

COURT OF APPEALS  
DIVISION II

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No. 40351-0-II

STATE OF WASHINGTON  
BY SW  
DEPUTY

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DOCTOR'S ASSOCIATES, INC.,

Appellant,

vs.

WAQAS SALEEMI and FAROOQ SHARYAR,

Respondents.

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APPELLANT'S SUPPLEMENTAL BRIEF

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## **I. STATEMENT OF FACTS AND ISSUES**

In this matter, the trial court disregarded or overruled clear provisions of a Franchise Agreement (the “Agreement”) in several material respects. First, the trial court ordered that the arbitration be held in Washington, instead of in Connecticut, as set forth in the Agreement. Second, the trial court ordered that Washington law would apply even though the Agreement provided that Connecticut law would apply on issues other than the *Franchise Investment Protection Act*, Chapter 19.100 RCW. This would include evidentiary issues and issues concerning privilege. Next the trial court ordered that the case would proceed to arbitration with no limitation on damages (contrary to the express limitations found in the Agreement). CP 217-8. RP (Sept 19, 2008) pg. 17, ln 6-22.

The matter proceeded to arbitration in Tacoma, Washington, under Washington law with no limitation on damages. The arbitrator awarded the plaintiffs \$230,000 in compensatory damages, \$161,536 for attorney’s fees and \$32,837.96 for costs. CP 222.

This Court has ordered supplemental briefing on two issues. First, the Court asks the parties to address the issue of harmless error or prejudice. Second, the Court asks whether the appellant or the respondent has the burden of demonstrating prejudice or harmless error on appeal.

These issues arise in the context of a review of an arbitration award. There is no arbitration hearing, trial or pre-trial record before this Court (and there was no record before the trial court) concerning the issues addressed by the arbitrator or concerning the evidence adduced before the arbitrator. There is no record as to evidentiary rulings made by the arbitrator. There is no record as to how the arbitrator calculated or determined the award of damages. Nor is there any means available for determining what was considered by the arbitrator, or how he reached the award.

## II. ARGUMENT

### A. *Standard of Review.*

Plaintiffs argue that the court's errors are harmless. Respondents Answering Brief, pg. 31-36. It is conceded that ordinarily an error which is harmless will not justify awarding a new trial. *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). However, in a case such as this there is no way to determine if the error was harmless.

Appellate courts will review an alleged error in jury instructions *de novo*. *State v. Van Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010).

### B. *Determination of Harmless Error.*

*In State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006) Justice

Sanders said in a concurring opinion:

We may excuse as “harmless error” only an “error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). In other words, an error is harmless only if does not affect the evidence properly presented to the jury.

In the majority opinion in *Levy, Id.*, the Court drew a distinction between structural errors and trial-type errors. The Court pointed out that structural errors resist harmless error review completely because it taints the entire proceedings. Arguably, in a case such as this where the trial court’s order established rules for the conduct of the arbitration proceedings, which were not in accord with the terms of the arbitration agreement, the error was structural and nor merely a trial-type error. In such a case, the harmless error doctrine should not apply.

In the *Britton* case, the court used a test to determine if an appellant had been harmed by the trial court’s actions. That test required the appellate court to look to “...the whole record, and not to that part only which precedes and includes the particular exception under consideration.” *State v. Britton*, 27 Wn.2d 336, 342, 178 P.2d 341, 344 (1947). Here, it is impossible for this appellate court to look at the

entire record to see how the decision of the arbitrator was influenced by the trial court's order. There simply is no such record to review.

In *Boeke v. International Paint Co. et. al.*, 27 Wn. App. 611, 620 P.2d 103 (1980) the court held that error was harmless where there was an adequate showing that the trial court's error was harmless based on the special interrogatories answered by the jury. In such a case there was a sufficient record available for the appellate court to make a determination that the error was harmless.

