

Case No. 35467-5-II

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

STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

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**GLACIER WATER PRODUCTS, LLC, a Washington Limited  
Liability Company,**

Appellant

v.

**NORTHWEST PROPERTIES UNLIMITED, LLC, a Washington  
Limited Liability Company,**

Respondent

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**BRIEF OF RESPONDENT**

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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court properly conclude that the liquidated damages clause was based on a reasonable prediction of the escalating damages likely to arise from Glacier Water Products' long-term default on the commercial lease?
2. Did the trial court properly conclude that Paragraph 8 of the lease reasonably called for an additional late fee for each successive month of a default, where that interpretation was supported by the language of the lease, the circumstances surrounding the making of the lease, and the subsequent acts and conduct of the parties?
3. Did the trial court properly exercise its discretion in denying Glacier Water Products' motion for reconsideration where that motion: (1) failed to specify the basis for relief under CR 59, (2) sought post-judgment relief based on an argument not raised at trial; and (3) relied on a contractual provision that, by its terms, had no application in this case?
4. Should Glacier Water Products' demands for a refund and attorney fees be denied where the trial court properly entered judgment in favor of Northwest Properties Unlimited?

## **II. COUNTERSTATEMENT OF THE CASE**

This case arises from the undisputed breach by Glacier Water Products LLC (hereafter referred to as "GWP") of its long-term commercial warehouse lease with Northwest Properties Unlimited, LLC (hereafter referred to as "NWP"). In negotiating the lease, NWP made it clear that an escalating late charge would be necessary to protect against the escalating and potentially catastrophic damage likely to arise from an extended default in rent. GWP agreed on the provision, signed the Lease, occupied NWP's premises, and immediately went into an extended default in rent lasting nearly one year.

The evidence at trial showed: (1) during the lengthy default, GWP never objected to NWP's repeated updates on late charges due, but actually acknowledged those compound late charges; (2) the actual damages to NWP from the extended default were severe, and may have exceeded the late charges owed; and (3) GWP confirmed its agreement to the late charge through its subsequent conduct and actions. Based on this evidence the trial court upheld the late charge provision and awarded judgment for NWP.

**NWP Background.** The owner and President of NWP is Curtis Hood. Although Mr. Hood never graduated from high school, he achieved financial success through hard work and the careful growth of his business. Verbatim Report of Proceedings, Volume I (VRP I), p. 58-60. After an honorable discharge from the United States Army, Mr. Hood worked for three years as an employee at a local heating and air conditioning business until, using his personal credit card, he started his own business (Sound Heating) from scratch. VRP I, p. 59.

After several years of growth, Sound Heating needed a new warehouse space. Rather than continue leasing, Mr. Hood decided to construct his own commercial warehouse space, which could be leased to other tenants. VRP I, p. 60. Mr. Hood personally committed \$500,000 towards the project, and the bank allowed Mr. Hood to borrow \$2.2 million for the real estate and the construction. VRP I, pp. 60-61. For collateral, the lending bank required Mr. Hood to pledge his personal residence, a personal guarantee, and the assets of his company, Sound Heating. VRP I, p. 61. The project was highly leveraged. VRP I, p. 97. The bank was relying on Mr. Hood's assurance that the debt would be serviced with the projected stream of income from leased space in two

future buildings. VRP I, p. 61. Sound Heating would lease a portion of the first building, with the bulk of the premises to be leased by NWP to other long-term industrial tenants. VRP I, p. 61-62.

When the financing was approved, Mr. Hood purchased a five-acre parcel of industrial land in Frederickson, Pierce County. He divided the parcel into two separate lots, and began implementing a two phase plan of construction. VRP I, p. 62. In Phase 1, NWP would construct its first warehouse building on one of the lots and immediately seek to fill the vacant premises with stable, long-term tenants to offset the substantial debt payments and property taxes. VRP I, p. 62. For Phase 2, NWP would construct and lease a second, identical building. VRP I, p. 63.

To generate revenue for debt financing and property taxes, NWP needed to move quickly. VRP I, p. 63. As Mr. Hood explained,

Every month that you don't have rental income is just money wasted. So having an idle space, whether it be a constructed building or a developed piece of commercial property, is not a good idea. You want to get it developed, get tenants in it so that you have some income to offset your expenses.

VRP I, p. 63. NWP completed the Phase 1 construction project on March 1, 2004, and NWP began searching for long term reliable tenants to fill the unoccupied warehouse space. VRP I, p. 62.

**Negotiations With GWP.** A few months after the Phase 1 building was complete, GWP arrived on the scene and expressed an interest in NWP's vacant warehouse space. VRP I, p. 63. Curtis Hood began negotiations with GWP President John Destito, and Vice President Joon Choe. VRP I, p. 64.

John Destito portrayed GWP as an extremely successful and well connected company with a "worldwide distribution of water". VRP I, pp. 64-65. Although Mr. Hood was new to the commercial leasing business, John Destito convinced him that GWP would be a reliable tenant financially capable of leasing a large portion of the building for five years with options to renew, while paying for substantial tenant improvements to suit its business needs. VRP I, p. 64.

At the time, Mr. Hood was not aware that Mr. Destito had been the subject of a state investigation and consent decree arising from his previous business dealings. See VRP II, pp. 256-57.

**Paragraph 8.** With \$2.2 million in financing and ongoing construction, NWP was understandably concerned with the potential impact of a long-term default. The damage from a lengthy default in the midst of its highly leveraged construction project could be catastrophic.

Accordingly, NWP proposed a late charge that would compound if the tenant failed to pay rent for several months. VRP I, pp. 84, 93-95.

The compounding late charge was specifically negotiated by the parties. GWP persuaded NWP to reduce the late charge amount to \$150.

VRP I, pp. 93-94. The provision finally agreed to states:

LATE CHARGE. If tenant fails to make any rent within 10 days of the date such amount is due, the tenant shall also pay a late charge of \$150 per day said rents remain late. Late charges will continue to apply until all late fees have also been paid or otherwise negotiated in writing by both Landlord and Tenant.

Exhibit 1, Par. 8 (attached as Appendix A).

During negotiations, Mr. Hood made it "very clear" to GWP that the \$150 late charge was a "compounding late fee" that would increase with each additional month of nonpayment. VRP I, pp. 93-95. Mr. Hood also made it clear that the compounding late fee was to offset the compounding damage of extended default:

It was very clear. It was made very clear that that was a compounding late fee, because of -- my damage was -- would be compounding if they went into a default.

VRP I, pp. 94-95. Mr. Hood reasonably (and accurately) predicted that his damage would compound if GWP were to fail to make rent for multiple months. VRP I, p. 95. A multi-month default could quickly escalate into

NWP's own default on \$2.2 million in financing secured with everything Mr. Hood owned – everything earned through the 17-year development of his heating and air conditioning business, including his personal residence. VRP I, pp. 97-98.

As business owners themselves, Mr. Destito and Mr. Choe were aware that a long-term failure to pay rent could potentially kill their landlord's business. VRP I, pp. 191-92; VRP II, p. 267-68; see also VRP II, pp. 288-90, 293. But, even with the negotiated reduction in the late charge, Mr. Choe "ultimately refused to sign the lease because of the compounding late charge." VRP I, p. 98. Despite Mr. Choe's misgivings, President John Destito agreed to the compound late charge and signed the lease as negotiated on behalf of GWP. VRP I, pp. 98-99.

**Difficulty In Predicting Potential Damages.** At the time GWP signed the lease, it was difficult if not impossible for NWP to quantify the potential damage from a long term breach. VRP I, p. 98. Mr. Hood could only guess at the lender's potential reaction to an unforeseen crisis in rental income:

It's your best guess on what may happen in the future with taxes, what may happen with your interest rate on your loan, what may happen if you do default. The bank had the option to step in, because the leases are its collateral to the

bank. They could have stepped in and said, "Curtis, you are no longer in charge. We're taking over." And then they could have treated me as a nonowner, like, "Okay. Now you're just a tenant, and we want money."

VRP I, p. 98. As the damage from a long term breach were difficult to ascertain, Paragraph 8 provided an important protection for NWP.

**GWP's Non-Performance.** Mr. Destito's promises of reliable long-term payments were empty. GWP went into default almost immediately. VRP I, p. 79. For nearly one year -- from October, 2004 through September, 2005 -- GWP remained in a complete and admitted default of its obligations to make payments under the lease. The extended default caused tremendous damage to NWP, and threatened NWP's owner Curtis Hood with financial ruin.

**GWP's Assurances.** As NWP's financial struggles escalated, GWP owner John Destito spent his time traveling on speculative business trips, all the while assuring NWP that a full payment of all past due amounts -- including compound late fees -- was just around the corner. VRP I, 89-90. Mr. Destito communicated with Mr. Hood weekly to keep him updated on his plans for imminent payment. VRP II, pp. 233, 266. To gain Mr. Hood's confidence, Mr. Destito referred to alleged business arrangements with Steve Wynn of the Wynn Casino in Las Vegas,

Sylvester Stalone, and Chinese governmental officials. VRP I, pp. 89-90; VRP II, p. 268. Another one of Mr. Destito's methods to generate confidence (and delay eviction) was to introduce Mr. Hood to "clients" who were apparently prepared to purchase GWP product. VRP II, p. 268. Mr. Destito introduced Mr. Hood to an individual who allegedly would be providing a \$10,000,000 line of credit. VRP II, pp. 291-92.

GWP representations were misleading. Later, Mr. Destito confirmed that his travels to China were not actually related to GWP. VRP II, p. 269. While Mr. Destito had represented that there were contracts in place for the sale of GWP water, no such contracts existed. See VRP II, pp. 271-273 ("We had a contract that was negotiated and pending with a buyer that was purchasing all of our product. . . . No, we didn't actually have a contract."); see also VRP I, p. 195. With respect to the alleged \$10,000,000 line of credit, Mr. Destito later admitted that the money was not intended for GWP, but was for some other entity. VRP II, pp. 291-92.

**Compounding Late Charges.** As GWP's default in rent escalated, NWP constantly provided GWP with updated late charge calculations. VRP I, p. 99. Spreadsheets were circulated at least monthly,

and sometimes more frequently – as when Mr. Destito was expressing optimism regarding an imminent pay off of the past due balance. VRP I, p. 99; VRP II, pp. 316-17. At trial, Mr. Hood testified that GWP never disagreed or objected to the compounding late charges reflected in the updates. VRP I, p. 99; see VRP 4, pp. 387-389; CP 136, Finding No. 28 - 31 (Appendix D). In fact, Mr. Destito stated, "Those late charges are worth it not to be out on my ear." VRP I, p. 99; VRP II, p. 321. Later, to forestall eviction proceedings, Mr. Destito signed an unconditional personal guaranty. The guaranty document expressly confirmed Mr. Destito's agreement to pay the then due compounded late charge as calculated by NWP. Exhibit 8 (Appendix B); VRP I, pp. 100-101.

**GWP's Departure.** Later, when payment still did not materialize, NWP started eviction proceedings. VRP I, p. 91. Mr. Destito persuaded Mr. Hood not to follow through with eviction, assuring that payment would arrive in days, and that full payment of all compound late fees would be "worth it" if GWP could keep using the new leased premises. VRP I, pp. 91-92. In late summer, 2005, GWP paid a portion of the amounts due, and promised to pay the remainder by September 30, 2005. Rather than complete payment, GWP abandoned the premises in the

middle of the night without notice to NWP. VRP I, p. 81. When GWP left the premises, it had not paid anything for the extensive tenant improvements it ordered. VRP I, pp. 71, 73; see also VRP I, pp. 65, 69.

The abandoned premises stood vacant from September, 2005 until February 1, 2006, when NWP was finally able to relet the premises to a new tenant. In order to attract this tenant, NWP was forced to make substantial, costly concessions. VRP I, 82-83; see also Exhibit 37, CP 49-50 (Appendix C- Worksheet for Damages).

**Actual Damages.** In hindsight, NWP's compounding late charge was insufficient to offset the tremendous damage actually resulting from GWP's default. VRP I, p. 95. In the midst of a highly volatile construction market, the lending bank refused to fund Mr. Hood's loan for the Phase 2 building:

We were supposed to move directly into our Phase 2 construction on an identical building. My loan was approved to do so. And then the bank found out about the default, which I didn't hide anything from them. I kept them abreast of the situation, the promises, the personal guarantee, all of that type of stuff. They were getting more and more nervous. So they said, "Curtis, look. Your loan is approved, but we will not fund the loan until you get your situation with Glacier Water repaired."

VRP I, p. 95. Although Mr. Hood ultimately avoided bankruptcy, he

estimates that the mid-stream halt of the Phase 2 construction project caused hundreds of thousands of dollars in increased construction costs and other consequential damages. VRP I, pp. 95-96. The dramatically escalating costs were confirmed with the testimony of NWP's contractors. See VRP I, p. 159. The bank's decision to freeze funding occurred at a time of dramatic price escalations for "[s]tructural steel, reinforcing steel, lumber, rigid insulation, concrete ...". VRP I, 159.

During GWP's default, NWP was forced to continue monthly tax payments of \$4,000 on the empty Phase 2 lot, with another \$4,000 each month for the Phase 1 building that GWP was failing to pay for. VRP I, p. 96. During the year of delay for the Phase 2 building, property taxes alone exceeded \$48,000. I, 96-97.

**The Bench Trial.** At trial, the court received considerable conflicting testimony and argument by counsel regarding GWP's obligation to pay the late charges. See, e.g., CP 36-38; VRP I, pp. 84-85, 92-93, 185, 194; VRP II, pp. 334-338; pp. 355-58. The court considered the evidence surrounding the negotiation and implementation of the provision (outlined above), and evaluated the credibility of the witnesses. The court found NWP's evidence to be credible and persuasive. See VRP

4, pp. 387-389. The court entered a series of findings and conclusions upholding the reasonable interpretation and enforcement of Paragraph 8 as a compounding late charge. CP 133-140 (attached in Appendix D).

After extended deliberation over findings and conclusions, and the entry of judgment, GWP brought a motion for reconsideration raising a new contractual theory for a reduction in damages to present value. The trial court denied the motion, and GWP filed this timely appeal.

