

NO. 45728-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
AT TACOMA



Thurston County Superior Court Cause No. 12-2-00670-6

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CH<sub>2</sub>O, INC., a Washington corporation,

Plaintiff/Appellant

vs.

MERAS ENGINEERING, INC., a California corporation,

Defendant/Third-party Plaintiff/Respondent.

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BRIEF OF APPELLANT  
CH<sub>2</sub>O, INC.

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PETER T. PETRICH, WSBA# 8316  
REBECCA M. LARSON, WSBA# 20156  
DAVIES PEARSON, P.C.  
920 Fawcett Avenue  
Tacoma, WA 98402  
253-620-1500

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## II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendant Meras' Motion for Partial Summary Judgment Regarding Section 9 of Distributor Agreement and Denying Plaintiff CH<sub>2</sub>O's Motion for Summary Judgment Regarding Contract Term, entered on November 26, 2013.

### Issues Pertaining to Assignments of Error:

- a. Whether the language of Section 9 of the Distributor Agreement between CH<sub>2</sub>O and Meras prohibits the recovery of economic damages by CH<sub>2</sub>O for Meras' breach of the Agreement?
- b. Whether the trial court's interpretation of Section 9 prohibiting the recovery of economic damages for breach renders the contract obligations illusory?
- c. Whether the language of Section 9 of the Distributor Agreement reasonably can be read to preclude only recovery for indemnity between the parties arising from third-party claims?

## III. STATEMENT OF THE CASE

This case involves a Distributor Agreement (the "Agreement") entered into between Plaintiff/Appellant CH<sub>2</sub>O, Inc. ("CH<sub>2</sub>O") and Defendant/Respondent Meras Engineering, Inc. ("Meras") in 2007. (CP 70-78). CH<sub>2</sub>O and Meras are both companies that provide chemical water treatment products and services to commercial customers in the United States and abroad. CH<sub>2</sub>O is a Washington corporation, and Meras is based in California. At the time that the agreement was entered into, CH<sub>2</sub>O had

an existing customer base in California (“the Territory”) to which it sold specific products. Through the Agreement, CH<sub>2</sub>O appointed Meras as a non-exclusive distributor for the sale of particular products to specific customers. The customers and products were identified in Addendums A and B to the Agreement, respectively. (CP 6-17, 75-77).

Pursuant to Section 6(a) of the Agreement, Meras was to “use its best efforts to develop and maintain the market for the Products in the Territory.” (CP 71). The Agreement also contained non-compete provisions in Section 15 whereby Meras was not to sell or distribute any products of potential competitors of CH<sub>2</sub>O that were the same or similar to CH<sub>2</sub>O’s products. (CP 73). The Agreement was to continue for an initial period of three years and then automatically renew annually unless the parties expressly terminated it. (CP 73).

In accordance with the terms of the Agreement, CH<sub>2</sub>O wholesaled products to Meras for sales to its existing customers. On or about September 30, 2011, CH<sub>2</sub>O, Inc. received written notice from Meras’ attorney terminating the Agreement. (CP 7). Consequently, according to Section 14 of the Agreement, the Agreement was effectively terminated December 31, 2011. (CP 73).

CH<sub>2</sub>O subsequently learned that during the term of the Agreement, Meras violated the non-compete provisions of Section 15 of

the Agreement by selling products similar to those of CH<sub>2</sub>O to CH<sub>2</sub>O's customers. CH<sub>2</sub>O alleges that Meras did not use its "best efforts to develop and maintain the market for the Products" pursuant to Section 6(a) of the Agreement. Further, Meras failed to "refer to CH<sub>2</sub>O inquiries and requests for the Products from potential customers outside the Territory", as required by Section 6(b). CH<sub>2</sub>O suffered a significant drop off in its sales to its California customers from the years prior to the Agreement compared to after Meras took over, demonstrating not only losses as a result of those sales not occurring for CH<sub>2</sub>O but also indicating that Meras stole these customers for themselves.

CH<sub>2</sub>O filed the underlying suit for damages for Meras' breach of the Distributor Agreement. (CP 6-17). Defendant Meras raised the argument that the provisions of Section 9 of the Agreement preclude recovery by CH<sub>2</sub>O for Meras' breach. Section 9 of the Agreement reads as follows:

9. **Limitation of Liability.** Neither party shall be liable to the other for incidental, special, consequential or punitive damages, including but not limited to loss of profits, use of capital, or business opportunity, downtime costs or claims of customers of said party arising out of the performance, non-performance or termination of this Agreement, whether based upon strict liability, active or passive negligence, contract, breach of warranty or any other legal theory.