**C. *Error In Jury Instruction Similar to Error in Law Governing Arbitration.***

Arguably an error in a jury instruction may be equated with an error which binds an arbitrator in consideration of legal or factual issues. In each case, the issue concerns an alleged mistake of law binding upon the trier of fact.

There is a range of opinion concerning the effect of an improper jury instruction in a criminal case. Appellant has found a dearth of law in this state concerning the effect of an improper order controlling the law to be considered by an arbitrator.

In *In re the Personal Restraint of Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982) the Court held that on a direct appeal an improper instruction is presumed to be prejudicial and will furnish grounds for a

reversal. Later cases applied a different standard.

In *State v. Peters*, a decision announced in September of this year, Division I was asked to consider the effect of an improper jury instruction.

In the *Peters* case the Court said:

A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). In order to determine whether the error is harmless, we must “ ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’ “ *Brown*, 147 Wn.2d at 341, 58 P.3d 889 (quoting *Neder*, 527 U.S. at 19). The State bears the burden of showing that the error is harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

*State v. Peters*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2011 WL 4361604 (2011). In July of this year, a Division II panel was called up to consider a similar issue. In *State v. Lundy*, 162 Wn. App. 865, 256 P.3d 466 (2011) the Court held that an erroneous jury instruction would not provide a basis for a new trial if the appellate court was satisfied, beyond a reasonable doubt that the verdict would have been the same absent the error. In this decision, the appellate court noted that it was up to the appellant to show the prejudice. Even if we were to adjust the standard from beyond a reasonable doubt to a preponderance of the evidence, the rule would still

require an appellate court to determine, by a preponderance of the evidence that the result would have been the same had the error not occurred.

In a case such as this, where there is no record of arbitration hearing testimony and no record of pre-hearing proceedings, for this court to review, it would be difficult for either party to establish that error by the trial court affected or did not affect the outcome. However, we do know that the award of damages appears on its face to exceed the amounts authorized by the Franchise Agreement.

Respondent argues that the damage award could still be consistent with the Franchise Agreement, depending on how the arbitrator calculated the damages. However, where the trial court removed the contractual cap on damages, and where the award of damages is arguably not in compliance with that cap, a presumption should arise that the trial court's order affected the final outcome.

**D. *Burden To Show Error is on Appellant and Burden to Show Error was Harmless Shifts to Respondent.***

Division I of the Court of Appeals, in a civil appeal, held that “on appeal, jury instructions are reviewed *de novo*. Where an instruction contains an erroneous statement of the applicable law it is reversible error where a party has been prejudiced. An error is prejudicial where it affects

the outcome of the trial.” *Anfinson v. FedEx Ground Package Systems, Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010). This same court held that the error is *presumed* to be prejudicial and grounds for reversal “...unless it affirmatively appears that it was harmless...” *Id.*, at 36. The Court went on to hold:

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.

A fair reading of this decision would indicate that the burden was on the appellant to show the error and then shifted to the respondent to show that the error was harmless.

In *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 232 P.3d 564 (2010) this Division of the Court of Appeals, speaking through Judge Armstrong held that “[a]n error is prejudicial if it presumably affects the outcome of a trial.” *Chunyk & Conley/Quad-C*, *Id.* at 156 Wn. App. 255. Following this approach, once the appellant showed error by the trial court, there would be a presumption that the error affected the outcome. It would then be up to the respondent to show that the error was harmless.

In a case decided on September 15, 2011, the Supreme Court of this state visited some of the issues now before this Court. The Court, in a

direct criminal appeal, held that the burden was initially on the appellant to show the error and to show how the error affected the rights of the appellant. The burden then shifted back to the respondent to show that the error was harmless. *State v. Gordon*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, WL 4089893 (2011).

In *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996) the Court held that once error was shown the burden shifted to the opposing party to show that error was harmless. The Court reviewed the transcript of the trial and considered the testimony that was offered in the light most favorable to the appellant and against the party asserting that error was harmless.

