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No. 68547-3-1

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

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COMMONWEALTH LAND TITLE INSURANCE COMPANY, a  
Nebraska Insurance Company, and TRANSNATION TITLE  
INSURANCE COMPANY, a Nebraska Insurance Company,

Appellants,

v.

DALE ALAN LAND DEVELOPMENT CO., LLC, a Washington limited  
liability company,

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

In 2008, Soundbuilt and Commonwealth entered a fully executed settlement agreement that resolved all of Soundbuilt's claims in this case. As part of this deal, Soundbuilt assigned to Commonwealth its claims and interests in this lawsuit and was substituted out as a party. Three years later, Soundbuilt reappeared in this case, and under the guise of a "motion to enforce", it argued that it was entitled to a summary finding that Commonwealth had breached the settlement agreement. It did so without asserting any claim against Commonwealth that Commonwealth could investigate and defend. Soundbuilt's actions were without legal basis and contrary to the express purpose of a settlement, which is to ensure finality in litigation. If Soundbuilt believed Commonwealth was in breach of the settlement agreement, its proper course of action was to bring a breach of contract claim to allow for the appropriate exposition of both sides' claims and defenses. There is no dispute that this did not happen here.

In response, Soundbuilt overstates its rights and interests in this case to claim that it is still a party, and it relies on an inapposite civil rule as the basis for its actions. But simply because Soundbuilt may believe that it has been wronged – which Commonwealth disputes – does not excuse it from abiding by the basic principles of civil procedure. This is

especially the case here, where Soundbuilt's actions have prevented Commonwealth from raising its own claims and defenses in the manner expressly provided for under the rules. On these grounds, Commonwealth respectfully requests that the Court reverse the trial court's order and judgment.

## **II. ARGUMENT**

In its opening brief, Commonwealth established multiple bases supporting reversal of the trial court's order. First, by virtue of its assignment and substitution, Soundbuilt was not a party and could not seek relief in this case. Second, even assuming Soundbuilt were a party, it could not seek a finding of breach without first bringing a breach of contract claim. Nor could it use CR 2A or a "motion to enforce" for this purpose. Third, because this case was pending on appeal, under RAP 7.2, the trial court was without jurisdiction to enter its order. And, notwithstanding the above, the trial court's award of late fees, default interest and attorneys' fees was contrary to the terms of the Settlement Agreement and in error.

In its response, Soundbuilt does not dispute that a nonparty cannot seek relief in an action. Instead, it argues that it somehow remained a party to this case, despite the fact that it had settled and assigned away all of its claims and interests and was substituted out as a party years ago. It

also does not dispute that it did not file a claim for breach, instead claiming it could seek its requested relief under CR 2A. Its arguments rest on a fundamental misapplication of this rule. But most significantly, Soundbuilt cannot reasonably dispute that, had it brought its claims properly and afforded Commonwealth an opportunity to defend against them fairly, the outcome of this litigation could have been entirely different. On these grounds, reversal is proper.

**A. The Trial Court Erred in Allowing Soundbuilt to File Motions and Seek Relief in this Case Years after Its Assignment and Substitution Out of this Action.**

Soundbuilt does not dispute that it needed to be a party to this case to bring its Motion to Enforce. Instead, it mischaracterizes both the extent of its assignment under the Settlement Agreement and the effect of the trial court's order substituting it out of this case to argue that it remained a party. The record establishes that this is not the case. As a nonparty, Soundbuilt could not seek relief in this action. *See River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (prospective intervenor's motion denied because he was not a party).<sup>1</sup> The trial court erred in allowing it to do so.

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<sup>1</sup> Soundbuilt attempts to distinguish this case, Resp. Br. at 34, but *Miggins* only demonstrates that, as a nonparty, Soundbuilt was not entitled to move for affirmative relief in this case. 143 Wn.2d at 80. Soundbuilt offers no contrary authority. That Soundbuilt was once a party is a distinction without difference.

