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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

KEY DEVELOPMENT INVESTMENT, LLC and TRINITY GLASS
INTERNATIONAL, INC.

Respondent,

v.

PORT OF TACOMA,

Appellant.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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**OBJECTION TO RESPONDENT/CROSS-APPELLANT'S
CITATION TO "PLAINTIFFS' STATEMENT OF UNCONTESTED
FACTS--CORRECTED"**

The Port of Tacoma ("Port") objects to Key Development Investment LLC's ("Key") and Trinity Glass International, Inc.'s ("Trinity") citations to a document titled "Plaintiffs' Statement of Uncontested Facts--Corrected" to support factual assertions throughout the Answering Brief and Cross Petition Brief. This document is included in the Clerk's Papers at CP 1690-CP 1727. This 37-page document consists of trial counsel's own "summaries" of statements found in various other pleadings, declarations, and depositions, taken out of context, many of which are not "summaries" at all, but are instead conclusory misrepresentations of the facts or are, at best, misleading.

The document states it was submitted below "[t]o facilitate the Court's consideration of the pending summary judgment motions," includes facts "which **should be** uncontested," and provides "citations to the record from which those facts may be verified." CP 1690 (emphasis added). The trial court never found that any of the "facts" set out in this document were "uncontested," nor were these "facts" ever admitted by the Port to be uncontested. The Port objected below to this document (*see* CP 228 and fn2, CP 229; CP 530-534; CP 569-579), and objects again here.

This Court and the Port are forced to search for the page number

cited within the “Statement of Uncontested Facts” and then search again for the actual page in the record on which the asserted “fact” is found. However, once the “fact” is located, it is often not what the “summary” reported it to be. Each and every statement in the Cross-Petitioners’ Brief that cites the “Plaintiff’s Statement of Uncontested Facts--Corrected” should be stricken from the Cross-Petitioners’ Brief as a violation of RAP 10.3(a)(5).

REPLY ON APPELLANT’S OPENING BRIEF

I. RESTATEMENT OF FACTS

The Port relies upon the Statement of Facts set out in its opening brief, which is incorporated as if set forth fully herein. It is important for the Court to understand the course of events that took place over a period of approximately eight months. The Port therefore sets out the following “time line” for the Court’s consideration.

September - December 2007: The Port was engaged in planning for the “massive” \$850 million (CP 338) “East Blair Project.” CP 334-340. During this period of time, with the permission of Key (CP 1397, lines 21-25; CP 1398, lines 1-9), Robert Hacker, a broker with CB Richard Ellis, approached a Port real estate representative on behalf of Key to inquire if the Port might be interested in acquiring Key’s property. CP 60-62. On September 21, 2007, Jay Stewart signed an agreement at the

request of Key's in-house lawyer, Chong So, to keep conversations regarding the property confidential. CP 156; CP 1344-1345. This Confidentiality Agreement states, in part, "[a]ll information provided regarding the purchase and sale, and or acquisition of the property in question shall remain confidential to the parties **for the sole purpose of the evaluation and possible interest in the purchase and or acquisition of the property.**" CP 1345 (emphasis added).

On November 27, 2007, Harvey Widman submitted a second letter of intent to Key for the purchase of its property for \$32.8 million (CP 347-350), after being told by Key that his first offer of \$27 million was too low. CP 343-344. However, he received no response from Key, nor did Key attempt any further negotiations with Mr. Widman. CP 344. Mr. Widman "considered it a dead issue within a matter of a few weeks." *Id.*

In early December of 2007, Jack Hedge, a Port Real Estate Manager, and Eivor Donohue, one of the owners of Superlon, inspected Key's property. CP 156. On December 19, 2007, John Bauder, Robert Hacker's partner, sent an email to Chong So, telling him that the Port was "very, very interested" in buying the property (CP 1684), but acknowledged that obstacles remained to be resolved in his qualifying statement that the Port "just can't seem to get out of their own way." CP 1688.

In December of 2007, “Key received a proposal and letter of intent from MetalTech, Inc., to lease a portion of the Property.” CP 38.

January 2008 - March 24, 2008: On January 9th, the first draft of what was later signed by the parties as the “Agreement” was sent by Jay Stewart to John Bauder. CP 366-370. The January 9, 2008 draft document and all subsequent iterations clearly indicated that the Port had no intention of making an unconditional promise to enter into a purchase and sale agreement with Key, and that even if it did enter into an actual purchase and sale agreement, there would still be contingencies. *See* CP 365- 458.

On January 14th, Bob Emerson, the Port’s Senior Director of Industrial Development and Real Estate (CP 262), met with Ki Ham, a principle shareholder of Key. CP 52-53. During the meeting, Mr. Ham told Mr. Emerson that his property was not for sale. *Id.* Mr. Emerson countered with words to the effect, “Good, because we don’t want to have to buy it.” *Id.*

E-mail correspondence and draft agreements went back and forth between Mr. Stewart and representatives of Key, resulting in **ten** different iterations of the document between January 9 and March 19. CP 365-458. On March 21, the Agreement, now titled “Intent to Purchase and Right of Entry,” was signed by Jay Stewart on behalf of the Port, and on March 24

was signed by Alex Lee on behalf of Key. CP 94.

This Agreement, for which the Port paid Key a nonrefundable \$10,000, gave the Port a period of “30 days from mutual execution” to “reach a mutually acceptable Purchase and Sale Agreement,” with the condition that “[s]hould Buyer and Seller not execute a PSA as provided above, the transaction contemplated by this Agreement shall be terminated, and Buyer and Seller shall have no further obligations to each other with respect to the Property.” CP 91. The Agreement also granted the Port 90 days to “satisfy itself, **in its sole discretion** regarding the legal and physical condition of the subject Property and to obtain **Port Commission approval** of purchase of the Property.” *Id.* From the initial draft in January until and including when the Agreement was finally executed in March, Key and Trinity knew that even if Key and the Port executed an actual purchase and sale agreement, such a purchase and sale agreement would include contingencies.

On March 15, a real estate broker with Collier’s International presented Key with another proposal and draft lease for MetalTech to lease approximately 45,742 square feet of Key’s Property for 62 months. CP 158. Key and Trinity contend that they did not accept because the Port was insisting on a short-term lease if it bought the property. However, the real estate agent for MetalTech at that time, Wil Johnston, stated by sworn

declaration:

MetalTech was interested in a certain building because of its size and available power. The property owner/management, however, tried to move MetalTech to another location where the power distribution was not good and would have been very expensive to correct. . . . MetalTech then chose to lease in Sumner. To the best of my recall, we received no indications during our negotiations that Key/Trinity were in negotiation to sell to the Port of Tacoma, nor was an issue raised about a short-term lease.

CP 303-304.

The President of MetalTech, Matt Steinman, stated by sworn

declaration:

[D]uring our negotiations, we were never told that the Port of Tacoma was going to buy the property nor was the issue of a short-term lease raised. We stopped negotiating with Key/Trinity because they were unwilling or unable to provide me with the building and power that my business required. In addition, they seemed to be increasing the price to an amount that made leasing unfavorable to us.

