

FILED

SEP 18, 2013

Court of Appeals
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
OPENING BRIEF

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I. INTRODUCTION

Appellant Washington Tire Company (“WTC”) has been working for more than five years to develop a tire manufacturing facility in Washington. In 2008, WTC committed to purchase a 96-acre property owned by Respondent Port of Ephrata (the “Port”).

The parties entered into an Earnest Money Agreement (“Agreement” or “EMA”), which called for a number of conditions to be met before closing the sale. WTA spent the next two years identifying investors and working with government agencies to obtain approvals needed to close. WTA invested significant sums into the deal and thought it would pay off – WTA had satisfied all of its pre-closing obligations in 2010 when it received the final FAA approval of the land transaction.

Shortly before closing, however, the Port allegedly became concerned when it realized that WTA’s principal, Abraham Hengyucius (“Abraham”), had signed the Agreement under his assumed American name, Abraham, rather than his Chinese name. The Port demanded that WTC provide a legal “certification” that WTC was properly incorporated and that Abraham had authority to bind WTC. Despite WTC’s efforts to satisfy the Port, it unilaterally terminated the Agreement and refused to close the sale, instead initiating litigation against WTC.

The trial court erred when it found that WTC's sole and exclusive remedy for the Port's unilateral breach of contract was rescission and return of WTC's \$40,000 earnest money. The trial court further erred when it ruled that the Port was entitled to repudiate because WTC failed to answer adequate assurances demanded by the Port, constituting an anticipatory breach. WTC is entitled to specific performance of the Agreement or, in the alternative, full damages for breach of contract or promissory estoppel.

The trial court's ruling should be reversed. First, WTC's remedies for the Port's breach have not been contractually limited. The Agreement does not clearly state that rescission is the "sole and exclusive" remedy. Absent clear intent, the presumption in Washington is that all contract remedies remain. The trial court improperly ignored Washington Supreme Court precedent by disallowing WTC's specific performance claim. If WTC's sole remedy is a refund of its money, the contract is illusory. WTC would be without any meaningful remedy for the Port's breach.

Second, the trial court's ruling that WTC committed an "anticipatory breach" is without basis in fact or law. The Port does not dispute that WTC satisfied all conditions of closing. WTC never challenged Abraham's authority, and WTC never gave any indication that it would not close the transaction. The adequate assurances doctrine does

not apply here, but even if it did, the Port's unreasonable demand for information was satisfied by WTC and Abraham (and, in any event, could have been satisfied by simple research by the Port alone). The trial court erroneously applied the doctrine of anticipatory breach to allow the Port to avoid its contractual obligations.

Finally, if the parties' contract is essentially unenforceable against the Port, then WTC should be entitled to its out-of-pocket expenses under the doctrine of promissory estoppel.

This Court should reverse the trial court, direct specific performance in favor of WTC, order the Port to repay all attorneys' fees and costs previously collected, and award WTC fees and costs on appeal.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error.

No. 1. The trial court ruled that if the Port refused to complete the sale of 96 acres of Port property to WTC, then under the parties' contract WTC's sole and exclusive remedy was a return of WTC's earnest money.

No. 2. The trial court ruled that WTC committed an anticipatory breach of the parties' contract by failing to provide adequate assurance that the parties' contract was binding on WTC and that Abraham Hengyucius had authority to bind WTC.

No. 3. The trial court dismissed WTC's alternative promissory estoppel claim for WTC's out-of-pocket expenses incurred in reliance on the Port's indications that it would sell the Port's property to WTC.

No. 4. The trial court awarded the Port attorney's fees and costs for prevailing on summary judgment under the parties' EMA.

B. Issues Pertaining To Assignments Of Error.

1. Did the trial court err in concluding WTC's sole and exclusive remedy for the Port's breach in failing to complete the sale was a return of WTC's earnest money where (a) the parties' contract does not state that the remedy was intended to be exclusive and (b) such an interpretation would render the contract illusory because WTC would be without any meaningful remedy?

2. Did the trial court err in concluding that WTC had committed an anticipatory breach where (a) WTC never threatened or indicated that it would not close the transaction and (b) WTC indicated that it wished to and intended to close the transaction.

3. Did the trial court err in concluding that WTC should not be entitled to recoup its out-of-pocket expenses where WTC incurred those expenses based on written and oral statements by the Port that it intended to sell the property to WTC?

4. Should the Port have to reimburse WTC for the attorneys' fees and costs awarded by the trial court?

III. STATEMENT OF THE CASE

A. WTC's Principal, Abraham Hengyucius, Has Become A Leader In The "Off The Road" Tire Industry.

WTC's principal, Abraham Hengyucius ("Abraham"), was born in China and earned a Ph. D. from Nanjing University in China. (CP 313-14.) In 2003, Abraham formed American Seashores International, Inc., a California corporation ("American Seashores"). (CP 314.) American Seashores was a general business company focusing in international trade, including shoes, tires, picture frames and other commodities. (CP 314.) It marketed a tire under its brand name "California," which branded two sizes of tires – a 35" and 49" tire. (CP 314.) California-brand tires were sold through about early 2006. (CP 314.)

In about 2005, Abraham formed American Tire Corp., a New Jersey corporation ("ATC") to develop and deliver giant Off-The-Road ("OTR") tires, otherwise known as "earthmover" tires. (CP 314.) OTR tires are expensive, industrial-sized tires used on large vehicles, primarily in the mining industry. (CP 314.) ATC developed two types of giant tires – a 57" and 63" tire – under ATC's brand "Colorado." (CP 314.)

Since entering into the OTR industry, Abraham has gained recognition as a leader of OTR tires, a highly competitive field. (CP 315.)

For example, Abraham was invited to deliver a speech at the 2008 and 2009 OTR Tire Conference held by the Tire Industry Association, the largest industry association among OTR tire companies worldwide. (CP 315; 325-335.)

B. Abraham Formed WTC In 2008 To Manufacture OTR Tires In Washington State.

After working in the OTR tire industry for several years, Abraham concluded that it would be more efficient to establish a manufacturing facility locally, in Washington. (CP 315.) Local production would lead to better quality tires and better cost control of the tires produced, including cutting down on shipping expenses. (CP 315.)

In about November 2007, the Seattle Office of the Washington State Department of Community Trade and Economic Development wrote to Abraham to discuss a potential tire manufacturing facility in Washington. (CP 315-16.) In December 2007, Abraham came to Washington to investigate potential sites at the Port of Bellingham and south to the Port of Longview. (CP 316.) The Governor's Office of Regulatory Assistance and local government officers welcomed Abraham to invest here. (CP 316.) In March and July 2008, Abraham returned to Washington to continue to explore potential sites, and investigated dozens of industrial properties along the I-5 corridor, as well as east on Highway 90 to Grant County. (CP 316.)

