

No. 62600-1-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

SEA-TAC AIR CARGO LIMITED PARTNERSHIP, a Washington
limited partnership, acting by and through its general partner,
TRANSIPLEX (SEATTLE), INC., a Washington corporation,

Appellants

v.

PORT OF SEATTLE

Respondent

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

In 2002, the parties entered into a “Seventh Amendment” to their long-term lease agreement. Under the Seventh Amendment, appellant Transiplex ceded a portion of its leasehold back to the Port of Seattle in exchange for substantial consideration as recited in the agreement, *i.e.*: (i) a reduction in rent; (ii) an option to extend the lease for an additional 10 years; and (iii) a right of first refusal for lease of an adjacent property. Three years later, having received all of the consideration for which it bargained, Transiplex claimed that it was entitled to something more — the right to control aircraft parking on the property it had transferred back to the Port.

The trial court’s dismissal of Transiplex’ breach of contract claim on summary judgment was proper for at least three reasons. First, the Seventh Amendment unambiguously affirms that the Port, and not Transiplex, has the sole authority to determine where planes may park on the property in question: “*Upon execution of this Amendment, the Deleted Premises shall return to the Port’s possession and the Port shall assume responsibility for the management of aircraft movement within the Deleted Premises.*” This language renders any alleged pre-contractual discussions of contemplated parking positions moot. Even if the parties had agreed to establish certain parking positions as part of the Seventh Amendment (they did not), the Port would always have the right to manage parking as it sees fit. This is true because it is the Port’s property; Transiplex has no ongoing easement or license to control how it is used.

Second, “context” evidence does not in any way support Transiplex’ claim that other language in the agreement — namely, a statement that the Port “*intends to pave the Deleted Premises for use as additional common use cargo hardstand parking, in accordance with the Port’s schedule for the Transiplex Hardstand Expansion Project*” — was intended to guarantee use of “angle-in nose-load parking” positions adjacent to the Transiplex facility. To the contrary, context evidence shows that: (a) the foregoing language was incorporated to address a timing concern — as an affirmation that the Port intended to proceed in accordance with a designated “*schedule*” — and not in connection with any agreement related to parking rights; and, (b) in any event, the “*Transiplex Hardstand Expansion Project*,” as defined in formal, published plans, did not include “angle-in nose-load parking” positions.

Third, there is no evidence that the Port has failed to provide satisfactory parking to any Transiplex tenant. In fact, uncontroverted evidence shows that no Transiplex tenant *wants* to use any noseload parking position adjacent to the Transiplex facility. Nothing in the Seventh Amendment contemplates that Transiplex will have a right to dictate how third-party aircraft operators must use Port facilities. For these and other reasons discussed in the argument below, Transiplex’ breach of contract claim must fail.

The duty of good faith and fair dealing does not provide a viable alternative basis for Transiplex’ contract claim. Washington law makes clear that the duty of good faith exists only in regard to the performance of

specific contract obligations. The Seventh Amendment and the parties' underlying Ground Lease confirm that the Port has sole authority to control parking on Port common areas, subject only to its responsibility to provide services on an equal basis to airport users. The Port here has provided services on an equal basis to Transiplex tenants, as the tenants themselves have affirmed. There is no basis for the claim that the Port has failed to honor its contractual obligations in good faith.

Transiplex' claim for tortious interference with business relations is based mainly on the contention that the Port compelled Cargolux, a Transiplex tenant, to vacate the Transiplex facility. But the unequivocal testimony of Cargolux management establishes that Cargolux' decision was based solely on Transiplex' offensive conduct – *i.e.*, Transiplex' threat to evict Cargolux if it did not pay Transiplex' legal fees in this matter, and also agree to a 45% increase in rent. Transiplex' speculation that Cargolux "true" reasons were something else is not supported by any evidence, and does not defeat summary judgment.

Finally, Transiplex appeals the trial court's denial of Transiplex' motion to reconsider, and rulings on several prior discovery motions, based on the fact that the Port made a late production of several documents after the final motion for summary judgment was argued. As the trial court properly recognized, the documents did not alter the essential bases for the trial court's decision, and, after three years of trial court proceedings, did not justify re-opening litigation of the matter.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Contract Claim (Assignments of Error 1-2)

Did the trial court err in dismissing Transiplex' claim for breach of contract based on the Port's alleged failure to provide promised parking for Transiplex tenants, where (1) the parties' integrated written lease agreement provides no parking rights for tenants, and expressly recognizes that the Port has sole authority to manage parking on Port common areas; and (2) undisputed evidence shows that Transiplex' tenants are fully satisfied with their parking arrangements, and have no desire to park in alternate positions advocated by Transiplex?

B. Good Faith and Fair Dealing Claim (Assignments 3-4)

Did the trial court err in dismissing Transiplex' claim for "breach of duty of good faith and fair dealing" relating to the Port's alleged failure to "cooperate and encourage" nose-load parking by Transiplex tenants, where (1) Washington law recognizes such claims only in connection with the performance of specific contract terms, and (2) the contract here does not require the Port to "cooperate and encourage" any particular form of parking, but rather requires the Port to provide parking to Transiplex' tenants "in the same manner" as the Port provides parking to other airport users, and (3) there is no evidence to show that the Port has failed to provide parking to Transiplex tenants in the same manner as other tenants?

C. Tortious Interference Claim (Assignments 3-4)

Did the trial court err in dismissing Transiplex' claim for "tortious interference with business relations," where (1) the Port's interactions with

the third parties in question occurred in the context of legitimate business relationships between the Port and the third parties, and were not improper under Washington law, and (2) there was no evidence the Port's conduct caused any breach or termination of any Transiplex business relationship?

D. Discovery Issues (Assignments 5-9)

Did the trial court abuse its discretion in denying Transiplex' third request to extend a hearing on summary judgment, where Transiplex had conducted thorough discovery and deposed all material witnesses during the three years the case had been pending, and wholly failed to demonstrate that further discovery would produce any material evidence?

III. STATEMENT OF THE CASE

A. The Parties

Respondent Port of Seattle is a municipal corporation charged with operating SeaTac International Airport for public benefit. *See* RCW 14.08.020, 120.

Appellant Transiplex is a commercial warehouse owner. Pursuant to a long-term lease agreement with the Port, as described in Section B below, Transiplex leases approximately 445,000 sq. ft. of land adjacent to the SeaTac airfield. Transiplex has constructed 4 warehouse-type structures on the property, where it subleases space to various commercial tenants. *See* CP 186, 300-301. Over the years, Transiplex' tenants have included two air cargo carriers — Cargolux, and more recently,

Hanjin/KAL¹ — who fly 747-400 freighters and conduct space-intensive “noseload” operations as described in Transiplex’ brief. CP 300-301; App. Br., at 6.

It bears emphasis that Transiplex neither owns nor operates aircraft, nor does it currently lease, license, or control space for parking aircraft. Transiplex’ only business, for purposes relevant here, is to lease out warehouse space near the airfield. For all matters relating to the movement of aircraft — including landing, taxiing, and parking — operators such as Cargolux and KAL deal directly with the Port. *See* CP 256, 281-95 (sample license agreement for parking).

The Port manages parking on airport common areas in accordance with a “best fit” policy. CP 297. Aircraft operators who are regular users of SeaTac periodically submit their flight schedules and requests for parking assignments. *Id.* The Port considers each operator’s scheduling requests in light of other operators’ competing needs, as well as the Port’s overall operational needs, and makes parking assignments accordingly. *Id.* The Port’s contracts with operators affirm that the Port retains the exclusive right to control and manage Port common areas. CP 287-88.

B. The Ground Lease Agreement

Transiplex and the Port entered into their underlying lease agreement (the “Ground Lease”) in 1982. CP 155-83. The original

¹ Hanjin Transportation Co., Ltd. leases space from Transiplex and provides cargo handling services for its sister company, Korean Airlines Co., Ltd. (“KAL”), which regularly lands freighter aircraft at SeaTac. CP 1440-41. While Hanjin itself is not an aircraft “operator,” it may be considered as one for purposes here due to its relationship with KAL.

Ground Lease provided for a 40-year term, and one 5-year extension. CP 156. By its express terms, the Ground Lease does not confer any access or parking rights on Port common areas.²

In the late 1990's, the parties began discussions that ultimately led to the "Seventh Amendment" to the Ground Lease. At the time, Transiplex' leasehold included a large "apron" between its warehouses and an airport taxiway. *See* CP 186. Transiplex had developed a portion of the apron to provide a single parking position. Historically, Transiplex' tenant Cargolux had parked and nose-loaded planes in this position, but by 1998 the position could not safely be used for this purpose.³ *See* CP 297, 217-19. The remaining area of the apron was undeveloped and underutilized. *See* CP 259. Meanwhile, the Port was interested in acquiring additional space to expand cargo parking capacity. *See* CP 214-15.

