Supreme Court No. 96977-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76152-8

WASHINGTON STATE COURT OF APPEALS, DIVISION I

FUJI FOOD PRODUCTS, INC., a California corporation,

Petitioner,

v.

OCCIDENTAL, LLC, a Washington limited liability company,

Respondent

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

After a jury trial on competing claims related to a commercial lease, this dispute is now reduced to an appeal about attorney fees. Respondent Occidental, LLC ("Occidental") successfully defended against petitioner Fuji Food Products, Inc.'s ("Fuji") claim for breach of the lease by failing to return Fuji's security deposit. The jury specifically found that Fuji had breached the lease by failing to fulfill any of the conditions required by the lease prior to surrendering the premises and that Occidental was actually damaged in the amount of $42,000 by this breach. (CP: 2492 – Answers to Special Verdict Questions 6 & 7). Occidental also successfully defended against four of Fuji's five claims against it (breach of contract, violation of the CPA, unjust enrichment and negligent misrepresentation), and successfully reduced the extent of damages that Fuji sought, from as much as $257,000 (RP 1512) to an award of $60,000 for its claim of conversion.

Occidental appealed, in part, because the trial court incorrectly determined that Fuji was the prevailing party for the sole reason that it had achieved a net award of $18,000. The Court of Appeals agreed with Occidental and reversed, recognizing that both parties prevailed at trial on distinct and several claims, such that both parties are entitled to an award of attorney fees and costs under the *Marassi*[1] proportional approach. The *Marassi* proportional approach continues to be utilized by Washington courts. Nothing about the Court of Appeals decision here conflicts with

[1] *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

Douglass v. Shamrock Paving, 189 Wn.2d 733, 406 P.3d 1155 (2017). There is thus no basis to take review under RAP 13.4(b)(1).

Occidental seeks discretionary review of that part of the Court of Appeals decision finding the trial court did not err in denying Occidental's CR 50 motions to dismiss Fuji's conversion claim.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its unanimous unpublished decision on December 3, 2018. *Fuji Food Products, Inc. v. Occidental, LLC*, 6 Wn. App.2d 1027 (Dec. 3, 2018) ("the decision"). In the decision, the Court of Appeals (A) affirmed the trial court's denial of Occidental's CR 50 motion; (B) harmonized the jury's answers to questions on the Special Verdict Form; and (C) reversed the award of "prevailing party" fees and costs in favor of Fuji and remanded for rehearing on this issue under the *Marassi* proportional approach. The Court of Appeals further denied Fuji's motion for reconsideration and awarded Occidental, as the prevailing party on appeal, its fees and costs for the appeal. RAP 18.1.

III. ISSUES PRESENTED BY FUJI FOR REVIEW

The issues raised in Fuji's Petition for Review do not merit review under RAP 13.4(b)(1) or (4). The Court of Appeals recognized that both Occidental and Fuji prevailed at trial on distinct and several claims and that Occidental was entitled to a proportional award of fees for those claims upon which it prevailed. Accordingly, the Court of Appeals (1) reversed the trial court's order finding that Fuji was the prevailing party based solely on Fuji receiving a relatively small net affirmative judgment, and

(2) remanded for a determination of prevailing party fees using the "proportionality approach" relying upon *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993) and *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006).

This part of the decision is not in conflict with any decision of this Court, nor does this part of the decision present an issue of substantial public interest that warrants Supreme Court review under RAP 13.4(b)(1) or (4).

IV. ISSUE FOR REVIEW PRESENTED BY OCCIDENTAL

Based on RAP 13.4(b)(1) and (2), Occidental seeks review of that part of the decision which affirms the trial court's denial of Occidental's CR 50 motions on its affirmative defense of abandonment. Abandonment is a complete defense to Fuji's claim of conversion. It has long been held by Washington courts that a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other. *Ferris v. Blumhardt*, 48 Wn.2d 395, 402-403, 293 P.2d 935 (1956); *Monro v. Fetzer*, 56 Wn.2d 39, 42, 350 P.2d 1012 (1960); *In re Lyman's Estate*, 7 Wn. App. 945, 948–49, 503 P.2d 1127 (1972), opinion adopted sub nom. *In re Estate of Lyman*, 82 Wn. 2d 693, 512 P.2d 1093 (1973).