In July 2008, Abraham formed Washington Tire Corporation (“WTC”) as the entity responsible for developing the new OTR tire plant in Washington. (CP 316; 337-38.)

In 2009, Abraham formed a company called Washington Investment & Development, LLC (“WI&D”), which started working to identify and obtain commitments from investors wishing to obtain an EB-5 visa. (CP 315.) An EB-5 visa is a United States program that provides a method for obtaining a green card to foreign nationals who invest significant sums in the United States that create or preserve jobs. (CP 315.) To qualify, the foreign national must invest at least \$1 million, or \$500,000 if the investment is made in a targeted employment area. (CP 315.) A number of individuals were identified to invest in a tire manufacturing facility to be built in Washington. (CP 315.)

WTC also engaged Scott Fraser of GVA Kidder Mathews to act as a buyer’s broker on its behalf. (CP 316.) Mr. Fraser explored the needs of WTC’s future operations and land requirements. (CP 316.) Mr. Fraser travelled with Abraham to a number of prospective sites for WTC’s plant in Washington. (CP 316; 367-68.)

C. The Port Of Ephrata Agreed To Sell 96 Acres To WTC.

In August 2008, Mr. Fraser and Abraham visited a 96-acre site located in Ephrata, which was owned by the Port of Ephrata. (CP 316;

367-68.) WTC concluded that this location was a good fit for its planned tire manufacturing facility. (CP 316.) Mr. Fraser submitted an offer to purchase the property on WTC's behalf, including a proposed Purchase and Sale Agreement. (CP 316; 368.)

The Port proposed its own contract and, on October 1, 2008, Abraham executed the Earnest Money Agreement ("Agreement" or "EMA") for WTC. (CP 316; 368.) Abraham had authority to execute the Agreement on WTC's behalf. (CP 316; 337; 442; 444.) The Agreement contemplated a number of conditions that the parties expected to be met, including a period to conduct due diligence before closing. (CP 316; 340-46.) WTC deposited \$40,000 into escrow. (CP 317.)

The parties understood that the tire manufacturing plant would be a significant project for the community and create Ephrata jobs. (CP 317.)

D. WTC Engaged In Two Years Of Costly Due Diligence.

With the Port's assistance and encouragement, Abraham, on behalf of WTC, met with various government agencies, including the Governor's Office of Regulatory Assistance, Grant County PUD, Grant County Economic Development Council ("EDC"), City of Ephrata officers, and several Port of Ephrata officers. (CP 317.) WTC submitted its proposed timeline for the project and the project was enthusiastically received. (CP 317.)

WTC retained Columbia Northwest Engineering and environmental professionals to finalize off-site infrastructure, water, sewer, and air studies. (CP 317.) WTC worked with the Department of Ecology in Spokane to discuss SEPA, waste water, and air permit issues, and the Port required that WTC process all studies necessary to obtain FAA approval of the land transaction. (CP 317.)

Port officials were happy with the proposed project and WTC during the due diligence period. (CP 317.) In March 2009, for example, Port manager, Michael Wren, along with Terry Brewer from Grant County EDC, delivered presentations on the WTC project at a public hearing in Olympia. (CP 317.) The Washington State Economic Revitalization Board approved a \$1,000,000 loan to the Port for road improvements to support the WTC project. (CP 317.) Governor Christine Gregoire wrote to WTC in support of the proposed Grant County facility. (CP 317; 353.)

In July 2009, WTC completed and submitted a 30-year traffic study. (CP 317-18.) In December 2009, WTC provided the Port with a 254-page report relating to environmental issues. (CP 318.)

E. The Port Was On Notice That Abraham Hengyucius Is An Assumed American Name.

WTC arranged for its investors to visit Port officials and the surrounding area on January 19, 2010. (CP 318.) In preparation for that visit, on January 6, 2010, WTC emailed Mr. Brewer at Grant County

EDC, with a copy to Mr. Wren, Port manager, identifying the legal names of all the visitors at the site visit. (CP 318.) Mr. Wren was informed that Abraham would attend that meeting (Abraham attended all of the meetings regarding WTC). The only name identified on this email for Abraham was Abraham's Chinese name, Hengyu Zhang. (CP 318.)

No one from Grant County or the Port ever asked Abraham why he was using a name other than Abraham Hengyucius. (CP 318.) Abraham attended the investor visit, under his Chinese name, without question. (CP 318.) Abraham never hid the fact that his legal name was Hengyu Zhang, not Abraham Hengyucius. (CP 318.)

In January 2010, Abraham attended a public hearing in Grant County regarding the project. (CP 318.) No objections were made. (CP 318.) The project successfully passed and was on track for a problem-free closing. (CP 318.)

In March 2010, Mr. Wren visited China to meet with WTC's investors. (CP 318.) This meeting was arranged at WTC's cost and expense. (CP 318.) During the meeting, Mr. Wren was introduced to a number of Chinese people and he was well aware that it is customary for Chinese people to use Americanized names when working with people in the West. (CP 318.) In May 2010, WTC similarly arranged for

Washington state senators to visit China in support of WTC's investment in Washington state. (CP 318.)

F. WTC Satisfied All Requirements For Closing The Land Sale.

On July 20, 2010, Mr. Wren notified WTC that the Port had received the Land Release Notification from the FAA. (CP 318.) WTC responded to this July 20 email and accepted the conditions of the land sale transaction. (CP 318.) By doing so, WTC satisfied all of its conditions under the Agreement. (CP 318.) The Port was responsible for completing the two tasks remaining before the sale could close: (1) clear title relating to easements, and (2) obtain a single Tax ID number for the parcel. (CP 318-19; 286-87.)

G. The Port Used A Pretextual Concern About Abraham's Use Of His Well-Established American Name To Terminate The Agreement Prior To The Land Sale's Closing.

In late July 2010, WTC arranged another meeting and presentation for investors to visit the property. (CP 319.) The program included a spot for Abraham to speak. (CP 319.) On August 3, 2010, Abraham provided Grant County EDC with the visitors' legal names, including his own Chinese name. (CP 319; 216-25.) In the email, Abraham requested that "Regarding the agenda, please kindly change my name to Jacqueline Zhn=ang (sic) for the presentation." (CP 319; 215-37.)

The Port appears to have wrongly concluded that Abraham intended to make the presentation under a different name (Jacqueline Zhang). Abraham merely meant to convey that Jacqueline Zhang (aka “Jin”) – who handled EB-5 marketing – would be the presenter rather than Abraham. (CP 319.) Abraham subsequently clarified to Mr. Brewer and the Port that “Jin Zhang is a lady responsible for EB-5 marketing” and that “Hengyu Zhang is my Chinese name” and “Abraham is my American name.” (CP 319; 239.)

The Port immediately and unilaterally requested that the FAA delay the land transfer documentation being prepared for the impending closing, even though Abraham’s legal name has no bearing on the FAA’s conditions for the land release. (CP 319; 229-30.)

