

NO. 47345-3-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,
Respondent-Plaintiff

vs.

PHILLIPS 66 COMPANY, et al
Appellants-Defendants

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE COUNTY OF COWLITZ

BRIEF OF APPELLANTS

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INTRODUCTION

This case arises out of the improper attempts of Plaintiff/Appellee Millennium Bulk Terminals – Longview, LLC (“MBT”) to obtain costs to which it is not entitled from Defendant/Appellant Phillips 66 Co. (“P66”).¹

In January of 2011, MBT (a majority-owned subsidiary of Ambre Energy, an Australian company) bought a bulk terminal in Longview, Washington (the “Terminal”) from Chinook Ventures, Inc. (“Chinook”). MBT acquired the Terminal as part of its plan to export coal and other bulk products. At the time of the sale, Chinook was facing regulatory and permitting problems, but MBT was well aware of those problems.

When the MBT-Chinook transaction closed in January of 2011, P66 was storing green petroleum coke (“petcoke”) at the Terminal pursuant to a Terminal Agreement that P66 had signed with Chinook. The Terminal Agreement contained an assignability clause, and MBT had agreed to assume the contract in its Asset and Purchase Agreement with Chinook. In addition, MBT representatives repeatedly assured P66 that MBT would honor the Terminal Agreement and planned to retain P66’s petcoke business.

On the day of the closing for MBT’s purchase of the Terminal—with no advance notice to P66—MBT flip-flopped. Instead of assuming the Chinook-

¹ Defendant/Appellant Phillips 66 Co. is successor-in-interest to ConocoPhillips Co., and the two entities are referred to collectively herein as “P66.” *See* CP 465 (MTB’s agreement to an assignment from Conoco Phillips to Phillips 66 and to the release of any liabilities and obligations of ConocoPhillips Co.).

P66 Terminal Agreement as it had agreed to do and as it had told P66 that it would do, MBT instead executed an amendment to the sales agreement that purported to reject the Terminal Agreement. Shortly afterwards, MBT insisted that P66 remove its petcoke from the Terminal – something that P66 would have forced Chinook to handle pursuant to the Terminal Agreement if MBT had warned P66 of MBT’s impending about-face. Although P66 believed that the Terminal Agreement legally remained in effect, P66 nevertheless agreed to replace it with a second agreement – the Access and Services Agreement (the “ASA”), which governed removal of the petcoke.

Under the ASA, P66 had sole responsibility for removing the petcoke. Further, if MBT voluntarily undertook to perform any actions in connection with the removal of the petcoke, MBT had to obtain P66’s *prior written agreement* under Section 5 of the ASA if MBT wanted reimbursement.

MBT agreed that P66 could not and should not remove the petcoke until MBT had obtained the necessary permits. MBT did not acquire those permits until March 1, 2012. The permits contained MBT’s estimate that the removal of the petcoke would take approximately 180 days. P66 removed the petcoke within that time frame after MBT obtained the required permits.

In September of 2012 – roughly seven months after the parties had executed the ASA and after P66 had virtually completed the removal of the petcoke – MBT for the first time demanded that P66 reimburse it for \$692,788

in costs. Of that amount, \$415,557 was allegedly incurred *before the ASA was executed*, and \$335,034 was allegedly incurred after the ASA was executed. More than \$200,000 of the costs were 18 months old and predated the ASA by a year. The costs apparently consisted primarily of amounts that MBT paid to third-party vendors for matters relating to wastewater removal. P66 had never agreed to any of these expenditures as required by Section 5 of the ASA. Indeed, MBT's own conduct and internal documents make clear that MBT was not entitled to reimbursement. MBT certainly was not entitled to recover *under the ASA* for costs incurred *before the ASA even existed*.

P66 refused to pay the improper costs that MBT sprang on P66 at the last minute, and MBT sued for trespass, negligence, and breach of the ASA. The trial court erroneously granted summary judgment for MBT, and P66 seeks reversal through this appeal. The summary judgment order did not specify the grounds on which it was granted.

The summary judgment cannot be affirmed based on MBT's *claim for breach of the ASA*. As discussed above, MBT never obtained P66's prior written agreement for the costs that it is seeking in this lawsuit as required by Section 5 of the ASA. Nor do any other terms in the ASA obligate P66 to reimburse MBT for those costs.

In its Motion for Summary Judgment, MBT smugly argued that it had succeeded in inserting clauses in the ASA that were broad enough to require

P66 to reimburse MBT for the cost of removing and remediating wastewater – whether or not that was what the parties intended and whether or not that requirement was within the “spirit” of the ASA. The problem with MBT’s “gotcha” argument is that MBT’s interpretation of the ASA is flat wrong. When the ASA is properly construed, it is clear that, as a matter of law, P66 had no obligation to reimburse MBT for the wastewater removal or remediation costs that it is seeking here. The terms and “spirit” of the agreement are in harmony with each other.

Nor can the summary judgment be affirmed based on the *trespass claim* that MBT asserted against P66. That claim is rife with fact issues. For example, consent is a defense to trespass. Where a land owner (*e.g.*, Chinook) has consented to the presence of an item on its land, but the land owner or its transferee (*e.g.*, MBT) later withdraws that consent, then the owner of the item (*e.g.*, P66) is entitled to a reasonable time in which to remove the item. Here, there are at least fact issues about whether P66 removed the petcoke reasonably promptly after MBT requested that it do so. Fact questions about intent, foreseeability causation, and equitable estoppel also preclude summary judgment as does the economic loss rule/independent duty doctrine.

MBT did not even move for summary judgment on its *nuisance claim*, but in any event, the summary judgment could not be affirmed as to that claim for many of the same reasons that summary judgment cannot be affirmed

based on MBT's trespass claim. Liability for nuisance requires an *unreasonable* interference with a property interest. In light of MBT's initial assumption of the Terminal Agreement and MBT's encouragement of P66's petcoke operations, there are at least fact questions about whether P66 engaged in any unreasonable interference. The fact that MBT "came to the alleged nuisance" also would defeat summary judgment based on nuisance.

The trial court also erred in granting summary judgment against P66 on P66's fraud and negligent misrepresentation claims. The summary judgment evidence adduced by P66 clearly raised fact issues on those claims. The summary judgment should be set aside in its entirety.

ASSIGNMENTS OF ERROR

- (1) The trial court erred in granting MBT's motion for summary judgment on its claims for affirmative relief given that the summary judgment evidence at least raised genuine issues of material fact as to whether MBT was entitled to recover on its breach of contract, trespass, and nuisance claims, and in reality, MBT was not entitled to recover on those claims as a matter of law, and was certainly not entitled to the entire amount of damages awarded by the trial court.
- (2) The trial court erred in granting MBT's application for attorneys' fees given that the summary judgment cannot be sustained based on MBT's contract claim.

- (3) The trial court erred in granting MBT's motion for summary judgment on P66's counterclaims for fraud and negligent misrepresentation and in dismissing those counterclaims because P66's summary judgment evidence raised genuine issues of material fact as to whether P66 was entitled to recover on them.
- (4) The trial court erred in denying P66's motion for summary judgment on MBT's claims for affirmative relief given that there are no genuine issues of material fact relating to MBT's claims for breach of contract, trespass, or negligence, and MBT is not entitled to recover on those claims as a matter of law.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- (1) Should the summary judgment in favor of MBT be reversed to the extent that it is based on MBT's *claim for breach of the ASA* given that (a) P66's summary judgment evidence at least raises genuine issues of material fact as to whether MBT is entitled to recover on its breach of contract claim, and (b) MBT cannot recover for breach of the ASA as a matter of law? AE 1, 4.
- (2) At a minimum, did the trial court err in awarding MBT alleged *pre-ASA damages* for breach of the ASA? AE 1.
- (3) Should the *attorneys' fees award* be set aside since MBT is not entitled to summary judgment on its breach of contract claim? AE 2.

- (4) Should the summary judgment for MBT be reversed to the extent that it might be based on MBT's *trespass claim* given that (a) P66's summary judgment evidence at least raises genuine issues of material fact as to whether MBT is entitled to recover on its trespass claim and (b) MBT cannot recover for trespass as a matter of law? AE 1, 4.
- (5) Should the summary judgment for MBT be reversed to the extent that it might be based on MBT's *nuisance claim* given that (a) MBT did not even move for summary judgment on its nuisance claim, (b) P66's summary judgment evidence at least raises genuine issues of material fact as to whether MBT is entitled to recover on its nuisance claim, and (c) MBT cannot recover for nuisance as a matter of law? AE 1, 4.
- (6) Should the summary judgment against P66 on its *fraud and negligent misrepresentation claims* be reversed given that P66's summary judgment evidence raises genuine issues of material fact with respect to whether P66 is entitled to recover on those claims? AE 3.

STATEMENT OF THE CASE

PROCEDURAL POSTURE OF THE CASE

MBT filed this lawsuit on December 5, 2013, contending that Defendants Phillips 66 Co. and ConocoPhillips Co. (P66's predecessor in interest) were liable to it for trespass, nuisance, and breach of the ASA. CP 1. (Phillips 66 and ConocoPhillips are collectively referred to as "P66. See p. 1

n.1, *supra*.) P66 answered and filed a counterclaim against MBT for fraud, negligent misrepresentation, and breach of the ASA. CP 8. The parties engaged in extensive discovery. On December 17, 2014, MBT and P66 each filed a motion for summary judgment and subsequently filed responses and replies. CP 29, 104, 752, 1410, 1442, 1475. On March 16, 2015, the trial court granted summary judgment for MBT and against P66, awarding MBT \$692,788.38 in actual damages plus \$100,887.54 in prejudgment interest plus post-judgment interest. CP 1507, 1517. The trial court also awarded MBT attorneys' fees and costs in the amount of \$113,589.77. CP 1512, 1517. On March 19, 2015, P66 filed its Notice of Appeal. CP 1522.

