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No. 71707-3

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

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
AUG 11 PM 1:33

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Pacific Market International, LLC (“PMI” or “Tenant”) was forced to sue because it was being charged by its landlord, TCAM Core Property Operating Fund LP (“TCAM” or “Landlord”) for parking spaces that PMI had never agreed to pay for, and for which it had no use.

PMI and TCAM first described the material terms of their agreement in a letter of intent, which reflected PMI’s need for parking availability—the same arrangement PMI previously had in the same building. TCAM then prepared the initial lease draft based upon the letter of intent. As PMI expected, the garage parking clause in the body of the Lease did *not* obligate it to pay for parking spaces it did not need in a given month. Rather, the operative parking garage term gave PMI the right to the non-exclusive use of the lesser of: 1) the number of spaces set forth in the lease summary; and 2) the number of spaces TCAM was actually able to obtain in any given month from the garage owner. The lease draft also unremarkably provided that “[p]arking fees for each month shall be paid to the Landlord.” Nothing in the body of the Lease even remotely suggested that PMI would be required to take or pay for parking spaces that it did not need (or that TCAM was not able to provide). Instead, the lease term granted PMI the *right* to purchase parking spaces on an “as needed” basis.

TCAM also (confusingly) inserted the phrase “shall lease” into paragraph 13 of the lease summary. This paragraph was designed to state

the “Number of Parking Spaces” that might be available to PMI pursuant to the operative lease term. The phrase was objectively out of place, given the structure, language, and intent of the lease document. It also failed to create a valid “lease” of parking spaces. It therefore arrived a nullity, and appeared – objectively and subjectively – to be a drafting error or oversight. During the course of discovery, PMI learned that TCAM had *intended* to insert language in the parties’ 2010 Office Lease (“Lease”) that would obligate it to pay for a certain number of parking spaces each month, regardless of PMI’s need, and regardless even of TCAM’s ability to provide the parking spaces. This intention was *never* expressed to PMI during the parties’ lengthy lease negotiations.

When PMI’s counsel, Margaret Schaaf, received TCAM’s initial lease draft, she noticed the possible conflict. The sole communication between the parties over the meaning of garage parking provisions in the Lease occurred on March 18, 2010, when Ms. Schaaf wrote a letter to TCAM’s counsel (“3/18/10 Schaaf Letter”) that identified the inconsistency (among other items to be addressed in lease negotiations), and stated that the language in the Lease summary should be revised to match the language in the body of the Lease (which reflected the parties’ mutual intent as to parking, as far as PMI knew). TCAM’s attorney claims that he did not understand the comment, while acknowledging that he never made any effort to follow up or respond. Having no reason to

understand that TCAM in fact intended for the “shall lease” language to create a mandatory payment obligation, PMI also let the matter drop.

In hindsight, both parties should have done more to ascertain what the other intended. But that is not what happened: instead, the parking language in the body and summary of the lease remained substantially unchanged, and became part of the parties’ contract. The question for this Court, then, is whether the trial court correctly interpreted the contract when it granted summary judgment to PMI. The trial court was correct, and should be upheld, for the following reasons:

First, PMI wins if there is a conflict between the Lease body and summary because the Lease also provides that such conflicts *shall be resolved in favor of language in the body*. There is, at the least, a conflict between the two provisions.

Second, PMI’s interpretation is bolstered by valid extrinsic evidence that supports an “as needed” parking arrangement. The existing sublease was on an “as needed” basis; parking fees always had been, and continue to be, paid to the garage operator only for spaces actually used; and parking in the garage (and the larger neighborhood) is not abundant, indicating that the parties were not likely to have been concerned with excess parking. TCAM was PMI’s landlord for several years under the prior sublease, and must have known these details, as well as the fact that PMI only needed approximately 15 spaces per month.

TCAM's interpretation, on the other hand, depends on irrelevant evidence of its subjective intention to negotiate a departure from the existing "as needed" arrangement.

Third, TCAM's reliance on the phrase "shall lease" falls apart in light of its concession that the language does not, in fact, create a valid lease for parking spaces.

Fourth, a number of black-letter contract principles support the conclusion that the Lease created an "as needed" arrangement for parking. Chief among these is the principle that, where the parties hold contrary intentions, the intention of the party who did not know there was a difference of opinion should control. Here, the 3/18/10 Schaaf Letter letter manifested PMI's intention that parking be on an "as needed" basis, and TCAM remained silent despite this knowledge.

II. STATEMENT OF ISSUES

1. Whether this Court should affirm the trial court's January 31, 2014 summary judgment order, March 14, 2014 judgment, and May 20, 2014 amended judgment (together, the "Judgment")?
2. Whether the Court should enter judgment in favor of PMI due to TCAM's failure to mitigate its damages, or remand for trial, in the event that the Judgment is not upheld?

III. STATEMENT OF THE CASE

The facts set forth in TCAM's Statement of the Case are notable for the emphasis they place on their own unilateral and subjective

perspective of the lease drafting process. *See, e.g.*, App. Brief, pg. 10 (“[i]t is undisputed that *TCAM intended* PMI to pay for ... parking spaces ...”) (emphasis added); pg. 11 (quoting “first draft of [Letter of Intent], which was *never transmitted to PMI ...*”) (emphasis added); pg. 12 (“TCAM drafted and *intended this term to mean* that PMI was required to pay for ... parking ...”) (emphasis added); pg. 13 (observing that TCAM Form Lease was heavily revised internally by TCAM’s counsel); pg. 14 (explaining that TCAM counsel revised language in form lease “before sending the first draft to PMI.”); pg. 15 (describing TCAM counsel’s internal edits to SLP 18(a)); pg. 17 (acknowledging that “[t]he first draft of the lease provided to PMI incorporated the revised language *but did not show the redline changes.*”) (emphasis added); pg. 18 (“TCAM’s counsel was confident that the two parking provisions were correctly drafted to reflect *TCAM’s intent ...*”) (emphasis added).

These facts, while not untrue, are largely irrelevant, because they do not shed any light on the parties’ *mutual* intent. Rather, they highlight an essential problem with TCAM’s case: although PMI now knows that TCAM *intended* to propose a “must take” or “must pay” parking arrangement, it kept that desire to itself. As a consequence, TCAM’s case relies almost entirely on facts that were unknown to PMI, and which are therefore unhelpful to ascertain mutual intent.

A. History of the Building and the Garage.

In 2005, PMI began leasing space in the World Trade Center North building located at 2401 Elliot Avenue in Seattle, Washington (the

“Building”). CP 548 ¶ 3. When PMI first became a tenant in the Building, it was pursuant to a sublease with Real Networks (the “Real Sublease”). CP 580-624. The owner of the Building was WRC Wall Street LLC (“WRC”). CP 581. The Real Sublease expired by its terms on September 30, 2010. CP 580. The Port of Seattle owned – and still owns – the parking structure that is at the center of the parties’ dispute. CP 576-577. This structure, which is known as the Bell Street Parking Garage (“Garage”) has approximately 1,700 parking spaces, and is located adjacent to, and partly underneath, the Building. CP 549.

In 2007, TCAM purchased the Building – but not the Garage. CP 67 ¶ 3. In order to ensure that it would have sufficient parking for its tenants, TCAM apparently also assumed WRC’s interests in a certain Parking Agreement and Covenant (“Parking Agreement”) under which WRC – and now TCAM – agreed to rent at least 133 parking spaces per month from the Port of Seattle. CP 68 ¶ 4. Although the Parking Agreement was executed in 1999 (CP 922-934), the parking costs were not passed down to PMI under the Real Sublease. CP 592-593 ¶ 15, App. Brief, pg. 7. Nor were any of its details shared with PMI during lease negotiations. CP 1081.