Soundbuilt now suggests that it assigned only its interest in the “lis pendens”<sup>2</sup>, and retained the right to “certain claims” in this case. Resp. Br. at 32-33. But, on the face of the Settlement Agreement, what Soundbuilt undisputedly assigned was the full extent of its “right, title and interest” to all of its claims in this lawsuit. CP 39 (¶ 5.2) (“Upon deposit of the \$5,000,000.00 . . . the right, title and interest of [Soundbuilt] in the PSA, the Lawsuit and the lis pendens shall transfer to Commonwealth”) (emphasis added). After signing the Agreement, Soundbuilt retained no claims or interests in this case.<sup>3</sup> It assigned them all to Commonwealth. *Id.*; see also *Puget Sound Nat’l Bank v. Dep’t of Revenue*, 123 Wn.2d 284, 292-93, 868 P.2d 127 (1994) (“an assignment carries with it the rights and liabilities as identified in the assigned contract”; the “assignee acquires whatever rights the assignor possessed prior to the assignment”).

Soundbuilt attempts to distinguish Commonwealth’s authority on assignments on the ground that these cases did not arise in the context of settlement enforcement. Resp. Br. at 33-34. Its argument wholly misses

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<sup>2</sup> Soundbuilt recorded this lis pendens on the property at issue in the underlying contract repudiation action between it and DALD. CP 217 (¶ 4). On behalf of the owners of the property at issue, Commonwealth settled with Soundbuilt and resolved all of Soundbuilt’s claims. CP 38-42. Commonwealth now has all of Soundbuilt’s rights under the lis pendens, and in this case. CP 39 (¶ 5.2).

<sup>3</sup> Indeed, the only “right” Soundbuilt retained under the Settlement Agreement was to collect on three judgments that had already been entered in its favor against DALD. CP 39 (¶ 5.2). It did not retain the right to any “claims”, nor did it have any unresolved claims once it entered the Settlement Agreement.

the point. These cases stand for the general proposition that an assignee “steps into the shoes of the assignor, and has all of the rights of the assignor.” *Puget Sound*, 123 Wn.2d at 292 (quoting *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993)). After entering the Settlement Agreement, Soundbuilt was divested of its interests in this case and was no longer a party. *See Amende v. Town of Morton*, 40 Wn.2d 104, 107, 241 P.2d 445 (1952). This rule applies across the board whether or not an assignment arises in the course of a settlement agreement.

Soundbuilt also mischaracterizes the record when it claims that Commonwealth’s substitution for Soundbuilt in this litigation was only “partial.” Resp. Br. at 33. In fact, the sole right Soundbuilt retained after entry of the Substitution Order was to move the trial court “for a determination of the reasonableness of the settlement agreement between [Soundbuilt] and Commonwealth.” CP 822 (§ 4). The purpose of this reasonableness determination was to allow Commonwealth to pursue its indemnity claims against DALD/Newhall for the settlement amounts. *See, e.g.*, CP 359-64. Soundbuilt obtained a reasonableness determination, and the Newhalls challenged it in their appeal, naming Soundbuilt as a party in the *Newhall* appeal for that reason. CP 351-64. But Soundbuilt’s limited

(and fully realized) right to litigate reasonableness did not authorize its actions at issue here.<sup>4</sup>

In sum, both the Settlement Agreement and Substitution Order divested Soundbuilt of party status. Despite this, Soundbuilt reinserted itself into this case three years after its settlement. This was contrary to the terms of the Settlement Agreement and Substitution Order, as well as the policy underlying finality in settlements. Because Soundbuilt was no longer a party at the time the trial court granted it relief, reversal is required on this basis alone.

**B. The Trial Court Erred in Granting Soundbuilt Relief When Soundbuilt Failed to Properly Bring a Claim for Breach.**

1. CR 2A Is Not a Substitute for a Breach Claim.

Reversal is also required because, even if it had remained a party to this case, Soundbuilt could not prosecute a breach of contract claim under the guise of a CR 2A motion. Soundbuilt argues that its actions were authorized under this rule, but CR 2A applies only to resolve disputes as to the “existence or material terms” of a settlement agreement.

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<sup>4</sup> Soundbuilt also contends that Commonwealth’s intervention in this case somehow “insured” that Soundbuilt would remain a party to the litigation. Resp. Br. at 33. But the purpose of Commonwealth’s intervention was for the opposite reason – to resolve all of Soundbuilt’s claims and substitute in its place in this case. CP 516 (¶ 5). And this was precisely the effect of the Settlement Agreement and Substitution Order, both of which were entered after Commonwealth intervened. CP 38-42; CP 821-22.

