

No. 35813-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**BAGELHEADS, INC. and ROBERT MACKEY, JR.,**

**Appellants**

**v.**

**DONALD KOSTEROW,**

**Respondent**

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**BRIEF OF RESPONDENT DONALD KOSTEROW**

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DIVISION II  
STATE OF WASHINGTON  
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**A. Issues Presented**

Appellants' assignments of error raise four issues for this Court to decide:

**1. The 50.5% Loophole.**

Appellant Robert Mackey wanted to start a bagel business. Having no experience, he consulted with Respondent Donald Kosterow—who had started eight bagel stores—so he could gain from Mr. Kosterow's vast experience. Mr. Kosterow promised to give Mr. Mackey the benefit of his experience, in exchange for 2% of gross sales, but only if Mr. Mackey promised he would own "no less than fifty-one percent (51%)" of any store in which he used the information. In an admitted effort to avoid paying Mr. Kosterow, Mr. Mackey obtained a **50.5%** interest in a second bagel store and did not pay Mr. Kosterow 2% of its gross sales. Was there substantial evidence supporting the jury's finding that "51%" meant any majority interest and that Mr. Mackey owed Mr. Kosterow 2% of the store's sales? (Assignment of Error No. 1.)

**2. Failure to Preserve Error.**

If a party does not object or otherwise afford the trial court any opportunity to avoid or correct an alleged legal error, then the party has failed to preserve the error for appeal. In this appeal, Mr. Mackey argues that the consulting agreement was unambiguous, that "51% means

51%," and, thus, Mr. Mackey could not have owed fees for the 50.5% store. Mr. Mackey assigns error to the trial court for allowing the jury to find that "51%" meant any majority interest. But Mr. Mackey did not seek summary judgment, non-suit, directed verdict, or judgment n.o.v. on this issue. Moreover, in closing argument, Mr. Mackey's counsel told the jury it was "up to you whether you want to disregard the language of the contract and find that 51% does not mean 51%," and the jury did. Can Mr. Mackey assign error to entry of judgment consistent with the jury's verdict? (Assignment of Error No. 1.)

**3. Unauthorized Disclosures of Information.**

In the consulting agreement, Mr. Mackey promised that he would not "divulge any of the information regarding the bagel operation business" received from Mr. Kosterow, and that he would not "utilize any of such information in any bagel business other than" one in which Mr. Mackey was the majority owner. Thereafter, Mr. Mackey consulted with several people who had no experience, showing them how to start their own bagel stores—stores in which Mr. Mackey had no ownership interest. Like Mr. Kosterow, Mr. Mackey charged his consultees 2% of their gross sales, and he required his consultees to not divulge any information learned from Mr. Mackey. Was there substantial evidence

that Mr. Mackey breached his non-disclosure promise to Mr. Kosterow?  
(Assignment of Error No. 2.)

**4. Damages for Unauthorized Disclosures.**

The jury found that Mr. Mackey had breached the non-disclosure provision by entering into these consulting agreements. Mr. Mackey collected more than \$45,000 from these improper relationships. Was there substantial evidence to support the jury's damage award of \$27,200 in damages to Mr. Kosterow for Mr. Mackey's breach of the non-disclosure provision? (Assignment of Error No. 3.)

**B. Statement of the Case**

**1. Procedural History.**

Donald Kosterow filed in Clark County Superior Court a complaint against three defendants, Robert Mackey, Jr., his wife Janet Mackey, and their company, Bagelheads, Inc. Mr. Kosterow asserted three causes of action: breach of contract, fraud, and misappropriation of trade secrets. Before trial, Mr. Kosterow dropped the fraud claim, and the case proceeded to a three-day jury trial on the remaining claims. At the conclusion of the trial, the jury entered a special verdict, finding that Bagelheads, Inc. had breached its duty to pay consulting fees to Mr. Kosterow, that Bagelheads, Inc. and Mr. Mackey had breached the non-disclosure provisions of the consulting agreement, and awarding

Mr. Kosterow a total of \$52,194.49 in damages. The jury did not find for Mr. Kosterow on his trade secrets claim, and the jury did not find any liability against defendant Janet Mackey.

Pursuant to an attorney's fees provision in the consulting agreement, Mr. Kosterow sought attorney's fees and costs in the amount of \$52,382.50. The trial court judge, the Honorable Judge John F. Nichols, found that Mr. Kosterow had substantially prevailed, but not on all of his claims, and therefore awarded \$39,600. The court entered judgment in favor of Mr. Kosterow, and against Mr. Mackey and Bagelheads, Inc., in the principal amount of \$91,794.49. Bagelheads, Inc. and Mr. Mackey have appealed from this judgment.

## **2. Statement of Facts.**

The gravamen of the Appellants' appeal is that the jury's verdict is not supported by any substantial evidence. While the Appellants acknowledge that all of the evidence presented at trial, and all reasonable inferences the jury could draw from the evidence, must be viewed in the light most favorable to the Respondent, the statement of facts in the Appellant's brief falls far short of meeting this standard. The Appellants have selectively presented the undisputed facts, and they have failed to state the disputed facts in the light most favorable to the Respondent. Where the testimony was in conflict, the Appellants' brief assumes that the

jury believed the Mackeys when, in fact, the jury could have disregarded their testimony and believed the testimony of the Kosterows.

Accordingly, Mr. Kosterow hereby provides the following statement of facts in a manner that adheres to the proper standard on this appeal.

**a. The Principal Actors.**

During a thirty-six year career in the timber industry, Mr. Kosterow started—at the age of sixteen—as sweeper in a lumber mill, climbed through the ranks to become a Regional Manager with Boise Cascade, and ascended to Vice President. (RP Vol. I, 81, 89-91.) At the age of 52, Mr. Kosterow retired from the industry and moved, along with his wife Donna, back to the Pacific Northwest to settle in Vancouver, Washington. (RP Vol. I, 90:25-91:16.) After a short while, the Kosterows began toying with the idea of opening a bagel business in Vancouver. (RP Vol. I, 91:24-92:10.) They soon opened their first store and called it "Sunrise Bagels." (RP Vol. I, 96:4-12.) Their business grew quickly, and within several years, the Kosterows had opened their eighth Sunrise Bagel location. (RP Vol. I, 97:13-18.)

Back in the 1970's, while he was working in the paper and pulp industry, Mr. Kosterow became acquainted with Mr. Robert Mackey, Sr., a chemical salesman who sold products to Mr. Kosterow's company. (RP 99:7-17.) A long-standing friendship was struck between the

Kosterows and the Mackeys. (RP 100:1-10.) It was on one of the mens' hunting trips that Mr. Kosterow first met Mr. Mackey's son, Robert Mackey, Jr., the defendant in this lawsuit. (RP 100:11-17)

Robert Mackey, Jr. and his wife, Janet Mackey, who lived in Florida, wanted to start their own business and, in the Spring of 1997, Robert approached Mr. Kosterow to ask him about the business.

Mr. Kosterow recounted their first conversation about the bagel business:

7 Q. I want to direct your attention now to the  
8 time when Robby -- what you call Bob Jr., called you  
9 to talk about the bagel business. Do you recall a  
10 telephone call where he called you to ask you about  
11 the bagel business?

