

UNITED STATE BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

AUSTIN, MICHAEL ROBERT AND CARRIE ANN
DEBTORS

CASE NUMBER: 04-45325
MOTION FOR RELIEF
FROM THE AUTOMATIC STAY

- 1) Jeffrey Elfering and Patricia Elfering through their counsel of record, Robert P. Cunningham of Quinlivan & Hughes, P.A., and pursuant to Bankruptcy Rules 4001 and 9014, moves the Court for relief from the automatic stay set forth in 11 U.S.C. § 362.
- 2) The court will hold a hearing on this motion at 2:00 p.m. on November 4, 2004, at the United States Courthouse at 300 South Fourth Street, in Minneapolis, Minnesota.
- 3) Any response to this motion must be filed and delivered not later than November 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than October 26, 2004, which is seven days before the time set for hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE TO THIS MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
- 4) This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1471 and 11 U.S.C. § 362.
- 5) Michael Robert Austin and Carrie Ann Austin, Debtors, filed Chapter 7 Bankruptcy petition on or about September 22, 2004.
- 6) The Debtors are the owners of: 1980 Dodge Van; Flower shop inventory; Home Décor Inventory; Quilted Bear Consignment Items; HP Computer with printer; IBM Computer with printer; 1998 IBM Office Jet Computer; Fax Machine; 2000 HP

Vectra; HP Laserjet; Other Misc. Office Equipment and Supplies (hereinafter “Collateral”).

- 7) The Elferings have a perfected security interest in the Collateral by virtue of an installment promissory note and security agreement. See attached Exhibit A and B.
- 8) The Debtors are in default of the obligations owing to the Elferings and the current amount owing is approximately \$220,662.85, plus interest.
- 9) The Elferings commenced a District Court action on July 16, 2004 against Debtors to collect on the installment promissory note and security agreement. On June 16, 2004, Judge Lorette of Stearns County District Court issued a Temporary Restraining Order against Debtors to preclude them from disposing of secured Collateral under the installment promissory note and security agreement entered into with the Elferings. See attached Exhibit C. The Temporary Restraining Order required Debtors to return all secured Collateral to the Elferings. Debtors have not returned all secured Collateral to the Elferings and the Elferings have not been able to sell the Collateral in accordance with the security agreement as this Bankruptcy proceeding was initiated one day prior to a District Court hearing requesting the court allow the secured Collateral to be returned and sold.
- 10) The Debtors have asserted counterclaims against the Elferings in this District Court action. See Exhibit D. The Debtors list said counterclaims as an asset in this Bankruptcy proceeding.
- 11) The fair market value of the above mentioned property has decreased and continues to decrease.

- 12) Pursuant to the schedules filed, the Debtors have no equity in the property and the property is not necessary to an effective reorganization.
- 13) If the automatic stay continues to be in effect, it would prevent the Elferings from realizing on their security described in this motion, the Elferings would be irreparably harmed as the value of its collateral continues to decrease and the Elferings would be deprived of adequate protection under 11 U.S.C. § 362.
- 14) There has been no offer of adequate protection that has been made by the debtors to the Elferings and it is unlikely that the Debtors have the ability to offer such protection.
- 15) By their own schedule, Debtors indicate they wish to surrender the floral business property to the Elferings.

WHEREFORE, Jeffery and Patricia Elfering move this Court for:

A) An order terminating or modifying the automatic stay to permit the Elfering's to continue their District Court action and enforce the Temporary Restraining Order that was issued by Stearns County District Court, which has been previously described in this motion;

B) In the alternative, relief in the form of adequate protection to prevent irreparable harm to the Elferings by continuation of the automatic stay;

C) Such other relief as the Court may deem just and equitable.

QUINLIVAN & HUGHES, P.A.

Dated: October 15, 2004

By: /s/ Robert P. Cunningham
Robert P. Cunningham #0283940
James S. McAlpine #322155
Krista L. Durrwachter #332367
Attorneys for Jeffrey and Patricia
Elfering
PO Box 1008
St. Cloud, MN 56302-1008
(320) 251-1414
(320) 251-1415 (Fax)

UNSWORN CERTIFICATE OF SERVICE

I, Robert P. Cunningham, declare under penalty of perjury that on October 15, 2004, I mailed copies of the attached Notice of Hearing and Motion for Relief from Stay by first class mail postage prepaid to each entity named below at the address stated:

Stephen L. Heller
Heller Law Firm, P.L.C.
Roosevelt Ofc. Park
606 - 25th Ave. So., Ste. 110
St. Cloud, MN 56301

Michael & Carrie Austin
PO Box 864
St. Joseph, MN 56374

U.S. Trustee
U.S. Trustee's Office
300 S 4th ST RM 1015
Minneapolis, MN 55415

Trustee
Terri A. Georgen-Running
PO Box 16335
St. Paul, MN 55116

Executed on: October 15, 2004

Signed: /s/ Robert P. Cunningham
Quinlivan & Hughes, P.A.
Attorney for Creditors Jeffrey
and Patricia Elfering
P.O. Box 1008
St. Cloud, MN 56302
(320) 251-1414

VERIFICATION

I, Jeffrey Elfering, the moving party, named in the foregoing notice of hearing and motion, declare under the penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated: 10/13/04

By: Patricia Elfering
Patricia Elfering

INSTALLMENT PROMISSORY NOTE

\$264,027.53

Date: September 5, 2000

For value received, **MICHAEL R. AUSTIN** and **CARRIE A. AUSTIN**, husband and wife, (the "Borrowers"), jointly and severally promise to pay to the order of **PATRICIA A. ELFERING** and **JEFFREY J. ELFERING**, wife and husband, (the "Lender"), at 103 East First Street South, Melrose, Minnesota, or at any other place designated at any time in writing by the holder hereof, in lawful money of the United State of America, the principal sum of **Two Hundred Sixty-four Thousand Twenty-seven and 53/100 Dollars (\$264,027.53)**, together with interest (calculated on the basis of actual days elapsed and a 365 day year) on the unpaid principal, from the date hereof until this Note is fully paid, at an annual rate of eight per cent (8%).

The Borrowers promise to pay principal and interest as follows:

Principal and interest shall be paid together in one hundred eighty (180) consecutive installments of Two Thousand Five Hundred and Twenty-three and 18/100 Dollars (\$2,523.18) each, beginning October 5, 2000, and on the same day of each month thereafter until September 5, 2015, when the entire unpaid principal and accrued interest hereon shall become due and payable. Each such installment, when paid, shall be applied first in payment of accrued interest and the balance thereof shall be applied in reduction of principal.

This Note is secured by a Security Agreement and Financing Statement, dated September 5, 2000, between Borrowers and Lender.

