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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31771-4-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

NORTH TOWN MALL, LLC, a Delaware limited liability company,

Plaintiff/ Respondent,

vs.

WHOLESALE SPORTS USA, INC., a Utah corporation; ALAMO
GROUP, LLC, a California limited liability company,

Defendants/Appellants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Washington law is clear. A landlord cannot assert its right to forfeiture against a tenant, while at the same time demanding and accepting rent payments. Having made its election of remedies as to a particular breach, the landlord cannot then attempt to have it both ways. Yet, this is exactly what North Town Mall, LLC (North Town) has done.

It is undisputed that North Town continued to demand and accept rent payments after it had notice of an alleged breach by its tenant Wholesale Sports USA, Inc. (Wholesale Sports). Despite manifesting its choice to continue with the lease for commercial space (Lease), North Town filed two separate lawsuits: (1) a civil complaint for breach of lease, fraudulent transfer, and piercing the veil (Breach Case)¹ and (2) an unlawful detainer action seeking Wholesale Sports' eviction from its commercial space at North Town Mall (Premises).

The defendants in both actions were Wholesale Sports, Alamo Group, LLC (Alamo) and United Farmers of Alberta Cooperative Limited (UFA). The trial court dismissed UFA from the unlawful detainer action. CP 322. In both actions, North Town alleges Wholesale Sports breached

¹The Breach Case is pending in Spokane Superior Court, Cause No. 13-2-01201-9. That case is proceeding with discovery and trial on the disputed facts underlying both lawsuits.

the Lease when UFA transferred its interest in Wholesale Sports' stock to Alamo (Transfer). Only the unlawful detainer action is before this court.

In a show cause hearing on North Town's request for a writ of restitution, the Spokane Superior Court sitting in a summary proceeding (Trial Court) found North Town had accepted rent payments with knowledge of the Transfer. Contrary to settled law, the Trial Court ruled no waiver had occurred and Wholesale Sports was in unlawful detainer. Relying on an unpublished case interpreting the Residential Landlord Tenant Act, chapter 59.18 RCW, the Trial Court also ruled the Writ of Restitution (Writ) could issue without the restitution bond mandated by RCW 59.12.090.

These rulings are contrary to law and unsupported by the undisputed facts in the record. Wholesale Sports and Alamo ask this court to reverse the Order for Writ of Restitution (Order for Writ) and remand this matter for a determination of the damages incurred by Wholesale Sports as a result of the wrongful issuance of the Order for Writ.

II. ISSUES AND ASSIGNMENTS OF ERROR

First Issue: Whether a landlord's acceptance of rent with knowledge of an alleged breaching transfer by the tenant manifests consent, such that the landlord is precluded from relying on the transfer as an event of default.

Assignments of Error

(1) The Trial Court erred in ruling Wholesale Sports breached the Lease where North Town continued to accept rent payments after it had knowledge of the Transfer. RP 29:24-30:2.

(2) The Trial Court erred in failing to rule the acceptance of rent, negotiations for modification of the Lease, and demands for a letter of credit manifested North Town's consent to the Transfer, despite North Town's stated objections to the same. RP 29:22-30:2.

Second Issue: Whether a tenant is entitled to a trial by a jury to resolve factual disputes regarding an alleged breach where fact finding remains pending in a separate matter.

Assignments of Error

(1) The Trial Court erred in finding a prohibited assignment despite North Town's admission that it did not have sufficient information to determine the nature of the transfer. RP 4:23-5:10, 29:24-30:2.

(2) The Trial Court erred in resolving disputed questions of fact regarding the alleged breach and the equities where the parties advised the court that North Town had alleged the same facts as a basis for relief in the pending Breach Case. RP 16-20:5, 29:24-30:2.

(3) The Trial Court erred in failing to dismiss the shareholder, Alamo, as a party to the unlawful detainer action where the record

establishes Alamo was not a tenant or party to the Lease, and was not served with the ten-day notice. CP 102, 171, 212; RP 30:19-23.

Third Issue: Whether a tenant is in lawful possession of the leasehold where the landlord has continued to solicit and accept rent payments with knowledge of an alleged breach.

Assignments of Error

(1) The Trial Court erred in ruling the acceptance of rent payments with knowledge of the Transfer did not waive North Town's right to evict Wholesale Sports for that particular breach. RP 29:6-30:2.

(2) The Trial Court erred in entering the Order for Writ because the undisputed facts establish the forfeiture was inequitable in that Wholesale Sports made unreimbursed tenant improvements of \$467,485.09. RP 38:25-39:9, 18-24; CP 321-22, 332.

Fourth Issue: Whether a court may order restitution of a leasehold where the undisputed facts establish restitution is inequitable.

Assignment of Error

(1) The Trial Court erred in failing to weigh the equities because the record established Wholesale Sports had invested substantial funds to improve the Premises and had continued to make rent payments.

Fifth Issue: Whether a restitution bond is a statutorily required prerequisite to the issuance of a writ, particularly where the factual

disputes will be resolved in a separate pending lawsuit and where the tenant is entitled to appeal the order for the writ.

Assignments of Error

(1) The Trial Court erred in failing to order North Town to post a restitution bond as required by RCW 50.12.090. CP 321-22.

(2) The Trial Court erred in relying on the unpublished case of *Housing Authority of the City of Seattle v. Johnson*, 92 Wn. App. 1042 (1998), in violation of RCW 2.06.040, to rule a restitution bond was not required under the facts of this case. RP 45:8-21.

(3) The Trial Court erred in finding no restitution bond was required pending prosecution of North Town's Breach Case, where that claim was based upon the same disputed allegations relied upon to assert unlawful detainer. RP 19:16-20:16, 45: 24-46:3.

III. STATEMENT OF THE CASE

On April 25, 2012, Wholesale Sports entered a lease for 34,371 square feet of retail space at North Town Mall, in Spokane, Washington (Premises). CP 17, 58, 212. North Town Mall is owned and operated by General Growth Properties (GGP) through its subsidiary, North Town. CP 269, ¶2.

GGP offered \$756,162 in tenant improvements as an incentive, but Wholesale Sports was required to spend an additional \$467,485.09 to

bring the Premises within code requirements and to cover basic improvements, such as electric, plumbing, and drywall. CP 18, 151, ¶6; 331-32.

After renovation of the Premises, Wholesale Sports and UFA entered into negotiations for the transfer of Wholesale Sports' stock to Alamo. *See* CP 151, ¶2; 154. On February 10, 2013, UFA, Wholesale Sports, and the shareholders of Wholesale Sports entered an agreement whereby Alamo would purchase all of the stock of Wholesale Sports. CP 151, ¶2.

A. Article 19 (Assignment) of the Lease is at issue in the Breach Case and this matter.

The Lease includes two provisions North Town alleges Wholesale Sports breached. These allegations are made in both lawsuits. Section 10.01 requires the Premises be open for business at least ten hours a day, seven days a week, "unless prevented from doing so by causes beyond Tenant's control." CP 127-28.

Article 19 purports to limit the tenant's ability to "transfer, assign, sublet, enter into license or concession agreement, change ownership, mortgage or hypothecate [the] Lease or Tenant's interest in and to the Premises" without the consent of the landlord. CP 37, §19.01. Permitted transfers, which do not require the consent of the landlord, include (1)

assignments or sublets of the Lease to “any person or entity which controls or is controlled by or is under common control with the Tenant, or (2) assignments to any person or entity which acquires an ownership interest in all or substantially all of the assets of the tenant, provided the person or entity has a tangible net worth at least as great as the tangible net worth of the tenant as of the date of the Lease.” CP 38, §19.04.

Upon a default, North Town’s remedies under the Lease are reentry upon 30 days written notice, collection of past rent owing and future rent unsatisfied by re-letting after eviction, and termination of the Lease. CP 44-45.

B. North Town claims to object to the Transfer, but continues to solicit and accept rent payments from Wholesale Sports.

On February 12, 2013, Wholesale Sports notified North Town, through GGP, that the Transfer would occur in mid-March. CP 151, ¶3; 154. Wholesale Sports offered to provide a summary of the pending transaction. CP 152, ¶9. Wholesale Sports continued to be the sole tenant on the Lease after the Transfer occurred on March 11, 2013 (Closing Date). CP 129, ¶¶5, 6.

North Town did not contact Wholesale Sports until February 22, 2013, after the general manager of North Town Mall, John Shasky, claims to have learned from a newspaper article that Wholesale Sports planned to

permanently close the Premises in March. CP 158, ¶6; 270, ¶6. Mr. Shasky, sent a notice of anticipatory default to Wholesale Sports based upon §10.01 of the Lease. CP 158, ¶7; 262-63.

On February 25, 2013, Greg Sullivan, Vice President of Big Box Leasing for GGP, contacted Don Gaube, managing member of Alamo, on behalf of North Town to discuss the Transfer. CP 271, ¶8.

Three days later, North Town received payment for rent from Wholesale Sports for the month of March in the amount of \$36,719.69. CP 159, ¶10. With knowledge of the Transfer set to close mid-March, North Town accepted payment for the entire month. *See* RP 7:9-10.

On March 4, Mr. Shasky sent a Notice of Default for Violation of the Lease, objecting to the pending Transfer. CP 265-68. Mr. Shasky alleged the Transfer violated the Lease because North Town had not provided its consent. CP 265-68. Mr. Shasky demanded that Wholesale Sports immediately cure the alleged default within five days. CP 265. Mr. Shasky sent a second identical letter to Wholesale Sports on March 7. CP 267-68.

Wholesale Sports' new president, Mr. Gaube, entered discussions with GGP's counsel, Rosemary Feit, to address any legitimate issues raised by North Town regarding the Transfer. CP 131, ¶17. Wholesale Sports did close the store to the public for inventory, training, and

reorganization from March 10 to March 29, 2013, but continued to operate under its own name as the lessee. CP 129, ¶6; 130, ¶8. Mr. Gaube advised Ms. Feit of the purpose of the temporary closure. CP 130, ¶10.

Despite ongoing dialogue and North Town's acceptance of rent for all of March, North Town filed its complaint in the Breach Case on March 25, 2013, in which it alleged the temporary closure and Transfer breached the Lease. Appendix A North Town's Complaint for Breach of Contract Case No. 13-2-01201-9. On March 19 and 21, 2013, North Town delivered a Ten-Day Notice to Comply with Rental Agreement or Quit Premises (Notice) to Wholesale Sports. CP 102, 106-07. The Notice demanded cure of two incidents of default within ten days: "(1) failing to keep the Premises open for business a minimum of ten (10) continuous hours a day seven (7) days per week since March 10, 2013; and (2) assigning the Lease without Landlord's consent." CP 102. Wholesale Sports reopened the Premises on March 29, 2013, within the cure period. CP 130, ¶11.

Despite its stated objections to the Transfer, North Town requested immediate payment of rent for the month of April. CP 130, ¶14. Wholesale Sports remitted payment for April's rent on April 30, 2013. CP 130, 134. Two days later, North Town filed its complaint for unlawful detainer under a separate case number from that of the Breach Case

(Complaint). CP 3. Only Wholesale Sports was the tenant, but the complaints in both cases name Alamo and UFA as defendants. CP 3.

