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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31771-4-III

WASHINGTON COURT OF APPEALS, DIVISION III

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

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

BRIEF OF RESPONDENT NORTH TOWN MALL, LLC

Hon. Maryann C. Moreno

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ORIGINAL

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I. INTRODUCTION

Respondent North Town Mall, LLC (“North Town”) was given notice on February 12, 2013, by its major tenant Appellant Wholesale Sports USA (“WSS”), of a pending change of control transaction. But North Town was not given a request to consent to assignment of WSS’ 10-year Lease, nor a proposed assignment-change of control instrument, nor the \$1,500 processing fee, all of which were required under ¶ 19 of the Lease. The cryptic notice gave no indication of a change in operation of the store, just control. On February 21, North Town was alerted by a local newspaper article that the store would close in less than a month despite the 10-year Lease. On March 10, WSS closed indefinitely. With inadequate information and unsatisfactory responses from WSS personnel, North Town took action to protect itself.

First, it sent notice of anticipatory breach, then a ten-day notice to comply with the lease or quit the premises. *Second*, on March 25 with the store still closed, it filed a damages action alleging breach of the Lease, fraudulent transfer, piercing the corporate veil, and seeking immediate attachment of the inventory at a show cause hearing on the 29th. *Third*, on May 2 North Town filed this unlawful detainer because, when the store “re-opened” on March 29 (the day of the attachment show cause hearing), it was in material breach by: 1) having a known liquidator, Appellant Alamo Group (“Alamo”), as WSS’ new, unqualified owner without North

Town's approval, breaching the non-assignment provisions of ¶ 19; and 2) operating as a liquidator, in breach of the use and continuous operation clauses. It later failed to pay April and May rent.

All indications from Appellants were that the store would not remain open long or to operate consistent with Lease requirements. The unlawful detainer was needed to protect the value of North Town's asset (the mall) by preserving its character, which would be damaged by the presence of a short-term liquidator, as well as the loss of a major retail tenant.

Judge Moreno saw the situation for what it was, despite Appellants' refusal to provide documents of the "change of control." Appellants' plan after the sale of WSS was to force favorable terms to escape the obligations of WSS' 10-year Lease by closing the store and restructuring the company, leaving WSS an empty shell and North Town with no leverage or recourse. Judge Moreno rightly granted the writ of restitution because material breaches of the assignment and use provisions were never cured or waived.

This appeal fails under settled law. Acceptance of belated rent payments for April and May neither cured nor waived the non-monetary breaches of the Lease's assignment or use provisions, nor could they. Appellants' absurd argument would mean a tenant could breach material use, operations, or other provisions of their lease with impunity so long as rent was paid; a cancerous tenant could never be removed. Fortunately, that is not the law.

It is undisputed (if also undocumented) that Alamo acquired all of WSS' stock and WSS never sought North Town's consent to this change of ownership and control, in breach of ¶ 19 of the Lease. Judge Moreno heard Appellants admit they intended to leave as soon as they could, barely into the 10-year term, and that they would not operate as a retail tenant as the Lease required but as a liquidator, which was expressly prohibited. She heard them decline to provide the relevant documents to North Town or to the Court -- documents they claimed would show the change of ownership was permitted under the Lease -- and to say that the documents would be better provided "through discovery" in the separate damages action. "Trust us," they seemed to say, as they also said with the faux letter of credit offered to North Town that is discussed *infra*. When evicted, Appellants sought only a short stay from the trial court to conduct their liquidation sale. Tellingly, Appellants did not seek a stay in this Court pending appeal because they had no intent to operate a retail store at the mall pursuant to the Lease.

Based on the evidence of Appellants' ongoing breaches and clear intent to leave, Judge Moreno issued the writ of restitution ("Writ") so that North Town could restore the premises to a conforming retail use, critical to preserving the quality and character of the mall. Because the Writ was a final judgment that allowed this appeal, no bond was required of North Town. Judge Moreno should be affirmed and North Town awarded its fees under the Lease.

II. RESTATEMENT OF ISSUES

1. Must the trial court be affirmed because there was sufficient evidence of uncured breaches by Appellants Wholesale Sports (“WSS”) and Alamo Group (“Alamo”) to support the Writ of Restitution?
2. Must the trial court be affirmed because there is sufficient evidence to support the Writ of restitution on the basis of any or all of the following material breaches of the 10-year Lease: 1) WSS made an unauthorized assignment of the Lease; and/or 2) WSS and Alamo operated the premises in violation of the Lease by using the premises for liquidation purposes and had no intent to return to a retail operation; and/or 3) WSS and Alamo demonstrated their intent to vacate the premises as soon as possible after gutting WSS in an effort to insure that North Town would have no genuine recourse for their breach of the ten-year term?
3. Where Appellants chose not to provide the documents governing the claimed “change of control” of WSS to Alamo, must any argument of insufficient evidence to determine breach be rejected under judicial estoppel or as invited error?
4. Where Appellants chose to not provide the documents governing the claimed “change of control” of WSS to Alamo, is North Town entitled to the conclusive presumption the documents would show an unauthorized transfer, in violation of the Lease?
5. Must Appellants’ fee request be denied absent a final determination on appeal or remand that they were wrongfully evicted?
6. Should North Town be awarded its reasonable attorneys’ fees on appeal pursuant to the Lease and statutes if the case is affirmed?

III. RESTATEMENT OF THE CASE ¹

A. Procedural Overview.

This appeal over immediate possession of the premises arose after WSS issued a notice of pending change of control on February 12, 2013 (CP 133, App. A) for which it did not seek consent from North Town as required under ¶ 19 of the Lease. The cryptic notice did not indicate there would be any material change in the operation of the WSS store at North Town Mall. North Town only learned of the new owners' plan to close the store from a newspaper article on February 21, 2013. CP 259-60, App. B. It immediately began inquiries into Appellants' intentions and took steps to protect itself. *See* CP 262-263, App. C hereto (notice of anticipatory default and to comply with the lease dated February 22); CP 269-273, App. D hereto (Sullivan Dec. describing North Town's efforts and contacts with Appellants in February and early March, 2013).

Following the sale and dismembering of WSS, Appellants made plain (primarily through Alamo) they did not want the North Town Mall space or the 10-year obligation under the Lease and that Sportsman's Warehouse, which had bought ten other WSS stores, would not operate the North Town store. *See e.g.*, CP 271-272 ¶¶ 7 – 13 (Sullivan Dec.). The purpose of the Lease was to secure a long-

¹ The hearings are in one volume, paginated consecutively. Cites are to hearing date and page. The page ranges are: May 23, pp. 1-21; May 28, pp. 22 – 32; June 14, pp. 33-47; and June 21, 2014, pp. 48 – 68. The Lease is at CP 10 – 100.

term tenant to insure the mall's economic health and stability as a whole. *See, e.g.*, CP 37, Lease ¶ 19.01.

To protect itself, North Town sent WSS a certified notice of anticipatory default dated February 22, 2013, based on public information WSS was planning to close the store, CP 262-63, App. C; then notices of default by certified mail dated March 5 and March 7, CP 265-68, App. E; and a 10-day notice to cure breaches or quit the premises on March 19. CP 102. With the store closed but inventory apparently on the premises, North Town filed its damages suit for breach of the Lease, fraudulent transfer, piercing the corporate veil, and for immediate attachment of WSS' inventory on March 25. The March 29 show cause hearing was stricken when the store re-opened on that date, removing attachment as a partial remedy, but leaving damages claims under the three theories. The civil damages action is pending and in discovery.² Because the store re-opened as a liquidator under the operation of Alamo, and rent was not paid for April or May, this unlawful detainer was filed on May 2. CP 1-8 (complaint). Judge Moreno granted the Writ of Restitution ("Writ") after two hearings on May 23 and 28, entering the order on June 14 and the Writ on June 17. CP 321-22; 372-73.

² Little occurred in the damages action (Spokane Superior Court No. 13-2-01201-9 ("Damages Case")) until the unlawful detainer was resolved by Judge Moreno and this Court determined that the appeal would proceed as of right.

B. Background of the Parties and the Lease, its Strong Non-Assignment and Strict Use Provisions, and Expedited Payment to WSS of its Tenant Improvement Allowance.

The Lease between North Town and WSS was signed April 25, 2012 (CP 58-59, Lease), and WSS opened its store at the mall in July, 2012. CP 269 ¶ 3 (Sullivan Dec.). Because the success of the mall is an “interdependent enterprise” with WSS that requires both WSS and North Town to maintain a certain character and quality to be successful, the Lease has a strong non-assignment clause that prohibits most assignments absent prior consent from North Town.

19.01. Assignment Prohibited. Landlord and Tenant acknowledge that a **Shopping Center is an interdependent enterprise** and that **the realization of benefits of this Lease, both to Landlord and Tenant, is dependent on Tenant creating and maintaining a successful and profitable retail operation on 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 will 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. . . . **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.

Lease ¶ 19.01 (emphasis added), CP 37. *See also* ¶¶ 19.02 – 19.03, CP 37-38 (setting forth the requirements of consent for transfers and the protocol for seeking consent, including payment of the \$1,500 processing fee).

Since WSS is a corporation and Alamo purports to have acquired 100% of its stock, the transfer to Alamo falls under the final quoted sentence. Absent North Town's express consent, the stock transfer to Alamo was a prohibited transfer per the underlined portions *supra*. It is undisputed consent was never sought or given.

Consistent with these requirements, the Lease also has strong, specific, and material use provisions. CP 26-27, Lease ¶ 9. These provisions expressly prohibit such things as conducting business as a "second-hand store, adult book store, massage parlor, or any auction, distress, fire, bankruptcy, moving, liquidation, or going-out-of-business sale," Lease ¶ 9.03(a) (CP 26-27), among other prohibited uses (*see* CP 27, Lease ¶¶ 9.01, 9.03(b) – (g)). Also consistent with the "interdependent enterprise" concept are the provisions in ¶ 10 which require continuous operation of the premises with appropriate quantity and quality of merchandise and adequate staff. CP 27-28.

In September 2012, WSS sought payment from North Town of the Lease's allowance of \$756,000 for tenant improvements, but submitted a defective application. CP 270 ¶ 4. After North Town assisted, WSS submitted a proper application for full payment on

January 24, 2013. *Id.* WSS requested expedited payment, which was granted. WSS picked up the check at North Town's parent's office in Chicago on February 6, 2013. *Id.*

C. WSS' Actions in February and March 2013 Which Demonstrated WSS Intended to Quit the Premises Early.

1. Notice to North Town of WSS' "change of control," and the inadvertent notice to North Town by the newspaper of WSS's intent to permanently close.

Six days after picking up a check for three-quarters of a million dollars, on February 12, WSS sent its change of control notice to Greg Sullivan at the parent company for North Town, to whom such notices should be sent. CP 270 ¶¶ 2, 5; CP 133, App. A hereto; *see* CP 54-55 ¶ 38.04 (notices). The notice said in part:

On February 10, 2013, UFA Co-operative Limited ("UFA") and Wholesale Sports USA, Inc. ("WSS") or "Lessee") signed a definitive agreement with Sportman's Warehouse, Inc. ("Sportman's") and Alamo Group LLC ("Alamo"). Under this agreement, Sportman's and Alamo will acquire the business interests of WSS, and Alamo will purchase all of the capital stock of WSS.