Prepayment shall be permitted, without penalty, provided that any prepayment shall be made simultaneously with a prepayment on that certain Contract for Deed entered into simultaneously with this Installment Promissory Note so that the balance due on this Installment Promissory Note and the balance due on the Contract for Deed shall be paid down proportionately to the end that the debt represented by both this Installment Promissory Note and the Contract for Deed will retire simultaneously.'

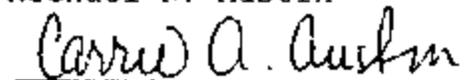
If any installment of principal and/or interest is not paid when due, or if the Borrowers shall fail to pay when due any indebtedness the Borrowers may owe for money borrowed, or if a garnishment summons or a writ of attachment is issued against or served upon the Lender for the attachment of any property of the Borrowers' in the Lender's possession or any indebtedness owing to the Borrowers, or if the Borrowers shall submit to the Lender any credit application or financial statement containing information which shall prove to be incorrect in any respect when made, or if the Borrowers are generally not paying their debts as such debts become due, or if the Lender shall at any time in good faith believe that the prospect of due and punctual payment of this Note is impaired, then, in any such event, the holder may, at its option, declare this Note to be immediately due and payable and this Note shall be immediately due and payable, together with all accrued unpaid interest, without notice or demand.

This Note shall also become automatically due and payable (including unpaid accrued interest) without notice or demand should the Borrowers die, or should a petition be filed by or against the Borrowers under the United States Bankruptcy Code. If this Note is not paid on the date it matures (whether at stated maturity or on an earlier date due to acceleration), the Lender shall have the right to set off the indebtedness evidenced by this Note against any indebtedness of the Lender to the Borrowers. The holder may at any time renew this Note or extend the maturity date of any one or more installments for any period and release any security for, or any party to, this Note, all without notice to or consent of and without releasing any accommodation maker, endorser, or guarantor. The Borrowers agree to pay all costs of collection, including attorney's fees, in the event this Note is not paid when due. Presentment or other demand for payment, notice of dishonor and protest are hereby waived by the Borrowers. This Note shall be governed by the substantive laws of the State of Minnesota, except insofar as the Lender may rely on the laws of the United States to justify the interest rate charged hereunder.

BORROWERS



Michael R. Austin



Carrie A. Austin

SECURITY AGREEMENT

THIS AGREEMENT, is made this 5th day of September, 2000, between **Michael R. Austin and Carrie A. Austin, husband and wife, 8806 - 170th Avenue, Royalton, Minnesota 56373, ("Debtor")**, and **Patricia A. Elfering and Jeffrey J. Elfering, wife and husband, 103 East First Street South, Melrose, Minnesota 56352 ("Secured Party")**.

SECURITY INTEREST AND COLLATERAL. To secure the payment and performance of each and every debt, liability, and obligation of every type and description which Debtor may now, or at any time hereafter, owe to the Secured Party (the "Obligations"), Debtor grants Secured Party a security interest (the "Security Interest") in the following property (the "Collateral"):

All now owned or later acquired, and wherever situated, business furniture, equipment, fixtures, inventory, work-in-process, and accounts receivable, including business fixtures attached to the real estate, all merchandise on hand and all proceeds therefrom.

THIS IS A PURCHASE MONEY SECURITY INTEREST.

together with the proceeds of all of the foregoing property and, in the case of equipment and other goods, together with all accessories, attachments, parts, equipment, accessions, and repairs now or hereafter attached or affixed thereto or used in connection therewith.

It is the intention of the parties that this obligation will be paid simultaneously with Contract for Deed payments on real estate purchased simultaneously with these assets and completion of the payments pursuant to the Contract for Deed will be required as part of the security for this transaction.

SPECIAL REPRESENTATIONS, COVENANTS, AND WARRANTIES OF DEBTOR. Debtor represents, covenants and warrants that:

- (a) **STATUS OF DEBTOR.** Debtor is an individual and, if Debtor is an individual, the address of Debtor's residence is that shown at the beginning of this agreement.
- (b) **USE OF COLLATERAL.** The Collateral will be used primarily for business purposes.
- (c) **PROCEEDS OF LOAN; PURCHASE MONEY.** The proceeds of a loan from the Secured Party will be used by Debtor to acquire the Collateral, and Secured Party may, at its option, disburse such proceeds directly to the seller of the Collateral, and/or to the insurance agent or broker for insurance thereon.



(d) LOCATION OF COLLATERAL.

- (1) **Fixtures.** If any part or all of the Collateral will, or may become, so related to particular real estate as to become a fixture, the legal description of the real estate concerned is:

Lots Ten (10), Eleven (11), and Twelve (12) of Hoeschen's Subdivision of part of Mill Block of Clark's Addition to Melrose, the wall of the W. line of said Lots, between Lots 12 & 13 of said block, being and constituting a party wall, in Stearns County, Minnesota.

together with all hereditaments and appurtenances belonging thereto and subject to all easements, restrictions and reservations of record.

and the name and address of the record owner of the real estate is: Michael R. Austin and Carrie A. Austin, husband and wife, 8806 - 170th Avenue, Royalton, Minnesota 56373.

- (2) **Chief Place of Business.** If the Collateral is used primarily for business, the chief place of business of Debtor is: Pat's Floral and Gifts, 415 East Main Street, Melrose, Minnesota 56352.
- (3) **Other Collateral.** All other Collateral will be kept at Pat's Floral and Gifts, 415 East Main Street, Melrose, Minnesota 56352. Debtor will not remove the Collateral from said location without the written consent of Secured Party, except for temporary periods of not more than 30 days.

- (e) **CHANGES OF ADDRESS.** Debtor will immediately notify Secured Party of any change in Debtor's addresses.

ADDITIONAL REPRESENTATIONS, WARRANTIES AND AGREEMENTS. Debtor represents, warrants, and agrees that:

- (a) Debtor has (or will have at the time Debtor acquires rights in Collateral hereafter arising) absolute title to each item of Collateral free and clear of all security interests, liens, and encumbrances, except the Security interest. Debtor will not sell or otherwise dispose of the Collateral, or any Interest therein, without the prior written consent of Secured Party.

(b) Debtor will:

- (1) keep all tangible Collateral in good repair, working order, and condition, normal depreciation excepted,
- (2) promptly pay all taxes and other governmental charges levied or assessed upon or against any Collateral, or upon or against the creation, perfection or continuance of the Security Interest,
- (3) keep all Collateral free and clear of all security interests, liens and encumbrances except the Security Interest.

