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No. 66723-8-I

COURT OF APPEALS
WASHINGTON STATE
DIVISION I

224 WESTLAKE, LLC

Respondent,

v.

ENGSTROM PROPERTIES, LLC

Appellant.

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APPELLANT'S BRIEF

Sylvia Luppert
Reaugh Oettinger & Luppert, P.S.
1601 Fifth Avenue
Suite 2200
Seattle, WA 98101-1625
(206) 264-0665
(206) 264-0662, fax
sll@reaugh.com

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I. INTRODUCTION.

In November 2006, Engstrom Properties, LLC (Engstrom) and Investco Properties Development Corporation (IPDC) executed a Real Estate Purchase Option Agreement (POA) for Engstrom's building and land at 224 Westlake Avenue North in Seattle. (See Appendix A.) A few months later, IPDC secretly assigned its interest in the POA to 224 Westlake, LLC (Westlake), a newly formed entity with no business experience or reputation and no assets other than its purported interest in the POA. (See Appendix B.) Engstrom contends this assignment breached the POA's anti-assignment clause. Engstrom did not learn of the Assignment until October 2009, and only learned of the breach during discovery in this lawsuit.

Engstrom agreed in the POA to remove two underground fuel tanks from the basement and perform any necessary soil clean up required under environmental laws. Engstrom removed the tanks and excavated and replaced a large volume of soil. Engstrom's environmental consultant concluded the site was clean. Westlake's consultant, however, concluded that one spot of contamination remained. To remove any doubts about the soil, Engstrom reopened the excavation, removed an additional 150 yards of soil and tested again. Engstrom's consultant determined that the site was clean. The Washington Department of Ecology later confirmed this determination. Westlake scheduled then cancelled its testing, demanded

unreasonably lengthy extensions of the closing date, and then unilaterally declared Engstrom in default.

The trial court properly granted Engstrom's summary judgment that Westlake breached the anti-assignment provision, but then erroneously required a trial on the moot issue of whether Engstrom could have reasonably withheld consent to the assignment. The trial court later erroneously concluded that Engstrom breached the POA by insisting on a reasonable extension of the closing date, even though Engstrom never refused to close.

The trial court signed the findings and conclusions that Westlake proposed before the trial was even held. The trial court failed to give Engstrom proper notice of presentation before doing so. As a result, many findings are unsupported. The trial court's legal rulings are plainly in error. This Court should reverse.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred by granting only part of Engstrom's motion for summary judgment based on the violation of the anti-assignment clause, and by denying Engstrom's motion for reconsideration. The order was entered on October 30, 2009 and the denial of Engstrom's motion for reconsideration entered on December 2, 2009. CP 157-58, 168-69.

2. The trial court erred in entering Findings and Conclusions on December 20, 2010 without notice of presentation. CP 354-64. (See

Appendix C.)

3. The trial court erred in its December 20, 2010 Findings of Fact 1, 2, 3, 4, 5, 8, 13, 14, 17, 22, 23, 24, 26, 27, 28, and in the factual findings stated in Conclusions of Law 11, 12, 14, and 15 which are unsupported. CP 354-64.

4. The trial court erred as a matter of law in its December 2010 conclusions of law contained in its Findings 2, 3, 4, 5, 10, 13, 19, 22, and 24 and Conclusions 2, 3, 4, 11, 12, 13, and 15. *Id.*

5. The trial court erred in its December 2010 Conclusion 16 in awarding damages contrary to law and the POA, its calculation of the amount of damages, *id.*, and its February 18, 2011 Finding 1.2 that damages were proven with exactness. CP 422. (See Appendix D.)

6. The trial court erred in its February 2011 Conclusions that Westlake was entitled to attorneys fees and costs, and the amount of fees including an additive to the lodestar amount. CP 421-26.

7. The trial court erred in not permitting Engstrom's attorney to review and challenge plaintiff's invoices for fees and costs. CP 421-26.

8. The trial court erred in entering Judgement against Engstrom. CP 419-20. (See Appendix E.)

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a void assignment precludes the assignee from enforcing the purported assigned contract?

2. Whether Engstrom breached the POA even though Engstrom performed all of its contractual obligations and Westlake refused to tender performance or close?
3. Whether an award of damages contrary to the law on damages and the parties' agreement should be reversed?
4. Whether attorneys fees may be awarded contrary to the lodestar methodology?

III. STATEMENT OF THE CASE

A. ENGSTROM AND IPDC EXECUTED A LONG TERM PURCHASE OPTION AGREEMENT (POA) IN NOVEMBER 2006.

On November 20, 2006, Engstrom Properties and Investco Properties Development Corporation (IPDC) executed a Real Estate Purchase Option Agreement (POA) for Engstrom's building and land at 224 Westlake Avenue North in Seattle. The Purchase Price was \$4.55 million. Closing was to occur on or before March 1, 2009. Ex. 1 § 2.2, § 5.1. The Option was to be exercised 60 days before December 31, 2008. Ex. 1, § 2.1(c). The Option Price was an initial payment of \$75,000 and seven additional quarterly payments of \$75,000, all totaling \$600,000, to be credited against the purchase price only if IPDC exercised the option and closed the purchase of the property. Ex 1, § 2.1(d). If IPDC failed to close the purchase, the Option Price was to be "non-refundable and forfeited." *Id.*

B IPDC SECRETLY ASSIGNED THE POA TO WESTLAKE IN VIOLATION OF ANTI-ASSIGNMENT PROVISION

The POA contains an anti-assignment provision which permits assignment only under two conditions: First, with the prior written consent of the other party, or Second, without consent if IPDC owns at least 51 percent of the LLC or partnership to which it assigns its interest. Ex 1, §13.¹

IPDC assigned its interest in the POA to Westlake on June 8, 2007. Ex 2. IPDC did not seek Engstrom's prior consent before executing the Assignment or notify Engstrom at the time. RP 152, 188. Engstrom finally received notice of the Assignment, 16 months later, in October 2008 when Westlake exercised the purchase option. RP 152, Ex 3.

The Assignment appeared to comply with the second condition of §13 of the POA. Paragraph C of the Assignment's recitals acknowledges the anti-assignment restriction on assignments, stating, "Pursuant to Section 13 of the Purchase Agreement, Purchaser may assign the Purchase Agreement to a limited liability company in which Purchaser owns at least 51% of the ownership interests." The assignment language in paragraph 1 states, "Assignor and Assignee hereby certify that at least 51% of the ownership

1

Section 13 of the POA provides: This Agreement is not generally assignable by Purchaser or Seller without Seller's or Purchaser's prior written consent, which consent shall not be unreasonably withheld; provided, however, that Purchaser shall be able to assign this Agreement to a partnership or limited liability company in which Purchaser owns and continues to own through the Closing Date at least 51% of the ownership interests without the consent of Seller and upon written notice to Seller

interests of Assignee are owned by the same parties which own shares of Assignor.”

After Westlake sued Engstrom, Engstrom learned that IPDC owned no interest in Westlake. RP 514-15, CP 26. Westlake’s ownership consisted of five separate trusts and LLC’s, none of whom is IPDC, first revealed in Westlake’s Answer to Engstrom’s Interrogatories. CP 48.

The limitation on assignment was important to Engstrom Properties. Steve Engstrom, its manager, explains in his declaration, CP 26-27, that he wanted assurance that he would be dealing with a purchaser with the same financial resources and sound business judgment as IPDC. As long as IPDC was the majority owner of any partnership or LLC who received an assignment, he felt he knew with whom he was dealing with. He knew nothing about Westlake. CP 26-27. He testified, at RP 372, “I don't sell something that is my life’s work to somebody that I haven't determined is worthwhile to sell to.”

IPDC well knew that Engstrom was relying on IPDC’s and Investco’s reputation and financial resources when it executed the POA². Michael

2

“Investco” is the common name of a group of companies run by Investco Financial Corporation (IFC). RP 26. IFC is owned by Evergreen Capital Trust. (ECT). ECT is owned by Michael Corliss. RP 28. IPDC, IFC, and Investco Management Services are part of the group of Investco companies. RP 346. Even though separate entities, they all operate under the single name “Investco” See, e.g. Ex 3, 4, 5, 243.

Corliss, the person who effectively controls Investco and controlled the transaction, RP 164-65, testified that he knew before the purchase that Engstrom was familiar with Investco's credibility and financial capacity, that he knew this was an important factor to Engstrom. He testified that he knew Engstrom had investigated Investco and understood it had a good track record for closing transactions. RP 183.

Upon discovering Westlake's true ownership, Engstrom moved for summary dismissal of Westlake's claims. CP 20-25. Despite depriving Engstrom of the opportunity of consenting or withholding consent to the assignment, Westlake responded that the entities comprising it had some common ownership with IPDC and so were almost the same, that Engstrom Properties waived its objection to the Assignment by not objecting before he knew the anti-assignment provision had been violated, and that even if IPDC had sought Engstrom's prior consent to the Assignment, Engstrom could not have reasonably withheld it. CP 104-115.

The trial court, the Honorable Jim Rogers, agreed that the POA does not allow assignment under the facts and that Engstrom did not waive his objection. CP 157-58. He denied the motion, however, concluding that a material issue of fact existed, whether Engstrom could reasonably withhold

consent³. *Id.* Engstrom's motion for reconsideration was denied, CP 168-69, as was its petition to this Court for interlocutory review.

C. THE DEADLINE FOR EXERCISING THE OPTION WAS IN THE MIDST OF THE WORST ECONOMIC CONDITIONS SINCE THE GREAT DEPRESSION.

The POA required that the option be exercised 60 days before December 31, 2008, i.e, by November 1, 2008. Ex 1, §2.1(c). On September 14, 2008, Lehman Brothers filed for bankruptcy protection and Merrill Lynch was sold, heralding an economic catastrophe⁴. Over a period of six to eight weeks, including one week before the deadline to exercise the option, Westlake was negotiating a turn-around sale of the 224 Westlake property to a third party. RP 413-14, 419. If it exercised the option and closed the purchase, Westlake would make a profit of \$2.4 million. Ex 235.

On October 23, 2008, IPDC notified Engstrom that it had assigned its interest in the POA to Westlake and that Westlake was exercising the option to purchase. Ex. 3. Then the potentially profitable turn-around sale fell through. RP 102.

Westlake did not seek financing until after it exercised the POA. RP

3

The order, CP 158, states, "Engstrom cannot reasonably withhold consent to assignment, according to the Agreement. Even though he was not asked at the time of the Assignment, this requirement still exists. Genuine issues of material fact preclude judgment on this issue."

4

See www.nytimes.com/2008/09/15/business/15lehman.html.

321-22. It sought loans for both the purchase and construction. RP 337. It never received the loans for which it applied. RP 341.

D. ENGSTROM WENT TO GREAT EFFORT AND EXPENSE TO REMOVE TWO UNDERGROUND STORAGE TANKS AND PERFORM SOIL CLEAN UP, AS IT AGREED TO DO IN THE POA.

The POA acknowledged the existence of two underground storage tanks on the Property. Ex 1, §3.5. Engstrom agreed to “to remove the tanks, complete any clean up of the Property required by any applicable state, federal or local rule, regulation, ordinance, statute, ruling, decision, or other determination relating to Hazardous Substances . . . ” on or before Closing. *Id.* The POA further provided that Purchaser may conduct additional testing and that “the Closing Date shall be extended as is reasonably necessary to complete such tank removal, clean up and permitted testing.” *Id.*

Westlake exercised the option on October 23, 2008, and Engstrom commenced tank removal and clean up. RP 375, Ex 7. Engstrom agreed “to notify Purchaser in writing at the commencement of such tank removal and clean work” (Emphasis in POA). Ex 1, §3.5. On October 20, 2008, Brad Olson, Engstrom’s property manager, notified Charlie Laboda, Westlake’s project manager, by email of the commencement of the tank removal. RP 98, Ex 251. It is uncontroverted that Westlake received this notice, contrary to Conclusion 15, CP 363.

On November 18, 2008, before the soil around the tanks had been completely excavated, Westlake sent its consultant, the Riley Group, to take soil samples. Paul Riley acknowledged that testing soil samples before excavation had been complete would likely result in finding contamination. RP 253-54. Laboda also understood that samples taken before completion of excavation would likely be contaminated and therefore useless. RP 100.

By December 2, 2008, soil removal was completed, and RK Environmental (RK), Engstrom's environmental consultant, took more soil samples. RP 208-09. The sampling locations conformed to Ecology guidelines. RP 212. The tests of the soil samples showed no contamination. Ex. 7. A few days later, RK issued a report stating tank removal and clean up were complete. Ex 7, RP 55. On the same day, Engstrom sent RK's report to Westlake. It is uncontroverted that Engstrom provided Charlie Laboda with the report, RP 44-45, contrary to Conclusion 15, CP 363.

When the soil removal and clean up were completed, Engstrom informed Westlake by email that it intended to close the excavation, and asked Westlake to come in and test before the excavation was closed. Ex 259, RP 494. Westlake did not respond. RP 497.

Instead, Westlake delayed sending the Riley Group back to take a second set of soil samples while the excavation was open, until January 14, 2009, six weeks after receiving notice from Engstrom that the tank removal

and excavation were complete. Ex 10, p 3, RP 252. Westlake notified Engstrom that Riley found contaminated soil only two days after Riley Group took its second samples, RP 114, Ex 26. A week later, Riley Group completed its written report of its findings, and a few days later, Westlake sent the Riley Group report to Engstrom. RP 118, Ex 10. In all, it had taken Riley Group nine days to sample, test, and submit a written report.

Steve Engstrom was concerned that a “battle of environmental experts” had begun. RP 379. His most pressing desire was to satisfy the purchaser that the site was clean. RP 503. Engstrom then retained another environmental firm, Pinnacle GeoSciences, to review all of the test results, to take further soil samples in order to determine the vertical and lateral extent of any soil contamination, and to make a recommendation about what should be done. RP 379, 286-87, Ex 12. Pinnacle found no further contamination, but cited to the Riley Group’s conclusion that a hot spot of petroleum contamination remained near the building’s footings. Ex 12, RP 289. Fearing that additional soil removal could collapse the building and observing that the small amount of contamination posed no risk to human health or the environment, Pinnacle recommended that no further soil removal be performed until the building was demolished. 294-95, Ex 12.

Steve Engstrom hand delivered the Pinnacle report to Charlie Laboda, on February 5, 2009. RP 503. Mr. Laboda indicated he would refer it to his

principals. RP 507.

Not wishing to delay and determined to remove any obstacles to closing, Engstrom arranged for further soil removal, sampling and testing. On February 23, 2009, Engstrom again notified Westlake that it had completed additional soil removal and cleanup. Ex 16. Laboda reviewed the notice letter that day. RP 73. Engstrom offered full cooperation with Westlake for any additional testing it wanted. *Id.* Two days later, Engstrom sent Westlake RK's second report showing that the site was clean. Ex 18, RP 75.

