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Washington State
Supreme Court

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION III
Cause No. 331750-III

Whitman County Superior Court
Cause No. 10-2-00293-4

GARRETT RANCHES, LLC
a Washington Limited Liability Company
Respondents

v.

LARRY HONN FAMILY, LLC
a Washington Limited Liability Company
Appellants

MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

LARRY HONN FAMILY, LLC. asks this court to accept review of the Court of Appeals, Division III's decision on reconsideration and parts of the decision addressed in petitioners' motion for reconsideration.

B. DECISION

The petitioner seeks review of parts of the Court of Appeals, Division III's decision filed on February 25, 2016 **(See Appendix "A")** and the court's Order Denying Motion for Reconsideration of parts of the decision filed March 29, 2016. **(See Appendix "B").**

On reconsideration the petitioner sought review of those parts of the February 25, 2016 decision as herein identified:

1. The Division III Panel Failed to Address the Petitioner's Second Assignment of Error Which is One of First Impression.

The issue presented to the Division III panel was:

ASSIGNMENT OF ERROR NO. 2: The trial court committed error by appointing Mr. Esser over the objection of the appellant

The court having appointed the neutral 3rd arbitrator pursuant to RCW 7.04A.110 (1) over the objection of the appellant is an issue of first impression for the court, which was not addressed in the Division 3 decision. The court appointed arbitrator

was suggested by the respondents and was a former law partner of the respondent. The petitioner strongly objected as that is clearly a violation of an appearance of fairness in the arbitration process. Washington case law does not address the court's appointment of a 3rd neutral arbitrator pursuant to RCW 7.04A.110 (1) over a party's objection.

2. There was Substantial Evidence to Support the Trial Court's Appointment of a 3rd Neutral Arbitrator.

The trial court found the respondent presented substantial evidence for the trial court to find that the parties arbitration method for appointing a 3rd neutral arbitrator had failed and to intervene pursuant to RCW 7.04A.110 (1).

3. A Declaration or Argument of Counsel is Not Evidence.

The declaration of counsel is not evidence. His unsupported statement that the arbitration panel was deadlocked is not sufficient evidence for the trial court to intervene in the arbitration process pursuant to RCW 7.04A.110 (1).

4. The e-mail Attachment to Mr. Ferguson's Declaration was a Further Statement from Mr. Ferguson and not the Arbitrators.

Counsel for the respondent did not attach any letter, e-mail or other supporting evidence from the arbitrators indicating they

were deadlocked or that the arbitration method had failed. The only supporting attachment was Mr. Fergusons's own e-mail in which he alone indicates the arbitrators were deadlocked. That is not substantial evidence or evidence of any kind from the arbitrators. This is not substantial or sufficient evidence for the trial court to intervene in the arbitration process pursuant to RCW 7.04A.110(1).

5. The Trial Court Was Uncertain If The Arbitrators Were Deadlocked Or If The Arbitration Method Had Failed.

The trial court did not know if the arbitrators were deadlocked and clearly indicated that fact but intervened in the arbitration process pursuant to RCW 7.04A.110 (1).

Page 23
21 As far as the court's designation of
22 Mr. Esser, when that issue was brought before me,
23 **really wasn't certain whether the two arbitrators that**
24 had been selected by the parties had been unable to
25 reach an agreement. I think the two attorneys had a
Page 24
1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.
(October 24, 3014 - VR23-24)
(Attached as Appendix "C")

The trial court's intervention by placing a time limit on the arbitrators to appoint a 3rd arbitrator or the court appointed arbitrator would serve as the 3rd neutral arbitrator was wrongful intervention in the arbitration process pursuant to RCW

7.04A.110(1).

6. The Trial Court Must Find The Arbitration Method Had Failed Prior To Intervening And Appointing An Arbitrator Under RCW 7.04A.110

This panel found at page 11 of its decision:

> "The trial court was uncertain whether the arbitrators were at an impasse and, therefore, gave them two additional weeks. Impliedly, the trial court found that if the arbitrators still could not agree on a nonparty arbitrator after two additional weeks, then they truly were at an impasse".
> **(See Appendix "A")**

The trial court nominated the respondents ex-law partner as the 3rd neutral arbitrator at the suggestion of the respondent. As a result, the arbitrator selected by the respondent had no incentive to select a truly neutral arbitrator due to the trial court's intervention. A copy of Appellant's Motion for Reconsideration is attached as **Appendix "D"**.

C. ISSUES PRESENTED FOR REVIEW

1. Does the trial court have authority to intervene in the arbitration process pursuant to RCW 7.04A.110 (1) without evidence of a failed method from the arbitrators.

2. Does a unsupported affidavit from counsel constitute substantial or sufficient evidence to support a motion under RCW 7.04A.110.

3. Can a trial court appoint a 3rd neutral arbitrator pursuant to RCW 7.04A.110(1) over an objection based upon a violation of an appearance of fairness.

D. STATEMENT OF THE CASE

This case involves an agreed three member arbitration panel pursuant to RCW 7.04A. Each party nominated an arbitrator and the two named arbitrators were to choose a 3rd neutral arbitrator. The respondent moved to have the court appoint a 3rd neutral arbitrator and nominated counsel's ex-law partner and social friend. The petitioner objected and the trial court over the petitioner's objection appointed the respondents recommended neutral arbitrator.

Division III held that substantial evidence was the standard of review for the appointment of an arbitrator pursuant to RCW 7.04A.110(1).

Division III satiated at page 11:

> "Here, a substantial evidence standard of review is appropriate because the trial court was required to weigh evidence in determining whether the party arbitrators were unable to select the nonparty arbitrator."

There was no evidence from the arbitrators of a deadlock,

Division III also stated at page 11:

> "The trial court was uncertain whether the arbitrators were at an impasse and, therefore, gave them two additional weeks."
> **(See Appendix "A")**

Division III found that it was appropriate for the trial court to intervene in the arbitration process even though the trial court was uncertain if the arbitrators were deadlocked.

The trial court gave the parties' arbitrators two weeks to appoint a 3rd neutral arbitrator or the court's named arbitrator would be appointed. This intervention is illusory as the trial courts appointed 3rd neutral arbitrator was the respondent counsel's ex-law partner and social friend. The respondents previously selected arbitrator would need do nothing and the arbitration panel would end up stacked with the respondent's named arbitrator and the court appointed (respondent's attorney's ex-law partner and social friend) neutral arbitrator.

Division III identified substantial evidence at pages 11-12:

> "Substantial evidence is defined as that quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *McCleary* v. *State,* 173 Wn.2d 477, 514,269 P.3d 227 (2012) (quoting *Sunnyside Valley Irrig. Dist.* v. *Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003))."
> **(See Appendix "A")**

After identifying what substantial evidence is Division III, at page 12, found that the court by intervening and giving the parties two additional weeks constituted substantial evidence.

"Here, a rational fair-minded person could be persuaded

> that the arbitrators were at an impasse given their disagreement on who should be the third arbitrator *and* their inability to agree after two additional weeks. We therefore conclude that substantial evidence supports the trial court's finding that the party arbitrators could not agree on a third arbitrator, and that the agreed method for selecting the third arbitrator had failed. Consequently, because RCW 7 .04A.IIO(1) authorized the trial court to select an arbitrator if the parties' agreed method failed, the trial court did not err in selecting an arbitrator."
> **(See Appendix "A")**

The evidence Division III referenced was the affidavit of respondent's counsel. (CP 31-33) **(See Appendix "E")**

Division III wrongly used the trial courts intervention and its effect to support the intervention as substantial evidence. The trial courts intervention guaranteed that the parties would not appoint another 3rd neutral arbitrator as all the respondent had to do was nothing to guarantee the appointment of the respondent counsel's e-law partner and social friend as the neutral arbitrator and thus stacking the panel.

Division III did not address the petitioner's second assignment of error and further failed to address the issue on reconsideration.

The court having appointed the neutral 3rd arbitrator pursuant to RCW 7.04A.110(1) over the objection of the appellant is an issue of first impression for the court, which was not addressed in the decision or on reconsideration.

Washington case law does not address the court's appointment of a 3rd neutral arbitrator pursuant to RCW 7.04A.110(1) over a party's objection.

The respondent in their motion for the appointment of a 3rd neutral arbitrator nominated three individuals as a "neutral arbitrator". (CP5) **(See Appendix "E")** The petitioner objected to respondent's recommended "neutral arbitrators" arguing it was unfair on its face to have a party's recommended "neutral arbitrator" be appointed. (CP35-36) **(See Appendix "E")**

The petitioner specifically objected at the October 3, 2014 hearing to any nominated 3rd neutral arbitrator by either party due to the chance of bias.

> Page 7
> 4 And they've also nominated a couple other
> 5 attorneys here in Whitman County. And I think, by
> 6 definition, you start having individuals nominated by
> 7 a party, they're not a -- they're not a neutral
> 8 arbitrator.
> (October 3, 2014 - VR7)
> **(See Appendix "C")**

The respondent had recommended Mr. Timothy Esser as the 3rd "neutral arbitrator" as just another attorney from Whitman County. (CP5) **(See Appendix "E")** The appellant was unaware of who Mr. Esser was at the time of his appointment or the social

relationship with the respondents counsel at the time of the appointment. (CP262) **(See Appendix "E")**

Judge Frazier admitted at the motion for reconsideration hearing that he was aware of the Esser and Libey partnership but did not disclose it. Judge Frazier stated:

> Page25
> 17 So, even though he was -- his name was
> 18 thrown out by one of the parties, I thought -- and he
> 19 was sitting right there -- "Yeah, perfect." And I
> 20 still think that that's the case here. I was aware
> 21 that -- I was aware but I don't think I thought about
> 22 the fact that he had previously been Mr. Libey's
> 23 partner ...
> (October 24, 20014 - VR26)
> **(See Appendix "C")**

Judge Frazier, later at the February 13, 2015 hearing, then indicates he didn't think about the prior partnership but should have:

> Page 35
> 14 ... At the time when I made the
> 15 appointment, didn't even think -- should have, should
> 16 have known -- "Yeah, he used to be in the Libey firm.
> 17 They were partners."
> (February 13, 2015 - VR35)
> **(See Appendix "C")**

At the October 24, 2014 reconsideration hearing Judge Frazier acknowledged that the appointment of Mr. Esser was clearly outside of the court's normal procedure by stating:

Page 24
4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such"
(October 24, 2014 - VR24)
(See Appendix "C")

But in this case the court did appoint Mr. Esser over the objection of the appellant. Why was this arbitration different from all the other cases Judge Frazier has in his court?

This interference by the court allowed the respondent's selected arbitrator, Mr. Reed to sit back, do nothing, and the respondent's nominated 3rd neutral arbitrator Mr. Esser would be appointed. Thus, successfully stacking the arbitration panel in favor of the respondent.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The decision by Division III is in conflict with decisions of the Supreme Court;

The arbitration at issue in this request for review was pursuant to RCW 7.04A. RCW 7.04A contains Washington's version of the uniform arbitration act (UAA). As an alternative form of dispute resolution, mandatory arbitration substitutes for litigation. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885,891-92,16 P.3d

617 (2001). "Arbitration is attractive because it is a more expeditious and final alternative to litigation." Boyd v. Davis, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). Further, arbitration is supposed to "avoid the formalities, the expense, and the delays ofthe court system." Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 766, 934 P.2d 731 (1997).

The underlying grounds for this request for review rest in the decision of Rodriguez v. Windermere Real Estate/Wall St., Inc., 142 Wn. App. 833, 841, 175 P.3d 604 (2008). Which held:

> "But, arbitration can substitute for litigation only if we have confidence in the ability of the arbitrators to make fair, unbiased decisions."

The R*odriguez, court went on to add* at 841:

> "The choice of arbitrators has serious implications because 'arbitrators are, when acting under unlimited authority, final judges of both the law and the facts, and ... no review will lie for a mistake in either.'"

In this case the decision of Division III disregards and ignores the intent and plain meaning of this court's decision in Rodriguez v. Windermere Real Estate/Wall St., Inc., supra.

The decision of Division III is not in conformity with the Rodriguez court when it finds an unsupported declaration of opposing counsel sufficient evidence to authorize the trial court to

appoint a 3rd neutral arbitrator. And that the results of the trial court intervention were supporting evidence for the authority to intervene.

The decision of Division III is not in conformity with the Rodriguez when the panel held that the appointment of the opposing counsels ex-law partner and social friend was acceptable as a 3rd neutral arbitrator.

Further, the decision of Division III is not in conformity with the Rodriguez when the panel refused to address the issue of first impression that the appointment of the opposing counsels ex-law partner and social friend was acceptable as a 3rd neutral arbitrator over the strenuous objection if the petitioner..

2. As to the issue of first impression the Decision of Division III failing to address an issue of first impression to the court raises an issue of substantial public interest that should be determined by the Supreme Court. The use of Arbitration is encouraged by the Washington courts. Parties to arbitration must have faith in the process that it will be fair and unbiased. The acts of the Whitman County Superior Court were clearly unfair and biased. The refusal of Division III to address the petitioner's Assignment of Error No. 2 in its decision or on reconsideration leaves the public with

uncertainty as to the arbitration process and the courts authority to intervene under RCW 7.04A.110 (1).

F. CONCLUSION

It is respectfully requested that this court accept the Petition for Review as the Division III failed to address a critical issue of first impression on issues that affect the fair and unbiased nature of the arbitration process and the trial courts authority to intervene under RCW 7.04A.110.

Respectfully submitted this 5th day of April, 2016.

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STATE OF WASHINGTON)
)ss
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The undersigned, being first duly sworn on oath, deposes and says:

I am competent to be a witness in the above entitled matter; on the 22 day of April, 2016, I mailed via first class mail, with postage prepaid thereon a copy of the forgoing addressed to the below named as follows:

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LORRIE HODGSON

APPENDIX

GARRETT RACHES, LLC
v.
LARRY HONN FAMILY, LLC

Court of Appeal, Division III
Case No. 338193-III

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Appendix A

FILED
February 25, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

GARRETT RANCHES LLC, a Washington Limited Liability Company,	)	No. 33175-0-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Appellant.	)	

LAWRENCE-BERREY, J. — The Larry Honn Family, LLC (the Honns) appeal the trial court's confirmation of an arbitration award in favor of Garrett Ranches, LLC (the Garretts). The Honns argue (1) the trial court erred when it appointed the nonparty arbitrator because the Garretts failed to establish that the parties' agreed method for appointing an arbitrator had failed, (2) the trial court erred in not vacating the arbitration award, given the prior professional and current social relationships between the nonparty arbitrator and the Garretts' counsel, (3) the trial court erred in not vacating the arbitration award for obvious error, and (4) the trial court erred in not recusing itself. We disagree

with the Honns' arguments and affirm.

FACTS AND PROCEDURE

In September 2010, the Honns and the Garretts entered into a "Cash Rent Farm Lease with Option to Purchase." Clerk's Papers (CP) at 312. Under the terms of the lease, the Honns leased certain farmland in Whitman County to the Garretts. The lease also contained an option for the Garretts to purchase the land. Under the terms of the lease:

> 15. Arbitration: In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all the powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County, Washington.

CP at 317.

Soon after the lease was entered, the Honns and the Garretts began to dispute its validity and terms. The matter was submitted to arbitration in 2010, where the arbitrators determined that both the lease and option were valid and enforceable. The matter was again submitted to arbitration in 2011, as the parties could not agree to the terms of the sale pursuant to the option. In an unpublished 2013 case, this court affirmed the trial

court orders confirming the arbitration awards in favor of the Garretts. *See Garrett Ranches LLC v. Larry Honn Family LLC*, noted at 177 Wn. App. 1014, 2013 WL 5658373. In the first two rounds of arbitration, Read Smith served as the Garretts' party arbitrator, David Gittins was the Honns' party arbitrator, and Dwayne Blankenship was the nonparty arbitrator.

This appeal stems from a further round of arbitration between the Honns and the Garretts. The subject of this round was whether the option to purchase was unenforceable for lack of consideration. Mr. Smith remained the Garretts' party arbitrator, but the Honns chose a new party arbitrator, Frank Gebhardt.

On September 25, 2014, the Garretts filed a motion with the trial court requesting that it appoint Dwayne Blankenship, the nonparty arbitrator in the prior arbitrations, as the third arbitrator for the current matter. The Garretts' counsel submitted a declaration that stated the party arbitrators had reached a deadlock on selection of the nonparty arbitrator. Attached to the declaration were e-mails where the Garretts' counsel told the Honns' counsel: "I am under the impression that our two arbitrators have not chosen a third arbitrator because of confusion on the issue." CP at 11. In the chain of response e-mails, the Honns' counsel did not deny a deadlock, but rather the two attorneys began to argue regarding Mr. Blankenship's qualifications. In response to the Garretts' motion,

the Honns asserted that the party arbitrators were not deadlocked, and that appointment of any nonparty arbitrator recommended by a party would be inherently biased.

The Honorable David Frazier presided over the October 3, 2014, motion hearing. Instead of appointing Mr. Blankenship (as suggested by the Garretts), Judge Frazier gave the party arbitrators two additional weeks to agree on a nonparty arbitrator. Absent an agreement by that time, Judge Frazier indicated that Timothy Esser would be appointed. Judge Frazier explained his choice of Mr. Esser on the record:

> I'm not appointing [Mr. Esser] because he has patience. I'm appointing him because I know him very well and he has no patience. And this is a case that needs someone that isn't going to put up with the garbage that this Court has been presented with, with frivolous motions and all of the procedural background.

Report of Proceedings (RP) (Oct. 3, 2014) at 14.

Soon after the October 3, 2014 hearing, the Honns discovered that in 2009, Mr. Esser left the predecessor firm of Libey & Ensley. Libey & Ensley represented the Garretts in the current matter. In addition, Gary Libey, of Libey & Ensley, drafted the lease at issue.

On October 14, 2014, the Honns moved for reconsideration of the appointment of Mr. Esser as the third neutral arbitrator, and also moved to disqualify Libey & Ensley from representing the Garretts. Judge Frazier presided over both motions on October 24,

2014. Judge Frazier denied the motion to disqualify Libey & Ensley, since the evidence the Honns sought from Mr. Libey was obtainable through other sources. Judge Frazier also noted that it was highly unlikely Mr. Libey would be called as a witness since there was a high possibility "[the] case is going to get thrown out of arbitration if the law is applied," and "I think the issue's res judicata here." RP (Oct. 24, 2014) at 22-23.

As for the motion to reconsider the appointment of Mr. Esser, Judge Frazier noted that although he was uncertain that the party arbitrators were deadlocked, they had not selected a third neutral arbitrator by the deadline. He did not envision a conflict based on Mr. Esser serving as the third neutral arbitrator, because since the time the partnership between Mr. Esser and Mr. Libey ended, both attorneys had represented opposing sides and "had pretty good knock-down, drag-out fights" in Judge Frazier's courtroom. RP (Oct. 24, 2014) at 26. However, Judge Frazier nominated three alternatives in the event Mr. Esser decided to recuse himself from the arbitration. Mr. Esser officially became the nonparty arbitrator on October 17, 2014.

In early November 2014, Mr. Esser made the following mandatory arbitrator disclosures:

> I know of no facts which would affect my impartiality. I have never had contact in any manner with either the Garretts or Mr. & Mrs. Larry Honn. As you know, I was partners for many years with Mr. Libey. And during that time, approximately eight years ago, I represented Larry Honn,

> Jr. on a personal matter, it had nothing to do with his family's business interests.

CP at 222. In mid-November 2014, the Honns' counsel sent a letter to Mr. Esser that requested he step down as the nonparty arbitrator because "[i]t has come to my attention by way of an affidavit that you and Mr. Libey may still have an ongoing friendship which could influence your decisions in the pending arbitration." CP at 224. The affidavit, from an individual not involved in the litigation, stated "I observed Mr. Libey and Mr. Esser walking down the street together," and "I see them, along w/Judge Fraiser [sic], regularly frequenting the local restaurants." CP at 225. Mr. Esser refused to recuse himself as the nonparty arbitrator.

The arbitration panel issued an award in favor of the Garretts on January 23, 2015.[1] Mr. Esser authored the arbitration award. The Garretts' arbitrator joined with Mr. Esser, and the Honns' arbitrator wrote a dissent. The arbitration award concluded that "[t]he Garretts may proceed with their purchase of the property for the cash price set forth in their Lease/Option Agreement and upon the terms set forth in the second arbitration award." CP at 146. Concerning consideration for the option, the award stated "we have

[1] The Honns' arbitration summary judgment theory was that they were entitled to withdraw the option before it was accepted, as it contained no independent consideration. The Garretts' arbitration summary judgment theory was that res judicata barred the Honns' action, and even if it did not, the mutual promises, rights, and obligations

multiple promises relating to the lease and to the option which combined equal one, integrated contract. Contrary to the Honns' argument, Garretts did give consideration for the option, and they exercised the option consistent with the terms of the parties' agreement." CP at 143. The award also indicated that res judicata applied as "[t]he Honns could have and should have raised their consideration argument at the earlier arbitrations." CP at 145.

The Garretts moved the trial court to have the arbitration award confirmed, while the Honns sought to have the award vacated. The Honns argued that the award should be vacated because Mr. Esser was not neutral, violated the appearance of fairness doctrine, failed to consider evidence in support of the Honns' position, and misapplied Washington law. At the same time, the Honns moved to disqualify Judge Frazier under the appearance of fairness doctrine, arguing that he was biased against the Honns, impermissibly commented on the evidence during a prior hearing by suggesting res judicata would end the arbitration quickly, and helped stack the arbitration panel against them.

The Honns submitted the same affidavit that they unsuccessfully used in the attempt to get Mr. Esser to recuse himself as the nonparty arbitrator. Although the

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contained in the lease served as consideration for the option.

affidavit claimed that Judge Frazier frequents restaurants with Mr. Libey and Mr. Esser, Judge Frazier said that the affiant "better check her facts here because there is a lot of inaccuracies with respect to that." RP (Feb. 13, 2015) at 38-39. Judge Frazier explained that he has had lunch with Mr. Libey before, but it is common in the legal community for judges to have meals with lawyers, especially in small communities like Whitman County. In fact, the very same day as the hearing, Judge Frazier was having lunch with a group of lawyers, and Mr. Libey came into the restaurant to talk to a retired judge. Judge Frazier denied the Honns' motion to recuse himself and confirmed the arbitration award.

The Honns appeal.

ANALYSIS

Chapter 7.04A RCW contains Washington's version of the uniform arbitration act (UAA). As an alternative form of dispute resolution, mandatory arbitration substitutes for litigation. *See Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617 (2001). "Arbitration is attractive because it is a more expeditious and final alternative to litigation." *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). Arbitration is supposed to "avoid the formalities, the expense, and the delays of the court system." *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 766, 934 P.2d 731 (1997). "But, arbitration can substitute for litigation only if we have confidence in the ability of the

arbitrators to make fair, unbiased decisions." *Rodriguez v. Windermere Real Estate/Wall St., Inc.*, 142 Wn. App. 833, 841, 175 P.3d 604 (2008).

"The choice of arbitrators has serious implications because 'arbitrators are, when acting under unlimited authority, . . . final judges of both the law and the facts, and . . . no review will lie for a mistake in either.'" *Rodriguez*, 142 Wn. App. at 841 (internal quotation marks omitted) (quoting *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 785, 812 P.2d 500 (1991)). Consequently, RCW 7.04A.110(2) provides that "[a]n arbitrator who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as a neutral arbitrator."

Freedom of contract allows parties to choose the method used to appoint the arbitrator(s). Under the tripartite arbitration process, "each party designates one arbitrator, and these two party arbitrators then agree on a third arbitrator who is presumably neutral." *Perez*, 85 Wn. App. at 766. Although "[i]t is widely acknowledged that the party arbitrators serving on a tripartite panel may not be completely neutral," the third arbitrator must be neutral. *Id.*

1. Whether the trial court erred in appointing the nonparty arbitrator

The Honns argue that the trial court erred when it appointed the nonparty arbitrator because there was insufficient evidence that the parties' method for choosing the arbitrator had failed. RCW 7.04A.110(1) provides in relevant part:

> If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If . . . the agreed method fails, . . . the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.

The Honns argue that we should apply de novo review to whether the trial court properly applied RCW 7.04A.110(1) to the facts presented. They argue that de novo review is appropriate where the record below is in written form because the reviewing court is in as good of a position as the trial court to make the proper determination. The Garretts agree, and note that de novo review applies to a trial court's decision on a motion to compel arbitration. We disagree, and take this opportunity to clarify when de novo review is, and is not, the appropriate standard when reviewing a trial court's decision based wholly on documentary evidence.

We recently held:

> Appellate courts generally review a superior court's findings of fact for substantial evidence. This is true even where the trial court's findings are based entirely on documentary evidence, provided that the trial court was called on to reconcile conflicting evidence. However,

> "where . . . the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo."

Goodeill v. Madison Real Estate, ___ Wn. App. ___, 362 P.3d 302, 306 (2015) (quoting *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014)).

Here, a substantial evidence standard of review is appropriate because the trial court was required to weigh evidence in determining whether the party arbitrators were unable to select the nonparty arbitrator. In their motion for the trial court to appoint Mr. Blankenship as the nonparty arbitrator, the Garretts argued that the arbitrators could not agree on the nonparty arbitrator because their arbitrator thought Mr. Blankenship should be appointed, whereas the Honns' arbitrator wanted to appoint Brian Balch. The Honns disagreed, and argued that both arbitrators were still working toward appointing a third arbitrator. The trial court was uncertain whether the arbitrators were at an impasse and, therefore, gave them two additional weeks. Impliedly, the trial court found that if the arbitrators still could not agree on a nonparty arbitrator after two additional weeks, then they truly were at an impasse.

Substantial evidence is defined as that quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *McCleary v. State*, 173 Wn.2d 477,

514, 269 P.3d 227 (2012) (quoting *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). Here, a rational fair-minded person could be persuaded that the arbitrators were at an impasse given their disagreement on who should be the third arbitrator *and* their inability to agree after two additional weeks. We therefore conclude that substantial evidence supports the trial court's finding that the party arbitrators could not agree on a third arbitrator, and that the agreed method for selecting the third arbitrator had failed. Consequently, because RCW 7.04A.110(1) authorized the trial court to select an arbitrator if the parties' agreed method failed, the trial court did not err in selecting an arbitrator.

2. Whether the trial court erred in confirming the arbitration award[2]

The Honns argue that the trial court erred in denying their motion to vacate the arbitration award because the nonparty arbitrator was biased, and also failed to make the necessary mandatory disclosures. The party challenging the arbitration award has the burden of showing grounds for vacating the award. *Hanson v. Shim*, 87 Wn. App. 538, 546-47, 943 P.2d 322 (1997). Review of an arbitrator's conduct for evident partiality,

[2] The Honns' assign error both to the trial court's denial of their motion for reconsideration of the appointment of Mr. Esser and the trial court's denial of their motion to vacate the arbitration award. Because the Honns' arguments relating to the former assigned error are subsumed in their arguments relating to the latter assigned error, we address the latter only.

along with compliance with the statutory arbitrator disclosures, is a question of law that courts review de novo. *See S&S Constr., Inc. v. ADC Props., LLC*, 151 Wn. App. 247, 258-60, 211 P.3d 415 (2009).

The trial court must vacate an arbitration award if it determined there is "[e]vident partiality by an arbitrator appointed as a neutral." RCW 7.04A.230(1)(b)(i). In addition, an arbitrator's failure to make a mandatory arbitrator disclosure under RCW 7.04A.120 is grounds to vacate an arbitration award.

A. Evident partiality

Washington's UAA does not define "evident partiality." "'Evident partiality', like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms.'" *Schreifels v. Safeco Ins. Co.*, 45 Wn. App. 442, 445, 725 P.2d 1022 (1986) (quoting *Int'l Bhd. of Elec. Workers, Local 323 v. Coral Elec. Corp.*, 104 F.R.D. 88, 89 (S.D. Fla. 1985)). Evident partiality exists where the arbitrator has an actual conflict of interest. *See S&S Constr.*, 151 Wn. App. at 258-59. However, an arbitrator's prior employment 25 years earlier with a predecessor law firm, accompanied with an appropriate disclosure, is "far too remote, and commonplace to be considered a conflict." *Id.* at 259.

Although the Honns argue that the judicial appearance of fairness doctrine applies to arbitrators, "[t]he goals of the arbitration process would not be served if arbitrators and judges were held to the same high standard." *Perez*, 85 Wn. App. at 766. If the arbitrator discloses any potential conflicts, the mere appearance of impropriety is not enough to establish evident partiality. "'To vacate an arbitration award where nothing more than an appearance of bias is alleged would be "automatically to disqualify the best informed and most capable potential arbitrators."'" *S&S Constr.*, 151 Wn. App. at 259 n.13 (quoting *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981)).

Here, Mr. Esser had previously been a partner of the predecessor firm to Libey & Ensley, the firm that represented the Garretts in the arbitration. Mr. Esser's association with the firm ended roughly five years before he was appointed as the nonparty arbitrator. Taking the safe route, Mr. Esser disclosed his prior partnership with Mr. Libey. The record does not indicate that Mr. Esser and attorneys from Libey & Ensley recently served as co-counsel on other matters or referred cases to each other. To the contrary, Judge Frazier indicated that since the time the partnership dissolved, Mr. Esser and Mr. Libey have "had pretty good knock-down, drag-out fights and it hasn't affected their ability to advocate against one another very zealously." RP (Oct. 24, 2014) at 26. Mr. Esser's prior membership in Libey & Ensley does not present an actual conflict and, therefore,

does not establish evident partiality. Such a relationship, especially in a rural community, is far too commonplace to be considered an actual conflict for an ethical arbitrator. *See S&S Constr.*, 151 Wn. App. at 259.

B. Nondisclosure of social relationship

The Honns also argue that Mr. Esser failed to disclose his continuing social relationship with Mr. Libey. In order to prevent an arbitrator from serving when a conflict is present, RCW 7.04A.120 requires certain mandatory arbitrator disclosures. Under RCW 7.04A.120(1), the arbitrator must disclose "known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding." These include a "financial or personal interest in the outcome of the arbitration proceeding," and an "existing or past relationship with any of the parties [or] their counsel or representatives." RCW 7.04A.120(1)(a), (b).

Under the case law "'[n]ot every relationship is a disclosable relationship.'" *Hanson*, 87 Wn. App. at 547 (quoting *St. Paul Ins. Cos. v. Lusis*, 6 Wn. App. 205, 209, 492 P.2d 575 (1971)). "A general duty to disclose exists when the relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality." *Id.* This inference exists "when an arbitrator has had a relatively recent association with a law firm representing a party and a continuing relationship with the

firm on other matters." *Id.* (citing *Lusis*, 6 Wn. App. at 213 ("Relatively recent, although prior, professional association with *counsel* for one of the parties as a member of the same law firm, at least when coupled with a continuing and present 'co-counsel' arrangement on other matters, is a necessarily disclosable circumstance.")). However, "[j]ust as a given circumstance or relationship may be too trivial to require disclosure, so also open declaration or public knowledge of the circumstance or relationship might be such as to negate the necessity to disclose." *Lusis*, 6 Wn. App. at 214.

In *Hanson*, Division One held that the arbitrator did not need to disclose that approximately 20 years ago, the arbitrator was an associate of the law firm representing a party. *Hanson*, 87 Wn. App. at 546-48. Further, the *Hanson* court noted that prejudice was not shown from the nondisclosure because the party "d[id] not claim that the prior association had any actual impact on the award; rather it argue[d] that the nondisclosure limited its right to choose a neutral arbitrator." *Id.* at 548.

Similarly, in *Lusis*, Division Two held that an arbitrator did not need to disclose that he was on the board of the Washington State Trial Lawyers Association with a party's attorney. *Lusis*, 6 Wn. App. at 215. The appellant argued prejudice based on the "undisclosed personal and professional relationships," despite the fact that the arbitrator and the other side's attorney had never practiced together and were commonly

adversaries. *Id.* at 206-07. The court concluded that the relationship did not need to be disclosed, as it was reasonable for the arbitrator to assume that the parties knew of the connection based on the membership of the Washington State Trial Lawyers Association being publicly listed. *Id.* at 214-15.

Even if the affidavit claiming that Mr. Esser, Mr. Libey, and Judge Frazier frequent restaurants together was reliable, Mr. Esser was under no obligation to disclose a fact that was allegedly public knowledge. *See id.* Moreover, the Honns have not established that any alleged partiality or failure to disclose by Mr. Esser prejudiced them by impacting the arbitration award. *See S&S Constr.*, 151 Wn. App. at 259 (the proponent must "show prejudice resulting from those relationships"); *see also Hanson*, 87 Wn. App. at 548 (prejudice is established only if it is shown that the award was affected). Prior professional, and even current, social relationships between attorneys in a small community do not equate arbitrator partiality or an unwillingness of an attorney to advocate for a client. As Judge Frazier noted, Mr. Esser and Mr. Libey "had pretty good knock-down, drag-out fights" in his courtroom prior to the arbitration at issue. RP (Oct. 24, 2014) at 26.

In sum, neither Mr. Esser's disclosed prior membership in Libey & Ensley nor Mr. Esser's undisclosed social relationship with Mr. Libey establish a sufficient basis for vacating the arbitration award.

3. Whether obvious error exists in the arbitration award

The standards of reviewing arbitration awards are well-stated in *S&S Construction*:

> Washington public policy strongly favors finality of arbitration awards. Judicial review of arbitration awards is strictly limited to the grounds set forth by the Washington uniform arbitration act, chapter 7.04A RCW. Similarly, appellate review of arbitration proceedings is restricted to grounds identified in the act. An appellate court limits review of an arbitrator's award to that of the court that confirmed, vacated, modified, or corrected that award.

S&S Constr., 151 Wn. App. at 254 (citations omitted).

This court reviews a trial court's decision to confirm or vacate an arbitration award de novo. *See Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 903-04, 359 P.3d 884 (2015).

The Honns argue that the trial court should have vacated the award because it was contrary to law, in that material facts precluded summary dismissal of the lack of consideration issue, and res judicata should not apply because they timely asserted the consideration issue once the Garretts attempted to exercise the option to purchase.

In *Broom v. Morgan Stanley DW, Inc.*, 169 Wn.2d 231, 237, 236 P.3d 182 (2010), the court held that former RCW 7.04.160(4) (1943)[3] authorized a reviewing court to vacate an award for a facial legal error. Former RCW 7.04.160(4) allowed an award to be vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted to them was not made." In holding that this subsection allowed vacatur for facial legal errors, it emphasized that the legislature had not sought to amend the statute despite knowing of its historical judicial construction. *Id.* at 238. We note that the statute has since been amended, and its current provision more narrowly provides: "Upon motion of a party to the arbitration proceeding, the court shall vacate an award if . . . [a]n arbitrator exceeded the arbitrator's powers." RCW 7.04A.230(1). The current statute omits "or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made." The omission of the broader language may have been intentionally done to encourage arbitrators to provide reasoned written explanations for their awards, without concomitant concern that reviewing courts would vacate them. The parties have not briefed the continued viability of the rule that allows review of facial legal errors, so we do not further address the issue, and assume without deciding, that the rule remains viable.

[3] Repealed by the LAWS OF 2005, ch. 433, § 50 (eff. Jan. 1, 2006).

The facial legal error standard is a "very narrow ground for vacating an arbitral award," furthering the "purposes of arbitration" while preventing "obvious legal error." *Broom*, 169 Wn.2d at 239. "[C]ourts may not search the arbitral proceedings for *any* legal error; courts do not look to the merits of the case, and they do not reexamine evidence." *Id.* Therefore, "[r]arely is it possible to have an arbitration award vacated for [obvious] error of law on the face of the award." *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 382, 260 P.3d 220 (2011). The classic example of an obvious legal error is "'where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.'" *Id.* at 389 (quoting *Fed. Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000)).

Here, Mr. Esser authored an eight-page arbitration decision that awarded the Garretts the right to enforce the option to purchase the Honns' property. When reviewing for obvious legal error, it is proper for us to review the written arbitration decision itself. *See id.* ("Where a final award sets forth the arbitrator's reasoning along with the actual dollar amounts awarded, any issue of law evident in the reasoning may also be considered as part of the face of the award.").

The eight-page award granted summary judgment to the Garretts based on (1) mutual promises in the lease constituting consideration for the option to purchase, and (2) res judicata as the Honns should have raised their consideration argument at the earlier arbitrations. Mr. Esser's award does not contain any obvious legal errors. His conclusion that the mutual promises in the lease constitute consideration for the option is not an obvious error of law. *See Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 318-20, 481 P.2d 17 (1971). Moreover, contrary to what the Honns argue on appeal, and as Mr. Esser's award reasoned, res judicata bars affirmative defenses. *See Symington v. Hudson*, 40 Wn.2d 331, 338, 243 P.2d 484 (1952) ("[W]here a party has had a full and fair opportunity to make all of the defenses at his command, and he elects not to disclose his claim . . . the doctrine of *res judicata* applies and he cannot later assert it."). Consequently, there is no obvious legal error, and the trial court did not err in confirming the award issued by the arbitration panel.

4. Whether the trial court erred in not recusing itself[4]

The Honns also argue that Judge Frazier should have recused himself, and that he violated the appearance of fairness doctrine. "Washington's appearance of fairness

[4] The Honns assign error both to the trial court's appointment of Mr. Esser, and Judge Frazier's refusal to recuse himself. Because both assigned errors depend on the same facts and the appearance of fairness doctrine, we address the latter only.

doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial." *Tatham v. Rogers*, 170 Wn. App. 76, 80, 283 P.3d 583 (2012). In the same vein, the Code of Judicial Conduct (CJC) requires "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC Rule 2.11(A) (asterisk omitted).

> The issue for a judge in considering whether the appearance of fairness doctrine may be or has been violated is not whether he or she personally and in good faith views a family relationship, for example, or a financial interest, or a fiduciary relationship, to be of little significance. It is whether, in light of the relationship, a reasonably prudent and disinterested person would conclude that all parties can or did obtain a fair, impartial, and neutral hearing.

Tatham, 170 Wn. App. at 104.

The burden of establishing an appearance of fairness violation is on the proponent, who must "provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice." *State v. Witherspoon*, 171 Wn. App. 271, 289, 286 P.3d 996 (2012), *aff'd*, 180 Wn.2d 875, 329 P.3d 888 (2014). "The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough." *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 24, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016, 327 P.3d 55 (2014). This court reviews a trial judge's recusal decision for

abuse of discretion—whether "the decision was manifestly unreasonable or based on untenable reasons or grounds." *Id.* at 23-24.

A. Social relationship between opposing counsel and judge

It may be ill advised for a judge to eat lunch with an attorney who currently has a case in front of the judge, but a reasonable person would not question the judge's impartiality when there is no evidence that the case was discussed. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340-41, 54 P.3d 665 (2002) (no violation of appearance of fairness doctrine when judge inadvertently had dinner with two named members of a class action lawsuit and "neither the judge nor the [two class members] discussed the case"). A personal relationship between the judge and an attorney in a case, standing alone, is not enough to warrant recusal. *See Tatham*, 170 Wn. App. at 103-04; *see also Kok*, 179 Wn. App. at 25.

Here, the Honns submitted an affidavit that implies Judge Frazier, Mr. Libey, and Mr. Esser eat lunch together almost every day. However, Judge Frazier stated on the record that the affiant "better check her facts." RP (Feb. 13, 2015) at 38. Judge Frazier admitted to having lunch with Mr. Libey before, but pointed out that lawyers and judges sometimes eat meals together. It is an unavoidable fact of litigation, especially in rural communities, that a judge is a member of the legal community and may have ongoing

social relationships with attorneys coming before the court. Given the paucity of evidence that Judge Frazier had any greater of a social relationship with Mr. Libey than he had with other attorneys, and the absence of evidence that Judge Frazier and Mr. Libey discussed the pending case, we hold that Judge Frazier did not abuse his discretion in denying the Honns' motion that he recuse himself on this basis.

B. Comments concerning case viability

The Honns also argue that Judge Frazier violated the appearance of fairness doctrine by commenting that the arbitration should be dismissed quickly if res judicata is applied. Although a violation of the appearance of fairness doctrine may be present when the trial judge impermissibly comments on the evidence or case, such comments are harmless when they are not conveyed to the finder of fact. *See Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 318-20, 284 P.3d 749 (2012).

First, the Honns take Judge Frazier's comment out of context to make it sound like he originated the res judicata idea. Instead, the Garretts, in their motion to have Mr. Blankenship appointed the neutral arbitrator, raised the defense of res judicata as a basis for having a person knowledgeable about the case history appointed. Further, Judge Frazier's comment that res judicata would likely dispose of the arbitration was made to explain his decision to not disqualify Mr. Libey, since dismissal on that summary basis

would make Mr. Libey's testimony unnecessary. Moreover, Judge Frazier's res judicata comment was not communicated to a trier of fact, and thus the Honns were not prejudiced. *See id.* at 320.

The Honns have failed to produce sufficient evidence to establish a violation of the appearance of fairness doctrine, as "mere speculation is not enough." *Kok*, 179 Wn. App. at 24. Despite the Honns' assertions of prejudice, "a reasonably prudent and disinterested person would conclude that all parties received a fair, impartial, and neutral hearing." *Id.* at 23. Judge Frazier's decision not to recuse himself was not manifestly unreasonable or based on untenable grounds. *See id.* at 23-24.

5. Whether the Garretts should be awarded reasonable attorney fees on appeal

On appeal, the Garretts request an award of reasonable attorney fees pursuant to RAP 18.1 and a provision in the farm lease. Paragraph 16 of the farm lease provides:

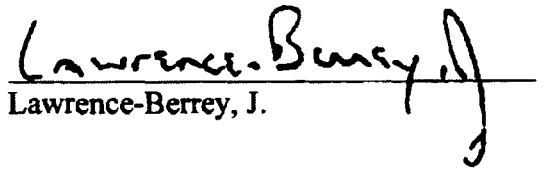
> 16. Litigation: In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

CP at 317. Under RCW 4.84.330, the prevailing party is entitled to attorney fees for actions on a lease, if the lease provides for attorney fees. A party may request reasonable attorney fees on appeal under RAP 18.1. "A contractual attorney fee provision authorizes

an award of fees to the prevailing party on appeal." *Kenneth W. Brooks Trust A.v. Pac. Media, LLC*, 111 Wn. App. 393, 401, 44 P.3d 938 (2002). The Garretts are the prevailing party on appeal. We therefore award them their reasonable attorney fees, subject to their compliance with RAP 18.1.

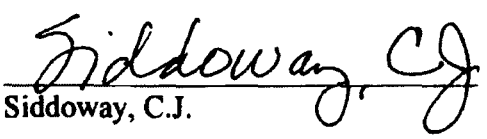
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

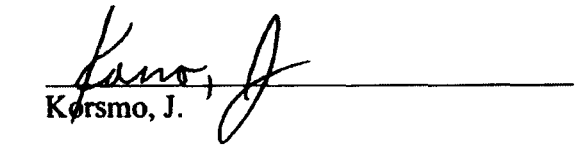


Lawrence-Berrey, J.

WE CONCUR:



Siddoway, C.J.



Korsmo, J.

Appendix B

FILED
March 29, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

GARRETT RANCHES LLC, a Washington Limited Liability Company,	)	**No. 33175-0-III**
Respondent,	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
v.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of February 25, 2016, is denied.

PANEL: Judges Lawrence-Berrey, Korsmo, and Siddoway

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

Appendix C

In The Matter Of:

Garrett Ranches v.

Honn Family

Verbatim Report of Proceedings

Vol. I

October 3, 2014

Snover Court Reporting, Inc.

505 N. Argonne Rd., Ste A 201

Spokane Valley, WA 99212

Original File 100314 Hearing in Garrett v.txt

Min-U-Script® with Word Index

1 SUPERIOR COURT OF WASHINGTON

2 COUNTY OF WHITMAN

3

4 GARRETT RANCHES, LLC, a
Washington limited liability
5 company,

6 Plaintiff,

7 v. CASE NO. 10-2-00293-4
APPEAL NO. 331750

8 LARRY HONN FAMILY, LLC, a
company,

9

Defendant.

10

11

12 VERBATIM REPORT OF PROCEEDINGS
October 3, 2014
13 Pages 1 to 15

14

15

16

17 Michael S. Kuplack, CCR

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1 A P P E A R A N C E S

2

3 BEFORE JUDGE DAVID FRAZIER

4

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1 (8:31 a.m.)
2 THE COURT: Garrett Ranches, LLC,
3 represented by Attorney Will Ferguson, against the
4 Larry Honn Family, LLC, Gregory Lockwood representing
5 Larry Honn Family. And today, this is on for a motion
6 brought by the plaintiffs for appointment of a third
7 arbitrator, it sounds like. There's a stalemate over
8 the appointment of a third arbitrator by the two
9 arbitrators that are on board. So, --
10 MR. FERGUSON: Thank you, Judge.
11 THE COURT: -- take it away.
12 MR. FERGUSON: Your Honor, we're here to
13 break the deadlock on the appointment of the third and
14 final arbitrator. Under the cash rent farm lease
15 between the parties, there is a set procedure for the
16 determination of the arbitration panel. Each party
17 appoints their own arbitrator and then the two
18 arbitrators appoint a third arbitrator. According to
19 the Arbitration Act, if there is a chosen method for
20 appointment of the final arbitrator, then the court
21 may appoint that third and final arbitrator, and we
22 ask that this court appoint Mr. Dwayne Blankenship.
23 And there are two primary reasons that
24 Mr. Blankenship should be appointed. The first is
25 that he has very intimate knowledge of the facts in

1 this case. He was there through the first two
2 arbitration hearings. He's been a part of the three
3 arbitration rulings; that is, the first arbitration
4 award, the second one, and the supplemental award.
5 So, we ask that this court appoint him because he
6 knows the facts.
7 Now, the second is that he knows the
8 issues that have been presented. We've decided the
9 issue of consideration, whether there was adequate
10 consideration to support the option. We've decided
11 exactly what the parameters of the lease are, where
12 the boundaries of this lease include. For example,
13 there is a certain part of the ranch that was excepted
14 from the lease. Mr. Blankenship ruled in Honn
15 Family's favor and said, "Well, we're going to set
16 that aside. We don't know that the parties really
17 intended to include that in the lease and the option."
18 So, those are the two primary reasons why
19 we ask this court to appoint Mr. Blankenship.
20 Obviously, there are other things, such as the issues
21 that we've presented for arbitration are basically
22 factual issues. They're not legal issues. We don't
23 need -- We don't necessarily need someone who is a
24 lawyer or former lawyer to be the third and final
25 arbitrator. What we need is somebody with good common

1 sense, with some stability, with some patience,
2 especially for this case, to make a decision. And
3 Mr. Blankenship has made decisions based upon legal
4 issues before, and we did have legal issues throughout
5 the first and second arbitrations.
6 If the Court does not approve
7 Mr. Blankenship, then we ask that a local attorney,
8 someone from Whitman County, be appointed as the third
9 and final arbitrator. But, again, our first
10 preference is Mr. Blankenship.
11 Now, I know that the Honns' position is
12 that there has not been any evidence of a deadlock,
13 but we wouldn't be here if there weren't a deadlock.
14 We'd like to get this taken care of. We'd like to
15 have arbitration sometime this year; we'd like to get
16 this wrapped up this year. And by all indications,
17 there is a deadlock. We've selected Dwayne
18 Blankenship and the Honns have selected a guy by the
19 name of Balch (balch) or Balch (bawlch), I don't know
20 how you pronounce his last name. He's a Spokane
21 attorney.
22 So, we ask this court appoint Dwayne
23 Blankenship, and I can prepare an order to that effect
24 today.
25 THE COURT: Mr. Lockwood?

1 MR. LOCKWOOD: Thank you, your Honor.
2 Judge, as was indicated, there is a mechanism for
3 appointing the third arbitrator in this case; that is,
4 the arbitrator that Mr. Read (sic), who was chosen by
5 the Garretts, and Mr. Gebhardt, the arbitrator that
6 the Honns have picked, are to come together and they
7 are to decide on who the third, neutral arbitrator
8 is. I want to stress that. It's the third, neutral
9 arbitrator.
10 At this point, Judge, you have no evidence
11 in front of you that the arbitrators are in a
12 deadlock. I have no indication of that. Now, I'm
13 still under the impression that the two arbitrators
14 are trying to decide who the third arbi- -- third,
15 neutral arbitrator will be. And until the arbitrators
16 give us some indication that they're in deadlock, I
17 think we're way premature.
18 The fact that I would not agree with
19 Mr. Ferguson's request to appoint Mr. Blankenship is
20 kind of irrelevant because we have a mechanism;
21 that's, the arbitrators are to pick that third,
22 neutral party. And setting that aside, they've asked
23 me that Mr. Blankenship be appointed, and we said, no,
24 we don't want to have Mr. Blankenship; he wouldn't be
25 someone that we would want as a third, neutral

1 arbitrator. But yet they're asking to have the Court
2 appoint someone that we've already rejected. In
3 essence, they want to pick both arbitrators.
4 And they've also nominated a couple other
5 attorneys here in Whitman County. And I think, by
6 definition, you start having individuals nominated by
7 a party, they're not a -- they're not a neutral
8 arbitrator. But as we set today, Judge, I don't
9 think -- I think we've put the cart before the horse
10 here, because there is no evidence before this court
11 from the arbitrators that they're deadlocked. As far
12 as I know, as I indicated, they're still negotiating
13 to say who that third arbitrator is. And what they're
14 attempting to do is interrupt that process and have
15 the Court jump in, and that's just premature.
16 Number two, I have another issue that I
17 want to raise, that I think is -- may affect this
18 first issue, and I'd ask for the Court's guidance and
19 for some direction on this. If you would, I would
20 like the Court to take a look at Exhibit Number 2 to
21 the memorandum that was filed in this case. It's a
22 letter from Mr. Libey. I don't know if you have that
23 in front of you. But on page 3 of that, of that
24 letter --
25 By the way, this letter was a letter that

1 went to the prior arbitrators. And I notice that
2 Mr. Read, their arbitrator, actually lives in
3 Spokane. Mr. Gebhardt's in Spokane. So, it just
4 seems reasonable that we -- and if we can find a
5 Spokane attorney to work, it would be nice to have all
6 the arbitrators in the same location.
7 But if you would, I want you to turn to
8 page 3 of that letter. And in the third paragraph in
9 here, it says that Mr. Libey was the individual who
10 drafted this option. That being the case, I'm going
11 to depose Mr. Libey. Mr. Libey is going to be a
12 witness in this case.
13 Under the Washington Rules of Professional
14 Conduct, as a witness in a legal proceeding -- And
15 they knew that he'd probably be a witness in this,
16 especially when I saw this. They knew he's going to
17 be a witness. Under Washington RPCs, they have an
18 obligation to withdraw from the case, Mr. Libey and
19 the firm. And I will be bringing a motion to have
20 him -- the firm disqualified based on the fact that
21 they are going to be witnesses and he drafted that
22 option and that option is the specific issue at issue
23 in this arbitration.
24 And what I'd like to do is give them an
25 opportunity to withdraw from the case and have another

1 counsel appointed. And I think we should at least
2 give the new counsel an opportunity to maybe appoint a
3 different arbitrator than Mr. Read , if he so chooses.
4 So, I kind of -- I wanted to get some guidance from
5 the Court on that issue. But --
6 Now, for their motion, there's nothing
7 before the Court today that the arbitrators are
8 deadlocked. All we have is a declaration from
9 Mr. Ferguson, and Mr. Ferguson's not one of the
10 arbitrators. Therefore, I'd request that their motion
11 be denied and, just as has been going on with this
12 since this -- these parties got together, everyone,
13 you know, asks for attorney fees, we ask for attorney
14 fee, basically an hour for coming down, an hour for
15 going back, and, you know, I'm not even going to ask
16 for time for here in court, Judge.
17 THE COURT: All right. Anything further?
18 MR. FERGUSON: Very briefly, your Honor.
19 The first is that there is argu- -- there is argument
20 from Mr. Lockwood that there is no evidence of a
21 deadlock. However, if the Court looks at page 2 of
22 Exhibit 1 to my declaration, there is an e-mail to the
23 effect that the arbitrators have not chosen a third
24 part. The people who were cc'd on that e-mail
25 included Mr. Smith, Mr. Gebhardt, and my client and

1 then Mr. Lockwood's secretary. So, if there -- if
2 there were any objection by the arbitrators saying,
3 "Oh, no, Mr. Ferguson, you're under the wrong
4 impression. We're still working on it," there wasn't
5 an e-mail to that effect. So, those arbitrators were
6 included on that e-mail and it's still my
7 understanding that there is a deadlock.
8 The second is that the Honns have argued
9 that Mr. Blankenship is biased against them because
10 he's made decisions against them. That would be like
11 saying that this court is biased against me because
12 I've practiced before it for six years and it has
13 ruled against me on numerous occasions. It's
14 absolutely absurd to say that.
15 Mr. Blankenship is an independent and
16 neutral arbitrator and he has been from Day One.
17 Simply because he's made decisions against the Honns
18 does not mean that he is no longer independent.
19 The third, your Honor, is I appreciate
20 Mr. Lockwood's heads-up on the letting us know that he
21 would be bringing a motion to disqualify my firm. We
22 look forward to that motion and we ask that this court
23 appoint Mr. Blankenship and not award them attorneys
24 fees.
25 Thank you.

1 MR. LOCKWOOD: Your Honor, can I briefly
2 address the issue of the e-mail that wasn't
3 referenced?
4 THE COURT: Go ahead.
5 MR. LOCKWOOD: Basically, what that e-mail
6 did was basically says our understan- -- these
7 arbitrators have -- haven't been able to pick an --
8 third, neutral arbitrator at that time, which was true
9 and they're still working on it. We -- And as I said,
10 you know, there's nothing from the arbitrators that
11 said they'd given up and declared a deadlock and they
12 can't decide someone.
13 And if -- And if we get to the point where
14 Mr. Read indicates that, "I will only arbitrate if
15 Mr. Blankenship is here; otherwise, we're deadlocked,"
16 I think he's acting in bad faith and ought to try to
17 find someone else. So, that's going to raise a whole
18 'nother can of worms coming up.
19 But as I've said here today, I don't think
20 there is a basis for the motion.
21 THE COURT: Well, we've had -- I think we
22 just need to have a standing setting, not every week,
23 probably every other week, to hear motions in this
24 case. If there's ever a case that has been over-
25 litigated, I think it's this case. And oddly enough,

1 the case is always in court, yet there's an
2 arbitration cause in the lease.
3 What I'm going to do on the issue of today,
4 I'll call it the issue of the day, in anticipation, I
5 appreciate, Mr. Lockwood, you've already tipped me off
6 about the issue that we'll have coming up, and then I
7 won't worry about the third issue that will probably
8 be one or two weeks down the line. But I don't see
9 where all of these motions do very much to get to
10 the -- really, the important issue of resolve is the
11 controversy that these two parties have.
12 You've got the agreement for mediation.
13 Both sides have appointed a mediator. It sounds to me
14 like the mediators that have been appoint- -- excuse
15 me, arbitrators, the two, have been unable to select
16 the third, but apparently there's a dispute as to even
17 that issue.
18 What I'm going to do today -- And I'm
19 trying to expedite this so the controversy will be
20 resolved. And I think I'm fighting everybody here,
21 but it's my desire to get it resolved. I think that
22 the parties would want to get the case resolved. I'm
23 going to refer it back to the two mediators. I'll
24 enter an order directing it be referred back to the
25 two -- and I mean arbitrators, not mediators -- with

1 the direction that they select the third arbitrator
2 by, I'll say, the 17th of October. And then if they
3 have not selected or have a stalemate and put that in
4 writing to both sides and haven't selected an
5 arbitrator, the third, by that date, then I will
6 appoint the third. It makes sense to appoint
7 Mr. Blankenship. There's an argument about
8 Mr. Blankenship. I'm hearing that this is primarily
9 factual; I'm hearing it's primarily legal.
10 There's one lawyer, one layperson, I
11 believe right now are the two arbitrators. We've got
12 a Spokane lawyer. I think it's Mr. Smith, Read Smith,
13 not Mr. Read, who I'm acquainted with from St. John.
14 I think he retired and lives in Spokane now, but he's
15 on.
16 What I'm going to do, if these two
17 mediators cannot -- I've got mediation on the mind --
18 these two arbitrators can't come to an agreement as to
19 the third arbitrator, I am going to appoint right
20 there Mr. Esser, who was suggested. But Mr. Ferguson
21 said we need an arbitrator with stability and common
22 sense and patience. I'm going to appoint Mr. Esser
23 because of stability and common sense and, I think, 40
24 years of law practice in Whitman County and I know he
25 has extensive experience in contract law and in farm

1 law and a great deal of common sense and -- but I'm
2 not appointing him because he has patience. I'm
3 appointing him because I know him very well and he has
4 no patience. And this is a case that needs someone
5 that isn't going to put up with the garbage that this
6 Court has been presented with, with frivolous motions
7 and all of the procedural background. It needs
8 somebody that's going to get in with the other two
9 arbitrators, be fair, impartial, and aggressively seek
10 to get a decision entered that'll be fine.
11 So, I'll give the other, the two existing
12 arbitrators a chance. If they can't get it done in
13 two weeks and they can't agree, then everyone's stuck
14 with Mr. Esser. And so that's where I'll leave it.
15 We'll see you probably in the near future, Counsel.
16 I'll let you do an order to this effect,
17 that someone needs to make sure, maybe both of you
18 make sure, that the order gets immediately to these
19 existing arbitrators so they can work on seeing if
20 they can. And if they know it's Mr. Esser, they might
21 work very hard to come to an agreement. I'm joking on
22 that.
23 MR. LOCKWOOD: Thank you, Judge.
24 (The hearing concluded at 8:49 a.m.)
25

1 REPORTER'S CERTIFICATE

2

3 I, Michael S. Kuplack, a Certified Court Reporter
4 and a Notary Public in and for the State of
5 Washington, do hereby certify:
6 That the proceedings were recorded by the court
7 and thereafter, a CD was provided to me and
8 transcribed to the best of my ability; that I am in no
9 way related to any party to the matter, nor to any
10 counsel, nor do I have any financial interest in the
11 event of the cause.
12 WITNESS MY HAND THIS 10th day of April, 2015.
13
14
15
16 Michael S. Kuplack
17 CCR No. 2750
Notary Public in and for the
18 State of Washington, Spokane County.
Commission expires August 27, 2016.
19
20
21
22
23
24
25

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In The Matter Of:

Garrett Ranches v.

Honn Family

Verbatim Report of Proceedings

Vol. I

October 24, 2014

Snover Court Reporting, Inc.

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Spokane Valley, WA 99212

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1 SUPERIOR COURT OF WASHINGTON

2 COUNTY OF WHITMAN

3

4

GARRETT RANCHES, LLC, a
5 Washington limited liability
company,

6

Plaintiff,

7

v. CASE NO. 10-2-00293-4
8 APPEAL NO. 331750

LARRY HONN FAMILY, LLC, a
9 company,

10 Defendant.

11

12

VERBATIM REPORT OF PROCEEDINGS
13 October 24, 2014
Pages 1 to 31

14

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1 A P P E A R A N C E S

2

3 BEFORE JUDGE DAVID FRAZIER

4

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1 (8:34 a.m.)
2 THE COURT: I have Garrett Ranches against
3 Larry Honn Family, LLC. And plaintiffs are
4 represented by Will Ferguson, defendants by Gregory
5 Lockwood. And the defendants have a motion to
6 disqualify a law firm, motion to reconsider
7 appointment of an arbitrator.
8 So, Mr. Lockwood, you made a motion.
9 I'll --
10 MR. LOCKWOOD: Thank you, your Honor.
11 THE COURT: -- let you work it.
12 MR. LOCKWOOD: (Cleared throat.) Excuse
13 me.
14 Judge, basically there's two matters
15 this morning and they both stem around basically the
16 same issue, and that issue is, what we're trying to do
17 is just establish, you know, a fair and what we
18 consider an arbitration that doesn't have, you know,
19 the appearance of some improprieties of some kind.
20 And this is a -- I know we've been in and out of your
21 court on numerous occasions and I know the Court would
22 rather not have this here, and to be honest you with,
23 Judge, we'd rather not be here. We'd like to get this
24 matter resolved.
25 But this is a very serious matter for my

1 clients. We're talking about a farm that it's the
2 family farm and, in essence, they're fighting to save
3 that farm. And we're dealing with a 2000-acre farm
4 located here in Whitman County that's at issue. So,
5 this is a rather important case.
6 When we were in front of you the last
7 time, your Honor, we were here because there were some
8 problems with the arbitrators finding a neutral third
9 party as a neutral third arbitrator, and at that time,
10 we basically filed an objection to recommendations by
11 the parties. We're saying, you know, when the parties
12 make a recommendation for a neutral third party,
13 almost as a matter of course they're not neutral
14 because they're picking someone that's favorable to
15 your position.
16 At that time, the plaintiffs recommended
17 Mr. Timothy Esser. At that point, to be honest with
18 the Court -- You know, I don't practice in Whitman
19 County a lot; most of my practice is Spokane, Stevens
20 County, Pend Oreille, Ferry, those counties. So, I
21 wasn't familiar with Mr. Esser at that time, although
22 we did object to him initially, saying, "They
23 recommended him. We think there might be some bias
24 based on that recommendation."
25 The Court basically entered its order

1 saying that if the arbitrators don't find a neutral
2 third party, that the court was inclined to go ahead
3 and appoint Mr. Esser. Well, apparently the
4 arbitrators, you know, were still unable to come up
5 with a neutral third party; so, based on your previous
6 ruling, Mr. Esser was going to be the -- nominated as
7 this third neutral arbitrator.
8 Well, when I got back to the office, I
9 kind of looked up Mr. Esser to find out, you know, a
10 little bit about him. Mr. Esser, I come to find, was
11 a former law partner for Mr. Libey and they practiced
12 over here in Colfax for a number of years. Mr. Esser
13 moved down to Pullman. Likewise, Mr. Libey's law firm
14 and he, they continued to practice together down
15 there. Now, Mr. Esser eventually formed his own
16 partnership with another attorney and that other
17 attorney was also with the Libey law group for a
18 while.
19 So, we're dealing with Mr. Esser's
20 relationship with the Libey law firm which has gone on
21 for a number of years. And what's being argued is,
22 "Well, he wasn't a part of this law firm at the time
23 we were doing this negotiation." That may be.
24 However, because they have a longstanding relationship
25 and I think that there's at least an appearance that,

1 you know -- I don't know if Mr. Esser and Mr. Libey
2 continue to be good friends, you know, if they go
3 fishing, play cards, what, I don't know. All I know
4 is that they've had this existing relationship for a
5 number of years and that to nominate him as a neutral
6 third arbitrator, I think, is -- goes against, you
7 know, the -- you know, at least the appearance of
8 impropriety (sic). So, we're asking that the Court
9 reconsider its decision on Mr. Esser.
10 I know that they've nominated -- once
11 again, they've nominated another attorney down here.
12 And I think you notice, in all the pleadings that I
13 filed, I've never nominated a specific attorney. What
14 I've represented, that since there's not an
15 arbitration panel here in Whitman County, there is one
16 in Spokane, both arbitrators are in Spokane right now,
17 so that nominating a third arbitrator from -- or
18 asking the -- an arbitrator be appointed from the
19 arbitration panel who is just -- they rotate, so
20 whoever comes up would come up.
21 Another option instead of just
22 specifically naming someone is that, you know, we're
23 fortunate here in this area, we have a law school,
24 Gonzaga Law School. I'm sure that, you know, they --
25 if the arbitrators contact someone from the --

1 Gonzaga, in their contract department, they'd be more
2 than happy to have someone appointed as a neutral
3 third arbitrator.
4 We just want to have an arbitration that
5 at least on its face appears fair, because this is a
6 very serious matter. And, quite frankly, you know,
7 after me finding this out about Mr. Esser, if I hadn't
8 come in and at least filed this motion, I think I'd be
9 committing malpractice. So, we ask the Court
10 reconsider that appointment and that they -- that the
11 arbitrators be directed to seek a third arbitrator
12 from either the arbitration panel or the law school,
13 someone that we know would be impartial.
14 The second matter that I brought before
15 this court would be a motion for disqualification,
16 under the Rules of Professional Conduct 3.7, of the
17 Libey law firm, and the reason why, 3.7 basically
18 indicates that if you are an attorney for the party,
19 one of the parties, and you know you're going to be a
20 witness or have a fair belief that you're going to be
21 a witness, the Rules of Professional Conduct, they use
22 the word "shall," shall withdraw from the case.
23 Well, they do -- You look under the case
24 law and there's -- and Washington case law basically
25 says that you kind of look at some of the underlying

1 factors and make that determination. Well, in this
2 case, Mr. Libey was the attorney that drew the option
3 agreement up, and this option is what's at issue in
4 this case. More specifically, we're dealing with
5 issues of consideration supporting that option. So,
6 Mr. Libey's going to be required to come into court or
7 at least in the arbitration testify as to, you know,
8 him drafting that document and items that he used and
9 based that, that option, on, which are paramount to
10 the issues that are -- that are in this arbitration.
11 That being the case, he's going to be giving material
12 testimony inside the arbitration.
13 Under Rules of Professional Conduct 3.7,
14 based on that and the underlying case law that
15 supports it, Mr. Libey's law firm should be
16 disqualified. There has been no showing that, you
17 know, that there'd be a hardship worked on the
18 Garretts. I mean, there's other attorneys around that
19 could represent them on this matter as equal as the
20 Libey law firm.
21 So, based on case law and Washington's
22 professional conduct code, we're requesting that the
23 Court disqualify the Libey law firm in this particular
24 arbitration. And if the Court has any questions, I'd
25 be happy to answer those.

1 THE COURT: No questions.
2 Mr. Ferguson.
3 MR. FERGUSON: Judge, the first issue that
4 I want to address is this Motion for Reconsideration.
5 Not only must the moving party, when moving for
6 reconsideration, show that their motion falls within
7 one of the requirements of the Motion for
8 Reconsideration, but they also have to show the merits
9 of the Motion for Reconsideration. Now, the merits
10 here are this, as opposing counsel put it, an
11 appearance of impropriety. However, simply stating an
12 appearance of impropriety does not mean much of
13 anything. So, let's look at the facts.
14 The facts are that Mr. Esser has not been
15 with the Libey & Ensley firm since June 1st of 2009.
16 The lease and option underlying this action were not
17 even drafted until September of 2010. So, well over a
18 year after Mr. Esser left the firm, after he had no
19 further financial interest in this, in the law firm,
20 this litigation started with the drafting of the
21 lease -- excuse me -- and the option.
22 Those are the facts. There's really
23 nothing more that the Defense can point to that says
24 that Mr. Esser is somehow biased in favor of the
25 parties -- biased in favor of the parties -- and

1 that's the important thing. And clearly he's not
2 biased in favor of the parties because we know that at
3 least one member of his firm, probably Mr. Sandberg,
4 has represented one of the Honns on a criminal matter,
5 and probably on other matters. So, to say that
6 Mr. Esser is somehow automatically biased in favor of
7 Garrett Ranches is absolutely absurd. It isn't
8 supported by the facts.
9 And as this Court well knows, in the
10 practice of law, when law practices break up, it's a
11 lot like a divorce. I'm pretty sure that an
12 ex-husband and ex-wife don't invite each other over
13 for barbecues every night, at least in the usual
14 divorce, and such is probably the case with attorney
15 firms. I refer to the breakup that we had in 2009 as
16 "the divorce" because Mr. Esser and Mr. Sandberg went
17 off on their own; they've been on their own since June
18 1st, 2009; they don't have any connection with our
19 firm.
20 As to the alternate appointment, we have
21 suggested Mr. Savage. If this court finds that it
22 will reconsider it's decision and it wants to
23 appointment another third arbitrator, then we propose
24 Mr. Savage.
25 Now, Mr. Savage, we propose him but we

1 also still propose Mr. Blankenship. And here again,
2 when we get into the issue regarding disqualification
3 of the law firm, this is exactly why we need
4 Mr. Blankenship on this arbitration panel as a neutral
5 third arbitrator, and again all the arguments that go
6 along with having him appointed, for and against.
7 We suggested Mr. Savage. Mr. Savage has
8 never had any contact, at least any -- excuse me, any
9 conflict, that I can discern, with our firm, he's
10 never been a part of our firm, and we believe he would
11 do just as fine a job as Mr. Esser if this court
12 decides to reconsider.
13 Now, the suggestion of somebody from
14 Gonzaga Law School. Now, it's been the defendant's
15 position, since, I think, Mr. Lockwood started this
16 case, to try to drag this up to Spokane County, get a
17 Spokane County arbitrator, get a Spokane County this,
18 Spokane County -- There just seems to be simply no
19 need for that. We have a Whitman County case, Whitman
20 County land, Whitman County parties. This should stay
21 in Whitman County. The third arbitrator should be
22 from Whitman County.
23 Now, the Defense proposes somebody from
24 Gonzaga Law School. Now, I think the record would end
25 up showing that this may look good on its face, except

1 for the fact that I believe, if my memory serves me
2 correctly, Mr. Lockwood's former partner in law
3 teaches at Gonzaga law. So, that would be the
4 appearance of impropriety if that's all we were going
5 on was the appearance of impropriety. But again,
6 here, Judge, there's no appearance of impropriety.
7 There is no impropriety on a factual level.
8 Turning to the motion for
9 disqualification of the Libey & Ensley law firm,
10 the -- flat out the test in Washington is, number one,
11 there must be compelling circumstances to disqualify a
12 firm. That's the first burden. The second -- and
13 this is the -- this is the case cited by Defense, this
14 is the Klickitat County case -- when an attorney is to
15 be called, "A motion for disqualification must be
16 supported by a showing that the attorney will give
17 evidence material to the determination of the issues
18 being litigated, that the evidence is unobtainable
19 elsewhere, and that the testimony is or may be
20 prejudicial to the testifying attorney's client."
21 Well, first, has to be -- there has to
22 be a showing of material evidence. All we have from
23 the Defense is they say, "Well, Mr. Libey will testify
24 that he drafted the option agreement." Well,
25 that's -- we can get that from other sources, too.

1 That the Larry Honn Family LLC had no input or
2 contribution in any way to his drafting of the
3 option. Again, we already know that. Number three,
4 that at the time of drafting the option agreement, the
5 members of the Larry Honn Family Trust did not
6 indicate any dollar amount to be placed in the
7 option. And I'm guessing that that was -- that
8 Mr. Libey wasn't present at the negotiations.
9 All three of those facts are obtainable
10 from other sources. We know that because I submitted
11 the excerpts from the transcripts of the depositions
12 of Larry Honn Sr., Charlotte Honn, Frank Garrett, and
13 Joshua Garrett. Everyone agrees, well, Mr. Libey
14 wasn't there. He wasn't there in negotiations. Of
15 course he doesn't know any of those facts. Of course
16 he wouldn't be able to offer any material evidence.
17 Even if he could offer the material evidence, it is
18 obtainable elsewhere. And even if it weren't
19 obtainable elsewhere, it would be protected by
20 attorney-client privilege.
21 Now, I would have objected to
22 Mr. Lockwood's response that he served via facsimile
23 yesterday -- because I don't accept service via
24 facsimile, I want that noted for the record -- but I
25 do like the fact that he supplied his letter of

1 October 7th in which he states, in the second full
2 paragraph, "Additionally, we would like to subpoena
3 the client file at Libey & Ensley, PLLC, that relates
4 to the drafting of the option, including all notes and
5 letters." How much more protected by an attorney-
6 client privilege can we get?
7 Clearly, your Honor, I think that the --
8 that the reasons behind making this motion are
9 unseemly. There is no material evidence to be offered
10 by Mr. Libey. There's no material evidence, even if
11 he had any, that could be disclosed under the
12 attorney-client privilege. There are no exceptional
13 circumstances warranting disqualification. And
14 Mr. Libey would not be testifying about any of these
15 facts.
16 And this gets back to what I mentioned
17 about Mr. Blankenship. This is exactly why we need
18 Mr. Blankenship as a third arbitrator, because he
19 knows exactly what was arbitrated in the first
20 arbitration; that is, after these depositions were
21 taken. Because what we hear from Defense is they're
22 going to bring up issues relating to the -- to the
23 consideration underlying the option.
24 Page 14 of the deposition of Frank
25 Garrett answers those questions regarding

1 consideration supporting the option. That was already
2 litigated. That's why those questions were asked at
3 the depositions back in 2010. That's what some of the
4 arbitration was about in 2010. That's why we need
5 somebody who was there, who can say, "Oh, yeah, we
6 already arbitrated that issue. We've already decided
7 that there was good consideration underlying the
8 option." Exactly why.
9 Your Honor, the Motion for
10 Reconsideration should be denied. Mr. Esser does not
11 have any bias for any of the parties or any of the
12 attorneys, clearly not. Second, the motion to
13 disqualify the firm of Libey & Ensley should be denied
14 and we're asking for attorneys fees, either under
15 CR 11 or under the attorney fee provision in the lease
16 and option, which provides that if either party is
17 involved in litigation, the prevailing party can
18 obtain attorneys fees. I've included with my response
19 to the Motion to Disqualify my declaration, which
20 indicates the amount of time that I've spent on this
21 and what my hourly rate is.
22 So, for those reasons, your Honor, we ask
23 the motions be denied and that attorneys fees be
24 granted to Garrett Ranches.
25 MR. LOCKWOOD: I'm going to address -- go

1 from the latest comments to the ones earlier.
2 The request for attorney fees in a
3 situation where you're asking for disqualification
4 under the Rules of Professional Conduct, your Honor,
5 are just -- you know, it's hard to indicate how
6 misplaced that is. The RCWs are extremely clear --
7 or, excuse me, the Rules of Professional Conduct are
8 clear that if you're a witness and you know you're
9 going to be a witness, you should not be representing
10 that particular party. So, for them to come in and
11 ask for attorney fees because we base an objection on
12 the Washington Rules of Professional Conduct, I think
13 that that's more than misplaced. Now, what they've
14 argued is that -- You can't find this anywhere else.
15 So, the problem is, we're dealing with
16 the consideration that was drafted in an option. This
17 option agreement only had one open provision and that
18 was, how much is the property going to sell for.
19 Everything else was drafted by Mr. Libey. And all
20 these other terms and conditions and statements inside
21 of that option, only Mr. Libey can answer as to, "When
22 you drafted this, what did you rely on?" No one else
23 can do that because he's the one that drafted it. And
24 they knew that if this came up as an issue, that
25 Mr. Libey was going to have to address those issues.

1 The fact that Mr. Libey had put this in
2 writing in itself is the only one that can answer the
3 question. Mr. Garrett can't answer what Mr. Libey
4 relied on. One of the issues that we've dealt with --
5 Example. Way back when, I asked Mr. Garrett at that
6 second supplemental arbitration that was done, you
7 know, "Who drafted the document?" At that time,
8 Mr. Garrett said, "Oh, I don't know. I don't
9 remember." That was the response we got at that
10 point. Now that we're sitting here at this -- under a
11 whole new set of issues, we find out that, yes, in
12 fact, Mr. Garrett -- or Mr. Libey did draft the
13 document. So, we brought the motion.
14 Now they're saying that there's no basis
15 for materiality. Well, that's there since he's
16 drafted a document, and that's the issue before the
17 arbitrators.
18 We've -- And the last document that was
19 submitted to the court yesterday -- and the reason why
20 it came in yesterday, because that morning, we got
21 their response. So, we filed this immediately, that
22 we received it. And the reason why I filed that for
23 the Court, to indicate to the Court we've already
24 requested authorization from the arbitrators to take
25 Mr. Libey's deposition and we're going to be doing

1 that.
2 So, he's scheduled for a dep -- or he's
3 going to be scheduled for a deposition. He is going
4 to be giving testimony the arbitration. And based on
5 that and the fact that he's the only one that drafted
6 this material, I think he should be -- the firm should
7 be disqualified. And the issue of awarding attorney
8 feeds, quite frankly, Judge, is I think more than
9 misplaced.
10 Now, on the issue, the remaining issue
11 dealing with the -- with the appointment of Mr. Esser,
12 when they talk about the breakup of a firm, through
13 the years, I've been -- You know, I've been practicing
14 24 years. Through the years, you know, the firm's
15 members come and go, come and go, you know. Quite
16 frankly, everyone that's come and gone throughout the
17 firm that we had is -- we have good terms with, we
18 refer clients back and forth. And the fact that, you
19 know, they allege they consider it a divorce, well, it
20 may or may not. I'm just saying that that doesn't
21 necessarily always follow.
22 And there's no reason, there's absolutely
23 no reason, that another -- that a neutral party can't
24 be nominated or appointed by the Court. It's not that
25 Mr. Esser's the only attorney in Whitman County or

1 Spokane County.
2 Now, what Mr. Ferguson's indicated about
3 my former partner is a professor, that's true, and
4 there's times when I've over -- I've been over at the
5 law school and done things, but that doesn't mean
6 that -- I didn't nominate my old partner. I said, you
7 know, have them appoint someone that's not. I also
8 recommended the arbitration panel. The arbitration
9 panel, someone's appointed that we don't even have a
10 clue who comes up on that arbitration panel. It just
11 rotates and comes up.
12 As to Mr. Blankenship, Mr. Blankenship
13 has been rejected by the arbitrator that we appointed,
14 and for them to keep trying to raise him, to throw him
15 back in the mix, they didn't want an appoint- -- They
16 wanted the same -- their same crew from the first one,
17 since this matter began. And that would be totally
18 improper, to go back and say, "Well, we're going to
19 appoint Blankenship even though your arbitrator has
20 already disqualified him."
21 The Court, I think, had -- is on the
22 right track of appointing an attorney involved in
23 this, because we're dealing specifically with legal
24 issues, but, however, Mr. Esser or anyone else that
25 has any relationship -- I want -- I don't want anyone

1 related to my firm or my prior firms, and I don't --
2 we don't want anyone as a neutral party related to
3 Mr. Libey's firm. We just want a neutral party. Once
4 we get that, we'll have that matter resolved and we
5 can get this -- go forward and get this thing
6 arbitrated and resolved. But we just want to have a,
7 you know, fair field on this thing, your Honor.
8 Thank you.
9 THE COURT: All right. Well, here's what
10 I'm going to do as far as the issue of the motion to
11 reconsider the appointment of Mr. Esser. Now, you
12 have a case here that has gone on for a long time, and
13 my frustrations, and I think I've expressed those
14 frustrations, you have a lease, you have an agreement
15 between two limited liability farm corporations. We
16 know the lease has an option to purchase; it also has
17 an arbitration clause. People normally enter into
18 arbitration agreements as a means of settling their
19 disputes for two reasons: Expediency, to save time,
20 to have -- not have to go through the delays that
21 they're involved in, setting cases for trial and going
22 into court; and economy, to save expenses.
23 So, my frustration here is these parties
24 have agreed to arbitration to save time and money and
25 there's been a lot of court time spent on procedural

1 matters that I don't see have a great deal of
2 significance in the case, and obviously been a lot of
3 time and expense involved on procedural issues. And
4 secondly, this is a case that has been subject to a
5 previous arbitration with an arbitration panel. And I
6 know from litigation that stemmed, the court decision
7 that stemmed from that, issues were litigated and
8 decided by the arbitrators that relate to the lease
9 and that relate to the option to purchase. And here
10 we are again.
11 It's gone through arbitration, it's come
12 to court, it's been confirmed, it's been appealed,
13 it's back here again, and the Honns lost. Now here we
14 are with another request for arbitration. It relates
15 to whether there was consideration, as I understand
16 it, the issue for the arbitration agreement.
17 I now have a couple motions concerning
18 the selection of a third arbitrator And now, after all
19 of this time, a motion to disqualify what I'll call
20 the Libey -- that's Libey (ly-bee), not Libey (lib-
21 ee) -- law firm here. On that issue, number one, on
22 both issues, parties have agreed to arbitration. And
23 I think from everything that I've read here, it is
24 highly, extremely unlikely, from a realistic,
25 practical standpoint and from a legal standpoint, that

1 Mr. Libey will be a witness in the arbitration. I'm
2 having trouble wrapping my head around that.
3 The facts that have been identified by
4 the Honns here that he'll testify to, as I see it,
5 have been obtained and are obtainable through other
6 witnesses, other sources, and that's a factor to
7 consider. Doesn't even appear that they're in dispute
8 and/or many of these are privileged and wouldn't be
9 admissible anyway. So, I am not going to grant the
10 motion to disqualify, at this time, the Libey law
11 firm. And if I were, that would probably make quick
12 work of the second issue, which concerns Mr. Esser
13 here.
14 But additionally, you know, I think it's
15 highly likely -- I have to determine the likelihood of
16 Mr. Libey being a witness in the case and the rule, I
17 think it's highly likely that, when the matter goes
18 before the panel of arbitrators and they're presented
19 with the law, I think it's highly likely that, from a
20 legal standpoint, this case in arbitration isn't going
21 to go very far because I think -- and it's not my
22 decision to make except as it pertains to the
23 likelihood of there being any witnesses -- that case
24 is going to get thrown out of arbitration if the law
25 is applied, because there was a arbitration already on

1 the very subject that's being disputed here, the lease
2 and an offer to or an option to purchase.
3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then -- should
5 have -- I think the issue's res judicata here. And
6 I'm only deciding that -- It's not my decision to
7 make. That's up to the arbitrators. These parties
8 have agreed to arbitration. But I don't think you're
9 going to have any witnesses. That's my legal analysis
10 based on everything that I have seen here. So, no,
11 I'm not going disqualify the Libey firm here.
12 Now, we do an arbitration, you agreed to
13 arbitration, so if the arbitrators see you later on,
14 "Oh, Libey may be a witness or is going to be a
15 witness and this -- the facts that he could testify to
16 aren't obtainable elsewhere," then the issue then can
17 be renewed before the arbitrators. Again, they've
18 agreed to arbitration and this isn't the issue. What
19 evidence is presented at arbitration, that's up to the
20 arbitrators, not to this court.
21 As far as the court's designation of
22 Mr. Esser, when that issue was brought before me,
23 really wasn't certain whether the two arbitrators that
24 had been selected by the parties had been unable to
25 reach an agreement. I think the two attorneys had a

1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.
4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such" -- But Mr. Esser
10 was sitting right where this gentleman here is sitting
11 as you were arguing the case.
12 I'm very familiar with Mr. Esser. He's
13 had a lot of cases before this court, and I think he's
14 been a lawyer -- he was a year ahead of me. No, he
15 was in my class in law school. Didn't even know him
16 in law school, but he was in my class, so he's been a
17 lawyer almost 40 years and I'm aware of that. And I'm
18 aware of the issues in this case, procedural hassling
19 that has taken place. And I think Mr. Ferguson
20 indicated he should be appointed because he has
21 patience, something to that effect.
22 No, he doesn't. He doesn't have any
23 patience. That's what caught my attention. And
24 because I don't feel that when parties agree to settle
25 their disputes through a procedure that involves, or

1 is designed to involve, economy and saving time, to
2 have a patient trier of fact that's going to listen to
3 all kinds of frivolous and irrelevant procedural
4 issues, I don't feel benefits the parties to the
5 litigation.
6 And I'm, again, familiar with Mr. Esser.
7 He's got broad experience, but particularly in
8 contract law, in civil litigation, in agricultural
9 law, in farm leases litigation, and I know him to be
10 very knowledgeable and a person that has the unique
11 skill of focusing on the real issues, identifying the
12 real issues, cutting through the irrelevant and the
13 frivolous, and he has an amazing ability to do in one
14 hour what would take me and a lot of lawyers and
15 whatnot, he can do in an hour what some of us it takes
16 eight hours. And he's extremely independent.
17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner and he had been, I'm sure I'm -- I think
24 Mr. Ferguson was in the firm at the time. I didn't
25 know how long ago that was; I'm hearing now it was

1 five years ago. And the evidence here is that he
2 wasn't in that firm at the time the lease that's in
3 dispute here was drafted.
4 And since whenever the dissolution of the
5 partnership or whatever it was, the separation,
6 occurred, maybe one reason I didn't immediately
7 remember that Libey and Esser were partners is that I
8 don't know how many cases they've come in here and had
9 pretty good knock-down, drag-out fights and it hasn't
10 affected their ability to advocate against one another
11 very zealously for the positions of their parties
12 here.
13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.