STATEMENT OF FACTS

A. In 2008, P66 Began Storing Petcoke at a Terminal Owned by Chinook.

As of 2008, Chinook owned a terminal located in Longview, Washington on the Columbia River (the "Terminal"). CP 140 ¶ 3. Chinook operated the Terminal as a flat storage and transport site facility that handled fly ash, petroleum coke, coal, alumina, and cement that were transported into and out of the Terminal by ship, rail, and truck. *Id.* The Terminal is essentially a privately-owned port on the Columbia River. *Id.*

In September 2008, Chinook and P66² entered into an agreement called the ConocoPhillips/Chinook Fuel Coke Handling Agreement for handling petroleum coke at the Terminal (the “Terminal Agreement”). CP 140 ¶ 4; CP 289. The Terminal Agreement had a one-year evergreen term under which the contract would automatically renew unless one of the parties cancelled by written notice “at least one (1) year in advance of its desire to terminate [the] Agreement.” CP 140, 292 Sect. VI. The Terminal Agreement also contained a provision that expressly made the agreement “binding upon each of the parties and their respective successors and assigns.” CP 140, 297 Sect. 9.11.

The Terminal Agreement required Chinook to provide all material, equipment, personnel, and services needed to receive and store P66’s green petroleum coke (“petcoke”). CP 140, 289 Sect. 1.1. P66 paid nine dollars per metric ton of petcoke “as a flat all-inclusive handling fee payment ... for the services.” CP 140, 291 Sect. 5.1. It is undisputed that P66 paid the handling fee for the petcoke that is the subject of this lawsuit and never received a termination notice. *See* CP 157 ¶ 3; CP 159 ¶ 7; CP 311 p. 47; CP 312 p. 51.

B. Chinook Had Environmental Permitting Issues at the Terminal, but P66 Was Never Implicated in Any of the Infractions.

During the time that it owned the Terminal, Chinook had several

² The parties to the contract were actually Chinook and ConocoPhillips, the predecessor-in-interest of Phillips 66. CP 462. However, as previously noted, Defendants ConocoPhillips Co. and Phillips 66 Co. are collectively referred to as “P66.” *See* p. 1 n.1, *supra*.

environmental permitting problems. CP 157 ¶ 5. These permit violations included (1) Washington State Department of Ecology Notice of Penalty and Administrative Order No. 7391 and 7392, dated February 26, 2010, and (2) Washington State Department of Ecology Administrative Order No. 8026. *See* CP 323-27 (Department of Ecology Letter discussing Notice of Penalty and Administrative Order); CP 329-38 (Administrative Order).

Of course, obtaining proper permits and ensuring the proper operation of the Terminal were the responsibilities of the Terminal owners (*i.e.*, Chinook and MBT). CP 157 ¶ 5. MBT assumed these permitting duties and obligations when it purchased the Terminal from Chinook. CP 324. ***Significantly, P66 was never cited for any of the environmental infractions.*** CP 157 ¶ 5.

C. MBT Purchased the Terminal with Eyes Wide Open and Was Well Aware of the Permitting Issues.

As the relevant documents demonstrate, MBT purchased the Terminal with full knowledge of the presence of P66's petcoke at the Terminal, the existence of the Terminal Agreement that allowed P66 to store its petcoke at the Terminal, and the Terminal's permitting issues relating to the petcoke.

MBT became interested in purchasing the Terminal in 2010 and began negotiations with Chinook that same year. On June 30, 2010, the parties executed a Letter of Intent that was to serve as an outline for the transaction. CP 340-47. In Exhibit A to the Letter of Intent, "Chinook disclose[d] that it

has executed contracts to provide facilities or marine terminal services to ... 4. ConocoPhillips [P66]” CP 345. Thus, MBT knew about the existence of P66 and its relationship with Chinook very early in the due diligence process.

Two months later, in August 2010, MBT submitted an environmental checklist for permitting to the Washington Department of Ecology. CP 349-432. That document revealed that MBT had been advised (1) of the existence of “[a] stockpile for storage of petroleum coke and coal” (CP 368, 386), and (2) that a “number of agencies have indicated that a number of remedial actions are necessary to correct permitting and compliance violations.” (CP 351). Thus, before MBT purchased the Terminal, MBT knew about P66’s petcoke and about the permitting issues.

D. MBT Initially Assumed the Terminal Agreement and Assured P66 that It Was Welcome to Continue Its Petcoke Operations at the Terminal.

On August 17, 2010, MBT and Chinook entered into the Asset Purchase Agreement for the sale of the Terminal to MBT. CP 164-287. That agreement further demonstrates that MBT knew about the presence of P66’s petcoke at the Terminal and was aware of Chinook’s contractual agreement to store P66’s coke at the Terminal. Indeed, MBT even agreed to assume the P66/Chinook Terminal Agreement. CP 192, Schedule 1.1(b). In Section 5.8 of the Asset Purchase Agreement, MBT further agreed that “[e]ach Assumed Contract and Permit is in full force and effect and is valid, binding, and

enforceable in accordance with its terms in all material respects.” CP 178.

One month later, on September 20, 2010, Michael Klein (the Vice President of Legal and Corporate Development for MBT) reached out to P66 to discuss the Terminal Agreement. CP 140-41 ¶ 5. He sent an e-mail to P66’s Patrick Piechota that stated, “As part of our due diligence investigation, we would like to understand ... [t]he current state of your contract with [Chinook].” CP 153. P66 confirmed that the contract was in place and that all fees relating to the petcoke had been paid. CP 140-41 ¶ 5; CP 157 ¶ 6.

From that point until January 2011, MBT repeatedly told P66 that MBT wanted to be in the fuel petcoke business and would honor the Terminal Agreement inherited from Chinook. CP 141 ¶ 5; CP 157-58 ¶ 6. On October 10, 2010, P66’s Dave Gipson met with MBT’s CEO Joe Cannon and Michael Klein. CP 158 ¶ 6. At that meeting, Gipson was informed that MBT would continue to export petcoke at the Terminal. *Id.*; CP 437. In fact, MBT was so certain regarding its intention to be in the petcoke business that it pursued other potential customers and sought P66’s approval to do so. CP 440.

E. On the Day of Closing, MBT Flip-Flopped by Purporting to Reject the Terminal Agreement Without Providing Notice to P66.

MBT and Chinook delayed the closing date from October 30, 2010 to January 11, 2011. CP 253-57. ***On the day of closing and inconsistent with months of prior representations to the contrary,*** MBT for the first time

sought to avoid the Terminal Agreement between Chinook and P66 without providing any advance notice to P66. In the Fourth Amendment to the Asset Purchase Agreement, MBT stated for the first time that it would not assume any contracts of Chinook. CP 258-63.

F. MBT's Last Minute Rejection of the Terminal Agreement Reduced the Price that MBT had to Pay Chinook, But Also Let Chinook Off the Hook for Its Obligations to P66.

MBT's agreement with Chinook required Chinook to "[r]emove the petcoke and repair the existing petcoke pad" prior to closing. CP 203. The agreement further provided that if that work was "not completed prior to Closing, Ambre [MBT] [would] obtain a closing adjustment" (a reduction in price). *Id.* Chinook did not remove the petcoke, and MBT did, in fact, obtain a price reduction for the Terminal. CP 309 p. 39. Simmons, MBT's Vice President of Operations at the Terminal and its Corporate Representative, estimated the reduction to be "a couple hundred thousand dollars." *Id.*

While MBT benefitted from its last-minute abandonment of the Terminal Agreement between P66 and Chinook, P66 was left holding the bag. By executing the document that rejected the Terminal Agreement on the day of closing and without any warning to P66, MBT precluded P66 from negotiating with Chinook for the petcoke's removal—which is action that P66 would have taken if it had known of the falsity of MBT's representations that it would assume the Terminal Agreement. CP 158 ¶ 7. MBT's repeated

misrepresentations to P66 that MBT would assume the Terminal Agreement caused P66 to lose its window of opportunity in dealing with Chinook before the Chinook-MBT transaction was completed and that window slammed shut.

G. P66 Believed that MBT Was Legally Obligated to Assume the Terminal Agreement, but Agreed to Enter into a New Agreement in Order to Resolve Matters with MBT.

Even though MBT purported to reject the Terminal Agreement in its final closing documents with Chinook, P66's Dave Gipson did not believe that MBT had the right to do so. CP 487-88 pp. 80-82. After all, the Terminal Agreement contained a provision that expressly made the agreement "binding upon each of the parties and their respective successors and assigns." CP 297 Sect. 9.11. Gipson reminded MBT that "a contract [the Terminal Agreement] was in force and fully transferab[le] to any new owner." CP 445. He also told MBT that the fees that P66 already had paid to Chinook should cover any "cost for services performed by MBT." CP 448. Nevertheless, P66 ultimately agreed to enter into a new contract with MBT that covered the removal of the petcoke – the Access and Services Agreement (the "ASA") – in order to bring matters with MBT to a conclusion. CP 487-88 pp. 80-82; CP 462-66.

H. The Access and Services Agreement Governed P66's Removal of the Petcoke and Required MBT to Obtain P66's Prior Written Agreement if MBT Wanted to be Reimbursed for any Costs.

Following negotiations, P66 and MBT executed the ASA on February 10, 2012. CP 462-66. As set forth in the Recitals, the purpose of the ASA

was very specific: “to facilitate the removal . . . of the ‘Petcoke’ . . . and move the Petcoke via truck to the Port of Longview.” CP 462.

Under Section 4.a of the ASA, P66 had the sole responsibility for performing all of the work relating to the removal of the petcoke. CP 462-63. On the other hand, MBT’s responsibilities, as set forth in Section 4.b, were limited to providing P66 with access to the site and using its best efforts to support P66 in completing the removal. CP 463. The ASA did not give MBT the right to do or direct any work relating to the removal.

Moreover, under Section 5, if MBT did voluntarily undertake any work relating to the removal, MBT could obtain reimbursement from P66 *only if MBT had obtained P66’s prior written agreement*. CP 463. Section 5 stated:

Charges and Fees. *Any charges and fees associated with the Removal of the Petcoke, levied by MBT to [P66], shall be agreed in writing in advance by the parties.*

CP 463 (emphasis added). This provision would prevent MBT from clandestinely attempting to tag P66 with responsibility for fees that P66 did not view as part of its contractual obligation or viewed as too high or viewed as being for work that P66 simply preferred to do itself, as it had the right to do under the ASA. The prior written agreement requirement was necessary because, as Dave Gipson, P66’s lead negotiator, explained, the objective was for the ASA not to create any “financial responsibility toward each other. . . . [MBT] would not owe [P66] money and [P66] would not owe [MBT] money.