B. Parking Scarcity at the Garage.

The Garage is located near the Port of Seattle cruise ship terminal at Bell Street Pier, in an area of the central waterfront that has experienced significant growth in the past decade. CP 549 ¶ 3. Available parking in the neighborhood has not kept up with demand, and the Garage therefore

lacks capacity at times, particularly during the cruise ship season. *Id.* In approximately 2008 or 2009, PMI (along with other tenants) complained to the property manager about the lack of parking. *Id.* The Garage responded by adding employees during busy periods in order to park cars closer together, valet-style. *Id.* This alleviated the problem somewhat. *Id.* Nevertheless, there is currently a waiting list for monthly parking passes at the Garage, suggesting that the demand for parking in the Garage continues to exceed the available supply. *Id.*

PMI has a long record of accomplishment of promoting environmental sustainability, including encouraging its employees to consider alternatives to driving to work. CP 548 ¶ 2. PMI's efforts in this regard have been successful, and its workforce has come to need relatively few parking spaces. *Id.* Since 2009, the number of employees purchasing parking spaces has remained relatively stable, at approximately 15 per month. CP 549 ¶ 4. However, given the limited supply of parking in the area, PMI – like any employer – also desires reliable access to parking for its employees and visitors who do not walk, bike, or ride the bus to work. *Id.*

C. PMI has Always had a Right to Parking.

Both the prior Real Sublease, and now the Lease, harmonize PMI's limited need for parking with the general shortage of parking in the area. Each instrument does so by granting PMI the nonexclusive right to use a certain number of parking spaces in the Garage. CP 8-54 at 40 and CP 580-624 at 592 ¶ 15. The excess spaces (if any) would then be available

to sell to monthly parkers or other third-parties. At Lease commencement, PMI was given the right to 34 spots. CP 12. This therefore left (and continues to leave) approximately 15-20 spaces available for TCAM to sell to third parties each month.

PMI and its employees only receive parking passes for the number of spaces that they actually choose to use in any given month. CP 1080 ¶ 7. This procedure has remained consistent and unchanged for a number of years, and did not change when the Lease went into effect. *Id.*

D. TCAM's Internal Decision to Reflect a "Must-Take" Arrangement not Manifested to PMI in LOI.

The Real Sublease was set to expire on September 30, 2010. CP 580. In the summer of 2009, PMI therefore began to explore its leasing alternatives and future needs for space. CP 629. PMI engaged a commercial broker, OfficeLease (Paul Suzman and Larry Pflughoeft). CP 627-628. TCAM engaged their own broker, Kidder Matthews (Garth Olsen and Jeff Huntington). CP 638-640.

After some initial discussions, the brokers began to discuss the general outline of a new lease. On or about August 31, 2009, TCAM's brokers prepared the initial letter of intent. CP 222-224. Apparently believing that parking would continue to be offered to PMI on an as-needed basis, TCAM's August 31, 2009 draft (*which was not shared with PMI during lease negotiations*) included a paragraph labeled "Parking" which read "[t]he parking *ratio* for the building is 1.2:1000 RSF ..." (emphasis added). *Id.*

TCAM's business representative, Keith Awad, had a different idea, and instructed the brokers to reflect a "must take" arrangement for parking. CP 219-220. The intention, as PMI now knows, was to obligate it to pay for a "proportionate share" of the 133 parking spaces that TCAM receives from the Port of Seattle. CP 642; App. Brief, pgs. 28-30, 32, 38, 45 & 48.

As explained in Section A.2.a *infra*, however, the resulting edit – which consisted of changing the word "ratio" to "requirement" in the resulting letter of intent ("LOI") – failed to change the meaning of the sentence, and Mr. Awad's desire was *never* presented to PMI during the parties' lease negotiations, or – aside from the ill-fated lease summary – incorporated into any writing.

E. TCAM Inserts "Shall Lease" Language into the Lease Summary Only.

Several additional letter of intent drafts were exchanged by the parties between September 1, 2009 and January 19, 2010, but none of the revisions related to parking generally. PMI therefore continued to understand parking would remain on an "as needed" basis. CP 632-633. By approximately March 2010, the parties had resolved all of the key business issues (or so they thought) and turned negotiations over to their lawyers. CP 69 ¶ 10, CP 208.

TCAM's first, internal lease draft was based on a TCAM/TIAA form for a property that did *not* contain a mandatory parking provision (the "TCAM Form Lease"). CP 661-721; App. Brief, pgs. 13 & 14. The

TCAM Form Lease (and thus the resulting Lease) was structured such that it had a number of summary paragraphs called the Basic Lease Provisions (“BLPs”), followed by the operative terms constituting the body of the Lease, which are referred to as “Standard Lease Provisions” (“SLPs”). Located between the BLPs and SLPs is a paragraph, referred to herein as the “Conflict Provision,” providing that:

In the event of any conflict between the provisions of the Basic Lease Provisions and the provisions of the Standard Lease Provisions, *the Standard Lease Provisions shall control.*

Id. at CP 666, (emphasis added); CP 13.

When it revised the TCAM Form Lease, TCAM nevertheless made no material changes to the first sentence of SLP 18(a), which contains the disputed term “Tenant shall have the right.” CP 40; CP 691. TCAM also inserted the phrase “shall lease” into the lease summary, BLP 13. CP 665. This created a conflict in the Lease language: SLP 18(a) continued to reflect PMI’s intention that general parking would be on an as-needed basis, while BLP 13 arguably reflected TCAM’s intention that general parking would be on a “must pay” basis.

F. PMI’s Lawyer Recognizes the Inconsistency and Warns TCAM of PMI’s Understanding.

On March 2, 2010, TCAM shared the first lease draft with PMI. CP 252-311. Approximately two weeks later, PMI’s lawyer, Margaret Schaaf, responded to the TCAM lease draft. The 3/18/10 Schaaf Letter

specifically identified the inconsistency between BLP 13 and SLP 18(a), stating as follows:

Parking. (§ 13) The provisions of Section 13 should be modified to conform to Section 18 which correctly describes the agreement between the parties. ...

CP 723-735 at 732.

TCAM's lawyers ignored (or, as they claim, did not understand) the comment, and never attempted to reconcile the provisions. Following the 3/18/10 Schaaf Letter, the issue of general parking never came up again in the subsequent meetings, calls, and e-mails between the parties. CP 770; CP 574-575; CP 645-646; CP 776-778; CP 80-81; CP 765-766; CP 783. The language relative to general parking remained materially unchanged, and became part of the final Lease agreement. CP 8-54.

IV. STANDARD OF REVIEW

Orders granting or denying summary judgment are reviewed *de novo*, and the appellate court performs the same function as the trial court. *See, e.g., Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386 n.4, 78 P.3d 161 (2003); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003).

This Court reviews attorney fee awards for abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, P.2d 632 (1998). An abuse of discretion exists only when the court exercises its discretion on manifestly unreasonable grounds. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

V. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment to PMI under Well-Settled Principles of Contract Interpretation.**

The guiding principle of contract interpretation is to determine the *outwardly manifested intent of the parties*. See, e.g., *Hearst Commc'ns v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). The parties' manifested intent is often found in the writing itself; however, under Washington's "context rule," extrinsic evidence is also admissible to prove the mutual intent of the parties, even when the written words appear to be clear and unambiguous. See *Berg v. Hudesman*, 115 Wn.2d 657, 668-69, 801 P.2d 222 (1990).

This Court should affirm the trial court because there are no facts in the record suggesting that the parties mutually intended to create a "must pay" parking arrangement. The only places the Court could even theoretically find such an intention are in the Lease itself, or the letter of intent and lease drafts that preceded it. But, as explained below, those instruments wholly failed to express what TCAM was proposing (in the case of the LOI), or set up a conflict that was resolved in favor of an "as needed" understanding (in the case of the Lease). The trial court should be affirmed.

1. **The Operative Parking Provision in the Lease, SLP 18(a), Creates an "As Needed" Arrangement for Parking that Trumps the "Shall Lease" Language in BLP 13.**

The Lease itself provides the most compelling evidence of the parties' failure to agree on a "must pay" parking arrangement. The

language, structure, and format of the Lease all support a conclusion that general parking was intended to be on an “as needed” basis. If there is any conflict or ambiguity about the parties’ choice, the Conflict Provision resolves the dispute in favor of an “as needed” arrangement.

a. SLP 18(a) Provides for General Parking on an As-Needed Basis.

The starting point is the operative lease term for parking.

Paragraph 18(a) of the SLPs is labeled “Parking; Common Areas,” and provides as follows:

Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13 of the Basic Lease Provisions for the parking of operational motor vehicles used by Tenant, its officers and employees only. In addition, there will be two (2) visitor parking spaces available to visitors of tenants of the Building on a non-exclusive basis. Parking fees for each month shall be paid to Landlord simultaneously with Rent. Parking fees shall equal the parking fees charged by the Garage owner. In addition, Tenant shall have the right to one (1) executive parking stall located in the loading area of the Building at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner; such cost is \$330 per stall as of the date of this Lease. The visitor spaces and the executive parking shall be striped, numbered and marked with signs that state that such places shall not be blocked. Tenant acknowledges that because Landlord does not own the parking garage, Landlord cannot guarantee the condition or availability of the same; provided that Landlord agrees to use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces hereunder.

SLP 18(a).

