

Appeal No. 63712-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE AT SEATTLE

Craig Bernhart, DDS, P.S.,

Appellant,

vs.

Cedar Professional Center, LLC,

Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the Order and Judgment dated March 31, 2009
entered by Commissioner Lester Stewart of the Snohomish County
Superior Court in the matter of Cedar Professional Center, LLC v.
Craig Bernhart, DDS, P.S. case number 09-2-03723-8

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Exhibit A. Commercial Lease

A. INTRODUCTION

This appeal arises from a default judgment (CP 14) in a commercial unlawful detainer action governed by the Unlawful Detainer Act, RCW 59.12. The Appellant, Craig Bernhart DDS, PS, is the tenant under the Lease. (Appendix Exhibit A)

The Judgment was entered against Appellant, after Dr. Bernhart had timely filed and served a Notice of Appearance, (CP7) an Answer (CP 8) and a Declaration disputing that rent was due (CP 9), and after Dr. Bernhart had appeared and advised the court that no rent was owed. (RP 3, 4) The Commissioner did not conduct an evidentiary hearing. (RP 3, 4)

The judgment in this case was entered nine days after Appellant had been served with the Summons and Complaint (CP 40-44) and Order to Show Cause (CP36-37). The Order to Show Cause was not supported by any affidavits or declarations. The alleged unpaid rent related to "CAM" (Common Area Maintenance) charges which had been disputed for over seven years dating back to early 2003 and four years before the February 2007 lease.

In this appeal Appellant contends that the "show cause" proceeding was not authorized by RCW 59.12; and that the entry of a default after Appellant's appearance or answer was in violation of Appellant's rights to a trial under RCW 59.12.130. Tuschoff v.

Westover, 60 Wn. 2nd 722 (1962).

The Commissioner's decision to enter the Judgment was colored by that fact that Dr. Bernhart is not an attorney. Dr. Bernhart is Appellant's sole shareholder, director and officer. He appeared at the show cause hearing in this capacity, as a well as ,his being a "witness", the 'Appellant', and also Respondent's member manager. The Commissioner's position was contrary to decisions allowing corporate officers who are a defendant's sole shareholder to appear in court. Willipa Trading v. Muscanto, Inc. 45 Wn. App. 779 (1986).

Notwithstanding any other error, at a minimum the trial court lacked jurisdiction to enter a default via a procedure not statutorily authorized by the Unlawful Detainer Act (RCW 59.12) and abused his discretion by then ambushing the Appellate by his failure to set the matter for trial or for hearing on a later date to allow Appellant time to retain counsel. Biomed Comm, Inc. v. Department of Health Board of Pharmacy, 146 Wn. App. 929 (2008).

B. ASSIGNMENT OF ERRORS

Appellant assigns error to the Judgment and Order entered on March 31, 2009 (CP 25-29) inclusive of the Findings of Fact and Conclusions of Law stated in the Judgment (CP 26-29), and the Order Denying Appellant's Motion For Revision. (CP 19)
Appellant assigns error to recitals in the Judgment stating that the

Commissioner considered “any opposition submitted by defendant” (CP 25-26) when in fact the Commissioner did not consider any of Appellant’s timely filed pleadings, evidence or argument. (Appendix Exhibit A transcript, at page 5, RP 5.)

Appellant also assigns error to the Finding of Fact and Conclusions of Laws denominated as 1, 3, 5, 6, 7, and 8. The Findings and Conclusions are mixed together are not stated separately. They are encompassed in the Judgment at CP 25-29.

With respect to Finding/Conclusion 3 Appellant specifically assigns error to the factual finding that: “Defendant is in default on breach of the lease by failing to pay \$72,001.39 or vacate the premises after receipt of a 3-day written notice to do so.”

With respect to the mixed Findings of Fact and Conclusions of Law 6, 7, and 8, Appellant specifically assigns error to all express/implied findings that Appellant is in breach of the lease, that Appellant owes any rent to Respondent, that Appellant is not entitled to possession, and all express or implied conclusions that there is not factual dispute as to Appellant’s financial obligations to Respondent.

C. STATEMENT OF ISSUES

1. Whether the Court Commissioner erred by invoking a summary show cause proceeding which is not authorized by the

Unlawful Detainer Act, RCW 59.12.

2. Whether the Court Commissioner erred in issuing an Order To Show Cause which was not supported by any competent evidence such as affidavits, or declarations.

3. Whether the Court Commissioner compounded its errors by its failure to actually conduct a hearing and refusal to allow Appellant to present evidence at the show cause hearing.

4. Whether the Court Commissioner erred by not allowing Dr. Bernhart to represent it at the show cause hearing.

5. Whether the trial court Judge, Judge Apell, reviewing the Commissioner's decision also erred ed by denying Appellant's Motion For Revision.

6. Whether Appellant is entitled to reasonable attorney fees on appeal under the attorney fee provisions of the Lease.

D. STATEMENT OF THE CASE

This case was commenced on March 18, 2009 by the filling of an Eviction Summons, Complaint For Unlawful Detainer pursuant to RCW 59.12 and the issuance of an Order To Show Cause. (CP 40-44, and 36-37, respectively). Dr. Bernhart was served with these pleadings on Sunday March 22, 2009.

On Monday March 30, 2009 the Appellant filed its Notice of

Appearance, Answer and Declaration in opposition to the Show Cause Order. (CP, 7, 8, and 9 respectively).

The show cause hearing was on Tuesday March 31, 2009. At that time the Court Commissioner, Lester Stewart, entered the Judgment and Order For Writ of Restitution. (CP 25-29). The Commissioner did not conduct an evidentry hearing. (RP 1-5) No testimony was taken.

Appellant timely filed a Motion For Revision .(CP 22-24). This was denied by Judge Apell. (CP 19). Appellant then filed a Motion For Reconsideration (CP 13-18). This was not ruled on.

Appellant then timely filed a Notice of Appeal. (CP 3-11). Pending appeal, the Respondent evicted Appellant which resulted in Appellant filing for a Chapter 11 bankruptcy. The bankruptcy stayed this appeal pending appointment of the undersigned counsel as special counsel to proceed with it.

The procedures used in this case and the defects with the process used by the trial court are further detailed in the following:

E. STATEMENT OF FACTS

General Background Facts.

The Appellant, Craig Bernhart DDS PS, is a professional service corporation. It is owned by Dr. Craig Bernhart who is its sole

shareholder, director and officer.

The Respondent, Cedar Professional Center, LLC, is a Washington limited liability. It is owned by Dr. Craig Bernhart and Mariann Danard. (CP 31-33, at 31). Respondent owns an office building which it rents to its members and their businesses. While Dr. Bernhart and Mariann Danard are the Respondent's "member managers" Ms. Danard is the building manager and has been in exclusive control of the Respondent's financial records relating to the building. (CP 31-33 at 31).

The Disputed Rent.

The underlying "eviction" is in actuality a partnership dispute and relates to Ms. Danard's attempts to charge the Respondent for her expenses. (CP 31-33, at 31,32). As the building's manager Ms. Danard assessed undocumented expenses as "Common Area Maintenance" (CAM) expenses.. Ms. Danard, then charged these expenses to Appellant. There is no evidence supporting the alleged CAM expenses were charged nor that Ms. Danard assessed a pro rata share to the portion of the building used by herself or her businesses which also occupy he building. (CP 31-33). This has been a seven year dispute.

Ms. Danard and the Respondent have failed to account and

document the alleged CAM expenses—for the past seven years. She has failed to provide documentation or an accounting of the CAM expenses to the Appellant , who is entitled to such information each year pursuant to the express terms of the lease subject of this litigation, and, separately, to Dr. Bernhart who is also entitled to it in his capacity as the Respondent's other member manager. There is no evidence in this case supporting the underlying charges claimed by Respondent. (CP 31-33, and attachments)

The Lease and 3 Day Notice To Pay Rent.

The parties entered into the subject Lease on February 5, 2007. The rent under the lease varied from \$3,747 to \$3,859.76 per month. (CP 31-33, at 32, 33, Appendix Exhibit A)

Despite Appellant's undisputed payments of the actual rent (which included an additional 20% for CAM charges), the Respondent's Three Day Notice claimed that \$73,000 in rent was still due, however, none of these charges has ever been documented despite an express provision in the Lease that all CAM charges must be supported by appropriate documentation. (CP 31-33). This is in addition to Dr. Bernhart's right to an accounting of such expenses as a member and as a manager of the Respondent, which Ms. Danard, as the financial manager never provided. (CP 31-33).

The Eviction Lawsuit.

This case was commenced by the filing of a Summons and Complaint on March 18, 2009. (CP 40-44). The statutory Summons stated that the response/answer date was 5:00 p.m. on Monday March 30, 2009 and that the response could be faxed to Respondent's counsel. (CP 40 and 41). It indicated that Appellant could "respond" by either serving a Notice of Appearance or, alternatively, by serving an Answer. (CP 40-41).

The Complaint was not verified, attested to, or sworn to by any witness. (CP 43-44). A copy of the lease was not attached to the Complaint, nor any related pleading filed at that time.

The Order to Show Cause issued on March 18, 2009 directed the Appellant to physically appear in court on March 31, 2009. (CP36-37). The relief requested in the Order To Show Cause was not supported by any declaration, affidavit, or other admissible evidence but only a "certificate" signed by Respondent's counsel which stated that rent was due.(CP39). It was not under oath or penalty of perjury, nor did it claim to be based or founded on any personal knowledge. (CP39).

Appellant Timely Responded To Eviction Summons.

Dr. Bernhart was served on March 22, 2009. He contacted two

law firms which had represented him on other matters. Respondent asserted a conflict of interest with Appellant's anticipated counsel. (RP 4-5). On March 30, 2009 Appellant timely filed with the court and also served on Respondent's counsel a Notice Of Appearance, Answer and Declaration of Craig Bernhart in Opposition to the show cause. (CP 7, CP 8 and CP 9, respectively). Working copies of these documents were also delivered. (RP 5).

Appellant's Answer Denied Rent Was Due

Appellant's Answer specifically denied the allegations in the Complaint that any rent was due and asserted six defenses :

- A. Payment.
- B. Plaintiff has failed to provide an accounting.
- C. Plaintiff failed to provide evidence of charges.
- D. Plaintiff has breached covenants.
- E. Accord and Satisfaction.
- F. Offset.

The Answer was timely served and filed with the Court Clerk and served on Respondent's counsel. (CP 34). In further response to the Respondent's Complaint Appellant filed and served the Declaration of Dr. Bernhart. (CP31-33). In his Declaration, Mr. Bernhart indicated that the Appellant had paid all rents due and owing under the Lease. (CP 31-33). He also explained that Respondent's CAM charges were not supported by any documents produced to the

Appellant/tenant or to Dr. Bernhart as one of the Respondent's member and /manager. (CP 31-33)

The Show Cause Hearing.

The show cause hearing occurred on March 31, 2009. Dr. Craig Bernhart personally appeared and advised the Court Commissioner that he disputed the Respondent's allegations that any rent was due. (RP 3, 4). The show cause hearing lasted a few moments. No witnesses were sworn in. The Commissioner refused to consider the records and proof of payment that Dr. Bernhart had brought with him. He did not consider Dr. Bernhart's Declaration. Nor did he review the Appellant's Answer or Notice of Appearance. The following discourse reflects what occurred at the 3-4 minute hearing.

Commissioner: I see. Okay. Mr. Bernhart, you're kind of hamstrung herein in terms of responding, but do you have proof that the rent has been paid and is current.

Berhart: Yes, I do.

Commissioner: It's current, is it?

Bernhart: Yes, it is your honor.

The Commissioner asked Dr. Bernhart why Appellant did not have an attorney at the hearing. Dr. Bernhart explained that a conflict of interest had been asserted the day before.

Commissioner: Is there any reason why your attorney, your attorney wouldn't be here today to assist you with this?

