

FILED  
6-15-16

Court of Appeals  
Division I  
State of Washington

NO. 74623-5

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
II. COUNTER STATEMENT OF ISSUES .....	6
III. COUNTER STATEMENT OF THE CASE.....	7
A. The Parties’ Underlying Dispute.....	7
B. TCAM’s Failure to Mitigate .....	9
1. TCAM knew exactly how many parking passes PMI was using and paying for. ....	9
2. TCAM Made No Effort to Sell the Parking Passes it Retained and Rejected Third Party Offers to Purchase Parking. ....	9
C. Procedural Posture and the Prior Appeal. ....	11
1. PMI’s Changing Position in Trial Court. ....	11
2. The Court of Appeals Reverses and Adopts TCAM’s Position that it has not Suffered Damages.....	13
3. PMI Recognized the Court’s Error and Moved for Clarification and Reconsideration while TCAM does not, thereby Acquiescing in the Court’s Findings of “No Injury” and “No Trial.”.....	15
4. TCAM changes its Position on Remand.....	17
5. TCAM Files a Late Appeal.....	18
IV. STANDARD OF REVIEW .....	18
V. ARGUMENT.....	19

A.	The Opinion gave TCAM precisely what it asked for and it is estopped from now asking for something else.....	19
1.	TCAM is Judicially Estopped from Claiming Money Damages. ....	24
2.	TCAM Raised its Novel Application of RCW 7.24.080 for the First Time on this Second Appeal. ....	26
B.	This Court already Decided that TCAM did not Suffer an Injury and Foreclosed Further Litigation on Damages.....	28
C.	TCAM did not Timely Appeal the Final Judgment and the Trial Court did not Abuse its Discretion when it Denied TCAM’s Motions under CR 15 and CR 59. ....	31
D.	TCAM is not Entitled to Further Relief Under the Declaratory Judgment Act.....	40
VI.	The transcript of the oral argument in the prior appeal is irrelevant .....	45
VII.	PMI is entitled to attorneys’ fees and costs.....	47
VIII.	CONCLUSION.....	48

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Allstot v. Edwards</i> , 114 Wn. App. 625, 60 P.3d 601 (2002) .....	34
<i>Bank of Am. v. Owens</i> , 177 Wn. App. 181, 311 P.3d 594 (2013) .....	29, 37
<i>Baxter v. Ford Motor Co.</i> , 179 Wash. 123, 35 P.2d 1090 (1934) .....	37
<i>Beckman v. Spokane Transit Auth.</i> , 107 Wn.2d 785, 733 P.2d 960 (1987) .....	34
<i>Bell Helicopter Textron, Inc.</i> , 806 F.3d 335, 340 (5 <sup>th</sup> Cir. 2015) .....	35
<i>Bird v. Best Plumbing Grp., LLC</i> , 161 Wn. App. 510, 260 P.3d 209 (2011) .....	35
<i>Blue Mountain Serv. Corp. v. Zlateff</i> , 53 Wn. App. 690, 769 P.2d 883 (1989) .....	48
<i>Boeing v. State</i> , 89 Wn.2d 443, 572 P.2d 8 (1978) .....	27
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 108 P.3d 147 (2005) .....	25
<i>Daves v. Nastos</i> , 39 Wn. App. 590, 694 P.2d 686 (1985) .....	35
<i>Del Guzzi Constr. Co. v. Global Nw. Ltd.</i> , 105 Wn.2d 878, 719 P.2d 120 (1986) .....	38
<i>DeLoach v. Woodley</i> , 405 F.2d 496 (5th Cir. 1968) .....	37

<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn. App. 508, 20 P.3d 447 (2001) .....	27
<i>Donald B. Murphy Contractors, Inc. v. King County</i> , 112 Wn. App. 192, 49 P.3d 912 (2002) .....	38
<i>Evergreen Moneysource Mortg. Co. v. Shannon</i> , 167 Wn. App. 242, 274 P.3d 375 (2012) .....	38
<i>Gabrielson v. Montgomery Ward &amp; Co.</i> , 785 F.2d 762 (9th Cir. 1986) .....	37
<i>Harris v. Fortin</i> , 183 Wn. App. 522 .....	26
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978) .....	27
<i>Humphrey Indus., Ltd. v. Clay Street Assoc., LLC</i> , 176 Wn.2d 662, 295 P.3d 231 (2013) .....	29
<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008) .....	38
<i>Kathryn Learner Family Trust v. Wilson</i> , 183 Wn. App. 494, 333 P.3d 552 (2014) .....	36
<i>Kelly v. Powell</i> , 55 Wn. App. 143, 776 P.2d 996 (1989) .....	34
<i>Kennett v. Yates</i> , 45 Wn.2d 35, 272 P.2d 122 (1954) .....	28
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706, 846 P.2d 550 (1993) .....	29
<i>In re Lowe</i> , 191 Wn. App. 216, 361 P.3d 789 (2015) .....	19
<i>Marassi v. Lau</i> , 71 Wn. App. 912, 859 P.2d 605 (1993), <i>rev'd on other grounds, Wachovia SBA Lending, Inc. v. Kraft</i> , 165 Wn.2d 481, 200 P.3d 683 (2009) .....	48

<i>Maryhill Museum of Fine Arts v. Emil’s Concrete Constr. Co.</i> , 50 Wn. App. 895, 751 P.2d 866 (Div. 3 1988) .....	44
<i>McCausland v. McCausland</i> , 129 Wn. App. 390, 118 P.3d 944 (2005) .....	29
<i>Moriarty v. Svec</i> , 233 F.3d 955 (7th Cir. 2000) .....	25
<i>Newport Yacht Basin Ass’n of Condominium Owners v. Supreme Nw., Inc.</i> , 168 Wn. App. 86, 285 P.3d 70 (Div. 1 2012), review denied, 175 Wn.2d 1015, 287 P.3d 10 (2012).....	43
<i>Oliver v. Flow Intern. Corp.</i> , 137 Wn. App. 655, 155 P.3d 140 (2006) .....	37
<i>Pac. Mkt. Int’l, LLC v. TCAM Core Prop. Fund Operating LP</i> , No. 71707-3-I (Wash. Ct. App. June 9, 2014) .....	2, 15, 16, 24
<i>Pierson v. Hernandez</i> , 149 Wn. App. 297, 202 P.3d 1014 (2009).....	30
<i>River House Dev., Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 272 P.3d 289 (2012) .....	19
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	31
<i>Ronken v. Bd. of County Commn’rs</i> , 89 Wn.2d 304, 572 P.2d 1 (1977).....	42
<i>Schoenwald v. Diamond K Packing Co.</i> , 192 Wash. 409, 73 P.2d 748 (1937).....	41
<i>Shelton v. Azar, Inc.</i> , 90 Wn. App. 923, 954 P.2d 352 (1998).....	37
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998).....	46
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	24, 25

<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	27
<i>State, ex rel., A.N.C. v. Grenley</i> , 91 Wn. App. 919, 930, 959 P.2d 1130 (1998).....	34
<i>State v. O'Connell</i> , 83 Wn.2d 797, 532 P.2d 872 (1974).....	27
<i>Thompson v. Wilson</i> , 142 Wn. App. 803, 175 P.3d 1149 (2008).....	41
<i>TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.</i> , 134 Wn. App. 819, 142 P.3d 209 (2006).....	14, 43
<i>United Nursing Home v. McNutt</i> , 35 Wn. App. 632, 669 P.2d 476 (1983).....	41, 42
<i>Weeks v. Bayer</i> , 246 F.3d 1231 (9th Cir. 2001) .....	39
<i>Wilcox v. Lexington Eye Inst.</i> , 130 Wn. App. 234, 241, 122 P.3d 729 (2005).....	33
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	37
<i>Wolfe v. Legg</i> , 60 Wn. App. 245, 803 P.2d 804 (1991).....	38
<i>Yniguez v. Arizona</i> , 939 F.2d 727 (9th Cir. 1991) .....	25
<i>Young v. Whidbey Island Bd. of Realtors</i> , 96 Wn.2d 729, 638 P.2d 1235 (1982).....	43
<b>Statutes</b>	
RCW 7.24.080 .....	<i>passim</i>
<b>Other Authorities</b>	
CR 15 .....	<i>passim</i>

CR 15(a).....	38, 39
CR 15(b).....	34
CR 54(c).....	33, 34, 35
CR 59 .....	<i>passim</i>
<i>DeWolf, D., Allen, K. &amp; Caruson, D., 25 Wash. Prac., Contract Law &amp; Prac. § 14.11 (3d. ed. 2014)</i> .....	44
RAP 2.4(g).....	36
RAP 2.5(a) .....	27, 28
RAP 5.2(e) .....	32
RAP 9.11.....	46, 47
RAP 18.8.(b) .....	46
<i>Tegland, Karl B., 15 Wash. Prac. Civil Procedure § 42.26 (2<sup>nd</sup> Ed.)</i> .....	42

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This appellate court decided this case on April 13, 2015. The Court reversed summary judgment, ruling in favor of TCAM. The decision was final. Having ruled, this Court remanded the case back to the King County superior court, not for trial but for entry of judgment without a trial. The Court did not remand for the introduction of new evidence, claims of “further relief,” a determination of the amount of money damages or litigation over the failure to mitigate those damages or over amended pleadings of any other claims. In fact, this Court did exactly what TCAM asked it to do – find that money damages and the corresponding duty to mitigate were not at issue.

The trial court then followed this Court’s instructions – it did exactly what this Court ordered it to do. It entered the judgment according to the appellate court’s opinion, precisely as this Court held. All of TCAM’s attempts in the trial court to subsequently circumvent the “no money damages” position it previously took fell on unsympathetic ears. The trial court saw through that posture as an “end run” around this Court’s opinion. TCAM’s strategy was to eviscerate PMI’s mitigation defense on appeal but then resurrect a money damages claim it argued was nonexistent on appeal.

This changing position has been TCAM's pattern. In its counterclaims TCAM did not initially plead a claim for money damages. However, on summary judgment, TCAM asked for entry of a specific money judgment, which PMI disputed as to amount and validity. Then, faced with PMI's mitigation defense, TCAM represented to the trial court that "mitigation is simply not an issue in this case" because "[t]his is an action for Declaratory Judgment [and] mitigation is irrelevant." CP 1024. Again on appeal, TCAM initially circled back to its request for entry of money damages (Br. of Appellant at 50, *Pac. Mkt. Int'l, LLC v. TCAM Core Prop. Fund Operating LP*, No. 71707-3-I (Wash. Ct. App. June 9, 2014)), but then when responding to PMI's mitigation defense, TCAM changed its position once again, denying that this was a case about money damages. TCAM argued on Reply that mitigation of damages "is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment" Reply Br. of Appellant at 22, *Pac. Mkt. Int'l, LLC v. TCAM Core Prop. Fund Operating LP*, No. 71707-3-I (Wash. Ct. App. Sept. 10, 2014), and "[t]he only claims asserted in the complaint and counterclaim were for declaratory judgment regarding the meaning of the Lease." *Id.* In other words, TCAM laid the groundwork for a money damages claim when it was expedient to do so, but then denied that this case was about money damages when it was inconvenient.

