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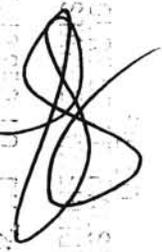
**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

MICHAEL S. KENNARD and BETTY S. KENNARD,
husband and wife,
Appellants,

v.

CAPTAIN JACK JR.'S FAMILY ENTERTAINMENT CENTER INC.,
STACY STANG and MICHAEL STANG, husband and wife,
Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
12-2-02806-7

BRIEF OF APPELLANT

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INTRODUCTION

This appeal asks whether Michael and Stacy Stang's counterclaim in an unlawful detainer action excused their failure to pay rent. Unlawful detainer is a summary proceeding, and as a rule, superior courts do not have statutory authority to consider a tenant's counterclaims.

The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent. In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed. "It has long been settled that counterclaims may not be asserted in an unlawful detainer action." Granat v. Keasler, 99 Wn.2d 564, 570, 663 P.2d 830 (1983).

Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985)

(citations omitted).

One exception exists to this general rule – when a tenant's counterclaim excuses breaching the lease.

An exception to the general rule is made when the counterclaim, affirmative equitable defense, or set-off is based on facts which excuse a tenant's breach. Examples of such exceptions are: breach of implied warranty of habitability, and breach of covenant of quiet enjoyment.

Munden, 105 Wn.2d at 45.

The Stangs' company, Respondent Captain Jack Jr.'s Family Entertainment Center (Captain Jacks), leased a commercial building from Appellants Mike and Betty Kennard. When Captain Jacks failed to pay rent for May through August, 2012, the Kennards served a notice to quit and filed this unlawful detainer action. The Stangs counterclaimed, alleging that their unpaid work on the building offset any rent owed. After a summary trial, Whatcom County Superior Court Judge Deborra Garrett found the parties agreed to a set-off.

Until late August 2012, Tenants reasonably believed that Landlord would permit them to defer payment of any rent due for the months May through August 2012, after reduction of repairs and improvements Tenants had made, until the parties had agreed upon their respective financial responsibilities.

(Findings of Fact ¶ 8; CP 229).

But the trial court did not decide whether any rent remained due. "The court makes no finding as to the parties' respective financial responsibilities for the alleged improvements, as that issue was and is not before the Court." (Findings of Fact ¶ 6; CP 228). Although it did not rule on the amount of the offset, the court denied a writ of restitution and awarded the Stangs \$16,300 in reasonable attorneys' fees. (Fee Award; CP 233-237).

The Kennards appeal for three reasons. First, substantial evidence does not establish an oral agreement to offset tenant improvements against unpaid rent and to defer payment. Second, the Stangs' counterclaim for tenant improvements does not excuse nonpayment under the parties' written lease. Third, the trial court erred by accepting the Stangs' counterclaim yet not calculating how much rent was due.

The Kennards respectfully request this Court to vacate the trial court's judgment, fee award, and findings and conclusions, and remand to determine the past rent due. The Kennards also request an award of reasonable attorneys' fees on appeal.

I. ASSIGNMENTS OF ERROR

The trial court erred as a matter of law by entering three orders: (1) March 1, 2013 Findings of Fact and Conclusions of Law (CP 227-232; Appendix A); March 1, 2013 Findings of Fact and Conclusions of Law in Support of Entry of Judgment for Attorney's Fees and Costs (CP 233-237; Appendix B); and March 1, 2013 Final Judgment (CP 238-240; Appendix C). Specific assignments of error in these orders are:

Findings of Fact and Conclusions of Law (Unlawful Detainer)

A. Finding of Fact ¶ 4 is not supported by substantial evidence in the record. (CP 228).

B. Finding of Fact ¶ 5 is not supported by substantial evidence in the record. (CP 228).

C. Finding of Fact ¶ 6 is an error of law. (CP 228).

D. Finding of Fact ¶ 7 is not supported by substantial evidence. (CP 228-229).

E. Finding of Fact ¶ 8 is not supported by substantial evidence. (CP 229).

F. Finding of Fact ¶ 9 is not supported by substantial evidence and is an error of law. (CP 229).

G. Finding of Fact ¶ 10 is not supported by substantial evidence and is an error of law. (CP 229).

H. Finding of Fact ¶ 11 is not supported by substantial evidence and is an error of law. (CP 230).

I. Finding of Fact ¶ 17 is not supported by substantial evidence and is an error of law. (CP 230).

J. Conclusion of Law ¶ 3 is not supported by substantial evidence and is an error of law. (CP 231).

K. Conclusions of Law ¶¶ 5-9 are errors of law. (CP 231).

Findings of Fact and Conclusions of Law (Attorneys' Fees)

L. Finding of Fact ¶ 1 is an error of law. (CP 234).

M. Conclusions of Law ¶¶ 1-4 are errors of law. (CP 236-237).

Final Judgment

N. The order and judgment are not supported by substantial evidence and are errors of law. (CP 238-240).

Issues pertaining to the Assignments of Error include:

O. "Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds." Jones v. Best, 134 Wn.2d 232, 240, 950 P.2d 1 (1998). The parties agreed to settle up the costs of tenant improvements "when we were done", but they did not discuss deferring rent or offsetting tenant improvements against unpaid rent. (1/15/13 VRP 95). Does substantial evidence prove that the parties nonetheless agreed to defer rent payments and offset tenant improvements against unpaid rent?

P. A tenant may raise a counterclaim in an unlawful detainer action only if it is "based on facts which excuse a tenant's

breach.” Angelo Property Co., LP v. Hafiz, 167 Wn. App. 789, 811-812, 274 P.3d 1075 (2012). Here, the parties agreed to settle up later, but did not agree to offset the cost of improvements against rent. Did the trial court err by accepting the counterclaim as an excuse for not paying rent?

Q. “[I]f the alleged unlawful detainer be after default in the payment of rent,” the court shall “find the amount of rent due, and the judgment shall be rendered against the defendant...for...the rent due.” RCW 59.12.170. The court refused to find a default “because the evidence was not sufficient to determine the amount of any rent owing by Tenants for the months May through August, 2012.” (Finding of Fact ¶ 17; CP 230). Did the trial court err by declining to calculate the rent due?

II. STATEMENT OF FACTS

A. The Parties' Written Lease Required the Stangs To Pay Rent Between May and August 2012

On February 17, 2012, Michael and Stacey Stang, owners of Captain Jack Jr.'s Family Entertainment Center, Inc., signed a commercial lease for 4176 Meridian Street in Bellingham Washington. (Lease Agreement, Exhibit A to Complaint and Plaintiff's Trial Exhibit 1; CP 16-40) (Appendix D). The Stangs

wanted to open a restaurant and entertainment center that sold pizza and had a play area and games for children. (1/15/13 VRP 78). After inspecting the Kennards' commercial building, the Stangs concluded it was the right size and location. But they also knew that renovating the former office into a restaurant would take substantial work. (1/15/13 VRP 157).

The parties' written lease has four provisions that defined the Stangs' relationship with their landlords, the Kennards. First, the Stangs took possession of the leased property on February 17, 2012, but their obligation to pay rent did not begin until May. The lease provided they

shall have early occupancy for the purpose of working on the premises upon full execution of the Lease. During the early occupancy period, Tenant shall pay no base rent or NNN rent but will pay utilities.

(Lease Addendum ¶ 1; CP 39). As a result, the Stangs worked on their restaurant and entertainment center from February to May 2012 without paying rent.

Second, starting on May 1, 2012, the lease required the Stangs to pay \$4,630.42 per month rent for the next year. (Lease ¶ 1(b); CP 16)(Lease Rent Rider, CP 36). The rent remained at that amount for a year, and then increased each year for the next five.

Because the building required significant alteration, the initial rent was roughly half of market value. (1/15/13 VRP 32) (“I said we’ll cut the rent in half for the first year”). First month’s rent was due “beginning on the Commencement Date”, May 1st. (Lease ¶ 4(a); CP 18). Although the Kennards did not require either a security deposit or prepaid rent, the lease required Captain Jacks to pay \$4,630.42 on May 1st, when the lease commenced. No ambiguity existed on the amount of rent and when it was due.

Third, the parties agreed to divide responsibility for tenant improvements. Exhibit B to the lease listed the improvements the Kennards would complete, and those the Stangs would complete. (Lease Exhibit B; CP 35). In the body of the lease, the parties agreed to notice and cure periods if these improvements were inadequate. (Lease ¶ 2(b); CP 35). Nowhere in the lease did the parties agree to set off the costs of these tenant improvements against the rent owed. The lease treated tenant improvements independently of the obligation to pay rent.

Fourth, if the Kennards did not demand rent immediately, they did not waive their right to collect it later. In the section governing rent payments, the lease stated “Landlord’s acceptance of less than the full amount of any payment due from Tenant shall

not be deemed an accord and satisfaction or compromise of such payment unless Landlord specifically consents in writing..." (Lease ¶ 4(d); CP 18). Any change to the payment schedule or amount required the Kennards' consent in writing.

At trial, the Stangs acknowledged that they signed the lease and failed to make rent payments after notice for May through August, 2012. (1/15/13 VRP at 143). The Stangs had defaulted. Under paragraph 19 of the Lease, default included "failure by Tenant to pay any sum, including Rent, due under this Lease following five (5) days notice from Landlord of the failure to pay." (Lease ¶ 19(b); CP 24).

B. Substantial Evidence Proves The Parties Intended To Settle Up Later, Not to Offset Rent

The trial court did not find a default, however. Instead, it concluded that the parties modified the written lease with subsequent oral agreements.

It's an unusual situation indeed when a tenant doesn't pay rent and becomes a defendant in an unlawful detainer action and is not subject to a writ of restitution. But I don't see the payment of rent as a black and white issue here.

I believe the informal agreements between the parties after the tenancy began that the lease agreement, which provided very clearly for a specified amount of rent, was modified and I don't know the amount of

rent. I don't know what rent it came down to based on those modifications because there's more to be found. The issue before the court today is simply have the conditions for a writ of restitution been met; my finding is that they have not.

(1/15/13 VRP at 210-211).

At trial, the court heard testimony from three witnesses: Michael Kennard, Stacey Stang and Michael Stang. (1/15/13 VRP 24, 79 and 156). Although their description of the conflict differed, the three agreed that the trouble arose over tenant improvements. Remodeling the commercial building into a restaurant and children's play area would be a substantial project. Exhibit B to the lease contained a long and detailed list of the necessary tenant improvements. The first list had the landlord's responsibilities:

- 1. Tenant Improvements to be Completed by Landlord**
 1. Landlord to remove all debris and rubbish from the premises and present it to Tenant in broom sweep condition.
 2. Landlord will furnish and install a fire sprinkler system that meets requirements as set by local codes.
 3. Landlord will repair rain gutters that are leaking.
 4. Landlord to repair damaged siding and power wash the building in preparation of painting it.
 5. Landlord to repair all entry doors to proper working condition, including repair of overhead roll-up doors.

6. Landlord to repair window glass that is broken, cracked, damaged.
7. Landlord to bring building to code will install an access ramp to the lower portion of the building.

(Lease Exhibit B; CP 35).

The second -- and longer -- list had the tenant's responsibilities:

2. Tenant Improvements to be Completed by Tenant

Tenant will at Tenant's sole cost but with Landlord's permission which shall not be unreasonably withheld:

1. Will install HVAC equipment necessary and sufficient to meet the needs of his business. HVAC system and all other improvements made by Tenant, other than those Tenant and Landlord specify in writing, shall remain with the property upon termination of lease.
2. Will be allowed to tear down and dispose of the shed in the SE corner of the property.
3. Shall install new awning.
4. Will remove rusted fence.
5. Will install and/or repair flooring where deemed necessary.
6. Will install restrooms as needed.
7. Will install kitchen area as needed.
8. Will upgrade plumbing as needed.
9. Will upgrade electrical fixtures and wiring as needed.
10. Will remodel interior of building as needed.
11. Will paint exterior of building.

(Lease Exhibit B; CP 35). The Stangs took a substantial risk in trying to renovate an office building into a family entertainment center.

As construction began, the parties realized it made sense to have the Stangs' construction workers complete some of the work on the landlord's list. Mr. Kennard agreed to having the Stangs pressure wash the building (#4), repair the cracked windows (#6), and install an access ramp to the back of the building (#7). (1/15/13 VRP 56).

The heart of this dispute was over when and how much Kennard would pay the Stangs for this work. Mr. Kennard told the Stangs that the parties would settle up later. As Mrs. Stang testified,

A. ...in those conversations I had with him I brought up the fact that we had certain invoices that were outstanding for work and he said that we would worry about that when we were done.

Q. When we were done, is that the quote?

A. When we were done. When we, you know, were going to settle up basically is how he put it.

(1/15/13 VRP 95).

Mr. Kennard testified that he did not agree to either defer rent or excuse it to pay for this work.

Q. Did you ever tell either of the defendants that they didn't owe rent?

A. Never.

Q. Did you tell either of the defendants that they didn't have to pay rent until the fire suppression system was completed?

A. Never.

Q. What did you do when you realized you were not going to be paid rent?

A. Well, I immediately requested a meeting with Stacy Stang.

(1/15/13 VRP 35).

From May to mid-August, Mr. Kennard had held off hounding the Stangs for rent, giving them time to open their restaurant.

Q. ...Can you tell me why you didn't ask for rent in the month of May not having received it?

A. Well, we had a lease and the lease is my guarantee that I'm going to receive rent. And I see these people struggling doing everything they can, scrambling to get open, and I didn't worry about not getting the rent eventually. So I didn't hound them for it right while they were in the midst of preparing to get the building finished so they could open.

(1/15/13 VRP 34-35).

The Stangs testified that they assumed their expenses would either defer rent or serve as an offset. Mrs. Stang believed "settling up later" meant

that he was going to pay us, either pay us when he got the – because he was still having trouble financing the sprinkler system and so my assumption was that he would settle up when he either got his financing or we would have reduced rent. Actually I was thinking we would have no rent basically until we worked off the invoices he owed us.

(1/15/13 VRP 95). Mr. Stang believed rent would not be due until Mr. Kennard installed the sprinkler system.

A. We had been in contact with Mr. Kennard during our early occupancy and had talked about some of the issues he was having getting the sprinkler system installed. We believed and through conversation with him determined that he was not demanding rent until he had completed the sprinkler system.

Q. When you say that he was not demanding rent until he completed the sprinkler system, were those his words that he used or is that just your understanding?

A. That was my understanding.

Q. Was your understanding based on just one conversation you had with Mr. Kennard?

A. I think at that point the conversation had shifted between Mr. Kennard and myself to Mrs. Stang and Mr. Kennard, and upon conversation with my business partner, Mrs. Stang, we

determined that rent was not being demanded at that point.

(1/15/13 VRP 164).

The Stangs learned their assumptions were incorrect when Mrs. Stang met with Mr. Kennard on August 27, 2012. She presented him invoices totaling \$25,000 for the three repairs, and Mr. Kennard objected to its costing that much. (1/15/13 VRP 104).

As Mrs. Stang testified,

Q. During this meeting did Mr. Kennard admit to you at any time that he owed you or Mr. Stang any money for these improvements?

A. Yes.

Q. Did he indicate how he was going to be paying you back for the money that he owed you?

A. No.

(1/15/13 VRP 104). By August 27, 2012 at the latest, the Stangs knew that the Kennards did not agree to offset the improvements against unpaid rent.

