

No. 46823-9-II

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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COLLEGE MARKETPLACE, LLC,

Appellant,

v.

OLHAVA ASSOCIATES, LP; HD DEVELOPMENT OF MARYLAND,  
INC.; and WAL-MART REAL ESTATE BUSINESS TRUST,

Appellees.

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**APPELLANT'S REPLY BRIEF**

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College Marketplace respectfully submits this Reply Brief in response to Home Depot’s Opposition Brief (“HD Opp.”), Olhava’s Opposition Brief (“Olhava Opp.”) and Wal-Mart Real Estate Business Trust’s Brief (“Wal-Mart Opp.”). Of the three Respondents in this matter, only Home Depot (“HD”) attempts to support the trial court’s decision on the merits of College Marketplace’s Declaratory Judgment claim. As discussed below, HD misstates that decision and the applicable law, and the other Parties fail to respond to College Marketplace’s central arguments as to why the attorneys’ fee awards should be reversed.

## I. ARGUMENT IN REPLY

### A. The Parties Agree That the Interpretation of the ECRs Presents a Question of Law

In its Opening, College Marketplace argued that the interpretation of the 2004 ECRs presents a question of law. *Wilkinson v. Chiwawa Cmty. Ass’n.*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). HD makes the same argument,<sup>1</sup> so there is no dispute that this Court reviews the trial court’s interpretation of the 2004 ECRs *de novo*. *Bauman v. Turpen*, 139 Wn. App. 78, 86, 160 P.3d 1050 (2007) (interpretation of a restrictive covenant presents a question of law and is reviewed *de novo*).

The Parties also agree that there is no ambiguity in the applicable ECR language. HD Opp., p. 15 (“College presented no evidence at trial to show any ambiguities in the Original ECRs, which was a fully integrated

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<sup>1</sup> HD Opp., p. 13. As to the merits of the Declaratory Judgment claim, Olhava and Wal-Mart incorporate and adopt HD’s arguments. For simplicity, we will refer to the HD Opposition instead of listing all three briefs in every instance.

agreement.”). As such, extrinsic evidence is not admissible to “vary, contradict or modify the written word” or to “show an intention independent of the instrument.” *Wilkinson*, 180 Wn.2d at 251. Beyond these threshold matters, however, there is very little accurate in HD’s Brief.

**B. HD Misstates Washington Law Regarding Construction of Restrictive Covenants Involving Commercial Property**

As College Marketplace described in its Opening, in *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), the Washington Supreme Court directly addressed whether to abandon its long-standing rule that restrictive covenants should be strictly construed: “Historically, Washington courts [...] held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land.” *Id.* at 621. The Supreme Court chose to change that rule in *some* circumstances, but not in *these* circumstances. The Court held that in disputes: (1) “among *homeowners* in a subdivision”; and (2) that did *not* involve the “maker of the covenants,” the rule of strict construction should no longer apply. *Id.* Here, of course, neither of the conditions in *Riss* applies because this dispute involves *commercial* property (not homeowners in a subdivision) and the parties that drafted the covenants are parties to the dispute. *See* Opening, p. 19. HD simply ignores *Riss*, even though it is a Supreme Court decision that is directly on point. Indeed, HD carefully edits an excerpt from the *Wilkinson* opinion

to remove the reference to *Riss* and to “subdivision covenants.” HD Opp., p. 14.<sup>2</sup>

Contrary to HD’s argument, Washington has not abandoned the long-standing rule requiring strict construction of restrictive covenants regarding commercial properties; the full text of *Wilkinson* makes it clear that the Court intended to *follow*, not to overrule, *Riss*. Opening, p. 19.<sup>3</sup> Because this dispute does not fit either circumstance, the historical rule requiring strict construction of the covenants applies and “all doubts [as to the ECRs] must be resolved in favor of the free use of land.” *Id.*

Remarkably, HD goes on to argue that the trial court was not required to strictly construe the ECRs because the “rationale [for supposedly abandoning the rule of strict construction in *Wilkinson*] applies equally, if not with even greater force, to covenants governing properties within a commercial development.” HD Opp., p. 14. But, while the Supreme Court in *Riss* acknowledged that there is a distinction between restrictive covenants regarding commercial properties and “subdivision covenants,” it resolved that distinction in a way exactly the opposite of what HD suggests. The Supreme Court abandoned the rule of strict

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<sup>2</sup> The full quote is: “While Washington courts once strictly construed covenants in favor of the free use of land, we no longer apply this rule where the dispute is between homeowners who are jointly governed by the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621-24, 934 P.2d 669 (1997). This change in approach was driven by the recognition that “[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land.” 180 Wn.2d at 250.