Although the Complaint alleged Wholesale Sports unlawfully possessed the Premises, just four days after its filing date, North Town cashed Wholesale Sports' April rent check. CP 134, 142-43¶10. Wholesale Sports issued a second check for payment of rent for the month of May, which North Town cashed on May 20, 2013. CP 130, 135, 143, 147. Both checks were signed by Mr. Gaube. CP 134- 35. Both checks bear Wholesale Sports' new business address in Alamo, California. CP 134-35. It was thus apparent to North Town that it was demanding and accepting rent from Wholesale Sports' new shareholder, Alamo, even after it had claimed to object to the Transfer.

C. Despite its acceptance of rent payments, North Town alleged Wholesale Sports unlawfully detained the Premises and sought a writ of restitution.

The Complaint, motion and order to show cause allege North Town is entitled to a writ of restitution based upon the events of default alleged in the Notice (and in the Breach Case): (1) the temporary closures of the Premises and (2) the alleged failure to obtain North Town's consent to the Transfer. CP 1-110. The Complaint sought termination of Wholesale Sports' tenancy and restoration of the Premises, as well as double damages for rent North Town asserted remained owing. CP 2, 7.

Wholesale Sports, Alamo and UFA filed an answer to the Complaint (Answer) and response on May 10. CP 111-35. The Answer asserts North Town was not entitled to relief under the unlawful detainer statute because it had continued to solicit and accept rent payments after it had received notice of the alleged events of default. CP 114, ¶4; 122-23. Further, even if North Town had not waived its right to relief, whether the Transfer breached the Lease is a disputed question of fact that should be determined at trial and would be resolved in the Breach Case. CP 123; RP 19:16-20:5. Alamo and UFA argued they should be dismissed as they were not tenants or parties to the Lease. CP 121-22,

Ten days after the Answer raising acceptance of rent as an affirmative defense was filed, North Town cashed the rent check for May. CP 135, 143, 147.

North Town sought and obtained an order to show cause, but no scheduling order was entered or any trial date set. *See* CP 108-10.

D. Ruling waiver did not apply and relying on disputed facts, the Trial Court entered the Order for Writ.

At the show cause hearing, North Town acknowledged Wholesale Sports had cured the violation of §10.01 by reopening the Premises on March 29. RP 6:9-20. Thus, the only issues to be determined were whether

the Transfer violated the Lease, whether North Town waived its right to relief, and whether Alamo and UFA were proper parties.

North Town admitted it did not have sufficient information from which it could determine whether the transfer of Wholesale Sports' assets and stock was an assignment requiring consent, such that it breached the Lease. RP 4:23-5:10. According to North Town:

[I]t would probably help if we could see the documentation so we understand what the true nature of the transaction is and what the true nature of Wholesale Sports is at this point, if that is in fact the tenant.

RP 19:7-13.

Despite its acknowledgement that it did not know whether or not a breach had occurred, North Town insisted it was entitled evict Wholesale Sports. RP 5:10-12.

Wholesale Sports advised the Trial Court:

As to the documents and disputes, it's better resolved through discovery, through civil – civil litigation in a – on a normal proceeding, which North Town Mall has also filed and sought remedies for breach of contract, alleged fraudulent transfer and piercing the veil.

RP 19:16-21.

North Town did not dispute that the same allegations regarding the Transfer were at issue in the Breach Case or that those facts would likely be resolved in the Breach Case. *See* RP 20:2-24. Rather, North Town

represented to the Trial Court that North Town would not be pursuing further proceedings in the unlawful detainer action **because** North Town would be pursuing the Breach Case. RP 43:20-22.

Wholesale Sports advised the Trial Court that even if the Transfer were a breach of the Lease (which was disputed), North Town was not entitled to restitution. RP 16:10-20. Because North Town had accepted its rent payments after North Town had notice of the Transfer, Washington law did not allow unlawful detainer as a remedy. RP 16:10-20. North Town conceded it had accepted rent payments through May. RP 7:6-10.

Despite the contested facts regarding the Transfer and the pending Breach Case, the Trial Court ruled Wholesale Sports breached the Lease by failing to follow the consent procedure. RP 29:2-5. Although it was undisputed that North Town had accepted rent with knowledge of the Transfer, the Trial Court ruled, "...acceptance of rent for April and May does not waive the claim for the breach of the assignment without consent. They're two totally different things." RP 29:24-30:2. Having rejected waiver as an affirmative defense, the Trial Court ruled Wholesale Sports was in unlawful detainer. RP 30:8.

E. Although North Town stated its intent to continue to prosecute its claims arising out of the Transfer under a separate cause number, the Trial Court ruled no Restitution Bond was required.

Prior to entry of the Order for Writ, and with the Breach Case still pending, Wholesale Sports and Alamo requested a restitution bond pursuant to RCW 59.12.090. CP 289-92. Citing the only published decision interpreting RCW 59.12.090², Wholesale Sports advised the Trial Court that because the statute requires a restitution bond, the only issue was the amount necessary to cover Wholesale Sports' potential damages. CP 290-91; RP 37:2-22. Wholesale Sports submitted evidence showing damages were likely to be \$2.3 million to \$3 million. CP 324-226, 330-40; RP 40:13-21. In rebuttal, North Town argued only that because, after the Trial Court had issued its oral ruling, Wholesale Sports had posted a "Store Closing Sale" sign and had made plans to liquidate its inventory, it would incur no damages as a result of the Writ. CP 363-64, ¶¶3-4.

Before ruling, the Trial Court asked North Town whether it anticipated any further proceedings in the unlawful detainer matter. RP 43:15-19. North Town indicated that because it would be prosecuting the Breach Case, there would be no more proceedings in the unlawful

²*IBF, LLC v. Heuft*, 141 Wn. App. 624, 174 P.3d 945 (2007).

detainer case. RP 43:220-22. The Trial Court then ruled no bond was necessary. RP 43:20-22.

To reach this result, the Trial Court relied upon an unpublished case interpreting RCW 59.12.380 of the Residential Landlord-Tenant Act. RP 45:2-32.

THE COURT: I usually see the tenant wanting to post the bond to stay the writ so they can, you know, do whatever they need to do. But I don't believe under this particular fact pattern that the court is required to set a bond with the writ. So I'm going to deny the request for the bond.

RP 45:22-46:1.

Relying upon disputed facts as to the breach and disregarding settled law, the Trial Court issued the Order for Writ. CP 321-22. The Order dismissed UFA and specified that North Town was not required to post a restitution bond. CP 322. The Trial Court refused to dismiss Alamo, although it was never a tenant or party to the Lease, ruling Alamo was "the party that is in control of the premises, so they will remain as a party." RP 30:19-23.

On June 17, 2013, the clerk of the court issued the Writ. CP 372-73. Wholesale Sports and Alamo Group timely filed their notice of appeal. CP 382-83.

To permit an orderly eviction from the Premises, the Trial Court granted Wholesale Sports a stay of the execution of the Writ until July 21,

2013, conditioned upon payment of rent through that date. CP 389-90; RP 64:25-65:18. This occurred and North Town accepted the rent.

IV. ARGUMENT

Because the parties' arguments before the trial court were based solely upon written materials, this court stands in the same position as the trial court and reviews the record de novo. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506 (2012). Questions of law are also reviewed de novo. *Id.* Although a trial court's decision regarding the **amount** of a bond is discretionary, whether the law requires a restitution bond as a prerequisite to a writ of restitution is a question of law. *See* RCW 59.12.090. The trial court's findings of fact must be supported by substantial evidence and must support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

The Trial Court found the Transfer breached the Lease based upon disputed facts. Despite finding North Town had continued to accept rent payments with knowledge of the Transfer, the Trial Court ruled waiver did not apply. The Trial Court then ignored the requirements of RCW 59.12.090 in refusing to require a restitution bond. These rulings are unsupported by the record and are contrary to Washington law.

A. According to Washington law, by choosing to accept rent payments with knowledge of the Transfer, North Town manifested its consent.

[I]t is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition of his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of the breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of the lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof.

Wilson v. Daniels, 31 Wn.2d 633, 640-41, 198 P.2d 496 (1949).

Failure to obtain consent to a transfer of the leasehold does not void the assignment, but merely renders it voidable at the option of the lessor. *OTR v. Flakey Jake's, Inc.*, 112 Wn.2d 243, 247, 770 P.2d 629 (1989). Upon learning of the assignment, the landlord must either declare a forfeiture or recognize the new owner of the lessee as the tenant. *Id.* at 248. What the landlord may **not** do is continue to accept rent payments with knowledge of the transfer, while also denying the validity of the transfer. *Id.*

Once the landlord has knowledge of the breach, any act of the landlord (including negotiations, demands for rent or security for future

rent, or acceptance of rent payments) waives the condition which subjects the tenant to forfeiture. *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234, 242-43, 24 L. Ed. 689 (1877); *D'Ambrosio v. Nardone*, 72 Wash. 172, 129 P. 1029 (1913) (holding the landlord had ratified assignment by accepting rent from the assignee).

The acceptance of rent with knowledge of the alleged breach is the equivalent of written consent to the lessee's continuing possession, which waives the landlord's right to seek relief based upon that particular breach. *Signal Oil Co. v. Stebick*, 40 Wn.2d 599, 603-04, 245 P.2d 217 (1952); *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 362, 118 P. 329 (1911) (holding landlord estopped from disputing the validity of assignment after accepting rent from assignee). Once the landlord accepts rent from the transferee with knowledge of the transfer, "the right to declare a forfeiture [is] waived as fully and completely as by the written consent provided for in the lease itself." *Batley v. Dewalt*, 56 Wash. 431, 433, 105 P. 1029 (1909).

Analyzing a very similar fact pattern, the North Carolina Supreme Court held a landlord waived the right to object to the assignment by accepting rent payments, even though the landlord had expressed its objection to the assignment. *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E.2d 871, 877, 879 (1957). As was the case here, the

landlord claimed it had insufficient information to grant consent, and voiced its objections. *Id.* at 874. Although the landlord rejected a rent check from the assignee, it continued to accept rent from the lessee on the assignee's behalf. *Id.* at 874, 878. Even after it was clear the lessee was not going to cure the breach, and even after the landlord had filed suit and the lessee had expressly pled the acceptance of rent as waiver, the landlord continued to accept payment of rent. *Id.* at 878-79.

The *Fairchild* court noted that under the terms of the lease, the possession of the premises by either the lessee or assignee was wrongful once the landlord refused to consent to the assignment. *Id.* At that point, the landlord was entitled to damages, but not rent. *Id.* By choosing to accept rent, the landlord waived his right to object to the assignment. *Id.* at 879. This is consistent with Washington's rule that acceptance of rent with knowledge of the breach is an affirmation by the landlord that the contract of the lease is still in force. *Wilson*, 31 Wn.2d at 641.

