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No. 65672-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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**SC EAST CAMPUS, INC., a Delaware corporation,
Plaintiff-Respondent,**

vs.

**WEYERHAEUSER COMPANY, a Washington corporation,
Defendant-Appellant.**

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

The trial court should have dismissed this action at the outset. Plaintiff-Respondent SC East Campus, Inc. (“SCE”) alleged only that Defendant-Appellant Weyerhaeuser Company (“Weyerhaeuser”) breached the lease agreement for an office building that SCE had already sold to another entity. Upon the sale, SCE assigned all of its interest in the lease to the buyer, and therefore lacked standing to assert a claim for breach of that lease. In addition, SCE claimed only consequential damages that were explicitly barred by the lease. The action should have been dismissed on both of those grounds, and should never have gone to trial. Even so, the trial court erred in calculating the damages it awarded to SCE at trial. The Court should reverse the trial court and remand for dismissal and an award of Weyerhaeuser’s attorneys’ fees and costs.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by failing to dismiss this action as a matter of law, by failing to enter judgment in favor of Weyerhaeuser as a matter of law, and by entering judgment in favor of SCE at trial.

2. The trial court erred in its calculation of the damages awarded to SCE.

3. The trial court erred by awarding attorneys' fees and costs to SCE, and by not awarding attorneys' fees and costs to Weyerhaeuser.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err as a matter of law by failing to grant Weyerhaeuser's motions for summary judgment and directed verdict on the basis that SCE had no standing to assert a claim for breach of contract, having already assigned that claim to another entity?

(Assignment of Error 1.)

2. Did the trial court err as a matter of law by failing to grant Weyerhaeuser's motions for judgment on the pleadings, summary judgment, and directed verdict on the basis that SCE had waived its right to seek the only damages—consequential damages—alleged in this action? (Assignment of Error 1.)

3. Did the trial court err as a matter of law by failing to subtract undisputed offsets from the damages awarded to SCE?

(Assignment of Error 2.)

4. Did the trial court err as a matter of law by awarding SCE attorneys' fees and costs, since Weyerhaeuser should have been the prevailing party below? (Assignment of Error 3.)

III. STATEMENT OF THE CASE

A. The Parties

Defendant-Appellant Weyerhaeuser Company is a Washington corporation headquartered in Federal Way, Washington. Plaintiff-Respondent SCE is a Delaware corporation that, from approximately December 2002 to October 2007, owned commercial real estate on Weyerhaeuser's campus in Federal Way.

B. Weyerhaeuser Leases Office Space from SCE

The commercial real estate owned by SCE comprised two office buildings, commonly known as EC-3 and EC-4, on the eastern part of Weyerhaeuser's campus. CP 215. SCE purchased those buildings from Weyerhaeuser Financial Services, Inc. ("WFS"), a Delaware corporation, in November 2002 for a purchase price of \$26,100,000. CP 215-26. At the time SCE purchased EC-3 and EC-4, WFS and Weyerhaeuser had an existing 10-year lease agreement (the "Lease") under which Weyerhaeuser leased all of the office space in EC-4. CP 186-213. When SCE purchased EC-4, it assumed all of WFS's rights and obligations under the preexisting Lease with Weyerhaeuser. CP 169, 215.

C. SCE Sells the Office Space and Assigns All Right, Title, and Interest in the Lease to the Buyer

In approximately February 2007, SCE preliminarily negotiated the sale of EC-3 and EC-4 to New City North America, Inc. ("New City"), a

California corporation, for the price of \$36,750,000. CP 231-80. In the proceedings below, SCE alleged that “all contingencies to completing [that] purchase and sale had been satisfied . . . with the exception of the provision of [an] executed estoppel certificate,” which SCE requested from Weyerhaeuser pursuant to Section 23 of their Lease. CP 170-71.

Section 23 of the Lease describes Weyerhaeuser’s obligation to provide an “estoppel certificate,” and was the focus of the trial below. CP 204. SCE claimed that Weyerhaeuser did not provide an executed estoppel certificate as required by Section 23, and that SCE’s sale of EC-3 and EC-4 to New City failed as a consequence. CP 171-73. SCE alleges that New City officially cancelled the sale on May 18, 2007. CP 172.