Here, even considering all of the earlier evidence presented to the jury about Fuji's intent to remove the south cooler rooms and ship them to California, the trial court should have determined - as a matter of law - that Fuji voluntarily relinquished its ownership in the south cooler rooms on December 23, 2013. This is the date that Fuji's laywer wrote to Occidental asserting that Fuji had no obligation to remove the cooler rooms and that

Fuji did not want those cooler rooms if Vinum Wine would take them. The Court of Appeals strained the bounds of reasonableness to the breaking point when it declared that the jury could reasonably have found "the text of the [December 23rd] letter to be equivocal evidence of Fuji's intent to abandon the cooler rooms." Decision, p. 11. There is nothing equivocal about the language used by Fuji's lawyer in that letter. The only *reasonable* interpretation is that the jury overlooked or disregarded the letter. This is why the trial court should have granted Occidental's CR 50 motions by recognizing that whatever Fuji did or said before December 23, its lawyer's letter speaking on Fuji's behalf was a clear abandonment by Fuji of its ownership interests in the south cooler rooms. There was no other interpretation that Occidental could give to Fuji's December 23 letter.

The decision thus conflicts with settled Washington appellate precedent and discretionary review should be granted. RAP 13.4(b)(1) and (2). If Fuji's petition is denied, this issued should be accepted and is amenable to resolution by *per curium* decision based on the cross-petition and any response filed by Fuji.

V. STATEMENT OF THE CASE

A. Fuji's *Statement of the Case* is an Attempt to Re-Try its Case and Ignores Occidental's Counterclaim and, More Importantly, the Jury's Verdict.

Fuji's *Statement of the Case* sets forth selective portions of testimony and evidence presented by Fuji at trial in a manner intended to inflame prejudice against Occidental. Of course, Occidental presented competing testimony and facts; the jury determined *that Fuji breached the*

lease. However, Fuji does not seek to reverse the judgment of the jury, so none of the facts set forth by Fuji are relevant to the limited attorney fee issue upon which it seeks discretionary review. Occidental therefore sets forth below only those facts relevant to the Court of Appeals' decision to apply the proportional approach to awarding fees where both Occidental and Fuji prevailed on distinct and several claims:

Fuji originally sued its landlord, Occidental, for return of its $42,000 security deposit and damages alleging five separate causes of action: breach of contract, conversion, violation of CPA, unjust enrichment, and negligent misrepresentation. (CP: 1-7) At the time of trial, Fuji sought damages of as much as $215,000, *in addition to* return of its $42,000 security deposit. (RP: 1512). Through motion practice and trial, Occidental prevailed in defeating four of Fuji's five claims and in significantly reducing the amount awarded to Fuji. The jury found in favor of Fuji on the single claim of conversion awarding it $60,000 for that claim. Occidental counterclaimed for breach of contract. The jury found for Occidental on this claim awarding it the value of Fuji's security deposit - $42,000 - as actual damages. (CP: 2490-92).

Both Fuji and Occidental alleged breach of the lease. Both parties proved at least one breach occurred. Occidental put on proof that Fuji breached the lease in multiple ways, including:

- Failing to make repairs to the premises after Fuji surrendered possession including repair of frozen pipe, locksmith to gain access to fix the frozen pipe, repair to roll-up doors to premises
- Failing to pay its utility bills;

- Failing to pay to remove a partition wall;
- Failing to pay its share of the 2013 and 2014 Common Area Maintenance expenses;

(*See* CP 2474-2475 – Instruction #19). Notably, as the Court of Appeals observed, Occidental put on "substantial evidence" to support a finding that Fuji repudiated the lease. (*See* CP 2466 & 2469 – Instruction #'s 12 & 15).

