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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

EUN TEAK JUNG and LAW OFFICES OF RAMON K. QUICHOCHO, LLC, **Plaintiffs,** **vs.** **JU YOUNG KIM and TAEWOO CORP.,** **Defendants.**	**CIVIL ACTION NO. 10-0314** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
JU YOUNG KIM and TAEWOO CORP., **Counter-Plaintiffs,** **vs.** **EUN TEAK JUNG,** **Counter-Defendant.**	

THIS MATTER came before the Court for a Bench Trial that commenced on June 18, 2012 at 9:30 a.m. and concluded on June 27 at 4:35 p.m. in Courtroom 202A. Plaintiff and counter-defendant Eun Teak Jung ("Plaintiff" or "Jung") and plaintiff Law Offices of Ramon K. Quichocho, LLC ("the Law Offices") (collectively, "Plaintiffs") were represented by Robert H. Myers, Jr., Esq. Defendants and counter-plaintiffs Ju Young Kim ("Kim") and Tae Woo Corporation ("Tae Woo Corp.") (collectively, "Defendants") were represented by Stephen J. Nutting, Esq.

On November 1, 2010, Plaintiffs filed a complaint against Defendants for: I) Unlawful Detainer; II) Partition; III) Unjust Enrichment; IV) Breach of Contract; V) Accounting; VI) Trespass/Encroachment; VII) Negligence Per Se; VIII) Nuisance; IX) Injunctive Relief; and X) Punitive Damages. Defendants filed a counterclaim based on the doctrine of adverse possession.

On December 21, 2011, the Court ruled on Defendants' motion for summary judgment, ordering:

1. the dismissal of Counts I[1], IX and X in their entirety;

2. the dismissal of Count VIII as to Private Nuisance but not Public Nuisance; and

3. summary judgment for Defendants as to Counts III, V and VI for all years up and until the year 2008.

On December 21, 2011, the Court also ruled on Plaintiffs' cross-motion from summary judgment, ordering:

1. summary judgment for Plaintiffs as to Count II, pending a final hearing on the most equitable type of partition; and

2. summary judgment for Plaintiffs as to Kim's counterclaim based on Adverse Possession.

The matter proceeded to trial on the remaining issues of: (A) partition type, (B) breach of contract, (C) unjust enrichment (2008 to present), (D) accounting (2008 to present), (E) trespass/encroachment (2008 to present), (F) negligence per se, and (G) public nuisance.

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[1] In their Proposed Findings of Fact and Conclusions of Law, Defendants seek an award of attorney's fees and costs incurred in defending against Count I for Unlawful Detainer pursuant to the Holdover Tenancy Act. 2 CMC § 40209. Defendants shall submit a separate memorandum of law and facts in support of their claim for attorney's fees and costs no later than October 12, 2012. Plaintiffs have until November 1, 2012 to file any opposition and Defendants have until November 12, 2012 to file a reply. The Court will hear the parties' arguments whether the Holdover Tenancy Act is applicable for purposes of court costs, and what amount of court costs is reasonable. The hearing on arguments is set for November 15, 2012 at 9:00 a.m. in Courtroom 202A.

I.
FINDINGS OF FACT

Having considered the papers submitted and evidence adduced and being fully informed, the Court makes the following findings of fact:

1. Jung and Kim are both citizens of Korea who came to Saipan in about 1985 and 1986 respectively.

2. On September 29, 1987, Jung, Kim, and Yung Hoi Koo ("Koo") (collectively, "the Cotenants") entered into a written agreement to lease certain real property ("the Subject Property") located in Gualo Rai, Saipan. The Subject Property is legally described as: Tract No. 22890 New-R1, containing an area of 3,238 square meters, more or less, of raw land with one small building thereon. The term of the lease is for a period of fifty-five years commencing on October 1, 1987, and expiring, unless sooner terminated, at midnight on September 20, 2042. The total rent for the Subject Property is $1,800.00 per month for the first five years with a rate of increase of 15% for every five-year period of the term of the lease.

3. In leasing the property, the Cotenants took their respective interests as tenants in common each with a one-third undivided interest in the entirety of the Subject Property.

4. The Cotenants agreed to each pay one-third of the rent for the entire tract of the Subject Property, which they have continuously abided by since the beginning of the lease to the present.

5. Shortly after executing the lease, Kim began using part of the raw land on the Subject Property for his aluminum and glass business, Tae Woo Corp., with the consent of the other cotenants, Jung and Koo.

6. In about October 1987, the Cotenants agreed to build a one-story commercial building ("Building") on the Subject Property, which was completed in 1988.[2] The Building was divided into three separate units. Kim took the northern unit, Jung took the middle unit, and Koo took the southern unit.

[2] The Cotenants split the construction costs for the Building evenly in thirds. Subsequently, they each built a second story on their units and split the construction costs evenly again.

7. In 1988, during construction of the Building, Kim requested permission from Jung to use the portion of leased land directly behind Jung's middle Building unit for Kim's business. The parties stipulated at trial that this portion of land ("the Disputed Property") consists of approximately 487 square meters, which Jung claims is part of his one-third apportioned property. Jung contends he permitted Kim to use the Disputed Property in exchange for monthly rent of $300.00 with a 15% rate increase for every five-year period. Kim, however, contends there was no rental agreement and Jung said simply to go ahead and use his property and that he had no need for it.

8. Soon after Kim took possession of the Disputed Property, Kim erected a fence around a substantial portion of the property behind the Building. The fence served to protect the inventory and equipment of his business.

9. Kim also built several structures on the Subject Property behind the Building, including employee barracks, storage buildings, and various outbuildings used for the construction and assembly of aluminum windows and doors. At trial, the parties stipulated that his construction encroached upon and over the Disputed Property.

10. Kim managed Tae Woo Corp. until 1994. Then, from 1994 to 2006, Kim's brother-in-law managed the business while Kim made frequent trips between Saipan and Korea. In 2006, Kim's brother-in-law passed away, and Kim reclaimed management responsibilities. Kim's sister, Ms. Lee, also began working for Tae Woo Corp. in 2006.

11. Jung never complained of the operations of Tae Woo Corp., nor mentioned anything to Kim about rent until 2007. In 2007, Jung demanded Kim to pay him $150,000, which Jung would deduct the past-due rent from and hold the remaining amount for future rent. Kim ignored Jung's demand for rent.

12. Prior to 2007, Kim and Jung were on very good terms. Jung was married to Kim's sister and Jung and Kim were family. They did favors for each other during the their lease of the Subject Property. Kim installed the doors and windows in Jung's middle Building unit and in Jung's business in Tinian free of charge, and Kim loaned Jung money on multiple

occasions.[3] Similarly, Jung did favors for Kim, including permitting Kim to use Jung's apportioned property despite receiving an offer from Koo to purchase Jung's property interest for $300,000.

13. In 2007, Jung's and Kim's close, affable relationship broke down.

14. Shortly after Kim ignored Jung's demand for rent in 2007, Jung built a small, wooden barracks behind Jung's middle Building unit on the Disputed Property.

15. In 2008, after Jung built the small, wooden barracks, Jung discovered a fence ("Prison Fence")[4] erected around, and welded to, the barracks, which prevented Jung's access to the Disputed Property.[5] Jung objected to Kim and inquired why he built the Prison Fence. Kim responded that the Prison Fence is necessary to prevent burglary. Kim has many valuable tools and materials on the property, which had been previously stolen.