It is TCAM's position that PMI agreed to pay a defined amount each month under SLP 18 and BLP 13, ostensibly in exchange for parking spaces. App. Brief, pgs. 37-38. TCAM holds that PMI is obligated to make this payment regardless of whether TCAM even had parking spaces to give, regardless of whether PMI actually needed or received any parking spaces, and regardless of whether TCAM might have sold its spaces to someone else. App. Brief, pgs. 33-36. That is, TCAM's argument is not really that PMI agreed to lease, take, or use a certain amount of parking each month, and that it must therefore pay for what it promised to take. Rather, TCAM's position must be that PMI promised to pay a certain amount of money each month under SLP 18 and BLP 13 – period. And that, in exchange for this payment, TCAM would *try* to make some parking spaces available to PMI.

The parties never agreed to such an arrangement, and SLP 18(a) does not come close to manifesting any such intent. Rather, SLP 18(a) unambiguously reflects an “as needed” parking arrangement whereby TCAM is required to try to provide a certain number of parking spaces to PMI each month, and PMI is required to pay for what it actually needs and uses in any given month. The Lease achieves this intent by providing that “*PMI shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13... Parking fees for each month shall be paid to Landlord simultaneously with Rent.*” SLP 18(a) (emphasis added). TCAM's

decision to use the phrase “PMI shall have the right” in this sentence (as opposed to, for example, “PMI shall be obligated to pay for” or “PMI shall be required to lease” or some other locution) is dispositive. By its use of this language, TCAM plainly granted PMI the right to use a certain number of parking spaces, and – in exchange – PMI promised to pay the corresponding “fees for each month.” The language cannot be fairly read to obligate PMI to pay for spaces as to which it has not exercised its right, or for which it did not – or could not – actually use.

TCAM nevertheless attempts to obfuscate the plain meaning of the term “right” in two ways. Both are unsound.

TCAM first makes a linguistic argument based on the dictionary definition of “right.” App. Brief, pg. 31. The essence of the argument is that rights and duties are correlative. *Id.* at 31-32. In support, TCAM points to the fourth definition of “right” in Black’s, as well as the commentary. *Id.* However, it is unclear that the fourth definition of “right” even applies – choices that are more appropriate might be definition 5 (“The interest claim, or ownership that one has in tangible or intangible property ...”), or definition 2 (“Something that is due to a person by just claim, legal guaranty, or moral principle ...”). Each of these definitions is more consistent with the common understanding that a “right” is generally unencumbered. Having the “right” to vote obviously does not create a legal duty to do so.

Even assuming that the right granted to PMI here includes a correlative duty, TCAM is incorrect about the scope of that duty. It would not – as TCAM would have it – be an obligation to pay for all of the parking spaces referenced in BLP 13, regardless of use, need, or availability. Rather, a more consonant reading would be that PMI’s “right” to parking corresponds to its duty to pay for the spaces it actually uses.

TCAM’s argument also fails under its own hypothetical. It asserts that “Item 13 and Paragraph 18(a) create mutual obligations upon the parties: TCAM will make the parking spaces available and PMI will pay for them, regardless of whether it uses them.” App. Brief, pgs. 32-33. It illuminates the point when it argues that “a right in one person places a duty on another.” App. Brief, pg. 32, n. 8. The problem is that TCAM’s “duty” is completely chimerical: the Lease provides that “because Landlord does not own the parking garage, Landlord *cannot guarantee the condition or availability of the same ...*” That is, for TCAM’s interpretation to prevail, the Court would have to accept that the parties intended that PMI would pay at least \$89,760 a year¹ in exchange for TCAM’s “reasonable efforts” to provide parking. This interpretation is manifestly unreasonable, and cannot be squared with the language of the Lease.

¹ Thirty-four spaces at a rate of \$220 per month.

TCAM also makes a structural argument based on the use of the word “right.” App. Brief, pgs. 35-38. This argument disingenuously argues that “PMI” used the phrase “right but not the obligation” in two other places in the Lease, and so, “[i]f PMI intended to have a right but not an obligation to pay for the parking spaces, it should have used this language in Item 13 or Paragraph 18(a), as it did in Paragraphs 4 and 5.” *Id.* at pg. 37. For starters, *TCAM* drafted the Lease, not PMI. App. Brief, pg. 13. As such, PMI did not choose any language in the first instance, it merely reacted to language presented by TCAM. Nor did PMI have any reason to know that “TCAM is required to lease 133 parking spaces in the Garage and will be forced to absorb that cost if it cannot pass it on to its tenants.” *Id.* at pg. 36.² Therefore, PMI would not have been able to assess, at the lease drafting stage, how this unknown fact was influencing TCAM’s drafting choices. PMI was at the mercy of TCAM to provide it with relevant information, which, in this case, TCAM chose to withhold. CP 1081 ¶ 10.

The analogy also fails when other uses of the word “right” in the Lease are examined. The word “right” appears over 100 times. And the exact phrase “shall have the right” (the locution used in the first sentence of SLP 18(a)) appears approximately 25 times. The expectation, based on TCAM’s argument, would be that whenever the phrase “shall have the

² It is ironic that TCAM would seek the Court’s sympathy in light of the fact that there is nothing to prevent it from selling any excess spaces to the Garage or directly to third parties. On the other hand, PMI is faced with Lease language that says that its use of the parking spaces is limited to “Tenant, its officers and employees only.”

right” (or something similar) is used *without* “but not the obligation” there must be an accompanying obligation. But that is not, in fact, the case. For example, SLP 9(c) provides that “Tenant shall have the right to terminate this Lease ...” if the premises is damaged and cannot be repaired within 90 days. CP 31. SLP 18(c) states that “Landlord shall have the right to contract or otherwise arrange for amenities, services or utilities.” CP 41 SLP 23 provides that “Tenant is hereby granted the right to extend the Lease Term ...” CP 39. SLP 19(l) states that “Landlord shall have the right at any time to install, affix and maintain any and all signs on the exterior and on the interior of the Building.” CP 34. Plainly, these terms do not *obligate* TCAM to install signs, or contract for undefined amenities. Nor is PMI obligated to terminate the Lease if there is a fire, or to renew the Lease if it does not want to. All of these examples (and many others in the Lease) use “shall have the right” or a similar phrase to provide *choices*. Just like SLP 18(a) gives PMI the ability to use up to a certain number of parking spaces each month.

SLP 18(a) also emphasizes that a purpose – if not *the* purpose – of BLP 13 is to define “the number of parking spaces” PMI shall have a right to. It is notable that BLP 13 is not referenced elsewhere in SLP 18(a). Even though SLP 18(a) addresses parking fees, there is no comparable reference to BLP 13 in that sentence. This is consistent with the very way BLP 13 itself is labeled, which reads “**13. Number of Parking Spaces:**”

TCAM's construction of SLP 18(a) also dashes up against the sentence "Parking fees for each month shall be paid to Landlord simultaneously with Rent." CP 40. Black's defines a "fee" as "1. A charge for labor or services, esp. professional services." *Black's Law Dictionary* 1999 7th ed. pg. 629. That is, a fee is paid *in exchange for something*. Here, that "something" is parking. Thus, an obligation to pay "parking fees" is inconsistent with TCAM's position that PMI is required to pay, even if TCAM is not able to obtain any parking from the garage operator. It is also inconsistent with BLP 13's purported creation of a lease. A tenant's payment under a lease is known as "rent," not a "fee."

As already discussed, the "must pay" arrangement urged by TCAM is also unsound because TCAM has no corresponding obligation to actually provide parking. *See* SLP 18(a) ("because TCAM does not own the parking garage, TCAM cannot guarantee the condition or availability of [the parking spaces]."). TCAM makes PMI's point when it observes that PMI "did not bring any claims against TCAM" in 2008 or 2009 when it complained about the lack of parking. App. Brief, pg. 34. According to TCAM, this means that PMI "knew of and did not dispute the reasonable and necessary limitation on TCAM's duty regarding parking spaces." *Id.* The argument misses the point. For one thing, under the Real Sublease then in effect, *PMI was not being charged for parking spaces it did not need or use*. CP 592-593 ¶ 15, App. Brief, pg. 7. For another thing, PMI's complaints led to the Garage implementing space utilization

measures. CP 548-549 ¶ 3. This curative measure would have obviously eliminated the need to bring a claim.

Furthermore, TCAM's decision to retain lease language that disclaims its commitment to actually provide parking spaces is also manifestly inconsistent with the asserted creation of an unbending obligation to pay. At the least, one would expect SLP 18 to include language waiving or forgiving payment for unavailable parking spaces if the parties otherwise intended to create a "must pay" arrangement. *See Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 7, 776 P.2d 721 (1989) ("[a] contract is often as important for what it does not say as for what it requires"). If TCAM's interpretation is accepted, PMI would be obligated to pay for at least 34 parking spaces each month, even if none of them are actually available. This is an absurd position, and shows the strained reading that would have to be applied to SLP 18(a) in order to conclude that it creates a "must pay" arrangement.