² Paragraph 6 of the Ground Lease provides in part: "All access to and from the Premises by Lessee, its tenants . . . etc., including access to and from the Premises by aircraft carrying Lessee's or its tenants' air cargo or air freight, shall be at such point or points as may be determined by the Port. Nothing herein shall be construed to permit Lessee or Lessee's tenants to operate directly or indirectly aircraft in or out of the Airport or over any portions thereof, it being understood that any airline tenants and other tenants of Lessee who operate aircraft shall be required to pay landing fees and other applicable tariffs or charges at the rates which the Port may charge from time to time for the privileges of operating aircraft at the Airport." CP 160-61 (emphasis added).

³ Transiplex suggests this was due to a "realignment of the taxiway," App. Br., at 9, which is slightly inaccurate. The original parking area was never large enough to accommodate noseload operations without having the tail of the plane extend beyond the boundary of Transiplex premises and into the Port taxiway. CP 297. For many years, this encroachment was not a concern, because the adjacent taxiway was little-used. In the late 1990's, however, the Port developed additional parking to the east, which caused more traffic to flow through the area. *Id.* At that point, the encroachment created safety concerns, which led to several citations against Cargolux. CP 1155-71. Cargolux and the Port then cooperated to establish a new parking position (later designated as "NL 1") to the west. CP 297.

Accordingly, the parties developed a plan to transfer the apron area back to the Port, which would redevelop the space as a common use airplane parking area (often referred to as “hardstand” or “ramp”). This would allow Transiplex to obtain a substantial rent reduction, without losing any rentable warehouse space. Transiplex also negotiated and obtained certain other benefits, as described in Section C below.

There is no dispute that in discussions preceding the Seventh Amendment, the parties contemplated that the newly-developed parking area would be able to “accommodate” nose-load operations. *See, e.g.*, CP 221 (early “concept drawings” identified five potential parking configurations, including one configuration for angled nose-load parking). Although the area would still not be large enough to readily accommodate “straight-in” noseloading perpendicular to Transiplex’ warehouse, the expanded width of the hardstand would allow “angle-in” parking with room for noseloading. There is also no dispute that the hardstand as built *can* accommodate noseload parking in this manner. CP 634. The issue here is whether Transiplex has any right to dictate how the parking area is actually used at any given point in time.

C. Commencement of the “Transiplex Hardstand Expansion Project”

Port engineers began planning the “Transiplex Hardstand Expansion Project” in the spring of 2001, with project completion expected in the summer of 2002. CP 623-24, 738. Consistent with Port protocol, the project was given an official designation (the “Transiplex

Hardstand Expansion Project”), and assigned to a project manager, Janene Axt. Ms. Axt began by preparing a schedule with target dates for project milestones, including: Preparation of various phases of construction drawings; submission to the Port Commission for approval; public bidding and contracting; and commencement and completion of construction. *See* CP 739-45.

During the summer and fall of 2001, Ms. Axt and Port staff prepared project plans in accordance with the schedule.⁴ In the process, Ms. Axt analyzed requirements for 747 nose-load parking, and ensured that the new hardstand as-built could accommodate angle-in noseload positions. CP 634, 2037. Meantime, attorneys for Transplex and the Port negotiated a lease amendment, as described below.

D. Negotiation of the Seventh Amendment

The terms of the Seventh Amendment were negotiated between Transplex’ general counsel, Jon Schneider, and Isabel Safora, then-Senior Counsel for the Port. Over the summer and fall of 2001, Mr. Schneider and Ms. Safora exchanged letters containing proposed language, and several draft agreements, culminating in a final draft dated December 3, 2001. CP 255-60, 564-77; CP 148-53.

⁴ At the outset, Port engineers noted the presence of a large City of Seattle water main that runs under the western edge of the Transplex leasehold. *See* CP 638, 772-74. The City’s recorded easement prohibits operation of heavy vehicles (including, needless to say, a loaded 747-400) across the easement. CP 774, at ¶8. Port engineers investigated and concluded, by August 2001, that time and engineering work required to protect the main and obtain necessary City approvals were prohibitive. CP 631, at 90:15-91:1. Accordingly, the Port’s construction plans never contemplated paving over the main as discussed in Transplex’ brief. CP 632; *see* App. Br., at 11-13.

1. Specific Consideration Obtained by Transiplex

Much of the contract negotiations concerned two specific items demanded by Transiplex in exchange for reduction of the leasehold — a right to extend the Ground Lease for an additional 10 years (as ultimately reflected in ¶ 2 of the Seventh Amendment), and a right of first refusal for the lease of certain adjacent space (¶ 5). CP 565. Thus the recitals in the final agreement set forth:

[A]s consideration for Lessee agreeing to delete portions of the premises from the Lease ('Deleted Premises'), the Port has agreed to grant Lessee an extension of the Lease term on the remaining Premises and a right of first refusal to lease additional Airport land in accordance with the terms of the Seventh Amendment.

CP 148 (emphasis added). The following sections addressed the deletion of portions of the premises, the reduced rent, and specific consideration granted to Transiplex in more detail. C 149-51, ¶¶ 2-5.

2. Negotiation of Paragraph 6 of the Seventh Amendment

Transiplex' breach of contract claim is based solely on paragraph 6 of the agreement, which was incorporated near the end of the drafting process. *See* CP 566, 572 (draft dated October 24, 2001). This section provides:

The Port intends to pave the Deleted Premises for use as additional common use cargo hardstand parking, in accordance with the Port's schedule for the Transiplex Hardstand Expansion Project. Upon execution of this Amendment, the Deleted Premises shall return to the Port's possession and the Port shall assume responsibility for the management of aircraft

movement within the Deleted Premises.
The Port shall be responsible for providing
cargo hardstand services as common use
cargo hardstands to current and future
tenants of Lessee in the same manner as the
Port provides such services to other users of
common use cargo hardstands at the Airport.

Two points relating to the drafting of this section are relevant to Transiplex' arguments. First is the question of what, if any, parking rights Transiplex' tenants would have on the new hardstand. Early in the negotiations, Transiplex' counsel proposed that Transiplex' tenants receive a parking "preference." CP 564-77, 227-29.⁵ Port counsel responded that consistent with state and federal requirements, the Port could not grant preferential treatment to any particular users of airport common areas.⁶ Transiplex then proposed that the Port would "*assume responsibility for aircraft movement*" on the premises, but also "*insure that future management supports the continued cargo operations of [Transiplex'] present and future tenants.*" CP 259-60. Again, Port counsel responded that this language was unacceptable. CP 256. The Port then proposed language that Transiplex tenants would be treated "*in the same manner*" as other carriers, as set forth in the last two sentences of Paragraph 6 above, and Transiplex accepted this language. *Id.*

⁵ In early discussions, some Port personnel had also contemplated that Transiplex tenants would have preferential parking rights. See CP 221 ("You have been offered . . . preferential parking rights"); CP 224 ("Transiplex would be granted the right to eight hours of daily preferential parking on the existing aircraft parking position.").

⁶ In order to obtain federal funding, the Port must make its facilities available to all carriers on an equal and non-discriminatory basis, and refrain from granting any "exclusive rights" to use of the airfield. CP 256, 269-71; see generally 47 USC, §§ 401-483. State law likewise prohibits any lease agreements or concessions that would deprive the public of "rightful, equal, and uniform" use of Port property. RCW 14.08.120(4), (6).

The second issue concerned the timing of the project, and relates to the first sentence in Paragraph 6 above. As of October 2001, the Port's project planning was well underway, with the expectation that the project would be presented for Commission approval in December 2001, and put out for bid in time for construction the following summer. CP 566. As the negotiations progressed, Transiplex' counsel wanted assurances that the project would proceed as planned if and when the amendment was executed. *Id.* To address these timing concerns, Port counsel sought to incorporate a reference to the existing project schedule. The contemporaneous handwritten notes of Ms. Safora, Port counsel, reflect the progression of her efforts to identify the relevant schedule by name. She wrote, "*Name of project - schedule,*" and then, "*Cargo Hardstands,*" and finally "*upon Transiplex Hardstand Expansion.*" Supp. CP ____ - Sub. 190, P. 3.

