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No. 62727-9-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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QUALITY FOOD CENTERS, INC., a Washington corporation nka FRED  
MEYER STORES, INC., an Ohio corporation and/or THE KROGER CO.,  
an Ohio corporation,

Appellant,

v.

BETA-BOTHELL CENTER, LLC., a Washington limited liability  
company,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 2

    A. Beta Bothell Offers an Unreasonable Interpretation  
        of the 2002 Amendment That is Contrary to its  
        Plain Language, Structure, and the Parties’ Stated  
        Intent ..... 2

    B. There is No Evidence that QFC Shared Beta  
        Bothell’s Subjective Intent in Negotiating the 2002  
        Amendment..... 8

    C. Beta Bothell Misconstrues QFC’s Argument  
        Regarding Parol Evidence of Negotiations That  
        Preceded the Signing of the 2002 Amendment..... 11

III. RELIEF REQUESTED..... 13

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	11
<i>Hearst Comm'ns, Inc. v. Seattle Times, Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	2, 7, 13
<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818, 194 P.3d 221 (2008).....	2
<b>OUT-OF-STATE CASES</b>	
<i>Outlet Embroidery Co. v. Derwent Mills</i> , 254 N.Y. 179 (N.Y. Ct. App. 1930).....	1
<b>OTHER AUTHORITIES</b>	
Marvin A. Chirelstein, <i>Concepts and Case Analysis in the Law of Contracts</i> , at 81-82 (1990).....	12
Restatement (Second) of Contracts § 201.....	1
Restatement (Second) of Contracts § 201(1).....	10
<i>Webster's Third Int'l Dictionary</i> (2002).....	7

## I. INTRODUCTION

Neither the context rule nor the Restatement (Second) of Contracts § 201 can help Beta Bothell transform the plain language and stated purpose of the 2002 Lease Amendment into the opposite of what the parties intended. Beta Bothell's interpretation is contrary to the stated intent of the parties: "Landlord and Tenant desire to amend the lease . . . to help Tenant recover some of its remodel costs and ***add*** additional options to renew." CP 52 (emphasis added). It is also contrary to all logic and business sense. Pursuant to the 1992 Lease Modification, CP 47-51, QFC already had four five-year options at a formula rent, which it could exercise beginning in April of 2008, when the extended term of the lease was set to expire. CP 47. There is no rational reason why QFC would bargain away the formula-rent options at the same time it made a long-term commitment to the Bothell location by investing over \$1.4 million in a "major remodel." CP 52. *See Outlet Embroidery Co. v. Derwent Mills*, 254 N.Y. 179, 183 (N.Y. Ct. App. 1930) ("We are to seek some other meaning whereby reason will be instilled and absurdity avoided").

In contrast, QFC's interpretation gives effect to the stated intent of the parties "to add" additional options to renew, and to every provision of the 2002 Amendment, including the parties' decision to preserve paragraph 3 of the 1992 Modification that specified the formula rent. It is

also supported by common sense. Most importantly, QFC's interpretation is consistent with "what was written." *Hearst Comm'ns, Inc. v. Seattle Times, Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "What was written" included adding options to renew, not replacing options to renew. It should be enforced.

## II. ARGUMENT

### A. **Beta Bothell Offers an Unreasonable Interpretation of the 2002 Amendment That is Contrary to its Plain Language, Structure, and the Parties' Stated Intent**

Washington courts "search for intent through the objective manifest language of the contract itself." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, 194 P.3d 221 (2008). The objective language of the 2002 Amendment at issue in this case makes the parties' intent crystal clear. It states that the parties intended to "help" QFC recover some of the costs of a "major remodel" and "***add*** additional options to renew." CP 52 (emphasis added). The 2002 Amendment provides that the rent for "additional" options will be negotiated in good faith. *Id.*

Pursuant to the extensive 1992 Modification, in 2002 QFC already had four formula-rent options to renew the Lease after its then-effective term, which was set to expire in 2008. CP 47-51. In 2002, however, the building was in need of a "major remodel" that prompted the Amendment. CP 52. The remodel cost QFC over \$1.4 million; the investment

demonstrated its long-term commitment to the Bothell location. CP 205-208.