CP 351-352.

March 24 - April 23, 2008: On April 3, 2008, Collier's

International presented Key with a proposal and draft lease for

mkConstructs to lease 83,041 square feet of the property for 38 months.

Key and Trinity contend that they did not accept because of the Port's

demand for short term leasing. CP 158-159. However, mkConstructs

procurement manager at that time, Virginia Sledjeski-Rae, stated by sworn

declaration:

The negotiations for that lease ceased after May 2008, primarily because of internal financial difficulties facing mkConstructs. . . . at no time was there ever mention of a need for a short-term lease, and the reason the lease did not go through was not related to any issue pertaining to a short-term lease. In fact, at that time, mkConstructs would have preferred a short-term lease.

CP 332.

During the 30-day period of the Agreement, Key and the Port attempted to negotiate a mutually acceptable Purchase and Sale Agreement, but were unable to do so. The Agreement terminated by its own terms on April 23, 2008.

Key and Trinity filed suit against the Port in November of 2008, alleging that the Port engaged in tortious conduct (CP 38-41) during the months preceding the signing of the Agreement, i.e., between September of 2007 and March 24, 2008. CP 182 (“Key is seeking recovery for breach of common law duties, nearly all of which are antecedent to the Intent to Purchase.”).

II. ARGUMENT

This Court reviews a trial court’s decision to grant or deny a motion for reconsideration for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362

(1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002) (citing *Littlefield*, 133 Wn.2d at 46-47, 940 P.2d 1362).

On May 28, 2010, the trial court granted the Port's motion for summary dismissal of the tort claims of both Key and Trinity because, inter alia, there were "no exceptions to the economic loss rule." CP 1040-1041. The trial court's June 18 order granting reconsideration of its May 28 order states, "Trinity's tort claims shall not be dismissed under the economic loss rule." CP 1088. The trial court indicated orally that it was reinstating Trinity's tort claims because, as a third-party beneficiary, it did not "have an opportunity to allocate risk." Verbatim Report of Proceedings, page 13, lines 13-17. The trial court's decision to reinstate Trinity's tort claims was manifestly unreasonable and was based upon untenable grounds.

A. *Eastwood and Affiliated* did not change the law in Washington regarding the "economic loss rule." The Supreme Court merely gave the rule a new name.

Trinity incorrectly refers to "the Supreme Court's former

formulation of the [economic loss] rule” being set forth in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), and asserts that the rule applied in *Alejandre* “has now been rejected by the Supreme Court.” Answering Brief, page 26 (emphasis added). Not so. The Supreme Court was careful to specifically state the contrary: “Our decisions in this case and in *Eastwood* **leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances.**” *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 450, 243 P.3d 521 (2010) (emphasis added).

While the *Eastwood* court issued three opinions, none garnering a majority, **seven** justices affirmed the court’s previous holdings in *Alejandre, supra*, *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986 (1994), *Atherton Condo. Apartment-Owners Bd. Of Dir. V. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990) and *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987). See *Eastwood*, 170 Wn.2d 380, 390-392, 241 P.3d 1256 (lead opinion), and at 414-416 (Chambers, J., concurring) (2010).

The independent duty doctrine does not change or negate the economic loss rule: it merely gives the old rule a new name to reflect the long-standing tort principle that if a party breaches a duty **that arises independently of any contract**, the aggrieved party may seek tort

damages. *Eastwood*, 170 Wn.2d at 387, 389, 241 P.3d 1256 (“The term “economic loss rule” has proved to be a misnomer ... the rule is merely a case-by-case question of whether there is an independent tort duty . . . A review of our cases on the economic loss rule shows that ordinary tort principles have always resolved the question.”).

B. Under Washington law, a third-party beneficiary has the right to contractual remedies, and the economic loss rule/independent duty doctrine applies to a third-party beneficiary.

It is well established in Washington that third party beneficiaries have the right to maintain an action for breach of contract and can enforce a contract provision to the same extent that the parties can enforce it.

Grand Lodge of Scandinavian Fraternity of America, Dist. No.7, 2 Wn.2d 561, 569, 98 P.2d 971 (1940); *Kinne v. Lampson*, 58 Wn.2d 563, 567, 364 P.2d 510 (1961).

It is also well established in Washington that the economic loss rule/independent duty doctrine does not require contractual “privity.” *See Affiliated*, 170 Wn.2d at 448, fn1, 243 P.3d 521 (discussing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 209 Wn.2d 406, 745 P.2d 1284 (1987), in which plaintiff was not in contractual privity with the defendant); *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 833, 881 P.2d 986 (1994) (economic loss rule applies to

plaintiffs who are not in privity with the defendant but who claim economic losses from the breach of a contract between the defendant and a third party); *Baddeley v. Seek*, 138 Wn. App. 333, 336, 156 P.3d 959 (2007) (economic loss rule did not apply where plaintiffs were neither a party to a contract nor a third party beneficiary of the contract); *Jackson v. City of Seattle*, 158 Wn. App. 647, 658, 244 P.3d (2010) (abrogating *Borish v. Russell*, 155 Wn. App. 892, 230 P.3d 646 (2010) (“The idea that there must be privity between the parties before the economic loss rule comes into play would seem to be at odds with the leading case of *Berschauer/Phillips*.”)).

Trinity’s assertion that “the rule limiting contract parties to their contractual remedies does not apply to nonparties to the contract” (Answering Brief at 30) is contrary to Washington law.

C. The trial court erred in ruling that the economic loss rule did not apply to Trinity because it was a third-party beneficiary of the Key/Port Agreement, and thus did not have the opportunity to allocate risk.

The trial court found that since a third-party beneficiary does not have the opportunity to allocate risk within the contract that bestows a benefit upon it, the economic loss rule does not apply to Trinity, which it acknowledged was a third-party beneficiary of the Key/Port Agreement. June 18, 2010 Verbatim Report of Proceedings, page 13 (“If you’re a

third-party beneficiary, you do not, by definition have an opportunity to allocate risk so the economic loss rule could not apply in that context, as a matter of law, it seems to me, and I agree that I made a mistake.”).

The trial court’s decision was manifestly unreasonable because it is “outside the range of acceptable choices” and is based upon untenable grounds, given the court’s acknowledgement that Trinity was a third-party beneficiary of the Key/Port Agreement and the fact that the economic loss rule/independent duty doctrine does apply to third-party beneficiaries in Washington.

Further, the trial court’s decision is based upon untenable grounds because the court’s finding that Trinity had no opportunity to allocate risk is unsupported by the record and by the statements of Trinity itself. In this unusual case, Trinity’s in-house counsel (CP 43), Chong So, and Trinity’s vice president and chief financial officer (CP 68; CP 94), Alex Lee, represented Key in the negotiations with the Port from the very beginning with Chong So’s September 2007 request that Jay Stewart sign a confidentiality agreement. The overlapping management and common ownership of Key and Trinity (CP 37; CP 52) resulted in Chong So’s and Alex Lee’s representation of Key in the negotiations with the Port, which gave Trinity the opportunity, through these Trinity employees, to allocate risk within the contract between the Port and Key.