Bernhart: I had an attorney that was supposed to be here today, but because he also represents the LC, he told me that, uh, that there was a conflict of interest and he wouldn't be able to do it. He gave me notice yesterday at five o'clock. I haven't been able to

Commissioner: He didn't refer you to anybody who might, uh?

Bernhart: Not, not.

Commissioner: Did it occur to this attorney earlier that this might be a predicament and refer you to somebody?

Bernhart: No, this was, no. This came up at five o'clock yesterday afternoon.

Commissioner: **Bummer**. Well what do we do?

Bernhart: I have documents to show that the rents were paid.

After Dr. Bernhart indicated that he had documents with him showing that the rent had been paid, he indicated to the Commissioner that Appellant had timely answered and filed documents with the court in opposition to the hearing. Specifically:

Bernhart: I have documents to show that the rents were paid.

Commissioner: Well, you know, Mr. Bernhart, what I'm included to do, you may have a meritorious defense. I don't know. Nothing was filed or supplied, filed with or supplied to the court prior to his hearing. ... I understand that there may be underlying defenses that, that are possibly meritorious, but analyzing it strictly from the standpoint and I guess in the further complication, you're not an attorney and can't

represent a corporate entity. That, that law is established clearly in the State of Washington.

Bernhart: You Honor, the documents were filed with the court yesterday by five o'clock. They were also faxed to, uh, the law firm there showing proof of that the rents were paid.

Commissioner: Well, again, I didn't get any of that stuff so, you know, if plaintiff is choosing not to continue this hearing which you have a right, you know, not to do, my, my, feeling is to grant the Judgment and we'll see what happens down the road.

The Commissioner then entered the Judgment against the Appellant. (CP 25-29).

Motion For Revision.

After entry of the Judgment the Appellant filed a Motion For Revision before Judge Apell (CP 22-24). The Appellant was represented by counsel at the revision hearing. The revision hearing was also attended by Dr. Bernhart, who again stood ready, willing and able to testify. At the review hearing, Judge Apell limited his consideration to the "record." Judge Apell did not conduct any evidentiary hearing. The court did not examine witnesses, and did not allow Appellant's attorney to do so.

Judge Apell denied Appellant's Motion for Revision on the sole basis that Dr. Bernhart was not an attorney. (CP 19). Appellant filed a Motion For Reconsideration. This was never ruled on. (CP 13-

18). This appeal was then timely taken by the filing of a Notice of Appeal on June 22, 2009. (CP 3-11).

Appellant was forced into bankruptcy when the Respondent ceased the Appellants business records and assets.

F. STANDARD OF REVIEW

Review of the Commissioner's Judgment and Order, and Findings of Fact and Conclusion of Law (25-29) is de novo. M H 2 Co. v. Hwany, 104 Wn. App. 680 (2001); City of Seattle v. Megrey, 93 Wn. App. 391,393 (1998). The Commissioner's refusal to allow Dr. Bernhart to testify or provide evidence at the show cause hearing is reviewed by abuse of discretion. Goodell v. ITT Federal Support, Serv. Inc. , 89 Wn. 2d 488, 493 (1979).

Review of the Judge Apell's Order Denying Appellant's Motion For Revision is also de novo. Hartson Partnership v. Goodwin, 99 Wn. App. 227 (2000). Review of his failure to conduct a hearing or to consider evidence is abuse of discretion. Goodell v. ITT Federal Support, Serv. Inc., 89 Wn. 2d 488, 493 (1979).

G. ARGUMENT

Argument Summary

The procedures authorized by the Unlawful Detainer Act, RCW 59.12, are to be strictly adhered to. The statute does not authorize a

summary show cause proceeding but guarantees a tenant the right to a jury trial. Tuschoff v. Westover, 60 Wn. 2nd 722 (1962). The trial court erred by not setting this case for trial after the Appellant's appearance, answer, and filing pleadings indicating that no rent was due. The process was further flawed because it was not supported by any affidavits or declarations supporting either the issuance of the Order To Show Cause or the relief ultimately granted by the court.

RCW 59.12.120 does not authorized the entry of a default after a tenant has appeared unless a motion for default and supporting pleadings are first filed and served on the tenant at least five days prior to a hearing on the motion for default. CR 5, CR 6, CR 55 and RCW 4.28.210. Such a motion can only be filed after the response date stated in the Summons.

Upon the Appellant's filing an Answer and/or filing any pleadings contesting that any rent was due the trial court Commissioner was obligated to set the matter for trial under. This is required by RCW 59.12.130.

Assuming that a show cause proceeding may be used for an eviction under the Unlawful Detainer Act, RCW 59.12, then the Commissioner and later Judge Apell each erred by their failure to conduct an evidentry hearing, examine witnesses, consider written

and oral evidence, and/or otherwise afford Appellant “a meaningful opportunity to be heard.” Carlstrom v. Hanline, 98 Wn. App. 780, at 790 (2000). See also, Leda v. Whisnand, 150 Wn. App. 69 (2009).

The Court Commissioner’s decision not to allow Dr. Bernhart to participate as the Appellant’s ‘legal representative’ was itself an error even though Dr. Bernhart is not an attorney. The interests of Dr. Bernhart and the Appellant are identical. His acting as Appellant’s counsel for this hearing was permissible under the per se exception to the rule that non attorneys may not appear before the court. This exception includes appearances of a corporate officer acting on behalf of solely owned corporation. Willipa Trading v. Muscanto, Inc. 45 Wn. App. 779 (1986). Should a court object to the appearance of a corporate officer, then the matter should be continued to afford the party the opportunity to obtain counsel: failure to do so is an abuse of discretion.. Biomed Comm, Inc. V. Department of Health Board of Pharmacy, 146 Wn. App. 929 (2008).

1. The Trial Court Erred By Invoking A Summary Show Cause Proceeding Not Authorized By RCW 59.12.

The Commissioner’s erred by issuing the Order To Show Cause directing the Appellant to personally appear in court nine days later. This procedure”is not authorized by RCW 59.12. A deviation

from the procedures authorized by this statute is an abuse of discretion. Tuschoff v. Westover, 60 Wn. 2nd 722 (1962).

Substantively, what happened in this case is that the Commissioner partially followed a show cause procedure authorized under the Residential Landlord Tenant Act (RCW 59.18) but without the Act's safeguards which require an evidentiary hearing where written and oral evidence are duly considered.

Unlike the Residential Landlord Tenant Act (RCW 59.18), the Unlawful Detainer Act (RCW 59.12), does not, however, authorize a summary show cause proceeding before a judge to determine if rent is owed. The different procedures authorized by RCW 59.12 and RCW 59.18 can not be mixed and matched.

The Supreme Court has consistently held that commercial evictions are far more complex and that the consequences arising from an error are much more significant than those involving residential tenancies. As such the procedural safeguards of RCW 59.12, including the right to a jury trial under RCW 59.12.130, may not be disregarded or by passed by the use of any procedures not authorized by RCW 59.12. Tuschoff v. Westover, *id.* The procedures authorized by this statute are to be strictly applied and construed in favor of the tenant. Laffranchi v. Lim, 146 Wn. App. 176, 383, (2008).

The Unlawful Detainer Act (RCW 59.12) does not authorize a show cause procedure to short circuit the eviction process. Procedurally, an unlawful detainer under this Act is commenced by the service of an Eviction Summons and Complaint for Unlawful Detainer. The summons contains a "return date." Pursuant to RCW 59.12.120 a landlord may not enter a default after that time if the tenant has either "appeared" or "answered."

If the tenant has either "appeared" but not answered, then the plaintiff must give notice of a motion for an order of default pursuant to CR 5 and CR 6 and this motion must be supported by appropriate pleadings required by CR 55. The motion, supporting pleadings, must be served upon the tenant not less than five days before hearing on this motion. CR 5, CR 6, and CR 55.

If the tenant denies that rent is owed in the answer or in any "pleading" then the case must be set for trial pursuant to RCW 59.12.130. RCW 59.12.130 serves as the cornerstone of a tenant's rights under the Unlawful Detainer Act (RCW 59.12). This statute grants the tenant the right to a jury trial. The language of this statute is clear:

"Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury is waived as in other cases."

The right to a jury trial under this statute is triggered by the filing of any “pleadings” that present an issue of fact. The statute does not contemplate a mini trial or summary proceedings. The pleadings filed by the Appellant included an Answer denying that rent was due and the Declaration of Dr. Bernhart. There were sufficient to trigger a right to a jury trial under RCW 59.12.130. Tuschoff v. Westover, id. Washington Constitution Art. 1 Section 21. The right to a jury trial is and shall remain inviolate and may not be bypassed by summary proceedings before a judge. Id.

The decision of Tuschoff v. Westover, id. is a seminal decision with respect to a tenant’s rights under RCW 59.12. In this case, the Supreme Court reversed a judgment entered by the trial court after a mini bench trial. The Supreme Court held that the tenant’s rights to a full jury trial had been triggered by the tenant’s appearance and disputing that rent was due. See also Truly v. Heuft, 138 Wn. App. 913, (2007) (action under Residential Landlord Tenant Act, RCW 59.18); Smith v. Seattle Camp No. 69, 57 Wash. 556, 557 (1910).

In the present case, the Commissioner’s entry of a default judgment at the show cause hearing was in denigration of the statutory procedure allowed under RCW 59.12 . Factually, it was also contrary to Eviction Summons issued by Respondent’s counsel since

the Summons merely required the Appellant to provide a Notice of Appearance or an Answer. Once this occurred, there was no basis for the show cause hearing.

The use of both an eviction summons and show cause order created a procedural trap to ambush the Appellant. The Court Rules and procedures, however, are not to be used in this manner. Rather the Court Rules and process are to be construed and applied in a manner to eliminate procedural traps. Gott v. Woody, Wn. App. 504 (1974). The rules are to be applied in a way to minimize miscarriage of justice arising from rigid of procedural regulations. Petrarca v. Halligan, 83 Wn. 2d 773 (1974).

The trial court's use of a show cause procedure and subsequent entry of a judgment after Appellant's appearance and without notice under CR5, CR 6 and CR 55 was contrary to the procedures authorized by RCW 59.12. and an abuse of discretion.

2. The Trial Court Erred By Issuing An Order To Show Cause Which Was Not Supported By Any Competent Evidence.

The Court Commissioner's issuance of the show cause order is flawed for an additional reason that neither the initiation of the proceeding or the resulting judgment were founded on supporting

affidavits or competent evidence.

Initially, the Court Commissioner had no basis to issue the order to show cause. Under Washington law a tenant's right of possession is originally lawful and is presumed to be so until proven otherwise by admissible evidence submitted to the court in strict compliance with the statutory procedural process and rules of evidence. Duprey v. Donahoe, 52 Wn. 2nd 129, 135 (1958). In an eviction proceeding the burden is upon the plaintiff to prove his right of possession by a preponderance of the evidence. Housing. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 292 (2005). The eviction statutes requires proper notice at all stages of the process. Christensen v. Ellsworth, 162 Wn. 2d 365 (2007).

Respondent did not submit to the Commissioner nor serve Appellant with any affidavits or declarations supporting the issuance of the show cause order or the relief sought other than Respondent's counsel's "Certified Statement" which was not under oath or attested to, nor premised on personal knowledge, nor did it provide any explanation of how rent was assessed, what was paid, what if any was due, or whether there was even a written lease. This statement was not sufficient to support either the issuance of the show cause order or the later monetary judgment.

3. The Trial Court Compounded Its Errors By Refusing To Allow Appellant To Present Evidence At The Show Cause Hearing and Failure To Conduct An Evidentry Hearing.

At the show cause hearing the Commissioner sui spontae defaulted the Appellant and entered a judgment against it without prior notice under CR 5, CR 6, and CR 55. This was error.

A trial court lacks authority to enter a judgment without proper notice. Shreve v. Chamberlin, 66 Wn. App. 728,731 (1992); See also generally, Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, (2001).