Ms. Safora testified that the reason for the reference to the "*Transiplex Hardstand Expansion Project*" in the first sentence of Paragraph 6 was simply to identify the relevant project schedule. Supp. CP ____, Sub. 190, pp. 3-4. She chose the phrase "*intends to pave,*" rather than "*shall pave,*" because she did not want to contractually bind the Port to the identified schedule — recognizing that construction projects do not always proceed as scheduled. The phrase "*intends to pave*" was accurate, in terms of the Port's then-current plans; but it also allowed leeway if circumstances changed. *Id.*

Transiplex' counsel did not have any comments concerning this proposed language, and it was incorporated unchanged into the final agreement.

E. Commission Approval and Construction of the Project

At a Port Commission meeting on December 11, 2001, Port staff presented two related agenda items — the proposed Seventh Amendment to the lease and the “Transiplex Hardstand Expansion Project.” As Transiplex notes, background discussion in the staff memorandum requesting authorization for the Seventh Amendment stated that “*latest designs indicate the new ramp will be large enough to accommodate two simultaneous 747-400 nose-load operations . . .*” CP 238. But there was no indication, in the summary of agreement terms or elsewhere, that Transiplex would retain any particular parking rights. To the contrary, after the heading “*Parking Position Management,*” the summary noted simply that the “*Port will schedule the three to four new Port parking positions and receive the revenues . . .*” CP 239.

The Port Commission approved the Seventh Amendment and the Transiplex Hardstand Expansion Project at the December 11, 2001 meeting. The Port then finalized construction drawings and prepared its bid package for publication.

1. Completion of the “Marking Plan”

Meantime, the penultimate construction drawings for the project were routed to Dan Cowdin, the Port’s “ramp manager” who oversees cargo parking. Mr. Cowdin made changes to the “marking plan” diagram,

which identified the parking lines to be painted after construction was complete. Specifically, he replaced the “angle-in” nose-load parking lines with a series of “straight-in” parking positions. *See* CP 633, at 129:4-130:20; CP 637 (90% drawing, generated 11/30/01) and CP 689 (100% drawing, dated 1/23/02). Based on his experience, Mr. Cowdin believed that the “angle-in” positions would be awkward, because additional towing would be required to rotate and maneuver the planes into or out of the positions, while straight-in positions would provide a more efficient allocation of space under then-existing conditions. CP 298, 1443. Ms. Axt accepted Mr. Cowdin’s changes, recognizing that control of parking positions on the ramp was his responsibility. CP 633-34. Thus the final plans for the Transplex Hardstand Expansion Project did not include instructions to paint angle-in nose-load parking positions — although the hardstand could certainly accommodate such positions, if and when the need arose. *See* CP 634-35.

2. Publication of Final Construction Drawings

The Port published notice of the project and bidding instructions beginning January 23, 2002. CP 766, at 244:13-245:6; CP 768-770. Thereafter, the full package of construction drawings was available to interested parties — either at Port offices, or by mail.⁷ *Id.* As the Port received and reviewed construction bids, the last remaining project

⁷ Transplex complains that the Port did not send a copy of the project plans to Transplex’ absentee manager, Scott Wilson, who resides in Canada. App. Br., at 12, CP 608; *cf.* CP 562 (Declaration of Don Cunningham, Transplex’ resident maintenance manager in Seattle, confirming that he received and reviewed copies of construction plans and schedule before the end of April, 2002). For his part, Mr. Wilson evidently made no effort to obtain or review the publicly-available plans.

milestone was execution of the Seventh Amendment. Execution was delayed until Transiplex obtained authorization from each of its tenants to modify the underlying ground lease. CP 966, at 169-170; CP 1247-87.

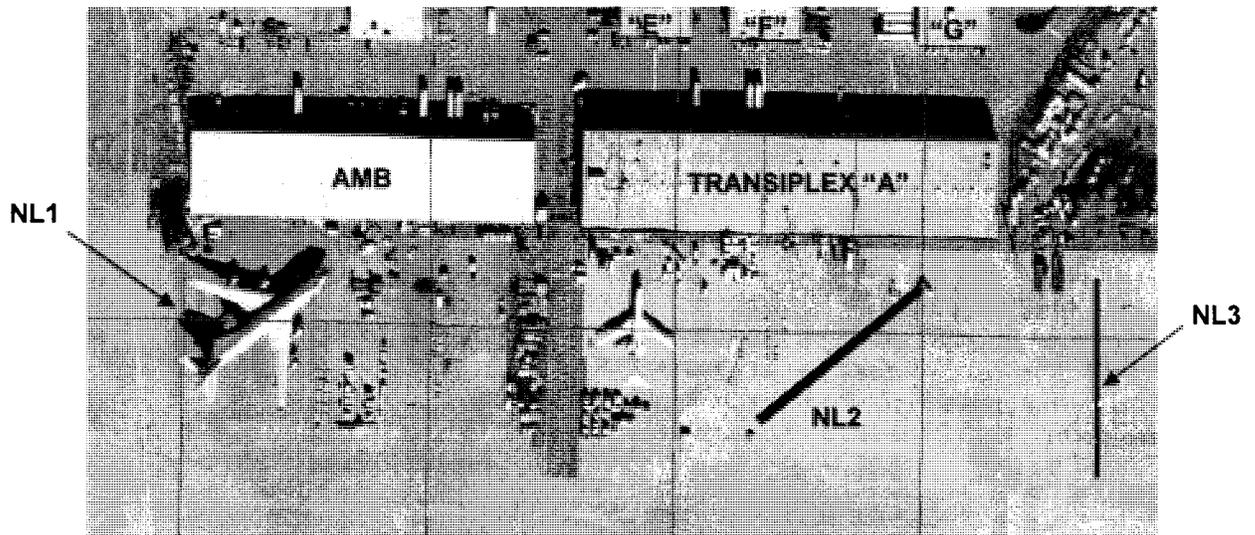
3. Execution of Lease Consents

Transiplex sent each of its tenants a copy of the Seventh Amendment, together with a written summary explaining that execution of the Amendment would “*allow the Port to construct additional hardstand parking positions . . . which would be available for the use of the various tenants and others under the Port’s control and direction.*” CP 1248. The summary made no reference to noseload parking, or any promised parking rights on the rebuilt hardstand. *Id.*⁸ Transiplex obtained the last of the tenant consents in mid-April, 2002 (CP 1260), and executed the Seventh Amendment on April 25, 2002. CP 152. Construction of the hardstand began shortly thereafter.

F. The Port’s Provision of Parking Following Completion of the Project

After completion of the project in the summer of 2002, the Port continued to provide parking on an equal basis to Transiplex’ tenants in accordance with the “best fit” policy. A diagram of parking positions that have been used since 2002 is shown below.

⁸Transiplex offered hearsay testimony to the effect that Cargolux executed the lease consent “based on . . . assurances” that the Port would provide nose-load parking on the expanded ramp. App. Br., at 10, citing CP 1340 (Declaration of Scott Wilson). The Port objected to the underlying declarations as hearsay and requested that they be stricken (RP8/20/08 at 46), but the court did not expressly rule. Joseph Joyce, who executed the lease consent on behalf of Cargolux, testified that: (1) he did not recall discussing any particular parking configurations with Transiplex at the time, and (2) he fully understood that the Port would be responsible for managing parking thereafter. CP 2513.



Cargolux has mainly parked in the position designated as “NL1.” This position was established in 1999-2000 primarily for Cargolux’ use; it offers ample space for nose-load parking, is relatively easy to enter and exit, and minimizes idling and taxi time. CP 297; CP 375-76 at 35:3-10; 36:8-15; CP 379, at 49:10-50:16. 747-400 aircraft using this space taxi directly onto the line; after unloading, they are towed straight back and then taxi forward to the runway. CP 297. By all accounts (and as specifically confirmed in these proceedings, as described below), Cargolux is pleased with its parking position at NL1.⁹ CP 1442-3.

⁹Transiplex’ characterization of Cargolux’ operations, at pp. 5-6 of its brief, is unsupported by citations to the record and is somewhat misleading. Cargolux and other carriers contract with third-party vendors to manage cargo on the ground — “aircraft handlers,” who load and unload planes, and “cargo handlers,” who stage, move, and store inbound and outbound cargo. CP 300. As part of this process, cargo is ordinarily carted between the warehouse and the airplane loading area. For this purpose, the difference between the “NL1” position and a position such as “NL2” is nominal; it does not affect the rates that Cargolux pays for aircraft or cargo handling services. CP 382, at 61:20-25; CP 2736, at 416:1-17. Cargolux’ main priority is to reduce the time the plane spends on the ground; it is more efficient to cart the cargo to NL1, rather than spend additional time to maneuver the plane closer to the warehouse at NL2. CP 1443, 2511-12.