16. In September 2009, Ramon K. Quichocho entered into a five-year lease agreement with Jung to rent Jung's middle Building unit for $1,500.00 per month. Mr. Quichocho moved his law office into the first story and used the second story as his residence.

17. On September 28, 2009, Mr. Quichocho wrote a letter to Kim, demanding the removal of: (1) a potentially leaking propane gas tank, (2), the Prison Fence that blocks the emergency exit through the back of Mr. Quichocho's law office, and (3) aluminum scrap metal dangerously protruding through the Prison Fence onto Mr. Quichocho's leased property.

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[3] Kim testified that the value of the unpaid loans and professional services and materials Kim gave Jung totaled around one million dollars. However, the value of the favors exchanged between Kim and Jung was not explored in any real depth.

[4] This fence was referred to throughout the proceedings as a "prison fence," apparently because it encages Jung's wooden barracks, blocking its outdoor access.

[5] Kim testified at trial that the prison fence was built in 2002 when S Mart was renting the middle Building unit from Jung. Allegedly, S-Mart was a victim of theft, so the owner of S-Mart and Jung asked Ms. Lee to build a fence around a small rear entry-way, which they feared gave access to the thief or potential thieves. Ms. Lee complied. The Court, however, discounts this testimony and agrees with Jung who testified the Prison Fence was built in 2008 because: (1) Kim's testimony was inconsistent as he claimed the fence was built "before 2009," "before 2006," and in 2002 while S-Mart was Jung's tenant; (2) Kim's testimony was contradictory because he claimed that the Prison Fence was built in direct response to Jung's and S-Mart's request but then stated elsewhere in his deposition that it was built to protect Tae Woo Corp.'s inventory against theft; (3) Ms. Lee did not officially work for Tae Woo Corp. until 2006; and (4) the Prison Fence is welded to the wooden barracks, making it more likely that the wooden barracks was built first.

18. Kim rectified Mr. Quichocho's first and third complaints, but did nothing to resolve the second complaint because both the Building Safety Division of the Department of Public Works and OSHA inspectors who had inspected the premises advised that there was no lawful requirement for the rear exit.

19. Plaintiffs argue that there are no exits from either the first or second floors of Jung's middle Building unit. The Court finds this argument incredible. It is axiomatic that if there are no exits then there are no entrances and, hence, no means to enter inside the Building. It is uncontested, however, that Mr. Quichocho is able to enter his leased premises. It is also clear from the photographs that the first floor has a front entrance that leads outside to the parking lot, and the second floor has a front entrance that leads outside to a balcony with access to an outdoor staircase on the northern-most end of the Building.

20. On October 26, 2009, Mr. Quichocho sent a second letter to Kim on behalf of his client, Jung, demanding Kim to pay Jung past due rent for use of the Disputed Property and to vacate the premises. Specifically, the letter demanded payment of $193,802.51 as of September 30, 2009 based upon an alleged oral contract in which Kim agreed to pay Jung $300.00 per month as rent with a 15% rate increase every five years. Kim did not comply with either demand.

21. Nowhere in the October 2009 letter was there a request to enter, occupy or use any portion of the premises.

22. No evidence was introduced that there were any other communications between Kim, and Jung or Mr. Quichocho relative to Mr. Quichocho's demands on the property after that date, other than in the course of litigation.

23. Kim did not pay Jung any rent, nor vacate the premises. Kim continues to operate Tae Woo Corp. on the portion of the Subject Property located behind Kim's and Jung's Building units. The instant lawsuit ensued.

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II.
CONCLUSIONS OF LAW

A. COUNT II - PARTITION

1. Partition is an equitable remedy that divides property held by cotenants "into distinct portions, so that they may hold them in severalty." *Hamilton v. MacDonald*, 503 F.2d 1138, 1150 (9th Cir. 1974)[6] (quoting Black's Law Dictionary 1276 (4th ed. 1968)). Partition is highly favored because co-owners have an inherent right to alienate their interest in land. *Duffy v. Maciag*, 431 A.2d 1233, 1235 (R.I. 1981). A tenant in common is free to demand partition at any time as a matter of right.[7] *See Manglona v. Kaipat*, 3 NMI 322, 333 (1992). The party seeking to prevent partition has the burden of proving it would be inequitable. *Sweeney v. Bay State Oil & Gas Co*., 133 P.2d 538, 540 (Okla. 1943).

2. Defendants, who wish to avoid partition, have the burden to prove that partition would be inequitable. Defendants argue that the Subject Property has already been effectively partitioned by parol, which is enforceable in equity in spite of the statute of frauds. A parol partition requires: (1) an oral agreement among cotenants to partition their jointly owned real property, and (2) part performance on behalf of the cotenants in conformity with the agreement. Am. Jur. 2d *Partition* § 68 (2012) ("Cotenants may make a parol partition of joint properties among themselves, and where each one, pursuant to such a contract performs his or her part by taking exclusive possession of his or her own share partitioned, the statute of frauds does not apply and equity will enforce the partition agreed upon.") (collecting cases).

3. The existence of an oral agreement to partition property must be proven with "clear, definite and unequivocal" evidence such that a court may order specific performance of the contract to partition. *Cooper v. Davis*, 174 A.2d 144, 146 (Md. Ct. App. 1961). Defendants contend that the Cotenants agreed to partition the Subject Property when Jung told Kim to go

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[6] Because there is no dispositive Commonwealth written law, it is necessary to consult persuasive authority from other jurisdictions. 7 CMC § 3401; *see also, e.g., Hee v. Oh*, 2011 MP 18 ¶ 11 (seeking guidance from other jurisdictions that . . . when "no Commonwealth case . . . addresses this issue."); *Ishimatsu v. Royal Crown Ins*. Corp., 2010 MP 8 ¶ 42.

[7] *See generally Mulsow v. Gerber Energy Corp*., 697 P.2d 1269 (Kan. 1985); *Ellis v. Jenkins*, 295 S.E.2d 736 (Ga. 1982); *Terrible v. Terrible*, 534 P.2d 919 (Nev. 1975); *Hazelwood v. Hazelwood*, 345 So. 2d 819 (Fla. Ct. App. 1977); *Williams v. Williams*, 63 Cal. Rptr. 354 (Cal. Ct. App. 1967).

ahead and use his property. This is clearly not a partition agreement; rather, it is a revocable license[8] for Kim to use Jung's allotted property.[9] Kim could not have reasonably believed he became the absolute owner of the Disputed Property based on Jung's casual statement to go ahead and use the property.[10] *But cf. id.* at 147. There was no discussion as to consideration or scope and duration of the alleged partition, and Koo, who is a joint owner of the Subject Property, was never consulted in the matter. (Jung's Dep. at 61: 14-25.) Therefore, Jung cannot be estopped from revoking Kim's license. The Cotenants did not agree to partition the Subject Property.[11]

4. Because the Cotenants did not agree to partition the Subject Property, Kim's exclusive possession of the property located behind the Building and his construction of improvements thereon are inconsequential. Such overt acts provide evidence of an oral partition agreement and serve to remove the agreement from the statute of frauds, but the overt acts do not constitute a partition it and of itself. *See, e.g., Cooper*, 174 A.2d at 146) ("[E]quity will recognize and confirm an oral agreement to partition if it has been followed by overt acts

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[8] A license is a denoted interest in land that does not require any formal requirements to be created. Restatement (First) of Property § 514 (1944). A license "entitles the owner of the interest to a use of the land" that "arises from the consent of the one whose interest in the land used is affected thereby." *Id*. § 512. Kim's license to use the Disputed Property endures at the will of Jung. *See id*. § 514(b).