In this background, the only rational interpretation of the 2002 Amendment is that it added the four negotiable-rent options to the four formula-rent options QFC already had. Beta Bothell's theory that the parties' intended to replace the formula-rent options with negotiable rent options makes no business sense. It is difficult to imagine why any tenant -- especially a tenant that is considering investing over \$1.4 million in a major remodel -- would trade the certainty of favorable fixed rent over twenty years for the uncertainty of negotiable rent over the same number of years. CP 205-208.

Beta Bothell's theory is also belied by structure of the 2002 Amendment. The parties chose to leave intact Paragraph 3 of the 1992 Modification that provided the method for calculating the formula-rent options. CP 47, 52. This indicates that the parties did not intend for negotiable rent options to replace the formula-rent options. Instead, they chose to "add" additional options. This explains why the 2002 Amendment maintains the 1992 formula for the first set of options *and also states* that the rent for the second set of options was to be "mutually negotiated in good faith." CP 52.

Beta Bothell dismisses QFC's interpretation that is faithful to the plain language of the 2002 Amendment and the parties' stated intent to "add" options as "clever theories." Beta Bothell's Response Brief, at 25. It claims instead that QFC shared Beta Bothell's replacement theory. *Id.* at 5. Beta Bothell also claims that QFC had similarly interpreted the option clauses in the original Lease and 1992 Lease Modification, and argues that the parties should be bound by this "mutual" understanding, which Beta Bothell traces back to 1976. *Id.*

In so doing, however, Beta Bothell lumps together three agreements without any regard to their specific language or purpose. The continuity Beta Bothell struggles to create falls apart when one looks at the actual language of the original Lease, the extensive 1992 Modification, and the 2002 Amendment.

The 1976 Lease provided:

The term of this Lease shall be for a period of twenty (20) years commencing on the date being the earlier of (a) the expiration of forty-five (45) days after the premises are made available to tenant . . . or (b) the opening by tenant of its business from the premises . . . Tenant shall have the option . . . to extend the term of this Lease, upon the same terms and conditions . . . for 2 additional terms of five (5) years, upon giving Landlord written notice of the exercise of such option at least ninety (90) days prior to the expiration of the original or any extended term of the lease.

CP 10-11. There is no dispute that pursuant to the 1976 Lease the options were added to the original term, as the Lease expressly provided.

The 1992 Modification of the 1976 Lease was extensive and detailed. The modifications reflected the supermarket's expansion to 29,723 square feet. The minimum rent more than tripled. Reflecting these major changes, the 1992 Modification modified the original term and granted QFC four options to extend it:

TERM: Paragraph 2: The term of the lease will be increased to fifteen (15) years commencing upon the grand opening of tenant's expanded space.

Tenant shall have the option . . . to extend the term *of this lease modification*, upon the same terms and conditions . . . (except rent) for four (4) additional terms of five years upon giving landlord written notice . . . prior to the expiration *of the extended term of the lease*.

CP 47 (emphasis added).

Beta Bothell emphasizes that “[a]t no time, from the date of the 1992 Lease Modification through this litigation, has QFC ever claimed the 1992 Lease Modification granted QFC four ‘additional’ option terms in addition to the two granted in the original lease (i.e., six option terms).”

Beta Bothell's Response Brief, at 5 (emphasis in the original). Of course QFC agrees that the 1992 Modification gave it four -- not six -- options to renew. That is exactly what it says.

There is no dispute that the 1992 Modification changed the original 20-year term, due to expire in 1996, to a new 15-year term that began “upon the grand opening of [the] expanded space” on April 14, 1993. The 1992 Modification then gave QFC the option to extend “the term *of this lease modification* . . . for four (4) additional terms of five years upon giving landlord written notice . . . prior to the expiration *of the extended term of the lease.*” CP 47 (emphasis added).

Under the 1992 Modification, the original 20-year term (and the two options that went with it) ceased to exist. It was replaced with a new, “extended” 15-year term, to begin at the grand opening of the expanded premises. The only renewal options associated with the extended 15-year term were “four (4) additional terms of five years” at the formula rent specified in Paragraph 3 of the 1992 Modification. CP 47. The 1992 Modification explicitly provided that the options followed the extended 15-year term because they could be exercised “prior to the expiration of the extended term of the lease.” *Id.*

Based on the plain language of the 1992 Modification, QFC never argued -- nor could it argue -- otherwise. This does not help Beta Bothell, however, because QFC’s position is not a function of QFC sharing Beta Bothell’s subjective understanding of what “adding” means. Instead, QFC’s position simply follows “what was written” in the 1992

Modification itself. Its position in 1992, and today, is that agreements mean exactly what they say. *See Hearst*, 154 Wn.2d at 503 (“Washington continues to follow the objective manifestation theory of contracts. [W]e attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable words used.”).

