

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

KISSLING INTERESTS LLC

Plaintiff,

OPPOSING

AFFIDAVIT

v.

NETWORK OF RELIGIOUS COMMUNITIES, INC.
3433

Index No.: I2003-

Defendant.

STATE OF NEW YORK)
)ss:
COUNTY OF ERIE)

Reverend Dr. G. Stanford Bratton, being duly sworn, deposes and says:

1. I am the Executive Director of defendant NETWORK OF RELIGIOUS COMMUNITIES (the “Network”). As such, I have personal knowledge of the facts and circumstances set forth herein. I make this affidavit in opposition to plaintiff KISSLING INTERESTS LLC’s (“Kissling”) application for a Yellowstone injunction and a preliminary injunction.

Background

2. The Network is the current owner of real property located at 1272 Delaware Avenue, Buffalo, New York 14209. A portion of that property, mainly the back half, all black-topped areas and driveways, and the surrounding areas are at issue in this lawsuit. (the “Leased Premises”).

3. In or about 1990, representatives of an entity known as 1310 Delaware Realty

Associates ("1310"), which owned at least two high-rise apartment buildings adjacent to the Premises (1290 and 1310 Delaware Ave.), approached the Network's predecessor in interest, The Council of Churches of Buffalo and Erie County (the "Council"), regarding the possibility of creating a parking lot on the back half of 1272 Delaware and leasing the same and various other sections of the property from the Council so that 1310 would be able to offer its tenants off-street parking.

4. The Council, now the Network, is an entity whose main focus is to foster cooperation and understanding within and between the various communities of faith throughout Western New York. Neither the Council nor the Network are operated for profit and neither entity had or has a substantial budget. Thus, the members of the Council viewed 1310's proposal as an opportunity to provide for the maintenance and repair of a portion of their property.

5. On or about September 13, 1990, the Council entered into a Lease (the "Lease")

with 1310. The Lease was drafted and prepared by a principal of 1310 who also acted as counsel for 1310. A copy of the Lease, which describes the Leased Premises in greater detail, is attached hereto as **Exhibit A**.

Kissling's Obligations Under the Lease

6. The Lease called for 1310 to repair and resurface the existing driveways at the

Leased Premises and to construct a parking lot, with appropriate drainage, on the Leased Premises in accordance with the site plans and specifications attached to the Lease. 1310

did in fact resurface the existing driveway and construct the parking lot in accordance with the terms of the Lease.

7. The primary consideration for the Lease is the maintenance and repair of the

Leased Premises. Although the Lease does provide for monthly payments originally totaling \$1,500 annually (thereafter increasing by \$75 a year), and the payment of insurance, taxes, etc., those payments are nominal and are much less than the total amount 1310 and/or Kissling charged or charges its tenants to park on the Premises.

8. Paragraph 9 of the Lease provides:

9. Repairs and Maintenance

- (a) *Lessee shall at all times at its sole cost and expense keep and maintain the paving and drainage in connection with the parking lot and driveways in good condition and repair and likewise shall be responsible for maintaining the shrubbery within the leased premises. . .*

- (b) *Lessee shall do any and all other required maintenance and repair to the leased premises and shall be responsible for the removal of snow from the driveways and the parking lot* to the extent reasonably required to at all times permit egress from and ingress to the parking lot from Delaware Avenue and the parking of vehicles in not less than 80% of the parking spaces. . .

(emphasis added).

9. The Lease provides further:

14. Events of Default and Remedies:

- (a) Defaults. The occurrence of any one or more of the following events shall constitute a default and breach of this lease by Lessee:

- (i) The failure by Lessee to make any payment of rent or any other payment required to be made by Lessee hereunder, as

and when due, where such failure shall continue for a period of fifteen days after receipt of written notice thereof from Lessor to Lessee.

