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Division III
State of Washington

No. 316734
(Grant County Superior Court No. 10-2-01453-1)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GRANT COUNTY PORT DISTRICT NO. 9, PORT OF EPHRATA,

Plaintiff / Respondent,

v.

WASHINGTON TIRE CORPORATION, et al.,

Defendant / Petitioner.

**PETITIONER WASHINGTON TIRE CORPORATION'S
REPLY BRIEF**

Christopher R. Osborn, WSBA No. 13608
Neil A. Dial, WSBA No. 29599
Attorneys for Petitioner
WASHINGTON TIRE CORPORATION

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
E-mail: osboc@foster.com
dialn@foster.com

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I. INTRODUCTION

As set forth in the opening brief of Petitioner Washington Tire Corporation (“WTC”), the trial court erred by (1) holding that the remedy provision in the parties’ Earnest Money Agreement (“EMA”) was WTC’s “sole and exclusive” remedy (Opening Br. 20-36); (2) applying the doctrine of adequate assurances to this real property transaction and holding as a matter of law that the Grant County Port District No. 9, Port of Ephrata (the “Port”) was entitled to repudiate the EMA (Opening Br. 36-46); and (3) concluding as a matter of law that WTC is not entitled to pursue its alternative promissory estoppel claim for its out of pocket damages (Opening Br. 46-49). In its response brief, the Port does not dispute that WTC satisfied all conditions for closing under the EMA. Nor does the Port argue WTC ever refused to close the sale transaction. None of the Port’s responses justify its breach of the EMA. WTC is entitled to pursue its claims, including its claim for specific performance, and therefore, the trial court’s summary judgment rulings should be reversed.

First, the Port cites inapposite cases (and ignores controlling law and basic logic) in its nonsensical contention that “remedy provisions without the words ‘exclusive’ or ‘sole’ are just as potent and enforceable as those with said words.” (Resp. Br. 30). On the contrary, when interpreting real estate contracts, longstanding case authority makes clear

that a limitation on remedies provision must include explicit language stating that the express remedy is also the exclusive remedy. *Second*, like the trial court, the Port fails to justify why Washington State should adopt the doctrine of adequate assurances—a doctrine arising from the Uniform Commercial Code—in the real property context, or, even if it should, how the doctrine’s exacting standards could possibly be met as a matter of law in this case. *Third*, the Port’s promissory estoppel argument is hopelessly confused: the Port simultaneously argues that promissory estoppel cannot apply where the parties had a valid agreement, even as the Port claims its agents “had no legal capacity or power to enter into such an obligation.” (Resp. Br. 47).

This Court should reverse the trial court’s erroneous summary judgment rulings and award WTC its reasonable fees and costs.

II. FACTS

The relevant facts on appeal are set forth in WTC’s opening brief. Unfortunately, the Port continues to make spurious allegations of fraud that are neither supported by the record nor relevant to this appeal. Specifically, the Port’s brief is replete with baseless allegations that Abraham Hengyucius somehow misled the Port by doing business under his American name instead of his Chinese name. (*See, e.g.*, Resp. Br. 10-11). The Port’s contention that Abraham’s use of his American name was

some sort of a material misrepresentation is unsupported by any facts in the record. (*See* CP 253.) The Port claims Abraham’s use of his American name somehow prevented it from discovering alleged adverse facts as part of its due diligence. But that claim is entirely baseless, as explained in WTC’s opposition to summary judgment (CP 429-33), because if the Port had done even basic due diligence on Abraham Hengyucius, the very American name known to the Port, the Port would have discovered the same business history and related court proceedings the Port alleges it was prevented from discovering. The Port is using its own lack of due diligence as a pretextual reason to repudiate the EMA.

In any event, the trial court did not base its summary judgment rulings on the Port’s allegations of fraud. On the contrary, the trial court enforced Section 9 of the parties’ EMA, implicitly rejecting the Port’s fraud-in-the-inducement theory. The Port did not appeal this ruling. As such, this Court should ignore the Port’s allegations of “fraud,” as those allegations have no bearing on the legal issues on appeal.

III. ARGUMENT

A. A Provision Limiting Damages That Fails To Explicitly Say That The Stated Damage Remedy Is The Exclusive Remedy Does Not Affect A Right For Specific Performance.