In all, Engstrom removed and replaced approximately 200 cubic yards of soil from the basement at an expense in excess of \$170,000. RP 242, 511.

When Laboda received Engstrom's February 23 notice, he scheduled the Riley Group to perform additional testing. Ex. 247, RP 112. Initially, the Riley Group recommended that Westlake use Engstrom's consultant's test results so that further testing would be unnecessary. Ex 247. Laboda rejected Riley Group's recommendation, however, and Riley Group arranged to perform the testing on March 4, 2009. Ex. 248, RP 136-37. Laboda then cancelled the scheduled test, and never rescheduled. RP 137.

**E. WESTLAKE POSED A HOBSON'S CHOICE TO ENGSTROM:
EITHER AGREE TO WESTLAKE'S UNREASONABLE AND
UNLIMITED EXTENSION DEMANDS OR BE IN BREACH**

The parties' attorneys began discussing an extension of closing but could not agree on what constituted a reasonable extension. Westlake initially

asked for a thirty day extension, then a sixty day extension, and then an opened-ended extension of 30 days after its consultants issued a report. Ex 14, 20, 257. Engstrom explained to Westlake that any extension worked a financial hardship on Engstrom. Ex. 19, 21. Westlake countered that it needed time to obtain financing. Ex 255. The POA contains no financing contingency and does not extend closing if the Purchaser has not obtained financing. Ex 1.

On February 26, Engstrom proposed an extension from the March 1 closing date to March 6, 2009; 11 days from its February 23 notice of completion of the second cleanup. Ex. 255. Earlier, Riley Group had taken samples and reported results to Laboda within two days. Riley even submitted a written report nine days after taking its samples. Westlake asserted on February 27, 2009, that a reasonable closing would be March 31, 2009. Ex 20. Later that day, Westlake “corrects” its prior response, and demanded an open ended extension to “30 days from the date our expert confirms the property is clean,” in order to obtain financing. Ex 255.

On March 4, 2009, Engstrom’s attorney wrote to Westlake’s attorney to state that Engstrom was concerned, particularly since Westlake cancelled its testing scheduled for that day, that Westlake did not intend to close because it was financially unable to do so and was deliberately stalling. “Your client could cut its losses by either negotiating an extension in good

faith or demonstrating that it is capable of closing upon completion of confirmatory testing.” Ex 21. On March 5, Westlake’s attorney replied, claiming that Westlake had the funds to close, and declaring that Engstrom was in material breach. Ex 22. The letter closed, by demanding extraordinary and extra contractual conditions:

Accordingly, it is our position and demand that (I) Engstrom reopen the site and pay for the cost of any additional testing by 224 Westlake’s expert, including specifically the areas identified by Pinnacle and, (ii) agree to a reasonable extension of closing to allow a reasonable and timely accomplishment of these tasks. Failure to comply will constitute, in our opinion, a material breach of the PSA and our client will take action accordingly.”

F. ENGSTROM EXECUTED AND DELIVERED ALL CLOSING DOCUMENTS.

On March 6, 2009, Engstrom executed all the documents for closing. CP 395. Also, Engstrom’s attorney wrote to Westlake’s attorney to suggest that the two attorneys meet to work out whatever impediments Westlake had to closing. Ex 23. Westlake’s attorney responded saying Westlake would not tender funds to escrow, and “our position is that your client is in material breach and enough said as we have a dispute on that.” He did agree to a meeting, however.

Even after Engstrom executed the closing documents, it implored Westlake to schedule whatever testing it desired and to close. Ex 23, 47, 256, 258. Westlake would not schedule any testing after it cancelled the March

4, 2009 test, and it refused to close. RP 80, 137-38.

Westlake filed its complaint on March 26, 2009. CP 1. On April 27, 2009 the Washington Department of Ecology issued a “no further action” letter confirming that the site met all environmental standards. Ex 24. Engstrom forwarded Ecology’s letter to Westlake. RP 88.

G. PROCEDURAL HISTORY.

Trial commenced on October 11, 2009 before the Honorable Richard McDermott, and concluded on October 18, 2009. CP 285-86. Before trial, the parties submitted proposed Findings and Conclusions⁵. On December 21, 2010, Judge McDermott signed Westlake’s proposed Findings and Conclusions without notice of presentation. CP 354-64.

Westlake submitted its request for attorneys fees. CP 310-17, 365-71. Engstrom objected on multiple grounds, including that Westlake had not provided its invoices from which the reasonableness of its attorneys’ time and efforts might be determined. CP 377-86. Judge McDermott signed and entered Judgment and Findings on Westlake’s attorneys fee request without permitting Engstrom to review Westlake’s invoices. RP 419-426. This appeal followed. CP 427-450.

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King County Superior Court does not permit filing any unsigned proposed orders, and consequently, the parties’ proposed Findings and Conclusions cannot be part of the record. The footing on the signed Findings and Conclusions, CP 354-64, show that they are Plaintiff’s Proposed Findings.

IV. SUMMARY OF ARGUMENT

The threshold issue is whether Westlake has standing to sue. IPDC breached the anti-assignment provision because it neither sought prior consent nor owned 51 percent of Westlake. As a matter of law, this breach voids the assignment. Any issue about Engstrom reasonably withholding consent to assignment is moot because he was not asked to consent prior to the assignment. Westlake may not rely upon a provision its assignor breached. This Court should reverse and dismiss on this independently sufficient ground.

If the Court does not agree that the assignment is void, the Court must determine whether Engstrom breached the Purchase Option Agreement when it performed every obligation of Seller under the POA. It did not prevent Westlake from testing. While Engstrom could not agree to a specific date of extension of closing in advance of Westlake conducting its tests, that was not a breach, and certainly not a material breach. The party who refuses to close within a reasonable period of extension is the party in breach.

If the Court decides both the issues of assignment and breach against Engstrom, Engstrom asks the Court to reverse the award of damages and attorneys fees. The trial court's award of damages equal to Westlake's option payments and development costs is contrary to the law of damages and to the limitations on damages in the POA. Engstrom also asks the Court to reverse

the award of attorneys fees and costs contrary to the lodestar methodology.

V. ARGUMENT.

A. BECAUSE IPDC BREACHED THE ANTI-ASSIGNMENT PROVISION, WESTLAKE MAY NOT ENFORCE IT OR THE POA.

As a general rule, an option contract is assignable unless such assignment is expressly prohibited by statute or contract, or is in contravention of public policy. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1*, 124 Wn.2d 816, 829, 881 P.2d 986 (1994); *Big Bend Land Co. v. Hutchings*, 71 Wash. 345, 348, 128 P. 652 (1912). When a contract prohibits assignment, any assignment of rights under the contract is void. *Levinson v. Linderman*, 51 Wn.2d 855, 322 P.2d 863 (1958); *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn.App. 292, 295-96, 627 P.2d 1350 (1981). “A provision in the contract for the sale of real estate that the contract shall not be assigned without the written consent of the vendor is enforceable.” *Boyd v. Bondy*, 113 Wash. 384, 386, 194 P. 393 (1920). See also, *Bethel v. Matthews*, 187 Wash. 175, 59 P.2d 1125 (1936). When an option contract does contain an anti-assignment clause, courts will typically enforce the clause. See *Behrens v. Cloudy*, 50 Wn. 400, 401, 97 P. 450 (1908); 3 Corbin on Contracts, § 11.15 at 586 (1996). The POA contains an anti-assignment clause in § 13, Ex. 1, providing:

This Agreement is not generally assignable by Purchaser or

Seller without Seller's or Purchaser's prior written consent, which consent shall not be unreasonably withheld; provided, however, the Purchaser shall be able to assign this Agreement to a partnership or limited liability company in which Purchaser owns and continues to own through the Closing Date at least 51% of the ownership interests without the consent of Seller and upon written notice to Seller.

When IPDC assigned its interest in the POA to Westlake in June 2007, neither IPDC nor Westlake sought or obtained Engstrom's prior written consent. RP 188. IPDC did not own any interest in Westlake, much less "at least 51%." CP 48.

"The 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. and Plumbing Co.* at 295, (quoted with approval in *Berschauer/Phillips*, 124 Wn.2d at 830, 881 P.2d 986). Engstrom knew nothing about the recently formed 224 Westlake LLC at the time IPDC was required to seek Engstrom's consent: i.e prior to when IPDC and Westlake executed the Assignment. CP 26-27.

A party who accepts an assignment of an interest which is expressly not assignable, acquires only a cause of action against the assignor. *Bonds-Foster Lumber Co. v. Northern Pac. Ry. Co.*, 53 Wash. 302, 307, 101 P. 877 (1909). Westlake, a non-party, has no cause of action against Engstrom.

If a party has breached a contract condition precedent, neither he nor one standing in his shoes may maintain an action on it, and prejudice or the lack of it is immaterial.

Van Dyke v. White 55 Wn.2d 601, 606, 349 P.2d 430 (1960). Prior consent or IPDC's ownership are conditions precedent. "A party is barred from enforcing a contract that it has materially breached." *Rosen v. Ascentry Technologies, Inc.*, 143 Wn.App. 364, 369, 177 P.3d 765, 767 (2008), quoting *Bailie Communications, Ltd. v. Trend Bus. Sys.*, 53 Wn.App. 77, 81, 765 P.2d 339 (1988). In the absence of the ownership requirements, IPDC's failure to seek Engstrom's prior consent is a material breach.

The factors of materiality "are to be viewed 'as of the time for performance and in terms of the actual failure.'" *Bailie Communications, Ltd.*, at 83, quoting Restatement 2d *Contracts*, § 237, Comment b. Thus, Judge Rogers was correct in determining that an assignment had not occurred, but in error in denying Engstrom's Summary Judgement Motion on the basis that the requirement of prior consent "still exists." CP 157-58

The requirement that Engstrom could not reasonably withhold consent no longer existed once the assignment had already occurred. IPDC's and Westlake's unilateral breach of the assignment provision made it impossible to give *prior* consent. Steve Engstrom's concern, "I don't sell something that is my life's work to somebody that I haven't determined is worthwhile to sell to." RP 372, goes to the heart of Washington courts' enforcement of anti-assignment clauses: to protect contracting parties in selecting the persons with whom they deal. *Portland Elec. & Plumbing Co.*, at 295.

Judge McDermott cites to *R.B. Robbins v. Hunts Food & Industries, Inc.*, 64 Wn.2d 289, 391 P.2d 713 (1964), which is materially different because there prior consent was sought and withheld, unlike the facts here. Citing *R.B. Robbins*, Judge McDermott states that whether withholding consent is reasonable “is to be measured by the action which would be taken by a reasonable man in like circumstances.” Judge McDermott, however, ignored the actual circumstances, which were prior to the assignment, when he concludes that a reasonably prudent person would not withhold consent after being paid all of the option payments. CP 342. The assignment did not occur after payment of all of the option payments in October 2008, but instead in June 2007. The POA requires prior consent, meaning consent prior to the assignment. Prior to the assignment, Westlake had made no option payments. Moreover, Westlake had no assets whatsoever prior to the assignment, because its only asset was its purported rights under the POA.

Prior to the assignment, Westlake was a zero asset entity with no business experience or reputation. It is impossible to know what Engstrom would have asked and how Westlake and IPDC would have responded prior to the assignment. Judge McDermott did not correctly apply the correct standard of reasonableness, because he ignored the words “prior consent,” which dictated looking at a far different time frame than he employed.

Before executing the POA, Engstrom had investigated Investco and

its reputation. Westlake, a brand new company, had no reputation. In June 2007, Engstrom could not investigate it or receive an assurances of its performance under the POA. Engstrom could not ask for assurances of future performance based on an assignment it knew nothing about.

Westlake, standing in IPDC's shoes, is barred from enforcing any part of the POA, and particularly not the very provision IPDC breached. Westlake should not be permitted to stand on the rights of that breached contract provision. This lawsuit should have been dismissed on Engstrom's motion for summary judgement.

B. MANY ERRONEOUS FINDINGS OF FACT WERE AVOIDABLE HAD THE TRIAL COURT GIVEN THE REQUIRED NOTICE OF PRESENTATION BEFORE ENTERING WESTLAKE'S PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BEFORE TRIAL .

As the arguments above and below make clear, this appeal principally concerns errors of law, rather than errors of fact. Nonetheless, Engstrom is compelled to assign error to numerous factual errors even though most are not substantial, lest they become "verities on appeal." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010).

Judge McDermott signed and entered Westlake's Proposed Findings and Conclusions on December 20, 2010, without a notice of presentation as

required by CR 52(c)⁶. CP 354-64. Consequently numerous factual errors occurred because Westlake’s proposed Findings were submitted before the trial and in anticipation of what the evidence might show. Some of the errors assigned to a few factual findings have more weight than others. Engstrom also addresses the weightier assignments separately in more detail.

Finding 1. The title of the parties’ agreement is “Real Estate Purchase Option Agreement,” not “Real Estate Option Agreement.” Ex. 1.

Finding 2. The requirement of consent to assignment is a requirement of *prior* written consent, and it applies to both parties, not just Engstrom. Ex. 1, § 13.

Finding 3. The POA requires seven, not eight, quarterly payments of \$75,000, following an initial payment of \$75,000 within 90 days of execution of the POA. Ex. 1, § 2.1 (b) and (d). Further, nothing in § 2.1 contains the words, “or its assignee.”

Finding 4. Section 3.5 does not state that the Property was “potentially contaminated.” That section does not use the term, “or its assignee.” That section does not use the word “confirmatory,” or provide any

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CR 52(c) provides: “Unless an emergency is shown to exist, or a party has failed to appear at a hearing or trial, the court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days’ notice of the time and place of the submission, and have been served with copies of the proposed findings and conclusions. . . .”

reason for Purchaser's "environmental testing." Neither that section nor any other portion of the POA requires "independently written confirmation of compliance with local and national hazardous substance laws." Instead the section provides, "written notice of the completion of such tank removal and clean up." Ex. 1 § 3.5.

Finding 5. Neither § 3.5 nor any other portion of the POA uses the term, "confirmatory testing." Neither § 3.5 nor any other portion of the POA uses the term, "written confirmation of compliance with hazardous substances laws." Section 3.5 provides "*The parties* further agree that the Closing Date shall be extended . . .," and not "*Engstrom* agreed to extend the closing date." Ex. 1, § 3.5.

Finding 8. The amount \$437,354.15 is arithmetically incorrect, as discussed elsewhere, and is different from the amount stated in the Judgement, CP 419-420.