When the case was sent back to the trial court, TCAM devised a new plan to secure a money judgment. TCAM proposed a declaratory judgment consistent with this Court's Opinion, except for the insertion that TCAM was also entitled to "further relief." This proposed judgment was then accompanied by a Motion for Further Relief seeking a money judgment. When that stratagem did not succeed, and the trial court entered judgment as prescribed by this Court, TCAM then made a post-judgment request for leave to amend the pleadings to add new claims. This too would have required a trial. The trial court was not persuaded.

PMI warned this Court in the first appeal that this would happen. Indeed, not only did PMI not mislead the Court, it pointed out in a motion immediately after the Opinion that PMI had not paid all of the excess parking charges. TCAM remained silent. TCAM neither moved for reconsideration on its own nor joined in the portion of PMI's motion alerting this Court to the factual dispute. PMI anticipated that TCAM would do exactly what it had done twice before – revert to its money judgment claim after having extinguished the mitigation defense. PMI's motion for reconsideration was denied, and the case was remanded for entry of judgment in favor of TCAM. The Opinion's holding expressly foreclosing the possibility of a trial, as well as any possible finding that

TCAM (or PMI for that matter) had suffered monetary damages was not disturbed.

As already noted, the trial court recognized TCAM's maneuver for what it was – an end run around this Court – denied TCAM's motion for further relief, and entered judgment directly consistent with the Opinion. After filing two successive motions for reconsideration under CR 59, and a motion for leave to amend under CR 15 (all of which were also denied), TCAM filed this second appeal.

TCAM's notice of this second appeal was then filed late. PMI moved to dismiss the appeal of the final judgment on the ground that it was untimely. In a May 27, 2016 letter ruling, Commissioner Neel referred the motion to dismiss to the panel for consideration along with the merits of the appeal. PMI therefore incorporates its motion by reference, which is also summarized below. The relief TCAM requests should be denied for the following reasons:

*First*, as an important threshold matter, TCAM waited too long to file a second appeal of the Final Judgment (which included the denial of its motion for further relief). Final judgment was entered on October 27, 2015, but TCAM did not file its notice of appeal until January 13, 2016, 78 days later. The notice of appeal was also filed 57 days after entry of the denial of the first motion for reconsideration. TCAM's second,

successive motion for reconsideration did not toll its deadline to appeal the Final Judgment.

*Second*, TCAM is not entitled to re-litigate issues that were already decided by this Court. The Opinion in the First Appeal foreclosed both parties' ability to have a trial on whether TCAM was entitled to money damages (in addition to the \$174,830.60 that it already recovered), whether PMI was entitled to recoup some portion of the amounts it paid under protest, or whether TCAM had mitigated damages. Under the law of the case doctrine, the trial court was compelled to grant declaratory relief only, and it did not err when it gave TCAM precisely what it was awarded in the first appeal.

*Third*, TCAM was not just a passive recipient of the Court's ruling; it advocated for the result that it now complains about. Apparently recognizing the difficulties PMI's mitigation defense presented to a claim for money damages, TCAM told the trial court – and this Court – that a trial was not warranted because it sought declaratory relief. TCAM's prior statements (and omissions) have consequences, and it is now estopped from changing its position in order to have a second bite of the apple, when PMI has not even had a first bite.

*Fourth*, and although the Court need not reach TCAM's substantive arguments, they nevertheless fail on the merits. As the case

law shows, the Declaratory Judgment Act's allowance for "further relief" is not a replacement for normal course litigation of a substantial, disputed, claim for breach of contract and money damages, nor is CR 54(c). If TCAM wanted to try to prove it had been injured, it was required to plead and prove the precise amount of its money damages and that it took reasonable steps to mitigate.

*Fifth*, PMI should be awarded its attorneys' fees and costs as the prevailing party on this (second) appeal under the parties' contract. This litigation has become an expensive endeavor. PMI should not have to bear the costs incurred in adhering to a trial court judgment that directly followed this Court's Opinion, which opinion was specifically sought by TCAM in the first instance.

## **II. COUNTER STATEMENT OF ISSUES**

1. Did the trial court abuse its discretion when it denied TCAM's post-judgment motion for leave to amend its complaint to add claims that had been foreclosed by this Court on the first appeal? (No.)
2. Did the trial court abuse its discretion when it denied TCAM's motions for reconsideration they also requested relief that had been foreclosed by this Court on the first appeal? (No.)
3. Was TCAM's appeal of the Final Judgment untimely for the reasons stated in PMI's Motion to Dismiss? (Yes.) If TCAM's appeal

was not untimely, should the requested relief nevertheless be denied because it was foreclosed by this Court on the first appeal, and because it is not entitled to use the Declaratory Judgment Act to recover money damages and avoid substantive litigation on mitigation? (Yes.)

4. Should PMI be awarded its fees and costs as the prevailing party on this (second) appeal? (Yes.)

### **III. COUNTER STATEMENT OF THE CASE**

TCAM's Statement of the Case omits key facts. Following is PMI's Counter Statement of the Case. An appendix attaching several of the key pleadings and documents is also filed herewith.

#### **A. The Parties' Underlying Dispute.**

PMI leases office space in the World Trade Center North building located at 2401 Elliot Avenue in Seattle (the "Building"). CP 584 ¶ 3. In the Lease, PMI was given the right to use 34<sup>1</sup> unassigned parking spaces in the large parking garage ("Garage") that is at the center of the parties' dispute. CP 12. Access is controlled by electronic parking passes, which are distributed by the Garage manager, Republic Parking. CP 553 ¶ 5. Notwithstanding the allocation described in the Lease, PMI does not actually receive an equivalent number of parking passes each month. CP 1084 ¶ 7. PMI and its employees only receive parking passes for the

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<sup>1</sup> The parking allocation increases over the life of the Lease. CP 12.

number of spaces that they actually need. *Id.* This procedure has remained consistent and unchanged for a number of years, and did not change when the new Lease went into effect. *Id.*<sup>2</sup> This left 15-20 (or more) parking passes that TCAM could sell to third parties each month.

At the time the case was litigated in the trial court, there was a waiting list for monthly parking passes at the Garage, demonstrating that the demand for parking in the Garage exceeds available supply. *Id.* In addition, TCAM had received offers to purchase or lease monthly parking space. CP 651-52, 755-57, 1008-9.

After the Lease was signed, the parties disputed whether PMI was obligated to purchase all 34 spaces or just those it actually used each month. In order to avoid a default under the Lease – and possible eviction – PMI began paying for the parking it did not need, *but all payments were made under protest.* CP 750-52, 1088-89. PMI eventually paid \$174,830.60 for parking charges that it disputed. Even though it was paying for its full complement (at the time) of 34 spaces, PMI still was not given parking passes for the spaces that it did not need, and was paying for

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<sup>2</sup> Indeed, the new lease reinforced the *scarcity* of parking. Paragraph 18(a) of the Lease provides that “Tenant shall have the right to the nonexclusive use of [parking spaces] for the parking of operational motor vehicles used by *Tenant, its officers and employees only.*” (emphasis added). This shows that TCAM did not want PMI to take all of its allocated spaces and then sell them to third-parties at a profit. It also shows that PMI could not have mitigated its own damages.

under protest. CP 1084 ¶ 7. TCAM, and its agent Republic Parking, continued to control those. *Id.*

**B. TCAM's Failure to Mitigate**

**1. TCAM knew exactly how many parking passes PMI was using and paying for.**

Both parties knew that the number of parking spaces allocated to PMI under the Lease exceeded its usage, despite what TCAM now contends. CP 1084 ¶ 6; Br. of Appellant at 40. First, PMI and its employees *never* took anywhere close to the full allocation of parking. TCAM certainly knew, directly or through its agent Republic Parking, how much parking PMI was using and paying for each month. Second, once a dispute arose, PMI began paying for the disputed passes *under protest*. CP 750-52, 1088-89. This – and the fact that a lawsuit was soon ongoing – could only have heightened TCAM's awareness of the problem. Third, PMI received only the number of parking passes that it actually wanted and needed, *even after it began paying under protest*. CP 1084 ¶ 7. TCAM therefore retained the balance, whether directly or through Republic Parking.

**2. TCAM Made No Effort to Sell the Parking Passes it Retained and Rejected Third Party Offers to Purchase Parking.**

TCAM did nothing to try to re-let, re-sell, or otherwise dispose of the excess parking passes, even though it should have easily been able to

do so. PMI's broker, Paul Suzman, testified that there was a ready market for the available parking spaces. CP 1080-81. There was also evidence of a strong demand for parking in the general vicinity of the Garage, ranging from \$150/month to \$239.51/month. CP 1081. TCAM's representative, Keith Awad, even testified the market value for the spaces was "in the 300 range" (which would be substantially higher than the lease rates). CP 1011-12.

TCAM nevertheless made absolutely no effort to sell these excess parking spaces. Indeed, not only did TCAM not make any affirmative efforts to sell the passes, it ignored unsolicited queries that it received. *See* CP 651-652, 755-757. For example, in May 2011 TCAM's broker took a call from a person interested in leasing a block of monthly parking. CP 1008-9. TCAM's representative, Keith Awad testified that he had no interest in following up on the interest, which would have been to PMI's benefit. *Id.*

TCAM's claimed entitlement to money damages is therefore far from settled as a factual matter. Nothing is prohibiting TCAM from selling the spaces to third parties, and given the scarcity of parking in the neighborhood, it should not be a particularly difficult task. TCAM's failure to mitigate its damages – particularly after PMI prevailed on summary judgment and stopped paying anything for the parking spaces it

did not need – is especially inexplicable in light of the fact that it has been embroiled in threatened or actual litigation for most of the period in question. TCAM has been on notice of PMI’s inability to use – and unwillingness to pay for – the excess parking passes throughout years of litigation. TCAM had a duty to make reasonable efforts to put them to use, but chose not to.

TCAM claims that PMI had “at the very least, equal opportunity to mitigate.” Br. of Appellant at 39. It is the party damaged who has the duty to mitigate, but even so PMI *paid* for its full allocation of passes under protest during much of the relevant period but only *received* the number of passes that it actually used. CP 1084, ¶¶ 4,7. PMI does not own the Garage, and does not control access to it. CP 1083-1084, ¶¶ 2-4. Lacking physical passes, it had nothing to sell, and it also had nothing to “surrender” to TCAM. *Id.*

**C. Procedural Posture and the Prior Appeal.**

**1. PMI’s Changing Position in Trial Court.**

On February 23, 2012, PMI filed the underlying lawsuit against TCAM (CP 1-54). On May 7, 2012, TCAM filed its responsive pleading, which included a declaratory judgment counterclaim. CP 55-62. PMI’s reply to the counterclaim was filed on October 29, 2012, and included an affirmative defense of failure to mitigate damages. CP 63-66. Following

substantial discovery (including discovery on mitigation), the parties filed cross-motions for summary judgment. CP 73-100, 527-551. On January 31, 2014, the trial court granted PMI's motion for summary judgment, and on March 14, 2014, entered judgment in favor of PMI (which included an award of \$174,830.60 representing the Protest Payments).<sup>3</sup> CP 1096-98.