[9] The Disputed Property is part of Jung's allotted property. In leasing the Subject Property, each cotenant was allotted the exclusive use to an equal one-third portion of the land and each pays an equal one-third share of the total rent. Jung's allotted one-third portion of the Subject Property is comprised of the middle Building Unit and the land directly behind it. The fact that Kim requested Jung's permission to use the Disputed Property supports this arrangement.

[10] Jung may have been estopped from revoking Kim's license had Jung attempted to do so soon after Kim incurred the expense of setting up his business on the Disputed Property and before gaining an equivalent return on the business venture. However, it is not unreasonable that after more than twenty years Jung has changed his mind and no longer wants Kim using the property. Allowing Jung to revoke his license after Kim has presumably enjoyed profits from his twenty-five years of unhindered use of Jung's apportioned property does not contravene principles of equity. Lastly, Kim's favors for Jung does not transform Kim's revocable license into an irrevocable license coupled with an interest because there is no evidence that the favors constituted consideration to secure Kim's continued use of Jung's property. It is likely the favors were gratuitous because Kim and Jung were like family and Jung allegedly did favors for Kim as well.

[11] It is undisputed that "[i]n leasing the property, the parties took their respective interests as Tenants in Common each with a ***one-third (1/3) undivided interest in the entirety*** of the property leased." (Defs.' Pretrial Statement at 4) (emphasis added). If there was a partition, Jung would be the absolute owner of the Disputed Property and middle Building unit, while Kim would own the northern Building unit and land behind it, and Koo would own the southern Building unit and the property behind it.

which can be attributed only to individual ownerships of the lands occupied exclusively after the oral agreement of partition.").

5. Kim argues that even if the Cotenants did not agree to partition the property, a court-ordered partition should be denied due to four equitable defenses, including: (1) the unclean hands doctrine, (2) laches, (3) waiver, and (4) fairness. Although partition is generally an absolute right of a cotenant, a partition may be denied where it would contravene principles of law or equity or violate public policy. *Lawrence v. Harvey*, 607 P.2d 551, 556 (Mont 1980); *Kayann Properties, Inc. v. Cox*, 149 S.E.2d 553, 557 (N.C. 1966). All of Kim's asserted equitable defenses lack merit.

6. "The doctrine of unclean hands applies to a litigant whose own conduct in connection with the same matter or transaction has been unconscientious, unjust, marked by a want of good faith or violates the principles of equity and righteous dealing." *Crown Constr. Co. v. Huddleston*, 961 S.W.2d 552 (Tex. App. 1997). In an action for partition, the defense of "unclean hands" does not arise simply because the party seeking partition has an ulterior motive. *Schmit v. Klumpyan*, 663 N.W.2d 331, 336 (Wis. Ct. App. 2003) (citing Restatement (second) of Torts § 682 cmt. b (1977)); *Thomas v. Witte*, 214 Cal. App. 2d 322, 326 (Cal. Ct. App. 1963). "Barring illegal acts, a co-tenant's active pursuit of his right to partition does not give him 'unclean hands' precluding the exercise of that right." *Buell v. Rubin*, 13 LCR 558, 564 (Mass. Land Ct. 2005).

7. Kim bases his "unclean hands" defense on Jung's ulterior motive to extort money from Kim and on Jung's subsequent filing of frivolous claims in the instant lawsuit. The Court finds that Jung's offer to Kim to allow Kim to continue enjoying exclusive use of Jung's jointly-owned and allotted property in exchange for money is not extortion but a rightful proposal. *See Commonwealth Dev. Auth. v. Tenorio*, 2004 MP 22 ¶ 26. Jung's motive for making the proposal to Kim is immaterial, even if Jung had no true desire to use the property himself. Jung's active pursuit of his right to a partition after Kim's rejection of the proposal was appropriate. Although Plaintiffs asserted many claims against Defendants that ultimately failed, the Court does not find them frivolous because they each had some basis in the law.

But cf. New Shintani Corp. v. Quitugua, 2011 MP 9 ¶ 10 (sanctioning an attorney for filing a lawsuit that was clearly time-barred and, thus, frivolous). Finally, any alleged misconduct that Plaintiffs may have committed during the trial, such as coaching witnesses, was not part of the alleged partition transaction; therefore, it is irrelevant to the defense of unclean hands.

8. Kim also argues that partition is barred by laches because Jung waited twenty-three years before bringing his partition claim. Laches may bar an action that is marked by unreasonable delay, which prejudices the defendant. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.D.C. 1982). An unreasonable delay depends "upon some change in the condition or relations of the property or the parties." *Id*. (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1982)). Specifically in terms of a partition action, the defense of laches does not lie until there is an ouster or the plaintiff receives notice of adverse action concerning his or her property interest. *Steele v. Mack*, 341 So. 2d 1322, 1325 (Miss. 1977); *Shives v. Niewoehne*r, 191 N.W.2d 633, 637 (Iowa 1971); *Occhino v. Occhino*, 793 P.2d 1149, 1151 (Ariz. Ct. App. 1990); *Espy v. Espy*, 238 Cal. Rptr. 182, 197 (Cal. Ct. App. 1987). Consequently, a cotenant who waits twenty-five years before seeking a partition does not present an unreasonable delay if no change in circumstances occurred during that time period. *See McFall v. Trubey*, 992 So. 2d 867, 869-70 (Fla. Ct. App. 2008).

9. Jung waited twenty-three years before bringing his partition - from 1987, when the Cotenants leased the Subject Property, until 2010 when the complaint was filed. During these twenty-three years, Defendants concede that Kim operated Tae Woo Corp. on the property with no objection from Jung and there was never any change to the property or to the Cotenants' interest in the property. Hence, there was no change in circumstances that could give rise to a laches defense. Soon after Kim ignored Jung's demand for rent and to vacate the premises, Jung filed the instant partition claim. There was no unreasonable delay.[12]

[12] Jung's twenty-year delay, from 1987 to 2007, in demanding rent from Kim is relevant only to the extent that it tends to shed doubt on the existence of a monthly rental agreement between Kim and Jung. It has no bearing, however, on Plaintiffs' partition claim.

10. Even if the delay was unreasonable, it did not cause Kim any unfair prejudice. A laches defense recognizes two types of prejudice: "a loss of evidence or witnesses supporting defendant's position or the defendant may have changed his position in a manner that would not have occurred but for plaintiff's delay." *Id*. at 844 (citation omitted). First, there has been no loss of evidence. All of the material witnesses are still available and no physical evidence of a partition agreement ever existed in the first place. Second, Plaintiffs' "delay" in filing their partition claim prejudices only the plaintiff, Jung, by forfeiting his use and enjoyment of his property to Kim for the previous twenty-three years. *See Shives*, 191 N.W.2d at 637 ("Mere delay which does not work disadvantage or harm to [the defendant] is not such laches.") (citation omitted).