On September 10, 2012, the Kennards sent the Stangs a five-day notice to quit under Paragraph 19(a) of the Lease. (9/10/12 Notice to Quit, Exhibit B to Complaint, CP 42-43) (Plaintiff's Trial Exhibit 2). When the Stangs did not pay rent, on September 20, 2012, the Kennards mailed and posted a three-day

notice to quit under RCW 59.12.030. (9/20/12 Notice to Quit, Exhibit C to Complaint, CP 47) (Plaintiffs' Trial Exhibit 3).

On September 27, 2012 and October 2, 2012, the Stangs mailed two monthly rent checks to the Kennards. (1/15/13 VRP 122). When it became clear the Stangs would not pay rent for May through August, 2012, the Kennards filed this unlawful detainer action.

On January 15 and 16, 2013, Whatcom Superior Court Judge Deborra Garrett held a bench trial on the Kennard's complaint. The court found that the parties had made an oral agreement to defer rent, and as a consequence, the Stangs were not in default. (1/15/13 VRP 207). Although the court originally did not award attorneys fees, it later reconsidered and granted the Stangs' request for \$16,300. (1/15/13 VRP 209) ("as for attorney's fees, I think we'll let that question abide the ultimate result in the case"); (3/1/13 Findings and Conclusions on Attorney's Fees, CP 233-237).

The Kennards now appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews findings of fact for substantial evidence in the record and conclusions of law *de novo*.

On appeal from a bench trial, conclusions of law are reviewed *de novo*. Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.

Edmonson v. Popchoj, 155 Wn. App. 376, 382-383, 228 P.3d 780 (2010) (footnotes and citations omitted).

IV. SUBSTANTIAL EVIDENCE DOES NOT PROVE AN OFFSET OR DEFERRAL

A. The Stangs Did Not Establish A "Meeting Of The Minds"

To modify their written lease, the Stangs and the Kennards had to make a separate, binding agreement, satisfying all the requirements of an oral contract.

Modification of a contract by subsequent agreement of the parties arises out of the parties' intention and requires a meeting of the minds. Mutual assent generally requires a valid offer and acceptance. There must be consideration separate from that of the original contract for a valid contract modification.

Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 571, 161 P.3d 473 (2007).

Furthermore, because they alleged the modification as a counterclaim, the Stangs carry the burden of proof.

The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention...The essential elements of a contract are "the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration." DePhillips v. Zolt Constr. Co., Inc., 136 Wn.2d 26, 31, 959 P.2d 1104 (1998) (quoting Family Med. Bldg., Inc. v. D.S.H.S., 104 Wn.2d 105, 108, 702 P.2d 459 (1985)).

Bogle and Gates, P.L.L.C. v. Holly Mountain Resources, 108 Wn. App. 557, 560-561, 32 P.3d 1002 (2001) (citations omitted).

Here, the Stangs failed to prove the subject matter of the contract, the promise, the terms and conditions, and the price. The relevant agreement is not that the Stangs would complete three of the improvements on the landlord's list. Instead, the Stangs had to prove that Kennard agreed to defer all rent payments for some extended period and offset the cost of improvements against rent. Substantial evidence does not support the trial court's ruling that such an agreement existed.

First, in paragraph four of its Findings, the trial court noted the parties agreed to settle up later.

Between February 17, 2012, and late August 2012, the parties made several oral agreements, most of them for Tenants to perform or arrange for previous repairs or improvements to the property. These oral agreements *included an agreement that financial responsibility for these repairs or improvements would be determined and agreed by the parties at a later date.* The parties have not yet determined or agreed to their respective financial responsibilities for these improvements.

(Findings of Fact ¶ 4, CP 228) (emphasis added). This was not a promise to defer rent or offset the amount owing. It was an ambiguous agreement to work out the amount owing, and the payment, later.

Second, the trial court found that the Stangs' "reasonably believed" they did not owe rent as agreed in the written lease.

Until late August 2012, Tenants reasonably believed that Landlord would permit them to defer payment of any rent due for the months of May through August 2012, after reduction of repairs and improvements Tenants had made, until the parties had agreed upon their respective financial responsibilities.

(Findings of Fact ¶ 8, CP 229). There is no evidence that this "reasonable belief" was mutual – that Mr. Kennard agreed to it and the parties had a meeting of the minds over the timing of rent payments. In fact, Mr. Kennard testified to the exact opposite. He

held off asking for rent to let the Stangs open their business, but he never agreed to waive rent or credit the Stangs' costs against it.

Third, the Stangs did not prove a reliance contract or allege promissory estoppel. Under Washington law, an *implied* promise is insufficient to create a binding contract.

TAM cites no authority for the proposition that an implied promise is sufficient to meet the first required element of a promissory estoppel claim. Indeed, promissory estoppel requires a "promise" defined as a "manifestation of intention," that is, a *demonstration* or display of the promisor's intent. Under this definition of a "promise," such *display* of intent must necessarily be explicit rather than implicit. And although promissory estoppel may apply in the absence of mutual assent or consideration, the doctrine may not be used as a way of supplying a promise. Nor is a general duty to act honestly in the contract setting what is contemplated for promissory estoppel.

Tacoma Auto Mall, Inc. v. Nissan North America, Inc., 169 Wn. App. 111, 128, 279 P.3d 487 (2012). Because Mr. Kennard did not promise the Stangs he would delay or offset rent, there was no basis for reasonable reliance.

Fourth, any possible implied agreement to defer rent ended on August 27, 2012. At his meeting with Mrs. Stang, Mr. Kennard stated unequivocally that he expected the Stangs to pay rent as agreed in the written lease. Regardless of their earlier assumptions, at that point, the Stangs had the obligation to pay

May through August rent and seek separate reimbursement for their expenses. When they failed, they defaulted under the written lease.

B. The Trial Court Erred By Accepting The Counterclaim

Without proof that Mr. Kennard agreed to offset rent with tenant improvements, the Stangs' counterclaim is only that the Kennards owed the Stangs money. Tenant improvements were independent of the obligation to pay rent. The Stangs' counterclaim therefore did not excuse their failure to pay rent.

A counterclaim or setoff is permitted only in two situations: (1) the covenant to pay rent is dependent upon the covenants allegedly breached; or (2) the defendant is asserting an equitable defense, *i.e.*, a recognized legal right without adequate legal means of enforcement.

Skarperud v. Long, 40 Wn. App. 548, 550-551, 699 P.2d 786 (1985).

In Skarperud, the tenant alleged that the landlord failed to provide adequate water for the tenant's crops. The Court of Appeals dismissed the counterclaim because, like here, it did not excuse the failure to pay rent.

The covenant to pay rent is independent of any covenant to supply water to the leased or adjacent premises or any agreement to supply labor or materials. The parties' lease calls for rental at a sum

certain regardless of any crops produced or compensation for work performed.

Skarperud, 40 Wn. App. at 551. The Stangs' counterclaim may establish that the Kennards owe for a share of the tenant improvements. It does not create a defense to non-payment of rent. The trial court erred by accepting the counterclaim rather than dismissing it as outside the scope of an unlawful detainer action. Angelo Property Co., LP v. Hafiz, 167 Wn. App. 789, 814-815, 274 P.3d 1075 (2012) (trial court must decide "whether a tenant's counterclaim is based on facts that may 'excuse' the tenant's breach alleged by the landlord").

V. THE COURT ERRED BY NOT CALCULATING THE RENT DUE

Next, regardless of the counterclaim, the unlawful detainer statute required the trial court to calculate the rent due. Under RCW 59.12.170,

the jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, *if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due*, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due.

RCW 59.12.170 (emphasis added). The finder of fact must determine whether rent was due.

A tenant defaults by not paying rent. The landlord can then require the tenant to pay within three days or quit. If the tenant continues in possession without paying, the tenant is unlawfully detaining the premises. In an unlawful detainer action, the jury must determine the rent owed (for the period before the three-day notice expired) and also the "damages" resulting from unlawfully detaining the premises.

Sprincin King Street Partners v. Sound Conditioning Club, Inc., 84 Wn. App. 56, 63, 925 P.2d 217 (1996).

Although it concluded that "Plaintiff Landlord is entitled to rent for the months of May through August 2012", the trial court did not find the Stangs in default for not paying. (Findings of Fact ¶ 9, CP 229).

Because the evidence was not sufficient to determine the amount of rent owing by Tenants for the months of May through August, 2012, the Landlord did not establish a default in the payment of rent as required for the Court to issue a Writ of Restitution.

(Findings of Fact ¶ 17, CP 230); (Conclusion of Law ¶ 5, CP 231)
("Writ of Restitution is not granted because Plaintiff has not met its burden to establish a default in the payment of rent for the months of May through August 2012").

The court also did not calculate the rent due after any offsets. "The Court makes no findings or conclusions as to the parties' financial obligations under the lease as modified by their oral agreements, as this issue was not before the Court." (Conclusion of Law ¶ 6, CP 231).

This was legal error for three reasons. First, the Stangs defaulted by not tendering the full rent due. As detailed above, any agreement to defer rent ended on August 27, 2012. That meant the Stangs were in default when they failed to pay the entire amount due within five days of receiving notice. They should have deposited the contractual amount of rent for May through August -- \$18,521.68 -- into the court registry. If they successfully proved their counterclaim and offset, they could deduct that amount from the rent owing. The trial court erred by not finding a default.

Second, the court erred by concluding the amount of an offset, and the remaining rent owing -- was not an issue before the court. Once the trial court accepted the Stangs' counterclaim as relevant, it had both jurisdiction and the statutory obligation to rule on the merits of the Stangs' assertions. It was error to accept review of the counterclaim but not decide it.

This Court recently discussed the obligation to decide counterclaims in Indigo Real Estate Services, Inc. v. Wadsworth, 169 Wn. App. 412, 280 P.3d 506 (2012). Under federal Section 8 regulations, a landlord must show “material noncompliance” with a lease before a landlord could evict a tenant receiving housing benefits. This Court ruled that the trial court erred by not accepting the counterclaim.

The trial court erred by determining that Wadsworth had unlawfully detained the premises without first determining that her conduct constituted material noncompliance supporting termination of her tenancy. Pursuant to the express terms of the lease, the court was required to determine whether Wadsworth's four-day delay in removing the plywood panel—the sole basis found by the court to justify her eviction—was either a “substantial violation” or a “repeated minor violation” of the lease.

Indigo Real Estate Services, 169 Wn. App. at 425-426.

Merely asserting the counterclaim was not enough, however.

The Court on remand required the tenant to prove her assertion.

We decline Wadsworth's invitation to hold that the four-day delay in removing the plywood panel cannot constitute material noncompliance as a matter of law. At the show cause hearing, Indigo's stipulation to the time and nature of Wadsworth's compliance was clearly contingent upon the trial court's acceptance of its legal argument. Accordingly, the extent and severity of Wadsworth's alleged breach was never fully litigated. This factual issue must be determined at trial.

Indigo Real Estate Services, 169 Wn. App. at 426.

The same conclusion applies here. The Stangs not only had to assert that their improvements offset any past due rent, they had to prove they did. In its oral ruling at trial, the court found the Stangs' invoices unpersuasive.

The invoices that the defendant gave to the plaintiffs are not sufficient, in my view, to determine the amounts actually owing. And that's because I can't tell from those invoices what is payment to another vendor.

(1/15/13 VRP 204). Because of these problems, the trial court did not calculate the rent due.

Based on the evidence that's been introduced in this proceeding, I don't believe the court has sufficient evidence to make a ruling as to which expenses should have been reimbursed; whether those reimbursements would exist as a set-off to the rent. I don't believe that factual information is before the court sufficiently to make a resolution in a dollar amount as to what each party is owed.

(1/15/13 VRP 201).

Third, the trial court erred by placing the burden of proof for the counterclaim on the Kennards, rather than the Stangs. The Kennards proved the rent due under the lease, \$4,630.42 per month, and the Stangs conceded they did not pay that amount for May through August 2012. The burden then shifted to the Stangs

to prove their counterclaim – that the cost of tenant improvements equaled or exceeded the rent due. They failed, and consequently they did not prove an excuse to breaching the lease.

The trial court had an obligation to decide whether the Stangs owed rent to the Kennards for May through August 2012. It was insufficient to conclude that both parties owed each other some undetermined amount. If the offsets were greater than the rent, then the Stangs proved their counterclaim. If not, they were in default and the Kennards proved unlawful detainer.

The trial court's error invalidates its attorneys' fees award and final judgment. Because the Stangs should not have been the prevailing party at trial, they do not qualify for an award of reasonable attorneys' fees.

VI. The Kennards Deserve Reasonable Attorneys' Fees on Appeal

Under paragraph 25 of the parties' written lease,

if Tenant or Landlord engage the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of Rent or other payments, or possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees in such action, whether in mediation or arbitration, at trial, on appeal, and in any bankruptcy proceeding.

(Lease ¶ 25, CP 27). The Kennards respectfully request reasonable attorneys' fees as provided in RAP 18.1.

In the alternative, the Kennards ask the court to vacate all previous attorneys' fees awards until this matter is resolved on remand. See Indigo Real Estate Services, Inc., 169 Wn. App. at 426-27 ("because no party has yet prevailed on the merits, such an award is premature").

CONCLUSION

Unlawful detainer trials focus on two issues: possession and rent. Under limited circumstances, a tenant may assert a counterclaim, but only if it excuses breaching the lease. Here, the trial court erred by accepting Michael and Stacy Stang's counterclaim for unpaid tenant improvements. Yet even if the counterclaim was valid, the court erred by not calculating the rent due.

Appellants Michael and Betty Kennard respectfully request the Court to vacate the trial court's findings and conclusions on unlawful detainer, attorneys' fees award, and judgment, and to remand for rehearing.

DATED this 18 day of September, 2013.

BURI FUNSTON MUMFORD, PLLC

By 
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellants' Opening Brief to:

Kristen C. Reid
Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225

DATED this 18th day of September, 2013.


Heidi Main

APPENDIX A

SCANNED 6

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MICHAEL S. KENNARD and BETTY S.
KENNARD, husband and wife,

NO. 12-2-02806-7

Plaintiffs,

v.

CAPTAIN JACK JR.'S FAMILY
ENTERTAINMENT CENTER, INC.,
STACY STANG and MICHAEL
STANG, husband and wife,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendants.

JUDGE DEBORRA E. GARRETT

This case was tried to the bench on January 15, 2013 and January 16,
2013. Testimony was heard, exhibits were admitted, and arguments of counsel
were taken by the Court. On the basis of this record, and pursuant to CR 52, the
Court makes the following:

Findings of Fact

1. The Plaintiffs as Landlord (Landlord) and the Defendant, Captain Jack
Jr.'s Family Entertainment Center, Inc., as Tenant (Tenant) entered
into a lease agreement on or about February 17, 2012. That lease

71A

FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 1

ORIGINAL

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1 pertains to the property and improvements commonly known as 4176
2 Meridian Street, Bellingham, WA.

