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

SPOKANE SLAVIC BAPTIST CHURCH, Respondent,

v.

JOE TRENCHUK, individually and on behalf of his marital community
dba GREEN GLOBAL ENTERPRISES, LLC, JOE TRENCHUK
TRUST, IVAN KRIGER, individually and on behalf of his marital
community dba GREEN GLOBAL and GREEN GLOBAL
ENTERPRISES, LLC and GREEN GLOBAL ENTERPRISES, LLC, an
inactive Washington Limited Liability Company, Appellants.

RESPONSE BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

This is a breach of contract case. Spokane Slavic Baptist Church ("the Church") entered into two related contracts with Green Global Enterprises LLC dba Green Global ("Green Global") and with Joe Trenchuk.

The first of those two agreements provided that Green Global would sell, and the Church would buy, the former Fred Meyer Property in northeast Spokane, Washington. That first agreement was written, fully executed, and entirely unambiguous.

The second agreement required the Church to make a \$250,000 deposit (the "Deposit") for the former Fred Meyer property's purchase (the "Deposit Agreement"). The second agreement was also written, fully executed, and entirely unambiguous. The Deposit Agreement specifically required the Church to make the Deposit directly to Mr. Trenchuk, and the agreement required Mr. Trenchuk to hold the deposit in his personal bank account (as opposed to in an account belonging to Green Global). Critically, the Deposit Agreement obliged Mr. Trenchuk to fully and unconditionally refund the Church's deposit, if the former Fred Meyer property's transaction was not consummated.

The transaction fell through. The Church demanded that its Deposit be refunded, but Mr. Trenchuk refused.

The core facts relevant to the Church's breach of contract claim are undisputed. Firstly, Mr. Trenchuk does not argue that there is any ambiguity in the Deposit Agreement. Secondly, he does not dispute that the Deposit Agreement entitled the Church to a full and unconditional refund. Thirdly, Mr. Trenchuk acknowledges he accepted the Church's Deposit into his personal bank account. Fourthly, it is undisputed that the Church never purchased the former Fred Meyer property. In fact, Green Global never even acquired title to the property – it, therefore, had no property to sell. And finally, Mr. Trenchuk acknowledges that he did not refund the Church's money. Those undisputed facts required the Trial Court to enter judgment in the Church's favor, and the same facts require the Court of Appeals to affirm the Trial Court's order.

In an effort to avoid liability, Mr. Trenchuk makes four arguments. One, he asserts that the purchase had "begun" by the Deposit Agreement's deadline, which (he asserts) rendered the Deposit nonrefundable. Two, he asserts that there was an oral modification of the Parties' contract, which alleviated him of the obligation to refund the Church's money. Three, he asserts that the contract is unconscionable and, thus, unenforceable. And four, he contends that the Church was paid and accepted a refund from a third party. None of Mr. Trenchuk's arguments are supported by the law, and none of Mr. Trenchuk's arguments are supported by the record.

Further, nearly all of Mr. Trenchuk's arguments rely upon a misrepresentation of the record and a false portrayal of the Parties' relationships and roles. Specifically, Mr. Trenchuk contends (i) that he was solely involved in this matter as a result of having been asked, and having agreed, to hold the Church's Deposit; and (ii) that he dealt with Ivan Kriger as a representative of the Church.¹

Mr. Trenchuk's involvement in the former Fred Meyer property transaction arose from the undisputed fact that he was Mr. Kriger's business partner in Green Global – the entity that was to sell the property to the Church. Mr. Trenchuk asks the Court to disregard his ownership/membership in Green Global and to, instead, view Mr. Kriger as synonymous with "the Church," based on nothing more than (i) Mr. Kriger being an adherent to the Church's faith and (ii) Mr. Kriger being related by marriage to one of the Church's leaders.² There is no legitimate basis for Mr. Trenchuk's attempt to redefine Mr. Kriger's role.³

¹ Mr. Trenchuk's opening brief misrepresents the record by asserting that the Church did things, said things, or knew things, where the record undisputedly shows that Ivan Kriger did, said, and knew those things. *See e.g.*, Mr. Trenchuk's Opening Brief ("Trenchuk Brief"), pp. 2, 9-11, 13, 15.

² There is a cynical bias in Mr. Trenchuk's disregard of his own business partnership with Mr. Kriger based upon Mr. Kriger's religious affiliation and his marriage. Moreover, the Church specifically testified that they

The record unambiguously shows that Mr. Trenchuk agreed to unconditionally and fully refund the Church's Deposit if the former Fred Meyer property sale was not consummated. The record unambiguously shows that Mr. Trenchuk failed to do so. And the record does not contain any support for Mr. Trenchuk's assertion that the Church modified, waived, or released its refund rights.

Based upon the undisputed contracts, the facts of record, and the law, the Superior Court entered a summary judgment in the Church's favor against Mr. Trenchuk. The Church respectfully asks the Court of Appeals to affirm the Trial Court's order in every respect.

II. RESTATEMENT OF THE ISSUES PRESENTED

A. Where a written contract's terms are unambiguous, Washington's Courts enforce the terms as written. The contract at issue gave the Church the absolute right to a full refund (from Mr. Trenchuk), in the event that the subject real estate purchase was not consummated. Undisputed facts establish that the real estate purchase was not consummated (or even begun). However, Mr. Trenchuk refused to refund the Church's money.

were not dealing with Mr. Kriger as a brother-in-law, and that they trusted Mr. Trenchuk based upon **his** religious affiliation. CP 80, 84.