As previously noted the use of a show cause proceeding is not authorized by the Unlawful Detainer Act. However, once this procedure was invoked, then the Commissioner had the additional duty to safeguard the Appellant's rights to afford Appellant "a meaningful opportunity to be heard" Carlstrom v. Hanline, 98 Wn. App.780, at 790 (2000). The trial court thus has an obligation to allow a tenant to present evidence. Hartson Partnership v. Goodwin, 99 Wn. App. 227 (2000)

Under the Residential Landlord Tenant Act, RCW 59.18 the court's failure to consider oral testimony or to swear in witnesses is abuse of discretion and reversible error. Leda v. Whisnand, id. While

the Unlawful Detainer Act does not contain the statutory safeguard of RCW 59.18.380 (which requires the court itself to examine the witnesses), the underlying precept of this statute and the Unlawful Detainer Act's preservation of a tenant's right to a jury trial under RCW 59.12.130 are both the same: They are both founded on the tenant's right to be afforded a meaningful opportunity to be heard.

The 2009 decision of Leda v. Whisnand, id. is important because it involved Snohomish County Superior Court's summary eviction practices.. In this case , as in the present case, the court commissioner's failed to conduct a hearing and to consider evidence tendered by the tenant. This was reversible error. The Court Of Appeals, explained why as follows :

“However, it does not follow that trial courts may properly disregard evidence that credibly supports a legitimate defense. This is especially so where, as in RCW 59.18.380, show cause hearings, summary rulings routinely determine whether a trial is available at all, and so routinely constitute the only opportunity to present evidence. Indeed, the prejudicial effect of the trial court's refusal to take testimony in this case is manifest. Whisnand sought to introduce evidence that, if true, would have established that he had been given insufficient notice by Leda of their intent to terminate the tenancy.... A tenant who raises a viable legal defense, either in written submissions or during the show cause hearing, is entitled to testify in support of that defense.”

In the context of the present case, the use of a show cause proceeding was err. However, once this procedure was invoked the Appellant had the right to testify in support of his defenses or the absolute right that the matter be set for trial as mandated by RCW 59.12.130. The Commissioner's failure to allow Dr. Bernhart to present the issues of fact to a jury is violation of his due process and Washington Constitution I rights.

4. The Trial Court Erred By Not Allowing Dr. Bernhart, As The Appellant's Sole Shareholder, Officer and Director, To Appear or Represent It.

At the heart of the Commissioner's error was the erroneous belief was that Dr. Bernhart could not appear on behalf of the Appellant because he was not an attorney. This position was founded on a series of erroneous understandings of the law with respect to "appearances" and the ability of a corporate officer who is the corporation's sole shareholder to appear as a corporation's legal representative in an expedited proceeding.

It is well settled Washington law that the overriding purpose of the rules of civil procedure is to promote and do justice. CR 1. In view of this objective, the court's have taken a broad view of what constitutes an "appearance" for purposes of triggering further notice.

In unlawful detainer actions “appearances” have been deemed to include both formal and “informal actions manifesting a party’s intent to contest the matter.” Skillcraft Fiberglass, Inc. v. Boeing Co., 72 Wn. App. 40, 45-46 (1993). Under Snohomish County Local Rules a party’s “physical appearance in court” is an appearance under the local rules. SCLR 11(b).

The Court of Appeals in Housing Authority of Grant County v. Newbigging, *id.* considered whether the tenant had “appeared” for purposes of triggering prior notice of a hearing for entry of a default when the tenant’s father had contacted the landlord’s counsel. The Court of Appeals held that this was sufficient to trigger the landlord’s obligation to give prior notice under CR 55 before a default could enter. In finding that the tenant had appeared the Court commented:

Here, Ms. Newbigging appeared informally when she tried to resolve the matter by having her father submit her July rent, late fee and attorney fees directly to Housing’s counsel. (citations omitted)... [T]he record does not reflect whether Housing sent Ms. Newbigging an affidavit supporting default judgment as set forth in CR 55(a).

Housing Authority of Grant County v. Newbigging *Id.* at 188-189

Since the record in that case did not reflect service of the notice for the hearing or supporting affidavits had been given the

court vacated the default. Under these circumstances the court ruled:

Without notice the court lacked authority to enter the default judgment. (citations deleted). A party who has not received proper notice is “entitled as a matter of right to have any resulting default judgment vacated.”

The significance of this decision is that it recognizes substance over form. In this decision the tenant manifested an intent to appear even though it was via her father. Likewise, in the present case, the Appellant appeared in several contexts.

While the Dr. Bernhart is not an attorney, his appearance was still sufficient to trigger the due process rights of being given notice prior to entry of a default. As in Housing Authority of Grant County v. Newbigging, *id.* the trial court’s entry of a default in the present case was without prior notice under CR 5, CR 6 and CR 55. It was thus an abuse of discretion. and Appellant, is entitled to have the judgment vacated as a matter of right.

The mere fact that Dr. Bernhart was not an attorney does not change this analysis. The striking of a pleading signed by a non-lawyer without giving the party an opportunity to obtain counsel is manifestly unreasonable and based on an erroneous view of the law. Biomed Comm, Inc. v. Department of Health, Board of Pharmacy, 146 Wn. App. 929 (2008). (Trial court erred by striking a petition signed

by a non-lawyer without notice.)

Washington has recognized the “pro se” exception for appearances before the courts and recognized that lay persons may desire to “act on his own behalf” Washington State Bar Association v. Great Western Union Federal Savings and Loan, 91 Wn. 2d 48 (1978). The “pro se” exceptions apply when an individual is acting solely on his behalf. *id* at 57, (1978). A individual is deemed to be acting solely on his behalf when he represents himself or represents a corporation owed by him. ” Willipa Trading v. Muscanto, Inc., *id*.

In Willipa Trading v. Muscanto, Inc., *id* the Court of Appeals held that a non-lawyer could appear on behalf of a corporation of which he was president, director and sole shareholder. In allowing the non-lawyer to represent the corporation the Court of Appeals recognized the that the interests of the non-lawyer and a corporation he owns are effectively the same. The Willipa Trading court concluded that the non-lawyer “was, in fact acting on his own behalf” and thus his “personal interests were virtually indistinguishable from those of his corporation.” 45 Wn. App. at 787. The corporate officer was permitted to represent his company in court proceedings.

A similar situation existed in Finn Hill Masonry, Inc. v. Department of Labor& Industries, 146 Wn. App. 543, 545-46 (2005).

In this case the non-lawyer represented the corporation in court proceedings before the superior court and appellate court. The defendant had not objected to the non-lawyer's representation of the corporation at the superior court level but raised it on appeal. After noting that counsel should generally represent a corporation, the court of appeals permitted the corporation's non-lawyer president to represent his corporation on appeal.

The Supreme Court has noted that the underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, the Supreme Court's decisions "have prohibited only those activities that involve the lay exercise of legal discretion because of the potential for public harm. " Perkins v. CTX Mortgage Co., 137 Wn. 2d 93, 102 (1999).

Dr. Bernhart's appearance for the Appellant does not affect the public interest nor have a potential for public harm to a third party. Rather, consistent with the analysis of the Court of Appeals in Willipa Trading v. Muscanto, Inc., id. Dr. Bernhart and Appellant's interests are identical, and on that basis his appearance falls within the pro se exception. Dr. Bernhart should have been permitted to participate and to default Appellant sui sponte was is unreasonable, based on an erroneous understanding of the law and an abuse of discretion.

Biomed Comm, Inc. v. Department of Health, Board of Pharmacy, id

5. The Commissioner and Judge Sitting On Review
Abused Their Discretion In Entering The Judgment,
Refusal To Set The Case Over For Trial.

The errors committed by the Commissioner were repeated by Judge Apell when he denied the Appellant's Motion For Revision. Judge Apell sitting in review in the present case deemed the proceeding to be limited to "the record." Like the Commissioner he did not conduct an evidentiary hearing. At the time of the review hearing the record included Appellant's Answer, a Notice of Appearance and the Declaration of Dr. Bernhart. Appellant was represented at the review hearing by legal counsel. Dr. Bernhart attended the hearing in his capacity as a witness, but was not allowed to speak in any capacity including as a witness .

The hearing on a Motion For Revision in an unlawful detainer action requires the court to engage in the same process as the Commissioner. Their duties are "equivalent." Hartson Partnership v. Goodwin, 99 Wn. App. 227 (2000).

Judge Apell like the Commissioner, before him ,simply took the position that Dr. Bernhart did not have the right to appear at the show cause hearing before the Commissioner since he was not an

attorney. However, this was moot since Appellant had retained legal counsel to address the court at the revision hearing, and since the trial court had before it written evidence that the rent was disputed. In view of Appellant's Answer, Declaration and appearance, the matter should have been set over for trial as required by RCW 59.12.130. The Judge's denial of Appellant's Motion For Revision was n abuse of discretion for all of the reasons previously discussed.

6. Appellant is Entitled To Reasonable
Attorney Fees On Appeal.

Pursuant to RAP 18.1 Appellant seeks recovery of its costs and reasonable attorney fees. RCW 4.84.330 provides for the recovery of attorney fees in an action to enforce the agreement. The Lease subject of this appeal provides for payment of reasonable attorney fees to the prevailing party. At page16, paragraph 25.14 of the Lease (Exhibit A to Appendix) it states:

25.14 Attorney's Fees. In the event any action or proceeding is brought by either party against the other arising out of or in connection with this Lease, as set forth in Section 25.13, the prevailing party shall be entitled to recover its costs and reasonable attorney fees and costs incurred in such action or proceedings, including any appeal.

Based on this provision the trial court Commissioner awarded

Respondent reasonable attorney. Pursuant to this provision, should the Court of Appeals revise or reverse the Judgment against the Appellant, then the Appellant is the prevailing party on this appeal and entitled to its reasonable attorney fees and costs.

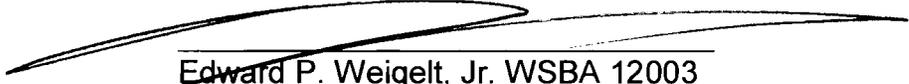
H. CONCLUSION

Upon Appellant's appearance or answer the Court Commissioner's erred by not setting the case over for trial. This was an abuse of discretion as a matter of law.

This is especially true in the context of an improperly invoked summary proceeding which spanned a mere nine days. To default the Appellant under these circumstances is contrary to the overriding purpose of the court system to do justice. As noted in Griggs v. Averbeck Realty, Inc. 92 Wn.2d 576, 582 (1979) "justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted."

The judgment against the Appellant should be vacated and the Appellant awarded its reasonable attorney fees on appeal as allowed under the parties' lease.

Dated this 2nd day of May , 2011.



Edward P. Weigelt, Jr. WSBA 12003
Attorney For Appellant

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE AT SEATTLE

Craig Bernhart, DDS, P.S.,)	
)	
Appellant,)	No. 63712-6-I
vs.)	
)	
Cedar Professional Center, LLC,)	APPENDIX TO
)	APPELLANT'S OPENING
Respondent.)	BRIEF
_____)	

INDEX TO APPENDIX

EXHIBIT A: Commercial Lease Dated Feb. __, 2007.

Edward P. Weigelt, Jr. WSBA 12003
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EXHIBIT A

COMMERCIAL LEASE

THIS COMMERCIAL LEASE, dated February ____, 2007, is made between Cedar Professional Center LLC, a Washington limited liability company ("Landlord"), and Craig E. Bernhart, D.D.S., P.S, a Washington corporation ("Tenant"). (This agreement is hereinafter referred to as the "Lease").

