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No. 69278-0-I
COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

SHUMET MEKONEN, WONDWOSSEN MERSHA; TIGABU LAKEW; HABTAMU ABOYE; YIRGA BELETE; and SELAMNEH AMBAW,

APPELLANTS

v.

DESSIE ZEWDU; WORKU ASMARE; WORKU MELESE; BAZAZEW BIRHAN; MOTBAYNER TEBEJE; ENDALE ANDENO; MELAKU KEBEDE; NEGA WONDIMAGEGN; KASA DERAR; and GREEN CAB TAXI & DISABLED SERVICE ASSOCIATION, LLC,

RESPONDENTS / CROSS-APPELLANTS

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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BRIEF OF RESPONDENTS / CROSS-APPELLANTS

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I. INTRODUCTION

This is a dispute over control of Green Cab Taxi & Disabled Service Association, LLC ("Green Cab"). Plaintiffs' Group does not contest "the trial court's determination that respondents are entitled to manage and operate Green Cab," *Appellants' Brief* at 2, yet they wish to contest the buy-out remedy ordered by the trial court as part of its injunctive relief. The trial court has broad discretion as to the scope of injunctive relief, and the defaulting party may not pick and choose which remedies for default will be applied against it. Both loss of the right to governance and deemed buy-out are remedies for default under the Operating Agreement between the parties. *Ex. 1,* Art. 8.1(c)(v). The trial court did not err in granting Defendants' Group both remedies.

On Cross-Appeal, Defendants' Group will demonstrate:

1. The trial court erred by allowing Plaintiffs' breach of contract and tortious interference claims to go to the jury based on speculative testimony on alleged lost gross revenues that was grounded in pro forma projections without any documentary verification, and which failed to show net profit;

2. The trial court should have held the line on its original motion in limine ruling to disallow Shumet Mekonen a personal damages claim, due to his stonewalling deposition testimony and failure to produce documentary evidence of damages; and

3. The trial court erred by allowing Plaintiffs to sue on a contract between Green Cab and King County, because they lacked standing and they did not bring a derivative action.

II. ASSIGNMENTS OF ERROR AND ISSUES [See §V, *infra*]

III. STATEMENT OF THE CASE

A. Statement of Facts

1. Organization of Green Cab

Green Cab was formed in response to a contract awarded under a King County Request for Proposal ("RFP") entitled "Alternative Way to Structure a Taxicab Association – Test." *Ex. 2*; 7/23 VRP 15/7-10. This RFP set forth the test plan of a taxicab association in which the drivers would be employees governed by collective bargaining and workers' compensation insurance, all vehicles would be hybrid electric vehicles covered by one liability insurance policy, and 10% of vehicles would be wheelchair accessible. *Ex. 2* at 6-8. The plan was to issue 50 taxi licenses to the successful bidder. *Ex. 2* at 5. These licenses are for King County pickup – not the more valuable City of Seattle or Seatac Airport pickup. *Ex. 2* at 5; 7/26 VRP 122-23/16-11. Unlike prior taxi licenses, which had been trading at a monopoly market value of $150,000-$300,000, *ex. 2* at 5, these licenses would remain the property of King County and be nontransferable except under special circumstances authorized by the County. *Ex. 2* at 6 (¶6.2.2); 7/30 VRP 109-110/21-2; 112-113/16-14.

This contract was awarded in the name of Green Cab Taxi and Disabled Services Association by letter of September 21, 2007, addressed

to its president, Tigabie Tekeba.[1] *Ex. 3.* Green Cab is governed by the June 2008 Operating Agreement, which is Exhibit 1 (hereinafter the "Operating Agreement"). Under the Operating Agreement, the Board of Directors of Green Cab was responsible for, *inter alia,* "ensuring compliance with King County and other governmental rules, regulations and requirements applicable to the Company or its business . . .." *Ex. 1* Art. 6.1(c)(i). Plaintiff Mekonen testified that compliance with the RFP is not required by the Operating Agreement. 7/23 VRP 95/14-20, 96/1-5.

2. Hardships Prior to the Schism

After the award letter was issued, Green Cab immediately invested a lot of money in purchasing and painting vehicles, renting office space, hiring a manager and dispatchers, obtaining insurance, and securing the required DDS computerized dispatching system. 7/23 VRP 75-76/10-1; 7/26 VRP 120-21/23-7; 7/30 VRP 196-197/12-1. Some of the vehicles were purchased through Green Cab and some were directly contributed by member-drivers as part of their capital contribution. 7/23 VRP 30/18-21; 7/23 VRP 103-104/16-2; 7/26 VRP 119-20/23-5. Either way, the individual member was responsible for making the car payments on their cab(s). 7/26 VRP 11/7-9, 129-130.

[1] Mr. Tekeba, deceased at the time of trial, was the brother of Shumet Mekonen, leader of the Plaintiffs' Group and primary witness for the Plaintiffs. 7/26 VRP 69/15-19.

A lawsuit against King County by competing cab companies prevented the issuance of the fifty licenses that Green Cab expected to receive, and effectively blocked it from doing business from the date of the award until August 2008. 7/23 VRP 76/15-16; 7/26 VRP 70-71/23-5. This caused a period of tremendous financial strain and hardship, as the members had already gone into debt in expectation of an immediate stream of income. 7/25 VRP 76-77; 7/26 VRP 70-71/21-16; 7/26 VRP 120-21/23-7. To help keep Green Cab afloat, in 2008 the Board of Directors instituted the requirement that each member must pay weekly dues. Ex. 50 p.12; 7/30 VRP 145/7-17, 148/9-13.

After the competitors' lawsuit settled in 2008, King County re-awarded the RFP contract to the LLC by letter to Green Cab's Board Chairman. Ex. 67. But the County only issued Green Cab twenty-two licenses – far fewer than the fifty they had counted on for budgeting. 7/23 VRP 77/2-6. They received more licenses in 2009 or 2010, but never the full fifty licenses. 7/23 VRP 77/10-14. All licenses issued to Green Cab were kept in the name of King County, and subject to revocation for any violations found by the County. 7/24 VRP 67-68/12-10; 7/30 VRP 200/8-10. Because of the financial strain and the complete change in expected conditions, the owner-drivers overlooked some of the idealistic reforms of their RFP bid contract when they got their licenses. Instead of turning

over all their receipts to Green Cab and waiting for a salary like an employee, they acted like the owner-drivers that they were: they made their money and kept it for themselves. 7/23 VRP 78/4-7, 79/3-6, 79/11-17. Importantly, this is the testimony of *Plaintiffs'* Group leader Shumet Mekonen, and it describes the situation already in place **before the schism.**

By 2009, the financial strain had caused many Green Cab drivers to default on their car payments, and/or on their dues owed to Green Cab. 7/25 VRP 100/1-7; 7/26 VRP 74/3-10; 7/30 VRP 158-161. Some of the drivers were working at more lucrative day jobs rather than driving. This exacerbated the financial strain for the rest, since Green Cab could only remain viable if everybody paid their share. 7/26 VRP 73/10-18, 125-26/22-2. In 2009, Green Cab's membership unanimously agreed on a policy stating that no member in default on dues could serve on the Board of Directors. *Ex. 70;* 7/30 VRP 26/20-25, 121-122/15-3.

During this period of continued financial strain, Green Cab was evicted from its first offices in Tukwila. Due to the company's poor credit, the next office in Kent was rented in the name of the 2009 Board Chairman, Dessie Belete. 7/26 VRP 73/10-22; 7/30 VRP 55-56/8-8.

When the bank repossessed vehicles, the Board authorized other members, and in some instances new members, to step in and purchase the

vehicles in order to help keep an income stream needed for continued Green Cab solvency. 7/26 VRP 134/1-12; 7/30 VRP 87/11-19, 109/19-20, 112-113/16-2, 116/4-16. Because King County recognized that Green Cab had been put into financial strain due to the competitors' lawsuit and delay and cut-back in issuance of licenses, it worked with Green Cab by allowing those transfers of licenses within the company. 7/30 VRP 81/1-20, 109-110/21-2, 112-113/16-2, 113/7-14.

3. The Schism: September 2010 – January 2011

Mr. Mekonen became dissatisfied with Green Cab's management for various reasons in 2010, including the collection of dues by the hired manager, Mark Scofield. 7/23 VRP 117/4-10, 118/12-15. He called for an election held September 4, 2010, for the purpose of electing a new Board of Directors. A Board was chosen to the liking of the Plaintiffs' Group, Chaired by Mr. Mekonen, but populated by defaulters. 7/23 VRP 159-161/22-17, 161/22-24, 7/26 VRP 95, 7/30 VRP 25-27/24-9.

Concerned about being governed by a "defaulters" Board, members of the Defendants' Group properly noticed a new election for September 25, 2010. 7/30 VRP 27/7-9. Notice was given to all members, and no member was excluded from participating in this election. 7/30 VRP 27-28/24-13, 29/19-22. A majority of Green Cab members (20 out of 36) voted at that election, although Plaintiffs' Group chose not to

participate. 7/30 VRP 28/14-15, 29/6-18. A new Board satisfactory to Defendants, Chaired by Worku Melese, was chosen at the September 25th election. 7/24 VRP 91/11-13; 7/30 VRP 29/19-25.