On August 4, 2010, Mr. Wren wrote to Abraham stating that he did not want the name issue “to get blown out of proportion” but that he was “tasked by [the Port’s] commissioners to get some clarification so that we can continue to support [WTC].” (CP 241.) In the email, Mr. Wren appreciated the common cultural practice of using a western name: “After being in China myself, I understand how common the use of American names is, however, can you please show me something (fax) that shows your legal name to include Abraham, since that is what you’ve signed all

of the documents by?” (CP 241.) Mr. Wren indicated that the Port would not move forward without this information. (CP 241.)

On August 6, 2010, WTC provided copies of Abraham’s identification showing his Chinese name and made clear that Abraham Hengyucius is his American name – something Abraham believes Mr. Wren had known since at least January 2010. (CP 319; 245-48.)

On August 13, 2010, Mr. Wren sent Abraham a letter from the Port’s legal counsel, Kathryn Kennison. (CP 319; 253.) In the letter, Ms. Kennison acknowledged the nearly two years of progress on the project that WTC had performed in order to satisfy the contingencies, resulting in the Port finally obtaining FAA approval to close. (CP 253.)

Ms. Kennison demanded that:

Before proceeding any further with closing this transaction, the Port will require certification from a Washington attorney known to myself who deals extensively in commercial transactions which established the legitimate incorporation of Washington Tire Corporation, and the legal authority of ‘Abraham Hengyucious’ [sic] to bind Washington Tire Corporation as its President.

(CP 253.) Ms. Kennison had no justification under the parties’ Agreement to make this demand. No provision requires WTC to confirm that it was legitimately incorporated. (CP 340-46.)

Even so, the Secretary of State has never questioned the validity of WTC, and accepted its Articles of Incorporation. No one at WTC has ever

doubted Abraham's authority, as President, to bind the corporation. (CP 320; 438.) To the contrary, WTC ratified the Agreement, signed by Abraham, on many occasions and expended considerable sums in reliance on the Agreement. (*E.g.*, CP 320.)

H. WTC Acted Cooperatively And Responded Adequately To The Port's Unreasonable Demand For Publicly-Available Information.

The documents and information requested by the Port, through its counsel, were either publicly available or consisted of legal research which the Port could have completed on its own. WTC's articles of incorporation, which conclusively establish that WTC was legitimately incorporated in Washington, are publicly available documents that can easily be obtained by request from the Washington Secretary of State. (*See, e.g.*, <https://www.sos.wa.gov/corps/OrderDocs.aspx>.)

Because WTC wanted to close this important deal, it acted cooperatively and provided the Port with its Articles of Incorporation and Certificate of Incorporation. (CP 438, 320.) Abraham also offered to execute any and all documents the Port might require to resolve the Port's concerns. (*Id.*) Abraham had authorization from WTC to execute the Agreement, and his authority has never been questioned by WTC. (CP 439; 441-42; 444.) Abraham used his American name on the Articles of Incorporation in which he signed as "Incorporator," and he was also

identified on the Secretary of State's website as the Chairman of WTC. (CP 337; 628.)

In addition, out of an abundance of caution, on August 27, 2010, Abraham legally changed his name from Hengyu Zhang to Abraham Hengyucius. (CP 320.) Abraham provided the Port with a copy of the Pierce County District Court's Order Changing Name, filed on August 27, 2010. (CP 320.) In addition, WTC had its broker – Mr. Fraser – go to Ephrata to meet with the Port, and he offered to have WTC execute whatever replacement documents may be required to further clarify Abraham's authority to execute documents as Abraham Hengyucius on behalf of WTC. (CP 320; 368-69.)

Although WTC retained an attorney, Abraham was unable to provide the legal "certification" sought by the Port in the time provided. The Port, however, did not need a certification from an "attorney known to" the Port's counsel to verify that WTC was a legitimate Washington corporation or that Abraham was legally authorized to execute the Agreement on WTC's behalf.

I. Rather Than Work With WTC To Resolve Its Alleged Concerns, The Port Unilaterally Terminated The Agreement And Initiated Litigation.

As a result of an inquiry from a reporter, Abraham learned for the first time that the Port was unilaterally attempting to terminate its

Agreement. (CP 323.) The Port's proffered reasons for the termination related solely to the formation of WTC and the enforceability of the Agreement, because Abraham had signed the Agreement using his American, rather than his Chinese, name. (CP 323; CP 259.)

On September 22, 2010, Abraham inquired of Mr. Wren about the unilateral termination and reminded him that WTC's agreement was enforceable and that WTC had expended two years of due diligence and considerable sums of money getting the project to the point of closing. (CP 323.) Unfortunately, the Port refused to engage in further negotiations with WTC, supposedly because of an alleged failure by WTC to provide sufficient evidence of WTC's formation and Abraham's authority to bind WTC, choosing instead to file its Complaint For Declaratory Judgment on September 28, 2010. (CP 323.)

J. The Contract Provision.

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.)

At no time until the filing of the lawsuit did the Port ever express, directly or indirectly to Abraham, or anyone else acting for WTC, that the Port understood Paragraph 9 of the Agreement to be the exclusive remedy, in the event the Port breached the obligation to sell the property. (CP 323.) Nor did Abraham or anyone else for WTC ever tell the Port that WTC was agreeing to limit its remedies in any way. (CP 323.) WTC made clear that it would be expending considerable sums of money exploring the viability of the project at this location. (CP 323.) WTC would not have agreed to do so if the parties had intended that its “sole” or “exclusive” remedy for a seller breach would be to obtain its \$40,000 earnest money back. (CP 323-24.)

At no time prior to the lawsuit did WTC seek rescission and a return of its earnest money; instead, WTC has sought to move forward with closing but those efforts have been rebuffed by the Port. (CP 324.)

The trial court erroneously concluded as a matter of law that, under this provision, the sole and exclusive remedy to WTC was rescission and return of WTC’s \$40,000 earnest money.

K. Procedural History

The Port filed its complaint in September 2010. (CP 609-13.) On November 15, 2010, WTC filed its answer, defenses and counterclaims, including a claim for specific performance. (CP 710-16.)

On May 1, 2012, the Port moved for summary judgment. (CP 1.) WTC opposed the motion on May 29, 2012. (CP 185.) At the June 8, 2012 summary judgment hearing, the trial court asked the parties to submit supplemental briefing addressing cases the court identified (Hr'g Tr., 53-56, Jun. 8, 2012): *Graoch v. Titan Constr. Corp.*, 126 Wn. App. 856, 109 P.3d 830 (2005); *Douglas Northwest, Inc. v. O'Brien*, 64 Wn. App. 661, 828 P.2d 565 (1992); and *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 696 P.2d 1270 (1985). The trial court announced its decision on September 12, 2012 in a letter opinion. (CP 495.) On October 5, 2012, the trial court entered a judgment dismissing all of WTC's counterclaims, except for the claim for promissory estoppel. (CP 532-37.)