B. Facts Related to Cross-Review.

The key piece of evidence proving Fuji's intent to abandon the south cooler rooms came from its own lawyer and speaking agent – Mr. Mario Tapenes. (Exh. 239)[2] Mr. Tapenes wrote to Occidental's lawyer on December 23, 2013 stating unequivocally: "*To be clear, Tenant's position is as follows*:" (1) Fuji has no obligation to remove the cooler rooms because Vinum Wine wants them; (2) Fuji does not want the cooler rooms if Vinum Wine will take them; and (3) if Vinum Wine will not take them, Fuji will remove them but will not pay holdover rent during the time it will take its contractors to remove them (minimally 3 weeks). *Id.*

The content of this letter is not subject to equivocation. The only reasonable interpretation is that the jury overlooked or disregarded the letter when it found that Fuji did not abandon the cooler rooms. CP 2491 (Question #5).

[2] Attached to this Answer as Appendix A.

VI. REASONS WHY FUJI'S PETITION SHOULD BE DENIED

A. The Decision Does Not Conflict With any Decision from This Court. RAP 13.4(b)(1).

Fuji claims that the decision conflicts with *Douglass v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 406 P.3d 1155 (2017). It does not. Fuji's argument in support is based on the single fact that it was awarded a relatively small net affirmative judgment of $18,000. The *Douglass* case did not reject the *Marassi* proportional approach. The *Douglass* court held, in relevant part, that the prevailing party is generally the party who has an affirmative, positive recovery at the end of trial. This holding does not undermine the proportional approach to prevailing party fees when both parties prevail on separate and distinct claims.

First, Fuji ignores that *both* Occidental *and* Fuji prevailed on claims and *both* were awarded positive recovery by the jury. Occidental was awarded $42,000 and Fuji was awarded $60,000. Both Occidental and Fuji had claims against the other that were decided by the jury. Such was not the case in *Douglass*. The only claim at issue was that of Douglass for MTCA recovery; Shamrock Paving, Inc. had no counterclaims. Therefore, and necessarily, only one party *could* prevail. On remand, if Douglass recovers his remedial action costs, he will be prevailing party. If not, Shamrock Paving, Inc. will be prevailing party.

The facts and the issue in *Douglass* are so different as to make it irrelevant to a decision about which party is the prevailing party in a breach of contract case where both parties prevail on separate claims. As noted by the Court of Appeals, (decision at n. 7), *Douglass* addressed the issue of

whether a landowner who incurred remedial action costs under the Model Toxics Control Act was the prevailing party for purposes of an award of attorney fees under RCW 70.105D.080. The *Douglass* court did not address how a trial court should evaluate competing requests for attorney fees when both parties prevail on different claims.

Finally, in its discussion of "prevailing party," the *Douglass* court cites to, and relies upon, cases that recognize the enduring viability of the *Marassi* proportional approach. *See, e.g.*, *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 969 (1997) ("If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties," citing *Marassi*); *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (setting forth same quote from *Riss v. Angel, supra*, also citing *Marassi*, and noting "As surveyed by the court below [*Guillen v. Contreras*, 147 Wn. App. 326, 333-334, 195 P.3d 90 (2008)], there is ample case law supporting this approach."). This can hardly be viewed as rejecting the Marassi proportional approach. Fuji's argument that the decision conflicts with Douglass is simply incorrect.

B. The Decision Does Not Raise an Issue of Substantial Public Interest. RAP 13.4(b)(4).

1. Petitioner Has Never Before Asserted, or Argued, That it Should be Awarded Fees Based on Grounds of Equity. This Court Should Reject Fuji's RAP 13.4(b)(4) Petition on This Basis, Alone. RAP 2.5(a)

Disregarding all of its prior arguments based on the contract between the parties, and without ever presenting this argument to the trial court or to the Court of Appeals, Fuji now asserts that it should have been awarded its attorney fees based on "grounds of equity." Petitioner does not argue any of the recognized grounds to raise this issue for the first time on appeal. RAP 2.5(a).