Finding 13. Engstrom did notify Westlake in writing of the commencement of clean up activities. See Ex 251. Charlie Laboda initially testified he had received no notice of the commencement of tank removal, RP 95, but recanted that statement on cross examination and admitted he had received notice. RP 98. Further, if the Finding is referring to the closure of the November excavation, Westlake was given notice on November 22, 2008, before the tank excavation was filled, that it wished to close the excavation,

and invited Westlake's input on any need to reschedule. Ex. 259, RP 491. Westlake did not send its consultant back to the site until January 14, 2009, six weeks later. RP 127, Ex.10. If the finding is referring to the over-excavation that occurred in February 2009, nothing in the record even suggests that Engstrom's replacement of the soil and floor made Westlake's consultant, the Riley Group, "unable to take full soil samples."

Finding 14. Nothing in the record supports the Finding that "Engstrom expected 224 Westlake to accept at face value," the report issued on December 8, 2008. In fact, the record is contrary in establishing that Engstrom invited Westlake to conduct its own testing. Ex. 16, 259.

Finding 17. The record does not support that Engstrom *contracted* with Pinnacle GeoSciences on or about January 16, 2009. Instead, the evidence in the record establishes that Engstrom *contacted* Pinnacle on January 16. RP 303. Pinnacle performed its soil tests on January 23, 2009. RP 303, Ex. 12. Consequently, the time between Pinnacle's tests and its February 4 report is 12 days. Ex 12. Further, Pinnacle did not *confirm* the Riley Group report, because Pinnacle found no contamination. RP 289. Instead, Pinnacle *used* the Riley Group's test results. RP 289-90.

Finding 22. The POA, § 3.5 requires notice "to Purchaser in writing at the commencement of such tank removal and clean up work" (Emphasis in POA). The POA does not require advance notice of subsequent activities.

Finding 23. The record contains no mention of “data dump.”

Finding 24. The record does not support that RK’s February 25, 2009 memorandum “is comprised only of *preliminary* data.” See Ex. 18. Further, the POA does not require “written *confirmation* of the completion of the clean up,” but instead, “written notice of the completion of such tank removal and cleanup.” See Ex 1, § 3.5. Further the February 25 RK memorandum is also a notice of completion. See, Ex 18.

Finding 26. The record reflects that Engstrom notified Westlake of completion of clean up on February 23, 2009, and that based on this notice, Westlake scheduled testing for March 4, 2009. Ex 16, 19, 248, RP 136-37.

Finding 27. The record does not support that Engstrom “insisted on a March 6, 2009 closing.” Further, Engstrom initially suggested an extension of 11 days, from its February 23 notice to March 6, 2009. Ex 16. An extension of 11 days is not unreasonable, as the trial court appeared to understand when it questioned Westlake’s project manager, Laboda:

THE COURT: What was your belief of what was a reasonable time for you to obtain a written report from Riley to confirm whether or not the site was dirty or clean?

A. It usually took them over a week to write the report prior.

THE COURT: Once they got the soil sample?

A. Correct. And I would expect the same.

THE COURT: So, the same general time frame as occurred in

January, correct?

A. Correct.

THE COURT: If my recollection is correct, they took the soil samples on the 14th, they did a preliminary analysis on the 16th, and you got your written report on the 23rd; is that correct?

A. Correct.

THE COURT: And you had no reason to believe that that same timeline wouldn't have been roughly about the same?

A. Correct.

RP 157-58.

Finding 28. The record does not support that Engstrom “demanded” a March 6 date.

Finding 30. Engstrom’s objection to any assignment, does not state that he was only concerned with Westlake’s financial ability to close. Instead it states that he was secure in his knowledge and understanding of Investco, and “I would not have consented to an assignment to an LLC with multiple members whose financial ability and business judgment I know nothing about.” CP 26-27.

Conclusion 11 The factual component of Conclusion 11, that Engstrom did not provide written notice of commencement is wrong, as discussed above. If the legal conclusion that the POA required written notice before Engstrom continued clean up activities in February, it misconstrues the

word “commencement” in the POA.

Conclusion 12 This Conclusion is a finding of fact. It is unsupported by and contrary to the record because Engstrom did notify Westlake of its completion, as discussed above concerning Findings 13 and 26.

Conclusion 13 This Conclusion is a finding of fact that is not supported by the record and is contrary to the terms of the POA in which Engstrom specifically agreed to extend the closing date. Ex 1, § 3.5.

Conclusion 15 This Conclusion contains factual findings of failure to provide notice and failure to extend the Closing date are unsupported by the record as described in Findings 13 and 26 above. The errors in the trial court’s legal conclusion are discussed below.

Some of the above factual errors are mixed findings of fact and conclusions of law, particularly those restating the terms of the POA. The erroneous conclusions of law are discussed below.

**C. ENGSTROM PERFORMED ALL OF SELLER’S OBLIGATIONS,
SO IT DID NOT BREACH.**

1. Standard of Review.

Review of a trial court's decision following a bench trial requires determining whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Endicott v. Saul*, 142 Wn.App. 899, 909, 176 P.3d 560, 566 (2008). Findings of fact must be

supported by substantial evidence, which is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Id.* The Court reviews questions of law de novo. *Id.*, *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

Review of an issue of whether a party breached a contract presents a mixed question of fact and law. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866, 875 (2008); *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

Erwin v. Cotter Health Centers, 161 Wn.2d 676, 688, 167 P.3d 1112, 1118 (2007) describes the standard of review for mixed questions of law and fact and the appropriate analysis on review:

Determining whether a person acted as a real estate broker through a particular course of conduct is a mixed question of law and fact, in that it requires applying legal precepts (the definition of “real estate broker”) to factual circumstances (the details of the person's conduct). *See Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). “Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts.” *Id.* at 403, 858 P.2d 494.

Here, the Court must determine whether Engstrom breached the POA by applying legal precepts (the Seller’s obligations under the POA) to the factual circumstances (Engstrom’s conduct). Although the trial court denominated its determination in Conclusion 15, CP 363, that Engstrom materially

breached the POA as a conclusion of law, it includes both factual findings and conclusions of law.⁷

2. The Trial Court's Conclusions Are Inconsistent with the Rules of Contract Construction.

Washington follows the objective manifestation theory of contracts, looking for the parties' intent as objectively manifested rather than their unexpressed subjective intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). A court should consider only what the parties wrote, giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. *Hearst*, at 504. Important here, "[C]ourts, under the guise of construction or interpretation, should not make another or different contract for the parties." *Corbray v. Stevenson* 98 Wn.2d 410, 415, 656 P.2d 473, 475 (1982); see also, *Public Employees Mut. Ins. Co. v. Sellen Const. Co., Inc.* 48 Wn.App. 792, 796, 740 P.2d 913 (1987).

3. The Trial Court Misapplied the Law to Its Construction of the POA

The POA provides in §3.5, "The parties further agree that the Closing

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Conclusion of law 15, CP 363, states, "Engstrom's failure to provide 224 Westlake with written notice of its commencement and completion of clean up activities, constitute material breaches of the Option Agreement. Engstrom's failure to reasonably extend the Closing Date to allow 224 Westlake to exercise its right to perform confirmatory testing also constitutes a material breach, which breach discharged 224 Westlake's duty to close."

Date shall be extended as is reasonably necessary to complete such tank removal, clean up and permitted testing.” The parties were unable to agree *in advance* on what constituted a reasonable extension to allow Westlake to test, and particularly Engstrom would not agree to the open ended extension of 30 or 45 days after whatever unspecified date Westlake’s expert confirmed the site was cleaned up. RP 529.

The POA does not, however, require the parties to agree in advance of Westlake’s testing on what is a “reasonably necessary” extension. The POA did not automatically terminate when closing did not occur, but only once an unreasonable time had elapsed for Westlake to complete whatever testing it thought necessary to close. It was unreasonable for Westlake to claim breach after it cancelled its test, refused to reschedule any test.

The parties’ actual experiences with soil testing is the best guide to what is a reasonable time for testing and to why a date should not be set in advance. The initial soil removal was completed on December 2, 2008. RK concluded its testing and issued a report six days later. Ex 7. The Riley Group received test results two days after taking soil samples. Ex. 10. From sampling to Riley Group’s report was 9 days. Engstrom Properties then engaged Pinnacle, who drilled 6 test pits through a concrete slab, took 13 soil samples, received test results, and wrote a comprehensive report on its findings within 12 days. Ex. 12. After Engstrom’s second, broader

excavation, RK took additional samples, received test results, and issued a memorandum on its findings two days later. Ex. 18.

Not only did none of the prior testing take more than 12 days, the possibility of Riley finding additional contamination, as it did earlier, cautioned against absolutely fixing a closing date before Riley tested.

Engstrom's offer to extend closing to March 6, 2009 was reasonable in allowing Westlake 11 days to sample the soil and test. Although the POA does permit whatever testing the Purchaser deems necessary and appropriate, it does not specify that the purchaser may also take the time for a formal report. Even so, the history shows that sampling, testing and producing a report took no longer than 10 days. In contrast, Investco's demands of 30 days, 60 days, and 30 days and 45 days after an unspecified time for its consultant's confirmation were far longer than reasonably necessary.

Engstrom neither refused to extend closing nor did Engstrom prevent Westlake from any testing Westlake thought necessary to close. Charlie Laboda admitted that Westlake was never denied access to the building after the tenant vacated. RP 40, 140. Engstrom's execution of the closing documents on March 6, 2009 did not signal that Westlake must also close on that date. Indeed the correspondence and communications between the parties' attorneys leading up to and following March 6 demonstrate that Engstrom desired to complete its obligations, while continuing to urge

Westlake to go forward without imposing a “drop dead” date. RP 395-96.

In contrast, Westlake cancelled its scheduled test on March 4, declared Engstrom in material breach on March 5, and never returned to test and never attempted to close. Engstrom was not in material breach by disagreeing with Westlake’s lengthy proposed extensions.

Whether a breach of contract is material depends upon the circumstances of each particular case. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 403, 814 P.2d 255, 265 (1991).

[M]ateriality is a term of art in contract analysis, and identifies a breach so significant it excuses the other party’s performance and justifies rescission of the contract. As stated in the Washington pattern jury instructions, a material breach is one “serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract.”

Park Avenue Condominium Owners Ass’n v. Buchan Developments, L.L.C. 117 Wn.App. 369, 383, 71 P.3d 692, 698 (2003). See also, *Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc.*, 64 Wn.2d 1, 6, 390 P.2d 548, 551 (1964), citing 6 Corbin, Contracts, § 1253, p. 13 (to be material, a breach must “amount to a substantial or total failure of consideration.”)

If Engstrom had prevented Westlake from performing its tests, it might have been a material breach by Engstrom. Instead of preventing Westlake’s testing, Engstrom offered full cooperation. Ex 16. It was not a material breach to disagree with Westlake’s proposed extension periods.

Westlake was free to perform its tests at any time after February 23, 2009. It chose, instead, to manufacture a material breach by Engstrom in order to escape its contractual obligations.

The conditions of the economy in late 2008 and 2009 may explain why Westlake did not close, as observed in *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 521 (2009), “Whenever the fair market value of the condominiums increases dramatically between presale and completion, Sellers may have an incentive to breach, but when the housing market takes a downturn (as may be the case in a recession), Buyers would seem to have an incentive to breach.” Here, at the critical time preceding closing, the economy was in recession, giving Westlake an ample incentive to not close.

4. Neither The Facts Nor The Law Support the Conclusion That Engstrom Committed A Material Breach.

The trial court’s Conclusion 15, CP 363, that Engstrom materially breached by failing to provide written notice of its commencement and completion of cleanup, and by refusing a reasonable extension of closing is contradicted by the record. Even if these factual statements were supported by evidence, as a matter of law, they would not constitute a material breach.

Engstrom did notify Westlake on October 20, 2008 of commencement of tank removal and cleanup at the planning phase of tank removal, as Westlake’s project manager admits. RP 96, 98, Ex 251. Even if Engstrom

had not notified Westlake, a material breach would not have occurred because Westlake had actual knowledge. Westlake's project manager was at the site at the time the tanks were exposed, retained the Riley Group to go to the site to take samples, and was present when Riley Group took the first samples on November 21, 2008. RP 98-99. Indeed, four months elapsed without any complaint about notice of the commencement of tank removal.

The record contains multiple references to Engstrom's notices of completion of clean up activities on both December 9, 2008 and February 23, 2009. Ex 7, 16, 18. The record does not support the trial court's finding that Engstrom failed to give notice of commencement and completion.

Further, the record does not support that Engstrom failed to extend the closing, but instead supports that Engstrom was willing to extend closing, but not willing to agree in advance to Westlake's proposed extensions, particularly after Westlake cancelled its scheduled March 4 test. See, Ex 16, 19, 21, 23, 44, 46, 47, 256, 258. Engstrom's disagreement with Westlake's proposed extensions did not amount to a breach "serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract." *Park Avenue Condominium Owners Ass'n*, at 383. Westlake continued to have the opportunity to send its consultants to the property to test well beyond March 1, 2009. It instead manufactured a spurious reason to not close.

D. WESTLAKE DID NOT TENDER PERFORMANCE SO IT CANNOT ASSERT A BREACH BY ENGSTROM

When a contract requires concurrent performance by both parties, “the party claiming nonperformance of the other must establish as a matter of fact the party's own performance.” *Willener v. Sweeting*, 107 Wn.2d 388, 394 (1986). Engstrom performed all of the obligations of Seller under the POA, and Westlake refused to close.

“We have held a purchaser may not rescind a contract without a tender of the purchase price if the duties are concurrent. A vendor selling land may not put the buyer in default until the vendor has offered to perform; the payment of the purchase price and the delivering of the deed are concurrent acts.” *Willener*, at 394-95 (citations omitted). Here, the POA, § 5.1, provides that Purchaser and Seller perform concurrently. Only the Seller, Engstrom, performed. Instead of tendering performance, Westlake claimed the Seller was in material breach even though Engstrom had nothing further it could do. On the other hand, Westlake’s failure to perform any testing after notice from Engstrom that clean up was complete, and its premature repudiation of the POA was a material breach.

E. DAMAGE AWARD IS CONTRARY TO LAW AND THE POA, AND MISTAKEN IN ARITHMETIC.

Damages for a breach of a purchase and sale agreement are benefit of the bargain damages. *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957);

Friebe v. Supancheck 98 Wn.App. 260, 269, 992 P.2d 1014, 1018 (1999). Consequential damages may also be awarded if they flow naturally from a breach of contract. *Pettaway v. Commercial Automotive Service, Inc.* 49 Wn.2d 650, 655, 306 P.2d 219, 222 (1957). The damages awarded by the trial court do not fall within either category of damages. Further, Westlake offered no evidence of either category of damages.

The damages award disregards the parties' limitation of remedies. Contractual remedies limitations must be enforced. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517-518, 210 P.3d 318, 322 (2009).