Washington courts have recognized that “because land is unique and difficult to value, specific performance is often the only adequate

remedy for a breach of contract regarding real property.” *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 222, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011). Absent a clear intention to the contrary, it is also well established that courts will not construe a damages provision in a real estate contract to bar the specific performance remedy. *Asia Inv. Co. v. Levin*, 118 Wash. 620, 627-28, 204 P. 808 (1922) (provision in purchase and sale agreement for liquidated damages did not preclude party from seeking specific performance); *Paradise Orchards Gen. P’ship v. Fearing*, 122 Wn. App. 507, 511, 518, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005) (language stating that upon a buyer’s breach the seller “shall have the right” to repossess property and “shall have no obligation” to refund the earnest money “does not specify mandatory and exclusive remedies”). As the court in *Cochran v. Lakota Land & Water Co.* explained, to construe a limitation provision otherwise would enable the breaching party to take advantage of its own wrong and escape liability. 171 Wash. 155, 157, 162-63, 17 P.2d 861 (1933).

Paragraph 9 of the Earnest Money Agreement, titled “ENFORCEMENT,” states:

If title is insurable and all other terms of the Agreement are satisfied, and Purchaser refuses to complete purchase, then the earnest money shall be forfeited to Seller as liquidated damages. If Seller refuses to complete the sale then Purchaser shall be entitled to rescission of this Agreement

and return of its earnest money.

(CP 323, 341.) Nowhere in Section 9 is there any language indicating these remedies are exclusive.

1. Return Of Earnest Money Is Not WTC's Sole Remedy.

If a contract is “subject to two interpretations” (*e.g.*, that the remedy is exclusive, versus nonexclusive), it must be “interpreted as to preserve the rights of all the parties, rather than be interpreted in such a way as to destroy the rights of either one.” *Asia Inv. Co.*, 118 Wash. at 628 (emphasis added). Because there is no explicit language in the EMA that would prevent WTC from suing for specific performance, Paragraph 9 cannot be interpreted to mean that WTC's sole and exclusive remedy for the Port's breach is rescission and a return of WTC's earnest money deposit. The Port's baffling contention that “[e]xclusive remedy provisions without the words ‘exclusive’ or ‘sole’ are just as potent and enforceable as those with said words” misses the point. (Resp. Br. 30). Without the words “exclusive” or “sole” the provision is not an “exclusive remedy provision,” and the very notion that a provision lacking any indication of exclusivity can be transformed, after the fact, into an “exclusive remedy provision” contravenes both common sense and established law. *Asia Inv. Co.*, 118 Wash. at 627-28 (provision in purchase and sale agreement for damages remedy did not preclude party

from seeking specific performance).

On the contrary, in the context of a real estate purchase and sale, a damages clause will not foreclose the remedy of specific performance, absent express language in the contract making clear that the specified damages are meant to be a party's sole and exclusive remedy. *Id.* at 624-28; *McCutchen v. Brink*, 129 Wash. 103, 104-08, 224 P. 605 (1924). This is because the proper function of a damages provision is to limit the non-breaching party's recovery of monetary damages, not to deprive the non-breaching party of the right to specific performance. *Paradise Orchards*, 122 Wn. App. at 518 (citing *Jenson v. Richens*, 74 Wn.2d 41, 47, 442 P.2d 636 (1968); *Asia Inv. Co.*, 118 Wash. at 625-26). "The law of the state of Washington is in accord with the position taken by Restatement of Contracts § 378 (1932) which states, 'The fact that a contract contains a provision for the payment of a penalty or liquidated damages for breach of a promise is not a bar to the specific enforcement of the promise.'" *Save-Way Drug, Inc. v. Standard Inv. Co.*, 5 Wn. App. 726, 728, 490 P.2d 1342 (1971). The Restatement provides the rationale for the rule as follows:

A provision for a penalty for the breach of a promise does not afford an adequate remedy, in cases where damages are not adequate, since the provision is not itself enforceable beyond the amount collectible as damages. Neither does a provision for the payment of a sum as liquidated damages

afford an adequate remedy, even though it is itself an enforceable promise; since it is the uncertainty as to the extent of injury that makes the provision for liquidated damages enforceable, and no one supposes that the parties by their advance agreement actually render the extent of injury certain. Such a provision, unlike a penalty, affords a remedy; but it is not necessarily an adequate remedy.