(CP 72).

Because the interpretation of Section 9 was pivotal to the outcome of this matter, both parties filed summary judgment motions on this issue seeking a ruling clarifying what damages were allowed or precluded by Section 9. (CP 35-50, 125-136). In order to accommodate Meras' counsel's schedule, Plaintiff agreed to have both motions heard by the Court without oral argument. (CP 204).

The trial court ultimately granted Defendant Meras' motion for summary judgment and denied Plaintiff CH<sub>2</sub>O's motion, ruling that the language of Section 9 precluded Plaintiff CH<sub>2</sub>O from recovering economic damages for breach of the Distributor Agreement. The parties were notified of the trial court's decision via e-mail on November 22, 2013 from the court's judicial assistant. The parties forwarded an ex parte Order Granting Defendants Motion for Partial Summary Judgment Regarding Section 9 of Distributor Agreement and Denying Plaintiff's Motion for Partial Summary Judgment Regarding Contract Term, which the trial court signed on November 26, 2013. (CP 184-188). Plaintiff CH<sub>2</sub>O now appeals the trial court's summary judgment ruling.

#### IV. ARGUMENT

a. Standard of Review:

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.”

*Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 483, 78 P.3d 1274, 1276 (2003), citing *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002).

It is black-letter law that in a motion for summary judgment, the court must consider "the facts and the inferences from the facts in a light most favorable to the nonmoving party." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Here both parties have moved for summary judgment on the same set of facts, and the court must consider each party's arguments in the light most favorable to the opposing side. Summary judgment is only appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones*, 146 Wn.2d at 300-01; CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009)(emphasis added).

In the present matter, although there were two separate motions for summary judgment, the trial court was essentially making one decision, that is, deciding as a matter of law which party's interpretation of Section

9 should be applied. CH<sub>2</sub>O argued that Section 9 should be read to allow recovery of economic damages in the event of a breach, and Meras argued that it should be read to preclude the recovery of any economic damages. The trial court agreed with Meras that CH<sub>2</sub>O could not recover economic damages for Meras' breach, and it therefore entered the order that granted Meras' motion and denied CH<sub>2</sub>O's motion. (CP 184-188) However, the trial court's decision was in error and did not correctly apply the law of contract interpretation.

b. Rules Regarding Contract Interpretation:

The touchstone of contract interpretation is the parties' intent. *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5, 277 P.3d 679 (2012). Washington follows the "objective manifestation test" for contract formation. *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 399, 245 P.3d 779 (2011); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998). This theory imputes to a person an intention corresponding to the reasonable meaning of his words and acts. *Id.* Washington recognizes the context rule, which focuses on the actual, objective meeting of the minds of the parties, rather than merely the written expression of their agreement. *Id.*

The intent of the parties to a contract is to be determined by examining their objective manifestations, including both written agreements and the context within which those agreements were executed. *Chatterton v. Business Valuation Research, Inc.*, 90 Wn. App. 150, 155, 951 P.2d 353 (1998). Under the context rule, a court may consider extrinsic evidence to determine the specific words and terms used, but not to show an intention independent of the instrument.

A court may consider extrinsic evidence as an aid in interpreting a contract's words, but it cannot import one party's unexpressed, subjective intentions into the writing. *Seaborn*, 132 Wash.App. at 270, 131 P.3d 910 (citing *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990)).

*Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash. App. 571, 585, 271 P.3d 899, 907 (2012).

Extrinsic evidence includes the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations urged by the parties

*Nye v. Univ. of Washington*, 163 Wash. App. 875, 883, 260 P.3d 1000, 1004 (2011) review denied, 173 Wash. 2d 1018, 272 P.3d 247 (2012).

The intent of the parties may also be discovered from the actual language of the agreement, as well as from the contract as a whole, the subject matter and the objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of

the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *Id.*, at 883.