1. Damage Award Is Inconsistent With Law of Damages.

The purpose of damages is neither “to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract.” *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn.App. 317, 320, 692 P.2d 903 (1984), quoting *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957)), *review denied*, 103 Wn.2d 1036 (1985). Instead, the purpose of damages is to put the injured party “into as good a position pecuniarily as he would have been had the contract been performed.” *Diedrick v. School Dist. 81*, 87 Wn.2d 598, 610, 555 P.2d 825 (1976).

To place the nonbreaching party in the position he would be in had the contract been performed, he is “entitled to the benefit of his bargain, i.e.,

whatever net gain he would have made under the contract.” *Platts*, at 46.

That party is not entitled to more than he would have received had the contract been performed, and if the breach “relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery.” *Id.*

Benefit of the bargain damages are measured as “the difference between the market value of the property had it been as represented and the market value of the property as it actually was at the time of the sale.” *Johnson v. Brado*, 56 Wn.App. 163, 168-169, 783 P.2d 92 (1989). See also, *Hardinger v. Till*, 1 Wn.2d 335, 339, 96 P.2d 262 (1939).

Westlake presented no evidence of the market value of the property in March 2009. The only evidence of market value reflected the downturn in real estate values at the time based upon Engstrom’s then pending sale to another purchaser. Ex. 250. “Thus, under ‘the benefit of the bargain’ rule, the purchaser has proved no damages if he fails to prove that the actual value of the property is greater than the price he contracted to pay.” *Carlson v. Leonardo Truck Lines, Inc.*, 13 Wn.App. 795, 799, 538 P.2d 130, 132 (1975). Consequently, Westlake suffered no benefit of the bargain loss, but was relieved of a purchase of property for more than the market value.

2. Westlake Elected Its Remedy To Terminate the POA Precluding Its Action for Damages.

Contracts are to be construed and enforced according to the intention of the parties as determined by all of the terms employed in the contract, and specifically including terms relating to remedies. *West American Finance Co. v. Finstad*, 146 Wash. 315, 319 (1928).

Section 10(b) of the POA states, “If Seller fails to perform any covenant of Seller contained herein, Purchaser may elect *either* to terminate this Agreement *or* pursue any other remedy including, but not limited to, an action for specific performance or actual damages against Seller.” Westlake did not elect between terminating the Agreement and pursuing an action for damages, it did both.

The election provided in the POA is consistent with Washington law. “Appellants might have brought either one of two actions: One for the rescission and recovery of the purchase price, and the other, a suit for damages” *Reilly v. Hopkins*, 133 Wash. 421, 425, 234 P. 13 (1925). An action for recession is in equity, and a suit for damages is one in law. *Id.* Westlake brought a suit for damages. Complaint for Damages, CP 3-10. Having made its election, it may not also have rescission.⁸

“It is a basic principle of contract law that parties by an express agreement may contract for an exclusive remedy that limits their rights, duties

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The grounds for recession are not present here. See 25 Washington Practice § 11:6.

and obligations.” *Graoch Associates No. 5 Ltd. Partnership v. Titan Const. Corp.*, 126 Wn.App. 856, 865, 109 P.3d 830 (2005), quoting *Board of Regents v. Wilson*, 27 Ill.App.3d 26, 326 N.E.2d 216, 220 (1975).

In circumstances similar to those here, *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 320, 724 P.2d 1127 (1986) enforced a contractual limitation on remedies and found that an election had occurred. There, the agreement stated, “In the event of default by buyer, seller shall have the election to retain the earnest money as liquidated damages, or to institute suit to enforce any rights seller has.” Seller had not returned the buyer’s earnest money and had commenced a suit for damages. *Puget Sound Service* held that the seller’s retention of the earnest money was an election, and bound the seller to that election.

Here, Westlake sued for damages. It is bound by its election.

3. Westlake Is Not Entitled to Return of Option Payments Under POA Provisions

Return of consideration is not the normal measure of damages for breach of contract because, “The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. *Lincor Contractors, Ltd. v. Hyskell* 39 Wn.App. 317, 321, 692 P.2d 903, 906 (1984), *review denied*, 103 Wn.2d 1036 (1985). Return of the option price to

Westlake robs Engstrom of the consideration for the option and places Westlake in a better position than it would be if the contract were performed.

By the parties' own agreement, if the Purchaser does not close, the Option Price and Payments shall be forfeited. Ex 1, section 2.1(b) and (d)⁹. The Purchaser, Westlake, chose not to close. Westlake is not entitled to a return of the Option Payments.

The Option Payments were consideration for the option, and fully earned by Engstrom. Option contracts, like all contracts, require consideration. *Hill v. Corbett*, 33 Wn.2d 219, 223, 204 P.2d 845, 848 (1949); *see also*, 25 Washington Practice, *Contract Law*, § 2:25. Consideration may be either a benefit to one party or a detriment to the other; it need not be both. *Arndt v. Manville*, 53 Wn.2d 305, 308, 333 P.2d 667 (1958). Westlake purchased the option for the Option Price and received the benefit for which it bargained. Engstrom's consideration for the option was a detriment because Westlake's exclusive right to buy the property for the two year option period, precluded Engstrom from selling to another before the collapse of the economy.

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Paragraph 2.1(b) provides, "2.1 (b) "The Option Price shall apply and be credited against the Purchase Price at Closing in the event Purchaser elects to exercise its Purchase Option and close the purchase of the Property."

Section 2.1(d) provides, "[I]n the event Purchaser fails . . . to close the purchase of the Property in accordance with the terms of this Agreement, all Option Payments and the Option Price theretofore paid shall be non-refundable and forfeited by Purchaser and this Agreement shall terminate. . . ."

To return the Option Payments to Westlake when Engstrom Properties performed the option portion of the POA would penalize Engstrom by robbing it of the consideration for the option. This would be contrary to the terms of the POA and result in an unjust enrichment to Westlake.

3. Westlake Is Not Entitled to Development Costs As Damages Under POA Provisions.

Although the POA permits the purchaser to engage in “Development Activities” during the pendency of the Agreement, the POA places all risk for the costs of Purchaser’s Development Activities on the Purchaser alone. Specifically, § 3.2 provides: “. . . Purchaser agrees to pay all costs incurred in its Development Activities and further agrees to indemnify and hold harmless Seller from any and all costs, damages, loss, injury or other expense that may be incurred in connection therewith, including those that may result if Purchaser fails to purchase the Property pursuant to this Agreement. . . .”

As further support that the parties intended any expenses of Development Activities to be the Purchaser’s sole risk and not to be recoverable, § 3.3 provides that the Purchaser’s liability for its Development Activity costs remains with the purchaser even if the Agreement terminates and the default provisions in Article X are contrary. “*Notwithstanding any other provision of this Agreement to the contrary*, Purchaser’s obligations under this Section 3.3 and under Sections 3.2, 4.1 and 4.2 shall survive any

termination of this Agreement.” (Emphasis added.). The trial court erred in disregarding the parties’ agreement.

4. THE AMOUNT OF DAMAGES IS INACCURATE.

Westlake submitted 170 exhibits numbered 50 through 220 as representing evidence of its development costs, and three different exhibits representing summaries of the costs. Ex 49, 253, 254. Two of the summaries, Ex 49, 253, were not provided to Engstrom until mid-trial. RP 81. Engstrom’s objections to admission of exhibits 49 and 253 because they were not summaries and not accurate,¹⁰ were overruled following a protracted and confusing mix of testimony and discussion. RP 425-438. The trial court’s admission of these documents was an abuse of discretion and its reliance on them in awarding damages was an error of law.

The original summary, at one time marked as exhibit 49, was remarked as exhibit 254. RP 432-33. Exhibit 254 contains the total of \$1,041,834.12 as the total of option payments and development costs. The new exhibit 49 contains a total of \$1,080,104.65 for option payments and development costs. Exhibit 253, a summary in a different format has a total of \$1,037,354.15 as the total of option payments and development costs.

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ER 1006 provides: “The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. . . .”

The trial court's Findings and Conclusions from trial provides as Westlake's damages as \$600,000 in Option Payments and \$437,354.15 in development costs for a total of \$1,037,354.15, the same total as Exhibit 253. CP 364. CP 363. Its Findings and Conclusions in support of its Judgement, the court states a fourth total development costs of \$436,310, belying its assertion that damages were proved with exactness. CP 421-26.

Damages must be proven with reasonable certainty or supported by competent evidence in the record. *Iverson v. Marine Bancorporation*, 86 Wn.2d 562, 565, 546 P.2d 454, 456 (1976); *Lincor*, at 321. Illustrating the lack of certainty in the evidence, the invoices in exhibits 50 to 220 include entity expenses, such as attorneys fees for formation, registered agent fees, and a \$5,000 a month fee for Investco . RP 447. The entity expenses are neither development expenses nor damages flowing from breach. Perhaps the most egregious error in Westlake's damages calculation is claiming \$150,000 in option payments twice. RP 448. (Exhibits 50 and 51 are IPDC's preassignment expense invoice and Westlake's payment of that invoice in the amount \$173,933. Of that total amount is two option payments of \$75,000. Westlake includes the two payments again in its total option payments of \$600,000.)

F. ATTORNEYS FEE AWARD IS EXCESSIVE AND CONTRARY TO LAW.

“To determine the appropriate attorney fees, the trial court begins by figuring out the lodestar (total number of hours reasonably expended, multiplied by the reasonable hourly rate of compensation). After the lodestar figure is calculated, the court may consider a contingency adjustment based on additional factors.” *Morgan v. Kingen*, 166 Wn.2d 526, 539 (2009). The lodestar methodology was made applicable to Washington courts by *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 675 P.2d 193 (1983). *Bowers* sets forth the steps and considerations applicable to determination of reasonable attorneys fees:

1. The party requesting attorneys fees must provide sufficient documentation of the work performed. *Id.*
2. The trial court should “discount hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time.” *Id.*
3. “Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.” *Id.*
4. The court may adjust the lodestar under two circumstances: “the contingent nature of success, and the quality of work performed.”

Id. The trial court’s award of attorneys fees is inconsistent with *Bowers*.

First, Westlake did not provide reasonable documentation. It provided only summaries in the two Declarations of Christopher Brain. CP 320, 337, 341, 369. These summaries do not provide sufficient information from which to determine the number of hours expended by each attorney and the tasks on

which each attorney performed work. In addition, the summaries are inadequate to determine whether any of fees were for work which was unnecessary or duplicative or unsuccessful. Counsel must provide contemporaneous records documenting the hours worked. Such documentation “need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).” *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998).

Engstrom’s attorney requested copies of invoices and the fee agreement from plaintiff’s attorney. CP 372-74. Westake’s attorney refused to provide this documentation claiming it was protected by the attorney client privilege. *Id.* Fee information, however, does not fall within the attorney client privilege because that information typically reveals no confidential professional communications between the attorney and client. *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 531 (1984); *R.A. Hanson Co., Inc. v. Magnuson* 79 Wn.App. 497, 502 (1995). If the invoices or fee agreement contained confidential communications, those communications could have been redacted.

Without invoices and fee agreements, Engstrom was unable to determine what attorney efforts to contest or concede. While the trial court reviewed the fee invoices in camera, CP 423, an *in camera* review does not

permit Engstrom to contest the claimed fees. Further, Engstrom had better knowledge than the trial court of what billed activities were unnecessary, useless, or duplicative. “The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.” *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538 (2007), citing, *Bowers*, 100 Wn.2d at 597.

The court may adjust the lodestar under two categories: “the contingent nature of success, and the quality of work performed.” *Bowers*, at 598. “[T]he risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case.” *Id.*, at 597-98 (emphasis added). *Bowers*, at 599, states that among the guidelines for adjusting a fee award for risk, “Most important, ‘the contingency adjustment is designed solely to compensate for the possibility ... that the litigation would be unsuccessful and that no fee would be obtained’.” Therefore, the risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case.” (Emphasis added.)

The risk factor was not present here. Westlake paid its attorneys fees on a regular basis, and there was never a possibility that plaintiff’s attorneys would receive no fee. See, Ex 230 showing through the last entry on the check register dated March 25, 2010, plaintiff paid Tousley Brain Stevens a

total of \$38,314.35. Westlake's attorney concedes Westlake paid the firms full fees until January 2010, when Westlake and its attorney agreed that Westlake would be paid half its fees regardless of outcome, and if it recovered a judgement, it would pay the balance of the full fee plus a 15 percent bonus. CP 322. There is no risk in this arrangement that Westlake's attorneys would recover no fee. The full rate plus bonus may be binding between them, but the bonus does not constitute a reasonable adjustment to be charged to Engstrom.

The rate of attorneys fees awarded is excessive. "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers*, at 597. Engstrom did not object to Westlake's attorneys established billing rate, CP 382, but the fees awarded included an additive that effectively increased the billing rate to \$669.16 per hour for all timekeepers including its paralegal and law clerk¹¹. For any of the timekeepers, \$669 per hour is unreasonable on its face. Fees of \$669 per hour is 163 % of Mr. Brain's \$415 hourly rate, 226 % of Ms. McEntee's \$205 rate, and 318 % of the law clerk's and paralegal's \$160 rate. CP 322.

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This rate was calculated by subtracting costs of \$12,424.24 from the total attorneys fees and costs awarded of \$312,826.24, leaving \$300,402 as the total fee award. CP 419. The total number of hours for all time keepers, including paralegals is 454.90 hours. CP 322, 369. Dividing \$300,402 by 454.9 hours results in an hourly rate of \$669.16 for each time keeper.

An adjustment based on the quality of work is not warranted. “This is an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.” *Bowers*, at 598-99. The trial court's lodestar figure may “in *rare* instances, be adjusted upward or downward in the trial court's discretion.” *Mahler*, 135 Wn.2d at 434 (emphasis added). In this, a contract case without special complexity, no adjustment for quality is warranted. The trial court’s findings on fees does not justify the limited basis for adjustment based on quality of work

“The essence of the lodestar methodology is the initial formula: a reasonable hourly rate for a reasonable number of hours worked. A trial judge who strays from this formula will typically have a difficult time establishing that an award of attorney fees is actually reasonable.” *Highland School Dist. No. 203 v. Racy*, 149 Wn.App. 307, 316-17 (2009). While the plaintiff’s attorneys’ usual hourly rate, rather than the premium rate of \$669 an hour may be reasonable, neither the trial court nor Engstrom could assess the reasonable number of hours worked in the absence of adequate documentation, and could not, therefore, determine the lodestar amount of reasonable attorneys fees. The party requesting attorneys fees has the burden of proving its fees are reasonable. *Bowers*, at 597. Westlake did not.