(ii) The failure of Lessee to observe or perform any of the covenants, conditions or provisions of this lease to be observed or performed by Lessee, other than described in subparagraph (i) above, where such failure shall continue for a period of forty-five days after receipt of written notice thereof from Lessor to Lessee; provided, however, if the nature of Lessee's default is such that more than forty-five days are reasonably required for its cure, then Lessee shall not be deemed to be in default if Lessee commences such cure within said forty-five day period and thereafter diligently prosecutes such cure to completion

(b) Remedies. *In the event of any such default or breach by Lessee as hereinabove described which is not cured within any applicable cure period, the Lessor may at any time thereafter until such default is cured, with or without notice or demand and without limiting Lessor in the exercise of any right or remedy which Lessor may have by reason of such default or breach, terminate this Lease.*

15. Lessor's Right to Cure Lessee's Defaults:

In the event Lessee fails to cure any default within the time periods described in Section 14 above, Lessor may perform any such obligations on Lessee's behalf, including, without limitation, the making of necessary maintenance and repairs. . . *Lessor's exercise of this right to cure under this Section shall not be deemed a waiver of any right to terminate this Lease or any other remedy provided to Lessor as a result of Lessee's default.*

(emphasis added).

10. In or about August 2000, 1310 sold and/or assigned its interests in the apartments

and the Lease to Kissling. Although required to do so under the express terms of paragraph seventeen (17) of the Lease, Kissling failed to notify the Network of said sale

and assignment and has never provided the Network with the written assumption of the Lease required by paragraph seventeen (17).

11. Prior to 1310's sale of its interest in the apartments and the Lease to Kissling,

1310 promptly paid all rents due under the Lease. More importantly, prior to 1310's sale of its interest in the apartments and the Lease to Kissling, the Leased Premises were well maintained in accordance with the terms of the Lease.

12. For example, 1310 regularly, *without direction from the Network*, trimmed all

shrubbery and trees on the Leased Premises, cleaned up all fallen branches, leaves and debris located on the Leased Premises, mowed all grasses located within the Leased Premises, cleaned all drainage instruments and sewers annually, repaired all cracks and holes in the parking lot and driveway annually, sealed and relined the parking lot and driveway annually, snow-plowed the parking lot and driveway within hours of a snowfall and repaired all damage caused by said snow-plowing.

Kissling's Repeated Failure to Fulfill its Obligations Under the Lease

13. Kissling immediately breached the Lease by failing to pay rent for the months of

August, September and October 2000 and failing to provide any maintenance services for that same period of time.

14. By certified letter dated November 2, 2000, the Network notified Kissling of said

defaults and received no response from Kissling until November 8, 2000 when a representative of Kissling stormed into the Network office after hours and demanded a

meeting with your deponent. Subsequent to that meeting Kissling did cure its non-payment default by paying the back rents, but continued to fail to provide the maintenance services called for under the Lease.

15. By certified letter dated November 24, 2000, the Network again informed Kissling that it was in default because it failed to provide the snow-removal services called for under the Lease. Although Kissling representatives did eventually plow the Leased Premises, the Network was completely unplowed for over three days.

16. By certified letter dated January 17, 2001, the Network was again forced to inform Kissling that it was in breach of the Lease due to its failure to pay rent for the month of January 2001.

17. On or about January 19, 2001, your deponent received a call from the building manager at Kissling's 1310 Delaware Avenue property, who suggested that she try to obtain rent payments for all of 2001 via one check because Kissling continuously failed to pay the rent on time. In order to accommodate Kissling and avoid further aggravation, the Network agreed to accept payment for all of 2001 via one check.

18. Once spring arrived, Kissling continued its failure to properly maintain the Leased Premises.

19. In or about June 2001, lightning struck a tree on the Leased Premises. A large limb from the tree fell into the parking lot and pulled down the power lines and the telephone lines.

20. The Network notified Kissling of said lightning strike, but Kissling failed to respond and failed to remove the fallen limb from the parking area. Fearing that someone would be injured and/or that the utility companies would not repair the fallen lines, after waiting over a week for Kissling to remove the fallen limb and debris, members of the Network, including myself, dragged the fallen limb and debris off of the parking lot onto another portion of the Leased Premises.