Id. at 728-29 (quoting *Restatement of Contracts* § 378 (1932)).

The below table compares contract provisions in Washington cases that have addressed the exclusivity of remedies in real estate contracts:

Language	Holding
<p>“[F]ailure of purchaser to complete purchase within the time stated except for defective title shall operate as liquidated damages.” <i>Asia Inv. Co. v. Levin</i>, 118 Wash. 620, 624, 627-28 (1922).</p>	<p>No “exclusive” language. Provision <u>not</u> exclusive.</p>
<p>“[I]n case of default by [Party B],... said premises shall revert to and revest in [Party B]... and any payment... forfeited to [Party A], which said payments... shall in that case be deemed as damages hereby liquidated for the nonperformance of this contract by [Party B].” <i>McCutchen v. Brink</i>, 129 Wash. 103, 104-08 (1924).</p>	<p>No “exclusive” language. Provision <u>not</u> exclusive.</p>
<p>“[In] the event of the buyer’s default the seller ‘shall have the right’ to repossess the property and ‘shall have the right’ to sell the apple crop and keep the proceeds. The provision further states partly that the seller ‘shall have no obligation’ to refund the earnest money deposit.” <i>Paradise Orchards Gen. P’ship v. Fearing</i>, 122 Wn. App. 507, 518 (2004).</p>	<p>“No language in the agreement states the remedies are exclusive.” Provision <u>not</u> exclusive.</p>

Language	Holding
<p>“[I]f seller does not approve this sale within the period allowed..., the said earnest money shall be refunded. But if said sale is approved by seller and title to the said premises is insurable or marketable and purchaser neglects or refuses to comply with any of said conditions . . . , then the earnest money . . . shall be forfeited to seller as liquidated damages” <i>Save-Way Drug, Inc. v. Standard Inv. Co.</i>, 5 Wn. App. 726, 728 (1971).</p>	<p>No “exclusive” language. Provision <u>not</u> exclusive.</p>
<p>“[A]ny default by Seller under this Agreement . . . shall enable Buyer, as its sole and exclusive remedy, to terminate this Agreement and recover from Seller the portion of the Deposit paid by Buyer and any nonrefundable sums reasonably paid by Buyer to unrelated third parties” <i>Torgerson v. One Lincoln Tower, LLC</i>, 166 Wn.2d 510, 515, 522 (2009) (emphasis added).</p>	<p>Clear “exclusive” language. Provision provided seller’s sole remedy.</p>

As the above cases make clear, the absence of language in the EMA indicating that a remedies provision is exclusive is fatal to the Port’s argument. The parties’ subjective reasons for eliminating a sentence purportedly mentioning the remedy of specific performance during contract negotiations is irrelevant. (*See* Resp. Br. 20). *First*, as the Port acknowledges, unexpressed subjective intent is irrelevant. *Second*, even if the parties’ intent were relevant, given Washington’s clear precedent on the issue, one understands why the parties may have felt such a provision was not necessary. Moreover, determining unexpressed intent would be an issue for the trier of fact and inappropriate for summary judgment.

The Port also argues that this contract is somehow a special

exception to the general rule in Washington that remedies are not limited unless the parties expressly say they are, because the parties in this case identified a remedy for a “specific condition.” (Resp. Br. 35). In cases involving such foreseen conditions, the Port contends, the remedy can be interpreted as exclusive even though it lacks any wording to that effect. But if a mere foreseen condition of “the possible occurrence of a condition or event by which the EMA should be rescinded and terminated” were enough to transform the provision into an exclusive remedy clause, Washington courts would have reached opposite results in *Asia Investment* (foreseeing “failure of purchaser to complete purchase within the time stated” resulting in forfeiture of deposit), *McCutchen* (foreseeing default by one party resulting in rescission and forfeiture of deposit payments), *Paradise Orchards* (foreseeing default by buyer and providing that seller can repossess the property and keep the deposit), and *Save-Way Drug* (foreseeing seller failing to approve sale within a reasonable time and providing for return of deposit to buyer).