The 2002 Amendment was less extensive. CP 52. The changes were limited to two paragraphs. The extended 15-year term, due to expire in 2008, and the formula-rent options that went with it, were left intact. Yet, the parties were very clear that they intended “to help” QFC “recover some of its remodel costs” and wished to “**add** additional options to renew.” CP 52.

Beta Bothell reads this key word -- “to add” -- entirely out of the 2002 Amendment. Under its interpretation, nothing was “added” to what QFC already had under the 1992 Modification. That is not “what was written,” however. “To add” means to give one more than one had before, to increase, to augment, or improve. *See Webster’s Third Int’l Dictionary* (2002). Under the 1976 Lease, QFC had a 20-year term plus two additional five-year options. Under the 1992 Modification, QFC had a new 15-year term that began in 1993 plus four formula-rent options.

Under the 2002 Amendment, the parties “add[ed] additional [negotiable-rent] options” to the four formula-rent options QFC already had. Beta Bothell’s interpretation is contrary to “what was written” in the 2002 Amendment and common sense and should be rejected.

**B. There is No Evidence that QFC Shared Beta Bothell’s Subjective Intent in Negotiating the 2002 Amendment**

Essentially, Beta Bothell’s argument is that no matter what the logic, the stated intent, and the objective language of the 2002 Amendment provide, Beta Bothell’s subjective interpretation controls. It argues that “if parties mutually ascribe a certain meaning to a word, it will override other definitions,” citing Restatement (Second) of Contracts § 201. *See* Beta Bothell’s Response Brief, at 18. The problem is, Beta Bothell offers no evidence that, at the time the 2002 Amendment was drafted, QFC shared its subjective interpretation. *Id.* at 18-19. It cites a single e-mail message *from Rich Brunhaver* to Lynda Junker, dated February 19, 2002, where Mr. Brunhaver relayed his father Lewis Brunhaver’s negotiating position, including:

Options: Landlord will grant four (4) additional five (5) year options to renew w/base rent to be negotiated. (After the existing term of April 14, 2008).

*Id.* at 19 (citing CP 201).

But Beta Bothell offers absolutely no evidence that QFC agreed to or accepted Lewis Brunhaver's negotiating position between February 19, 2002 and June 5, 2002, when the 2002 Amendment was signed. *Id.* The only evidence in the record is to the contrary. CP 205-208. The Internal Memorandum by Todd Kjar, QFC Vice President of Real Estate, to the Kroger Capital Committee, *dated February 28, 2002*, contains QFC's understanding of the proposed terms of the 2002 Amendment:

**Lease.** Existing lease expires April 2008.

**Renewals.** This lease has 4-5 year renewals. Landlord has granted an additional 4-5 year options.

**Rent.** \$153,696/yr during the remaining term.

**Option Rent.** Rent for each options calculated at 75% of combined base rent plus percentage rent.

**Percentage Rent.** Landlord has granted an additional \$1,000,000 in breakpoint; 1.5% of gross sales in excess of \$11,246,000/yr. or \$216,269/wk. Lease has a recapture provision whereby 50% of any percentage rent is offset against \$1,618,812 for work completed in 1992.

CP 207.

Mr. Kjar's second bullet point speaks for itself. In negotiating the terms of the 2002 Amendment in February of 2002, QFC knew that it already had four formula-rent options pursuant to the 1992 Modification, and believed that it was getting four more. Similarly, QFC believed (and Beta Bothell does not dispute) that Mr. Lewis Brunhaver agreed to grant

QFC an “additional” \$1,000,000 in breakpoint, which raised the existing breakpoint from \$10,246,400 to \$11,246,400. In both instances, Mr. Kjar used the word “additional” consistently with its common meaning that “adding” usually results in having more of something (*e.g.*, longer tenancy, higher breakpoint, etc.) than one had before.

Based on these “additional” concessions by Beta Bothell, Mr. Kjar recommended and received Kroger Capital Committee’s approval of the \$1,408,000 investment in a new remodel. It makes absolutely no business sense that QFC would commit to such a large investment if it did not believe that Beta Bothell had agreed to provide additional options beyond the ones QFC already had pursuant to the 1992 Modification. Mr. Kjar’s February 28, 2002 memorandum shows that this was exactly how QFC approached its decision to invest.