A rule calling for shifting burdens would appear to be the best system for analyzing civil appeals as it is consistent with the shifting burdens of proof applicable to most civil proceedings. Under such an approach the burden to show that the trial court committed error would be on the appellant; that burden would then shift to the respondent to show that the error was harmless.

There is also the issue of when harmless error analysis would be appropriate. There may be examples where such an approach makes sense. For instance, if the only issue in the instant case was the forum for the hearing, the appellate court might use the harmless error approach to

find that such error was harmless. Similarly, if it can be shown that all elements of Connecticut law are the same as all evidentiary and substantive laws of Washington, this court might apply the harmless error standard to find that the error was harmless and not worthy of a new trial. However, where the appellate court is called upon to review the record as a whole, to determine if there was a basis for the damage award, then that appellate court cannot and should not engage in the harmless error analysis, as it would violate federal substantive law arising from the *Federal Arbitration Act*, (“FAA”).

**E. Harmless Error Analysis is Improper in Consideration Where Arbitrator Exceeded Authority.**

Under the *Federal Arbitration Act*, it is clear that parties to an arbitration agreement have the right to establish the terms and procedures for the arbitration regardless of most state laws. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) the Supreme Court held that there is a body of substantive federal arbitration law that preempts conflicting state laws. In *Rent-A-Center, West, Inc. v. Jackson*, \_\_ U.S. \_\_, 130 S. Ct. 2772 (2010) the Court held that once the trial court has decided that the dispute is arbitrable, then the remaining issues are for the arbitrator.

In *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. \_\_,

130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) the Supreme Court held that an arbitration panel exceeded its powers by imposing its policy choices over the choices made by the parties or established by existing law. In this case the Supreme Court held that the appropriate remedy was vacation of the award. The Court did not engage in a harmless error analysis. In the instant case appellant suggests that engaging in an analysis of whether the error was harmless would run counter to the approach approved by the Supreme Court.

In *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003) the Court held that even RICO claims are arbitrable and must be arbitrated where the agreement calls for arbitration. The Court went on to hold that remedial limitations in the agreement will not relieve a party from the obligation to arbitrate the dispute. In addition, the Court held that lower courts and appellate courts should not take upon themselves the decisions concerning the application of remedial contract provisions. These matters are strictly for the arbitrator.

In *AT&T Mobility, LLC v. Concepcion et. ux.*, \_\_\_ US \_\_\_, 131 S.Ct. 1740, 179 L.Ed.2d 742 (April 27, 2011) the Court held that state laws forcing (or preventing) class actions in arbitrations will not be upheld where the contract bars class actions. This decision stands for the simple

proposition that the contract between the parties governs the dispute and the arbitration. Courts must enforce such agreements as written.

If we apply the existing body of federal substantive law to the instant dispute there are three things that are clear. First, the agreement of the parties must be enforced. Second, once it is determined that the arbitrator exceeded his authority (by relying on the trial court's order of September 19, 2008) then the role of the courts is to refuse to confirm the award and to send the matter back for a new arbitration hearing, in conformity with the agreement of the parties and all applicable law.

Third, if a "harmless error" standard is used, for the evaluation of this dispute this Court would be substituting its judgment as to whether the error by the trial court influenced the outcome of the arbitration hearing. This substitution is contrary to the body of federal substantive law discussed above.

The appellate courts of this state have also recognized that the role of an appellate court is limited in cases involving arbitration. On September 6, 2011 Division I of the Court of Appeals held:

This court's review of an arbitrator's award is limited to that of the court which confirmed, vacated, modified, or corrected that award. The trial court's review is confined to the question of whether any of the statutory grounds for vacation exist.

***Cummings v. Budget Tank Removal & Environmental Services, LLC,***

\_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 3890760 (2011). The court went on to hold that “[i]n deciding a motion to vacate, a court will not review the merits of the case, and ordinarily will not consider the evidence weighed by the arbitrators.” *Id.*, at Para. 24. Nor is it the role of the appellate courts to try the case *de novo* or to examine the evidence submitted to the arbitrator. *Moen v. State*, 13 Wn. App. 142, 533 P.2d 862 (1975).