In TCAM's motion for summary judgment, it sought entry of a judgment for money damages. CP 87, 95, 99. TCAM supported that request with the Declaration of Keith Awad. CP 69 ¶ 12. PMI disputed the damages and further argued that TCAM failed to mitigate its damages. CP 973-75.

In response to the mitigation defense, TCAM took an extraordinary step in representing to the trial court that "mitigation is simply not an issue in this case" because "[t]his is an action for Declaratory Judgment [and] [m]itigation is irrelevant." CP 1024. "Neither party has brought a breach of contract claim." *—notwithstanding that it had just asked for entry of money damages. Id.*

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<sup>3</sup> PMI recognizes that when it prevailed, TCAM and PMI agreed on a form of order that included a judgment in favor of PMI for the return of all the Protest Payments. CP 1086-98. That money was not repaid to PMI notwithstanding the judgment. The difference is that TCAM did not have a mitigation defense (or any other defense that PMI is aware of aside from its lease interpretation argument). Introducing a new claim where there was no dispute would have been an exercise in elevating form over substance. In contrast, the situation is much different here: the amounts are larger, the math more complicated, and PMI has a strong defense.

**2. The Court of Appeals Reverses and Adopts TCAM's Position that it has not Suffered Damages.**

The trial court granted PMI's summary judgment motion, and TCAM appealed. CP 1099-1103. At the inception of the First Appeal, TCAM once again suggested it was entitled to money damages. Br. of Appellant at 25 (No. 71707-3-I). TCAM drew little attention to this issue, devoting the entire argument in its opening brief to the lease interpretation issue. PMI then presented its competing interpretation of the Lease, but *also* argued that if TCAM's lease interpretation argument was correct, then the case should be remanded to adjudicate PMI's mitigation defense to TCAM's request for money judgment. Br. of Resp't (No. 71707-3-I). **And once again, just as it had done in the trial court, TCAM represented—in contradiction to its earlier request for a money judgment--that “[t]he only claims asserted in the complaint and counterclaim were for declaratory judgment regarding the meaning of the Lease.”** App.'s Reply Br., at 22. According to TCAM:

The only claims asserted in the complaint and counterclaim were for declaratory judgment regarding the meaning of the Lease. Although failure to mitigate was raised as an affirmative defense ... it is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment.” CP 2782

The conclusion TCAM sought was that because there is no damage claim, there is no corresponding mitigation defense. TCAM took the

position that there was no need for further factual development, or a trial on mitigation or damages, because TCAM then said it was seeking declaratory relief only. CP 60, 1024. In making this argument, TCAM was also avoiding the possibility that all or some portion of the Protest Payments would be disgorged on remand due to TCAM's failure to mitigate.

This Court accepted TCAM's arguments, and on April 13, 2015, it issued its Unpublished Opinion in Case No. 71707-3-I (the "Opinion"). CP 2484-93. The Court decided the lease interpretation question in favor of TCAM. CP 2484. But at TCAM's urging, the Court also foreclosed further litigation on mitigation. The Opinion cited *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc*<sup>4</sup>. for the proposition that "[t]he doctrine of avoidable consequences, or mitigation of damages, prevents an *injured party* from recovering damages that the party could have avoided through reasonable efforts." (emphasis in Opinion) CP 2493. The Court then unambiguously held that "**TCAM has not been injured.**" *Id.* (emphasis added). It also found that "**there is no reason to remand this matter for trial.**" *Id.* (emphasis added). The Court did also say that "PMI has been paying under protest for the parking spaces it does not use." CP 2493. That was obviously true roughly from lease

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<sup>4</sup> 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006).

commencement until just before PMI prevailed on summary judgment at the trial court.

In so ruling, the Court adopted TCAM's position that mitigation was not relevant because TCAM did not have a claim for breach of contract, and therefore could not have suffered a monetary injury. Thus, the Opinion spared TCAM from the trial on mitigation that it wanted to avoid, but also foreclosed any recovery beyond the \$174,830.60 in Protest Payments.

**3. PMI Recognized the Court's Error and Moved for Clarification and Reconsideration while TCAM does not, thereby Acquiescing in the Court's Findings of "No Injury" and "No Trial."**

PMI filed a motion for reconsideration immediately after the Opinion was issued. In this motion, PMI observed that TCAM might well change its position and claim entitlement to damages for the period between January 31, 2014 (when PMI prevailed on summary judgment and stopped making payments under protest) and the date that the trial court entered final judgment on remand. *See Mot. for Clarification & Recons., Pac. Mkt. Int'l, LLC v. TCAM Core Prop. Fund Operating LP*, No. 71707-3-I, at 10-11 (Wash. Ct. App. May 4, 2015).

This shows that PMI did not "mis[lead] this Court and the superior court into believing that TCAM had been paid in full." Br. of Appellant at

1. Not only did PMI never claim that it continued to make Protest

Payments after summary judgment was entered in its favor, it *affirmatively reminded the Court that this was not the case.* See Mot. for Clarification & Recons., No. 71707-3-I, at 15. PMI told the Court that there were a multitude of factual issues. Despite TCAM's repeated accusations to the contrary, PMI informed the Court in detail that parking payments ceased:

PMI then made payments on November 9, 2012, March 20, 2013, and April 3, 2013, and August 31, 2013. CP 1084-88. Then it stopped. No other payments were made prior the summary judgment hearing date. This is why TCAM claimed that in 2014 when it filed for summary judgment, that PMI owed in excess of \$35,000, **a number PMI disputed.**

Mot. for Clarification & Recons., *Pac. Mkt. Int'l, LLC v. TCAM Core Prop. Fund Operating LP*, No. 71707-3-I at 14 (Wash. Ct. App. May 4, 2015), pg. 15 (emphasis added).

PMI went on to point out that there were a number of factual issues, including the disputed amount allegedly due before summary judgment, the amount due after, the claimed expansion of the parking space obligation and its calculation, and most significantly – mitigation of damages where there was an excess demand for parking. *Id.* at 9-18. PMI hardly “misinformed this Court...that it had paid TCAM in full.” Br. of Appellant at 2.

It is also telling that **TCAM remained silent: it *did not move for reconsideration of (or appeal) the question of whether it had suffered an injury and it did not join in the section of PMI's motion alerting the Court to nonpayment.*** TCAM said nothing, and allowed any deadline to challenge the Opinion to pass. To all outward appearances, TCAM preferred the certainty of keeping \$174,830.60 to the uncertainty of a trial on damages and mitigation that might well result in it being ordered to disgorge a portion of the sums PMI paid under protest. The tradeoff, though, was that TCAM lost the ability to claim even more.

#### **4. TCAM changes its Position on Remand.**

This Court issued its mandate on July 24, 2015. CP 2483-2493. Three months later, TCAM filed a motion with the trial court – on eight days' notice (CP 2796) – claiming that it *had* been injured, and asking that money damages be awarded to it in the summary procedure described in RCW 7.24.080. CP 2494-510. The requested relief not only flew directly in the face of the Opinion, but it was also manifestly designed to deprive PMI of its mitigation defense and the opportunity to recoup the sums it had paid under protest.<sup>5</sup> However, the trial court saw through TCAM's

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<sup>5</sup> Moreover, if PMI were to prevail in litigation over damages and mitigation, then the \$144,201.24 awarded to TCAM as the prevailing party would be thrown into doubt as well. All of this is presumably why TCAM chose not to challenge the Opinion's dual findings of "no injury" and "no trial." A trial on damages and mitigation was too large of a risk.

maneuver, and correctly denied the motion for “further relief.” On October 27, 2015, the trial court entered judgment in favor of TCAM on its sole cause of action for declaratory relief, and awarded TCAM its reasonable attorneys’ fees, consistent with the Opinion CP 2792-96. TCAM then filed the post-judgment motions that are at the center of the parties’ latest dispute. CP 2797-2817, 2827-2840. These motions were denied in turn by the trial court, and this second appeal followed.

#### **5. TCAM Files a Late Appeal.**

Final judgment was entered on October 27, 2015. TCAM filed one timely motion for reconsideration, which was denied on December 21, 2015. Rather than file a notice of appeal within thirty days of the denial of the motion for reconsideration, TCAM filed a second successive motion for reconsideration assuming that a second reconsideration motion after a first denial would extend the deadline to appeal for another thirty days (it did not). After the second reconsideration motion was denied, TCAM filed a notice of appeal – 78 days after the Final Judgment and 57 days after the denial of the first motion for reconsideration.

#### **IV. STANDARD OF REVIEW**

As explained in PMI’s Motion to Dismiss, TCAM did not timely appeal from the Final Judgement. Mot. to Dismiss. Therefore, the standard of review in this case is abuse of discretion, the standard

applicable to both CR 15 and CR 59 motions. *See River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (“We review a trial court’s denial of a motion for reconsideration for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002)); *In re Lowe*, 191 Wn. App. 216, 227, 361 P.3d 789 (2015) (“[t]he standard of review of a court’s decision to deny leave to amend or supplement pleadings is abuse of discretion”).

## V. ARGUMENT

### A. **The Opinion gave TCAM precisely what it asked for and it is estopped from now asking for something else.**

The issues that TCAM has raised in this second appeal are entirely of its own making. Throughout this litigation, TCAM has employed a contradictory strategy of claiming, on the one hand, that it is entitled to an award of money, and on the other hand, that money damages (and thus mitigation) are not at issue because its claims were (and are) for declaratory relief only. Which position TCAM is claiming, and when, has depended on how it suits it.

The law does not allow a party like TCAM to take contrary positions throughout the course of litigation, prevail on one of the theories, and then argue that it was unjust to not allow it to also have a recovery

based on the contrary theory. But that is exactly what TCAM is trying to do here. Despite its current exhortations to the contrary, TCAM did in fact represent to this Court (and the trial court) that mitigation (and thus money damages) were not at issue because it sought declaratory relief. As a consequence, TCAM is estopped from now claiming that it should be awarded money damages on top of the Protest Payments.

As the trial court explained:

*It was inappropriate for TCAM to have filed the motion for additional relief which was, essentially, an end run around the decision of the Court of Appeals, civil court rules that would require an amendment to pleadings if a new cause of action was raised, civil court rules that would require at least 28 days' notice for a decision to be decided by summary judgment, and the right to trial on disputed factual issues, such as those that would arise if there was an issue about mitigation of damages.*

CP 2796 (emphasis added).