Several months later, in October 2007, SCE sold EC-3 and EC-4 to Fidelity REIT Investor LLC (“Fidelity”) for \$33,625,000—an amount \$3,125,000 less than what New City had offered in February. CP 383-444. SCE alleged that the sale to Fidelity was possible because Weyerhaeuser ultimately provided SCE an executed estoppel certificate sometime after the sale to New City was cancelled. CP 173.

When SCE sold EC-4 to Fidelity, it assigned to Fidelity all of its interest in the Lease with Weyerhaeuser. SCE “agree[d] to sell, transfer and convey to [Fidelity] . . . [SCE’s] interest in” the Lease, CP 383, and did in fact “grant, sell, assign, transfer, convey and deliver” to Fidelity “all

of [SCE's] right, title, and interest in" the Lease, CP 431. SCE agrees that it assigned all right, title, and interest in the Lease to Fidelity. Summary Judgment RP at 36.

D. SCE Sues Weyerhaeuser for Breach of the Lease

On April 25, 2008, approximately six months after SCE sold EC-3, EC-4, and its interest in the Lease to Fidelity, SCE sued Weyerhaeuser for breaching the Lease. CP 3-63. It alleged no other causes of action. *Id.*; *see also* CP 166-74. SCE alleged that its sale to New City failed because Weyerhaeuser did not provide a properly executed estoppel certificate in the time required by Section 23 of the Lease, and that, as a consequence, SCE was forced to sell EC-3 and EC-4 at a lower price to Fidelity several months later. CP 3-10. SCE sought "\$3,125,000 in consequential damages." CP 10. SCE calculated its requested damages by subtracting the sale price to Fidelity (\$33,625,000) from the previous offer made by New City (\$36,750,000). *See id.* SCE also requested pre-judgment interest from the date of the failed sale to New City plus legal costs and expenses pursuant to Section 29.1 of the Lease. *Id.* SCE requested no other damages. *Id.*

On July 9, 2008, SCE moved to amend its complaint in order to recharacterize its requested damages as "compensatory" rather than "consequential." CP 71-85. The following day, Weyerhaeuser moved for

judgment on the pleadings, arguing that the “consequential” damages sought by SCE were barred by Section 12.10 of the Lease. CP 98-132.

Section 12.10 states:

Waiver of Consequential Damages. In no event shall either party be liable to the other party for consequential damages.

CP 118. Weyerhaeuser argued that, regardless of the new label SCE attempted to give its damages request, the requested damages constituted, as a matter of law, consequential damages barred by the Lease. CP 101-04. In opposition, SCE argued that its alleged damages were properly classified as “expectation damages,” and claimed that it had made a “scriveners’ error” by previously describing them as “consequential.”

CP 137-38. The trial court granted SCE’s motion to amend its complaint, CP 152-63, and denied Weyerhaeuser’s motion for judgment on the pleadings, CP 164-65.

Weyerhaeuser moved for summary judgment approximately one year later. CP 182-454 (Gauen Decl. in support of motion); CP 455-77 (motion). Weyerhaeuser again contended that SCE had waived its right to seek consequential damages. CP 468-72. Weyerhaeuser also argued that SCE lacked standing to assert its breach of contract claim, having previously assigned its interest in the Lease to Fidelity. CP 472-73. In opposition, SCE argued only that the trial court had already decided the

consequential damages issue. CP 2287-88. SCE offered no response whatsoever to Weyerhaeuser's "standing" argument, and identified no legal theory entitling SCE to state a claim for breach of the Lease. *See* CP 2275-2301. At oral argument on the motion, SCE conceded that it had assigned its "title right interest in the lease," but additionally made the bare assertion that it "didn't convey [its] claims." Summary Judgment RP at 36. The trial court denied Weyerhaeuser's motion. CP 2355-56.

