

FILED

JUN 23 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 285952-III

COURT OF APPEALS, STATE OF WASHINGTON,  
DIVISION III

FRED AND LESLIE BROWN and FAB VENTURES LLC,

Appellants

vs.

JAMES AND MICHELLE HEREFORD and WAVE VENTURES LLC,

Respondents.

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BRIEF OF APPELLANT

---

HUGH O. EVANS, #6063  
CHRISTOPHER J. KERLEY, #16489  
MARKUS W. LOUVIER, #39319  
EVANS, CRAVEN & LACKIE, P.S.  
Attorneys for Appellants  
818 W. Riverside, #250  
Spokane, WA. 99201  
(509) 455-5200

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## I. INTRODUCTION

In this breach of contract case the parties strenuously disagreed over the meaning of certain contract terms and provisions. The trial court refused to grant either party's motion for summary judgment on whether the contract was breached, finding material issues of fact existed as to the contract's terms.

In the subsequent jury trial, consistent with *Berg v. Hudsmen*, 115 Wn.2d 657, 801 P.2d 212 (1990) the evidence focused on the context of the agreement, with each party arguing the context evidence supported its interpretation of the contract's terms.

In keeping with its summary judgment ruling and the nature of the evidence, the trial court gave WPI 301.05, the "context rule" instruction based on *Berg*. But then the Court, over the plaintiffs' objection, gave a non-pattern "ambiguity" instruction which told the jury that, if they found an ambiguity in the written contract, they should construe the contract "against the party who prepared, or whose attorney prepared, the contract."

Issuance of that instruction was error, for at least three reasons: First, whether an ambiguity exists in a written contract is a question for the court, not the jury. Second, application of the rule of contra proferentem (construing an ambiguity in a written contract against the drafter), was, in any case, inappropriate because the parties were of equal bargaining

strength and both participated in creating the contract. Third, Instruction No. 16 was an erroneous statement of the law because it directed the jury to apply "context rule" principles of construction to create an ambiguity, not resolve one.

## **II. ASSIGNMENT OF ERROR**

The giving of Instruction No. 16 in this breach of contract case was prejudicial error for the following reasons:

- Whether an ambiguity exists in a written contract is a question of law for the court
- Application of contra proferentem was inappropriate, in any case, because the parties were of equal bargaining strength and both participated in creating the written contract.
- Instruction No. 16 was an erroneous statement of the law because it directed the jury to apply "context rule" principles of construction to create an ambiguity, not resolve one

## **III. STATEMENT OF THE CASE**

In 2003 Defendant James Hereford (a defendant below, and hereinafter referred to as "Hereford"), was hired as an employee of Next IT Corporation by its CEO, Fred Brown (a plaintiff below, and hereinafter referred to as "Brown"). RP 105, 119-121. Soon thereafter, Hereford invited Brown to invest in a high-end home to be built in the prestigious Black Rock development outside of Coeur d'Alene, Idaho. RP 120, 123; 690; 696. Hereford needed Brown's backing to obtain financing for the

Project and told Brown he had construction experience which would help keep costs of the Project under control. RP 120-122.

When Hereford approached Brown with the idea, he explained he had already paid for half of the lot on which the home was to be built and had an experienced contractor, Kevin Gunder (hereinafter referred to as "Gunder") in place. RP 121. Hereford further told Brown that Gunder would build the Project without a fee, so long as Brown and Hereford paid the costs of the Project. RP 121. Gunder would receive money only if the Project made a profit, and Brown and Hereford would split the remaining profits 50/50. RP 121-123.

Unbeknownst to Brown, Hereford had a verbal agreement in place with Gunder pursuant to which Hereford would extract a ten-percent "management fee" for the project, irrespective of whether the project showed a profit. RP 485, 690. At no time during construction was Brown aware that Hereford had this side agreement with Gunder that would compensate Hereford beyond the agreed split of profits and serve to guarantee Hereford a financial return on the project. RP 127.

Eventually, Hereford initiated contact with attorney Daniel Cadagan about the subject matter of what became a document titled "Receipt and Investment Management Agreement" ("RIMA"), a written contract regarding the parties' roles in the construction of the house.

Appendix A; EX #56; RP 360; CP 1905. Hereford told Cadagan that his agreement with Brown was for Brown to guarantee a line of credit which would be used by Gunder to build the home. RP 363. When the home was sold, Gunder would receive half of the profits, while the remainder would be split 50/50 between Brown and Hereford. RP 363-364. Hereford admitted at trial that he never told Cadagan he would receive a fee for managing the project. RP 364; 583.