<sup>3</sup> Home Depot also relies on *Shafer v. Board of Trustees*, 76 Wn. App. 267, 883 P.2d 1387 (1994). But *Shafer* is a decision of the Court of Appeals that preceded the Supreme Court decision in *Riss*, and *Shafer* involved a dispute among homeowners in a residential subdivision.

construction *only* as to homeowners' disputes; the trial court was not free to disregard the Supreme Court's ruling. Nor was there any evidence in the trial court record, let alone a finding, to support such a conclusion. In particular, there is no support for HD's argument relating to the supposed "collective interest" of the property owners in the Center; its reference to Findings 4 and 5 (HD Opp., p. 15) is confusing because those Findings do not discuss any "collective interest" of the property owners.<sup>4</sup>

**C. HD Misstates Both the Holding of *Wilkinson* and the Basis for the Trial Court's Decision**

As College Marketplace discussed in its Opening Brief, in *Wilkinson* the Supreme Court held that *new* restrictions could not be imposed on property owners by a homeowners' association unless the governing covenants authorized the association to *create* new restrictions. 180 Wn.2d at 256. "[W]hen the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants." *Id.* (emphasis in original).

With this holding, *Wilkinson* reconciled two lines of cases that were in apparent contradiction. Opening, pp. 11-14. Contrary to HD's argument (HD Opp., p. 2), College Marketplace never described *Wilkinson* as a "departure from prior Washington law." But the dissenting

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<sup>4</sup> HD repeatedly refers to "findings" that do not exist in the actual Findings of Fact, including "findings" that are actually Conclusions of Law. *See, e.g.*, HD Opp., pp. 3, 13, 15.

Justices in *Wilkinson* described it as such. “[O]ur cases have never distinguished between amendments that ‘change’ existing covenants and amendments that ‘create new restrictions.’ [...] But in today’s opinion, the majority adopts that distinction as a new rule.” 180 Wn.2d at 278 (McCloud, J., dissenting). Regardless of whether *Wilkinson* is seen as reconciling prior law or announcing a new rule of law, it is clear that the distinction—between a reservation in the covenants of the right to add new restrictions, on one hand, and the right merely to change existing covenants, on the other—was the crux of the holding in *Wilkinson*. HD tries to obscure that key distinction as well as the trial court’s error in applying it.

There is no doubt that the trial court understood the significance of this distinction in *Wilkinson* but misapplied its holding. The trial court held that the phrase “modify or cancel” that appears in the 2004 ECRs demonstrates a “broad preservation of power” that includes the right to make “additions” to the restrictions. CP 527 (Oct. 3, 2014 Conclusions of Law (“CL”) 6); *see also* CP 528 (CL 7) and (CL8) (“Section 15 of the Original ECRs contains express notice that the Original ECRs allow for additional restrictions [...]”). For all the reasons discussed in the Opening, these conclusions were erroneous. Opening Brief, pp. 12-14.

HD does not even attempt to defend the trial court’s holding that the 2004 ECRs allowed Defendants to add new restrictions, even though it was the trial court’s primary basis for its decision. CP 525-29 (CL 5-10). Instead, HD tries to obscure this distinction with a series of partial quotes

from *Wilkinson* that conflate its holding regarding the right to add restrictions versus the right to change existing restrictions. HD Opp., pp. 2-3.<sup>5</sup> HD also purports to rely on *Shafer*, but fails to acknowledge that *Wilkinson* held that the new covenants in that case were enforceable *only* because the governing instrument expressly reserved the power to *create such new restrictions*. See Opening, p. 13. Ultimately, however, HD does appear to acknowledge that the 2004 ECRs do not reserve the power to create new restrictions, so that the use restrictions in the 2008 ECRs are valid *only* if they are “consistent with the general plan of development *and* related to an existing covenant.” *Wilkinson*, 180 Wn.2d at 257 (emphasis in original).

**D. The 2008 ECRs Created New Use Restrictions, Not Merely Modifications of Existing Restrictions**

HD argues that the restrictions added in the 2008 ECRs “are not different in nature from the existing use restrictions in the Original ECRs,” and that it was “not unexpected that Olhava’s and Wal-Mart’s right to amend the existing ECRs could be exercised to change the existing use restriction [*sic*] or add additional restrictions as Wal-Mart and Olhava deemed appropriate for the good of the Center.” HD Opp., pp. 21-22. But this misses the point of *Wilkinson*, in several key respects.