Lastly, TCAM's position is inconsistent with the Lease's provision for "Executive Parking," which contains a parallel description of the parties' intent: TCAM is to provide one executive stall, and the cost of the stall is 1.5 times the cost of parking charged by the Port of Seattle. However, TCAM has conceded that PMI is *not* obligated to pay for the executive parking stall if it elects not to use it in a particular month. CP 566. TCAM claims that this distinction "makes practical sense" because its lease of the 133 general parking spaces under the Parking

Agreement creates an obligation that it wants to pass down – unlike the loading dock, where the executive parking space is located. App. Brief, pg. 36. But the distinction does *not* make sense unless the Parking Agreement is incorporated into the Lease, which it was not.

b. BLP 13 does not Unambiguously Create a “Must pay” Arrangement for General Parking.

TCAM’s case rests on a fallacy: that “[t]he word ‘shall’ in Item 13 is unambiguous[,]” and thus dispositive of the parties’ intentions.³ While the meaning of the word “shall” is obvious enough, it makes no sense in a vacuum. It can only be understood by reference to the words, sentences, and paragraphs surrounding it.

What TCAM actually wrote was that PMI “shall *lease* thirty four (34) parking spaces in the Garage ...” CP 12 (emphasis added). This is problematic for TCAM because, as explained *infra*, the language is insufficient to create a valid lease for parking spaces (a point which TCAM now concedes). See App. Brief, pg. 26 (arguing that TCAM used the word lease “*for lack of a better term ...*”) (emphasis added). The Court’s inquiry therefore need to go no farther than the phrase “shall lease” – no such “lease” was created, TCAM concedes this, and PMI therefore does not have an obligation to pay for unneeded parking spaces based on this defective language.

³ See App. Brief, pg. 29

TCAM's position is further weakened when a few additional words are considered: the entire first sentence of BLP 13 says "PMI shall lease thirty four (34) parking spaces in the Garage, *pursuant to* the provisions of Paragraph 18(a) below." (emphasis added). Black's defines the term "pursuant to" as:

1. In compliance with; in accordance with; under <she filed the motion pursuant to the court's order>. 2. As authorized by; under <pursuant to Rule 56, the plaintiff moves for summary judgment>. 3. In carrying out <pursuant to his responsibilities, he ensured that all lights had been turned out>.

Black's Law Dictionary (7th Ed., 1999), pg. 1250.

TCAM relies on the same definition (App. Brief, pg. 29), but draws an untenable conclusion when it claims that BLP 13 "incorporates the parts of Paragraph 18(a) relevant to PMI's obligation." *Id.* Rather, a plain reading of the term "pursuant to" makes it clear that BLP 13 is subservient to – *under* – SLP 18(a). BLP 13 serves SLP 18(a): not the other way around, as TCAM would have it. That being the case, it is SLP 18(a) that determines what, exactly, PMI "shall" be required to do relative to the purported "lease" of general parking.

The "shall lease" language in BLP 13 is not the dispositive phrase TCAM holds it out to be. In fact, when considered in connection with the surrounding words and phrases, it is apparent that it is not sufficient to create a "must pay" arrangement. At most, the term is ambiguous. *See Syrovoy v. Alpine Res., Inc.*, 68 Wn. App. 35, 40, 841 P.2d 1279 (1992)

(holding that an ambiguity in a contract is present if a term is reasonably capable of being understood in either of two or more senses).

c. If BLP 13 Conflicts with SLP 18, SLP 18 Controls Due to the Conflict Provision.

In order to deal with the possibility that a conflict might arise between the BLPs and SLPs, the Lease incorporates the Conflict Provision, which states that any conflict between them *shall* be resolved in favor of the SLPs. CP 13. The Conflict Provision is consistent with the Lease's use of the term "pursuant to" in BLP 13, which also provides, specifically, that BLP 13 is subservient to SLP 18(a).

As just explained, BLP 13 and SLP 18(a) need not be read to create a conflict: they can, and should, be read together to grant PMI a right to use a certain number of parking spaces in the Garage. However, they can *not* fairly be read together to create a "must pay" parking arrangement. As a consequence, even if BLP 13 is read in a manner favorable to TCAM, it is put in *direct* conflict with SLP 18(a), and PMI wins.

The drafter's choice to elevate the SLP's makes sense in light of the essential purpose of the BLP's, which is to express, in summary fashion, the key facts relevant to the Lease, such as the name of the tenant (BLP 1), the address of the Building (BLP 2), the base rent amount (BLP 5), the initial term of the Lease (BLP 9), the commencement and expiration dates (BLPs 10, 11), the identity of the brokers (BLP 12), addresses for notice and payment of rent (BLPs 14, 15), and so on.

This structure is completely consistent with the relationship between SLP 18(a) and BLP 13. BLP 13 was designed and intended to describe a fact – the “Number of Parking Spaces,” while SLP 18(a) was designed and intended to describe the terms of the parties’ agreement relative to the parking spaces. TCAM’s choice to insert a substantive term in a portion of the Lease where a bare fact belongs was defective as a matter of lease drafting. It did not express what TCAM apparently intended, and it created needless confusion and ambiguity, ambiguity that must be resolved in favor of PMI.

TCAM argues, in circular fashion, that there is no “actual conflict” because the language of BLP 13 and SLP 18(a) “can, and should, be read together” to find a “must pay” arrangement. App. Brief, pg. 38. It is true that the provisions should not be read in a vacuum – they only make sense when “read together.” But that does *not* mean that they stand on equal footing. SLP 18(a) is the operative and *dominant* lease term, as just explained. Therefore, the provisions can, and should, be “read together” to find an “as needed” arrangement.

Nevertheless, it is certainly possible to find a conflict. TCAM relies on *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044 (2009) for the proposition that “[a] conflict arises when two provisions are contradictory and cannot coexist.” App. Brief, pg. 38. The conflict addressed in *Kirwin* was between an ordinance and a statute, and its bearing on contract interpretation principles is therefore questionable. In

any event, the essential dispute between the parties – whether parking is on an “as needed” or “must pay” basis is hardly reconcilable. If the parties’ conflicting intentions are both manifested in the Lease, then there is a conflict.

Furthermore, the Conflict Provision is just as essential to ascertaining the parties’ intent as any other provision of the Lease. Indeed, its importance is highlighted by its prominent placement between the BLP’s and SLP’s.⁴ If there is a conflict, the Conflict Provision must be invoked, because that is the construction that “gives a reasonable, lawful and effective meaning to all the terms...” *See* Restatement (Second) of Contracts, § 203(a); *PUD No. 1 of Lewis Co. v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985) (“[a]n interpretation which gives a reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, imprudent, or meaningless”).

d. PMI is not Obligated to Pay for a “Proportionate Share” of Parking.

TCAM acknowledges that its purpose in seeking to create a “must pay” arrangement for parking was to pass the cost of the Parking Agreement down to its tenants on a proportionate basis. *See* App. Brief, pgs. 28-30, 32, 38, 45 & 48. The concession is important because the alleged obligation to pay a “proportionate share” of the costs arising under

⁴ It could just as easily have been included in SLP 19, the “miscellaneous” provision.

the Parking Agreement is not in the appropriate section of the Lease. This omission provides strong additional evidence that the parties never manifested an intention to create a “must pay” arrangement for general parking. *See, e.g., Wilkinson v. Chiwawa Communities Assoc.*, 180 Wn.2d 241, 251, 327 P.3d 614 (2014) (“[t]he lack of an express term with the inclusion of other similar terms is evidence of the drafters’ intent”).

Under Standard Lease Provision 3, PMI pays “Additional Rent” to TCAM in “an amount equal to Tenant’s Proportionate Share” of certain specifically defined Operating Expenses. CP 16-17. SLP 3 goes on to define the Operating Expenses as including certain specific fees, assessments, costs, taxes, utilities, and the like. *Id.* Despite the fact that TCAM *repeatedly* asserts that PMI is obligated to pay for a “proportionate share” of the 133 parking spaces it gets from the Port of Seattle (*see* App. Brief, pgs. 28-30, 32, 38, 45 & 48) it does not – and cannot – claim that the cost associated with the Parking Agreement qualifies as an Operating Expense under SLP 3. As a matter of lease structure, if TCAM’s intention was to pass its own obligation under the Parking Agreement along to its tenants, then it could, and should, have presented a lease draft that defined the cost of the parking spaces as an Operating Expense.