In 2005 and 2006, the Port expanded the hardstand to the south and east of the Transiplex facility, and created a new “straight-in” nose-load parking position (“NL3”) to serve KAL/Hanjin, which became a Transiplex tenant in 2006. *See* CP 1440-41. The NL3 position is also relatively easy to enter and exit, and allows ample space for nose-loading in front of the plane. There is no dispute that Hanjin prefers the NL3 position, and does not wish to park elsewhere. CP 1440-41.

In the course of this litigation, the Port established a new “angle-in” nose-load position (“NL2”) immediately south of the Transiplex facility. CP 299, 304. As discussed further below, there are currently no operators willing to park in this position, and it remains largely unused.

G. Procedural Background

Transiplex initiated this litigation August 2005. At the time, the primary dispute between the parties, and the focus of the complaint, concerned the Port’s right to a rent increase. CP 1-11. On cross-motions for summary judgment heard in December 2005, the trial court resolved that issue in Transiplex’ favor.¹⁰ CP 102-106. Over the next three years, the parties litigated Transiplex’ additional claims, as described below.

1. While the Litigation Was Pending, Cargolux Rejected Transiplex’ Desired Parking Positions

Litigation in 2006 and 2007 focused mainly on Transiplex’ claim that the Port had failed to provide “agreed aircraft parking adjacent to the

¹⁰ The Ground Lease authorizes the Port to adjust the rent to market rate every five years, based on a procedure with certain time lines. Transiplex successfully asserted that the Port’s notice of rental adjustment for the 2004-2009 time period was untimely, and therefore defective.

terminal” following the 2002 lease amendment. CP 7, ¶ 13. Trial was originally set for February 12, 2007, but was extended to May 14, 2007, on Transiplex’ motion. Supp. CP ____, Sub Nos. 49, 52-53.

Following an additional three months of discovery, the parties agreed to stay the trial date again — until November 15, 2007 — to attempt a settlement. Supp. CP ____, Sub No. 54-55; CP 2467-68. By letter agreement dated February 6, 2007, the Port agreed to paint a new “angle-in” noseload parking line directly South of Transiplex’ Building A, and assign Cargolux to park there on a test-basis. *Id.* Pursuant to this agreement, the Port prepared a diagram of the new parking line (“NL2”), and forwarded the diagram to Cargolux for review.¹¹ CP 304, 310. Cargolux tested the line on March 25, 2007, and then immediately requested that the Port “*NOT schedule Cargolux flights on the [NL2 line] until further notice.*” CP 553. Cargolux followed up with an e-mail explaining that it was able to conduct operations “reasonably” in the NL2 position, but noted several complications. CP 314. At Transiplex’ urging,¹² Cargolux proposed moving the line 60 feet to the west, to solve some of its concerns. *Id.* In further correspondence, however, Cargolux

¹¹Transiplex’ assertion that the Port “*painted the line in the position that Transiplex had rejected*” (App. Br., at 15) is misleading. Transiplex had objected to language identifying specified coordinates for the line, in favor of more generic language that the Port would “*paint a parking line to accommodate nose-load parking . . .*,” because Transiplex “*did not want to be limited to one particular location or heading.*” CP 2456. There was no suggestion that Transiplex considered or specifically “rejected” the line ultimately drawn as NL2. *Id.*

¹²Transiplex’ attorney generated the initial draft of the correspondence, and then asked Cargolux to send it to the Port without disclosing Transiplex’ authorship. *See* CP 1989-90 (“Attached is a draft of a letter . . . for sending to the Port as a message from you of course. (Don’t simply forward this message.)”).

stated that moving the line would not resolve all of its issues, and that it wished to continue parking in its NL1 position. Cargolux' local operations manager explained:

After receiving input from the operating crew that departed the [aircraft] last month and the current line it is advised that *Cargolux would only choose that Nose Load spot if it was the last one available to us.* The crew did not like all the additional stopping and adjusting of the normally smooth pushback from our normal C2NL1 parking spot. Also, it would take a additional wing walker to spot the [aircraft] behind us during the pushback to make sure we were not too close to FedEx during the push for safety purposes. [CP 313 (emphasis added)].

As there were no other prospective users of the "NL2" line, the test ceased at that point.

Following the failure of the March test, Transplex asserted that the Port should have positioned the new nose-load parking position differently. Transplex suggested that a more workable nose-load position would be oriented to the *northwest*, rather than *northeast* like the NL2 position. See CP 299. At a mediation in October, 2007, the parties agreed to test an alternate, northwest-oriented line. CP 1907, 1992. The Port retained a consultant, as agreed, to prepare a diagram of a new line, which was then forwarded to Cargolux for review. CP 520-30. Cargolux responded, unequivocally, that it did not wish to use a northwest-oriented line. CP 528. Once again, because no interested carrier was willing to

participate, no further test was conducted. The parties proceeded to litigate motions for summary judgment.

2. After Extensive Consideration, the Court Granted Summary Judgment on Transiplex' "Breach of Contract" Claim

Litigation of the summary judgment motions that are the subject of this appeal spanned 16 months, and involved 343 pages of briefing, 2,444 pages of declarations and evidence, and 5 separate hearings. During that time, the trial date and discovery cutoff were extended 3 more times (*See* Supp. CP ____, Sub Nos. 101-2, 134, 173-4), and the scope of litigation steadily expanded, as Transiplex asserted new claims for, *e.g.*, the failure of the parking "tests" as described above ("breach of good faith and fair dealing"), and contacts between Port attorneys and various witnesses ("tortious interference with business relations"). CP 2422-26; 2433-34. The trial court's ultimate resolution reflected an extraordinary degree of patience and consideration.

The parties filed cross-motions for summary judgment on claims for breach of the Seventh Amendment in September and October 2007. Following oral argument on December 14, 2007, the trial court concluded that the merits of Transiplex' contract claim, if any, turned on the interpretation of the first sentence of paragraph 6 of the Amendment. On December 21, 2007, the court directed the parties to gather and submit any additional extrinsic evidence relating to the words "*intends*" and "*. . . in accordance with the Port's schedule for the Transiplex Hardstand Expansion Project*" as used in that sentence. CP 559-60.

The parties conducted additional discovery concerning the Port's planning and development of the "Transiplex Hardstand Expansion Project," as outlined in sections C, D, and E above, and submitted supplemental briefs and evidence in February 2008. CP 561-77, 591-1013, 1022-49. After hearing additional argument on March 28, 2008, the court concluded that the reference to the "*schedule for the Transiplex Hardstand Expansion Project*" could only refer to the project as defined by the Port's then-current plans; there was no evidentiary basis to suggest the parties had intended to refer to something else. CP 1050-55; *see also* 6/6/08 RP at 26-33) (explaining court's reasoning). Because the project was built in accordance with project plans, Transiplex' claim lacked merit and the Port's motion was granted. *Id.*

On April 24, 2008, Transiplex moved for reconsideration, asserting that it had misunderstood the court's December 21, 2007 order, and had no opportunity to submit relevant context evidence. CP 1072-73. At a hearing on June 6, 2008, the court set aside the question of whether these excuses were well-founded, and reasoned that it would be best to ensure that all relevant evidence was before the court. (6/6/08 RP at 15-17, 26). On that basis, the court continued the hearing once again to allow for gathering and submission of additional evidence.

After further briefing (CP 1109-1653) and additional oral argument on August 20, 2008, the court reaffirmed summary judgment for the Port on October 14, 2008. CP 2494-95.

3. Transiplex Expanded the Litigation to Include “Tortious Interference” and Other Claims

Meantime, while resolution of the first summary judgment motion was pending, Transiplex filed an amended complaint asserting, among other things, a claim of “tortious interference with business relations.” CP 578-90. Ensuing discovery addressed a raft of issues relating to the Port’s dealings with various Port users CP 1654-56, but ultimately the claims focused mainly on two points, as described below.

a. Claims Related to the “CDP”

Transiplex’ Amended Complaint asserted that the Port had disclosed plans to “bulldoze” the Transiplex facility, as a means to (presumably) scare tenants away from Transiplex. CP 582-83. The source of these allegations related to the Port’s ongoing “Comprehensive Development Plan,” (CDP), which was initially published in 2005. The CDP contemplates possible relocation of several cargo warehouses, including Transiplex’, to make way for expansion and consolidation of cargo facilities over the next 20 years. *See* CP 1655, 1799, 2620.

As the Port’s published plans make clear, and as the Port repeatedly reaffirmed to Transiplex during the litigation, the CDP is merely a planning document; it contemplates numerous potential projects, many of which may never be funded or built. CP 1740, 1799-1800. Unless and until any such project is formally presented to and approved by the Port Commission, it cannot be considered even remotely imminent. Accordingly, no Transiplex tenant has any reasonable cause for concern

that its facility will be “bulldozed” in the near future. Transiplex tenants testified that their awareness of Port planning activities had no bearing on their lease relations with Transiplex. CP 2735, at 414:14-19, 2741.

b. Claims Related to Cargolux

As it developed, the most contentious issue in the “tortious interference” litigation concerned a parallel dispute between Transiplex and Cargolux relating to payment of Transiplex’ legal fees.