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<sup>5</sup> For example, HD argues that *Wilkinson* holds that “[t]he power to amend restrictive covenants includes the power to add restrictions so long as they are not inconsistent with the general plan of development or have no relation to existing covenants.” HD Opp., p. 3. But the quoted language comes from *Wilkinson*’s discussion of the right to *change* existing restrictions, which applies where there is *no right to add restrictions*. *Wilkinson*, 180 Wn.2d at 256-57.

First, the test established in *Wilkinson* is not whether an amendment is “different in nature” from the restrictions in the original covenants; rather, the test regarding the relationship to existing covenants is designed to determine whether an amendment is limited to modification of an existing covenant, on one hand, or the creation of a new restriction that did not previously exist, on the other. *Wilkinson* recognizes that minor adjustments to existing covenants are to be expected, but creating *new* covenants that did not previously exist frustrates the reasonable expectation of intervening purchasers. “This rule protects the reasonable, settled expectation of landowners by giving them the power to block ‘new covenants that have no relation to existing ones’ and deprive them of their property rights.”<sup>6</sup> *Wilkinson*, 180 Wn.2d at 256 (quoting from *Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000)).

Second, *Wilkinson* also makes it clear that the test is applied from the perspective of intervening purchasers. The Court therefore asks whether a reasonable purchaser under the original covenants would have been on notice that the amended restrictions might ban these uses. *Id.* at 258 (“Like the covenants in *Meresse*, the Chiwawa covenants prohibiting nuisance or offensive uses or the display of excessive rental signs would not have placed Chiwawa homeowners on notice that short-term rentals would be prohibited.”). HD’s lengthy discussion of the supposed evidence

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<sup>6</sup> HD argues (HD Opp., p.7) that “there is no limit on which provisions of the original ECRs may be amended,” but this does not distinguish *Wilkinson*, in which the governing document reserved the power “to change these protective restrictions and covenants in whole or in part” by majority vote. *Id.*, p. 246

relating to secret understandings among the Defendants is irrelevant to this point. HD Opp., pp. 5-7.<sup>7</sup>

Finally, and most importantly, HD ignores one of the key bases for the holding in *Wilkinson*. The Supreme Court held that where the original covenants provide a list of specific uses that are prohibited, it is reasonable for a purchaser of property to assume that uses that are *not* in the list are intended to be *permitted*. “The lack of an express term with the inclusion of other similar terms is evidence of the drafter’s intent.” *Wilkinson*, 180 Wn.2d at 251. The Supreme Court further held, “The drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit [other uses], they would have done so.” *Id.* HD stands this holding on its head, arguing that because certain other uses were restricted in the original covenants, “[i]t was therefore not unexpected that Olhava’s and Wal-Mart’s right to amend the existing ECRs could be exercised to change the existing use restriction *or add additional restrictions ...*”. HD Opp., pp. 21-22 (emphasis added). But under similar circumstances in *Wilkinson*, the Supreme Court held that including some specific restrictions creates a reasonable expectation that other uses were not (and would not be) prohibited.

As College Marketplace argued in its Opening (pp. 15-18), there

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<sup>7</sup> There is no finding of fact that supports HD on this point, in any event. The absence of a finding, of course, “is taken as a negative finding on the issue.” *Peoples Nat’l Bank v. Birney’s Enters.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

are a number of compelling reasons why the new use restrictions in this case are unrelated to the restrictions in the 2004 ECRs. As to the new restriction against paint stores, HD readily concedes, “under the original ECRs, paint stores were not a restricted use.” HD Opp., p. 23. Indeed, the original ECRs confirm to a reasonable purchaser that the property may be used as a “paint store,” so long as the store maintains a parking ratio of five spaces per 1,000 feet of building space.<sup>8</sup> Under similar circumstances, the *Wilkinson* Court reasoned that an express restriction on the size of “For Rent” signs “proves not just that the [original] covenants allow some rentals but that the drafters anticipated rentals and consciously decided not to limit their duration, restricting just the appearance of rental signs.” *Wilkinson*, 180 Wn.2d at 251. Likewise, here, a reasonable purchaser of property in the Center would have concluded that it would be permitted to lease to a paint store, so long as the express parking requirements were satisfied.