1 And we don't have a case here where the
2 arbitrator went from the firm to -- or one of the
3 lawyers, to the position of arbitrator. There was a
4 "divorce," I think I heard the term. I don't know
5 what happened there. It doesn't matter.
6 So, I am not going to -- I don't think
7 there's any legal basis at this point for -- I'm not
8 going to disqualify or reconsider my designation of
9 Mr. Esser.
10 Now, he does have some duties and one is
11 to be fair and impartial. Just because the two
12 attorneys here, the two sides, picked an arbitrator,
13 they've got a duty to be independent. You've
14 selected, essentially, a judge. And the person that
15 each side selects, I'm sure you think that there's
16 some advantage that you may have as a result of that.
17 But their role is to be neutral, fair, impartial, and
18 independent, and they have a legal duty to do that,
19 all three them, even the ones that each of you have
20 selected here, and they have other duties.
21 So, again, I don't think there's any
22 legal basis to disqualify Mr. Esser. I'm not going to
23 do that. I think he is particularly suited to be an
24 arbitrator in this particular case. But, by the same
25 token, I'm going to not bar or prohibit Mr. Lockwood

1 or the Honns here from challenging him in the
2 arbitration process or inquiring as to whether he
3 feels he should -- he has any question as to his
4 impartiality.
5 And he may elect to recuse for, among
6 other reasons that I've heard here, I'm hearing he may
7 have -- his present firm, someone from his present
8 firm, he or Mr. Sandberg, may have not represented the
9 Garrett side but represented the Honns. So, he may
10 say, "Hey, I can't because I know something special
11 about the Honns or something that might affect my
12 ability to be fair."
13 So, I'm not disqualifying him, but it
14 might be an issue to raise to him in the process of
15 arbitration. And because of the possibility he may
16 recuse, and I think that might be a real possibility
17 here for the reasons I've stated, was an association
18 in there, with both sides, I think, to expedite
19 things, rather than have you make motions, spend more
20 money, come back before the court with more argument
21 on, "Well, Esser can't do it, appoint somebody else,"
22 I'm going to appoint some alternates.
23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

1 again experienced, a lot of farm experience. He
2 practices in Whitman County, has offices in Whitman
3 County on a part-time basis, and he has a main office
4 in Davenport. He's got, like, seven offices, his
5 firm. And he has ag. expertise and lease expertise,
6 farm lease, and he grew up on a farm.
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop because he's not out and about and he's
12 not a litigator, with a lot of farm experience, even
13 raises apples himself.
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time. Same
17 reason: a lot of experience and Whitman County farm
18 experience and lease experience.
19 So, I'm trying to keep you gentlemen out
20 of court, get you to arbitration, so keeping Esser
21 with three alternates. And not that I don't like
22 seeing the two of you or tired of this case, but I
23 feel sorry for your clients. They need to get to the
24 merits and not spend a lot of money on all of these
25 procedural issues.

1 MR. FERGUSON: Judge, do you have a
2 decision on attorneys fees?
3 THE COURT: And attorney fees, there's --
4 I'm going to deny the requests under CR 11. And the
5 prevailing party, I think, under the lease, in any
6 dispute gets attorneys fees. I'm going to leave that
7 up to the arbitrators as to who ultimately prevails,
8 not who prevails on each individual skirmish.
9 MR. LOCKWOOD: Thank you, your Honor.
10 (The hearing concluded at 9:17 a.m.)
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1 REPORTER'S CERTIFICATE

2

3 I, Michael S. Kuplack, a Certified court Reporter
4 and a Notary Public in and for the State of
5 Washington, do hereby certify:
6 That the proceedings were recorded by the court
7 and thereafter, a CD was provided to me and
8 transcribed to the best of my ability; that I am in no
9 way related to any party to the matter, nor to any
10 counsel, nor do I have any financial interest in the
11 event of the cause.
12 WITNESS MY HAND THIS 9th day of December, 2014.
13
14
15
16 Michael S. Kuplack
17 CCR No. 2750
Notary Public in and for the
18 State of Washington, Spokane County.
Commission expires August 27, 2016.
19
20
21
22
23
24
25

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In The Matter Of:

Garrett Ranches v.

Honn Family

Verbatim Report of Proceedings

Vol. I

February 13, 2015

Snover Court Reporting, Inc.

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Spokane Valley, WA 99212

Original File 021315 Hearing in Garrett v.txt

Min-U-Script® with Word Index

1 SUPERIOR COURT OF WASHINGTON

2 COUNTY OF WHITMAN

3

4 GARRETT RANCHES, LLC, a
Washington limited liability
5 company,

6 Plaintiff,

7 v. CASE NO. 10-2-00293-4
APPEAL NO. 331750

8 LARRY HONN FAMILY, LLC, a
company,

9

Defendant.

10

11

12 VERBATIM REPORT OF PROCEEDINGS
February 13, 2015
13 Pages 1 to 45

14

15

16

17 Michael S. Kuplack, CCR

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1 A P P E A R A N C E S

2

3 BEFORE JUDGE DAVID FRAZIER

4

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1 (2:19 p.m.)
2 THE COURT: We have the remaining matter
3 Garrett Ranches, LLC, against Larry Honn, LLC.
4 Plaintiffs are represented by Attorney Will Ferguson,
5 and Attorney Gregory Lockwood represents the
6 Defendants. And there's a number of motions. It
7 started off to confirm the latest arbitrators' award.
8 Then there's motions to vacate the award and for the
9 Court to recuse itself. The Defendant's motions, I
10 think, need to be heard first.
11 MR. LOCKWOOD: Sorry?
12 THE COURT: I think the Defendants'
13 motions --
14 MR. LOCKWOOD: Oh.
15 THE COURT: -- need to be heard --
16 MR. LOCKWOOD: Yeah, thank you, your Honor.
17 THE COURT: -- before I can get to the
18 next --
19 MR. LOCKWOOD: Thank you, your Honor.
20 As the Court indicated, we have several
21 motions pending today. I think the first motion that
22 I think is the most pertinent that we should, you
23 know, deal with first is, we have a motion for
24 disqualification of the Court in this matter. I filed
25 a brief. I indicated our reasons in that brief and I

1 don't think there's -- it makes no sense for me just
2 to go over it again in open court since I know the
3 judge has read it.
4 The reason why we think it's very
5 pertinent is because the Court has, the last time we
6 were here, made comments in which we felt they were
7 comments on the case itself, and those issues that the
8 Court commented on are specifically going to be
9 popping up in the motion to vacate. And as we cited,
10 Washington has a Appearance of Fairness Doctrine that
11 applies. And, you know, under the circumstances,
12 based on the comments that we've recited to the Court,
13 we're asking that the Court disqualify itself, do a
14 recusal, we can have another judge appointed from
15 somewhere and get these last matters taken care of.
16 And if the new judge on, if he grants our motion to
17 vacate, then at that point he would just appoint a
18 different, neutral arbitrator and we could get this
19 matter finally resolved in what we consider to be a
20 fair and equitable manner, your Honor.
21 So, we're asking that the Court grant our
22 initial motion. And I think what I'd like to do is
23 just maybe have Mr. Ferguson address that and have the
24 Court rule on that and then we can move forward, if
25 necessary.

1 MR. FERGUSON: Judge, I just wanted to
2 confirm the Court got both of my responses to the
3 motions. There is a response to the motion for
4 disqualification and also a combined response to the
5 objection to confirmation and motion to vacate.
6 THE COURT: Well, I received those. I
7 skimmed them, I'll be honest. I didn't have a -- I
8 just saw them today.
9 MR. FERGUSON: Sure, understood.
10 So, the motion before the Court, the
11 motion to disqualify, I don't think there are any
12 grounds to disqualify this Court. I put that forth in
13 my brief. The cases cited by Mr. Lockwood, which
14 would be Witherspoon and, I believe, the Tatham case,
15 neither of those cases hold that this Court should
16 recuse itself. Neither of those cases holds that this
17 Court violated the Appearance of Fairness Doctrine.
18 And I -- And I think that if the Court looks at the
19 case law, the rules underlying both of those cases, it
20 will determine that, number one, again, Appearance of
21 Fairness was not violated. And simply because the
22 courts say, "Well, we have some issues like res
23 judicata," that in no way gets even close to the -- to
24 the issue of the Appearance of Fairness Doctrine,
25 absolutely not.

1 In actuality, if the Defendant had
2 reviewed its materials, it would have found that we've
3 been raising this res judicata issue or call it issue
4 preclusion or just flat out, "Hey, this has been
5 decided before," we brought that up long, long before
6 that hearing and we had been battling over that issue.
7 This motion, we would normally ask for CR
8 11 sanctions, but given that the lease and option
9 contain a -- an attorney fee provision, we ask this
10 Court for attorneys fees in responding and in
11 prevailing in this motion.
12 The Court should not recuse itself; there
13 are no grounds for that. And I think that the Court
14 will find that there was no violation of the
15 Appearance of Fairness Doctrine. And the argument
16 also goes into the Appearance of Fairness Doctrine in
17 regards to Mr. Esser, as well, and I'll address that
18 when opposing counsel gets up here to talk about his
19 motion to vacate and his objection to confirmation of
20 the arbitration award.
21 We ask this Court deny the Defendant's
22 motion for this Court to recuse itself. Thank you.
23 MR. LOCKWOOD: Your Honor, in response, the
24 cases that we cited are very clear. I mean, even
25 if -- even if the, you know, the Court didn't intend

1 to but it, you know, it had that appearance -- And the
2 reason why I specifically referenced the wordings of
3 what the Court has said, I know that, you know, my
4 client, other individuals that have reviewed it, look
5 at this and they -- every one that I've run it past
6 feels that, you know, this does appear to be, you
7 know, if nothing else, on its face, because the -- you
8 know, my client feel that the Court was biased or at
9 least commented on evidence at the time. And as I
10 cited to the Court, you know, if the Court feels there
11 is even the slightest chance that there is a violation
12 of this Appearance of Fairness Doctrine, under the
13 Rules of Judicial Conduct, which were cited in there,
14 it basically indicates that a judge should recuse
15 himself.
16 And now that we're going into this final
17 phase, we're talking about vacation -- vacating of
18 this arbitration award that's dealt with Mr. Esser's
19 acts, number one, Mr. Esser's failure to look at
20 evidence, and then also dealing with this res
21 judicata, which was raised specifically in this Court,
22 it wasn't that the Court said we have issues. Number
23 one, that whole topic wasn't even in relationship
24 to -- wasn't even in relationship to that hearing that
25 we had here before, but there's some matters that came

1 up, like I said, that I put them all before the Court,
2 things that were said in Court, the affidavit that we
3 received from a non-party indicating what appears to
4 be kind of a social relationship between Mr. Esser,
5 Mr. Libey, and they've seen, your Honor, the judge
6 with them, as well, this is during times when the case
7 is going.
8 And so we think all this combined, all
9 we're asking at this point is that, you know, we at
10 least have someone looking at this matter that can,
11 you know, at least eliminate these issues, because
12 that's what we have now is a bunch of issues that, you
13 know, if -- you know, if nothing else, are going to be
14 looked at by an appellate panel. So, we'd like to
15 eliminate those so we don't have to go through that,
16 that process. And by the Court recusing himself,
17 appointing another judge to handle these last
18 matters -- and they may rule the same way the Court
19 would, but at least we would have those issues off the
20 table and we don't have to deal with those at a later
21 date.
22 Thank you.
23 THE COURT: Well, let me ask, it was an
24 arbitration, that's an underlying issue. Decision was
25 made. Plaintiff apparently prevailed, is asking the

1 Court today to confirm the arbitration decision, and
2 the Defense is seeking to vacate that decision. The
3 Superior Court, when there's an arbitration, doesn't
4 sit -- isn't the Superior Court's function to serve as
5 an appellate role, is it? I mean, is the function --
6 My understanding of arbitration, and I have limited
7 understanding of arbitration, is if a decision is
8 made, it gets confirmed, there's a judge in the
9 Superior Court, and if there's an appeal, the appeal's
10 to the Court of Appeals. Now, am I wrong?
11 MR. LOCKWOOD: An order on confirmation of
12 the award or deny, yeah, those are issues that will go
13 up on appeal along with the --
14 THE COURT: This Court wouldn't decide
15 whether there was error with --
16 MR. LOCKWOOD: No.
17 THE COURT: -- in the arbitration.
18 MR. LOCKWOOD: Well, I mean, in the
19 initial -- initially the Court would, based on our
20 motion to vacate the award. That's in the Court's
21 jurisdiction, so -- and whatever the Court rules
22 there, then that matter would -- can get -- may get
23 reviewed, if necessary, farther down the line. But --
24 THE COURT: And your basis there is
25 essentially there was an impartial arbitrator

1 appointed by the Court.
2 MR. LOCKWOOD: Yes. And this arbitration
3 award that was made, it's not just your standard
4 arbitration award, the arbitration award, but there's
5 also a dissent that was filed with the arbitration
6 award --
7 THE COURT: But, I mean, --
8 MR. LOCKWOOD: -- by the other arbitrator.
9 THE COURT: -- there's something that --
10 Would it be proper for me to rule I agree that the
11 decision of the arbitrators is correct? I'm not -- By
12 confirming the arbitrator, I'm not ruling they were
13 right or wrong, am I? Or whoever the judge may be.
14 MR. LOCKWOOD: No. But we're not looking
15 at the decision right now, we're looking at a basis to
16 vacate it. And the reason why we're looking at
17 vacating it -- the reason why, I guess, we could -- I
18 guess, if you want, Judge, we can move it in that --
19 the reason why --
20 THE COURT: I think it relates.
21 MR. LOCKWOOD: Pardon?
22 THE COURT: I think it relates, yeah.
23 MR. LOCKWOOD: Okay. So, you want me to
24 just go forward a little? The problem we have is, on
25 our motion for reconsideration, as you know, we

1 objected to Mr. Esser at the time he was appointed.
2 We did a motion for reconsideration when we learned
3 that he was a former partner. We didn't know he was a
4 former partner before he -- And I'm not from Whitman
5 County, I don't know the judges here -- or, excuse me,
6 the attorneys here, so I didn't know who Mr. Esser
7 was. The documentation that was submitted by Libey's
8 law firm never said who he was. They never said he
9 was a former partner, they never said anything. All
10 they said, well, Mr. Esser and Sandberg, his partner,
11 basically the two people that Mr. Libey knows. And so
12 the Court at that point appointed Mr. Esser.
13 Now, one of the problems we have is at that
14 point, from what the Court's earlier comments and the
15 reconsideration, the Court knew that Mr. Esser was a
16 former partner of Mr. Libey at the time he was
17 initially appointed. And --
18 THE COURT: I knew, but, quite frankly, I
19 didn't think of it because they haven't been partners
20 for some time.
21 MR. LOCKWOOD: I --
22 THE COURT: You brought up the
23 reconsideration yesterday.
24 MR. LOCKWOOD: I understand. We filed a
25 motion for reconsideration and we said, you know, if

1 nothing else, that the problem -- an arbitration, we'd
2 have a three-panel arbitration where we have to have a
3 neutral arbitrator. A neutral arbitrator is
4 absolutely essential because, you know, all -- you
5 have to have two people and you control the
6 arbitrator. It's like having a jury and basically
7 controlling the -- you know, 10 of the jurors in a
8 civil case. So, we had objected. We objected in a
9 reconsideration.
10 At that time, the Court -- the Court
11 said, "Well, if Mr. Esser recuses himself, we can
12 appoint these other three -- one of these other three
13 individuals." And we listed three other individuals
14 who, you know, at the time, any of those other three
15 probably would have been fine. But instead, we're
16 leaving it up to Mr. Esser now, a former partner, to
17 make his decision whether he's going to get off the
18 case.
19 Well, Mr. Esser made his disclosures
20 under the arbitration rules. His only disclosure that
21 he made was basically what we found out in our motion
22 for reconsideration. All he came back, says, "Yeah,
23 I'm a former partner." That's all he said. I put
24 that -- The Court has that in its file. He doesn't
25 mention that, "Oh, yes, I have an ongoing social

1 relationship that Mr. Libey," none of that.
2 Then, while Mr. Esser is appointed in the
3 process, we asked to make some -- we tried -- I asked
4 to do some depositions. We wanted to take depositions
5 of the 30(b)(6) designee for Garrett, LLC. I was
6 denied that opportunity. I was denied to take
7 Mr. Libey's deposition, which, as it appears at this
8 point, was a critical decision on the part of
9 Mr. Esser because he made a ruling that the document
10 put together by Mr. Libey was an integrated document.
11 So, I wasn't even allowed to ask Mr. Libey regarding
12 the questions of integration on the document. And he
13 specifically ruled on that.
14 Then we -- I get an affidavit sent to my
15 office from, you know, a non-party which basically
16 says, "We've seen Mr. Libey, we've seen Mr. Esser and
17 also the judge, you know, frequenting restaurants in
18 Colville." Which is perfectly fine; there's nothing
19 wrong about socializing with anyone in the bar. The
20 problem is, it is when we're in the middle of
21 litigation and these -- with these -- and these two
22 people are kind of thrust on us as one a neutral
23 arbitrator and the other person the opposing party.
24 That's where the problem lies at that point.
25 I did what the Court told me to do. Said

1 that, "You need to -- If Mr. -- If Mr. Esser will
2 recuse himself, then we'll appoint one of these other
3 three people," which is perfectly fine. So, I sent a
4 letter to Mr. Esser saying, you know, "It appears that
5 you're having a social relationship with Mr. Libey
6 that violates at least the Appearance of Fairness
7 Doctrine. You know, you're a neutral arbitrator.
8 We've got to -- This is a serious matter. We ask that
9 you recuse yourself so one of the other third
10 arbitrators that the judge had nominated could take
11 your place."
12 He provides an order simply saying, you
13 know, "I deny your motion." He doesn't explain the
14 relationship, doesn't explain anything. All he does
15 is just deny our motion, then he goes forward. And we
16 go to -- we submit all the documentation for -- Well,
17 back up a second.
18 Mr. Esser -- At the hearing or the phone
19 hearing that we had dealing with the discovery issue,
20 Mr. Esser at that point basically instructs us to file
21 summary motions. Now, we file. And he thinks this
22 matter can be resolved without actually having my
23 people have their day in Court, so to say, in
24 arbitration. Which, unfortunately, you know, that
25 basically corresponds directly with some of the

1 Court's comment, where they said, "We don't think
2 you're going to have witnesses. This isn't going very
3 far." I cited those in the brief.
4 So, now we have Mr. Esser basically taking
5 control of what's been taking place and we aren't even
6 going to be able -- we're not going to -- we're not
7 going to have witnesses other than what we can put
8 into the record through the summary motion. So, we
9 filed a summary motion and, along with that, have
10 submitted evidence. The Garretts -- There was no
11 evidence submitted by Garrett Ranches, none. The only
12 evidence that was submitted was evidence that we put
13 into evidence in the summary motion. There was some
14 argument of counsel, but no evidence.
15 So, Mr. Esser, basically as a neutral
16 arbitrator, kind of controlled the summary motion
17 hearing. I started off and I began to make my
18 argument and Mr. Esser interrupted me and he says --
19 he says, "We understand, you know -- you know, I feel
20 that there was no consideration paid in this matter."
21 He said, "I have a question, I have issues with the
22 res judicata. I want you to talk about that."
23 So, I started talking about that and, you
24 know -- you know, when the Court indicated at the
25 summary motion that Mr. Esser doesn't have much

1 patience, you know, that definitely spilled over into
2 that summary motion --
3 THE COURT: What did I say, now? That's
4 patience with frivolous.
5 MR. LOCKWOOD: Okay.
6 THE COURT: Frivolous. Now you're taking
7 my statements out of context.
8 MR. LOCKWOOD: Okay.
9 THE COURT: Be fair.
10 MR. LOCKWOOD: I'll be fair. That's what
11 the Court did say.
12 In my -- In my argument, I started
13 trying to address the issues of the res judicata, in
14 which I told him, in essence, basically what we have
15 is a, you know, a defense -- you know, we withdraw --
16 when you withdraw, that's not a claim, that's a
17 defense, that's an affirmative defense for a specific
18 performance which they filed. They filed a motion --
19 They filed a claim for specific performance, and we
20 said, "Nah, that's a defense."
21 Well, then Mr. Ferguson made some -- it
22 was his turn to make -- he made comments and he
23 commented about the consideration issue and basically
24 argued that it was a integrated document and some
25 other things. Well, I wanted to address that.

1 Mr. Esser wouldn't let me, allow me to address it in
2 our summary motion argument, but I did address it in
3 my motion for vacating the award. The reason why,
4 Mr. Esser completely disregarded evidence that was
5 submitted to him.
6 What we basically provided him was a
7 excerpt from the deposition that Mr. Moyer took of
8 Mr. Frank Garrett. In that document, in his
9 deposition that was submitted, Mr. Garrett indicated
10 that he raised the issue of putting up hay as
11 consideration for the option and that the Honns didn't
12 respond. That's in the record. That's what
13 Mr. Garrett said and he was very clear. It was -- It
14 was no ambiguity, it wasn't -- there was -- there
15 was -- there was no, you know, mistake. He said,
16 "We're looking at compensation for the option to being
17 putting up hay, except the Honns didn't respond to our
18 suggestion." In other words, at that point there was
19 no consideration put up for the option.
20 And this -- And the lease, as Mr. Esser was
21 able to spin it, was not the integrated document
22 supporting the option, because we know it's not
23 because Mr. Garrett indicated that they discussed the
24 compensation for the option as completely something
25 else, something different. So, he just completely

1 disregarded that.
2 Then, you know, as to the res judicata
3 issue, you know, Mr. Esser, I mean, looking at this
4 thing, basically looking at it saying, "Oh, you have a
5 claim, you should have filed the claim." Well, it's
6 not a claim. It's a defense. And fortunately for us,
7 the Court of Appeals can review issues on the face of
8 the document if they're wrong. So, at least Mr. Esser
9 stated, you know, some reasons in the face of his
10 appeal. But, I think, based on all those issues that
11 were raised -- And the reason why we've -- you know, I
12 raise those issues about disregarding evidence and
13 disregarding the case law, I cited case law to
14 Mr. Esser and I also cited to this Court, when it
15 talks about options, our Supreme Court in case after
16 case after case said when you're dealing with options,
17 if it's not support of a consideration, you can
18 withdraw it at any time. Doesn't say you have to do
19 it immediately or as soon as you find out or
20 whatever. It just says if you do it before it's
21 exercised. That's all it says.
22 Mr. Esser, in order to get -- you know, I
23 think he -- I think he worked backwards at this, he
24 was reverse engineering it, trying to -- I think he
25 had a decision in mind and he worked that way, because

1 he completely disregarded that. In fact -- And he
2 also tried to distinguish the fact that, you know,
3 option-wise for an independent, stand-alone option is
4 different than an option that's encompassing another
5 document.
6 You know, there's no case law in
7 Washington. He never cited anything. He's just
8 making up his own law in order to get to where he
9 wanted to get. So, because of that, you know, we
10 think that it should be vacated.
11 But, as we said earlier, our initial motion
12 for the disqualification, we think the Court should
13 allow a separate judge to hear that matter, the
14 matters on the vacation, just because there's so many
15 issues that are raised in that motion that are related
16 to comments made on the motion for reconsideration
17 that we think indicate that there -- or at least it
18 can be taken as though there may be some bias there.
19 Because of that, we think at this point just to have
20 another judge appointed at this time to -- you know,
21 to kind of, you know, I guess we'd call it bat cleanup
22 just seems to make the most sense.
23 Thank you.
24 THE COURT: Go ahead.
25 MR. FERGUSON: Your Honor, to get to the

1 question that you posed to opposing counsel, it's the
2 Court's role here to confirm the arbitration award
3 unless it is modified or vacated, and that's section
4 7.04A.220. And that says that the Superior Court
5 shall confirm the award unless modified or vacated.
6 And what's -- this case boils down to -- And let me
7 categorize opposing counsel's motions. I think, that
8 way, we can -- we can grapple with the issue a lot
9 easier and talk about what the law is, rather than
10 perceptions.
11 The Defendant here states essentially four
12 grounds for why this Court should not confirm the
13 arbitration award. And I'll also add that
14 confirmation does not mean that the Court looks into
15 the legal basis for the arbitrators' decision; it
16 looks at only those specific enumerated statutory
17 factors in 200, 230, and 240.
18 So, there are four grounds that the
19 Defendant claims would prevent this Court from
20 confirming the arbitration. Number one is the
21 Appearance of Fairness Doctrine. Number two is
22 240(1)(b)(i). The next one is 240(1)(c) and
23 240(1)(d). Those -- Or, excuse me, 230(1)(d), (1)(c),
24 and (1)(b)(i). Those -- And I'll address each one of
25 those in turn.

1 But I want to get back to Mr. Lockwood's
2 perception of what happened at that summary judgment
3 hearing via telephone. That isn't relevant to today's
4 case, so I'm going to leave that by the wayside. I
5 think his recollection and my recollection are
6 substantially different, especially how he believes he
7 was treated by Mr. Esser. And I want to talk just a
8 little bit about him asking for the -- to take the
9 deposition of Mr. Libey and to access our attorney-
10 client files.
11 The denial by the arbitration panel before
12 the summary judgment hearing of Mr. Lockwood's access
13 to our files and to take the deposition of Mr. Libey
14 was a unanimous decision. It was not Mr. Esser simply
15 saying, "No, you can't." It was all three of the
16 arbitrators saying, "No, you can't. There will
17 probably be some dispositive motions made and we're
18 going to entertain those before we delve into whether
19 we're really going to allow depositions to take place
20 and access to files."
21 So, then back to the motions before this
22 Court today. There's a motion by the Defense to
23 vacate and an objection to confirmation. The first
24 issue is the Appearance of Fairness Doctrine. And the
25 argument that goes to the Appearance of Fairness

1 Doctrine regarding Mr. Esser's involvement is the --
2 is the same analysis as this Court would employ in
3 determining whether the Appearance of Fairness
4 Doctrine was violated by this Court. And so, for
5 those reasons, we integrated our response to their
6 motion to disqualify this Court into our response to
7 their motion to vacate.
8 And really what it boils down to is
9 whether the Appearance of Fairness Doctrine is
10 violated from an objective perspective, whether a
11 reasonable person would view the proceedings as being
12 fair on its face. And the Court also looks at, and
13 the Court of Appeals, and Mr. Lockwood has hinted that
14 there will be an appeal, so the Court of Appeals will
15 look at whether the Court was apparently biased toward
16 a party. Now, I don't believe there's been any
17 showing whatsoever, and I don't think there can be any
18 showing, that this Court or any of the arbitrators,
19 except, well, maybe Mr. Gebhardt, who was the
20 appointed arbitrator for the Honns, and then possibly
21 our arbitrator who was appointed for us, would be
22 biased in favor of one party or the other.
23 There's been no showing that Mr. Esser was
24 in any way biased toward anyone. And, in fact -- And
25 this is something that opposing counsel stated when he

1 was up here, that Mr. Esser had simply just denied his
2 request for Mr. Esser to recuse himself. He said,
3 well, there just wasn't any reason. However, there
4 was a letter on November 6, 2014, where Mr. Esser
5 said, "I'm making this disclosure. I've considered
6 your letter, Mr. Lockwood. I've considered the
7 affidavit of this Connie Taylor, and I'm going to deny
8 your request. I don't believe that my impartiality is
9 affected in any way." And that's at the very bottom
10 paragraph of Mr. Esser's letter, and that's in the
11 record as Exhibit D to Defendant's own motion -- or,
12 excuse me, Objection to Confirmation of Arbitration
13 Award and Motion to Vacate Arbitration Award, et
14 cetera, et cetera, filed on February 3rd. So,
15 Mr. Esser did provide his reasons.
16 Now, the declaration of Connie -- or the
17 affidavit, actually, of Connie Taylor, that was
18 something I didn't even get to see until after it was
19 considered by the arbitration panel. I realize that
20 some of the documents say that I was cc'd on that
21 communication, but I was cc'd on it well late of even
22 the consideration by the arbitration panel. I didn't
23 receive notice of that affidavit. And had I, the
24 arbitration panel would have learned that in no way
25 was that affidavit accurate, it may have even been a

1 complete fabrication, because the person who created
2 that affidavit happens to be the girlfriend of the son
3 of Larry Honn, Sr.
4 So, there is absolutely no evidence that
5 either this Court or the arbitration panel, Mr. Esser,
6 violated the Appearance of Fairness Doctrine. And
7 we've set forth further reasons in my brief, including
8 the Kok decision, which I think applies on all fours.
9 The remainder of the motion to vacate,
10 subsections (1)(b)(i) and (1)(c) and (1)(d), (1)(b)(i)
11 states that the arbitration award may be vacated upon
12 a showing evidencing partiality by an arbitrator who
13 is considered to be neutral. Again, there's been no
14 showing, and there can't be any showing. Simply
15 because Mr. Esser was partners half a decade ago with
16 Mr. Libey does not create impartiality. I think the
17 case law flat out refutes that. And I cite the Court
18 to Hanson versus Shim, which is Division 1, 1997. I
19 cited that in my brief. And even in that case, there
20 was no disclosure. Here we even have a disclosure,
21 okay. And in the Hanson case, the Court of Appeals
22 said, "Yeah, the arbitrator didn't even disclose this,
23 but we're still going to find that he wasn't -- that
24 the arbitrator was not partial, that he was
25 impartial."

1 Subsection (1)(c), and that's the third
2 argument posed by the Defense, and that is that the
3 arbitration award may be vacated upon a showing that
4 the arbitrator refused to consider evidence material
5 to the controversy. There is no indication that
6 Mr. Esser refused to review this material. This is
7 simply the Defense saying, "Well, we didn't get the
8 answer we wanted. We argued, we argued for a legal
9 position, but we just didn't get what we wanted and so
10 we're going to argue this issue again, we're going to
11 argue the legal issue again."
12 Now, the legal issue, to give the Court a
13 window into it, was does Washington require
14 independent consideration for an option that appears
15 inside of a lease. Now, this "integrated document"
16 talk from the dissent by Mr. Gebhardt and by
17 Mr. Lockwood, that's a completely different theory of
18 law than what Mr. Esser was talking about. Mr. Esser
19 was saying, "I agree with Plaintiff. You don't need
20 separate consideration for an option that appears in
21 the lease." The argument fronted by the Defense was,
22 "Yes, you do. You need independent consideration."
23 And Mr. Esser simply disagreed with the Defendants and
24 came to a different legal conclusion.
25 So, it doesn't -- as a legal matter, it

1 doesn't matter what Mr. Garrett or Mrs. Honn thought
2 about consideration. Doesn't matter. The legal
3 theory applies and the legal theory says it doesn't
4 matter what they thought.
5 And again, this wasn't just Mr. Esser. It
6 was two of the three arbitrators. And again, I don't
7 know why Mr. Esser is being singled out.
8 And then we have subsection (1)(d), and
9 that was another subsection cited by the Defendant.
10 This is the final one, but there wasn't any argument
11 on it. And that one says that an arbitration award
12 may be vacated upon a showing that an arbitrator
13 exceeded his powers. I cannot garner from Defense
14 material as to exactly how Mr. Esser or the
15 arbitration panel itself exceeded its powers. I mean,
16 there's just -- there's simply no argument on that. I
17 can't even brief it because I don't know what they're
18 talking about.
19 So, your Honor, this Court should confirm
20 the arbitration award. That was the motion that we
21 had made. This was carried over from last Friday.
22 The statutes are clear, there's only a limited series
23 of things to consider, and the arbitration award
24 should be deemed valid. And then if the Defense wants
25 to -- wants to argue these issues on appeal, then I

1 think they have the right to do that, but I think that
2 there are no grounds to deny confirmation.
3 Thank you.
4 THE COURT: Okay. I'm going to give
5 Mr. Lockwood the last word.
6 MR. LOCKWOOD: Just kind of finish up here
7 real briefly. He talks about disclosures. Mr. Libey
8 didn't disclose anything other than what we've brought
9 to the Court's attention that we found out at our
10 motion for reconsideration. As a matter of fact, you
11 know, pretty much, I guess, everyone in this courtroom
12 other than myself knew the relationship between
13 Mr. Libey and Mr. Esser but it was never disclosed. I
14 mean, Mr. Esser never disclosed when his partnership
15 ended, whether he still had an ongoing business
16 relationship with Mr. Libey, whether or not, you know,
17 they had social contact, and if they did, what type of
18 social contact. All those are issues which go to the
19 appearance of fairness and bias and none of those were
20 raised in disclosures.
21 Now, Counsel cites these cases dealing
22 with the issue of non-disclosure and then he talked
23 about someone that was a member of a law firm for a
24 number -- a period of years. In that case, there's
25 no -- there was no allegation or inference that there

1 was a continuing social relationship between those
2 parties. In this case, there is, and that is
3 extremely critical when you're doing -- dealing with
4 an arbitration when you have to have a neutral third
5 party as an arbitrator.
6 The issue of impartiality that was raised
7 and there's nothing that shows impartiality, well,
8 yeah, there -- the inference of impartiality, number
9 one, comes from the fact that, like I said, it all
10 relates to the non-disclosure dealing with an ongoing
11 relationship with the attorney on that, on the other
12 side of the case. That was another reason why I also
13 cited the fact that those -- the issues relating to
14 the -- Mr. Garrett's declaration -- or not declaration
15 but deposition, appeared to me was completely
16 disregarded by Mr. Esser. And as I said earlier, it
17 appears that Mr. Esser, in fact, was kind of reverse
18 engineering to get where he wanted to go in this
19 matter.
20 Last but not least, Judge, we think that
21 these issues on the vacating this matter are something
22 that should be left up to a different court,
23 considering the issues that we raised in our motion
24 for disqualification.
25 I'll just leave it at that.

1 THE COURT: Okay. Well, I think I've made
2 it obvious before, I find this case to be -- This has
3 been a long, drawn out case. I find it to be very
4 frustrating. I think it's interesting that this case,
5 the underlying issue here is a lease and it is a lease
6 that has a provision for alternative dispute
7 resolution, arbitration, which means an agreement to
8 handle any disputes that arise out of court in an
9 efficient, economical manner.
10 And, yes, I have been frustrated. I
11 haven't just been frustrated with the Honns.
12 Mr. Lockwood makes it sound how unfair the judge is.
13 I've been up front. When I say "the Honns," I really
14 mean the Honns' lawyer, not the Honns; and when I say
15 "the Garretts," I mean the Garretts' lawyer, because,
16 you know, what my frustration is, I have sympathy for
17 the parties, the Honns and the Garretts, because
18 lawsuits and hiring lawyers and paying court costs, I
19 know, is expensive. I see bills all the time as to
20 how much it costs.
21 And here in this case, maybe the lawyers
22 here think this is just great, that's the way to do
23 business as a lawyer, but this is an arbitration case
24 where the Court doesn't decide the merits of the
25 issue. Usually courts are -- it's maybe 30 minutes of

1 court time. Never seen a case with arbitration like
2 this one. I have the court docket here. The -- To
3 date, the most recent files -- And maybe some of
4 these -- maybe Mr. Ferguson's later documents didn't
5 make the computer, I don't know. Doesn't matter. In
6 an arbitration case, there's been 264 separate
7 pleadings. Now, I would think that, at least from a
8 lawyer's standpoint, they would find that somewhat
9 shocking, maybe somewhat embarrassing, because the
10 action, the decision-making, the real decision-making,
11 is made in arbitration.
12 This isn't the first set of arbitration.
13 If I remember right, and I'm speaking off the top of
14 my head here, but it seems as though the first round
15 involved maybe two separate arbitrations, maybe it was
16 just one, and then I do know that that arbitration
17 involved issues pertaining -- it all related to the
18 lease. Included in the lease was the option to
19 purchase here. And I know that not because of
20 anything I may have heard out on the street or at
21 lunch or because I'm acquainted with lawyers that
22 might be involved in the case, but because of
23 documents, many of the 264 documents that have been
24 filed in the case, and arguments that I've heard from
25 the lawyers in this courtroom since 2010. This case

1 was filed in 2010. Gentlemen, this is 2015, five
2 years later.
3 Now, the challenge being made here to this
4 Court, the issue with respect to the request of this
5 Court to recuse itself is really two-fold. The first
6 relates to the Court's appointment of Mr. Esser as an
7 arbitrator; and also to comments that the Court made
8 that the Honn side of the case here is construed to
9 be, I think they termed them comments on the evidence
10 or pre-deciding the case or issues in the case.
11 As far as the appointment of Mr. Esser as
12 the arbitrator, I found it frustrating to -- how many
13 times did the issue of appointing an arbitrator come
14 before the Court in this latest round. We had parties
15 that can't agree to anything. The arbitrators
16 couldn't agree. I think it started out with appoint
17 new arbitrators on one side, keep the old
18 arbitrators. I thought that was -- Excuse me, I'm
19 going to offend people here. I thought that was
20 somewhat frivolous because, based on things I had
21 heard from the mouths of these two lawyers previously,
22 and I don't know who was arguing what, Mr. Gittins, I
23 know, was an arbitrator and there was all kinds of
24 statements made by these two lawyers in this Court, in
25 this case, that he hadn't been paid; so when there was

1 a -- and this is -- Mr. Ferguson said we had to have
2 an argument over whether the old arbitrator should
3 remain. Well, come on. Common sense based on what I
4 had heard earlier, I knew Gittins wasn't going to
5 serve. I knew that, common sense, from what I had
6 heard from the two of you. But, no, we had to have a
7 hearing and argument. I think Mr. Lockwood won that
8 one, right?
9 MR. LOCKWOOD: Yes, your Honor.
10 THE COURT: So, why didn't you file -- ask
11 me to recuse, Mr. Ferguson? You know? You lost one
12 there. Impartial here, I guess.
13 We get to the point, the ultimate point
14 here, of a request or a motion to appoint the third
15 arbitrator -- And, you know, you refer to the
16 arbitrators as, I guess what I'm hearing is you're
17 supposed to have one that favors one side and one that
18 favors the other side and then they pick a neutral
19 one. I don't think that's how arbitration is supposed
20 to work. I think each side gets to select an
21 arbitrator, but I don't think, when you select an
22 arbitrator, the role of the arbitrator is to be biased
23 in favor of the side of the party that made the
24 appointment.
25 Now, again, I don't know a lot about

1 arbitration, but my understanding was, if you're an
2 arbitrator, regardless of who appointed you, your job
3 is to be fair and impartial and neutral. Maybe I'm
4 wrong, but, again, I don't know a lot about
5 arbitration. That was my understanding here.
6 You had an argument in this court as to the
7 appointment of the arbitrator, and I think I pointed
8 out at the time, rarely, if ever, I don't know if I've
9 ever done this, when it's appointing a guardian ad
10 litem -- I think I stated at the time, I almost never
11 follow the suggestion of one of the parties.
12 And Mr. Ferguson, I know, did suggest
13 Mr. Libey. I know this. In the course of his
14 statement as to why he would be a good arbitrator in
15 the case, he stated how patient he was. Now, don't
16 take offense, Mr. Ferguson, but I think I pointed out:
17 No, he's not. Yeah, I know him, he's been in this
18 court many, many times in my 14 years in this court
19 and many times in my 18 in District Court, and I've
20 seen a lot of him and I haven't seen a lot of
21 patience, but I've seen common sense, practicality and
22 efficiency.
23 And the statement that Mr. Lockwood finds
24 so offensive that I made, he's construing it as though
25 I'm going to appoint Mr. Esser because he won't hear

1 any procedural motions or issues. That's a quote.
2 That's the way you're trying to construe it. And what
3 you'd really be arguing is, wouldn't hear any
4 procedural issues that the Honns bring up. Well, read
5 the quotation that you made: Frivolous. Frivolous
6 issues and procedural -- I know he wouldn't put up
7 with it, and I'm sure he didn't, and he shouldn't. Me
8 either.
9 Now, just so I won't offend Mr. Lockwood's
10 sensitivities here, I'll give you an example of
11 something I find frivolous. This is what I find
12 frivolous. One week ago there was, by Mr. Ferguson, a
13 motion set, I think, to confirm the arbitration award,
14 one of the things before the Court today, and he
15 scheduled it and I -- I think he scheduled for last
16 week, the 6th of February. Mr. Lockwood, I think,
17 e-mailed, called, letter, something, "I have court
18 that day. I can't be in court." Well, civility,
19 common decency.
20 See, I'm not picking on you,
21 Mr. Lockwood.
22 What did he have to do? We had to have a
23 hearing. We had to have a hearing on whether, I
24 guess, Mr. Lockwood could be in two places at once.
25 That's not your fault. I -- Right here.

1 Mr. Ferguson, why did we have to have that?
2 That has been standard operating procedure
3 with everybody in this case from the first time I saw
4 it in 2010. And if that's the way that the lawyers in
5 this case think that the practice of law should be or
6 that this case should be handled, well, I guess the
7 lawyers and I have a big disagreement. I'm stating
8 that right here on the record here.
9 So, yeah, I appointed Mr. Esser and
10 appointed Mr. Esser because I knew he could be neutral
11 and he could be fair and he would be efficient and
12 wouldn't put up with so much, quite frankly, that I
13 haven't -- that I have put up with, and shouldn't, in
14 this particular case. At the time when I made the
15 appointment, didn't even think -- should have, should
16 have known -- "Yeah, he used to be in the Libey firm.
17 They were partners." I don't remember how long ago,
18 but, yeah, I knew that. Didn't remember that. Maybe
19 one reason I didn't think about it is, even though
20 they may have been partners at one time, I see them on
21 other sides of cases very frequently, very frequently,
22 and have been for a few years now, again don't know
23 how far back.
24 Now, I think the law -- And we had a
25 motion to reconsider and I was reminded of that former

1 business relationship and of the fact there'd been a
2 termination of that relationship, which I also knew
3 about, and I did not hear anything at that
4 reconsideration hearing that made me believe that
5 there's a matter of law or for any other reason that
6 that former partnership relationship in and of itself
7 would constitute grounds to disqualify Mr. Esser. Or
8 if he had been a judge in a case, sitting up here, and
9 years earlier had been a partner of one of the lawyers
10 in the action, I think the law's pretty clear, there's
11 no legal requirement of recusal, particularly when
12 everyone is aware of the situation here.
13 So, you know, it also, I think, needs to be
14 pointed out, this case, what's the case about? Is it
15 the Libey firm against the Lockwood firm or is it the
16 Garretts against the Honns? And I point that out
17 because, yeah, we've got a small community. And don't
18 tell me Spokane -- It's bigger than here, but you see
19 the same issues all the time in Spokane. It is not
20 unusual for a judge that has been a member of one of
21 the firms in Spokane to hear cases where one of the
22 judge's partners, former partners, represents one of
23 the litigants. And there's ethical rules that permit
24 that, particularly after a given period of time.
25 This community, last month we had, in the

1 month of January, five jury trials. And we have a lot
2 of interaction between the citizens of this small
3 community and the legal community here. And in the
4 five cases that had jury trials last month, I think in
5 every one of them there were jurors that knew one of
6 the attorneys or that was on -- one case was the
7 Library Board with one of the prosecutors. With that,
8 the Prosecuting Attorney back here, he handled one of
9 the cases and there was a juror had some relationship
10 with he or his wife.
11 And the law is pretty clear in a jury
12 trial, just because there is a -- if you've got a
13 lawyer representing the party in a case and a
14 potential juror that has a business relationship with
15 the lawyer, "That's my lawyer," I think the law is
16 pretty clear that's not grounds to excuse the juror.
17 So, I did not feel previously, I do not
18 feel now, that the fact that I appointed Mr. Esser and
19 refused the motion to reconsider, I do not feel that
20 was error as a matter of fact or as a matter of law
21 here.
22 There is some kind of an affidavit as far
23 as Mr. Libey, Mr. Esser, and myself having lunch,
24 sounds like about every day. I probably shouldn't
25 disclose this because this is going to upset

1 Mr. Lockwood and the Honns, but, you know, I do know
2 Mr. Libey so well that I know he doesn't eat lunch. I
3 know what he does at noon. Well, he might eat lunch,
4 but I don't know where he eats it; it isn't with me.
5 Might be with Mr. Esser, but I don't think so because
6 he walks down the street with a gym bag every noon.
7 It's a small community. I can see it out the window.
8 And maybe as I walk to lunch sometimes with other
9 people, he's in the group and walks along. He goes to
10 that gym down here and he works out every day.
11 And I don't know when -- Yeah, I've had
12 lunch with Mr. Libey. I don't know when. I was
13 having lunch with other lawyers today and he came in
14 because one of the people there was a former Superior
15 Court judge, he came in to speak to him. So what?
16 And when this case gets appealed and my decision gets
17 appealed, you might want to ask the panel, some of the
18 judges, "Have you ever had breakfast or lunch with
19 Judge Frazier, the judge whose decision you're going
20 to review?" Or if it goes on to the Supreme Court,
21 ask that panel of Supreme Court justices the same
22 thing.
23 As far as that affidavit from -- or
24 declaration or whatever it was, that person better
25 check her facts here because there is a lot of

1 inaccuracies with respect to that. And even if it
2 were true, it's, I don't feel, grounds for me to
3 recuse myself in this particular case, or grounds for
4 Mr. Esser to be disqualified.
5 When I made my decision on the issue of
6 appointment of Esser, I referred the issue, "Bring it
7 up with Esser. He may know a lot more about it than I
8 do. And if he feels recusal is necessary, he can."
9 And I'm Frustrated here. I wanted to avoid further
10 time, further expense, further hearing, further legal
11 fees. So, okay, "If he recuses...," and I, off the
12 top of my head, named off a lot of other people and
13 tried to give a little bit of consideration in the
14 quick matter that I did it, so other -- they might
15 have some expertise in this area and could there be
16 any possible grounds that they might not be able to
17 serve in a fair manner, again trying to keep these
18 people -- save you some money, keep you out of court
19 and give myself some time to get the work I need to
20 get done and not have to continually relitigate the
21 same types of cases.
22 Esser apparently was asked to recuse, he
23 refused to recuse, and I haven't heard anything here
24 today that I feel would be grounds to vacate the
25 arbitrators' decision because he participated in that

1 particular proceeding here.
2 The second complaint that I'm hearing and
3 the grounds that this Court recuse itself here relates
4 to comments I made that had been construed to, I
5 guess, mean that I have prejudged the case or referred
6 to as a comment on the evidence. And, interestingly,
7 I feel, and I believe the Court of Appeals feels, that
8 when judges are asked to make decisions on motions or
9 on petitions, when they make those decisions, they are
10 required to state why and state the factual basis and
11 the legal basis. And I feel that that's proper, I
12 feel that's fair and I think it is necessary. And
13 Mr. Lockwood's submittal here indicates what I said,
14 but we have to consider the context of how those
15 statements or why those statements were made.
16 There was a motion here that I had to
17 decide, made on the Honns behalf, to essentially
18 disqualify the Libey firm on the grounds that
19 Mr. Libey would be a witness. Now, in order to decide
20 that issue, there are some facts that the Court has to
21 take into account and there are legal standards that
22 guide the Court in making that decision. And I
23 believe -- And I believe the standard is the Court has
24 to ascertain whether the lawyer, in fact, is going to
25 be a witness, whether the lawyer's testimony is

1 necessary or whether the lawyer will, in fact, likely
2 be a witness.
3 And again, this Court has had a lot of
4 history with this case. This Court knew that there
5 had been an arbitration many years ago because this
6 Court heard a lot of issues pertaining to that, and I
7 believe there was a confirmation of the award. I know
8 there was an appeal and an appellate decision came
9 back and I know that it related to the lease. And the
10 issue here is the option to purchase as part of the
11 lease, and I knew that that was an issue that was
12 addressed to some extent by the Court of Appeals, by
13 the parties previously in their arbitration. And I
14 also knew from the parties that this option to
15 purchase and the validity of this option to purchase
16 was an issue in the present litigation.
17 And so in making a decision as to whether I
18 should order that the -- we'll call it "the Libey
19 firm" be disqualified here and to determine is it
20 likely that Mr. Libey will really be a witness, and
21 yes, I made comments. I think I made comments like,
22 "I don't think that's going to happen because my
23 experience here, this case and other cases, probably
24 going to be thrown out on grounds of res judicata."
25 Now, it's not my decision to decide

1 whether, in fact, that should be the arbitrators'
2 decision. That was left up to the arbitrators, and
3 the arbitrators weren't sitting here in the
4 courtroom. And I'll comment on the evidence as I give
5 the jury my opinion as to the value or weight to be
6 given to evidence. No, I made those comments as a
7 basis and as a reason for not disqualifying the Libey
8 firm.
9 And I'm hearing here today -- I don't know
10 if this is fact or not; it was the argument of
11 Mr. Ferguson here -- that all three of the
12 arbitrators, unanimous decision -- not just Esser but
13 all three, the other two, too -- decided to hear that
14 legal issue or the legal issues first and did,
15 apparently, decide those.
16 So, I'm, number one, denying the motion to
17 recuse. And, quite frankly, under circumstances where
18 I am asked or requested to recuse myself from a case,
19 I almost invariably, whether I agree there's a good
20 reason or not, heck with it, I'll recuse myself. I
21 don't have any vested interest in any cases. You
22 don't think I'm going to be fair, you get another
23 judge. But, you know, I'm not going to do it here
24 because I don't see any merit to the argument.
25 What I see is what I've seen historically

1 in this particular case, just effort after effort
2 after effort to keep the case going and to run the
3 expenses up, and it just flat out isn't fair and it
4 isn't fair to the Honns and it isn't fair to the
5 Garretts, who are picking up the tab for all of these
6 bills. It's a -- It's an injustice to them to have
7 another hearing, another judge.
8 And the bottom line, the arbitrators made a
9 decision, and it's undisputed from the record I have,
10 a legal decision. So, why keep litigating at this
11 level? If you disagree, appeal. You can have
12 reconsiderations and another judge and more
13 arbitrations or you can get the issue in an efficient,
14 effective manner to the Court of Appeals.
15 I'm not going to recuse myself. I'm going
16 to deny the motion to vacate the arbitration
17 decision. And I'm going to grant the order confirming
18 the arbitration award, which in effect, I believe,
19 brings an end to this case at this level, at this
20 time. So, you can avoid future hearings, expenses,
21 arguments, time, and not to mention the mental anguish
22 the poor litigants have to go through when they have
23 cases pending in court. I'm sensitive of those
24 things, as well, not just one side but for both sides
25 here.

1 So, that's my decision. Now I've
2 explained it, I've given details. I appreciate you
3 both agree with it, disagree in certain respects and
4 in many respects, but that's it and you're stuck with
5 it. And I think I've made a sufficient record. When
6 you disagree, take it up. I invite you to. Okay?
7 So, I don't know whether you've got an
8 order prepared.
9 MR. FERGUSON: I do, Your Honor.
10 THE COURT: If you do, I'd ask that you
11 review it with Mr. Lockwood. And if you need some
12 time, take your time. If we can get one entered
13 today, then we save a presentment hearing and further
14 argument about the language of the order.
15 (Discussion off the record amongst the
16 Court, support staff, and counsel regarding preparing
17 and signing documents.)
18 THE COURT: All right. That will conclude
19 the matter. That's the last thing we have left, so we
20 will adjourn.
21 (The hearing concluded at 3:32.)
22
23
24
25

1 REPORTER'S CERTIFICATE

2

3 I, Michael S. Kuplack, a Certified court Reporter
4 and a Notary Public in and for the State of
5 Washington, do hereby certify:
6 That the proceedings were recorded by the court
7 and thereafter, a CD was provided to me and
8 transcribed to the best of my ability; that I am in no
9 way related to any party to the matter, nor to any
10 counsel, nor do I have any financial interest in the
11 event of the cause.
12 WITNESS MY HAND THIS 7th day of April, 2014.
13
14
15
16 Michael S Kuplack
17 _____
Michael S. Kuplack
18 CCR No. 2750
Notary Public in and for the
19 State of Washington, Spokane County.
Commission expires August 27, 2016.
20
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Appendix D

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MAR 08 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 331750

WHITMAN COUNTY CAUSE NO. 10-2-00293-4

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

GARRETT RANCHES, LLC
a Washington Limited Liability Company
Respondents

v.

LARRY HONN FAMILY, LLC
a Washington Limited Liability Company
Appellants

APPELLANT HONN'S MOTION FOR RECONSIDERATION

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Rules

RAP 12.4 1

The appellant Larry Honn Family, LLC requests reconsideration of this court's unpublished decision dated February 25, 2016 pursuant to RAP 12.4 as follows:

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S APPOINTMENT OF A 3rd NEUTRAL ARBITRATOR.

The court found the respondent presented substantial evidence for the trial court to find that the parties arbitration method for appointing a 3rd neutral arbitrator had failed and to intervene pursuant to RCW 7.04A.110(1).

The panel stated that the proper standard to apply is whether or not substantial evidence was presented to the trial court to invoke RCW 7.04A.110(1) and allow the trial court to appoint a 3rd neutral arbitrator.

The panel stated at page 11

> "Here, a substantial evidence standard of review is appropriate because the trial court was required to weigh evidence in determining whether the party arbitrators were unable to select the nonparty arbitrator."

Applying the substantial evidence test the panel found at page 12:

> "We therefore conclude that substantial evidence supports the trial court's finding that the party arbitrators could not agree on a third arbitrator, and that the agreed method for selecting the third arbitrator had failed."

To support the above finding **the panel relied upon the only document in the court record submitted in support of the respondent's motion to have the trial court appoint a 3rd neutral arbitrator**, which was a declaration of William Ferguson the attorney for the respondent.

1. A Declaration Or Argument Of Counsel Is Not Evidence.

The declaration of William Ferguson is not evidence. His unsupported statement that the arbitration panel was deadlocked is not evidence. It is argument.

In State v. Jordan, 158 Wn.App. 297, 304, 241 P.3d 464 (2010) the court stated:

> Jordan asserts this argument was an impassioned plea to vindicate the victim's rights. There was no objection, however, and any possible prejudice would easily be obviated with a curative instruction. ***Indeed, the jury was instructed that argument of counsel is not evidence*** and that they must not decide the case based on sympathy or prejudice

In this case, if the declaration of respondent's counsel William Ferguson is removed, the record is void of any supporting evidence for the respondent's motion to have the court appoint a 3rd neutral arbitrator or the panels finding of substantial evidence.

The appellants have found no case law in the State of Washington or any other jurisdiction, state or federal where a declaration of counsel is found to be substantial evidence supporting their own motion.

2. The E-mail Attachment To Mr. Ferguson's Declaration Was A Further Statement From Mr. Ferguson And Not The Arbitrators.

Counsel for the respondent did not attach any letter, e-mail or other supporting evidence from the arbitrators indicating they were deadlocked or that the arbitration method had failed. The only supporting attachment was Mr. Fergusons's own e-mail in which he alone indicates the arbitrators were deadlocked. That is not substantial evidence or evidence of any kind from the arbitrators'. That is an e-mail from one attorney to opposing counsel.

The appellant has found no case law which has held an unsupported declaration of opposing counsel is to be considered substantial evidence in the State of Washington or any other state or federal court.

Further the panel indicates that there was no objection to Mr. Ferguson's claim. That is not correct as the issue of no evidence from the arbitrators indicating a deadlock was raised in the

objection to respondent's motion to appoint a 3rd neutral arbitrator. (CP35)

If this is the current standard in the State of Washington it is paramount that this case be published as it will affect every case in the State of Washington now in litigation.

3. The Trial Court Was Not Presented With Any Evidence From The Arbitrators Indicating The Arbitration Method Had Failed.

The trial court did not know if the arbitrators were deadlocked and clearly indicated that fact:

> 23
> 21 As far as the court's designation of
> 22 Mr. Esser, when that issue was brought before me,
> 23 **really wasn't certain whether the two arbitrators that**
> **24 had been selected by the parties had been unable to**
> **25 reach an agreement. I think the two attorneys had a**
>
> 24
> **1 disagreement on that issue. And I thought, "Oh,**
> **2 they'll probably agree to the third arbitrator if we**
> **3 put a deadline on it." Apparently they didn't.**
> (October 24, 3014 - VR23-24)

This panel cannot identify any evidence the trial court relied upon other than the declaration of the respondent's counsel William Ferguson and his own e-mails. There was absolutely nothing from the arbitrators' indicating they were deadlocked.

How can this panel find that there was substantial evidence to support the trial courts intervention pursuant to RCW 7.04A.110 when the trial court admits it **"really wasn't certain whether the two arbitrators that had been selected by the parties had been unable to reach an agreement."**

4. The Trial Must Find The Arbitration Method Had Failed Prior To Intervening And Appointing An Arbitrator Under RCW 7.04A.110

This panel found at page 11 of its decision:

> "The trial court was uncertain whether the arbitrators were at an impasse and, therefore, gave them two additional weeks. Impliedly, the trial court found that if the arbitrators still could not agree on a nonparty arbitrator after two additional weeks, then they truly were at an impasse".

RCW 7.04A.110(1) reads:

> (1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, ***the agreed method fails,*** or an arbitrator appointed fails or is unable to act and a successor has not been appointed, ***the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator***. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method. *Emphasis Added*

The plain meaning of RCW 7.04A.110(1) requires a finding that the arbitration method had failed prior to

intervening and appointing a 3rd neutral arbitrator. That did not occur in this case.

The trial court had no authority under RCW 7.04A.110(1) to intervene in the arbitration process by giving the arbitrators' an arbitrary two week period to name a 3rd arbitrator or the court's named arbitrator would be appointed. Further is was an illusory two week period as the court appointed the former law partner of respondent's counsel. The respondent's named arbitrator, Mr. Smith, would just have to stay silent and the arbitration would be stacked with the respondent's named arbitrator and the respondent's counsel's former law partner.

Based upon the above it is requested that the court reconsider its finding that substantial evidence existed to find that the arbitration process had failed authorizing the intervening of the trial court in the arbitration process.

II. THE PANEL FAILED TO ADDRESS THE SECOND ISSUE RAISED BY THE APPELLANT WHICH IS ONE OF FIRST IMPRESSION.

ASSIGNMENT OF ERROR NO. 2: The trial court committed error by appointing Mr. Esser over the objection of the appellant

The court having appointed the neutral 3rd arbitrator pursuant

to RCW 7.04A.110(1) over the objection of the appellant is an issue of first impression for the court, which was not addressed in the decision.

Washington case law does not address the court's appointment of a 3rd neutral arbitrator pursuant to RCW 7.04A.110(1) over a party's objection.

The respondent in their motion for the appointment of a 3rd neutral arbitrator nominated three individuals as a "neutral arbitrator". (CP5) The appellant objected to respondent's recommended "neutral arbitrators" arguing it was unfair on its face to have a party's recommended "neutral arbitrator" be appointed. (CP35-36)

The appellant specifically objected at the October 3, 2014 hearing to any nominated 3rd neutral arbitrator by either party due to the chance of bias.

7
4 And they've also nominated a couple other
5 attorneys here in Whitman County. And I think, by
6 definition, you start having individuals nominated by
7 a party, they're not a -- they're not a neutral
8 arbitrator.
(October 3, 2014 - VR7)

The respondent had recommended Mr. Timothy Esser as a "neutral arbitrator" as just another attorney from Whitman County. (CP5) The appellant was unaware of who Mr. Esser was at the

time of his appointment or the social relationship with the respondents counsel at the time of the appointment. (CP262)

Judge Frazier admitted at the motion for reconsideration hearing that he was aware of the Esser and Libey partnership but did not disclose it Judge Frazier stated:

25
17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner ...
(October 24, 20014 - VR26)

Judge Frazier later at the February 13, 2015 hearing then indicates he didn't think about the prior partnership but should have:

35
14 ... At the time when I made the
15 appointment, didn't even think -- should have, should
16 have known -- "Yeah, he used to be in the Libey firm.
17 They were partners."
(February 13, 2015 - VR35)

At the October 24, 2014 reconsideration hearing Judge Frazier acknowledged that the appointment of Mr. Esser was clearly outside of the court's normal procedure by stating:

24
4 And normally, and I think I said this at

5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such"
(October 24, 2014 - VR24)

But in this case the court did appoint Mr. Esser over the objection of the appellant. Why was this arbitration different from all the other cases Judge Frazier has in his court?

This interference by the court allowed the respondent's selected arbitrator, Mr. Reed to set back do nothing and the respondent's nominated 3rd neutral arbitrator Mr. Esser would be appointed. Thus, successfully stacking the arbitration panel in favor of the respondent.

Although, the relationship between an arbitrator and counsel may not be grounds for disqualification of a parties arbitrator it should be considered in the appointment of a neutral arbitrator by the court.

It was later learned that the court knew of the social relationship between Mr. Esser and Mr. Libey and failed to disclose it. Unknown to the appellants at the time of the October 3, 2014 hearing, Judge Frazier, Mr. Esser and Mr. Libby were frequently seen together socializing in Colfax, Washington. (CP225) At the

October 3, 2014 hearing the respondent and the court both failed to mention the issue of the Esser and Libey partnership nor did either mention the ongoing social relationship between Judge Frazier, Mr. Esser and Mr. Libey. (October 3, 2014 - VR11-15), (CP5)

The trial court over the objection of the appellant knowingly appointed Mr. Esser as the 3rd "neutral arbitrator" having specific knowledge of the prior partnership of Mr. Esser and Mr. Libey which would or could affect the impartiality of the arbitrator.

The Washington Supreme court held in Rodriguez v. Windermere Real Estate/Wall Street, Inc., 175 P.3d 604, 142 Wn.App. 833, 831 (2008) that:

> Arbitration serves as a beneficial alternative to litigation that can provide a more expeditious and less expensive resolution of disputes. King County v. Boeing Co., 18 Wash.App. 595, 602, 570 P.2d 713 (1977). **But, arbitration can substitute for litigation only if we have confidence in the ability of the arbitrators to make fair, unbiased decisions. The choice of arbitrators has serious implications because: " arbitrators are, when acting under unlimited authority, ... final judges of both the law and the facts, and ... no review will lie for a mistake in either." Dep't of Soc. & Health Servs. v. State Pers. Bd., 61 Wash.App. 778, 785, 812 P.2d 500 (1991)** *Emphasis Added*

In this case the trial court appointed Mr. Esser over appellant's objection to the appointment of Mr. Esser, due to his prior relationship with the respondents counsel.

III. THE PANEL FURTHER FAILED TO ADDRESS THE APPELLANT'S MOTION FOR RECONSIDERATION OF THE APPOINTMENT OF MR. ESSER AT THE 3RD NEUTRAL ARBITRATOR.

The appellant assured the following issue for review:

ASSIGNMENT OF ERROR NO.3: The trial court committed error by the denial of appellant's motion for reconsideration of the order appointing Mr. Timothy Esser as the 3rd neural arbitrator.

The appellant, following the appointment of Timothy Esser, filed for reconsideration of the appointment of Mr. Esser. (CP45-49) The motion for reconsideration was based upon the objection of the appellant to the Mr. Esser the former partner of respondent's counsel Mr. Gary Libey. (CP280-290)

Judge Frazier further, in his October 24, 2014 oral ruling on the motion for reconsideration, attempted to explain a basis for the appointment of Mr. Esser. Judge Frazier states:

> 26
> 14 this -- We have a small community. So is Spokane. I
> **15 mean, I know judges in Spokane, lawyers in Spokane,**
> **16 and I don't know how often that a lawyer from a**
> **17 Spokane law firm gets elevated to one of the courts,**
> **18 Superior Court. Sometimes some of the big firms, I**
> **19 know they kind of have a lull for a certain period of**
> **20 time, a couple years, they flat out won't hear any**
> **21 cases, there'll be disclosure, and they -- Former**
> **22 partners hear cases of former partners and they base**
> **23 their decisions not on who the lawyers are but what**
> **24 are the facts of the case and what's the law that**
> **25 applies.** *Emphasis Added*

(October 24, 2014 - VR23-24), (CP 263-264)

The court's reasoning is misplaced in light of the court's ability to name three other disinterested attorneys who could serve as "alternate" neutral arbitrators and who were not former partners and a social friend of Mr. Gary Libey.

Judge David Frazier stated in his October 24, 2014 oral ruling:

28
13 So, I'm not disqualifying him, but it
14 might be an issue to raise to him in the process of
15 arbitration. And because of the possibility he may
16 recuse, and I think that might be a real possibility
17 here for the reasons I've stated,
...
23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

29
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop

14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time.
Emphasizes Added
October 24, 2014 - VR28-29), (CP 268-269)

If the court's comments were sincere "And because of the possibility he may recuse, and I think that might be a real possibility

here for the reasons I've stated" The court would have appointed one of the three alternates named by Judge Frazier.

The trial court committed error in failing to grant the appellants' motion for reconsideration for the appointment of an alternant 3rd neutral arbitrator

All of this in light of the court going outside of its normal practice in appointing arbitrators as stated on October 24, 2014:

> 24
> 4 **And normally, and I think I said this at**
> 5 **the time, if it's an issue of appointing a mediator or**
> 6 **appointing an expert or a guardian ad litem and it's**
> 7 **disputed, or an arbitrator, and one party says, "I**
> 8 **want such and such," and the other party disagrees, "I**
> 9 **don't want to appoint such and such"**
> ***Emphasizes Added***
> (October 24, 2014 - VR24)

The trial court should not have appointed Mr. Esser, as the 3rd neutral arbitrator, over the objection of the appellants.

IV. CONCLUSION

The trial court lacked substantial evidence to support the court's appointment of a 3rd neutral arbitrator pursuant to RCW 7.04A.110. Further the trial court appointed an arbitrator under RCW 7.04A.110 without authority to do so as the statute requires that the arbitration must have failed prior to appointment.

Additionally, the court should not have appointed Mr. Esser as

the 3rd neutral arbitrator pursuant to RCW 7.04A.110 in light of the appellant's objection.

It is respectfully requested that the court grant the appellants motion for reconsideration and modify its decision accordenly.

Dated this 8th day of March, 2016.

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Appendix E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company,	)	No. 10-2-00293-4
Plaintiff,	)	MEMORANDUM OF PLAINTIFF
v.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Defendant.	)	

COMES NOW, the Petitioner, GARRETT RANCHES, LLC, by and through its attorney of record, LIBEY & ENSLEY, PLLC, by Will Ferguson, and submits the following MEMORANDUM OF PLAINTIFF IN SUPPORT OF PLAINTIFF'S MTION FOR APPOINTMENT OF 3RD AND FINAL ARBITRATOR

ISSUES

1. Should this Court appoint Mr. Dwayne Blankenship as the 3rd and final arbitrator in this matter?

FILED
SEP 25 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

222 A

ARGUMENT

The appointed arbitrators in this matter have reached a deadlock in appointment of the 3rd and final arbitrator. This Court should appoint Dwayne Blankenship.

RCW 7.04A.110(1) provides:

> **If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails**. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, **the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.** The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.

(emphasis added). The method for selecting the 3rd arbitrator is contained in Paragraph 15 of the Lease:

> In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all the powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County, Washington.

Honn Family has resisted the appointment of Mr. Blankenship for two reasons: 1. It claims that the issue it is raising is a purely legal one that can only be decided by an attorney and 2. Mr. Blankenship, because he has ruled

against Honn Family in the two prior arbitrations, is biased against Honn Family.

The issue raised by Honn Family is one that has already been decided. Raising the issue is frivolous. Honn Family admits that the Arbitration Panel in 2010 held that the Option was valid and that it was supported by adequate consideration. However, in the next breath, Honn Family claims that the Option is not valid because it wasn't supported by adequate consideration and could thereby be withdrawn at any time. The circular-nature of Honn Family's argument shows that Honn Family wants to re-litigate the issue of consideration, much like it wanted to re-litigate the 2010 arbitration by seeking appellate review of the 2010 Arbitration Award, even though the matter went up on appeal in 2012, far outside the appeal window. Attached hereto as **Exhibit No. 1** are the emails between counsel for Garrett Ranches, Will Ferguson, and counsel for Honn Family, Gregory Lockwood.

Mr. Lockwood states in his email of September 23, 2014: "I understand the option has been held to be valid. Our position is that the Honns had a right to withdraw the option as it was not supported by adequate consideration." However, the Arbitration Panel in 2010 already decided that the option *was* supported by adequate consideration.

Even if the Arbitration Panel entertains Honn Family's frivolous issue, the best way to resolve whether the Arbitration Panel already addressed that issue is for Mr. Blankenship to continue as 3rd arbitrator. Mr. Blankenship can factually confirm that the issue was already decided. Mr. Blankenship presumably read Mr. Libey's letter of

December 20, 2010 (attached hereto as **Exhibit No. 2**). At Page 7, Paragraph 2; Pages 10-12, under the heading "Case Law" (discussing the Valley Garage, Inc. v. Nyseth case); and Page 14, Paragraph 8, Mr. Libey clearly raised and briefed the issue of adequate consideration. And Mr. Blankenship and was co-author of the 2010 Arbitration Award (attached hereto as **Exhibit No. 3**), which, at Paragraph 2, Page 2, held: "The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid…."

Factual issues predominate in this arbitration. The matters we are asking the Arbitration to Decide are: 1. Did Garrett Ranches exercise its option? 2. Did Honn Family refuse to comply with the Option? Both questions are factual and should result in the Arbitration Panel finding that Honn Family should sell the property to Garrett Ranches. Excluding the frivolous issue raised by Honn Family, the only two issues are factual. Deciding factual issues does not take a legal background or education. What is needed of an arbitrator in this case is common sense, patience, solid judgment, and fairness to all parties; all of which Mr. Blankenship has shown.

Honn Family's second objection, as stated above, is that Mr. Blankenship has ruled against them in the prior two arbitrations. However, a review of the record shows that Mr. Blankenship has ruled against Garrett Ranches on some issues as well. The idea that Mr. Blankenship is biased against Honn Family simply because he has made a ruling that did not favor Honn Family is absurd. That would be like saying that if any court rules against one party it is automatically

biased against that party. It ignores the reality that one party must prevail in this proceeding.

Appointing anyone other than Mr. Blankenship would unnecessarily delay and overburden this arbitration. Mr. Blankenship has been involved in this case as the 3rd arbitrator for almost 4 years now. He knows what has been argued, what has been decided, and, most importantly, has an intimate knowledge of the facts.

In the alternative, if this Court does not appoint Mr. Blankenship as the 3rd arbitrator and elects to appoint an attorney, it should appoint a 3rd arbitrator from Whitman County, such as Timothy Esser or Roger Sandberg. This case is an entirely Whitman County case; the property is situated in Whitman County and both parties reside and do business in Whitman County. The arbitration should be held here and if this Court appoints an attorney, the attorney should be a Whitman County attorney.

CONCLUSION

This Court should appoint Dwayne Blankenship as the 3rd and final arbitrator in this matter.

DATED this 24th day of September, 2014.

LIBEY & ENSLEY, PLLC

By _____

WILL FERGUSON
Of Attorneys for Plaintiff
WSBA No. 40978

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on September 24th, 2014, I caused a copy of this document to be mailed to:

J. Gregory Lockwood
Attorney at Law
421 W. Riverside, Ste. 960
Spokane, WA 99201-0504

Will Ferguson

Will Ferguson

From: JOHN LOCKWOOD <jgregorylockwood@hotmail.com>
Sent: Tuesday, September 23, 2014 11:25 AM
To: Will Ferguson
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection

I understand the option has been held to be valid. Our position is that the Honns had a right to withdraw the option as it was not supported by adequate consideration.

From: will.ferguson@lenlawyers.com
To: jgregorylockwood@hotmail.com
CC: jread@comcast.net; fjgebhardt@fggzlaw.com; plowings80@hotmail.com; gary.libey@lenlawyers.com; hodgsonlorrie@hotmail.com
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection
Date: Tue, 23 Sep 2014 16:15:05 +0000

Mr. Lockwood,

Just to show I am not pulling the wool over your eyes on the fact that the issue of adequate consideration for the option was decided by the Arbitration Panel in 2000, I have attached Mr. Libey's letter of December 20, 2010, to the Arbitration Panel and I have attached a copy of the 2010 Arbitration Award. Consideration, for the lease and option, was raised, briefed, argued, and decided.

I direct your attention to Pg. 7, Paragraph 2; Pages 10-12, under the Heading "Case Law" (discussing the Valley Garage, Inc. v. Nyseth case, which is still good law, by the way); and Page 14, Paragraph 8. Then I direct your attention to the attached 2010 Arbitration Award at Page 2, Paragraph 2, which holds that the Option is valid.

This is precisely why we need Mr. Blankenship as our 3rd arbitrator; he knows the procedural history, he knows what was argued, and he knows what was decided. On top of that, Mr. Blankenship showed keen common sense, civility, and professionalism. Clearly, Mr. Blankenship is the right choice.

Thanks,

Will Ferguson

From: JOHN LOCKWOOD [mailto:jgregorylockwood@hotmail.com]
Sent: Monday, September 22, 2014 9:36 AM
To: Will Ferguson
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection

I disagree. We need someone who knows contract law as the issue here is the withdrawal of the option based upon lack of consideration.

EXHIBIT NO. 1

From: will.ferguson@lenlawyers.com
To: jgregorylockwood@hotmail.com
CC: jread@comcast.net; fjgebhardt@fggzlaw.com; plowings80@hotmail.com; gary.libey@lenlawyers.com; hodgsonlorrie@hotmail.com
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection
Date: Sun, 21 Sep 2014 22:44:45 +0000
Mr. Lockwood,

If you would like to add your legal issue to the two factual issues, I think we can handle all three issues at arbitration. Since the factual issues predominate and because the arbitration panel already decided the issues surrounding the Option and consideration (adequacy of consideration for the Option was raised and decided in the first arbitration, in which you were not involved, but Mr. Blankenship was involved), I think Mr. Blankenship would be perfect.

Thanks,

Will Ferguson

From: JOHN LOCKWOOD [mailto:jgregorylockwood@hotmail.com]
Sent: Friday, September 19, 2014 8:45 PM
To: Will Ferguson
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection

The legal issue is the withdrawal of the option due to a
lack of supporting consideration.

From: will.ferguson@lenlawyers.com
To: jgregorylockwood@hotmail.com
CC: jread@comcast.net; fjgebhardt@fggzlaw.com; plowings80@hotmail.com; gary.libey@lenlawyers.com; hodgsonlorrie@hotmail.com
Subject: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection
Date: Fri, 19 Sep 2014 23:00:40 +0000
Mr. Lockwood,

I am under the impression that our two arbitrators have not chosen a third arbitrator because of confusion on the issues. My understanding is that Mr. Gebhardt believes the issue to be arbitrated is a legal one.

To my knowledge, there are only two issues: 1. Whether Garrett Ranches, LLC exercised its option, and 2. Whether Honn Family, LLC has refused to cooperate with the sale of the real property. Those two issues are both factual, therefore I see no need for the third arbitrator to be an attorney and I don't see any reason why Mr. Blankenship can't continue in his role as 3rd arbitrator. Mr. Blankenship is fully versed in the facts of this case and I see no reason to spend the money and time educating a new arbitrator. Additionally, I think Mr. Blankenship has done a commendable job in the past and I have no doubt he will continue to do a great job in this next round of arbitration.

Please let me know your response.

Thanks,

Will Ferguson

Will Ferguson

From: JOHN LOCKWOOD <jgregorylockwood@hotmail.com>
Sent: Tuesday, September 23, 2014 11:08 AM
To: Will Ferguson
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection

I would object to Mr. Blankienship as this needs a legal determination.

From: will.ferguson@lenlawyers.com
To: jgregorylockwood@hotmail.com
CC: jread@comcast.net; fjgebhardt@fggzlaw.com; plowings80@hotmail.com; gary.libey@lenlawyers.com; hodgsonlorrie@hotmail.com
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection
Date: Mon, 22 Sep 2014 23:32:47 +0000

Mr. Lockwood,

Understood. And again, the arbitration panel decisively ruled that there was adequate consideration supporting the Option. You should know that they decided that issue because you appealed the first arbitration decision. Given that the arbitration panel (and ultimately the Court of Appeals) decided that the Option was supported by adequate consideration, what issue is it that you think should be decided? Unless you maintain that an option, adequately supported by consideration, can be unilaterally withdrawn for any reason (or no reason) by the granting party?

In any event, I would suppose that Mr. Gebhardt would do an exceptional job on providing whatever clarification or analysis is needed for Mr. Smith and Mr. Blankenship, in the off chance we don't adequately brief them on the law. I look forward to Mr. Smith and Mr. Gebhardt selecting Mr. Blankenship.

Thanks,

Will Ferguson

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Sent: Friday, September 19, 2014 8:45 PM
To: Will Ferguson
Subject: RE: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection

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From: will.ferguson@lenlawyers.com
To: jgregorylockwood@hotmail.com
CC: jread@comcast.net; fjgebhardt@fggzlaw.com; plowings80@hotmail.com; gary.libey@lenlawyers.com; hodgsonlorrie@hotmail.com
Subject: Garrett Ranches, LLC v. Larry Honn Family LLC: Arbitrator Selection
Date: Fri, 19 Sep 2014 23:00:40 +0000
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Please let me know your response.

Thanks,

Will Ferguson

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Bruce Ensley
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Pullman Office:
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Pullman, WA 99163
Phone: (509) 334-5500
Fax: (509) 334-5507

December 20, 2010

Read Smith
916 W. Willapa Ave.
Spokane, WA 99224

SENT BY EMAIL:
jread@comcast.net

David Gittins
Attorney at Law
843 7th St.
Clarkston, WA 99403

SENT BY EMAIL:
david@gittinslaw.com

Dwayne Blankenship
1200 SE Harvest Dr.
Pullman, WA 99163

SENT BY EMAIL:
dwayne@pullman.com

RE: Garrett/Honn - Arbitration
Garretts' Request: Specific Performance

Dear Arbitrators:

Introduction

We are scheduled to arbitrate this dispute commencing at 9:00 a.m. on Wednesday, December 22, 2010, in the Whitman County Superior Court jury room.

The purpose of this letter is to provide you with copies of the parties' depositions, exhibits, and legal research ahead of the hearing. I am sure you will get a set of arbitration documents from Mr. Moorer too. Thank you for taking the short time to review all of this information ahead of the hearing, if possible.

As discussed in further detail below, the Garretts request **specific enforcement** of the Lease and Option.

EXHIBIT NO. 2

I think the arbitration will take all day. Our witnesses will be Frank Garrett, Joshua Garrett, and Anne Lowe, the notary. I suspect the Honns and their son will also testify. We have not conducted formal discovery other than taking each other's clients' depositions.

Per RCW 7.04A.130, it will take a majority vote of the arbitrators (i.e., two out of three) to make a decision.

RCW 7.04A.150(1) states:

> The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence.

RCW 7.04A.190(1) and (2) state in part:

> (1) An arbitrator shall make a record of an award. The record must be authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.
>
> (2) An award must be made within the time specified by the agreement to arbitrate . . .

Thus, the statute gives you wide discretion in the process and procedure of conducting this arbitration. For example, you may want to hold separate meetings of the parties and their attorneys before conducting the formal hearing. That is most certainly up to you. Two out of you three must sign a written decision. (Hopefully the decision will be unanimous.) The arbitration clause in the Lease/Option requires a decision within 30 days of your appointment which would be close to early

January, 2011, i.e., 30 days after Mr. Blankenship was appointed as the third arbitrator..

Factual Background

Frank Garrett and Larry Honn met several times in the summer of 2010, which resulted in serious discussions of the Garretts leasing the Honns' ranch with an option to purchase it. The two Garretts, the two Honns, and their son, Larry Honn, Jr., later met at the Honns' home in LaCrosse on Tuesday, August 24, 2010, to discuss the terms of a lease/option.

The Garretts then had me prepare a Cash Rent Farm Lease with Option (the "Lease/Option") in early September 2010, for them to take to the Honns to further discuss and possibly execute. The Garretts made an appointment with the Honns to meet the Honns again at their home on Tuesday, September 14, 2010, to discuss the Lease/Option draft.

The Garretts took to the Honns' home the draft of the Lease/Option. There were several blanks which the Garretts intended to specifically negotiate when they met with the Honns. There was also a standard form purchase and sale agreement to confirm the cash terms of the sale attached as Exhibit "A" as referenced in the Option paragraph.

Exhibit "A" (i.e., the form purchase and sale agreement) was not physically attached to the Lease/Option when the parties executed it. It had been separated by the Garretts when they reviewed the Lease/Option draft. The Garretts had Exhibit "A" with them at the Honns' home, but the Honns did not request to review it.

After several hours of discussions and negotiations, the parties executed the Lease/Option at the Honns' home. Only the two Garretts and the two Honns who signed the Lease/Option were present. When the final negotiations occurred and the Lease/Option was completed, Anne Lowe from Endicott came later in the afternoon to notarize all of their signatures.

The parties duly executed the Lease/Option. They were not to execute the attached Exhibit "A", the Contract of Sale, as it was prepared just to confirm the Garretts' obligation to pay cash in full at closing and to allocate the closing costs in the customary manner. This document was to be signed in the future when and if the Garretts exercised the option to purchase.

When the Garretts and the Honns completed signing the Lease/Option, Anne Lowe, the notary, notarized their signatures and left. The Garretts and the Honns spent some time thereafter discussing their mutual satisfaction with their agreement and expressed relief and happiness that they had completed the deal.

The Garretts returned to me the original Lease/Option and I sent a copy to the Honns by letter dated September 16, 2010. Mr. Garrett had some questions about a few acres which were not included in the legal descriptions and requested that I call Mr. Honn. On Friday, September 17, 2010, I talked to Mr. Honn for about five minutes on a speakerphone with Mr. Garrett present to briefly discuss some small parcels which the Honns considered part of the ranch but were not taxed to them.

Within a few days after executing the Lease/Option, the Honns changed their minds and wanted to void the Lease/Option. Mr. Honn called Mr. Garrett on September 19, 2010, and told him the Lease/Option was null and void. The Honns had become very upset with the Garretts because of rumors they heard that the Garretts were going to buy the Honns' ranch and trucking business. Unfortunately, the Honns believed these false rumors and accused the Garretts of being dishonest. The Honns soon retained Mr. Moorer, who sent me a letter claiming the Honns repudiated the Lease/Option. We exchanged several letters which are exhibits to Mr. Honn's deposition.

As a result of the Honns' repudiation of the Lease/Option, the Garretts demanded arbitration of the Honns' claim. Each of the parties appointed one arbitrator, and the two appointed a third arbitrator as set forth in the arbitration clause of the Lease/Option.

Honns' Claims

As of writing this letter, it is difficult to know for sure the actual reason(s) the Honns desire to repudiate the Lease/Option. Since this is an arbitration, there have been no formal pleadings or pretrial motions to specifically identify the disputed facts and legal theories that the Honns claim support repudiation of the Lease/Option. However, based upon their testimony at their depositions, the Garretts are aware of the Honns' major complaints.

The Honns claim they were deceived when they signed the Lease/Option, the Garretts misrepresented the terms of the Lease/Option, and that the Lease/Option is not a complete agreement. The Honns want out of the deal they made with the Garretts. The Honns have vehemently denied the legal effect of the Lease/Option, and have told the Garretts to stay off the ranch. It appears the Honns have what is called "seller's remorse."

The Garretts will testify that they are honest and well-respected farmers and they did nothing dishonest. The Garretts negotiated in good faith at the request of the Honns a very fair and reasonable Lease/Option. The Garretts will testify there was mutual assent on all material items of the agreement when they all signed the Lease/Option on September 14, 2010. Despite having been denied access to the ranch since November 1, 2010, the Garretts have timely sent their monthly $2,000 rent checks to the Honns and will continue to do so again by December 31, 2010, for the January, 2011, rent payment.

The two major reasons the Honns gave at their depositions to repudiate the Lease/Option were that they wanted to keep some of their cattle on the ranch for a year or two after the Lease/Option commenced and that they did not actually read Exhibit "A" (the form Contract of Sale) before they signed the Lease/Option. The Honns claim these two reasons justify a complete repudiation of the Lease/Option and that it is null and void in its entirety.

Indeed, the Garretts, as honest and reasonable people, agreed to accommodate the needs of the Honns to retain cattle on the ranch for a reasonable period of time after the Lease/Option commenced for the Honns to market the cattle to minimize their income taxes. Now the Honns claim that the Lease/Option is invalid because pasture use after November 1, 2010, was a material term and was not written into the Lease/Option. The Garretts respond that if the post-Lease/Option pasture was an important issue for the Honns, the Honns had full opportunity to write that concern into the form Lease/Option when they wrote in other specific terms. In any event, the Garretts are reasonable folks and will accommodate the Honns to the best of their ability. Over the years I have written many leases and/or sales where one party asked for some reasonable accommodation to remove equipment, clean out the barn or shed, or some other similar after-closing requests. This is a very frequent situation and certainly does not excuse performance of a binding contract.

