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No. 66207-4

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

EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.,

Plaintiff/Respondent,

v.

TROIANI SEATTLE, LLC, a Washington limited liability company;
PAUL S. MACKAY, SR. and GAIL MACKAY, and the marital
community thereof; CHAD MACKAY and JENNIFER MACKAY, and
the marital community thereof; RICHARD TROIANI and JANE DOE
TROIANI, and the marital community thereof; and KENNETH SHARP
and JANE DOE SHARP, and the marital community thereof,

Defendants/Appellants.

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES PRESENTED	2
III. STATEMENT OF THE CASE	3
A. The Troiani Seattle Lease	3
B. Personal Guaranties by Individual Appellants	4
C. Troiani Seattle Stops Paying Rent and Closes the Restaurant	5
D. Troiani Seattle’s Default.....	5
E. Breach of Contract and Default Remedies	6
F. Troiani Seattle’s Attempt to Assign Lease	7
G. Discovery Facts	8
IV. ARGUMENT.....	10
A. STANDARDS OF REVIEW.....	10
1. Motion to Vacate	10
2. Motion for Reconsideration.....	10
3. Summary Judgment	10
B. TROIANI SEATTLE BREACHED THE LEASE.....	11
C. THE INDIVIDUAL APPELLANTS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE GUARANTY FOR TROIANI SEATTLE’S BREACH. ..	11
1. The Individual Appellants Unconditionally Guaranteed Troiani Seattle’s Performance.....	12

TABLE OF CONTENTS

	<u>Page</u>
2. The Individual Appellants Are Barred from Raising Any Defense that Troiani Seattle May Have.....	13
D. TROIANI SEATTLE’ S BREACH IS NOT EXCUSED BECAUSE TROIANI SEATTLE FAILED TO COMPLY WITH LEASE PROCEDURES TO NAME A PARTY IN DEFAULT.....	16
E. TROIANI SEATTLE’S BREACH IS NOT EXCUSED BECAUSE EXPEDITORS ACTED WITHIN ITS CONTRACT RIGHTS.	19
1. The Lease’s Assignment Language Is Open Only to One Reasonable Interpretation.	19
2. The Lease’s Plain Language and Troiani Seattle’s Conduct Establish that the Parties Intended Assignment Only to Corporate Affiliates.	21
D. TROIANI SEATTLE’ S BREACH IS NOT EXCUSED BECAUSE EXPEDITORS HAD NO OBLIGATION TO CONSENT TO THE PROPOSED ASSIGNMENT. ...	24
E. THE TRIAL COURT WAS WITHIN ITS DISCRETION WHEN IT DENIED APPELLANTS’ MOTION TO VACATE.....	27
1. Appellants Make No Argument or Cite to Any Authority Regarding the Motion to Vacate.	29
2. There Was No “Newly Discovered” Evidence.....	29
a. Appellants Actually Possessed the “Evidence” in Question Approximately Two Months Prior to the Summary Judgment Hearing and Order.....	29

TABLE OF CONTENTS

	<u>Page</u>
b. Appellants Also Failed to Exercise Due Diligence in Obtaining Documents from Their Previous Counsel.	31
3. There Was No Fraud or Misconduct by Expeditors.	33
4. Appellants Make Numerous Unsupported and Incorrect Statements Regarding the Lease Draft. ...	34
H. THE COURT SHOULD AFFIRM THE TRIAL COURT’S DENIAL OF APPELLANTS’ MOTION TO RECONSIDER.	35
V. CONCLUSION	35

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Adams v. Western Host, Inc.</i> , 55 Wn. App. 601, 779 P.2d 281 (1989)	30
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004)	21
<i>Badgett v. Sec. State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991)	25, 26
<i>Bethell v. Matthews</i> , 187 Wash. 175, 59 P.2d 1125 (1936).....	23
<i>Coughlin v. Smith</i> , 163 Wash. 290, 1 P.2d 214 (1931)	14
<i>Ebsary v. Pioneer Human Servs.</i> , 59 Wn. App. 218, 796 P.2d 769 (1990)	10, 33
<i>Ernst Home Ctr., Inc. v. Sato</i> , 80 Wn. App. 473, 910 P.2d 486 (1996)	27
<i>Falcone v. Perry</i> , 68 Wn.2d 909, 416 P.2d 690 (1966).....	33
<i>Fortress Credit Corp. v. Hudson Yards, LLC</i> , 78 A.D.3d 577 (N.Y. App. Div. 2010).....	15
<i>Fruehauf Trailer Co. of Canada Ltd. v. Chandler</i> , 67 Wn.2d 704, 409 P.2d 651 (1966)	12, 13, 15
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003)	10, 21, 31
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	22
<i>In re Marriage of Tang</i> , 57 Wn. App. 648, 789 P.2d 118 (1990)	10
<i>Johnny's Seafood Co. v. City of Tacoma</i> , 73 Wn. App. 415, 869 P.2d 1097 (1994)	19

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Ledaura, LLC v. Gould</i> , 155 Wn. App. 786, 237 P.3d 914 (2010)	26
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 427 P.2d 724 (1967).....	33
<i>Miller v. U.S. Bank of Wash.</i> , 72 Wn. App. 416, 865 P.2d 536 (1994)	20
<i>Moore v. Pacific Northwest Bell</i> , 34 Wn. App. 448, 662 P.2d 398 (1983)	33
<i>Nat'l Bank of Wash. v. Equity Invs.</i> , 81 Wn.2d 886, 506 P.2d 20 (1973)	15
<i>Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n</i> , 64 Wn. App. 938, 827 P.2d 334 (1992).....	10
<i>Portland Elec. & Plumbing Co. v. City of Vancouver</i> , 29 Wn. App. 292, 627 P.2d 1350 (1981).....	23
<i>Robey v. Walton Lumber Co.</i> , 17 Wn.2d 242, 135 P.2d 95 (1943)	12, 13
<i>Ross v. Harding</i> , 64 Wn.2d 231, 391 P.2d 526 (1964).....	25
<i>Security State Bank v. Burk</i> , 100 Wn. App. 94, 995 P.2d 1272 (2000)	14
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003)	10
<i>Tremmel v. Safeco Ins. Co. of Am.</i> , 42 Wn. App. 684, 713 P.2d 155 (1986)	29, 35
<i>Watkins v. Restorative Care Ctr.</i> , 66 Wn. App. 178, 831 P.2d 1085 (1992)	22
<i>Weems v. N. Franklin Sch. Dist.</i> , 109 Wn. App. 767, 37 P.3d 354 (2002)	10
<i>Wilson v. Henkle</i> , 45 Wn. App. 162, 724 P.2d 1069 (1986)	10

TABLE OF AUTHORITIES

Page

Other Authorities

Restatement (Third) of Suretyship and Guaranty § 48
(1996)15

Rules

CR 56(f).....32
CR 593, 30
CR 60(b)28, 29, 33

I. INTRODUCTION

Appellants defaulted under the terms of their Lease by failing to pay rent and by closing their operations. They now seek authority to excuse their non-performance.