Trinity's arguments appear to be based upon a position that, because the trial court granted reconsideration of its summary dismissal of Trinity's tort claims, it found that the Port owed tort duties to Trinity. However, the trial court made **no** finding that the Port owed any tort duty to Trinity. This finding is required under *Eastwood* and *Alejandre*:

The court determines whether there is an independent tort duty of care, and "[t]he existence of a duty is a question of law and depends on **mixed considerations of logic, common sense, justice, policy and precedent.**"

Eastwood, 170 Wn.2d at 389, 241 P.3d 1256 (emphasis added; citations omitted).

This Court should reverse the trial court's June 18 Order Granting Reconsideration and remand with instruction that trial go forward on Trinity's contract claims only.

D. The trial court had Trinity's arguments before it regarding the Port's "independent duties" to avoid various tortious conduct, and specifically found there was "no exception to the economic loss rule."

Furthering its incorrect position that the "independent duty doctrine" is somehow a new and different rule than the familiar "economic loss rule," Trinity argues that the trial court's granting reconsideration was "also correct under the 'independent legal duty' doctrine set forth by the Supreme Court in *Eastwood*." Answering Brief, page 32. As the *Eastwood* Court stated, the economic loss rule still exists under a new

name: the principle has not changed. The economic loss rule and the independent legal duty doctrine are one and the same.¹

First, the trial court's grant of reconsideration was not "correct" under the economic loss rule, as discussed in Section C above.

Second, the arguments presented regarding the torts of wrongful interference with business expectancies (Answering Brief at 32-35); intentional misrepresentation (*Id.* at 36-39), and negligent misrepresentation (*Id.* at 39-41) were **all** presented to the trial court during the summary judgment proceedings, but the court below nevertheless granted summary dismissal of both Key's and Trinity's tort claims. *See* CP 131-153; CP 174-177; CP 181-212.

During the summary judgment proceedings, the tort claims of Trinity and Key were presented as one and the same by use of the plural "Plaintiffs." *See* CP 131; CP 171. The trial court dismissed the tort claims of **both** Trinity and Key based upon the documents and arguments presented during the summary judgment proceedings, and upon its finding that no exception to the economic loss rule applied to **either** Key **or** Trinity. CP 1044. This finding is tantamount to a finding that the Port

¹ "Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy and precedent in a particular set of circumstances led us to the legal conclusion that the defendant did not owe a duty." *Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256.

owed no tort duties to either Key or Trinity.

In its brief, Trinity attempts to revise the basis of the trial court's decision on reconsideration from what it was -- that as a third-party beneficiary, Trinity had no opportunity to allocate risk, so the economic loss rule did not apply to Trinity -- to a **nonexistent** finding that the Port owed tort duties to Trinity. The court made no such finding, and Trinity did not seek reconsideration of the trial court's summary dismissal of its tort claims on that basis. *See* CP 1047-1049.

This Court should reverse the June 18 Order Granting Reconsideration of dismissal of Trinity's tort claims and remand for trial on Trinity's contract claims only.

E. The trial court's initial determination that there were "no exceptions to the economic loss rule" was correct.

Trinity argues that simply because Washington courts have recognized the existence of particular torts, a duty related to those torts automatically ran from the Port to Trinity in this case. Not true. Trinity bears the burden of establishing the existence of any tort duty owed to it by the Port. *Hutchins v. 1001 Fourth Av. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991). If there is no legal duty, there is no tort claim, regardless of any other facts. *Folsom v. Burger King*, 135 W.2d 658, 671, 958 P.2d 301 (1998). As the *Eastwood* court wrote, "When no

independent tort duty exists, tort does not provide a remedy.” *Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256.

The burden is on Trinity to convince **this** Court that, based upon “mixed considerations of logic, common sense, justice, policy and precedent” in the “particular set of circumstances” (*Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256), an independent tort duty ran from the Port to Trinity regarding business expectancies, intentional misrepresentations, and negligent misrepresentations.

1. Trinity’s expectation that its lease would be terminated if Key sold or leased its property imposed no duty on the Port because termination of an existing contract is not a “business expectancy.”

Trinity asserts that its “business expectancy” was the opportunity to terminate its lease with Key “as part of Key’s proposed sale of the Property to Widman in December of 2007,² or as part of the proposed re-lease of the Property to MetalTech or mkConstructs in March and April 2008.” Answering Brief at 33.

- (a) *Trinity had no “business expectancy under Restatement (Second) of Torts § 766B.*

Trinity characterizes the opportunity to **terminate** its existing

² Trinity cites “CP 1697 ¶ 36” to support this statement. There is no ¶ 36 at CP 1697. The Port objects again to all citations to this document and requests the Court to strike every factual statement citing CP 1690 – CP 1727.

contract with Key as the equivalent of “the exercise by a third party of an option to **renew or extend** a contract with the plaintiff.” Answering Brief at 38 (citing Restatement (Second) of Torts § 766B). However, § 766B of the Restatement “is concerned **only** with intentional interference with **prospective** contractual relations, **not yet reduced to contract.**”

Restatement (Second) of Torts § 766B, Comment a (emphasis added). *See also Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (“valid business expectancy includes any **prospective** contractual or business relationship that would be of pecuniary value”) (emphasis added). Trinity does not have a claim for wrongful interference with a business expectancy under § 766B of the Restatement because its contractual/business relationship with Key had already been reduced to contract and it was not **prospective**.

(b) *Trinity had no “business expectancy” under Restatement (Second) of Torts § 766.*

Restatement (Second) of Torts § 766 “is concerned only with intentional interference with subsisting contracts.” *Id.*, Comment a. Since Trinity’s contract with Key was a “subsisting” contract, Restatement § 766 might apply. This Section provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by **inducing or otherwise causing the third person not to perform the contract**, is subject to liability

to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement of Torts (Second), § 766 (emphasis added).

However, § 766 provides no basis for Trinity's claim, because it is applicable only where the third person (in this case, identified by Trinity as Key) is induced or caused **not** to perform an existing contract. Trinity does not claim that the Port's interference caused Key not to perform its existing contract with Trinity. Trinity thus has no claim for wrongful interference with a business expectancy under § 766 of the Restatement.

(c) *Trinity had no "business expectancy" under § 766A of the Restatement (Second) of Torts.*

Finally, § 766A of the Restatement of Torts (Second) provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Trinity does not claim that the Port prevented it from performing its contract with Key or caused Trinity's performance of its existing contract with Key to be more expensive or burdensome. Trinity thus has no claim for wrongful interference with a business expectancy under § 766 of the Restatement.