21. On or about June 25, 2001, Mr. Anthony Kissling arrived at the Leased Premises to inspect the tree fall and informed the Network that Kissling would take care of the fallen limbs and debris and that Kissling would contact the telephone company to have the lines repaired. During that meeting, your deponent notified Kissling that representatives of Kissling had severely damaged a brick walkway and entranceway when snow-plowing.

22. On or about August 2, 2001, by certified letter, the Network was again forced to inform Kissling that it was again in default because it failed to remove the fallen limbs and debris. Moreover, I specifically informed Kissling that the Network had been contacted by the City of Buffalo regarding the piles of branches as the same was attracting rats.

23. Subsequently, Kissling asked that your deponent be available at the Network's office on August 9-10, 2001 to meet with Scott LaCass, Kissling's Director of Maintenance. I agreed to and did make myself available to LaCass on those dates. However, LaCass failed to show-up at the Network's office for any such meeting.

24. On or about August 11-12, 2001, after receiving another call from the City of Buffalo regarding the fallen limbs and debris, Father Butch Mazur, myself and other members of the Network obtained a chain saw and cut-up and removed the troublesome limbs and debris ourselves, as it was evident that despite personal notice almost two months earlier and written notice approximately ten days earlier, that Kissling was not going to make good on its promise to remove the limbs and debris and honor its obligations under the Lease. The remainder of the fallen limbs and debris were piled on the grass near the fallen tree and left for Kissling to remove.

25. On or about August 13, 2001, by certified letter, the Network was again forced to inform Kissling that it was in default because it had failed to provide the Network with evidence that it had obtained liability insurance covering the Leased Premises.

26. On or about August 15, 2001, your deponent received a call from Anthony Kissling asking that I meet with a Kissling representative to walk through the Leased Premise to indicate what maintenance work was not done. In addition, Kissling asked that I prepare a list of maintenance work that needed to be completed.

27. On or about August 16, 2001, I completed the requested list and met with a representative of Kissling, who assured me that the work called for on the list and under the Lease would be completed.

28. During the following weeks, some hedges were trimmed and some of the fallen limbs were removed, but the majority of the work called for under the Lease and set forth

on the requested list was not completed.

29. On or about October 15, 2001, the Network received a notice of violation from the City of Buffalo regarding overgrown trees and bushes located on the Leased Premises. Copies of that notice were provided to Kissling. Attached hereto as **Exhibit B** is a copy of the October 15, 2001 notice.

30. On or about December 25, 2001, Buffalo experienced a major snow storm and Kissling quickly discovered that its two lightweight trucks were incapable of plowing the snow that had fallen. Therefore, several days after the snowstorm, Kissling hired a snow plow company to plow the Leased Premises.

31. While acting as an agent for Kissling, the snow plow company drove onto the Network's lawn cutting off and damaging many bushes. More importantly, Kissling's agent caused serious and further damage to the brick entranceway and walkway Kissling had previously damaged and failed to repair.

32. On or about January 24, 2002, after Kissling again failed to pay the rent due under the Lease, the Network notified Kissling that it was in default and demanded immediate payment. It was not until March 14, 2002, that Kissling finally paid the rents due and owing to the Network.

33. On or about June 28, 2002, the Network received a final notice from the City of Buffalo, regarding its failure to comply with the previous notice dated October 15, 2002

concerning the overgrown trees and bushes on the Leased Premises. Copies of this notice were forwarded to Kissling immediately upon receipt. Attached hereto as **Exhibit C** is a copy of the June 28, 2002 notice.

34. On or about July 1, 2002, by certified letter, the Network was again forced to
to
notify Kissling that it was in default for failing to provide the maintenance services required under the Lease.

35. Pursuant to Kissling's request, the Network prepared, mailed and faxed to Kissling a list of maintenance work that had not been completed. Kissling responded by letter dated July 10, 2002, stating that it received the July 10, 2002 list and that "[It] will move immediately to take care of all this work." Attached hereto as **Exhibit D** is a copy of Kissling's letter dated July 10, 2002 whereby Kissling acknowledged that under the Lease it was obligated to perform the work called for on the July 10, 2002 list and agreed that Kissling would complete that work immediately.