Once North Town became aware of the alleged default, it had the option to either (a) reenter the leasehold, terminate the Lease, and seek damages, or (b) continue the Lease. *See Knickerbocker Life*, 96 U.S. at 244; CP 45. It could not do both. Nor could it change its mind once it had manifested consent by accepting rent. *Id.*

After North Town had received notice indicating the stock transfer would occur in mid-March (CP 154; 270, ¶5), North Town (1) accepted rent for the entire month of March (CP 159, ¶10), (2) engaged in negotiations to allow Wholesale Sports to remain in the premises, despite its stated objection to the Transfer (CP 272, ¶¶10-11), (3) canceled a hearing on a writ of attachment in response to Wholesale Sports' reopening of the Premises (RP 29:15-24), (4) demanded a letter of credit securing future rent payments from Wholesale Sports and Alamo (CP 130, ¶12; 142, ¶7; 145; 272, ¶13; 279-80, ¶¶2-8), (5) demanded and accepted payment of rent for April (CP 130, ¶14), and (6) accepted payment of rent for May after Defendants had raised the defense of waiver through acceptance of rent (CP 135, 143, 147). The Trial Court therefore had before it more than sufficient facts to find that North Town had consented to the assignment and wished to continue benefiting from the Lease.

Having obtained substantial rent payments after receiving notice of the Transfer, North Town cannot be now heard to argue that it may evict its tenant because North Town did not consent to the alleged improper Transfer. *See Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wn. App. 51, 60, 504 P.2d 324 (1972); *Wilson*, 31 Wn.2d at 641. As a matter of law and fact, the Trial Court erred in concluding Wholesale Sports was in breach of the Lease. *See* RP 29:2-30:5.

B. The Trial Court erred in finding the Transfer breached the Lease where North Town admitted it did not know the true nature of the Transfer or whether it breached the Lease.

In an unlawful detainer proceeding, possession by the tenant is presumed to be lawful until the landlord establishes its right to possession by a preponderance of the evidence. *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 763, 205 P.3d 937 (2009). “Whenever an issue of fact is presented by the pleadings it must be tried to a jury. . .” RCW 59.12.130.

Here, North Town bore the burden of establishing the Transfer breached the Lease. Yet, North Town did not allege the Transfer violated the Lease in its Complaint. *See* CP 5-6. In fact, North Town admitted it did not know the nature of Transfer or even who its tenant was. RP 5:10-12. North Town did not dispute that the allegations regarding the Transfer remained the disputed subject of the Breach Case. *See* RP 20:2-24. Nor did North Town dispute that discovery would be conducted to determine the nature of the Transfer in the Breach Case. *See* RP 19:16-24.

The Trial Court was apprised that a factual dispute existed and that not even North Town claimed to have established that a breach had occurred. Nevertheless, the Trial Court found the Transfer was an assignment requiring consent and that the failure to obtain consent breached the Lease. RP 28:16-29:5. Because the nature of the Transfer

remained disputed, the Trial Court's findings violated RCW 59.12.130. Additionally, because the nature of the Transfer was disputed, the Trial Court also erred in finding Alamo was a proper party to an unlawful detainer action. RP 30:19-23.

C. North Town's acceptance of over \$108,000 in rent payments after it had knowledge of the Transfer waived its right to forfeiture under chapter 59.12 RCW.

Just as acceptance of rent manifests the landlord's consent to assignment, it also manifests the landlord's affirmation of the tenant's right to possession. The established rule in Washington is that if the landlord accepts rent with knowledge of a breach, the landlord waives the right to seek forfeiture based upon that breach. *Signal Oil*, 40 Wn.2d at 603; *Wilson*, 31 Wn.2d at 640-41.

Because the landlord has consented to the tenant's continued possession, the landlord can only wait until a new or continuing breach occurs, and then must recommence the notice process before seeking restitution under RCW 19.12.090. *Signal Oil*, 40 Wn.2d at 604; *Wilson*, 31 Wn.2d at 644; *Duvall Highlands, LLC v. Elwell*, 104 Wn. App. 763, 768, 19 P.3d 1051 (2001); *MH2 Co. v. Hwang*, 104 Wn. App. 680, 684, 16 P.3d 1272 (2001).

In *Signal Oil*, the tenant, Stebick, violated the lease by failing "to use the premises for no other purpose than to conduct an automobile sales

business; to continuously operate said business.” 40 Wn.2d at 600-01. The ten-day notice was served on October 21, 1950, and the complaint for unlawful detainer, on January 12, 1951. *Id.* As is the case here, Signal Oil continued to solicit rent payments even after bringing the action for unlawful detainer and received and accepted rent payments through its agent up to the time of trial. *Id.* at 605. The trial court issued a writ of restitution and Stebick appealed. *Id.*

The *Signal Oil* court agreed with Stebick that the acceptance of rent gave the tenant the right to possess the premises, during the term for which the rent was paid. *Id.* at 602. “Having accepted rent for November, December and January, when it commenced this action, [Signal Oil] waived the breach of the terms of the lease relied upon in its notice of October 21st, and that notice, since it referred only to a breach which had been waived, became a nullity.” *Id.* at 605. If the breach continued after the acceptance of rent, Signal Oil was required to issue a new notice and cease its acceptance of rent. *Id.* at 603. The *Signal Oil* court therefore reversed the order for a writ of restitution. *Id.* at 606.

Similarly, in *Wilson*, the tenant was alleged to have committed a variety of breaches: (1) failure to operate his business in accordance with the requirements of the lease, (2) damage to the premises, (3) failure to complete needed repairs and maintenance, (4) failure to report and pay

federal and local taxes, and (5) failure to make utility payments. 31 Wn.2d at 636-37. The landlord was aware of these violations before he gave notice to the tenant and before he accepted rent payments from the tenant. *Id.* at 638-39. The *Wilson* court held that by accepting rent, the landlord had waived his right to rely on any known prior breaches as a basis for forfeiture. *Id.* at 644.

North Town has previously argued to this Court that the waiver rule does not apply because the transfer of stock to Alamo on March 11, 2013 is a continuing breach. Appendix B, North Town's answer to the Court's Mot. to Determine Appealability at 12-13. Even if one were to stretch logic to assume the one-time Transfer on March 11, 2013 could be considered continuing in nature, *Signal Oil* and *Wilson* clearly required North Town to issue a second ten-day notice and cease accepting rent payments. *Signal Oil*, 40 Wn.2d at 603; *Wilson*, 31 Wn.2d at 643. North Town failed to satisfy these requirements.

The undisputed evidence in the record demonstrates North Town accepted rent payments after it had knowledge of, and even after it had objected to, the Transfer. CP 159, ¶10; 130-35,143, 147; RP 28:13-15, 17:16-18. There is no evidence in the record, and North Town makes no claim, that a second ten-day notice was served after acceptance of rent payments ceased. These undisputed facts do not support the Trial Court's

conclusions of law that no waiver occurred and that Wholesale Sports unlawfully detained the Premises. RP 29:24-30:2, 8.

D. Because North Town accepted the benefit of substantial rent payments and received the benefit of renovations, for which Wholesale Sports paid over \$456,000³, forfeiture was inequitable.

“Equity’s goal is always to do substantial justice to both contracting parties when a forfeiture is sought.” *Shoemaker v. Shaug*, 5 Wn. App. 700, 704, 490 P.2d 439 (1971). Washington courts will not order forfeiture where equity shows no clear right to that remedy. *Id.* In determining whether enforcement would be inequitable, the court looks to whether there is a substantial loss to the tenant if forfeiture is enforced with no corresponding loss to the landlord if a period of grace is allowed. *Id.*

Wholesale Sports incurred a substantial loss as a result of the Order for Writ and the Writ. Evidence in the record establishes Wholesale Sports stood to lose between \$2.3 and \$3 million in lost sales, cost of transporting inventory, cost of inventory that would remain unsold or sold below cost, and the unreimbursed cost of renovating the Premises. CP 324-40.

³Although North Town presented the Declaration of John Shasky stating Wholesale Sports had been fully reimbursed for its tenant improvements, North Town subsequently admitted this statement was made without full knowledge of the facts. *See* CP 369, ¶4; RP 43:4-7.

The record does not reveal a corresponding loss that North Town would have incurred had Wholesale Sports been allowed to remain in the Premises pending the ultimate resolution. North Town continued to receive rent payments during Wholesale Sports' tenancy. The Breach Case is pending, in which discovery and fact finding will resolve whether the Transfer was a breach. By evicting Wholesale Sports, North Town benefited from the Premises' renovations paid for in part by Wholesale Sports. *See* CP 331-32, ¶¶7-8. The Trial Court erred in failing to consider and balance the equities prior to ordering restitution based upon disputed facts.

E. The Writ was invalid because the Trial Court did not require North Town to first post a restitution bond under RCW 59.12.090.

The posting of a restitution bond is a prerequisite to a valid writ of restitution. *IBF, LLC v. Heuft*, 141 Wn. App. 624, 636 (2007).

The plaintiff at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue *but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such sum as the court or judge may order* conditioned that the plaintiff will prosecute his action without delay, *and will pay all costs that may be adjudged*

to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.

RCW 59.12.090 (emphasis added.)

In *IBF*, the landlord leased commercial space to Carmen Heuft, who failed to pay rent for three months. 141 Wn. App. at 628-29. After two show cause hearings, the trial court ordered judgment in the amount of back rent and ordered IBF to post a bond prior to seeking a writ of restitution. *Id.* at 630. IBF posted a sheriff's bond and the writ was issued. *Id.*

On appeal, Heuft argued she was entitled to more due process before judgment was entered than was afforded by the show cause hearing. *Id.* at 634. The *IBF* court rejected this contention, but also found that the issuance of the judgment from a show cause hearing did not obviate the need for a restitution bond. *Id.* at 635-36. RCW 59.12.090 governs the issuance of a writ of restitution, regardless of whether there was a show cause hearing. *Id.*

The *IBF* court held no writ should have issued until the landlord had posted a bond that covered all of Heuft's potential damages, including costs and attorney's fees, as RCW 59.12.090 clearly intends. *Id.* at 636. The issuance of the sheriff's bond was insufficient because it indemnified the sheriff, and did not cover Heuft's costs and attorney's fees should the

eviction be determined to be wrongful. *Id.* at 636. The trial court therefore erred in issuing the writ.

Here, Wholesale Sports requested a restitution bond as a precondition to the Writ and provided evidence of substantial costs and losses it would incur as a result of having to close operations on the Premises and move its inventory. CP 289-92, 324-40. The Trial Court denied North Town's request. Prior to ruling, the Trial Court inquired as to whether North Town anticipated any more proceedings under the unlawful detainer cause number. RP 43:15-19. North Town's counsel responded: "No. We filed a separate -- we filed suit as to the breach of the lease under a separate cause number, your Honor." RP 43:20-22.

The same factual and legal issues North Town asserted as conclusions in the unlawful detainer action are to be actually tried and defended in the Breach Case. North Town is thus continuing to prosecute its action against Wholesale Sports just as RCW 59.12.090 anticipates, but is doing so under a separate cause number. *See* RP 19:16-25.

Relying on *Housing Authority of the City of Seattle v. Johnson*, 92 Wn. App. 1042, 1998 WL 712377 (Div. 1, Oct. 12, 1998) (Unpublished), however, the Trial Court ruled no restitution bond was required because the writ was being issued with the final judgment in the unlawful detainer action. RP 45:18-46:1.