11. Next, Kim argues that Jung waived the right to partition because the Cotenants agreed, either expressly or impliedly, not to partition the Subject Property, and they acted in conformity with that agreement for twenty-three years. A cotenant may waive the right to partition through an express or implied agreement with the other cotenant(s) not to partition. *Kayann Properties, Inc. v. Cox*, 149 S.E.2d 553, 557 (N.C. 1966); *Twin Lakes Reservoir & Canal Co. v. Bond*, 401 P.2d 586, 590 (Colo. 1965); *Ortmann v. Kraemer*, 378 P.2d 26, 30 (Kan. 1963); *Thomas v. Witte*, 214 Cal. App. 2d 322, 327 (Cal. Ct. App. 1963). An implied agreement not to partition exists where the purpose of the transaction would be defeated by partition, or a partition would interfere with a contract. *Rosenberg v. Rosenberg*, 108 N.E.2d 766, 767-68 (Ill. 1952).

12. There is no evidence of an express agreement to not partition the Subject Property. Also, Defendants failed to prove an implied waiver of partition. The purpose of the lease was to give each cotenant a separate, one-third portion of the Subject Property for their exclusive use. A physical partition would not prevent the Cotenants from continuing to use the Subject Property as originally intended;[13] they could still use their allotted one-third property shares. Although a physical partition may disrupt or destroy the operation of Tae Woo Corp., the lease

[13] Kim expanded his business onto Jung's allotted middle portion of the Subject Property ***after*** the Cotenants signed the lease. At the time of the lease, the Cotenants did not agree Kim would use any more land than his northern one-third share.

was not created to ensure the effective operation of Tae Woo Corp. Neither Jung nor Koo has ever had any interest, pecuniary or otherwise, in Tae Woo Corp. *But cf. Thomas v. Witte*, Cal. App. 2d 322, 324 (Cal. Ct. App. 1963) (finding an implied waiver of partition where multiple investors acquired certain real property to be used specifically for a long-term oil and gas operation). A partition would not defeat the purpose of the lease.

13. A partition would also not conflict with any agreement or contract among the Cotenants. *But cf. Schwartz v. Shapiro*, 229 Cal. App. 2d 238, 253 (Cal. Ct. App. 1964) (finding an implied waiver of partition where the co-owners of real property agreed not to sell their one-half property interest before giving the other co-owner the right to purchase it). Although Jung agreed to allow Kim to use the Disputed Property, the parties made no agreement or offered any consideration to limit Jung's right to later revoke Kim's license. Jung retained the right to partition the property despite the absence of any discussion regarding a potential future partition, *Sweeny v. Bay State Oil & Gas Co*., 133 P.2d 538, 540 (Okla. 1943), and despite Kim's improvement of the Disputed Property. *See Benson v. Fox*, 589 S.W.2d 823, 826 (Tex. App. 1979). Furthermore, the parties made no durational limitation on Kim's permissive use of the Disputed Property, making any potential waiver of partition invalid as an unreasonable restraint on alienation. *See Roberts v. Jones*, 30 N.E.2d 392, 393-94 (Mass. 1940); *Smith v. Brasseale*, 105 So. 199, 200 (Ala 1925).

14. Lastly, Kim argues that partition should be denied in the interests of fairness. A court may deny a cotenant's request for partition if the court determines it would be unfair. *See American Medical International, Inc. v. Feller*, 59 Cal. App. 3d 1008, 1015 (Cal. App. 1976). However, "litigants should be wary of relying on the expectation that the court will so exercise its discretion [to deny partition], since it should be so exercised only in extreme cases or where manifest injustice, fraud or oppression will result if partition is granted." *Condrey v. Condrey*, 92 So. 2d 423, 427 (Fla. 1957) (citation omitted); *see also Cook v. Williams*, 546 S.E.2d 767, 769 (W. Va. 2001) (holding that the trial court erred in refusing partition to ex-wife simply because ex-husband used the property for a business and had made improvements to the property). It would be unfair to deny Jung any benefit of his apportioned property for

the entire fifty-five year lease term based on his generous decision to allow Kim to use it. At the same time, the Court is cognizant of the extreme hardship Kim would suffer in having to relocate his business, which the Court takes into account in fashioning the most equitable type of partition.[14]

a. Type of Partition

1. There are two types of partition: (1) partition in kind, and (2) partition by sale. A partition in kind grants each cotenant an exclusive interest in their divided shares of the property. *Witt v. Sheffer*, 636 P.2d 195, 197 (Kan. Ct. App. 1981). A partition by sale results in a sale of the joint estate and a division of the proceeds. *Irons v. Le Sueur*, 487 So. 2d 1352, 1355-56 (Ala. 1986). A partition in kind is strongly favored. *Chesmore v. Chesmore*, 484 P.2d 516, 519 (Okla. 1971).

2. Here, a partition in kind is feasible and preferable by both parties; therefore, it shall be implemented. The Building is already physically divided into three separate units with each cotenant exclusively occupying their respective unit. Each cotenant shall exclusively own their respective Building units in severalty. Also, Koo shall own in severalty the property he built behind his southern Building unit.

3. The only difficult issue involves the property located behind Kim's and Jung's Building units because Kim is using that whole portion of the Subject Property for his business. In partition, the court, if possible, will allot the portion improved to the cotenant who made the improvement. *Bayley v. Nichols*, 104 N.E. 1054, 1056 (Ill. 1914). In light of the substantial improvements constructed by Kim on the Disputed Property, [15] and the necessity of such property for Kim's business in contrast to Jung's relatively minor interest in the property, the Court grants Kim the portion of the Subject Property on which Tae Woo Corp. occupies.

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[14] The trial court has discretion to fashion a partition judgment to prevent it from "becoming an instrument of fraud or oppression" based on the circumstances of the case. *Witt v. Sheffer*, 636 P.2d 195, 197 (Kan. Ct. App. 1981) (citing cases).

[15] Kim has a factory, barracks storage unit, A-frames, and many large aluminum pieces that encroach onto Jung's property.

4. When an equal division of property in a partition in kind is either impracticable or inequitable, the court has "broad equitable powers" to order the former cotenant receiving the larger portion of the property to compensate the other former cotenant for the disparity with an "owelty."[16] *Chesmore v. Chesmore*, 484 P.2d 516, 519 (Okla. 1971). An "owelty" is a "pecuniary sum awarded to one party in order to equalize the shares of the parties in partition." *Id.* at 518. The general rule is that, in ordering a partition in kind with an owelty, the court must find that the owelty is "equitably necessary; that the amount required is fair, and that its payment is not so imposed upon a party as to be unreasonably burdensome, considering both the condition of the property and the party." *Joslin v. Joslin*, 6 A.2d 456, 459 (R.I. 1939) (quotation omitted).

5. The Cotenants each took an undivided one-third interest in the entirety of the Subject Property. The Court finds that Kim shall be awarded a greater share of the Subject Property in order to allow him to continue operating Tae Woo Corp. in a manner consistent with the last twenty-five years. However, since Jung will necessarily receive a lesser portion of the Subject Property as originally agreed upon among the Cotenants, Kim shall pay Jung a reasonable amount of owelty to compensate Jung for receiving a smaller quantum of property.

b. Amount of Owelty

1. The Court calculates the amount of owelty based on the fair market value of the Disputed Property at the time Jung filed his partition claim on November 1, 2010. The owelty payment shall also date back to November 1, 2010 and continue throughout the term of the lease.

2. Both parties presented expert witnesses who appraised the Subject Property and offered their opinion as to its fair market value. The Court weighs the credibility and scrutinizes the testimonies of these experts in determining the amount of owelty Kim owes Jung.

[16] "Owelty" of partition is imbedded in the common law. *See* 59A Am. Jur. 2d *Partition* § 174 (2012). Therefore, it may be used in the Commonwealth. *See* 7 CMC § 3401.