In addition, as will be further briefed, the Honns' failure to read Exhibit "A" is not a legal cause to void the Lease/Option. Further, the fact that Exhibit "A" was not attached to the Lease/Option when it was signed has no legal significance to the validity of the Lease/Option. The parties agreed to a price of $400,000 for the ranch if the Garretts elected to buy it. In fact, Mrs. Honn inserted the $400,000 figure in Paragraph 4 of the Lease/Option. Exhibit "A" was only a standard form purchase and sale agreement which allocated the closing costs in the normal and customary manner. There was nothing to hide in Exhibit "A", nor did the Garretts intend to do so.

Legal Rules

The question before the arbitrators is whether the Lease/Option is a contract. There are several contract rules to consider. Attached to this letter are copies of portions of relevant chapters from Washington Practice, Contract Law & Practice, Volume 25, for your consideration. In summary, the more important legal principles are the following:

1. A contract is a set of promises for the breach of which the law provides a remedy. In this case,

the parties duly signed the Lease/Option which should be enforced.

2. The essential elements of a contract include the subject matter, the parties, the promise, the terms and conditions, and the consideration. All such elements exist in the Lease/Option.

3. The Garretts have the burden of proof by a preponderance of the evidence to prove the essential elements. The Lease/Option will provide such proof.

4. The Honns have the burden of proof by a preponderance of the evidence to establish any affirmative defenses, such as misrepresentation, undue influence, or fraud. They will not be able to prove any such defenses.

5. The existence of a contract focuses on the objective manifestations of the parties, rather than the subject intent of the parties. Today, mutual assent is the modern expression for the concept of "meeting of the minds." Therefore, when interpreting a contract, the subjective intention of the parties is irrelevant; instead, emphasis is placed on the outward manifestations of assent made by each party to the other. The Honns' private subjective intentions are not relevant to enforcing the contract.

6. Parol evidence (oral or verbal statements) is not admissible for the purpose of adding to, modifying, contradicting, or varying the terms of a written contract. Parties to a contract are bound by it as signed, and parol evidence cannot change the contract. Parol evidence is admissible, though, to show the situation of the parties to a writing and the circumstances under which the instrument was executed in order to ascertain the intention of the parties and to

properly construe the writing. In fact, extrinsic evidence is admissible as to the entire circumstances under which a contract was made as an aid in ascertaining the parties' intent. Thus, although both parties will testify about all of the facts and circumstances which culminated in the execution of the Lease/Option, the Honns are bound to honor its terms.

7. While procedural contract requirements are enforceable, they are also subject to waiver by the party who benefits from them. Paragraph 2.b. of the Lease/Option provided that it would be effective upon approval of an operating line of credit by the Lessee. The Garretts have waived this condition by the payment of rent to the Honns.

8. Although the reasonableness of the contracting parties' respective interpretations of the contract may be a factor in discerning the meaning of the contract, the courts should recognize that unilateral and subjective beliefs about the impact of a contract do not constitute evidence of the parties' intent. Such evidence is therefore inadmissible. If the Honns claim they only intended to lease their irrigated hay ground, then this defense should be rejected.

9. The courts must read each contract as an average person would read it without giving it strained or forced meaning. This includes looking at the contract as a reasonable person would in the same circumstances that existed when the parties to the contract entered into it. The Lease/Option is a relatively short and simple document which the Honns read. They did not manifest any intent to hold off signing until their attorney looked it over.

10. Parties to a contract may incorporate additional contractual terms by referring to a separate agreement so long as the incorporation by reference in the parties' agreement is clear and unequivocal. The document which is incorporated by reference need not be physically attached to the contract. Exhibit "A" was just the form for the contract of sale. It did not contain any terms applicable to the Lease.

11. In general, ignorance of the contents of a contract does not affect the liability of one who signs it or who accepts it other than by signing. In fact, a party to a contract is "conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." The Honns claim they didn't or couldn't read the Lease/Option and signed it anyway. They are nevertheless bound by its terms.

12. A misrepresentation is an assertion that is not in accord with the facts. Fraud is an intentional false representation of a matter of material fact, by either words, conduct, concealment, or false or misleading allegations which both deceive and is intended to do so. If the Honns claim fraud, they will have a heavy burden of proof (clear, cogent, and convincing) to establish the nine elements.

13. Specific performance of a contract will be granted against a party who has committed or is threatening to commit a breach of the duty. An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under contract would have produced. This is the only fair and reasonable remedy, which the Garretts request.

Case Law

Washington case law clearly supports the Garretts' position that the Lease/Option is a valid and binding contract. Attached is a copy of Valley Garage, Inc. v. Nyseth, 4 Wn. App. 316, 481 P.2d 17 (1971), for your review. In this case the owner of real estate entered into a Lease which contained an option to purchase for a reasonable price representing the fair market value of the property as agreed by the parties. If the parties could not agree, then the sales price would be established by arbitration.

The lessee gave notice of his election to exercise the option and the owners/lessors refused to sell. A lawsuit followed, and the trial court ordered the owners/lessors to sell for a cash payment, which decision was upheld on appeal.

The owners/lessors claimed that the failure of the lease to indicate whether the sale would be cash or credit, who provides title insurance, if any, who pays the excise tax, whether the taxes were prorated, the date of possession, the time for performance and the disposition of encumbrances, if any, should defeat the action for specific performance.

Further, the owners/lessors argued that the lease agreement was a lease for a 7-year-period and the option, if valid, could only be exercised at the end of the 7-year-period. They also argued that there was no consideration from the lessees for the option.

The court stated several well-recognized legal principles:

An option to purchase property is a contract wherein the owner, in return for valuable consideration, agrees that another party shall have the privilege of purchasing the property within a specified time and upon the terms and conditions expressed in the option. Once the option is exercised, it becomes a contract of purchase and sale binding upon the parties.

A contract of purchase and sale is subject to specific performance. Although the parties could not be ordered to prepare and execute a real estate purchase contract over a

period of years (since this would require a further meeting of the minds), the contract contains the essential elements of a cash sale. It contains a description of the property subject to sale and a method for the determination of a price which may be specifically enforced.

The owners/lessors contended that the contract was too indefinite to support specific performance.

The court stated that a greater degree of certainty is required for the specific performance than is necessary to establish a contract as a basis of an action at law for damages. An agreement is, however, considered to be sufficiently definite and certain if its provisions are capable of being reduced to certainty or of being made certain by the aid of legal presumptions or evidence of established customs.

The indefinite provisions of the contract may all be rendered certain through reference to legal presumptions and established customs.

Encumbrances. In the absence of any provision in the contract indicating the character of the title provided for, it is presumed that the vendor of real estate will convey a good or marketable title to the purchaser.

Time of performance. Where no time is specified in the option agreement for the final payment and delivery of the instruments of conveyance, the time of payment and delivery is a reasonable time after acceptance by the optionee.

Payment of excise tax. State law expressly states that the payment of the excise tax is the obligation of the seller.

Time for possession. In absence of a stipulation to the contrary, the right of possession arises upon conveyance of the property. That is, right to possession is presumed to follow legal title.

With respect to the proration of real estate taxes and procurement of title insurance, these are matters of common

knowledge in which there are established customs; the court may take judicial notice of such customers.

The court went on to state that the contract is specifically enforceable. The agreement contained no provision restricting the time in which the option may be exercised. The agreement specifically provided that notice to exercise the option may be given on or before a certain date. The lessees could therefore elect to exercise the option at any time during the duration of the lease agreement.

The grant of the option by the owners/lessors to the lessees was part of the basis of the bargain for entering into the contract. It is not required that separate consideration flow from the lessees to the owners/lessors. Proper notice was given to the owners/lessors informing them of the lessees' election to exercise the option.

Rubin v. Moys Case

There is also clear precedent in Whitman County for the granting of specific performance to the Garretts. In the case of Rubin v. Moys, the Whitman County Superior Court (as upheld on three appeals) specifically enforced a handwritten Contract of Sale for farmland. The Rubin/Moys case involved a contract that had substantially less clarity than the Lease/Option before you. Yet, the trial court granted specific performance in an emotionally charged case which lasted nearly 30 years and which was upheld on appeal three times.

Attached to this letter are copies of the following documents and decisions from the Rubin/Moys case:

1. Sale Contract;
2. Third Amended Findings of Fact and Conclusions of Law;
3. First Court of Appeals Decision;
4. Second Court of Appeals Decision; and
5. Third Court of Appeals Decision.

It is important to note that the same legal principles and disputes took place in the Rubin/Moys case which resulted in

specific enforcement of a sales contract and the right to buy the rest of the farm upon Moys' death.

There are several Findings of Fact and Conclusions of Law in the Moys case which deserve special mention:

1. When the parties signed the "Sale Contract," they intended a real estate purchase contract implementing their prior discussions. The Court enforced this sale even though there was not a legal description prepared until 25 years later and all of the terms of the right to buy the rest of the farm were not included in the Contract.

2. At the time Moys drafted the Contract, he intended that Rubins could purchase the balance of the farm upon Moys' death. (There was no specific mention of the length of the option to buy in the contract, and the court interpreted the duration to be Moys' lifetime. Later the Rubins exercised the right to buy the rest of the farm when Moys died.)

3. By their conduct, the parties interpreted the Contract to impose mutual access easements to allow each access to their property. Again, there was no mention made in the Contract of mutual easements; yet the Court found this term by the parties' conduct.

4. It is a normal custom in Whitman County, Washington, that the seller is responsible to pay the excise tax (actually this is required by RCW 82.45.080), costs of a survey, if necessary, and title insurance for the sales price of property when title is conveyed. Although the Moys Contract was silent in this regard, the Court found it is reasonable to interpret it consistent with normal customary real estate sales closing cost allocations such that Moys would pay the excise tax, survey costs, and title insurance on

the purchase price when title was conveyed. (These were the same terms found in the form Contract of Sale which is Exhibit "A" to the Lease/Option.)

5. Even written contracts, properly acknowledged and prepared by attorneys, and containing a correct legal description, sometimes contain shortcomings and ambiguities. Courts do not necessarily refuse to enforce contacts merely because some interpretation of the actual provisions of the contract is required.

6. Since Moys prepared the written portion of the Contract, failed to see an attorney, and dictated all of the terms of the Contract (except one inserted at the Rubins' request), he could not complain of its inadequacies.

7. There was no overreaching by the Rubins. Moys was competent at all material times. The need to rely upon contracts outweighs the sympathies produced by Moys. People should be entitled to the benefit of their bargains.

8. The Rubins' right to purchase the rest of Moys' farm was reasonable and for a legitimate purpose. The right was supported by adequate consideration because it was included in the original Contract. The Rubins' right to buy the rest of the farm was enforced.

9. The Court ordered specific performance of the Contract.

Attorney's Fees

Paragraph 16 of the Lease/Option provides:

> Litigation: In the event either or both parties shall be reasonably required to retain an attorney to enforce

> any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

In addition to specific performance of the Lease/Option, the Garretts also request an award of their attorney's fees and costs if they are deemed the prevailing party. Upon receipt of the Arbitrators' decision, the prevailing party will submit a post-arbitration motion for an award of its attorney's fees and costs.

Rent Paid

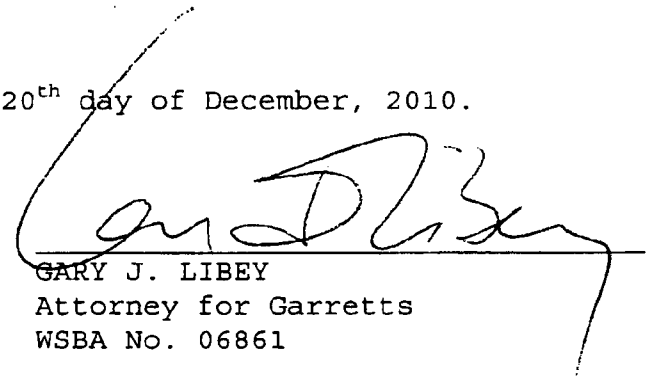
The Garretts have paid rent to the Honns for the months of November and December, 2010, and will continue to pay monthly rent until and unless you rule otherwise. However, since the Garretts have been denied possession of the ranch since November 1, 2010, they request the arbitrators order a refund of this rent paid or order an offset from any further rent to be paid by them.

Summary

You were selected as arbitrators because of your common sense and experience in negotiating, interpreting, and/or executing contracts, your ability to fairly weigh and judge the credibility of witnesses, and to render a fair and impartial decision consistent with the evidence.

We ask that you uphold the Lease/Option in its entirety.

Respectfully submitted this 20th day of December, 2010.



GARY J. LIBEY
Attorney for Garretts
WSBA No. 06861

Libey, Ensley & Nelson, PLLC
N. 409 Main St.
P.O. Box 619
Colfax, WA 99111
Phone: 509-397-4345
Fax: 609-397-3594

GJL:sm
Enclosures

cc: Mark Moorer
Frank Garrett

In re GARRETT RANCHES LLC, A Washington Limited Liability Company,	)	ARBITRATION AWARD
Petitioner,	)	
vs.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Respondent.	)	

This arbitration award is made following an arbitration hearing which took place in Colfax, Washington on December 22, 2010. The arbitrators, having considered all the testimony and exhibits received as evidence at the hearing, make the following award.

1. The Cash Rent Farm Lease Agreement is valid and shall be enforced, subject to the following modifications:

1.1 That property owned by the Honn Living Trust, Tax Parcel No. 2-0000-39-17-28-3890 containing six (6) acres, shall be excluded from the lease and option to purchase.

1.2 The lease shall be subject to that agreement by and between Floyd C. Honn and Bertie J. Honn, husband and wife, and Larry K. Honn and Charlotte Honn dated April 20, 1998, and received as evidence as Exhibit 5.

1.3 The Lessor's livestock shall be removed from all rangeland on the leased premises by May 1, 2011, or such other date as may be mutually agreed to by the parties. Lessor may again place livestock upon the rangeland on October 15, 2011, or such other date as may be mutually agreed to by the parties. Lessor shall remove all livestock from the property by May 1, 2012, or such other date as may be mutually agreed to by the parties.

EXHIBIT NO. 3

1.4 Lessor's livestock shall be permanently removed from all tillable ground by February 15, 2011.

1.5 Lessor shall have the hay shed cleaned by June 1, 2011, and the shop and home cleaned by September 1, 2011. Lessee shall be entitled to utilization of these improvements on those same respective dates.

1.6 The term of the lease shall commence November 1, 2010.

1.7 The review contemplated by Paragraph 3 shall be amended to read as follows:

> If the parties are unable to agree upon the annual revision to the rent, the rent for each year commencing November, 2011 shall be adjusted on November 1 of each year, based upon increases, if any, in the Consumer Price Index for all urban consumers, Series CUUR0000SA0, not seasonally averaged ("CPI"). The basis for computing the adjustment in rent shall be the CPI as identified above for the most recent month preceding November for which data is available. The CPI base for the month of November, 2010 is 218.803. If the new CPI is greater than the base CPI, the rent for the next year shall be determined by multiplying the rent for the previous year by the percentage increase, if any, between the base CPI and the new CPI. The resulting amount shall be the rent for the next year. This same adjustment shall be made for each year of the lease. If the Consumer Price Index is replaced by a new federal statistic, the new statistic shall be used in determining any increase in the rent."

2. Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid, subject to the following:

2.1 The parties shall mutually agree upon the terms, covenants, and conditions of a contract of sale consistent with the Cash Rent Farm Lease by January 1, 2012. If the parties are unable to reach an agreement by that date as to the terms, the arbitrators reserve jurisdiction to issue a further arbitration award pertaining to the terms of the proposed contract of sale.

3. Attorney Fees. Each party shall be responsible for their own attorney fees and costs. The arbitrators' fees shall be paid as follows:

3.1 Larry Honn Family LLC shall pay the arbitrator fees of David A. Gittins and one-half of the fees of Dwayne Blankenship.

3.2 Garrett Ranches LLC shall pay the arbitrator fees of Read Smith and one-half of the arbitrator fees of Duane Blankenship.

DATED this 20th day of December, 2010.

Read Smith

Read Smith

David A. Gittins

David A. Gittins

Dwayne Blankenship

Dwayne Blankenship

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Motion/Declaration for Appointment of 3rd and Final Arbitrator**

I. Motion

GARRETT RANCHES, LLC, by and through its attorney, Will Ferguson, moves this Court pursuant to RCW 7.04A.110 for an Order appointing Dwayne Blankenship as the 3rd and final arbitrator in this matter.

This Motion is based on the records and files herein, the Memorandum in Support of Plaintiff's Motion for Appointment of 3rd and Final Arbitrator, and the Declaration, attached hereto.

Dated: 09/24/2014

Will Ferguson, WSBA 40978
Of Attorneys for Petitioner
LIBEY & ENSLEY, PLLC

FILED
SEP 25 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

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II. Declaration of Counsel

WILL FERGUSON declares:

1. My firm represents the interests of the Plaintiff, Garrett Ranches, LLC.
2. This case was initiated in 2010. There have been 2 rounds of arbitration; one in 2010 and the second in 2011.
3. In both rounds of arbitration, the Arbitration Panel was composed of Dwayne Blankenship, Read Smith, and David Gittins.
4. On August 20, 2014, this Court ruled that Honn Family, LLC could select an arbitrator other than David Gittins and that the arbitrators selected by each party could select a third arbitrator, whether that be Dwayne Blankenship or not.
5. When this Court ruled that Honn Family could appoint an arbitrator other than Mr. David Gittens, it did so with the rationale that Mr. Gittens would likely refuse to be appointed because Honn Family had not paid his fees.
6. Since this Court's ruling on August 20, 2014, the arbitrator selected by Garrett Ranches, Read Smith, and the arbitrator selected by Honn Family, Frank Gebhardt, have reached a deadlock on selection of the 3rd and final arbitrator. Attached hereto as **Exhibit No. 1** to the Memorandum of Plaintiff, are the emails between counsel, regarding the issues and Mr. Blankenship's appointment.
7. Mr. Smith has nominated Dwayne Blankenship and Mr. Gebhardt has nominated Brian Balch.
8. Mr. Blankenship has been involved with this case for 4 years and there is no indication of any bias toward one party or another. Mr. Blankenship has, as the 3rd arbitrator in the preceding two arbitrations, decided matters of fact and law. Each and every decision made by the arbitration panel has thus far been upheld by this Court and by Division III of the Court of Appeals.
9. RCW 7.04A.110 should be used to resolve the deadlock on appointment of a 3rd arbitrator.

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

Signed at Colfax, Washington, on September 24th, 2014.

Will Ferguson

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on September 24th, 2014, I caused a copy of this document to be mailed to:

J. Gregory Lockwood
Attorney at Law
421 W. Riverside, Ste. 960
Spokane, WA 99201-0504

Will Ferguson

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 OBJECTION TO AND DECLARATION IN OPPOSITION TO APPOINTMENT OF A THIRD ARBITRATOR PURSUANT TO RCW 7.04a.110 AND REQUEST FOR ATTORNEY FEES

The defendant objects to the plaintiff's motion to appoint a third arbitrator pursuant to RCW 7.04a.110 which reads:

> (1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.

In this case, there is an agreed method for appointment of arbitrators. Each party is to select an arbitrator and a third arbitrator will be chosen by the arbitrators

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selected. In this case each party has selected an arbitrator and they are in the process of selecting a third.

Mr. Ferguson's e-mails urging our agreement to a third arbitrator have been rejected. That being said the arbitration agreement states that we each appoint one arbitrator and the chosen arbitrators chose a third. The arbitrators are still in that process. There has been no indication from the arbitrators that the method to choose a third arbitrator have failed. The allegations of Mr. Ferguson are not sufficient to declare a failed process as the arbitrators are still working toward appointment of a third arbitrator. The named arbitrators have a duty to act in good faith to choose a third arbitrator. That process is ongoing and this court should not interrupt that process.

There is no affidavit or declaration from the appointed arbitrators indicating that they have declared a deadlock in their attempt to appoint a neutral third arbitrator.

As such the court should dismiss the motion to have the court appoint a third arbitrator.

Without waving the above objection. the Larry Honn Family Trust, LLC objects to this court appointing Mr. Blankenship or any party nominated by the parties to this arbitration as the third arbitrator must be a neutral arbitrator. The purpose of the 3rd arbitrator is to be a neutral arbitrator which is why the two selected arbitrators choose the 3rd arbitrator. If in fact the first choice of a neutral arbitrator does not result in a named neutral arbitrator that does not indicate the process is failed. The arbitrators are still working towards an appointment.

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Any party, including attorneys, nominated as a neutral arbitrator by the parties should be disqualified for appointment by this court in the event it becomes necessary. Further, Spokane County has an arbitration list of attorneys who are qualified to act as arbitrators. There is no reason why Spokane attorneys should be disqualified to serve as an arbitrator as the law in Whitman County and Spokane County is the same.

For the above reasons the Motion to have the Court appoint a third arbitrator is premature and should be denied.

Dated this 29th day of September, 2014

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.

J. GREGORY LOCKWOOD,
WSBA No. 20629
Attorney for Defendants

DECLARATION

I, J. Gregory Lockwood, am the attorney of record for Larry Honn Family Trust, LLC., and make this declaration from my personal knowledge under penalty of perjury under the laws of the State of Washington.

1. Both parties have picked an arbitrator in this matter.
2. The arbitrators are working towards choosing the third arbitrator.

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3. I have not been provided any documents from the arbitrators' that indicate that they have reached an impasse and have given up trying to choose the 3rd arbitrator
4. The fact that the parties' attorneys do not agree on the 3rd arbitrator is not relevant as there is a process designated in the arbitration clause which is being followed.
5. There is no basis for the motion to have the court designate a 3rd arbitrator as it is premature at best and an attempt to manipulate the arbitration panel. This is strenuously objected too.
6. Without waving the objection, it is asserted that since the 3rd arbitration is to be neutral, all persons recommended by either party should be disqualified. Any individual recommended by a specific party would be per se non-neutral.
7. In the event the court appoints a 3rd arbitrator it recommended that the arbitrator come from the arbitration panel list maintained by Spokane County. Theses attorneys have training in arbitration hearing and are well qualified to hear the issues in this case as any from another county.
8. It is respectfully requested that the motion to have the court appoint a 3rd arbitrator be denied and attorney fees be awarded in defending this motion. My hourly rate is $195.00 an hour. In responding to the plaintiff's motion for an appointment of a 3rd arbitrator. I have 1.8 hours of time not including

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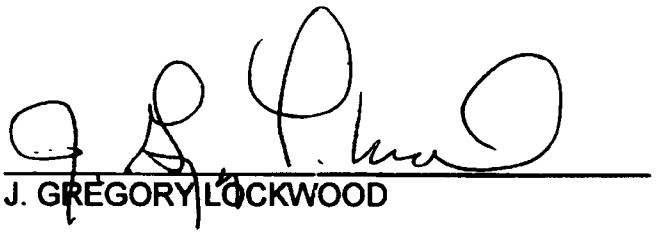
court or 2.5 hours of travel/court time. Actual attorney fees related defending this motion total $741.00 including court time and travel.

DATED at Spokane, Washington, this 30th day of September, 2014.



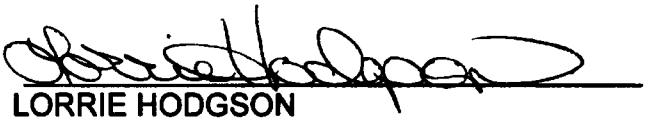
J. GREGORY LOCKWOOD

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on September 30, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	____X_____ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED September 30, 2014.



LORRIE HODGSON

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SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 MOTION AND DECLARATION IN SUPPORT OF DISQUALIFICATION OF THE LAW FIRM LIBEY & ENSLEY, PLLC.

MOTION FOR DISQUALIFICATION OF THE LAW FIRM

LIBEY & ENSLEY, PLLC.

The defendant moves the court for an order of disqualification of the law firm LIBEY & ENSLEY, PLLC, as counsel for the plaintiff pursuant to RPC 3.7.

This motion was brought to the attention of the plaintiff and this court to give the plaintiff an opportunity to withdraw and find substitute counsel. To date no indication of a withdrawal has been given by the plaintiff's counsel.

RPC 3.7 states the lawyer as witness rule. The sections relevant to this case provide: (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

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OCT 14 2014
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The Washington Supreme court in Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wash.2d 789, 811-812, 881 P.2d 1020 (1994) held that a trial court has the authority under RPC 3.7 to disqualify a lawyer who refuses to withdraw from a case.

An appellate court reviews the trial court's ruling for abuse of discretion. Id. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when it is exercised contrary to law. State v. Tobin, 161 Wash.2d 517, 523, 166 P.3d 1167 (2007).

The case of Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co., gives some guidance as it was a review of a trial court decision to permit counsel to continue representation in a case where the opposing party intended to call him as a witness. In that decision the court favorably cited and applied a test adopted by the Arizona Supreme Court in Cottonwood Estates, Inc. v. Paradise Builders, Inc., 128 Ariz. 99, 624 P.2d 296 (1981)

The PUD No. 1 court at page 812 cited to the following factors in determining disqualification.

1. A motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated,

2. The evidence is unobtainable elsewhere, and

3. The testimony is or may be prejudicial to the testifying attorney's client.

a. A motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated.

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The arbitration at issue in this case concerns only one issue and that is in regard to the party's option agreement. The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. His testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC. That the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey.

That at the time of drafting the option agreement the members of the Larry Honn Family Trust did not indicate any dollar amount to be placed in the option.

Gary Libey as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC.,

b. The evidence is unobtainable elsewhere.

Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement.

c. The testimony is or may be prejudicial to the testifying attorney's client.

The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. His testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC. That the Larry Honn Family Trust LLC, had no input or contributed to the wording of the option that was drafted. As such any ambiguity is construed against the drafter. In this case the plaintiff's attorney drafted the option agreement and any ambiguity is construed against the drafter. Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 513, 760 P.2d 350 (1988).

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The testimony will also indicate that the parties did not discuss consideration for the option at the time the option agreement was drafted. This is a key issue in the parties dispute.

In American States Ins. Co. ex rel. Kommavongsa v. Nammathao, 153 Wn.App. 461, 467, 220 P.3d 1283 (2009) Division III held that a trial court considering disqualification in a situation such as this case must apply the Cottonwood Estates ' standards and make appropriate findings concerning the materiality and necessity of counsel's testimony, as well as determine any prejudice to the attorney's client, Before making the decision to disqualify counsel.

CONCLUSION

Based upon the above the law firm of LIBEY & ENSLEY, PLLC, should be disqualified as counsel for the plaintiff pursuant to RPC 3.7.

Dated this 9th day of October, 2014

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.

J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

DECLARATION

I J. Gregory Lockwood am the attorney of record for the above named defendant and make this declaration from my personal knowledge and under penalty of perjury under the laws of the State of Washington.

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1. The arbitration at issue in this case concerns only one issue and that is in regard to the party's option agreement.

2. The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. He is a necessary witness in this arbitration.

3. It is anticipated that his testimony will indicate that he drafted the option agreement at the sole direction of Garrett Ranches, LLC.

4. It is further anticipated that he will indicate that the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey.

5. Additional facts would reveal that at the time of drafting the option agreement the members of the Larry Honn Family Trust, LLC did not indicate any dollar amount to be placed in the option.

6. And specifically, Gary Libey as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC,

7. Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement.

8. Gary Libey a partner in the firm that represents the plaintiff will provide testimony that he drafted the option agreement at the sole direction of Garrett Ranches, LLC, and the Larry Honn Family Trust LLC, had no input or contributed to the wording of the option that was drafted.

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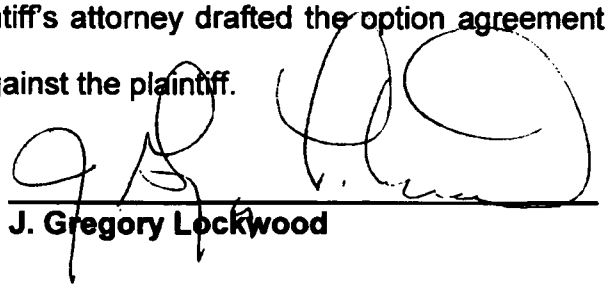
9. As such any ambiguity the arbitrators may find would be construed against the drafter. In this case the plaintiff's attorney drafted the option agreement and any ambiguity would be construed against the plaintiff.



J. Gregory Lockwood

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	_____X____ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.

LORRIE HODGSON

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SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITATOR PURSUANT TO RCW 7.04a.110

MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITATOR PURSUANT TO RCW 7.04a.110

The defendant by and through its attorney of record J. Gregory Lockwood moves for reconsideration and objects to the court's appointment of attorney Timothy Esser as a neutral third arbitrator pursuant to RCW 7.04a.110(2).

Mr. Ferguson as counsel for the plaintiff had recommended Mr. Esser as a neutral third arbitrator and the defendant having raised objections as to any nominated arbitrator by either party due to an appearance of impartiality.

The defendants had also indicated to the court that Mr. Gary Libey would be a witness at the arbitration, due to the option being drafted by him and his firm. It was further indicated that the defendants would be seeking the disqualification of

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J. Gregory Lockwood, PLLC
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Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

plaintiff's counsel pursuant to Washington RPC 3.7, as Gary Libey is a partner in the law firm representing the plaintiff.

It is no surprise that the plaintiff's counsel nominated Timothy Esser as he was a partner in plaintiff's counsels firm prior to the formation of Esser & Sanberg.

The letterhead from the law firm of LIBEY, ENSLEY, ESSER & NELSON, PLLC, clearly indicated that Timothy Esser was a partner in the firm along with Gary Libey. See Exhibit "A" attached to the accompanying Declaration of J. Gregory Lockwood.

Further, the current law firm which represents the plaintiff LIBEY & ENSLEY, PLLC, current includes all members of the law firm LIBEY, ENSLEY, ESSER & NELSON, PLLC, except for Timothy Esser. See Exhibit "B" attached to the accompanying Declaration of J. Gregory Lockwood.

Further, prior to Timothy Esser forming the law firm of Esser & Sandberg he worked in Pullman as part of the firm of NUXOLL, LIBEY, ENSLEY & ESSER PLLC, See Exhibit "C" attached to the accompanying Declaration of J. Gregory Lockwood.

The court's oral decision on October 3, 2014 to appoint Timothy Esser in the event the parties chosen arbitrators could not agree on a third neutral arbitrator by October 17, is objected to as follows:

1. Mr. Timothy Essor was nominated by the plaintiff's counsel knowing that;

2. Mr. Timothy Esser was a partner with Gary Libey in a number of law firms prior to the formation of Esser & Sandberg. It should be noted that Mr. Sandberg also practiced with the firm of LIBEY, ENSLEY, ESSER & NELSON, PLLC,

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3, Gary Libey will be a witness in the arbitration regarding the option contract.

4. Timothy Eesser would be asked to authorize discovery against his old firm.

5. It is believed that Timothy Esser may have been associated with the plaintiff's current counsel at the time of Gary Libey drafting the option contract.

6. The defendant is entitled to a neutral 3rd arbitrator with no relationship to plaintiff's counsel or law firm.

Further objection is made pursuant to RCW 7.0A.110 (2) which reads:

> (2) An arbitrator who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as a neutral arbitrator.

Pursuant to RCW 7.0A.110 (2) Timothy Esser should be disqualified due to his long standing relationship as a law partner in the plaintiff's council's firm.

Additionally, RCW 7.04A.120(1) and (2) requires the disclosure of the relationship with attorney Gary Libey and their partnerships.

> (1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
>
> (a) A financial or personal interest in the outcome of the arbitration proceeding; and
>
> (b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, witnesses, or the other arbitrators.

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(2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceedings and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

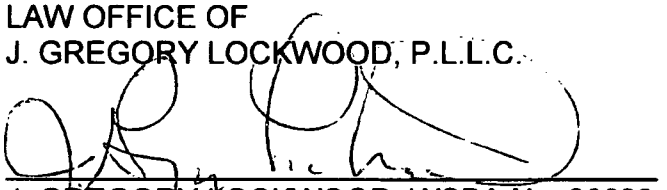
Although no disclosure has been made by the arbitrator at this time it is public record of the relationship and as such the defendant has raised this early objection.

RELIEF REQUESTED

For the above reasons the defendants object to and seek reconsideration of the Court's decision of the appointment of Timothy Esser as the neutral 3rd arbitrator. It is further requested that a neutral 3rd arbitrator be appointed from the arbitration panel established by Spokane County Superior Court. Currently, both arbitrators are located in Spokane County.

Dated this 9th day of October, 2014

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	____X____ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 DECLARATION OF J. GREGORY LOCKWOOD IN SUPPORT OF MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITATOR PURSUANT TO RCW 7.04a.110

I J. Gregory Lockwood am the attorney of record for the above named defendant and make this declaration from my personal knowledge and under penalty of perjury under the laws of the State of Washington.

1. The court has indicated that in the event the parties named arbitrators are unable to choose a neutral 3rd arbitrator the court will appoint attorney Timothy Esser as the 3rd neutral arbitrator.

2. Timothy Esser was nominated by the plaintiff's counsel indicating that he would be a fair arbitrator.

FILED
OCT 1 4 2010
SHIRLEY BAGGS
WHITMAN COUNTY

Law Office of
J. Gregory Lockwood, PLLC
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Spokane WA 99201
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ORIGINAL

3. Upon returning to my office I inquired about Timothy Esser and found that Mr. Esser was a prior partner in the law firm of LIBEY, ENSLEY, ESSER & NELSON, PLLC.

4. The letterhead of the above referenced law firm clearly indicated that Timothy Esser was a partner in the firm along with Gary Libey. See attached copy of Letterhead dated March 6, 2008 marked as Exhibit "A".

5. Further, the Law firm which represents the plaintiff LIBEY & ENSLEY, PLLC, currently includes all members of the law firm LIBEY, ENSLEY, ESSER & NELSON, PLLC, except for Timothy Esser. See Law firm internet posting marked as Exhibit "B".

6. Additionally, prior to Timothy Esser forming the law firm of Esser & Sandberg he worked in Pullman as part of the firm of NUXOLL, LIBEY, ENSLEY & ESSER PLLC, See news article marked and attached as Exhibit "C".

7. Due to the close relationship with the plaintiff's counsel and law firm it is requested that he be withdrawn from the court's intended choice as 3rd neutral arbitrator in this case.

8. The appointment of Timothy Esser would be prejudicial to the defendants due to his close relationship with the plaintiff's law firm and raises issues if clear bias.

Dated this 9th day of October, 2014

J. GREGORY LOCKWOOD,

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	___X___ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.

LORRIE HODGSON

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Telephone: (509) 624-8200
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EXHIBIT A

LIBEY, ENSLEY, ESSER & NELSON, PLLC
Attorneys at Law
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
Fax: (509) 334-2205
Email: nleen@pullman.com
Website: www.pullmancolfaxlawyers.com

BRUCE ENSLEY
TIMOTHY ESSER* / **
GARY J. LIBEY*
GUY C. NELSON*
ROGER J. SANDBERG

*ALSO ADMITTED IN IDAHO
**ALSO ADMITTED IN OREGON

Of Counsel: Wesley A. Nuxoll

COLFAX OFFICE
409 NORTH MAIN
P.O. Box 619
Colfax, Washington 99111-0619
Phone: (509) 397-4345
Fax: (509) 397-3594

March 6, 2008

HAND DELIVERED

To: University Appeals Board
Office of Student Conduct

Re: Alpha Kappa Lambda Fraternity

This letter serves as our appeal of the Conduct Board's findings against Alpha Kappa Lambda Fraternity in a notice dated February 21, 2008, copy attached. We have authorized our attorney, Timothy Esser, to hand deliver this.

In accordance with the instructions of your February 21st letter, we offer our appeal of the Conduct Board's initial order on the following the grounds:

1. a procedural error which materially affected the decision;
2. The decision was not supported by substantial evidence;
3. The severity or appropriateness of the sanctions.

1. **Procedural errors which materially affected the decision**

Errors in procedure materially affected the decision by failing to provide accused student a reasonable opportunity to prepare and to present a response to those allegations. WAC 504-406-27 (2)(a).

The notice provided by the Office of Student Conduct, in a letter dated February 5th (exhibit A) did not comply with the clear and unambiguous guidelines of WAC 504-26-403 (2). Specifically it omitted *'the approximate time and place of the alleged act that forms the factual basis for the charge of violation'; 'a list of witnesses who may be called to testify, to the extent known'* and *'a description of all documentary and real evidence to be used at the hearing, to the extent known...'*

WAC 504-26-403 (2) outlines the elements of this notice using "shall include" which WAC defines as being utilized in the imperative sense;

(2) The written notice shall be completed by the conduct officer and shall include:

(a) The specific complaint, including the university policy or regulation allegedly

violated;

(b) The approximate time and place of the alleged act that forms the factual basis for the charge of violation;

(c) The time, date, and place of the hearing;

(d) A list of the witnesses who may be called to testify, to the extent known;

(e) A description of all documentary and real evidence to be used at the hearing, to the extent known, including a statement that the student shall have the right to inspect his or her student conduct file.

(3) Time for hearings.

By denying the accused the specific information related to the act that formed the factual basis for the accusation, denying the accused the list of witnesses that would be called and denying the accused access to the evidence that would be used against the accused, this error prevented AKL from having a reasonable opportunity to prepare and to present a response to those allegations. [WAC 504-406-27 (a)]

Further, the Conduct Board considered evidence not presented by witnesses at the hearing, as well as ex parte communication by Chris Wuthrich, who was not identified as a witness, Nick Hupka, who was not identified as a witness, Enrique Silva, who was not identified as a witness and Brandon Mueller, who was not identified as a witness.

2. **The decision was not supported by substantial evidence;**

Whether there were facts in the case that, if believed by the fact finder, were sufficient to establish that a violation of the standards of conduct for students occurred. WAC 504-26-407 (2) (b).

The Conduct Board's finding of facts does not provide sufficient evidence to sustain the charge of possession, use or distribution of illegal drugs on chapter property or in the course of a chapter function. The record of the conduct hearing does not include facts that support this charge. No evidence was presented that would subject the determination that the fraternity controls and is responsible for activity at "The Joint." The "joint" is simply an off campus residence rented by students, not the fraternity.

That the fraternity took action to expel members based on their individual conduct, off chapter property and not during a chapter function, is not sufficient to find the fraternity responsible for the charge. In fact it suggests to the contrary, that alleged actions were committed by individuals and responded to appropriately by the fraternity.

Further, allegations of an arrest for the actions of individuals at an off campus private residence not owned or controlled by the fraternity does not support a claim that drugs were used, possessed or distributed on fraternity property.

Finally, the allegations that non-members, photographed wearing t- shirts produced by the fraternity, were arrested months later on drug charges does not support the charge that drugs were used, sold or distributed on the property. The T-shirts had no Fraternity insignia on them and were distributed to members and non-members during a move-in week at WSU.

3. **The severity or appropriateness of the sanctions.**

Loss of recognition for five years is too severe and inappropriate given the charges and findings of fact.

The University's policies and procedures do not support the immediate removal of freshman in the event that a fraternity fails to provide a university approved live in advisor. The fraternity presently has in place a professional staff member in that capacity. **The Fraternity Organization Agreement identifies that failure to provide a sufficient live-in advisor will result in the loss of freshmen housing privileges the following semester, not the current semester.**

Further, the act of loss of recognition for allegations against individual members and non-members of the fraternity, which allegedly occurred off fraternity property and not at fraternity functions, is not supported by precedent or policy.

Further, such act is not in the best interest of promoting healthy and ideal living environments on campus, and prevents the University from conducting important oversight and educational programming to the living group. With the loss of recognition, the fraternity can continue to operate without freshman living in the property, yet the University Office of Greek Life cannot conduct such important and vital functions as monitoring the chapter's grades, social activities, recruitment activities and University required participation in educational programming.

A fair and appropriate punishment would keep the fraternity within the supervision of the University, while holding the chapter to strict standards for compliance with all University regulations, and require the chapter to demonstrate clear and convincing steps taken in conjunction with the University, the National Fraternity and the fraternity alumni board to ensure the chapter meets the standards expected of all WSU students, fraternities and living groups.

Alpha Kappa Lambda Fraternity
700 NE California, Pullman, WA

By _____
Mike Wood, Chapter President

Attachment

EXHIBIT B

LIBEY & ENSLEY, PLLC

Attorneys at Law

Serving Eastern Washington and Northern Idaho

| Home | Attorneys | Practice Areas |

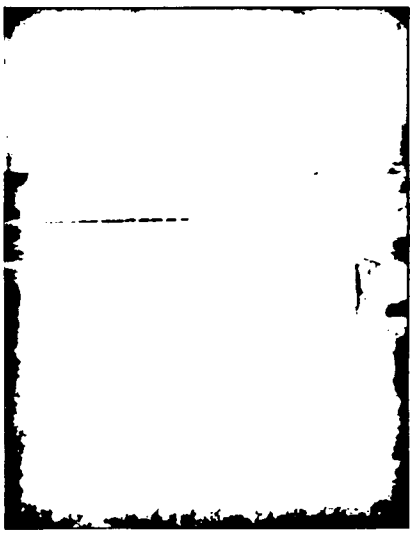
Colfax Office:
North 409 Main Street
Colfax, WA 99111

Phone: (509) 397-4345
Fax: (509) 397-3594

Welcome
to Libey & Ensley, PLLC.

Our law firm was established in 1890, and continues to practice today in the greater Whitman County area.

We are proud of our reputation for providing a wide variety of specialized legal services.



© 2012 Libey & Ensley, PLLC

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LIBEY & ENSLEY, PLLC

Attorneys at Law

Serving Eastern Washington and Northern Idaho

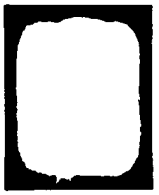
Our Attorneys

Colfax Office:
North 409 Main Street
Colfax, WA 99111

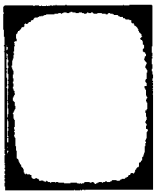
Phone: (509) 397-4345
Fax: (509) 397-3594

Gary J. Libey — E-mail Gary

Bruce Ensley — E-mail Bruce



Guy C. Nelson — E-mail Guy



Will Ferguson — E-mail Will

Wesley A. Nuxoll
Retired

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EXHIBIT C

Colfax law firm opens Pullman office June 1

Five area attorneys have pooled their resources to expand a Colfax law firm and are adding a Pullman office as of June 1.

Wesley A. Nuxoll, Gary J. Libey, Bruce Ensley and Timothy Esser are forming Nuxoll, Libey, Ensley & Esser and have hired Leslie A.M. Cloaninger as an associate with the new firm. It will specialize in business, banking, estate planning, probate, real estate, land use, taxation, civil and criminal litigation and municipal law, Libey said.

Nuxoll and Libey have had a joint Colfax practice for about 15 years. Ensley has been with Hickman, Webster & Ensley since 1975. Tim Esser is a former Whitman County deputy prosecutor, had his own firm, and most recently has been with Irwin, Myklebust, Savage, Brown & Esser.

As well as adding a Pullman office on Kamiaken Street, the new firm will establish offices in Endicott, Lacrosse and Rosalia.

Nuxoll, an Idaho native, graduated from Gonzaga University School of Law in 1954 and has practiced in Whitman County since 1956. He was adjunct professor at Gonzaga from 1973 to 1975 and his practice emphasizes estate planning, probate, real estate, civil litigation and banking.

Libey, who was born in Spokane, graduated from Gonzaga in 1976 and has practiced in Whitman County since 1976. He was a part-time Whitman County District Court judge from 1979 to 1982.

As well as being a Whitman County Superior Court Commissioner, he is city attorney for Colfax, Uniontown, Rosalia, Malden, Endicott, and Lacrosse. His specialties include estate planning, probate, real estate and civil litigation.

Ensley, a Colfax native, earned his law degree at Willamette University College of Law in 1976. He joined the Colfax firm of Hickman and Webster in 1976 and became a partner in 1978. In addition to working for private clients, Ensley is general counsel for the Port of Whitman County and specializes in business and tax planning, probate and trust administration, and estate and financial planning.

Esser, who was born in Spokane, earned his law degree from Gonzaga where he spent a year on the law review. He has practiced law in Whitman County since 1977 and specializes in civil and criminal litigation, real estate and land use.

Cloaninger is also a Spokane native who attended Washington State University and earned her law degree from Gonzaga. Her current practices covers domestic relations, criminal law and bankruptcy.

SHELLY HANNA PHOTO

UNITED IN LAW: (from left) Timothy Esser, Gary Libey, Leslie Cloaninger, Wesley A. Nuxoll and Bruce Ensley have formed a new law firm, Nuxoll Libey Ensley & Esser.

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **ORDER RE: APPOINTMENT OF ARBITRATOR**

THIS MATTER came before the Court on the Motion and Declaration of Plaintiff for Appointment of 3rd and Final Arbitrator;

BASED on the evidence and arguments presented,

NOW THEREFORE,

IT IS HEREBY ORDERED:

The Arbitrators chosen by the Parties in this matter shall select a 3rd and final arbitrator on or by October 17, 2014. If the Arbitrators do not choose a 3rd and final arbitrator on or by October 17, 2014, this Court hereby appoints Timothy H. Esser of Esser & Sandberg, PLLC, of Pullman, WA, as the 3rd and final arbitrator.

DATED this 15th day of October, 2014.

FILED
OCT 16 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

JUDGE DAVID FRAZIER

Presented By:

LIBEY & ENSLEY, PLLC

By _____
Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff
LIBEY & ENSLEY, PLLC

Approved ~~for Entry, Notice of Presentment waived~~: To form + with objection to content

By _____
Gregory Lockwood
Attorney for Defendant

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Declaration of Counsel in Opposition to Motion for Reconsideration on Appointment of Timothy Esser**

WILL FERGUSON declares:

1. I am an attorney in the firm of LIBEY & ENSLEY, PLLC.

2. LIBEY & ENSLEY, PLLC represents the Plaintiff, GARRETT RANCHES, LLC.

3. Defendant objects to the appointment of Timothy Esser of Esser and Sandberg as the 3rd and final arbitrator in this matter.

4. Timothy Esser has not been a member or principal of LIBEY & ENSLEY, PLLC since June 1, 2009.

5. Litigation or even any dispute between Plaintiff and Defendant in this matter did not begin until late 2010.

FILED
OCT 23 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

6. The Lease and Option underlying this litigation was not drafted until September of 2010.

7. Upon information and belief, Mr. Esser or a member of his firm has represented a member of the Honn family, including Larry Honn, Jr.

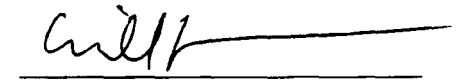
8. Garrett Ranches, LLC has no objection to the appointment of Mr. Esser.

9. Defendant, in opposing the appointment of Mr. Esser, does not prove any bias for or against any of the Parties.

10. If this Court does grant the Motion for Reconsideration, it should appoint Mr. David Savage, an attorney at Irwin, Myklebust, Savage, and Brown, in Pullman, WA.

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

DATED this 22nd day of October, 2014.



Will Ferguson

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 22nd day of October, 2014.

WILL FERGUSON

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Response to Defendant's Motion and Declaration to Disqualify the Firm of Libey & Ensley, PLLC**

COMES NOW the Plaintiff, by and through its attorney of record, Will Ferguson, and submits the following response to Defendant's Motion and Declaration in Support of Disqualification of the Law Firm of Libey & Ensley, PLLC (hereinafter "Motion to Disqualify").

DEFENDANT'S MOTION TO DISQUALIFY SHOULD BE DENIED

A response to Defendant's Motion to Disqualify hardly merits a response. However, because Defendant has brought this Motion, Plaintiff must respond and entertain Defendant's arguments.

Disqualification of an attorney is a high burden for Defendant to meet. In this case, Defendant cannot meet that burden.

FILED
OCT 23 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

The general rule is that a court will not disqualify an attorney "**absent compelling circumstances**." Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co., 124 Wash.2d 789 (1994) (emphasis added). Not only must the moving party show compelling circumstances, the moving party must satisfy an extended test:

> When an attorney is to be called..., a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client.

Id. at 813 (alteration in original). The above test adds an implied lesser test: when an attorney is to be called. Therefore the moving party must show that the testimony of the attorney is necessary, not just a wish or an unseemly tactic. There are no outstanding issues in this case to which Mr. Libey's testimony would be relevant. What information Mr. Libey relied upon in drafting the Lease and Option is irrelevant. The validity of the Lease and Option, the negotiations surrounding the execution of the Lease and Option, and the consideration supporting both the Lease and Option, have all been litigated, decided, and upheld. The only issue remaining to be decided at the third round of arbitration is whether Garrett Ranches properly exercised its Option and therefore whether the Arbitration Panel should order a sale of the property.

Turning to the stated test, the moving party must show that the attorney has information or facts in his or her possession that are not protected by attorney client privilege, which are obtainable nowhere else. All Defendant has done in this case is state that it wants to take the deposition of Mr. Libey. Defendant provides no indication that Mr. Libey has any information not protected by privilege *and* that is unobtainable elsewhere.

Here are the stated reasons for Defendant's desire to call Mr. Libey:

1. "His testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC."
2. "That the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey."
3. "That at the time of drafting the option agreement the members of the Larry Honn Family Trust did not indicate any dollar amount to be placed in the option."

4. "Gary Libey as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC."

Motion to Disqualify at Page 3, Lines 3-10. If counsel for Defendant already knows what Mr. Libey would testify to, then Mr. Libey's testimony is not necessary; Defendant's counsel has already obtained this information elsewhere. Defendant even defeats its own argument at Page 3, Lines 12-14 by stating "Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement." However, Defendant's counsel already indicates that he knows what information was relied upon by Mr. Libey, by stating in Page 3, Lines 3-10, what he knows Mr. Libey's testimony would entail.

Furthermore, the evidence Defendant's counsel seeks is already in the record. Ignoring the fact that he can obtain the same evidence from his own clients, Defendant's counsel could consult the Deposition Transcripts of Larry Honn, Sr., Charlotte Honn, Frank Garrett, and Joshua Garrett who both testified in substance:

1. Honns did not consult with Mr. Libey on the drafting of the Lease and Option, primarily because Mr. Libey was the attorney for Garrett Ranches.
2. The negotiations took place at Defendant's ranch and Mr. Libey was not one of those individuals present.
3. The sales price, terms of sale, and monthly rent amounts were negotiated and entered at Defendant's ranch, even at the behest of Mr. and Mrs. Honn, principals of Defendant.

Attached hereto as Exhibit Nos. 1-4, are the pertinent pages from the Deposition Transcripts of Larry Honn, Sr., Charlotte Honn, Frank Garrett, and Joshua Garrett, respectively. Mr. Libey played no part in the negotiations between the parties and had no contact with the Defendant in drafting the Lease and Option. The Lease and Option were drafted for Mr. Libey's client and that was the extent of his involvement.

Finally, the firm of Libey and Ensley, has represented Garrett Ranches on this matter for almost 4 years. To disqualify the firm of Libey and Ensley would require Garrett Ranches to

find replacement counsel at great cost. This matter has generated no less than six large 3-ring binders of litigation, has resulted in one appeal, two completed arbitrations, three arbitration awards, and an upcoming round of arbitration. Finding a new firm would place a substantial hardship on Garrett Ranches.

Defendant claims that Libey & Ensley, PLLC should be disqualified because Mr. Gary Libey could be a material witness. But Defendant does not provide any coherent reason why Mr. Libey would offer or even have to offer testimony material to any issue. For the reasons stated above, this Court should deny Defendant's Motion to Disqualify.

CR 11 SANCTIONS SHOULD BE IMPOSED AGAINST THE DEFENDANT AND OR DEFENDANT'S COUNSEL

Defendant's Motion to Disqualify should be denied and this Court should impose Civil Rule 11 sanctions on the Defendant and its attorney. WA CR 11(a) provides in part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If a court finds a violation of CR 11, it may impose appropriate sanctions upon "the person who signed it, a represented party, or both...." Id. "To impose sanctions for a baseless filing, the trial court must not only find that the claim was without a factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim." West v. State, Washington Ass'n of County Officials, 162 Wash.App. 120. Had counsel for Defendant performed a reasonable inquiry into the factual basis of Defendant's Motion, he would have reviewed the Deposition Transcripts of Larry Honn, Charlotte Honn, Frank Garrett, and Joshua Garrett, all of which would have shown that even if the testimony he were seeking from Mr. Libey were relevant, he could have obtained that same information from his client and Plaintiff.

Furthermore, there are three reasons why Defendant's Motion is brought in bad faith: 1. The issue of the validity of the Lease and Option has already been decided in favor of validity. This litigation has been going on for approximately four years now. Validity has been conclusively decided by the Arbitration Panel, this Court, and the Court of Appeals. Defendant was even allowed to bootstrap its way into appealing the First Arbitration Award, which was entered over a year before Defendant filed a Notice of Appeal and included the First Arbitration Award in its assignments of error.

2. Mr. Libey is not likely going to be a witness, let alone a material witness. On December 13, 2010, Mr. Libey took the depositions of the principals of the Honn Family, LLC. On that same day and the following day, then counsel for Defendant, Mark Moorer, took the depositions of Frank Garrett and Joshua Garrett. Exhibit Nos. 1-4 show Mr. Libey's complete lack of involvement in the formation of the Lease and Option except only to confer under client confidentiality with Frank Garrett. Therefore, Mr. Libey cannot have any testimony whatsoever, bearing on any negotiations or lack thereof.

3. Even if Mr. Libey had any testimony bearing on any relevant facts, his testimony would be protected by attorney client privilege. See RPC 1.6. See also RCW 5.60.060(2)(a) (disqualification of attorney as witness against client).

4. The attorney for whom disqualification was sought in Klickitat was the draftsman of a settlement agreement. The attorney in that case was therefore involved with both parties. Even then, the Washington Supreme Court upheld the trial court's denial of the motion to disqualify. In fact, the trial court also "...expressed valid concern regarding...the potentially unseemly tactics..." utilized by the party attempting to disqualify the attorney. Klickitat, 124 Wash.2d at 813. Here, Mr. Libey has represented Garrett Ranches and only Garrett Ranches since the drafting of the Lease and Option and the beginning of this case. Defendant knows that and this Motion was made in bad faith. Not only is there no factual support for the Motion, there is no legal support for the Motion because none of the information sought by Defendant is relevant to the remaining issue at arbitration.

If this Court does not impose CR 11 sanctions against the Defendant or its counsel, it should award attorney fees to Garrett Ranches pursuant to Paragraph 16 of the Cash Rent

Farm Lease with Option to Purchase, which provides that the prevailing party in litigation may obtain attorney fees from the non-prevailing party.

This Court should impose CR 11 sanctions against the Defendant, its counsel, or both.

DATED this 22nd day of October, 2014.

LIBEY & ENSLEY, PLLC

Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff

DECLARATION OF COUNSEL

WILL FERGUSON Declares:

1. I am the attorney for the Plaintiff herein.
2. I have spent four hours in preparation of this Response, including review of the underlying Motion, conference with client, and research. My hourly rate is $180.00. I estimate that I will have to devote another hour in preparation for hearing and for the hearing itself. I request this Court impose CR 11 sanctions against Defendant, or fees pursuant to the attorney fee provision in the Cash Rent Farm Lease with Option to Purchase, commensurate with my work on this matter.

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

Dated this 22nd day of October, 2014, at Colfax, WA.

WILL FERGUSON

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 22nd day of October, 2014.

WILL FERGUSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company, Petitioner,	No. 10-2-00293-4
vs.	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company, Respondent.	

DEPOSITION OF LARRY K. HONN

Taken at the instance of the Petitioner

December 13, 2010

11:20 a.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 1

1 going to.
2 Q. And did they talk to your wife, too?
3 A. No, they didn't, did they?
4 Q. To your knowledge, anyway. We'll ask her later.
5 A. No.
6 Q. Okay. All right. Were you the family spokesman
7 pretty much with the Garretts?
8 A. I guess so. Whatever.
9 Q. Okay. Did you -- So, why were they coming to
10 your house? What was your understanding?
11 A. Well, what he told me on the telephone, Frank is
12 the one that called me. He said, "We've got a preliminary
13 copy of the contract."
14 Q. Okay.
15 A. And I thought, "Well, that's kind of strange,"
16 because I'd never been contacted by anybody or anything on
17 it at all, so . . .
18 Q. Okay. But he said he had a preliminary copy of
19 the contract. And did he want to come out and have you
20 look it over?
21 A. Well, that's what he said at the time. But
22 that's not the way it turned out.
23 Q. Okay. So, what happened at the meeting on, at
24 your home? What happened?
25 A. Well, he gave, I think he gave me a copy of it,

1 and I can't read anymore, but I did finally figure out the
2 first page. And it had a whole bunch of things wrong.
3 And he says, "Don't worry about it. We'll change
4 all that."
5 Q. Okay. Let me -- Was there some conversation
6 before he handed this document to you?
7 A. No. None. When he came in the door, he handed
8 it to me.
9 Q. Well, let me hand you what's been marked as
10 Exhibit Number 1, and, Mr. Honn, I'm going to slide that
11 over to you.
12 Mr. Moorer, a copy for you, too.
13 MR. SHAW: Thank you.
14 Q. (BY MR. LIBEY:) Can you read at least the top of
15 this document today in your deposition?
16 A. Yeah. I can read that top two lines.
17 Q. What does it say?
18 A. It says, but I ~~didn't read that the~~ first, when
19 he handed it to me. It may have been there, but . . .
20 Q. What does it say?
21 A. It says "Cash Rent Farm Lease" and then with
22 "Option to Purchase."
23 Q. Okay. Is that in larger print than the rest of
24 the document?
25 A. Yes, it is.

1 Q. And is it in bold print?
2 A. Yes, it is.
3 Q. And it's underlined?
4 A. Yes, it is.
5 Q. Okay. So, tell me, when Mr. Garrett handed you
6 this document, what did you do?
7 A. I tried to read it. And I sat there for an hour
8 or so trying to read it, but I couldn't read it. And, but
9 I didn't say I couldn't read it.
10 But my wife knew at that time that I couldn't
11 read it, because I can't read unless I'm laying horizontal
12 in our bed and on my back, and then I turn on my right side
13 and can get things out there focused right so I can read
14 it.
15 Q. Okay. Well, let me just test you on this, if you
16 could. Can you read the top line, the first full, long
17 sentence of this?
18 A. Well, if I take time I can, yes.
19 Q. Okay. Well, take your time. Go ahead and just
20 read it to me out loud, just to see how you do.
21 A. "THIS CASH RENT FARM LEASE WITH OPTION TO
22 PURCHASE."
23 Q. Okay. You were able to read that just now?
24 A. Yes, I did.
25 Q. Okay. If this room was quiet and you had time ,

1 how long would it take you to read the, let's just say,
2 five pages of this document?
3 A. Probably an hour.
4 Q. Because of your eye problems?
5 A. Yes. And my mental problems, too.
6 Q. What kind of mental problems do you have? This
7 is the first time we've talked about that.
8 A. Well -- And I don't know how severe they are, but
9 the doctor told me that I shouldn't sign anything anymore,
10 and so . . .
11 Q. Which doctor was that?
12 A. Dr. Johnson, here in Colfax.
13 Q. When did he tell you that?
14 A. Probably a year ago or so. It was after I'd
15 already quit signing all the documents or checks or
16 anything.
17 Q. What sort of problems did you report you had to
18 Dr. Johnson?
19 A. Loss of memory and couldn't keep track of things
20 and so on, like that.
21 Q. Okay. Did you go to Dr. Johnson just for a
22 physical checkup?
23 A. Yep. Annual.
24 Q. Okay. How else did you do? Besides your memory,
25 what other problems did Dr. Johnson tell you you had?

A. Well, I've had eye problems for at least that long and . . .

Q. Anything else?

A. Well, yes, there is other things, but that has nothing to do with this.

Q. Okay. The only things that would have anything to do with this would be mental problems, which is your memory?

A. Uh-huh.

Q. Correct?

A. Yes, exactly.

Q. And then your eyesight, which we've talked about, correct?

A. Uh-huh.

Q. You have to say yes or no to me, if you would.

A. Yes. I have trouble with my eyesight.

Q. Okay. So, at the meeting when Mr. Garrett handed you this document, this lease, did you try to take time to read it over?

A. I kind of just skipped over the first page, to be honest with you.

And then we got to the part where it said description of the irrigated land, and I said, "That's totally wrong," and I told him it was. And there was 150 acres, and he had down 120 acres.

1 Q. Well, let's go back. That's on Page 1, so let's
2 go back to Page 1, where it says "Property" in the first
3 paragraph.
4 Do you see Paragraph Number 1, "Property,
5 Farmland"?
6 A. Uh-huh.
7 Q. Can you read that to me?
8 A. Maybe. "Farmland:" "a. Farmland:"
9 Q. Right. Read that if you would, that sentence.
10 A. "The Property currently consists of 2,008 acres,
11 including 120 acres." That's where I told him it was
12 wrong.
13 And he said, "Don't worry about it. This is just
14 a draft. I'll get it corrected."
15 Q. Let's keep reading. Then we'll go back to what's
16 wrong. 120 acres, go ahead, of what?
17 A. "Acres of irrigated farmland out of a total of
18 335 acres of tillable farmland, located in Whitman County,
19 Washington."
20 Q. Okay. Do you recall Mr. Garrett bringing with
21 him your Assessor's parcel number descriptions?
22 A. No, I don't remember that.
23 Q. Okay.
24 A. But when we looked at it that night, my wife and
25 I, we saw where it was, the descriptions, were land that, I

1 told him the first day, that weren't included in that.
2 That's where my son lived up there. And I told him that
3 first day out in that field.
4 Q. We're talking about the mobile home?
5 A. Yep, exactly.
6 Q. Is there a well at that mobile home also?
7 A. Yes. And it's on the line. Between Section 28
8 and 29.
9 Q. Okay. Well, let me just ask you then, is the
10 first part of this sentence, "The property currently
11 consists of 2,008 acres," is that more or less correct to
12 you?
13 A. I don't -- My wife can answer that far better
14 than I can.
15 Q. At least in your mind, you know your own land.
16 You've owned it and worked out there for --
17 A. 50 years. Over 50 years.
18 Q. Okay. And you probably know that land like
19 nobody else?
20 A. Probably so.
21 Q. Well, does this sound about right, about 2,008
22 acres, total?
23 A. No. Not total, because you've got included in
24 there Section 29 and six acres off of Section 28 on the
25 west side that is not supposed to be in there.

1 And I told Frank that the first day I ever met
2 with him, that I would not lease that, that that wasn't
3 part of the lease.
4 Q. We don't have it in here. Let's just say there's
5 no land in here from Section 29 and there's no land in here
6 from Section 6. Let's just assume that for --
7 A. Well, what the hell does Section 6 got to do with
8 what I just said? Nothing.
9 Q. I'm just trying to get your opinion of whether
10 this lease is accurate when it says you have about 2,008
11 acres.
12 A. I don't know.
13 Q. Okay. Did you have about 100 -- You mentioned
14 that the lease also says, "including 120 acres of irrigated
15 farmland." You said the "120 acres" number was wrong?
16 A. That's right, exactly. And I told him that.
17 Q. What should the number be?
18 A. Should be 150 acres. That's what the Soil
19 Conservation Service said.
20 Q. Okay. All right. And then it says, "out of a
21 total of 335 acres of tillable farmland." What --
22 A. I don't know where you got that figure --
23 Q. Okay.
24 A. -- because that's not even close to right.
25 Q. All right. And so, did you agree, when you were

1 talking with the Garretts, did you agree that if they
2 leased the property, they would also get to lease the
3 irrigation equipment?
4 A. When I was talking to them, I thought that was
5 all they were going to lease, because they said they didn't
6 care about the cattle being there for three more years.
7 Q. Okay. Let's talk about the irrigation equipment
8 I'm talking about.
9 A. Okay.
10 Q. Not the land, but the irrigation equipment. Was
11 that going to be part of the lease with the Garretts?
12 A. Yes.
13 Q. And just to clarify what you're trying to tell me
14 is, your thinking is, they were only going to lease the
15 irrigated hay ground from you?
16 A. Uh-huh.
17 Q. You've got to say yes or no for the record.
18 A. Yes.
19 Q. And that would be only 150 acres of irrigated hay
20 ground, correct?
21 A. Well, they had another plan that they were going
22 to get another circle and put on some of that that wasn't
23 irrigated.
24 Q. Okay. But in your, at least from your
25 understanding of this deal, you were only going to be

1 obligated to lease to them your 150 acres of irrigated hay
2 ground?
3 A. Hay ground.
4 Q. Is that correct? Correct?
5 A. Yes.
6 Q. And they were going to pay you $2,000 a month for
7 that?
8 A. That's what we decided at the end.
9 Q. Okay.
10 A. And I knew right then I should have been smart
11 enough at that time when I signed that, to know that that
12 was the same $2,000 a month that they were going to pay
13 Larry, that they weren't going to take him. But I wasn't
14 that smart at the time.
15 Q. Well, let's go to the next page of the lease
16 then, if you would.
17 You must have had a conversation with the
18 Garretts about the term of the lease, because I see where
19 on the second page right up there on the top, the initial
20 term of the lease had a blank space to fill in. Do you
21 remember that?
22 A. I didn't have anything to do with it. My wife
23 and Frank Garrett, he told her what to write down, and she
24 wrote it down.
25 Q. So, is this writing on this document her writing?

1 A. Yes, it is.
2 Q. Okay. And, again, this was in the presence of
3 your son, Larry Jr.?
4 A. No. It was not, because they said he didn't need
5 to come there.
6 Q. Okay.
7 A. So, he didn't come that day.
8 Q. I'm sorry. All right. It was just the four of
9 you that day.
10 A. That's right, exactly.
11 Q. I got you. Okay. So, your wife filled in the
12 blanks for a five-year term. Was that okay with you when
13 she did that?
14 A. Well, not really, because they had talked me into
15 that. Because I said one year, and they says, "Oh, no. We
16 can't do it for one year. It has to be for five -- three
17 years." And then they changed it to five.
18 And I said, "Okay. I know you've got to make
19 some money off of it, too," and . . .
20 Q. Okay. So, then, was there a discussion about how
21 the rent would be for the property? Do you recall talking
22 about that?
23 A. Well, my wife said, "Well, we've got to have a
24 payment each month then."
25 Q. Okay.

1 A. Is what she said, and so, that was written in
2 there.
3 Q. How much did you need each month?
4 A. At least $2,000.
5 Q. And would that be enough for you to live on?
6 A. No. It had nothing to do with us living. It was
7 just supporting the ranch.
8 And they said, "Well, you won't need insurance."
9 Well, they found out that you do need insurance.
10 Q. When you say "supporting the ranch," what do you
11 mean by that? Isn't this to support you?
12 A. No, it wasn't.
13 Q. Okay.
14 A. My son was supposed to go to work for them, so --
15 Q. Okay.
16 A. -- just to support the ranch.
17 Q. So, who was going to get the $24,000 a year, or
18 the $2,000 a month? Who was going to get that?
19 A. Well, we had to pay taxes.
20 Q. Okay.
21 A. And we had to pay irrigation and all that kind of
22 stuff, because they couldn't get that irrigation changed
23 into their name, and . . .
24 Q. What kind of irrigation did you have to pay?
25 What are you talking about? What kind of irrigation?

1 A. For the two pumps. That's what I have to pay.
2 Q. For the electricity?
3 A. Yes, exactly.
4 Q. So, the electricity was going to stay in your
5 name?
6 A. I guess so.
7 Q. Well, was it or wasn't it? I mean, was that --
8 A. I don't know.
9 Q. Okay.
10 A. That was never discussed, I don't think.
11 Q. Who was going to get the $2,000 rent then? Was
12 it going to be you and your wife that were going to get
13 that?
14 A. Well, the way it turned out, we haven't accepted
15 any money, and so I don't know who would get it if they win
16 this.
17 Q. But, I mean, under the way this was set up, what
18 was your understanding, who was going to get the $2,000 a
19 month rent? Was that going to be --
20 A. Well, my wife handles all the money.
21 Q. Okay.
22 A. So, it would be whoever asks, probably.
23 Q. All right. And were you making that much off the
24 ranch yourself, a month?
25 A. More than, but the whole thing was, I knew they

1 had to make a profit or they weren't going to do it.
2 And I didn't know at the time that they were
3 going to just purchase it. And I didn't know that until
4 four days later when we got calls from Endicott.
5 Q. Well, let's just talk about -- We'll focus on
6 what happened after this. Let's just focus on the day of
7 September 14, 2010. We're walking through the lease.
8 You've mentioned your wife filled in the blanks
9 of the term for five years. There's also the next
10 paragraph where somebody wrote in, and can you read that?
11 In handwriting "annual rent payment is open for review
12 October 1st of each year."
13 Can you see where that's written in handwriting
14 right there? Up a little higher, and then there's initials
15 right next to it, "CH," I take it, would that be your wife?
16 A. Yes, it would be.
17 Q. Looks like an "LKH."
18 A. That's me.
19 Q. And an "FDG."
20 A. That's Garretts, both of those are.
21 Q. Okay. Can you read that to me? Can you read
22 that handwritten sentence that's written in your --
23 A. It says "annual rent payment is open for review
24 October 1st each year."
25 Q. Okay. Now, is that something that you guys

1 talked about?
2 A. No. She mentioned that, "Well, we've got to be
3 able to review this."
4 Q. So, whose handwriting is that?
5 A. It's my wife's.
6 Q. And so, apparently --
7 A. But she was told what to say by Frank Garrett.
8 Exactly what to say or what to write down.
9 Q. But you all initialed it, right?
10 A. Yeah. I guess. Well, I can't read, but, yes, I
11 guess I initialed it.
12 Q. What does that mean to you by your initials on
13 there? What does that mean?
14 A. It probably means that you're bound to it.
15 Q. When you put your initials on there, is that what
16 you intended?
17 A. No, it wasn't. Because, I was thinking all the
18 time, there's three days, 72 hours, to renege on this, and
19 I can't read, so -- And I didn't read it at the time,
20 and . . .
21 Q. Okay. How much time were the Garretts there?
22 How long were they there?
23 A. About two hours, and in this time, they got a
24 notary over there.
25 Q. Okay.

1 A. And I don't know why they did that, because she
2 said, "Well, I've already read it."
3 So -- Because, my first cousin is a notary, right
4 there in LaCrosse that we could have got, but we weren't
5 really ready to sign it. We were kind of pushed hard to
6 sign it.
7 Q. Well, the next paragraph talks about rent, and
8 there's a handwritten amount in the rent blank space of
9 $24,000. And if you can follow me, it says, "payable
10 $2,000 commencing November 1, 2010."
11 Did your wife write that in it?
12 A. Yes, she did. Frank told her what to write down,
13 but she did write it.
14 Q. And you were there the whole time this was going
15 on?
16 A. Yes. And I should have told him right at the
17 time.
18 Q. Well, you seem like a pretty verbal person to me,
19 are you? You're not afraid to speak your mind, are you?
20 A. Well, at the time I was, because I thought Frank
21 was an honest man. So, I thought, "Well, he's got to get
22 this so he can make some money on it, too."
23 And I didn't know at the time that he wanted to
24 steal the ranch, so that's the whole facts right there.
25 Q. Do you remember talk ing to them also about if

1 they bought it from you how much the price would be, if
2 they bought the ranch from you how much it would be?
3 A. The only time I could have possibly mentioned
4 that is the first day when I was verbalizing in the field
5 about this whole thing, and I said at least $400,000.
6 Q. Okay. Now, you'll see in the document you're
7 looking at in the lease on Paragraph 4 there was a blank,
8 "dollars," that's been handwritten in $400,000. Can you
9 see that? In Paragraph 4?
10 A. Yeah, I see it.
11 Q. Whose handwriting is that?
12 A. Probably my wife's.
13 Q. Okay.
14 A. I don't know.
15 Q. Well, do you recall her writing in the numbers?
16 A. I remember Frank telling her how much and he
17 asked me, "Isn't that right?"
18 And I said, "I guess so," because I didn't
19 remember the conversation.
20 And he says, "Well, it was 400,000." And so she
21 wrote down that.
22 Q. Okay. All right. And did you understand from
23 signing, or from when they filled in the $400,000, that Mr.
24 Garrett would have the option to buy the ranch from you for
25 $400,000?

1 void," and then you said something about a legal
2 description.
3 A. Then I said, "You've got to get Section 28 and 29
4 off of there."
5 And he said, "Don't worry about it. I'll take
6 care of it."
7 Q. So, was that your major concern, there was
8 Section 28 and 29 in the lease, and you didn't want it in
9 the lease?
10 A. Well, that was one of my concerns. The other
11 option was to buy. I never had discussed with -- Well,
12 what we discussed was after five years that with a mutual
13 agreement between the two of us, that, if we agreed to it,
14 then they could purchase it, but we never said anything
15 other than that.
16 Q. So, did you -- Okay. Going back on the 15th or
17 the night of the 14th, did you have any conversation with
18 anybody else besides your wife? Did you and your wife talk
19 about this lease?
20 A. My wife and I did, but that was it.
21 Q. Nobody else came by?
22 A. No.
23 Q. So, was your wife in agreement with you that she
24 wanted to call the deal off, too?
25 A. Yes, exactly. She was standing right there when

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company, Petitioner, vs. LARRY HONN FAMILY LLC, a Washington Limited Liability Company, Respondent.	No. 10-2-00293-4

DEPOSITION OF CHARLOTTE E. HONN

Taken at the instance of the Petitioner

December 13, 2010

1:25 p.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 2

1 your home on the 14th?
2 A. Yes.
3 Q. Happens to be another Tuesday?
4 A. Yes.
5 Q. Is that a special day for you guys or something?
6 A. No. It just happened.
7 Q. Okay. And, again, this appointment was also at
8 two o'clock?
9 A. Yes.
10 Q. And the first one on August 24th was also at two
11 o'clock?
12 A. Yes.
13 Q. Okay. Any particular reason?
14 A. No.
15 Q. Okay. So, they came to your house in LaCrosse,
16 at your home?
17 A. Yes.
18 Q. And Josh and Frank did, correct?
19 A. Right.
20 Q. And just the two, you and your husband, were
21 there?
22 A. Yes.
23 Q. Okay. So, let's walk me through what happened
24 when the Garretts got there.
25 A. Well, they presented us with a lease and talked

1 about it and said that this was just a generic one and that
2 it was just a preliminary thing.
3 And we discussed it, and I wasn't happy with it,
4 and I never have been happy with doing it but, because of
5 my husband, I went along with it.
6 Q. Okay.
7 A. And I decided that, you know, five years, there's
8 a lot of things that can change.
9 And I said, "Well, I think we need to put in
10 there that every year it should be checked to see what we
11 wanted to do and what the price should be, and everything
12 else. It could be more, it could be less. We don't know
13 in five years' time, what's going to happen."
14 Q. Were they agreeable to that?
15 A. Yes.
16 Q. As a matter of fact, let's have you look at
17 Exhibit Number 1, which is a copy of the lease.
18 A. I also told them that they had part of the mobile
19 home section in there.
20 Q. Okay. Well, when they came, did they bring with
21 them copies of your assessed, assessment --
22 A. Yes.
23 Q. -- records?
24 A. Yes. But what the copies were and to what my tax
25 was, I never found the numbers until after they left, what

1 the numbers that corresponded with our tax copies of our
2 tax bills.
3 Q. Did you have -- Did you make a copy of this
4 lease?
5 A. Yes, I did. But my printer was out of colored
6 ink, and I didn't realize we had signed it in blue ink, so
7 you can't hardly see the signatures on the copy we have
8 until you sent the copy.
9 Q. Okay. But you made a copy after it was signed?
10 A. Yes.
11 Q. Did you take time to read through it before you
12 signed it?
13 A. Yes, I did. But I was so intent on getting this
14 right that I just didn't catch this within 30 days, just
15 take over.
16 Q. Okay. When you say "getting this right," you're
17 looking at the top of Page 2 of the lease where it says
18 "Term."
19 A. Right.
20 Q. So, there was a discussion about how long the
21 Garretts would be able to lease the property?
22 A. Right. Five years.
23 Q. Let's just go back to Page 1, if you could, and
24 let's kind of start from the beginning.
25 A. "Cash Rent Farm: Lease with Option to Purchase."

1 Q. And are you able to read and understand this sort
2 of document?
3 A. Yes.
4 Q. Okay. And so, in the document here under
5 "Farmland." It says, "The Property currently consists of
6 2,008 acres."
7 A. It's 2,208 acres.
8 Q. 2,208 acres. Did you say anything about that?
9 A. No. Because I didn't realize it. Like I said,
10 their copies were totally different, and I was trying to
11 figure that out, and I was trying to listen with everything
12 that was going on.
13 And I went in the office to look through, and I
14 couldn't. I never caught up with what was going on until,
15 with the parcels.
16 Q. So, your testimony is, there's 2,208 total acres?
17 A. No, 2,202.
18 Q. Excuse me. Okay. 2,202. I'll write that down
19 correctly.
20 A. That's what their tax bills say.
21 Q. Okay. So, just going back to the beginning of
22 this. This document says "2,008 acres," and there was
23 nothing said --
24 A. Well, I didn't realize it then, because like I
25 said, I was trying to match their paper with my papers, and

1 I, with the different numbers and stuff, I guess I didn't
2 catch which numbers, where they were.
3 And I was trying to listen to what they were
4 talking about and everything, so I would know what was
5 going on.
6 Q. And it says, "including 120 acres of irrigated
7 farmland."
8 A. And Larry said right then and there it was 150
9 acres.
10 Q. Okay. And so, is that correct, 150?
11 A. Uh-huh.
12 Q. You've got to say yes, if you would, please.
13 A. Yes.
14 Q. Okay. Out of a total of 335 acres of tillable
15 farmland. Is that how much tillable farmland you have
16 there on your land, 335 acres of tillable farmland?
17 A. Well, it could be if they went up into the field
18 and back in the corner where we had some grain crop we grew
19 one year.
20 Q. Okay. I'm not saying that's tillable. I mean,
21 that's not all being tilled right now --
22 A. Right.
23 Q. -- but it's potentially tillable? Would that
24 be --
25 A. I'm not sure how many acres that would be,

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company, Petitioner, vs. LARRY HONN FAMILY LLC, a Washington Limited Liability Company, Respondent.	No. 10-2-00293-4

DEPOSITION OF FRANK D. GARRETT

Taken at the instance of the Respondent

December 14, 2010

1:25 p.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 3

1 write something up right there and then.
2 A. Yes.
3 Q. And I think you said, "Why don't we sign
4 something right now?"
5 A. Larry Sr. said that.
6 Q. Larry Sr. said that. And you said, no, you would
7 contact your lawyer and get something drawn up.
8 A. And they were in agreeance with that.
9 Q. Okay. Did you reschedule another appointment to
10 meet back with them?
11 A. Not at that time.
12 Q. Okay. Did you have any idea when you would be
13 getting back to them about whatever your lawyer was going
14 to draw up?
15 A. Not at that time.
16 Q. And when you were thinking about having a lawyer
17 draw something up on that day, were you thinking about Mr.
18 Libey or were you thinking about me?
19 A. Mr. Libey. I didn't know that you existed.
20 Q. A little levity is sometimes good.
21 MR. LIBEY: I'll drink to that.
22 Q. (BY MR. MOORER:) I'm going to assume, then, the
23 conversation ended?
24 A. Yes.
25 Q. It ended amicably?

1 A. Yes.
2 Q. And you were anticipating coming back and talking
3 to them about this draft document?
4 A. Correct.
5 Q. Okay. And so, I'm assuming, then, you met with
6 Mr. Libey, or you called him up and you talked to him?
7 A. Well, first we contacted the Department of
8 Ecology --
9 Q. Okay.
10 A. -- to get a copy of all water rights, irrigation,
11 and springs and wells that existed on the property.
12 Q. Okay.
13 A. Then I went to the courthouse, visited with the
14 Assessor, got copies of assessments that pertained to
15 Honns' LLC.
16 Q. Okay. Anything else?
17 A. No.
18 Q. After you talked to the Department of Ecology and
19 went to the courthouse and got those assessments, then did
20 you schedule your appointment with Mr. Libey?
21 A. Correct.
22 Q. And you told him what you wanted?
23 A. I told him that we had discussed the lease with
24 the option to purchase. As far as setting the lease price,
25 it was still up in the air. And it had been mentioned

1 twice, once in the field and once on the August 24th
2 meeting that their price was $400,000, but I told Gary to
3 leave that open.
4 Q. Why is that?
5 A. I didn't know that that was set in stone.
6 Q. Okay. I don't want you to -- There's
7 attorney-client privilege there about your communication
8 with Mr. Libey.
9 So, you just indicated to him that you wanted a
10 draft of this Farm Lease with an Option to Purchase. Okay.
11 And am I to assume, then, that you believed that the draft
12 that you presented to the Honns was, in general, concurrent
13 with what had occurred on August 24th?
14 A. Please rephrase that.
15 Q. Sure. The document that you had Gary draw up as
16 a Farm Lease With Option to Purchase --
17 MR. LIBEY: Exhibit Number 1.
18 Q. (BY MR. MOORER:) Exhibit Number 1. You believed
19 that it was, it represented your conversation with the
20 Honns from August 24th?
21 A. In most part.
22 Q. Okay.
23 A. Because, I gave Mr. Libey the Assessor's report,
24 which showed the different parcels of ground. And we were
25 still up in the air about the length of the lease, when it

1 would begin, the payment of the lease.
2 And I told Gary to leave the line about option to
3 buy, that figure out, and we'd fill that in when we met
4 back with the Honns.
5 Q. Okay. Any other terms that you thought needed to
6 be left out or added to it?
7 A. No.
8 Q. Okay.
9 A. Not that I recall.
10 Q. Okay. And did you call the Honns to set up the
11 meeting for September 14th?
12 A. Yes. After I had received a copy from my
13 attorney, then we called Larry Honn, Sr. and said that we
14 had a copy of the lease and option to buy. "We'd like to
15 set up a time to come down and let you review it."
16 Q. Okay. So, you made that appointment?
17 A. Correct.
18 Q. Did you offer to give them a copy of the lease
19 before you got there so that they could read it in advance?
20 A. That was a very short time period between the
21 time we received it and the date that we went down there.
22 Q. Okay.
23 A. We received it in the mail, Josh and I read
24 through it, and I called Larry Sr. and --
25 Q. Okay. And set up the meeting.

1 A. -- set up the meeting.
2 Q. So, on September 14th, you went to their home in
3 Endicott?
4 A. In LaCrosse.
5 Q. LaCrosse, sorry. And you met with Larry Honn and
6 his wife, Charlotte?
7 A. Correct.
8 Q. And that was you and Josh?
9 A. Correct.
10 Q. And, then, tell us about how that meeting went.
11 A. We presented the copy of the lease and option to
12 buy.
13 Q. And the one that you presented, is it the same
14 one that is there marked as Exhibit Number 1?
15 A. Yes. Other than when Josh and I had received it
16 from Gary, we took off Exhibit A, and he was reading that
17 and I was reading the other part, then we exchanged and
18 read them back and forth.
19 When we took this document in, we had not
20 reattached Exhibit A. It was in our folder. But, what we
21 showed them was the Cash Rent for Farm Lease with Option to
22 Purchase.
23 Q. Okay. So, you presented to them the first, I'm
24 going to say --
25 A. Everything except Exhibit A.

1 Q. So, the first seven pages?
2 A. Let me check. Correct.
3 Q. Okay. And did you have one copy for each of them
4 or just one copy?
5 A. Just one copy.
6 Q. Okay.
7 A. Larry Sr. read it first.
8 Q. Okay. Did he actually read it, or did he look at
9 it?
10 A. That, I can't answer.
11 Q. Okay. You were present when he was reading
12 yesterday for Mr. Libey, and several times he took his
13 glasses off. Do you recall that?
14 A. Correct.
15 Q. Did you see him do that at all at the meeting on
16 September 14th?
17 A. Not that I was aware of.
18 Q. Okay. Did you actually see him -- Did he say,
19 "Well, wait a minute, this says, 'Cash Rent with Option to
20 Purchase.'" Did he read that to you and say, "We didn't
21 agree to an option to purchase"?
22 A. No. He just was quietly going through it.
23 Q. And where did he quietly go through this in the
24 house?
25 A. In the living room.

1 Q. In the living room. Okay. Was his wife sitting
2 next to him?
3 A. Correct.
4 Q. And did it appear as though she was going through
5 the paperwork as well?
6 A. No. Because when Larry got done looking it over,
7 reading it, whatever he did, then it was given to
8 Charlotte, and she read through it.
9 Q. How much time did Larry take to look at it?
10 A. I wasn't timing. I don't know exactly, but . . .
11 Q. What do you think? I mean, did he take two
12 seconds or 20 minutes or somewhere in between?
13 A. I would say closer to 30-plus minutes.
14 Q. Okay. So, during that 30-plus minutes, what did
15 you and Josh and Charlotte talk about?
16 A. Well, at that time, I took out the Assessor's
17 report, and I was showing those to Charlotte. And she
18 said -- She took them, and I just presumed that she was
19 making copies of them. I have no idea what she was doing.
20 But, anyway, she took them into their, I would assume,
21 office.
22 Q. Okay. And how long was she in the office?
23 A. 15 minutes, perhaps.
24 Q. During the period of time that she was gone, did
25 Larry ask you any questions about the lease?