The transactions are expected to close in mid-March of 2013.

Representatives of Alamo and/or Sportman's will contact you regarding the transactions. This letter serves as notice of a pending change of control of the Lessee under your lease with WSS. UFA will be pleased to ensure a smooth transition to the new owners.

CP 133, App. A hereto. The notice directed questions to the general counsel of UFA without specifying the role UFA played in the transaction or anything further about the roles of WSS, Alamo, or

Sportsman's going forward. The notice did not contain a request for North Town to consent to the transfer, nor did it contain the \$1,500 fee required by ¶9.03 of the Lease or a proposed instrument of transfer for review or approval. CP 270 ¶ 5; CP 158 ¶¶4-5 ((John Shasky Declaration, the mall's general Manager). Mr. Sullivan stated that "[t]he notice was unclear as to which entity had purchased which [Wholesale Sports] stores, but indicated [North Town's parent] or North Town would be contacted by appropriate representatives." CP 270 ¶5. No such contact was made to North Town. *Id.*

The cryptic notice did not provide meaningful substantive information about what was in store for the mall as a result of the contemplated change in control of a major tenant.

Enlightenment came not from WSS, nor its acquiring stockholder Alamo, nor a "representative of Sportman's," but rather from fortuitous coverage by the local Spokesman-Review newspaper which informed North Town on February 21 that:

The new owner of the former Warehouse Sports outdoor and sporting equipment outlets in Spokane and Coeur d'Alene will close the two stores in mid-March.

Employees at the stores said company officers informed them on Wednesday [February 20] that their stores' final day will be March 10.

The Announcement was a sudden reversal, following last week's announcement that Warehouse Sports was selling 14 U.S. stores back to Sportsman's Warehouse, a Utah company, and a partner, Alamo Group.

#

Last week's announcement said the sale was part of UFA's refocusing solely on its Canadian retail business.

Canadian newspapers reported that Sportsman's Warehouse plans to operate 10 of the reacquired stores, but that Alamo Group, which bought four stores, was closing them in March.

CP 259, App. B hereto (emphasis added).

2. **North Town has to scramble on news of the impending closure of its major tenant WSS, and that WSS no longer has assets, only the liability of the Lease.**

This news of impending closure, which was not intended to reach North Town personnel, changed the landscape. Suddenly, Sullivan and Shasky were confronted with the imminent closure of a major tenant, not a mere change of control of a major retailer that would continue to operate for the remaining nine years of the Lease. The mall's personnel scrambled to get answers and protect North Town's interests.

On February 22, the day after the news article, Sullivan tried to contact Mr. Bingley of WSS. He ultimately reached UFA's general counsel and WSS' corporate secretary, Mr. Nysetvold. CP 271, App. D Mr. Sullivan learned from Mr. Nysetvold that "UFA had sold 14 WSS stores to Sportsman's Warehouse and that Sportsman's Warehouse had sold four of those stores to Alamo Group" and confirmed that the four acquired by Alamo would be closed and that Sportsman's Warehouse did not want to take over the

Lease at North Town Mall.” CP 271 ¶ 7. When Sullivan raised the Lease’s obligations including the consent to transfer requirement, Nysetvold told Sullivan to “get in touch with Don Gaube of Alamo Group, not WSS, regarding the location at North Town Mall.” *Id.*

Thus, on February 22, 2013, Mr. Shasky sent by certified mail the notice of anticipatory default to Mr. Bingley at WSS to protect North Town’s rights. CP 262-263, App. C. Like all of North Town’s notices and the Lease, it had strong and detailed non-waiver provisions. *Id.* See also CP 159 ¶ 9 (Shasky Dec.) and Lease no waiver provisions, ¶¶ 24.05 (CP 46), 38.03 (CP 54).³

Mr. Sullivan was able to speak with Mr. Gaube in February, and with Mr. Nysetvold and Mr. Bingley in early March. These conversations informed Sullivan that neither WSS nor Alamo was interested in, nor going to, operate the premises as required under the Lease. CP 271-272. For instance, Mr. Gaube spoke of helping to find “a replacement tenant” while Mr. Nysetvold and Bingley asked Sullivan if North Town would accept Alamo as a replacement tenant, a suggestion quickly rejected (Alamo was a known

³ ¶ 24.04 states: “Strict Performance. The failure of Landlord to insist upon Tenant’s strict performance of an of the terms, conditions and covenants herein contained shall not be deemed a waiver of any rights or remedies that Landlord may have, and shall not be deemed a waiver of any subsequent breach or default by tenant in performing the terms, conditions and covenants herein contained.”

¶ 38.03 states: “No Waiver. No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing and is signed by Landlord.”

liquidator, not an operator of retail sports stores) and a clear indicator of their intent to not comply with the Lease. *See* CP 271-272 ¶¶ 8-9.⁴ Although the two WSS representatives first “indicated [on the March 4 phone call that] they would try to incentivize Sportsman’s Warehouse to take over the Lease,” on March 6 they called Sullivan to tell him Sportsman’s Warehouse “would not take over the Wholesale Sports store at North Town Mall,” though they professed to want to “resolve” the issue. CP 271-272, ¶¶ 9-10.

Mr. Sullivan also testified that neither North Town nor its parent received any documentation from Appellants regarding the nature of the transaction other than the original February 12 letter, and that “Mr. Gaube has been unable to respond to [the North Town parent’s] inquiry as to which entity received the proceeds from the sale of the other 10 stores to Sportsman’s Warehouse.” CP 272 ¶¶ 12-13.

The only information North Town had was that whatever assets WSS possessed when it signed the Lease were now gone; Alamo owned its stock and appeared to be in operational control of the store and the Lease; and Alamo did not intend to operate as a

⁴ Mr. Nysetvold’s declaration does not dispute Mr. Sullivan’s recitation in his May 15, 2013, declaration of their conversation that Nysetvold and Bingley asked Sullivan if North Town would accept Alamo, the known liquidator, as a replacement tenant. *See* CP 150-152, Mr. Nysetvold’s May 22, 2013 declaration. Mr. Gaube’s declarations do not dispute that Alamo’s only intent was to operate as a liquidator, not a retailer.

retailer but only as a liquidator (in breach of the Lease) with someone bankrolling Alamo's interim operations. While later pleadings and the Gaube declarations asserted that WSS was still the tenant and responsible for the Lease, no evidence indicated that WSS had any assets of its own or the ability to satisfy any of the requirements of the Lease. That ability had been stripped away by the "change of control" transaction which Appellants refused to disclose in any meaningful detail, in violation of ¶ 19.01 of the Lease. By all appearances and representations, Alamo had a high level of control over WSS it refused to fully disclose. Meanwhile, nothing more was stated other than what was in the February 12 change of control letter about the degree of control or the roles of the other principals specified in the change of control letter -- UFA and Sportsman's Warehouse. The letter stated both were involved in the transaction and UFA would work with North Town "to insure a smooth transition." CP 133. They both likely had important financial and operational roles.

3. Appellants' false statements at the hearings highlight the obviousness of the multiple breaches of the Lease and its non-assignment provisions.

WSS' lack of assets and any financial capacity following the "change of control" are why North Town requested a short term (six months) letter of credit ("LOC") from Alamo "while the parties discussed a possible resolution of this matter." CP 272 ¶ 13

(Sullivan Dec.). But as Mr. Sullivan noted, “no such letter was ever posted.” *Id.* Indeed, while Mr. Gaube, Alamo’s managing member, testified in his first two declarations that he had provided an LOC for six months’ rent and sent it to North Town’s parent’s general counsel⁵ and that North Town’s parent’s counsel had approved the form of the LOC,⁶ and Appellants’ counsel argued those representations to Judge Moreno (RP 5/23/13 p. 8:20 – p.9:1), it became embarrassingly apparent at the May 23 and 28 hearings that an approved, executed and valid LOC was **never** provided to North Town or issued by a bank. Mr. Gaube had to admit to Judge Moreno in his third declaration dated May 28 that his sworn representations in his two earlier declarations were not accurate. CP 279.⁷ Nor had

⁵ See Gaube Declaration dated May 10, 2013, CP 130 ¶ 12 (“Since the sale of stock, North Town Mall, LLC has requested, and Alamo Group, LLC has provided, a letter of credit for the benefit of Landlord, equivalent to six lease payments payable upon default.”); Gaube Declaration dated May 22, 2013, CP 142 ¶ 7 (representing that Alamo Group had obtained for the benefit of North Town a letter of credit “guaranteeing payment of the equivalent of six months rent in the event of default” by completing the paperwork required by the issuing bank, implying that this financial guarantee was valid and in place).

See also CP 145-146, the unsigned, “sample only” form of a standby letter of credit allegedly sent to North Town’s general counsel. The “sample only” form did not name North Town or its parent company and shows a value of only \$20,000 per month rather than the \$36,719 per month in rent and other charges due under the lease and necessary to keep North Town whole. The shortfall between the proffered “sample only” LOC and the actual rent and other charges would therefore be over \$100,000 for the six months.

⁶ See CP 142:13-14 “After receiving [North Town’s parent’s counsel’s] approval of the letter of credit, . . .”

⁷ Mr. Gaube testified in his third declaration dated May 28, 2013, after reciting that he had believed the underlying statements in the prior declarations to
(Footnote continued next page)

the LOC form been “approved” by North Town’s parent’s counsel,⁸ as Mr. Gaube had claimed. All this destroyed any credibility Mr. Gaube and Appellants might otherwise have had while also documenting the continuing breaches of the Lease’s assignment provisions by a transfer to an unqualified liquidator without seeking the required consent. Mr. Gaube and Appellants were similarly inaccurate in their filings related to the restitution bond they sought after Judge Moreno ruled she would issue the Writ.⁹

have been true “at the time I signed the declaration[s],” that in fact, those material statements were not true:

Thus, **my statements** that Alamo Group had provided the letter of credit to North Town and that I had signed the letter of credit and sent the signed letter of credit application and continuing reimbursement to US Bank **were not correct.**

CP 279: 17-20 (emphasis added). Although Mr. Gaube states later in his May 28 declaration that he had fixed the LOC application problems and expected approval of the LOC from the bank that same day (CP 280 ¶ 8), the record reflects that no such approved LOC was ever tendered to North Town or provided to the Court.

⁸ Appellants’ counsel had to admit on May 28 that Mr. Gaube’s LOC representations were materially incorrect, including the alleged “approval” of the form LOC by North Town’s parent’s counsel: “And we received word from Ms. Harju today that [North Town’s parent’s counsel] **had never approved the draft letter of credit**, which could have caused additional confusion there.” RP 5/28/13 p. 25:13-20 (emphasis added). “Confusion” is not the right word.

⁹ Similar to the LOC inaccuracies, Mr. Gaube and Appellants purported to “rely” on a non-existent “Billy Nichols declaration” that was never filed in court to try and establish damages for purposes of requesting a large restitution bond. Mr. Gaube’s June 13 declaration in support of a restitution bond (and also Appellants’ June 13 Memorandum in Support of Restitution Bond) claimed that WSS would “lose approximately \$1,300,000” and \$165,000 as a result of the issuance of the Writ. CP 325 ¶¶ 4 - 5 (Gaube Dec.); CP 290:8-10 (memo in support). These materials were before Judge Moreno before she signed the order for the writ of restitution. See RP 6/14/13 pp. 33-47.