It has also been held that a reviewing court may not examine the reasoning behind an arbitration award. *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995). It has also been held that our courts have no collateral authority to go behind an arbitration award to determine if the award was correct. *Morrell v. Wedbush*, 143 Wn. App. 473, 178 P.3d 387 (2008). Instead, issues to be decided in arbitration must be decided in arbitration and not by the courts. *Id.*

Under the cases that limit the role of a trial court or a reviewing court it is clear that courts lack the authority to look at the evidence. Yet, the analysis of whether error was harmless requires just that sort of inquiry.

In *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992) our Supreme Court held that the superior court has precisely circumscribed authority when passing on an arbitrator's decision. It also held that an

appellate court's inquiry is similarly limited in addressing an appeal from a superior court's decision. The Court then held that the superior court may only confirm, vacate, modify or correct an arbitrator's award.

Under this standard there is no place for the appellate courts to review the award to determine if the award was subject to harmless error.

Rather, the proper approach is to vacate the award and allow the parties to arbitrate the case under the proper rules and standards. This approach has been recognized in Washington, in a series of cases including *Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn. App. 884, 939 P.2d 1258 (1997). In that case the Court of Appeals held that the authority of the courts is limited to either vacating an award where the arbitrator has exceeded his authority.

In *Davidson v. Hensen*, 85 Wn. App. 187, 933 P.2d 1050 (1997) this Division held that a trial court has no jurisdiction to enter a void judgment and no jurisdiction to confirm a void arbitration award. Once the trial court determines that the arbitrator exceeded his authority, the award is void and thus beyond the authority of the court to confirm. The sole authority of the trial court is to either not confirm or to vacate the award. *Davidson, supra; ACF Property Management, Inc. v. Chausse*, 69 Wn. App. 913, 850 P.2d 1387 (1993).

### III. CONCLUSION

If the harmless error standard applies, it could be argued that the trial court's order setting the venue for the arbitration in Washington was harmless error. However, if Washington evidentiary rules and other statutes were applied by the arbitrator, instead of the rules for Connecticut, then it is impossible to determine if there was error caused by the application of the wrong law. In addition, it is impossible to determine the basis for the damage award as the award would appear to grossly exceed the limitations on damages established by contract.

If the harmless error standard applies, there should be a shifting burden. First, the appellant must show that there was error. Then the burden should shift to the respondent to show that the error was harmless. Otherwise the appellant would be asked to prove a negative. If the appellant fails to meet the requisite burden, then a new trial should not be ordered. On the other hand, if the error is shown and if that error permeates the trial, then the respondent carries the burden to show that the result would have been the same even if that error had not occurred.

In this case, the appellant has shown that the trial court committed obvious error in its order of September 19, 2008. Appellant also showed that this order permeated the arbitration. Due to the total absence of a record of what took place at the arbitration, the respondent is unable to show that the error was harmless. Nor is there anything in the arbitration

award which would indicate that the arbitrator disregarded the trial court's order and followed the contract. Therefore, using this harmless error analysis the error cannot be shown to be harmless and appellant is entitled to a new arbitration hearing, following the terms of the contract.

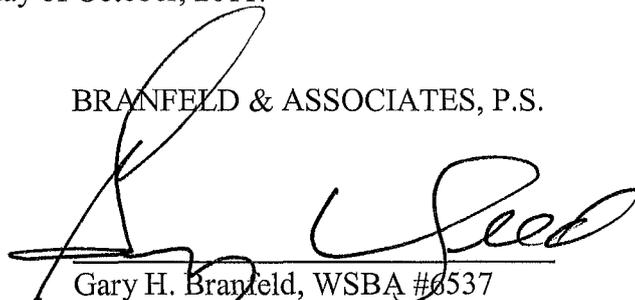
It is also appellant's position that the harmless error doctrine is generally inappropriate in arbitration disputes on appeal, where there is a need to examine the evidence presented. As previously shown the role of the trial court is to determine if the dispute is arbitrable. Once that issue is resolved all other issues are for the arbitrator. Therefore, it was error for the trial court to condition the arbitration on terms outside of the agreement of the parties.