Three days later, on September 28, 2010, Mr. Mekonen changed the locks on the Green Cab management office and kicked out the manager, Mark Scofield, who had been trying to collect back dues from the defaulting members. 7/26 VRP 80/6-14, 82/4-10. The September 25th Board was forced to meet at Starbucks because they could not get into the Green Cab manager's office. 7/26 VRP 82/14-20. They were unable to serve effectively, because they were denied access to the company records and accounts, and because the Plaintiffs' Group dominated the accounting and dispatch system. 7/26 VRP 82/4-10, 90/19-21; 7/30 VRP 53/5-16.

The Defendants' Group became desperate when they realized that, although they were driving and recording credit card transactions, they were not getting paid. 7/30 VRP 51-52/13-9, 53/5-16. They retained counsel and both sides filed suit in October 2010. These lawsuits were eventually consolidated into the present lawsuit. In December, 2010, accompanied by the police, the Defendants appeared at the Green Cab offices to enforce their rights. 7/30 VRP 54-55/3-6. Because Mr. Belete was on the lease, the police required that Mr. Mekonen hand over the keys – which he did, reluctantly. 7/30 VRP 55-56/25-8.

Although nobody required that Mr. Mekonen and his group leave, they withdrew and rented new offices in Seattle. 7/24 VRP 16/13-24, 19/17-23, 21/8-11; 7/30 VRP 56/9-11. They also purchased separate insurance. 7/30 VRP 92/8-19, 93, 97/17-22. All these actions of withdrawal threw the King County RFP contract into jeopardy, because it required a single office and a single insurance policy. 7/24 VRP 141-42/6-12; 7/31 VRP 110/8-20 (admissions by Plaintiff).

Upon restoration of the offices, the Defendants' Group found that many of the records were missing, that two months of bills and rent were unpaid, and that the King County-required DDS computerized dispatch system was on the verge of being shut down for nonpayment. 7/31 VRP 88-89/17-5. In January 2011, members of the Defendants' Group traveled to Vancouver, B.C. to meet with the company that manages the DDS system. The amount past due was $5,854.70, which included $2,459.70 for the Plaintiffs' Group's charges. Nonetheless, the Defendants' Group was forced to pay the full charge in order to reinstate the DDS system. 7/31 VRP 89-90/6-3. At that point, rather than give the Plaintiffs' Group any more of a "free ride", the Defendants' Group negotiated a new contract for DDS dispatching services covering only their own cabs. 7/31 VRP 90/4-8. The Plaintiffs' Group received dispatches under the Green Cab DDS system through January, 2011. 7/31 VRP 92-93.

From that time until the date of trial, Green Cab existed under two separate management groups, each competing for the right to call themselves Green Cab Taxi & Disabled Service Association, LLC, and to claim the rights under the licenses and King County RFP award. The record evidences a number of clashes between the two groups, demonstrating clearly that they cannot work together. *E.g., Exs. 100 & 109;* 7/26 VRP 33-34/24-8; 7/30 VRP 35-44.

4. Plaintiffs' Admissions of Default

Plaintiffs failed to answer Requests for Admission served upon them in discovery, resulting in the deemed admission of two key defaults under the Operating Agreement. *Ex.* 50; 7/19 VRP 45/6-11. The trial court instructed the jury on these admissions, *inter alia,* as follows:

> 3. Under article 8.1(b)(i), (b)(ii) and (c)(5) of the Green Cab operating agreement and the laws relating to limited liability companies all the plaintiffs and defendants must pay capital contributions in a timely manner including but not limited to weekly fees and insurance premiums. A failure to make these contributions constitutes a default and any defaulting party is subject to the relevant defaulting provisions of the operating agreement.
>
> 4. Each plaintiff has not paid their capital contributions in a timely manner including but not limited to weekly fees and insurance premiums.
>
> 5. Under article 5.6 of the Green Cab operating agreement no member may disassociate or withdraw from the LLC because a disassociation or withdrawal would violate the terms of the taxi license program.

6. Each plaintiff has disassociated or withdrawn from the Green Cab LLC.

7/31 VRP 109-110/11-2. Thus, Plaintiffs admitted that they defaulted under the Operating Agreement by: (1) failing to pay weekly fees and insurance premiums; and (2) withdrawing from Green Cab.

5. Damages Evidence

No plaintiff ever produced a single shred of documentary evidence in support of their claims for damages. No tax returns, trip sheets, credit card reports, profit-loss statements, or other documents, were produced into evidence. The trial court permitted Plaintiffs to submit their damages claims to the jury based solely on oral testimony about past revenue experience, with some scattered references to expenses and current earnings. All this will be detailed in the Cross-Appeal Argument below. *See,* Section V(C) & (D), *infra.*

The trial court's Memorandum Decision, entered August 24, 2012, provides an excellent summary chart of the damages awarded to the Plaintiffs by the jury, as well as the many claims on which the Plaintiffs were awarded nothing. CP 349 (attached hereto as Appendix A).

Mr. Mekonen claimed he was personally damaged in the amount of $315,000. 7/24 VRP 66/4-21. He was awarded a total of $133,000

($95,000 for breach of contract, and $38,000 for tortious interference). CP 230-231, 234-235.

Plaintiff Wondwossen Mersha testified he lost $144,000, plus $14,000 profit on the sale of his repossessed vehicle. 7/25 VRP 103/3-7, 109/11-17. He was awarded $22,500 ($8,500 for tortious interference, and $14,000 for breach of fiduciary duty). CP 218, 235.

Plaintiff Yirga Belete testified that he lost the difference between $7200 per month and $960 per month for 18 months, which comes to $112,320. 7/26 VRP 29/4-6, 30/3-20. He also testified that he lost $12,000 in attorneys fees due to actions of one or more of the Defendants, arising out of his arrest on a felony charge. 7/26 VRP 33-37. He was awarded a total of $26,600, all for tortious interference. CP 237.

Plaintiff Habtamu Aboye testified that he lost $3,000 per month since December, 2010, roughly eighteen months to the date of trial, for a total of $54,000. 7/26 VRP 42/11-13. The jury awarded him $0. CP 349.

The other two plaintiffs offered no evidence of personal damages, and their damages claims were dismissed. 7/26 VRP 63/9-15.

C. Procedural Facts

The commencement of this action in October 2010 and trial of this matter in July 2012 is covered by Appellants' Opening Brief at pp.5-6. However, it is not accurate that the jury found that "respondents had

breached the operating agreement," as stated at page 6 of the Appellants' Brief. The special verdict is for "breach of contract," CP 230-31, and the instructions sought by Plaintiffs and opposed by Defendants allowed a verdict on breach of contract for breach of the Operating Agreement *or the RFP contract with King County.* 7/31 VRP 7-9, 114-115.

Contrary to the statement in Appellants' Brief that the claim for buy-out of plaintiffs' rights in Green Cab had not been pleaded, this claim was pleaded on April 4, 2011 as part of Defendants' counterclaims in its first Answer to Plaintiffs' Complaint. CP 929 (¶4B.7), 932 (¶¶4K.1 and 4K.5). This is detailed in the argument, Section IV(C)(2), *infra.*

The parties agreed that certain facts pertaining to injunctive relief would be tried to the jury by special interrogatory, but that (in accordance with longstanding law) the trial court would decide the injunctive relief. CP 222-225 (Special Verdict Form "A"); CP 447; 7/18 VRP 20-21/23-1; 7/31 VRP 73/12-21. Control over Green Cab came down to the validity of the September 4th election. 7/31 VRP 105/13-25; 107/10-22; CP 343. The jury returned the following key Special Verdict Form A:

> 4. In September 2010, was there a requirement that only members current in the payment of capital contributions, including weekly fees and insurance premiums, could serve as a member of the board of directors?
> YES

> 5. If your answer to Question No. 4 was "Yes," in the September 4, 2010 election, were members not current in the payment of capital contributions, including weekly fees and insurance premiums, elected to the board of directors?
> YES
>
> 6. For the September 4, 2010 election, did the Members of Green Cab LLC agree to waive the requirement that Members be current on the payment of capital contributions, including weekly fees and insurance premiums, in order to serve on the board of directors?
> NO

CP 223. Based on this, as well as the trial court's own independent review of the evidence, the trial court held that the September 4th election was **invalid,** and that the September 25th election was **valid.** CP 344-345. Accordingly, Defendants were the prevailing party on the crucial issue of control over the Green Cab company, which was the essential dispute leading to the lawsuits. CP 346; CP 341-342. That ruling is not disputed on appeal. *Appellants' Brief* at 2.

In their complaint, Plaintiffs claimed damages of $961,500. CP 34, 35, 37, 38, 39, 40. As detailed elsewhere in this Brief, at trial the various Plaintiffs testified to damages of $651,320, but were only awarded a total of $182,100.

In addition to the jury award of $18,600 to Green Cab, the trial court added $18,163.75 in fees and $1,497.10 in costs, as sanctions for various discovery abuses by the Plaintiffs. CP 356-58, 361, 457.