In the wake of this discussion with Hereford, Cadagan put together a draft agreement, and sent it to Hereford via email. RP 360. Hereford made corrections to the document, which he then sent back to Cadagan. RP 361. Both Brown and Hereford reviewed the contract in its final form, and signed it. RP 365. Hereford signed the contract as a member of his limited liability company, defendant WAVE Ventures LLC, while Brown signed as a member of his limited liability company, plaintiff FAB Ventures, LLC. Appendix A; EX #56; CP 1905.

The contract contained the following provisions:

...  
II. Receipt. By authorized initials thereby on the attached Exhibit "A", included herein by reference, WAVE shall acknowledge receipt from the Bank, FAB or others, of each and every amount so received (the "Receipts") of WAVE for purposes of this Investment.

III. Investment Management.

...

WAVE shall not make other investments of the funds received under this Agreement without the advance, written consent of FAB.

...

V. Fees. In as much as WAVE benefits from having FAB join with WAVE in the Investment noted here, WAVE shall not charge FAB any fees for providing the vehicle through which the Investment here noted is made. (emphasis added).

In keeping with his agreement with Hereford, Brown approached Washington Trust Bank CEO John E. Heath III ("Heath") about establishing a line of credit to finance the Project. RP 246-247. Heath had a substantial banking history with Brown and believed Hereford had a background in construction and was therefore capable of overseeing the project. RP 253-254. Hereford did not tell Washington Trust Bank about his management fee. RP 592-593. Heath agreed to lend the funds via a line of credit. RP 248. Brown, through a power of attorney given to his wife, signed an unlimited guarantee for the project. RP 293-294; P 61. The original loan budget for the project was one million dollars. RP 250. During the project, the line of credit was extended dramatically, climbing to \$1.5 million, and eventually \$2.3 million. RP 290-291.

Hereford never asked Brown if he could to use the line of credit for any purpose other than construction costs. RP 127; P 56; CP 1905. Had

Hereford asked him to use the funds for another purpose, Brown would not have allowed Hereford to do so. *Id.*

On December 1, 2003 and March 25, 2004 respectively, Hereford used funds from the line of credit to make purchases of 100,000 and 170,000 shares of Next IT stock. RP 628-629. Hereford testified at trial that the purchases were "advances" on his management fee for the project. RP 534-540. When the home eventually sold in March of 2007 for \$3,720,000.00 Hereford reported a profit of \$1,312.00. RP 612; CP 1899. Hereford's purported "accounting" of the project omitted any reference or discussion of his management fee. RP 582; CP 1899. Hereford did not offer to give any of the profits to either Gunder or Brown. RP 612-613. While the "profit" was only \$1,312.00, Hereford claimed to have earned a management fee of \$345,000.00. RP 637.

#### IV. PROCEDURE BELOW

Brown and FAB Ventures, LLC (hereinafter collectively referred to as 'Brown') filed a *Complaint for Breach of Contract, Conversion, and Constructive Trust* ("*Complaint*") on January 16, 2008. CP 3-10. The *Complaint* alleged conversion, breach of fiduciary duty, breach of contract, Securities Act of Washington violations, fraud, and unjust enrichment. *Id.* Brown's primary contract claims were that Hereford and WAVE, LLC breached the RIMA by Hereford's unauthorized and

undisclosed extraction of the management fee and by his use of the funds to purchase Next IT stock.

Brown filed a Motion for Summary Judgment on the breach of contract claim on May 22, 2009. CP 736-811. Hereford filed a Motion for Partial Summary Judgment on the same date. CP 812-814. Both motions were denied on July 8, 2009, with the Court finding the existence of material issues of fact. CP 896-897.

The case was then tried to a jury. At the close of evidence, the parties submitted proposed instructions. (CP 928-952). Over Brown's objection, the Court issued Instruction No. 16 which had been proposed by Hereford. CP 2018-2047; Appendix B. The Jury returned a Special Verdict form on July 24, 2009, finding that Hereford had not breached the contract with Brown. CP 02058-02062.<sup>1</sup> Brown's post trial motions were denied, and this appeal followed. CP 2290-2292.

