

STATE OF INDIANA )  
 )SS:  
COUNTY OF TIPPECANOE )

IN THE TIPPECANOE SUPERIOR COURT 2

CAUSE NO.: 79D02-1012-MF-00026

FILED

JAN 30 2014

Christie Coffey  
Clerk of Tippecanoe County

TCO ASSETS LAND LLC, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THOMAS B. MILLS, *et al.*, )  
 )  
Defendants. )

**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST MILLS**

Cross-claim Plaintiff T6 Unison Site Management (“T6 Unison”), by counsel, pursuant to Rule 56, Indiana Rules of Trial Procedure, respectfully moves the Court for the entry of summary judgment against Defendants, David J. Mills, Thomas B. Mills, and Donna J. Mills (collectively, the “Mills”). In support, T6 Unison states as follows:

**I. INTRODUCTION**

On or about April 13, 2009, T5 Unison Site Management, LLC (“T5 Unison”) paid the Mills Fifty Thousand and 00/100 Dollars (\$50,000.00) in exchange for an easement right. T5 Unison subsequently assigned the easement right to T6 Unison. The Mills defaulted on a Mortgage held by Plaintiff TCO Assets Land, LLC (“TCO”), and as a direct and proximate result of the Mills’ default TCO foreclosed upon its mortgage. TCO’s foreclosure of the mortgage has extinguished the rights that T6 Unison held pursuant to the assignment of the T5 Unison easement. The Mills benefited from the \$50,000.00 they received in exchange for the easement and in failing to maintain title to the Real Estate, have materially breached the terms of the easement. There are no genuine issues of material fact in dispute and T6 is entitled to the entry of summary judgment in its favor on both counts of its Cross-claim against the Mills.

**II. DESIGNATION OF EVIDENCE**  
**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

- Exhibit A.** Verified Affidavit of Raymond W. Goodwin. (“Goodwin Affidavit”).
- Exhibit B.** A true and accurate copy of the Warranty Deed to Donna J. Mills and Thomas B. Mills, and David J. Mills dated April 22, 1993, and recorded of even date, in the Office of the Tippecanoe County Recorder as Instrument No.: 93-07936. (“Deed”).
- Exhibit C.** A true and accurate copy of the Term Note in the original principal amount of \$1,300,000.00, executed by Donna J. Mills and Thomas B. Mills in Favor of Lafayette Community Bank dated January 23, 2005. (“TCO Note”).
- Exhibit D.** A true and accurate copy of the Mortgage executed by Donna J. Mills, Thomas B. Mills, and David J. Mills, dated January 23, 2004, and recorded November 5, 2004, as Instrument Number 2004-04030674 in the Office of the Recorder of Tippecanoe County, Indiana. (“TCO Mortgage”).
- Exhibit E.** A true and accurate copy of April 14, 2009 Wireless Communications Easement and Assignment Agreement recorded June 3, 2009 in the Office of the Recorder of Tippecanoe County, Indiana as Instrument No. 2009090011881. (“Wireless Easement Agreement”).
- Exhibit F.** A true and accurate copy of the July 18, 2009 Assignment of Easement recorded August 10, 2009 in the Office of the Recorder of Tippecanoe County, Indiana as Instrument No. 200909017587 (“Easement Assignment”).
- Exhibit G.** TCO Complaint and Exhibits designated therein filed December 20, 2010. (“Complaint”). The Court is asked to take judicial notice of the Complaint as it appears within the court’s file.
- Exhibit H.** TCO Motion for Summary Judgment and Documents Designated therein filed August 4, 2011. (“TCO Motion”). The Court is asked to take judicial notice of the TCO Motion as it appears within the court’s file.
- Exhibit I.** April 18, 2012 Order on Summary Judgment and Decree of Foreclosure. (“TCO Decree of Foreclosure”). The Court is asked to take judicial notice of the TCO Decree of Foreclosure as it appears within the court’s file.
- Exhibit J.** A true and accurate copy of Defendants Thomas B. Mills and Donna J. Mills Responses to Plaintiff’s First Set of Requests for Admissions (“Mills’ Admissions”).