- (4) at all reasonable times, permit Secured Party or its representatives to inspect any Collateral, wherever located, and to examine, inspect and copy Debtor's books and records pertaining to the Collateral, and its business and financial condition,
- (5) keep accurate and complete records pertaining to the Collateral and pertaining to Debtor's business and financial condition, and submit to Secured Party such periodic reports concerning the Collateral and Debtor's business and financial condition as Secured Party may from time to time request,
- (6) promptly notify Secured Party of any loss of, or material damage to, any Collateral or of any adverse change, known to Debtor, in the prospect of payment of any sums due on or under any account constituting Collateral,
- (7) at all times keep all tangible Collateral other than household goods insured by an insurer selected by Debtor (provided that Secured Party may refuse to accept an insurer offered by Debtor for reasonable cause) against fire, theft, collision (in the case of motor vehicles) and such other risks as Secured Party may reasonably request, with a loss payable clause in favor of Secured Party, and deliver a duplicate copy of the policy of such insurance to the Secured Party,
- (8) pay when due, or reimburse Secured Party on demand, for all costs of collection of any of the Obligations and all other out-of-pocket expenses (including in each case all reasonable attorneys' fees) incurred by Secured Party in connection with the creation, perfection, satisfaction, or enforcement of the Security Interest, or the creation, continuance, or enforcement of this Agreement, or any or all of the Obligations, and
- (9) execute, deliver, or endorse any and all instruments, documents, assignments, security agreements, financing statements, documents relating to certificates of title, and other agreements and writings which Secured Party may at any time reasonably request in order to secure, protect, perfect, or enforce the Security Interest and Secured Party's rights under this Agreement.

If Debtor at any time fails to perform or observe any condition contained in this Agreement, and if such failure shall continue for a period of ten calendar days after Secured Party gives Debtor written notice thereof (or, in the case of the conditions contained in clauses (7) and (9) of this Section, immediately upon the occurrence of such failure, without notice or lapse of time) Secured Party may perform or observe such condition on behalf and in the name, place, and stead of Debtor and may take any other actions which Secured Party may reasonably deem necessary to cure or correct such failure (including, without limitation, the payment of taxes, the satisfaction of security interests, liens, or encumbrances, the performance of obligations under contracts or agreements with account debtors, the procurement and maintenance of insurance, the execution of financing statements, the endorsement of instruments, and the procurement of repairs or transportation).

Except to the extent that the effect of such payment would be to render any loan or foreclosure of money usurious, or otherwise illegal under any applicable law, Debtor shall pay Secured Party on demand the amount of all moneys expended and all costs and expenses (including reasonable

attorneys' fees) incurred by Secured Party in connection with, or as a result of, Secured Party's performing or observing such agreements, or taking such actions, together with interest thereon from the date expended or incurred by Secured Party at the highest rate applicable to any of the Obligations.

To facilitate the performance or observance by Secured Party of such agreements of Debtor, Debtor hereby irrevocably appoints (which appointment is coupled with an interest) Secured Party, or its delegate, as the attorney-in-fact of Debtor with the right (but not the duty) from time to time: (A) to create, prepare, complete, execute, deliver, endorse, or file in the name and on behalf of Debtor, any and all instruments, documents, financing statements, applications for insurance, and other agreements and writings required to be obtained, executed, delivered, or endorsed by Debtor under this Agreement, (B) to obtain, adjust, settle, and cancel the insurance required under clause (7) above, and (C) to endorse any draft, check, or other instrument issued by any insurer of the Collateral.

COLLECTION RIGHTS OF SECURED PARTY. Secured Party may, at any time (both before and after the occurrence of an Event of Default) notify an account debtor that such account has been assigned or transferred to Secured Party for security and shall be paid directly to Secured Party. If Secured Party so requests, Debtor will notify such account debtors in writing and will indicate on all invoices to such account debtors that the amount due is payable directly to Secured Party. At any time after Secured Party or Debtor gives such notice to an account debtor, Secured Party may, in its own name or in Debtor's name, demand, sue for, collect, or receive any money or property at any time payable or receivable on account of, or securing any such account, or grant any extension to, make any compromise or settlement with, or otherwise agree to waive, modify, amend, or change the obligations (including collateral obligations) of any such account debtor,

EVENT OF DEFAULT. Each of the following occurrences shall constitute an event of default under this Agreement ("Event of Default"):

- (a) Debtor's failure to pay any or all of the Obligations when due or (if payable on demand) on demand, or shall fail to observe or perform any condition or agreement herein,
- (b) any representation or warranty by Debtor set forth in this Agreement or made to Secured Party in any financial statements or reports submitted to Secured Party by or on behalf of Debtor shall prove materially false or misleading,
- (c) a garnishment summons or a writ of attachment shall be issued against, or served upon, the Secured Party for the attachment of any property of the Debtor in Secured Party's possession or any indebtedness owing to Debtor,
- (d) Debtor or a guarantor of any Obligation: (i) files or has filed against them, voluntarily or involuntarily, a petition in bankruptcy, or for reorganization, or for the adoption of an arrangement or plan under the United States Bankruptcy Act, or (ii) dies, or
- (e) Secured Party, in good faith, believes that the prospect of due and punctual payment of any or all of the Obligation is impaired.

REMEDIES UPON EVENT OF DEFAULT. Upon the occurrence of an Event of Default, and at any time thereafter, Secured Party may exercise any one or more of the following rights and remedies:

- (a) declare all unmatured Obligations to be immediately due and payable, and the same shall thereupon be immediately due and payable, without presentment or other notice or demand,
- (b) exercise and enforce any or all rights and remedies available upon default to a secured party under the Uniform Commercial Code, including but not limited to: (a) the right to take possession of any Collateral without judicial process or by judicial process (but without a prior hearing or notice thereof, which Debtor hereby expressly waives), and (b) the right to sell, lease, or otherwise dispose of any or all of the Collateral, and in connection therewith, require Debtor to assemble the Collateral and make it available to Secured Party at a place designated by Secured Party. If notice to Debtor of any intended disposition of Collateral or any other intended action is required by law, such notice shall be deemed commercially reasonable if given at least 10 calendar days prior to the date of intended disposition or other action, and
- (c) exercise or enforce any or all other rights or remedies available to Secured Party by law or agreement against the Collateral, against the Debtor, or against any other person or Property.

MISCELLANEOUS.

This Agreement can be waived, modified, amended, terminated or discharged, and the Security Interest can be released, only by a writing signed by Secured Party. A waiver signed by Secured Party shall be effective only in the specific instance and for the specific purpose given.

Mere delay or failure to act shall not preclude the exercise or enforcement of any of Secured Party's rights or remedies. All rights and remedies of Secured Party are cumulative and may be exercised singularly or concurrently, at Secured Party's option, and the exercise or enforcement of any one such right or remedy shall neither be a condition to, nor bar the exercise or enforcement of, any other. Secured Party shall not be obligated to realize on the Collateral at all, or in any particular manner or order, or to apply any cash proceeds of Collateral in any particular order of application.