G. THE COURT SHOULD AWARD ENGSTROM ATTORNEYS FEES AND COSTS ON APPEAL.

Engstrom requests its fees and costs in this matter, including on appeal, pursuant to RAP 18.1 and the POA, Ex 1, § 10 (c).

V. CONCLUSION.

Engstrom asks the Court to dismiss Westlake's claim entirely because it has no standing to enforce the POA following the breach of the anti-assignment clause. Alternatively, Engstrom asks the Court to reverse the trial court's conclusion that Engstrom was in breach of the POA and its awards of damages and legal expenses.

Submitted this 31st day of May, 2011

REAUGH OETTINGER & LUPPERT, P.S.



Sylvia Luppert, WSBA 14802
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1625
206-264-0665, fax: 206-264-0662
sll@reaugh.com

APPENDIX

- A. Purchase Option Agreement
- B. Assignment
- C. Findings & Conclusions December 2010
- D. Findings & Conclusions February 2011
- E. Judgement

APPENDIX A

20th SM

REAL ESTATE PURCHASE OPTION AGREEMENT

This Real Estate Purchase Option Agreement ("Agreement") is made as of November __, 2006, by and between **Engstrom Properties LLC**, a Washington limited liability company ("Seller"), and **Investco Properties Development Corporation**, a Washington corporation, and/or permitted assigns ("Purchaser").

ARTICLE I. PROPERTY TO BE CONVEYED

1.1 Seller shall sell to Purchaser upon the timely exercise by Purchaser of the option granted to Purchaser hereunder and subject to the other terms of this Agreement, and Purchaser may purchase from Seller by the timely exercise of such option granted hereunder, upon the terms and conditions hereinafter set forth, that certain real property located at 224 Westlake Avenue North, Seattle, King County, Washington and legally described in Exhibit A attached hereto together with all personal (excluding cash and rents due but unpaid as of the Closing) and real property related thereto including, without limitation, except as noted above, all of Seller's rights under and to leases and rents related thereto, all improvements thereon, all appurtenant utility or access easements, mineral rights, utility connections rights, property-use approvals, zoning approvals, plans, permits, surveys, engineering studies, appraisals, cost estimates, construction approvals and any and all other information in the possession of Seller relating to the use or development of the subject real property in accordance with the terms of this Agreement (herein collectively referred to as the "Property").

1.2 The Property shall include all right, title and interest, if any, of Seller as of the Closing in the following:

- (a) Any portion of the Property lying in the bed of any street, road, highway or avenue, open or proposed, in front of or adjoining all or any part of the Property and in all strips, gores, or right-of-way;
- (b) Lake beds, streams, riparian rights and easements appurtenant to the Property;
- (c) All minerals, oil and gas under the Property, and oil and gas and mineral rights, all water and water rights;
- (d) All right, title and interest of Seller, if any, in and to any award or payment made or to be made:
 - (i) for any taking in condemnation or eminent domain of property lying in the bed of any street, road, highway or avenue, open or proposed, in front of or adjoining all or any part of the Property;
 - (ii) for damage to the Property or any part thereof by reason of change of grade or closing of any such street, road, highway or avenue; or

- (iii) for any taking in condemnation or eminent domain of any part of the Property;
- (e) All tenant leases, rents, and profits from and after the Closing (as hereinafter defined);
- (f) Assignable licenses, trade names, franchises, permits and contracts held by Seller in connection with the Property;
- (g) All refundable tenant security deposits, together with interest, if any, required by law to be paid on such deposits (subject to the rights of tenants thereto); and
- (h) All prepaid rents.

ARTICLE II. PURCHASE OPTION AND PURCHASE PRICE

2.1 Purchase Option; Option Price; Option Period; Option Payments.

(a) Purchase Option. Seller hereby grants to Purchaser for the Option Price and the Option Payments (amounts and payments of which are set forth below), and Purchaser hereby acquires from Seller, the option ("Purchase Option") to acquire the Property within the Option Period (subject to the Closing Date provision of Section 5.1) and based upon the payments and other terms set forth in this Agreement.

(b) Option Price. The initial consideration for the grant by Seller to Purchaser of the Purchase Option is the sum of \$75,000 (the "Option Price") which Purchaser shall pay to Seller upon Purchaser's written notice to Seller pursuant to Section 3.1, which notice must be given, if at all, on or before ninety (90) days after the date of this Agreement (subject, however, to the terms of Section 3.5). The Option Price shall apply and be credited against the Purchase Price at Closing in the event Purchaser elects to exercise its Purchase Option and close the purchase of the Property.

(c) Option Period. Following the payment of the Option Price Purchaser shall have until December 31, 2008 (the "Option Period") in which Purchaser may exercise its Purchase Option in accordance with this Agreement. Purchaser's Purchase Option may only be exercised during the Option Period by Purchaser giving written notice to Seller no less than sixty (60) days prior to the end of the Option Period (the "Purchase Notice").

(d) Option Payments. As a requirement for Purchaser to be entitled to exercise its Purchase Option hereunder after it has paid the Option Price, Purchaser shall make quarterly payments to Seller in the amount of \$75,000 on April 1, 2007, on July 1, 2007, on October 1, 2007, on January 1, 2008, on April 1, 2008, on July 1, 2008 and on October 1, 2008 (the "Option Payments"). The Option Price and the Option Payments shall apply and be credited against the Purchase Price at Closing in the event Purchaser elects to exercise its Purchase Option and close the

purchase of the Property. Except as otherwise provided in this Agreement, in the event Purchaser fails to timely make a scheduled Option Payment or to close the purchase of the Property in accordance with the terms of this Agreement, all Option Payments and the Option Price theretofore paid shall be non-refundable and forfeited by Purchaser and this Agreement shall terminate. However, Purchaser shall have three (3) days to cure any default in payment following written notice from Seller.

(e) Payments. All payments from Purchaser to Seller shall be delivered to Seller at Seller's notice address (Section 12) or in such other manner as Seller may designate to Purchaser by written notice.

2.2 Purchase Price. The purchase price (hereinafter referred to as the "Purchase Price") for the Property shall be FOUR MILLION FIVE HUNDRED FIFTY THOUSAND AND NO/100'S DOLLARS (\$4,550,000). The Purchase Price shall be payable all cash at Closing (including the Option Price and all Option Payments previously made).

ARTICLE III. FEASIBILITY STUDY; DEVELOPMENT ACTIVITIES

3.1 Purchaser's Feasibility Period. Purchaser shall have a period from the date of mutual execution of this Agreement until ninety (90) thereafter to conduct such inspections, analyses and tests on the Property and to prepare plans, drawings and designs for developing the Property, and such financial and economic studies and other feasibility studies as Purchaser shall in its discretion deem necessary for development of the Property for such uses as Purchaser deems appropriate. On or before the end of such period Purchaser shall give Seller written notice of its decision to pay, and shall pay, the Option Price specified in Section 2.1(b) above. In the event Purchaser fails to give such written notice or to pay the Option Price on or before the end of such period, this Agreement shall terminate and, except as set forth in Sections 3.2 and 3.3, neither party shall have any obligations hereunder. Notwithstanding the foregoing, this Section is subject to the further terms of Section 3.5 regarding the removal of underground tanks.

3.2 Purchaser's Right To Develop the Property. Purchaser shall have the right to conduct such inspections, analyses and tests on the Property and to prepare plans, drawings and designs for developing the Property, and such financial and economic studies and other feasibility studies as Purchaser shall in its discretion deem necessary for development of the Property for such uses as the Purchaser deems appropriate (the "Development Activities"). Seller hereby grants to Purchaser and to Purchaser's representatives, consultants and contractors, access and right of entry to the Property at all reasonable times and upon reasonable notices to Seller and to all applicable lessees of the Property (in compliance with the terms of all leases and subleases of the Property (copies of which (i.e., of all leases and subleases existing as of the date of this Agreement have been delivered to Purchaser) for such purposes and Seller further agrees that Purchaser shall have authority to make development applications with the City of Seattle and any other government agency or entity with jurisdiction over the Property including, without limitation, applications for development permits, rezones, boundary line adjustments, special use permits, master use permits, variances and comprehensive plan amendments related to the Development Activities. Purchaser agrees to pay all

costs incurred in its Development Activities and further agrees to indemnify and hold harmless Seller from any and all costs, damages, loss, injury or other expense that may be incurred in connection therewith, including those that may result if Purchaser fails to purchase the Property pursuant to this Agreement. Seller agrees to support Purchaser's Development Activities including signing any applications for permits or other development approvals requested by the Purchaser, provided, however, that no such actions will impair Seller's rights in and to the Property or bind Seller to any actions in the event Purchaser fails to purchase the Property pursuant to this Agreement. Purchaser acknowledges that it shall have no right to interfere with the rights and business operations of any lessee or sublessee of the Property, and notwithstanding the foregoing or any other provision of this Agreement to the contrary, Purchaser and its agents shall not interfere with the right and business activities of any lessee or sublessee of the Property except as is permitted by the lessor and/or sublessor, as applicable, under any such lease or sublease, and Purchaser shall indemnify Seller with respect to any damages to Purchaser caused by any such unpermitted interference and activities.

3.3 Lien Indemnity. Seller shall have the right at all times to demand that Purchaser furnish releases for materials, labor, professional services and/or costs (its "Lien Claims") incurred by Purchaser or its agents in Purchaser's Development Activities related to the Property. Purchaser shall indemnify, defend and hold Seller and the Property harmless from any Lien Claims made by any person or other entity including, but not limited to, the amount of the Lien Claims, interest, penalties and attorneys' fees and costs and for any damages to the Property. This indemnity includes an obligation on Purchaser to post any bond necessary to clear a lien filed against the Property. Purchaser agrees that any and all claims or liens that Purchaser may have as the result of Purchaser's Development Activities shall be subordinate to any deed of trust, mortgage or the security agreement between Seller and other persons or entities which exist prior to, during or subsequent to the term of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, Purchaser's obligations under this Section 3.3 and under Sections 3.2, 4.1 and 4.2 shall survive any termination of this Agreement. Seller shall give written notice to Purchaser of any claims arising under this section 3.3 and in the event that Purchaser fails to cure such claims to Seller's satisfaction within 30 days after such notice, Seller shall have the right upon three (3) days written notice to Purchaser to terminate this Agreement and retain all Option Payments and the Option Price as an additional right and remedy to Purchaser's obligations under this Section 3.3.

3.4 Memorandum of Agreement. Seller agrees that Purchaser may in its sole discretion record a memorandum of this Agreement in the records of King County, Washington in such form as Purchaser deems appropriate.

3.5 Underground Storage Tanks. The parties acknowledge that there are two (2) underground storage tanks that exist on the Property. Seller shall on or before Closing remove the tanks, complete any clean up of the Property required by any applicable state, federal, or local rule, regulation, ordinance, statute, ruling, decision, or other determination relating to Hazardous Substances as defined in Section 7.1(b) and provide Purchaser with written notice of the completion of such tank removal and clean up. Seller and Purchaser agree that the removal of

the tanks and completion of any required clean up of the Property is a condition to Purchaser's obligation to Close under Section 5.1. The parties acknowledge that the Property is currently subject to a lease and sublease, the terms of which extend through December 31, 2008, and that Seller may be precluded from removing such tanks and performing such clean up until after such lease termination date. Seller further agrees to notify Purchaser in writing at the commencement of such tank removal and clean up work and that Purchaser may, following receipt of such initial clean up notice and subject to the other provisions of this Article III, contract for any additional environmental testing, at its own cost, Purchaser may deem necessary or appropriate, provided that such additional testing shall not delay the normal tank removal and clean up work performed by Seller. The parties further agree that the Closing Date shall be extended as is reasonably necessary to complete such tank removal, clean up and permitted testing.

ARTICLE IV. TITLE

4.1 Environmental Protection for Seller. Following the effective date of this Agreement, Purchaser shall be fully responsible for any violation of any applicable environmental laws with respect to and/or contamination of the Property by spills of toxic substances or other contamination of the property arising from the acts of Purchaser or Purchaser's agents, and Purchaser agrees to promptly clean up such spills or contamination at its own expense, comply with applicable environmental laws, and hold Seller harmless therefrom. Further, in the event a lawsuit is necessary to enforce this provision, Purchaser agrees to pay Seller's reasonable attorneys' fees, costs and any expert expenses.

4.2 Residual Unused Study Information to Seller. In the event Purchaser terminates this Agreement or fails to exercise its Purchase Option for whatever reason, then Purchaser shall forthwith provide Seller with copies of all Purchaser and third party drawings, applications, correspondence, permits, and information and materials relating to feasibility of the proposed development, boundary line revisions, and all other information or permits obtained relative to Purchaser's Development Activities. Seller acknowledges and agrees that any and all such information received from Purchaser is accepted without warranties or representations, whether express or implied, including any warranty of habitability, merchantability, or fitness for a particular purpose including, without limitation, the: stability or suitability of the soil; presence or absence of any hazardous substances; building, zoning, sensitive area, or other restrictions under any law, rule, ordinance, or regulation affecting the use, improvement, or occupancy; any defective condition of the land; and Seller's ability to utilize any specific information or permit or any other document, plan, report or other information.

4.3 No Warranties Regarding Condition of Property. There are no warranties regarding the condition of the Property, except as expressly provided in this Agreement. Purchaser will have an opportunity to inspect the Property fully from the date of this Agreement until the termination of this Agreement or the end of the Option Period, whichever occurs first, as well as to examine a title insurance report. The Property shall be free of encumbrances, except for those listed on Exhibit B attached hereto.

4.4 Title Commitment. Seller shall obtain at its own expense and deliver to Purchaser on or before the tenth (10th) business day following execution of this Agreement a preliminary commitment (hereinafter referred to as the "Title Commitment") for a 1970 ALTA Form B with 1984 revisions owner's standard coverage title insurance policy in the amount of the Purchase Price issued by Chicago Title Insurance Company, 701 Fifth Avenue, Suite 3400, Seattle, WA 98104 (hereinafter referred to as the "Title Company") setting forth the condition of Seller's title to the Property, together with all exceptions or conditions to such title, and accompanied by correct, complete and legible copies of all instruments referred to in the Title Commitment as conditions or exceptions to title to the Property, together with a plot map and any surveys or building plans in Seller's possession or control.

4.5 New Title Matters. For any non-monetary encumbrance (e.g., an easement, lease) title exception not listed in Exhibit B hereto and first appearing in the initial preliminary commitment from the Title Company (Section 4.4) or thereafter, and not appearing in the preliminary title commitment to Seller dated October 16, 2006 from Pacific Northwest Title Company of Washington, Inc. (a copy of which has been delivered to Purchaser), Purchaser shall give written notice to Seller (within fifteen (15) days of its receipt of notice of the existence of such additional/new encumbrance) of Purchaser's objection, if any, to such title exception. If Purchaser does not give such notice, such title exception shall be deemed added to Exhibit B. If Purchaser gives such written notice objecting to such title exception and Seller does not, within ten (10) days after its receipt of such notice from Purchaser, agree to remove such title exception, this Agreement shall terminate and the Option Price and all Option Payments theretofore received by Seller shall be returned to Purchaser, unless, within five (5) days after such ten (10) day period, Purchaser gives notice to Seller that Purchaser will proceed with the transaction and waive its objection to such exception being included on Exhibit B.

