

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No: 20210115  
Burleigh Co. No. 2021-cv-00240

Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )

vs. )

Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC, )

Defendants. )

**PLAINTIFFS' MOTION TO  
DISMISS APPEAL**

\*\*\*

\*\*\*

\*\*\*

(1.) Pursuant to Rule 27 of the North Dakota Rules of Appellate Procedure and other applicable law and rule, Plaintiffs Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (“Plaintiffs”), by and through their attorney of record, respectfully move the Court to dismiss the appeal brought by Defendants Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC (collectively, “Transform”). Transform’s appeal is not allowed by law, is unripe, and is otherwise contrary to the controlling legal precedent provided by Gasic v. Bosworth, 2014 ND 85, 845 N.W.2d 306. Moreover, because of these defects and because Transform failed to first request or obtain Rule 54(b) certification, the Court lacks the necessary jurisdiction to entertain the attempted appeal.

(2.) This Motion is based upon the Brief filed in support and all of the other records contained in this Court’s docket and in the docket of the district court.

(3.) WHEREFORE, Plaintiffs respectfully request that this Court dismiss the appeal filed by Transform.

Dated this 21<sup>st</sup> day of April, 2021.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Bradley N. Wiederholt

Randall J. Bakke (#03989)

Bradley N. Wiederholt (#06354)

300 West Century Avenue

P.O. Box 4247

Bismarck, ND 58502-4247

(701) 751-8188

[rbakke@bgwattorneys.com](mailto:rbakke@bgwattorneys.com)

[bwiederholt@bgwattorneys.com](mailto:bwiederholt@bgwattorneys.com)

Attorneys for Plaintiffs,

Ted J. Boutrous, L.L.C. and The Boutrous  
Group, LLP

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Plaintiffs' Motion to Dismiss Appeal** was on the 21st day of April, 2021, emailed to the following:

Ryan C. McCamy (#06420)  
Douglas W. Murch (#05983)  
Conmy Feste Ltd.  
406 Main Avenue, Suite 200  
P.O. Box 2686  
Fargo, ND 58108-2686  
rmccamy@conmylaw.com  
dmurch@conmylaw.com

By: /s/ Bradley N. Wiederholt  
BRADLEY N. WIEDERHOLT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No: 20210115  
Burleigh Co. No. 2021-cv-00240

Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )

vs. )

Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC, )

Defendants. )

**BRIEF IN SUPPORT OF PLAINTIFFS’  
MOTION TO DISMISS APPEAL**

\*\*\*

\*\*\*

\*\*\*

**I. SUMMARY OF DISMISSAL ARGUMENT**

(1.) Plaintiffs<sup>1</sup> request the Court dismiss Transform’s appeal as neither the Amended Judgment of Eviction nor the other orders/judgment appealed from adjudicates all of the liabilities and claimed damages between the parties in the district court action. Thus, there is no final order or judgment, making the attempted appeal interlocutory and not authorized by law. The appeal is also otherwise unripe and barred by the holding of Gasic v. Bosworth, 2014 ND 85, 845 N.W.2d 306. Additionally, because Transform failed to request Rule 54(b) certification prior to attempting an appeal of less than all of the claims and issues in this case, the North Dakota Supreme Court lacks the necessary jurisdiction to consider the appeal now. Plaintiffs should not be forced to incur the time

---

<sup>1</sup> Plaintiffs Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (“Plaintiffs”) submit this brief in support of their Motion to Dismiss Appeal filed by Defendants Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC (collectively, “Transform”).



and expense to respond to an unripe and improper appeal that Plaintiffs believe Transform has raised prematurely to further abuse the judicial process and to further defeat Plaintiffs' entitlement to the "inexpensive, expeditious, and simple means" provided by North Dakota law "to determine possession" of the vacant Kmart building located in Bismarck, ND. For these reasons and as more fully set forth below, Plaintiffs respectfully request Transform's appeal be dismissed in all things.

## **II. RELEVANT PROCEDURAL & FACTUAL BACKGROUND**

(2.) Relevant to the instant motion is the following partial procedural history.<sup>2</sup> By their pleading entitled *Summons and Action for Summary Eviction & Damages* ("Complaint"), Plaintiffs initiated this lawsuit on February 8, 2021 (docs. 43 & 1) ("Summons and Complaint") with service of same made on the Defendants on February 11, 2021. (docs. 60, 61 & 67). In addition to requesting a summary eviction hearing under N.D.C.C. § 47-32-01 and requesting limited monetary damages pursuant to N.D.C.C. § 47-32-04 (stating, "An action of eviction cannot be brought in a district court in connection with any other action, except for rents and profits accrued or for damages arising by reason of the defendant's possession." (emphasis added)), Plaintiffs also requested termination of the lease. *See* Complaint at ¶ 69 and PRAYER FOR RELIEF. While Plaintiffs' Complaint requested summary eviction pursuant to express lease terms providing for "summary [eviction] proceedings" as well as requesting their limited damages per Section 47-32-04, Plaintiffs did not request any other damages such as damages for waste that Plaintiffs might discover upon obtaining possession of the

---

<sup>2</sup> All of the documents referenced in this brief are contained in the docket of the district court and the documents critical to the issues in this dismissal motion are furthermore provided to the Court as exhibits to the Declaration of Bradley N. Wiederholt, filed herewith. A copy of the Court's docket as of the date of this brief is attached as ***Exhibit 1***.

Kmart building; those further damages were simply reserved. *See* Complaint at PRAYER FOR RELIEF ¶ 7.<sup>3</sup>

(3.) On February 12, 2021 the Court issued a *Notice to Parties Regarding February 19, 2021 Hearing* in which the Court disallowed Plaintiffs from bringing the limited damages issue before the Court at the Eviction Hearing, and ruled that “the Court will only be addressing the issue of right to possession of the premises at issue” during the Hearing. (doc. 45). On February 16, 2021 Transform filed an *Expedited Motion to Dismiss For Lack of Subject Matter Jurisdiction* along with supporting papers. (docs. 63 - 65). The next day, on February 17, 2021, the Court entered an *Order* ruling “the matter of the eviction was properly filed with the Court”; the “February 19, 2021 [Hearing] will be held for the purpose of determining if there was a breach of the lease and the right to possess the premises at issue” and “the matter of damages will be scheduled at a later date to allow for discovery and time to prepare.” (doc. 70) (“the Jurisdictional Order”) Transform then answered the Complaint on February 18, 2021, alleging, among other things, that the district court lacked subject matter jurisdiction, that allowing this matter to proceed in summary proceedings is improper, and that it was unable to “bring a counterclaim” due to the procedural posture of the case as an action for summary eviction under “Ch. 47-32 of the North Dakota Century Code”. (doc. 82, at ¶¶ 3 & 60).

(4.) The Eviction Hearing was then held on February 19, 2021, where upon conclusion of hearing testimony, evidence, and limited argument for approximately 7 hours, the Court took the matter under advisement. After considering the parties’ post hearing briefing (docs. 107 & 109), on

---

<sup>3</sup> The Complaint provides: “Because Plaintiffs have been without opportunity to inspect the building interior or the building envelope and other areas of the premises which are in the Defendants’ sole possession, they must reserve their right to bring additional claims and additional damages – as part of separate lawsuit – after being allowed to perform a future inspection, including but not limited to claims for treble damages due to potential waste committed by Defendant(s). *See* N.D.C.C. § 32-17-22[.]”

March 23, 2021 the Court entered its *Findings of Fact, Conclusions of Law, and Order* (doc. 122) (“Eviction Order”). The Eviction Order ordered Transform to surrender possession of the premises to Plaintiffs on March 26, 2021 (by noon). It further ordered that “The issue of damages is reserved until a full hearing is held.” Eviction Order at ¶40. Plaintiffs then filed a proposed judgment (doc. 123) and the *Judgment of Eviction* was entered on March 23, 2021 (doc. 125). The Court then entered a “temporary stay” (doc. 138) the day after Transform filed a motion seeking a stay of the judgment. (doc. 132). After conducting a short evidentiary hearing and taking limited oral argument on March 29, 2021, the Court entered another Order the same day requiring Transform to file a bond in the total amount of \$10,000 and temporarily staying the case upon the filing of the bond. *See Order Regarding Stay* (doc. 144).

(5.) On April 12, 2021, the Court then held another hearing that was limited only to oral argument concerning Transform’s reconsideration motion. (doc. 129). Later that same day the Court issued an order in which it issued the following rulings relevant to this issue:

    [¶19] The Defendant’s Motion to Reconsider is DENIED.

    [¶20] The Plaintiff is entitled to possession of the premises on April 14, 2021 at 12:00 p.m. Plaintiff shall file a Proposed Amended Judgment with the new date for possession.

    [¶21] The Temporary Stay has EXPIRED and any bond posted can be returned to Defendants.

*Order on Motion for Reconsideration* (doc. 183). Plaintiffs then filed a proposed amended judgment (doc. 184) as required by the Court and the *Amended Judgment of Eviction* was entered on April 13, 2021 (doc. 186). The *Amended Judgment of Eviction* contains essentially the same language concerning possession as provided in paragraph 20 of the Court’s aforementioned Eviction Order. Plaintiffs then served on Transform the *Notice of Entry of Amended Judgment of Eviction*. (doc. 187). Both the Judgment of Eviction and Amended Judgment of Eviction provided that the “Court [was] reserving the issues of damages, costs, disbursement, fees, and interest[.]”

(docs. 125 & 186). After receiving the *Notice of Entry of Amended Judgment of Eviction*, Transform refused to transfer possession (doc. 187) and filed its Notice of Appeal in this Court and also filed in the district court its *Defendants' Motion to Stay Eviction* along with motion papers. (docs. 189-192). Plaintiffs filed their [] *Motion for Issuance of Writ Of Execution To Enforce Amended Judgment of Eviction*, and supporting motion papers. (docs. 202-214). Critically, Transform never requested Rule 54(b) certification from the district court.

(6.) A hearing before the district court is set for May 18, 2021 to address both the latest motion for stay by Transform and Plaintiffs' motion seeking a writ of execution and to hold Transform in contempt for unlawfully holding over in violation of court orders and judgments. (docs. 226 & 227). Plaintiffs remain at the present time without possession of the vacant Kmart building as required by the *Amended Judgment of Eviction*. See Affidavit of Bradley N. Wiederholt (doc. 210) and Affidavit of Albert Daou (doc. 207). Nor has the issue of Plaintiffs' requested damages pursuant to N.D.C.C. § 47-32-04 or the issue of the requested lease termination been addressed or adjudicated by the district court.

### **III. LAW & ANALYSIS**

(7.) Transform's appeal is not authorized by law, is otherwise premature, and is barred by controlling precedent.<sup>4</sup> The following standard applies:

Generally, "[t]he right to appeal is jurisdictional, and we consider appealability of a judgment on our own initiative even when neither party has questioned appealability." *Kouba v. Febco, Inc.*, 1998 ND 171, ¶ 7, 583 N.W.2d 810. When an order or judgment is not appealable, this Court will dismiss the appeal sua sponte. See *Meyer v. City of Dickinson*, 397 N.W.2d 460, 461 (N.D.1986). "Only judgments and decrees which constitute a final judgment of the rights of the parties

---

<sup>4</sup> Plaintiffs' motion to dismiss is brought pursuant to Rule 27, which provides: "(f) Motion to Dismiss Based on Ground Appeal Not Authorized by Law. Unless otherwise ordered by the court, the filing of a motion to dismiss based on the ground that the appeal is not authorized by law tolls the time for filing briefs on the merits. If the motion is denied, the running of the time for filing briefs on the merits resumes upon notice of entry of the order." N.D. R. App. P. 27.

and certain orders enumerated by statute are appealable.” *State v. North Dakota Ins. Reserve Fund*, 2012 ND 216, ¶ 4, 822 N.W.2d 38; *see also* N.D.R.Civ.P. 54(b).

Under N.D.R.Civ.P. 54(b), a judgment, to be final, must dispose of all claims or the district court must direct entry of a final partial judgment if the court properly expressly determines “there is no just reason for delay.” “Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.” *Id.*

Gasic v. Bosworth, 2014 ND 85, ¶¶ 4-5, 845 N.W.2d 306, 307 (citations and quotations in original); *see also*, N.D.C.C. § 28-27-02 (providing what orders are immediately appealable).

(8.) Transform’s Notice of Appeal identifies its appeal is taken from the Notice To Parties Regarding February 19, 2021 Hearing (doc. 45), the Jurisdictional Order (doc. 70), the Eviction Order (doc. 122), the Judgment of Eviction (doc. 125), Order on Motion for Reconsideration (doc. 183), and the Amended Judgment of Eviction (doc. 186). None of those orders is the type of order contemplated by N.D.C.C. § 28-27-02, and thus they are interlocutory and non-appealable. In the same vein, the orders and judgments fail to constitute full and final determination of the merits of all of the claims and issues between the parties that remain for the district court to determine in this action. And critically, all of those orders/judgments expressly and unambiguously reserve the damages issue for a later hearing on a later date, meaning not all of the issues and claims have been addressed by the district court to date.

(9.) As the Court is aware, where less than all of the claims between the parties are resolved by some partial order or judgment, a party wishing to take an immediate appeal must comply with the requirements of Rule 54, N.D. R. Civ. P., including requesting and obtaining an express determination by the district court “that there is no just reason for delay” and an appeal should be allowed. Greer v. Glob. Indus., Inc., 2018 ND 206, ¶ 11, 917 N.W.2d 1, 5 (“Greer”) (further describing other factors the district court must consider in any Rule 54(b) request). But

Transform never did so; it never sought Rule 54(b) certification from the district court. The Greer case also set forth the requirements a party must meet to obtain North Dakota Supreme Court jurisdiction for an appeal, and those requirements absolutely include meeting the statutory criteria and also requesting and obtaining Rule 54(b) certification:

Before we can consider the merits of an appeal, we must determine whether we have jurisdiction. *Holverson v. Lundberg*, 2015 ND 225, ¶ 6, 869 N.W.2d 146. We apply a two-step analysis to determine whether we have jurisdiction:

First, the order appealed from must meet one of the statutory criteria of appealability set forth in N.D.C.C. § 28-27-02. If it does not, our inquiry need go no further and the appeal must be dismissed. If it does, then [N.D.R.Civ.P. 54(b), if applicable,] must be complied with. If it is not, we are without jurisdiction.

*Id.* at ¶ 9 (quoting *In re Estate of Hollingsworth*, 2012 ND 16, ¶ 9, 809 N.W.2d 328).

The right to appeal is purely statutory, and if there is no statutory basis for an appeal, we do not have jurisdiction and we must dismiss the appeal.

Greer, 2018 ND 206 at ¶¶ 7-8 (citations and quotations in original). Because Transform has not bothered to seek Rule 54(b) certification, the Court lacks jurisdiction to entertain the instant appeal.

(10.) Moreover, the Court has previously spoken directly to this issue in a previous case. In Gasic v. Bosworth (“Gasic”), a case involving a premature appeal from a summary eviction proceeding, the Court dismissed the appeal because the order appealed from was not final or allowed by law as it did not adjudicate all of the disputed issues before the district court. In this regard, the Court stated:

Bosworth raises multiple issues on appeal, including that Gasic does not own the land and has no legal authority to file this case, that the three-day notice required under N.D.C.C. § 47-32-02 is deficient, that Gasic never posted nor served by legal process the three-day notice required under N.D.C.C. § 47-32-02, and that the defendants have not been afforded due process required under N.D.C.C. ch. 47-32.

Here, neither the district court's order of eviction, nor the court's stay of eviction, provides any specific findings regarding these issues. *Cf. Hansen v. Winkowitsch*, 463 N.W.2d 645, 647-48 (N.D.1990) (affirming judgment of eviction where

defendants did not challenge trial court's findings of fact, but instead the court's conclusion of law that plaintiff had title and was entitled to possession, since none of the documents present by defendants affected the plaintiff's title to the land). The defendants have also interposed an answer and counterclaim, but the order for eviction does not address the counterclaim, even to dismiss it as improper under N.D.C.C. § 47-32-04. Thus, the order of eviction is neither final nor appealable. *See Kouba*, 1998 ND 171, ¶ 7, 583 N.W.2d 810; *State Bank of Kenmare v. Lindberg*, 434 N.W.2d 347, 348 (N.D.1989); *Gillmore v. Morelli*, 425 N.W.2d 369, 370 (N.D.1988).

“Additionally, the district court entered the ‘stay of eviction’ on September 16, 2013, stating the court ‘[d]oes hereby find sufficient grounds to stay Eviction of Defendants, ... until a hearing on such motion can be scheduled.’ It is clear from the court's stay that further hearing of this case was contemplated in the district court before entry of a final judgment.”

We conclude that defendants' appeal from the order for eviction is not an appeal from a final order or judgment, and we dismiss the appeal.

### III

The appeal is dismissed.

Gasic, 2014 ND 85 at ¶¶ 10-14.

(11.) The Court should follow what Plaintiffs believe is the controlling legal precedent provided by the Gasic opinion and dismiss the appeal for the lack of following the jurisdictional prerequisite of first obtaining Rule 54(b) certification. Like in Gasic, the district court reserved the issue of Plaintiffs' claimed damages for a “future hearing” which has yet to occur. The reservation of the damages in the instant case is addressed by the district court in no less than four (4) separate orders and judgments. *See* Jurisdictional Order, Eviction Order, Judgment of Eviction & Amended Judgment of Eviction (docs. 70, 122, 125, & 186). Additionally, although the district court has determined the issue of possession, and has done so twice without equivocation, the issue of lease termination as requested in Plaintiff's Complaint has yet to be decided. Complaint (doc. 1) at ¶ 69, PRAYER FOR RELIEF ¶2. This further confirms the orders and judgments appealed from are not final for purposes of an appeal as both damages and termination remain for the district court.

(12.) While Transform now argues through its appeal notice that Plaintiffs' Complaint should not have been allowed to proceed as a summary eviction proceeding,<sup>5</sup> it would only be natural and appropriate – prior to any appeal – to first allow the district court to decide lease termination where the Court has ruled in a clear and unambiguous manner that Transform is in material breach of the lease. Such a determination would not be beyond the scope of normal summary eviction proceedings and this further confirms those issues are clearly intertwined. No doubt Transform will further argue to this Court, as it has to the court below, that summary eviction proceedings did not allow it to bring a counterclaim – a position raised in its Answer.<sup>6</sup> However, the North Dakota Supreme Court clearly provides otherwise, stating:

[ ] The statute strictly limits the parties' ability to combine the eviction with other claims and precludes the defendant from interposing a counterclaim, except as a setoff to the plaintiff's claim for damages, rent, or profits. N.D.C.C. § [47–32–04]. The proceeding is limited to a speedy determination of the right to possession of the property, without bringing in extraneous matters. The purpose of the statute is to provide an inexpensive, expeditious, and simple means to determine possession.