To ascertain the meaning of unclear and ambiguous language in a contract, each provision must be read as part of the whole contract and in light of all of the circumstances surrounding it. If it remains unclear, resort must be had to extrinsic interpretative aids, including the conduct of the parties under it. *Henry v. Lind*, 76 Wash.2d 199, 201, 455 P.2d 927 (1969). The interpretation of contract language which gives reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, imprudent or meaningless. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985). In the event a contract is susceptible to either a reasonable or an unreasonable meaning, the court should give effect to the more rational meaning. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987). Courts will not give effect to interpretations that would render contract obligations illusory. *Taylor v. Shigaki*, 84 Wash. App. 723, 730, 930 P.2d 340 (1997). See also, *Kennewick Irr. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9th Cir.1989).

- c. Reading Section 9 of the Distributor Agreement to Prohibit Recovery of Economic Damages for Breach Is Not a Reasonable Interpretation and Renders the Contract Obligations Illusory.

When read on its own, Section 9 would appear to prohibit either party from recovering *any* sort of economic damages against the other for *any* type of claim under the Agreement:

9. **Limitation of Liability.** Neither party shall be liable to the other for incidental, special, consequential or punitive damages, including but not limited to loss of profits, use of capital, or business opportunity, downtime costs or claims of customers of said party arising out of the performance, non-performance or termination of this Agreement, whether based upon strict liability, active or passive negligence, contract, breach of warranty or any other legal theory.

(CP 72)

But this reading would render the entire contract completely meaningless and illusory, providing no remedy to either side for anything. A review of the document as a whole shows that this clearly could not have been the intent of the parties. If it were, there would be no need for a written contract to begin with. Instead, Section 9 should be read as a bar to indemnification between the parties for damages incurred as a result of claims raised by third parties. This is a reasonable interpretation in light of the contract as a whole, it is not in conflict with other parts of the contract, and it leaves the remedy of economic damages possible between the parties if the contract is breached.

The entire purpose of the Distributor Agreement is to set forth the rights and responsibilities of Defendant Meras as a product distributor for Plaintiff CH<sub>2</sub>O. It is very specific as to duration (Section 4 – CP 71); territory and customers (Section 3 and Addendum B – CP 71, 76); products being distributed (Section 2 and Addendum A – CP 71, 75, 77-78), and the duties of both parties (Sections 6 and 7 – CP 71-72). It would make no sense for the parties to set forth such obligations and then provide no way to enforce them and allow no penalty for a breach.

It is also clear from the wording of other provisions that the parties intended there to be consequences for breach of the contract. To begin with, the Agreement has a choice of laws, venue, and attorney fee clause:

18. **Notices, Governing Law** This Agreement shall be governed and construed by the laws of the State of Washington. In the event of a dispute over any part of this Agreement, the parties agree that the matter shall be settled through binding arbitration in Thurston County, Washington, and the prevailing party shall be entitled to recover from the losing party any costs, disbursements and reasonable attorney fees incurred in such dispute. **This shall be in addition to any other recovery** resulting from resolution of the dispute. . . . (Emphasis added).

(CP 74)

Not only does Section 18 provide for attorney fees and costs to the prevailing party, but it expressly states that these fees and costs will be “in addition to” any other recovery resulting from the resolution of the dispute. This language demonstrates that damages (recovery) were clearly

anticipated. As noted above, courts will not give effect to interpretations of provisions that would render contract obligations illusory. *Taylor v. Shigaki*, 84 Wash. App. 723, 730, 930 P.2d 340 (1997). Interpreting Section 9's language to prohibit economic recovery for a breach of the Agreement would render the language of Section 18 meaningless.

It is also of note that another provision of the Agreement, Section 13, discusses situations in which liability will *not* attach:

13. **Force Majeure** No liability shall result from delay in performance or non-performance in whole or in part if performance as agreed has been made impracticable by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid, or by the occurrence of any contingency the non-occurrence of which was a basic assumption on which this contract was made, including, but not limited to, acts of God, fire, flood, accident, riot, war, sabotage, strike, labor trouble or shortage, breakdown or failure of equipment, embargo, or CH<sub>2</sub>O's inability to obtain at prices and on terms deemed by it to be practicable any required raw material, energy source, equipment, labor or transportation or the Product itself if sources from third parties. . . .

(CP 73).

By expressly stating that damages are *not* recoverable in situations beyond the parties' control, Section 13's *force majeure* provisions demonstrate that the parties intended that that there would be other situations in which liability *would* attach and for which a party could recover damages. Reading Section 9's language to the contrary would

render this entire section superfluous. Thus, Section 9 should not be read as a bar to recovery of economic damages for breach of the Agreement.