4.6 Title Not Insurable. If title is not insurable at Closing in accordance with the provisions of this Agreement, Seller shall not be in default under this Agreement; and Purchaser may elect to proceed to close the purchase of the Property despite such non-insurability or Purchaser may terminate this Agreement and receive the return of any and all Option Payments and the Option Price, whereupon this Agreement shall terminate and all obligations of the parties shall cease.

ARTICLE V. CLOSING

5.1 Date and Place of Closing. The sale of the Property shall be closed (herein referred to as the "Closing") in the offices of Chicago Title Insurance Company, Sue Stevens, 701 Fifth Avenue, Suite 3400, Seattle, WA 98104, (206) 628-5694 (hereinafter the "Closing Agent") at such time and on such date as Purchaser shall select (herein referred to as the "Closing Date") in the Purchase Notice described in Section 2.1(c). Purchaser and Seller shall, on demand, deposit with the Closing Agent all instruments and moneys necessary to complete the sale of the Property in accordance with this Agreement. Seller and Purchaser agree that the Closing Date prescribed in the Purchase Notice shall occur on or before March 1, 2009, subject to extension of such date pursuant to Section 3.5 above.

5.2 Seller's Items at Closing. At the Closing, Seller agrees to deliver the following items to Purchaser:

- (a) A duly executed Statutory Warranty Deed in a form acceptable for recording, of the type customarily used for commercial real estate transactions in the State of Washington, conveying to Purchaser fee title to the Property subject only to the exceptions to title set forth in Exhibit B, as such may be modified pursuant to Section 4.5. Seller shall pay the excise tax in connection with the transfer of the real estate to Purchaser;
- (b) The title policy ("Title Policy") from the Title Company insuring such title;
- (c) Such evidence and documents as may be reasonably required by Purchaser and/or the Title Company evidencing the authority of the person executing the various documents on behalf of Seller in connection with its sale of the Property.
- (d) A duly executed Assignment, in recordable form, assigning to Purchaser Seller's interest as lessor in any leases with respect to the Property, with a warranty as to Seller's free and clear title thereto as lessor.
- (e) A duly executed Assignment from Seller to Purchaser of Seller's right, title and interest in all contracts pertaining to the Property assumed by Purchaser.
- (f) A letter to the lessees under any leases pertaining to the Property stating that the lease and the lessees' security and other deposits have been conveyed to Purchaser in accordance with applicable law and that rent accruing thereafter should be paid to Purchaser or Purchaser's designee.
- (g) A certificate that Seller is not a foreign person or entity defined and pursuant to Section 1445 of the Internal Revenue Code of 1986, as amended, ("IRC").
- (i) Any items required to be delivered pursuant to this Agreement and any other documents or agreements referred to in this Agreement or reasonably appropriate in connection with this transaction.

5.3 Purchaser's Items at Closing. At Closing, Purchaser agrees to deliver the following items to Seller:

- (a) Payment in cash of the Purchase Price subject to adjustments and prorations as set forth herein.

- (b) Such evidence and documents as may be reasonably required by Seller and/or the Title Company evidencing the authority of the person executing the various documents on behalf of Purchaser in connection with its purchase of the Property.
- (c) Any items required to be delivered pursuant to this Agreement and any other documents or agreements referred to in this Agreement or reasonably appropriate in connection with this transaction.

ARTICLE VI. PRORATIONS AND CLOSING COSTS

6.1 Prorations. Property taxes for the current year and any prepaid rent shall be prorated at Closing.

6.2 Closing Costs. Costs of closing the transaction contemplated hereby shall be allocated between Seller and Purchaser as follows:

- (a) Seller shall pay at closing:
 - (i) the premium for the Title Policy for standard coverage;
 - (ii) Seller's prorated portion of any real property taxes;
 - (iii) any excise taxes on the transfer of the Property;
 - (iv) one-half of any escrow fees of the Title Company;
 - (v) South Lake Union Street Car LID assessment; and
 - (vi) all other costs and expenses allocated to Seller pursuant to the terms of this Agreement.
- (b) Purchaser shall pay at Closing:
 - (i) one-half of any escrow fees of the Title Company;
 - (ii) the cost of recording;
 - (iii) the premium for additional extended coverage on the Title Policy (if desired by Purchaser); and

- (iv) all other costs and expenses allocated to Purchaser pursuant to the terms of this Agreement.
- (c) Each party shall bear its own attorneys' fees and costs incurred in connection with the negotiations leading up to the execution of this Agreement and the sale of the Property and the drafting of the documents in connection with the sale.

ARTICLE VII. REPRESENTATIONS, WARRANTIES AND COVENANTS

7.1 Seller's Representations and Warranties. For the purpose of inducing Purchaser to enter into this Agreement and to consummate the transaction contemplated hereby pursuant to the terms and conditions hereof, Seller represents and warrants to Purchaser as of the date hereof and, except as otherwise set forth herein, to Purchaser as of the Closing Date as follows:

- (a) The leases now in effect or which shall be in effect at the date of the Closing comply or shall comply, with respect to Seller as the lessor thereunder, with any applicable law; and all brokerage commissions and other compensation and fees payable in connection with such leases have been fully paid or shall be fully paid by Seller prior to the Closing by Seller.
- (b) Except as discussed under Section 3.5 with regard to existing underground tanks, to the best of Seller's actual knowledge, there is no hazardous substance, petroleum, hydrocarbon, underground storage tanks or toxic materials of any kind as such terms may be described in any state, federal, or local rule, regulation, ordinance, statute, ruling, decision, or other determination ("Hazardous Substances") in, on, or about the Property, and Seller has not allowed the deposit, release, or storage of Hazardous Substances in, on, or about the Property prior to the effective date of this Agreement, and Seller shall not allow the deposit, release, or storage of Hazardous Substances in, on, or about the Property during the term of this Agreement.
- (c) Seller owns the Property and has the right to sell the Property and is not a foreign person as defined by the Foreign Investment in Real Property Tax Act, IRC Section 1445(b)(2), as amended;
- (d) Seller shall indemnify, defend and hold Purchaser harmless from and against any claims, damages, losses and liabilities arising out of a breach of these warranties.

7.2 Purchaser's Representations and Warranties. For the purpose of inducing Seller to enter into this Agreement and to consummate the transaction contemplated hereby pursuant to the terms and

conditions hereof, Purchaser represents and warrants to Seller as of the date hereof and, except as otherwise set forth herein, to Seller as of the Closing Date as follows:

- (a) Purchaser has been duly organized and is validly existing under the laws of the State of Washington.
- (b) The President of Purchaser executing this Agreement on behalf of Purchaser is authorized to bind Purchaser. Purchaser has obtained all consents, approvals, authorizations, or orders necessary to execute this Agreement and consummate this transaction, and all documents will be validly executed and delivered if executed by such President of Purchaser and will be binding upon Purchaser. The obligations of Purchaser under this Agreement constitute the legal, valid, and binding obligations of Purchaser, enforceable in accordance with their terms.
- (c) Purchaser will not sell, assign or convey any right, title or interest whatsoever in or to the Property or create or permit to exist any lien, encumbrance or charge thereon without promptly discharging the same, except as otherwise expressly provided for herein.
- (d) The financial statements delivered to Seller by Purchaser herewith accurately represent the financial condition of Purchaser as of the date of such statements. No material adverse change has occurred in the financial condition of Purchaser since the date of such financial statements. Seller agrees that any and all financial statements provided by Purchaser shall be kept confidential and used only for purposes of this Agreement and not disclosed to any third parties.

ARTICLE VIII. [Intentionally Left Blank]

ARTICLE IX. CASUALTY OR CONDEMNATION

9. Casualty or Condemnation. Seller shall immediately notify Purchaser upon learning of any material casualty to or any action, pending or threatened, to condemn all or any part of the Property. In the event of any such casualty or in the event that any such action is taken or threatened, all or any part of the Property is condemned or otherwise taken for public or private use after the date of this Agreement and before the Closing Date, Purchaser shall in its absolute discretion have the right to elect to:

- (a) terminate this Agreement by giving written notice to Seller of such termination, whereupon all Option Payments and the Option Price theretofore paid shall be returned to Purchaser and any or all rights or obligations of Seller and Purchaser under this Agreement shall terminate and this Agreement shall be of no further force or effect; or

- (b) accept the Property without abatement of the Purchase Price, in which event Seller shall assign to Purchaser, upon the Closing Date, all of Seller's right, title and interest in and to any condemnation award and any proceeds and moneys therefore received by Seller in the manner of compensation for such taking or condemnation.

ARTICLE X. DEFAULT

10. Default; Remedies.

- (a) If Purchaser fails to perform any covenant of Purchaser contained herein, Seller, may, in addition to any other remedy, terminate this Agreement and retain the Option Price and all Option Payments previously paid, and the benefit of all of Purchaser's Development Activities.
- (b) If Seller fails to perform any covenant of Seller contained herein, Purchaser may elect either to terminate this Agreement or pursue any other remedy including, but not limited to, an action for specific performance or actual damages against Seller.
- (c) If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any such action, on trial and/or appeal, shall be entitled to its reasonable attorneys' fees and related costs to be paid by the nonprevailing party as fixed by the court or adjudicating authority.

ARTICLE XI. COMMISSIONS

11. Commissions. Seller has engaged any broker/agent in connection with the subject matter of this Agreement and the sale of the Property. Seller shall pay the applicable commission in connection therewith, and Seller agrees to hold Purchaser harmless from any and all claims for commission or brokerage fees, excepting for claims arising through or on behalf of Purchaser (which claims Purchaser shall pay).

ARTICLE XII. NOTICES

12. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be given to the parties as follows:

PURCHASER:

Investco Properties Development Corporation, a Washington corporation
Scott Matthews, President
1302 Puyallup Street
Sumner, Washington 98390
Phone: (253) 863-6200
Fax: (253) 863-0460

SELLER:
Engstrom Properties LLC
c/o Steve D. Engstrom
14235 209th Avenue NE
Woodinville, Washington 98077

Any such notices shall be either (a) sent by certified mail, return receipt requested, in which case notice shall be deemed delivered three business days after deposit, postage prepaid in the U.S. mail, or (b) sent by a nationally recognized overnight courier, in which case notice shall be deemed delivered one business day after deposit with such courier; or (c) served personally, in which case notice shall be deemed given on the date of such service. The above addresses may be changed by written notice to the other party; provided that no notice of a change of address shall be effective until actual receipt of such notice. Copies of notices are for informational purposes only, and a failure to give or receive copies of any notice shall not be deemed a failure to give notice.

ARTICLE XIII. ASSIGNMENT

13. Assignment. This Agreement is not generally assignable by Purchaser or Seller without Seller's or Purchaser's prior written consent, which consent shall not be unreasonably withheld; provided, however, that Purchaser shall be able to assign this Agreement to a partnership or limited liability company in which Purchaser owns and continues to own through the Closing Date at least 51% of the ownership interests without the consent of Seller and upon written notice to Seller.

ARTICLE XIV. NON-MERGER

14. Non-Merger. The terms and provisions of this Agreement shall not merge in, but shall survive, the closing of the transactions contemplated herein and the deeds to be delivered hereto.

ARTICLE XV. AMENDMENT

15. Amendment. This agreement cannot be amended except by a further agreement in writing executed by all parties to this Agreement.

ARTICLE XVI. ENTIRE AGREEMENT

16. Entire Agreement. This Agreement supersedes any prior agreement between the parties and contains the entire agreement of the parties concerning the transaction described herein. No other agreement, statement, representation or promise made by any party that is not in writing and signed by all parties to this Agreement after the date hereof shall be of any effect whatsoever.

ARTICLE XVII. PERFORMANCE

17. Performance. Time is of the essence of this Agreement. In the event the date for performance of any term or condition hereof falls on a weekend or legal holiday, the date for performance shall automatically be extended to the next succeeding business day. No waiver or consent to any breach or other default in the performance of any of the terms of this Agreement shall be deemed to constitute a waiver of any subsequent breach or default of the same or similar nature.

ARTICLE XVIII. INTERPRETATION

18. Interpretation. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Washington. Captions in this Agreement are inserted only as a matter of convenience and for reference, and in no way describe, define or limit the intent of this Agreement and are not to be used in interpreting this Agreement.

ARTICLE XIX. PARTIAL INVALIDITY

19. Partial Invalidity. If any part of this Agreement is judged invalid by a court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall continue in full force and effect.

ARTICLE XX. SUCCESSORS BOUND

20. Successors Bound. The provisions of this Agreement shall extend to, bind and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns.

ARTICLE XXI. WAIVER

21. Waiver. Each party hereto reserves the right to waive, in whole or in part, any provision hereof which is for the sole benefit of that party.

ARTICLE XXII. COUNTERPART

22. Counterparts. This agreement may be executed in more than one counterpart, each of which shall be deemed an original.

SELLER:
Engstrom Properties LLC

By: Steve D Engstrom
Steve Engstrom, Manager 11-20-06

BUYER:
Investco Properties Development Corporation

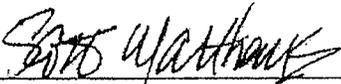
By: 
Scott Matthews, President

EXHIBIT A

LEGAL DESCRIPTION

The Land is located in King County, Washington, and is legally described as follows:

Lot 11, Block 97, D.T. Denny's 5th Addition to North Seattle, according to the plat thereof recorded in Volume 1 of Plats, page 202, in King County, Washington;

EXCEPT the westerly 12 feet thereof condemned in King County Superior Court Cause No. 47549 for the widening of Westlake Avenue North, as provided by Ordinance No. 12023 of the City of Seattle.

The parties authorize the designated escrow agent to correct the legal description entered if erroneous or incomplete.

EXHIBIT B

PERMITTED EXCEPTIONS TO TITLE

1. Lease Agreement between Seller as Landlord and Alki Sports LLC as Tenant dated May 1, 2006.

2. Option and Site Lease Agreement dated January 8, 2001 between Engstrom/Lambert Real Estate Partnership as Landlord and Qwest Wireless, L.L.C. (now Cellco Partnership d/b/a Verizon Wireless or one of its affiliates (per a Consent to Assignment of Agreement dated December 9, 2004) as Tenant. [Landlord's interest was assigned to Athletic Supply Company, Inc. pursuant to an Assignment and Assumption of Lease Agreement dated May 13, 2005, and in turn assigned to Seller pursuant to an Assignment and Assumption of Lease Agreement dated May 1, 2006.]