IT IS AGREED:

1. BASIC PROVISIONS AND DEFINITIONS.

The following terms, whenever used in this Lease, with the first letter of each word capitalized, will have the meanings set forth in this Section, and only such meanings, unless expressly contradicted, limited or expanded in this Lease:

- 1.1 **Premises Building:** The leased portion of the property as shown and/or legally described on attached Exhibits A (Building) and B (Premises Floor Plans).
- 1.2 **Building Address:** 22725 44th Avenue West, Mountlake Terrace, Washington
- 1.3 **Tenant's Square Footage & Proportionate Share:**
- | <u>Tenant's Sq. Footage:</u> | <u>Bldg Total Sq. Footage:</u> |
|-------------------------------------|--------------------------------|
| 2,077 (1,910 + 167 common) | 8,813 |
| Tenant's proportionate share 23.57% | |
- 1.4 **Date of Execution:** The date above written, which is the date of full execution hereof.
- 1.5 **Commencement Date (Section 4):** February 8, 2007
- 1.6 **Initial Term (Section 3):** Five (5) years commencing on the commencement date and ending at the end of the 60th month therefrom
- 1.7 **Initial Term End Date (Section 3):** February 7, 2012
- 1.8 **Extended Terms (Section 3, Rider #1):** Three (3) five (5) year options at market rent
- 1.9 **Minimum Rent for Initial Term: (Section 7, Rider 1):**
- | | |
|--------------|-------------------------------------|
| Months 1-12 | (\$ 44,967.05 = 3,747.25 per month) |
| Months 13-24 | (\$ 46,317.10 = 3,859.76 per month) |
| Months 25-36 | (\$ 47,706.61 = 3,975.55 per month) |
| Months 37-48 | (\$ 49,137.81 = 4,094.81 per month) |
| Months 49-60 | (\$ 50,611.94 = 4,217.66 per month) |

- 1.10 **Percentage Rent (Section 8):** None.
- 1.11 **Rent Payment:** Monthly, in advance on the first calendar day of each month.
- 1.12 **Deposits (Section 9):** Security Deposit \$ 3,330.00 (initial Lease)
First month's rent \$ 3,747.25
- 1.13 **Landlord's Notice and Payment Address (Section 25.15):**
- | | |
|--|--|
| NOTICE: | PAYMENT: |
| Cedar Professional Center LLC
22725 44 th Avenue West
Mountlake Terrace, WA 98043 | Cedar Professional Center LLC
22725 44 th Avenue West
Mountlake Terrace, WA 98043 |
- 1.14 **Tenant's Billing and Notice Address (Section 25.15):**
- Craig E. Bernhart D.D.S., P.S.
22725 44th Avenue West
Mountlake Terrace, WA 98043
- 1.15 **Guarantors Addresses (Section 25.18):**
- None
- 1.16 **Tenant's Trade Name (if any):**
- 1.17 **Permitted Uses under Lease (Section 5):** General office use and dentistry services.
- 1.18 **Riders & Exhibits to the Lease (Section 24.20)** Riders #: 1
Exhibit Lettered: A, B, C
- 1.19 **Broker Fee (if any, owed by Landlord): (Section 25)** N/A

Should be 3747.94

2. PREMISES

Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, upon the terms and conditions set forth in this Lease, the Premises as legally described on attached Exhibit A and identified on the floor plan attached as Exhibit B. The Premises are a part of the building which is situated at the Building Address as set out in Section 1.2.

3. TERM

Tenant leases from Landlord the Premises for a Lease term which includes the Initial term of this Lease listed in Section 1.6 and the Extended terms listed in Section 1.8 (the "Lease Term"). The Initial Term will begin on the Commencement date and end at midnight on the Initial Term End Date unless sooner terminated as provided elsewhere in this Lease.

Notwithstanding the foregoing or as otherwise set forth in the Lease, Tenant may terminate the Lease upon one hundred eighty (180) days notice to Landlord; provided, however, that Tenant is not otherwise in material default under the Lease terms hereunder.

4. POSSESSION

4.1 Possession. Except as provided elsewhere in this Lease, Tenant will be entitled to possession of the Premises on the Commencement Date.

4.2 Early Possession. Landlord and Tenant may agree to Tenant's occupancy of the Premises prior to the Commencement Date. If Tenant occupies the Premises prior to the Commencement Date, the occupancy will be subject to all provisions of this Lease, the occupancy shall not advance the termination date and Tenant shall pay all additional rent (not including minimum rent) throughout the period of early occupancy.

4.3 Surrender of Premises. At the expiration or sooner termination of this Lease, Tenant shall return the Premises to Landlord in the same condition in which received or, if altered by Landlord or by Tenant with Landlord's consent, then the Premises may be returned in such altered condition, broom clean, reasonable wear and tear excepted. Tenant shall remove all personal property, trade fixtures, appliances and equipment ("Fixtures"). Where such removal will require structural changes or damage to the Premises, Landlord will have the option to have same removed at Tenant's expense and under Landlord's supervision. Tenant shall also remove any and all alterations which Landlord designates to be removed pursuant to Section 11.4 below, and shall restore the Premises to the condition they were in prior to the installation or construction of said alterations. If Tenant has failed to fully pay all amounts due under this Lease, Landlord may, at Landlord's option, designate any or all Fixtures paid for by Tenant and installed on the Premises as Landlord's payment in full or in part of any such unpaid amounts, and Tenant shall provide Landlord with a Bill of Sale correctly evidencing the transfer of ownership. If Tenant fails to remove any fixture, at Landlord's option, Tenant shall agree to designate and permit Landlord to remove the same at Tenant's expense. Tenant shall return all keys to the Landlord within twelve (12) hours following termination of this Lease or pay for the cost of new keys, if the Landlord so requires. Tenant's obligation to perform this covenant shall survive the expiration or termination of this Lease. Landlord may place and maintain "For Lease" signs in conspicuous places on the Premises for ninety (90) days prior to the expiration or early termination of this Lease, and reserves the right to enter any part of the Premises during business hours, after notice to Tenant, during the ninety (90) day period to show the Premises to prospective tenants.

5. USE

5.1 Use. Tenant covenants that at all times during the Lease term and such other time as Tenant occupies the Premises, Tenant shall use the Premises for the Permitted uses and for no other purposes without the prior written consent of Landlord, as set out in Section 1.17.

5.2 Uses Prohibited. Tenant shall not do or permit anything to be done in or about the Premises or bring or keep anything therein which will in any way increase or affect the existing rate of any fire or other insurance policy upon the Premises or the Building, or cause a cancellation of any such insurance policy covering said Premises, nor which will in any way obstruct or interfere with the right of other tenants or occupants of the Building or injure or annoy them, nor shall the Tenant use or allow the Premises to be used for any improper, immoral, unlawful, objectionable or offensive purpose, nor shall Tenant cause, maintain or suffer or permit any nuisance in, on or about the Premises. Landlord acknowledges that the permitted use identified under Section 1.17 shall not constitute a prohibited use hereunder. Tenant shall not commit or allow to be committed any waste in or upon the Premises and shall refrain from using or permitting the use of the Premises or any portion thereof as living quarters, sleeping quarters or for lodging purposes. Tenant shall not do or permit anything to be done in or about the Premises, nor bring or keep anything thereon that is or will constitute or create a hazardous waste or substance or violate any environmental law. Tenant will indemnify and hold the Landlord harmless from any and all damages related to the Tenant's introduction to, or creation of, hazardous waste on the Premises. Tenant shall advise Landlord in writing immediately of any environmental concern related to Tenant's use and occupancy of the Premises brought to Tenant's attention by any private party or governmental agency or official. Landlord shall have the right to remedy any environmental problem and to conduct any environmental tests reasonably necessary to discover a hazardous waste or other environmental problem and Tenant shall be liable for all costs and expenses related to such tests or remedial action if a hazardous waste or environmental problem caused by Tenant is found to exist.

5.3 Building Codes and Zoning. Tenant has investigated all applicable building and zoning codes, regulations

and ordinances to determine whether Tenant's intended use of the Premises is permitted. Based upon this investigation, Tenant accepts the Premises "As Is", subject to all applicable statutes, ordinances, rules and regulations governing Tenant's use of the Premises. Any and all expenses required to comply with all applicable statutes, ordinances, rules, regulations and requirements in effect during the Lease Term or part thereof regulating Tenant's use of the Premises will be borne exclusively by Tenant, unless otherwise assumed by Landlord hereunder. Tenant agrees to comply with all such statutes, ordinances, rules and regulations throughout the Lease Term.

5.4 Condition of Premises. Tenant has inspected the plumbing, lighting, air conditioning, heating, windows, interior walls, flooring and all other elements of the Premises prior to execution of this Lease. Based upon that inspection, Tenant accepts the Premises "As Is" in the absence of any material change in its condition prior to the Commencement Date or the date the Tenant takes possession of the Premises, whichever is earlier. Tenant acknowledges that neither Landlord nor Landlord's agent has made any representation or warranty as to the present or future suitability of the Premises for the conduct of Tenant's business. Provided however, that upon Tenant taking possession of the premises, Landlord warrants that all mechanical, plumbing and electrical systems servicing the premises shall be in working order, and that the walls, ceiling and roof shall not leak.

6. COMMON AREAS

6.1 Areas. Landlord shall make available such areas and facilities for the common use of all tenants of the Building (including but not limited to elevators, walkways and foyers) as Landlord shall reasonably deem appropriate ("Common Areas"). The utility systems up to the exterior walls of the Premises are Common Areas. Landlord or its agents shall operate, manage, equip, light, repair, replace and maintain the Common Areas for their intended purposes in such manner as Landlord shall reasonably, in its sole discretion, determine. Landlord may, from time to time, change the size, location, nature and use of any Common Area, and make installations therein and move and remove the same, provided that Tenant's access to the Premises is not materially altered. All expenses in connection with the Common Areas are Operating Expenses for the purposes of Section 10 below.

6.2 Rights. Tenant and its employees, agents and invitees shall have the non-exclusive right (in common with other tenants of the Building and Landlord) to use the Common Areas, subject to any Rules, as defined in Section 18. Landlord may at any time temporarily close any Common Areas due to construction, maintenance, repair or changes to any part of the Building or the real property upon which the Building is located, with prior notice to Tenant.

7. MINIMUM RENT

7.1 Initial Term. During the Initial Term of this Lease, Tenant agrees to pay to Landlord at Landlord's Payment Address or such other place as designated, the Minimum Rent for the Initial Term of this Lease, in the manner described in Section 7.3.

7.2 Extended Terms. During any Extended Term or Terms, Tenant shall pay the Minimum Rent for the Extended Terms as set out in Section 1.8 and in the manner described in Section 7.3.

7.3 Rent Payment. The Minimum Rent for the Initial Term or any Extended Term shall be paid in advance of the first day of each calendar month of the Initial Term or any Extended Term or any period prior of subsequent thereto while Tenant is in possession of the Premises. The Minimum Rent for any partial month shall be prorated. The Minimum Rent is exclusive of any sales, franchise, business or occupation or other tax based on rents and should any such taxes apply during the term of this Lease, the Minimum Rent shall be increased by such amount. In the event percentage or other additional rent is payable by the Tenant under this Lease, it shall be paid in the manner and at the time set forth in the Riders attached hereto and by reference made a part of this Lease.

8. PERCENTAGE RENT. [Intentionally left blank.]

9. FIRST/LAST MONTHS RENTAL AND SECURITY DEPOSIT.

9.1 Deposits.

(a) As set out in Section 1.12, tenant has deposited the Security Deposit for the performance of all of the terms, covenants and conditions of this Lease and as additional consideration for entering into this Lease. Landlord shall not be required to keep the Security Deposit separate from its general accounts and Tenant shall not be entitled to interest on such deposit. In no event may the Security Deposit be used as or applied to the last month's rent. Should tenant not be in default the security deposit shall be applied to the rental due and owing in the 36th month of this lease.

(b) Tenant has deposited the sum of \$3,747.25 with Landlord, said sum to be applied by Landlord towards the first month's minimum rental obligation.

