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COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

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Grant County Port District No. 9, Port of Ephrata, Respondent,

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

v.

Washington Tire Corporation, Appellant,

and

Chicago Title Company of Oregon, Defendant.

BRIEF OF RESPONDENT
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PORT OF EPHRATA

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I. Introduction

This case involves disputes arising out of the interpretation, enforcement, and rescission of an earnest money agreement covering land situated in Grant County, Washington, with particular focus on the agreement's exclusive remedy clause. In 2008, Respondent Grant County Port District No. 9, Port of Ephrata (herein "Port District"), entered into negotiations for the purchase and sale of Port District real estate with a man identifying himself by a name other than his true legal name. Although the man identified and referred to himself only as "Abraham Hengyucius" and affiliated w/American Tire Corporation during the contract negotiations, the man's actual legal name was "Hengyu Zhang" (herein "Hengyucius/Zhang"). Hengyucius/Zhang did not disclose his true name to the Port District at the beginning of the contract negotiations with the Port District and eventually claimed to be affiliated with several corporate entities, one of which was the Appellant Washington Tire Corporation (herein "WTC"). Given Hengyucius/Zhang's background and history in the tire industry, it became abundantly clear why the man's true legal

name was intentionally concealed from the Port District and the pseudonym was adopted and used by Hengyucius/Zhang.

At the conclusion of the contract discussions, Hengyucius/Zhang informed the Port District that the name of the buyer would be “Washington Tire Corporation”. After WTC’s real estate agent submitted a proposed offer to purchase to the Port District to initiate the negotiation process, the terms and conditions of sale were then actively negotiated by the parties (which included the elimination of the proposed specific performance remedy) and outlined and memorialized in a final Earnest Money Agreement (herein “the EMA”). The EMA eliminated the original buyer - proposed provision allowing the specific enforcement of the EMA or original buyer remedy and limited the remedy to other than the return of the earnest money and termination of the EMA.

Only after the EMA was executed, did the Port District discover Hengyucius/Zhang’s true legal name. Because Hengyucius/Zhang concealed his true legal name, the Port District was precluded from conducting any meaningful due diligence search into

his background. Upon discovery of Hengyucius/Zhang's true legal name, the Port District made multiple written requests to Hengyucius/Zhang and WTC's legal counsel for proof or evidence of Hengyucius/Zhang's authority to act and sign the EMA on behalf of the WTC. The requested proof of corporate authority was never furnished by WTC. In the absence of reasonable assurances or compliance from WTC or Hengyucius/Zhang, the EMA was declared terminated by the governing body of the Port District.

The Port District then commenced this litigation to fully and finally resolve all disputes between the parties regarding the rescission of the EMA. WTC responded by filing counterclaims against the Port District, requesting specific performance and asserting that the EMA should be enforced and its remedies should not be restricted or limited despite the plain language of section 9 of the EMA.

II. Statement of the Case

Respondent, Grant County Port District No. 9, Port of Ephrata ("Port District") is a municipal corporation and public entity of the

state of Washington. (CP 18; 51; 81; 391; 566; 610.) The Port District was formed and operates under Title 53 RCW. (CP 18; 610.)

In the year 2008, negotiations for the possible sale and purchase of a 96-acre parcel of land situated in Grant County, Washington and owned by the Port District (herein “subject land” or “subject property”) began between the Port District and an individual identifying himself only as “Abraham Hengyucius” (herein “Hengyucius” or “Zhang”) and Hengyucius’s real estate agent, Scott Fraser of GVA Kidder Mathews (herein “Fraser”). (CP 19; 47-49; 51;81; 316; 320; 367-369.) Prior to October of 2008, Port District Manager Michael Wren (herein “Wren”) actively participated in the contract negotiations with the buyer’s contingent, comprised of Fraser and Hengyucius, regarding the terms of sale. (CP 19; 367-369; 392-393.) As part of those negotiations, Wren communicated primarily via e-mail with Fraser and Hengyucius. (CP 19.) During the negotiations, all communications were from Fraser or Abraham. Neither Hengyucius nor Fraser revealed to the Port District that

“Hengyucius” was a made-up, fictional name and that Hengyucius’s true legal name was Hengyucius Zhang. (CP 19-20; 81; 392; 394.)

In communicating with Fraser, Wren frequently received copies of prior e-mails from Hengyucius to Fraser in which “American Tire Company” is identified next to the sending party’s e-mail address and/or under Hengyucius’s name. (CP 19-20; 33-35; 37-38; 41.) At the end of the negotiations, Hengyucius requested that the buyer’s name be changed to “Washington Tire Corporation” in the proposed real estate transaction. (CP 19; 44.)

On or about August 25, 2008, Fraser sent Wren an e-mail with an attached file containing a preliminary offer to purchase the Port District’s real property. (CP 19; 47; 51-70; 316; 368.) In the e-mail, the preliminary offer is described as “the offer from American Tire Corp (who will be doing business as Washington Tire Corporation)”. (CP 19; 47.) While the preliminary offer itself makes no reference to American Tire Corporation, the offer was submitted to Wren with a signature immediately above the signature line of “Dr. Abraham Hengyucius” as “President” of the buyer, Washington Tire

Corporation (herein "WTC"). (CP 20; 56; 313; 392.) The offer was never signed or accepted by the Port District. (CP 20; 56; 368.) The parties continued to engage in good faith contract negotiations involving the terms of an Earnest Money Agreement that was finalized in the Fall of 2008. (CP 19; 367-369; 392-393.)