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<sup>1</sup> In the wake of the jury's verdict, the trial court entered Findings of Fact and Conclusions of Law on Brown's Unjust Enrichment Claim dated September 9, 2009. CP 2135-2139. The trial court declined to grant equitable relief on the basis of the jury's finding that the contract did not preclude Hereford's management fee. 2138 at para. 8, 2139 at para. 12. The trial court entered Findings of Fact and Conclusions of Law Awarding Attorney Fees and Costs on September 9, 2009. CP 2141-2148. In deciding the attorney's fees issue, the Court found that the contract claims were the "predominant claim[s] made in this case," while other claims were merely ancillary. CP 2144 at para. 13.

## V. ARGUMENT

### A. Standard of Review

Jury instructions "are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where its prejudices a party. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied." *Lewis v. Simpson Timber Company*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008). A clear misstatement of the law is presumed to be prejudicial. *Thompson v. King Feed and Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

### B. Propriety of Instruction No. 16

#### 1. **The giving of instruction 16 was error because whether an ambiguity exists in a written contract is a question of law for the court.**

It is axiomatic that determining whether a written instrument is ambiguous is a question of law for the court. *Ladlum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 115, 411 P.2d 868 (1966); *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983); *Syrovoy v. Alpine Resources, Inc.*, 68 Wn.App. 35, 39, 841 P.2d 1279 (1992); *R.A. Hanson*

*Company v. Aetna Insurance Company*, 26 Wn.App. 290, 295, 612 P.2d 456 (1980).

Here, because whether a written contract is ambiguous is a question of law for the court, it was error for the trial court to allow the jury to make that determination.

**2. Application of contra proferentem was inappropriate, in any case, because the parties were of equal bargaining strength and both participated in creating the written document.**

The rule of contra proferentem – construing an ambiguity in a written document against the drafter – is closely related to the concept of the adhesion contract. As one legal author has observed:

If the drafting was done wholly by the one side, then, as we saw above, the presumption in interpreting a doubtful provision is against that party. Is it not probable that the draftsman took great care in specifying the right and duties of his party and less care in stating those of the other party? If so, then the former's rights will be strictly interpreted and the latter's, if defined ambiguously, will be given a more favorable interpretation. If in addition it appears that the drafting party was in the stronger bargaining position, then as a rule of construction the court would, under the influence of 20<sup>th</sup> century views of justice, favor the weaker party whenever possible. Thus came about the concept "contract of adhesion."

*The Interpretation and Construction of Contracts*, 64 COLUM. L. REV., 33, 856 (1964).

See also *Chermak v. P.J. Taggares, Inc.*, 166 Wash. 67, 6 P.2d 380 ("uncertainties of contracts should be interpreted against experienced party preparing contract and in favor of other party.").

Application of the rule is inappropriate where both parties participated in the creation of the document. See e.g. *Dwelley v. Chesterfield*, 88 Wn.2d 331, 560 P.2d 353 (1977). In *Dwelley*, the court refused to apply the rule because there was insufficient evidence that one party was singularly responsible for creating the document and presented it to the other for signature. On this point, the court observed:

No evidence was presented regarding which of the parties instigated the discussions leading up to the written agreement. There was also no evidence regarding the length and manner of the discussions. Although it is possible that Mr. Chesterfield drafted the agreement and presented it to petitioner for her signature without any revisions being made, it is also possible that he presented a rough draft of the agreement to petitioner and together they decided on the exact wording of the agreement. From the record before us, it is also possible to speculate that petitioner did not wish to continue making the premium payments on the VA policy and sought a way to get out from under these payments. She could have requested that Mr. Chesterfield prepare an agreement reflecting her desires. Because the phraseology of the agreement is the only evidence upon which to find that Mr. Chesterfield or his representative drafted the agreement, we do not believe this is a proper

case for invoking the rule that an ambiguous contract should be construed against the party who drafted it.

88 Wn.2d at 336.

See also *Shell Offshore, Inc. v. Marr*, 916 F.2d 1040 (5<sup>th</sup> Cir. 1990) (for purposes of contra proferentem, neither party considered to be drafting party when initial draft was modified and re-modified in series of exchanges between parties to produce a document reflecting "give and take" between obligor and obligee); *Colburn v. Parker and Parsley Development Company*, 842 P.2d 321, 328 (Kansas 1992) (contra proferentem "of little consequence" when both parties participate in drafting and negotiating final written agreement).