*In re Marriage of Ferree (Ferree)*, 71 Wn. App. 35, 45, 856 P.2d 706 (1993). The scope of its application is limited to circumstances where the parties dispute whether a settlement agreement was finalized or the purport of its material terms. *Id.* at 39 (“By its terms, CR 2A applies only to agreements that satisfy two elements. First, the agreement . . . must be made by parties or attorneys ‘in respect to the proceedings in a cause’. Second, ‘the purport’ of the agreement must be disputed.”) (quoting CR 2A) (citations omitted). CR 2A cannot be used to litigate a breach of contract claim, although that is how Soundbuilt used it here.

Soundbuilt contends that parties to settlement agreements routinely “enforce” their agreements before the court that presided over the original claims, and that its actions were accordingly proper here. Resp. Br. at 27-32. But the cases it cites only illustrate the specific and limited purpose of this rule – as a tool to seek a judicial determination regarding an agreement’s existence or material terms. *See Ferree*, 71 Wn. App. at 39-45 (determining whether unrecorded settlement agreement was enforceable); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 478-82, 176 P.3d 510 (2008) (determining whether settlement agreement was unenforceable due to alleged failures during negotiation process); *Lavigne v. Green*, 106 Wn. App. 12, 16-21, 23 P.3d 515 (2001) (determining whether settlement

was enforceable when not evidenced by writing or other statements).<sup>5</sup> Unlike the circumstances in those cases, Soundbuilt did not ask the trial court to “enforce” its agreement with Commonwealth, i.e. to declare its existence or to settle a dispute about the meaning of a material term. It instead asked that Commonwealth be declared in breach. CP 336. This is conclusively outside the scope of CR 2A. *Ferree*, 71 Wn. App. at 45 (“The issue for the court was not whether the agreement was disputed in the sense that Mr. Ferree did not wish to abide by it, but rather whether the agreement was disputed in the sense that Mr. Ferree had controverted its existence or material terms.”).

Relying on the policy underlying CR 2A, Soundbuilt further contends that its motion was appropriate because the trial court that presided over the underlying litigation is in the best position to determine whether a settlement should be “enforced” under this rule. Resp. Br. at 31-32. But again, Soundbuilt did not ask the trial court to decide an issue related to enforceability, or any other issue related to the underlying litigation. Instead, three years after entering the Settlement Agreement, it

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<sup>5</sup> Soundbuilt additionally cites *Howard v. Royal Specialty Underwriting*, 121 Wn. App. 372, 377, 89 P.3d 265 (2004). Resp. Br. at 28. *Howard* addressed the question of whether a reasonableness determination should have been made in an underlying action or in a subsequent insurance bad faith case. *Id.* at 377-83. As set forth above, however, a reasonableness determination is wholly distinct from an enforcement action. This case is irrelevant to the question of the proper scope of CR 2A or to whether Soundbuilt was required to bring a claim for breach.

improperly asked the trial court to find that Commonwealth's actions before a different tribunal breached its terms. Even assuming the trial court here would be in the best position to determine this issue, this does not excuse Soundbuilt's failure to bring its claims before the court in the correct manner, viz., filing a claim for breach of contract to allow Commonwealth to fairly defend against it. At a minimum, remand is necessary to allow this to happen.<sup>6</sup>

Soundbuilt's attempt to parse out and read together sections of Washington Practice to support its arguments also fails. Resp. Br. at 31-32. When read in full, § 53:26 stands only for the proposition that a party may move to enforce a settlement agreement in a pending action, "when one party denies the existence of a settlement . . ." Tegland, 15 Wash. Prac., Civ. Proc. § 53.26 (2d ed. 2009) (emphasis added). That is not the case here. Likewise, § 53:27 simply provides that a new action may be filed when a settlement agreement is breached without a suit having been filed in the first instance. *Id.* at § 53.27. Neither section provides that a party may use CR 2A to seek a finding of breach, regardless of whether it attempts to do so in the underlying case or a new action.<sup>7</sup>

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<sup>6</sup> Because Soundbuilt is no longer a party in this case, however, reversal with leave to file a new action is the proper outcome here.

<sup>7</sup> Soundbuilt's citation to Tegland, 15 Wash. Prac., Civ. Proc. § 53.28 (2d ed. 2009) also does not support its claims. Resp. Br. at 32. This section only states

Soundbuilt could not use CR 2A or any other summary procedure to obtain its requested relief here. It was instead required to plead and litigate properly a claim for breach of contract. Any contrary holding would turn on their head the basic principles of civil procedure.