On February 22, 2013, the Port moved for summary judgment on the remaining promissory estoppel claim. (CP 538.) WTC opposed that motion on March 18, 2013. (CP 546.) The Trial Court granted the Port's motion on April 23, 2013 (CP 573), dismissing the remaining promissory estoppel claim. WTC timely appealed on May 13, 2013, the trial court's letter decision and summary judgment orders. (CP 579-81.)

IV. ARGUMENT

A. Standard of Review.

When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, here WTC. *Riojas v. Grant Cnty. Pub. Util. Dist.*, 117 Wn. App. 694, 697, 72 P.3d 1093 (2003); CR 56.

Summary judgment is appropriate only if the moving party can show both that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.

A party responding to a summary judgment motion may show that summary judgment on the issues raised is proper in its favor as a matter of law. *See, e.g. Cle Elum Bowl, Inc. v. N. Pac. Ins. Co., Inc.*, 96 Wn. App. 698, 981 P.2d 872 (1999) (summary judgment properly granted for non-moving party); *see also Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) (undisputed facts supported summary judgment for non-moving party). Here, no reasonable trier of fact could find that the Port was entitled to repudiate the contract, or that the parties limited the available remedy for breach of contract to rescission. As a matter of law, WTC is entitled to specific performance of the contract.

B. WTC's Damages For The Port's Breach Of Contract Are Not Limited To Return Of Its Earnest Money.

The Port breached the Earnest Money Agreement when it refused to close the sale of 96-acres of property to WTC. As explained further below, no basis existed under Agreement for the Port's refusal, as all conditions of closing had been met. The trial court erred when it held that Section 9 of the Agreement provided an exclusive remedy for the Port's breach: rescission and return of WTC's \$40,000 earnest money deposit. WTC's claims for specific performance or, in the alternative, for restitution and damages, are supported by Washington law and should have been granted.

1. The Agreement Does Not Limit WTC's Remedy To Rescission Of The Agreement.

Long standing Washington law holds that unless the parties clearly and "definitely decided to limit their rights," the courts will not interpret contract language to have that effect. *Asia Inv. Co. v. Levin*, 118 Wash. 620, 628, 204 P. 808 (1922) (provision in purchase and sale for liquidated damages did not affect party from seeking specific performance); *see also McCutchen v. Brink*, 129 Wash. 103, 105, 224 P. 605 (1924) (emphasis added). If the contract is "subject to two interpretations," then 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.” *Id.* (emphasis added).

Multiple cases have applied the now well-established rule that courts should not construe a liquidated damage provision to limit remedies absent a clear intention to the contrary, as the Supreme Court in *Asia Investment* held. For example, a provision providing that the lease “shall be forfeited unto said lessors as liquidated damages agreed upon” did not limit the available remedies because the language did not clearly express such a limitation. *Cochran v. Lakota Land & Water Co.*, 171 Wash. 155, 161, 17 P.2d 861 (1933). The Court held that construing the provision otherwise would enable the breaching party to take advantage of their own wrong and escape liability. *Id.* See also *Reiter v. Bailey*, 180 Wash. 230, 235, 39 P.2d 370 (1934) (holding that a party to a contract retained all rights and remedies for breach of contract that were not explicitly excluded under the terms of the contract); *Paradise Orchards Gen. P’ship v. Fearing*, 122 Wn. App. 507, 511, 94 P.3d 372 (2004) (language in earnest money agreement 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.”).

The parties' intent as expressed in the plain language of Section 9 governs its interpretation under Washington law. "Words should be given their ordinary meaning; contracts should be construed to reflect the intent of the parties; courts, under the guise of construction or interpretation, should not make another or different contract for the parties." *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982) (citations omitted).

Section 9 provides as follows:

9. ENFORCEMENT: 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.

This section contains no plain language that expressly and definitely limits the remedies available to WTC. For example, Section 9 does not provide that rescission is WTC's "exclusive" or "sole" remedy. Nor does Section 9 state that WTC is prohibited from seeking specific performance, contract damages, or any other form of relief. On the contrary, similar to *Paradise Orchards*, stating that WTC shall be entitled to rescission or that WTC shall be entitled to a return of its earnest money "does not specify mandatory and exclusive remedies" but instead merely reserves the "right to invoke the enumerated remedies" under the agreement, at the benefited party's discretion. *Paradise Orchards*, 122 Wn. App. at 519. "This

interpretation is consistent with the long-held rule in Washington that a liquidated damages clause in a real estate purchase and sale contract does not foreclose the remedy of specific performance absent language in the contract specifying liquidated damages to be the sole and exclusive remedy.” *Id.* As the court in *Paradise Orchards* explained, “[t]he proper function of a liquidated 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.” *Id.*

Had the Port intended rescission to be the “exclusive” or “sole” remedy, it could have negotiated the terms of Section 9 accordingly. Similarly, had the Port intended to prohibit WTC from seeking specific performance or any other form of relief, it could have negotiated the terms of Section 9 accordingly. The Port did not do so, and the parties never contemplated that rescission would be the “exclusive” or “sole” remedy for breach of the Agreement. (CP 323-24.)

Because Section 9 of the EMA does not contain any language that clearly expresses any intent to limit remedies available to WTC, Washington Supreme Court precedent dictates that Section 9 cannot be interpreted as limiting remedies available to WTC. The Agreement should be interpreted in a way that preserves all of WTC’s legal rights, including

its right to restitution and damages and/or specific performance.¹ The trial court erred when it limited WTC's remedies to return of its \$40,000 earnest money, of which more than \$20,000 was deducted for the Port's attorneys' fees and costs.

2. The Trial Court Misapplied Washington Law.

In interpreting Section 9, the trial court refused to apply the presumption against exclusivity as required by the Washington Supreme Court in *Asia Investment, McCutchen, Cochran, and Reiter*, as well as this Court in *Paradise Orchards*. The trial court instead reasoned that the earnest money here was sufficiently different from those cases, writing that:

The language in the earnest money agreement at issue in Paradise Orchards is essentially identical to the language at issue here except in one respect. It deals with *any default*. The language at issue here deals *specifically* with the Port's refusal to complete the sale. Washington Courts have held that where the parties have foreseen a specific condition, as they have done here in addressing the possibility of the Port District's refusal to complete the sale, and provided a specific remedy for that condition, it is presumed to be sole remedy...."

¹ To the extent any ambiguity exists, Washington law requires that such ambiguity be construed against the Port (as drafter of the EMA) and in favor of WTC. (CP 316, confirming that the Port drafted the EMA; *see also Murray v. Odman*, 1 Wn.2d 481, 489, 96 P.2d 489 (1939) (applying the rule of *contra proferentem*, which requires that ambiguities in written documents be construed most strongly against the drafter)).