### **III. STANDARD OF REVIEW**

This Court may affirm on any ground finding support in the record. RAP 2.5(a). An appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument. Inland Foundry Co., Inc. v. Department of Labor and Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001); State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003); *accord* Yousoufian v. King County Executive, 152 Wn.2d 421, 440, 98 P.3d 463 (2004) (Court of Appeals correctly refused to consider a challenge to the findings where the respondent failed to assign error to the finding at issue). Findings unchallenged on appeal are considered verities. Hagemann v. Worth, 56 Wn. App. 85, 89, 782 P.2d 1072 (1989).

#### **IV. SUMMARY OF ARGUMENT**

The primary issue in this appeal is the trial court's determination that the liquidated damages were reasonable. In paragraph 8 of the Lease, the parties agreed on a daily late charge of \$150 to begin accruing for those rent payments more than ten days late. At the time of contract, these late charges provided a reasonable approximation of the compounding damage NWP expected to experience from a long term loss in rental revenue. GWP's reliable stream of monthly payments was sorely needed to sustain NWP, which had just financed the multi-phase construction of the only commercial property in its portfolio. A loss in revenue could easily threaten the destruction of NWP's business, and the loss of everything its owner possessed.

Unfortunately, NWP's financial nightmare began soon after the lease was signed. GWP immediately defaulted, and failed to pay rent for nearly one year. GWP successfully squatted on the NWP premises, using Mr. Hood's "free" warehouse to pursue speculative pie-in-the-sky business opportunities, with little regard to the increasingly damaging consequences

to NWP's business. Eventually, NWP's bank terminated construction financing at a time of major escalation in construction costs. GWP repeatedly gave false promises of certain payment; NWP relied on those promises, and repeatedly updated GWP on the compounding late charges. GWP did not object or express surprise, but acknowledged and expressly confirmed the compounding nature of the late charges.

At trial, GWP sought to avoid its responsibility for the late charges. The evidence showed that the charges were reasonable and that NWP's actual damage may have exceeded the amount due as late charges. Considering all the evidence, the trial court properly upheld the late charges, and entered a battery of carefully prepared findings supported by substantial evidence. See Appendix D. While GWP tries to reargue the facts and evidence at trial, such argument is inappropriate on appeal. The trial court's findings and conclusions are supported by substantial evidence, and should be affirmed.

V. **ARGUMENT**

A. **The Liquidated Damages Clause Provided A Reasonable Prediction Of The Escalating Damage Likely To Result From A Long Term Breach.**

In Washington, liquidated damages clauses are favored and will be enforced to the extent reasonable and not a penalty. Walter Implement, Inc.

v. Focht, 107, Wn.2d 533, 558, 730 P.2d 1340 (1987); Wallace Real Estate Inv. v. Groves, 124 Wn.2d 881, 886-887, 881 P.2d 1010 (1994) (liquidated damages of \$15,000 per month was reasonable forecast of potential damage, given escalating property values); Buchanan v. Kettner, 94 Wn. App. 370, 984 P.2d 1047 (1999). Given this favored position, a liquidated damage clause will be construed as a penalty “only rarely and when the facts and circumstances of a particular case compel that result.” Brower Co. v. Garrison, 2 Wn. App 424, 432, 468 P.2d 469 (1970).

The general rule favoring the enforcement of a negotiated liquidated damages clause is especially appropriate here, when the contract involves relatively sophisticated parties working in a commercial context. See Wallace Real Estate Investment, Inc., 124 Wn.2d at 887, citing Walter Implement, 107 Wn.2d at 558 and Wise v. United States, 249 U.S. 3621, 39 S.Ct. 303, 63 L.Ed 647 (1919).

Washington courts have generally applied a two-part test from the Restatement of Contracts to evaluate the enforcement of a liquidated damages clause. Liquidated damages clauses were upheld where: (1) the amount fixed is a reasonable forecast of just compensation for the harm that is cause by the breach; and (2) the harm is incapable or very difficult of ascertainment. Watson v. Ingraham, 124 Wn.2d at 850, citing Walter Implement, 107 Wn.2d

at 559; Restatement of Contracts, Section 339, at 552 (1932); see also Wallace Real Estate, 124 Wn.2d at 889, 893.

However, in Watson and Wallace Real Estate, the Supreme Court clarified that the “central inquiry” is whether the specified liquidated damages were reasonable at the time of contract formation. Watson, 124 Wn.2d at 853; Wallace Real Estate, 124 Wn.2d at 893 (both decided the same day). The reasonableness of the forecast of potential loss is examined prospectively, from the time that the contract was formed. Watson, 124 Wn.2d at 850-851, Wallace Real Estate, 124 Wn.2d at 889; Walter Implement, 107 Wn.2d at 559.

Now, under Watson, the difficulty of ascertaining the potential harm “is merely an element of the court’s inquiry into the reasonableness of a liquidated damages provision.” Watson, 124 Wn.2d at 853. The difficulty in estimating damages is “best treated simply as an element that affects the reasonableness of the damages estimated, rather than as a separate requirement.” Wallace Real Estate, 124 Wn.2d at 893. To the extent that GWP argues differently, it has misstated the law. See GWP Brief, p. 13.

Actual damage suffered is another factor for evaluating reasonableness. Although the reasonableness of predicted damage is judged prospectively, actual damages suffered can provide confirming evidence of

the reasonableness of the estimate. Watson, 124 Wn.2d at 851; Wallace Real Estate, 124 Wn.2d at 890-893; Walter Implement, 107 Wn.2d at 559.

Although GWP suggests otherwise, there is no requirement that the contracting parties specifically discuss the anticipated losses from a breach. Wallace, 124 Wn.2d at 894 (citations omitted). The parties are not required to make a record of their prediction, or negotiate a pre-contract analysis of damages. Such a requirement would undermine the policies favoring liquidated damages clauses. Such clauses are designed to facilitate certainty among parties on questions that are often difficult to quantify or prove in the first place. See Watson, 124 Wn.2d at 851-52; Wallace Real Estate, 124 Wn.2d at 893 (courts can employ hindsight in evaluating reasonableness).

If a liquidated damages provision is later challenged, the courts are capable of evaluating the reasonableness of the forecast based on the circumstances shown to exist at the time of contracting. Such provisions may be supported by after-the-fact expert testimony, as well as the court's own observation of the subjective "personal cost" to a contracting party in avoiding a breach. See Wallace, 124 Wn.2d at 894 (relying on the testimony of an economic professor at trial regarding the reasonableness of extension payments); Watson, 124 Wn.2d at 854-855 ("the liquidated sum may have, in part, reflected the personal cost to Ingraham of a delay in the sale date.").

Lost business opportunities and the inconvenience of litigation and dealing with lawyers are other factors properly considered by the courts in their after-the-fact evaluation of reasonableness. Wallace Real Estate, 124 Wn.2d at 895-96. Thus, while the evidence at trial must confirm that the provision is based on a reasonable pre-estimate of damage, there is no mandate for contracting parties to analyze or even discuss the basis for the amount agreed upon at time of contracting. Id., at 894.

In this case, the late fee provision was specifically negotiated, and provided a reasonable and accurate forecast of potential losses to NWP from a long-term default. There was substantial evidence at trial confirming the precarious position of NWP at the time the lease was entered. See, e.g., VRP I, pp. 60-63, 97-98. The object of NWP's lease was to generate revenue necessary to facilitate the completion of a multi-phase construction project, and to protect NWP's reputation with the lender. Curtis Hood made it "very clear" how the late charge provision was intended to apply. VRP I, pp. 94-95. Because of the compounding damages from an extended default, compounding late charges would be due for each successive month that GWP might fail to pay rent. VRP I, pp. 94-95. This was understood by GWP, and the Vice President objected to the provision for this specific reason. VRP I,

p. 98. But GWP President John Destito knowingly and willingly signed the lease with Paragraph 8. VRP I, pp. 98-99; CP 136, Finding No.s 23-25.

There was also substantial evidence regarding the tremendous difficulty of predicting the damage that might arise from a long term default. See Watson, 124 Wn.2d at 853-54. Mr. Hood could only guess how the bank might react to such insecurity, and how the volatile construction market might impact his Phase 2 building if delays were to arise. VRP I, 98. With each month of continued default, came the increased possibility of losing control over the project, losing his collateral, and going into bankruptcy. Fluctuations in the construction market provided an additional consideration supporting the reasonableness of the estimate. Watson, 124 Wn.2d at 854; VRP I, 159. Thus, the trial court properly recognized that the difficulty in ascertaining damages provided an important factor supporting the reasonableness of Paragraph 8, and entered a finding to that effect. CP 135, Finding No. 22 (Appendix D).

NWP's actual damages provided another factor supporting reasonableness of the provision. There was substantial evidence of this damage, including testimony from Mr. Hood and his contractor. VRP I, pp. 95-96, 159, 96-97. This evidence contradicts GWP's absurd suggestion that

NWP has been overcompensated. GWP cannot blind this court to the testimony at trial showing that its long-term default had devastating financial consequences on NWP's project and business plan. These damages extended far beyond the loss in rent, triple net payments, and tenant improvement costs that GWP was obligated to pay under its lease. See CP 43-51, Exhibit 37 (Appendix C). Ironically, GWP likely benefitted from a liquidated damages provision that did not fully compensate NWP.

In sum, the trial court properly found that NWP's late charge provision was not punitive, but represented a reasonable forecast of the compounding harm to NWP that might arise from a long-term default by GWP. CP 136-38 (Appendix D – Findings 21-22, 28 - 35; Conclusions 4 - 7); see Grenier v. Compratt Const. Co., 189 Conn. 144, 152, 454 A.2d 1289 (Conn. 1983) (liquidated damages clauses “not necessarily violative of public policy simply because the amount of damages escalates with the period of delay.”). Clearly, given NWP's need to preserve a stream of income, each successive month of delay would escalate the potential damage to NWP, including the potential destruction of NWP's entire business structure. The cumulation of damages to NWP was difficult to quantify at the time, but these damages were real and substantiated throughout GWP's failure to perform under the lease, and they are beyond dispute today. Throughout the

breach GWP was fully aware of the problems it had created, and the late charges that were accumulating. But rather than vacate the premises and allow NWP to search for a replacement tenant, GWP led NWP to believe that full payment of the reasonable late charges was imminent, and would allow NWP to recover the losses it was experiencing. Given the findings of the court, GWP is estopped from challenging the reasonableness of a judgment amount that it promised to pay. There is substantial evidence in the record supporting the trial court's decision on the reasonableness of the late charge provision, and that decision should be affirmed.

**B. Under Paragraph 8 Of The Lease, The Parties Agreed That GWP Would Pay An Additional Late Charge For Each Successive Month Of Default.**

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 contract 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. Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wash.2d 656, 674, 911

P.2d 1301 (1996); Berg v. Hudesman, 115 Wash.2d 657, 663, 667, 801 P.2d 222 (1990).

Determining a contractual term's meaning often involves a question of fact and examination of objective manifestations of the parties' intent. Denny's Restaurants, Inc. v. Security Union Title Ins. Co., 71 Wn. App. 194, 201, 859 P.2d 619 (1993). If two or more meanings are reasonable, a question of fact is presented. When a question of fact exists as to meaning, the trial court must identify and adopt the meaning that reflects the parties' intent; the appellate court reviews the trial court's decision for substantial evidence. Martinez v. Miller Industries, Inc., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (citation omitted).

In this case substantial evidence supported the trial court's reasonable determination that Paragraph 8 was intended to provide an escalating late charge for each additional month of default in rent. This interpretation was supported by the language of Paragraph 8: "If tenant fails to make any rent within 10 days of the date *such amount is due*, the tenant shall also pay a late charge of \$150 per day *said rents remain late ...*" Exhibit 1, Par. 8 (Appendix A). Thus, under the plain language of the contract, "a late charge" applies to each rent payment more than ten days late.

This trial court's findings were also supported by subject matter and object of the contract. As outlined above, NWP and its owner Curtis Hood were at a crucial stage of financing and construction, with a lender relying heavily on a steady stream of income from warehouse tenants. NWP needed a long term tenant for its new Phase 1 building, and Mr. Hood was acutely aware that successive months without payment from GWP would compound NWP's cash flow situation with the lender and the construction project on the Phase 2 building. These circumstances were very clear to the parties at the time of negotiations. During GWP's extended default, the company acknowledged constant written updates on the compounding late charges. The trial court found this testimony credible and persuasive, and also acknowledged that Mr. Destito confirmed the compounding late charges in his personal guaranty, and reaffirmed to Mr. Hood that the amounts were "worth it" given the value of the premises. VRP I, p. 99; VRP II, p. 321; CP 136, Finding No.s 29 and 30 (Appendix D). The court's decision on the meaning of Paragraph 8 is supported by substantial evidence, and should be affirmed.

As both parties were relatively experienced in business, they agreed to a disclaimer of the rule of construing the lease against the drafting lessor. Under Paragraph 39(e), the parties agreed that the lease shall be given a fair

and reasonable interpretation without weight to its having been drafted by any party. Exhibit 1, Par. 39(e) (Appendix A); see also VRP I, p. 87-88. Any argument by GWP to the contrary should be rejected. Compare GWP Brief, at p. 20 (acknowledging that the agreement must be interpreted without consideration to who drafted it) and p. 18 (arguing for the interpretation “most favorable” to GWP). This is not a residential lease, but a commercial lease among sophisticated parties. Any argument by GWP for preferential interpretation of the lease is not warranted, and is undermined by the trial court’s resolution of the factual circumstances surrounding the intended meaning of Paragraph 8.

**C. The Trial Court Did Not Abuse Its Discretion When It Denied Plaintiff’s Motion For Reconsideration.**

Motions for reconsideration are reviewed for an abuse of discretion. Weems v. North Franklin School Dist., 109 Wn. App. 767, 37 P.3d 354 (2002). An abuse of discretion occurs when a trial court bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable. Lian v. Stalick, 106 Wn. App. 811, 823-24, 25 P.3d 467 (2001). A trial court passing on a motion for reconsideration is confined to the factual record made at trial, and must refuse to consider evidence tendered

for the first time on reconsideration. Jet Boats, Inc. V. Puget Sound National Bank, 44 Wn. App. 32, 41-42, 721 P.2d 18 (1986).