2. Commonwealth's Counterclaims Could Not Be Asserted Before the Bankruptcy Court.

Soundbuilt is also unable to rebut Commonwealth's argument that its failure to file a breach claim prevented Commonwealth from raising its valid defenses and counterclaims in a proper action. In particular, among other possible defenses, Commonwealth was precluded from raising the claim that Soundbuilt improperly reached an agreement with the Newhall bankruptcy trustee to acquire the right to dismiss the *Newhall* appeal and ensure it would receive additional settlement funds from Commonwealth ("Soundbuilt-Trustee Agreement"). Op. Br. at 18-19.<sup>8</sup>

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that if a party repudiates a settlement agreement after dismissal, the party seeking to enforce the agreement may do so in the original action after moving to vacate the dismissal under CR 60 (b)(3). These circumstances are not present here. See *Brothers v. Public School Employees of Wash.*, 88 Wn. App. 398, 407, 945 P.2d 208 (1997) ("A contract is repudiated when a party indicates 'distinctly and unequivocally' that it either will not or cannot substantially perform any of its contractual obligations.") (citation omitted).

<sup>8</sup> As set forth in Commonwealth's opening brief, any further obligation of Commonwealth to Soundbuilt was dependent on the outcome of Commonwealth's litigation to enforce its indemnity agreement with DALD/Newhall. See Op. Br. at 6-7. Only in the event of a final, non-appealable order requiring DALD/Newhall to indemnify Commonwealth for greater than \$5 million would Soundbuilt be entitled to payment over and above the initial \$5 million settlement amount. See *id.*

In response, Soundbuilt summarily contends that its actions in the Newhall bankruptcy were permissible. Resp. Br. at 35. But it cannot dispute that this question was never litigated or decided by a trial court.

Soundbuilt's only other argument is that Commonwealth either should have litigated, or actually did litigate, its claim of Soundbuilt's breach in the Newhall bankruptcy. Resp. Br. at 35-36. Soundbuilt is incorrect on either count. The bankruptcy court had no jurisdiction over Commonwealth's state law contract claim for breach. *See, e.g., In re Ray*, 624 F.3d 1124, 1130-1136 (9th Cir. 2010) (holding generally that resolution of a state law breach of contract claim is beyond the scope of a bankruptcy court's authority). Its jurisdiction was limited to deciding the specific bankruptcy claims before it. *See* 28 U.S.C. § 157 (bankruptcy court jurisdiction). With regard to consideration of the Soundbuilt-Trustee Agreement, the question before the bankruptcy court was whether the agreement met the statutory factors for a compromise of claim or sale of an asset of the estate. Bank. R. 9019; 11 U.S.C. § 363. Commonwealth could not have raised its breach claim to the bankruptcy court. Soundbuilt cites no contrary authority.

Citing only to Commonwealth's objections to the Soundbuilt-Trustee Agreements, Soundbuilt argues that Commonwealth actually did litigate its breach claim before the bankruptcy court. Resp. Br. at 36

(citing CP 572-78, 686-94). But these objections set forth only Commonwealth's arguments that these agreements failed to satisfy the relevant bankruptcy factors, and that it would be against public policy for the bankruptcy court to approve them because they promoted the interests of a third-party (Soundbuilt) over those of the estate and its creditors. CP 572-78, 686-94. They did not raise any claim of breach.

Soundbuilt cannot dispute that because it never brought a claim for breach against Commonwealth, Commonwealth has never had the opportunity to assert and resolve its own claims and defenses. The trial court's order and judgment must be reversed on this ground.

**C. The Trial Court Lacked Jurisdiction Under RAP 7.2 to Decide Soundbuilt's Motion While this Case was Pending on Appeal.**

For either of the reasons set forth above, the trial court's order granting Soundbuilt's Motion to Enforce was in error and should be reversed. But in addition, because this case was pending before this Court on the *Newhall* appeal, the trial court also lacked jurisdiction to enter its order and judgment. RAP 7.2(a) ("After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule . . ."). It should be reversed on this basis.