36. Again at the request of Kissling, on July 10, 2002, your deponent met
with two
Kissling representatives, Scott LaCass and another individual, and provided them with the requested July 10, 2002 list of unperformed maintenance. Attached hereto as **Exhibit E** is a copy of that list containing my notes from that meeting. Please take notice that Kissling again agreed to complete all the items contained on that list.

37. On or about September 3, 2002, the Network received a further notice of
failure to
comply with previous notices from the City of Buffalo. Despite receiving copies of the City of Buffalo's notices dated October 15, 2001 and June 28, 2002 months earlier and

agreeing to complete this work, in breach of the Lease, Kissling had still failed to trim and/or remove the troublesome trees and bushes. Attached hereto as **Exhibit F** is a copy of the September 3, 2002 notice.

The Final Notice of Default

38. On or about September 5, 2002, by certified letter the Network was again forced to inform Kissling that it was in violation of the Lease. At that point in time, Kissling had failed to provide the Network with proof of insurance, had still failed to remove the overgrown trees and bushes mentioned in the City of Buffalo notices, and failed to undertake the agreed upon maintenance work outlined in the July 10, 2002 list and agreed to by Kissling. Attached hereto as **Exhibit G** is a copy of that notice of default letter containing the July 10, 2002 list enclosed with that letter.

39. Of particular importance to this proceeding, please take notice that the September 5, 2002 notice, like all previous notices, makes reference to and evidences Kissling's complete failure to fulfill its maintenance obligations and responsibilities under the terms of the Lease. The Lease allocates all responsibilities for maintaining the Leased Premises to Kissling. Nowhere in the Lease is any responsibility for maintenance allocated to the Network. Furthermore, nowhere does the Lease require the Network to police Kissling's performance of its maintenance obligations. The Network never had to police 1310's performance of its maintenance obligations, and certainly pursuant to the terms of the Lease it is not required to police Kissling's performance of those same obligations.

40. Also of particular importance to this proceeding, please take notice that the

September 5, 2002 notice makes reference to the enclosed July 10, 2002 list of maintenance work agreed to by Kissling which, among other things, specifically calls for Kissling to “Repair walkway, brick steps along driveway and hedges damaged by snowplows.” At this point in time, September 2002, Kissling had been on notice of this damage for well over one (1) year, had repeatedly acknowledged that this work was required to be performed by Kissling under the terms of the Lease, and had in fact agreed to complete the work.

41. Additionally, please take notice that the enclosed July 10, 2002 list of maintenance work agreed to by Kissling also calls for Kissling to “Inspect and clean four (4) sewer drains in parking areas.” At this point in time, September 2002, Kissling had also been on notice of the need for this work for well over one year, had repeatedly acknowledged that this work was required to be performed by Kissling under the terms of the Lease, and had in fact agreed to complete the work.

42. The September 5, 2002 Notice and the enclosed July 10, 2002 list agreed to by Kissling also calls for Kissling to: (a) remove all downed leaves and debris, and (b) inspect and repair all blacktop in the parking lot and the driveways. At this point in time, September 2002, Kissling had also been on actual and constructive notice of the need for this work, had repeatedly acknowledged that this work was required to be performed by Kissling under the terms of the Lease, and had in fact agreed to complete the work.

43. In a further attempt to accommodate Kissling, pursuant to the terms of the Lease, the Network allowed Kissling an opportunity to cure its general default and the specific defaults referenced in the September 5, 2002 notice of default.

44. Although Kissling did eventually provide proof of insurance and weeks later

Kissling trimmed and removed a portion of the problem trees and bushes, Kissling continued with its general failure to maintain the Leased Premises. After Kissling again failed to pay the rents due in January, February, and March 2003, the Network was “fed up.”

45. Therefore, by certified letter dated March 21, 2003, pursuant to paragraph 14(b)

of the Lease, the Network properly terminated the Lease because of: (1) Kissling’s general failure to maintain the Leased Premises, (2) its failure to perform numerous specific maintenance items required by the Lease and agreed to by Kissling, and (3) Kissling’s failure to pay rents due January, February and March 2003. Attached hereto as **Exhibit H** is a copy of the March 21, 2003 Notice of Termination.