The Earnest Money Agreement (herein "EMA") between the Port District, as seller, and WTC, as buyer, for WTC's purchase of the subject land located in the Port District's industrial development district is dated October 1, 2008. (CP 20; 25-31; 316; 368; 615-626.) Section 9 of the EMA explicitly provides that, in the event that the Port District does not complete the sale, then WTC shall be entitled to the return of its earnest money. (CP 26; 323; 393; 616.) It further provides that if buyer does not complete the sale, the Earnest Money is forfeited. Neither specific performance nor any other buyer or seller remedy is mentioned in or allowed under the terms of the EMA. (CP 25-31; 615-626.)

Thereafter, WTC deposited \$40,000.00 in earnest money per the terms of the EMA, which was held in escrow at the Portland,

Oregon office of Chicago Title Company. (CP 317; 610.) The closing of the EMA was contingent on several conditions precedent. (CP 610.)

Subsequently, it was discovered that “Hengyucius”, an alleged officer of WTC, who signed the EMA on behalf of WTC, was a fictitious, made-up name and that, according to Hengyucius’s Chinese passport, Hengyucius’s actual legal name is “Hengyu Zhang”, a Chinese national with a history of engaging in sharp and deceptive tire business dealings and practices. (CP 20; 76; 81; 84-93; 313; 368; 391-395; 612; 700-709.) Wren did not discover that Hengyucius’s true legal name was “Hengyu Zhang” until August of 2010. (CP 20; 81.) In all e-mail communications from Hengyucius received prior to August of 2010, Hengyucius had identified himself only as “Abraham” or “Abraham Hengyucius” and had never referred to himself as “Hengyu Zhang”. (CP 20; 34-35; 37-38; 41; 44-45; 47-49; 72-73; 81; 653.) During the negotiations, the Port District relied, in good faith and to its detriment, on the representations of Hengyucius. (CP 20; 21; 81.)

On August 16, 2010, in response to the newly discovered information regarding the identity of the buyer and Hengyucius, the Port District's Attorney, Katherine L. Kenison, sent a letter to Zhang requesting that Zhang provide written verification from WTC that Zhang had the representative and corporate authority to act and sign the EMA on behalf of WTC and that WTC was a lawfully formed and existing corporate entity. (CP 21-22; 81-82; ; 320; 611; 630-632.)

On or about August 17, 2010, the Port District's legal counsel received a telephone call from an attorney for USA Tire Marketing. (CP 611.) Said legal counsel was interested in acquiring information as to whether the land sale to WTC had closed. (CP 611.) USA Tire Marketing had a judgment for \$1.5 million, which it intended to record in Grant County, Washington to encumber the subject land upon the sale. (CP 611.) The very next day the Port District received e-mail correspondence from Emily G. Zhang, Zhang's wife, providing some business information and contact information for WTC's then corporate attorney (herein "WTC Attorney"). (CP 634-637.) About a week later, the Port District's Attorney received an e-

mail from the then WTC Attorney indicating that the WTC Attorney would be providing the requested certification to the Port District. (CP 639.) The Port District's Attorney then made telephone contact with the WTC Attorney and asked for and received confirmation that the requested corporate certification would be furnished to the Port District by August 25, 2010. (CP 611.) When the August 25th deadline approached, the WTC Attorney requested and the Port District Attorney agreed to a certification deadline extension to September 1, 2010. (CP 611; 641.)

The September 1st deadline came and passed without WTC providing the required corporate certification to the Port District. (CP 22; 611.) Having received no certification or communication from the WTC Attorney earlier in the day, the Port District's attorney took additional action on September 1st by attempting to contact by telephone and leaving a telephone message for the WTC Attorney and transmitting e-mail correspondence to the WTC, as well as sent email correspondence whereby the Port District inquired about the status of the written certification. (CP 611; 641.) Following the September 1st

deadline, the requested certification was never provided by the WTC Attorney, WTC, or Zhang to the Port District, or to the Port District's Attorney. (CP 22; 611.)

The use of the fictitious name Abraham Hengyucius effectively prevented the Port District from conducting any inquiry or due diligence into the background of the buyer as it related to the person calling himself Abraham Hengyucius. (CP 21; 81; 393-394.) No trade or assumed names for Hengyu Zhang resulted from or were found in a search of trade or assumed names on the Washington Department of Licensing, Business Listing Service's website. (CP 20.) The Port District had no reason to question whether Hengyucius was using his legal name until almost two (2) years after the EMA was executed. (CP 20; 21.)

In mid September of 2010, the information related to WTC available on the Washington Secretary of State, Corporations Division's website had changed significantly. (Cp 20-21; 78-74; 611; 643-644; 649.) WTC's registered agent was then listed as a "Ruslana Kozmech", whose address was allegedly 3118 Judson Street, Gig

Harbor, Washington, which is actually the physical address for the Gig Harbor United States Post Office, and several new officers were mysteriously named. (CP 20-21; 78-79; 611; 643-644; 649.) The new officers included four (4) vice presidents, three (3) of whom were all former or existing creditors, or representatives of prior or current creditors, of WTC and who had no knowledge of their appointment as corporate officers. (CP 21; 142-149; 321; 611; 646.)

On or about September 20, 2010, the Port District, acting through its governing commission, took action in open session during a commission meeting to terminate the EMA based upon WTC's and Hengyucius's prior actions and omissions and failure to cure the deficiencies upon the request of the Port District. (CP 23; 140.) At no time prior to or after the September 20th termination by the Port District did WTC produce a copy of any corporate bylaws of WTC delineating the authority of Zhang or any other persons as the officers of WTC. (CP 394.)

On or about September 28, 2010, the Port District commenced an action for the rescission of the EMA against WTC by filing a

Complaint and Summons in the Superior Court of Washington for Grant County (herein the “trial court”). (CP 604-709.) In mid November of 2010, WTC finally answered the Complaint and asserted various counterclaims related to the EMA against the Port District. (CP 710-716.)