IV. RESPONDENTS' ARGUMENT

A. Standard of Review

With respect to review of the trial court's grant of injunctive relief, the standard of review is abuse of discretion:

> " 'A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case.' " *Standing Rock [Homeowner's Ass'n v. Misich],* 106 Wn. App. [231] at 240, 23 P.3d 520 [2001] (quoting *Steury v. Johnson,* 90 Wn. App. 401, 405, 957 P.2d 772 (1998)). A trial court has broad discretion to fashion an injunction that is appropriate to the facts, circumstances, and equities before it, and the reviewing court will give great weight to the trial court's exercise of discretion. *Id.*

Sunnyside Valley Irrigation v. Dickie, 111 Wn. App. 209, 219-20, 43 P.3d 1277 (Div. 3 2002); *accord, Waremart, Inc. v. Progressive Campaigns, Inc.,* 139 Wn.2d 623, 628, 989 P.2d 524 (1999); *Tradewell Stores, Inc. v. T.B. & M., Inc.,* 7 Wn. App. 424, 427-28, 500 P.2d 1290 (Div. 2 1972).

The trial court's discretion extends to the **scope** of an injunction:

> The duration and scope of an injunction are decided on the facts of each case at the trial court's discretion. The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary.

King v. Riveland, 125 Wn.2d 500, 515, 886 P.2d 160 (1994) (citations omitted); *accord, e.g., Waremart v. Progressive Campaigns, supra,* 139 Wn.2d at 628; *Boeing Co. v. Sierracin Corp.,* 108 Wn.2d 38, 63, 738 P.2d

665 (1987); *Washington Fed'n of State Employees v. State,* 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

B. Overview of the Argument

From early in this dispute, the Defendants' Group alleged that Plaintiffs defaulted under the Operating Agreement's obligation to pay capital contributions, including weekly fees assessed by the Green Cab Board of Directors, and that this default subjected the Plaintiffs to the remedies for default under Article 8.1 of the Operating Agreement. CP 929 ¶4B.7; CP 932 ¶4K.1 (Answer & Counterclaim of Majority Members) (April 4, 2011). As detailed in the Statement of Facts, §III(A)(4), *supra,* Plaintiffs admitted to facts constituting defaults under the Operating Agreement, including failure to pay weekly fees, and improper withdrawal from Green Cab. 7/31 VRP 109-110. The remedies for default under Article 8.1 of the Operating Agreement include (1) loss of the right to governance; and (2) the defaulting member is deemed to have offered their membership units for sale to Green Cab at "net book value" as "determined by the Company's accountant . . .." *Ex. 1,* Art. 8.1(c)(v).

The trial court in this case was charged by the parties with determining appropriate injunctive relief related to control over Green Cab, based on Special Verdict Form A which, as returned by the jury, supported Defendants' claim that the September 4th election was invalid

because members who had defaulted in payment of dues were elected to the Board. Ordering implementation of the buy-out remedy for default under the Operating Agreement was but a necessary and appropriate incident to the granting of injunctive relief, in order to avoid the continued turmoil of forced association by two groups that could not work together. The trial court was in the best position to make this determination based on the facts, circumstances and equities before it, and its determination of the scope of this injunction was not based upon untenable grounds, or manifestly unreasonable, or arbitrary. Accordingly, under the authorities stated above, it must be affirmed.

C. The Injunctive Relief is not Inconsistent with the Verdict and is Supported by the Operating Agreement

Plaintiffs argue that the buy-out remedy applied by the trial court is both contrary to the jury verdict and unsupported by the language of the Operating Agreement. *Appellants' Brief* at 11-14. They also assert a number of procedural objections to the relief granted. *Id.* at 2, 13-14. Plaintiffs are mistaken on all counts.

1. The Injunctive Relief is Not Inconsistent with the Jury Verdict on Breach of Contract

The elements of breach of contract are: (1) existence of a contract; (2) contract terms impose a duty; (3) duty is breached; and (4) breach proximately causes damage to the claimant. *NW Independent Forest Mfrs.*

v. Dept. of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (Div. 2 1995); 6A Wash. Prac. WPI 300.01 (6th ed. 2013). "A party requesting injunctive relief has the burden of proving (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual or substantial injury." *Sunnyside Valley v. Dickie, supra,* 111 Wn. App. at 220. Obviously, the elements are not the same. Plus, the injunctive claim is equitable in nature, calling upon the court to exercise broad discretion. *Id.* at 219. While the legal claim for contract relief looks to past damages, the equitable claim for injunction is preventative in nature, and focuses on future harm. *Braam ex. rel. Braam v. State,* 150 Wn.2d 689, 708, 81 P.3d 851 (2003) ("Injunctive relief is prospective"); *Lewis Pacific Dairymen's Ass'n v. Turner,* 50 Wn.2d 762, 776, 314 P.2d 625 (1957) ("The purpose of an injunction is not to punish the wrongdoer for past transactions, but to restrain present or threatened future wrongful acts.").

"It is the rule in this state that answers to special interrogatories should, if possible, be read harmoniously to support a judgment." *State v. Evans Engine and Equip. Co., Inc.,* 22 Wn. App. 202, 204, 589 P.2d 290 (Div. 1 1978); *Van Cleve v. Betts,* 16 Wn. App. 748, 757, 559 P.2d 1006 (Div. 2 1977). It is only "[w]hen an irreconcilable inconsistency exists" that the appellate courts will reverse the judgment. *Evans Engine, supra;*

accord, e.g., State v. Robinson, 84 Wn.2d 42, 45, 523 P.2d 1192 (1974) ("a 'special finding of fact' will not be deemed to control a general verdict unless it is so irreconcilably inconsistent that it cannot be otherwise interpreted."). There is no irreconcilable inconsistency between the jury's ruling on Green Cab's breach of contract claim and the trial court's grant of injunctive relief, because the jury's Special Verdict Form A on Validity of Elections shows that the jury, like the trial court, found that non-payment of weekly fees was a default. Thus, at the time that it considered injunctive relief, the trial court had before it the jury's finding of default in payment of weekly fees, plus the admissions of record that Plaintiffs had failed to pay weekly fees and had withdrawn from the Company in default of the Operating Agreement. These defaults, standing alone, did not necessarily require the jury to find a breach of contract, but they were enough for the trial court, acting in equity, to grant the injunction, including the deemed buy-out remedy of the Operating Agreement.

a. The Trial Court's Injunction is Supported by Special Verdict Form A and the Admissions and Evidence

Special Verdict Form A contains two specific findings of default: (1) weekly fees were required, but members who voted on September 4 were not current in the payment of their weekly fees; and (2) members elected to the Board on September 4 were not current in weekly fees,

though this was required. CP 222-223 (Answers ##1, 2, 4, 5). While Plaintiffs focus on an alleged inconsistency between the injunctive relief and Special Verdict Form C (Breach of Contract), the jury findings in Special Verdict Form A support the trial court's imposition of an injunctive remedy for default.

"When the jury has been discharged it is the court's duty to determine the legal effect of the verdict." *Minger v. Reinhard Dist. Co.,* 87 Wn. App. 941, 946, 943 P.2d 400 (Div. 3 1997); *accord, Evans Engine,* 22 Wn. App. at 205. As detailed in Section III(A)(3) and (4), *supra,* in addition to the jury findings of default in Special Verdict Form A, the admissions and evidence of record demonstrate that weekly fees were mandatory, that Plaintiffs were in default on those fees, and that Plaintiffs had defaulted by withdrawing from the Company, moving to a new office, purchasing separate insurance, and ceasing or cutting back on driving the licensed vehicles. Therefore, there was no abuse of discretion in finding that Plaintiffs were in default for purposes of injunctive relief, separate from the legal claim of breach of contract. The trial court was well within its discretion to determine that an award of the Operating Agreement's remedy of deemed buy-out was necessary to prevent future "actual or substantial injury," which is the very essence of equitable injunctive relief.

The injunctive relief granted here was not based upon untenable grounds, or manifestly unreasonable, or arbitrary, and therefore it must be affirmed.

b. There is No Irreconcilable Conflict Between the Breach of Contract Verdict and the Injunctive Relief

The Instruction on Defendants' breach of contract claim demonstrates that the trial court's injunctive relief is not necessarily inconsistent with the jury's adverse verdict on breach of contract. Instruction #15 on this claim required the jury to find:

1. That the plaintiffs entered into a contract with defendants.

2. That the terms of the contracts included the following obligations:

   (A) all the plaintiffs and defendants must pay capital contributions in a timely manner, including weekly fees and insurance premiums.

   (B) defaulting members who fail to make capital contributions for 30 days automatically forfeit all rights including the right to vote on, consent to or otherwise participate in any decision of the members;

   (C) upon election by the members each director shall serve for one year or by his or her resignation or removal which ever is sooner.

   (D) no member shall disassociate or withdraw from Green Cab LLC.

3. That the plaintiffs breached the contract in one or more ways complained of by the defendants.

4. That the defendants were not in material breach of contract and had performed or offered to perform their obligations under the contract.

5. That the plaintiffs materially breached the contract.

6. That the defendants were damaged as a result of the plaintiffs' breach or breaches.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence your verdict should be for defendants on this claim. On the other hand if any of these proposition has not been proved your verdict should be for the plaintiffs on this claim.

7/31 VRP 116-117/17-19.