A bench trial was held from May 3, 2010 through May 24, 2010. CP 6242. At the close of SCE's case in chief, Weyerhaeuser moved for a directed verdict and renewed the legal arguments made in its summary judgment motion. Trial RP at 1796-1802. In response, SCE argued again that it was not claiming consequential damages and that, even if it were, (1) the Lease's waiver of consequential damages conflicts with more general provisions dealing with available remedies; and (2) the waiver provision is included in a section of the Lease dealing with insurance and indemnity, and therefore relates only to insurance. *Id.* at 1802-05. With respect to SCE's standing to state a claim for breach of the Lease (having previously assigned all of its interest in the Lease to Fidelity), SCE argued only that Weyerhaeuser's legal theory "makes no sense" and that Weyerhaeuser offered "no proof" in support of it. *Id.* at 1805. The trial court denied Weyerhaeuser's motion for directed verdict. *Id.* at 1808.

At the conclusion of the bench trial, the court issued findings of fact and conclusions of law in favor of SCE, and held that Weyerhaeuser was liable to SCE in the principal amount of \$3,125,000, plus pre- and post-judgment interest at the statutory rate, plus attorneys' fees and costs. CP 6251. Weyerhaeuser filed a motion to amend the court's findings of fact and conclusions of law. CP 6252-65. Among other things, Weyerhaeuser argued that the court failed to account for undisputed offsets that should reduce the judgment entered against Weyerhaeuser. CP 6255-57. Specifically, the lower sales price paid by Fidelity saved SCE (1) \$500,000 in incentive fees paid to the entity managing SCE's properties; (2) \$32,812.50 in fees paid to SCE's real estate broker; and (3) \$55,625 in Washington state and local excise taxes. CP 6256-57. In addition, (4) during the five months between the cancelled sale to New City and the eventual sale to Fidelity, SCE collected \$731,472.07 in rent from Weyerhaeuser. CP 6257. Those four offsets total \$1,319,909.57. In its short response to Weyerhaeuser's motion to amend the court's findings and conclusions, SCE did not challenge the existence of the offsets or Weyerhaeuser's calculation of them. CP 6454-57. Nevertheless, the trial court denied Weyerhaeuser's motion to amend, CP 6466-67, and entered Judgment for SCE in the full principal amount of \$3,125,000, plus pre-

and post-judgment interest at the statutory rate, plus attorneys' fees and costs, CP 6468-69.

Weyerhaeuser filed this appeal on June 28, 2010. CP 6781-6819.

IV. SUMMARY OF ARGUMENT

The trial court erred in four different ways, and should be reversed. First, the trial court should have dismissed SCE's claim for breach of contract because SCE had previously assigned its entire interest in the Lease, including any legal claims, to Fidelity. Second, the trial court should have dismissed SCE's claim for breach of contract because the only damages alleged—consequential damages—are explicitly barred by the Lease. Third, the trial court erred by failing to subtract undisputed offsets from the damages awarded to SCE. Fourth, and finally, having erred for the reasons stated above, the trial court also incorrectly awarded SCE its attorneys' fees and costs, having wrongly found it to be the substantially prevailing party. Each of those issues presents a question of law that is reviewed *de novo*. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002).

V. ARGUMENT

A. SCE Assigned Its Right to Sue on the Lease, and Therefore Lacks Standing to Bring This Action

In its purchase and sale agreement ("PSA") with Fidelity, SCE contractually assigned "all of [its] right, title, and interest" in the Lease.

CP 431. When a court interprets a contract like the PSA, (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) the court will not read ambiguity into a contract that is otherwise clear and unambiguous. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). A court “determine[s] the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst Commc’ns, Inc. v. Seattle Times, Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). In fact, a court does “not interpret what was intended to be written but what was written,” and generally gives “words in a contract their ordinary, usual, and popular meaning.” *Id.* at 504. A court may interpret and construe an unambiguous contract as a matter of law. *Id.* at 512.

Here, SCE unambiguously, and without reservation, agreed to “sell, transfer and convey” its “interest in the Lease[]” to Fidelity, CP 383, and did in fact “grant, sell, assign, transfer, convey, and deliver” to Fidelity “all of [SCE’s] right, title, and interest in” the Lease, CP 431.¹ SCE does not dispute the assignment. Summary Judgment RP at 36.

¹ Exhibit D to the PSA, “Form of Assignment,” was explicitly “incorporated into [the PSA] by . . . reference and made a part [t]hereof for all purposes.” CP 411. When “parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009).