Any fees that [MBT] incurred, in regards to the petcoke, would be approved by [P66] in advance.” CP 508 pp. 162-64. Trevor Simmons, who negotiated the ASA on behalf of MBT, repeatedly told Gipson that the intent “was for the parties to move forward with moving the coke and for the parties to have a clean break without financial obligation to the other except those that may arise in the future.” CP 159 ¶ 8.

The ASA, of course, also contained a number of other provisions. For example, Section 6.b dealt with indemnity, and Section 6.a provided that P66 would have “no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT Site.” CP 463-64. But Section 6.a also contained an “except” clause that made clear that Section 6.a did not negate the indemnity obligations imposed on P66 by Section 6.b. CP 463.

I. P66 Removed the Petcoke After MBT Obtained the Required Permits, Losing About One Million Dollars in the Process.

As MBT knew, P66 could not remove the petcoke until MBT had obtained the necessary permits. CP 487 p. 77. MBT did not obtain those permits until March of 2012, and the permits recited that MBT anticipated that the removal would take approximately 180 days. CP 740-41. After MBT obtained the permits, P66 promptly removed the petcoke within that time frame as requested by MBT. CP 504 pp. 147-48; CP 744-45. P66 lost about one million dollars as a result of the removal process. CP 491 pp. 94-95.

J. Prior to the Removal, MBT Had Comingled P66's Petcoke with Weyerhauser's Coal.

Before the removal, and over P66's objection, MBT stored coal belonging to Weyerhauser on the same pad that it stored P66's petcoke. CP 539 pp. 53-54; CP 565, 606, 738.

In June of 2011, P66's Gipson informed MBT of the need to separate the coal because it was being comingled with the petcoke. CP 565; CP 489 p. 86. But MBT never segregated the coal from the petcoke. As a consequence (and as MBT's own witness admitted), it was impossible to tell what stormwater runoff was coming off of P66's petcoke and what stormwater runoff was coming off of Weyerhauser's coal (for which P66 clearly had no responsibility). CP 539 pp. 53-54; CP 514 p. 187. Documents relating to a citizen suit brought against MBT reflect that the coal (which did not belong to P66) was causing significant pollution problems. CP 568, 572-83, 584-89.

K. After P66 Had Finished Removing the Petcoke, MBT Dumped \$700,000 Worth of Bills on P66 – Seeking Costs for Which It Had Never Obtained P66's Prior Agreement.

In September 2012 – 18 months after many of the charges and fees already had been incurred and seven months after the parties had executed the ASA – MBT first sprang on P66 its request for reimbursement of the \$692,788 in fees and costs at issue in this lawsuit. CP 160 ¶ 11. MBT had never sought P66's written agreement for the wastewater disposal charges at

issue in this case – even though Section 5 of the ASA unequivocally requires written agreement for fees and charges “associated with the Removal of the Petcoke.” CP 463. MBT knew that prior approval was required for the costs at issue and had sought prior approval for other wastewater charges. CP 630-31; CP 305-06 pp. 24-25.

L. MBT’s Own Conduct and Internal Documents Confirm that MBT Knew that It Was Not Entitled to the Reimbursement that It Seeks in this Lawsuit.

MBT’s internal correspondence demonstrates that wastewater treatment was a cost to be paid by MBT itself. In October 2011, MBT’s Trevor Simmons advised Ken Miller, MBT’s then-CEO, that “[a]ny delay costs [MBT] money in treating water from the pet coke pad.” CP 549 (emphasis added). By acknowledging that delay “costs [MBT] money” in treating runoff wastewater, MBT acknowledged that treating or disposing of runoff wastewater was MBT’s own responsibility. CP 549 (emphasis added).

Similarly, on July 29, 2012, when discussing whether to pursue a post-contractual wastewater charge with P66, Miller asked Simmons the amount that MBT had spent in the past related to stormwater treatment ***for which MBT was not seeking compensation at that time.*** CP 552-53. In response, Simmons stated, “MBT has already spent nearly \$700,000 on pet coke water disposal to date and not claimed YET from Phillips 66, or mentioned it.” *Id.* Mr. Simmons’ e-mail is revealing: it shows that while seeking approval for

some post-contractual wastewater charges (the subject of the same e-mail string), MBT chose not even to mention other wastewater charges. Aware that its basis for recovery was weak, MBT was playing a strategic game and did not want to push its luck too far. P66 paid MBT's first request relating to wastewater, even though P66 did not think that it owed the money (507-08, pp. 160-61), but MBT's after-the-fact \$700,000 demand was the straw that broke the camel's back. P66 stood its ground, and this lawsuit ensued.

ARGUMENT

I. DE NOVO REVIEW APPLIES TO SUMMARY JUDGMENTS.

This Court reviews summary judgments *de novo*. See *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). The Court engages in the same inquiry as the trial court. *Id.* Summary judgment is appropriate only where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). All facts and inferences must be “viewed in the light most favorable to the nonmoving party.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Summary judgment is proper only “where reasonable minds could reach but one conclusion.” *Id.* A “court must deny summary judgment when a party raises a material factual dispute.” *Id.* at 485-86.

II. MBT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR BREACH OF THE ACCESS AND SERVICES AGREEMENT (“ASA”).

A. MBT’S Interpretation of the ASA Is Wrong as a Matter of Law, and MBT Is Not Entitled to the Damages Awarded to It Under that Agreement.

MBT persuaded the trial court that, under the ASA, MBT was entitled to reimbursement for money that it had voluntarily paid third-party vendors to remove wastewater from its Terminal and for related expenses. But nothing in the ASA obligated P66 to make such payments. It is axiomatic that a contract must be read “as whole” and in light of “its subject matter and objective.” *Davis v. State Dep’t of Transp.*, 138 Wn.App. 811, 818, 159 P.3d 427 (2007), *review denied*, 163 Wn.2d 1019 (2008). When the ASA is read as a whole, it is clear that its entire purpose was to provide a framework for the ***removal of the petcoke by P66***, and that the additional payment obligations conjured up by MBT are nowhere to be found in the agreement.

1. The purpose of the ASA was to “facilitate the removal . . . of the ‘Petcoke’ . . . and move the Petcoke via truck to the Port of Longview.”

The ASA had a very specific and limited purpose: to provide the terms and conditions under which P66 would remove the petcoke that MBT had unexpectedly decided that it did not want at its Terminal. As discussed above, MBT had repeatedly assured P66 that it would assume Chinook’s lease with P66 and that P66 could continue its petcoke operations at the Terminal, but on

the very day that the MBT-Chinook transaction closed, MBT changed its mind and soon afterwards told P66 that it had to remove its petcoke from the Terminal. *See* pp. 11-14, *supra*. The ASA constituted the agreement that P66 and MBT reached to accomplish the removal of the petcoke that MBT had suddenly decided was necessary.

The Recitals in the ASA succinctly state the purpose of the ASA: “Whereas, the Parties wish to facilitate the removal (‘the Removal’) of the . . . ‘Petcoke’ . . . on the property leased by MBT, . . . and move the Petcoke via truck to the Port of Longview.” CP 462. With respect to the effect of the Recitals, Section 11 of the ASA states: “The recitals set forth above are hereby incorporated in and made a part of this Agreement by this reference.” CP 465. Thus, the Recitals are a substantive part of the ASA, and the rest of the agreement must be construed in light of the purpose of the ASA as set forth in the Recitals. Consequently, when construing the terms of the ASA, this Court should focus on whether a particular construction would operate to “facilitate the removal” of the petcoke under the agreement.

2. Expenditures that P66 made *before the ASA even existed* could not possibly have been made to facilitate P66’s removal of the petcoke *under the ASA*, so at a minimum, the summary judgment should be reversed to eliminate the \$415,557.62 in *pre-ASA expenditures*.

As part of its recovery, MBT sought and obtained reimbursement under the ASA for \$415,557.62 that it allegedly paid third-party vendors to “manage

the petcoke and remediate its environmental effects” *before* P66 and MBT entered into the ASA. CP 34-35. As a preliminary matter, the ASA does not entitle MBT to the recovery of such costs at all. But in any event, costs incurred *before the execution of the ASA* obviously could not have been funds spent to “facilitate the removal” of the petcoke *under the ASA* since the ASA did not even exist at the time that the costs were incurred. Therefore, at minimum, the summary judgment in favor of MBT for those pre-contract costs (\$415,557.62) should be set aside.

3. Multiple provisions in the ASA make clear that it is the obligation of P66 – not MBT – to remove the Petcoke.

Section 1 of the ASA states: “[P66] shall remove the Petcoke stockpiled on the containment pad at the MBT Site as of the date of this Agreement.” CP 462 (emphasis added). Similarly, Section 4.a, which allocates responsibilities between the two parties, provides that “[P66] and its agents and contractors shall” perform all the substantive obligations relating to the removal of the petcoke, including “[c]ontract[ing] with a third party provider to organize, load, and transport the Petcoke from the MBT site’ and “[s]upervis[ing] and perform[ing] all functions necessary for the Removal.” CP 462-63. In contrast, MBT’s responsibilities, as set forth in Section 4.b, were limited to providing P66 with reasonable access to the site and using its best efforts to support P66 in completing the removal process. CP 463.

4. Section 5 of the ASA clearly states that P66 will only reimburse MBT for expenditures made by MBT that P66 *agreed to in advance in writing.*

Section 5 of the ASA states: “Any charges or fees associated with the Removal of the Petcoke, levied by MBT to [P66], shall be agreed in writing in advance by the Parties.” CP 463. In other words, in order for MBT to be entitled to reimbursement for any funds that MBT itself spent to remove the petcoke or to take any other actions related to the removal to the petcoke, MBT first had to obtain P66’s advance written agreement.

This advance-agreement provision makes perfect sense. After all, P66 had sole responsibility for the removal of the petcoke under the ASA. P66 would not want also to be on the hook for whatever charges MBT might unilaterally decide to incur. CP 521 p. 213. The charges might be for items that P66 had no obligation to pay for under the ASA or the charges might be too high. Even if the charges seemed facially reasonable, P66 might have been able to take advantage of economies of scale and might have been able to get a better price. Only if MBT had actually approached P66 in advance in an attempt to reach an agreement could the parties have known what the most efficient and economical course of action would have been and whether P66 would have been willing to agree to MBT’s proposal. Although it is impossible to know what would have happened if MBT had complied with Section 5, P66 might well have preferred to handle obligations under the ASA

itself (as the ASA entitled it to do) and not to pay additional amounts to MBT.