This instruction allowed the jury to reject Defendants' breach of contract claim in ways that are not inconsistent with the trial court's grant of injunctive relief. To just catalog a few of these possibilities:

- The jury could have believed that the last paragraph ("if **any of these propositions** has not been proved your verdict should be for the plaintiffs") meant that each term stated in paragraph 2(A)-(D) had to be found in order to rule for Defendants. The instruction was confusing because it did not contain the word "or" to show that any one of those terms could give rise to a breach of contract.[2]

[2] This was not cured by the language of paragraph 3 ("breached the contract in one or more ways complained of by the defendants"), because that goes to breach, not terms of the contract, and the "one or more" language was not tied directly to paragraph 2.

- If the jury believed this, then it is highly likely that they would not have found 2(B) to be a term of the contract, since Defendants' own witnesses testified that they allowed defaulting members to **vote for directors,** but only drew the line at allowing defaulting members to **serve as directors.** 7/26 VRP 25-26/24-15.
- The jury may have believed that Plaintiffs did breach the contract, but that their breach was not material. However, because the equitable issue of injunctive relief is entrusted to the trial court as a matter of law, and because there is no special jury finding on materiality, the trial court had to exercise its own discretion as to the immediacy of the danger, and whether the injury to be suffered in the future is "actual or substantial." *Sunnyside Valley, supra,* 111 Wn. App. at 220. Nothing the jury did binds the trial court on these equitable determinations.
- The jury may have believed that there was a default, but no damages. This would not be inconsistent with a grant of injunctive relief, because the legal claim is based on past damages, whereas the injunctive relief looks to future harm. The trial court was within its discretion to believe that continued forced association between the two groups would be an ongoing harm warranting injunctive relief.
- The jury might have been confused on the damages issue due to a disconnect between Special Verdict Form C and jury instruction #15.

Special Verdict Form C addresses *only* "Defendant Green Cab LLC's claim of breach of contract . . .," while Instruction 15(6) requires a finding "that the defendants were damaged" in order to find for Defendants on breach of contract. *Compare* CP 221 *with* 7/31 VRP 116-117. "Defendants" is a group of individual members plus Green Cab LLC. 7/31 VRP 104/10-13. The jury may have believed that because the weekly dues were owed only to the LLC, not to the individual defendants, the requirement stated in Instruction #15(6) "[t]hat the defendants were damaged" was not met. This, of course, would not be inconsistent with a finding of ongoing harm to Green Cab the LLC, and a grant of the injunction that was actually entered in this case. CP 341-342.

There were many ways that the jury could have found against Green Cab on its breach of contract claim that would still leave open the finding that Plaintiffs invaded a clear legal or equitable right of Green Cab by failing to pay weekly dues and by withdrawing from the company, and that the ongoing association of defaulting members threatened in the future to cause substantial harm to the company. In other words, there is no "irreconcilable inconsistency" between the jury's verdict on the breach of contract claim, and the trial court's grant of equitable relief including

the Operating Agreement's buy-out remedy for default. Therefore, there is no abuse of discretion here.

2. The Injunctive Relief is Supported by the Operating Agreement

Plaintiffs' argument that the Operating Agreement does not support the trial court's injunctive relief is based on the false premise that "[t]he jury found that [Plaintiffs] had not breached the Operating Agreement . . .." *Appellants Brief* at 12. The jury did not necessarily find that there was no default under the Operating Agreement, but only that Plaintiffs were not liable for breach of contract under Instruction #15. Breach of contract has more elements to it than just the breach itself.

The jury was instructed as to admitted defaults by the Plaintiffs. 7/31 VRP 109-110. This Court "should presume the jury followed the court's instructions absent evidence to the contrary." *State v. Montgomery,* 163 Wn.2d 577, 596, 183 P.3d 267 (2008); *accord, e.g., State v. Blake,* 172 Wn. App. 515, 531, 298 P.3d 769 (Div. 1 2012). Nothing on the face of the verdicts is necessarily contrary to the instructions laying out Plaintiffs' admissions of default.

Once Plaintiffs' false premise is discarded, they are left with the admission in their brief that "a member can lose his interest in Green Cab . . . pursuant to the remedies under paragraph 8.1(c), if he is a Defaulting

Member." *Appellants Brief* at 12. Plaintiffs admitted to default both in failing to make weekly payments, and in withdrawing from the Company in derogation of Article 5.6 of the Operating Agreement, which states that "[a] Member may not withdraw as a Member prior to dissolution and commencement of winding up of the Company . . . without the written consent of all the other Members." *Ex. 1* Art.5.6(a).[3]

The Green Cab Operating Agreement specifies the remedies for default for payment of monetary obligations under Article 8.1(c), and for "other defaults" under Article 5.8(b). *Ex. 1* pp. 5, 12-13. These provisions merge into Article 8.1(c) because Article 5.8(b)(iii) permits, as a remedy for "other default," that "the Company may . . . Remove the defaulting Member upon a purchase of his or her membership Interest pursuant to Section 8.1(c)(v) . . .." *Ex. 1* p.5. Article 8.1(c)(v) gives the Company, *inter alia,* the following remedy against a Defaulting Member:

> (v) If a Defaulting Member fails to make a Capital Contribution for more than 30 days from the date due, then cause the Defaulting Member to: . . . (ii) be deemed to have offered for sale to the Company all of the Units and any other associated rights then held by the Defaulting Member for a purchase price determined by the Company's accountant to be

[3] Plaintiffs attempt to escape the admission of withdrawal by arguing it is "meaningless" because the Operating Agreement prohibited withdrawal. *Appellants' Brief* at 13-14. Plaintiffs confuse the legal effects of facts with the facts themselves. Plaintiffs admitted both the **fact** that the Operating Agreement prohibited withdrawal, and the **fact** that they withdrew. 7/31 VRP 109-110/22-2. The legal consequences are for the court to determine, but they do not negate the admissions themselves.

> the net book value of the Defaulting Member's Percentage Interest in the Company represented by the Units. . . .

Ex. 1 at p.13. **This is exactly the remedy ordered by the trial court.** CP 347. It is plainly supported by the Operating Agreement.

3. Plaintiffs' Procedural Objections Must Fail

Plaintiffs framed their one assignment of error in terms of the trial court "deciding issues other than those pleaded and submitted to the court for determination." *Appellants' Brief* at 2. They presented no legal argument about failure to plead the buy-out remedy for default, mentioning it only in their Statement of the Case. *Id.* at 7. Plaintiffs have waived the pleading issue by failing to brief this assignment of error. *State v. Davis,* 60 Wn.2d 233, 236, 373 P.2d 128 (1962); *Wharf Restaurant, Inc. v. Port of Seattle,* 24 Wn. App. 601, 613, 605 P.2d 334 (Div. 1 1979).

Regardless, this issue was pleaded and raised in discovery. Washington is a notice pleading state: "our pleading system only requires ' "a short and plain statement of the claim" and a demand for relief.'" *McDevitt v. Harborview Medical Center,* 291 P.3d 876, 882 (2012) (*quoting, Putman v. Wenatchee Medical Center,* 166 Wn.2d 974, 983, 216 P.3d 374 (2009) (*quoting,* CR 8)). The buy-out default provisions were

first pleaded on April 4, 2011 as part of Defendants' counterclaims in its first Answer to Plaintiffs' Complaint:

> 4B.7 Per the Agreement, Article 8.1(b)(ii) & (c)(5), and RCW 25.15.195, all parties shall pay their capital contributions, in a timely manner, including, but not limited to, weekly fees, and insurance premiums, **or the defaulting parties shall be subject to the relevant defaulting provisions of the Agreement,** and RCW 25.15.140.
>
> * * *
>
> K. TENTH CLAIM FOR RELIEF: Injunctive Relief – RCW 7.40
>
> 4K.1 Majority Members allege all previous paragraphs.
>
> * * *
>
> 4K.5 The Majority Members respectfully request injunctive Relief, in order to prevent Plaintiffs from committing their actions and omissions . . ..
>
> * * *

CP 929 (emphasis added), 932. This was more than sufficient to meet the standards of notice pleading. In addition, Plaintiffs admitted they were in default under these provisions in unanswered Requests for Admission, 7/19 VRP 45/6-11; 7/31 VRP 109-110/11-2, and therefore these issues were unquestionably raised and made a part of this case.

Plaintiffs argue that the trial court overstepped its bounds because the Operating Agreement sets forth a number of possible remedies for default, and "the court was not tasked with making that decision for Green Cab." *Appellants' Brief* at 13. This misstates the record. In addition to the Counterclaim pleading and Request for Admission cited in the preceding paragraph, this relief was specifically requested on behalf of

Green Cab by its attorneys in Defendants' Brief in Support of Equitable Relief. CP 282 (¶¶ 3 & 4). The trial court simply did what courts are authorized to do: it granted relief requested by Green Cab.