In its response, Soundbuilt does not dispute that this case was on appeal at the time of its motion, or that the trial court's jurisdiction was

narrowly confined as a result. Instead, it argues that the trial court could act on its motion under two of the enumerated grounds in RAP 7.2. Resp. Br. at 37-38 (citing RAP 7.2(l) and (e)). Neither ground applies.

With regard to RAP 7.2(l), Soundbuilt contends incorrectly that only a portion of this case was on review in the *Newhall* appeal, and that the trial court retained jurisdiction of the remainder under this rule. Resp. Br. at 37-38; RAP 7.2(l) (“If the trial court has entered a judgment that may be appealed under rule 2.2(d) in a case involving multiple parties, claims, or counts, the trial court retains full authority to act in the portion of the case that is not being reviewed by the appellate court.”). But the order and judgment on review in the *Newhall* appeal were final and resolved all remaining claims against all parties in this case. CP 359-64. They were neither certified under CR 54(b) nor on review under RAP 2.2(d).

Instead, the CR 54(b) judgment Soundbuilt cites in support of its argument is the judgment on review in the present appeal, not the *Newhall* appeal. Resp. Br. at 38 (citing CP 819).<sup>9</sup> Soundbuilt’s confusion of this issue by reference to the incorrect judgment is either careless or improper.

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<sup>9</sup> The order and judgment at issue in the *Newhall* appeal addressed the issue of DALD/*Newhall*’s obligation to Commonwealth under the Indemnity Agreement. CP 351-364; Op. Br. at 9. In contrast, the order and judgment on review in this appeal addressed Commonwealth’s purported breach of its Settlement Agreement with Soundbuilt. CP 811-820; Op. Br. at 14-16.

In either case, there is no dispute that Soundbuilt – a former party to this case – had no claims pending against Commonwealth (or any other party) over which the trial court retained jurisdiction during the *Newhall* appeal. RAP 7.2(1) has no application here.

Soundbuilt’s reliance on RAP 7.2(e) is similarly flawed. Resp. Br. at 38. This rule permits the trial court to decide only postjudgment motions “authorized by the civil rules”. RAP 7.2(e). But as set forth above, Soundbuilt’s Motion to Enforce was not authorized under CR 2A or any other civil rule. And moreover, Soundbuilt is incorrect that the trial court’s ruling on the Motion to Enforce had no bearing on the issues on review in the *Newhall* appeal. Resp. Br. at 39. Indeed, Soundbuilt’s Motion to Enforce asked the trial court to decide the question of Commonwealth’s obligation to Soundbuilt under the Settlement Agreement while this Court was considering the same issue in the *Newhall* appeal.<sup>10</sup> Under such circumstances, the proper course of action would

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<sup>10</sup> In particular, Soundbuilt’s Motion to Enforce asked the trial court to hold that Commonwealth owed Soundbuilt the full contingent settlement amount of \$3 million as set forth in the Settlement Agreement. CP 196-210; CP 39-40 (¶ 5.3). At the same time, this Court was considering whether DALD/*Newhall* was obligated to indemnify Commonwealth for its settlement with Soundbuilt, *see* CP 351-64, a determination that could trigger, reduce or dispose of any further payment obligation on the part of Commonwealth under the agreement. CP 39-40 (¶ 5.3). The result of this determination would thus have a direct bearing on Commonwealth’s obligation to Soundbuilt, the same issue that was before the trial court on the Motion to Enforce.

have been to seek permission of this Court prior to entry of a final order. RAP 7.2(e). Soundbuilt admittedly did not do so. Resp. Br. at 39.

Soundbuilt claims the trial court's lack of jurisdiction is cured because the mandate in the *Newhall* appeal has now issued. As such, it claims a "final non-appealable order" has been entered determining the *Newhall*'s indemnity obligations, thereby triggering Commonwealth's contingent payment obligation under the Settlement Agreement. Resp. Br. at 39-40; CP 39-40 (¶ 5.3).<sup>11</sup> But Soundbuilt's argument only further illustrates why reversal is the only proper outcome here.