MBT apparently believes that it is better to ask for forgiveness than for permission because it is undisputed that MBT never sought P66's advance agreement to any of the costs it is seeking in this lawsuit. CP 161 ¶ 14; CP 520-21 pp. 210-14. Instead, MBT simply presented P66 with a \$692,000 bill at the end of the removal process and told P66 to pay it. CP 160 ¶ 11; CP 636-736, 744-45; CP 520-21, pp. 210-14. MBT offers no explanation for why it did not seek P66's prior agreement as required by Section 5, but rather just wants the Court to ignore the terms of the contract. That the Court cannot do.

“Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” *Little Mtn. Estates Tenants Ass'n v. Little Mtn. Estates MHC LLC*, 169 Wn.2d 265, 270 n.3, 236 P.3d 193 (2010), quoting, *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955) . Rather, it is “black letter law of contracts that the parties to a contract shall be bound by its terms.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009), quoting *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). “Words in a contract should be given their ordinary meaning.” *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

In the present case, the conditions under which P66 had a duty to reimburse MBT for expenses arising from the removal of the petcoke could

not have been stated more plainly. Under Section 5 of the ASA, P66 had such a duty only if the parties had agreed to reimbursement in advance in writing. It is undisputed that MBT never even sought – let alone obtained – advance agreement from P66. CP 161 ¶14; CP 520-21 pp. 210-14. Therefore, MBT cannot recover its alleged expenses. MBT’s effort to evade the consequences of its own bargain and get a second bite at the apple must be rejected. The ASA must be enforced as written. The summary judgment should be set aside.

a. The authority relied on by MBT is distinguishable.

In the trial court, MBT cited *Pederson’s Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn.App. 432, 437, 922 P.2d 126, 131 (1996), in support of its argument that the ASA did not, in fact, have to be enforced as written.³ But that case is distinguishable. It involved the highly specialized rule applicable in insurance disputes that “[e]ven where an insured breaches the insurance contract, the insurer is not relieved of its duty to pay unless it can prove actual and substantial prejudice caused by the insured.” In *Transamerican*, the court refused to reverse the trial court’s judgment in favor of the insured based on the insured’s failure to give timely notice of its claim because the insurer was not prejudiced. The present case obviously does not involve an insurance dispute and, in any event, P66 did suffer a prejudicial

³ The only other case relied on by MBT in support of its argument that the contractual language of the ASA should be ignored was an unpublished Court of Appeals decision improperly cited by MBT in violation of GR 14.1, which was also distinguishable.

loss of its contractual rights under the ASA.

b. MBT's failure to obtain P66's prior agreement to MBT's expenditures is fatal to MBT's claim for reimbursement.

P66's Dave Gipson testified that MBT's failure to obtain P66's prior agreement to MBT's expenditures relating to waste water formed the basis for P66's refusal to reimburse MBT for those expenditures. CP 509-10 pp. 167-69. MBT acts like its omission is no big deal. But the advance-agreement requirement was an important contractual right for P66. After all, P66 had the contractual obligation to remove the petcoke from the Terminal. It is hardly surprising that P66 would not want MBT gallivanting about incurring additional costs and simply expecting P66 to pick up the tab for those costs at the end of the project. CP 521 pp. 213-15. If MBT had approached P66 about an agreement to reimburse MBT's expenditures in advance, P66 might well have refused for the reasons discussed above. *See* pp. 23-24, *supra*.

P66 did, in fact, conclude that MBT was not entitled to the costs sought. Gipson testified that, under the ASA, P66 had "no responsibility" for any expenses incurred by MBT "preexecution of the contract [the ASA]." CP 508 p. 162. More than \$400,000 of the almost \$700,000 sought by MBT consists of precontract expenditures, so MBT is not entitled to recover those expenses as a matter of law or, alternatively, there are at least fact questions about whether MBT is entitled to be reimbursed for those expenses. A fact question

also exists about the recoverability of MBT's wastewater expenditures given that some of the wastewater related to coal for which P66 was not responsible rather than to petcoke. CP 514 pp. 187-88. *See* pp. 41-42, *infra*.

But the bottom line is that the parties entered into a contract that allocated all the responsibility for removing the petcoke to P66. If MBT nevertheless decided that it wanted to remove the petcoke itself or take any other actions related to the removal of the petcoke, then MBT had to obtain P66's prior written agreement if MBT wanted to be reimbursed. Because MBT did not obtain P66's prior agreement, MBT is not entitled to reimbursement, and the summary judgment should be set aside. For this Court to hold otherwise would improperly render Section 5 meaningless.

c. Section 5 at least means that the ASA did not authorize precontract expenses and MBT cannot recover for precontract expenses.

At a minimum, Section 5 establishes that the parties could not have intended for the ASA to authorize *precontract expenses* incurred by MBT. After all, it would have been impossible for the parties to have "agreed in writing *in advance*" to expenses that MBT already had incurred *in the past*. The only logical conclusion is that the parties did *not* intend for the ASA to authorize past expenses. The first time that MBT suggested otherwise was when it dropped its bombshell demand for \$700,000 on P66 in September of 2012. CP 160 ¶ 11; CP 161 ¶ 14; CP 520-21 pp. 211-214.

5. Sections 6.a and 6.b also do not provide a basis for requiring P66 to reimburse MBT for payments made to third-party vendors.

Because MBT clearly did not meet the requirements for reimbursement of its payments to third-party vendors under Section 5, MBT has tried to shoe horn those expenses to fit under other provisions of the ASA. But MBT's efforts to contort other terms of the ASA do not work either.

a. Section 6.b is clearly an indemnity provision and does not create liability for MBT's voluntary payments to third-party vendors.

Under Section 6.b, P66 agrees “to indemnify, defend, and hold harmless MBT to the fullest extent permitted by law from any *third-party* claims, damages to persons or property, liabilities, or costs to the extent caused by [P66], its employees, agents, contractors, or representatives arising from or related to the Petcoke, the Removal, and the activities contemplated under this Agreement.” CP 463-64 (emphasis added). The phrase, “to indemnify, defend, and hold harmless,” consists of indemnity language and refers to protecting one party from claims brought against that party by another third party. *See Nunez v. Am. Bldg. Maintenance Co. West*, 144 Wn.App. 345, 351, 190 P.3d 56, review denied, 165 Wn.2d 1008 (2008) (duty to indemnify generally arises when the plaintiff in an underlying action prevails on facts that give rise to coverage). Indeed, the word “third-party” appears at the beginning of the list of the matters for which P66 could potentially be liable under Section 6.b. Because the expenses that MBT seeks are its own voluntary

payments to vendors acting on behalf of MBT (as opposed to liabilities owed to third parties), Section 6.b cannot save MBT's contract claims.

b. Moreover, Section 6.b only covers claims relating to the removal of petcoke.

MBT argues that P66's responsibility to reimburse MBT under the ASA extends to any liability or damages in any way related to the petcoke, whether or not the liability or damages were related to the *removal* of the petcoke that was the subject of the ASA. Through this argument, MBT seeks to recover for expenditures *generally relating to petcoke* that MBT made *before* execution of the ASA. But Section 6.b applies only to covered matters "*arising from or related to the Petcoke, the Removal, and the activities contemplated under this Agreement.*" CP 463-64 (emphasis added). In other words, P66 has liability to MBT only for matters relating to the petcoke *and* the removal *and* the activities contemplated under the ASA. P66 does *not* have liability for any matters just generally related to the petcoke, but not related to the removal and the activities contemplated under the agreement.

c. The main part of Section 6.a provides that P66 shall have no liability for contamination or pollution, but the "except" clause in Section 6.a makes clear that Section 6.a is not negating P66's obligations under Section 6.b.

Nothing in the rest of the ASA broadens the scope of P66's responsibility to MBT under Section 6.b (quoted above). To the contrary, Section 6.a narrows that responsibility by stating that "the Parties expressly

agree that [P66] shall have no liability for any contamination or pollution from hazardous or toxic material present or past at the MBT Site.” CP 463. However, Section 6.a also carves out, via an introductory “except” clause, the obligations imposed against P66 in favor of MBT as set forth in Section 6.b. In other words, the “except” clause makes clear that Section 6.a is not negating or eliminating the obligations imposed on P66 by Section 6.b.

The “except” clause at the beginning of Section 6.a is just a short-hand reference to the fuller language in Section 6.b and states, “Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal,” The “except” clause does not constitute an independent basis for imposing liability against P66, but rather is a carve-out referring to “*the* liability, claims, or causes of action” dealt with in elsewhere in the ASA, *i.e.*, in Section 6.b. The bottom line is that under Section 6.a, P66 “shall have no liability for any contamination or pollution from hazardous or toxic material present or past at the MBT Site” *except* to the extent that Section 6.b imposes such liability.

Finally, nothing in Sections 6.a or 6.b excuses MBT from its obligation under Section 5 to obtain P66’s prior written approval as a prerequisite to reimbursement. This fact alone is fatal to MBT’s breach of contract claim.

B. Evidence of the Context Surrounding the ASA Confirms that MBT Is Not Entitled to Summary Judgment.

Washington has adopted the “context rule” for construing contracts.

Berg v. Hudesman, 115 Wn.2d 657, 663-69, 801 P.2d 222 (1990). That rule allows a court, in determining the meaning of a contract, to consider “the contract as a whole, 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 to the contract, and the reasonableness of respective interpretations advocated by the parties.” *Id.* at 667, quoting, *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). Statements made by the parties in preliminary negotiations, usages of trade, and the course of dealing between the parties also may be considered. *Spectrum Glass Co. v. Public Utility Dist. No. 1*, 129 Wn.App. 303, 311, 119 P.3d 854 (2005).

The context rule applies even with respect to an unambiguous contract as a tool to help construe the contract. *Roats v. Blakely Island Main. Comm’n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012). Since appropriate extrinsic evidence may be considered “regardless of whether the contract language is deemed ambiguous,” extrinsic evidence certainly may be considered where an ambiguity exists. *Spectrum Glass*, 129 Wn.App. at 311. “A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.” *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 421, 909 P.2d 1323 (1995).