2. TCAM’s Subjective Desires are Irrelevant; what Matters for Purposes of Ascertaining Intent are the Documents, Drafts, and Other Information that Were Known to Both Parties.

TCAM’s appeal brief focuses on facts and circumstances that were unknown to PMI prior to execution of the Lease. But none of these “facts” are relevant to show the parties’ *mutual* intent. *See Lietz v. Hansen*

Law Offices, P.S.C., 166 Wn. App. 571, 585, 271 P.3d 899 (2012) (“[a] court may consider extrinsic evidence as an aid in interpreting a contract, but it cannot import one party’s unexpressed, subjective intentions into the writing”); *see also Multicare Med. Ctr. v. State, Dep’t. of Soc. & Health Servs.*, 114 Wn. 2d 572, 587, 790 P.2d 124 (1990) *superseded on other grounds* (unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be determined by their objective acts or outward manifestations).

Indisputably, TCAM wanted PMI to pay for a minimum of 34 parking spaces, whether it used them or not. But that intention was never expressed to PMI. TCAM argues that its intention was manifested by the LOI and lease draft (App. Brief, pgs. 13 & 18), but as explained *infra* that is not correct. Those documents were either far too opaque (in the case of the LOI) or merely set up a conflict (in the case of the Lease), and so PMI never understood what TCAM intended.⁵ PMI, on the other hand, explicitly manifested its intention that parking remain on an as-needed basis. *See* CP 723-735 at 732 (noting that SLP 18 “correctly describes the agreement between the parties”).

a. The Letter of Intent Required TCAM to Make a Certain Number of Parking Spaces Available to PMI.

TCAM first relies on its subjective intentions in connection with the LOI that it circulated to PMI on September 1, 2009. CP 229-231.

⁵ PMI would have rejected any requirement to be bound to a “must pay” parking arrangement, had it been proposed. CP 548 ¶ 2.

Before circulating the LOI to PMI, the relevant parking language read as follows:

The parking ratio for the building is 1.2:1000 RSF leased at market rates, current \$220 per stall per month. The parking structure is controlled by the Port of Seattle, but the allocation will remain for the duration of the lease.

CP 222-224

It is undisputed that this language would have reflected an “as needed” parking arrangement, consistent with the then-existing Real Sublease. CP 592 ¶ 15. It is also undisputed that Mr. Awad instructed TCAM’s brokers to revise this language to reflect a “must take” arrangement for general parking. CP 69 ¶ 9; CP 219. However, the broker’s one-word edit – changing “ratio” to “requirement” – fell far short of objectively expressing TCAM’s intent.

First, the revised language fails as a matter of basic grammar. In both the initial, internal, LOI draft and the September 1, 2009 version that was shared with PMI, the subject of the first sentence is the “building.” Changing the word “ratio” to “requirement” did not convert the subject of the sentence from building to tenant. The word “tenant” does not even appear in the relevant paragraph. It is therefore not possible to fairly read the sentence as imposing an obligation or requirement on PMI. Indeed, when the LOI was delivered to PMI’s broker, Paul Suzman, he quite reasonably read the sentence to mean that the *building* would continue to be “required” to make a certain number of spaces available to PMI each month. CP 990.

The LOI also refers to “an allocation” of parking for the duration of the Lease. The transitive verb “allocation” is descriptive of the parties’ intent and directly supports PMI’s interpretation: it means “*to set apart or earmark.*” That is, a plain reading of the LOI is that the landlord was agreeing to set parking spaces aside for PMI. An allocation is not an obligation, which is “to bind legally.” PMI’s brokers therefore had no reason to question TCAM’s use of the term “parking requirement for the building.”

Third, general parking under the existing Real Sublease was on an “as needed” basis. Even TCAM’s broker, Jeff Huntington, apparently understood that that procedure would continue, until Mr. Awad instructed him otherwise on August 31, 2009. CP 219. Mr. Huntington’s default assumption was completely reasonable. And in his over 30 years as a commercial broker, PMI’s representative, Paul Suzman, had only encountered one previous deal where parking was “must pay”—and in that case, it was carefully and specifically negotiated. CP 991-992. PMI therefore had no reason to parse the LOI for language that might suggest some other intention.

TCAM ignores these factors, and instead emphasizes that “it was critical to TCAM, the new owner of the Building, that PMI pay for all its parking spaces.” App. Brief, pg. 45. However, it then acknowledges, as it must, that the only expression of this desire was the internal change of the word “ratio” to “requirement.” *Id.* (acknowledging that “Mr. Awad

instructed his brokers to change a sentence ... It was only after this important change was made that Mr. Awad approved sending the [LOI] to PMI's broker").

TCAM is not correct when it argues that "[t]his evidence reflects the objective manifestation of TCAM's intent to require PMI to pay for its proportionate share of parking spaces." App. Brief, pg. 45. These internal deliberations are not admissible to vary the plain meaning of "parking requirement for the building." See *Hulbert v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011) ("extrinsic evidence of a party's subjective, unilateral intent as to the contract's meaning is not admissible").

b. TCAM's Initial Lease Draft Set up a Conflict Between SLP 18(a) and BLP 13.

The initial lease draft that TCAM prepared was similarly contaminated by its subjective understanding. TCAM's initial lease draft (which, like the initial LOI draft, was not shared with PMI), was based on the TCAM Form Lease. CP 661-721; CP 757-759. And, just like the letter of intent draft that TCAM had worked from, the TCAM Form Lease did *not* reflect a "must pay" parking arrangement. App. Brief, pg. 14, CP 665, 691-692. Nevertheless, despite TCAM's awareness of the Conflict Provision, it made *only cosmetic changes to the first sentence of SLP 18(a)*. CP 691; CP 563-565.

PMI was not privy to any of the edits, changes, and revisions that TCAM so painstakingly details in its brief. App. Brief, pgs. 13-17. It

makes no difference what TCAM *thought* it was doing, the only thing that matters is what was expressed to PMI. See *Chevalier v. Woempner*, 172 Wn. App. 467, 476, 290 P.3d 1031 (2012) (“[w]e do not interpret what was intended to be written, but what was written”) (quoting *Hearst v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005)).

c. TCAM’s Reliance on the Parking Agreement with the Port of Seattle is Misplaced.

TCAM again relies on improper extrinsic evidence when it emphasizes its obligation under the Parking Agreement to pay for 133 parking spaces. App. Brief, pg. 48. Despite its manifest importance to TCAM, the Parking Agreement was never shared with PMI. CP 982, 985-986.⁶ Because PMI was not aware of its contents, it cannot be relevant to the parties’ objective intent. And even if it had been shared, it is unclear why this would matter. Just because a landlord incurs a cost or expense does not automatically mean that it will be passed down to its tenants: the tenants’ obligation to pay (or not) depends on the negotiated lease terms. Indeed, the Parking Agreement has apparently been in effect since 1999, yet the parking costs were not passed down to PMI under the Real Sublease. CP 592-593 ¶ 15, App. Brief, pg. 7. Furthermore, Mr. Awad

⁶ TCAM argues that it “informed PMI that the parking agreement ... was recorded in the public records.” App. Brief, pg. 6. The e-mail cited by TCAM (CP 346) refers to a number of lease provisions, *not* including BLP 13 or SLP 18. The third such comment states “Section 19(i). We did not find any recorded CC&Rs against the property. There are a number of other recorded documents relating mostly to the parking structure and we encourage you to review them if you have any questions or concerns about them.” *Id.* If this e-mail was intended to put PMI on notice of the Parking Agreement, TCAM took great pains to obfuscate the fact. Furthermore, PMI would not have had “questions” about parking because it understood that it would be on an “as needed” basis: it had no reason to probe every undefined “recorded document.”

testified that TCAM does not recover all of its parking garage expenses from its tenants, even setting aside the dispute with PMI. CP 1006. If TCAM intended to recover a portion of its Garage costs from PMI, it was required to manifest that intention.

d. TCAM's Lawyers' Confidence in the Correctness of their Drafting is Irrelevant.

TCAM also asserts that there was no conflict between BLP 13 and SLP 18(a) because TCAM's counsel was confident that the provisions were correctly drafted and there was no inconsistency. App. Brief, pg. 18. This again, is blatantly subjective, irrelevant testimony. It could just as easily be said that PMI's counsel was confident that the provisions were *not* correctly drafted, and there *was* an inconsistency. CP 723-735 at 732.

