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No. 66226-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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CLERK OF COURT
COURT OF APPEALS
STATE OF WASHINGTON

RECREATIONAL EQUIPMENT, INC.,

Appellant,

v.

WORLD WRAPPS NORTHWEST, INC.,

Respondent.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellant, Recreational Equipment, Inc. (“REI”) seeks reversal of the trial court’s ruling that REI’s tenant, Respondent World Wrapps Northwest, Inc. (“World Wrapps”) is entitled to an equitable grace period to exercise a five-year option to renew. World Wrapps leases an upper corner of REI’s Seattle Flagship store to operate a café.

World Wrapps was over seven weeks late in attempting to exercise its option to renew the lease and did so only after REI informed World Wrapps that REI intended to seek a new tenant.

At trial, World Wrapps argued that remodel work performed more than four years before the renewal deadline entitled World Wrapps to an equitable grace period in which to exercise the option. But, World Wrapps offered no evidence that the cost of the remodel work (which actually reduced the leased space by a third) could not have been entirely recouped or amortized during the four years that World Wrapps used the refurbished space and enjoyed substantially reduced rent.

Instead, World Wrapps argued, and the trial court agreed, that it was enough for World Wrapps to show generally that, if the lease was not extended and it was forced to move to a new location, World Wrapps’ business might suffer from lost income and that jobs might have to be eliminated.

The trial court's ruling should be reversed. The narrow circumstances under which an equitable grace period is allowed under Washington law, as established in Wharf, Heckman Motors, Inc. v. Gunn, 73 Wn. App. 84, 87, 867 P.2d 683 (1994), and Cornish College of the Arts v. 1000 Virginia Limited Partnership, __ Wn. App. __, 242 P.3d 1 (Oct. 25, 2010), were not proven at trial.

Accordingly, this appeal concerns three issues:

(1) whether the trial court erred in granting a lessee an equitable grace period to exercise its leasehold option where no risk of inequitable forfeiture was shown;

(2) whether prejudice or potential detriment to the lessee's business if it is not allowed to untimely exercise an option constitutes a "special circumstance" justifying an equitable grace period; and

(3) whether, pursuant to the rule announced in Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 605 P.2d 334 (1979), a seven-week delay in exercising the leasehold option is too long where the landlord did not invite the delay by previously accepting late exercises of option rights.

REI respectfully requests this Court overturn the trial court's grant of an equitable grace period and the resulting award of attorneys' fees and costs to World Wrapps. REI further asks this Court to enter judgment in

favor of REI that World Wrapps' exercise of its option to renew was untimely and, therefore, the option was waived.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error.

1. The trial court erred in finding that clear, cogent, and convincing evidence was presented to support the findings and conclusions identified in Assignments of Error 2 – 14.

2. The trial court erred in entering Finding of Fact 18 and Conclusion of Law 1, granting World Wrapps an equitable grace period, without entering any conclusions that World Wrapps would have suffered an inequitable forfeiture if the May 25, 2010 expiration of the Third Amendment had been enforced as written.¹

3. In Conclusion of Law 5, the trial court erred in concluding that World Wrapps would lose the value of its investment in remodeling the leased space if the court had not granted World Wrapps an equitable grace period.

4. In Finding of Fact 6 and Conclusions of Law 5 and 6, the trial court erred in finding and concluding that \$250,000 was spent by World Wrapps to remodel the leased space.

¹ The trial court's Findings of Fact and Conclusions of Law are located at CP 334-342.

5. In Conclusion of Law 5, the trial court erred in concluding that general prejudice to World Wrapps' business as a result of World Wrapps' failure to renew the option is a "special circumstance" justifying an equitable grace period under Washington law, as iterated by Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 605 P.2d 334 (1979); Heckman Motors, Inc. v. Gunn, 73 Wn. App. 84, 867 P.2d 683 (1994); and Cornish College of the Arts v. 1000 Virginia Limited Partnership, ___ Wn. App. ___, 242 P.3d 1 (Oct. 25, 2010).

6. In Findings of Fact 4, 5, and 6, the trial court erred in finding that World Wrapps negotiated and entered into the Lease with REI in 1995 and that the lease term began to run based on when World Wrapps took occupancy.

7. In Findings of Fact 5 and 6, the trial court erred in finding that the first five-year lease term commenced, at the earliest, on September 1, 1996, and that the second option period under the Lease, had it been exercised, would have ended on either August 31, 2011 or September 30, 2011.

8. In Finding of Fact 6 and Conclusion of Law 5, the trial court erred in finding that REI and World Wrapps both intended and

agreed that the lease term under the Third Amendment would extend from May 1, 2006 to the end of the second renewal option term under the Lease.

9. In Finding of Fact 6 and Conclusion of Law 8, the trial court erred in finding and concluding that REI and World Wrapps did not negotiate the May 25, 2010 expiration date contained in the Third Amendment.

10. In Finding of Fact 7 and Conclusion of Law 7, the trial court erred in finding and concluding that REI's lawyer made a mistake in inserting the May 25, 2010 date in the Third Amendment by using the "made" date on the first page of the original lease and adding fifteen years, rather than calculating fifteen years from the date on which the original lease term had actually commenced.

11. The trial court erred in entering Conclusion of Law 7 that REI contributed to World Wrapps' delay in exercising its option to renew the Lease.

12. In Finding of Fact 12 and Conclusion of Law 4, the trial court erred in finding and concluding that REI knew the Third Amendment's May 25, 2010 expiration date was a mistake and that REI hoped to exploit that mistake to World Wrapps' detriment.

13. In Conclusion of Law 7, the trial court erred in concluding that REI's delay in signing and returning the Third Amendment contributed to World Wrapps' failure to correctly document the expiration date of the Third Amendment in its business records, thereby contributing to World Wrapps' failure to timely exercise its option to renew the Lease.

14. In Conclusion of Law 7, the trial court erred in concluding that REI contributed to World Wrapps' failure to timely exercise its option to renew by not immediately alerting World Wrapps that it had missed the deadline to exercise its option to renew the Lease.

B. Issues Pertaining To Assignments Of Error.

(1) In Cornish College of the Arts v. 1000 Virginia Limited Partnership, __ Wn. App. __, 242 P.3d 1 (Oct. 25, 2010), this Court held that an equitable grace period “may be warranted in limited circumstances where an *inequitable forfeiture* would otherwise result.” Id. at 9 (emphasis added) (citing Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 611, 605 P.2d 334 (1979)). Did the trial court err in granting an equitable grace period to World Wrapps without concluding that World Wrapps would otherwise suffer an inequitable forfeiture? (Assignments of Error 1-4.)