12 A. I recall having conversations with Robby kind  
13 of late spring of '87.

14 Q. '97?

15 A. '97, I mean.

16 Q. Yeah. And what types of questions was he  
17 asking you about the bagel business during these  
18 initial calls?

19 A. Well, initially, of course, Robby was excited  
20 about wanting to do a business of sorts, and open his  
21 own business. And he had heard so much about our  
22 business from his father that he just got excited  
23 about the possibility.

(RP Vol. I, 102:7-23.)

**b. Discussions Leading Up To the Consulting Agreement.**

After that initial call, Mr. Mackey and Mr. Kosterow had numerous telephone conversations. Mr. Mackey asked Mr. Kosterow

general financial questions, such as whether the businesses "make any money" and "[h]ow much does it cost to get going?" (RP Vol. I, 102:4-103:6.) Mr. Kosterow provided other general information, such as what equipment Mr. Mackey would need and where he could find it. (RP Vol. I, 103:2-19). In the summer of 1997, Mr. Mackey traveled from Florida to Washington and spent several days reviewing Mr. Kosterow's bagel business operations.

On July 16 1997, Mr. Mackey sent a letter to Mr. Kosterow thanking him for all this help. (RP Vol. I, 104:6-14; Ex. 1.) In his letter, Mr. Mackey thanked Mr. Kosterow "for taking the time to speak with me the other day. It was a very informative discussion and your insight is very valuable to me." (Ex. 1.) Mr. Mackey wrote that he and his wife Janet were "moving along in our start up process and I wanted to try to finalize our possible working relationship." (Ex. 1.) Mr. Mackey stated he had "visited many operations and found yours to be the best. I would like to utilize your consulting services in our start up." Mr. Mackey concluded by making a proposition to Mr. Kosterow: "I will pay you 2% of the gross sales on a yearly basis until a sum of \$50,000 has been reached. At that time this agreement will terminate." (Ex. 1.)

Mr. Kosterow did not accept this particular proposal. Instead, both Mr. Kosterow and Mr. Mackey continued to negotiate the

terms of the consulting agreement, and they both employed counsel to assist them in drafting a formal agreement. (Exs. 5, 8, 9, 10.)

These discussions almost broke down, however, over whether Mr. Mackey would be agree to treat Mr. Kosterow's information as proprietary and keep it to himself. (RP Vol. I, 116:5-25.) While they were negotiating the terms, Mr. Mackey balked and—in a letter sent by his attorney—refused to enter into a restrictive covenant. As his attorney wrote: "For the reasons stated hereinabove, and others, I cannot in good faith advise my client to enter into a restrictive covenant." (RP Vol. I, 117:16-118:7; Ex. 9.)

Mr. Kosterow responded by having his lawyer send a letter breaking off the discussions: "It is unfortunate that you do not believe that [Kosterow] has a legitimate business interest that is protectable with a covenant not to compete. Because you cannot advise your client to agree to such protections, [Kosterow] is not interested in continuing discussions with Mr. Mackey and Bagelheads." (RP Vol. I, 119:4-16; Ex. 10.)

Soon thereafter, however, Mr. Mackey relented, the parties picked up their negotiations, and they continued their ongoing discussions regarding the bagel business. Mr. Kosterow recalled the resumption of talks:

17 Q. Okay. But that's not the end of our story,

18 is it?

19 A. It's not.

20 Q. Okay, that's a rhetorical question, you don't  
21 have to answer that. Did you have further  
22 discussions with Mr. Mackey, directly, after that  
23 letter was sent out by your attorney?

24 A. It wasn't very long after that that Robby  
25 called and then we started talking like Robby and I  
1 were talking before the lawyers got involved. Robby  
2 thought his lawyer might have gone a little too far  
3 and that he still was very interested in doing a  
4 Sunrise store and he'd like to continue on the  
5 journey in that direction.

6 Q. So based on that conversation with him, did  
7 you decide to proceed forward with Mr. Mackey?

8 A. Yes, I did.

(RP Vol. I, 119:17-120:8.)

**c. Key Provisions of The Consulting Agreement.**

Eventually, in May of 1998, the parties executed a written Consulting Agreement. (RP Vol. I, 145:11-25; Ex. 21.) The agreement contained two key provisions that are at the heart of this lawsuit.

The first key provision pertained to the terms of Mr. Kosterow's compensation:

4. Compensation: As compensation for its independent contractor services and for the disclosure and use of such recipes, formulas, methods, techniques, supplier information, etc., the Corporation shall pay to Consultant 2% of the Corporation's gross sales from each bagel store location owned by Bagelheads, Inc., owned by family members of Robert Mackey, Jr., or a branch in which Robert Mackey, Jr. owns no less

than fifty-one percent (51%), arising from the sale of its bagel and related products for the initial consecutive four (4) year period of each bagel store location operation.

The second key provision prohibited disclosure of the information provided:

5. Non-Disclosure: Corporation and its shareholders hereby covenant that it shall not divulge any of the information regarding the bagel operation business received from Consultant, nor shall it utilize any of such information in any bagel business operation other than one solely in conjunction with the family members of Robert Mackey, Jr., or one in which Robert Mackey, Jr. has no less than fifty-one percent (51%) ownership interest therein of which this Agreement shall apply.

These two provisions worked together to impose certain duties and obligations on the Mackeys. The Mackeys were obligated to pay 2% of the gross sales of any store of which they owned "no less than fifty-one percent." And they had a duty not to divulge or use any of the information received from the Kosterows unless they owned "no less than fifty-one percent" of the store. As a result, the Mackeys could use the information only for stores of which they had a majority interest, and—for four years after the store opened—they would have to pay 2% of the store's gross sales to Mr. Kosterow.

At the trial, Mr. Kosterow discussed the intention behind the fifty-one percent floor of ownership.

25 Q. Okay. And why was it important for you to  
1 put limits on the number of stores or ownerships Mr.  
2 Mackey had in other stores? Can you explain that to  
3 us?

4 A. Why it was important?

5 Q. Yeah, why was that important to you to have  
6 limits on other stores?

7 A. Well, I think the importance to Donna and I  
8 were that we knew the Mackeys and we knew bob [sic] and  
9 Julia very well. We therefore trusted Robby. It was  
10 thousands of miles away from Vancouver, Washington,  
11 and there was no way I could possibly know what was  
12 happening unless Robert was a full owner -- a major  
13 owner in a store.

(RP Vol. I, 109:25-110:13.)

**d. Performance by Mr. Kosterow.**

At trial, Mr. Mackey tried to convince the jury that Mr. Kosterow had failed to live up to his end of the Consulting Agreement by refusing to provide crucial information that Mr. Mackey needed to make his business successful. Mr. Mackey testified that Mr. Kosterow refused to tell Mr. Mackey the formulation of the flour Mr. Kosterow used to make his bagels. On cross-examination, Mr. Mackey testified as follows:

5 Q. Okay. And you asked Mr. Kosterow for the  
6 formulation of the flour and he said, "No, I'm not  
7 gonna tell you that"?

