

695479

ORIGINAL

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 695479

Radiance Capital, L.L.C., a Washington limited liability company,

Appellant,

v.

CIRCLE S FOODS, Inc., a foreign corporation, dba CIRCLE S.
MARKET AND DAILY; SUBHASH CHANDER SHARMA and
“JANE DOE” SHARMA, husband and wife; JAGTAR SINGH and
“JANE DOE” SINGH, husband and wife; and NAVJIT SINGH and
“JANE DOE” SINGH, husband and wife,
Respondent.

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 12/2/13


Appellant’s Reply Brief

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TABLE OF CONTENTS

<u>Description</u>	<u>Page No.</u>
I. <u>INTRODUCTION</u>	1
II. <u>ARGUMENT</u>	2
A. The Contract unambiguously Sets Forth Circle S's Duties.	2
1. The Agreement and Notice Must Be Read Together to Determine the Terms of the Parties' Contract.	3
2. Circle S Had Duties to Provide Two Types of Insurance and Satisfactory Proof of Such Coverage on a Continuing Basis	4
a. Circle S. had a duty to maintain two types of insurance coverage.	
b. Circle S. had a duty to provide evidence of both types of coverage that satisfied Radiance.	5
c. Circle S had a continuing duty to provide evidence that it maintained both types of coverage.	6
3. Radiance Was Not Required to Provide Advance Notice of Insurance charges or Opportunities to Cure Insurance Deficiencies.	9
4. Radiance Was Permitted to Charge Default and Collection Fees.	12
B. Viewed in the Light Most Favorable to Circle S., the Evidence Conclusively Establishes that Circle S. Breached the contract.	17
C. Viewed in the Light Most Favorable to Circle S., the Evidence conclusively Demonstrates	

that Circle S's Breaches Proximately Caused Damages to Radiance.	19
D. As the Rightful Prevailing Party, Radiance is entitled to Recover Attorney's Fees and Costs.	21
III. CONCLUSION	24

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page Nos.</u>
<i>Bay v. Jensen</i> , 147 Wn. App. 641, 661, 196 P.3d 753 (2008).	23
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 667, 801 P.2d 222 (1990)	2
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 261, 897 P.2d 1239 (1995).	3, 7
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992)	13
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 85, 60 P.3d 1245 (2003)	8, 12,
<i>Hegwine v. Longview Fibre Co.</i> , 132 Wn. App. 546, 555, 132 P.3d 789 (2006)	2
<i>James S. Black & Co. v. P & R Co.</i> , 12 Wn. App. 533, 535, 530 P.2d 722 (1975)	11
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 5, 977 P.2d 570 (1999)	8
<u>RCW</u>	<u>Page No.</u>
RCW 4.84.330	24
<u>RAP</u>	
RAP 9.1	13
RAP 9.6	13
RAP 10 3(a) (5)	13
<u>APPENDIX</u>	
APPENDIX E Amended Findings of Fact and Conclusions of Law, September 17, 2012	

I. INTRODUCTION

Stripped of all unnecessary distractions, such as imagined “misrepresentations” of the record and finger-pointing over the extent of litigation that has resulted from an unpaid bill of less than \$400, this appeal boils down to whether Appellant Radiance Capital, LLC (“Radiance”) proved each element of its breach of contract claim against Respondent Circle S Food, Inc. (“Circle S”). Under the agreed principles of contract interpretation and construction, reasonable minds cannot differ on the fact that Circle S was obligated to maintain two types of insurance coverage (loss payee and additional insured) to protect Radiance’s interest in the fryer, and was also obligated to provide Radiance with satisfactory proof that it was maintaining that coverage. The evidence conclusively establishes that Circle S failed to either procure the required insurance or provide the necessary proof its existence. Viewed in the best possible light for Circle S, there is simply no room for debate that Radiance incurred damages as a result of Circle S’s failure to meet its contractual obligations. Therefore, this Court should reverse the trial court’s judgment.

II. ARGUMENT

The parties agree that the trial court's conclusions of law are subject to *de novo* review, and the trial court's findings of fact must be supported by substantial evidence. *See* Radiance's Opening Br. at 32 and Circle S's Br. at 15 (citing *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 132 P.3d 789 (2006)). The parties also agree on the elements of a claim for breach of contract. *See* Radiance's Opening Br. at 35 and Circle S's Br. at 17 (citing cases setting forth the elements of duty, breach, causation, and damages). The governing standards and trial court record supports only one reasonable conclusion: Circle S breached its contract with Radiance and proximately caused Radiance's financial damages.

A. The Contract Unambiguously Sets Forth Circle S's Duties.

Circle S cannot dispute that, under the "context rule" announced in *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), extrinsic evidence is properly considered to show the parties' situation and the circumstances under which the parties executed a written contract, for purposes of both ascertaining the parties' intent and construing the contract. In addition, when two

or more instruments are made as part of one transaction, they will be read and construed with reference to each other. *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995). However, in its brief, Circle S overlooks these fundamental principles, which properly control the interpretation and construction of the Equipment Financing Agreement (“the Agreement”).

