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No. 68547-3

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

SOUNDBUILT NORTHWEST LLC,

Respondent.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE RICHARD MCDERMOTT

BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RESTATEMENT OF ISSUES .....	2
III.	RESTATEMENT OF FACTS.....	3
	A. Respondent Soundbuilt Obtained A Judgment For Specific Performance After DALD/Newhall Repudiated Its Contract To Sell 22 Lots To Soundbuilt in 2004. Appellant Commonwealth Had Issued Title Insurance Without Exception For Soundbuilt's Claim.....	3
	B. Commonwealth Agreed To Pay Soundbuilt \$5 Million In 2008 And An Additional \$3 Million After Pursuing "As Soon As Reasonably Possible" Its Indemnification Claims Against DALD/Newhall To Final Judgment. ....	5
	C. Commonwealth Resisted All Efforts To Finalize The Judgment Establishing DALD/Newhall's Indemnity And Triggering Commonwealth's Obligation To Pay Soundbuilt, Arguing Against Its Own Judgment In Newhall's Bankruptcy Proceedings.....	8
	D. The Same Judge Who Had Presided Over All Proceedings In This Litigation Entered Judgment Against Commonwealth On Soundbuilt's CR 2A Motion To Enforce The Settlement Agreement.....	14
IV.	RESPONSE ARGUMENT.....	17
	A. Commonwealth Breached The Settlement Agreement When It Tried To Block A Deal That Would Have Resulted In A Final Order Triggering Its Obligation To Pay Soundbuilt \$3 Million.....	17

1.	A Party To An Agreement Cannot Rely On The Failure Of A Condition Precedent That It Itself Frustrates. ....	18
2.	Commonwealth Breached An Explicit Contractual Duty To Avoid Delay. ....	22
3.	Commonwealth’s Statutory “Rights” As A Bankruptcy Creditor Did Not Excuse Its Breach Of The Settlement Agreement. ....	24
B.	Soundbuilt Properly Brought Its Motion To Enforce The Settlement Agreement In The Underlying Action Before The Court That Had Presided Over All Proceedings. ....	27
1.	CR 2A Expressly Authorizes Enforcement of Settlement Agreements In The Underlying Action.....	27
2.	Soundbuilt’s Assignment To Commonwealth Of Its Lis Pendens Claims And The Forum Selection Clause Are No Impediment To Soundbuilt’s Right To Enforce The Settlement Under CR 2A. ....	32
C.	RAP 7.2 By Its Terms Authorizes This CR 2A Motion, And Any Further Procedural Impediments To Enforcement And Entry of Judgment Are Moot.....	37
D.	All Fees Assessed By The Trial Court Are Proper, And Soundbuilt Is Entitled To Its Fees On Appeal. ....	40
V.	CONCLUSION .....	41

## TABLE OF AUTHORITIES

### CASES

<b><i>Amende v. Town of Morton</i></b> , 40 Wn.2d 104, 241 P.2d 445 (1952).....	33
<b><i>Ashburn v. Safeco Ins. Co.</i></b> , 42 Wn. App. 692, 713 P.2d 742, <i>rev. denied</i> , 105 Wn.2d 1016 (1986).....	19
<b><i>Badgett v. Sec. State Bank</i></b> , 116 Wn.2d 563, 807 P.2d 356 (1991) .....	21
<b><i>Cavell v. Hughes</i></b> , 29 Wn. App. 536, 629 P.2d 927 (1981).....	20-21
<b><i>CHG Int'l, Inc. v. Robin Lee, Inc.</i></b> , 35 Wn. App. 512, 667 P.2d 1127, <i>rev. denied</i> , 100 Wn.2d 1029 (1983).....	21
<b><i>Egbert v. Way</i></b> , 15 Wn. App. 76, 546 P.2d 1246 (1976).....	20
<b><i>Estate of Jordan v. Hartford Accident &amp; Indem. Co.</i></b> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	33
<b><i>Frank Coluccio Const. Co., Inc. v. King County</i></b> , 136 Wn. App. 751, 150 P.3d 1147 (2007).....	19, 22
<b><i>Highlands Plaza, Inc. v. Viking Inv. Corp.</i></b> , 72 Wn.2d 865, 435 P.2d 669 (1967).....	18
<b><i>Howard v. Royal Specialty Underwriting, Inc.</i></b> , 121 Wn. App. 372, 89 P.3d 265 (2004), <i>rev. denied</i> , 153 Wn.2d 1009 (2005).....	28