As background: Transiplex’ standard lease agreements with its tenants authorize it to collect various building “operating expenses” in addition to base rent. CP 2171. In March 2008, Transiplex tenants received a summary accounting showing a dramatic increase in operating expenses, mainly due to Transiplex’ inclusion of over \$560,000 in legal fees, for 2007 alone,¹³ under the heading of “administration, accounting, and office expenses.” CP 2209-11; 2216-18. An accompanying letter explained that the higher costs were “due to legal expenses associated with the Port of Seattle’s breaches of the Ground Lease . . .” CP 2209.

Cargolux protested and refused payment of Transiplex’ legal fees. CP 2213. As the dispute escalated, Transiplex sent a Notice of Default on May 29, 2008, stating that it would terminate Cargolux’ lease within 10 days if the fees were not paid in full. CP 2220. The next day, Transiplex notified Cargolux that its lease would terminate in any event on

¹³ Transiplex had evidently included legal fees in its operating expense calculations for 2005 and 2006 as well, but the nature of the fees was not specifically identified, and the numbers were not large enough to attract attention at the time. CP 2160-61.

November 30, 2008, unless Cargolux agreed to a 45% increase in rent. CP 2162, ¶ 21.

In response, on June 5, 2008, Cargolux filed a Motion for Temporary Restraining Order and Complaint for Declaratory Relief against Transiplex. *See* CP 2162, at ¶ 5, 2222-23. Meantime, Cargolux began making plans to vacate the Transiplex facility on or before November 30, 2008. CP 2225. As of the close of discovery, Cargolux was not planning to lease any alternate space, but would instead rely on the facilities of its cargo handler, CAS, in a neighboring building. CP 2048, at 90:5-13.

Transiplex asserted that Cargolux' impending departure from the Transiplex facility was the result of "tortious interference" by the Port — notwithstanding unequivocal testimony by Cargolux personnel that their decision was motivated solely by Transiplex' conduct. CP 2735, 2741.

4. The Court Granted Summary Judgment on Transiplex' Remaining Claims, and Denied Further Requests to Extend the Proceedings

The Port filed a second motion for partial summary judgment on September 26, 2008, seeking to resolve Transiplex' claims of tortious interference, breach of the duty of good faith and fair dealing, and other claims that are not raised on appeal. CP 2267-94.

While the motion for summary judgment was pending, the court considered two related discovery motions. The Port moved to quash an expansive CR 30(b)(6) deposition notice, issued 5 days before the latest discovery cutoff, which sought testimony as to virtually all

communications relating to any aspect of Transiplex' evolving claims. CP 1793-1804. Transiplex moved to compel further responses to its "Fourth Set of Discovery Requests." CP 1893-1902. The Port opposed Transiplex' motion on the grounds that it had already responded to most of the requests, and the limitations inherent in its remaining objections were reasonable and appropriate. CP 2295-2303. On October 21, 2008, the court granted the Port's motion to quash in part (allowing several depositions to proceed on specified topics), and denied Transiplex' motion to compel. CP 2490-91, CP 2492-93.

At the October 24, 2008 hearing on the Port's motion for summary judgment, the court granted Transiplex' request for a continuance to conduct additional discovery as authorized by the October 21 order. 10/25/08 RP at 4. Transiplex conducted additional depositions, and the parties reappeared for argument on November 25, 2008. At the conclusion of the hearing, the court orally granted the Port's motion. 11/25/08 RP at 52-58. The court's written ruling was entered January 12, 2009. CP 2757-59.

While entry of the written order was pending, Port counsel discovered e-mail correspondence and notes of discussions between Port and Cargolux personnel that had not previously been produced. CP 2765-94. Port counsel produced the documents to Transiplex' counsel on December 4, 2008. CP 2765. On January 22, 2009, Transiplex filed a motion for reconsideration of the summary judgment ruling, claiming that the Port's late production warranted reversal of the ruling in its entirety.

CP 3283-92. By order dated February 12, 2009, the court found that the substance of the reconsideration motion addressed only issues related to Cargolux, and that “even considering the arguments contained in the motion for reconsideration — and the [subsequently produced] documents . . . — there is insufficient evidence to support a finding that all elements of the tortious interference claim have been met.” CP 3653.

IV. ARGUMENT

A. Standard of Review

Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits declarations establishing it is entitled to judgment as a matter of law. *See Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 719 P.2d 98 (1986). The non-moving party must then present evidence that material facts are in dispute; if it fails to do so, summary judgment is appropriate. *Id.* at 852. In demonstrating disputed material facts, the nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or . . . having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). A defendant who can point out that the plaintiff lacks competent evidence to support *any element* of its claim is entitled to summary judgment, as “a complete failure of proof concerning an element necessarily renders all other facts immaterial.” *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993).

A dispute over the meaning of a contract can be resolved as a matter of law so long as it does not depend upon “the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.” *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990); *see also Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (interpretation is a question of law where “only one reasonable inference can be drawn from the extrinsic evidence”); 6/6/08 RP at 6 (Transiplex agrees that interpretation of the Seventh Amendment was a matter of law).

B. The Trial Court Properly Dismissed Transiplex’ Claim for Breach of the Seventh Amendment

Transiplex’ breach of contract claim is governed by the well-settled principles set forth in *Berg v. Hudesman*, and further articulated in *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 500, 115 P.3d 262 (2005); *Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 98 P.3d 491 (2004); and *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003). Transiplex duly recites these principles (App. Br., at 21-22), but misapplies them in an effort to achieve its desired result.

The aim of contract analysis is to “determine the meaning of *specific words and terms used*” in a contract, and not to interpret language to conform to some “intention independent of the instrument.” *Hearst*, 154 Wn.2d at 503 (emphasis in original) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 694-95, 974 P.2d 836 (1999)). Courts generally “give

words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.* at 504 (quoting *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987)). Context evidence may be relevant to show the intended meaning of specific words used, but never to “vary, contradict or modify the written word.” *Hearst*, 154 Wn.2d at 503 (quoting *Hollis*, 137 Wn.2d at 695).

Thus in *Hearst*, the court rejected the contention that specific language in the Joint Operating Agreement between the *Seattle P-I* and the *Seattle Times* should be interpreted to conform to the parties’ expressed interest in sustaining the operations of both papers. “Because extrinsic evidence may be used only to determine the meaning of specific words in the agreement, extrinsic evidence about the parties’ desire to ensure that the Seattle area maintained two newspapers of general circulation is irrelevant.” 154 Wn.2d at 509.

In *Elliot Bay Seafoods*, the plaintiff leased property at Pier 66 in Seattle, based largely on the Port’s representations that it would develop the pier to include a working fishing terminal. This court rejected the contention that the representations by Port personnel were relevant to establish a breach of contract.

No extra-contractual promise can be implied to guarantee a fish processing facility or maintain any particular mix of tenants at Pier 66 when that issue was not addressed in any term of the lease. . . . *Berg* held that extrinsic evidence may be admitted to give meaning to the words used in the contract,

not to create a new contract term. [124 Wn. App. at 12]

In *Go2Net*, the defendant offered extrinsic evidence to suggest that the term “impressions,” as used in internet advertising contracts, referred to visits by human users, and not visits by automated search engines or web crawlers. This court rejected this argument in light of the unambiguous language of the agreements.

[T]he agreements plainly provide that ‘[a]ll impressions billed are based on Go2Net’s ad engine count of impressions,’ and that ‘[i]n the event of a conflict between the numbers of impressions reported by Go2Net, Inc. and any remote server, the Go2Net, Inc. count stands.’ This language shows an objective mutual intent to allow Go2Net’s method of counting impressions to prevail, and it effectively preempts any arguments over the definition of ‘impressions.’ Go2Net did exactly what the agreement said it could do: it billed C I Host based on Go2Net’s ad engine count of impressions. Had C I Host wished to ensure that Go2Net’s ad engine was counting only the number of times a human actually viewed the ad, it should have contracted to count the number of impressions itself, or specified its own definition of ‘impressions’ in the agreements. [115 Wn. App. at 86; citation omitted]

1. Transiplex’ Proposed Interpretation of Paragraph 6 Is Contrary to the Plain Language of the Agreement

Transiplex’ extrinsic evidence is analogous to the evidence offered in the foregoing cases, and the result should be the same. Transiplex points to parole discussions indicating the parties expected the hardstand to accommodate noseload parking — an “intention independent of the

instrument” — and asks the court to construe the language of Paragraph 6 to conform to this “intention.” But the plain language of the agreement simply does not bear the interpretation Transiplex advocates. The statement that the Port intended to proceed “*in accordance with the Port’s schedule for Transiplex Hardstand Expansion Project*” is unambiguous; it refers to discrete, readily-verifiable sources. There was only one such “schedule,” and one such “Project.” As the trial court recognized, it makes no sense to say that the parties intended to refer to something else. 6/6/08 RP at 29-32. As in *Go2Net, supra*, the Port “did exactly what the agreement said it [w]ould do” in this section of the agreement, and cannot be found in breach.