In particular, Soundbuilt does not dispute that it caused the *Newhall* appeal to be dismissed prior to a decision on its merits, and that the issuance of the mandate in that appeal was solely the result of its intervention in the bankruptcy proceeding. *See* Resp. Br. at 9, 14. The question that remains to be decided, however, is whether Soundbuilt's intervention in the bankruptcy court to acquire the right to dismiss the *Newhall* appeal breached the Settlement Agreement. This is the issue that Commonwealth was prevented from raising below, and it serves as a complete defense to Soundbuilt's claim of breach, regardless of the fact

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<sup>11</sup> Notably, there is no dispute that the mandate in the *Newhall* appeal did not issue prior to the entry of the trial court's order on the Motion to Enforce. As such, the decision of this Court was not final, *Obert v. Env'tl. Research & Dev. Corp.*, 112 Wn.2d 323, 340, 771 P.2d 340 (1989), and RAP 7.2 still constrained the trial court's jurisdiction.

that the *Newhall* mandate has now been entered. *See, e.g., Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588-89, 167 P.3d 1125 (2009) (breach of contractual condition may excuse other party's performance). Rather than moot these questions regarding Soundbuilt's conduct, the issuance of the *Newhall* mandate ripens them for consideration.

Soundbuilt also claims that Commonwealth took an "extraordinary step" when it answered the trustee's motion to dismiss the *Newhall* appeal. Resp. Br. at 14. But far from "extraordinary", Commonwealth's answer to the dismissal motion was expressly ordered by this Court. *See* Appendix A (letter dated January 25, 2012). Indeed, Commonwealth was warned that its failure to file an answer "may result in the imposition of sanctions". *Id.* And its answer to the trustee's dismissal motion merely asked the Court to exercise its discretion when deciding whether to dismiss the appeal given the significance of the issues presented. CP 807-10. Its actions in this regard were not improper.

**D. Soundbuilt's Breach Claim was not Raised Properly Below and, in Any Event, Lacks Substantive Merit.**

Soundbuilt devotes the majority of its briefing to its assertion that Commonwealth's actions in the bankruptcy proceeding breached the Settlement Agreement. Much of this argument is based on unsupported

speculation about Commonwealth's motivation in objecting to the Soundbuilt-Trustee Agreements. But because the question of Commonwealth's breach was never properly addressed before the trial court, this Court should decline to reach the merits of Soundbuilt's arguments on appeal. *See, e.g., Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 163, 516 P.2d 1028 (1973) (because trial court was without jurisdiction to decide claims, appellate court declined to consider their merits). Reversal is required so Soundbuilt's claim may be considered on a full record and with due consideration of Commonwealth's defenses.

Even as presented in its response brief, however, Soundbuilt's breach claims are without merit. Soundbuilt cannot dispute that, at the time the trial court granted its Motion to Enforce, the Settlement Agreement's express condition precedent governing Commonwealth's obligation to pay Soundbuilt any additional amounts had not been triggered. *See Op. Br.* at 32-34. In particular, the Settlement Agreement conditioned any additional payments on the entry of a "final, non-appealable" order finding DALD/Newhall liable to Commonwealth for the settlement payments. CP 38-39 (¶ 5.1). Until that condition was triggered, there was no basis to award Soundbuilt any additional amounts. *See CHG Intn'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 515, 667 P.2d 1127 (1983) ("A condition must be exactly fulfilled or no liability arises

on the promise which it qualifies.”) (citing 5 Williston, *Contracts* § 675, p. 184 (3d ed. 1961)).

In response, Soundbuilt contends that the condition should be excused and Commonwealth be declared in breach of the agreement based solely on Commonwealth’s objections to the Soundbuilt-Trustee Agreements. Resp. Br. at 17-24. As a creditor of the estate, Commonwealth objected to entry of these agreements on the grounds that they were procedurally and substantively flawed under the applicable standards governing compromises of claims and sales of assets. *See, e.g.*, Op. Br. at 10-12, 26-29; CP 572-78, 592-97. It was entitled to do so. Bank. R. 9019; 11 U.S.C. § 363. Soundbuilt advances no valid argument to the contrary.<sup>12</sup>

Soundbuilt claims that Commonwealth’s objections to the Soundbuilt-Trustee Agreements somehow breached the express terms of the Settlement Agreement. Resp. Br. at 22-23. But the terms of the Settlement Agreement are clear: Commonwealth was obligated to obtain

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<sup>12</sup> Citing only to *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008), Soundbuilt claims that, by entering the Settlement Agreement, Commonwealth waived its statutory rights to participate fully in the Newhall bankruptcy action. Resp. Br. at 25. But *Wynn* held only that the plaintiff there waived certain statutory confidentiality rights by failing to object to testimony before it was given. 163 Wn.2d at 381. In contrast, Commonwealth raised its objections in the bankruptcy to avoid waiving its rights. *Wynn* does not establish that Commonwealth either did, or was obligated to, waive its rights under the terms of the Settlement Agreement.