To the extent that there was any misunderstanding about the interrelated question of damages and mitigation, the seeds of confusion were planted by TCAM, not PMI. TCAM repeatedly invoked the declaratory nature of its claims as a talisman against PMI's backup argument that there might need to be further fact-finding, and a trial, on mitigation and damages. TCAM's current position thus manifests a complete about-face from the position it advocated prior to filing its

Motion for Further Relief on remand. It was PMI who consistently urged litigation of TCAM's claimed damages and failure to mitigate.

On the other hand TCAM apparently made a strategic decision to downplay mitigation, its damages, and the fact that PMI had paid \$174,830.60 under protest. To that end, it focused on the fact that it was seeking only declaratory relief. In the conclusion to its opening appeal brief, TCAM states:

The superior court erred in holding that PMI was not obligated to pay for parking. As the Lease plainly states that PMI "shall lease thirty four (34) parking spaces in the Garage," the Court should remand this case for entry of an order to this effect. The Court should also award attorneys' fees and costs incurred at the trial court level and on appeal to TCAM as the prevailing party.

Br. of Appellant at 50 (No. 71707-3-I). Notably, there is no mention of a money judgment against PMI (or the sums it had already received).

Although it tries to back away from it now, throughout the trial court and appellate court proceedings, TCAM *did* repeatedly urge the court to accept that the claims were declaratory in nature, and thus that mitigation, damages, and injury were not at issue. This was both explicit and implicit.

Explicitly, in its appellate reply brief, TCAM represented that "[t]he **only claims** asserted in the complaint and counterclaim **were for**

**declaratory judgment regarding the meaning of the Lease.”** CP 2782. (emphasis added). TCAM argued that mitigation of damages “is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment.” *Id.*

TCAM similarly represented in the trial court that “mitigation is simply not an issue in this case” because “[t]his is an action for Declaratory Judgment [and] [m]itigation is irrelevant.” CP 1024. “Neither party has brought a breach of contract claim.” *Id.* And in its only filed pleading, TCAM did not plead a claim for breach of contract or seek money damages. CP 55-62. Its Answer alleges one counterclaim—“declaratory judgment.” CP 60. Nowhere in TCAM’s pleading does it allege, seek or pray for money damages arising out of a breach of the “Parking Garage Lease.” CP 55-62.

Not only did TCAM repeatedly *say* that it sought declaratory relief only, and urge on that basis that mitigation was not an issue, but its *implicit* suggestions were just as powerful. It is manifest that TCAM and its lawyers decided to try to use the Declaratory Judgment Act to obtain a windfall monetary recovery while depriving PMI of an opportunity to litigate mitigation. *When* that decision was made will never be known. Potentially it was in the course of the prior appeal, which would explain why TCAM was so cavalier about the lack of a claim for breach of

contract or money damages. Even if not, TCAM certainly left the strong impression that its position was that mitigation was not an issue because it would not be asking for more money. It may have simply outsmarted itself this time.<sup>6</sup>

TCAM's argument that it had no way of knowing whether PMI would pay the full amount in the future is also completely disingenuous. It has known from practically the outset of the dispute that PMI disagreed not only with TCAM's interpretation of the parking language in the Lease, but *also* that PMI believed that TCAM had not acted reasonably with respect to its duty to mitigate. It is not a new issue. The facts just described show TCAM *chose* to stand exclusively on its claim for declaratory relief, notwithstanding its post-hoc allegations to the contrary.

TCAM's argument that it expected that PMI would continue to pay even after it prevailed on summary judgment in the trial court also makes no sense. In January 2014 the trial court agreed with PMI that it did not need to pay for the excess parking and that its unwillingness to pay did not constitute a breach of the Lease. CP 1096-98. From that point forward,

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<sup>6</sup> Other examples of TCAM's behavior have been seen throughout the case. *See, e.g.*, CP 219-228, 695-697 (TCAM's broker purports to change the "as needed" parking arrangement to a "must take" arrangement by using the term "parking requirement" instead of "parking ratio" in an LOI, but otherwise not disclosing TCAM's intentions); CP 219-228 (TCAM inserts "shall lease" language into lease summary, but not the body of the lease draft); CP 669, 695-97) (TCAM's lawyers claim not to understand PMI's lawyer's direct request to reconcile the same provisions).

PMI was not obligated to pay for the excess parking (and had no reason to pay). For that situation to change, two things had to happen: first, there would have to be a reversal of the trial court's lease interpretation ruling (which happened), *and* TCAM would have to prove that it was damaged above and beyond the sum of \$174,830.60, taking its failure to mitigate into account (*which has never happened*). PMI has repeatedly, and strenuously, argued that TCAM needs to prove its alleged damages and respond to PMI's mitigation defense before it can recover more. CP 530, 549-550; Br. of Resp't at 47-50, *Pac. Mkt. Int'l, LLC v. TCAM Core Prop. Fund Operating LP*, No. 71707-3-I (Wash. Ct. App. Aug. 11, 2014); Mot. for Clarification & Recons., No. 71707-3-I, at 13-18. In contrast, TCAM's position was ever-shifting. TCAM does not get a windfall money recovery of nearly \$200,000, and does not get to deprive PMI of its mitigation defense, simply because it chose to emphasize the declaratory nature of the case for strategic reasons.

**1. TCAM is Judicially Estopped from Claiming Money Damages.**

This Court accepted TCAM's argument that this was a declaratory judgement case, and so TCAM is judicially estopped from now claiming that it is entitled to money damages. Judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Skinner v. Holgate*,

141 Wn. App. 840, 847, 173 P.3d 300 (2007) (judicial estoppel barred claim that plaintiff had not disclosed in bankruptcy proceeding) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)); *see also Moriarty v. Svec*, 233 F.3d 955, 962 (7th Cir. 2000) (plaintiff judicially estopped from arguing on *second* appeal that “single employer” doctrine did not apply, where it previously argued and prevailed on *first* appeal that two companies were “single employer”). The doctrine exists to “preserve respect for judicial proceedings” and to “avoid inconsistency, duplicity, and ... waste of time.” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (citation omitted). The doctrine exists primarily to protect the “integrity of the judicial process.” *Yniguez v. Arizona*, 939 F.2d 727, 739 (9th Cir. 1991).

Courts consider three factors in deciding whether judicial estoppel bars an argument: (1) whether the party is taking a position “clearly inconsistent” with its earlier position; (2) whether judicial acceptance of the current position would “create[] the perception that the court was misled”; and (3) whether the party would “derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Skinner*, 141 Wn. App at 848 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)).

In applying these factors, Division One has prohibited a plaintiff from suing to collect on a promissory note when the plaintiff had claimed that the note had no value as the debtor in a bankruptcy proceeding. *Harris v. Fortin*, 183 Wn. App. 522, 524, 333. P.3d 556 (2014). Similarly, TCAM has claimed throughout these proceedings that it has no claim for damages against PMI, and TCAM must be prohibited from attempting to collect damages at this point.

The first factor of judicial estoppel is present because TCAM's claim for money damages is "clearly inconsistent" with its position throughout this litigation that its claims are declaratory in nature. The second factor is satisfied because, if TCAM is allowed to collect damages now, it would "create the perception" that the Court of Appeals was misled in its belief that TCAM has "not been injured." CP 2778. Finally, the third factor is satisfied because TCAM would "derive an unfair advantage" by avoiding the mitigation issue and misleading this Court, only to request that the issue be resurrected after it has benefited from a contrary position.

**2. TCAM Raised its Novel Application of RCW 7.24.080 for the First Time on this Second Appeal.**

Another problem with TCAM's shifting strategy is that the relief that it now seeks – money judgment under RCW 7.24.080 – is not

something that it requested until the case was remanded to the trial court. An issue, theory or argument not presented at the trial court level should not be considered on appeal. *See Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978), citing *Boeing v. State*, 89 Wn.2d 443, 450-51, 572 P.2d 8 (1978); RAP 2.5(a). The purpose of this rule “is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *See Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001) (declining review in context of review of grant of summary judgment).

It is well-settled that failing to raise an issue before the trial court precludes the party from raising it on appeal. *See, e.g., Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *State v. O'Connell*, 83 Wn.2d 797, 822, 532 P.2d 872 (1974). Indeed, “[w]ithout a showing that the contention was presented to the court below, it cannot be considered here.” *Boeing Co. v. State*, 89 Wn.2d 443, 450, 572 P.2d 8 (1978). Because “[a]n issue, theory or argument not presented at trial will not be considered on appeal,” this Court should summarily reject TCAM’s new damages theories as waived. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). Although RAP 2.5(a) provides limited exceptions to this general rule,<sup>7</sup> TCAM’s new arguments do not satisfy any of them.

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<sup>7</sup> Under the Rule, “a party may raise the following claimed errors for the

TCAM's arguments on remand were even more attenuated than the cases just cited. Here TCAM asked for declaratory relief but never disclosed that it planned to argue that it is entitled to a money award under the statute as "further relief" – a mechanism that would require additional factfinding, albeit in a summary procedure – until the case was remanded. TCAM was required to disclose its theory earlier.

**B. This Court already Decided that TCAM did not Suffer an Injury and Foreclosed Further Litigation on Damages.**

TCAM received exactly what it asked for from this Court the first time. This second appeal therefore arrives stillborn because the relief TCAM seeks was foreclosed by this Court's earlier Opinion. The Opinion specifically precluded further litigation on mitigation (or any other issue), leaving nothing for the trial court to do but enter declaratory judgment and determine an appropriate award of legal fees – just like TCAM asked. On remand, "the parties and the trial court [are] bound by the law stated in the decision on the first appeal." *Kennett v. Yates*, 45 Wn.2d 35, 36, 272 P.2d 122 (1954). The trial court was obligated to follow the ruling actually

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first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). In addition, a party may raise issues of appellate court jurisdiction, grounds for *affirming* a trial court decision, and issues raised by another co-party below. *Id.*

entered by this Court, and had discretion only within the four corners of the opinion. As Division One recently explained:

An appellate court's mandate is binding on the lower court **and must be strictly followed**. While a remand “for further proceedings” “signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case,” **the trial court cannot ignore the appellate court's specific holdings and directions on remand**. Also, RAP 12.2 [which embodies the “law of the case doctrine”] ... **binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled**.

*Bank of Am. v. Owens*, 177 Wn. App. 181, 189-190, 311 P.3d 594 (2013) (emphasis added); *see also McCausland v. McCausland*, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *rev'd on other grounds* (explaining that “[t]he superior court may exercise discretion where an appellate court directs it to ‘consider’ an issue, although in so doing, it must adhere to the appellate court’s instructions, if any”); *Humphrey Indus., Ltd. v. Clay Street Assoc., LLC*, 176 Wn.2d 662, 673, 295 P.3d 231 (2013) (explaining that “our prior decision did not authorize the trial court to reconsider imposing attorney[s’] fees ...); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-717, 846 P.2d 550 (1993) (citations omitted) (“[a]n unchallenged conclusion of law becomes the law of the case.”).