Appellants argue that *Respondent* breached the Lease several months before the Appellants' default and *that* breach by *Respondent* excused Appellants' failure to perform. But Appellants never took the required actions under the Lease (the same actions taken later by Respondent) to name a party in default, and for good reason. Appellants Paul Mackay, Chad Mackay, Richard Troiani, and Kenneth Sharp had agreed to unconditionally guaranty the Lease and expressly waived any defense they may have for Appellant Troiani Seattle's failure to perform.

Appellants urge the Court to overlook those facts and focus on an event and a narrow interpretation of the Lease that suits their argument, but nevertheless defies reason and, most importantly, is contradicted by Appellants' own undisputed conduct. The trial court acted within its discretion and determined correctly that Appellants committed two Events of Default under the terms of the Lease. The trial court also determined correctly that no action or inaction by Respondent would strip Respondent's right to seek recourse for and satisfaction of its damages, as supported by the individual Appellants' personal guaranties.

II. ISSUES PRESENTED

1. Whether the trial court correctly determined as a matter of law that Appellant Troiani Seattle defaulted under the terms of the Lease because it failed to pay rent when due, ceased restaurant operations, and failed to cure after written notice of default from Respondent Expeditors.

2. Whether the trial court correctly determined as a matter of law that the individual Appellants and their marital communities are jointly and severally liable for all damages recoverable under the Lease because their personal guaranties are unconditional and waive any defense (including release or discharge) that Appellant Troiani Seattle may assert for its failure to perform.

3. Whether the trial court correctly determined as a matter of law that Appellant Troiani Seattle was not excused from performing its obligations because it failed to comply with the terms of the Lease for naming Respondent in default, and provided neither notice of default nor an opportunity to cure.

4. Whether the trial court correctly determined as a matter of law that Appellant Troiani Seattle was not excused from performing its obligations under the Lease because Respondent's refusal to consent to an assignment of the Lease had no effect on Appellant Troiani Seattle's obligations under the Lease.

5. Whether the trial court correctly determined as a matter of the law that the Lease was assignable only to a corporate affiliate of Appellant Troiani Seattle based upon the plain language of the Lease and Appellants' undisputed conduct in attempting to assign the Lease.

6. Whether the trial court was within its discretion to deny Appellants' CR 60(b) motion to vacate, where Respondent produced to Appellants two months prior to the summary judgment hearing the evidence Appellants claimed was "newly discovered," where Appellants failed to exercise due diligence in obtaining the same evidence from their counsel who assisted them in negotiating the Lease terms, and where Appellants failed to seek a continuance of the summary judgment hearing.

7. Whether the trial court was within its discretion to deny Appellants' motion for reconsideration where Appellants made no attempt to show that they satisfied the requirements of CR 59.

III. STATEMENT OF THE CASE

A. The Troiani Seattle Lease

In July 2003, Expeditors (as Landlord) and Troiani Seattle, LLC ("Troiani Seattle") (as Tenant) entered into a "Retail Lease for Troiani Seattle, LLC" (hereinafter referred to as the "Lease"). CP 76-113. Under the Lease, Troiani Seattle rented from Expeditors the premises located in downtown Seattle at 1001 Third Avenue, for a term commencing on

July 18, 2003 and expiring on November 30, 2013. Lease ¶ 1 (CP 81). The Lease required the premises to be used only for the operation of a “first class, full service, sit-down restaurant and bar.” Lease ¶ 3.1 (CP 82). Troiani Seattle agreed to operate its restaurant continuously during the entire term of the Lease, with certain exceptions not relevant here. Lease ¶ 3.2 (CP 82). The Lease required Troiani Seattle to pay monthly installments of a specified Minimum Rent, Additional Rent, and Percentage Rent. Lease ¶¶ 6.1, 6.2, 6.4 (CP 83-84).

B. Personal Guaranties by Individual Appellants

Concurrently with their execution of the Lease, the individual Appellants—Paul Mackay, Chad Mackay, Richard Troiani, and Kenneth Sharp—each bound themselves and their marital communities to unconditionally guaranty Troiani Seattle’s prompt and full performance of the Lease terms, including payment of all rent and other sums due under the Lease. Lease, Ex. F (CP 113) (the “Guaranty”). The Guaranty provides that each individual Appellant is jointly and severally liable with Troiani Seattle and one another for any recovery sought by Expeditors under the Lease.

The language used in the Guaranty is clear about the parties’ intent: “The Guaranty is an inducement to the Landlord to enter into the Lease and the Guarantors acknowledge that the *Landlord relies upon this*

Guaranty as a material provision and consultation of the Lease and would not have made the Lease without it.” Id. (emphasis added).

The individual Appellants agreed that their liability would not be diminished or discharged by *any* release of Tenant from the performance of its obligations. *Id.* They also expressly waived the right to assert *any* defense that Troiani Seattle may have for the failure to perform any of its obligations under the Lease. *Id.*

C. Troiani Seattle Stops Paying Rent and Closes the Restaurant

Beginning on September 1, 2009, and for all other due dates thereafter, Troiani Seattle failed to pay the specified Minimum Rent, Percentage Rent, and Additional Rent due under the Lease. CP 72. Troiani Seattle also ceased operation of the restaurant at the premises on approximately September 26, 2009. *Id.*

D. Troiani Seattle’s Default

Lease Section 19.1 lists five occurrences that constitute “Events of Default” (a defined term) including, among other things: Tenant’s failure to pay Rent or other sums due as additional rent, where such failure continues for ten (10) days after written notice thereof by Landlord to Tenant; and Tenant’s failure to perform as required by any of the covenants and agreements contained in the Lease within a reasonable

time, but in no event later than thirty (30) days after written notice by Landlord to Tenant. Lease ¶ 19.1(a)-(b) (CP 91).