- 3 2. The Lease Agreement provided that Tenants would take possession of
4 the premises on February 2012 and would begin paying the specified
5 rental fees beginning May 1, 2012.
- 6 3. Tenants took possession of the premises on or about February 27,
7 2012, and have remained in possession since that time.
- 8 4. Between February 17, 2012, and late August 2012, parties made
9 several oral agreements, most of them for Tenants to perform or
10 arrange for previous repairs or improvements to the property. These
11 oral agreements included an agreement that financial responsibility for
12 these repairs or improvements would be determined and agreed by the
13 parties at a later date. The parties have not yet determined or agreed
14 to their respective financial responsibilities for these improvements.
- 15 5. The parties intended their oral agreements for repair and improvement
16 of the property to modify their respective financial obligations.
- 17 6. The Court makes no finding as to the parties' respective financial
18 responsibilities for the agreed improvements, as that issue was and is
19 not before the Court.
- 20 7. Tenants did not pay rent for the months of May through August 2012.
21 Landlords did not seek payment of rent from Tenants for the months of
22 May through August 2012 until late August 2012, when Landlord
23 May through August 2012 until late August 2012, when Landlord
24 May through August 2012 until late August 2012, when Landlord
25 May through August 2012 until late August 2012, when Landlord
26 May through August 2012 until late August 2012, when Landlord

27 **FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 2**

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Michael Kennard verbally advised Tenant Stacey Stang that payment of rents was expected.

8. Until late August 2012, Tenants reasonably believed that Landlord would permit them to defer payment of any rent due for the months of May through August 2012, after reduction of repairs and improvements Tenants had made, until the parties had agreed upon their respective financial responsibilities.

9. Tenants' duty to pay rent was modified by oral agreements made by the parties after the lease was executed. Plaintiff Landlord is entitled to rent for the months of May through August 2012, and Tenant is entitled to compensation, in cash or as a set off to this rent, for the expenses incurred and the labor expended by Tenant in ^e affecting the repair and improvements which were the subject of the parties' oral agreements. Tenant is not entitled to compensation for repairs, improvements, or expenses which are Tenant's responsibility under the lease agreement, in the absence of a specific agreement between the parties to the contrary.

10. The amount of rent owing cannot be established without further evidence regarding the parties' oral agreements and the nature of the work performed and expenses incurred pursuant to those agreements and to the Lease Agreement.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 3

1 11. The evidence is not sufficient to determine the amount of any rent
2 owing for the months of May through August, 2012, ^{and} ~~and~~ the Court
3 makes no finding on this issue.

4 12. Tenants did not pay the rent for September, 2012, as specified in the
5 Lease Agreement.

6 13. Landlord filed this action on October 22, 2012.

7 14. Tenants paid the rent for September 2012 on or about September 27,
8 2012.

9 15. Tenants have paid the rent for all months after September 2012 into
10 the registry of this Court, as previously ordered by the Court.

11 16. The Landlords action for Unlawful Detainer was filed in this Court and
12 service was effected as specified in the statute.

13 17. Because the evidence was not sufficient to determine the amount of
14 any rent owing by Tenants for the months of May through August,
15 2012, the Landlord did not establish a default in the payment of rent as
16 required for the Court to issue a Writ of Restitution.

17 18. Any conclusion of law which is deemed a finding of fact is hereby
18 adopted as such.

19 Based upon the foregoing findings of fact, now are entered the following:

20 **Conclusions of Law**

- 21 1. The Court has jurisdiction to hear this matter, and venue as proper.
22 2. The statutory requirements for notice were met and the Unlawful
23 Detainer action was properly filed in this Court.
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27 FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 4

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- 1 3. The lease at issue was modified by the parties' several oral
2 agreements for the repair and improvement to the premises.
- 3 4. The only issue before the Court is the Plaintiff's request for a Writ of
4 Restitution.
- 5 5. The requested Writ of Restitution is not granted because Plaintiff has
6 not met its burden to establish a default in the payment of rent for the
7 months of May through August 2012.
- 8 6. The Court makes no findings or conclusions as to the parties' financial
9 obligations under the lease as modified by their oral agreements, as
10 this issue was not before the Court.
- 11 7. Defendants are the prevailing party in the Writ of Restitution matter.
- 12 8. Defendants are entitled to reasonable attorneys' fees pursuant to
13 paragraph 25 of the parties' Lease Agreement.
- 14 9. This is a final order in this matter and there is no reason for delay in
15 entry of the same.
- 16
- 17

18 **Order**

19 Based upon the foregoing findings of fact and conclusions of law it is NOW,

20 THEREFORE, HEREBY ORDERED:

21 That a judgment consistent with these findings of fact and conclusions of law
22 shall be entered forthwith.

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27 FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 5

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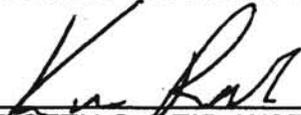
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1 It is so ordered this 1st day of March 2013.

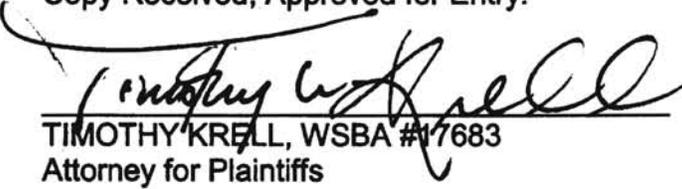
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5 JUDGE DEBORRA E. GARRETT
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9 Presented by:

10 BELCHER SWANSON LAW FIRM, PLLC

11 
12 _____
13 KRISTEN C. REID, WSBA #38723
14 Attorney for Defendants

15 Copy Received; Approved for Entry:

16 
17 _____
18 TIMOTHY KRELL, WSBA #17683
19 Attorney for Plaintiffs
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27 FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 6

APPENDIX B

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By [Signature] Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

MICHAEL S. KENNARD and BETTY S.
KENNARD, husband and wife,

NO. 12-2-02806-7

Plaintiffs,

v.

CAPTAIN JACK JR.'S FAMILY
ENTERTAINMENT CENTER, INC.,
STACY STANG and MICHAEL STANG,
husband and wife,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN
SUPPORT OF ENTRY OF
JUDGMENT FOR ATTORNEY'S
FEES AND COSTS

Defendants.

JUDGE DEBORRA E. GARRETT

THIS MATTER, having come before the Court upon Defendants' Motion for Award of Attorney's Fees, the Defendants being represented by Kristen C. Reid of the Belcher Swanson Law Firm, PLLC, the Plaintiff being represented by Timothy Krell, and the Court having reviewed the files and records herein, and having heard oral argument on the same, the Court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF
LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEYS' FEES AND COSTS- 1

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I. FINDINGS OF FACT

1. The only claim at issue in the above-captioned case was whether Plaintiff was entitled to a writ of restitution entitling Plaintiff to possession of the subject property. The Court has denied Plaintiff's request for a writ and found in favor of Defendant. As a result, Defendant is the prevailing party in the above captioned case.

2. The written lease between the parties contains a fee shifting clause, entitling the prevailing party in a litigation arising from the lease to an award of reasonable attorney's fees.

ROJ
paragraph
25

3. Defendants have submitted detailed invoices supported by Declarations and legal memoranda identifying and explaining all of the attorneys' fees and costs they have incurred reasonably relating the claims upon which the court has granted attorneys' fees and costs, namely: the Declarations and Supplemental Declarations (and attachments thereto) of Kristen C. Reid, Hugh Klinedinst, and Bradley Swanson.

3. Upon reviewing the Declarations listed above, all the invoices attached, the memorandum explaining the motion, and any and all other documents submitted by Defendants, the Court finds that the attorneys' fees claimed by Defendants and awarded by the Court as specified in the Conclusions of Law below arise out of and are reasonably related to either the prosecution or defense of claims upon which the Defendants prevailed at trial. The Court further

FINDINGS OF FACT AND CONCLUSIONS OF
LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEYS' FEES AND COSTS- 2

1 finds that the amount of the attorneys' fees claimed by the Defendants,
2 independent of the attorney's invoices submitted to substantiate the motion, is
3 reasonable in light of the nature for the legal rights at issue, the legal and factual
4 complexity of the claims, and the motions, discovery, pretrial and trial
5 preparation, particularly in relation to the resources expended and incurred by all
6 parties in the litigation.

7
8 4. Upon reviewing the Declarations listed above and the invoices
9 submitted by Defendants, the Court finds that the costs claimed by Defendants
10 ~~and awarded by the Court as specified in the Conclusions of Law below~~ *are*
11 reasonable and necessary, and further, arise out of and are reasonably related to
12 ~~either the prosecution or defense of claims upon which the Defendants prevailed~~
13 at trial, *but are not provided in The Lease*

14
15 5. With respect to the Defendants' attorneys' fees, the Court
16 specifically finds that there were no unwarranted charges included in the amount
17 that is awarded by the Court as reflected in Conclusions of Law below as well as
18 the Judgment entered on the same date, that the number of hours expended by
19 the various counsel in the case were objectively reasonable, that the hourly rate
20 charged by various counsel was objectively reasonable, and that none of the
21 time expended was unnecessary, duplicative, wasteful, or otherwise
22 unreasonable.

23
24 6. Defendants had at stake significant and important rights,
25 specifically but not limited to the right to continue to possess the premises for the

26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEYS' FEES AND COSTS- 3

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1 full term of the lease after having invested ^{substantially on} ~~thousands of dollars on~~ tenant
2 improvements. The loss of ^{possession of} ~~this right~~ would have caused substantial detriment to
3 Defendants and therefore it was reasonable for Defendants to dedicate the
4 resources outlined in their motion for fees, to the defense of their rights.

5 7. Any conclusion of law which is deemed a finding of fact is hereby
6 adopted as such.

7 III. CONCLUSIONS OF LAW

8 Based upon the above Findings of Fact, the Court makes the following
9 Conclusions of Law:

10 1. The Court, having reviewed all of the following factors, concludes:

11 A. ~~All of~~ ^{The} objective factors reviewed by the Court support a
12 conclusion that the attorneys' fees claimed by the Defendants and ultimately
13 awarded by this Court are reasonable and appropriate;

14 B. ~~All of~~ ^{The} subjective factors reviewed by the Court establish
15 that the amount of fees claimed are reasonable and appropriate;

16 2. Upon review of Defendants' entire motion, the Court further
17 concludes that the amount of fees is reasonable and necessary based on the
18 issues presented, the rights of the parties at stake, and the result obtained.

19 3. Upon review of Defendants' entire motion, the Court further
20 concludes that the amount of costs requested by Defendants is reasonable and
21 necessary based on the issues presented, the rights of the parties at stake, the
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26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEYS' FEES AND COSTS- 4

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1 result obtained, and the lease providing such costs may be awarded as part of
2 ~~reasonable attorney's fees.~~ *Costs are not awarded, however, because the Lease does not provide for an award of costs. PJG*

3 4. Based upon the foregoing, the Court finds that the following
4 amounts of attorney's fees and costs are reasonable and appropriate under the
5 facts and law, and judgment should be ordered awarding the same to
6 Defendants, as follows:

- 7
8 1. Fees: \$16,300.00
9 2. Total: \$16,300.00

10 SIGNED this 1st day of March 2013.

11
12 
13 JUDGE DEBORRA GARRETT

14 Presented by:

15 BELCHER SWANSON LAW FIRM, PLLC

16 
17 KRISTEN C. REID, WSBA #38723
18 Attorney for Defendants

19 Copy Received, Approved for Entry:

20 TIMOTHY G. KRELL REAL ESTATE LAW, PLLC

21
22 _____
23 TIMOTHY KRELL, WSBA# 17683
24 Attorney for Plaintiffs

25
26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEYS' FEES AND COSTS- 5

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APPENDIX C

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By *[Signature]*
Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

MICHAEL S. KENNARD and BETTY S.
KENNARD, husband and wife,

Plaintiffs,

v.

CAPTAIN JACK JR.'S FAMILY
ENTERTAINMENT CENTER, INC.,
STACY STANG and MICHAEL STANG,
husband and wife,

Defendants.

NO. 12-2-02806-7

FINAL JUDGMENT

JUDGE DEBORRA E. GARRETT

I. JUDGMENT SUMMARY

Judgment Creditor:	Stacey and Michael Stang
Judgment Debtor:	Michael S. Kennard and Betty S. Kennard
Judgment Date:	February 8, 2013
Principal Amount:	\$N/A
Pre-Judgment Interest:	\$N/A
Attorneys Fees:	\$16,300
Costs:	\$0
Attorney for Plaintiff:	Timothy Krell
Attorney for Defendant:	Kristen C. Reid

FINAL JUDGMENT- 1

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pu 13-9-00657-1
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72

1 INTEREST SHALL CONTINUE TO ACCRUE ON THE PRINCIPAL JUDGMENT
2 AS WELL AS THE ATTORNEY'S FEES AND COSTS AT THE RATE OF 12%
3 PER ANNUM. FURTHER, ANY AND ALL ATTORNEY'S FEES AND COSTS
4 INCURRED IN THE COLLECTION OF THIS ACTION SHALL BE AWARDED AS
5 PART OF THE JUDGMENT.
6

7 II. JUDGMENT

8
9 Based upon the Plaintiffs' claims for a Writ of Restitution, the ensuing trial,
10 and Defendants' motion for Attorneys' Fees and Costs, pursuant to this Court's
11 Findings of Fact and Conclusions of Law entered on the same date of this order,
12 and the Court having reviewed all materials submitted in support and opposition
13 thereof, and the Findings of Fact and Conclusions of Law entered in support of
14 the award of attorneys' fees, it is NOW, THEREFORE, HEREBY:
15

16 ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' request for a
17 Writ of Restitution is DENIED.

18 ORDERED, ADJUDGED, AND DECREED that the Defendants are the
19 prevailing party.

20 ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' claims for a
21 Writ of Restitution are dismissed WITH PREJUDICE, but the balance of Plaintiffs'
22 claims are dismissed WITHOUT PREJUDICE.

23 ORDERED, ADJUDGED, AND DECREED that Defendants are awarded a
24 monetary judgment against the Plaintiffs in the amount of \$16,300 as reasonable
25 attorneys' fees.
26

27 FINAL JUDGMENT- 2

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1 ORDERED, ADJUDGED, AND DECREED that interest shall accrue on
2 the net money judgment awarded Defendants at 12% per annum from the date of
3 entry herein, and that Defendants are entitled to any and all attorney's fees and
4 litigation-related costs incurred in the collection of this Judgment.

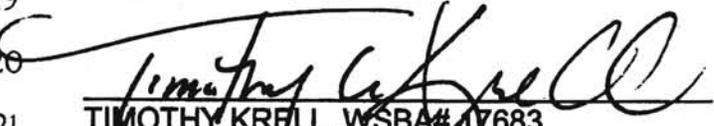
5 ORDERED, ADJUDGED, AND DECREED that this is a final judgment
6 against Plaintiff Michael S. Kennard and Betty S. Kennard, and there is no just
7 reason for delay of entry of the same.

8
9 DONE IN OPEN COURT this 13th day of March 2013.