Instead, Fuji's untimely argument is based on the jury finding that Occidental breached its contractual duty of good faith and fair dealing. (CP 2490). This finding is based on the jury instruction defining the implied duty of good faith and fair dealing:

> A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of its contract.

CP: 2470 (Instruction No. 16). This finding by the jury does not rise to the level of "bad faith" for which fees may be awarded. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999) (Three types of bad faith conduct have warranted attorney's fees: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith); *see also In re Impoundment of Chevrolet Truck, WA License*

No. A00125A ex rel. Registered/Legal Owner, 148 Wn.2d 145, 160 n.13, 60 P.3d 53 (2002) (citations omitted) (The type of bad faith conduct for which attorney's fees may be awarded under a court's equitable power refers to conduct involving ill will, fraud, or frivolousness). Even if Fuji had timely raised this argument, the jury's finding does not support Fuji's equitable claim for attorney's fees.

2. The Cases Upon Which Fuji Relies do not Support its Argument.

Neither of the two cases cited by Fuji support its argument. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) involved a partnership agreement where one partner breached his fiduciary duty to the other. Here, the dispute involves claims related to a commercial lease agreement between two relatively sophisticated businesses. Occidental did not owe Fuji a fiduciary duty, nor has Fuji ever asserted this. In *Public Utility Dist. No. 1 of Snohomish County v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976), this Court recognized that a court may exercise its equitable power to award attorney's fees "if the losing party's conduct constitutes bad faith or wantonness," *id*. at 390, but declined to find such conduct on the part of respondent. Here, nothing about the conduct of Occidental warrants the award of fees, in equity, to Fuji. Moreover, nothing about the *Marassi* proportional approach to attorney fees will act to "discourage good faith litigants from bringing good faith claims." This Court should reject Occidental's petition based upon RAP 13.4(b)(4).

VII. THE COURT SHOULD AWARD OCCIDENTAL ATTORNEY FEES AND COSTS FOR ANSWERING FUJI'S PETITION

Pursuant to RAP 18.1(a) and (j), Occidental respectfully requests the Court exercise its discretion and award Occidental its reasonable attorneys' fees and costs in answering this Petition. A prevailing party is entitled to attorneys' fees and costs in responding to a petition for review if requested in the party's answer and if "applicable law grants to a party the right to recovery." RAP 18.1(a) and (j).

Should the Court grant Occidental's request, Occidental will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

VIII. CROSS-PETITION FOR REVIEW

Occidental seeks discretionary review of that part of the decision finding that the trial court did not err in denying Occidental's CR 50 motions to dismiss Fuji's conversion claim. That part of the decision conflicts with decisions of this Court and with published decisions of the Court of Appeals. RAP 13.4(b)(1) and (2).

A. Issue on Cross-Review.

Does that part of the Court of Appeals' decision finding the December 23rd letter from Fuji's lawyer was equivocal about Fuji's intent to abandon the cooler rooms conflict with the following Supreme Court and Court of Appeals precedent:

> A contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other.

Ferris v. Blumhardt, 48 Wn.2d 395, 402–03, 293 P.2d 935, 939 (1956) (internal citations omitted); *In re Lyman's Estate*, 7 Wn. App. 945, 948–49, 503 P.2d 1127 (1972), *opinion adopted sub nom In re Estate of Lyman*, 82 Wn. 2d 693, 512 P.2d 1093 (1973).

B. Standard of Review.

> Abandonment of a legal right is generally a question of fact. *See Moore v. Nw. Fabricators, Inc.*, 51 Wn.2d 26, 27, 314 P.2d 941 (1957). This court reviews findings of fact for supporting substantial evidence. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). Substantial evidence is evidence "sufficient to persuade a rational fair-minded person that the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

In re Tr.'s Sale of Real Prop. of Brown, 161 Wn. App. 412, 415, 250 P.3d 134, 136 (2011).