When, as here, a seller assigns all of its right, title, and interest in a contract to another party, without reservation, the assignment includes all legal claims the seller might have had relating to the assigned contract. *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1066-68 (9th Cir. 1998). In *Knott v. McDonald's Corp.*, a case virtually identical to this one, the owners of two McDonald's franchises, the Knotts, entered into a preliminary agreement to sell their franchises for \$3,500,000. *Id.* at 1066. That sale was cancelled after the prospective buyers met with representatives from McDonald's. *Id.* The Knotts later sold their franchises to different buyers for only \$2,850,000. *Id.* When the Knotts ultimately sold their franchises, they "assigned 'all [their] right, title and interest' in the franchises" to the buyers. *Id.* After that sale was completed, the Knotts sued McDonald's for breach of contract and tortious interference with the Knotts' first attempt to sell the franchises. *Id.*

The trial court granted summary judgment to McDonald's because the Knotts "lacked standing to assert [their] claims as they had assigned all of their rights under the franchise agreements" to the buyers. *Id.* at 1067. On review in the U.S. Court of Appeals for the Ninth Circuit, the Knotts claimed that their assignment "did not include the right to sue for breach of contract because they never intended to assign that right." *Id.* The

Ninth Circuit disagreed and, applying Illinois state contract law that mirrors Washington contract law, held that the Knotts' assignment of "all [their] right, title and interest" in the franchises, "while admittedly broad, [was] not ambiguous." *Id.* (emphasis in original). The Ninth Circuit therefore affirmed the district court's grant of summary judgment because "'all' is an all-encompassing term and [left] little doubt as to what rights the Knotts assigned to the [buyers] and what rights they retained." *Id.* "In short," the court explained, "'all' means all," even though the Knotts contended, after the fact, that they never intended to assign their legal claims along with their other interests in the franchises. *Id.*

The *Knott* decision has been cited in Washington and is entirely consistent with Washington law. For example, in *Dennis v. Heggen*, 35 Wn. App. 432, 434, 667 P.2d 131 (1983), this Court dismissed the Heggens' legal claims because their pleadings alleged the previous assignment of "all interest of Heggen" to another party named in the lawsuit. The Court held that the Heggens' assignment of "all interest" was "unlimited and unambiguous," and, like in *Knott*, included "any cause of action" the Heggens might have had. *Heggen*, 35 Wn. App. at 435.

Here, SCE assigned its entire interest in the Lease to Fidelity, without reservation, just as the parties did in *Knott*, *Heggen*, and other cases involving a similar assignment of legal claims, e.g., *SAPC, Inc. v.*

Lotus Dev. Corp., 921 F.2d 360, 362-65 (1st Cir. 1990) (“By transferring all rights and interests related to all of [the] intellectual property, this language unambiguously assigns not only the . . . copyrights, but any then existing claims for infringement.”); *Nat’l Council of Young Israel, Inc. v. Feit Co., Inc.*, 347 F. Supp. 1293, 1295 n.3 (S.D.N.Y. 1972) (“This comprehensive and unrestricted conveyance of Unity’s property was sufficient to include the existing causes of action . . .”). SCE’s unambiguous assignment included any cause of action SCE might have had against Weyerhaeuser under the terms of the Lease, including the only cause of action alleged here. In the proceedings below, SCE argued that Weyerhaeuser had “no proof” that SCE assigned its legal claims, Trial RP at 1805, but of course the “proof” is in the language of the assignment itself, which is all-encompassing and unambiguous, CP 383, 431. The trial court erred as a matter of law in denying Weyerhaeuser’s various motions to dismiss based on SCE’s lack of standing, and should be reversed.

B. SCE Waived Its Right to Seek Consequential Damages, and Alleges No Other Type of Damages

Section 12.10 of the Lease contains an absolute waiver of consequential damages. It states:

Waiver of Consequential Damages. In no event shall either party be liable to the other party for consequential damages.

CP 199. The Court can interpret this unambiguous provision as a matter of law. *Hearst*, 154 Wn.2d at 512.

In the proceedings below, SCE originally characterized its alleged damages as “consequential,” CP 10, but later claimed that its alleged damages were actually “compensatory,” and that the Lease’s waiver provision did not prohibit them, *e.g.*, CP 136-38. SCE got it right the first time. Definitions of “consequential” damages are not difficult to find in Washington case law, and plainly encompass the type of damages alleged here.