In this case, the trial court did not abuse its discretion when it rejected GWP's effort to present a new contractual theory after the close of evidence and entry of judgment. In its motion, GWP attempted to argue for the first time that paragraph 24(a) of the lease should be interpreted as mandating a reduction of NWP's lost rent award to present value. CP 116. However, the trial court recognized that GWP's selective reading of paragraph 24(a) failed to recognize that the provision applies when the Landlord has reentered the Property, repossessed itself thereof, and removed the tenant. Exhibit 1, Par. 24(a); VRP 6, pp. 432-433. In this case, NWP did not reenter and remove GWP from the premises. To the contrary, GWP made an unannounced abandonment of the premises in the middle of the night. Given the language of the contract, the trial court did not abuse its discretion in denying the motion.

The fact that this contractual argument was asserted after trial and the entry of findings, conclusions and judgment, provided an additional basis for rejecting it, and upholding the finality of the court's decision. In addition, rather than proper legal support, the motion merely cited to Civil Rule 59

without identifying a specific ground for relief, or any authority. See CP 115-16. This provided yet another alternative basis supporting denial of the motion. See Noll v. John Hancock Mut. Life Inc. Co., 66 Wn.2d 540, 403 P.2d 898 (1965).

**D. GWP's Claims For A Refund And Attorney's Fees Are Without Merit.**

For the reasons explained above, GWP was not entitled to a refund for the simple reason that it still owes NWP for an unpaid portion of amounts due. Even if GWP had a justified basis for avoiding the judgment (it does not), the remedy would be a remand – not a refund. Under the common law, the mere fact that a judgment is reversed on technical grounds does not entitle a party to a refund of amounts paid. See Healy v. Wostenberg, 47 Wyo. 375, 38 P.2d 325, 330-31 (Wyo. 1934) (the reversal of a judgment does not entitle debtor to automatic refund where reversal does not invalidate the creditor's underlying claim to payment) (citations omitted). The party must come up with some legal or equitable basis for a refund, and then meet its burden of proof on the required elements.

In this case, NWP was entitled to judgment with or without compounding of the late charges. Although Mr. Destito attempted to dispute the nature of the late charge provision that GWP had understood and agree

to, he always acknowledged that GWP was at least responsible for paying an uncompounded late charge. VRP II, pp. 287, 325; CP 38. GWP's refund claim would also be barred by the various affirmative defenses that were raised, but which were not necessary for the trial court to address. These defenses included estoppel, laches, accord and satisfaction, and unclean hands. CP 40-42. In any event, a remand is not warranted in cases such as this, where the judgment is proper and supported by the evidence.

Instead of a remand, NWP should be awarded reasonable costs and attorney's fees for the time spent defending the judgment in this appeal. Such an award is provided for in Paragraph 25 of the Lease. Exhibit 1, Par. 25 (Appendix A).

**VI. CONCLUSION**

NWP respectfully asks that this Court affirm the judgment. As the prevailing party, NWP should be awarded the reasonable fees and costs associated with defending the decision of the trial court.

**RESPECTFULLY SUBMITTED** this 31 day of May, 2007.



Talis M. Abolins, WSBA #21222  
Attorney for Respondent

APPENDIX A  
LEASE AGREEMENT

LEASE AGREEMENT

THIS LEASE is entered into between Northwest Properties, LLC (Landlord) and Glacier Water Products, LLC (Tenant) as "Tenant".

Kelly Kenyon  
Office Manager  
Pat Kenyon  
Warehouse Manager

Lease Date

Premises 5526 184th Street E. Puyallup, WA Suite 98375 (E), F & G & H

Lease Commencement Date 10-1-04 or ASAP

Lease Term: FIVE (5) year initial term

Lease Extension Options TWO (2) Five (5) year options \$15,855 S/F (840 down) = 1,680 S/F

Initial Base Rent \$ 7,200.90 per month Warehouse & office space (840 up)

Initial Additional Rent: \$ 1,426.95 per month (NNN) charges @ \$.09 S/F

1. **PREMISES** Landlord hereby leases to Tenant, upon the terms and conditions of this Agreement, a portion of the real property situated in the City of Pierce County, Washington, commonly known as 5526 184th St. E. and legally described on the attached Exhibit A (including land, building and improvements, the "Property" or the "Business Park"). The portion of the Property leased to Tenant ("Premises") is Suite E & F & G and outlined on the sketch attached hereto as Exhibit B, which building contains approximately 15,855 square feet of rentable space.

2. **TERM** The term ("Lease Term") of this Lease is 5 years. The Lease term shall begin on the Rent Commencement Date defined below. If the Lease Commencement Date is a day other than the first day of a calendar month, then the Lease Term shall expire on the date which is the Lease Term period from the first day of the month after the Rent Commencement Date, and Tenant shall be deemed to have been given early occupancy as of the Rent Commencement Date under all terms of this Lease, including Rent, and other amounts due to Landlord, applicable to the period of early occupancy. The parties acknowledge that certain obligations under this Lease may be due before the Rent Commencement Date, including without limitation construction, hold harmless, liability insurance, etc. The parties agree they are bound by such obligations prior to commencement of the Lease Term. As used in this Lease, "Lease Year" means each successive period of twelve months, the first Lease Year beginning on the Rent Commencement Date and ending on the first anniversary of such Date if it falls on the first day of a month, or the first day of the following month if it does not.

3. **RENEWAL OPTION** Tenant shall have the option to renew the Lease for TWO (2) additional term(s) of five (5) year(s).

4. **CONSTRUCTION: ACCEPTANCE OF PREMISES**

(a) **Landlord's Work** Landlord agrees that it will, at its cost, pursue to completion the Premises to the extent specified in Exhibit C as "Landlord's Work". The Landlord's Work shall be completed on or before \*\*\* ("Completion Date"). The taking of possession of the Premises by Tenant shall constitute its acknowledgment that the Landlord's Work has been fully performed as agreed, that the Premises are then in good and rentable condition and as represented by Landlord, and that Landlord has fully complied with all of Landlord's obligations regarding the condition of the Premises.

980 CC H  
\*\*\* Work to be completed within 45 days of receiving final T.I. building permits.

(b) **Delay in Completion** If Landlord cannot deliver possession of the Premises to Tenant by the Completion Date for any reason, Landlord shall not be subject to any liability therefore, nor shall such failure affect the validity of this Lease or the obligations of Tenant hereunder. In such case, the Completion Date (and the Rent Commencement Date) shall be extended a period of time equal to the period of any delay in delivery of possession of the Premises. Tenant shall not be obligated to pay Rent until possession of the Premises is tendered to Tenant; provided, however, that if Landlord has not completed the Landlord's Work within ninety (90) days from the original Completion Date, then Tenant may cancel this Lease by giving Landlord notice within ten (10) days from the expiration of such sixty day period. Upon such effective notice, the parties shall be discharged from all obligations under this Lease.

(c) **Early Occupancy** If Tenant occupies the Premises before the Completion Date, such occupancy shall constitute the Rent Commencement Date and shall be subject to all the terms of this

...operative date of the Lease Term and Tenant shall pay ... for each period at the initial monthly date set forth below, prorated for partial months.

5. RENT COMMENCEMENT DATE. The "Rent Commencement Date" shall be the date on which the Premises are occupied or one month following which the Premises are ready for occupancy, whichever comes first. Upon Tenant's occupancy of the Premises, the parties shall complete and execute a Commencement and Continuance Date Agreement in the form attached to this Lease as Exhibit D.

6. RENT

(a) Covenants to Pay Rent. Tenant covenants and agrees to pay Rent to Landlord on or before the first (1st) day of each calendar month during the Lease Term. "Rent" is all amounts due from Tenant under this Lease, including Basic Rent and Additional Rent, as defined below. Payment shall be made to Landlord or to such other party as Landlord may designate. Tenant's obligations to pay Basic Rent and Additional Rent are absolute and unconditional, and shall not at any time be subject to offset, discount, or reduction of any kind whatsoever. The duty to pay Basic Rent and Additional Rent is a covenant of the Tenant which is independent of any and all undertakings, covenants or warranties of Landlord, and no claimed breach or default on the part of the Landlord will justify or excuse the failure to make such payments on the dates specified.

(b) Basic Rent. Beginning on the Rent Commencement Date and continuing on the first day of each month until (but not including) the expiration date of the Lease Term, Tenant covenants and agrees to pay monthly Basic Rent, in advance, to Landlord as basic minimum rental for the Premises. The initial "Basic Rent" is \$7,200.90 (dollars (\$7,200.90)), per month and is subject to adjustments as provided below.

(c) Annual Basic Rent Adjustments. The monthly Basic Rent due under this Lease shall be subject to annual adjustments on the anniversary of the Rent Commencement Date of each year to increase the Basic Rent by 3 percent (3%) over the Basic Rent in effect for the previous twelve months.

(d) Additional Rent. This is a "triple-net" lease, which means that Tenant is to pay its percentage share of all costs of ownership, management, operation and maintenance of the Premises throughout the Lease Term. Therefore, in addition to the Basic Rent required above, Tenant agrees to pay Landlord "Additional Rent" based upon Tenant's Percentage Share of the of the Operating Expenses (defined below) incurred by Landlord related to the Premises and the Property in each Accounting Period. An "Accounting Period" is a calendar year except that the first Accounting Period shall commence on the Rent Commencement Date and the last Accounting Period shall end on the date the Lease Term expires or terminates. The initial Additional Rent under this Lease is dollars (\$ ) per month, in advance. If the Tenant occupies an entire building, then Tenant will pay one hundred percent (100%) of the Operating Expenses for the Property described on Exhibit A.

(e) Initial Payments. Upon execution of this Lease, Tenant shall pay to Landlord the sum of \$18,423.42 dollars (\$ ) to be applied to the Basic Rent due for the 1st & Last month(s) of the Lease Term. Payment also includes (2) months of (NNN) @ \$1,426.95 each and a \$500.00 utility deposit of \$500.00.

7. ADDITIONAL RENT

(a) Percentage Share. Tenant's "Percentage Share" of Operating Expenses is approximately \$.09 S/F per month for (NNN) charges. This amount may vary annual depending on cost increases. Landlord shall notify Tenant, in writing of any increase at least (30) days in advance of any justified increase. Taxes, insurance, building damage or road/parking lot repairs.

(b) Operating Expenses. In this Lease, "Operating Expenses" means all costs of ownership, management, operation, maintenance and security of the Premises, all such costs of the Business Park and its common areas allocable or assessed to the Premises, all such costs including without limitation, the following: janitorial, cleaning, landscaping, guard and other services; costs incurred in connection with any attempts to control trespassing, picketing, demonstrations, gatherings or assemblies, vandalism, thefts, and any other interferences with the use of common areas; gas, electricity, water, sewer, waste disposal, and other utilities; heating, ventilation and air-conditioning; window-washing; materials and supplies; painting, repairs, and other maintenance; parking lot resurfacing and restriping, as well as cleaning, sweeping, and ice and snow removal; maintenance, repair, replacement, permanent change and service of equipment, including without limitation the HVAC system, alarm systems, elevator equipment, and other equipment; reserves for any common area improvements; costs of independent contractors; Landlord's management fees and expenses; audit expenses; insurance and insurance deductibles of any kind; taxes, assessments and other governmental and utility charges of any kind; premiums and other costs for Landlord's insurance expenses on the Premises; the cost of any repair, renovation, alteration, and improvement required to be made by Landlord under any governmental law, rule or regulation; depreciation on personal Premises; supplying directional signs,

other matters, and, in addition, an allowance to Landlord for Landlord's supervision of maintenance and operation of the common areas and any other expense or charge which in accordance with generally accepted accounting and management principles would be considered a cost of ownership, management, operation, and maintenance of the Premises. Landlord shall determine (including expenses and their allocation to tenants).

(c) Payments Adjustments Upon the Rent Commencement Date, Landlord shall submit to Tenant a statement of the anticipated monthly Additional Rent for the period between such commencement and the following January, and Tenant shall pay the amount of Additional Rent on a monthly basis concurrently with the payment of the Basic Rent. Tenant shall continue to make said monthly payments until notified by Landlord of a change thereof. By March 1st of each year, Landlord shall endeavor to give Tenant a statement showing the total Operating Expenses for the Property for the prior calendar year and Tenant's Percentage Share thereof, prorated from the commencement of Lease Term. If the total Additional Rent which Tenant made for the prior calendar year is less than the Tenant's Percentage Share of the actual Operating Expenses, then within ten (10) days after receipt of such statement from Landlord, Tenant shall pay (i) the difference in a lump sum, and (ii) shall concurrently pay the difference in monthly Additional Rent payments made in the then current calendar year and the amount of monthly payments which Landlord has estimated based on the prior year's experience and based upon the entire amount of Landlord's estimate of additional maintenance items (including major items such as asphalt resurfacing or re-roofing) to be done in that calendar year. Any overpayment by Tenant shall be credited towards the monthly Additional Rent next coming due. Landlord shall determine and adjust the Additional Rent payments each calendar as provided in this paragraph. Even though the term of this Lease or any extension has expired and Tenant has vacated the Premises, Tenant shall immediately pay any increase due over the estimated Additional Rent previously paid and, conversely, any overpayment made shall be immediately rebated by Landlord to Tenant when the final determination of Tenant's actual Additional Rent is made. Failure of Landlord to submit statements as called for herein shall not be deemed a waiver of Tenant's requirement to pay sums as herein provided. Landlord's good faith determination of actual Additional Rent shall be conclusive on the parties. Upon Tenant's failure to pay any portion of Additional Rent, estimated or actual adjustments, Landlord shall have the rights and remedies under this Lease for the failure of Tenant to pay Rent.

8. LATE CHARGE: If tenant fails to make any rent within 10 days of the date such amount is due, the tenant shall also pay a late charge of \$150.00 per day said rents remain late. Late charges will continue to apply until all late fees have also been paid. OR otherwise negotiated in writing by both Landlord and Tenant.