8 A. I don't think he said it in that tone, but

9 indicated that he was not going to tell me.  
10 Q. Well, I'm sure he didn't use my tone cuz  
11 he's a much nicer man than I am. But be that as it  
12 may, you're saying to the jury that in February of  
13 1999, less than a year of going into the contract  
14 where he's supposed to "Use his best faith efforts to  
15 tell you everything that you need to know about  
16 recipes, suppliers, techniques, etcetera necessary and  
17 desirable for the successful operation of the bagel  
18 operation business," but where Mr. Kosterow drew the  
19 line was, "I'm not telling you about my flour." Is  
20 that your testimony?  
21 A. I guess it is.

(RP Vol. I, 227:5-21.)

Mr. Kosterow denied this allegation, and he testified in rebuttal that the formulation was no secret and was readily available on the label on the flour bags or from the flour supplier. The jury did not find that Mr. Kosterow had failed to perform any of his obligations under the contract, and Mr. Mackey does not suggest on appeal that the jury erred in this regard. In fact, Mr. Kosterow diligently performed all of his obligations under the contract, and he provided Mr. Mackey information regarding every conceivable aspect of the bagel business.

For example, Mr. Kosterow directed his staff to train Mr. Mackey in every aspect of how to make the bagels. Mr. Mackey stayed with the Kosterows and went to the store for an entire week on that trip. (RP Vol. II, 62:18-62:5.) Mr. Kosterow not only provided Mr. Mackey with all the Sunrise Bagels recipes, he allowed Mr. Mackey

to work side-by-side with Mr. Kosterow's head dough maker. (RP Vol. I, 147:8-148:12.) Mr. Mackey even hired Mr. Kosterow's dough maker, who moved to Florida and started making bagels for the Mackeys. (RP Vol. I, 147:8-148:12.) Mr. Kosterow shared with Mr. Mackey the knowledge acquired from years of experience of how you can make 60 varieties of bagels without cross-contamination or excessive waste. (RP Vol. I, 116:5-25.)

In addition to the recipes and techniques for mass producing many different varieties of bagels, Mr. Kosterow provided Mr. Mackey with detailed information regarding the equipment he would need to acquire to replicate the manufacturing process in Florida. Mr. Kosterow told Mr. Mackey what types of mixers, proofers, and ovens he would need. (Ex. 7.) Mr. Kosterow told Mr. Mackey that he should look for used equipment, what prices he should expect to pay, and what equipment vendors and brokers he should contact. (Ex. 12.) Mr. Kosterow tracked down particular equipment and passed the information along to Mr. Mackey. Mr. Kosterow sold some of his own equipment to Mr. Mackey at a substantial reduction off of new prices. (Ex. 12.) Mr. Mackey admitted to all of this on cross-examination:

18 Q. Let me ask you this, Mr. Mackey. In order  
19 to help you start up your bagel business you also  
20 asked Mr. Kosterow for advice regarding equipment to

21 be used in the production of bagels, is that right?

22 A. Yes.

23 Q. And he told you what equipment he

24 recommended you should use, correct?

25 A. He did.

1 Q. Okay. And he provided you with equipment

2 lists, correct?

3 A. He did.

4 Q. And he provided you with pricing information

5 about new and used equipment, correct?

6 A. He did.

7 Q. And he gave you leads on where you might be

8 able to buy used equipment at a discount, right?

9 A. He did.

10 Q. He put you in touch with equipment brokers?

11 A. Yes.

(RP Vol. II, 63:18-64:11)

In addition to the manufacturing equipment, Mr. Kosterow provided Mr. Mackey with extremely detailed lists of the dozens of ancillary appliances, utensils, and kitchenwares he would need to operate his business. (Ex. 15) He advised Mr. Mackey on what size of cooler he would need, how many oven racks he would need, whether he would need a "grease trap," etc. (Ex. 16.) Mr. Kosterow's wife, Donna, prepared a list of all the smallwares that the Mackeys would need for their store—such as bowls, aprons, scrapers, knives—and she used her reseller's license to obtain the items for the Mackeys at wholesale prices. (Ex. 20.)

In addition, Mr. Kosterow provided Mr. Mackey with extensive information regarding how to lay out his entire store, from the

manufacturing area, to the display area, to the seating area, to the drive-through espresso window. When Mr. Mackey came to Vancouver to spend a week to learn the entire process, he brought a video of the inside of his store location and asked Mr. Kosterow for ideas of how to deal with an inconveniently placed structural column. (RP Vol. II, 10:4-11:4.)

Mr. Mackey sent Mr. Kosterow rough layouts of his store and asked Mr. Kosterow to provide a design that Mr. Mackey could use to "submit to the Restaurant board so we can start the approval process." (Ex. 14.)

Mr. Kosterow worked late into the evening, drawing upon his training as a mechanical draftsman and on his experience in designing numerous bagel stores, and he provided Mr. Mackey with detailed, properly scaled drawings showing where to put everything, from the register, to the display cases, to the tables, to the toaster, to the proofers and ovens. (Ex. 15). Mr. Mackey admitted to all of this on cross-examination. (RP Vol. II, 68:19-19.)

Using his vast experience, Mr. Kosterow also advised Mr. Mackey on some of the technical aspects of his operation. For example, Mr. Mackey solicited advice on whether he needed a "water meter and chiller for the mixer," whether he needed a low-flow walk in cooler, what "water and power requirements do we need for the

equipment," and whether "the soda head going [sic] to be on the coffee bar." (Ex. 16.)

In addition to all of this operational information, Mr. Mackey sought and received financial information from Mr. Kosterow. Mr. Mackey sent Mr. Kosterow a financial pro forma for a "reality check" to "make sure that Jan and I are not deluding ourselves." (RP Vol. I, 121:13-19; Ex. 11.) Mr. Kosterow provided Mr. Mackey with a break-even analysis and discussed with Mr. Mackey what costs he was "willing to reduce through aggressive management." (RP Vol. I, 121:20-122:8; Ex. 11.) Mr. Kosterow shared with Mr. Mackey a set of financial pro formas that Mr. Kosterow had prepared for a store that he had planned on opening, to show the financial assumptions and projections for the first few years of operation. (RP Vol. I, 224:12-225:6.) As Mr. Kosterow testified on cross-examination, he gave Mr. Mackey "the structure of how to put a business plan together. Along with that would be some financials of bagel operations and the most recent one was the Greenfield mill that was in Gresham. And it had a total spreadsheet of all costs, startup costs, equipment cost, labor and so forth." (RP Vol. I, 224:16-24.)

Mr. Kosterow also put Mr. Mackey in touch with his various suppliers. Mr. Kosterow put him in touch with Sysco Foods and, to help Mr. Mackey, Mr. Kosterow vouched for Mr. Mackey's credit in

response to a questionnaire from Sysco Foods. (RP Vol. I, 123:6-16.)  
Mr. Kosterow put Mr. Mackey in touch with his coffee supplier,  
Bridgetown Coffee, and Mr. Mackey used Bridgetown to supply his coffee  
needs. (RP Vol. II, 173:14-24.) Mr. Kosterow provided Mr. Mackey  
information on how to maximize his output and minimize waste, how to  
rotate the ingredients for making sandwiches, and gave Mr. Mackey free  
run of his office to review and copy whatever information he wanted to  
take back with him to Florida. (RP Vol. I, 148:13-25.)