Here, this Court determined that TCAM had not been injured, and that a trial was not appropriate on remand.<sup>8</sup> That determination became the law of the case, and was final and binding on both parties. The trial court did not err when it declined to entertain further proceedings on TCAM's alleged damages (or when it denied leave to amend, or (twice) declined to reconsider the Motion for Further Relief or form of Final Judgment). Indeed, the trial court did not have discretion to do anything more than enter judgment on TCAM's claim for declaratory relief, award TCAM its reasonable attorneys' fees, and close the case. Anything else would have been directly contrary to this Court's instructions. TCAM misses the mark when it claims otherwise. If it wanted the opportunity to try to prove that it *was* entitled to damages, it was required to be upfront about its position in litigation, or at the least, timely ask the Court of Appeals to reconsider the Opinion (as PMI did), or appeal. TCAM stayed quiet and is now blaming PMI and the trial court for its miscalculation.

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<sup>8</sup> TCAM claims that this Court's ruling on mitigation is dicta "and is not binding authority." See App. Br. at pg. 36, n. 7. The argument is not a sound application of the law. A court's discussion in response to a party's "urged disposition of the issue" is not dictum. See, e.g., *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009). Here, TCAM urged the Court not to remand for trial on the theory that mitigation was not relevant to its claims for declaratory relief. Reply Br. of Appellant at 22, (71707-3-I) The Court's ruling was therefore not dicta. The argument also does not make any sense. This Court instructed the trial court *not* to conduct a trial (CP 2484-2493), a statement that is directly at odds with the proposition that the question of mitigation and damages was not decided on appeal.

No applicable exception to the law of the case doctrine exists here. First, TCAM does not (and cannot) point to any intervening change of law. *See Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (“An appellate court’s discretion to disregard the law of the case is at its apex when there has been a subsequent change in controlling precedent”).

Second, this is not a situation where a “prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.” *Id.* TCAM did not claim or request money damages (and had not pled a cause of action for breach of contract), and so it was obviously not “clearly erroneous” to find that it had not suffered a cognizable injury. TCAM also did not suffer a “manifest injustice.” First, PMI brought this precise issue to the Court’s attention on reconsideration. PMI was completely forthcoming, yet the Court decided there was no reason to reconsider. Meanwhile, TCAM did not say anything at all. The issue has already been raised and decided. Second, this Court did **exactly what TCAM asked it to do** – exclude consideration of money damages and mitigation. How can the resulting final judgment then be unjust?

**C. TCAM did not Timely Appeal the Final Judgment and the Trial Court did not Abuse its Discretion when it Denied TCAM’s Motions under CR 15 and CR 59.**

As explained in PMI’s Motion to Dismiss, TCAM’s appeal as to the Final Judgment (and thus its Motion for Further Relief) was not timely

filed. The Final Judgment was entered on October 27, 2015, and cannot be connected to a timely-filed motion under RAP 5.2(e). TCAM filed two motions for reconsideration in the trial court under CR 59, but the second was not filed within 10 days of entry of the Final Judgment. TCAM's January 13, 2016 Notice of Appeal was therefore untethered from the Final Judgment, and thus untimely. Mot. to Dismiss; CP 2792-2796. Moreover, none of TCAM's remaining motions survive scrutiny under the applicable abuse of discretion standard.

TCAM's first motion for reconsideration<sup>9</sup> re-argued its point that further relief should have been granted under RCW 7.24.080, but the bulk of the reconsideration portion of the motion is spent arguing with the trial court over whether it was appropriate for TCAM to file its motion for further relief on 8 days' notice. CP 2799. It also claimed that denial of a money award was an "injustice," but misrepresented the facts in so arguing. *Id.* (claiming that TCAM is left with "*no recovery* under the Lease." (emphasis added), while making no mention of TCAM's retention of the Protest Payments). The motion was properly denied.<sup>10</sup>

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<sup>9</sup> This motion was filed on November 6, 2015 and is combined with TCAM's motion for leave to amend. CP 2797-2817

<sup>10</sup> TCAM's appeal from this motion was also untimely. CP 2868-77.

TCAM's second motion for reconsideration<sup>11</sup> fares no better. For starters, it was untimely to the extent it purports to challenge the Final Judgment (and/or the denial of its motion for further relief) because it was filed more than 10 days after entry of those rulings. CP 2827-40. Moreover, the argument raised in this motion – that the trial court should have granted relief under CR 54(c) – fails because this second motion for reconsideration was the first time that TCAM had raised the issue. *See Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.”). The relief sought by TCAM also would have required some form of additional fact-finding, and so once again, the argument was too late. For this reason alone the trial court did not abuse its discretion when it denied the motion.

TCAM's substantive argument also has no merit. For starters, TCAM's is not entitled to a money award under CR 54(c) for the same reason RCW 7.24.080 is not applicable: neither mechanism is a substitute for litigating a disputed claim for breach of contract or money damages (or resolving affirmative defenses like the ones raised by PMI). Under TCAM's theory, would litigants no longer need to claim or prove damages

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<sup>11</sup> This motion is dated November 24, 2015, and is styled “TCAM's Motion for Reconsideration of November 17, 2015 Order.” CP 2827-40.

or resolve affirmative defenses *before* judgment? This is not a tenable application of the rule.

The rule and the case law interpreting CR 54(c) do not support the result TCAM wants. CR 54(c), like CR 15(b), is not intended to be a backdoor way to obtain relief that was not proved – or in this case, was foreclosed – in prior litigation in the case. Rather, the rule allows a party to obtain relief, notwithstanding a clumsy or deficient pleading, if it proved it was entitled to that relief in the normal course of litigation, typically at trial. *See Beckman v. Spokane Transit Auth.*, 107 Wn.2d 785, 791, 733 P.2d 960 (1987) (litigant “could have received a larger award *at trial* if the court believed *she was entitled to it.*”) (emphasis added); *State, ex rel., A.N.C. v. Grenley*, 91 Wn. App. 919, 930, 959 P.2d 1130 (1998) (CR 54(c) “expressly differentiates between default judgments and judgments after trial. Here, a full trial on the issues was held, so rules regarding default judgments do not apply.”); *Allstot v. Edwards*, 114 Wn. App. 625, 632, 60 P.3d 601 (2002) (“the parties argued the issue and the trial court ruled on it.”); *Kelly v. Powell*, 55 Wn. App. 143, 149, 776 P.2d 996 (1989) (under CR 54(c), “relief in *litigated* cases *may* exceed the amount requested in the complaint...” (emphasis in Court’s opinion)). Here, of course, *there was no trial (or any other adjudication by the trial court) on mitigation or damages.* The trial court did not, and could not,

“find merit” in TCAM’s claim for damages within the constraints of the Opinion *Cf. Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510, 529, 260 P.3d 209 (2011) (insurance case heavily relied on by TCAM); App. Br. pg. 19.

Second, as the cases cited by TCAM show, 54(c) should not be invoked where it would work a “substantial prejudice to the opposing party.” *Daves v. Nastos*, 39 Wn. App. 590, 593, 694 P.2d 686 (1985); Br. of Appellant at 17. As explained elsewhere, the prejudice to PMI in this case would be severe. PMI is prejudiced by TCAM’s continued litigation of issues that were already settled by this Court. *See, e.g., Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 (5<sup>th</sup> Cir. 2015) (overruling district court’s award of relief under CR 54(c) because relief sought was so untimely as to be prejudicial; “[w]ere such qualifications not in place, the aims of the Federal Civil Rules to eliminate trial by ambush and afford full and fair litigation of disputed issues would be placed at risk”).<sup>12</sup> Moreover, it would not serve justice to allow TCAM to use CR 54(c) to retain the Protest Payments and obtain additional monetary relief of nearly \$200,000, all while denying PMI of the opportunity to put on a defense at trial.

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<sup>12</sup> CR 54(c) also is not a tool to undo an appellate opinion, and none of the cases cited by TCAM suggest otherwise.

Third, none of the cases cited by TCAM involve an award of money damages arising out of a claimed breach of contract that was, or should have been, proved in the underlying litigation. *Kathryn Learner Family Trust v. Wilson*, one of the cases relied on most heavily by TCAM, involved unpled claims for attorneys' fees. 183 Wn. App. 494, 333 P.3d 552 (2014). But a claim for attorneys' fees, unlike the substantive relief TCAM seeks here, is a quintessential post-judgment matter. So much so that there is a specific appellate rule, RAP 2.4(g), that acknowledges that an award of attorneys' fees will commonly follow an underlying "decision on the merits." Here, TCAM has not prevailed "on the merits" of a claim for breach of contract or money damages. The situation is simply not analogous to a post-judgment request for attorneys' fees.

The trial court similarly did not abuse its discretion when it denied TCAM's request for leave to amend its complaint to add a claim for money damages. Indeed, in so asking the trial court, TCAM practically conceded that what it really wanted was an improper do-over. CP 2802 ("An amendment *will allow the parties to litigate the claim through the normal course, including summary judgment and/or trial.*") (emphasis added). But litigation "through the normal course, including ... trial" is not something that the trial court was capable of granting in light of the "no injury" and "no trial" language contained in the Opinion *See, e.g.*

*Owens*, 177 Wn. App. at 189-190; *Baxter v. Ford Motor Co.*, 179 Wash. 123, 125, 35 P.2d 1090 (1934).

The amendment rules “do not require that courts indulge in futile gestures.” *DeLoach v. Woodley*, 405 F.2d 496, 496-97 (5th Cir. 1968); accord *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (futile amendments should be denied, regardless of whether there is prejudice to the opposing party). Indeed, a court abuses its discretion in granting leave to amend in such a case. *Shelton v. Azar, Inc.*, 90 Wn. App. 923, 928, 954 P.2d 352 (1998) (citation omitted). Because it could not possibly be reconciled with the Opinion, TCAM’s proposed amended pleading could not even theoretically survive dismissal.

Moreover, the “touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.” *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); see also *Oliver v. Flow Intern. Corp.*, 137 Wn. App. 655, 664, 155 P.3d 140 (2006). Sitting on unpleaded claims while discovery, dispositive motion practice, and even an appeal unfold is prejudicial. TCAM’s motion for leave to amend, like its other post-appeal motions in the trial court, was intended to upset the final adjudication of this Court after its preferred stratagem did not work. Case law confirms that this kind of gamesmanship is not proper under CR 15, that it constitutes undue delay,

and that it results in hardship by causing additional costs by depriving PMI a prompt legal ruling.