None of this escaped the attention of Judge Moreno. The faux LOC became a focus in Judge Moreno's colloquies with counsel on May 23. North Town's counsel pointed out that some representations made in Appellants' declarations "simply are not true." RP 5/23/13 pp. 6-7. On hearing Appellants' apparent dismissiveness of the importance of the LOC, Judge Moreno bored in on the issue:

J. Moreno: So, there is a letter of credit or there isn't? . . . Well, then why do they say there's no letter of credit? . . . Well, no, let's stop - - stick to that - - . . . - - letter of credit. Either you have a letter of credit or you don't have a letter of credit. It seems like a simple issue.

Ms. Leland: Mr. Gaube stated in his declaration that he did get the letter of credit.

J. Moreno: What did he do with it?

Ms. Leland: I think that it – the bank has it.

J. Moreno: Has there been a copy provided to the other side?

Ms. Leland: I do not believe [so] based on what Mr. Gaube has told me.

RP 5/23/13 pp. 9-10 (some opposing counsel responses omitted).

Nonetheless, Appellants continued to argue that this unsubstantiated, faux LOC helped show Alamo's bona fides by giving the landlord "assurance that rent would continue to be paid." RP 5/23/13 pp.14-15. Appellants argued that the assurance of payment of rent "was not an issue as well, because Alamo was purchasing the stock **and had the means to cover the rent and demonstrate[d] that by executing the letter of credit,**" arguing

there was no continuing breach justifying a writ of restitution. RP 5/23/13 p. 15 (emphasis added); *see also id.*, p. 11.

For good reason, North Town's counsel was not satisfied with these responses. She pointed out she had not seen a copy of the LOC, just a draft, and that "if there was one, that would be relatively easy to provide that." *Id.*, p. 17:8-15. She then went to the heart of North Town's concern:

Ms. Harju: My client's concern is here, from what they see, there's been an assignment; Alamo Group is a known liquidator; it appears that that's how the store is being operated to some extent at this point and --

J. Moreno: What does that mean?

Ms. Harju: That there's -- they -- they're not honoring previous gift cards for Wholesale Sports. They're also -- all sales are final, as indicated on the receipts. . . . even though on the outside it appears that it's the Wholesale Sports, that there are indications that it's become more of a liquidated -- liquidation sale, which is exactly what my client did not want to have happen.

J. Moreno: So if it's a liquidation sale, this lease has another 8 or 9 years to go, right? . . . What does that -- what does that mean? If it's a liquidation sale, it's a liquidation sale meaning -- they're going to liquidate and be done?

Ms. Harju: We don't know, because we can't seem to get the answers as to what the intention is. We were told -- we were told that there -- there was -- weren't going to be changes. Then the store -- the newspaper said the stores were closing; the store closed; then it reopened. . . . it's true . . . that there's some communication issues that appear to be between the parties and within the parties as well . . .

J. Moreno: So is there anything that the tenants can do at this point that would satisfy your client?

Ms. Harju: . . . it would probably help if we could see the documentation so we could understand what the true nature of the transaction is and what the true nature of Wholesale Sports is at this point; if it is in fact the tenant.

RP 5/23/13 pp. 17-19.

A tenant typically resists an unlawful detainer because they want to remain in the premises and use the space for the intended purpose. There was no such pretense by Appellants. Any possible doubt was laid to rest in the continued hearing on May 28 when Appellants' counsel said that North Town's prosecution of the unlawful detainer was "a curious way to try to compel a tenant to **stay in the mall longer than the tenant wants to . . .**," making explicit Appellants' determination to leave right away. RP 5/28/13 pp. 25:24 – 25:1 (emphasis added). The parties had also clarified that the separate damages case was pending so that there was nothing to be tried in the unlawful detainer case. *See* RP 5/23/13 p. 19:16 – p. 20:25; RP 6/14/13 p. 43:15 – 23.¹⁰ This meant the Writ would issue as part of a final judgment.

4. **Judge Moreno issues the Writ of Restitution and does not impose a restitution bond on North Town.**

Appellants' clear breach of the assignment provision and undeniable intent to operate only as a liquidator, and then only for a short time period, made Judge Moreno's decision to issue the writ as

¹⁰ *See also* RP 5/23/13 p. 11:18-21; RP 6/14/13 p. 44:2-3 for examples of Appellants' admissions they intended not to operate consistent with the Lease, and to leave as soon as possible.

part of a final judgment straightforward, meaning there was no need for North Town to post a restitution bond. *See* RP 5/28/13 p. 27:3 – p. 30:25 (denying Appellants’ motion for mediation and granting the writ);¹¹ RP 6/14/13 p. 44:17 – p. 46:1 (ruling denying restitution bond). The restitution bond by North Town was not necessary because, as Judge Moreno noted, the unlawful detainer case was

¹¹ After noting ¶ 19.01 requires the landlord’s consent for a change of control or ownership in excess of 49% of the stock, which change or transfer of ownership is deemed a prohibited assignment, Judge Moreno ruled in relevant part:

. . . an assignment [such as that] is prohibited unless consent is obtained.
. . . assignments without consent are considered a default and could and would result in termination of the lease.

There’s a procedure for requesting consent, and that is set out in subpart of 19.03 of the lease agreement. It has to be in writing. The landlord must receive a copy of the instrument that documents the sale. There’s a processing fee. I think about \$1500. And there was a requirement that there be some acknowledgement that the assignee would be assuming the obligations of the tenant.

It’s uncontested that Alamo has purchased all the stock of the – of the tenant. That would be, of course, over 49%. And accordingly, then, under subpart 01 – Section 19, subpart 01, consent is required.

It’s also uncontested Wholesale Sports did not utilize the consent mechanism that was provided in the lease. So therefore, the bottom line is they are in breach of the lease.

. . . However, waiver does not destroy the actual breached condition or covenant. . . . in my mind, acceptance of rent for April and May does not waive the claim for breach of the assignment without consent. They’re two totally different things.

. . . Alamo has ownership of the stock of Wholesale and has basically taken over control of those premises. So they are – they are the party that is in control of the premises, so they will remain as a party.

RP 5/23/13 pp. 27-30.

over and was not proceeding to trial. The applicable statute, RCW 59.18.380, only applied if the unlawful detainer was going to trial, which was not the case here where the writ was going to be issued with a final judgment. *See* RP 6/14/13 p. 45:2-25. The order for the Writ was entered and provided “Plaintiff shall not be required to post a restitution bond.” CP 322. *See* RP 6/14/13 pp. 45-46.

Although Appellants argued they would be damaged by the eviction, any genuinely arguable damages Appellants wanted to assert as an existing liquidator were cured by Judge Moreno partially granting their request for a stay through July 21 so they could sell their inventory.¹² Appellants had no other possible damages since they intended to vacate the premises, as further evidenced by their failure to seek a stay to remain in possession pending an appeal, which the statute gave them an absolute right to do. *See* RCW 59.12.200, 59.12.210, and 59.12.220. Under these statutes, Appellants would only have had to obtain a bond or letter of credit for the rent due during the pendency of the appeal, not the remaining lease term, and Alamo had contended it could readily obtain an LOC. The decision not to stay in the premises can only be seen as a tactical one dictated by the fact Appellants had no use for the space once the inventory was liquidated.

¹² Appellants’ effort to establish damages at the June 14 hearing failed. They depended on a Billy Nichols declaration that was not produced. *See* fn. 9, *supra*.

The overall record thus made plain to Judge Moreno Appellants had transferred control in violation of the Lease, had no intent to operate in the premises pursuant to the requirements of the Lease, and no intent to remain beyond the time needed to liquidate their inventory. They were in continuing breach that was not cured by rent, justifying issuance of the writ. The facts set forth in Section D demonstrate further support for Judge Moreno's decisions.

D. North Town Had to Start Two Separate Lawsuits to Protect the Mall as a Whole and to Recover Damages for Appellants' Current and Anticipated Breaches of the 10-Year Lease.

1. North Town is first forced to initiate the damages civil action to protect its valuable interests in the 10-year Lease.

On March 10, after sending the February 12 change of control letter and telling North Town personnel they would only operate as a liquidator and cut short the ten-year lease, as detailed *supra*, Appellants closed the WSS store at North Town Mall. CP 159 ¶ 11. At that point, rent was current and paid. On March 19 North Town served on WSS a Ten-Day Notice to Comply With Rental Agreement or Quit Premises pursuant to Ch. 59.12 RCW ("Notice"). CP 102, App. F. The Notice specified breaches of Articles 10 and 19 of the Lease which are titled "Continuous Operation" and

“Assignment.” *Id.*; see CP 27, 37.¹³ ***Specifically excluded*** from a permitted use for the “business” is using the premises for a liquidation, going out of business, moving, or similar distress-type sale. ¶ 9.03(a).¹⁴

When the store closed, to secure itself against the potential damages from the multiple breaches of the Lease, North Town filed the damages case, a civil action for damages for breach of contract and fraudulent transfer on March 25 and to attach the store’s inventory. On March 29, the hearing date for the attachment, the store “re-opened,” which staved off the attachment. CP 159 ¶ 11.

Despite continued requests from North Town, Appellants refused to provide any documentation about the transaction that changed the ownership of the store or who was responsible to North Town under the Lease and whether, as Appellants contended, they

¹³ The Notice specified “(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. “Business” is defined in ¶ 9 of the Lease specifying the permitted use of the premises, which is “solely for the purpose of conducting **its business, which is specifically described as follows:** primarily for the sale of outdoor sports and recreation merchandise, but for no other Purpose . . .” CP 26. Emphasis added.

¹⁴ The provision states in relevant part at pp. 26-27 (emphasis added):

Tenant shall not use, or permit any other person to use, the Premises or any part thereof, or adjacent sidewalks or Common Areas, for conducting thereon a second-hand store, adult book store, massage parlor or any auction, distress, fire, bankruptcy, moving, liquidation or going-out-of business sale; or display of pornography, nudity, graphic violence, drugs, or drug paraphernalia, or other goods or services which, in the reasonable discretion of Landlord, are inconsistent with a family-oriented Shopping Center.

had not breached the assignment clause. *See* RP 5/23/13 p. 19:16-21. In addition, the store was not being operated as a normal retailer but in liquidation mode, by not accepting returns, exchanges, or gift cards, among other things (*see* CP 368 ¶ 3 (Shasky Dec.); RP 5/23/13 p. 18), clear violations of the Use and Continuous Operation provisions. On top of those continuous material breaches, after the store “re-opened,” “Wholesale Sports” (or whomever was in fact operating the entity under that name; Judge Moreno found that Alamo was in control of the premises, RP 5/28/13 p. 30:19-22) failed to pay the required rent and charges of over \$36,000 for April and May. CP 159 ¶ 12.

2. North Town is forced to file the unlawful detainer action to protect its interests in proper operations in its mall and to evict a breaching tenant.

On May 2, 2013, North Town filed an unlawful detainer action against Appellants based on breaches of the assignment, continuous operation, and rent provisions of the Lease. CP 1-8. April rent was paid late on May 6, and Appellants answered the petition for a writ of restitution on May 10. *See* CP 111-116. North Town filed its unlawful detainer only after it was confronted with the continuing breaches of the Lease by Appellants after they “re-opened” the store on March 29, 2013.