A Yellowstone Injunction is Unwarranted

46. A Yellowstone injunction is unwarranted under the circumstances.

47. First, Kissling improperly characterizes the Network’s March 21, 2003 “Notice

of Termination” as an additional notice of default. Second, *the time to cure the general and specific defaults has expired and there is no basis for a Yellowstone injunction where it is sought after the expiration of the cure period or after the service of a notice of termination.*

48. The March 21, 2003 Notice of Termination is based upon Kissling’s failure to

cure its general default in the performance of its maintenance obligations and its failure to

cure all of the specific maintenance obligations called for under the Lease and agreed to by Kissling and identified in the Network's September 5, 2002 notice of default, including but not limited to its failure to: (1) repair a brick entranceway that was repeatedly damaged by Kissling agents, (2) repair a brick walkway that was repeatedly damaged by Kissling agents, (3) repair or replace certain bushes and/or shrubs damaged by Kissling agents, (4) inspect and clean four sewer drains located on the Leased Premises, (5) to clear and remove downed limbs, leaves and debris from the Leased Premises, and (6) inspect and repair all blacktop in the parking lot and driveways.

49. Kissling's attempt to tender payment to counsel for the Network on or about

March 28, 2003 was properly refused because the Lease had been terminated.

50. Paragraph 14(b) of the Lease grants the Network the ability to terminate the Lease

at anytime after the cure period for the default expires with or without notice so long as the default has not been cured. More specifically, paragraph 14(b) provides:

(b) Remedies. In the event of any such default or breach by Lessee as hereinabove described which is not cured within any applicable cure period, the Lessor may at any time thereafter until such default is cured, with or without notice or demand and without limiting Lessor in the exercise of any right or remedy which Lessor may have by reason of such default or breach, terminate this Lease.

(emphasis added).

51. Kissling's general default in its failure to perform its maintenance obligations

under the Lease and numerous specific defaults identified in the Network's September 5,

2002 notice of default were not cured within the cure periods specified within the Lease and were not cured as of the March 21, 2003 Notice of Termination.

52. For example, pursuant to paragraph 14(a) of the Lease, the cure period for repairing the brick entranceway that was repeatedly damaged by Kissling agents was at most forty-five days from Kissling's receipt of the September 5, 2002 notice of default sent by certified mail (even though Kissling had been notified of the damage as early as June 2001). Despite notice of this default, Kissling failed to cure or take steps to cure the default and repair the brick entranceway prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Attached hereto as **Exhibit I** are photographs taken April 12, 2003 evidencing the damage caused by Kissling agents and evidencing that Kissling failed to cure this default.

53. Similarly, the cure period for repairing the brick walkway that was repeatedly damaged by Kissling agents was at most forty-five days from Kissling's receipt of the September 5, 2002 notice of default sent by certified mail. Despite notice of this default and its agreement to repair the walkway, Kissling failed to cure or take steps to cure the default and repair the brick walkway prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Attached hereto as **Exhibit J** are photographs taken April 12, 2003 evidencing that Kissling also failed to repair the walkway and cure this default.

54. The cure period for repairing or replacing certain bushes and/or shrubs damaged by Kissling agents was also at most forty-five days from Kissling's receipt of the September 5, 2002 notice of default sent by certified mail. Despite notice of this default

and its agreement to repair or replace the damaged bushes and/or shrubs, Kissling failed to cure or take steps to cure this default and repair or replace the bushes and/or shrubs prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Attached hereto as **Exhibit K** is a photograph taken April 12, 2003 evidencing that Kissling also failed to repair or replace the damaged bushes and cure this default.