2. Context Evidence Does Not Support Transiplex’ Interpretation

Transiplex asserts that this case is distinguishable from *Hearst, Go2Net* and *Elliot Bay Seafoods* because “Transiplex asked the court to use the extrinsic evidence to interpret the words of the Seventh Amendment, not to vary or contradict them.” App. Br., at 22. This assertion rings hollow, as none of the extrinsic evidence offered by Transiplex has any particular bearing on the specific language in question. In fact, the only evidence in the record relating to the intended meaning of the “schedule for the . . . Project” is the declaration of Ms. Safora, which supports a common-sense interpretation: The words were introduced to address the timing of the project, and not specific parking rights. CP 566.

Transiplex' reliance on the minutes of the Port Commission meeting approving the Seventh Amendment, CP 244-45, is completely unavailing. App. Br., at 22-23. The minutes include no reference to the "schedule for the . . . Project,"¹⁴ and nothing to support Transiplex' interpretation of the phrase. The introductory statement that "[l]atest designs indicate the new ramp will be large enough to accommodate two simultaneous 747-400 nose-load operations," CP 244, is accurate, and does not remotely suggest that the Port would be bound to use the property in a particular way. Indeed, the most notable thing about the minutes is what they do *not* say. The terms of the Seventh Amendment, as presented to the Port Commission, included no indication that Transiplex would retain any residual parking rights, or that the Port's authority to manage the property would be restricted in any way. If Transiplex truly believed that it was to receive parking rights, it should have insisted on lease language to that effect, so that the Port Commission could fairly pass on the issue.

In fact, the parties' course of dealing makes it clear that the Port did not agree, and would not have agreed, to grant parking rights to Transiplex. As Transiplex surely understood, an agreement governing aircraft parking rights on Port property over a 35-year term would be somewhat complicated; it would have to resolve, among other things,

¹⁴ The minutes related to the approval of the Seventh Amendment, CP 244-45, do not mention the "Transiplex Hardstand Expansion Project" by name. Minutes related to the "Transiplex Hardstand Expansion," which was introduced as a separate agenda item, stated merely that the expanded hardstand would accommodate "two Group V aircraft (B747-400) or three Group IV aircrafts (MD-11)," and did not refer to nose-loading.

where, when, and how parking would be assigned, and how competing interests would be resolved. Thus Transiplex had proposed that the parties identify an “‘envelope’ of time” within which its tenants would have priority for use of the hardstand, CP 228, or, failing that, that the Port agree to “insure that future management supports the continued cargo operations of present and future tenants of [Transiplex] with the exception of interruptions general to all air carriers at the airport (*e.g.*, weather, etc.).” CP 259. The Port explicitly rejected these proposals, and the parties settled on stating simply that the Port would treat Transiplex’ tenants in the “same manner” as other tenants. In context, it makes no sense to suggest that the parties intended to provide additional rights to Transiplex by way of an elliptical reference to the Port’s “inten[t]” to proceed in accordance with an identified “schedule.”

3. Transiplex’ Interpretation Conflicts with Other Provisions of the Agreement

Transiplex’ reliance on parole evidence to the effect that the hardstand was expected to “accommodate” noseload parking is, in any event, misleading and misplaced. As described above, there is no dispute that the hardstand as built can accommodate noseload parking (CP 2037); the relevant question is whether the Port is constrained to manage the hardstand for that particular purpose. On that score, the contract language is clear. The Seventh Amendment confirms that the Port has the sole authority to manage the premises, subject only to its statutory obligation to treat airport users on an equal basis.

While asserting that the contract should be interpreted to “include nose-load parking” (App. Br., at 3), Transiplex conspicuously omits any discussion of what specific property rights it claims to have, or how its interpretation would be applied in practice. But clearly, any mandate that the Port “include” or “accommodate” nose-load parking would be inconsistent with the contract language stating that the Port is responsible for managing the movement of aircraft on the area in question. The trial court properly rejected such an interpretation.

4. Section 201 of the Restatement of Contracts Does Not Support Transiplex’ Position

Transiplex argues that its position is supported by the principles of 201 of the Restatement (Second) of Contracts, because the Port allegedly knew that Transiplex attached a different meaning to the relevant language at the time of contracting. (App. Br., at 27). Transiplex offers no Washington authority applying this section, and the argument is, in any event, unavailing.

There is no evidence that the Port “knew” that Transiplex interpreted the relevant contract language to mean that the Port would be obliged to maintain and utilize two angle-in noseload parking positions in accordance with Transiplex’ wishes. Nor, in fact, is there any evidence that Transiplex *did* so interpret the relevant language at the time. To the contrary, as discussed above, the lease negotiations had specifically resolved that that the Port’s only obligation was to treat Transiplex’

tenants in the same manner as other airport users. There was no confusion as to Transiplex' rights on this point, and Section 201 does not apply.

Transiplex argues that Port staff's changes to the hardstand marking plan in late 2001 or early 2002 amounted to a "last-minute repudiation of the Port's intent to provide two nose-load parking spaces," which the Port was obliged to communicate to Transiplex. App. Br., at 27. But as Transiplex recognized, the parking positions are simply lines on the pavement, which the Port can repaint or reconfigure at any time, with relatively little effort. *See* CP 1342, ¶ 9. Indeed, the Port subsequently did paint a nose-load position on the hardstand. CP 299, 304. Absent any contractual basis for the assertion that the Port was obliged to maintain a specific parking configuration, as discussed above, Mr. Cowdin's decision to configure the lines in a certain way in 2002 did not amount to a material breach of the agreement, nor was it something that the Port was required to disclose to Transiplex.

5. The Port Has Fulfilled Its Contractual Obligations by Providing Parking to Transiplex' Tenants "in the same manner" as Other Airport Users

The Port's only relevant contractual obligation is to provide parking to Transiplex tenants in the "same manner" as other airport users. Each affected tenant testified that, so far as it is concerned, the Port has satisfied this obligation. CP 1440-44. Accordingly, there is no issue of material fact as to whether the Port has breached the agreement.

Transiplex claims there is an issue of fact as to Cargolux' desires with respect to parking, based on a single e-mail dated March 19, 2003,

wherein Jim Piontkowski of Cargolux asked whether it was “possible to park our aircraft outback of our facility.” CP 208. While there is no record of any written response to Mr. Piontkowski’s e-mail, Mr. Cowdin of the Port testified that he was in regular contact with Cargolux’ operations personnel (Mr. Chinn) regarding parking, and was consistently informed that Cargolux wished to park at NL1 position. CP 298. Mr. Piontkowski testified that he deferred to Mr. Chinn and Mr. Joyce, Cargolux’ Operations Manager for Western North America, with regard to parking issues. CP 2502-3. There is no question that Mr. Joyce spoke for Cargolux when he declared that Cargolux did not wish to use any angle-in position south of the Transiplex facility. CP 1442-44. In sum, there is no issue of material fact as to whether the Port has breached any provision of the Seventh Amendment.

C. The Trial Court Properly Dismissed Transiplex’ Claim for Breach of the Contractual Duty of Good Faith and Fair Dealing

Transiplex asserts that the Port breached the contractual duty of good faith and fair dealing by: (1) “failing to disclose the decision of Port staff to repudiate a primary purpose of the contract,” (2) “building the project in a way that made it more difficult for Transiplex to realize the basic benefit of the contract,” (3) “failing to cooperate in performance,” and (4) “failing to exercise its discretionary power to control aircraft parking to allow Transiplex to realize the basic benefit of the contract.” App. Br., at 29. These claims are defective on both the law and the facts.

Washington courts recognize that every contract contains “an implied duty of good faith and fair dealing,” which “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). The duty to cooperate exists, however, “only in relation to performance of a specific contract term.” *Id.* As the court explained in *Badgett*:

This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it ‘inject substantive terms into the parties’ contract.’ Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. *Thus, the duty arises only in connection with terms agreed to by the parties.*

116 Wn.2d at 569 (citations omitted, emphasis added). Washington courts thus emphatically reject the notion of a “a free-floating duty of good faith unattached to the underlying legal document.” *Id.* at 570; *see also Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). As a “matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Badgett*, 116 Wn.2d at 569-70.