3. **The May and June hearings and Appellants' position they would not submit any "change of control" documents to demonstrate the bona fides of their claimed position of a permitted assignment and that they were entitled to retain possession.**

North Town's counsel stated at the outset of the May 23 hearing that the writ of restitution was sought because WSS was in breach of the Lease, including Section 19 which "prohibits assignment of the lease by Wholesale Sports, which includes by merger, consolidation, transfer of assets, or any transfer of stock interest in excess of 49 per cent." RP 5/23/13 p. 2. As North Town's counsel noted:

[T]hat same section requires the tenant to provide the landlord a request for consent to assign the lease, **which includes providing the proposed transfer instrument** as well as the processing fee.

RP 5/23/13 p. 2:19-22 (emphasis added). The processing fee of \$1,500 was never provided by WSS or anyone else. CP 158 ¶ 5. Appellants' refused to provide the transfer instrument to North Town or the court. Rather, Appellants argued that only a summary was required, a suggestion North Town rejected. RP 5/23/13 p. 13:20-24. Appellants then expressly argued to Judge Moreno that those fact issues "were better resolved through discovery, through [] civil litigation [] on a normal proceeding." *Id.* RP 5/23/13 p. 19:16-21. Those documents were never produced in the unlawful detainer action, though they were in the possession and control of Appellants. At the hearing on June 14, Appellants' counsel confirmed that

Appellants had no intent or desire to keep renting the facility and operate a commercial business and they had no intent to remain.

The fact [WSS] may have started selling off some of their inventory already **because they had been negotiating to terminate the lease early and anticipated leaving** is already figured into the amount of inventory in the store.

RP 6/14/13 pp. 41:25 – 42:4 (emphasis added).

When giving her oral decision later, Judge Moreno stated:

But my understanding of the case . . . was that this was simply the unlawful detainer piece. It was to restore the plaintiff the premises and to eject or get rid of or boot out the defendant for, as I recall, selling – selling the store, basically.

RP 6/14/13 p. 44:21– p. 45:1. Judge Moreno denied the bond under RCW 59.12.090 based on the statute’s language: “I don’t believe under this particular fact pattern [where the writ of restitution was not issued pending trial but with a final judgment] that the court is required to set a bond with the writ.” RP 6/14/13 p. 45:2 – p. 46:1.

E. Preliminary Appeal Proceedings: Court’s Appealability Motion; North Town’s Request to Stay the Appeal; Appellants’ Motions to Stay the Damages Case.

The Court’s motion to determine appealability was heard September 4, 2013. Following North Town’s suggestion at argument to stay the appeal pending completion of the related damages action (which was temporarily stayed pending the Court’s appealability decision), Commissioner McCown ruled the Writ is appealable as a matter of right and denied North Town’s motion to stay the appeal. *See* October 3, 2013, Order, App. G hereto. The

Commissioner recognized that North Town's fraudulent transfer and piercing claims are unrelated to the propriety of the Writ. *Id.* Judge Eitzen lifted the temporary stay in the damages action on November 15, 2013, allowing discovery and providing that trial would not occur before the appeal was decided. May 16, 2013, Order, pp. 1-2, App. H. Appellants did not appeal Judge Eitzen's order.

In February 2014, after the damages case was transferred to Judge Price and North Town pursued long-overdue discovery (first requested in May, 2013), and also moved to amend its complaint to add a new party and new claims, Appellants again sought to stay all discovery in the damages action by simultaneously bringing motions in both the trial court and in the appellate court.¹⁵ Judge Price heard and denied Appellants' stay motion and granted North Town's motion to amend the complaint on February 28, 2014, with an order entered March 7. Appellants did not appeal Judge Price's order, but answered and asserted counterclaims. Nor did Appellants strike their stay motion in the appellate court in light of Judge Price's order and their failure to appeal it.

¹⁵ See North Town Mall's Answer to Motion to Stay Related Trial Court Proceedings dated March 17, 2014, pp. 2-7, and associated March 17, 2014, Declaration of Parker Keehn providing trial court documents, including Ex. 1 (transcript of 11/15/13 hearing), Ex. 2 (Nov. 15, 2013 Order Dissolving Stay), Ex. 3 (Feb. 28, 2014 hearing transcript), Ex. 4 (March 7, 2014 Order denying stay), and Ex. 6 (North Town's Opposition to Motion to vacate or Amend Order Dissolving Stay), pp. 3-7 (factual and procedural history) & pp. 11-13 (arguments why discovery is necessary).

Appellants' motion to stay the damages case was heard on May 7, 2014, after the 30-day period for seeking review of Judge Price's order had expired. Commissioner Wasson denied it on May 16, 2014 because "the related case is not before this Court. Therefore, this Court has no jurisdiction to affect the course of that case in the trial court, by stay or otherwise." May 16 Order, p. 2, App. H. After the time to file a motion to modify the order expired without one being filed, North Town filed its response.¹⁶

IV. RESPONSE ARGUMENT

A. Standard of Review.

The issuance of a writ of restitution in an unlawful detainer action often is reviewed *de novo*; but since Judge Moreno weighed conflicting affidavits and is well and regularly versed in unlawful detainer actions, the more appropriate standard is abuse of discretion. *See Dolan v. King County*, 172 Wn. 2d 299, 310, 258 P.3d 20 (2011) ("where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate").

In addition, the appellate court can and will affirm on any theory set forth in the pleadings and evidence, even if the trial court did not consider the theory. *Gamboa v. Clark*, ___ Wn. App. ___, 321 P.3d 1236, 1249 (2014)("We may sustain the trial court result

¹⁶ The merits briefing was suspended pending the outcome of the stay motion.

on any correct ground, even though that ground was not considered by the trial court”); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). In doing so, the appellate court “may consider any issues raised by the parties.” *Anya Gomez v. Sauerwein et al.*, ___ Wn.2d ___, ___ P.3d ___ (No. 88307-6, June 19, 2014), Slip Op., at 17-20, (addressing the issue of proximate cause over objection because the issue **had** been raised in the trial court).

B. Judge Moreno Properly Issued the Writ of Restitution Based on the Record Before Her and Settled Law: Appellants Were in Continuing Breach, North Town Did Not Waive Any Breaches, and Payment of Rent Did Not Cure the Continuing Breaches.

1. Settled law of unlawful detainer, the facts, and the Lease’s no-waiver provision require the rejection of Appellants’ waiver argument.

An unlawful detainer action is a special statutory form of action and is primarily concerned with the right to possession. *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 979 P.2d 917 (1999). Under RCW 59.12.170, a landlord is limited in an unlawful detainer action to recovering possession, past due rent, and resulting damages. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-48, 711 P.2d 295 (1985); *Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 808-809, 274 P.3d 1075, *rev. den.*, 175 Wn. 2d. 1012 (2012). Unlawful detainer courts do not have jurisdiction to award damages outside of those authorized under RCW 59.12 *et. seq.*, or to add claims to turn the action into a simple breach of lease. *Id.* See

Tuschoff v. Westover, 65 Wn.2d 69, 395 P.2d 630 (1964), overruled in part by *Munden v. Hazelrigg*, supra.¹⁷ See also *Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 925 P.2d 217 (1996) (in unlawful detainer case jury determines rent owed and damages resulting from unlawful detaining of premises).

Munden partly overruled *Tuschoff* by following California law to make a “procedural tweak” to the law to allow an unlawful detainer proceeding “to be converted into an ordinary civil suit for damages, [in which] the parties may then properly assert any cross claims, counterclaims, and affirmative defenses,” only *after* the right to possession is finally determined. *Munden v. Hazelrigg*, 105 Wn.2d at 45-46. The Court explained that it “merely adopt[ed] an **adjunct to the general rule prohibiting claims unrelated to the issue of possession in unlawful detainer proceedings.**” *Id.* at 47. The goal is to prevent a tenant who breaches its lease from defeating the summary remedy by contesting the breaches.

One purpose of this rule is to **prevent tenants who have violated the covenants of their lease from frustrating the ordinary and summary remedy provided by statute for restitution of the premises.**

¹⁷ The Court held at 65 Wn.2d at 73 (emphasis added) (citation omitted):

The special summons employed in an unlawful detainer action is insufficient to give the court jurisdiction of the parties in a general proceeding. **The court has obtained jurisdiction over the parties only for the limited statutory purpose of determining the issue of possession.**

Munden v. Hazelrigg, 105 Wn. 2d. at 46 (emphasis added). These principles and the facts validate Judge Moreno’s grant of the Writ as a final judgment so that the breaching tenant – Appellants – could not frustrate the statute’s summary remedy.

Landlords often must bring both an unlawful detainer action to regain possession and a second, civil action to determine future rent and other damages and any other issues that are *not incidental* to the unlawful detainer itself. Since the decision in *Munden*, if the unlawful detainer is brought first, it can be converted to a damages action, but *only* when “the right to possession ceases to be an issue.” *Munden*, 105 Wn.2d at 45. Here, both actions were necessary. The damages case was needed because only it could provide the relief of attaching WSS’ inventory to protect the damages claim. Because the store was closed in March, 2013, North Town did not know if an unlawful detainer was needed. And since North Town’s claimed damages are not solely related to past due rent, unlawful possession, or the tenant’s damage to the premises, the damages action is proper.

Here North Town’s damages claims include lost future rent and profits through the original term of the parties’ lease. The issues in the unlawful detainer action are limited, as Commissioner McCown recognized. Even when finally resolved, the unlawful detainer case will not resolve or preclude the entire dispute between the parties, even if Appellants were to prevail on appeal. The claims

in the damages case will remain and include the damages due to whichever party prevails on appeal.

2. **WSS' argument that North Town's acceptance of rent waived Appellants' continuing non-monetary breaches fails as a matter of settled law.**

Appellants principally argue that a landlord who accepts rent with notice of breach always manifests its intent to continue under the lease and thus has no right to evict. This does not accord with either established Washington law or, more to the point, the facts of this case.

Wholesale was served with a notice to comply or vacate the premises which expressly alleged violations of the assignment and continuous operation and use provisions, while also reserving North Town's rights as to other defaults. *See* CP 102 (March 19, 2013, 10-day notice to comply or quit, specifying continuous operation and assignment without consent, but *not* rent); CP 4-7 (complaint alleging failure to comply with the assignment and continuous operation provisions). *See also* CP 265-268, (March 4 & 7, 2013, notices of default based on unconsented assignment but not referencing rent).

In *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 856, 679 P.2d 936 (1984), this Court noted that the notice of default "gives the tenant an alternative, *i.e.* either correct the default or vacate the premises." Unlike in *Slack*, Appellants failed to correct (and could not correct) the unapproved assignment, and there was no notice of unpaid rent to correct. Rather, there was a failure to cure the noticed breach of the Lease, fully justifying the unlawful detainer. *Slack*.

Moreover, accepting rent “does not operate as a waiver of a continuance of the breaches or of any subsequent breaches.” *Wilson v. Daniels*, 31 Wn.2d 633, 198 P.2d 496 (1949). Appellants committed multiple continuing breaches of the Lease with North Town, all actionable. The unpermitted assignment was a continuing breach and was the focus of the Ten-Day Notice invoked by the Unlawful Detainer Complaint. It was never cured.