Expeditors sent to Troiani Seattle on October 13, 2009, a written notice of default for its failure to operate its restaurant continuously during the entire term of the Lease, as provided by Lease Section 3.2. CP 118-20. Troiani Seattle did not cure within 30 days after such notice. CP 72.

Expeditors sent a second written notice of default to Troiani Seattle on November 2, 2009, regarding its failure to pay rent beginning on September 1, 2009, and for all other due dates thereafter. CP 115-16. Troiani Seattle did not cure within 10 days after such notice. CP 72.

After failing to cure either Event of Default, Expeditors served notice to Troiani Seattle on November 13, 2009, terminating the Lease and requesting that Troiani Seattle vacate the premises.

E. Breach of Contract and Default Remedies

Each Event of Default by Troiani Seattle triggered Expeditors' right to exercise certain remedies under Lease Section 19.3: (1) terminate the Lease; (2) recover possession of the premises; and (3) recover all damages it incurred by reason of Troiani Seattle's default. Lease at 19.3 (CP 92). Those damages include, but are not limited to: the cost of recovering possession of the premises; expenses of reletting, including necessary renovations and alterations; reasonable attorneys' fees; real

estate commissions; and the balance of the rent due under the Lease for the remainder of the term minus such rental loss that Troiani Seattle proves could be reasonably be avoided. Lease at 19.3 (CP 92).

F. Troiani Seattle's Attempt to Assign Lease

In July 2009, Troiani Seattle sought consent from Expeditors to assign its interest in the Lease. CP 72-73. Soon thereafter, but almost three months before the first Event of Default, Troiani Seattle gave Expeditors some information regarding the restaurant concept proposed by a prospective assignee, Cerro Blanco. *Id.* Included in the information were projected financials, resumes of the operators, and information about the company and its concept; there is, however, no evidence in the record that Troiani Seattle ever expressed the terms of the transaction or provided to Expeditors a copy of its agreement with Cerro Blanco.

Expeditors reviewed the proposal and ultimately determined it would not consent to the assignment. It made that determination after careful consideration and, in part, because senior management felt that the proposed restaurant concept was not acceptable for the building, which is Expeditors' worldwide corporate headquarters and thus the "face" of the company. *Id.*

As discussed below, the Lease did not provide Troiani Seattle a unilateral right to assign its interest in the Lease, and Expeditors had no

obligation to consent to an assignment unless the assignee was a corporate affiliate of Troiani Seattle. CP 72-73. There is no evidence in the record that Troiani Seattle protested Expeditors' refusal of consent or consummated the assignment, one or both of which Troiani Seattle would have done if it believed it had an unfettered right to assign.

G. Discovery Facts

This action has been pending since February 2010. CP 1. On July 21, 2010, Expeditors produced documents to Appellants' counsel in response to Appellants' discovery requests. CP 239. Within that production, there were no less than *five* drafts of the lease that show "assignment" language and redlined changes to that language identical to that in the draft lease submitted by Appellants as "newly discovered" evidence. CP 236. In fact, at least one of the drafts produced by Expeditors appears to be identical to the document submitted by Appellants, except for the printed date in the "header" (which is a function of the automatic Microsoft Word "PrintDate" field that reflects when the electronic version of the document was opened and printed).

Expeditors filed its partial summary judgment motion on August 3, 2010, approximately two weeks after this production to Appellants. CP 38-120. Appellants filed their opposition to the motion on September 7, 2010, approximately six weeks after Expeditors' document

production. CP 121-36. The trial court heard argument on Expeditors' motion on September 17, 2010, and granted the motion that same day, approximately eight weeks after Expeditors' document production. CP 169-72. On September 30, 2010, Appellants filed their motion to vacate, claiming that the trial court should find that documents that were part of the July 2010 document production qualify as "newly discovered" under CR 60(b)(3) or fraudulently "hidden" under CR 60(b)(4). CP 180-83.

A timeline of these events follows:

July 21, 2010	Respondent produces documents to Appellants, including draft lease Appellants later claimed to be "newly discovered"
August 3, 2010	Respondent files motion for partial summary judgment
September 7, 2010	Appellants file opposition to motion for summary judgment
September 17, 2010	Hearing; trial court enters order granting partial summary judgment
September 30, 2010	Appellants file motion contending draft lease is "newly discovered" or fraudulently "hidden"

On October 14, 2010, the trial court denied Appellants' motion to vacate. CP 338-39. Appellants also filed a motion for reconsideration, which the trial court denied on October 6, 2010. CP 224-25.

IV. ARGUMENT

A. STANDARDS OF REVIEW

1. Motion to Vacate

Motions to vacate or for relief of judgment are addressed to the sound discretion of the trial court and will not be disturbed absent a showing of manifest abuse of discretion. *Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n*, 64 Wn. App. 938, 942, 827 P.2d 334, 337 (1992); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990); *Wilson v. Henkle*, 45 Wn. App. 162, 166, 724 P.2d 1069 (1986). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Ebsary v. Pioneer Human Servs.*, 59 Wn. App. 218, 225, 796 P.2d 769 (1990).

2. Motion for Reconsideration

Similarly, a trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003); *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002).

3. Summary Judgment

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

B. TROIANI SEATTLE BREACHED THE LEASE.

Troiani Seattle breached the Lease by committing two Events of Default under Lease Section 19.1: (1) failing to pay rent when due, and (2) ceasing restaurant operations. Expeditors provided two individual notices of default to Troiani Seattle in compliance with Lease Section 20.1, and Troiani Seattle did not cure either breach before the applicable cure period expired. CP 72, 115-16, 118-20.