Finally, HD fails to respond to the argument that the new use restrictions in the 2008 ECRs (which were added *to protect HD’s business*) were unrelated to the use restrictions in the 2004 ECRs (which were for the benefit of Wal-Mart). Opening, p. 16. Thus, Section 3 of the 2004 ECRs (“Competing Business”) (CP 572) restricts a number of specific uses that might compete with Wal-Mart’s store and Section 15 (“Document Execution, Modification and Cancellation”) (CP 580)

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<sup>8</sup> Opening, p. 17; 2004 ECRs, Section 4(e)(6) (“Outparcel(s) Development”) (CP 573). See also Section 6(a)(2) (“‘Parking Area’ Ratio”) (CP 682).

provides that these restrictions might be “modified,” but only by the agreement of Wal-Mart and the Developer. Many of the new restrictions, including the restriction prohibiting paint stores, were added to benefit HD, rather than Wal-Mart. Oct. 3, 2014 Findings of Fact (“FF”) 29 (CP 525). The new restrictions added in 2008 for HD’s benefit are not *related* to the earlier Wal-Mart restrictions, because in the absence of an express reservation of such a power, a reasonable purchaser would not understand that new restrictions could be imposed on the Center to limit competition with HD. Opening, pp. 16-17.

For all of these reasons, the new use restrictions in the 2008 ECRs were not related to existing restrictions. Because the 2004 ECRs did not reserve the right to create new restrictions, under *Wilkinson* it is clear that the new use restrictions are invalid.

**E. Under the 2004 ECRs, “Only” Wal-Mart and Olhava, Not Home Depot, May Modify the Restrictions**

HD argues that the ECRs permit Wal-Mart and Olhava to “add new parties” and to impose restrictions to their benefit (HD Opp., p. 13), but this ignores the fact that the ECRs provide that “only” Wal-Mart and Olhava may modify the ECRs. Purchasers such as College Marketplace had the right to expect that this language meant what it said. Opening, pp. 20-22.

HD further argues that purchasers were somehow on notice from a map attached to the ECRs that there would be two anchor tenants and that “Home Depot’s customary restrictions on certain competing businesses”

would be added to the ECRs. HD Opp., p. 6. But there is no evidence, let alone a Finding, to support that argument.<sup>9</sup> Moreover, the mere fact that a second anchor might be added does not mean that additional use restrictions would necessarily follow.<sup>10</sup> It certainly would have been possible in the ECRs to expressly reserve the right to create new use restrictions for the benefit of a second anchor, but Defendants did not do so. Instead, they did not reveal their plans until well after other properties had been sold to unsuspecting purchasers, including College Marketplace.

**F. HD Continues to Mischaracterize the Public Policy Issue**

In support of its Declaratory Judgment claim, College Marketplace intended to introduce evidence and make arguments that the use restrictions in the 2008 ECRs were invalid for the additional reason that they were unreasonable, under the circumstances. In this sense, restrictive covenants in a real estate development are no different than a non-compete provision in an employment agreement (which is another form of restrictive covenant). *See Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 931-32, 540 P.2d 1373 (1975); *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 369, 680 P.2d 448 (1984). In its Opening Brief, College Marketplace showed that, under well-established Washington law, *Defendants* had the burden to show that the restrictions

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<sup>9</sup> HD purports to cite to the “record” but the documents it cites are Declarations from earlier motions that were not admitted at the trial. (CP 2268, 1776-77)

<sup>10</sup> For example, it is clear from the trial court’s Findings that HD operated its store in the Center for almost three years without the benefit of the new use restrictions. FF 17, 28 (CP 523-24).

are both reasonable and consistent with public policy. *Sheppard*, 85 Wn.2d at 933<sup>11</sup>. The public policy issue is inherent in any claim challenging a restrictive covenant and *cannot be waived* by a party. *Waring v. Lobdell*, 63 Wn.2d 532, 533-34, 387 P.2d 979 (1964). Moreover, Defendants (including HD) were specifically aware that College Marketplace was making this argument by at least October 2013, almost a year prior to trial. HD now concedes this latter point. HD Opp., p. 25.

HD confuses the issue, as it did in the trial court, by labeling the reasonableness argument as an “antitrust claim,” and arguing that it learned of this claim for the first time on the eve of trial. But this is a red herring. College Marketplace challenged the validity of the restrictive covenants, which necessarily raised the issue of their reasonableness *in connection with its Declaratory Judgment claim*. The reasonableness issue in these circumstances touches on some of the policies that also underlie the antitrust laws, but that alone does not make this a new antitrust claim. Just like an employer attempting to enforce a non-competition clause against an ex-employee, the proponent of a restrictive property covenant must prove that it is reasonable under the circumstances. *Sheppard*, 85 Wn.2d at 933. Not only did Defendants fail