The opportunity to terminate an existing contract is not a “business expectancy” upon which a claim of wrongful interference can be based under the Restatement §§ 766, 766A, or 766B.

The Port thus owed no tort duty to Trinity related to Trinity’s “business expectancy” that its lease of Key’s property would be terminated in the event that Key found a new tenant or purchaser. The trial court’s original order dismissing Trinity’s claim of interference with business expectancies was correct. This Court should reverse the order granting reconsideration.

(d) The Port’s pre-Agreement oral representations to Key did not “cause the termination of Trinity’s expectancies.”

Trinity asserts that “Key and Trinity failed to avail themselves of the Widman, MetalTech, and mkConstructs opportunities” based on their reliance on misrepresentations made by Port employees regarding purchase of the Key property. Answering Brief at 35.

First, Trinity had no “business expectancy” related to the purchase of Key’s property, as discussed above.

Second, the “opportunities” presented by Widman, MetalTech, and mkConstructs belonged solely to Key as the property owner, not to Trinity. *See* CP 1079-1080 (Trinity admitting that it was “not claiming that it had ‘business relationships’ with those potential lessees (MetalTech or

mkConstructs) or with other prospective tenants or buyers”).

Even intertwined companies may not bring each other’s claims, based on the principle that once entities have chosen the benefits of incorporating a separate company, they may not then ignore that separateness whenever it benefits them. *See, e.g., Bross Utils. Serv. Corp. v. Aboubshait*, 618 F.Supp. 1442, 1445 (S.D.N.Y. 1985). Because Trinity had no authority to lease or sell Key’s property, it did not rely on any statements made by the Port employees, and did not fail to avail itself of any opportunity, for it had none.

Like the first essential element -- the existence of a valid business expectancy -- Trinity cannot establish the third essential element of wrongful interference with a business expectancy: a breach or termination of the expectancy by wrongful interference of the Port.

(e) *Trinity can produce no evidence of an improper purpose or improper means utilized by the Port.*

The alleged “evidence” of the Port’s “improper purpose or improper means” is identified as the “Port’s real estate director testified that he withheld material information because he was ‘concerned that if Trinity knew what was going on, Trinity might sell the property to someone else.’” Answering Brief at 35. The citation for the quoted language is to CP 1713-1714, ¶ 117, the “Statement of Uncontested Facts

-- Corrected.”

The language found at ¶ 117 on CP 1713-1714 is, “Mr. Emerson told Mr. Bauder that he had not informed Key and Trinity about the Port’s relocation efforts with regard to Superlon because he was concerned that if they knew what was going on, they might sell the property to someone else.”

In fact, the language set out in quotation marks as **Mr. Emerson’s** “testimony” at page 35 of the Answering Brief is a quotation of Trinity’s **trial lawyer’s own summary of his own deposition question to John Bauder**. *See* CP 1390-1391. Mr. Emerson said no such thing.³

After seeing this misrepresentation of facts in the Plaintiffs’ Motion for Partial Summary Judgment (*see* CP 138, lines 4-9), Mr. Emerson stated by sworn Declaration:

This is a false representation of the question that I was asked and a false representation of my belief as well. First of all, the questions pertained to the state of flux that surrounded the design processes existing up to that point in time. “Trinity” wasn’t even mentioned in this, and the questions did not pertain to whether someone else might be attempting to buy the property, which to my knowledge was not the situation anyway.

³ Trinity repeats this fabrication at 37 of its brief to support its argument that “Trinity is entitled to the inference that Port expected Trinity to be influenced by the Port’s misrepresentations and omissions.” Each and every citation to the “Statement of Uncontested Facts -- Corrected” should be stricken from Trinity’s and Key’s briefing.

CP 265, lines 8-21. *See also* CP 265, lines 21-23; CP 266-268, line 3.

In truth, Trinity did not and cannot produce any evidence whatsoever that the Port interfered with any of its business expectancies for an “improper purpose” or by “improper means.”

Trinity bases its interference with business expectancies claim on its contract with Key, as stated in the Answering Brief at 33: “the business expectancies actually at issue in this case are the opportunities Trinity had to terminate its existing financial obligations under its lease with Key.” Trinity has not and cannot present any evidence that the Port used any improper means that induced or caused Trinity not to perform its contract with Key or not to continue its business relation with Key. Trinity has thus failed to present any evidence to establish the fourth essential element of wrongful interference with business expectancies.

*(f) No act of the Port caused Trinity's loss of
“an estimated \$4.4 million.”*

Trinity asserts at page 35 of its brief that it “lost an estimated \$4.4 million from the lost opportunity to terminate its lease obligations before the real estate market soured.” Trinity did not “lose” \$4.4 million. Trinity already owed the \$4.4 million to Key under its existing lease. The fact that

Trinity had to continue paying its rent⁴ as a result of Key's decision not to "avail itself" of the Widman, mkConstructs, and MetalTech opportunities was not the "result" of any wrongful interference with its business expectancies by the Port, which is the fifth essential element of the tort.

The trial court's original order dismissing Trinity's wrongful interference with a business expectancy was correct. This Court should rule that the Port owed no tort duty to Trinity regarding business expectancies related to the potential purchase of Key's property, and should reverse the order reinstating Trinity's claim because terminating an existing contract is not a "business expectancy."

2. The Port owed Trinity no tort duty regarding any representations made to Key regarding the purchase of Key's property.

At page 36 of its brief, Trinity asserts, "Washington law imposes an independent legal duty not to commit fraud, regardless of whether plaintiff's injury is an economic loss or the parties also have a contractual relationship," quoting *Eastwood*, 170 Wn.2d at 789, 241 P.3d

⁴ Trinity misrepresents the Port's statement by asserting, "the Port acknowledges that Trinity 'would have benefited financially from termination of its lease with Key.'" Answering Brief at 35. What the Port actually wrote was "Trinity had no 'valid business expectancy' arising from the proposals made to Key for the purchase or lease of Key's property, even if it would have benefitted financially from termination of its lease with Key." Appellant's Opening Brief at 39. Such misrepresentation should not be countenanced by this Court.

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This is **not** what the *Eastwood* court wrote. Instead, what the *Eastwood* court stated is that “[e]conomic losses are **sometimes** recoverable in tort, even if they arise from contractual relationship. . . . Thus, the fact that an injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.” *Eastwood*, 170 Wn.2d at 788-789, 241 P.3d 1256 (emphasis added).

Trinity’s misinterpretation of the *Eastwood* language implies that if a particular tort has been acknowledged by Washington courts, the duty associated with that tort automatically applies to every individual or entity in every situation. This is not the law. A court must make a “case-by-case” legal determination of whether a duty runs from one party to another based upon “mixed considerations of logic, common sense, justice, policy, and precedent” applied to the “particular set of circumstances.” *Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256 (citations omitted).