(2) In Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 605 P.2d 334 (1979), this Court held that an equitable grace period is warranted only in “special circumstances.” Id. at 611. Did the trial court apply an erroneous legal standard when concluding that an equitable grace period was warranted because World Wrapps would otherwise suffer prejudice to its business? (Assignments of Error 1, 5-8 .)

(3) In Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 605 P.2d 334 (1979), this Court held that a two-month delay in exercising an option to renew is ordinarily considered “so excessive as to not justify the intervention of equity.” Id. at 613. Did the trial court err in excusing World Wrapps’ seven-week delay in exercising its option to renew the Lease, where REI has not previously allowed for the late exercise of lease options? (Assignments 1, 6-14.)

III. STATEMENT OF THE CASE

1. **History Of The Lease And Tenants At The Café Space In REI’s Flagship Store.**

REI’s Flagship store in downtown Seattle opened on Friday, September 13, 1996. (RP 68:16-18.) Before the grand opening, REI entered into a Lease, dated May 25, 1995, with third-party Todo Loco, Inc. (“Todo Loco”) to facilitate the operation of a café on the second floor

of the Flagship store. (RP 66:12-23; Ex. 1.) Todo Loco is not affiliated with, or related to, World Wrapps. (RP 72:17-20.)

The Lease was subsequently assigned by Todo Loco to Todo Assets Company on April 4, 1997, and later to World Wrapps. (RP 71:20-72:16; Ex. 3.) Todo Assets Company began operating the REI Flagship café as a World Wrapps restaurant following the lease assignment in April 1997. (RP 72:13-16.)

Two amendments were made to the Lease on July 25, 1995 and September 1, 1997. (RP 71:3-7, 72:21-73:2; Exs. 2, 4.)

The Lease provided for an initial term of five years. (RP 66:12-23; Ex. 1, § 1.3.) The lease term did not commence on a date certain, instead commencing on the date REI delivered possession of the premises to Todo Loco. (Id.) For purposes of calendaring the lease term, the “Commencement Date” was to be the

first day of the calendar month following the calendar month in which *the date of delivery of possession occurs* (or from the date of possession, if that date is the first day of a calendar month).

(Id.) (emphasis added). The Lease also included options to renew for two successive periods of five years. (Ex. 1, § 8.) To exercise the options, the Lease required the tenant to send written notice “at least 180 days prior to the commencement of the renewal term.” (Id.)

2. Confusion Over The Lease Commencement Date And Corresponding Lease Terms.

Neither REI nor World Wrapps knows the date when REI delivered possession of the premises to Todo Loco so that construction on tenant improvements could begin during the summer of 1996. (RP 69:8-21, 474:9-25.) REI and Todo Loco did not contemporaneously document the commencement date, or, if they did, those records have been lost in the intervening years. (RP 70:23-71:2, 316:9-317:12.) Todo Loco has gone out of business.

Under the Lease, REI was obligated to make the premises available to Todo Loco at least 60 days before the Flagship store's grand opening on September 13, 1996. (RP 70:7-22, 316:9-317:12; Ex. 1, § 1.3.) Todo Loco would need time in advance of the store opening to make tenant improvements. (RP 69:8-70:22, 316:9-317:1.) REI employees recall that Todo Loco did occupy the café in advance of the mid-August store opening, even providing food to the REI employees working to open the Flagship store. (RP 68:21-69:7.) This information indicates that Todo Loco would have moved in sometime after mid-June 1996, but *prior* to August 1, 1996 in order to make tenant improvements. (See RP 69:8-70:6.)

When Todo Loco's assignee, Todo Assets Company, provided notice of its election to exercise the first renewal option, however, it noted that the first renewal term would commence on September 1, 2001 and end on August 31, 2006. (RP 82:10-83:25; Ex. 12.) Based on this January 19, 2001 letter,² it appears Todo Assets Company erroneously believed that REI first delivered possession of the premises to Todo Loco sometime after August 1, 1996. (Id. See also RP 432:4-435:1; Ex. 12.)

At trial, World Wrapps presented its own internal documents implying that October 1, 1996 was the lease commencement date. (RP 396:3-397:16; Exs. 98-99.) No Todo Loco documents were provided, and World Wrapps could not explain without speculation why October 1, 1996 appeared in its records because the author of the document is no longer employed by World Wrapps. Id. World Wrapps does not have any records created contemporaneously with the Lease's execution because Todo Assets Company (a World Wrapps affiliate) did not assume the Lease until April 4, 1997. (See 71:20-72:20; Ex. 3.)

REI also has an internal document which noted October 1, 1996 as the commencement date. (RP 306:8-307:10, 315:16-317:12; Ex. 100.)

² Todo Assets Company sent the renewal notice approximately 225 days prior to the date it believed the renewal term commenced, September 1, 2001. (See Ex. 12.)

Throughout the years, various REI employees have maintained lease tracking spreadsheets and tickler systems for lease commencement dates and deadlines, such as notice requirements for renewal options. (RP 308:6-8, 211:14-19.) When REI's current asset manager, Wendy Mackenzie, took over for her predecessor in 2008, she started a new lease tracking spreadsheet from scratch, by reviewing the underlying lease documents.³ (RP 306:8-308:18; Ex. 100.) Ms. Mackenzie could not determine the date REI delivered possession of the premises to Todo Loco and could not locate a writing between the parties identifying the date Todo Loco actually took possession. (RP 317:6-12.) So, in noting the lease commencement date on her new spreadsheet, Ms. Mackenzie instead used the date World Wrapps' predecessor had likely started paying rent. (RP 338:25-339:4, 344:12-345:14.)

Despite the fact that no evidence was introduced that showed the actual date Todo Loco took possession and the original lease commenced, the trial court found that, based on World Wrapps' unexplained (and after-the-fact) internal documents, REI's 2008 spreadsheet, and the Todo Assets

³ After Wendy Mackenzie completed her lease tracking spreadsheet, REI did not retain the old spreadsheets, which sometimes had different information noted and therefore could lead to confusion. (RP 372:13-373:16.)

Company lease renewal notice that it was “clear” the lease commencement date was, “at the earliest,” September 1, 1996. (FF 5.)

3. World Wrapps’ Default For Cleanliness And Maintenance Violations Lead To The Café Remodel And The Third Amendment To Lease.

In August 2005, World Wrapps defaulted under the Lease for its failure to maintain the premises. (RP 140:14-141:17, 501:2-7; Ex. 17.) World Wrapps cured the default within the ten-day cure period allotted under the Lease. (RP 143:16-144:17, 501:2-9.) REI and World Wrapps agreed, however, that the café still needed remodeling. (RP 144:18-146:13, 422:14-16; Ex. 24.)