(1) The Agreement and Notice Must Be Read Together to Determine the Terms of the Parties’ Contract.

The Agreement and Notice were executed together as part of one transaction for the financing of the fryer between Radiance and Circle S. *See* App. Tab E, Am. Findings of Fact and Concl. of Law, Sept. 17, 2012, Findings 2 and 7 (finding that the Agreement and Notice were executed by Circle S on the same day). Although the trial court found that “Plaintiff was not a signator to the Notice,” *see* App. Tab E, Finding 7, the document specifically names Radiance and contains other language confirming that it is an agreement by Circle S for the benefit of Radiance, including:¹

- Grantor [Circle S] agrees to deliver to the Company [Radiance] proof of the required insurance as

¹ The Notice is in the form of a request from Circle S to its insurance agent, Jim Short of Farmer’s Insurance. However, Circle S agreed that its use of agents would not absolve it of its obligations under the agreement, including those relating to insurance. App. A, Ex. 1, ¶ 3.

provided above, with an effective date as shown on the date below or earlier.

- GRANTOR [Circle S] ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS AGREEMENT TO PROVIDE INSURANCE AND ITS TERMS.

App. B, Ex. 3. The trial court also found that the Agreement does not incorporate the Notice by reference, but the reverse is true: the Notice incorporates the Agreement by reference. *Compare* App. Tab E, Finding 7 with App. B, Ex. 3 (“We have entered into an . . . Equipment Finance Agreement with Radiance”, and instructing agent to provide evidence of coverage “in accordance with” Circle S’s “obligations” under the Equipment Finance Agreement with Radiance.).

(2) Circle S Had Duties to Provide Two Types of Insurance and Satisfactory Proof of Such Coverage on a Continuing Basis.

A proper review of the whole Agreement, the whole Notice, and the undisputed circumstances lead to only one reasonable conclusion: Circle S had a contractual duty to provide two types of insurance coverage and had a separate contractual duty to provide satisfactory proof of that coverage on an ongoing basis.

(a) Circle S had a duty to maintain two types of insurance coverage.

There is no dispute that Circle S had a duty to maintain two types of insurance coverage: all risk or “loss payee” coverage and public liability and property damage or “additional insured” coverage. Paragraph 13 of the Agreement sets out the following obligations of Circle S:

- Maintain “all risk insurance” against loss or damage to the fryer in an amount and form approved by Radiance that names Radiance as loss payee;
- Provide Radiance with evidence that satisfies Radiance of the maintenance of loss payee coverage; and
- Maintain “public liability and property damage coverage” in the amounts and form that Radiance reasonably required.

App. Tab A, Ex. 1, ¶ 13; App. Tab E, Findings 5-6. In fact, after signing the Agreement and Notice, Circle S acknowledged its obligation to provide both types of insurance coverage by sending certificates showing both types of coverage. As the trial court found, and as Radiance conceded, “[t]here is no dispute that the

original proof of insurance that Defendant Circle S delivered to the Plaintiff was acceptable to Plaintiff in all respects.” App. Tab E, Finding 11. Under the context rule of contract interpretation, this subsequent course of conduct between the parties supports Radiance’s interpretation that Circle S had a duty to provide and maintain both loss payee and additional insured coverage.

(b) Circle S had a duty to provide evidence of both types of coverage that satisfied Radiance.

The Notice specified the amount and form of insurance coverage required by Radiance. The Notice instructed Circle S’s insurance agent to provide specific evidence of coverage “in accordance with” Circle S’s “obligations” under the Equipment Finance Agreement with Radiance. App. Tab B, Ex. 3. In particular, the Notice set forth the specific form and amount of the loss payee coverage and the additional insured coverage. First, the Notice requires Circle S’s insurance agent to provide evidence that Circle S had “primary all risk or its equivalent . . . for not less than the aggregate Equipment Cost/Advance shown on the agreement” App. Tab B, Ex. 3, ¶ a; *see also* App. Tab E, Finding 8. In its brief, Circle S argues (as the trial court erroneously concluded) that

the Agreement and Notice are inconsistent, and thus ambiguous, because the Agreement requires Circle S to provide proof of the “all risk insurance,” but does not specifically require Circle S to give proof of the liability insurance. App. Tab E, Conclusion 2. However, paragraph 13 of the Agreement expressly notified Circle S that Radiance would describe the form and amount of the insurance it required; the Notice serves this purpose. Further, paragraph 23 of the Agreement also states that “Debtor shall furnish Creditor . . . such other information and documents not specifically mentioned herein related to this Agreement as Creditor may request.” App. Tab A, Ex. 1, ¶ 23. The Notice constitutes such a request. Thus, there is nothing inconsistent or ambiguous about the Agreement’s failure to specifically mention the required proof of liability insurance. *See Boyd*, 127 Wn.2d at 261 (a court must read documents that are part of the same transaction together).