10
11 
12 _____
13 JUDGE DEBORRA E. GARRETT

14 PRESENTED BY:
15
16 BELCHER SWANSON LAW FIRM, PLLC

17 
18 _____
19 KRISTEN C. REID, WSBA# 38723
20 Attorney for Defendants

21 Copy Received, Approved for Entry:
22 
23 _____
24 TIMOTHY KRELL, WSBA# 117683
25 Attorney for Plaintiffs

APPENDIX D

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)

THIS LEASE AGREEMENT (the "Lease") is entered into and effective as of February, 2012 (date),
between Michael S. Kennard and Betty S. Kennard ("Landlord"),
and Captain Jack Jr.'s Family Entertainment Center, Inc. (Tenant).
Landlord and Tenant agree as follows:

1. LEASE SUMMARY.

a. **Leased Premises.** The leased commercial real estate (the "Premises") consists of the real property legally described on attached Exhibit A, and all improvements thereon, and commonly described as 4176 Meridian Street, Bellingham, WA 98226

b. **Lease Commencement Date.** The term of this Lease shall be for a period of 60 months and shall commence on May 1, 2012 or such earlier or later date as provided in Section 3 (the "Commencement Date").

c. **Lease Termination Date.** The term of this Lease shall terminate at midnight on April 30, 2017 or such earlier or later date as provided in Section 3 (the "Termination Date"). Tenant shall have no right or option to extend this Lease, unless otherwise set forth in a rider attached to this Lease (e.g., Option to Extend Rider, CBA Form OR).

d. **Base Rent.** The base monthly rent shall be (check one): \$ _____, or according to the Rent Rider attached hereto ("Base Rent"). Rent shall be payable at Landlord's address shown in Section 1(h) below, or such other place designated in writing by Landlord.

e. **Prepaid Rent.** Upon execution of this Lease, Tenant shall deliver to Landlord the sum of \$ none as prepaid rent, to be applied to the Rent due for the months _____ through _____ of the Lease.

f. **Security Deposit.** Upon execution of this Lease, Tenant shall deliver to Landlord the sum of \$ none to be held as a security deposit pursuant to Section 5 below. The security deposit shall be in the form of (check one): cash, or letter of credit according to the Letter of Credit Rider (CBA Form LCR) attached hereto.

g. **Permitted Use.** The Premises shall be used only for Restaurant and Fun Center

and for no other purpose without the prior written consent of Landlord (the "Permitted Use").

h. Notice and Payment Addresses.

Landlord: Michael S. Kennard and Betty S. Kennard
2915 Eldridge Ave.
Bellingham, WA 98225

Fax No.: 360-734-1597 Phone number: 360-730-6453
Email: clandmike@aol.com

Tenant: Captain Jack Jr.'s Family Entertainment Center, Inc.
c/o Stacy and Michael Stang, 148 Windward Dr.
Bellingham, WA 98229

Fax No.: 360-933-4493 Phone number: 360-200-1820
Email: mike_stang@hotmail.com and staceystang@hotmail.com

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

2. PREMISES.

a. **Lease of Premises.** Landlord leases to Tenant, and Tenant leases from Landlord the Premises upon the terms specified in this Lease.

b. **Acceptance of Premises.** Except as specified elsewhere in this Lease, Landlord makes no representations or warranties to Tenant regarding the Premises, including the structural condition of the Premises or the condition of all mechanical, electrical, and other systems on the Premises. Except for any tenant improvements to be completed by Landlord as described on attached Exhibit B (the "Landlord's Work"), Tenant shall be responsible for performing any work necessary to bring the Premises into a condition satisfactory to Tenant. By signing this Lease, Tenant acknowledges that it has had an adequate opportunity to investigate the Premises; acknowledges responsibility for making any corrections, alterations and repairs to the Premises (other than the Landlord's Work); and acknowledges that the time needed to complete any such items shall not delay the Commencement Date.

c. **Tenant Improvements.** Attached Exhibit B sets forth all Tenant's Work, if any, and all tenant improvements to be completed by Tenant (the "Tenant's Work"), if any, that will be performed on the Premises. Responsibility for design, payment and performance of all such work shall be as set forth on attached Exhibit B. If Tenant fails to notify Landlord of any defects in the Landlord's Work within thirty (30) days of delivery of possession to Tenant, Tenant shall be deemed to have accepted the Premises in their then condition. If Tenant discovers any major defects in the Landlord's Work during this 30-day period that would prevent Tenant from using the Premises for the Permitted Use, Tenant shall notify Landlord in writing and the Commencement Date shall be delayed until after Landlord has notified Tenant that Landlord has corrected the major defects and Tenant has had five (5) days to inspect and approve the Premises. The Commencement Date shall not be delayed if Tenant's inspection reveals minor defects in the Landlord's Work that will not prevent Tenant from using the Premises for the Permitted Use. Tenant shall prepare a punch list of all minor defects in Landlord's Work and provide the punch list to Landlord, which Landlord shall promptly correct.

3. **TERM.** The term of this Lease shall commence on the Commencement Date specified in Section 1, or on such earlier or later date as may be specified by notice delivered by Landlord to Tenant advising Tenant that the Premises are ready for possession and specifying the Commencement Date, which shall not be less than _____ days (thirty (30) days if not filled in) following the date of such notice.

a. **Early Possession.** If Landlord permits Tenant to possess or occupy the Premises prior to the Commencement Date specified in Section 1, then such early occupancy shall not advance the Commencement Date or the Termination Date set forth in Section 1, but otherwise all terms and conditions of this Lease shall nevertheless apply during the period of early occupancy before the Commencement Date.

b. **Delayed Possession.** Landlord shall act diligently to make the Premises available to Tenant; provided, however, neither Landlord nor any agent or employee of Landlord shall be liable for any damage or loss due to Landlord's inability or failure to deliver possession of the Premises to Tenant as provided in this Lease. If possession is delayed, the Commencement Date set forth in Section 1 shall also be delayed. In addition, the Termination Date set forth in Section 1 shall be modified so that the length of the Lease term remains the same. If Landlord does not deliver possession of the Premises to Tenant within _____ days (sixty (60) days if not filled in) after the Commencement Date specified in Section 1, Tenant may elect to cancel this Lease by giving written notice to Landlord within ten (10) days after such time period ends. If Tenant gives such notice of cancellation, the Lease shall be cancelled, all prepaid rent and security deposits shall be refunded to Tenant, and neither Landlord nor Tenant shall have any further obligations to the other.

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The first "lease year" shall commence on the Commencement Date and shall end on the date which is twelve (12) months from the end of the month in which the Commencement Date occurs. Each successive lease year during the initial term and any extension terms shall be twelve (12) months, commencing on the first day following the end of the preceding Lease Year. To the extent that the tenant improvements are not completed in time for the Tenant to occupy or take possession of the Premises on the Commencement Date due to the failure of Tenant to fulfill any of its obligations under this Lease, the Lease shall nevertheless commence on the Commencement Date set forth in Section 1.

4. RENT.

a. **Payment of Rent.** Tenant shall pay Landlord without notice, demand, deduction, or offset, in lawful money of the United States, the monthly Base Rent stated in Section 1 in advance on or before the first day of each month during the Lease term beginning on (check one): the Commencement Date, or _____ (if no date specified, then on the Commencement Date), and shall also pay any other additional payments due to Landlord ("Additional Rent"), including Operating Costs (collectively the "Rent") when required under this Lease. Payments for any partial month at the beginning or end of the Lease shall be prorated. All payments due to Landlord under this Lease, including late fees and interest, shall also constitute Additional Rent, and upon failure of Tenant to pay any such costs, charges or expenses, Landlord shall have the same rights and remedies as otherwise provided in this Lease for the failure of Tenant to pay rent.

b. **Triple Net Lease.** This Lease is what is commonly called a "Net, Net, Net" or "triple-net" Lease, which means that, except as otherwise expressly provided herein, Landlord shall receive all Base Rent free and clear of any and all other impositions, taxes, liens, charges or expenses of any nature whatsoever in connection with the ownership and operation of the Premises. In addition to Base Rent, Tenant shall pay to the parties respectively entitled thereto, or satisfy directly, all Additional Rent and other impositions, insurance premiums, repair and maintenance charges, and any other charges, costs, obligations, liabilities, requirements, and expenses, which arise with regard to the Premises or may be contemplated under any other provision of the Lease during its term, except for costs and expenses expressly made the obligation of Landlord in this Lease.

c. **Late Charges; Default Interest.** If any sums payable by Tenant to Landlord under this Lease are not received within five (5) business days after their due date, Tenant shall pay Landlord an amount equal to the greater of \$100 or five percent (5%) of the delinquent amount for the cost of collecting and handling such late payment in addition to the amount due and as Additional Rent. All delinquent sums payable by Tenant to Landlord and not paid within five (5) business days after their due date shall, at Landlord's option, bear interest at the rate of fifteen percent (15%) per annum, or the highest rate of interest allowable by law, whichever is less (the "Default Rate"). Interest on all delinquent amounts shall be calculated from the original due date to the date of payment.

d. **Less Than Full Payment.** Landlord's acceptance of less than the full amount of any payment due from Tenant shall not be deemed an accord and satisfaction or compromise of such payment unless Landlord specifically consents in writing to payment of such lesser sum as an accord and satisfaction or compromise of the amount which Landlord claims. Any portion that remains to be paid by Tenant shall be subject to the late charges and default interest provisions of this Section 4.

5. SECURITY DEPOSIT. Upon execution of this Lease, Tenant shall deliver to Landlord the security deposit specified in Section 1 above. Landlord's obligations with respect to the security deposit are those of a debtor and not of a trustee, and Landlord may commingle the security deposit with its other funds. If Tenant breaches any covenant or condition of this Lease, including but not limited to the payment of Rent, Landlord may apply all or any part of the security deposit to the payment of any sum in default and any damage suffered

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by Landlord as a result of Tenant's breach. Tenant acknowledges, however, that the security deposit shall not be considered as a measure of Tenant's damages in case of default by Tenant, and any payment to Landlord from the security deposit shall not be construed as a payment of liquidated damages for Tenant's default. If Landlord applies the security deposit as contemplated by this Section, Tenant shall, within five (5) days after written demand therefore by Landlord, deposit with Landlord the amount so applied. If Tenant complies with all of the covenants and conditions of this Lease throughout the Lease term, the security deposit shall be repaid to Tenant without interest within thirty (30) days after the surrender of the Premises by Tenant in the condition required hereunder by Section 11 of this Lease.

6. **USES.** The Premises shall be used only for the Permitted Use specified in Section 1 above, and for no other business or purpose without the prior written consent of Landlord. No act shall be done on or around the Premises that is unlawful or that will increase the existing rate of insurance on the Premises, or cause the cancellation of any insurance on the Premises. Tenant shall not commit or allow to be committed any waste upon the Premises, or any public or private nuisance. Tenant shall not do or permit anything to be done on the Premises which will obstruct or interfere with the rights of other tenants or occupants of the Premises, or their employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees or to injure or annoy such persons.

7. **COMPLIANCE WITH LAWS.** Tenant shall not cause or permit the Premises to be used in any way which violates any law, ordinance, or governmental regulation or order. Landlord represents to Tenant that, as of the Commencement Date, to Landlord's knowledge, but without duty of investigation, and with the exception of any Tenant's Work, the Premises comply with all applicable laws, rules, regulations, or orders, including without limitation, the Americans With Disabilities Act, if applicable, and Landlord shall be responsible to promptly cure at its sole cost any noncompliance which existed on the Commencement Date. Tenant shall be responsible for complying with all laws applicable to the Premises as a result of the Permitted Use, and Tenant shall be responsible for making any changes or alterations as may be required by law, rule, regulation, or order for Tenant's Permitted Use at its sole cost and expense. Otherwise, if changes or alterations are required by rule, law, regulation, or order unrelated to the Permitted Use, Landlord shall make changes and alterations at its expense.

8. **UTILITIES.** Landlord shall not be responsible for providing any utilities to the Premises and shall not be liable for any loss, injury or damage to person or property caused by or resulting from any variation, interruption, or failure of utilities due to any cause whatsoever, and rent shall not abate as a result thereof, except to the extent due to the intentional misconduct or gross negligence of Landlord. Tenant shall be responsible for determining whether available utilities and their capacities will meet Tenant's needs. Tenant shall install and connect, if necessary, and directly pay for all water, sewer, gas, janitorial, electricity, garbage removal, heat, telephone, and other utilities and services used by Tenant on the Premises during the term, whether or not such services are billed directly to Tenant. Tenant will also procure, or cause to be procured, without cost to Landlord, all necessary permits, licenses or other authorizations required for the lawful and proper installation, maintenance, replacement, and removal on or from the Premises of wires, pipes, conduits, tubes, and other equipment and appliances for use in supplying all utilities or services to the Premises. Landlord, upon request of Tenant, and at the sole expense and liability of Tenant, shall join with Tenant in any reasonable applications required for obtaining or continuing such utilities or services.

9. **TAXES.** Tenant shall pay all Taxes (defined below) applicable to the Premises during the Lease term. All payments for Taxes shall be made at least ten (10) days prior to their due date. Tenant shall promptly furnish Landlord with satisfactory evidence that Taxes have been paid. If any Taxes paid by Tenant cover any period of time before or after the expiration of the term, Tenant's share of those Taxes paid will be prorated to cover only the period of time within the tax fiscal year during which this Lease was in effect, and Landlord shall

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promptly reimburse or credit Tenant to the extent required. If Tenant fails to timely pay any Taxes, Landlord may pay them, and Tenant shall repay such amount to Landlord upon demand. Landlord may also elect to pay all such Taxes directly to the appropriate taxing authority/ies and receive reimbursement thereof from Tenant within ten (10) days after invoice, either of the full amount paid or at Landlord's election in equal monthly installments.

The term "Taxes" shall mean: (i) any form of tax or assessment imposed on the Premises by any authority, including any city, county, state or federal government, or any improvement district, as against any legal or equitable interest of Landlord or Tenant in the Premises or in the real property of which the Premises are a part, or against rent paid for leasing the Premises; and (ii) any form of personal property tax or assessment imposed on any personal property, fixtures, furniture, tenant improvements, equipment, inventory, or other items, and all replacements, improvements, and additions to them, located on the Premises, whether owned by Landlord or Tenant. "Taxes" shall exclude any net income tax imposed on Landlord for income that Landlord receives under this Lease.

Tenant may, upon reasonable prior notice to Landlord, contest the amount or validity, in whole or in part, of any Taxes at its sole expense, only after paying such Taxes or posting such security as Landlord may reasonably require in order to protect the Premises against loss or forfeiture. Upon the termination of any such proceedings, Tenant shall pay the amount of such Taxes or part of such Taxes as finally determined, together with any costs, fees, interest penalties, or other related liabilities. Landlord shall reasonably cooperate with Tenant in contesting any Taxes, provided Landlord incurs no expense or liability in doing so.

10. ALTERATIONS. Tenant may make alterations, additions or improvements to the Premises, including any Tenant Work identified on attached Exhibit C (the "Alterations"), only with the prior written consent of Landlord, which, with respect to Alterations not affecting the structural components of the Premises or utility systems therein, shall not be unreasonably withheld, conditioned, or delayed. Landlord shall have thirty (30) days in which to respond to Tenant's request for any Alterations so long as such request includes the name of Tenant's contractors and reasonably detailed plans and specifications therefore. The term "Alterations" shall not include the installation of shelves, movable partitions, Tenant's equipment, and trade fixtures that may be performed without damaging existing improvements or the structural integrity of the Premises and Landlord's consent shall not be required for Tenant's installation or removal of those items. Tenant shall perform all work at Tenant's expense and in compliance with all applicable laws and shall complete all Alterations in accordance with plans and specifications approved by Landlord, using contractors approved by Landlord. Tenant shall pay, when due, or furnish a bond for payment (as set forth in Section 18) all claims for labor or materials furnished to or for Tenant at or for use in the Premises, which claims are or may be secured by any mechanics' or materialmen's liens against the Premises or any interest therein. Tenant shall remove all Alterations at the end of the Lease term unless Landlord conditioned its consent upon Tenant leaving a specified Alteration at the Premises, in which case Tenant shall not remove such Alteration, and it shall become Landlord's property. Tenant shall immediately repair any damage to the Premises caused by removal of Alterations.