The café remodel led REI and World Wrapps to negotiate the Third Amendment to Lease (“Third Amendment”), starting in November 2005. (RP 167:4-168:18; Ex. 25.) World Wrapps wanted to significantly reduce the size of the premises it rented from REI.⁴ (RP 146:5-10.) World Wrapps also sought to obtain two additional options to extend the Lease. (RP 178:10-179:6; Ex. 36.)

World Wrapps had nevertheless internally committed to completing the remodel even if REI would not agree to re-negotiate the

⁴ REI and World Wrapps agreed to reduce the premises occupied by World Wrapps by over 1,100 square feet, from approximately 3,286 to 2,154. (Ex. 5, §§ A, 1.)

lease. (RP 538:3-21, 541:1-542:14; Ex. 26) (“Perhaps when (if) they won’t do an extension, we can use that as leverage to get them to pay some of [the remodel] so we don’t have so much to amortize in the short time.”). At trial, however, World Wrapps witnesses testified that the company would not have invested in remodeling the café if the lease term under the Third Amendment did not extend to the end of the second renewal option term (under the original Lease), and also provide two more options to renew the lease. (RP 426:11-14.) However, the remodel work was completed entirely before the Third Amendment was executed by either party. (RP 428:8-11, 200:20-201:7.)

World Wrapps did not exercise the second renewal option before executing the Third Amendment. (RP 431:15-18.) The deadline for exercising the second renewal option passed while REI and World Wrapps were negotiating the Third Amendment.⁵ (RP 482:3-13.)

4. The Parties’ Negotiation Of The Third Amendment.

REI’s in-house counsel, Danette Capello, took the lead in preparing the first draft of the Third Amendment. (RP 180:16-23, 260:23-

⁵ Using the lease term dates suggested by Todo Assets Company in its notice to exercise the first renewal option (for purposes of simplicity) – September 1 to August 31 – the deadline to exercise the second renewal option would have been 180 days before September 1, 2006, or by no later than March 5, 2006. (Ex. 1, § 8.)

261:16; Exs. 39, 42.) REI's asset manager at the time, Tom Foley, sent the draft amendment to World Wrapps' executive, Phillip DeMaria, in February 2006. (RP 185:17-20; Ex. 43.) Mr. Foley negotiated the amendment with Mr. DeMaria. (See, e.g., 187:12-22; Ex. 49.) The draft contained a proposed expiration date of May 25, 2010. (RP 185:7-186:4; Ex. 43.) The expiration date was conspicuously highlighted. (Id.)

On April 19, 2006, World Wrapps, through Mr. DeMaria, proposed changes and additions to the draft Third Amendment, asking for: (a) waiver of rent for April and May 2006; (b) a sale and assignment clause; (c) a clause obligating REI to maintain its adjacent premises, seek the consent of World Wrapps for significant changes to the premises, and to maintain clear ingress and egress into the World Wrapps café; (d) a clause stating that World Wrapps would not be obligated to pay any construction allowance to REI for work required to reduce the size of the leased premises; and (d) providing May 1, 2006 as the "reduction date" of the premises. (RP 441:14-443:14; Exs. 49, 50.) World Wrapps did *not* propose an alternative expiration date for the amended lease.

In fact, May 25, 2010 remained the expiration date in this and at least three subsequent drafts of the Third Amendment exchanged between REI and World Wrapps. (RP 459:7-20; Exs. 5, 43, 49-50, 57, 61-62.)

Although three executives from World Wrapps reviewed multiple drafts of the Third Amendment, not one of them told REI that May 25, 2010 was not the correct expiration date. (RP 441:14-442:4, 520:18-21.)

REI initially rejected many of the changes suggested by World Wrapps. (RP 453:4-454:4.) By the final draft, however, REI agreed that May 1, 2006 would be the “reduction date,” and also agreed to provide World Wrapps with two-months’ free rent during the remodeling phase. (Ex. 5.)

5. The Parties’ Execution Of The Third Amendment.

Mr. DeMaria signed the Third Amendment on World Wrapps’ behalf on or around November 9, 2006. (RP 459:7-14, Ex. 5.) The improvements at issue in this case had been completed months before, in April and May of 2006. (E.g., Ex. 5, § 1(a).) REI executives executed the Third Amendment on April 4, 2007. (RP 200:20-201:7.) The Third Amendment’s first term began on May 1, 2006, before the first renewal period under the original Lease had ended.⁶ (Ex. 5, § 1(a).) After May 2006, World Wrapps began paying reduced rent for the premises

⁶ Again, for purposes of simplicity, using the dates asserted in Todo Asset Company’s notice to renew, the first option period would have ended on August 1, 2006. (Ex. 12.) If, as REI believes, the commencement date was much earlier than September 1, 1996, the first option period would also have ended earlier.

based on the reduction of square footage accomplished by the remodel.
(RP 467:12- 468:5.)

6. World Wrapps' Failure To Exercise Its Option To Renew The Lease.

World Wrapps was required to provide written notice of its intent to exercise the "Third Renewal Option" at least 180 days prior to the May 25, 2010 expiration, which is on or before November 27, 2009. (RP 320:17-25; Ex. 5.) Tom Foley's successor, Wendy Mackenzie, had noted this deadline in REI's lease tracking spreadsheets and in her calendar. (RP 320:17-321:7.) A few days before the deadline, Ms. Mackenzie contacted her supervisor, Jerry Chevassus, to let him know that World Wrapps had not yet provided notice. (RP 65:17-66:4, 330:20-331:11; Ex. 79.) Ms. Mackenzie thought World Wrapps may have decided not to renew the lease because the store's sales were down. (RP 330:20-321:23; Ex. 79.)

After receiving Ms. Mackenzie's email, Mr. Chevassus contacted his superiors to start a discussion about REI's options in the event World Wrapps chose not to exercise the option, or exercised late. (RP 89:5-90:25.) The group discussed whether to keep the space a café, turn it into retail space, or use it in other ways. (Id.; RP 94:16-95:12.) During this consensus-building process, the REI Flagship store manager was,

logically, asked not to tell World Wrapps that it had missed its option. (RP 110:24-111:21.)

Eventually, after several weeks of discussion, REI executives agreed that the leased premises would remain as a café, but REI would look at placing other café operators in the space. (RP 94:16-96:13; 332:2- 6.)

World Wrapps did not notify REI of its intent to renew the lease on or before November 27, 2009. (RP 331:22-332:6; Ex. 84.)