For example, in *Donald B. Murphy Contractors, Inc. v. King County*, the denial of a motion to amend was upheld where it was filed less than two months before the discovery cutoff, and less than three months before the trial date. 112 Wn. App. 192, 199, 49 P.3d 912 (2002); see also *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 888-89, 719 P.2d 120 (1986) (affirming trial judge's denial of motion to amend filed just over one week before summary judgment hearing because amendment would be "untimely and unfair" to the other parties); *Ives v. Ramsden*, 142 Wn. App. 369, 387, 174 P.3d 1231 (2008) (finding unfair prejudice where motion to amend answer was filed after conclusion of trial); *Wolfe v. Legg*, 60 Wn. App. 245, 247-251, 803 P.2d 804 (1991) (upholding trial court's denial of motion to leave to amend; "further delays necessitated by adding the counterclaim would further add to ... prejudice"); *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 262-63, 274 P.3d 375 (2012) (upholding denial of motion for leave to amend where non-moving parties would be required to "complete additional discovery and to repeat already conducted discovery").

Notably, TCAM's motion for leave to amend was even more untimely than the cases just cited. If CR 15(a) has any temporal limitation

– which it must – it has long since expired in this case. TCAM had ample opportunity to amend its complaint during the trial court proceedings, but instead insisted that damages are not an issue in this “action for Declaratory Judgment.” CP 1024.

Moreover, TCAM cannot satisfy the “interests of justice” standard set out in CR 15(a) because TCAM’s motion comes following entry of final judgment. For one thing, amending a pleading post-judgment does not make any procedural sense, because at that point there is nothing to amend. There is also a practical need to ensure finality. As a result, once judgment is entered, courts can, and do, hold motions for leave to amend to a higher standard. *See, e.g., Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) (upholding trial court’s denial of leave to amend; permitting the amendment post-judgment would “simply grant him the forbidden ‘second bite of the apple’”).

Here, TCAM chose not to pursue damages because it did not want a trial on mitigation, *and it remained silent when the Court of Appeals gave it exactly what it asked for*. That it subsequently had second thoughts does not provide a basis for leave to amend under CR 15.

**D. TCAM is not Entitled to Further Relief Under the Declaratory Judgment Act.**

In addition to being untimely, TCAM's argument that the trial court improperly denied its Motion for Further Relief and did not award it money damages also fails on the merits. As already discussed, TCAM did not plead, prove, or obtain a money judgment in any amount against PMI. In fact, it effectively disclaimed all but declaratory relief, a position the Court accepted, and substantially relied on, in its Opinion. TCAM's argument for money damages instead rests on RCW 7.24.080, which provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper. ..." But this argument not only dashes up against the plain language of the Opinion, it is also an unsound application of RCW 7.24.080.

*First*, it bears repeating that awarding TCAM a money judgment under RCW 7.24.080, or any other procedure, would be in direct conflict with the Opinion. An exegesis on the meaning and application of RCW 7.24.080 is not even needed: the statute obviously does not permit TCAM to claim an injury, and demand money damages, when the Court has already ruled that TCAM has suffered no injury. The nature of the remedy makes no difference in light of the finding of no injury.

*Second*, awarding monetary relief to TCAM under the summary procedure provided by RCW 7.24.080 is not necessary or proper. "[T]he

Washington Supreme Court has historically ‘limited the operation of the uniform declaratory judgment act to cases where there is no satisfactory remedy at law available.’” *Thompson v. Wilson*, 142 Wn. App. 803, 819, 175 P.3d 1149 (2008) (citations omitted). Here, allowing the relief requested would be contrary to the instructions given by this Court on remand, would reward TCAM’s studied choice to not assert breach of contract claims earlier in the lawsuit, and it would replace PMI’s right to a trial on mitigation with a summary show cause procedure.

*Third*, the cases cited by TCAM do not prove its point. *United Nursing Home, Ronken*, and the other cases TCAM relies on do not give trial courts a blank check, just because relief has been asked for, and obtained, under the Declaratory Judgments Act. Nor could it be so. In fact, *Schoenwald v. Diamond K Packing Co.* (a case TCAM did not address), says just the opposite. 192 Wash. 409, 421, 73 P.2d 748 (1937). It explains that the Declaratory Judgment Act does not authorize adjudication of questions not raised or addressed on appeal. *Id.* Nor do the cases cited by TCAM say that the summary adjudication procedure set forth in RCW 7.24.080 may be used in place of a trial, where a trial would otherwise be appropriate.

*United Nursing Homes, Inc. v. McNutt*, the case TCAM relies upon most heavily, is also completely inapposite. In that case, “[t]he trial court

*found the [plaintiffs] were damaged.*” 35 Wn. App. 632, 640, 669 P.2d 476 (1983) (emphasis added). The trial court then ordered “meticulous” financial audits in order to ascertain the exact amount of their damages. *Id.* at 641. Here in contrast, this Court found *no damage*. And TCAM wants to *avoid* a “meticulous” examination of its conduct relative to the unused parking.

Some of the cases cited by TCAM do not even involve post-declaratory judgment claims for money damages. For example, *Ronken v. Bd. of County Comm'n's* involved the imposition of related *injunctive* relief, not money damages. 89 Wn.2d 304, 311, 572 P.2d 1 (1977); *see also Karl B. Tegland*, 15 Wash. Prac. Civil Procedure § 42.26 (2<sup>nd</sup> Ed.) (explaining that a “court might, for example, grant injunctive relief to enforce an earlier declaration”). Relative to RCW 7.24.080, *Ronken* announces only the unremarkable proposition that “every court has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.” *Id.* at 312. Here, in contrast, TCAM wants to use the statute to *undo* this Court’s rulings.

*Fourth*, TCAM’s invocation of “justice” ignores its own gamesmanship and the fact that it has retained the Protest Payments (despite not proving damages or establishing the reasonableness of its efforts to mitigate). Indeed, the evidence actually in the record shows that

TCAM ignored its duty to mitigate (even after PMI raised it as an affirmative defense), and now wants PMI to pay for parking passes that it might have sold to others. That is not appropriate, and does not constitute an injustice – at least not to TCAM.

In its briefing in the first appeal, TCAM failed to cite a single authority in support of its argument that it did not have a duty to mitigate damages. And the Court of Appeals cited only one case on mitigation (at page 10 of the Opinion), and that case supports PMI. *See TransAlta Centralia Generation LLC v. Sickelsteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006) (holding that the tenant was entitled to raise the mitigation of damages defense). This has long been the law in Washington, as in most jurisdictions. An injured party (*i.e.*, a party seeking damages for its injury or loss) must “use such means as are reasonable under the circumstances to avoid or minimize the damages.” *Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982).

Whether reasonable alternative courses of action were available to the non-breaching party to mitigate damages is typically a question of fact to be resolved with other damages issues in an action to recovery for breach of contract. *Newport Yacht Basin Ass’n of Condominium Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 103, 285 P.3d 70 (Div. 1 2012),

review denied, 175 Wn.2d 1015, 287 P.3d 10 (2012); *D. DeWolf, K. Allen & D. Caruso*, 25 Wash. Prac., Contract Law & Prac. § 14.11 (3d. ed. 2014). Once it becomes apparent that a defendant is unwilling to fulfill its contractual obligations, the other party has a duty to mitigate. *See Maryhill Museum of Fine Arts v. Emil's Concrete Constr. Co.*, 50 Wn. App. 895, 901, 751 P.2d 866 (Div. 3 1988). Since the very early days of the Lease, when TCAM first brought up the issue regarding payment for unused parking spaces, PMI made it clear it was not going to pay for them because PMI did not believe these excess payments were owed. CP 979 ¶ 4. Yet, TCAM did nothing. *See* Sec. 3(C)(2) *infra*.

*Fifth*, TCAM's position ignores the existence of real factual disputes over the proper calculation of its newly-claimed damages. Because this Court ruled that there was no injury to TCAM, money damages should not be an issue for the various reasons discussed *infra*. However, if TCAM is allowed to change its position again, then the prejudice to PMI is even more severe at this point given the passage of time since the trial court heard arguments on summary judgment in early 2014. Indeed, on remand TCAM sought damages through September 2015, in the total amount of \$148,299.24. CP 2513-14 ¶ 10. It also sought compounding interest at a default rate of 18%, for a total of \$31,194.70.

CP 2675 ¶ 15. Lastly, it also claimed a 10% late charge, totaling an additional \$14,829.92. CP 2675 ¶ 16.

TCAM's suggestion that there is a "clear formula" the Court can use to calculate the amounts owing also misses the mark. CP 2504. The formula does not take TCAM's failure to mitigate into account. If TCAM has acted unreasonably, then PMI is entitled to a reduction in the amounts that TCAM claims it is owed, and, potentially, recoupment of all or some of the Protest Payments. These are issues that could only have been resolved by a factfinder, not by the summary procedure set out in RCW 7.24.080.

#### **VI. THE TRANSCRIPT OF THE ORAL ARGUMENT IN THE PRIOR APPEAL IS IRRELEVANT**

TCAM's argument that this Court should review the appellate transcript in the prior appeal is another attempt at misdirection. TCAM suggests that there is a smoking gun that PMI is trying to hide, specifically statements that were made regarding PMI's payments under protest. PMI is not trying to hide anything. Any suggestion to the contrary is eviscerated by the arguments PMI raised in its appellate motion for clarification and reconsideration. *See* Mot. for Clarification & Recons., No. 71707-3-I; *see infra* Sec. E.

But that is not even a relevant question. At bottom, the only question in this second appeal (aside from the timeliness of TCAM's

various filings) is whether the trial court correctly applied this Court's Opinion when it declined to conduct a trial or award nearly \$200,000 in money damages to TCAM in a summary procedure. The transcript of the oral argument held before this Court on March 9, 2015 is not even theoretically relevant to that question.

To the extent that TCAM thought there were any errors or misstatements in the Opinion that could be rectified by reference to the oral argument transcript, it was required to raise those issues in a motion for reconsideration before this Court – like PMI did. It is far too late for TCAM to try to undo the Opinion now. *See* RAP 18.8.(b) (providing that late motions for reconsideration will only be considered in “extraordinary circumstances and to prevent a gross miscarriage of justice”); *Shumway v. Payne*, 136 Wn.2d 383, 392, 964 P.2d 349 (1998). Moreover, the request is at direct odds with RAP 9.11, as explained in PMI's Resp. to Mot. of Appellant for Leave to Cite Oral Argument.