Appellants did not contest either asserted breach in the summary judgment proceeding below, and they do not contest them now in their brief on appeal. Expeditors is therefore entitled to partial summary judgment that Troiani Seattle committed two Events of Default and thus defaulted under the express terms of the Lease. The Events of Default triggered Expeditors' right to terminate the Lease and recover certain damages under Section 19.3 of the Lease, as supported by the individual Appellants' Guaranty.

C. THE INDIVIDUAL APPELLANTS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE GUARANTY FOR TROIANI SEATTLE'S BREACH.

Appellants' request that this Court excuse the non-performance by Troiani Seattle (i.e., release or discharge it from its obligations) should *at most* apply only to Troiani Seattle and not the individual Appellants. Even if Troiani Seattle has or had any defenses excusing non-performance, the

individual Appellants have waived their right via the Guaranty to assert those defenses and are fully liable to Expeditors for all amounts due and owing under the Lease. To hold otherwise as a matter of law would be to disregard the intent of the parties, as evidenced by the clear and ambiguous language of the Guaranty, and the case law represented by *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966) and similar decisions.

A guaranty is “a promise to answer for the debt, default, or miscarriage of another person,” and it is a separate and independent promise from a primary obligor’s promise under a contract. *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943).

The Guaranty in this case is a document signed by the individual Appellants, whereby they unconditionally promised to answer for any failure by Troiani Seattle to perform its obligations under the Lease, Ex. F (CP 113). The individual Appellants made that promise, waiving any right to require Expeditors to proceed first for recovery against Troiani Seattle. *Id.*

1. The Individual Appellants Unconditionally Guaranteed Troiani Seattle’s Performance.

A guaranty may be absolute or conditional. *Robey*, 17 Wn.2d at 255. A conditional guaranty contemplates, as a condition to liability on

the part of the guarantor, the happening of some contingent event other than the default of the principal debtor. *Id.* at 256. By contrast, a guaranty that does not include any limitation or condition is construed as absolute. *Id.*

Here, there is no dispute that the Guaranty is—by its very terms—unconditional and thus *absolute*. Lease, Ex. F (CP 113). The Guaranty expresses no event upon which the guarantors’ obligations are triggered. The individual Appellants promised simply to guarantee the performance of the Tenant’s obligations under the Lease.

“[I]t is not necessary to first pursue and exhaust the principal before proceeding against the guarantor, in cases where the guaranty is absolute; that where the time and the amount of the payments are fixed, the liability of the guarantor depends upon no other condition than the nonpayment by the [obligor].” *Robey*, 17 Wn.2d at 257.

2. The Individual Appellants Are Barred from Raising Any Defense that Troiani Seattle May Have.

Although the general rule is that a guarantor is relieved of liability when the principal debt has been discharged (and Appellants do argue that Troiani Seattle’s debt should be discharged), it has long been established in Washington that a guaranty is a contract, subject to interpretation as such, and that guarantors may contract away their defenses. *See Fruehauf*,

67 Wn.2d at 709 (“In clear and unambiguous terms, the guaranty agreement waived the defense of release and discharge.”); *Coughlin v. Smith*, 163 Wash. 290, 301, 1 P.2d 214 (1931) (discussing agreement that “expressly provides for the contingency of the forfeiture of the contract . . . and states that appellants are not to be relieved”); *Security State Bank v. Burk*, 100 Wn. App. 94, 97, 995 P.2d 1272 (2000) (“A guarantor may waive certain defenses.”).

The individual Appellants raised no defense to the Guaranty in the summary judgment proceeding below, and they do not raise any now in their brief on appeal. There is good reason for that approach. In clear and unambiguous terms, the individual Appellants agreed in the Guaranty that their liabilities will not be diminished, released, or discharged by five express occurrences:

The liability of Guarantor shall not be diminished released or discharged by (i) the *release of Tenant from the performance of any of its obligations* due to operation of law or otherwise, (ii) *any defense Tenant may have for failure to perform* any of its obligations under the Lease, (iii) any delay by Landlord or Tenant in exercising any right, power or remedy under the lease, (iv) any assignment of Guarantor, (v) any amendment or modification to the Lease without notice to the Guarantor, or (vi) the failure of Landlord or Tenant to give any notices which may be required under the Lease.

Lease, Ex. F (CP 113) (emphasis added).

The Supreme Court of Washington has explicitly authorized such broad defense waivers by guarantors. *See Nat'l Bank of Wash. v. Equity Invs.*, 81 Wn.2d 886, 918, 506 P.2d 20 (1973), *Fruehauf*, 67 Wn.2d at 704; *see also Fortress Credit Corp. v. Hudson Yards, LLC*, 78 A.D.3d 577 (N.Y. App. Div. 2010); Restatement (Third) of Suretyship and Guaranty § 48 (1996).

For example, in *Fruehauf*, the guarantor asserted a defense of release or discharge of the principal debt. 67 Wn.2d at 709. The Court held that the guarantor contracted away the defense by the clear terms of the guaranty and, thus, was obligated to compensate the creditor for the fixed amount of the creditor's loss attributable to the debtor's breach." *Id.* at 710. The Court was clear to point out that "discharge of the original obligation is not a defense available to a third person who has expressly guaranteed to pay the creditor a fixed or determinable amount in the event of loss." *Id.* at 709.

Appellants have not yet argued that the Guaranty ensures only performance of Lease obligations to the extent that such are owed, subject to Troiani Seattle's non-performance being justified. They may attempt to make that point in their reply brief. But that argument disregards the clear and unambiguous language of the Guaranty, which memorializes the parties' intent and contemplation that the release or discharge of Troiani

Seattle would have *no effect* on the individual Appellants' liability and would, in fact, obligate them to nevertheless perform all payment of rent and all other sums and other obligations due under the Lease.

It is undisputed that Troiani Seattle defaulted under the Lease by committing two Events of Default, triggering Expeditors' right to recover certain damages. The Guaranty is a contract enforceable at law. Per the terms of the Guaranty, Appellants Paul Mackay, Chad Mackay, Richard Troiani, and Kenneth Sharp are jointly and severally liable for payment to Expeditors of all sums due under the Lease because of Troiani Seattle's breach. *Id.* ("The obligations of each Guarantor shall be joint and several in the event more than one Guarantor executes this Guaranty.")