For example, in *Park Ave. Condo. Owners Ass’n v. Buchan Dev., L.L.C.*, this Court adopted the definition of “consequential damages” found in *Black’s Law Dictionary*: “Losses that do not flow directly and immediately from an injurious act . . . but that result indirectly from the act.” 117 Wn. App. 369, 389, 71 P.3d 692 (2003) (quoting *Black’s Law Dictionary* 394 (7th ed. 1999)). Applying that definition, the Court affirmed an award of damages compensating condominium owners for the cost of repairing various construction defects, but denied payment for relocation expenses necessarily incurred by the owners while repairs were being made. *Id.* at 389. The Court held that an award for such indirect relocation costs was barred by Washington’s Condominium Act,

RCW 64.34.100(1), which explicitly prohibits “consequential” damages awards. *Id.*

The Washington Supreme Court, in *Sprague v. Sumitomo Forestry Co., Ltd.*, similarly explained that consequential damages are indirect, and “do not arise within the scope of the immediate buyer-seller transaction ... but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties” 104 Wn.2d 751, 761, 709 P.2d 1200 (1985) (quoting *Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974)). In *Sprague*, a Japanese timber company breached a contract to purchase timber from a logger, Sprague. *Id.* at 753-55. Washington’s Uniform Commercial Code (“UCC”) barred an award for “consequential damages” caused by that breach. *Id.* at 760-61. Sprague sought direct damages relating to the value of his unsold logs, but also claimed that the timber company’s breach prevented him from devoting time to a separate contract with a plywood company. *Id.* He claimed that his lost profits from the plywood company were \$171,200. *Id.* at 760. The Supreme Court denied Sprague’s claim for lost profits because they constituted “consequential” damages barred by the UCC:

Sprague’s loss clearly did not arise within the scope of his contract with [the timber company]; instead, Sprague incurred this loss as a consequence of his delay in

performing his contract with [the plywood company], a third party. The fact that [the timber company's] conduct proximately caused Sprague's loss is irrelevant to this analysis. The focus is upon losses arising within the scope of the immediate contract. Accordingly, Sprague's loss can only be characterized as consequential.

Id. at 761.

Thus, in Washington, when a loss is indirectly caused by breach, and results from the non-breaching party's dealings with a third party, the alleged damages are "consequential," not "compensatory." Washington courts consistently characterize "consequential damages" in this way even when awarding them in cases where they are not barred by contract or statute. *E.g., Lidral v. Sixth & Battery Corp.*, 47 Wn.2d 831, 835-36, 290 P.2d 459 (1955) (court awarded "consequential damages" when construction company's failure to complete commercial building resulted in foreseeable lost rent to building's owner); *Dally v. Isaacson*, 40 Wn.2d 574, 578-79, 245 P.2d 200 (1952) (court awarded "consequential damages" to general contractor when subcontractor's breach resulted in foreseeable damages relating to the general contractor's separate contract with a third party).

Given this understanding of "consequential" damages, SCE's claimed damages can only be characterized as "consequential" under Washington law. SCE's alleged damages plainly arise from its indirect

dealings with third parties, New City and Fidelity, and do not arise directly from SCE's relationship with Weyerhaeuser. Indeed, the harm alleged by SCE is no different from the "lost profits" properly characterized as "consequential damages" by the Supreme Court in *Sprague*. Because SCE's claimed damages are "consequential," SCE cannot recover them under the terms of the Lease. CP 199 (Section 12.10).

None of the legal authority cited by SCE in the proceedings below alters this analysis. See CP 137-38. SCE cited *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 767-73, 115 P.3d 349 (2005), to support SCE's characterization of its alleged damages as "compensatory," but the dispute in *Crest* involved only direct damages relating to the repair of an improperly poured concrete slab; it involved no damages allegedly stemming from a third-party relationship. CP 137. The other cases cited by SCE, *Gaglidari v. Denny's Rest., Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), and *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223 (2002), are no more helpful. *Id.* Both involve alleged breaches of employment contracts, and neither involves damages stemming from any relationship other than the direct employer-employee relationship. See *Gaglidari*, 117 Wn.2d at 440-48 (holding that breach of an employment contract does not give rise to a claim for emotional distress damages);

Ford, 146 Wn.2d at 155-57 (holding that an employee cannot seek lost future earnings when alleging breach of an at-will employment contract).