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<sup>11</sup> Thus, a finding that the restriction is reasonable under the circumstances is necessary before the court can uphold the restriction. The absence of such a finding is yet another reason the trial court decision must be reversed. *Birney’s Enters.*, *supra*, 54 Wn. App. at 670.

to carry their burden, they successfully prevented College Marketplace from addressing the issue.<sup>12</sup>

**G. The Attorneys' Fee Provision Is Not Applicable**

The fee provision applies only to claims brought to obtain relief from a “breach or threatened breach,” neither of which occurred here. HD does not dispute that the Defendants drafted the fee provision in Section 13 of the ECRs, nor does it cite any authority to controvert the cases in the Opening that establish that any ambiguities in the provision must be strictly construed against Defendants, as the drafters. *Id.*, p. 37.

**1. There was no evidence of a threatened or actual breach by College Marketplace.**

HD acknowledges that, under the clause at issue, fees are only available under this provision in an action that is filed ““in the event of” a breach or threatened breach.” HD Opp., p. 42. But as College Marketplace established in the Opening, there was no actual or threatened breach here. Defendants conceded in the trial court that there had been no breach. CP 1489 (Nov. 26, 2014 Mem. Op. on Defts’ Mot. for Fees, p. 4).

As to the issue of “threatened breach,” HD mischaracterizes the argument in the Opening and then turns its guns on the straw man it created. HD claims that “College argues that the evidence does not show

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<sup>12</sup> To meet its burden, HD would have to show that the new use restrictions are ancillary to a valid relationship that the law deems worthy of protection. Opening, pp. 26-29. Contrary to HD’s argument, and the trial court’s decision, College Marketplace does not need to establish the other elements of a statutory antitrust claim in order to prevail on this argument. HD Opp., p. 26. But in any event, the issue for this Court is whether the trial erred by disallowing evidence and argument on this issue, not whether HD might meet its burden at the trial.

it ‘knowingly’ breached or threatened to breach the Amended ECRs.” HD Opp., p. 38. But the actual argument by College Marketplace was that there was no threatened breach because a “threat” requires proof of a communication to the “threatened party.” Opening, p. 40. There is nothing in the record that shows any communication to the Defendants that College Marketplace intended to go forward *unless* the Defendants first waived the use restriction or the court ruled it invalid. For that reason alone, there was no threat of a breach. It is not surprising that HD cites to no evidence, let alone a Finding, of such a “threat” because the record is clear that College Marketplace had no knowledge of, and did not communicate with Defendants, regarding the new use restrictions until Sherwin Williams discovered them. Sherwin Williams refused to go forward with the lease *unless* the legal issue was first favorably resolved. Any communication by College Marketplace made it clear that it would not be able to go forward with the lease unless and until the legal issues were resolved. *Id.*, pp. 37-40.

When Defendants refused to budge, College Marketplace chose not to sign the lease but instead to seek a judicial declaration of its rights, which is “a means of settling an actual controversy *before it ripens into a violation of the civil or criminal law, or a breach of a contractual duty.*” *Tuyen Thanh Mai v. American Seafoods Co., LLC*, 160 Wn. App. 528, 547-48, 249 P.3d 1030 (2011) (emphasis added). The trial court’s conclusions regarding “threatened breach” (CP 1514) (February 20, 2015 Conclusions of Law re Attorneys’ Fees (“Atty Fees CL”) 7, 10) are

erroneous because they ignore that there was never a threat to breach the agreement. Opening, pp. 37-43.

HD argues that this case is no different than an action by Defendants to enjoin a breach by a property owner, but that argument ignores that, in an action for an injunction, Defendants would need to show a “well-grounded fear” of an “immediate” violation of the ECRs, which is a prerequisite to any injunction. *Id.*, p. 43. In fact, Defendants sought an injunction in the instant case, but the Court did not grant it because there was no “threat” that College Marketplace would breach the ECRs unless it was enjoined. (CP 533-36) (Oct. 3, 2014 Judgment).

Finally, HD attempts to rewrite the Agreement by referring to the drafters’ supposed intent in preparing Section 13 (HD Opp., p. 40), but: (1) there is no such evidence in the record; and (2) it would be inadmissible in any event. *Wilkinson*, 180 Wn.2d at 251 (court will not consider extrinsic “[e]vidence that would vary, contradict or modify the written word” or “show an intention independent of the instrument”). Defendants drafted Section 13 of the ECRs and chose language that limits its scope to actions that are filed “in the event of a breach or threatened breach.” There was no threatened breach by College Marketplace and the clause does not apply to any of the claims.