9.2 Applications on Default. If Tenant is in default under this Lease, Landlord may use the Security Deposit, or any portion thereof, to cure the default or to compensate Landlord for actual damages (including reasonable attorney's fees) sustained by Landlord resulting from Tenant's default, including, but not limited to, the payment of rent and the cost of cleaning and/or repairing the Premises. Any payment to Landlord from the Security Deposit shall not be considered a payment of liquidated damages. Tenant shall, within ten (10) days after written demand, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to the full amount stated above, and Tenant's failure to do so shall be a material breach of this Lease. If Tenant is not in default at the expiration of the Lease Term and after Tenant has vacated the Premises, Landlord shall return the Security Deposit (less any amounts deducted by Landlord that Tenant has not restored pursuant to this Section 9.2) within thirty (30) days of the latter of such expiration of this Lease or vacation of the Premise. No trust relationship is created between Landlord and Tenant with respect to the Security Deposit.

10. OPERATING EXPENSES

10.1 Net Lease. The purpose of this Section 10 is to ensure that, in addition to Minimum Rent, Tenant pays its Proportionate Share of all expenses relating to the use, maintenance, ownership, repair and insurance of the Premises, except costs specifically assumed by Landlord according to other terms of this Lease.

10.2 Direct Expense. The expenses listed in this Section 10.2 ("Direct Expenses") are to be paid directly by Tenant:

10.2.1. Utilities. Tenant agrees to pay before delinquency and at its sole cost and expense, all charges for utilities supplied to the Premises including, without limitation, water, electricity, gas heating, lighting, sewer, waste disposal, security, air conditioning and ventilating throughout the full Lease Term. Tenant agrees to pay, upon fifteen (15) days notice, Tenant's Proportionate Share of such charges.

10.2.2 Personal Property Taxes. Tenant shall pay, before delinquency, any and all taxes levied or assessed and payable during the Lease term upon all Tenant's equipment, furniture, fixtures and any other personal property located on the Premises. If any of the same are assessed or taxed with the building or real property upon which the Building is located, Tenant shall pay Landlord the amount of such taxes within ten (10) days after receipt of a written statement setting forth the amount of such taxes that Landlord has determined to be attributable to Tenant's personal property.

10.2.3 Licenses and Taxes. Tenant shall be liable for, and shall pay throughout the Lease Term, all license and excise fees and occupation taxes covering the business conducted on the premises. If any governmental authority or unit under any present or future law effective at any time during the Lease Term shall in any manner levy a tax on rents payable under this Lease or rents accruing from use of the premises or a tax in any form against Landlord because of, or measured by, income derived from the leasing or rental of said property, such tax shall be paid by Tenant, either directly or through Landlord, and upon Tenant's default therein, Landlord shall have the same remedies as upon failure to pay Minimum Monthly Rent. It is understood and agreed, however, that Tenant shall not be liable to pay any net income tax imposed on Landlord unless, and then only to the extent that, the next income tax is a substitute for real estate taxes.

10.3 Additional Rent. Tenant shall pay as additional rent ("Additional Rent") in the manner set forth in Section 10.4, Tenant's Proportionate Share of the following expenses

10.3.1 Real Property Taxes and Assessments. Tenant's Proportionate Share of all real property taxes and general and special assessments levied and assessed against the Building improvements or the land of which the Premise are a part. Each year Landlord shall notify Tenant of Landlord's calculation of Tenant's Proportionate Share of the real property taxes and assessments. Tenant shall pay Tenant's Proportionate Share of said taxes or assessments in the manner set forth in Section 10.4. Upon written request, Landlord will furnish Tenant with a copy of the Tax assessment bill. Landlord may require from Tenant, upon reasonable written notice from Landlord, a payment of the Tenant's Proportionate Share of such real property taxes and/or assessments to Landlord on a periodic basis. Taxes and assessments payable shall be prorated in the first and last calendar years of the Lease Term.

10.3.2 Common Area Expenses. To the extent not covered by other provisions of this Lease, Tenant shall pay Tenant's Proportionate Share of the following costs associated with Common Areas of the Building in the manner set forth in Section 10.4:

(a) All real estate taxes, including assessments, all insurance costs, all utility costs and all costs to maintain, repair and replace common areas, parking lots, sidewalks, driveways and other areas used in common by the tenants of the Building (including, but not limited to HVAC and signs).

(b) Any parking charges, utility subcharges, or any other costs levied, assessed or imposed by or at the direction of, or resulting from statutes or regulations, or interpretations thereof, promulgated by any governmental authority in connection with the use or occupancy of the Premises or the parking facilities serving the Premises.

10.4 Payment of Additional Rent. Tenant shall pay Additional Rent described in Section 10.3 or elsewhere, in the manner set forth herein:

10.4.1 Additional Monthly Rent. On the Commencement Date or as soon as possible thereafter, Landlord shall submit to Tenant a statement of the estimated total Additional Rent owed by Tenant under Section 10.3 for the period from the Commencement Date to the end of the calendar year. Tenant shall pay such estimated Additional Rent in monthly payments equal to the amount of the Additional Rent divided by the number of full months remaining in the period from the Commencement date to the end of the calendar year (the "Additional Monthly Rent"). The Additional Monthly Rent shall be paid concurrently with the monthly payment of the Minimum rent and shall be adjusted as provided in Section 10.4.2 herein.

10.4.2 Adjustments Statement. By March 1 of each year of the Lease Term, Landlord shall endeavor to provide Tenant with a statement showing the actual Additional Rent for the prior calendar year (the "Adjustments Statement"). If the total of the Additional Monthly Rent payments which Tenant has made for the prior calendar year is less than Tenant's Proportionate Share of the actual Additional Rent for such period, Tenant shall pay within ten (10) days after receipt of the Adjustments Statement, an amount equal to (i) the deficiency for the previous calendar year, plus (ii) the deficiency due to Additional Monthly Rent payments made in the current calendar year prior to such Additional Monthly Rent being adjusted as set forth in Section 10.4.3. Failure of Landlord to submit Adjustment Statements shall not be deemed to be a waiver of Tenant's obligation to pay sums as required by this Section 10.4.

10.4.3 Adjustment of Additional Monthly Rent. The amount of Additional Monthly Rent owing in the current calendar year shall be adjusted concurrently with Landlord's provision of the Adjustments Statement to Tenant. Taking into account the actual amount of the Additional Rent for the previous calendar year, Landlord shall submit to Tenant as part of the Adjustments Statement (i) an estimate of the total Additional Rent for the current calendar year and (ii) the adjusted Additional Monthly Rent amount based on such estimate.

10.4.4 Deficiency/Overpayment. Even though the term has expired and Tenant has vacated the Premises, when the final determination is made of Tenant's Proportionate Share of the Additional Rent for the year in which the Lease terminates, Tenant shall immediately pay any deficiency between the total of the Additional Monthly Rent payments made and the actual Additional Rent due. Any overpayment made shall be immediately rebated by Landlord to Tenant, provided there are no outstanding rents or charges due. This provision shall survive termination

of this Lease.

10.5 Exclusions From Direct Expenses. Notwithstanding the provisions of Section 10.2, Direct Expenses shall not include:

(a) Legal fees, brokerage fees, leasing commissions, advertising costs, promotional expenditures, architectural and engineering fees, and other similar expenses incurred in connection with (i) the leasing of space in the Building (including rental or other obligations to third parties or prospective tenants or occupants of the Building which Landlord pays or assumes) or other expenses (including the cost of Landlord's leasing suite and space planning costs for tenants) incurred by Landlord in connection with the leasing of tenant space in the Building or (ii) the costs of the design and construction of tenant improvements to the Premises or the premises of other tenants;

(b) any costs (unless such costs would otherwise have been incurred by Landlord in the normal course of maintenance and repair and which are not otherwise excluded by the terms of this Section), including penalties and fees, incurred due to a violation, or responding to a potential violation, by Landlord or any tenant or occupant of the Building of any applicable laws including, without limitation, any applicable ordinance of the City of Mountlake Terrace pertaining to the installation/retrofit of fire sprinklers in the Building or the terms and conditions of this Lease or of any other lease, contract, easement, license, encumbrance or other obligation or agreement relating to the Building;

(c) any costs incurred in the event any portion of the Building is made untenable by fire, earthquake, or other casualty or by exercise of the rights of eminent domain or other cause, or to perform repairs or other work occasioned by loss or damage due to casualty or the exercise of rights or eminent domain, whether or not paid for by insurance or condemnation proceeds; provided that a customary deductible may be included within Direct Expenses;

(d) damage and repairs or any other costs necessitated by the negligence or willful misconduct of Landlord, or any of its employees, agents, vendors, contractors or providers of materials or services;

(e) wages, salaries and benefits paid to leasing agents, promotional directors and other personnel to the extent of time by such other personnel not actually allocated to the management, operation, administration, repair or maintenance of the Building, including the cost of pension plans, fringe benefits, medical insurance, group life and disability insurance, general welfare benefits, union contributions, payroll taxes and other related expenses; provided, however, that in no event shall Direct Expenses include wages, salaries, and benefits paid to personnel of Landlord above the level of Manager;

(f) legal fees, accounting fees, professional expenses and other related costs except those incurred in connection with the management, maintenance, operation and repair of the Building and expressly excluding such fees and costs incurred in connection with proposals, negotiations or disputes with tenants or other occupants of the Building or prospective tenants or occupants of the Building or associated with the enforcement of the terms of any lease (including unlawful detainer proceedings or proceedings for the collection of rent), requests to assign or sublet or the defense of Landlord's title to or interest in the Building or any part thereof, and the sale, transfer, financing or refinancing of the Building;

(g) any costs (including permits, licensing and inspection fees) incurred in renovation or otherwise improving, decorating, painting or altering space for tenants or licensees in the Building and including such renovations to any vacant space in the Building available or intended to be made available for leasing;

(h) any ground lease rental and any amortization interest, points, penalties, principal and other payments on mortgages and any other form of monetary encumbrance or any form of financing for Landlord relating to the Building, and any other cost or expense relating or required pursuant to any such mortgage, encumbrance or financing, if any, except as otherwise provided in Section 10.2.1; depreciation on the Building or any Building components, systems or equipment, except as otherwise expressly provided for in Sections 11.1, 11.2, or 11.4;

(i) all items and services for which Tenant directly reimburses Landlord or pays third persons for such services which are otherwise not offered by Landlord to all tenants hereunder or which Landlord provides selectively to one or more tenants or occupants of the Building which are not customary for normal office use;

(u) any costs relating to the actual, alleged or threatened, presence, storage, removal, remediation, investigation, maintenance, containment or treatment of any substance identified as a hazardous substance under applicable laws or customary industry standards in, on, about, under or adjacent to the Building, including without limitation, in connection with any effort to comply with any law;

(v) any costs, expenses, assessments, fees and other payments pertaining or relating to:

Any CC&Rs, easements, use restrictions or deed restrictions encumbering the Building not in effect during the Base Year;

Any document or instrument imposed for, or relating to the grant of entitlements for (or development of), the Building (including those relating to low or moderate income housing, arts fees, housing replacement, school or child-care facilities, transportation impact management or mitigation fee, special assessment districts, parking management fees, recycling fees, infrastructure payments or fees or similar payments); or

Any future development or redevelopment of the Building (including, without limitation, any of the same which would not be incurred, paid or payable if the Building were not further developed or redeveloped).

11. MAINTENANCE, REPAIRS AND ALTERATIONS.

11.1 Landlord's Obligations. Landlord shall maintain and repair the foundations, exterior walls and the roof structure of the Building. Absent express written approval from Landlord, Tenant shall not do any work in or about the premises that will require roof penetrations. Except as otherwise required by Section 14 regarding subrogation, if any of this maintenance and/or repair is required in whole or in part because of the negligence of the Tenant, its agents or invitees, Tenant shall pay to Landlord the reasonable cost of the repairs. Except as provided by Section 15 regarding reconstruction, there shall be no abatement of rent, and no liability of Landlord, due to any injury or interference with Tenant's business arising from Landlord's performance of any maintenance or repair which it is required or permitted to perform. Tenant waives any right which it may have under any current or future law or ordinance to make repairs at Landlord's expense.