Meras asks this court to enforce the plain language of Section 9 while ignoring the plain language of other sections of the Agreement. It argued at the trial court that in Section 18, dealing with fees and costs, the reference to “recovery” resulting from the resolution of the dispute should instead be read as “relief”. (CP 113-114). But Section 18 clearly applies “[i]n the event of a dispute over any part of this Agreement”, and allows attorney fees and costs in addition to “*any other recovery* resulting from resolution of the dispute...” (emphasis added). This language is unambiguous. Injunctive or declaratory relief, however, would *not* be a recovery. Recovery implies a monetary result, getting back something that is owed. Section 18 anticipates that the parties may recover economic damages for breach, which would make no sense if the parties could never obtain a monetary judgment.

If Section 9 is read to allow economic damages for breach of the contract, it does not conflict with Section 18, and both may be applied. But if Section 9 does not allow for economic damages, there is a clear conflict with Section 18. Again the interpretation of contract language which gives “reasonable, fair, just and effective meaning to all manifestations of intention” is preferred to an interpretation which leaves a

part of such manifestations unreasonable, imprudent or meaningless. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985).

Meras also discussed the Agreement's language regarding liability for "claims of customers" in Section 9, arguing that because the term "claims of customers" is included as only one element of Section 9, the entire Section 9 cannot apply only to third party claims. (CP 114-115). But Meras reads this clause too narrowly. Read as a whole, Section 9 applies not just to damages for "claims" of customers, but instead to damages for "loss of profits, use of capital, or business opportunity, downtime costs or claims" of customers. The phrase "of customers" modifies not just the word "claims" but the entire sentence before it, including any losses suffered by a customer. This reading allows a unified enforcement of the entire contract.

d. The Available Extrinsic Evidence Supports CH<sub>2</sub>O's Argument that Economic Damages Are Available for Breach of the Distributor Agreement:

Although the language of the Distributor Agreement taken as a whole is sufficient to demonstrate the parties intended to allow economic recovery for a breach, in Washington parol evidence is also admissible to show the situation of the parties to a writing and the circumstances under

which the instrument was executed in order to ascertain the intention of the parties and to properly construe the writing. *West Coast Pizza Co., Inc. v. United Nat. Ins. Co. Re: Policy No. XTP0079005*, 166 Wn. App. 33, 38, 271 P.3d 991 (2011). Extrinsic evidence is admissible as to the entire circumstances under which a contract was made as an aid in ascertaining the parties' intent. *Id.*

As stated in *Olsen v. Nichols*, 86 Wash. 185, 149 P. 668 (1915), parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible.

*Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944).

Tony McNamara, President of CH<sub>2</sub>O, was involved in the negotiating of the Distributor Agreement. He testified that the parties worked together in creating the Distributor Agreement and fully intended

that they be able to recover against each other for any breach of the contract. (CP 53-54).<sup>1</sup> This benefitted and protected both parties, which is the prime purpose of any written contract. This evidence further supports the argument that the language of Section 9 was never intended by the parties to prevent economic damages.

Mr. McNamara's declaration was based upon his own personal knowledge; he and James Shaw of Meras had multiple conversations throughout the course of negotiating the terms of the Distributor Agreement, which Mr. Shaw confirmed. (CP 157-159, 161, 171). Mr. McNamara clearly has sufficient personal knowledge to testify as to what the parties understood based upon their conversations during the negotiations.

Although Mr. McNamara's statements are based on actual knowledge from conversations he had with Meras and its representatives, to remedy any further objection, CH<sub>2</sub>O also submitted to the trial court the Declaration of James Shaw. (CP 170-174). Mr. Shaw's Declaration unambiguously confirms that Mr. Shaw intended that the Agreement provide for economic damages as a remedy should either party breach the Agreement. (CP 172, ¶ 6).

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<sup>1</sup> Although Meras moved to strike Tony McNamara's declaration, the trial court specified in its order on summary judgment that it did not consider this motion and was not making a ruling on it. (CP 184-188).