D. TROIANI SEATTLE' S BREACH IS NOT EXCUSED BECAUSE TROIANI SEATTLE FAILED TO COMPLY WITH LEASE PROCEDURES TO NAME A PARTY IN DEFAULT.

Although Appellants' sole argument in favor of justifying its non-performance is that Expeditors breached the lease several months beforehand and *that* breach excused Troiani Seattle's failure to perform (but does not excuse, as set forth above, the individual Appellants' obligation under the Guaranty), that argument fails to recognize the conditions expressed in the Lease, compliance with which are necessary to name a party in default. CP 91-92.

Assuming *arguendo* that Expeditors did not comply with its obligations under the Lease, it is undisputed that Troiani Seattle thereafter failed to comply with the relevant Lease terms. Lease Section 19.2 (under heading, “Default and Remedies”) provides in part the following:

The doing of the following by Landlord shall constitute an event of default under the terms of the Lease: Failure to perform any of Landlord’s material obligations or any of the material covenants and agreements contained in this Lease within a reasonable time *but in no event more than thirty (30) days after written notice* by Tenant to Landlord specifying wherein Landlord has failed to perform such obligations.

CP 91-92 (emphasis added). Lease Section 20.2 (under heading, “Notice of Default and Right to Cure) provides in part the following:

Landlord shall not be considered to be in default under this Lease unless: (a) the Tenant has given to Landlord and any mortgagee on the Premises *written notice specifying the default* (provided Landlord has previously given written notice to Tenant identifying any such mortgagee); (b) the *Landlord has failed for thirty (30) days to cure the default.*

CP 92 (emphasis added).

Although it agreed to do so in the Lease, there is no evidence in the record that Troiani Seattle ever provided to Expeditors a written notice of default (or ever even mentioned orally the concepts of *default* or *breach* at the time or until this litigation commenced). To the contrary, Troiani Seattle concedes that it continued to negotiate with Expeditors regarding lease concessions as well as alternative proposals, none of which were

acceptable to Expeditors. Because no written notice was given, Expeditors was also afforded no time to cure.

If the failures above can be ignored, Lease Section 20.2 goes on to provide that Troiani Seattle will have no right of termination for Landlord's default absent notice to and consent by all owners of the property and mortgagees of Landlord then existing. CP 92-93. Troiani Seattle does not argue or cite any evidence that it ever provided such notice.

Appellants now urge the Court to determine as a matter of law that Expeditors breached the Lease, notwithstanding that Troiani Seattle failed to perform a very simple but important procedure necessary to name a party in default. In fact, it is the same procedure that Expeditors carried out sometime later to give notice and opportunity to cure to Troiani Seattle for its (actual) failure to perform.

To determine that Expeditors "breached" or "defaulted" or committed an "Event of Default" under the Lease would be to disregard the express definitions of those terms under the Lease and the parties' original intent. Expeditors committed no Event of Default because it never received written notice of an action specified under Lease Section 20.2, and it was afforded no opportunity to cure such action. The parties agreed expressly that no party will be determined to have committed an

Event of Default or breached or defaulted under the Lease unless, at a minimum, written notice and an opportunity to cure are given.

E. TROIANI SEATTLE’S BREACH IS NOT EXCUSED BECAUSE EXPEDITORS ACTED WITHIN ITS CONTRACT RIGHTS.

Under the plain language of the Lease and Appellants’ undisputed conduct, Troiani Seattle had a limited right to assign the Lease to a corporate affiliate, which Cerro Blanco is not.

1. The Lease’s Assignment Language Is Open Only to One Reasonable Interpretation.

Expeditors’ right to refuse Troiani Seattle’s request to assign the Lease to Cerro Blanco derives from the plain language of Section 12.1 of the Lease regarding “Assignment & Subletting.” The language is unambiguous because it is open to only one reasonable interpretation. The Lease unambiguously limited Troiani Seattle’s right to assign the Lease to its corporate affiliates, which Cerro Blanco is not. Leases are contracts. Their construction is governed by the intent of the parties at the time of executions as manifested by the plain meaning of the language used. *Johnny’s Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 420, 869 P.2d 1097 (1994). Here, Troiani Seattle’s rights to assign (or sublease) are governed by Section 12.1 of the Lease, which was a product of the parties’ negotiation and provides in pertinent part:

Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate, (“Affiliate”) provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated

CP 87. Here, it is undisputed that Cerro Blanco does not qualify as an Affiliate under Section 12.1 of the Lease. Thus, Expeditors had no obligation to consent to the proposed assignment of the Lease to Cerro Blanco, and the trial court correctly entered summary judgment dismissing Troiani Seattle’s counterclaim based upon Expeditors’ refusal to consent to the proposed assignment to Cerro Blanco.¹

It is undisputed that Section 12 of the Lease governs the tenant’s right to assign the Lease. It is also undisputed that Section 12 permits an assignment only to tenant **affiliates**, provided that certain net worth and operational thresholds are met; proposed agreements, credit reports, and financial statements are submitted; and the landlord consents. In other words, Troiani Seattle’s right to assign was expressly limited to a certain kind of affiliate to whom Expeditors consented.

¹ The Guarantors also have no right to recover anything on any counterclaim by Troiani Seattle. *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 424-25, 865 P.2d 536 (1994) (a guarantor may not recover affirmatively on the claims of the principal debtor). Guarantors may raise defensively such claims, *id.*, but have waived that right here.

In light of that language, Appellants' interpretation of Section 12 defies both logic and common sense. It is not reasonable to interpret language that expressly defines to whom a tenant can assign, **with consent**, to mean that the landlord would be required to accept an assignment to anyone else without any control whatsoever.

2. The Lease's Plain Language and Troiani Seattle's Conduct Establish that the Parties Intended Assignment Only to Corporate Affiliates.

The undisputed evidence of Appellants' conduct plainly supports Expeditors' position that its consent was required to assign the Lease. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351, 103 P.3d 773 (2004) (under context rule in determining the meaning of a contract's terms, court may consider subsequent acts and conduct of the parties); *Go2Net*, 115 Wn. App at 85 (even if court considers extrinsic evidence in interpreting a contract, summary judgment is appropriate where only one reasonable inference can be drawn).