Housing Authority does not govern this case. Reliance on an unpublished case is contrary to RCW 2.06.040. Further, the *Housing Authority* court considered whether a restitution bond was required in a residential unlawful detainer action, where the findings of a hearing officer collaterally estopped the tenant from contesting the facts underlying the unlawful detainer action, where the tenant had been arrested while in possession of a weapon that was at issue, and where the landlord was statutorily exempt from the restitution bond requirement. 1998 WL 712377, at *1, 5.

This dispute arose out of a commercial lease and the proceedings are governed by chapter 59.12 RCW. Collateral estoppel does not prevent Wholesale Sports from contesting North Town's eviction. Washington law supports just the opposite. It is North Town that is estopped from claiming the Transfer was a breach. Further, in *Housing Authority*, no additional fact finding would occur regarding the tenant's right of possession; whereas, here, a civil matter based upon the same disputed facts and principles of law remains pending.

In *IBF*, the court ruled a tenant had the right to a restitution bond pending final resolution of the dispute over her right to possession. Here, Wholesale Sports was entitled to a bond that would guarantee it would be reimbursed for any damages and costs that resulted from the wrongful

issuance of the Writ. By failing to acknowledge that North Town was continuing to prosecute its claims under a separate cause number and that Wholesale Sports and Alamo had a right to appeal, the Trial Court denied Wholesale Sports the protections to which it is entitled under RCW 59.12.090, and allowed North Town to circumvent the bond requirement through the filing of a separate civil action. The Writ was therefore issued in error.

F. Appellants are entitled to attorney's fees under RAP 18.1, RCW 59.12.090, and the terms of the Lease.

RCW 59.12.090 provides the defendant in an unlawful detainer action is entitled to all costs “which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.” The *IBF* court acknowledged those costs included attorney's fees. 141 Wn. App. at 636.

Suing out of a writ is wrongful where there is not reasonable cause to believe the grounds for the forfeiture are true. *Brown v. Peoples Nat. Bank of Washington*, 39 Wn.2d 776, 780, 238 P.2d 1191 (1951). Here, the suing out of the Writ was wrongful because North Town accepted rent payments from Wholesale Sports after it had knowledge of the Transfer both before and after the Closing Date. North Town had no reasonable cause to believe it had the right to possess the Premises during those

periods for which it had accepted rent. Wholesale Sports and Alamo are entitled to damages, including its costs and attorney's fees on this appeal pursuant to RCW 59.12.090.

In addition, per the Lease, the prevailing party is entitled to reasonable attorney's fees and costs up to \$7,500.00. CP 207, §35. The Lease provides attorney's fees include fees on appeal. CP 207, §35. The award of attorney's fees and costs is "in addition to any other relief which may be granted, whether legal or equitable." CP 207, §35. Wholesale Sports asks this court to enter an award of all fees and costs incurred on appeal pursuant to the Lease.

In addition to the fees and costs allowed on appeal by both the Lease and RCW 59.12.090, Wholesale Sports and Alamo ask this court to remand this matter for a determination of additional fees, costs and damages to which Wholesale Sports and Alamo are entitled under RCW 59.12.090.

V. CONCLUSION

According to settled Washington law, by accepting rent payments with knowledge of the Transfer, North Town manifested its consent to the Transfer and could no longer rely on the Transfer as an event of default. Washington law also holds that having accepted rent with knowledge of the Transfer, North Town could no longer rely upon that alleged breach in

an action for unlawful detainer. The Trial Court therefore erred in finding the acceptance of rent had no effect on either the fact of the breach or North Town's right to evict its tenant.

The Trial Court further erred by denying Wholesale Sports the protections offered by RCW 59.12.090, even though the Trial Court knew there would be further proceedings in a separate matter based upon the same facts and alleged breach, and even though Wholesale Sports and Alamo had a right to seek review.

The Court of Appeals should therefore reverse the Order for Writ, remand this matter for a determination of Wholesale Sports and Alamo's costs and damages incurred as a result of the wrongful issuance of the Writ, and award Appellants their attorney fees on appeal.

DATED this *30th* day of December, 2013.

Respectfully submitted,



C. MATTHEW ANDERSEN, WSBA No. 6868
COLLETTE C. LELAND, WSBA No. 40686
WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
Attorneys for Defendants/Appellants

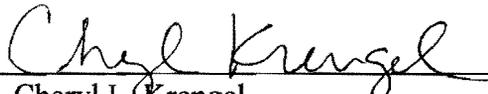
DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on December 30, 2013, I caused the foregoing document to be served on the following counsel in the manner indicated:

Gregory M. Miller	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Kenneth W. Hart	VIA CERTIFIED MAIL	<input type="checkbox"/>
Parker R. Keehn	HAND DELIVERED	<input type="checkbox"/>
Carney Badley Spellman, P.S.	BY FACSIMILE	<input type="checkbox"/>
701 Fifth Avenue, Suite 3600	VIA FEDERAL EXPRESS	<input type="checkbox"/>
Seattle, WA 98104-7010	VIA EMAIL	<input checked="" type="checkbox"/>

Attorneys for Plaintiff/Respondent

DATED on December 30, 2013, at Spokane, Washington.


Cheryl L. Kregel

APPENDIX A

WASHINGTON STATE COURT OF APPEALS, DIVISION III

NORTH TOWN MALL, LLC, a
Delaware limited liability
company,

Respondent,

vs.

WHOLESALE SPORTS USA,
INC., a Utah corporation; ALAMO
GROUP, LLC, a California limited
liability company,

Appellants,

and

UNITED FARMERS OF
ALBERTA CO-OPERATIVE
LIMITED, a foreign association;
ALL OTHER OCCUPANTS,

Defendants.

DECLARATION OF SHAWN
K. HARJU ATTACHING
TRIAL COURT DOCUMENTS
RELEVANT TO COURT'S
MOTION ON
APPEALABILITY

1. My name is Shawn K. Harju. I am an attorney licensed to practice in Washington since 2000, competent to make this declaration, and make it of my own personal knowledge and the records of my office.

2. I am the trial attorney for Respondent, North Town Mall, LLC., and participated in the trial court proceedings underlying this matter. Attached hereto as exhibits are trial court documents I believe are relevant to the appealability matter before the Court. In order to reduce the bulk, I am including only the relevant parts of attachments to the attached declaration in Ex. A, and the entire lease separately as Exhibit E.

3. Attached as Exhibit A is the July 19, 2013, Declaration of Shawn K. Harju and the following exhibits or portions of exhibits thereto:

- Ex. A thereto, Ten-Day Notice to Comply with Rental Agreement or Quite Premises dated March 19, 2013;
- Ex. B thereto, Complaint for Breach of Lease, Violation of the Fraudulent Transfer Act, and Piercing the Corporate Veil, filed March 25, 2013;
- Ex. C thereto, Affidavit for Attachment Under RCW 6.25.030 filed March 25, 2013, *without* any of its attachments;
- Ex. D thereto, Order to Show Cause issued March 25, 2013;
- Ex. E thereto, Shasky Declaration dated May 13, 2013 with all exhibits thereto *except* the copy of the lease;
- Ex. F thereto, Sullivan Declaration dated May 15, 2013, with its sole exhibit attached;
- Ex. H thereto, North Town's Response to Memorandum in Support of Restitution Bond filed June 17, 2013, with the supporting declarations of Shasky (dated June 13) and West (dated June 14);
- Ex. I thereto, Order for Writ of Restitution entered June 14, 2013;
- Ex. K thereto, Opposition to Defendants' Motion for Stay filed June 24, 2013, and supporting declaration of Shasky (dated June 19, 2013).

4. Attached as Exhibit B is North Town Mall's Opposition to Motion to Stay Proceedings Pending Appeal filed July 19, 2013;

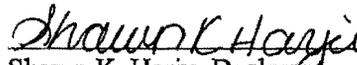
5. Attached as Exhibit C is the July 17, 2013, Writ of Restitution;

6. Attached as Exhibit D is July 26, 2013 Order on Motion to Stay Proceedings Pending Appeal.

7. Attached as Exhibit E is a complete copy of the lease between North Town Mall and Wholesale Sports, executed on April 25, 2012.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

DATED this 28th day of August, 2013, in Seattle, Washington.


Shawn K. Harju, Declarant

Carney Badley Spellman
701 Fifth Ave., Ste. 3600
Seattle, WA 98104-7010
P: 206-607-4163
Email: Harju@carneylaw.com

EXHIBIT B

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ORIGINAL FILED
MAR 25 2013
THOMAS R. FALLOUJST
SPOKANE COUNTY CLERK

**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF SPOKANE**

**NORTH TOWN MALL, LLC, a Delaware
limited liability company,**

Plaintiff,

v.

**UNITED FARMERS OF ALBERTA CO-
OPERATIVE LIMITED, a foreign
association; WHOLESALE SPORTS USA,
INC., a Utah corporation; ALAMO
GROUP, LLC, a California limited liability
company,**

Defendants.

NO. **13201201-9**
**COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
PIERCING THE CORPORATE VEIL**

COMES NOW plaintiff North Town Mall, LLC, by and through its attorneys, Shawn K. Harju and Carney Badley Spellman, P.S., and alleges as follows:

I. PARTIES

1.1 Plaintiff North Town Mall, LLC ("North Town") is a Delaware limited liability company with its principal place of business in Chicago, Illinois and doing business in Spokane, Spokane County, Washington.

1.2 Defendant United Farmers of Alberta Co-Operative Limited ("UFA"), upon information and belief, is a foreign association with its principal place of business in Calgary, Alberta, Canada.

**COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL - 1**

NOR057 0029 oe211v25k6

**CARNEY
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SPELLMAN**

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COPY

1 1.3 Defendant Wholesale Sports USA, Inc. ("Wholesale Sports"), upon
2 information and belief, is a Utah corporation with its principal place of business in Calgary,
3 Alberta, Canada and doing business in the State of Washington.

4 1.4 Defendant Alamo Group LLC ("Alamo Group"), upon information and belief,
5 is a California limited liability company with its principal place of business in California.

6 **II. JURISDICTION AND VENUE**

7 2.1 This Court has subject matter jurisdiction and personal jurisdiction over the
8 defendants in this lawsuit.

9 2.2 Venue is properly in Spokane County Superior Court because the property at
10 issue is located, in Spokane County.

11 **III. FACTS**

12 3.1 Plaintiff North Town owns North Town Mall located at 4750 North Division
13 in Spokane, Spokane County, Washington ("North Town Mall").

14 3.2 An affiliate of North Town, Spokane Valley Mall LLC ("Spokane Valley"),
15 owns Spokane Valley Mall (fka Spokane Valley Mall Plaza) located at 14700 E. Indiana
16 Avenue in Spokane Valley, Spokane County, Washington ("Spokane Valley Mall").

17 3.3 On March 16, 2001, the predecessor-in-interest to Spokane Valley, Spokane
18 Mall Development Company Limited Partnership, entered into a 15-year Shopping Center
19 Lease Agreement with Sports Warehouse, Inc. dba Sportsman's Warehouse ("Sportsman's
20 Warehouse").

21 3.4 On November 3, 2008, UFA incorporated UFA Holdings, Inc., a Utah
22 corporation ("UFA Holdings").