After discovery was conducted by the parties, the Port District initiated summary judgment proceedings in order to prevail on its claims and request the summary dismissal and denial of the counterclaims of WTC. (CP 1-3.) WTC never filed a counter summary judgment motion against the Port District with the trial court. (CP 495-502; 532-537; 573-577.) The Port District ultimately prevailed on all claims and counterclaims and Orders granting summary judgment disposing of said claims and counterclaims were entered with the trial court on October 5, 2012 and April 23, 2013, respectively, which constitute the decisions on appeal herein. (CP 495-502; 532-537; 573-577.) Although WTC did not file a motion for reconsideration with the trial court, WTC filed a notice of appeal with such court on or about May 14, 2013, which commenced this appeal

of the trial court's summary judgment rulings. (CP 579-603.)

III. Argument

A. Standard of Review for Summary Judgment Proceedings

Civil Rule 56 provides that a moving party should be granted judgment as a matter of law if said party demonstrates that there is no genuine issue of material fact. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 655 (1995). The purpose of summary judgment is to “avoid a useless trial when there is no genuine issue of any material fact.” *Olympic Fish Prods, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). “In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom in favor of the nonmoving party.” *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256, 616 P.2d 644 (1980). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condo Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

With regard to the burden imposed upon parties in a summary judgment proceeding, the burden effectively shifts from the moving

party to the nonmoving party if an initial burden is met by the moving party. Once the moving party has established the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party that has the burden of proof at trial to make a “showing sufficient to establish” each essential element of its case. *Blue Diamond Group, Inc. v. K B Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011). “The nonmoving party's burden is not met by responding with conclusory allegations, speculative statements, or argumentative assertions.” *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000). Summary judgment on the interpretation of a contract is “proper where the parties’ written contract, viewed in light of the parties’ other objective manifestations has only one reasonable meaning.” *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 266 P.3d 229 (2011) (quoting *Hall v. Custom Craft Fixtures*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997)).

In reviewing a trial court’s grant of summary judgment, the appellate court “engages in the same inquiry as the trial court.”

Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The appropriate standard of review for a summary judgment order is de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

The trial court properly granted summary judgment in favor of the Port District. The Port District has clearly shown that no genuine issue of material fact exists that would have prevented the trial court from rendering, or would prevent this court from summarily affirming, the summary judgment decisions resolving and disposing of all claims and counterclaims asserted in this action in a manner favorable to the Port District. Moreover, WTC has repeatedly failed to satisfy its summary judgment burden as the opposing party. This appeal highlights and confirms that WTC has produced no evidentiary or legal basis to support each element of its counterclaims or defenses to the Port District's claims. Because WTC failed to satisfy its summary judgment burden, the trial court properly granted the Port District's claims and dismissed with prejudice the WTC's counterclaims in the summary judgment proceeding. The trial court's

decisions rescinding the EMA, ordering the return of the earnest money funds to WTC, and dismissing all counterclaims are entirely consistent with the state law and should be affirmed.

- B. The Exclusive Remedy Available to Washington Tire Corporation Under the Plain Language of the Earnest Money Agreement Is Contract Termination and Return of the Earnest Money.
 - 1. The Language Used in Paragraph 9 of the EMA, the Exclusive Remedy Provision, Was Freely and Actively Bargained For By the Parties, Plainly and Unambiguously Restricts WTC's Remedy to Return of Earnest Money and Contract Termination, and is Enforceable by Its Own Terms.

Simply stated, WTC bargained for and received the exact exclusionary clause that was ultimately inserted into paragraph 9 of the EMA. WTC only complained about the clause after it became operative based upon WTC's own violative acts and omissions evidencing no intention to properly perform its obligations and duties with the WTC corporate authorization required to bind WTC. What is most unfortunate for WTC is that its failure to timely act and produce corporate bylaws or other corporate documents showing Zhang's purported corporate authority to act on behalf of WTC eventually led to WTC's own downfall and the demise of the real property

transaction contemplated by the EMA. WTC had, within its own power, the ability to cure and remedy its contract failures and comply with the reasonable requests of the Port District to come into compliance but then declined to cure and remedy those failings without legal excuse or justification. Even after this action was commenced by the Port District, WTC obstinately refused to file or produce the WTC bylaws purportedly showing officer authority requested by the Port District.

In construing a contract such as the EMA, the intent of the parties, as expressed in the plain language, is given controlling weight by the court. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). Also, in interpreting a written contract, Washington courts follow the “objective manifestations theory of contracts”, looking for “the parties’ intent by its objective manifestations instead of the parties’ unexpressed subjective intent.” *Paradiso v. Drake*, 135 Wn. App. 329, 336, 143 P.3d 859 (2006) (citing *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). Courts should consider “only what the parties wrote, giving words in a

contract their ordinary, usual, and popular meaning unless the agreement, as a whole, clearly demonstrates a contrary intent.” *Id.* In construing a contract, the intent of the parties, as expressed in the plain language, is given controlling weight by the court. *Corbray*, 98 Wn.2d at 415. Courts impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). For purposes of contract interpretation, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *See City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981); and *See also Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 109, 696 P.2d 1270 (1985). Courts interpret what was written rather than what was intended to be written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944) (cited with approval in *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)).

When specifically interpreting an exclusionary or limited remedy clause, the “perhaps misguided judgment” on the part of one party does not make an exclusionary clause unconscionable or any less enforceable. *See Am. Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 225, 797 P.2d 477 (1990). Moreover, the Washington Supreme Court has noted that it does not “ ‘promote justice to seek strained interpretations [of contracts] in aid of those who do not protect themselves.’ ” *Id.* at 226 (quoting *Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir.1933)).