Moreover, the undisputed fact that Circle S initially provided proof of both loss payee and additional insured coverage confirms that the parties intended for Circle S to provide proof of both types of coverage. App. Tab E, Finding 11. Thus, Circle S’s argument and the trial court’s mistaken conclusion that Circle S

had no duty to provide proof that it maintained additional insured coverage cannot be squared with and does not flow from the trial court's finding regarding Circle S's actual conduct. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (appellate court should determine whether trial court's conclusions of law flow from the findings.).

Further, the trial court's interpretation that Circle S was not required to provide proof that it maintained additional insured coverage under the Agreement and Notice is unreasonable and illogical, given that the clear business purpose of both documents was to allow Radiance to confirm that Circle S had sufficient coverage to protect its interests in the fryer at all times. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84, 60 P.3d 1245 (2003) (noting that the court should consider the objective of the contract, all circumstances surrounding its making, the subsequent acts and conduct of the parties, and the reasonableness of their respective interpretations).

Second, consistent with the language in Paragraph 13 of the Agreement, the Notice requires Circle S's insurance agent to provide "combined *public liability and property damage*

insurance with a single limit of not less than \$500,000 per occurrence, or such other amount as the Company may require . . . the Company must be named as Additional Insured.” (emphasis added) App. Tab B, Ex. 3 ¶ b; *see also* App. Tab E, Finding 9. Circle S argues (and the trial court improperly concluded) that the Agreement’s failure to mention the term “additional insured” is an inconsistency with the Notice and an ambiguity. As explained above, however, paragraph 13 of the Agreement states that Radiance would dictate the amount and form of the insurance coverage; the Notice does that with respect to the public liability and property damage coverage. The fact that both the Notice and the Agreement identify the coverage with the same words (“public liability and property damage insurance”) supports the consistency of the two documents.

(c) Circle S had a continuing duty to provide evidence that it maintained both types of coverage.

The language and circumstances surrounding the Agreement and Notice contradict Circle S’s argument (and the trial court’s erroneous conclusion) that Circle S was only required to provide proof that it was maintaining both types of coverage one

time, rather than continually, because the Notice states that Circle S had to deliver proof of its initial insurance with an effective date of October 7, 2005 or earlier. App. Tab E, Finding 10.

First, this interpretation is squarely opposed by Circle S's subsequent conduct. It was undisputed that Jim Short, Circle S's agent, sent numerous certificates of insurance in an attempt to show that Circle S was maintaining the correct coverage required by the Agreement. App. Tab E, Finding 21. If the parties only intended for Circle S to have to provide proof of insurance once, Circle S, through its agent, would not have continued to provide these certificates.

Second, the trial court's interpretation is inconsistent with other language in the Notice. The Notice requires Circle S, through its agent, to give Radiance 10 days' notice "of any cancellation or revision in our coverage in favor of" Radiance. App. B, Ex. 3, ¶ c. The Notice also instructs Circle S's insurance agent to provide specific evidence of coverage "in accordance with" Circle S's "obligations" under the Equipment Finance Agreement with Radiance. App. Tab B, Ex. 3. This clear language contradicts the interpretation of Circle S and the trial court that Radiance only

required initial proof of coverage. There is no reason to read any such ambiguity into the contract. *See James S. Black & Co. v. P&R Co.*, 12 Wn. App.533, 535, 530 P.2d 722 (1975).

Third, Circle S's argument (and the trial court's finding) that Radiance only required Circle S to obtain insurance for the first year of the five-year term of payments is inconsistent with the obvious business purpose of the Agreement and Notice. The Agreement specifically required Circle S to "maintain" (not just obtain) both types of insurance coverage. App. Tab A, Ex. 1, ¶ 13; App. Tab E, Findings 5-6. The obvious purpose of requiring the maintenance of insurance coverage and proof of such coverage was to protect Radiance's interest in the collateral; if there was a fire, damage, or other loss to the property, the insurance would protect Radiance's investment. VRP 48-49. It would be illogical for Radiance to only require proof of the initial insurance policy, when the Agreement required Circle S to make payments on the fryer for five years. VRP 55-56; 103-04. Therefore, the parties' business objective of continuously protecting Radiance's interest in the fryer supports the reasonable interpretation that Circle S had a continuing duty to maintain the two types of insurance coverage

and provide proof of such maintenance pursuant to the Agreement and Notice. *See Go2Net, Inc.*, 115 Wn. App. at 84 (noting that the court should consider the objective of the contract, all circumstances surrounding its making, the subsequent acts and conduct of the parties, and the reasonableness of their respective interpretations).

(3) Radiance Was Not Required to Provide Advance Notice of Insurance Charges or Opportunities to Cure Insurance Deficiencies.

Contrary to Circle S's argument in its brief, there is nothing in either the Agreement or the Notice that required Radiance to issue a written notice to Circle S if Radiance became unsatisfied with the proof of coverage or the coverage itself. Paragraph 13 of the Agreement notifies Circle S that if it fails to provide both "all risk insurance" and "public liability and property damage coverage," then Radiance might purchase forced place insurance and add its price plus any customary charges associated with such insurance to the amount owed by Circle S. Similarly, the Notice contains the following: "Grantor [Circle S] acknowledges and agrees that if Grantor fails to provide any required insurance or

fails to continue such insurance in force, the Company [Radiance] may do so at Grantor's expense." App. Tab B, Ex. 3.