It is also not even clear that the statement mentioned by the trial court was made at oral argument. *It more likely alludes to statements TCAM made in their appellate briefs (such as the excerpts cited above), or from the language of the Opinion* Moreover, TCAM's own opening brief in the first appeal noted that PMI had made payments under protest, while suggesting that they had stopped by the time summary judgment was

entered in PMI's favor. Br. of Appellant at 24-25 (No. 71707-3-I). (explaining that PMI "has made several payments ... under protest. *Id.* As of January 2014, PMI owed TCAM approximately \$35,710.40. *Id.*) But TCAM then closes its brief with a remand request that did not include a demand for money damages in any amount. Br. of Appellant at 50 (No. 71707-3-I). Any of these sources provide sufficient support for a determination that TCAM was not pursuing additional money damages, without need of undertaking an examination of what was said at oral argument. TCAM is trying to create confusion about this Court's instructions to the trial court, but the transcript on oral argument is not relevant to that quest, and is inadmissible under RAP 9.11

#### **VII. PMI IS ENTITLED TO ATTORNEYS' FEES AND COSTS**

PMI should not have had to respond to this appeal or the various motions that TCAM filed in the trial court. PMI accepted the ruling of this Court and paid the attorneys' fees that it directed be awarded.<sup>13</sup> The parties' Lease provides that "the prevailing party shall be entitled to attorneys' fees and costs." CP 41. TCAM has been awarded its reasonable fees and costs as the prevailing party through entry of final judgment on October 27, 2015. CP 2792-96. If PMI prevails on appeal, then PMI asks that its fees be awarded as the prevailing party on the post-

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<sup>13</sup> Notwithstanding its payment, TCAM has refused to enter a satisfaction of judgment.

judgment aspects of the case, as well as its fees in this second appeal. *See, e.g., Marassi v. Lau*, 71 Wn. App. 912, 913, 859 P.2d 605 (1993), *rev'd on other grounds, Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (accepting proportionality approach to fee awards); *see also Blue Mountain Serv. Corp. v. Zlateff*, 53 Wn. App. 690, 769 P.2d 883 (1989) (error to deny fees to a prevailing party where a lease specifically awards them).

### VIII. CONCLUSION

TCAM should be happy with the windfall result it got the first time it appealed. Not only did it prevail on its lease interpretation argument (and a corresponding attorney fee award), it retained over \$174,000 that PMI paid under protest, even though TCAM never proved that it was entitled to that amount, and even though TCAM did not show that it made reasonable efforts to re-sell the parking passes it retained.

Now, after this Court has ruled, TCAM is trying to come back for more. But TCAM is not entitled to change its position and re-open the case to take a second bite of the damages apple. Further litigation was foreclosed by the Opinion, and so the trial court did not err when it denied TCAM's motion for further relief and entered final judgment. The case is over, as PMI, the trial court, and this Court have already recognized. The

trial court should be affirmed, and PMI should be awarded its fees and costs.

Respectfully submitted this 15<sup>th</sup> day of June, 2016.

Davis Wright Tremaine LLP

By /s/ Rhys M. Farren  
Rhys M. Farren, WSBA #19398  
Anthony S. Wisen, WSBA #39656  
Attorneys for Pacific Market International, LLC

### CERTIFICATE OF SERVICE

I certify that on the 15<sup>th</sup> day of June, 2016, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

Thomas F. Peterson	<input checked="" type="checkbox"/>	U.S. Mail
Eleanor H. Walstad	<input checked="" type="checkbox"/>	Electronic Mail
Socius Law Group, PLLC	<input type="checkbox"/>	Legal Messenger
Two Union Square	<input type="checkbox"/>	Hand Delivery
601 Union Street, Suite 4950		
Seattle, WA 98101-3951		
Email: tpeterson@sociuslaw.com		
Email: ewalstad@sociuslaw.com		

  
Susan Bright

# **APPENDIX 1**

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Honorable Laura Gene Middaugh

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PACIFIC MARKET INTERNATIONAL,  
LLC,

Plaintiff,  
v.

TCAM CORE PROPERTY FUND  
OPERATING LP, a Delaware limited  
partnership,  
Defendant.

NO. 12-2-06885-2 SEA

DEFENDANT’S ANSWER TO  
COMPLAINT, AFFIRMATIVE  
DEFENSES, AND COUNTERCLAIM

For its answer, affirmative defenses, and counterclaim to Plaintiff’s Complaint for Declaratory Judgment (“Complaint”), Defendant, TCAM Core Property Fund Operating LP (“TCAM”), admits, denies, affirmatively asserts and alleges as follows:

I. ANSWER

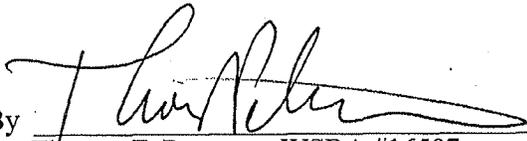
- 1.1 Answering paragraph 1 of the Complaint, TCAM admits the same.
- 1.2 Answering paragraph 2 of the Complaint, TCAM admits the same.
- 1.3 Answering paragraph 3 of the Complaint, TCAM admits the same.
- 1.4 Answering paragraph 4 of the Complaint, TCAM admits the same.
- 1.5 Answering paragraph 5 of the Complaint, TCAM admits the allegations in the first, second, and third sentences of said paragraph, denies that the Port does not enter into fixed, long-term rental agreements, and lacks sufficient information regarding whether or not



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DATED this 7<sup>th</sup> day of May, 2012.

SOCIUS LAW GROUP, PLLC

By   
Thomas F. Peterson, WSBA #16587  
Attorneys for Defendant

## **APPENDIX 2**

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

PACIFIC MARKET INTERNATIONAL, LLC, )  
a Washington limited liability company, )  
Plaintiff, )  
v. )  
TCAM CORE PROPERTY FUND )  
OPERATING LP, a Delaware limited )  
partnership, )  
Defendant. )

No. 12-2-06885-2 SEA  
**REPLY TO COUNTERCLAIM**

Pacific Market International, LLC (“PMI” or “Plaintiff”), by and through its attorneys of record, alleges the following as its Reply to the Counterclaim of the Defendant, TCAM Core Property Fund Operating LP (“TCAM” or “Defendant”), pleaded in Defendant’s Answer, Affirmative Defenses and Counterclaim:

**I. REPLY**

1. Answering Paragraph 3.1 of the Counterclaim, PMI admits the allegations.
2. Answering Paragraph 3.2 of the Counterclaim, PMI admits that TCAM is a Delaware limited partnership. PMI denies that TCAM is “doing business” in the state of Washington.
3. Answering Paragraph 3.3 of the Counterclaim, PMI admits the allegations.

1 of whether it has exercised a right to use or entered into an individual lease or rental  
2 arrangement for the stall.

3 13. Answering Paragraph 3.13 of the Counterclaim, PMI admits the allegations.

4 14. Answering Paragraph 3.14 of the Counterclaim, PMI denies the allegations.

5 15. Answering Paragraph 3.15 of the Counterclaim, PMI admits that Lease language  
6 speaks for itself.

7 16. As further answer to the Counterclaim, PMI incorporates the allegations of its  
8 Complaint.

## 9 II. AFFIRMATIVE DEFENSES

10 As further reply to the Counterclaim, plaintiff PMI alleges the following affirmative  
11 defenses:

- 12 A. Failure to state a claim.
- 13 B. Misrepresentation or detrimental reliance.
- 14 C. Waiver.
- 15 D. Estoppel.
- 16 E. Lack of mutual assent on a contract term.
- 17 F. Failure to mitigate damages.

## 18 III. RELIEF REQUESTED

19 WHEREFORE, having alleged the foregoing as its reply and affirmative defenses,  
20 Plaintiff PMI prays for relief and judgment as follows:

- 21 A. For judgment in favor of PMI on each and every request for relief sought in  
22 PMI's original Complaint;
  - 23 B. For dismissal of the Counterclaim with prejudice;
  - 24 C. For leave to amend the pleadings as justice may require to state other claims or  
25 to conform to proof as entered at trial; and
  - 26 D. For such other and further relief as the Court deems just or equitable.
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DATED this 29th day of October, 2012.

Davis Wright Tremaine LLP  
Attorneys for Pacific Market International, LLC

By /s/ Rhys M. Farren  
Rhys M. Farren  
WSBA #19398

## **APPENDIX 3**

Honorable Laura Gene Midaugh  
Hearing: January 31, 2014 @ 9:00 a.m.  
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PACIFIC MARKET INTERNATIONAL,  
LLC,

Plaintiff,

v.

TCAM CORE PROPERTY FUND  
OPERATING LP, a Delaware limited  
partnership,

Defendant.

NO. 12-2-06885-2 SEA

DEFENDANT TCAM CORE  
PROPERTY FUND OPERATING LP'S  
MOTION FOR SUMMARY  
JUDGMENT

**I. RELIEF REQUESTED**

This lawsuit involves a dispute over the terms of a commercial lease in which Plaintiff Pacific Market International, LLC ("PMI") refuses to pay for 34 parking stalls despite the lease term, "tenant **shall** lease thirty four (34) parking spaces in the Garage ...." (Declaration of Thomas F. Peterson ("Peterson Decl."), Ex. A) (emphasis added). Defendant TCAM Core Property Fund Operating LP ("TCAM"), as the landlord, intentionally negotiated its lease with PMI to include language requiring PMI to lease a certain number of parking stalls. PMI's after-the-fact arguments that it did not want this obligation and did not realize that the lease it executed included this language may reflect carelessness and inattention but does not allow PMI to shirk its contractual responsibilities. The lease contains the objective manifestation of the parties' intent that PMI is required to lease a

DEFENDANT TCAM'S MOTION FOR  
SUMMARY JUDGMENT

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Facsimile 206.838.9101

1 **H. PMI is in Breach of the Lease**

2 Within a month after the Lease was executed, TCAM billed PMI for the 34 parking  
3 stalls in the Garage and has continued to bill PMI for its proportionate share of the parking  
4 stalls. (Awad Decl., ¶ 12; Peterson Decl., Ex. B, Shea dep. at 82:25-83:5.) PMI increased  
5 the size of its rentable square feet and thus its proportionate share of parking stalls increased  
6 to 44. (Awad Decl., ¶ 12.) Since the beginning of the lease term, PMI has paid the Port for  
7 approximately 13 to 19 parking stalls and TCAM has credited PMI for these payments. (*Id.*)  
8 However, PMI refused to pay the amount owed. (*Id.*) Instead, as PMI is required under the  
9 Lease to be current on all payments to TCAM in order to do any projects on the Premises,  
10 such as a remodel, it has made several payments for the amounts then owed under protest.  
11 (*Id.*) Currently, PMI owes TCAM approximately \$35,710.40. (*Id.*)

12 **III. ISSUES PRESENTED**

13 Whether this Court should grant summary judgment in favor of the landlord, TCAM,  
14 where the Lease requires the tenant, PMI, to pay for 34 parking stalls and PMI has failed to  
15 do so.

16 **IV. EVIDENCE RELIED UPON**

17 This motion is based on the pleadings and files herein and the Declaration of Thomas  
18 F. Peterson, with attached exhibits, and the Declaration of Keith Awad.