Appellants’ repeated argument is that acceptance of rent by North Town vitiated or waived its right to a writ of restitution based on the prohibited assignment or non-permitted use and, thus, the Writ was wrongfully issued and they should have been entitled to remain in possession. This is wrong as a matter of the facts set out *supra* and the settled law.

Judge Moreno fully understood that acceptance of rent does not waive or vitiate a claim of a continuing breach that is for other than unpaid rent. She correctly held that “acceptance of the 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 5/28/13, p. 29:24 – p. 30:2. Because North Town’s March 19 notice to comply or quit the premises did not address rent at all since rent was then current, the unpaid rent specified in the unlawful detainer complaint was only incidental to the other breaches and not the basis for the unlawful detainer. More to the point, it was the March 19 Ten-Day notice for breach of the assignment clause and

continuous operation that was invoked by the May 1 unlawful detainer complaint, CP 5-7, *not* the non-payment of rent.

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). While "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 well-established that "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*, 40 Wn.2d at 603 (emphasis added).

The requirements of RCW 59.12.030(4) were met here. Appellants breached the assignment requirement, that breach was noticed to Appellants by the March 19 notice, and Appellants never cured that breach. The Complaint did not raise allegedly unpaid rent except as a possible form of incidental damages – rather, it asserted the most material issue, the unpermitted assignment. Appellants' payment of rent did not cure the fact they were operating as a liquidator and thus in material breach of the continuous conforming use provisions of the Lease; payment of rent also did not cure the

fact they intended to leave as soon as possible, breaching the 10-year term. Nor did paying rent cure the improper transfer of ownership..

The Court explained 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), p. 708) (emphasis added). This Court reiterated the rule in 2001 (emphasis added):

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.

MH 2 Co. v. Hwang, 104 Wn. App. 680, 684, 16 P.3d 1272 (2001).

This is the rule Judge Moreno correctly relied on. She was fully justified in issuing the Writ on the unique record before her, where the complaint and accompanying notice focused on the uncured breach of the assignment provisions of the Lease and where the Lease’s no waiver provision (§ 38.03) explicitly provides “[n]o provision of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing and is signed by the Landlord.” CP 54. In sum, North Town’s acceptance of belated rent

payments unrelated to the notice to comply or quit did not effect a waiver of the other breaches.

3. **Appellants’ refusal to produce material evidence in their possession estops them from arguing for reversal or remand based on insufficient evidence, is invited error and results in a conclusive presumption the evidence supports North Town.**

Appellants argue there was insufficient evidence supporting the Writ. But the record before Judge Moreno shows the only evidence “lacking” was evidence to refute Appellants’ material, continuing, breaches. North Town’s evidence established, at minimum: 1) breach of the non-assignment clause of the lease; 2) breach in the use of the space since it was being used for liquidation sales with prohibited signage, refusal to honor gift cards, and a no-return policy; and 3) an anticipated breach of the remaining nine years of the term.¹⁸

All the evidence available to North Town from Appellants and in the record confirms that, whatever the nominal titles, Alamo had taken over the space, was closing the store, and intended to not stay for the remaining 9+ years of the 10-year Lease. Given these facts establishing breaches by Appellants, it was up to Appellants to provide the positive evidence they implied they had to conclusively

¹⁸ As noted *supra*, the court can affirm on any basis supported by the record, even if not relied on by the trial court. Here the undisputed breaches of the permitted use provisions and Lease term can serve as additional independent bases to affirm.

rebut North Town's evidence of continuing breaches or, at minimum, demonstrate there was an issue of fact that required trial.

But Appellants did *not* put forth such evidence. They refused to provide any documents that would have clarified the nature of the change of control transaction which would have established the nature of WSS's, Alamo's, UFA's, and Sportsman's Warehouse's interests and, thus, whether those parties complied with the assignment provisions of the Lease. What evidence Appellants did provide (the February 12 letter and declarations) showed a prohibited assignment as defined by the Lease for which they did not obtain consent -- as Judge Moreno found.¹⁹ North Town was not obliged to accept Appellants' word regarding the nature of the transaction. Under the Lease (and common sense), North Town was entitled to documentation (even if under a protective order) to verify Appellants' assertion that consent was "not required."

Appellants expressly argued to Judge Moreno at the May 23 hearing that discovery in the damages case was the best way to address the prohibited assignment issue, refusing to produce key evidence in their possession.

¹⁹ Nor did they provide documents to show the financial capacity required under ¶ 9.04 of the Lease. Rather, they tried to imply that capacity with a phantom LOC. The one provided by declaration was clearly marked "sample" and thus was not a copy of an actual, effective LOC, despite what the declarant stated under oath. See footnotes 5-8 and accompanying text, *supra*.

THE COURT: So is there anything that the tenants can do at this point that would satisfy your client?

MS. HARJU: Frankly, I would have to find out from them. . . . it 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.

THE COURT: Okay. All right. Anything else from either side?²⁰

MS. LELAND: Yes, your Honor. **As to the documents and the disputes, it's better resolved through discovery, through civil -- civil litigation in a -- on an normal proceeding, which North Town Mall has also filed and sought remedies for breach of contract, alleged fraudulent transfer, and piercing of the veil.** And --

THE COURT: Is that a separate filing?

MS. LELAND: That is a separate filing, your Honor.

THE COURT: In a different case number?

MS. LELAND: It is.

THE COURT: Okay.

MS. LELAND: And that is simply a -- a better forum for resolving these issues, particularly where, again, North Town has waived its right to -- to order -- to receive a forfeiture of the premises.

RP 5/23/13 p. 18:18 -- p. 20:5 (emphasis added).

²⁰ This was Appellants' chance to tell Judge Moreno: 1) they needed a trial to determine if there had been a breach of the non-assignment clause; or 2) the proceedings should be (a) converted to a civil action; (b) stayed pending the outcome of the damages case; or (c) stayed pending appeal per statute, so that WSS could remain in possession as a retailer, pay rent, and get the benefit of its tenant improvements. They requested none of these. Appellants requested only a very short stay of eviction to July 31 so they could conduct their liquidation sale in violation of the Lease. *See* CP 378 ¶¶ 3-4, 379 (6/19/13 stay motion requesting stay only to July 31, for liquidation sales).

Appellants’ decision to withhold evidence from North Town and Judge Moreno in the unlawful detainer action by claiming the issues “were better resolved through discovery” in the damages case²¹ means they are now precluded by several principles from now arguing on appeal that reversal is required because North Town did not have enough evidence of their breach. Those principles include judicial estoppel, invited error, and waiver. They also are subject to a conclusive presumption: evidence in a party’s control it chooses not to produce is deemed adverse to the non-disclosing party.

Judicial estoppel “precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations and citations omitted). The purpose of the doctrine is “to avoid inconsistency, duplicity, and . . . waste of time.” *Id.* The Supreme Court set out three “core factors” that guide application of the doctrine, relying on recent United States and prior Washington law²²

²¹ As noted in section III.E., *supra*, even though Appellants argued the relevant documents should be produced in discovery in the civil damages case, Appellants have fought repeatedly to prevent their disclosure in that action with motions to stay discovery in the trial court and a simultaneous stay motion brought in this Court, which were all denied when opposed by North Town. *See* North Town’s Answer to Motion to Stay Related Trial Court Proceedings (March 17, 2014), p. 15, and associated documents in the Keehn Declaration filed March 17, 2014.

²² *Arkison v. Ethan Allen, Inc.*, 160 Wn. 2d 535, 538-39, 160 P.3d 13 (2007):

Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether “a party's later position” is “clearly inconsistent” with its earlier position”; (2) whether “judicial

(Footnote continued next page)

that were applied in *McFarling v. Evaneski*, 141 Wn. App. 400, 403-05, 171 P.3d 497 (2007). This Court applied judicial estoppel in *McFarling* because the facts met the three core factors of “(1) inconsistent positions, (2) that misled a court, and (3) results in an unfair advantage or detriment on the opposing party.” *Accord, Mueller v. Garske*, 1 Wn. App. 406, 408-09, 461 P.2d 886 (1969), rejecting a party’s contrary position on appeal since “a party is not permitted to maintain inconsistent positions in judicial proceedings.”

The core factors are met in this case, as in *McFarling* and *Mueller*. Appellants’ position was that it need not provide documents that demonstrate the nature of the underlying “change of control” transaction and the true status of WSS and Alamo (and Sportsman’s Warehouse and UFA) because those issues are more properly addressed in the damages action. This is inconsistent with their current assertion that the record before Judge Moreno was deficient such that the appellate court must rule the eviction was wrongful. It also does not justify remand for a new determination

acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’ ”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) . . . These factors are not an “exhaustive formula” and “[a]dditional considerations” may guide a court’s decision. *Id.* at 751, 121 S.Ct. 1808; *see, e.g., Markley v. Markley*, 31 Wn.2d 605, 614–15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel).

using that information; requiring such a costly remand in the face of Appellants' tactical non-disclosure would be plainly inequitable.

Appellants' refusal to provide the information they now say is missing, and then claim there is insufficient evidence for the trial court decision, is invited error. They cannot claim on the one hand that Judge Moreno did not have enough evidence to conclude there was a breach when, on the other hand, they held the evidence in their files and argued it was "better produced" in the damages case.²³

The invited error doctrine " 'prohibit[s] a party from setting up an error at trial and then complaining of it on appeal.' " *City of Seattle v. Patu*, 147 Wash.2d 717, 720, 58 P.3d 273 (2002).

Angelo Prop. Co., LP v. Hafiz, supra, 167 Wn. App. at 823.

To the extent Appellants assert or imply there was inadequate evidence before Judge Moreno for her to determine they breached the assignment provisions of ¶ 19 of the Lease, they also waived their known right to provide that evidence by their tactical choice to withhold it. *See Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954) (waiver is the relinquishment of a known right). It is improper at best for a party to tell the trial court it cannot have evidence in that party's control, then tell the appellate court that the

²³ It becomes especially unseemly when those documents, which Appellants told Judge Moreno are "better produced" in the damages case, are being *withheld* in the damages case, as Appellants have done everything possible to avoid producing them, including simultaneous motions to stay discovery in the trial court and this Court. *See* fn. 21, *supra*.

trial court's decision was not supported by sufficient evidence related to the point the withheld evidence squarely addresses.

Waiver and preservation of error principles also dispose of Appellants' arguments that North Town was required to give a second notice to comply or quit the premises after receipt of the unpaid rent in May. *First*, as noted *supra*, the March 19 notice on which the Unlawful Detainer complaint was based did not give notice as to rent but focused on the unpermitted assignment and continuous use provisions. *Second*, acceptance of rent in May could not have cured or waived the assignment breach by March 29, the ten-day deadline. *Third*, substantively, any such notice would have been pointless and futile given 1) the nature of the breach of the assignment clause that could not be remedied; 2) Appellants' denial of that breach (a denial they asked the court to accept based on their withholding of the relevant documents on the transaction); and 3) the obvious evidence they would not comply with the lease provisions on change of control or operations. Any new notice after payment of rent would have been pointless and futile.