The trial court found that it was Radiance's standard practice to automatically send out a written notice regarding any deficiency in a certificate or other proof of insurance and to give the customer an opportunity to cure such defects. App. Tab E, Finding 12; VRP 133, 136. At trial, Mr. Price testified that he had not seen any such correspondence in the file for Circle S. VRP 133, 136. Of course, after trial Radiance obtained evidence from U.S. Bank confirming that Radiance sent three letters in 2006 and 2007 notifying Circle S of Radiance's belief that the required coverage was expiring and requesting confirmation that Circle C had the required coverage. CP 296-298.² Nevertheless, the trial court found that Radiance did not provide any advanced written notice to Circle S regarding any defects in its proof of coverage

² Circle S argues that Radiance somehow misrepresents the record by citing to CP 296-298, which the trial court only considered in denying Radiance's motion for reconsideration. However, there is nothing improper about including these documents in the appellate record. *See* RAP 9.1 and 9.6. The trial court's failure to admit into evidence and consider the letters from 2006 and 2007 does not change the fact that Radiance sent them to Circle S. Circle S cites no authority holding that it is improper to cite evidence in an appeal that was brought to the trial court's attention via a motion for reconsideration. Therefore, the Court should disregard this argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (Arguments not supported by pertinent authority or meaningful analysis need not be considered.); RAP 10.3(a)(5).

and Radiance never gave Circle S a chance to fix those problems. App. Tab E, Finding 12.

Based upon a finding that Radiance failed to follow a normal procedure of giving advanced written notice when proof of coverage was insufficient, the trial court incorrectly concluded that paragraph 25 of the Agreement *required* Radiance to give such notice, along with an opportunity to cure such deficiency. However, nothing in paragraph 25 contractually obligates Radiance to provide advance warnings about insurance defects. Paragraph 25 merely specifies that any notices must be in writing (rather than oral) and mailed to Circle S at its address. *See* App. Tab E, Conclusion 3; App A., Ex. 1, ¶ 25. There is no statement in the Agreement or Notice obligating Radiance to provide any advance notice of an intention to protect itself with Forced Placed coverage following a breach by Circle S. There is also no provision in either document granting Circle S an opportunity to cure any deficiencies in the proof of insurance or the insurance coverage itself. In addition to lacking contract language, Circle S's interpretation is inconsistent with the business purpose of the Agreement, which was clearly designed to allow Radiance to

protect itself from potentially uninsured risks to the equipment it had financed. Radiance provided opportunities to cure as a courtesy to its customers; it was not contractually required to do so. In fact, in the event of default, paragraph 17 of the Agreement permitted Radiance to declare all monies owed due immediately without any notice or demand to Circle S. App. Tab A, Ex. 1, ¶ 17. Also, paragraph 14 states that “[i]f Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligation, and Debtor shall (a) reimburse Creditor the cost of such performance and related expenses . . . “ *Id.* at ¶ 14. Thus, the trial court’s conclusion that the Agreement required advance notice and an opportunity to cure is not supported by the contract, by the record, or by substantial evidence..

Circle S is also unable to refute the evidence at trial which conclusively documented that Radiance did in fact send Circle S approximately 49 written notices that it was unsatisfied with Circle S’s proof of insurance. These notices came in the form of monthly invoices that charged Circle S fees for insurance on the fryer. VRP 51, 53, 101, 102, 108, 129-30, 196.

Mr. Singh, Circle S's witness, admitted that he knew Radiance had a problem with Circle S's insurance coverage back in 2007, when Radiance sent Circle S an invoice with a charge for forced placed insurance coverage, as it was permitted to do under the Agreement and Notice. VRP 156-58. In response to that invoice, Mr. Singh contacted Radiance, received an explanation regarding the problem with the insurance, and promised to have Mr. Short correct any deficiencies. *Id.* Every one of Radiance's invoices from that point forward included a fee for insurance, but Circle S never paid those charges and never contacted Radiance again about them. *Id.* at 183-85. According to Mr. Singh, Circle S instructed Mr. Short to follow Radiance's directions regarding obtaining and proving insurance. *Id.* at 170-74, 187, 195. This testimony is directly opposed to the trial court's conclusion that Circle S had insufficient opportunity to cure the problems. Unfortunately, Mr. Short repeatedly failed to do this, as shown by the numerous certificates lacking proof of at least one of the required types of coverage and the insurance policies from 2009 and 2010 showing that Radiance was not properly named as a loss

payee and the additional insured coverage was incorrect. App. Tab C, Ex. 16; App. Tab D, Ex. 40.³

Based upon this record, the trial court erroneously concluded that Radiance was required to do more than “simply charge Defendant Circle S for an insurance premium without explanation as to how and why the insurance that Defendant Circle S continued to provide proof of an annual basis was inadequate.” App. E, Conclusion 4. In light of the evidence, no reasonable person could doubt that Circle S had actual notice of and many opportunities to cure the clear deficiencies in both its coverage and its proof of coverage, even though it was not contractually entitled to either notice or the chance to cure its defaults.