Finally, contrary to the Port’s argument, *Torgerson v. One Lincoln Tower, LLC* supports—rather than undermines—WTC’s position. The contract in *Torgerson* expressly provided that the enumerated remedies were the “sole and exclusive” remedies available. The Washington Supreme Court followed the well-established rule that provisions limiting

remedies “must be explicitly negotiated between buyer and seller and be set forth with particularity” in finding that an exclusive remedy provision which explicitly provided that recovery of the deposit was the seller’s “sole and exclusive” remedy was, indeed, exclusive. 166 Wn.2d at 522.

Unlike in *Torgerson*, Section 9 of the EMA does not provide that WTC’s “sole and exclusive” remedy is to rescind the EMA and demand a return of its earnest money. In fact, neither “sole” nor “exclusive,” nor any such limiting language can be found in Section 9. Section 9 merely provides that upon breach by the Port, WTC shall be “entitled” to rescission, without requiring WTC to elect this remedy. Thus, the language of the EMA is not “nearly identical” to the language at issue in *Torgerson*, as the Port contends. (Resp. Br. 21). *Torgerson* illustrates precisely how Section 9 lacks the plain language necessary to limit the remedies available to WTC under Washington law. If the Port wanted to limit WTC’s remedies, then the Port should have bargained for a sole and exclusive remedy clause, as the Seller did in *Torgerson*.

The Port’s reliance on non-real-estate cases presuming a specific remedy to be an exclusive remedy directly contradicts the holding in *Paradise Orchards*, which made clear that “*Asia Investment* and its progeny” control the “real estate purchase and sale context” and not inapposite cases applying a different presumption in a different context.

Paradise Orchards, 122 Wn. App. at 518.

Under Washington Supreme Court law and basic common sense, a contract provision stating that a remedy is available does not automatically mean that such remedy is the only one available—unless the parties say so. The EMA clearly lacks any language that would satisfy the standard reiterated time and again by the Washington Supreme Court. The trial court’s grant of summary judgment to the Port should be reversed.

2. Interpreting Paragraph 9 As An Exclusive Remedy Provision Would Render The EMA Illusory.

Washington law prohibits interpretations of contracts that would render such contracts illusory. *See, e.g., Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340, *rev. denied*, 132 Wn.2d 1009 (1997). “A supposed promise is illusory when its provisions make its performance optional or discretionary on the part of the claimed promisor.” *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986).

If, as the Port contends, WTC were limited to a simple refund of its own earnest money deposit, the Port would have no obligation under the EMA. It could completely opt to fail to sell the property, without any consequence and at no expense. In *Delson Lumber Co. v. Washington Escrow Co.*, the court rejected a similarly improper interpretation that

would have resulted in an illusory contract: “[T]here is no express language which purports to exculpate defendant from its own breach of the instructions. Were we to construe the provision in that fashion, defendant’s duty and promise under the agreement would be illusory. It would be unreasonable to inject that inference into the agreement.” 16 Wn. App. 546, 552, 558 P.2d 832 (1976).

In comparison, the case the Port relies on to support its argument, *Omni Grp., Inc. v. Seattle-First Nat’l Bank*, is inapposite because it involved a condition precedent that was not satisfied. 32 Wn. App. 22, 645 P.2d 727, *rev. denied*, 97 Wn.2d 1036 (1982) However, here, it is undisputed that WTC satisfied all of its conditions precedent prior to closing. (CP 282-83, 287-88, 323-24, 368-69, 604-709.) The Port’s argument that there was somehow a new condition precedent (for which it provides no evidence) simply bolsters WTC’s position that the Port’s breach was pretextual.

In sum, the trial court should be reversed, and the contract should be construed to allow WTC specific performance.

B. The Doctrine Of Adequate Assurances Does Not Apply.

The Port contends that the trial court was correct in applying, for the first time in Washington State history, the doctrine of adequate assurances to real estate. The Washington State Supreme Court has held

that such application is inappropriate. Furthermore, the Port argues that WTC's "silence" in response to the Port's demand for an attorney certification supporting Abraham's use of an American name and his authority to bind WTC justified the Port's repudiation of the contract. (Resp. Br. 38). This is not the law.

1. Washington Has Not Adopted Or Applied The Doctrine Of Adequate Assurances To Real Estate Transactions.

The doctrine of adequate assurances permits Party A to demand assurance of performance from Party B where Party B gives Party A "reasonable grounds" to believe that Party B will not perform the contract. *See Restatement (Second) of Contracts* § 251 (1981). Washington has applied this doctrine to contracts for the sale of goods, but as the Port concedes, Washington state has never extended the doctrine to real estate contracts. *Compare* RCW 62A.2-609(1) (right to demand adequate assurance that goods will be delivered); *with Torgerson*, 166 Wn.2d at 523 (refusing to extend RCW 62A.2 to real estate).