3. Plaintiffs' expert witness David S. Demapan ("Mr. Demapan") is a licensed real estate appraiser and possesses a master's degree in accounting. He owns a consulting firm in Saipan called Demapan & Associates. He has worked in taxes, appraisals, and financial reporting for the past fifteen to twenty years. Over the course of his career, Mr. Demapan has completed more than thirty appraisals.

4. Mr. Demapan personally inspected the Subject Property and researched the market conditions in the course of appraising the fair market value of the Subject Property in fee simple. Mr. Demapan created an appraisal report (hereinafter, "Demapan's Appraisal Report"), wherein he concluded that the fair market value of Jung's one-third interest in the Subject Property is $44,253.00.

5. In reaching this conclusion, Mr. Demapan used the Sales Comparison Approach; whereby, he compared the Subject Property to three other real properties in the same neighborhood of Gualo Rai that were recently transacted. Mr. Demapan considered various differences among the properties in making any necessary value adjustments, and assigned a percentage of weight to the comparable properties correlating to their level of similarity to the Subject Property. He reached a "Combined Weighted Values Indicator" of $41.00 per square meter. Mr. Demapan multiplied $41.00 by the total area of the Subject Property (3,238 square meters), divided by three, to reach the $44,253.00 figure for Jung's one-third portion of the Subject Property.

6. Mr. Demapan also calculated Kim's three and a half years of past due rent for the Disputed Property, from June 30, 2008 to May 17, 2012, in the amount of $10,332.00. He reached this figure by multiplying the value per square meter ($41.00) by the area of the

Disputed Property (480 square meters),[17] times a 15% capitalization rate,[18] times 3.5 years of unpaid rent, which comes out to $10,332.00.[19]

7. The Court is concerned that Mr. Demapan's figures are inflated because Mr. Demapan: (1) appraised the Subject Property in fee simple without making any adjustment for the Cotenants' leasehold interest of thirty-four remaining years;[20] (2) used the same per-square-meter value of $41.00 for both the entire Subject Property and the Disputed Property without making any adjustments for the substantial limitations encumbering the Disputed Property; and (3) used an excessive capitalization rate for his calculations of Kim's past due rent.

8. ***First***, Mr. Demapan valued the Subject Property based on an interest in fee simple even though the Cotenants possess only a leasehold interest. During trial, Mr. Demapan conceded that an appraisal of the Subject Property based on a leasehold interest would yield a different fair market value than what he concluded. ***Second***, Mr. Demapan derived the value of the Disputed Property from the fair market value of $41.00 per square meter he assigned to the entire Subject Property. Logically, a large piece of real property abutting a main road like Middle Road is more valuable than a small piece of property landlocked by a commercial building, residential property, a noisy aluminum factory and a warehouse. In the case at hand, the only relevant determination is the fair market value of the Disputed Property, which must logically be less per square meter than the fair market value of the Subject Property as a whole.

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[17] Mr. Demapan relied on the assumption that the Disputed Property consists of 480 square meters in making his calculations. However, during trial, the parties stipulated that the area of the Disputed Property is 487 square meters. Therefore, Mr. Demapan's conclusions are slightly undervalued in light of the updated figure of 487 square meters for the area of the Disputed Property.

[18] The capitalization rate "basically represents the net operating income of the subject property in percentage." (Demapan's Appraisal Report at 9.)

[19] Substituting the correct area of the Disputed Property into Mr. Demapan's calculations results in a past due rent amount of $10,482.68.

[20] Although both experts agreed that a fifty-five year leasehold is equivalent to a fee simple interest for purposes of appraisals in the CNMI, an adjustment should be made when a leasehold is for less than fifty-five years. In 2008, there were only thirty-four years remaining on the lease, but Mr. Demapan made no adjustments. Curiously, Mr. Tiples appraised the Disputed Property also in fee simple without appearing to have made any adjustment for the Cotenants' reduced leasehold interest.

9. ***Third***, Mr. Demapan used a 15% capitalization rate despite his acknowledgement that the Department of Public Land (DPL) uses a capitalization rate of 4% to 8%. (Demapan's Appraisal Report at 9.) Mr. Demapan testified that the capitalization rate of 15% is appropriate because that is the rate "being used by the landowner in the existing agreement with Mr. Jung [and the other cotenants]." (*Id*.) However, the existing agreement between the landowner and the Cotenants was created in 1987 during much better economic times than in the time period of 2008 to the present.[21] It is unlikely the Cotenants would have agreed to a capitalization rate of 15% in the current economic depression, particularly considering that the standard capitalization rate currently being used by DPL is only 4% to 8%.

10. Defendants' expert witness Lilio B. Tiples ("Mr. Tiples") is a licensed appraiser in the CNMI and a registered civil engineer. He owns his own appraisal company in Saipan, known as LBT Appraisals. He has been doing appraisals since 1987 to the present, including twenty-one years in Saipan. Over the course of his career as an appraiser, Mr. Tiples completed more than 600 appraisals.

11. Like Mr. Demapan, Mr. Tiples used the Sales Comparison Approach; whereby, Mr. Tiples compared the Subject Property to three similar properties in the same area that had been recently transacted. He researched the current market conditions, and made various adjustments in values based on the differences between the subject and comparable properties. He concluded in his appraisal report (hereinafter, "Tiples' Appraisal Report") that the fair market value for Jung's one-third interest in the Subject Property is $61,521.81 at $57.00 per square meter.

12. Unlike Mr. Demapan, Mr. Tiples went one step further in making a large downward adjustment in value for the severe limitations encumbering the Disputed Property. The Disputed Property is essentially "landlocked." (Tiples' Appraisal Report at 21.) It is encompassed by a commercial building to the West, an aluminum factory to the North, a warehouse to the South, and residential property to the East. The only access to the main road

[21] According to Mr. Demapan, "the economy on the island is in depression," "a number of businesses who have been in operation for many years have either closed down their operations or filed for bankruptcy," "[t]he island is not as safe as before," and "[t]he CNMI government is broke." (*Id*. at 6-7.)

(Middle Road) is through one of the adjoining properties. There is no visibility of the Disputed Property from Middle Road, which impairs its value as a commercial property. And the neighboring commercial structures impair its appeal as a residential property. "The market for the [Disputed Property] is limited essentially to one or more adjoining property owners." (*Id.*)

13. Mr. Tiples first calculated the fair market value of the Disputed Property without consideration of its limitations. He multiplied $57.00 per square meter (fair market value of the Subject Property) by 494 square meters (the area of the Disputed Property) for a total value of $28,158.00.[22] Next, he subtracted $9,964.74 to account for the lack of an access way to the Disputed Property for a total fair market value of $18,193.36, or rounded to $18,000.00.[23] When the stipulated area of 487 square meters for the Disputed Property is substituted into Mr. Tiples' formula, the resulting fair market value for the Disputed Property is $17,794.26.

14. Like Mr. Demapan, Mr. Tiples also calculated the market rent of the Subject Property by multiplying the fair market value of the property by the land interest rate.[24] The only difference is that Mr. Tiples used a 6% land interest rate as opposed to 15% used by Mr. Demapan. Mr. Tiples' calculation of $18,000.00 multiplied by a 6% interest land rate comes out to $1,080.00 per year, or $90.00 per month. In adjusting this figure to reflect the correct area of the Disputed Property, the market rent is $1,067.66 per year, or $89.00 per month.[25]

15. The Court accepts Mr. Tiples' initial appraisal of the Disputed Property of $27,759.00, or $57.00 per square meter. The Court also agrees with Mr. Tiples that a

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[22] Mr. Tiples' initial appraisal of the Disputed Property is slightly overvalued because the parties subsequently, at trial, stipulated that the Disputed Property consists of 487 square meters as opposed to the 494 square meters figure relied upon by Mr. Tiples in his calculations.