First and foremost, Appellants **did** request Expeditors' consent to an assignment to Cerro Blanco. *See* CP 72, 140-41. That request would have been unnecessary if consent were not required and there is no

evidence that, when making the request for consent to assign, Troiani Seattle ever took the position that consent was not required.²

Second, Troiani Seattle did not consummate the transaction when Expeditors decided not to consent to the assignment—or take any action to try and enforce its supposed “unfettered” right to assign. That is not surprising, because the agreement between Troiani Seattle and Cerro Blanco was conditioned on consent by Expeditors. *See* CP 154 (“The sale contemplates the assignment of the premises lease **with the owner’s [Expeditors’] consent.**”) (emphasis added). If Troiani Seattle believed it required no consent to assign the Lease to Cerro Blanco, the parties to that transaction would have had no reason to make such consent a term of their own agreement, or Troiani Seattle certainly would have taken some sort of action to attempt to compel Expeditors to provide consent.³ Again, there

² Appellants claim that this condition was requested by Cerro Blanco, but provide no citation to anything in the record establishing that fact. Nor is there anything in the record that the actual Troiani/Cerro Blanco agreement ever was provided to Expeditors prior to this litigation.

³ Appellants relied upon the declaration of Chad S. Mackay to contend that “we understood and intended that the assignment provisions of the Lease only applied to our affiliates, and we freely could assign the Lease to someone else.” For purposes of the inquiry here, it does not matter what Mr. Mackay or any other Appellant thought the Lease provisions mean. Unilateral and subjective beliefs do not constitute evidence of the parties’ intent. *Watkins v. Restorative Care Ctr.*, 66 Wn. App. 178, 191, 831 P.2d 1085 (1992). When interpreting and construing a contract, a court does not interpret what was intended to be written, but rather what was written. *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

is no evidence that Appellants ever protested Expeditors' refusal to consent.

Appellants' attempted construction of the assignment provision is unreasonable. Even strictly construed, the provision refers to only one class of parties to whom Troiani Seattle could assign the Lease. Notwithstanding "strict construction," the provision must also be interpreted in accord with the principle that "[t]he primary purpose of clauses prohibiting the assignment of contract rights without a contracting party's permission is to protect him in selecting the persons with whom he deals." *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 295, 627 P.2d 1350 (1981) (citing *Bethell v. Matthews*, 187 Wash. 175, 59 P.2d 1125 (1936)). Here, Appellants would have this Court turn these principles on their head by adopting the unreasonable interpretation that, by specifically naming Troiani Seattle affiliates as the class of available assignees, Expeditors intended to give up its right to choose who it dealt with to any other party in the world (i.e., every entity that was not a Troiani Seattle affiliate). Appellants cite no case where a court held that an assignment clause that identifies a specific class of assignees has been interpreted to subject a landlord to and saddle a landlord with unwanted assignments to anyone else in the world.

**D. TROIANI SEATTLE' S BREACH IS NOT EXCUSED
BECAUSE EXPEDITORS HAD NO OBLIGATION
TO CONSENT TO THE PROPOSED ASSIGNMENT.**

Assuming that, contrary to the plain language and context, Section 12.1 permitted Troiani Seattle to freely assign the lease to a third party, Expeditors did not breach the Lease because there is neither an express obligation in the Lease nor implied obligation under Washington law for a landlord to affirmatively consent to its tenant's proposed assignment.

Confusingly, Appellants ask this Court to believe that the parties intended for Troiani Seattle to have an unfettered right to assign the Lease, with no input by Expeditors. But they simultaneously ask the Court to find that Expeditors breached the Lease because it did not provide the particular input Appellants sought when they requested consent.

Appellants make an argument that is not supported by Washington law: that Expeditors had an obligation to consent based on a duty of good faith implied not in the Lease, but instead in the separate contract that Troiani Seattle had with the proposed assignee. Expeditors' failure to consent, Appellants argue, prevented Troiani Seattle from exercising its right. But Troiani Seattle's agreement with Cerro Blanco fell through not because Expeditors' lack of consent prevented it from assigning the Lease, but instead because the proposed assignee chose not to close. The proposed assignee (Cerro Blanco) chose not to close because, Appellants

argue, it required consent (whether or not required under the Lease). If Troiani Seattle did have an unfettered right to assign the Lease, no action or inaction by Expeditors, short of changing the locks to the premises, would prevent such an assignment.

Expeditors' lack of consent amounted to, if anything, the failure of a condition precedent to the enforceability of the agreement between Troiani Seattle and Cerro Blanco. *See Ross v. Harding*, 64 Wn.2d 231, 241, 391 P.2d 526 (1964) (failure of condition precedent regarding assignment of lease rendered agreement unenforceable). Again, there is no evidence that Troiani Seattle took any steps to try and enforce its alleged unfettered right of assignment. Rather, it elected simply to let the Cerro Blanco agreement fail.

Appellants seek to import into the Lease an obligation by Expeditors to consent to any proposed assignment of the Lease. Every Washington contract contains a duty of good faith, which obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). But the duty does not inject substantive terms into the contract. *Badgett*, 116 Wn.2d at 569. It requires only that the parties perform the obligations imposed by their agreement in good faith. *Id.*

In essence, Appellants ask the Court to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract—a free-floating duty of good faith unattached to the underlying legal document. *See id.* at 570 (“There is no free-floating duty of good faith that is unattached to an existing contract.”). The distinction is illustrated by the two cases cited as support on this point in Appellants’ brief.

In *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 790, 237 P.3d 914 (2010), the plaintiff and defendant were parties to an option contract for the purchase and sale of real property. The prospective purchaser tendered performance under the option to purchase the real property, but the owner rejected the tender, asserting a contract-based right to reject the tender. *Id.* at 790. The Court of Appeals reversed summary judgment in favor of the property owner, holding that the property owner had no right to reject tender of performance.