In the instant case, both parties were involved in the process which resulted in Cadagan's creation of written contract. It was Hereford who first approached Cadagan about creating a document to embody the agreement of the parties. It was Hereford who first explained the nature of the agreement to Cadagan. After Cadagan prepared a draft, he sent it to Hereford via email for review. Hereford reviewed the document, made corrections, and then sent it back to Cadagan. Both Brown and Hereford reviewed the contract in its final form, before it was signed. Because of this joint participation in the creation of the contract, the concept of contra proferentem was simply inapplicable, and should never have been

submitted to the jury. Moreover, to the extent application of the doctrine is based, in part, on contracting parties' unequal bargaining power, that inequality did not exist between Hereford and Brown.

**3. Instruction No. 16 was an erroneous statement of the law because it directed the jury to apply "context rule" principles of construction to create an ambiguity, not resolve one**

Notwithstanding that it is the role of the Court, not the jury, to determine whether an ambiguity exists, the purpose of resorting to extrinsic evidence is to resolve an ambiguity, not create one. Parole evidence is never admissible to create an ambiguity in a written contract. *Washington Fish and Oyster Company v. GP Halfert and Co.*, 44 Wn.2d 646, 659, 269 P.2d 806 (1954); *Schwieger v. Harry W. Robbins and Company*, 48 Wn.2d 22, 24, 290 P.2d 984 (1955); *Huberdeau v. Desmaris*, 2 Wn.App. 265, 270, 467 P.2d 624 (1970).

Here, Instruction 16 was an erroneous statement of the law because it told the jury it could consider the extrinsic evidence to find an ambiguity in the written contract. That is contrary to well established Washington law.

**VI. CONCLUSION**

Based on the foregoing argument and authorities, Appellants Brown and FAB Ventures, Inc. respectfully request that this matter be

remanded for retrial of the breach of contract claim. Appellants further request that the trial court's Findings and Conclusions on Unjust Enrichment and its award of costs and attorney fees be vacated because, as the trial court noted, the Findings, Conclusions and Fee/Cost award were predicated on the jury's breach of contract verdict.

Respectfully submitted this 23<sup>rd</sup> day of June, 2010.

EVANS, CRAVEN & LACKIE, P.S.

By 

HUGH O. EVANS, #6063

CHRISTOPHER J. KERLEY, #16489

MARKUS W. LOUVIER, #39319

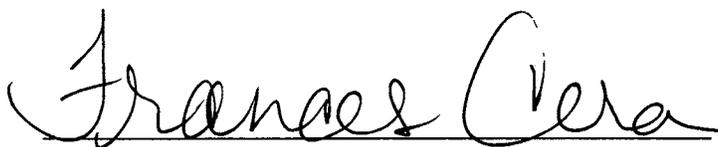
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of June, 2010, pursuant to RAP 5.4(b), a true and correct copy of BRIEF OF APPELLANTS was delivered in the manner indicated below to the following:

Ahrend Law Firm PLLC  
100 East Broadway Avenue  
Moses Lake, WA 98837

VIA REGULAR MAIL   
VIA CERTIFIED MAIL [ ]  
VIA FACSIMILE [ ]  
HAND DELIVERED [ ]



Frances Cera, legal assistant to Christopher J. Kerley  
and Markus W. Louvier

# **APPENDIX A**

RECEIPT AND INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement ("Agreement") is entered into by and between WAVE Ventures, LLC ("WAVE") and FAB VENTURES, LLC ("FAB"), collectively referred to as the "Parties" and individually as a "Party", as of the 24<sup>th</sup> day of June, 2003.

I. **Purpose.** It is the intent of the Parties that up to ONE MILLION Dollars (\$1,000,000) (the "Funds") from Washington Trust Bank, Spokane, WA (the "Bank"), which shall be borrowed in the name of WAVE, but shall be personally guaranteed by James Hereford, Member of WAVE, and Fred A. Brown, Member of FAB. Such personal guarantee by FAB Member Fred A. Brown is deemed to be of value, and is the consideration entitling FAB to share in the net proceeds of the investment of such Funds. WAVE will then loan an equivalent amount to Kevin Gunder ("Gunder"), at a commercially reasonable interest rate higher than that charged to WAVE by the Bank, and properly secured, for the purpose of building a house within the "Black Rock Development" on Coeur d'Alene Lake, Kootenai County, Idaho (the "Development"), for subsequent sale to as yet unknown buyers, such house to have an approximate sale value of Three Million Dollars (\$3,000,000) (the "Investment"); and upon such sale Gunder will return to WAVE the principal loaned to Gunder, which shall be repaid to the Bank, plus a return on such Investment equal to one-half (1/2) of the net profits of such sale, which portion is expected to be in the amount of approximately Four Hundred Thousand Dollars (\$400,000) (the "Return"), which portion WAVE and FAB will divide equally, as well as any interest amounts received from Gunder net of interest paid to the Bank. All loan and security documentation, distributions, payments, receipts, etc., will be handled through WAVE.