11. REPAIRS AND MAINTENANCE; SURRENDER. Tenant shall, at its sole expense, maintain the entire Premises including without limitation the roof surface and normal repairs and maintenance to all heating, ventilation, and air conditioning ("HVAC") equipment at the Premises, in good condition and promptly make all repairs and replacements, whether structural or non-structural, necessary to keep the Premises in safe operating condition, including all utilities and other systems serving the Premises, but excluding the roof structure, subfloor, foundation, exterior walls, and capital repairs and replacements to the HVAC system (collectively, "Landlord's Repair Items"), which Landlord shall maintain in good condition and repair at Landlord's expense, provided that Tenant shall not damage any Landlord's Repair Items and shall promptly repair any damage or injury done thereto caused by Tenant or its employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees. Notwithstanding anything in

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this Section to the contrary, Tenant shall not be responsible for any repairs to the Premises made necessary by the negligence or willful misconduct of Landlord or its employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees therein. If Tenant fails to perform Tenant's obligations under this Section, Landlord may at Landlord's option enter upon the Premises after ten (10) days' prior notice to Tenant and put the same in good order, condition and repair and the cost thereof together with interest thereon at the default rate set forth in Section 4 shall be due and payable as Additional Rent to Landlord together with Tenant's next installment of Base Rent. Upon expiration of the Lease term, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys, to Landlord in as good condition as when received by Tenant from Landlord or as thereafter improved, reasonable wear and tear and insured casualty excepted.

12. ACCESS AND RIGHT OF ENTRY. After twenty-four (24) hours' notice from Landlord (except in cases of emergency, when no notice shall be required), Tenant shall permit Landlord and its agents, employees and contractors to enter the Premises at all reasonable times to make repairs, inspections, alterations or improvements, provided that Landlord shall use reasonable efforts to minimize interference with Tenant's use and enjoyment of the Premises. This Section shall not impose any repair or other obligation upon Landlord not expressly stated elsewhere in this Lease. After reasonable notice to Tenant, Landlord shall have the right to enter the Premises for the purpose of (a) showing the Premises to prospective purchasers or lenders at any time, and to prospective tenants within one hundred eighty (180) days prior to the expiration or sooner termination of the Lease term; and, (b) for posting "for lease" signs within one hundred eighty (180) days prior to the expiration or sooner termination of the Lease term.

13. SIGNAGE. Tenant shall obtain Landlord's written consent as to size, location, materials, method of attachment, and appearance, before installing any signs upon the Premises. Tenant shall install any approved signage at Tenant's sole expense and in compliance with all applicable laws. Tenant shall not damage or deface the Premises in installing or removing signage and shall repair any injury or damage to the Premises caused by such installation or removal.

14. DESTRUCTION OR CONDEMNATION.

a. Damage and Repair. If the Premises are partially damaged but not rendered untenable, by fire or other insured casualty, then Landlord shall diligently restore the Premises to the extent required below and this Lease shall not terminate. The Premises shall not be deemed untenable if twenty-five percent (25%) or less of the Premises are damaged. Landlord shall have no obligation to restore the Premises if insurance proceeds are not available to pay the entire cost of such restoration. If insurance proceeds are available to Landlord but are not sufficient to pay the entire cost of restoring the Premises, or if Landlord's lender shall not permit all or any part of the insurance proceeds to be applied toward restoration, then Landlord may elect to terminate this Lease and keep the insurance proceeds, by notifying Tenant within sixty (60) days of the date of such casualty.

If the Premises are entirely destroyed, or partially damaged and rendered untenable, by fire or other casualty, Landlord may, at its option: (a) terminate this Lease as provided herein, or (b) restore the Premises to their previous condition to the extent required below; provided, however, if such casualty event occurs during the last six (6) months of the Lease term (after considering any option to extend the term timely exercised by Tenant) then either Tenant or Landlord may elect to terminate the Lease. If, within sixty (60) days after receipt by Landlord from Tenant of written notice that Tenant deems the Premises untenable, Landlord fails to notify Tenant of its election to restore the Premises, or if Landlord is unable to restore the Premises within six (6) months of the date of the casualty event, then Tenant may elect to terminate the Lease upon twenty (20) days' written notice to Landlord unless Landlord, within such twenty (20) day period, notifies Tenant that it will in fact restore the Premises or actually completes such restoration work to the extent required below, as applicable.

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If Landlord restores the Premises under this Section 14, Landlord shall proceed with reasonable diligence to complete the work, and the base monthly rent shall be abated in the same proportion as the untenable portion of the Premises bears to the whole Premises, provided that there shall be a rent abatement only if the damage or destruction of the Premises did not result from, or was not contributed to directly or indirectly by the act, fault or neglect of Tenant, or Tenant's employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees. No damages, compensation or claim shall be payable by Landlord for inconvenience, loss of business or annoyance directly, incidentally or consequentially arising from any repair or restoration of any portion of the Premises. Landlord shall have no obligation to carry insurance of any kind for the protection of Tenant or any alterations or improvements paid for by Tenant; any Tenant Improvements identified in Exhibit C (regardless of who may have completed them); Tenant's furniture; or on any fixtures, equipment, improvements or appurtenances of Tenant under this Lease, and Landlord's restoration obligations hereunder shall not include any obligation to repair any damage thereto or replace the same.

b. **Condemnation.** If the Premises are made untenable by eminent domain, or conveyed under a threat of condemnation, this Lease shall automatically terminate as of the earlier of the date title vests in the condemning authority or the condemning authority first has possession of the Premises and all Rents and other payments shall be paid to that date. If the condemning authority takes a portion of the Premises that does not render the Premises untenable, then this Lease shall continue in full force and effect and the base monthly rent shall be equitably reduced based on the proportion by which the floor area of any structures is reduced. The reduction in Rent shall be effective on the earlier of the date the condemning authority first has possession of such portion or title vests in the condemning authority. Landlord shall be entitled to the entire award from the condemning authority attributable to the value of the Premises and Tenant shall make no claim for the value of its leasehold. Tenant shall be permitted to make a separate claim against the condemning authority for moving expenses, provided that in no event shall Tenant's claim reduce Landlord's award.

15. INSURANCE.

a. **Tenant's Liability Insurance.** During the Lease term, Tenant shall pay for and maintain commercial general liability insurance with broad form property damage and contractual liability endorsements. This policy shall name Landlord, its property manager (if any), and other parties designated by Landlord as additional insureds using an endorsement form acceptable to Landlord, and shall insure Tenant's activities and those of Tenant's employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees with respect to the Premises against loss, damage or liability for personal injury or bodily injury (including death) or loss or damage to property with a combined single limit of not less than \$2,000,000, and a deductible of not more than \$10,000. Tenant's insurance will be primary and noncontributory with any liability insurance carried by Landlord. Landlord may also require Tenant to obtain and maintain business income coverage for at least six (6) months, business auto liability coverage, and, if applicable to Tenant's Permitted Use, liquor liability insurance and/or warehouseman's coverage.

b. **Tenant's Property Insurance.** During the Lease term, Tenant shall pay for and maintain special form clauses of loss coverage property insurance (with coverage for earthquakes if required by Landlord's lender and, if the Premises are situated in a flood plain, flood damage) for all of Tenant's personal property, fixtures and equipment in the amount of their full replacement value, with a deductible of not more than \$10,000.

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c. **Miscellaneous.** Tenant's insurance required under this Section shall be with companies rated A-/VII or better in Best's Insurance Guide, and which are admitted in the state in which the Premises are located. No insurance policy shall be cancelled or reduced in coverage and each such policy shall provide that it is not subject to cancellation or a reduction in coverage except after thirty (30) days prior written notice to Landlord. Tenant shall deliver to Landlord upon commencement of the Lease and from time to time thereafter, copies of the insurance policies or evidence of insurance and copies of endorsements required by this Section. In no event shall the limits of such policies be considered as limiting the liability of Tenant under this Lease. If Tenant fails to acquire or maintain any insurance or provide any policy or evidence of insurance required by this Section, and such failure continues for three (3) days after notice from Landlord, Landlord may, but shall not be required to, obtain such insurance for Landlord's benefit and Tenant shall reimburse Landlord for the costs of such insurance upon demand. Such amounts shall be Additional Rent payable by Tenant hereunder and in the event of non-payment thereof, Landlord shall have the same rights and remedies with respect to such non-payment as it has with respect to any other non-payment of rent hereunder.

d. **Waiver of Subrogation.** Landlord and Tenant hereby release each other and any other tenant, their agents or employees, from responsibility for, and waive their entire claim of recovery for any loss or damage arising from any cause covered by property insurance required to be carried or otherwise carried by each of them. Each party shall provide notice to the property insurance carrier or carriers of this mutual waiver of subrogation, and shall cause its respective property insurance carriers to waive all rights of subrogation against the other. This waiver shall not apply to the extent of the deductible amounts to any such property policies or to the extent of liabilities exceeding the limits of such policies.

16. INDEMNIFICATION.

a. **Indemnification by Tenant.** Tenant shall defend, indemnify, and hold Landlord and its property manager, if any, harmless against all liabilities, damages, costs, and expenses, including attorneys' fees, for personal injury, bodily injury (including death) or property damage arising from any negligent or wrongful act or omission of Tenant or Tenant's employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees on or around the Premises, or arising from any breach of this Lease by Tenant. Tenant shall use legal counsel reasonably acceptable to Landlord in defense of any action within Tenant's defense obligation.

b. **Indemnification by Landlord.** Landlord shall defend, indemnify and hold Tenant harmless against all liabilities, damages, costs, and expenses, including attorneys' fees, for personal injury, bodily injury (including death) or property damage arising from any negligent or wrongful act or omission of Landlord or Landlord's employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees on or around the Premises, or arising from any breach of this Lease by Landlord. Landlord shall use legal counsel reasonably acceptable to Tenant in defense of any action within Landlord's defense obligation.

c. **Waiver of Immunity.** Landlord and Tenant each specifically and expressly waive any immunity that each may be granted under the Washington State Industrial Insurance Act, Title 51 RCW. Neither party's indemnity obligations under this Lease shall be limited by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under the Worker Compensation Acts, Disability Benefit Acts or other employee benefit acts.

d. **Exemption of Landlord from Liability.** Except to the extent of claims arising out of Landlord's gross negligence or intentional misconduct, Landlord shall not be liable for injury to Tenant's business or assets or any loss of income therefrom or for damage to any property of Tenant or of its employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees, or any other person in or about the Premises.

e. **Survival.** The provisions of this Section 16 shall survive expiration or termination of this Lease.

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17. ASSIGNMENT AND SUBLETTING. Tenant shall not assign, sublet, mortgage, encumber or otherwise transfer any interest in this Lease (collectively referred to as a "Transfer") or any part of the Premises, without first obtaining Landlord's written consent which shall not be unreasonably withheld, conditioned, or delayed. No Transfer shall relieve Tenant of any liability under this Lease notwithstanding Landlord's consent to such Transfer. Consent to any Transfer shall not operate as a waiver of the necessity for Landlord's consent to any subsequent Transfer. In connection with each request for consent to a Transfer, Tenant shall pay the reasonable cost of processing same, including attorneys' fees, upon demand of Landlord, up to a maximum of \$1,250.

If Tenant is a partnership, limited liability company, corporation, or other entity, any transfer of this Lease by merger, consolidation, redemption or liquidation, or any change in the ownership of, or power to vote, which singularly or collectively represents a majority of the beneficial interest in Tenant, shall constitute a Transfer under this Section.

As a condition to Landlord's approval, if given, any potential assignee or sublessee otherwise approved by Landlord shall assume all obligations of Tenant under this Lease and shall be jointly and severally liable with Tenant and any guarantor, if required, for the payment of Rent and performance of all terms of this Lease. In connection with any Transfer, Tenant shall provide Landlord with copies of all assignments, subleases and assumption agreement or documents.

18. LIENS. Tenant is not authorized to subject the Landlord's assets to any liens or claims of lien. Tenant shall keep the Premises free from any liens created by or through Tenant. Tenant shall indemnify and hold Landlord harmless from liability for any such liens including, without limitation, liens arising from any Alterations. If a lien is filed against the Premises by any person claiming by, through or under Tenant, Tenant shall, within 10 days after Landlord's demand, at Tenant's expense, either remove the lien or furnish to Landlord a bond in form and amount and issued by a surety satisfactory to Landlord, indemnifying Landlord and the Premises against all liabilities, costs and expenses, including attorneys' fees, which Landlord could reasonably incur as a result of such lien.

19. DEFAULT. The following occurrences shall each constitute a default by Tenant (an "Event of Default):

a. Failure To Pay. Failure by Tenant to pay any sum, including Rent, due under this Lease following five (5) days' notice from Landlord of the failure to pay.

b. Vacation/Abandonment. Vacation by Tenant of the Premises (defined as an absence for at least fifteen (15) consecutive days without prior notice to Landlord), or abandonment of the Premises (defined as an absence of five (5) days or more while Tenant is in breach of some other term of this Lease). Tenant's vacation or abandonment of the Premises shall not be subject to any notice or right to cure.

c. Insolvency. Tenant's insolvency or bankruptcy (whether voluntary or involuntary), or appointment of a receiver, assignee or other liquidating officer for Tenant's business; provided, however, that in the event of any involuntary bankruptcy or other insolvency proceeding, the existence of such proceeding shall constitute an Event of Default only if such proceeding is not dismissed or vacated within sixty (60) days after its institution or commencement.

d. Levy or Execution. The taking of Tenant's interest in this Lease or the Premises, or any part thereof, by execution or other process of law directed against Tenant, or attachment of Tenant's interest in this Lease by any creditor of Tenant, if such attachment is not discharged within fifteen (15) days after being levied.

e. Other Non-Monetary Defaults. The breach by Tenant of any agreement, term or covenant of this Lease other than one requiring the payment of money and not otherwise enumerated in this Section or elsewhere in this Lease, which breach continues for a period of thirty (30) days after notice by Landlord to Tenant of the breach.

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f. **Failure to Take Possession.** Failure by Tenant to take possession of the Premises on the Commencement Date or failure by Tenant to commence any Tenant's Work in a timely fashion.

Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in no event less than thirty (30) days after notice by Tenant to Landlord. If Landlord fails to cure any such default within the allotted time, Tenant's sole remedy shall be to seek actual money damages (but not consequential or punitive damages) for loss arising from Landlord's failure to discharge its obligations under this Lease. Nothing herein contained shall relieve Landlord from its duty to perform of any of its obligations to the standard prescribed in this Lease.

Any notice periods granted herein shall be deemed to run concurrently with and not in addition to any default notice periods required by law.