It is clear that WTC is asking this court to find ambiguity in a simple and easily understandable exclusive remedy provision of the EMA where none exists and then improperly apply a strained reading of that provision, which promotes justice to no one and is contrary to applicable law. The limited remedy provision of the EMA is entirely clear on its face and is in no way ambiguous or susceptible to multiple meanings. The court need look no further than, and should strictly apply, the plain language of the provision limiting WTC’s contract remedy rather than reaching for an alternate meaning or strained

meaning that defies logic and common sense. Furthermore, such exclusionary provision was actively bargained for and duly accepted by WTC and the remedy of specific performance which it now seeks to impose, was specifically proposed and then eliminated during contract negotiations. (CP 19.) WTC neither questioned nor voiced any complaint about that particular provision until after the contract negotiation period had concluded. As acknowledged in *Am. Nursery Prods.*, WTC can find no refuge with or support from the Port District or the courts to save it from its own “misguided judgment” in bargaining for and accepting the provision which it now questions. The limited remedy provision of the EMA is enforceable by its very terms and restricts WTC’s remedies to contract termination and the return of the earnest money funds as conclusively and appropriately decided by the trial court.

Interestingly, WTC has not devoted a single word in its initial briefing to the 2009 Washington Supreme Court case of *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 210 P.3d 318 (2009), a case that is factually and legally similar to the case at bar and supports

the Port District's, as well as the trial court's, interpretation of the plain and unambiguous language of the exclusionary clause of the EMA. Although both parties cited and discussed this case in their briefing submitted to the trial court, it is now simply ignored by WTC. The Port District submits that *Torgerson* undermines WTC's legal position and WTC's strained reading of the restrictive remedy provision of the EMA and cannot be ignored. In *Torgerson*, the Supreme Court upheld a mutual limitation of remedies nearly identical to the terms of the EMA. The contract in question provided that if the buyers were in breach, the sellers would keep the Buyer's deposit; if the sellers were in breach, the buyers would be refunded their deposit. The court held that this was a mutual allocation of risk and was not unconscionable or otherwise void against public policy. *Id.* at 521.

Section 9 of the EMA unequivocally provides for the sole and exclusive enforcement of the EMA. Under that provision, if title is insurable and all other terms of the Agreement are satisfied, the Port District would retain the earnest money as liquidated damages upon WTC's refusal to complete the purchase, and WTC would be entitled

to the return of its earnest money upon the Port District's termination of the EMA. This is the exclusive remedy where all contingencies are satisfied and title is insurable. Both parties are sufficiently sophisticated in their transactions to provide for a fair and meaningful opportunity to have bargained for different terms. They did not. Zhang, who claims to be a representative of WTC, has touted his attainment of a higher education degree in the form of a Ph.D. and his status as a business leader in the off road tire industry. (Brief of Appellant, 5, 6). In addition, Zhang and WTC had the assistance of Fraser, an experienced and highly regarded real estate agent, at all stages of the negotiations. (CP 19.) As the sole remedy for the Port District's termination of the EMA, WTC is only entitled to the return of its earnest money and is prohibited from seeking specific performance, contract damages, or any other form of relief from the court.

Prior and later Washington appellate decisions are in accord with *Torgerson* and support the Port District's and the trial court's reasonable interpretation of the EMA that Section 9 is binding and

restricts the legal remedies of WTC to contract termination and the return of the earnest money. For example, in *Douglas Northwest, Inc.*, Division 1 of the Washington Court of Appeals interpreted a damages clause containing a condition precedent in a contractor/subcontractor construction agreement and did not examine or determine the enforceability of an exclusive remedy provision in a contract. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992). The *Douglas Northwest* Court ultimately held that a general contractor who disregarded a contract requirement that a subcontractor obtain all necessary construction permits as a condition of recovering damages could not assert that requirement or a breach thereof as a bar to the subcontractor's recovery of damages. *Id.* at 675-676. This case is clearly distinguishable from *Douglas Northwest*. In this action, the Port District has not alleged or maintained that WTC has failed to meet a mandatory condition of exercising its exclusive remedy of rescission and return of earnest money and certainly has not disregarded or waived the exclusive remedy requirement of the EMA.

In connection with *Donald B. Murphy Contractors, Inc.*, Division 2 of the Washington Court of Appeals interpreted and enforced the terms of a written construction contract between the State, as owner, and Donald B. Murphy Contractors, Inc. (herein “DBMCI”), as contractor, providing that the State was not liable for DBMCI’s temporary construction work that was damaged by weather or the related time delays caused by the damages. *Donald B. Murphy*, 40 Wn. App. at 105-108. Said Court of Appeals reasoned that, under a specific section of the construction contract, “the only remedy available to ... [DBMCI] for weather-caused delays is an extension of time in which to complete the contract.” *Id.* at 107. Such Court also cites a Washington Supreme Court case for the following legal presumption that parties intend a remedy prescribed in their contract to be the sole remedy upon the happening of a foreseen condition:

[W]here 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 to prescribed remedy as the sole remedy of the condition, and this presumption is controlling where there is nothing in the contract itself or in the condition surrounding its execution that necessitates a different conclusion.

Id. at 107-108 (citing *Goss v. Northern Pac. Hosp. Ass'n. of Tacoma*, 50 Wash. 236, 239, 96 P. 1078 (1908)).

Without a doubt, the *Donald B. Murphy* Court correctly interpreted and enforced the plain and unambiguous risk of loss and liability term of the construction contract as written. Similarly, the Port District is respectfully requesting that this court take the same action in interpreting section 9 of the EMA and enforce such paragraph precisely as written and agreed to by the parties. It is the position of Port District that the parties to the EMA clearly foresaw the possible occurrence of a condition or event by which the EMA should be rescinded and terminated by including language to that effect in section 9 of the EMA limiting the remedies of the parties. That condition has happened, and the restricted remedy requirement should be fully implemented and given effect. Said paragraph should be strictly interpreted and followed by the parties as well as this court to restrict WTC's remedies to return of the earnest money funds and contract termination.