All notices to Debtor shall be deemed sufficiently given if delivered or mailed by registered or certified mail, postage prepaid, to Debtor at its address set forth above or at the most recent address shown on Secured Party's records.

This Agreement shall be binding upon and inure to the benefit of Debtor and Secured Party and their respective heirs, representatives, successors, and assigns and shall take effect when signed by Debtor and delivered to Secured Party; Debtor waives notice of Secured Party's acceptance hereof. Secured Party may execute this Agreement if appropriate for the purpose of filing, but the failure of Secured Party to execute this Agreement shall not affect or impair the validity or effectiveness of this Agreement. A photographic or other reproduction of this Agreement or of any financing statement signed by Debtor shall have the same force and effect as the original for all purposes of a financing

statement.

This Agreement shall be governed by the laws of the State of Minnesota.

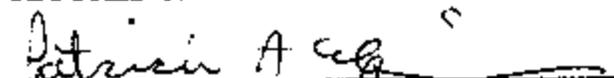
If any provision or application of this Agreement is held unlawful or unenforceable in any respect, such illegality or unenforceability shall not affect other provisions or applications which can be given effect, and this Agreement shall be construed as if the unlawful or unenforceable provision or application had never been contained herein or prescribed hereby.

This contract contains all of the terms and conditions of this transaction and supersedes any former documents or terms and conditions, written or verbal by any party or agent or employee of a party and that the dispute of any term or condition of this transaction shall be interpreted exclusively within the written terms of this agreement.

If this Agreement is signed by more than one person as Debtors, all such persons shall be bound both severally and jointly with the others, and the Obligations shall include all debts, liabilities, and obligations owed to Secured Party by any Debtor solely, or by both, or several, or all Debtors jointly, or jointly and severally, and all property described above shall be included as part of the Collateral, whether it is owned jointly by both or all Debtors, or is owned in whole or in part by one (or more) of them.

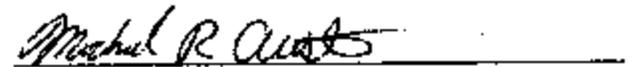
IN TESTIMONY WHEREOF, Debtor and Secured Party have hereunto set their hands the day and year first above written.

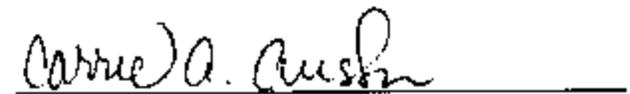
SECURED PARTY:


Patricia A. Elfering


Jeffrey Elfering

DEBTOR:


Michael R. Austin


Carrie A. Austin

This document prepared by:

Meyer Meyer Dymoke & Dymoke, P.A.
300 West Riverside Avenue
Melrose, MN 56352
Telephone (320) 256-4205

STATE OF MINNESOTA
COUNTY OF STEARNS

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

CASE TITLE:

Jeffrey and Patricia Elfering,

Plaintiff,

vs.

Michael and Carrie Austin, d/b/a Petal
Patch Floral, Gift & Wedding Center,

Defendants.

Case Type:

Court File #

C1042583

**ORDER FOR EX PARTE TEMPORARY
RESTRAINING ORDER**

TO: ABOVE-NAMED DEFENDANTS:

The above-captioned matter came before the Court for an ex parte Temporary Restraining Order on June 15, 2004. The Court makes the following order:

ORDER

1. Plaintiffs' Motion for Temporary Restraining Order is GRANTED. The Court finds that from the facts shown by the Affidavit and the Complaint that immediate and irreparable injury, loss, or damage will result to Plaintiffs before any hearing on the matter can occur.

2. Plaintiffs' attorney has provided the Court in writing the efforts made to give notice to Defendants and the reasons that support the ex parte Temporary Restraining Order.

3. Defendants are restrained from removing property from their business premises located at 415 East Main Street, Melrose, Minnesota, 56352. Defendants are restrained from interfering with Plaintiffs, their agents or representatives, and/or attorneys from seizing collateral located at or in Defendants' place of business identified above.



4. Defendants are restrained from interfering with Plaintiffs, their agents or representatives and/or attorneys from examining and copying Defendants' books and records, including invoices.

5. Plaintiffs may take possession of the premises or the collateral to prevent the unlawful sale or removal of inventory, other assets and other related items in the Security and Purchase Agreement and change the locks to prevent the sale or removal of the collateral.

6. Plaintiffs may enter the Defendants' premises to inventory the collateral, including but not limited to, the inventory, furniture, and equipment.

7. Defendants must turn over all inventory to Plaintiffs if Plaintiffs are not allowed to repossess the premise, change the locks and take possession.

8. Defendants are required to turn over all inventory and secured property identified in the Purchase Agreement and Security Agreement.

9. Defendants are required to open all safes and remove all inventory for the inspection of the Plaintiffs.

10. Defendants are required to turn over all of Defendants books and records, including invoices, to Plaintiffs.

11. The documents referenced in this Order are identified in the Motion for Ex Parte Temporary Restraining Order and incorporated herein by reference to include the Asset Purchase Agreement, the Security Agreement, Installment Promissory Note, the State of Minnesota UCC Fixture Financing Statement and the Non-Competition Agreement.

Dated: 6/16/04

DISTRICT COURT
STEARNS COUNTY, MN
FILED

By Kimberly Partridge

Judge of District Court

JUN 16 2004

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF STEARNS

SEVENTH JUDICIAL DISTRICT

CASE TITLE:

Case Type:

Court File #

Jeffrey and Patricia Elfering,

Plaintiff,

**ORDER FOR EX PARTE TEMPORARY
RESTRAINING ORDER**

vs.

Michael and Carrie Austin, d/b/a Petal
Patch Floral, Gift & Wedding Center,

Defendants.

TO: ABOVE-NAMED DEFENDANTS:

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Dated: _____

By _____
Judge of District Court

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF STEARNS

SEVENTH JUDICIAL DISTRICT

Case type: Other Civil
Court File No: C1-04-2583

Jeffrey and Patricia Elfering,

Plaintiffs,

vs.

ANSWER AND COUNTERCLAIM

Michael and Carrie Austin, d/b/a Petal
Patch Floral, Gift & Wedding Center,

Defendants.

TO: PLAINTIFFS ABOVE-NAMED and their attorney, Mr. James S. McAlpine of
QUINLIVAN & HUGHES, P.A., P.O. Box 1008, St. Cloud, MN 56302-1008.