In sum, Mr. and Mrs. Kosterow did everything in their  
power, and provided all the information they were asked for by  
Mr. Mackey, to help the Mackeys succeed in their new bagel business.  
With the exception of his controverted claim regarding Mr. Kosterow's  
refusal to provide the flour formulation, Mr. Mackey did not testify to a  
single thing he asked that Mr. Kosterow did not try his best to answer.  
Mr. Mackey admitted that it made sense to pay money to draw upon  
Mr. Kosterow's experience to avoid the pitfalls of starting a new bagel  
business:

- 12 Q. ... And it  
13 made sense to pay Mr. Kosterow to get all this  
14 information from him, right?  
15 A. It did.  
16 Q. It was better than trying to figure it out  
17 on your own, wasn't it?  
18 A. It was more efficient.

19 Q. And it helped you avoid some of the pitfalls  
20 of starting a new bagel business, right?

21 A. It did.

(RP Vo. II, 71:12-21.)

**e. Breaches by Mr. Mackey.**

**(1) Failure to Make Quarterly Payments and Accountings.**

Mr. Mackey opened his store in Pensacola in 1998. Under the terms of the Consulting Agreement, Mr. Mackey was obligated to provide Mr. Kosterow with an accounting every quarter, showing his gross sales for the period, along with a check equal to 2% of those gross sales. Section 4(b) of the Agreement states clearly that: "Corporation shall make quarterly accountings and payments to consultant on a regular basis during the term of this Agreement." (Ex. 21.)

Mr. Mackey completely and utterly failed to meet this obligation. Mr. Kosterow never received a single payment on time, and other than handwritten notes from Mr. Mackey purportedly stating his monthly sales for the period, he never received a proper accounting from Mr. Mackey. (RP Vol. I, 155:2-16.) Mr. Kosterow had to remind Mr. Mackey repeatedly of his payment and accounting obligations, including sending him nine "reminder" letters when the payments were

long overdue. (Exs. 23, 25, 27, 29, 31, 32, 34, 35, and 36.) As

Mr. Kosterow succinctly summarized Mr. Mackey's breaches:

2 Q. Okay. Now did Mr. Mackey ever provide you  
3 with a verif -- anything from an accountant showing  
4 his sales?

5 A. Never.

6 Q. Did he make regularly quarterly -- regularly  
7 -- I must be getting tired. Did he make regular  
8 quarterly payments to you starting right off the bat?

9 A. Never.

(RP Vol. I., 155:2-9.)

Mr. Mackey repeatedly promised that he would provide Mr. Kosterow with an accounting, but he never did. In March 1999, Mr. Mackey wrote that he "was in the process of doing a full financial statement with our accountant. I will forward you a copy of this for 1998." (Ex. 24.) Mr. Mackey never did. Then, in April 2000, Mr. Mackey wrote: "I will forward the financial statements when I get them." (Ex. 26.) Mr. Mackey never did. Then, in May 2001, Mr. Mackey wrote: "In 2001 we switched over to QuickBooks so I am sending a copy of our 1<sup>st</sup> quarter report." (Ex. 30.) Mr. Mackey did not send any such report.

The evidence suggested there was no valid reason why Mr. Mackey never provided an accounting. Mr. Mackey admitted that his

store used a sophisticated "Point-of-Sale" system that could easily generate daily, weekly, monthly, quarterly, and annual reports.

20 Q. Okay. That's fine. This POS system that  
21 you installed in your store, you put it in right from  
22 the get go, right?

23 A. Yes.

\*\*\*

4 Q. Does it also keep track of the receipts?

5 A. It does a daily cash sheet for us with  
6 taxes and everything on it.

7 Q. And it sounds like a pretty fancy system?

8 A. It is.

9 Q. And you had it from the beginning, right?

10 You could have printed off monthly receipts from that  
11 system, right?

12 A. Probably.

13 Q. Could have printed off quarterly receipts  
14 from that system?

15 A. I probably could.

16 Q. Annual receipts.

17 A. I imagine I could.

18 Q. It was very easy to generate sales reports  
19 from that system, wasn't it?

20 A. It was.

(RP Vol. II, 221:20-222:20.)

But when asked to explain why he never provided

Mr. Kosterow with any quarterly accounting, Mr. Mackey said he did not have the time.

16 Q. Okay. Now with regard to -- well, onto the  
17 consulting agreement you were obligated to provide  
18 quarterly payments. Do you understand that?

19 A. I do.

20 Q. Okay. And you understood that those were a  
21 percentage of the gross receipts for that quarter?

22 A. I did.

23 Q. And you understand that you were obligated  
24 to provide an accounting of some sort with that?

25 A. I did.

1 Q. And there was testimony today by you that in  
2 several communications you -- Mr. Kosterow you stated  
3 you would provide QuickBooks and accounting summary,  
4 but that never happened?

5 A. It did not.

6 Q. Okay, and why don't you explain why that  
7 never happened?

8 A. You know, we wanted to, we intended but it  
9 just -- we worked every day and it's one of those  
10 things, among many, that just got put off and put  
11 off.

(RP Vol. II, 201:16- 202:11.)

## (2) Underpayments of Gross Sales.

In addition to admittedly breaching his obligation to make quarterly payments and provide quarterly accountings, Mr. Mackey also admittedly under-reported the "gross sales" from his Pensacola store. The 2% fee was supposed to be based on the "gross sales," which were defined broadly in Section 4(a) of the Consulting Agreement as "the sales price of all such bagel and all products produced and/or sold by the Corporation ..." (Ex. 21) Mr. Mackey admitted that his store made *wholesale* sales, but he calculated the amount owed to Mr. Kosterow based on his sales tax returns, which reflected only *retail* sales. When asked for his explanation for this under-reporting and underpayment, Mr. Mackey said it was a "mistake."

1 Q. Okay. And in '01 you began selling  
2 wholesale?  
3 A. That's correct.  
4 Q. And who did you begin selling wholesale to?  
5 A. To the Nine Mile Road store to (inaudible).  
6 Q. Okay. And were your -- those sales reflected  
7 in your sales tax returns?  
8 A. No, they were not.  
9 Q. So can you explain why you were using your  
10 sales tax returns to calculate your gross income for  
11 Mr. Kosterow?  
12 A. It was clearly a mistake on my part. I had  
13 been doing it for three years and I just didn't adapt  
14 to the changes of doing it any differently.

(RP Vol. II, 206:1-14.)

At the conclusion of trial, Mr. Kosterow asked the jury award him damages for these underpayments. The jury awarded him \$994.49 in damages, which was the amount of the underpayment admitted to by Mr. Mackey. This damage award is not contested on this appeal

### **(3) Taking a 50.5% Ownership.**

As mentioned above, Mr. Kosterow was concerned about receiving payments and protecting his information if Mr. Mackey became involved with bagel stores in which he was not a majority owner. As Mr. Kosterow put it: "[W]e knew the Mackeys and we knew bob [sic] and Julia very well. We therefore trusted Robby. It was thousands of miles away from Vancouver, Washington, and there was no way I could possibly know what was happening unless Robert was a full owner -- a

major owner in a store." (RP Vol. I, 109:25-110:13.) Accordingly, Section 5 of the Consulting Agreement required that Mr. Mackey could only use the information provided by Mr. Kosterow if Mr. Mackey owned "no less than fifty-one percent" of the store. (Ex. 21.) And, if Mr. Mackey owned "no less than fifty-one percent" of a store, than he had to pay Mr. Kosterow 2% of the store's gross sales for the first four years of such ownership. (Ex. 21.)