In this case, a court must determine whether a potential purchaser of commercial real property owes any duty to the tenant of the property owner regarding oral statements made to the property owner during informal conversations preceding entry into a letter of intent. Based upon

logic, common sense, justice, policy, and precedent, the answer is most certainly “no.”

(a) *Trinity had no relationship with the Port that gave rise to a duty related to intentional misrepresentations.*

A legal duty to avoid intentional misrepresentations exists only where the person to whom someone is speaking has a right to rely on the truth of the representations being made. *West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002) (citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)). The tenant of a property owner has no right to rely on the truth of representations made by a potential buyer to the property owner during preliminary negotiations.

The failure to disclose material facts within a person’s knowledge constitutes fraudulent misrepresentation only when “a person is under a duty to speak.” *Oates v. Taylor*, 31 Wn.2d 898, 902-903, 199 P.2d 924 (1949). The Port had no duty to speak to Trinity at all. The Port engaged in informal discussions and preliminary negotiations regarding a letter of intent with Key and Key alone.

At page 37 of its brief, Trinity alleges that because the Port knew Chong So and Alex Lee were Trinity’s employees in addition to being Key’s representatives regarding a possible purchase of Key’s property, and because the Port was aware that termination of Trinity’s lease of

“Trinity had no contract with defendant” (CP 176), and is belied by the fact that Alex Lee signed the Agreement with the Port as Vice President of Key. CP 94.

“Judicial estoppel is an equitable doctrine precluding a party from asserting one position in a court proceeding and later seeking advantage by taking an inconsistent position.” *Skinner v. Holgate*, 141 Wn. App. 840, 843, 173 P.3d 300 (2007). “In short, judicial estoppel prevents a litigant from “playing fast and loose with the courts.” *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (citations omitted).

This Court should apply judicial estoppel in this case to prevent Trinity from “playing fast and loose” by taking the position in this appeal that Alex Lee and Chong So were representing both Trinity and Key in the negotiations leading up to the Agreement but that Alex Lee was only representing Key when he signed the Agreement as Vice President of Key.

Further, Trinity continues to “play fast and loose” with this Court by citing a false statement from the “Statement of Uncontested Facts -- Corrected” to support its argument about the Port employees’ intent. *See* Answering Brief at 37, citing “CP 1713-14 ¶ 117 (“Port real estate director testified that he was ‘concerned that if *Trinity* knew what was going on, Trinity might sell the property to someone else.’”) (emphasis by Trinity). This is sheer nonsense: Trinity had no authority or ability to sell Key’s

property.

What is stated at ¶ 117 of this document is: “Mr. Emerson told Mr. Bauder that he had not informed **Key and** Trinity about the Port’s relocation efforts with regard to Superlon because he was concerned that if **they** knew what was going on, **they** might sell the property to someone else.” CP 1713-1714 (emphasis added.) This time, Trinity makes a misrepresentation about a misrepresentation. *See* CP 265. The Port again asks the Court to strike each and every “fact” statement supported by citation to CP 1690-CP 1727, including the “representations” allegedly made by Port employees set out in the Answering Brief at 38.

The Court should rule that Trinity is judicially estopped from arguing that the Port was in discussions and negotiations with Trinity leading up to the Agreement between the Port and Key because Trinity took the position below that Trinity and Key were separate entities and that Trinity had no contract with the Port. Application of judicial estoppel in this manner would mean that the Port made no representations whatsoever “to Trinity,” and thus made no false statements of existing fact to Trinity.

(c) *The statements made by the Port’s employees to Key were not statements of existing fact.*

In its brief at 38, Trinity relies upon a passage from *Shook v. Scott*,

56 Wn.2d 351, 356, 353 P.2d 431 (1990) to support the proposition that “an ‘existing fact’ . . . includes anything of a present nature indicated in a statement, even if that statement concerns a future event.” The language of the *Shook* court cannot credibly be stretched that far. What the *Shook* court actually wrote was,

a statement is one of existing fact if a **quality** is asserted which **inheres in the article or thing about which the representation is made** so that, at the time the representation is made, the **quality** may be said to exist independently of future acts or performance of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer.

Id. (emphasis added).

The *Shook* court set out the “proper test” for determining “whether a representation pertains to an existing fact or is a mere expression of opinion or a promise”: “[w]here the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is **not** of an existing fact. *Shook*, 56 Wn.2d at 356, 353 P.2d 431 (quoting *Rankin v. Burnham*, 150 Wn. 615, 274 P.98, 99 (1929) (emphasis added)).

The *Rankin* court wrote that promissory statements relating to future actions, an agreement to do something at a future time, “or to make

good subsequent conditions that have been assured” are not actionable as fraud, and nonperformance alone of such statements does not constitute evidence of fraud. *Rankin*, 150 Wn. at 618, 274 P.98. The failure to make good a promise to perform an act in the future “is merely a breach of contract, which must be enforced by an action on the contract, if at all. And as in the case of promises, it is generally held that mere assertions of intention, or declarations of future purpose, do not amount to fraud.” *Id.*

Trinity identified the alleged false representations made by Port employees in its Amended Complaint. *See* CP 20; CP 40. None of the identified “misrepresentations” were statements of existing fact under *Shook* and *Rankin*.

Hedging its bets, Trinity adds that “even ‘promises of future performance’ are actionable if such promise[s] [are] made for the purpose of deceiving.” Answering Brief, page 39. But the Port made no promises to Trinity. Further, the evidence establishes that the Port had no intent to deceive Key. *See* CP 219-221; CP 334-CP 342; CP 262-300.

This Court should rule that the Port owed no duty to Trinity regarding any of the representations made to Key regarding the possible purchase of Key’s property. The Court should reverse the order granting reconsideration of dismissal of Trinity’s claim for fraudulent misrepresentation and remand for trial on Trinity’s contract claims only.

3. The Port owed Trinity no duty regarding negligent misrepresentations.

Washington adopted the Restatement (Second) of Torts with respect to the elements of negligent misrepresentation. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). Section 552(1) of the Restatement describes negligent misrepresentation as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

From this plain language describing the elements of the tort, it is clear that the Port owed no duty of care to Trinity regarding pre-Agreement representations made to Key about its intentions to purchase Key's property. No transaction ever took place between the Port and Trinity, and no duty arose under § 552 of the Restatement that required the Port to exercise reasonable care in making representations to Trinity about its intentions to purchase Key's property.

Trinity asserts that it "was one of the very limited number of parties who were intimately involved in the interactions regarding the Property." Answering Brief at 40. In fact, Trinity was **not** a party in the pre-Agreement discussions and negotiations between Key and the Port. As

Alex Lee stated during his deposition, “we’re looking at two different entities.” CP 1427. In spite of the fact that it was Alex Lee, Trinity’s vice president and chief financial officer (CP 68; CP 94) who signed the Agreement between the Port and Key, Trinity insisted below that “[t]here was no contract between the Port and Trinity[.]” CP 176.