(4) Radiance Was Permitted to Charge Default and Collection Fees.

In its brief, Circle S also attempts to defend the trial court’s conclusion that Radiance had no contractual basis for default and

³ Page 18 of Radiance’s Amended Opening Brief states that “However, like his inconsistent Certificates, Jim Short could not truthfully specify that both required coverages had been maintained continuously during the term of the contract.” In a footnote, Circle S contends this statement is an “assertion” that is “without basis,” because Mr. Short never testified at trial. Respondent’s Br. at 13, note 4. But Circle S misses the point: Jim Short’s letter of January 28, 2011 (Ex. 36) stating that Farmers covered Radiance as both loss payee and additional insured was untrue because the insurance policies from 2009 and 2010 show otherwise.

collection fees on the ground that “[t]here is no contractual provision that provides for an assessment of a ‘Default and Collection Fee.’” App. Tab E, Finding 19. This analysis is flawed.

Although the terms “agreement transfer fee” and “default and collection fee” do not appear anywhere in the Agreement or Notice, this does not mean that there is no contractual basis for charging such fees, as both Circle S and the trial court assume. Paragraph 16 of the Agreement explains that “Debtor’s default in performing any other obligation hereunder [in the Agreement] or under any other agreement between Debtor and Creditor” constitutes a default under the Agreement. App. Tab A, Exh. 1, ¶ 16. Thus, a default under the Notice constitutes a default under the Agreement. In this instance, Circle S defaulted under the Agreement by failing to perform its obligations under the Agreement to obtain both types of required coverage and by failing to perform its duty under the Notice to provide sufficient evidence of such coverage. Paragraph 17 outlines the remedies available to Radiance if Circle S defaults on the Agreement:

Upon the occurrence of an event of default .
. . . Creditor shall have the right to (a) at
Creditor’s option, declare immediately due
and payable the active amount of all of

Debtor's obligations hereunder, without notice or demand to Debtor and without setoff

App. Tab A, Ex. 1, ¶ 17. Additionally, paragraph 18 states that “Debtor shall pay Creditor its costs and expenses, including repossession and attorney’s fees and court costs, incurred by Creditor in enforcing this Agreement. This obligation includes the payment of such amounts whether an action is filed and whether an action that is filed is dismissed.” *Id.* at ¶ 18. These provisions support Radiance’s charges to Circle S of \$480 in “default and collection fees,” including a charge of \$150 for filing the necessary titling papers under the UCC (called an “agreement transfer fee”) plus a charge of \$330 for Circle’s S default under the Agreement, which constituted its costs and expenses in trying to enforce the Agreement before filing suit. VRP 94.

B. Viewed in the Light Most Favorable to Circle S, the Evidence Conclusively Establishes that Circle S Breached the Contract.

In its brief, Circle S was unable to controvert the evidence of its breach. As explained above, Circle S two duties: (1) obtain and maintain two types of insurance coverage and (2) to present

satisfactory evidence of its coverage to Radiance. Two sets of evidence conclusively establish that those duties were breached.

First, the insurance certificates demonstrate Circle S's failure to provide adequate proof of the required coverage. As the trial court found, "[i]nsurance certificates were faxed to specific employees of Plaintiff by Defendants' insurance agent for the relevant time period covering the equipment at issue here. (Exhibit 16)." App. Tab E, Finding 21; App. Tab C, Ex. 16. As explained above, the parties agree that the first certificate was satisfactory. However, as Mr. Price carefully demonstrated by his handwritten annotations, each subsequent certificate obviously lacked either "loss payee" or "additional insured" coverage. These repeated failures constituted breaches of Circle S's duty to provide satisfactory evidence that it was carrying the required insurance coverage.

Second, Circle S's actual insurance policies from 2009 and 2010, which Circle S offered into evidence, show that Circle S failed to obtain the proper insurance coverage in those years.⁴

⁴ Indeed, Circle S objected to its own evidence, once it realized that evidence proved its breaches of the contract. VRP 176 ("So am I understanding correctly that this is your exhibit that you're now objecting to?").

Although the trial court found that “[t]he insurance policies introduced into evidence (Exhibit 40) reflect that Plaintiff was a named on those policies during 2009 and 2010,” App. Tab E, Finding 22, those insurance policies (1) improperly name Radiance as a “lessor,” which it was not; (2) fail to name Radiance as “loss payee,” as required by the Agreement; and (3) they identify Radiance as an “additional insured” for “office equipment,” rather than for the fryer or kitchen appliances. App. Tab D, Ex. 40. Thus, on their face, the insurance policies show that Circle S breached its promise to provide both “loss payee” and “additional insured” coverage to Radiance for the fryer it purchased. Viewed in any light, including that most favorable to Circle S, the insurance certificates that Circle S sent to Radiance and the insurance policies it obtained from Farmers demonstrate that Circle S breached both of its obligations under the Agreement.