With full knowledge of these contractual provisions, Mr. Mackey devised a scheme wherein he thought he would be able to operate another bagel store down the road in Pensacola Beach, have a controlling interest in the store, but not have to pay Mr. Kosterow his 2% fee. Mr. Mackey's idea was to acquire a **50.5%** interest in another bagel store, thus exploiting what he thought was a loophole in the contract.

Mr. Mackey admitted to these facts on cross-examination:

9 Q. ... Now I want to talk about the 50.5% solution  
10 quickly. You've admitted that the reason you took a  
11 50.5% interest in the Pensacola Beach store was  
12 because you didn't want the 2% provision to kick in,  
13 isn't that right?

14 A. That's correct.

15 Q. And your attorney asked you why and you  
16 said, "well, because I didn't use any of the  
17 information that Mr. Kosterow gave me by the time I  
18 started getting into that store," right?

19 A. I don't know what my attorney -- I can't  
20 remember exactly.

21 Q. Was that one of your reasons for why you

22 didn't think you should have to pay 2% to Mr.  
23 Kosterow?  
24 A. We did not feel we should pay 2%. It had  
25 been six years since we had gotten any information  
1 from him and we were no longer using one single piece  
2 of it.  
3 Q. That's right. So you felt justified in not  
4 paying him under the contract, even though you knew  
5 under the contract that if you had a 51% ownership in  
6 that store you would have to pay 2% for the first  
7 four years of your 51% ownership, right?  
8 A. Right. We felt that \$51,000 was enough.  
9 Q. Now it doesn't say in here anywhere that you  
10 have to have 51% and use the information that he gave  
11 you in order for this 2% provision to kick in, does  
12 it?  
13 A. I don't understand what you're saying.  
14 Q. Let me -- I'll break it down. It didn't  
15 matter whether or not you used the information he  
16 gave you. The simple fact that you owned 51% of the  
17 store is what obligated you to pay 2%, right?  
18 A. I believe so.  
19 Q. Okay. And you knew that and that's why you  
20 chose 50.5%?  
21 A. That's correct.

(RP Vol. II, 228:9-229:21.)

Mr. Kosterow did not learn of this Pensacola Beach store from Mr. Mackey. (RP 107:12-21.) Instead, Mr. Kosterow only found out about this store when his friend from Bridgetown Coffee mentioned the Pensacola Beach store. (RP 182:17-183:10.) Mr. Kosterow asked the jury to award him 2% of the sales of the Pensacola Beach store. The jury did, awarding Mr. Kosterow \$24,000 based on Mr. Mackey's testimony estimating the gross sales during the relevant time period in the range of

\$1.2 million. Mr. Mackey appeals from the finding that his 50.5% ownership in this store obligated him to pay Mr. Kosterow 2% of the store's gross sales.

**(4) Breach of the Non-Disclosure Provisions.**

As quoted above, Section 5 of the Consulting Agreement contained a broad non-disclosure provision, and Mr. Mackey's testimony showed he understood the provision prohibited him from divulging or using any of the information in conjunction with any store that he did not own.

3 Q. Okay. Why don't you look at Exhibit 21.

4 21, yes, the contract and on Page 2 there's a

5 Paragraph 5 and it's entitled "Non-Disclosure," right?

6 A. Yes, sir.

7 Q. Okay. And then it says, "Corporation and its  
8 shareholders," that's you and your wife, right?

9 A. Yes, sir.

10 Q. "Hereby covenant that it shall not divulge

11 any of the information regarding the bagel operation

12 business received from consultant," that's Mr.

13 Kosterow, right?

14 A. Yes, sir.

15 Q. "Nor shall it utilize any of such

16 information in any bagel business operation other than

17 one solely in conjunction with the family members of

18 Robert Mackey Jr. or one in which Robert Mackey Jr.

19 has no less than a 51% ownership interest." So you

20 understood that you were supposed to keep all the

21 information that you received from Mr. Kosterow

22 confidential, right?

23 A. Yes.

(RP Vol. II, 79:3-23.)

But shortly after making this promise to Mr. Kosterow, Mr. Mackey secretly began holding himself out in Florida as a consultant to others who wanted to open their own bagel stores. The first person Mr. Mackey consulted with was his scuba diving friend, Mr. Kerry Freeland. Mr. Freeland owned a local dive shop, but he had not prior experience in the bagel business, and Mr. Mackey admitted that he was the "sole source of information to Mr. Freeland on how to run a bagel store ...." (RP Vol. II 81:13-18.) Mr. Freeland wanted to open a Bagelheads store, known at the "Nine Mile Road" store, so Mr. Mackey presented Mr. Freeland with a written agreement that echoed the one Mr. Mackey had with Mr. Kosterow. (RP Vol. II, 83:23-84:8.)

Under Section 4 of Mr. Mackey's agreement with Mr. Freeland, Mr. Mackey promised to "render consulting services and training to Retailer [Mr. Freeland] to assist Retailer in its retail sales of Company's Products as may be reasonably desired by Retailer."

Mr. Mackey admitted he did just that, and that he was paid 2% of Mr. Freeland's gross sales, just as Mr. Mackey was still paying Mr. Kosterow 2% of his sales.

- 6 Q. Okay. So under this contract you were  
7 obligated to provide consulting services and training  
8 to Mr. Freeland to assist him in selling bagels and  
9 cream cheese at the Nine Mile Road store, right?  
10 A. Yes.

11 Q. And in exchange for that you were going to  
12 receive a percentage of his sales, right?  
13 A. Yes.  
14 Q. And your ultimate agreement with his was he  
15 was going to pay you 2% of his sales, isn't that  
16 right?  
17 A. That's correct.  
18 Q. Just as you were paying 2% of your sales to  
19 Mr. Kosterow, right?  
20 A. That's correct.

(RP Vol. II, 85:6-19.)

Mr. Mackey went often to Mr. Freeland's store, both before and after it opened, to provide advice on the operation of the bagel store. (RP Vol. II, 85:21-86:6.) In addition to an upfront fee of \$7,000, Mr. Freeland paid Mr. Mackey 2% of his gross sales—which were roughly \$50,000 per month—for the first four years of operation. (RP Vol. II, 87:21-89:3). In sum, Mr. Mackey received at least \$40,000 from Mr. Freeland under their agreement.

Mr. Mackey's agreement with Mr. Freeland also had lengthy non-disclosure and non-competition provisions that echoed the agreement Mr. Mackey had with Mr. Kosterow. Like Mr. Kosterow's agreement, Section 10 of the Mackey/Freeland contract required Mr. Freeland to treat as confidential "[a]ll business information and all materials containing business information provided by Company to Retailer, including but not limited to lists of present or prospective

customers or vendors ..., methods of operation ..., pricing policies ..., plans or strategies ..., " etc. (Ex. 48.) The provision required Mr. Freeland to acknowledge that any "unauthorized disclosure or other breach of this provision will cause irreparable injury to Company ...." (Ex. 48.)