Gasic, 2014 ND 85 at ¶ 7 (quoting Aurora Med. Park, LLC v. Kidney & Hypertension Ctr., PLC, 2010 ND 122, ¶ 7, 784 N.W.2d 151 (emphasis added)). The applicable legal standard demonstrates Transform did in fact have the authority to bring a counterclaim as a “setoff” to address Plaintiffs’ limited damages claim, but it did not do so. Presumably, it could move the district court for leave to amend its answer in this regard. Moreover, because the district court did not allow any damages evidence at the February 19 Eviction Hearing, Transform has never in reality been prejudiced by the “no counterclaim rule” provided in the summary eviction statutes.

---

<sup>5</sup> Transform’s Notice of Appeal identifies as one of its appeal issues that the “district court err[ed] in exercising jurisdiction over this matter as a summary eviction action pursuant to North Dakota law[.]” Notice of Appeal at Issue No. 2.

<sup>6</sup> Transform alleges in its Answer that it is “entitled to a scheduling order and proper hearing instead of a summary eviction [as well as] the ability to bring a counterclaim, which is not allowed by Ch. 47-32[.]”



(13.) The point of these arguments is that there remains much to be addressed by the district court, and those issues are intertwined with the issues Transform has prematurely presented for appeal. Once the additional damages and termination issues the district court has yet to address below are decided, it would be reasonable to expect the prospect of a later appeal. This Court has stated its preference against allowing piecemeal appeals. Sprunk v. N. Dakota Workers Comp. Bureau, 1998 ND 93, ¶ 16, 576 N.W.2d 861, 868 (“Where unsettled issues are evident and are linked to those brought for review, piecemeal appeals should not be encouraged without appropriate reason. [] Rule 54(b), N.D.R.Civ.P., is designed to deter piecemeal disposal of litigation and avoid injustice caused by unnecessary delay in adjudicating the separate claims.” (internal citations and quotations omitted)). Transform has not raised any such “appropriate reason” and it has not met its burden to vest this Court with the necessary jurisdiction to decide an unripe appeal. the issues prior to Transform being entitled to any appeal.

(14.) There is simply no good reason, legal or equitable, to allow Transform to force an early appeal when it has failed in its jurisdictional prerequisites via Rule 54(b), where there is no statutory basis for an interlocutory appeal, where the controlling legal precedent provides dismissal is appropriate, and where disputed issues remain for the district court to resolve and those issues are interwoven with the already decided issues. Transform has not shown the orders and judgments appealed from are final or otherwise allowed by law, and the Court lacks the necessary jurisdiction to entertain the appeal now.

#### **IV. CONCLUSION**

(15.) Plaintiffs respectfully request the Court dismiss the appeal for these reasons, and Plaintiffs reserve their right to request their costs on appeal at the appropriate time as well as to be awarded costs and fees for a frivolous appeal.

Dated this 21<sup>st</sup> day of April, 2021.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Bradley N. Wiederholt

Randall J. Bakke (#03989)

Bradley N. Wiederholt (#06354)

300 West Century Avenue

P.O. Box 4247

Bismarck, ND 58502-4247

(701) 751-8188

rbakke@bgwattorneys.com

bwiederholt@bgwattorneys.com

Attorneys for Plaintiffs,

Ted J. Boutrous, L.L.C. and The Boutrous  
Group, LLP

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Brief in Support of Plaintiffs' Motion to Dismiss Appeal** was on the 21st day of April, 2021, emailed to the following:

Ryan C. McCamy (#06420)  
Douglas W. Murch (#05983)  
Conmy Feste Ltd.  
406 Main Avenue, Suite 200  
P.O. Box 2686  
Fargo, ND 58108-2686  
rmccamy@conmylaw.com  
dmurch@conmylaw.com

By: /s/ Bradley N. Wiederholt  
BRADLEY N. WIEDERHOLT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No: 20210115  
Burleigh Co. No. 2021-cv-00240

Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )

vs. )

Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC, )

Defendants. )

**DECLARATION OF  
BRADLEY N. WIEDERHOLT**

\*\*\*

\*\*\*

\*\*\*

BRADLEY N. WIEDERHOLT hereby states and declares as follows:

1. I am an attorney duly licensed to practice law in the State of North Dakota and am admitted to practice before this Court.
2. I am a member of the firm Bakke Grinolds Wiederholt, attorney for Plaintiffs Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP.
3. This affidavit is submitted in support of *Plaintiffs' Motion to Dismiss Appeal*, filed herewith.
4. Attached hereto as ***Exhibit 1*** is a true and correct copy of the Register of Actions for case entitled Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP v. Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC, Case No. 08-2021-CV-00240 venued in District Court in Burleigh County, State of North Dakota.

5. Attached hereto as ***Exhibit 2*** is a true and correct copy of Action for Summary Eviction & Damages filed in the District Court as Docket Number 1.
6. Attached hereto as ***Exhibit 3*** is a true and correct copy of Notice to Parties Regarding February 19, 2021 Hearing filed in the District Court as Docket Number 45.
7. Attached hereto as ***Exhibit 4*** is a true and correct copy of Order dated February 17, 2021 filed in the District Court as Docket Number 70.
8. Attached hereto as ***Exhibit 5*** is a true and correct copy of Defendants' Answer to the Action for Summary Eviction & Damages filed in the District Court as Docket Number 82.
9. Attached hereto as ***Exhibit 6*** is a true and correct copy of Findings of fact, Conclusions of Law, and Order filed in the District Court as Docket Number 122.
10. Attached hereto as ***Exhibit 7*** is a true and correct copy of Judgment of Eviction filed in the District Court as Docket Number 125.
11. Attached hereto as ***Exhibit 8*** is a true and correct copy of Order on Motion for Reconsideration filed in the District Court as Docket Number 183.
12. Attached hereto as ***Exhibit 9*** is a true and correct copy of Amended Judgment of Eviction filed in the District Court as Docket Number 186.
13. Attached hereto as ***Exhibit 10*** is a true and correct copy of Notice of Electronic Remote-Party Proceeding filed in the District Court as Docket Number 221.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING STATED  
ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Dated: April 21, 2021.

County Where Signed: Burleigh County, North Dakota

/s/ Bradley N. Wiederholt  
Bradley N. Wiederholt

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Declaration of Bradley N. Wiederholt** was on the 21st day of April, 2021, emailed to the following:

Ryan C. McCamy (#06420)  
Douglas W. Murch (#05983)  
Conmy Feste Ltd.  
406 Main Avenue, Suite 200  
P.O. Box 2686  
Fargo, ND 58108-2686  
[rmccamy@conmylaw.com](mailto:rmccamy@conmylaw.com)  
[dmurch@conmylaw.com](mailto:dmurch@conmylaw.com)

By: /s/ Bradley N. Wiederholt  
BRADLEY N. WIEDERHOLT

**REGISTER OF ACTIONS****CASE NO. 08-2021-CV-00240****Ted J. Boutrous, LLC, et al. vs. Transform Operating Stores LLC, et al.**§  
§  
§  
§  
§  
§  
§Case Type: **Forcible Detainer**Date Filed: **02/08/2021**Location: **-- Burleigh County**Judicial Officer: **Weiler, Bobbi**Supreme Court Docket Number: **20210115****PARTY INFORMATION**

|                  |   |  |
|------------------|---|--|
| <b>Defendant</b> | <b>Kmart</b><br>208 SO LaSalle St Suite 814<br>Chicago, IL 60604                            | <b>Attorneys</b><br><b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W) |
| <b>Defendant</b> | <b>Transform KM LLC</b><br>120 W. Sweet Avenue<br>Bismarck, ND 58501                        | <b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W)                     |
| <b>Defendant</b> | <b>Transform Operating Stores LLC</b><br>1209 N. Orange Street<br>Wilmington, DE 19801      | <b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W)                     |
| <b>Defendant</b> | <b>Transform SR Brands LLC</b><br>208 SO LaSalle St., Suite 814<br>Chicago, IL 60604        | <b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W)                     |
| <b>Defendant</b> | <b>Transformco</b><br>208 SO LaSalle St Suite 814<br>Chicago, IL 60604                      | <b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W)                     |
| <b>Defendant</b> | <b>Transformco Operating Stores LLC</b><br>1209 N Orange Street<br>Wilmington, DE 19801     | <b>Ryan Christopher McCamy</b><br><i>Retained</i><br>701-293-9911 x0000(W)                     |
| <b>Plaintiff</b> | <b>Ted J. Boutrous, LLC</b><br><br>3608 43rd Avenue S.<br>Minneapolis, MN 55406             | <b>Randall Joseph Bakke</b><br><i>Retained</i><br>701-751-8188 x0000(W)                        |
|                  |   | <b>Bradley Neuman Wiederholt</b><br><i>Retained</i><br>701-751-8188 x0000(W)                   |
| <b>Plaintiff</b> | <b>The Boutrous Group, LLP</b><br><br>110 E. Avenue A<br>P.O. Box 615<br>Bismarck, ND 58502 | <b>Randall Joseph Bakke</b><br><i>Retained</i><br>701-751-8188 x0000(W)                        |
|                  |   | <b>Bradley Neuman Wiederholt</b><br><i>Retained</i><br>701-751-8188 x0000(W)                   |

**EVENTS & ORDERS OF THE COURT**

|            |  |
|------------|--|
| 04/13/2021 | <b>DISPOSITIONS</b>  |
|            | <b>Amended Judgment / Order Entered</b> (Judicial Officer: Weiler, Bobbi) Reason: Amended Judgment<br><br>03/23/2021 <b>Judgment / Order Entered</b> (Judicial Officer: Weiler, Bobbi) |

|            |  |
|------------|--|
| 02/08/2021 | <b>OTHER EVENTS AND HEARINGS</b>                 |
|            | <b>Complaint</b> <b>Index # 1</b>                |
|            | <i>Action for Summary Eviction &amp; Damages</i> |
|            | <b>Exhibit</b> <b>Index # 2</b>                  |
| 02/08/2021 | <i>Exhibit 1 - Notice of Intention to Evict</i>  |
| 02/08/2021 | <b>Affidavit</b> <b>Index # 3</b>                |





|            |   |                   |
|------------|---|-------------------|
|            | <i>Affidavit of Michael J. Boutrous</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 4</b>  |
|            | <i>Exhibit 2 - Original of Ground Lease and Exhibit D of Kresge Lease dated September 27, 1969</i>                                  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 5</b>  |
|            | <i>Exhibit 3 - Original of Kresge Lease and Exhibit C of the Ground Lease dated June 8, 1970</i>                                    |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 6</b>  |
|            | <i>Exhibit 4 - Attornment Agreement dated September 27, 1969</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 7</b>  |
|            | <i>Exhibit 5 - Findings of Fact, Conclusion of Law and Order</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 8</b>  |
|            | <i>Exhibit 6 - KFYR News Report</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 9</b>  |
|            | <i>Exhibit 7 - KX News Report</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 10</b> |
|            | <i>Exhibit 8 - USA Today News Repot</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 11</b> |
|            | <i>Exhibit 9 - Transformco Press Release</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 12</b> |
|            | <i>Exhibit 10 - Transformco Webpage</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 13</b> |
|            | <i>Exhibit 11 - City of Bismarck letter dated June 24, 2020</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 14</b> |
|            | <i>Exhibit 12 - Property Service Management Agreement dated June 9, 2020</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 15</b> |
|            | <i>Exhibit 13 - Invoices and checks written to Integrity Property Management</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 16</b> |
|            | <i>Exhibit 14 - Letter to Transform Operating Stores, LLC from Ted Boutrous, LLC and The Boutrous Group dated December 3, 2019</i>  |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 17</b> |
|            | <i>Exhibit 15 - Letter to Transform Operating Stores LLC from Tory Jackson dated January 9, 2020</i>                                |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 18</b> |
|            | <i>Exhibit 16 - Letter from Transform Operating Stores LLC to Tory Jackson dated January 17, 2020</i>                               |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 19</b> |
|            | <i>Exhibit 17 - Letter from Tory Jackson to Transform Operating Stores LLC dated February 5, 2020</i>                               |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 20</b> |
|            | <i>Exhibit 18 -Letter from Tory Jackson to Transform Operating Stores, LLC dated April 16, 2020</i>                                 |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 21</b> |
|            | <i>Exhibit 19 - Letter from Tory Jackson to Transform Operating Stores, LLC dated August 10, 2020</i>                               |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 22</b> |
|            | <i>Exhibit 20 - Letter from Ryan McCamy to Tory Jackson dated September 3, 2020</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 23</b> |
|            | <i>Exhibit 21 - Complaint in Frances Grueneich v. Kmart Operations LLC, et al.</i>  |                   |
| 02/08/2021 | <u>Summons</u>  | <b>Index # 24</b> |
|            | <i>(Proposed) Summons submitted by Brad Wiederholt</i>  |                   |
| 02/08/2021 | <u>Letter</u>   | <b>Index # 25</b> |
|            | <i>Letter to Court Requesting Hearing</i>   |                   |
| 02/08/2021 | <u>Notice of Assignment and Case Number</u>   | <b>Index # 26</b> |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 27</b> |
|            | <i>Exhibit 32 - 2020 and 2021 Incident Reports</i>  |                   |
| 02/08/2021 | <u>Affidavit</u>  | <b>Index # 28</b> |
|            | <i>Affidavit of Dennis Sotebeer</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 29</b> |
|            | <i>Exhibit 33 - Invoices and cancelled checks</i>   |                   |
| 02/08/2021 | <u>Exhibit</u>  | <b>Index # 30</b> |
|            | <i>Exhibit 34 - Aerial Photograph</i>   |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 31</b> |
|            | <i>Exhibit 22 - Letter from Ted Boutrous, LLC and The Boutrous Group, LLP to S. Jeffrey Stollenwerck dated May 11, 2018</i>         |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 32</b> |
|            | <i>Exhibit 23 - Letter from Ted J. Boutrous LLC and The Boutrous Group LLP to S. Jeffrey Stollenwerk dated December 2, 2016</i>     |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 33</b> |
|            | <i>Exhibit 24 - Letter from Ivy Israel to Ted J. Boutrous LLC and The Boutrous Group LLP</i>  |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 34</b> |
|            | <i>Exhibit 25 - Letter from Ted J. Boutrous LLC and The Boutrous Group LLP to Transform Operating Stores LLC dated July 8, 2020</i> |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 35</b> |
|            | <i>Exhibit 26 - Diagram</i>   |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 36</b> |
|            | <i>Exhibit 27 - Rent Checks</i>   |                   |
| 02/09/2021 | <u>Affidavit</u>  | <b>Index # 37</b> |
|            | <i>Affidavit of Della Boutrous</i>  |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 38</b> |
|            | <i>Exhibit 28 - City of Bismarck October 24, 2019 letter</i>  |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 39</b> |
|            | <i>Exhibit 29 - Email between Della Boutrous and Ms. Schmidt dated August 27, 2020</i>  |                   |
| 02/09/2021 | <u>Affidavit</u>  | <b>Index # 40</b> |
|            | <i>Affidavit of Abdou ("Albert") Joseph Daou</i>  |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 41</b> |
|            | <i>Exhibit 30 - Email String between Albert and Bismarck PD</i>   |                   |
| 02/09/2021 | <u>Exhibit</u>  | <b>Index # 42</b> |
|            | <i>Exhibit 31 - Invoices to Boutrous Enterprises</i>  |                   |
| 02/11/2021 | <u>Summons</u>  | <b>Index # 43</b> |
| 02/11/2021 | <u>Notice of Hearing</u>  | <b>Index # 44</b> |
|            | <i>Notice of Electronic Remote-Party Proceeding Eviction</i>  |                   |
| 02/12/2021 | <u>Notice</u>   | <b>Index # 45</b> |
|            | <i>to Parties Regarding February 19, 2021 Hearing</i>   |                   |
| 02/12/2021 | <u>Service Document</u>   | <b>Index # 46</b> |

|            |   |
|------------|---|
|            | <b>Certificate of Service upon all Defendants</b>   |
| 02/12/2021 | <b>Exhibit Index # 47</b><br><i>Exhibit 42 - Video of water issues with the building including ice buildup in the parking lot (CD Located in Exhibit Cabinet)</i>   |
| 02/12/2021 | <b>Notice Index # 48</b><br><i>Notice of Filing of Additional Hearing Exhibits</i>  |
| 02/12/2021 | <b>Exhibit Index # 49</b><br><i>Exhibit 35 - Check from Defendant Transform KM LLC to Plaintiffs for February rent</i>  |
| 02/12/2021 | <b>Exhibit Index # 50</b><br><i>Exhibit 36 - Bismarck Police Department Records</i>   |
| 02/12/2021 | <b>Exhibit Index # 51</b><br><i>Exhibit 37 - Timeline</i>   |
| 02/12/2021 | <b>Exhibit Index # 52</b><br><i>Exhibit 38 - February 9, 2021 Incident Report</i>   |
| 02/12/2021 | <b>Exhibit Index # 53</b><br><i>Exhibit 39 - February 11, 2021 Incident Report</i>  |
| 02/12/2021 | <b>Exhibit Index # 54</b><br><i>Exhibit 40 - Video of Alarm sounding on January 6, 2021</i>   |
| 02/12/2021 | <b>Exhibit Index # 55</b><br><i>Exhibit 41 - Second Video of Alarm Sounding on January 6, 2021</i>  |
| 02/12/2021 | <b>Exhibit Index # 56</b><br><i>Exhibit 43 - O&amp;E Report and Deeds</i>   |
| 02/12/2021 | <b>Exhibit Index # 57</b><br><i>Exhibit 44 - Map</i>  |
| 02/12/2021 | <b>Exhibit Index # 58</b><br><i>Exhibit 45 - Email from Transform to Della Boutrous dated November 4, 2019</i>  |
| 02/12/2021 | <b>Service Document Index # 59</b><br><i>Certificate of Service via email on Ryan McCamy</i>  |
| 02/12/2021 | <b>Service Document Index # 60</b><br><i>Affidavit of Service of Summons and Action for Summary Eviction &amp; Damages and supporting documents on Defendant Transform SR Brands, LLC d/b/a Transformco d/b/a Kmart</i>                 |
| 02/12/2021 | <b>Service Document Index # 61</b><br><i>Affidavit of Service of Summons and Action for Summary Eviction &amp; Damages and supporting documents on Defendant Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC</i> |
| 02/12/2021 | <b>Service Document Index # 62</b><br><i>Certificate of Service via email on Ryan McCamy</i>  |
| 02/16/2021 | <b>Notice Index # 63</b><br><i>Defendants' Notice of Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction</i>  |
| 02/16/2021 | <b>Motion Index # 64</b><br><i>Defendants' Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction</i>  |
| 02/16/2021 | <b>Brief Index # 65</b><br><i>Defendants' Brief in Support of Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction</i>   |
| 02/16/2021 | <b>Service of Motion Index # 66</b><br><i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>   |
| 02/16/2021 | <b>Service Document Index # 67</b><br><i>Affidavit of Service of Summons and Action for Summary Eviction &amp; Damages and supporting documents on Defendant Transform KM LLC</i>   |
| 02/17/2021 | <b>Letter Index # 68</b><br><i>Letter to Judge Bobbi Weiler from Bradley N Wiederholt dated February 12, 2021</i>   |
| 02/17/2021 | <b>Exhibit Index # 69</b><br><i>Exhibit to Judge Letter</i>   |
| 02/17/2021 | <b>Order Index # 70</b>   |
| 02/17/2021 | <b>Notice Index # 71</b><br><i>Notice of Filing of Additional Hearing Exhibits</i>  |
| 02/17/2021 | <b>Exhibit Index # 72</b><br><i>Exhibit 46 - February 12, 2021 Incident Report</i>  |
| 02/17/2021 | <b>Exhibit Index # 73</b><br><i>Exhibit 47 - February 13, 2021 Incident Report</i>  |
| 02/17/2021 | <b>Exhibit Index # 74</b><br><i>Exhibit 48 - February 14, 2021 Incident Report</i>  |
| 02/17/2021 | <b>Exhibit Index # 75</b><br><i>Exhibit 49 - Video taken of damage inside the Kmart store on February 14, 2021</i>  |
| 02/17/2021 | <b>Exhibit Index # 76</b><br><i>Exhibit 50 - Bismarck Fire Department Report dated February 3, 2021</i>   |
| 02/17/2021 | <b>Service Document Index # 77</b><br><i>Certificate of Service on Ryan McCamy</i>  |
| 02/17/2021 | <b>Service Document Index # 78</b><br><i>Certificate of Service on Ryan McCamy</i>  |
| 02/17/2021 | <b>Report Index # 79</b><br><i>Plaintiffs' Exhibit List for Eviction Hearing</i>  |
| 02/17/2021 | <b>Service Document Index # 80</b><br><i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>  |
| 02/18/2021 | <b>Report Index # 81</b><br><i>Defendants' Exhibit List</i>   |
| 02/18/2021 | <b>Answer Index # 82</b><br><i>Defendants' Answer to the Action for Summary Eviction &amp; Damages</i>  |
| 02/18/2021 | <b>Report Index # 83</b><br><i>Defendants' Amended Exhibit List</i>   |
| 02/18/2021 | <b>Exhibit Index # 84</b><br><i>Exhibit 100 - Certificate of Insurance</i>  |
| 02/18/2021 | <b>Exhibit Index # 85</b><br><i>Exhibit 101 - Landscape Services Contract</i>   |
| 02/18/2021 | <b>Exhibit Index # 86</b><br><i>Exhibit 102 - Snow Plowing/Removal Services Agreement</i>   |
| 02/18/2021 | <b>Exhibit Index # 87</b><br><i>Exhibit 103 - 9/1/20 Inspection</i>   |