9. SECURITY DEPOSIT. Tenant has deposited Five Hundred dollars (\$500.00) as a security deposit to be held by Landlord for Tenant's faithful performance of all of its obligations under this Lease. If there is a Tenant Default under this Lease, including without limitation failure to pay Rent, Landlord may (but is not required to) use, apply or retain all or any part of this security deposit to pay Rent or any other amount due under this Lease, including expenses, damages and other compensation to which Landlord is entitled by reason of Tenant's Default. If any portion of the security deposit is so used, then within ten (10) days after written demand, Tenant shall deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount. Landlord shall not be required to keep this security deposit separate from its general funds, and Tenant is not entitled to interest on the security deposit. If Tenant fully and faithfully performs all of its obligations under this Lease, the security deposit or any remaining balance shall be applied to the last month's Rent of the Lease Term. If Landlord assigns its interest in the Property and this Lease, it shall also transfer the security deposit to Landlord's successor in interest.

10. USE OF PREMISES

(a) Business Purpose. The Premises are to be used for the purpose of conducting thereon a manufacturing, warehouse and office for its water business and for no other purpose without written consent of Landlord. In no event will the Tenant use or permit the Premises to be used for any purpose which violates any zoning or other ordinance, any law or ordinance relating to Hazardous Substances, or any other law or ordinance.

(b) Hazardous Waste. Tenant represents and warrants to Landlord that no Hazardous Substance will be generated, stored, or disposed of on, under or to the Premises. As used in this Lease, the term

"Hazardous Substances" means any hazardous liquid or dangerous substances waste or material which or will in the future be regulated under any federal state or local statute, ordinance, rule, regulation or other law now or in the future in effect pertaining to the protection of the environment or of human health, including environmental contamination or clean up, including, without limitation, any substance, waste or material which is now or will in the future be designated as hazardous in (or for purposes of) the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), The Federal Water Pollution Control Act (33 U.S.C. 1251, *et seq.*), the Clean Air Act (42 U.S.C. 7001, *et seq.*) or the Model Toxics Control Act (RCW 70.105D 0-10 *et seq.*). Tenant shall indemnify, protect, defend and hold Landlord harmless from and against any damage, loss, expense, or liability resulting from any breach of this representation warranty, including without limitation all attorney's fees and costs. This indemnity shall survive the term of this Lease.

(c) Rules & Regulations. Tenant shall use the Premises and the Property common areas designated by Landlord and as limited or otherwise restricted by Landlord in accordance with such reasonable rules and regulations not inconsistent with this Lease as may from time to time be made by Landlord for the general safety, comfort, and convenience of Landlord and the Property tenants. Tenant shall cause its employees, agents, invitees, and licensees to abide by such rules and regulations. Landlord shall not be responsible to Tenant for the non-performance of any rules or regulations by any other tenants, occupants, or users of the Property.

(d) Parking. Tenant shall have the right to use, in common with other tenants or occupants of the Property, the parking facilities of the Property subject to the rules and regulations and any charges of Landlord for such parking facilities which may be established or altered by Landlord at any time or from time to time during the term hereof. Tenant and Tenant's employees shall park only in areas designated by Landlord and as limited or otherwise restricted by Landlord. Landlord shall have the right to make changes to the common areas including, without limitation, changes in the location of driveways, entrances, exits, vehicular parking spaces, parking area, and the direction of the flow of traffic. Landlord shall provide \_\_\_\_\_ (14) parking spaces for Tenant.

11. REPAIRS. The Premises have been inspected, or if construction or alteration thereof is contemplated then the Premises will be inspected when Tenant assumes possession. Upon acceptance of possession the Tenant waives any claim that the Premises are deficient in any respect, except only for any exceptions noted in writing by Tenant and consented to in writing by Landlord. Tenant will at all times keep the Premises neat, clean and in a sanitary condition. Tenant will replace all cracked or broken glass in all windows or doors. Except for reasonable wear and tear and damage by fire or unavoidable casualty, Tenant will at all times preserve the Premises in as good repair as they are now or may hereafter be put to. All repairs shall be at Tenant's sole cost and expense, except for repairs required for the outside roof, walls and foundation. Tenant agrees that at the expiration or sooner termination of this Lease, Tenant will quit and surrender the Premises without notice, and in a neat and clean condition, and will deliver up all keys belonging to said Premises to the Landlord or Landlord's agents. Tenant will, at all times, cause the Premises to comply with all ordinances, regulations, rules or orders of every governmental entity undertaking jurisdiction over the Premises. To the extent that any damage to the Premises is covered by insurance the Landlord will aid the Tenant in efforts to obtain any proceeds from such insurance for reimbursement for sums reasonably expended by Tenant.

12. ALTERATIONS. Tenant shall not make any alteration, addition or improvement in the Premises without the prior consent of Landlord. Landlord may condition its consent upon assurance that all work shall comply with all applicable federal, state and local laws, ordinances, rules and regulations and its review and approval of plans and construction contracts. No alteration, addition or improvement may be done except by a licensed contractor approved by Landlord. Any and all alterations, additions and improvements shall be made at Tenant's sole expense and, with the exception of trade fixtures, shall become the property of the Landlord, and shall remain in and be surrendered with the Premises as a part thereof at the termination of this Lease, without disturbance, molestation or injury. Landlord may require Tenant to remove any such alterations at Tenant's sole cost and expense. Tenant shall indemnify, protect, defend and hold Landlord and its employees and agents harmless from damage, claims, loss or expense arising out of any alteration, addition or improvement requested or made by Tenant, including all attorney's fees, court costs and other litigation expenses. Tenant agrees that Landlord has the right to make alterations to the Premises, to the building in which the Premises are situated, and to the Property, and Landlord shall not be liable for any damage which Tenant might suffer by reason of such undertaking.

13. SIGNS. All signs or symbols placed by Tenant in the windows, doors ~~or~~ of the Premises, or upon any part of the Property, shall be subject to the prior approval of the Landlord. Any signs placed on the Premises shall be so placed upon the understanding and agreement that Tenant will remove them at the termination of the tenancy and repair any damage or injury to the Premises caused thereby, and if not so

removed by Tenant from Landlord may have same removed at Tenant's expense. The Landlord may require that all signs on or about the Property be of a uniform size, shape and appearance. The Landlord from the Landlord may specify such size, shape and appearance. The Tenant will cause the signs to comply with such requirements. Tenant must have all signs manufactured and installed by a firm approved in writing in advance by Landlord.

14. LIENS. Tenant has no authority to allow any liens to be filed against the Property. Tenant shall not suffer or permit any lien to be filed against the Property or any part thereof or the Tenant's leasehold interest, by reason of work, labor, services, or materials performed or supplied to Tenant or anyone holding the Property or any part thereof under Tenant. If any lien is filed against the Property as a result of services performed or materials furnished, Tenant agrees to cause such lien to be discharged prior to entry of final judgment (after all appeals) for the foreclosure of such lien and further agrees to indemnify, defend, protect and hold harmless the Landlord and any lender with a lien on the Property against liability, loss, damage, costs or expenses (including reasonable attorneys' fees, statutory costs, and all litigation expenses) on account of such claim of lien. Upon request of the Landlord, the Tenant agrees to promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge.

#### 15. INSURANCE

(a) Liability Insurance. Without limiting the obligations and responsibilities of the Tenant under this Lease, Tenant shall, at its own expense, maintain adequate liability insurance with an insurance company or companies licensed to do business in Washington in the minimum amount of \$1,000,000 for property damage, and in the minimum amounts of \$2,000,000 (per individual) and \$2,000,000 (per accident) for personal injuries, to indemnify both Landlord and Tenant against any such claims, demands, losses, damages, liabilities and expenses. Landlord shall be named as one of the insured and shall be furnished with a copy of such policy or policies of insurance which shall bear an endorsement that the same shall not be canceled except upon ten (10) days' prior written notice to Landlord. Neither the Tenant nor any of Tenant's officers, directors, employees, agents or shareholders will make any contention that any of them are an "Insured" or are entitled to insurance protection under any policy of liability insurance purchased by Landlord.

(b) Tenant's Liability & Property Insurance. Tenant shall, at Tenant's sole expense, maintain public liability and property damage insurance insuring against any and all claims for injury to or death of persons and loss of or damage to property occurring upon, in, or outside of the Property. Such insurance shall have liability limits of not less than \$2,000,000 in respect of injury or death to any one person, not less than \$2,000,000 in respect of any and one occurrence or accident, and not less than \$1,000,000 for property damage with a maximum deductible amount of \$1,000. All such insurance shall name Landlord and Tenant as co-insureds, with severability of interests endorsement. At Landlord's request, its lender with a lien on the Property shall also be a named insured. All such insurance shall be issued by carriers acceptable to Landlord and shall contain provision whereby the carrier agrees not to cancel or modify the insurance without thirty (30) days' prior written notice to Landlord. In no event shall the limits of said policies be considered as limiting the liability of Tenant under this Lease. All policies must be on a "Per Occurrence" basis and not a "Claims Made Only" basis. On or before taking possession of the Property pursuant to this Lease, Tenant shall furnish Landlord with a certificate evidencing the aforesaid insurance coverage, and renewal certificates shall be furnished to Landlord at least thirty days prior to the expiration date of each policy for which a certificate was theretofore furnished.

(c) Tenant's Property Insurance. Tenant shall, at Tenant's sole expense, maintain on all of Tenant's personal property, fixtures and leasehold improvements on the Property, and all plate glass and other glass on the Premises, a policy of "all risk" hazard insurance in the amount of their replacement value. Such insurance shall name Landlord as an additional insured.

(d) Tenant's Insurance. Tenant shall provide Landlord with documentary evidence of the existence of the insurance coverage required in this Lease. All proceeds of Tenant's insurance shall be applied to Tenant's obligation to restore personal property, fixtures, and leasehold improvements under this Lease, and any proceeds of such insurance remaining after such restoration shall belong to Tenant. If Tenant fails to maintain any insurance required under this Lease, Landlord may do so, and Tenant shall upon demand reimburse Landlord for the full premium expense incurred.

(e) Landlord's Property Insurance. Landlord shall maintain on the Property a policy of "all risk" hazard insurance in the full amount of its replacement value. All such insurance shall name Landlord as insured and, at Landlord's election, its lender with a lien on the Property shall also be a named insured. All proceeds of any such insurance shall be paid to Landlord and applied to the restoration of

the Tenant to the extent required in this Lease. Any proceeds of such insurance remaining after such restoration shall belong to Landlord.

(f) Operating Expenses Burdened Landlord. Any and all amounts incurred by Landlord for insurance required under this Lease shall be included within Operating Expenses for which Tenant shall pay Additional Rent. Although Tenant is obligated to pay its proportionate share of the cost of the insurance maintained by Landlord, the Landlord will not unreasonably withhold consent to the Tenant insuring the premises under a blanket policy of insurance if all the Landlord's interests are protected.

16. ACCIDENTS, LIABILITY AND INDEMNIFICATION. Landlord and its employees shall not be liable to Tenant or the Tenant's employees, patrons, visitors, invitees, or any other persons for any such injury to such persons or for damage to personal property caused by an act, omission, or neglect of Tenant or Tenant's agents. Tenant shall indemnify, defend, protect and hold Landlord and its employees and agents harmless from any and all claims for such injury and damages, whether the injury occurs on or off the Premises or the Property, including all attorney's fees, court costs and other litigation expenses.

17. WAIVER OF SUBROGATION. Neither Landlord nor Tenant shall be liable to the other for loss arising out of damage to or destruction of the Premises, the Property, or the contents hereof, when such loss is caused by any of the perils included within a standard form of fire and extended coverage insurance against loss or damage by fire, wind storm, hail, explosion, automobile collision, smoke or not. Such absence of liability shall exist whether or not the damage or destruction is caused by the negligence of either Landlord or Tenant, or their respective agents, servants or employees.

18. INDEMNITY BY TENANT. Tenant agrees that Landlord shall not be liable for any claims for death of or injury to persons or damages to or destruction of property sustained by Tenant or by any other person in or outside of the Property, including without limiting the generality of the foregoing, any claims caused by or arising from the condition or maintenance of any part of the Property, unless such damage is caused by the sole negligence or intentional misconduct of Landlord. Tenant hereby waives and releases all claims therefor and agrees to indemnify, defend, protect and hold Landlord harmless against any such loss, damage, or liability or any expense (including all attorney's fees, court costs and other litigation expenses) incurred by Landlord in connection therewith.

19. DAMAGE TO PREMISES

(a) Notice Election to Repair. If the Premises are damaged by fire or other casualty to an extent which makes the Premises or a significant part of the Property untenantable, then the Tenant shall give notice of such event to Landlord. Within ten (10) days after receipt of such notice, Landlord shall give Tenant notice whether Landlord elects to repair or replace the Premises or elects to terminate this Lease. If the Landlord fails to give notice of its intention within such time period, Tenant shall give Landlord notice that the election by the Landlord is required and if Landlord does not elect to repair or replace within five (5) days after the second notice, this Lease shall terminate. If the Landlord elects to repair or rebuild, the Landlord will proceed to do so with reasonable diligence commencing upon settlement of any insurance claim or, if there is no such claim, as soon as practicable.

(b) Repair. If this Lease is not terminated under this Paragraph then the rent shall be abated to the extent the Premises are untenantable during the repair or reconstruction. The Lease Term shall not be extended by virtue of the Premises being untenantable for any period of time.

20. CONDEMNATION

(a) Entire Taking. If all of the Property are taken by any public authority under the power of eminent domain, this Lease shall terminate as of the date possession is taken by said public authority pursuant to such condemnation.

(b) Partial Taking; Right to Terminate. If twenty-five percent (25%) or more of the Property are taken by any public authority under the power of eminent domain and, in the opinion of either Landlord or Tenant, it is not economically feasible to continue this Lease in effect, either party may terminate this Lease. If any part of the Property is so taken and, in the opinion of Landlord, it is not economically feasible to continue this Lease in effect, Landlord may terminate this Lease. Termination by either party shall be made by notice to the other given not later than thirty days after possession is so taken, the termination to be effective as of the later of thirty days after said notice or the date possession is so taken.