SCE cites a Washington pattern jury instruction, WPI 303.04, and *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981), to suggest that consequential damages are unusual in Washington, and, unlike the damages alleged here, are “a *special* type of damage that generally relate to emotional distress and items *outside* the contemplation of the parties at the time the contract was executed.” CP 138 (emphasis added). But the opposite is true. Consequential damages can only be awarded when they were “*within* the contemplation of the parties at the time the contract was made.” *Alpine*, 30 Wn. App. at 754 (emphasis added). That rule has existed since *Hadley v. Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854). Moreover, the commentary to WPI 303.04 explains that “lost profits [constitute] consequential damages” not in strange and unforeseeable circumstances, but “only when,” as here, “they would have been generated by transactions that were separate from, but depended upon, the contract that was breached.” 6A Wash. Practice: Wash. Pattern Jury Instructions: Civil § 303.04, cmt. at 247 (5th ed. 2005). Thus, contrary to what SCE suggests, consequential damages are not a rare species of damages implicated in only the most unusual circumstances; they are, in fact, commonly awarded when foreseeable,

e.g., Lidral, 47 Wn.2d at 835-36 (building owner's lost rent foreseeable to breaching construction company), and not explicitly barred by contract, *e.g., Agip Petroleum Co., Inc. v. Gulf Island Fabrication, Inc.*, 56 F. Supp. 2d 776, 777 (S.D. Tex. 1999) (contractual waiver of consequential damages), or by statute, *e.g., RCW 64.34.100(1)* (statutory prohibition of consequential damages award).

SCE also incorrectly claims that, even if its alleged damages are properly characterized as "consequential," the placement of the waiver provision in the Lease suggests that the waiver is limited only to insurance-related matters. Trial RP 1803. The actual wording of the Lease permits no such inference. The consequential damages waiver is contained in a section of the Lease entitled "Insurance; Indemnity," which does not deal exclusively with insurance requirements, and which contains other similarly broad liability waivers, such as the tenant's waiver of any and all personal injury claims that the tenant, a licensee, or an invitee might make against the landlord. CP 197 (Section 12.1). Moreover, a mutual waiver of consequential damages is nothing more than two parties agreeing at the outset to indemnify each other from future consequential damages claims, so the waiver is not misplaced in the portion of the contract where the parties attempt to "allocate risk in advance." *Agip Petroleum*, 56 F. Supp. 2d at 777 (explaining that the enforceable

consequential damages waiver at issue was simply the parties' way of allocating risk in their contract).

Finally, SCE argues that the consequential damages waiver is inconsistent with other broadly-worded provisions elsewhere in the Lease, which, for example, obligate the tenant to pay "any other costs or damages arising out of Tenant's default." CP 138 (citing Lease Section 17.2). No conflict exists. The consequential damages waiver is naturally read in conjunction with the other provisions, and merely provides one specific limitation on the otherwise broad universe of damages that might be available in the case of breach. In any event, the Court must make every effort to "harmonize clauses that seem to conflict," *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007), and, if a conflict exists, give effect to the "specific terms and exact terms" rather "than general language," *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2005) (quoting Restatement (Second) of Contracts § 203(c) (1981)). Here, regardless of the general language elsewhere in the Lease, the parties' specifically-expressed intention to waive consequential damages is clear, and must be enforced.

Despite SCE's attempt to recharacterize its alleged damages, it has claimed only consequential damages in this action, and those damages are specifically and unambiguously barred by the Lease. SCE cannot

maintain a claim for breach of the Lease without alleging recoverable damages, so its claim should have been dismissed by the trial court. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (damages are a necessary element of a breach of contract claim). The trial court erred as a matter of law, and should be reversed.