23 3.5 Immediately subsequent to the incorporation of UFA Holdings, Sportsman's
24 Warehouse and UFA Holdings executed a Collateral Assignment of Lease (the "Collateral
25 Assignment") as part of a transaction in which UFA Holdings agreed to loan money to
26

COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL - 2

NOR057 0029 cc211v25k6

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1 Sportsman's Warehouse. In the event of a default by Sportsman's Warehouse under the terms
2 of the Collateral Assignment, UFA Holdings would acquire certain business assets of
3 Sportsman's Warehouse, including some or all of its stores. Spokane Valley consented to the
4 Collateral Assignment.

5 3.6 Sportsman's Warehouse did ultimately default under the Collateral
6 Assignment and UFA purchased Sportsman's Warehouses locations throughout the northwest
7 United States, including the store at Spokane Valley. UFA rebranded the stores it purchased
8 as Wholesale Sports.

9 3.7 On June 1, 2009, Spokane Valley and UFA Holdings entered into a Second
10 Amendment of the Lease whereby the trade name of the store located at Spokane Valley
11 changed from Sportsman's Warehouse to Wholesale Sports.

12 3.8 On July 21, 2011, UFA Holdings changed its name to Wholesale Sports USA,
13 Inc.

14 3.9 In the Spring of 2012, it was decided by the management of the leasing group
15 for General Growth Properties, Inc. (the indirect parent entity that ultimately owns, operates
16 and oversees leasing matters for Spokane Valley Mall and North Town Mall) that it would be
17 in the best interest of Spokane Valley Mall and North Town Mall if Wholesale Sports was
18 relocated to North Town Mall.

19 3.10 On April 25, 2012, Spokane Valley and Wholesale Sports entered into a Lease
20 Termination Agreement whereby Wholesale Sports was to vacate from its location at
21 Spokane Valley Mall.

22 3.11 On that same date, North Town entered into a 10-year Shopping Center Shop
23 Lease Agreement (the "Lease") with Wholesale Sports for the rental of approximately 34,371
24 square feet of commercial property located in North Town Mall and commonly known as
25

26

COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL - 3

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1 Space 12 (the "Premises"). Wholesale Sports opened its new location in North Town Mall on
2 July 20, 2012.

3 3.12 Paragraph 10.01 of the Lease contains a covenant of continuous operation:

4 10.01 Tenant's Business Operations. Tenant covenants during the first five
5 (5) years after the Rental Commencement Date to keep the entire Premises
open for business a minimum of ten continuous hours a day 7 days per week

6

7 3.13 Section 19 of the Lease prohibits assignment of the Lease by Wholesale
8 Sports:

9 19.01 Assignment Prohibited. Landlord and Tenant acknowledge that a
10 Shopping Center is an interdependent enterprise and that the realization of the
benefits of this Lease, both to Landlord and Tenant, is dependent upon Tenant
11 creating and maintaining a successful and profitable retail operation in the
Premises. Landlord and Tenant further acknowledge that the character and
12 quality of Tenant's operation, and of the Shopping Center, will be enhanced by
Tenant's use of its best efforts to establish a successful character and image.
Accordingly, with the exception of a Permitted Transfer as defined below,
13 *Tenant shall not have the power to transfer, assign, sublet, enter into license
or concession agreements, change ownership, mortgage or hypothecate this
Lease or Tenant's interest in and to the Premises (collectively referred to in
14 this Section as "Assign" and "Assignment") or permit the use of the Premises
by licensees or concessionaires or other persons other than Tenant and its
employees, without first procuring the written consent of Landlord, which
15 consent shall not be unreasonably withheld, conditioned or delayed. Such
prohibition against assigning or subletting shall include any assignment,
16 subletting or transfer by operation of law. With the exception of a Permitted
Transfer, any transfer of this Lease by Tenant through merger,
17 consolidation, transfer of assets, or liquidation shall constitute a prohibited
Assignment for purposes of this Section. In the event that Tenant hereunder
18 is a corporation, limited liability company, an unincorporated association, or a
partnership, the transfer, assignment, or hypothecation of any stock or
19 ownership interest in such corporation, company, association or partnership
in the aggregate in excess of forty-nine (49%) shall be deemed a prohibited
20 Assignment within the meaning of this Section.*

21 19.02 Consent Required. With the exception of a Permitted Transfer, any
22 attempted Assignment, subletting, mortgage, hypothecation, change of
ownership, license or concessionaire agreement, or other or other [sic]
23 "transfer of intent" without Landlord's consent shall be void, shall confer no
benefit on any third party, and shall constitute a default hereunder which, at
24 the option of Landlord, shall result in the termination of this Lease or the
exercise by Landlord of any of its other remedies hereunder.

25 ***

26

COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL - 4

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1 19.04 Permitted Transfer. Notwithstanding anything in this Lease to the
2 contrary, Tenant may, without the consent of Landlord (any of the following
3 being referred to as a "Permitted Transfer"), (i) assign this Lease or sublet all
4 or any part of the Premises to any person or entity which controls, is controlled
5 by or is under common control with Tenant or (ii) assign this Lease to any
6 person or entity (x) resulting from the merger or consolidation with Tenant or
7 (y) which acquires either the ownership interest in or substantially all of the
8 assets of Tenant, provided, however, in the case of this subpart (ii) such person
9 or entity has a tangible net worth at least as great as the tangible net worth of
10 Tenant as of the date of this Lease.

11 (Emphasis added.)

12 3.14 In September 2012, Wholesale Sports submitted paperwork to North Town
13 requesting the tenant allowance to which it was entitled under the Lease. As the paperwork
14 was not initially correct, North Town assisted Wholesale Sports with making a proper request
15 that was resubmitted on January 24, 2013. Per the request of Wholesale Sports, the request
16 was expedited so that a representative of Wholesale Sports could pick up the allowance of
17 \$746,162.00 from the offices of General Growth Properties, Inc. in Chicago, Illinois on
18 February 6, 2013.

19 3.15 Just one week later, on or about February 12, 2013, North Town received
20 notification from UFA and Wholesale Sports that the business interests of Wholesale Sports
21 were to be acquired by Sportsman's Warehouse and Alamo Group with Alamo Group
22 acquiring all of the capital stock of Wholesale Sports. Such notification stated that the
23 transactions were expected to close in mid-March 2013. Regarding the Lease, the notification
24 indicated:

25 *This letter serves as notice of a pending change of control of the Lessee
26 under your lease with WSS. UFA will be pleased to work with all of WSS's
landlords to ensure a smooth transition to the new owners. (Emphasis added.)*

3.16 North Town learned from the local Spokane newspaper on February 21, 2013
that Alamo Group, as the new owner of the Wholesale Sports store located in North Town
Mall, intended to close the store in March 2013. This was the first that North Town had
heard of any plans to close the Premises.

COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL - 5

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1 3.17 Despite representations to the contrary by Alamo Group principal, Donald
2 Gaube, that the Premises would remain open for business, the Wholesale Sports store at
3 North Town Mall has not been open for business since March 10, 2013. Based upon lawsuits
4 filed in the United States District Court for the Western District of Washington, North Town
5 has reason to believe that Alamo Group has already closed three other stores located in the
6 States of Washington and Idaho which it acquired from Wholesale Sports.

7 3.18 On or about March 19, 2013, North Town posted at the Premises, and served
8 on the Registered Agent of Wholesale Sports, its Ten-Day Notice to Comply with Rental
9 Agreement or Quit Premises on the grounds that Wholesale Sports is violation of the
10 continuous operations covenant contained in the Lease (paragraph 10.01), as well as the
11 provision prohibiting assignment of the Lease (Section 19). While Mr. Gaube has claimed
12 that Alamo Group intends to reopen the Premises, employees for Wholesale Sports have been
13 seen palletizing the store's inventory.

14 **IV. FIRST CAUSE OF ACTION – BREACH OF LEASE AGREEMENT**

15 4.1 North Town reasserts the above allegations contained in paragraphs 1.1
16 through 3.18 as though fully set forth herein.

17 4.2 Wholesale Sports defaulted under the Lease when it assigned the Lease to
18 Sportsman's Warehouse and/or Alamo Group without the consent of North Town.

19 4.3 Wholesale Sports further defaulted under the Lease when it ceased its business
20 operations at North Town Mall.

21 4.4 As a result of the default of Wholesale Sports North Town is suffering, and
22 shall suffer, damages including but not limited to future rent to be paid under the Lease in the
23 approximate amount of \$4,543,530.00.

24 4.5 Wholesale Sports is also responsible for all expenses that North Town will
25 incur as a result of Wholesale Sports defaulting under the Lease, including but not limited to
26

COMPLAINT FOR BREACH OF
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1 those expenses related to returning the Premises to the condition called for in the Lease and
2 the cost to locate a new tenant for the Premises.

3 4.6 In accordance with the terms of the Lease and Washington law, North Town is
4 entitled to a judgment against Wholesale Sports USA, Inc. for an amount likely to exceed
5 \$4,543,530.00 and is further entitled to pre- and post-judgment interest, attorneys' fees, and
6 costs.

7 **V. SECOND CAUSE OF ACTION –**
8 **FRAUDULENT TRANSFER ACT (RCW 19.40) VIOLATION**

9 5.1 North Town reasserts the above allegations contained in paragraphs 1.1
10 through 4.6 as though fully set forth herein.

11 5.2 Wholesale Sports leased the Premises from North Town and agreed to
12 exclusively occupy the Premises and agreed to pay rent and other monetary obligations
13 through the term of the Lease ending in 2022. Wholesale Sports USA, Inc. defaulted under
14 the Lease causing North Town at least \$4,543,530.00 in damages.

15 5.3 Wholesale Sports, with the assistance of UFA and Alamo Group, fraudulently
16 transferred all of its assets to Sportsman's Warehouse and/or Alamo Group so as to put those
17 assets out of reach, and thus to avoid the liability of Wholesale Sports, to North Town for rent
18 and other obligations owed under the Lease.

19 5.4 Wholesale Sports made this transfer with the intent to hinder, delay and/or
20 defraud North Town.

21 5.5 Wholesale Sports made this fraudulent transfer while it was obligated to North
22 Town under the Lease and knowing full well that the remaining assets of Wholesale Sports
23 were unreasonably less than the amounts owed to North Town under the Lease.

24 5.6 Wholesale Sports knew that, after the fraudulent transfer, it would not have the
25 financial means to satisfy its obligations to North Town under the Lease.

26
COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
FRAUDULENT TRANSFER ACT,
AND PIERCING THE CORPORATE
VEIL – 7

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1 5.7 The transfers to Sportsman's Warehouse and Alamo Group included all of the
2 assets of Wholesale Sports, thereby rendering Wholesale Sports insolvent.

3 5.8 As a result of the fraudulent transfer, North Town is entitled to a judgment
4 against UFA, Wholesale Sports and Alamo Group for all amounts owed by Wholesale Sports
5 to North Town (at least \$4,543,530.00), pre- and post-judgment interest, attorneys' fees, and
6 legal costs; having the transfer from Wholesale Sports to Sportsman's Warehouse and Alamo
7 Group avoided; attaching, in accordance with RCW 6.25, the assets of UFA, Wholesale
8 Sports and Alamo Group to satisfy the debt of Wholesale Sports to North Town; and other
9 relief necessitated by justice.