19 **V. ARGUMENT & AUTHORITY**

20 **A. Summary Judgment Standard**

21 Summary judgment on an issue of contract interpretation is appropriate when it is a  
22 question of law: either the interpretation does not depend on the use of extrinsic evidence or  
23 there is only one reasonable inference from the extrinsic evidence. *Renfro v. Kaur*, 156 Wn.  
24 App. 655, 661, 235 P.3d 800 (2010), review denied, 170 Wn.2d 1006, 245 P.3d 227 (2010).  
25 Thus, if a contract's written words have but one reasonable meaning when read in context, a  
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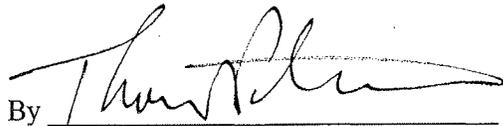
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**VI. CONCLUSION**

For the foregoing reasons, TCAM respectfully requests that the Court find that the Lease requires PMI to pay for its proportionate share of parking stalls in the Garage and grant its motion for summary judgment. The parties negotiated and executed a Lease that expressly states, "Tenant shall lease thirty four (34) parking spaces," and that term should be enforced. A proposed order is attached for the Court's convenience.

DATED this 3<sup>rd</sup> day of January, 2014.

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587  
Eleanor H. Walstad, WSBA #44241  
Attorneys for Defendant

## **APPENDIX 4**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PACIFIC MARKET INTERNATIONAL,  
LLC,

Plaintiff,

v.

TCAM CORE PROPERTY FUND  
OPERATING LP, a Delaware limited  
partnership,

Defendant.

NO. 12-2-06885-2 SEA

DEFENDANT TCAM CORE  
PROPERTY FUND OPERATING LP'S  
REPLY BRIEF IN SUPPORT OF ITS  
MOTION FOR SUMMARY  
JUDGMENT

**A. The Lease Requires PMI to Pay for Its Proportionate Share of Parking Stalls**

The lease that the parties negotiated over the course of a year requires PMI to pay for its proportionate share of parking stalls. Item 13 of the Basic Lease Provisions, where important terms such as the rent are found, creates the unambiguous obligation by providing that "Tenant shall lease thirty four (34) parking spaces in the Garage"; Paragraph 18(a) of the Standard Lease Provisions, which complement the Basic Lease Provisions, explains the mechanics of the obligation, including that "Parking fees for each month shall be paid to the Landlord simultaneously with Rent."<sup>1</sup> (Peterson Decl., Ex. A.) PMI's argument that it is not so required not only fabricates language in Paragraph 18(a) that is not there, i.e., "but not the

<sup>1</sup> TCAM's counsel explained "I don't believe the basic lease info is meant to be a summary. They are both terms of the lease." (Third Declaration of Thomas F. Peterson ("3d Peterson Decl."), Ex. SS, Moore dep. at 38:19:20.) They are not merely a recitation of facts. (PMI's Oppo. at 12:10.)

DEFENDANT TCAM'S REPLY IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT

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1 **H. The Parties' Practice and Custom is That PMI Leases the Parking Stalls from**  
2 **TCAM, Not From The Port of Seattle**

3 TCAM is required to lease 133 parking stalls in the Garage from the Port of Seattle.  
4 In turn, PMI is required under the lease to pay for its proportionate share of those parking  
5 stalls. Then those employees of PMI who wish to use one of PMI's parking stalls effectively  
6 lease it from PMI, and pay the operator of the Garage directly. (See Shea Decl., ¶ 5; Supp.  
7 Shea Decl., ¶ 3.) TCAM bills PMI for the remainder in order to pay the Port. (Supp. Shea  
8 Decl., ¶ 4.) The actual practice reflects the lease: PMI is obligated to pay for its  
9 proportionate share of parking stalls.<sup>8</sup>

10 PMI had no relationship with TCAM prior to the lease, so there was no practice or  
11 custom between the parties or "dramatic change in [their] relationship prior to the lease  
12 execution." (PMI's Oppo. at 19:2.) PMI's sublease with RealNetworks is only relevant in  
13 that it shows that PMI is aware of the language necessary to create an option instead of an  
14 obligation to lease parking stalls.

15 **I. This is An Action for Declaratory Judgment; Mitigation is Irrelevant**

16 Both parties are seeking the Court's interpretation of the lease, an executory contract  
17 that is still being performed, and a ruling on whether PMI is required to pay for its  
18 proportionate share of parking stalls. Neither party has brought a breach of contract claim.  
19 Mitigation is simply not an issue in this case. Even if it were, the duty to mitigate runs both  
20 ways and PMI has not passed the cost on to its employees or sought to sublease the parking  
21 stalls.

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24 <sup>8</sup> Whether or not there was a different practice under PMI's Sublease with RealNetworks, which stated that PMI  
25 had the "right but not the obligation" to lease parking stalls, is irrelevant because TCAM did not negotiate that  
26 lease and the lease gave PMI the option but not the obligation to lease parking stalls. (Peterson Decl., Ex. EE.)

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DATED this 27<sup>th</sup> day of January, 2014.

SOCIUS LAW GROUP, PLLC

By   
Thomas F. Peterson, WSBA #16587  
Eleanor H. Walstad, WSBA #44241  
Attorneys for Defendant

DEFENDANT TCAM'S REPLY IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT

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## **APPENDIX 5**

NO. 71707-3

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

---

**BRIEF OF APPELLANT**

---

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“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.”  
(Assignment of Error 1.)

Is TCAM, rather than PMI, entitled to a monetary judgment and award of attorneys’ fees and costs under the prevailing party provision in the commercial office space lease? (Assignment of Error 2.)

#### IV. STATEMENT OF CASE

The parking spaces at issue in this dispute are in a parking garage (the “Garage”) adjacent to and partly underneath the World Trade Center North Office Building located at 2401 Elliot Avenue, Seattle, Washington 98121, (the “Building”), which is currently owned by TCAM and in which PMI is a tenant. CP 548-49 (Declaration of Brian Shea (“Shea Decl.”), ¶ 3).

TCAM purchased the Building from WRC Wall Street, LLC in 2007. CP 67 (Declaration of Keith Awad (“Awad Decl.”), ¶ 3). TCAM is owned by Teachers Insurance and Annuity Association-College Retirement Equities Fund (“Teachers”), a nonprofit organization that manages retirement funds for teachers and public employees. CP 946 (Second Declaration of Keith Awad (“2d Awad Decl.”), ¶ 2).

The Garage is, and always has been, owned by the Port of Seattle. CP 67 (Awad Decl., ¶ 3); CP 947 (2d Awad Decl., ¶ 5); CP 922-934

under protest. *Id.* As of January 2014, PMI owed TCAM approximately \$35,710.40. *Id.*

After the parties engaged in discovery, the parties filed cross-motions for declaratory judgment, asking the trial court to interpret the Lease to determine whether PMI is required to pay for its proportionate share of parking spaces. CP 71-95 (TCAM's MSJ); CP 523-547 (PMI's MSJ). In its briefing, PMI claimed that it did not intend to be required to pay for all of its parking spaces, but only those that it actually used, and argued that the Lease reflects its intent. CP 546 (PMI's MSJ at 24:13-14); CP 971 (PMI's Oppo. at 24:24-26). Specifically, PMI argued that Paragraph 18(a) provided that PMI was not obligated to pay for all of its parking spaces and that this provision supersedes Item 13. CP 531 (PMI's MSJ at 9:22-24). In making this argument, PMI relied on an internal conflict provision in the Lease which provides that "[i]n 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." CP 107-108 (Executed Lease at p. 4); CP 531 and 537 (PMI's MSJ at 9:8-10 and 15:6-9); CP 948 (PMI's Oppo. at 1:19-20). This is the argument that the trial court adopted in granting PMI's Motion for Summary Judgment and denying TCAM's cross-motion. CP 1100-1102 (Amended Judgment).

parties. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). Here, TCAM's Lease provides for fees and costs to the prevailing party. CP 136 (Executed Lease, Paragraph 19(a)). Therefore, if TCAM prevails on appeal it is entitled to costs and its reasonable attorneys' fees incurred at the trial court level and in its appeal.

## VI. CONCLUSION

The Court should reverse the superior court's order granting summary judgment in PMI's favor. The superior court failed to apply the rules of contract interpretation and instead adopted PMI's contorted and nonsensical interpretation of the Lease. The superior court erred in holding that PMI was not obligated to pay for parking. As the Lease plainly states that PMI "shall lease thirty four (34) parking spaces in the Garage," the Court should remand this case for entry of an order to this effect. The Court should also award attorneys' fees and costs incurred at the trial court level and on appeal to TCAM as the prevailing party.

Respectfully submitted this 9<sup>th</sup> day of June, 2014

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## **APPENDIX 6**

NO. 71707-3

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

---

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

---

**REPLY BRIEF OF APPELLANT**

---

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spaces in the Garage.” CP 107 (Executed Lease, p. 3, Item 13). PMI knew this and simply failed to pursue a change in the Lease language.

**D. TCAM is Entitled to Judgment in its Favor**

The main thrust of this case is the interpretation of the Lease. The only claims asserted in the complaint and counterclaim were for declaratory judgment regarding the meaning of the Lease. Although failure to mitigate was raised as an affirmative defense in both the answer and reply, it is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment.

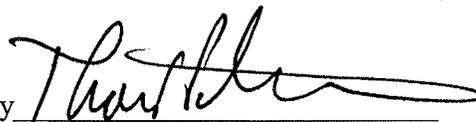
In any event, PMI’s argument regarding failure to mitigate damages is spurious. PMI has not surrendered any parking spaces to TCAM. CP 947 (2d Awad Decl., ¶ 8.) PMI is in a far superior position to mitigate its damages than TCAM is: TCAM is not entitled under the Lease to take control of or sublease PMI’s parking spaces and would not even know how many spaces PMI would want to sublease or assign. PMI claims that “its use of the parking spaces is limited to ‘Tenant, its officers and employees only.’” PMI’s Brief at fn. 2. However, nothing in the Lease prohibits PMI from subleasing or assigning its parking stalls.

The only evidence related to the unused parking spaces weighs in TCAM’s favor. On the one hand, Mr. Shea claims to be aware of individuals interested in purchasing monthly parking passes but provides

that the Lease creates an “as needed” parking arrangement, a term not in the Lease, is at odds with the plain language of the Lease. This interpretation is also not supported by the evidence PMI cites. The evidence instead shows that the Lease was not effectively a renewal of the RealNetworks sublease, PMI knew or should have known that TCAM would pass on the cost of the parking spaces to PMI, to accomplish this the Lease stated that PMI “shall lease” the parking spaces, and PMI knew that the Lease created a “shall lease” parking arrangement. Thus, the Court should reverse the superior court’s order granting summary judgment in PMI’s favor and remand this case for entry of an order to this effect. The Court should also award attorneys’ fees and costs incurred at the trial court level and on appeal to TCAM as the prevailing party.

Respectfully submitted this 10<sup>th</sup> day of September, 2014

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