20. **REMEDIES.** Landlord shall have the following remedies upon an Event of Default. Landlord's rights and remedies under this Lease shall be cumulative, and none shall exclude any other right or remedy allowed by law.

a. **Termination of Lease.** Landlord may terminate Tenant's interest under the Lease, but no act by Landlord other than notice of termination from Landlord to Tenant shall terminate this Lease. The Lease shall terminate on the date specified in the notice of termination. Upon termination of this Lease, Tenant will remain liable to Landlord for damages in an amount equal to the Rent and other sums that would have been owing by Tenant under this Lease for the balance of the Lease term, less the net proceeds, if any, of any reletting of the Premises by Landlord subsequent to the termination, after deducting all of Landlord's Reletting Expenses (as defined below). Landlord shall be entitled to either collect damages from Tenant monthly on the days on which rent or other amounts would have been payable under the Lease, or alternatively, Landlord may accelerate Tenant's obligations under the Lease and recover from Tenant: (i) unpaid rent which had been earned at the time of termination; (ii) the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of rent loss that Tenant proves could reasonably have been avoided; (iii) the amount by which the unpaid rent for the balance of the term of the Lease after the time of award exceeds the amount of rent loss that Tenant proves could reasonably be avoided (discounting such amount by the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus 1%); and (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under the Lease, or which in the ordinary course would be likely to result from the Event of Default, including without limitation Reletting Expenses described in Section 20(b) below.

b. **Re-Entry and Reletting.** Landlord may continue this Lease in full force and effect, and without demand or notice, re-enter and take possession of the Premises or any part thereof, expel the Tenant from the Premises and anyone claiming through or under the Tenant, and remove the personal property of either. Landlord may relet the Premises, or any part of them, in Landlord's or Tenant's name for the account of Tenant, for such period of time and at such other terms and conditions as Landlord, in its discretion, may determine. Landlord may collect and receive the rents for the Premises. To the fullest extent permitted by law, the proceeds of any reletting shall be applied: first, to pay Landlord all Reletting Expenses (defined below); second, to pay any indebtedness of Tenant to Landlord other than rent; third, to the rent due and unpaid hereunder; and fourth, the residue, if any, shall be held by Landlord and applied in payment of other or future obligations of Tenant to Landlord as the same may become due and payable, and Tenant shall not be entitled to receive any portion of such revenue. Re-entry or taking possession of the Premises by Landlord under this Section shall not be construed as an election on Landlord's part to terminate this Lease, unless a notice of termination is given to

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

Tenant. Landlord reserves the right following any re-entry or retaking, or both, under this Section to exercise its right to terminate the Lease. Tenant will pay Landlord the Rent and other sums which would be payable under this Lease if repossession had not occurred, less the net proceeds, if any, after retaking the Premises and after deducting Landlord's Relating Expenses. "Relating Expenses" is defined to include all expenses incurred by Landlord in connection with retaking the Premises, including without limitation, all repossession costs, brokerage commissions and costs for securing new tenants, attorneys' fees, remodeling and repair costs, costs for removing persons or property, costs for storing Tenant's property and equipment, and costs of tenant improvements and rent concessions granted by Landlord to any new Tenant, prorated over the life of the new lease.

c. **Waiver of Redemption Rights.** Tenant, for itself, and on behalf of any and all persons claiming through or under Tenant, including creditors of all kinds, hereby waives and surrenders all rights and privileges which they may have under any present or future law, to redeem the Premises or to have a continuance of this Lease for the Lease term, or any extension thereof.

d. **Nonpayment of Additional Rent.** All costs which Tenant is obligated to pay to Landlord pursuant to this Lease shall in the event of nonpayment be treated as if they were payments of Rent, and Landlord shall have the same rights it has with respect to nonpayment of Rent.

e. **Failure to Remove Property.** If Tenant fails to remove any of its property from the Premises at Landlord's request following an unexpired Event of Default, Landlord may, at its option, remove and store the property at Tenant's expense and risk. If Tenant does not pay the storage cost within five (5) days of Landlord's request, Landlord may, at its option, have any or all of such property sold at public or private sale (and Landlord may become a purchaser at such sale), in such manner as Landlord deems proper, without notice to Tenant. Landlord shall apply the proceeds of such sale: (i) to the expense of such sale, including reasonable attorneys' fees actually incurred; (ii) to the payment of the costs or charges for storing such property; (iii) to the payment of any other sums of money which may then be or thereafter become due Landlord from Tenant under any of the terms hereof; and (iv) the balance, if any, to Tenant. Nothing in this Section shall limit Landlord's right to sell Tenant's personal property as permitted by law or to foreclose Landlord's lien for unpaid rent.

21. **MORTGAGE SUBORDINATION AND ATTORNEYMENT.** This Lease shall automatically be subordinate to any mortgage or deed of trust created by Landlord which is now existing or hereafter placed upon the Premises including any advances, interest, modifications, renewals, replacements or extensions ("Landlord's Mortgage"). Tenant shall attorn to the holder of any Landlord's Mortgage or any party acquiring the Premises at any sale or other proceeding under any Landlord's Mortgage provided the acquiring party assumes the obligations of Landlord under this Lease. Tenant shall promptly and in no event later than fifteen (15) days after request execute, acknowledge and deliver documents which the holder of any Landlord's Mortgage may reasonably require as further evidence of this subordination and attornment. Notwithstanding the foregoing, Tenant's obligations under this Section to subordinate in the future are conditioned on the holder of each Landlord's Mortgage and each party acquiring the Premises at any sale or other proceeding under any such Landlord's Mortgage not disturbing Tenant's occupancy and other rights under this Lease, so long as no unexpired Event of Default by Tenant exists.

22. **NON-WAIVER.** Landlord's waiver of any breach of any provision contained in this Lease shall not be deemed to be a waiver of the same provision for subsequent acts of Tenant. The acceptance by Landlord of Rent or other amounts due by Tenant hereunder shall not be deemed to be a waiver of any previous breach by Tenant.

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

23. **HOLDOVER.** If Tenant shall, without the written consent of Landlord, remain in possession of the Premises and fail to return them to Landlord, _____, the tenancy shall be a holdover tenancy and shall be on a month-to-month basis, which may be terminated according to Washington law. During such tenancy, Tenant agrees to pay to Landlord 150% of the rate of rental last payable under this Lease, unless a different rate is agreed upon by Landlord. All other terms of the Lease shall remain in effect. Tenant acknowledges and agrees that this Section does not grant any right to Tenant to holdover, and that Tenant may also be liable to Landlord for any and all damages or expenses which Landlord may have to incur as a result of Tenant's holdover.
24. **NOTICES.** All notices under this Lease shall be in writing and effective (i) when delivered in person or via overnight courier to the other party, (ii) three (3) days after being sent by registered or certified mail to the other party at the address set forth in Section 1; or (iii) upon confirmed transmission by facsimile to the other party at the facsimile numbers set forth in Section 1. The addressee for notices and payment of rent set forth in Section 1 may be modified by either party only by written notice delivered in conformance with this Section.
25. **COSTS AND ATTORNEYS' FEES.** If Tenant or Landlord engage the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of Rent or other payments, or possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees in such action, whether by mediation or arbitration, at trial, on appeal, and in any bankruptcy proceeding.
26. **ESTOPPEL CERTIFICATES.** Tenant shall, from time to time, upon written request of Landlord, execute, acknowledge and deliver to Landlord or its designee a written statement specifying the following, subject to any modifications necessary to make such statements true and complete: (i) the total rentable square footage of the Premises; (ii) the date the Lease term commenced and the date it expires; (iii) the amount of minimum monthly Rent and the date to which such Rent has been paid; (iv) that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended in any way; (v) that this Lease represents the entire agreement between the parties; (vi) that all obligations under this Lease to be performed by either party have been satisfied; (vii) that there are no existing claims, defenses or offsets which the Tenant has against the enforcement of this Lease by Landlord; (viii) the amount of Rent, if any, that Tenant paid in advance; (ix) the amount of security that Tenant deposited with Landlord; (x) if Tenant has sublet all or a portion of the Premises or assigned its interest in the Lease and to whom; (xi) if Tenant has any option to extend the Lease or option to purchase the Premises; and (xii) such other factual matters concerning the Lease or the Premises as Landlord may reasonably request. Tenant acknowledges and agrees that any statement delivered pursuant to this Section may be relied upon by a prospective purchaser of Landlord's interest or assignee of any mortgage or new mortgage of Landlord's interest in the Premises. If Tenant shall fail to respond within ten (10) days to Landlord's request for the statement required by this Section, Landlord may provide the statement and Tenant shall be deemed to have admitted the accuracy of the information provided by Landlord.
27. **TRANSFER OF LANDLORD'S INTEREST.** This Lease shall be assignable by Landlord without the consent of Tenant. In the event of any transfer or transfers of Landlord's interest in the Premises, other than a transfer for collateral purposes only, upon the assumption of this Lease by the transferee, Landlord shall be automatically relieved of obligations and liabilities accruing from and after the date of such transfer, including any liability for any retained security deposit or prepaid rent, for which the transferee shall be liable, and Tenant shall assign to the transferee.
28. **LANDLORD'S LIABILITY.** Anything in this Lease to the contrary notwithstanding, covenants, undertakings and agreements herein made on the part of Landlord are made and intended not as personal covenants, undertakings and agreements for the purpose of binding Landlord personally or the assets of Landlord but are made and intended for the purpose of binding only the Landlord's interest in the Premises, as the same may from time to time be encumbered. In no event shall Landlord or its partners, shareholders, or members, as the case may be, ever be personally liable hereunder.



LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

29. **RIGHT TO PERFORM.** If Tenant shall fail to timely pay any sum or perform any other act on its part to be performed hereunder, Landlord may make any such payment or perform any such other act on Tenant's behalf. Tenant shall, within ten (10) days of demand, reimburse Landlord for its expenses incurred in making such payment or performance. Landlord shall (in addition to any other right or remedy of Landlord provided by law) have the same rights and remedies in the event of the nonpayment of sums due under this Section as in the case of default by Tenant in the payment of Rent.

30. **HAZARDOUS MATERIAL.** As used herein, the term "Hazardous Material" means any hazardous, dangerous, toxic or harmful substance, material or waste including biomedical waste which is or becomes regulated by any local governmental authority, the State of Washington or the United States Government, due to its potential harm to the health, safety or welfare of humans or the environment. Landlord represents and warrants to Tenant that, to Landlord's knowledge without duty of investigation, there is no Hazardous Material on, in, or under the Premises as of the Commencement Date except as may otherwise have been disclosed to Tenant in writing before the execution of this Lease. If there is any Hazardous Material on, in, or under the Premises as of the Commencement Date which has been or thereafter becomes unlawfully released through no fault of Tenant, then Landlord shall indemnify, defend and hold Tenant harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses including without limitation sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees, incurred or suffered by Tenant either during or after the Lease term as the result of such contamination.

Tenant shall not cause or permit any Hazardous Material to be brought upon, kept, or used in or about, or disposed of on the Premises by Tenant, its employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees, except with Landlord's prior consent and then only upon strict compliance with all applicable federal, state and local laws, regulations, codes and ordinances. If Tenant breaches the obligations stated in the preceding sentence, then Tenant shall indemnify, defend and hold Landlord harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses including, without limitation, diminution in the value of the Premises; damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises, or elsewhere; damages arising from any adverse impact on marketing of space at the Premises; and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees incurred or suffered by Landlord either during or after the Lease term. These indemnifications by Landlord and Tenant include, without limitation, costs incurred in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work, whether or not required by any federal, state or local governmental agency or political subdivision, because of Hazardous Material present in the Premises, or in soil or ground water on or under the Premises. Tenant shall immediately notify Landlord of any inquiry, investigation or notice that Tenant may receive from any third party regarding the actual or suspected presence of Hazardous Material on the Premises.

Without limiting the foregoing, if the presence of any Hazardous Material brought upon, kept or used in or about the Premises by Tenant, its employees, officers, agents, servants, contractors, customers, clients, visitors, guests, or other licensees or invitees, results in any unlawful release of any Hazardous Materials on the Premises or any other property, Tenant shall promptly take all actions, at its sole expense, as are necessary to return the Premises or any other property to the condition existing prior to the release of any such Hazardous Material; provided that Landlord's approval of such actions shall first be obtained, which approval may be withheld at Landlord's sole discretion. The provisions of this Section shall survive expiration or termination of this Lease.

31. **QUIET ENJOYMENT.** So long as Tenant pays the Rent and performs all of its obligations in this Lease, Tenant's possession of the Premises will not be disturbed by Landlord or anyone claiming by, through or under Landlord.

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

32. MERGER. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger and shall, at the option of Landlord, terminate all or any existing subtenancies or may, at the option of Landlord, operate as an assignment to Landlord of any or all of such subtenancies.

33. GENERAL.

a. Heirs and Assigns. This Lease shall apply to and be binding upon Landlord and Tenant and their respective heirs, executors, administrators, successors and assigns.

b. Brokers' Fees. Tenant represents and warrants to Landlord that except for Tenant's Broker, if any, described or disclosed in Section 35 of this Lease, it has not engaged any broker, finder or other person who would be entitled to any commission or fees for the negotiation, execution or delivery of this Lease and shall indemnify and hold harmless Landlord against any loss, cost, liability or expense incurred by Landlord as a result of any claim asserted by any such broker, finder or other person on the basis of any arrangements or agreements made or alleged to have been made by or on behalf of Tenant. Landlord represents and warrants to Tenant that except for Landlord's Broker, if any, described and disclosed in Section 35 of this Lease, it has not engaged any broker, finder or other person who would be entitled to any commission or fees for the negotiation, execution or delivery of this Lease and shall indemnify and hold harmless Tenant against any loss, cost, liability or expense incurred by Tenant as a result of any claim asserted by any such broker, finder or other person on the basis of any arrangements or agreements made or alleged to have been made by or on behalf of Landlord.

c. Entire Agreement. This Lease contains all of the covenants and agreements between Landlord and Tenant relating to the Premises. No prior or contemporaneous agreements or understandings pertaining to the Lease shall be valid or of any force or effect and the covenants and agreements of this Lease shall not be altered, modified or amended to except in writing signed by Landlord and Tenant.

d. Severability. Any provision of this Lease which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision of this Lease.

e. Force Majeure. Time periods for either party's performance under any provisions of this Lease (excluding payment of Rent) shall be extended for periods of time during which the party's performance is prevented due to circumstances beyond such party's control, including without limitation, fires, floods, earthquakes, lockouts, strikes, embargoes, governmental regulations, acts of God, public enemy, war or other strife.

f. Governing Law. This Lease shall be governed by and construed in accordance with the laws of the State of Washington.

g. Memorandum of Lease. Neither this Lease nor any memorandum or "short form" thereof shall be recorded without Landlord's prior consent.

h. Submission of Lease Form Not an Offer. One party's submission of this Lease to the other for review shall not constitute an offer to lease the Premises. This Lease shall not become effective and binding upon Landlord and Tenant until it has been fully signed by both of them.

i. No Light, Air or View Easement. Tenant has not been granted an easement or other right for light, air or view to or from the Premises. Any diminution or shutting off of light, air or view by any structure which may be erected on or adjacent to the Premises shall in no way affect this Lease or the obligations of Tenant hereunder or impose any liability on Landlord.

j. Authority of Parties. Each party signing this Lease represents and warrants to the other that it has the authority to enter into this Lease, that the execution and delivery of this Lease has been duly authorized, and that upon such execution and delivery, this Lease shall be binding upon and enforceable against the party on signing.