Once the matter was arbitrated the role of the trial court was also limited. Our courts may not look behind the award to determine if there was error. Rather, the courts must look to the face of the award. In this case, the face of the award rule must include the addition of the trial court's order of September 19, 2008, as the arbitration was conducted under that order. As the trial court's order exceeded the authority of the trial court, the case went to arbitration based on improper limitations and conditions. As the arbitration hearing was flawed, the award was flawed. The award clearly exceeds the authority of the arbitrator as it was based on the trial court's order and not on the agreement of the parties.

Once the award was brought to the trial court for confirmation the court should have refused to confirm the award and should have instead vacated the award and sent it back for arbitration in accordance with the agreement of the parties. Instead the award was confirmed and a judgment was entered against the appellant. As the award should have been held to be void, the trial court's entry of an order confirming the award was error as was the entry of the judgment. Under such circumstances the role of the appellate court is to simply send the matter back to the trial court with instructions to vacate the order confirming the award and the judgment, as well as the original offending order of September 19, 2008. The trial court should then order the matter to be arbitrated in accordance with the terms of the Franchise Agreement.

Dated this 14th day of October, 2011.

BRANFELD & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read 'Gary H. Branfeld', is written over a horizontal line. The signature is stylized and cursive.

Gary H. Branfeld, WSBA #6537  
Attorneys for Appellant

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**CERTIFICATE OF SERVICE**

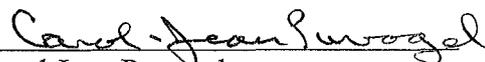
STATE OF WASHINGTON  
DEPUTY

I, Carol Jean Puvogel, hereby declare under the penalty of perjury under the laws of the State of Washington in the County of Pierce that on October 14th, 2011, I delivered by depositing in the United States mail, postage prepaid, a properly addressed envelope containing a true and correct copy of Appellant's Supplemental Brief to the Respondents at the following address:

Todd S. Baran, PC  
Attorney at Law  
4004 SE Division St  
Portland, OR 97202-1645

Law Offices of Douglas D. Sulkosky  
Douglas D. Sulkosky  
1105 Tacoma Avenue S  
Tacoma, WA 98402

Dated at University Place , Washington this 14th day of October,  
2011.

  
\_\_\_\_\_  
Carol Jean Puvogel

**APPENDIX**

Portion of Franchise Agreement, Clerk's Papers, Appellant 5-7

d. We may transfer and assign this Agreement without your consent, and this Agreement will inure to the benefit of our successors and assigns.

**10. ARBITRATION OF DISPUTES.**

a. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration. The arbitration shall be administered by an arbitration agency, such as the American Arbitration Association ("AAA") or the American Dispute Resolution Center, in accordance with its administrative rules including, as applicable, the Commercial Rules of the AAA and under the Expedited Procedures of such rules or under the Optional Rules For Emergency Measures of Protection of the AAA. Judgment rendered by the Arbitrator may be entered in any court having jurisdiction thereof. The costs of the arbitration will be borne equally by the parties. The parties agree that Bridgeport, Connecticut shall be the site for all hearings held under this Paragraph 10, and that such hearings shall be before a single arbitrator, not a panel, and neither party shall pursue class claims and/or consolidate the arbitration with any other proceedings to which we are a party. The parties will honor validly served subpoenas, warrants and court orders.

b. If you breach the terms of your Sublease, the Sublessor, whether us or our designee, may exercise its rights under the Sublease, including to evict you from the franchised location. Any action brought by the Sublessor to enforce the Sublease, including actions brought pursuant to the cross-default clause in Paragraph 6 of the Sublease (which provides that a breach of the Franchise Agreement is a breach of the Sublease), is not to be construed as an arbitrable dispute.