Mr. Mackey's consulting activities were not limited to Mr. Freeland. In September 2001, Mr. Mackey entered into the same arrangement with two individuals, Joseph Parnell and James Richardson, who wished to open a bagel store in Fort Walton Beach, Florida. (RP Vol. II, 89:4-14; Ex. 49.) Like the deal with Mr. Freeland, Mr. Mackey promised to give these two individuals all the information they needed to open their own bagel store, and they agreed to pay Mr. Mackey 2% of their gross sales. (RP Vol. II, 89:18-91:9.) The contract with Messrs. Parnell and Richardson contained the same type of non-disclosure and non-competition provisions as did the contract with Mr. Freeland. Mr. Mackey received more than \$5,000 in payments from the owners of the Fort Walton Beach store. (RP Vol. II, 92:2-93:4.)

Thereafter, Mr. Mackey entered into a similar consulting agreement with another acquaintance, Mr. Rick Finch, who wanted to open a bagel store in Pensacola Beach. (RP Vol. II, 103:19-25; Ex. 39.) Mr. Finch was a pharmaceutical salesman with no experience in the bagel business. (RP 103:19-105:17.) The agreement between Mr. Mackey and

Mr. Finch was similar to the agreements with Mr. Freeland and with Messrs. Parnell and Richardson, with one interesting change.

By the time he entered into his agreement with Mr. Finch, Mr. Mackey believed that Mr. Kosterow was intending to sue him for breach of the Consulting Agreement. Mr. Mackey thereafter inserted the phrase "for no additional payment or fee" into the section entitled "Consulting Services." Thus, Section 4 of the Mackey/Finch agreement provided: "Consulting Services. Company, *for no additional payment or fee*, shall render consulting services and training to Retailer to assist Retailer in its retail sales of Company's Products as may be reasonably desired by Retailer." (Ex. 39 (emphasis added.)) Mr. Mackey did not explain to the jury why he added this phrase, but the jury could have reasonably inferred he did it to make it seem like the fees paid by Mr. Finch were not for consulting services, and therefore Mr. Kosterow would not be able to claim those fees as damages in the impending lawsuit. In any event, Mr. Mackey received 4% of Mr. Finch's gross sales under his agreement with Mr. Finch. (EX. 39, Section 2.)

In sum, there was substantial evidence presented to the jury showing that Mr. Mackey never provided quarterly accountings, he never made timely quarterly payments, he under-reported his sales from his main store by excluding wholesale sales and only paying on reported retail

sales, he acquired a 50.5% interest in another store with the admitted intention of avoiding the 2% fee that was due to Mr. Kosterow, and—even though he promised to keep all information he received from Mr. Kosterow confidential and to refrain from using any of that information for stores in which he was not a majority owner—Mr. Mackey became a consultant to four other novices to help them start their own bagel stores in which Mr. Mackey had no ownership interest.

**C. The Jury's Verdict and the Entry of Judgment**

At the close of the evidence, Judge Nichols read the jury instructions to the jury and the attorneys made their closing arguments. Mr. Mackey had no objections or reservations to any of the jury instructions as read by the Judge and as given to the jury in writing. Mr. Mackey also had no objection to the Special Verdict form that was given to the jury and used by the jury in rendering its verdict. Mr. Mackey had no objections to Mr. Kosterow's closing argument, and no evidentiary rulings were made against Mr. Mackey. The jury deliberated and filled out the Special Verdict form that the jurors had been provided.

According to the jurors' answers on the special verdict form, the jury found that Bagelheads, Inc. had breached the payment provision of the Consulting Agreement "by not paying plaintiff 2% of the gross sales from" the main Bagelheads store. The jury found that

Mr. Kosterow was damaged by this breach and awarded him \$994.49.

(CP 432.) Appellants do not appeal from this finding.

The jury also found that Bagelheads, Inc. had breached the payment provision of the Consulting Agreement "by not paying plaintiff 2% of gross sales from any store other than" the main store. The jury found that Mr. Kosterow was damaged by this breach and awarded Mr. Kosterow \$24,000. (CP 433.) Bagelheads, Inc. appeals from the jury's finding of this breach. (Assignment of Error 1.)

The jury also found that both Bagelheads, Inc. and Mr. Mackey breached "Section 5 of the Consulting Agreement," the non-disclosure provision, and that Mr. Kosterow suffered damages as result of Mr. Mackey's unauthorized disclosures to third parties. The jury awarded Mr. Kosterow \$27,200 in damages for this breach. (CP 433-34.) Mr. Mackey and Bagelheads, Inc. appeal from the jury's finding of breach and its award of damages. (Assignments of Error 2 and 3.)

Lastly, the jury found that none of the defendants had misappropriated trade secrets in violation of the statute. This finding was not appealed.

**D. None of Appellants' Assignments of Error Has Any Merit**

**1. Appellants Failed to Preserve Error Regarding the "51%" Clause.**

Under the terms of the Consulting Agreement, Mr. Mackey was prohibited from being involved with any bagel store unless he owned "no less than fifty-one percent (51%)" of the store. It was important to Mr. Kosterow that Mr. Mackey be a majority owner of any such store because Mr. Kosterow, who was three thousand miles away, only knew and trusted Mr. Mackey. From the very commencement of this lawsuit, Mr. Kosterow claimed that Mr. Mackey broke his promise by taking a 50.5% ownership interest in a store in a deliberate attempt to avoid paying Mr. Kosterow 2% of the store's sales.

At the conclusion of trial, the jury received several instructions that related to Mr. Kosterow's claim. The court instructed the jury that the meaning of the terms used in the contract should be determined by the jury based on the parties' conduct, language, and circumstances:

8 Instruction number 6, the meaning of the term used in  
9 alleged contract are determined by the intent of the  
10 parties. You should determine what plaintiff and  
11 defendant intended in connection to mean by examining  
12 their conduct, their language, and their circumstances  
13 that existed at the time they allegedly entered into  
14 a contract. When the terms of a contract are  
15 unambiguous the intent of the patties [sic] must be

16 discerned from the language used in the document  
17 itself.

(RP Vol. III, 51:8-17.)

The court also instructed the jury that there is an implied  
duty of good faith and fair dealing in every contract:

17 Instruction number 6a, a duty of good faith  
18 and fair dealing is implied in every contract. This  
19 duty requires a party to cooperate with each other so  
20 that each may obtain the full benefit of the  
21 performance. However, this duty does not require a  
22 party to accept a material change or terms of its  
23 contract.

(RP Vol. III, 51:17-23.)

The court also provided the jury with a special verdict  
form, which asked the jury whether Appellants had breached the contract  
by "not paying 2% of gross sales from" the 50.5% store. The jury  
answered this question in the affirmative and awarded Mr. Kosterow  
\$24,000 for this particular breach of the contract. (CP 433.)