02/18/2021 **Exhibit** **Index # 88**  
*Exhibit 104 - 2/1/21 Inspection*

02/18/2021 **Service Document** **Index # 89**  
*Affidavit of Service upon R. Bakke, B. Wiederholt*

02/19/2021 **Civil Hearing** (9:00 AM) (Judicial Officer Weiler, Bobbi)  
*via Zoom - meeting ID 874 9704 1652 or call 669 900 9128 or 646 558 8656*  
 Result: Hearing Ended

02/19/2021 **Report** **Index # 90**  
*Plaintiffs' Amended Exhibit List for Eviction Hearing*

02/19/2021 **Exhibit** **Index # 91**  
*Exhibit 51 - February 16, 2021 Incident Report*

02/19/2021 **Exhibit** **Index # 92**  
*Exhibit 52 - February 18, 2021 Incident Report*

02/19/2021 **Exhibit** **Index # 93**  
*Exhibit 53 - Video Taken on February 18, 2021 of the Kmart Building [CD in Clerk's cabinet]*

02/19/2021 **Exhibit** **Index # 94**  
*Exhibit 54 - Photo showing water damage*

02/19/2021 **Service Document** **Index # 95**  
*Service on Ryan McCamy*

02/19/2021 **Report** **Index # 96**  
*Plaintiffs' Second Amended Exhibit List for Eviction Hearing*

02/19/2021 **Exhibit** **Index # 97**  
*Exhibit 55 - Email string dated September 2020 between Christine Schmidt of McDonald s and Cheryl Schwartz of Transform SR Holding Management regarding parking lot maintenance*

02/19/2021 **Exhibit** **Index # 98**  
*Exhibit 56 - Email string dated September 2020 through October 2020 between Christine Schmidt of McDonald s and Cheryl Schwartz of Transform SR Holding Management regarding parking lot maintenance*

02/19/2021 **Service Document** **Index # 99**  
*Certificate of Service on Ryan McCamy*

02/19/2021 **Exhibit** **Index # 100**  
*Exhibit 105 - Oct 13. 1971 letter to Paul Moore*

02/19/2021 **Exhibit** **Index # 101**  
*Exhibit 106 - April 21, 1994 Letter to Lucille Miller*

02/19/2021 **Exhibit** **Index # 102**  
*Exhibit 107- April 22, 2009 Letter to Lucille Miller*

02/19/2021 **Exhibit** **Index # 103**  
*Exhibit 108 - April 16, 2014 Letter to Lucille Miller*

02/19/2021 **Service Document** **Index # 104**  
*Affidavit of Service upon R. Bakke, B. Wiederholt*

02/19/2021 **Exhibit** **Index # 105**  
*Exhibit 109 - April 16, 2019 Letter to Boutrous*

02/19/2021 **Service Document** **Index # 106**  
*Affidavit of Service upon R. Bakke, B. Wiederholt*

02/26/2021 **Brief** **Index # 107**  
*Defendants' Post-Hearing Brief*

02/26/2021 **Service Document** **Index # 108**  
*Affidavit of Service upon R. Bakke, B. Wiederholt*

02/26/2021 **Brief** **Index # 109**  
*Plaintiffs' Post-Hearing Brief*

02/26/2021 **Affidavit** **Index # 110**  
*Affidavit of Bradley N. Wiederholt*

02/26/2021 **Exhibit** **Index # 111**  
*Exhibit A - Plaintiffs final Exhibit List marked up by paralegal Kate Finck during the hearing*

02/26/2021 **Exhibit** **Index # 112**  
*Exhibit B - February 23, 2021 Email to Ryan McCamy from Brad Wiederholt and McCamy's response letter dated February 25, 2021*

02/26/2021 **Exhibit** **Index # 113**  
*Exhibit C - Page from hearing notes*

02/26/2021 **Affidavit** **Index # 114**  
*Second Affidavit of Abdou "Albert" Joseph Daou*

02/26/2021 **Exhibit** **Index # 115**  
*Exhibit 57 - Incident Report dated 2/22/21*

02/26/2021 **Exhibit** **Index # 116**  
*Exhibit 58 - Video taken on February 22, 2022 -- CD in File Cabinet*

02/26/2021 **Service Document** **Index # 117**  
*Certificate of Service on Ryan McCamy*

02/26/2021 **Letter** **Index # 118**  
*Letter to Honorable Bobbi Weiler 2-26-21*

02/26/2021 **Service Document** **Index # 119**  
*Affidavit of Service upon R. Bakke, B. Wiederholt*

03/01/2021 **Under Advisement** (Judicial Officer: Weiler, Bobbi )  
*Hearing Held*

03/18/2021 **Letter** **Index # 120**  
*Letter to Judge Weiler from Brad Wiederholt dated March 18, 2021*

03/18/2021 **Service Document** **Index # 121**  
*Certificate of Service for Service on Ryan McCamy*

03/23/2021 **Findings** **Index # 122**  
*of Fact, Conclusions of Law, and Order*

03/23/2021 **Proposed Judgment** **Index # 123**  
*(Proposed) Judgment of Eviction*

03/23/2021 **Service Document** **Index # 124**  
*Certificate of Service for service on Ryan McCamy*

03/23/2021 **Judgment** **Index # 125**  
*of Eviction*

03/23/2021 **Notice of Entry of Judgment** **Index # 126**

Notice of Entry of Judgment of Eviction

03/23/2021 **Service Document** **Index # 127**  
Certificate of Service for service on Ryan McCamy

03/25/2021 **Notice** **Index # 128**  
Defendants' Notice of Expedited Motion for Reconsideration

03/25/2021 **Motion** **Index # 129**  
Defendants' Expedited Motion for Reconsideration

03/25/2021 **Brief** **Index # 130**  
Defendants' Brief in Support of Motion to Reconsider

03/25/2021 **Notice** **Index # 131**  
Defendants' Notice of Expedited Motion to Stay or Relief from Judgment

03/25/2021 **Motion** **Index # 132**  
Defendants' Expedited Motion to Stay or Relief from Judgment

03/25/2021 **Brief** **Index # 133**  
Defendants' Brief in Support of Motion for Stay or Relief from Judgment

03/25/2021 **Service of Motion** **Index # 134**  
Affidavit of Service upon R. Bakke, B. Wiederholt

03/25/2021 **Letter** **Index # 135**  
Letter to Judge Weiler from Brad Wiederholt dated March 25, 2021

03/25/2021 **Service Document** **Index # 136**  
Service on Ryan McCamy

03/26/2021 **Notice of Hearing** **Index # 137**  
- Remote Hearing - Motion - ZOOM

03/26/2021 **Order** **Index # 138**  
Granting Temporary Stay of Judgment

03/26/2021 **Notice of Assignment and Case Number** **Index # 139**

03/26/2021 **Letter** **Index # 140**  
Letter to Judge Weiler from Brad Wiederholt dated March 26, 2021

03/26/2021 **Service Document** **Index # 141**  
Certificate of Service for service on Ryan McCamy

03/26/2021 **Notice** **Index # 142**  
- Remote - Civil Hearing - ZOOM

03/29/2021 **Civil Hearing** (11:00 AM) (Judicial Officer Weiler, Bobbi)  
via ZOOM - meeting ID 825 8994 7404 or call 669-900-9128  
Result: Hearing Ended

03/29/2021 **Notice of Scheduling Change** **Index # 143**  
- Amended Motion Hearing - ZOOM

03/29/2021 **Order** **Index # 144**  
Regarding Stay

04/06/2021 **Notice** **Index # 145**  
Defendants' Notice of Motion to Quash Subpoenas

04/06/2021 **Motion** **Index # 146**  
Defendants' Motion to Quash Subpoenas

04/06/2021 **Brief** **Index # 147**  
Brief in Support of Defendants' Motion to Quash Subpoenas

04/06/2021 **Affidavit** **Index # 148**  
Affidavit of Ryan C. McCamy in Support of Defendants' Motion to Quash Subpoenas

04/06/2021 **Exhibit** **Index # 149**  
Exhibit A - Subpoena upon Thad Campbell

04/06/2021 **Exhibit** **Index # 150**  
Exhibit B - Subpoena upon Tyler Leier

04/06/2021 **Exhibit** **Index # 151**  
Exhibit C - Subpoena upon Mark Conway

04/06/2021 **Exhibit** **Index # 152**  
Exhibit D - Subpoena upon Robert Gibbs & Sons, Inc.

04/06/2021 **Exhibit** **Index # 153**  
Exhibit E - Subpoena upon Hyperion Protection and Recovery, Inc.

04/06/2021 **Service of Motion** **Index # 154**  
Affidavit of Service upon R. Bakke, B. Wiederholt

04/06/2021 **Brief** **Index # 155**  
Plaintiffs' Response in Opposition to Defendants' Motion to Stay or Relief from Judgment

04/06/2021 **Service Document** **Index # 156**  
Certificate of Service on Ryan McCamy

04/06/2021 **Brief** **Index # 157**  
Plaintiffs' Response in Opposition to Defendants' Motion to Reconsider

04/06/2021 **Service Document** **Index # 158**  
Certificate of Service on Ryan McCamy

04/06/2021 **Notice** **Index # 159**  
Notice of Filing of Additional Hearing Exhibits

04/06/2021 **Exhibit** **Index # 160**  
Exhibit 59 February 24, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 161**  
Exhibit 60 - February 25, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 162**  
Exhibit 61 - February 26, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 163**  
Exhibit 62 - March 1, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 164**  
Exhibit 63 - March 3, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 165**  
Exhibit 64 - March 20, 2021 Summary of Observation and General Notice / Review

04/06/2021 **Exhibit** **Index # 166**  
Exhibit 65 - March 29, 2021 Incident Report

04/06/2021 **Exhibit** **Index # 167**

|            |  |
|------------|--|
|            | <i>Exhibit 66 - March 29, 2021 Video of Manhole Cover - In Clerk's Cabinet</i>   |
| 04/06/2021 | <u>Exhibit</u> <b>Index # 168</b><br><i>Exhibit 67 - March 30, 2021 Incident Report</i>  |
| 04/06/2021 | <u>Exhibit</u> <b>Index # 169</b><br><i>Exhibit 68 - Letter dated March 23, 2021 to Albert Daou from City of Bismarck Assistant City Attorney</i>  |
| 04/06/2021 | <u>Exhibit</u> <b>Index # 170</b><br><i>Exhibit 69 - April 5, 2021 Cover email and letter from Tyler Gensrich of Hyperion Protection &amp; Recovery, Inc.</i>  |
| 04/06/2021 | <u>Exhibit</u> <b>Index # 171</b><br><i>Exhibit 70 - 2020 Burleigh County Real Estate Tax Statement</i>  |
| 04/06/2021 | <u>Service Document</u> <b>Index # 172</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/07/2021 | <u>Brief</u> <b>Index # 173</b><br><i>Plaintiffs' Response in Opposition to Defendants' Motion to Quash Subpoenas</i>  |
| 04/07/2021 | <u>Service Document</u> <b>Index # 174</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/07/2021 | <u>Order</u> <b>Index # 175</b><br><i>Order - Motion to Quash Subpoenas is GRANTED</i>   |
| 04/07/2021 | <u>Notice</u> <b>Index # 176</b><br><i>Notice of Filing of Additional Hearing Exhibits</i>   |
| 04/07/2021 | <u>Exhibit</u> <b>Index # 177</b><br><i>Exhibit 71 - July 10, 2020 Video of Manhole Cover in Kmart parking lot - In Clerk's Cabinet</i>  |
| 04/07/2021 | <u>Exhibit</u> <b>Index # 178</b><br><i>Exhibit 72 - Documents Received from Arrow Service Team bates labelled Arrow-001-0027</i>  |
| 04/07/2021 | <u>Exhibit</u> <b>Index # 179</b><br><i>Exhibit 73 - Documents Received from Robert Gibb &amp; Sons bates labelled Robert Gibb &amp; Sons-001-0080</i>   |
| 04/07/2021 | <u>Service Document</u> <b>Index # 180</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/09/2021 | <u>Brief</u> <b>Index # 181</b><br><i>Defendants' Reply Brief in Support of Motion to Reconsider</i>   |
| 04/09/2021 | <u>Service Document</u> <b>Index # 182</b><br><i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>   |
| 04/12/2021 | <b>Motion/Hearing</b> (10:00 AM) (Judicial Officer Weiler, Bobbi)<br>via ZOOM - <a href="https://www.zoom.com">www.zoom.com</a> - meeting ID 871 8102 0582 or call 669-900-9128<br>05/03/2021 Reset by Court to 04/12/2021 |
|            | Result: Hearing Ended  |
| 04/12/2021 | <u>Order</u> <b>Index # 183</b><br><i>on Motion for Reconsideration</i>  |
| 04/12/2021 | <u>Proposed Judgment</u> <b>Index # 184</b><br><i>Proposed Amended Judgment of Eviction filed by attorney Brad Wiederholt</i>  |
| 04/12/2021 | <u>Service Document</u> <b>Index # 185</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/13/2021 | <u>Judgment</u> <b>Index # 186</b><br><i>Amended Judgment of Eviction</i>  |
| 04/14/2021 | <u>Notice of Entry of Judgment</u> <b>Index # 187</b><br><i>Notice of Entry of Amended Judgment of Eviction</i>  |
| 04/14/2021 | <u>Service Document</u> <b>Index # 188</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/14/2021 | <u>Notice</u> <b>Index # 189</b><br><i>Defendants' Notice of Motion to Stay Eviction</i>   |
| 04/14/2021 | <u>Motion</u> <b>Index # 190</b><br><i>Defendants' Motion to Stay Eviction</i>   |
| 04/14/2021 | <u>Brief</u> <b>Index # 191</b><br><i>Defendants' Brief in Support of Motion to Stay Eviction</i>  |
| 04/14/2021 | <u>Service of Motion</u> <b>Index # 192</b><br><i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>  |
| 04/14/2021 | <u>Letter</u> <b>Index # 193</b><br><i>Letter to Judge Bobbi Weiler from Bradley N Wiederholt dated April 14, 2021</i>   |
| 04/14/2021 | <u>Exhibit</u> <b>Index # 194</b><br><i>Exhibit A - Email chain dated April 13, 2021 between Brad Wiederholt and Ryan McCamy</i>   |
| 04/14/2021 | <u>Service Document</u> <b>Index # 195</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/14/2021 | <u>Letter</u> <b>Index # 196</b><br><i>Letter to Judge Bobbi Weiler from Bradley N Wiederholt dated April 14, 2021</i>   |
| 04/14/2021 | <u>Service Document</u> <b>Index # 197</b><br><i>Certificate of Service on Ryan McCamy</i>   |
| 04/14/2021 | <u>Notice of Hearing</u> <b>Index # 198</b><br><i>- Remote Motion Hearing - ZOOM</i>   |
| 04/16/2021 | <u>Notice</u> <b>Index # 199</b><br><i>Notice of Appeal by Transform Operating Stores, et al.</i>  |
| 04/16/2021 | <u>Notice of Filing the Notice of Appeal</u> <b>Index # 200</b><br><i>Notice of Filing Notice of Appeal</i>  |
| 04/16/2021 | <u>Service Document</u> <b>Index # 201</b><br><i>Unsworn Declaration of Service</i>  |
| 04/16/2021 | <u>Notice</u> <b>Index # 202</b><br><i>Notice of Plaintiffs' Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction</i>  |
| 04/16/2021 | <u>Motion</u> <b>Index # 203</b><br><i>Plaintiffs' Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction</i>  |
| 04/16/2021 | <u>Brief</u> <b>Index # 204</b><br><i>Brief in Support of Plaintiffs' Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction</i>   |
| 04/16/2021 | <u>Request</u> <b>Index # 205</b><br><i>Request for Expedited Decision on Plaintiffs' Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction</i>   |
| 04/16/2021 | <u>Civil Filing</u> <b>Index # 206</b><br><i>Certified Copy of Amended Judgment of Eviction</i>  |