ANSWER

Defendants Michael and Carrie Austin, d/b/a Petal Patch Floral, Gift & Wedding Center
("Austins") for their Answer to Jeffrey and Patricia Elfering's ("Plaintiffs") Complaint, state and
allege as follows:

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.
2. Deny each and every allegation, matter and thing in the Complaint, except as expressly admitted herein.
3. Admit the allegations in Paragraph 1 of the Complaint.
4. Admit the allegations in Paragraph 2 of the Complaint.

5. Admit the allegations in Paragraph 3 of the Complaint that on or about August 20, 2000, Plaintiffs executed a document styled as an Asset Purchase Agreement ("Asset Purchase Agreement") providing for the purchase and sale of a floral and gift business located at 415 East Main Street, Melrose, MN 56352 in Stearns County (hereafter the "Store"). The Austins are without sufficient knowledge or information to admit or deny that the document attached to the Complaint as Exhibit A is a true and correct copy of the Asset Purchase Agreement, and therefore deny same and put Plaintiffs to their strict proof thereof.

6. Admit the allegations in Paragraph 4 of the Complaint that the total purchase price of the Asset Purchase Agreement was \$365,000, which was agreed by the parties to allocated \$90,000 to inventory, \$102,500 to equipment, \$20,000 to a non-compete covenant, and \$152,500 to goodwill.

7. Admit the allegations in Paragraph 5 of the Complaint that on or about September 5, 2000, Plaintiffs and the Austins executed a document styled as a Security Agreement ("Security Agreement") and another document styled as a Contract for Deed ("Contract for Deed"). The Austins are without sufficient knowledge or information to admit or deny that the document attached to the Complaint as Exhibit D is a true and correct copy of the Security Agreement, or that the document attached to the Complaint as Exhibit B is a true and correct copy of the Contract for Deed and therefore deny same and put Plaintiffs to their strict proof thereof.

8. Deny the allegations in Paragraph 6 of the Complaint.

9. The Austins allege that the Security Agreement speaks for itself, and the Austins deny the remainder of Plaintiffs' allegations in Paragraph 7 of the Complaint.

10. Admit the allegations in Paragraph 8 of the Complaint.

11. Admit the allegations in Paragraph 9 of the Complaint that on or about September 5, 2000 the Austins executed a document styled as an Installment Promissory Note ("Installment Promissory Note"), but deny that Plaintiffs executed the Installment Promissory Note. The Austins deny that the Austins failed to make monthly payments under the Installment Promissory Note, and affirmatively allege that any failure to make payment was justified by Plaintiffs' prior material breaches of contract, all as more fully set forth herein. The Austins are without sufficient knowledge or information to admit or deny that the document attached to the Complaint as Exhibit C is a true and correct copy of the Installment Promissory Note, and therefore deny same and put Plaintiffs to their strict proof thereof.

12. Admit that on or about September 5, 2000, Plaintiffs and the Austins executed a document styled as a Non-Competition Agreement ("Non-Competition Agreement"), but deny that the Non-Competition Agreement is void, and affirmatively allege that the Non-Competition Agreement is valid and enforceable according to its terms. The Austins are without sufficient knowledge or information to admit or deny that the document attached to the Complaint as Exhibit H is a true and correct copy of the Non-Competition Agreement, and therefore deny same and put Plaintiffs to their strict proof thereof.

13. Admit the allegations in Paragraph 11 of the Complaint, except that the Austins deny that the Austins have defaulted or that the Austins have obligations that are due and payable.

14. Deny the allegations in Paragraph 12 of the Complaint that Plaintiffs have made efforts to resolve the matter without court action. The Austins admit previously expressing a possible intention to allow the Contract for Deed to be cancelled, but affirmatively allege that no such communication were binding upon the Austins and the Austins remain entitled to enforcement

of the terms of the Contract for Deed pursuant to applicable law. In further response, the Austins admit that the Austins have refused to voluntarily surrender possession of the premises which are the subject of the Contract for Deed (the "Premises"), and affirmatively allege that the Plaintiffs' forcible ejection of the Austins from the Premises and continued possession thereof is wrongful, tortious, and actionable. The Austins deny that the Austins have wrongfully sold, concealed, disposed of or depleted collateral in which the Plaintiffs have any enforceable lien or security interest, including inventory, office equipment or other assets. (The personal property in which the Plaintiffs have an enforceable security interest pursuant to the Security Agreement is hereafter collectively referred to as the "Collateral".)

15. The Austins allege that the Installment Promissory Note speaks for itself and deny the remainder of Plaintiffs' allegations in Paragraph 13 of the Complaint.

16. The Austins further affirmatively allege that the Plaintiffs' current possession of the Collateral is wrongful, tortious and actionable, and Plaintiffs have failed to manage and dispose of the Collateral in a commercially reasonable manner, thereby entitling the Austins to such defenses and remedies as are provided by applicable law.

17. The Austins allege that the Plaintiffs' claims and causes of action are barred, in whole or in part, by the following affirmative defenses: denial of performance or occurrence of conditions precedent, election of remedies, estoppel, failure to mitigate damages, illegality, insufficiency of service of process, laches, lack of personal jurisdiction, lack of subject matter jurisdiction, public policy, unclean hands, unconscionability, and waiver.

COUNTERCLAIM

The Austins for their counterclaim against Plaintiffs, state and allege as follows:

1. Defendants Michael and Carrie Austin ("Austins") are individual Minnesota residents whose principal place of residences is: 212 East Eighth Street North, Melrose, County of Stearns, State of Minnesota.

2. Upon information and belief, Plaintiffs Jeffrey and Patricia Elfering ("Plaintiffs") are husband and wife and are individual Minnesota residents.

3. On or about August and September 2000, the Austins and Plaintiffs executed various documents pursuant to which the Austins purchased from Plaintiffs, and Plaintiffs sold to the Austins, a commercial building and floral and gift business located at 415 East Main Street, Melrose, Minnesota, 56352, which is located in Stearns County. The Closing Documents executed by the parties pursuant to such transaction included the Asset Purchase Agreement, Promissory Note, Security Agreement, Non-Competition Agreement, and Contract for Deed (hereafter, collectively, the "Closing Documents").

4. The Closing Documents provided for a total purchase price to be paid by the Austins to Plaintiffs in the amount of Five Hundred Fifteen Thousand Dollars (\$515,000). Pursuant to the terms of the Closing Documents, the Austins have already paid to the Plaintiffs approximately Three Hundred Thousand Dollars (\$300,000.00) of the purchase price.

5. Notwithstanding the Austins' timely performance of their payment obligations under the Closing Documents, the Plaintiffs have repeatedly breached, disregarded and refused to perform their obligations under the terms of the Closing Documents, all as more fully set forth herein. The Plaintiffs' repeated breaches and performance failures effectively release the Austins of further payment obligations to the Plaintiffs and entitle the Austins to recover such damages as are proved at trial.