In the present case, the ASA unambiguously precludes MBT from recovering reimbursement of the expenses that it is seeking even without

consideration of “context” evidence. *See* pp. 20-30, *supra*. But the context evidence makes it even clearer that MBT is not entitled to those expenses.

The “circumstances leading to the execution” of the ASA include the fact that P66 had been storing its petcoke at the Terminal under its contract with Chinook. CP 289. In return for the fees that P66 had already paid to Chinook, ***Chinook was responsible for handling waste water produced by the storage of the petcoke.*** CP 509 p. 165. MBT had told P66 that it had assumed Chinook’s contract with P66 and had indicated that P66 could continue its petcoke operations under that contract. CP 141 ¶ 5; CP 157-58 ¶ 6. *See* pp. 11-12, *supra*. Then, on the very day that the Chinook-MBT deal closed, MBT changed its mind and decided not to assume the Chinook-P66 contract. CP 258, 263. *See* p. 12-14, *supra*. Shortly afterwards, MBT informed P66 that it needed to remove its petcoke from the Terminal. CP 158 ¶ 7.

Needless to say, P66 was caught unawares by MBT’s change in position. *Id.* Nevertheless, P66 began to make arrangements to remove the petcoke. *Id.* To facilitate the removal, P66 and MBT entered into the ASA. CP 462-66. The guiding principle (or “spirit”) underlying that agreement was that P66 would be solely responsible for the removal of the petcoke and that after the petcoke was removed, the parties would go on down the road without having any ongoing financial responsibilities to each other. CP 483 p. 63. Dave Gipson described the context of the ASA in the following testimony:

[T]he spirit of the agreement was that no moneys would exchange between MBT and ConocoPhillips. That we would be responsible for moving the petcoke from the terminal solely on our own. We would contract with the necessary subcontractors to move the coke. We would not interfere with MBT's normal daily business and MBT would not interfere with the movement of the petcoke. CP 483 p. 63

Along the same lines, Gipson later testified (CP 508 p. 163):

[T]he intent – the original spirit of the agreement, when we entered into it with MBT, was that we would have no financial responsibility toward each other. That they would not owe us any money and we would not owe them any money. Any fees that they incurred, in regards to the petcoke, would be approved by us in advance.

MBT's Simmons had a similar understanding of the ASA's intent. CP 159 ¶ 8.

Given the specific and limited nature of the project covered by the ASA, P66 understood that it had “no responsibility” under the ASA for matters that occurred or expenses that were incurred “[p]recontract, pre-execution of the contract.” CP 508 p. 162. As for any fees incurred *by MBT*, “those fees would have had to have been approved ahead of time,” regardless of when incurred, in light of the language of the contract and the goal of avoiding any ongoing financial obligations between the parties. CP 509 p. 167.

With respect to the “subsequent conduct of the parties” aspect of the context rule, MBT did seek and obtain advance approval for some expenses, but not the ones involved in this lawsuit. CP 630-31; CP 305-06 pp. 24-25. *See* 18-19, *supra*. This conduct reflects that MBT knew that the ASA did not cover the expenses in question. MBT's own internal documents also show that

MBT did not believe that it was entitled to those expenses and intentionally delayed in seeking their recovery. CP 549, 552-53. *See* 18-19, *supra*.

The context evidence makes it clear that the summary judgment was improper. Although the Court may consider the context evidence even if the Court views the ASA as unambiguous, the evidence also supports P66's interpretation of the ASA if the Court concludes that there is an ambiguity.

C. There Is at Least a Fact Question Concerning the Meaning of the ASA and Whether MBT Is Entitled to Recover.

If this Court is not persuaded that the ASA unambiguously means what P66 contends that it means, then there are at least fact questions about its meaning and about whether MBT is entitled to recover for breach of the ASA. In order to be entitled to summary judgment, MBT had to establish as a matter of law that the ASA unambiguously means what MBT contends that it means, that P66 violated the ASA, and that MBT suffered damages in a particular amount. MBT failed to carry that burden.

If P66's interpretation of the ASA is not right as a matter of law, then the following fact issues exist and require a trial: What is the meaning of Section 5 of the ASA? Did Section 5 require MBT to obtain P66's advance written agreement in order to obtain reimbursement of the expenses that it is seeking in this lawsuit? What is the meaning of Section 6.b? Is Section 6.b an indemnity provision that would only apply if a third party had brought a

claim against MBT? Or does Section 6.b apply to non-indemnity claims brought by MBT to obtain reimbursement for payments that MBT voluntarily made to third-party vendors? What is the meaning of the “except” clause in Section 6.a? Is it a shorthand reference to Section 6.b? Or does the “except” clause create some kind of independent basis for liability on the part of P66? All of these questions have a factual component that would have to be resolved by the trier of fact (unless, again, P66 is right as a matter of law).

III. BECAUSE THE SUMMARY JUDGMENT CANNOT BE AFFIRMED BASED ON BREACH OF THE ASA, THE ATTORNEYS’ FEES AWARD ALSO MUST BE SET ASIDE.

MBT’s claim for breach of the ASA formed the sole basis for the trial court’s award of attorneys’ fees to MBT. CP 1488. Because the summary judgment cannot be affirmed based on breach of the ASA, the attorneys’ fees award also must be reversed. If part of the damages award is set aside, then the attorneys’ fees award likewise should be reduced.

IV. MBT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS OR NUISANCE CLAIMS.

Nor can the trial court’s summary judgment in favor of MBT be affirmed based on MBT’s trespass or nuisance claims. Indeed, MBT did not even move for summary judgment on its nuisance claims, which is hardly surprising given the fact-intensive nature of nuisance actions. Nevertheless, many of the same arguments that defeat MBT’s trespass claims also defeat

MBT's nuisance claims. Therefore, and out of an abundance of caution, P66 will address MBT's nuisance claims as well as its trespass claims.

A. MBT's Trespass and Nuisance Claims Are Barred by the Economic Loss Rule/Independent Duty Doctrine

MBT and P66 entered into the ASA in order to resolve their disputes relating to the petcoke, and any recovery by MBT relating to the petcoke must be based on that agreement. The economic loss rule/independent duty doctrine bars MBT from recovering on its trespass or nuisance claims.

Historically, Washington courts applied the economic loss rule to bar a plaintiff from recovering tort damages when the defendant's duty to the plaintiff was governed by contract, and the plaintiff suffered only economic losses. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007); *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 385, 241 P.3d 1256 (2010). In *Eastwood*, a majority of the Washington Supreme Court concluded that the term "economic loss rule" was a misnomer, and renamed the rule the "independent duty doctrine" to more accurately describe how courts should determine whether one party to a contract can seek tort remedies from the other. *Eastwood*, 170 Wn.2d at 388, 416, discussed in, *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 91-92, 312 P.3d 620 (2013). Under this doctrine, "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract."

Eastwood, 170 Wn.2d at 389. Whether a tort duty arises independently of a contract turns on what the terms of the contract are and whether the contract covers the matter. *Donatelli*, 179 Wn.2d at 92.

In the present case, MBT seeks reimbursement from P66 for costs that MBT allegedly incurred in disposing of wastewater relating to the petcoke. The ASA is a written agreement intended to resolve the parties' disputes concerning the removal of the petcoke so that the parties could move forward without any ongoing obligations to each other. CP 462-66; CP 483 p. 63; CP 508 p. 163; CP 159 ¶ 8. Therefore, P66's obligation to reimburse MBT, if any, arises from the contract. MBT's efforts to recast its contract claim as a trespass or nuisance action must be rejected. *Donatelli*, 179 Wn.2d at 92.

B. There Are at Least Fact Issues Relating to Consent, and so the Summary Judgment Cannot Be Affirmed Based on MBT's Trespass or Nuisance Claims.

A plaintiff cannot recover for trespass or nuisance based on the presence of items on the plaintiff's property where the plaintiff has consented for the allegedly trespassing items to be on the plaintiff's property. Nor can a plaintiff recover for trespass or nuisance after withdrawing its consent until the defendant has had a reasonable amount of time to remove the items. That is exactly the situation that exists in the present case.

P66 stored its petcoke at the Terminal pursuant to its contract with Chinook, and thus P66 had consent for its petcoke to be at the Terminal. CP

164. MBT also initially agreed that P66 could keep its petcoke at the Terminal and even wanted P66 to do so. CP 141 ¶ 5; CP 157-58 ¶ 6; CP 437, 440. *See* 11-12, *supra*. However, MBT subsequently changed its mind and told P66 to remove its petcoke. CP 158 ¶ 7; CP 258, 263. *See* 12-14, *supra*. After MBT withdrew its consent, P66 removed the petcoke within a reasonable time, but P66 could not even begin the removal process until MBT had obtained the necessary permits. CP 487 p. 77; CP 740-41; CP 504 pp. 147-48, CP 744-45. *See* 16, *supra*. Under these facts, there is at least a fact question about whether MBT consented to the petcoke's presence. Therefore, the summary judgment cannot be sustained based on MBT's trespass or nuisance claims.

Consent is a defense to trespass and nuisance. *See Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956) (where one has authorization (*i.e.*, consent) to do an act on another's land, the act does not constitute a trespass even though it otherwise would be a trespass). As the Restatement explains, "One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it." Restatement (Second) of Torts § 892A (1979). In addition, the Restatement states that "consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it." *Id.* at § 892B(1). "[Consent] may be manifested by action or inaction and need not be communicated to the actor." *Id.* at § 892.

The Restatement also addresses the rules that apply when a land owner or its transferee withdraws consent to the presence of items on its land:

If the possessor consents to the presence on the land of a thing which is to be removed at some time thereafter, and if such consent is terminated or suspended, one entitled to the immediate possession of the thing is privileged, as against such possessor *and his transferee*, to be on the land at a reasonable time for the purpose of removing the thing in a reasonable manner and with reasonable promptness, unless he knows or has reason to know the time of such termination or suspension a reasonable period in advance.