Meras also argued that any statements of Mr. McNamara constitute extrinsic evidence that should be excluded because it is being submitted to demonstrate an intent independent of the instrument. But Mr. McNamara's testimony does not introduce any new terms or modifications to the Agreement. It does not contradict or change any portion of the Agreement. Rather, his testimony is submitted to assist the court in interpreting the contract's existing words, which is admissible. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash. App. 571, 585, 271 P.3d 899, 907 (2012).

Mr. McNamara's testimony and that of Mr. Shaw simply show the circumstances surrounding the making of the Distributor Agreement and the reasonableness of the interpretation urged by CH<sub>2</sub>O. As such, the court may consider it.

e. Reading Section 9 to Address Only Claims of Third Parties Allows the Contract to be Given Effect as a Whole:

As mentioned above, it is possible to read Section 9 in a way that does not render other provisions of the contract unenforceable or illusory, and that is to apply Section 9 only to the claims of third parties against either Meras or CH<sub>2</sub>O. Section 9 states that "Neither party shall be liable to the other for incidental, special, consequential or punitive damages," including but not limited to, "loss of profits, use of capital, or business

opportunity, downtime costs or claims of customers of said party ....” Contracts routinely contain provisions indemnifying one party for third-party claims made against another party, and these provisions are enforceable, *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 834, 271 P.3d 850, 852 (2012), but parties may also agree to each be responsible for their own third-party claims. Section 9 reasonably can be read to state that neither Meras nor CH<sub>2</sub>O may recover against the other for damage claims raised by third-party purchasers. This gives a valid meaning not only to Section 9 but also allows the other provisions of the Agreement to be enforced without a conflict.

Meras has argued that the language of Section 9 is unambiguous and therefore should be enforced as written, excluding any liability for any economic damages. (CP 111, 176). But the Distributor Agreement clearly is ambiguous when Section 9 is read in conjunction with the other sections of the Agreement. Again, the objective in evaluating an ambiguous contract is to give it a practical and reasonable meaning that fulfills its purpose, rather than a strained or forced meaning that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 592, 269 P.3d 1017 (2012).

*City of Tacoma v. Bonney Lake* is on point. It involved franchise agreement contracts between the City of Tacoma and several municipalities under which the City would provide water services to the municipalities. The City filed a declaratory judgment action seeking a ruling that the municipalities were required to pay for the costs of fire hydrants under the agreements. The agreements happened to contain broad indemnity and hold harmless provisions which stated that the City of Tacoma “hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the [municipality] . . .from any and all claims, costs, judgments, awards or liability to any person.” *City of Tacoma*, 173 Wn.2d at 593. The trial court had ruled that this provision prevented the City of Tacoma from suing the municipalities for the costs of the hydrants. The Supreme Court, however, held that while the language was undeniably broad, it did not prevent the City of Tacoma from suing other parties to the agreement because this would result in an absurd outcome:

Concluding otherwise would produce the absurd result of precluding a party to a contract from disputing its obligations under that contract. Cf. *Eurick v. Pemco Inc. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)(contract interpretation should not produce an absurd result). This gives rise to a broad policy concern that the amicus raises: under the Municipalities’ interpretation, an indemnified party could completely avoid its contractual obligations by claiming any enforcement action to compel performance is

a “claim” arising under the contract. Thus, the trial court erred.

*City of Tacoma*, 173 Wn.2d at 593.

The exact same result would occur in the present matter if Section 9 is read to preclude any suit for breach of contract; Meras could completely avoid its contractual obligation to CH<sub>2</sub>O. Therefore, the only practical, unambiguous way to read the Distribution Agreement as a whole is that the parties intended a remedy to exist for any breach of the contract between the parties themselves, but if claims were raised by a purchaser or other third-party entity, neither CH<sub>2</sub>O nor Meras would be required to indemnify the other. Because there is a reasonable way to read the contract and give meaning to each of its provisions, then, that is how the contract as a whole should be interpreted.