1 A. I don't think so. He was studying it. We really
2 didn't get into the questioning and answering period until
3 after both of them had reviewed the contract.
4 Q. Okay. And during the period of time that he was
5 studying it, did you talk to him about any particular
6 provisions?
7 A. No.
8 Q. So, you just sat there?
9 A. Correct.
10 Q. Did Josh talk to him about any of the provisions?
11 A. No.
12 Q. So, he just sat there?
13 A. (Witness nodded head affirmatively.)
14 Q. Did Larry mention anything about his ability to
15 read or not read?
16 A. No.
17 Q. I just want to double check. You didn't see him
18 take his glasses off or do anything that would suggest that
19 he couldn't read?
20 A. I wasn't aware that he had a problem.
21 Q. Okay. Then, did you go through the document that
22 was presented to them as a Cash Rent Farm Lease with Option
23 to Purchase?
24 A. Correct. When both of them had studied it, then
25 we sat down and said, we asked them if this was

1 appropriate, and then went to Page 2 and started to fill in
2 the blanks.
3 Q. Okay. Was there any discussion about the number,
4 going back to Page 1, was there any discussion about the
5 total number of acres?
6 A. No.
7 Q. Was there any discussion about the irrigated
8 farmland?
9 A. No.
10 Q. Was there any discussion about the tillable
11 farmland?
12 A. No.
13 Q. Was there any discussion about the parcel
14 numbers?
15 A. No.
16 Q. Was there any discussion about the irrigated
17 equipment?
18 A. Well, not as we were going through the contract.
19 But Larry said, "We'll try to have it up in tip-top shape
20 when you take it over."
21 Q. Was there any discussion about the water rights
22 on September 14th?
23 A. Yes, there was. I don't think that they were
24 really aware of just what the water rights were.
25 Q. Okay. What makes you believe that they were not

1 really aware?
2 A. We asked about the different acres, and they
3 talked about, at one time, irrigating 220 acres, and that
4 they had cut it back because they didn't want to hire help.
5 So, that was a concern to me, whether the, you
6 know, you either use it or lose it. And that was a big
7 concern to me, that they were presently irrigating, to my
8 knowledge, 120 acres.
9 Q. Okay.
10 A. So, that was a concern, and we talked a little
11 about that.
12 Q. Okay.
13 A. And then, of course, the discussion turned to the
14 length of the lease. Larry wanted it one year. Well, we
15 weren't going to enter into a one-year contract, because we
16 would buy additional equipment, and that, to our liking,
17 was not a long enough contract for us to make those
18 adjustments.
19 Q. Okay. And was there a discussion then
20 about -- Did you propose a different length of contract?
21 A. Yes. Five years.
22 Q. Was there a discussion about a number of years
23 between one and five, such as three?
24 A. May have been three tossed out, but Josh and I
25 were pretty well stuck on five, and they agreed to it.

1 Q. Okay. And so, who wrote the five in here?
2 A. Charlotte.
3 Q. And did you advise her to write that in here, or
4 did she just pick up the pen and --
5 A. She had the pen and she had the contract. She
6 wrote it in.
7 Q. Okay. Was there a discussion about this
8 effective date? That's paragraph 2.
9 A. Effective date or the commencement?
10 Q. It says "Effective Date." It's Paragraph 2b on
11 Page 2?
12 A. Rephrase that question.
13 Q. Sure. You're looking at Exhibit 1 there.
14 A. Correct.
15 Q. And you turned to the second page, and if you
16 take a look at the top, under Paragraph 2, it says "Terms"
17 underlined.
18 A. Yes.
19 Q. And then, if you drop down to small Paragraph b,
20 there is another underline, under the two words "Effective
21 Date."
22 A. Yep.
23 Q. Okay. And it says there, "This lease shall
24 become effective upon approval of an operating line of
25 credit by the Lessee."

1 A. Well, Josh and I wouldn't have gone down there if
2 we hadn't have researched that. And, to our opinion, we
3 had obtained operating capital to do this, and so we
4 proceeded with the lease.
5 Q. But my question was, was there a discussion about
6 that sentence between the Honns --
7 A. No.
8 Q. -- and the Garretts?
9 A. (Witness shook head negatively.)
10 Q. Did anybody ask any questions like, "Is there an
11 operating line in place?"
12 A. No.
13 Q. Was there an operating line in place?
14 A. Yes.
15 Q. When was the operating line put in place?
16 A. Well, there was an existing operating line in
17 place at that time.
18 Q. What was that existing operating line?
19 A. You mean, dollar value or what?
20 Q. Yes. Let's just start with, who is that existing
21 operating line with?
22 A. FSA.
23 Q. And on September 14th, what was the maximum
24 amount you could draw on that?
25 A. 170,000.

1 Q. Excuse me?
2 A. 170,000.
3 Q. And how much was then currently existing on that
4 line?
5 A. Not sure at that time.
6 Q. What is your best guess?
7 A. 50,000.
8 Q. Was it up for renewal?
9 A. Yes.
10 Q. What is your renewal date on that?
11 A. It ran -- it ran to the end of August.
12 Q. So, from August 1 through July 31 of each year.
13 A. It's from September 1st to October 30th.
14 Q. Okay. Why did you say, "it ran to the end of
15 August"?
16 A. Because that's the cut-off time.
17 Q. Cut-off for what?
18 A. That's when we can proceed with renewal, but
19 they, the settlement could run into November, after the
20 crops are sold and livestock are sold.
21 Q. Are you able to draw on your credit line after
22 August?
23 A. Yes.
24 Q. Okay. So, it doesn't cut off any availability of
25 credit?

1 A. No.
2 Q. Okay. You're still able to use it?
3 A. Correct.
4 Q. Okay.
5 A. It's just a date when we should reapply for the
6 next year.
7 Q. Okay. If you had a credit line in place, did you
8 tell the Honns that the credit line was in place?
9 A. No. They didn't ask anything about it.
10 Q. What was your purpose of putting it in the
11 contract?
12 A. We put it in the contract as a safety net that if
13 we couldn't procure a line of credit big enough to take
14 this, we would have -- we could opt out of it if we had to.
15 Q. Okay. So, did you feel that you didn't have a
16 big enough credit line to cover this?
17 A. At the time, we thought it was adequate.
18 Q. Okay. Were you concerned that your credit would
19 be extended to the point that you wouldn't be able to have
20 an effective date?
21 A. Rephrase that.
22 Q. Sure. Were you concerned that your credit line
23 would be tapped out and you would no longer have the
24 ability to make the payments under this lease?
25 A. No, not necessarily.

1 Q. Okay. Was this put in there for your protection
2 or for their protection?
3 A. Put in there for our protection.
4 Q. Okay. Did you tell them that you did have an
5 operating line of credit at that time and said, "Don't
6 worry about that sentence"?
7 A. No. It was never discussed.
8 Q. Would you agree with me that the lease doesn't
9 come into effect until that condition is complied with?
10 A. Rephrase your question.
11 Q. Okay. Let's read the sentence together.
12 A. "This Lease shall become effective upon approval
13 of an operating line of credit by the Lessee."
14 Q. Right. So, the lease doesn't become effective
15 until there's approval of the operating line, correct?
16 A. Correct.
17 Q. How would the Honns know it if you didn't tell
18 them?
19 A. They probably wouldn't.
20 Q. When did you plan --
21 A. That should have been a concern of theirs to ask
22 us that question.
23 Q. When were you planning to tell them that that
24 line of credit was in place?
25 A. When they asked.

1 Q. Okay. Paragraph 3 deals with rent, do you agree?
2 A. Pardon me?
3 Q. Paragraph 3 deals with rent?
4 A. Yes.
5 Q. Do you agree?
6 A. (No response.)
7 Q. And there's written in here the amount of
8 $24,000?
9 A. Correct.
10 Q. Tell us about how that amount got plugged in
11 there.
12 A. That was a figure that Charlotte thought that
13 they needed. Josh and I had done some cash flow research,
14 and we figured, we thought that was a figure that we could
15 live with.
16 Q. Okay. And so, she just threw it out there, and
17 did you say --
18 A. Charlotte threw it out.
19 Q. Okay. Charlotte threw it out there, and did you
20 respond or did Josh respond?
21 A. I responded.
22 Q. And how did you respond?
23 A. That would be agreeable with us.
24 Q. Okay.
25 A. $2,000 a month.

1 Q. Okay. Well, that was my next question. Did you
2 then say, "$2,000 a month," or "We'll pay you $24,000 a
3 year"?
4 A. Charlotte said, "We would like it in a monthly
5 payment."
6 Q. Okay. And so, that's how it got, the phrase got
7 written in there, "payable $2,000 a month commencing
8 November 1, 2010"?
9 A. Correct.
10 Q. Okay. And did you concur that she should write
11 that in?
12 A. Yes.
13 Q. And then, how is it that the next sentence was
14 added, "annual rent payment is open for review October 1 of
15 each year"?
16 A. Charlotte was concerned about inflation, cost of
17 living, and they wanted a safety net in there that they
18 could have an option to review the lease payment on October
19 1st.
20 Q. And you were agreeable with that?
21 A. Correct.
22 Q. So, let's look forward, how would that review
23 occur?
24 A. That was never really discussed, but I would say
25 it would be a negotiated item, based on, in my opinion,

1 based on rate of inflation for the year.
2 Q. Well, let's assume October 1 of 2011 is here.
3 A. Okay.
4 Q. And Charlotte calls you up and says, "Frank, our
5 expenses went up $5,000, so we need to set the rent at
6 $2,420 a month." And you say, "Gee, Charlotte, that's a
7 lot of money."
8 A. Mr. Moorer, that's a hypothetical question. If
9 that was the fact, I would call my attorney and we'd
10 probably be in arbitration.
11 Q. But how do you resolve that issue?
12 A. Through arbitration.
13 Q. Okay. But it's a review.
14 A. Right.
15 Q. What does it mean to review something?
16 A. We're reviewing it to set a price for the next
17 year's rent.
18 Q. Is there anything that requires you to change the
19 price?
20 A. Rephrase that.
21 Q. It says that you're going to review the price.
22 It doesn't say you're going to change the price.
23 A. Right.
24 Q. So, what happens if you can't reach agreement as
25 to the amount of the change?

1 A. That's why that arbitration clause is in there,
2 if we can't come to terms.
3 Q. But the term is that you will review it. The
4 term is not that you will change the price.
5 A. Okay.
6 Q. Would you agree with me?
7 A. I'm sure it was intended to mean --
8 Q. Well, that's what I'm asking you. Was the intent
9 that there would be a review, and if it was reasonable, it
10 would be changed?
11 A. Correct.
12 Q. Okay. Whether it was going to go up or whether
13 Frank called and said, "Gee, guys, electricity went to
14 $2,000 a month. We need a little relief under this lease."
15 It would go either way.
16 A. It could work both ways.
17 Q. Either way. And, then, I see that there are
18 initials by that sentence and there are some initials here,
19 "FDG," and I think that's a "D." Are those your initials?
20 A. Correct.
21 Q. And what does "D" stand for?
22 A. David.
23 Q. Okay. Now, we've got this Paragraph Number 4,
24 "Option to Purchase."
25 A. Correct.

1 Q. Tell us about the conversation as it relates to
2 that option.
3 A. We got to that part of it. I asked Larry that --
4 previously he had mentioned $400,000 twice -- "Is that the
5 figure that you would be satisfied with the purchase of the
6 ranch?"
7 Q. And how did he respond?
8 A. "Yes."
9 Q. Just a simple "yes"?
10 A. I don't remember for sure just how, but it
11 implied yes.
12 Charlotte's response was, "Should I put it in
13 there?"
14 Q. And who responded to that question?
15 A. Larry Sr.
16 Q. Larry Sr. responded?
17 A. Larry Honn.
18 "Put it in," he said. And that's when she wrote
19 it in.
20 Q. So, when Larry Honn says that you told her to
21 write it in, he's wrong?
22 A. Rephrase that.
23 Q. Sure. When Larry Honn says in his deposition
24 yesterday that you told her to write that in, that's wrong?
25 A. That's wrong.

1 Q. When Charlotte says you told her to write that
2 in, that's wrong?
3 A. If, indeed, that's what Charlotte said.
4 Q. Okay. Yesterday, when they testified here, they
5 said that "We talked about a term of at least $400,000."
6 They kept using the words "at least" before $400,000.
7 Where does that come from?
8 A. I have no idea.
9 Q. That's just made up, is that what you're telling
10 me?
11 A. Correct.
12 Q. Okay. Can you take a look at that sentence that
13 says, the first sentence there, it says, "During the term
14 of this lease," under Paragraph 4?
15 A. Gotcha.
16 Q. "Option to Purchase: During term of this lease,
17 the Lessor grants to the Lessee an option to purchase for
18 the sum of $400,000."
19 Did you read that to say that you were getting an
20 option to purchase for $400,000? You would give them
21 $400,000, and you'd get an option to purchase?
22 A. Correct. And that it would be exercised at any
23 time during the lease.
24 Q. Okay. Was there any discussion about that it
25 could be exercised anytime during the lease?

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company, Petitioner, vs. LARRY HONN FAMILY LLC, a Washington Limited Liability Company, Respondent.	No. 10-2-00293-4

DEPOSITION OF JOSH GARRETT

Taken at the instance of the Respondent

December 13, 2010

4:10 p.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 4

1 sale or not, and what the amount of that property would be.
2 And he did state $400,000.
3 Q. On that date?
4 A. On that date.
5 Q. So, on August 24th, he said $400,000?
6 A. Yes, he did.
7 Q. He said, "I'll take less than $200 an acre."
8 A. He never said that. He said he would take
9 $400,000.
10 Q. Do you think he had any idea what that number
11 meant?
12 A. I have no idea. You'll have to ask him.
13 Q. Did you have any idea what that number meant?
14 A. I did have an idea of what that number meant.
15 Q. What did it mean to you on August 24th?
16 A. It meant he wanted $400,000 for that property.
17 Q. Did you have any idea how many acres that was
18 there?
19 A. Not at that time, sir.
20 Q. So, you didn't know if that was one acre or 2,000
21 acres?
22 A. Well, we knew it was roughly around 2,000 acres,
23 but we did not know the exact figure.
24 Q. Okay. Both the Honns indicated that their
25 statement was, "at least $400,000."

1 A. That was not brought up at that time.
2 Q. So, you disagree with them --
3 A. Yes, I do.
4 Q. -- as to the term "at least"?
5 A. Yes, I do.
6 Q. Did you gulp when he said $400,000?
7 A. Gulp, sir?
8 Q. Yeah.
9 A. What do you mean by "gulp"?
10 Q. Well, you're familiar with the price of farm
11 ground?
12 A. Sure.
13 Q. You're familiar with the price of pasture ground?
14 A. Yes, sir.
15 Q. Okay. $400,000 on 2,000 acres is 200 bucks an
16 acre, correct?
17 A. That is correct.
18 Q. Okay. And either you have to be a fool or
19 something else to offer --
20 A. Well, given the fact that we'd gone out with
21 Larry Jr. and had spent time out in their pasture those two
22 times as he took us around, we knew the extent of what it
23 was going to take to bring the property up to a reasonable
24 amount of money.
25 The weed control issue was a big one. The

1 pasture itself had been grazed down considerably. There
2 had been a lot of reseeding that needed to be done, along
3 with the spraying.
4 Also, the alfalfa fields were never sprayed, and
5 so there was a real loss of production on that. So, there
6 was some major upkeep that needed to be done on this farm
7 to bring it up to a profitable state.
8 Q. Okay. And so, you thought $400,000 --
9 A. Was a reasonable amount at that time.
10 Q. Really? You sit here today and tell me that?
11 A. Sure.
12 Q. What is the average price of real estate in that
13 part of the country?
14 A. Depends on what you're asking for real estate.
15 Are you asking "irrigation"?
16 Q. Just pasture?
17 A. Pasture. I think we went to the Assessor's
18 office, and they said it was roughly around $150 an acre.
19 Q. To buy pasture ground?
20 A. To buy pasture ground.
21 Q. And you're familiar with sales of pasture ground
22 in the last year for $150 an acre?
23 A. I have no idea. I did not look it up.
24 Q. You didn't look it up?
25 A. No.

1 lease, or did your father?
2 A. My father did.
3 Q. Okay. And between August 24th and September
4 14th, you didn't have any conversations with the Honns?
5 A. I do believe Larry came out to the shop one
6 evening with his step-daughter, only briefly, just said hi
7 and left, so . . .
8 Q. But Larry Honn, Jr. is not a participant in this?
9 A. No, no, but that's the only person I had contact
10 with.
11 Q. Okay.
12 A. Yeah, I believe so.
13 Q. Okay. September 14th, tell us about that day.
14 A. Well, we, my father contacted Larry Sr. about
15 setting up a meeting, and we set it up for September 14th.
16 We showed up, I believe around 1:00, because we
17 were there for about three, three-and-a-half hours. We
18 showed up, we had the documents with us, and we presented
19 them to Charlotte and Larry.
20 Q. Okay. When you showed up and you presented, you
21 said documents, did you present both a lease and the option
22 -- and the contract for purchase?
23 A. Are you referring to Exhibit A?
24 Q. Yeah. The Contract of Sale.
25 A. No. It was not attached to the lease agreement.

1 And we had it in the folder, and we just never showed it to
2 them.
3 Q. So, they never saw an Exhibit A?
4 A. No. But they never asked for one either. And
5 had they, we would have presented it right away to them.
6 Q. Okay. So, let's go back through the lease now in
7 its presented form. Okay.
8 Between August 24th and September 14th, how did
9 you determine there was 2,008 acres?
10 A. We went off the parcel numbers and determined it
11 off of the parcel numbers.
12 Q. Okay. And do you believe that all 13 parcel
13 numbers are applicable to the ranch?
14 A. As far as?
15 Q. Well, okay. You were present during Mr. and
16 Mrs. Honn's testimony. They indicated that there are 12
17 parcel numbers applicable to the ranch --
18 A. And there's 13 on this.
19 Q. -- and there's 13 on this.
20 A. Well, there's one parcel on here that Larry had
21 discussed with my father on the 15th about getting deleted
22 off of this lease agreement, which we were going to comply
23 with. And that happens to be the six acres that was in
24 Section 29, I believe.
25 Q. Okay. But there's still 13 on here.

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendants.	NO. 10-2-00293-4 REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISQUALIFY AND MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITRATOR PURSUANT TO RCW 7.04a.110

Defendant Larry Honn Family LLC, by and through its attorney of record J. Gregory Lockwood, hereby files the following reply to Plaintiff's Response To Motion For Reconsideration And Objection To Appointment Of Timothy Esser As A Third Arbitrator Pursuant To RCW 7.04a.110 as follows:

The defendants have previously stated their objections to Mr. Esser which were not addressed by the Garrett's counsel. As a former partner he has had close working relationship and friendship with the law firm representing the plaintiff which could have the effect of inadvertently influencing his decision. The defendants have

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OCT 24 2014
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WHITMAN COUNTY CLERK

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the right to a fair hearing with an impartial neutral 3rd arbitrator that has no relationship with plaintiff's counsel.

The plaintiff's counsel continues to nominate a 3rd arbitrator. As stated earlier arbitrators unilaterally nominated are subject to suspicion and bias. As proposed an arbitrator appointed from the arbitration list maintained by Spokane County Superior Court would provide an arbitrator free of theses suspicions and biases. There has been no reasonable objection raised by the plaintiff to the appointment from the Spokane Arbitration panel except that this is a Whitman County case. The law is the same in Spokane County as it is in Whitman County. Additionally, in cases where a Whitman County judge has been affidavited or recused, judges from other counties have presided over Whitman County cases. This is no different.

As to the issue of Mr. Libey being a witness. He is a material witness and authorization to take his deposition has been requested. See Exhibit "A".

The Garrett(s) have failed to identify any legitimate reason why Mr. Libey's law firm should not be disqualified under Washington's Rules of Professional Conduct and case law.

Dated this 23rd day of October, 2014.

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.

J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

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CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on October 23, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619	_____ U.S. MAIL _____X____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY

DATED October 23, 2014

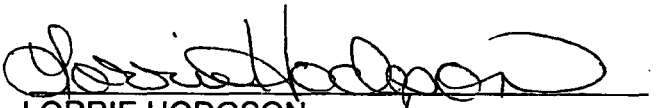

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EXHIBIT A

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October 7, 2014

Frank Gebhardt
421 West Riverside Ave. Suite 1400
Spokane, WA 99201

Read Smith
916 W. Willapa Avenue
Spokane, WA 99224

RE: Garrett Ranches, LLC v. Larry Honn Family, LLC
Case No. 10-2-00293-4

Dear Mr. Gebhardt and Mr. Smith:

As you know, I represent the Honn Family Trust, LLC in matters relating to the above mentioned case. We are requesting authorization to take the deposition of the Garrett's 30(b)(6) designee on issues related to the option and we want to take the deposition of Gary J. Libey of Libey & Ensley, PLLC as he drafted the option together with a request for production of the file related to the option..

Additionally, we would like to subpoena the client file at Libey & Ensley, PLLC that relates to the drafting of the option, including all notes and letters.

If you have any questions, please contact my office.

Sincerely,

J. Gregory Lockwood
Attorney at Law

JGL/lkh

cc: Will Ferguson

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 DEFENDANT'S MEMORANDUM REGARDING DEPOSITION REQUESTS FOR THE PLAINTIFF'S CR30(B)(6) DESIGNEE AND MR. GARY LIBEY.

The defendant has requested authority to take the deposition of GARRETT RANCHES, LLC's CR 30(b)(6) designee regarding issues related to the option that was contained in the parties farm leas and the discovery deposition of Mr. Gary Libey of the law firm LIBEY & ENSLEY, PLLC., as preparer of the option at issues and regarding his relationship with Mr. Timothy Esser.

The defendant is requesting discovery pursuant to RCW 7.04A.170(2) which reads:

> (2) On request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness, including a witness who cannot be subpoenaed for or is unable to attend a hearing, to be taken under conditions determined by the arbitrator for use as evidence in order to make the proceeding fair, expeditious, and cost-effective.

FILED
NOV 14 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

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A. CR 30(b)(6) DESIGNEE AND FACT WITNESS

It is requested that the plaintiff's CR 30 (b)(6) designee of GARRETT RANCHES, LLC, be made available for deposition to give testimony regarding knowledge of the Limited Liability Company (LLC) and the LLC's subjective beliefs and opinions and interpretation of documents and events related to the option contained in the parties farm lease and the discovery deposition of said designated individual.

In Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 40, 111 P.3d 1192, (2005) the court held that:

"A person can be both a fact witness and a CR 30(b)(6) witness."

As such the deposition requested will serve both purposes.

The deposition of the plaintiff's CR 30 (b)(6) designee is necessary, as the disputed issues that are presented for arbitration are specifically related to the knowledge and facts concerning documents which will be submitted at time of arbitration.

B. DEPOSITION OF MR. GARY LIBEY

The deposition of Mr. Gary Libey is necessary for several reasons. First he is the individual who drafted the option at issue in this arbitration. He is the only individual who knows what information was relied upon in drafting the option. Likewise his file regarding the option is necessary as it will provide evidence of any documents the drafter of the option may have relied upon.

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Secondly, the defendants feel it is necessary to inquire as to the relationship of Mr. Libey and the neutral arbitrator in this matter Mr. Esser. It is known that the individuals have had a long relationship which included partners is several law practices in both Colfax and Pullman Washington.

Based upon the above the depositions of plaintiff's CR 30 (b)(6) designee and Mr. Gary Libey are necessary,

Dated this 11th day of November, 2014

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.

J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on November 11, 2014 I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Frank Gebhardt Attorney at Law 421 West Riverside Ave. Suite 1400 *Spokane*, WA 99201	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Read Smith 916 West Willapa Avenue Spokane WA 99224	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____

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Timothy Esser Attorney at Law 520 East Main Street Pullman, WA 99163	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____

Dated this 11th day of November, 2014.

LORRIE HODGSON

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Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND DENYING DEFENDANT'S MOTION TO DISQUALIFY THE FIRM OF LIBEY & ENSLEY, PLLC**

THIS MATTER came before the Court on the Motions and Declarations of Defendant for Reconsideration and Disqualification of the Firm of Libey & Ensley, PLLC,

BASED on the evidence and arguments presented,

THE COURT FINDS:

1. There does not appear to be a conflict of interest between Mr. Timothy Esser and the Parties or their attorneys;
2. It is highly unlikely that Gary J. Libey will be a witness in the proceedings; and
3. The facts sought by Defendant from Mr. Libey are available from other sources and are not in dispute.

FILED
NOV 14 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

NOW THEREFORE,

IT IS HEREBY ORDERED:

1. Defendant's Motion for Reconsideration on the appointment of Timothy Esser as arbitrator is DENIED. However, if Mr. Esser recuses himself, the third and final arbitrator in these proceedings will be appointed in the following order of priority: 1. Rusty McGuire, 2. Steve Bishop, and 3. Howard Neill.
2. Defendant's Motion to disqualify the law firm of Libey and Ensley, PLLC, is DENIED.
3. Attorney fees for the prevailing party, Plaintiff, are RESERVED for determination by the Arbitration Panel.

DATED this 14th day of November, 2014.

JUDGE DAVID FRAZIER

Presented By:

LIBEY & ENSLEY, PLLC

By_____
Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff
LIBEY & ENSLEY, PLLC

Approved for Entry, Notice of Presentment waived:

By:_____
Gregory Lockwood
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, A Washington Limited Liability Company,	)	No. 10-2-00293-4
Petitioner,	)	MOTION FOR ORDER CONFIRMING ARBITRATION AWARD FROM 3RD ARBITRATION
v.	)	
LARRY HONN FAMILY LLC, A Washington Limited Liability Company,	)	
Respondent.	)	

COMES NOW, GARRETT RANCHES LLC, and moves this Court for an Order confirming the Arbitration Award dated January 23, 2015, which was filed in this Court on January 27, 2015. This motion is based upon RCW 7.04A.220.

DATED this 28th day of January, 2015.

LIBEY & ENSLEY, PLLC

By _____
WILL FERGUSON

MOTION FOR ORDER CONFIRMING ARBITRATION AWARD

FILED
JAN 29 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

LIBEY & ENSLEY, PLLC
ATTORNEYS AT LAW
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COLFAX, WASHINGTON 99111-0619
(509) 397-4345 FAX (509) 397-3594

249

Of Attorneys for Petitioner
WSBA No. 40978

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on January 28, 2015, I caused a copy of this document, the Arbitration Decision referenced herein, and the Proposed Order Confirming Arbitration Award, to be mailed to the office of J. Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201.

By _____
Will Ferguson

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SUPERIOR COURT OF WASHINGTON FOR WHITMAN COUNTY

In Re Arbitration of:	)	
	)	
GARRETT RANCHES, LLC, a Washington limited liability company,	)	No. 10-2-00293-4
	)	ARBITRATION DECISION
Plaintiff,	)	
v.	)	
	)	
LARRY HONN FAMILY, LLC, a Washington limited liability company,	)	
	)	
Defendant.	)	

Oral argument on the parties' cross-motions for summary judgment was heard before arbitrators Timothy Esser, Frank Gebhardt and Read Smith on December 22, 2014. Garrett Ranches, LLC was represented by attorney Will Ferguson and Larry Honn Family LLC was represented by attorney J. Gregory Lockwood. Thereafter, counsel for the parties were asked to provide information in support of their respective requests for attorney fees. Both attorneys provided their hourly rate and number of hours worked on the case. Based on the evidence presented and considering the argument of counsel, the following arbitration decision is rendered.

CONSIDERATION

The Honns moved for summary judgment on the theory that there was no independent consideration for the option and that because they withdrew the option before the Garretts exercised their option right, the option is terminated. The Garretts respond that

the option is part of an integrated contract that includes the lease, that there are mutual promises, rights and obligations in the agreement which provide consideration for the option; that the rule cited by Honns is inapplicable. I agree with the Garretts' position.

The material facts are:

1. The parties executed a single document, a lease with an option to buy.
2. The agreement was to run for five years and granted to the Garretts the right at any time during those five years to exercise their option to purchase the property for the price set forth in their agreement.
3. The lease option agreement is an integrated document; there is no ambiguity about its terms. There is no "separate" consideration for the option; if there is consideration for the option it is as argued by Garretts – the mutual promises, obligations and rights set forth in the entire agreement, including the lease provisions.
4. The Honns gave written notice that they withdrew the option on February 9, 2012.
5. The Garretts gave written notice that they were exercising the option on May 4, 2014, within the five year period authorized in the lease/option agreement.

Honns rely on the rule set forth in Baker v. Shaw, 68 Wash. 99 (Wash. 1912).

The material facts are stated at page 99:

> That on October 30, 1909, the defendant J. N. Shaw gave to the plaintiff a written option to purchase the capital stock of said Commercial Importing Company, Incorporated; that there was no consideration whatever for said option. . . .

The court's holding and rationale is set forth at page 103:

> It is conceded that no consideration passed from appellant to respondents when it was executed. An option may be granted with or without consideration.
>
> **If a valuable consideration passes from the person to whom the option is given, the party giving it cannot withdraw his offer within the agreed period of time over**

> **which the option is to extend.** On the other hand if the option be given without consideration, it may be withdrawn at any time prior to its acceptance and a tender of performance, but not thereafter, as such acceptance will convert it into a bilateral or mutual contract, binding upon both parties. 3 Page on Contracts § 1616. [emphasis supplied]

> The oral evidence and supplemental agreement unquestionably show that the option was accepted by appellant prior to any withdrawal by respondents; that from and after November 27, 1909, a valid contract existed between the parties, and that on November 29, 1909, appellant deposited $5,000 as agreed.

The Garretts take no issue with Baker; their position is that because consideration was given, the emphasized language from the opinion controls our case.

Honns also rely upon Harting v. Barton, 101 Wn.App. 954, 6 P.3d 91 (2002), quoting extensively from the case and then writing this at page 13 of their memorandum:

> In Harting the lessee was to pay taxes under the option but failed to do so. In the case at bar, the taxes have been paid by the defendant as stated in Paragraph 6 of the Farm Lease. This point cannot be argued.

Honns' observation is accurate, but provides no support for their position. An accurate reading of Harting shows it to actually support the Garretts' position. In Harting, the same as here, the parties entered into a lease of farm ground with the lessee receiving an option to purchase the farm ground for no separate consideration.

The lessor decided that the lessee did not have the financial wherewithal to farm the property and sued to rescind the lease and purchase option. The lessee counterclaimed for specific performance of the lease option. Harting page 958. The suit was brought before the lessee purported to exercise the option. Harting page 958. If the Baker rule applied the court could have simply cited it because the option was withdrawn before it was exercised. Instead, the appellate decision in favor of the owner was based on the court's determination

not that there was a lack of consideration, but rather that Mr. Barton, the lessee and holder of the option failed to fulfill his promised consideration to farm the leased property in a proper manner and to pay the taxes.

The Garretts cite Valley Garage, Inc. v. Nyseth, 4 Wash.App. 316, 481 P.2d 17 (1971). In Valley Garage an owner of property agreed to lease it and in the written lease agreement gave an option to purchase to a third party. There was no separate consideration for the option. Thereafter, the recipient of the option exercised his right; the owner of the property failed to perform. The owner of the property at page 318 argued that, "There was no consideration for the option." The court stated at page 320, "The grant of the option by the Nyseths to Cortours and the lessees was part of the basis of the bargain for entering into the contract." The court ruled that the option was enforceable and granted specific performance, ordering the owner of the property to convey the property to the holder of the option.

While the Valley Garage holding and analysis support the Garretts' position, the result is also consistent with the rule in Baker, i.e., the holder of the option exercised the option **before** the owner of the property withdrew it. (In fact, the owner of the property never withdrew the option in Valley Garage.)

Honns entire argument is premised upon a case that clearly is inapplicable - a stand-alone option with no consideration. We were taught in law school that for a contract to be valid there must consideration. We were taught that consideration can consist of a promise for a promise. Here we have multiple promises relating to the lease and to the option which combined equal one, integrated contract. Contrary to Honns' argument, Garretts did give

consideration for the option, and they exercised the option consistent with the terms of the parties' agreement.

I agree with the analysis offered by the Garretts. The rule in Baker cited and relied upon by Honns is limited to the facts of Baker – a naked, stand-alone option, with no consideration, which option is not part of an integrated document that includes mutual promises which constitute consideration.

If contract provisions are unambiguous a court's interpretation of the contract is a question of law which may be decided on summary judgment. Truck Center Corp. v. General Motors Corp., 67 Wn.App. 539, 837 P.2d 631 (1992).

While summary judgment is normally granted in favor of the moving party, courts have long held that summary judgment may be granted in favor of the nonmoving party if it becomes clear that he or she is entitled thereto. Rubenser v. Felice, 58 Wn.2d 862 at 866, 365 P.2d 320 (1961); Impecoven v. Dept. of Revenue, 120 Wn.2d 357 at 365, 841 P.2d 752 (1992), Washington Practice Volume 14A, p. 100.

Garretts are entitled to summary judgment. Honns are to convey the property to Garretts for the purchase price set forth in their agreement and subject to the terms set forth in the second arbitration decision.

RES JUDICATA

The Garretts move for summary judgment arguing that the issue of whether the option is valid could have been and should have been litigated in each of the two prior arbitrations and therefore, Honns are barred by the Doctrine of Res Judicata from attempting to litigate this issue in this third arbitration proceeding. I agree with the Garretts' position.

Claim preclusion, or res judicata, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wash.2d 759, 763, 887 P.2d 898 (1995). The claim preclusion doctrine has four requirements:

> (1) the parties in the two successive proceedings are the same; (2) the prior proceeding ended in a final judgment; (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding; and (4) application of the doctrine must not work an injustice.

Chavez v. Dep't of Labor & Indus., 129 Wash.App. 236, 239-40, 119 P.3d 392, 394 (2005).

The decision in Arbitration 1 was confirmed January 28, 2011. The decision in Arbitration 2 was confirmed February 10, 2012. Division III of the Court of Appeals upheld both confirmations on October 13, 2013.

In the first arbitration the Honns took the position that the Lease Option Agreement should be declared invalid. The arbitrators ruled against the Honns:

> 1. The Cash Rent Farm Lease Agreement is valid and shall be enforced, subject to the following modifications: . . . .
>
> 2. Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid, subject to the following: . . . . [Arbitration Award, pp 1 and 2]

Following the first arbitration award, the parties could not agree on the terms of the contract of sale. The Honns took the position that the lease option agreement had been forfeited due to Garretts' alleged breach and therefore there was nothing to arbitrate. The Superior Court and eventually the arbitrators rejected Honns' position finding that the Garretts had not breached, allowing arbitration, and setting forth the terms of the sale contract the parties were unable to agree upon.

At oral argument in this third arbitration, Honns' counsel agreed, reluctantly, that had his position prevailed at the second arbitration there would have been no enforceable option.

In Karlberg v. Otten, 167 Wash.App. 522, 280 P.3d 1123 (2012), the court noted at page 532:

> Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.
>
> "The general doctrine is that the plea of Res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Sanwick v. Puget Sound Title Ins. Co., 70 Wash. 2d 438, 441-42 P.2d 624, 627 (1967) (emphasis added).

Neither in their briefing nor at oral argument have the Honns provided a reason why they could not have raised the consideration argument they raise herein at either the first or second arbitrations. Given that they have consistently sought release from their lease/option agreement, their argument that the matter was not "ripe" at the time of the first two arbitrations is not supported by the facts. Application of res judicata will result in no injustice. The Honns could have and should have raised their consideration argument at the earlier arbitrations. Because they did not their claim is not only unsupported by the law as set forth in the first part of this decision, their claim is barred by principles of res judicata.

Summary judgment is granted to Garrett Ranches LLC, dismissing Larry Honn Family LLC's challenge to the validity of the option. Therefore, the following award is entered in favor of Garrett Ranches LLC:

1. The Garretts may proceed with their purchase of the property for the cash price set forth in their Lease/Option Agreement and upon the terms set forth in the second arbitration award. Garretts are entitled to apply to the Superior Court for an order of sale.

2. As the prevailing party in this third arbitration proceeding, Garretts are entitled to an award of reasonable attorney fees. They advise that Mr. Ferguson's hourly rate is $200/hour which is a reasonable rate. They are granted total fees in the amount of $8,360 and costs in the amount of $293.56. $3,740 of those fees is for working on these summary judgment matters; the balance is for responding to motions brought by Honns in the Superior Court and herein, for example, unsuccessfully alleging Garretts' attorney had a conflict and should be ordered off the case, objecting to the undersigned as arbitrator, seeking to take the deposition of Garretts' attorney and have access to his file. The fees sought by Garretts in successfully responding to these motions are reasonable and therefore total fees and costs in the amount of 8,653.56 are awarded.

3. Larry Honn Family LLC is responsible for arbitrator Gebhardt's fees and costs. Garrett Ranches LLC is responsible for arbitrator Read Smith's fees and costs. My fees and costs are $5,550.00. Each party shall pay one half and payment is due no later than March 1, 2015, after which interest at 12% shall accrue on any unpaid balance.

Before Garretts tender the payment proceeds to Honns they shall check with the undersigned to determine whether Honns have paid to the undersigned their share of the fees and costs. In the event they have not, Garretts shall deduct from the sale proceeds the amount necessary to pay me for my fees and costs in the event Honns have failed to pay.

DATED: This 23rd day of Jan 2014.

By _____
Timothy Esser, Arbitrator

[X] I, Arbitrator Read Smith, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Read Smith 1/23/15

Read Smith Date

[ ] I, Arbitrator Read Smith, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Read Smith Date

[ ] Other.

Read Smith Date

[ ] I, Arbitrator Frank Gebhardt, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Frank Gebhardt Date

[✓] I, Arbitrator Frank Gebhardt, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

[X] Other.
Dissent attached

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

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

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	No. 10-2-00293-4 **DISSENTING ARBITRATION OPINION OF FRANK J. GEBHARDT**

I have reviewed the Arbitration Decision drafted by arbitrator Timothy Esser and joined in by arbitrator Read Smith. I dissent.

The majority decision states that: "The lease option agreement is an integrated document; there is no ambiguity about its terms." (Page 2, Line 9-10). An integrated writing is one adopted by the parties as the final and complete expression of the agreement. If a document is a complete integration, any terms and agreements that are not contained in it are disregarded. In light of the Arbitration Award dated January 19, 2012, it remains a mystery to me how this Lease Option Agreement could ever qualify as an integrated agreement. For the three (3) arbitrators in that second Arbitration Award went, in my experience, way beyond what a court would do in supplying terms missing from that Lease Option Agreement. That arbitration panel imposed requirements and added terms to that Agreement.

The Majority's Arbitration Decision, states that: "Honns are to convey the property to Garretts for the purchase price set forth in their agreement <u>and subject to the terms set forth in the</u>

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Second Arbitration Decision. (Page 5, Line 17-20). This orders the Honns to sell the property, not on terms necessarily specified in the Lease Option Agreement, but upon terms dictated by an arbitration panel. An integrated agreement would neither require, nor permit, such terms of sale.

The arbitrators have all read the same option cases regarding the necessity for consideration, including those cited in the Majority Decision. I would hold that there was no independent consideration given by Garrett Ranches, LLC ("Garrett") to the Larry Honn Family, LLC ("Honns"). Therefore, although a valid option was created in the Lease Option Agreement, having been given without consideration, the Honns' reserved the right to withdraw the Option prior to its exercise. And, in fact, the Honns did withdraw that Option in February, 2012, more than two (2) years prior to the Garrett's attempt to exercise the Option.

In addressing the *res judicata* issue, the chronology of the withdrawal and attempted exercise of the option must be noted:

February 9, 2012. Honns withdraw the Option.

May 5, 2014. Garrett sends notice of the exercise of the Option.

May 13, 2014. Honns' attorney responds that that the Option has been revoked.

So the actual issue of whether or not the Honn's withdrawal of their Option was legally permissible did not arise until May 5, 2014 when Garrett gave notice of the exercise of that Option.

In my opinion, *res judicata* should not apply in this case because I believe that such application will result, and now has resulted, in an injustice upon the Honns. The Second Arbitration Award is dated January 19, 2012. It was not until the next month that the Option was withdrawn. A finding by the second arbitration panel that the Option was valid was not a finding that there was consideration, since an Option can be valid without consideration. I do not believe that the consideration issue and right to withdraw the Option was ripe until after the second arbitration hearing, when the Option was in fact withdrawn and the Option was attempted to be exercised.

Included among the matters for which the Garretts' attorney, Mr. Ferguson, sought arbitration, in his July 3, 2014 letter is: "All matters related to Garrett Ranches, LLC's exercise of the Option". Clearly, one of the matters relating to the exercise of the Option is whether the Option existed in May, 2014 when its exercise was attempted, or whether the Option had been

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legally withdrawn in February, 2012. Whether the Option had been legally withdrawn in 2012 required a determination whether there was consideration given for the Option. In their decision, the Majority holds that ". . . Garretts did give consideration for the option . . . ." (page 4, line 26, page 5, line 1).

So the Majority, believing that "consideration" was an open issue, as it must since it decided that issue, concludes, without a passing glance of inconsistency, that the consideration issue should have been raised by the Honns at an earlier arbitration.

I would find in favor of the Honns and find that the Option was withdrawn prior to Garrett's notice of exercise of that Option.

By: Frank J. Gebhardt
FRANK J. GEBHARDT, WSBA #4854
Arbitrator

Date: 1-27-15

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SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 OBJECTION TO CONFIRMATION OF ARBITRATION AWARD AND MOTION TO VACATE ARBITRATION AWARD PURSUANT TO RCW 7.04A.230(1)(b)(i) AND WASHINGTON'S APPEARANCE OF FAIRNESS DOCTRINE AND SUPPORTING DECLARATION

The defendants Honn Family Trust, LLC., by and through its attorney of record J. Gregory Lockwood hereby moves the court for an order denying confirmation of arbitration ward pursuant to RCW 7.04A.230(1)(b)(i).

RCW 7.04A.230(1)(b)(i) provides: "the court shall vacate an award if: (b) There was [ ] (1) Evident partiality by an arbitrator appointed as a neutral." Established case law holds that under this statue, an arbitrator has a general duty to disclose a circumstance or relationship that bears on the question of impartiality where that relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality. Hanson v. Shim, 87 Wn. App. 538, 943 P.2d 322 at 547.

FILED
FEB 3 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

ORIGINAL

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In this case the trial court appointed the neutral arbitrator Mr. Timothy Esser following his recommendation by the plaintiff and the opposition of the defendant. The trial court knew of Mr. Esser's relationship with Garry Libby the attorney for the plaintiff. The defendants assert that the appointment of Mr. Timothy Esser and the refusal to reconsider the appointment at the October 24, 2014 hearing for reconsideration was a violation of Washington's appearance of fairness doctrine

In the recent Division 3 case of Tatham v. Rogers, 283 P.3d 583, 170 Wn.App. 76 (2012) the court held at page 81 as follows:

> Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wash.2d 792, 808, 975 P.2d 967 (1999).

The Division 2 also recently addressed Washington's appearance of fairness doctrine in State v. Witherspoon, 286 P.3d 996 (2012) in which they held at page 1004:

> Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. State v. Gamble, 168 Wash.2d 161, 187, 225 P.3d 973 (2010) (citing State v. Bilal, 77 Wash.App. 720, 722, 893 P.2d 674 (1995)). " ' The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' " State v. Post, 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting State v. Madry, 8 Wash.App. 61, 70, 504 P.2d 1156 (1972)). An individual must demonstrate evidence of a judge's actual or potential bias for an appearance of fairness claim to succeed. Gamble, 168 Wash.2d at 187-88, 225 P.3d 973; State v. Dominguez, 81 Wash.App. 325, 329, 914 P.2d 141 (1996). The Code of Judicial Conduct (CJC) and due process require judges to disqualify themselves in a proceeding in which their impartiality " might reasonably be questioned." State v. Chamberlin, 161 Wash.2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007)). The test for determining whether the judge's impartiality might reasonably be questioned is an objective one.

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State v. Leon, 133 Wash.App. 810, 812, 138 P.3d 159 (2006), review denied, 159 Wash.2d 1022, 157 P.3d 404 (2007).

The court knowingly appointed the plaintiff's recommended neutral arbitrator Mr. Esser, over the objections of the defendants. See attached copy of defendants response to plaintiffs request to appoint Mr. Esser marked as Exhibit "A".

At the time of the initial hearing the defendants were unaware of the relationship between Mr. Esser and Mr. Libby. However the court had full knowledge of the relationship, that Mr. Esser was the former partner of Mr. Libby. Attached as Exhibit "B" is the Libby Law Firm memorandum requesting Mr. Essers appointment as neutral arbitrator. The memorandum fails to mention that Mr. Esser was a former partner of the Libby Firm and fails to mention that Mr. Esser and Mr. Libby have a ongoing social relationship. It was not until researching Mr. Libby that the defendant found that Mr. Esser was Mr. Libby's former partner. That information was the basis for the motion for reconsideration filed by the defendant.

At October 24, 2014 hearing on defendant's motion for reconsideration the court stated the following in regard to the motion for reconsideration beginning at page 24 line 4 of the October 24, 2014 hearing transcript.

Page 24

4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such" -- But Mr. Esser
10 was sitting right where this gentleman here is sitting
11 as you were arguing the case.
12 I'm very familiar with Mr. Esser.

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17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there - - "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner and he had been, I'm sure I'm -- I think
24 Mr. Ferguson was in the firm at the time. I didn't
25 know how long ago that was; I'm hearing now it was

Page26

1 five years ago.

See copy of October 24, 2014 hearing transcript. Marked as Exhibit "C".

The court clearly knew of the relationship between Mr. Esser and Mr. Libby and failed to disclose that to the defendants, at the time of Mr. Esser's initial appointment by the court. It was not until the hearing on the defendant's motion for reconsideration did the court make any disclose of its knowledge.

Further, the court knew that Mr. Esser had been sitting in the hearing room when the court appointed him as the neutral arbitrator. The court did not disclose his attendance to the defendants and allowed to hear the defendant's argument objecting to his appointment.

Additionally, the court indicated that Mr. Esser would not allow what the court considered frivolous and irrelevant procedural issues. It appeared to the defendants that any procedural issue raised by them was considered frivolous and irrelevant by this court. The court seemed to find it acceptable that Mr. Esser would not listen to procedural issues.

The court stated at Page 24-25 of the court transcript:

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24 because I don't feel that when parties agree to settle
25 their disputes through a procedure that involves, or
25
1 is designed to involve, economy and saving time, to
2 have a patient trier of fact that's going to listen to
3 all kinds of frivolous and irrelevant procedural
4 issues, I don't feel benefits the parties to the
5 litigation.

The court compared the appointment of Mr. Esser as the neutral arbitrator to a judge from a law firm hearing his old partners' cases. The court indicated that that was acceptable after a couple of years. That has no "appearance of Fairness".

The court transcript of the October 24, 2014 hearing states at Page 26

13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.

Page 27

1 And we don't have a case here where the
2 arbitrator went from the firm to -- or one of the
3 lawyers, to the position of arbitrator. There was a
4 "divorce," I think I heard the term. I don't know
5 what happened there. It doesn't matter.
6 So, I am not going to -- I don't think
7 there's any legal basis at this point for -- I'm not
8 going to disqualify or reconsider my designation of
9 Mr. Esser.

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As the court indicated it was very familiar with Mr. Esser and knew of the relationship with Mr. Libby. The court knew of the objection raised by the defendants but refused to appoint anyone else other than Mr. Esser even though the court named three attorneys who the court would and could appoint BUT ONLY if Mr. Esser voluntarily recused himself.

The court stated beginning at page 28 line 23 of the October 24, 2014 hearing:

23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

29

1 again experienced, a lot of farm experience. He
2 practices in Whitman County, has offices in Whitman
3 County on a part-time basis, and he has a main office
4 in Davenport. He's got, like, seven offices, his
5 firm. And he has ago expertise and lease expertise,
6 farm lease, and he grew up on a farm.
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop because he's not out and about and he's
12 not a litigator, with a lot of farm experience, even
13 raises apples himself.
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time. Same
17 reason: a lot of experience and Whitman County farm
18 experience and lease experience.

The court had the option to appoint any one of the three attorneys, Mr. Rust McGuire, Mr. Stephen Bishop or Mr. Howard Neil as the third neutral arbitrator. Any of these would have been acceptable to the defendant. The court choose to force

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arbitration on the defendants with the plaintiff having nominated Mr. Reed Smith as their chosen arbitrator and the plaintiff's nominated neutral arbitrator Mr. Esser.

This was fundamentally unfair and a violation of Washington's Appearance of Fairness Doctrine and evident partiality by the arbitrator appointed as a neutral.

On November 6, 2014 Mr. Esser sent a letter to the parties regarding his Disclosure of Arbitrator pursuant to RCW 704A.120. See copy of Disclosure of Arbitrator marked as Exhibit "D"

Mr. Esser indicated only that he was a former partner of Mr. Libby which was known at that time and the subject of the defendant's objection to his appointment at the hearing for reconsideration.

Mr. Esser intentionally failed to disclose when the partnership had ended. Still unknown as of this date. Mr. Esser intentionally failed to address any ongoing social relationship with Mr. Libby (plaintiff's counsel). These critical omissions are clear violations of RCW 704A.120.

On November 14, 2014 the defendant sent a letter to Mr. Esser regarding an affidavit from a Ms. Khani Taylor. In Ms Taylor's affidavit she disclosed the ongoing social relationship of Mr. Libby, Mr. Esser and Judge Fraizer having seen all three frequent local restaurants together. Theses social activities with both Mr. Libby and Judge Fraizer were not disclosed as required under RCW 704A.120. This information was brought to Mr. Esser's attention. The affidavit of Ms. Taylor created grave concerns about having a fair arbitration and confirmed the defendant's earlier concerns expressed to the court. The defendants requested Mr. Esser recuse himself in light of the disclosure so that one of the alternates could be appointed. See attached copy of letter to Mr. Esser attached as Exhibit "E".

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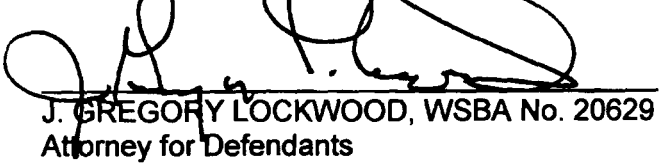
On November 17, 2014 Mr. Esser submitted an order denying the request for recusal. In his order he did not deny his social relationship with Mr. Libby and Judge Fraizer nor did he address the defendants concerns raised by Ms. Taylor's affidavit. Nor did Mr. Esser's Order indicate why the social relationship with Mr. Libby and Judge Fraizer was not in his Disclosure of Arbitrator as required by RCW 704A.120. See attached copy of Order denying request for recusal marked as Exhibit "F" Mr. Esser not addressing the affidavit of Ms. Taylor confirms that the defendants fears of bias and precludes any further inquiry.

The intentional omission by Mr. Esser regarding his relationship with Mr. Libby creates a reasonable inference of the presence of bias or the absence of impartiality.

Further, the omissions of Mr. Esser also violate Washington Appearance of fairness doctrine. It is respectfully requested that the court vacate the arbitration award and reschedule arbitration with one of the alternate neutral arbitrators previously selected on October 14, 2014.

Dated this 3rd day of February, 2015

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

DECLARATION

I, J. Gregory Lockwood, am the attorney of record for Larry Honn Family Trust, LLC., and make this declaration from my personal knowledge under penalty of perjury under the laws of the State of Washington.

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The following exhibits are attached to the Defendant's Objection To Confirmation Of Arbitration Award And Motion To Vacate Arbitration Award:

Exhibit "A"- defendant's response to plaintiffs request to appoint Mr. Esser;

Exhibit "B" - the Libby Law Firm memorandum requesting Mr. Essers' appointment as neutral arbitrator;

Exhibit "C"- copy of October 24, 2014 hearing transcript;

Exhibit "D"- disclosure of Arbitrator;

Exhibit "E"- copy of letter to Mr. Esser;

Exhibit "F" - copy of Order denying request for recusal

J. GREGORY LOCKWOOD

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CERTIFICATE OF SERVICE

I, J. Gregory Lockwood, do declare that on February 3, 2015 I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	_____ U.S. MAIL _____ FACSIMILE ____X____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED February 3, 2015.

J. Gregory Lockwood

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EXHIBIT "A"

OCT 2014

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 DECLARATION OF J. GREGORY LOCKWOOD IN SUPPORT OF MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITATOR PURSUANT TO RCW 7.04a.110

I J. Gregory Lockwood am the attorney of record for the above named defendant and make this declaration from my personal knowledge and under penalty of perjury under the laws of the State of Washington.

1. The court has indicated that in the event the parties named arbitrators are unable to choose a neutral 3rd arbitrator the court will appoint attorney Timothy Esser as the 3rd neutral arbitrator.

2. Timothy Esser was nominated by the plaintiff's counsel indicating that he would be a fair arbitrator.

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3. Upon returning to my office I inquired about Timothy Esser and found that Mr. Esser was a prior partner in the law firm of LIBEY, ENSLEY, ESSER & NELSON, PLLC.

4. The letterhead of the above referenced law firm clearly indicated that Timothy Esser was a partner in the firm along with Gary Libey. See attached copy of Letterhead dated March 6, 2008 marked as Exhibit "A".

5. Further, the Law firm which represents the plaintiff LIBEY & ENSLEY, PLLC, currently includes all members of the law firm LIBEY, ENSLEY, ESSER & NELSON, PLLC, except for Timothy Esser. See Law firm internet posting marked as Exhibit "B".

6. Additionally, prior to Timothy Esser forming the law firm of Esser & Sandberg he worked in Pullman as part of the firm of NUXOLL, LIBEY, ENSLEY & ESSER PLLC, See news article marked and attached as Exhibit "C".

7. Due to the close relationship with the plaintiff's counsel and law firm it is requested that he be withdrawn from the court's intended choice as 3rd neutral arbitrator in this case.

8. The appointment of Timothy Esser would be prejudicial to the defendants due to his close relationship with the plaintiff's law firm and raises issues if clear bias.

Dated this 9th day of October, 2014

J. GREGORY LOCKWOOD,

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CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	____X____ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.

LORRIE HODGSON

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EXHIBIT A

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Attorneys at Law
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Email: nleen@pullman.com
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BRUCE ENSLEY
TIMOTHY ESSER* / **
GARY J. LIBEY*
GUY C. NELSON*
ROGER I. SANDBERG

*ALSO ADMITTED IN IDAHO
**ALSO ADMITTED IN OREGON

Of Counsel: Wesley A. Nuccoli

COLFAX OFFICE
409 NORTH MAIN
P.O. Box 619
Colfax, Washington 99111-0619
Phone: (509) 397-4345
Fax: (509) 397-3594

March 6, 2008

HAND DELIVERED

To: University Appeals Board
Office of Student Conduct

Re: Alpha Kappa Lambda Fraternity

This letter serves as our appeal of the Conduct Board's findings against Alpha Kappa Lambda Fraternity in a notice dated February 21, 2008, copy attached. We have authorized our attorney, Timothy Esser, to hand deliver this.

In accordance with the instructions of your February 21st letter, we offer our appeal of the Conduct Board's initial order on the following the grounds:

1. a procedural error which materially affected the decision;
2. The decision was not supported by substantial evidence;
3. The severity or appropriateness of the sanctions.

1. **Procedural errors which materially affected the decision**

Errors in procedure materially affected the decision by failing to provide accused student a reasonable opportunity to prepare and to present a response to those allegations. WAC 504-406-27 (2)(a).

The notice provided by the Office of Student Conduct, in a letter dated February 5th (exhibit A) did not comply with the clear and unambiguous guidelines of WAC 504-26-403 (2). Specifically it omitted *'the approximate time and place of the alleged act that forms the factual basis for the charge of violation'; 'a list of witnesses who may be called to testify, to the extent known'* and *'a description of all documentary and real evidence to be used at the hearing, to the extent known...'*

WAC 504-26-403 (2) outlines the elements of this notice using "shall include" which WAC defines as being utilized in the imperative sense;

(2) The written notice shall be completed by the conduct officer and shall include:

(a) The specific complaint, including the university policy or regulation allegedly

violated;

(b) The approximate time and place of the alleged act that forms the factual basis for the charge of violation;

(c) The time, date, and place of the hearing;

(d) A list of the witnesses who may be called to testify, to the extent known;

(e) A description of all documentary and real evidence to be used at the hearing, to the extent known, including a statement that the student shall have the right to inspect his or her student conduct file.

(3) Time for hearings.

By denying the accused the specific information related to the act that formed the factual basis for the accusation, denying the accused the list of witnesses that would be called and denying the accused access to the evidence that would be used against the accused, this error prevented AKL from having a reasonable opportunity to prepare and to present a response to those allegations. [WAC 504-406-27 (a)]

Further, the Conduct Board considered evidence not presented by witnesses at the hearing, as well as ex parte communication by Chris Wuthrich, who was not identified as a witness, Nick Hupka, who was not identified as a witness, Enrique Silva, who was not identified as a witness and Brandon Mueller, who was not identified as a witness.

2. **The decision was not supported by substantial evidence;**

Whether there were facts in the case that, if believed by the fact finder, were sufficient to establish that a violation of the standards of conduct for students occurred. WAC 504-26-407 (2) (b).

The Conduct Board's finding of facts does not provide sufficient evidence to sustain the charge of possession, use or distribution of illegal drugs on chapter property or in the course of a chapter function. The record of the conduct hearing does not include facts that support this charge. No evidence was presented that would subject the determination that the fraternity controls and is responsible for activity at "The Joint." The "joint" is simply an off campus residence rented by students, not the fraternity.

That the fraternity took action to expel members based on their individual conduct, off chapter property and not during a chapter function, is not sufficient to find the fraternity responsible for the charge. In fact it suggests to the contrary, that alleged actions were committed by individuals and responded to appropriately by the fraternity.

Further, allegations of an arrest for the actions of individuals at an off campus private residence not owned or controlled by the fraternity does not support a claim that drugs were used, possessed or distributed on fraternity property.

Finally, the allegations that non-members, photographed wearing t- shirts produced by the fraternity, were arrested months later on drug charges does not support the charge that drugs were used, sold or distributed on the property. The T-shirts had no Fraternity insignia on them and were distributed to members and non-members during a move-in week at WSU.

3. **The severity or appropriateness of the sanctions.**

Loss of recognition for five years is too severe and inappropriate given the charges and findings of fact.

The University's policies and procedures do not support the immediate removal of freshman in the event that a fraternity fails to provide a university approved live in advisor. The fraternity presently has in place a professional staff member in that capacity. **The Fraternity Organization Agreement identifies that failure to provide a sufficient live-in advisor will result in the loss of freshmen housing privileges the following semester, not the current semester.**

Further, the act of loss of recognition for allegations against individual members and non-members of the fraternity, which allegedly occurred off fraternity property and not at fraternity functions, is not supported by precedent or policy.

Further, such act is not in the best interest of promoting healthy and ideal living environments on campus, and prevents the University from conducting important oversight and educational programming to the living group. With the loss of recognition, the fraternity can continue to operate without freshman living in the property, yet the University Office of Greek Life cannot conduct such important and vital functions as monitoring the chapter's grades, social activities, recruitment activities and University required participation in educational programming.

A fair and appropriate punishment would keep the fraternity within the supervision of the University, while holding the chapter to strict standards for compliance with all University regulations, and require the chapter to demonstrate clear and convincing steps taken in conjunction with the University, the National Fraternity and the fraternity alumni board to ensure the chapter meets the standards expected of all WSU students, fraternities and living groups.

Alpha Kappa Lambda Fraternity
700 NE California, Pullman, WA

By _____
Mike Wood, Chapter
President

Attachment

EXHIBIT B

LIBEY & ENSLEY, PLLC

Attorneys at Law

Serving Eastern Washington and Northern Idaho

| Home | Attorneys | Practice Areas |

Colfax Office:
North 409 Main Street
Colfax, WA 99111

Phone: (509) 397-4345
Fax: (509) 397-3594

Welcome
to Libey & Ensley, PLLC.

Our law firm was established in 1890, and continues to practice today in the greater Whitman County area.

We are proud of our reputation for providing a wide variety of specialized legal services.

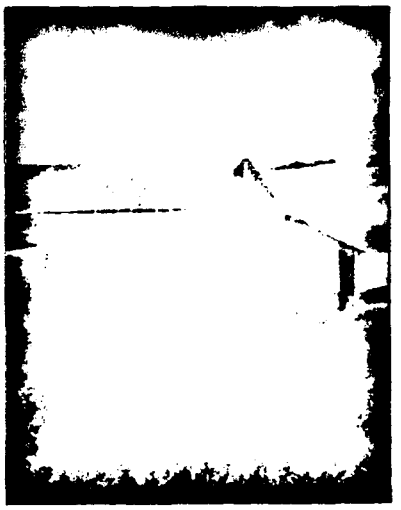

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EXHIBIT C

Five area attorneys have pooled their resources to expand a Colfax law firm and are adding a Pullman office as of June 1.

Wesley A. Nuxoll, Gary J. Libey, Bruce Ensley and Timothy Esser are forming Nuxoll, Libey, Ensley & Esser and have hired Leslie A.M. Cloaninger as an associate with the new firm. It will specialize in business, banking, estate planning, probate, real estate, land use, taxation, civil and criminal litigation and municipal law, Libey said.

Nuxoll and Libey have had a joint Colfax practice for about 15 years. Ensley has been with Hickman, Webster & Ensley since 1976. Tim Esser is a former Whitman County deputy prosecutor, had his own firm, and most recently has been with Irwin, Myklebust, Savage, Brown & Esser.

As well as adding a Pullman office on Kamiaken Street, the new firm will establish offices in Endicott, Lacrosse and Rosalia.

Nuxoll, an Idaho native, graduated from Gonzaga University School of Law in 1954 and has practiced in Whitman County since 1956. He was adjunct professor at Gonzaga from 1973 to 1975 and his practice emphasizes estate planning, probate, real estate, civil litigation and banking.

Libey, who was born in Spokane, graduated from Gonzaga in 1976 and has practiced in Whitman County since 1976. He was a part-time Whitman County District Court judge from 1979 to 1982.

As well as being a Whitman County Superior Court Commissioner, he is city attorney for Colfax, Uniontown, Rosalia, Malden, Endicott, and Lacrosse. His specialties include estate planning, probate, real estate and civil litigation.

Ensley, a Colfax native, earned his law degree at Willamette University College of Law in 1976. He joined the Colfax firm of Hickman and Webster in 1976 and became a partner in 1978. In addition to working for private clients, Ensley is general counsel for the Port of Whitman County and specializes in business and tax planning, probate and trust administration, and estate and financial planning.

Esser, who was born in Spokane, earned his law degree from Gonzaga where he spent a year on the law review. He has practiced law in Whitman County since 1977 and specializes in civil and criminal litigation, real estate and land use.

Cloaninger is also a Spokane native who attended Washington State University and earned her law degree from Gonzaga. Her current practices covers domestic relations, criminal law and bankruptcy.

SHELL THANKS PHOTO

UNITED IN LAW: (from left) Timothy Esser, Gary Libey, Leslie Cloaninger, Wesley A. Nuxoll and Bruce Ensley have formed a new law firm, Nuxoll Libey Ensley & Esser.

EXHIBIT "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company,	)	No. 10-2-00293-4
Plaintiff,	)	MEMORANDUM OF PLAINTIFF
v.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Defendant.	)	

COMES NOW, the Petitioner, GARRETT RANCHES, LLC, by and through its attorney of record, LIBEY & ENSLEY, PLLC, by Will Ferguson, and submits the following MEMORANDUM OF PLAINTIFF IN SUPPORT OF PLAINTIFF'S MTION FOR APPOINTMENT OF 3RD AND FINAL ARBITRATOR

ISSUES

1. Should this Court appoint Mr. Dwayne Blankenship as the 3rd and final arbitrator in this matter?

ARGUMENT

The appointed arbitrators in this matter have reached a deadlock in appointment of the 3rd and final arbitrator. This Court should appoint Dwayne Blankenship.

RCW 7.04A.110(1) provides:

> **If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails.** If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, **the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.** The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.

(emphasis added). The method for selecting the 3rd arbitrator is contained in Paragraph 15 of the Lease:

> In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all the powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County, Washington.

Honn Family has resisted the appointment of Mr. Blankenship for two reasons: 1. It claims that the issue it is raising is a purely legal one that can only be decided by an attorney and 2. Mr. Blankenship, because he has ruled

against Honn Family in the two prior arbitrations, is biased against Honn Family.

The issue raised by Honn Family is one that has already been decided. Raising the issue is frivolous. Honn Family admits that the Arbitration Panel in 2010 held that the Option was valid and that it was supported by adequate consideration. However, in the next breath, Honn Family claims that the Option is not valid because it wasn't supported by adequate consideration and could thereby be withdrawn at any time. The circular-nature of Honn Family's argument shows that Honn Family wants to re-litigate the issue of consideration, much like it wanted to re-litigate the 2010 arbitration by seeking appellate review of the 2010 Arbitration Award, even though the matter went up on appeal in 2012, far outside the appeal window. Attached hereto as **Exhibit No. 1** are the emails between counsel for Garrett Ranches, Will Ferguson, and counsel for Honn Family, Gregory Lockwood.

Mr. Lockwood states in his email of September 23, 2014: "I understand the option has been held to be valid. Our position is that the Honns had a right to withdraw the option as it was not supported by adequate consideration." However, the Arbitration Panel in 2010 already decided that the option *was* supported by adequate consideration.

Even if the Arbitration Panel entertains Honn Family's frivolous issue, the best way to resolve whether the Arbitration Panel already addressed that issue is for Mr. Blankenship to continue as 3rd arbitrator. Mr. Blankenship can factually confirm that the issue was already decided. Mr. Blankenship presumably read Mr. Libey's letter of

December 20, 2010 (attached hereto as **Exhibit No. 2**). At Page 7, Paragraph 2; Pages 10-12, under the heading "Case Law" (discussing the Valley Garage, Inc. v. Nyseth case); and Page 14, Paragraph 8, Mr. Libey clearly raised and briefed the issue of adequate consideration. And Mr. Blankenship and was co-author of the 2010 Arbitration Award (attached hereto as **Exhibit No. 3**), which, at Paragraph 2, Page 2, held: "The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid…."

Factual issues predominate in this arbitration. The matters we are asking the Arbitration to Decide are: 1. Did Garrett Ranches exercise its option? 2. Did Honn Family refuse to comply with the Option? Both questions are factual and should result in the Arbitration Panel finding that Honn Family should sell the property to Garrett Ranches. Excluding the frivolous issue raised by Honn Family, the only two issues are factual. Deciding factual issues does not take a legal background or education. What is needed of an arbitrator in this case is common sense, patience, solid judgment, and fairness to all parties; all of which Mr. Blankenship has shown.

Honn Family's second objection, as stated above, is that Mr. Blankenship has ruled against them in the prior two arbitrations. However, a review of the record shows that Mr. Blankenship has ruled against Garrett Ranches on some issues as well. The idea that Mr. Blankenship is biased against Honn Family simply because he has made a ruling that did not favor Honn Family is absurd. That would be like saying that if any court rules against one party it is automatically

biased against that party. It ignores the reality that one party must prevail in this proceeding.

Appointing anyone other than Mr. Blankenship would unnecessarily delay and overburden this arbitration. Mr. Blankenship has been involved in this case as the 3rd arbitrator for almost 4 years now. He knows what has been argued, what has been decided, and, most importantly, has an intimate knowledge of the facts.

In the alternative, if this Court does not appoint Mr. Blankenship as the 3rd arbitrator and elects to appoint an attorney, it should appoint a 3rd arbitrator from Whitman County, such as Timothy Esser or Roger Sandberg. This case is an entirely Whitman County case; the property is situated in Whitman County and both parties reside and do business in Whitman County. The arbitration should be held here and if this Court appoints an attorney, the attorney should be a Whitman County attorney.

CONCLUSION

This Court should appoint Dwayne Blankenship as the 3rd and final arbitrator in this matter.

DATED this 24th day of September, 2014.

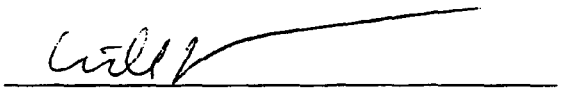
LIBEY & ENSLEY, PLLC

By _____
WILL FERGUSON
Of Attorneys for Plaintiff
WSBA No. 40978

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on September 24th, 2014, I caused a copy of this document to be mailed to:

J. Gregory Lockwood
Attorney at Law
421 W. Riverside, Ste. 960
Spokane, WA 99201-0504



Will Ferguson

EXHIBIT "C"

In The Matter Of:

Garrett Ranches v.

Larry Honn Family

Transcript of Proceedings

Vol. I

October 24, 2014

Snover Realtime Reporting

505 N. Argonne Rd., Ste A-201

Spokane Valley, WA 99212

Original File 102414 Hearing.txt

Min-U-Script® with Word Index

1 SUPERIOR COURT OF WASHINGTON

2 COUNTY OF WHITMAN

3

4 GARRETT RANCHES, LLC, a
Washington limited liability
5 company,

6 Plaintiff,

7 v. CASE NO. 10-2-00293-4

8 LARRY HONN FAMILY, LLC, a
Washington limited liability
9 company,

10 Defendant.

11

12

HEARING
13 October 24, 2014
Pages 1 to 31

14

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16

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17
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E-mail: www.snoverrealtime.com
23
LIC. NO. WA 2750 / ID 744
24

25

1 A P P E A R A N C E S

2

3 BEFORE JUDGE DAVID FRAZIER

4

FOR THE PLAINTIFF:

5

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6 By: Will M. Ferguson
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7 Colfax, WA 99111-2098
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9

FOR THE DEFENDANT:

10

LAW OFFICE OF J. GREGORY LOCKWOOD, PLLC
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12 Spokane, WA 99201
509.624.8200
13 jgregorylockwood@hotmail.com

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25

1 (8:34 a.m.)
2 THE COURT: I have Garrett Ranches against
3 Larry Honn Family, LLC. And plaintiffs are
4 represented by Will Ferguson, defendants by Gregory
5 Lockwood. And the defendants have a motion to
6 disqualify a law firm, motion to reconsider
7 appointment of an arbitrator.
8 So, Mr. Lockwood, you made a motion.
9 I'll --
10 MR. LOCKWOOD: Thank you, your Honor.
11 THE COURT: -- let you work it.
12 MR. LOCKWOOD: (Cleared throat.) Excuse
13 me.
14 Judge, basically there's two matters
15 this morning and they both stem around basically the
16 same issue, and that issue is, what we're trying to do
17 is just establish, you know, a fair and what we
18 consider an arbitration that doesn't have, you know,
19 the appearance of some improprieties of some kind.
20 And this is a -- I know we've been in and out of your
21 court on numerous occasions and I know the Court would
22 rather not have this here, and to be honest you with,
23 Judge, we'd rather not be here. We'd like to get this
24 matter resolved.
25 But this is a very serious matter for my

1 clients. We're talking about a farm that it's the
2 family farm and, in essence, they're fighting to save
3 that farm. And we're dealing with a 2000-acre farm
4 located here in Whitman County that's at issue. So,
5 this is a rather important case.
6 When we were in front of you the last
7 time, your Honor, we were here because there were some
8 problems with the arbitrators finding a neutral third
9 party as a neutral third arbitrator, and at that time,
10 we basically filed an objection to recommendations by
11 the parties. We're saying, you know, when the parties
12 make a recommendation for a neutral third party,
13 almost as a matter of course they're not neutral
14 because they're picking someone that's favorable to
15 your position.
16 At that time, the plaintiffs recommended
17 Mr. Timothy Esser. At that point, to be honest with
18 the Court -- You know, I don't practice in Whitman
19 County a lot; most of my practice is Spokane, Stevens
20 County, Pend Oreille, Ferry, those counties. So, I
21 wasn't familiar with Mr. Esser at that time, although
22 we did object to him initially, saying, "They
23 recommended him. We think there might be some bias
24 based on that recommendation."
25 The Court basically entered its order

1 saying that if the arbitrators don't find a neutral
2 third party, that the court was inclined to go ahead
3 and appoint Mr. Esser. Well, apparently the
4 arbitrators, you know, were still unable to come up
5 with a neutral third party; so, based on your previous
6 ruling, Mr. Esser was going to be the -- nominated as
7 this third neutral arbitrator.
8 Well, when I got back to the office, I
9 kind of looked up Mr. Esser to find out, you know, a
10 little bit about him. Mr. Esser, I come to find, was
11 a former law partner for Mr. Libey and they practiced
12 over here in Colfax for a number of years. Mr. Esser
13 moved down to Pullman. Likewise, Mr. Libey's law firm
14 and he, they continued to practice together down
15 there. Now, Mr. Esser eventually formed his own
16 partnership with another attorney and that other
17 attorney was also with the Libey law group for a
18 while.
19 So, we're dealing with Mr. Esser's
20 relationship with the Libey law firm which has gone on
21 for a number of years. And what's being argued is,
22 "Well, he wasn't a part of this law firm at the time
23 we were doing this negotiation." That may be.
24 However, because they have a longstanding relationship
25 and I think that there's at least an appearance that,

1 you know -- I don't know if Mr. Esser and Mr. Libey
2 continue to be good friends, you know, if they go
3 fishing, play cards, what, I don't know. All I know
4 is that they've had this existing relationship for a
5 number of years and that to nominate him as a neutral
6 third arbitrator, I think, is -- goes against, you
7 know, the -- you know, at least the appearance of
8 impropriety (sic). So, we're asking that the Court
9 reconsider its decision on Mr. Esser.
10 I know that they've nominated -- once
11 again, they've nominated another attorney down here.
12 And I think you notice, in all the pleadings that I
13 filed, I've never nominated a specific attorney. What
14 I've represented, that since there's not an
15 arbitration panel here in Whitman County, there is one
16 in Spokane, both arbitrators are in Spokane right now,
17 so that nominating a third arbitrator from -- or
18 asking the -- an arbitrator be appointed from the
19 arbitration panel who is just -- they rotate, so
20 whoever comes up would come up.
21 Another option instead of just
22 specifically naming someone is that, you know, we're
23 fortunate here in this area, we have a law school,
24 Gonzaga Law School. I'm sure that, you know, they --
25 if the arbitrators contact someone from the --

1 Gonzaga, in their contract department, they'd be more
2 than happy to have someone appointed as a neutral
3 third arbitrator.
4 We just want to have an arbitration that
5 at least on its face appears fair, because this is a
6 very serious matter. And, quite frankly, you know,
7 after me finding this out about Mr. Esser, if I hadn't
8 come in and at least filed this motion, I think I'd be
9 committing malpractice. So, we ask the Court
10 reconsider that appointment and that they -- that the
11 arbitrators be directed to seek a third arbitrator
12 from either the arbitration panel or the law school,
13 someone that we know would be impartial.
14 The second matter that I brought before
15 this court would be a motion for disqualification,
16 under the Rules of Professional Conduct 3.7, of the
17 Libey law firm, and the reason why, 3.7 basically
18 indicates that if you are an attorney for the party,
19 one of the parties, and you know you're going to be a
20 witness or have a fair belief that you're going to be
21 a witness, the Rules of Professional Conduct, they use
22 the word "shall," shall withdraw from the case.
23 Well, they do -- You look under the case
24 law and there's -- and Washington case law basically
25 says that you kind of look at some of the underlying

1 factors and make that determination. Well, in this
2 case, Mr. Libey was the attorney that drew the option
3 agreement up, and this option is what's at issue in
4 this case. More specifically, we're dealing with
5 issues of consideration supporting that option. So,
6 Mr. Libey's going to be required to come into court or
7 at least in the arbitration testify as to, you know,
8 him drafting that document and items that he used and
9 based that, that option, on, which are paramount to
10 the issues that are -- that are in this arbitration.
11 That being the case, he's going to be giving material
12 testimony inside the arbitration.
13 Under Rules of Professional Conduct 3.7,
14 based on that and the underlying case law that
15 supports it, Mr. Libey's law firm should be
16 disqualified. There has been no showing that, you
17 know, that there'd be a hardship worked on the
18 Garretts. I mean, there's other attorneys around that
19 could represent them on this matter as equal as the
20 Libey law firm.
21 So, based on case law and Washington's
22 professional conduct code, we're requesting that the
23 Court disqualify the Libey law firm in this particular
24 arbitration. And if the Court has any questions, I'd
25 be happy to answer those.

1 THE COURT: No questions.
2 Mr. Ferguson.
3 MR. FERGUSON: Judge, the first issue that
4 I want to address is this Motion for Reconsideration.
5 Not only must the moving party, when moving for
6 reconsideration, show that their motion falls within
7 one of the requirements of the Motion for
8 Reconsideration, but they also have to show the merits
9 of the Motion for Reconsideration. Now, the merits
10 here are this, as opposing counsel put it, an
11 appearance of impropriety. However, simply stating an
12 appearance of impropriety does not mean much of
13 anything. So, let's look at the facts.
14 The facts are that Mr. Esser has not been
15 with the Libey & Ensley firm since June 1st of 2009.
16 The lease and option underlying this action were not
17 even drafted until September of 2010. So, well over a
18 year after Mr. Esser left the firm, after he had no
19 further financial interest in this, in the law firm,
20 this litigation started with the drafting of the
21 lease -- excuse me -- and the option.
22 Those are the facts. There's really
23 nothing more that the Defense can point to that says
24 that Mr. Esser is somehow biased in favor of the
25 parties -- biased in favor of the parties -- and

1 that's the important thing. And clearly he's not
2 biased in favor of the parties because we know that at
3 least one member of his firm, probably Mr. Sandberg,
4 has represented one of the Honns on a criminal matter,
5 and probably on other matters. So, to say that
6 Mr. Esser is somehow automatically biased in favor of
7 Garrett Ranches is absolutely absurd. It isn't
8 supported by the facts.
9 And as this Court well knows, in the
10 practice of law, when law practices break up, it's a
11 lot like a divorce. I'm pretty sure that an
12 ex-husband and ex-wife don't invite each other over
13 for barbecues every night, at least in the usual
14 divorce, and such is probably the case with attorney
15 firms. I refer to the breakup that we had in 2009 as
16 "the divorce" because Mr. Esser and Mr. Sandberg went
17 off on their own; they've been on their own since June
18 1st, 2009; they don't have any connection with our
19 firm.
20 As to the alternate appointment, we have
21 suggested Mr. Savage. If this court finds that it
22 will reconsider it's decision and it wants to
23 appointment another third arbitrator, then we propose
24 Mr. Savage.
25 Now, Mr. Savage, we propose him but we

1 also still propose Mr. Blankenship. And here again,
2 when we get into the issue regarding disqualification
3 of the law firm, this is exactly why we need
4 Mr. Blankenship on this arbitration panel as a neutral
5 third arbitrator, and again all the arguments that go
6 along with having him appointed, for and against.
7 We suggested Mr. Savage. Mr. Savage has
8 never had any contact, at least any -- excuse me, any
9 conflict, that I can discern, with our firm, he's
10 never been a part of our firm, and we believe he would
11 do just as fine a job as Mr. Esser if this court
12 decides to reconsider.
13 Now, the suggestion of somebody from
14 Gonzaga Law School. Now, it's been the defendant's
15 position, since, I think, Mr. Lockwood started this
16 case, to try to drag this up to Spokane County, get a
17 Spokane County arbitrator, get a Spokane County this,
18 Spokane County -- There just seems to be simply no
19 need for that. We have a Whitman County case, Whitman
20 County land, Whitman County parties. This should stay
21 in Whitman County. The third arbitrator should be
22 from Whitman County.
23 Now, the Defense proposes somebody from
24 Gonzaga Law School. Now, I think the record would end
25 up showing that this may look good on its face, except

1 for the fact that I believe, if my memory serves me
2 correctly, Mr. Lockwood's former partner in law
3 teaches at Gonzaga law. So, that would be the
4 appearance of impropriety if that's all we were going
5 on was the appearance of impropriety. But again,
6 here, Judge, there's no appearance of impropriety.
7 There is no impropriety on a factual level.
8 Turning to the motion for
9 disqualification of the Libey & Ensley law firm,
10 the -- flat out the test in Washington is, number one,
11 there must be compelling circumstances to disqualify a
12 firm. That's the first burden. The second -- and
13 this is the -- this is the case cited by Defense, this
14 is the Klickitat County case -- when an attorney is to
15 be called, "A motion for disqualification must be
16 supported by a showing that the attorney will give
17 evidence material to the determination of the issues
18 being litigated, that the evidence is unobtainable
19 elsewhere, and that the testimony is or may be
20 prejudicial to the testifying attorney's client."
21 Well, first, has to be -- there has to
22 be a showing of material evidence. All we have from
23 the Defense is they say, "Well, Mr. Libey will testify
24 that he drafted the option agreement." Well,
25 that's -- we can get that from other sources, too.

1 That the Larry Honn Family LLC had no input or
2 contribution in any way to his drafting of the
3 option. Again, we already know that. Number three,
4 that at the time of drafting the option agreement, the
5 members of the Larry Honn Family Trust did not
6 indicate any dollar amount to be placed in the
7 option. And I'm guessing that that was -- that
8 Mr. Libey wasn't present at the negotiations.
9 All three of those facts are obtainable
10 from other sources. We know that because I submitted
11 the excerpts from the transcripts of the depositions
12 of Larry Honn Sr., Charlotte Honn, Frank Garrett, and
13 Joshua Garrett. Everyone agrees, well, Mr. Libey
14 wasn't there. He wasn't there in negotiations. Of
15 course he doesn't know any of those facts. Of course
16 he wouldn't be able to offer any material evidence.
17 Even if he could offer the material evidence, it is
18 obtainable elsewhere. And even if it weren't
19 obtainable elsewhere, it would be protected by
20 attorney-client privilege.
21 Now, I would have objected to
22 Mr. Lockwood's response that he served via facsimile
23 yesterday -- because I don't accept service via
24 facsimile, I want that noted for the record -- but I
25 do like the fact that he supplied his letter of

1 October 7th in which he states, in the second full
2 paragraph, "Additionally, we would like to subpoena
3 the client file at Libey & Ensley, PLLC, that relates
4 to the drafting of the option, including all notes and
5 letters." How much more protected by an attorney-
6 client privilege can we get?
7 Clearly, your Honor, I think that the --
8 that the reasons behind making this motion are
9 unseemly. There is no material evidence to be offered
10 by Mr. Libey. There's no material evidence, even if
11 he had any, that could be disclosed under the
12 attorney-client privilege. There are no exceptional
13 circumstances warranting disqualification. And
14 Mr. Libey would not be testifying about any of these
15 facts.
16 And this gets back to what I mentioned
17 about Mr. Blankenship. This is exactly why we need
18 Mr. Blankenship as a third arbitrator, because he
19 knows exactly what was arbitrated in the first
20 arbitration; that is, after these depositions were
21 taken. Because what we hear from Defense is they're
22 going to bring up issues relating to the -- to the
23 consideration underlying the option.
24 Page 14 of the deposition of Frank
25 Garrett answers those questions regarding

1 consideration supporting the option. That was already
2 litigated. That's why those questions were asked at
3 the depositions back in 2010. That's what some of the
4 arbitration was about in 2010. That's why we need
5 somebody who was there, who can say, "Oh, yeah, we
6 already arbitrated that issue. We've already decided
7 that there was good consideration underlying the
8 option." Exactly why.
9 Your Honor, the Motion for
10 Reconsideration should be denied. Mr. Esser does not
11 have any bias for any of the parties or any of the
12 attorneys, clearly not. Second, the motion to
13 disqualify the firm of Libey & Ensley should be denied
14 and we're asking for attorneys fees, either under
15 CR 11 or under the attorney fee provision in the lease
16 and option, which provides that if either party is
17 involved in litigation, the prevailing party can
18 obtain attorneys fees. I've included with my response
19 to the Motion to Disqualify my declaration, which
20 indicates the amount of time that I've spent on this
21 and what my hourly rate is.
22 So, for those reasons, your Honor, we ask
23 the motions be denied and that attorneys fees be
24 granted to Garrett Ranches.
25 MR. LOCKWOOD: I'm going to address -- go

1 from the latest comments to the ones earlier.
2 The request for attorney fees in a
3 situation where you're asking for disqualification
4 under the Rules of Professional Conduct, your Honor,
5 are just -- you know, it's hard to indicate how
6 misplaced that is. The RCWs are extremely clear --
7 or, excuse me, the Rules of Professional Conduct are
8 clear that if you're a witness and you know you're
9 going to be a witness, you should not be representing
10 that particular party. So, for them to come in and
11 ask for attorney fees because we base an objection on
12 the Washington Rules of Professional Conduct, I think
13 that that's more than misplaced. Now, what they've
14 argued is that -- You can't find this anywhere else.
15 So, the problem is, we're dealing with
16 the consideration that was drafted in an option. This
17 option agreement only had one open provision and that
18 was, how much is the property going to sell for.
19 Everything else was drafted by Mr. Libey. And all
20 these other terms and conditions and statements inside
21 of that option, only Mr. Libey can answer as to, "When
22 you drafted this, what did you rely on?" No one else
23 can do that because he's the one that drafted it. And
24 they knew that if this came up as an issue, that
25 Mr. Libey was going to have to address those issues.