Beta Bothell correctly states that the court should look at the parties’ intent “*at the time the contract was executed.*” Beta Bothell’s Response Brief, at 19 (emphasis in the original). Without any evidence that QFC shared Beta Bothell’s subjective understanding of the 2002 Amendment at the time it was negotiated or signed, and in light of the uncontroverted contrary memorandum by Mr. Kjar, who signed the 2002 Amendment, CP 53, Restatement (Second) of Contracts § 201(1) does not apply.

Beta Bothell also correctly suggests that the Court should look to the evidence of intent by parties with first-hand knowledge of the 2002 Amendment. Beta Bothell's Response Brief, at 12-13. This does not include Mr. Hom, who has no personal knowledge of the 2002 Amendment. CP 87-94. It *does* include Mr. Kjar, QFC's Vice President of Real Estate, who signed the 2002 Amendment. CP 53. Mr. Kjar's memorandum, dated February 28, 2002, is in the record. CP 205-208. It is an internal QFC document written five years before the dispute arose. As such, it is a more reliable indicator of the parties' intent than any declarations prepared in connection with pending litigation.

**C. Beta Bothell Misconstrues QFC's Argument Regarding Parol Evidence of Negotiations That Preceded the Signing of the 2002 Amendment**

Beta Bothell misconstrues QFC's position regarding Beta Bothell's reliance on the February 2002 negotiations that preceded the signing of the 2002 Amendment. Beta Bothell's Response Brief, at 2. QFC does not object to the evidence of negotiations, including the February e-mail exchange, CP 201, being admitted. Washington law permits the admission of extrinsic evidence, but limits how that evidence can be used. *See Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) ("Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of

showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.”).

Even if, in negotiating the terms of the 2002 Amendment in February of 2002, Mr. Lewis Brunhaver intended for the negotiable-rent options to be added to the extended term of the Lease and replace the formula-rent options, that is not what the final June 2002 Amendment provides for. The parol evidence rule does not allow the evidence of unilateral negotiating positions to detract from the objective terms of the final agreement:

Since the completion and execution of a written contract is typically the concluding point in the bargaining process, one’s ordinary expectation is that the document itself will contain all the conscious and important elements of the deal. All sorts of things might have been said in the course of negotiations; tentative understandings might have been reached on particular issues but then later dropped or traded away or even forgotten. . . . The parol evidence rule assumes that the formal writing reflects the parties minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document . . . were not intended to survive.

Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts*, at 81-82 (1990).

The trial court erred by using the evidence of Beta Bothell’s negotiating position to import into the final 2002 Amendment unstated

meaning that was contrary to its unambiguous intent, structure, business logic, and the common meaning of the verb “to add.” It should be reversed and the parties held to the objective terms of the 2002 Amendment. The parties intended “to add” the four negotiable-rent options to the four formula-rent options available to QFC under the 1992 Modification. That is the only meaning that gives effect to the parties’ stated objective to “*add* additional options.” It is also the only interpretation that gives effect to all provisions of the 2002 Amendment, without reducing any of its provisions to meaningless surplusage.

### **III. RELIEF REQUESTED**

Sometimes the parties to a contract use the same words to express different intent and expectations. Generally, the resulting lack of clarity can be cured by the interpretive tools that include considering (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of a contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of the parties’ respective interpretations. *Hearst*, 154 Wn.2d at 502. As discussed in QFC’s opening brief and here, the predominance of these factors supports QFC’s interpretation. The trial court’s order denying QFC’s motion for summary judgment and granting Beta Bothell’s motion for summary judgment, CP 312-313, should be reversed.

In the unusual case when all interpretive aids fail and the parties' divergent meanings cannot be reconciled, there is simply no meeting of the minds on the disputed term. If the Court concludes that 2002 Amendment fails to reflect the meeting of the parties' minds on the negotiable-rent options, the parties should be held to the undisputed terms of the 1992 Modification, which gave QFC four five-year options at the formula rent. The formula was incorporated into the 2002 Amendment, CP 52. The undisputed portions of the 2002 Amendment, including the increase in breakpoint, are also enforceable.

DATED: July 10, 2009.

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**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury of the laws of Washington State that I caused true and correct copies of the foregoing document to be served on the following individual(s) by the method(s) indicated:

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