Meras’ primary argument below for precluding economic/monetary damages for breach of the Agreement is that there are other, non-economic types of damages available, such as injunctive relief or seeking a declaratory judgment (CP 112-113). However, this argument provides CH<sub>2</sub>O with no viable remedy when, as here, it does not find out that the contract was breached until after the opposing party has already terminated it.<sup>2</sup> Imposing injunctive relief would be useless since there are

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<sup>2</sup> Meras accused CH<sub>2</sub>O of “failing to timely assert its contractual rights”. (CP 180). But CH<sub>2</sub>O was not aware of Meras’ breach until after the contract was terminated.

no future sales activities that could be enjoined. The damage has already occurred. Likewise with an action for declaratory relief, if economic damages are not permitted, there can be no teeth to any declaratory order. Not only are none of these remedies appropriate after a contract is terminated, but limiting breach of contract damages to non-economic remedies makes no sense in the context to which this Agreement applies. No matter whether the trial court found that Meras had a duty under the Agreement, there could never be any consequences for Meras' breach of that duty.

Meras previously argued that the franchise agreement in *City of Tacoma* dealt specifically with a waiver of all "claims" and damages (leaving no remedy for a breach), whereas Section 9 in the present matter disclaims only liability for economic damages (leaving non-economic remedies). But again, that provides no relief in this situation. The *City of Tacoma* court held a strict reading of the language of its agreement would allow an indemnified party to "completely avoid its contractual obligations by claiming any enforcement motion to compel performance is a 'claim' arising under the contract." 173 Wn.2d 584, 593, 269 P.3d 1017 (2012). The result would be identical in the present case, even if Section 9 allowed non-economic remedies. There is no viable enforcement provision available to CH<sub>2</sub>O for the breach that has already occurred

except for economic damages, and the language of Section 9 allows Meras to completely avoid its contractual obligations if no economic recovery can be made. The damage has already been done, and the contract has already been terminated. Economic damages for breach are the only reasonable remedy that could have been contemplated by the parties.

f. CH<sub>2</sub>O was not the sole drafter of the Distributor Agreement, and Meras is Not Entitled to Have the Language of Section 9 Read in the Light Most Favorable to Meras:

Meras has also argued that CH<sub>2</sub>O drafted the Distributor Agreement, and therefore it should be read in the light most favorable to Meras. A contract is generally construed against the drafter. However, a contract should not be construed against its drafter unless the intent of the parties cannot otherwise be determined. *Washington Professional Real Estate LLC v. Young*, 163 Wn. App. 800, 818, 260 P.3d 991(2011). In the present matter, the parties' intent that damages for breach be recoverable clearly is shown by the forum selection, choice of law, and attorney fee clause, and in the specific exclusion of damages in limited other circumstances. There is no reason for the court to interpret Section 9 so that it would make those clauses superfluous. Again, this would leave CH<sub>2</sub>O with no remedy at all under the contract, an absurd outcome prohibited by case law.

In addition, this Distributor Agreement was freely negotiated between the parties, with both sides participating in drafting its terms. This was not an adhesion contract where one side submitted a take-it-or-leave-it offer to the other. There is no reason that the language of the contract should be interpreted against CH<sub>2</sub>O, when both sides participated in negotiating the contract.

James Shaw was the Meras representative who ultimately signed the Agreement on behalf of Meras. He was a principal of Meras at the time and had full authority to bind the company to the Distributor Agreement. He testified to the following via declaration:

6. It was understood by both me and Tony McNamara that the Distributor Agreement was an enforceable agreement and that either of the parties would be able to seek economic damages for breach of the contract. There would have been no point to having a written contract at all if the parties had not expected to be able to recover economic damages in the result of a breach.

(CP 172).

Both of the principals signing the Distributor Agreement have therefore testified that they fully intended that the Agreement would provide for the recovery of economic damages in the event one of the parties breached the contract. There is no dispute here. Although the language of the Agreement may have been inartfully drafted, it can be

read the way Mr. McNamara and Mr. Shaw have testified. Thus, the trial court's summary judgment ruling should be reversed.

Although Mr. Shaw signed the Distributor Agreement on behalf of Meras, the other Meras principals Christopher Binfield and D. Bryan O'Connell were each aware of and contributed to negotiations with CH<sub>2</sub>O to arrive at the terms of the Agreement. On October 17, 2006, Mr. Binfield, Mr. O'Connell and Mr. Shaw all flew from California to Washington to meet with Tony McNamara, Carl Iverson, and other CH<sub>2</sub>O representatives to discuss Meras possibly contracting with CH<sub>2</sub>O. (CP 158 – 159, 170-174). Mr. Shaw confirmed that it was not only he but also Mr. O'Connell and Mr. Binfield who along with CH<sub>2</sub>O were responsible for defining the list of customers to be included on Addendum A to the Distributor Agreement, as well as the product list included on Addendum B. (CP 158-159, 161, 170-174) As Meras and all three of its principals were involved in negotiating the terms of the Distributor Agreement, there are no grounds to construe any ambiguity in the Agreement against CH<sub>2</sub>O as the drafter.