<b><i>Kwiatkowski v. Drews</i></b> , 142 Wn. App. 463, 176 P.3d 510, <i>rev. denied</i> , 164 Wn.2d 1005 (2008).....	27
<b><i>Lavigne v. Green</i></b> , 106 Wn. App. 12, 23 P.3d 515 (2001).....	31
<b><i>Marriage of Ferree</i></b> , 71 Wn. App. 35, 856 P.2d 706 (1993) .....	27, 29-31, 37
<b><i>Olver v. Fowler</i></b> , 161 Wn.2d 655, 168 P.3d 348 (2007).....	33
<b><i>Puget Sound Nat'l Bank v. Dep't of Revenue</i></b> , 123 Wn.2d 284, 868 P.2d 127 (1994).....	33
<b><i>Refrigeration Eng'g Co. v. Mckay</i></b> , 4 Wn. App. 963, 486 P.2d 304 (1971).....	19
<b><i>Renfro v. Kaur</i></b> , 156 Wn. App. 655, 235 P.3d 800, <i>rev. denied</i> , 170 Wn.2d 1006 (2010).....	41
<b><i>River Park Square, L.L.C. v. Miggins</i></b> , 143 Wn.2d 68, 17 P.3d 1178 (2001).....	34
<b><i>Sound Built Homes, Inc. v. Dale Alan Land Dev. Co.</i></b> , 137 Wn. App. 1055, 2007 WL 959942 (2007).....	5
<b><i>Thompson v. Ezzell</i></b> , 61 Wn.2d 790, 379 P.2d 990 (1963) .....	39
<b><i>Wynn v. Earin</i></b> , 163 Wn.2d 361, 181 P.3d 806 (2008).....	25

#### STATUTES

11 U.S.C. § 363.....	11
11 U.S.C. § 1109 .....	35
RCW 4.22.060 .....	28

## **RULES AND REGULATIONS**

CR 2A .....	2-3, 27-32, 34, 36-39
CR 24.....	33-34
CR 54.....	38
CR 56.....	29
Fed. R. Bankr. P. 2018 .....	35
Fed. R. Bankr. P. 2019 .....	10
RAP 18.1 .....	41
RAP 7.2.....	2, 37-38

## **OTHER AUTHORITIES**

Black's Law Dictionary (9th ed. 2009).....	19
Restatement (Second) of Contracts (1981-82).....	19
Tegland, 15 Wash. Prac., Civil Procedure (2009) .....	31-32
5 S. Williston, Contracts (3rd ed.) .....	19

## I. INTRODUCTION

In a settlement with Respondent Soundbuilt Homes Inc., Appellant Commonwealth Land Title Insurance Company agreed to pursue claims against parties that breached a contract to sell Soundbuilt 22 lots under development. Commonwealth agreed to pursue these claims “as soon as reasonable possible,” to use its “best reasonable efforts” to avoid any delay in obtaining a final judgment, and that when final judgment was entered on those claims would pay Soundbuilt \$3 million. In direct breach of its agreement, Commonwealth objected to a settlement in bankruptcy court that would have resulted in a final judgment against the breaching parties.

This court should reject Commonwealth’s meritless attempts to avoid and further delay honoring the deal it made with Soundbuilt by raising various procedural issues that do not address the bottom line – a final judgment has been entered and Commonwealth undisputedly owes Soundbuilt \$3 million. To remand for further proceedings would only waste judicial resources and reward Commonwealth’s breach of the parties’ agreement. This court should affirm and award Soundbuilt its fees on appeal.