3. The Relevant Extrinsic Evidence Supports an "As Needed" Parking Arrangement.

In contrast to the improper evidence of subjective intent relied upon by TCAM, the relevant extrinsic evidence favors PMI. In the search for the parties' manifested intent, there are a number of relevant sources of inquiry. As Division One has explained:

We may discern intent from the actual language of the disputed provisions, the contract as a whole, the subject matter and objective of the contract, the circumstances in which the contract was signed, the later acts and conduct of the parties, and the reasonableness of the parties' interpretations. The court considers the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made in those negotiations, trade usage, and the course of dealing between the parties.

Diamond “B” Constructors, Inc. v. Granite Falls Sch. Dist., 117 Wn. App. 157, 161-162, 70 P.3d 966 (2003) (internal quotations, punctuation, and citations omitted)

a. Intent to Reflect “As Needed” Arrangement Reflected in LOI, Lease, and 3/18/10 Schaaf Letter.

The LOI, Lease, and comment 39 of the 3/18/10 Schaaf Letter all provide relevant, admissible evidence of the parties’ intent to create an “as needed” arrangement for parking. Each of these instruments was shared with the other party, and each supports PMI’s argument.

There is no dispute that PMI noticed the internal conflict in the lease draft when it received it from TCAM. As TCAM puts it, “Mr. Shea’s brokers informed him that ‘Item 13 makes it an obligation.’” App. Brief, pg. 17. Without accepting the brokers’ lay conclusion, this exchange is nevertheless important because it establishes that there was no mutual intent to create a “must pay” parking arrangement at this point. Critically, though, PMI’s subjective understanding was converted to objective, admissible, evidence when PMI’s lawyer delivered the 3/18/10 Schaaf Letter, including comment 39. CP 723-735 at 732.

b. Prior Course of Conduct Favors PMI’s Interpretation.

When PMI first became a tenant in the Building in 2005, it was pursuant to a sublease with Real Networks (the “Real Sublease”). CP 581-624. It is undisputed that, under the Real Sublease, PMI was entitled to use up to one and one-fifth (1.2) parking stalls per 1,000 square feet of

rentable space in the Garage. CP 592-593 at ¶ 15. TCAM became the landlord under the Real Sublease in 2007. CP 67 ¶ 3.

An “as needed” arrangement was therefore the baseline understanding going into the lease negotiations. Indeed, TCAM’s own broker, Jeff Huntington, initially intended to propose an optional arrangement for general parking in the 8/31/09 LOI draft. CP 222-224. And – apparently unwittingly – this is in fact what he presented to PMI. CP 229-231. TCAM had been PMI’s landlord for approximately two years at the time, and must have been familiar with the terms of the existing sublease. CP 67 ¶ 3. It must also have known (or should have known) that PMI was paying for approximately 15 parking spaces.⁷

Given the parties’ existing understanding, it was incumbent upon TCAM to be clear about the change it intended to propose. It was not, and the prior, “as needed” arrangement is therefore powerful extrinsic evidence that the parties did not intend to vary their existing parking relationship.

c. Limited Supply of Parking Favors “As Needed” Arrangement.

As explained *infra*, as a general matter, parking is scarce in the Garage and the surrounding area. This suggests that the parties were likely focused, if anything, on whether parking would be sufficiently

⁷ TCAM attempts to divorce itself from its association with the Real Sublease by arguing that “TCAM was not the landlord which negotiated and entered into the sublease. *See* App. Brief, pg. 48. This is true, but it does not mean, and cannot mean, that it was ignorant of the contracts that it assumed.

available to PMI. CP 548-49 ¶ 3. It would not be reasonable to infer that the parties were concerned with, or negotiating over, the prospect of unused parking spaces. The issue was the scope of TCAM's responsibility for scarcity, not PMI's responsibility for over-supply.

This is not inconsistent with the fact that PMI typically needs only approximately 15 parking spaces per month. CP 549 ¶ 4. Parking and commuting patterns change over time, and so it would not have been unreasonable for PMI to want the ability, over the potential sixteen-year life of the Lease (including a five year renewal option (*See* CP 48)), to be able to use more spaces in the future. A key bus route could be cancelled at any time, and as employees age they might be less likely to ride a bicycle to work. Of course, if PMI had been told that TCAM was only making spaces available on a "must pay" basis, the negotiations would have gone differently. PMI merely accepted the allocation that was presented to it. This certainly is not evidence of an *existing* need for additional parking.⁸

d. "As Needed" Arrangement Consistent with Actual Operations of the Garage.

TCAM's arguments are also wholly inconsistent with the actual operations of the Garage. Among other things, while TCAM argues that it

⁸ TCAM also misses the point when it argues that "the evidence reflected that PMI wanted more parking spaces: in its Sublease with RealNetworks, Inc. PMI required RealNetworks, Inc. to make five additional parking spaces available to it." App. Brief, pg. 10. It is true that PMI needed more spaces than the 1.2/1,000 RSF calculation permitted in 2005, when the Real Sublease was executed. But this only shows that needs change over time, and that it is was therefore reasonable for PMI to want to protect itself from such fluctuations.

has bound PMI to a multi-year “parking spaces lease,” parking spaces at the Garage are, in fact, *available only on a monthly basis*. CP 549 ¶ 5. Furthermore, despite the fact that it had paid over \$174,000 for unneeded parking spaces,⁹ PMI does not receive parking passes (and therefore does not have access to) any spaces other than those purchased by its employees on a monthly basis through the Garage manager, Republic Parking.

e. Continuing “As Needed” Arrangement Consistent with Lack of Negotiations over “Must pay” Provision.

The lack of negotiations also shows a lack of intent to transition from an “as needed” to a “must pay” parking arrangement. Both sides knew, or should have, that PMI used approximately 15 parking spaces per month.¹⁰ It is inexplicable that the parties would have spent weeks negotiating over relatively minor details such as roof deck use and elevation (CP 356, 363, 365, 377, 380, 386-387), while ignoring a change in their relationship that would have enormous financial consequences to PMI. Common sense suggests that the lack of negotiation meant that the parties intended to continue with the existing parking arrangement.

B. The “Parking Spaces Lease” is Invalid.

TCAM makes a key concession in its brief when it states that the “parking provision constitutes neither a lease nor a license.” App. Brief,

⁹ CP 1080 ¶ 8.

¹⁰ Contrary to TCAM’s assertion that “TCAM was not aware of PMI’s parking needs and had no reason to know” (App. Brief, pg. 10), TCAM must have received the parking fees paid by PMI (through the Garage operator), and it therefore must have known how much parking TCAM was using. It had been PMI’s landlord for more than two years.

pg. 27. TCAM is correct about this. For one thing, any “lease” of parking garage space advocated by TCAM fails under Washington’s statute of frauds because it does not contain “a description of the land sufficiently definite to locate it without recourse to oral testimony.” *Martinson v. Cruikshank*, 3 Wn.2d 565, 567, 101 P.2d 604 (1940). For another thing, the language fails to create a lease because there is no start date, no end date and no duration or term to the lease. In *Keys v. Klitten*, 21 Wn.2d 504, 519, 151 P.2d 989 (1944), the court said that “[o]ne of the fundamental rules respecting the specific performance of contracts is that performance will not be decreed where the contract is not certain in its terms. The terms must be complete and free from doubt or ambiguity, and must make the precise act which is to be done clearly ascertainable.”

TCAM’s attempt to create a wholesale lease of 34 (or more) parking spaces did not comply with these basic principles. When it defined the parking garage arrangement as a “lease” in BLP 13 and excluded the Garage from the definition of “Premises” (CP 10), TCAM also chose to separate the parking garage arrangement from the terms of the main Lease.¹¹ PMI certainly could not have expected that. It was possible to create parking garage space leases by legally describing and defining the real property and including all material terms, including the

¹¹ TCAM contends that “[t]he superior court agreed with TCAM that it was a contract provision within the Lease, not a separate lease.” App. Brief, pg. 27, n. 5. However, the Court declined to make findings of fact and conclusions of law, consistent with CR 52(a)(5)(B). See CP 1089-1091. Therefore, the trial court’s oral comments (which are not in any event part of the record) are not controlling, or even relevant.

duration of the lease. But that is not what TCAM did.

TCAM's concession that it did not create a valid lease does not absolve it of the ramifications of that failure. PMI obviously cannot be bound to pay for 34 or more parking spaces pursuant to a lease that is now admittedly invalid. TCAM's entire argument rests on the phrase "Tenant shall lease thirty four (34) parking spaces." CP 12. Now that phrase reads "Tenant shall _____ thirty four (34) parking spaces." TCAM would apparently replace the word "lease" with "pay for," but the terms "be able to use" or "have the right to" are more plausible in light of SLP 18(a). The Court should not in any event permit TCAM to re-write the contract by replacing a term it now dislikes – "lease" – while retaining one it likes – "shall." See *Hulbert v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011) ("[n]or is it admissible under the parol evidence rule to add to the terms of a fully integrated written contract").