1 The fact that Mr. Libey had put this in
2 writing in itself is the only one that can answer the
3 question. Mr. Garrett can't answer what Mr. Libey
4 relied on. One of the issues that we've dealt with --
5 Example. Way back when, I asked Mr. Garrett at that
6 second supplemental arbitration that was done, you
7 know, "Who drafted the document?" At that time,
8 Mr. Garrett said, "Oh, I don't know. I don't
9 remember." That was the response we got at that
10 point. Now that we're sitting here at this -- under a
11 whole new set of issues, we find out that, yes, in
12 fact, Mr. Garrett -- or Mr. Libey did draft the
13 document. So, we brought the motion.
14 Now they're saying that there's no basis
15 for materiality. Well, that's there since he's
16 drafted a document, and that's the issue before the
17 arbitrators.
18 We've -- And the last document that was
19 submitted to the court yesterday -- and the reason why
20 it came in yesterday, because that morning, we got
21 their response. So, we filed this immediately, that
22 we received it. And the reason why I filed that for
23 the Court, to indicate to the Court we've already
24 requested authorization from the arbitrators to take
25 Mr. Libey's deposition and we're going to be doing

1 that.
2 So, he's scheduled for a dep -- or he's
3 going to be scheduled for a deposition. He is going
4 to be giving testimony the arbitration. And based on
5 that and the fact that he's the only one that drafted
6 this material, I think he should be -- the firm should
7 be disqualified. And the issue of awarding attorney
8 feeds, quite frankly, Judge, is I think more than
9 misplaced.
10 Now, on the issue, the remaining issue
11 dealing with the -- with the appointment of Mr. Esser,
12 when they talk about the breakup of a firm, through
13 the years, I've been -- You know, I've been practicing
14 24 years. Through the years, you know, the firm's
15 members come and go, come and go, you know. Quite
16 frankly, everyone that's come and gone throughout the
17 firm that we had is -- we have good terms with, we
18 refer clients back and forth. And the fact that, you
19 know, they allege they consider it a divorce, well, it
20 may or may not. I'm just saying that that doesn't
21 necessarily always follow.
22 And there's no reason, there's absolutely
23 no reason, that another -- that a neutral party can't
24 be nominated or appointed by the Court. It's not that
25 Mr. Esser's the only attorney in Whitman County or

1 Spokane County.
2 Now, what Mr. Ferguson's indicated about
3 my former partner is a professor, that's true, and
4 there's times when I've over -- I've been over at the
5 law school and done things, but that doesn't mean
6 that -- I didn't nominate my old partner. I said, you
7 know, have them appoint someone that's not. I also
8 recommended the arbitration panel. The arbitration
9 panel, someone's appointed that we don't even have a
10 clue who comes up on that arbitration panel. It just
11 rotates and comes up.
12 As to Mr. Blankenship, Mr. Blankenship
13 has been rejected by the arbitrator that we appointed,
14 and for them to keep trying to raise him, to throw him
15 back in the mix, they didn't want an appoint- -- They
16 wanted the same -- their same crew from the first one,
17 since this matter began. And that would be totally
18 improper, to go back and say, "Well, we're going to
19 appoint Blankenship even though your arbitrator has
20 already disqualified him."
21 The Court, I think, had -- is on the
22 right track of appointing an attorney involved in
23 this, because we're dealing specifically with legal
24 issues, but, however, Mr. Esser or anyone else that
25 has any relationship -- I want -- I don't want anyone

1 related to my firm or my prior firms, and I don't --
2 we don't want anyone as a neutral party related to
3 Mr. Libey's firm. We just want a neutral party. Once
4 we get that, we'll have that matter resolved and we
5 can get this -- go forward and get this thing
6 arbitrated and resolved. But we just want to have a,
7 you know, fair field on this thing, your Honor.
8 Thank you.
9 THE COURT: All right. Well, here's what
10 I'm going to do as far as the issue of the motion to
11 reconsider the appointment of Mr. Esser. Now, you
12 have a case here that has gone on for a long time, and
13 my frustrations, and I think I've expressed those
14 frustrations, you have a lease, you have an agreement
15 between two limited liability farm corporations. We
16 know the lease has an option to purchase; it also has
17 an arbitration clause. People normally enter into
18 arbitration agreements as a means of settling their
19 disputes for two reasons: Expediency, to save time,
20 to have -- not have to go through the delays that
21 they're involved in, setting cases for trial and going
22 into court; and economy, to save expenses.
23 So, my frustration here is these parties
24 have agreed to arbitration to save time and money and
25 there's been a lot of court time spent on procedural

1 matters that I don't see have a great deal of
2 significance in the case, and obviously been a lot of
3 time and expense involved on procedural issues. And
4 secondly, this is a case that has been subject to a
5 previous arbitration with an arbitration panel. And I
6 know from litigation that stemmed, the court decision
7 that stemmed from that, issues were litigated and
8 decided by the arbitrators that relate to the lease
9 and that relate to the option to purchase. And here
10 we are again.
11 It's gone through arbitration, it's come
12 to court, it's been confirmed, it's been appealed,
13 it's back here again, and the Honns lost. Now here we
14 are with another request for arbitration. It relates
15 to whether there was consideration, as I understand
16 it, the issue for the arbitration agreement.
17 I now have a couple motions concerning
18 the selection of a third arbitrator And now, after all
19 of this time, a motion to disqualify what I'll call
20 the Libey -- that's Libey (ly-bee), not Libey (lib-
21 ee) -- law firm here. On that issue, number one, on
22 both issues, parties have agreed to arbitration. And
23 I think from everything that I've read here, it is
24 highly, extremely unlikely, from a realistic,
25 practical standpoint and from a legal standpoint, that

1 Mr. Libey will be a witness in the arbitration. I'm
2 having trouble wrapping my head around that.
3 The facts that have been identified by
4 the Honns here that he'll testify to, as I see it,
5 have been obtained and are obtainable through other
6 witnesses, other sources, and that's a factor to
7 consider. Doesn't even appear that they're in dispute
8 and/or many of these are privileged and wouldn't be
9 admissible anyway. So, I am not going to grant the
10 motion to disqualify, at this time, the Libey law
11 firm. And if I were, that would probably make quick
12 work of the second issue, which concerns Mr. Esser
13 here.
14 But additionally, you know, I think it's
15 highly likely -- I have to determine the likelihood of
16 Mr. Libey being a witness in the case and the rule, I
17 think it's highly likely that, when the matter goes
18 before the panel of arbitrators and they're presented
19 with the law, I think it's highly likely that, from a
20 legal standpoint, this case in arbitration isn't going
21 to go very far because I think -- and it's not my
22 decision to make except as it pertains to the
23 likelihood of there being any witnesses -- that case
24 is going to get thrown out of arbitration if the law
25 is applied, because there was a arbitration already on

1 the very subject that's being disputed here, the lease
2 and an offer to or an option to purchase.
3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then -- should
5 have -- I think the issue's res judicata here. And
6 I'm only deciding that -- It's not my decision to
7 make. That's up to the arbitrators. These parties
8 have agreed to arbitration. But I don't think you're
9 going to have any witnesses. That's my legal analysis
10 based on everything that I have seen here. So, no,
11 I'm not going disqualify the Libey firm here.
12 Now, we do an arbitration, you agreed to
13 arbitration, so if the arbitrators see you later on,
14 "Oh, Libey may be a witness or is going to be a
15 witness and this -- the facts that he could testify to
16 aren't obtainable elsewhere," then the issue then can
17 be renewed before the arbitrators. Again, they've
18 agreed to arbitration and this isn't the issue. What
19 evidence is presented at arbitration, that's up to the
20 arbitrators, not to this court.
21 As far as the court's designation of
22 Mr. Esser, when that issue was brought before me,
23 really wasn't certain whether the two arbitrators that
24 had been selected by the parties had been unable to
25 reach an agreement. I think the two attorneys had a

1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.
4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such" -- But Mr. Esser
10 was sitting right where this gentleman here is sitting
11 as you were arguing the case.
12 I'm very familiar with Mr. Esser. He's
13 had a lot of cases before this court, and I think he's
14 been a lawyer -- he was a year ahead of me. No, he
15 was in my class in law school. Didn't even know him
16 in law school, but he was in my class, so he's been a
17 lawyer almost 40 years and I'm aware of that. And I'm
18 aware of the issues in this case, procedural hassling
19 that has taken place. And I think Mr. Ferguson
20 indicated he should be appointed because he has
21 patience, something to that effect.
22 No, he doesn't. He doesn't have any
23 patience. That's what caught my attention. And
24 because I don't feel that when parties agree to settle
25 their disputes through a procedure that involves, or

1 is designed to involve, economy and saving time, to
2 have a patient trier of fact that's going to listen to
3 all kinds of frivolous and irrelevant procedural
4 issues, I don't feel benefits the parties to the
5 litigation.
6 And I'm, again, familiar with Mr. Esser.
7 He's got broad experience, but particularly in
8 contract law, in civil litigation, in agricultural
9 law, in farm leases litigation, and I know him to be
10 very knowledgeable and a person that has the unique
11 skill of focusing on the real issues, identifying the
12 real issues, cutting through the irrelevant and the
13 frivolous, and he has an amazing ability to do in one
14 hour what would take me and a lot of lawyers and
15 whatnot, he can do in an hour what some of us it takes
16 eight hours. And he's extremely independent.
17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner and he had been, I'm sure I'm -- I think
24 Mr. Ferguson was in the firm at the time. I didn't
25 know how long ago that was; I'm hearing now it was

1 five years ago. And the evidence here is that he
2 wasn't in that firm at the time the lease that's in
3 dispute here was drafted.
4 And since whenever the dissolution of the
5 partnership or whatever it was, the separation,
6 occurred, maybe one reason I didn't immediately
7 remember that Libey and Esser were partners is that I
8 don't know how many cases they've come in here and had
9 pretty good knock-down, drag-out fights and it hasn't
10 affected their ability to advocate against one another
11 very zealously for the positions of their parties
12 here.
13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.

1 And we don't have a case here where the
2 arbitrator went from the firm to -- or one of the
3 lawyers, to the position of arbitrator. There was a
4 "divorce," I think I heard the term. I don't know
5 what happened there. It doesn't matter.
6 So, I am not going to -- I don't think
7 there's any legal basis at this point for -- I'm not
8 going to disqualify or reconsider my designation of
9 Mr. Esser.
10 Now, he does have some duties and one is
11 to be fair and impartial. Just because the two
12 attorneys here, the two sides, picked an arbitrator,
13 they've got a duty to be independent. You've
14 selected, essentially, a judge. And the person that
15 each side selects, I'm sure you think that there's
16 some advantage that you may have as a result of that.
17 But their role is to be neutral, fair, impartial, and
18 independent, and they have a legal duty to do that,
19 all three them, even the ones that each of you have
20 selected here, and they have other duties.
21 So, again, I don't think there's any
22 legal basis to disqualify Mr. Esser. I'm not going to
23 do that. I think he is particularly suited to be an
24 arbitrator in this particular case. But, by the same
25 token, I'm going to not bar or prohibit Mr. Lockwood

1 or the Honns here from challenging him in the
2 arbitration process or inquiring as to whether he
3 feels he should -- he has any question as to his
4 impartiality.
5 And he may elect to recuse for, among
6 other reasons that I've heard here, I'm hearing he may
7 have -- his present firm, someone from his present
8 firm, he or Mr. Sandberg, may have not represented the
9 Garrett side but represented the Honns. So, he may
10 say, "Hey, I can't because I know something special
11 about the Honns or something that might affect my
12 ability to be fair."
13 So, I'm not disqualifying him, but it
14 might be an issue to raise to him in the process of
15 arbitration. And because of the possibility he may
16 recuse, and I think that might be a real possibility
17 here for the reasons I've stated, was an association
18 in there, with both sides, I think, to expedite
19 things, rather than have you make motions, spend more
20 money, come back before the court with more argument
21 on, "Well, Esser can't do it, appoint somebody else,"
22 I'm going to appoint some alternates.
23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

1 again experienced, a lot of farm experience. He
2 practices in Whitman County, has offices in Whitman
3 County on a part-time basis, and he has a main office
4 in Davenport. He's got, like, seven offices, his
5 firm. And he has ag. expertise and lease expertise,
6 farm lease, and he grew up on a farm.
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop because he's not out and about and he's
12 not a litigator, with a lot of farm experience, even
13 raises apples himself.
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time. Same
17 reason: a lot of experience and Whitman County farm
18 experience and lease experience.
19 So, I'm trying to keep you gentlemen out
20 of court, get you to arbitration, so keeping Esser
21 with three alternates. And not that I don't like
22 seeing the two of you or tired of this case, but I
23 feel sorry for your clients. They need to get to the
24 merits and not spend a lot of money on all of these
25 procedural issues.

1 MR. FERGUSON: Judge, do you have a
2 decision on attorneys fees?
3 THE COURT: And attorney fees, there's --
4 I'm going to deny the requests under CR 11. And the
5 prevailing party, I think, under the lease, in any
6 dispute gets attorneys fees. I'm going to leave that
7 up to the arbitrators as to who ultimately prevails,
8 not who prevails on each individual skirmish.
9 MR. LOCKWOOD: Thank you, your Honor.
10 (The hearing concluded at 9:17 a.m.)
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1 REPORTER'S CERTIFICATE

2

3 I, Michael S. Kuplack, a Certified court Reporter
4 and a Notary Public in and for the State of
5 Washington, do hereby certify:
6 That the proceedings were recorded by the court
7 and thereafter, a CD was provided to me and
8 transcribed to the best of my ability; that I am in no
9 way related to any party to the matter, nor to any
10 counsel, nor do I have any financial interest in the
11 event of the cause.
12 WITNESS MY HAND THIS 9th day of December, 2014.
13
14 _____
Michael S. Kuplack
15 CCR No. 2750
Notary Public in and for the
16 State of Washington, Spokane County.
Commission expires August 27, 2016.
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EXHIBIT "D"

TIMOTHY ESSER*
ROGER J. SANDBERG

*ALSO ADMITTED IN IDAHO

ESSER & SANDBERG, PLLC
Attorneys at Law
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
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PEGGY LYND.
Office Administrator / Paralegal

November 6, 2014

Will Ferguson
Attorney at Law
P.O. Box 619
Colfax, WA 99111

John Lockwood
Attorney at Law
522 W. Riverside Ave., Ste, 420
Spokane, WA 99201

Re: Garrett v. Honn Arbitration – Disclosure by Arbitrator

Gentlemen:

RCW 7.04A.120 provides:

> (1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
>
> (a) A financial or personal interest in the outcome of the arbitration proceeding; and
>
> (b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, witnesses, or the other arbitrators.

I know of no facts which would affect my impartiality. I have never had contact in any manner with either the Garretts or Mr. & Mrs. Larry Honn. As you know, I was partners for many years with Mr. Libey. And during that time, approximately eight years ago, I represented Larry Honn, Jr. on a personal matter, it had nothing to do with his family's business interests.

Sincerely,

Timothy Esser
Esser & Sandberg

cc: Frank Gebhardt
Read Smith

EXHIBIT "E"

Law office of
J. Gregory Lockwood, P.L.L.C.
421 W. Riverside Avenue, Suite 960
Spokane, Washington 99201
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

November 14, 2014

Timothy Esser
520 E Main St
Pullman, WA 99163

RE: Garrett v. Honn

Dear Mr. Esser:

It has come to my attention by way of an affidavit that you and Mr. Libey may still have an ongoing friendship which could influence your decisions in the pending arbitration. I have attached a copy f the affidavit for your review.

My clients are entitled to a fair, unbiased neutral arbitrator in this matter with at least the appearance of fairness. The open and public association with Mr. Libey at this juncture casts reasonable suspicion even if inadvertent.

As the court appointed neutral arbitrator, following my client's objection and under the circumstances which now present themselves, my clients request that you recue yourself from this arbitration.

The court has made accommodation for this event by appointing alternate arbitrators.

Very truly yours,

J. Gregory Lockwood
Attorney at Law

cc:
Read Smith
Frank Gebhardt
Will Ferguson

I, KHANI TAYLOR,

ON OR ABOUT 29 OCT 2014 I WAS DRIVING SOUTH ON MAIN ST IN COLFAX AT APPX. 11:00 am. WHILE I WAS STOPPED FOR TWO PEOPLE IN THE CROSS WALK BY STEVE'S GLASS I OBSERVED MR. LIBEY AND MR. ESSER WALKING DOWN THE STREET TOGETHER. I HAVE SPENT MOST OF MY 40 YRS LIVING IN COLFAX SO IT WAS NOT A SHOCK TO ME TO SEE THE TWO MEN TOGETHER, WHAT WAS A SHOCK WAS THE FACT THAT I HAD RECENTLY HEARD THAT THEY HADN'T SEEN OR SPOKEN TO EACHOTHER SINCE MR. ESSER'S RETIREMENT. I SEE THEM, ALONG W/ JUDGE FRAISER, REGULARY FREQUENTING THE LOCAL RESTAURANTS.

- Acknowledgment by person signing in an individual capacity:

State of Washington
County of Whitman

I certify that I know or have satisfactory evidence that [illegible] person) is the person who appeared before me, and [illegible] acknowledged that he/she signed this instrument and [illegible] to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: 11/12/14

(Signature of Notary)

Notary Public — State of Washington
My Appointment Expires: 4-1-18

(Seal or Stamp)

KATHRYN WRIDE
COMMISSIONED NOTARY PUBLIC
STATE OF WASHINGTON

Khani Taylor — Date 12 Nov 2014

EXHIBIT "F"

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	)	ORDER DENYING REQUEST FOR RECUSAL

The undersigned received Exhibit A today from Mr. Lockwood – his letter and affidavit of Connie Taylor.

For the reasons stated in my disclosure letter sent on November 6, 2014, attached as Exhibit B, the request for recusal is denied.

DATED: This 17th day of November 2014.

By _____
Timothy Esser, Arbitrator

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 MOTION FOR DISQUALIFICATION OF JUDGE DAVID FRAZIER FOR VIOLATION OF WASHINGTON'S APPEARANCE OF FAIRNESS DOCTRINE AND SUPPORTING DECLARATION

The defendants Honn Family Trust, LLC., by and through its attorney of record J. Gregory Lockwood hereby moves the court for an order of disqualification of Judge David Frazier from all additional matters related to the above caption case including all motions currently pending before this court including Motion to Vacate Arbitration Award and Motion to Confirm Arbitration Award.

This motion is based upon comments on the evidence and suggested dispositive motions for plaintiffs in the October 24, 2014 hearing o n defendants motion for reconsideration of the appointment of Mr. Timothy Esser as the neutral arbitrator on the three person panel. See attached transcript of October 24, 2014 hearing transcript marked as Exhibit "A"

FILED
FEB 3 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK
ORIGINAL

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In the recent Division 3 case of Tatham v. Rogers, 283 P.3d 583, 170 Wn.App. 76 (2012) the court held at page 81 as follows:

> Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wash.2d 792, 808, 975 P.2d 967 (1999).

The Division 2 also recently addressed Washington's appearance of fairness doctrine in State v. Witherspoon, 286 P.3d 996 (2012) in which they held at page 1004:

> Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. State v. Gamble, 168 Wash.2d 161, 187, 225 P.3d 973 (2010) (citing State v. Bilal, 77 Wash.App. 720, 722, 893 P.2d 674 (1995)). " ' The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' " State v. Post, 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting State v. Madry, 8 Wash.App. 61, 70, 504 P.2d 1156 (1972)). An individual must demonstrate evidence of a judge's actual or potential bias for an appearance of fairness claim to succeed. Gamble, 168 Wash.2d at 187-88, 225 P.3d 973; State v. Dominguez, 81 Wash.App. 325, 329, 914 P.2d 141 (1996). The Code of Judicial Conduct (CJC) and due process require judges to disqualify themselves in a proceeding in which their impartiality " might reasonably be questioned." State v. Chamberlin, 161 Wash.2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007)). The test for determining whether the judge's impartiality might reasonably be questioned is an objective one. State v. Leon, 133 Wash.App. 810, 812, 138 P.3d 159 (2006), review denied, 159 Wash.2d 1022, 157 P.3d 404 (2007).

In this case the trial judge has clearly shown his bias against the defendants in violation of the Appearance of Fairness Doctrine. At the parties last court proceeding dated October 24, 2014 the court was requested to make rulings on two of the defendants motions. (1) Motion for reconsideration on the Court's appointment of Mr.

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Timothy Esser as a neutral third arbitrator and (2) Motion to disqualify the Libby law Firm as potential witnesses.

The transcript of the October 24, 2014 hearing is attached as Exhibit "A" which states the follows beginning at page 22:

> 8 and/or many of these are privileged and wouldn't be
> 9 admissible anyway. So, I am not going to grant the
> 10 motion to disqualify, at this time, the Libey law
> 11 firm. And if I were, that would probably make quick
> 12 work of the second issue, which concerns Mr. Esser
> 13 here.
> 14 But additionally, you know, I think it's
> 15 highly likely -- I have to determine the likelihood of
> 16 Mr. Libey being a witness in the case and the rule, I
> 17 think it's highly likely that, when the matter goes
> 18 before the panel of arbitrators and they're presented
> 19 with the law, I think it's highly likely that, from a
> 20 legal standpoint, this case in arbitration isn't going
> 21 to go very far because I think -- and it's not my
> 22 decision to make except as it pertains to the
> 23 likelihood of there being any witnesses -- that case
> 24 is going to get thrown out of arbitration if the law
> 25 is applied, because there was a arbitration already on
>
> PAGE 23
>
> 1 the very subject that's being disputed here, the lease
> 2 and an offer to or an option to purchase.
> 3 And maybe the specific issue that's now
> 4 raised, consideration, wasn't raised then -- should
> 5 have -- I think the issue's res judicata here. And
> 6 I'm only deciding that -- It's not my decision to
> 7 make. That's up to the arbitrators. These parties
> 8 have agreed to arbitration. But I don't think you're
> 9 going to have any witnesses. That's my legal analysis
> 10 based on everything that I have seen here. So, no,
> 11 I'm not going disqualify the Libey firm here.

Res Judicata

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The court's comments on the case at page 22 line 16 - page 23 line 9 is a clear comment on the evidence. In fact the court has indicated that in his opinion the case will not go very far in arbitration. The court has interjected its bias in the case and further suggesting the dispositive motion of Res Judicata in reference to the defendant's lack of consideration defense.

The court further states in open court that the issues of consideration raised by the defendants at arbitration should have been raised earlier. The defendants are now required to bring their objections to the arbitration confirmation hearing before the trial court which has interjected its feeling in the case. The plaintiff did in fact raise the issue of Res Judicata at summary judgment after the court indicated that the defendant's consideration issue should be thrown out of court due to Res Judicata. The (former partner of the Libby law firm) and neutral arbitrator appointed by the court ruled as the court indicated he would rule on the issue of Res Judicata.

Also indicating a strong bias against the defendants and more troubling to the defendant is the court's comment at page 23:

> 8 have agreed to arbitration. But I don't think you're
> 9 going to have any witnesses. That's my legal analysis

This is troubling in light of the course of the arbitration and how the court appointed neutral arbitrator conducted the arbitration by not allowing depositions and requesting Summary Motions.

Further, the court knowingly appointed the plaintiff's recommended neutral arbitrator Mr. Esser, over the objections of the defendants.

At the time of the initial hearing the defendants were unaware of the relationship between Mr. Esser amd Mr. Libby. However the court had full

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knowledge of the relationship, that being Mr. Esser was the former partner of Mr. Libby. The plaintiff's memorandum recommending Mr. Esser and in opposition to summary judgment fails to mention that Mr. Esser was a former partner of the Libby Firm and fails to mention that Mr. Esser and Mr. Libby have a ongoing social relationship. It was not until the motion for reconsideration that the defendant learned the extent of the relationship. At that time the court stated the following in regard to the motion for reconsideration beginning at page 24 line 4 of the October 24, 2014hearing transcript.

> Page 24
>
> 4 And normally, and I think I said this at
> 5 the time, if it's an issue of appointing a mediator or
> 6 appointing an expert or a guardian ad litem and it's
> 7 disputed, or an arbitrator, and one party says, "I
> 8 want such and such," and the other party disagrees, "I
> 9 don't want to appoint such and such" -- But Mr. Esser
> 10 was sitting right where this gentleman here is sitting
> 11 as you were arguing the case.
> 12 I'm very familiar with Mr. Esser.
>
> Page 25
>
> 17 So, even though he was -- his name was
> 18 thrown out by one of the parties, I thought -- and he
> 19 was sitting right there - - "Yeah, perfect." And I
> 20 still think that that's the case here. I was aware
> 21 that -- I was aware but I don't think I thought about
> 22 the fact that he had previously been Mr. Libey's
> 23 partner and he had been, I'm sure I'm -- I think
> 24 Mr. Ferguson was in the firm at the time. I didn't
> 25 know how long ago that was; I'm hearing now it was
>
> Page26
>
> 1 five years ago.

The court clearly knew of the relationship between Mr. Esser and Mr. Libby and failed to disclose that to the defendants, at the time of Mr. Esser's initial

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appointment. Not until the hearing on the defendants motion for reconsideration did the court make any limited disclosure and only after the defendants supplied information of the partnership. See attached copy of the Declaration of J. Gregory Lockwood filed October 14, 2014 with defendants evidence of partnership, marked as Exhibit "B".

Additionally, on or about November 13, 2014 the defendant received an affidavit from a Ms. Khani Taylor. In Ms Taylor's affidavit she disclosed that she had seen Mr. Libby and Mr. Esser and Judge Fraizer having lunch frequently at the local restaurants. This social relationship between the court and both Mr. Esser and Mr. Libby was never disclosed by the court. See attached declaration of Khana Taylor attached hereto as Exhibit "C". The affidavit of Ms. Taylor created grave concerns and confirmed the defendant's earlier concerns expressed to the court and questions the court's impartiality.

Further the court knew that Mr. Esser had been sitting in the hearing room when the court appointed him as the neutral arbitrator. The court did not disclose his attendance to the defendants and allowed him to hear the defendant's argument objecting to his appointment.

Additionally, the court indicated that Mr. Esser would not allow what the court considered frivolous and irrelevant procedural issues. It appeared to the defendants that any procedural issue raised by them was considered frivolous and irrelevant by this court. The court seemed to find it acceptable that Mr. Esser would not listen to procedural issues.

The court stated at Page 24-25 of the court transcript:

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24 because I don't feel that when parties agree to settle
25 their disputes through a procedure that involves, or
25
1 is designed to involve, economy and saving time, to
2 have a patient trier of fact that's going to listen to
3 all kinds of frivolous and irrelevant procedural
4 issues, I don't feel benefits the parties to the
5 litigation.

Procedural matters are important to a fair hearing.

The court compared the appointment of Mr. Esser as the neutral arbitrator to a judge from a law firm hearing his old partners' cases. The court indicated that that was acceptable after a couple of years. That position has no "appearance of Fairness"

The court transcript of the October 24, 2014 hearing states at Page 26

13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.

Page 27

1 And we don't have a case here where the
2 arbitrator went from the firm to -- or one of the
3 lawyers, to the position of arbitrator. There was a
4 "divorce," I think I heard the term. I don't know
5 what happened there. It doesn't matter.
6 So, I am not going to -- I don't think
7 there's any legal basis at this point for -- I'm not
8 going to disqualify or reconsider my designation of

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9 Mr. Esser.

As the court indicated it was very familiar with Mr. Esser and knew of the relationship with Mr. Libby. The court knew of the objection raised by the defendants but refused to appoint anyone else other than Mr. Esser even though the court named three attorneys who the court would and could appoint, BUT ONLY if Mr. Esser voluntarily recused himself.

The court stated at page 28 beginning at line 18:

> 13 So, I'm not disqualifying him, but it
> 14 might be an issue to raise to him in the process of
> 15 arbitration. And because of the possibility he may
> 16 recuse, and I think that might be a real possibility
> 17 here for the reasons I've stated, was an association
> 18 in there, with both sides, I think, to expedite
> 19 things, rather than have you make motions, spend more
> 20 money, come back before the court with more argument
> 21 on, "Well, Esser can't do it, appoint somebody else,"
> 22 I'm going to appoint some alternates.
> 23 So, if Esser -- if he recuses himself or
> 24 gets disqualified by the arbitration panel, I'm going
> 25 to appoint as first alternate attorney Rusty McGuire,
>
> PAGE 29
>
> 1 again experienced, a lot of farm experience. He
> 2 practices in Whitman County, has offices in Whitman
> 3 County on a part-time basis, and he has a main office
> 4 in Davenport. He's got, like, seven offices, his
> 5 firm. And he has ago expertise and lease expertise,
> 6 farm lease, and he grew up on a farm.
> 7 Second, similar circumstance, he's
> 8 remotely situated in Garfield, Washington, Stephen
> 9 Bishop. He'd be the second. If Esser recuses,
> 10 McGuire can't do it or won't do it, I'll appoint
> 11 Stephen Bishop because he's not out and about and he's
> 12 not a litigator, with a lot of farm experience, even
> 13 raises apples himself.
> 14 And then third alternate, Howard Neill,

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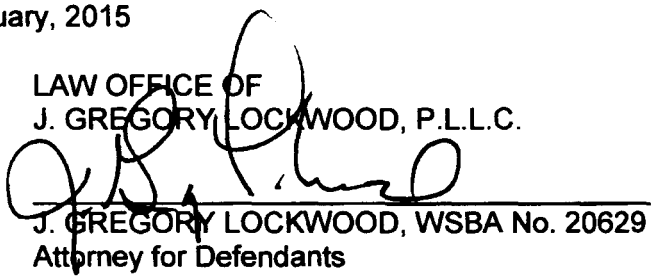
The court had the option to appoint any one of the three alternate attorneys, Mr. Rust McGuire, Mr. Stephen Bishop or Mr. Howard Neil as the third neutral arbitrator. Any of these would have been acceptable to the defendant as they had no relationship with the plaintiff or their counsel. The court choose to force arbitration on the defendants with the plaintiff having nominated Mr. Reed Smith as their chosen arbitrator and the plaintiff's having nominated the neutral arbitrator Mr. Esser. Thus, ensuring a biased and impartial three person arbitration panel.

The court knowingly allowed the plaintiffs to pick both their chosen arbitrator and the neutral arbitrator which is a clear violation of Washington's Appearance of Fairness Doctrine.

It is respectfully requested that the court disqualify itself from all additional matters related to the above caption case including all motions currently pending before this court including Motion to Vacate Arbitration Award and Motion to confirm Arbitration Award pursuant to Washington Appearance of Fairness Doctrine and the Code of Judicial Conduct (CJC) as due process require judges to disqualify themselves in a proceeding in which their impartiality " might reasonably be questioned." State v. Chamberlin, 161 Wash.2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007))

Dated this 3rd day of February, 2015

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

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DECLARATION

I, J. Gregory Lockwood, am the attorney of record for Larry Honn Family Trust, LLC., and make this declaration from my personal knowledge under penalty of perjury under the laws of the State of Washington.

The following exhibit's are attached to the Motion For Disqualification Of Judge David Frazier For Violation Of Washington's Appearance Of Fairness Doctrine and Supporting Declaration:

Exhibit "A"- copy of October 24, 2014 hearing transcript;

Exhibit "B"- Declaration of J. Gregory Lockwood for October 14, 2014, re: Esser and Libby Partnership;

Exhibit "C"- Declaration of Khana Taylor;

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CERTIFICATE OF SERVICE

I, J. Gregory Lockwood, do declare that on February 3, 2015, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	_____ U.S. MAIL _____ FACSIMILE ____X____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED February 3, 2015.

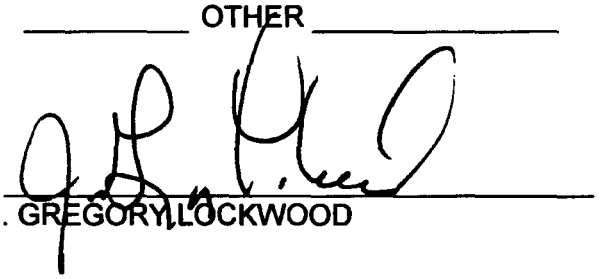

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EXHIBIT "A"

In The Matter Of:

Garrett Ranches v.

Larry Honn Family

Transcript of Proceedings

Vol. I

October 24, 2014

Snover Realtime Reporting

505 N. Argonne Rd., Ste A-201

Spokane Valley, WA 99212

Original File 102414 Hearing.txt

Min-U-Script® with Word Index

1 SUPERIOR COURT OF WASHINGTON

2 COUNTY OF WHITMAN

3

4 GARRETT RANCHES, LLC, a
Washington limited liability
5 company,

6 Plaintiff,

7 v. CASE NO. 10-2-00293-4

8 LARRY HONN FAMILY, LLC, a
Washington limited liability
9 company,

10 Defendant.

11

12

HEARING
13 October 24, 2014
Pages 1 to 31

14

15

16

Michael S. Kuplack, CCR
17
SNOVER COURT REPORTING
18
Professional Court Reporters
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Spokane Valley, Washington 99212
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(509)467-0666 Fax (509)315-8375
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E-mail: www.snoverrealtime.com
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LIC. NO. WA 2750 / ID 744
24

25

1 A P P E A R A N C E S

2

3 BEFORE JUDGE DAVID FRAZIER

4

FOR THE PLAINTIFF:

5

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6 By: Will M. Ferguson
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9

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1 (8:34 a.m.)
2 THE COURT: I have Garrett Ranches against
3 Larry Honn Family, LLC. And plaintiffs are
4 represented by Will Ferguson, defendants by Gregory
5 Lockwood. And the defendants have a motion to
6 disqualify a law firm, motion to reconsider
7 appointment of an arbitrator.
8 So, Mr. Lockwood, you made a motion.
9 I'll --
10 MR. LOCKWOOD: Thank you, your Honor.
11 THE COURT: -- let you work it.
12 MR. LOCKWOOD: (Cleared throat.) Excuse
13 me.
14 Judge, basically there's two matters
15 this morning and they both stem around basically the
16 same issue, and that issue is, what we're trying to do
17 is just establish, you know, a fair and what we
18 consider an arbitration that doesn't have, you know,
19 the appearance of some improprieties of some kind.
20 And this is a -- I know we've been in and out of your
21 court on numerous occasions and I know the Court would
22 rather not have this here, and to be honest you with,
23 Judge, we'd rather not be here. We'd like to get this
24 matter resolved.
25 But this is a very serious matter for my

1 clients. We're talking about a farm that it's the
2 family farm and, in essence, they're fighting to save
3 that farm. And we're dealing with a 2000-acre farm
4 located here in Whitman County that's at issue. So,
5 this is a rather important case.
6 When we were in front of you the last
7 time, your Honor, we were here because there were some
8 problems with the arbitrators finding a neutral third
9 party as a neutral third arbitrator, and at that time,
10 we basically filed an objection to recommendations by
11 the parties. We're saying, you know, when the parties
12 make a recommendation for a neutral third party,
13 almost as a matter of course they're not neutral
14 because they're picking someone that's favorable to
15 your position.
16 At that time, the plaintiffs recommended
17 Mr. Timothy Esser. At that point, to be honest with
18 the Court -- You know, I don't practice in Whitman
19 County a lot; most of my practice is Spokane, Stevens
20 County, Pend Oreille, Ferry, those counties. So, I
21 wasn't familiar with Mr. Esser at that time, although
22 we did object to him initially, saying, "They
23 recommended him. We think there might be some bias
24 based on that recommendation."
25 The Court basically entered its order

1 saying that if the arbitrators don't find a neutral
2 third party, that the court was inclined to go ahead
3 and appoint Mr. Esser. Well, apparently the
4 arbitrators, you know, were still unable to come up
5 with a neutral third party; so, based on your previous
6 ruling, Mr. Esser was going to be the -- nominated as
7 this third neutral arbitrator.
8 Well, when I got back to the office, I
9 kind of looked up Mr. Esser to find out, you know, a
10 little bit about him. Mr. Esser, I come to find, was
11 a former law partner for Mr. Libey and they practiced
12 over here in Colfax for a number of years. Mr. Esser
13 moved down to Pullman. Likewise, Mr. Libey's law firm
14 and he, they continued to practice together down
15 there. Now, Mr. Esser eventually formed his own
16 partnership with another attorney and that other
17 attorney was also with the Libey law group for a
18 while.
19 So, we're dealing with Mr. Esser's
20 relationship with the Libey law firm which has gone on
21 for a number of years. And what's being argued is,
22 "Well, he wasn't a part of this law firm at the time
23 we were doing this negotiation." That may be.
24 However, because they have a longstanding relationship
25 and I think that there's at least an appearance that,

1 you know -- I don't know if Mr. Esser and Mr. Libey
2 continue to be good friends, you know, if they go
3 fishing, play cards, what, I don't know. All I know
4 is that they've had this existing relationship for a
5 number of years and that to nominate him as a neutral
6 third arbitrator, I think, is -- goes against, you
7 know, the -- you know, at least the appearance of
8 impropriety (sic). So, we're asking that the Court
9 reconsider its decision on Mr. Esser.
10 I know that they've nominated -- once
11 again, they've nominated another attorney down here.
12 And I think you notice, in all the pleadings that I
13 filed, I've never nominated a specific attorney. What
14 I've represented, that since there's not an
15 arbitration panel here in Whitman County, there is one
16 in Spokane, both arbitrators are in Spokane right now,
17 so that nominating a third arbitrator from -- or
18 asking the -- an arbitrator be appointed from the
19 arbitration panel who is just -- they rotate, so
20 whoever comes up would come up.
21 Another option instead of just
22 specifically naming someone is that, you know, we're
23 fortunate here in this area, we have a law school,
24 Gonzaga Law School. I'm sure that, you know, they --
25 if the arbitrators contact someone from the --

1 Gonzaga, in their contract department, they'd be more
2 than happy to have someone appointed as a neutral
3 third arbitrator.
4 We just want to have an arbitration that
5 at least on its face appears fair, because this is a
6 very serious matter. And, quite frankly, you know,
7 after me finding this out about Mr. Esser, if I hadn't
8 come in and at least filed this motion, I think I'd be
9 committing malpractice. So, we ask the Court
10 reconsider that appointment and that they -- that the
11 arbitrators be directed to seek a third arbitrator
12 from either the arbitration panel or the law school,
13 someone that we know would be impartial.
14 The second matter that I brought before
15 this court would be a motion for disqualification,
16 under the Rules of Professional Conduct 3.7, of the
17 Libey law firm, and the reason why, 3.7 basically
18 indicates that if you are an attorney for the party,
19 one of the parties, and you know you're going to be a
20 witness or have a fair belief that you're going to be
21 a witness, the Rules of Professional Conduct, they use
22 the word "shall," shall withdraw from the case.
23 Well, they do -- You look under the case
24 law and there's -- and Washington case law basically
25 says that you kind of look at some of the underlying

1 factors and make that determination. Well, in this
2 case, Mr. Libey was the attorney that drew the option
3 agreement up, and this option is what's at issue in
4 this case. More specifically, we're dealing with
5 issues of consideration supporting that option. So,
6 Mr. Libey's going to be required to come into court or
7 at least in the arbitration testify as to, you know,
8 him drafting that document and items that he used and
9 based that, that option, on, which are paramount to
10 the issues that are -- that are in this arbitration.
11 That being the case, he's going to be giving material
12 testimony inside the arbitration.
13 Under Rules of Professional Conduct 3.7,
14 based on that and the underlying case law that
15 supports it, Mr. Libey's law firm should be
16 disqualified. There has been no showing that, you
17 know, that there'd be a hardship worked on the
18 Garretts. I mean, there's other attorneys around that
19 could represent them on this matter as equal as the
20 Libey law firm.
21 So, based on case law and Washington's
22 professional conduct code, we're requesting that the
23 Court disqualify the Libey law firm in this particular
24 arbitration. And if the Court has any questions, I'd
25 be happy to answer those.

1 THE COURT: No questions.
2 Mr. Ferguson.
3 MR. FERGUSON: Judge, the first issue that
4 I want to address is this Motion for Reconsideration.
5 Not only must the moving party, when moving for
6 reconsideration, show that their motion falls within
7 one of the requirements of the Motion for
8 Reconsideration, but they also have to show the merits
9 of the Motion for Reconsideration. Now, the merits
10 here are this, as opposing counsel put it, an
11 appearance of impropriety. However, simply stating an
12 appearance of impropriety does not mean much of
13 anything. So, let's look at the facts.
14 The facts are that Mr. Esser has not been
15 with the Libey & Ensley firm since June 1st of 2009.
16 The lease and option underlying this action were not
17 even drafted until September of 2010. So, well over a
18 year after Mr. Esser left the firm, after he had no
19 further financial interest in this, in the law firm,
20 this litigation started with the drafting of the
21 lease -- excuse me -- and the option.
22 Those are the facts. There's really
23 nothing more that the Defense can point to that says
24 that Mr. Esser is somehow biased in favor of the
25 parties -- biased in favor of the parties -- and

1 that's the important thing. And clearly he's not
2 biased in favor of the parties because we know that at
3 least one member of his firm, probably Mr. Sandberg,
4 has represented one of the Honns on a criminal matter,
5 and probably on other matters. So, to say that
6 Mr. Esser is somehow automatically biased in favor of
7 Garrett Ranches is absolutely absurd. It isn't
8 supported by the facts.
9 And as this Court well knows, in the
10 practice of law, when law practices break up, it's a
11 lot like a divorce. I'm pretty sure that an
12 ex-husband and ex-wife don't invite each other over
13 for barbecues every night, at least in the usual
14 divorce, and such is probably the case with attorney
15 firms. I refer to the breakup that we had in 2009 as
16 "the divorce" because Mr. Esser and Mr. Sandberg went
17 off on their own; they've been on their own since June
18 1st, 2009; they don't have any connection with our
19 firm.
20 As to the alternate appointment, we have
21 suggested Mr. Savage. If this court finds that it
22 will reconsider it's decision and it wants to
23 appointment another third arbitrator, then we propose
24 Mr. Savage.
25 Now, Mr. Savage, we propose him but we

1 also still propose Mr. Blankenship. And here again,
2 when we get into the issue regarding disqualification
3 of the law firm, this is exactly why we need
4 Mr. Blankenship on this arbitration panel as a neutral
5 third arbitrator, and again all the arguments that go
6 along with having him appointed, for and against.
7 We suggested Mr. Savage. Mr. Savage has
8 never had any contact, at least any -- excuse me, any
9 conflict, that I can discern, with our firm, he's
10 never been a part of our firm, and we believe he would
11 do just as fine a job as Mr. Esser if this court
12 decides to reconsider.
13 Now, the suggestion of somebody from
14 Gonzaga Law School. Now, it's been the defendant's
15 position, since, I think, Mr. Lockwood started this
16 case, to try to drag this up to Spokane County, get a
17 Spokane County arbitrator, get a Spokane County this,
18 Spokane County -- There just seems to be simply no
19 need for that. We have a Whitman County case, Whitman
20 County land, Whitman County parties. This should stay
21 in Whitman County. The third arbitrator should be
22 from Whitman County.
23 Now, the Defense proposes somebody from
24 Gonzaga Law School. Now, I think the record would end
25 up showing that this may look good on its face, except

1 for the fact that I believe, if my memory serves me
2 correctly, Mr. Lockwood's former partner in law
3 teaches at Gonzaga law. So, that would be the
4 appearance of impropriety if that's all we were going
5 on was the appearance of impropriety. But again,
6 here, Judge, there's no appearance of impropriety.
7 There is no impropriety on a factual level.
8 Turning to the motion for
9 disqualification of the Libey & Ensley law firm,
10 the -- flat out the test in Washington is, number one,
11 there must be compelling circumstances to disqualify a
12 firm. That's the first burden. The second -- and
13 this is the -- this is the case cited by Defense, this
14 is the Klickitat County case -- when an attorney is to
15 be called, "A motion for disqualification must be
16 supported by a showing that the attorney will give
17 evidence material to the determination of the issues
18 being litigated, that the evidence is unobtainable
19 elsewhere, and that the testimony is or may be
20 prejudicial to the testifying attorney's client."
21 Well, first, has to be -- there has to
22 be a showing of material evidence. All we have from
23 the Defense is they say, "Well, Mr. Libey will testify
24 that he drafted the option agreement." Well,
25 that's -- we can get that from other sources, too.

1 That the Larry Honn Family LLC had no input or
2 contribution in any way to his drafting of the
3 option. Again, we already know that. Number three,
4 that at the time of drafting the option agreement, the
5 members of the Larry Honn Family Trust did not
6 indicate any dollar amount to be placed in the
7 option. And I'm guessing that that was -- that
8 Mr. Libey wasn't present at the negotiations.
9 All three of those facts are obtainable
10 from other sources. We know that because I submitted
11 the excerpts from the transcripts of the depositions
12 of Larry Honn Sr., Charlotte Honn, Frank Garrett, and
13 Joshua Garrett. Everyone agrees, well, Mr. Libey
14 wasn't there. He wasn't there in negotiations. Of
15 course he doesn't know any of those facts. Of course
16 he wouldn't be able to offer any material evidence.
17 Even if he could offer the material evidence, it is
18 obtainable elsewhere. And even if it weren't
19 obtainable elsewhere, it would be protected by
20 attorney-client privilege.
21 Now, I would have objected to
22 Mr. Lockwood's response that he served via facsimile
23 yesterday -- because I don't accept service via
24 facsimile, I want that noted for the record -- but I
25 do like the fact that he supplied his letter of

1 October 7th in which he states, in the second full
2 paragraph, "Additionally, we would like to subpoena
3 the client file at Libey & Ensley, PLLC, that relates
4 to the drafting of the option, including all notes and
5 letters." How much more protected by an attorney-
6 client privilege can we get?
7 Clearly, your Honor, I think that the --
8 that the reasons behind making this motion are
9 unseemly. There is no material evidence to be offered
10 by Mr. Libey. There's no material evidence, even if
11 he had any, that could be disclosed under the
12 attorney-client privilege. There are no exceptional
13 circumstances warranting disqualification. And
14 Mr. Libey would not be testifying about any of these
15 facts.
16 And this gets back to what I mentioned
17 about Mr. Blankenship. This is exactly why we need
18 Mr. Blankenship as a third arbitrator, because he
19 knows exactly what was arbitrated in the first
20 arbitration; that is, after these depositions were
21 taken. Because what we hear from Defense is they're
22 going to bring up issues relating to the -- to the
23 consideration underlying the option.
24 Page 14 of the deposition of Frank
25 Garrett answers those questions regarding

1 consideration supporting the option. That was already
2 litigated. That's why those questions were asked at
3 the depositions back in 2010. That's what some of the
4 arbitration was about in 2010. That's why we need
5 somebody who was there, who can say, "Oh, yeah, we
6 already arbitrated that issue. We've already decided
7 that there was good consideration underlying the
8 option." Exactly why.
9 Your Honor, the Motion for
10 Reconsideration should be denied. Mr. Esser does not
11 have any bias for any of the parties or any of the
12 attorneys, clearly not. Second, the motion to
13 disqualify the firm of Libey & Ensley should be denied
14 and we're asking for attorneys fees, either under
15 CR 11 or under the attorney fee provision in the lease
16 and option, which provides that if either party is
17 involved in litigation, the prevailing party can
18 obtain attorneys fees. I've included with my response
19 to the Motion to Disqualify my declaration, which
20 indicates the amount of time that I've spent on this
21 and what my hourly rate is.
22 So, for those reasons, your Honor, we ask
23 the motions be denied and that attorneys fees be
24 granted to Garrett Ranches.
25 MR. LOCKWOOD: I'm going to address -- go

1 from the latest comments to the ones earlier.
2 The request for attorney fees in a
3 situation where you're asking for disqualification
4 under the Rules of Professional Conduct, your Honor,
5 are just -- you know, it's hard to indicate how
6 misplaced that is. The RCWs are extremely clear --
7 or, excuse me, the Rules of Professional Conduct are
8 clear that if you're a witness and you know you're
9 going to be a witness, you should not be representing
10 that particular party. So, for them to come in and
11 ask for attorney fees because we base an objection on
12 the Washington Rules of Professional Conduct, I think
13 that that's more than misplaced. Now, what they've
14 argued is that -- You can't find this anywhere else.
15 So, the problem is, we're dealing with
16 the consideration that was drafted in an option. This
17 option agreement only had one open provision and that
18 was, how much is the property going to sell for.
19 Everything else was drafted by Mr. Libey. And all
20 these other terms and conditions and statements inside
21 of that option, only Mr. Libey can answer as to, "When
22 you drafted this, what did you rely on?" No one else
23 can do that because he's the one that drafted it. And
24 they knew that if this came up as an issue, that
25 Mr. Libey was going to have to address those issues.

1 The fact that Mr. Libey had put this in
2 writing in itself is the only one that can answer the
3 question. Mr. Garrett can't answer what Mr. Libey
4 relied on. One of the issues that we've dealt with --
5 Example. Way back when, I asked Mr. Garrett at that
6 second supplemental arbitration that was done, you
7 know, "Who drafted the document?" At that time,
8 Mr. Garrett said, "Oh, I don't know. I don't
9 remember." That was the response we got at that
10 point. Now that we're sitting here at this -- under a
11 whole new set of issues, we find out that, yes, in
12 fact, Mr. Garrett -- or Mr. Libey did draft the
13 document. So, we brought the motion.
14 Now they're saying that there's no basis
15 for materiality. Well, that's there since he's
16 drafted a document, and that's the issue before the
17 arbitrators.
18 We've -- And the last document that was
19 submitted to the court yesterday -- and the reason why
20 it came in yesterday, because that morning, we got
21 their response. So, we filed this immediately, that
22 we received it. And the reason why I filed that for
23 the Court, to indicate to the Court we've already
24 requested authorization from the arbitrators to take
25 Mr. Libey's deposition and we're going to be doing

1 that.
2 So, he's scheduled for a dep -- or he's
3 going to be scheduled for a deposition. He is going
4 to be giving testimony the arbitration. And based on
5 that and the fact that he's the only one that drafted
6 this material, I think he should be -- the firm should
7 be disqualified. And the issue of awarding attorney
8 feeds, quite frankly, Judge, is I think more than
9 misplaced.
10 Now, on the issue, the remaining issue
11 dealing with the -- with the appointment of Mr. Esser,
12 when they talk about the breakup of a firm, through
13 the years, I've been -- You know, I've been practicing
14 24 years. Through the years, you know, the firm's
15 members come and go, come and go, you know. Quite
16 frankly, everyone that's come and gone throughout the
17 firm that we had is -- we have good terms with, we
18 refer clients back and forth. And the fact that, you
19 know, they allege they consider it a divorce, well, it
20 may or may not. I'm just saying that that doesn't
21 necessarily always follow.
22 And there's no reason, there's absolutely
23 no reason, that another -- that a neutral party can't
24 be nominated or appointed by the Court. It's not that
25 Mr. Esser's the only attorney in Whitman County or

1 Spokane County.
2 Now, what Mr. Ferguson's indicated about
3 my former partner is a professor, that's true, and
4 there's times when I've over -- I've been over at the
5 law school and done things, but that doesn't mean
6 that -- I didn't nominate my old partner. I said, you
7 know, have them appoint someone that's not. I also
8 recommended the arbitration panel. The arbitration
9 panel, someone's appointed that we don't even have a
10 clue who comes up on that arbitration panel. It just
11 rotates and comes up.
12 As to Mr. Blankenship, Mr. Blankenship
13 has been rejected by the arbitrator that we appointed,
14 and for them to keep trying to raise him, to throw him
15 back in the mix, they didn't want an appoint- -- They
16 wanted the same -- their same crew from the first one,
17 since this matter began. And that would be totally
18 improper, to go back and say, "Well, we're going to
19 appoint Blankenship even though your arbitrator has
20 already disqualified him."
21 The Court, I think, had -- is on the
22 right track of appointing an attorney involved in
23 this, because we're dealing specifically with legal
24 issues, but, however, Mr. Esser or anyone else that
25 has any relationship -- I want -- I don't want anyone

1 related to my firm or my prior firms, and I don't --
2 we don't want anyone as a neutral party related to
3 Mr. Libey's firm. We just want a neutral party. Once
4 we get that, we'll have that matter resolved and we
5 can get this -- go forward and get this thing
6 arbitrated and resolved. But we just want to have a,
7 you know, fair field on this thing, your Honor.
8 Thank you.
9 THE COURT: All right. Well, here's what
10 I'm going to do as far as the issue of the motion to
11 reconsider the appointment of Mr. Esser. Now, you
12 have a case here that has gone on for a long time, and
13 my frustrations, and I think I've expressed those
14 frustrations, you have a lease, you have an agreement
15 between two limited liability farm corporations. We
16 know the lease has an option to purchase; it also has
17 an arbitration clause. People normally enter into
18 arbitration agreements as a means of settling their
19 disputes for two reasons: Expediency, to save time,
20 to have -- not have to go through the delays that
21 they're involved in, setting cases for trial and going
22 into court; and economy, to save expenses.
23 So, my frustration here is these parties
24 have agreed to arbitration to save time and money and
25 there's been a lot of court time spent on procedural

1 matters that I don't see have a great deal of
2 significance in the case, and obviously been a lot of
3 time and expense involved on procedural issues. And
4 secondly, this is a case that has been subject to a
5 previous arbitration with an arbitration panel. And I
6 know from litigation that stemmed, the court decision
7 that stemmed from that, issues were litigated and
8 decided by the arbitrators that relate to the lease
9 and that relate to the option to purchase. And here
10 we are again.
11 It's gone through arbitration, it's come
12 to court, it's been confirmed, it's been appealed,
13 it's back here again, and the Honns lost. Now here we
14 are with another request for arbitration. It relates
15 to whether there was consideration, as I understand
16 it, the issue for the arbitration agreement.
17 I now have a couple motions concerning
18 the selection of a third arbitrator And now, after all
19 of this time, a motion to disqualify what I'll call
20 the Libey -- that's Libey (ly-bee), not Libey (lib-
21 ee) -- law firm here. On that issue, number one, on
22 both issues, parties have agreed to arbitration. And
23 I think from everything that I've read here, it is
24 highly, extremely unlikely, from a realistic,
25 practical standpoint and from a legal standpoint, that

1 Mr. Libey will be a witness in the arbitration. I'm
2 having trouble wrapping my head around that.
3 The facts that have been identified by
4 the Honns here that he'll testify to, as I see it,
5 have been obtained and are obtainable through other
6 witnesses, other sources, and that's a factor to
7 consider. Doesn't even appear that they're in dispute
8 and/or many of these are privileged and wouldn't be
9 admissible anyway. So, I am not going to grant the
10 motion to disqualify, at this time, the Libey law
11 firm. And if I were, that would probably make quick
12 work of the second issue, which concerns Mr. Esser
13 here.
14 But additionally, you know, I think it's
15 highly likely -- I have to determine the likelihood of
16 Mr. Libey being a witness in the case and the rule, I
17 think it's highly likely that, when the matter goes
18 before the panel of arbitrators and they're presented
19 with the law, I think it's highly likely that, from a
20 legal standpoint, this case in arbitration isn't going
21 to go very far because I think -- and it's not my
22 decision to make except as it pertains to the
23 likelihood of there being any witnesses -- that case
24 is going to get thrown out of arbitration if the law
25 is applied, because there was a arbitration already on

1 the very subject that's being disputed here, the lease
2 and an offer to or an option to purchase.
3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then -- should
5 have -- I think the issue's res judicata here. And
6 I'm only deciding that -- It's not my decision to
7 make. That's up to the arbitrators. These parties
8 have agreed to arbitration. But I don't think you're
9 going to have any witnesses. That's my legal analysis
10 based on everything that I have seen here. So, no,
11 I'm not going disqualify the Libey firm here.
12 Now, we do an arbitration, you agreed to
13 arbitration, so if the arbitrators see you later on,
14 "Oh, Libey may be a witness or is going to be a
15 witness and this -- the facts that he could testify to
16 aren't obtainable elsewhere," then the issue then can
17 be renewed before the arbitrators. Again, they've
18 agreed to arbitration and this isn't the issue. What
19 evidence is presented at arbitration, that's up to the
20 arbitrators, not to this court.
21 As far as the court's designation of
22 Mr. Esser, when that issue was brought before me,
23 really wasn't certain whether the two arbitrators that
24 had been selected by the parties had been unable to
25 reach an agreement. I think the two attorneys had a

1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.
4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such" -- But Mr. Esser
10 was sitting right where this gentleman here is sitting
11 as you were arguing the case.
12 I'm very familiar with Mr. Esser. He's
13 had a lot of cases before this court, and I think he's
14 been a lawyer -- he was a year ahead of me. No, he
15 was in my class in law school. Didn't even know him
16 in law school, but he was in my class, so he's been a
17 lawyer almost 40 years and I'm aware of that. And I'm
18 aware of the issues in this case, procedural hassling
19 that has taken place. And I think Mr. Ferguson
20 indicated he should be appointed because he has
21 patience, something to that effect.
22 No, he doesn't. He doesn't have any
23 patience. That's what caught my attention. And
24 because I don't feel that when parties agree to settle
25 their disputes through a procedure that involves, or

1 is designed to involve, economy and saving time, to
2 have a patient trier of fact that's going to listen to
3 all kinds of frivolous and irrelevant procedural
4 issues, I don't feel benefits the parties to the
5 litigation.
6 And I'm, again, familiar with Mr. Esser.
7 He's got broad experience, but particularly in
8 contract law, in civil litigation, in agricultural
9 law, in farm leases litigation, and I know him to be
10 very knowledgeable and a person that has the unique
11 skill of focusing on the real issues, identifying the
12 real issues, cutting through the irrelevant and the
13 frivolous, and he has an amazing ability to do in one
14 hour what would take me and a lot of lawyers and
15 whatnot, he can do in an hour what some of us it takes
16 eight hours. And he's extremely independent.
17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner and he had been, I'm sure I'm -- I think
24 Mr. Ferguson was in the firm at the time. I didn't
25 know how long ago that was; I'm hearing now it was

1 five years ago. And the evidence here is that he
2 wasn't in that firm at the time the lease that's in
3 dispute here was drafted.
4 And since whenever the dissolution of the
5 partnership or whatever it was, the separation,
6 occurred, maybe one reason I didn't immediately
7 remember that Libey and Esser were partners is that I
8 don't know how many cases they've come in here and had
9 pretty good knock-down, drag-out fights and it hasn't
10 affected their ability to advocate against one another
11 very zealously for the positions of their parties
12 here.
13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.

1 And we don't have a case here where the
2 arbitrator went from the firm to -- or one of the
3 lawyers, to the position of arbitrator. There was a
4 "divorce," I think I heard the term. I don't know
5 what happened there. It doesn't matter.
6 So, I am not going to -- I don't think
7 there's any legal basis at this point for -- I'm not
8 going to disqualify or reconsider my designation of
9 Mr. Esser.
10 Now, he does have some duties and one is
11 to be fair and impartial. Just because the two
12 attorneys here, the two sides, picked an arbitrator,
13 they've got a duty to be independent. You've
14 selected, essentially, a judge. And the person that
15 each side selects, I'm sure you think that there's
16 some advantage that you may have as a result of that.
17 But their role is to be neutral, fair, impartial, and
18 independent, and they have a legal duty to do that,
19 all three them, even the ones that each of you have
20 selected here, and they have other duties.
21 So, again, I don't think there's any
22 legal basis to disqualify Mr. Esser. I'm not going to
23 do that. I think he is particularly suited to be an
24 arbitrator in this particular case. But, by the same
25 token, I'm going to not bar or prohibit Mr. Lockwood

1 or the Honns here from challenging him in the
2 arbitration process or inquiring as to whether he
3 feels he should -- he has any question as to his
4 impartiality.
5 And he may elect to recuse for, among
6 other reasons that I've heard here, I'm hearing he may
7 have -- his present firm, someone from his present
8 firm, he or Mr. Sandberg, may have not represented the
9 Garrett side but represented the Honns. So, he may
10 say, "Hey, I can't because I know something special
11 about the Honns or something that might affect my
12 ability to be fair."
13 So, I'm not disqualifying him, but it
14 might be an issue to raise to him in the process of
15 arbitration. And because of the possibility he may
16 recuse, and I think that might be a real possibility
17 here for the reasons I've stated, was an association
18 in there, with both sides, I think, to expedite
19 things, rather than have you make motions, spend more
20 money, come back before the court with more argument
21 on, "Well, Esser can't do it, appoint somebody else,"
22 I'm going to appoint some alternates.
23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

1 again experienced, a lot of farm experience. He
2 practices in Whitman County, has offices in Whitman
3 County on a part-time basis, and he has a main office
4 in Davenport. He's got, like, seven offices, his
5 firm. And he has ag. expertise and lease expertise,
6 farm lease, and he grew up on a farm.
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop because he's not out and about and he's
12 not a litigator, with a lot of farm experience, even
13 raises apples himself.
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time. Same
17 reason: a lot of experience and Whitman County farm
18 experience and lease experience.
19 So, I'm trying to keep you gentlemen out
20 of court, get you to arbitration, so keeping Esser
21 with three alternates. And not that I don't like
22 seeing the two of you or tired of this case, but I
23 feel sorry for your clients. They need to get to the
24 merits and not spend a lot of money on all of these
25 procedural issues.

1 MR. FERGUSON: Judge, do you have a
2 decision on attorneys fees?
3 THE COURT: And attorney fees, there's --
4 I'm going to deny the requests under CR 11. And the
5 prevailing party, I think, under the lease, in any
6 dispute gets attorneys fees. I'm going to leave that
7 up to the arbitrators as to who ultimately prevails,
8 not who prevails on each individual skirmish.
9 MR. LOCKWOOD: Thank you, your Honor.
10 (The hearing concluded at 9:17 a.m.)
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1 REPORTER'S CERTIFICATE

2

3 I, Michael S. Kuplack, a Certified court Reporter
4 and a Notary Public in and for the State of
5 Washington, do hereby certify:
6 That the proceedings were recorded by the court
7 and thereafter, a CD was provided to me and
8 transcribed to the best of my ability; that I am in no
9 way related to any party to the matter, nor to any
10 counsel, nor do I have any financial interest in the
11 event of the cause.
12 WITNESS MY HAND THIS 9th day of December, 2014.
13
14 _____
Michael S. Kuplack
15 CCR No. 2750
Notary Public in and for the
16 State of Washington, Spokane County.
Commission expires August 27, 2016.
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7th (1)
14:1

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8:34 (1)
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EXHIBIT "B"

COPY
OCT 1 4 2014

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 DECLARATION OF J. GREGORY LOCKWOOD IN SUPPORT OF MOTION FOR RECONSIDERATION AND OBJECTION TO APPOINTMENT OF TIMOTHY ESSER AS A THIRD ARBITATOR PURSUANT TO RCW 7.04a.110

I J. Gregory Lockwood am the attorney of record for the above named defendant and make this declaration from my personal knowledge and under penalty of perjury under the laws of the State of Washington.

1. The court has indicated that in the event the parties named arbitrators are unable to choose a neutral 3rd arbitrator the court will appoint attorney Timothy Esser as the 3rd neutral arbitrator.

2. Timothy Esser was nominated by the plaintiff's counsel indicating that he would be a fair arbitrator.

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3. Upon returning to my office I inquired about Timothy Esser and found that Mr. Esser was a prior partner in the law firm of LIBEY, ENSLEY, ESSER & NELSON, PLLC.

4. The letterhead of the above referenced law firm clearly indicated that Timothy Esser was a partner in the firm along with Gary Libey. See attached copy of Letterhead dated March 6, 2008 marked as Exhibit "A".

5. Further, the Law firm which represents the plaintiff LIBEY & ENSLEY, PLLC, currently includes all members of the law firm LIBEY, ENSLEY, ESSER & NELSON, PLLC, except for Timothy Esser. See Law firm internet posting marked as Exhibit "B".

6. Additionally, prior to Timothy Esser forming the law firm of Esser & Sandberg he worked in Pullman as part of the firm of NUXOLL, LIBEY, ENSLEY & ESSER PLLC, See news article marked and attached as Exhibit "C".

7. Due to the close relationship with the plaintiff's counsel and law firm it is requested that he be withdrawn from the court's intended choice as 3rd neutral arbitrator in this case.

8. The appointment of Timothy Esser would be prejudicial to the defendants due to his close relationship with the plaintiff's law firm and raises issues if clear bias.

Dated this 9th day of October, 2014

J. GREGORY LOCKWOOD,

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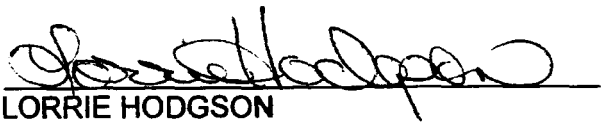
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	____X____ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.



LORRIE HODGSON

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EXHIBIT A

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Attorneys at Law
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
Fax: (509) 334-2205
Email: nleen@pullman.com
Website: www.pullmancolfaxlawyers.com

BRUCE ENSLEY
TIMOTHY ESSER* / **
GARY J. LIBEY*
GUY C. NELSON*
ROGER J. SANDBERG

*ALSO ADMITTED IN IDAHO
**ALSO ADMITTED IN OREGON

Of Counsel: Wesley A. Nuxoll

COLFAX OFFICE
409 NORTH MAIN
P.O. Box 619
Colfax, Washington 99111-0619
Phone: (509) 397-4345
Fax: (509) 397-3594

March 6, 2008

HAND DELIVERED

To: University Appeals Board
Office of Student Conduct

Re: Alpha Kappa Lambda Fraternity

This letter serves as our appeal of the Conduct Board's findings against Alpha Kappa Lambda Fraternity in a notice dated February 21, 2008, copy attached. We have authorized our attorney, Timothy Esser, to hand deliver this.

In accordance with the instructions of your February 21st letter, we offer our appeal of the Conduct Board's initial order on the following the grounds:

1. a procedural error which materially affected the decision;
2. The decision was not supported by substantial evidence;
3. The severity or appropriateness of the sanctions.

1. **Procedural errors which materially affected the decision**

Errors in procedure materially affected the decision by failing to provide accused student a reasonable opportunity to prepare and to present a response to those allegations. WAC 504-406-27 (2)(a).

The notice provided by the Office of Student Conduct, in a letter dated February 5th (exhibit A) did not comply with the clear and unambiguous guidelines of WAC 504-26-403 (2). Specifically it omitted *'the approximate time and place of the alleged act that forms the factual basis for the charge of violation'; 'a list of witnesses who may be called to testify, to the extent known'* and *'a description of all documentary and real evidence to be used at the hearing, to the extent known...'*

WAC 504-26-403 (2) outlines the elements of this notice using "shall include" which WAC defines as being utilized in the imperative sense;

(2) The written notice shall be completed by the conduct officer and shall include:

(a) The specific complaint, including the university policy or regulation allegedly

violated;

(b) The approximate time and place of the alleged act that forms the factual basis for the charge of violation;

(c) The time, date, and place of the hearing;

(d) A list of the witnesses who may be called to testify, to the extent known;

(e) A description of all documentary and real evidence to be used at the hearing, to the extent known, including a statement that the student shall have the right to inspect his or her student conduct file.

(3) Time for hearings.

By denying the accused the specific information related to the act that formed the factual basis for the accusation, denying the accused the list of witnesses that would be called and denying the accused access to the evidence that would be used against the accused, this error prevented AKL from having a reasonable opportunity to prepare and to present a response to those allegations. [WAC 504-406-27 (a)]

Further, the Conduct Board considered evidence not presented by witnesses at the hearing, as well as ex parte communication by Chris Wuthrich, who was not identified as a witness, Nick Hupka, who was not identified as a witness, Enrique Silva, who was not identified as a witness and Brandon Mueller, who was not identified as a witness.

2. **The decision was not supported by substantial evidence;**

Whether there were facts in the case that, if believed by the fact finder, were sufficient to establish that a violation of the standards of conduct for students occurred. WAC 504-26-407 (2) (b).

The Conduct Board's finding of facts does not provide sufficient evidence to sustain the charge of possession, use or distribution of illegal drugs on chapter property or in the course of a chapter function. The record of the conduct hearing does not include facts that support this charge. No evidence was presented that would subject the determination that the fraternity controls and is responsible for activity at "The Joint." The "joint" is simply an off campus residence rented by students, not the fraternity.

That the fraternity took action to expel members based on their individual conduct, off chapter property and not during a chapter function, is not sufficient to find the fraternity responsible for the charge. In fact it suggests to the contrary, that alleged actions were committed by individuals and responded to appropriately by the fraternity.

Further, allegations of an arrest for the actions of individuals at an off campus private residence not owned or controlled by the fraternity does not support a claim that drugs were used, possessed or distributed on fraternity property.

Finally, the allegations that non-members, photographed wearing t- shirts produced by the fraternity, were arrested months later on drug charges does not support the charge that drugs were used, sold or distributed on the property. The T-shirts had no Fraternity insignia on them and were distributed to members and non-members during a move-in week at WSU.

3. **The severity or appropriateness of the sanctions.**

Loss of recognition for five years is too severe and inappropriate given the charges and findings of fact.

The University's policies and procedures do not support the immediate removal of freshman in the event that a fraternity fails to provide a university approved live in advisor. The fraternity presently has in place a professional staff member in that capacity. **The Fraternity Organization Agreement identifies that failure to provide a sufficient live-in advisor will result in the loss of freshmen housing privileges the following semester, not the current semester.**

Further, the act of loss of recognition for allegations against individual members and non-members of the fraternity, which allegedly occurred off fraternity property and not at fraternity functions, is not supported by precedent or policy.

Further, such act is not in the best interest of promoting healthy and ideal living environments on campus, and prevents the University from conducting important oversight and educational programming to the living group. With the loss of recognition, the fraternity can continue to operate without freshman living in the property, yet the University Office of Greek Life cannot conduct such important and vital functions as monitoring the chapter's grades, social activities, recruitment activities and University required participation in educational programming.

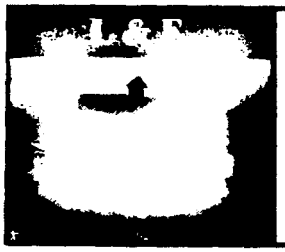
A fair and appropriate punishment would keep the fraternity within the supervision of the University, while holding the chapter to strict standards for compliance with all University regulations, and require the chapter to demonstrate clear and convincing steps taken in conjunction with the University, the National Fraternity and the fraternity alumni board to ensure the chapter meets the standards expected of all WSU students, fraternities and living groups.

Alpha Kappa Lambda Fraternity
700 NE California, Pullman, WA

By _____
Mike Wood, Chapter President

Attachment

EXHIBIT B



LIBEY & ENSLEY, PLLC

Attorneys at Law

Serving Eastern Washington and Northern Idaho

Colfax Office:
North 409 Main Street
Colfax, WA 99111

Phone: (509) 397-4345
Fax: (509) 397-3594

Welcome
to Libey & Ensley, PLLC.

Our law firm was established in 1890, and continues to practice today in the greater Whitman County area.

We are proud of our reputation for providing a wide variety of specialized legal services.

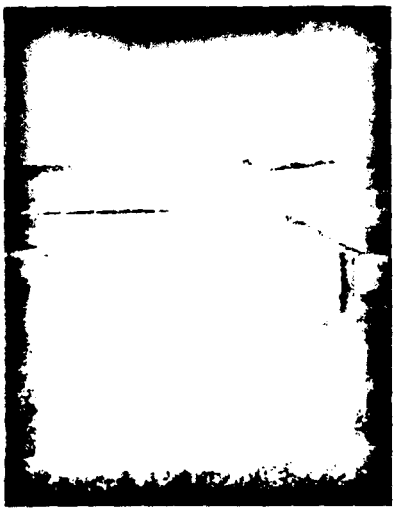


EXHIBIT C

Five area attorneys have pooled their resources to expand a Colfax law firm and are adding a Pullman office as of June 1.

Wesley A. Nuxoll, Gary J. Libey, Bruce Ensley and Timothy Esser are forming Nuxoll, Libey, Ensley & Esser and have hired Leslie A.M. Cloaninger as an associate with the new firm. It will specialize in business, banking, estate planning, probate, real estate, land use, taxation, civil and criminal litigation and municipal law, Libey said.

Nuxoll and Libey have had a joint Colfax practice for about 15 years. Ensley has been with Hickman, Webster & Ensley since 1976. Tim Esser is a former Whitman County deputy prosecutor, had his own firm, and most recently has been with Irwin, Myklebust, Savage, Brown & Esser.

As well as adding a Pullman office on Kamiaken Street, the new firm will establish offices in Endicott, Lacrosse and Rosalia.

Nuxoll, an Idaho native, graduated from Gonzaga University School of Law in 1954 and has practiced in Whitman County since 1956. He was adjunct professor at Gonzaga from 1973 to 1975 and his practice emphasizes estate planning, probate, real estate, civil litigation and banking.

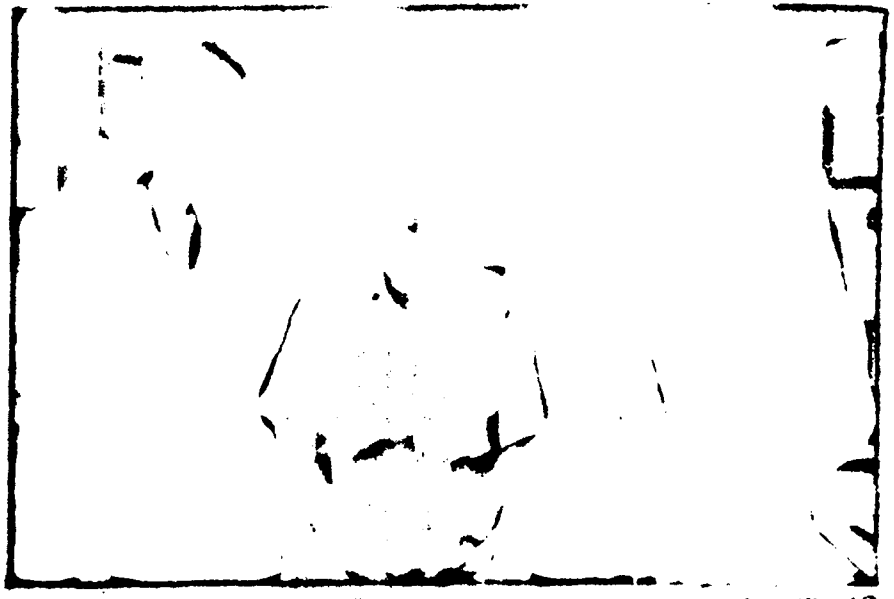
Libey, who was born in Spokane, graduated from Gonzaga in 1976 and has practiced in Whitman County since 1976. He was a part-time Whitman County District Court judge from 1979 to 1982.

As well as being a Whitman County Superior Court Commissioner, he is city attorney for Colfax, Uniontown, Rosalia, Malden, Endicott, and Lacrosse. His specialties include estate planning, probate, real estate and civil litigation.

Ensley, a Colfax native, earned his law degree at Willamette University College of Law in 1976. He joined the Colfax firm of Hickman and Webster in 1976 and became a partner in 1978. In addition to working for private clients, Ensley is general counsel for the Port of Whitman County and specializes in business and tax planning, probate and trust administration, and estate and financial planning.

Esser, who was born in Spokane, earned his law degree from Gonzaga where he spent a year on the law review. He has practiced law in Whitman County since 1977 and specializes in civil and criminal litigation, real estate and land use.

Cloaninger is also a Spokane native who attended Washington State University and earned her law degree from Gonzaga. Her current practices covers domestic relations, criminal law and bankruptcy.



SHELLY HANNA PHOTO

UNITED IN LAW: (from left) Timothy Esser, Gary Libey, Leslie Cloaninger, Wesley A. Nuxoll and Bruce Ensley have formed a new law firm, Nuxoll Libey Ensley & Esser.

EXHIBIT "C"

I, KHANI TAYLOR,

ON OR ABOUT 29 OCT 2014 I WAS DRIVING SOUTH ON MAIN ST IN COLFAX AT APPX. 11:00am. WHILE I WAS STOPPED FOR TWO PEOPLE IN THE CROSS WALK BY STEVE'S GLASS I OBSERVED MR. LIBEY AND MR. ESSER WALKING DOWN THE STREET TOGETHER. I HAVE SPENT MOST OF MY 40 YRS LIVING IN COLFAX SO IT WAS NOT A SHOCK TO ME TO SEE THE TWO MEN TOGETHER, WHAT WAS A SHOCK WAS THE FACT THAT I HAD RECENTLY HEARD THAT THEY HADN'T SEEN OR SPOKEN TO EACHOTHER SINCE MR. ESSER'S RETIREMENT. I SEE THEM, ALONG W/ JUDGE FRAISER, REGULARY FREQUENTING THE LOCAL RESTAURANTS.

- Acknowledgment by person signing in an individual capacity:

State of Washington
County of Whitman

I certify that I know or have satisfactory evidence that [illegible] person) is the person who appeared before me, and [illegible] acknowledged that he/she signed this instrument and [illegible] to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: 11/12/14

(Signature of Notary) (Seal/Stamp of Notary)

Notary Public — State of Washington
My Appointment Expires: 4-9-18

KATHERINE ANN WRIDE
COMMISSION EXPIRES
NOTARY
PUBLIC
4-9-18
STATE OF WASHINGTON

X Khani Taylor Date 12 Nov 2014

RECEIVED
FEB 06 2015
LIBERTY, ENSLEY & NELSON

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 AMENDMENT TO DEFENDANTS MOTION TO VACATE ARBITRATION AWARD ADDING RCW 7.04A.230(1)(c) AND (d) AND DECLARATION IN SUPPORT THEREOF

The defendants amend their motion to vacate arbitration award to add RCW 7.04A.230(1)(c) and (d) to its motion.

RCW 7.04A.230(1)(c) reads:

> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> (d) An arbitrator exceeded the arbitrator's powers;

FILED
FEB 6 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

The neutral arbitrator Mr. Timothy Esser refused to consider the declaration statements of Frank Garrett in his decision regarding the issue of consideration.

ORIGINAL

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Mr. Esser drafted the arbitration decision. Mr. Esser seemed to focus on two issues relating to consideration. (1)The option being an integrated contract and (2) that the option was supported by consideration.

The decent of the arbitrator Frank Gephardt addresses the issue of the contract being integrated.

However, Mr. Esser has intentionally ignored the evidence produced by the defendant at the summary Judgment hearing regarding statements made by Mr. Frank Garrett in his December 14, 2010 deposition by Mr. Moorer. Mr. Frank Garrett was as clear it can be made that the lease was not consideration for the option and that he was negotiating putting up hay as compensation for the option. See attached Exhibit "A"

In the December 14, 2010 deposition Mr. Garrett stated in his deposition at page 14 and beginning at line 14 that:

14. A. And I also interjected that for compensation for
15. putting up the hay, We would be interested in an option to
16. purchase.

Mr. Honn did not agree nor did he respond to this offer

Mr. Garrett stated in his deposition at page 16 and beginning at line 18 that:

18. A. I just threw that statement out . And there was
19. no response from Larry Sr.

Nor was there a response from Charlotte Honn.

Frank Garrett's deposition was submitted as evidence at the arbitration summary judgment hearing.

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Further the uncontroverted declaration of Charlotte Honn indicated that the defendant did not receive any consideration for the option. See the attached Declaration of Charlotte Honn marked as Exhibit "B"

The plaintiff submitted no evidence to the arbitration panel in opposition to the plaintiff's motion.

The deposition testimony of Frank Garrett coupled with the declaration of Charlotte Honn at a minimum create a dispute of material fact as to the issue of consideration and rebuts Mr. Esser's ruling on consideration.

Mr. Esser following the courts October 24, 2014 comments on the evidence on the issue of Res Judicata and found that the Honns should have raised the issue in the prior arbitration. Mr. Esser misapplied Washington law and abused his power by intentionally mischaracterizing an affirmative defiance to the plaintiff's specific performance claim.

The time line on this issue is as follows:

September 14, 2010	CASH RENT FARM LEASE WITH OPTION TO PURCHAE was signed by both Garrett Ranches, LLC and the Larry Honn Family Trust, LLC.
December 20, 2010	Lease and option were held to be valid by arbitration panel. Option fully enforceable, **if option exercised at this time.** **Garrett Farms, LLC., DOES NOT EXERCISE OPTION.**
December 11, 2011	Continued arbitration regarding terms of Sale agreement. **Garrett Farms, LLC., DOES NOT EXERCISE OPTION.**

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February 9, 2012	Larry Honn Family Trust, LLC., gave the plaintiff NOTICE OF WITHDRAWL OF OPTION TO PURCHASE CONTAINED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHAWSE. Effect of notice of withdrawal of option terminated plaintiff's right to exercise the option. **OPTION NOLONGER ENFORCABLE OR VALID AS OF THIS DATE.** Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 220 P.2d 328 (Wash. 1950) **Garrett Farms, LLC., DOES NOT EXERCISE OPTION.**
May 5, 2014	Plaintiff attempts to exercise withdrawn option. **OPTION NOLONGER ENFORCABLE OR VALID DUE TO IT HAVING BEEN WITHDRAWN.**

The briefing provided clearly indicates that at the time of filing the Notice of Withdrawal of Option there was no dispute and no cause of action had accrued.

The plaintiff had not at that time attempted to exercise the option. There was no dispute between the parties at that time as the Garretts could have chosen not to exercise the option. Since the arbitration agreement only requires the arbitration of disputes the issue was not ripe for arbitration.

Additionally, the withdrawal of the option is not a claim or cause of action. It is an affirmative defense to the plaintiff's claim for specific performance (attempt to enforce the option).

The neutral arbitrator created law in regard to the option seemingly requiring the Honns to file their Notice of Withdrawal earlier which is inconsistent with Washington law. In Whitworth v. Enitai Lumber Co., 36 Wash.2d 767, 770-71, 220 P.2d 328 (1950) the court held:

> If no consideration passes, the transaction resolves itself into a mere offer which may be withdrawn by the **option or at any time Before acceptance by the optionee**.

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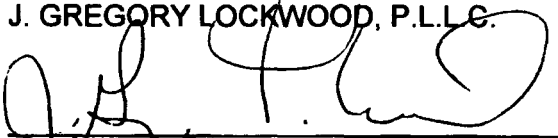
Mr. Esser had a goal in mind and fashioned his decision accordingly. As such the arbitration award should be vacated.

Dated this 6th day of February, 2015

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

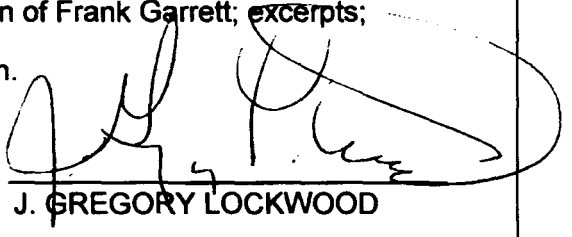
DECLARATION

I, J. Gregory Lockwood, am the attorney of record for Larry Honn Family Trust, LLC., and make this declaration from my personal knowledge under penalty of perjury under the laws of the State of Washington.

The following exhibits are attached to the Defendant's Amendment To Defendants Motion To Vacate Arbitration Award Adding Rcw 7.04a.230(1)(c) and (d) and Declaration in Support Thereof:

Exhibit "A"- December 14, 2010 deposition of Frank Garrett; excerpts;

Exhibit "B" - Declaration of Charlotte Honn.