The fact that Alex Lee and Chong So were employees of Trinity in addition to being Key’s representatives in negotiations with the Port does not mean that Trinity was “intimately involved in the interactions regarding the Property” **as a separate entity**. There were no representations made by the Port to Trinity regarding a transaction between the Port and Trinity.

This Court should rule that, based on considerations of logic, common sense, justice, policy and precedent (*Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256), the Port owed no duty to Trinity regarding negligent misrepresentations.

III. CONCLUSION

Because the opportunity to terminate an existing contract is not a “business expectancy,” the Port owed Trinity no duty regarding interference with Trinity’s business expectancies.

Because there was no relationship between the Port and Trinity that gave rise to a duty to “tell the truth” about its intentions during pre-

Agreement discussions and negotiations with Key, the Port owed Trinity no duty regarding intentional misrepresentations.

Because the Port gave no “business advice” to Trinity and engaged in no transaction with Trinity, the Port owed no duty to Trinity regarding negligent misrepresentations.

The Court should reverse the trial court’s order granting reconsideration and reinstatement of Trinity’s tort claims and remand for trial on Trinity’s contract claims only.

RESPONSE TO KEY’S CROSS-APPEAL

I. ASSIGNMENT OF ERROR

The Port assigns no error to the Court’s May 27 order summarily dismissing Key’s tort claims.

II. STATEMENT OF THE CASE

The Port relies upon the Statement of the Case set out in its Opening Brief and the Restatement of Facts included at pages 2-6 herein.

III. ARGUMENT

Key asserts in its brief at 41-42 that the trial court dismissed all three of Key’s tort claims “[b]ased solely” on the existence of a contractual relationship with the Port and the trial court’s “understanding of the ‘economic loss rule’” and its reliance upon language in *Alejandre*.

This court reviews an order granting summary judgment de novo

and engages in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). This Court “may use any valid ground to affirm the trial court's conclusion, even if [its] reasoning differs from that of the trial court.” *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 70, 23 P.3d 1 (2001). The Port asks the Court to affirm the trial court’s conclusion on the ground that the Port owed no independent tort duty to Key.

A. Key failed to convince the trial court that the Port owed it any tort duty independent of the contract between them.

At pages 42-48 of its brief, Key repeats the erroneous argument that simply because the torts of wrongful interference with a business expectancy, fraudulent misrepresentation, and negligent misrepresentation have been recognized by Washington courts, the Port therefore automatically owed an “independent tort duty” related to each of these torts to Key in this case. This is not the law.

Key has the burden of convincing **this** Court that the Port owed Key a duty related to each of the torts allegedly committed by the Port based upon “considerations of common sense, justice, policy and precedent in a particular set of circumstances” (*Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256), or upon “[s]ome type of special relationship.” *Colonial Imports*, 121 Wn.2d at 732, 853 P.2d 913.

Although Key argued below that the Port owed it tort duties independent of the contract (CP 131-153; CP 174-177; CP 181-212), it failed to convince the trial court that such duties existed. The trial court made no finding that any independent tort duty ran from the Port to Key, made no finding that there were any genuine issues regarding breach of any such duty, and dismissed Key's tort claims because, inter alia, there was no exception to the economic loss rule. CP 1044.

The Port posits that the trial court's ruling is tantamount to a finding that the Port owed no independent tort duties to Key. This Court should affirm the trial court's May 28th order on that basis and remand for trial on Key's contract claims only. Alternatively, this Court should affirm the May 28 order on the basis that the Port owed no tort duties to Key that were independent of its contract with Key.

B. Key failed to establish that the Port owed a duty not to “interfere” in Key’s business expectancies.

On this appeal, Key simply ignores its burden to establish the existence of a duty regarding interference with its business expectancies. Instead, relying solely upon citations to the improper “Statement of Uncontested Facts -- Corrected,” it sets out conclusory assertions about each of the five elements of the tort. *See* Answering Brief at 43. Every “fact” allegedly supported by citation to that document should be stricken

by the Court.

1. The Port owed no duty to Key not to “interfere” with Key’s business expectancies with Widman, mkConstructs, and MetalTech because it had a privilege to do so.

(a) *Not all “interference” with business expectancies is “wrongful.”*

The duty not to “interfere” with business expectancies applies only to those without a privilege to do so. *Calbom v. Knudtson*, 65 Wn.2d 157, 162, 396 P.2d 148 (1964) (quoting Restatement of Torts § 766 (1939); *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (“plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a ‘duty of non-interference; i.e., that he interfered for an improper purpose . . . or . . . used improper means.”).

Thus, the initial inquiry into whether the Port owed a duty to Key not to interfere with its business expectancies of selling its property to Harvey Widman or leasing its property to mkConstructs or MetalTech involves the issue of whether the Port had a privilege to attempt to “induce” Key not to enter into contracts with other lessors or purchasers.

(b) *The Port was a competitor for Key’s property.*

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is

his competitor or not to continue an existing contract terminable at will does **not** interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

Restatement of Torts (Second) § 768(1) (emphasis added).

Section 768 “differentiates between interference with an existing contract . . . and interference with a prospective contractual relation.” *Id.*, Comment a. Key had only prospective contractual relations with Harvey Widman, MetalTech, and mkConstructs. “Under the conditions stated in Clauses (a) through (d) of Subsection (1), competition is not an improper basis for interference in the latter situation. If one party is seeking to acquire a prospective contractual relation, the other can seek to acquire it too.” *Id.*

The Port’s privilege to engage in business and compete with Mr. Widman, MetalTech, and mkConstructs for acquisition of Key’s property “implicat[e] a privilege to induce Key to do their business with [it] rather than with [its] competitors.” *Id.*, Comment b. The Port was privileged to

do so by “express inducement as well as indirectly by attractive offers of [its] own goods or services.” *Id.* “The only limitations upon this are those stated in Clauses (a) to (d),” which includes “wrongful means.” *Id.* “Wrongful means” include “physical violence, fraud, civil suits and criminal prosecutions.” *Id.*, Comment e; *see also Havsy v. Flynn*, 88 Wn. App. 514, 520, 945 P.2d 221 (1997) (“the plaintiff has the burden of proving the elements of the tort on which he sues” and “the burden of asserting an abuse of privilege rests on the one asserting it, and here that one is the plaintiff”).

(c) *Key failed to present evidence of “wrongful means” utilized by the Port.*

The only evidence of “wrongful means” identified in Key’s brief is Paragraph 117 of the “Statement of Uncontested Facts -- Corrected,” which the Port has previously identified herein as a false statement. The conclusory assertion that “the Port acted based on an improper purpose or improper means” with citation to that false statement should be stricken from Key’s brief.

The Port established below that it had made no intentional misrepresentations to Key that might be considered use of “improper means.” *See* CP 542-583; CP 262-300; CP 334-342. This Court should rule that the Port owed no duty to Key not to “interfere” with its business

expectancies because the Port had a privilege to do so as a competitor for Key's property.