³ Though Green Global and Mr. Kriger were Defendants below, neither is a party to this appeal, and neither Green Global nor Mr. Trenchuk have asserted any claim against Mr. Kriger.

Was the Trial Court, therefore, correct to summarily enforce the Parties' Deposit Agreement?

B. Washington Courts expect parties to make arguments based upon an accurate and candid presentation of the record. Mr. Trenchuk, however, mispresents his business partner and co-defendant, Ivan Kriger, as being synonymous with "the Church." Should the Court reject Mr. Trenchuk's arguments that are based upon a misrepresentation of the record?

C. Washington law forbids a party from attempting to manufacture a false issue of fact by contradicting unambiguous answers previously given in litigation. Mr. Trenchuk improperly relies on contradictory testimony from himself and from Mr. Kriger. Should the Court disregard such contradictory testimony in evaluating this appeal?

D. Washington's Courts may invalidate a contract based upon unconscionability only where the agreement is monstrously one-sided or where there is serious irregularity in the agreement's formation. There is no evidence to show that the Deposit Agreement's formation was suspect, and the Deposit Agreement's terms are clear and reasonable. Should the Court, therefore, reject Mr. Trenchuk's unconscionability arguments?

III. STATEMENT OF FACTS

A. JOE TRENCHUK AND IVAN KRIGER WERE PARTNERS IN GREEN GLOBAL, AND THROUGH GREEN GLOBAL, THEY OFFERED TO SELL PROPERTY THAT THEY DID NOT YET OWN.

Ivan Kriger and Joe Trenchuk are business partners; they owned and operated a business known as Green Global. CP 64-65, 90-91. Green Global (through Messrs. Kriger and Trenchuk), represented (to the Church) that Green Global had the ability to acquire the former Fred Meyer property and that, once it had acquired the property, Green Global would sell the former Fred Meyer property to the Church. CP 12-13, 18, 90-91.

Specifically, Green Global agreed to sell the former Fred Meyer property to the Church for \$2.5 million, under seller financing at a 5% interest rate. *See id.* The Church intended to use the property as its new church building and for its sanctuary. CP 13.

The Church was aware that Green Global was not yet in title to the former Fred Meyer property. CP 12-13, 80-85. Green Global represented that it had a pending loan transaction with an entity known as Kennedy Funding ("Kennedy") with respect to property at Idaho's Silver Mountain; Green Global also represented that once the transaction with Kennedy was concluded, Green Global would be able to acquire the former Fred Meyer property. CP 80-85. The Church never had any agreement with Kennedy.

CP 80-85. And the Church had no contact with Kennedy until after the Church became aware that its money had been lost to Kennedy and that Mr. Trenchuk was not making good on his contractual promise to refund the Church's Deposit. *See id.*

B. GREEN GLOBAL REQUIRED THE CHURCH TO MAKE A DEPOSIT OF \$250,000, MR. TRENCHUK AGREED TO HOLD THE DEPOSIT, AND THE PARTIES' AGREED THAT THE DEPOSIT WOULD BE REFUNDED IF THE REAL ESTATE PURCHASE WAS NOT CONSUMMATED.

The Church's agreement with Green Global was entered on or about February 14, 2014. CP 18. Shortly thereafter, Green Global notified the Church that it needed to make a deposit of \$250,000 for the deal to proceed. CP 91-93, 103-12. Between February and May 2014, Green Global and the Church discussed the deposit terms. *See id.*

In March or April 2014, Mr. Kriger asked the Church to make a nonrefundable deposit. CP 92, 103-05. The Church, however, declined Green Global's request for a non-refundable deposit. *See* CP 82, 91-93, 103-08.

In early May 2014, the Church proposed making a deposit through a promissory note. CP 82, 92, 107-08. Green Global, however, would not accept a note. *See id.*

Therefore, on May 15, 2014, the Church, Green Global, and Joe Trenchuk⁴ entered into the Deposit Agreement, a written agreement whereby (i) the Church agreed to make the \$250,000 Deposit; (ii) the Deposit would be paid to the "Joe Trenchuk Trust account"; (iii) the Deposit would be used as a down payment for purchase of the former Fred Meyer property's purchase; and (iv) if the purchase was not closed by June 15, 2014, the Deposit would be refunded to the Church. CP 20. Mr. Trenchuk holding the Deposit as a trustee was a requirement for the Church because it knew Mr. Kriger had no money (in fact, he was living in Mr. Trenchuk's house at the time). CP 82, 84.

The Deposit Agreement did not place any limit on the Deposit's refundability. CP 20. Specifically, the Deposit Agreement stated: "If the old building of Fred Meyer is not purchased by Spokane Slavic Baptist Church by June 15, 2014, the \$250,000 *is refundable*." *Id.*

The Church paid the Deposit (in its entirety) on May 15, 2014. CP 22. Joe Trenchuk accepted the Church's Deposit in the form of a cashier's check. *Id.*, *see also* CP 65, 71. Mr. Kriger and the Church specifically

⁴ The May 15, 2014 Agreement is in the name of the "Joe Trenchuk Trust," and Mr. Trenchuk signed over the phrase "Joe Trenchuk Trust." CP 20. However, it is undisputed that Mr. Trenchuk deposited the money in his personal bank account. CP 22, 65, 71. Mr. Trenchuk also admitted that there is no distinction between himself as an individual and the "Joe Trenchuk Trust." CP 385.

told Mr. Trenchuk that the Deposit was to "remain in [Mr. Trenchuk's] account until he was directed to pay them out[, and i]f the funds were not used[, Mr. Trenchuk] was to refund them to [the Church]." CP 65, 93.