II. **Receipt.** By authorized initials thereby on the attached Exhibit "A", included herein by reference, WAVE shall acknowledge receipt from the Bank, FAB or others, of each and every amount so received (the "Receipts") of WAVE for purposes of this Investment.

III. **Investment Management.** WAVE agrees to manage the investment of such Receipts. WAVE shall exercise commercially reasonable prudence in undertaking and overseeing such investments on behalf of WAVE and FAB so as to provide a solid return on such investments, including that Return noted here. FAB and WAVE understand and agree that some investments may be made under long term agreements, including that Investment noted here to Gunder which Investment both Parties do hereby agree to. WAVE shall not make other investments of the funds received under this Agreement without the advance, written consent of FAB. WAVE shall provide periodic reports to FAB of the present status of investments, such as is shown on attached Exhibit B, incorporated herein by reference.

IV. **Indemnification.** FAB understands and agrees that any and all investments, including that Investment to Gunder noted here, carry some degree of risk. As such, FAB

shall hold harmless and indemnify WAVE, its owners, officers, managers, employees and agents against claims or actions arising out of such investments, and against financial losses by FAB incurred as a result of any of said investments and WAVE's management of such Receipts; PROVIDED, however, that such does not apply to gross negligence on the part of WAVE.

V. Fees. In as much as WAVE benefits from having FAB join with WAVE in the Investment noted here, WAVE shall not charge FAB any fees for providing the vehicle through which the Investment here noted is made.

VI. General Provisions.

A. Time of the Essence. Time is of the essence of each and every term and provision of this Agreement.

B. Governing Law, Venue and Fees. This Agreement is made in accordance with and shall be interpreted and governed by the laws of the State of Washington. If any legal claim, action or other proceeding (an "action") is commenced to enforce or interpret any provision of this Agreement, or which relates to the subject matter hereof or the transactions contemplated by this Agreement, then: (i) such action shall be governed by the laws of the State of Washington; (ii) the venue of such action shall be in Spokane County, Washington; and (iii) the Party(s) who substantially prevails therein shall be entitled to recover from the Party(s) who does not substantially prevail, in addition to statutory taxable costs and disbursements, all damages and expenses actually incurred by the substantially prevailing Party(s) in the prosecution or defense of such action, all reasonable attorney's fees, costs related to investigation and discovery, expert and other witness fees and other legal expenses so incurred. "Legal claim, action or other proceeding" shall include, retention of an attorney to make any demand, enforce any remedy or otherwise protect or enforce rights under this Agreement, suit in any court of appellate, general or limited jurisdiction, at law or in equity, federal or state bankruptcy courts or other action affecting creditor's rights, any declaratory judgment proceeding, any arbitration or mediation, or any appeal, enforcement or other appellate court action related to the foregoing. All reimbursements required by this Section shall be due and payable on demand, and may be offset by any sum owed to the Party(s) so liable, and the failure of the defaulting Party(s) to promptly reimburse the same shall in itself constitute a further and additional default hereunder.

C. Independent Covenants. Each of the covenants of this Agreement to be performed by the respective Parties is hereby declared to be an independent consideration for the execution of this Agreement in its entirety, and this Agreement shall be terminated, at the election of either Party, for the violation of any one or more of the several covenants herein contained to be performed by either Party, by the service of written notice which may be delivered personally to one Party by the other, or mailed to such Party at such Party's address noted herein and.

D. Successors; Assignments. Subject to the restrictions on assignments herein provided, all of the rights of the Parties hereunder shall inure to the benefit of, and all obligations of the Parties hereunder shall bind their heirs, personal representatives, successors and assigns. Except as may be otherwise specifically provided herein, no transfer, renewal, extension, assignment or assumption of this Agreement or of any obligation hereunder shall relieve any Party from liability for any obligation hereunder.

E. Execution of Documents. Each of the Parties hereto agrees to execute all documents necessary to implement the provisions of this Agreement.