Fourth, Appellants never raised this issue as a defense in the trial court, so that either Judge Moreno or North Town could address it, raising it for the first time in their opening brief. Rather, Appellants appeared below and argued against eviction without raising an objection to the sufficiency of the notice to comply or quit; they never asserted a second notice was required. Nowhere in

the transcripts do they raise the defense that North Town had to give a new notice after acceptance of rent. Rather, their express defense was that with payment of rent, North Town had to “seek alternate relief such as an action for breach of the lease.” CP 379 (June 17 Motion for Stay). By their actions, Appellants waived and failed to preserve the issue and defense of a second, post-rent notice. *See Lybbert v. Grant County*, 141 Wn.2d 29, 38–39, 1 P.3d 1124 (2000) (defendant waives affirmative defenses like insufficient service of process by actions inconsistent with the defense or by delay in asserting it); *In re Welfare of H.S.*, 94 Wn. App. 511, 526, 973 P.2d 474 (1999) (notice is a matter of personal jurisdiction, objection to which may be waived by appearing and litigating the issues).

Finally, Appellants’ refusal to provide the change of control documents should make that evidence subject to the well-settled presumption arising out of spoliation principles that evidence in a person’s control which the party chooses not to produce is conclusively deemed to be adverse to the party who controls it. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977) (reversing trial court’s ruling because the County had failed to preserve and produce critical evidence, requiring a negative presumption);²⁴ *Wright v. Safeway Stores*, 7 Wn.2d 341, 352, 109 P.2d 542 (1941).

²⁴ The court stated at 89 Wn.2d at 385-86 (emphasis added):

(Footnote continued next page)

Each of these bases – judicial estoppel; invited error; adverse presumption of the evidence – is an independently sufficient basis to affirm Judge Moreno’s ruling that Appellants were in continuing breach of the assignment provisions and affirm her grant of the Writ.

4. **The most likely deal among Appellants and their cohorts stripped WSS of all assets and left North Town with recourse against only an empty shell.**

Given the evidentiary presumption against Appellants from their withheld evidence, it is fair to imagine, just hypothetically, the likely terms of the agreement that Appellants refused to share with North Town. Under that un-disclosed deal, imagine that, *first*, WSS sold all of the inventory and personal property in each of its 14 U.S. stores, including fixtures, leasehold improvements, equipment and supplies, and assigned the leases for ten stores, to Sportsman’s for tens of millions of dollars, given the likely 1.9 million-dollar inventories each, similar to that claimed for the North Town WSS. *See* CP 325, ¶ 3 (Gaube Dec. re restitution bond).

We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, **the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.** In so holding, we have noted, “(t)his rule is uniformly applied by the courts and is an integral part of our jurisprudence.’ *British Columbia Breweries (1918) Ltd. v. King County*, 17 Wn.2d 437, 455, 135 P.2d 870, 877 (1943) (quoting with approval 20 AM.JUR. 188, s 183). *See Bengston v. Shain*, 42 Wn.2d 404, 255 P.2d 892 (1953); *Krieger v. McLaughlin*, 50 Wn.2d 461, 313 P.2d 361 (1957).

Second, imagine that WSS then distributed the sale proceeds to its then-sole shareholder UFA, leaving WSS as an empty shell except for the four leases -- including the North Town lease -- that Sportsman's did not want to assume, for stores slated to be closed.²⁵

Third, only after the assets were all sold to Sportsman's, and only after the sale proceeds had all be distributed out to WSS's sole shareholder UFA, the agreement would provide that, then and only then, Alamo would finally acquire all of UFA's stock in WSS for a nominal amount and be bankrolled to close the four stores with funds to make a few lease payments and pay legal fees, if needed.

Had things gone according to a carefully designed agreement as outlined above, by about March 17 or 18, one week following the closing of the deal, the WSS store at North Town Mall would have been completely dark and completely empty—inventory, shelving, fixtures and equipment, all gone. If a visitor – or a manager of the mall – had peered into the windows of the dark space, there would have been nothing, not even shelves. North Town's "tenant" would have been completely stripped of its assets with no means to conduct business or to pay its rent. And the new WSS shareholder would be a single member LLC, with no direct liability to the landlord, leaving

²⁵ This is a reasonable hypothetical based on the record before Judge Moreno, including WSS' February 12, 2013, notice that WSS' business interests were being acquired by Sportsman's Warehouse and Alamo, that Alamo had acquired the WSS stock, the Spokesman-Review article in App. B., and the Appellants' claims in support of their request for a restitution bond, among other facts.

North Town with no recourse. But now, imagine the news article and fast action by North Town frustrated those plans and began this case.

C. Judge Moreno’s Determination That No Bond Was Required For the Writ is Consistent With the Statute, the Facts, and the Law of the Case Since the Writ Issued With the Judgment, Which the Court of Appeals Determined is Final and Appealable of Right.

Appellants argue that RCW 59.12.090 required Judge Moreno to impose a bond on North Town when issuing the Writ and that her failure to do that voids the Writ and requires reversal. They also complain that her individual research led her to an unpublished appellate decision that she used to guide her analysis. Their arguments fail on the law, on the facts, and on logic.

The statute provides in relevant part:

... 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, with sufficient surety to be approved by the clerk, **conditioned that the plaintiff will prosecute his or her action without delay**, . . .

RCW 59.12.090 (emphasis added). The statute thus contemplates a bond will be issued when there is a trial pending on the issue of possession of the property, not a later civil action for damages.

Judge Moreno’s ruling is consistent with the underscored portions of the statute. Her ruling recognized that charging North Town as the plaintiff with a restitution bond would have no purpose here where the Writ *issued at the time of judgment* and there was nothing more in the unlawful detainer action for immediate right to

the premises for plaintiff North Town to “prosecute without delay.” Possession was finally decided and subject only to appeal, not to trial. Indeed, the finality of Judge Moreno’s order was what Appellants argued for this appeal to proceed as of right. The finality of the order is the law of the case since the Commissioner’s ruling in October that the appeal could proceed. Thus Appellants’ argument at p. 28 of the Response that North Town “is continuing to prosecute its action against Wholesale Sports just as RCW 59.12.090 anticipates” is necessarily wrong and inconsistent with their own position accepted by the Court of Appeals.

This also makes sense. Where, as here, the issuance of the Writ occurs along with the final judgment, the purpose for such a bond no longer exists because the successful plaintiff no longer can “prosecute his or her action without delay.” It is finished. It is the tenant who then has a right to appeal, if it so chooses, and can invoke the statutes giving it the right to remain in the premises pending appeal under RCW 59.12.200, 59.12.210, and 59.12.220

Judge Moreno’s ruling thus not only makes logical sense, it is the only construction which gives proper effect to all the statutes in Ch. 59.12 RCW, including those allowing the defendant to retain possession even after an adverse ruling. To require a bond by North Town would be inconsistent with the requirements of the tenant to post a bond if it wants to remain in the premises during appeal. Finally, requiring successful plaintiffs in unlawful detainers to post

such a bond would be inconsistent with the fundamental premise of the courts that a trial court judgment is presumed to be correct and valid and enforceable unless and until it is either stayed or it is overruled or vacated by a higher court. *See e.g.*, RAP 7.2(c) (“Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.”). *Accord, Dike v. Dike*, 75 Wn. 1, 448 P.2d 490 (1968).²⁶

As to Appellants’ complaint that Judge Moreno did her own research and found an unpublished appellate decision that guided her analysis, their concern is misplaced. First, the case involved the residential landlord tenant act as evidenced by her citation to that statute, so it could not be “controlling authority” in the commercial context. What Judge Moreno did was cite the authority within that unpublished decision and show how she thought it applied at least by analogy, as this Court has encouraged. *See State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012), *rev. den.*, 177 P.3d 1008 (2013). The appellate courts have pointed out in many decisions that the fact trial courts consider authorities in unpublished decisions located on

²⁶ Appellants’ position also is contrary to what they strenuously argued to this Court -- that the unlawful detainer action resulted in a final order subject to immediate appeal as a final determination of the rights of the parties to immediate possession of the premises. Appellants cannot now take a position contrary to the one they took to prosecute this appeal and on which their right to the continued appeal depends. *Arkison, supra; Mueller, supra.*

their own volition rather than proffered by a party and found an analysis instructive is not error. *See, e.g., Oltman v. Holland Am. Line USA*, 163 Wn.2d 236, 248-49, 178 P.3d 981, *cert. dismissed*, 129 S. Ct. 24 (2008) (trial judges not barred from considering analyses of other trial judges). It does not harm the parties.

D. Appellants' Request for Fees Should be Denied.

Appellants request fees under the unlawful detainer statute on the premise they are entitled if they prevail with a determination that they were wrongfully evicted. Even under their theory for fees, their request should be denied if and when their appeal is rejected or if the matter is remanded to the trial court for further proceedings and an ultimate determination of the right to possession following a trial based on full discovery. Even if Appellants were to completely prevail on appeal with a ruling that they were wrongfully evicted and have a right of possession, any fee award should be limited to the agreed cap in the Lease, of fees only up to \$7,500.

E. Request for Attorney's Fees on Appeal.

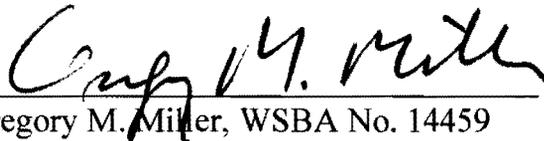
The Lease provides for "reasonable attorneys' fees" to the prevailing party, subject to a cap of \$7,500 per occurrence. Lease, ¶ 35, CP 53. North Town requests its reasonable attorneys' fees if it prevails pursuant to RAP 18.1, the Lease, and RCW 4.84.330.

V. CONCLUSION

Judge Moreno properly issued the Writ on the record before her without a bond. North Town did not waive its right to the premises for the continuing breaches of the assignment and use provisions by its acceptance of rent payments. North Town Mall respectfully requests that the Court affirm the trial court and award it reasonable attorney's fees per the Lease.

Dated this 25th day of June, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Attorneys for Respondent

APPENDICES

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APPENDIX A



Wholesale Sports
700, 4838 Richard Road SW
Calgary, AB Canada
T3E 6L1

Bruce Nyservold, Corporate Secretary
Ph: +1 (403) 570-4580
Fax: +1 (403) 570-4023
Email: Bruce.Nyservold@ufa.com

VIA EMAIL & COURIER

February 12, 2013

General Growth Properties
110 N Wacker Drive
Chicago, IL 60606

Attention: Mr. Gregory Sullivan
(email: Gregory.Sullivan@GGP.com)

RE: Wholesale Sports USA, Inc. - property located at #12, 4750 N Division Street, Spokane, WA

Dear Mr. Sullivan:

On February 10, 2013, UFA Co-operative Limited ("UFA") and Wholesale Sports USA, Inc. ("WSS" or "Lessee") signed a definitive agreement with Sportsman's Warehouse, Inc. ("Sportsman's") and Alamo Group LLC ("Alamo"). Under this agreement, Sportsman's and Alamo will acquire the business interests of WSS, and Alamo will purchase all of the capital stock of WSS.

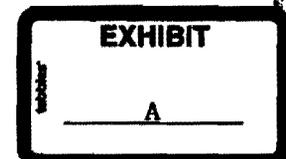
The transactions are expected to close in mid-March of 2013.

Representatives of Alamo and/or Sportsman's will contact you regarding the transactions. This letter serves as notice of a pending change of control of the Lessee 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.