C. Argument in Support of Cross-Appeal.

1. Occidental Lawfully Possessed the Cooler Rooms as of December 23.

The tort of conversion requires (1) willful interference with another's property, (2) without lawful justification, (3) resulting in the deprivation of the owner's right to possession. *E.g., Wash. State Bank v. Medalia Healthcare LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999), *rev. denied*, 140 Wn.2d 1007, 999 P.2d 1261 (2000). Occidental lawfully possessed the cooler rooms as of December 23rd because this is the date that Fuji - in writing – rejected any further ownership interest in the cooler rooms.

2. The Only *Reasonable* Interpretation of the Jury's Finding is That it Disregarded Fuji's December 23rd Letter.

In relevant part, the Court of Appeals held as follows, p. 11:

> Assuming the evidence in the light most favorable to Fuji, a reasonable jury could conclude either that Occidental's conversion occurred before Fuji sent the December 23rd letter, or that Fuji did not intend this letter to be an expression of intent to voluntarily relinquish ownership of the cooler rooms. A jury could reasonably find the text of the letter to be equivocal evidence of Fuji's intent to abandon the cooler rooms.

Even if the jury concluded that Occidental had converted the cooler rooms *before* it sent the December 23rd letter – a conclusion which is not factually supportable – Fuji abandoned its ownership interest in the cooler rooms as of December 23rd and abandonment is a complete defense to conversion. *Jones v. Jacobson*, 45 Wn.2d 265, 267, 273 P.2d 979 (1954); *Lowe v. Rowe*, 173 Wn. App. 253, 263, 294 P.3d 6 (2012).

The trial court should have granted Occidental's CR 50 motions because Fuji's December 23rd letter was conduct clearly manifesting an intent to abandon the cooler rooms. *Monroe v. Fetzer*, 56 Wn.2d 39, 350 P.2d 1012 (1960); *Ferris v. Blumhardt*, 48 Wn.2d 395, 293 P.2d 935 (1956); *see also* 5A A. Corbin, Contracts § 1236, pp. 542-44 (1964). Any other conclusion necessarily disregards the December 23rd letter.

Alternatively, the Court of Appeals suggested that the jury could reasonably have concluded that the text of the December 23rd letter was equivocal about Fuji's intent to abandon the cooler rooms. This suggestion strains the notion of "reasonable." The letter from Fuji's lawyer –

Mr. Tapanes – is not equivocal under any reasonable reading. In responding to a Notice of Default letter from Occidental, Ex. 237, Mr. Tapanes wrote:

> ***To be clear, Tenant's position is as follows***:
>
> **1**. Tenant has no obligation to remove the Cold Storage Facilities or the remaining Partitions based on the November 21 understanding and the fact that Landlord has reached an agreement with Vinum for the lease of the Premises with them in place.
>
> **2**. Tenant is not obligated to remove any other improvements . . . the rooms in the other areas of the Premises are not "cooler rooms."
>
> **3**. In the unlikely event that Landlord and Vinum do not have an agreement in principle for the lease of the Premises with the Cold Storage Facilities and remaining Partitions intact, Tenant stands by its December 11 response to Landlord to remove the Cost (sic) Storage Facilities and the remaining Partitions provided Landlord grants Tenant access in which to do so and with the understanding that removal will require some lead time.

Ex. 239 (emphasis added).[3] Fuji did not respond to Occidental's Notice of Default letter with "Fuji will remove the cooler rooms." Occidental could not have – and did not - interpret the December 23rd letter any way other than Fuji no longer wanted the cooler rooms.

Fuji's conversion claim should have been dismissed as a matter of law based on Occidental's affirmative defense of abandonment. Occidental lawfully possessed the cooler rooms after December 23, 2013. The Court

[3] Notably, Fuji never called its lawyer, Mr. Tapanes, to testify at trial to explain what he meant in the December 23rd letter that he wrote to Occidental. *See* ER 613. Instead, all of the testimony relied upon by Fuji to assert that letter was never intended to indicate abandonment of the cooler rooms was by Mr. Marchica, who did not write the letter.

of Appeals decision conflicts with long-standing Washington law providing that a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other.

IX. CONCLUSION

Occidental respectfully asks this Court to deny Fuji's petition for review. Occidental respectfully asks this Court to grant its cross-petition for review.