Finally, Plaintiffs argue that because there was no evidence of written notice of default to the Plaintiffs in payment of the weekly dues as required by Article 8.1(b)(ii), the deemed buy-out remedy could not be granted under this Article. *Appellants' Brief* at 14. This argument is made for the first time on appeal, and should therefore not be considered. *Herberg v. Swartz,* 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *accord, e.g., Van Vonno v. Hertz Corp.,* 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992); RAP 2.5(a). But even if considered, it is belied by Plaintiffs' own testimony. Mr. Mekonen testified that he was notified of his obligation to pay weekly dues by Chairman Dessie Zewdu and Manager Mark Scofield, but he objected on principle because he did not believe imposition of dues was appropriate under the Operating Agreement. 7/23 VRP 118-12-22; *see also,* 7/30 VRP 63/11-15. "The law does not require tender of a useless performance." *Puget Sound Service Corp. v. Bush,* 45 Wn. App. 312, 318, 724 P.2d 1127 (Div. 1 1986). Plaintiffs' repudiation of the obligation to pay the weekly dues operates to discharge Defendants from any obligation to perform a condition precedent, because " '[o]ne party need not perform a condition precedent if it appears that the other party

cannot or will not perform.'" *Id.* (*quoting, McCormick v. Tappendorf,* 51 Wash. 312, 314, 99 Pac. 2 (1909)). It is very clear from the totality of the record that no niceties of procedure would have had any effect on the Plaintiffs' Group's refusal to pay weekly fees once they dissociated from the rest of the Company, and therefore this argument must fail.

This argument also fails because it only addresses one of two defaults: the failure to pay weekly fees. There is no notice requirement applicable to improper withdrawal under Article 5.6, the other basis for invoking the buy-out remedy.

D. The Trial Court Did Not Err in Receiving Evidence on Post-trial Injunctive Relief in Declaration Form from Green Cab's Accountant

As already established, the parties agreed to reserve the issue of injunctive relief to the trial court, for determination after the verdicts on damages were in. That issue was taken up by the trial court on August 24 based on written briefs and the trial record. As stated by the trial court in its Order Denying Plaintiff's Motion for Reconsideration:

> No party has suggested that any dispute regarding the valuation of a membership interest should be decided by the jury and this Court understood that all parties to this lawsuit submitted the issue of the valuation of the membership to the Court for resolution based on the evidence presented prior to the August 24, 2012 hearing.

CP 447.

Plaintiffs object to the trial court's reliance upon the declaration of Green Cab's accountant, Tesfaye Temesgen, on the grounds of lack of disclosure, hearsay, foundation, and conclusory opinion. *Appellants' Brief* at 15-17. None of these objections can withstand analysis.

This Court "review[s] a trial court's ruling on a motion to strike for an abuse of discretion." *Engstrom v. Goodman,* 166 Wn. App. 905, 910, 271 P.3d 959 (Div. 1 2012).[4] Similarly, it "review[s] a trial court's to admit or exclude evidence for abuse of discretion." *Id.*

The trial court has discretion to allow late-disclosed testimony for good cause. *Hough v. Stockbridge,* 152 Wn. App. 328, 339, 216 P.3d 1077 (Div. 2 2009); KCLR 4(j); KCLR 26(k)(4). In this case, a previous accountant had been disclosed, and the trial court may have felt that it made little difference that the newer accountant, Mr. Ternesgen, be permitted to testify in his place. CP 937 ¶2.16. With respect to the subject-matter of the opinion, the trial court would be well within its discretion to allow testimony of the Green Cab accountant on the book value of one unit of interest in the Company in light of the Plaintiffs' admission that "any defaulting party is subject to the relevant defaulting

[4] Buried at the bottom of page 3 of an eight-page brief entitled "Plaintiffs' Response & Objections to Defendants' Request for Injunctive Relief," was the statement "Plaintiffs hereby object and move to strike the declaration of Tesfaye Temesgen." CP 309. This failed to elicit an express ruling by the trial court.

provisions of the operating agreement," 7/31 VRP 109/15-18, and the parties' agreement that the buy-out price for a default shall be "determined **by the Company's accountant** . . .." *Ex. 1* p.13 (emphasis added).

Contrary to the statement by Appellants that they were denied an opportunity to engage in discovery on the issue of the buy-out remedy for default, *Appellants Brief* at 3 ¶3, they have known from the beginning that the Operating Agreement governs the remedies for default, and they have known since Defendants' Cross-Claims were filed on April 4, 2011, that Defendants were relying on the very provision of the Operating Agreement that provides for buy-out based on the book value assigned by the Green Cab accountant. CP 929 ¶4B.7. Furthermore, they were served with Requests for Admission seeking an admission of their default under the very provision of the Operating Agreement referencing buy-out at book value as set by the Green Cab accountant, **which they failed to answer.** 7/19 VRP 45/6-11, 7/23 VRP 56/13-21. Plaintiffs have no one to blame but themselves for not engaging in discovery on this issue.

With respect to the hearsay argument, Plaintiffs fail to take note of a special statute applicable to injunctions, which provides that, "[o]n the hearing of an application for an injunction, each party may read from affidavits." RCW 7.40.060. As recognized by Washington Practice, this constitutes a special statutory exception to the hearsay rule:

> Rule 802 states the general rule that hearsay is not admissible except as provided by the evidence rules, other court rules, or statute. The rule thus defers to other court rules **and statutes [fn2]** authorizing the admission of hearsay evidence under specified circumstances.

5B K. Tegland, Wash. Prac., Evidence Law and Practice § 802.3 (5th ed. 2013). Footnote #2 cites, *inter alia,* "RCWA 7.40.060 (affidavits admissible on application for injunction)." *Id.* at n.2. Accordingly, the accountant's affidavit is admissible under the authority of RCW 7.40.060.

Finally, Plaintiffs object to the conclusory nature of the declaration, and the foundation for the opinion. But the Evidence Rules expressly permit testimony as to an ultimate issue for the trier of fact, and permit an expert to "testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise." ER 704, 705. The foundation for this testimony is simple: **he is the person that the parties agreed would establish book value for purposes of the buy-out provisions of the Operating Agreement.** Mr. Temesgen's declaration states that he has worked as Green Cab's accountant since March 2012. CP 286 ¶2. No further qualification is needed – nor is any other qualification allowed for the purpose of expressing the particular opinion at issue. The parties themselves agreed to be bound by "the purchase price determined by the Company's accountant to be the net book value . . .." *Ex. 1* p.13 (Art.

8.1(c)(v)(ii)). The method of valuation of a buy-out interest in a company set forth by the members in their founding agreement is controlling on them, regardless of whether that method results in a price above or below actual market value. *In re Randall's Estate,* 29 Wn.2d 447, 456-57, 458-59, 188 P.2d 71 (1947). In this case, that agreed-upon method specifies who will state the binding valuation, and therefore Mr. Temesgen was the only person qualified to give this testimony.

Underlying this challenge is the question of appropriateness of the valuation. The parties agreed that the value would be based on **book value,** not **market value.** As the trial court noted:

> Although the taxi cab licenses may have a market value greater than the net book value of an interest in the company, it is the membership interest that is at issue and not the fair market value of a King County taxi cab license.

CP 448. The trial court considered the terms of the Operating Agreement and the opinion of the accountant, but also other evidence, including the substantial evidence of business interruption from this lawsuit, which was bound to reduce the value of the Green Cab licenses, and of the business as a whole. CP 447. Included in this trial evidence was Mr. Gebremichael's testimony that, in March 2011, he purchased one unit in Green Cab for $6,000. 7/30 VRP 152/1-8, 21-23. Even if some taxicab licenses trade with a higher value, the evidence in this case showed that

the licenses in question were of diminished value because they were not Seattle or Airport licenses, they were kept in the name of King County and nontransferable except with County permission, and because of the Green Cab litigation and record of hardships. 7/24 VRP 67-68/17-10, & Section III(A)(2), (3), *supra.*

V. CROSS-APPEAL

A. Assignments of Error

1. The trial court erred by entering the Judgment in Favor of Yerga Belete against All Defendants, on September 13, 2012. CP 464.

2. The trial court erred by entering the Judgment in Favor of Wondwassen Mersha against All Defendants, on September 13, 2012. CP 468.

3. The trial court erred by entering the Judgment in Favor of Shumet Mekonen against All Defendants, on September 13, 2012. CP 471.

4. The trial court erred by denying Defendants' Motion for Judgment NOV in its Memorandum Decision of August 24, 2012. CP 349-55.

5. The trial court erred by ruling on Motion in Limine that Mr. Shumet Mekonen could testify to any damages figure that he stated in his deposition, despite his failure to produce any documents to verify those figures. 7/19 VRP 45-46, 68-73.

6. The trial court erred in overruling Defendants' objection to Mr. Mekonen's claim for personal damages based on the Motion in Limine ruling. 7/24 VRP 43/16-21.

7. The trial court erred by denying Defendants' motion for directed verdict re: damages. 7/26 VRP 62-63.

8. The trial court erred by giving jury instructions and overruling objections to the same that submitted Plaintiffs' claim to the jury based on breach of the Green Cab - King County RFP contract. 7/31 VRP 7-10, 27, 106, 114.

B. Issues Pertaining to Assignments of Error

1. Was Plaintiffs' evidence of lost profits damages too speculative to go to the jury, in that it was not supported by any documentary evidence, and based on pro forma statements of gross revenue rather than evidence of net profit after expenses?

2. Was it an abuse of discretion to permit Mr. Mekonen to submit a personal claim for damages after he testified in his deposition that he did not have such a claim, and that he had no records to support such a claim?

3. Did Plaintiffs lack standing to sue for breach of the RFP contract between Green Cab Taxi & Disabled Service Association, LLC and King County?