10 **VI. THIRD CAUSE OF ACTION - PIERCE THE CORPORATE VEIL**

11 6.1 North Town reasserts the above allegations contained in paragraphs 1.1
12 through 5.8 as though fully set forth herein.

13 6.2 Wholesale Sports is wholly-owned and controlled by UFA and/or wholly-
14 owned and controlled subsidiaries of UFA. UFA so dominates and controls Wholesale Sports
15 that they must be viewed as one and the same legal entity such that UFA is liable for the
16 actions of Wholesale Sports. UFA has improperly used the corporate form in an attempt to
17 shield itself from liability for the actions of Wholesale Sports.

18 6.3 Wholesale Sports fraudulently conveyed its assets to Sportsman's Warehouse
19 and Alamo Group, thereby wrongfully using the limited liability shields of UFA, Wholesale
20 Sports and Alamo Group to evade its responsibilities to North Town under the Lease for the
21 Premises.

22 6.4 North Town has been harmed by the fraud of UFA, Wholesale Sports and
23 Alamo Group by virtue of the fact that it is now insolvent and unable to meet its obligations
24 to North Town under the Lease.

25
26

COMPLAINT FOR BREACH OF
LEASE, VIOLATION OF THE
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AND PIERCING THE CORPORATE
VEIL - 8

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6.5 The limited liability shields of UFA, Wholesale Sports and Alamo Group must be disregarded in order to prevent an unjustified loss to North Town. North Town is entitled to judgment against all defendants for all amounts found to be due and owing from Wholesale Sports in this matter plus pre- and post-judgment interest, attorneys' fees and costs.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiff North Town Mall, LLC, prays for relief as follows:

1. For judgment against defendants in the amount of \$4,543,530.00 or such other amount as proven at trial;
2. For avoidance of the transfer from Wholesale Sports to Sportsman's Warehouse and Alamo Group;
3. For attachment of the assets of defendants pursuant to RCW 6.25, *et seq.*;
4. For plaintiff's attorneys' fees and costs and interest as provided for in contract, statute and otherwise; and
5. For such other relief as the Court deems just and proper in the circumstances.

DATED this 22nd day of March 2013.

CARNEY BADLEY SPELLMAN, P.S.

By: Shawn K. Harju
 Shawn K. Harju, WSBA #29942
 Attorney for North Town Mall, LLC

COMPLAINT FOR BREACH OF LEASE, VIOLATION OF THE FRAUDULENT TRANSFER ACT, AND PIERCING THE CORPORATE VEIL - 9

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APPENDIX B

NO. 31771-4-III

WASHINGTON STATE COURT OF APPEALS, DIVISION THREE

NORTH TOWN MALL, LLC,
a Delaware limited liability company,

Respondent,

vs.

WHOLESALE SPORTS USA, INC., a Utah corporation; ALAMO
GROUP, LLC, a California limited liability company,

Appellants,

and

UNITED FARMERS OF ALBERTA CO-OPERATIVE LIMITED, a
foreign association; ALL OTHER OCCUPANTS,

Defendants.

On appeal from Spokane County Superior Court,
Hon. Maryann C. Moreno

**NORTH TOWN'S ANSWER TO THE COURT'S
MOTION TO DETERMINE APPEALABILITY**

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INDEX TO EXHIBITS TO HARJU DECLARATION

EXHIBIT	DOCUMENT
Ex. A	July 19, 2013, Declaration of Shawn K. Harju with relevant attachments thereto: <ul style="list-style-type: none">• Ex. A thereto, Ten-Day Notice to Comply with Rental Agreement or Quite Premises dated March 19, 2013;• Ex. B thereto, Complaint for Breach of Lease, Violation of the Fraudulent Transfer Act, and Piercing the Corporate Veil, filed March 25, 2013;• Ex. C thereto, Affidavit for Attachment Under RCW 6.25.030 filed March 25, 2013, <i>without</i> any of its attachments;• Ex. D thereto, Order to Show Cause issued March 25, 2013;• Ex. E thereto, Shasky Declaration dated May 13, 2013 with all exhibits thereto <i>except</i> the copy of the lease;• Ex. F thereto, Sullivan Declaration dated May 15, 2013, with its sole exhibit attached;• Ex. H thereto, North Town's Response to Memorandum in Support of Restitution Bond filed June 17, 2013, with the supporting declarations of Shasky (dated June 13) and West (dated June 14);• Ex. I thereto, Order for Writ of Restitution entered June 14, 2013;• Ex. K thereto, Opposition to Defendants' Motion for Stay filed June 24, 2013, and supporting declaration of Shasky (dated June 19, 2013).

- Ex. B July 19, 2013, Opposition to Motion to Stay Proceedings Pending Appeal;
- Ex. C July 17, 2013, Writ of Restitution;
- Ex. D Order on Motion to Stay Proceedings Pending Appeal;
- Ex. E Lease between North Town Mall and Wholesale Sports, executed on April 25, 2012 (complete).

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Crooks, “Discretionary Review of Trial Court Decisions
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61 WASH. L. REV. 1541, 145-46 (1986) 11

I. INTRODUCTION.

The Court has set this matter for hearing on its own motion to determine if the appeal from the writ of restitution in the unlawful detainer proceeding is appealable as of right and, if not, whether discretionary review should be granted. For the reasons detailed below, it is Respondent North Town Mall, LLC's position that the writ is not appealable because it was a summary proceeding used to determine the issue of possession and not a final determination of the rights of the parties, *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P.2d 986 (2000). Appellants cannot meet the requirements for discretionary review under RAP 2.3(b). **First**, there was no obvious or probable error by the trial court in issuing the writ. **Second**, since Appellants planned to vacate the premises some nine years before the end of the ten-year lease, the challenged order does not substantially limit their freedom to act.

North Town suggests that, if it is not dismissed, the current appellate matter should be stayed pending the outcome of the civil action for breach of lease and damages now pending in the trial court and set for trial in April 2014. Any appeal arising from that civil action, which derives from the same essential facts as the writ of restitution, should be heard as one appeal with this one, rather than piecemeal. Because Appellants have no immediate or continuing interest in possession of the premises, a stay is appropriate no matter how appealability is determined.

II. FACTS RELEVANT TO COURT'S MOTION.¹

A. Overview.

In most landlord-tenant disputes, the unlawful detainer is typically filed first. Appellants' conduct, however, led to the somewhat atypical procedural posture in this case, in which the civil action was filed first.

Less than one year into the ten-year lease by and between Appellant Wholesale Sports USA, Inc. ("Wholesale Sports") and Respondent North Town Mall, LLC ("North Town") dated April 25, 2012 (the "Lease", Harju Dec., Ex. E), North Town learned that Wholesale Sports was selling its 34,371 square foot sporting goods store at North Town Mall to Appellant Alamo Group, LLC ("Alamo") and that Alamo "intended to liquidate the premises at North Town Mall." These plans constituted breaches of provisions of the Lease that forbade an assignment without North Town's permission and failing to operate a store in the premises.² On March 10, Wholesale closed its store at North Town Mall.³ At that point, rent was current and paid.⁴ To secure itself against the potential loss of the rental income on the more than nine years remaining on the Lease, and other damages it had suffered, North Town filed a civil

¹ Trial court documents relevant to the Court's motion are provided in the Declaration of Shawn K. Harju which is being filed along with this Answer ("Harju Dec."). Page references are, e.g., Harju Dec., pp. A-1 to A-3; pp. 8-28 to E-29.

² Harju Dec., p. A-54, ¶ 8 (Declaration of Greg Sullivan, dated May 15, 2013, ¶ 8).

³ Harju Dec., p. A-32, ¶ 11 (Declaration of John Shaksy, dated May 13, 2013, ¶ 11).

⁴ *Id.* ¶ 10.

action for breach of contract on March 25, 2013 (the “Civil Case”) and simultaneously sought to attach the store’s inventory.⁵

After the store re-opened on March 29,⁶ Wholesale Sports failed to pay rent for April and May. Accordingly, on May 2, 2013, North Town filed an unlawful detainer action.⁷ April rent was ultimately paid late on May 6,⁸ and Wholesale Sports answered the petition for a writ of restitution on May 10. The matter was heard on a show cause hearing on May 23.⁹ Judge Moreno granted the writ of restitution (the “Writ”) based on the show cause hearing with an oral ruling on May 28; no bond was provided for in the proposed order.¹⁰ Wholesale Sports sought a bond on June 13, which was denied. On June 14, the order for the writ of restitution was entered, which provided that “Plaintiff shall not be required to post a restitution bond.”¹¹

The Writ itself was entered on June 17, 2013.¹² Wholesale Sports moved to stay the Writ that same day. On June 20, Wholesale Sports filed a notice of appeal. Following a hearing on Wholesale Sports’ motion to stay the Writ, the court entered an order on June 21 giving Wholesale

⁵ Harju Dec., pp. A-19 to A-20. (Affidavit for Attachment under RCW 6.25.030, dated March 22, 2013).

⁶ Notably, the store re-opened on the same day the show cause hearing was noted for the writ of attachment. The hearing was stricken in an effort to informally resolve the dispute.

⁷ Harju Dec., p. A-32, ¶ 12 (Shaksy Decl. ¶ 12).

⁸ *Id.* May rent was paid on May 20, 2013.

⁹ Harju Dec., p. B-4 (Opposition to Motion to Stay Proceedings Pending Appeal at 4:13-14).

¹⁰ *Id.* at B-14-18.

¹¹ Harju Dec., p. A-74 (Order for Writ of Restitution).

¹² Harju Dec., p. C-1-2 (Writ of Restitution).

Sports until July 21, 2013 to vacate the premises; required a cash bond by Wholesale Sports to cover the June and July rent; and prohibited Wholesale Sports from displaying liquidation sale signage. The court did *not* stay the Writ pending appeal.¹³

On June 27, Wholesale Sports then moved in the trial court to stay the Civil Case. The trial court has deferred a ruling on that motion until this Court determines whether this appeal will proceed.¹⁴

B. Specific Lease Provisions & Facts Relevant to Court's Motion.

Section 19 of the Lease prohibits assignment of the Lease by Wholesale Sports:

19.01 Assignment Prohibited. Landlord and Tenant acknowledge that a Shopping Center is an interdependent enterprise and that the realization of the benefits of this Lease, both to Landlord and Tenant, is dependent upon Tenant creating and maintaining a successful and profitable retail operation in the Premises. Landlord and Tenant further acknowledge that the character and quality of Tenant's operation, and of the Shopping Center, will be enhanced by Tenant's use of its best efforts to establish a successful character and image. Accordingly, with the exception of a Permitted Transfer as defined below, ***Tenant shall not have the power to transfer, assign, sublet, enter into license or concession agreements, change ownership, mortgage or hypothecate this Lease or Tenant's interest in and to the Premises*** (collectively referred to in this Section as "Assign" and "Assignment") ***or permit the use of the Premises by licensees or concessionaires or other persons other than Tenant and its employees, without first procuring the written consent of Landlord***, which consent shall not be unreasonably withheld, conditioned or delayed. Such prohibition against assigning or subletting shall include any assignment, subletting or transfer by operation

¹³ Harju Dec., pp. A-83 to A-84 (Order on Motion to Stay)).