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

k. Time. "Day" as used herein means a calendar day and "business day" means any day on which commercial banks are generally open for business in the state where the Premises are situated. Any period of time which would otherwise end on a non-business day shall be extended to the next following business day. Time is of the essence of this Lease.

34. **EXHIBITS AND RIDERS.** The following exhibits and riders are made a part of this Lease, and the terms thereof shall control over any inconsistent provision in the sections of this Lease:

Exhibit A Legal Description of the Premises
Exhibit B Tenant Improvement Schedule

CHECK THE BOX FOR ANY OF THE FOLLOWING THAT WILL APPLY. CAPITALIZED TERMS USED IN THE RIDERS SHALL HAVE THE MEANING GIVEN TO THEM IN THE LEASE.

- Rent Rider
 Arbitration Rider
 Letter of Credit Rider
 Guaranty of Tenant's Lease Obligations Rider
 Option to Extend Rider

35. **AGENCY DISCLOSURE.** At the signing of this Lease, Landlord is represented by

William Douglas Meyer, Managing Broker, Sterling Real Estate Group

(insert both the name of the Broker and the Firm as licensed) (the "Landlord's Broker"), and Tenant is represented by

Courtland Booz'e, Broker, Sterling Real Estate Group

(insert both the name of the Broker and the Firm as licensed) (the "Tenant's Broker").

This Agency Disclosure creates an agency relationship between Landlord, Landlord's Broker (if any such person is disclosed), and any managing brokers who supervise Landlord's Broker's performance (collectively the "Supervising Brokers"). In addition, this Agency Disclosure creates an agency relationship between Tenant, Tenant's Broker (if any such person is disclosed), and any managing brokers who supervise Tenant's Broker's performance (also collectively the "Supervising Brokers"). If Tenant's Broker and Landlord's Broker are different real estate licensees affiliated with the same Firm, then both Tenant and Landlord confirm their consent to that Firm and both Tenant's and Landlord's Supervising Brokers acting as dual agents. If Tenant's Broker and Landlord's Broker are the same real estate licensee who represents both parties, then both Landlord and Tenant acknowledge that the Broker, his or her Supervising Brokers, and his or her Firm are acting as dual agents and hereby consent to such dual agency. If Tenant's Broker, Landlord's Broker, their Supervising Brokers, or their Firm are dual agents, Landlord and Tenant consent to Tenant's Broker, Landlord's Broker and their Firm being compensated based on a percentage of the rent or as otherwise disclosed on the attached addendum. Neither Tenant's Broker, Landlord's Broker nor either of their Firms are receiving compensation from more than one party to this transaction unless otherwise disclosed on an attached addendum, in which case Landlord and Tenant consent to such compensation. Landlord and Tenant confirm receipt of the pamphlet entitled "The Law of Real Estate Agency."

36. **COMMISSION AGREEMENT.** If Landlord has not entered into a listing agreement (or other compensation agreement with Landlord's Broker), Landlord agrees to pay a commission to Landlord's Broker (as identified in the Agency Disclosure paragraph above) as follows:

- \$ _____
 5.0 % of the gross rent payable pursuant to the Lease
 \$ _____ per square foot of the Premises
 Other _____



LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

Landlord's Broker shall shall not (shall not if not filled in) be entitled to a commission upon the extension by Tenant of the Lease term pursuant to any right reserved to Tenant under the Lease calculated as provided above or as follows _____

_____ (if no box is checked, as provided above). Landlord's Broker shall shall not (shall not if not filled in) be entitled to a commission upon any expansion of the Premises pursuant to any right reserved to Tenant under the Lease, calculated as provided above or as follows _____ (if no box is checked, as provided above).

Any commission shall be earned upon execution of this Lease, and paid one-half upon execution of the Lease and one-half upon occupancy of the Premises by Tenant. Landlord's Broker shall pay to Tenant's Broker (as identified in the Agency Disclosure paragraph above) the amount stated in a separate agreement between them or, if there is no agreement, \$ _____ or 50 % (complete only one) of any commission paid to Landlord's Broker, within five (5) days after receipt by Landlord's Broker.

If any other lease or sale is entered into between Landlord and Tenant pursuant to a right reserved to Tenant under the Lease, Landlord shall shall not (shall not if not filled in) pay an additional commission according to any commission agreement or, in the absence of one, according to the commission schedule of Landlord's Broker in effect as of the execution of this Lease. Landlord's successor shall be obligated to pay any unpaid commissions upon any transfer of this Lease and any such transfer shall not release the transferor from liability to pay such commissions.

37. BROKER PROVISIONS.

LANDLORD'S BROKER, TENANT'S BROKER AND THEIR FIRMS HAVE MADE NO REPRESENTATIONS OR WARRANTIES CONCERNING THE PREMISES; THE MEANING OF THE TERMS AND CONDITIONS OF THIS LEASE; LANDLORD'S OR TENANT'S FINANCIAL STANDING; ZONING OR COMPLIANCE OF THE PREMISES WITH APPLICABLE LAWS; SERVICE OR CAPACITY OF UTILITIES; OPERATING COSTS; OR HAZARDOUS MATERIALS. LANDLORD AND TENANT ARE EACH ADVISED TO SEEK INDEPENDENT LEGAL ADVICE ON THESE AND OTHER MATTERS ARISING UNDER THIS LEASE.

IN WITNESS WHEREOF, this Lease has been executed the date and year first above written.

LANDLORD Michael S. Kennard



TENANT Stacey Stang, President

LANDLORD Betty S. Kennard



TENANT Michael Stang, General Manager

BY Landlord

MICHAEL STANG, STACEY STANG
BY

ITS: _____

ITS: DIRECTORS

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Michael Stang is the person who appeared before me and said person acknowledged that MICHAEL STANG signed this instrument, on oath stated that MICHAEL STANG was authorized to execute the instrument and acknowledged it as the DIRECTOR of CAPTAIN JACK JR'S F.F.C. INC. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this 17th day of February, 2012.



Bar H Neil

(Signature of Notary)

Barbara H Neil

(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington
Residing at Whatcom County

My appointment expires 5/24/2014

STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Stacey Stang is the person who appeared before me and said person acknowledged that Stacey Stang signed this instrument, on oath stated that Stacey Stang was authorized to execute the instrument and acknowledged it as the President of CAPTAIN JACK JR'S F.F.C. INC. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this 17th day of February, 2012.



Bar H Neil

(Signature of Notary)

Barbara H. Neil

(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington
Residing at Whatcom County

My appointment expires 5/24/2014

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Michael Scott Kennard is the person who appeared before me and said person acknowledged that Michael Scott Kennard signed this instrument, on oath stated that Michael Scott Kennard was authorized to execute the instrument and acknowledged it as the owner of 4176 Meridian st to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this 18th day of February, 2012.

Martin K Carter

(Signature of Notary)

Martin K Carter

(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington

Residing at Bellingham WA

My appointment expires Sept 1, 2015



STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Betty Stock Kennard is the person who appeared before me and said person acknowledged that Betty Stock Kennard signed this instrument, on oath stated that Betty Stock Kennard was authorized to execute the instrument and acknowledged it as the owner of 4176 Meridian to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this 18th day of February, 2012.

Martin K Carter

(Signature of Notary)

Martin K Carter

(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington

Residing at Bellingham WA

My appointment expires Sept 1, 2015



LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

EXHIBIT A
[Legal Description of the Property]

D KELLOGG'S ADD TO WHATCOM THAT PTN OF N 1/2 OF LOT 16-TOG WI VAC ANNA ST ABTG-DAF-BEG ON
W SEC LI 995 FT N OF DW SEC COR-TH S 89 DEG 45'00" E 316.5 FT-TH N PAR TO W SEC LI 326 FT ML

EXHIBIT A

LEASE AGREEMENT
(Single Tenant for Entire Parcel - NNN)
(Continued)

EXHIBIT B
[Tenant Improvement Schedule (Landlord's Work)]

1. Tenant Improvements to be Completed by Landlord

1. Landlord to remove all debris and rubbish from the premises and present it to Tenant in broom sweep condition.
2. Landlord will furnish and install a fire sprinkler system that meets requirements as set by local codes.
3. Landlord will repair rain gutters that are leaking.
4. Landlord to repair damaged siding and power wash the building in preparation of painting it.
5. Landlord to repair all entry doors to proper working condition, including repair of overhead roll-up doors.
6. Landlord to repair window glass that is broken, cracked, damaged.
7. Landlord to bring building to code will install an access ramp to the lower portion of the building.

2. Tenant Improvements to be Completed by Tenant

Tenant at Tenant's sole cost but with Landlord's permission which shall not be unreasonably withheld:

1. Will install HVAC equipment necessary and sufficient to meet the needs of his business. HVAC system and all other improvements made by Tenant, other than those Tenant and Landlord specify in writing, shall remain with the property upon termination of lease.
2. Will be allowed to tear down and dispose of the shed in the SE corner of the property.
3. Shall install new awning.
4. Will remove rusted fence.
5. Will install and/or repair flooring where deemed necessary.
6. Will install restrooms as needed.
7. Will install kitchen area as needed.
8. Will upgrade plumbing as needed.
9. Will upgrade electrical fixtures and wiring as needed.
10. Will remodel interior of building as needed.
11. Will paint exterior of building.

EXHIBIT B

RENT RIDER

This Rent Rider ("Rider") is made part of the Lease Agreement dated February, 2012, (the "Lease") between Michael S. Kennard and Betty S. Kennard ("Landlord") and Captain Jack Jr.'s Family Entertainment Center, Inc. ("Tenant") concerning the space commonly known as 4176 Meridian Street, Bellingham WA 98226 (the "Premises"), located at the property commonly known as 4176 Meridian Street Bellingham, WA 98226 (the "Property").

1. BASE MONTHLY RENT SCHEDULE. Tenant shall pay Landlord base monthly rent during the Lease Term according to the following schedule:

Lease Year (Stated in Years or Months)	Base Monthly Rent Amount
Months 1-12	\$ 4,630.42
Months 13-24	\$ 9,260.83
Months 25-36	\$ 9,538.65
Months 37-48	\$ 9,816.48
Months 49-60	\$ 10,103.57

2. CONSUMER PRICE INDEX ADJUSTMENT ON BASE MONTHLY RENT. The base monthly rent shall be increased on the first day of the second year of the Lease and on the first day of each year of the Lease thereafter (each, an "Adjustment Date") during the term of this Lease (but not during any extension term(s) unless specifically set forth elsewhere in the Lease or another Rider attached thereto). The increase shall be determined in accordance with the increase in the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers (all items for the geographical statistical area in which the Premises is located on the basis of 1982-1984 equals 100) (the "Index"). The base monthly rent payable immediately prior to the applicable adjustment date shall be increased by the percentage that the Index published for the date nearest preceding the applicable Adjustment Date has increased over the Index published for the date nearest preceding the first day of the Lease Year from which the adjustment is being measured. Upon the calculation of each increase, Landlord shall notify Tenant of the new base monthly rent payable hereunder. Within twenty (20) days of the date of Landlord's notice, Tenant shall pay to Landlord the amount of any deficiency in Rent paid by Tenant for the period following the subject Adjustment Date, and shall thereafter pay the increased Rent until receiving the next notice of increase from Landlord. If the components of the Index are materially changed after the Commencement Date, or if the Index is discontinued during the Lease term, Landlord shall notify Tenant of a substitute published Index which, in Landlord's reasonable discretion, approximates the Index, and shall use the substitute Index to make subsequent adjustments in base monthly rent. In no event shall base monthly rent be decreased pursuant to this Rider.

INITIALS: LANDLORD _____ DATE _____ TENANT MJS DATE 2/17/12
LANDLORD _____ DATE _____ TENANT slg DATE 2/17/12



GUARANTY OF TENANT'S LEASE OBLIGATIONS RIDER

*This has been prepared for submission to your attorney for review and approval prior to signing.
No representation is made by licensee as to its sufficiency or tax consequences*

This Guaranty of Tenant's Lease Obligations Rider (the "Guaranty") is made by Stacey Stang and Michael Stang, whose address is 148 Windward Dr., Bellingham, WA 98229 ("Guarantor"), for the benefit of Michael S. Kennard and Betty S. Kennard ("Landlord"), whose address is 2915 Eldridge Ave. Bellingham, WA 98225.

- Underlying Lease.** Landlord and Captain Jack Jr.'s Family Entertainment Center, Inc. ("Tenant"), have entered into that certain Lease Agreement dated February, 2012 (the "Lease") concerning the leased space commonly known as 4176 Meridian Street, Bellingham, WA 98226 (the "Premises").
- Guaranty.** Guarantor induced Landlord to enter into the Lease in consideration for Guarantor's guaranty, and Guarantor further acknowledges that it receives direct financial and economic benefits because Tenant will lease the Premises. Therefore, Guarantor absolutely, unconditionally and irrevocably guarantees to Landlord and its successors and assigns, without deduction by reason of set-off, defense or counterclaim, a) the full, punctual, and complete payment of all rent and other sums to be paid to Landlord under the Lease, including all attorney's fees, costs and expenses of collection incurred by Landlord in enforcing its rights and remedies under the Lease and this Guaranty; and b) the full, punctual, and complete discharge and performance of each and every other term, covenant, obligation and warranty of Tenant contained in the Lease. If Tenant defaults or breaches the Lease, Guarantor shall perform Tenant's obligations on Tenant's behalf. This Guaranty shall remain in full force and effect until all the terms, covenants, conditions, and agreements contained in the Lease are fully performed and observed. This Guaranty shall be enforceable against Guarantor without the necessity of any suit or proceeding on the part of Landlord against Tenant or any other party.
- No Discharge of Guarantor.** This Guaranty shall not be discharged and the liability of Guarantor shall in no way be affected by (a) the release or discharge of Tenant in any receivership, bankruptcy or other proceeding; (b) the impairment, limitation or modification of any liability to Landlord of Tenant or the estate of Tenant in bankruptcy, or of any remedy for the enforcement of Tenant's liability under the Lease or resulting from the operation of any present or future provision of federal or state bankruptcy or insolvency laws or other statute or from the decision in any court; (c) the rejection or disaffirmance of the Lease in any bankruptcy, insolvency, or similar proceeding; (d) the assignment, transfer, or encumbrance of all or any portion of the Tenant's interest in the Lease, the subletting of all or any portion of the Premises, or the granting to any third party of any rights of occupancy of all or any portion of the Premises; (e) waiver of discharge by Landlord of default or future performance by Tenant of any term of the Lease or Guaranty; (f) the exercise, forbearance, or election by Landlord of any of its rights or remedies reserved under the Lease, this Guaranty, or by law; (g) the release by Landlord of any security given to Landlord; or (h) any extension, renewal, amendment, expansion, or termination of the Lease.