C. The Trial Court Erred by Permitting Plaintiffs' Speculative Evidence of Lost Profits to Go to the Jury

Shumet Mekonen testified to a personal claim for damages of $315,000. 7/24 VRP 40-41/2-2, 43/3-13, 43-44/25-18, 44-45/19-4, 66/4-21. This is based on his testimony that each cab earned $300 per day, thirty days each month, for $9,000 in earnings each month per cab for two cabs, which comes to $18,000 per month. This was then multiplied by the damages period of 17½ months from the date his group was told to hand over the keys to the Green Cab office, to the date of trial. 7/24 VRP 40-41/2-2, 43/3-13, 43-44/25-18, 44-45/19-4. This testimony does not

account for any expenses whatsoever, or any down time for vehicles based on repair or driver unavailability. In discussing the same figures in relation to the company as a whole, Mr. Mekonen called it "monthly revenues lost." 7/24 VRP 40-41/23-2. **Revenues are not profits.**

What's more, Mr. Mekonen's testimony is merely pro forma, not based on any actual records of past profits. Mr. Mekonen admits he was asked to produce trip sheets to document his losses. 7/24 VRP 99/15-17. According to Mr. Mekonen, a trip sheet is "the chart you have to write down the time when you pick up the customer, when you drop, and the amount you make." 7/24 VRP 99/18-22. Keeping trip sheets for all fares is a duty imposed by King County government on licensed cab drivers. 7/26 VRP 135-36. Mr. Mekonen admitted that he did not produce his trip sheets to document his claimed losses. 7/24 VRP 100/5-10. Nor did he produce his tax returns or any other documentary evidence in support of his testimony. 7/24 VRP 103/11-24, 133/8-24, 134/18-24.

Mr. Mekonen's other testimony about possible losses was also clearly based on a pro forma "plan", not on actuality:

Q: And so, what was your **expected revenue** per cab per shift?
A: Per shift is 150.
Q: $150 per cab per shift. So how many shifts in a day? Two, right?
A: Two.
Q: So then how many dollars a day **would** each cab make?
A: 300.

7/23 VRP 27/5-11 (emphasis added).

Q: 50 cabs. So if you had 50 cabs, what was your **business model** for revenue per day for the Green Cab company?
A: That's 50 times 300.
Q: Is that $15,000 a day?
A: Yes, that's what **our plan** was.

7/23 VRP 27-28/22-1 (emphasis added).

Q: What was the revenue per cab? You said it was $300 per day; is that right?
A: Yes.
Q: And so, if you month, how much **would** one cab make in a month?
A: Times 30 (inaudible).
Q: 30 times 300 that **would be?**
A: 9,000.
Q: So if you look at it that way, one cab **would be making** $9,000 per month for the Green Cab Taxi and Disabled Association; is that correct?
A: Yes.
Q: That was **your plan** going into this?
A: Yes, **that was the plan.**

7/23 VRP 28/11-24 (emphasis added).

Later, Mr. Mekonen discussed possible operating expenses. However, his testimony on that was also pro forma. In his own words, when confirming a total of projected monthly expenses of $462,020: **"That was the plan for the model we made up."** 7/23 VRP 70/2-3 (emphasis added); *see also,* 7/23 VRP 80/19-21 (expenses for 2008-2010 were not $462,000 per month). Interspersed with this testimony, Mr. Mekonen specified some of Green Cab's actual expenses. 7/23 VRP 58-64, 85/12-16. Significantly, however, when Mr. Mekonen testified about

his personal damages claim, he used the pro forma numbers for gross revenue without any deduction for expenses. 7/24 VRP 40-41/2-2, 43/3-13, 43-44/25-18, 44-45/19-4, 66/4-21. Again, none of this evidence was verified by documents.

The two other plaintiffs who recovered for tortious interference damages each testified that they would have made $300 per day, without any deduction for expenses. 7/25 VRP 106-07/23-10, 107-08/22-5, 109/1-17 (Wondwossen Mersha; claimed loss of $144,000); 7/26 VRP 28-29/13-6 (Yirga Belete; total loss comes to $112,320). On cross-examination, Mr. Mersha admitted that only about $140 per shift was profit. 7/25 VRP 119/17-19. Neither of these Plaintiffs produced any documentary evidence of any kind in support of their testimony claiming lost profits.

The general rule in Washington is that lost profits "are properly recoverable as damages when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty." *Larsen v. Walton Plywood Co.,* 65 Wn.2d 1, 15, 390 P.2d 677 (1964); *accord, e.g., Tiegs v. Watts,* 135 Wn.2d 1, 17, 954 P.2d 877 (1998). "The usual method of proving lost profits is from profit history." *Larsen, supra,* 65 Wn.2d at 16. "The calculation of lost profits damages must be based on net profits, not gross revenue or gross profits." *Parkway Dental Assocs.,*

P.A. v. Ho & Huang Properties, L.P., 391 S.W.3d 596, 608 (Tex. App. 2012). Use of mere pro forma estimates of profits is not sufficient. *Farm Crop Energy, Inc. v. Old National Bank of Washington,* 109 Wn.2d 923, 930-31, 750 P.2d 231 (1988). Under the "new business rule", a new business without a profit history will be denied damages for prospective profits, unless "**factual data** is available to furnish a basis for computation of probable losses.'" *Larsen, supra,* 65 Wn.2d at 17 (*quoting, Barbier v. Barry,* 345 S.W.2d 557, 563 (Tex.Civ.App. 1961)) (emphasis added). This factual data my be supplied by way of expert testimony, subject to the requirement of documentation by tangible evidence:

> Although expert testimony is a sufficient basis for an award of lost profits, their opinions must be based upon tangible evidence rather than upon speculation and hypothetical situations. *Bogart v. Pitchless Lumber Co., supra* [72 Wash. 417, 130 P. 490 (??)]. Consequently, our judicial concern is limited to the question: Was there a substantial and sufficient factual basis upon which the respective opinions could be based?

Larsen, supra, 65 Wn.2d at 19 (*citing, Warner v. Channell Chemical Co.,* 121 Wash. 237, 208 P. 1104 (1922)); *accord, Farm Crop Energ. v. Old National Bank, supra,* 109 Wn.2d at 928.

In the present case, Plaintiffs presented no expert testimony about their losses, but they did present lay testimony. Lay testimony by interested witnesses about lost profits is also subject to the requirement

that it be supported by tangible evidence in order to remove it from the realm of speculation. This is illustrated by the case of *National School Studios, Inc. v. Superior School Photo Service, Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952), in which an employer claimed lost profits due to breach of a noncompetition covenant by a former employee, and testified that profit was calculated based on 10% of volume. *Id.* at 274-75. In upholding the trial court's ruling that this testimony, standing alone, was insufficient to show lost profits, the Washington Supreme Court stated:

> In our opinion, the trial court was correct in denying appellant judgment for damages because of the inadequacy of its proof. The burden was upon appellant to prove with reasonable certainty its loss of profits caused by respondents' acts. **The bare, oral statement by appellant's president that it made ten per cent. profit on the dollar volume of the business obtained by Lien is a mere conclusion. It does not constitute the reasonable certainty of proof which is required under the circumstances shown to exist in this case.**
>
> It is common knowledge that such a corporation as appellant (which was doing business in nearly every state in the Union) **must keep detailed books of account from which its *net* income can be ascertained.** It would have been a simple matter to have computed such income with respect to the portion of its business obtained by Lien.

National School Studios v. Superior School Photo, supra, 40 Wn.2d at 275 (emphasis added).

Similarly, in *B&B Farms, Inc. v. Matlock's Fruit Farms, Inc.*, 73 Wn.2d 146, 437 P.2d 178 (1968), the Supreme Court upheld the trial

courts refusal to award lost profits, due in part to failure to produce the best evidence of these losses:

> But conceding that the damages do not have to be proved with exact certainty, nevertheless the rule is **that the plaintiff must produce the best evidence available and it must be sufficient to afford a reasonable basis for estimating his loss** before he will be in a position to demand the court fix the amount of his damages. *Dunseath v. Hallauer,* 41 Wn.2d 895, 253 P.2d 408 (1953). If the plaintiff produced the best evidence available, that fact is not pointed out in the brief nor in the record.

B&B Farms, supra, 73 Wn.2d at 151 (emphasis added).

Based on these authorities, the rule with respect to proof of future lost profits in a new business requires that the party seeking recovery must produce the best tangible evidence of losses. Mere testimony by interested witnesses based on obviously pro forma figures of gross revenue, unsupported by any trip sheets, tax returns, or company profit and loss statements, falls far short of satisfying this standard. Both breach of contract and tortious interference claims have damages as an essential element, and Plaintiffs failed to carry their burden when they had a chance. The judgments on these claims should be reversed.

D. The Trial Court Should Not have Allowed Mr. Mekonen to Avoid the Ruling on the Motion in Limine by Claiming Personal Damages

On Motion in Limine, the trial court ruled that Mr. Mekonen could not submit a personal claim for damages because (as paraphrased by the

court) he testified in deposition "I am not asking for any money personally in this case." 7/19 VRP 45/16-23; 7/19 VRP 70-71/22-8. But later, the trial court overruled Defendants' objection based on the ruling in limine, made when Mr. Mekonen was asked about his personal claim for damages. 7/24 VRP 43/16-21. This ruling rewards discovery abuse, returning us to the days of "blindman's bluff" that the rules of discovery were supposed to avoid. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (*quoting, Gammon v. Clark Equip. Co.,* 38 Wn. App. 274, 280, 686 P.2d 1102(1984), *aff'd,* 104 Wn.2d 613, 707 P.2d 685 (1985)). Our system of full pretrial discovery of facts "obviously cannot succeed without the full cooperation of the parties." *Id.*

The record of Mr. Mekonen's published deposition shows far less than full cooperation. First, the deposition itself was conducted under an order compelling attendance, after repeated failures to appear. CP 260-61, CP 503-04. Second, the testimony given was clearly obstructionist:

Q: So you've kept no company books or records at the Madison Street location?
A: We don't have any.
Q: You have no books or records?
A: No.