COUNT I – BREACH OF CONTRACT (NON-COMPETITION)

6. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 5 of the Austins' Counterclaim, inclusive, as if fully set forth hereat.

7. The Asset Purchase Agreement executed by Plaintiffs provides, in pertinent part: "In consideration of Buyer entering into this Agreement and further in consideration of the payment of Twenty Thousand and 00/100 Dollars (\$20,000.00) from Buyer to Seller, as described in Article II and II, from the Effective Date and for a period of five (5) years thereafter Seller shall refrain, directly or indirectly, from carrying on a business similar to that involved in this transaction in the City of Melrose, Minnesota, or within a radius of thirty miles from the City of Melrose, Minnesota."

8. Plaintiffs and the Austins executed the Non-Competition Agreement on or about September 5, 2000.

9. The Non-Competition Agreement constituted a binding contract, enforceable according to its terms against Plaintiffs.

10. The Non-Competition Agreement provides, in pertinent part: "as additional consideration for the consummation of the sale of assets outlined in the Agreement, it is required that Seller execute this Non-Competition Agreement for the benefit of Buyer," and "Seller expressly acknowledges that this Non-Competition Agreement constitutes a material portion of the consideration paid by Buyer to the Company pursuant to the Agreement."

11. Paragraph 1 of the Non-Competition Agreement provides, in part: "Seller agrees that for a period of five (5) years from the date of closing on the Agreement, Seller will not, within thirty (30) miles of the City of Melrose, Minnesota: (A) contact, directly or indirectly, any person or entity who is a customer of the Buyer or otherwise has a business relationship with the Buyer for purposes

of competing or aiding another to compete, directly with the same or similar business of Buyer; or (B) engage in (as a principal, partner, director, officer, Seller, member, manager, agent, owner, employee, consultant, salesperson, representative or otherwise) the same or similar business of Buyer.”

12. The Non-Competition Agreement provides, in part: “Seller acknowledges that the restrictions contained in Paragraph 1 above, in view of the nature of the business in which the Buyer is engaged and the knowledge of Seller, are reasonable and necessary in order to protect the legitimate interests of the Buyer, and that any violation of those restrictions would result in irreparable injuries to the Buyer.”

13. Pursuant to the Asset Purchase Agreement, the stipulated allocation of value of the Plaintiffs’ performance of their non-competition obligations was in the amount of Twenty Thousand Dollars (\$20,000.00).

14. The Non-Competition Agreement provides, in part: “Should the Buyer prevail in any action arising out of this Agreement, Seller shall reimburse Buyer for attorneys’ fees and costs and expenses of litigation.”

15. Upon information or belief, Plaintiffs have actively and voluntarily participated in one or more craft shows within thirty (30) miles of Melrose, Minnesota, pursuant to which Plaintiffs sold or offered to sell gift items. Plaintiffs’ participation in any craft shows placed Plaintiffs in direct competition with the Austins, and constituted a breach and default under the express terms of the Non-Competition Agreement.

16. Upon information and belief, Plaintiffs have provided material aid and assistance to other persons or businesses in competition with the Austins, including, without limitation,

commuting such persons significant distances from the Melrose area to assist them in the purchase of items similar to those being sold by the Austins. In doing so, Plaintiffs engaged in (as a principal, partner, director, officer, Seller, member, manager, agent, owner, employce, consultant, salesperson, representative or otherwise) the same or similar business as the Austins, in breach of the Non-Competition Agreement.

17. Upon information and belief, Plaintiffs' relationship with persons employed by Lakeland Floral Supply (a wholesale supplier) has resulted in the wrongful diversion of business from Melrose area customers from the Austins' business to competitors.

18. Upon information and belief, Plaintiffs have manufactured, or assisted others in the manufacturing of silk arrangements, as a result of which, the Plaintiffs voluntarily and wrongfully placed themselves in direct competition with the Austins, in violation of the Non-Competition Agreement.

19. Upon information and belief, Plaintiffs acquired ownership or some other cognizable interest in a business located in Melrose, Minnesota that engages in retail sales of calendars, pins, cards, silk flower arrangements, small pens and other gift items, which placed Plaintiffs in direct competition with the Austins and constituted a breach of Plaintiffs' obligations under the Non-Competition Agreement.

20. Upon information and belief, Plaintiffs made flower arrangements for one or more family members' weddings, which constituted direct competition with the Austins' business in violation of the Non-Competition Agreement, especially as there are few weddings in Melrose, Minnesota, and the Austins' business relied heavily upon those limited weddings as occasions to make substantial profits.

21. The Austins have suffered damages as a result of the Plaintiffs' breaches of the Non-Competition Agreement, all in such amounts as shall be proved by the Austins at trial.

22. Each and every individual act of Plaintiffs that contravened the Non-Competition Agreement constituted a material breach of the Closing Documents, and thereby relieved the Austins of the Austins' obligations to subsequently continue to perform corresponding obligations under the Closing Documents.

COUNT II – BREACH OF WARRANTY

23. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 22 of the Austins' Counterclaim, inclusive, as if fully set forth hereat.

24. The Asset Purchase Agreement provides, in pertinent part: "All of the Purchased Assets are in all material respects (i) fit and suitable for the use and purpose for which they were intended, (ii) in good operating condition and repair, ordinary wear and tear excepted, and (iii) free from material defects." The Asset Purchase Agreement also provides: "No representation or warranty by Seller in this Agreement contains an untrue statement of material fact or omits to state any material fact necessary to make the statements herein contained, in light of the circumstances under which made, not misleading; it being understood that as used in this subparagraph 'material' means material to any individual statement or omission and in the aggregate as to all statements and omissions."

25. On and before the closing date, the Plaintiffs knew or reasonably should have known that the roof of the Store was damaged and had substantial leakage problems. The Plaintiffs did not disclose this material defect to the Austins prior to the closing, and such problems became evident soon after the Austins were granted possession of the Premises.

26. Plaintiffs failed to disclose the fact that there were substantial defects in the roof of the Premises, and also failed to disclose that such defects caused major leakage problems, although such problems were material and should have been disclosed under the Asset Purchase Agreement.

27. The Austins have suffered damages as a result of the Plaintiffs' aforementioned breach of warranty, all in such amounts as shall be proved by the Austins at trial.

28. Plaintiffs' breach of warranty constituted a material breach of the Closing Documents, and thereby relieved the Austins of their obligations to Plaintiffs under the Closing Documents.

COUNT III – TRESPASS TO LAND

29. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 28 of their Counterclaim, inclusive, as if fully set forth hereat.

30. Before even commencing this civil action, and without providing the Austins with any advance notice, Plaintiffs wrongfully sought and obtained a pretended Temporary Restraining Order ("TRO") on or about June 16, 2004. Immediately thereafter, Plaintiffs entered the Premises, changed the locks, took possession of the Collateral therein, and have continuously thereafter excluded the Austins from entering the Premises or gaining access to any personal property located therein.

