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STATE OF WASHINGTON  
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NO. 695479

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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RADIANCE CAPITAL, LLC

APPELLANT

V.

CIRCLE S. FOODS, INC. DBA CIRCLE S. MARKET AND DAILY,  
SUBHASH CHANDER SHARMA AND "JANE DOE" SHARMA,  
JAGTAR SINGH AND "JANE DOE" SINGH AND NAVJIT SINGH  
AND "JANE DOE" SINGH

RESPONDENTS

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BRIEF OF RESPONDENTS

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## **APPENDICES**

- A. Exhibit 1: Equipment Financing Agreement between Radiance Capital LLC and Circle S Foods dba Circle S Market and Daily
- B. Exhibit 2: UCC Financing Statement
- C. Exhibit 3: Notice to Provide Insurance Authorization
- D. Exhibit 18: Letter dated February 1, 2011, from Paul R. J. Connolly to Mike Price

## I. INTRODUCTION

Appellant Radiance Capital LLC (Radiance) brings this appeal in an attempt, based on misleading facts and misstatement of the record, to retry a contractual dispute over a \$381.78 “insurance premium.” The trial court properly found in favor of the convenience store owners—respondents Circle S. Foods, Inc. dba Circle S. Market and Daily, Subhash Chander Sharma and “Jane Doe” Sharma, Jagtar Singh and “Jane Doe” Singh, Navjit Singh and “Jane Doe” Singh (hereinafter collectively “Circle S”)—on the basis that Radiance failed to meet its burden at trial.

The Court should reject Radiance’s attempt to overturn the decision of the trial court which was based on facts very different than those alleged facts offered by Radiance on appeal.

## II. RESPONSE TO ASSIGNMENT OF ERROR

Circle S responds to the assignment of error claimed by Radiance as follows:

1. The trial court did not err in its interpretation of the contract documents with respect to Circle S’ required proof of insurance.
2. The trial court did not err in finding that Radiance failed to provide written notice to Circle S that Circle S’ proof of

insurance was not satisfactory. There was no evidence of such notice at trial. **Finding No. 21.**

3. The trial court did not err in finding that Radiance was named on the insurance policies. **Finding No. 22.**

4. The trial court did not err in concluding that Circle S did not owe the insurance premiums that Radiance had invoiced because Radiance failed to explain the inadequacy of the proof of insurance annually provided by Circle S. **Conclusion No. 4.**

5. The trial court did not err in concluding that Paragraph 18 of the Financing Agreement required that Radiance provide Circle S with written notice of the proof of insurance “reasonably required” by Radiance. **Conclusion No. 4.**

6. The trial court did not err in concluding there was an inconsistency between the Financing Agreement and the Notice to Provide Insurance Authorization. The Notice requested that Plaintiff be named as an “additional insured” while the Financing Agreement only required that Plaintiff be named as a “loss payee.” **Conclusion No. 2.**

7. In concluding there was an inconsistency between the Financing Agreement and the Notice to Provide Insurance Authorization, the trial court did not err in recognizing that the

Financing Agreement required Circle S to maintain liability insurance in such amounts and form as Circle S reasonably required, but did not specifically require Circle S to provide Radiance with proof of such liability insurance. **Conclusion No. 2.**

8. The trial court did not err in concluding that (a) Paragraph 25 of the Financing Agreement required Radiance to provide Circle S with written notice that Circle S' proof of insurance was unsatisfactory, and (b) Radiance failed to provide Circle S with such written notice. There was no evidence of such notice at trial. **Conclusion Nos. 3 and 4.**

9. The trial court did not err in concluding that Radiance could not charge Circle S for insurance when Radiance failed to provide Circle S with written notice that the proof of insurance was unsatisfactory or that the insurance maintained was not in such amounts and form as Radiance reasonably required. Additionally the trial court did not err in recognizing that Circle S could have cured any ongoing deficiency had Radiance informed Circle S that its insurance was unsatisfactory. **Conclusion No. 4.**

10. The trial court did not err in finding that Radiance failed to provide Circle S with written notice that Circle S' proof

of insurance was unsatisfactory or with an opportunity to cure as was Radiance's standard practice. There was no evidence of such notice at trial. **Finding No. 12.**

11. The trial court did not err in finding that Radiance failed to provide Circle S with written notice that its payments were inadequate or that Circle S was in default because there was no evidence of such notice at trial. **Finding Nos. 14 and 15.**

12. The trial court did not err in finding that Circle S paid off the Financing Agreement in full in October 2011. **Finding No. 16.**

13. The trial court did not err in finding that Radiance did not expressly demand payment for insurance premiums until January 13, 2011. **Finding No. 17.**

14. The trial court did not err in finding that (1) there was no contractual provision for a "Default and Collection Fee" and (2) Radiance failed to provide written notice to Circle S of any default before February 8, 2011. There was no evidence of such a contractual provision or such a notice at trial. **Finding No. 19.**

15. The trial court did not err in finding that Radiance did not respond to Circle S' proof of insurance because Radiance did not provide evidence of such a response at trial. **Finding No.**

21.

### III. RESTATEMENT OF THE CASE

#### A. Statement of Relevant Facts.

This dispute arises from a simple secured transaction for a \$5,950 convenience store fryer. In November 2005, Circle S purchased the fryer for its small family-operated convenience store located in Oregon, and financed the fryer through Radiance, a Washington commercial equipment financing company. VRP 41, 149-50. In consideration for financing the fryer, Circle S and Radiance entered into an Equipment Financing Agreement (the “Financing Agreement”). VRP 44, 150-51; Appendix A (Exhibit 1). In exchange for Radiance’s agreement to advance the funds, Circle S agreed to pay Radiance monthly principal and interest payments. App. A (Exh. 1), pg. 4. Radiance protected the Financing Agreement by taking a UCC security interest in the fryer and obtaining personal guarantees of loan repayment from Circle S’ co-owners. *Id*; App. B (Exh. 2).

As part of the Financing Agreement, Circle S was required to maintain liability and property damage coverage “in such amounts and in such forms as Radiance shall reasonably require.” App. A (Exh. 1), ¶ 13. Radiance provided Circle S with a “Notice

to Provide Insurance Authorization,” App. C (Exh. 3), which Circle S subsequently gave to its insurance agent, Jim Short. VRP 152-54. Mr. Short placed insurance on the fryer and sent the first Certificate of Insurance directly to Radiance as proof of insurance. VRP 48-49, 152-154. It is undisputed that the initial certificate satisfied Radiance’s insurance requirement. *See* unchallenged Finding of Fact No. 11 (“There is no dispute that the original proof of insurance that Defendant Circle S delivered to the Plaintiff was acceptable to Plaintiff in all respects”)<sup>1</sup>; *see also* VRP 100. At trial, Radiance offered no evidence that Circle S’ actual policy ever changed. *See generally* CP 1-659, VRP 1-223 and Exhs. 1-40.

In fact, Circle S kept the same type of insurance coverage on the fryer through the entire term of the Financing Agreement. VRP 155-156. As proof of that coverage, Radiance received updated Certificates of Insurance from Mr. Short. VRP 125-126. The only change Circle S made was to increase the amount of liability coverage from \$1 million to \$2 million. VRP 156.

Over the next five years, Circle S made a total of sixty monthly loan payments of \$148.83 for the fryer, amounting to a

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<sup>1</sup> Unchallenged findings of fact are verities on appeal. *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 741, 119 P.3d 926 (2005).

total of \$8,929.80—\$5,950 in principal and \$2,979.80 in interest. VRP 159, 163-64. Radiance accepted and cashed each of Circle S' loan payments without complaint. VRP 157. Beginning in January 2007, however, more than a year into the lease, Radiance's invoices began including a new charge of \$7.81 for an "insurance premium" fee. Exh. 5; VRP 156. According to Radiance, this is when it first incurred "force placed" insurance premiums:<sup>2</sup>

Q: Now, the first premium, it's kind of cut-off by the hole punch, but we can see the date at the very bottom of the list. It says January 1, 2007. Do you see where I'm reading?

A: Yes, um hum.

Q: Okay. To the best of your knowledge, does this represent the date that Radiance first incurred insurance premiums for this contract?

A: Yes, it is.

VRP 65 (direct examination of Mike Price). During this time period, Radiance admits that it was satisfied with Circle S' proof of insurance:

Q: ... From July of '06 to July of '07 you were – you were comfortable and satisfied by the coverage that was provided. Right?

A: Yeah....

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<sup>2</sup> "Force placed" insurance is coverage that Radiance purchases and "forces" the borrower to pay for.

VRP 100. At trial, Radiance was unable to explain why it started charging Circle S for the insurance premium in January 2007.

Q: Okay. Isn't it correct that long before July of 2007 Radiance started paying for its own insurance for the fryer owned by Circle S?