¹⁴ Harju Dec., pp. D-1 to D-2 (Order on Motion to Stay Proceedings Pending Appeal, dated July 26, 2013).

of law. With the exception of a Permitted Transfer, ***any transfer of this Lease by Tenant through merger, consolidation, transfer of assets, or liquidation shall constitute a prohibited Assignment for purposes of this Section.*** In the event that Tenant hereunder is a corporation, limited liability company, an unincorporated association, or a partnership, ***the transfer, assignment, or hypothecation of any stock or ownership interest in such corporation, company, association or partnership in the aggregate in excess of forty-nine (49%) shall be deemed a prohibited Assignment within the meaning of this Section.***

19.02 Consent Required. With the exception of a Permitted Transfer, any attempted Assignment, subletting, mortgage, hypothecation, change of ownership, license or concessionaire agreement, or other or other [sic] “transfer of intent” without Landlord’s consent shall be void, shall confer no benefit on any third party, and shall constitute a default hereunder which, at the option of Landlord, shall result in the termination of this Lease or the exercise by Landlord of any of its other remedies hereunder.

19.03 Request for Consent. With the exception of a Permitted Transfer where the consent of Landlord is not required, should Tenant desire Landlord’s consent to a proposed transfer of interest, ***Tenant shall request such consent in writing and provide Landlord with a copy of the instrument which will be used to document such transfer, or provide Landlord with a statement, certified to be true and correct by Tenant, of the terms and conditions under which such transfer is to be made together with a non-refundable processing fee (the “Fee”) payable to Landlord in the amount of One Thousand and Five Hundred Dollars (\$1,500.00).*** Said Fee shall be compensation to Landlord for costs incurred in preparing and processing the instruments necessary to document such consent, and Landlord shall not be obligated to entertain or consider any request for consent to assignment of this Lease unless such request is accompanied by the Fee. Any instruments used to document such transfer shall include acknowledging that such assignee specifically assumes the obligations of Tenant hereunder. Notwithstanding any such assignment or other transfer of interest, it is specifically understood that the assigning or transferring Tenant shall continue to be fully responsible for all of the Tenant obligations hereunder.

19.04 Permitted Transfer. Notwithstanding anything in this Lease to the contrary, Tenant may, without the consent of Landlord (any of the following being referred to as a “Permitted Transfer”), (i) assign this Lease or sublet all or any part of the Premises to any person or entity which controls, is controlled by or is under common control with Tenant or (ii) assign this Lease to any person or entity (x) resulting from the merger or consolidation with Tenant or (y) which acquires either the ownership interest in or substantially all of the assets of Tenant, provided, however, in the case of this subpart (ii) such person or entity has a tangible net worth at least as great as the tangible net worth of Tenant as of the date of this Lease.

(Emphasis added.)¹⁵

On February 12, 2013, North Town Mall received notification from United Farmers of Alberta Cooperative Limited (“UFA”) and Wholesale Sports that the business interests of Wholesale Sports were to be acquired by Sportsman’s Warehouse and Alamo, with Alamo acquiring all of the capital stock of Wholesale Sports. The notification stated that the transactions were expected to close in mid-March 2013. Regarding the lease, the notification indicated:

This letter serves as notice of a pending change of control of the Lessee under your lease with [Wholesale Sports]. UFA will be pleased to work with all of [Wholesale Sports’] landlords to ensure a smooth transition to the new owners.

(Emphasis added.)¹⁶ No request for consent or instrument of transfer for review or \$1,500 transaction fee were included with the notice—as

¹⁵ Harju Dec., pp. A-19 to A-23 (Affidavit for Attachment under RCW 6.25.3030, Exhibit 1).

¹⁶ Harju Dec., p A-53, ¶ 5 (Declaration of Greg Sullivan, dated May 15, 2013 “Sullivan Decl.” ¶ 5).

required by the Lease.¹⁷ North Town learned from the local Spokane newspaper on February 21, 2013 that Alamo, the new owner of the Wholesale Sports store located in North Town Mall, intended to close the store in March 2013. This was the first that North Town Mall had heard of any plans to close the premises.¹⁸

On March 11, 2013, one day after Wholesale Sports closed its doors, the transaction between UFA, Wholesale Sports and Alamo closed.¹⁹ On March 19, 2013, North Town served Wholesale Sports with a 10-Day Notice to Comply with Rental Agreement or Quit Premises, alleging breaches of continuous use and assignment provisions of the Lease.²⁰ Although the 10-Day Notice did not allege non-payment of rent as a breach, April and May rent was unpaid when the unlawful detainer action was filed on May 2, 2013. While the unlawful detainer action was ongoing, June rent was not paid. The trial court ultimately ordered Wholesale Sports to pay a cash bond covering June rent and prorated July rent through the July 21, the date on which Wholesale Sports was ordered to surrender the premises to North Town.

¹⁷ Harju Dec., p. A-60 (Exhibit).

¹⁸ Harju Dec., pp. A-39; A-41 (Shasky Decl., ¶ 6, Exhibit 3).

¹⁹ *Id.* (¶ 5).

²⁰ Harju Dec., pp. A-5 to A-6 (Ten-Day Notice to Comply with Rental Agreement or Quit Premises).

III. REASONS WHY APPEAL SHOULD BE DISMISSED

A. The June 14, 2013 Writ of Restitution is not a Final Order and Therefore Is Not Appealable under RAP 2.2(a)(3).

The judgments, orders, and rulings that are appealable as a matter of right are listed in RAP 2.2. What the judgments, orders, and rulings listed in RAP 2.2 all have in common is a measure of finality or an impact on the parties that is sufficiently fundamental to warrant the right to immediate appellate review. A show cause hearing in an unlawful detainer action does not qualify. *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P.2d 986 (2000).

Of the 13 subsections of RAP 2.2(a) which specify appealable orders, subsection (a)(3) controls here. It provides, in pertinent part, for an immediate appeal of

[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

This Court has affirmatively held that “A show cause hearing is not the final determination of the rights of the parties in an unlawful detainer action.” *Carlstrom*, 98 Wn. App. at 788. Rather, it is a summary proceeding to determine the issue of possession, pending a lawsuit. *Id.* A writ of restitution for the premises does not, for example, determine the plaintiff’s right to any other relief as prayed for in the complaint and provided for in chapter 59.18 RCW, including damages for unpaid rent. Thus, the Supreme Court and Court of Appeals have long applied the language of RAP 2.2(a)(3), or its predecessor to deny the immediate

appealability of orders on the issue of possession issued before a final judgment on the merits, even well before statehood.

In *Chambers v. Hoover*, 3 Wash.Terr. 20, 21, 13 Pac. 905 (1887), the Court denied a motion to dismiss the appeal of a writ of restitution, holding that, unlike the situation here, in *Chambers* it appeared the order granting the writ was also the judgment in the entire case, and was therefore appealable. Consistent with *Chambers*, this Court in *Meadow Park Garden Assoc. v. Canley*, 54 Wn. App. 371, 372, 773 P.2d 875 (1989), held that no appeal would be allowed from an order in an unlawful detainer action that required the issue of immediate right of possession be resolved in show cause hearing by court sitting without jury. More recently in *State v. Trask*, 91 Wn. App. 253, 957 P.2d 781 (1998), this Court found that the trial court's order was entered before the trial court disposed of all claims and all parties; consequently, that landowner was neither permitted nor required to appeal such order under RAP 2.2(d) (which is now RAP 2.2(a)(3)).

In the foregoing decisions, RAP 2.2(a)(3) (or its forerunner) was applied and appealability was determined according to whether the order at issue determined or discontinued the *entire* action. If the order fell within the RAP 2.2(a)(3) language because it disposed of all the claims and rights of all the parties, as it did in *Chambers*, it was appealable. If the order did not fall within 2.2(a)(3) because it did not determine all the rights and claims of all the parties, as in *Meadow Park* and *Trask*, then no appeal could lie. Thus, both this Court and the Supreme Court have looked

to the *effect* of an order issued from a show cause hearing to determine its appealability.

Thus, appealability in this case rests on whether the Writ for which Wholesale Sports and Alamo seek review was a final disposition of all the rights of the parties in the full action. Applying the foregoing rule to the facts here shows that the Writ, on its own, is not appealable as of right. No judgment has been issued in the case below. The Writ did not dispose of North Town's claim to unpaid rent under RCW 59.18. In its May 1, 2013 complaint, North Town prayed for relief of both restitution of the premises and damages for unpaid rent. When the Writ was issued on June 14, 2013, no judgment was entered regarding the further relief sought by North Town in its complaint. Wholesale Sports had not yet paid June rent or any future rents under the lease. Although on June 21, 2013, Wholesale Sports was ordered to pay June rent and prorated July rent into trust, North Town's entitlement to rent for the duration of the long-term lease has not been resolved. Thus, the effect of the writ is not to determine or discontinue the action pursuant to RAP 2.2(a)(3). It is not appealable.²¹

²¹ Appellants may argue that once the issue of possession ceases to be an issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, thus effectively ending the unlawful detainer action. However, the question of *right* to possession must have resolved itself before the action can be so converted. *Munden v. Hazelrigg*, 105 Wn.2d 39, 47, 711 P.2d 295 (1985). Here, because Appellants claim the Writ was in error, the right to possession is not yet resolved and the unlawful detainer action cannot be converted.

B. The Criteria for Discretionary Review Under RAP 2.3 Are Not Met.

The trial court's order granting the Writ was not in error -- obvious, probable, or otherwise -- such as to warrant review under any of the circumstances set out in RAP 2.3(b)(1)-(3). Moreover, given their own actions and intent, Appellants cannot meet the other requirements of subsections (1) and (2), that further proceedings are rendered useless, or that the challenged order substantially limits their freedom to act. Appellants stated clearly their intent to vacate the premises some nine years *before* expiration of the ten-year lease. They do not seek to operate in the mall -- they have made clear they are done with that location. They thus present no sense of urgency on getting an immediate resolution over the preliminary issue of the right to possession, since they have eschewed any such right. In these circumstances, the well-settled law disfavoring piecemeal appeals shows why discretionary review must be rejected.²²

At the outset, the arguments set out *supra* demonstrate that this unlawful detainer matter is not ripe for appeal and that there are no circumstances warranting a piecemeal appeal of the entire matter. The settled law of unlawful detainers which holds that the appeal is only proper *after* the entire matter is litigated, including all associated damages, controls and should be respected. Particularly where the Appellant asserts they do not intend to use the property for the purpose stated in the Lease --

²² See, e.g., *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) ("Interlocutory review is disfavored", citing prior decisions). *Accord*, Crooks, "Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure," 61 WASH. L. REV. 1541, 145-46 (1986).

for commercial sales as an anchor to the mall – but at most for liquidation purposes, there is neither urgency nor propriety in an early appeal on the right of possession itself.

Nevertheless, Appellants may try to argue obvious error on two grounds: First that the trial court erred in issuing the Writ when North Town Mall had accepted rent for the period set out in the 10-day notice; and second, that the trial court erred in failing to require a bond to secure the Writ. Both arguments fail.