C. The Port had no duty to avoid intentional misrepresentations to Key because they were not parties to a business transaction and Key had no right to rely on the pre-Agreement statements made by Port employees.

Key has asserted that the alleged intentional misrepresentations were made by Port employees prior to the time it entered into the Agreement with the Port, i.e., between September 2007 and March of 2008. CP 182. Between September of 2007 and January of 2008, Key and the Port engaged in nothing more than informal discussions regarding a possible purchase of Key's property, followed by a period of preliminary negotiations during early January through late March of 2008 just to formulate and agree upon a simple letter of intent that might eventually lead to a purchase and sale agreement. No business transaction ever took place. This Court is asked to determine, based on "mixed considerations of logic, common sense, justice, policy and precedent" in the "particular set of circumstances" (*Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256), whether an experienced and knowledgeable seller of commercial real property has a right to rely on oral statements made by a potential buyer who has not signed a purchase and sale agreement regarding that potential buyer's future intentions.

1. Key had no right to rely on representations made by the Port's employees.

A legal duty to avoid intentional misrepresentations exists only where the person to whom someone is speaking has a right to rely on the truth of the representations being made. *West Coast, Inc.*, 112 Wn. App. at 206, 48 P.3d 997 (2002) (citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)). Where the representee has “expert knowledge and was peculiarly fitted and qualified by knowledge and experience to evaluate the truth or falsity of a representation,” he has no right to rely on the representation. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 464, 457 P.2d 603 (1969). During his deposition, Mr. Bauder answered “yes” to the question of whether he felt his clients were “knowledgeable in the field of selling real estate on a commercial basis.” CP 250.

Chong So was an attorney whose “focus was on commercial transactions, real estate transactions” (CP 250), and Mr. Bauder was a real estate agent who had previous experience in real estate transactions with the Port. *See* CP 249; CP 1395, lines 20-25. Each of these men had “expert knowledge and was peculiarly fitted and qualified by knowledge and experience” to evaluate the statements regarding the Port’s intentions that were made in the context of preliminary discussions regarding a letter of intent.

Both of these men knew there were contingencies involved in dealing with the Port -- in particular, that the Port Commissioners must approve any purchase of real property -- and that there was not, and could not be, an unconditional promise by Port employees to buy Key's property absent the Port Commissioners' approval. "[A] party cannot be permitted to say that he was taken advantage of, if . . . because of his business experience or his prior dealings with the other, he should have acquired further information before he acted." *Oates v. Taylor*, 31 Wn.2d at 904, 199 P.2d 924.

In an email from Jack Bauder to Jay Stewart and Bob Emerson dated April 15, 2008, only eight days before the Agreement expired, Mr. Bauder stated that "Although the signed proposal is **non-binding**, the owner has been approaching this transaction as if it was already under contract." CP 506 (emphasis added). Only eight days before the Agreement expired, Jack Bauder, Chong So, and Alex Lee knew that Key had no contract with the Port for purchase of its property. They certainly knew there was no contract in September of 2007 through March of 2008. Key's decision to treat the potential transaction "as if it was already under contract" was its own business decision, and did not create any duty of care on the part of the Port.

Key had no right to rely on oral representations made by the Port

employees because Key knew that no purchase could take place without Port Commission approval, that all drafts and the final version of the letter of intent were full of contingencies, and that a purchase and sale agreement would also include contingencies. “[M]ixed considerations of logic, common sense, justice, policy and precedent” in the “particular set of circumstances” (*Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256) requires a ruling that the Port owed no duty to Key regarding statements of intent made during preliminary conversations and negotiations.

2. Neither the common law nor statutory law imposes any duty on a potential purchaser of real property regarding representations about its intention to buy the property.

While a **seller** has a common law duty to disclose to a buyer all material facts about the property that the buyer cannot reasonably ascertain (*see, e.g., McRae v. Bolstad*, 32 Wn. App. 173, 176-77, 646 P.2d 771 (1982), *aff'd*, 101 Wn.2d 161, 676 P.2d 496 (1984)), and has a statutory duty to disclose all materials facts about the property (RCW 64.06.020), neither common law nor statute imposes any duty on a potential **buyer** to avoid misrepresentations to the seller regarding his intentions or future plans to buy the property. It is well-established law that “[a] promise of future performance is not a representation of an

existing fact and will not support a fraud claim.” *West Coast, Inc. v.*

Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997.

3. The legal authorities relied upon by Key do not support a finding of any duty independent of the Agreement between Key and the Port regarding fraudulent misrepresentation.

In its brief at 44, Key relies on Restatement of Torts (Second) §§ 551 and 552 to argue that “a party to a business transaction must disclose matters known to it that it knows to be necessary to prevent its partial or ambiguous statement of the facts from being misleading.” However, §§ 551 and 552 have been adopted by the Washington Supreme Court “as the standard governing claims of **negligent** misrepresentation” (*Haberman v. WPPSS*, 109 Wn.2d 107, 161-62, 744 P.2d 1032 (1987), 750 P.2d 254 (1988)) (emphasis added). Sections 551 and 552 have nothing to do with intentional misrepresentation.⁵

Key’s reliance on *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 457 P.2d 535 (1969), to support its assertion that “regardless of the contractual relationship between the parties, the Port breached its

⁵ The Port must object again to another misrepresentation about a statement made in the Port’s Opening Brief. Contrary to Key’s assertion at page 44 of its Brief, the Port did not acknowledge that “Key was a party to the transaction with the Port.” Rather, the Port stated, “The Port was not involved in a business transaction with Trinity. The Port was involved in discussions and negotiations with Key regarding a **possible** transaction with Key.” Appellant’s Opening Brief, page 45 (emphasis added).

independent legal duty not to defraud Key” (Cross-Petition Brief, page 45) is also misplaced. In *Markov*, the lessor made a promise during the term of an existing lease to its lessee that the lease would be renewed for three years following negotiations undertaken “for the express purpose of extending the lease[.]” *Id.* at 391, 457 P.2d 535. “Changes in the lease agreement itself were consistent with a finding of a promise to grant a renewal.” *Id.* at 392, 457 P.2d 535. The Court found that ABC had a right to rely upon the representations of Markov that the lease would be extended. *Id.* at 396, 457 P.2d 535. In this case, there was no existing contract to purchase Key’s property, and the Port was not a property owner who promised to extend an existing lease. The Port was merely a potential purchaser of Key’s property. *Markov* is inapposite.

No Washington court has ever found that a potential buyer of real property owes the seller any duty regarding representations about the potential buyer’s intention to purchase the property.⁶ The suggested duty of a buyer to disclose its true intent to a seller would literally put a stop to real estate transactions as they exist in this country. In keeping

⁶ Under the plaintiffs’ theory, if a buyer were to state that he really didn’t want some property, thereby negotiating a lower price, and the seller later found out that the buyer really wanted and/or needed the property, the seller would be allowed to bring an action for misrepresentation alleging that if he had known the buyer’s true intent, he could have charged more for the property.

with Washington law, this Court should rule that the Port, as a mere potential buyer of Key's property, did not owe Key a duty to avoid intentional misrepresentations about its intention to purchase Key's property.