11.2 Tenant's Obligations. Tenant shall, at Tenant's sole cost and expense, keep in good condition and repair all portions of the Premises not required to be maintained by Landlord under Section 11.1, including, without limitation, the maintenance, repair and replacement of any storefront, all interior walls or partitions and interior portions of exterior walls, doors, exterior and interior glass and window casements, roof covering (but not roof structure) and all utility systems within the Premises including heating, ventilation and air conditioning systems ("HVAC") unless such expense constitutes a capital expenditure as defined by GAAP. Tenant shall, upon expiration or sooner termination of this Lease, surrender the Premises to Landlord in good and clean condition, ordinary wear expected. Any damage to adjacent premises caused by Tenant's use of the Premises shall be repaired at the sole cost and expense of Tenant. If Tenant fails to perform the maintenance, repair or replacement required by this Section 11.2 or to surrender the Premises in the condition required by this Section, Landlord shall have the right to perform the necessary work at Tenant's expense, and Tenant agrees to reimburse all costs incurred by Landlord. Landlord shall have the right to contract for such services as HVAC maintenance and bill Tenant for the reasonable cost for such service.

11.3 Government Repairs. In the event any governmental agency requires major repairs or modifications to be made to the Premises, which repairs are the obligation of Landlord and cannot, in Landlord's judgment, be justified by the Minimum Rent, the Landlord shall have the right to cancel and terminate this Lease by giving Tenant ninety (90) days written notice. Major repairs for purposes of this Section shall be repairs or modifications with a cost exceeding six (6) months' Minimum Rent under this Lease. However, Tenant may elect in writing within fifteen (15) days of Tenant's receipt of the ninety (90) days notice of cancellation from Landlord to make these repairs at its sole cost and expense, in which event this Lease shall remain in full force and effect.

11.4 Alterations and Additions. Tenant shall not make or permit any alteration, addition or improvement to the Premises without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Tenant shall pay any and all costs incurred by Landlord in reviewing and evaluating any request for the consent required by

this section. Any alteration, addition or improvement consented to by Landlord shall be made in a good workmanlike manner at Tenant's sole cost and expense and shall comply with all applicable laws, codes, ordinances, rules and regulations. Tenant shall provide Landlord performance and payment bonds in the full amount of the construction contract for its initial build-out of the premises. All alterations, additions or improvements (including but not limited to wall and window covering, paneling and built-in cabinet work, but excluding movable furniture and trade fixtures) shall at once become a part of the Premises belonging to the Landlord and shall be surrendered with the Premises at the expiration of this Lease, unless Landlord demands their removal as set forth below. Upon expiration or sooner termination of the Lease term, Tenant shall, at Tenant's sole cost and expense, with all due diligence, remove any alterations, additions or improvements made by Tenant and designated by Landlord to be removed; provided Landlord gives Tenant not less than thirty (30) days advance written notice prior to termination of this Lease. Tenant shall, at its sole cost and expense, repair any damage to the Premises caused by such removal. If Tenant fails to remove any such alterations, additions or improvements, Landlord may do the same at Tenant's expense.

12. LIENS

12.1 Liens. Tenant shall keep the Premises free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant, and agrees to hold Landlord harmless from the same. Landlord may require, at Landlord's sole option, that Tenant provide, at Tenant's sole cost and expense, a materialmen's labor and performance bond acceptable to Landlord in an amount equal to one and one-half times the estimated cost of any improvements, additions or alterations to the Premises which the Tenant desire to make, to insure Landlord against any liability for mechanics' and materialmen's liens, and to insure completion of the work.

12.2 Encumbrances. The Tenant shall not cause or suffer to be placed, filed or recorded against the title to the Premises, the Building, or any part thereof, any mortgage, deed of trust, security agreement, financing statement or other encumbrances. Further, in no event shall the Tenant lien or mortgage any leasehold improvements, alterations, additions or improvements thereto, except trade fixtures, appliances and equipment which are owned by Tenant and which are not, and which do not become a part of the Premises. The form of any such mortgage, deed of trust or other security agreement or financing statement which includes a legal description of the Premises or the Building shall be subject to Landlord's prior written approval, which approval shall be subject to such conditions as the Landlord may deem appropriate.

13. HOLD HARMLESS

Tenant agrees to indemnify and hold Landlord and its agents harmless from any and all claims arising from Tenant's use of the Premises, from the conduct of Tenant's business, or from any activity, work or things done or permitted to be done by Tenant on the premises or elsewhere. Tenant further agrees to indemnify and hold Landlord and its agents harmless from any and all claims arising from, in connection with, or related to any default by Tenant in the performance of its obligations under this Lease, or any act, omission or neglect of Tenant, its agents or invitees. Tenant further agrees to indemnify and hold Landlord and its agents harmless from all costs (including but not limited to attorney's fees) incurred by Landlord in connection with its defense against any claim made against the Landlord as to which Tenant is required to indemnify Landlord pursuant to this Section. Tenant shall give prompt notice to Landlord of any casualty or accident in the Premises. Upon notice by Landlord, Tenant, at Tenant's expense, shall defend Landlord, through counsel reasonably satisfactory to Landlord, in any action or proceeding brought against Landlord by reason of any such claim. Tenant further assumes all risk of, and waives and releases all claims against Landlord for any damages to person or property sustained by Tenant, or any person claiming through Tenant, which damage results from any accident or occurrence in or on the Premises from any cause whatsoever, unless such damage is caused by the gross negligence of Landlord or its agent(s).

14. SUBROGATION

Neither Landlord nor Tenant shall be liable to the other or to any insurance company (by way of subrogation or otherwise) insuring the other party for any loss or damage to any building, structure or other tangible property, or any resulting loss of income, or losses under worker's compensation laws and benefits, even though such loss or damage might have been occasioned by the negligence of such party, its agents or employees if any such loss or damage is covered by insurance benefiting the party suffering such loss or damage or was required to be covered by insurance pursuant to this Lease.

15. RECONSTRUCTION

15.1 Effect of Insured Loss. Except as provided below, if the Premises are damaged by fire or other cause covered by Landlord's property insurance, Landlord agrees to repair the same, and this Lease shall remain in full force and effect.

15.2 Landlord's Options. Landlord shall have the option either to repair or rebuild the Premises or to terminate this Lease if the Premises or any portion of the Building is damaged if:

- (a) The damage results from any cause not covered by Landlord's insurance;
- (b) Insurance proceeds are insufficient to fully pay for repair and restoration;
- (c) The cost to repair exceeds twenty-five percent (25%) of the then complete replacement cost of the Premises and the Building;
- (d) The repair or restoration, in Landlord's opinion, cannot be completed within six (6) months of the damage; or
- (e) The damage occurs during the last twelve (12) months of the Lease Term.

Landlord shall exercise its option to terminate this Lease by giving to Tenant, at any time within thirty (30) days after the damage, written notice of its election to terminate this Lease as of the date specified in the notice. The termination date shall not be less than thirty (30) nor more than sixty (60) days after the date of notice. If Landlord fails to give notice within the thirty (30) days, it shall be deemed to have elected to repair or restore the damage. If Landlord terminates this Lease as provided by this Section 15.2, this Lease shall automatically terminate on the date specified in Landlord's notice. Neither party shall have further liability to the other, except for obligations which were accrued and unpaid as of the date of termination specified in Landlord's notice, and except that Landlord shall return any unused balance of the Security Deposit to Tenant.

15.3 Rent Abatement. This Lease shall remain in full force and effect if Landlord elects to repair the damage, or until the termination date specified in the notice of termination, as applicable, except that the Minimum Rent and any Additional Rent shall be proportionately abated from the date of damage until the repairs are completed, or until the specified termination date, as applicable. Such proportionate abatement shall be based upon the extent to which the damage materially interferes with the business carried on by Tenant in the Premises.

15.4 Tenant's Repair Obligations. Landlord shall not be required to repair or replace any leasehold improvements, fixtures or other personal property of Tenant, all of which shall be repaired or replaced promptly by Tenant.

16. EMINENT DOMAIN.

16.1 Total or Partial Taking. If any portion of the Premises is taken or appropriated by any public or quasi-public authority under the power of eminent domain, or is purchased by the condemner in lieu of condemnation proceedings, either party shall have the right to terminate this Lease upon thirty (30) days written notice given to the other party within sixty (60) days after the date that possession is surrendered to the condemner. If neither party elects to terminate, the Minimum Rent and any Additional Rent thereafter to be paid shall be equitably reduced. If any part of the Building other than the Premises is so taken or appropriated, or is purchased by the condemner in lieu thereof, Landlord shall have the right at its option to terminate this Lease upon thirty (30) days written notice to Tenant given within sixty (60) days after the date that possession is surrendered to the condemner.

16.2 Damages. Landlord reserves all rights to the entire damage award or payment for any taking by eminent domain and Tenant shall make no claim whatsoever against Landlord for damages for termination of its leasehold interest in the Premises or for interference with its business. Tenant hereby grants and assigns to Landlord any right

Tenant may now have or hereafter acquire to damages related to any taking by eminent domain and agrees to execute and deliver such further instruments of assignment thereof as Landlord may from time to time request. Tenant shall, however, have the right to claim from the condemning authority all compensation that may be recoverable by Tenant on account of any loss incurred by Tenant in removing Tenant's merchandise, furniture, trade fixtures and equipment or for damage to Tenant's business provided, however, that Tenant may claim such damages only if they are awarded separately in the eminent domain proceeding and not as part of Landlord damages.

17. ASSIGNMENT AND SUBLETTING.

17.1 Restriction. Except as permitted herein, Tenant shall not, without the prior written consent of Landlord:

(a) Voluntarily, involuntarily or by operation of law, assign, transfer, mortgage, pledge, hypothecate or otherwise encumber this Lease, or any interest in it, or any right of privilege appurtenant to it;

(b) Sublet all or any part of the Premises; or

(c) Allow any other person, except the agents and invitees of Tenant, to occupy or use any portion of the Premises.

Any assignment, transfer, encumbrance, subletting or uses without Landlord's consent shall be void and shall, at the option of Landlord, constitute a material default under this Lease. An assignment or sublease consented to by Landlord shall not be binding upon Landlord unless the assignee or subtenant delivers to Landlord:

(i) An original executed assignment or sublease;

(ii) Any collateral agreements; and

(iii) An instrument containing said assignee's or sublessee's assumption of all of the obligations of the Tenant under this Lease, in form and substance satisfactory to Landlord.

The assignee's or sublessee's failure to execute such a covenant shall not waive, release or discharge the assignee or sublessee from its liability for the performance of the Tenant's obligations under this Lease. Regardless of Landlord's consent, no subletting or assignment shall release Tenant of Tenant's obligations or alter the primary liability of Tenant to pay rent and to perform all the obligations of the Tenant under this Lease.

Should the tenant wish to assign the lease in whole or in part or sublet all or any portion of the premises, it shall so notify the landlord in writing and request landlord to consent to the proposed assignment or sublease. At the same time, tenant shall also submit to landlord the name of the proposed assignee or subtenant, the nature of the proposed assignee or subtenant's business to be carried on in the premises, the terms and provisions of any proposed assignment or sublease and such financial business and other background information as landlord may request concerning the proposed assignee or subtenant.

17.2 Excluded Transfers. Tenant may assign this lease or sublease the premises to:

(a) Any corporation into which tenant has merged or consolidated;

(b) Any subsidiary, successor, affiliated corporation of tenant;

(c) Any corporation that acquires all or substantially all of the assets or operations of tenant;

(d) Any partnership, the majority interest of which shall be owned by tenant, subsidiary or affiliated interest of which shall be owned by tenant or subsidiary or affiliated corporation of tenant.