Also, in 2005, Division 1 of the Court of Appeals rendered its opinion in the *Graoch* case whereby said Court held that a “one-year limited remedy warranty in general contractor’s contract with subcontractor did not bar a claim against a subcontractor for breach of contract.” *Graoch Assocs. #5 Ltd P’ship v. Titan Constr. Corp.*, 126 Wn. App. 856, 109 P.3d 830 (2005). While the warranty provisions of the subject contract required defects appearing within one year of substantial completion work to be corrected in *Graoch*, said provisions made no reference to any legal or equitable remedies that would be triggered upon breach, default, failure to perform, or the happening of any other event unrelated to the condition of the work. *Id.* at 858-862. Regardless, the *Graoch* Court appropriately recognized that “no rule permits ... [the court] to ignore the plain language of the contract” and that it is a “basic principal of contract law that parties by an express agreement may contract for an exclusive remedy that limits their rights, duties, and obligations.” *Id.* at 865-867.

Even though the *Graoch* Court did not determine that the construction contract under review contained an enforceable restrictive

remedies provision, it certainly did not foreclose the possibility that parties to a contract, like the parties to the EMA, could contract for an enforceable exclusive remedy provision. In contrast to the material facts in *Graoch*, the EMA which is the subject of this case does contain a plain and unambiguous exclusive remedy provision that specifically provides for rescission and return of the earnest money agreement and does not contain warranty provisions allowing for alternate remedies. Unlike the situation in *Graoch*, the Port District and WTC did not enter into a warranty laden construction contract. Instead, the parties contracted for an exclusive remedy provision in an EMA that is entirely enforceable to limit WTC's remedies.

In its opening brief, WTC challenges the trial court's decisions granting summary judgment in favor of the Port District by suggesting that the trial court disregarded applicable case law regarding the interpretation of exclusive remedy provisions of contracts. (Brief of Appellant, 24). Like the Port District, the trial court recognized and applied all legal doctrines applicable to the interpretation and enforcement of restrictive remedy provisions and came to the only

reasonable and logical interpretation of section 9 of the EMA: WTC's remedies are restricted to contract rescission and the return of the earnest money.

In a similar fashion, WTC goes to great lengths to argue that appellate cases such as *Asia Inv. Co. v. Levin*, 118 Wash. 620, 624-27, 204 P. 808 (1922), *McCutchen v. Brink*, 129 Wash. 103, 224 P. 605 (1924), and *Cochran v. Lakota Land & Water Co.*, 171 Wash. 155, 17 P.2d 861 (1933), all of which involve the interpretation of liquidated damage clauses in contracts, dictate a different interpretation than that utilized by the Port District or trial court to limit WTC's remedies. (Brief of Appellant, 20, 21, 27-28, 32, 34). However, in the WTC's initial briefing, no explanation is given by WTC as to how the second sentence of paragraph 9 of the EMA transformed into or is properly viewed as a "liquidated damages" clause, whether liquidated damages provisions are treated and interpreted the same as exclusive remedy provisions in the law, or how said appellate cases are similar to or applicable to the issues on appeal. Because said appellate cases are factually distinguishable from this case in that they relate to the

interpretation of entirely different liquidated damages clauses, the Port District submits that said cases have limited, if any, precedential value and application to the legal issues on review.

Also, it is clear that the trial court appropriately acknowledged and factually and legally distinguished this case from *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004) (remedy provision in earnest money agreement related to all defaults rather than specific condition). The trial court recognized, applied, and followed the applicable law related to exclusively remedy provisions, including those cited and discussed by the Port District *supra*, and ruled accordingly that paragraph 9 is an exclusive remedy provision restricting WTC's remedy to return of earnest money.

Without citation to proper legal authority, WTC also contends that the failure to insert the words "exclusive remedy" or "sole remedy" in section 9 of the EMA implies that there was no intention by the parties for said provision to contain the sole and exclusive remedies available to the parties. (Brief of Appellant, 30). WTC is clearly mistaken as Washington case law provides no support for this

contention. Exclusive remedy provisions without the words “exclusive” or “sole” are just as potent and enforceable as those with said words since the controlling inquiry and presumption is that contracting parties intend a remedy prescribed in their contract to be the sole remedy upon the happening of a foreseen condition irrespective of whether specific words are used. *See Donald B. Murphy*, 40 Wn. App. 98; *See also United Glass Workers’ Local No. 188 v. Seitz*, 65 Wn.2d 640, 399 P.2d 74 (1965). The parties foresaw the Port District’s possible refusal to complete the sale and termination of the EMA and made provision for it by restricting the parties remedies in section 9 of the EMA. Regardless of WTC’s apparent beliefs to the contrary, paragraph 9 is not subject to more than one interpretation and clearly and powerfully limits WTC’s remedies to earnest money return upon the termination of the EMA by the Port District.

In summary, one of the many provisions of the EMA freely and actively negotiated by the parties is paragraph 9, a provision which is plain and unambiguous on its face. Based upon an objective reading

and interpretation of this provision given the ordinary and plain meaning of the words used therein, WTC's sole remedy is exclusively limited to termination of the EMA and the return of the earnest money held by Defendant Chicago Title Insurance Company. Said provision is susceptible only to one reasonable, objective interpretation, to wit: the simple one offered by the Port District. The Port District is not requesting extraordinary or complex relief from the court; instead, the Port District is merely requesting that the Court give effect to Paragraph 9 as written and agreed to by the parties. While WTC could have negotiated a different provision other than the exclusive remedy provision, it completely failed to do so and WTC's self-serving subjective beliefs and post-litigation interpretations to the contrary are irrelevant and cannot raise a genuine issue of material fact regarding the enforceability and application of said provision and the disposition of this appeal in favor of the Port District.