[23] Mr. Tiples first searched for market data on a sale of a landlocked property similar to the Disputed Property. Mr. Tiples was unsuccessful. Therefore, he calculated the diminution in value of the landlocked Disputed Property by multiplying the size of a necessary access road (6.1 meters x 28.66 meters or 174.82 square meters) by the Subject Property's fair market value ($57.00 per square meter) for a total of $9,964.74.

[24] Mr. Tiples' term of "land interest rate" is essentially interchangeable with Mr. Demapan's term of "capitalization rate" for purposes of calculating the fair market rent of the Subject Property.

[25] Mr. Tiples also calculated the monthly rent of the Disputed Property for the remainder of the lease term pursuant to the contract provisions. However, Mr. Tiples noted that the contract rent is higher than the market "because the lease was negotiated and executed at the time the economic condition was still good." (Tiples' Appraisal Report at 22-23.)

downward adjustment must be made to the Disputed Property. Common sense dictates that the value per square meter must be substantially less for the Disputed Property than for the entire Subject Property for the reasons illuminated in Mr. Tiples' Appraisal Report, i.e. lack of access road. Mr. Demapan, on the other hand, made no adjustment for the Disputed Property's lack of access road. Mr. Demapan also lost some credibility at trial when he testified hypothetically that the rental value for an ocean-view property should be equal to a non-ocean-view property comparable in all other respects. Also, Mr. Demapan's market rent appraisal lacks credibility because he used a 15% capitalization rate simply because it was also used in the lease that was created in 1987 during much better economic times than in the present. Mr. Tiples, however, used a 6% land interest rate, which is the average rate currently used by DPL according to Mr. Demapan,[26] and thus more accurately reflects the present fair market rent.

16. The Court finds, however, that Mr. Tiples' downward adjustment is excessive. Specifically, Mr. Tiples used an unreasonably large "necessary access road" of 174.82 square meters in calculating the deduction.[27] Based on the size and geographical location of the Disputed Property, the Court finds that a necessary access road would consist of 6.1 meters by 12.2 meters, or 74.42 square meters. Applying this figure into Mr. Tiples' formula, the fair market value of the Disputed Property is $23,517.06 and the monthly rent is $117.59, rounded to $120.00. Based on the reports and testimonies of Mr. Demapan and Mr. Tiples, the Court finds that the fair market value of the Disputed Property is $23,517.06 and its fair market rent is $120.00 per month.

17. The Subject Property shall be partitioned in kind so that Kim acquires a divided and exclusive interest in his northern one-third portion of the Subject Property plus the portion of the Disputed Property occupied by Tae Woo Corp. Jung shall acquire a divided and exclusive interest in his middle one-third portion of the Subject Property less the portion of the Disputed Property occupied by Tae Woo Corp.

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[26] Mr. Tiples contends the "interest rates applied in public land lease range from 2% to 8%." (Tiples' Appraisal Report at 21.) Based on this assertion, Mr. Tiples' used a higher-end interest rate.

[27] Mr. Tiples provided no basis for his determination that a necessary access road would consist of 174.82 square meters.

18. Kim shall pay Jung past due rent from November 1, 2010 to the date of this order in the amount of $120.00 per month.[28] Thus, the past due rent up to and including October 1, 2012 is $2,880.00. Kim shall continue paying Jung rent in the amount of $120.00 per month from November 1, 2012 until the expiration or termination of the lease.

B. COUNT IV – BREACH OF ORAL CONTRACT

1. Jung seeks a judgment of $182,120.55 for unpaid loss rental income plus interest[29] as of June 1, 2012 pursuant to an oral rental agreement between Kim and Jung. (*See* Pls.' Ex. 060C.) Kim denies agreeing to pay Jung any rent for the use of the Disputed Property, and claims he began using the Disputed Property with Jung's express, unconditional consent.

2. Jung, in bringing a breach of contract claim, has the burden to prove the existence of the contract. *Belden v. Thorkildsen*, 197 P.3d 148, 155 (Wyo. 2008) (citing cases); *see also In re Estate of Haskins*, 224 S.W.3d 675, 683 (Tenn. Ct. App. 2006) (holding the plaintiff failed to meet his burden to prove the existence of the alleged oral contract because his testimony was "confusing" and "conflicting").

3. Jung failed to meet his burden in proving the existence of an oral rent contract between Jung and Kim. Kim used the Disputed Property for twenty-three years without paying Jung any rent before Jung filed the instant breach of contract claim. Jung also testified in his deposition and at trial that he never asked Kim for rent for twenty years until 2007. (Jung's Dep. at 62: 12-22.) Jung's testimony is also conflicting because in his pleadings and exhibits he claims to have repeatedly demanded Kim to pay him rent. (Pls.' Compl. ¶ 23) ("Every year

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[28] The Court declines to award any prejudgment interest. There is no statutory prejudgment interest rate in the Commonwealth, but the court has discretion to order prejudgment interest for the withholding of property. *See Manglona v. Baza*, 2012 MP 4 ¶ 23; *see also Manglona v. Gov't. of the Commonwealth of the N. Mariana Islands*, 2010 MP 10 ¶ 20. In determining whether to order prejudgment interest, the court should consider principles of fairness and the extent of the plaintiff's damages. *Manglona*, 2010 MP 10 ¶ 26. Here, it is not necessarily fair to punish Kim for refusing to suddenly pay Jung a large sum of money or vacate the premises where he had been operating his business for two decades without objection. Also, the damages incurred by Jung from Kim's withholding of the Disputed Property are minimal since that property is of little use to Jung.

[29] Plaintiffs calculated the total damages for unpaid loss rental income plus interest based on three different interest rates, including three, six and nine percent that correlate to damages in the amount of $127,910.35, $155,015.45, and $182,120.55, respectively. (Pls.' Exs. 033A-060C.)

since 1987, Mr. Jung tried to collect the monthly payments, but each year Mr. Kim promises to pay he fails."); (Pls.' Ex. 029.)

4. Prior to 2007, Jung and Kim were on good terms. Then, in 2007, their relationship broke down apparently because Jung heard rumors that Kim was spreading insults against Jung among various friends and acquaintances. Immediately after the relationship broke down, Jung demanded Kim to pay him rent, reasoning Kim should pay based on "common sense" because "he use[d] [Jung's] land." (Jung's Dep. at 62: 12-22, 63: 2-7.) Also around this time, Jung was experiencing financial difficulties due to multiple civil judgments against him for many thousands of dollars. It seems clear that Jung's demand for rent was not based on an oral contract created some twenty years earlier, but was based on ill-feelings developed towards Kim, a need to fulfill sudden financial needs, and Jung's notion of fairness.

5. There is no oral contract between Kim and Jung.

C. COUNT III - UNJUST ENRICHMENT

1. In order to establish a claim for unjust enrichment, the plaintiff must prove that the defendant received a benefit and the retention of that benefit would be unjust. *See Olaitiman v. Emran*, 2011 MP 8 ¶ 15; *Manglona v. Tenorio*, Civ. No. 93-1061 (NMI Super. Ct. June 10, 2002) (Findings of Fact and Conclusions of Law at 5, 7); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution."). There is no "unjust enrichment" when the defendant enjoys a benefit upon the consent of the plaintiff. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d (2011).