C. Viewed in the Light Most Favorable to Circle S, the Evidence Conclusively Demonstrates that Circle S’s Breaches Proximately Caused Damages to Radiance.

The evidence conclusively establishes that Circle S’s failure to provide satisfactory evidence of the required insurance coverage proximately caused the following damages: (1) \$5,555.00

in attorneys' fees from the Oregon litigation that Circle S filed despite the provision in the Agreement requiring cases to be filed in Washington, which was dismissed for lack of jurisdiction (VRP 79); (2) \$381.78 of unpaid premiums for the 49 months of forced place insurance that Radiance purchased after July 2007 (VRP 109-111, 202); (3) \$480 in default and collections fees (VRP 94); (4) the reasonable attorneys' fees and costs for this prosecution of this lawsuit (VRP 209); and (5) the need to repossess the fryer (*id.*).

Circle S argues that its failure to provide adequate proof of correct insurance coverage was not the cause of any of Radiance's damages, based upon the evidence that Radiance began charging Circle S for forced place insurance in January 2007, even though Mr. Price admitted that Radiance was satisfied with Circle S's proof of coverage through July 2007. *See also* App. Tab E, Finding 12.

However, this billing discrepancy does not relate to causation; it relates to the amount of damages to which Radiance is entitled. Radiance has not requested damages for the insurance premiums it paid between January and July of 2007. The fact that

Radiance cannot explain how or why the discrepancy occurred does not undermine the conclusion that Radiance was entitled to protect itself with forced placed insurance after July 2007 when all of Circle S's certificates after that date were defective. The billing discrepancy also does not diminish the fact that Radiance incurred attorneys' fees and expenses defending the Oregon litigation that Circle S improperly initiated, \$481 in default and collection fees, and its reasonable fees.

D. As the Rightful Prevailing Party, Radiance is Entitled to Recover Attorneys' Fees and Costs.

In its brief, Circle S also tries to deny Radiance the attorneys' fees and expenses to which it is entitled under the Agreement. Rule 18.1(b) requires a party to "devote a section of its opening brief to the request for the fees or expenses." In its brief, Circle S urges this Court to reject Radiance's request for fees and costs. In *Bay*, the court rejected a request for attorneys' fees under Rule 18.1(b) when the party failed to cite a specific statute or explain the grounds for the request. *Bay v. Jensen*, 147 Wn. App. 641, 661, 196 P.3d 753 (2008). In this case, unlike in *Bay*, Radiance did devote a section of its opening brief to its request for attorneys' fees (pp. 45-46) that incorporated the reasons provided

in the preceding parts of its brief for why this Court should find that Circle S breached the parties' contract and award attorneys' fees and expenses to Radiance as required by the contract. As Circle S acknowledges, RCW 4.84.330 gives this Court authority to award Radiance attorneys' fees under the parties' contract.

III. CONCLUSION

Based on the foregoing, Appellant Radiance Capital, LLC respectfully asks that this Court reverse the trial court's judgment and remand the case for the assessment of damages and proof of attorneys' fees.

RESPECTFULLY SUBMITTED this 9th day of August, 2013.



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APPENDIX E

**Radiance Capital L.L.C. v. Circle S Foods
dba Circle S Market and Daily et al
Washington Appellate Court Division I
Case No. 695479**

**E. Amended Findings of Fact and Conclusions of
Law, September 17, 2012**

FILED
KING COUNTY, WASHINGTON

SEP 17 2012
SUPERIOR COURT CLERK
BY AIMEE SILVA
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RADIANCE CAPITAL, LLC, a Washington
limited liability company,

Plaintiff,

v.

CIRCLE S FOODS, INC., a foreign
corporation, dba CIRCLE S. MARKET AND
DAILY; SUBHASH CHANDER SHARMA
and "JANE DOE" SHARMA, husband and
wife; JAGTAR SINGH and "JANE DOE"
SINGH, husband and wife; and NAVJIT
SINGH and "JANE DOE" SINGH, husband
and wife,

Defendants,

NO. 11-2-08075-7 KNT

AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

~~PROPOSED~~ 

The parties appeared before the court on August 14, 2012 to present their case. Plaintiff appeared through its attorney of record, Shannon R. Jones, and Defendants appeared through their attorneys of record, Andrew Kinstler and Lauren D. Parris of Helsell Fetterman LLP. The court having examined the parties and witnesses present, considered the evidence, and being fully advised in the premises, now makes the following:

~~PROPOSED~~ Amended Findings and Conclusions - 1

ORIGINAL

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I. FINDINGS OF FACTS

1
2 1. Plaintiff is a financing company with offices in Washington State.
3 Defendant Circle S Foods, Inc. (hereafter "Defendant Circle S"), is an Oregon
4 corporation with physical operations located solely in the State of Oregon.
5 Plaintiff contracted in 2005 to provide financing to Defendant Circle S, Inc. for the
6 purchase of a "fryer."