A: I'd have to look at the – the records.

Q: Could you look at Exhibit 11?

A: (Witness complies)

Q: And didn't we see that at the bottom of Exhibit 11 Radiance began purchasing insurance on the Circle S Market fryer in January of '07?

A: Yeah, that's what it says here.

Q: **So even though Circle S had the insurance that was required by your own admission through July, you began purchasing that insurance from a third party in January of '07, correct?**

A: **That's – that's when the – it's marked here as the date.**

VRP 109-10 (emphasis added). Circle S kept paying the prior amount, ignoring the additional, unexplained charge. VRP 158.

In September 2010, Circle S called Radiance to confirm that the October 2010 payment would be its last. VRP 161. After confirming Circle S' account number, a Radiance representative confirmed that Circle S had only one remaining payment. VRP

161-162. The representative also confirmed that Circle S would not receive any additional invoices from Radiance. VRP 162. Circle S made its final payment for the fryer in October 2010. VRP 162.

On January 13, 2011, Radiance sent Circle S a letter demanding payment of a \$150 “Agreement Transfer Fee” and \$381.78 in “Insurance Fees” in order to “purchase” the fryer from Radiance. Exh. 15. Circle S refused to pay the added insurance premium but, in an effort to settle the dispute informally, tendered the Agreement Transfer Fee despite the fact that the Financing Agreement does not call for, describe, or place debtors on notice of such a fee. VRP 164-165; App. A (Exh. 1). Radiance rejected Circle S’ offer. VRP 165.

Circle S contacted insurance agent Jim Short to inquire about the \$381.78 insurance fee. VRP 166. Mr. Short guaranteed Circle S that its policy continually listed Radiance as an insured. *Id.* On January 28, 2011, Mr. Short sent a letter to Radiance confirming that Radiance was continuously insured under Circle S’ policy as both a loss payee and an additional insured. App. D (Exh. 18).

On February 8, 2011, Radiance declared a default, stating that Circle S was “past due” and that it was “accelerating” all “past due and future payments” on the loan agreement. Exh. 21. Radiance added \$480 in unspecified “Default & Collections Fees” and threatened legal action if Circle S did not pay Radiance \$861.78 within 10 days. *Id.*

**B. Statement of Procedure.**

Facing potential litigation in King County, Washington, Oregon-based S.K. Bal, LLC (“S.K. Bal), Circle S’ successor in interest, filed suit for declaratory relief against Radiance in Marion County, Oregon, asking the court to declare that (1) S.K. Bal is the lawful owner of the fryer, (2) Radiance has no lien rights in the fryer, and (3) S.K. Bal owed no “Default & Collections Fees,” “Agreement Transfer Fee,” or obligation to pay “Insurance Fees.” Exh. 30. Radiance then filed this litigation in King County. CP 1-10. The Marion County court dismissed S.K. Bal’s action for declaratory relief in favor of the King County litigation. Exh. 31.

On August 14, 2012, the parties ultimately proceeded to a one-day bench trial in King County. CP 273. Each side called one witness to the stand—Mr. Michael Price on behalf of Radiance and Mr. Jagtar Singh on behalf of Circle S. VRP 2. Mr. Price

testified that Radiance force-placed insurance in response to Circle S' failure to provide satisfactory proof of insurance. VRP 53-57. He also testified that he was not sure whether Circle S was provided with written notice of the insurance deficiency and an opportunity to cure, as was Radiance's standard practice.

Q: Does Radiance have a protocol, a procedure for making sure that its collateral is properly insured?

A: Yeah, we send out notices to the customer and state that if we don't receive the proper insurance, you know, as far as additional loss payee and under the amounts, that the insurance would be force-placed, and beginning within, you know, a certain number of days.

VRP 54 (direct examination of Mike Price).

Q. ... you said that there's a notice that goes out telling them that they don't have the right insurance and giving them a certain amount of time to get the right insurance.

A. Yeah. It's a standard thing. It comes right off the system and goes out. We don't have a copy of it here it doesn't sound like.

THE COURT: I'm sorry, if we don't have a copy, it's -

THE WITNESS: He says we don't have a copy in here, so we must not.

Q. **And have you yourself seen copies of these documents that actually went to Circle S notifying Circle S that they didn't have the coverage and that they had a certain amount of time to get it?**

**A. No. All I know is our policy is to send that notice out.**

**Q. Okay. So you don't know whether that was sent to Circle S or not?**

**A. No. All we would have sent them would have been the invoice stating the insurance.**

VRP 102-103 (cross examination of Mike Price) (emphasis added).<sup>3</sup> As evidence of breach, Radiance simply offered the Financing Agreement and related documents, invoices showing its force placed insurance premiums, and the monthly invoices it sent to Circle S. Exhs. 1-14.

For the defense, Mr. Singh testified that Circle S maintained the same type of coverage for the entirety of the contract, VRP 155-56, and that Circle S refused to pay the insurance premiums because it had the proper coverage and could not afford to double cover the fryer, VRP 158. To support its claim that it was properly insured, Circle S offered its insurance billing statement and a letter from its insurance agent confirming that

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<sup>3</sup> This testimony contradicts Radiance's claim that "Mike Price testified that Circle S was in fact given written notice and an opportunity to cure, pursuant to standard Radiance practice." See Appellant's Brief, pg. 41.

Radiance was continuously listed as a loss payee and an additional insured. App. D (Exh. 18) at pg. 7; Exh. 41.<sup>4</sup>

The trial court resolved the case in favor of Circle S and dismissed Radiance's claims. CP 273-282; VRP 9 (August 16, 2012). The trial court held that Radiance failed to prove by a preponderance of the evidence that the Defendants breached the contract. Circle S was declared the prevailing party for purposes of attorney's fees. CP 281; VRP 10 (August 16, 2010). The trial court entered its Finding of Facts and Conclusions of Law on September 17, 2012. CP 273-282.

On September 25, 2012, Radiance filed a Motion for Reconsideration on the basis of "newly discovered evidence" related to the issue of whether Radiance sent Circle S a notice of insurance deficiency. CP 285-379. In its motion, Radiance alleged that it was unable to obtain the "newly discovered evidence" (purported to be insurance deficiency notices sent to Circle S) before trial because its third party bank did not to provide the records until August 20, 2012. CP 287-89. Radiance admits,

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<sup>4</sup> Radiance's assertion that "Jim Short could not truthfully specify that both required coverage had been maintained continuously during the term of the contract" is without basis. Appellant's Brief, pg. 17. Mr. Short never testified in this case. VRP 2.

however, that it did not request these documents from its bank until August 13, 2012, the eve of trial:

**We go to trial tomorrow morning** on this deal that I spoke to you about and **I was wondering if when an insurance certificate came to US Bank and it was insufficient was there a standard letter that was sent out? I see in account notes that insurance cert requests were sent out.** Also, if there is a letter used does it go to the customer or to the insurance agent? If you have a letter can you send me a copy and also if you have a copy that was directly to Circle S Market and Daily would be even more helpful.

CP 375 (Radiance email dated August 13, 2012 to US Bank) (emphasis added). US Bank responded to Radiance's request seven days later on August 20, 2012. CP 376.

The trial court denied Radiance's Motion finding it did not exercise due diligence in obtaining the evidence before trial and that substantial justice was done in this matter. CP 595-97.

### **C. Radiance's Misleading Statement of the Record**

Radiance misstates the record in its appellate brief by citing to and referring to CP 296-98 as factual evidence before the trial court. See Appellant's Brief, pgs. 12-14 (citing CP 296-298). The trial court did not see CP 296-98 until September 25, 2012, more than six weeks after trial, and the only reason those pages exist in the clerk's papers is because Radiance offered them as "newly discovered evidence" to support its Motion for Reconsideration.

CP 285-315. Radiance never offered these documents at trial, no court has determined their admissibility under the Rules of Evidence, and the trial court did not consider them when finding and concluding that Radiance failed to provide written notification of insurance deficiencies. *See generally* CP 1-659, VRP 1-223 and Exhs. 1-40.

#### IV. ARGUMENT

##### A. Standard of Review

The Court of Appeals, as an appellate court, will not retry factual aspects of a case. *Platt Elec. Supply, Inc. v. City of Seattle, Division of Purchasing*, 16 Wn. App. 265, 555 P.2d 421 (1977). “When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law.” *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

Unchallenged findings of fact are verities on appeal. *Keever & Associates, Inc. v. Randall, supra*, 129 Wn. App. 733, 741, 119 P.3d 926 (2005). The appellate court reviews challenged findings to determine if they are supported by substantial evidence. There

is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Durrah v. Wright*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

“The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party.” *Lewis v. Dep't of Licensing*, 157 Wn.2d 466, 468, 139 P.3d 1078 (2006). An appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82–83, 877 P.2d 703 (1994). Moreover, the appellate court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 861, 292 P.3d 779 (2013).