(c) Continuation. If part of the Property or Premises is so taken, and neither Landlord nor Tenant elects to terminate this Lease, or until termination is effective, as the case may be, the Rent shall be



## REMEDIES UPON DEFAULT

(a) Remedies. If there is a Default, Landlord may, at its option, irrevocably declare Tenant's rights under this Lease terminated, and retake the Property using such force as may be necessary, and repossess itself thereof, as of its former estate, and remove all persons and property from the Property. Notwithstanding any such remedy, the liability of Tenant all Rent under this Lease shall not be extinguished for the balance of the Lease Term or extended Lease Term, and Tenant shall make good to Landlord any deficiency arising from a retaking of the Property at a lesser Rent, plus the costs and expenses of renovating, altering and retaking the Property, including attorneys' fees and brokers' fees incident to Landlord's recovery or retaking. Tenant shall pay any such deficiency each month as the amount thereof is ascertained by Landlord or, at Landlord's option, Landlord may recover in addition to any other sums, the then present value of the amount at the time of judgment by which the unpaid Rent for the balance of the term after judgment exceeds the amount of Rent loss which Tenant proves could be reasonably avoided, discounted at the rate of seven percent (7%).

(b) Relenting. In retaking the Property, Landlord may grant rent concessions and Tenant shall not be credited therefor. Landlord has no duty to retake the Property in the event of a default by Tenant. Tenant acknowledges that if Tenant is in default under this Lease and at that time any other premises in the Building or other property owned by Landlord are available for Lease, Landlord has the right to lease such other premises, and this shall not reduce Tenant's obligations under this Lease through the remaining Lease term.

(c) Indemnities. No termination or expiration of this Lease shall be deemed to affect Landlord's right to enforce any indemnity or hold harmless obligation of Tenant under this Lease for matters which occurred prior to the termination or expiration of this Lease, or for any other remedy at law or in equity.

(d) Repetitive Defaults. If during the Lease Term Tenant commits acts or omissions of Default for which three or more default notices are given by Landlord (whether or not such Defaults are cured by Tenant), Landlord may elect to cause an early termination of this Lease notwithstanding the Lease Term provided in this Lease. Landlord's election to exercise its early termination rights shall be effective only upon written notice delivered to Tenant specifying Landlord's election to cause an early termination of this Lease. Such early termination shall be in effect when such written notice is provided to Tenant. Landlord's right of early termination shall be in addition to all other rights and remedies available to Landlord at law or in equity.

(e) Interest upon Default. If there is any Default, all unpaid Rent and other amounts past due under this Lease shall bear interest ("Default Interest") from the due date at the rate of five percent (5%) above Bank of America prime rate as set from time to time and in no event shall this rate be less than twelve percent (12%).

(f) Remedies Cumulative. The specified remedies to which Landlord may resort under the terms of this Lease are cumulative and are not intended to be exclusive of any other remedies or means of redress to which Landlord may lawfully be entitled in case of any breach or threatened breach by Tenant of any provision of this Lease. In addition to the other remedies in this Lease provided, Landlord shall be entitled to the restraint by injunction of the violation, or attempted or threatened violation, of any of the covenants, conditions, provisions of this Lease.

25. COSTS, ATTORNEYS' FEES AND INTEREST. If Landlord employs an attorney or if Landlord brings suit to recover any rent due hereunder, or for breach of any other provision of this Lease or to recover possession of the Premises or to enforce or defend any rights under federal bankruptcy law, Landlord shall be awarded its attorney's fees, statutory court costs, and all other litigation costs and expenses expended or incurred in connection with such action and in any appellate or collection proceedings. All sums due from Tenant to Landlord shall bear interest at the Default Interest rate.

26. NON-WAIVER OF BREACH. Landlord's failure to insist upon strict performance of any of the covenants or agreements of this Lease, or to exercise any option herein conferred in any one or more instances shall not be a waiver or relinquishment of any Default nor shall any such approval constitute a waiver of the right to disapprove of any act in the future. The approval of any assignment of this Lease or of the subletting of the Premises or the approval of any variation from the strict requirements of this Lease shall not constitute a waiver of the right to refuse consent to any future assignment, subletting or variation. Tenant agrees that it will not rely upon nor ever assert the existence of any purported past or future approval, consent, or waiver from the Landlord not in writing and signed by the Landlord's president, or by a person previously designated in writing to have the authority to bind the Landlord to contracts.

32. **SUBORDINATION OF TENANT'S INTEREST.** This Lease is and shall be subordinate to any encumbrance now of record or any encumbrance hereafter recorded affecting the Property. Tenant shall remain to any purchaser of any leasehold interest, or to any grantee or transferee designated in any deed or instrument, including subordination, non-disturbance and assignment agreements and escrow certificates, and in such form as the lender may require and is consistent with commercial lending practices. Tenant's failure to properly execute such documents shall be a default under this Lease.

Or if no address is specified, notices to the Tenant shall be given at the Premises:

P.O. Box 632  
29700 SE Highpoint Way  
Preston, WA 98050-0632

Notices to the Tenant shall be given to (address) Joon Choe, VP (206)852-9428  
Glacier Water Products, LLC

Buyallup, WA 98375

5526 184th St. E., Suite A

Northwest Properties Unlimited, LLC

Notices to the Landlord shall be given to: Curtis Hood (253)380-1754

31. **NOTICES.** Any notice, approval, consent or request required or permitted under this Lease shall be in writing and shall be delivered to or mailed to the person entitled to receive the same at the address stated below or such other address as may be submitted by notice, or, if no address is specified then notice to the Tenant shall be given at the Premises. Such notices shall be deemed given on the day delivered or on the third business day after deposit in the U.S. mail, postage prepaid.

30. **HOLD OVER.** If Tenant holds over the expiration of the Lease Term, such tenancy shall be for an indefinite period of time on a month-to-month tenancy, which tenancy may be terminated as provided by the laws of the State of Washington. During such tenancy Tenant agrees to pay to Landlord the rental and charges set forth in this Lease and to be bound by all of the terms, covenants, and conditions set forth herein so far as applicable.

29. **HEIRS AND SUCCESSORS.** Subject to the provisions hereof pertaining to assignment and subletting, the covenants and agreements of this Lease shall be binding upon the heirs, legal representatives, successors and assigns of any or all of the parties hereto.

(b) **Transfer of Landlord's Interest.** In the event of any transfer or transfer of Landlord's interest in the Property, other than a transfer for security purposes only, the transferor shall be automatically relieved of any and all obligations and liabilities on the part of Landlord accruing from and after the date of such transfer and Tenant agrees to remain to the transferor. Any such transfer shall be made expressly subject to this Lease, and the transferee must assume Landlord's obligations hereunder.

(a) **Limitations.** Anything in this Lease to the contrary notwithstanding, covenants, undertakings and agreements herein made on the part of Landlord are made and intended not as personal covenants, except Landlord's interest in the Building, but are made and intended for the purpose of binding only the Landlord's interest in the Building, as the same may from time to time be encumbered. While Tenant may bring a legal action against Landlord, judgments may be enforced only against Landlord's interest in the Building. No personal liability or personal responsibility is assumed by, nor shall at any time be asserted or enforceable against, Landlord or its partners or agents or their respective legal representatives, successors, and assigns on account of this Lease or on account of any covenants, undertakings or agreements of Landlord in this Lease contained. Nothing in this paragraph shall impose any liability on Landlord that has been waived or released elsewhere in this Lease.

**LANDLORD'S LIABILITY**

37. **REMOVAL OF PROPERTY.** In the event of any emergency or taking possession of the Premises Landlord shall have the right, but not the obligation, to remove from the Premises all personal property located thereon and to store the same in any place selected by Landlord, including but not limited to a public warehouse at the expense and right of the owners thereof with the right to sell such stored property without notice to Tenant, after it has been stored for a period of thirty (30) days or more. The proceeds of such sale shall be applied first to the cost of such sale, second to the payment of the charges for storage, if any, third to the payment of any sums of money which may be due from Tenant to Landlord under any of the terms hereof, and the balance, if any, shall be paid to Tenant.

33. STOPPED CERTIFICATES. Upon Landlord's written request, Tenant shall execute, acknowledge and deliver to Landlord a written statement certifying (a) that none of the terms or provisions of this Lease have been changed (or if they have been changed, stating how they have been changed); (b) that the Lease has not been canceled or terminated; (c) the last date of payment of the rent and other charges and the time period covered by such payment; (d) that Landlord is not in default under the Lease (or, if Landlord is claimed to be in default, stating why); and, (e) such other representations or information with respect to Tenant of the Lease as Landlord may reasonably request or which any prospective purchaser or encumbrancer of the Property may require. Tenant shall deliver such statement to Landlord within ten (10) days after Landlord's request. Landlord may give any such statement by Tenant to any prospective purchaser or encumbrancer of the Property. Such purchaser or encumbrancer may rely conclusively upon such statement as true and correct. If Tenant does not deliver such statement to Landlord within said ten (10) day period, Landlord, and any prospective purchaser or encumbrancer may conclusively presume and rely upon the following as facts: (i) that the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (ii) that this Lease has not been canceled or terminated except as otherwise requested by Landlord; (iii) that not more than one (1) month's rent or other charges have been paid in advance; and (iv) that Landlord is not in default under the Lease. If Tenant does not deliver such statement to Landlord within said ten (10) day period, Tenant shall be estopped from denying the truth of the above.

34. TENANT'S FINANCIAL CONDITION. Within ten (10) days after written request from Landlord, Tenant shall deliver to Landlord such financial statements as Landlord reasonably requires to verify the net worth of Tenant or any assignee, subtenant, or guarantor of Tenant. In addition, Tenant shall deliver to any lender designated by Landlord any financial statements required by such lender to facilitate the financing or refinancing of the Property. Tenant represents and warrants to Landlord that each such financial statement is a true and accurate statement as of the date of such statement. All financial statements shall be confidential and shall be used only for the purposes set forth in this Lease.

35. PERSONAL PROPERTY TAXES. Tenant shall pay or cause to be paid before delinquency any and all taxes levied or assessed and which become payable during the term hereof upon all Tenant's leasehold improvements, equipment, furniture, fixtures and any other personal property located in the Premises. In the event any or all of the Tenant's leasehold improvements, equipment, furniture, fixtures, and other personal property shall be assessed and taxed with the real property, Tenant shall pay to Landlord its share of such taxes within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's property.

36. RULES AND REGULATIONS. Tenant shall faithfully observe and comply with the rules and regulations that Landlord shall from time to time promulgate and/or modify. The rules and regulations shall be binding upon the Tenant upon delivery of a copy of them to the Tenant. Landlord shall not be responsible to Tenant for the nonperformance of any said rules and regulations by any other tenant or occupant.

37. FOR LEASE SIGNS. The Landlord may place "For Lease" signs upon the Premises in prominent locations selected by Landlord for the ninety (90) days preceding termination of this Lease.

38. QUIET ENJOYMENT. Landlord covenants and agrees that so long as Tenant remains in full compliance with all of Tenant's obligations under this Lease, Tenant shall lawfully and quietly hold, occupy, and enjoy the Property during the term of this Lease, subject to the other terms and provisions of this Lease and subject to all mortgages, underlying leases, and other underlying matters of record to which this Lease is or may become subject and subordinate. However, Landlord does not guarantee the continued present status of light, air, or view over any premises adjoining or in the vicinity of the Property.

39. MISCELLANEOUS.

(a) Integration; Amendments. This Lease contains the entire agreement between Landlord and Tenant concerning the leasing of the Premises. There is no oral or written agreement in addition to those in this Agreement. This Lease may only be altered by written consent of both Landlord and Tenant.

(b) Memorandum of Lease. Unless approved by Landlord in writing, if Tenant causes this Lease or a notice or memorandum thereof to be placed of record, such recording shall constitute a default by Tenant under this Lease. If Landlord so requests, Tenant agrees to execute and place of record an instrument, in recordable form, evidencing the commencement date and expiration date of this Lease, which instrument Landlord may record.

(c) Force Majeure. Landlord shall have no liability whatsoever to Tenant on account of the following acts of "force majeure," which shall include (a) the inability of Landlord to fulfill, or delay in fulfilling, any of Landlord's obligations under this Lease by reason of strike, lockout, other labor trouble, dispute or disturbance, (b) governmental regulation, moratorium, action, preemption or priorities or other controls, (c) shortages of fuel, supplies or labor, (d) any failure or defect in the supply, quantity or character of electricity or water furnished to the Property by reason of any requirement, act or omission of the public utility or others furnishing the Building with electricity or water, and (e) for any other reason, whether similar or dissimilar to the above, or for Act of God, beyond Landlord's reasonable control. If this Lease specifies a time period for performance of an obligation of Landlord, that time period shall be extended by the period of any delay in Landlord's performance caused by any of the events of force majeure described herein.

(d) Captions and Construction. The captions in this Lease are for the convenience of the reader and are not to be considered in the interpretation of its terms.

(e) Interpretation. This Lease has been submitted to the scrutiny of all parties hereto and their counsel if desired, and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or its counsel.

(f) Partial Invalidation. If any term or provision of this Lease or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced as written to the fullest extent permitted by law.

(g) Number, Gender, Permissive Versus Mandatory Usage. Where the context permits, references to the singular shall include the plural and vice versa, and to the neuter gender shall include the feminine and masculine. Use of the word "may" shall denote an option or privilege and shall impose no obligation upon the party which may exercise such option or privilege; use of the word "shall" shall denote a duty or an obligation.

(h) Tenant's Liability. Each Tenant, and all general partners of any partnership which is a Tenant, shall be jointly and severally liable under this Lease.

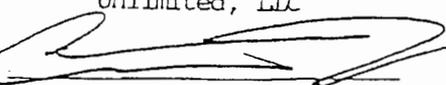
(i) Time. Time is of the essence to all of Tenant's obligations under this Lease.

(j) Governing Law. This Lease shall be governed by the laws of the State of Washington.