17.3 Judicially Imposed Assignment. If the non-assignment provisions of this Section are deemed to be unenforceable in any bankruptcy proceeding, Landlord and Tenant agree that a showing of adequate assurance of future performance by a prospective assignee of this Lease must include, without limitation, clear and convincing

evidence that:

(a) Landlord will receive the full benefit of each and every term of its bargain in this Lease, except for the non-assignment and related termination clauses;

(b) The Premises will continue to be used solely for the use permitted by this Lease;

(c) A judicially imposed assignment will not cause an acceleration or increase in the interest rate, or fees in connection with, any indebtedness of Landlord secured by Landlord's interest in the building or this Lease; and

(d) The prospective assignee has the means, expertise and experience to operate the business to be conducted upon the Premises in a first-class manner.

17.4 Assignment by Landlord. If Landlord shall assign its interest under this Lease or transfer its interest in the Premises, Landlord shall be relieved of any obligation accruing hereunder after such assignment or transfer, and such transferee shall thereafter be deemed to be the Landlord under this Lease. Landlord may transfer Tenant's Security Deposit to such transferee and Tenant shall look solely to the transferee for the return of such deposit.

18. REMEDIES IN DEFAULT

18.1 Defaults. The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Tenant:

(a) The vacating or abandonment of the Premises by Tenant or the failure to continuously operate in the premises in accordance with the Lease Agreement.

(b) The failure by Tenant to make when due any payment of rent or any other payment required to be made by Tenant under this Lease, where such failure shall continue for a period of three (3) business days after written notice of default from Landlord to Tenant. In the event that Landlord serves Tenant with a notice to pay rent or vacate pursuant to applicable unlawful detainer statutes, such notice to pay rent or vacate shall also constitute the notice required by this Section.

(c) The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant, other than those described above, for a period of thirty (30) days after written notice of such default from Landlord to Tenant; provided, however, that if the nature of Tenant's default is such that more than thirty (30) days are reasonably required for its cure, then Tenant shall not be deemed to be in default if Tenant commences a cure within that thirty (30) day period and thereafter diligently prosecutes the cure to completion.

(d) Tenant becomes a "debtor" as defined in the Bankruptcy Code, 11 U.S.C. Section 101, or any successor statute, or if trustee or a receiver is appointed to take possession of substantially all of the Tenant's assets located at the Premises or of Tenant's interest in this Lease.

18.2 Remedies. In the event of a material default or breach by Tenant, Landlord may at any time thereafter, with or without notice or demand and without limiting Landlord in the exercise of any right or remedy which Landlord may have by reason of such default or breach:

(a) Terminate Tenant's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. In this event, Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default including, but not limited to: the cost of recovering possession of the Premises; expenses of reletting (including necessary renovation and alteration of the Premises); reasonable attorney's fees and costs and any real estate commission actually paid; the worth at the time of award by a court having jurisdiction of any unpaid rent or other charges owed by Tenant to Landlord which had been earned at the time of termination; the amount by which the

unpaid rent or other charges for the balance of the term after the time of such award exceeds the amount of such rental or other loss for the same period that Tenant proves could reasonably be avoided; and that portion of the leasing commission paid by Landlord according to this Lease applicable to the unexpired term of this Lease.

(b) Maintain Tenant's right to possession in which case this Lease shall continue in effect whether or not Tenant shall have abandoned the Premises. In this event, Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease, including the right to recover the rent as it becomes due under the Lease.

(c) Pursue any other remedy now or afterwards available to Landlord under the laws or judicial decisions of the state where the Premises are located.

18.3 Late Charges. Tenant acknowledges that late payment by Tenant to Landlord of rent and other sums due under this Lease will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. These costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed on Landlord by the terms of any mortgage or deed of trust covering the Premises. Accordingly, if any installment of rent or other sums due from Tenant shall not be received by Landlord or Landlord's agent within five (5) days after the amount shall be due, then without any requirement of notice to Tenant, Tenant shall pay to Landlord a late charge of Seventy-Five Dollars (\$75) plus one percent (1%) per month interest on the delinquencies from the date due until payment. The parties agree that this late charge plus interest represents fair and reasonable estimate of the cost Landlord will incur by reason of late payment by Tenant. Acceptance of the late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to the overdue amount, nor prevent Landlord from exercising any of the other rights or remedies granted to Landlord under this Lease, or at law or equity.

18.4 Default by Landlord. Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in any event within (30) days after written notice by Tenant to Landlord. Said notice shall specify wherein Landlord has failed to perform such obligation; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are required for performance, then Landlord shall not be in default if Landlord commences performance within such thirty (30) days period and thereafter diligently prosecutes the same to completion. Tenant further agrees not to invoke any of its remedies under this Lease until said thirty (30) days have elapsed.

19. RULES AND REGULATIONS

Tenant shall faithfully observe and comply with all recorded covenants, conditions and restrictions affecting the Premises, all existing rules and regulations, and all rules and regulations that Landlord may from time to time make to facilitate the reasonable operation of the Building of which the Premises are a part or the complex in which it is located or to comply with the requirements of any governmental entity or insurance company (collectively called "Rules"). Landlord reserves the right to modify the Rules from time to time. The Rules and any modifications shall be binding upon Tenant upon delivery of a copy of the Rules to Tenant. Landlord shall not be responsible to Tenant for the failure of any other tenants or occupants to comply with the Rules.

20. ABANDONMENT AND SURRENDER

20.1 Abandonment. Tenant agrees not to vacate or abandon the Premises at any time during the Lease Term. Should Tenant vacate or abandon said Premises or be dispossessed by process of law or otherwise, such abandonment, vacation or dispossession shall be deemed a breach of this Lease and, in addition to any other rights which Landlord may have, Landlord may remove any personal property belonging to Tenant which remains on the Premises and store the same, the cost of such removal and storage to be Tenant's liability.

20.2 Voluntary Surrender. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger, but shall, at the option of Landlord, terminate all or any existing subleases or subtenancies, or operate as an assignment to it of any or all such subleases or subtenancies.

21. ENTRY BY LANDLORD

Landlord reserves the right to enter the Premises to inspect the same during business hours upon reasonable written notice to perform any alterations, improvements, repairs or maintenance, to provide any services that Landlord may deem necessary or desirable and to do any other act permitted under this Lease. Landlord may retain a key with which to unlock all of the doors in the premises (excluding Tenant's vaults, safes and files). No entry by Landlord shall be construed or deemed to be a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from all or any portion of the Premises.

22. ESTOPPEL CERTIFICATE

Upon not less than ten (10) days prior written notice from Landlord, Tenant shall execute, acknowledge and deliver to Landlord a written estoppel certificate stating certain facts including, but not limited to:

(a) That this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease as so modified is in full force and effect);

(b) The date to which the Minimum Rent and other charges are paid; and

(c) That there are not, to Tenant's knowledge, any uncured defaults on the part of the Landlord (or specifying such defaults if any are claimed).

The statement shall be in any form that Landlord provides to Tenant. Any such statement may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the Building or the real property upon which it is located.

23. SIGNS

All signs or symbols placed by Lessee in the windows, on doors, or upon any exterior part of the building shall be subject to Lessor's prior written approval. Lessor may demand the removal of signs which are not so approved. Lessee's failure to comply with such request within forty-eight (48) hours shall constitute a breach of this Lease. Lessor may terminate this Lease, or, in lieu thereof, cause the sign to be removed and the building repaired at the sole expense of the Lessee. At the termination of this Lease, Lessee shall remove all signs placed by it upon the Premises, and shall repair any and all damage caused by such removal. All signs must comply with all sign ordinances and be placed in accordance with required permits. Lessor may place "For Lease" signs on Lessee's Premises store front (30) days prior to Lease termination.

The pylon/message center sign currently on the corner of 228th and 44th Avenue West is the property of the Lessor. Maintenance of this sign presently resides with the Lessee. Lessor reserves the right to maintain this sign in the future. Lessee shall have sole use of this sign.

24. AUTHORITY OF PARTIES

If Tenant is a corporation, limited liability company, or partnership, each individual executing this Lease on behalf of said entity represents and warrants that he or she is duly authorized to execute and deliver this Lease on its behalf. Tenant represents that the Lease is binding on its shareholders, members or partners, whatever the case may be.

25. GENERAL PROVISIONS

25.1 Exhibits and Addendums. Any exhibits and addendums attached to this Lease are a part hereof and are fully incorporated in this Lease by this reference.

25.2 Non-Waiver of Default. Landlord's waiver of any term, covenant or condition of this Lease shall not be deemed to be a waiver of any other term, covenant or condition. Landlord's acceptance of any sum shall not be deemed to be a waiver of any preceding default by Tenant, other than the failure of Tenant to pay the particular sum so accepted, regardless of Landlord's knowledge of such preceding default at the time it accepts the sum.

25.3 Joint Obligations. If there is more than one Tenant, the obligations of the Tenants under this Lease shall be joint and several.

25.4 Section Titles. The section titles of this Lease are not a part of this Lease and shall have no effect upon its construction or interpretations.

25.5 Time. Time is of the essence of this Lease and each and all of its provisions in which performance is a factor, including, but not limited to, Tenant's execution of estoppel certificates and subordinations and Tenant reimbursements to Landlord.

25.6 Successors and Assigns. The covenants and conditions of this Lease apply to and bind the heirs, successors, executors, administrators and assigns of all parties of this Lease.

25.7 Recordation. A short form memorandum may be recorded at the request of either party, and at the requesting party's expense.

25.8 Quiet Possession. Subject to all the provisions of this Lease and provided Tenant pays all sums due under this Lease and observes and performs all of the other covenants, conditions and provisions to be observed and performed by Tenant, Tenant shall have quiet possession of the Premises for the entire Lease Term, against any adverse claim of Landlord or any party claiming under Landlord.

25.9 Prior Agreements. This Lease contains the full agreement of the parties with respect to any matter covered or mentioned in this Lease. No prior agreements or understandings pertaining to any such matter shall be effective for any purpose. This Lease may be amended or supplemented only by an agreement in writing signed by the parties or their respective successors in interest.

25.10 Inability to Perform.

(i) Except as provided in Sections 14 and 15, this Lease and Tenant's obligations hereunder, including Tenant's obligation to make payments, shall not be affected or impaired because Landlord is unable to fulfill any of its obligations, or is delayed in doing so, if such inability or delay is caused by reason of weather, strike labor troubles, acts of God, or any other cause beyond the reasonable control of the Landlord.

(ii) Except as provided in Sections 14 and 15, Tenant's obligations hereunder shall be excused to the extent Tenant is unable to fulfill any of said obligations, or is delayed in doing so, if such inability or delay is caused by reason of weather, strike, labor troubles, acts of God, or any other cause beyond the reasonable control of the Tenant.

25.11 Severability. Any provision of this Lease which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision, and all other provisions shall remain in full force and effect.

25.12 Cumulative Remedies. No remedy or election under this Lease shall be deemed to be exclusive but shall, whenever possible, be cumulative with all other remedies at law or in equity.

25.13 Choice of Law. This Lease shall be governed by the laws of State of Washington. In the event of any dispute between Tenant and Landlord (and its affiliates, members, managers, shareholders, directors, officers, employees, attorneys, or advisors) arising out of this Agreement, or relating to Tenant's relationship with Landlord, will be subject to arbitration in accordance with the rules of the American Arbitration Association. Such arbitration will occur in Seattle, Washington before a sole arbitrator. With respect to such arbitration, Tenant and Landlord each agree that the parties may take formal discovery. BY AGREEING TO ARBITRATION, EACH PARTY ACKNOWLEDGES THAT ITS RIGHT TO TRIAL BY JURY HAS NOW AND BEEN FOREVER WAIVED WITH RESPECT TO ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN RELATION TO THIS AGREEMENT, WHETHER ARISING IN CONTRACT, TORT, OR OTHERWISE AND WHETHER OR NOT INVOLVING AN ACTION TO RESCIND OR DISAVOW THIS AGREEMENT.