Conclusions of law must flow from the findings of fact. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). An appellate court reviews, de novo, whether the trial court's conclusions of law flow from the supported findings. *Id.*; *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73

P.3d 369 (2003). Unchallenged conclusions of law become the law of the case and should not be disturbed on appeal. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 846 P.2d 500 (1993).

**B. Radiance Failed To Prove Breach At Trial.**

It was Radiance's burden at trial to prove that Circle S breached a duty owed under the contract, and that, as a result of that breach, Radiance incurred damages. *See Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981) (holding that breach of a contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the plaintiff).

*i. Radiance's contractual documents are ambiguous with respect to the insurance required.*

It is unclear what duty Circle S owed to Radiance because the Radiance contract is ambiguous. As noted by the trial court, there are inconsistencies between the two documents that could be read to impose a duty on Circle S with respect to insurance coverage. CP 278-79. ("Conclusion No. 2"); App. A (Exh. 1); App. C (Exh. 3). Ambiguities in a contract are interpreted against the drafter. *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 395, 254 P.3d 208 (2011).

According to the Financing Agreement, Circle S was to (1) list Radiance as a “loss payee” on all risk insurance covering the value of the equipment, (2) provide Radiance with proof of such insurance, and (3) maintain liability insurance in such an amount and form as Radiance reasonably required. App. A (Exh. 1), ¶ 13. However, the Financing Agreement did not specifically require that Circle S provide Radiance with proof of liability insurance. Conversely, the Notice to Provide Insurance Authorization required Circle S to name Radiance as an “additional insured” on the liability insurance, language that does not appear in the Financing Agreement. App. C (Exh. 3), ¶ a.

Additionally, the Notice to Provide Insurance Authorization required Circle S to only provide proof of its initial insurance policy:

**FAILURE TO PROVIDE INSURANCE.** Grantor agrees to deliver to the Company proof of the required insurance as provided above, **with an effective date as shown on the date below or earlier.**<sup>5</sup>

App. C (Exh. 3) (emphasis added). There is no contractual requirement for Circle S to provide Radiance with annually updated proof of liability insurance.

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<sup>5</sup> The “date below” is October 7, 2005. App. C (Exh. 3).

Furthermore, as the trial court noted, it is significant that the Financing Agreement does not reference the Notice to Provide Insurance Authorization. When Radiance wanted to include an extrinsic document, the Financing Agreement would specifically incorporate the document by reference. For example, Schedule A is specifically incorporated into the Financing Agreement. *See* App. A (Exh. 1), ¶ 2. However, nowhere does the Financing Agreement refer to the Notice to Provide Insurance Authorization.

These inconsistencies between the two documents created ambiguity regarding what type of insurance, or proof of insurance, Circle S was required to provide under the contract. The trial court properly construed that ambiguity against Radiance, and properly found that, given the undisputed adequacy of the initial insurance coverage purchase by Circle S, Radiance did not carry its burden of proving a breach of contract by Circle S.

- ii. *There is no evidence, written or oral, that Radiance provided Circle S with notice of any insurance deficiency.*

Radiance admitted at trial that it was Radiance's standard policy to provide written notice and an opportunity to cure in the event of an insurance deficiency. It also admitted that it failed to provide Circle S with such notification.

A. No. All I know is our policy is to send that notice out.

Q. Okay. So you don't know whether that was sent to Circle S or not?

A. No. All we would have sent them would have been the invoice stating the insurance.

VRP 102-103 (cross examination of Mike Price).

Radiance argues that it provided Circle S with oral notice of Circle S' insurance deficiency. However, this argument too fails. Oral notification is inconsistent with the language of the Financing Agreement which requires written notification:

NOTICES: **Notices shall be in writing** and sufficient if mailed to the party involved, United States mail first class postage prepaid, at its respective address set forth above or at such other address as such party may provide on notice in accordance herewith. Notice so given will be effective when mailed ...

App. A (Exh. 1), ¶ 25 (emphasis added); *see also* unchallenged Finding of Fact No. 23. Unchallenged findings of fact are verities on appeal. *Keever*, 129 Wn. App. at 741.

Also, Radiance claims that the oral notification took place in January 2007 when Radiance began including a \$7.81 insurance premium fee on Circle S' invoices. Exh. 5; VRP 156-157. It is undisputed that Radiance was satisfied with the Circle S proof of insurance during that time. It is nonsensical to argue that

Radiance provided notice of an insurance deficiency when in fact there was no insurance deficiency at all.

Radiance failed to proffer any evidence that it provided Circle S with written notice as required by contract, or that it provided Circle S with an opportunity to cure any deficiency in the proof of insurance “reasonable required” by Radiance. Given the ambiguity between the contractual documents and Radiance’s failure to provide notice, the trial court properly held that Radiance failed to prove breach.

**C. Radiance Also Failed To Establish How Any Breach By Circle S Proximately Caused Radiance Any Harm.**

A breach of contract claim may be dismissed when there is no evidence of damages caused by the breach. *Jacob's Meadow Owners Assoc. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153 (2007).

In its trial brief, Radiance argued that it force-placed insurance in response to Circle S’ failure to provide proof of insurance naming Radiance as an additional insured:

Radiance received endorsements which did not include “additional insured” coverage; therefore, Radiance obtained and paid for that coverage, charging the premiums back to Circle S Foods on its monthly invoice.

CP 74 (“Plaintiff’s Trial Brief”). However, at trial Radiance offered evidence which established that it placed insurance in January 2007, *before* it allegedly received any endorsements that did not include “additional insured.” Exh. 5; VRP 98-99. The trial court found this evidence persuasive:

Exhibit 5 reflects that the Plaintiff started charging Defendants Circle S insurance premiums for the equipment financed by Defendant Circle S beginning January 1, 2007 even though the Plaintiff’s authorized representative, Michael Price, testified that adequate insurance was provided by the Defendants at all times between the times periods of June of 2006 and July of 2007. **There is no explanation in any of the exhibits or testimony that explain why Plaintiff started charging Defendant Circle S for insurance premiums for the equipment financed by Defendant Circle S in January 2007.**

CP 276-77 (unchallenged Finding of Fact No. 13) (emphasis added); *see also* VRP 6 (trial court’s oral decision on August 16, 2012). On appeal, the Court of Appeals defers to the trial court for purposes of evaluating the persuasiveness of the evidence and credibility of the witnesses. *Lodis v. Corbis Holdings, Inc., supra*, 172 Wn. App. at 861.

In its appellate brief Radiance now argues that it placed insurance due to deficiencies in Circle S’ 2009 and 2010 insurance policies. Appellant’s Brief, pp. 38-40. However, it is clear from the record that Radiance did not place insurance in

response to a deficiency in the insurance policies. By his own admission, Mr. Price never saw Circle S' insurance policies and Radiance's understanding of its coverage came solely from the Certificates of Insurance:

**Q. Okay. Thank you.  
And, again, you – you never saw the actual insurance policies between the insurer for Circle S and Circle S?**

**A. The only thing I received and -- and it's in the documents so far as that's all the insurance premiums we received.**

Q. The insurance policies. You've never seen the actual policy?

A. All I've seen is what we've testified to and brought.

[...]

Q. Okay. You looked at those certificates that are Exhibit 16 and that's all you've seen. Correct?

A. That's all that was presented to the company and that's what I've seen.

**Q. Okay. So you don't know whether Circle S had insurance naming Radiance as an additional insured or loss payee beyond what's on those certificates; you just don't know?**

**A. Yeah, only what's listed on the certificates.**

VRP 114-115 (emphasis added).

One could imagine that there is breach in almost every contract, but it is only actionable if a party's breach proximately caused the other party to incur damages. The trial court's docket would be inundated with breach of contract cases if every company had the opportunity to recover "damages" upon discovery, *after the conclusion of the contractual term*, that the other party breached the contract some years earlier. More importantly, it would be unjust.

Here, Radiance provided no evidence demonstrating that it force-placed insurance in response to Radiance's unsatisfactory proof of insurance. It placed insurance due to some inexplicable error on its end and it should not be allowed to recoup fees from Circle S due to its own mistake. Radiance did not prove a breach of contract by Circle S that proximately caused Radiance damage. Therefore, the trial court's dismissal of Radiance's claim was appropriate.

**D. The Trial Court's Denial of Radiance's Motion for Reconsideration and/or A New Trial Should be Upheld.**

An appellate court reviews for abuse of discretion a trial court's denial of CR 59(a) motion for a new trial. *Collins v. Clark*

*County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).

Pursuant to CR 59(a)(4), there are grounds for a new trial or reconsideration if a party proffers evidence that meets the following five requirements: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987). “Failure to satisfy **any** one of these five factors is a ground for denial of the motion.” *Id.* at 330 (emphasis added). In the present case, Radiance failed to satisfy multiple factors. Therefore, the trial court did not abuse its discretion in denying the motion.