(CP 498) (emphasis in original), citing *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. at 685; *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 107, 696 P.2d 1270 (1985) review denied 103 Wash.2d 1039 (1985); *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 308, 540 P.2d 912 (1975); *F.S. Jones Const. Co. v. Duncan Crane & Rigging, Inc.*, 2 Wn. App. 509, 512, 468 P.2d 699 (1970).

The distinction drawn by the trial court between the language in the EMA and the language in cases like *Paradise Orchards* is not a meaningful distinction. Furthermore, none of the cases cited by the trial court support the conclusion that WTC intended for a return of WTC's earnest money to be its sole and exclusive remedy, as the trial court found. The trial court's reliance on cases presuming a specific remedy to be an exclusive remedy directly contradicts the holding in *Paradise Orchards*, which made clear "*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. *See Paradise Orchards*, 122 Wn. App. at 518. The trial court should be reversed.

- a. **No Legal Distinction Can Be Made Between Contract Language Providing A Remedy For Any Breach And Language Providing A Remedy For A Specific Breach.**

The language in this case and the language found in the *Paradise Orchards* case (where the remedy was not exclusive) are “essentially identical.” The trial court however was wrong to hold that providing a remedy for any default is materially different than providing for a remedy for a specific breach. The Washington Supreme Court rejected similar arguments in *McCutchen*, *Cochran*, and *Reiter*, and this conclusion should be rejected in this case as well.

In every case where parties provided a remedy for breach, one can argue – as the trial court did here – that the parties “foresaw” the possibility of the breach as a specific condition that might occur. Simply because a specific type of breach is contemplated by the parties does not make the enumerated remedy exclusive, particularly in the context of a real estate purchase and sale contract. A similar argument was expressly rejected by the Supreme Court in *McCutchen*:

It is the theory of the appellant, to quote her, that “the parties to the contract provided therein for remedy in case of breach of its conditions, namely, that in case of failure to make the payments at the time mentioned the contract should be void and all rights of the vendee should be forfeited, and all payments made should be deemed liquidated damages, and having thus provided the remedy for the breach of contract, the remedy is exclusive.” In other words, that the vendor had only one remedy for the breach by the vendee, and that is not the usual case where the vendor had the choice of either compelling specific performance or of declaring the contract at an end and retaining the liquidated damages therein provided.

This question is not a new one, and has been determined adversely to the appellant's theory.

McCutchen, 129 Wash. at 104.

The Court in *McCutchen* explained the well-established rule that “[u]nless it is clear that it was the intention of the parties definitely decided to limit their rights, the courts will not interpret language to have that effect.” *McCutchen*, 129 Wash. at 105 (quoting *Asia Inv.*, 118 Wash. 620). The Court also observed that even in cases where the contract provides for liquidated damages and that “neither party shall be put to any further liability,” a vendee is still permitted to compel specific performance. *Id.* at 106.

Similarly, in *Cochran*, the non-breaching party was entitled to forgo liquidated damages and sue for specific performance, even where the parties foresaw that required payments might be missed and included a liquidated damage provision should that breach occur. *Cochran*, 171 Wash. at 159-63.

The *Cochran* Court held that, because the liquidated damage provision available for monetary defaults did not “clearly express an intention of the parties” to limit the non-breaching party's rights, the court would not imply a limitation on remedies. *Cochran*, 171 Wash. at 163. “To construe these provisions as respondents contend for would enable

them to take advantage of their own wrong and escape liability of what they deemed to be a burdensome lease.” *Id.* See also *Reiter*, 180 Wash. at 232-34 (non-breaching party was entitled to pursue other remedies on contract even though the parties specifically contemplated the possibility of failed payments and provided for a right to declare a forfeiture).

In short, the trial court’s attempt to distinguish the language in this case from the language in *Asia Investment* and its progeny, including *Paradise Orchards*, has no basis in law. Courts in Washington construe such remedies for the benefit of the non-breaching party, here WTC, and allow the right to sue for specific performance and other remedies, in addition to the enumerated remedy of rescission and a refund earnest money. To hold otherwise, would reward a party for its own bad acts.

b. The Construction Cases Cited By The Trial Court Arise From A Materially Different Context And Do Not Apply.

Rather than apply the holdings in *Asia Investment* and other binding Washington Supreme Court cases, the trial court erroneously relied on construction cases, namely *Douglas Northwest*, *Donald B. Murphy Contractors*, *S.L. Rowland*, and *F.S. Jones*. The trial court’s reliance on these cases was misplaced because, in each the “foreseeable condition” was not a breach of contract, including an obligation to sell property, as explained below, and because those cases arise in a materially

different context. *Paradise Orchards*, 122 Wn. App. at 518 (rejecting reliance upon “an inapposite labor contract case, which reasons a specific remedy is presumably the sole remedy,” because “in the real estate purchase and sale context” the holdings in *Asia Investment* and its progeny control) (citation omitted).

In *Douglas Northwest, Inc. v. O’Brien*, for example, a contractor sought to pursue a *quantum meruit* labor and equipment inefficiency claim against a subcontractor. 64 Wn. App. 661. The subcontractor argued that the contractor’s *quantum meruit* claim was barred because the contract provided an exclusive remedy for O’Brien’s claims. *Id.* at 683. The contract, however, did not specify any particular remedy for labor and equipment inefficiency claims. *Id.* at 684. Nor did the contract contain any language clearly limiting remedies available for labor and equipment inefficiency claims. *Id.* at 683-84. Because the contract lacked clear language limiting the available remedies, the Court of Appeals actually ruled that O’Brien was entitled to pursue its *quantum meruit* claim. *Id.* at 684-85. Thus, *Douglas Northwest* supports WTC’s position.

The *Douglas Northwest* court mentioned the presumption discussed in *Donald B. Murphy Contractors, Inc. v. State*, a Division II decision relied upon by the trial court, but held that the presumption did not apply. 64 Wn. App. 661. In *Donald B. Murphy Contractors*, the

parties entered into a contract to build two highway construction projects. 40 Wn. App. at 100. Several days of heavy rains resulted in delays and the contractor asserted a claim for damages stemming from costs associated with those weather-caused delays and associated change work orders. *Id.* at 101-02. The State argued that the contractor’s claim was barred because an extension of time was the only remedy available under the contract for weather-caused delays. *Id.* at 107-08. Because the contract provided an extension of time as the only remedy available for weather-caused delays, the Court of Appeals ruled that the contractor’s claim for damages was barred. *Id.*

The *Donald B. Murphy Contractors* case is distinguishable from the facts here. *First*, unlike in *Donald B. Murphy Contractors*, Section 9 of the EMA does not provide that rescission is the “only” remedy available to WTC. Nor does Section 9 provide for rescission as the “sole” or “exclusive” remedy available to WTC. As explained above, and like *Douglas Northwest*, Section 9 does not contain any language that clearly expresses any intent to limit remedies available to WTC. *Asia Investment, Cochran, Reiter, and McCutchen* all dictate that Section 9 cannot be interpreted as limiting remedies available to WTC under Washington law, and must be interpreted as preserving WTC’s legal right to pursue all

rights and remedies for breach of the EMA, including contract damages or specific performance.