C. Other Black Letter Contract Principles favor PMI.

The general parking provisions in the Lease cannot fairly be read to create a "must pay" arrangement, notwithstanding TCAM's subjective intent to impose such an obligation on PMI. BLP 13, SLP 18(a), and the Conflict Provision, read together in light of the extrinsic evidence, simply do not say what TCAM wishes.

TCAM's attempt to read a "must pay" parking arrangement into the Lease is also unsound because such a reading flies in the face of numerous black-letter principles of contract interpretation. PMI's

construction of the Lease, on the other hand, is consistent with both common sense and hornbook contract law.

1. PMI's Interpretation Controls Because it Expressed its Understanding to TCAM, while TCAM Remained Silent.

Summary Judgment was properly granted to PMI because TCAM knew that PMI believed that the Lease contained an “as needed” arrangement for parking (by virtue of the 3/18/10 Schaaf Letter). On the other hand, PMI was never informed that TCAM intended a “must pay” parking arrangement. These binary facts are fatal to TCAM’s case.

Where the parties “attach the same meaning to a contract term, and each is aware of the other’s intended meaning, or has reason to be so aware, the contract is enforceable in accordance with that meaning.” 5 Corbin *Interpretation of Contracts* § 24.5 (1998); RST (Second) Contracts § 201(1). On the other hand, “if the parties are seen to have attached different meanings to a contract term at formation, and if neither party knew or had reason to know of the other party’s intended meaning, there is a lack of mutual assent.”¹² *Id.*

¹² There must be a “meeting of the minds” on the essential terms of the agreement, and this mutual assent of the parties must be gleaned from outward manifestations. *Washington Shoe Mfg. Co. v. Duke*, 126 Wash. 510, 516-17, 218 P. 232 (1923). Mutual assent is a core of common meaning sufficient to determine the parties’ performance with reasonable certainty. See Restatement (Second) Contracts § 20 cmt. b (1979). To be enforceable, Washington courts require that a contract include all material terms so to inform the parties as to their obligations. See *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 603, 230 P.3d 199 (2010) (“An enforceable contract requires acceptance of all material terms.”); *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985) (“The legal principle with which we are concerned is that preliminary agreements must be definite enough on material terms to allow enforcement without the court supplying those terms.”). The facts of this case illustrate the classic contract formation problem. As to general parking the parties arguably never reached a meeting of the minds.

The situation in this case falls between these two poles: the parties here ascribed different meanings to the general parking language that carried through the various iterations of the letters of intent and the Lease. However only one party – TCAM – was aware that there was a difference of opinion.

Eight individuals were deposed in this case, consisting of PMI and TCAM’s brokers (Mr. Suzman for PMI, Mr. Huntington and Mr. Olsen for TCAM), their attorneys (Ms. Schaaf for PMI, Mr. Moore and Ms. Wright for TCAM), and their principals (Mr. Shea for PMI, Mr. Awad for TCAM). The consistent testimony from PMI’s representatives was that they considered the Lease to reflect an “as needed” arrangement. CP 632-633; CP 763-764. On the other hand, TCAM’s representatives all testified that they believed the Lease reflected a “must pay” arrangement. CP 770; CP 642. The testimony was uniform and uncontroverted on one other point: no one recalled any discussions or communications about general parking outside of the letters of intent and Lease drafts prepared by TCAM. CP 770; CP 574-575; CP 645-646; CP 776-778; 80-81; 765-766; 783.

With one exception.

The 3/18/10 Schaaf Letter *specifically* noted the inconsistency between BLP 13 and SLP 18(a), when it stated: “39. Parking. (§ 13) The provisions of Section 13 should be modified to conform to Section 18 which correctly describes the agreement between the parties.” The

3/18/10 Schaaf Letter is clear proof both that PMI recognized a conflict between BLP 13 and SLP 18(a) prior to execution of the Lease *and* that PMI expressed this understanding to TCAM.¹³

Section 201 of the Restatement (Second) of Contracts explains:

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

RST (Second) Contracts § 201; *see also Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (“it is possible that the parties have attached different meanings to certain terms used, and if so, the rules set out in Restatement (Second) of Contracts § 201 provide guidance.”).

PMI wins under this rule. It did not know (and had no reason to know) that TCAM intended a “must take” or “must pay” arrangement. TCAM, on the other hand, knew (or should have known) that PMI understood the lease language relative to general parking to be inconsistent. The term should therefore be interpreted in accordance with the meaning ascribed by PMI.

¹³ TCAM claims that the “comment made no sense.” App. Brief, pg. 18, n. 18.¹³ Nonsense. The comment was plainly labeled “Parking” and cannot reasonably be read to refer to SLP 13, the Lease term dealing with access and construction.

2. **TCAM's Position Conflicts with the Lease Interpretation Principle *Contra Proferentum*.**

It is a long-standing rule in Washington that ambiguities in leases should be construed against landlords (and in favor of tenants). An equally well-settled companion principle is that ambiguities in contracts should be construed against the drafter.¹⁴

In the seminal case *Armstrong v. Maybee*, the Court was tasked with determining whether the lessee was responsible for replacing the leased premises – a mill – when it was destroyed by fire. 17 Wash. 2d 48 P. 737 (1897). The Court announced the general principle that “the courts will not extend or enlarge the obligation of the lessee beyond the plain meaning of the language used and the intention existing at the time it was made[.]” and that “*if there is not an express stipulation to the effect to restore buildings ... from fire or water ... the loss must fall upon the landlord ...*” *Id.* at 28-29 (emphasis added).¹⁵

The “ambiguities must be construed in favor of the lessee” rule set forth in *Armstrong* has matured into a black-letter principle of Washington lease law. See *Wash. Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 327-28, 635 P.2d 138 (1981) (“As we said in *Armstrong* what controls in a lease is the intent of the parties at the time of its execution, and the plain meaning

¹⁴ Under Washington law, “[a]mbiguity exists in a contract provision when, reading the contract as a whole, two or more reasonable and fair interpretations are possible.” 25 Wash. Prac. Contract Law and Practice § 5.5 (2nd Ed.).

¹⁵ In light of its determination that a promise to repair was equivalent to a promise to rebuild, the *Armstrong* court determined that the lease was clear, finding that “we are unable, from any fair reading of the whole lease, to find any doubtful language, or anything in the circumstances of the parties, which would require other than one construction of the language used.” *Id.*

of the language used. Where lessor drafts the lease, ambiguities must be resolved in favor of the lessee.”); *see also Carlstrom v. Hanline*, 98 Wn. App. 780, 785, 990 P.2d 986 (2000) (“if a lease is ambiguous, the court will adopt the interpretation that is the most favorable to the lessee”); *Wilkening v. Watkins Distrib., Inc.*, 55 Wn. App. 526, 531, 778 P.2d 545 (1989) (quoting *Payne*); *Puget Inv. Co. v. Wenck*, 36 Wn.2d 817, 827, 221 P.2d 459 (1950) (“[a]mbiguities in a lease must be resolved in favor of the lessee”); *Allied Stores Corp. v. North West Bank*, 2 Wn. App. 778, 784, 469 P.2d 993 (1970) (“if the provisions of a lease are doubtful in that they are reasonably capable of more than one interpretation, the court will adopt that interpretation which is more favorable to the lessee ...”).

The moral of *Armstrong* and its progeny is that, as a default matter, landlords – not tenants – assume the risk when a lease term is subject to more than one reasonable interpretation.

A related legal principle is the doctrine of *contra proferentum*, which states that an ambiguous contract term may be construed against the party who drafted it. *See* 25 Wash. Prac. Contract Law and Practice § 5.5 (2nd Ed.) (“[g]enerally, ambiguous contracts are to be construed against the drafter.”). This hornbook rule has also been specifically adopted in Washington in the lease context. *Corbin* explains the doctrine as follows:

If ... it is clear that the parties did attempt to make a valid contract and the only remaining question is which of two possible and reasonable meanings should be adopted, the court will often adopt the meaning that is less favorable in its legal effect to the party who chose the words.

5 Corbin on Contracts § 24.27, *Interpretation of Contracts* 1998.

The Restatement of Contracts (Second) similarly provides that “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” RST Contracts (second) § 206 (1981); *see also Diversified Realty, Inc. v. McElroy*, 41 Wn. App. 171, 173, 703 P.2d 323 (1985) (“[i]f the lease is ambiguous, it will be construed against the drafter”); *Puget Inv. Co. v. Wenck*, 36 Wn.2d 817, 827, 221 P.2d 459 (1950) (“since the instrument was prepared by the lessor, it must be construed most strongly in favor of the lessee.”); *Allied Stores*, 2 Wn. App. at 784 (when an ambiguity exists, courts will adopt interpretation “more favorable to the lessee, particularly when, as here, the lease was drafted by the lessor”).