(k) Authority to Sign If Tenant is a corporation, a limited liability company, or a limited partnership, each person signing this Lease on behalf of the corporation, company or partnership warrants that he or she has full authority from such corporation, company or partnership to enter into and execute this Lease on behalf of such entity.

DATED this 29<sup>th</sup> day of July, 2004

"Landlord" Northwest Properties  
Unlimited, LLC

By:  8/20/04  
its Managing member  
Curtis Hood

By: \_\_\_\_\_

its \_\_\_\_\_

"Tenant" Glacier Water Products, LLC

By: \_\_\_\_\_

its Vice President  
Joon Choe

By:  8/20/04

its President + Managing Partner  
John S. Destito



STATE OF WASHINGTON )  
 ) ss.  
County of Pierce )

I certify that I know or have satisfactory evidence that --- is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as a member of ---, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this \_\_\_ day of \_\_\_\_\_, 200

Notary Public in and for the State of Washington,  
residing at: \_\_\_\_\_

Name (printed or typed) \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) ss.  
County of Pierce )

*NORTHWEST PROPERTIES UNLIMITED, LLC*  
*BY: CURTIS HOOD, MANAGING MEMBER*

I certify that I know or have satisfactory evidence that --- is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as a member of ---, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this 20<sup>th</sup> day of August, 2004

*Cara L. Wermuth*  
Notary Public in and for the State of Washington,  
residing at: Pushalwa WA.  
Name (printed or typed) CARA L. WERMUTH  
My appointment expires: 5/25/2007



INDIVIDUAL Acknowledgment

STATE OF \_\_\_\_\_ )  
County of Pierce ) ss.

I certify that I know or have satisfactory evidence that \_\_\_\_\_  
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 this \_\_\_\_ day of \_\_\_\_\_, 2004

Notary Public in and for the State of Washington,  
residing at: \_\_\_\_\_

Name (printed or typed) \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

REPRESENTATIVE CAPACITY Acknowledgment

STATE OF \_\_\_\_\_ )  
County of Pierce ) ss.

*Glacis Water Products, LLC*  
*By: John Desito, President & Manager*  
*Ph: 253.557.8570*

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

DATED this 20<sup>th</sup> day of August, 2004

*[Signature]*  
Notary Public in and for the State of Washington,  
residing at: Kenilworth WA.

CARA L. WERNUTH  
Name (printed or typed)  
My appointment expires: 5/25/2007



EXHIBIT A  
TO  
LEASE AGREEMENT

LEGAL DESCRIPTION OF PROPERTY

The Property referred to in this Lease Agreement is located in Pierce County, Washington, and is legally described as follows:

Commonly known as: Suite E, 5526 184th St. E.  
F, G, H Puyallup, WA 98375  
17,535 s/ft Office/Warehouse  
1,640 / 15,855

CHICAGO TITLE INSURANCE COMPANY  
A.L.T.A. COMMITMENT  
SCHEDULE A  
(Continued)

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LEGAL DESCRIPTION EXHIBIT

LOT 12, PIERCE COUNTY LARGE LOT SURVEY NO. 9601100450, ACCORDING TO MAP THEREOF RECORDED JANUARY 10, 1996, RECORDS OF PIERCE COUNTY, WASHINGTON, AND AS CORRECTED BY AFFIDAVIT OF MINOR CORRECTION OF SURVEY, RECORDED JANUARY 31, 1996, UNDER RECORDING NO. 9601310620, RECORDS OF PIERCE COUNTY, WA; SAID LARGE LOT SUPERCEDES PIERCE COUNTY LARGE LOT SUBDIVISION NO. 9011300746, ACCORDING TO MAP THEREOF RECORDED NOVEMBER 30, 1990, RECORDS OF PIERCE COUNTY, WASHINGTON.

EXCEPT: ANY PORTION THEREOF DEEDED TO PIERCE COUNTY IN DEED RECORDED UNDER AUDITORS FILE NUMBER 9608010592.

ALSO KNOWN AS PARCELS 1 AND 2 OF BINDING SITE PLAN RANGLES LOT 12 RECORDED UNDER RECORDING NUMBER 200306165004.

NOTE: See attached Exhibit 'F' building plan

EXHIBIT B  
TO  
LEASE AGREEMENT

Description of Premises

Suite E,F,G,H      Totalling 15,855 S/F warehouse

Space:              Landlord to build out 1,680 S/F  
of office space within the warehouse.  
840 S/F main floor with 840 S/F of  
mezzanine office up.

All final plans will be approved by both  
Landlord and Tenant prior to submitting  
for building permits. Both parties will  
sign a Letter of Agreement prior to the  
construction of any tenant improvement.

Any changes to office plans and/or size  
of office will reflect changes in cost  
and is described in Exhibit 'C'.

EXHIBIT C  
TO  
LEASE AGREEMENT

Landlord's Work

Landlord to provide a "bay" or "space" of 15,855 S/F± which shall include (4) grade level doors and (4) dock high loading doors. (4) man doors and (2) "storefront" type sets of glass doors.

Landlord to permit and construct a total of 1,680 s/f of finished 2-story office space as per final agreed to plans by both Landlord and tenant. To include (2) ADA restrooms, stairs to mezzanine, walls floors, doors and HVAC and lighting for the offices. Any and all materials to be agreed to by both parties, in writing and prior to submittal for permits. All work to be completed according to the current Pierce County building and fire codes. Landlord to install (2) 200 amp panels with 208 3-phase. Any other electrical to be permitted and installed by Tenant.

The Tenant shall pay to Landlord an amount of \$30,000.00 of which \$15,000.00 shall be due within 10 days after signing of the lease, and prior to submitting for permits. The remaining \$15,000.00 to be paid within (60) days after final inspection and approval by Pierce County inspectors.

Any changes in the final size of the Tenant office improvement will have adjustments to the Tenant's payment for said improvements. As per example.: \$30,000.00 divided by 1,680 s/f = \$17.86 s/f. The final amount of Tenants compensation to Landlord will be at \$17.86 s/f for total of office improvements. Those changes would occur in writing and prior to submitting for permits.

Both Landlord and Tenant to jointly assist each other during the pre-move in date of occupancy. Both parties will attempt to get a partial use move-in date within (1) month of signing the lease (or ASAP). All rent will be prorated as to the use of warehouse and completed offices from the date of that specific use and occupancy of either.

Any and all of the terms and conditions of this Lease are subject to change upon written agreement between the Landlord and Tenant.

EXHIBIT D  
TO  
LEASE AGREEMENT

Commencement and Termination Date Agreement

This Agreement is made with respect to the Lease Agreement dated July 29th, 2004 (the "Lease") between A as "Landlord" and B, as "Tenant" for the lease of "Premises" located at C. Any capitalized term not defined in this Agreement has the meaning given in the Lease.

The Lease provides that when certain obligations completed, Landlord and Tenant shall enter into a supplemental agreement confirming the Rent Commencement Date and the Lease Term. Accordingly, the parties agree as follows:

1. The Rent Commencement Date of the Lease is date of occupancy by tenant 10/1/04, 2004 OR ASA 9/20 ccf
2. The Lease Term shall expire on five (5) years from date of occupancy, subject to any provision in the Lease for extending the Lease Term.
3. Tenant's obligation to pay Rent shall commence on the Rent Commencement Date.

DATED this 29th day of July, 2004

'A' "Landlord" Northwest Properties  
Unlimited, LLC

By: [Signature] 8-20-04

is Managing member  
Curtis Hood

By: \_\_\_\_\_

is \_\_\_\_\_

'B' "Tenant" GLACIER WATER PRODUCTS, LLC

By: \_\_\_\_\_

is Vice President

By: [Signature] 8-20-04

is PRESIDENT + managing Partner  
John S. Dertito

'C' - Premises..... 5526 184th Street E.  
Suite E & F & G & H  
Puyallup, WA 98375

Exhibit A

Plaintiffs Receivables

	Monthly	# of Months	Total
Rent on Unit EFGH	\$7,451.85	12	\$89,422.20
Rent of Unit D	\$1,607.40	5	\$8,037.00
<b>Total</b>			<b>\$97,459.20</b>

Default Interest on Units EFGH at 12%

Nov	\$49.67
Dec	\$149.02
Jan	\$223.53
Feb	\$298.04
Mar	\$372.55
Apr	\$447.06
May	\$521.57
June	\$596.08
July	\$670.59
Aug	\$745.10
<b>Total</b>	<b>\$4,073.21</b>

Default Interest on Unit D at 12%

Nov	\$10.67
Dec	\$26.74
Jan	\$42.81
Feb	\$53.48
Mar	\$64.28
Apr	\$64.28
May	\$64.28
Jun	\$64.28
Jul	\$64.28
Aug	\$64.28
<b>Total</b>	<b>\$519.38</b>

Total Default Interest **\$4,592.59**

Summary of Plaintiffs Receivables

Rent of Units EFGH	\$89,422.20
Rent for Unit D	\$8,037.00
Interest on rent	\$4,592.59
<b>Total</b>	<b>\$102,051.79</b>

Summary of Defendant's Payments

On Commencement:	\$18,423.42
August Payment	\$7,200.00
September Payment	\$243,200.00
<b>Total Payment to Plaintiff</b>	<b>\$268,823.42</b>

Plaintiffs Receivables	-\$102,051.79
<b>Balance Due Defendant</b>	<b>\$166,771.63</b>

APPENDIX B  
PERSONAL GUARANTY

## LEASE GUARANTY AGREEMENT

THIS LEASE GUARANTY AGREEMENT is made on this 26<sup>th</sup> day of January, 2005, on behalf of Glacier Water Products, LLC, a Washington limited liability company, hereinafter referred to as "Lessee," by John Destito and Joon Choe, hereinafter collectively referred to as "Guarantors", to Northwest Properties Unlimited, LLC, a Washington limited liability company, hereinafter referred to as "Lessor".

### RECITALS

1. Lessee and Lessor have entered into a Lease Agreement and Addendums thereto relative to certain property situated at 5526 184<sup>th</sup> Street East, Puyallup, WA 98375, in accordance with the terms and provisions of a Lease Agreement which by reference is incorporated herein as though fully set forth.

2. The Guarantors are willing to guarantee payment of all sums due under the terms and provisions of said Lease Agreement as well as guarantee Lessee's performance of all of the terms and conditions set forth in said Lease Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, the parties hereby agree as follows:

#### Section 1. Statement of Guarantee.

Guarantors hereby guarantee payment by rent by Lessee as well as payment of all other obligations between the Lessee and Lessor arising out of or in connection with the leased premises

including the construction of improvements thereon and the performance by Lessee of all other terms, conditions, covenants and agreements of the above referenced Lease Agreement, and any amendments thereto and any extensions or assignments thereof, with respect to the above referenced leased premises, and any new premises that may become subject to the Lease Agreement entered into between the Lessor and Lessee. Lessor's consent to any assignments, subleases, amendments and extensions by Lessee or to any compromise or release of Lessee's liability hereunder, with or without notice to the Guarantors, or Lessor's failure to notify the Guarantors of any default and/or reinstatement of the Lease Agreement by Lessee, shall not relieve the Guarantors from liability under the terms of this Lease Guaranty Agreement. Each Guarantor shall be jointly and severally liable for the obligations of the Lessee to the Lessor under the terms and provisions of said Lease Agreement. This Lease Guaranty Agreement shall not only apply to subsequent obligations but also shall apply to the amount presently due and owing by the Lessee to the Lessor in the approximate sum of \$121,000.00.

**Section 2. Unconditional Guaranty of Payment.**

Within the provisions of Section 1, the Guarantors hereby unconditionally guarantee for the term of the Lease Agreement, the payment of the Lessee's obligations to the Lessor as evidenced by the aforesaid Lease Agreement when the same become due and payable. The Guarantors also guarantee payment of the Lessee's obligations as more particularly set forth herein in the event the Lessee (a) becomes insolvent; (b) goes voluntarily or involuntarily into bankruptcy or other debtor relief proceedings; (c) goes into receivership; or (d) has any assets taken by legal proceedings.

**Section 3. Duration.**

This Lease Guaranty Agreement shall continue in full force and effect during the entire term of the Lease Agreement and any extensions thereof.

**Section 4. Lessor's Rights Against Guarantors.**

If the Lessee defaults with respect to any obligation guaranteed herein by the Guarantors under the terms of the above referenced Lease Agreement, the Lessor shall have the right to enforce payment from the Guarantors and to declare the Lessee's indebtedness due and payable and to enforce payment from the Guarantors without first notifying or demanding payment from the Lessee. The Lessor does not have to first demand payment from any other Guarantors or sell any of the collateral or apply any of the Lessee's deposits before enforcing payment from the Guarantors. The Guarantors also waives any right to notice of any kind from the Lessor, including notice that the Lessee has not paid or satisfied its obligations and notice of any action taken or not taken by the Lessee, the Lessor or any Guarantor.

**Section 5. Attorneys' Fees.**

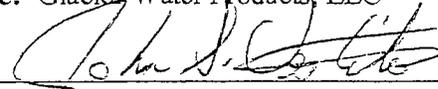
In the event any legal action is instituted to enforce any of the terms and provisions of this Lease Guaranty Agreement, the prevailing party in such legal action shall be entitled to recover all of its reasonable attorneys' fees and all other costs of litigation.

**Section 6. Binding Effect.**

This Guaranty is binding upon the parties hereto, their heirs, successors and assigns.

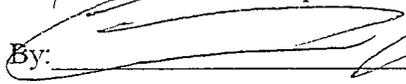
**IN WITNESS WHEREOF**, this Lease Guaranty Agreement has been executed on the day and year first above written.