## V. CONCLUSION

The trial court's order Granting Defendants Motion for Partial Summary Judgment Regarding Section 9 of Distributor Agreement and Denying Plaintiff's Motion for Partial Summary Judgment Regarding

Contract Term, which the trial court signed on November 26, 2013, incorrectly interprets the provisions of Section 9 of that Distributor Agreement. It is clear from the language of the document as a whole that the parties never intended to exclude economic damages as a remedy for breach of the contract. Reading Section 9 in this manner conflicts with other provisions of the Distributor Agreement and would render these other provisions useless. A contract properly is to be interpreted in a manner which allows all of the provisions to be enforced, which was not done by the trial court's ruling.

For the reasons set forth above, Plaintiff/Appellant CH<sub>2</sub>O, Inc. respectfully requests that this court reverse the trial court's November 26, 2013 summary judgment order and its Order of Dismissal of All Claims and Final Judgment, entered on January 31, 2014, and order that the trial court grant CH<sub>2</sub>O, Inc.'s Motion for Partial Summary Judgment Regarding Contract Term allowing CH<sub>2</sub>O, Inc. to seek economic damages against Meras Engineering for breach of the Distributor Agreement.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of May, 2014.

DAVIES PEARSON, P.C.  
Attorneys for Plaintiff/Appellant CH<sub>2</sub>O, Inc.

  
PETER T. PETRICH, WSBA# 8316  
REBECCA M. LARSON, WSBA# 20156

920 Fawcett Avenue  
P.O. Box 1657  
Tacoma, WA 98401  
(253) 620-1500 Telephone  
(253) 572-3052 Facsimile  
ppetrich@dpearson.com  
rlarson@dpearson.com

NO. 45728-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
AT TACOMA

Thurston County Superior Court Cause No. 12-2-00670-6

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CH<sub>2</sub>O, INC., a Washington corporation,

Plaintiff/Appellant

vs.

MERAS ENGINEERING, INC., a California corporation,

Defendant/Third-party Plaintiff/Respondent.

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AFFIDAVIT OF SERVICE RE:  
BRIEF OF APPELLANT

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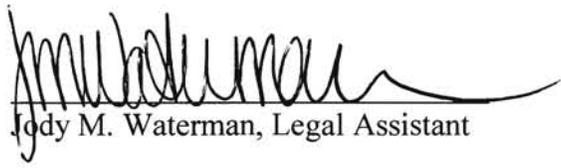
PETER T. PETRICH, WSBA# 8316  
REBECCA M. LARSON, WSBA# 20156  
DAVIES PEARSON, P.C.  
920 Fawcett Avenue  
Tacoma, WA 98402  
253-620-1500

I, Jody M. Waterman, legal assistant to counsel for Plaintiff/Appellant CH<sub>2</sub>O, Inc., declare that on May 22, 2014, I sent for filing and service via Legal Messenger the Brief of Appellant to the Clerk of the Washington Court of Appeals, Division II.

I further declare that on this date, I also sent for service via postage paid first class mail and Email the Brief of Appellant to the parties listed below:

Joyce L. Thomas  
Christie Fix  
FRANK FREED SUBIT & THOMAS LLP  
705 Second Avenue, Suite 1200  
Seattle, WA 98104-1798  
[jthomas@frankfreed.com](mailto:jthomas@frankfreed.com); [cfix@frankfreed.com](mailto:cfix@frankfreed.com)

DATED: May 22, 2014

  
Jody M. Waterman, Legal Assistant

**STATE OF WASHINGTON**        )  
                                          ) ss.  
**COUNTY OF PIERCE**        )

I, Joanne R. Kemper, certify that I know or have satisfactory evidence that Jody M. Waterman is the person who appeared before me, and said person acknowledged that she signed this Affidavit of Service and acknowledged it to be her free and voluntary act for the uses and purposes mentioned herein.

DATED: May 22, 2014

  
Name: JOANNE R. KEMPER  
NOTARY PUBLIC in and for the State Of  
Washington  
My commission expires: 10/31/2016