Mr. Trenchuk admitted that he understood that the Deposit Agreement meant that "the funds would remain in [his] account if not used for the [C]hurch's loan [and that i]f not used [he] would return them." CP 65.

C. GREEN GLOBAL WAS NOT ABLE TO PERFORM, THE REAL ESTATE PURCHASE FELL THROUGH, AND UNBEKNOWNST TO THE CHURCH, MR. TRENCHUK HAD RELEASED THE DEPOSIT AND THE MONEY WAS LOST.

As noted above, the Church was aware that Green Global was attempting to close a larger deal with Kennedy, and the Church believed that closure of that deal was necessary for the Church's deal with Green Global to proceed. *See* CP 80-85, *see also* CP 329. The Church had no relationship with and no contracts with Kennedy. *See id.*, *see also* CP 339-362. In fact, before the deal fell apart the Church had no contact with Kennedy. *See id.*⁵

Unbeknownst to the Church, Green Global did not actually have a loan commitment with Kennedy that covered the former Fred Meyer

⁵ While Green Global provided updates to the Church with respect to the status of Green Global's transaction with Kennedy, the Church did not closely monitor those updates. CP 80-85.

property. CP 329-30, 339-50. Instead, the transaction that was being discussed between Kennedy and Green Global was limited to Green Global's acquisition at Idaho's Silver Mountain. *Id.* The Church did not learn that Green Global lacked the ability to honor its agreement with the Church until after everything fell apart and the Church's money was lost. CP 80-85.

Mr. Trenchuk falsely asserts that the Church denied any knowledge of Kennedy. Trenchuk Brief, p.1. The Church was aware that Green Global was working on a transaction with Kennedy, and the Church believed that the Green Global/Kennedy transaction was prerequisite to the closing of the Green Global/Church transaction. CP 80-85. However, there is no evidence in the record to show that the Church had any knowledge (at the time) that Green Global and Mr. Trenchuk planned to irrevocably give the Church's \$250,000 Deposit to Kennedy in order to facilitate Green Global's transaction with Kennedy. *See* CP 12-13, 18, 64-65, 80-85, 90-91, 263-64, 395-98. Unfortunately, the Church learned that Green Global and Mr. Trenchuk had given the Church's Deposit to Kennedy after the money was lost. CP 80-85.

Through its discussion with Green Global, the Church was aware that Green Global was sending a monetary deposit to Kennedy; however, the Church was not aware that Green Global was sending the Church's

Deposit to Kennedy. CP 80-85. However, that was a distinction without a difference – the Church had no business with Kennedy and the Church had Mr. Trenchuk's personal commitment that the Deposit would be refunded (regardless of the circumstances) in the event that Green Global was not able to complete its sale of the former Fred Meyer property by June 2014. *Id.*

The Church never knew or agreed that the Deposit would become nonrefundable. *Id.*⁶ In fact, as late as July 31, 2014 – months after the money was sent to Kennedy – Mr. Kriger acknowledged in writing that the Church paid a \$250,000 deposit to Green Global and that the entirety of the deposit would be refunded if the real estate purchase was not consummated. CP 363.

Mr. Trenchuk acknowledges that **he** sent the Church's deposit to Kennedy. CP 65, 71. Importantly, Mr. Trenchuk does not identify any discussion with the Church regarding his transfer of the Deposit to

⁶ Mr. Kriger testified (at deposition) that he informed the Church that the deposit money would be nonrefundable, and Mr. Trenchuk heavily relies upon that testimony. *See* Trenchuk Brief, pp. 9-11, *see also* CP 285. However, that testimony is in direct contradiction to Mr. Kriger's prior statements. *See infra*. Further, Mr. Kriger's declaration testimony makes it clear that his statements regarding a nonrefundable deposit were made in March and April 2014 – months prior to the Parties' Deposit Agreement. *See infra*. Those statements are, therefore, irrelevant to the issue before the Court.

Kennedy; Mr. Trenchuk acknowledges that he took his instructions from Mr. Kriger (his partner in Green Global).⁷ CP 375, 386. Mr. Kriger gave his partner (Mr. Trenchuk) instructions to send the Church's money to Kennedy, and Mr. Trenchuk did so. *Id.*; *see also* CP 65, 71. The Church was not involved.

About a month later, the transaction between Green Global and Kennedy fell apart. On July 1, 2014, Green Global and Kennedy entered into an agreement that (i) terminated the pending loan transaction, (ii) released all claim to the \$250,000 that Green Global had paid to Kennedy (*viz.*, the Church's money), and (iii) refunded \$30,900 to Green Global. CP 331-32, 336-37. The Church was not a party to the July 1, 2014 agreement between Green Global and Kennedy, and the Church was unaware that Kennedy and Green Global had terminated their agreement/transaction. *See id.*, *see also* CP 80-85. Despite having entered into a written agreement terminating its agreement with Kennedy, Green

⁷ Mr. Trenchuk attempted to create an issue of fact by offering contradictory testimony regarding who gave him the direction to send the deposit funds to Kennedy. First, Mr. Trenchuk testified that the direction came from Mr. Kriger. CP 375, 386. However, once it became apparent that taking direction from Mr. Kriger (Mr. Trenchuk's partner) would not eliminate his liability to the Church, Mr. Trenchuk attempted to change his testimony to assert that the Church instructed him to send the money to Kennedy. CP 212.