2. Section 9 of the EMA, the Binding Exclusive Remedy Provision, Cannot Reasonably Be Interpreted or Construed as Creating an Illusory Contract and was Specifically Bargained For and Agreed to by WTC.

The thrust of WTC's final contention regarding the trial court's interpretation of the exclusive remedy provision of the EMA is that such interpretation would "allow the Port to breach the EMA at will, without any meaningful consequence" and would render the Port District's obligations and duties discretionary and thus unenforceable as illusory. (Brief of Appellant, 35). WTC further argues that adopting such interpretation is contrary to law in that it involves reading the EMA to be unenforceable. (Brief of Appellant, 35).

Under Washington law, a promise given for a promise that is dependent upon a condition does not necessarily render it illusory. *See In re Estate of Tveekrem*, 169 Wash. 468, 14 P.2d 3 (1932); 1 A. Corbin, *Contracts* § 149 (1963); 3A A. Corbin, *Contracts* § 644 (1960). Furthermore, a promise is not illusory if the obligation of the first contracting party is conditioned on the other contracting party taking some action which has a result satisfactory to the first contracting party. *See Omni Group, Inc. v. Seattle-First Nat'l Bank*, 32 Wn. App. 22, 25, 645 P.2d 727 (1982).

In the case at bar, the Port District's obligations and duties under the EMA cannot be viewed or interpreted as "discretionary" or "illusory" as a matter of law. At all times, the Port District acted reasonably and in good faith regarding the negotiations leading to and following the execution of the EMA. The Port District had every right to condition its obligations and duties under the EMA on WTC taking appropriate curative action and furnishing proof satisfactory to the Port District confirming that WTC was a validly incorporated business entity and Zhang had the corporate authority to execute the EMA for WTC following the Port District's discovery of Zhang's true name. Had WTC not anticipatorily breached, failed to give adequate assurances in good faith, and refused to remedy same, the Port District would not have taken action to terminate or have declined to sell under the EMA. In that event, the parties could have moved forward and closed the real estate transaction. Even with the imposed conditions, the Port District's obligations and duties were not illusory by any legal standard.

In addition, the Port District's decision to not complete the transaction resulted in significant meaningful consequences for the Port District. The Port District neither received the earnest money funds nor the proceeds from the sale of the subject real property from WTC. Furthermore, section 9 of the EMA was freely negotiated and agreed to by WTC. By its own admission, WTC is bound by and subject to the terms of the EMA, including section 9 thereof. As indicated in the prior section of this brief, the Port District is under no mandate to save WTC from itself and undo an unambiguous exclusive remedy provision previously agreed to by WTC.

3. EMA Section 9 Provides the Exclusive Remedy.

When a court interprets a contract, its primary goal is to ascertain the parties' intent. *Paradise Orchards Gen. P'ship. v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (Div. 3, 2004). While the question of intent is typically a question of fact, an unambiguous contract is a question of law. *Id.* at 517 (quoting *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 254, 76 P.3d 1205 (2003); *Stranberg v. Lasz*, 115 Wn. App. 396,

402, 63 P.3d 809 (2003)). In Washington, the rule regarding liquidated damage clauses in real estate purchase and sale contracts provides that the liquidated damages clause is a limitation on the recovery of monetary damages and does not generally limit the available remedies of the non-breaching party. *Id.*; *Asia Inv. Co. v. Levin*, 118 Wash. 620, 624-27, 204 P. 808 (1922). While the existence of a liquidated damage clause does not automatically limit the parties' available remedies, the parties may provide for a limitation on remedies in their contract. Furthermore, where the parties have identified a specific condition which may develop and provide for a specific remedy in the event that specified condition occurs, the courts will presume "that the parties intended the prescribed remedy as the sole remedy for the condition." *S.L. Rowland Constr. Co. v. Beall Pipe and Tank Corp.*, 14 Wn. App. 297, 309, 540 P.2d 912 (Div. 1, 1975). Thus, the line of cases regarding liquidated damage clauses can be read in harmony with the cases dealing with exclusive remedy clauses and applied to situations where the parties modify a liquidated damages clause to provide for a limitation on remedies; as the trial

court correctly applied to the remedies provision of the EMA. The determination of whether a remedies provision limits the parties' remedies ultimately depends on the language of the contract and the intent of the parties. Indeed, the court in *Cochran v. Lakota Land & Water Co.*, 171 Wash. 155, 17 P.2d 861 (1933), noted that "specific cases are not very helpful, for the reason that each case is made to depend largely upon the language used in the particular agreement under consideration."

In interpreting the remedies clause in the earnest money agreement at issue in *Paradise Orchards*, the court found that by using the phrases "shall have the right" and "shall have no obligation" the clause "unambiguously implie[d] that the buyer (*sic*) has discretion to invoke the enumerated remedies." *Paradise Orchards*, 122 Wn. App. at 518. While the seller was given the positive right under the contract to repossess the property and sell the crop by the express language of the remedies clause, the specific language used did not provide that the seller was limited to those enumerated remedies. The other cases cited by WTC deal with similar contract clauses that provided for liquidated

damages and did not otherwise limit the remedy. See *Cochran v. Lakota Land & Water Co.*, 171 Wash. 155, 17 P.2d 861 (1933); *Reiter v. Bailey*, 180 Wash. 230, 235, 39 P.2d 370 (1934). These cases simply have no application to the EMA as its remedy clause goes beyond the simple provision of liquidated damages and expressly limits the parties' remedy in the event that the other party does not proceed with the real estate transaction.