7. REI's Notice That The Lease Would End On May 25, 2010 Due To World Wrapps' Failure To Exercise Its Option To Renew.

After REI reached consensus, on or around January 8, 2010, REI notified World Wrapps by letter that REI had not received any notice from World Wrapps exercising the option before the deadline. (RP 331:22-332:6; Ex. 84.) REI explained that, as such, it intended to conduct a search for a new café operator. (Id.)

8. World Wrapps' Notice Of Intent To Renew The Lease.

An attorney for World Wrapps responded to REI's letter on January 14, 2010. (RP 519:17-520:6; Ex. 87.) Mr. Barkewitz claimed that the November 27, 2009 deadline for notice to renew the lease "is not necessarily clear under the terms of the Third Amendment to Lease." (Ex. 87.) World Wrapps argued that its failure to exercise its option

before the deadline “resulted in part from the ambiguity between the Third Amendment to the Lease and the original Lease document.” (Ex. 87.)

World Wrapps’ attorney did not contend that the May 25, 2010 date was a mistake. (RP 519:17-521:6; 525:18-526:19, Ex. 87.) To the contrary, World Wrapps acknowledged and agreed that the Third Amendment expired on May 25, 2010, stating that there were “almost five months remaining in the Lease term” at the time of the letter. (Ex. 87.) World Wrapps provided notice of its intent to renew through Mr. Barkowitz’s January 14, 2010 letter. (See Ex. 87.)

REI’s in-house counsel, Danette Capello, responded to the letter on February 8, 2010. (Ex. 90.) She rejected World Wrapps’ argument that it was entitled to an equitable grace period under Washington law. (Id.)

9. REI’s Search For A New Café Operator.

In January 2010, Wendy Mackenzie also informed a World Wrapps representative that REI would not accept World Wrapps’ late notice. (RP 332:20-334:3; Ex. 86.)

REI thereafter continued its search for a new café operator, including retaining professional commercial real estate brokers to assist in the process. (RP 96:5-10.) REI dedicated more than \$10,000 for a

commercial broker to support its efforts to locate a café vendor that better fit the mission and culture of the REI co-op. (Ex. 91.)

10. World Wrapps' Lawsuit Against REI.

In March 2010, World Wrapps sued REI in a separate action in King County for a judgment declaring that it had timely exercised its option to renew the Lease. (Cause No. 10-2-10432-1 SEA, Dkt. 1.) It was not until May 2010 that World Wrapps first claimed REI made a scrivener's error in drafting the Third Amendment's expiration date. (Id. at Dkt. 11-12.) World Wrapps' lawsuit was recently dismissed by stipulation.

11. World Wrapps' Refusal To Surrender The Premises On Or Before May 25, 2010.

World Wrapps did not vacate the premises on or before May 25, 2010. (RP 336:3-8.) REI did not consent to World Wrapps' continued occupancy of the Premises. (RP 335:8-15, 336:9-12; Ex. 94.) As such, REI viewed World Wrapps as a holdover tenant under the Lease:

If Tenant shall, without written consent of Landlord, hold over after the expiration of the term of this Lease, such tenancy shall be a month-to-month tenancy, which tenancy may be terminated as provided by the laws of the State of Washington. During such tenancy, Tenant agrees to pay Landlord double the rate of rent[] as set forth herein, unless a different rate is agreed upon, and to be bound by all of the terms, covenants and conditions as herein specified, so far as applicable.

(Ex. 1, § 29.) REI reminded World Wrapps that double rent was due as a holdover tenant and warned the café operator that, if REI did not receive timely payment for double rent, REI reserved its right to bring an unlawful detainer action. (RP 335:14-336:8; Ex. 93.)

12. World Wrapps' Failure To Pay Double Rent.

World Wrapps pays \$29.57 per square foot (2,154) for its monthly rent payment. (Ex. 5, § 1(d).) That amount is doubled when World Wrapps acts as a holdover tenant. (Ex. 1, § 29.) World Wrapps failed to pay double rent to REI at any time. (CP 4.)

On June 7 and June 8, 2010, REI caused a five-day Notice to Pay Rent or Vacate Premises to be properly served on World Wrapps in accordance with RCW 59.12.040, RCW 59.12.030(3), and the Lease. (RP 336:9-13; Ex. 95.) The notice informed World Wrapps that it was in default under the Lease for failing to pay rent due and owing under the Lease. (Id.)

World Wrapps failed to pay all amounts in default within five days of service of the Notice, as required by the Lease and statute. (CP 4.) World Wrapps also did not vacate the leased premises. (RP 336:3-8.)

13. World Wrapps' Refusal To Vacate, Even After REI Terminated The Holdover Month-To-Month Tenancy.

On May 26, 2010, REI caused a Notice of Termination of Month-to-Month Tenancy to be served on World Wrapps in accordance with RCW 59.12.040, RCW 59.12.030(2), and the Lease. (Ex. 94.) The Notice informed World Wrapps that it must vacate the Premises on or before the last day of the monthly lease term, or no later than June 30, 2010. (Id.) World Wrapps did not vacate the Premises by that date. (RP 336:3-8.)

14. REI's Lawsuit Against World Wrapps.

Because World Wrapps refused to vacate the premises, REI initiated the underlying unlawful detainer case in the King County Superior Court on July 1, 2010. (CP 1-6.)

REI pled two causes of action for unlawful detainer: (1) failure to pay or vacate under RCW 59.12.030(3); and (2) failure to vacate the premises under RCW 59.12.030(2). (Id. at 4-5.) REI sought to evict World Wrapps, collect damages for double rent, and recoup attorneys' fees and costs. (Id. at 5-6.)

World Wrapps denied that it was in breach of the lease and asserted equitable counterclaims and affirmative defenses. (CP 8-14.) World Wrapps counterclaimed for (1) reformation due to mutual mistake

or scrivener's error, (2) breach of contract, (3) breach of duty of good faith and fair dealing, and (4) equitable grace period. (Id.)

The parties tried this case without a jury before the Honorable Judge Carol Schapira. (CP 334.) The trial lasted two and a half days, starting on Monday, September 13, 2010. (Id.) REI presented five witnesses: Jerry Chevassus, Bobby Mullins, Tom Foley, Danette Capello, and Wendy Mackenzie. (Id.) World Wrapps presented three witnesses: Phillip DeMaria, Carol Visor, and Jim Richardson. (Id.)

On September 15, 2010, the trial court issued a ruling from the bench. (CP 335.) The court denied World Wrapps' claims for mutual mistake/scrivener's error, breach of contract, and breach of duty of good faith and fair dealing, but granted World Wrapps' claim for an equitable grace period. (Id.) The trial court denied all of REI's claims. (Id.)