The evidence proffered by Radiance in its motion for reconsideration could have been discovered before trial by exercise of due diligence. The Court “cannot condone a procedure that would permit a litigant to gamble on [trial] and, when it is adverse, thereupon to produce allegedly “newly discovered” evidence, claiming accident, surprise, and no lack of reasonable diligence as an excuse for negligence and plain inaction in not

theretofore having produced such evidence.” *Davenport v. Taylor*, 50 Wn.2d 370, 311 P.2d 990 (Wash. 1957). The Court may deny motions for reconsideration when a movant cannot adequately explain why it failed to timely produce evidence. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003).

Here, Radiance knew of the existence of the “newly discovered evidence” and had access to it well before trial. This is evident from Mr. Price’s trial testimony that it is Radiance’s standard practice to provide written notice of insurance inadequacies and default. VRP 102. It is also evident from Radiance’s own supporting declarations in which counsel stated “Radiance knew other records should exist.” CP 318, ¶ 6. Additionally, Radiance could see *within its own system* that it allegedly sent notices to Circle S. In an email dated August 13, 2012, Radiance employee Jody Burleigh states that she could “see in account notes that insurance cert requests were sent out.” CP 373. Yet, despite its knowledge of a deficiency letter, Radiance did not request these letters from its bank until the eve of trial. CP 375 (“We go to trial tomorrow morning ... was there a standard letter that was sent out?”).

Further, the “newly discovered evidence” was specifically

requested by Circle S in discovery, and was not produced. The trial court properly excluded the evidence on Radiance's motion for a new trial because Radiance did not produce the documents in response to Circle S' discovery request. See CP 407-08, 411-428, 435-44, 477-85 (Radiance's responses to RFP Nos. 1, 4, and 7). Sanctions may be imposed for failure to seasonably supplement discovery responses. KCLR 26(e); CR 26(e)(4); *In re Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).

In essence, Radiance failed to present at trial evidence that Radiance knew existed but had not bothered to obtain despite a duty to do so. Radiance did not timely request the information. Radiance did not attempt to subpoena the evidence. Radiance did not seek a continuance to obtain the evidence. Instead, Radiance tried the case, received an adverse judgment and then asked the trial court for a "do over."

Moreover, the newly discovered evidence is immaterial. Only one of the three letters proffered by Radiance relates to the issue of whether Radiance provided written notice to Circle S of deficient insurance. The February 23, 2006 letter is addressed not to Circle S but to Mr. Jim Short and states that Radiance "records indicate insurance coverage on the above contract is **Due to**

**Expire....** (2/28/06).” CP 586. The letter dated January 10, 2007 states that Radiance’s “records indicate insurance coverage on the above contract has been “Cancelled.” CP 587. Radiance has offered no evidence that Circle S ever cancelled insurance. Quite the opposite, Mr. Singh testified that Circle S maintained the same policy on the fryer for the entirety of the contract.

Neither of these letters gives Radiance notice of deficient insurance coverage, and therefore both letters are immaterial.

The third newly discovered letter would not have changed the result of the trial. While the third letter does speak to Circle S’ alleged insurance deficiency, it is dated June 20, 2007. CP 588. Circle S had proper insurance from July 2006 to July 2007. VRP 100. Admission of a letter dated during the very time Radiance admitted Circle S had proper insurance coverage would not have changed the result of the trial.

Therefore, the trial court was right to deny Radiance’s motion for a new trial.

**E. This Court Should Award Circle S Appellate Attorney’s Fees and Costs.**

RAP 18.1 allows this Court to award fees where it is statutorily allowed. RCW 4.84.330 provides that the Court must

award attorney's fees to the prevailing party of a contractual dispute when the contract specifically provides for attorney's fees and costs incurred to enforce provisions of the contract. Moreover, RAP 14.2 allows for costs to the prevailing party and RAP 14.3 includes reasonable attorney's fees as allowable costs.

If Circle S prevails, it should be awarded all of its post-trial fees and costs, in an amount to be determined by affidavit following oral argument. Paragraph 18 of the Financing Agreement specifically provides for attorney's fees and costs. App. A (Exh. 1). Additionally, instead of going to Small Claims Court or submitting the case to mandatory arbitration, Radiance chose a forum that would absurdly run up the costs of a dispute over non-payment of the \$381.78 allegedly owed. Costs have been unjustly placed on Circle S initially through trial and now through this appeal. As the prevailing party, Circle S should be allowed to recoup these fees and costs from Radiance.

Radiance also requests appellate attorney's fees and costs but cites no authority for its request and devotes no argument to it. Therefore, the Court should deny its request. See RAP 18.1; *Bay v. Jensen*, 147 Wn. App. 641, 196 P.3d 753 (2008) ("RAP 18.1(b) requires more than [a] bald request for attorney fees on appeal.").

## V. CONCLUSION

It is telling that almost every argument offered in Radiance's appellate brief is "supported" by documents that were not offered at trial. Aware of its case deficiencies at trial, Radiance would like this Court to retry the case based on a different record. The Court should deny such a request.

The trial court properly held that Radiance failed to prove breach. There was an ambiguity in the contract regarding what duty Circle S owed. Additionally, there is no evidence that Radiance ever properly notified Circle S that Radiance needed additional proof of coverage. Radiance did not establish how its damages, if any, were proximately caused by Circle S' breach. Nor did it attempt to explain why it began charging Circle S for force placed insurance when it admits Circle S had proper coverage.

The trial court also properly denied Radiance's Motion for Reconsideration. The "newly discovered evidence" would not have changed the outcome as the evidence was not relevant to the issue of notice of insurance deficiency to Circle S. Moreover, Radiance could have easily obtained the evidence before trial upon exercise of due diligence. A third party delay in delivering documents is not an excuse when Radiance waited until the eve

of trial to request them, never subpoenaed them, and did not seek a trial continuance despite knowing that it did not have the documents.

The Court should affirm King County Superior Court Judge Joan Dubuque's Findings of Fact and Conclusions of Law and award of attorney's fees and costs, as well as her subsequent decision to deny appellant's CR 59 motion for reconsideration and/or a new trial. Additionally, the Court should award Circle S, as the prevailing party, its attorney's fees and costs for having to defend this appeal.

Respectfully submitted this 1<sup>st</sup> day of July, 2013.

HELSELL FETTERMAN LLP

By   
Andrew Kinstler, WSBA No. 12703  
Lauren D. Parris, WSBA No. 44064  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 1<sup>st</sup> day of July, 2013 the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, legal messenger, and that copies were served on the following party in the manner indicated:

**Attorney for Appellant**

Talis M. Abolins  
Campbell, Dille, Barnett, & Smith  
317 S. Meridian  
Puyallup, WA 98371

Via first class U.S. Mail  
 Via Legal Messenger  
 Via Facismile  
 Via Email to  
TalisA@cdb-law.com

  
\_\_\_\_\_  
Kyna Gonzalez, Legal Assistant

# EXHIBIT 1

## EQUIPMENT FINANCING AGREEMENT - CONTRACT No.

CREDITOR: Radiance Capital LLC	DEBTOR: Oracle S. Foods Inc. dba Oracle S. Market and Daily
Address: 2505 Third Avenue, Suite 200	Address: 2525 W. Harvard Ave
City/State/Zip: Seattle, WA 98121	City/State/Zip: Roseburg, OR 97470