Second, the rationale in *Donald B. Murphy Contractors* was based on the fact that the parties had expressly considered and determined what should occur if a specific, foreseen “condition” occurred. The Court explained the rule when such a condition is contemplated by the parties:

Where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion.

40 Wn. App. at 107-08 (emphasis added).

Here, however, the Port does not identify any foreseen “condition” that occurred, which might have justified the Port’s termination of the EMA. A “condition” is an “uncertain act or event that triggers or negates a duty to render a promised performance.” *See* Black’s Law Dictionary (9th ed. 2009). The fact that the Port might breach its duty to sell is not the type of “condition” that would warrant limiting WTC’s remedies.

On the contrary, the Court in *Donald B. Murphy Contractors* specifically found that the State had “fully performed its obligations” and that there was “no liability on the part of the state.” 40 Wn. App. at 108. Here, the Port’s failure to close amounted to a blatant breach of the EMA.

To interpret the EMA to mean that rescission is WTC's "exclusive" remedy for the Port's breach – essentially allowing the Port to take advantage of its own wrongdoing and escape liability – would result in the improper interpretation that Washington's Supreme Court explicitly prohibits. *See Cochran*, 171 Wash. at 161.

Third, in *Donald B. Murphy Contractors*, no other factors, such as additional contract language or the conditions surrounding contract execution, necessitated a different conclusion. In this case, however, there are circumstances surrounding the execution of the EMA that negate a presumption that the parties intended to limit remedies available to WTC. For example, WTC agreed to pay substantial costs associated with the permits, design, and construction of the required infrastructure. (CP 342; Section 14 of the EMA.) In addition, the EMA required that WTC provide a development plan, obtain FAA approval, abide by the Port's Industrial Development District requirements, and complete a feasibility investigation as conditions precedent to the closing. (*See* CP 344-46; Sections 23 and 27 of the EMA.) WTC incurred substantial sums getting the project to the point of closing, which it would not have spent had it thought the Port could unilaterally terminate the EMA for less than \$40,000. (CP 323.).

Finally, in *Donald B. Murphy Contractors* the parties negotiated an adequate remedy. 40 Wn. App. 98. Here, however, there is no provision that would allow WTC any meaningful remedy; rather, if the trial court's decision stands, WTC's sole remedy will be limited to a return of WTC's own funds, which were cut in half by an award of attorney fees and costs to the Port. There are no cases supporting the conclusion that a return of the non-breaching party's own earnest money should be interpreted to be the sole and exclusive remedy available a buyer where a seller breaches the covenant to sell the property yet the buyer does not elect to rescind the contract.

The *F.S. Jones Construction* and *S.L. Rowland* cases are also materially different from the circumstances here. As with *Douglas Northwest* and *Donald B. Murphy Contractors*, neither of these cases arose in the real estate purchase and sale context, but instead are construction cases, which cite the inapplicable case *United Glass Workers' Local No. 188 v. Seitz*, 65 Wn.2d 640, 399 P.2d 74 (1965). See *F.S. Jones Constr.*, 2 Wn. App. at 512 (quoting *United Glass Workers' Local No. 188* for the proposition that a specific remedy is presumed to be a sole remedy absent contrary evidence); *S.L. Rowland Constr. Co.*, 14 Wn. App. at 308-09 (same). Surprisingly, the trial court relied on these construction cases, and in doing so ignored the holding in *Paradise Orchards*, which was

binding authority and which made clear that these types of cases have no application to the context here:

This interpretation is consistent with the long-held rule in Washington that a liquidated damages clause in a real estate purchase and sale contract does not foreclose the remedy of specific performance absent language in the contract specifying liquidated damages to be the sole and exclusive remedy. *Asia Investment Co. v. Levin*, 118 Wash. 620, 624–27, 204 P. 808 (1922); *McCutchen v. Brink*, 129 Wash. 103, 104–07, 224 P. 605 (1924).

The foregoing authorities are persuasive in the real estate purchase and sale context. *Paradise* relies upon an inapposite labor contract case, *United Glass Workers' Local No. 188 v. Seitz*, 65 Wash.2d 640, 642, 399 P.2d 74 (1965), which reasons a specific remedy provision is presumably the sole remedy. *Asia Investment and its progeny control here.*

Paradise Orchards, 112 Wn. App. at 518 (emphasis added).

The clear mandate from this Court is that the *Asia Investment* decision, and not *United Glass Workers' Local No. 188*, controls where the context involves the purchase and sale of real estate. None of the construction cases relied upon by the trial court apply in the context here.

In the *F.S. Jones Construction*, for example, the parties foresaw the need for change orders on a construction project, and agreed to follow a dispute resolution provision. 2 Wn. App. at 512. The court held that because the parties provided a means to resolve their dispute over price changes, the presumption that their dispute resolution procedure provides

the sole remedy for price changes applied, absent conditions surrounding the agreement to suggesting it was not the exclusive procedure. *Id.*

Likewise, in *S.L. Rowland*, the court held that where parties provide for a remedy for resolving a dispute should inclement weather result in delay, the parties' contract remedy should be presumed to be the parties' sole remedy. 14 Wn. App. at 309. But again, neither *F.S. Construction* nor *S.L. Rowland* considered facts like those here, where a breaching party is trying to escape a remedy caused by that party's own breach. Rather, the parties simply agreed to resolve disagreements upon the happening of uncertain, but foreseeable conditions that neither party had the ability to control.

In short, *Asia Investment*, *Cochran*, *Reiter*, *McCutchen*, and *Paradise Orchards* are directly on point, while the construction cases relied upon by the trial court are distinguishable and have been and should be rejected in the context of a purchase and sale transaction involving real estate.

3. Washington Law Prohibits Interpretations That Render Contract Provisions Illusory.

The Port's proffered interpretation of Section 9 should also be rejected for the additional reason that adopting it would allow the Port to breach the EMA at will, without any meaningful consequence. Such an

interpretation, if accepted, makes the Port's obligations under the EMA illusory. A contract that makes a party's performance discretionary is an illusory contract. *See Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986). When a promise is illusory, there is no consideration and no enforceable contract. *Omni Grp., Inc. v. Seattle-First Nat. Bank*, 32 Wn. App. 22, 24-25, 645 P.2d 727 (1982).