D. The Port owed Key no duty regarding negligent misrepresentation because the Port and Key had competing interests, were dealing at arm's length during the negotiations, and had no special relationship.

As noted previously, no Washington court has ever established a duty upon a buyer to reveal its intentions throughout negotiations. The very essence of negotiations involves competing interests, in the absence of which there would be no need to negotiate and no uncertainties related thereto.

In *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 733, 853 P.2d 913 (1993), the Supreme Court cited *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or. 149, 843 P.2d 890 (1992) as one of the cases that "premise the finding of a duty to disclose upon the nature of the relationship between the parties." The "central question" in the *Onita* case was whether, "during the parties' arms-length negotiations . . . defendants owed plaintiffs a duty to exercise reasonable care in communicating factual information to prevent economic losses to plaintiffs." *Onita*, 843 P.2d at 896. The *Onita* court first examined

relationships in which such a duty of care has been acknowledged, i.e., attorney and client, providers of professional or independent services and their clients, agent and principal, and primary insurers and excess insurers, and noted that, in these relationships,

the professional who owes a duty of care is, at least in part, acting to further the economic interests of the “client,” the person owed the duty of care. In contrast, the present case involves two adversarial parties negotiating at arm's length to further their own economic interests.

Onita, 843 P.2d at 897.

The *Onita* court concluded that, “in arm's-length negotiations, economic losses arising from a negligent misrepresentation are not actionable.” *Id.* “Recognition of the tort of negligent misrepresentation in a case such as this, in which parties in a bargaining transaction contemplate a later written agreement, would undermine fundamental principles of contract law.” *Onita*, 843 P.

There can be no question that the Port and Key were dealing at arm’s length. Although no Washington court has specifically discussed the tort of negligent misrepresentation in the context of informal discussions and preliminary arms-length negotiations, the Supreme Court has written that the duty to disclose ordinarily does not arise where “the parties are dealing at arm’s length” *Oates v. Taylor*, 31 Wn.2d at 903, 199 P.2d 924. Rather, “[s]ome type of special relationship must exist before

the duty will arise.” *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993).

In Washington, the court will find a duty to disclose where the court can conclude there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose.

Id. (quoting *Favors v. Matzke*, 53 Wn. App. 789, 770 P.2d 686, *review denied*, 113 Wn.2d 1033, 784 P.2d 531 (1989)).

There was no “special relationship” between the Port and Key that gave rise to a duty on the part of the Port to disclose its intentions to Key under § 551 of the Restatement. In fact, in a commercial setting, a potential buyer and the seller of real property have competing interests.

Under Section 552(1) of the Restatement,

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Onita provides guidance under this section of the Restatement as well:

The text of section 552 and the comments and illustrations thereto suggest that the editors, in using the words “[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions,” had in mind relationships other than the relationship between persons negotiating at arm's length. The comments provide no illustrations dealing with business adversaries in the commercial sense.

Onita, 843 P.2d at 899.

Here, as in *Onita*, the parties were in an “adversarial” relationship as the seller and potential purchaser of real property, and the Port did not owe any duty to plaintiffs during the negotiations by virtue of a contractual, professional, or employment relationship or as a result of any fiduciary or similar relationship implied in the law.” *Onita*, 843 P.2d at 899. As did the *Onita* court, this Court should rule that, “[i]n an arm's-length negotiation, a negligent misrepresentation is not actionable.” *Id.* This Court should rule that the Port owed no duty of care to Key regarding representations made about its intent to purchase Key’s property.

CONCLUSION

It is a fundamental principle of law in the state of Washington that a party to a contract should be prevented “from obtaining through a tort claim benefits that were not part of the bargain.” *Alejandre*, 159 Wn.2d at 683. The decisions of the Supreme Court in *Eastwood* and *Affiliated*,

rendered this past December “leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances.” *Affiliated*, 170 Wn.2d at 450. “The Court determines whether there is an independent tort duty of care, and ‘[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent’ When no independent tort duty exists, tort does not provide a remedy.” *Eastwood*, 170 Wn.2d at 389.

The only “bargain” between the Port and Key was an Agreement wherein the Port paid Key a non-refundable sum of \$10,000 in exchange for a 30-day opportunity to put together a mutually acceptable purchase and sale agreement. In this action, Key is attempting, through tort claims, to obtain benefits that were not part of the Agreement. The essence of Key’s claim is to obtain benefits akin to specific performance of a sale for \$35 million but where Key keeps the property. Such “benefits” are contrary to the express, written Agreement that allowed the parties to walk away without “further obligations to each other” in the event a PSA was not executed.

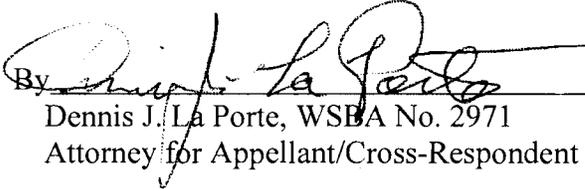
Key always knew, beginning in September of 2007, that it did not have an unconditional promise from the Port that it would purchase Key’s property. Key’s representatives were knowledgeable and experienced in commercial real estate sales. They made multiple additions/deletions to

proposals. They knew that statements of intent to buy are not binding on a potential purchaser. There is no “special relationship” between a seller and a potential purchaser of commercial real property. The only relationship between Key and the Port was a contractual one conducted at arm’s length by parties negotiating competing interests.

The Port requests this Court to affirm the May 28, 2010 order granting summary dismissal of Key’s tort claims and remand this case for trial on Key’s contract claims only.

Respectfully submitted this 29th day of July, 2011.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By 
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Attorney for Appellant/Cross-Respondent

Fri 7/29/2011 3:46
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEY DEVELOPMENT INVESTMENT LLC and TRINITY GLASS INTERNATIONAL, INC.,	NO. 40974-7-II
Respondents.	DECLARATION OF SERVICE OF REPLY BRIEF OF APPELLANT/CROSS RESPONDENT
v.	
PORT OF TACOMA,	
Appellant.	

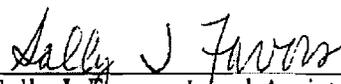
Sally J. Favors hereby declares as follows:

Per the agreement of the parties for service via electronic mail, on July 29, 2011, I emailed a true and accurate copy of the Reply Brief of Appellant/Cross Respondent to the attorneys for the respondents as follows:

Hall Baetz (hallbaetz@comcast.net);
D. Bruce Lamka (brucelamka@gmail.com);
Roger A. Leishman (rogerleishman@dwt.com); and
Carly A. Summers (carlysummers@dwt.com).

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

Dated this 29th day of July, 2011, in Tacoma, Washington.


Sally J. Favors, Legal Assistant to
Dennis J. La Porte, Attorney at
Law, WSBA #2971