55. The cure period for clearing and removing downed limbs, leaves and debris from the Leased Premises was also at most forty-five days from Kissling's receipt of the September 5, 2002 notice of default sent by certified mail. Despite notice of this default and its agreement that it would clear and remove all downed limbs, leaves and debris from the Leased Premises, Kissling failed to cure or take steps to cure this default and clear and remove all downed limbs, leaves and debris from the Leased Premises prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Although Kissling may have removed a minimal number of downed limbs subsequent to the September 5, 2002 notice of default, it certainly did not clear or remove all or even the majority of fallen leaves and debris from the Leased Premises and it did not diligently prosecute a cure of the default as required under paragraph 14(b) of the Lease. Attached hereto as **Exhibit L** are photographs taken April 12, 2003 evidencing that Kissling also failed to cure this default and evidencing the large amount of fallen leaves, limbs and debris that have been located on the Leased Premises since the September 5, 2002 notice of default.

56. The cure period for inspecting and cleaning four sewer drains located on the Leased Premises was also at most forty-five days from Kissling's receipt of the

September 5, 2002 notice of default sent by certified mail. Despite notice of this default and its agreement to inspect and clean the sewer drains as was done annually by 1310, Kissling failed to cure or take steps to cure this default prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Kissling's failure to inspect and clean all four sewer drains is evidenced by the severe flooding that occurred on the Leased Premises in or about January 2003.

57. The cure period for inspecting and repairing all blacktop in the parking lot and

driveways was also at most forty-five days from Kissling's receipt of the September 5, 2002 notice of default sent by certified mail. Despite notice of this default and its agreement to inspect and repair all blacktop in the parking lot and driveways, Kissling failed to cure or take steps to cure this default and repair all blacktop in the parking lot and driveways prior to the expiration of the cure period and prior to the Network's issuance of its Notice of Termination. Attached hereto as **Exhibit M** is a photograph taken April 12, 2003 evidencing a large hole in the blacktop surface that has existed since at least September 5, 2002, which Kissling failed to repair in order to cure this default.

58. Finally, attached hereto as **Exhibit N** a photograph of the Kissling apartments

located immediately adjacent to the Leased Premises. This photograph allows for a comparison of the level of maintenance Kissling provides to its property and the Leased Premises and evidences Kissling's complete failure to maintain and repair the Leased Premises.

59. The chart below summarizes Kissling's failure to cure the specific maintenance

defaults contained in the September 5, 2002 notice of default:

Defaults Existing At	Date Written	Expiration of 45	Evidence of
<u>03/21/03 Termination</u>	<u>Kissling's</u>	<u>Notice Provided</u>	<u>Day Cure Period</u>
<u>Cure Default</u>			<u>Failure to</u>

Failure to repair brick steps damaged by Kissling snowplow	09/05/02	10/25/02	As of 03/21/03 Notice of Termination and continuing to date the brick steps were not repaired. See Exhibit I.
Failure to repair brick walkway damaged by Kissling snowplow.	09/05/02	10/25/02	As of 03/21/03 Notice of Termination and continuing to date the brick walkway was not repaired. See Exhibit J.
Failure to repair or replace bushes damaged by Kissling snowplow.	09/05/02	10/25/02	As of 03/21/03 Notice of Termination and continuing to date the damaged bushes were not repaired or replaced. See Exhibit K.
Failure to clear and remove all downed limbs, leaves and debris.	09/05/02	10/25/02	As of the 03/21/03 Notice of Termination and continuing to date Kissling has not cleared and removed all downed limbs, leaves and debris. See Exhibit L.
Failure to inspect and repair all blacktop in parking lot and driveways.	09/05/02	10/25/02	As of 03/21/03 Notice of Termination and continuing to date the damaged sections of the blacktop and driveways were not repaired. See Exhibit M.
Failure to inspect and clean four sewer drains.	09/05/02	10/25/02	As of 03/21/03 Notice of Termination and continuing to date all four sewer drains have not been inspected and cleaned, as evidenced by the severe flooding that occurred in or about January 2003.

60. The Lease was properly terminated by way of the March 21, 2003 Notice of

Termination because Kissling generally defaulted by completely failing to perform its maintenance obligations under the Lease and failed to cure the specific maintenance obligations agreed to by Kissling and identified in the Network's September 5, 2002 notice of default. Therefore, Kissling is not entitled to a Yellowstone injunction.