Ledaura is different from this case because the owner’s refusal to perform absolutely prevented the prospective purchaser from obtaining its benefit of the contract. The owner breached the duty of good faith implied by the option contract: there was no possibility that the prospective purchaser could purchase the property without the owner’s performance. By contrast, Expeditors’ refusal to consent presented no such bar and

could not prohibit Troiani Seattle from obtaining its contract benefit—i.e., from freely assigning the Lease to a third party (assuming that Expeditors’ consent was not required, as Appellants argue).

Appellants’ second case is distinguishable for a more obvious reason: because the Court of Appeals *expressly did not* adopt the view held by other states that a landlord’s breach of a lease provision regarding reasonable consent to sublease or assign entitles the tenant to declare the lease terminated. *Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 489, 910 P.2d 486 (1996). (“Assuming Washington were to adopt this view (we do not so hold)”). Moreover, the lease at issue in *Ernst* specifically provided that in the event of default by the landlord, rent would not be due during any period of default. *Id.* at 489. Here, the Lease contains no such provision and, as discussed above, Expeditors was not in default under the terms of the Lease.

E. THE TRIAL COURT WAS WITHIN ITS DISCRETION WHEN IT DENIED APPELLANTS’ MOTION TO VACATE.

In arguing for their desired interpretation of the assignment language in the Lease, Appellants place great weight on one of the drafts of the Lease—in fact, they go so far as to make it an appendix to their appellate brief. That draft, however, was never part of the summary judgment record before the trial court. It was submitted by Appellants

only after the court granted summary judgment, in the context of a CR 60(b) motion as “newly discovered” evidence. The trial court denied Appellants’ CR 60(b) motion. Thus, the draft was never part of the summary judgment record and cannot be part of the record on appeal unless this Court was to find that the trial court abused its discretion denying the motion to vacate.

Appellants gloss over this threshold standard of review problem and attempt to rely on the draft as if it is part of the record, without addressing in any substantive way the denial of their motion to vacate. In fact, the only reference Appellants make to this important issue is that “Troiani’s defense counsel at the time explained he had been unaware of that evidence at the time of the summary judgment order.” Appellants Brief at 11. The trial court rejected that argument and Appellants now fail to claim that the trial court abused its discretion in doing so.

In their motion to vacate below, Appellants relied upon two CR 60(b) subsections: CR 60(b)(3) (newly discovered evidence); and CR 60(b)(4) (fraud). Neither ground had merit, and the trial court exercised its discretion and denied the motion. As a result, the draft lease was not part of the summary judgment record below, nor is it part of the summary judgment record on appeal.

1. Appellants Make No Argument or Cite to Any Authority Regarding the Motion to Vacate.

In their second assignment of error, Appellants claim that “[f]or substantially the same reasons as it erred in entry of partial summary judgment, the trial court erred in denying defendants’ motions for reconsideration and for CR 60(b) relief from the Order of partial summary judgment.” Appellants’ Brief at 2. This is plainly wrong, as this Court reviews a motion to vacate under a different standard of review than a motion for summary judgment. *See supra* at Part IV.A. Moreover, despite assigning error to the trial court’s denial of their motion to vacate, Appellants fail to make any argument or cite to any authority suggesting that the trial court erred. As such, under longstanding appellate principles, this Court should not even consider the issue. *See Tremmel v. Safeco Ins. Co. of Am.*, 42 Wn. App. 684, 692 n.4, 713 P.2d 155 (1986) (contentions unsupported by argument or citation of authority will not be considered on appeal).

2. There Was No “Newly Discovered” Evidence.

a. Appellants Actually Possessed the “Evidence” in Question Approximately Two Months Prior to the Summary Judgment Hearing and Order.

Evidence that was available to a party prior to the entry of the order in question cannot satisfy the definition of “newly discovered”

evidence. *See Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (interpreting identical “newly discovered” evidence standard under CR 59(a)). It is undisputed that Appellants had the relevant draft of the lease in their possession in July 2010, almost two months prior to the September 17 hearing.

Prior to filing its opposition, Expeditors advised Appellants in writing that the cited draft lease was neither in fact nor by law “newly discovered,” because numerous drafts were produced by Expeditors containing that very same language. Expeditors suggested that Appellants withdraw their CR 60(b) motion. CP 303. Appellants responded by claiming for the first time that the documents were somehow “hidden” by Plaintiff, even though the five lease drafts comprise some 146 of the total 3,801 pages produced. *Id.*

The only possible explanation for why Appellants did not “see” the drafts of the lease produced by Expeditors before the September 17 hearing is that neither they nor their counsel (since replaced by new counsel) reviewed the documents Appellants themselves requested in discovery. That failure to review documents produced in discovery, particularly in the face of a summary judgment motion, does not indicate the exercise of due diligence or provide a basis to undo the order of partial summary judgment. *See* CR 60(b)(3).

In *Go2Net*, 115 Wn. App at 88-89, the appellate court affirmed the denial of a motion for reconsideration where documents were produced **one day** prior to a summary judgment hearing. Because those documents were produced prior to the hearing, the Court held they could not qualify as evidence discovered after the hearing. *Id.* at 89. The Court further rejected the argument that the defendant did not have sufficient opportunity to evaluate the documents produced one day prior to the hearing, noting that the defendant should have asked for a continuance. *Id.* Finally, the Court finally rejected a “misconduct” argument because there was no evidence that plaintiff “deliberately tried to hide the documents.” *Id.* The facts here are even less favorable to Appellants than in *Go2Net*.

b. Appellants Also Failed to Exercise Due Diligence in Obtaining Documents from Their Previous Counsel.

In their motion below, Appellants also claimed that they had been trying to obtain documents from other prior counsel, Craig Gilbert at Perkins Coie LLP, who assisted them in negotiating the Lease terms. Remarkably, Appellants represent here that Expeditors was the “sole” drafter of the Lease, which is plainly incorrect as Appellants were getting advice from Mr. Gilbert and proposing contract language. Appellants identified Mr. Gilbert as someone with knowledge in a July 1, 2010,

interrogatory answer, but apparently waited over six weeks until “mid-August” to request from him documents associated with the lease. *See* CP 222. Almost nine weeks later (and five weeks after the motion for partial summary judgment was filed) Chad Mackay alleged that he requested lease drafts from Mr. Gilbert. *See* CP 184. At that point, Expeditor’s lawsuit had been pending for *seven* months.