In *Torgerson*—a case the Port describes as "factually and legally similar to the case at bar" (Resp. Br. 20)—the court refused to apply RCW 62A.2 to a case involving real estate:

[T]he UCC does not generally apply to real estate contracts. . . . [J]ust because courts have applied the UCC by analogy on definitional matters such as the meaning of a disclaimer, and this court has applied the unconscionability doctrine

beyond the UCC context, does not mean we need to import UCC remedial provisions into real estate contracts.

166 Wn.2d at 523.

The Port points to only three cases (outside of Washington) in which the doctrine of adequate assurances has been applied to the sale of real property.¹ *Juarez v. Hamner*, 674 S.W.2d 856 (Tex. App. 1984); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66 (Utah 1982); *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772 (Me. 1989). But those cases only found “reasonable grounds” for demanding assurances where the other party made explicit statements renegeing on the parties’ agreement. In *Juarez*, the seller’s wife wrote the buyers a letter stating, “I will not now, nor during the period specified in the . . . contract with [my husband, the purported seller], agree in any way to transfer title or otherwise convey this property to you.” 674 S.W.2d at 858. In *Bitzes*, the seller sent a letter (1) claiming the parties’ purchase option agreement failed for impossibility, (2) refusing to pay the agreed price, and (3) inviting a lawsuit. 649 P.2d at 70. And, in *Drinkwater*, the court vacated summary judgment because the question of whether the seller had adequate grounds

¹ The Port misleadingly states that “a multitude of other jurisdictions have adopted the rule of Restatement § 251 as law,” citing cases from only eight states, five of which adopted the rule in contexts completely unrelated to real property. *Marvel Entm’t Grp., Inc. v. ARP Films, Inc.*, 684 F. Supp. 818 (S.D.N.Y. 1988) (copyright); *Julian v. Mont. State Univ.*, 747 P.2d 196 (Mont. 1987) (wage dispute); *Lo Re v. Tel-Air Commc’ns, Inc.*, 490 A.2d 344 (N.J. App. 1985) (purchase of radio license and equipment); *Conf. Ctr. Ltd. v. TRC-The Research Corp. of New England*, 455 A.2d 857 (Conn. 1983) (commercial lease); *L. E. Spitzer Co. v. Barron*, 581 P.2d 213 (Ak. 1978) (joint venture agreement).

to demand assurances after the purchasers failed to timely respond to the seller's demand was an issue of fact not appropriate for summary judgment. 563 A.2d at 776.

The doctrine of adequate assurances should not be applied to a real estate contract when the state has not previously adopted the doctrine. *See Olyaie v. Gen. Elec. Capital Bus. Asset Funding Corp.*, 217 F. App'x 606, 610 (9th Cir. 2007) (holding it is inappropriate to provide a theory of liability for failure to provide assurances where the theory had never before been adopted by the state), citing *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1141 (9th Cir. 2003) (declining to apply section 251 where plaintiffs "have not cited, and we have not found, any Oregon court that has cited, or relied on, this section of the Restatement").

2. The Port Failed To Make A Proper Demand.

The Port's request to WTC regarding Abraham's name does not constitute a demand for assurance of performance under the EMA. Whenever a purported "demand" addresses issues other than the performance due under the contract, it does not constitute a demand for performance under the doctrine of adequate assurances. *See, e.g., Alaska Pacific Trading Co. v. Eagon Forest Prods.*, 85 Wn. App. 354, 365, 933 P.2d 417 (1997) (supplier's letters to the purchaser did not demand performance and there was no showing the purchaser would not perform).

Likewise, in *Steel Strip Wheels, Ltd. v. Gen. Rigging, LLC*, there was no demand when a supplier sent an email reciting the consequences of delay in shipping truck wheels, and threatened to breach if it did not receive immediate payment for the wheels from the purchaser. 2009 WL 3190415 (E.D. Mich. Sept. 30, 2009) The court held that “[a]lthough the email explained the basis for General Rigging’s concerns—namely cash flow problems and the belief that without containers, the presses would not be ready for shipment for another 30 to 45 days—it concluded with an ultimatum. Such a writing is not a ‘demand.’” *Id.* at *9.