7
8 2. On October 7, 2005, Defendant Circle S executed an Equipment
9 Financing Lease Agreement ("Financing Agreement") in the form provide to
10 Defendant Circle S by Plaintiff. Schedule A to the Financing Agreement was
11 signed by the individual defendants as Guarantors. (Trial Ex. 1.)

12
13 3. On November 29, 2005, the CFO of the Plaintiff corporation signed
14 the Financing Agreement on behalf of the Plaintiff.

15 4. The Financing Agreement provides that the terms of the agreement
16 between the Plaintiff and Defendant Circle S are fully reflected in the Financing
17 Agreement and cannot be changed except by a written agreement signed by all
18 parties. (Exhibit 1, paragraph 27.)

19
20 5. Paragraph 13 of the Financing Agreement provided that Defendant
21 Circle S would maintain and provide to the creditor (Plaintiff) evidence
22 satisfactory to the creditor for the maintenance of all risk insurance against loss or
23 damage to the collateral for no less than the full replacement value. The insurance
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1 was to be in an amount and form, and with companies approved by the creditor.

2 The creditor was to be named as a loss payee.

3 6. Paragraph 13 of the Financing Agreement further provided that
4 Defendant Circle S would maintain public liability and property damage coverage
5 in such amounts and in such forms as creditor (Plaintiff) shall reasonably require.

6
7 7. On October 7, 2005 Defendant Circle S also executed the form of
8 "Notice to Provide Insurance Authorization" on behalf of all defendants provided
9 to it by Plaintiff which was then sent to Defendant Circle S's insurance agent.
10 (Trial Exhibit 3.) Plaintiff was not a signator to the Notice to Provide Insurance
11 Authorization, nor is that document referenced in the Financing Agreement.

12
13 8. Paragraph "a" of the Notice to Provide Insurance Authorization
14 instructs the insurance agent to provide to Plaintiff an endorsement to Defendant
15 Circle S's insurance policy evidencing "primary all risk insurance or its equivalent
16 coverage for the equipment" with the Plaintiff named as loss payee.

17
18 9. Paragraph "b" of the Notice to Provide Insurance Authorization
19 requires the insurance agent to provide to Plaintiff an endorsement to Defendant
20 Circle S's insurance showing public liability and property damage with a single
21 limit of not less than \$500,000 per occurrence, with the Plaintiff to be named as
22 an additional insured.

1 10. The Notice to Provide Insurance Authorization states that Defendant
2 Circle S agrees to deliver the proof of insurance described above to the Plaintiff
3 with an effective date of October 7, 2005 or earlier.

4 11. There is no dispute that the original proof of insurance that
5 Defendant Circle S delivered to the Plaintiff was acceptable to Plaintiff in all
6 respects.

7 12. Plaintiff's authorized representative, Michael Price, testified that it
8 was Plaintiff's standard practice to send its customers a written notice, with an
9 opportunity to cure, in any instance where the Plaintiff believed that the customer
10 had failed to provide Plaintiff with adequate proof of insurance. Plaintiff failed to
11 follow this standard practice with Defendant Circle S. At no time during the five
12 year course of this contract, did any employee of the Plaintiff provide a written
13 notice to the Defendants that Plaintiff required any additional or different
14 insurance or proof of insurance, nor did any written notice advise the Defendants
15 to cure any shortcoming in the proof of insurance provided.

16 13. Exhibit 5 reflects that the Plaintiff started charging Defendant Circle
17 S insurance premiums for the equipment financed by Defendant Circle S
18 beginning on January 1, 2007 even though the Plaintiff's authorized
19 representative, Michael Price, testified that adequate insurance was provided by
20 the Defendants at all times between June 2006 and July 2007. There is no
21 explanation in any of the exhibits or any testimony that explains why Plaintiff
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1 started charging Defendant Circle S for insurance premiums for the equipment
2 financed by Defendant Circle S in January 2007.

3 14. While the Defendant Circle S paid the monthly lease fee of \$148.83,
4 Defendant Circle S never paid any additional amounts charged to it by Plaintiff for
5 insurance premiums. Similarly, the Plaintiff never charged a late fee or advised
6 the Defendants that any payments were inadequate.

7
8 15. At no time during the course of the five year contract did the
9 Plaintiff declare the Defendants to be in default.

10 16. Defendant Circle S paid off the Financing Agreement in full in
11 October 2010.

12 17. It was not until the letter (Exhibit 15) dated January 13, 2011 that the
13 Plaintiff expressly demanded payment for the insurance premiums it was
14 charging, as well as a \$150 transfer fee.

15
16 18. In a letter dated February 4, 2011 (Exhibit 20), Defendant Circle S
17 tendered the \$150 fee and disputed the remaining amounts claimed due.