|            |                                 |                    |  |
|------------|---------------------------------|--------------------|--|
| 04/16/2021 | <b><u>Affidavit</u></b>         | <b>Index # 207</b> | <i>Affidavit of Abdou Albert Joseph Daou</i>   |
| 04/16/2021 | <b><u>Exhibit</u></b>           | <b>Index # 208</b> | <i>Exhibit A - April 14, 2021 Incident Report</i>  |
| 04/16/2021 | <b><u>Exhibit</u></b>           | <b>Index # 209</b> | <i>Exhibit B - Placeholder for Video taken of Kmart property on April 14, 2021 (DVD in cupboard in Clerk's office)</i>   |
| 04/16/2021 | <b><u>Affidavit</u></b>         | <b>Index # 210</b> | <i>Affidavit of Bradley N. Wiederholt</i>  |
| 04/16/2021 | <b><u>Exhibit</u></b>           | <b>Index # 211</b> | <i>Exhibit C - Letter dated March 25, 2021 from Ryan McCamy to Brad Wiederholt</i>   |
| 04/16/2021 | <b><u>Exhibit</u></b>           | <b>Index # 212</b> | <i>Exhibit D - Email string dated April 13, 2021 between Ryan McCamy and Brad Wiederholt</i>   |
| 04/16/2021 | <b><u>Proposed Order</u></b>    | <b>Index # 213</b> | <i>Proposed Writ of Execution filed by attorney Brad Wiederholt</i>  |
| 04/16/2021 | <b><u>Service of Motion</u></b> | <b>Index # 214</b> | <i>Certificate of Service on Ryan McCamy</i>   |
| 04/19/2021 | <b><u>Order</u></b>             | <b>Index # 215</b> | <i>Order for Transcript (Defendants) - Emailed Jana Aamodt on 04/19/2021</i>   |
| 04/19/2021 | <b><u>Service Document</u></b>  | <b>Index # 216</b> | <i>Affidavit of Service upon R. Bakke and B. Wiederholt</i>  |
| 04/19/2021 | <b><u>Order</u></b>             | <b>Index # 217</b> | <i>Amended Order for Transcript (Defendants) - Emailed Jana Aamodt on 04/19/2021</i>   |
| 04/19/2021 | <b><u>Service Document</u></b>  | <b>Index # 218</b> | <i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>   |
| 04/20/2021 | <b><u>Letter</u></b>            | <b>Index # 219</b> | <i>for the Supreme Court to Ryan McCamy dated 4/19/21</i>  |
| 04/20/2021 | <b><u>Letter</u></b>            | <b>Index # 220</b> | <i>from the Supreme Court to Ryan McCamy dated 4/19/21 - CORRECTED</i>   |
| 04/21/2021 | <b><u>Notice</u></b>            | <b>Index # 221</b> | <i>- Remote Hearing - Motion to Stay and Motion in Contempt (same hearing date/time, two motions)</i>  |
| 04/21/2021 | <b><u>Response</u></b>          | <b>Index # 222</b> | <i>Defendants' Brief in Opposition to Plaintiffs' Motion for Writ of Special Execution</i>   |
| 04/21/2021 | <b><u>Affidavit</u></b>         | <b>Index # 223</b> | <i>Affidavit of Ryan C. McCamy in Support of Defendants' Brief in Opposition to Plaintiffs' Motion for Writ of Special Execution</i>                                   |
| 04/21/2021 | <b><u>Exhibit</u></b>           | <b>Index # 224</b> | <i>Exhibit A - Email exchange with Plaintiffs' counsel dated April 14, 2021</i>  |
| 04/21/2021 | <b><u>Service Document</u></b>  | <b>Index # 225</b> | <i>Affidavit of Service upon R. Bakke, B. Wiederholt</i>   |
| 05/18/2021 | <b>Motion/Hearing</b>           |                    | <b>(9:00 AM) (Judicial Officer Weiler, Bobbi)</b><br><i>Motion to Stay and Motion in Contempt - via ZOOM - meeting ID 841 7701 0468 - zoom.com or call 669-900-128</i> |

---

**FINANCIAL INFORMATION**


---

|            |  |                        |                            |             |
|------------|--|------------------------|----------------------------|-------------|
|            | <b>Attorney Wiederholt, Bradley Neuman</b> |                        |                            |             |
|            | Total Financial Assessment                 |                        |                            | 10.00       |
|            | Total Payments and Credits                 |                        |                            | 10.00       |
|            | <b>Balance Due as of 04/21/2021</b>        |                        |                            | <b>0.00</b> |
| 03/23/2021 | Transaction Assessment                     |                        |                            | 10.00       |
| 03/23/2021 | Phone Payment                              | Receipt # 08-2021-4252 | Wiederholt, Bradley Neuman | (10.00)     |
|            | <b>Plaintiff The Boutrous Group, LLP</b>   |                        |                            |             |
|            | Total Financial Assessment                 |                        |                            | 100.00      |
|            | Total Payments and Credits                 |                        |                            | 100.00      |
|            | <b>Balance Due as of 04/21/2021</b>        |                        |                            | <b>0.00</b> |
| 02/08/2021 | Transaction Assessment                     |                        |                            | 80.00       |
| 02/08/2021 | E-File Payment                             | Receipt # 08-2021-1832 | The Boutrous Group, LLP    | (80.00)     |
| 04/13/2021 | Transaction Assessment                     |                        |                            | 10.00       |
| 04/13/2021 | Phone Payment                              | Receipt # 08-2021-5321 | Randal Bakke               | (10.00)     |
| 04/16/2021 | Transaction Assessment                     |                        |                            | 10.00       |
| 04/16/2021 | Phone Payment                              | Receipt # 08-2021-5556 | Bakke, Randall Joseph      | (10.00)     |

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2021-CV-00240

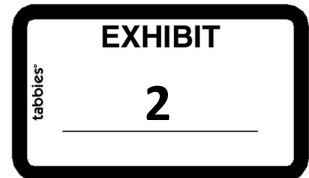
Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )

vs. )

Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC,

Defendants.

**ACTION FOR SUMMARY EVICTION &  
DAMAGES**



\*\*\*

\*\*\*

\*\*\*

COME NOW Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP, and for their Action for Summary Eviction & Complaint against Defendants, state and allege as follows:

**THE PARTIES**

1. Ted J. Boutrous, L.L.C. is a North Dakota limited liability company with its principal place of business in Bismarck, North Dakota. Ted J. Boutrous, L.L.C., is duly authorized and empowered to transact business in the State of North Dakota, including in Burleigh County.

2. The Boutrous Group, LLP, is a North Dakota limited liability partnership with its principal place of business in Bismarck, North Dakota. The Boutrous Group, LLP is duly authorized and empowered to transact business in the State of North Dakota, including in Burleigh County.

3. Defendant Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC is a Delaware limited liability company with its principal place of business at 3333 Beverly

Road, Hoffman Estates, IL 60179, with Registered Agent identified as The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. This Defendant is not registered to conduct business within the State of North Dakota by the North Dakota Secretary of State.

4. Defendant Transform SR Brands LLC is a Delaware limited liability company with its principal place of business at 3333 Beverly Road, Hoffman Estates, IL 60179, with Registered Agent identified as C T Corporation System, 208 So. LaSalle St, Suite 814, Chicago, IL 60604. This Defendant is not registered to conduct business within the State of North Dakota by the North Dakota Secretary of State.

5. Defendant Transform KM, LLC is a Delaware limited liability company with its principal place of business at 3333 Beverly Road, Hoffman Estates, IL 60179, with a Registered Agent identified as CT Corporation System, 120 W. Sweet Ave., Bismarck, ND 58504. A routine address search for CT Corporation System in Bismarck identifies an address of 314 East Thayer Ave., Bismarck, ND 58501.

### **JURISDICTION & VENUE**

6. Plaintiffs reallege and incorporate by reference the allegations contained in all prior paragraphs.

7. At all relevant times hereto, the foregoing Defendants, and/or each of them (referred to herein collectively as “Defendants”, “Tenant” or as “Transform”), transacted business in Burleigh County within the State of North Dakota.

8. This Court has jurisdiction pursuant to N.D.C.C. §§ 27-05-06(2), 47-32-(01) & (02), and venue is appropriate pursuant to N.D.C.C. §§ 28-04-(01), (02) & (04).

9. Boutrous served the aforementioned Defendants, via personal service on their



Registered Agents and via process server by posting to the building located at 2625 State Street, Bismarck ND, 58504, with *Notice of Intention to Evict* pursuant to N.D.C.C. §§ 47-32-(01)&(02), with true and correct copies of the said Proofs of Service of the said *Notice of Intention to Evict* attached hereto and incorporated herein by reference as ***Exhibit 1***.

### **FACTS**

10. Plaintiffs reallege and incorporate by reference the allegations contained in all prior paragraphs.

11. On or about September 27, 1969, Theodore J. Boutrous and Floyd N. Boutrous, then individually as owners of certain real property located in Bismarck, North Dakota, and as Lessors, entered into that certain commercial lease agreement entitled *Original of Ground Lease and Exhibit D of Kresge Lease* with an individual known as Paul O. Moore, as Lessee, covering certain real property located in Burleigh County, North Dakota, as more particularly described in the Ground Lease (referred to herein as “the Ground Lease”). A true and accurate copy of the Ground Lease is attached to the Affidavit of Michael J. Boutrous as ***Exhibit 2*** and incorporated herein by reference.

12. The *Ground Lease* – recorded against the real property rolls in the Burleigh County Recorder’s Office as Document No. 240461 – provides the purpose for the lease agreement in relevant part as follows:

#### **PURPOSE:**

The parties agree and contemplate that the Lessee [Paul O. Moore] **shall construct and sublease a shopping center** on the property described in paragraph III hereof. Therefore, the purpose for this agreement is to fix the terms and conditions under which the Lessors agree to and do hereby lease to the Lessee the property described in part III hereof and the terms and conditions under which the Lessee agrees to pay rental therefor.

(emphasis added).

13. The terms and conditions of Section V of the Ground Lease establish the understanding of the original Lessor and Lessee that the Lessee Paul O. Moore would sublease the very same property in Bismarck, ND to S.S. Kresge Company (later operated under the name Kmart) for purposes of constructing and ultimately operating a retail facility to be known as Kmart.

14. The aforementioned sublease referenced in the Ground Lease was duly entered into via that certain commercial lease agreement entitled *Original of Kresge Lease and Exhibit C of the Ground Lease*, dated June 8, 1970, by and between Paul O. Moore as landlord and S.S. Kresge Company as tenant, as amended, a true and correct copy of which is attached to the Affidavit of Michael J. Boutrous as **Exhibit 3** and incorporated herein by reference (referred to herein as “the Lease” or “the Kmart Lease”).

15. The Kmart Lease and the rights to possession incidental thereto as well as damages for the breach thereof are the subject of this Action for Summary Eviction & Damages. The Kmart Lease very clearly provides that the building and operating of a Kmart store are the purposes contemplated by the parties.

16. Plaintiffs succeeded to the interests of the original Lessors Theodore J. Boutrous and Floyd N. Boutrous in the Ground Lease, and upon termination of the Ground Lease on or about July 31, 2014, have succeeded to the interests of the Landlord in the Kmart Lease pursuant to an agreement entitled *Attornment Agreement*, dated September 27, 1969. Copies of the *Attornment Agreement*, and *Findings of Fact, Conclusions of Law, and Order* are attached to the Affidavit of Michael J. Boutrous as **Exhibits 4 & 5** and incorporated herein by reference. *See also*, Affidavit of Della Boutrous at ¶ 9.

17. In addition to possessing the rights of the Landlord in the Kmart Lease, Plaintiffs are also the record title owners of the real property described as the leased premises in both the Ground Lease and the Kmart Lease, which are sometimes described by their real property address of 2625

State Street, Bismarck ND, 58503, located in Burleigh County, State of North Dakota (the “Leased Premises”). Affidavit of Della Boutrous at ¶ 10 and Michael J. Boutrous at ¶ 10.

18. Kmart Corporation succeeded to the interests of S.S. Kresge Company as the Tenant under the Kmart Lease, and for a period of many years until 2020 operated a Kmart Store on the Leased Premises. Affidavit of Della Boutrous at ¶ 12 and Michael J. Boutrous at ¶ 12.

19. Following the closure of the Kmart store on the Leased Premises in early February of 2020, on information and belief, one or more of the Defendants identified above, have succeeded to Kmart Corporation’s interest as the Tenant in the Kmart Lease and/or possess other tenancy rights in the Kmart Lease. Affidavit of Della Boutrous at ¶ 13 and Michael J. Boutrous at ¶ 13.

20. In addition to the Kmart Store and parking lot, there are two outlots within the boundaries of the Leased Premises, which are not at issue in this action as those subleases are subject to their own lease arrangements. Those outlots contain Arby’s and McDonald’s restaurants and their associated parking areas and rights of way. Affidavit of Della Boutrous at ¶ 14 and Michael J. Boutrous at ¶¶ 14-15.

21. The Bismarck Kmart Store that operated for many years at the Leased Premises was closed on or about February 3, 2020 and has remained vacant to the present date. True and correct copies of local and national news reports concerning Kmart store closures are attached to the Affidavit of Michael J. Boutrous as ***Exhibits 6, 7, & 8*** and incorporated herein by reference, and can be accessed at the following links:

- <https://www.kfyrtv.com/content/news/Bismarck-Kmart-to-close-in-early-2020-564626991.html>;
- <https://www.kxnet.com/news/bismarck-kmart-to-close-by-february-2020/>;
- <https://www.usatoday.com/story/money/2019/11/07/kmart-sears-store-closings-96-stores-set-shutter-february-2020/2521653001/>

(links last accessed February 8, 2021) (below photo of Kmart Store sign taken on December 3, 2020)



22. Prior to the 2020 Bismarck Kmart Store closure, on or about September 17, 2013, a resident of Bismarck, Frances Grueneich, (“Grueneich”) was – on information and belief – at the Leased Premises as a lawful invitee where she was attending a farmer’s market in the Kmart parking lot where she sustained injuries.

23. On information and belief, Grueneich tripped over and partially fell into an open or loose manhole cover or broken portions of the pavement in the Kmart parking lot and was then essentially run over by a car, resulting in major debilitating injuries to Grueneich, all of which is more fully described in her lawsuit in the South Central Judicial District Court, County of Burleigh, against Boutrous, against Kmart Operations LLC, and others in an action entitled: *Frances Grueneich v. Kmart Operations LLC; Ted J. Boutrous, L.L.C.; Boutrous Group, L.L.P.; Capitol Farmers Market; and Terry Schmidt*, assigned Civil No. 08-2018-CV-00347 (“the Grueneich Lawsuit”).

24. A true and correct copy of the Complaint in the Grueneich lawsuit, dated December 26, 2017, is attached to the Affidavit of Michael J. Boutrous as ***Exhibit 21*** and incorporated herein by reference.

25. In the Complaint, Grueneich alleges failures to maintain the parking lot and other failures of certain legal duties by both Boutrous and by Kmart, stating in part:

*[¶13] On the morning of September 17, 2013, Grueneich was an invitee of defendant Kmart at its retail store in Bismarck. At that time and place Grueneich was walking across the Kmart parking lot owned by Defendant Boutrous and operated by defendant Kmart. As Grueneich was walking she tripped on a broken area in the parking lot surface and fell to the ground.*

*[¶14] At that same time and place, defendant Schmidt was operating a motor vehicle and was driving through the portion of the Kmart parking lot designated as the location of the outdoor produce market for the defendant Farmers Market. Defendant Schmidt had stopped his vehicle and exited it to check on some produce and when Schmidt re-entered the vehicle he drove his vehicle forward and over the top of Grueneich. The negligence of Kmart, Boutrous, Farmers Market and Schmidt was the proximate cause of plaintiff's injuries.*

*[¶15] As a result of the combined actions and inactions of the defendants, Grueneich sustained very severe injuries as are more particularly described below.*

*(. . .)*

*[¶18] Defendant Kmart owed a duty to Grueneich to ensure that the parking lot was properly maintained and to ensure that the traffic flow patterns provided for proper safety and in particular that the traffic flow in and around the area provided to defendant Farmers Market was safe and appropriate for both vehicle and pedestrian traffic. Defendant Kmart failed to do so and that failure was the proximate cause of the injuries to Grueneich.*

*[¶19] Defendant Boutrous owed a duty to Grueneich to ensure that the parking lot was properly maintained. Defendant Boutrous failed to do so and that failure was the proximate cause of the injuries to Grueneich.*

*(. . .)*

26. Although it denied any responsibility for Grueneich's lawsuit and her claimed damages, and continues to so deny, Boutrous has substantial liability exposure due solely to Kmart's shoddy or non-existent parking lot maintenance and upkeep and other failures, which had essentially turned the parking lot into a nuisance and a dangerous condition, and which also constitutes a material breach of the Tenant's obligations under the Kmart Lease. Those conditions remain and have grown worse as of the present date.

27. Photos taken in the Kmart parking lot on July 10 & 31, 2020 (respectively) are below:



28. That lack of maintenance and basic upkeep continued after Transform succeeded to Kmart's interest in the Kmart Lease sometime in early 2020. In fact, the failure of Transform to perform its most basic maintenance and other Lease obligations has become much worse with the near total abandonment of the Leased Premises, which abandonment is now more than one (1) year since the closure of the Bismarck Kmart Store. Affidavit of Della Boutrous, ¶ 17; Affidavit of Michael J. Boutrous, ¶ 16.

29. Because of Transform's de facto abandonment of the Leased Premises and resultant nuisance and dangerous conditions thereon, Boutrous has found it necessary to hire a property management company to address the lack of maintenance and oversight, and to routinely check in on the Leased Premises, and has undertaken other necessary security precautions. Affidavit of Della Boutrous at ¶ 21; Affidavit of Michael J. Boutrous at ¶ 28. In this regard, a true and correct copy of the Affidavit of Albert Daou ("Mr. Daou") of Integrity Property Management LLC, along with supporting *Exhibits 31 – 33*, are attached hereto and incorporated by reference. These maintenance, protective and other security measures have included installing a chain link fence,

installing a “No Trespassing” sign, and visiting the Leased Premises at least weekly. *See* Affidavit of Albert Daou at ¶ 13, 21 & 22.

30. Boutrous’ approximate costs incurred to date to perform address Tenant’s lack of maintenance, security, and oversight, which should have been performed all along by Tenant, total approximately \$12,065.00. *See* Integrity and Other Invoices and Proofs of Payment, attached to the Affidavit of Michael J. Boutrous as ***Exhibit 13*** incorporate herein by reference. Those costs include ongoing property management costs, and other infrastructure costs to keep out trespassers and unsuspecting members of the public who might be injured by or sustain property damage from the dangerous parking lot conditions and other dangers.

31. Plaintiffs have undertaken certain management, oversight, and security roles at the Leased Premises because Transform has wholly failed in its obligations to do so.

32. Mr. Daou has prepared and shared with Plaintiffs numerous incident reports based on his own and his staffs’ ongoing weekly site visits since the summer of 2020, which reports contain descriptions and photographs documenting the nuisance conditions, damages to property, and a lack of maintenance and oversight. *See Exhibit 33*.