1. The Port Did Not Engage in Bad Faith by Failing to Pave Over the “Water Main,” or Failing to Disclose Changes to the Marking Plan, or Failing to Cooperate to Provide Noseload Parking

Transiplex’ arguments with respect to the “water main,” the “marking plan,” and the Port’s alleged duty to “cooperate” to provide nose-load parking all fall squarely within the rule of *Badgett*, and were properly dismissed. The Port did not undertake any contractual obligation to fortify the water main on the western edge of the premises to withstand air cargo traffic, or to configure parking lines on the hardstand in a particular manner, or to manage parking in accordance with Transiplex’ wishes. The Port stated that it would construct the hardstand “in accordance with the Port’s schedule for the Transiplex Hardstand Expansion Project,” and then provide parking to Transiplex tenants in the “same manner” as other Port users. The Port has carried out all of its obligations in good faith — such that Transiplex cannot identify any tenant or prospective tenant who is in any way dissatisfied with the Port’s parking arrangements. Indeed, although it was not required to do so, the Port expanded the hardstand yet again in 2005-6 to suit nose-load operations for Hanjin/KAL, which then became a Transiplex tenant. CP 298-99, 1440-41, 1635-36. Transiplex’ assertion that the Port is required to do something more in order to carry out the “purpose” or “spirit” of the Seventh Amendment should fail.

2. The Port Has Not Breached the Duty of Good Faith by Failing to Exercise its “Discretionary Power” to Accommodate Transiplex’ Wishes

Transiplex relies on *Goodyear Tire v. Whiteman Tire*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997), (1998) for the proposition that the covenant of good faith obliged the Port to exercise its “discretionary authority” under the contract to accommodate Transiplex’ wishes.¹⁵ *Goodyear* does not support Transiplex’ position.

In *Goodyear*, the court noted that the duty of good faith and fair dealing applies “when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time.” 86 Wn. App. at 739 (quoting *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995)). The duty does *not* extend, however, to a situation where a contract contains an express and unconditional reservation of certain rights to a party. Thus in *Goodyear*, the parties entered a dealership contract that expressly recognized the right of the distributor (Goodyear) to establish competing outlets in the dealer’s (Whiteman’s) trade area. Goodyear subsequently undertook a series of competing activities that ultimately drove Whiteman out of business. The court upheld the dismissal of Whiteman’s good faith and fair dealing claims on summary judgment:

[T]he contract provision reserving Goodyear’s right to sell in Whiteman’s trade area is not stated by reference to a certain context. It is unconditional and does not call for the exercise of discretion and the

¹⁵ Transiplex also cites *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006). There is no indication that the 8th Circuit in *Craig* was “applying Washington law,” as Transiplex suggests. In any case, the discussion in *Craig* is not inconsistent with *Goodyear*, as discussed herein.

consequent implied covenant to exercise that discretion in good faith. It was not reasonable for Whiteman to rely on Goodyear's assurances directly contrary to the language of the contract, especially in light of the additional provision that the contract completely expressed the obligations of the parties.[86 Wn. App. at 741]

Similarly here, the parties' integrated agreement provides that Transiplex and its tenants have no right to operate in Port common areas except as directed by the Port. CP 160-61. The Port has the sole authority and responsibility to manage parking on the hardstand, subject only to its obligation to provide parking on an equal basis to respective Port users. The duty of good faith does not operate as a further constraint on the Port's authority manage the hardstand.

D. The Trial Court Properly Dismissed Transiplex' Tortious Interference Claim.

To establish tortious interference with a contractual relationship or business expectancy, a plaintiff must prove:

(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997); *see also Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

In *Pleas*, the court confirmed that the *plaintiff* bears the burden of proving the defendant's conduct was "wrongful by some measure beyond the fact of the interference itself." *Pleas*, 112 Wn.2d at 803-04 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1368 (1978)); *cf.* App. Br., at 36-37. Conduct may be deemed "wrongful" if it arises from "improper motives" or "wrongful means." *Id.* "Improper motives" generally refers to a specific objective of harming the plaintiff. *See Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996). "Wrongful means" include actions that are unlawful or fraudulent, or violate established business ethics or customs. *Pleas*, 112 Wn.2d at 804; *see also* Restatement (Second) of Torts, § 767, cmt. c (1979).

A defendant whose conduct is deemed "improper" by these standards may still avoid liability by establishing that its conduct is legally "privileged." *Pleas*, 112 Wn.2d at 804; *see, e.g., Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007) (Madsen, J. dissenting) ("Once a surety has notice of a potential claim, it is privileged to intervene and protect its interests without liability for tortious interference"); *Jeckle v. Crotty*, 120 Wn. App. 374, 85 P.3d 931 (2004) (actions of attorneys for purposes of litigation were privileged); *see also Top Serv. Body Shop*, 582 P.2d at 1371, n. 12; Restatement (Second) of Torts, § 767, cmt. b (recognizing that distinction between elements of the plaintiff's *prima facie* case (whether the conduct is "improper") and defense of privilege are unclear).

1. Miscellaneous Allegations of “Harassment” Do Not Establish Tortious Interference

Over the course of this litigation, Transiplex sought and obtained voluminous discovery and challenged numerous interactions between the Port and Transiplex tenants — tenants who are, for the most part, users of the airport who interact with Port personnel on a regular basis.

Transiplex’ brief refers to a number of these interactions in passing, without offering any sustained or coherent explanation as to how the facts establish a claim of tortious interference. App. Br., at 38-41. While the Port denies that it engaged in any improper conduct as to any Transiplex tenant, many of the incidents are moot as they do not relate to any alleged “breach or termination” of a business relationship. *Leingang*, 131 Wn.2d 133. For purposes here, the Port will focus on dealings with Cargolux, which is the only tenant that receives more than passing attention in Transiplex’ brief.¹⁶

¹⁶ The only other factual claim that plausibly approaches the elements of tortious interference involves a ground services provider, Swissport, which Transiplex mentions at page 42 of its brief. In the proceedings below, Transiplex alleged that a comment by a Port staff member — to the effect that ground service equipment repair activities were not permitted in “cargo” buildings — caused a one-month delay in commencement of a lease between Transiplex and Swissport, resulting in a loss of roughly \$5700. CP 2078; see CP 2282-85, and 2053-2103. As discussed in detail below, the circumstances of the conversation do not allow for any inference that the comments in question were motivated by any improper objective, or were in any way “wrongful.” Nor does the evidence establish that the Port’s statements — rather than Transiplex’ intervening, 10-week delay in responding to Swissport’s proposed lease revisions — “caused” the delay in commencement of the lease. The Port refers the court to the briefing below (CP 2282-85) and related exhibits (CP 2053-2103) for further background.

2. Transiplex Failed to Establish the Elements of Tortious Interference as to Cargolux

Transiplex cites to evidence indicating that on April 28, 2008, Cargolux personnel met with Tom Green, the Port's Business Development manager, to discuss the Port's evolving, long-term plans for renovation of the north cargo area to accommodate Cargolux' planned introduction of larger "747-8" aircraft. CP 2479-80; CP 2562. In the course of the meeting, Cargolux informed Mr. Green of its ongoing dispute with Transiplex regarding legal fees, as described above. CP 2413. In an e-mail following the meeting, Mr. Green raised several questions about the dispute, and noted that:

The airport wants to do everything that it can to provide the best operating environment for your business, and so the more we know about the current situation the better that we can hopefully propose positive solutions. [CP 2414].

Cargolux subsequently requested Mr. Green's assistance in viewing airport cargo facilities, as potential alternatives to the Transiplex facility. CP 2605-06; 2735, at 413:11-22. On or about May 27, 2008, Mr. Green provided a tour to visiting Cargolux personnel, by driving them around the airport in a van. CP 2607-10; 2782.