On this appeal, Appellants claim it was error for the trial  
court to allow the jury to find this breach and to award these damages.  
Appellants argue that "51%" is an unambiguous contract term and,  
therefore, the jury should not have been allowed to find that the contract  
applied to a store in which Mr. Mackey owned a 50.5% interest.  
Appellants argue that "the issue should never have been submitted to the

jury in the first place" and that the contract did not entitle Mr. Kosterow any payments from the 50.5% store "as a matter of law."<sup>1</sup>

The long-standing general rule in Washington is that "[a]n issue, theory or argument not presented at trial will not be considered on appeal."<sup>2</sup> The primary reason for this rule is judicial economy. "The rule reflects a policy of encouraging efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial."<sup>3</sup> Not only is it inefficient and unfair to the trial court, but it is also unfair to the opposing party to allow appellants to raise new issues for the first time on appeal.

Here, Appellants clearly are raising a new issue for the first time on appeal. Mr. Mackey never argued to the trial court that Mr. Kosterow's claim was barred "as a matter of law." Mr. Mackey did not bring any motion to dismiss or motion for judgment on the pleadings to strike this claim. Although he brought a motion for partial summary judgment on other claims, Mr. Mackey never brought any such motion relating to this claim. Mr. Mackey argues that this issue should never have been allowed to reach the jury, but Mr. Mackey did not object to the

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<sup>1</sup> Brief of Appellants, p. 17.

<sup>2</sup> *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

<sup>3</sup> *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

jury instructions allowing the jury to discern the meaning of the terms used in the contract and imposing a duty of good faith and fair dealing on both parties to the contract—either one of which could have supported the jury's finding of breach. Remarkably, Mr. Mackey's counsel also conceded in his closing argument that the jury could find the 50.5% solution was a breach of the contract, when he told the jury it was "up to you whether you want to disregard the language of the contract and find that 51% does not mean 51%." Moreover, at the close of trial, Mr. Mackey did not move for any non-suit or directed verdict on this claim, and after the verdict, Mr. Mackey did not move for any judgment n.o.v. to strike the jurors' award of damages on this claim.

In sum, Mr. Mackey's first assignment of error is that "the trial court erred when it entered judgment for Kosterow" on this claim. But Mr. Mackey's defense that "51% means 51%" as a matter of law is a new defense that is being raised for the first time on this appeal. He never raised this defense below, and he never gave the trial court a single opportunity to rule on this defense. Therefore, this issue has not been preserved for appeal and even if it had merit—which it does not—this Court should refuse to sanction Appellants' decision to raise this issue for the first time on appeal. Accordingly, Appellant's first assignment of error has no merit.

**2. The Jury Had Ample Evidence to Find the 50.5% Ownership Breached the Letter and Spirit of the Consulting Agreement.**

Although not stated as a separate assignment of error, Appellants argue that the "verdict requiring Bagelheads to pay royalties for the" 50.5% store was not supported by substantial evidence,<sup>4</sup> and they claim that Mr. Kosterow "presented no evidence that 51 percent meant anything other than 51 percent."<sup>5</sup> Accordingly, the Appellants ask this Court to disregard the jury's verdict and enter a judgment that does not award Mr. Kosterow any payments from the 50.5% store.<sup>6</sup>

Although not expressly stated as such, the Appellant's argument is tantamount to the argument the Appellants would have made to the trial court had the Appellants brought a motion either for a directed verdict or for judgment notwithstanding the jury's verdict. The problem with the Appellants' argument is that it improperly assumes "that the jury was obligated to accept that version of the evidence which was most favorable to the contentions of the appellants and to reject that which supported the position of the respondents."<sup>7</sup>

When an appellant asks the Court of Appeals to throw out a jury's verdict on the grounds it is not supported by substantial evidence,

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<sup>4</sup> Brief of Appellants, p. 3.

<sup>5</sup> Brief of Appellants, p. 22.

<sup>6</sup> Brief of Appellants, p. 23.

<sup>7</sup> *State v. O'Connell*, 83 Wn.2d 797, 838, P.2d 872 (1974).

the Court of Appeals should do so rarely, not to substitute its judgment for that of the jury, and only when there is truly no evidence of any substance that supports the jury's verdict. "As we have said on so many occasions, this court will overturn a jury's verdict only rarely and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict."<sup>8</sup> Moreover, in reviewing the evidence, the appellate court should draw all reasonable inferences in favor of the respondent. "The inferences to be drawn from the evidence are for the jury and not for this court."<sup>9</sup> Finally, "the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered."<sup>10</sup>

In this case, there were numerous facts from which the jury could infer that the use of the term "51%" in the consulting agreement was meant to mean any majority interest. In their brief, Appellants make the bald assertion that Mr. Kosterow "never testified that the parties had agreed that 51 percent really meant 'a majority.'"<sup>11</sup> Not only is this assertion not supported at all by the Appellants' citation to the Report of Proceedings, it also completely ignores the testimony of Mr. Kosterow as the reason he wanted the 51% limitation in the contract.

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<sup>8</sup> *Id.* at 839 (citation omitted).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* (citation omitted).

<sup>11</sup> Brief of Appellants, p. 22.

25 Q. Okay. And why was it important for you to  
1 put limits on the number of stores or ownerships Mr.  
2 Mackey had in other stores? Can you explain that to  
3 us?

4 A. Why it was important?

5 Q. Yeah, why was that important to you to have  
6 limits on other stores?

7 A. Well, I think the importance to Donna and I  
8 were that we knew the Mackeys and we knew bob and  
9 Julia very well. We therefore trusted Robby. It was  
10 thousands of miles away from Vancouver, Washington,  
11 and there was no way I could possibly know what was  
12 happening unless Robert was a full owner -- a major  
13 owner in a store.

(RP Vol. I, 109:25-110:13.)

In addition, the jury could also infer that 51% meant a majority, because it could have reasonably concluded that the understanding of the parties when they entered into the contract was that percentages of ownership would be measured in no less than 1% increments. If the smallest increment of ownership were 1%, then a 51% interest would be the minimum interest an owner could have and still be in the majority. The use of 51% as a legal shorthand for majority is not uncommon.

Finally, the jury could reasonably infer that Mr. Mackey himself understood that 51% meant a majority based on his conduct. Mr. Mackey admitted that it was his idea to take only a 50.5% ownership and the only reason he did so was to avoid paying Mr. Kosterow a percentage

of the store's gross sales. Mr. Mackey tried to justify his position by saying he felt he had paid enough to Mr. Kosterow for his services and he did not want to pay him any more. Mr. Mackey further admitted that that he did not tell Mr. Kosterow about the existence of, or his ownership in, the 50.5% store, and Mr. Kosterow only learned of it from Mr. Jensen, the coffee supplier to both parties.

In sum, there was ample evidence for the jury to find that 51% meant any majority interest and that Mr. Kosterow was due 2% of the gross sales from the 50.5% store. Accordingly, this Court should reject the Appellants' invitation to throw out the jury's verdict and substitute Appellants' proposed finding for that of the jury.

**3. There Was Ample Evidence of Unauthorized Disclosures by Mr. Mackey.**

Viewing the record in the light most favorable to the Respondent, the jury could have reasonably found the following facts to be true. Mr. Mackey had never started or operated a bagel store before consulting with Mr. Kosterow. By the time he consulted with Mr. Mackey, Mr. Kosterow had massive experience gained from starting eight bagel stores. Mr. Kosterow answered every question that Mr. Mackey asked, and Mr. Kosterow provided Mr. Mackey with everything Mr. Kosterow knew about the bagel business. Mr. Mackey used Mr. Kosterow's recipes and techniques for making bagels. Mr. Mackey

promised that he would not divulge or use *any* of the information he obtained from Mr. Kosterow unless Mr. Mackey had a majority interest in the bagel store. While the contract was still in effect, Mr. Mackey began consulting with other individuals who had no experience starting or running a bagel store. Mr. Mackey consulted extensively with these individuals and gave them substantial advice on how to start and run their stores. In addition, Mr. Mackey used the information learned from Mr. Kosterow by supplying his consultees with raw bagel products that Mr. Mackey made using information provided from Mr. Kosterow.