Restatement (Second) of Torts § 177 (1965) (emphasis added). Thus, when MBT (Chinook's transferee) withdrew its consent for P66's petcoke to remain at the Terminal, P66 was entitled to a reasonable amount of time to remove the petcoke. *See id.* at § 178 (giving former tenant the right, as against the land owner and its transferee, to be on land while removing chattels in a reasonable manner and with reasonable promptness).

Chinook clearly gave its consent to the presence of the petcoke at the Terminal by executing the Terminal Agreement that allowed P66 to store its petcoke there. *See* CP 140 ¶ 4; CP 289 §§ 1.1 and 1.5 (specifically authorizing P66 to store petcoke at the Terminal in exchange for payment). MBT likewise gave its consent to the presence of P66's petcoke at the Terminal for some period of time by purchasing the Terminal with full knowledge of the petcoke's presence and of the impossibility of moving the petcoke until MBT had the necessary permits. CP 345, 349-432, 192, 178. *See* pp. 10-16, *supra*.

MBT further manifested its consent by initially assuming the Terminal Agreement. CP 192. The schedules to its Asset Purchase Agreement with Chinook stated that MBT would assume the Phillips 66/Chinook contract for “shipping petroleum coke.” *Id.* And in Section 5.8 of the Asset Purchase Agreement, MBT agreed that “[e]ach Assumed Contract and Permit is in full force and effect and is valid, binding, and enforceable in accordance with its terms in all material respects.” CP 178. Further, MBT told P66 that MBT would honor the Terminal Agreement and said that it wanted to be in the petcoke business. CP 157-58 ¶ 6; CP 434, 437. *See pp. 11-12, supra.*

MBT argued in the trial court that it never formally assumed the Terminal Agreement and therefore could not be bound by its terms. But that argument misses the point. For purposes of MBT’s tort claims, the question is not whether MBT was bound by Chinook’s contractual obligations; it is ***whether Chinook’s consent to Phillips 66’s storage of coke at the Terminal carried forward*** after the asset sale until a reasonable time after MBT obtained the permits that allowed P66 to remove the petcoke. That question must be answered in the affirmative: as the Restatement reflects, if a transferee withdraws consent to the presence of the items on the transferee’s property, the transferee must allow a reasonable time for the removal of those items. Restatement (Second) of Torts § 177 (1965). *See p. 39, supra.*

MBT understood that the petcoke could not be removed until MBT had

obtained the necessary permits for the removal. CP 487 p. 77. Indeed, MBT insisted that the petcoke should not even be “touch[ed]” until then. *Id.* In its Motion for Summary Judgment, MBT complained that P66 did not remove the petcoke for more than a year after MBT first requested its removal in January of 2011. But MBT did not even obtain the required permits until March of 2012, which itself was more than a year after MBT’s request for removal. CP 740-41. And the permits recited that MBT estimated that the removal would take approximately 180 days. *Id.* After MBT obtained the permits, P66 promptly removed the petcoke from the site as requested by MBT within that general time frame. CP 504 pp. 147-48. Under the circumstances, MBT’s complaint that it took P66 more than a year to remove the petcoke is misguided and certainly cannot justify the summary judgment against P66. At the very least, fact questions exist about whether P66 removed the petcoke within a reasonable time after demand, and those fact questions preclude affirmance of the summary judgment based on trespass or nuisance.

C. Fact Issues Exist About How Much of MBT’s Alleged Damages Were Caused by Wastewater from Weyerhaeuser’s Coal, as Opposed to Wastewater from P66’s Petcoke.

MBT’s trespass and nuisance claims (as well as its contract claims, *see* pp. 26-27, *supra*) are barred because the petcoke was comingled with coal that was owned by Weyerhaeuser, not P66. *See* p. 17, *supra*. MBT’s head of environmental compliance, Kristen Gaines, conceded that the petcoke was

commingled with coal and that some of the stormwater runoff was the product of the coal. CP 539 pp. 53-54. She acknowledged that when it rains, “some of the runoff water is going to come off of the coal.” *Id.*

P66 told MBT that MBT needed to separate the petcoke from the coal, but MBT just ignored the matter. CP 565. There can be no doubt that waste water from coal was a problem at the Terminal. *See* CP 568, 572-83, 584-89.

In the trial court, MBT strenuously argued that it had no obligation to dispose of wastewater from coal. But MBT’s argument again misses the point. Whether or not MBT had an obligation to remove coal wastewater, MBT *did* remove coal waste water, and P66 should not have to pay for that removal since P66 did not own the coal. Given MBT’s failure to segregate the coal that was on the storage pad, there is no way to determine what wastewater was runoff from petcoke and what wastewater was runoff from coal. CP 514 p. 187; CP 539 pp. 53-54. Because the summary judgment includes damages for which P66 is clearly not responsible (the costs relating to coal waste water removal), the summary judgment must be reversed and cannot be affirmed on any theory.

D. Fact Issues Exist About Whether MBT is Equitably Estopped From Asserting All Its Claims.

“Equitable estoppel is based on the notion that ‘a party should be held to a representation made or position assumed where inequitable consequences

would otherwise result to another party who has justifiably and in good faith relied thereon.” *Brevick v. City of Seattle*, 139 Wn.App. 373, 379, 160 P.3d 648 (2007) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)). The doctrine of equitable estoppel prevents a party from making a later claim where (1) one party has made an admission, statement, or act inconsistent with the later claim; (2) another party reasonably relies on the admission, statement, or act; and (3) the relying party would be injured if the first party is allowed to contradict or repudiate the admission, statement, or act. *Id.* at 378-79. There is evidence of all three elements here:

- MBT represented that it would honor the Terminal Agreement and would assume that agreement. (Element #1) (CP 140-41 ¶ 5; CP 157-58 ¶ 6; CP 437, 440. *See* pp. 11-12, *supra.*)
- MBT also took other actions and made other representations indicating that it welcomed the presence of the petcoke and intended to get into the petcoke business. (Element #1) (CP 140-41 ¶ 5; CP 157-58 ¶ 6; CP 437, 440. *See* pp.11-12, *supra.*)
- P66 relied on the foregoing representations by refraining from requiring Chinook to handle the petcoke removal matter prior to MBT’s closing. (Element #2) (CP 158 ¶ 7. *See* 13-14 *supra.*)
- MBT later changed course and reneged on its prior agreement to assume the Terminal Agreement and to allow P66 to continue its petcoke operations at the Terminal. (Element #3) (CP 258, 263. *See* 12-14, *supra.*)
- Instead, MBT demanded that P66 remove its petcoke from the Terminal. (Element #3) (CP 158 ¶ 7.)
- P66 has been damaged by incurring costs relating to the petcoke that it would not otherwise have incurred. (Element

#3) (Element #2) (CP 158 ¶ 7. *See* 12-14, *supra*.)

The foregoing evidence at least raises fact issues with respect to P66's equitable estoppel defense. MBT represented that it was assuming P66's Terminal Agreement with P66 and that P66 could continue its petcoke operations at the Terminal.⁴ P66 relied on those representations by refraining from requiring Chinook to take action with respect to the petcoke. When MBT changed course and reneged on its prior agreements, P66 was harmed because its window of opportunity to obtain relief from Chinook had closed. Under these circumstances, MBT is equitably estopped from recovering on any of its claims (its claims for trespass, nuisance, and breach of the ASA).

E. Fact Issues Exist with Respect to the Underlying Elements of MBT's Trespass Claims.

The elements of trespass under Washington law are: “(a) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages.” *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 567, 213 P.3d 619 (2009). There are at least fact questions about the existence of these required elements.

⁴ The Restatement (Second) of Torts Section 840D (1979) provides: “The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but is a factor to be considered in determining whether the nuisance is actionable.”

1. Fact issues exist about whether it was reasonably foreseeable that P66's petcoke would disturb MBT's possessory interest

MBT's summary judgment evidence did not establish that it was reasonably foreseeable that the presence of P66's petcoke at the Terminal would disturb the possessory interests of Chinook or MBT. After all, Chinook agreed to the presence of the petcoke at the Terminal by executing the Terminal Agreement with P66. CP 140, 289. MBT also initially agreed to the petcoke's presence by assuming the Terminal Agreement and otherwise indicating that P66's petcoke was welcome to remain at the Terminal. CP 178, 192; CP 140-41 ¶ 5; CP 157-58 ¶ 6; CP 437, 440. *See* 11-12, *supra*. These facts at least raise fact issues regarding reasonable foreseeability.

2. Fact issues also exist about intent.

Nor did the summary judgment evidence establish the intent necessary for a trespass claim. An act is intentional if "the actor desires to cause consequences of his act, or . . . he believes that the consequences are substantially certain to result from it." *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985), quoting, Restatement (Second) of Torts Sect. 8A (1965). Here, P66 delivered and stored its coke at the Terminal pursuant to a valid contract with Chinook. CP 289. P66 neither desired nor was substantially certain – indeed P66 had no idea – that its petcoke would become stuck at the Terminal due to the failure of Chinook and

MBT to have the proper environmental permits in place. CP 157 ¶3.

F. MBT Did Not Even Move for Summary Judgment on Its Nuisance Claims, and in Any Event, Fact Issues Exist with Respect to MBT's Nuisance Claims.

Nuisance consists of “a substantial and unreasonable interference with the use and enjoyment of another person's property.” *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn.App. 252, 276, 337 P.3d 328 (2014), citing, *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). See RCW Sections 7.48.010, 7.48.120 (codifying Washington's nuisance laws). Thus, even if the conduct at issue interferes with comfort and enjoyment, nuisance liability exists only when the interference is **unreasonable**. *Kitsap*, 184 Wn.App. at 276, citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923-24, 296 P.3d 860 (2013); *Bradley*, 104 Wn.2d at 689.

Given the key role that unreasonableness plays in establishing liability for nuisance and given the fact-intensive nature of reasonableness inquiries, it is hardly surprising that MBT did not move for summary judgment on its nuisance claim and did not adduce evidence that would support summary judgment in its favor on that claim. In any event, the evidence adduced by P66 at least raised fact issues regarding reasonableness and nuisance.

There was nothing unreasonable about the standard business arrangement pursuant to which Chinook contractually agreed that P66 could store petcoke at the Terminal in exchange for a fee. CP 291-92 Section V.