1. **PRINCIPAL AGREEMENT:** Debtor hereby grants Creditor a security interest under the Uniform Commercial Code in the property (collectively the "Collateral" and individually in "Item" or "Items of Collateral") described in Schedule A attached hereto and incorporated herein. Such security interest is granted to secure performance by Debtor of its obligations hereunder and under any other present or future agreement with Creditor. Debtor shall insure that such security interest is and shall remain a sole first lien security interest.
2. **PAYMENTS:** Debtor shall repay Creditor the "Total Advance" shown in Schedule A together with interest in the number of periodic installments shown in Schedule A. The initial installment payment shall be decreased due as of the date indicated on Schedule A and subsequent installment payments shall be due on the same day of each month thereafter until paid, whether or not an invoice is rendered. Advance Payments, if any are shown in Schedule A, will be used for the first payment and any balance will be used for the last payment(s), provided that if there is a default, any payments under this Agreement may be applied to Debtor's obligations to Creditor in such order as Creditor elects.
3. **NO AGENCY:** DEBTOR ACKNOWLEDGES THAT NO SUPPLIER OR ANY OTHER OR INTERMEDIARY NOR ANY AGENT OR OTHER THEREOF IS AN AGENT OF CREDITOR AND FURTHER THAT NONE OF SUCH PARTIES IS AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF THIS AGREEMENT. NO REPRESENTATION AS TO ANY MATTER BY ANY SUCH PARTY SHALL BIND CREDITOR OR AFFECT DEBTOR'S DUTY TO PAY.
4. **NONCANCELANE AGREEMENT; REPAYMENT; NO OFFSET:** THIS AGREEMENT IS NON-CANCELANE BY DEBTOR FOR ANY REASON WHATSOEVER. DEBTOR MAY REPAY THE INSTALLMENT PAYMENTS ONLY IN ACCORDANCE HEREWITH. ALL PAYMENTS HEREBY UNDER ARE TO BE MADE WITHOUT OFFSET.
5. **FINANCING:** THIS AGREEMENT IS SOLELY A FINANCING AGREEMENT. CREDITOR HAS HAD NO INVOLVEMENT IN THE SELECTION OR PURCHASE OF AND HAS MADE AND HEREBY MAKES NO AGREEMENT, REPRESENTATION OR WARRANTY AS TO ANY ITEM OF COLLATERAL.
6. **LOCATION; INDESTRUCTIBLE USE:** Debtor shall keep, or as to an item which is movable, permanently garage and not remove from the United States, as appropriate, each Item of Collateral in Debtor's possession and control at the Collateral Location specified in Schedule A or at such other location to which such item may have been moved with prior written consent of Creditor. Upon request, Creditor may inspect the Collateral during normal business hours and enter the premises where the Collateral may be located for such purpose. Each item shall be used solely for commercial or business purposes and operated in a careful and proper manner in compliance with all applicable governmental requirements and all requirements of insurance policies carried hereunder and all manufacturers' instructions and warranty requirements.
7. **ALTERATIONS; SECURITY INTEREST; COUNTERPARTS:** Without Creditor's prior written consent, Debtor shall not make any alterations, additions or improvements to an Item of Collateral that detract from its economic value or functional utility. All additions and improvements made to an Item shall be deemed accessories thereto, and shall not be removed if removal would impact the Item's economic value or functional utility. Creditor's security interest shall cover all modifications, accessories, additions to and replacements and substitutions for the Collateral. Debtor will not make any replacements or substitutions without Creditor's prior written consent.
8. **MAINTENANCE:** Debtor shall maintain the Collateral in good repair, condition and working order. Debtor shall cause all repairs required to maintain the Collateral in such condition to be made promptly by qualified parties. Debtor will cause each Item of Collateral for which a service contract is generally available to be covered by such a contract that provides coverage typical as to property of the type involved and is issued by a competent service entity.
9. **LOSS AND DAMAGE; CASUALTY VALUE:** Debtor will bear all risk of loss, theft, destruction or disposition of or damage to any Item. Debtor shall give Creditor prompt notice of a casualty occurrence and shall thereafter place the Item in good repair, condition and working order, provided however, that if such Item is destroyed by Creditor to be lost, stolen, destroyed or damaged beyond repair or is requisitioned or seizes a constructive total loss under an insurance policy carried hereunder, Debtor shall pay Creditor all remaining payments of such Item to satisfy the debt.
10. **TITLING:** If requested by Creditor, Debtor shall cause so Item of Collateral subject to title registration laws to be titled as directed by Creditor. Debtor shall advise Creditor promptly as to any necessary titling. Debtor shall cause all documents of title to be furnished to Creditor within sixty (60) days of the date on any filing done by Debtor.
11. **TAXES:** Unless otherwise directed in writing by Creditor, Debtor shall pay when due and make filings with respect to all taxes, fees, including registrations, liens, penalties, and other governmental assessments with respect to the Collateral and shall pay all other governmental assessments (including gross receipt taxes but exclusive of Federal and State taxes based on Creditor's net income) related to amounts due hereunder, the Collateral or otherwise related hereto.
12. **LIMITED POWER OF ATTORNEY:** Debtor hereby irrevocably appoints Creditor as Debtor's attorney-in-fact for the following limited purposes: (1) to sign and file or record on Debtor's behalf and in Debtor's name any document Creditor deems necessary to perfect or protect Creditor's interest in the Collateral or pursuant to the UCC, and (2) to sign, endorse and/or assign, on Debtor's behalf and in Debtor's name, for Creditor's benefit, any instrument representing proceeds from any policy of insurance covering the Collateral.
13. **INSURANCE:** Debtor shall maintain and provide Creditor evidence satisfactory to Creditor for the maintenance of all risk insurance against loss of or damage to the Collateral for not less than the full replacement value thereof naming Creditor as Loss Payee. Such insurance shall be in an amount and form and with coverages approved by Creditor, shall provide at least thirty (30) days advance written notice to Creditor of material change or cancellation, shall provide full benefit of warranty protection, if appropriate, and shall provide that coverage is "primary." In the event of any assignment of this Agreement of which Debtor receives notice, Debtor shall cause such insurance to provide the same protection to the assignee as its interest may appear. The proceeds of such insurance, at the option of the Creditor, shall be applied forward (a) the repair or replacements of the appropriate Item or Items of Collateral, (b) payment of the increasing balance, or (c) payment of any other amount due to Debtor hereunder. Any excess of such proceeds remaining shall belong to Debtor. Debtor shall maintain public liability and property damage coverage in such amounts and in such forms as Creditor shall reasonably require. If Debtor does not provide the insurance described in this section, Creditor may, but will not be required to, buy such insurance and add the cost, including any customary charges or fees associated with the placement, maintenance or service for such insurance, to the Leasehold Payment amount due from the Debtor.
14. **CREDITOR'S PAYMENT:** If Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligation, and Debtor shall (a) reimburse Creditor the cost of such performance and related expenses and (b) pay Creditor the less charge contemplated in Paragraph 21 on the cost and expense of such performance.
15. **WARRANTY:** Debtor shall indemnify, defend and hold harmless Creditor against any claim, action, suit, liability or expense, including attorney's fees and court costs, incurred by Creditor related to this Agreement.
16. **FAILURE:** Any of the following constitutes an event of default hereunder: (a) Debtor's failure to pay any amount hereunder, within ten (10) business days of when due; (b) Debtor's default in performing any other obligation hereunder or under any other agreement between Debtor and Creditor; (c) Debtor change its name, state of incorporation, chief executive officer and/or place of business without providing Creditor with thirty (30) days written notice of such change; (d) death or judicial declaration on incompetency of Debtor; (e) an individual or partner; (f) the filing by or against Debtor of a petition under the Bankruptcy Code or under any insolvency law or law providing for the relief of debtors, including without limitation, a petition for reorganization, agreement or extension; (g) the making of an assignment for the substantial portion of its assets by Debtor for the benefit of creditors, appointment of a receiver or trustee for Debtor or for any Debtor's assets, institution by or against Debtor of any other type of insolvency proceeding or other proceeding contemplating settlement of claims against or winding up of the affairs of Debtor; Debtor's cessation of active business within or the making by Debtor of a transfer of a material portion of Debtor's assets or inventory not in the ordinary course of business; (h) the occurrence of an event described in (d), (e) or (f) as to a partner or other party of Debtor's obligations hereunder; (i) any reclassification of a material debt in connection herewith by or on behalf of Debtor; (j) Debtor's default under a lease or agreement providing financial accommodations with a third party or (k) Creditor shall good faith deem itself measure as a result of a material adverse change in Debtor's financial condition or otherwise.

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17. **REPAIRS:** Upon the occurrence of an event of default Creditor shall have the right, option, duty and remedy of a secured party, and Debtor shall have the rights and duties of a Debtor, under the Uniform Commercial Code of Washington (regardless of whether such Code or law similar thereto has been enacted in a jurisdiction wherein the rights or remedies set forth) Without limiting the generality of the foregoing, Creditor shall have the right to (a) at Creditor's option, declare immediately due and payable the entire amount of all of Debtor's obligations hereunder, without notice or demand in writing and without liability for any, if deemed appropriate, tender of assets or all assets of Collateral, without demand or notice whatever located, without any process of law and without liability for any damages occasioned by such taking of possession including damages to contents; (b) require Debtor to assemble any or all items of Collateral at a location in reasonable proximity to their designated location hereunder; (c) upon notice to Debtor required by law, sell or otherwise dispose of any items of Collateral, whether or not in Creditor's possession, in a commercially reasonable manner at public or private sale at any place designated in such notice and apply the net proceeds of such sale after deducting all costs of such sale, including, but not limited to, costs of transportation, repossession, storage, refurbishing, advertising and brokers fees, to the obligations of Debtor hereunder with Debtor remaining liable for any deficiency and with any excess being returned to Debtor or (c) within any other remedy available under the Uniform Commercial Code or otherwise to Creditor. All proceeds are cumulative. Any sale may be adjourned by announcement at the time and place specified for such sale without further published notice, and Creditor may, if permitted by law, sell and license the purchaser of any such sale.