25.14 Attorney's Fees. In the event any action or proceeding is brought by either party against the other arising out of or in connection with this Lease as set forth in Section 25.13, the prevailing party shall be entitled to recover its costs and reasonable attorney's fees and costs incurred in such action or proceedings, including any appeal.

25.15 Notices. All notices or demands which are required or permitted to be given by either party to the other under this Lease shall be in writing. Except as otherwise provided in any addendum, all notices and demands to the Tenant shall be either personally delivered or sent by the US Mail, registered or certified, postage prepaid, addressed to the Tenant at the Premises, or at the address set forth in Sections 1.14 and 1.15, or to such other place as Tenant may from time to time designate in a notice to the Landlord. Except as provided in any addendum, all notices and demands to the Landlord shall be either personally delivered or sent by US Mail, registered or certified, postage prepaid, addressed to the Landlord at the address set forth below, or to such other person or place as the Landlord may from time to time designate in a notice to the Tenant. Any notices sent by US Mail as provided above shall be deemed to have been received three (3) days after deposit into the mail as set out in Section 1.13 and 1.14.

25.16 Subordination. At Landlord's option, this Lease shall be subject to and subordinate to the lien of any existing or future mortgages or deeds of trust in any amount or amounts whatsoever, now or hereafter placed in or against the Building or the real property upon which it is located, and to any extensions, renewals or replacements thereof, without the necessity of the execution and delivery of any further instruments on the part of Tenant to effectuate such subordination. Upon Landlord's request, Tenant will execute and deliver such further instruments as may be appropriate to evidence such subordination of this Lease. As long as Tenant is not in default under this Lease, said subordination shall not disturb Tenant's right to possession of the Premises.

25.17 Attornment. In the event of foreclosure, or the exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the Premises, or in the event of any sale in lieu thereof, Tenant shall attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as Landlord under this Lease; provided said purchaser expressly agrees in writing that, so long as Tenant is not in default under the Lease, Tenant's possession and occupancy of the Premises shall not be disturbed and said purchaser will thereafter perform all of the obligations of Landlord under this Lease.

25.18 Guarantor. In the event that there is a Guarantor of this Lease, the Guarantor(s) shall have the same obligations as Tenant under this Lease.

25.19 Compliance with Environmental Laws. The parties acknowledge that there are certain federal, state and local laws, regulations and guidelines now in effect and that additional laws, regulations and guidelines may hereafter be enacted relating to or affecting the Premises and the larger parcel of land upon which the demised Premises may be a part, concerning the impact on the environment of construction, land use, the maintenance and operation of structures, and the conduct of business. Tenant shall not cause, or permit to be caused, any act or practice by negligence, or omission, or otherwise that would adversely affect the environment or do anything or permit anything to be done that would violate any of said laws, regulations or guidelines. Any violation of this covenant shall be an event of default under this Lease. Tenant shall indemnify and hold Landlord harmless from any and all cost, expense, claims, losses, damages, fines and penalties, including reasonable attorneys' fees that may in any manner arise out of or be imposed because of the failure of Tenant to comply with this covenant. The foregoing shall cover all requirements whether or not foreseeable at the present time and regardless of the expense attendant thereto.

25.20 Riders and Exhibits. The Riders and Exhibits referred to in Section 1.19 are attached to this Lease and made a part of it.

26. BROKERS

Tenant warrants that it has had no dealing with any real estate broker or agent in connection with the negotiation of this Lease and it knows of no other real estate broker or agent who is entitled to a commission in connection with this Lease. Under no circumstances shall Landlord be obligated to pay any brokerage fees.

27. LEGAL DOCUMENT

Tenant understands that this is a legally binding contract. Tenant has carefully read each of its provisions and

represents and warrants that it has discussed the legal effect of the Lease with its legal counsel.

IN WITNESS WHEREOF, the parties have executed this instrument as of the day and year first above written:

LANDLORD:
Cedar Professional Center LLC

By:

Its: Member

TENANT:
Craig E. Bernhart, D.D.S., P.S.

By:

Its:

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

ACKNOWLEDGMENT

On this day personally appeared before me Craig Bernhart to me known to be the individual who executed the within and foregoing instrument as duly appointed Member of the Cedar Professional Center LLC, and acknowledges that he/she signed the same as his/her free and voluntary act and deed and on oath stating that his/her powers authorizing the execution of this instrument have not been revoked.

GIVEN under my hand and official seal the 5th day of February, 2007.



Sabrina Koskinen
SIGNATURE
PRINTED NAME SABRINA KOSKINEN
Notary Public in and for the State of Washington,
residing at King County
My Commission Expires: 07/07/09

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

ACKNOWLEDGMENT

On this day personally appeared before me Craig Bernhart to me known to be the individual who executed the within and foregoing instrument as duly appointed President for Craig Bernhart DDS PC and acknowledges that he/she signed the same as his/her free and voluntary act and deed and on oath stating that his/her powers authorizing the execution of this instrument have not been revoked.

GIVEN under my hand and official seal the 5th day of February, 2007.



Sabrina Koskinen
SIGNATURE
PRINTED NAME SABRINA KOSKINEN
Notary Public in and for the State of Washington,
residing at King County
My Commission Expires: 07/07/09

EXHIBIT A

LEGAL DESCRIPTION

The West 220 feet for the South 213.24 feet of the Southwest quarter of the Southwest quarter of the Southwest quarter of Section 27, Township 27 North, Range 4 East, W.M.; EXCEPT the West 20 feet thereof, for 44th Avenue West; EXCEPT the East 10 feet of the West 30 feet thereof for 44th Avenue West as conveyed to the City of Mountlake Terrace by deeds recorded under Recording Nos. 2058207, 2058208 and 2058218; EXCEPT the south 30 feet thereof, for 228th Street Southwest as conveyed to Snohomish County by deed recorded under Recording No. 1190952; AND EXCEPT that portion thereof, conveyed to the City of Mountlake Terrace by deed recorded under Recording No. 8805230074, Situate in the County of Snohomish, State of Washington (Tax Parcel No. 270427-003-018-00).

EXHIBIT B
FLOOR PLANS

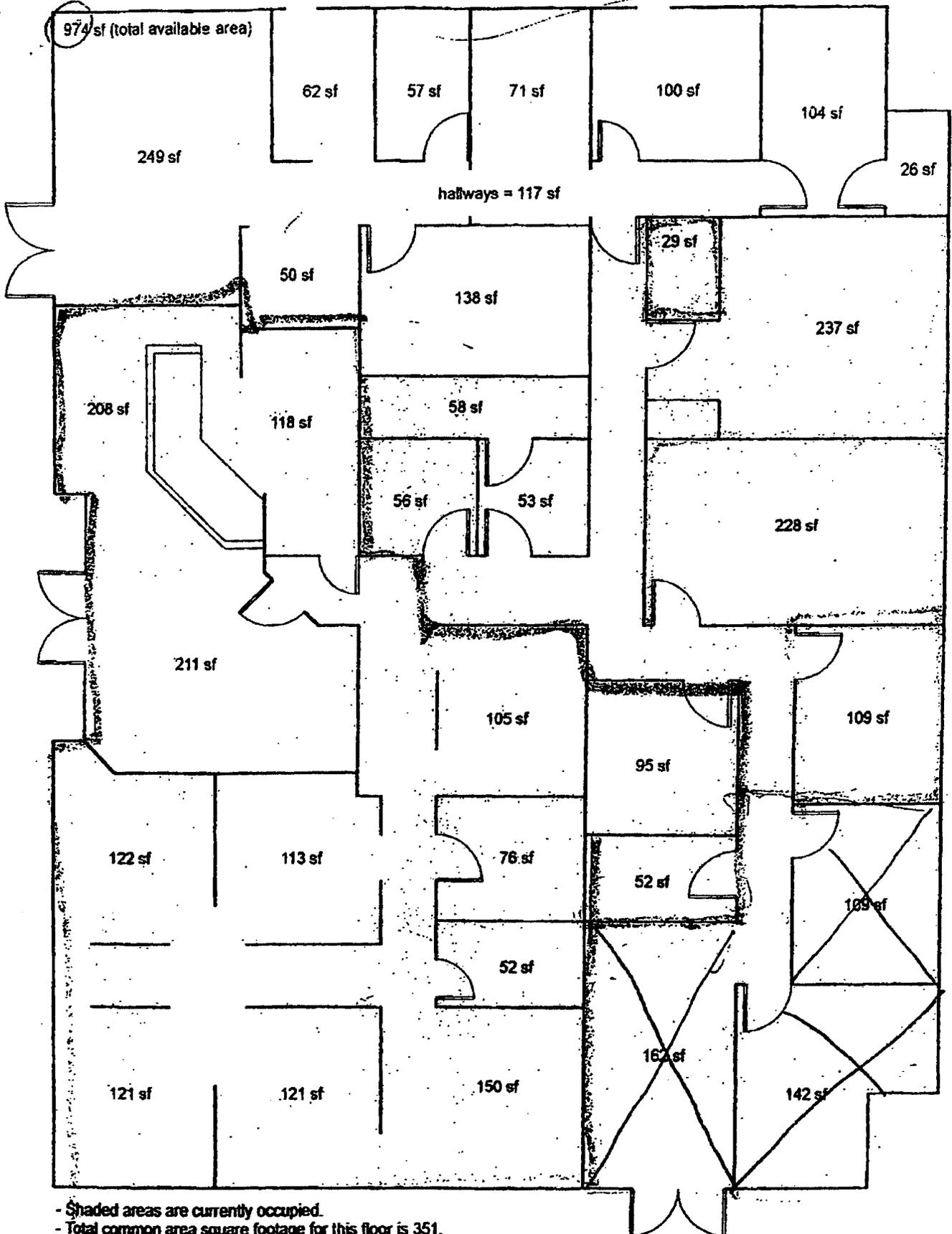
See attached plans. Premises leased by Tenant are outlined in yellow.

RIDER 1

Tenant's monthly rent and pro rata share are calculated per square foot as set forth below. It is expressly understood that if Tenant's square footage shall change or be adjusted by mutual agreement between Tenant and Landlord, the monthly rent and Tenant's pro rata share shall adjust accordingly.

TERM	RENT PER SQUARE FOOT	MINIMUM RENT
MONTHS 1 -12	21.65	44,967.05
MONTHS 13 - 24	22.30	46,317.10
MONTHS 25 - 36	22.96	47,706.61
MONTHS 37 - 48	23.66	49,137.81
MONTHS 49 - 60	24.37	50,611.94

Lower Level - 22725 44th Avenue West, Mountlake Terrace, WA



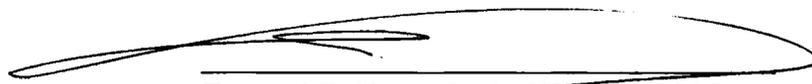
- Shaded areas are currently occupied.
- Total common area square footage for this floor is 351.

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON AT SEATTLE

CRAIG BERNHART, DDS, P.S.,)	
)	
Appellant,)	
vs,)	Case No. 63712-6-I
)	
CEDAR PROFESSIONAL CENTER,)	CERTIFICATE OF SERVICE
)	APPELLANT'S BRIEF
Respondent.)	
_____)	

The undersigned hereby certifies under penalty of perjury that on this date he caused or had caused to be served upon the Respondent copies of the Appellant's Opening Brief and Appendix by U.S. mail postage prepaid addressed to the Respondent and Mariann Danard, its manager, at 22725 44th Ave. West Mountlake Terrace Washington, 98041

Dated this 2st day of May, 2011.



Edward P. Weigelt, Jr. WSBA 12003
9222 36th Ave. S.E. Everett, Wa. 98208
P.O. Box 2299 Lynnwood, Wa. 98036

FILED
COURT OF APPEALS
DIVISION ONE

MAY - 2 2011