APPENDIX B

**ASSIGNMENT
OF
REAL ESTATE PURCHASE OPTION AGREEMENT**

THIS ASSIGNMENT OF REAL ESTATE PURCHASE OPTION AGREEMENT (the "Agreement") is entered into and effective as of the 8th day of June 2007 by and between Investco Properties Development Corporation, a Washington corporation ("Assignor") and **224 Westlake L.L.C.**, a Washington limited liability company ("Assignee").

RECITALS

A. Assignor, as "Purchaser" and Engstrom Properties, LLC, as "Seller" are parties to that certain Real Estate Purchase Option Agreement dated November 20, 2006 (the "Purchase Agreement") with respect to the Athletic Supply Building located at 224 Westlake Avenue North, Seattle, Washington.

B. Assignor desires to assign all of its right, title and interest under the Purchase Agreement to Assignee and Assignee desires to accept the Assignment of the Purchase Agreement pursuant to the terms, conditions and obligations of this Agreement.

C. Pursuant to Section 13 of the Purchase Agreement, Purchaser may assign the Purchase Agreement to a limited liability company in which Purchaser owns and continues to own through the Closing Date at least 51% of the ownership interests.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions stated herein, the parties agree as follows:

AGREEMENT

1. Assignor and Assignee hereby certify that at least 51% of the ownership interests of Assignee are owned by the same parties which own the shares of Assignor.

2. Assignor hereby transfers and assigns all of its right, title and interest in the Purchase Agreement to Assignee subject to all of the terms and conditions of the Purchase Agreement, including without limitation, Assignor's obligations with respect to the Option Payments.

2. Assignee hereby accepts the assignment and transfer of all of Assignor's right, title and interest in and to the Purchase Agreement and agrees to perform all of Assignor's obligations under the Purchase Agreement.

EXECUTED ON FOLLOWING PAGE

DATED as of the day and year first above written.

ASSIGNOR:

Investco Properties Development Corporation

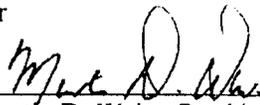
By: 

Scott Matthews, President

ASSIGNEE:

224 Westlake L.L.C.

By: Investco Financial Corporation
Its: Manager

By: 

Martin D. Weiss, President

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

224 WESTLAKE, LLC, a Washington limited
liability company

Plaintiff,

v.

ENGSTROM PROPERTIES, LLC, a
Washington limited liability company,

Defendant.

NO. 09-2-13811-7 SEA

**PLAINTIFF'S ~~PROPOSED~~ *RFM*
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came on regularly for trial without a jury on October 11, 2010 before the Honorable Richard F. McDermott. Plaintiff appeared through its counsel, Christopher I. Brain and Adrienne D. McEntee of Tousley Brain Stephens PLLC. Defendant appeared through its counsel, Sylvia Luppert of Reaugh Oettinger & Luppert PS. Having heard the testimony of the witnesses, reviewed the evidence, submitted and heard the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

The Real Estate Option Agreement

1. On or about November 20, 2006, Engstrom Properties, LLC ("Engstrom") and Investco Properties Development Corporation ("IPDC") entered into a Real Estate Option

ORIGINAL

1 Agreement (the "Option Agreement") for the purchase of a building located at 224 Westlake
2 Avenue in Seattle, Washington (the "Property").

3 2. The Option Agreement authorized IPDC to assign the Option Agreement to an
4 entity in which IPDC owned 51 percent of the ownership interests. It also allowed IPDC to
5 assign the Option Agreement upon written consent to any other entity, which provision
6 prohibited Engstrom from unreasonably withholding consent to such assignment.

7 3. To maintain the option to purchase the Property, IPDC or its assignee was
8 required to make eight quarterly payments to Engstrom, totaling \$600,000, the last payment
9 being due October 1, 2008. If, after October 1, 2008, IPDC or its assignee elected to exercise
10 the option, it could apply the option payments at closing to the Property's \$4,550,000 purchase
11 price. The Option Agreement authorized IPDC or its assignee to conduct feasibility studies and
12 other studies regarding future development during the option period.

13 4. In Section 3.5 of the Option Agreement, Engstrom acknowledged that the
14 Property was potentially contaminated by reason of underground fuel storage tanks located
15 below the basement floor of the building and assumed the exclusive responsibility for clean up
16 of the hazardous substances. Engstrom further agreed that IPDC or its assignee could, at its
17 own cost and expense, perform independent confirmatory testing to insure that the Property
18 was indeed clean of all hazardous substances. Engstrom agreed to provide written notice of its
19 commencement of tank removal and clean up work, which also required independently written
20 confirmation of compliance with local and national hazardous substances laws.

21 5. The right to perform confirmatory testing, Engstrom's agreement to provide
22 written notice of clean up work, and Engstrom's written confirmation of compliance with
23 hazardous substance laws, were conditions precedent to IPDC's, or its assignee's, obligation to
24 close. Moreover, Engstrom agreed to extend the closing date as "reasonably necessary" to
25 complete the tank removal and testing by both parties.

26 ///

1 **Assignment and Exercise of the Option**

2 6. IPDC assigned its rights to 224 Westlake, LLC ("224 Westlake") on June 18,
3 2007 (the "Assignment"). And on October 23, 2008, after all option payments in the total
4 amount of \$600,000 had been paid to Engstrom, 224 Westlake's Manager, Investco Financial
5 Corporation ("IFC"), provided Engstrom with written notice of the Assignment.

6 7. IFC also gave Engstrom written notice that 224 Westlake intended to exercise
7 the option and close by March 1, 2009, the closing date provided for in Section 5.1 of the
8 Option Agreement. March 1, 2009 was a Sunday. The actual closing date described in Section
9 5.1 would have been Monday, March 2, 2009. \

10 8. By the time IFC exercised the option on behalf of 224 Westlake on October 23,
11 2008, IPDC and 224 Westlake had not only paid \$600,000 in option deposits, but had also paid
12 \$ 437,354.15 for due diligence, feasibility plans and permitting expenses in anticipation of
13 purchasing and redeveloping the Property.

14 9. Engstrom did not object to, or ask questions about, the Assignment. Engstrom
15 did not complain about the Assignment in its Answer, filed on April 30, 2009. The first time
16 Engstrom questioned the Assignment's propriety was in August 2009, when Engstrom moved
17 for summary judgment that the Assignment was void.

18 10. Steve Engstrom declared that his objection to the Assignment was based on
19 concerns with 224 Westlake's financial ability to close. But Engstrom at no time IPDC or 224
20 Westlake, or its principals, ^{for RDM} requested from any financial information related to their ability to close. In
21 addition, he had already received all \$600,000 in option payments from IPDC and 224
22 Westlake when Engstrom was notified of the Assignment. A reasonably prudent person in
23 Engstrom's position, having received all monies to which it was entitled under the Option
24 Agreement, would not have withheld consent to the Assignment. Engstrom's position lacks
25 credibility.

26 ///

1 **The Environmental Work**

2 **A. Engstrom's First Excavation Promised a Clean Site**

3 11. In November 2008, Engstrom hired Budget Tank Removal to excavate and
4 remove underground tanks on the Property. Shortly thereafter, Engstrom terminated Budget
5 after one of the tanks was ruptured causing diesel to spill into the soil. Engstrom next retained
6 Spooner Construction to remove the tanks, and RK Environmental to assess the completeness
7 of the work.

8 12. At the time of the initial excavation in November 2008, 224 Westlake's
9 environmental consultant, the Riley Group, was allowed access to the site and took some soil
10 samples which indicated the soil was contaminated.

11 13. Engstrom subsequently commenced additional "clean up activities," and
12 performed further excavation of the site. When Engstrom felt clean up was complete,
13 Engstrom poured a concrete slab over the area. Engstrom did not notify 224 Westlake in
14 writing that it was commencing clean up activities, as required by Section 3.5 of the Option
15 Agreement. Accordingly, 224 Westlake's consultant, the Riley Group, was unable to take full
16 soil samples after the tank removal and prior to replacement of the contaminated soil and
17 concrete floor.

18 14. Afterward, Engstrom represented that the site was clean, and its consultant RK
19 Environmental issued a report on December 8, 2008, which report Engstrom expected 224
20 Westlake to accept at face value.

21 **B. The Riley Group's Confirmatory Testing Found Contamination**

22 15. 224 Westlake did not accept RK Environmental's findings, and instead
23 exercised its right pursuant to Section 3.5 of the Option Agreement to "contract for any
24 additional environmental testing, at its own cost." 224 Westlake retained the Riley Group as its
25 environmental consultant. Because of weather complications, and the time needed to arrange
26 for a drill rig to drill through the newly-laid concrete slab for testing, the Riley Group was

1 unable to take samples until January 14, 2009. Those samples revealed contamination levels
2 above the state-required cleanup levels.

3 16. 224 Westlake informed Engstrom of Riley's findings, and on or about January
4 23, 2009, demanded that Engstrom complete the cleanup as required by Section 3.5 of the
5 Option Agreement, and reminded Engstrom that the Closing Date should be reasonably
6 extended to accommodate the required cleanup.

7 **C. Pinnacle GeoSciences Agrees with the Riley Group's Findings**

8 17. On or about January 16, 2009, after it was notified of the Riley Group's
9 findings, Engstrom retained Pinnacle GeoSciences ("Pinnacle"). Pinnacle's February 4, 2009
10 report, rendered 19 days later, confirmed the Riley Group's determination that the Property
11 contained high levels of diesel and heavy oils. The Pinnacle report recommended further clean
12 up would be cost prohibitive, concluding that if 224 Westlake redeveloped the Property in the
13 future, 224 Westlake could deal with the remaining contamination at that time. Engstrom
14 initially agreed with the Pinnacle report recommendations.

15 18. Engstrom's position was unacceptable to 224 Westlake for several reasons.
16 First, the Option Agreement provided that Engstrom alone was responsible for clean up.
17 Second, 224 Westlake feared that the State would require 224 Westlake to perform additional
18 clean-up work in the future. Third, it would ^{RJM} ~~not~~ be very difficult to obtain construction
19 financing for the remodel project if the site was contaminated. Fourth, the existence of
20 hazardous material would chill any future sale of the Property.

21 19. 224 Westlake's fears were well-grounded. Under a new law that took effect
22 June 2010, and is the first of its kind in the U.S., sellers of commercial real estate in
23 Washington State are now required to disclose a wide range of "environmental conditions" to
24 prospective buyers, exposing them to new liabilities. The law (SB 6749), which is based on
25 disclosures required for residential properties and unanimously passed by the State House and
26 Senate, requires sellers to fill out a new disclosure form (Form 17 Commercial) before closing

1 a transaction involving commercial property. The broad environmental disclosure requirements
2 in the law could compel sellers to ensure that they disclose even minor past contamination, and
3 risk rescission for failure to do so.

4 **D. Engstrom's Secretive Second Excavation Also Promised a Clean Site**

5 20. After advising Engstrom that it was unacceptable to 224 Westlake that
6 contaminants remain on site, 224 Westlake heard nothing from Engstrom, even though closing
7 was fast approaching. Accordingly, by letter dated February 9, 2009, 224 Westlake demanded
8 "complete clean up," and requested that an addendum be executed so that a reasonable closing
9 date could be set to allow completion and subsequent confirmatory testing by 224 Westlake.

10 21. Engstrom did not respond to the February 9, 2009 letter. With the March 2,
11 2009 closing date just weeks away, 224 Westlake again wrote Engstrom on February 20, 2009,
12 proposing a 60-day extension to allow completion of the clean up and confirmatory testing.

13 22. In its first response through counsel on February 23, 2009, Engstrom disclosed
14 that it had done additional work at the building. Specifically, Engstrom had retained Spooner
15 Construction and RK Environmental for a second time to excavate and conduct testing. Like
16 Engstrom's November/December 2008 clean-up activities, Engstrom again failed to notify 224
17 Westlake that it was performing clean-up work, as required under Section 3.5.

18 23. Counsel ^{for plaintiff Ron} did not have a copy of the new report that allegedly indicated that the
19 site was clean. The only documentation 224 Westlake received was a memorandum from RK
20 Environmental dated February 25, 2009 and delivered on February 26, 2009, which RK
21 Environmental has described as simply a "data dump."

22 24. RK Environmental's memorandum, which was comprised only of preliminary
23 data, did not constitute written confirmation of the completion of the clean up, as required by
24 the Option Agreement. Accordingly, RK Environmental's memorandum did not resolve 224
25 Westlake's contamination concerns.

26 ///

1 25. 224 Westlake immediately gave notice that it intended to perform additional
2 confirmatory testing and that a reasonable continuance of the March 2, 2009 closing date would
3 be required to accomplish the testing.

4 26. Engstrom responded to the request on Friday, February 27, 2009 with a
5 proposed amendment extending the closing date four days to Friday, March 6, 2009. This
6 period of time was insufficient for 224 Westlake to arrange and perform independent testing,
7 obtain the necessary analysis and report, and prepare to close. Consultant Stephen Perrigo
8 testified that scheduling for drilling could take up to two weeks. And consultant Roy Kuroiwa
9 testified that a two week period was standard to obtain final lab results. Accordingly, 224
10 Westlake requested a reasonable extension of 30 days — to March 31, 2009 — in order to
11 properly arrange and perform confirmatory testing.

12 27. Despite 224 Westlake's objections, Engstrom insisted on a March 6, 2009
13 closing. Engstrom's limited extension by only four days, when the process for confirmatory
14 testing could take up to four weeks, was not reasonable.

15 28. On March 6, 2009, 224 Westlake was financially able to close the deal. With
16 \$4,117,579.18 in its bank account, 224 Westlake more than covered the \$3,950,000.00 balance
17 required to close. The deal did not close because 224 Westlake was not able to perform
18 confirmatory testing. *by the March 6 date demanded by Engstrom. RSM*

19 29. The State issued a No Further Action on April 27, 2009.

20 Procedural History

21 30. On August 27, 2009, Engstrom moved for summary judgment that the
22 Assignment from IPDC to 224 Westlake was void, and that as a result, 224 Westlake had no
23 standing to bring its lawsuit. Engstrom stated that its objection regarding the Assignment —
24 raised several months after 224 Westlake filed this lawsuit — was based on a concern with 224
25 Westlake's financial ability to close the sale.

26 ///

1 under the Option Agreement, would not have withheld consent to the Assignment. Engstrom's
2 refusal to consent to the Assignment is unreasonable.

3 **Breach of Contract**

4 5. Section 3.5 of the Option Agreement requires Engstrom to remove two
5 underground storage tanks on the Property, and on or before Closing, to "clean up of the
6 Property required by any applicable state, federal, or local rule, regulation, ordinance, statute,
7 ruling, decision, or other determination relating to Hazardous Substance."

