

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

CH₂O, INC., a Washington corporation,

Plaintiff/Appellant

vs.

MERAS ENGINEERING, INC., a California corporation,

Defendant/Third-party Plaintiff/Respondent.

REPLY BRIEF OF APPELLANT
CH₂O, INC.

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I. TABLE OF AUTHORITIES

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II. ARGUMENT

a. The Term “Recovery” Implies a Monetary Recovery:

Meras argues in its brief that the language of Section 9 of the Distributor Agreement is unambiguous and absolutely waives the parties’ potential liability for any monetary damages, leaving injunctive or other declaratory relief as “recoveries” available to CH₂O under the Agreement. CH₂O’s position is that such an interpretation of Section 9 conflicts with other sections of the Distributor Agreement, such as Section 18 of the Agreement. Section 18 provides for an award of attorney fees and costs, which shall be “in addition to any other recovery resulting from resolution of the dispute.” (CP 74)

Meras argues that the term “recovery” as used in Section 18 of the Agreement includes non-economic relief, and that the plain meaning of the word “recovery” does not require a monetary recovery. But the common understanding of the term “recovery” among the general public clearly requires some sort of tangible economic or monetary recovery. Courts “generally give words in a contract their ordinary, usual, and *popular* meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262, 268 (2005)(emphasis added). The Oxford

English Dictionary includes the following definitions of “recovery” in a legal context:

- II.4. Law. a. The fact or procedure of gaining possession of some property or right by a verdict or judgment of court; . . .
- c. A fine, etc., recovered at law.

Oxford English Dictionary, 370-71, Second Edition, 1989.

Clearly, in the common sense, “recovery” implies more than the ability to obtain an injunction. There has to be something tangible, that is, monetary damages or recovery of property, to compensate for a loss. Thus, the provisions of the Distributor Agreement conflict with each other.

b. Reading the Distributor Agreement as a Whole Demonstrates That the Parties Intended Monetary Damages as a Remedy if the Agreement Was Breached:

As already set forth in CH₂O's opening brief, 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).

Assuming the definition of “recovery” as used in Section 18 of the Distributor Agreement refers to economic/monetary recovery, the Agreement as a whole cannot be given meaning if Section 9 does not allow for monetary damages for breach of the Agreement by one of the parties. It simply makes no sense and leads to an absurd result – leaving no remedy for a party who discovers a breach, even though that party supposedly may recover costs, disbursements, and attorney fees involved “in addition to any other recovery” resulting from resolution of the dispute [*i.e.*, breach]. (Section 18).

Contrary to Meras’ assertion, CH₂O’s reliance on *City of Tacoma v. Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012), is not misplaced. Meras argues that the franchise agreement in that case 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 monetary damages (leaving non-economic remedies). But the result would be the same. The *City of Tacoma* court held a strict reading of the language 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.” (Id., at 593). The issue was whether contract language should be interpreted so that it allows a party to avoid any and all contractual obligations without consequence. If a party could avoid all of its obligations, then the contract is illusory; there is no way to enforce it.

The result in the present matter if economic damages are not allowed would be identical to that in *City of Tacoma*, even if Section 9 of the Distributor Agreement does not specifically exclude non-economic remedies. As already mentioned, there is no viable enforcement provision available to CH₂O for the breach that has already occurred except for economic damages. Here, the damage has already been done, and the contract has already been terminated. (Even if the breach had been found while the contract was still in force, the only remedy for CH₂O's losses would be monetary). It is not reasonable to believe the parties entered into a contract that provided no right to economic damages in the event that contract was breached. Economic damages for breach are the only reasonable remedy that could have been contemplated by the parties. Anything else would render the provision essentially a nullity.

c. The Passage of Time Should Not Invalidate CH₂O's Right to Recover:

Meras also argues that because CH₂O “rested on its rights” in not seeking to enforce the terms of the Distributor Agreement prior to August 2011, it somehow waived the right to enforce the contract. But Meras does not dispute that CH₂O did not become aware of the potential breach until after reviewing its files in two other lawsuits involving Meras and former CH₂O employees ongoing at that same time. Meras also does not dispute that the Distributor Agreement remained in force and effect until Meras terminated it, effective December 31, 2011. Meras cites no caselaw that CH₂O waived any rights by not finding out about Meras’ breach at an earlier date, and under the circumstances of this litigation (and in light of the multiple other ongoing suits between the parties both in Washington and California at that time), CH₂O’s claim for breach of the Distributor Agreement and its filing of the present suit when it did was reasonable.

d. Mr. McNamara’s and Mr. Shaw’s Declarations Demonstrate the Mutual, Agreed-Upon Intention of Both Parties that Economic Damages Be Recoverable for Breach of the Distributor Agreement:

CH₂O submitted declarations from Tony McNamara of CH₂O and James Shaw of Meras regarding the circumstances surrounding the negotiating and drafting of the Distributor Agreement. Contrary to Meras’ assertions, this evidence was not submitted to show an intention independent of the instrument, nor to vary, contradict or modify the

written word. Rather, it shows the parties' mutual intention for the instrument itself.

“A trial court may resort to parol evidence for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties.” *Bort v. Parker*, 110 Wash.App. 561, 573, 42 P.3d 980, review denied, 147 Wash.2d 1013, 56 P.3d 565 (2002), citing *Berg*, 115 Wash.2d at 669, 801 P.2d 222. Extrinsic evidence is admissible “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.” *Berg*, 115 Wash.2d at 669, 801 P.2d 222. “Admissible extrinsic evidence does not include (1) evidence of a **party's unilateral or subjective intent** as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.” *Bort*, 110 Wash.App. at 574, 42 P.3d 980. ““Unexpressed impressions are meaningless when attempting to ascertain the mutual intentions [of the parties].” *Lynott v. National Union Fire Ins. Co.*, 123 Wash.2d 678, 684, 871 P.2d 146 (1994), quoting *Dwelley v. Chesterfield*, 88 Wash.2d 331, 335, 560 P.2d 353 (1977).

Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 84-85, 60 P.3d 1245, 1250-51 (2003)(emphasis added).

“When analyzing the parties' intent, a court must examine not only the four corners of any writing the parties may have signed, but also the circumstances leading up to and surrounding the writing.” *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 8, 937 P.2d 1143, 1146 (1997). Both Mr. McNamara and Mr. Shaw state that the parties' mutual intent for the Distributor Agreement was that either side could sue the other for

monetary damages in the event of a breach. (CP 157-159, 161, 172). Neither side would have entered into the contract without such a remedy. (*Id.*) This evidence does not constitute either party's unilateral or subjective intent. Rather, it is the acknowledged, agreed-upon *mutual* intent that the parties had when drafting the Distributor Agreement. Mr. Shaw had full authority to enter into the contract on behalf of Meras and to speak and act on behalf of Meras. It is not improper for the Court to consider this evidence, as it does not contradict the plain language of the Agreement but merely explains the parties' intentions.

e. Attorney Fees:

Based upon CH₂O's interpretation of the Distributor Agreement, the attorney fees and costs provisions of Section 18 of the Distributor Agreement should only be applicable if other economic recovery is had by a party. Thus, if this Court determines that Section 9 of the Distributor Agreement allows for recovery of economic damages and reverses the trial court, then CH₂O should be entitled to an award of attorney fees and costs under RAP 18.1. If the Court determines that recovery of economic damages are not permitted under Section 9 of the Distributor Agreement, then that section clearly conflicts with Section 18 of the Agreement, and the due to the ambiguity, this Court should deny Meras' request for an award of attorney fees on appeal.

III. CONCLUSION

For the reasons set forth above, Plaintiff/Appellant CH₂O, 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 CH₂O, Inc.'s Motion for Partial Summary Judgment Regarding Contract Term allowing CH₂O, Inc. to seek economic damages against Meras Engineering for breach of the Distributor Agreement.

RESPECTFULLY SUBMITTED this 6TH day of August, 2014.

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Affidavit of Service attached to Reply Brief.

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