REI submitted a Motion for Reconsideration to the trial court on September 24, 2010. (CP 301-310.) To date, the trial court has not issued a ruling on REI's motion, or otherwise addressed it in any way.

On October 7, 2010, the trial court adopted the Findings of Fact and Conclusions of Law prepared and presented by World Wrapps. (CP 334-342.) The court granted World Wrapps' motion for attorneys' fees and costs the same day. (CP 343-347.)

IV. STANDARDS FOR REVIEW

Appellate courts review issues of law and the trial court's Conclusions of Law *de novo*. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 556, 132 P.3d 789 (2006). Findings of Fact are reviewed to ascertain whether they are supported by "substantial evidence," which exists where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the [factual] finding." Hilltop Terrace Homeowners' Ass'n v. Island County, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

Findings of fact are also reviewable *de novo* where the trial court has mislabeled a conclusion of law as a finding. Grundy v. Brack Family Trust, 151 Wn. App. 557, 567, 213 P.3d 619 (2009). Where, as in this case, a number of factual findings present mixed questions of law and fact, such findings are reviewed under the error of law standard. See Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 687, 167 P.3d 1112 (2007); State ex rel. Freedom Foundation v. WEA, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). The process of determining the applicable law and applying it to the facts is a question of law that this court reviews *de novo*. Id.

Most of the challenged trial court findings here are either mislabeled legal conclusions or mixed statements of fact and law reviewable under a *de novo* standard. Findings of Fact 4-7 also lacked substantial evidentiary support. (CP 335-37.)

V. ARGUMENT

A. The Trial Court Improperly Expanded Washington Law By Granting An Equitable Grace Period To World Wrapps.

Washington's Supreme Court has long held that time is of the essence in option contracts. See Chambers v. Slethej, 136 Wash. 84, 86, 238 P. 924 (1925). The parties' agreed-upon period for exercising an option "is as binding as any statutory limitation." Id. It is also well established that a court should not, under the guise of equity, rewrite contracts between private parties. Pacific Fin. Corp. v. Snohomish County, 160 Wash. 384, 389, 295 P. 110 (1931) ("Equity, like it does in all other express contracts in which the terms of the contract are clear and plain, follows the law, and the courts have no authority on any equitable principle to rewrite the contract for the parties.").

Courts in equity will likewise seldom relieve a party from that party's own lack of diligence. See Oregon Iron & Steel Co. v. Kelso State Bank, 129 Wash. 109, 117, 224 P. 569 (1924) ("It being the direct result of carelessness and inattention to his own affairs, there can be no relief at

law, and, even in equity, courts will seldom if ever relieve a man from the result of a mistake attributable to negligence or want of diligence in his own affairs.”).

Thus, when exercising an option to renew a commercial lease, a lessee’s renewal notice “must be definite, unequivocal, unqualified and given strictly in accordance with the terms of the lease.” Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn. App. 601, 610, 605 P.2d 334 (1979). See also Heckman Motors, Inc. v. Gunn, 73 Wn. App. 84, 88, 867 P.2d 683 (1994) (“The general rule is that an option must be exercised timely or it is lost.”).

An exception to this rule exists “only when equity requires it.” Heckman, 73 Wn. App. at 88. In Wharf, this Court held that, while “there can be special circumstances which may warrant a court in granting equitable relief against a lessee’s failure or delay in giving notice to renew an option in its lease,” the “circumstances in which equitable relief can be granted are *very limited*.” Id. at 610-11 (emphasis added). See also Cornish College of the Arts v. 1000 Virginia Limited Partnership, ___ Wn. App. ___, 242 P.3d 1, 9 (Oct. 25, 2010) (“Even where a party is entitled to equitable relief, the grant of an equitable grace period is appropriate only in limited circumstances.”).

The limited circumstances under which an equitable grace period may be granted are not present in this case. *First*, World Wrapps did not prove the threshold requirement that enforcement of the lease would result in inequitable forfeiture. “A superior court has the authority to grant an equitable grace period ... when an inequitable forfeiture would otherwise result.” Cornish, 242 P.3d at 5. *Second*, general prejudice or detriment to a lessee’s business as result of the lease termination is not a “special” or “limited circumstance” justifying equitable tolling. *Third*, and finally, World Wrapps’ two-month delay in exercising its option, in the absence of wrongful conduct by REI, is so excessive as to prevent the intervention of equity.

1. At Trial, World Wrapps Did Not Prove Inequitable Forfeiture – A Threshold Requirement.

Under Washington law, the lessee must establish that inequitable forfeiture would occur before an equitable grace period may be granted. See Wharf, 24 Wn. App. at 611; Heckman, 73 Wn. App. at 87; Cornish, 242 P.3d at 9 (holding an equitable grace period “may be warranted in limited circumstances where an inequitable forfeiture would otherwise result”).

Adopting and incorporating Professor Corbin’s teaching, this Court has explained that there “is one sort of case in which it has been held that

the power of acceptance continues to exist for a short time after the expiration [of the option] ... [where] the holder of the option neglected to give notice of acceptance within the time fixed *although he had made valuable permanent improvements with the intention to give the notice.*" Heckman, 73 Wn. App. at 87 (quoting 1 Arthur Linton Corbin, Corbin on Contracts § 35 (1963)) ("Washington law is in accord.") (emphasis added); see also Wharf, 24 Wn. App. at 611 (holding that Corbin "best expresses this rule and its limitations").

World Wrapps did not (and could not) establish at trial that it would *forfeit* the type of substantial improvements required by Washington law, or that any improvements were made specifically with the intention to give notice on the Third Renewal Option. The improvements were completed four years before, in anticipation of entering the Third Amendment and were completed before that amendment was executed by either REI or World Wrapps. (E.g., RP 428:8-11.)

a. World Wrapps Had Full Enjoyment Of The Improvements For More Than Four Years.

World Wrapps finished remodeling the café in the spring of 2006, more than four years before the lease term expired. (See, e.g., Ex. 5, § 1(a) (premises reduced as of May 1, 2006.)) In those four years, World

Wrapps had full use and enjoyment of the premises. In fact, World Wrapps has gotten so much use out of the equipment and fixtures it purchased that they have significantly diminished in value. (RP 543:1-20.) World Wrapps claims the value of the equipment and fixtures is so marginalized that it could not or would not take those fixtures and equipment from REI into a new World Wrapps store. (Id.)

The trial court here nevertheless concluded that World Wrapps would lose the value of its investment in upgrading the reduced space if an equitable grace period was not granted. (CL 3.) But Division II of the Washington Court of Appeals has held that no inequitable forfeiture would occur under similar facts. See Heckman, 73 Wn. App. at 88. The lessee in Heckman benefited from its improvements for approximately five years. Id. The appellate court found that after five years of use, there could be no inequitable forfeiture. Id.