As the trial court correctly held, section 9 of the EMA identifies a specific condition and provides a specific remedy in the event that condition occurs. Under the enforcement clause, the condition identified is the situation where title is insurable and all other terms of the EMA are satisfied and one of the parties refuses to complete the transaction. If the Seller fails to go forward with the sale, the Purchaser is limited to the rescission of the EMA and a return of its earnest money. By its plain language, the enforcement clause is not a simple liquidated damages clause, but instead identifies a specific condition and a specific remedy and the presumption under Washington law is that the parties are limited to the remedy specified.

C. The Trial Court Correctly Held that WTC Repudiated the EMA By Failing to Provide Adequate Assurances.

As the trial court correctly held, WTC's silence in response to the Port District's request for confirmation of Zhang's authority to sign on behalf of WTC was a failure to provide adequate assurances within a reasonable time and was therefore a repudiation of the contract by WTC. (CP 501.) Restatement (Second) of Contracts § 251 (1979) sets forth the doctrine of anticipatory repudiation as follows:

- (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 not already received the agreed exchange until he receives such assurance.
- (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

While Washington courts have not yet adopted this Restatement or doctrine for general application,¹ it has applied it to the sales of goods for over 40 years after the enactment of RCW 62A.2-609 & 2-610. Moreover, as the trial court correctly noted, this doctrine is consistent with current Washington contract law. The doctrine of adequate assurance and anticipatory repudiation is related to the duty of good faith and fair dealing. Restatement (Second) of Contracts § 251, comment a. A request for adequate assurances follows from the principal that every contract contains an implied duty of good faith and fair dealing that obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). Where Restatement (Second) of Contracts § 251 comports with existing duties of good faith and fair dealing under Washington law,

¹Given the opportunity, a multitude of other jurisdictions have adopted the rule of Restatement § 251 as law. See e.g., *L.E. Spitzer Co. v. Barron*, 581 P.2d 213 (Alaska 1978); *Conference Ctr. Ltd. v. TRC--The Research Corp. of New England*, 455 A.2d 857 (Conn.1983); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66 (Utah, 1982); *Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F. Supp. 818 (S.D.N.Y.1988); *Julian v. Montana State Univ.*, 747 P.2d 196 (Mont.1987); *Juarez v. Hamner*, 674 S.W.2d 856 (Tex. App.1984); *Lo Re v. Tel-Air Communications, Inc.*, 490 A.2d 344 (N.J. Super.A.D. 1985); *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me.1989).

the Court should adopt this Restatement and affirm the trial court's extension and application to the EMA.

1. Port District Had Reasonable Grounds to Demand Adequate Assurances From WTC.

In order to demand adequate assurances from the other party, there must be reasonable grounds to believe that that party will breach via non-performance of its obligations. In the present matter, the trial court correctly held that the confusion regarding Zhang's identity presented reasonable grounds to doubt whether WTC was legally bound by his signature on the EMA and would be obligated to fulfill the EMA. (CP 501.) Reasonable grounds for a belief that there will be a breach by the other party "must be determined in the light of all the circumstances of the particular case." Restatement (Second) of Contracts § 251, comment c. "Even circumstances that do not relate to the particular contract, such as default under other contracts, may give reasonable grounds for such belief." *Id.* On page 40 of its Appellant's Brief, WTC confuses the doctrine of anticipatory repudiation through a failure to provide adequate assurances with anticipatory breach. An anticipatory breach occurs when a party makes

"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." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). Anticipatory repudiation through a failure to provide adequate assurances, in contrast, deals with the situation where there is not a "distinct and unequivocal statement" that there will be a breach, but the circumstances give rise to "reasonable grounds" that the other party will breach when its performance is due. *Id.*

For Washington corporations, "all corporate powers shall be exercised by or under the authority of the corporation's board of directors." RCW 23B.08.010. Thus, for any officer or agent to be authorized to conduct business on behalf of the corporation, the board of directors must first delegate that authority. See *Barnes v. Treece*, 15 Wn. App. 437, 549 P.2d 1152 (Div. 1, 1976). After the Port District became aware of the inconsistency between Zhang's legal name and the name with which he signed the EMA, as well as the questionable history associated with his legal name, it reasonably

questioned whether Zhang had been properly delegated the authority to act on behalf of WTC by WTC's board of directors. To relieve this doubt, the Port District requested that WTC provide written verification that Zhang had authority to act on behalf of WTC in signing the EMA. (CP 21-22; 81-82; 611; 630-632.) This uncertainty would have been easily and expeditiously resolved by the production of WTC's bylaws or a board resolution reciting the delegation of authority to Zhang as WTC's agent. WTC's failure to provide this evidence even after the commencement of litigation supports the logical conclusion that it simply does not exist.

WTC does not directly address the question regarding Zhang's authority to act on behalf of WTC, but instead attempts to confuse the issue by providing irrelevant arguments. First, the issue regarding whether the use of a fictitious name was a misrepresentation or fraud does not relate to the claim that WTC repudiated the contract by failing to provide adequate assurances. Second, the statement that Zhang was the incorporator of WTC and continued as its chairman and president does nothing to rebut the Port District's concern that WTC

was not bound by Zhang's acts - the Port District's concern was that the proper authorizations had not been made to appoint Zhang as WTC's authorized agent. Zhang's identity as incorporator, chairman, and president does not automatically provide that Zhang was also appointed as the authorized agent; there must be a positive action taken by the board of directors. Third, the Port District had no alternative means to determine whether WTC had appointed Zhang as its authorized agent other than by making the request directly to WTC as the custodian of its corporate records. All of WTC's arguments evade the fundamental fact that the Port District was attempting to ensure that the legal formalities of Zhang's appointment as an agent of WTC had been observed - regardless of whether under the name of Abraham Hengyucius or Hengyu Zhang. Just as the trial court observed, WTC "has not advanced any alternate explanation for [WTC's] silence and the court cannot conceive of one" other than Zhang simply "did not have the authority to bind [WTC]." (CP 501.)