8 6. Section 3.5 of the Option Agreement requires Engstrom "to notify Purchaser in
9 writing at the commencement of such tank removal and clean up work"

10 7. Section 3.5 of the Option Agreement requires Engstrom to "provide Purchaser
11 with written notice of the completion of such tank removal and clean up."

12 8. Section 3.5 of the Option Agreement further provides: "[T]he removal of the
13 tanks and completion of any required clean up of the Property is a condition to Purchaser's
14 obligation to Close...."

15 9. Pursuant to Section 3.5 of the Option Agreement, "Purchaser may ... contract
16 for any additional environmental testing, at its own cost, Purchaser may deem necessary or
17 appropriate...."

18 10. In order for the Purchaser (224 Westlake) to exercise its right, Section 3.5 of the
19 Option Agreement provides: "The parties further agree that the Closing Date shall be extended
20 as is reasonably necessary to complete such tank removal, clean up and permitted confirmatory
21 testing."

22 11. Engstrom did not provide 224 Westlake with written notice that it had
23 commenced clean up activities when it arranged for additional excavation in
24 November/December 2008, and again in January 2009.

25 12. Engstrom did not provide 224 Westlake with written notice that it had
26 completed clean up activities.

1 13. Engstrom did not agree to reasonably extend the Closing Date to accommodate
2 224 Westlake's right to perform confirmatory testing.

3 14. "A breach or non-performance of a promise by one party to a bilateral contract,
4 so material as to justify a refusal of the other party to perform a contractual duty, discharges
5 that duty." *Jacks v. Blazer*, 39 Wn.2d 277, 235 P.2d 187 (1951). A material breach sufficient to
6 allow rescission of a contract is one that "substantially defeats the purpose of the contract."
7 *Mitchell v. Straith*, 40 Wn. App. 405, 410, 698 P.2d 609 (1985). In determining whether a
8 breach of some, but not all, of the contract terms is substantial, rather than trivial or
9 inconsequential, the fact-finder may properly consider whether the injured party would have
10 been less willing to enter the contract without those terms. *Campbell v. Hauser Lumber Co.*,
11 147 Wash. 140, 265 P. 468 (1928).

12 15. Engstrom's failure to provide 224 Westlake with written notice of its
13 commencement and completion of clean up activities, constitute material breaches of the
14 Option Agreement. Engstrom's failure to reasonably extend the Closing Date to allow 224
15 Westlake to exercise its right to perform confirmatory testing also constitutes a material breach,
16 which breach discharged 224 Westlake's duty to close.

17 **Damages**

18 16. 224 Westlake is awarded a judgment for damages which reflect the \$600,000 in
19 option payments 224 Westlake made to Engstrom, and the \$ 437,354.15 that 224 Westlake
20 spent on feasibility and other development expenses during the option period.

21 17. 224 Westlake is the prevailing party in this action, and shall be awarded attorney
22 fees and costs pursuant to Section 10(c) of the Option Agreement.

23 DATED this 20th day of December, 2010.

24 
25 THE HONORABLE RICHARD F. McDERMOTT
26

1 Presented by:

2 TOUSLEY BRAIN STEPHENS PLLC

3
4 By:

5 Christopher I. Brain, WSBA #5054
6 Adrienne D. McEntee, WSBA #34061
7 *Attorneys for Plaintiff*

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APPENDIX D

1 THE HONORABLE RICHARD F. McDERMOTT
2 Noted for Hearing: January 19, 2011 at 10:30 a.m.
3 With Oral Argument
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6

7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 IN AND FOR KING COUNTY

9 224 WESTLAKE, LLC, a Washington
10 limited liability company

11 Plaintiff,

12 v.

13 ENGSTROM PROPERTIES, LLC, a
14 Washington limited liability company,

15 Defendant.

NO. 09-2-13811-7 SEA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW CONCERNING
PREJUDGMENT INTEREST,
ATTORNEYS' FEES AND COSTS**

16 This matter came on regularly for trial without a jury on October 11, 12, 13, 14, and 18,
17 2010, before the Honorable Richard F. McDermott. Plaintiff appeared through its counsel,
18 Christopher I. Brain and Adrienne D. McEntee of Tousley Brain Stephens PLLC ("TBS").
19 Defendant appeared through its counsel, Sylvia Luppert of Reaugh Oettinger & Luppert PS.
20 Having heard the testimony of the witnesses, reviewed the evidence, the legal memoranda and
21 pleadings submitted by the parties, and heard the arguments of counsel, the Court entered
22 Plaintiff's Findings of Fact and Conclusions of Law on December 20, 2010 (the "December 20
23 Findings") and requested Plaintiff to submit additional Findings of Fact and Conclusion of Law
24 with respect to prejudgment interest and attorneys' fees and costs. The Court then reviewed the
25 pleadings filed by the parties with respect thereto and based on the foregoing, the Court enters
26 the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
CONCERNING PREJUDGMENT INTEREST, ATTORNEYS'
FEES AND COSTS - 1**

4878/001/239461.2

ORIGINAL

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

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I. FINDINGS OF FACT

1. **Prejudgment Interest**

1.1 By entry of the December 20 Findings, the Court found that Defendant had materially breached the Real Estate Option Agreement ("Option Agreement") and that the Plaintiff was the prevailing party in this litigation, all as set forth in the December 20 Findings.

1.2 The Option Agreement expressly granted Plaintiff the "Right To Develop the Property" during the option period, which included the right to conduct inspections, analyses, tests, and to prepare plans, drawings and designs, and conduct feasibility studies and other studies regarding future development. At trial, Plaintiff established that it paid \$436,310.00 in due diligence and feasibility work. The December 20 Findings state that the amount is \$437,354.15, which is hereby corrected to be \$436,310.00.

1.3 The Court finds that Plaintiff proved all damages with exactness, and that all damages constitute sums certain and are therefore "liquidated." The Court admitted approximately 170 exhibits, comprised of receipts and cancelled checks, which establish not only the \$600,000.00 in option payments made to Defendant, but also prove that Plaintiff, pursuant to Section 3.2 of the Option Agreement, incurred and paid individual invoices totaling \$436,310.00 in development expenses for architects, engineers, surveyors, traffic consultants, permits, and site plans, among other development-related expenses. Defendant offered no contradictory evidence.

2. **Attorneys' Fees and Costs**

2.1 In support of Plaintiff's request for an award of attorneys' fees and costs, Plaintiff submitted the Declaration of Christopher I. Brain Regarding Plaintiff's Damages and Attorneys' Fees, the Supplemental Declaration of Christopher I. Brain Regarding Attorneys' Fees and Costs, and the Reply Declaration of Christopher I. Brain Re Attorneys' Fees and Costs (the "Brain Declarations"), as well as the pleadings submitted by both parties with respect thereto. The Court has thoroughly reviewed these pleadings not only with respect to the

1 prejudgment interest issue but also with respect to the attorneys' fees and costs issue. The
2 Court also reviewed *in camera* the Detail Fee Transaction File which set forth the times and
3 work performed by each billing attorney/paralegal commencing February 9, 2009 through
4 January 14, 2011.

5 2.2 The fee agreement by and between Plaintiff and TBS can best be described as a
6 modified contingency fee agreement whereby TBS agreed to be paid from January 1, 2010
7 forward at the hourly rate equal to one-half of its standard hourly billing rate plus all costs
8 incurred. If Plaintiff did not prevail, fees would remain at the 50 percent rate. However, if
9 Plaintiff prevailed at trial, the TBS fees would be "trued up" to its full hourly rate and TBS
10 would recover 15 percent of the amount of the award, including prejudgment interest, exclusive
11 of any award for attorneys' fees and costs (the "Fee Agreement").

12 2.3 The Court finds that this Fee Agreement is reasonable and reasonably allocated
13 the trial risk and reward between Plaintiff and TBS.

14 2.4 The Court has examined the full hourly rates for TBS attorneys and paralegals
15 involved and their relative experience and finds that the rates are reasonable.

16 2.5 The Court has also examined Exhibits 3, 4, 5, 6 and 7 with respect to the tasks
17 performed and given the complexity and number of factual and legal issues raised in this case,
18 the length of the dispute, the amount of briefing, and the results obtained, the Court finds that
19 Plaintiff's counsel is entitled to a lodestar multiplier as set forth in paragraph 4 of these
20 Findings.

21 **3. Calculation of Prejudgment Interest**

22 The Court finds that prejudgment interest should commence from the date of default,
23 March 6, 2009, at the rate of \$340.70 per day for a total of \$233,039.00 in prejudgment interest
24 through January 19, 2011.

25 ///

26 ///

1 465 (1984). See also *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 851, 792 P.2d 142
2 (1990). Had Defendant performed as required under the Option Agreement, Plaintiff would
3 have had the benefit of its investment. The Court therefore concludes that the \$1,036,310.00 in
4 damages naturally accrued from Defendant's breaches. They were foreseeable because the
5 parties expressly agreed that the purchaser would have the right to conduct development
6 activities during the option period.

7 2. **Prejudgment Interest:** The prevailing party in a lawsuit is generally entitled to
8 an award of prejudgment interest on liquidated damages. *Hadley v. Maxwell*, 120 Wn. App.
9 137, 141, 84 P.3d 286 (2004). A liquidated claim is one where the evidence furnishes data that,
10 if believed, makes it possible to compute the amount with exactness, without reliance on
11 opinion or discretion. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).
12 At trial, Plaintiff established \$1,036,310.00 in damages through more than 170 exhibits
13 comprised of receipts and cancelled checks. Accordingly, the Court concludes that the Plaintiff
14 is entitled to prejudgment interest on the full \$1,036,310.00, calculated from the date of default,
15 March 6, 2009.

16 3. **Attorneys' Fees and Costs:** Attorney fees and costs may be awarded when
17 authorized by a contract, a statute, or a recognized ground in equity. *Kaintz v. PLG, Inc.*, 147
18 Wn. App. 782, 785, 197 P.3d 710 (2008); see also RCW 4.84.330. Section 10(c) of the Option
19 Agreement provides that the prevailing party shall be awarded attorneys' fees and costs.
20 Because Plaintiff is the prevailing party in this action, the Court concludes that Plaintiff shall be
21 awarded its attorneys' fees and costs pursuant to the lodestar method based on a modified
22 contingency fee agreement using the damages award, including prejudgment interest, but
23 exclusive of any award for attorneys' fees and costs. Given the complexity and number of
24 factual and legal issues raised in this case, the length of the dispute, the amount of briefing, and
25 the results obtained, the fees and costs incurred in this matter are reasonable for the services
26 performed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
CONCERNING PREJUDGMENT INTEREST, ATTORNEYS'
FEES AND COSTS - 5

4878/001/239461.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

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4. **Judgment:** Plaintiff is entitled to a judgment in the total amount of

\$ 1,582,175.²⁴

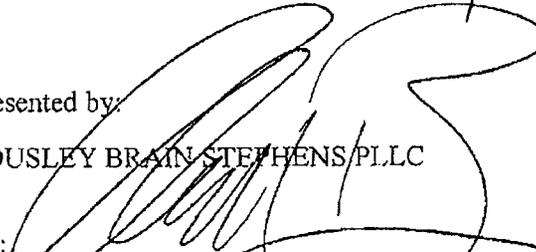
DATED this 18th day of February, 2011.


THE HONORABLE RICHARD F. McDERMOTT

Presented by:

TOUSLEY BRAIN STEPHENS PLLC

By:


Christopher I. Brain, WSBA #5054
Adrienne D. McEntee, WSBA #34061
Attorneys for Plaintiff

APPENDIX E

1 THE HONORABLE RICHARD F. McDERMOTT
2 Noted for Hearing: January 19, 2011 at 10:30 a.m.
3 With Oral Argument
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6

7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 IN AND FOR KING COUNTY

9 224 WESTLAKE, LLC, a Washington limited
10 liability company

11 Plaintiff,

12 v.

13 ENGSTROM PROPERTIES, LLC, a
14 Washington limited liability company,

15 Defendant.

NO. 09-2-13811-7 SEA

JUDGMENT

16 **I. JUDGMENT SUMMARY**

17 Judgment for Breach of Contract: \$ 1,036,310.00

18 Judgment for Prejudgment Interest: \$ 233,039.00

19 Judgment for Attorneys' Fees and Costs:

\$ 312,826.²⁴

20 TOTAL JUDGMENT

\$ 1,582,175.²⁴ *RJM*

21 Judgment Creditor:

224 Westlake, LLC

23 Attorney for Judgment Creditor:

Christopher I. Brain
Tousley Brain Stephens PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101-4416
206-682-5600

24 Judgment Debtor:

Engstrom Properties, LLC

25 Attorneys for Judgment Debtor:

Sylvia Luppert
Reaugh Oettinger & Luppert, P.S.
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1625
206-264-0665

1 **II. JUDGMENT**

2 On December 21, 2010, the Court entered Plaintiff's proposed Findings of Fact and
3 Conclusions of Law, with modifications. In addition, the Court ruled that Plaintiff is entitled to
4 prejudgment interest and attorneys' fees and costs, and contemporaneously with this Judgment
5 enters Plaintiff's proposed Findings of Fact and Conclusions of Law Concerning Prejudgment
6 Interest, Fees and Costs. Based on the Court's Findings and Conclusions, the Court enters a
7 Judgment against Defendant Engstrom Properties, LLC as follows:

8 1. A judgment in the amount of \$1,036,310.00 for damages resulting from a breach
9 of contract;

10 2. A judgment in the amount of \$233,039.00 for prejudgment interest through
11 January 19, 2011; and

12 3. A judgment in the amount of \$ 312,9826.²⁴ for reasonable attorneys'
13 fees and costs;

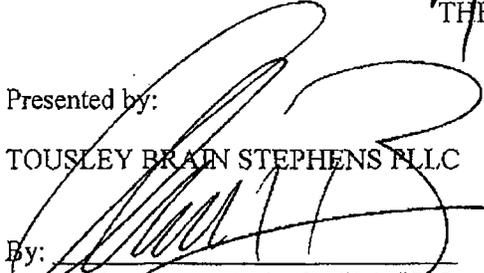
14 4. The total judgment, therefore, is in the amount of \$ 1,582,175.²⁴
15 which shall bear interest at the rate of 12 percent per annum from January 20, 2011 until paid.

16
17 DONE IN OPEN COURT this 18th day of February, 2011.

18 
19 THE HONORABLE RICHARD F. McDERMOTT

20
21 Presented by:

22 TOUSLEY BRAIN STEPHENS PLLC

23
24 By: 

25 Christopher I. Brain, WSBA #5054
26 Adrienne D. McEntee, WSBA #34061
Attorneys for Plaintiff