**2. The phrase “any action” must be read in the context of Section 13.**

It is a well-established rule that, in interpreting the meaning of words in an agreement, “we view the contract as a whole, interpreting

particular language in the context of other contract provisions.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000). HD pays lip service to this rule (HD Opp., p. 37), but then ignores it. *Id.*, p. 38. Reading this language in the context of Section 13 makes it clear that the phrase “any action” refers to an action brought *pursuant to* Section 13, which is limited in two key respects: (1) to actions filed “in the event of a breach or threatened breach of this Agreement” (*see* discussion, above); and (2) to actions that seek relief “from the consequences of said breach or threatened breach.” (CP 1512-13) (February 20, 2015 Findings of Fact re Attorneys’ Fees (“Atty Fees FF”) 32).

The attorneys’ fee clause and the phrase “any action” were included by Defendants in Section 13 of the ECRs, which is entitled “**Breach.**” (CP 660). The first sentence of the Section describes the scope of the clause: “in the event of breach or threatened breach of this Agreement.” *Id.* The scope is further limited later in the paragraph: “shall be entitled to institute *proceedings for full and adequate relief from the consequences of said breach or threatened breach.*” *Id.* (emphasis added). The phrase “in any action” appears in the very next sentence; the only reasonable interpretation of the clause—read in context—is that “any action” refers to an action brought pursuant to Section 13, which is limited in scope to “proceedings for [...] relief from the consequences of said breach or threatened breach.” (CP 660). If the drafters of this clause had

really intended to create a broad attorneys' fee clause for all disputes they would have placed this language in a separate paragraph entitled "Attorneys' Fees," rather than placing it at the end of a paragraph entitled "**Breach.**" But Defendants chose instead to draft a narrow attorneys' fee clause that applied in limited circumstances and it was an error for the trial court to re-write that agreement.

HD and the trial court both appear to concede the first limitation. The trial court concluded that Section 13 "applies to 'any action' regarding a breach or threatened breach of the 2008 ECRs." (CP 1513) (Atty Fees CL 2). HD also concedes this point: "Rather, fees are available 'in any action' that is filed 'in the event of' a breach or threatened breach of the Amended ECRs." HD Opp., p. 42. Because there was no breach or threatened breach by College Marketplace, the clause did not apply to any claims, including the tort claims.

Moreover, neither the trial court nor HD acknowledged that the attorneys' fee clause was also expressly limited to "proceedings for full and adequate relief from the consequences of said breach or threatened breach." (CP 660). None of the tort claims as to which fees were awarded under Section 13 involved a claim for "relief from the consequences" of a "breach or threatened breach" by College Marketplace. The trial court's conclusions that fees expended in defending the tort claims are recoverable because they arose from the ECRs are erroneous because Section 13 of the ECRs applies only to a subset of claims that might arise

from the contract, i.e., claims for relief from a breach or threatened breach. (CP 1515-16) (Atty Fee CL 15, 17, 19 and 21).

HD cites a number of decisions that allowed an award of fees for tort claims that are deemed to be “on the contract,” but none of those cases involved the type of limited attorneys’ fees clause that Defendants chose to draft. In *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009), the fee clause at issue covered all claims or controversies “relating to the agreement” (“In the event of any controversy, claim, or dispute relating to this Agreement or the prior Agreement, or their breach, the prevailing party shall be entitled to recover reasonable expenses, costs and attorneys’ fees.”). The contract in *W. Stud Welding v. Omark Indus.*, 43 Wn. App. 293, 296-97, 716 P.2d 959 (1986), contained two separate attorney’s fee provisions: Article 9 (“In the event of a dispute between the parties hereto . . . the prevailing party shall be entitle to reasonable attorney’s fees and cost [sic]:) and Article 11 (“In the event of any action to enforce the terms of this Agreement, the prevailing party will be entitled to recover, in addition to all other damages, attorney’s fees and costs of suit.”). Neither of these cases dealt with an attorneys’ fee clause like the one that Defendants drafted, which limits the entitlement to fees to “proceedings for [...] relief from the consequences of said breach or threatened breach.”