33. Mr. Daou also obtained an email report prepared by Bismarck PD Officer Clint Fuller, summarizing increased police presence because of Transform’s abandonment of its obligations. *See* Email report, attached to the Affidavit of Albert Daou as ***Exhibit 30*** incorporated herein by reference.

34. Some of the problems documented at the Leased Premises by Mr. Daou include:
- a. transients and vagrants sitting for long periods of time, sleeping, and essentially loitering under the Kmart Store awning;
  - b. the dumping of garbage, old televisions, mattresses, and other debris in the parking lot and on the sides and rear of the building;
  - c. transients, trespassers and others sleeping in the dumpster area (described by Mr. Daou as a “homeless camp”) at the rear of the building, and in cars, and in campers;
  - d. increased drug and suspicious activity requiring law enforcement intervention;
  - e. unauthorized cars parked by the public with “For Sale” signs;

- f. unauthorized vendors setting up and selling products, food, and other items;
- g. peeling paint and water damage to the building, and other potentially greater unknown damages;
- h. wind damages to the building from recent high wind events;
- i. broken sign and otherwise dilapidated building appearance;
- j. burned out bulbs leading to dark and dangerous conditions;
- k. transients, trespassers or others attempting to break into the building and setting off alarms;
- l. transients, trespassers or others attempting to sleep in the cardboard compactor at the rear of the building and setting off alarms;
- m. settlement, cracks, holes, and other dangerous parking lot conditions in the asphalt;
- n. manhole cover in parking lot that will not stay in place – condition has existed continuously since at least 2013;
- o. lack of timely snow removal;
- p. lack of lawn care and weed control; and
- q. negative affect on and nuisance to the neighboring Arby's and McDonald's outlots and to the neighbor to the east Mr. Lubester.

35. The foregoing conditions and occurrences are the obligation of Transform to remedy, repair and/or prevent from occurring pursuant to its obligations as Tenant under the Kmart Lease.

36. Photos taken by Mr. Daou on July 10, December 21 & 28, 2020 documenting some of these conditions, damages, and potential waste are below:







37. Photos taken by Mr. Daou showing wind damage and a trespasser attempting to force entry into and sleep in the cardboard compactor, taken January 12 & 22, 2021 are below:





38. Photos taken by Mr. Daou showing burnt out overhead parking lot lighting, chain link fence, random snow piles, and “No Trespassing” sign, taken January 4, 2021 are below:





39. The Tenant's failure to maintain the Leased Premises and to follow applicable ordinances and laws did not start in 2020. On the contrary, the pattern of neglect began well prior, as reflected, for example, by the Grueneich lawsuit concerning an injury that happened in 2013.

40. In May of 2018, Michael Boutrous received a call from a concerned citizen who was then sitting in his vehicle in the McDonalds drive through. He informed Michael that he had just witnessed a truck strike a large metal light pole in the Kmart parking lot, that the light pole appeared to be damaged, and that the truck left the scene. Michael took photographs of the damaged light pole and sent a letter via Certified Mail to the Tenant (on behalf of the Plaintiffs) raising concerns about the damage and asking that it be repaired or replaced. To this very day, the Tenant has never responded to the Boutrous letter and the damaged light pole remains as a potential falling or electrical hazard. Photographs showing the damaged light pole, the letter sent to Tenant, and the returned and

signed Certified Receipt for the letter are attached to the Affidavit of Michael J. Boutrous as ***Exhibit 22*** and incorporated herein by reference.

41. In October of 2019, the City of Bismarck advised Boutrous that the water bill for the Leased Premises in the amount of \$499.88 had been and remained unpaid in derogation of the City's ordinances, and also requested Boutrous as the real property owner to make prompt payment because Kmart had declared bankruptcy and apparently refused to do so. The City's letter cited Bismarck Ordinances, Section 11-01-10 & 11-02-02(4). *See* Letter October 24, 2019, City Utility Bill, and Boutrous Check No. 1311 attached to the Affidavit of Della Boutrous as ***Exhibit 28*** and incorporated herein by reference.

42. Despite the fact the Tenant is clearly responsible for the payment of utilities under the Lease (described below at Section 16 of the Lease), the then-tenant Kmart refused to pay. Plaintiffs have never been repaid for the water bill. Affidavit of Michael J. Boutrous at ¶ 42. Once Transform succeeded to the interests of the Tenant in the Lease, it missed another water bill payment in a much higher amount than the October 24, 2019 amount, but Transform made payment of that bill after being asked by Boutrous to do so. *Id.* at ¶ 42.

43. Boutrous was further put on notice by the City of Bismarck in late June of 2020 concerning "the tall grass and/or weeds [that need] to be managed or eradicated." *See* Letter attached to the Affidavit of Michael J. Boutrous as ***Exhibit 11*** and incorporated herein by reference. The City's letter referred to "Bismarck's Code of Ordinances[,] [which] states that tall grass and weeds in excess of 8 inches in height are declared a public nuisance[.]" *See id.*

44. Of more concern than the non-payment of the water bill and unmown grass and out of control weeds was the Tenant's lapses in providing proofs of insurance coverage for the Leased Premises, which occurred in 2016 and again in 2020. *See* Letter by Ted J. Boutrous LLC and The

Boutrous Group, LLP, dated December 2, 2016; Sears Holdings' Response Letter, dated December 14, 2016, and Letter by Ted J. Boutrous LLC and The Boutrous Group, LLP to Transform, dated July 8, 2020, attached to the Affidavit of Michael J. Boutrous as *Exhibits 23 – 25* and incorporated herein by reference; Affidavit of Michael J. Boutrous, ¶ 37.

45. In addition to the Tenant not complying with Bismarck's Ordinances and neglect of proof of insurance obligations, Boutrous sent numerous letters to Transform in 2019 and 2020 addressing non-payment of rents for the McDonalds outlot, addressing widespread maintenance concerns and problems, and ongoing problems of trespassers, vagrants, and non-authorized members of the public essentially overrunning and taking over the parking lot area of the Leased Premises. Affidavit of Michael J. Boutrous at ¶¶ 25-26, & 32.

46. Those letters provided express notices of breach of Transform's obligations, and also provided more than adequate opportunity to cure the numerous material breaches and other deficiencies outlined therein. Although a few letter responses were sent in 2020 by Transform's attorneys, most of the deficiencies and material breaches remained uncured after notice, and remain uncured to the present date.

47. The aforementioned letters include the following:

- a. Letter by Ted J. Boutrous LLC and The Boutrous Group, LLP, dated December 3, 2019 (*Exhibit 14*);
- b. Letter by Tory Jackson to Transform, dated January 9, 2020 (*Exhibit 15*);
- c. Letter by Transform to Tory Jackson, dated January 17, 2020 (*Exhibit 16*);<sup>1</sup>
- d. Letter by Tory Jackson to Transform, dated February 5, 2020 (*Exhibit 17*);
- e. Letter by Tory Jackson to Transform, dated April 16, 2020 (*Exhibit 18*);
- f. Letter by Tory Jackson to Transform, dated August 10, 2020 (*Exhibit 19*); and
- g. Letter by Ryan McCamy to Tory Jackson, dated September 3, 2020 (*Exhibit 20*);<sup>2</sup>

---

<sup>1</sup> Attorney David Pursel refers to "Transform Operating Stores LLC [], successor in interest to the Original Tenant" in the Kmart Lease.

<sup>2</sup> Attorney McCamy refers to his client as "Transformco Operating Stores LLC" and "Transformco d/b/a Kmart". Transformco appears to be the wholly owned tradename of Transform SR Brands

True and correct copies of the foregoing letters are attached to the Affidavit of Michael J. Boutrous and incorporated herein by reference as *Exhibits 14 – 20*.

48. The communications sent by Boutrous to Kmart/Transform, beginning in May of 2018 through the early fall of 2020, coupled with the Tenant’s lack of action and abject failure to do its duties under the Lease, demonstrate that the Tenant was not and is not fulfilling its maintenance and other Lease obligations and was otherwise failing to comply with City Ordinances and other applicable laws. The Tenant’s actions and lack of proper action have been to the direct detriment of: the general public; invitees at the Leased Premises; the Arby’s and McDonalds subtenants; as well as Boutrous.

49. In fact, the correspondence and incident reports show a Tenant apparently unable or unwilling to fulfill any of its most basic maintenance duties, which has led to the nuisance and dangerous conditions, and which has already led to damages and waste to the parking lot, the infrastructure and the building itself. Boutrous is highly concerned about unknown conditions in the building, and to the building envelope, which are or may be causing further damage and potentially waste.

50. Attorney Jackson’s April 16, 2020 letter (*Exhibit 18*) on behalf of Plaintiffs provides express notice to Transform that it must advise Boutrous of its “plans to keep the demised premises secured and in good order and repair[.]” It goes on to discuss the potential for “damage and security issues now that the demised premises are vacant” and that “Landlord expects that Tenant will cooperate by making one of its representatives available for an inspection.” Attorney Jackson closes the letter by requesting a “detailed explanation of Tenant’s plans for securing and

---

LLC. See <https://en.wikipedia.org/wiki/Transformco> (last accessed January 27, 2021)

maintaining the demised premises[.]”

51. Transform never responded to Attorney Jackson’s April 16, 2020 letter. Michael J. Boutrous Affidavit, ¶ 38; Della Boutrous Affidavit, ¶ 29.

52. Attorney Jackson’s later August 10, 2020 letter (*Exhibit 19*) expressly and in considerable detail references the many maintenance and other failures by Transform with respect to the parking lot, the building, and other areas of the Leased Premises, and also refers to the effective abandonment leading to transients and homeless encampments, increased drug use, and other non-authorized and illegal activities occurring there on a widespread and near daily basis, all of which caused the property to become an eyesore, a nuisance, and a danger to the public.

53. The same letter also refers specifically to Section 14 of the Kmart Lease, stating: “Tenant is responsible for all repairs and maintenance to keep the demised premises ‘in good order and repair.’” Attorney Jackson’s letter further states:

“Tenant, through its negligent abandonment of the demised premises, has failed to preserve the demised premises in a safe and good condition, resulting in deterioration and security issues. Tenant also has allowed the demised premises to be used for purposes contrary to the Lease.

( . . . )

Given all of this, Landlord hereby notifies Tenant that Landlord is exercising its statutory right under NDCC § 47-16-16 to terminate Tenant’s month-to-month tenancy under the Lease, effective immediately. Tenant has allowed the demised premises to be used in a manner contrary to the agreement of the parties as set forth in the Lease, to the detriment of the security of the demised premises and the safety of the general public.

Tenant must immediately surrender the demised premises to Landlord. If Tenant fails to do so, Landlord will pursue all available legal remedies under North Dakota law.

54. Because Boutrous has waited for a period of more than five (5) months after its August 2020 letter to institute this action, and because Boutrous provided detailed notice of the many unsafe conditions and failures of Transform to perform its Lease and other obligations, none of which has been cured to date, attorney Jackson’s letter on behalf of Plaintiffs (and the previous

May 11, 2018 and April 16, 2020 letters) provided Transform with more than adequate opportunity to cure its many breaches.

55. Despite express notice, Transform has elected to effectively abandon the Leased Premises, and has not performed the maintenance and other routine obligations and upkeep as required by the Kmart Lease, required by Bismarck municipal ordinances, and required by North Dakota law,<sup>3</sup> resulting not only in an eyesore but also resulting in damages to Boutrous, and a hazard and nuisance to the public and to the invitees of the Arby's and McDonalds outlots. As such, Transform is in material breach of the Lease.

56. Since the Bismarck Kmart Store closure, neither Transform nor any other subtenant has operated any store, retail establishment or shopping center at the Leased Premises. *See* Affidavit of Albert Daou at ¶ 16, Affidavit of Della Boutrous, ¶ 17, and Affidavit of Mark J. Boutrous, ¶ 17-18, Affidavit of Dennis Sotebeer, ¶ 5.

57. The Leased Premises are no longer being used or utilized by Transform for the original purpose as set forth in the Kmart Lease (referring to operating a Kmart store) or as set forth in the Ground Lease (referring to a "shopping center"). This condition of an abandoned building and premises, and ongoing waste and nuisance activity, has persisted now for over one (1) year.

58. In addition to Transform being in material breach of its Lease obligations and no longer using the Leased Premises for the purpose contemplated by the parties to the Lease, Transform's (and its predecessor Kmart) have also negatively affected and interfered with the quiet enjoyment of other tenants, the owners of the Arby's and McDonald's outlots. In this regard, the

---

<sup>3</sup> *See e.g.*, N.D.C.C. §§ 13-17-22 (treble damages for waste of lessee); 47-16-09 (lessee to exercise ordinary care); 47-16-10 (lessee must repair injuries); and 47-16-11 (property not to be used for other purpose).



Affidavits of Dennis Sotebeer, along with supporting Exhibits 33-34, are attached hereto and incorporated herein by reference.

59. Mr. Sotebeer has a somewhat long history with Kmart and the follow on tenants under the Kmart Lease (collectively, “Transform”) in attempting, usually unsuccessfully, to persuade Transform to repair the extremely rough and potholed parking lot and driving lanes and to change lamps in the large overhead lights that provide needed security lighting for the entire 12.19 acres, which includes the McDonald’s outlot. As detailed by Mr. Sotebeer, McDonald’s pleas to Transform to perform its basic Lease obligations has fallen on deaf ears. The lack of adequate overhead lighting remains to the present date, which is a serious security concern for McDonald’s customers.

60. In the same way, when Mr. Sotebeer himself more recently elected to fix the parking lot and driving lane potholes by hiring a contractor to do it, and then asking to be repaid, Transform ignored him.

61. The Kmart Lease provides, *inter alia*, the following terms and provisions that are relevant to the relief requested in this lawsuit:

*14. Tenant shall at its own expense, carry out such repairs and maintenance as it deems necessary to keep the demised premises in good order and repair, . . .*

*(. . .)*

*16. Landlord covenants and agrees that the demised premises shall be properly serviced with gas, electric, telephone, water, sewer and other utilities sufficient to meet Tenant’s requirements at the commencement of the lease term. Tenant shall pay all charges for utility services furnished to the demised premises during the lease term.*

*17. Tenant shall observe and comply with all rules, orders and regulations of all duly constituted public authorities. Tenant shall have the right, however, to contest, without cost to Landlord, the validity or application of any such rule, order, or regulation and may postpone compliance therewith until the final determination of any such proceeding.*

*(. . .)*

24. *If the rent reserved in this lease, or any part thereof, shall remain unpaid for a period of thirty (30) days or if Tenant shall be in default under any other provision of this lease and shall remain so for a period of thirty (30) days after notice to Tenant of said nonpayment or other default, then Landlord may, by giving notice to Tenant at any time thereafter during the continuance of such default, either (a) terminate his lease, or (b) re-enter demised premises by summary proceedings or otherwise, expel Tenant and remove all property therefrom, relet said premises at the best possible rent readily obtainable (making reasonable efforts therefor), and received the rent therefrom: provided however, Tenant shall remain liable for the equivalent of the amount of all rent reserved herein less the avails of reletting, if any, after deducting therefrom the reasonable cost of obtaining possession of said premises and of any repairs and alterations necessary to prepare it for reletting. . . .*

26. *(. . .)*

*Landlord further covenants, represents and warrants that it is seized of a leasehold estate in the land described in Exhibit "A" free and clear of any liens, encumbrances, restrictions and violations (or claims or notices thereof) pursuant to a lease between Theodore J. Boutrous and Floyd N. Boutrous and Landlord, a copy of which lease and addendum thereto is attached hereto, marked Exhibit "D", and made a part hereof.*

*(. . .)*

28. *During the lease term Tenant shall indemnify and save Landlord harmless against all penalties, claims or demands of whatsoever nature arising from Tenant's use of the demised premises, except those which shall result, in whole or in part, and directly or indirectly, from the default or negligence of Landlord.*

*(. . .)*

30 *At the expiration or earlier termination of the lease term, Tenant shall surrender demised premises together with alterations, additions and improvements then a part thereof, in good order and condition, ordinary wear, tear, and use thereof excepted. . . .*

*(. . . )*

34. *The conditions, covenants and agreements contained in this lease shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns. All covenants and agreements of this lease shall run with the land.*

See Kmart Lease, ***Exhibit 3***.

62. On information and belief, on February 4, 2021 – as Bismarck had a cold spell during an unseasonably warm winter – water supply pipes inside the vacant Kmart building burst apparently from the cold, with large amounts of water cast upon the floor of the building, likely causing damage

to interior components and fixtures of the building. Affidavit of Albert Daou, Exhibit 33 (February 4, 2021 report). The Fire Department responded to the call, but as of the time of filing this Action, the incident reports had not yet been received.

63. The Kmart Lease specifically contemplates summary proceedings to expel the tenant who is in default or in material breach of its Lease obligations or other terms thereof.

**COUNT 1**  
**SUMMARY EVICTION**

64. Plaintiffs reallege and incorporate by reference the allegations contained in all prior paragraphs.

65. Despite Boutrous providing express written notices of breach/default and despite Transform being provided more than adequate opportunity to cure, Transform has been since February of 2020 and remains to the present day in material breach of its Lease obligations entitling Boutrous to evict Transform. *See* N.D.C.C. § 47-32-01(8) (“An action for eviction to recover the possession of real estate is maintainable in the proper district court when: [] 8. The lessee violates a material term of the written lease agreement between the lessor and lessee.”)

66. Transform’s numerous and ongoing failures of its Lease obligations and effective abandonment of same has negatively affected and unreasonably disturbed the peaceful enjoyment of subtenants Arby’s and McDonalds in the Leased Premises and in their respective rights of way thereon, entitling Boutrous to evict Transform. *See* N.D.C.C. § 47-32-01(8) (“An action for eviction to recover the possession of real estate is maintainable in the proper district court when: [] A lessee or a person on the premises with the lessee’s consent acts in a manner that unreasonably disturbs other tenants’ peaceful enjoyment of the premises.”).

67. Transform has caused the Leased Premises to be used for a purpose other than as

set forth in the Lease, allowing Boutrous to terminate/rescind the Lease and to evict Transform. See N.D.C.C. § 47-16-11 (“When real property is leased for a particular purpose, the lessee must not use it for any other purpose. If the lessee violates the lease in this respect, the lessor may hold the lessee responsible for the safety of the property during such use in all events or may treat the contract as rescinded thereby.”).

68. Transform’s numerous and ongoing failures of its Lease obligations and effective abandonment of same has directly and proximately caused numerous nuisance and dangerous conditions to exist on the Leased Premises, which is detrimental and dangerous to Boutrous, to the general public, and to lawful invitees thereon.

69. Boutrous is entitled to an order providing for the immediate termination of Transform’s tenancy rights under the Lease, the immediate eviction of Transform from the Leased Premises, and the immediate granting and restoring to Boutrous of its right to possession and quiet enjoyment of the Leased Premises, as well as all incidents and rents that may be derived therefrom.