18. **LITIGATION EXPENSES:** Debtor shall pay Creditor its costs and expenses, including repossession and attorney's fees and court costs, incurred by Creditor in enforcing this Agreement. The obligation includes the payment of such expenses whether an action is filed and whether an action that is filed is discontinued.

19. **ASSIGNMENTS:** Without the prior written consent of Creditor, Debtor shall not sell, lease or create or allow any lien other than Creditor's security interest against an item of Collateral or assign any of Debtor's obligations hereunder. Debtor's obligations are not assignable by operation of law. Consent to any of the foregoing applies only in the event Debtor, Creditor may assign, pledge or otherwise transfer any of its rights hereunder without notice to Debtor. If Debtor is given notice of any such assignment, Debtor shall acknowledge receipt thereof in writing and shall thereupon pay any accounts due hereunder as directed in the notice. The right of an assignee to enforce this Agreement shall be free of any claim or defense Debtor may have against Creditor, and Debtor agrees not to assert against an assignee any claim or defense which Debtor may have against Creditor. Subject to the foregoing, this Agreement inures to the benefit of, and is binding upon, the heirs, legatees, personal representatives, successors and assigns of the parties.

20. **MARININGS; PERSONAL INCENTIVE:** Debtor shall meet the Collateral or its location as requested by Creditor to indicate Creditor's security interest. Debtor will provide Creditor any real property surveys requested by Creditor as to the real property where an item of Collateral is or is to be located.

21. **LATE PAYMENT AND NSF FEES:** In the event a payment is not made within ten (10) days when due hereunder, the Debtor promises to (a) pay a late charge to Creditor or its assignee not less than one month thereafter, of up to 10% of the payment, or twenty-five dollars (\$25.00), whichever is greater and (b) pay Creditor amounts paid to others in connection with collection of the amount. The late charge and for the interest payments set forth in this Agreement shall apply only when permitted by law, and if not permitted by law, the late charge and/or interest payments shall be calculated at the maximum rate permissible by law. If a check or other instrument tendered for payment is dishonored, Debtor shall be liable for a fifty dollar (\$50.00) fee.

22. **COMPLIANCE WITH LAW:** Debtor and Creditor intend to comply with all applicable law. If it is determined that payments under this Agreement result in an interest payment higher than that allowed by applicable law, then any excess interest collected will be applied to the repayment of principal and interest will be charged at the rate allowed by law.

23. **ADDITIONAL DOCUMENTS:** Debtor shall provide to Creditor such financing statements and similar documents as Creditor shall request. Debtor authorizes Creditor where permitted by law to make filings of such documents without Debtor's signature. Debtor further shall furnish Creditor (a) a fiscal year-end financial statement including balance sheet and profit and loss statement within one hundred twenty (120) days of the close of each fiscal year and (b) such other information and documents not specifically mentioned herein relative to this Agreement as Creditor may request. Debtor shall reimburse Creditor for all search and filing fees incurred by Creditor related hereto.

24. **CROSS COLLATERALIZATION BENEFIT:** All Collateral shall secure the payment and performance for all of Debtor's liabilities and obligations to Creditor hereunder, under any other agreement between Debtor and Creditor, and under any of the loan documents relating hereto, including but not limited to all Equipment Finance Agreements, Lease Agreements, Inventory Financing Agreements and all other documents (referred to herein collectively as the "Documents"). Creditor's security interest in the Collateral shall not be terminated until and unless all of Debtor's obligations to Creditor under any of the Documents are fully paid and performed. The occurrence of an event of default under any other of the Documents shall be deemed to be an Event of Default hereunder and an Event of Default hereunder shall be deemed to be an Event of Default under the Documents.

25. **NOTICES:** Notices shall be in writing and sufficient if mailed to the party involved. United States mail first class postage prepaid, at its respective address set forth above or at such other address as each party may provide on notice in accordance herewith. Notices so given shall be effective when mailed. Debtor shall promptly notify Creditor of any change in Debtor's address.

26. **CHOICE OF LAW; WAIVER OF JURY TRIAL:** THIS AGREEMENT SHALL BE DEEMED FULLY EXECUTED AND PERFORMED IN THE STATE OF WASHINGTON AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS THEREOF WITHOUT REGARD TO THE CONFLICTS OF LAWS RULES OF SUCH STATE. DEBTOR AGREES TO SUBMIT TO THE JURISDICTION OF THE STATE OF WASHINGTON IN KING COUNTY. EACH CREDITOR AND DEBTOR HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY ACTION INVOLVING THIS AGREEMENT.

27. **GENERAL:** This agreement constitutes the entire agreement of the parties as to the subject matter and shall not be amended, altered or changed except by a written agreement signed by the parties. Any number by Creditor used in this writing, and supplements shall not constitute a waiver. Whenever the context of this Agreement requires, the word includes the masculine or feminine and the singular includes the plural. If there is more than one Debtor named in this Agreement, the liability of each shall be joint and several. The terms to the paragraphs of this Agreement run solely for the convenience of the parties and are not to act in the interpretation. Any provision declared invalid shall be deemed severable from the remaining provisions that shall remain in full force and effect. This is of the essence of this Agreement. The obligations of Debtor shall survive the release of security interest in the Collateral.

28. **DEBTOR'S WARRANTIES:** DEBTOR CERTIFIES AND WARRANTS: (a) THE FINANCIAL AND OTHER INFORMATION WHICH DEBTOR HAS SUBMITTED OR WILL SUBMIT, TO CREDITOR IN CONNECTION WITH THIS AGREEMENT IS OR SHALL BE AT THE TIME OF SUBMISSION TRUE AND COMPLETE; (b) THE DEBTOR'S EXACT LEGAL NAME, STATE OF INCORPORATION, LOCATION OF ITS CHIEF EXECUTIVE OFFICE AND/OR ITS PLACE OF RESIDENCE AS APPLICABLE HAVE BEEN CORRECTLY IDENTIFIED TO CREDITOR; (c) THIS AGREEMENT HAS BEEN DULY AUTHORIZED BY DEBTOR AND UPON EXECUTION BY DEBTOR SHALL CONSTITUTE THE LEGAL, VALID AND BINDING OBLIGATION, CONTACT AND AGREEMENT OF DEBTOR INCORPORABLE AGAINST DEBTOR IN ACCORDANCE WITH ITS TERMS; AND (d) EACH SIGNING PROVIDED BY DEBTOR IN CONNECTION THEREWITH MAY BE FULLY REPLIED UPON BY CREDITOR NOTWITHSTANDING ANY TECHNICAL DEFICIENCY IN ATTESTATION OR OTHERWISE. THE PERSON EXECUTING THIS AGREEMENT ON BEHALF OF THE DEBTOR WARRANTS THAT PERSON'S DUE AUTHORITY TO DO SO. DEBTOR FURTHER WARRANTS THAT EACH ITEM OF COLLATERAL SHALL AT THE TIME CREDITOR FINDS THE TOTAL ADVANCE BE OWNED BY DEBTOR FREE AND CLEAR OF LIENS AND ENCUMBRANCES AND BE IN GOOD CONDITION AND WORKING ORDER.