Lessee: Glacier Water Products, LLC

By:  1-26-05

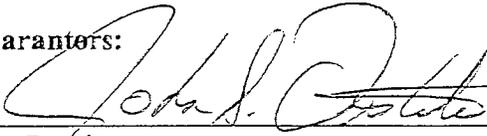
Its: Managing Member

Lessor: Northwest Properties Unlimited, LLC

By:  1-26-05

Its: Managing Member

Guarantors:

 1-26-05

John Destito

Joon Choe

APPENDIX C

WORKSHEET FOR DAMAGES (CP 43-51)

## Northwest Properties vs Glacier Water Products

Worksheet for Damages based on Family Medical Building, Inc. vs DSHS / WPI 303.01

(Landlord in commercial lease case entitled to benefit of its bargain, including all damages accruing naturally from the breach)

### Summary -

	Total Basic Rent & NNN	Amount Paid	Late Charges (1)	Interest @ 12% APR	TOTAL DUE
<b>EFGH TOTAL</b>	<b>558,489.12</b>	(18,423.42)	<b>236,700.00</b>	<b>4,098.52</b>	<b>780,864.22</b>
<b>D TOTAL</b>	<b>8,037.00</b>			<b>541.16</b>	<b>8,578.16</b>
<b>RELET - LOSSES AVOIDED</b>	<u>(336,388.25)</u>				<u>(336,388.25)</u>
<b>NET LOSS - EXCLUDING TI</b>	<b>230,137.87</b>	(18,423.42)	<b>236,700.00</b>	<b>4,639.68</b>	<b>453,054.13</b>
<b>TENANT IMPROVEMENTS</b>					<b>81,928.18</b>
<b>TOTAL NET LOSS - INCLUDING TI</b>					<b>534,982.31</b>
<b>Credit for Sept. 1, 2005 Payment</b>					<u>(250,400.00)</u>
<b>TOTAL AMOUNT OWED TO NWP</b>					<b>284,582.31</b>

Note on late charges:

1. Per attached late charge worksheet, late charges are compounded based on the compounding damage that NWP expected from a long term continuing default. GWP contends that the compounding of late charges is not "reasonably related to a prediction of actual damages." The evidence will show that GWP is wrong. However, if late charges are not compounded, the total late charge amount would be \$44,100. Under this scenario, GWP would owe a total amount of \$91,982.31.



### Northwest Properties vs Glacier Water Products

Worksheet for Damages based on Family Medical Building, Inc. vs DSHS / WPI 303.01

(Landlord in commercial lease case entitled to benefit of its bargain, including all damages accruing naturally from the breach)

Unit EFGH:

Month	#days in Month	Due Date	Basic Rent Amount (1)	Oper.		Total Basic Rent & NNN	Amount Paid	Late Charges (3)	Interest		TOTAL DUE
				Expenses (NNN) (2)	Rent & NNN				Amount Paid	@ 12% APR (4)	
Oct-04	31	1-Oct	6,024.90	1,426.95	7,451.85	(7,451.85)	0	0	0	0.00	0.00
Nov-04	30	1-Nov	6,024.90	1,426.95	7,451.85	0.00	44,100.00	74.52	51,626.37		
Dec-04	31	1-Dec	6,024.90	1,426.95	7,451.85	0.00	39,600.00	149.04	47,200.89		
Jan-05	31	1-Jan	6,024.90	1,426.95	7,451.85	0.00	34,950.00	223.56	42,625.41		
Feb-05	28	1-Feb	6,024.90	1,426.95	7,451.85	0.00	30,300.00	298.07	38,049.92		
Mar-05	31	1-Mar	6,024.90	1,426.95	7,451.85	0.00	26,100.00	372.59	33,924.44		
Apr-05	30	1-Apr	6,024.90	1,426.95	7,451.85	0.00	21,450.00	447.11	29,348.96		
May-05	31	1-May	6,024.90	1,426.95	7,451.85	0.00	16,950.00	521.63	24,923.48		
Jun-05	30	1-Jun	6,024.90	1,426.95	7,451.85	0.00	12,300.00	596.15	20,348.00		
Jul-05	31	1-Jul	6,024.90	1,426.95	7,451.85	0.00	7,800.00	670.67	15,922.52		
Aug-05	31	1-Aug	6,024.90	1,426.95	7,451.85	0.00	3,150.00	745.19	11,347.04		
Sep-05	30	1-Sep	6,024.90	1,426.95	7,451.85	0.00	0.00	0.00	7,451.85		
<b>Total Year 1 (2004-2005)</b>			<b>72,298.80</b>	<b>17,123.40</b>	<b>89,422.20</b>	<b>(7,451.85)</b>	<b>236,700.00</b>	<b>4,098.52</b>	<b>322,768.87</b>		
Oct-05			6,024.90	1,426.95	7,451.85	0.00					
Nov-05			6,024.90	1,426.95	7,451.85	0.00					
Dec-05			6,024.90	1,426.95	7,451.85	0.00					
Jan-06			8,000.65	1,534.50	9,535.15	0.00					
Feb-06			8,000.65	1,534.50	9,535.15	0.00					
Mar-06			8,000.65	1,534.50	9,535.15	0.00					
Apr-06			8,000.65	1,534.50	9,535.15	0.00					
May-06			8,000.65	1,534.50	9,535.15	0.00					
Jun-06			8,000.65	1,534.50	9,535.15	0.00					
Jul-06			8,000.65	1,534.50	9,535.15	0.00					
Aug-06			8,000.65	1,534.50	9,535.15	0.00					
Sep-06			8,000.65	1,534.50	9,535.15	0.00					
<b>Total Year 2 (2005-2006)</b>			<b>90,080.55</b>	<b>18,091.35</b>	<b>108,171.90</b>	<b>0.00</b>					



Month	#days In Month	Due Date	Oper.		Total Basic Rent & NNN	Amount Paid	Late Charges (3)	Interest @ 12% APR (4)	TOTAL DUE
			Basic Rent Amount (1)	Expenses (2) (NNN)					
<b>EFGH TOTAL YR. 1 THRU YR 5</b>			<b>468,032.37</b>	<b>90,456.75</b>	<b>558,489.12</b>	<b>(18,423.42)</b>	<b>236,700.00</b>	<b>4,098.52</b>	<b>780,864.22</b>
<b>D TOTAL (6)</b>					<b>8,037.00</b>			<b>541.16</b>	<b>8,578.16</b>
<b>RELET - LOSSES AVOIDED</b>					<u>(336,388.25)</u>				<u>(336,388.25)</u>
<b>NET LOSS - EXCLUDING TI</b>					<b>230,137.87</b>	<b>(18,423.42)</b>	<b>236,700.00</b>	<b>4,639.68</b>	<b>453,054.13</b>
<b>TENANT IMPROVEMENTS (5)</b>									<b>81,928.18</b>
<b>TOTAL NET LOSS - INCLUDING TI</b>									<b>534,982.31</b>
<b>Credit for Sept. 1, 2005 Payment</b>									<u>(250,400.00)</u>
<b>TOTAL AMOUNT OWED TO NWP</b>									<b>284,582.31</b>

**Note:**

1. Base rent increases in Jan. 1, 2006 when increased office space became functional for GWP. Thereafter, rent increases in year 3 by 3% per year.
2. NNN based on \$0.09/SF. For settlement purposes, calculations do not reflect annual increases in NNN.
3. Late charges calculated at \$150/day; late charge begins 10 days after the first missed payment until all rent and late charges are paid in full. See Late Charge Calculation Worksheet.
4. Interest based on 12% APR, calculated to include Basic Rent and Oper. Expenses.
5. Tenant Improvement loss based on amount GWP was obligated to pay (see TI worksheet).
6. See Unit D worksheet for calculation detail.

**Northwest Properties vs Glacier Water Products**

**Unit D:**

Month	#days in Month	Due Date	Basic Rent Amount	Oper. Expenses (NNN)	Total Basic Rent & NNN	Amount Paid	# of days late	Late Charges (1)	Interest @ 12% APR (2)	Total Due w/out T.I. & Other Costs
Oct-04	31	1-Oct	1,299.60	307.80	1,607.40	0.00		0	0	1,607.40
Nov-04	30	1-Nov	1,299.60	307.80	1,607.40	0.00	20	0	10.72	1,618.12
Dec-04	31	1-Dec	1,299.60	307.80	1,607.40	0.00	31	0	32.15	1,639.55
Jan-05	31	1-Jan	1,299.60	307.80	1,607.40	0.00	31	0	48.22	1,655.62
Feb-05	28	1-Feb	1,299.60	307.80	1,607.40	0.00	28	0	64.30	1,671.70
Mar-05	31	1-Mar				0.00	31		64.30	64.30
Apr-05	30	1-Apr				0.00	30		64.30	64.30
May-05	31	1-May				0.00	31		64.30	64.30
Jun-05	30	1-Jun				0.00	30		64.30	64.30
Jul-05	31	1-Jul				0.00	31		64.30	64.30
Aug-05	31	1-Aug				0.00	31		64.30	64.30
Sep-05	30	1-Sep								
<b>Subtotal Unit D</b>			<b>6,498.00</b>	<b>1,539.00</b>	<b>8,037.00</b>	<b>0.00</b>		<b>0</b>	<b>541.16</b>	<b>8,578.16</b>

**Note:**

1. Late charges reflected in Unit EFGH.
2. Interest based on 12% APR, calculated to include Basic Rent and Oper. Expenses.

**Northwest Properties vs Glacier Water Products**  
**Relet - Losses Avoided**  
**Tenant: Brite Light Welding**

Unit EFGH:

Month	#days in Month	Due Date	Basic Rent Amount	Oper. Expenses (NNN)	Less Yr. 1 Discount (1)	Total Rent & NNN
Feb-06	28	1-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Mar-06	31	2-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Apr-06	30	3-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
May-06	31	4-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Jun-06	30	5-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Jul-06	31	6-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Aug-06	31	7-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Sep-06	30	8-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Oct-06	31	9-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Nov-06	30	10-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Dec-06	31	11-Feb	6,808.00	1,426.95	(1,535.50)	6,699.45
Jan-07	31	12-Feb	<u>6,808.00</u>	<u>1,426.95</u>	<u>(1,535.50)</u>	<u>6,699.45</u>
<b>Total Yr. 1</b>			<b>81,696.00</b>	<b>17,123.40</b>	<b>(18,426.00)</b>	<b>80,393.40</b>
Feb-07			7,012.24	1,426.95		8,439.19
Mar-07			7,012.24	1,426.95		8,439.19
Apr-07			7,012.24	1,426.95		8,439.19
May-07			7,012.24	1,426.95		8,439.19
Jun-07			7,012.24	1,426.95		8,439.19
Jul-07			7,012.24	1,426.95		8,439.19
Aug-07			7,012.24	1,426.95		8,439.19
Sep-07			7,012.24	1,426.95		8,439.19
Oct-07			7,012.24	1,426.95		8,439.19
Nov-07			7,012.24	1,426.95		8,439.19
Dec-07			7,012.24	1,426.95		8,439.19
Jan-08			<u>7,012.24</u>	<u>1,426.95</u>		<u>8,439.19</u>
<b>Total Yr. 2</b>			<b>84,146.88</b>	<b>17,123.40</b>		<b>101,270.28</b>
Feb-08			7,222.61	1,426.95		8,649.56
Mar-08			7,222.61	1,426.95		8,649.56
Apr-08			7,222.61	1,426.95		8,649.56
May-08			7,222.61	1,426.95		8,649.56
Jun-08			7,222.61	1,426.95		8,649.56
Jul-08			7,222.61	1,426.95		8,649.56
Aug-08			7,222.61	1,426.95		8,649.56
Sep-08			7,222.61	1,426.95		8,649.56
Oct-08			7,222.61	1,426.95		8,649.56
Nov-08			7,222.61	1,426.95		8,649.56
Dec-08			7,222.61	1,426.95		8,649.56
Jan-09			<u>7,222.61</u>	<u>1,426.95</u>		<u>8,649.56</u>
<b>Total Yr. 3</b>			<b>86,671.29</b>	<b>17,123.40</b>		<b>103,794.69</b>

Month	#days in Month	Due Date	Basic Rent Amount	Oper. Expenses (NNN)	Less Yr. 1 Discount (1)	Total Rent & NNN
Feb-09			7,439.29	1,426.95		8,866.24
Mar-09			7,439.29	1,426.95		8,866.24
Apr-09			7,439.29	1,426.95		8,866.24
May-09			7,439.29	1,426.95		8,866.24
Jun-09			7,439.29	1,426.95		8,866.24
Jul-09			7,439.29	1,426.95		8,866.24
Aug-09			7,439.29	1,426.95		8,866.24
Sep-09			<u>7,439.29</u>	<u>1,426.95</u>		<u>8,866.24</u>
<b>Total 8 mo. Yr. 4</b>			<b>59,514.28</b>	<b>11,415.60</b>		<b>70,929.88</b>
GRAND TOTAL BRITE LIGHT RELET			312,028.45	62,785.80		<b>356,388.25</b>
ELECTRICAL UPGRADES REQUIRED BY BRITE LITE (2)						<u>(20,000.00)</u>
<b>TOTAL LOSSES AVOIDED THRU BRITE LIGHT LEASE</b>						<b>336,388.25</b>

Note:

1. Discount offered to Brite Light to secure the lease.
2. Exhibit C to Brite Light lease requires NWP to pay \$20K for electrical upgrades to secure the lease.

**Northwest Properties vs Glacier Water Products  
 Tenant Improvements**

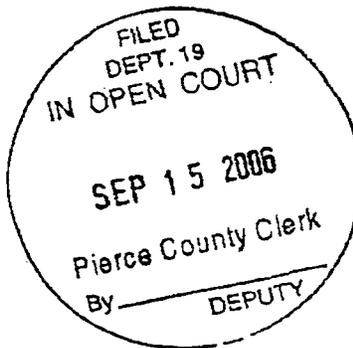
Tenant: Glacier Water Products

<b>Warehouse TI:</b>	
Invoice - Exhibit B	18,393.91
Garage Door Openers - Invoice Exh. 4	10,880.00
Invoice - Exhibit 3	<u>3,835.31</u>
Total Warehouse TI	33,109.22
Warehouse TI Interest (1)	<u>2,979.83</u>
<b>Total Warehouse TI + Interest</b>	<b>36,089.05</b>
<b>Temporary Office TI</b>	
Temp. Office TI Interest (1)	407.40
<b>Total Temp. Office TI + Interest</b>	<b>4,934.03</b>
<b>Perm. Office TI:</b>	
Initial Payment due 10 days after signing	15,000.00
Initial Payment Interest (1)	1,350.00
Square Footage Adjustment (2)	9,555.10
Final Payment	<u>15,000.00</u>
<b>Total Perm. Office TI (3)</b>	<b>40,905.10</b>
<b>TOTAL TI</b>	<b>81,928.18</b>

Note:

1. Interest at 12% for 9 months on agreed upon TI costs
2. Sq. Footage adjustment based on \$17.86/sf over 1,680 SF; total SF = 2215.
3. If actual cost is used, Perm. Office TI would exceed \$131,000.