“as soon as reasonably possible” a “final, non-appealable” order against DALD/Newhall from the Washington courts. CP 39 (¶ 5.3). It attempted to do so when it moved promptly for summary judgment before the trial court and defended the entry of judgment in its favor before this Court in the *Newhall* appeal. But-for Soundbuilt’s intervention in the Newhall bankruptcy, this Court would have resolved the indemnity issues raised in the *Newhall* appeal on their merits, as was expressly contemplated in the Settlement Agreement. *Id.* It was Soundbuilt, not Commonwealth, that breached the Settlement Agreement when it intervened in the bankruptcy proceeding to prevent this from happening. Had Soundbuilt merely allowed this indemnity litigation to take its course, the issues in this appeal would never have arisen.

Nor is Soundbuilt correct that Commonwealth’s objections to the Soundbuilt-Trustee Agreement were in bad faith. Resp. Br. at 24-25. Commonwealth’s objections were made to ensure that the trustee met his duty to establish through admissible evidence, not speculation, that any agreement with Soundbuilt made economic sense and signified the best deal for the estate. CP 572-78, 592-97.<sup>13</sup> The trustee was obligated to

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<sup>13</sup> Soundbuilt also contends that Commonwealth was entitled under the bankruptcy rules to bid in and “offer a better deal” to acquire for itself the right to control the *Newhall* appeal. Resp. Br. at 26; *see also id.* at 35 (citing 11 U.S.C. § 1109; Bank. R. 2018(a)). But had Commonwealth done so, it unquestionably would have faced a claim by Soundbuilt that its actions were in breach of the

meet these standards in the best interests of all creditors, including Commonwealth. *See, e.g., In re A&C Prop.*, 784 F.2d 1377, 1382 (9th Cir. 1986) (trustee must establish that a compromise of claim is fair and equitable); *In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010) (“A trustee has the duty to maximize the value of the estate” when selling assets of the estate under § 363).<sup>14</sup>

Soundbuilt also implies that Commonwealth’s objections lacked substantive merit. Resp. Br. at 24. But it cannot dispute that the United States District Court found the contrary. After the bankruptcy court approved the first Soundbuilt-Trustee Agreement, Commonwealth appealed this order to the District Court. CP 619-20. In granting a stay of the order, the District Court found that Commonwealth had “shown a likelihood of success on the merits of its appeal contending that the bankruptcy court [had] abused its discretion”. CP 647. As a result, Soundbuilt and the trustee entered a second agreement, but this agreement suffered from many of the same substantive flaws as the first.

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Settlement Agreement. *See* CP 441 (“Mr. Brain made it very clear that if we bid, we’re going to get sued”). Soundbuilt cannot now argue that Commonwealth should have done precisely what Soundbuilt warned it not to do.

<sup>14</sup> The bankruptcy court’s supposition as to the reasons for Commonwealth’s objections is irrelevant to the issues here. Op. Br. at 29-31. But regardless, the bankruptcy court did not find that Commonwealth could not raise its objections or that it had done so in “bad faith” as Soundbuilt claims. Resp. Br. at 26.

Regardless of the merits of these claims, however, the trial court erred in considering their substance on an incomplete record, and without consideration of Commonwealth's defenses. Because these claims were never properly before the trial court in the first instance, this Court should decline to consider their merits on appeal. At a minimum, remand is appropriate to permit full consideration of these claims and defenses before the trial court.

**E. The Trial Court Erred in Awarding Late Fees, Default Interest, and Attorneys' Fees to Soundbuilt.**

Finally, Soundbuilt failed to rebut Commonwealth's arguments that the trial court erred in awarding Soundbuilt \$73,295.34 in late fees, \$247,561.64 in default interest, and \$44,965.00 in attorneys' fees in its judgment. As set forth in Commonwealth's opening brief, the trial court had no legal basis to make these awards. Op. Br. at 34-38.