## II. RESTATEMENT OF ISSUES

1. Does a party use its “best reasonable efforts” and act in good faith to fulfill a condition precedent to obtain a “final, non-appealable” judgment triggering its obligation to pay \$3 million under a settlement agreement where it objects, appeals, and otherwise delays a bankruptcy court’s decision affirming settlement and dismissal of a pending appeal, in which the delaying party is the respondent, that will result in a “final, non-appealable” judgment?

2. May a Civil Rule 2A motion to enforce a settlement agreement be brought before the trial court that presided over the resolution of the claims settled in the agreement, or is a party prohibited from utilizing CR 2A and required to begin a separate action against another party to the litigation merely because the party seeking to enforce the agreement as part of the settlement partially assigned away a portion of its interest in the case to the party breaching the agreement?

3. Does a trial court retain jurisdiction to consider upon and act to enforce a settlement under RAP 7.2 where an appeal between other parties in the case is pending before the court of appeals, and is any objection to enforcement of the settlement rendered moot when the mandate is returned in the other appeal?

4. Where the parties' settlement agreement provides for an award of all fees incurred in enforcing the agreement, including fees incurred in bankruptcy court, does a trial court properly award all fees incurred by a party in enforcing the agreement, including fees incurred in bankruptcy court, when the other party to the agreement willfully blocks the occurrence of a condition precedent to its full performance of the contract in bankruptcy court?

### III. RESTATEMENT OF FACTS

This restatement of facts is based on the undisputed facts before the trial court in granting respondent's CR 2A motion to enforce the parties' Settlement Agreement:

**A. Respondent Soundbuilt Obtained A Judgment For Specific Performance After DALD/Newhall Repudiated Its Contract To Sell 22 Lots To Soundbuilt in 2004. Appellant Commonwealth Had Issued Title Insurance Without Exception For Soundbuilt's Claim.**

In September 2003, respondent Sound Built Homes Inc. ("Soundbuilt"),<sup>1</sup> which constructs single-family residential developments, contracted with the Dale Alan Land Development Co. LLC ("DALD") through its principal Greg Newhall to purchase a

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<sup>1</sup> Sound Built Homes Inc. ("SBH") has been succeeded via merger by Soundbuilt Northwest LLC, ("SBNW") which acquired all rights of Sound Built Homes Inc. (CP 11, 14)

22-lot subdivision that DALD was developing in Covington, Washington. (CP 11, 217) Eight months later, in May 2004, as the plat development was nearing completion, DALD repudiated its purchase and sale agreement with Soundbuilt and instead sold the 22 lots to Chelan Homes Inc. for a higher price. (CP 217)

Before the sale to Chelan closed, Soundbuilt filed an action for specific performance and a lis pendens on the property. (CP 217) Chelan nevertheless was able to obtain title insurance from appellant Commonwealth Land Title Insurance Company (“Commonwealth”) that did not contain an exception for Soundbuilt’s claim. (CP 12, 217) As a condition to providing title insurance to Chelan, Commonwealth required DALD and Newhall to indemnify it for any damages resulting from defective title. (CP 217, 519-24)

Chelan thereafter built and sold 22 houses in the subdivision, for approximately \$400,000 each. (CP 218) Appellant Transnation Title Company (“Transnation”) provided title insurance to the homeowners that also did not contain an exception for Soundbuilt’s claim to the property. (CP 218) Appellants Commonwealth and Transnation are hereafter referred to collectively as “Commonwealth.”

Soundbuilt prevailed in its claims against DALD at trial, and the trial court awarded Soundbuilt specific performance of the purchase and sale agreement. (CP 218) DALD appealed this ruling and lost in an unpublished decision issued by this court in April 2007. (CP 20-31; ***Sound Built Homes, Inc. v. Dale Alan Land Dev. Co.***, 137 Wn. App. 1055, 2007 WL 959942 (2007)) The Supreme Court denied review of this court's decision in March 2008. (CP 35; 163 Wn.2d 1009 (2008))

After DALD's unsuccessful appeal, the 22 homeowners were substituted for DALD as parties to the original action, so that Soundbuilt could enforce its order of specific performance. (CP 218) In May 2008, Soundbuilt sought an order against each homeowner granting it possession of the property and all improvements. (CP 218-19)