Here, the Port never demanded anything related to WTC’s performance due under the EMA. Instead, its requests had to do with Abraham’s legal name, and WTC’s incorporation—a matter wholly distinct from anticipating that WTC would not perform.

3. The Port Lacked Reasonable Grounds To Make A Demand.

As the trial court recognized, and as *Drinkwater* demonstrates, “a party’s intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place.” (CP 500) (citing *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994)). *Corbin on Contracts* explains the rule as follows:

Prospective Failure of Consideration

. . . In a contract for the sale of land, conveyance to be at a future date, the existence of a mortgage or other defect in title does not prove prospective inability to convey the agreed title, if the mortgage or other defect is one which the vendor has power to remove by the agreed date. If the clearing of the defect depends upon *the will of some third person*, one who has not expressed a willingness to cooperate in clearing it, a purchaser who was not aware of the existence of the defect when the contract was made is discharged from duty to buy; and his right of action is not conditional on tender of his own performance.

6 *Corbin on Contracts* § 1259 (1962 & Supp. 1984) (emphasis added).

Indeed, “Washington courts have refused to hold that a communication between contracting parties that raises doubt as to the ability or willingness of one party to perform, but is not an outward denial, is a repudiation of the contract.” *Alaska Pac. Trading Co.*, 85 Wn. App. at 366 (finding that it was unreasonable for one party to assume that statements from the other party that (1) it wished it could get out of their contract and (2) was having problems obtaining approval from its head office to accept the first party’s shipments were the equivalent of an unwillingness to perform); *Lovric v. Dunatov*, 18 Wn. App. 274, 282, 567 P.2d 678 (1977) (letter indicating that one party “may” not be able to perform was not direct and positive enough to be a repudiation).

Further, where the other party has satisfied its obligation due under the contract, “adequate grounds” to demand assurances do not exist. In

Cherwell-Ralli, Inc. v. Rytman Grain Co., the court applied the doctrine of adequate assurances where a buyer of goods under an installment contract demanded assurance from the seller that it would continue shipping goods 433 A.2d 984 (Conn. 1980). The court concluded that the buyer did not have reasonable grounds to demand assurances in the first place because the seller had satisfied its obligations under the contract by delivering everything that was ordered. *Id.* “A party to a sales contract may not suspend performance of its own for which it has ‘already received the agreed return.’ At all times, the buyer had received all of the goods which it had ordered.” *Id.* at 719-20 (citation omitted).

Like the seller in *Cherwell-Ralli*, WTC fully performed. The Port received the Land Release Notification from the FAA, and WTC accepted all of the conditions. (CP 318.) WTC worked for more than two years to obtain the FAA Notification, obtained significant investors, and satisfied all other conditions of the sale. Unlike the purchasers in *Juarez* and *Bitzes*, where adequate grounds to demand assurances existed, neither Abraham nor WTC ever disavowed or challenged the EMA. (CP 282-83, 287-88, 323-24, 368-69.)

And, even though the Port’s demand for assurances was not justified, WTC went to great lengths to address the Port’s concerns: WTC provided the Port with a copy of WTC’s certificate of incorporation just

two days after the Port requested confirmation that WTC was legitimately incorporated (CP 634-37), offered to re-execute the EMA or sign any other documents that the Port might deem necessary to remedy their concerns (CP 438), and Abraham even formally changed his name (CP 282-83, 320). To the extent any reasonable grounds existed previously (they did not), Abraham and WTC's response negated any notion that WTC might breach the EMA by refusing to close the land transaction. It was the Port who behaved in bad faith. Despite the fact that all of the conditions of closing of the EMA had been satisfied (CP 306), the Port insisted on pursuing its post hoc justification for its own premature breach, refusing to entertain any of WTC's offers to address its concerns and failing to research for itself whether Abraham's use of an assumed name had any consequence. The Port's manager, Michael Wren, admitted that the Port never accepted Abraham's offer to re-execute the contract once he had changed his name, never asked for an extended period of due diligence, and never bothered to determine whether Abraham's use of an assumed name had any consequence with respect to the EMA. (CP 283-84, 287-88, 292, 294-95, 301, 309).