2. "Cotenancy gives each tenant equal rights of use and possession of the co-owned property," *Del Rosario v. Camacho*, 2001 MP 2 ¶ 89, and a cotenant out of possession has no right to a proportion of the "profits derived from the possessing cotenant's own capital, labor and skill." *Id*. at ¶ 91 (citation omitted).

3. While cotenants share equal rights to the use and possession of the property, "none can be excluded from any portion thereof." *Id*. ¶ 89. A cotenant who is excluded, or ousted,

from the premises is entitled to recover a "share of the value of the use and occupation of the land from the time of the ouster." *Zaslow v. Kroenert*, 176 P.2d 1, 5 (Cal. 1946); *see also Gillmor v. Gillmor*, 694 P.2d 1037, 1039 (Utah 1984); *Bowers v. Rightsell*, 294 S.W. 21, 23 (Ark. 1927).

4. An "ouster" occurs when one cotenant makes "a clear, unequivocal demand to use" the property and the possessing cotenant prevents him from exercising this legal right. *Gillmor*, 694 P.2d at 1040-41. There must be "clear and unmistakable" evidence of the occupying cotenant's intent to dispossess the nonoccupying cotenants. *Heggen v. Marentette*, 144 N.W.2d 218, 226 (N.D. 1966) (quotations and citations omitted); *Hampton v. Manuel*, 405 S.W.2d 47, 51-52 (Tenn. Ct. App. 1965) ("When one attempts to set up an ouster as between tenants in common the evidence should be viewed by the court most strongly against that person who attempts to set up an ouster and in favor of the tenant in common who makes no such attempt."); *Sheehan v. All Persons*, 252 P. 337, 340 (Cal. Ct. App. 1927).

5. Jung cannot meet his burden in proving that Kim ousted him because (1) Jung did not make a clear, unequivocal demand to use the Disputed Property, and (2) there is no clear and unmistakable evidence of Kim's intent to dispossess Jung of the Disputed Property.

6. ***First***, Jung demanded Kim to vacate the premises or pay rent but did not clearly communicate a desire to personally occupy the Disputed Property.[30] A demand for rent or to vacate the premises brought by the nonoccupying cotenant against the occupying cotenant does not, standing alone, amount to an ouster. *See Spiller v. Mackereth*, 334 So.2d 859, 862 (Ala. 1976) ("[S]everal cases have held that the occupying cotenant is not liable for rent notwithstanding a demand to vacate or pay rent."); *Shives v. Niewoehner*, 191 N.W.2d 633, 636 (Iowa 1971); *Mueller v. Allen*, 128 P.3d 18, 24-25 (Utah Ct. App. 2005) (holding that

[30] Jung testified at trial that he told Kim he wanted to use his land but did not specify for what purpose or that he wanted to personally use and enjoy the land. *See Spiller v. Mackereth*, 334 So.2d 859, 862 (Ala. 1976) ("The normal fact situation which will render an occupying cotenant liable to out of possession cotenants is one in which the occupying cotenant refuses a demand of the other cotenants to be allowed into use and enjoyment of the land."). Also, neither of the two demand letters directed to Kim that Mr. Quichocho wrote on behalf of himself and Jung made any mention of Jung's desire to use the property occupied by Defendants. (Pls.' Exs. 029-030); (Defs.' Ex. A.)

plaintiff's use of the property over defendant's objection did not constitute an ouster because "[n]othing in the record indicate[d] . . . that [plaintiff] wanted to reoccupy the home after she moved out"); *Brown v. Havens*, 85 A.2d 812, 815 (N.J. Super. Ct. Ch. Div. 1952).

7. Also, Jung's construction of the small, wooden barracks on the Disputed Property did not present clear and unequivocal evidence of Jung's intent to use the whole Disputed Property. *Cf. Lilly v. Lynch,* 945 P.2d 727, 733 (Wash. Ct. App. 1997) (holding that the property title owner's minor usage of the disputed area did not interrupt the adverse claimant's possession). While *Lilly* dealt with the issue of adverse possession, the issue of ouster is very similar. Here, Jung's construction of the small, wooden barracks did not put Kim on notice of Jung's intention to retake his property because the barracks did not interrupt Kim's use of the Disputed Property or the operation of Tae Woo Corp. *Cf. id*. Jung failed to express in words or actions an unequivocal desire to use and enjoy his property at the exclusion of Kim.

8. The first suggestion that Jung intended to use the Disputed Property arose at trial wherein he testified he wanted to build a house on the property. The Court finds this testimony disingenuous considering Jung never mentioned a desire to build a house on the Disputed Property during any of the proceedings before trial. Furthermore, both expert witnesses testified that building a house on the Disputed Property would certainly not be the highest and best use of the land. That area regularly floods, which is why the back door of Jung's middle Building unit is raised a few feet. Also, the area is landlocked and adjacent to a noisy factory. Lastly, Jung admitted he did not have the financial means to build a house, but he intended to seek financial assistance from his brother, which was also never mentioned prior to trial. The Court does not believe Jung intended to build a house on the Disputed Property, and moreover, it is undisputed that Jung never communicated this "desire" to Kim.

9. ***Second***, Kim did not express a clear intent to dispossess Jung of the Disputed Property. Kim made no statements to Jung to that effect, nor did Kim claim to anyone that he was the absolute owner of the Disputed Property. Kim merely used the Disputed Property for his business. "'Mere possession and use' of the land by one cotenant does not by itself constitute 'ouster' of the other cotenants." *Apatang v. Mundo*, 4 NMI 90, 93 (1994) (quoting

Osborn v. Warner, 694 P.2d 730, 733 (Wyo. 1985)); *Gonzalez v. Gonzalez*, 236 A.D.2d 589, 590 (N.Y. App. Div 1997).

10. The only basis for finding an ouster is Kim's construction of the Prison Fence that blocked Jung's access to the Disputed Property. However, when Jung confronted Kim about the fence, Jung testified that Kim said he built the fence to protect Tae Woo Corp. against burglary – not because Kim was claiming the property as his own at the exclusion of Jung. This testimony is consistent with Kim's trial and deposition testimony that he was concerned about theft because Tae Woo Corp.'s inventory had been stolen on multiple prior occasions. (Kim's Dep. at 89: 13-18.) The Alabama Supreme Court similarly found no ouster when the occupying cotenant put locks on a jointly-owned building because the locks were installed to protect the merchandise inside rather than to exclude the other cotenants from entering. *Spiller*, 334 So. 2d at 862.

11. Kim did not oust Jung; therefore, Jung's claim for unjust enrichment fails.

D. COUNT V - ACCOUNTING

1. "An equitable accounting is a remedy which prevents unjust enrichment by requiring disgorgement of profits a fiduciary receives as a result of a breach of the duty of loyalty." *Matsunaga v. Matsunaga*, 2006 MP 25 ¶ 30 (citing cases).

2. "Where [] 'possession by one tenant [is] accompanied by an ouster or exclusion of a [cotenant],' the excluded cotenant may recover the reasonable rental value of the portion of the property so occupied." *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 942 A.2d 21, 28 (N.J. Super. Ct. 2008); s*ee also Teixeira v. Verissimo*, 239 Cal. App. 2d 147, 155-56 (Cal. Ct. App. 1966) (citing cases).