Moreover, World Wrapps' heavy use of the upgraded premises for four years distinguishes it from the lessee in Wharf, where an inequitable forfeiture was found. See Wharf, 24 Wn. App. at 612. In that case, the (sparse) facts indicate that the lessee had made *recent* valuable improvements to the premises (not four years prior). Id. The facts also indicate that additional improvements were planned and discussed with

the lessor at the very time the renewal notice was due. Id. See also Cornish, 242 P.3d at 9-10 (finding inequitable forfeiture where sub-lessee made \$600,000 in improvements in anticipation of owning the property in furtherance of its long-term campus master planning).

After full use and enjoyment of the property for more than four years, World Wrapps does not risk losing the value of its 2006 investment, or an inequitable forfeiture of any kind.

b. World Wrapps Had The Opportunity To Fully Amortize The Cost Of Its Improvements.

No evidence suggests that World Wrapps could not have amortized the entire cost of the remodel, purportedly \$250,000, before May 25, 2010. In Heckman, the Court of Appeals held that no inequitable forfeiture would occur where the tenant “‘had basically amortized out all ... expenses in the improvement of that lot’ during the initial 5-year term of the lease.” Heckman, 73 Wn. App. at 88.

The trial court found that World Wrapps spent \$250,000 to remodel the café. (FF 6; CL 5-6.) The court relied on testimony from World Wrapps executive, Jim Richardson. (RP 502:5-7.) The documentary evidence, however, shows that, at the time of the remodel, World Wrapps estimated spending no more than \$200,000, and more like \$160,000. (RP 445:3-447:14; Ex. 47.) No documentary evidence was

submitted at trial to support Mr. Richardson's after-the-fact increased cost estimate.

Likewise, World Wrapps offered *no* evidence that it was unable to amortize the cost of the improvements within the more than four years it has had to use the remodeled premises.

To the contrary, like Heckman, the evidence proven at this trial shows that World Wrapps had the opportunity to, and even planned to, amortize the entire cost of the improvements within the initial term of the lease. (RP 538:3-21; Ex. 26) ("Perhaps when (if) they won't do an extension, we can use that as leverage to get them to pay for some of it so we don't have so much to amortize in the short time."). The diminished value of the fixtures and equipment alleged by World Wrapps' executive Jim Richardson is further proof that World Wrapps benefited from and used-up the cost of the upgrade during the applicable lease period ending May 25, 2010, thereby eliminating any inequitable forfeiture. (RP 543:1-20.)

c. REI Subsidized At Least 67% Of The Remodel Through Rent Reductions.

World Wrapps' true investment in upgrading the leased premises was substantially less than the \$250,000 it claims. World Wrapps was

able to directly offset the cost of the remodel through a sizeable reduction in rent expenses from REI.

Even assuming that World Wrapps did spend \$250,000 on the remodel, more than \$168,000 of the cost was offset by rent reductions. According to World Wrapps' calculations, the company estimated that it would save at least \$42,000 per year in its rent and common area maintenance expenses due to the roughly 30% reduction in the size of the remodeled premises. (REP 445:3-447:14; Exs. 47-48.) REI and World Wrapps agreed to reduce the premises occupied by World Wrapps by over 1,100 square feet, from 3,286 to 2,154 square feet. (Ex. 5, §§ A, 1.)

REI also waived two months' rent during the construction phase of the remodel, which saved World Wrapps at least an additional \$12,400 on the remodel project. (Ex. 5, § 1(f).)

Spread over the four-year lease term, World Wrapps really only spent approximately \$82,000 on the upgrade. That is a mere \$20,500 per year for a World Wrapps store that makes between \$750,000 and \$1,000,000 in gross revenue each year, with approximately \$135,000 in profit. (RP 494:18-495:21.)

In light of Heckman's ruling that simple amortization can defeat inequitable forfeiture, the fact that World Wrapps *also* received a cost

savings directly tied to the down-sizing remodel entirely undercuts World Wrapps' claim that it faces any inequitable forfeiture for the 2006 investment into the premises.

d. REI Made A Significant Investment In World Wrapps' Remodel.

Whether the landlord spent funds of its own on the improvements at issue is also relevant to whether an inequitable forfeiture might occur. Heckman, 73 Wn. App. at 88 (no inequitable forfeiture where landlord paid for a greater percentage of the work on the property).

In this case, the cost of reducing the premises for World Wrapps (and consequent expansion for REI) cost REI close to \$400,000 – well above any alleged cost World Wrapps spent on its improvements. (Ex. 44.) As one example, REI demolished and constructed all the walls, doors, and windows necessary to reduce the size of the premises for World Wrapps.⁷ (Id.; RP 428:21-24.) This cost does not include other improvements REI made to turn the extra space into a children's play area. These facts, too, demonstrate that World Wrapps would not suffer an inequitable forfeiture if the express written terms of the Lease were enforced.

⁷ As REI witness Bobby Mullins explained at trial, World Wrapps requested the reduction in premises; the premises were too large for World Wrapps to effectively maintain. (RP 145:21-146:10.)

Furthermore, unlike Wharf and Cornish, no evidence here shows that REI, as lessor, would be in a position to receive a windfall, such as a newly-renovated building, as a consequence of the missed option. See Cornish, 242 P.3d at 9-10. To the contrary, the evidence actually shows that the improvements were completed in order to make the space more functional as a smaller World Wrapps restaurant and that, after four years, there was little, if any, residual value. (E.g., RP 145:21-146:10, 543:1-20.) Again, this is not a circumstance where an *inequitable* forfeiture would occur.

e. World Wrapps Made The Improvements In Anticipation Of Executing The Third Amendment To Lease – Not Exercising The Renewal Option Four Years Later.

This Court has held that when “the holder of an option makes valuable permanent improvements to the property *with the intention to give its notice to exercise or extend the option*, but then fails to timely give such notice, an equitable period of grace may be appropriate.” Cornish, 242 P.3d at 9 (citing Wharf, 24 Wn. App. at 611) (emphasis added).

Here, the trial court found that World Wrapps would not have invested in the 2006 remodel “but for obtaining the extension at that time and the additional renewal options.” (CL 6.)

The “extension” referred to by the trial court is World Wrapps’ shorthand for its mistaken belief that the Third Amendment’s lease term would run from May 1, 2006 – the Third Amendment’s effective date, which was prior to the expiration of the first renewal term under the original lease – to the expiration of the second renewal term under the original Lease (treating the second renewal term as if it had been exercised). (RP 425:6-426:4.) But, World Wrapps and REI did not have an agreement about when the second renewal term ended because, as explained in Section III.2 above, the parties do not know what date the original Lease commenced. (See also FF 19.)