Deposition of Shumet Mekonen at 58/9-13 (8-5-2011).[5]

[5] Relevant excerpts from the deposition are Appendix B to this Brief. The deposition was published on the record at trial. 7/24 VRP 131/20-21.

Q: Did you file any tax returns?
A: No.
Q: Do you have any tax accounting information in your office?
A: No.

Id. at 59/2-6.

Q: Have you made any money? Gross, any gross money since January?
A: No.
Q: You haven't charged one fare?
A: I mean, people does, but not that much. Yeah.
Q: Do you have records of the fares that you've charged?
A: No.

Id. at 60/12-20. Then Mr. Mekonen admitted that they kept trip sheets, which were in fact their "records", and that they would be located at their office. *Id.* at 60-61/21-6.

Q: Have you produced any of those records with discovery?
A: No.

Id. at 61/7-9.

Q: So why didn't you produce those timesheets with your discovery responses?
A: That's not appropriate to a reason to discovery.
Q: Why is it not appropriate?
A: Because it's to return to the county, not to you to discovery or to the lawyer.
Q: But I did ask for all documents relevant to this case, and you have alleged damages in this case based on loss of income . . . Right?
A: That's not relevant to me to return it to you any way.

* * *

Q: But I'm asking you because you have said that you've been damages in this lawsuit. You've been damaged because –
A: I haven't damage the loss.

Q: You have been?
A: I haven't.
Q: You have had no damages in this lawsuit?
A: I have damage myself by somebody else, but I haven't damage to anybody.
Q: Okay. But the damages you've received, the alleged damage you've received, part of it is for lost wages, right?
A: Yeah.
Q: And you need to have records of those wages so that you can show what wages you've brought in and what wages you haven't brought in, right?
A: Yeah.
Q: And so that's relevant to this lawsuit and you did not produce those document[s] to me, right?
A: At the time it was not relevant to me. I didn't give it to you.
Q: So it's your answer that you believed it was not relevant that's why you didn't give it to me?
A: Yeah.

* * *

Q: How much money are you asking for in this lawsuit?
A: To whom?
Q: From the other side. From the opposing group?
A: I don't ask any money to anybody.
Q: You haven't asked for any damages in this lawsuit?
A: I haven't ask any money.

Id. 62-64/2-8. Next, Mr. Mekonen testified that "we" – meaning his group as a whole – lost business opportunity valued at $189,000. *Id.* at 64/9-15. That is not a personal claim. He then testified that they had written down figures to come to that total. *Id.* at 64/16-20.

Q: So doesn't it make sense if you know how much you make that you should have produced any document relevant to that question?
A: We should have produced that if we work.

Id. at 64/21-24; *see also,* 7/24 VRP 133/8-24 (trial testimony summarizes the above).

Defendants were severely prejudiced in their ability to cross-examine the ubiquitous testimony about earning $300 per day by the complete failure of the Plaintiffs to produce documents supporting their claimed damages. The trial court recognized this, and initially ruled that Mr. Mekonen could not assert a personal claim for damages. 7/19 VRP 70-71/22-8. Nonetheless, over objection, he was allowed to do so, and he was personally awarded $133,000. That judgment should be reversed, to avoid rewarding discovery intransigence. "[W]illful or intentional nondisclosure is defined as nondisclosure without reasonable excuse . . .." 3A Wash. Prac. CR 37 §11 (*citing, Carlson v. Lake Chelan Community Hosp.,* 116 Wn. App. 718, 75 P.2d 533 (Div. 3 2003)). There was no reasonable excuse given by Mr. Mekonen for failure to produce documentation of his damages. Pretrial discovery only works if the litigants know that they cannot profit by hiding facts that might undermine their claims. Anything less than full reversal will send the message that stonewalling works, thus threatening the viability of our system of pretrial discovery. It was an abuse of discretion for the trial court to reverse the ruling in limine midstream through the trial, without any explanation.

E. The Trial Court Erred by Allowing Plaintiffs to Sue for Breach of the RFP Contract

In addition to the Operating Agreement, the other contract in evidence was the RFP contract with King County for an Alternate Way to Structure a Taxicab Association, awarded to Green Cab Taxi and Disabled Service Association, LLC. *Exs. 2, 3 & 67.* This is the contract that creates a duty of Green Cab to implement a system in which the drivers would be employees governed by collective bargaining and health and workers' compensation insurance. *Ex. 2* at 6-8; *Ex. 67* at 1.

Over objection by Defendants that Plaintiffs lacked standing to assert a breach of the RFP contract because it was a contract between Green Cab and King County, not between the parties, the trial court nonetheless allowed Plaintiffs to sue Defendants for breach of this contract. 7/31 VRP 7-9/1-16. Despite Defendants' timely and specific objection, the trial court instructed the jury that it could find a breach of contract against Defendants if it found that the terms of the contract included obligations (1) to implement an employer-employee relationship with member drivers; (2) to pay a salary or wage for work performed; (3) to comply with workers' compensation; and (4) to provide health insurance benefits. 7/31 VRP 114/14-21. This was error. Plaintiffs have no standing to enforce Green Cab's contract with King County.

"Standing is a common law doctrine that prohibits a litigant from raising another's legal right.'" *Donlin v. Murphy,* 300 P.3d 424, 429 (Div. 1 2013) (*citing, Grant Cty. Fire Protection Dist. v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004)). The usual rule is that only a party to the contract has standing to sue to enforce it. *Kim v. Moffett,* 156 Wn. App. 689, 700, 234 P.3d 279 (Div. 2 2010); *see also, id.* at 698 (*quoting* CR 17) ("every action shall be prosecuted in the name of the real party in interest"); *Eastlake Const. Co. v. Hess,* 33 Wn. App. 278, 381, 655 P.2d 1160 (Div. 1 1982). Under the usual rule, the parties with standing to sue for breach of duties under the RFP would have been either Green Cab or King County.

There can be no dispute that Plaintiffs had no right to sue on behalf of King County. As for Green Cab, a limited liability company is a separate legal and juridical entity, fully empowered to control and sue upon its own contracts. RCW 25.15.030(1), (2).

> Ordinarily, an action at law or a suit in equity, to enforce corporate rights or to redress wrongs done to a corporation, cannot be maintained by a stockholder or a group of stockholders. The reason for this is that the cause of action accrues to the corporation itself, and the stockholders' rights therein are merely of a derivative character and therefore can be enforced or asserted only through the corporation.
>
> However, where it is shown that the stockholder has exhausted all his available means to obtain within the corporation itself redress of his grievances or the institution of

> an action in conformity to his wishes, and it appears that the corporation is incapable of enforcing a right of action accruing to it or that its officers or directors are acting fraudulently or collusively among themselves or with others, in such a manner as will result in serious injury to the corporation or to the interests of its stockholders, then, in order to prevent a failure of justice, equity will permit a suit to be brought by a stockholder or stockholders to enforce a right of action belonging to the corporation.

Goodwin v. Castleton, 19 Wn.2d 748, 761, 144 P.2d 725 (1944).

The principles stated in *Goodwin* recognizing a limited equitable right of derivative action are now codified for LLC members at RCW 25.15.370-.385. But this does not support the action that was allowed to Plaintiffs here, for at least three reasons:

(1) The statute clearly requires, as a precondition to bringing a derivative action, that "the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort," RCW 25.15.380, *see also,* CR 23.1, and Plaintiffs complaint does not comply, CP 892-916;

(2) The relief allowed is recovery **on behalf of the LLC,** not recovery on behalf of the Plaintiffs, as was allowed under the claim charged to the jury by the trial court, RCW 25.15.370 ("A member may bring an action in the superior courts in the right of a limited liability company **to recover a judgment in its favor** . . .."); and

(3) "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." CR 23.1. Plaintiffs cannot adequately represent a group (if one even exists) that may have been harmed by failure to implement employer-employee relationships with wages and insurance benefits, because the testimony of Shumet Mekonen establishes that this occurred prior to the schism at a time when both groups were participating in management of Green Cab. 7/23 VRP 79/3-6, 11-17.

If any party were to have sued on the RFP contract, it should have been either King County, Green Cab, or non-complicit members of Green Cab suing on behalf of Green Cab after following the proper procedures for a derivative action under CR 23.1 and RCW 25.15.370-.385. Plaintiffs simply lacked standing to enforce either King County's or Green Cab's rights under that contract, and therefore it was error to instruct the jury otherwise.

Despite the faulty instructions, the claims of breach of contract by all Plaintiffs except Shumet Mekonen were rejected. CP 349. These rulings should remain intact. The only breach of contract judgment was in favor of Mr. Mekonen against all Defendants in the amount of $95,000.