Witnessed ES JS NY

**29. NO WARRANTIES BY CREDITOR** CREDITOR MAKES NO REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING, BUT NOT LIMITED TO: THE CONDITION, DESIGN, OR QUALITY OF THE EQUIPMENT; THE FITNESS OF THE EQUIPMENT FOR USE OR FOR A PARTICULAR PURPOSE; THE MERCHANTABILITY OF THE EQUIPMENT; COMPLIANCE OF THE EQUIPMENT WITH THE REQUIREMENTS OF ANY LAWS, RULES, SPECIFICATIONS OR CONTRACTS PERTAINING THERETO, PATENT INFRINGEMENT; OR LATENT DEFECTS; THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE EQUIPMENT OR THE CONFORMITY OF THE EQUIPMENT TO THE PROVISIONS AND SPECIFICATIONS OF ANY PURCHASE ORDER RELATING THERETO; THE OPERATION, USE OR PERFORMANCE OF THE EQUIPMENT OR ANY OTHER REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESSED OR IMPLIED, WITH RESPECT TO THE EQUIPMENT. NO DEFECT OR UNFITNESS OF THE EQUIPMENT SHALL RELIEVE DEBTOR OF THE OBLIGATION TO PAY RENT OR OF ANY OTHER OBLIGATION UNDER THIS AGREEMENT. THE DEBTOR ALSO ACKNOWLEDGES THAT THE CREDITOR HAS MADE NO REPRESENTATION OR WARRANTY OF ANY KIND, NATURE OR DESCRIPTION, EXPRESSED OR IMPLIED, WITH RESPECT TO THE OPERATION, USE OR PERFORMANCE OF THE EQUIPMENT. CREDITOR SHALL HAVE NO LIABILITY TO DEBTOR OR ANY PERSON WHOMSOEVER FOR ANY CLAIM, LOSS, DAMAGE, OR EXPENSE (INCLUDING ATTORNEY FEES) OF ANY KIND OR NATURE, WHETHER SPECIAL, CONSEQUENTIAL, ECONOMIC OR OTHERWISE, CAUSED OR ALLEGED TO BE CAUSED DIRECTLY, INDIRECTLY, INCIDENTALY, OR CONSEQUENTIALY BY THE EQUIPMENT OR ANY PART THEREOF OR PRODUCTS THEREFROM, BY ANY INADEQUACY OF THE EQUIPMENT OR DEFECT OR DEFICIENCY THEREIN, BY ANY INCIDENT WHATSOEVER ARISING IN STRICT LIABILITY OR OTHERWISE, FROM CREDITOR'S OR DEBTOR'S NEGLIGENCE OR OTHERWISE, BY THE USE OR MAINTENANCE THEREOF, OR FOR REPAIR, SERVICING OR ADJUSTMENT THERETO, OR FOR ANY INTERRUPTION OF SERVICE OR LOSS OF USE OF THE EQUIPMENT, OR FOR ANY LOSS OF BUSINESS OR DAMAGE WHATSOEVER AND HOWSOEVER CAUSED, OR ARISING OUT OF THIS AGREEMENT. DEBTOR SHALL INDEMNIFY AND HOLD CREDITOR HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS COSTS EXPENSES, DAMAGES, LOSSES, LIABILITIES INCURRED OR SUFFERED BY THE CREDITOR, DEBTOR, OR ANY OTHER PARTY IN CONNECTION WITH THE DELIVERY, OPERATION, USE OR PERFORMANCE OF THE EQUIPMENT, OR AS A RESULT OF ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT.) FURTHER, DEBTOR UNDERSTANDS AND AGREES THAT THERE SHALL BE NO ABATEMENT OF RENT DURING ANY PERIOD OF BREAKDOWN OR NONUSE OF THE EQUIPMENT.

This Agreement is effective only upon execution by an authorized officer of Creditor following Debtor's execution hereof. Debtor hereby authorizes Creditor to disburse the Total Advance as reflected on the Pay Proceeds Direction attached to each Schedule A.

CREDITOR: Radiance Capital LLC

DEBTOR: Circle S. Foods, Inc. aka Circle S. Market and Daily

By: *[Signature]*

By: *[Signature]*

Title: CFO

Title: President

Date: 11/29/05

Date: 10/7/05

# EXHIBIT 2

01/24/2006 12:17 IFAX Copier@radiance-capital.com

Heidi DeFord

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OR Sec. of State

**UCC FINANCING STATEMENT**  
FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional) Phone: (800) 331-3282 Fax: (818) 802-4141	
B. SEND ACKNOWLEDGEMENT TO: (Name and Address)	518373 RADIANCE
UCC Direct Services	6849185
P.O. Box 29071	OROR
Glendale, CA 91208-9071	

THE ABOVE SPACE IS FOR FILER'S OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME CIRCLE S. FOODS, INC.
--

OR	1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
----	----------------------------	------------	-------------	--------

1c. MAILING ADDRESS 2525 W. HARVARD AVE.	CITY ROSEBURG	STATE OR	POSTAL CODE 97470	COUNTRY
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1d. SEC. INSTRUCTIONS	1e. UCC INFO RE ORGANIZATION SECTION	1f. TYPE OF ORGANIZATION Corporation	1g. JURISDICTION OF ORGANIZATION OR	1h. ORGANIZATION ID # if any 205789-88	<input type="checkbox"/> NONE
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2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME
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OR	2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
----	----------------------------	------------	-------------	--------

2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
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2d. SEC. INSTRUCTIONS	2e. UCC INFO RE ORGANIZATION SECTION	2f. TYPE OF ORGANIZATION	2g. JURISDICTION OF ORGANIZATION	2h. ORGANIZATION ID # if any	<input type="checkbox"/> NONE
-----------------------	--------------------------------------	--------------------------	----------------------------------	------------------------------	-------------------------------

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE if ASSIGNOR SPT) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME Radiance Capital LLC
---

OR	3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
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3c. MAILING ADDRESS 2505 Third Avenue Suite 200	CITY Seattle	STATE WA	POSTAL CODE 98121	COUNTRY
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4. THE FINANCING DOCUMENT covers the following collateral:

CIRCLE S. FOODS, INC. (the CIRCLE S. MARKET AND DAILY EQUIPMENT FINANCING AGREEMENT DATED ON 11/29/2005 FOR: (1) 6708 FRYE 2049 S/N: 70011

6. ALTERNATE DISPOSITION OF COLLATERAL	7. COLLATERAL	8. COMMENCEMENT	9. ASSIGNMENT	10. ASSIGNMENT	11. AS. LEN	12. SCH. SEC. FILED
13. FIVE YEAR FINANCING STATEMENT (S. 9-10) (for filing for records) (to FEDERAL)	14. CHECK IF FINANCING STATEMENT REPORTING ON (S. 9-10)	15. AS. LEN	16. AS. LEN	17. AS. LEN	18. AS. LEN	19. AS. LEN
5. CAPITAL PLAN REFERENCE DATA						

# EXHIBIT 3

**NOTICE TO PROVIDE INSURANCE  
INSURANCE AUTHORIZATION**  
(To be completed and signed by the customer)



To: **Jim Short**

Insurance Agents Name

**Farmers**

Insurance Company Name

**1655 Barnes Rd. SE, Salem, OR 97306**

Insurance Company Address

Insurance Agents Fax Number **503-673-2333** Insurance Agents Telephone Number **(503)363-4521**

**581-0349**

We have entered into an Equipment Lease or Equipment Finance Agreement with Radiance Capital LLC ("Company") under which the Company will lease or finance property described in the agreement attached hereto. In accordance with our obligations, please provide:

**Radiance Capital LLC  
Attn: Betty Temple  
2121 SW Broadway, Suite 200  
Portland, OR 97201  
800-547-4905**

With evidence of insurance including:

- An endorsement showing primary all risk or its equivalent coverage for the equipment (the Company must be named as Loss Payee) for not less than the aggregate Equipment Cost/Advance shown on the agreement (for vehicles comprehensive and collision coverage with deductibles of not more than \$1,000).
- An endorsement showing combined public liability and property damage insurance with a single limit of not less than \$500,000 per occurrence, or such other amount as the Company may require on notice to Lessee, the Company must be named as Additional Insured.
- A standard 10-days notice of cancellation or revision in our coverage in favor of the Company.
- An endorsement providing the Company full breach of warranty protection, if applicable.

**FAILURE TO PROVIDE INSURANCE:** Grantor agrees to deliver to the Company proof of the required insurance as provided above, with an effective date as shown on the date below or earlier. Grantor acknowledges and agrees that if Grantor fails to provide any required insurance or fails to continue such insurance in force, the Company may do so at Grantor's expense. The cost of any such insurance, at the option of the Company, shall be added to the indebtedness or lease balance. GRANTOR ACKNOWLEDGES THAT IF THE COMPANY SO PURCHASES ANY SUCH INSURANCE, THE INSURANCE WILL PROVIDE LIMITED PROTECTION AGAINST PHYSICAL DAMAGE TO THE COLLATERAL, UP TO AN AMOUNT EQUAL TO THE LESSER OF (1) THE UNPAID BALANCE OF THE DEBTOR LEASE BALANCE, EXCLUDING ANY UNEARNED FINANCE CHARGES, OR (2) THE VALUE OF THE COLLATERAL; HOWEVER, GRANTOR'S EQUITY IN THE COLLATERAL MAY NOT BE INSURED. IN ADDITION, THE INSURANCE MAY NOT PROVIDE ANY PUBLIC LIABILITY OR PROPERTY DAMAGE INDEMNIFICATION AND MAY NOT MEET THE REQUIREMENTS OF ANY FINANCIAL RESPONSIBILITY LAWS.

**AUTHORIZATION:** For purposes of insurance coverage on the Collateral, Grantor authorizes the Company to provide to any person (including any insurance agent or company) all information the Company deems appropriate, whether regarding the Collateral, the loan or other financial accommodations, or both.

**GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS AGREEMENT TO PROVIDE INSURANCE AND AGREES TO ITS TERMS.**

Date: **10-7-05**

GRANTOR: **Subhash Chander Sharma**

**Circle S. Foods Inc. dba Circle S. Market and Daily**  
PRINT LEGAL NAME OF LESSEE/DEBTOR ABOVE

By: 

**President**

Title

# EXHIBIT 18

**ATTORNEYS**  
PAUL R.J. CONNOLLY, PC  
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**LAW CLERK**  
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BILLY DALTO  
billy@connollypc.com

Law Office of  
**PAUL R.J. CONNOLLY**

2731 12<sup>th</sup> Street SE  
PO Box 3088  
Salem, OR 97302  
Ph: 503.585.2054 | Fax: 503.844.7037

**PROFESSIONAL STAFF**  
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LESLIE EGAN  
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CANDICE MEDZA  
candice@connollypc.com

**DATE:** February 1, 2011  
**TIME:** 4:50 PM  
**TO:** Mike Price  
**FAX NUMBER:** 253-565-0988  
**PAGES:** Transmitting a total of 9 pages, including this page  
**SUBJECT/TITLE:** Jagtar Singh/Circle S Market Fryer financing agreement  
**ADDITIONAL INFORMATION:** Please see attached.  
  
**FROM:** Paul R.J. Connolly

Confidentiality Notice

This facsimile transaction (and/or documents accompanying it) may contain confidential information belonging to the sender which is protected by attorney-client privilege. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this transmission is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

**PLEASE CONTACT OUR OFFICE IMMEDIATELY IF YOU HAVE DIFFICULTY RECEIVING ANY OF THE PAGES.**

FAX TRANSMITTED: DATE \_\_\_\_\_ TIME \_\_\_\_\_ BY \_\_\_\_\_  
©2009 RUPPC Group

**ATTORNEYS**

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candice@connollypc.com

February 1, 2011

Mike Price  
Radiance Capital, LLC  
820 A Street, Suite 300  
Tacoma, WA 98402

Via Fax No 253-565-0088  
And First Class Mail

Re: S.K. Bai, LLC, dba Circle S Market  
Your Contract #621-0700228-001 – Fryer Financing

Dear Mr. Price:

This office represents Jagtar Singh, doing business as Circle S Market. Please direct all future communication with my client to this office. I understand that you have told my client that you intend to repossess the equipment identified in the above-referenced contract tomorrow unless payment of \$531.78 is immediately made pursuant to the terms of your letter dated January 20, 2011. Your letter is based on erroneous pretenses and your unreasonable demands are rejected.

My client has exercised his option to keep the equipment pursuant to his agreement with your firm. He will not voluntarily surrender the Fryer. You have no basis for removal of the Fryer from my client's property. This letter is a demand that you take no self-help to remove this equipment.

You are advised that my client will not permit any of your representatives to enter his property at this time. Be warned that any attempt to enter the property or remove the Fryer would be a breach of the peace, and my client will contact law enforcement to arrest any persons breaching the peace.

Mike Price  
Radlance Capital, LLC  
February 1, 2011  
Page 2

As my client has previously informed you, he is ready, willing, and able to pay the Agreement Transfer Fee of \$150.00 per the contract terms covering the Fryer at issue, to effect the transfer of ownership of this equipment from your firm to his company. My client repeatedly offered you this payment, which you rejected in breach of the agreement for this equipment financing arrangement. Per his understanding of his financing agreement with your firm, my client intends to keep the Fryer and again asks you to accept the \$150.00 transfer fee. He is willing to immediately send you a cashier's check for \$150.00 either by First Class Mail or Express Mail. Please advise me of whether or not you will accept this transfer fee and which mailing option is acceptable.

As far as the "Insurance Fees" you have applied, my client rejects them. First, your contract with my client does not provide for such fees. See Exhibit A. Second, you have failed to provide any basis or support for this vague "Insurance Fee" charge. Third, per the contract terms, my client has provided continuous insurance coverage on the Fryer at issue (See Exhibit B), naming your firm as the "Loss Payee" (See Exhibit C), which is exactly what your contract requires. Forth, you yourself conceded in a telephone conference with my law clerk that the original insurance coverage certificate was correct.

Finally, your demand for the certificates to contain the words "Additional Insured" is unreasonable. The contract you provided to my client requires only that my client name your firm as "Loss Payee." See Exhibit A. Per Section 13 of your contract, my client named you as "Loss Payee." See Exhibit C. The contract says nothing about naming your firm as "Additional Insured." See Exhibit A, Page 1, Section 13. Moreover, there is no practical difference between "Loss Payee" and "Additional Insured." It seems to me that you are in a better position as "Loss Payee" than you would be as "Additional Insured."

Again, my client is ready, willing, and able to pay you the \$150.00 transfer fee. Please let me know if you will accept this transfer fee per the terms of your agreement and complete the transfer of ownership and title of the Fryer to my client. If you do not meet your duties under the agreement, my client will pursue legal remedies to effect the transfer. Feel free to contact me directly if you wish to further discuss this matter.

Very truly yours,



Paul R.J. Connolly

PRJC/bd  
cc Client









Jim Short 73-07-358  
1655 Barnes Rd SE  
Salem, OR 97306  
503-563-4521  
503-581-0349 fax  
[jshort@farmersamt.com](mailto:jshort@farmersamt.com)

January 28, 2011

Circle S Market  
1082 Monmouth St  
Independence, OR 97351

RE: Business Owners Policy # 03506-91-81

Dear Jagtar Singh,

This letter is to verify that you have been continuously insured by Farmers Insurance Exchange since 03/20/2006. Your policy includes building coverage, business personal property coverage, liability coverage and automobile liability.

We have had Highline Capital Corp and Radiance Capital LLC listed on the policy as loss payee and additional insured. I have been in correspondence with these companies on numerous occasions and they have not clearly clarified what their requirements are and what needed to be corrected on the certificate.

The fact is that coverage for business personal property has always existed on this policy. Any claim would have resulted in the property being covered with a check made out to the insured and the loss payee. Since the policy is a replacement cost policy, the replacement cost would be paid upon actual replacement of the property.

Regards,

cc/ Billy, Paul Connolly's office



POLICY NUMBER: 00894-91-20

BUSINESSOWNERS

### THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. OREGON LOSS PAYABLE PROVISIONS (INCLUDES RESTRICTIONS OR ABRIDGMENTS)

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS POLICY

**SCHEDULE**

Item No.	Code	Description of Property
001	001	RESIDENTIAL PROPERTIES

Preferred Approach  
(Indicate Paragraph A, B or C)

Loss Payee  
(Name & Address)  
**PAUL CONNOLLY, P.C.**  
1111 1/2 AVENUE, SUITE 200  
PORTLAND, OREGON 97201

The following is added to the Businessowners Property Coverage Form LOSS PAYMENT Loss Coverage, as shown in the Declaration or by an "A," "B" or "C" in the Schedule:

**A. LOSS PAYABLE**

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declaration have an insurable interest, you will:

- 1. Adjust claims with you and ...
- 2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

**B. LENDERS LOSS PAYABLE**

1. This Loss Payee shown in the Schedule or in the Declaration is a creditor (including a mortgagee or holder) with whom you have entered a contract for the sale of Covered Property, unless stated in that Contract Property is established by each written contract.

a. Withdrawn receipts;

b. A contract for deed;

c. Bills of lading; or

d. Financing statements.

2. For Covered Property in which both you and a Loss Payee have an insurable interest:

- a. You will pay 50% covered loss or damage to each Loss Payee by first order of priority, as interests may appear.
- b. The Loss Payee has the right to receive two percent when it the Loss Payee has elected foreclosure by either action on the Contract Property.

Information required to complete this schedule, if not shown on the endorsement, will be shown in the Declaration.

DP 15 00 04 00

Copyright, Insurance Services Office, Inc., 2000

Page 1 of 2



**Commercial Certificate of Insurance**

**FARMERS**

Policy No. 00000000000000000000

Effective Date: 04/25/11

Contract No. 20080400000000000000

Insured: **CHORAL & COMPANY**  
 2000 WEST BAYVIEW AVE  
 ANN ARBOR, MI 48106  
 734-769-4000

Agents: **PAUL CONNOLLY, PC**  
 2000 WEST BAYVIEW AVE  
 ANN ARBOR, MI 48106  
 734-769-4000

20080400000000000000

Code	Type of Insurance	Policy Number	Amount	Excess	Sublimits	Particulars
B	General Liability	00000000000000000000	\$1,000,000	\$500,000	\$500,000	General Liability Commercial General Liability - General Motors Equipment - Vehicle Fire & Theft
	Automobile Liability					Automobile Liability Commercial Automobile Liability - General Motors Fire & Theft
	Medical Payments					Medical Payments Commercial Medical Payments - General Motors Fire & Theft
	Umbrella Liability					Umbrella Liability Commercial Umbrella Liability - General Motors Fire & Theft
	Workers Compensation					Workers Compensation Commercial Workers Compensation - General Motors Fire & Theft
	Professional Liability					Professional Liability Commercial Professional Liability - General Motors Fire & Theft

PAUL CONNOLLY, PC

20080400000000000000