With this in mind, the trial court’s conclusion makes clear that World Wrapps completed the 2006 improvements in anticipation of entering into the *Third Amendment*, not exercising the Third Renewal Option provided for in the *Third Amendment*. (RP 426:11-14.) The improvements were completed more than four years before the Third Renewal Option, and were, in fact, completed before either of the parties had executed the Third Amendment. (RP 428:8-10.) This is not enough to prove inequitable forfeiture. See Wharf, 24 Wn. App. at 611 (explaining that the “mere fact that a price was paid for the option does not result in forfeiture”) (quoting Corbin, supra, at 147).

2. Commonplace Prejudice Or Economic Harm To World Wrapps Is Not A Special Circumstance Justifying An Equitable Grace Period Under Washington Law.

General prejudice to the lessee's business is not a consideration for purposes of evaluating the risk of inequitable forfeiture, or under any other circumstance identified in Wharf, Heckman, or Cornish. See Wharf, 24 Wn. App. at 612-13 (identifying prejudice to the *lessor*, not the lessee, as a result of a delayed exercise of the option); Heckman, 73 Wn. App. at 87-88 (same); Cornish, 242 P.3d at 9 (same).

The Wharf, Heckman, and Cornish opinions are clear that "special circumstances" must be present to justify an equitable grace period. Wharf, 24 Wn. App. at 610. The Wharf court noted that the loss of an option itself, without more, was not a "special circumstance." Wharf, 24 Wn. App. at 611 ("The mere fact that a price was paid for the option does not result in forfeiture.") (quoting and adopting Corbin, supra, at 146).

No Washington appellate court has considered whether the loss of an option would be a "setback"⁸ for the lessee's business in evaluating whether an equitable grace period should be allowed. (RP 624:17-625:21; see also CL 5 (considering the "prejudice" from loss of gross income

⁸ During its oral decision, the trial court indicated that it considered "what a great setback for World Wrapps" it would be if they were forced to leave the REI premises. (RP 624:17 - 625:21; see also CL 5.)

stream and effect on the World Wrapps franchise)). Undoubtedly, it could have been a substantial loss for the lessees in both Wharf and Heckman – a restaurant and a car dealership. Profits and jobs could be lost in both cases. Cash flow could be significantly hindered in both cases. Indeed, in nearly *every* situation where a commercial lessee is forced to move out of the premises, the loss of an option to stay would likely be a detrimental setback and, in many instances, a threat to the vitality of the business.

General prejudice or detriment to the lessee's business, as a consequence of losing an option and having to relinquish the premises, is not a special circumstance. If general prejudice was considered, an inequitable forfeiture could be claimed in virtually every case where a lessee missed the deadline to exercise its option to renew.

3. World Wrapps' Seven-Week Lag In Exercising Its Option Does Not Support An Equitable Grace Period.

If the risk of inequitable forfeiture exists (not in this case), this Court has articulated four other special circumstances to consider before a trial court has the authority to grant an equitable grace period: (1) the failure to give notices was purely inadvertent; (2) the failure to give timely notice did not prejudice or change the position of the lessor; (3) the lease was for a long term; and (4) the length of delay in exercising the option, including whether the lessor "substantially contributed to cause the delay"

by “*previously accept[ing] even later exercises of lease options ... without comment.*” Cornish, 242 P.3d at 9 (quoting Wharf, 24 Wn. App. at 613) (emphasis added).

World Wrapps did not provide REI with notice of its intent to renew until January 14, 2010 – seven weeks after the deadline. (Ex. 87.) The 180-day notice period for the Third Renewal Option expired on November 27, 2009. (See Ex. 5, § 2.)

In Wharf, this Court found that a two-month delay in exercising renewal options is ordinarily “considered so excessive as to not justify the intervention of equity.” Wharf, 24 Wn. App. at 613; see also Heckman, 73 Wn. App. at 88 (delay for more than six weeks was inexcusable where [*as in the present case*] it was “for no reason except that [the tenant] did not read the lease appropriately”).

The two-month delay in Wharf was excused, however, because the landlord’s conduct had “substantially contributed to cause the delay” by “previously accept[ing] even later exercises of lease options ... without comment.” Wharf, 24 Wn. App. at 613. The Wharf landlord had allowed tardy exercises of lease options from the tenant without objection over the parties’ 25-year leasing history. Id.

No similar facts exist in this case, as the trial court acknowledged during its oral ruling. (RP 623:5-14) (“one of the next factors is why did [World Wrapps] fail to give timely notice? I’m not blaming REI.”) Indeed, the trial court did not enter any findings or conclusions indicating that REI had previously accepted late renewal notices from World Wrapps or its predecessor. (See CP 334-342.)

Conclusion of Law 7 nevertheless appears to excuse World Wrapps from the seven-week delay for conduct attributed to REI. In addition to being distinguishable from the type of lulling activity highlighted in Wharf, the findings of interference in Conclusion of Law 7 are unsupported legally and factually.

a. REI’s Delay In Providing A Signed Copy Of The Third Amendment Did Not Cause World Wrapps To Miss The Renewal Deadline.

No evidence exists in the record to support the conclusion that REI’s delay in signing and returning the Third Amendment contributed to the lease expiration date being incorrect in World Wrapps’ lease-tracking system. (CL 7.)

As a preliminary matter, the record shows that World Wrapps does not even know what dates were calendared in its system prior to January 8, 2010. (RP 417:11-15.) When World Wrapps received REI’s

January 2010 letter, the World Wrapps employee in charge of managing the tickler system, Carol Visor, changed the lease expiration date to May 25, 2010 in World Wrapps' records. (RP 416:9-417:1.) Ms. Visor could not say what was originally calendared in World Wrapps' tickler system because she was not responsible for calendaring World Wrapps' lease renewals until 2009. (RP 398:2-5.)

Regardless, REI's delay in providing a signed copy of the Third Amendment did not delay World Wrapps in complying with the new lease's terms. The World Wrapps executive responsible for signing and executing the Third Amendment testified that, after he signed the document, he would have sent a copy of the Third Amendment that he executed to World Wrapps' home office for administration of the lease. (RP 476:3-478:9.) Indeed, World Wrapps noted and complied with other changes in the Third Amendment before receiving REI's signed copy – for example paying rent based on the new square footage. (Id.) Conclusion of Law 7 is erroneous.

b. REI's Decision Not To Remind World Wrapps' Of Its Lease Rights Does Not Excuse World Wrapps' Tardy Notice.