A Preliminary Injunction is Unwarranted

61. Your deponent is advised by counsel that in order for Kissling to be entitled to a

preliminary injunction, Kissling must show: (1) a likelihood of success on the merits; (2) danger of an irreparable injury in the absence of an injunction; and (3) that a balancing of the equities tips in Kissling's favor. Kissling cannot satisfy any of the criteria for obtaining a preliminary injunction.

62. As demonstrated above, Kissling will be unsuccessful on the merits because the

Network properly terminated the Lease by way of the March 21, 2003 Notice of Termination because Kissling generally defaulted by completely failing to perform its maintenance obligations under the Lease and failed to cure the specific maintenance obligations agreed to by Kissling and identified in the Network's September 5, 2002 notice of default.

63. In addition, Kissling will not suffer any irreparable harm as a result of the Network's termination of the Lease. Any harm Kissling suffers from or will suffer from is the result of its affirmative conduct (i.e. its continuous failure to repair and maintain the Leased Premises and its failure to cure all defaults under the Lease).

64. For a period of approximately three years the Network has bent-over-backwards in an attempt to amicably resolve Kissling's continuous failure to maintain the Leased Premises. Throughout that period of time, Kissling has collected parking rents/fees from its tenants, purportedly to cover repair and maintenance of the Leased Premises, but has continuously failed to maintain the Leased Premises. Unaware that the Lease exists, on numerous occasions various Kissling tenants have come to the Network office complaining of the complete lack of maintenance of the Leased Premises and have advised that in their opinion the parking area is very dangerous.

65. Kissling will not suffer irreparable harm as its tenants are currently free to park on the street until Kissling locates another off-street parking area. Moreover, as is evidenced by the March 25, 2003 "Notice to Persons Parking at 1272 Delaware Avenue" distributed to those parking on the Leased Premises, in the future the Network may be willing to rent parking spaces to those currently parking on the Leased Premises so that it may have a source of funds to do the repairs and maintenance that Kissling has continuously neglected and refused to complete.

66. Despite Kissling's allegations to the contrary, the equities undoubtedly tip in the Network's favor. According to the Lease, all responsibilities and obligations for maintaining the Leased Premises belong to Kissling. Yet Kissling has continuously failed to undertake those obligations and has essentially made me into a full-time maintenance director, thereby hindering my ability to fulfill my duties at the Network. The primary consideration for the Lease was the repair and maintenance of the Leased Premises and Kissling has repeatedly failed to provide the Network with that repair and maintenance

work. Through its own affirmative conduct, Kissling repeatedly breached the Lease and caused the Network to terminate the Lease.

67. The Network made numerous attempts to resolve this continuous dispute without the need to resort to litigation. However, on each occasion Kissling failed to fulfill its promises and its obligations under the Lease. Kissling has acted in bad faith throughout its entire relationship with the Network and, except for the fact that they are too late because the Lease has already been terminated, Kissling's current statements that it will make all necessary repairs are no different than the numerous empty promises Kissling previously made to the Network. Moreover, those statements were made by Scott LaCass, the very same individual that Kissling purportedly charged with responsibility for overseeing the repair and maintenance of the Leased Premises that was never completed.

68. In short, Kissling's motion should be denied in its entirety. The Court should deny Kissling's request for a Yellowstone injunction because the Lease was properly terminated by way of the March 21, 2003 Notice of Termination after Kissling generally defaulted by completely failing to perform its maintenance obligations under the Lease and failed to cure the specific maintenance obligations called for under the Lease, agreed to by Kissling and identified in the Network's September 5, 2002 notice of default. Additionally, the Court should deny Kissling's request for a preliminary injunction because: (a) Kissling will not be successful on the merits, (b) Kissling has not and will not suffer an irreparable harm, and (c) the balance of equities tips in the Network's favor. The Network is entitled to a judgment declaring that the Lease has been terminated, that the Network is entitled to possession of the Leased Premises and ordering Kissling to vacate the Leased Premises.

Reverend Dr. G. Stanford Bratton

Subscribed and sworn to before me
this ____ day of April, 2003

Notary Public

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