Washington law prohibits adopting an interpretation of a contract that would render the contract unenforceable. *See, e.g., Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997). Contracts must "be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to absurd conclusion, or that renders the contract nonsensical or ineffective." *Washington Pub. Util. Dist. v. Clallam Cnty.*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). On this basis alone, the trial court's interpretation of Section 9 must be rejected, and the contract should be read to mean that WTC can pursue specific performance or other contract remedies if, as occurred here, WTC elects a different remedy than rescission.

C. The Port Was Not Entitled To Repudiate The Contract Under The Doctrine Of Adequate Assurances.

The Port argued and the trial court agreed that the Port was "allowed ... to repudiate" the Agreement because WTC anticipatorily breached under the doctrine of adequate assurances set forth in the

Restatement (Second) of Contracts § 251. (CP 500-01.) The trial court erred when it found that the Port's demand for an attorney certification supporting Abraham's use of an American name and his authority to bind WTC was a request for assurances was not an anticipatory breach. The trial court's conclusion is legally and factually flawed, and should be reversed.

1. Washington Law Applies The Doctrine Of Adequate Assurances Only To Contracts For The Sale Goods.

As the trial court recognized, Washington courts have not generally adopted the Restatement (Second) of Contracts § 251. (CP 501.)

The doctrine of adequate assurances has only been adopted under Washington's Commercial Code, which applies specifically to contracts for the sale of goods. *See* RCW 62A.2-609(1) (outlining right to demand adequate assurance that goods will be delivered); *see also* RCW 62A.2-106 (defining "contract for sale" as "both a present sale of goods and a contract to sell goods at a future time"); RCW 62A.2-105 (defining "goods" as "all things (including manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid.").

Washington's Commercial Code, including RCW 62A.2-609(1), has no application to this case because the EMA is not a contract for sale

of goods. The court erred, as a matter of Washington law, in applying doctrine of adequate assurances to this case.

2. Even If The Adequate Assurance Doctrine Applied To Real Estate Contracts, It Was Not Satisfied Here.

The doctrine of adequate assurances does not allow a party to make unreasonable demands in order to justify its repudiation of the contract. Even if adequate assurances generally applied to real estate contracts (it does not), the express language of the Restatement contradicts the trial court's ruling that the Port was entitled to repudiate.

The Restatement provides that:

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has no already received the agreed exchange until he receives such assurance.

Restatement (Second) of Contracts § 251 (emphasis added).

WTC did not provide any grounds for the Port to believe that WTC would “breach by non-performance” – that it would be unable to close the land sale – and the Port’s demand for assurances did not relate to that performance. Moreover, the policy allowing a party to “suspend” performance cannot apply where the conditions of closing were already met and there is nothing to suspend. The Restatement does not apply to

the circumstances of this case. The trial court's ruling should be overturned.

a. The Port's Unreasonable Demand Did Not Relate In Any Way To WTC's Performance Of The Agreement.

The Port's demand has nothing to do with WTC's performance of the contract. By letter dated August 16, 2010, the Port's counsel demanded "certification from a Washington attorney known to [her] who deals extensively in commercial transactions which establishes the legitimate incorporation of Washington Tire Corporation, and the legal authority of 'Abraham Hengucious' to bind Washington Tire Corporation as its President." (CP 253.)

The incorporation of WTC and authority of Abraham Hungucius to bind WTC, however, only has bearing on the "enforceability of the Earnest Money Agreement" not on WTC's performance under the EMA. (CP 253. (emphasis added).) Abraham's use of an assumed American name has nothing to do with whether WTC will perform by closing the land sale. Because the Port made no demand for adequate assurance of WTC's performance, the doctrine of adequate assurances does not apply.

b. The Port Lacked "Reasonable Grounds" To Believe That WTC Would Breach.

The Port did not have any "reasonable grounds" to believe that WTC would fail to close the land sale. The Port had received the Land

Release Notification from the FAA, and WTC accepted all of the conditions. (CP 318.) WTC had worked for more than two years to obtain the FAA Notification, obtain significant investors, and satisfy all other conditions of the sale.

The mere fact that Abraham was using an assumed American name, rather than his Chinese name, has nothing to do with whether WTC would perform. Abraham had been using his assumed name for business purposes for more than ten years. (CP 313.) Neither Abraham nor WTC ever disavowed or challenged the EMA. (CP 282-83; 287-88; 323-24; 368-69.)

In fact, no evidence suggests that WTC would anticipatorily breach the EMA. As the trial court recognized (but misapplied), “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). Rather, an “anticipatory breach is a positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations” *Id.* (internal citations omitted) (emphasis added).

Any purported concerns about Abraham’s authority to bind the company are “red herrings” because (1) the Port was on notice, as far back

as January 2010, that Abraham was an assumed American name;
(2) Abraham served as WTC's incorporator, Chairman, and President; and
(3) simple legal research shows that Washington law supports the use of
assumed names in business and that WTC was legitimately incorporated.
No reasonable trier of fact could conclude that "reasonable grounds"
existed for the Port to demand adequate assurances from WTC.

First, the Port's statement that Abraham's use of his American
name was a "material misrepresentation" is unsupported by any facts.²
(*See* CP 253.) Since at least January 2010, the Port was on notice that
Abraham's legal, Chinese name was Hengyu Zhang. (CP 318.) Abraham
never tried to hide or conceal his Chinese name from the Port.

Furthermore, the Port understood that it was common and
customary for Chinese people to use Americanized names in the course of
business. (*See* CP 229.) Abraham has been known by his American name
in the business community for more than ten years. There is no evidence
that Abraham was trying to deceive the Port by using a "new" name.

² The Port alleged that Abraham committed "fraud" by using his American
name, which supposedly prevented the Port from discovering alleged
adverse facts as part of the Port's due diligence. The Port's inflammatory
allegations of fraud were baseless, as explained in WTC's opposition to
summary judgment. (CP 429-33.) The trial court impliedly rejected the
Port's fraud arguments when it enforced Section 9 of the parties' EMA,
which the Port did not appeal.

There is nothing inappropriate or otherwise suspicious about a Chinese person using an assumed American name.

Second, Abraham was the incorporator of WTC, and continued as its Chairman and President. WTC proceeded to satisfy all of the conditions required of it to complete the sale. This evidence rebuts any alleged concern by the Port that Abraham did not have “authority” from the corporation to buy the property.

Third, the Port could have and should have conducted the simple legal research necessary to determine that use of an Americanized or other assumed name does not render the parties’ contract unenforceable. The Washington Supreme Court has explained that “the general rule is that a corporation may contract and do business under an assumed name as well as can an individual, and be bound thereby in its corporate capacity.” *Seattle Ass’n Of Credit Men v. Green*, 45 Wn.2d 139, 142, 273 P.2d 513 (1954). The Washington Code also contemplates that corporations and individuals can use assumed names to conduct business. *See, e.g.*, RCW 19.80.005 (defining “true and real name” as “the designation or appellation by which an individual is best known and called in the business community where that individual transacts business, if this is used as that individual’s legal signature”). Plainly, signing a contract using an assumed name does not render the contract unenforceable, and

there is no doubt that if the Port attempted to enforce the contract against WTC, it could have done so; in fact, the trial court enforced Section 9 and awarded fees against WTC under the contract, despite the fact Abraham signed the contract using his American name.