Moreover, MBT's actions both before and after signing the Asset Purchase Agreement with Chinook reveal that MBT originally welcomed the presence of the petcoke at the facility. CP 178, 192; CP 140-41 ¶ 5; CP 157-58 ¶ 6; CP 437, 440. *See* 11-12, *supra*. Therefore, there was nothing unreasonable about P66's belief that its petcoke would be allowed to remain at the Terminal. Nor was it unreasonable for P66 subsequently to wait until the required permits were in place to undertake removal of the petcoke; indeed, that was what the law required. MBT's nuisance claim thus fails for lack of an essential element. *Kitsap*, 184 Wn.App. at 276, citing, *Lakey*, 176 Wn.2d at 923-24. At a minimum, there are fact questions concerning whether P66's conduct relating to the petcoke was unreasonable and regarding whether there was any unreasonable interference with MBT's use and enjoyment of the Terminal.

G. The Summary Judgment Also Cannot Be Sustained Based on Nuisance Because MBT Came to the Alleged Nuisance.

MBT's nuisance claim also fails because MBT was fully aware of the alleged "nuisance" prior to purchasing the Terminal, and went through with the sale anyway. CP 345; CP 368, 386. *See* pp. 10-11, *supra*. Where, as here, the plaintiff has "come to the nuisance," courts generally refuse to find liability, holding that the plaintiff knowingly assumed the risks associated with the condition. *See Buchanan v. Simplot Feeders, Ltd. P'ship.*, 134 Wn.2d 673, 678, 952 P.2d 610 (1998). While coming to the nuisance does not

absolutely bar a nuisance action, it is one factor to consider in deciding whether to grant relief. *Id.*, citing Restatement (Second) of Torts § 840D.

V. FACT ISSUES AROUND WITH RESPECT TO P66'S CLAIMS FOR FRAUD AND MISREPRESENTATION.

If this Court holds that MBT's interpretation of the ASA is correct, then MBT necessarily made critical misrepresentations and omissions that form the bases for P66's claims for fraud and negligent misrepresentation:

- Trevor Simmons, the lead negotiator for MBT, repeatedly stated that the intent of the ASA was for the parties to move forward with removing the petcoke and that the parties would have a clean break *without financial obligations to each other* except for those that might arise in the future. CP 159 ¶ 9.
- MBT consciously chose not to disclose its secret belief that P66 was responsible for the expenses sought in this case and never provided P66 the invoices for which it now seeks compensation during the 13 months they were incurred prior to execution of the ASA, or for seven months after the ASA was executed. When the parties entered into the ASA, MBT also hid that it had already incurred significant expenses it intended to seek. CP 160 ¶ 11; CP 161 ¶ 14; CP 534-35 pp. 33-38; CP 520-21 pp. 210-14.

The fraudulent nature of MBT's misrepresentations and omissions is reflected in MBT's own internal correspondence:

- MBT's Trevor Simmons's internal correspondence acknowledges that the wastewater charges are MBT's responsibility. CP 549. *See* p. 18, *supra*.
- MBT internal correspondence reflects that MBT was playing a fraudulent game involving strategic decisions not to seek or even mention the bogus charges it is now seeking while it was angling to get other money from P66. CP 552-53. *See* 18-19, *supra*.

P66's Gipson testimony demonstrates that if P66 had known of MBT's secret belief that the ASA gave MBT "a license to incur [and obtain reimbursement for] any charges it wanted as to the petcoke," P66 never would have agreed to the ASA as drafted. CP 520-21 pp. 210-14. *See Ikeda v. Curtis*, 43 Wn.2d 449, 459-61, 261 P.2d 684 (1953) (fraud can be based on non-disclosure where one party to business transaction intentionally prevents the other party from acquiring material information; fraud also can be based on representations that are literally true but create a false impression).

MBT also committed fraud and negligent misrepresentation by falsely representing to P66 that MBT would assume the Terminal Agreement and that P66 could continue its petcoke operations at the Terminal. *See* pp. 11-12, *supra*. MBT did not reveal the truth until it was too late for P66 to compel Chinook to handle the petcoke removal situation. *See* pp. 12-14, *supra*.

These material misrepresentations and omissions were intended to be acted upon by P66, were relied on by P66, and caused damages to P66. The summary judgment evidence raises genuine issues of material fact as to both P66's fraud claim and its negligent misrepresentation claim. *See Swanson v. Solomon*, 50 Wn.2d 825, 828 314 P.2d 655 (1957) (fraud requires (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its

falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damages); *Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007) (elements of negligent misrepresentation: (1) defendant supplied information for the guidance of others in their business transactions that was false, (2) defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) defendant was negligent in obtaining or communicating the false information, (4) plaintiff relied on the false information, (5) plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages).

P66 was the victim of repeated misrepresentations, and its claims for fraud and negligent misrepresentation should be allowed to proceed.

CONCLUSION

For the foregoing reasons, Appellants Phillips 66 Company, individually and as successor in interest to ConocoPhillips Company ("P66"), request that this Court reverse the summary judgment for Appellee Millennium Bulk Terminals – Longview, LLC ("MBT"); reverse the summary judgment against P66; render judgment that MBT take nothing on its claims for affirmative relief (including on its claim for attorneys' fees) or reduce the judgment; and remand to the trial court for further proceedings P66's claims for affirmative relief. P66 also requests such other and further relief to which it is entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Logan E. Johnson", written over a horizontal line.

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

MILLENNIUM BULK TERMINALS-
LONGVIEW, LLC, a Delaware limited
liability corporation

Respondent-Plaintiff,

vs.

PHILLIPS 66 COMPANY, a Delaware
corporation, and CONOCOPHILLIPS
COMPANY, a Delaware corporation,

Appellants-Defendants.

Court of Appeals No.
47345-3-II

CERTIFICATE AND
DECLARATION OF
SERVICE FOR BRIEF
OF APPELLANTS

CERTIFICATE AND DECLARATION OF SERVICE

I, Logan Johnson, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on July 1, 2015, I caused the originals of the accompanying Brief of Appellants and this Declaration and Certificate of Service to be filed with the following Court by e-filing:

Court of Appeals for the State of Washington, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

In addition, I caused a true and correct copy of the accompanying Brief of Appellants and this Certificate and Declaration of Service to be served upon the following counsel for Respondent-Plaintiff via U.S. mail, postage prepaid, and e-mail:

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Dated July 1, 2015



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APPENDIX A

Access and Services Agreement,
dated February 10, 2012
CP 740 - 741

ACCESS AND SERVICES AGREEMENT

THIS SERVICES AGREEMENT (the "Agreement") dated as of Feb. 10 2012, is entered into by and between ConocoPhillips Company ("COP") and Millennium Bulk Terminals - Longview, LLC ("MBT") and together with COP (the "Parties").

RECITALS

WHEREAS, the Parties wish to facilitate the removal (the "Removal") of the green petroleum coke stockpiled (the "Petcoke") on the property leased by MBT, commonly known as the Former Reynolds Aluminum Smelter Facility in Cowlitz County, Washington ("MBT Site") and move the Petcoke via truck to the Port of Longview;

NOW, THEREFORE, for and in consideration for the mutual covenants contained herein, the Parties hereby agree as follows:

1. **Scope.** COP shall remove the Petcoke stockpiled on the containment pad at the MBT Site as of the date of this Agreement. COP intends to remove this Petcoke in three (3) ratable lots of approximately 25,000 MT each and transfer the Petcoke, via truck, to the Port of Longview (the "Removal"). Additionally, COP will arrange to have removed approximately 180 MT of pulverized Petcoke located in a silo near the Carbon House at MBT. Removal of the pulverized Petcoke will be predicated on this material being dry and having the ability to be made to flow freely.

2. **Term.** This Agreement will remain in effect until Removal is complete or until terminated as mutually agreed upon in writing by the Parties.

3. **Manner and Completion of the Removal.** The Parties will give their best cooperative efforts to facilitate the Removal in a quick, logistically sound, and commercially reasonable manner, considering all applicable health, safety, and environment impacts, laws, and regulations. COP anticipates that the Removal will be completed by April 30, 2012 (the "Completion Date"). COP will notify MBT in writing as soon as COP has reason to believe the Removal will not be completed by the Completion Date and will provide MBT with a reasonable estimate of a new completion date.

4. **Responsibilities.** A copy of a written removal plan entitled "Operations and Environmental Protection Plan for Green Petroleum Coke Removal" prepared by Anchor QEA, LLC dated January 2012 (the "Removal Plan"), is attached hereto as Attachment I and is incorporated herein by this reference. In accordance with the Removal Plan:

a. COP and its agents and contractors shall:



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- i. Develop and provide to MBT the data and plans of management to submit with applications to the necessary regulatory agencies to receive approvals for the Petcoke to be handled, loaded on to trucks, and removed from the MBT Site.
- ii. Contract with a third party provider to organize, load, and transport the Petcoke from the MBT site and provide lift schedule.
- iii. Supervise and perform all functions necessary for the Removal in a manner consistent with the approved plans of management, industry safety standards, and applicable laws and regulations.
- iv. Coordinate all activities with MBT's Site supervisor to control the interaction with MBT work.
- v. Keep the MBT Site property free and clear from any and all liens asserted against the property by any contractor or subcontractor hired to perform the work described herein.

b. MBT shall:

- i. Provide COP, its agents, and contractors access to the MBT Site and the Petcoke piles during normal working hours, defined as 06:00 to 18:00 hours, seven (7) days per week, or at other times as approved in advance in writing by MBT.
- ii. Make best efforts to support COP and its agents and contractors while completing the Removal.

5. Charges and Fees. Any charges or fees associated with the Removal of the Petcoke, levied by MBT to COP, shall be agreed in writing in advance by the Parties.