Global continued to assure the Church that the Church's Deposit was refundable. CP 333-34, 363.⁸

Mr. Trenchuck falsely asserts that the Church received a refund from Kennedy. Trenchuk Brief, pp. 27-29. There is no support in the record for Mr. Trenchuk's assertion. The only money that was ever refunded went from Kennedy to Green Global – the company owned by Messrs. Kriger and Trenchuk. CP 335, 331. The Church never got its money back.

The Church finally became aware that Green Global would not be able to complete the former Fred Meyer property's sale in August 2014. CP 80-86. At around the same time, the Church learned that Green Global, Mr. Kriger, and Mr. Trenchuk were taking the position that the Church's money was lost and could not be recovered. *Id.* In December 2015, the Church sent a joint letter (with Green Global) to Kennedy in hopes of getting the Church's money back; however, Kennedy refused. *See* CP 291.

Mr. Trenchuk's attempt to cast the Church's December 2015 joint letter with Green Global as the Church's voluntary withdrawal from the

⁸ Green Global's July 31, 2014 letter confirming that the Deposit remained refundable identifies an additional payment of \$25,00 from the Church. CP 363. That payment was separate from the Deposit Agreement and has never been part of this litigation.

planned purchase/sale of the former Fred Meyer property is inconsistent with the record. *See* Trenchuk Brief, p. 33. The record is undisputed that Green Global's transaction with Kennedy was dead by July 2014 – about 6 months before the December 2015 letter. In early July 2014, Green Global released all claims against Kennedy and received a partial reimbursement (\$30,900). CP 336-37. The Church's joint letter with Green Global was the Church's last-ditch effort to recover its money. *See* CP 291.

D. GREEN GLOBAL AND MR. TRENCHUK REFUSED TO REFUND THE CHURCH'S DEPOSIT.

As time went on, it became apparent that Green Global was not going to be able to honor its obligation to sell the former Fred Meyer property to the Church. However, Green Global and Mr. Trenchuk refused to refund the Church's Deposit. CP 14-15.

On or about May 10, 2016, and again on May 22, 2017, the Church sent written notices to Green Global, Mr. Trenchuk, and Mr. Kriger seeking a refund of the Deposit. CP 24, 26. The Church's letters noted that the Deposit was expressly and specifically refundable and that the former Fred Meyer property had been sold to someone else. *See id.* Despite the Church's demand for the return of its Deposit, Green Global, Mr. Trenchuk, and Mr. Kriger refused to refund the Deposit. CP 14-15. The

Church was, therefore, left with no alternative but to pursue legal action against Green Global, Mr. Trenchuk, and Mr. Kriger.

IV. STATEMENT OF CASE

The Church filed suit on October 5, 2017. CP 1-8. On August 24, 2018, the Church moved for Summary Judgment. CP 130-32. On November 16, 2018, the Trial Court granted the Church's motion for summary judgment and awarded the Church a money judgment against Mr. Trenchuk. CP 425-30.⁹

Mr. Trenchuk moved for reconsideration on November 26, 2018. CP 431-46. The Trial Court denied Mr. Trenchuk's motion for reconsideration on January 16, 2019. CP 459. Mr. Trenchuk filed a timely notice of appeal. And on March 7, 2019, the Trial Court entered an order of finality to allow this appeal to proceed. CP 472-76.

V. ARGUMENT

A. REVIEWING THIS MATTER DE NOVO, THE COURT SHOULD AFFIRM THE TRIAL COURT'S SUMMARY JUDGMENT ORDER.

Summary judgment rulings are reviewed *de novo* with the Appellate Court performing the same inquiry as the Trial Court. *Kruse v.*

⁹ On January 25, 2019, the Trial Court entered an Order disbursing certain funds that were held in the Court's registry; those funds were applied to the Church's judgment. CP 460-63. And on February 21, 2019, the Church filed a partial satisfaction of judgment, acknowledging that payment. CP 469-71.

Hemp, 121 Wn.2d 715, 722 (1993). Summary judgment is proper if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 (1989). A material fact is one "upon which the outcome of the litigation depends . . ." *Morris v. McNicol*, 83 Wn.2d 491, 494 (1974).

This matter involves no genuine issues of material fact. The Parties' agreements are unambiguous. As the Court can see from the record, Mr. Trenchuk's attempts to create the appearance of disputed facts result from misrepresentations of the record. There are no genuine issues of material fact that are supported by the record. And the Church is entitled, as a matter of law, to have its unambiguous contract enforced. The Church, therefore, respectfully asks the Court to affirm the Trial Court in every respect.

B. THE CHURCH IS ENTITLED TO THE BENEFIT OF ITS UNAMBIGUOUS BARGAIN WITH MR. TRENCHUK.

1. Washington State Law Enforces Unambiguous Contracts Based Upon The Parties' Written Manifestations.

The interpretation of an unambiguous contract is a question of law and may be resolved by summary judgment. *In re Estates of Wahl*, 99 Wn.2d 828, 831 (1983). In contract interpretation cases, summary judgment is proper if the parties' written contract, viewed in light of the

parties' other **objective** manifestations, has only one reasonable meaning.

GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135 (2014).

"The essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a breach of contract." *Carboneau v.*

Peterson, 1 Wn.2d 347, 374 (1939). Contract damages, therefore, are based on the injured party's expectation interest and are intended to give that party the benefit of the bargain. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 849-50 (1990); *Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 309 (1975); 25 Wn. Prac., Contract Law and Practice § 14:4.

The Court's function in contract interpretation is to effectuate the parties' **manifested** intent; the parties' subjective intentions are irrelevant in the inquiry.¹⁰ *In re Marriage of Karlsten*, Slip Op. 66124-8-I, 2012 (Wn. App. Mar. 5, 2012) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990); *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855 (1981)).

Thus, where the parties include specific provisions allocating the risk of

¹⁰ Throughout his opening brief, Mr. Trenchuk asserts that he "considered" the Deposit Agreement to no longer be in effect once he transferred the Deposit to Kennedy. See Trenchuk Brief, pp. 13, 19. Mr. Trenchuk's subjective belief is irrelevant. There are no objective manifestations, from any Party, that would modify or otherwise affect the Parties' obligations under the Deposit Agreement.

loss, the Courts enforce the provisions as written. *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 307 (1975) ("Where parties provide a remedy . . . in their contract, that remedy is presumed to be the sole remedy.").

The Deposit Agreement is an unambiguous manifestation of the Parties' intent. CP 20. It provides the Church an absolute and unconditional right to have its Deposit refunded, in the event that its purchase of the former Fred Meyer property could not be consummated. *Id.* The Deposit Agreement is a clear and enforceable allocation of risk, rights, and responsibilities. The Trial Court was therefore correct to enforce it as written, and the Church respectfully asks the Court to affirm the Trial Court's decision.

2. *There Is No Evidence In The Record To Support Mr. Trenchuk's Alleged Contract Modification.*

The burden of proving modification of a contract is on the party asserting it. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 28 (2005). One party may not unilaterally modify a contract. *Jones v. Best*, 134 Wn.2d 232, 240 (1998). Therefore, "modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds." *Id.* at 240, *see also Wagner v. Wagner*, 95 Wn.2d 94, 103 (1980). Absent a mutual exchange of obligations or

rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract. *Rosellini v. Banchemo*, 83 Wn.2d 268 (1974); *Flower*, 127 Wn. App. at 27-28 (quoting *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 499 (1983)).

The record does not support Mr. Trenchuk's assertion that the Deposit Agreement was modified. *See* Trenchuk Brief, pp. 16-26. While the Church knew that Green Global was sending some money to Kennedy, there is **no place in the record that contains any indication** that the Church knew that Mr. Trenchuk (or Green Global) would then consider the Deposit to be nonrefundable. More importantly, there is no indication in the record that the Church **ever agreed** that the Deposit would become nonrefundable.

a. Mr. Trenchuk's Shifting Testimony Must be Disregarded.

As noted above, Mr. Trenchuk's principal argument is that he was instructed to wire the Church's Deposit to Kennedy, and that, by doing so, he satisfied all his contractual obligations. *See generally* Trenchuk Brief. Mr. Trenchuk is woefully imprecise in stating who told him to send the Church's money to Kennedy. *See id.* at 2, 13, 19. Mr. Trenchuk vacillates between asserting (i) that "the Church" told him to send the money, (ii)

that Mr. Kriger told him to send the money, and (iii) that both the Church and Mr. Kriger told him to send the money. *See id.*

Mr. Trenchuk's vacillation is exactly the kind of self-contradiction that Washington law forbids. *See Marthaller v. King County Hosp.*, 94 Wn. App. 911, 918 (1999). When a party has given clear answers in his prior sworn discovery answers, he or she "cannot thereafter create [a genuine issue of material fact] with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Klontz v. Puget Sound Power & Light*, 90 Wn. App. 186, 192 (1998) (*quoting Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185 (1989)). In cases where a party attempts to do so, the unexplained inconsistencies between the party's initial testimony and subsequent testimony must be disregarded. *Marshall*, 56 Wn. App. at 184.

Early in this litigation, the Church propounded requests for admission on Mr. Trenchuk. CP 383-89. In response to those requests, Mr. Trenchuk specifically averred that Ivan Kriger authorized him to send the Church's Deposit to Kennedy:

REQUEST FOR ADMISSION NO. 7. Admit that Plaintiff Spokane Slavic Baptist Church never provided Trenchuk with a verbal authorization to release the \$250,000 given to him by Plaintiff Spokane Slavic Baptist Church.

RESPONSE:

Deny – authorization went through Ivan Kriger

CP 386. The Church followed up on Mr. Trenchuk's admission with interrogatories. CP 365-80. In his responses to those interrogatories, Mr. Trenchuk confirmed that he took his direction from Ivan Kriger:

INTERROGATORY NO. 15.: If you denied Request for Admission No. 7, please explain in detail your denial.

ANSWER:

I was informed by Ivan Kriger that the church had directed him to send the money to Kennedy Funding so they could obtain the loan for the Fred Meyers building.

CP 375. Mr. Trenchuk signed both of these discovery answers under penalty of perjury. CP 380, 389. Mr. Trenchuk's answers are direct and unambiguous.

Despite the clarity of his prior answers, when the Church moved for summary judgment, Mr. Trenchuk filed a declaration (on October 19, 2018), asserting that a Church administrator directed him to send the Church's Deposit to Kennedy. CP 209-16, *see specifically* CP 212. Mr. Trenchuk's October 19, 2018 declaration is an impermissible self-contradiction, and it must be disregarded. Mr. Trenchuk cannot create an issue of fact by retreating from and contradicting his prior answers. *See Marshall*, 56 Wn. App. at 184.

Moreover, Mr. Trenchuk's October 19, 2018 declaration is internally inconsistent and self-contradictory. *See generally*, CP 209-16. First, the declaration states that the meeting during which Mr. Trenchuk signed the Deposit Agreement (May 15, 2014), was the "**first and only time**" that he spoke with anyone at the Church. CP 211, ¶ 8 (emphasis added). About five paragraphs later, Mr. Trenchuk's declaration asserts that he received direction to send the Church's Deposit to Kennedy, from a Church official about five days after that meeting. CP 212, ¶ 13.

Mr. Trenchuk's October 19, 2018 declaration has no evidentiary value. The Court should, therefore, disregard it and reject Mr. Trenchuk's attempt to create the appearance of disputed issues of fact where none exist.

b. The Church Never Had an Agreement with Kennedy.

The Church had an agreement to purchase property from Green Global – **not** Kennedy. CP 18. The Church had an agreement to have that purchase funded by Green Global – not Kennedy. CP 18, 80. The Church never had an agreement with Kennedy. *Id.*

The Church insisted that the Deposit be placed with Mr. Trenchuk because the Church knew (i) that he was an owner/member of Green Global; (ii) that he was the primary source of funding for Green Global;

and (iii) that Mr. Kriger (Green Global's other owner) did not have any money. CP 81-84. *See also* CP 91-93, 103-12. And the unambiguous Deposit Agreement made the Deposit wholly and unconditionally refundable. CP 20.

Having no agreement with Kennedy, the Church never had a reason to agree to pay Kennedy any amount. Specifically, the Church never had a reason to agree that the Deposit (money that the Church had previously given to Mr. Trenchuk as a wholly refundable deposit towards the Church's purchase of the former Fred Meyer property) be given to Kennedy, as a nonrefundable payment towards Green Global's purchase of property at Silver Mountain. The record clearly shows that the Church's only interactions, only obligations, and only rights were *vis-à-vis* Green Global and Mr. Trenchuk. CP 80-84. Mr. Trenchuk's arguments to the contrary are at odds with the record and with reason.

Mr. Trenchuk's repeated assertions that the Church knew that its money was being sent to Kennedy misses the point. The record clearly shows that the Church was aware that Green Global was working on a transaction with Kennedy and that said transaction involved Green Global sending money to Kennedy. CP 85. Insofar as the Church was concerned, the interactions between Green Global and Kennedy were "noise;" the Church had Green Global's promise to sell the former Fred Meyer

property, and that is all the Church cared about. *Id.* Thus, the Church did not care what Green Global did with the Deposit because it had Mr. Trenchuk's promise that money would be refunded. CP 80-85. In the end the Church would either get the property or would get an unconditional refund. *Id.*; *see also* CP 20. Mr. Trenchuk's effort to insert the Church into Green Global's interactions with Kennedy are contrary to the Parties' agreements and the record.

c. Mr. Trenchuk's Purported Reliance on the Church's November 21, 2013 "Agreement Letter" (CP 219) is Contrary to the Record.

Acknowledging that his testimony rests on shifting sands, Mr. Trenchuk asserts that it does not matter whether he took direction from the Church or from Mr. Kriger. *See* Trenchuk Brief, p. 19. Mr. Trenchuk makes this argument based upon a November 21, 2013 "Agreement Letter," which he asserts fully vested Mr. Kriger with authority to alienate the Church's money. *See id.*

Mr. Trenchuk's argument comports with neither the facts nor with logic. Mr. Trenchuk is asserting that the November 21, 2013 "Agreement Letter" empowered Mr. Kriger to work as both the buyer and the seller with respect to the former Fred Meyer property. Mr. Trenchuk is asserting that his reliance on Mr. Kriger (despite the obvious self-dealing) obviates Mr. Trenchuk of all responsibility. And Mr. Trenchuk is asserting that he

took direction for the Church from Mr. Kriger, despite the fact that Messrs. Kriger and Trenchuk were business partners. None of Mr. Trenchuk's assertions are consistent with the record.

The Church did sign an "Agreement Letter" on or about November 21, 2013. CP 219. However, Mr. Trenchuk's purported reliance upon that "Agreement Letter" to justify his acceptance of direction from Mr. Kriger (with respect to the Church's rights, responsibilities, and money) is completely at odds with the document. *See id.*; *see also* Trenchuk Brief, p. 19. The November 21, 2013 "Agreement Letter" identifies "Ivan Kriger, president of Green Global Enterprises to be [the Church's] sole negotiator on the property known as Fred Meyer . . ." CP 219. The "Agreement Letter" does not give Mr. Kriger authority to enter into new contracts **or modify existing contracts** on behalf of the Church. *See id.* Most importantly, the "Agreement Letter" specifically notes that the **Church will pay Green Global a commission of \$54,000 for Mr. Kriger's work.** *Id.* The "Agreement Letter," therefore, truly represents a retention of Green Global, not of Mr. Kriger as an individual. *See id.*

As an owner of Green Global, Mr. Trenchuk cannot reasonably rely upon that "Agreement Letter" as a basis for his claimed belief that Ivan Kriger was acting as the Church's agent (when Mr. Kriger instructed Mr. Trenchuk to send the Church's money to Kennedy). *State v. Parada*,

75 Wn. App. 224, 231 (1994) (reliance on an agent's authority must be justifiable, and "[o]ne dealing with an agent is not entitled to rely on the agent's representations when put on notice that a question exists as to the agent's authority."). Mr. Trenchuk cannot rely upon an agreement that provides for a commission payment to Green Global (Mr. Trenchuk's own company) for services provided through Green Global by Mr. Kriger (Mr. Trenchuk's business partner). *See id.* Mr. Trenchuk's argument is a transparent attempt to offer an after-the-fact justification for his and Mr. Kriger's (through Green Global) use of the Church's money for their own enrichment.

C. MR. TRENCHUK'S ASSERTION THAT THE CHURCH'S DEPOSIT WAS RENDERED NONREFUNDABLE BY VIRTUE OF THE "PURCHASE" HAVING BEEN "BEGUN" IS CONTRARY TO THE DEPOSIT AGREEMENT'S PLAIN LANGUAGE.

Throughout his opening brief, Mr. Trenchuk conflates the pending transaction between Green Global and Kennedy with the planned transaction between Green Global and the Church. *See* Trenchuk Brief, pp. 26-27. Conflating the two transactions, Mr. Trenchuk asserts that the Deposit Agreement was fully performed because the "purchase" had "begun" prior to June 15, 2014. *See id.* Mr. Trenchuk's argument is entirely contrary to the record – the "purchase" that had to occur prior to June 15, 2014 was the Church's purchase of the former Fred Meyer

property from Green Global. CP 20. The record is clear that as of June 15, 2014, Green Global owned no interest in the former Fred Meyer property – it had nothing to sell to the Church. *See* CP 83. It is, therefore, impossible for the Church's "purchase" of property from Green Global to have "begun" by the Deposit Agreement's deadline. *See id., see also* CP 20.

More fundamentally, Mr. Trenchuk's argument is contrary to the Deposit Agreement's plain language. The Deposit Agreement's relevant language reads: "If the old building of Fred Meyer is not purchased by Spokane Slavic Baptist Church by June 15, 2014, the \$250,000 is refundable." CP 20. Washington courts interpret contracts according to the ordinary meaning of the words used. *Syrovoy v. Alpine Res.*, 68 Wn. App. 35, 40 (1992). And unless the language used in a contract is amenable to multiple reasonable interpretations, the issue is one of law. *See Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116 (1966). The Court can and should take judicial notice that the ordinary definition of the word "purchased" is "to have acquired." As a matter of law and undisputed fact, the Church had not acquired anything by June 15, 2014. Mr. Trenchuk's argument is entirely baseless and should be disregarded.

D. MR. TRENCHUK'S ASSERTION THAT THE CHURCH RECEIVED A REFUND OF \$30,900 IS DIRECTLY CONTRARY TO THE RECORD; THAT MONEY WENT TO MR. TRENCHUK'S COMPANY, GREEN GLOBAL.

Mr. Trenchuk asserts that the Church received a refund of \$30,900 from Kennedy. Trenchuk Brief, pp. 27-29. That assertion is flatly contradicted by the record. Mr. Kriger cites to pages 48 and 49 from the deposition of Ivan Kriger to support his assertion. *Id.* at 28-29; *see also* CP 294-95. The Court will note, however, that the portion of Mr. Kriger's testimony that is cited by Mr. Trenchuk does not say to whom the \$30,900 was paid. *See id.* However, Mr. Kriger's testimony **directly** addressed that issue at page 57 (and Exhibit 7) of the same deposition. CP 331, 335. Mr. Kriger's unambiguous testimony, and the unambiguous wire confirmation document from Kennedy, show that the \$30,900 went to Green Global, **not the Church.** *Id.*

Additionally, Mr. Trenchuk represented to the Court that the Church received \$30,900 when the record unambiguously shows that said money was paid to the company that Mr. Trenchuk and Mr. Kriger jointly owned. Such blatant misrepresentation should not be countenanced.

E. MR. TRENCHUK'S UNCONSCIONABILITY ARGUMENT IS CONTRARY TO WASHINGTON STATE LAW AND IS UNSUPPORTED BY THE RECORD.

Whether a contract is unconscionable is a question of law for the courts. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995).

Unconscionability may either be (i) substantive – where a clause in the contract is one-sided or overly harsh, or (ii) procedural – where impropriety took place while forming the contract. *Schroeder v. Fageol Motors*, 86 Wn.2d 256, 260 (1975).

Substantive unconscionability only exists when a provision in the contract is “one-sided” or “overly harsh,” as determined by whether it is “shocking to the conscience, monstrously harsh, and exceedingly calloused.” *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740 (2015) (when looking at the agreement as a whole, rather than just the at-issue provision, the court found no substantive unconscionability when the terms were not one sided).

To determine whether a contract is procedurally unconscionable, Courts examine: (i) the manner in which the contract was entered; (ii) whether each party had a reasonable opportunity to understand the terms of the contract; and (iii) whether the important terms were hidden in a maze of fine print. *See Romney*, 186 Wn. App. at 736 (no procedural

unconscionability where there was no lack of clarity as to the terms and the terms were permitted by law).

Like his other arguments, Mr. Trenchuk's unconscionability argument is based upon a misrepresentation of the record. *See* Trenchuk Brief, p. 31. Specifically, Mr. Trenchuk asserts (i) that the Church knew that its Deposit would become nonrefundable once it was routed to Kennedy and (ii) that the Church's purported failure to provide that information to Mr. Trenchuk renders the Deposit Agreement to be unenforceable.¹¹ *Id.*

Ivan Kriger's deposition testimony is the sole basis for Mr. Trenchuk's assertion that the Church was aware that the Deposit would become nonrefundable when it was sent to Kennedy. *See* Trenchuk Brief, pp. 30-31; CP 284-85. As noted above, Mr. Kriger's testimony is directly contrary to Mr. Kriger's July 31, 2014 written statement, confirming that the Deposit money was, and remained, fully and unconditionally refundable. CP 363. Furthermore, the Church's testimony was

¹¹ Mr. Trenchuk also asserts that the Deposit Agreement rendered him into a "guarantor." Trenchuk Brief, p. 31. However, the Deposit Agreement unambiguously makes Mr. Trenchuk the primary obligor with respect to the refund of the Church's Deposit. CP 20.

unambiguous – it never agreed that its Deposit would become nonrefundable. CP 80-85.¹²

More importantly, Mr. Trenchuk's interpretation of Mr. Kriger's testimony is inconsistent with the record. While Mr. Kriger did testify that he told the Church that its deposit money would be nonrefundable, the record is clear that Mr. Kriger said that prior to the Parties' Deposit Agreement. *See* CP 90-94, 103-12. Mr. Trenchuk takes a quote from Mr. Kriger's deposition testimony out of context to assert that the Church "knew" that its deposit money would be nonrefundable. *See* Trenchuk Brief, pp. 10-11. However, a review of Mr. Kriger's declaration testimony (which is in chronological order) and a review of the exhibits to that declaration make it clear that Mr. Kriger's statements regarding a nonrefundable deposit were made well before the Parties' Deposit Agreement. CP 91-93, 103-12. The record also states that the Church declined to agree to a nonrefundable deposit, proposed a promissory note, and ultimately agreed to the terms contained in the Deposit Agreement. *See id.*, *see also* CP 20, 82.

¹² Notably, the Church borrowed \$200,000 from another religious institution for the Deposit. CP 82. Thus, the Church could not have agreed to make the Deposit nonrefundable. CP 82.

The Deposit Agreement is clear, direct, and transparent. There is nothing unconscionable about the Deposit Agreement's terms, and there was nothing unconscionable in its execution.

VI. CONCLUSION

The Church has an unambiguous contractual right to a refund. Mr. Trenchuk has a primary and unambiguous contractual duty to provide that refund. The Church never agreed to modify those rights or duties.

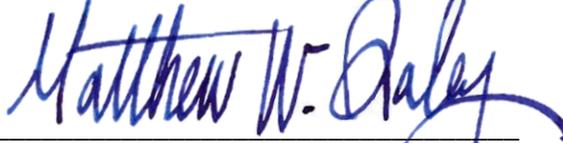
The Church's only legal relationships are with Green Global and Mr. Trenchuk. Mr. Trenchuk's attempt to insert the Church into Green Global's agreements with Kennedy are contrary to the record. The Church's deal was as simple as can be – the Church would get the former Fred Meyer property or it would get a full and unconditional refund.

As owners/members of Green Global, Messrs. Trenchuk and Kriger took risks in hopes of reaping rewards. That those risks did not pan out does not justify Messrs. Trenchuk and Kriger in attempting to thrust their business losses onto the Spokane Slavic Baptist Church.

Based upon the foregoing, the record, and the other pleadings in the Court file, the Church respectfully asks the Court to affirm the Trial Court's Order.

RESPECTFULLY SUBMITTED, this 28th day of August 2019.

WITHERSPOON· KELLEY, P.S.

A handwritten signature in blue ink that reads "Matthew W. Daley". The signature is written in a cursive style with a large, looping initial "M".

SHELLEY N. RIPLEY, WSBA # 28901

MATTHEW W. DALEY, WSBA # 36711

Counsel for Spokane Slavic Baptist Church

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28th day of August 2019, the foregoing was delivered to the following persons in the manner indicated:

<p>J. Gregory Lockwood 421 W. Riverside Ave., Ste. 960 Spokane, Washington 99201 jgregorylockwood@hotmail.com <i>Counsel for the Respondents/Appellants</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> Via Electronic Mail <input checked="" type="checkbox"/> Via Court's Electronic Court Records System</p>
<p>Ivan Kriger PO Box 960 Kellog, Idaho 83837 ivankrigersam@gmail.com <i>Respondent Pro Se</i></p>	<p><input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> Via Electronic Mail</p>

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