31. Plaintiffs' request for relief disregarded Minn. Stat. § 565.23 et seq., the "Claim and Delivery" statutes, which provide the legal means of recourse of obtaining possession of collateral, just the circumstance alleged by the Plaintiffs. Instead, Plaintiffs sought to obtain possession of the collateral by a means that is not legally permissible and does not afford the requisite protections to the responding party, a TRO.

32. On or about June 18, 2004, several days after the Plaintiffs wrongfully obtained the TRO, the Austins were served with a Summons and Complaint in the above-entitled matter. When

Plaintiffs' entered the premises and took possession of the property pursuant to the pretended TRO, Plaintiffs did not have lawful authority to do so. Not having been served with a Summons, the Court lacked jurisdiction over the Austins or their property, including the Premises, to issue a TRO that would be binding on the Austins or affect the Austins' legal rights.

33. The Complaint served by the Plaintiffs, after Plaintiffs had already wrongfully taken possession of the Store, did not even allege facts supporting a claim for ejectment from the Store, much less request an Order of Ejectment.

34. On the date of the TRO, the Austins continued to have unrestricted rights to occupancy and possession of the Premises, pursuant to the Contract for Deed, Notice of Cancellation of which was served on the Austins on or about June 14, 2004.

35. Plaintiffs' entry onto the premises was entirely unlawful and constituted a breach of peace, as Plaintiffs had neither the Austins consent, nor proper or validly issued Court Order authorizing the Plaintiffs' subsequent actions.

36. Upon information and belief, not only Plaintiffs have continuously and repeatedly trespassed in and on the Premises, Plaintiffs have wrongfully allowed or invited others to continuously and repeatedly trespass, each of which occurrences constitutes a separate count of actionable trespass for which the Austins are entitled to recover damages against Plaintiffs.

37. The Austins have suffered damages as a result of the Plaintiffs' aforementioned trespass to land, all in such amounts as shall be proved by the Austins at trial.

38. Plaintiffs' trespass to land constituted a material breach of the Closing Documents, and thereby relieved the Austins of their subsequent performance obligations to Plaintiffs under the Closing Documents.

COUNT IV – TRESPASS TO CHATTELS

39. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 38 of their Counterclaim, inclusive, as if fully set forth hereat.

40. Plaintiffs obtained possession and control of the Austins' personal property by means of a trespassory entrance into the Premises, all as more fully set forth above. The means by which Plaintiffs obtained possession and control of the Austins' personal property was and continues to be wrongful and constitutes actionable trespass to chattels.

41. The Austins have suffered damages as a result of the Plaintiffs' aforementioned trespass to chattels, all in such amounts as shall be proved by the Austins at trial.

42. Plaintiffs' trespass to chattels constituted a material breach of the Closing Documents, and thereby relieved the Austins of their subsequent obligations to Plaintiffs under the Closing Documents.

COUNT V – CONVERSION

43. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 42 of their Counterclaim, inclusive, as if fully set forth hereat.

44. The means by which Plaintiffs obtained possession of the Premises and the Austins' personal property located therein was tortious, wrongful and actionable, all as more fully set forth above.

45. Upon information and belief, Plaintiffs intend to permanently deprive the Austins of their personal property after having obtained possession of such property by wrongful means. Plaintiffs have converted the Austins' personal property.

46. The Austins have suffered damages as a result of the Plaintiffs' aforementioned

conversion, all in such amounts as shall be proved by the Austins at trial.

47. Plaintiffs' conversion constituted a material breach of the Closing Documents and thereby relieved the Austins of their subsequent performance obligations to Plaintiffs pursuant to the Closing Documents.

COUNT VI – BREACH OF CONTRACT-CONSULTING AGREEMENT

48. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 47 of the Austins' Counterclaim, inclusive, as if fully set forth hereat.

49. The Asset Purchase Agreement provides, in pertinent part: "Seller agrees to work, without compensation, with Buyer for one month after the Effective Date, during normal business hours, to acquaint Buyer with the operation of the business."

50. Plaintiffs failed and refused to fulfill their consulting obligations under the Asset Purchase Agreement, as Plaintiff Jeffrey Elfering refused to provide consulting services after closing for more than a week.

51. The Austins have suffered damages as a result of the Plaintiffs' aforementioned failure to provide consulting services, all in such amounts as shall be proved by the Austins at trial.

52. Plaintiffs' breach of contract by refusing to provide the agreed consulting services constituted a material breach of the Closing Documents and thereby relieved the Austins of their subsequent performance obligations pursuant to the Closing Documents.

COUNT VII – BREACH OF CONTRACT

53. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 52 of the Austins' Counterclaim, inclusive, as if fully set forth hereat.

54. The Asset Purchase Agreement provides, in pertinent part: "Seller agrees to provide

to Buyer a complete list of gift certificates which have not been redeemed at the Effective Date. ... The parties agree that the percentage of the sale that Seller will pay to Buyer shall be determined by the parties at the time each gift certificate is redeemed.”

55. Upon information and belief, Plaintiffs did not make payments to which Plaintiffs agreed, with regard to gift certificates. Plaintiffs and the Austins agreed that, as customers redeemed gift certificates that had been sold prior to the Austins’ operation of the Store, Plaintiffs would pay to the Austins a percentage of the amount so redeemed. Although the Austins honored gift certificates that had been sold prior to the Austins’ operation of the Store, Plaintiffs did not pay the agreed gift certificate reimbursement. In refusing to make payment, Plaintiffs breached their contractual obligations to the Austins. (have to tell you I don’t get this?)

56. The Austins have suffered damages as a result of the Plaintiffs’ aforementioned failure to provide payment for redeemed gift certificates, all in such amounts as shall be proved by the Austins at trial.

57. Plaintiffs’ breach of contract in failing to pay in full gift certificate reimbursement constituted a material breach of the Closing Documents and thereby relieved the Austins of the Austins’ obligations to Plaintiffs pursuant to the Closing Documents.

COUNT VIII – BREACH OF CONTRACT

58. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 57 of their Counterclaim, inclusive, as if fully set forth hereat.

59. Prior to closing, Plaintiffs agreed to provide various notes and important information relating to the operation of the business during holidays, including the amount of inventory needed.

60. Plaintiffs failed and refused to provide such notes and other information relating to

the operation of the store during holidays and, as such, breach their agreements with the Austins.

61. The Austins have suffered damages as a result of the Plaintiffs' aforementioned failure to provide operational information as Plaintiffs agreed, all in such amounts as shall be proved by the Austins at trial.