**B. Commonwealth Agreed To Pay Soundbuilt \$5 Million In 2008 And An Additional \$3 Million After Pursuing "As Soon As Reasonably Possible" Its Indemnification Claims Against DALD/Newhall To Final Judgment.**

Commonwealth defended the homeowners against Soundbuilt's claims under its title insurance policies. (CP 219) Facing extraordinary liability to the homeowners, who would be out on the streets as a result of Commonwealth's decision to issue title

insurance policies that did not even list, much less create an exception to clear title for Soundbuilt's prior claim to the properties, Commonwealth settled with Soundbuilt on July 28, 2008. (CP 13, 219, 299-34) The parties' Settlement Agreement is Appendix A to this brief.

In the agreement, Soundbuilt agreed to release its right to obtain possession of the properties and assigned its "right, title, and interest" in the lawsuit against DALD to Commonwealth, in exchange for a \$5 million payment by August 8, 2008. (CP 219, 229-30, 821-23) Soundbuilt did not assign the judgment itself, nor did it assign the right to monies from several of its claims covered by the judgments, which it retained the right to enforce. (CP 230) The parties neither agreed, nor was Soundbuilt ever dismissed, as a party to this case.

Commonwealth also agreed to pursue its indemnification claims against DALD/Newhall "as soon as reasonably possible," and to pay Soundbuilt the amount of any judgment "determining the liability of" DALD/Newhall, up to an additional \$3 million, should DALD/Newhall be found liable to Commonwealth for more than \$5 million. (CP 229-30)

The parties' Settlement Agreement required Commonwealth to pay the additional settlement amounts of up to \$3 million "within thirty (30) days of entry of a final, non-appealable order of the Washington courts (including orders of dismissal) determining the liability of DALD and Greg Newhall and his marital community for payments made by Commonwealth to [Soundbuilt] pursuant to this agreement." (CP 229-30) The parties expressly agreed that Commonwealth's obligations were not dependent on its ability to collect on its indemnification claim:

In no event shall Commonwealth's obligation to make payment to [Soundbuilt] be dependent upon Commonwealth's ability to collect the sums adjudged to be due from DALD or Newhall.

(CP 231) The parties further agreed that the "final, non-appealable order of the Washington courts" triggering Commonwealth's obligation to pay could include "orders of dismissal." (CP 229)

Commonwealth agreed that it would "use its best reasonable efforts to avoid continuance [of] any of the proceedings . . . . needed to obtain a final, non-appealable order," in a special section of the Settlement Agreement entitled "Minimal Continuances of Further Legal Proceedings." (CP 231) This provision reads, in its entirety:

5.5 Minimal Continuances of Further Legal Proceedings. Commonwealth agrees that it will use its best reasonable efforts to avoid continuance any of the proceedings, either before the trial court or on appeal, needed to obtain a final, nonappealable order related to the legal matters described in this Agreement, affecting SBH's collection of the balance due SBH. Continuances consistent with the diligent completion of all litigation related to this Agreement may be requested or granted if, in Commonwealth's discretion, such continuance is reasonably needed to represent effectively Commonwealth's position in the litigation.

(CP 231) The parties also agreed that "Time is of the essence in the performance of the obligations set forth in this Agreement." (CP 233) The Settlement Agreement provided for a two percent late fee if any payment by Commonwealth was made more than 30 days after it was due, and for interest on its indebtedness at twelve percent on default. (CP 230) The agreement included an attorney's fees provision for recovery of fees if "a party takes action to enforce any of the terms of this Agreement, including action in the United States Bankruptcy Court." (CP 232)

**C. Commonwealth Resisted All Efforts To Finalize The Judgment Establishing DALD/Newhall's Indemnity And Triggering Commonwealth's Obligation To Pay Soundbuilt, Arguing Against Its Own Judgment In Newhall's Bankruptcy Proceedings.**

Commonwealth had intervened in this specific performance action in order to pursue its claims for indemnification against