Moreover, what constitutes "reasonable grounds" to demand assurances or a "reasonable time" to respond to the demand is a question for the trier of fact. In *Drinkwater*, the court vacated the district court's

summary judgment for the seller because the issue of whether the purchasers had failed to timely provide assurances to the seller was a question of fact. “Whether the Drinkwaters . . . threatened a repudiation is a question for the factfinder, as is the question whether [seller] . . . was justified in treating the nonreceipt of any response from the [purchasers] as a repudiation.” 563 A.2d at 776. Thus, even if the failure to provide adequate assurances within a reasonable amount of time may constitute anticipatory repudiation of a real estate contract, “[h]ow much time is reasonable depends on the circumstances of the case” and is a question of fact for the jury. *Id.*; see also *Spring Creek Holding Co. v. Shinnihon U.S.A. Co.*, 943 A.2d 881, 894 (N.J. App. 2008) (“Whether the obligee’s asserted grounds to demand adequate assurance are ‘reasonable,’ and whether the obligor’s response is ‘adequate,’ are ordinarily questions of fact for the jury.”); *AMF, Inc. v. McDonald’s Corp.*, 536 F.2d 1167, 1170 (7th Cir. 1976) (“Whether in a specific case a buyer has reasonable grounds for insecurity [so as to be entitled to demand assurances] is a question of fact”).

In sum, the Port was not entitled to demand assurances in the first place. The trial court was wrong to find as a matter of law that WTC committed an anticipatory breach of the EMA.

C. Because the Trial Court’s Interpretation Of The EMA Renders It An Illusory Contract, WTC’s Alternative Promissory Estoppel Claim Should Not Have Been Dismissed.

The Port urges this Court to affirm the trial court’s finding that the EMA was a valid contract which barred WTC from pursuing its alternative claim of promissory estoppel. But the Port presents hopelessly confused rationales for barring the claim. WTC should be entitled, at a minimum, to pursue its reliance damages.

1. WTC’s Promissory Estoppel Claim Is A Proper Alternative Theory To A Breach Of Contract Claim.

The trial court found that the parties to the EMA “intended the agreement to be a platform to enable the parties to investigate the mutual desirability of the proposed transaction and for Washington Tire to explore the availability of financing.” (CP 500.) From there, the trial court erroneously held that the agreement was valid, concluded WTC’s sole and exclusive remedy was a return of its own money under the EMA, and dismissed WTC’s promissory estoppel claim. (CP 573.)

But setting forth a bare framework to explore the desirability of some future transaction, without an ability to enforce the Agreement, would constitute an agreement to agree, which is not enforceable in Washington due to lack of consideration. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004) (agreements

to agree are not enforceable). Moreover, as explained above, the trial court's interpretation of Paragraph 9 as providing WTC's exclusive "remedy" under the EMA renders the Port's promise to sell the property to WTC entirely illusory. When a promise is illusory, there is no consideration and no enforceable contract. *Omni Grp., Inc.*, 32 Wn. App. at 24-25.

The Port also argues that its agents who carried out the EMA with WTC were not authorized to act on the Port's behalf. According to the Port, this means that "[a]ny action or representation by anyone other than the port commission is simply not binding on the Port District and cannot be the basis for a promissory estoppel argument." (Resp. Br. 47). However, the Port provides no evidence whatsoever demonstrating that its agents were somehow not authorized to act on its behalf. And in the paragraph preceding its contention that its agents were not authorized to act on its behalf, the Port argues that WTC and the Port reached a valid contract preventing WTC from seeking promissory estoppel. (*Id.* at 46.)

All of the evidence in this case, as well as the arguments of the Port itself, indicate that its agents were acting with apparent authority and that the Port relied upon them to do so. (CP 18-184.) The Washington Supreme Court explicitly allows promissory estoppel claims where a governmental entity's agents acted with apparent authority in carrying out

the entity's functions:

Not only have we expressly held that the doctrine of apparent authority may be invoked against a municipal corporation where it exercises a proprietary function, but we have also recognized that the equitable principles of estoppel and implied contract, in both of which 'apparent authority' plays a part, may apply, even where the function being performed is governmental, provided the particular contract is not ultra vires.²

State v. O'Connell, 83 Wn.2d 797, 834-35, 523 P.2d 872 (1974).