On or about June 3, 2008, Cargolux informed Mr. Green that it had received a notice of default from Transiplex. CP 2786. Mr. Green responded:

. . . I want to be clear that the airport values our relationship with Cargolux very highly, and we will do whatever is in our power to ensure that your operations at SEA will

continue uninterrupted. I believe that we will continue to have some alternate facility options available should the need arise, and Cargolux will continue to have a very high priority for facilities at the airport.
[CP 2786]

On June 5, 2008, Cargolux filed its complaint and motion for TRO against Transplex. CP 1666-1713. Meantime, Cargolux' counsel contacted the Port's counsel to request copies of certain pleadings in this case, which Port counsel forwarded by e-mail dated June 3, 2008. CP 2388. Cargolux' counsel then sent courtesy copies of Cargolux' Complaint and motion for a TRO when the documents were filed. CP 1656, 1666-1713. There is no evidence Port counsel were involved in the dispute, or even aware of it, prior to being notified by Cargolux' counsel.¹⁷

As the trial court properly recognized, these contacts between the Port and Cargolux do not rise to the level of tortious interference. The Port has a significant business relationship with Cargolux; it has a strong and perfectly legitimate interest in providing "the best operating environment" possible for Cargolux' business, and in ensuring that Cargolux' operations "continue uninterrupted." CP 2414, 2786; *see Leingang*, 131 Wn.2d at 157 ("Exercising in good faith one's legal interests is not improper interference"). The fact that the Port was responsive to Cargolux' requests and concerns does not stand as evidence

¹⁷ The Port produced all e-mail and other correspondence between the parties' respective attorneys. CP 2305. The Port's outside counsel was not aware of any impending dispute between Transplex and Cargolux related to legal fees until discussions surrounding the transmission of requested documents, on or about June 3, 2008. CP 1655, 2388.

of any “improper purpose”; nor was the Port’s conduct (showing available facilities, or responding to requests for information) in any way “wrongful.” To the contrary, as the trial court observed, the Port acted consistently with its own duty to manage the airport in a productive and efficient manner. 11/25/08 RP, at 55; *see* CP 271, 49 U.S.C. § 47107(A)(13)(a) (the Port must maintain fees and rents to “make the airport as self-sustaining as possible . . .”).

Likewise, as the trial court recognized, there is nothing wrongful or improper in the fact that the Port engages in long-term planning for its customers’ air cargo needs; that process predates this dispute, and will continue long after. Nor is it wrongful to engage Cargolux — an important operator and user — in this process. If and when any plans are implemented that involve modification of the Transiplex leasehold, Transiplex’ rights and interests will necessarily be addressed; meantime, Transiplex has no basis to complain that the Port’s conduct is “tortious.”

Further, even if the Port’s conduct were deemed improper, there is no issue of material fact as to whether the Port’s conduct induced or caused Cargolux to vacate its lease with Transiplex. Joseph Joyce, Cargolux’ North American Operations Manager, testified:

Q: I think you told us that Cargolux intends to vacate the Transiplex warehouse; is that correct?

A: That’s correct.

Q: Have you been involved in that decision?

A: Yes I have.

Q: And is one of the reasons the effort to impose, Transiplex's efforts to impose legal fees from the litigation it has with the Port? . . .

A: Yes.

Q: Does Cargolux's decision to move have anything to do with access to nose-load parking?

A: No.

Q: Anything to do with any concern that Transiplex may be torn down or demolished?

A: No.

Q: Has the Port asked you to vacate the Transiplex space?

A: No.

Q: Has the Port encouraged you in any way to vacate the Transiplex space?

A: No.

Q: Has the Port interfered in any way with your relationship with Transiplex?

A: No.

CP 2735; *see also* CP 2741, at 217:5-21 (Piontkowski Dep.); CP 2633, at 144:20 - 141:14 (Green Dep.).

In sum, there was no issue of material fact as to the merits of Transiplex' tortious interference claims.

E. The Trial Court Properly Denied Transiplex' Requests to Extend the Proceedings and Compel Additional Discovery

Transiplex asserts that the trial court abused its discretion in denying Transiplex' third motion to compel discovery, partially granting the Port's motion for protective order, denying a second continuance of

the motion for summary judgment, and denying reconsideration of summary judgment in light of the Port's late production of certain documents. App. Br., at 4. As the trial court recognized, Transiplex' arguments below related mainly to Cargolux, and so the Port will focus on those issues here.¹⁸

A motion for continuance is properly denied if the moving party does not outline the evidence that is sought, and demonstrate how the new evidence would support the party's position. CR 56(f); *see Briggs v. Nova Services*, 135 Wn. App. 955, 147 P.3d 616 (2006), *aff'd*, __ Wn.2d __, 2009 WL 2619809 (Aug. 27, 2009); *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). Review of the trial court's decision on a motion for continuance, as well as its decisions on underlying discovery issues, is subject to an abuse of discretion standard. *Briggs*, 135 Wn. App. at 619, 622.

Transiplex submitted a "Rule 56(f) Certification" of counsel on October 16, 2008, before the court ruled on the then-pending discovery motions. CP 2450-53. The declaration included conclusory assertions that further discovery was "necessary . . . for Transiplex's opposition to the Port's pending motion for partial summary judgment," but no specific account of what evidence was sought or how it would be material to the pending claims. CP 2452. Nevertheless, the court granted a continuance

¹⁸ The discovery requests underlying Transiplex' motion to compel discovery, CP 1893-1905, and the Port's motion for protective order, CP 1793-1805 addressed a wide range of topics, most of which are not directly related to the issues briefed on this appeal. To the extent that Transiplex' appeal challenges the court's rulings in their entirety, such that the nature and extent of the Port's responses on various issues are relevant, the Port refers to its briefing below at CP 1793-1805, 1886-92, and 2295-2361.

of the October 24 hearing to allow, among other things, a CR 30(b)(6) deposition of the Port as to its communications with Cargolux. 10/24/08 RP at 4; CP 2492-93.

By the time of the continued hearing on November 25, 2008, Transiplex had conducted thorough depositions of Cargolux and Port personnel regarding communications between them. As outlined above, each of these witnesses testified unequivocally that Cargolux' decision to vacate the Transiplex facility was in no way motivated by the Port. Transiplex' counsel was left to argue that all of this testimony was false — notwithstanding its distinctly plausible ring:

THE COURT: . . . [Y]our client gives them a notice that you intended to find them in default if they didn't pay the attorney's fees; and it seems to me clear from the record that Cargolux considered that a very serious threat to them, so they couldn't afford, apparently, to shut down or to have you interfere in any way with their business, so they paid the amount that was requested, right?

MR. BOUNDY: Close. They went to court. They started the lawsuit. They went to court and asked early on for an order preventing us from enforcing that notice

THE COURT: Didn't they also object to the lease that had been offered to them as well as any continuing obligation to pay attorney's fees?

MR. BOUNDY: They certainly did not accept the proposed rental lease, that is true.

THE COURT: Didn't they express those as the reasons why?

MR. BOUNDY: They did. They did say that those were reasons.

THE COURT: Then the evidence is that those weren't reasons that they chose to move?

MR. BOUNDY: Well, as I indicated earlier, I don't think that Cargolux is volunteering these days to say one of the real reasons we decided to move is because, you know, the Port was influencing us . . . [11/25/08 RP at 25-6]

Transiplex' claim that all knowledgeable witnesses were untruthful does not stand as a justification for further discovery. Transiplex presented no coherent rationale to continue the hearing, and the court properly exercised its discretion in denying a further continuance and granting the Port's motion for summary judgment.

In its motion for reconsideration, Transiplex asserted that the Port's production of additional documents on December 4, 2008 justified reversal of the summary judgment ruling as to all claims. The trial court correctly recognized that the new documents related only to Cargolux, and had no bearing on the facts that justified summary judgment. CP 3652-53. Indeed, the only "new" information was that Tom Green, the Port's CR 30(b)(6) witness, may have merged two distinct meetings in his recollection: Mr. Green had recalled that after the airport "tour," the parties had gone to a nearby Thai restaurant for lunch, when in fact, the lunch meeting occurred on a separate date. CP 2766. Otherwise, the December 4 documents offered nothing to contradict the witnesses'

material testimony, and nothing that would establish conduct rising to the level of tortious interference.²⁰

Accordingly, the trial court's ultimate decision denying Transiplex' motion for reconsideration was not an abuse of discretion.

V. CONCLUSION

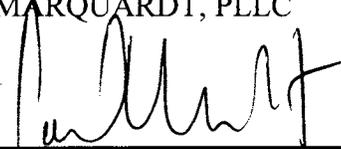
For the foregoing reasons, the Court should affirm the judgment of the trial court in this matter.

DATED this 1st day of September, 2009.

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²⁰ Transiplex also quotes from a 2007 audit and a subsequent investigative report relating to Port construction practices, to the effect that some Port personnel had engaged in a "history and pattern" of bad acts. App. Br., at 46. These reports had nothing to do with the issues in this case; they were submitted as part of an omnibus, 11th-hour declaration, which had no apparent purpose other than to pad the record with information Transiplex hoped to use to prejudice this Court on appeal. CP 3293-97. Recognizing this, the trial court struck the reports from the record. CP 3650-51. Transiplex has not appealed that ruling. The reports should not have been cited or quoted in Transiplex' brief, and should be disregarded.