DALD and Newhall. (CP 219, 516) In October 2008, Commonwealth moved in this action for summary judgment on its indemnity claim against DALD and Newhall. (CP 525-49) On November 18, 2008, the King County Superior Court Judge Richard McDermott (“the trial court”) issued a letter ruling granting Commonwealth summary judgment. (CP 865-66) In December 2008, the Newhalls filed for bankruptcy, automatically staying the indemnity litigation. (CP 14, 516)

After Commonwealth obtained relief from the stay, the trial court entered an \$8 million judgment in Commonwealth’s favor against the Newhalls and DALD on March 14, 2009. (CP 45-53, 507-13, 558-60) The order and judgment included a determination that the Settlement Agreement between Soundbuilt and Commonwealth was reasonable. (CP 52) The Newhalls then appealed this order, identifying Soundbuilt and Commonwealth as respondents on appeal. (CP 351-64)

In February 2011, Soundbuilt negotiated an agreement with the Newhalls’ bankruptcy trustee to dismiss the Newhall appeal in exchange for Soundbuilt paying the bankruptcy estate the first \$225,000 of the \$3 million payment due from Commonwealth. (CP 601-17) Commonwealth was originally a party to these

negotiations, but subsequently directed Soundbuilt to negotiate a deal with the trustee by itself. (CP 14) Nothing in the parties' Settlement Agreement limited Soundbuilt's right to achieve a resolution of the DALD/Newhall indemnity claim outside litigation and resolution of the appeal, and Soundbuilt pursued the agreement with the trustee based on its understanding that Commonwealth would accept such a settlement. (CP 14)

The \$225,000 payment contemplated by the Newhall deal almost doubled the estate assets, and would have resulted in a higher distribution to every creditor. (CP 15) Commonwealth was Newhall's largest creditor by far, and indeed took the position that it was the only creditor with an interest in this claim. (CP 573) It was undisputed that this deal with Newhall would have provided Commonwealth with more money from the bankruptcy proceeds than without it. (CP 14-15, 222-23)

Rather than allow the appeal of its \$8 million judgment to be dismissed and the judgment against DALD/Newhall to become "final and non-appealable," Commonwealth objected to the Newhall deal in bankruptcy court. (CP 572-78, 592-97) Commonwealth claimed that the trustee had not applied the "fair and equitable" standard for proposing and approving an agreement under B.R.

9019. (CP 593-95) Commonwealth further objected on the grounds that Soundbuilt's payment to the estate was contingent on the judgment against the Newhalls becoming final and on *Commonwealth* fulfilling its obligation to pay Soundbuilt \$3 million under the Settlement Agreement. (CP 575-77) Commonwealth also objected on procedural grounds that the bankruptcy trustee did not properly provide notice of the agreement to all creditors under 11 U.S.C. § 363 (CP 595-96) – even though it had earlier asserted that “Commonwealth is the only party that possesses an interest” in the claim. (CP 573) Rather than allow the trustee to dismiss the appeal of its own judgment, Commonwealth encouraged that the appeal be continued, because “the Trustee might prevail” and obtain a reversal of the judgment that Commonwealth had obtained against DALD/Newhall. (CP 577)

The bankruptcy court approved the Newhall deal to dismiss the appeal on May 6, 2011. (CP 599-617) Commonwealth appealed the approval of the Newhall deal to the U.S. District Court, and sought an emergency stay of the order pending appeal raising the same objections that it had raised to the bankruptcy court. (CP 619-20, 622-23, 625, 627-39) Commonwealth argued it would suffer “irreparable harm” if the Newhall appeal was dismissed and its \$8

million judgment against DALD/Newhall became final. (CP 628, 635) Commonwealth again encouraged the trustee to continue the appeal of its \$8 million judgment because of the “significant benefit to the estate that would come if the Trustee prevails,” and because “every other creditor” would benefit from a reduction of Commonwealth’s judgment. (CP 637)