### III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On October 29, 2004, the Mills owned fee simple title to real estate commonly known as 3180 W. County Road 250 N., West Lafayette, Indiana 46750 and as more particularly described as follows:

A PART OF THE NORTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 WEST, WABASH TOWNSHIP, TIPPECANOE COUNTY, INDIANA, MORE COMPLETELY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE SOUTH LINE OF THE SAID NORTHEAST QUARTER, SAID POINT OF BEGINNING BEING 1178 FEET WEST OF THE SOUTHEAST CORNER OF THE NORTHEAST QUARTER AFORESAID; THENCE SOUTH 88 DEGREES AND 45 MINUTES WEST ON THE SAID SOUTH LINE FOR A DISTANCE OF 528.7 FEET; THENCE NORTH 0 DEGREES AND 49 MINUTES WEST FOR A DISTANCE OF 436 FEET; THENCE SOUTH 88 DEGREES AND 45 MINUTES WEST FOR A DISTANCE OF 200 FEET; THENCE NORTH 0 DEGREES AND 49 MINUTES WEST FOR A DISTANCE OF 888.3 FEET TO THE NORTH LINE OF THE SOUTH HALF OF THE SAID NORTHEAST QUARTER; THENCE EASTERLY ON THE SAID NORTH LINE FOR A DISTANCE OF 335 FEET TO THE WESTERN RIGHT OF WAY LINE OF THE NICKEL PLATE RAILROAD; THENCE SOUTHEASTERLY ON THE SAID RIGHT OF WAY LINE FOR A DISTANCE OF 654 FEET; THENCE SOUTH 1 DEGREE AND 15 MINUTES EAST FOR A DISTANCE OF 788.7 FEET, TO THE PLACE OF BEGINNING.

SAID TRACT OF LAND CONTAINS 17.5 +/- ACRES, MORE OR LESS.

TAX PARCEL NO. 132-01500-0084

ALSO

A PART OF THE SOUTHEAST QUARTER (1/4) OF THE NORTHEAST QUARTER (1/4) OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 WEST, WABASH TOWNSHIP, TIPPECANOE COUNTY, INDIANA, MORE COMPLETELY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT AT THE INTERSECTION OF THE WESTERLY RIGHT-OF-WAY LINE OF THE NICKLE PLATE RAILROAD AND THE SOUTH LINE OF THE NORTHEAST QUARTER (1/4) OF SECTION 10, AS HERETOFORE DESCRIBED SAID POINT BEING 625.7 FEET WEST OF THE SOUTHEAST CORNER OF THE NORTHEAST QUARTER (1/4) OF THE SAID SECTION 10, THENCE

WEST ON THE SOUTH LINE OF THE NORTHEAST QUARTER (1/4) FOR A DISTANCE OF 552.3 FEET, THENCE NORTH 1 DEGREE AND 15 MINUTES WEST FOR A DISTANCE OF 788.7 FEET TO THE WESTERLY RIGHT-OF-WAY LINE OF THE NICKLE PLATE RAILROAD, THENCE SOUTH 36 DEGREES AND 15 MINUTES EAST ON THE WESTERLY LINE OF THE NICKLE PLATE RAILROAD FOR A DISTANCE OF 962.8 FEET TO THE PLACE OF BEGINNING.

SAID TRACT OF LAND CONTAINS 5 +/- ACRES, MORE OR LESS.

EXCEPT A PART OF THE NORTHEAST QUARTER OF SECTION TEN (10), TOWNSHIP TWENTY-THREE (23) NORTH, RANGE FIVE (5) WEST, WABASH TOWNSHIP, TIPPECANOE COUNTY, INDIANA, BEING MORE COMPLETELY DESCRIBED AS FOLLOWS, TO-WIT: COMMENCING AT THE SOUTHEAST CORNER OF THE NORTHEAST QUARTER OF SECTION 10-23-5, SAID CORNER BEING MARKED BY A RAILROAD SPIKE; THENCE SOUTH 88°-45'-00" WEST ALONG THE SOUTH LINE OF SAID QUARTER SECTION AND THE APPROXIMATE CENTERLINE OF COUNTY ROAD 250 NORTH A DISTANCE OF 1573.02 FEET TO THE POINT OF BEGINNING OF THE HEREIN DESCRIBED TRACT, SAID POINT BEING MARKED BY A PK NAIL; THENCE CONTINUING SOUTH 88°-45'-00" WEST ALONG SAID SOUTH LINE AND SAID APPROXIMATE CENTER LINE A DISTANCE OF 83.28 FEET TO A PK NAIL; THENCE NORTH 0°-49'00" WEST A DISTANCE OF 523.04 FEET TO A RE-BAR; THENCE NORTH 88°-45'-00" EAST PARALLEL WITH SAID SOUTH LINE A DISTANCE OF 83.28 FEET TO A RE-BAR; THENCE SOUTH 0°-49'-00" EAST A DISTANCE OF 523.04 FEET TO THE POINT OF BEGINNING, CONTAINING 1.000 +/- ACRE.