2. Zhang's Lack of Authority to Bind WTC Was a Total Breach.

If Zhang had not been properly appointed as the authorized

agent of WTC, WTC would not be bound to the EMA and its performance of its obligations thereunder would be fundamentally in question. WTC's allegation that the failure to provide adequate assurances in the form of the appointment of Zhang as the authorized agent rendered the entire agreement and all obligations suspended until WTC provided adequate assurance that it was bound to the EMA.

3. Port District's Request Was a Proper Demand for Adequate Assurance.

On August 16, 2010, the Port District requested that WTC provide written verification that "Abraham Hengyucius" had authority to act on behalf of the corporation and that the corporation was a lawfully formed and existing corporate entity in response to the discovery of Zhang's concealment of his true identity and the associated business history with that name. (CP 81-82.) The Port District was reasonably requesting that WTC provide simple proof as to its existence and the appointment of Zhang as its authorized agent.

4. WTC's Failure to Provide Adequate Assurance Was a Repudiation of the EMA.

While WTC provided the Port District with a certificate of

incorporation, it has never provided the Port District with any documents that show that Zhang was the appointed agent of WTC with full authority to bind the corporation to the EMA. (CP 22; 501.) The offer to change his name or re-execute the EMA without the requested proof of authority is meaningless. Because WTC has failed to adequately respond to the Port District's reasonable request for adequate assurances, the trial court correctly found that WTC's responsive silence was a repudiation of the EMA.

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

The trial court properly found that the EMA is a binding contract on the Port District and WTC and therefore properly concluded that WTC's claim under a theory of promissory estoppel was barred. To obtain recovery based on a promissory estoppel counterclaim, a counterclaimant must establish five (5) mandatory elements: "(1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that 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." *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d 491 (2004).

However, where there is a written contract between the parties, a promissory estoppel claim is barred because "estoppel, by its very nature, is an alternative theory of liability based on the absence of an express agreement."² See *Hatfield v. Columbia Fed. Sav. Bank*, 57 Wn. App. 876, 885, 790 P.2d 1258 (1990), overruled on other grounds by *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 864 P.2d 937 (1994) ("The doctrine of promissory estoppel was developed to cover certain situations in which consideration is lacking."); See *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993); and *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980). WTC simply cannot attempt to establish a claim for damages based on promissory estoppel when there is a valid written contract that governs the obligations and duties of the

²WTC cites to *Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 750 P.2d 231 (1988), to support its contention that both breach of contract and promissory estoppel claims may be pursued in the same action. In *Farm Crop Energy, Inc.*, the promissory estoppel claim was based on a separate and additional representation by an authorized agent after the written contract had been executed, WTC has not alleged any separate representations by the port commission other than those contained in the EMA.

parties.³ All sums expended by WTC were made under the terms of the contract and therefore are not recoverable under a theory of promissory estoppel.

Even if WTC could allege a promissory estoppel claim based on representations by the Port District's agents outside the written contract, such relief is barred by public policy. The "doctrine of estoppel cannot be invoked to enforce a promise of an officer or agent against a corporation or government, if such representative person had no legal capacity or power to enter into such an obligation." *NW Magnesite Co.*, 28 Wn.2d 1, 28, 182 P.2d 643 (1947). RCW 53.08.090 authorizes the port commission to sell and convey real property of the port district. Any 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.

WTC is precluded from raising promissory estoppel claims by the existence of a binding written contract as it reduces the parties'

³See Section III(B)(2) for Respondent's response to the allegation that the EMA is an illusory contract.

entire agreement to writing and controls any disputes. Furthermore, even if there was a valid basis to raise a promissory estoppel claim, WTC claim would fail as it is violative of public policy and the representations of an unauthorized agent of the Port District cannot be the basis for a claim for damages against it.

F. Port District Is Entitled to Attorney Fees on Appeal.

Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). Section 21 of the EMA provides that the prevailing party shall be entitled to recover reasonable attorney's fees and all costs and expenses including costs of appeal incurred incident to any proceedings to enforce or forfeit the EMA. (CP 29.) As the prevailing party, the Port District is entitled to its reasonable attorneys' fees and costs on appeal to the extent this Court upholds the trial court's decisions.

favorable to the WTC, WTC's remedies clearly and exclusively are limited to the termination of the EMA and the return of the earnest money funds of \$40,000. WTC is not entitled to specifically enforce the EMA or seek damages from the Port District based upon any theory of law or counterclaim. The Port District was completely justified in terminating the EMA based upon WTC's anticipatory breach, failure to provide adequate assurances, and related legal failures and deficiencies. For the within and foregoing reasons, the Court should affirm the trial court's grant of summary judgment in favor of the Port District approving the Port District's claims and dismissing with prejudice all counterclaims of WTC.

Dated: November 7, 2013.

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CERTIFICATE OF SERVICE

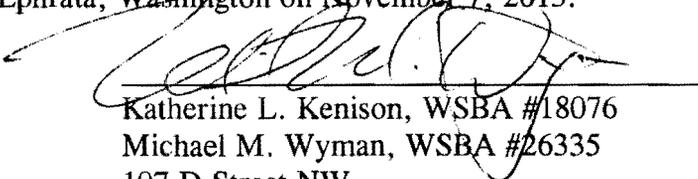
I, the undersigned, certify that on November 7, 2013, I caused a true and correct copy of Respondent Grant County Port District No. 9, Port of Ephrata's Brief in the above captioned case to be served upon counsel for the parties of record in this action by sending same property addressed to and by the 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 Ephrata, Washington on November 7, 2013.



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