The district court granted a stay based on its determination that the bankruptcy court had failed to apply the “fair and equitable” standard to approval of the settlement under B.R. 9019. (CP 646-47) As authorized by the bankruptcy court, the trustee and Soundbuilt then terminated the first Newhall deal, and noted for approval a second agreement that addressed the objections raised by Commonwealth. (CP 726-36) The trustee moved the bankruptcy court for approval of the revised Newhall deal. (CP 651-55) Commonwealth again objected to dismissing the appeal of its \$8 million judgment, arguing that the trustee did not have authority to terminate the first agreement and that the bankruptcy court lacked jurisdiction to approve a second agreement. (CP 657-68) Commonwealth continued to argue that the trustee had “ignore[d] the strength of his case” (against itself!) and encouraged

the trustee to continue to appeal Commonwealth's judgment. (CP 667)

On August 26, 2011, the district court vacated the appeal. (CP 673-74) The bankruptcy court ordered an evidentiary hearing to decide whether to approve the revised Newhall deal. Commonwealth opposed approval. (CP 289-93, 702) At the evidentiary hearing on December 7, 2011, the bankruptcy court approved the revised Newhall deal, on extensive oral findings of fact that were incorporated into its final order. (CP 371-394, 396-97)

The bankruptcy court found that the revised Newhall deal was fair and equitable. (CP 384-91) The bankruptcy court noted that the Newhalls' attorney believed they could reduce the claim on appeal, but not below \$2.5 million – and that it would cost \$250,000 in legal fees to achieve that result. (CP 386) The bankruptcy court also noted that despite having “plenty of opportunity,” Commonwealth had failed to offer a better deal to the estate. (CP 388)

The bankruptcy court then found that the motivations of Commonwealth were quite clear, and that its objections were not made in good faith, nor as a creditor in the bankruptcy estate:

It's not Commonwealth wearing his hat as concerned creditor that truly in good faith believes that if this compromise were turned down and the estate went forth in litigation on the Sound Built claim, that it's in fact going to receive a greater distribution. It's that it will not be forced to -- or at least it hopes, I think, not to be forced to pay the substantial sum it's agreed to pay Sound Built if the appeal is dropped, and that that's perhaps a better result for Commonwealth personally.

(CP 388-89)

On January 13, 2012, following approval of the revised Newhall deal, the trustee moved in this court to withdraw the Newhall appeal. (CP 263-66, 807) Rather than support this motion, Commonwealth took the extraordinary step as a respondent of filing an answer to the motion asking the appellate court to "exercise its discretion" and consider the appeal because of the "public importance of the case." (CP 807-10)

This court granted the motion to withdraw and dismissed the Newhall/Commonwealth appeal on February 29, 2012. (CP 870-71)

This court issued its mandate on May 11, 2012. (CP 868-69)

**D. The Same Judge Who Had Presided Over All Proceedings In This Litigation Entered Judgment Against Commonwealth On Soundbuilt's CR 2A Motion To Enforce The Settlement Agreement.**

Soundbuilt first filed a motion alleging that Commonwealth had breached its obligation to proceed without delay and seeking to

enforce the settlement agreement on June 3, 2011, after Commonwealth opposed the first Newhall deal to dismiss the appeal of the judgment that, once affirmed on appeal, would trigger its payment obligation to Soundbuilt. (CP 1-7) The trial court denied the motion without prejudice, with leave to renew the motion after November 1, 2011. (CP 185-86)

Soundbuilt filed its renewed motion to enforce the Settlement Agreement on December 5, 2011. (CP 196-212) The trial court, the Honorable Richard McDermott, granted the renewed motion on March 16, 2012 – after the Newhall appeal had been dismissed, but before the mandate was returned. (CP 813-16) The trial court entered judgment against Commonwealth for \$4,031,409.77, which included interest and the late fee authorized by the Settlement Agreement on the \$3 million payment from May 6, 2011. (CP 818) This was the date the trial court established that Commonwealth breached the Settlement Agreement by objecting to the trustee settlement that would have assured Commonwealth of a final, non-appealable judgment in its favor. (CP 815, 817-20)