J. GREGORY LOCKWOOD

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CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on February 6, 2015, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-3594 fax	_____ U.S. MAIL _____ FACSIMILE ____X____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED February 6, 2015.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
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Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

EXHIBIT A

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF WHITMAN
3
4 GARRETT RANCHES LLC, a)
Washington Limited)
5 Liability Company,)
)
6 Petitioner,) No. 10-2-00293-4
)
7 vs.)
)
8 LARRY HONN FAMILY LLC, a)
Washington Limited)
9 Liability Company,)
)
10 Respondent.)
_____)
11
12
13 DEPOSITION OF FRANK D. GARRETT
14 Taken at the instance of the Respondent
15
16
17
18 December 14, 2010
19 1:25 p.m.
20 North 409 Main Street
21 Colfax, Washington
22
23 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
24 1312 N. Monroe Street
Spokane, Washington 99201
25 (509) 456-0586 - (800) 358-2345

1 and specific questions about the irrigation, what the power
2 was for the year to irrigate the ground, the condition of
3 the irrigation pumps, who they got the electricity from --
4 Big Bend Electric -- water rights were a concern, which
5 they couldn't answer that question.
6 We talked a little about EPA and their concern
7 about, we may have to fence off the rivers and creeks,
8 especially if cattle were watering.
9 Liability insurance came up. We were going to
10 check to see if -- Charlotte wasn't sure whether they were
11 going to have to carry a policy, and we checked into that
12 and found out that both of us needed to carry a policy.
13 Q. Okay.
14 A. And I also interjected that for compensation for
15 putting up the hay, we would be interested in an option to
16 purchase.
17 The meeting went very cordial and Larry said,
18 "Why don't we sit down and sign something up right now?" I
19 said, "No. Let me contact my attorney, and for the
20 protection of both parties, have it done right." They were
21 in agreeance with that.
22 Q. Okay. So, when you talked about the carrying
23 capacity, did you talk about the number of cows that they
24 have on the place?
25 A. Yes.

1 A. Soil Conservation Service.
2 Q. So, it's Soil Conservation Service. Because, I
3 was thinking of DNR, that that's more of a DNR issue.
4 A. Could be.
5 Q. Do you know?
6 A. Not for sure.
7 Q. Okay.
8 A. I would think you were correct. Department of
9 Natural Resources.
10 Q. Okay. And, then, did you talk about whether or
11 not any of the ground was in CRP?
12 A. No.
13 Q. Okay. And you say you talked about liability
14 insurance.
15 I'm curious. You're the only one that mentioned
16 so far, compensation for putting up hay would be the option
17 of purchase. Tell us about that?
18 A. I just threw that statement out. And there was
19 no response from Larry Sr.
20 Q. Okay. Was there a response from Charlotte or
21 Larry Jr.?
22 A. Larry Jr.
23 Q. What did Larry Jr. say?
24 A. "Dad, did you hear what Frank said?"
25 Q. How did Dad respond?

1 A. No response.
2 Q. Was that the only time that Larry Jr. said
3 something to Dad that there was no response?
4 A. Yes.
5 Q. I'm going to stop you there for a minute. I want
6 to go back to the field. Yesterday, Mr. Honn appeared to
7 be somewhat agitated, Larry Sr., even though he's not Larry
8 Sr. Would you agree with me?
9 A. Yes.
10 Q. When you talked to him in the field, did he
11 express himself the same way when he was -- You said that
12 he was upset over Larry Jr. not getting the work done, so
13 on and so forth. Did he express himself in the same type
14 of mannerisms?
15 A. Yes. And also at that August 24th meeting.
16 Q. In what way?
17 A. He degraded his son to the point where I was
18 appalled and embarrassed to be in the room with him.
19 Q. In what way did he degrade his son?
20 A. His work ethics, water not being changed,
21 equipment not being repaired.
22 Q. So, he demeaned him?
23 A. Yes.
24 Q. Belittled him?
25 A. Yes.

EXHIBIT B

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendants.	NO. NO. 10-2-00293-4 DECLARATION OF CHARLOTTE HONN

I, Charlotte Honn am one of the managing members of the Larry Honn Family Trust, LLC., the named defendant in the above captioned action and make this declaration from my personal knowledge under penalty of perjury under the Laws of the State Washington.

1. On September 14, 2010 a farm lease captioned CASH RENT FARM LEASE WITH OPTION TO PURCHASE was signed by both Garrett Farms, LLC and the Larry Honn Family Trust, LLC., See copy of farm lease attached as Exhibit "A and incorporated by reference.

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

2. The farm lease states a mouthy rent of $2000.00 in exchange for the land, farm house, barn, Irrigation equipment and water rights.

3. The Larry Honn Family Trust, LLC was required under the lease to pay all taxes or any other encumbrances on the property. The Garrett Ranches, LLC were to pay only the rent payment and no addition monies for any other purpose.

4. The first rent check was issued by Garrett Farms, LLC, on October 15, 2010 in the total amount of $2000.00 the amount stated in the lease. See attached copy of Check marked as Exhibit "B and incorporated by reference. At no time were additional funds paid by Garrett Farms, LLC.

5. Immediately following the lease was signed problems arose which were identified in a September 30, 2010 letter from attorney Mark Moorer to Gary Libey See attached copy of letter marked as Exhibit "C" and incorporated by reference. This letter identifies the dispute between the parties at the time.

6. In response the Garrett Ranches, LLC filed for arbitration.

7. Following arbitration an arbitration award was issued on December 20, 2010 in which the lease and option were held to be valid. See attached copy of award marked as Exhibit "D" and incorporated by reference. The issue of consideration for the option was not discussed or litigated in the arbitration as the entire lease was at issue due to a failure to have a meeting of the minds on the lease.

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J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

8. We were in hopes that the entire lease would be revoked by the arbitrators but it was not. As a result we choose to withdraw our option as we were not compensated for the option in any way. On February 9, 2011 we sent by certified mail and by hand delivery to Frank Garrett NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTAINED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE. See attached copy of Withdrawal of Option to Frank Garrett marked as Exhibit "E" and incorporated by reference

9. The withdrawal of the option was also recorded with the Whitman County Auditor's office. See attached copy of Recorded Withdrawal of Option marked as Exhibit "F" and incorporated by reference

10. There was no response from Garrett Ranches, LLC., to the Notice of Withdrawal of the option to Frank Garrett

11. A copy of the return of service from Joshua Garrett was apparently not delivered by certified mail so a follow-up of the Notice of Withdrawal of the Option was resent by certified mail and delivered to Joshua Garrett on November 15, 2013. See attached copy of Notice Withdrawal of Option to Joshua Garrett marked as Exhibit "G" and incorporated by reference

12. There was no response from Garrett Ranches, LLC., to the Notice of Withdrawal of the option to Joshua Garrett.

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

13. On May 5, 2014 we received a letter from Garrett Ranches, LLC., that they were exercising the option in the lease. See attached copy of May 5, 2014 letter marked as Exhibit "H" and incorporated by reference .

14. Since we had withdrawn the Option prior to the Garratt Ranches LLC.'s Notice of exercising the Option, the option was no longer open and we responded with a letter dated May 13, 2014 indicating the option was no longer available. See attached copy of May 13, 2014 letter marked as Exhibit "I" and incorporated by reference.

15. On July 2, 2014 the Garrett Ranches LLC., asked for arbitration indicating that " All matters related to Garrett Ranches, LLC., exercise of the Option" were to be arbitrated. This would include the Larry Honn Family Trust, LLC.'s claim of lack of consideration for the option and the ability to withdraw the option under Washington law. See attached copy of July 3, 2014 letter marked as Exhibit "J" and incorporated by reference.

16. To ensure our issues would be covered we demanded arbitration as well on September 29, 2014. See attached copy of September 29, 2014 letter marked as Exhibit "K" and incorporated by reference.

17. We have withdrawn the option to purchase based upon our rights under Washington law. As such it is requested that the arbitration panel grant our motion for summary judgment as no material issues of fact are in dispute and dismiss Garrett Ranches LLC's claim to enforce the option. The date

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J. Gregory Lockwood, PLLC
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Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

of the withdrawal of the option and Garrett Ranches LLC's letter attempting to exercise the option are not in dispute.

DATED at Spokane, Washington this 21 day of November, 2014.

CHARLOTTE HONN

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on November 24, 2014 I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Frank Gebhardt Attorney at Law 421 West Riverside Ave. Suite 1400 *Spokane*, WA 99201	___X___ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Read Smith 916 West Willapa Avenue Spokane WA 99224	___X___ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Timothy Esser Attorney at Law 520 East Main Street Pullman, WA 99163	___X___ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619	___X___ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____

Dated this 24 day of November, 2014.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

EXHIBIT A

CASH RENT FARM LEASE WITH OPTION TO PURCHASE

701653
Lease Reg Fee: $ 124.00
05/21/2010 10:02 AM Page: 2 of 13
Eunice L. Carter, Whitman County Auditor

THIS CASH RENT FARM LEASE WITH OPTION TO PURCHASE, made and entered into the day and year last herein written, by and between LARRY HONN FAMILY LLC, a Washington limited liability company, (the "Lessor"), and GARRETT RANCHES LLC, a Washington limited liability company, (the "Lessee");

W I T N E S S E T H :

The Lessor does hereby lease to the Lessee, and the Lessee does hereby lease from the Lessor, certain farmland (the "Property") upon the following terms:

1. Property:

a. Farmland: The Property currently consists of two thousand eight (2,008) acres, including one hundred twenty (120) acres of irrigated farmland out of a total of three hundred thirty-five (335) acres of tillable farmland, located in Whitman County, Washington, described as follows:

Parcel Nos.	2-0000-39-16-04-2901
	2-0000-39-16-04-1390
	2-0000-39-16-04-1900
	2-0000-39-17-33-9000
	2-0000-39-17-32-9000
	2-0000-39-16-03-2900
	2-0000-39-16-03-1902
	2-0000-39-17-31-1900
	2-0000-39-17-31-4900
	2-0000-39-17-28-3890
	2-0000-39-17-28-8900
	2-0000-39-16-05-1690
	2-0000-39-16-05-2690

b. Irrigation Equipment: This Lease shall include all irrigation equipment currently owned by the Lessor located on the Property.

c. Water Rights: This Lease shall also include the right of the Lessee to utilize all water rights with respect

to the Property.

2. Term:

a. Initial: The initial term of this Lease shall be for a period of Five (5) years commencing on November 1- 2010 and terminating on November 1- 2015, or upon completion of harvest in 2015, whichever date first occurs.

b. Effective Date: This Lease shall become effective upon approval of an operating line of credit by the Lessee. If annual rent payment is open for review each year.

3. Rent: Rent for the Property shall be the annual cash sum of Twenty-four Thousand Dollars ($24,000.00, ~~which shall be due and payable before the ____ day of _____, commencing on~~ payable $2000.00 a month commencing November 1, 2010

4. Option to Purchase: During the term of this Lease, the Lessor hereby grants to the Lessee an option to purchase the Property for the sum of Four Hundred Thousand ($400,000.00). The Lessee may exercise this option at any time during this Lease upon 30 days' written notice. If the Lessee exercises this option, then the parties shall execute a Contract of Sale in such form as is attached hereto as Exhibit "A". Any crops growing on the Property at the time of closing shall be included as part of the Property.

5. Lessee's Covenants: The Lessee covenants and agrees:

a. To pay all rental promptly as required;

b. To pay for all seed utilized upon the Property;

c. Not to permit or commit waste on the Property;

d. To farm the Property in a good and farmerlike manner in conformity with approved practices promulgated by governmental agencies in conformity with generally accepted farming practices in the area;

e. To use all reasonable efforts to combat noxious weeds on the Property, including the borders around the

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Lease Rec Fee: $ 124.00
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Eunice L. Coker, Whitman County Auditor

Property, whether the same be annual or perennial;

f. To furnish all labor and machinery necessary to farm the Property in a good and farmerlike manner;

g. To pay for and apply all chemicals and fertilizers for the farming operation;

h. To perform all work to carry out the terms of this Lease in due and proper season without expense to the Lessor, except as hereinafter set forth;

i. To deliver peaceable possession to the Lessor on the termination of this Lease;

j. To allow the Lessor on the Property at all reasonable times for the purposes of inspection of the crops thereon, or for all other reasonable purposes;

k. Not to assign or sublet in whole or in part this Lease, or the rights hereunder, without the prior written consent of the Lessor;

l. Not to burn any stubble or residue, alter waterways nor increase or decrease the current cropland actually farmed without the prior consent of the Lessor; and

m. To keep and maintain all current CRP in the condition required by the Whitman County F.S.A.

6. Lessor's Covenants: The Lessor covenants and agrees:

a. To deliver peaceable possession of the Property to the Lessee for the term of this Lease; and

b. To timely pay all taxes and encumbrances on the Property.

7. Government Payments: The Lessee shall be entitled to receive all farm program payments from the United States Department of Agriculture with respect to the Property, including all CRP payments during this Lease.

8. Weed Control: The Lessee shall utilize such chemicals and other farming methods as are customarily used in the area to control noxious weeds on all of the Property. The Lessee

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Lease Rec Fee: $ 120.00
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shall pay all the costs of noxious weed control on the Property.

9. Environmental Safeguards: The Lessee shall at all times utilize the Property in a manner which will assure its safe, lawful, and healthful use. The parties shall not engage in any activity which may cause or result in air or water pollution or the release of a hazardous substance and shall comply with all environmental laws now or hereafter applicable with respect to the Property. The Lessee may not install any underground tanks. The parties shall defend, indemnify, and hold each other harmless from any expense, claim, or damages resulting from the other's activities (including agents and employees) on the Property. This obligation shall survive the termination of this Lease.

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10. Liability: The Lessee shall maintain a comprehensive farming casualty and public liability insurance policy of not less than One Million Dollars ($1,000,000) single limits, covering all farming operations conducted on the Property. The Lessee does indemnify and hold the Lessor harmless of and from any liability incurred by reason of acts of the Lessee, its agents or employees, in conducting farming operations on the Property.

11. Summerfallow: Upon the expiration of this Lease, if the Lessee has prepared any summerfallow on the Property, then the Lessor shall pay the custom farm rate for such and shall reimburse the Lessee for any fertilizer applied thereto. The Lessee shall keep an accurate accounting of all such farming operations and expenditures, including receipts therefor.

12. Breach of Lease: Time is of the essence of this agreement, and in the event the Lessee shall fail to carry out any of the covenants or agreements herein contained, then, and in such event, the Lessor may, in addition to any other remedy, declare this Lease forfeited and immediately enter the Property and all rights and privileges herein granted shall thereupon terminate as fully as though this Lease had expired by the limitations herein expressed; provided, however, the Lessor shall deliver written notice specifying such violation to the Lessee and the Lessee

shall have thirty (30) days from the date of receipt of such notice within which to perform such agreement and thereby reinstate this Lease. No waiver by the Lessor of strict performance of any one covenant shall constitute a waiver of any subsequent enforcement of such covenant. In the alternative, if the Lessee fails to properly and timely cultivate the Property or harvest the crops thereon, the Lessor, or its agents, shall have the right to enter upon the Property and complete such work, to harvest, thresh and care for such crops and to hold and retain a sufficient portion of the crops of the Lessee to pay therefore; provided, however, the Lessor shall deliver the Lessee written notice of intent to perform such work three (3) days prior thereto and in the meantime the Lessee shall have failed, during said three (3) days, to commence and timely continue performance thereof.

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Lease Rec Fee: $ 124.00
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Eunice L. Coker, Whitman County Auditor

13. Default: The rights hereby granted to the Lessee are personal. They shall not be subject to involuntary transfer or execution, bankruptcy or operation of law. The Lessee shall have no right to assign the Lease or any interest therein, or to sublet all or any part of the Property, or permit management or operation of all or any part of the Property by another without first obtaining the written consent of the Lessor. On any such approved assignment or subletting, the Lessee and every person claiming under this Lease shall be and remain liable for the performance of all of its obligations. On any violation or attempted violation of these provisions, this Lease may be declared in default and the Lessor, at its option, may terminate this Lease.

14. Notices: Service of all demands, notices or other documents from either party to the other shall be by personal service or by certified mail, return receipt requested to the following addresses of the parties, to-wit:

Lessor	Lessee
Larry Honn Family LLC c/o Larry Honn, Sr. P.O. Box 38 LaCrosse, WA 99143	Garrett Ranches LLC c/o Frank Garrett c/o Joshua Garrett P.O. Box 216 Endicott, WA 99125

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15. Arbitration: In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all the powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County, Washington.

16. Litigation: In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

17. Parties Bound: This Lease shall be binding upon the heirs, executors, administrators and lawful assigns of the respective parties hereto.

DATED this 14 day of September 2010.

LESSOR:

LARRY HONN FAMILY LLC

By _____
Larry Honn, Sr., Manager

By _____
Charlotte Honn, Manager

LESSEE:

GARRETT RANCHES LLC

By _____
Frank Garrett, Manager

By _____
Joshua Garrett, Manager

STATE OF WASHINGTON)
)
County of Whitman)

I certify that I know or have satisfactory evidence that LARRY HONN, SR., and CHARLOTTE HONN are the individuals who appeared before me, and said individuals acknowledged that they signed this instrument, were authorized to execute this instrument, and acknowledged it as the managers of LARRY HONN FAMILY LLC, a Washington limited liability company, to be their free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this 14 day of Sept., 2010.

_____
Print Name: Anne L. Lowe
Notary Public in and for the State of Washington, residing at Endicott
My Appointment Expires: June 30, 2012

STATE OF WASHINGTON)
)
County of Whitman)

I certify that I know or have satisfactory evidence that FRANK GARRETT and JOSHUA GARRETT are the individuals who appeared before me, and said individuals acknowledged that they signed this instrument, on oath stated that they were authorized to execute this instrument, and acknowledged it as the managers of GARRETT RANCHES LLC, a Washington limited liability company, to be their free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this 14 day of Sept, 2010.

_____
Print Name: Anne L. Lowe
Notary Public in and for the State of Washington, residing at Endicott WA
My Appointment Expires: June 30 2012

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Lease Rec Fee: $ 124.00
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Eunice L. Coker, Whitman County Auditor

EXHIBIT "A"

CONTRACT OF SALE

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LRPR Rec Fee: $ 124.00
06/21/2016 10:02 AM Page: 9 of 13
Eunice L. Coker, Whitman County Auditor

THIS CONTRACT OF SALE, made and entered into the day and year last herein written, by and between LARRY HONN FAMILY LLC, a Washington limited liability company, (the "Seller"), and GARRETT RANCHES LLC, a Washington limited liability company, (the "Purchaser");

W I T N E S S E T H :

The Seller hereby agrees to sell to the Purchaser, and the Purchaser hereby agrees to purchase from the Seller, the Property hereinafter described (the "Property") upon the following terms, covenants and conditions, to-wit:

1. PROPERTY DESCRIBED:

a. Legal Description: The Property is situated in Whitman County, Washington, and is more particularly described as follows:

Parcel Nos. 2-0000-39-16-04-2901
2-0000-39-16-04-1390
2-0000-39-16-04-1900
2-0000-39-17-33-9000
2-0000-39-17-32-9000
2-0000-39-16-03-2900
2-0000-39-16-03-1902
2-0000-39-17-31-1900
2-0000-39-17-31-4900
2-0000-39-17-28-3890
2-0000-39-17-28-8900
2-0000-39-16-05-1690
2-0000-39-16-05-2690

b. Growing Crops: The purchase price includes any crops growing on the Property as of the date of closing, all irrigation equipment, and water rights.

c. CRP Contract: The CRP contract on the Property will remain in effect and the Purchaser will receive any further CRP payments after closing. The Purchaser shall assume

all responsibilities to keep and maintain the current CRP in a form approved by the F.S.A. office.

2. PURCHASE PRICE: The total purchase price of the Property shall be the sum of Four Hundred Thousand Dollars ($400,000.00).

3. METHOD OF PAYMENT: Said purchase price shall be payable in cash at the time of closing.

4. FINANCING: Seller acknowledges that Purchaser may be financing a portion of the purchase price through a commercial lending institution. This sale is contingent upon Purchaser being approved for said financing upon terms and conditions acceptable to the Purchaser. Purchaser shall forthwith apply for said financing and diligently pursue the same.

5. CONTINGENCY: This sale is also contingent upon review and confirmation of all water rights to the satisfaction of the Purchaser.

6. CONVEYANCE: Title shall be conveyed at closing by warranty deed, reflecting only easements and reservations of record as are acceptable to the Purchaser.

6. CLOSING AGENT: The firm of Libey, Ensley & Nelson, PLLC, Attorneys at Law, is hereby designated and appointed as Closing Agent for this sale. Said Closing Agent shall prepare all necessary documents and pay from monies collected from the parties all costs associated herewith. In making disbursement of the money deposited in trust, said attorneys shall be acting as an escrow agent and shall have a duty to each party to disburse the funds in accordance with this Agreement and any other written instructions of the parties.

7. CLOSING COSTS: The Seller shall pay the excise tax, the title insurance premium, and one-half (1/2) of the Closing Agent's fee and costs. The Purchaser shall pay one-half (1/2) of the Closing Agent's fee and costs, and the recording fee for the Warranty Deed. The Purchaser shall further pay any costs to obtain financing to purchase the Property.

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8. CLOSING: The date of closing this sale shall be on or before 60 days after the Purchaser exercises its option to purchase the Property.

9. TITLE INSURANCE: A standard ALTA owner's policy of title insurance will be purchased through Pioneer Title Insurance Company to the extent of the purchase price provided for herein, reflecting only easements and reservations of record as are acceptable to the Purchaser and the standard exceptions contained in said Commitment.

In the event of a cancellation of this sale, each party shall pay one-half (½) of the cancellation fees charged by the title insurance company.

10. REAL ESTATE TAXES: Real estate taxes payable in the year of closing on the Property shall be prorated between the parties.

11. ENFORCEMENT: If either party finds it necessary to refer this matter to an attorney for enforcement of any of its provisions, it is agreed that the prevailing party shall be entitled, in addition to any other relief granted, for reimbursement of reasonable attorney's fees and, if litigated, for all court costs incurred. Venue of any such action shall be in Whitman County, Washington.

12. PARTIES BOUND: This Agreement shall be, and is, binding upon the heirs, executors, administrators and lawful assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands this _____ day of _____, 2010.

SELLER: LARRY HONN FAMILY LLC

By_____
Larry Honn, Sr., Manager

By_____
Charlotte Honn, Manager

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Lease Rec Fee: $ 124.00
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PURCHASER: GARRETT RANCHES LLC

By_____
Frank Garrett, Manager

By_____
Joshua Garrett, Manager

STATE OF WASHINGTON)
)
County of Whitman)

I certify that I know or have satisfactory evidence that LARRY HONN, SR., and CHARLOTTE HONN are the individuals who appeared before me, and said individuals acknowledged that they signed this instrument, were authorized to execute this instrument, and acknowledged it as the managers of LARRY HONN FAMILY LLC, a Washington limited liability company, to be their free and voluntary act for the uses and purposes mentioned in the instrument.

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Lerta Rec Fee: $ 124.00
06/21/2010 15:02 PM Page: 12 of 13
Eunice L. Coker, Whitman County Auditor

DATED this _____ day of _____, 2010.

_____
Print Name: _____
Notary Public in and for the State of Washington, residing at _____
My Appointment Expires: _____

STATE OF WASHINGTON)
)
County of Whitman)

I certify that I know or have satisfactory evidence that FRANK GARRETT and JOSHUA GARRETT are the individuals who appeared before me, and said individuals acknowledged that they signed this instrument, on oath stated that they were authorized to execute this instrument, and acknowledged it as the managers of GARRETT RANCHES LLC, a Washington limited liability company, to be their free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this _____ day of _____, 2010.

_____
Print Name: _____
Notary Public in and for the State of Washington, residing at _____
My Appointment Expires: _____

EXHIBIT B

GARRETT RANCHES, LLC
PH. 509-657-3387
4151 LEE ROAD, P.O. BOX 216
ENDICOTT, WA 99125

98-753/1251
01570654

1892

DATE 10-15-10

PAY TO THE ORDER OF Larry Honn Family LLC $ 2000.00

Two thousand 00/100 DOLLARS

BANK OF WHITMAN
SPOKANE - PULLMAN - TRI-CITIES - WALLA WALLA - OTHELLO - RITZVILLE
MATTAWA - ROSALIA - POMEROY - WARDEN - ROYAL CITY - LIND - LACROSSE
WASHTUCNA - ENDICOTT - CLARKSTON MAIN OFFICE - COLFAX

MEMO Rent Payment

Frank Gorecki

⑆125107532⑆ 01570 654⑈ 1892

EXHIBIT C

MARK S. MOORER

Attorney at Law in Idaho & Washington

113 N. Jackson Street, P.O. Box 9004, Moscow, ID 83843
Telephone: (208) 882-2539 Facsimile: (208) 882-4490
Email: Mark@farmermark.com

VIA FACSIMILE: (509) 397-3594

COPY

September 30, 2010

Gary J. Libey
Libey, Ensley, Esser & Nelson
P. O. Box 619
Colfax, WA 99111-0619

Re: Larry Honn Family LLC and Garrett Ranches LLC

Dear Mr. Libey:

I have been retained by Larry and Charlotte Honn and Honn Family LLC regarding the lease document you prepared on behalf of Garrett Ranches LLC. The purpose of this letter is to indicate my clients' written desire to repudiate said document.

As I understand the facts, the Honns own a cattle ranch at Endicott. This ranch is primarily managed by Larry, and his son does the physical work. Because of advancing age and health issues the Honns contemplated leasing the property. And I understand Garrett Ranches expressed an interest.

The Honns state that when negotiations occurred the Garretts agreed that their son was to be retained as an employee for five (5) years and the option to purchase was not to occur until the end of the five (5) year lease. The Honns tell me that provisions for annual review of the lease were left out. The Honns tell me there was no Contract of Sale attached as Exhibit "A". And, they tell me that as they were discussing purchase price, discussing the value of pasture land versus building versus irrigated ground that only one of the values was written down.

The Honns told me that after this document was signed a return copy was forwarded from your office with an unsigned Contract of Sale. Further they heard through the rumor mill that there was no intent to lease but simply to buy at a price that is facially ridiculous. Doesn't that value work out to be $195.00 per acre?

Thus, I want to make sure that your client is not moving forward with an attempt to enforce this document. It does not appear to be based on a meeting of the minds nor does it contain all the material items. Consequently my clients do not intend to honor this document and do not intend to allow Garrett Ranches onto their property until an appropriate lease is entered into.

Please forward all future correspondence to my office regarding this matter.

Sincerely,

Mark S. Moorer,
Attorney at Law

MSM/flg
cc: Larry and Charlotte Honn

EXHIBIT D

In re GARRETT RANCHES LLC, A Washington Limited Liability Company,	)	ARBITRATION AWARD
Petitioner,	)	
vs.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Respondent.	)	

This arbitration award is made following an arbitration hearing which took place in Colfax, Washington on December 22, 2010. The arbitrators, having considered all the testimony and exhibits received as evidence at the hearing, make the following award.

1. The Cash Rent Farm Lease Agreement is valid and shall be enforced, subject to the following modifications:

1.1 That property owned by the Honn Living Trust, Tax Parcel No. 2-0000-39-17-28-3890 containing six (6) acres, shall be excluded from the lease and option to purchase.

1.2 The lease shall be subject to that agreement by and between Floyd C. Honn and Bertie J. Honn, husband and wife, and Larry K. Honn and Charlotte Honn dated April 20, 1998, and received as evidence as Exhibit 5.

1.3 The Lessor's livestock shall be removed from all rangeland on the leased premises by May 1, 2011, or such other date as may be mutually agreed to by the parties. Lessor may again place livestock upon the rangeland on October 15, 2011, or such other date as may be mutually agreed to by the parties. Lessor shall remove all livestock from the property by May 1, 2012, or such other date as may be mutually agreed to by the parties.

1.4 Lessor's livestock shall be permanently removed from all tillable ground by February 15, 2011.

1.5 Lessor shall have the hay shed cleaned by June 1, 2011, and the shop and home cleaned by September 1, 2011. Lessee shall be entitled to utilization of these improvements on those same respective dates.

1.6 The term of the lease shall commence November 1, 2010.

1.7 The review contemplated by Paragraph 3 shall be amended to read as follows:

> If the parties are unable to agree upon the annual revision to the rent, the rent for each year commencing November, 2011 shall be adjusted on November 1 of each year, based upon increases, if any, in the Consumer Price Index for all urban consumers, Series CUUR0000SA0, not seasonally averaged ("CPI"). The basis for computing the adjustment in rent shall be the CPI as identified above for the most recent month preceding November for which data is available. The CPI base for the month of November, 2010 is 218.803. If the new CPI is greater than the base CPI, the rent for the next year shall be determined by multiplying the rent for the previous year by the percentage increase, if any, between the base CPI and the new CPI. The resulting amount shall be the rent for the next year. This same adjustment shall be made for each year of the lease. If the Consumer Price Index is replaced by a new federal statistic, the new statistic shall be used in determining any increase in the rent."

2. Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid, subject to the following:

2.1 The parties shall mutually agree upon the terms, covenants, and conditions of a contract of sale consistent with the Cash Rent Farm Lease by January 1, 2012. If the parties are unable to reach an agreement by that date as to the terms, the arbitrators reserve jurisdiction to issue a further arbitration award pertaining to the terms of the proposed contract of sale.

3. Attorney Fees. Each party shall be responsible for their own attorney fees and costs. The arbitrators' fees shall be paid as follows:

3.1 Larry Honn Family LLC shall pay the arbitrator fees of David A. Gittins and one-half of the fees of Dwayne Blankenship.

3.2 Garrett Ranches LLC shall pay the arbitrator fees of Read Smith and one-half of the arbitrator fees of Duane Blankenship.

DATED this 20th day of December, 2010.

Read Smith

Read Smith

David A. Gittins

David A. Gittins

Dwayne Blankenship

Dwayne Blankenship

EXHIBIT E

NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTANED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE

Tenant Name: GARRETT FARM LLC.
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Date: FEBRUARY 9, 2011

Lease property located in Whitman County, Washington described as follows:

Parcel Nos. 2-0000-39-16-04-2901
2-0000-39-16-04-1390
2-0000-39-16-04-1900
2-0000-39-17-33-9000
2-0000-39-17-32-9000
2-0000-39-16-03-2900
2-0000-39-16-03-1902
2-0000-39-17-31-1900
2-0000-39-17-31-4900
2-0000-39-17-28-3890
2-0000-39-17-28-8900
2-0000-39-16-05-1690
2-0000-39-16-05-2690

YOU ARE HEREBY NOTIFIED that the LARRY HONN FAMILY LLC, Lessor, hereby withdraws the **Option to Purchase** contained in the **Cash Rent Farm Lease with Option to Purchase** dated September 14, 2010.

LARRY HONN FAMILY LLC, Lessor

Larry K. Honn, Manager

Charlotte Honn, Manager

7009 0080 0000 7639 8960

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	$ .45	0711
Certified Fee	2.95	01
Return Receipt Fee (Endorsement Required)	2.35	Postmark Here
Restricted Delivery Fee (Endorsement Required)	$0.00	
Total Postage & Fees	$5.75	02/10/2012

Sent To
GARRETT FARM LLC
Street, Apt. No.; or PO Box No.
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
City, State, ZIP+4
Endicott, WA 99125

CERTIFICATE OF SERVICE

I, J. Gregory Lockwood do declare that on February 9, 2012, I caused to be served a copy of the forgoing NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTANED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE to the following listed party via the means indicated:

GARRETT FARM LLC
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

___x_____ U.S. MAIL (CERTIFIED)
_____ FACSIMILE
___X___ HAND DELIVERY
_____ ELECTRONIC DELIVERY
_____ OTHER _____

DATED February 9, 2012.

J. Gregory Lockwood
522 W. Riverside, #420
Spokane, WA 99201

NDER: COMPLETE THIS SECTION

Complete [illegible] plete
tem 4 if Restr[illegible] ed.
Print your name a[illegible] on the reverse
[illegible] we can return the card to you.
[illegible] card to the back of the mailpiece,
[illegible]

GARRETT FARM LLC
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Frank Garrett

☐ Agent
☐ Addressee

B. Received by (Printed Name)
FRANK GARRETT

C. Date of Delivery
2 [illegible]

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

[illegible] Express Mail
☐ Return Receipt for Merchandise
[illegible]

7009 0080 0000 7639 8960

English Customer Service USPS Mobile Register / Sign In

USPS.COM

Search USPS.com or Track Packages

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Track & Confirm

GET EMAIL UPDATES [redacted]

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
70090080000076398960	First-Class Mail®	Delivered	February 13, 2012, 8:44 am	ENDICOTT, WA 99125	Expected Delivery By: February 11, 2012 Certified Mail™ Return Receipt
		Notice Left	February 11, 2012, 9:17 am	ENDICOTT, WA 99125	
		Arrival at Unit	February 11, 2012, 8:48 am	ENDICOTT, WA 99125	
		Dispatched to Sort Facility	February 10, 2012, 6:18 pm	COLFAX, WA 99111	
		Acceptance	February 10, 2012, 2:58 pm	COLFAX, WA 99111	

Check on Another Item

What's your label (or receipt) number?

[redacted]

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Privacy Policy ›
Terms of Use ›
FOIA ›
No FEAR Act EEO Data ›

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Forms & Publications ›
Careers ›

OTHER USPS SITES
Business Customer Gateway ›
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Inspector General ›
Postal Explorer ›

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November 15, 2013

This document is a true and correct copy of records maintained by the US Postal Service showing proof of delivery.

The above declaration is made from my personal knowledge under penalty of perjury under the laws of the State of Washington.

Signed _____ 11/15/13
Spokane Postmaster

POSTMASTER
PO BOX 79
SPOKANE, WA 99210-0079

Help

Product Tracking System

UNITED STATES POSTAL SERVICE

Home | Search | Reports | Manual Entry | Rates/ Commitments | PTS / EDW | USPS Corporate Accounts | September 13, 2013

Track & Confirm Intranet

Delivery Signature and Address

Tracking Number: 7009 0080 0000 7639 8960

This item was delivered on 02/13/2012 at 08:44:00

< Return to Tracking Number View

Signature	**Delivery Section** Frank Garrett FRANK GARRETT
Address	P.O Box 216

Enter up to 10 items separated by commas.

Select Search Type: Quick Search Submit

Product Tracking System, All Rights Reserved
Version: 1.4.0.27

November 15, 2013

This document is a true and correct copy of records maintained by the US Postal Service showing proof of delivery.

The above declaration is made from my personal knowledge under penalty of perjury under the laws of the State of Washington.

Signed Karen K Faulke 11/15/13
Spokane Postmaster

POSTMASTER
PO BOX 79
SPOKANE, WA 99210-0079

EXHIBIT F

Whitman County, WA
Eunice L. Coker, Auditor
400 N. Main
Colfax, WA 99111

AIL TO:
DD, Atty.
:. 420

Receipt: 28263

oduct	Name	Extended
7	Release Option	$73.00
# Pages 2, Document # 721703, Document Info: J GREGORY LOCKWOOD ATTY, Related to Real Estate true		
tal		$73.00
nder (Check)		$73.00
ieck # 2205, Paid By J GREGORY CKWOOD/SPOKANE		

721703
Release Option Rec Fee: $ 73.00
12/06/2013 09:36 AM Page: 1 of 2
Eunice L. Coker, Whitman County Auditor

Thank You

Fri Dec 06 09:36:20 PST 2013 cpitts

CORDING COVER SHEET

DOCUMENT TITLE: NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTAINED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE

REFERENCE NUMBER(S) OF DOCUMENT:

ORIGINAL DOCUMENT AUDITOR'S NO. 701053

PARTIES:

Plaintiff: GARRETT RANCHES, LLC, a Washington limited liability company

Defendant: LARRY HONN FAMILY LLC, a Washington limited liability company

Legal **Description:**

I.	NW Pt Lots 3-4, N of River	10-96/42810
2.	NE-SW¼ S of **River**	10-96/42810
3.	NE-SW¼ N of **River;** Lots 1 & 2	10-96/42810
4.	All of 33	10-96/42810
5.	All S of Co Rd	10-96/42810
6.	NW Lot 4 PT 3 & S½ N of **River**	10-96/42810
7.	NE Lot 2 Pt **N of River**	10-96/42810
8.	NE	10-96/42810
9.	SE	10-96/42810
10.	SW Pt of SW; W½ of SE S of Rd	9-04/55826; 657892
11.	All of SW; W½ of SE S of Rd	10-96/42810
12.	NE¼ Pt Lots 1-2	10-96/42810
13.	NW¼ Pt Lots 3-4 N of Rd	10-96/42810

Assessor's Property Tax Parcel Account Number(s) :
2-0000-39-16-04-2901; 2-0000-39-16-04-1390; 2-0000-39-16-04-1900; 2-0000-39-17-33-9000; 2-0000-39-17-32-9000; 2-0000-39-16-03-2900; 2-0000-39-16-03-1902; 2-0000-39-17-31-1900; 2-0000-39-17-31-4900; 2-0000-39-17-28-3890; 2-0000-39-17-28-8900; 2-0000-39-16-05-1690; 2-0000-39-16-05-2690

Release Option Rec Fee: $ 73.00
12/06/2013 09:36 AM Page: 2 of 2
Eunice L. Coker, Whitman County Auditor

NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTANED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE

Tenant Name: GARRETT FARM LLC.
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Date: FEBRUARY 9, 2011

Lease property located in Whitman County, Washington described as follows:

Parcel Nos. 2-0000-39-16-04-2901
2-0000-39-16-04-1390
2-0000-39-16-04-1900
2-0000-39-17-33-9000
2-0000-39-17-32-9000
2-0000-39-16-03-2900
2-0000-39-16-03-1902
2-0000-39-17-31-1900
2-0000-39-17-31-4900
2-0000-39-17-28-3890
2-0000-39-17-28-8900
2-0000-39-16-05-1690
2-0000-39-16-05-2690

YOU ARE HEREBY NOTIFIED that the LARRY HONN FAMILY LLC, Lessor, hereby withdraws the **Option to Purchase** contained in the **Cash Rent Farm Lease with Option to Purchase** dated September 14, 2010.

LARRY HONN FAMILY LLC, Lessor

Larry K. Honn, Manager

Charlotte Honn, Manager

ORIGINAL

EXHIBIT G

NOTICE OF WITHDRAWAL OF OPTION TO PURCHASE CONTANED IN THE CASH RENT FARM LEASE WITH OPTION TO PURCHASE

Tenant Name: GARRETT FARM LLC.
c/o Frank Garrett
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Date: FEBRUARY 9, 2011

Lease property located in Whitman County, Washington de

Parcel Nos. 2-0000-39-16-04-2901
2-0000-39-16-04-1390
2-0000-39-16-04-1900
2-0000-39-17-33-9000
2-0000-39-17-32-9000
2-0000-39-16-03-2900
2-0000-39-16-03-1902
2-0000-39-17-31-1900
2-0000-39-17-31-4900
2-0000-39-17-28-3890
2-0000-39-17-28-8900
2-0000-39-16-05-1690
2-0000-39-16-05-2690

RIVERSIDE STATION
SPOKANE, Washington
992019998
5480520012-0099
11/15/2013 (509)252-2346 04:50:17 PM
Sales Receipt
Product Sale Unit

7013 1090 0000 8175 1115

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	$ $0.46	0012
Certified Fee	$3.10	22
Return Receipt Fee (Endorsement Required)	$2.55	Postmark Here
Restricted Delivery Fee (Endorsement Required)	$0.00	
Total Postage	GARRETT FARMS LLC 11/15/2013	

Sent To
Street, Apt. No. or PO Box No.
c/o Joshua Garrett
P.O. Box 216
Endictt WA 99125

YOU ARE HEREBY NOTIFIED that the LARRY HON withdraws the **Option to Purchase** contained in the **Option to Purchase** dated September 14, 2010.

LARRY HONN FAMILY LLC

Larry K. Honn, Manager

Charlotte Honn, Manager

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

GARRETT FARMS LLC
c/o Joshua Garrett
P.O. Box 216
Endictt. WA 99125

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from service label)

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

EXHIBIT H

Bruce Ensley
Gary J. Libey

Will Ferguson

LIBEY & ENSLEY, PLLC
A Professional Limited Liability Company
Attorneys at Law
North 409 Main Street
P.O. Box 619
Colfax, Washington 99111-0619

Phone: (509) 397-4345
Fax: (509) 397-3594
www.lenlawyers.com

Wesley A. Nuxoll
(Retired)

Of Counsel:
Guy C. Nelson*

*Also Admitted in Idaho

May 5, 2014

Gregory Lockwood
421 West Riverside Ave., Suite 960
Spokane, WA 99201

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Larry Honn Family, LLC
c/o Larry Honn, Sr.
P.O. Box 38
LaCrosse, WA 99143

RE: Exercise of Option to Purchase

Mr. Lockwood and Larry Honn Family, LLC,

Pursuant to Page 2, Paragraph 4 of the Cash Rent Farm Lease with Option to Purchase, executed on September 14, 2010, Garrett Ranches, LLC (hereinafter "Garrett Ranches"), hereby notifies Honn Family, LLC that Garrett Ranches, LLC exercises its Option to Purchase for the agreed sum of four hundred thousand dollars ($400,000.00). The sale will close, as agreed, within 30 days of this Notice. We will, unless we specify otherwise, operate as the Closing Agent for this sale.

Sincerely,

Will Ferguson

cc: Client

EXHIBIT

I

Law office of

J. Gregory Lockwood, P.L.L.C.
421 W. Riverside Avenue, Suite 960
Spokane, Washington 99201
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

May 13, 2014

GARRETT FARM LLC.
c/o Frank Garrett
P.O. Box 216
Endicott, WA 99125

GARRETT FARM LLC.
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Will Morgan Ferguson
Libey & Ensley, PLLC
409 N Main Street
PO Box 619
Colfax, WA 99111-0619

RE: Garrett Ranches, LLC v. Larry Honn Family, LLC

Dear Gentlemen:

As you are aware the option to purchase has been revoked. My clients do not wish to sell at this time.

If you have any questions, please contact my office.

Very truly yours,

J. Gregory Lockwood
Attorney at Law

7009 0080 0000 7639 9431

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$ .48
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 6.48

Postmark Here

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

GARRETT FARM LLC.
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

7009 0080 0000 7639 9448

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$ .48
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 6.48

Postmark Here

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

GARRETT FARM LLC.
c/o Frank Garrett
P.O. Box 216
Endicott, WA 99125

SENDER: COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:

GARRETT FARM LLC.
c/o Frank Garrett
P.O. Box 216
Endicott, WA 99125

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Frank Garrett ☐ Agent ☐ Addressee

B. Received by (Printed Name) FRANK GARRETT
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Article Number (Transfer from service label) 7009 0080 0000 7639 9448

Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

SENDER: COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:

GARRETT FARM LLC.
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Frank Garrett ☐ Agent ☐ Addressee

B. Received by (Printed Name) FRANK GARRETT
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Article Number (Transfer from service label) 7009 0080 0000 7639 9431

Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

EXHIBIT
J

EXHIBIT K

Law office of
J. Gregory Lockwood, P
421 W. Riverside Avenue, Suite
Spokane, Washington 9920
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

September 29, 2014

7009 0080 0000 7637 3905

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	$ .48
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$6.48

Postmark Here

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

GARRETT FARMS LLC
c/o Frank Garrett
PO Box 216
Endicott, WA 991245

7009 0080 0000 7637 3922

Total Postage & Fees $ 6.48

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

GARRETT FARMS LLC
c/o Joshua Garrett
PO Box 216
Endicott, WA 991245

PS Form 3800, August 2006 See Reverse for Instructions

GARRETT FARMS LLC
c/o Joshua Garrett
PO Box 216
Endicott, WA 991245

GARRETT FARMS LLC
c/o Frank Garrett
PO Box 216
Endicott, WA 991245

RE: Garrett Ranches, LLC v. Larry Honn Family, LLC
Case No. 10-2-00293-4

Dear Gentlemen:

This letter is a demand for arbitration under the contract Cash Rent Farm Lease with Option to Purchase sign on September 14, 2010.

The parties have a dispute regarding the adequacy of consideration supporting the option to purchase, further there is a dispute regarding Honn's right to withdraw option pursuant to Washington case law due to inadequate consideration supporting option and what is legal effect of withdrawing option.

It is requested that the arbitration penal determine the following specific disputes regarding the option to purchase:

1. What was the consideration paid by Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

2. Was there adequate consideration paid by Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

3. What is the legal effect of the consideration or lack of consideration paid Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

4. Was the Honn Family Trust, LLC's withdrawal of the option to purchase executed prior to the Garret Ranches, LLC notice of intent to exercise the option to purchase.

Sincerely,

J. Gregory Lockwood
Attorney for Larry Honn Family, LLC

JGL/lkh

cc: client

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

GARRETT FARMS LLC
c/o Joshua Garrett
PO Box 216
Endicott, WA 991245

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Frank Garrett ☒ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery 10-7-14

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7009 0080 0000 7637 3899

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-15

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

GARRETT FARMS LLC
c/o Frank Garrett
PO Box 216
Endicott, WA 991245

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Frank Garrett ☐ Agent ☒ Addressee

B. Received by (Printed Name) C. Date of Delivery 10-7-14

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
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Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's COMBINED Response to:** **1. Defendant's Objection to Confirmation of 3rd Arbitration Award and Motion to Vacate Arbitration Award** **&** **2. Amendment to Defendant's Motion to Vacate Arbitration Award Adding RCW 7.04A.230(1)(c) and (d)**

COMES NOW the Plaintiff, by and through its attorney of record, Will Ferguson, and submits the following response to Defendant's Objection to Confirmation of 3rd Arbitration Award and Motion to Vacate Arbitration Award (hereinafter "Defendant's Objection" or "Objection") and Amendment to Defendant's Motion to Vacate Arbitration Award Adding RCW 7.04A.230(1)(c) and (d) (hereinafter "Amendment to Defendant's Motion to Vacate" or "Amendment"). The Objection and Amendment were served separately but the responses thereto are combined herein.

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Defendant claims this Court should not confirm the 3rd Arbitration Award, for four reasons. First, Defendant objects to confirmation, claiming that the appearance of fairness doctrine was violated. Second, Defendant claims that the Award should be vacated because RCW 7.04A.230(1)(b)(i) was violated. Third, Defendant claims the Award should be vacated because RCW 7.04A.230(1)(c) was violated. Fourth, Defendant claims the Award should be vacated because RCW 7.04A.230(1)(d) was violated. For the reasons stated below, this Court should overrule Defendant's Objection, dismiss Defendant's Motion to Vacate, and confirm the Award in it its entirety.

DEFENDANT'S OBJECTION SHOULD BE OVERRULED BECAUSE THE APPEARANCE OF FAIRNESS DOCTRINE WAS NOT VIOLATED

The 3rd Arbitration Award should be confirmed because the appearance of fairness doctrine was not violated. Much like the response given to Defendant's Motion for Disqualification of Judge David Frazier, neither Mr. Esser nor this Court violated the appearance of fairness doctrine.

The test for impartiality is an objective one and is stated as "whether the judge's impartiality might reasonably be questioned...." State v. Witherspoon, 171 Wash.App. 271, 288 (Div. 2, 2012). Importantly, there is a presumption that the court performed its functions without bias or prejudice. Id. at 289. Bare oral assertions do not amount to a violation of the appearance of fairness doctrine. Id. The appearance of fairness doctrine requires the moving party to produce "sufficient evidence demonstrating actual or potential bias, *such as a personal or pecuniary interest on the part of the judge; mere speculation is not enough.*" Kok v. Tacoma School Dist. No. 10, 179 Wash.App. 10, 24 (Div. 2, 2013) (emphasis added).

In Defendant's Motion for Disqualification of Judge David Frazier, Defendant argued that the appearance of fairness doctrine had been violated because this Court commented on the record about the issues being raised by Defendant. Defendant also insinuantes bias by this Court in favor of Mr. Libey, Plaintiff's former counsel in this matter. In Defendant's Objection, however, Defendant claims that this Court violated the appearance of fairness

doctrine by appointing Mr. Esser and that Mr. Esser violated the doctrine by accepting the appointment. The same facts that do not support the allegation of bias against this Court also do not support an allegation of bias against Mr. Esser. Insofar as an argument is required on the appearance of fairness doctrine in relation to Mr. Esser, Plaintiff incorporates its Response to Defendant's Motion for Disqualification of Judge David Frazier because the same argument applies.

Another reason for overruling Defendant's Objection is because Defendant has already argued this issue. Res Judicata or issue preclusion should even apply to Defendant's Objection. The issue of whether to appoint Mr. Esser was decided in both this Court's initial appointment of Mr. Esser on October 3, 2014, in Defendant's Motion for Reconsideration on the appointment of Mr. Esser on October 24, 2014, and in Mr. Esser's consideration of Defendant's request that Mr. Esser recuse himself on November 17, 2014. At each stage, Defendant argued that Mr. Esser should not be appointed; at each stage, Defendant did not prevail. Now Defendant brings an Objection, calling it an Objection under Washington's appearance of fairness doctrine. The argument presented in the Objection is the same argument as October 3, October 24, & November 17, but with a different name: "appearance of fairness doctrine". This Objection by Defendant is the same argument, re-packaged.

DEFENDANT'S MOTION TO VACATE SHOULD BE DENIED BECAUSE RCW 7.04A.230 WAS NOT VIOLATED

The 3rd Arbitration Award should be confirmed in its entirety because RCW 7.04A.230(1)(b)(i), (1)(c), and (1)(d) were not violated.

Subsection (1)(b)(i) states that an arbitration award may be vacated upon a showing of evident partiality by an arbitrator appointed as a neutral. All of the relevant evidence indicates that Mr. Esser was and remained neutral, giving Defendant the opportunity to raise and argue its issues; even entertaining a motion for recusal supported by an Affidavit that Defendant did not disclose to Plaintiff until well after the motion. Defendant levels an accusation that Mr. Esser was biased in favor of Mr. Libey. Mr. Libey was not a party to

this action and no longer represents Plaintiff in this matter. Though Defendant levels accusations, it can point to nothing in the record that indicates either partiality or the reasons for partiality, such as a pecuniary interest.

To support its argument that the 3rd Arbitration Award be vacated under Subsection (1)(b)(i), Defendant cites, Hanson v. Shim, 87 Wn.App.538 (Div. 1, 1997), but ignores both the ruling in the case and the facts. The ruling was that the arbitration award in Hanson was not one that should be vacated simply because the arbitrator had been an associate of the law firm representing a party. Id. at 548. In Hanson, the arbitrator had been an associate of the firm representing a party in the arbitration. Id. The arbitrator did not disclose the fact. Id. When the party found out about the prior association, the party did not object and waited for the ruling before objecting. Id. After an unfavorable ruling came down from the arbitrator, the party objected. Id. The Court of Appeals stated that to prove that the award was subject to vacation, the moving party had to show that a continuing relationship existed, that the lack of disclosure impacted the award, and that the prior association between the arbitrator and the firm impacted the award. Id. The party in Hanson could show none of those things, much like the Defendant in this case.

Subsection (1)(c) states that an arbitration award may be vacated upon a showing that an arbitrator refused to consider evidence material to the controversy. Defendant's argument boils down to this: the majority of the arbitrators did not agree with Defendant's legal argument and now Defendant wants to re-argue the legal issue to this Court, only this time Defendant re-packages the argument under Subsection (1)(c). What the record clearly shows is that the Arbitration Panel did not refuse to consider the evidence submitted by either party. The record shows that the Arbitration Panel duly considered all the evidence but came to a different legal conclusion than that argued by Defendant. What Defendant fails to grasp is that the Declaration of Charlotte Honn and the Deposition Transcript of Frank Garrett are not central to the legal theory and conclusion adopted by the Arbitration Panel. The legal theory and conclusion adopted by the majority on the Panel was that no separate consideration was needed to support the Option. Arbitration Decision, page 5, lines 3-7. Therefore, as a legal principle, what Mr. Garrett and Mrs. Honn thought about

consideration is irrelevant. Finally, there is no indication that Mr. Esser, or any of the other arbitrators, for that matter, disregarded the Declaration of Charlotte Honn or the Declaration Transcript of Frank Garrett. The only indication is that after considering both, the Arbitration Panel simply came to a conclusion other than the one Defendant wanted.

Subsection (1)(d) states that an arbitration award may be vacated upon a showing that an arbitrator exceeded his powers. Defendant asserts that Mr. Esser exceeded his powers as arbitrator, but Defendant provides neither an explanation nor argument to support Defendant's position. As a result, one can only guess at what Defendant is asserting and Plaintiff is unable to generate a response for Defendant's lack of support and clarity.

DATED this 12th day of February, 2015.

LIBEY & ENSLEY, PLLC

Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff

DECLARATION OF COUNSEL

WILL FERGUSON Declares:

1. I am the attorney for the Plaintiff herein.
2. I have spent six hours in preparation of this Response, including review of the underlying Motion, conference with client, and research. My hourly rate is $200.00. I estimate that I will have to devote another hour in preparation for hearing and for the hearing itself. I request this Court grant attorney fees pursuant to the attorney fee provision in the Cash Rent Farm Lease with Option to Purchase, commensurate with my work on this matter.

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

Dated this 12th day of February, 2015, at Colfax, WA.

WILL FERGUSON

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 12th day of February, 2015.

WILL FERGUSON

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Response to Defendant's Motion for Disqualification of Judge David Frazier**

COMES NOW the Plaintiff, by and through its attorney of record, Will Ferguson, and submits the following response to Defendant's Motion for Disqualification of Judge David Frazier (hereinafter "Motion to Disqualify").

DEFENDANT'S MOTION TO DISQUALIFY SHOULD BE DENIED

A response to Defendant's Motion to Disqualify hardly merits a response. However, because Defendant has brought this Motion, Plaintiff must respond and entertain Defendant's arguments.

Defendant cites two cases, neither of which applies. In Tatham v. Rogers, 283 P.3d 583, Division 3 of the Court of Appeals found that a trial judge's service as alternate attorney in fact for a party's lawyer, authorizing the judge to personally "have all the powers of an

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WHITMAN COUNTY CLERK

absolute owner" as to the person's assets and liabilities is critical both because of its nature and its currency." Id. at 598. Tantham involved a property distribution between two former cohabitants, Dr. Tantham and Mr. Rogers. Id. at 81. Dr. Tantham's lawyer was Ms. Bierbaum. Id. at 84. Feeling as though he had been slighted, Mr. Rogers instructed a personal investigator to determine whether there was a connection between the trial judge and Ms. Bierbaum. Id. The investigator discovered a list of connections ranging from the fact that the judge had been business partners with Ms. Bierbaum to political connections between the two of them. Id. at 85. However, "[s]tanding alone, the past professional relationship between the judge and Ms. Bierbaum and the personal and political dealings between them during that relationship and in the several years that followed would probably not require the judge's disqualification...." Id. at 103. Instead, it was the judge's pecuniary interest as Ms. Bierbaum's alternate attorney in fact that caused the Court of Appeals to decide that the appearance of fairness doctrine had been violated. Here, there are no facts even close to the ones presented in Tatham.

In State v. Witherspoon, 171 Wash.App. 271 (Div. 2, 2012) a defendant convicted of second degree robbery challenged his conviction on a multitude of frivolous grounds, including that the trial court violated the appearance of fairness doctrine by making comments, evidencing a potential bias. Id. at 287-88. The alleged violative statement was that "before becoming a judge, he may have defended Witherspoon in a past, unrelated proceeding." Id. at 287. The Court of Appeals resoundingly rejected the defendant's allegation, stating that the defendant "fails to provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice." Id. at 289.

The test for impartiality is an objective one and is stated as "whether the judge's impartiality might reasonably be questioned...." Id. at 288. Importantly, there is a presumption that the court performed its functions without bias or prejudice. Id. at 289. Bare oral assertions do not amount to a violation of the appearance of fairness doctrine. Id.

Even in a case where the trial judge's spouse had represented one of the parties in a case, the appearance of fairness doctrine is not violated. Kok v. Tacoma School Dist. No. 10, 179

Wash.App. 10, 23 (Div. 2, 2013). In Kok, the estate of Samnang Kok sued the school district after Kok had been shot in the hallway at Foss High School. Id. at 13. The trial court dismissed the action and the estate appealed, claiming among other things, that the trial judge should have recused herself because her husband had represented the school district in the past. Id. The Court of Appeals rejected the estate's claim that the appearance of fairness doctrine had been violated, stating that neither the trial judge nor her spouse had any interest in the outcome of the case. Id. Furthermore, the Court of Appeals stated that a party must produce sufficient evidence demonstrating actual or potential bias, *such as personal or pecuniary interest on the part of the judge; mere speculation is not enough.* Id. at 24 (emphasis added). Here, this Court literally has personal or pecuniary interest in the outcome of this case. Neither this Court's income nor its future income nor any business interest is at all impacted by this case. This Court has no pecuniary or personal interest in the outcome of this case, either from a perspective of who the parties are or who the attorneys are. For that matter, this Court has no pecuniary or personal interest in the appointment of any particular arbitrator. This Court never practiced or had any business relationship with Mr. Esser, Mr. Ferguson, Libey & Ensley, PLLC, or Defense Counsel. Finally, Mr. Esser has no business relationship (and hasn't had one for over half a decade now) with Libey & Ensley, PLLC. What this boils down to is neither Mr. Esser nor this Court had a dog in the fight.

What the caselaw under the appearance of fairness doctrine says is that the judiciary may not be unfairly biased or potentially biased against a *party*. The key here is the word "party". There are only two parties to this action, Garrett Ranches, LLC and Larry Honn Family, LLC. This Court has no connection to either LLC or its members. This Court has shown nothing even resembling bias against a party in this case. Defendant has prevailed in numerous motion hearings, including one in which this Court imposed attorney fees against Plaintiff.

The flagship of the Defendant's argument is that this Court commented on the legal issue of res judicata. Defendant's factual support is that this Court *sua sponte* selected res judicata as a means of defeating Defendant's arguments. Defendant claims that this Court

originated the idea of res judicata and everyone followed its lead. Defendant is not being candid with itself; Plaintiff had, since before the third round of arbitration began, claimed that the issues raised by Defendant had already been decided. Whether one calls the principles res judicata or issue preclusion, the facts and the law were there to support Plaintiff's assertions. Not a single case supports Defendant's assertion that a court and counsel cannot even know each other.

The supporting claim of Defendant is that this Court showed bias by appointing Mr. Timothy Esser. The core of Defendant's argument is that Mr. Libey and Mr. Esser had, in the past, been business partners. This fact, alone is insufficient to support Defendant's claim. Defendant cannot show either actual or potential bias on Mr. Esser's part. In other words, Defendant needs direct and/or circumstantial evidence of bias. First, Defendant has literally no proof of actual bias. Second, pointing out the prior business relationship, ending a half-decade ago, does not show potential bias. But to shore up its shaky ground, Defendant trotted out the Affidavit of Khani Taylor. Not only did Defense Counsel not serve Plaintiff with the Affidavit before the arbitration hearing in which Mr. Esser addressed Defendant's recusal motion, but the Affidavit was sent directly to Mr. Esser, without Defendant notifying Plaintiff's Counsel that he was sending the Affidavit or even making a motion. The first Plaintiff's Counsel heard anything about the Affidavit or the fact that it was sent to Mr. Esser without Plaintiff's Counsel's knowledge was when Defense Counsel brought it up at an arbitration hearing. Had Defense Counsel disclosed the Affidavit or the fact that he sent it to Mr. Esser, Plaintiff would have had the chance to address the claims made in the Affidavit. What the arbitration panel would have discovered is that Khani Taylor is or was the girlfriend of Larry Honn, Jr., the son of Honn Family, LLC's principal member. The arbitration panel also would have discovered that the factual assertions made by Khani Taylor were either incorrect or pure fabrication.

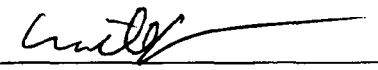
Defendant's final claim is that this Court appointed an arbitrator suggested by Mr. Ferguson. But Defense Counsel fails to recall that he too proposed arbitrators, one of whom was his former business partner. Transcript of Proceedings, October 24, 2014, at page 11-12, 23-7. When confronted about his suggestion of his former business partner, Defense

Counsel fumbled around for an explanation until he arrived at some vague discussion of how he thought the selection process at Gonzaga worked. Transcript of Proceedings at page 19, lines 2-11. Had this Court selected one of Mr. Lockwood's (i.e. Defendant's) proposed arbitrators, a challenge to this Court's integrity by Plaintiff would be just as absurd as Defendant's current onslaught.

Defendant flails about in an attempt to show a personal relationship between Mr. Libey, Mr. Esser, and this Court that would actually or potentially bias the decisions made in this case, but fails to do so from a factual standpoint and certainly fails to do so from a legal standpoint.

DATED this 12th day of February, 2015.

LIBEY & ENSLEY, PLLC



Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff

DECLARATION OF COUNSEL

WILL FERGUSON Declares:

1. I am the attorney for the Plaintiff herein.
2. I have spent three hours in preparation of this Response, including review of the underlying Motion, conference with client, and research. My hourly rate is $200.00. I estimate that I will have to devote another hour in preparation for hearing and for the hearing itself. I request this Court grant attorney fees pursuant to the attorney fee provision in the Cash Rent Farm Lease with Option to Purchase, commensurate with my work on this matter.
3. Defense Counsel, Gregory Lockwood, did not send to me the Affidavit of Khani Taylor until several days after consideration by Mr. Esser at the

arbitration hearing. Defense Counsel used the Affidavit to support his client's request for Mr. Esser to recuse himself from arbitration.

4. The facts contained in the Affidavit of Khani Taylor are either incorrect or a knowing fabrication. Upon information and belief, I discovered the following facts:

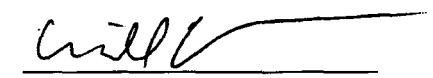
   a. Mr. Esser had not retired, unlike what was alleged by Khani Taylor.

   b. Mr. Libey had no interaction with Mr. Esser on October 29, 2014. Therefore, the person walking with Mr. Libey on October 29, 2014, if there was anyone, was certainly not Mr. Esser.

   c. Mr. Libey does not frequent local restaurants with Judge David Frazier.

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

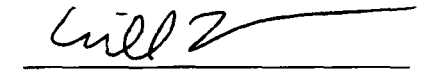
Dated this 12th day of February, 2015, at Colfax, WA.



WILL FERGUSON

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 12th day of February, 2015.



WILL FERGUSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, A Washington Limited Liability Company,	)	No. 10-2-00293-4
Petitioner,	)	ORDER CONFIRMING ARBITRATION AWARD FROM 3RD ARBITRATION
v.	)	
LARRY HONN FAMILY LLC, A Washington Limited Liability Company,	)	
Respondent.	)	

THIS MATTER came before the Court upon the Motion for Order Confirming Arbitration Award from 3rd Arbitration by the Petitioner, GARRETT RANCHES LLC, which appeared through its attorneys of record, LIBEY & ENSLEY, PLLC, by Will Ferguson. The Respondent, LARRY HONN FAMILY LLC, appeared through its attorney of record, J. Gregory Lockwood. The Court having considered the records and files herein and the decision of the arbitrators;

NOW, THEREFORE,

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LIBEY & ENSLEY, PLLC
ATTORNEYS AT LAW
N. 409 MAIN STREET, P.O. BOX 619
COLFAX, WASHINGTON 99111-0619
(509) 397-4345 FAX (509) 397-3594

IT IS HEREBY ORDERED that the Arbitration Award dated January 23, 2015, filed herein on January 27, 2015, is hereby confirmed in its entirety.

DONE IN OPEN COURT this 13th day of February, 2015.

SUPERIOR COURT JUDGE

Presented by:

LIBEY & ENSLEY, PLLC

By

WILL FERGUSON
Of Attorneys for Petitioner
WSBA No. 40978

Approved as to Form and Content/
Notice of Presentment Waived:

J. Gregory Lockwood
Attorney for Respondent
WSBA No.

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SUPERIOR COURT OF WASHINGTON FOR WHITMAN COUNTY

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	))))))))))))))	No. 10-2-00293-4 ARBITRATION DECISION

Oral argument on the parties' cross-motions for summary judgment was heard before arbitrators Timothy Esser, Frank Gebhardt and Read Smith on December 22, 2014. Garrett Ranches, LLC was represented by attorney Will Ferguson and Larry Honn Family LLC was represented by attorney J. Gregory Lockwood. Thereafter, counsel for the parties were asked to provide information in support of their respective requests for attorney fees. Both attorneys provided their hourly rate and number of hours worked on the case. Based on the evidence presented and considering the argument of counsel, the following arbitration decision is rendered.

CONSIDERATION

The Honns moved for summary judgment on the theory that there was no independent consideration for the option and that because they withdrew the option before the Garretts exercised their option right, the option is terminated. The Garretts respond that

the option is part of an integrated contract that includes the lease, that there are mutual promises, rights and obligations in the agreement which provide consideration for the option; that the rule cited by Honns is inapplicable. I agree with the Garretts' position.

The material facts are:

1. The parties executed a single document, a lease with an option to buy.
2. The agreement was to run for five years and granted to the Garretts the right at any time during those five years to exercise their option to purchase the property for the price set forth in their agreement.
3. The lease option agreement is an integrated document; there is no ambiguity about its terms. There is no "separate" consideration for the option; if there is consideration for the option it is as argued by Garretts – the mutual promises, obligations and rights set forth in the entire agreement, including the lease provisions.
4. The Honns gave written notice that they withdrew the option on February 9, 2012.
5. The Garretts gave written notice that they were exercising the option on May 4, 2014, within the five year period authorized in the lease/option agreement.

Honns rely on the rule set forth in Baker v. Shaw, 68 Wash. 99 (Wash. 1912).

The material facts are stated at page 99:

> That on October 30, 1909, the defendant J. N. Shaw gave to the plaintiff a written option to purchase the capital stock of said Commercial Importing Company, Incorporated; that there was no consideration whatever for said option. . . .

The court's holding and rationale is set forth at page 103:

> It is conceded that no consideration passed from appellant to respondents when it was executed. An option may be granted with or without consideration.
>
> **If a valuable consideration passes from the person to whom the option is given, the party giving it cannot withdraw his offer within the agreed period of time over**

> **which the option is to extend.** On the other hand if the option be given without consideration, it may be withdrawn at any time prior to its acceptance and a tender of performance, but not thereafter, as such acceptance will convert it into a bilateral or mutual contract, binding upon both parties. 3 Page on Contracts § 1616. [emphasis supplied]

> The oral evidence and supplemental agreement unquestionably show that the option was accepted by appellant prior to any withdrawal by respondents; that from and after November 27, 1909, a valid contract existed between the parties, and that on November 29, 1909, appellant deposited $5,000 as agreed.

The Garretts take no issue with Baker; their position is that because consideration was given, the emphasized language from the opinion controls our case.

Honns also rely upon Harting v. Barton, 101 Wn.App. 954, 6 P.3d 91 (2002), quoting extensively from the case and then writing this at page 13 of their memorandum:

> In Harting the lessee was to pay taxes under the option but failed to do so. In the case at bar, the taxes have been paid by the defendant as stated in Paragraph 6 of the Farm Lease. This point cannot be argued.

Honns' observation is accurate, but provides no support for their position. An accurate reading of Harting shows it to actually support the Garretts' position. In Harting, the same as here, the parties entered into a lease of farm ground with the lessee receiving an option to purchase the farm ground for no separate consideration.

The lessor decided that the lessee did not have the financial wherewithal to farm the property and sued to rescind the lease and purchase option. The lessee counterclaimed for specific performance of the lease option. Harting page 958. The suit was brought before the lessee purported to exercise the option. Harting page 958. If the Baker rule applied the court could have simply cited it because the option was withdrawn before it was exercised. Instead, the appellate decision in favor of the owner was based on the court's determination

not that there was a lack of consideration, but rather that Mr. Barton, the lessee and holder of the option failed to fulfill his promised consideration to farm the leased property in a proper manner and to pay the taxes.

The Garretts cite Valley Garage, Inc. v. Nyseth, 4 Wash.App. 316, 481 P.2d 17 (1971). In Valley Garage an owner of property agreed to lease it and in the written lease agreement gave an option to purchase to a third party. There was no separate consideration for the option. Thereafter, the recipient of the option exercised his right; the owner of the property failed to perform. The owner of the property at page 318 argued that, "There was no consideration for the option." The court stated at page 320, "The grant of the option by the Nyseths to Cortours and the lessees was part of the basis of the bargain for entering into the contract." The court ruled that the option was enforceable and granted specific performance, ordering the owner of the property to convey the property to the holder of the option.

While the Valley Garage holding and analysis support the Garretts' position, the result is also consistent with the rule in Baker, i.e., the holder of the option exercised the option **before** the owner of the property withdrew it. (In fact, the owner of the property never withdrew the option in Valley Garage.)

Honns entire argument is premised upon a case that clearly is inapplicable - a stand-alone option with no consideration. We were taught in law school that for a contract to be valid there must consideration. We were taught that consideration can consist of a promise for a promise. Here we have multiple promises relating to the lease and to the option which combined equal one, integrated contract. Contrary to Honns' argument, Garretts did give

consideration for the option, and they exercised the option consistent with the terms of the parties' agreement.

I agree with the analysis offered by the Garretts. The rule in Baker cited and relied upon by Honns is limited to the facts of Baker – a naked, stand-alone option, with no consideration, which option is not part of an integrated document that includes mutual promises which constitute consideration.

If contract provisions are unambiguous a court's interpretation of the contract is a question of law which may be decided on summary judgment. Truck Center Corp. v. General Motors Corp., 67 Wn.App. 539, 837 P.2d 631 (1992).

While summary judgment is normally granted in favor of the moving party, courts have long held that summary judgment may be granted in favor of the nonmoving party if it becomes clear that he or she is entitled thereto. Rubenser v. Felice, 58 Wn.2d 862 at 866, 365 P.2d 320 (1961); Impecoven v. Dept. of Revenue, 120 Wn.2d 357 at 365, 841 P.2d 752 (1992), Washington Practice Volume 14A, p. 100.

Garretts are entitled to summary judgment. Honns are to convey the property to Garretts for the purchase price set forth in their agreement and subject to the terms set forth in the second arbitration decision.

RES JUDICATA

The Garretts move for summary judgment arguing that the issue of whether the option is valid could have been and should have been litigated in each of the two prior arbitrations and therefore, Honns are barred by the Doctrine of Res Judicata from attempting to litigate this issue in this third arbitration proceeding. I agree with the Garretts' position.

Claim preclusion, or res judicata, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wash.2d 759, 763, 887 P.2d 898 (1995). The claim preclusion doctrine has four requirements:

> (1) the parties in the two successive proceedings are the same; (2) the prior proceeding ended in a final judgment; (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding; and (4) application of the doctrine must not work an injustice.

Chavez v. Dep't of Labor & Indus., 129 Wash.App. 236, 239-40, 119 P.3d 392, 394 (2005).

The decision in Arbitration 1 was confirmed January 28, 2011. The decision in Arbitration 2 was confirmed February 10, 2012. Division III of the Court of Appeals upheld both confirmations on October 13, 2013.

In the first arbitration the Honns took the position that the Lease Option Agreement should be declared invalid. The arbitrators ruled against the Honns:

> 1. The Cash Rent Farm Lease Agreement is valid and shall be enforced, subject to the following modifications: . . . .
>
> 2. Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid, subject to the following: . . . . [Arbitration Award, pp 1 and 2]

Following the first arbitration award, the parties could not agree on the terms of the contract of sale. The Honns took the position that the lease option agreement had been forfeited due to Garretts' alleged breach and therefore there was nothing to arbitrate. The Superior Court and eventually the arbitrators rejected Honns' position finding that the Garretts had not breached, allowing arbitration, and setting forth the terms of the sale contract the parties were unable to agree upon.

At oral argument in this third arbitration, Honns' counsel agreed, reluctantly, that had his position prevailed at the second arbitration there would have been no enforceable option.

In Karlberg v. Otten, 167 Wash.App. 522, 280 P.3d 1123 (2012), the court noted at page 532:

> Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.
>
> "The general doctrine is that the plea of Res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Sanwick v. Puget Sound Title Ins. Co., 70 Wash. 2d 438, 441-42 P.2d 624, 627 (1967) (emphasis added).

Neither in their briefing nor at oral argument have the Honns provided a reason why they could not have raised the consideration argument they raise herein at either the first or second arbitrations. Given that they have consistently sought release from their lease/option agreement, their argument that the matter was not "ripe" at the time of the first two arbitrations is not supported by the facts. Application of res judicata will result in no injustice. The Honns could have and should have raised their consideration argument at the earlier arbitrations. Because they did not their claim is not only unsupported by the law as set forth in the first part of this decision, their claim is barred by principles of res judicata.

Summary judgment is granted to Garrett Ranches LLC, dismissing Larry Honn Family LLC's challenge to the validity of the option. Therefore, the following award is entered in favor of Garrett Ranches LLC:

1. The Garretts may proceed with their purchase of the property for the cash price set forth in their Lease/Option Agreement and upon the terms set forth in the second arbitration award. Garretts are entitled to apply to the Superior Court for an order of sale.

2. As the prevailing party in this third arbitration proceeding, Garretts are entitled to an award of reasonable attorney fees. They advise that Mr. Ferguson's hourly rate is $200/hour which is a reasonable rate. They are granted total fees in the amount of $8,360 and costs in the amount of $293.56. $3,740 of those fees is for working on these summary judgment matters; the balance is for responding to motions brought by Honns in the Superior Court and herein, for example, unsuccessfully alleging Garretts' attorney had a conflict and should be ordered off the case, objecting to the undersigned as arbitrator, seeking to take the deposition of Garretts' attorney and have access to his file. The fees sought by Garretts in successfully responding to these motions are reasonable and therefore total fees and costs in the amount of 8,653.56 are awarded.

3. Larry Honn Family LLC is responsible for arbitrator Gebhardt's fees and costs. Garrett Ranches LLC is responsible for arbitrator Read Smith's fees and costs. My fees and costs are $5,550.00. Each party shall pay one half and payment is due no later than March 1, 2015, after which interest at 12% shall accrue on any unpaid balance.

Before Garretts tender the payment proceeds to Honns they shall check with the undersigned to determine whether Honns have paid to the undersigned their share of the fees and costs. In the event they have not, Garretts shall deduct from the sale proceeds the amount necessary to pay me for my fees and costs in the event Honns have failed to pay.

DATED: This 23rd day of Jan 2014.

By _____
Timothy Esser, Arbitrator

[X] I, Arbitrator Read Smith, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Read Smith 1/23/15

Read Smith Date

[ ] I, Arbitrator Read Smith, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Read Smith Date

[ ] Other.

Read Smith Date

[ ] I, Arbitrator Frank Gebhardt, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Frank Gebhardt Date

[✓] I, Arbitrator Frank Gebhardt, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

[X] Other.
Dissent attached

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

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

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	No. 10-2-00293-4 **DISSENTING ARBITRATION OPINION OF FRANK J. GEBHARDT**

I have reviewed the Arbitration Decision drafted by arbitrator Timothy Esser and joined in by arbitrator Read Smith. I dissent.

The majority decision states that: "The lease option agreement is an integrated document; there is no ambiguity about its terms." (Page 2, Line 9-10). An integrated writing is one adopted by the parties as the final and complete expression of the agreement. If a document is a complete integration, any terms and agreements that are not contained in it are disregarded. In light of the Arbitration Award dated January 19, 2012, it remains a mystery to me how this Lease Option Agreement could ever qualify as an integrated agreement. For the three (3) arbitrators in that second Arbitration Award went, in my experience, way beyond what a court would do in supplying terms missing from that Lease Option Agreement. That arbitration panel imposed requirements and added terms to that Agreement.

The Majority's Arbitration Decision, states that: "Honns are to convey the property to Garretts for the purchase price set forth in their agreement <u>and subject to the terms set forth in the</u>

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Second Arbitration Decision. (Page 5, Line 17-20). This orders the Honns to sell the property, not on terms necessarily specified in the Lease Option Agreement, but upon terms dictated by an arbitration panel. An integrated agreement would neither require, nor permit, such terms of sale.

The arbitrators have all read the same option cases regarding the necessity for consideration, including those cited in the Majority Decision. I would hold that there was no independent consideration given by Garrett Ranches, LLC ("Garrett") to the Larry Honn Family, LLC ("Honns"). Therefore, although a valid option was created in the Lease Option Agreement, having been given without consideration, the Honns' reserved the right to withdraw the Option prior to its exercise. And, in fact, the Honns did withdraw that Option in February, 2012, more than two (2) years prior to the Garrett's attempt to exercise the Option.

In addressing the *res judicata* issue, the chronology of the withdrawal and attempted exercise of the option must be noted:

February 9, 2012. Honns withdraw the Option.

May 5, 2014. Garrett sends notice of the exercise of the Option.

May 13, 2014. Honns' attorney responds that that the Option has been revoked.

So the actual issue of whether or not the Honn's withdrawal of their Option was legally permissible did not arise until May 5, 2014 when Garrett gave notice of the exercise of that Option.

In my opinion, *res judicata* should not apply in this case because I believe that such application will result, and now has resulted, in an injustice upon the Honns. The Second Arbitration Award is dated January 19, 2012. It was not until the next month that the Option was withdrawn. A finding by the second arbitration panel that the Option was valid was not a finding that there was consideration, since an Option can be valid without consideration. I do not believe that the consideration issue and right to withdraw the Option was ripe until after the second arbitration hearing, when the Option was in fact withdrawn and the Option was attempted to be exercised.

Included among the matters for which the Garretts' attorney, Mr. Ferguson, sought arbitration, in his July 3, 2014 letter is: "All matters related to Garrett Ranches, LLC's exercise of the Option". Clearly, one of the matters relating to the exercise of the Option is whether the Option existed in May, 2014 when its exercise was attempted, or whether the Option had been

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legally withdrawn in February, 2012. Whether the Option had been legally withdrawn in 2012 required a determination whether there was consideration given for the Option. In their decision, the Majority holds that ". . . Garretts did give consideration for the option . . . ." (page 4, line 26. page 5, line 1).

So the Majority. believing that "consideration" was an open issue, as it must since it decided that issue, concludes, without a passing glance of inconsistency, that the consideration issue should have been raised by the Honns at an earlier arbitration.

I would find in favor of the Honns and find that the Option was withdrawn prior to Garrett's notice of exercise of that Option.

By: Frank J. Gebhardt
FRANK J. GEBHARDT, WSBA #4854
Arbitrator

Date: 1-27-15

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SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 ORDER RE: DEFENDANT'S MOTION FOR ORDER VACATING ARBITRATION AWARD

THIS MATTER came before this Court on February 13, 2015 pursuant to, Defendant's motion for order vacating the arbitration award. The court after review of the documents filed in this matter and hearing argument of counsel the court finds good cause to deny the defendant's motion.

IT IS HEREBY ORDERED that Defendant's Motion for Order Vacating Arbitration Award is hereby DENIED.

Dated this 25th day of February, 2015

Judge David Frazier
Whitman County Superior Court

ORDER RE: DEFENDANT'S MOTION FOR ORDER VACATING ARBITRATION AWARD - 1

FILED
FEB 25 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

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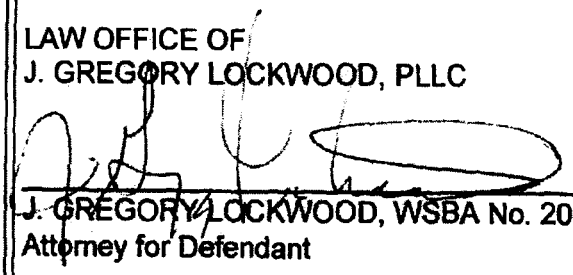
268

Presented by:

LAW OFFICE OF
J. GREGORY LOCKWOOD, PLLC



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendant

Approved as to form ~~and content~~,
presentment waived.

LIBEY & ENSLEY, PLLC

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SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 ORDER RE: DEFENDANT'S MOTION FOR DISQUALIFICATION OF JUDGE DAVID FRAZIER

THIS MATTER came before this Court on February 13, 2015 pursuant to Defendant's motion for disqualification of Judge David Frazier. The court after review of the documents filed in this matter and hearing argument of counsel the court finds good cause to deny the defendant's motion.

IT IS HEREBY ORDERED that Defendant's Motion for Disqualification of Judge David Frazier is hereby DENIED.

Dated this 25th day of February, 2015

Judge David Frazier
Whitman County Superior Court

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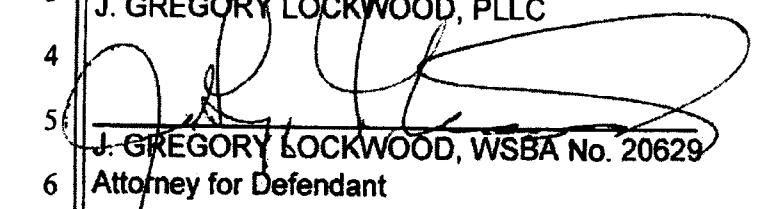
FILED
FEB 25 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

Presented by:

LAW OFFICE OF
J. GREGORY LOCKWOOD, PLLC



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendant

Approved as to form ~~and content~~,
presentment waived.

LIBEY & ENSLEY, PLLC

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Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Response to Defendant's Request for Authorization to Take Depositions and Access Confidential Client Files**

COMES NOW the Plaintiff Garrett Ranches, by and through its attorney of record, Will Ferguson, and submits the following response to Defendant's Memorandum Regarding Deposition Requests for the Plaintiff's CR 30(B)(6) Designee and Mr. Gary Libey ("Defendant's Memorandum Regarding Deposition"). Attached hereto are the following documents supporting this Response:

1. Applicable Excerpts from Deposition Transcripts of Larry Honn, Sr., Charlotte Honn, Frank Garrett, and Joshua Garrett (Exhibits 1-4).

FILED
NOV 13 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

2. Defendant's Motion and Declaration in Support of Disqualification of the Firm of Libey & Ensley, PLLC ("Motion to Disqualify") (Exhibit 5); and

3. Proposed Order Denying Defendant's Motion for Reconsideration and Motion to Disqualify the Firm of Libey & Ensley, PLLC, set for presentment on November 14, 2014, at 8:30 a.m. (Exhibit 6).

DEFENDANT'S REQUESTS SHOULD BE DENIED

Honn Family, by and through their attorney Mr. Gregory Lockwood, has requested the following from this Arbitration Panel:

1. Authorization to take the deposition of Garrett Ranches' CR 30(b)(6) designee;
2. Authorization to take the deposition of Gary J. Libey;
3. Authorization to access the confidential client file of Garrett Ranches at the firm of Libey & Ensley, PLLC.

Honn Family's request to this Arbitration Panel were preceded by Honn Family's motion in Whitman County Superior Court to disqualify the firm of Libey & Ensley, PLLC, claiming that Mr. Gary J. Libey would be called as a witness and because of that the firm of Libey & Ensley, PLLC should be disqualified. Defendant's Motion was resoundingly denied along with Honn Family's motion for reconsideration on the appointment of Mr. Esser.

A. HONN FAMILY SHOULD NOT BE GRANTED PERMISSION TO TAKE THE DEPOSITIONS OF GARRETT RANCHES AGAIN.

Honn Family has already taken the depositions of both principals of Garrett Ranches and should not be allowed to do so again. A second round of depositions serves no legitimate purpose because depositions would be unduly repetitious, would further delay

these proceedings, and any facts discovered at depositions would relate to issues that have already been decided.

The depositions of all parties involved occurred over the course of two days in December 13-14, 2010. At those depositions, Mr. Lockwood's predecessor, Mr. Mark Moorer, interrogated Garrett Ranches on all of the facts surrounding the negotiation of the Lease and Option and the components of the Lease and Option, including the underlying consideration. Nothing at the depositions produced any facts which would lead a reasonable person to conclude that Mr. Libey would be a potential witness. If Honn Family is given authorization to depose Garrett Ranches again, the only thing that will be accomplished is a delay of these proceedings.

B. HONN FAMILY SHOULD NOT BE PERMITTED TO TAKE THE DEPOSITION OF GARY J. LIBEY.

Mr. Libey is not a potential witness. Mr. Libey has neither relevant nor admissible testimony to offer this Arbitration Panel.

An attorney's work product and his communications with his clients are not discoverable and are protected. Additionally, Mr. Libey's drafting is not relevant to this arbitration. To interrogate the attorney for the opposing party, the moving party must show that the testimony of the attorney is necessary, not just a wish or an unseemly tactic. There are no outstanding issues in this case to which Mr. Libey's testimony would be relevant. What information Mr. Libey relied upon in drafting the Lease and Option is irrelevant. The validity of the Lease and Option, the negotiations surrounding the execution of the Lease and Option, and the consideration supporting both the Lease and Option, have all been

litigated, decided, and upheld. The only issue remaining to be decided during this round of arbitration is whether Garrett Ranches exercised its Option (a summary factual determination) and therefore this Arbitration Panel should order a sale of the property.