Likewise, the Port need only have gone to the Washington Secretary of State's website to request documents showing that WTC was properly incorporated.³ Under Washington law, WTC's articles of incorporation and certificate of existence conclusively prove that WTC was legitimately incorporated in Washington. *E.g.*, RCW 23B.01.280 (stating that "a certificate of existence of authorization issued by the secretary of state may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in the corporate form in this state."); RCW 23B.02.030(2) (providing that "[t]he secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to the incorporation....").

The Port was on notice that Abraham was an assumed name and should have known that Washington law specifically allows the use of assumed names for business purposes. The Port could have easily gone to

³ See Office of the Sec'y of State Corporation Documents Order Form, <https://www.sos.wa.gov/corps/OrderDocs.aspx> (last visited Sept. 18, 2013).

the Secretary of State's website to do its own due diligence showing that WTC is, in fact, legitimately incorporated. Under these facts, as a matter of law, the Port could not have "reasonably" feared that the WTC sale would not close. The trial court seriously erred when it found that the Port had reasonable grounds to believe Abraham's name could result in WTC's non-performance of the contract.

c. WTC Satisfactorily Responded To The Port By Providing Proof That WTC Was Legitimately Incorporated And Providing Proof Of Name.

Despite the Port's unreasonable and accusatory demands, WTC provided the Port with a copy of WTC's certificate of incorporation on August 18, 2010 – just two days after the Port requested confirmation the WTC was legitimately incorporated. (CP 634-37.)

WTC also offered to re-execute the EMA, or sign any other documents that the Port might deem necessary to remedy their alleged concerns. Abraham even offered to formally change his name, which he actually did in order to avoid future confusion. (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 would breach the EMA by refusing to close the land transaction. The trial court's ruling that WTC failed to provide adequate assurances is error.

d. WTC Did Not Commit A “Total Breach” By Non-Performance.

In addition, in order for the doctrine of adequate assurances to apply, the breach by non-performance must give rise to a claim for damages for “total breach” under the Restatement (Second) of Contracts § 243. That section provides:

(1) ... a breach of non-performance gives rise to a claim for damages for total breach only if it discharges the injured party’s remaining duties to render such performance, other than a duty to render an agreed equivalent under § 240.

(2) Except as stated in Subsection (3), a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach. ...

(4) In any case other than those stated in the preceding subsections, a breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.

Restatement (Second) of Contracts § 243 (emphasis added).

In this case, WTC has not caused a “total breach” under Section 243 because: (1) WTC’s alleged failure to provide the information requested did not discharge the Port’s remaining duties under the EMA; (2) WTC did not breach the EMA by non-performance; and (3) WTC’s alleged failure to provide the information requested in no way impaired the value of the EMA. Because there has been no “total breach” under

Section 243, the Port has no basis to assert that it was justified in repudiating the EMA pursuant to the doctrine of adequate assurances.

On this basis alone, the Port's motion for summary judgment as it relates to the doctrine of reasonable assurances should have been denied.

D. The Trial Court Improperly Dismissed WTC's Promissory Estoppel Claim.

The trial court found on summary judgment that the parties "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.) Yet if the parties' EMA was merely a framework to explore the mutual desirability of a proposed transaction, without the ability by WTC to enforce the Agreement, then the EMA is an agreement to agree. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004) (holding agreements to agree are not enforceable). Such a contract is unenforceable under Washington law because it lacks consideration. *See Omni Group, Inc.*, 32 Wn. App. at 24-25. As a result, WTC should have been allowed to pursue its alternative theory for promissory estoppel in order to recoup its out of pocket damages. *Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 939, 750 P.2d 231 (1988).

To establish a claim for promissory estoppel, a plaintiff must show five elements: “(1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.” *Id.*

As the Port’s own authority established, the “doctrine of promissory estoppel was developed to cover certain situations in which consideration is lacking.” *Hatfield v. Columbia Fed. Sav. Bank*, 57 Wn. App. 876, 885, 790 P.2d 1258 (1990). Moreover, remedies available under a promissory estoppel theory are not limited to those remedies available for breach of contract, and both alternative remedies may be pursued the same action. *See Farm Crop Energy*, 109 Wn.2d at 939.

Here, there is no dispute that WTC expended considerable sums working toward a closing, believing that if the conditions were satisfied, the Port would close. (CP 554-55.) Whether or not reliance is justified presents an issue of fact to resolve at trial. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) (whether a party justifiably relied on a promise is a question of fact for trial).

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.) The Port reasonably expected WTC to move forward with the project. WTC expended considerable sums of money, at the Port's encouragement. WTC was justified in expending these sums. Given the Port's written and oral promises to sell the property to WTC, it would be unjust to permit the Port to back out after all conditions were met and FAA approval obtained.

Justice would not be served if WTC were unable to recoup, at a minimum, the expenses it incurred in reliance on the Port's promises to sell the property to WTC. If WTC is not permitted to pursue specific performance for contract breach, or other contract remedies, it should be entitled to its reliance damages under its alternative claim for promissory estoppel. The contractual remedy provided for the Port's breach – a return of WTC's earnest money payment – is no remedy at all.

E. The Port Should Have To Repay The Attorneys' Fees And Costs Awarded.

Because WTC is entitled to specific performance, the trial court should not have directed judgment in favor of the Port. This Court should, therefore, require the Port to refund all of the attorneys' fees and costs collected by the Port. (CP 592.) (awarding \$21,653.70 of fees and costs to the Port).

F. WTC Should Also Be Awarded Its Attorneys' Fees And Costs On Appeal.

To the extent this Court reverses the trial court, WTC should be awarded its reasonable attorneys' fees and costs, both below and on appeal. The EMA has an express provision allowing the prevailing party to recover from the adverse party "a reasonable attorney's fee and all costs and expenses" that are incurred "incident to that proceeding." (CP 344, EMA ¶ 21.) This provision includes "costs of appeal." Under RAP 18.1(a), because "applicable law grants" WTC the right to recover its fees, this Court should award WTC all of its reasonable fees and costs.

V. CONCLUSION

Based on the foregoing, the trial court's summary judgment rulings should be vacated. Judgment in favor of WTC for specific performance should be directed, and the Port should be ordered to repay the fees and costs collected, as well as pay WTC for all of its reasonable fees and costs.

RESPECTFULLY SUBMITTED this 18th day of September, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 18, 2013, I caused a true and correct copy of Petitioner Washington Tire Corporation's Opening 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:

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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 September 18, 2013.

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