First, it is well-established that acceptance of rent does not waive a landlord's right to forfeiture under the statute where the alleged breach is continuing. North Town's 10-Day Notice did not allege breach on the grounds of unpaid rent; it alleged breach by way of Wholesale Sports' prohibited transfer of its interest in the lease to Alamo without consent, which consent was required under Section 19 of the lease. That breach is continuing in nature and, therefore, non-waivable. *Second*, no bond was required on the Writ because the trial court reasonably concluded that the proper bond amount was zero in light of evidence that Appellants were acting as liquidators not retailers, and therefore would sustain no damages from the Writ.

1. No Waiver Occurred.

Relief under the unlawful detainer statute requires: (1) the tenant's breach; (2) notice to the tenant of the existence of a breach together with an opportunity to correct; and (3) failure by the tenant to correct the breach. RCW 59.12.030(4); *Wilson v. Daniels*, 31 Wn.2d 633, 643, 198

P.2d 496 (1948). Although it is the case that “if a landlord accepts rent with knowledge of a prior breach of a lease covenant, the landlord waives the right to evict based *on that breach*[,]” *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757, 764, 205 P.3d 937, 941 (2009) (citing *Signal Oil Co. v. Stebick*, 40 Wn.2d 599, 603–04, 245 P.2d 217 (1952)) (emphasis added), it is equally well-established that acceptance of rent “does not operate as a waiver of a continuance of the breaches or of any subsequent breaches.” *Wilson*, 31 Wn.2d at 640. As the Washington Supreme Court stated in *Signal Oil Co.*,

‘Where the cause of forfeiture is a continuing breach or the breach of a continuing covenant, such as the breach of a covenant as to the use of the premises, * * * the waiver of one breach, as by the acceptance of rent accruing after the breach, does not destroy the breached condition or covenant, or waive subsequent breaches thereof, *such waiver discharging only the particular breach.*’

Signal Oil Co., 40 Wn.2d at 603 (quoting 51 C.J.S., Landlord and Tenant, § 117d(2), page 708) (emphasis added). This Court reiterated the rule in *M H 2 Co. v. Hwang*, 104 Wn. App. 680, 684, 16 P.3d 1272 (2001):

Generally, if a tenant fails to pay rent and the landlord accepts later rental payments, the breach is not wiped out; the landlord has merely waived a right under the statute to declare forfeiture *for the nonpayment*. Such a waiver does not waive a continuing breach or any future non-continuing breaches. Therefore, a landlord may later declare forfeiture for an older, continuing breach or any new breach.

(emphasis added).

Here, North Town never sought forfeiture on the basis of default in rent. At the time of North Town's March 19, 2013 10-Day Notice, Wholesale Sports was not in default for failure to pay rent. Although when the unlawful detainer action was filed on May 2 Wholesale Sports was in default on April rent, the unlawful detainer was premised on the non-monetary breaches alleged in the notice, not a default in rent. By accepting rent once the unlawful detainer was underway, North Town at most waived its right to declare forfeiture based on *those breaches*. The breach related to Wholesale Sports' prohibited transfer under the lease was never cured, was thus continuing, and could not have been waived by acceptance of the rent.

Moreover, even if acceptance of rent could operate as a waiver of other non-monetary breaches, Appellants cite no authority in support of their position that rent accepted *after* an unlawful detainer is filed waives non-monetary breaches alleged in the 10-Day Notice. In *Signal Oil*, relying on the rule that at the time notice is served a tenant must be in violation of the provisions of the lease in the notice (40 Wn.2d at 602), the Court held that Signal Oil could not commence an action for unlawful detainer against its tenant because rent had been paid *after* the notice was

served but *before* the unlawful detainer had been filed. *Id.* at 605.²³ Thus, under *Signal Oil*, waiver only occurs if rent is accepted *after* the notice is served but *before* the unlawful detainer action is filed. If the breach in the notice is “continuing” and rent is accepted after the notice is served but before the unlawful detainer action is commenced, a new notice must be issued before the action for forfeiture is filed. *Id.* at 604 (citing *Wilson*, 31 Wn.2d at 644).

In this case, Wholesale Sports paid March rent on February 28, 2013. North Town’s 10-Day Notice was served on March 19, 2013, alleging breaches that occurred between March 10 and March 29 (failure to operate in the premises) as well as breaches that continue to this very day (the transfer of Wholesale Sports’ stock). North Town filed its unlawful detainer action on May 2, 2013. Rent for April through July 21, 2013, when Wholesale Sports vacated the premises, was not received until *after* the unlawful detainer action was filed. Applying *Signal Oil* to the facts at bar, no waiver occurred.

²³ In *Signal Oil*, the tenant paid rent on October 1. *Id.* at 602. The breach alleged in the notice occurred between October 1 and October 21, the day the notice was served. *Id.* However, the unlawful detainer action was not filed until January 21. *Id.* at 603. The Court held that, “[h]aving accepted the rent for November, December and January, when it commenced this action, [Signal Oil] waived the breach of the terms of the lease relied upon in its notice of October 21[.]” *Id.* at 606.

2. The Bond amount of zero was within the trial court's discretion.

It was within the trial court's discretion to find that the proper bond amount in this case was zero. Although a bond is required by RCW 59.12.090, the statute leaves to the court's discretion the *amount* of the bond:

Before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond *in such sum as the court or judge may order. . . .*²⁴

See also RCW 4.44.470 (“Whenever by statute a bond or other security is required for any purpose in an action or other proceeding in a court of record and if the party shall apply therefor, the court shall have power to prescribe the amount of the bond or other security notwithstanding any requirement of the statute[.]”); *Jensen v. Torr*, 44 Wn. App. 207, 212, 721 P.2d 992 (1986) (trial court's denial of a request to raise a bond's amount is reviewed for an abuse of discretion).

Moreover, RCW 4.44.470 affords the trial court wide discretion in setting the amount of bond in a civil action. Although no Washington appellate cases are directly on point, other jurisdictions which have addressed the issue have held that “the bond amount may be zero if there is no evidence the party will suffer damages from the preliminary” ruling. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d

²⁴ The only reported case construing the statute is not on point because it did not address the reasonableness of the amount of the bond at issue. In *IBF, LLC v. Heuft*, 141 Wn. App. 624, 636, 174 P.3d 95 (2007), the court held that, because the purpose of the bond is to indemnify the defendant, it was error to issue the writ on a bond that indemnified the sheriff, not the defendant. *Id.* at 635-36. The issue in *this* case is whether it was within the trial court's discretion to determine a bond amount of \$0, which turns on the unique facts here. The reasonableness of the bond amount was not at issue in *IBF*.

878, 882 (9th Cir. 2003) (citing *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000) (applying Fed. R. Civ. P. 65 regarding preliminary injunctions).²⁵ In *Gorbach* the issue was over the amount of the bond required on a preliminary injunction preventing the INS from conducting denaturalization proceedings against plaintiffs. *Gorbach*, 219 F.3d at 1091. On review, the government argued that the district judge abused her discretion by not requiring a bond. The Ninth Circuit disagreed, holding that “the purpose of such a bond is to cover any costs or damages suffered by the government, arising from a wrongful injunction, and the government did not show that there would be any.” *Id.* at 1092.

In this case, as in *Gorbach*, the trial court was well within its discretion when it determined that the proper bond amount was zero in light of evidence that Appellants were currently acting as liquidators not retailers, with the intention to close the store in March 2013, and would therefore sustain no damages by way of the Writ.

Although Appellants offered evidence as to damages they would incur from closing the store and liquidating the inventory at another location they offered no evidence these costs were actually *caused* by the Writ and would not have been incurred irrespective of the Writ in the process of the store’s planned closure. Moreover, the trial court did not find that Appellants would suffer any damages, rejecting their proffered

²⁵ Rule 65 provides, in relevant part: “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”

evidence. Appellants had the burden of establishing any damages and there are no findings of any such damages.²⁶ This Court on appeal may not make a finding of fact, which is the province of the trial court.

IV. IN THE ALTERNATIVE, THIS APPEAL SHOULD BE STAYED PENDING RESOLUTION OF NORTH TOWN'S BREACH OF CONTRACT ACTION.

Even should the Court determine that, theoretically, Appellant's appeal of the Writ can proceed either as a matter of right or on discretionary review, it should be stayed pending determination of the remaining parts of the underlying action, for reasons of judicial economy and to avoid a piecemeal appeal.

It is well settled, as noted *supra*, that piecemeal appeals are disfavored. Even assuming there is a right to appeal the Writ, the Civil Case and the damages to be determined in it arise from the same set of facts as those underlying the Writ. Any appeal from those two matters should be heard in one appellate proceeding for the sake of this Court's and the parties' resources. They should only have to go through the appellate process once over the matters arising from the Lease.

Moreover, there is no urgency on resolving the unlawful detainer appeal. Appellants have no interest in regaining possession of the premises. They are not residential renters or public housing residents who need immediate shelter. They are commercial enterprises, companies that

²⁶ On appeal, the trial court's findings of fact must support its conclusions of law; the findings must be supported by substantial evidence. *M H 2 Co.*, 104 Wn. App. at 685. Substantial evidence is evidence sufficient to persuade a fair-minded person of the finding's truth or correctness. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 352-53, 172 P.3d 688 (2007).

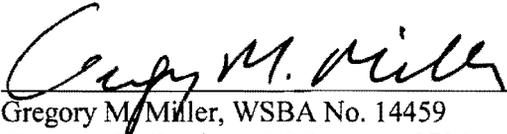
are finished with this location, but still need to resolve their ultimate obligations under the ten-year lease that was signed in April, 2012. Those obligations, which are the subject of the Civil Case, will be resolved in the damages litigation in due course. Any appeal should address everything.

V. CONCLUSION

North Town respectfully requests the Court dismiss this appeal as premature and not proper for discretionary review under RAP 2.3(b); or, alternatively, stay it pending resolution of North Town's breach of contract action and consolidate it with the appeal that results therefrom.

DATED this 28th day of August, 2013.

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By 

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WASHINGTON STATE COURT OF APPEALS, DIVISION III

NORTH TOWN MALL, LLC, a Delaware
limited liability company,

Respondent,

vs.

WHOLESALE SPORTS USA, INC., a Utah
corporation; ALAMO GROUP, LLC, a
California limited liability company,

Appellants,

and

UNITED FARMERS OF ALBERTA CO-
OPERATIVE LIMITED, a foreign association;
ALL OTHER OCCUPANTS,

Defendants.

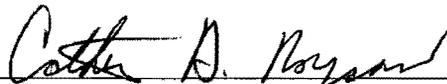
NO. 31771-4-III

CERTIFICATE OF
SERVICE

I declare under penalty of perjury that I electronically filed the originals with the Court of Appeals, Div. III using JIS Link, and caused copies of *North Town Mall's Answer to The Court's Motion to Determine Appealability, Declaration of Shawn K. Harju in Support of North Town Mall's Answer to The Court's Motion to Determine Appealability with Exs. A-E*, and this Certificate of Service to be served upon counsel of record on August 28, 2013, as follows:

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DATED this 28th day of August, 2013.


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