The rationale for these rules is practically self-explanatory: As the Restatement explains, “[w]here one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning.” Restatement, cmt. a.

The leading Washington case of *Murray v. Odman* explains the principle as follows:

It was within the power of the lessor to obviate the ambiguity and uncertainty to which the lease was susceptible. It was, therefore, her duty to see that the

instrument which she offered to the lessees clearly expressed her intention, whatever that may have been. Under the principle of contra proferentem, we are constrained to adopt that interpretation that is more favorable to the lessees...

1 Wn.2d 481, 489, 96 P.2d 489 (1939).

Here, it was similarly within TCAM's power to draft and negotiate terms that clearly expressed its desire to incorporate a "must pay" arrangement for general parking. It chose not to.

TCAM argues that these principles should not apply because "[b]oth parties were engaged in the lease negotiations and PMI had just as many opportunities to be clear about its position." App. Brief, pg. 40. TCAM also points to SLP 19(u), which provides that "this Lease shall not be construed against either party." CP 44.

The argument that "both parties were engaged in lease negotiations" misses the point. The doctrine is not concerned with whether both parties were "engaged" in lease negotiations, the concern is that the drafting party be particularly clear about what it intends, since it has superior knowledge of the document. *See Murray*, 1 Wn.2d at 489. Here, it is undisputed that TCAM had superior knowledge: it drafted the LOI (and did not tell PMI that it had changed the word "ratio" to "requirement"); it drafted the Lease (and did not share with PMI the edits that it made that were designed to create a "must pay" arrangement); it did not respond to Ms. Schaaf's comment when she specifically asked about general parking; and it knew about its obligations under the Parking Agreement but chose not to share that knowledge with PMI.

In fact, TCAM concedes that it acted *wilfully* in not responding to Ms. Schaaf. *See* App. Brief, pg. 18 (“TCAM’s counsel used the common approach in negotiating contracts by responding to PMI’s counsel with a revised draft of the lease containing *only those revisions acceptable to TCAM.*”) (emphasis added). That is, rather than forthrightly informing Ms. Schaaf that the parties had a difference of opinion on a material term, or asking what she meant, TCAM chose to remain silent. This is *precisely* the type of conduct that the rules described above are intended to avoid. The boilerplate language in SLP 19(u) should be construed in light of the extrinsic evidence in this case, evidence that is consonant with these black letter rules.

3. TCAM had an Obligation to be Clear about its Intentions Given the Amount of Money at Stake.

The *amount* of the obligation that TCAM intended to create is yet another reason to require it to have been more forthright. As our Supreme Court has explained, “Now, the money difference between the landlord’s and the tenant’s construction of this lease amounts to about \$70,000¹⁶ against the tenant. Those who seek so enormous an increase should establish it by language not doubtful.” *Gates v. W.B. Hutchinson Inv. Co.*, 88 Wash. 522, 526, 153 P. 322 (1915); *see also National Bank of Commerce of Seattle v. Dunn*, 194 Wash 472, 485, 78 P.2d 535 (1938).

That is, a party who intends to bind the counterparty to a significant financial obligation must be clear about what they are doing.

¹⁶ In 1915 dollars (approximately).

Here, TCAM would purport to bind PMI to a parking obligation of approximately \$1.35 million over the life of the Lease, compared to a total rent obligation of approximately \$14.5 million.¹⁷ TCAM was not clear about the enormous obligation it intended to create, and its interpretation should therefore be rejected.

D. If the Court Overturns the Judgment it Should Enter Judgment in Favor of PMI Based on TCAM's Failure to Mitigate its Damages, or Remand for Trial.

This Court can and should uphold trial court. However, in the event that it overturns the Judgment, the result should *not* be to “remand for entry of judgment in TCAM’s favor.” App. Brief, pg. 3. Rather, summary judgment should be entered in favor PMI based on TCAM’s failure to mitigate its damages, or the case should be remanded for trial.

A party cannot recover damages under a lease (or other contract) where it could have avoided such damages “through reasonable efforts.” *See Cobb v. Snohomish Cnty.*, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997). This is true regardless of whether or not the landlord accepts the surrender of the leased property. *See, e.g., Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 730 P.2d 76 (1986); *Pague v. Petroleum Prods., Inc.*, 77 Wn.2d 219, 223, 461 P.2d 317 (1969).

Here, TCAM failed to make reasonable efforts to avoid damages from PMI’s inability to use all 34 parking spaces, and even affirmatively ignored expressions of interest from a third party. *See* CP 751-753; CP 647-648. Despite the fact that it should apparently not be difficult to

¹⁷ *See* Lease, CP 8-54.

sell the monthly parking spaces that PMI does not need, TCAM did absolutely nothing. Indeed, Mr. Awad could only guess at the value of the excess parking spaces, and had no idea what steps might had been taken to re-let them:

Q. All right. Do you know what the market value of those excess parking spaces is?

A. I do not, actually. Roughly I know it's in the 300 range - - or I believe it to be in the 300 range.

Q. Do you know what you could resell them for?

A. No.

...

Q. And you are not aware of whether the property manager has made any effort to try to resell any parking spaces?

A. No. No.

CP 1007-1008.

Notably, PMI does *not* receive parking passes for the spaces it does not need. TCAM (or its agents) retain the passes. Nevertheless, Mr. Awad testified as follows when a third party expressed interest in purchasing some of the parking spaces:

Q. And Mr. Olsen says to you: "Would you be interested in leasing some of your excess parking to an outside group?" You got that email - - or that - - you saw that sentence?

A. Yes.

Q. Mr. Olsen said they would be interested in leasing a big chunk at half of what market is through 9/30/2014. You saw that as well?

A. Yes.

Q. All right. What - - do you know how much excess parking you had at the time?

A. I do not recall.

Q. Who was the outside group that Mr. Olsen was asking you if you if you would be interested - -

A. I do not know.

Q. - - in re-leasing them to?

A. I don't recall.

Q. Did you ask him?

A. I may or may not have. I don't recall.

CP 1004-1005.

It was Mr. Olson's recollection, however, that nobody on TCAM's side followed up on the lead:

A. I was representing a tenant that was looking at going into World Trade Center West, and they had a large parking requirement, and I thought maybe, you know, they'd have extra parking, and I could put them together, and they could lease space. And we did not do that transaction so there was no interest in it.

Q. Were there any follow-up communications or discussions with anybody about this?

A. I don't think so.

CP 999-1000.

This exchange shows two things. First, it shows that, even if the Court were to reverse the Judgment, PMI would be entitled to judgment, or a trial, on mitigation. The exchange also completely undercuts TCAM's implicit assertion that it is stuck with the parking spaces, and has no choice but to pass the cost down to its tenants. App. Brief, pg. 36. In fact, there is nothing prohibiting TCAM from selling the spaces to third

parties. Given the scarcity of parking in the neighborhood, this would not seem to be a particularly difficult task. Inexplicably, though, TCAM refuses to make any efforts to try to sell the spaces, and has even affirmatively turned away possible leads.

VI. PMI IS ENTITLED TO ATTORNEYS' FEES AND COSTS

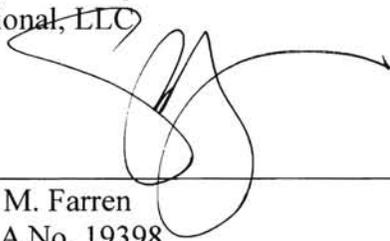
Because TCAM does not contest the *amount* of PMI's fee award, it should be left undisturbed if the Judgment is upheld. PMI acknowledges that TCAM would be entitled to its reasonable attorneys' fees and costs if the Judgment is overturned, and a subsequent judgment entered in TCAM's favor.

VII. CONCLUSION

For the foregoing reasons, PMI respectfully requests the Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 8th day of August, 2014.

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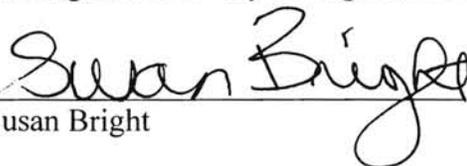
PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be served a true copy of the document entitled BRIEF OF RESPONDENT to which this is attached, by electronic mail on the following:

Thomas F. Peterson
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Executed at Bellevue, Washington this 8th day of August, 2014.


Susan Bright