18 19. On February 8, 2011, the Plaintiff sent a letter, Exhibit 21, that for
19 the first time advised the Defendants that Plaintiff contended that Defendants
20 were in default pursuant to the Financing Agreement, and demanded insurance
21 premiums in the amount of \$381.78 and a Default and Collections Fee of \$480.
22 There is no contractual provision that provides for an assessment of a "Default
23 and Collection Fee."
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1 the Plaintiff should be listed as a loss payee on all risk insurance covering the
2 value of the equipment, and that proof of such insurance should be provided to
3 Plaintiff. The Financing Agreement further required that Defendant Circle S
4 maintain liability insurance in such an amount and form as Plaintiff reasonably
5 required, but the Financing Agreement does not specifically require proof of
6 liability insurance to be provided to Plaintiff. The Notice to Provide Insurance
7 Authorization required that Plaintiff be named as an "additional insured" on the
8 liability insurance, language that does not appear in the Financing Agreement.
9 Further, there is no reference to the Notice to Provide Insurance Authorization in
10 the Financing Agreement, while the Schedule A attached to the Financing
11 Agreement is specifically incorporated into the Financing Agreement. The
12 Plaintiff's representative, Michael Price, confirmed at trial that the Plaintiff was
13 the drafter of these documents. These inconsistencies create an ambiguity which
14 under contract interpretation principals must be construed against the Plaintiff as
15 the drafter.
16
17

18 3. There is no evidence that Plaintiff ever notified Defendant Circle S
19 in writing, as required by Paragraph 25 of the Financing Agreement, that the
20 evidence of insurance provided by Defendant Circle S was not satisfactory to the
21 Plaintiff until after Defendant Circle S made its final payment of the financing for
22 the fryer.
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 [PROPOSED] Amended Findings and Conclusions - 7

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1 4. It was insufficient for Plaintiff to simply charge Defendant Circle S
2 for an insurance premium without an explanation as to how and why the
3 insurance that Defendant Circle S continued to provide proof of on an annual
4 basis was inadequate. In the absence of such a notice, the Plaintiff's claim for
5 breach of contract fails. Plaintiff did not prove that the insurance provided by
6 Defendant Circle S was inadequate. Plaintiff never informed Defendant Circle S
7 that the all risk property insurance provided by Defendant Circle S was not
8 "satisfactory to Creditor" (Exhibit 1, paragraph 13) or that the liability insurance
9 was not "in such amounts and in such forms as Creditor shall reasonably require."
10 (*Id.*) Had written notice been provided, as required by the Financing Agreement
11 (Exhibit 1, paragraph 25), and in keeping with Plaintiff's own standard practice,
12 then Defendant Circle S would have been provided with a reasonable opportunity
13 to cure any such inadequacy, rather than be charged a second time for insurance
14 that Defendant Circle S was already paying for, as evidenced by the Certificates of
15 Insurance provided to Plaintiff on a regular basis. (Exhibit 16.)
16
17

18 5. Plaintiff's representative testified at trial that Paragraph 15 of the
19 Financing Agreement allowed the Plaintiff to recover their costs and expenses if
20 Plaintiff pursued collections or litigation regarding a breach of the Financing
21 Agreement. However, Paragraph 15 of the Financing Agreement is an
22 indemnification clause which does not affect the obligations between the primary
23 parties to the Financing Agreement. The purpose of that indemnification clause is
24
25

 [PROPOSED] Amended Findings and Conclusions - 8

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1 to require the Defendants to indemnify the Plaintiff for any cost, expense and
2 damages if a claim is made against the Plaintiff.

3 6. Paragraph 18 of the Financing Agreement provides that the Plaintiff
4 is entitled to costs and expenses for enforcing the Financing Agreement. This
5 provision is required to be read as reciprocal under RCW 4.84.330 such that the
6 Defendants are entitled to recover costs and expenses in an action brought by
7 Plaintiff to enforce the Financing Agreement if the Defendants are the prevailing
8 parties in the action.

10 7. The Plaintiff's Complaint is dismissed with prejudice.

11 8. The Defendants are the prevailing parties.

12 9. Defendant Circle S must re-tender \$150 check because it is stale.

13 10. Plaintiff must provide a UCC Bill of Sale to Defendants.

14 11. Defendants are entitled to judgment against Plaintiff for Defendant's
15 attorney's fees and costs incurred in this matter, which the Court finds reasonable
16 after consideration ^{of} Defendants' motion for award of attorney fees, ~~and the Lodestar~~
17 ~~factors and RPC 1.5, in the amount of \$ _____, and costs of \$ _____~~
18 ~~plus interest on the attorney's fees and costs at 12% per annum until paid in full.~~
19 

20 12. Plaintiff has requested this Court to award its attorney's fees out of
21 the Oregon litigation as part of this proceeding. Plaintiff was not the prevailing the
22 party in this proceeding, and therefore this court has no authority to award the
23 Plaintiff any attorney's fees.
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DATED this 14 day of Sept, 2012.


Honorable Joanne Dubuque

PRESENTED BY:
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[PROPOSED] Amended Findings and Conclusions - 10

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