The parties agree that you may seek a stay of any eviction brought under the cross-default clause in Paragraph 6 of the Sublease by filing a demand for arbitration in accordance with Subparagraph 10 a. within thirty (30) days of the Sublessor's commencement of the eviction. The stay may be lifted upon conclusion of the arbitration. You may not seek a stay of eviction for any actions involving non-payment of rent or in a case where an arbitration award under the Franchise Agreement has been issued.

c. You may only seek damages or any remedy under law or equity for any arbitrable claim against us or our successors or assigns. You agree that our Affiliates, shareholders, directors, officers, employees, agents and representatives, and their affiliates, shall not be liable nor named as a party in any arbitration or litigation proceeding commenced by you where the claim arises out of or relates to this Agreement. You further agree that the foregoing parties are intended beneficiaries of the arbitration clause, and that all claims against them that arise out of or relate to this Agreement must be resolved with us through arbitration. If you name a party in any arbitration or litigation proceeding in violation of this Subparagraph 10 c., you will reimburse us for reasonable costs incurred, including but not limited to, arbitration fees, court costs, lawyers' fees, management preparation time, witness fees, and travel expenses incurred by us or the party.

d. Notwithstanding the arbitration clause in Subparagraph 10 a., we may bring an action for injunctive relief in any court having jurisdiction to enforce our trademark or proprietary rights, the covenants not to compete, or the restriction on disclosure of Confidential Information in order to avoid irreparable harm to us, our affiliates and the franchise system as a whole.

e. Any disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), and the parties agree that the FAA preempts any state law restrictions (including the site of the arbitration) on the enforcement of the arbitration clause in this Agreement. If, prior to an Arbitrator's final decision, either we or you commence an action in any court of a claim that arises out of or relates to this Agreement (except for the purpose of enforcing the arbitration clause or as otherwise permitted by this Agreement), that party will be responsible for the other party's expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and other costs and attorney's fees.

f. We and our Affiliates, and you and your Affiliates, will not withhold any money due to the other party and its Affiliates, under this Agreement or any other agreement. A party or its Affiliate that withholds money in violation of this provision will reimburse the party or its Affiliate whose money is withheld for the reasonable costs to collect the withheld money, notwithstanding the provisions of Subparagraph 10 a. These costs include, but are not limited to, mediation and arbitration fees, court costs, lawyers' fees, management preparation time, witness fees, and travel expenses incurred by the party or its Affiliate or an advertising fund, or its agents or representatives.

g. If a party (i) commences action in any court, except to compel arbitration, or except as specifically permitted under this Agreement, prior to an arbitrator's final decision, or (ii) commences any arbitration in any forum except where permitted under this Paragraph 10, or (iii) when permitted to commence a litigation proceeding, commences any litigation proceeding in any forum except where permitted under this Paragraph 10, then that party is in default of this Agreement. The defaulting party must commence arbitration (or a litigation proceeding, if

permitted under this Paragraph 10). In a permitted forum prior to any award or final judgment. The defaulting party will be responsible for all expenses incurred by the other party, including lawyers' fees. Subject to federal or state law, if a party defaults under any other provision of this Paragraph 10, or under any provision of Paragraph 17 or Paragraph 18, including, but not limited to, making a claim for special, incidental, consequential, punitive, or multiple damages, or damages in excess of the amount permitted under this Agreement, or you name a person or entity in any arbitration or legal proceeding other than us, the defaulting party must correct its claim. The defaulting party will be responsible for all expenses incurred by the other party, or the improperly named persons or entities, including lawyers' fees, and will be liable for abuse of process.