ALSO EXCEPT PART OF THE EAST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER OF SECTION TEN (10), TOWNSHIP TWENTY-THREE (23) NORTH, RANGE FIVE (5) WEST IN WABASH TOWNSHIP, TIPPECANOE COUNTY, INDIANA, MORE COMPLETELY DESCRIBED AS FOLLOWS, TO-WIT:

BEGINNING AT AN IRON PIPE ON THE SOUTH LINE OF THE NORTHEAST QUARTER OF SECTION 10-23-5 AND THE CENTERLINE OF COUNTY ROAD #250 N, SAID POINT BEING 1656.3 FEET WEST OF THE SOUTHEAST CORNER OF SAID QUARTER SECTION AND 50 FEET EAST OF THE WEST LINE OF GRANTOR'S TRACT OF LAND; THENCE NORTH 0°49' WEST A DISTANCE OF 523.04 FEET TO AN IRON PIPE; THENCE SOUTH 88°45' WEST AND PARALLEL TO THE SOUTH LINE OF SAID QUARTER SECTION A DISTANCE OF 250.0 FEET TO AN IRON PIPE; THENCE SOUTH 0°49' EAST A DISTANCE OF 87.04 FEET TO AN IRON PIPE; THENCE NORTH 88°45' EAST AND PARALLEL TO THE SOUTH LINE OF SAID QUARTER SECTION A DISTANCE OF 200.0 FEET TO AN IRON PIPE;

THENCE SOUTH 0°49' EAST A DISTANCE OF 436.0 FEET TO A RAILROAD SPIKE ON THE SOUTH LINE OF SAID QUARTER SECTION; THENCE NORTH 88°45' EAST ALONG SAID SOUTH LINE A DISTANCE OF 50.0 FEET TO THE PLACE OF BEGINNING, CONTAINING 1.0 +/- ACRES, MORE OR LESS.

AND BEING THE SAME PROPERTY CONVEYED TO THOMAS B. MILLS AND DONNA J. MILLS, AN UNDIVIDED 85/100 INTEREST, AND DAVID J. MILLS, AN UNDIVIDED 15/100 INTEREST FROM PRODUCERS MARKETING ASSOCIATION, INC., AN INDIANA CORPORATION BY CORPORATE WARRANTY DEED DATED APRIL 22, 1993 AND RECORDED APRIL 22, 1993 IN INSTRUMENT NO. 93-07936.

TAX PARCEL NO. 132-01-500-0117

(the "Real Estate")

*Exhibit A: Goodwin Affidavit, ¶¶ 4-5; Exhibit B, Deed.*

2. The Mills executed a Wireless Communication Easement and Assignment Agreement dated April 14, 2009 to T5, recorded June 3, 2009 as Instrument Number 200909011881 in the Office of the Tippecanoe County Recorder. *Exhibit A: Goodwin Affidavit, ¶¶ 4-5; Exhibit E: Wireless Easement Agreement.*

3. Paragraph 4 of the Wireless Easement Agreement states that its term "shall be perpetual" unless T5 Unison shall "voluntarily cease to use the Easements for a period of more than five years..." *Exhibit A: Goodwin Affidavit, ¶¶ 4-5; Exhibit E: Wireless Easement Agreement.*

4. Neither T5 Unison nor T6 Unison has voluntarily ceased to use the Easements for a period of five (5) or more years. *Exhibit A: Goodwin Affidavit, ¶ 4-5.*

5. In consideration for granting the perpetual Easement, the Mills received valuable consideration in the amount of Fifty Thousand and 00/100 Dollars (\$50,000.00) from T5 Unison. *Exhibit A: Goodwin Affidavit, ¶ 4-5.*

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