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NO. 62600-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SEA-TAC AIR CARGO LIMITED PARTNERSHIP, a Washington
limited partnership, acting by and through its general partner,
TRANSIPLEX (SEATTLE), INC., a Washington corporation,

Appellant,

v.

PORT OF SEATTLE, a Washington Municipal corporation,

Respondent.

REPLY BRIEF

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Appellant

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REPLY TO PORT'S STATEMENT OF THE CASE

The Port's statement of the case substantially disputes the evidence offered by Transiplex. Summary judgment was improper because material facts are disputed.

A. The Port improperly characterizes the evidence in its own favor instead of viewing the evidence in the light most favorable to Transiplex, the non-moving party on summary judgment.

The Port's Statement of the case fails to evaluate the evidence in the light most favorable to Transiplex, the non-moving party on these summary judgments. This mistake tacitly acknowledges that the Port knows it cannot prevail in this appeal if Transiplex is appropriately granted the benefit of all inferences in its favor.

The Port concedes the following points:

- "There is no dispute that in discussions preceding the Seventh Amendment, the parties contemplated that the newly-developed parking area would be able to 'accommodate' nose-load operations." BR 8.
- "[Project manager Janene] Axt analyzed requirements for 747 nose-load parking, and ensured that the new hardstand as-built could accommodate angle-in nose-load positions." BR 9.
- The Port Commission approved the Seventh Amendment with the understanding that "*latest designs indicate the new ramp will be large enough to*

accommodate two simultaneous 747-400 nose-load operations . . .” BR 13 (emphasis in original).

The Port obfuscates these concessions through argumentative and incorrect assertions. The Port drags across its brief the red herring that, “[t]he issue here is whether Transiplex has any right to dictate how the parking area is actually used at any given point in time.” BR 8. The Port fails to cite to the record because that has never been the issue.

The Port attempts to deflect the Court’s attention by trifurcating the evidence into three different categories: “Commencement of the ‘Transiplex Hardstand Expansion Project’”, BR 8-9; “Negotiation of the Seventh Amendment,” BR 9-13; and “Commission Approval and Construction of the Project.” BR 13-15. By artificially truncating matters, the Port hopes to limit the Court’s consideration of the extrinsic evidence to the negotiations between counsel. BR 9-13. However, the relevant course of negotiation includes literally years of discussions leading up to the Seventh Amendment, BA 7-10, as well as the understanding and assumptions of the Port Commission, which necessarily approved the project. BA 10-11.

The Port seeks to excuse its failure to extend the hardstand over a large Seattle water main under the western edge of the Transiplex leasehold, claiming the cost and delay “were prohibitive.” BR 9 n.4. This implicitly admits that the Port failed to comply with ¶ 6 of the Seventh Amendment, which stated, “[t]he Port intends to pave the **Deleted Premises** for use as additional common use cargo hardstand parking, in accordance with the Port’s schedule for the Transiplex Hardstand Expansion Project.” CP 151 (emphasis supplied). The **Deleted Premises** are the entire apron area in front of Transiplex building A relinquished to the Port by the Seventh Amendment, CP 148-49, which includes the City’s easement area. See diagram, CP 186. (A copy of CP 186 is attached to this brief as Appendix C.)

Drawings in March 2001 also showed parking positions that would require the loaded 747 to cross part of the City’s easement area. CP 195 (Appendix B to Transiplex’s opening brief). Yet the Port eventually admitted that its decision not to pave the area over the City water main easement precluded a second angled nose-load parking position, reducing the usability of the expanded hardstand. CP 1304.

The Port falsely suggests that Transiplex amended its lease to obtain a 10-year option to extend the lease and a right of first refusal to lease adjacent space. BR 10. This argument totally ignores the negotiations preceding the amendment, detailed in Transiplex's opening brief. BA 7-10.

From the very beginning, Transiplex was motivated to amend the lease in order to provide nose-load parking in front of its Building A. As early as February 2000, the Port offered to purchase the apron south of Transiplex building A and promised that the Port would create nose-load parking. CP 218. There is no mention of a lease extension or right of first refusal in this early correspondence between the parties.

Transiplex responded that it would be "unthinkable" not to allow nose-load operations in front of Transiplex building A. CP 1202. Transiplex said nothing about a lease extension or a right of first refusal.

The Port again offered to purchase the apron, which "would be paved and could accommodate 747-400 nose load operations by parking the aircraft at an angle." CP 221. The Port said nothing about an extension of the lease or a right of first refusal.

Following further discussions, the Port again offered to delete the apron area from the lease in exchange for: a 10-year lease extension; construction of a 747-400 nose-load compatible parking position; preferential parking south of Transiplex A; and, a right of first refusal on adjoining property. CP 488-89. It is evident from this course of negotiation that the lease extension and right of first refusal were added later and were only part of the consideration for the lease amendment.

The Port again mischaracterizes the events leading up to the execution of the Seventh Amendment when it focuses on preferential parking rights and the timetable for the project schedule. BR 11-12. Transiplex's counsel Jon Schneider explained Transiplex's intention that the property would be developed for hardstand parking, that Transiplex's current and future tenants would be granted the right to use the hardstand, that Cargolux would continue to conduct nose-load operations, and that the Port should proceed expeditiously with construction. CP 937-38. Accordingly, even this course of negotiation was consistent with the prior and subsequent agreement of the parties that the Port would develop the apron to allow two nose-load parking positions.

B. The Port's description of the procedural background supports reversal.

1. The nose-load parking test failed because the Port failed to pave the hardstand in a way that permitted nose-load parking.

The Port attempts to portray itself in a favorable light in its description of the March 2007 test of the angle-in nose-load parking. BR 17-20. In fact, as Transiplex argued in its opening brief, BA 37, the Port's conduct of the test is further evidence of the breach of the duty of good faith and fair dealing.

The Port proposed to paint a parking line on a specific orientation on the new expanded hardstand. CP 2456. Scott Wilson, Transiplex's vice president, explained that Transiplex "rejected this proposal¹" in favor of a general statement that the line must "accommodate nose-load parking for one 747 cargo plane" on the hardstand behind Building A. CP 2456. Notwithstanding, the Port painted the same line that Transiplex had previously rejected (referred to as NL2), and Cargolux used NL2 on March 24-25,

¹ The Port quibbles with Wilson's statement that Transiplex "rejected" the Port's proposed line. BR 18 n.11. The Port is toying with words. The Port proposed a specific line, and Transiplex "rejected" that restricted commitment. CP 2456.

2007. CP 553. Cargolux asked the Port not to schedule Cargolux on NL2 until further notice, adding that it had concerns it would articulate in a separate message after speaking to all parties involved. *Id.*

Transiplex's counsel Schneider drafted a letter for Cargolux articulating Cargolux's concerns. CP 1989-90. Schneider sent the draft to Cargolux, which changed the draft and forwarded it to the Port. *Id.*, CP 306.² The Cargolux letter explained that the gradient of the new hardstand made it too difficult to load and unload cargo. CP 306. Cargolux suggested moving the line over about 60 feet to the west where the pavement was sufficiently level.

The Port refused to move the nose-load line to the west, claiming safety concerns. CP 1979. The Port also claimed that the gradient extended across the entire hardstand. *Id.* Finally, the Port admitted that it had not extended the hardstand over the City water main, and that moving the line to the west would bring the aircraft

² The Port claims that Cargolux sent the letter "[a]t Transiplex's urging," pointing out that Schneider asked Cargolux to send the letter "as a message from you . . ." BR 18 and note 12. The truth is that Cargolux had already told the Port that it would send a separate message explaining Cargolux's concerns after speaking to all parties, CP 553, which obviously included Transiplex.

too close to the unprotected water main. *Id.* In light of the Port's refusal, Cargolux declined to park on NL2. *Id.*

2. The Court granted summary judgment dismissing Transiplex's breach of contract claim.

Two facts stand out in the Port's procedural history. BR 20-21. First, summary judgment is not appropriate where consideration of the motions "spanned 16 months, and involved 343 pages of briefing, 2,444 pages of declarations and evidence, and 5 separate hearings." BR 20. The Court should have conducted a full trial instead of granting summary judgment.

Second, the Port completely repudiates its trial argument. The Port convinced the trial court to grant the first summary judgment because Port staff removed the angled parking line from the final bid drawings. CP 596-97, 599-602, 1050, 1053 ("Prior to the execution of the Seventh Amendment, the Port prepared detailed construction plans for the 'Transiplex Hardstand Expansion Project.' The Court concludes that the reference to the 'Transiplex Hardstand Expansion Project' in context can only refer to the project as defined by these documents.")

On appeal, the Port abandons its argument and the trial court's rationale, arguing instead that, "the hardstand as built can accommodate noseload parking," BR 32 and that, "the parking

positions are simply lines on the pavement, which the Port can repaint or reconfigure at any time, with relatively little effort.” BR 34.

3. The Court granted summary judgment dismissing Transiplex’s claims of tortious interference and other claims.

Transiplex responds to the Port’s factual discussion as part of its argument, *infra*.

REPLY TO ARGUMENT

The Port’s muddled statement of the standard of review (BR 26) ignores its initial burden of showing the absence of any disputed material fact. ***Atherton Condo. Apartment-Owners Ass’n v. Blume Dev. Corp.***, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

The Port quotes the cryptic statement that the nonmoving party “may not rely on . . . having its affidavits considered at face value.” BR 26, quoting ***Seven Gables Corp. v. MGM/UA Entm’t Co.***, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). This simply means that a declarant must show the factual basis for the assertions in a declaration. ***Dwinell’s Cent. Neon v. Cosmopolitan Chinook Hotel***, 21 Wn. App. 929, 933, 587 P.2d 191 (1978), *rev. denied*, 92 Wn.2d 1009 (1979)(cited in ***Seven Gables***, 106 Wn.2d at 13.) The

Port's "face value" statement leads nowhere because the affidavits and declarations submitted by Transiplex all furnished the factual evidence upon which they rely.

A. The Court should interpret the words of the contract—"Transiplex Hardstand Expansion Project" and "additional common use cargo hardstand parking"—to include nose-load parking, which was the undisputed intention of both parties and was approved by the Port Commission.

Transiplex's opening brief clearly argued that the extrinsic evidence in this case was relevant to the interpretation of the words of the contract. BA 18-26. The language of ¶6 of the contract, with the relevant language highlighted, is as follows: (CP 151):

6. The Port intends to pave the Deleted Premises for use as **additional common use cargo hardstand parking**, in accordance with the Port's schedule for the **Transiplex Hardstand Expansion Project**. . . . The Port shall be responsible for providing **cargo hardstand services as common use cargo hardstands to current and future tenants of Lessee** in the same manner as the Port provides such services to other users of common use cargo hardstands at the Airport.

The Port focuses exclusively on one phrase – **"in accordance with the Port's schedule . . ."** BR 30 (emphasis altered). The Port collapses this phrase into a scheduling issue unrelated to the scope of the project. This is an unreasonably cramped reading of ¶ 6 and the evidence. Even if the Port's

“schedule” interpretation were reasonable, it is not the only reasonable interpretation of the language of ¶ 6. All of the evidence of the negotiation of the contract and the subsequent conduct of the parties is relevant to the proper interpretation of these words.

Equally importantly, the Port totally ignores the references to “common use cargo hardstand parking.” The nature and extent of the hardstand, and the purpose of the hardstand, is all relevant to the proper interpretation of ¶ 6.

A hypothetical shows that the absurdity of the Port’s position. Under the Port’s interpretation, the Port could have changed its design to eliminate any hardstand parking. This change would obviously have been contrary to the intentions and negotiations of the parties, but the Port’s interpretation would have allowed it to repudiate its plans and frustrate Transiplex’s entire purpose for entering into the contract.

In fact, the Port did change the plans in a way that made nose-load parking much more difficult. Although the Port claims that nose-load parking is possible on the expanded hardstand, BR 30, 32, the Cargolux test of NL2 demonstrated that NL2 was impractical, and the Port’s refusal to move NL2 in order to permit

nose-load parking shows that the Port itself concluded that nose-load parking was difficult under the project as completed.

Implicitly admitting the weakness of its argument, the Port battles a strawman of its own making, arguing that Transiplex did not retain or receive parking rights under the contract. BR 31. Transiplex never claimed that it received parking rights. To the contrary, Transiplex argued that it relinquished parking rights in return for nose-load parking “to current and future tenants of Lessee (Transiplex).”

The Port offers a strange argument that the Port did not breach its agreement with Transiplex because the Port has provided hardstand parking for the Transiplex tenants elsewhere. BR 33-34. The Port’s argument would only make sense if the Port had in fact paved the hardstand as it promised, to accommodate two simultaneous nose-load positions. The preference of Transiplex’s tenants not to use a hardstand that did not comply with the contract cannot possibly exonerate the Port from its breach of contract.

B. The Court should adopt Transiplex's understanding that the Transiplex Hardstand Expansion Project included two angled nose-load parking positions and reject one staffer's last-minute decision to eliminate nose-load parking because the Port knew that Transiplex thought the Project would provide nose-load parking and the Port never told Transiplex of the change of plans.

The Port convinced the trial court to grant partial summary judgment against Transiplex by arguing that the final construction bid documents did not show angle nose-load parking. CP 596-97, 599-602, 1050, 1053. Transiplex showed in its opening brief that the final construction drawings could not change the scope of the project because they were never communicated to Transiplex, citing *Restatement (Second) Of Contracts* § 201 (1981). BA 27-28.

The Port responds, "Transiplex offers no Washington authority applying this section, and the argument is, in any event, unavailing." BR 33. In fact, no less an authority than *Berg v. Hudesman*, repeatedly cited in the briefs of both parties (although not for this particular proposition), expressly approved of the rules in § 201: "[I]t is possible that the parties have attached different meanings to certain terms used, and, if so, the rules set out in *Restatement (Second) Of Contracts* § 201 provide guidance." *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

The Port argues absurdly that it had no reason to know that Transiplex expected it to create two angle-in nose-load parking positions on the expanded hardstand. BR 33. To the contrary, the extensive extrinsic evidence shows that the Port itself as well as Transiplex intended to create angle-in nose-load positions.

Finally, recognizing the hopelessness of its arguments, the Port reverses course and repudiates the very ground on which the trial court granted summary judgment, arguing that, “the parking positions are simply lines on the pavement, which the Port can repaint or reconfigure at any time, with relatively little effort.” BR 34. The obvious flaws with this argument are: (1) the trial court granted summary judgment on the opposite theory; and, (2) the Port completed the project in a way that made angled nose-load parking impractical, if not impossible.

C. The Port breached the contractual duty of good faith and fair dealing by: failing to disclose the decision of Port staff to repudiate a primary purpose of the contract; building the project in a way that made it more difficult for Transiplex to realize the basic benefit of the contract; failing to cooperate in performance; and failing to exercise its discretionary power to control aircraft parking to allow Transiplex to realize the basic benefit of the contract.

The Port argues that a party does not breach its duty of good faith unless the party breaches an express term of the contract. BR

35-37. Under the Port's niggardly view, the covenant of good faith and fair dealing would mean nothing. If a party can only show a breach of the duty of good faith by showing a direct breach of the specific term of the contract, then the duty of good faith serves no purpose. The Port's argument is also inconsistent with this Court's recent observation that the duty of good faith exists "to promote 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" **Frank Coluccio Constr. Co. v. King County**, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007) (quoting **Restatement (Second) of Contracts** § 205 cmt. a (1981)) (quoted at BA 29).

The Port also turns the duty of good faith on its head. Both parties cite the oft-quoted **Badgett** holding that the duty of good faith and fair dealing does not contradict express terms in the agreement. **Badgett v. Sec. State Bank**, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). However, the Port argues that the duty of good faith is irrelevant unless a specific clause of the contract expressly requires a particular act. Thus, the Port argues that it "did not undertake any contractual obligation to fortify the water main on the western edge of the premises to withstand air cargo traffic, or to configure parking lines on the hardstand in a particular

manner, or to manage parking in accordance with Transiplex's wishes." BR 37.

This argument totally ignores the Port's promise "to pave the Deleted Premises for use as additional common use cargo hardstand parking, in accordance with the Port's schedule for the Transiplex Hardstand Expansion Project." CP 151. The undertaking to "pave the Deleted Premises" included providing for two angled nose-loading parking spaces, which in turn required paving over the water main, configuring the parking lines on the hardstand in a manner to accomplish the agreed purpose, and managing parking so that the hardstand could be used for angled-in nose-load parking.

The Port argues that the duty of good faith is irrelevant because it never exercised any discretion with respect to providing cargo hardstand services to airport users. BR 38-39, relying on ***Goodyear Tire & Rubber Co. v. Whiteman Tire***, 86 Wn. App. 732, 738, 935 P.2d 628 (1997), *rev. denied*, 133 Wn.2d 1033 (1998). But the Port misapprehends the holding of ***Goodyear Tire***, which is best understood in light of the case on which ***Goodyear*** relied, ***Amoco Oil Co. v. Ervin***, 908 P.2d 493 (Colo. 1995). In ***Goodyear***, the distributor (Goodyear) contractually reserved the

right to compete with its dealer (Whiteman) in Whiteman's trade area. 86 Wn. App. at 741. In **Amoco**, the distributor (Amoco) contractually reserved discretion to establish terms of contractual performance. **Amoco**, 908 P.2d at 497. The **Amoco** Court explained, "[t]he concept of discretion in performance 'refers to one party's power after contract formation to set or control the terms of performance.'" *Id.* at 498 (quoting Steven J. Burton, **More on Good Faith Performance of a Contract: A Reply to Professor Summers**, 69 Iowa L. Rev. 497, 501 (1984)). The Colorado Supreme Court concluded that the record supported the jury's conclusion that Amoco breached its implied covenant of good faith and fair dealing. **Amoco**, 908 P.2d at 499.

The difference between **Goodyear** and **Amoco** is simply this: Goodyear reserved a right to itself that had nothing to do with performance under its contract with Whiteman; Amoco reserved to itself the discretion to determine the terms of performance. This case is therefore more like **Amoco**, and less like **Goodyear**, because in ¶ 6 of the contract the Port undertook responsibility for providing cargo hardstand services to Transiplex's current and future tenants, which is a term of performance. CP 151. The Port

obviously had discretion in how it made those determinations and was obligated to use good faith in exercising that discretion.³

D. Transiplex presented evidence that the Port interfered with Transiplex's leases with its existing tenants for an improper purpose.

Contrary to the Port's arguments, the evidence (as well as the Port's own Brief of Respondent) provides evidence that the Port interfered with Transiplex's tenants for an improper purpose – to lure Cargolux away from Transiplex, apparently reasoning that with Cargolux gone, the Port could argue that Transiplex was not damaged by the Port's breach of contract. The Port reveals this motive when it argues (incorrectly) in its brief that the decision of Cargolux to terminate its relationship with Transiplex eliminates any breach of contract. *E.g.*, BR 34-35.

The evidence also supports the conclusion that the Port intentionally interfered with Transiplex's lease with Cargolux,

³ The Port notes that Transiplex incorrectly stated in its opening brief that the 8th Circuit *Craig* case applied Washington Law. BR 38, citing *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006). Although *Craig* was apparently not actually decided under Washington law, the 8th Circuit cited and relied on Washington caselaw. *Craig*, 458 F.3d at 752, citing *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 909 (9th Cir. 2001) (applying Washington law) and *Goodyear Tire*, *supra*.

inducing or causing a breach or termination of the relationship. The Port failed to cooperate with Transiplex in testing nose-load parking on the expanded hardstand. The Port's lack of cooperation was improper because it went directly to the relationship between Transiplex and Cargolux, and was incidentally a breach of the Port's own agreement with Transiplex.

Having undermined the value to Cargolux of its lease with Transiplex, the Port showed Cargolux a long range plan calling for demolition of the Transiplex building. CP 2458-59, 2479. Learning of Transiplex's lease dispute with Cargolux, the Port pressed Cargolux for more information, coyly suggesting there might be something improper about Transiplex's claims. CP 2479-80 ("[Was Transiplex's disputed claim] called out as a separate line-item, or was it buried in the general lease rate for the warehouse? . . . [Are you] expecting to see future invoices from them for this avenue of costs?") The Port also told Cargolux that it was ready to "propose positive solutions." CP 2480. The Port took Cargolux personnel to other facilities that might be available for use by Cargolux. CP 2483. The clear inference of these communications is that the Port was encouraging Cargolux to terminate its lease

with Transiplex and enter into a different lease, either with the airport or as a subtenant of another airport lessee.

Finally, the Port argues that its actions did not influence the decision of Cargolux to terminate its lease with Transiplex, quoting Cargolux's deposition testimony that the decision was unrelated to the Port's actions. BR 44-45. But a jury is hardly obligated to accept the Cargolux testimony at face value. A jury could instead believe the contrary evidence. In the spring of 2006, Cargolux still wanted to resume parking on the new hardstand south of Transiplex building A. CP 2367. But in August 2006, the Port's Dan Cowdin told Cargolux that Transiplex wanted to force Cargolux to park in front of Transiplex building A, where nose-loading would be impossible. CP 2636. Cargolux resolved to fight any such proposal. *Id.* In November, 2007, Cargolux refused to enter into a renewed five year lease based on representations by the Port "about taking these buildings down to make the world's largest aircraft parking lot." CP 2638. The evidence on summary judgment is sufficient to give rise to the inference that the Port's action successfully induced Cargolux to terminate its lease, damaging Transiplex.

E. The trial court abused its discretion in denying Transiplex's motion to compel discovery of relevant information, refusing a second continuance of the summary judgment hearing pending Transiplex's completion of discovery from the Port, and denying reconsideration of summary judgment after the court produced clearly relevant documents previously withheld.

The Port argues that the trial judge did not abuse his discretion in denying Transiplex's motion for a second continuance of the second summary judgment hearing, arguing that Transiplex failed to offer a specific account of what evidence was sought or how it would be material to the pending claims. BR 46. The Port relies on two cases, neither of which supports its position. In the **Briggs** case, the party seeking a continuance failed to show what evidence was sought or how the evidence would raise a material issue of fact precluding summary judgment. **Briggs v. Nova Services**, 135 Wn. App. 955, 961-62, 147 P.3d 616 (2006), *aff'd on other grounds*, 213 P.3d 910, 2009 Wash. LEXIS 742 (2009). In the **Coggle** case, this Court held that, "[t]he primary consideration in the trial court's decision on a motion for a continuance should have been justice." **Coggle v. Snow**, 56 Wn. App. 499, 508, 784 P.2d 554 (1990).

The relevant chronology is as follows:

8/8/08 Transiplex serves its Fourth Set Of Interrogatories And Requests For Production, CP 1894;

9/8/08 Port responds, CP 1894;

9/8/08 Transiplex's CR 30(b)(6) Notice of Deposition, CP 1658;

9/15/08 Port moves for a protective order, CP 1793;

9/25/08 Transiplex moves to compel, CP 1893;

9/26/08 Port's second Motion For Summary Judgment, CP 2267;

10/16/08 Transiplex moves to continue summary judgment, CP 2450-53;

10/21/08 Court denies Transiplex's Motion For Discovery, except for exchange of privilege logs, and limited depositions, CP 2490, 2492;

10/24/08 Court continues hearing to allow a single limited CR 30(b)(6) deposition, 10/24/08 RP at 3-4;

11/25/08: Court denies any additional continuance and verbally grants summary judgment to the Port, 11/25/08 RP 57-58;

12/4/08 Port produces additional documents not previously produced, CP 2761;

1/12/09 Order Granting Summary Judgment, CP 2757;

1/22/09 Transiplex's Motion For Reconsideration, CP 3283;

2/12/09 Order Denying Reconsideration, CP 3652.

The additional discovery sought by Transiplex was directly relevant to the issues raised on summary judgment and which are still being argued in these appellate briefs:

- Transiplex sought correspondence relating to tortious interference and other topics. CP 1895-96. The Port

objected and responded incompletely, CP 1896-97, later producing more documents, CP 1897, some even after summary judgment was granted. CP 2760, 2765-94. In this appeal, the parties continue to dispute the sufficiency of the evidence in support of Transiplex's claim for tortious interference, and the documents belatedly produced only after summary judgment are directly relevant to the April 30, 2008, email discussed at some length during the summary judgment hearing. BA 44-45.

- Transiplex Request For Production 2 sought discovery of documents related to the Port's policies on the use of ground services equipment on the Transiplex leasehold, which the Port refused to answer. CP 1897. Statements about ground services equipment remain an issue even now on appeal. BA 39, BR 41 n.16.
- Transiplex Request for Production 6 sought documents related to the Port's future plans, which the Port partly refused to produce, despite the fact that the Port had shown some of the withheld drawings to Transiplex's tenant Cargolux. CP 1898-99. On appeal, the parties continue to dispute the nature and significance of the Port's communications with Transiplex's tenants regarding future plans. BA 38-39, BR 42-44.
- Transiplex Request for Production 7 sought all documents relating to the Port's plans for a 747 nose-load parking position, which is obviously at the heart of this lawsuit, but the Port simply stated that it had produced all such documents "subject to and without waiver of objections." CP 1901. It was and is impossible to know from this response whether all documents have been produced.

If this were not enough, on reconsideration Transiplex pointed out that the Port had produced additional emails after the

summary judgment showing that the Port had initiated contact with Cargolux leading up to the April 30, 2008 email, and that Cargolux responded that it "[w]ould like to see the latest on the cargo development plans you had for SEA" CP 2768-69. The failure to grant a second continuance of the summary judgment hearing, to order discovery, or to grant reconsideration, were all abuses of discretion for which this Court should reverse and remand.

CONCLUSION

For all the reasons stated in the Brief of Appellant and this Reply Brief, this Court should reverse the trial court's erroneous summary judgments and remand for summary judgment for Transiplex or for a trial by an impartial jury that can resolve any remaining factual disputes and finally resolve the issues in this case.

RESPECTFULLY SUBMITTED this 12 day of October
2009.

WIGGINS & MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 12 day of October 2009, to the following counsel of record at the following addresses:

Counsel for Respondent

Phillip Ginsberg
Carl J. Marquardt
Stokes Lawrence, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104



Charles K. Wiggins, WSBA 6948