62. Plaintiffs' breach of contract in not having provided operational information for holidays constituted a material breach of the Closing Documents and thereby relieved the Austins of the Austins' subsequent obligations to Plaintiffs pursuant to the Closing Documents.

COUNT IX – MISREPRESENTATION AND BREACH OF CONTRACT

63. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 62 of their Counterclaim, inclusive, as if fully set forth hereat.

64. Prior to closing when the Austins were assessing the value of the personal property to determine the fair market value under the Asset Purchase Agreement, Plaintiffs removed sale tags from old merchandise that had not sold for as many as four (4) years, and instead represented the value of such items as the full retail value.

65. Plaintiffs' representations of the value of the personal property sold in the Asset Purchase Agreement were false, and the Austins' obligations under the Asset Purchase Agreement and other Closing Documents entered into in connection therewith are void.

66. The Austins have suffered damages as a result of Plaintiffs' misrepresentations of the value of personal property included in the Asset Purchase Agreement, all in such amounts as shall be proved by the Austins at trial.

67. Plaintiffs' breach of contract and misrepresentations with respect to the valuation of merchandise constituted a material breach of the Closing Documents and thereby relieved the

Austins of the Austins' obligations to Plaintiffs pursuant to the Closing Documents.

COUNT X – TORTIOUS INTERFERENCE WITH CONTRACT

68. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 67 of their Counterclaim, inclusive, as if fully set forth hereat.

69. Upon information and belief, Plaintiffs contacted the Austins' wholesalers that had merchandise sales contracts with the Austins, changed the Austins' orders, and otherwise interfered with the Austins' operation of the Store and contractual relations. Plaintiffs used Plaintiffs' personal connections with such wholesalers to change the orders that the Austins had made to such wholesalers.

70. The Austins have suffered damages as a result of the Plaintiffs' aforementioned tortuous interference with the Austins' contracts, all in such amounts as shall be proved by the Austins at trial.

71. Plaintiffs' tortuous interference with the Austins' contracts constituted a material breach of the Closing Documents and thereby relieved the Austins of the Austins' obligations to Plaintiffs pursuant to the Closing Documents.

COUNT XI – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

72. The Austins restate and reallege the allegations set forth above in Paragraphs 1 through 71 of the Austins' Counterclaim, inclusive, as if fully set forth hereat.

73. Upon information and belief, Plaintiffs told people around Melrose, Minnesota, including customers and potential customers of the Austins, that Plaintiffs hoped that the Austins' business would fail so that Plaintiffs could promptly foreclose on the property, take back the business and keep the large down payment paid by the Austins to Plaintiffs. These communications naturally

impugned the public image of the Austins and their business, and created questions with respect to the integrity of the Austins and their business.

74. On several occasions, while the Austins were operating the Store, Plaintiffs called the Austins' employees at the employees' homes to obtain information about the Austins and operations of the Store. Such communications undermined trust among all persons involved and interfered with the effective operation of the Store.

75. Plaintiffs continuously called the Austins' insurance carrier, Cincinnati Insurance Company, in an attempt to obtain additional information about the Austins' insurance policies. Plaintiffs already had all of the information that was due to them under the contract, and they were so informed by the Austins' insurance agents. Plaintiffs eventually called the corporate headquarters of the Austins' insurance agency in their quest for information to which they were not entitled.

76. Plaintiffs wrongfully caused the Austins' insurance carrier to withhold a check to compensate the Store for damage to the roof, although the Austins were entitled to receive that money pursuant to the Closing Documents.

77. These actions undermined the relationship that the Austins had with their insurance carrier, interfered with the effective operation of the business, and constituted a breach of the implied covenant of good faith and fair dealing.

78. Plaintiffs' actions throughout the course of their contractual relationship with the Austins have constituted a breach of the Plaintiffs' duty of good faith and fair dealing.

79. The Austins have suffered damages as a result of the Plaintiffs' aforementioned breach of Plaintiffs' duty of good faith and fair dealing, all in such amounts as shall be proved by the Austins at trial.

80. Each of Plaintiffs' individual breaches of Plaintiffs' duty of good faith and fair dealing constituted a material breach of the Closing Documents and thereby relieved the Austins of the Austins' obligations to Plaintiffs pursuant to the Closing Documents.

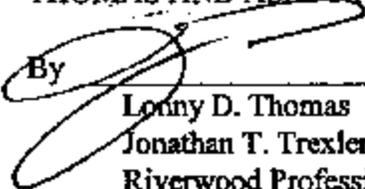
WHEREFORE, the Austins pray that judgment be entered in favor of the Austins and against the Plaintiffs and each of them, jointly and severally, as follows:

1. A money judgment against the Plaintiffs and each of them, jointly and severally, in an amount in excess Fifty Thousand Dollars (\$50,000.00)
2. A money judgment against the Plaintiffs and each of them, jointly and severally, in an amount equal to the costs, disbursements and expenses incurred by the Austins in these proceedings;
3. A money judgment against the Plaintiffs and each of them, jointly and severally, in an amount equal to the reasonable attorneys fees incurred by the Austins in these proceedings;
4. An Order restoring to the Austins possession of the personal property wrongfully taken by Plaintiffs;
5. An Order restoring to the Austins exclusive occupancy and possession of the Store;
6. An Order declaring the Plaintiffs' purported cancellation of the Contract for Deed null and void, and reinstating the Contract for Deed;
7. An Order determining that the Austins are released of all further performance of obligations under the Closing Documents or any of them;
8. An Order dismissing with prejudice and on the merits each and every request for relief of Plaintiffs; and

9. Such other and further relief as the Court deems just and equitable.

Dated: 7-16, 2004

THOMAS AND ASSOCIATES, P.A.

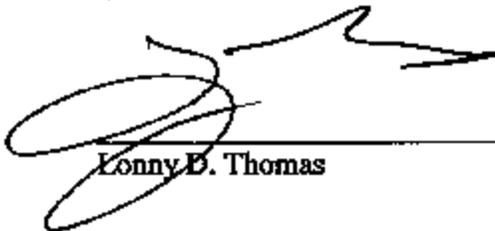
By 

Lonny D. Thomas (Reg. No. 170252)
Jonathan T. Trexler (Reg. No. 0334030)
Riverwood Professional Building
35258 County Road 3
P.O. Box 720
Crosslake, MN 56442
(218) 692-6969

ATTORNEYS FOR DEFENDANTS MICHAEL
AND CARRIE AUSTIN, D/B/A PETAL PATCH
FLORAL, GIFT & WEDDING CENTER

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorneys' fees and witness fees may be awarded pursuant to Minnesota Statutes Section 549.211, subd. 2, to the party against whom the allegations in this pleading are asserted.



Lonny D. Thomas