6. Liability; Indemnification.

a. Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal, the Parties expressly agree, that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT Site.

b. COP agrees to indemnify, defend, and hold harmless MBT against any liens asserted against the MBT Site by any contractor or subcontractor hired to perform the work described herein. COP agrees to indemnify, defend, and hold harmless

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MBT to the fullest extent permitted by law from any third-party claims, damages to persons or property, liabilities, or costs to the extent caused by COP, its employees, agents, contractors, or representatives arising from or related to the Petcoke, the Removal, and the activities contemplated under this Agreement.

c. COP shall promptly repair, restore, or replace any MBT-owned property, including all fixtures and personal property on the MBT Site, that it caused to be damaged in connection with this Agreement. Such repair, restoration, or replacement must leave the MBT-owned property in as good a condition as existed prior to the damage COP caused. COP shall indemnify MBT for any such damage to MBT-owned property that is not or cannot be promptly repaired, restored, or replaced and any consequential damages arising from the loss of use of such property. The term 'prompt' means as fast as can practicably be achieved.

d. Site Restoration. Upon completion of Removal, COP shall demobilize the associated project equipment and the open areas of the containment pad will be swept to a reasonably clear condition using a street sweeper. The containment pad will then be cleaned of remaining Petcoke using a dry vacuum truck or any other means as required depending on the condition of the containment pad surface.

7. Regulatory Compliance. COP and MBT will comply with all applicable federal, state, and local laws and regulations at all times while this Agreement is in effect.

8. Insurance. COP shall be responsible, at its sole expense, for obtaining and maintaining all insurance policies concerning the Removal as required by law. In addition, COP shall maintain general liability insurance that covers the Removal and the Petcoke and any liabilities that may arise from the Removal or Petcoke to the value of at least \$5,000,000. COP shall have the right to self-insure for the coverages required under this paragraph. COP will supply current insurance certificates or evidence of self insurance to MBT prior to on site work commencing.

9. Confidentiality. MBT, COP, and their respective employees, agents, contractors, and representatives shall keep the Agreement, the Petcoke, and the Removal confidential, except to the extent required by law. Neither the Parties nor their respective employees, agents, contractors, or representatives will not disclose, release, or cause or allow the disclosure or release of any information to the press, any news disseminating agency, or communications media, except as required by law, concerning the detail of this Agreement, the Petcoke, or the Removal, without, in each instance, securing the prior written consent of MBT and COP. The Parties will not release, disclose, or cause or allow the release or disclosure of any information unless specifically authorized by other Party, except to the extent required by law, in which case, the disclosing Party shall notify the other Party of such disclosure. COP or MBT is not authorized to express an opinion about any COP or MBT incident and shall make no statement in that respect.

10. Attorneys' Fees. If either party should find it necessary to employ an attorney to enforce a provision of this Agreement or to recover damages for the breach

hereof (including proceedings in bankruptcy, litigation and appeals), the prevailing party shall be entitled to be reimbursed for its court costs and reasonable attorneys' fees, in addition to all damages.

11. **Recitals.** The recitals set forth above are hereby incorporated in and made a part of this Agreement by this reference.

12. **Assignment.** This Agreement and its rights and obligations hereunder may be assigned only with the written consent of the nonassigning party. Consent to assignment shall not be withheld unreasonably.

Notwithstanding anything herein to the contrary, COP shall be permitted, without consent of or prior notice to the other party, to assign or transfer this agreement or any specific transactions and corresponding obligations under this agreement to Phillips 66 Company; provided that Phillips 66 Company has an investment grade credit rating or its obligations are guaranteed or otherwise supported by an entity with an investment grade credit rating, and Phillips 66 Company succeeds by assignment, purchase, merger, consolidation or otherwise to all or substantially all of the refining and marketing business of COP. Automatically upon such assignment or transfer, COP shall be released from all obligations and liabilities so assigned or transferred accruing after the effective date of such assignment or transfer, provided that, Phillips 66 Company assumes all of the obligations and liabilities so assigned or transferred accruing after the effective date. On or around the date of any such assignment or transfer, COP or Phillips 66 Company shall provide MBT with written notice (which may be given by fax or other electronic transmission) of the effective date thereof and Phillips 66 Company's contact information for billing and notice purposes under the Agreements, which shall take effect with respect to the Agreements immediately upon such effective date. You can find more information regarding the contemplated repositioning at the following link:

<http://www.conocophillips.com/EN/newsroom/repositioning/Pages/index.aspx> .

13. **Integration; Amendment.** This Agreement constitutes the entire agreement of the parties relating to the subject matter hereof. There are no agreements, promises, terms, conditions, obligations, or warranties other than those contained in this Agreement. This Agreement supersedes all prior communications, representations, or agreements, verbal or written, among the parties relating to the subject matter hereof. This Agreement may not be changed or amended orally, but only by an agreement in writing, signed by the party against whom enforcement is sought.

14. **Waiver.** No provision of this Agreement shall be waived unless the waiver is in writing signed by the waiving party. No failure by any party to insist upon the strict performance of any provision of this Agreement, or to exercise any right or remedy consequent upon a breach hereof, shall constitute a waiver of any such breach, of such provision, or of any other provision.

15. **Governing Law and Venue.** This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Washington, without

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regard to choice of law provisions. The parties submit to non-exclusive jurisdiction and venue in the state and federal courts of Cowlitz County, Washington for purposes of interpretation, validity, and enforcement of the terms of this Agreement.

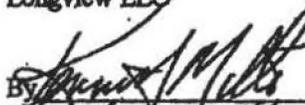
16. **Representation of Understanding.** Each party and signatory to this Agreement represents and warrants that they have carefully read all of the terms and conditions of this Agreement, have fully reviewed its provisions with their attorneys, know and understand its contents, and sign the same as their own free acts and deeds.

17. **Severability.** If any provision(s) of this Agreement is held by a court to be unenforceable or invalid for any reason, the remaining provisions of this Agreement shall be unaffected by such holding. If the invalidation of any such provision materially alters the agreement of the Parties, then the parties shall immediately adopt new provisions to replace those which were declared invalid.

18. **Counterparts.** This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one agreement binding on all parties. PDF, facsimile, or other electronic signatures will be deemed originals for all purposes.

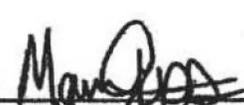
IN WITNESS WHEREOF, the undersigned have caused this services agreement to be duly executed and deliver as of the date first written above.

Millennium Bulk Terminals -
Longview LLC

By: 
Name: Kenneth Miller
Title: Pres + CEO



CobocoPhillips Company

By:  2/10/12
Name: Mark Cass
Title: Manager

APPENDIX B

Department of Ecology Letter Granting Approval to
Remove Green Petroleum Coke from the Millennium
Containment Pad, dated March 1, 2012
CP 740 - 741

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

March 1, 2012

Kristin Gaines, Manager Environment and Health
Millennium Bulk Terminals -- Longview, LLC
PO Box 2088
Longview, WA 98632

Subject: Ecology's Approval to Remove Green Petroleum Coke
from the Millennium Containment Pad

Dear Ms. Gaines:

Ecology has reviewed Millennium's "Operations and Environmental Protection Plan for Green Petroleum Coke Removal" (Proposal) received on February 14, 2012. In the Proposal, Millennium is planning to conduct a one-time project to remove approximately 110,000 tons of green petroleum coke (petcoke) from the containment pad located on the Millennium site.

Background: The petcoke is owned by Conoco Phillips (Conoco). Conoco had a commercial relationship with the previous site owner, Chinook Ventures, for the bulk handling and storage of petcoke. Millennium acquired the site assets from Chinook Ventures on January 11, 2011, and began their operations on the site on January 12, 2011. The petcoke was left when Chinook Ventures vacated the property. Conoco plans to remove all of the stored petcoke from the Millennium facility using Conoco's equipment, contractors, and operating protocols as described in the Proposal. According to the proposal, the petcoke will be loaded onto trucks within the containment pad and transported to the Port of Longview (Port) where it will be stored, and loaded onto ships for export. Millennium anticipates that the project will take approximately 180 days.

Ecology conducted a site visit on February 23, 2012 to observe the petcoke stored on the containment pad and to discuss the proposed removal process with Millennium representatives. Ecology also reviewed Southwest Clean Air Agency's (SWCAA) approval letter for the project dated February 27, 2012.

From information gathered during our site visit, review of the Proposal and SWCAA's approval letter, we understand that if all of the best management practices are followed in the Proposal, there will be zero discharges from the operation to stormwater or waters of the state.



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Ms. Kristin Gaines
March 1, 2012
page 2

Ecology has decided to approve the project based on the information described above. This one-time approval of the proposed removal of petcoke is contingent on compliance with the following conditions:

1. Millennium must notify Ecology of the startup of the project at least 24 hours before startup.
2. Material handling and removal operations must be limited to the petroleum coke owned by Conoco stored on the containment pad on the Millennium site.
3. Material handling and removal operations must be conducted in compliance with the procedures and practices detailed in the "Operations and Environmental Protection Plan for Green Petroleum Coke Removal" (Proposal) dated February 2012.
4. Material handling and removal operations must be conducted in compliance with the conditions in the Southwest Clean Air Agency's approval letter dated February 27, 2012 (copy enclosed).
5. Millennium must ensure that, in addition to the proposed procedures, all reasonable and practical control measures are taken to eliminate/minimize discharges of dust outside the enclosed controlled system designed for the material handling and removal operations.
6. In event of a dust release related to the material handling and removal activities, operations must be stopped and corrective action must be taken immediately to contain the release and to prevent the material from coming in contact with stormwater or areas where stormwater could later entrain the material and discharge it from the facility into surface water or groundwater. A record of the event and the corrective actions taken must be maintained. The records must be provided to Ecology upon request.
7. Material handling and transfer operations must be stopped if any of the conditions above cannot be met.
8. Millennium must notify Ecology when the material handling and removal project has been completed.

If you have questions please contact Judy Schwieters at (360) 407-8942.

Sincerely,



Garin Schriev, P.E.
Industrial Section Manager
Waste 2 Resources Program

cc: Wes Safford, SWCAA
Mike Wojtowicz, Dept of Building and Planning, Cowlitz County

enclosure

MBTL000735

SCHIFFER ODOM HICKS & JOHNSON PLLC

July 01, 2015 - 12:59 PM

Transmittal Letter

Document Uploaded: 3-473453-Appellants' Brief.pdf

Case Name: Millennium Bulk Terminals - Longview, LLC vs. Phillips 66 Company and ConocoPhillips Company

Court of Appeals Case Number: 47345-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Appellants'
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Julie Fitzgerald - Email: jfitzgerald@sohjlw.com

A copy of this document has been emailed to the following addresses:

pnicholson@sohjlw.com
ljohnson@sohjlw.com
joseph.vance@millernash.com
kathryn.rasmussen@millernash.com