Likewise, HD finds no support in *Hill v. Cox*, 110 Wn. App. 394, 411, 41 P.3d 495 (2002). *Hill* involved a claim for wrongful logging of trees, which breached a contract between the parties as well as certain

statutes. The plaintiff elected to seek remedies under the statutes and the court held that an attorneys' fee clause that covered "any action to enforce the provisions of this contract" allowed plaintiff to recover fees. Unlike this case, *Hill* involved both a breach and a claim to seek relief from that breach, as well as a materially different attorneys' fee clause.<sup>13</sup>

For all the reasons discussed in Sections A-E, above, the trial court erred in holding that Defendants were the prevailing parties in this litigation, which is a prerequisite to any award of fees. (CP 1512-13) (Atty Fee FF 32). But even if we assume, for the sake of argument, that Defendants had prevailed on the Declaratory Judgment and tort claims, the award of almost \$1 Million in fees and costs is erroneous because the limited attorneys' fee clause that Defendants drafted does not support an award of fees in this case.<sup>14</sup>

**3. If this Court reverses the Judgments, it should remand the issue of Olhava's entitlement to fees.**

Olhava's Opp. relates solely to one issue—its supposed entitlement to attorneys' fees for defending two tort claims, pursuant to the Purchase

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<sup>13</sup> *Edmonds v. Scott Real Estate*, 97 Wn. App. 834, 942 P.2d 1072 (1997) fails to support the award because the court in that case does not discuss the language or scope of the fee provision at issue.

<sup>14</sup> Wal-Mart and Olhava do not even address these issues. Finally, HD offers no authority in support of its argument that it can, at the same time, redact time entries from its time sheets and seek fees for the work reflected in those entries. Opening, pp. 41-42. HD's description of *Ideal Elec. Sec. Co., v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) is misleading. HD Opp., p. 45. That case actually held that the trial court abused its discretion by failing to require the disclosure of all of the fee statements and further held that, if the redacted fee statements were not provided, the *entire* attorneys' fee claim must be denied. The Court also held that "in camera review by the court alone is insufficient." *Id.*

& Sale Agreement (“PSA”) between College Marketplace and Olhava. As a threshold matter, it is important to recognize that the trial court did not award any fees to Olhava pursuant to the PSA; nor did it determine the amount of the fees that were reasonable to defend those claims. *See* Olhava Opp., p. 3. For that reason alone, the fee award to Olhava under the PSA would need to be remanded in the event that this Court reverses the Judgments for Attorneys’ Fees under the ECRs.

Moreover, if College Marketplace were to prevail on its Declaratory Judgment claim, it would then be considered the prevailing party for the lawsuit as a whole because it would have received a substantial portion of the relief it requested. *Riss*, 131 Wn.2d at 633-34.<sup>15</sup> In *Riss*, the homeowner plaintiff was only partially successful in his challenge to restrictive covenants, but because he was able to build the house he sought to have approved, the Supreme Court found him to be the prevailing party. *Id.* Therefore, if this Court reverses either of the two Judgments at issue the proper course is to remand to the trial court for a determination of whether, under the changed circumstances, Olhava should be considered the prevailing party in the litigation.

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<sup>15</sup> Olhava’s premise appears to be that it can be the “prevailing party under the PSA,” without regard to the outcome of the rest of the litigation. Olhava Opp., p. 3. That premise is wrong; the prevailing party is the party that substantially prevails in the lawsuit as a whole. *See, e.g., Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).

**H. This Court Should Remand With Direction To Enter Judgment for College Marketplace on the Declaratory Judgment Claim**

HD argues that, if the trial court decision is reversed, the Declaratory Judgment claim should be remanded for a new trial to allow HD to pursue several theories of defense. HD Opp., p. 46. RAP 12.2 gives this Court the authority to remand for a new trial or to remand with directions to enter a judgment on all or part of the case. Under these circumstances, the Court should at least direct a judgment as to the legal effect of the 2008 ECRs because none of HD's proffered "defenses" warrants another trial.

HD lists five defenses on which it proposes to introduce evidence on remand. HD Opp., pp. 46-47. But the meaning of the ECRs is a legal issue for this Court to resolve. *Bauman*, 139 Wn. App. at 86. Moreover, the Court should not consider extrinsic "[e]vidence that would vary, contradict or modify the written word" or "show an intention independent of the instrument." *Wilkinson*, 180 Wn.2d at 249-51. As such, HD's "defenses" are irrelevant to the Declaratory Judgment claim and the supposed evidence would be inadmissible, as a matter of law. Even if HD were to introduce evidence that College Marketplace knew that Wal-Mart and HD are co-anchor tenants in other developments (Defense #1), or that the industry practice is to have restrictions in shopping centers (Defense #2) (*see* HD Opp., p. 46), that evidence cannot be used to vary the language in the ECRs. To the contrary, College Marketplace and other purchasers are entitled to rely on the ECRs, as filed at the time of

purchase, and are further entitled to assume that omissions in language in the ECRs reflect the drafters' intent. *Wilkinson*, 180 Wn.2d at 249-51. Likewise, whether or not College Marketplace's leases to its tenants include restrictions on use (Defense #4) is completely irrelevant to the meaning of the ECRs. HD Opp., p. 46.