**11. OBLIGATIONS OF THE PARTIES.** The parties also agree as follows:

a. You are, and will at all times be identified as, a natural person and an independent contractor. You are not our agent, partner, or employee. This Agreement does not create a partnership, joint venture, agency, or fiduciary relationship.

b. All or any part of your rights and privileges under this Agreement will return to us if for any reason you abandon, surrender, or suffer revocation of your rights and privileges.

c. If, for any reason, any court, agency, or tribunal with valid jurisdiction in a proceeding to which we are a party, decides in a final, non-appealable ruling, that a portion of this Agreement is contrary to, or in conflict with any applicable present or future law, rule, or regulation, after giving such portion the broadest legal interpretation possible, then that portion will be invalid and severable. The remainder of this Agreement will not be affected and will continue to be given full force and effect. Any invalid portion will be deemed not to be a part of this Agreement as of the date the ruling becomes final if you are a party to the proceedings, or upon your receipt of notice of nonenforcement from us. If a court, agency, or tribunal decides a covenant not to compete is too broad as to scope, time, or geographic area, the parties authorize the court, agency or tribunal to modify the covenant to the extent necessary to make it enforceable.

d. No previous course of dealing or usage in the trade not specifically set forth in this Agreement will be admissible to explain, modify, or contradict this Agreement.

e. The parties will give any notice required under this Agreement in writing, and will send it by certified mail, registered mail or by mail service which uses a tracking system, such as Airborne Express or Federal Express. We will address notices to you at the Restaurant or at your home until you designate a different address by written notice to us. You must notify us of any address changes, including changes to your electronic mail address. You will address notices to us to Doctor's Associates Inc., 325 Bic Drive, Milford, CT 06460-3059, Attention Legal Department. Any notice will be deemed given at the date and time it is received, or refused, or delivery is made impossible by the intended recipient.

f. If your payment is more than one (1) week late you will pay a late fee equal to ten percent (10%) on any Royalty, advertising contributions, or other charges you will owe us under this Agreement. Also, you will pay interest on all your past-due accounts at up to eighteen percent (18%), but the late fee and interest will not be greater than the maximum rate allowed by law in the state in which our principal office is located or the Restaurant is located, whichever is higher.

g. You must immediately notify us of any infringement or challenge to your use of any of the Marks, or claim by any person of any rights in any of the Marks. We will indemnify you for all damages for which you are held liable in any proceeding arising out of the use of any of the Marks in compliance with this Agreement, provided you notify us promptly, cooperate in the defense of the claim, and allow us to control the defense of the action. If a third party challenges any of the Marks claiming infringement of alleged prior or superior rights in the Mark, we will have the option and right to modify or discontinue use of the Mark and adopt substitute Marks in your geographical business areas and in other areas we select. Our liability to you under such circumstances will be limited to your cost to replace signs and advertising materials. You acknowledge and agree we have the exclusive right to pursue any trademark infringement claims against third parties.

h. If we terminate this Agreement and we must purchase the Restaurant's equipment, leasehold improvements, or both, under any applicable state law, rule, regulation, or court decision, the purchase price will be your original cost, less depreciation and amortization, based on a five (5) year life under the straight-line method.

i. If the landlord terminates the lease for the Restaurant and an arbitrator or court determines you did not breach the Sublease and it was our fault or our Affiliate's fault the landlord terminated the lease, our obligation to you will be limited to the original cost of your leasehold improvements, less depreciation based on a five (5) year life, under the straight-line method. We will pay you when you reopen the Restaurant in a new location. If the

arbitrator or court determines you breached the Sublease or it was not our fault or our Affiliate's fault, and if we terminated the lease, we and our Affiliate will have no obligation to you for termination of the lease

j. If you believe that we are in default under this Agreement, you must give us written notice by certified mail, registered mail or by a mail service which uses a tracking system, such as Airborne Express or Federal Express, within ninety (90) days of the start of the default clearly stating each act or omission constituting the default. If we do not cure the default to your satisfaction within sixty (60) days after we receive your notice, you may give us notice that an arbitrable dispute exists. The parties will work diligently to attempt to resolve the arbitrable dispute in accordance with Paragraph 10

k. You will pay the Sales Tax or other tax assessed on all payments you make to us that we must collect from you or pay ourselves to the taxing authority.