If you have any questions or concerns, please contact Bruce Nyservold, General Counsel of UFA, at 403.570.4580 or at bruce.nyservold@ufa.com.

Best Regards,

Bruce Nyservold
General Counsel, UFA
Corporate Secretary, WSS



APPENDIX B

THE SPOKESMAN-REVIEW

February 21, 2013

Warehouse Sports outlets closing in Spokane, CdA

Tom Sowa

The Spokesman-Review

Tags: Alamo Group NorthTown mall Spokane Valley Sportsman's Warehouse UFA Co-operative Wholesale Sports

The new owner of the former Warehouse Sports outdoor and sporting equipment outlets in Spokane and Coeur d'Alene will close the two stores in mid-March.

Employees at the stores said company officers informed them on Wednesday that their stores' final day will be March 10.

The announcement was a sudden reversal, following last week's announcement that Warehouse Sports was selling 14 U.S. stores back to Sportsman's Warehouse, a Utah company, and a partner, Alamo Group.

That announcement came from Calgary-based UFA Co-operative Ltd., which had purchased the 14 U.S. Sportsman's Warehouse stores for roughly \$800 million in 2008.

After the purchase, UFA rebranded the stores as Wholesale Sports, the name it uses for outdoor equipment stores it operates across Canada.

Last week's announcement said the sale was part of UFA's refocusing solely on its Canadian retail businesses.

Canadian newspapers reported that Sportsman's Warehouse plans to operate 10 of the reacquired stores, but that Alamo Group, which bought four stores, was closing them in March.

It's unclear which two other stores will be closed.

Alamo Group, based in California, is described as a real estate investment company.

The Spokane store moved last summer from Spokane Valley Mall to NorthTown Mall. It took a 30,000-square-foot space in the mall formerly used by Emporium.

The NorthTown store employs roughly 40 workers. The Coeur d'Alene store, at 3534 N. Government Way, employs about 35 workers.

Attempts to reach Sportsman's Warehouse Wednesday were unsuccessful.

Get more news and information at Spokesman.com

APPENDIX C

General Growth Properties, Inc.

February 22, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED #7010 1060 0001 7848 4355

Wholesale Sports USA, Inc.
Attn: Glenn Bingley
4838 Richard Road SE, STE 700
Calgary, AB T3E6L1

Re: **Anticipatory Default**
Wholesale Sports USA, INC
Agreement of Lease Dated April 25, 2012
NorthTown Mall, Spokane, WA

Dear Mr. Bingley:

This letter constitutes written notice of anticipatory default by Tenant pursuant to the terms of the Lease Agreement dated April 25, 2012 (which with all amendments is the "Lease") entered into by and between NorthTown Mall, LLC, as Landlord and Wholesale Sports USA, Inc. as Tenant for Demised Premises known as Space No. 00012 consisting of approximately 34,371 square feet in the property commonly known as NorthTown Mall, Spokane, Washington.

It has come to Landlord's attention that Tenant is planning to close the Demised Premises for business. Be advised should Tenant vacate the Demised Premises, Landlord will seek a replacement tenant for the Demised Premises at Tenant's cost and expense, in an effort to mitigate Landlord's damages. Such costs and expenses will include, without limitation the cost of reletting the Demised Premises, including removing personal property of Tenant, clean up and repair, modification or required tenant improvements for the substitute tenant, and any fees or commissions paid to real estate or leasing agents

In addition to the above, Tenant's failure to continue to do business and/or pay rent will constitute an Event of Default within the meaning of the Lease (See Article 10, in particular). Any action or inaction by Tenant that contravenes any term, covenant or condition of the Lease that it is required to perform, including but not limited to operating the Demised Premises and payment of all rent and charges, shall constitute a default on the part of Tenant. If any such failure continues beyond the applicable period of cure as set forth in the Lease, Landlord will pursue any and all rights and remedies, available to



NorthTown Mall
4750 North Division
Spokane, WA 99207
509-483-0200
fax 509-483-0360
www.northtownmall.com
Equal Opportunity Employer

General Growth Properties, Inc.

Landlord as provided in the Lease and the state of Washington, including at Landlord's option unlawful detainer and ejection. Furthermore any personal property of Tenant left at the Premises will be deemed surrendered by the Tenant, and disposed of as deemed appropriate without any recourse against the Landlord.

Finally, be advised that any discussion that Landlord might have with Tenant exploring termination of the Lease shall not release Tenant of its obligations under the Lease. Nothing in this letter shall constitute a waiver, relinquishment or election of any remedies, rights, claims and defenses are expressly reserved herein.

Respectfully,

NorthTown Mall LLC

[Signature]
John Shasky, CSM
Senior General Manager



NorthTown Mall
4750 North Division
Spokane, WA 99207
509-483-1200
fax 509-483-0360
www.northtownmall.com
Equal Opportunity Employer

5544 6482 1000 0901 0102

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(Domestic Mail Only; No Insurance Coverage Provided)

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Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

RECEIVED
Postmark
FEB 22 2013
NORTH TOWN
CALGARY, AB

5544 6482 1000 0901 0102

WINDSTAR SPORTS USA, INC TEL
Richard Rolfe
4838 Richard Rolfe, Ste 700

PS Form 3800, August 2011 See Reverse for Instructions

APPENDIX D

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FILED

MAY 28 2013

**THOMAS R. FALLQUIST
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; ALL OTHER OCCUPANTS,

Defendants.

NO. 13201748-7

DECLARATION OF GREG
SULLIVAN

I, Greg Sullivan, hereby declare and state as follows:

1. I am over eighteen years of age, make this declaration based upon my personal
knowledge, and am competent to testify to the matters stated herein.

2. I am Vice President of Big Box Leasing for General Growth Properties, Inc.
("GGP"). GGP is the indirect parent entity that ultimately owns, operates and oversees
leasing matters for North Town Mall.

3. In July 2012, defendant Wholesale Sports USA, Inc. ("Wholesale Sports"),
pursuant to a lease with North Town Mall, LLC ("North Town") dated April 25, 2012, opened
its location at North Town Mall (the "Lease").

DECLARATION OF GREG
SULLIVAN - 1

NOR057 0029 oel32g25md

**CARNEY
BADLEY
SPELLMAN**

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

1 4. In September 2012, Wholesale Sports submitted paperwork to GGP to receive its
2 tenant allowance provided for in the Lease in the amount of \$756,000.00. As the paperwork was
3 not properly submitted, GGP assisted Wholesale Sports with making the proper request.
4 Wholesale Sports resubmitted the proper request on January 24, 2013. Per the request of
5 Wholesale Sports, GGP expedited payment of the tenant allowance so that a representative of
6 Wholesale Sports could pick it up at GGP's headquarters in Chicago, Illinois on February 6,
7 2013.

8
9 5. One week later, on February 12, 2013, I received notification from defendants
10 United Farmers of Alberta Cooperative Limited ("UFA") and Wholesale Sports that the
11 business interests of Wholesale Sports were to be acquired by Sportsman's Warehouse and
12 defendant Alamo Group, LLC ("Alamo Group"). More specifically, the notice stated that
13 Alamo Group was purchasing the capital stock of Wholesale Sports. Attached hereto as
14 Exhibit 1 is a true and correct copy of the February 12, 2013 letter received from defendants.
15 Nothing in the notification requested GGP's or North Town's consent to transfer the parties'
16 lease, nor was the required processing fee included. Furthermore, no proposed instrument of
17 transfer was provided for GGP's or North Town's review and approval. The notice was
18 unclear as to which entity had purchased which stores, but indicated GGP or North Town
19 would be contacted by the appropriate representative. I am not aware of any such
20 representative ever contacting GGP or North Town.
21

22 6. On February 21, 2013, it was brought to my attention by John Shasky, the
23 General Manager of North Town Mall, that the local paper had included an article stating that
24 Alamo Group had purchased four of the Wholesale Sports locations and intended to close all
25 of those locations.
26

DECLARATION OF GREG
SULLIVAN - 2

NOR057 0029 oel32g25md

CARNEY
BADLEY
SPELLMAN

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

1 7. On February 22, 2013, I attempted to contact Glenn Bingley of Wholesale
2 Sports. When Mr. Bingley did not return my call, I contacted Bruce Nysetvold, the Corporate
3 Secretary of Wholesale Sports and General Counsel for UFA. During my conversation with
4 Mr. Nysetvold, he stated that UFA had sold 14 Wholesale Sports stores to Sportsman's
5 Warehouse and that Sportsman's Warehouse had sold four of those stores to Alamo Group.
6 He confirmed that the four stores purchased by Alamo Group would be closed and that
7 Sportsman's Warehouse did not want to take over the Lease at North Town Mall. I reminded
8 Mr. Nysetvold of the obligations of Wholesale Sports under the Lease, including obtaining
9 consent to transfer the Lease. He indicated that I should get in touch with Don Gaube of
10 Alamo Group, not Wholesale Sports, regarding the location at North Town Mall.
11

12 8. Late in the day on February 25, 2013, I was able to reach Mr. Gaube. Mr.
13 Gaube stated that Alamo Group had purchased the four stores directly from Wholesale Sports
14 (not Sportsman's Warehouse), that he intended to conduct a liquidation sale from the
15 premises at North Town Mall, and that Alamo Group would do its best to locate a
16 replacement tenant for North Town. I reminded Mr. Gaube of the obligations of Wholesale
17 Sports under the Lease, including the requirement that Wholesale Sports remain in operation
18 for five years.
19

20 9. On March 4, 2013, I received a telephone call from Messrs. Bingley and
21 Nysetvold during which they asked whether North Town would accept Alamo Group as a
22 new tenant at the North Town Mall. I indicated that it was unlikely and reiterated North
23 Town's position as it related to the Lease obligations of Wholesale Sports. They indicated
24 that they would try to incentivize Sportsman's Warehouse to take over the Lease.
25
26

DECLARATION OF GREG
SULLIVAN - 3

NOR057 0029 oel32g25md

CARNEY
BADLEY
SPELLMAN

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

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10. On March 6, 2013, Messrs. Bingley and Nysetvold called me to let me know that Sportsman's Warehouse would not take over the Wholesale Sports store at North Town Mall. They also indicated, though, that Wholesale Sports wished to make an offer to resolve the matter.

11. I provided a counteroffer to Wholesale Sports on March 7, 2013, which was declined by Wholesale Sports on March 8, 2013. It is my understanding that the transaction between UFA, Wholesale Sports, Sportsman's Warehouse and Alamo Group closed on or about March 10, 2013.

12. Neither GGP nor North Town has ever received further documentation from any of the defendants demonstrating the actual nature of the sales transaction that took place. Based upon the information that has been provided to GGP and North Town by representatives for the various defendants, it is my understanding that the North Town Mall location is the only one that currently remains open of the four stores purchased by Alamo Group. Mr. Gaube has been unable to respond to GGP's inquiry as to which entity received the proceeds from the sale of the other 10 stores to Sportsman's Warehouse.

13. Although GGP previously requested that Alamo Group provide a letter of credit while the parties discussed a possible resolution of this matter, no such letter of credit was ever posted.

//
//
//

DECLARATION OF GREG
SULLIVAN - 4

NOR057 0029 oe132g25md

CARNEY
BADLEY
SPELLMAN

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO
THE BEST OF MY KNOWLEDGE.

DATED MAY 15, 2013, 2013, at Chicago, Illinois.