C. The Court Improperly Failed to Account for Undisputed Offsets in Calculating the Damages Award

Even if the trial court correctly awarded damages to SCE, it erred in calculating them. When a breach relieves a plaintiff of expenses he would otherwise have had to pay, “an amount equal to such expenditures must be deducted from his recovery.” *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957) (reducing damages from failed real estate contract by the amount of the brokerage commission saved). Similarly, “[a]ny benefit to the plaintiff resulting from a breach of contract reduces the damages otherwise payable.” 22 Am. Jur. 2d *Damages* § 385 (2003); *see also Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 851, 792 P.2d 142 (1990) (reducing damages award by the value of improvements made to non-breaching party’s property). Trial courts must apply these rules because a plaintiff “is not entitled to be placed in a better position than he would have been in if the contract had not been broken.” *Rathke v. Roberts*,

33 Wn.2d 858, 865, 207 P.2d 716 (1949) (quotations and citations omitted).

Here, Weyerhaeuser's actions allegedly prevented SCE from selling EC-3 and EC-4 to New City for \$36,750,000, and resulted in a subsequent sale to Fidelity for \$3,125,000 less. Even if SCE was harmed by Weyerhaeuser's actions, the lower sales price, paid at a later date, resulted in fewer expenses to SCE and additional rental income to SCE under the Lease. The trial court should have accounted for those benefits in calculating the damages award.

First, SCE paid certain incentive fees to the entity managing its real estate portfolio. Trial RP at 1576. Because of the lower sales price, SCE paid \$500,000 less in incentive fees than it would have paid had it sold EC-3 and EC-4 for more money to New City. *Id.*

Second, SCE paid a brokerage fee for the sale to Fidelity. Trial RP at 1600. The brokerage fee was 1.05 percent of the sales price, and would have been the same percentage of any sales price paid by New City. *Id.* Based on that percentage of the sales price, the brokerage fee paid for the sale to Fidelity was \$32,812.50 less than it would have been had the properties been sold at a higher price to New City.

Third, SCE was also required to pay excise tax on the sales price. Trial RP at 1601. Because of the lower sales price to Fidelity, SCE paid

\$55,625 less in excise tax than it would have paid after a sale to New City.
Id. and Trial Exs. 247, 1239.

Finally, during the five months between the cancelled sale to New City and the eventual sale to Fidelity, SCE collected \$731,472.07 in rent on both EC-3 and EC-4. Trial RP at 1575, 1596-97, and Trial Exs. 1240, 1249; *see also* CP 6257. Those amounts, like the expenses saved, must also be deducted from SCE's recovery.

In the proceedings below, SCE did not dispute the existence of these offsets or their amounts, CP 6454-57, but the trial court (which made no specific findings of fact one way or the other) still failed to apply them, CP 6468-69. The trial court erred as a matter of law, and, if the Court does not dismiss this action for the reasons stated above, the Court should remand this action for a proper calculation of damages, including a recalculation of pre-judgment interest.

D. Weyerhaeuser Should Be Awarded Its Attorneys' Fees and Costs

Section 29.1 of the Lease authorizes an award of attorneys' fees and costs to the "substantially prevailing party" in "the event of any litigation, arbitration, or other proceeding (including proceedings . . . on appeal)." CP 205. Rule of Appellate Procedure 18.1(a) also grants a party

the right to recover reasonable attorneys' fees and expenses on review if such a recovery is authorized by contract.

For the reasons described above, the Court should find Weyerhaeuser the substantially prevailing party on review, and should award Weyerhaeuser all attorneys' fees and costs incurred in connection with this appeal. For the same reasons, the Court should reverse the trial court's award of attorneys' fees and costs to SCE, and should remand this action for an award of the attorneys' fees and costs incurred by Weyerhaeuser in the proceedings below. CP 6251.

VI. CONCLUSION

The trial court should have dismissed this action at its very earliest stages, and erred by failing to do so. SCE had neither standing to make its claim nor recoverable damages. The action should have been dismissed on both of those grounds, and Weyerhaeuser should have been awarded its attorneys' fees and costs. Even if the action was properly brought to trial, the trial court erred in calculating the damages awarded to SCE. The Court should order this action dismissed, and remand it for an award of attorneys' fees and costs to Weyerhaeuser. Alternatively, it should

remand for a recalculation of the damages awarded to SCE. In any event, the trial court should be reversed.

RESPECTFULLY SUBMITTED this 29th day of November, 2010.

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CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via legal messenger service, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29 day of November, 2010, at Seattle, Washington.

Brenda K. Partridge
Brenda K. Partridge