Mr. Mackey told the jury that he did not use any information provided by Mr. Kosterow when Mr. Mackey consulted with Messrs. Freeland, Richardson, Parnell, or Finch, but the jury obviously did not believe Mr. Mackey and found, in the special verdict form, that Mr. Mackey and his company, Bagelheads, Inc., breached "Section 5 of the Consulting Agreement"—the non-disclosure provision. (CP 433.)

In their brief, the Appellants argue that the jury's verdict was not supported by any substantial evidence. But this Court should not "willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before

it."<sup>12</sup> Mr. Mackey cites cases from Florida and other jurisdictions for examples of cases in which the plaintiff failed to prove a non-disclosure claim, but those cases cannot and do not shed any light on the question here: based on all the evidence presented at *this trial*, was *this jury's* finding supported by the evidence and by all the reasonable inferences that can be drawn therefrom in Mr. Kosterow's favor? Appellants' brief has failed to show that this jury's finding was not supported and should be discarded.

**4. The Evidence Supported the Jury's Award of Damages.**

Mr. Kosterow proved that Mr. Mackey earned more than \$45,000 under his various consulting agreements. Mr. Mackey tried to argue to the jury that these payments were not for consulting services, but this argument was contradicted by the terms of Mr. Mackey's own written consulting agreements. These agreements generally obligated the consultees to pay a percentage of their gross sales to Mr. Mackey—over and above payments for any actual products purchased from Mr. Mackey—and they obligated Mr. Mackey to provide all necessary consulting services to the consultees so they could start and operate their own bagel stores. The jury did not award Mr. Kosterow the full amount sought for Mr. Mackey's breach of the non-disclosure provision. Instead,

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<sup>12</sup> *State v. O'Connell*, *supra* at 839 (citation omitted).

the jury awarded Mr. Kosterow \$27,200, roughly half of the total payments received by Mr. Mackey.

In his third assignment of error, Mr. Mackey now argues that Mr. Kosterow should not have been awarded any damages for breach of the non-disclosure provisions because Mr. Kosterow did not prove lost sales profits. But Mr. Mackey provides no authority, from Florida or elsewhere, that lost sales or profits is the only measure of damages available for breach of a non-disclosure provision. There are numerous cases that recognize that payment of a reasonable royalty is a proper measure of damages for breach of a non-disclosure.

For example, in *Perdue Farms v. Hook*, the Florida Court of Appeals affirmed a judgment of \$25 Million for breach of a non-disclosure provision, even though the plaintiff provided no evidence of lost sales or profits.<sup>13</sup> In affirming this award, the court noted that "The plaintiff fulfills its burden of proving damages by showing the misappropriation, the subsequent commercial use, and introduces evidence by which the jury can value the rights the defendant has obtained."<sup>14</sup> If a plaintiff cannot prove lost sales or profits directly attributed to the unauthorized use or disclosure of the information, then "[a] reasonable

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<sup>13</sup> *Perdue Farms v. Hook*, 777 So.2d 1047 (2001).

<sup>14</sup> *Id.* at 1052 (citation omitted).

royalty"—meaning the amount that someone would be willing to pay to use the information—is a proper measure of damages.<sup>15</sup>

Here, Mr. Mackey was willing to pay 2% of his gross sales for use of the information provided by Mr. Kosterow. There is no reason to believe that Mr. Mackey's consultees were unreasonable in agreeing to pay Mr. Mackey the same or similar amount for the use of the information provided to them by Mr. Mackey. Thus, there is ample evidence to support the jury's decision to award Mr. Kosterow at least part of the consulting fees that Mr. Mackey received from his consultee.

Finally, it is particularly ironic that Mr. Mackey would argue that Mr. Kosterow has suffered no damages as a result of Mr. Mackey's unauthorized commercial use of the information provided by Mr. Kosterow. Mr. Mackey required each of his consultees promise, in their written contracts with Mr. Mackey, to keep confidential "all business information" they received from Mr. Mackey, and he required them to acknowledge and agree "that such unauthorized disclosure or other breach of this [confidentiality] provision will cause irreparable injury to" Mr. Mackey's company.<sup>16</sup> Mr. Mackey simply cannot have it both ways.

In conclusion, the jury reasonably found that Mr. Kosterow suffered damages from Mr. Mackey's unauthorized commercial use of the

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<sup>15</sup> *Ibid.*

<sup>16</sup> *See e.g.*, Ex. 48, section 10.

information, and the evidence supported the amount of damages awarded.

Thus, there is no basis for rejecting the jury's award on this appeal.

**E. Mr. Kosterow Is Entitled to His Attorney's Fees on this Appeal.**

Reasonable attorney's fees can be claimed on appeal when they are provided for by contract, statute, or recognized ground in equity.<sup>17</sup> Here, the underlying contract provides that should "any controversy arise out of this Agreement, the prevailing party shall be entitled to recovery of all costs and expenses incurred in settling the controversy, including, but not limited to, all attorneys' fees of every kind, whether incurred by suit or otherwise." (Ex. 21, section 13.) Such a provision is generally interpreted to include attorney's fees on appeal.<sup>18</sup> Thus, should Mr. Kosterow prevail on this appeal, he is entitled to recover all attorney's fees and costs to the maximum extent allowed by law. Pursuant to RAP 18.1, should he prevail on this appeal, Mr. Kosterow will provide this court with an affidavit detailing these expenses within 10 days of this Court's decision.

**F. Conclusion**

The Appellants received a fair trial. Other than one alleged error, which they did not preserve on appeal and which was not an error,

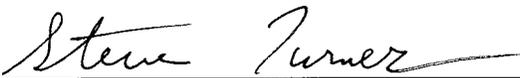
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<sup>17</sup> *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 716 P.2d 959 (1986).

<sup>18</sup> *Marine Enters. V. Security Trading*, 50 Wn. App. 768, 750 P.2d 1290, *rev. denied*, 111 Wn.2d 1013 (1988).

the Appellants do not assign any error to the trial court judge. Therefore, the gravamen of their appeal is that the jury failed to consider the evidence and the court's instructions, and they simply awarded Mr. Kosterow damages on two breach of contract claims for no good reason. While it is understandable that the Appellants were hopeful that the jury would believe their version of the facts—and that they are disappointed the jury did not—there is simply no valid basis for throwing out the jury's verdict, reversing the outcome at trial, and entering judgment in the Appellants' favor. Accordingly, Mr. Kosterow respectfully requests that the jury's verdict, and the court's judgment consistent with the verdict, be affirmed.

Respectfully submitted this 31<sup>st</sup> day of July, 2007.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of July, 2007, I caused  
to be served by United States Postal Mail the foregoing Brief of  
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