In order to receive authorization to take Mr. Libey's deposition, Honn Family must show that Mr. Libey has information or facts in his possession that are not protected by attorney client privilege, are not protected by the work product doctrine, and which are obtainable nowhere else. All Honn Family has done thus far is state that it wants to take the deposition of Mr. Libey. Honn Family provides no indication that Mr. Libey has any information not protected by privilege *and* that is unobtainable elsewhere.

Here were the reasons Honn Family supplied to the Whitman County Superior Court on October 31, 2014, when it attempted to disqualify the firm of Libey & Ensley:

1. "[Mr. Libey's] testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC."
2. "That the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey."
3. "That at the time of drafting the option agreement the members of the Larry Honn Family Trust did not indicate any dollar amount to be placed in the option."
4. "[Mr. Libey] as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC."

Motion to Disqualify at Page 3, Lines 3-10. If counsel for Honn Family already knows what Mr. Libey would testify to, then Mr. Libey's testimony is not necessary; Honn Family's counsel has already obtained this information elsewhere. Honn Family supplied at Page 3, Lines 12-14 of its Motion to Disqualify: "Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement." Honn Family has stated the same thing to this Arbitration Panel. See Page 2, Lines 20-21 in Defendant's Memorandum Regarding Deposition Requests for the Plaintiff's CR 30(B)(6) designee and Mr. Gary Libey. However, Honn Family's counsel already indicates that he knows what information was relied upon by Mr. Libey, by stating in Page 3, Lines 3-10, what he knows Mr. Libey's testimony would entail. Therefore, he doesn't need the information, even if it were relevant.

Furthermore, the evidence Honn Family seeks is already in the record. Ignoring the fact that he can obtain the same evidence from his own clients, Honn Family's counsel could consult the Deposition Transcripts of Larry Honn, Sr., Charlotte Honn, Frank Garrett, and Joshua Garrett who testified in substance:

1. Honns did not consult with Mr. Libey on the drafting of the Lease and Option, primarily because Mr. Libey was the attorney for Garrett Ranches.
2. The negotiations took place at Defendant's ranch and Mr. Libey was not one of those individuals present.
3. The sales price, terms of sale, and monthly rent amounts were negotiated and entered at Defendant's ranch, even at the behest of Mr. and Mrs. Honn, principals of Defendant.

Attached hereto as **Exhibit Nos. 1-4**, are the pertinent pages from the Deposition Transcripts of Larry Honn, Sr., Charlotte Honn, Frank Garrett, and Joshua Garrett, respectively. Mr. Libey played no part in the negotiations between the parties and had no contact with the Defendant in drafting the Lease and Option. The Lease and Option were drafted for Mr. Libey's client and that was the extent of his involvement.

As recently as its Memorandum Regarding Deposition, served today, Honn Family has added the fishing expedition of interrogating Mr. Libey about all connections between Mr. Libey and this Panel's final arbitrator, Mr. Esser. The Whitman County Superior Court selected Mr. Esser, considered his appointment, reconsidered his appointment, and reaffirmed his appointment. Honn Family has raised its objection, made its argument, and should not be allowed to waste further time on the matter.

Finally, none of the facts sought in any of the depositions are relevant at this point. All of the issues to which these facts relate (i.e. sufficient consideration for the Lease and Option, validity of the Lease and Option, intent of the parties, etc.) have already been argued, decided, and affirmed. Even if they hadn't already been argued, decided, and affirmed, Honn Family likely has lost the legal ability to raise these issues.

C. <u>HONN FAMILY SHOULD NOT BE GRANTED ACCESS TO GARRETT RANCHES' CONFIDENTIAL CLIENT FILE</u>.

Honn Family has no legal or equitable right to access or review Garrett Ranches' files at Libey & Ensley, PLLC. The contents of Garrett Ranches' file are protected by attorney-client privilege and the files are attorney work product.

RCW 5.60.060 provides that an attorney or counselor "shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." "Courts interpret this privilege as applying to all communications and advice between an attorney and client, including from the attorney to the client. And this privilege applies whether or not the communication is relevant to a controversy." Zink v. City of Mesa, 162 Wash. App. 688, 724, 256 P.3d 384, 403 (2011). "The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication." State v. Perrow, 156 Wash. App. 322, 328 (2010) (citing Dietz v. Doe, 131 Wash.2d 835, 842, 843 (1997)).

Work product "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." Soter v. Cowles Pub. Co., 131 Wash. App. 882, 893, 130 P.3d 840, 844 (2006) (aff'd, 162 Wash. 2d 716, 174 P.3d 60 (2007)). "The doctrine is now codified in the civil rules at CR 26(b)(4)." Id.

Therefore, to obtain the contents of the confidential file, Honn Family must show the contents are not protected, are discoverable, are admissible, and relevant to live issues. Honn Family's argument is that the file would provide facts relevant to its stated issues. The confidential file would not provide discoverable and admissible facts relevant to Honn Family's issues and, more importantly, all of the issues raised by Honn Family have been raised, decided, or lost by operation of law.

D. GARRETT RANCHES SHOULD BE GRANTED ATTORNEY FEES

"In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties." Thompson v. Lennox, 151 Wash.App. 479, 484 (2009).

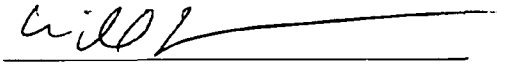
Attorney fees are available to the prevailing party in this case. Paragraph 16 of the Lease provides for attorney fees for Garrett Ranches:

> In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

Indisputably, Garrett Ranches has been required to obtain an attorney. If this Arbitration Panel denies Honn Family's requests, Garrett Ranches should be awarded attorney fees either at this stage of the arbitration, or at the conclusion of this arbitration.

DATED this 17th day of November, 2014.

LIBEY & ENSLEY, PLLC



Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff

DECLARATION OF COUNSEL

WILL FERGUSON Declares:

1. I am the attorney for the Plaintiff herein.
2. I have spent four hours in preparation of this Response, including review of the underlying requests, Defendant's Memorandum received today, November 13, 2014, and research. My hourly rate is $180.00. I estimate

that I will have to devote another hour to this matter. I request this Arbitration Panel impose attorney fees against Honn Family, commensurate with my work on this matter.

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

Dated this 13th day of November, 2014, at Colfax, WA.

WILL FERGUSON

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be emailed and mailed to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 13th day of November, 2014.

WILL FERGUSON

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF WHITMAN
3
4 GARRETT RANCHES LLC, a)
Washington Limited)
5 Liability Company,)
)
6 Petitioner,) No. 10-2-00293-4
)
7 vs.)
)
8 LARRY HONN FAMILY LLC, a)
Washington Limited)
9 Liability Company,)
)
10 Respondent.)
)
11
12
13 DEPOSITION OF LARRY K. HONN
14 Taken at the instance of the Petitioner
15
16
17 December 13, 2010
18 11:20 a.m.
19 North 409 Main Street
20 Colfax, Washington
21
22
23 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
24 1312 N. Monroe Street
Spokane, Washington 99201
25 (509) 456-0586 - (800) 358-2345

1 going to.
2 Q. And did they talk to your wife, too?
3 A. No, they didn't, did they?
4 Q. To your knowledge, anyway. We'll ask her later.
5 A. No.
6 Q. Okay. All right. Were you the family spokesman
7 pretty much with the Garretts?
8 A. I guess so. Whatever.
9 Q. Okay. Did you -- So, why were they coming to
10 your house? What was your understanding?
11 A. Well, what he told me on the telephone, Frank is
12 the one that called me. He said, "We've got a preliminary
13 copy of the contract."
14 Q. Okay.
15 A. And I thought, "Well, that's kind of strange,"
16 because I'd never been contacted by anybody or anything on
17 it at all, so . . .
18 Q. Okay. But he said he had a preliminary copy of
19 the contract. And did he want to come out and have you
20 look it over?
21 A. Well, that's what he said at the time. But
22 that's not the way it turned out.
23 Q. Okay. So, what happened at the meeting on, at
24 your home? What happened?
25 A. Well, he gave, I think he gave me a copy of it,

1 and I can't read anymore, but I did finally figure out the
2 first page. And it had a whole bunch of things wrong.
3 And he says, "Don't worry about it. We'll change
4 all that."
5 Q. Okay. Let me -- Was there some conversation
6 before he handed this document to you?
7 A. No. None. When he came in the door, he handed
8 it to me.
9 Q. Well, let me hand you what's been marked as
10 Exhibit Number 1, and, Mr. Honn, I'm going to slide that
11 over to you.
12 Mr. Moorer, a copy for you, too.
13 MR. SHAW: Thank you.
14 Q. (BY MR. LIBEY:) Can you read at least the top of
15 this document today in your deposition?
16 A. Yeah. I can read that top two lines.
17 Q. What does it say?
18 A. It says, but I didn't read that the first, when
19 he handed it to me. It may have been there, but . . .
20 Q. What does it say?
21 A. It says "Cash Rent Farm Lease" and then with
22 "Option to Purchase."
23 Q. Okay. Is that in larger print than the rest of
24 the document?
25 A. Yes, it is.

Q. And is it in bold print?

A. Yes, it is.

Q. And it's underlined?

A. Yes, it is.

Q. Okay. So, tell me, when Mr. Garrett handed you this document, what did you do?

A. I tried to read it. And I sat there for an hour or so trying to read it, but I couldn't read it. And, but I didn't say I couldn't read it.

But my wife knew at that time that I couldn't read it, because I can't read unless I'm laying horizontal in our bed and on my back, and then I turn on my right side and can get things out there focused right so I can read it.

Q. Okay. Well, let me just test you on this, if you could. Can you read the top line, the first full, long sentence of this?

A. Well, if I take time I can, yes.

Q. Okay. Well, take your time. Go ahead and just read it to me out loud, just to see how you do.

A. "THIS CASH RENT FARM LEASE WITH OPTION TO PURCHASE."

Q. Okay. You were able to read that just now?

A. Yes, I did.

Q. Okay. If this room was quiet and you had time ,

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Garrett Ranches LLC v. Honn Family
Court of Appeals Case No. 331750-III
Appendix Page Page 552 of 702

1 how long would it take you to read the, let's just say,
2 five pages of this document?
3 A. Probably an hour.
4 Q. Because of your eye problems?
5 A. Yes. And my mental problems, too.
6 Q. What kind of mental problems do you have? This
7 is the first time we've talked about that.
8 A. Well -- And I don't know how severe they are, but
9 the doctor told me that I shouldn't sign anything anymore,
10 and so . . .
11 Q. Which doctor was that?
12 A. Dr. Johnson, here in Colfax.
13 Q. When did he tell you that?
14 A. Probably a year ago or so. It was after I'd
15 already quit signing all the documents or checks or
16 anything.
17 Q. What sort of problems did you report you had to
18 Dr. Johnson?
19 A. Loss of memory and couldn't keep track of things
20 and so on, like that.
21 Q. Okay. Did you go to Dr. Johnson just for a
22 physical checkup?
23 A. Yep. Annual.
24 Q. Okay. How else did you do? Besides your memory,
25 what other problems did Dr. Johnson tell you you had?

A. Well, I've had eye problems for at least that long and . . .

Q. Anything else?

A. Well, yes, there is other things, but that has nothing to do with this.

Q. Okay. The only things that would have anything to do with this would be mental problems, which is your memory?

A. Uh-huh.

Q. Correct?

A. Yes, exactly.

Q. And then your eyesight, which we've talked about, correct?

A. Uh-huh.

Q. You have to say yes or no to me, if you would.

A. Yes. I have trouble with my eyesight.

Q. Okay. So, at the meeting when Mr. Garrett handed you this document, this lease, did you try to take time to read it over?

A. I kind of just skipped over the first page, to be honest with you.

And then we got to the part where it said description of the irrigated land, and I said, "That's totally wrong," and I told him it was. And there was 150 acres, and he had down 120 acres.

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1 Q. Well, let's go back. That's on Page 1, so let's
2 go back to Page 1, where it says "Property" in the first
3 paragraph.
4 Do you see Paragraph Number 1, "Property,
5 Farmland"?
6 A. Uh-huh.
7 Q. Can you read that to me?
8 A. Maybe. "Farmland:" "a. Farmland:"
9 Q. Right. Read that if you would, that sentence.
10 A. "The Property currently consists of 2,008 acres,
11 including 120 acres." That's where I told him it was
12 wrong.
13 And he said, "Don't worry about it. This is just
14 a draft. I'll get it corrected."
15 Q. Let's keep reading. Then we'll go back to what's
16 wrong. 120 acres, go ahead, of what?
17 A. "Acres of irrigated farmland out of a total of
18 335 acres of tillable farmland, located in Whitman County,
19 Washington."
20 Q. Okay. Do you recall Mr. Garrett bringing with
21 him your Assessor's parcel number descriptions?
22 A. No, I don't remember that.
23 Q. Okay.
24 A. But when we looked at it that night, my wife and
25 I, we saw where it was, the descriptions, were land that, I

1 told him the first day, that weren't included in that.
2 That's where my son lived up there. And I told him that
3 first day out in that field.
4 Q. We're talking about the mobile home?
5 A. Yep, exactly.
6 Q. Is there a well at that mobile home also?
7 A. Yes. And it's on the line. Between Section 28
8 and 29.
9 Q. Okay. Well, let me just ask you then, is the
10 first part of this sentence, "The property currently
11 consists of 2,008 acres," is that more or less correct to
12 you?
13 A. I don't -- My wife can answer that far better
14 than I can.
15 Q. At least in your mind, you know your own land.
16 You've owned it and worked out there for --
17 A. 50 years. Over 50 years.
18 Q. Okay. And you probably know that land like
19 nobody else?
20 A. Probably so.
21 Q. Well, does this sound about right, about 2,008
22 acres, total?
23 A. No. Not total, because you've got included in
24 there Section 29 and six acres off of Section 28 on the
25 west side that is not supposed to be in there.

1 And I told Frank that the first day I ever met
2 with him, that I would not lease that, that that wasn't
3 part of the lease.
4 Q. We don't have it in here. Let's just say there's
5 no land in here from Section 29 and there's no land in here
6 from Section 6. Let's just assume that for --
7 A. Well, what the hell does Section 6 got to do with
8 what I just said? Nothing.
9 Q. I'm just trying to get your opinion of whether
10 this lease is accurate when it says you have about 2,008
11 acres.
12 A. I don't know.
13 Q. Okay. Did you have about 100 -- You mentioned
14 that the lease also says, "including 120 acres of irrigated
15 farmland." You said the "120 acres" number was wrong?
16 A. That's right, exactly. And I told him that.
17 Q. What should the number be?
18 A. Should be 150 acres. That's what the Soil
19 Conservation Service said.
20 Q. Okay. All right. And then it says, "out of a
21 total of 335 acres of tillable farmland." What --
22 A. I don't know where you got that figure --
23 Q. Okay.
24 A. -- because that's not even close to right.
25 Q. All right. And so, did you agree, when you were

1 talking with the Garretts, did you agree that if they
2 leased the property, they would also get to lease the
3 irrigation equipment?
4 A. When I was talking to them, I thought that was
5 all they were going to lease, because they said they didn't
6 care about the cattle being there for three more years.
7 Q. Okay. Let's talk about the irrigation equipment
8 I'm talking about.
9 A. Okay.
10 Q. Not the land, but the irrigation equipment. Was
11 that going to be part of the lease with the Garretts?
12 A. Yes.
13 Q. And just to clarify what you're trying to tell me
14 is, your thinking is, they were only going to lease the
15 irrigated hay ground from you?
16 A. Uh-huh.
17 Q. You've got to say yes or no for the record.
18 A. Yes.
19 Q. And that would be only 150 acres of irrigated hay
20 ground, correct?
21 A. Well, they had another plan that they were going
22 to get another circle and put on some of that that wasn't
23 irrigated.
24 Q. Okay. But in your, at least from your
25 understanding of this deal, you were only going to be

1 obligated to lease to them your 150 acres of irrigated hay
2 ground?
3 A. Hay ground.
4 Q. Is that correct? Correct?
5 A. Yes.
6 Q. And they were going to pay you $2,000 a month for
7 that?
8 A. That's what we decided at the end.
9 Q. Okay.
10 A. And I knew right then I should have been smart
11 enough at that time when I signed that, to know that that
12 was the same $2,000 a month that they were going to pay
13 Larry, that they weren't going to take him. But I wasn't
14 that smart at the time.
15 Q. Well, let's go to the next page of the lease
16 then, if you would.
17 You must have had a conversation with the
18 Garretts about the term of the lease, because I see where
19 on the second page right up there on the top, the initial
20 term of the lease had a blank space to fill in. Do you
21 remember that?
22 A. I didn't have anything to do with it. My wife
23 and Frank Garrett, he told her what to write down, and she
24 wrote it down.
25 Q. So, is this writing on this document her writing?

1 A. Yes, it is.
2 Q. Okay. And, again, this was in the presence of
3 your son, Larry Jr.?
4 A. No. It was not, because they said he didn't need
5 to come there.
6 Q. Okay.
7 A. So, he didn't come that day.
8 Q. I'm sorry. All right. It was just the four of
9 you that day.
10 A. That's right, exactly.
11 Q. I got you. Okay. So, your wife filled in the
12 blanks for a five-year term. Was that okay with you when
13 she did that?
14 A. Well, not really, because they had talked me into
15 that. Because I said one year, and they says, "Oh, no. We
16 can't do it for one year. It has to be for five -- three
17 years." And then they changed it to five.
18 And I said, "Okay. I know you've got to make
19 some money off of it, too," and . . .
20 Q. Okay. So, then, was there a discussion about how
21 the rent would be for the property? Do you recall talking
22 about that?
23 A. Well, my wife said, "Well, we've got to have a
24 payment each month then."
25 Q. Okay.

1 A. Is what she said, and so, that was written in
2 there.
3 Q. How much did you need each month?
4 A. At least $2,000.
5 Q. And would that be enough for you to live on?
6 A. No. It had nothing to do with us living. It was
7 just supporting the ranch.
8 And they said, "Well, you won't need insurance."
9 Well, they found out that you do need insurance.
10 Q. When you say "supporting the ranch," what do you
11 mean by that? Isn't this to support you?
12 A. No, it wasn't.
13 Q. Okay.
14 A. My son was supposed to go to work for them, so --
15 Q. Okay.
16 A. -- just to support the ranch.
17 Q. So, who was going to get the $24,000 a year, or
18 the $2,000 a month? Who was going to get that?
19 A. Well, we had to pay taxes.
20 Q. Okay.
21 A. And we had to pay irrigation and all that kind of
22 stuff, because they couldn't get that irrigation changed
23 into their name, and . . .
24 Q. What kind of irrigation did you have to pay?
25 What are you talking about? What kind of irrigation?

1 A. For the two pumps. That's what I have to pay.
2 Q. For the electricity?
3 A. Yes, exactly.
4 Q. So, the electricity was going to stay in your
5 name?
6 A. I guess so.
7 Q. Well, was it or wasn't it? I mean, was that --
8 A. I don't know.
9 Q. Okay.
10 A. That was never discussed, I don't think.
11 Q. Who was going to get the $2,000 rent then? Was
12 it going to be you and your wife that were going to get
13 that?
14 A. Well, the way it turned out, we haven't accepted
15 any money, and so I don't know who would get it if they win
16 this.
17 Q. But, I mean, under the way this was set up, what
18 was your understanding, who was going to get the $2,000 a
19 month rent? Was that going to be --
20 A. Well, my wife handles all the money.
21 Q. Okay.
22 A. So, it would be whoever asks, probably.
23 Q. All right. And were you making that much off the
24 ranch yourself, a month?
25 A. More than, but the whole thing was, I knew they

1 had to make a profit or they weren't going to do it.
2 And I didn't know at the time that they were
3 going to just purchase it. And I didn't know that until
4 four days later when we got calls from Endicott.
5 Q. Well, let's just talk about -- We'll focus on
6 what happened after this. Let's just focus on the day of
7 September 14, 2010. We're walking through the lease.
8 You've mentioned your wife filled in the blanks
9 of the term for five years. There's also the next
10 paragraph where somebody wrote in, and can you read that?
11 In handwriting "annual rent payment is open for review
12 October 1st of each year."
13 Can you see where that's written in handwriting
14 right there? Up a little higher, and then there's initials
15 right next to it, "CH," I take it, would that be your wife?
16 A. Yes, it would be.
17 Q. Looks like an "LKH."
18 A. That's me.
19 Q. And an "FDG."
20 A. That's Garretts, both of those are.
21 Q. Okay. Can you read that to me? Can you read
22 that handwritten sentence that's written in your --
23 A. It says "annual rent payment is open for review
24 October 1st each year."
25 Q. Okay. Now, is that something that you guys

1 talked about?

2 A. No. She mentioned that, "Well, we've got to be

3 able to review this."

4 Q. So, whose handwriting is that?

5 A. It's my wife's.

6 Q. And so, apparently --

7 A. But she was told what to say by Frank Garrett.

8 Exactly what to say or what to write down.

9 Q. But you all initialed it, right?

10 A. Yeah. I guess. Well, I can't read, but, yes, I

11 guess I initialed it.

12 Q. What does that mean to you by your initials on

13 there? What does that mean?

14 A. It probably means that you're bound to it.

15 Q. When you put your initials on there, is that what

16 you intended?

17 A. No, it wasn't. Because, I was thinking all the

18 time, there's three days, 72 hours, to renege on this, and

19 I can't read, so -- And I didn't read it at the time,

20 and . . .

21 Q. Okay. How much time were the Garretts there?

22 How long were they there?

23 A. About two hours, and in this time, they got a

24 notary over there.

25 Q. Okay.

1 A. And I don't know why they did that, because she
2 said, "Well, I've already read it."
3 So -- Because, my first cousin is a notary, right
4 there in LaCrosse that we could have got, but we weren't
5 really ready to sign it. We were kind of pushed hard to
6 sign it.
7 Q. Well, the next paragraph talks about rent, and
8 there's a handwritten amount in the rent blank space of
9 $24,000. And if you can follow me, it says, "payable
10 $2,000 commencing November 1, 2010."
11 Did your wife write that in it?
12 A. Yes, she did. Frank told her what to write down,
13 but she did write it.
14 Q. And you were there the whole time this was going
15 on?
16 A. Yes. And I should have told him right at the
17 time.
18 Q. Well, you seem like a pretty verbal person to me,
19 are you? You're not afraid to speak your mind, are you?
20 A. Well, at the time I was, because I thought Frank
21 was an honest man. So, I thought, "Well, he's got to get
22 this so he can make some money on it, too."
23 And I didn't know at the time that he wanted to
24 steal the ranch, so that's the whole facts right there.
25 Q. Do you remember talk ing to them also about if

1 they bought it from you how much the price would be, if
2 they bought the ranch from you how much it would be?
3 A. The only time I could have possibly mentioned
4 that is the first day when I was verbalizing in the field
5 about this whole thing, and I said at least $400,000.
6 Q. Okay. Now, you'll see in the document you're
7 looking at in the lease on Paragraph 4 there was a blank,
8 "dollars," that's been handwritten in $400,000. Can you
9 see that? In Paragraph 4?
10 A. Yeah, I see it.
11 Q. Whose handwriting is that?
12 A. Probably my wife's.
13 Q. Okay.
14 A. I don't know.
15 Q. Well, do you recall her writing in the numbers?
16 A. I remember Frank telling her how much and he
17 asked me, "Isn't that right?"
18 And I said, "I guess so," because I didn't
19 remember the conversation.
20 And he says, "Well, it was 400,000." And so she
21 wrote down that.
22 Q. Okay. All right. And did you understand from
23 signing, or from when they filled in the $400,000, that Mr.
24 Garrett would have the option to buy the ranch from you for
25 $400,000?

1 void," and then you said something about a legal
2 description.
3 A. Then I said, "You've got to get Section 28 and 29
4 off of there."
5 And he said, "Don't worry about it. I'll take
6 care of it."
7 Q. So, was that your major concern, there was
8 Section 28 and 29 in the lease, and you didn't want it in
9 the lease?
10 A. Well, that was one of my concerns. The other
11 option was to buy. I never had discussed with -- Well,
12 what we discussed was after five years that with a mutual
13 agreement between the two of us, that, if we agreed to it,
14 then they could purchase it, but we never said anything
15 other than that.
16 Q. So, did you -- Okay. Going back on the 15th or
17 the night of the 14th, did you have any conversation with
18 anybody else besides your wife? Did you and your wife talk
19 about this lease?
20 A. My wife and I did, but that was it.
21 Q. Nobody else came by?
22 A. No.
23 Q. So, was your wife in agreement with you that she
24 wanted to call the deal off, too?
25 A. Yes, exactly. She was standing right there when

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company, Petitioner, vs. LARRY HONN FAMILY LLC, a Washington Limited Liability Company, Respondent.	No. 10-2-00293-4

DEPOSITION OF CHARLOTTE E. HONN

Taken at the instance of the Petitioner

December 13, 2010

1:25 p.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 2

1 your home on the 14th?
2 A. Yes.
3 Q. Happens to be another Tuesday?
4 A. Yes.
5 Q. Is that a special day for you guys or something?
6 A. No. It just happened.
7 Q. Okay. And, again, this appointment was also at
8 two o'clock?
9 A. Yes.
10 Q. And the first one on August 24th was also at two
11 o'clock?
12 A. Yes.
13 Q. Okay. Any particular reason?
14 A. No.
15 Q. Okay. So, they came to your house in LaCrosse,
16 at your home?
17 A. Yes.
18 Q. And Josh and Frank did, correct?
19 A. Right.
20 Q. And just the two, you and your husband, were
21 there?
22 A. Yes.
23 Q. Okay. So, let's walk me through what happened
24 when the Garretts got there.
25 A. Well, they presented us with a lease and talked

1 about it and said that this was just a generic one and that
2 it was just a preliminary thing.
3 And we discussed it, and I wasn't happy with it,
4 and I never have been happy with doing it but, because of
5 my husband, I went along with it.
6 Q. Okay.
7 A. And I decided that, you know, five years, there's
8 a lot of things that can change.
9 And I said, "Well, I think we need to put in
10 there that every year it should be checked to see what we
11 wanted to do and what the price should be, and everything
12 else. It could be more, it could be less. We don't know
13 in five years' time, what's going to happen."
14 Q. Were they agreeable to that?
15 A. Yes.
16 Q. As a matter of fact, let's have you look at
17 Exhibit Number 1, which is a copy of the lease.
18 A. I also told them that they had part of the mobile
19 home section in there.
20 Q. Okay. Well, when they came, did they bring with
21 them copies of your assessed, assessment --
22 A. Yes.
23 Q. -- records?
24 A. Yes. But what the copies were and to what my tax
25 was, I never found the numbers until after they left, what

1 the numbers that corresponded with our tax copies of our
2 tax bills.
3 Q. Did you have -- Did you make a copy of this
4 lease?
5 A. Yes, I did. But my printer was out of colored
6 ink, and I didn't realize we had signed it in blue ink, so
7 you can't hardly see the signatures on the copy we have
8 until you sent the copy.
9 Q. Okay. But you made a copy after it was signed?
10 A. Yes.
11 Q. Did you take time to read through it before you
12 signed it?
13 A. Yes, I did. But I was so intent on getting this
14 right that I just didn't catch this within 30 days, just
15 take over.
16 Q. Okay. When you say "getting this right," you're
17 looking at the top of Page 2 of the lease where it says
18 "Term."
19 A. Right.
20 Q. So, there was a discussion about how long the
21 Garretts would be able to lease the property?
22 A. Right. Five years.
23 Q. Let's just go back to Page 1, if you could, and
24 let's kind of start from the beginning.
25 A. "Cash Rent Farm: Lease with Option to Purchase."

1 Q. And are you able to read and understand this sort
2 of document?
3 A. Yes.
4 Q. Okay. And so, in the document here under
5 "Farmland." It says, "The Property currently consists of
6 2,008 acres."
7 A. It's 2,208 acres.
8 Q. 2,208 acres. Did you say anything about that?
9 A. No. Because I didn't realize it. Like I said,
10 their copies were totally different, and I was trying to
11 figure that out, and I was trying to listen with everything
12 that was going on.
13 And I went in the office to look through, and I
14 couldn't. I never caught up with what was going on until,
15 with the parcels.
16 Q. So, your testimony is, there's 2,208 total acres?
17 A. No, 2,202.
18 Q. Excuse me. Okay. 2,202. I'll write that down
19 correctly.
20 A. That's what their tax bills say.
21 Q. Okay. So, just going back to the beginning of
22 this. This document says "2,008 acres," and there was
23 nothing said --
24 A. Well, I didn't realize it then, because like I
25 said, I was trying to match their paper with my papers, and

1 I, with the different numbers and stuff, I guess I didn't
2 catch which numbers, where they were.
3 And I was trying to listen to what they were
4 talking about and everything, so I would know what was
5 going on.
6 Q. And it says, "including 120 acres of irrigated
7 farmland."
8 A. And Larry said right then and there it was 150
9 acres.
10 Q. Okay. And so, is that correct, 150?
11 A. Uh-huh.
12 Q. You've got to say yes, if you would, please.
13 A. Yes.
14 Q. Okay. Out of a total of 335 acres of tillable
15 farmland. Is that how much tillable farmland you have
16 there on your land, 335 acres of tillable farmland?
17 A. Well, it could be if they went up into the field
18 and back in the corner where we had some grain crop we grew
19 one year.
20 Q. Okay. I'm not saying that's tillable. I mean,
21 that's not all being tilled right now --
22 A. Right.
23 Q. -- but it's potentially tillable? Would that
24 be --
25 A. I'm not sure how many acres that would be,

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF WHITMAN
3
4 GARRETT RANCHES LLC, a)
Washington Limited)
5 Liability Company,)
)
6 Petitioner,) No. 10-2-00293-4
)
7 vs.)
)
8 LARRY HONN FAMILY LLC, a)
Washington Limited)
9 Liability Company,)
)
10 Respondent.)
)
11
12
13 DEPOSITION OF FRANK D. GARRETT
14 Taken at the instance of the Respondent
15
16
17 December 14, 2010
18 1:25 p.m.
19 North 409 Main Street
20 Colfax, Washington
21
22
23 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
24 1312 N. Monroe Street
Spokane, Washington 99201
25 (509) 456-0586 - (800) 358-2345

EXHIBIT NO. 3

1 write something up right there and then.
2 A. Yes.
3 Q. And I think you said, "Why don't we sign
4 something right now?"
5 A. Larry Sr. said that.
6 Q. Larry Sr. said that. And you said, no, you would
7 contact your lawyer and get something drawn up.
8 A. And they were in agreeance with that.
9 Q. Okay. Did you reschedule another appointment to
10 meet back with them?
11 A. Not at that time.
12 Q. Okay. Did you have any idea when you would be
13 getting back to them about whatever your lawyer was going
14 to draw up?
15 A. Not at that time.
16 Q. And when you were thinking about having a lawyer
17 draw something up on that day, were you thinking about Mr.
18 Libey or were you thinking about me?
19 A. Mr. Libey. I didn't know that you existed.
20 Q. A little levity is sometimes good.
21 MR. LIBEY: I'll drink to that.
22 Q. (BY MR. MOORER:) I'm going to assume, then, the
23 conversation ended?
24 A. Yes.
25 Q. It ended amicably?

1 A. Yes.
2 Q. And you were anticipating coming back and talking
3 to them about this draft document?
4 A. Correct.
5 Q. Okay. And so, I'm assuming, then, you met with
6 Mr. Libey, or you called him up and you talked to him?
7 A. Well, first we contacted the Department of
8 Ecology --
9 Q. Okay.
10 A. -- to get a copy of all water rights, irrigation,
11 and springs and wells that existed on the property.
12 Q. Okay.
13 A. Then I went to the courthouse, visited with the
14 Assessor, got copies of assessments that pertained to
15 Honns' LLC.
16 Q. Okay. Anything else?
17 A. No.
18 Q. After you talked to the Department of Ecology and
19 went to the courthouse and got those assessments, then did
20 you schedule your appointment with Mr. Libey?
21 A. Correct.
22 Q. And you told him what you wanted?
23 A. I told him that we had discussed the lease with
24 the option to purchase. As far as setting the lease price,
25 it was still up in the air. And it had been mentioned

1 twice, once in the field and once on the August 24th
2 meeting that their price was $400,000, but I told Gary to
3 leave that open.
4 Q. Why is that?
5 A. I didn't know that that was set in stone.
6 Q. Okay. I don't want you to -- There's
7 attorney-client privilege there about your communication
8 with Mr. Libey.
9 So, you just indicated to him that you wanted a
10 draft of this Farm Lease with an Option to Purchase. Okay.
11 And am I to assume, then, that you believed that the draft
12 that you presented to the Honns was, in general, concurrent
13 with what had occurred on August 24th?
14 A. Please rephrase that.
15 Q. Sure. The document that you had Gary draw up as
16 a Farm Lease With Option to Purchase --
17 MR. LIBEY: Exhibit Number 1.
18 Q. (BY MR. MOORER:) Exhibit Number 1. You believed
19 that it was, it represented your conversation with the
20 Honns from August 24th?
21 A. In most part.
22 Q. Okay.
23 A. Because, I gave Mr. Libey the Assessor's report,
24 which showed the different parcels of ground. And we were
25 still up in the air about the length of the lease, when it

1 would begin, the payment of the lease.
2 And I told Gary to leave the line about option to
3 buy, that figure out, and we'd fill that in when we met
4 back with the Honns.
5 Q. Okay. Any other terms that you thought needed to
6 be left out or added to it?
7 A. No.
8 Q. Okay.
9 A. Not that I recall.
10 Q. Okay. And did you call the Honns to set up the
11 meeting for September 14th?
12 A. Yes. After I had received a copy from my
13 attorney, then we called Larry Honn, Sr. and said that we
14 had a copy of the lease and option to buy. "We'd like to
15 set up a time to come down and let you review it."
16 Q. Okay. So, you made that appointment?
17 A. Correct.
18 Q. Did you offer to give them a copy of the lease
19 before you got there so that they could read it in advance?
20 A. That was a very short time period between the
21 time we received it and the date that we went down there.
22 Q. Okay.
23 A. We received it in the mail, Josh and I read
24 through it, and I called Larry Sr. and --
25 Q. Okay. And set up the meeting.

1 A. -- set up the meeting.
2 Q. So, on September 14th, you went to their home in
3 Endicott?
4 A. In LaCrosse.
5 Q. LaCrosse, sorry. And you met with Larry Honn and
6 his wife, Charlotte?
7 A. Correct.
8 Q. And that was you and Josh?
9 A. Correct.
10 Q. And, then, tell us about how that meeting went.
11 A. We presented the copy of the lease and option to
12 buy.
13 Q. And the one that you presented, is it the same
14 one that is there marked as Exhibit Number 1?
15 A. Yes. Other than when Josh and I had received it
16 from Gary, we took off Exhibit A, and he was reading that
17 and I was reading the other part, then we exchanged and
18 read them back and forth.
19 When we took this document in, we had not
20 reattached Exhibit A. It was in our folder. But, what we
21 showed them was the Cash Rent for Farm Lease with Option to
22 Purchase.
23 Q. Okay. So, you presented to them the first, I'm
24 going to say --
25 A. Everything except Exhibit A.

1 Q. So, the first seven pages?
2 A. Let me check. Correct.
3 Q. Okay. And did you have one copy for each of them
4 or just one copy?
5 A. Just one copy.
6 Q. Okay.
7 A. Larry Sr. read it first.
8 Q. Okay. Did he actually read it, or did he look at
9 it?
10 A. That, I can't answer.
11 Q. Okay. You were present when he was reading
12 yesterday for Mr. Libey, and several times he took his
13 glasses off. Do you recall that?
14 A. Correct.
15 Q. Did you see him do that at all at the meeting on
16 September 14th?
17 A. Not that I was aware of.
18 Q. Okay. Did you actually see him -- Did he say,
19 "Well, wait a minute, this says, 'Cash Rent with Option to
20 Purchase.'" Did he read that to you and say, "We didn't
21 agree to an option to purchase"?
22 A. No. He just was quietly going through it.
23 Q. And where did he quietly go through this in the
24 house?
25 A. In the living room.

1 Q. In the living room. Okay. Was his wife sitting
2 next to him?
3 A. Correct.
4 Q. And did it appear as though she was going through
5 the paperwork as well?
6 A. No. Because when Larry got done looking it over,
7 reading it, whatever he did, then it was given to
8 Charlotte, and she read through it.
9 Q. How much time did Larry take to look at it?
10 A. I wasn't timing. I don't know exactly, but . . .
11 Q. What do you think? I mean, did he take two
12 seconds or 20 minutes or somewhere in between?
13 A. I would say closer to 30-plus minutes.
14 Q. Okay. So, during that 30-plus minutes, what did
15 you and Josh and Charlotte talk about?
16 A. Well, at that time, I took out the Assessor's
17 report, and I was showing those to Charlotte. And she
18 said -- She took them, and I just presumed that she was
19 making copies of them. I have no idea what she was doing.
20 But, anyway, she took them into their, I would assume,
21 office.
22 Q. Okay. And how long was she in the office?
23 A. 15 minutes, perhaps.
24 Q. During the period of time that she was gone, did
25 Larry ask you any questions about the lease?

1 A. I don't think so. He was studying it. We really
2 didn't get into the questioning and answering period until
3 after both of them had reviewed the contract.
4 Q. Okay. And during the period of time that he was
5 studying it, did you talk to him about any particular
6 provisions?
7 A. No.
8 Q. So, you just sat there?
9 A. Correct.
10 Q. Did Josh talk to him about any of the provisions?
11 A. No.
12 Q. So, he just sat there?
13 A. (Witness nodded head affirmatively.)
14 Q. Did Larry mention anything about his ability to
15 read or not read?
16 A. No.
17 Q. I just want to double check. You didn't see him
18 take his glasses off or do anything that would suggest that
19 he couldn't read?
20 A. I wasn't aware that he had a problem.
21 Q. Okay. Then, did you go through the document that
22 was presented to them as a Cash Rent Farm Lease with Option
23 to Purchase?
24 A. Correct. When both of them had studied it, then
25 we sat down and said, we asked them if this was

1 appropriate, and then went to Page 2 and started to fill in
2 the blanks.
3 Q. Okay. Was there any discussion about the number,
4 going back to Page 1, was there any discussion about the
5 total number of acres?
6 A. No.
7 Q. Was there any discussion about the irrigated
8 farmland?
9 A. No.
10 Q. Was there any discussion about the tillable
11 farmland?
12 A. No.
13 Q. Was there any discussion about the parcel
14 numbers?
15 A. No.
16 Q. Was there any discussion about the irrigated
17 equipment?
18 A. Well, not as we were going through the contract.
19 But Larry said, "We'll try to have it up in tip-top shape
20 when you take it over."
21 Q. Was there any discussion about the water rights
22 on September 14th?
23 A. Yes, there was. I don't think that they were
24 really aware of just what the water rights were.
25 Q. Okay. What makes you believe that they were not

1 really aware?
2 A. We asked about the different acres, and they
3 talked about, at one time, irrigating 220 acres, and that
4 they had cut it back because they didn't want to hire help.
5 So, that was a concern to me, whether the, you
6 know, you either use it or lose it. And that was a big
7 concern to me, that they were presently irrigating, to my
8 knowledge, 120 acres.
9 Q. Okay.
10 A. So, that was a concern, and we talked a little
11 about that.
12 Q. Okay.
13 A. And then, of course, the discussion turned to the
14 length of the lease. Larry wanted it one year. Well, we
15 weren't going to enter into a one-year contract, because we
16 would buy additional equipment, and that, to our liking,
17 was not a long enough contract for us to make those
18 adjustments.
19 Q. Okay. And was there a discussion then
20 about -- Did you propose a different length of contract?
21 A. Yes. Five years.
22 Q. Was there a discussion about a number of years
23 between one and five, such as three?
24 A. May have been three tossed out, but Josh and I
25 were pretty well stuck on five, and they agreed to it.

1 Q. Okay. And so, who wrote the five in here?
2 A. Charlotte.
3 Q. And did you advise her to write that in here, or
4 did she just pick up the pen and --
5 A. She had the pen and she had the contract. She
6 wrote it in.
7 Q. Okay. Was there a discussion about this
8 effective date? That's paragraph 2.
9 A. Effective date or the commencement?
10 Q. It says "Effective Date." It's Paragraph 2b on
11 Page 2?
12 A. Rephrase that question.
13 Q. Sure. You're looking at Exhibit 1 there.
14 A. Correct.
15 Q. And you turned to the second page, and if you
16 take a look at the top, under Paragraph 2, it says "Terms"
17 underlined.
18 A. Yes.
19 Q. And then, if you drop down to small Paragraph b,
20 there is another underline, under the two words "Effective
21 Date."
22 A. Yep.
23 Q. Okay. And it says there, "This lease shall
24 become effective upon approval of an operating line of
25 credit by the Lessee."

1 A. Well, Josh and I wouldn't have gone down there if
2 we hadn't have researched that. And, to our opinion, we
3 had obtained operating capital to do this, and so we
4 proceeded with the lease.
5 Q. But my question was, was there a discussion about
6 that sentence between the Honns --
7 A. No.
8 Q. -- and the Garretts?
9 A. (Witness shook head negatively.)
10 Q. Did anybody ask any questions like, "Is there an
11 operating line in place?"
12 A. No.
13 Q. Was there an operating line in place?
14 A. Yes.
15 Q. When was the operating line put in place?
16 A. Well, there was an existing operating line in
17 place at that time.
18 Q. What was that existing operating line?
19 A. You mean, dollar value or what?
20 Q. Yes. Let's just start with, who is that existing
21 operating line with?
22 A. FSA.
23 Q. And on September 14th, what was the maximum
24 amount you could draw on that?
25 A. 170,000.

1 Q. Excuse me?
2 A. 170,000.
3 Q. And how much was then currently existing on that
4 line?
5 A. Not sure at that time.
6 Q. What is your best guess?
7 A. 50,000.
8 Q. Was it up for renewal?
9 A. Yes.
10 Q. What is your renewal date on that?
11 A. It ran -- it ran to the end of August.
12 Q. So, from August 1 through July 31 of each year.
13 A. It's from September 1st to October 30th.
14 Q. Okay. Why did you say, "it ran to the end of
15 August"?
16 A. Because that's the cut-off time.
17 Q. Cut-off for what?
18 A. That's when we can proceed with renewal, but
19 they, the settlement could run into November, after the
20 crops are sold and livestock are sold.
21 Q. Are you able to draw on your credit line after
22 August?
23 A. Yes.
24 Q. Okay. So, it doesn't cut off any availability of
25 credit?

1 A. No.
2 Q. Okay. You're still able to use it?
3 A. Correct.
4 Q. Okay.
5 A. It's just a date when we should reapply for the
6 next year.
7 Q. Okay. If you had a credit line in place, did you
8 tell the Honns that the credit line was in place?
9 A. No. They didn't ask anything about it.
10 Q. What was your purpose of putting it in the
11 contract?
12 A. We put it in the contract as a safety net that if
13 we couldn't procure a line of credit big enough to take
14 this, we would have -- we could opt out of it if we had to.
15 Q. Okay. So, did you feel that you didn't have a
16 big enough credit line to cover this?
17 A. At the time, we thought it was adequate.
18 Q. Okay. Were you concerned that your credit would
19 be extended to the point that you wouldn't be able to have
20 an effective date?
21 A. Rephrase that.
22 Q. Sure. Were you concerned that your credit line
23 would be tapped out and you would no longer have the
24 ability to make the payments under this lease?
25 A. No, not necessarily.

1 Q. Okay. Was this put in there for your protection
2 or for their protection?
3 A. Put in there for our protection.
4 Q. Okay. Did you tell them that you did have an
5 operating line of credit at that time and said, "Don't
6 worry about that sentence"?
7 A. No. It was never discussed.
8 Q. Would you agree with me that the lease doesn't
9 come into effect until that condition is complied with?
10 A. Rephrase your question.
11 Q. Okay. Let's read the sentence together.
12 A. "This Lease shall become effective upon approval
13 of an operating line of credit by the Lessee."
14 Q. Right. So, the lease doesn't become effective
15 until there's approval of the operating line, correct?
16 A. Correct.
17 Q. How would the Honns know it if you didn't tell
18 them?
19 A. They probably wouldn't.
20 Q. When did you plan --
21 A. That should have been a concern of theirs to ask
22 us that question.
23 Q. When were you planning to tell them that that
24 line of credit was in place?
25 A. When they asked.

1 Q. Okay. Paragraph 3 deals with rent, do you agree?
2 A. Pardon me?
3 Q. Paragraph 3 deals with rent?
4 A. Yes.
5 Q. Do you agree?
6 A. (No response.)
7 Q. And there's written in here the amount of
8 $24,000?
9 A. Correct.
10 Q. Tell us about how that amount got plugged in
11 there.
12 A. That was a figure that Charlotte thought that
13 they needed. Josh and I had done some cash flow research,
14 and we figured, we thought that was a figure that we could
15 live with.
16 Q. Okay. And so, she just threw it out there, and
17 did you say --
18 A. Charlotte threw it out.
19 Q. Okay. Charlotte threw it out there, and did you
20 respond or did Josh respond?
21 A. I responded.
22 Q. And how did you respond?
23 A. That would be agreeable with us.
24 Q. Okay.
25 A. $2,000 a month.

1 Q. Okay. Well, that was my next question. Did you
2 then say, "$2,000 a month," or "We'll pay you $24,000 a
3 year"?
4 A. Charlotte said, "We would like it in a monthly
5 payment."
6 Q. Okay. And so, that's how it got, the phrase got
7 written in there, "payable $2,000 a month commencing
8 November 1, 2010"?
9 A. Correct.
10 Q. Okay. And did you concur that she should write
11 that in?
12 A. Yes.
13 Q. And then, how is it that the next sentence was
14 added, "annual rent payment is open for review October 1 of
15 each year"?
16 A. Charlotte was concerned about inflation, cost of
17 living, and they wanted a safety net in there that they
18 could have an option to review the lease payment on October
19 1st.
20 Q. And you were agreeable with that?
21 A. Correct.
22 Q. So, let's look forward, how would that review
23 occur?
24 A. That was never really discussed, but I would say
25 it would be a negotiated item, based on, in my opinion,

1 based on rate of inflation for the year.
2 Q. Well, let's assume October 1 of 2011 is here.
3 A. Okay.
4 Q. And Charlotte calls you up and says, "Frank, our
5 expenses went up $5,000, so we need to set the rent at
6 $2,420 a month." And you say, "Gee, Charlotte, that's a
7 lot of money."
8 A. Mr. Moorer, that's a hypothetical question. If
9 that was the fact, I would call my attorney and we'd
10 probably be in arbitration.
11 Q. But how do you resolve that issue?
12 A. Through arbitration.
13 Q. Okay. But it's a review.
14 A. Right.
15 Q. What does it mean to review something?
16 A. We're reviewing it to set a price for the next
17 year's rent.
18 Q. Is there anything that requires you to change the
19 price?
20 A. Rephrase that.
21 Q. It says that you're going to review the price.
22 It doesn't say you're going to change the price.
23 A. Right.
24 Q. So, what happens if you can't reach agreement as
25 to the amount of the change?

1 A. That's why that arbitration clause is in there,
2 if we can't come to terms.
3 Q. But the term is that you will review it. The
4 term is not that you will change the price.
5 A. Okay.
6 Q. Would you agree with me?
7 A. I'm sure it was intended to mean --
8 Q. Well, that's what I'm asking you. Was the intent
9 that there would be a review, and if it was reasonable, it
10 would be changed?
11 A. Correct.
12 Q. Okay. Whether it was going to go up or whether
13 Frank called and said, "Gee, guys, electricity went to
14 $2,000 a month. We need a little relief under this lease."
15 It would go either way.
16 A. It could work both ways.
17 Q. Either way. And, then, I see that there are
18 initials by that sentence and there are some initials here,
19 "FDG," and I think that's a "D." Are those your initials?
20 A. Correct.
21 Q. And what does "D" stand for?
22 A. David.
23 Q. Okay. Now, we've got this Paragraph Number 4,
24 "Option to Purchase."
25 A. Correct.

1 Q. Tell us about the conversation as it relates to
2 that option.
3 A. We got to that part of it. I asked Larry that --
4 previously he had mentioned $400,000 twice -- "Is that the
5 figure that you would be satisfied with the purchase of the
6 ranch?"
7 Q. And how did he respond?
8 A. "Yes."
9 Q. Just a simple "yes"?
10 A. I don't remember for sure just how, but it
11 implied yes.
12 Charlotte's response was, "Should I put it in
13 there?".
14 Q. And who responded to that question?
15 A. Larry Sr.
16 Q. Larry Sr. responded?
17 A. Larry Honn.
18 "Put it in," he said. And that's when she wrote
19 it in.
20 Q. So, when Larry Honn says that you told her to
21 write it in, he's wrong?
22 A. Rephrase that.
23 Q. Sure. When Larry Honn says in his deposition
24 yesterday that you told her to write that in, that's wrong?
25 A. That's wrong.

1 Q. When Charlotte says you told her to write that
2 in, that's wrong?
3 A. If, indeed, that's what Charlotte said.
4 Q. Okay. Yesterday, when they testified here, they
5 said that "We talked about a term of at least $400,000."
6 They kept using the words "at least" before $400,000.
7 Where does that come from?
8 A. I have no idea.
9 Q. That's just made up, is that what you're telling
10 me?
11 A. Correct.
12 Q. Okay. Can you take a look at that sentence that
13 says, the first sentence there, it says, "During the term
14 of this lease," under Paragraph 4?
15 A. Gotcha.
16 Q. "Option to Purchase: During term of this lease,
17 the Lessor grants to the Lessee an option to purchase for
18 the sum of $400,000."
19 Did you read that to say that you were getting an
20 option to purchase for $400,000? You would give them
21 $400,000, and you'd get an option to purchase?
22 A. Correct. And that it would be exercised at any
23 time during the lease.
24 Q. Okay. Was there any discussion about that it
25 could be exercised anytime during the lease?

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF WHITMAN
3
4 GARRETT RANCHES LLC, a)
Washington Limited)
5 Liability Company,)
)
6 Petitioner,) No. 10-2-00293-4
)
7 vs.)
)
8 LARRY HONN FAMILY LLC, a)
Washington Limited)
9 Liability Company,)
)
10 Respondent.)
)
11
12
13 DEPOSITION OF JOSH GARRETT
14 Taken at the instance of the Respondent
15
16
17 December 13, 2010
18 4:10 p.m.
19 North 409 Main Street
20 Colfax, Washington
21
22
23 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
24 1312 N. Monroe Street
Spokane, Washington 99201
25 (509) 456-0586 - (800) 358-2345

EXHIBIT NO. 4

1 sale or not, and what the amount of that property would be.
2 And he did state $400,000.
3 Q. On that date?
4 A. On that date.
5 Q. So, on August 24th, he said $400,000?
6 A. Yes, he did.
7 Q. He said, "I'll take less than $200 an acre."
8 A. He never said that. He said he would take
9 $400,000.
10 Q. Do you think he had any idea what that number
11 meant?
12 A. I have no idea. You'll have to ask him.
13 Q. Did you have any idea what that number meant?
14 A. I did have an idea of what that number meant.
15 Q. What did it mean to you on August 24th?
16 A. It meant he wanted $400,000 for that property.
17 Q. Did you have any idea how many acres that was
18 there?
19 A. Not at that time, sir.
20 Q. So, you didn't know if that was one acre or 2,000
21 acres?
22 A. Well, we knew it was roughly around 2,000 acres,
23 but we did not know the exact figure.
24 Q. Okay. Both the Honns indicated that their
25 statement was, "at least $400,000."

1 A. That was not brought up at that time.
2 Q. So, you disagree with them --
3 A. Yes, I do.
4 Q. -- as to the term "at least"?
5 A. Yes, I do.
6 Q. Did you gulp when he said $400,000?
7 A. Gulp, sir?
8 Q. Yeah.
9 A. What do you mean by "gulp"?
10 Q. Well, you're familiar with the price of farm
11 ground?
12 A. Sure.
13 Q. You're familiar with the price of pasture ground?
14 A. Yes, sir.
15 Q. Okay. $400,000 on 2,000 acres is 200 bucks an
16 acre, correct?
17 A. That is correct.
18 Q. Okay. And either you have to be a fool or
19 something else to offer --
20 A. Well, given the fact that we'd gone out with
21 Larry Jr. and had spent time out in their pasture those two
22 times as he took us around, we knew the extent of what it
23 was going to take to bring the property up to a reasonable
24 amount of money.
25 The weed control issue was a big one. The

1 pasture itself had been grazed down considerably. There
2 had been a lot of reseeding that needed to be done, along
3 with the spraying.
4 Also, the alfalfa fields were never sprayed, and
5 so there was a real loss of production on that. So, there
6 was some major upkeep that needed to be done on this farm
7 to bring it up to a profitable state.
8 Q. Okay. And so, you thought $400,000 --
9 A. Was a reasonable amount at that time.
10 Q. Really? You sit here today and tell me that?
11 A. Sure.
12 Q. What is the average price of real estate in that
13 part of the country?
14 A. Depends on what you're asking for real estate.
15 Are you asking "irrigation"?
16 Q. Just pasture?
17 A. Pasture. I think we went to the Assessor's
18 office, and they said it was roughly around $150 an acre.
19 Q. To buy pasture ground?
20 A. To buy pasture ground.
21 Q. And you're familiar with sales of pasture ground
22 in the last year for $150 an acre?
23 A. I have no idea. I did not look it up.
24 Q. You didn't look it up?
25 A. No.

1 lease, or did your father?
2 A. My father did.
3 Q. Okay. And between August 24th and September
4 14th, you didn't have any conversations with the Honns?
5 A. I do believe Larry came out to the shop one
6 evening with his step-daughter, only briefly, just said hi
7 and left, so . . .
8 Q. But Larry Honn, Jr. is not a participant in this?
9 A. No, no, but that's the only person I had contact
10 with.
11 Q. Okay.
12 A. Yeah, I believe so.
13 Q. Okay. September 14th, tell us about that day.
14 A. Well, we, my father contacted Larry Sr. about
15 setting up a meeting, and we set it up for September 14th.
16 We showed up, I believe around 1:00, because we
17 were there for about three, three-and-a-half hours. We
18 showed up, we had the documents with us, and we presented
19 them to Charlotte and Larry.
20 Q. Okay. When you showed up and you presented, you
21 said documents, did you present both a lease and the option
22 -- and the contract for purchase?
23 A. Are you referring to Exhibit A?
24 Q. Yeah. The Contract of Sale.
25 A. No. It was not attached to the lease agreement.

1 And we had it in the folder, and we just never showed it to
2 them.
3 Q. So, they never saw an Exhibit A?
4 A. No. But they never asked for one either. And
5 had they, we would have presented it right away to them.
6 Q. Okay. So, let's go back through the lease now in
7 its presented form. Okay.
8 Between August 24th and September 14th, how did
9 you determine there was 2,008 acres?
10 A. We went off the parcel numbers and determined it
11 off of the parcel numbers.
12 Q. Okay. And do you believe that all 13 parcel
13 numbers are applicable to the ranch?
14 A. As far as?
15 Q. Well, okay. You were present during Mr. and
16 Mrs. Honn's testimony. They indicated that there are 12
17 parcel numbers applicable to the ranch --
18 A. And there's 13 on this.
19 Q. -- and there's 13 on this.
20 A. Well, there's one parcel on here that Larry had
21 discussed with my father on the 15th about getting deleted
22 off of this lease agreement, which we were going to comply
23 with. And that happens to be the six acres that was in
24 Section 29, I believe.
25 Q. Okay. But there's still 13 on here.

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 MOTION AND DECLARATION IN SUPPORT OF DISQUALIFICATION OF THE LAW FIRM LIBEY & ENSLEY, PLLC.

MOTION FOR DISQUALIFICATION OF THE LAW FIRM

LIBEY & ENSLEY, PLLC.

The defendant moves the court for an order of disqualification of the law firm LIBEY & ENSLEY, PLLC, as counsel for the plaintiff pursuant to RPC 3.7.

This motion was brought to the attention of the plaintiff and this court to give the plaintiff an opportunity to withdraw and find substitute counsel. To date no indication of a withdrawal has been given by the plaintiff's counsel.

RPC 3.7 states the lawyer as witness rule. The sections relevant to this case provide: (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

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EXHIBIT NO. P5

The Washington Supreme court in Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wash.2d 789, 811-812, 881 P.2d 1020 (1994) held that a trial court has the authority under RPC 3.7 to disqualify a lawyer who refuses to withdraw from a case.

An appellate court reviews the trial court's ruling for abuse of discretion. Id. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when it is exercised contrary to law. State v. Tobin, 161 Wash.2d 517, 523, 166 P.3d 1167 (2007).

The case of Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co., gives some guidance as it was a review of a trial court decision to permit counsel to continue representation in a case where the opposing party intended to call him as a witness. In that decision the court favorably cited and applied a test adopted by the Arizona Supreme Court in Cottonwood Estates, Inc. v. Paradise Builders, Inc., 128 Ariz. 99, 624 P.2d 296 (1981)

The PUD No. 1 court at page 812 cited to the following factors in determining disqualification.

1. A motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated,

2. The evidence is unobtainable elsewhere, and

3. The testimony is or may be prejudicial to the testifying attorney's client.

a. **A motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated.**

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The arbitration at issue in this case concerns only one issue and that is in regard to the party's option agreement. The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. His testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC. That the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey.

That at the time of drafting the option agreement the members of the Larry Honn Family Trust did not indicate any dollar amount to be placed in the option.

Gary Libey as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC.,

b. The evidence is unobtainable elsewhere.

Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement.

c. The testimony is or may be prejudicial to the testifying attorney's client.

The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. His testimony will be that he drafted the option agreement at the sole direction of Garrett Ranches, LLC. That the Larry Honn Family Trust LLC, had no input or contributed to the wording of the option that was drafted. As such any ambiguity is construed against the drafter. In this case the plaintiff's attorney drafted the option agreement and any ambiguity is construed against the drafter. Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 513, 760 P.2d 350 (1988).

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

The testimony will also indicate that the parties did not discuss consideration for the option at the time the option agreement was drafted. This is a key issue in the parties dispute.

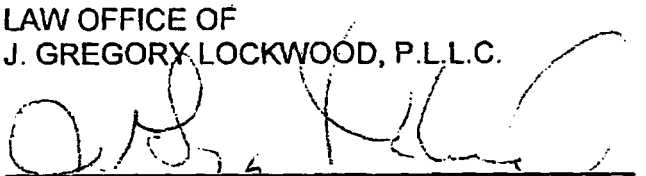
In American States Ins. Co. ex rel. Kommavongsa v. Nammathao, 153 Wn.App. 461, 467, 220 P.3d 1283 (2009) Division III held that a trial court considering disqualification in a situation such as this case must apply the Cottonwood Estates ' standards and make appropriate findings concerning the materiality and necessity of counsel's testimony, as well as determine any prejudice to the attorney's client, Before making the decision to disqualify counsel.

CONCLUSION

Based upon the above the law firm of LIBEY & ENSLEY, PLLC, should be disqualified as counsel for the plaintiff pursuant to RPC 3.7.

Dated this 9th day of October, 2014

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

DECLARATION

I J. Gregory Lockwood am the attorney of record for the above named defendant and make this declaration from my personal knowledge and under penalty of perjury under the laws of the State of Washington.

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

1. The arbitration at issue in this case concerns only one issue and that is in regard to the party's option agreement.

2. The option agreement was drafted by Gary Libey a partner in the firm that represents the plaintiff. He is a necessary witness in this arbitration.

3. It is anticipated that his testimony will indicate that he drafted the option agreement at the sole direction of Garrett Ranches, LLC.

4. It is further anticipated that he will indicate that the Larry Honn Family Trust LLC, had no input or contributed in any way to the wording of the option as drafted by Gary Libey.

5. Additional facts would reveal that at the time of drafting the option agreement the members of the Larry Honn Family Trust, LLC did not indicate any dollar amount to be placed in the option.

6. And specifically, Gary Libey as the drafter of the option agreement did not discuss consideration for the option with the members of the Larry Honn Family Trust LLC,

7. Gary Libey as the drafter of the option agreement, he is the only person who has knowledge of the information that was relied upon in drafting the option agreement.

8. Gary Libey a partner in the firm that represents the plaintiff will provide testimony that he drafted the option agreement at the sole direction of Garrett Ranches, LLC, and the Larry Honn Family Trust LLC, had no input or contributed to the wording of the option that was drafted.

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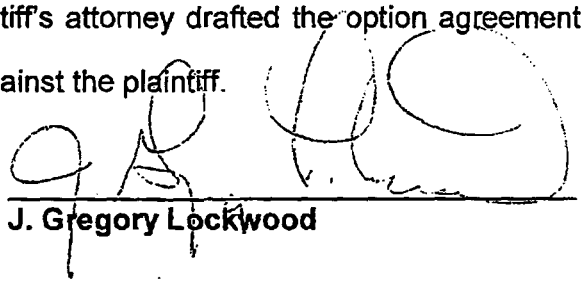
Facsimile: (509) 623-1491

9. As such any ambiguity the arbitrators may find would be construed against the drafter. In this case the plaintiff's attorney drafted the option agreement and any ambiguity would be construed against the plaintiff.



J. Gregory Lockwood

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on October 9, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-4345 (509) 397-3594 fax	___X___ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED October 9, 2014.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND DENYING DEFENDANT'S MOTION TO DISQUALIFY THE FIRM OF LIBEY & ENSLEY, PLLC**

THIS MATTER came before the Court on the Motions and Declarations of Defendant for Reconsideration and Disqualification of the Firm of Libey & Ensley, PLLC,

BASED on the evidence and arguments presented,

THE COURT FINDS:

1. There does not appear to be a conflict of interest between Mr. Timothy Esser and the Parties or their attorneys;
2. It is highly unlikely that Gary J. Libey will be a witness in the proceedings; and
3. The facts sought by Defendant from Mr. Libey are available from other sources and are not in dispute.

EXHIBIT NO. 6

NOW THEREFORE,

IT IS HEREBY ORDERED:

1. Defendant's Motion for Reconsideration on the appointment of Timothy Esser as arbitrator is DENIED. However, if Mr. Esser recuses himself, the third and final arbitrator in these proceedings will be appointed in the following order of priority: 1. Rusty McGuire, 2. Steve Bishop, and 3. Howard Neill.
2. Defendant's Motion to disqualify the law firm of Libey and Ensley, PLLC, is DENIED.
3. Attorney fees for the prevailing party, Plaintiff, are RESERVED for determination by the Arbitration Panel.

DATED this _____ day of November, 2014.

_____
JUDGE DAVID FRAZIER

Presented By:

LIBEY & ENSLEY, PLLC

By_____
Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff
LIBEY & ENSLEY, PLLC

Approved for Entry, Notice of Presentment waived:

By:_____
Gregory Lockwood
Attorney for Defendant

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendants.	NO. 10-2-00293-4 LETTER TO TIMOTHY ESSER DATED NOVEMBER 14, 2014

See attached.

Dated this 19th day of November, 2014.

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C.

J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Defendants

FILED
NOV 20 2014
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

241

CERTIFICATE OF SERVICE

I, Lorrie Hodgson, do declare that on November 19, 2014 I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Frank Gebhardt Attorney at Law 421 West Riverside Ave. Suite 1400 *Spokane*, WA 99201	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Read Smith 916 West Willapa Avenue Spokane WA 99224	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Timothy Esser Attorney at Law 520 East Main Street Pullman, WA 99163	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____
Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619	____X____ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY OTHER _____

Dated this 19th day of November, 2014.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

Law office of
J. Gregory Lockwood, P.L.L.C.
421 W. Riverside Avenue, Suite 960
Spokane, Washington 99201
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

November 14, 2014

Timothy Esser
520 E Main St
Pullman, WA 99163

RE: Garrett v. Honn

Dear Mr. Esser:

It has come to my attention by way of an affidavit that you and Mr. Libey may still have an ongoing friendship which could influence your decisions in the pending arbitration. I have attached a copy f the affidavit for your review.

My clients are entitled to a fair, unbiased neutral arbitrator in this matter with at least the appearance of fairness. The open and public association with Mr. Libey at this juncture casts reasonable suspicion even if inadvertent.

As the court appointed neutral arbitrator, following my client's objection and under the circumstances which now present themselves, my clients request that you recue yourself from this arbitration.

The court has made accommodation for this event by appointing alternate arbitrators.

Very truly yours,

J. Gregory Lockwood
Attorney at Law

cc:
Read Smith
Frank Gebhardt
Will Ferguson

I, KHANI TAYLOR,

ON OR ABOUT 29 OCT 2014 I WAS DRIVING SOUTH ON MAIN ST IN COLFAX AT APPX. 11:00 am. WHILE I WAS STOPPED FOR TWO PEOPLE IN THE CROSS WALK BY STEVE'S GLASS I OBSERVED MR. LIBEY AND MR. ESSER WALKING DOWN THE STREET TOGETHER. I HAVE SPENT MOST OF MY 40 YRS LIVING IN COLFAX SO IT WAS NOT A SHOCK TO ME TO SEE THE TWO MEN TOGETHER, WHAT WAS A SHOCK WAS THE FACT THAT I HAD RECENTLY HEARD THAT THEY HADN'T SEEN OR SPOKEN TO EACHOTHER SINCE MR. ESSER'S RETIREMENT. I SEE THEM, ALONG W/ JUDGE FRAISER, REGULARY FREQUENTING THE LOCAL RESTAURANTS.

- Acknowledgment by person signing in an individual capacity:

State of Washington
County of Whitman

I certify that I know or have satisfactory evidence that [illegible] person) is the person who appeared before me, and said person acknowledged that he/she signed this instrument and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: 11/12/14

(Signature of Notary) (Seal/Stamp of Notary)

Notary Public — State of Washington
My Appointment Expires: 4-1-18

KATHERINE WRIDE NOTARY PUBLIC COMMISSION EXPIRES 4-1-18 STATE OF WASHINGTON

X Khani Taylor 12 Nov 2014

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Declaration of Counsel in Support of:** **1. Summary Judgment;** **2. Order of Sale; and** **3. Attorney Fees**

WILL FERGUSON declares:

1. I am an attorney in the firm of LIBEY & ENSLEY, PLLC.

2. LIBEY & ENSLEY, PLLC represents the Plaintiff, GARRETT RANCHES, LLC.

3. On May 5, 2014, Garrett Ranches exercised its Option to Purchase the property in this matter, as evidenced by the attached letter and proof of mailing, attached hereto as **Exhibit Nos. 1 & 2**, respectively.

4. Defendant has refused to sell the property. Defendant responded with a letter from its counsel. Attached hereto as **Exhibit No. 3** is the letter of refusal.

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DEC 01 2014
WHITMAN COUNTY CLERK

5. Attached hereto as **Exhibit No. 4** is the letter of Gary Libey to the Arbitration Panel in Arbitration 1, setting forth the arguments, claims, and issues presented in Arbitration 1.

6. Attached hereto as **Exhibit No. 5** is the Arbitration Statement submitted by Defendant's attorney in Arbitration 1, setting forth the arguments, claims, and issues presented in Arbitration 1.

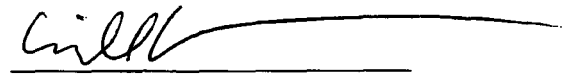
7. Attached hereto as **Exhibit No. 6**, is the Q&A between Defendant's counsel and Mr. Frank Garrett, regarding consideration for the Lease and Option.

8. I currently charge $200.00 per hour for my work in this case. I have spent eight billable hours on Plaintiff's Motion for Summary Judgment and anticipate that I will spend another four hours responding to Defendant's Motion for Summary Judgment. I estimate that I will spend another hour reviewing materials in preparation for oral argument, if any.

9. I request a minimum of $2,600.00 in attorney fees if the Arbitration Panel grants Plaintiff's Motion.

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

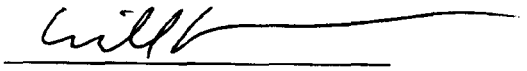
DATED this 30th day of November, 2014, at Colfax, Washington.



Will Ferguson

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered and mailed to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 1st day of December, 2014.



WILL FERGUSON

Declaration of Counsel

LIBEY & ENSLEY, PLLC

A Professional Limited Liability Company
Attorneys at Law
North 409 Main Street
P.O. Box 619
Colfax, Washington 99111-0619

Phone: (509) 397-4345
Fax: (509) 397-3594
www.lenlawyers.com

.uce Ensley
Gary J. Libey

Will Ferguson

Wesley A. Nuxoll
(Retired)

Of Counsel:
Guy C. Nelson*

*Also Admitted in Idaho

May 5, 2014

Gregory Lockwood
421 West Riverside Ave., Suite 960
Spokane, WA 99201

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Larry Honn Family, LLC
c/o Larry Honn, Sr.
P.O. Box 38
LaCrosse, WA 99143

RE: Exercise of Option to Purchase

Mr. Lockwood and Larry Honn Family, LLC,

Pursuant to Page 2, Paragraph 4 of the Cash Rent Farm Lease with Option to Purchase, executed on September 14, 2010, Garrett Ranches, LLC (hereinafter "Garrett Ranches"), hereby notifies Honn Family, LLC that Garrett Ranches, LLC exercises its Option to Purchase for the agreed sum of four hundred thousand dollars ($400,000.00). The sale will close, as agreed, within 30 days of this Notice. We will, unless we specify otherwise, operate as the Closing Agent for this sale.

Sincerely,

Will

Will Ferguson

cc: Client

EXHIBIT NO. 1

U.S. Postal Service

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 6.48

COLFAX, WA 99111 MAY 5 2014 USPS Postmark Here

7009 0820 0001 8438 7689

Sent To: LARRY HONN FAMILY LLC

Street, Apt. No.; or PO Box No.: C/O LARRY HONN SR ~~PO BOX 38~~

City, State, ZIP+4: LACROSSE WA 99143

PS Form 3800, August 2006 See Reverse for Instructions

Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 6.48

COLFAX, WA 99111 MAY 5 2014 USPS Postmark Here

7009 0820 0001 8438 7504

Sent To: GREGORY LOCKWOOD

Street, Apt. No.; or PO Box No.: 421 W RIVERSIDE AVE SUITE 960

City, State, ZIP+4: SPOKANE WA 99201

PS Form 3800, August 2006 See Reverse for Instructions

COLFAX MPO
COLFAX, Washington
991119998
5480520711-0099
05/05/2014 (509)397-2981 04:23:31 PM

Sales Receipt

Product Description	Sale Unit Qty	Price	Final Price
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:18 PM Label#:70090820000184387689			
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:30 PM Label#:70090820000184387504			
Total:			$0.00

Paid by:

Order stamps at usps.com/shop or call 1-800-Stamp24. Go to

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:

GREGORY LOCKWOOD
421 W RIVERSIDE AVE SUITE 960
SPOKANE WA 99201

COMPLETE THIS SECTION ON DELIVERY

A. Signature: X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name): Tice Whited C. Date of Delivery: 5-6-14

D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No

3. Service Type: ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Article Number (Transfer from service label): 7009 0820 0001 8438 7504

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

LARRY HONN FAMILY LLC
C/O LARRY HONN SR
PO BOX 38
LACROSSE WA 99143

COMPLETE THIS SECTION ON DELIVERY

A. Signature: X [signature] ☒ Agent ☐ Addressee

B. Received by (Printed Name): Marjorie Honn C. Date of Delivery: 05-06-14

D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☒ No

3. Service Type: ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label): 7009 0820 0001 8438 7689

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

EXHIBIT NO.

Law office of
J. Gregory Lockwood, P.L.L.C.
421 W. Riverside Avenue, Suite 960
Spokane, Washington 99201
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

May 13, 2014

GARRETT FARM LLC.
c/o Frank Garrett
P.O. Box 216
Endicott, WA 99125

GARRETT FARM LLC.
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Will Morgan Ferguson
Libey & Ensley, PLLC
409 N Main Street
PO Box 619
Colfax, WA 99111-0619

RE: Garrett Ranches, LLC v. Larry Honn Family, LLC

Dear Gentlemen:

As you are aware the option to purchase has been revoked. My clients do not wish to sell at this time.

If you have any questions, please contact my office.

Very truly yours,

J. Gregory Lockwood
Attorney at Law

cc: client

EXHIBIT NO. 3

LIBEY, ENSLEY & NELSON, PLLC

A Professional Limited Liability Company
Attorneys at Law
North 409 Main Street
P.O. Box 619
Colfax, Washington 99111-0619

Phone: (509) 397-4345
Fax: (509) 397-3594
www.lenlawyers.com

Bruce Ensley
Gary J. Libey
Guy C. Nelson*
Will Ferguson

*Also Admitted in Idaho

Of Counsel:
Wesley A. Nuxoll

Pullman Office:
1250 S.E. Bishop Blvd.
Suite H
Pullman, WA 99163
Phone: (509) 334-5500
Fax: (509) 334-5507

December 20, 2010

Read Smith
916 W. Willapa Ave.
Spokane, WA 99224

SENT BY EMAIL:
jread@comcast.net

David Gittins
Attorney at Law
843 7th St.
Clarkston, WA 99403

SENT BY EMAIL:
david@gittinslaw.com

Dwayne Blankenship
1200 SE Harvest Dr.
Pullman, WA 99163

SENT BY EMAIL:
dwayne@pullman.com

RE: Garrett/Honn - Arbitration
Garretts' Request: Specific Performance

Dear Arbitrators:

Introduction

We are scheduled to arbitrate this dispute commencing at 9:00 a.m. on Wednesday, December 22, 2010, in the Whitman County Superior Court jury room.

The purpose of this letter is to provide you with copies of the parties' depositions, exhibits, and legal research ahead of the hearing. I am sure you will get a set of arbitration documents from Mr. Moorer too. Thank you for taking the short time to review all of this information ahead of the hearing, if possible.

As discussed in further detail below, the Garretts request **specific enforcement** of the Lease and Option.

EXHIBIT NO. 4

I think the arbitration will take all day. Our witnesses will be Frank Garrett, Joshua Garrett, and Anne Lowe, the notary. I suspect the Honns and their son will also testify. We have not conducted formal discovery other than taking each other's clients' depositions.

Per RCW 7.04A.130, it will take a majority vote of the arbitrators (i.e., two out of three) to make a decision.

RCW 7.04A.150(1) states:

> The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence.

RCW 7.04A.190(1) and (2) state in part:

> (1) An arbitrator shall make a record of an award. The record must be authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.
>
> (2) An award must be made within the time specified by the agreement to arbitrate . . .

Thus, the statute gives you wide discretion in the process and procedure of conducting this arbitration. For example, you may want to hold separate meetings of the parties and their attorneys before conducting the formal hearing. That is most certainly up to you. Two out of you three must sign a written decision. (Hopefully the decision will be unanimous.) The arbitration clause in the Lease/Option requires a decision within 30 days of your appointment which would be close to early

January, 2011, i.e., 30 days after Mr. Blankenship was appointed as the third arbitrator.

Factual Background

Frank Garrett and Larry Honn met several times in the summer of 2010, which resulted in serious discussions of the Garretts leasing the Honns' ranch with an option to purchase it. The two Garretts, the two Honns, and their son, Larry Honn, Jr., later met at the Honns' home in LaCrosse on Tuesday, August 24, 2010, to discuss the terms of a lease/option.

The Garretts then had me prepare a Cash Rent Farm Lease with Option (the "Lease/Option") in early September 2010, for them to take to the Honns to further discuss and possibly execute. The Garretts made an appointment with the Honns to meet the Honns again at their home on Tuesday, September 14, 2010, to discuss the Lease/Option draft.

The Garretts took to the Honns' home the draft of the Lease/Option. There were several blanks which the Garretts intended to specifically negotiate when they met with the Honns. There was also a standard form purchase and sale agreement to confirm the cash terms of the sale attached as Exhibit "A" as referenced in the Option paragraph.

Exhibit "A" (i.e., the form purchase and sale agreement) was not physically attached to the Lease/Option when the parties executed it. It had been separated by the Garretts when they reviewed the Lease/Option draft. The Garretts had Exhibit "A" with them at the Honns' home, but the Honns did not request to review it.

After several hours of discussions and negotiations, the parties executed the Lease/Option at the Honns' home. Only the two Garretts and the two Honns who signed the Lease/Option were present. When the final negotiations occurred and the Lease/Option was completed, Anne Lowe from Endicott came later in the afternoon to notarize all of their signatures.

The parties duly executed the Lease/Option. They were not to execute the attached Exhibit "A", the Contract of Sale, as it was prepared just to confirm the Garretts' obligation to pay cash in full at closing and to allocate the closing costs in the customary manner. This document was to be signed in the future when and if the Garretts exercised the option to purchase.

When the Garretts and the Honns completed signing the Lease/Option, Anne Lowe, the notary, notarized their signatures and left. The Garretts and the Honns spent some time thereafter discussing their mutual satisfaction with their agreement and expressed relief and happiness that they had completed the deal.

The Garretts returned to me the original Lease/Option and I sent a copy to the Honns by letter dated September 16, 2010. Mr. Garrett had some questions about a few acres which were not included in the legal descriptions and requested that I call Mr. Honn. On Friday, September 17, 2010, I talked to Mr. Honn for about five minutes on a speakerphone with Mr. Garrett present to briefly discuss some small parcels which the Honns considered part of the ranch but were not taxed to them.

Within a few days after executing the Lease/Option, the Honns changed their minds and wanted to void the Lease/Option. Mr. Honn called Mr. Garrett on September 19, 2010, and told him the Lease/Option was null and void. The Honns had become very upset with the Garretts because of rumors they heard that the Garretts were going to buy the Honns' ranch and trucking business. Unfortunately, the Honns believed these false rumors and accused the Garretts of being dishonest. The Honns soon retained Mr. Moorer, who sent me a letter claiming the Honns repudiated the Lease/Option. We exchanged several letters which are exhibits to Mr. Honn's deposition.

As a result of the Honns' repudiation of the Lease/Option, the Garretts demanded arbitration of the Honns' claim. Each of the parties appointed one arbitrator, and the two appointed a third arbitrator as set forth in the arbitration clause of the Lease/Option.

Honns' Claims

As of writing this letter, it is difficult to know for sure the actual reason(s) the Honns desire to repudiate the Lease/Option. Since this is an arbitration, there have been no formal pleadings or pretrial motions to specifically identify the disputed facts and legal theories that the Honns claim support repudiation of the Lease/Option. However, based upon their testimony at their depositions, the Garretts are aware of the Honns' major complaints.

The Honns claim they were deceived when they signed the Lease/Option, the Garretts misrepresented the terms of the Lease/Option, and that the Lease/Option is not a complete agreement. The Honns want out of the deal they made with the Garretts. The Honns have vehemently denied the legal effect of the Lease/Option, and have told the Garretts to stay off the ranch. It appears the Honns have what is called "seller's remorse."

The Garretts will testify that they are honest and well-respected farmers and they did nothing dishonest. The Garretts negotiated in good faith at the request of the Honns a very fair and reasonable Lease/Option. The Garretts will testify there was mutual assent on all material items of the agreement when they all signed the Lease/Option on September 14, 2010. Despite having been denied access to the ranch since November 1, 2010, the Garretts have timely sent their monthly $2,000 rent checks to the Honns and will continue to do so again by December 31, 2010, for the January, 2011, rent payment.

The two major reasons the Honns gave at their depositions to repudiate the Lease/Option were that they wanted to keep some of their cattle on the ranch for a year or two after the Lease/Option commenced and that they did not actually read Exhibit "A" (the form Contract of Sale) before they signed the Lease/Option. The Honns claim these two reasons justify a complete repudiation of the Lease/Option and that it is null and void in its entirety.

Indeed, the Garretts, as honest and reasonable people, agreed to accommodate the needs of the Honns to retain cattle on the ranch for a reasonable period of time after the Lease/Option commenced for the Honns to market the cattle to minimize their income taxes. Now the Honns claim that the Lease/Option is invalid because pasture use after November 1, 2010, was a material term and was not written into the Lease/Option. The Garretts respond that if the post-Lease/Option pasture was an important issue for the Honns, the Honns had full opportunity to write that concern into the form Lease/Option when they wrote in other specific terms. In any event, the Garretts are reasonable folks and will accommodate the Honns to the best of their ability. Over the years I have written many leases and/or sales where one party asked for some reasonable accommodation to remove equipment, clean out the barn or shed, or some other similar after-closing requests. This is a very frequent situation and certainly does not excuse performance of a binding contract.

In addition, as will be further briefed, the Honns' failure to read Exhibit "A" is not a legal cause to void the Lease/Option. Further, the fact that Exhibit "A" was not attached to the Lease/Option when it was signed has no legal significance to the validity of the Lease/Option. The parties agreed to a price of $400,000 for the ranch if the Garretts elected to buy it. In fact, Mrs. Honn inserted the $400,000 figure in Paragraph 4 of the Lease/Option. Exhibit "A" was only a standard form purchase and sale agreement which allocated the closing costs in the normal and customary manner. There was nothing to hide in Exhibit "A", nor did the Garretts intend to do so.

Legal Rules

The question before the arbitrators is whether the Lease/Option is a contract. There are several contract rules to consider. Attached to this letter are copies of portions of relevant chapters from Washington Practice, Contract Law & Practice, Volume 25, for your consideration. In summary, the more important legal principles are the following:

1. A contract is a set of promises for the breach of which the law provides a remedy. In this case,

the parties duly signed the Lease/Option which should be enforced.

2. The essential elements of a contract include the subject matter, the parties, the promise, the terms and conditions, and the consideration. All such elements exist in the Lease/Option.

3. The Garretts have the burden of proof by a preponderance of the evidence to prove the essential elements. The Lease/Option will provide such proof.

4. The Honns have the burden of proof by a preponderance of the evidence to establish any affirmative defenses, such as misrepresentation, undue influence, or fraud. They will not be able to prove any such defenses.

5. The existence of a contract focuses on the objective manifestations of the parties, rather than the subject intent of the parties. Today, mutual assent is the modern expression for the concept of "meeting of the minds." Therefore, when interpreting a contract, the subjective intention of the parties is irrelevant; instead, emphasis is placed on the outward manifestations of assent made by each party to the other. The Honns' private subjective intentions are not relevant to enforcing the contract.

6. Parol evidence (oral or verbal statements) is not admissible for the purpose of adding to, modifying, contradicting, or varying the terms of a written contract. Parties to a contract are bound by it as signed, and parol evidence cannot change the contract. Parol evidence is admissible, though, to show the situation of the parties to a writing and the circumstances under which the instrument was executed in order to ascertain the intention of the parties and to

properly construe the writing. In fact, extrinsic evidence is admissible as to the entire circumstances under which a contract was made as an aid in ascertaining the parties' intent. Thus, although both parties will testify about all of the facts and circumstances which culminated in the execution of the Lease/Option, the Honns are bound to honor its terms.

7. While procedural contract requirements are enforceable, they are also subject to waiver by the party who benefits from them. Paragraph 2.b. of the Lease/Option provided that it would be effective upon approval of an operating line of credit by the Lessee. The Garretts have waived this condition by the payment of rent to the Honns.

8. Although the reasonableness of the contracting parties' respective interpretations of the contract may be a factor in discerning the meaning of the contract, the courts should recognize that unilateral and subjective beliefs about the impact of a contract do not constitute evidence of the parties' intent. Such evidence is therefore inadmissible. If the Honns claim they only intended to lease their irrigated hay ground, then this defense should be rejected.

9. The courts must read each contract as an average person would read it without giving it strained or forced meaning. This includes looking at the contract as a reasonable person would in the same circumstances that existed when the parties to the contract entered into it. The Lease/Option is a relatively short and simple document which the Honns read. They did not manifest any intent to hold off signing until their attorney looked it over.

10. Parties to a contract may incorporate additional contractual terms by referring to a separate agreement so long as the incorporation by reference in the parties' agreement is clear and unequivocal. The document which is incorporated by reference need not be physically attached to the contract. Exhibit "A" was just the form for the contract of sale. It did not contain any terms applicable to the Lease.

11. In general, ignorance of the contents of a contract does not affect the liability of one who signs it or who accepts it other than by signing. In fact, a party to a contract is "conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." The Honns claim they didn't or couldn't read the Lease/Option and signed it anyway. They are nevertheless bound by its terms.

12. A misrepresentation is an assertion that is not in accord with the facts. Fraud is an intentional false representation of a matter of material fact, by either words, conduct, concealment, or false or misleading allegations which both deceive and is intended to do so. If the Honns claim fraud, they will have a heavy burden of proof (clear, cogent, and convincing) to establish the nine elements.

13. Specific performance of a contract will be granted against a party who has committed or is threatening to commit a breach of the duty. An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under contract would have produced. This is the only fair and reasonable remedy, which the Garretts request.