First, the trial court's award of "late fees" was improper under the Settlement Agreement. By its plain terms, this fee could only accrue if "payment is not made within thirty (30) days of the date the sums described herein are due." CP 38 (§ 5.1). By awarding this late fee at the same time as it found Commonwealth liable for the sums set forth in the Settlement Agreement, the trial court erred.

In response, Soundbuilt claims that the late fee was proper because Commonwealth's obligation purportedly became "due" at the time it objected to the entry of the first Soundbuilt-Trustee Agreement. Resp. Br. at 40. This is incorrect. As set forth in the Settlement Agreement, any further obligation Commonwealth may have had to Soundbuilt came due only upon entry of a final non-appealable order in the Newhall indemnity action. CP 39 (§ 5.3). Even assuming the trial court was entitled to enter an order finding that Commonwealth's obligation was due prior to the satisfaction of this express condition precedent, an award of the late fee would only be appropriate if Commonwealth failed to pay Soundbuilt within thirty days of the court's order finding these amounts due. Any holding to the contrary further contradicts the Settlement Agreement.

For the same reason, the trial court erred in awarding default interest. As in the case of the late fee, the Settlement Agreement provided that interest would accrue at a default rate only if Commonwealth defaulted on its obligation to pay Soundbuilt once that obligation came due. CP 39 (§ 5.1) (default interest applies only "[i]f default be made in payment of this obligation"). Like the late fee, Soundbuilt's arguments to the contrary are counter to the agreement's express terms. Regardless of the outcome of the other issues on appeal, the trial court's award of both the late fee and default interest must be reversed.

The trial court also erred in awarding Soundbuilt its attorneys' fees that it incurred in obtaining and defending its agreements with the bankruptcy trustee to dismiss the *Newhall* appeal. The Settlement Agreement unambiguously permits recovery only of fees incurred "to enforce" its terms. CP 41 (§ 5.13). Any fees Soundbuilt incurred in the bankruptcy proceeding were expressly not for this purpose. Instead, Soundbuilt incurred these fees solely in its effort to secure an improper side-deal with the bankruptcy trustee. They are not recoverable.

Soundbuilt argues that it would not have incurred any fees in the bankruptcy court "if Commonwealth had allowed the *Newhall* appeal to proceed to final judgment, as it was required to do under the Settlement Agreement." Resp. Br. at 41 (emphasis added). But this statement only further illustrates the error of Soundbuilt's logic. It was Soundbuilt, not Commonwealth, that acted contrary to the terms of the Settlement Agreement when it acquired the right to dismiss the *Newhall* appeal before the Washington courts could decide the indemnity issue on its merits. It should not be rewarded for conduct that it claims breached the agreement.

Likewise, Soundbuilt should not be entitled to recover its fees incurred in litigating its improper Motions to Enforce. For the reasons discussed above, these motions were without any legal basis. Any fees Soundbuilt incurred in pursuing them were improper and not recoverable.

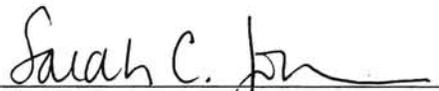
Because the trial court's award of late fees, default interest and attorneys' fees was improper, it must be reversed. This Court should instead award Commonwealth its attorneys' fees and costs incurred both before this Court and the trial court. CP 41 (§5.13); *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (attorneys' fees available when provided for by contract); *see also* RCW 4.84.330 ("In any action on a contract . . . the prevailing party, whether he is the party specified in the contract . . . or not, shall be entitled to reasonable attorneys' fees . . .").

### III. CONCLUSION

Reversal of the trial court's order and judgment is appropriate for any one of the grounds set forth above. Commonwealth respectfully requests that this Court reverse and award Commonwealth its fees and costs. At a minimum, Commonwealth requests that this Court remand this action to permit the claims at issue to be properly litigated below.

RESPECTFULLY SUBMITTED this 18th day of September, 2012.

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# APPENDIX A

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January 25, 2012

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CASE #: 62991-3-1

Commonwealth Land Title et al, Respondents v. Greg & Laurie Newhall, Appellants

Counsel:

On January 13, 2012, appellant filed a "motion for voluntary withdrawal of review". Counsel for respondent is directed to file a response to the motion on or before February 6, 2012. Counsel's failure to comply may result in the imposition of sanctions pursuant to RAP 18.9.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

ssd