## **COUNT 2** **DAMAGES**

70. Plaintiffs reallege and incorporate by reference the allegations contained in all prior paragraphs.

71. Since disputes have arisen between Boutrous concerning the Lease, Boutrous has not negotiated certain of the rent checks, totaling \$59,823.00 (Affidavit of Michael J. Boutrous at ¶ 42; Michael J. Boutrous Affidavit, *Exhibit 27*). Of that total, rent checks in the total amount of \$24,647.80 have become void (“void checks”). Of that total, rent checks in the total amount of \$35,175.20 are not void and would be negotiable (“non-void checks”).

72. Boutrous is entitled to negotiate the non-void checks and is entitled to be re-issued the void checks, and seeks an order from the Court ordering same.

73. Boutrous is also entitled to an award of damages sustained to date, presently calculable damages to be incurred in the future, and as set forth by law because of Transform's numerous and ongoing failures of its Lease obligations and effective abandonment of the Leased Premises.

74. Transform's breach of its Lease obligations is the direct and proximate cause of damages to Boutrous, in an amount of at least \$12,564.88, to be proven at the eviction hearing.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP pray for relief as follows:

1. For an Order of Eviction against Defendants, and/or each of them;
2. For an Order terminating Defendants' tenancy rights in the Lease, and/or the rights of each of them;
3. For an Order immediately restoring Boutrous to its full rights to possession of the Leased Premises and all incidents thereto and rents derived therefrom;
4. For a judgment and monetary damages in favor of Plaintiff Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP on their Damages claim against Defendants, jointly and severally, in an amount to be proven at the hearing in excess of \$12,564.88;
5. For taxable costs and disbursements as allowed by law;
6. For pre-judgment and post-judgment interest as allowed by law and/or contract;
7. Because Plaintiffs have been without opportunity to inspect the building interior or the building envelope and other areas of the premises which are in the Defendants' sole possession, they must reserve their right to bring additional claims and additional damages – as part of separate lawsuit – after being allowed to perform a future inspection, including but not limited to claims for treble damages due to potential waste committed by Defendant(s). *See* N.D.C.C. § 32-17-22 (“Waste – When actionable. If a [] tenant [] of real property, commits waste thereon, any person aggrieved by the waste may bring an action against the one committing waste therefor, and in such action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the premises.”);
8. For such other and further relief as the court deems just and proper.

PLAINTIFFS HEREBY DEMAND AN EVIDENTIARY HEARING TO BE HELD BY THE COURT NOT MORE THAN 3 DAYS AND NOT LESS THAN 15 DAYS FROM THE DATE OF THE SUMMONS OF THIS MATTER, WHICH IS DATED FEBRUARY 8, 2021.

Dated this 8th day of February, 2021.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Bradley N. Wiederholt  
Randall J. Bakke (#03989)  
Bradley N. Wiederholt (#06354)  
300 West Century Avenue  
P.O. Box 4247  
Bismarck, ND 58502-4247  
(701) 751-8188  
rbakke@bgwattorneys.com  
bwiederholt@bgwattorneys.com

Attorneys for Plaintiffs,  
Ted J. Boutrous, L.L.C. and The Boutrous  
Group, LLP

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Ted J. Boutrous, LLC and the Boutrous  
Group, LLP,

Plaintiffs,

v.

Transform Operating Stores, LLC d/b/a  
Transformco Operating Stores LLC;  
Transform SR Brands LLC d/b/a  
Transformco d/b/a Kmart; and Transform  
KM LLC,

Defendants.

Case No. 08-2021-CV-00240

**NOTICE TO PARTIES REGARDING  
FEBRUARY 19, 2021 HEARING**

EXHIBIT

3

[¶1] This matter is currently set for an eviction hearing on February 19, 2021. *See Docket Number 44* (Notice of Hearing). The Plaintiffs filed a 24-page Complaint for summary eviction, and an extensive amount of exhibits. *Docket Number 1* (Complaint) and *Docket Numbers 2-42*. No attorney has appeared to date on behalf of the Defendants. Based on the Court's review of the exhibits filed to date, the damages being alleged by the Plaintiffs appear to be complex and extensive.

[¶2] "Summary eviction . . . is primarily designed to quickly place a landowner back in possession in certain circumstances when there is little or no dispute to his right to possession." *Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2005 ND 118, ¶ 12, 698 N.W.2d 478 (emphasis added). "The expedited, summary procedure provides no meaningful opportunity for discovery and places the landowner back in possession within a matter of days of serving the summons and complaint." *Id.* "This remedy is particularly ill-suited to resolve complex legal and factual issues . . ." *Id.*

[¶3] The parties are hereby put on notice that at the hearing currently scheduled for February 19, 2021, the Court will only be addressing the issue of right to possession of the premises at issue. Given the apparent complexity and extensiveness of the damages being alleged by the Plaintiff in this matter, the Court concludes a summary eviction proceeding is inappropriate to fully and properly address the damages issues. If the Plaintiffs wish to pursue their claims relating to damages, a separate hearing will need to be scheduled. This will provide the Defendants time to respond to the alleged damages claimed.

[¶4] The Court also has concerns regarding potential bankruptcy proceedings involving any or all of the above-named Defendants. If there are bankruptcy proceedings currently pending, that certainly impacts this Court's ability to proceed in this matter, and/or to what extent this Court can proceed. Both parties are directed to inform the Court of their knowledge of the status of any bankruptcy proceedings involving any of the above-captioned parties by 12 p.m. on February 17, 2021. If there are bankruptcy proceedings pending, the Plaintiffs must identify what specific legal authority exists allowing this Court to proceed with this action while any bankruptcy is pending.

[¶5] If Plaintiffs desire to schedule a hearing on damages, they are directed to contact Court administration to schedule such a hearing no earlier than 60 days after the date of this Order.



IT IS SO ORDERED.

Dated this 12th day of February, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bobbi", followed by a long, horizontal, slightly wavy line.

---

Bobbi Weiler, District Judge  
South Central Judicial District

In District Court, Burleigh County, North Dakota

Ted J. Boutrous, LLC  
Plaintiff/Petitioner,

v.

Case No. 08-2021-CV-00240

Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC  
Defendant/Respondent.

**CERTIFICATE OF SERVICE**

Lindsey Dutton says that on the 12th day of February, 2021, she served:

**Notice to Parties regarding February 19, 2021 Hearing**

in the above-captioned matter as follows:

- ☒ 1<sup>st</sup> Class Mail
- ☐ E-Mail
- ☐ Personal Service

Transform KM LLC  
120 W. Sweet Avenue  
Bismarck, ND 58501

- ☒ 1<sup>st</sup> Class Mail
- ☐ E-Mail
- ☐ Personal Service

Transform Operating Stores, LLC d/b/a  
Transformco Operating Stores LLC  
1209 N. Orange Street  
Wilmington, DE 19801

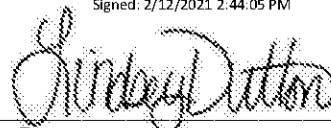
- ☒ 1<sup>st</sup> Class Mail
- ☐ E-Mail
- ☐ Personal Service

Transform SR Brands LLC d/b/a Transformco d/b/a  
Kmart  
208 SO LaSalle St., Suite 814  
Chicago, IL 60604

Dated this 12th day of February, 2021.

Filed and

Signed: 2/12/2021 2:44:05 PM



Lindsey Dutton

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2021-CV-00240

Ted J. Boutrous, LLC; The Boutrous Group, LLP,

Plaintiff,

vs.

**ORDER**

Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; Transform KM LLC,

Defendant.

[¶1] This is an eviction action filed by Plaintiff requesting immediate possession of the property at issue and damages. The Defendant recently filed a Motion to Dismiss for lack of jurisdiction based upon the extensive filings in this case. Defendant argues that this case is better suited for a breach of contract claim, which would allow the parties' time to prepare and engage in discovery.

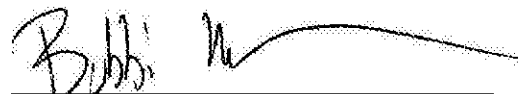
[¶2] The Court issued a Notice on February 12, 2021. The Court has already stated in the Notice that the matter of damages will be scheduled at a later date to allow for discovery and time to prepare. However, the matter of the eviction was properly filed with the Court.

[¶3] The hearing scheduled for February 19, 2021 will be held for the purpose of determining if there was a breach of the lease and the right to possess the premises at issue.

Dated on this the 17th day of February, 2021.

BY THE COURT:

Signed: 2/17/2021 9:54:09 AM



District Judge

EXHIBIT

4

tabbles



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Ted J. Boutrous, L.L.C. and The Boutrous  
Group, LLP,

Plaintiffs,

vs.

Transform Operating Stores, LLC d/b/a  
Transformco Operating Stores, LLC;  
Transform SR Brands LLC d/b/a Transformco  
d/b/a Kmart; and Transform KM LLC,

Defendants.

Case No.: 08-2021-CV-00240

**DEFENDANTS' ANSWER TO  
THE ACTION FOR SUMMARY  
EVICTION & DAMAGES**

Defendants, Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC, Transform SR Brands LLC d/b/a Transformco d/b/a Kmart and Transform KM LLC (collectively "Defendants") for their Answer to Plaintiffs' Action for Summary Eviction and Damages, state and allege as follows:

1. All allegations in Plaintiffs' Action for Summary Eviction & Damages are denied unless specifically admitted herein.
2. Plaintiffs' Action fails to state a claim upon which relief can be granted.
3. Plaintiffs' Action lacks subject matter jurisdiction as it is not one for "summary eviction" according to N.D.Cent.Code Ch. 47-32. See Defendants' Motion to Dismiss, previously filed.
4. Plaintiffs' Action fails to adhere to the procedural requirements of N.D.Cent. Code Ch. 47-32.
5. Defendants admit Paragraphs 1 and 2 of the Action for Summary Eviction & Damages.

6. Defendants lack sufficient information to admit or deny the allegations in Paragraph 3 of the Action for Summary Eviction & Damages and, therefore, holds Plaintiffs to its strictest proof.
7. Defendants lack sufficient information to admit or deny the allegations in Paragraph 4 of the Action for Summary Eviction & Damages and, therefore, holds Plaintiffs to its strictest proof.
8. Defendants admit Paragraph 5 of the Action for Eviction & Damages.
9. Paragraph 6 of the Action for Eviction & Damages is transitory and, therefore, no response is needed.
10. Defendants deny Paragraph 7 of the Action for Eviction & Damages.
11. Defendants deny Paragraph 8 of the Action for Eviction & Damages.
12. Defendants deny Paragraph 9 of the Action for Eviction & Damages.
13. Paragraph 10 of the Action for Eviction & Damages is transitory and, therefore, no response is needed.
14. Defendants admit Paragraph 11 of the Action for Eviction & Damages.
15. Defendants admit Paragraph 12 to the extent document, in its entirety, speaks for itself.
16. Defendants lack sufficient information to admit or deny the allegations in Paragraph 13 of the Action for Summary Eviction & Damages and hold Plaintiffs to their strictest proof; affirmatively allege the document speaks for itself.
17. Defendants admit Paragraph 14 of the Action for Eviction & Damages.
18. Defendants deny Paragraph 15 of the Action for Eviction & Damages; Defendants affirmatively allege Item 18 of the Lease provides otherwise.
19. Defendants admit Paragraph 16 of the Action for Eviction & Damages.

20. Defendants lack sufficient information to admit or deny the allegations in Paragraph 17 of the Action for Summary Eviction & Damages and, therefore, hold Plaintiffs to their strictest proof.
21. Defendants admit Paragraph 18 of the Action for Eviction & Damages.
22. Defendants deny Paragraph 19 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that Transform Operating Store's interest started prior to 2020.
23. Defendants admit Paragraph 20 of the Action for Eviction & Damages.
24. Defendants admit Paragraph 21 of the Action for Eviction & Damages. Defendants affirmatively allege that lease terms have been met.
25. Defendants lack sufficient information to admit or deny Paragraphs 22 – 26 the allegations of the Action for Summary Eviction & Damages; affirmatively allege these allegations date to an incident eight (8) years ago and prior to Transform Operating Store's interest in the property; Defendants affirmatively allege that they are aware of at least \$215,000 worth of documented repairs were done to the parking lot, light poles, and sewer castings between 2013-2019; Defendants affirmatively allege that Transform Operating is not responsible for alleged issues that happened prior to Transform Operating's interest in the property.
26. Defendants lack sufficient information to admit or deny the allegations in Paragraph 27 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that the drain cover was repaired in August 2020.; Defendants affirmatively allege that a light pole repair contract was awarded on February 3, 2021, and is pending due to weather restrictions.

27. Defendants deny Paragraphs 28 and 29 of the Action for Eviction & Damages; Defendants affirmatively allege that basic maintenance, landscaping, snowplowing, HVAC, alarms, and fire protection systems are currently and have been under contract with area contractors.
28. Defendants lack sufficient information to admit or deny the allegations in Paragraph 30 of the Action for Summary Eviction & Damages. Defendants affirmatively allege that Boutrous voluntarily chose to incur the alleged costs.
29. Defendants deny Paragraph 31 of the Action for Eviction & Damages.
30. Defendants lack sufficient information to admit or deny the allegations in Paragraphs 32 and 33 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that Mr. Daou's reports were not shared with or provided to Transform Operating Stores.
31. Defendants lack sufficient information to admit or deny the allegations in Paragraph 34 of the Action for Eviction & Damages; affirmatively allege that items a-q are alleged events stretching out over a period of years and not done with Defendants' knowledge and/or consent; Defendants further affirmatively allege that these alleged incidents predominately predate the interests of Transform Operating Stores.
32. Defendants deny Paragraphs 35, 36, 37, 38, 39, and 40 of the Action for Eviction & Damages; affirmatively allege that the allegations in Paragraph 40, along with Mr. Boutrous' correspondence, were addressed to Sears Holdings and predates Transform Operating Stores; Defendants further allege that it was not aware, either from Plaintiffs or from inspections, of a damaged light pole and this lawsuit is the first Defendants learned of the allegation; Defendants direct Plaintiffs' to preceding paragraphs 25-27 of this Answer concerning maintenance.



33. Defendants lack sufficient information to admit or deny the allegations in Paragraph 41 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that, to their knowledge, all utility bills are current.
34. Defendants deny Paragraph 42 of the Action for Eviction & Damages; Defendants affirmatively allege that Transform Operating Stores is not responsible for any errors and/or claims against Kmart; Defendants affirmatively allege that, to their knowledge, all utility bills are current.
35. Defendants lack sufficient information to admit or deny the allegations in Paragraph 43 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that a landscape contract was in place for the summer of 2020, and that the 2021 landscape contract has already been awarded.
36. Defendants lack sufficient information to admit or deny the allegations in Paragraph 44 of the Action for Summary Eviction & Damages. Defendants allege dates speak for themselves; and allege that any alleged default was cured.
37. Defendants lack sufficient information to admit or deny the allegations in Paragraph 45 of the Action for Summary Eviction & Damages; Defendants affirmatively allege that these photos were not shared with Transform Operating Stores' maintenance; Defendants further allege that the incident reports themselves identify that the alleged issues have already been resolved.
38. Defendants admit the allegations in Paragraphs 46-47 of the Action for Summary Eviction & Damages to the extent the correspondences speak for themselves. Defendants deny that notice was given, deny any deficiencies, and deny any material breaches; Defendants

affirmatively allege that Transform Operating Stores leases obligations were and continue to be met.

39. Defendants deny Paragraph 48 of the Action for Eviction & Damages; Defendants affirmatively allege that any Boutrous communications to Kmart would have been addressed by Kmart and not have involved Transform Operating Stores; Transform Operating Stores affirmatively alleges that it assumed the interests in the property as a part of Kmart's bankruptcy, and Plaintiffs failed to allege or assert any wrongdoings against Kmart in the bankruptcy action.

40. Defendants deny Paragraph 49 of the Action for Eviction & Damages.

41. Defendants admit document referenced in Paragraph 50 of the Action for Summary Eviction & Damages speaks for itself.

42. Defendants lack sufficient information to admit or deny the allegations in Paragraph 51 of the Action for Summary Eviction & Damages.

43. Defendants admit documents referenced in Paragraphs 52 and 53 of the Action for Summary Eviction & Damages speak for themselves.

44. Defendants deny Paragraphs 54 and 55 of the Action for Eviction & Damages.

45. Defendants admit Paragraph 56 of the Action for Eviction & Damages.

46. Defendants deny Paragraphs 57 and 58 of the Action for Eviction & Damages; affirmatively allege that McDonald's is a tenant of Transform Operating and that Plaintiffs have no right of enforcement on McDonald's behalf.

47. Defendants lack sufficient information to admit or deny the allegations in Paragraph 59 of the Action for Summary Eviction & Damages. Defendants affirmatively allege the lease terms have been complied with; Defendants affirmatively allege that a minimum of

\$215,000.00 has been spent on maintenance and upkeep on the property by Defendants during the time periods alleged by Plaintiffs in this Action for Summary Eviction & Damages. See preceding paragraphs 25, 26, and 27 of this Answer. Defendants affirmatively allege that McDonald's is a tenant of Transform Operating and that Plaintiffs have no right of enforcement on McDonald's behalf.

48. Defendants deny Paragraph 60 of the Action for Eviction & Damages; Defendants affirmatively allege that McDonald's is a tenant of Transform Operating and that Plaintiffs have no right of enforcement on McDonald's behalf.

49. Defendants admit Paragraph 61 of the Action for Eviction & Damages to the extent lease, in its entirety, speaks for itself.

50. Defendants admit Paragraph 62 of the Action for Eviction & Damages to the extent a sprinkler pipe froze and has been cleaned up; Defendants lack sufficient information on the remaining allegations; Defendants affirmatively allege that the building was properly heated at the time of the pipe break but that a door leading from the stockroom to the compactor room was erroneously closed preventing the heat from circulating; Defendants further affirmatively allege that the building is properly insured and that water restoration professionals promptly dealt with the pipe breakage and cleanup and that remediation is ongoing. (See Doc ID#27, 2/4/2021 Incident Report showing Arrow Service Team truck performing clean-up).

51. Defendants deny Paragraph 63 of the Action for Eviction & Damages.

52. Paragraph 64 of the Action for Eviction & Damages is transitory and, therefore, no response is needed.

53. Defendants deny Paragraph 65 of the Action for Eviction & Damages.

54. Defendants deny Paragraph 66 of the Action for Eviction & Damages; Defendants affirmative allege plaintiffs' lack stating to bring a claim belongs to a tenant or subtenant.
55. Defendants deny Paragraphs 67, 68 and 69 of the Action for Eviction & Damages.
56. Paragraph 70 of the Action for Eviction & Damages is transitory and, therefore, no response is needed.
57. Defendants admit Paragraph 71 of the Action for Eviction & Damages that checks have been tendered and accepted; Defendants lack sufficient information on remaining.
58. Defendants lack sufficient information to admit or deny the allegations in Paragraph 72 of the Action for Summary Eviction & Damages.
59. Defendants deny Paragraphs 73 and 74 of the Action for Eviction & Damages.