The Port also suggests that WTC should not be permitted to argue both breach of contract and promissory estoppel. (*Id.* at 46 n.2.) But CR 8 allows parties to plead in the alternative, and WTC's promissory estoppel claim is a proper alternative claim. *See, e.g., Durand v. HIMC Corp.*, 151 Wn. App. 818, 825, 837, 214 P.3d 189 (2009) (noting that claimant advanced both promissory estoppel and breach of contract claims). WTC presented its promissory estoppel theory as an alternative argument in the event that the EMA is invalid or unenforceable. The Port's argument that WTC should not be permitted to advance its alternative promissory estoppel claim lacks merit.

² The Port does not contend that the contract is ultra vires—indeed, “RCW 53.08.090 authorizes the port commission to sell and convey real property of the port district.” (Response Br. 47).

2. WTC Satisfies The Elements For Promissory Estoppel.

The Port does not dispute that WTC expended considerable sums working toward a closing, believing that if the conditions were satisfied, the Port would close. (CP 554-55.) WTC was justified in expending these sums; the Port undisputedly promised to sell the property to WTC upon satisfaction of the conditions for closing and approval by the FAA. (CP 340, 345-46; EMA ¶¶ 1, 27.) Whether such reliance was justified presents an issue of fact to resolve at trial. *Korslund v. DynCorp Tri-Cities Servs.*, 156 Wn.2d 168, 191, 125 P.3d 119 (2005) (whether party justifiably relied on promise is a question of fact for trial).

In light of the Port's written and oral promises to sell the property to WTC, it would be unjust to permit the Port to change its mind only after all conditions were met and the FAA approved the sale. Furthermore, if WTC is unable to recoup the expenses it incurred in reliance on the Port's promises to sell the property to WTC, justice would not be served. If WTC is foreclosed from pursuing contract remedies, such as specific performance, equity dictates that it should at a minimum be entitled to its reliance damages under its alternative claim for promissory estoppel.

IV. CONCLUSION

The trial court's grant of summary judgment to the Port should be reversed. *First*, the EMA does not contain the requisite explicit language

limiting WTC's remedies to foreclose WTC's right to sue for specific performance. *Second*, the breach and remedy rules from the UCC—*i.e.*, transactions involving movable goods—are not extended to real property transactions, but even so, the Port did not have reasonable grounds to demand assurances, as WTC never threatened to disavow the EMA. *Finally*, if the Port's interpretation is correct, the Agreement would be illusory and unenforceable; as such, WTC should be permitted to pursue its alternative promissory estoppel claim in order to recoup its out of pocket damages.

For these reasons, this Court should reverse the trial court, and WTC should be awarded its reasonable attorneys' fees and costs, both below and on appeal. The Port should also be required to refund the attorneys' fees and costs already collected. (CP 592) (awarding \$21,653.70 of fees and costs to the Port).

RESPECTFULLY SUBMITTED this 9th day of December, 2013.

/s/ Neil A. Dial

Christopher R. Osborn, WSBA No. 13608
Neil A. Dial, WSBA No. 29599
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
E-mail: osboc@foster.com; dialn@foster.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 9, 2013, I caused a true and correct copy of the foregoing Petitioner Washington Tire Corporation’s Reply Brief in the above captioned case to be served upon counsel for the parties of record in this action by sending same properly addressed to and by the designated method as follows:

COUNSEL FOR PLAINTIFF

Katherine L. Kenison
Michael Wyman
LeMargie Kenison
Wyman and Whitaker
107 D Street NW
Ephrata, WA 98823
Telephone: 509-754-2493
kkenison@basinlaw.com
mwyman@basinlaw.com

- Via U.S. Mail
- Via Facsimile
- Via Federal Express
- Via Email
- Via Legal Messenger

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

Executed at Seattle, Washington on December 9, 2013.

/s/ Neil A. Dial

 Christopher R. Osborn, WSBA No. 13608
 Neil A. Dial, WSBA No. 29599
 FOSTER PEPPER PLLC
 1111 Third Avenue, Suite 3400
 Seattle, Washington 98101-3299
 Telephone: (206) 447-4400
 Facsimile: (206) 447-9700
 E-mail: osboc@foster.com; dialn@foster.com
 Attorneys for Appellant