Greg Sullivan

DECLARATION OF GREG
SULLIVAN - 5

NOR057 0029 oc132g25md

CARNEY
BADLEY
SPELLMAN

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

APPENDIX E

General Growth Properties, Inc.

March 4, 2013

CERTIFIED MAIL 7010 0290 0002 5455 1218
RETURN RECEIPT REQUESTED

Wholesale Sports USA, Inc.
Attn: Glenn Bingley
4838 Richard Road SE, STE 700
Calgary, AB T3E6L1

Re: NOTICE OF DEFAULT FOR VIOLATION OF LEASE
Wholesale Sports – NorthTown Mall

Dear Mr. Bingley:

You are hereby given notice of your default under your Lease Agreement dated April 25, 2012 between NorthTown Mall LLC, as Landlord, and Wholesale Sports USA, Inc. as Tenant, described as follows:

You have notified us of an assignment transaction that violates Article 19 of the Lease. Tenant can't assign under Section 19.01 without Landlord's consent. Under Section 19.02, except for Permitted Transfers, no assignment or transfer of ownership can take place without Landlord's consent. Section 19.04 sets forth what constitutes a Permitted Transfer. The transaction as has been described to us is not a Permitted Transfer—as all of the assets of the Wholesale Sports USA, Inc. do not transfer to the ultimate tenant entity of this Lease. It is also our understanding that the assignee may not be continuously operating, may undertake a different use and because clearly the net worth of the resulting entity is below that of the tenant we signed the Lease with. As such, the transaction is a default under the Lease.

You are hereby given notice of your default under your Lease Agreement pursuant to Article 19 and Article 24 of the Lease, demand is made that you immediately cure your default by complying with the lease agreement as set forth above within 5 days from the date of receipt of this letter. Please note that under Article 24.01(b), this transaction is an immediate default, but we will, in this instance, give you 5 days to comply with the Lease.

Unless compliance is made in full with 5 days from the date of receipt of this letter, Landlord will exercise all rights granted to it under the Lease, which may include, an action for injunctive relieve, as well as recovery of possession of the premises. Any action to recover the premises will include an action to recover all past due and owing rents, rents to accrue in the future, including interest at the legal allowable rate, reasonable attorney's fees and cost of court.



NorthTown Mall
4750 North Division
Spokane, WA 99207
509-483-0211
fax 509-483-0360
www.northtownmall.com
Equal Opportunity Employer

General Growth Properties, Inc.

Please be advised that this matter is now being referred to our corporate office and, at the end of any applicable cure period, the matter will be forwarded to our local counsel for suit.

If you have any questions regarding this matter, please contact the undersigned immediately at (509) 462-3948


 John Shasky, CSM
 General Manager
 NorthTown Mall

U.S. Postal Service TM CERTIFIED MAIL TM RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$
RECEIVED MAR 04 2013 NORTH TOWN	
Sent to: <u>Windgate Sports</u> Street, Apt. No. or PO Box No. <u>4838 Richard Rd SE</u> City, State, ZIP+4	
PS Form 3800, August 2006 See Reverse for Instructions	

9121 5545 2000 0420 DTJ



NorthTown Mall
 4750 North Division
 Spokane, WA 99207
 509-462-0209
 fax 509-463-0390
www.northtownmall.com
 Equal Opportunity Employer

General Growth Properties, Inc.

March 7, 2013

UPS OVERNIGHT

Wholesale Sports USA, Inc.
Attn: Glenn Bingley
4838 Richard Road SE, STE 700
Calgary, AB T3E6L1

Re: NOTICE OF DEFAULT FOR VIOLATION OF LEASE
Wholesale Sports – NorthTown Mall

Dear Mr. Bingley:

You are hereby given notice of your default under your Lease Agreement dated April 25, 2012 between NorthTown Mall LLC, as Landlord, and Wholesale Sports USA, Inc. as Tenant, described as follows:

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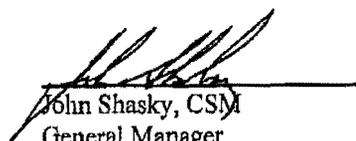


NorthTown Mall
4750 North Division
Spokane, WA 99207
509-483-0380
fax 509-483-0380
www.northtownmall.com
Equal Opportunity Employer

General Growth Properties, Inc.

Please be advised that this matter is now being referred to our corporate office and, at the end of any applicable cure period, the matter will be forwarded to our local counsel for suit.

If you have any questions regarding this matter, please contact the undersigned immediately at (509) 462-3948


John Shasky, CSM
General Manager
NorthTown Mall



NorthTown Mall
4750 North Division
Spokane, WA 99207
509 432 0201
fax 509-483-0380
www.norhtownmall.com
Equal Opportunity Employer

APPENDIX F

**TEN-DAY NOTICE TO COMPLY WITH
RENTAL AGREEMENT OR QUIT PREMISES
(RCW 59.12, et seq.)**

Via Hand Delivery/Personal Service, Certified Mail/Return Receipt Requested, and U.S. Mail: *Via Hand Delivery/Personal Service, Certified Mail/Return Receipt Requested, and U.S. Mail:*

TO: Wholesale Sports USA, Inc. dba
Wholesale Sports
12 North Town Mall
4750 North Division
Spokane, WA 99207

TO: Wholesale Sports USA, Inc. dba
Wholesale Sports
Attn: Glenn Bingley
4838 Richard Road SW, Suite 700
Calgary, Alberta Canada T3E6L1

North Town Mall LLC, a Delaware limited liability company, as the owner and landlord of the North Town Mall, 4750 North Division, Spokane, Washington, ("Landlord"), hereby notifies Wholesale Sports USA, Inc. dba Wholesale Sports ("Tenant") that Tenant is in breach of Articles 10 and 19 of that certain Lease dated April 25, 2012 (the "Lease"), for the lease of certain commercial property comprising approximately 34,371 square feet of floor area (the "Premises") located at the North Town Mall, 2160 North Division, in the County of Spokane, Washington, by (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.

Tenant must cure the foregoing defaults within ten (10) days of service upon Tenant of this Notice. If Tenant fails to comply with this Notice, Landlord may commence unlawful detainer proceedings against Tenant to terminate Tenant's rights under the Lease and the rights of all those claiming by, through or under Tenant, obtain possession of the Premises, recover all unpaid rent (doubled in accordance with RCW 59.12, et seq.), late fees, and attorneys' fees and costs all to the extent permitted under Washington's unlawful detainer statute codified at RCW 59.12, et seq.

Landlord does not waive or relinquish any of its rights or remedies, whether or not they are mentioned in this Notice. Landlord also does not waive or relinquish any of Tenant's duties or defaults, whether or not they are mentioned in this Notice. Landlord hereby reserves all of its rights and remedies, including but not limited to the right to commence additional proceedings and/or seek additional remedies in connection with any duties and defaults (whether they are mentioned in this Notice or not).

DATED this 19th day of March, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By Shawn K. Harju
Shawn K. Harju, WSBA #29942
Attorneys for Landlord
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

APPENDIX G

The Court of Appeals
of the
State of Washington
Division III

FILED

OCT -3 2013

COURT OF APPEALS
DIVISION III
SPokane County Superior Court

NORTH TOWN MALL, LLC, a Delaware)
limited liability company,)
)
Respondent,)
)
v.)
)
WHOLESALE SPORTS USA, INC., a)
Utah corporation; ALAMO GROUP, LLC,)
a California limited liability company,)
)
Appellants.)

COMMISSIONER'S RULING
NO. 31771-4-III

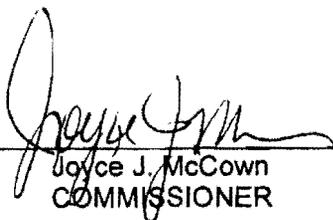
Having considered this Court's motion to determine appealability, the parties' memoranda, North Town Mall's motion for stay and the response and reply thereto, the record and file, and being of the opinion that this matter is appealable as a matter of right since the Spokane County Superior Court has entered a final decision in the writ of restitution action and actually issued a writ; and as to the motion for stay, since the trial court has stayed the other action on damages which is related to the instant case and in

No. 31771-4-III

some respects, but not all, the question of damages hinges on a decision by this Court on the instant case,

IT IS ORDERED, this matter is appealable of right. The motion for stay is denied.

October 3, 2013.


Joyce J. McCown
COMMISSIONER

APPENDIX H

The Court of Appeals
of the
State of Washington
Division III

FILED

MAY 16 2014

COURT REPORTER
BRYAN L. JONES
1000 1/2 AVENUE
SPokane, WA 99201

NORTH TOWN MALL, LLC,)	No. 31771-4-III
)	
Respondent,)	
v.)	COMMISSIONER'S RULING
)	
WHOLESALE SPORTS, USA,)	
INC, et al.,)	
)	
Appellant.)	

Wholesale Sports has appealed the Spokane County Superior Court's June 14, 2013 Order for Writ of Restitution and its June 17, 2013 Writ of Restitution that ordered Wholesale Sports to restore to North Town Mall possession of property it had leased. Wholesale Sports now moves this Court to stay proceedings in a related but separate superior court case, in which North Town has sued it and others for damages for breach of lease. *See North Town Mall, LLC v. Wholesale Sports, USA, et al.*, no. 13-2-01201-9.

The superior court in the related case originally stayed it pending this Court's decision on whether Wholesale Sports' appeal here was one of right. After this Court

No. 31024-8-III

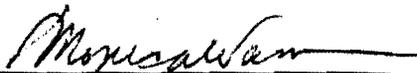
held it was appealable, the superior court dissolved its stay of the related case, allowed discovery to proceed, re-set the trial date, but deferred dispositive motions and trial pending this appeal. Then, in February 2014, the superior court allowed North Town to amend its complaint in the related case to add a party and issues, and the court denied Wholesale Sports' motion for stay.

Wholesale contends that this Court has jurisdiction to stay the related case under RAP 8.3, to insure effective and equitable review, and under RAP 8.1, because debatable issues exist, and it will suffer injury greater than North Town if this Court does not grant a stay.

This Court disagrees with Wholesale. The related case is not before this Court. Therefore, this Court has no jurisdiction to affect the course of that case in the trial court, by stay or otherwise. Accordingly,

IT IS ORDERED, Wholesale's motion to stay Spokane County Superior Court's cause no. 13-2-01201-9 pending the appeal here is denied.

May 16, 2014



Monica Wasson
Commissioner

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

FILED

JUN 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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 *RESPONDENT NORTH TOWN MALL'S RESPONSE BRIEF, APPENDICES A-H, and MOTION FOR EXTENSION OF TIME*, and this Certificate of Service to be served upon counsel of record on June 25, 2014, as follows:

<p>Collette C. Leland C. Matthew Andersen Winston & Cashatt, Lawyers 601 W Riverside Ste 1900 Spokane WA 99201 Phone: (509) 838-6131 Fax: (509) 838-1416 Email: ccl@winstoncashatt.com cma@winstoncashatt.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other _____</p>
---	--

DATED this 25th day of June, 2014.


Catherine A. Norgaard, legal assistant

Carney Badley Spellman
701 Fifth Ave., Ste. 3600
Seattle, WA 98104-7010
P: 206-622-8020 ext. 163
Email: Norgaard@carneylaw.com