#### **AFFIRMATIVE DEFENSES**

60. Defendants, by way of the allegations presented against them, are entitled to a scheduling order and proper hearing instead of a summary eviction. This includes the ability to bring a counterclaim, which is not allowed by Ch. 47-32 of the North Dakota Century Code in a summary eviction proceeding.
61. Plaintiffs' claims are barred by payment, release, waiver, accord and satisfaction, and estoppel.
62. Plaintiffs acted with unclean hands.
63. Plaintiffs have failed to mitigate its damages, if any.
64. Defendants assert that it has performed and/or substantially performed all duties owed under the contract(s)/lease(s)/agreement(s) other than any duties that were preventable or excused and therefore, never breached.

65. Defendants allege that a substantial amount of the allegations predate the interests of Transform Operating Stores in the property.
66. Defendants allege that Plaintiffs' claims against or involving Kmart lack subject matter jurisdiction and properly rest with the Bankruptcy Court.
67. Defendants have not been properly served with process as required by the North Dakota Rules of Civil Procedure and/or Ch. 47-32 of the North Dakota Century Code.
68. Defendants reserve all defenses available under Rules 8 and 12 of the North Dakota Rules of Civil Procedure.

**WHEREFORE** Defendants pray that this Court enter judgment as follows:

- a. Plaintiffs' Action for Summary Eviction and Damages lacks subject matter jurisdiction and, therefore, is dismissed;
- b. Plaintiff's Action for Summary Eviction and Damages be dismissed in its entirety and on its merits and with prejudice, and that a judgment be entered in favor of the Defendants;
- c. An award via judgment against Plaintiffs of Defendants' costs, disbursements, attorney fees, and other monetary relief as allowed by law and by contract(s); and
- d. Such other and further relief as this Court deems just and equitable.

Dated this 18<sup>th</sup> day of February, 2021.



Ryan C. McCamy (ND ID # 06420)

CONMY FESTE LTD

406 Main Avenue, Suite 200

P.O. Box 2686

Fargo, North Dakota 58108-2626

Phone: (701) 293-9911

Facsimile: (701) 293-3133

[rmccamy@conmylaw.com](mailto:rmccamy@conmylaw.com)

**Attorneys for Defendants**

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Ted J. Boutrous, LLC and the Boutrous  
Group, LLP,

Plaintiffs,

v.

Transform Operating Stores, LLC d/b/a  
Transformco Operating Stores LLC;  
Transform SR Brands LLC d/b/a  
Transformco d/b/a Kmart; and Transform  
KM LLC,

Defendants.

Case No. 08-2021-CV-00240

**FINDINGS OF FACT, CONCLUSIONS**

**OF LAW, AND ORDER**

EXHIBIT

6

[¶1] The Plaintiffs (Boutrous) filed a 24-page Complaint for summary eviction, and an extensive amount of exhibits and affidavits. *Docket No. 1* (Complaint) and *Docket Nos. 2-58, 72-76, 91-94, 97-98*.

[¶2] The Defendants (referred to as Transform – including all Transform Companies) filed a Motion to Dismiss and Brief. *Dockets Nos. 64-65*.

[¶3] The Court issued an Order on February 17, 2021 denying Transform's Motion to Dismiss. *Dockets No. 70*.

[¶4] Transform filed its Answer and Exhibits on February 18, 2021. *Docket No 82 (Answer) and Docket Nos. 84-88, 100-105*

[¶5] Both parties filed Post-Hearing Briefs. *Docket Nos. 107, 109*. Boutrous also filed additional affidavits and exhibits with their Post-Hearing Brief. *Docket Nos. 110-116*. The Court will not be considering any affidavits or exhibits filed after the hearing.

[¶6] A hearing was held on March 1, 2021 which lasted approximately seven hours.

The following witnesses testified:

A. Plaintiff's Witnesses: Albert Daou – Property Manager/Owner of Integrity Property Management – hired by Boutrous; Dennis Sotebeer – Manager at McDonald's; Della Boutrous; Michael Boutrous; Fire Fighter Tavis; Michele Kose – Bismarck Public Works.

B. Defendant's Witnesses: Darrell Penn – Real Estate Asset Manager from Transform; Mark Conway – Director of Facilities/Maintenance for Transform's Properties

[¶7] The Court Admitted the following Exhibits: 2 (Original Ground Lease); 3 (Original of Kresge Lease); 9 (Article – Transform Buys K-Mart Lease); 10 (Article – Transform's Website Showing Ownership of Bismarck K-Mart Lease); 12 (Property Management Agreement Between Bourtrous and Integrity); 14-20, 22-25 (Letters Regarding Property Issues); 21 (Complaint in Case 08-2018-CV-00347); 26 (Easement May); 30-34, 38-42, 46-53 (Reports/Videos/Photos of Issues at the K-Mart Property); 27, 35 (Rent Checks); 28 (Utility Bill); 29 (Email from McDonald's to Boutrous); 30, 36 (Emails with Police Department/Records); 100 (Insurance); 101 (Landscaping Contract); 102 (Snow Removal Contract); 103, 104 (Inspections of K-Mark Property); 109 (April 16, 2019 Letter from Transform to Boutrous).

### **FACTS**

[¶8] Both parties agreed there is a valid lease. Both parties agreed that Transform owns the lease for the K-Mart Property (although it is still not clear which Transform Company is the actual Lessee).

[¶9] It is still unclear when Transform took over ownership of the Lease from K-



Mart. The earliest communication between Transform to Boutrous was a Letter sent on April 16, 2019 extending the Lease for an additional five (5) years to October 31, 2024. *Docket No. 105 (Exhibit 109).*

[¶10] Transform, through the testimony of Conway, admits it was the responsibility of Transform to keep up the maintenance at the property, including parking lot maintenance, heating, water issues, securing the property, maintaining the property to avoid damages, snow removal, paying the utilities, and lawn care.

[¶11] Timeline of Relevant Property Issues:

- A. March 2020 – June 9, 2020- Seven Police Reports regarding issues at the K-Mart Property. *Docket No. 50.*
- B. June 9, 2020: Boutrous hires Integrity Property Management. *Docket No. 14.*
- C. June 9, 2020 – August 10, 2020 – Numerous issues documented by Integrity regarding the Property – including not mowing grass or controlling weeds, damaged sewer cover; damaged parking lot; damaged parking sign pole; transient persons living in vehicles and makeshift shelters; multiple vendors in the parking lot; garbage and abandoned vehicles in the parking lot. *Docket No. 32.*
- D. June 9, 2020 – August 10, 2020 – Ten Police Reports regarding issues at the K-Mart Property. *Docket No. 50.*
- E. August 10, 2020: Letter sent by Attorney for Boutrous to Transform claiming default for the following reasons: 1) Transform abandoned the property and failed to keep the property in a safe and good condition; 2) failed to perform basic upkeep including mow the grass and control weeds, failed to fix damaged

sewer cover, failed to fix damaged parking sign pole; 3) allowed transient persons to live in vehicles and makeshift shelters; 4) allowing transient people to engage in illegal drug use; 5) allow multiple vendors in the parking lot; 6) allowing garbage and abandoned vehicles in the parking lot; and 7) failed to protect the property. *Docket No. 21.*

F. August 10, 2020 – August 31, 2020 – Two Police Reports regarding issues at the K-Mart Property. *Docket No. 50.*

G. End of August – Boutrous puts up fence to try and protect the property. *Docket No. 27.*

H. August 10, 2020 – Hearing Date - Numerous issues documented by Integrity regarding the Property – damaged sewer cover; damaged parking lot; damaged parking sign pole; transient persons living in makeshift shelters; multiple vendors in the parking lot; garbage and abandoned vehicles in the parking lot. *Docket No. 32.*

I. September 1, 2020 – Hearing Date – Four Police Reports regarding issues at the K-Mart Property. *Docket No. 50.*

[¶12] The Purpose of the Lease: “The parties agree and contemplate that the Lessee shall construct and sublease a shopping center on the property . . . .” *Docket No. 4 (Ground Lease), ¶II.*

[¶13] Relevant Lease Terms:

A. Repairs/Maintenance: “Tenant shall at its own expense, carry out such repairs and maintenance as it deems necessary to keep the demised premises in good order and repair . . . .” *Dockets No. 5 (Kresge Lease),*

¶14.

- B. Utilities: “Tenant shall pay all charges for utility services furnished to the demised premises . . . .” *Dockets No. 5 (Kresge Lease)*, ¶16.
- C. Local Laws/Ordinances: “Tenant shall observe and comply with all rules, orders and regulations of all duly constituted public authorities. Tenant shall have the right, however, to contest, without cost to Landlord, the validity or application of any such rule, order, or regulation and may postpone compliance therewith until the final determination of any such proceeding.” *Dockets No. 5 (Kresge Lease)*, ¶17
- D. “If . . . . Tenant shall be in default under any other provision of this lease and shall remain so for a period of thirty (30) days after notice to Tenant of said . . . default, then Landlord may . . . either (a) terminate the lease, or b) re-enter demised premises by summary proceedings or otherwise, expel Tenant and remove all property. . . . If any default by Tenant . . . . cannot reasonable be remedied without thirty (30) days after notice of default, then Tenant shall have such additional time as shall be reasonably necessary to remedy such default . . . .”. *Dockets No. 5 (Kresge Lease)*, ¶24

## LAW AND ANALYSIS

[¶14] “Summary eviction . . . is primarily designed to quickly place a landowner back in possession in certain circumstances when there is little or no dispute to his right to possession.” *Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2005 ND 118, ¶ 12, 698 N.W.2d 478 (emphasis added). “The expedited, summary procedure provides no meaningful opportunity for discovery and places the landowner back in possession within a matter of days of serving the summons and complaint.” *Id.* “This remedy is particularly ill-suited to resolve complex legal and factual issues . . .” *Id.*

[¶15] This was certainly not a typical eviction action. Most eviction hearings last 15-60 minutes and have a small number of witnesses and exhibits. The hearing in this case lasted approximately seven hours and had numerous witnesses and exhibits.

[¶16] However, the Plaintiff properly served the Defendants and the eviction was properly before the Court. See N.D.C.C. §§ 27-05-06-(2), 47-32-01, 47-32-02, 28-04-01, 28-04-02, and 28-04-04.

[¶17] “[A] lease will ordinarily be construed most strongly against the lessor.” *VND, LLC v. Leever Foods, Inc.*, 2003 ND 198, ¶ 34.

“Leases are subject to the rules of contract construction.” *VND*, 2003 ND 198, ¶ 34, 672 N.W.2d 445. If the parties’ intent can be ascertained from the language of the contract alone, the interpretation of the contract to determine its legal effect is a question of law. *Id.* The object of interpreting a contract is to give effect to the parties’ mutual intention when the contract was executed. N.D.C.C. § 9-07-03. In interpreting a written contract, a court must first ascertain the intention of the parties from the writing alone, if possible. N.D.C.C. § 9-07-04. “A contract must be read and considered in its entirety so that all of its provision[s] are taken into consideration to determine the true intent of the parties.” *Lario Oil & Gas Co. v. EOG Resources, Inc.*, 2013 ND 98, ¶ 5, 832 N.W.2d 49. “Words in a contract are construed in their ordinary and popular sense.” *Id.*

*Abelmann v. Smartlease USA, LLC*, 2014 ND 227, ¶13, 856 N.W.2d 747.

[¶18] Under North Dakota Century Code § 47-32-01(8), an eviction action to recover the possession of real estate may be brought when “[t]he lessee violates a material term of the written lease agreement between the lessor and lessee.”

[¶19] Although a material breach is not defined, there is some North Dakota Case Law explaining material breaches. In *Abelmann*, the lease provided:

Section 1. [SmartLease’s] Obligations. [SmartLease] agrees to take good care of the Demised Premises and make as and when needed all repairs or replacements as necessary in and about the Demised Premises. [SmartLease] shall, at its sole expense, construct and maintain in good condition and repair all necessary structures/improvements, roads, sewer, sewer treatment systems, water, well(s), gas and electrical distribution systems and facilities that are now in or are to be installed by [SmartLease] on the Demised Premises and that are destroyed and/or damaged in any way by [SmartLease]. Should [SmartLease] fail to keep the Demised Premises in a good and orderly repair, the [Abelmans] may perform such repairs which become necessary in and about the Demised Premises . . . .

*Id.* at ¶4. The landlord presented evidence about several claimed breaches, including failure of paying rent and failing to maintain the property. The District Court ruled that purpose of the lease was to generate money and only ruled on any breach of failing to pay rent. The District Court did not consider any claims regarding failing to maintain the property. The Supreme Court, in reversing the District Court, stated the following: “We conclude the generation of income under the Ranger Rock operating agreement did not alleviate any potential breaches of material provisions of the lease, including using the premises to provide a high quality, clean and professionally managed RV park.”

*Id.* at ¶15.

[¶20] In *Zundel v. Zundel*, 2017 ND 217, 901 N.W.2d 731, the Landlord argued that

the Tenant breached the bin site lease by failing to make certain repairs to the bin site. “Section six of the lease titled “Repairs,” states, “Tenants shall, at their expense, make all repairs as shall be reasonably necessary to keep the Leased Property in good condition and repair.” *Id.* at ¶ 22. However, the bin site lease does not define “good condition and repair.” The district court found Tenant maintained the bin site “in good condition by making repairs, as needed, to keep the site in functional working condition.” The Supreme Court noted the following:

In addressing [Landlords] demands to repair the bin site, the court found many of his requested repairs, such as removing small trees from the site, “were solely cosmetic in nature and unrelated to the functioning of the bin site.” The court also found [Landlords] requests to repair two buildings and a pole barn were “patently unreasonable and absurd.” The court found the two buildings were old and worn when the lease was executed, but still served their intended purpose, which was to keep rain and snow off of equipment. The court found wholesale repair of the buildings was not necessary to keep the bin site functional. The court found “[The Landlord] made those demands [to repair the buildings], along with the many demands for cosmetic repair, solely in an effort to evict his brothers from the bin site and not in a genuine effort to keep the bin site in good condition and repair, as contemplated by 6the lease.”

*Id.* at ¶ 24. The Supreme Court upheld the District Court’s decision.

#### ***Issues at the Property***

[¶21] The Court did not consider any claims made by McDonald’s as McDonald’s is a lessee of Transform and not Boutrous. Any issues McDonald’s would have had regarding the parking and lighting is not a claim that Boutrous has standing to bring against Transform. Additionally, the Court did not consider any issues of the property prior to April 16, 2019, including the prior lawsuit, which is the only date the Court has suggesting when Transform took over the lease. The Court did consider the following issues that were presented at the hearing regarding the property:

[¶22] **Parking Lot:** There was extensive testimony and exhibits showing that there was parking lot rough spots, cracks, deep potholes, and lighting issues. Most of these issues were documented by Integrity Property, starting in June 2020. The Parking Lot issues were not resolved as of the date of the hearing.

[¶23] Transform argued that any parking lot issues was not a material breach and they did not have notice of the issues. Transform argued that because of the North Dakota winters it is not reasonable to expect asphalt to be fixed during the winter months. Additionally, Transform argued that prior owners of the lease had put extensive money into fixing parking lot issues and it is something that is an ongoing issue that is addressed as needed. Transform stated that it was their intent to fix the asphalt in the spring and they had already requested quotes for changing the lights out in the parking lot.

[¶24] **Water Leak/Broken Pipe:** There was also extensive testimony and exhibits regarding a pipe bursting and water damage to the building. Most of these issues were documented by Integrity Property, starting in early February, 2021. North Dakota had a mild winter, but there was one week with below zero temperature in late January/early February, 2021. Integrity Property Management notice a compactor door that was broken into in January, 2021. After this door was broken into an alarm was going off for approximately two weeks without any action on the part of Transform.

[¶25] On February 3, 2021, the fire department was notified of leak at the K-Mart Property. Water was coming out of the building and flowing through the parking lot. Transform was notified and testified that they had someone at the property within 72 hours. Transform/Fire Fighter Tavis stated that it is believed the below zero

temperature caused the pipes to freeze. Apparently it was not from lack of heat to the property, but because of the compactor door that was broken and allowing in the below freezing weather. A sprinkler head froze which lead to pipes freezing.

[¶26] Transform hired a company to push heat through the building to try and unfreeze the pipes. As of the date of the hearing, there was still standing water inside the building and the heater was still at the property. Transform stated it was not because they were ignoring the issue or there was a second leak, but because as the pipes are unfreezing, more water is leaking probably from pipes that were damaged from the freeze. Transform admitted that after the pipes were unfrozen, there will likely be damage caused by the frozen pipes. It is was unknown the total damage caused as the pipes were still unfreezing as of the date of the hearing.

[¶27] **Break-Ins, Homeless Encampments, Illegal Activity, Unauthorized Vendors and Sales, De Factor Used Car Lot:** There was also extensive testimony and exhibits regarding illegal activity at the property. There are police reports staring in March 2020 going to the date of the hearing. There are too many incidents for the Court to document every one of them in its decision, but the Court has reviewed the numerous reports and they are incorporated by reference into this decision through Docket No. 50. Additionally, there are numerous issues documented by Integrity regarding illegal activity. There are too many incidents for the Court to document every one of them in its decision, but the Court has reviewed the numerous reports and they are incorporated by reference into this decision through Docket No. 32. The Court also notes the break-in that lead to the water damage/leak.

[¶28] Again, Transform argues that these issues are not a material breach to the lease,



but are a police issue. Transform argues that such issues are common in the United States and there is not much they can do regarding homelessness and the issues that result from people squatting on the property. Transform also argues that they did not think they needed to anything more after Boutrous hired Integrity and put up a fence. Essentially arguing that it was not their responsibility because Boutrous was taking care of it. However, there was no evidence that Transform contacted Boutrous regarding the issues or what Integrity was hired to do at the property. There was also no testimony regarding Transform agreeing to pay for the services of Integrity or hire their own Property Management Company or Property Security. Transform also argues that they did not have notice of the issues.

[¶29] **Garbage, Trash, Debris:** There are numerous issues documented by Integrity regarding the garbage on the property. There are too many incidents for the Court to document every one of them in its decision, but the Court has reviewed the numerous reports and they are incorporated by reference into this decision through Docket No. 32. Transform again makes the arguments that they did not have notice and it was not a material breach.

[¶30] **Long Grass/Utilities:** Integrity Property and the City of Bismarck documented the knee high grass in June, 2020. *Docket No. 13 and 32*. It is unclear when this matter was resolved, but Transform did hire a landscaping company sometime in the summer of 2020. The City of Bismarck also documented non-payment of the water bill. *Docket No. 38*. Boutrous ended up paying the water bill in the amount of \$499.88.