F. Invalid Provision. If any term or provision of this Agreement is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, such term or provision shall be fully severable. This Agreement shall be construed and enforced as if such illegal or otherwise unenforceable term or provision had never comprised a part hereof. The remaining terms and provisions of this Agreement shall remain in full force and effect and shall not be affected thereby. Furthermore, in lieu of such illegal, invalid or unenforceable term or provision there shall be added automatically as part of this Agreement a legal, valid and enforceable term or provision as similar in terms and intent to such illegal, invalid or unenforceable provision as may be legally possible.

G. Merger, Interpretation and Construction. This Agreement expresses the full and final purpose and agreement of the Parties relating to the subject matter of this Agreement. There are no verbal agreements which modify, qualify, supplement or offset any of the provisions of this Agreement. The Parties each acknowledge that they have carefully reviewed all of the terms and provisions of this Agreement and have been afforded the opportunity to obtain the advice of independent legal counsel and such other professional advice as they may desire with respect thereto, and that each of them has determined that the terms and provisions of this Agreement plainly and unambiguously set forth their intent and all of their agreements with respect to the subject matter of this Agreement. This Agreement constitutes a completely integrated contract and constitutes a full, final and complete expression of all terms agreed upon between the Parties. There are no agreements between the Parties relating in any way to the subject matter of this Agreement which are not fully set forth in this Agreement. The words contained in this Agreement and all of the terms and provisions thereof shall be given their plain meaning, interpreted in the context of all of the other words contained in this Agreement. In the interpretation, construction and enforcement of this Agreement, no verbal, parol or extrinsic evidence shall be admitted, nor shall any of the surrounding circumstances leading to execution of this Agreement be considered, whether as an aid to ascertaining the intent of the Parties or for any other purpose, it being understood and agreed that such written words alone shall be determinative thereof.

H. References. The use of the singular term herein shall include the plural, and the masculine shall include the feminine and neuter, and vice versa, as the context requires.

I. Remedies Cumulative. All remedies provided for in this Agreement are distinct and cumulative to any other right or remedy afforded by law or equity and, to the extent permitted by law and not limited by the express provisions of this Agreement, may be exercised concurrently, independently, or successively. An action may be maintained to enforce such remedies in the alternative.

J. Supplement, Waiver, Modification, Amendment. No supplement, nor waiver, modification or amendment of any term or condition of this Agreement shall be effective unless in writing, executed by all of the Parties. This Agreement shall not be qualified, modified or supplemented by any preliminary negotiations, course of dealing, usage of trade or course of performance. No waiver or indulgence by any Party of any deviation by any other Party from full performance of this Agreement shall be a waiver of the right to subsequent or other full, strict or timely performance. No failure or delay on the part of

any Party to exercise any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

K. Party's Consent. Whenever any Party's consent is required under the terms hereof, such consent shall not be unreasonably withheld.

L. Relationship of Parties. The relationship between the Parties shall be strictly that as set forth herein, and no provision hereof shall be deemed to create any joint venture or partnership relationship between the Parties.

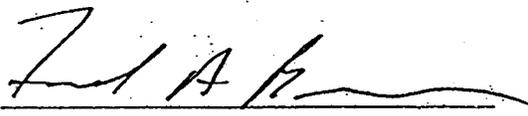
M. Corporate Authorization. Individuals executing this Agreement on behalf of and purporting to represent a legal entity, do hereby certify that they are now individuals properly authorized by the entities they purport to represent, to execute this Agreement on behalf of such entities; or that a resolution shall be duly adopted by the governing body of their respective entity, properly called and a quorum present, approving the terms and provisions of the Agreement and authorizing said individual to execute this Agreement.

N. Counterparts. This Agreement may be executed in any number of counterparts, each of which, when executed, shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Lease as of the day and year first above written.

"FAB":  
FAB Ventures, LLC

"WAVE":  
WAVE Ventures, LLC

By:   
Fred A. Brown, Member Manager

By:   
James Hereford, Member-Manager

6010 E. Greenbluff Rd.  
Colbert, WA 99005

1132 Trestle Creek Rd.  
Thornton, WA 99176





## **APPENDIX B**

INSTRUCTION NO.   16  

If, after applying the foregoing principles of interpretation, you find that the contract is ambiguous, then the doubt created by the ambiguity should be resolved against the party who prepared, or whose attorney prepared, the contract.

*Felton v. Menan Starch Co.*, 66 Wn.2d., 792, 797, 405 P.2d 58 (1965)