Respectfully submitted this 19th day of April, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By_____
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Attorneys for Respondent Occidental, LLC

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 19th day of April, 2019.

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Appendix A

FUJI FOOD PRODUCTS

December 23, 2013

Cameron D. Foster
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Via Email and First Class Mail

Re: Occidental Building Net Lease ("***Lease***") between Occidental, LLC ("***Landlord***") and Fuji Food Products, Inc. ("***Tenant***")

Dear Mr. Foster:

I write in response to your letter dated December 17, 2013 to Joe Marchica, Tenant's CEO.

Please be advised that Tenant disagrees with the assertions set forth in your letter and denies that it is in default of its obligations under the Lease. Specifically, the position articulated in your letter ignores key facts regarding Landlord's actions and misinterprets Tenant's obligations at termination.

Landlord's Actions

Since mid-October 2013, Landlord has been negotiating with Vinum Wine Importing & Distribution ("***Vinum***") to lease the Premises following the November 30, 2013 expiration of Tenant's Lease. Key to Vinum's desire to lease the Premises is that the Premises be delivered with some of the existing improvements, particularly the cold storage facilities consisting of a cooler, blast cooler and freezer room and related rooftop HVACs (collectively, "***Cold Storage Facilities***") certain racking within the Cold Storage Facilities, and an open partition to other rooms.

Following a walkthrough of the Premises with Landlord, Tenant, aware of the ongoing negotiations between Landlord and Vinum and wishing to comply with its obligations under the Lease, provided written notice to both parties on October 31, 2013 ("***Tenant Notice***") that it would begin removing the Cold Storage Facilities and removing three doors / openings in partition walls (collectively, "***Partitions***") from the Premises on November 7, 2013 unless prior to that date Landlord expressly released Tenant from those obligations. Tenant required approximately 3 weeks lead time to assure timely removal under the Lease.

As set forth in the Extension Agreement cited in your letter, Landlord, Tenant and Vinum participated in a telephone conference call to address the issues raised in the Tenant Notice. Landlord agreed to extend the termination date of the Lease to December 13, 2013 in order to allow additional time for discussion of the issues. Tenant also agreed to extend the date on which it would begin removal of the Cold Storage Facilities and the Partitions to November 21, 2013.

On November 21, 2013, Landlord, Tenant and Vinum again participated in a conference call. During that call, although Landlord and Tenant disagreed as to the meaning of the term "cooler room" in the Lease and thus the extent of Tenant's removal obligations, nevertheless, they agreed that Tenant would not be obligated to remove Cold Storage Facilities, certain racking within the Cold Storage Facilities, and two of the three Partitions upon surrender of the Lease because Vinum wanted to lease the Premises with them in place. Based on this understanding, Tenant removed one of the Partitions and left the Cold Storage Facilities intact.

On December 6, 2013, Tenant sent Landlord a letter memorializing the November 21 understanding and received a copy back from Landlord on December 10 that, while containing some modifications, did not alter the basic terms of the agreement reached on November 21. However, on the following day (December 11), Landlord unilaterally reneged on the agreement and abruptly demanded instead that Tenant comply with the terms of the Extension Agreement, i.e., surrender the Premises in two days on December 13.

In response, Tenant promptly sent Landlord an email advising Landlord that Tenant (1) would not be able to comply with its removal obligations by December 13 given the short notice and the necessary lead time, (2) would not pay any rent, holdover or other form of compensation to Landlord resulting from this delay, (3) would nevertheless surrender the Premises on December 13, 2013 with the understanding that Landlord would provide Tenant access to the Premises in order to comply with removal obligations, and (4) had contacted its contractor requesting expedited service, and was waiting an estimate as to the start and end dates of the removal and would communicate with Landlord as soon as possible to coordinate access to the Premises. Tenant surrendered possession of the property on December 13.

Landlord now claims that Tenant is in default of the Lease, despite the fact that Landlord's own actions and its breach of the November 21 agreement prevented Tenant from complying with the Lease obligations. Landlord's conduct and its claim are disingenuous, in bad faith and even more egregious given that it has reached an agreement in principle with Vinum for the lease of the Premises.