[¶31] **Violations of Local Ordinances.** Additionally, based upon the above the following Bismarck City Ordinances would have been violated by Transform:

- A. 10-07-01. Abandonment of Vehicles. *Docket No. 32 and 50*. Transform argues they had no notice.
- B. 10-07-02. Certain Vehicles Prohibited. *Docket No. 32 and 50*. Transform argues they had no notice.
- C. 14-05-05.1. Accumulation of Certain Items Prohibited. *Docket No. 32 and 50*. Transform argues they had no notice.

### *Notice*

[¶32] Transform's main argument is that they had no notice of the issues at the property. It is unclear how any one was supposed to notify Transform of issues. Transform provided no evidence that they provided notice to Boutrous that they took over the lease until the letter sent in April, 2019. The Letter in April, 2019 does not actually give contact information for Transform, but only had a heading from Sears Holding. This is also evident by the testimony and emails from McDonald's that they did not have contact information for Transform. *Docket No. 39*.

[¶33] What Transform cannot dispute is that as of August 10, 2020, they certainly had notice. On August 10, 2020, a letter was sent by Attorney for Boutrous to Transform claiming default for the following reasons: 1) Transform abandoned the property and failed to keep the property in a safe and good condition; 2) failed to perform basic upkeep including mow the grass and control weeds, failed to fix damaged sewer cover, failed to fix damaged parking sign pole; 3) allowed transient persons to live in vehicles and makeshift shelters; 4) allowing transient people to engage in illegal drug use; 5) allow multiple vendors in the parking lot; 6) allowing garbage and abandoned vehicles in the parking lot; and 7) failed to protect the property. *Docket No. 21*.

[¶34] After August 10, 2020 through the hearing date, there was several police reports and Integrity Reports documenting the same issues that were documented in the letter sent on August 10, 2020. *Docket No. 32 and 50.* Transform argues that they did not have notice of the parking lot issues to fix them prior to the North Dakota winters. However, August 10, 2020 would have given Transform plenty of time to fix the parking lot issues prior to winter, especially considering the mild fall and early winter of 2020.

[¶35] Transform essentially abandoned the K-Mart Property. Transform admits that they had no one regularly checking on the property. The only protection for the property were alarms located inside the property, which clearly did not work given the issues of the break-in that caused the water issues in January, 2021. They want to blame the homeless issues on the police. However, it is not the responsibility of the police to monitor an abandoned property for a company that chooses to not protect their property. Contrary to Transform's argument, homeless people overtaking abandoned buildings is not a common issue in Bismarck, North Dakota.

[¶36] Although the Court does find that Transform had actual notice of the issues on August 10, 2020, the Court also finds that Transform should have been aware of the problems starting in March, 2020 when the police reports show issues at the property. With little effort or costs, Transform could have either hired a security company or property management company to check on the property if it was their intent to leave the property empty. Transform cannot argue ignorance in order to avoid their responsibility in the lease and to the community. Transform seems to be content in collecting rent from McDonald's and Arby's, but abandoning the K-Mart Property and

investing no money or time into protecting the property.

***Material Breach***

[¶37] The Court outlined all the property issues above. One of the issues, taken alone, most likely would not have resulted in a material breach. However, the accumulation of the issues, is a material breach of the lease. The following terms of the lease have been violated which results in a material breach of the lease:

- A. Repairs/Maintenance: “Tenant shall at its own expense, carry out such repairs and maintenance as it deems necessary to keep the demised premises in good order and repair . . . .” *Dockets No. 5 (Kresge Lease)*, ¶14.
- B. Utilities: “Tenant shall pay all charges for utility services furnished to the demised premises . . . .” *Dockets No. 5 (Kresge Lease)*, ¶16.
- C. Local Laws/Ordinances: “Tenant shall observe and comply with all rules, orders and regulations of all duly constituted public authorities. Tenant shall have the right, however, to contest, without cost to Landlord, the validity or application of any such rule, order, or regulation and may postpone compliance therewith until the final determination of any such proceeding.” *Dockets No. 5 (Kresge Lease)*, ¶17
- D. “If . . . . Tenant shall be in default under any other provision of this lease and shall remain so for a period of thirty (30) days after notice to Tenant of said . . . default, then Landlord may . . . either (a) terminate the lease, or b) re-enter demised premises by summary proceedings or otherwise, expel Tenant and remove all property. . . . If any default by Tenant . . . .

cannot reasonable be remedied without thirty (30) days after notice of default, then Tenant shall have such additional time as shall be reasonably necessary to remedy such default . . . .”. *Dockets No. 5 (Kresge Lease)*, ¶24

### ORDER

[¶38] The Court has jurisdiction of the parties and the subject matter of this action.

[¶39] The Plaintiff is entitled to possession of the premises.

[¶40] The issues of damages is reserved until a full hearing is held.

[¶41] The Defendants and any other persons in possession with all personal belongings shall vacate the premises by March 26, 2021 at 12:00 pm. In the event the Defendants and any other persons in possession fail to vacate as ordered, the Clerk of Court shall issue a Writ of Special Execution to the sheriff of Burleigh County to immediately remove the Defendants and any other persons in possession from the premises and return possession to the Plaintiff without further order by the Court.

[¶42] Plaintiff shall prepare a proposed Judgment based upon these Findings.

IT IS SO ORDERED.

Dated this 23rd day of March, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bobbi Weiler", followed by a horizontal line.

Bobbi Weiler, District Judge  
South Central Judicial District

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2021-CV-00240

Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )

vs. )

Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC, )  
Defendants. )

**JUDGMENT OF EVICTION**

\*\*\*

\*\*\*

\*\*\*

(1.) The Court having made its *Findings of Fact, Conclusions of Law, and Order* (“Eviction Order”) dated March 23, 2021 (Doc. 122) – and reserving the issues of damages, costs, disbursements, fees, and interest – now directs the entry of judgment of eviction as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to the *Eviction Order* that Plaintiffs Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (“Plaintiffs”) are hereby entitled to possession, and all of the rights and incidents thereto, of the property more fully described in the Kresge Lease with street address at 2625 State Street, Bismarck, ND (“the premises”) and that Defendants Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC (“Defendants”) – being in material breach of said Kresge Lease – shall vacate and surrender the said premises to Plaintiffs or their designee no later than Friday, March 26, 2021 at 12:00 p.m. (central time).

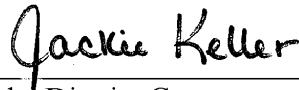


IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Judgment of Eviction in favor of Plaintiffs and against Defendants be entered and that a certified copy of this Judgment be recorded against the premises in the Burleigh County Recorder's Office.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2021.

BY THE COURT:

Signed: 3/23/2021 3:10:05 PM



\_\_\_\_\_  
Clerk of the District Court

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Ted J. Boutrous, LLC, and the Boutrous  
Group, LLP,

Plaintiffs,

v.

Transform Operating Stores, LLC d/b/a  
Transformco Operating Stores LLC;  
Transform SR Brands LLC d/b/a  
Transformco d/b/a Kmart; and Transform  
KM LLC,

Defendants.

Case No. 08-2021-CV-00240

**ORDER ON MOTION FOR  
RECONSIDERATION**

EXHIBIT

8

[¶1] The Court set out the relevant procedural history up until the Judgment in its Findings of Fact, Conclusions of Law, and Order. *Docket No. 122.*

[¶2] Since the Judgment, on March 25, 2021 Defendant filed its Expedited Motion for Reconsideration with Brief and Expedited Motion to Stay or Relief from Judgment. *Docket Nos. 128-134.* Plaintiff filed its *Letter* on March 25, 2021. *Docket No. 135.* The Court issued its Order Granting Temporary Stay on March 26, 2021. *Docket No. 138.* The Court noticed the parties for a hearing to address the issue of bond and a hearing was held on March 29, 2021. *Docket Nos. 142.* The Court issued its Order Regarding Stay on March 29, 2021. *Docket No. 144.*

[¶3] Defendants filed a Motion to Quash Subpoenas with attached Exhibits on April 6, 2021. *Docket Nos. 145-154.*

[¶4] Plaintiffs filed its Brief in Response to Opposition to Defendants' Motion to



Stay or Relief from Judgment and Response in Opposition to Defendants' Motion for Reconsideration on April 6, 2021. *Docket Nos. 155-158*. Defendants filed a number of Exhibits with its Responses. *Docket Nos. 160-171*.

[¶5] Plaintiffs filed its Response in Opposition to Defendants' Motion to Quash Subpoenas. *Docket No. 173*.

[¶6] The Court issued its Order Granting Defendants' Motion to Quash on April 7, 2021. *Docket No. 175*.

[¶7] Thereafter, Plaintiffs filed additional Exhibits. *Docket Nos. 177-179*.

### LAW AND ANALYSIS

[¶8] "North Dakota law does not formally recognize motions to reconsider." *Kautzman v. Doll*, 2018 ND 23, ¶ 9, 905 N.W.2d 744. "A motion to reconsider is generally treated as either a motion to alter or amend a judgment under N.D.R.Civ.P. 59(j), or as a motion for relief from a judgment or order under N.D.R.Civ.P. 60(b)." *Ayling v. Sens*, 2019 ND 114, ¶ 20, 926 N.W.2d 147.

[¶1] Rule 60(b) allows for relief based on the following:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

[¶9] The party moving for Rule 60(b) has the burden to establish “sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances.” *Follman v. Upper Valley Special Educ. Unit*, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

[¶10] The Defendants first argue that this case is not suited for an eviction proceeding. The Defendants don’t seem to go so far as to say that this Court does not have jurisdiction, but that eviction proceedings are “particularly ill-suited to resolve complex legal and factual issues. . . .” *Docket No. 130* (Defendant’s Brief in Support of Motion to Reconsider) ¶5. It appears to the Court that the Defendants’ are arguing that no commercial property is suitable for an eviction proceeding because of the possibility of complex lease interpretation. This Court finds no authority that supports the Defendants’ arguments. This Court is also not willing to make such a ruling. The lease and facts in this case were not overly complex. The Plaintiffs filed the proper documents and served them in compliance with North Dakota law. There was nothing irregular about the proceedings. To the extent that the Defendants are making the argument that this Court did not have jurisdiction, the Court found in its Order that it had jurisdiction to hear the matter.

[¶11] The Defendants next argue that the Court did not interpret the lease appropriately with regards to the notice requirement and right to cure. This Court’s Findings of Fact clearly cite the provision of the lease requiring notice. *Docket No. 122* (Findings of Fact, Conclusions of Law, and Order), ¶13. The Findings then go on to address the notice issue for several paragraphs. *Id.*, ¶¶32-36. It appears that Transform wants the Court to interpret the Notice requirement as a babysitting provision in that

Boutrous was required to diligently watch the property and give immediate notice to Transform of any issues at the property—essentially putting the burden on Boutrous to protect the property. The Courts' Findings clearly address this issue. It appears that the Defendants want to rehash the arguments previously considered and rejected by the Court. *A motion for reconsideration is not a vehicle for the losing party to rehash arguments previously considered and rejected.*

[¶12] The Defendants next argue that the Court did not consider the relationship between the parties. The parties did not present evidence of a strained relationship at the hearing held on February 19, 2021. The only communication that was presented at the hearing between Transform and Boutrous was Mr. Darrell Penn stating that he had a conversation with Della Boutrous over the phone when Transform took over the lease. Mr. Penn stated that it was a good conversation.

[¶13] There was no other testimony presented of communication between Transform and Boutrous. There was evidence submitted in the form of letters between attorneys for Transform and Boutrous in 2020. The Court cited those letters in its Findings. The Defendants argue that the letters are proof of a strained relationship and the Court should consider them as such, but then the Court should not consider them as evidence of *Notice* to Transform under the lease. The Court considered the testimony and the hundreds of pages of Exhibits admitted at the hearing. The Court did not view the letters as proof of a strained relationship, but as notice of the property issues. The very notice that the Defendants say they did not receive from Boutrous.

[¶14] Again, it appears that the Defendants want to rehash the arguments previously considered and rejected by the Court. *A motion for reconsideration is not a vehicle for*

the losing party to rehash arguments previously considered and rejected.

[¶15] Transform also argues that there was not a material breach. The Court made sufficient Findings on this issue and found there was a material breach.

[¶16] The other arguments made by Transform are arguments disagreeing to the Court interpretation of the facts. All other arguments appear that the Defendants want to rehash the arguments previously considered and rejected by the Court. A motion for reconsideration is not a vehicle for the losing party to rehash arguments previously considered and rejected.

[¶17] Defendants failed to show any exceptional circumstances or “sufficient grounds for disturbing the finality of the decree.”

### ORDER

[¶18] The Court did not consider any additional evidence that was submitted after the hearing held on February 19, 2021.

[¶19] The Defendant’s Motion to Reconsider is *DENIED*.

[¶20] The Plaintiff is entitled to possession of the premises on April 14, 2021 at 12:00 pm. Plaintiff shall file a Proposed Amended Judgment with the new date for possession.

[¶21] The Temporary Stay has *EXPIRED* and any bond posted can be returned to the Defendants.

IT IS SO ORDERED.

Dated this 12th day of April, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bobbi" followed by a stylized flourish.

Bobbi Weiler, District Judge  
South Central Judicial District

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2021-CV-00240

Ted J. Boutrous, L.L.C. and The Boutrous )  
Group, LLP, )  
Plaintiffs, )  
)  
vs. )  
)  
Transform Operating Stores, LLC d/b/a )  
Transformco Operating Stores LLC; )  
Transform SR Brands LLC d/b/a )  
Transformco d/b/a Kmart; and Transform )  
KM LLC, )  
)  
Defendants. )

**AMENDED  
JUDGMENT OF EVICTION**

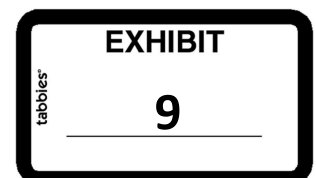
\*\*\*

\*\*\*

\*\*\*

(1.) The Court having made its *Findings of Fact, Conclusions of Law, and Order* (“Eviction Order”) dated March 23, 2021 (Doc. 122) as well as its *Order on Motion for Reconsideration*, dated April 12, 2021 (doc. 183) – and reserving the issues of damages, costs, disbursements, fees, and interest – now directs the entry of judgment of eviction as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to the *Eviction Order and Order on Motion for Reconsideration* that Plaintiffs Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (“Plaintiffs”) are hereby entitled to possession, and all of the rights and incidents thereto, of the property more fully described in the Kresge Lease with street address at 2625 State Street, Bismarck, ND (“the premises”) and that Defendants Transform Operating Stores, LLC d/b/a Transformco Operating Stores LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC (“Defendants”) – being in material breach of said Kresge Lease – shall vacate and surrender the said premises to Plaintiffs or their designee no later than Wednesday, April 14, 2021 at 12:00 p.m. (central time).



IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Amended Judgment of Eviction in favor of Plaintiffs and against Defendants be entered and that a certified copy of this judgment be recorded against the premises in the Burleigh County Recorder's Office.

Dated this \_\_\_\_ day of April, 2021.

Signed: 4/12/2021 4:28:37 PM

BY THE COURT:

A handwritten signature in black ink that reads "Jackie Keller". The signature is written in a cursive, flowing style.

---

Clerk of the District Court

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

CASE NO. 08-2021-CV-00240

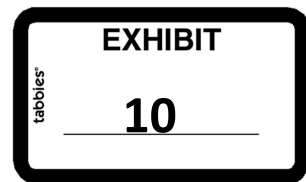
Ted J. Boutrous, LLC; The Boutrous Group, LLP,  
Plaintiff,

vs.

NOTICE OF ELECTRONIC  
REMOTE-PARTY  
PROCEEDING

Transform Operating Stores LLC; Transform SR Brands LLC; Transform KM LLC; Transformco  
Operating Stores LLC; Transformco; Kmart,  
Defendant.

It is hereby ordered that:



1. The following proceeding(s) will be conducted using contemporaneous audio or audiovisual transmission by reliable electronic means as permitted under N.D.Sup.Ct.Admin.R. 52, as supplemented by N.D.Sup.Ct.Admin.O. 26, 27, 28, 29, 30 or 31:

**Motion Hearing - Motion for Stay and Motion in Contempt on 5/18/2021 at 9:00 AM**

2. The proceeding(s) will be conducted by:

ZOOM - Please go to [www.zoom.com](http://www.zoom.com) and join a meeting using meeting ID 841 7701 0468 or call 669 900 9128 OR 646 558 8656. **IT IS UP TO THE ATTORNEY/PARTIES TO GET THIS INFORMATION TO ANY WITNESSES OR PARTICIPANTS.**

3. Documents and exhibits for the remote hearing must be handled as follows:
  - a. Not later than 5 business days before the scheduled proceeding, the plaintiff's or moving party's documents and exhibits must be numbered and **[electronically]** exchanged with all participants and provided to the court.
  - b. Not later than 2 business days before the scheduled proceeding, the defendant's or non-moving party's documents and exhibits must be numbered and **[electronically]** exchanged with all participants and provided to the court.
  - c. Documents and exhibits necessary for rebuttal may be used during the proceeding at the judge's discretion. All rebuttal documents and exhibits must be contemporaneously electronically exchanged with all participants prior to use during the proceeding. Contemporaneous electronic exchange may include realtime display, email, cloud upload and download, facsimile, or using other reliable electronic means.
  - d. Unless otherwise ordered by the judge, any exhibit (whether previously exchanged or not) offered or admitted into evidence from a remote location must be filed by the moving party into the Odyssey case management system within 2 business days of the close of the proceeding. Any party without

access to the Odyssey case management system must within 2 business days of the close of the proceeding transmit the documents to the clerk of court by United States mail or third-party commercial carrier. An exhibit not filed or transmitted as required by this paragraph must be deemed stricken from the record.

4. The following procedures and instructions apply:
- a. The proceeding under this order must be conducted in the same manner as if the parties appeared in person, and the judge presiding over the matter may exercise all powers consistent with the proceeding.
  - b. During the proceeding conducted under this order the remote location(s) must be considered an extension of the courtroom and held before the judge who is presiding. The judge's pronouncements, instructions, and rulings have the same force and effect as if all participants are physically present in the courtroom.
  - c. By participating in this proceeding, the parties stipulate that an oath administered by the judge, court reporter, or other authorized person to a witness, interpreter, or a party has the same force and binding effect as if the oath had been administered to a person physically present in the courtroom.
  - d. A court reporter or recorder who can **[see and]** hear the witness and other participants may administer oaths, record notes, and transcribe the proceeding without being physically present with any other participant.
  - e. During any proceeding conducted under this order, other than by a court reporter or recorder, no electronic device may be used by anyone for photography, videography, or audio recording of the court proceeding without prior approval from the judge. Such devices include cellular telephones, cameras, computers, laptops, tablets, digital voice recorders or similar devices.
  - f. In any proceeding conducted under this order an interpreter who can **[see and]** hear the witness and other participants may provide interpreter services without being physically present with any other participant.

Dated on this the 21st day of April, 2021

Signed: 4/21/2021 10:28:33 AM



---

District Court Personnel