REI had no legal obligation or other duty to remind World Wrapps about the renewal deadline, nor does REI have an obligation or duty to immediately inform World Wrapps after it missed the deadline.

Directly contrary to Conclusion of Law 7, the court in its oral ruling noted that it was “okay for REI to play hardball on not reading into the lease that the duty of good faith means that you’re supposed to tell somebody when they have to exercise their options or hint in – in some way.” (RP 621:12-16.) The trial court also later said it was “not criticizing REI” for not “notify[ing] [World Wrapps] that they had missed the date.” (RP 623:5-14. See also CP 341, at Order ¶ 10 (REI did not violate its duty of good faith and fair dealing under the lease)).

REI did not lull World Wrapps into ignoring the terms of the contract by choosing not to warn World Wrapps about the renewal notice. This conclusion is erroneous.

c. The Third Amendment's Expiration Date Was Not A Mistake That Contributed To World Wrapps' Late Renewal Notice.

The trial court erroneously found that the Third Amendment's May 25, 2010 expiration date was a mistake by both parties, though not a scrivener's error or mutual mistake. (FF 7, 19, CL 7.) The court seems to

have concluded that this alleged mistake on the part of REI contributed to World Wrapps missing the renewal notice date four years later. *First*, substantial evidence does not support the trial court's finding that REI was mistaken about the May 25, 2010 expiration date. But, *second*, even if the trial court were correct, this mistake on the part of REI would not be the sort of "contribution" that could excuse untimely notice by World Wrapps pursuant to the rule announced in Wharf.

The evidence presented at trial does not support a finding that *REI* was mistaken as to the May 25, 2010 expiration date contained in the Third Amendment, either at the time the Third Amendment was drafted and executed or when World Wrapps' notice to renew was due. (CL 4, 7.)

The trial court apparently found that REI did not intend the expiration date to be May 25, 2010, but the only testimony offered as to REI's intent in drafting the amendment was from REI witnesses, Ms. Capello and Mr. Foley, neither of whom ever testified as to intending a date other than May 25, 2010.

Ms. Capello testified that she intended to use the May 25, 2010 as the Third Amendment's expiration date. (RP 268:4-9.) She testified that she and Mr. Foley discussed the uncertainty surrounding the dates of the lease term and making new firm dates. (RP 263:18-264:4.) She testified there were business reasons which lead her to select the May 25, 2010

date. (RP 263:8-268:13.) Although the trial court found her to be a truthful and straightforward witness, the court found that the reasons she offered were not credible. (RP 615:21-616:8.)

Mr. Foley also testified that he and Ms. Capello intended to use a new, firm date for the expiration of the Third Amendment. (RP 168:19-170:2.) He also testified about possible business reasons for selecting the May 25, 2010 date. (Id.; RP 170:19-171:16.) Although the trial court did not think Mr. Foley was untruthful, it found his testimony on the issue was not credible. (RP 614:22-615:6.)

The trial court instead focused on the testimony of World Wrapps' witness Phillip DeMaria, who testified that he thought the dates under the original lease would control, but importantly he could not identify any specific date. (RP 474:4-476:2.) Based on this testimony, the trial court found that neither party ever agreed on the original commencement date of the lease. (FF 19.)

The trial court also found that the parties had not negotiated the May 25, 2010 date and that, therefore, REI never intended May 25, 2010 to be the operative expiration date. (FF 8.) The court made this finding despite more than four drafts of the Third Amendment having been passed back and forth between the parties containing the conspicuously highlighted May 25, 2010 expiration date, and despite other terms being

proposed or eliminated in the exchange of these four drafts. This too is error.

Even if the parties had been mistaken as to the expiration date, however, that would only support World Wrapps' argument that its failure to provide timely notice was inadvertent. The mistake does not support an argument that REI caused the delay, let alone an argument that REI contributed to the delay by a past history of allowing tardy notices and exercise of prior options. Conclusion of Law No. 7 is erroneous and should be reversed.

VI. CONCLUSION

At trial, World Wrapps did not offer evidence sufficient to prove that it would suffer an inequitable forfeiture if the terms of the Third Amendment to Lease were enforced as written. World Wrapps' investment into café improvements was made in anticipation of executing a lease amendment, and was made more than four years before the renewal option at issue arose. At trial, World Wrapps offered no evidence that it could not have and did not fully enjoy the use of the improvements over those four years. World Wrapps also offered no evidence that it did not have the opportunity to fully amortize the cost of the improvements over the lease term.

Instead, World Wrapps offered evidence of general prejudice to its business if not allowed to exercise the option, including loss of profit streams and jobs. The trial court erroneously believed that its broad equitable powers allowed it to consider the potential detriment to a lessee's business in deciding whether to grant an equitable grace period. But as Wharf, Heckman, and Cornish make clear, the trial court has discretion to grant an equitable grace period only to avoid an inequitable forfeiture. None was shown here.

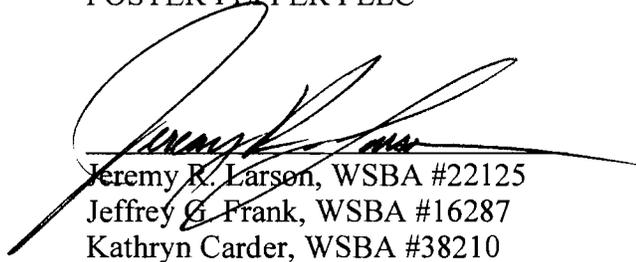
The court also erred in ruling that World Wrapps' seven-week delay in exercising its option was excusable. The Heckman and Wharf courts stated that a six-week and a two-month delay in giving notice were too long, unless the lessor contributed to the delay by previously allowing late exercises of options. Those circumstances did not occur here and there is no basis for excusing World Wrapps' tardy notice.

For these reasons, Appellant Recreational Equipment, Inc. asks this Court to reverse, without remand, the trial court's grant of an equitable grace period to World Wrapps. World Wrapps failed to satisfy its burden at trial to establish inequitable forfeiture. REI consequently asks this Court to enforce the written terms of the Third Amendment and order World Wrapps to vacate the premises. The award of attorneys' fees

and costs to World Wrapps' should be reversed and an award made to REI
as the prevailing party.

RESPECTFULLY SUBMITTED this 28th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned declares that on Friday, January 28, 2011, I caused to be served the following documents:

1. Appellant's Opening Brief;
2. And this document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true correct.

Executed on Friday, January 28, 2011, at Seattle, Washington.


Lisa Cachopo