Tenant's Obligations

I have reviewed the documents cited in your letter as well as various correspondences between Landlord and Tenant during the last few months.

Section 56 of the Lease specifically addresses the tenant improvements existing at the time the parties entered into the Lease. It clearly states that Tenant must remove all cooler rooms and

HVAC systems on the roof and that ***other*** improvements will remain at termination of Lease except for production and operating equipment, air compressors, tools for operation, shelving, and racking systems and all office furnishings, computers and phones.

Apparently, the parties disagree as to the meaning of the term "cooler rooms" as used in the Lease and therefore disagree as to the extent of Tenant's removal obligations. Tenant asserts that the term refers only to Cold Storage Facilities, while Landlord asserts that the term also includes the area of the Premises containing production rooms where Tenant manufactures and prepares its food product.

The particular facts and circumstances support Tenant's position as does common industry terminology. Specifically, the cooler, blast cooler and freezer are "cooler rooms" precisely because they are dedicated cold storage facilities, requiring robust HVAC systems and insulation designed for and used in the storage of raw and finished food products and not prolonged human occupation. The production rooms, on the other hand, are intended for prolonged human occupation while engaged in production, only provide occasional temporary cold temperature, do not require special insulation, achieve and maintain a substantially different (warmer) level of temperature than the Cold Storage Facilities, are controlled by a normal thermostat, and are not roof top systems.

At best, the term "cooler room" is ambiguous and to the extent it is unclear, ambiguous language in leases are generally interpreted against a landlord when the landlord is the primary drafter of the lease, as is the case here.

With respect to the Partitions, Tenant complied with the November 21 agreement and closed one of the Partitions.

I do not understand your citation to Section 16.2(c) of the Lease and the reference to the issues of continuation of Tenant's right to possession or abandonment of the Lease. Tenant has neither abandoned the Premise nor claims the right to possession. The Lease has expired per its own terms and the terms of the Extension Agreement. That is precisely why Tenant surrendered the Premises to Landlord on December 13 and requested access to comply with the removal obligations since Landlord's actions prevented Tenant from being able to do.

Tenant's Position

To be clear, Tenant's position is as follows:

1. Tenant has no obligation to remove the Cold Storage Facilities or the remaining Partitions based on the November 21 understanding and the fact that Landlord has reached an agreement with Vinum for the lease of the Premises with them in place.

2. Tenant is not obligated to remove any other improvements because it has (1) removed all its production and operating equipment, air compressors, tools for operation, shelving,

and racking systems and all office furnishings, computers and phones and (2) the rooms in the other areas of the Premises are not "cooler rooms."

3. In the unlikely event that Landlord and Vinum do not have an agreement in principle for the lease of the Premises with the Cold Storage Facilities and remaining Partitions intact, Tenant stands by its December 11 response to Landlord to remove the Cost Storage Facilities and the remaining Partitions provided Landlord grants Tenant access in which to do so and with the understanding that removal will require some lead time.

4. Subject to item no. 3 above, Tenant has complied with all its obligations under the Lease and demands a return of its security deposit, which per the Lease, is due within 15 days of the expiration, i.e., by December 28, 2013.

Please understand that while Tenant also hopes to amicably resolve the differences between the parties as it has tried to do all along, it is confident of its position in this matter, and will not shy away from the litigation intimated in your letter. Again, Tenant has done nothing to put itself or the Landlord in any "position." On the contrary, Tenant has attempted in good faith to assist Landlord in its effort to lease the Premises to Vinum. Any negative "position" Landlord claims to find itself in is the result of its own actions.

If you would like to discuss this matter further, please feel free to contact me at (562) 745-2355 which is my direct line.

Very truly yours,

Mario A. Tapanes
Counsel

Defendant Exhibit 239
Fuji Food Products Inc.
vs.
Occidental, LLC
14-2-10893-1

CARNEY BADLEY SPELLMAN

April 19, 2019 - 3:21 PM

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