HD apparently now seeks to resurrect its argument that Mr. Ruggiero knew about the planned changes in 2007 and that, because he served as a dual real estate agent for College Marketplace and Olhava, his knowledge regarding the secret negotiation of the 2008 ECRs should be imputed to College Marketplace (Defense #3). *Id.* But Washington has abrogated the traditional rules relating to agents in this context. "Unless otherwise agreed to in writing, a principal does not have knowledge or notice of any facts known by an agent or subagent of the principal that are not actually known by the principal." RCW 18.86.100 (1). Therefore, even if HD could prove that Ruggiero had knowledge, that cannot be imputed to College Marketplace, as a matter of law.

Finally, HD's argument regarding an "equitable servitude," (Defense #5) based on *Riverview Community Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014) misses the mark for several reasons. First, HD never pleaded an equitable servitude claim, so there is no such claim in the case. (CP 225-39) (HD's Am. Answer to Third Am. Compl.). Second, as HD elsewhere admits, the meaning of the ECRs turns on the Court's interpretation of the document, itself. HD Opp., p. 13. HD may not now attempt to introduce extrinsic evidence to

“vary, contradict or modify the written word” or to “show an intention independent of the instrument.” *Wilkinson*, 180 Wn.2d at 251. Third, the undisputed facts in this situation make it clear that no equitable servitude could be imposed on Lot 7A, in any event. There is no evidence that anyone with authority to bind Lot 7A ever made a representation to HD (or anyone else) regarding the use restrictions in the 2008 ECRs. Indeed, it is undisputed that those use restrictions did not exist when College Marketplace bought the property. Nor is this a case like *Riverview*, in which the developers made consistent representations to a group of home purchasers regarding the presence of a golf course on the developers’ property, and each of the purchasers relied on those representations. *Riverview*, 181 Wn.2d at 891-92.

None of HD’s proffered “defenses” to the Declaratory Judgment claim requires a trial. This Court should reverse both Judgments and remand with instructions to enter a Declaratory Judgment that the new use restrictions in the 2008 ECRs are invalid.

## **II. CONCLUSION**

In February, 2007, College Marketplace purchased Lot 7A in the Center. At the time, the only use restrictions in place were in the 2004 ECRs, which had been recorded by Olhava and Wal-Mart in June 2004. College Marketplace understood that its property was subject to certain express use restrictions and further understood that Wal-Mart and Olhava might “modify or cancel” the ECRs. But there was nothing in the ECRs

that reserved the right to add additional use restrictions. That was “the contract into which [College Marketplace] bought and the expectation that we must uphold.” *Wilkinson*, 180 Wn.2d at 258. But, unknown to College Marketplace, Wal-Mart, Olhava and HD were secretly negotiating new use restrictions that went far beyond the 2004 ECRs. College Marketplace did not discover these new use restrictions until a potential lessee, Sherwin Williams, raised the issue. The 2008 ECRs added 80 new use restrictions, which substantially reduced the value of College Marketplace’s property.

At that point, College Marketplace chose not to breach the restrictions, even though it believed them to be invalid. Instead it filed a Declaratory Judgment action to resolve the dispute over the meaning of the ECRs. Nonetheless, the trial court not only misapplied Washington law as to the merits of the Declaratory Judgment claim, it also awarded nearly \$1 Million in fees and costs to the Defendants for College Marketplace’s “threatened breach.” Neither of these decisions is just, nor do they find support in Washington law.

For all the reasons in its Opening Brief and this Reply Brief, College Marketplace respectfully requests that this Court reverse both the October 3, 2014 Judgment regarding the Declaratory Judgment claim (CP 533-36) and the February 20, 2015 Judgments in Favor of Home Depot, Wal-Mart and Olhava for attorneys’ fees (CP 1527-33), and remand those Judgments with instructions to enter a Declaratory Judgment in favor of College Marketplace that the new use restrictions in the 2008 ECRs are

invalid. For the reasons separately discussed above, College Marketplace further requests that this Court remand the issue of Olhava's entitlement to fees under the PSA for further consideration by the trial court.

DATED this 8th day of July, 2015.

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**CERTIFICATE OF SERVICE**

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## Transmittal Letter

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