Case Law

Washington case law clearly supports the Garretts' position that the Lease/Option is a valid and binding contract. Attached is a copy of Valley Garage, Inc. v. Nyseth, 4 Wn. App. 316, 481 P.2d 17 (1971), for your review. In this case the owner of real estate entered into a Lease which contained an option to purchase for a reasonable price representing the fair market value of the property as agreed by the parties. If the parties could not agree, then the sales price would be established by arbitration.

The lessee gave notice of his election to exercise the option and the owners/lessors refused to sell. A lawsuit followed, and the trial court ordered the owners/lessors to sell for a cash payment, which decision was upheld on appeal.

The owners/lessors claimed that the failure of the lease to indicate whether the sale would be cash or credit, who provides title insurance, if any, who pays the excise tax, whether the taxes were prorated, the date of possession, the time for performance and the disposition of encumbrances, if any, should defeat the action for specific performance.

Further, the owners/lessors argued that the lease agreement was a lease for a 7-year-period and the option, if valid, could only be exercised at the end of the 7-year-period. They also argued that there was no consideration from the lessees for the option.

The court stated several well-recognized legal principles:

An option to purchase property is a contract wherein the owner, in return for valuable consideration, agrees that another party shall have the privilege of purchasing the property within a specified time and upon the terms and conditions expressed in the option. Once the option is exercised, it becomes a contract of purchase and sale binding upon the parties.

A contract of purchase and sale is subject to specific performance. Although the parties could not be ordered to prepare and execute a real estate purchase contract over a

period of years (since this would require a further meeting of the minds), the contract contains the essential elements of a cash sale. It contains a description of the property subject to sale and a method for the determination of a price which may be specifically enforced.

The owners/lessors contended that the contract was too indefinite to support specific performance.

The court stated that a greater degree of certainty is required for the specific performance than is necessary to establish a contract as a basis of an action at law for damages. An agreement is, however, considered to be sufficiently definite and certain if its provisions are capable of being reduced to certainty or of being made certain by the aid of legal presumptions or evidence of established customs.

The indefinite provisions of the contract may all be rendered certain through reference to legal presumptions and established customs.

Encumbrances. In the absence of any provision in the contract indicating the character of the title provided for, it is presumed that the vendor of real estate will convey a good or marketable title to the purchaser.

Time of performance. Where no time is specified in the option agreement for the final payment and delivery of the instruments of conveyance, the time of payment and delivery is a reasonable time after acceptance by the optionee.

Payment of excise tax. State law expressly states that the payment of the excise tax is the obligation of the seller.

Time for possession. In absence of a stipulation to the contrary, the right of possession arises upon conveyance of the property. That is, right to possession is presumed to follow legal title.

With respect to the proration of real estate taxes and procurement of title insurance, these are matters of common

knowledge in which there are established customs; the court may take judicial notice of such customers.

The court went on to state that the contract is specifically enforceable. The agreement contained no provision restricting the time in which the option may be exercised. The agreement specifically provided that notice to exercise the option may be given on or before a certain date. The lessees could therefore elect to exercise the option at any time during the duration of the lease agreement.

The grant of the option by the owners/lessors to the lessees was part of the basis of the bargain for entering into the contract. It is not required that separate consideration flow from the lessees to the owners/lessors. Proper notice was given to the owners/lessors informing them of the lessees' election to exercise the option.

Rubin v. Moys Case

There is also clear precedent in Whitman County for the granting of specific performance to the Garretts. In the case of Rubin v. Moys, the Whitman County Superior Court (as upheld on three appeals) specifically enforced a handwritten Contract of Sale for farmland. The Rubin/Moys case involved a contract that had substantially less clarity than the Lease/Option before you. Yet, the trial court granted specific performance in an emotionally charged case which lasted nearly 30 years and which was upheld on appeal three times.

Attached to this letter are copies of the following documents and decisions from the Rubin/Moys case:

1. Sale Contract;
2. Third Amended Findings of Fact and Conclusions of Law;
3. First Court of Appeals Decision;
4. Second Court of Appeals Decision; and
5. Third Court of Appeals Decision.

It is important to note that the same legal principles and disputes took place in the Rubin/Moys case which resulted in

specific enforcement of a sales contract and the right to buy the rest of the farm upon Moys' death.

There are several Findings of Fact and Conclusions of Law in the Moys case which deserve special mention:

1. When the parties signed the "Sale Contract," they intended a real estate purchase contract implementing their prior discussions. The Court enforced this sale even though there was not a legal description prepared until 25 years later and all of the terms of the right to buy the rest of the farm were not included in the Contract.

2. At the time Moys drafted the Contract, he intended that Rubins could purchase the balance of the farm upon Moys' death. (There was no specific mention of the length of the option to buy in the contract, and the court interpreted the duration to be Moys' lifetime. Later the Rubins exercised the right to buy the rest of the farm when Moys died.)

3. By their conduct, the parties interpreted the Contract to impose mutual access easements to allow each access to their property. Again, there was no mention made in the Contract of mutual easements; yet the Court found this term by the parties' conduct.

4. It is a normal custom in Whitman County, Washington, that the seller is responsible to pay the excise tax (actually this is required by RCW 82.45.080), costs of a survey, if necessary, and title insurance for the sales price of property when title is conveyed. Although the Moys Contract was silent in this regard, the Court found it is reasonable to interpret it consistent with normal customary real estate sales closing cost allocations such that Moys would pay the excise tax, survey costs, and title insurance on

the purchase price when title was conveyed. (These were the same terms found in the form Contract of Sale which is Exhibit "A" to the Lease/Option.)

5. Even written contracts, properly acknowledged and prepared by attorneys, and containing a correct legal description, sometimes contain shortcomings and ambiguities. Courts do not necessarily refuse to enforce contacts merely because some interpretation of the actual provisions of the contract is required.

6. Since Moys prepared the written portion of the Contract, failed to see an attorney, and dictated all of the terms of the Contract (except one inserted at the Rubins' request), he could not complain of its inadequacies.

7. There was no overreaching by the Rubins. Moys was competent at all material times. The need to rely upon contracts outweighs the sympathies produced by Moys. People should be entitled to the benefit of their bargains.

8. The Rubins' right to purchase the rest of Moys' farm was reasonable and for a legitimate purpose. The right was supported by adequate consideration because it was included in the original Contract. The Rubins' right to buy the rest of the farm was enforced.

9. The Court ordered specific performance of the Contract.

Attorney's Fees

Paragraph 16 of the Lease/Option provides:

> Litigation: In the event either or both parties shall be reasonably required to retain an attorney to enforce

> any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

In addition to specific performance of the Lease/Option, the Garretts also request an award of their attorney's fees and costs if they are deemed the prevailing party. Upon receipt of the Arbitrators' decision, the prevailing party will submit a post-arbitration motion for an award of its attorney's fees and costs.

Rent Paid

The Garretts have paid rent to the Honns for the months of November and December, 2010, and will continue to pay monthly rent until and unless you rule otherwise. However, since the Garretts have been denied possession of the ranch since November 1, 2010, they request the arbitrators order a refund of this rent paid or order an offset from any further rent to be paid by them.

Summary

You were selected as arbitrators because of your common sense and experience in negotiating, interpreting, and/or executing contracts, your ability to fairly weigh and judge the credibility of witnesses, and to render a fair and impartial decision consistent with the evidence.

We ask that you uphold the Lease/Option in its entirety.

Respectfully submitted this 20th day of December, 2010.

GARY J. LIBEY
Attorney for Garretts
WSBA No. 06861

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Fax: 609-397-3594

GJL:sm
Enclosures

cc: Mark Moorer
Frank Garrett

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

GARRETT RANCHES LLC, A Washington Limited Liability Company, Petitioner, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Respondent.	Case No.: 10 2 00293 4 **ARBITRATION STATEMENT**

FACTS

It is believed the following facts will be introduced in this proceeding.

Larry and Charlotte Honn are the members of a Washington Limited Liability Company known as Honn Family LLC. The (Honns) own land in rural western Whitman County and farm and ranch the same.

Frank and Josh Garrett are the members of a Washington Limited Liability Company known as Garrett Ranches LLC. The (Garretts) lease land from Frank Garrett and others, operating a farming and ranching business in Whitman and other counties.

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EXHIBIT NO. 5

In the summer of 2010 Josh Garrett was approached by Larry Honn, Jr. about the possibility of helping his family hay some irrigated Alfalfa ground. Josh consented and his father, Frank, began swathing a field on the Honn Ranch. While servicing his machine Frank was approached by Larry Honn, Sr. and asked what he was doing. Upon learning that his son asked for assistance, the haying continued. During their brief conversation Larry Honn, Sr. indicated he might like to lease the Ranch.

On August 24, 2010 Frank and Josh went to the home of Larry and Charlotte in Endicott. Larry, Jr. was present for this meeting. During the meeting the Garrets talked in global terms about leasing the Honn Ranch. Issues were raised regarding the Honn's cattle, Larry Jr.'s continuing employment, insurance, length of agreement, cost, and even if the Honns would be willing to sell. Larry Honn allegedly stated he would need at least $400,000.00; that fact is disputed. The Garrets, armed with information, left the residence on the belief that a lease with option opportunity existed, so they contacted their attorney to prepare a draft agreement.

During the next several weeks the Garrets investigated the property, looked at parcel maps, looked into water rights, and so on. Upon receipt of the draft agreement Frank then contacted Larry and set up an appointment to review the draft. That meeting was set for September 14, 2010.

On September 14th Frank and Josh met Larry and Charlotte at their home in Endicott. At the meeting the Garretts showed the Honns the lease agreement. Apparently the Garrets had the "Contract of Sale" Exhibit "A" with them but never showed it to the Honns. The parties discussed the lease at length.

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The Honns acknowledged that they were looking at a lease. There is a disagreement over the property described and the "parcels" included. The Garrets showed Charlotte Honn a parcel map but she could not figure out what the parcels made reference too.

The parties talked at length about this being a lease for five (5) years and that term was written in. The parties talked about renegotiating yearly and that was written in. The parties talked about monthly rental and that an option would be for at least $400,000.00. Again, that fact is disputed. There was a discussion about the Honns continuing to pasture cattle on the property for more than a year, but those terms were not written in. There was a discussion about the Garretts continuing to hire Larry Jr. but that was not written in. There was a discussion that the house and other buildings would continue to be used by the Honns but that was not written in.

The Honns were told that this was a draft document; at least that is what they understood. They did not know they were signing what the Garretts purport to be a final document. Curiously, Josh Garrett called someone to come and notarize their signatures and then the Garretts left.

Because Larry Honn, Sr. suffers from multiple health issues he took significant time to study and read the lease after the Garretts left. On September 15th Larry called Frank to repudiate the lease. In Larry's words he told Frank the agreement was null and void. There were additional telephone calls and conversations thereafter on September 17, 19, and correspondence which followed. Eventually, this action followed correspondence between the parties' respective attorneys based upon their disputes.

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LAW

The burden of proving a contract, whether express or implied, is on the party asserting it, and each essential fact must be proven, including the existence of a mutual intention. *Boyle & Gates P.L.L.C. v. Holly Mountain Resources, Ltd.*, 108 Wa.App. 557, 32 P.3d 1002 (2001) (quoting *Cahn v. Foster & Marshall Inc.*, 33 Wa. App. 838, 658 P.2d 42 (1983)).

The essential elements of a contract are the subject matter of the contract, the parties, the promise, the terms and conditions and the price or consideration. *DePhillips v. Zolt Constr. Co.*, 136 Wash. 2d 26, 959 P.2d 1104 (1993). Contracts should be given a fair, reasonable, and sensible construction consistent with the apparent object and intent of the parties. *E-Z Loading Boat Trailers, Inc. v. Travelers Indem Co.*, 106 Wash. 2d 901, 726 P.2d 439 (1986). To determine the parties intent in a written agreement, court's employ the context rule. *Berg v. Hudesman,* 115 Wash. 2d 657, 801 P.2d 222 (1990).

Washington adheres to the general contact principle the parties have a duty to read the contracts they sign. *Nat'l Bank Wash. V. Equity Investors,* 81 Wash. 2d 886, 506 P.2d 20 (1973). The court will not casually depart from the principle, which imposes some responsibility on those who sign contracts, but has made exceptions. (*E.G. Nevue v. Close,* 123 Wash. 2d 253, 867 P.2d 635 (1994)). One exception is when a party asserts the contact was not fairly and knowingly made. Another, when the contract was entered into under undue influence. *Del Rosario v. Del Rosario,* 152 Wn. 2d 375, 97 P.3d 11 (2004). "The touchstone of contract interpretation is the parties' intent." *Tanner Elec. Coop. v. Puget Sound Power & Light Co.,* 128 Wash. 2d 656, 674, 911 P.2d 1301 (1996).

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Washington courts apply the "context rule" when called upon to interpret a contract: In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contact as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."

"Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." Berg, 115 Wash.2d at 667-68, 801 P.2d 222. "A trial court may resort to parol evidence for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the **[60 P.3d 1251]** intent of the parties. *Bort v. Parker,* 110 Wash. App. 561, 573, 42 P.3d 980, *review denied,* 147 Wash. 2d 1013, 56 P.3d 565 (2002), citing *Berg,* 115 Wash. 2d at 669, 801 P.2d 222. Extrinsic evidence is admissible "for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the intrustment." *Berg,* 115 Wash. 2d at 669, 801 P.2d 222. "admissible extrinsic evidence does *not* include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract." *Bort*, 110 Wash. App. At 574, 42 P.3d 980. "Unexpressed impressions are meaningless when attempting to ascertain the mutual

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intentions [of the parties]." *Lynott v. Nationals Union Fire Ins. Co.,* 123 Wash.2d 678, 684, 871 P.2d 146 (1994), quoting *Dwelley v. Chesterfield,* 88 Wash.2d 331, 335, 560 P.2d 353 (1977).

"In applying these principles, the reviewing court strives to ascertain the meaning of what is written in the contract, and not what the parties intended to be written." *Bort,* 110 Wash.App. at 574, 42 P.3d 980, citing *Confederated Tribes of Chehalis Reservation v. Johnson,* 135 Wash.2d 734, 752, 958 P.2d 260 (1998). When considering the circumstances leading up to and surrounding a writing, a court examines the parties' objective manifestations, but not their "unilateral or subjective purposes and intentions about the meanings of what is written." *Hall,* 87 Wash.App. at 9, 937 P.2d 1143, quoting *Lynott,* 123 Wash.2d at 684, 871 P.2d 146.

Finally, contracts may incorporate terms by reference to a separate . . . agreement, . . . including a separate document which is unsigned. *11 Williston on Contracts* § 30:25 (4th Ed 1999) Incorporation by reference must be clear and unequivocal. *Santa v. Sinclair,* 76 Wa.App 320, 885 P.2d 941 (1994). It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. *Western Washington Corp. of Seventh Day Adventists v. Ferrell Gas, Inc.,* 102 Wn App. 488, 7 P.3d 861 (Wash. Div. II 2000).

Did not

ISSUES

Did the Garretts and Honns enter into an enforceable lease with option to purchase? No.

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It is clear from the lease document that the parties were negotiating the ultimate use and possession of the Honn Ranch. What is in dispute are the terms and conditions. The Garretts argue that they were leasing the entire premises. The property they describe however is not the entire premises and includes another parcel that was never going to be part of the transaction. The Honns believed that the Garretts only wanted to lease the tillable ground. One factor was the fact that the Honns were going to keep their cattle and continue to use the pasture. All parties agree that the Honns were going to use the pasture for some period of time after the agreement was entered but for what term, for which uses, and how had not been written down. Thus, the lease of which land was at issue, had not been agreed to.

Contrary to earlier stm

The Honns were interested in insuring that Larry, Jr. would still have work. Their son continues to work for them today and his services would still be needed after any lease. There is nothing in the agreement about this issue, it simply was conveniently omitted. Thus, this issue had not been agreed to. True — there was no agmt

The Honns were concerned that the agreement had to make economic sense. Charlotte Honn was leery that the Garrets could not do the deal. Thus, she asked for monthly rent and annual reviews. But what happens at the review? There is no mechanism for resolving any dispute that may arise. Therefore was this a meeting of the minds? Yes = arb.t.

See the Hyatt case

The Garretts wanted an option to purchase. Frank asked Larry for a price. This price was a minimum number, it was written in, but there was no expression that it was a minimum. The Honns dispute there was an agreement.

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A collateral sale contract was to be included. But it was never shown to the Honns. Did they agree to actual sale terms? The mysterious "Exhibit A" is now attached to the lease, but it was never agreed to.

All of these questions make it clear that the terms and conditions of the lease and option were not agreed to. It is clear that the Honns believed this was only a draft document they were signing. It is respectfully submitted that the parties did not have a meeting of the minds and thus, the lease with option is voidable.

Dated this 21st day of December, 2010.

Mark S. Moorer, WSBA No. 18773
Attorney for Respondent

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 21st day of December, 2010, the foregoing was delivered to the following persons in the manner indicated:

Gary J. Libey Libey, Ensley, Esser & Nelson P. O. Box 619 Colfax, WA 99111-0619	VIA E-MAIL MAIL [X] VIA CERTIFIED MAIL [ ] VIA FACSIMILE [ ] HAND DELIVERED [ ]

Mark S. Moorer, WSBA No. 18773

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, a Washington Limited Liability Company,	)	
Petitioner,	)	No. 10-2-00293-4
vs.	)	
LARRY HONN FAMILY LLC, a Washington Limited Liability Company,	)	
Respondent.	)	

DEPOSITION OF FRANK D. GARRETT

Taken at the instance of the Respondent

December 14, 2010

1:25 p.m.

North 409 Main Street

Colfax, Washington

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1312 N. Monroe Street
Spokane, Washington 99201
(509) 456-0586 - (800) 358-2345

EXHIBIT NO. 6

1 BE IT REMEMBERED that the deposition of
2 FRANK D. GARRETT was taken in behalf of the Respondent,
3 pursuant to the Washington Rules of Civil Procedure before
4 Donna L. Zier, Certified Shorthand Reporter for Washington,
5 on Tuesday, the 14th day of December, 2010, at the law
6 offices of Libey, Ensley & Nelson, PLLC, North 409 Main
7 Street, Colfax, Washington, commencing at the hour of
8 1:25 p.m.
9
10 APPEARANCES:
11
12 For the Petitioner: GARY J. LIBEY, ESQ.
Libey, Ensley & Nelson, PLLC
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18 For the Respondent: MARK S. MOORER, ESQ.
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mark@farmermark.com
21
22
23 Also Present: Brian Shaw
24
25

1
2 I N D E X:
3
4 GARRETT RANCHES LLC vs. LARRY HONN FAMILY LLC
5 Case No. 10-2-00293-4
6 December 14, 2010
7
8
9 T E S T I M O N Y
10
11 FRANK D. GARRETT PAGE NO:
12 Examination by MR. MOORER 4-60
13
14
15 PRODUCTION REQUESTS:
16
17 (None)
18
19
20 E X H I B I T S:
21
22 NO: Identification PAGE NO:
23 1 Cash Rent Farm Lease with Option to Purchase 21
24
25

1 and specific questions about the irrigation, what the power
2 was for the year to irrigate the ground, the condition of
3 the irrigation pumps, who they got the electricity from --
4 Big Bend Electric -- water rights were a concern, which
5 they couldn't answer that question.
6 We talked a little about EPA and their concern
7 about, we may have to fence off the rivers and creeks,
8 especially if cattle were watering.
9 Liability insurance came up. We were going to
10 check to see if -- Charlotte wasn't sure whether they were
11 going to have to carry a policy, and we checked into that
12 and found out that both of us needed to carry a policy.
13 Q. Okay.
14 A. And I also interjected that for compensation for
15 putting up the hay, we would be interested in an option to
16 purchase.
17 The meeting went very cordial and Larry said,
18 "Why don't we sit down and sign something up right now?" I
19 said, "No. Let me contact my attorney, and for the
20 protection of both parties, have it done right." They were
21 in agreeance with that.
22 Q. Okay. So, when you talked about the carrying
23 capacity, did you talk about the number of cows that they
24 have on the place?
25 A. Yes.

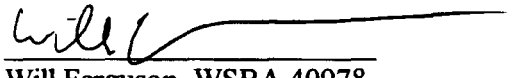
Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Motion for Summary Judgment, Order Requiring Sale, and Attorney Fees**

COMES NOW the Plaintiff, by and through its attorneys of record, and moves this Arbitration Panel for Summary Judgment, an Order Requiring Sale of property, and for attorney fees. This Motion is supported by Plaintiff's Brief and the Declaration of Counsel and exhibits thereto.

Dated this 30th day of November, 2014.

LIBEY & ENSLEY, PLLC



Will Ferguson, WSBA 40978
Of Attorneys for Plaintiffs

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ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered and mailed to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 1st day of December, 2014.

WILL FERGUSON

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Brief in Support of:** **1. Summary Judgment;** **2. Order Requiring Sale; and** **3. Attorney fees.**

COMES NOW the Plaintiff, by and through its attorneys of record, and submits this brief in support of Summary Judgment, an Order Requiring Sale of property, and for attorney fees. Honn Family's claims should be barred under both the doctrines of Collateral Estoppel and Res Judicata. This Arbitration Panel should grant summary judgment in favor of Garrett Ranches and order a sale of the property from Honn Family to Garrett Ranches.

A. GARRETT RANCHES SHOULD BE GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

Garrett Ranches should be granted summary judgment or judgment on the pleadings because Honn Family's arguments are barred under the doctrine of collateral estoppel. See Robinson v. Hamed, 62 Wash. App. 92, 96-97, 813 P.2d 171, 173-74 (1991) (holding "[I]t is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for

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collateral estoppel or issue preclusion in a subsequent judicial trial."). Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." WA CR 56(c).

The test for when collateral estoppel applies to a case: (1) the issue decided in the arbitration is identical with the one presented in the arbitration, (2) the prior arbitration ended in a final decision on the merits, (3) Honn Family was a party or in privity with a party in the arbitration, and (4) application of the doctrine does not work an injustice. See Robinson v. Hamed, 62 Wash. App. 92, 98-99, 813 P.2d 171, 175 (1991); see also Neff v. Allstate Ins. Co., 70 Wash.App. 796, 800, 855 P.2d 1223, 1225 (1993).

1. Honn Family presents an identical issue: validity of the Option. The issue Honn Family raised in Arbitration 1 was validity. The issue Honn Family raised in Arbitration 2 was validity. The issue Honn Family raises now is validity. Honn Family raised the issue of validity in Arbitration 1 and the Arbitration Panel ruled in favor of validity. Honn Family raised the issue of validity in Arbitration 2, by claiming Garrett Ranches had violated the Lease and Option, and the Arbitration Panel ruled in favor of validity. Now, Honn Family again raises the issue of validity, using the same core facts that were present in Arbitrations 1 & 2 and seeks a different ruling.

In Arbitration 2, Honn Family argued the Lease and Option were not valid because Garrett Ranches had violated the Lease. Honn Family now argues that the Option is not valid. Honn Family is simply describing the other side to the same coin. At Arbitration 2 and on appeal, Honn Family argued that the Lease and Option were not valid because Garrett Ranches had allegedly violated the Lease. Now Honn Family says the Option is not valid because there is no underlying consideration and Honn Family withdrew the Option. Honn Family cannot use the same nucleus

of facts and make an argument under one theory and then wait for the next round of litigation to use the same nucleus of facts and make an argument under another theory.

Honn Family has, since Arbitration 1, asserted that the Lease, Option, or a combination thereof were invalid. Simply coming up with a "new" argument is not enough to escape application of collateral estoppel.

Here is what Honn Family argued in Arbitration 1: invalidity of the Lease and Option. Pg. 6-7, Exhibit No. 5. Garrett Ranches argued for a finding of validity of the Lease and Option. Pg. 10-14, Exhibit No. 4. Honn Family's attorney even interrogated Mr. Frank Garrett at deposition about consideration for the Lease and Option. Pg. 14, Lines 13-21, Exhibit No. 6.

The Arbitration Panel in Arbitration 1 ruled: "The Cash Rent Farm Lease Agreement is valid and shall be enforced..." Pg 1, Paragraph 1. "Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid..." Page 2, Paragraph 2.

It is clear from the arguments made by counsel for both parties that the validity of the Lease ***and*** the validity of the Option were questioned. It is clear from the 2010 Arbitration Award that the Arbitration Panel reviewed the nucleus of facts, entertained argument on questions of validity, and made a separate and distinct ruling for the Lease and for the Option.

Honn Family argued the Lease and Option were invalid in Arbitration 2. More specifically, Honn Family argued that it terminated the Lease and Option.

The Arbitration Panel in Arbitration 2 ruled: "The arbitrators find that the Garretts have not violated the lease." Therefore, if Garrett Ranches didn't violate the Lease, then the Lease and Option are still valid.

It should also be noted that Honn Family admits it sent a Notice of Withdrawal of Option to Purchase Contained in the Cash Rent Farm Lease with Option to Purchase, on February 9, 2011. The Notice was ten full months before Arbitration 2, yet Honn Family either didn't raise the issue at Arbitration 2, when it had the opportunity to do so, or did raise the issue but didn't pursue it fully.

Honn Family's argument against validity of the Lease and Option is nothing new. Honn Family's challenge in this arbitration is simply an old argument with a new name.

2. Arbitrations 1 and 2 became final decisions on the merits when confirmed by the Whitman County Superior Court and certainly when confirmation was upheld by the Washington Court of Appeals. The arbitration award from Arbitration 1 was confirmed on January 28, 2011. The arbitration award from Arbitration 2 was confirmed on February 10, 2012. The Court of Appeals upheld both confirmations on October 15, 2013. RCW 7.04A.250(1) provides that after confirming an arbitration award, "the court shall enter a judgment in conformity with the order." The judgment "may be recorded, docketed, and enforced as any other judgment in a civil action." Id. "Washington public policy strongly favors finality of arbitration awards." S & S Const., Inc. v. ADC Properties LLC, 151 Wash. App. 247, 254, 211 P.3d 415, 419 (2009). "[A]n arbitration proceeding may be the basis for collateral estoppel or issue preclusion." Neff v. Allstate Ins. Co., 70 Wash. App. 796, 800, 855 P.2d 1223, 1225 (1993).

3. Honn Family is the same party as in the previous arbitrations and appeal. Honn Family was the limited liability company that entered into the Lease and Option, was the same entity in Arbitrations 1 and 2, was the same entity on appeal, and is the same entity now asserting invalidity of the Option.

4. Application of collateral estoppel does not work an injustice; it would be an injustice not to apply collateral estoppel. Judicial efficiency and fairness are the two guiding principles behind res judicata and collateral estoppel. Courts, arbitrators, and litigants have an interest in finality and an interest in litigating the nucleus of facts with whatever arguments their opponent can generate at the salient times of litigation. At some point, litigation has to end. Under Honn Family's model of litigation, it can keep dreaming up new arguments based on the same facts every time there is arbitration; that is inefficient. Courts recognize that inefficiency and require litigants like Honn Family to bring forth their issues in a regulated and timely manner. Otherwise, Honn Family would get a new run at the case every time it could come up with a new theory. If Honn Family didn't raise its current argument in Arbitrations 1 or 2, at confirmation of Arbitration Awards 1 or 2, or even on appeal, their argument should be barred.

Collateral estoppel, or issue preclusion, was illustrated in Robinson v. Hamed, 62 Wash. App. 92, 813 P.2d 171, (1991). In Robinson, two employees of Boeing got into a physical altercation in the Sea-Tac Airport. Hamed broke Robinson's jaw and the result was that Hamed was fired from Boeing. Hamed contested his firing. Hamed's firing was upheld by an arbitrator, who found that Boeing had "just cause" to fire Hamed. At the same time, Robinson filed a lawsuit against Hamed, alleging civil assault. Hamed counter-claimed and joined Boeing, alleging defamation, tortious interference, and wrongful termination. The trial court dismissed Hamed's claims of wrongful termination, tortious interference, and "independent contract" claims against Boeing and Hamed's claims of tortious interference against Robinson. Boeing brought a motion to dismiss Hamed's defamation claim, on the basis of collateral estoppel. The trial court denied the motion. Hamed was then permitted to amend his complaint, adding claims against Boeing for "aiding and abetting" and "ratification" of a tort, and tortious interference against Robinson. The

trial court then dismissed all of Hamed's claims against all of the defendants, leaving only Robinson's original claim for assault. Hamed appealed. Boeing cross-appealed from the trial court's denial of its motion for summary judgment on collateral estoppel, asserting that Hamed was collaterally estopped from relitigating the truth of Robinson's version of the altercation by reason of the arbitration decision.

The Court of Appeals agreed with Boeing, finding that the facts of the altercation had already been litigated in the arbitration and that the arbitrator had found Hamed's version of the events to be non-credible. The Court of Appeals applied the 4-factor test for issue preclusion and found that at the core of Hamed's claims were the same set of facts; a nucleus of facts that had been found by the arbitrator. The arbitrator had drawn conclusions from those facts, including that Hamed was not credible. Hamed argued that collateral estoppel should not apply to him because he did not assert his defamation claim in arbitration. Id. The Court of Appeals disagreed, stating that the preclusive effect of the arbitration was that Hamed does not get to relitigate the altercation. Id. The Court of Appeals explained that "...***collateral estoppel prevents a second litigation of issues between the same parties even in connection with a different claim*** or cause of action." Id. at fn. 4 (emphasis added). As a result, Hamed was collaterally estopped from relitigating the facts of the altercation.

Here are the core facts, the nucleus of facts, that have been with this case from day one: The parties negotiated and executed a Lease and Option. The facts were fully fleshed out by the time the parties attended Arbitration 1 in 2010. Both parties had the opportunity to conduct discovery, including taking the depositions of all parties involved. Both parties selected the Arbitration Panel, selected their arguments, briefed their issues, and participated in arbitration.

Honn Family's argument now is the exact same substance they argued in Arbitration 1 and Arbitration 2: invalidity of the Lease and Option.

Garrett Ranches should be granted summary judgment and Honn Family's claims should be barred under the doctrine of collateral estoppel.

B. GARRETT RANCHES SHOULD BE GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF RES JUDICATA

Even if Honn Family's current arguments were not raised in Arbitrations 1 or 2, they should have been because the nucleus of facts is the same, the prior Arbitrations proceeded to final judgment, and the final judmgents were affirmed by the Washington Court of Appeals.

Claim preclusion, or res judicata, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wash.2d 759, 763, 887 P.2d 898 (1995). The claim preclusion doctrine has four requirements:

> (1) the parties in the two successive proceedings are the same; (2) the prior proceeding ended in a final judgment; (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding; and (4) application of the doctrine must not work an injustice.

Chavez v. Dep't of Labor & Indus., 129 Wash. App. 236, 239-40, 118 P.3d 392, 394 (2005). As noted in issue preclusion or collateral estoppel above, the elements of application are very similar. Res judicata (or claim preclusion) and collateral estoppel (or issue preclusion), are "kindred doctrines designed to prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts, are at times indistinguishable and frequently interchangeable. If the differences must be noted, it could be said that res judicata is the more comprehensive doctrine, identifying a prior judgment arising out of the same cause of action between the same parties, whereas a collateral estoppel relates to and bars relitigation on a particular issue or determinative fact. Both doctrines require a large measure of identity as to parties, issues and facts,

and in neither can the party urging the two doctrines as a defense be a stranger to the prior proceeding." Bordeaux v. Ingersoll Rand Co., 71 Wash. 2d 392, 395-96, 429 P.2d 207, 209 (1967). "The general doctrine is that the plea of Res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, ***but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.***" Sanwick v. Puget Sound Title Ins. Co., 70 Wash. 2d 438, 441-42, 423 P.2d 624, 627 (1967) (emphasis added).

Claim preclusion, not just issue preclusion, applies to this case. The test is virtually identical to the test for issue preclusion. Here, the successive proceedings are the same. The parties are again engaged in arbitration. The prior proceedings ended in final judgments. All of the arbitration awards have thus far been confirmed and the confirmations were upheld by the Court of Appeals. Honn Family is attempting to raise a claim that it raised or should have raised in the prior arbitrations. Finally, the application of claim preclusion does not work an injustice because Honn Family has had no less than a couple years to make its claims.

An excellent illustration of claim preclusion is set forth in Karlberg v. Otten, 167 Wash. App. 522, 280 P.3d 1123 (2012). In Karlberg, the plaintiff Karlberg sued Otten to quiet title to a 45-foot wide strip. In his complaint, Karlberg alleged adverse possession, mutual recognition or acquiessence, and continual use. Otten answered by way of affirmative defense and alleged that Karlberg's occupation of the 45-foot wide strip permissive. Otten then amended his complaint, seeking trespass damages and an injunction. Otten then moved to amend his answer a second time and was denied by the court. Instead of accepting the court's decision, Otten filed a separate quiet title action against Karlberg. At trial on Karlberg's original complaint, the court ruled that

Karlberg had actually acquired more than the 45-foot wide strip he had alleged. However, Karlberg had plead only ownership of the 45-foot wide strip, not the full extent found by the court. In response to the trial court's ruling, Karlberg filed a second quiet title action, seeking the extent of land found by the trial court in the first quiet title action. Both parties then moved for summary judgment, alleging that the other party's suit was barred. The trial court granted summary judgment in favor of Karlberg, granting him the land in excess of the 45-foot wide strip, establishing the new boundary, and dismissing Otten's complaint to quiet title. Otten appealed the judgment awarding Karlberg the 45-foot wide strip and the judgment awarding Karlberg the additional land in excess of the 45-foot wide strip. Otten also appealed the dismissal of his quiet title action. Id. at 525-28. The Court of Appeals applied res judicata to Karlberg's second quiet title action, the action seeking the land in excess of the 45-foot wide strip. Id. at 532.

In finding that Karlberg was barred by the first action establishing the boundary as the 45-foot wide strip, the Court of Appeals said:

> Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Also referred to as claim preclusion or as the prevention of "claim splitting," res judicata prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. The doctrine puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.

Id. at 535. The court then stated the test as requiring identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of persons or against whom the claim is made. Id. at 536. The court applied the test and found that Karlberg was barred from later asserting more than the 45-foot wide strip he had alleged in the first action.

Between Arbitration 1 and Arbitration 2, Honn Family had two years to fully and fairly litigate its claims. It had two years to come up with its arguments, including its current argument

that the Option is invalid because it isn't supported by sufficient consideration. If Honn Family did not raise these issues in 2010 or 2012, it should have.

Honn Family now seeks summary judgment on claims it either raised or should have raised in Arbitrations 1 or 2. Res judicata asks not whether Honn Family did raise the claim, but whether they ***should have*** raised their current claim. Honn Family should have raised all of their claims in the 2010 Arbitration or, at the very latest, in the 2012 Arbitration. Whether they did or did not do so is irrelevant to claim preclusion analysis. Garrett Ranches should be granted summary judgment and Honn Family's claim should be barred.

C. THIS ARBITRATION PANEL SHOULD ORDER THE SALE OF THE PROPERTY

This Panel should exercise its broad authority to order a sale of the property. "[A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." RCW 7.04A.210(3).

Arbitration 1 affirmed the validity of the Lease and Option. Arbitration 2 reinforced validity and set out the terms of the sale and held that Garrett Ranches had not breached the Lease. The Washington Court of Appeals upheld Arbitration 1, Arbitration 2, and confirmation of all awards. Garrett Ranches has exercised its Option. The only remaining thing to do is order sale of the property.

Garrett Ranches has exercised the Option. According to the Lease and Option at Page 2, Paragraph 4, Garrett Ranches "may exercise this option at any time during this Lease upon 30 days' written notice. If [Garrett Ranches] exercises this option, then the parties shall execute a Contract of Sale in such form as is attached hereto as Exhibit "A"...." The Lease and Option

require that "all demands, notices or other documents from either party to the other shall be by personal service or by certified mail, return receipt requested...." Lease at Page 5, Paragraph 14.

On May 5, 2014, Garrett Ranches informed Honn Family via certified mail, return receipt requested, that it was exercising its option. Honn Family has refused to execute a Contract of Sale. See Exhibit No. 3 to the Declaration of Counsel in Support of Plaintiff's Motion for Summary Judgment.

Exhibit Nos. 1-2 to the Declaration of Counsel in Support of Plaintiff's Motion for Summary Judgment show Garrett Ranches has exercised its Option appropriately. Honn Family has refused to sell the property and this Arbitration Panel should order the sale to commence immediately.

D. THIS ARBITRATION PANEL SHOULD AWARD ATTORNEY FEES TO GARRETT RANCHES

"In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties." Thompson v. Lennox, 151 Wash.App. 479, 484, 212 P.3d 597 (2009).

Attorney fees are available to the prevailing party in this case. Paragraph 16 of the Lease provides for attorney fees for Garrett Ranches:

> In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

Incorporated herewith is the Declaration of Counsel in Support of Plaintiff's Motion for Summary Judgment. In the Declaration, Plaintiff's Counsel sets forth his hourly rate, hours devoted to this matter, and further anticipated hours in bringing Plaintiff's Motion. Garrett Ranches should be

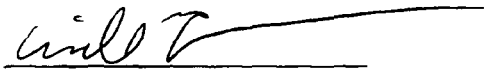
granted summary judgment, an Order requiring the sale of the property should be entered, and Garrett Ranches should be awarded attorney fees.

E. CONCLUSION

Garrett Ranches should be awarded summary judgment, disposing of Honn Family's claims, and this Arbitration Panel should order the sale of the property from Honn Family to Garrett Ranches. Pursuant to this Arbitration Panel's finding, it should award attorney fees to Garrett Ranches.

Dated this 30th day of November, 2014.

LIBEY & ENSLEY, PLLC



Will Ferguson, WSBA 40978
Of Attorneys for Plaintiffs

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered and mailed to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 1st day of December, 2014.

WILL FERGUSON

Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Plaintiff's Response to Defendant's Motion for Summary Judgment and Defendant's Motion for Dismissal of Arbitration**

COMES NOW the Plaintiff Garrett Ranches, by and through its attorney of record, Will Ferguson, and submits the following response to Response to Defendant's Motion for Summary Judgment and Dismissal of Arbitration.

A. INDEPENDENT CONSIDERATION IS NOT NECESSARY FOR THE OPTION IN THIS CASE

Washington law does not require independent consideration for the Option in this case. Valley Garage Inc. v. Nyseth, 4 Wash.App. 316, 481 P.2d 17 (1971).

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In Valley Garage, Calmer and Ellen Nyseth agreed to lease a parcel of real estate to Valley Garage, Inc. Id. at 317. The Lease contained an option to purchase the property. Id. The principal stockholder of Valley Garage, Inc., Mr. Couture, negotiated the lease with the Nyseths on behalf of Valley Garage, Inc. Id. at 317-318. Sometime after negotiating the lease, Mr. Couture, again on behalf of Valley Garage, Inc., exercised the option to purchase. Id. The Nyseths refused to sell the property and Valley Garage, Inc. filed suit for specific performance.

Nyseths argued that there was "no consideration...for the option." Id. at 318. The Court of Appeals rejected Nyseths' argument and held: "The grant of the option by the Nyseths to the Coutures and the lessees was part of the basis of the bargain for entering into the contract." Id. at 320.

Here, the Lease and Option are inseparable. The underlying consideration for the Lease is the same consideration underlying the Option: the bargain. Garrett Ranches sought to lease and occupy the property and to eventually purchase the property under an option and the Defendant wished to obtain rental income and have someone farm the property and eventually sell the property for the amount in the Option. There is no dispute that the parties negotiated the Lease and Option together in the home of the Honn Family. There is also no dispute that the Option was specifically addressed at the same time as the Lease and that the Honn Family agreed to the purchase price listed in the Option. Finally, there is no dispute that Larry Honn, Sr. directed Charlotte Honn to write the purchase price in the Option.

Washington law does not require that there be consideration for the lease and entirely separate and distinct consideration for an option integrated into a lease. What Washington

law does say is that in this case, just as in the Valley Garage case, when the Lease and Option form the basis of the bargain together, no independent consideration is necessary.

During the Lease period from November 1, 2010 and November 1, 2015, Defendant could not withdraw the Option. See Paragraph 2(a) of Lease and Option. The time for exercising the Option in this case is within the Lease period. Garrett Ranches exercised its option on May 5, 2014, well within the time period for exercising the Option. See Declaration of Counsel in Support of Plaintiff's Motion for Summary Judgment and Exhibits thereto. The Option could only be exercised during the term of the Lease. The Option was exercised by Garrett Ranches before November 1, 2015, thereby complying with the Lease and Option terms. Further evidence of the fact that the Option was not intented to be separate from the Lease is that Paragraph 4 of the Lease contains the Option; the Option is not a separate document. Furthermore, the Option in Paragraph 4 cannot be read by itself. The Option must be read in conjunction with Paragraph 2(a) in order to determine when the Option must be exercised.

The issue of the validity of the Option and, more specifically, consideration was litigated. See Declaration of Counsel in support of Motion for Summary Judgment and the Exhibits thereto; see also Brief in Support of Plaintiff's Motion for Summary Judgment. Furthermore, it should be noted that Defendant's "Summary Timeline" in its Memorandum in support of Motion for Summary Judgment entirely omits key events, such as confirmation of both arbitration awards and the affirmation of all matters by the Court of Appeals.

Defendant admits that the Lease and Option are valid. See Defendant's Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at page 2, lines 6-

7. But the Defendant then turns around and argues that validity aside, Washington law gives it the right to withdraw a valid option. However, to take that position, Defendant has read cases for what they are not and has invented a rule out of whole cloth to support its argument. Defense cites several cases, each of which it takes out of context and construes to mean something entirely different than what was written by each court. Here is a list of Defendant's cases, each with a brief synopsis of what the case actually holds:

1. Whitworth v. Enitai Lumber Company, 36 Wash.2d 767 (1950): Option to purchase a mill with no lease. The court found that the optionee failed to exercise the option within the time specified in the option. Id. at 771.
2. Baker v. Shaw, 68 Wash. 99 (1912): Option to purchase stock of a company. The option was accepted and was exercised prior to withdrawal by the optionor. Id. at 103.
3. Phillipp v. Curtis, 35 Wash.2d. 844 (1950): Month-to-month rental of a premises with an option to purchase. The option could be exercised after 60 days tenancy. Id. at 847. The court concluded that even though the *tenancy* could be terminated by the optionor/lessor at any time upon proper notice, the *option* was still an enforceable contract. Id. at 847-48 (emphasis added).
4. Pardee v. Jolly, 163 Wash.2d 558, 573 (2008): Optionee occupied the property and had an option to purchase the property. Id. at 573. The optionee did not occupy the property pursuant to a lease. Id. at 573-74. The court considered whether the agreement between the parties was then a pure option contract, a real estate contract, or a lease with an option to purchase. Id. at 573. The court

concluded that the agreement between the optionee and optionor was "a hybrid of a lease with an option to purchase and a pure option contract." Id. at 574. The court remanded on the lack of sufficient findings of fact. Id. at 576.

5. Strong v. Clark, 56 Wash.2d 230 (1960): Concerns nothing more than a statute of limitations when an instrument is properly recorded.

6. Bennett Veneer Factors, Inc. v. Brewer, 73 Wash.2d 849 (1968): Right of first refusal was valid. Id. at 856. Nothing in the case involved an option for the sale or purchase of real estate.

7. Syrovy v. Alpine Resources, Inc., 122 Wash.2d 544 (1993): A party to the contract attempted to reclassify a purchase and sale agreement of timber as an option to purchase timber. Id. at 551. Nothing in the case involved an option for the sale or purchase of real estate.

8. Hopkins v. Barlin, 31 Wash.2d 260 (1948): Optionee purchased, for $5,000.00, an independent option for the sale of certain business property. Id. at 268-69. The optionee failed to exercise the option because he was unable to invest further money to purchase the property. Id. at 265.

9. Harting v. Barton, 101 Wash.App. 954 (2000): A case involving a lease with option to purchase. Id. at 958. The trial court held that a breach of the lease also constituted a breach of the option because the option could not stand alone because the option was not supported by independent consideration. Id. at 965. The Court of Appeals disagreed and held that payment of the taxes under the lease was the consideration for the option and that the lessee/optionee had failed

to perform the conditions of the lease and the option. Id. at 966. Neither the trial court nor the Court of Appeals held that independent consideration is required in a lease with option to purchase.

Not a single case listed above and cited by Defense holds that an option must be supported by consideration *different and aside* from the consideration supporting the lease. Washington law does not require independent consideration for the Option in this case because the Option is not independent of the Lease; they were part of the same bargain. This issue was decided by Valley Garage, Inc.; no independent consideration is necessary. Defendant's Motion for Summary Judgment should be denied.

B. GARRETT RANCHES SHOULD BE AWARDED ATTORNEY FEES FOR RESPONDING TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

"In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties." Thompson v. Lennox, 151 Wash.App. 479, 484 (2009).

Attorney fees are available to the prevailing party in this case. Paragraph 16 of the Lease provides for attorney fees for Garrett Ranches:

> In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

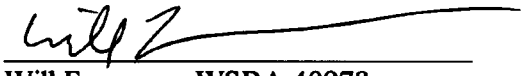
Indisputably, Garrett Ranches has been required to obtain an attorney. If this Arbitration Panel denies Honn Family's Motion for Summary Judgment, Garrett Ranches should be awarded attorney fees either at this stage of the arbitration, or at the conclusion of this arbitration. This request for attorney fees is supported by the Declaration of Counsel in Support of Plaintiff's Motion for Summary Judgment.

C. CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment and Dismissal of Arbitration should be denied. Garrett Ranches should be awarded costs and attorney fees.

DATED this 9th day of December, 2014.

LIBEY & ENSLEY, PLLC



Will Ferguson, WSBA 40978
Of Attorneys for Plaintiff

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered and mailed to the office of Gregory Lockwood at 421 W. Riverside Ave., Suite 960, Spokane, WA 99201, on the 9th day of December, 2014.

WILL FERGUSON

SUPERIOR COURT OF WASHINGTON FOR WHITMAN COUNTY

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	))))))))))))))	No. 10-2-00293-4 ARBITRATION DECISION

Oral argument on the parties' cross-motions for summary judgment was heard before arbitrators Timothy Esser, Frank Gebhardt and Read Smith on December 22, 2014. Garrett Ranches, LLC was represented by attorney Will Ferguson and Larry Honn Family LLC was represented by attorney J. Gregory Lockwood. Thereafter, counsel for the parties were asked to provide information in support of their respective requests for attorney fees. Both attorneys provided their hourly rate and number of hours worked on the case. Based on the evidence presented and considering the argument of counsel, the following arbitration decision is rendered.

CONSIDERATION

The Honns moved for summary judgment on the theory that there was no independent consideration for the option and that because they withdrew the option before the Garretts exercised their option right, the option is terminated. The Garretts respond that

FILED
JAN 27 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

the option is part of an integrated contract that includes the lease, that there are mutual promises, rights and obligations in the agreement which provide consideration for the option; that the rule cited by Honns is inapplicable. I agree with the Garretts' position.

The material facts are:

1. The parties executed a single document, a lease with an option to buy.
2. The agreement was to run for five years and granted to the Garretts the right at any time during those five years to exercise their option to purchase the property for the price set forth in their agreement.
3. The lease option agreement is an integrated document; there is no ambiguity about its terms. There is no "separate" consideration for the option; if there is consideration for the option it is as argued by Garretts – the mutual promises, obligations and rights set forth in the entire agreement, including the lease provisions.
4. The Honns gave written notice that they withdrew the option on February 9, 2012.
5. The Garretts gave written notice that they were exercising the option on May 4, 2014, within the five year period authorized in the lease/option agreement.

Honns rely on the rule set forth in Baker v. Shaw, 68 Wash. 99 (Wash. 1912).

The material facts are stated at page 99:

> That on October 30, 1909, the defendant J. N. Shaw gave to the plaintiff a written option to purchase the capital stock of said Commercial Importing Company, Incorporated; that there was no consideration whatever for said option. . . .

The court's holding and rationale is set forth at page 103:

> It is conceded that no consideration passed from appellant to respondents when it was executed. An option may be granted with or without consideration.
>
> **If a valuable consideration passes from the person to whom the option is given, the party giving it cannot withdraw his offer within the agreed period of time over**

> **which the option is to extend.** On the other hand if the option be given without consideration, it may be withdrawn at any time prior to its acceptance and a tender of performance, but not thereafter, as such acceptance will convert it into a bilateral or mutual contract, binding upon both parties. 3 Page on Contracts § 1616. [emphasis supplied]

> The oral evidence and supplemental agreement unquestionably show that the option was accepted by appellant prior to any withdrawal by respondents; that from and after November 27, 1909, a valid contract existed between the parties, and that on November 29, 1909, appellant deposited $5,000 as agreed.

The Garretts take no issue with Baker; their position is that because consideration was given, the emphasized language from the opinion controls our case.

Honns also rely upon Harting v. Barton, 101 Wn.App. 954, 6 P.3d 91 (2002), quoting extensively from the case and then writing this at page 13 of their memorandum:

> In Harting the lessee was to pay taxes under the option but failed to do so. In the case at bar, the taxes have been paid by the defendant as stated in Paragraph 6 of the Farm Lease. This point cannot be argued.

Honns' observation is accurate, but provides no support for their position. An accurate reading of Harting shows it to actually support the Garretts' position. In Harting, the same as here, the parties entered into a lease of farm ground with the lessee receiving an option to purchase the farm ground for no separate consideration.

The lessor decided that the lessee did not have the financial wherewithal to farm the property and sued to rescind the lease and purchase option. The lessee counterclaimed for specific performance of the lease option. Harting page 958. The suit was brought before the lessee purported to exercise the option. Harting page 958. If the Baker rule applied the court could have simply cited it because the option was withdrawn before it was exercised. Instead, the appellate decision in favor of the owner was based on the court's determination

not that there was a lack of consideration, but rather that Mr. Barton, the lessee and holder of the option failed to fulfill his promised consideration to farm the leased property in a proper manner and to pay the taxes.

The Garretts cite Valley Garage, Inc. v. Nyseth, 4 Wash.App. 316, 481 P.2d 17 (1971). In Valley Garage an owner of property agreed to lease it and in the written lease agreement gave an option to purchase to a third party. There was no separate consideration for the option. Thereafter, the recipient of the option exercised his right; the owner of the property failed to perform. The owner of the property at page 318 argued that, "There was no consideration for the option." The court stated at page 320, "The grant of the option by the Nyseths to Cortours and the lessees was part of the basis of the bargain for entering into the contract." The court ruled that the option was enforceable and granted specific performance, ordering the owner of the property to convey the property to the holder of the option.

While the Valley Garage holding and analysis support the Garretts' position, the result is also consistent with the rule in Baker, i.e., the holder of the option exercised the option **before** the owner of the property withdrew it. (In fact, the owner of the property never withdrew the option in Valley Garage.)

Honns entire argument is premised upon a case that clearly is inapplicable - a stand-alone option with no consideration. We were taught in law school that for a contract to be valid there must consideration. We were taught that consideration can consist of a promise for a promise. Here we have multiple promises relating to the lease and to the option which combined equal one, integrated contract. Contrary to Honns' argument, Garretts did give

consideration for the option, and they exercised the option consistent with the terms of the parties' agreement.

I agree with the analysis offered by the Garretts. The rule in Baker cited and relied upon by Honns is limited to the facts of Baker – a naked, stand-alone option, with no consideration, which option is not part of an integrated document that includes mutual promises which constitute consideration.

If contract provisions are unambiguous a court's interpretation of the contract is a question of law which may be decided on summary judgment. Truck Center Corp. v. General Motors Corp., 67 Wn.App. 539, 837 P.2d 631 (1992).

While summary judgment is normally granted in favor of the moving party, courts have long held that summary judgment may be granted in favor of the nonmoving party if it becomes clear that he or she is entitled thereto. Rubenser v. Felice, 58 Wn.2d 862 at 866, 365 P.2d 320 (1961); Impecoven v. Dept. of Revenue, 120 Wn.2d 357 at 365, 841 P.2d 752 (1992), Washington Practice Volume 14A, p. 100.

Garretts are entitled to summary judgment. Honns are to convey the property to Garretts for the purchase price set forth in their agreement and subject to the terms set forth in the second arbitration decision.

RES JUDICATA

The Garretts move for summary judgment arguing that the issue of whether the option is valid could have been and should have been litigated in each of the two prior arbitrations and therefore, Honns are barred by the Doctrine of Res Judicata from attempting to litigate this issue in this third arbitration proceeding. I agree with the Garretts' position.

Claim preclusion, or res judicata, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wash.2d 759, 763, 887 P.2d 898 (1995). The claim preclusion doctrine has four requirements:

> (1) the parties in the two successive proceedings are the same; (2) the prior proceeding ended in a final judgment; (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding; and (4) application of the doctrine must not work an injustice.

Chavez v. Dep't of Labor & Indus., 129 Wash.App. 236, 239-40, 119 P.3d 392, 394 (2005).

The decision in Arbitration 1 was confirmed January 28, 2011. The decision in Arbitration 2 was confirmed February 10, 2012. Division III of the Court of Appeals upheld both confirmations on October 13, 2013.

In the first arbitration the Honns took the position that the Lease Option Agreement should be declared invalid. The arbitrators ruled against the Honns:

> 1. The Cash Rent Farm Lease Agreement is valid and shall be enforced, subject to the following modifications: . . . .
>
> 2. Option. The option to purchase contained within the Cash Rent Farm Lease with Option to Purchase is valid, subject to the following: . . . . [Arbitration Award, pp 1 and 2]

Following the first arbitration award, the parties could not agree on the terms of the contract of sale. The Honns took the position that the lease option agreement had been forfeited due to Garretts' alleged breach and therefore there was nothing to arbitrate. The Superior Court and eventually the arbitrators rejected Honns' position finding that the Garretts had not breached, allowing arbitration, and setting forth the terms of the sale contract the parties were unable to agree upon.

At oral argument in this third arbitration, Honns' counsel agreed, reluctantly, that had his position prevailed at the second arbitration there would have been no enforceable option.

In Karlberg v. Otten, 167 Wash.App. 522, 280 P.3d 1123 (2012), the court noted at page 532:

> Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.
>
> "The general doctrine is that the plea of Res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Sanwick v. Puget Sound Title Ins. Co., 70 Wash. 2d 438, 441-42 P.2d 624, 627 (1967) (emphasis added).

Neither in their briefing nor at oral argument have the Honns provided a reason why they could not have raised the consideration argument they raise herein at either the first or second arbitrations. Given that they have consistently sought release from their lease/option agreement, their argument that the matter was not "ripe" at the time of the first two arbitrations is not supported by the facts. Application of res judicata will result in no injustice. The Honns could have and should have raised their consideration argument at the earlier arbitrations. Because they did not their claim is not only unsupported by the law as set forth in the first part of this decision, their claim is barred by principles of res judicata.

Summary judgment is granted to Garrett Ranches LLC, dismissing Larry Honn Family LLC's challenge to the validity of the option. Therefore, the following award is entered in favor of Garrett Ranches LLC:

1. The Garretts may proceed with their purchase of the property for the cash price set forth in their Lease/Option Agreement and upon the terms set forth in the second arbitration award. Garretts are entitled to apply to the Superior Court for an order of sale.

2. As the prevailing party in this third arbitration proceeding, Garretts are entitled to an award of reasonable attorney fees. They advise that Mr. Ferguson's hourly rate is $200/hour which is a reasonable rate. They are granted total fees in the amount of $8,360 and costs in the amount of $293.56. $3,740 of those fees is for working on these summary judgment matters; the balance is for responding to motions brought by Honns in the Superior Court and herein, for example, unsuccessfully alleging Garretts' attorney had a conflict and should be ordered off the case, objecting to the undersigned as arbitrator, seeking to take the deposition of Garretts' attorney and have access to his file. The fees sought by Garretts in successfully responding to these motions are reasonable and therefore total fees and costs in the amount of 8,653.56 are awarded.

3. Larry Honn Family LLC is responsible for arbitrator Gebhardt's fees and costs. Garrett Ranches LLC is responsible for arbitrator Read Smith's fees and costs. My fees and costs are $5,550.00. Each party shall pay one half and payment is due no later than March 1, 2015, after which interest at 12% shall accrue on any unpaid balance.

Before Garretts tender the payment proceeds to Honns they shall check with the undersigned to determine whether Honns have paid to the undersigned their share of the fees and costs. In the event they have not, Garretts shall deduct from the sale proceeds the amount necessary to pay me for my fees and costs in the event Honns have failed to pay.

DATED: This 23rd day of Jan 2014.

By _____
Timothy Esser, Arbitrator

[X] I, Arbitrator Read Smith, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Read Smith 1/23/15

Read Smith Date

[ ] I, Arbitrator Read Smith, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Read Smith Date

[ ] Other.

Read Smith Date

[ ] I, Arbitrator Frank Gebhardt, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Frank Gebhardt Date

[ ] I, Arbitrator Frank Gebhardt, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Frank Gebhardt Date

[ ] Other.

Frank Gebhardt Date

[ ] I, Arbitrator Frank Gebhardt, JOIN in the forgoing Arbitration Decision issued by Arbitrator Timothy Esser.

Frank Gebhardt Date

[X] I, Arbitrator Frank Gebhardt, DO NOT JOIN in the foregoing Arbitration Decision issued by Arbitrator Timothy Esser

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

[X] Other.
Dissent attached

Frank J. Gebhardt 1-27-15
Frank Gebhardt Date

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

In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	No. 10-2-00293-4 **DISSENTING ARBITRATION OPINION OF FRANK J. GEBHARDT**

I have reviewed the Arbitration Decision drafted by arbitrator Timothy Esser and joined in by arbitrator Read Smith. I dissent.

The majority decision states that: "The lease option agreement is an integrated document; there is no ambiguity about its terms." (Page 2, Line 9-10). An integrated writing is one adopted by the parties as the final and complete expression of the agreement. If a document is a complete integration, any terms and agreements that are not contained in it are disregarded. In light of the Arbitration Award dated January 19, 2012, it remains a mystery to me how this Lease Option Agreement could ever qualify as an integrated agreement. For the three (3) arbitrators in that second Arbitration Award went, in my experience, way beyond what a court would do in supplying terms missing from that Lease Option Agreement. That arbitration panel imposed requirements and added terms to that Agreement.

The Majority's Arbitration Decision, states that: "Honns are to convey the property to Garretts for the purchase price set forth in their agreement <u>and subject to the terms set forth in the</u>

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Second Arbitration Decision. (Page 5, Line 17-20). This orders the Honns to sell the property, not on terms necessarily specified in the Lease Option Agreement, but upon terms dictated by an arbitration panel. An integrated agreement would neither require, nor permit, such terms of sale.

The arbitrators have all read the same option cases regarding the necessity for consideration, including those cited in the Majority Decision. I would hold that there was no independent consideration given by Garrett Ranches, LLC ("Garrett") to the Larry Honn Family, LLC ("Honns"). Therefore, although a valid option was created in the Lease Option Agreement, having been given without consideration, the Honns' reserved the right to withdraw the Option prior to its exercise. And, in fact, the Honns did withdraw that Option in February, 2012, more than two (2) years prior to the Garrett's attempt to exercise the Option.

In addressing the *res judicata* issue, the chronology of the withdrawal and attempted exercise of the option must be noted:

February 9, 2012. Honns withdraw the Option.

May 5, 2014. Garrett sends notice of the exercise of the Option.

May 13, 2014. Honns' attorney responds that that the Option has been revoked.

So the actual issue of whether or not the Honn's withdrawal of their Option was legally permissible did not arise until May 5, 2014 when Garrett gave notice of the exercise of that Option.

In my opinion, *res judicata* should not apply in this case because I believe that such application will result, and now has resulted, in an injustice upon the Honns. The Second Arbitration Award is dated January 19, 2012. It was not until the next month that the Option was withdrawn. A finding by the second arbitration panel that the Option was valid was not a finding that there was consideration, since an Option can be valid without consideration. I do not believe that the consideration issue and right to withdraw the Option was ripe until after the second arbitration hearing, when the Option was in fact withdrawn and the Option was attempted to be exercised.

Included among the matters for which the Garretts' attorney, Mr. Ferguson, sought arbitration, in his July 3, 2014 letter is: "All matters related to Garrett Ranches, LLC's exercise of the Option". Clearly, one of the matters relating to the exercise of the Option is whether the Option existed in May, 2014 when its exercise was attempted, or whether the Option had been

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legally withdrawn in February, 2012. Whether the Option had been legally withdrawn in 2012 required a determination whether there was consideration given for the Option. In their decision, the Majority holds that ". . . Garretts did give consideration for the option . . . ." (page 4, line 26, page 5, line 1).

So the Majority, believing that "consideration" was an open issue, as it must since it decided that issue, concludes, without a passing glance of inconsistency, that the consideration issue should have been raised by the Honns at an earlier arbitration.

I would find in favor of the Honns and find that the Option was withdrawn prior to Garrett's notice of exercise of that Option.

By: Frank J. Gebhardt
FRANK J. GEBHARDT, WSBA #4854
Arbitrator

Date: 1-27-15

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Superior Court of Washington
County of Whitman

GARRETT RANCHES LLC, A Washington Limited Liability Company, Plaintiff, v. LARRY HONN FAMILY LLC, A Washington Limited Liability Company, Defendant.	**No. 10-2-00293-4** **Motion/Declaration for:** **1. Order of Sale and Appointment of Commissioner;** **2. Commissioner's Deed; &** **3. Award and Judgment of Attorney Fees and Costs**

I. Motion

GARRETT RANCHES, LLC, by and through its attorney, Will Ferguson, moves this Court for:

1. An Order of Sale and appointment of Commissioner to convey real estate;
2. Commissioner's Deed, issued pursuant to RCW 6.28.010; &
3. An Award and Judgment of Attorney Fees and Costs.

This Motion is based on the records and files herein, and the Declaration, attached hereto.

Dated: 2/26/2015

Will Ferguson, WSBA 40978

FILED
FEB 26 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

Of Attorneys for Plaintiff
LIBEY & ENSLEY, PLLC

II. Declaration of Counsel

WILL FERGUSON declares:

1. My firm represents the interests of the Plaintiff, Garrett Ranches, LLC.
2. On December 28, 2010, an Arbitration Award was handed down by a mutually-selected panel of arbitrators.
3. On January 28, 2011, the Arbitration Award was confirmed in the Whitman County Superior Court.
4. On January 19, 2012, an Arbitration Award was handed down by a mutually-selected panel of arbitrators (hereinafter "Second Arbitration Award").
5. On February 10, 2012, the Second Arbitration Award was confirmed in Whitman County Superior Court.
6. On June 4, 2012, a Supplemental Arbitration Award was handed down by a mutually-selected panel of arbitrators.
7. On July 12, 2012, the Supplemental Arbitration Award was confirmed by the Whitman County Superior Court.
8. On October 15, 2013, all of the Arbitration Awards and the Whitman County Superior Court's rulings were upheld by the Washington Court of Appeals, Division III.
9. On May 5, 2014, Plaintiff sent a letter to the Defendant and its attorney, Gregory Lockwood, that Plaintiff is exercising its Option under the Lease. Attached hereto as **Exhibit No. 1** is a copy of the letter exercising the Option. Attached hereto as **Exhibit No. 2** is a copy of the certificates of mailing of the letter exercising the Option.
10. On May 13, 2014, Defendant, through its attorney, refused to acknowledge Plaintiff's exercise of the Option and has made clear its rejection of the Option and its refusal to transfer the Property in the Lease and Option. Attached hereto as

Exhibit No. 3 is a copy of the letter from Defendant's Counsel, refusing to acknowledge the exercise of the Option.

11. The Lease and Option provide that the closing on the Property shall occur within 30 days of exercise of the Option. The time for Defendant's performance of transfer of the Property ran on or about June 5, 2014, excluding time for mailing. Once 30 days have elapsed without Defendant's compliance, Plaintiff is entitled to have the conveyance of the Property enforced against Defendant.

12. Plaintiff has obtained financing and a commitment for title insurance on the Property.

13. On June 13, 2014, this Court denied Plaintiff's request for a Commissioner's Deed, finding that the Arbitration Panel had not ordered a sale of the property.

14. The Arbitration Panel, on January 23, 2015, authorized the Plaintiff to proceed with the purchase of the Property and to seek an order which would require the Defendant to convey the property to Plaintiff. The Arbitration Panel stated at Paragraph 1, Page 8 of the 3rd Arbitration Award: "The Garretts may proceed with their purchase of the property for the cash price set forth in their Lease/Option Agreement and upon the terms set forth in the second arbitration award. Garretts are entitled to apply to the Superior Court for an order of sale."

15. On February 13, 2015, this Court confirmed the 3rd Arbitration Award.

16. This Court should enter an Order of Sale, appoint a Commissioner, and the Commissioner should be required to issue a Commissioner's Deed.

17. The Lease and Option, at Paragraph 16, provides that Plaintiff may obtain attorney fees.

18. At Paragraph 2, Page 8, of the 3rd Arbitration Award, the Arbitration Panel awarded Plaintiff $8,360.00 in attorney fees and $293.56 in costs.

19. The attorney fees and costs in the 3rd Arbitration Award should be reduced to judgment.

20. On February 13, 2015, this Court denied Defendant's Motion to Disqualify Judge David Frazier and Motion to Vacate Arbitration Award. Plaintiff prevailed on both Motions and requested attorney fees in responding to both Motions. The amount

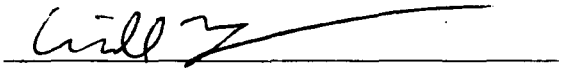
requested was $2,200.00. This Court should enter a Judgment for attorney fees in that amount, combined with the other amounts sought herein.

21. My hourly rate on this matter is $200.00. I believe the fees I have charged are reasonable. Preparation of this Motion and Declaration, including the attendant Notice of Hearing, required one hour of my time. I estimate argument preparation and argument to require one hour of attorney time. If this Court grants the Order and Commissioner's Deed, Plaintiff will incur additional attorney fees, to be determined.

22. The total Judgment for attorney fees sought herein is $10,960. The total Judgment for costs sought herein is $293.56. The total Judgment for attorney fees and costs sought herein is $11,253.56.

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

Signed at Colfax, Washington, on February 26th, 2015.



Will Ferguson

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be hand-delivered to the office of J. Gregory Lockwood, attorney for Defendant, 421 W. Riverside Ave., Suite 960, Spokane, WA 99201 on the 26th day of February, 2015.

WILL FERGUSON

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ce Ensley
ary J. Libey

Will Ferguson

Wesley A. Nuxoll
(Retired)

Of Counsel:
Guy C. Nelson*

*Also Admitted in Idaho

May 5, 2014

Gregory Lockwood
421 West Riverside Ave., Suite 960
Spokane, WA 99201

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Larry Honn Family, LLC
c/o Larry Honn, Sr.
P.O. Box 38
LaCrosse, WA 99143

RE: Exercise of Option to Purchase

Mr. Lockwood and Larry Honn Family, LLC,

Pursuant to Page 2, Paragraph 4 of the Cash Rent Farm Lease with Option to Purchase, executed on September 14, 2010, Garrett Ranches, LLC (hereinafter "Garrett Ranches"), hereby notifies Honn Family, LLC that Garrett Ranches, LLC exercises its Option to Purchase for the agreed sum of four hundred thousand dollars ($400,000.00). The sale will close, as agreed, within 30 days of this Notice. We will, unless we specify otherwise, operate as the Closing Agent for this sale.

Sincerely,

Will

Will Ferguson

cc: Client

& via email

EXHIBIT NO. 1

LIBEY & ENSLEY, PLLC
A Professional Limited Liability Company
Attorneys at Law
North 409 Main Street
P.O. Box 619
Colfax, Washington 99111-0619

Phone: (509) 397-4345
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ice Ensley
Gary J. Libey

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Wesley A. Nuxoll
(Retired)

Of Counsel:
Guy C. Nelson*

*Also Admitted in Idaho

May 5, 2014

Gregory Lockwood
421 West Riverside Ave., Suite 960
Spokane, WA 99201

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Larry Honn Family, LLC
c/o Larry Honn, Sr.
P.O. Box 38
LaCrosse, WA 99143

RE: Exercise of Option to Purchase

Mr. Lockwood and Larry Honn Family, LLC,

Pursuant to Page 2, Paragraph 4 of the Cash Rent Farm Lease with Option to Purchase, executed on September 14, 2010, Garrett Ranches, LLC (hereinafter "Garrett Ranches"), hereby notifies Honn Family, LLC that Garrett Ranches, LLC exercises its Option to Purchase for the agreed sum of four hundred thousand dollars ($400,000.00). The sale will close, as agreed, within 30 days of this Notice. We will, unless we specify otherwise, operate as the Closing Agent for this sale.

Sincerely,

Will

Will Ferguson

cc: Client

U.S. Postal Service™
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MAY 5 2014
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Sent To: GREGORY LOCKWOOD
Street, Apt. No.; or PO Box No.: 421 W RIVERSIDE AVE SUITE 960
City, State, ZIP+4: SPOKANE WA 99201

PS Form 3800, August 2006 — See Reverse for Instructions

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05/05/2014 (509)397-2981 04:23:31 PM

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Sales Receipt

Product Description	Sale Unit Qty	Unit Price	Final Price
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:18 PM Label#:70090820000184387689			
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:30 PM Label#:70090820000184387504			

Total: $0.00

Paid by:

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- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:

GREGORY LOCKWOOD
421 W RIVERSIDE AVE SUITE 960
SPOKANE WA 99201

COMPLETE THIS SECTION ON DELIVERY

A. Signature: X [signature] — ☐ Agent ☐ Addressee

B. Received by (Printed Name): Tric White — C. Date of Delivery: 5/6/14

D. Is delivery address different from item 1? ☐ Yes ☐ No
If YES, enter delivery address below:

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) [redacted]

2. Article Number (Transfer from service label): 7009 0820 0001 8438 75[redacted]4

PS Form 3811, February 2004 — Domestic Return Receipt — 102595-02-M-1540

EXHIBIT NO. 2

1 of 2

Nuwaubian Branches, LLC v. Larry Honn Family, et al.
Case No. 331750-III

OFFICIAL

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $ 6.48

COLFAX, WA 99111 MAY 5 2014 USPS

7009 0820 0001

Sent To LARRY HONN FAMILY LLC
Street, Apt. No.; or PO Box No. C/O LARRY HONN SR
City, State, ZIP+4 ~~PO BOX 38~~
LACROSSE WA 99143

PS Form 3800, August 2006 See Reverse for Instructions

COLFAX MPO
COLFAX, Washington
991119998
5480520711-0099
05/05/2014 (509)397-2981 04:23:31 PM

Sales Receipt

Product Description	Sale Unit Qty	Price	Final Price
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:18 PM Label#:70090820000184387689			
Pre-paid Mailpiece Acceptance 0 lbs. 0.50 oz. Acceptance Date:5/5/2014 4:23:30 PM Label#:70090820000184387504			

Total: $0.00

Paid by:

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****

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

LARRY HONN FAMILY LLC
C/O LARRY HONN SR
PO BOX 38
LACROSSE WA 99143

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Charlotte Honn ☒ Agent ☐ Address

B. Received by (Printed Name) Charlotte Honn
C. Date of Delivery 05-06-1

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7009 0820 0001 8438 7689

PS Form 3811, February 2004 Domestic Return Receipt

Law office of
J. Gregory Lockwood, P.L.L.C.
421 W. Riverside Avenue, Suite 960
Spokane, Washington 99201
(509) 624-8200 Telephone
(509) 623-1491 Facsimile

May 13, 2014

GARRETT FARM LLC.
c/o Frank Garrett
P.O. Box 216
Endicott, WA 99125

GARRETT FARM LLC.
c/o Joshua Garrett
P.O. Box 216
Endicott, WA 99125

Will Morgan Ferguson
Libey & Ensley, PLLC
409 N Main Street
PO Box 619
Colfax, WA 99111-0619

RE: Garrett Ranches, LLC v. Larry Honn Family, LLC

Dear Gentlemen:

As you are aware the option to purchase has been revoked. My clients do not wish to sell at this time.

If you have any questions, please contact my office.

Very truly yours,

J. Gregory Lockwood
Attorney at Law

cc: client

EXHIBIT NO. 3

FILED
MAR 30 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. NO. 10-2-00293-4 DECLARATION OF CHARLOTTE HONN

I, Charlotte Honn am one of the managing members of the Larry Honn Family, LLC., the named defendant in the above captioned action and make this declaration from my personal knowledge under penalty of perjury under the Laws of the State Washington.

1. On May 5, 2014 we received a letter from Garrett Ranches, LLC., that they were exercising the option in the lease.
2. Since that date no funds have been tendered.

DATED this ____ day of March, 2015.

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

ORIGINAL

1

2 Charlotte Honn
CHARLOTTE HONN

3

CERTIFICATE OF SERVICE

4 I, Lorrie Hodgson, do declare that on March 27, 2015 I caused to be

5 served a copy of the foregoing to the following listed party(s) via the means indicated:

6 Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 7 409 N Main Street PO Box 619 Colfax, WA 99111-0619	___X___ _____ _____ _____ _____	U.S. MAIL FACSIMILE HAND DELIVERY ELECTRONIC DELIVERY 8 OTHER _____

9

10 Dated this 27 day of March, 2015.

11 Lorrie Hodgson
LORRIE HODGSON

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Law Office of
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Spokane WA 99201
Telephone: (509) 624-8200

FILED
MAR 30 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 **OBJECTION TO ORDER OF SALE AND APPOINTMENT OF COMMISSIONER**

A. OBJECTION TO ORDER OF SALE AND APPOINTMENT OF COMMISSIONER

The defendants by and through their attorney of record hereby object to the plaintiff's motion for order of sale and the appointment of a commissioner to sign a commissioner's deed.

In this case there is no Judgment requiring the property to be sold. The plaintiff has not accepted the offer by performance nor is there a closing scheduled. The defendant has not refused any action as of this date and the plaintiff has made no showing of the necessity of a court appointed commissioner to sign a deed.

The plaintiffs have requested the court appoint a commissioner to sign a commissioner's deed pursuant to RCW 6.28.010.

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RCW 6.28.010. states:

> The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate:
>
> (1) When by a judgment in an action, a party is ordered to convey real property to another, or any interest therein.
>
> (2) When real property, or any interest therein, has been sold under a special order of the court and the purchase money paid therefore.

In this action there is no judgment ordering the defendants to convey real property. The arbitration decision on appeal only held that the plaintiffs had a right to exercise their option. Further there has been no sale under special order of this court.

B. OPTION NOT EXECUTED BY PLAINTIFF.

As stated in General Telephone Co. of Northwest, Inc. v. C-3 Associates, 32 Wn.App. 550, ____, 648 P.2d 491, (1982):

> Generally, an option is a unilateral contract which may be accepted by the optionee only by performance in accordance with its terms. "When the optionee decides to exercise his option he must act unconditionally and precisely according to the terms of the option.... Nothing less will suffice unless the optionor waives one or more of the terms of the option." (Footnotes omitted.) 1 S. Williston, Contracts § 61D (3d ed. 1957).

C. THE PLAINTIF HAS OFFERED NO EVIDENCE OF A TENDER OF $400,000.00 CASH.

In this case the option is for a cash sale. The plaintiff has not tendered $400,000.00 nor has an escrow been established in the amount of $400.000.00. To date all that has taken place is a notice of intent to execute the option.

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The option being a unilateral contract requires performance by the offeree prior to obligation forming on the part of the optoner. In Roger Bel Air v. 1st Security Bank of Washington, 69856-7-I the court held:

> The law recognizes two kinds of contracts: bilateral and unilateral. Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.. 114 Wn.2d 572, 583, 790 P.2d 124 (1990), overruled in part bv statute on other grounds as stated in Neah Bay Chamber of Commerce v. Dep't of Fisheries. 119Wn.2d 464, 832 P.2d 1310 (1992). The essential distinction between a bilateral and a unilateral contract is the method of acceptance. Multicare, 114 Wn.2d at 584. Under a unilateral contract, an offer cannot be accepted by promising to perform. Rather, "the offeree must accept, if at all, by performance, and the contract then becomes executed." Multicare. 114 Wn.2d at 584.

The plaintiff has not accepted the option as they have not performed on their part. The court held in Flower v. T.R.A. Indus., Inc., 127 Wn.App. 13, 27, 111 P.3d 1192 (2005) that in a unilateral contract, the offeror's offer or promise is not binding until the other party performs.

D. COURT LACKS AUTHORITY PURSUANT TO RAP RULE 7.2

The trial court lacks authority to grant the plaintiffs motions as this case has been accepted on appeal.

RULE 7.2 (a)and (c) states

> (a) Generally. After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.
>
> (c) Enforcement of Trial Court Decision in Civil Cases. In a civil case, except to the extent enforcement of a judgment or decision has been stayed as provided in rules 8.1 or 8.3, the trial court has authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court. Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.

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The arbitration award which was confirmed by this court did not order a sale of the property but rather only authorized the plaintiff to proceed in the purchase process if they desire pursuant to the terms of the option.

As such this court lacks authority to grant the relief requested by the plaintiff.

E. CONCLUSION

Until the plaintiffs produce evidence of a tender in the amount of $400,000.00 cash the offer has not been accepted pursuant to Washington case law nor is there an obligation on the part of the defendants to convey pursuant to Washington case law. As such there is no basis for this court to grant the plaintiff's motion to enter an Order of Sale or appoint a commissioner to sign a commissioner's deed.

Dated this 25th day of March, 2015.

LAW OFFICE OF
J. GREGORY LOCKWOOD, P.L.L.C

J. GREGORY LOCKWOOD, WSBA #20629
Attorney for Defendant

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J. Gregory Lockwood, PLLC
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Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on March 27, 2015, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson Libey, Enslee & Nelson, PLLC 409 N Main Street PO Box 619 Colfax, WA 99111-0619 (509) 397-3594 fax	___X___ U.S. MAIL _____ FACSIMILE _____ HAND DELIVERY _____ ELECTRONIC DELIVERY _____ OTHER _____

DATED March 27, 2015.

LORRIE HODGSON

Law Office of
J. Gregory Lockwood, PLLC
421 W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

FILED
APR 06 2015
JILL E. WHELCHEL
WHITMAN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

GARRETT RANCHES LLC, Plaintiff, vs. **LARRY HONN FAMILY LLC,** Defendant.	No. 10-2-00293-4 **DECISION, ORDER, & JUDGMENT ON PLAINTIFF'S MOTIONS** 15 9 00072 5

THIS MATTER came before the court on April 3, 2015 for a hearing on Plaintiff's Motion for the following: (1) an Order of Sale and Appointment of Commissioner; (2) a Commissioner's Deed pursuant to RCW 6.28.010; and (3) an Award and Judgment of Attorney Fees and Costs. Plaintiff was represented by attorney Will Ferguson; Defendant was represented by attorney J. Gregory Lockwood. At the conclusion of argument the court took its decision under advisement for further review and consideration. Based on that review, it hereby enters the following Decision and Order.

DECISION

On February 13, 2015, an Order Confirming Arbitration Award was entered in this action. This order confirmed the Arbitration Award in this matter dated January 23, 2015 in its entirety.

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(509) 397-6244

RCW 7.04A.220 provides as follows:

> After a party to an arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.

An action to confirm an arbitration award has been construed to be a motion for an order to render judgment on an award previously made by the arbitrators. *Price v. Farmers Ins. Co. of Wash.*, 133 Wn2d 490 (1977); *Equity Grouop, Inc. v. Hidden*, 88 Wn.App. 148 (1977).

Here, the primary issue before the arbitration panel was whether the option to purchase set forth in the Lease Option Agreement was withdrawn before it was exercised by the notice Plaintiff provided to Defendant. In ruling in favor of Plaintiff, the majority decision of the arbitrators found that: "Honns are to convey the property to Garretts for the purchase price set forth in their agreement and subject to the terms set forth in the Second Arbitration Decision." (*Arbitration Decision,* p. 5, lines 17-20). The decision provided that Garrett could proceed with the purchase of the property and were entitled to apply to the Superior Court for an "Order of Sale." (*Arbitration Decision,* p. 6, lines 1 - 4). Additionally, the Arbitration Decision awarded Garrett $8,653.56 in fees and costs as the prevailing party and required each party to pay one-half of Timothy Esser's fees and costs of $5,550.00 for serving as arbitrator. In the event Honn had not paid Esser this $2,775.00 amount by the time the sales proceeds were paid to Honn, the decision provided that this sum was to be deducted from the distribution that would otherwise be made to Honn. (*Arbitration Decision,* p. , lines 16-25).

On February 27, 2015, Defendant Honn filed a Notice of Appeal to Divison III of the Court of Appeals seeking review of the Order Confirming Arbitration Award and other decisions made by this Court relating to the arbitration proceeding. Plaintiff Garrett filed the present motion for an Order of Sale and other relief on February 26, 2015. The Court of Appeals thereafter accepted review.

It is undisputed that Garrett has not actually tendered the $400,000.00 cash purchase price to Honn or deposited said funds in an escrow account. They have stated, however, their willingness and ability to do so and their desire to proceed with the purchase. Contrary to

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Honn's argument, the tender of the purchase price is not the condition required to exercise the option granted under the Lease Option Agreement. The arbitrators determined that the purchase option was valid and that it had been exercised by Garrett's notice to Honn. A tender of the purchase price funds is not required to exercise the purchase option; it is a necessary prerequisite to trigger the requirement for Honn to execute a deed and to proceed to closing.

In general, the trial court has limited authority to act in a case after an appellate court accepts review. RAP 7.2(a). In a civil case, however, RAP 7.2(c) provides that the trial court has authority to enforce its decisions, and a party is allowed to execute on a trial court judgment during the pendency of an appeal unless enforcement is stayed under RAP 8.1 (supersedeas procedure) or 8.3 (injunctive or other relief granted by appellate court). Thus, Garrett is entitled to enforce the Arbitration Award that was the subject of the February 13, 2015 Confirmation Order. Under that order, Garrett has the right to proceed with the purchase of the Honn property and to apply to the Superior Court for an order of sale.

Paragraph 16 of the Lease Option Agreement provides that the prevailing party in a proceeding to enforce the agreement shall be entitled to reasonable attorney's fees and costs. Garrett is therefore entitled to fees and costs incurred in defending and enforcing the latest arbitration award before this court, and the court finds that the amount sought by Garrett's attorney is reasonable.

Consistent with the Arbitration Award and in order to enforce said award, the following order of sale shall be entered detailing procedures for the sale.

ORDER & JUDGMENT

BASED on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. To proceed with the purchase of the Honn property, Garrett shall deposit the agreed cash purchase price of $400,000.00 with a title company or other neutral closing agent doing business and having an office in Whitman County. Garrett shall also provide the title company or closing agent with copies of the Lease Option Agreement, the arbitration awards in this case, and this Decision, Order and Judgment.

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2. Upon receipt of the purchase price deposit from Garrett, the title company or closing agent shall provide notice to Honn and Honn's attorney that the deposit was received, and it shall obtain and/or prepare documents necessary to effectuate the closing of the sale of this property. If possible, the title company or closing agent shall schedule a date for closing within thirty (30) days after receipt of the purchase price funds from Garrett.

3. Honn shall pay the standard seller's closing costs and prorations and Garrett shall pay the standard buyer's closing costs and prorations. The parties shall equally divide the costs of the closing agent, and each shall bear the expense of their own legal fees associated with reviewing closing documents and providing representation relating to the closing.

4. The Arbitrator's Award provided that Honn is responsible for one-half of the $5,550.00 fees of arbitrator Timothy Esser. If Honn fails to provide proof of payment of these fees to the closing agent within three (3) business days of the date scheduled for closing, the closing agent shall deduct $2,775.00 from Honn's sales proceeds to satisfy this portion of the arbitration award.

5. Judgment will be entered in favor of Garrett and against Honn in the total amount of $11,253.56, which represents the $8,653.56 award for attorney fees and costs made by the arbitrators, together with an award of $2,600.00 for attorney fees and costs incurred in defending the arbitrators award before the trial court and in bringing the present motion. Counsel for Garrett shall prepare and, if necessary, shall note for presentment a separate judgment form with a judgment summary consistent with this award.

6. In the event Honn refuses to execute a deed and other seller's closing documents relating to this transaction, Garrett may make application to the court to have a commissioner appointed pursuant to RCW 6.28.010 for this purpose, and Honn will be required to bear all costs relating to said application and appointment, including any increased costs charged by the closing agent. Such costs shall be deducted from the sales proceeds that would otherwise be payable to Honn.

DATED this 6th day of April, 2015.

JUDGE

WHITMAN COUNTY SUPERIOR COURT
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(509) 397-6244