l. You will pay us any applicable Sales Tax or other tax on behalf of the local taxing authority at the same time and in the same manner you pay for the taxable goods or services, whether or not the requirement is specifically stated in this Agreement

m. You understand and acknowledge this Agreement does not grant you any territorial rights and there are no radius restrictions or minimum population requirements which limit where we can license or open another SUBWAY® restaurant, unless provided under applicable state law. We and our Affiliates have unlimited rights to compete with you and to license others to compete with you. You understand and acknowledge we and our Affiliates retain the exclusive unrestricted right to produce, distribute, and sell food products, beverages, and other products, under the SUBWAY® mark or any other mark, directly and indirectly, through employees, representatives, licensees, assigns, agents, and others, at wholesale, retail, and otherwise, at any location, without restriction by any right you may have, and without regard to the location of any SUBWAY® restaurant, and these other stores or methods of distribution may compete with the Restaurant and may adversely affect your sales. You do not have any right to exclude, control, or impose conditions on the location or development of any SUBWAY® restaurant, other restaurant, store or other method of distribution, under the SUBWAY® mark or any other mark

n. You acknowledge it is our intent to comply with all anti-terrorism laws enacted by the US Government. You further acknowledge that we may not carry on business with anyone officially recognized by the US Government as a suspected terrorist or anyone otherwise associated directly or indirectly with terrorist activities. The parties agree that if, at any time during the term of this Agreement, it is determined that you are a suspected terrorist or otherwise associated directly or indirectly with terrorist activities, that this Agreement may be terminated immediately. You acknowledge that you are not now, and have never been a suspected terrorist or otherwise associated directly or indirectly with terrorist activity, including but not limited to, the contribution of funds to a terrorist organization. You further acknowledge that it is not your intent or purpose to purchase a SUBWAY® franchise to fund or participate in terrorist activities.

o. You authorize us, at any time during the term of this agreement, to conduct credit checks or investigative background search on you which may reveal information about your business experience, educational background, criminal record, civil judgments, property ownership, liens, association with other individuals, creditworthiness and job performance.

**12. TERMS, REFERENCES AND HEADINGS.** All terms and words in this Agreement will be deemed to include the correct number, singular or plural, and the correct gender, masculine, feminine, or neuter, as the context or sense of this Agreement may require. Each individual signing this Agreement as the franchisee will be jointly and severally liable. References to "you" will include all such individuals collectively and individually. References to dollars (\$) in this Agreement refer to the lawful money of the United States of America. The paragraph headings do not form part of this Agreement and shall not be taken into account in its construction or interpretation

**13. GOVERNING LAW.** This Agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, except as may otherwise be provided in this Agreement. The parties agree any franchise law or business opportunity law of the State of Connecticut, now in effect, or adopted or amended after the date of this Agreement, will not apply to franchisees located outside of Connecticut. This Agreement, including the Recitals and all exhibits, contains the entire understanding of the parties and supersedes any prior written or oral understandings or agreements of the parties relating to the subject matter of this Agreement. The parties may not amend this Agreement orally, but only by a written agreement, except we may amend the Operations Manual from time to time as provided in this Agreement. The provisions of this Agreement which by their terms are intended to survive the termination or expiration of this Agreement, including, but not limited to, Subparagraphs 5 c., 5 h., 5 k., 8 d., 8 e., 8 g., 8 h., 11 b., 11 h., 11 j., 11 m., 11 n. and 11 o., and Paragraphs 10., 13., 14., 15., 16., 17., and 19. will survive the termination or expiration of this Agreement.