Indeed, Appellants were under a discovery obligation to Expeditors since April 28, 2010, when Expeditors served a discovery request on Appellants—to search for and produce all drafts of the lease.⁴ Appellants had an obligation to request such documents for their prior counsel.

Appellants claimed that they “diligently” looked for such documents and it took them over five months to “uncover them” notwithstanding that they possessed them since July 2010, when those drafts were produced in discovery by Expeditors. Tellingly, Appellants made no motion under CR 56(f) to continue the partial summary judgment hearing until such time as they could obtain the document they later argued was critical to their defense.

⁴ *See* CP 321 (Plaintiff’s Request for Production No. 5 to Defendants—“Please produce all written or electronic drafts of the lease.”).

3. There Was No Fraud or Misconduct by Expeditors.

Any suggestion by Appellants that Expeditors somehow was involved in fraud or misconduct is completely without merit. Expeditors did not withhold evidence from Appellants. To the contrary, Appellants wish to rely on evidence that Expeditors provided over two months before the summary judgment hearing. Appellants' inference that Expeditors somehow "misrepresented" the mutual intent of the parties" is equally without merit.

Appellants do not even address this issue, but it is clear that there is no basis for this Court to conclude that "no reasonable person would take the position adopted by the trial court," *Ebsary* 59 Wn. App. at 225, in denying Appellants' motion to vacate under CR 60(b). As such, the draft lease is not part of the summary judgment record and may not be considered on review in this court. *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 455, 662 P.2d 398 (1983) (a court reviewing a dismissal on summary judgment is confined to examining the record properly before the trial court) (citing *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967); *Falcone v. Perry*, 68 Wn.2d 909, 416 P.2d 690 (1966)).

4. Appellants Make Numerous Unsupported and Incorrect Statements Regarding the Lease Draft.

As discussed above, the draft lease Appellants rely upon so heavily is not part of the summary judgment record. Because it was not submitted until after summary judgment, a factual record regarding the sequence and negotiating of lease drafts was not developed below. Indeed, Appellants only submitted and attempted to rely on one of the exchanged drafts, as opposed to submitting the complete sequence. In addition, Appellants now make a number of unsupported (and incorrect) statements regarding the draft. For example, Appellants claim, without citation to anything in the record, that “Expeditors initially wanted (and drafted) a prohibition against assignment by Troiani to any third party” and that “Expeditors agreed to strike (and indeed strike) the clause against assignment to any third party.” Appellants Brief at 4. In fact, Expeditors believes that further discovery would show the exact opposite—that Troiani Seattle proposed the general assignment language and Expeditors rejected it—which would completely undermine Appellants’ argument regarding the mutual intent of the parties, as no reasonable Landlord would reject language that gave it **less** protection than it requested. Even without a developed record, it is plain that the redlined language contained in the

draft was provided by the Tenant, as all relate to issues favorable to or within the exclusive knowledge of Appellants.

Appellants also claim that the Lease was “solely” drafted by Expeditors. The draft they would like to rely on, however, shows this is untrue. In addition, Appellants admit that their attorney, Craig Gilbert, was involved in negotiating the Lease.

H. THE COURT SHOULD AFFIRM THE TRIAL COURT’S DENIAL OF APPELLANTS’ MOTION TO RECONSIDER.

As discussed above, in their second assignment of error, Appellants claim that the trial court erred in denying their motion for reconsideration. Appellants’ Brief at 2. As with the motion to vacate, this is plainly wrong, as this Court reviews a motion to vacate under a different standard of review than a motion for summary judgment. *See supra* at Part IV.A. Moreover, despite assigning error to the trial court’s denial of their motion for reconsideration, Appellants fail to make any argument or cite to any authority suggesting that the trial court erred. As such, this Court should not even consider the issue. *See Tremmel*, 42 Wn. App. at 692 n.4.

V. CONCLUSION

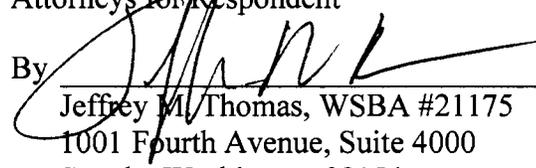
Based upon the foregoing, Respondent Expeditors International of Washington, Inc. respectfully requests the Court to affirm the trial court’s orders.

RESPECTFULLY SUBMITTED this 4th day of May, 2011.

**GORDON TILDEN THOMAS &
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Attorneys for Respondent

By



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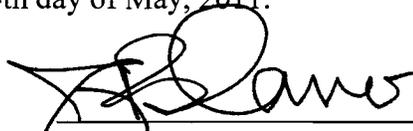
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2011, the Brief of Respondent was filed with the Washington Court of Appeals and copies were served upon counsel of record via messenger:

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Court of Appeals No. 66207-4
King County Superior Court No. 10-2-06521-1 SEA

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

EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.

Plaintiff/Respondent,

v.

TROIANI SEATTLE, LLC, a Washington limited liability company;
PAUL S. MACKAY, SR. and GAIL MACKAY, and the marital
community thereof; CHAD MACKAY and JENNIFER MACKAY, and
the marital community thereof; RICHARD TROIANI and JANE DOE
TROIANI, and the marital community thereof; and KENNETH SHARP
and JANE DOE SHARP, and the marital community thereof;

Defendants/Petitioners,

**AMENDED
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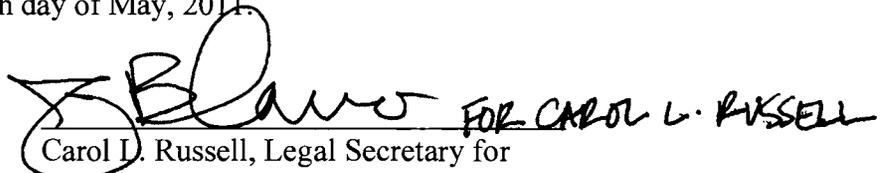
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I hereby certify that the Brief of Respondent, dated May 4, 2011, was filed with the Washington Court of Appeals and copies were served upon counsel of record as follows:

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