CP 230-31, 349, 471. This is a separate and independent ground for reversing Mr. Mekonen's breach of contract judgment.[6]

VI. CONCLUSION

Defendants respectfully request that this Court: (1) affirm the injunctive relief including the order on buy-out; (2) reverse all judgments for breach of contract and tortious interference for failure to prove the essential element of damages; (3) reverse the personal judgment in favor of Shumet Mekonen based on his deposition testimony; and/or (4) reverse and remand the judgment for breach of contract in favor of Shumet Mekonen. In addition, Defendants request an award of their costs.

DATED this 9th day of July, 2013.

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[6] If the Court agrees that damages were not proven, no remand is warranted. If the Court finds that mixing in the RFP contract was the only error, then remand is warranted. If so, this Court should instruct the trial court on remand that Mr. Mekonen may only sue for breach of the Operating Agreement. He may not pursue a derivative action on remand:

> "Standing to bring a stockholder derivative claim requires a proprietary interest in the corporation whose right is asserted." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 149, 744 P.2d 1032, 750 P.2d 254 (1987). To maintain a derivative claim, the plaintiff's interest as a shareholder must continue throughout the litigation. *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 350, 186 P.3d 1107 (2008), *aff'd*, 169 Wn.2d 199, 237 P.3d 241 (2010).

Donlin v. Murphy, supra, 300 P.3d at 429.

APPENDIX A

5. Defendants' Motion for Judgment for Directed Verdict

Defendants have filed a motion for the Court to enter a directed verdict against Plaintiffs on their various claims for damages and for directed verdict on Green Cab LLC's claim for breach of contract.

a. Plaintiffs' Damage Awards

The jury rendered the following special verdicts in favor of the following Plaintiffs:

PLAINTIFF	CLAIM	DAMAGES AWARDED
Shumet Mekonen	Breach of contract	$95,000
	Tortious interference	$38,000
	Breach of fiduciary duty	$0
Wondwossen Mersha	Breach of contract	$0
	Tortious interference	$ 8,500
	Breach of fiduciary duty v. Zewdu & Melese	$14,000
Habtamu Aboye	Breach of contract	$0
	Tortious interference	$0
	Breach of fiduciary duty	$0
Yirga Belete	Breach of contract	$0
	Tortious interference	$26,600
	Breach of fiduciary duty	$0

Defendants ask the Court to overturn these verdicts against the Defendants for the following reasons: (i) Defendants have qualified immunity from liability under RCW 25.15.155(1) and Plaintiffs failed to present sufficient evidence of gross negligence to warrant a finding of liability against Defendants; (ii) there was no evidence that Defendants tortiously interfered with a business relationship of the Plaintiffs; (iii) there was no evidence that Defendants kept credit card receipts from customers serviced by Plaintiffs; and (iv) the damage awards are not supported by the evidence, are based on evidence not produced during discovery, are inconsistent with the Court's pretrial ruling relating to Shumet Mekonen's claim for damages, and do not reflect the fact that the Plaintiffs' failed to mitigate their own losses by paying for DDS services directly.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SHUMET MEKONEN, et al, Plaintiffs, vs. DESSIE ZEWDU, et al, Defendants.	)	No. 10-2-36451-0 KNT

DEPOSITION UPON ORAL EXAMINATION OF

SHUMET MEKONEN

Taken at 901 Fifth Avenue, Suite 1700

Seattle, Washington

DATE TAKEN: August 5, 2011

REPORTED BY: VANESSA JONES, CCR #2098

books and records?

A. Well, we keep, but we don't have it yet.

Q. You don't have it?

A. Yeah.

Q. Okay. Do you keep company books and records?

A. We used to, but I told, but not right now. We don't have any yet. We didn't start yet. We are just trying to set up everything.

Q. So you've kept no company books or records at the Madison Street location?

A. We don't have any.

Q. You have no books or records?

A. No.

Q. Under the operating agreement does a member have the right to inspect records?

A. Who?

Q. Does any member have the right to inspect records underneath the operating agreement?

A. Yeah.

Q. Okay. But you don't have any records to be inspected?

A. No.

Q. Do you have any tax returns?

A. My individual, yeah.

Q. I'm talking about for Green Cab?

A. No.
Q. Did you file any tax returns?
A. No.
Q. Do you have any tax accounting information in your office?
A. No.
Q. How do you plan to handle the tax returns?
A. We are just -- what we did is just we have to get together and we have to apply in one group. That's what we are, we were doing before. So we didn't do any tax return at all for the whole company.
Q. But I'm talking about you now as a separate group.
A. A separate group for the future you're talking about?
Q. Well --
A. For the future or for the past?
Q. When did you take possession of the Madison Street location?
A. Since January.
Q. Since January?
A. Yeah.
Q. You've been in there since January?
A. We've been since January.
Q. Not before January?

A. No.
Q. Okay. So since January do you keep any sort of records for your taxes?
A. We don't have any records to keep. That's what I'm saying. We have registration.
Q. Uh-huh.
A. The car registration.
Q. Uh-huh.
A. And car insurance.
Q. Uh-huh.
A. That's all we have.
Q. Have you made any money? Gross, any gross money since January?
A. No.
Q. You haven't charged one fare?
A. I mean, people does, but not that much. Yeah.
Q. Do you have records of the fares that you've charged?
A. No.
Q. How do you know much money your members have made?
A. Their tax -- they have their trip sheets. They just use trip sheets.
Q. Where do the trip sheets go?

A. We keep it in our cars.
Q. You keep the trip sheets, so wouldn't those be your records?
A. It would be.
Q. Okay. And are those located in your office?
A. Gonna be, yeah, when we set up.
Q. Have you produced any of those records with discovery?
A. No.
Q. Why not?
A. Because we didn't work that time when you give us that discovery.
Q. So you haven't had any fares or kept any trip sheets between January 1st and July 29th when you provided me with your answers?
A. July 29th? That was not July 29th. I don't know.
Q. This is -- it's marked. It's date stamped. This is yours; you signed it.
A. On July 29th I sign it?
Q. No. You signed it a few days before that and it was delivered to me on July 29th.
Has your company made any money between January 1st and July, July 1st?
A. Yeah because -- yeah, we make money. We make

money. Some people make money.

Q. So why didn't you produce those timesheets with your discovery responses?

A. That's not appropriate to a reason to discovery.

Q. Why is it not appropriate?

A. Because it's to return to the county, not to you to discovery or to the lawyer.

Q. But I did ask for all documents relevant to this case, and you have alleged damages in this case based on loss of income so it follows that you would be keeping records of what your income is and that we would be able to get that information.

Right?

A. That's not relevant to me to return it to you any way.

Q. Who's it relevant to?

A. To the county.

Q. But I'm asking you because you have said that you've been damaged in this lawsuit. You've been damaged because --

A. I haven't damage the loss.

Q. You have been?

A. I haven't.

Q. You have had no damages in this lawsuit?

A. I have damage myself by somebody else, but I haven't damage to anybody.

Q. Okay. But the damages you've received, the alleged damage you've received, part of it is for lost wages, right?

A. Yeah.

Q. And you need to have records of those wages so that you can show what wages you've brought in and what wages you haven't brought in, right?

A. Yeah.

Q. And so that's relevant to this lawsuit and you did not produce those document to me, right?

A. At the time it was not relevant to me. I didn't give it to you.

Q. So it's your answer that you believed it was not relevant that's why you didn't give it to me?

A. Yeah.

Q. Okay.

A. Because the county is the one who asks about the documents. I mean about the trip sheets and --

Q. Do you know how much money in part you were suing the opposing side for?

A. I don't understand about how much money you are.

Q. How much money are you asking for in this

lawsuit?

A. To whom?

Q. From the other side. From the opposing group?

A. I don't ask any money to anybody.

Q. You haven't asked for any damages in this lawsuit?

A. I haven't ask any money.

Q. So, on Page 7, Paragraph 16 of your counterclaims you valued the transferred business opportunity in excess of $189,000 in monthly revenues.

Does that sound familiar?

A. That we lost.

Q. How do you know you lost that much money?

A. When we stopped not doing any business.

Q. Have you written down how you came to this number?

A. Yeah. We used to work a year ago, a year before this, how much we can make a year so we know that. That's how we figure.

Q. So doesn't it make sense if you know how much you make that you should have produced any documents relevant to that question?

A. We should have produced that if we work.

Q. Okay. And let me just go on here.

CERTIFICATE OF SERVICE

I, Patrick J. Sullivan, legal assistant at SULLIVAN LAW FIRM, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF RESPONDENT / CROSS-APPELLANTS to be sent by email and U.S. Mail, first class postage prepaid, to counsel of record for APPELLANTS and to trial counsel/co-counsel for RESPONDENTS, at the following addresses:

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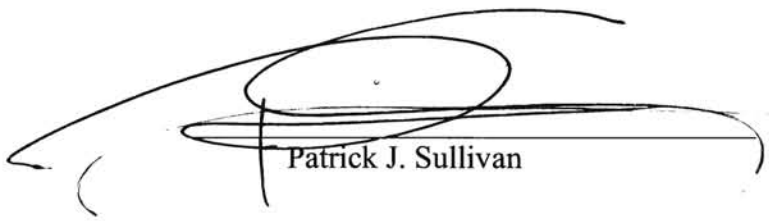
DATED this 9th day of July, 2013.



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