3. Jung's cause of action for accounting is directly derivative of his claim for unjust enrichment. Because the Court finds no ouster, and thus, no unjust enrichment, Jung is not entitled to an accounting. *See supra* pp. 21-23.

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E. COUNT VI - TRESPASS/ENCROACHMENT

1. "'An encroachment is an intrusion or invasion on adjoining property.'" *Estate of Taisacan v. Hattori*, 4 N. Mar. I. 26, 30 (1993) (quoting 2 C.J.S. *Adjoining Landowners* § 41 (1972)). "A trespass, in turn, 'consists of a physical entry upon the lands of another and taking possession thereof under such circumstances.'" *Id*. No trespass or encroachment can lie when the physical entry or intrusion on the land is privileged or authorized. Restatement (Second) of Torts § 158 cmt. e (1965) ("Conduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor.").

2. Generally, a cotenant's presence is privileged as a matter of law "[s]ince each cotenant has a legal right to enter upon and enjoy the common property," which *usually* precludes an action for trespass. *Mueller v. Allen*, 128 P.3d 18, 24 (Utah Ct. App. 2005) (quoting 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 87 (2005)). "An action for trespass, however, 'may arise against a cotenant who has actually ousted another.'" *Id*.; *Parker v. Shecut*, 562 S.E.2d 620, 622 (S.C. 2002); *Buchanan v. Jencks*, 96 A. 307, 310 (R.I. 1916) ("[A]n action of trespass will lie by one tenant in common against his cotenant only where there has been an ouster or the destruction of some portion of the common property."); *Davis v. Poland*, 66 A. 380, 382 (Me. 1906).

3. Because the Court finds no ouster as discussed above, Jung's claim for trespass and encroachment fails. *See supra* pp. 21-23.

F. COUNT VII - NEGLIGENCE PER SE

1. On June 25, 2012, Plaintiffs finished their case-in-chief, at which time Defendants brought forth a Rule 52(c) motion for judgment as a matter of law as to Count VII for negligence per se.[31] On the following day, June 26, 2012, the Court granted Defendants'

[31] Defense counsel actually brought forth a motion for directed verdict under Commonwealth Rule of Civil Procedure 50(a). However, the Court noted in its ruling from the bench that Rule 50(a) is inapplicable because this is a bench trial as opposed to a jury trial. Therefore, the Court reviewed the motion under Rule 52(c) as a judgment as a matter of law, which is used in civil bench trials. *See New Shintani Corp. v. Quitugua*, 2011 MP 9 ¶ 3, n.4. The Court also noted that, in ruling on a Rule 52(c) motion, the judge is not required to make all

motion. In compliance with Rules 52 (a) and (c) of the Commonwealth Rules of Civil Procedure, the Court now supports its judgment on Defendants' motion with these findings of fact and conclusions of law.

2. The Court noted in its December 21, 2011 partial summary judgment order that the only issue remaining for Count VII was whether "Defendants did, in fact, remove *all* means of egress and emergency exits to the Lot *in violation* of the [Commonwealth Building Safety Code]." *Jung et al. v. Kim et al*., Civ. No. 10-0314 (NMI Super. Ct. Dec. 21, 2011) (Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment at 12).

3. "All buildings or structures . . . not provided with adequate egress . . . are, for the purpose of this section, 'unsafe.'" 2 CMC § 7124(a).

4. "Additions or alterations shall not be made to an existing building or structure which . . . cause the existing building or structure to become unsafe." 2 CMC § 7113(c)(1).

5. In the December 21, 2011 partial summary judgment order, this Court raised the concern that "the CBSC does not define 'adequate egress.'" *Jung et al. v. Kim et al*., Civ. No. 10-0314 (NMI Super. Ct. Dec. 21, 2011) (Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment at 12).

6. At trial, Plaintiffs did not attempt to explain what constitutes "adequate egress" under the CBSC, nor present any testimony from competent witnesses about what "adequate egress" requires. Plaintiffs gave only conclusory statements that Defendants removed adequate egress, making the Building unsafe. Plaintiffs did attempt to elicit an opinion from their expert witness, Mr. Demapan, about the existence of a building code violation, but the Court sustained an objection to the question for being outside the scope of Mr. Demapan's expertise in appraisals and accounting.

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reasonable inferences in favor of the non-moving party. *Fifth Third Bank of W. Ohio v. United States*, 56 Fed. Cl. 668, 683 (2003); *Columbia First Bank, FSB v. United States*, 60 Fed. Cl. 97, 101 (2004); 47 Am Jur 2d *Judgments* § 564 (2012); 32B Am Jur 2d *Federal Courts* § 2199 (2012); 9-50 Moore's Federal Practice *Civil* § 50.06 (2012).

7. Defendants, on the other hand, pointed to clear statutory language in the Uniform Building Code (UBC) that outlines detailed requirements for the means and number of exits required based upon a building's use, size, and occupancy rate. The CBSC defers to the UBC whenever the CBSC is silent on a matter of design or construction. 2 CMC § 7142. The number of exits or means of egress constructed on a piece of real property is a matter of design or construction. Given the type of use and level of occupancy of Jung's middle Building unit, the UBC requires that each of the two stories of Jung's unit have at least one means of egress. UBC § 1004.2.3.2 and Table 10-A.

8. Based on the photographs and testimonies admitted into evidence, the Court found that the first story provides adequate egress through the front entrance door that leads to the parking lot. Also, the second story provides adequate egress, even though the Prison Fence blocks the back door, because there is a front entrance that leads to the balcony and allows one to exit down the outdoor staircase located on the northern-most end of the Building. During trial, Mr. Quichocho admitted that the length of Jung's middle Building unit does not exceed 200 feet and, thus, its egress cannot run afoul the rule for travel distance. UBC § 1004.5.2.1 ("In buildings not equipped with an automatic sprinkler system throughout, the travel distance shall not exceed 200 feet.").

9. There is one means of egress on each story of Jung's middle Building unit in compliance with the Commonwealth and uniform building codes.

G. COUNT VIII – PUBLIC NUISANCE

1. Plaintiffs allege Defendants committed a public nuisance for violating the CBSC.

2. "Violation of the building safety code shall constitute a per se public nuisance." 2 CMC § 7126(d).

3. As discussed above, Defendants did not violate the CBSC so Plaintiff's cause of action for public nuisance fails. *See supra* pp. 24-26.

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III.
CONCLUSION

For the foregoing reasons, each of Plaintiffs' causes of action, with the exception of Count II for Partition, are hereby **DENIED**.

The Court hereby **GRANTS** Plaintiffs' Count II for Partition. The Subject Property shall be partitioned in kind so that Kim acquires a divided and exclusive interest in his northern one-third portion of the Subject Property plus the portion of the Disputed Property occupied by Tae Woo Corp. Jung shall acquire a divided and exclusive interest in his middle one-third portion of the Subject Property less the portion of the Disputed Property occupied by Tae Woo Corp.

Kim shall pay Jung past due rent from November 1, 2010 to October 1, 2012 in the amount of $120.00 per month. Therefore, as of October 1, 2012, Kim shall pay Jung past due rent in the amount of $2,880.00. Kim shall continue paying Jung rent in the amount of $120.00 per month from November 1, 2012 until the expiration or termination of the lease.

IT IS SO ORDERED this 21st day of September, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge