

65672-4

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No. 65672-4-I

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

SC East Campus, Inc., a Delaware corporation,

Plaintiff-Respondent,

v.

Weyerhaeuser Company, a Washington corporation,

Defendant-Appellant.

BRIEF OF RESPONDENT

FOSTER PEPPER PLLC

Bradley P. Thoreson WSBA No. 18190

William H. Patton WSBA No. 5771

Miriam H. Cho WSBA No. 40238

1111 Third Avenue, Suite 3400

Seattle, Washington 98101-3299

Telephone: (206) 447-4400

Facsimile No.: (206) 447-9700

Attorneys for Plaintiff-Respondent,
SC East Campus, Inc.

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I. INTRODUCTION

“No good deed goes unpunished”

(Claire Booth Luce)

At the behest of Defendant-Appellant Weyerhaeuser Company (“Weyerhaeuser”), Plaintiff-Respondent SC East Campus Inc. (“SC East Campus”) negotiated a lease with AT&T to put a cell antenna on the roof of one of the two buildings SC East Campus owned on the Weyerhaeuser corporate campus in Federal Way. Weyerhaeuser wanted the AT&T cell antenna to improve cell phone reception for both Weyerhaeuser itself and for its subcontractors working on the campus. But when SC East Campus three years later tried to sell those two buildings at the height of the real estate market in May 2007, Weyerhaeuser killed the sale by claiming that the very same cell antenna installation that Weyerhaeuser requested was a violation of Weyerhaeuser’s single tenant lease.

Following a trial lasting more than three weeks, King County Superior Court Judge Cheryl Carey ruled emphatically for SC East Campus. As a matter of law, Judge Carey ruled that:

“Weyerhaeuser violated the implied covenant of good faith and fair dealing inherent in every contract by attempting to use Plaintiff’s request for a straightforward estoppel certificate as leverage to demand unconscionable and unworkable provisions in the access agreement with

AT&T for maintenance of the cell tower that was still essential to Weyerhaeuser's communication needs." CP 6251-52; CoL No. 5.

Judge Carey then determined that Weyerhaeuser's "breach of the Lease and breach of the covenant of good faith and fair dealing" was the "proximate cause" of SC East Campus's failed sale to New City. CP 6252; CoL No. 6. As a consequence, the trial court awarded SC East Campus damages in the amount of \$3,125,000 – the difference between the binding sale price to New City which Weyerhaeuser blocked in May 2007, and the replacement sale to Fidelity REIT which SC East Campus was finally able to effect in October 2007. As a liquidated sum, the trial court also provided for pre-judgment interest and awarded SC East Campus its legal fees and costs pursuant to the provisions of the Lease.

II. ISSUES REGARDING ASSIGNMENT OF ERRORS

1. Did the trial court appropriately reject Weyerhaeuser's assignment argument, because an assignment was not intended and Weyerhaeuser fraudulently undermined SC East Campus's sale to New City to such an extent that SC East Campus's claim for damages, in fact, could not be assigned?

2. Did the trial court appropriately reject Weyerhaeuser's consequential damages argument, on four different occasions, because

those damages were, in fact, compensatory damages proximately caused by Weyerhaeuser's bad faith?

3. Did the trial court appropriately reject Weyerhaeuser's damages arguments, because the reduction in sale price proximately caused by Weyerhaeuser's bad faith was a precisely calculated, liquidated amount of \$3,125,000 – the difference between the guaranteed sale price for the pending sale to New City that Weyerhaeuser destroyed and the replacement sale to Fidelity REIT that Weyerhaeuser delayed, but which eventually closed five months later?

III. STATEMENT OF THE CASE

After more than three weeks in trial, after hearing extensive testimony from nineteen witnesses, after reviewing voluminous exhibits, and after hearing argument from counsel, Judge Carey agreed that SC East had indeed been punished for its good deeds, and ruled for the Plaintiff on all its claims. CP 6242-6251. The trial court's "Decision Following Trial and Findings of Fact and Conclusions of Law," dated May 27, 2010 (CP 6242-6251) is attached as Appendix A to this Response Brief for the convenience of the Court in dealing with the extensive record in this case.

A. Weyerhaeuser needed better cell coverage on its campus and the cell antenna installation was Weyerhaeuser's own initiative

Weyerhaeuser's corporate headquarters and its surrounding campus in Federal Way is constructed in a sylvan setting befitting a tree

growing company. But because of the forested nature of the campus, “Weyerhaeuser fielded complaints about poor cellular reception around its campus as early as 2001.” CP 6243; FoF No. 3. Yet, despite the complaints, Weyerhaeuser’s real estate department consistently frowned on having cell installations on any of their buildings and campuses in the country, because “after analyzing issues related to the requirement for 24 hour, 7 day a week access, interference with proprietary equipment, and the length of commitment” they concluded “the lease income didn’t offset the increased hassle.” CP 6243; FoF No. 2.

Although the technology and facilities managers of Weyerhaeuser understood the maintenance and access issues a cell installation posed, the fact remained that “Weyerhaeuser needed improved cellular reception to solve the lack of internal cell phone coverage for Weyerhaeuser employees and third party contractors inside the buildings and to create better telecommunication coverage for a wider area of the Weyerhaeuser campus.” CP 6243; FoF No. 4. Thus, when AT&T approached Weyerhaeuser’s information technology director in January 2003 “about implementing a system solution to improve cellular reception on the Weyerhaeuser campus,” Weyerhaeuser technical and facilities managers came together to demand a cell installation, as the need for cellular service was pressing, and it became a Weyerhaeuser initiative. CP 6243; FoF

Nos. 5-8. Further, despite the corporate policy weighing against cell antenna installations, Assistant Real Estate Director, Todd Clark, himself, gave “the green light to the installation of the cell tower” on Weyerhaeuser’s headquarters campus in 2003. CP 6244; FoF No. 14.

SC East Campus only became involved, because one of the two buildings it owned on the campus – EC-4 – was identified by Weyerhaeuser and AT&T “as the ideal location for a cell tower since it was the building with the highest elevation on Weyerhaeuser’s east campus.” CP 6243; FoF No. 8. Thus, as the trial court found, the “initiative to implement a systems solution to improve cellular reception on the Weyerhaeuser campus was Weyerhaeuser’s initiative, not Plaintiff’s initiative.” CP 6243; FoF No. 7.

B. Not only was the cell installation Weyerhaeuser’s initiative, but Weyerhaeuser employees personally oversaw its installation

Weyerhaeuser, not SC East Campus, coordinated each aspect of the installation of the cell installation. The facilities director of the Weyerhaeuser campus buildings personally “facilitated arrangements between AT&T and Plaintiff with the goal of moving an agreement forward so that Weyerhaeuser could obtain better cellular reception on the entire Weyerhaeuser campus. CP 6243-44; FoF No. 9. The facilities manager, Dave Ringlee, also put together an access protocol for AT&T.”

CP 6244; FoF No. 10. Further, Weyerhaeuser offered to and in fact connected the cell tower into EC-4's own electric service panel, without any submeter and offered to write a letter to help expedite the permitting process with the City of Federal Way. CP 6244; FoF Nos. 12-13.

Furthermore, the cell tower and the in-building enhancements in Weyerhaeuser's Corporate Headquarters Building and Technology Center were wired together to get connectivity between each other, and the radio resource for the Corporate Headquarters and Technology Center was installed in an electrical closet in EC-4. CP 6244; FoF No. 17. As a result, "Weyerhaeuser agreed to give AT&T 24 hour, 7 day a week access to EC-4 to service the radio resource for the in-building enhancement for its own Corporate Headquarters and Technology Center." CP 6244; FoF No. 18.

In light of these facts, it is not surprising that the trial court found that "there was no default under Section 16.2 of the Lease in connection with Plaintiff's accommodating the request of Weyerhaeuser to the cell tower on EC-4." CP 6245; FoF No. 22. Simply put, allowing the installation of the cell tower on one of SC East Campus's buildings was an accommodation to fulfill Weyerhaeuser's own corporate needs for cell phone coverage – a good deed – that did not violate any portion of SC East Campus's lease with Weyerhaeuser. Unfortunately, however,

punishment lay in store for SC East Campus in repayment for this accommodation.

C. But when SC East Campus later tried to sell the two buildings at the height of a boom market, Weyerhaeuser used the presence of the cell antenna to kill the deal

On February 27, 2007, SC East Campus negotiated a purchase and sale agreement with New City North America (“New City”) for the sale of EC-3 and EC-4 for a purchase price of \$36,760,000.00. CP 6245; FoF No. 27. All contingencies on the purchase and sale agreement were waived, except for receiving tenant estoppel certificates from Weyerhaeuser. CP 6245; FoF No. 28. To fulfill the only contingency remaining to close the sale, SC East Campus, requested estoppel certificates from Todd Clark, Weyerhaeuser’s Assistant Director of Real Estate on April 20, 2007. CP 6245; FoF No. 29.

Despite Todd Clark’s previous green light to the cell installation, as well as his knowledge of the historical documentation that described the Weyerhaeuser requests to SC East Campus to accommodate the installation of the cell tower, he first revised the estoppel certificate to state that the “lease with AT&T is in violation of Tenant’s quiet enjoyment of the Premises, as well as other lease provisions.” CP 6248; FoF No. 52; emphasis added.

Todd Clark also asserted that a moisture condition that had previously existed in the building constituted a default under the lease. CP 6247; FoF No. 45; emphasis added. The truth, however, was that years before, in 2004, “Weyerhaeuser quickly solved an initial water vapor problem beneath employee’s desks mats on the ground floor by removing the mats.” In fact, Weyerhaeuser had reported to SC East Campus – in 2004, after the water vapor problem arose and after it had been quickly solved - that the status of the moisture issue was “golden.” RP 723, lines 16-17; CP 6245; FoF No. 24. The trial court accordingly found that, in fact, the “moisture issue was not a default under Section 16.2 of the Lease.” CP 6245; FoF Nos. 23-25.

Yet Todd Clark had “15 to 16 years of experience working on estoppel certificates for Weyerhaeuser.” He thus knew how critical the estoppel certificate was to the sale transaction contemplated by SC East Campus. Indeed, “Weyerhaeuser’s consistent practice, other than with the estoppel certificates at issue, was to execute and return them within ten business days of the initial request.” Clark not only knew of the pending purchase with New City and the May 16, 2007 deadline of the sale, but he had been explicitly warned at the outset that his proposed revisions to the estoppel certificates could become a legal issue. CP 6246; FoF Nos. 30-34.

But, for whatever reason, Mr. Clark appeared determined to punish SC East Campus for having accommodated Weyerhaeuser's request to install the AT&T cell antenna. Reason was thrown out the door and stubborn intransigence set in as Clark proceeded to try to leverage technical ambiguities between Weyerhaeuser's lease and the cell tower lease into financial benefit to Weyerhaeuser by holding the sale to New City hostage to his demands. CP 6248; FoF Nos. 54-56. Clark further undermined the sale by notices of "life safety" issues related to water vapor that, at the end of the day, Weyerhaeuser was responsible for as developer and seller of the building to SC East. CP 6247; FoF Nos. 45-48; 6245; FoF No. 26. But Todd Clark's supervisor, Rick Little, admitted that neither the issue of moisture nor the issue of the AT&T cell tower were defaults under the Lease. CP 6249; FoF No. 60.

In the end, the trial court, found that Todd Clark's behavior was unreasonable and that he "deliberately, intentionally and with full knowledge" used SC East Campus's pending sale to "prove a point" and "to send a message." CP 6249; FoF No. 64. Weyerhaeuser's unreasonable demands communicated through Todd Clark even reached the point that Weyerhaeuser demanded that Plaintiff/AT&T be required to use a helicopter to access the roof, even in emergencies, if Plaintiff/AT&T did not give 5 days advance notice." CP 6249; FoF No. 55.

As a result of Todd Clark's action, New City withdrew its purchase offer on May 14, 2007, specifically citing the lack of appropriate estoppel certificates. CP 59-60. Ultimately, the trial court determined that "through allegations of default and subsequent unreasonable demands, Todd Clark, Weyerhaeuser's assistant director of real estate so poisoned SC East Campus's pending purchase and sale agreement with New City, that New City terminated the transaction." CP 6250; FoF No. 67.

D. As a result of Weyerhaeuser's continued breach and refusal to deliver estoppel certificates, SC East Campus could not sell the buildings until months later when the market had declined

Months later, SC East Campus was finally able to sell the two buildings to another buyer, Fidelity REIT Investor LLC ("Fidelity REIT"), but at a substantially lower price – \$33,625,000. CP 6250; FoF No. 68. The sale to Fidelity REIT went through only because Weyerhaeuser finally delivered estoppel certificates substantially in the same form as had been proposed by SC East Campus for the earlier sale to New City. CP 6249; FoF Nos. 62-63.

Ruling that Weyerhaeuser's reckless assertions had poisoned the well, and caused the then purchaser, New City, to terminate the sale based solely on the fact that Weyerhaeuser had failed to execute the required estoppel, the trial court ruled that SC East Campus had prevailed on all of its claims and awarded SC East Campus \$3,125,000 in damages – the

difference between the purchase price agreed to by New City the eventual purchase price paid five months later by the second buyer, Fidelity REIT Investors. CP 6250-51; CoL Nos. 1-7:

- “Weyerhaeuser breached Section 23 of the Lease by failing to provide an executed estoppel certificate within those 10 business days, and in fact did not provide an executed estoppel certificate until July 16, 2007;” (CoL No. 2)
- “Weyerhaeuser breached the Lease by frustrating the purpose of Plaintiff in contracting with Weyerhaeuser to provide estoppel certificates under the Lease when it refused to provide a clean estoppel certificate until months after Plaintiff’s request, and instead, only providing mere obstructionist revisions to the estoppel certificate in the meanwhile;” (CoL No. 3)
- “Weyerhaeuser breached the Lease by frustrating the ability of Plaintiff to provide assurance to third parties, and in this case, New City, that the lease was in place, lease payments were being made, and that neither the landlord or tenant were in default;” (CoL No. 4)
- “Weyerhaeuser violated the implied covenant of good faith and fair dealing inherent in every contract by attempting to

use Plaintiff's request for a straightforward estoppel certificate as leverage to demand unconscionable and unworkable provisions in the access agreement with AT&T for maintenance of the cell tower that was still essential to Weyerhaeuser's communications needs;" (CoL No. 5)

- "Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing poisoned the pending transaction with New City and was the proximate cause of Plaintiff's failed sale to New City;" (CoL No. 6)
- "As a result of Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing, Plaintiff was damaged a sum of \$3,125,000, that can be specifically calculated as a liquidated damage amount."
(CoL No. 7)

E. Apart from the calculation of damages, Weyerhaeuser does not dispute these facts and conclusions

On appeal, Weyerhaeuser does not challenge the trial court's findings of fact, including the finding and conclusion that Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing was the proximate cause of SC East Campus's failed sale to New City.

Instead, Weyerhaeuser attempts to argue that the Lease does not allow SC East Campus to ask for damages resulting from this conduct, because such damages would be “consequential” damages barred under an insurance provision in the Lease. Additionally, Weyerhaeuser argues that SC East Campus actually assigned any right to sue that it had to Fidelity REIT upon sale of the two buildings, so that it is Fidelity REIT – not SC East Campus – that is entitled to the \$3,125,000 damages, if anyone is. Third, Weyerhaeuser argues that even if SC East Campus is entitled to some damages, the straightforward calculation of damages determined by the trial court must be thrown out and slashed.

These arguments are not only wrong, but they attempt to shield or minimize Weyerhaeuser’s own egregious and bad faith conduct that created the need for this lawsuit in the first place.

IV. SUMMARY OF ARGUMENT

Weyerhaeuser violated its Lease obligation to SC East Campus by refusing to provide signed estoppel certificates required under Section 23 of the Lease. By failing to provide those estoppel certificates, Weyerhaeuser not only destroyed SC East Campus’s pending sale to New City, but did so fraudulently by violating the covenant of good faith and fair dealing inherent in any contract.

As a consequence of its own bad faith, Weyerhaeuser proximately caused direct, liquidated, compensatory damages to SC East Campus. Weyerhaeuser's attempt to escape these ugly facts by interposing unfounded legal arguments should be rejected.

1. Assignment. Weyerhaeuser's assignment argument fails not only because an assignment of SC East Campus's claims was not intended, but because Weyerhaeuser's bad faith so poisoned the pending sale to New City that an assignment of SC East Campus's claim for damages to Fidelity REIT would not only be inequitable, but under Washington law could not be assigned.

2. Consequential Damages. The damages suffered by SC East Campus were not "consequential" damages as Weyerhaeuser maintains, but compensatory damages, proximately caused by Weyerhaeuser's bad faith refusal to comply with the Lease.

3. Damages. The damages caused by Weyerhaeuser's bad faith resulted in a precisely calculated, liquidated amount of \$3,125,000 – the difference between the guaranteed price for the pending sale to New City that Weyerhaeuser destroyed and the lower price for the replacement sale to Fidelity REIT that Weyerhaeuser delayed, but which eventually closed five months later.

V. ARGUMENT

A. Assignment

1. **Ironically, Weyerhaeuser suggests that its proven breach and bad faith should become a windfall for Fidelity REIT**

Weyerhaeuser argues that SC East Campus sold any claim against it for refusing to provide a signed estoppel certificate at the time of the replacement sale to Fidelity REIT. But, if SC East Campus does not have right to a claim against Weyerhaeuser because it sold that claim, then Fidelity REIT does. Since the case was tried to a judgment, the doctrine of collateral estoppel would bar Weyerhaeuser from denying liability. Because the identity of the plaintiff would change, the doctrine of res judicata would not apply, but the doctrine of collateral estoppel would. “When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel. . . Collateral estoppel or issue preclusion requires (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) the application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008);

citations omitted. All Fidelity REIT would need to do, therefore, is to walk into court and collect \$3,125,000.00 in liquidated damages, as the 6-year statute of limitations on a written contract for a contractual breach in 2007 has a long time to run.

Instead of compensating SC East Campus for Weyerhaeuser's proven breach of contract and bad faith, those same damages – under Weyerhaeuser's theory – should instead be converted into a sudden and unexpected windfall for Fidelity REIT. Such an outcome would not only be ironic, it would be the epitome of inequity. It was SC East Campus that suffered the loss.

2. The purchase and sale agreement itself did not provide for transfer of “all” rights as in *Knott v. McDonald's*

As support for its argument, Weyerhaeuser relies solely on the language of the purchase and sale contract with Fidelity REIT. It produced no other evidence at trial, or during the entirety of the case. Weyerhaeuser therefore is forced to rely almost exclusively on *Knott v. McDonald's Corp.*, 147 F.3d 1065 (9th Cir. 1998) for its argument that SC East Campus transferred “all” rights to sue Weyerhaeuser when it entered into the purchase and sale agreement with Fidelity REIT.

Weyerhaeuser's exclusive reliance on *Knott*, however, is unwarranted. The language of the purchase and sale agreement itself,

unlike the agreement in *Knott*, does not contain the same global and repeated language providing for the transfer of “all” rights. The basic purchase and sale agreement was the only instrument signed by the parties when the replacement sale to Fidelity REIT was agreed to. CP 414-15. Weyerhaeuser necessarily admits this (Weyerhaeuser Br. at 10). But then, attempting to effect a sleight of hand, Weyerhaeuser argues that an exhibit containing a standard form sentence, completely overrides the language of the signed purchase and sale agreement. *Id.*

In contrast to the global “*all*” language relied on in *Knott*, the conveyance language in the basic purchase and sale agreement with Fidelity REIT does not contain the global term “all.” The language in the signed purchase and sale agreement instead states that SC East Campus agrees simply to “*sell, transfer and convey*” the Real Property to Purchaser. CP 383; emphasis added.

In fact, the language in the SC East Campus Purchase and Sale Agreement is distinct from the assignment agreement in *Knott* and its use of the global term “all” in a number of other ways.

First, the agreement specifies particular aspects of the property that are transferred. CP 383-84. Unlike, the transfer language in *Knott*, there is not a global all-encompassing transfer.

Second, where Section 1 of the Purchase and Sale Agreement does use the term “all” with respect to contracts, it refers to the transfer of all contracts “other than leases.” CP 384; Section 1(e) (emphasis added).

Third, where the Purchase and Sale Agreement does provide for the transfer of Leases, the Agreement provides for the transfer of Seller’s interest in the Leases as identified in Schedule 1 – again not using the term “all.” CP 383; Section 1(c). Indeed in that referenced Schedule 1 (CP 417) there is a specific reference to the building leases and the AT&T antenna lease, but again Schedule 1 does not employ the term “all.”

Fourth, the Purchase and Sale Agreement never specifically references an “Exhibit D.” Yet it is this alleged reference to “Exhibit D” upon which Weyerhaeuser’s incorporation by reference argument rests. (Weyerhaeuser Br. at 10, n. 1.)

3. Washington has adopted a context rule of contract interpretation, but Weyerhaeuser produced no other evidence apart from ambiguous contract language itself

At minimum there is an ambiguity in the contract language itself, and additional evidence must be analyzed by the court under the Washington context rule to determine the parties’ intent. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). As the Supreme Court later explained in *Hearst v. Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005), the *Berg* Court adopted the

“context rule” and “recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument’s execution. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.” The *Hearst* Court also reaffirmed the principle developed in Washington cases after *Berg* that the context is meant not to contradict the written word but to determine the meaning of specific words and not to demonstrate an intent different from the written instrument. “Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Hearst*, 154 Wn.2d at 503, citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 83 (1999); emphasis in original. In *Hearst*, the Supreme Court held that the detailed, five-page definition of agency expenses encompassed all expenses and that extensive definition was not contradicted by the independent force majeure clause in the contract, nor could any parole evidence alter the comprehensive nature of

that five-page definition of agency expenses. *Hearst*, 154 Wn.2d at 505-07.

Here, however, there is no parallel to the five-page definition of “agency expenses” in *Hearst*. The language relied on by Weyerhaeuser is neither comprehensive nor consistent, and Weyerhaeuser produced no context evidence at all. In fact, Weyerhaeuser produced no other evidence – apart from a standard form exhibit (Exhibit D; CP 431). But the language in that Exhibit differs from the language in the purchase and sale agreement signed by the parties. Weyerhaeuser is at a loss to produce any evidence providing context to the differing language that would demonstrate that the intent of the SC East Campus and Fidelity REIT was actually to transfer this cause of action against Weyerhaeuser to Fidelity REIT. And, there is no such evidence to be produced, because that was not the intent of the parties.

4. SC East Campus warned Weyerhaeuser of legal action at the outset, evidenced no intent to waive its right to sue, and did not sit on this right

From the first indication that Weyerhaeuser was attempting to renege on its obligation to provide a signed estoppel certificate, SC East Campus warned Weyerhaeuser that its actions could result in legal action by SC East Campus. As the trial court ultimately found, “Todd Clark was explicitly warned that his proposed revisions to the estoppel certificates

could become a legal issue at the outset.” CP 6246; FoF No. 31; emphasis added. Then, after the New City purchase was poisoned and undermined by Weyerhaeuser and after an alternate, but far less valuable, sale was closed with Fidelity REIT, SC East Campus did not just sit on its hands. SC East Campus acted on its early warnings and sued Weyerhaeuser on April 25, 2008. CP 3. This was barely six months after the Fidelity REIT closing on October 17, 2007. CP 2384; Ans. No. 4. Such prompt action to assert its claim – a claim for which Weyerhaeuser was put on notice at an early stage when it could have been corrected – does not warrant any inference that SC East Campus intended to waive its right to sue for the benefit of its original bargain with New City.

As the Court of Appeals stated in 1998: “A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). It may result from an express agreement, or be inferred from circumstances indicating an intent to waive. *Bowman*, 44 Wn.2d at 669, 269 P.2d 960. Thus waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971) (citing *Alsens American Portland Cement Works v. Degnon Contracting Co.*, 222

N.Y. 34, 37, 118 N.E. 210 (1917)). The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. *Rhodes v. Gould*, 19 Wash. App. 437, 441, 576 P.2d 914, review denied, 90 Wn.2d 1026 (1978).” *Dombrowsky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 255, 928 P.2d 1127 (1998) (Farmers Insurance did not waive its right to limit its recovery under an insurance contract by demanding an appraisal award).

Here, there is no way in which a waiver by SC East Campus could possibly “be inferred from circumstances indicating an intent to waive” adopted as a standard of contract review in *Bowman*, cited above. In fact, the circumstances surrounding SC East Campus’s actions indicate quite the opposite. SC East Campus had no intention of waiving its claim against Weyerhaeuser. As noted above, SC East Campus put Weyerhaeuser on notice of a potential lawsuit when Weyerhaeuser first refused to deliver an estoppel certificate and thereby put the sale to New City in peril. CP 6246; FoF No. 31. When the sale to New City did implode, as SC East Campus had warned, SC East Campus then promptly and vigorously pursued the lawsuit against Weyerhaeuser within months of finally being able to sell the EC 3 and EC 4 buildings to an alternate buyer. CP 3.

5. **This case is also fundamentally different from *Knott* because there was a binding contract with New City which would have required New City to close and because Washington's Franchise Investment Protection Act does not permit any agreement to give up rights that are afforded under the Act**

In *Knott*, the Ninth Circuit emphasized the fact that the initial purchase and sale agreement allowed the potential buyers (the Carties) to cancel the contract for any reason whatsoever, so under California law there were no grounds on which Knott could have relied on the original contract being executed at all, no matter what was done by an intervening third party (in this case, McDonald's). "The agreement executed by the Knotts and the Carties provided the Carties with the right to 'withdraw from the purchase [of the franchises] at any time with no penalty, loss of deposit, or any further legal action by the Knotts.' Thus the contract with which McDonald's allegedly interfered was not an enforceable contract..." *Knott*, 147 F.3d at 1068; emphasis added.

Here, however, the Purchase and Sale Agreement between SC East Campus and New City was binding on New City and would have gone through had Weyerhaeuser fulfilled its obligation to deliver signed estoppel certificates. CP 6245-46; FoF No. 28 and 31. Indeed, as the trial court concluded: "Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing poisoned the transaction with New

RCW 19.100.190. Specifically, “Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision . . . is void.” RCW 19.100.220(2). In Washington, therefore, Knott would have had the opportunity, denied him by the Ninth Circuit under both California and Illinois law, to pursue his bad faith claims against McDonald’s as a “fundamental right of the state of Washington.” RCW 19.100.220(3).

6. Washington law also recognizes that certain rights are personal to the assignor and cannot be assigned

The foundation of the principle that certain rights cannot be assigned is the general contract principle in which there is the presumption that accrued causes of action are not assigned if they can be asserted independently. “Unless an assignment specifically or impliedly designates them, accrued causes of action arising out of an assigned contract, whether in contract or in tort, do not pass under the assignment as incidental to the contract if they can be asserted by the assignor independently of his or her continued ownership of the contract and are not essential to a continued enforcement of the contract.” 6A C.J.S. Assignments § 93 (2010); emphasis added.

Washington law further recognizes that some causes of action really cannot be assigned. “Washington case law recognizes the existence

of rights that are personal to the assignor and incapable of assignment.” *Federal Financial Company v. Gerard*, 90 Wn. App. 169, 178, 949 P.2d 412 (1998). Although the Court in *Gerard* found that no Washington case “specifically defines the nature of a right that is personal and hence, not assignable,” the Court did cite to examples of such cases where the principle was applied. *Gerard*, 90 Wn. App. at 178, n. 18 and 19.

Moreover, two of those citations – one from Washington and one from Colorado –incorporate the principle that a claim cannot be assigned where there was fraud. “*Heian v. Fischer*, 189 Wash. 59, 63, 63 P.2d 518 (1937) (action for damages for fraud can be brought only by party to whom fraudulent representations made).” *Id.* 90 Wn. App. at 178, n. 18. “*Huston v. Ohio & Colorado Smelting & Refining Co.*, 63 Colo. 152, 165 P. 251 (1917) (assignee of stock did not receive assignor’s action for fraud in connection with the stock’s purchase).” *Id.* 90 Wn. App. at 178, n. 19.

In common with *Heian v. Fischer* and *Huston v. Ohio & Colorado Smelting & Refining Co.*, SC East Campus’s claims against Weyerhaeuser for acting in bad faith cannot be assigned. The trial court concluded both that Weyerhaeuser had violated the covenant of good faith and fair dealing and that Weyerhaeuser’s bad faith was the proximate cause of the failed sale to New City. CP 6250-51; CoL Nos. 5 and 6.

While the term “fraud” was not expressly employed by the trial court, both Washington case law and basic dictionary definitions equate “bad faith” with “fraud.” With respect to insurance policies, for example, Washington courts interpreting the term “fraudulent act,” look to standard English language dictionaries for the meaning of undefined terms. *Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.*, 120 Wn.2d 490, 502, 844 P.2d 403 (1993) citing “*Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507, 87 A.L.R.4th 405 (1990). A fraudulent act is synonymous with a deceitful act. See *Webster’s Third New International Dictionary* 904 (1986). An act is dishonest if it involves a breach of trust or honesty. See *Webster’s Third International Dictionary* 650.” (Emphasis added.) In another case, the Court of Appeals also equated bad faith with fraud. “Bad faith is defined as ‘actual or constructive fraud’ or a ‘neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.’ Black’s Law Dictionary 127 (5th rev. ed. 1979).” *State v. Sizemore*, 48 Wn. App. 835, 837, 741 P.2d 572 (1987), review denied, 109 Wn.2d 1013 (1987); emphasis added. The current edition of Black’s defines “**fraudulent act**” as “Conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude.” Black’s Law Dictionary 733 (9th rev. ed. 2009); emphasis added.

Accordingly, the trial court's findings and conclusions of law holding that Weyerhaeuser acted with bad faith to undermine the sale between SC East Campus and New City means that claims against Weyerhaeuser for acting in bad faith are inherently claims involving fraud and therefore cannot be assigned to Fidelity REIT. Those claims remain, as they must, with SC East Campus.

7. In the end, the trial court twice rejected Weyerhaeuser's assignment argument

The trial court both denied Weyerhaeuser's motion for summary judgment (CP 2355-56) and its motion for directed verdict at the conclusion of SC East Campus's case (RP 1808, lines 17-25). In doing so, the trial court of necessity analyzed the evidence and twice rejected Weyerhaeuser's assignment argument. On the analysis of the facts demonstrating the intent of the parties to the contract, the trial court is owed a large measure of deference by the Court of Appeals, unless its interpretation of the facts and context directly contradicts plain and unambiguous language of the contract. A trial court's findings will not be reversed if supported by substantial evidence. *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004), citing *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Even if there are several reasonable interpretations of the

evidence, it is substantial if it reasonably supports the finding. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). And, circumstantial evidence is as good as direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

Furthermore, the trial court found Weyerhaeuser to have violated the covenant of good faith and fair dealing to such an extent that its demand for “unconscionable and unworkable” provisions in the AT&T Lease so “poisoned the pending transaction with New City” that Weyerhaeuser’s actions were the “proximate cause of SC East Campus’s failed sale to New City.” CP 6250-51; CoL Nos. 5 and 6. In other words – the words of Black’s Law Dictionary – Weyerhaeuser engaged in “fraudulent acts” by engaging in “conduct involving bad faith.” SC East Campus’s claims of bad faith are thus also claims of fraud, and under Washington law cannot, and could not, be transferred to Fidelity REIT.

B. Consequential Damages

1. The damages to SC East Campus were direct expectation damages, not “consequential” damages

In Washington, the general rule governing damages for breach of contract is that the aggrieved party should be put in the same economic position he would have been if the contract had been performed. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 770, 115 P.3d 349 (2005) (protecting the parties’ expectation interest by requiring

replacement of slab with one that conformed to the parties' contract). To this end, if a breach of contract is demonstrated, Washington courts will grant damages based on the injured party's expectation interest, so that they may obtain the benefit of the bargain and, to the extent possible, be put in as good a position as that party would have been had the contract been performed. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223 (2002) citing *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990).

Here, the benefit of the bargain was the value of the Lease with a signed estoppel as promised in § 23 of the Lease. CP 501. When Weyerhaeuser stripped away that contractual right by its bad faith, and by its protracted refusal to execute the estoppel certificates, the value of the Lease was reduced by \$3,125,000. This expectation damage is rightfully, under Washington law a compensatory – not a “consequential” – damage.

2. Weyerhaeuser's consequential damages argument has been rejected four times by two different trial judges

Weyerhaeuser has already lost this argument four times. It lost a CR 12(c) motion on this same issue before Judge Prochnau on July 8, 2009. CP 164-5. It then lost the argument on summary judgment before Judge Carey on September 11, 2009. CP 2355-6. And again it lost the same argument before Judge Carey in its motion for directed verdict at the

end of Plaintiff's case on May 19, 2010. CP 1808. And finally, it lost the argument on its CR 52 motion to amend Judge Carey's findings of fact and conclusions of law on June 17, 2010. CP 6466-7. Yet Weyerhaeuser still references the original scriveners' error of counsel and still tries to pigeon-hole its claims in a category known generally for future speculative or unusual losses such as unjust enrichment, emotional distress, mental anguish, and lost profits for failure to obtain bid award from a public entity. Those types of damages are rightly considered "consequential." They are a special type of damage that generally relate to emotional distress and items outside the contemplation of the parties at the time the contract was executed. *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981). The same principle is set out in WPI 303.04.

3. The damages here were (1) within the contemplation of the parties to the Lease, (2) caused by Weyerhaeuser's actions and (3) were proven with certainty

In *Alpine*, this Court reversed the trial court's ruling granting judgment n. o. v. on the issue of loss of profits. The *Alpine* Court, citing *Larson v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964), reiterated the law in Washington. "A party is entitled to recover lost profits in a breach of contract action when '(1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach and (3) they are proven with

reasonable certainty.” *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. at 754.

Each element of the three-part test set out in *Alpine* and *Larson* were each proven in this case. The estoppel certificate was a bargained for term intended to give the landlord the ability to sell its interest in the property, along with the lease, and provide assurances to the prospective purchaser. The trial court concluded that as a matter of law “Section 23 of the Lease required Weyerhaeuser to execute the final estoppel certificate within 10 business days of April 20, 2007.” CP 6250; CoL No. 1. Weyerhaeuser’s breach did not create consequential damages – such as unjust enrichment, emotional distress, mental anguish or lost profits on other investments SC East Campus might have made with the proceeds of the New City sale – but rather direct and certain damages that directly resulted from Weyerhaeuser’s actions that were the proximate cause of a reduction in the value of the Lease and the property. This potential loss in value was contemplated not only at the time of the initial purchase and Lease by SC East Campus, but at the time Weyerhaeuser first refused to provide the estoppel certificate required under the Lease. As the trial court found, “Todd Clark knew of the pending purchase with New City and the May 16, 2006 [sic] deadline of the sale.” CP 6250; FoF No. 66. Weyerhaeuser’s own Director of Real Estate, Rick Little, admitted that

neither the issue of moisture nor the issue of the AT&T cell tower were defaults under Section 16.2 of the Lease. CP 6249; FoF No. 60. Yet Todd Clark, on behalf of Weyerhaeuser, persisted in alleging both were defaults and in making unreasonable demands with the direct result that the pending sale to New City was terminated. CP 6250; FoF No. 67. SC East Campus was therefore “forced” to seek a second buyer at a certain and substantially lower price. CP 6250; FoF No. 68.

Indeed, Weyerhaeuser so frustrated the purpose of the Lease and the obligation to provide a signed estoppel certificate, that SC East Campus could not even begin to remarket the property until months after Weyerhaeuser caused the demise of the sale to New City. CP 6250; CoL Nos. 2-3. This extended delay of SC East Campus’s ability to even begin to remarket EC-3 and EC-4 caused direct damage to SC East Campus under its existing Lease with Weyerhaeuser, not under any speculative anticipation of what SC East Campus would have been able to earn through any other investment it could have made upon a successful sale to New City in May of 2007.

4. Even though damages to SC East Campus were not consequential damages, Weyerhaeuser’s own waiver argument is not supported by the language of the Lease

Regardless of the fact that the damages suffered by SC East Campus were direct damages stemming from Weyerhaeuser’s actions and

not “consequential” damages, Weyerhaeuser’s argument that the Lease provides for a waiver of all “consequential” damages is itself flawed.

Rick Little, Weyerhaeuser’s Director of Real Estate, admitted first that the Lease terms were written between the financial subdivisions of Weyerhaeuser and Weyerhaeuser itself. RP 347, lines 1-6. Little further admitted that the waiver of consequential damage provision in the Lease would not apply to damages to the owner caused, for example, by environmental contamination by Weyerhaeuser as the lessee. RP 368, lines 3-5. Third, even though Weyerhaeuser had written the lease between itself and its subsidiary, Little could not explain exactly why the consequential damage provision was a sub-number of the insurance provisions in the Lease. CP 496, § 12.10. Little, in fact, agreed that he had testified in his deposition that “I think it could be construed to potentially relate to insurance issues.” RP 366, lines 3-4.

But the direct damages to the value of the Lease and property directly and proximately caused by Weyerhaeuser’s bad faith in refusing to execute an estoppel certificate are neither “consequential” damages, nor do they relate to insurance issues. Weyerhaeuser’s argument that SC East Campus waived damages for a refusal to comply with the estoppel certificate requirement of the lease is yet again a strained argument of self-serving interpretation of a lease which Weyerhaeuser itself wrote. In a

wide-ranging discussion of the “economic loss rule” in Washington (the economic loss rule is not a bright-line bar to tort-like damages in contract cases), the Supreme Court recently noted that, although parties to a contract can limit liability for damages resulting from negligence, “Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced” *Eastwood v. Horse Harbor Foundation, Inc.*, ___ Wn.2d ___, ___, n.3, 241 P.3d 1256, 1264, n.3 (November 4, 2010), citing *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992). As a consequence, Weyerhaeuser’s strained consequential damages defense, based on an ambiguous subsection of the insurance provisions in a Lease – in which Weyerhaeuser alone controlled the drafting – should be rejected by this Court just as it was by two different King County Superior Court judges.

C. Damages

1. The damages awarded result from a straightforward and precise calculation of the lower sale price proximately caused by Weyerhaeuser’s bad faith

The trial court found not only that Weyerhaeuser tried to use its refusal to provide SC East Campus with an estoppel certificate as leverage to demand unconscionable and unworkable provisions in the access with AT&T which remained essential for Weyerhaeuser’s own communications needs, but also found that Weyerhaeuser violated the

implied covenant of good faith and fair dealing as well as having breached the Lease. CP 6251; CoL No. 5. As a result, the trial court concluded that “Weyerhaeuser’s breach of the Lease and breach of the covenant of good faith and fair dealing poisoned the transaction with New City and was the proximate cause of Plaintiff’s failed sale to New City.” CP 6251; CoL No. 5; emphasis added.

As a result of Weyerhaeuser’s breach of the Lease and bad faith, the trial court proceeded to grant damages to Plaintiff that compensate SC East Campus for the benefit of the bargain of the failed sale to New City. The \$3,125,000 in damages adopted in Conclusion of Law No. 7 is an exact and straightforward amount derived by subtracting the sale at \$33,625,000, that it was able to obtain from Fidelity REIT after Weyerhaeuser finally provided the required estoppel certificates (CP 6250; FoF No. 68), from the original sale price of \$36,750,000 that SC East Campus would have obtained from New City (CP 6245; FoF No. 27) had Weyerhaeuser not acted in bad faith to undermine the transaction

2. An award of damages will not be overturned absent a showing of abuse

The monetary amount of compensatory damages is fixed by the trier of fact who has discretion to make that determination within the range of relevant evidence. *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712,

716, 815 P.2d 293 (1991), citing *Mason v. Mortgage Am. Inc.*, 114 Wn.2d 842, 850, 792 P.2d (1990). Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating loss. *Kwik-Lok Corp v. Pulse*, 41 Wn. App. 142, 150, 702 P.2d 1226 (1985). Competent evidence of damages is that which does not subject the trier of fact to speculation or conjecture. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820 (1998). And, “[t]he amount of the award will, therefore, not be overturned absent a showing of abuse.” *Kwik-Lok Corp v. Pulse*, 41 Wn. App. at 150.

There was no such abuse by Judge Carey shown by Weyerhaeuser in this case. There was no speculation or conjecture regarding the amount of the award. Quite to the contrary, the amount of the award was calculated with the mathematical precision of a simple subtraction: The market value of the property and Lease at the time of the pending sale to New City in May 2007 was firmly established by the February 27 purchase and sale agreement – \$36,750,000. CP 6245; FoF No. 27. The lower market price when SC East Campus was finally able to sell the same property to a replacement buyer established by the October 2007 sale to Fidelity REIT – \$33,625,000. CP 6250; FoF No. 69. The simple subtraction of the lower market value achieved by SC East Campus through the sale to Fidelity REIT in October 2007, after Weyerhaeuser

finally provided a generic estoppel certificate in July (CP 6250; CoL No. 2), is the precise damage awarded by the trial court – \$3,125,000. CP 6251; CoL No. 7. There can be no argument that this measure of damages is lacking either mathematical precision or supporting evidence. Accordingly, there was no abuse of discretion by Judge Carey in establishing the award.

3. The benefit of the bargain damages awarded by the trial court were both conservative and appropriate

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give the injured party the benefit of its bargain. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427, 10 P.3d 417 (2000), citing *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984); emphasis added. In *Panorama* this Court pointed out that the trial court generally had the discretion in a construction defect case to award the damaged party the cost of repairs or the difference in the market price between the building without the defect and the resulting market value of the building with the imbedded defects – so long as the cost of repairs did not substantially exceed the difference in market price. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. at 427-428. In fact the *Eastlake* Court found that it was sometimes better that the

injured party be given a windfall rather than the benefit of the bargain that cannot be accurately measured by the standard market price difference. “Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party to a reasonable certainty. In that case he can usually recover damages base on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be undercompensated by being limited to the resulting diminution in the market price of his property.” *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d at 48.

Consistent with *Eastlake* and *Panorama*, therefore, an award of the benefit of the bargain damages measured by the diminution of market price is the conservative and the appropriate standard for measure of damages. Further, it should be noted that in applying this measure of damages neither the Supreme Court in *Eastlake* nor the Court of Appeals in *Panorama* suggested that any amount should be deducted from the market price for sales commissions or taxes as advocated by Weyerhaeuser.

Market price decline as a measure of damages is likewise employed by Washington courts in other factual contexts where the injured party has been deprived of the benefit of its bargain. The benefit of the bargain rule

is frequently applied in “actions for fraud inducing the sale of property.” *Gnash v. Saari*, 44 Wn.2d 312, 322, 267 P.2d 647 (1954). The benefit of the bargain is also employed in regulatory takings cases where the measure of damage is similarly the diminution in the fair market value of the property caused by the governmental takings or damages. *Phillips v. King Co.*, 136 Wn.2d 946, 956-57, 968 P.2d 871 (1998), citing *Peterson v. Port of Seattle*, 94 Wn.2d 479, 482, 618 P.2d 67 (1980). Again, the measure of damages is the diminution of the fair market value – with no subtraction for the cost of marketing, brokerage fees, taxes or other expenses that might have applied to a sale at the higher market price. The damage award is based simply on the straightforward measure of the diminution of market value that is the measure of the benefit of the bargain damages.

This straightforward measure of the diminution of market value to EC-3 and EC-4 caused by Weyerhaeuser’s bad faith is the same measure of damages employed by Judge Carey in this case. The trial court’s precise measure of liquidated damages should therefore be upheld.

VI. CONCLUSION

True to Claire Booth Luce’s adage, “*No good deed goes unpunished,*” SC East Campus’s negotiation of a cell antenna lease with

AT&T – at the request of and for the benefit of Weyerhaeuser – was punished.

Todd Clark used the lease with AT&T to try to gain leverage over SC East Campus by refusing to sign estoppel certificates required by the Lease with SC East Campus, thereby killing SC East Campus’s pending sale of the EC-3 and EC-4 buildings. In doing so, the trial court concluded as a matter of law that “Weyerhaeuser violated the implied covenant of good faith and fair dealing inherent in every contract by attempting to use Plaintiff’s request for a straightforward estoppel certificate as leverage to demand unconscionable and unworkable provisions in the access agreement with AT&T for maintenance of the cell tower that was still essential to Weyerhaeuser’s communications needs.”

Weyerhaeuser’s bad faith resulted not only in the failed sale to New City, but in an extended delay of the ability of SC East Campus to even put the buildings on the market again and to sell them eventually to Fidelity REIT five months later. This delay was costly. It resulted in a sale to Fidelity REIT at exactly \$3,125,000 *less* than the failed sale to New City. That liquidated sum represents precisely calculated compensatory damages, directly and proximately caused by Weyerhaeuser’s bad faith in undermining the benefit of the bargain that the Sacramento County Employee Retirement System would have obtained from the failed sale.

Judge Carey's ruling should be upheld in all respects.

RESPECTFULLY SUBMITTED this 29th day of December, 2010.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'Bradley P. Thoreson', written over a horizontal line.

Bradley P. Thoreson, WSBA No. 18190
William H. Patton, WSBA No. 5771
Miriam H. Cho, WSBA No. 40238
Attorneys for Plaintiff-Respondent,
SC East Campus, Inc.

Appendix A

DECISION FOLLOWING TRIAL
AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW

May 27, 2010

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KING COUNTY, WASHINGTON

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SC East Campus, Inc., a Delaware corporation,

Plaintiff,

v.

Weyerhaeuser Company, a Washington
corporation,

Defendant.

The Honorable Cheryl Carey

No. 08-2-14127-6 KNT

DECISION FOLLOWING TRIAL
AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THE ABOVE-ENTITLED CAUSE having come on for trial on May 3, 2010 through May 24, 2010, before the undersigned judge in the above-entitled Court; the parties having waived their right to a trial by jury; and the Court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law. Any finding of fact herein which should be classified as a conclusion of law is adopted as a conclusion of law, and vice versa.

Based upon the evidence received, the Court now finds that the following facts have been proved by a preponderance of the evidence:

SC EAST CAMPUS, INC.'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

I. FINDINGS OF FACT

1. Less than a month before Weyerhaeuser Financial Services, Inc. sold EC-3 and EC-4 to Plaintiff on November 25, 2002, Weyerhaeuser rewrote the identical leases for these buildings (the "Lease") in which Weyerhaeuser Company ("Weyerhaeuser") was the tenant and Weyerhaeuser Financial Services, Inc, the landlord.

2. Weyerhaeuser's Real Estate Department rejected a request for permission to install a cell tower on Weyerhaeuser's buildings in 2000 after analyzing issues related to the requirement for 24 hour, 7 day a week access, interference with proprietary equipment, and the length of commitment because they concluded that the lease income didn't offset the increased hassle;

3. Weyerhaeuser fielded complaints about poor cellular reception around its campus as early as 2001;

4. Weyerhaeuser needed improved cellular reception to solve the lack of internal cell phone coverage for Weyerhaeuser employees and third party contractors inside the buildings and to create better telecommunication coverage for a wider area of the Weyerhaeuser campus;

5. AT&T approached Mark Chaboya in January of 2003 about implementing a system solution to improve cellular reception on the Weyerhaeuser campus;

6. Mark Chaboya was a credible witness.

7. The initiative to implement a system solution to improve cellular reception on the Weyerhaeuser campus was Weyerhaeuser's initiative, not Plaintiff's initiative;

8. Plaintiff only became involved in the Weyerhaeuser initiative because EC-4 was identified as the ideal location for a cell tower since it was the building with the highest elevation on Weyerhaeuser's east campus;

9. David Ringlee, former facilities director for the Weyerhaeuser campus buildings, facilitated arrangements between AT&T and Plaintiff with the goal of moving an agreement

forward so that Weyerhaeuser could obtain better cellular reception on the entire Weyerhaeuser campus;

10. David Ringlee put together an access protocol for AT&T about which Weyerhaeuser's real estate agent later complained;

11. David Ringlee was a credible witness.

12. Weyerhaeuser offered to and in fact connected the cell tower into EC-4's own electric service panel, without any sub-meter;

13. Weyerhaeuser offered to write a letter to help expedite the permitting process with the City of Federal Way;

14. Todd Clark gave the green light to the installation of the cell tower on EC-4;

15. Cellular service was virtually non-existent on the Weyerhaeuser campus without the cell tower;

16. The cell tower and the in-building enhancements in the Corporate Headquarters and Technology Center were wired together to get connectivity between each other;

17. The radio resource for the Corporate Headquarters and Technology Center was located in an electrical closet in EC-4;

18. Weyerhaeuser agreed to give AT&T 24 hour, 7 day a week access to EC-4 to service the radio resource for the in-building enhancement for its own Corporate Headquarters and Technology Center;

19. Section 3.8 of the Radio Frequency Enhancement Addendum (for the West campus), Section 2.7 of the In-Building Service Enhancement Agreement (for the Corporate Headquarters and Technology Center), and Section 12 of the Option and Lease Agreement (for the cell tower) each gives AT&T "with access twenty-four hours per day seven days per week" to install, monitor, and complete any necessary repair and maintenance work;

20. Section 3.8 of the Radio Frequency Enhancement Addendum, Section 2.7 of the In-Building Service Enhancement Agreement, and Sections 2 and 14 of the Option and Lease Agreement each gives AT&T the right to connect to the customer's power source;

21. AT&T would have walked away from all of these agreements if Weyerhaeuser (or Plaintiff) had tried to negotiate on requirements for twenty-four seven access because AT&T viewed twenty-four seven access to be necessary to comply with the FCC requirement which required AT&T to maintain control over their network;

22. There was no default under Section 16.2 of the Lease in connection with Plaintiff accommodating the request of Weyerhaeuser to the cell tower on EC-4;

23. Weyerhaeuser quickly solved an initial water vapor problem beneath employee's desk mats on the ground floor by removing the mats;

24. Weyerhaeuser reported, after the water vapor problem arose, to Plaintiff that the status of the moisture issue was "golden";

25. The moisture issue was not a default under Section 16.2 of the Lease;

26. Plaintiff would have been entitled to seek redress from Weyerhaeuser's construction subsidiary, Quadrant, for resolution of the moisture issue since Weyerhaeuser's subsidiary originally constructed EC-3 and EC-4 and the other EC buildings in which the moisture appeared;

27. On February 27, 2007, Plaintiff negotiated a purchase and sale agreement with New City North America ("New City") for the sale of Buildings EC-3 and EC-4 for a purchase price of \$36,750,000;

28. All contingencies on the February 27, 2007 purchase and sale agreement were removed except for receiving estoppel certificates from the tenant, Weyerhaeuser;

29. On April 20, 2007, Plaintiff through its agent, requested estoppel certificates from Todd Clark, Assistant Director of Real Estate, at Weyerhaeuser;

30. Todd Clark had 15 to 16 years of experience working on estoppel certificates for Weyerhaeuser;

31. Todd Clark was explicitly warned that his proposed revisions to the estoppel certificates could become a legal issue at the outset;

32. New City withdrew its purchase offer on May 14, 2007, specifically citing the lack of appropriate estoppel certificates as the sole reason;

33. New City would have completed the deal, even though it had withdrawn its purchase offer, if Plaintiff had obtained an acceptable estoppel certificate from Weyerhaeuser;

34. Weyerhaeuser's consistent practice, other than with the estoppel certificates at issue, was to execute and return them within ten business days of the initial request;

35. Weyerhaeuser had superior knowledge regarding the issues of "default" Todd Clark raised in the estoppel certificates;

36. When the estoppel certificate was presented to Weyerhaeuser, Todd Clark failed to make any effort to conduct any kind of reasonable investigation of how Weyerhaeuser itself sought the installation of the cell tower on Building EC-4, that Weyerhaeuser itself adopted the 24/7 access protocol for AT&T to be able to maintain the cell tower, and Weyerhaeuser's agreement to allow AT&T to tie into the building electricity and its electrical panel contained within the third floor of the building;

37. Todd Clark, in evaluating the leases with Plaintiff and AT&T, did not go back to contact Peggy Kunkel to inquire about historical data related to the cell tower installation;

38. Peggy Kunkel was a credible witness;

39. Todd Clark, was unaware that Weyerhaeuser itself had a 27/7 access protocol with AT&T for both its headquarters building and its technology center;

40. Mark Chaboya, the network operations manager for Weyerhaeuser was unaware that there had been a protocol agreed to between Weyerhaeuser and AT&T for access and maintenance

41. Andrew Bylin, the current facility manager for Weyerhaeuser, didn't know of the access protocol between AT&T and Weyerhaeuser that Dave Ringlee had developed;

42. Jan Gibson, the former facilities director was unaware that one of her subordinates, Andrew Bylin, had already entered into an in-building service enhancement agreement with AT&T or agreed to allow AT&T to tie directly into the building power without a sub meter;

43. Jan Gibson was a credible witness;

44. David Ringlee was never contacted by anyone in facilities, following Plaintiff's request for estoppel certificates from Weyerhaeuser but prior to the summer of 2008, regarding cell tower facilities on EC-4, if there was some kind of protocol in place that allowed AT&T access to the EC-4 building, if there had been an agreement in place relative to who was going to pay for electricity required to operate the cell tower on EC-4;

45. With respect to the moisture issue, Todd Clark first identified that "no condition exists which with the giving of notice, the passage of time or both would constitute a default under the Lease on the part of Tenant or Landlord, except for the moisture condition referenced in Tenant's letter to Landlord dated April 28, 2004 and April 25, 2007" in his April 27 revision;

46. When Yuliya Oryol of Nossaman modified the moisture section to state that the moisture condition was inserted only to inform Landlord of the moisture, but that it did not constitute a default, Todd Clark added that "However, since the moisture appears to be migrating up through the slab, and the slab is the responsibility of Landlord, Landlord may have maintenance and/or repair responsibilities on the slab if the moisture issue becomes a life safety issue," escalating the issue even further by his reference to "life safety";

47. Yuliya Oryol was a credible witness.

48. Todd Clark's final revision of the moisture section was to state that "Tenant reserves all rights under the Lease with respect to the maintenance and repair obligations for the identified moisture condition on the Premises";

49. Jonathan McCall of BlackRock Realty sent an email on November 3, 2006 to both Jan Gibson and Todd Clark enclosing the historic documentation that described the Weyerhaeuser demands/requests to Plaintiff for the installation of the cell tower, and also explained the background of the issue (describing the poor cell phone coverage for Weyerhaeuser's own internal communication in the two buildings);

50. Jonathan McCall and Todd Clark had follow-up telephone conference after Jonathan McCall's November 3, 2006 email in which Mr. McCall discussed the historical documents with Todd Clark;

51. Jonathan McCall was a credible witness.

52. Despite Todd Clark's knowledge of the historical documentation that described the Weyerhaeuser demands/requests to Plaintiff for the installation of the cell tower, and also explained the background of the issue (describing the poor cell phone coverage for Weyerhaeuser's own internal communication in the two buildings), Todd Clark first revised the estoppel certificate to state that the "lease with AT&T is in violation of Tenant's quiet enjoyment of the Premises, as well as other lease provisions";

53. When Yuliya Oryol revised the AT&T cell tower section to state that the AT&T lease did not violate the Lease, but that "certain coordination issues exist which Tenant would like to have resolved with respect to the vendor who services the antenna," Todd Clark inserted further objections to the AT&T lease, stating that there were conflicts regarding "access, insurance, utilities, maintenance & repair provisions, and the definition of leased premises";

54. On May 7, 2007, Mr. Clark sent Plaintiff a marked up revised lease with AT&T demanding, that Weyerhaeuser be paid \$25,000 for each event in which AT&T did not provide Weyerhaeuser with at least 10 days' advance notice to access the cell tower on the roof of the building and demanded that the landlord pay Weyerhaeuser another \$25,000 for each and every incident where the landlord fails to read and reimburse Weyerhaeuser on a monthly basis for electricity used by the AT&T cell tower installation;

55. On May 30, 2007, Todd Clark demanded in his proposed amendment to the Lease that Plaintiff/AT&T be required to use a helicopter to access the roof, even in emergencies, if Plaintiff/AT&T did not give 5 days advance notice;

56. Todd Clark demanded of \$75,000 to make Weyerhaeuser whole in advance for its troubles with respect to AT&T access to EC-4. This was unreasonable;

57. The resounding response of third parties involved in the request for estoppel certificates demonstrates "shock" to Todd Clark's revisions;

58. David Kimport, counsel for Plaintiff, sent a letter on July 10, 2007 to Rick Little, Director of Real Estate of Weyerhaeuser, advising Mr. Little of the unconscionable actions both Mr. Clark and Mr. Clack had taken to undermine the first sale that Plaintiff received any reasonable response;

59. David Kimport was a credible witness.

60. Weyerhaeuser, through its real estate director, Rick Little, admits that neither the issue of moisture nor the issue of the AT&T cell tower were defaults under Section 16.2 of the Lease;

61. Rick Little was a credible witness;

62. Weyerhaeuser's July 16 and September 25, 2007 estoppel certificates contain no qualification about water vapor on the first floor;

63. Weyerhaeuser's July 16 and September 25, 2007 estoppel certificates acknowledge that, "Tenant is aware of a lease agreement between Owner and AT&T Wireless Services of Washington, LLC pursuant to which AT&T Wireless has placed a cell site on the roof of the building";

64. Todd Clark deliberately, intentionally and with full knowledge used the pending purchase of EC3 and EC4 "... to prove a point", "... to illustrate a point", "... to get a point across", and ... to send a message". Such behavior was unreasonable;

65. Todd Clark's testimony is not credible.

66. Todd Clark knew of the pending purchase with New City and the May 16, 2006 deadline of the sale;

67. Through allegations of default and subsequent unreasonable demands, Todd Clark, Weyerhaeuser's assistant director of real estate so poisoned SC East's pending purchase and sale agreement with New City, that New City terminated the transaction; and

68. Plaintiff was then forced to seek a second buyer and sold EC-3 and EC-4 to Fidelity REIT Investor LLC in October 2007 for \$33,625,000.

69. Had New City's loan with Artesia closed by May 16, 2007, the loan would have gone through;

70. Witnesses Takeuchi, Mirabelli, Krier, Bladder and Chin were credible witnesses.

II. CONCLUSIONS OF LAW

1. Section 23 of the Lease required Weyerhaeuser to execute the final estoppel certificate within 10 business days of April 20, 2007;

2. Weyerhaeuser breached Section 23 of the Lease by failing to provide an executed estoppel certificate within those 10 business days, and in fact did not provide an executed estoppel certificate until July 16, 2007;

3. Weyerhaeuser breached the Lease by frustrating the purpose of Plaintiff in contracting with Weyerhaeuser to provide estoppel certificates under the Lease when it refused to provide a clean estoppel certificate until months after Plaintiff's request, and instead, only providing mere obstructionist revisions to the estoppel certificate in the meanwhile;

4. Weyerhaeuser breached the Lease by frustrating the ability of Plaintiff to provide assurance to third parties, and in this case, New City, that the lease was in place, lease payments were being made, and that neither the landlord or tenant were in default;

5. Weyerhaeuser violated the implied covenant of good faith and fair dealing inherent in every contract by attempting to use Plaintiff's request for a straightforward estoppel

certificate as leverage to demand unconscionable and unworkable provisions in the access agreement with AT&T for maintenance of the cell tower that was still essential to Weyerhaeuser's communication needs;

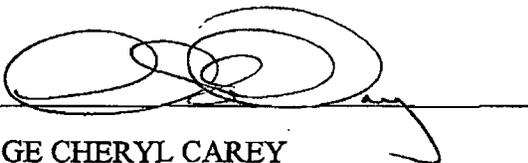
6. Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing poisoned the pending transaction with New City and was the proximate cause of Plaintiff's failed sale to New City;

7. As a result of Weyerhaeuser's breach of the Lease and breach of the covenant of good faith and fair dealing, Plaintiff was damaged a sum of \$3,125,000, that can be specifically calculated as a liquidated damage amount;

8. Plaintiff is entitled to statutory pre and post judgment interest on the liquidated damage amount; and

9. Plaintiff is entitled to its reasonable attorney fees and other costs under Section 29.1 of the Lease.

Signed this 27th day of May, 2010,



JUDGE CHERYL CAREY

No. 65672-4-I

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

SC East Campus, Inc., a Delaware corporation,

Plaintiff-Respondent,

v.

Weyerhaeuser Company, a Washington corporation,

Defendant-Appellant.

DECLARATION OF SERVICE

FOSTER PEPPER PLLC

Bradley P. Thoreson WSBA No. 18190

William H. Patton WSBA No. 5771

Miriam H. Cho WSBA No. 40238

1111 Third Avenue, Suite 3400

Seattle, Washington 98101-3299

Telephone: (206) 447-4400

Facsimile No.: (206) 447-9700

Attorneys for Plaintiff-Respondent,
SC East Campus, Inc.

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CLERK OF COURT
APPELLATE DIVISION
1111 3RD AVENUE
SEATTLE, WA 98101

ORIGINAL

I, Susan G. Banner, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on December 29, 2010, I caused a true and correct copy of the following documents:

1. **Brief of Respondent;**
2. and this Declaration of Service

to be served as follows:

Laurie Lootens Chyz
Michael J. Ewart
Hillis, Clark, Martin & Peterson
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925

Attorneys for Weyerhaeuser Company

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|-------------------------------------|--|
| <input checked="" type="checkbox"/> | via hand delivery. |
| <input type="checkbox"/> | via first class mail, postage prepaid. |
| <input type="checkbox"/> | via facsimile. |
| <input type="checkbox"/> | via e-mail. |

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington this 29th day of December, 2010.



Susan G. Banner