INITIALS: LANDLORD _____ DATE _____ TENANT MS DATE 2/17/12
LANDLORD _____ DATE _____ TENANT MS DATE 2/17/12



**ADDENDUM/AMENDMENT TO
CBA LEASES**

The following is part of the Commercial Lease Agreement dated February, 2012
Between Michael S. Kennard and Betty S. Kennard ("Landlord")
And Captain Jack Jr.'s Family Entertainment Center, Inc. ("Tenant")
regarding the lease of the property known as 4176 Meridian Street
Bellingham, WA 98228

IT IS AGREED BETWEEN THE LANDLORD AND TENANT AS FOLLOWS:

Landlord and Tenant Agree that:

1. Tenant shall have early occupancy for the purpose of working on the premises upon full execution of Lease. During the early occupancy period, Tenant shall pay no base rent or NNN rent but will pay utilities.
2. Tenant is granted the first right to purchase the property if and when the Landlord places it on the market for sale. Purchase price is as yet undetermined but shall be set at a mutually agreed price between Landlord and Tenant. If they are unable to mutually agree, Landlord (Seller) may market the property at any price desired but Tenant (Buyer) will be allowed First Right of Refusal on any offer received by Landlord (Seller). Buyer will have Five (5) business days to enter into escrow to purchase the property from the time Seller gives written notice that an offer has been received from a third party to purchase the property.
3. During the lease Extension, Base Rent shall increase by 3% on the First day of May each calendar year to establish the base rent for the succeeding twelve months.
4. Landlord agrees that property will not be for sale for the first 24 months of the lease (except to the Tenant).

Landlord agrees that should Tenant purchase the Property during the Lease or Lease Extension, that Landlord shall pay to Listing Broker, a 5% commission on the final sale price minus pre-paid lease commissions amortized.

AGENT (COMPANY): Sterling Real Estate Group By: _____

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

INITIALS:

Tenant/Lessee	<u>M/S</u>	DATE	<u>2/17/12</u>	Landlord/Lessor	_____	DATE	_____
Tenant/Lessee	<u>AK</u>	DATE	<u>2/17/12</u>	Landlord/Lessor	_____	DATE	_____

OPTION TO BUY REAL ESTATE

This Option To Buy Real Estate ("Option") is entered into February, 2012 (date) between Captain Jack Jr.'s Family Entertainment Center, Inc. ("Buyer") and Michael S. Kennard and Betty S. Kennard ("Seller").

- 1. TYPE OF OPTION.** This Option is is not part of a lease between Buyer, as Tenant, and Seller, as Landlord dated February, 2012 (the "Lease") for the real property legally described as set forth in the Lease, if this Option is part of a lease or in Exhibit A, attached to this Option (the "Property"). If this Option is part of a lease, a default by Buyer on the Lease shall also cause Buyer to default on this Option.
- 2. OPTION PAYMENT AND EXPIRATION.** In consideration of the terms of and rent paid under the Lease, \$ _____ paid by Buyer, Seller grants to Buyer, and Buyer's successors and assigns, the right to close the purchase of the Property on or before termination of Lease (the "Expiration Date"), without grace or extension of said date.
- 3. NOTICE - EXERCISE OF OPTION.** Buyer shall give written notice to Seller that Buyer intends to exercise this Option at least _____ days (thirty (30) days if not filled in) before the Expiration Date. Buyer shall send notice by certified mail to Seller at the following address: _____
- 4. PURCHASE AND SALE AGREEMENT.** Buyer and Seller have completed and attached a purchase and sale agreement (the "Purchase Agreement") to this Option as Exhibit B. If Buyer exercises this Option, Buyer and Seller shall proceed with the transaction according to the terms and conditions set forth in the Purchase Agreement and, unless otherwise stated in the Purchase Agreement, all time periods stated therein shall run from the date Buyer gives Seller notice that Buyer will exercise this Option (e.g., time periods for financing, inspections, and title review). In the event of a conflict between terms of this Option and the Lease or the Purchase Agreement, the terms of this Option shall control.
- 5. PURCHASE PRICE.** The purchase price of the Property is _____ Dollars (\$ _____), payable as follows:
The following shall be applied to the: Down Payment Purchase Price:
 All rent paid under the Lease.
 The dollar amount filled in at Paragraph 2, above;
 Other: _____
- 6. CLOSING.** Closing shall take place as set forth in the Purchase Agreement but in no event later than the Expiration Date set forth in this Option at the offices of _____ (the "Closing Agent"). No later than _____ days (10 days if not filled in) before the Closing date, Buyer shall deposit in escrow with the Closing Agent all money and documents necessary to close. Within _____ days (5 days if not filled in), Seller shall deposit in escrow with the Closing Agent all money and documents necessary to close.
- 7. TIME IS OF THE ESSENCE.** Time is of the essence of this Option. In the event that: (a) Buyer fails to give notice of exercise of this Option within the time provided herein; (b) this sale shall fail to close prior to the Expiration Date (through no fault of Seller); (c) Buyer shall fail to deposit all necessary documents and money into escrow on or before the time required in paragraph 6, above; or (d) Buyer defaults on the Lease (if this Option is part of a lease), then Buyer's right to purchase the Property shall terminate, and any option payment provided in paragraph 2, above, shall be retained by Seller.

INITIALS: BUYER MRS DATE 2/17/12 SELLER _____ DATE _____
BUYER MS DATE 2/17/12 SELLER _____ DATE _____



OPTION TO BUY REAL ESTATE
(continued)

8. **Commission.** In the event that this Option is exercised and the sale closed, Seller shall pay, at closing, a commission of \$ _____ or _____ % of the sale price to _____, a licensed real estate firm. No firm involved in this transaction is receiving compensation from more than one party unless disclosed on an attached addendum, in which case Buyer and Seller agree to such compensation. This Option may be recorded.

9. **AGENCY DISCLOSURE.** Agency disclosures are contained in the Lease (if any) and in the Purchase Agreement.

10. **TITLE INSURANCE.** Within _____ days (10 days if not filled in) following the date of this Option, Seller shall obtain from _____, at Seller's expense, and deliver to Buyer a preliminary commitment for a standard purchaser's policy of title insurance showing title. Buyer shall notify Seller in writing of any objectionable matters in the title report or any supplemental report no later than 5 days after Buyer receipt. If Seller cannot, at Seller's sole expense, make title satisfactory to Buyer in Buyer's sole discretion within _____ days (60 days if not filled in) following Buyer's receipt of a copy of said preliminary commitment, any option payment shall, unless Buyer elects in writing to waive such defects or encumbrances, be immediately refunded to Buyer. Notwithstanding the foregoing, Seller shall have until Closing to satisfy monetary encumbrances.

11. **OTHER AGREEMENTS.** None As follows:

Buyer Stacey Stang, President
Printed name and type of entity

Buyer Michael Stang, General Manager
Printed name and type of entity

Buyer *Stacey Stang*, President
Signature and title

Buyer *Michael Stang*, General Manager
Signature and title

Date signed 2/17/12

Date signed 2/17/12

Seller Michael S. Kennard
Printed name and type of entity

Seller Betty S. Kennard
Printed name and type of entity

Seller _____
Signature and title

Seller _____
Signature and title

Date signed _____

Date signed _____

INITIALS: BUYER MSL DATE 2/17/12
BUYER MSM DATE 2/17/12

SELLER _____ DATE _____
SELLER _____ DATE _____



OPTION TO BUY REAL ESTATE
(continued)

STATE OF WASHINGTON

COUNTY OF _____

ss.

I certify that I know or have satisfactory evidence that _____ appeared before me and signed this instrument and acknowledged it as the _____ of _____ to be _____

free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: _____

Notary public in and for the state of Washington

Residing at _____

My appointment expires _____

STATE OF WASHINGTON

COUNTY OF _____

ss.

I certify that I know or have satisfactory evidence that _____ appeared before me and signed this instrument and acknowledged it as the _____ of _____ to be _____

free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: _____

Notary public in and for the state of Washington

Residing at _____

My appointment expires _____

INITIALS: BUYER _____ DATE _____ SELLER _____ DATE _____

BUYER _____ DATE _____ SELLER _____ DATE _____



OPTION TO BUY REAL ESTATE
(continued)

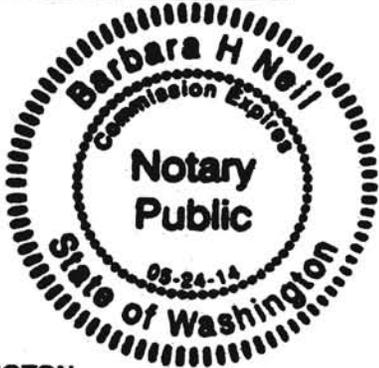
STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Michael Stang appeared before me and signed this instrument and acknowledged it as the Director of Captain Jack Jr's FEC, Inc. to be the free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 2-17-12



B H Neil
Notary public in and for the state of Washington
Residing at Whatcom County
My appointment expires 5/24/2014

STATE OF WASHINGTON

COUNTY OF Whatcom

ss.

I certify that I know or have satisfactory evidence that Stacey Archard Stang appeared before me and signed this instrument and acknowledged it as the President of President/Captain Jack Jr's FEC, Inc. to be the free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 2-17-12



B H Neil
Notary public in and for the state of Washington
Residing at Whatcom County
My appointment expires 5/24/2014

INITIALS: BUYER M/S DATE 2/17/12
BUYER S/S DATE 2/17/12

SELLER [Signature] DATE 02/18/2012
SELLER _____ DATE _____



OPTION TO BUY REAL ESTATE
(continued)

STATE OF WASHINGTON

COUNTY OF _____

ss.

I certify that I know or have satisfactory evidence that _____ appeared before me and signed this instrument and acknowledged it as the _____ of _____ to be _____

free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: _____

Notary public in and for the state of Washington

Residing at _____

My appointment expires _____

STATE OF WASHINGTON

COUNTY OF _____

ss.

I certify that I know or have satisfactory evidence that _____ appeared before me and signed this instrument and acknowledged it as the _____ of _____ to be _____

free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: _____

Notary public in and for the state of Washington

Residing at _____

My appointment expires _____

INITIALS: BUYER _____ DATE _____ SELLER _____ DATE _____
BUYER _____ DATE _____ SELLER _____ DATE _____



OPTION TO BUY REAL ESTATE
(continued)

EXHIBIT A
[Legal Description]

D KELLOGG'S ADD TO WHATCOM THAT PTN OF N 1/2 OF LOT 16-TOG WI VAC ANNA ST ABTG-DAF-BEG ON
W SEC LI 995 FT N OF SW SEC COR-TH S 89 DEG 45'00" E 316.5 FT-TH N PAR TO W SEC LI 326 FT M/L

INITIALS: BUYER MMS DATE 2/17/12 SELLER _____ DATE _____
BUYER gh DATE 2/17/12 SELLER _____ DATE _____



OPTION TO EXTEND RIDER

This Option to Extend Rider ("Rider") is made part of the lease agreement dated February, 2012, (the "Lease") between Michael S. Kennard and Betty S. Kennard ("Landlord") and Captain Jack Jr.'s Family Entertainment Center, Inc. ("Tenant") concerning the leased space commonly known as 4176 Meridian Street, Bellingham WA 98226 (the "Premises"), located at the property commonly known as 4176 Meridian Street Bellingham, WA 98226 (the "Property").

1. **Extension of Lease.** Provided Tenant is not in default of any provision of the Lease at the time that Tenant exercises the right to extend the Lease or at the time the new term begins, Tenant shall have one (zero if not completed) successive options to extend the term of the Lease for five years each. The term of the Lease shall be extended on the same terms, conditions and covenants set forth in the Lease, except that (i) the amount of the Base Rent stated in the Lease shall be adjusted as set forth below (provided, however, that Base Rent shall not be decreased); (ii) there shall be no free or abated rent periods, tenant improvement allowances or other concessions that may have been granted to Tenant at the beginning of the initial term hereof; and (iii) after exercise of Tenant's final extension term option, there shall be no further extension or renewal term options.
2. **Notice.** To extend the Lease, Tenant shall deliver written notice to Landlord not less than one hundred eighty (180) days prior to the expiration of the then-current Lease term. Time is of the essence of this Rider.
3. **Monthly Rent.** Landlord and Tenant shall make a good faith effort to determine and agree on the fair market value of rent for the Premises for the next term of the Lease.
 - a. ~~Failure to Agree on Rent.~~ If Landlord and Tenant are unable to agree on the fair market rental value for the Premises within thirty (30) days after Tenant gives notice to extend, they shall then have ten (10) days to select or appoint one real estate appraiser to determine the fair market value of rent for the Premises. All appraisers selected or appointed pursuant to this Rider shall be a Member of the American Institute of Real Estate Appraisers (M.A.I.) with at least ten (10) years experience appraising commercial properties in the commercial leasing market in which the Premises are located, or equivalent. The appraiser appointed shall determine the fair market rental value for the Premises within twenty (20) days of appointment, which determination shall be final, conclusive, and binding upon both Landlord and Tenant, and Base Rent shall be adjusted accordingly for the new term. The appraiser's fees and expenses shall be shared equally between the parties.
 - b. ~~Failure to Appoint One Appraiser.~~ If Landlord and Tenant cannot mutually agree upon an appraiser, then either party may give the other party written notice that it has selected and appointed an M.A.I. appraiser, complete with the name, address, and other identifying information about the appraiser. The party receiving such notice shall then have ten (10) days to select and appoint its own M.A.I. appraiser and respond by giving written notice to the other party, complete with the name, address, and other identifying information about the appraiser. If, however, the responding party fails to select and appoint an appraiser and give notice to the other party within ten (10) days, the determination of the appraiser first appointed shall be final, conclusive and binding upon both parties, and Base Rent shall be adjusted accordingly for the new term. The appraiser's fees and expenses shall be shared equally between the parties.

INITIALS: LANDLORD _____ DATE _____ TENANT MAS DATE 2/17/12
LANDLORD _____ DATE _____ TENANT ALS DATE 2/17/12



OPTION TO EXTEND RIDER
(Continued)

~~e. Method of Determining Rent. The appraisers appointed shall proceed to determine fair market rental value within twenty (20) days following their appointment. The conclusion shall be final, conclusive and binding upon both Landlord and Tenant. If the appraisers should fail to agree, but the difference in their conclusions as to fair market rental value is ten percent (10%) or less of the lower of the two appraisals, then the fair market rental value shall be deemed to be the average of the two, and Base Rent shall be adjusted accordingly for the new term. If the two appraisers should fail to agree on the fair market rental value, and the difference between the two appraisals exceeds ten percent (10%) of the lower of the two appraisals, then the two appraisers shall appoint a third M.A.I. qualified appraiser. If they fail to agree on a third appraiser within ten (10) days after their individual determination of the fair market rental value, either party may apply to the courts for the county in which the Premises are located, requesting the appointment of a third M.A.I. qualified appraiser. The third appraiser shall promptly determine the fair market rental value of the Premises. The parties shall then take the average of the two appraisals that are closest in value, which shall then constitute the fair market value, shall be final, conclusive and binding upon both parties, and Base Rent shall be adjusted accordingly for the new term. Each party shall pay the fees and expenses for its own appraiser. In the event a third appraiser must be appointed, his or her fees and expenses shall be borne equally by Landlord and Tenant.~~

INITIALS: LANDLORD _____ DATE _____ TENANT MS DATE 2/17/12
LANDLORD _____ DATE _____ TENANT SL DATE 2/17/12