APPENDIX D  
FINDINGS AND CONCLUSIONS



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

Northwest Properties Unlimited, LLC, a  
Washington limited liability company,  
  
Plaintiff,  
  
v.  
  
Glacier Water Products, LLC, a Washington  
limited liability company,  
  
Defendant.

No. 05-2-05598-2  
**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**THIS MATTER** having come regularly before the Court for trial, the plaintiff appearing by and through its attorney, Talis Abolins of Campbell, Dille, Barnett, Smith and Wiley, PLLC; the defendant having appeared by and through its attorneys, John McGary and Bob Baskerville; the Court having considered the testimony and evidence at trial, including the records and files in connection therewith, and in all things being advised; now, therefore, makes the following:

**FINDINGS OF FACT**

1. That the plaintiff holds fee simple title to the lands and premises located at 5526 184<sup>th</sup> Street East, Suites D-H, Puyallup, Washington 98375, Pierce County, Washington (the "premises").

CAMPBELL, DILLE, BARNETT,  
SMITH & WILEY, P.L.L.C.  
ATTORNEYS AT LAW  
317 SOUTH MERIDIAN  
PUYALLUP, WASHINGTON 98371-0164  
(253) 848-3513

1           2.     The defendant and plaintiff entered into a commercial Lease Agreement dated  
2 August 20, 2004, for a term of five years with two five-year extension options. The  
3 premises covered by the lease included Suites E, F, G, and H.

4           3.     The parties agreed that the monthly lease rate for Suites E, F, G, and H was  
5 \$7,451.85.

6           4.     The parties entered into an addendum to the original lease, adding Suite D at an  
7 additional lease rate of \$1,607.40. The parties stipulated that the amount owed by defendant  
8 to plaintiff for Suite D is \$8,037 plus interest at 12%. The parties further stipulated that the  
9 interest amount due for Suite D is \$519.38.

10          5.     The parties agreed that the lease provides for interest upon default by defendant  
11 and that the agreed rate of interest upon default is 12%.

12          6.     At trial, Defendant disputed its responsibility for the cost of tenant  
13 improvements. While disputing responsibility to pay for tenant improvements, the  
14 Defendant stipulated that the amounts claimed by Plaintiff were accurately specified as  
15 follows: (1) \$36,089.05 for warehouse improvements, which amount includes \$2,979.83 in  
16 interest; (2) \$4,934.03 for temporary office improvements, which amount includes \$407.40  
17 in interest; (3) \$40,905.10 for permanent office improvements, broken down as \$15,000.00  
18 for an initial payment, interest on that payment of \$1,350.00, a square footage adjustment  
19 of \$9,555.10 based on Exhibit C of the lease, and a final payment of \$15,000.00.

20          7.     Plaintiff completed the warehouse improvements.

21          8.     Plaintiff completed the temporary office space improvements.

22          9.     Plaintiff did not complete construction of the permanent office improvements.  
23 Construction on these improvements did not begin until after Defendant had vacated the  
24 premises.  
25  
26

1           10.    Shortly after moving into the premises, the defendant breached the commercial  
2 lease by failing to pay rent and triple net amounts due under the terms of the lease.

3           11.    Defendant did not pay the tenant improvement amounts specified above.

4           12.    During Defendant's occupation of the premises, the Defendant made a number  
5 of representations relating to its future ability to perform and make payment. Plaintiff relied  
6 on these representations to its detriment.

7           13.    Defendant vacated the premises in September, 2005, and they remained vacant  
8 until February of 2006.

9           14.    With regard to Suites E, F, G, and H, the unpaid balance of rent and triple net  
10 due and owing by Defendant for the lease term totals \$558,489.12.

11          15.    The parties stipulated that the interest associated with past due rent and triple net  
12 for Suites E, F, G, and H is \$4,073.21.

13          16.    Plaintiff acted reasonably in attempting to relet the premises, and succeeded in  
14 reletting the premises to Brite Lite Welding.

15          17.    To relet the premises it was necessary for Plaintiff to incur an additional  
16 \$20,000.00 in expenses for electrical upgrades required by Brite Lite.

17          18.    By reletting the premises, Plaintiff is likely to offset its loss of rent and triple net  
18 from Defendant with payments from Brite Lite in the amount of \$356,388.25.

19          19.    The amount owed by defendant to plaintiff for breach of the commercial lease  
20 relating to Suite D is \$8,556.38, which includes interest.

21          20.    After credits for losses avoided, Plaintiff still incurs a net loss of \$230,137.87  
22 in rent and triple net that Defendant was obligated to pay under the terms of its lease.

23          21.    The parties specifically negotiated the late fee provision in paragraph 8.

24          22.    At the time of signature, the potential escalating damage from a long-term  
25 default to Plaintiff was difficult for the parties to quantify.  
26

1 23. The parties understood that the provision would include an escalation of daily  
2 late charges in the event of a long-term default in rent spanning multiple months.

3 24. Before signing the lease, the Defendant attempted to negotiate a lower amount  
4 of late fees and Plaintiff adjusted paragraph 8 through these specific negotiations.

5 25. The escalating late charges agreed to in paragraph 8 provided a reasonable  
6 forecast of potential losses to Plaintiff from a long-term default.

7 26. The Plaintiff suffered considerable escalating damage from the Defendant's  
8 long-term default.

9 27. The parties stipulated that Defendant made three payments to plaintiff pursuant  
10 to the lease: (1) \$18,423.42 at commencement of the lease; (2) \$7,200.00 in August of 2005;  
11 and (3) \$243,200.00 in September of 2005.

12 28. The Plaintiff regularly informed Defendant of its calculations of amounts due,  
13 including the escalation of late charges.

14 29. Defendant did not complain to Plaintiff about the late charges or other amounts  
15 due as calculated by Plaintiff under the terms of the lease.

16 30. During Defendant's occupation of the premises, John Destito (the Defendant's  
17 President and Managing Partner), indicated that he believed the escalating late charges were  
18 "worth it" considering the alternative of an eviction.

19 31. On January 26, 2005, Mr. Destito signed a Lease Guaranty Agreement  
20 confirming his agreement that the amount due at that time included stacked late charges.

21 32. Between November 2004 and August, 2005, the Defendant was 1,578 days late  
22 in paying rent. The late charge provision agreed to by the parties calls for \$236,700.00 in  
23 late charges.

24 33. The late charges of \$236,700.00 represent a fair approximation of the damages  
25 actually suffered by Plaintiff as a result of the breach.

26

1 34. The Plaintiff never waived or abandoned its right to amounts owed by the  
2 Defendant under the terms of the lease.

3 35. Defendant voluntarily made partial payments on amounts claimed.

4 36. The plaintiff has incurred costs and attorney's fees in pursuing its remedies  
5 under the lease.

6 37. The plaintiff's attorneys have charged a reasonable hourly rate of \$ 250 for work  
7 performed by Bryce Dille; \$ 195 for work performed by Talis Abolins in 2006; and \$175 for  
8 work performed by Shannon Jones and Hillary Holmes in 2005.

9 38. The parties have stipulated that a reasonable fee for the prevailing party in this  
10 matter is \$24,570.55. The parties have further stipulated that the reasonable costs for the  
11 prevailing party are \$1,234.56. These amounts are reasonable given the nature of the work  
12 performed, and the results obtained at trial. The total amount of costs and fees to be awarded  
13 to Plaintiff is \$25,805.11.

14 **CONCLUSIONS OF LAW**

15 1. The Court has jurisdiction over the parties and subject matter of this action.

16 2. The Defendant breached its lease obligations, without legal excuse.

17 3. The Plaintiff is entitled to damages, as measured by the benefit of its bargain  
18 under the terms of the commercial lease. The Plaintiff's recovery should include the amount  
19 necessary to put the injured party (Plaintiff) in as good a position pecuniarily as it would  
20 have been in had the commercial lease been performed.

21 4. The plain meaning of paragraph 8 cannot be discerned without considering  
22 extrinsic evidence regarding the subject matter and objective of the contract, the  
23 circumstances surrounding the making of the contract, the subsequent acts and conduct of  
24 the parties, and the reasonableness of the respective interpretations urged by the parties.

25 5. Under paragraph 8 of the lease, the Defendant is obligated to pay a late charge  
26 of \$150 per day for each day that a monthly rental payment remains late.

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6. Pursuant to paragraph 8 of the lease, the Plaintiff is entitled to a reasonable late charge of \$236,700.00.

7. Enforcing the late charge to this extent is reasonable, and does not constitute a penalty.

8. Under the terms of the lease, the plaintiff was required to pay for the cost of warehouse tenant improvements specified in Exhibit C to the lease, and Defendant is not responsible for the cost of those tenant improvements.

9. The Defendant is not responsible for the cost of temporary office improvements, as there is no term in the lease obligating Defendant to pay for temporary office tenant improvements, and no evidence of a writing obligating Defendant to make such payment.

10. With regard to the tenant improvements relating to the permanent office, the Defendant is obligated to pay the initial \$15,000.00 pursuant to the terms of the lease within ten days of signing the lease, plus interest at 12%.

11. Under the lease, Defendant is not contractually responsible for the second \$15,000 installment for permanent office improvements, or any additional charges for square footage in excess of 1,680 square feet.

12. Under paragraph 25 of the lease, the Plaintiff is entitled to its attorneys' fees, statutory court costs, and all other litigation costs and expenses incurred in connection with this action.

13. The Defendant's counterclaims are without merit and Defendant's requests for equitable relief are denied.

14. Defendant is entitled to a credit for all payments made, and payments made shall not be included in the judgment amount.

15. Plaintiff is entitled to judgment against Defendant for the amount of \$226,994.04.

1 16. Plaintiff is further entitled reasonable attorney's fees under the terms of its lease  
2 in the amount of \$24,570.55.

3 17. Plaintiff is also entitled to costs incurred in the amount of \$ 1,234.56.  
4

5  
6 DATED this 15<sup>th</sup> day of September, 2006.

7  
8 **LINDA CJ LEE**  
9 JUDGE LINDA CJ LEE

10  
11  
12 Presented by:

13  
14 

15 Talis M. Abolins, WSBA #21222  
16 of Campbell, Dille, Barnett, Smith & Wiley  
Attorneys for Plaintiff

17  
18 Approved as to form:  
19 Notice of Presentment Waived:

20 15/ [Signature] #21222

21 John A. McGary, WSBA #1258  
22 Robert Baskerville, WSBA #5034  
23 Attorneys for Defendant

24 *Telephonic/Fax Approval*  
25 *(see attached)*

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16. Plaintiff is further entitled reasonable attorney's fees under the terms of its lease in the amount of \$24,570.55.

17. Plaintiff is also entitled to costs incurred in the amount of \$ 1,234.56.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

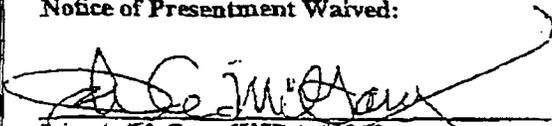
JUDGE LINDA CJ LEE

Presented by:



Talis M. Abolins, WSBA #21222  
of Campbell, Dille, Barnett, Smith & Wiley  
Attorneys for Plaintiff

Approved as to form:  
Notice of Presentment Waived:



Joan A. McGary, WSBA #1258  
Robert Baskerville, WSBA #5034  
Attorneys for Defendant

FILED  
COURT OF APPEALS  
DIVISION II

07 JUN -1 AM 11:59

STATE OF WASHINGTON  
BY 2  
DEPUTY

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

NORTHWEST PROPERTIES UNLIMITED,  
LLC, a Washington Limited Liability  
Company,

Respondent,

v.

GLACIER WATER PRODUCTS, LLC, a  
Washington Limited Liability Company,

Appellant.

No. 35467-5-II

**AFFIDAVIT OF  
MAILING**

MELINDA L. LEACH, being first duly sworn on oath, deposes  
and says:

That on the 31st day of May, 2007, she placed a true copy of the  
Brief of Respondent and Declaration of Mailing, in an envelope addressed  
to below stated as follows:

Christy O. King  
Christopher W. Brown  
The DuBoff Law Group, LLC  
Attorney for Appellee  
6665 SW Hampton Street, Suite 200  
Portland, WA 97223-8357

Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

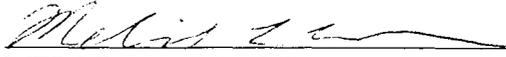
That she placed and affixed proper postage to the said envelope,

Affidavit of Mailing

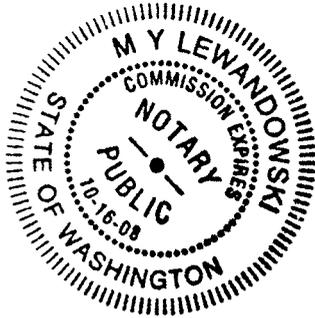
G:\DATA\BHD\MHood, Curtis 14619\Glacier Water Products, LLC .003\Appeal\AAffidavit of Mailing 5-31-07.wpd

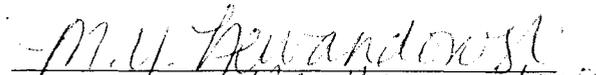
**ORIGINAL**

sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Puyallup, County of Pierce, State of Washington.

  
MELINDA L. LEACH

**SUBSCRIBED AND SWORN** to before me this 31st day of May, 2007.



  
Printed Name: M.Y. Lewandowski  
**NOTARY PUBLIC** in and for the State of  
Washington residing at Puyallup  
My commission expires: 12-16-08

Affidavit of Mailing

G:\DATA\BHD\Hood, Curtis 14619\Glacier Water Products, LLC .003\Appeal\AAffidavit of Mailing 5-31-07.wpd