As had the bankruptcy court, the trial court recognized that, regardless of its statutory rights as a creditor in the bankruptcy estate, Commonwealth's objection to the Newhall deal and

dismissal of the Newhall appeal were not based on its status as a creditor, but were improperly taken to delay the entry of a “final, non-appealable” judgment triggering its obligation to pay Soundbuilt an additional \$3 million under the Settlement Agreement. (CP 815) Noting that “Commonwealth’s efforts to prevent the implementation of the Trustee/[Soundbuilt] Agreement were undertaken in bad faith, and are a breach of the Commonwealth/[Soundbuilt] Agreement,” the court concluded that “Commonwealth cannot rely on its own breach of the Commonwealth/[Soundbuilt] Settlement Agreement and Commonwealth’s deliberate frustration of the condition precedent to payment . . .” (CP 815) The trial court entered judgment in favor of Soundbuilt pursuant to CR 54(b), concluding that the remaining issues did not concern Soundbuilt and that delay in the entry of judgment would prejudice Soundbuilt. (CP 819) The trial court awarded Soundbuilt \$44,965 in attorney fees incurred in the bankruptcy and trial court. (CP 818)

Commonwealth appealed, and stayed enforcement of the judgment. As more fully established in the procedural history of this case on appeal as reflected in this court’s docket, Commonwealth has continued its dilatory tactics in this court,

resisting perfection of the record and delaying filing of its opening brief.

#### **IV. RESPONSE ARGUMENT**

##### **A. Commonwealth Breached The Settlement Agreement When It Tried To Block A Deal That Would Have Resulted In A Final Order Triggering Its Obligation To Pay Soundbuilt \$3 Million.**

Commonwealth agreed with Soundbuilt that it would pursue a final judgment against DALD/Newhall “as soon as reasonably possible” and that it would use its “best reasonable efforts” to avoid delay in obtaining a “final, non-appealable” judgment. (CP 229) While Commonwealth argues various procedural issues and extraneous rights as a creditor to Newhall, it does not dispute the basic conclusion of the trial court. Moreover, while Commonwealth did not have to act in bad faith to breach the Settlement Agreement, its actions demonstrate that it did act in bad faith. The trial court correctly concluded that Commonwealth’s actions in the bankruptcy court and Court of Appeals, which specifically delayed entry of a final, non-appealable judgment against DALD, were a breach of Commonwealth’s explicit obligation to avoid delay. This court should affirm.

Commonwealth has done everything in its power to avoid obtaining a final judgment that would trigger its payment obligation under the Settlement Agreement. A final judgment would have been expeditiously entered after the bankruptcy trustee agreed to the dismissal of the Newhall appeal but for Commonwealth's appeal of that order and its continuing objections to any deal by the trustee that would have dismissed the Newhall appeal of the judgment it had obtained against Newhall. These uncontroverted facts demonstrate on their face that Commonwealth breached the Settlement Agreement by delaying entry of a final judgment. Washington law does not reward parties such as Commonwealth who take every possible avenue to undermine an agreement they signed.

**1. A Party To An Agreement Cannot Rely On The Failure Of A Condition Precedent That It Itself Frustrates.**

“It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.” *Highlands Plaza, Inc. v. Viking Inv. Corp.*, 72 Wn.2d 865, 876, 435 P.2d 669 (1967) (quoting 5 S. Williston, Contracts § 677 (3rd ed.); see

also Restatement (Second) of Contracts § 245, comment a (1981) (prevention of condition precedent by party excuses condition precedent “so that performance of the duty that was originally subject to its occurrence can become due in spite of its non-occurrence”).<sup>2</sup> “When through the fault of the promisor the occurrence or fulfillment of the condition precedent . . . is prevented, and the condition would have been fulfilled except for the prevention on part of the promisor, then the performance of the condition is excused and the liability of the promisor . . . on the contract becomes absolute regardless of the failure to fulfill the condition.” **Refrigeration Eng’g Co. v. Mckay**, 4 Wn. App. 963, 970, 486 P.2d 304 (1971).

As Commonwealth concedes (App. Br. 25-26), contract law imposes a duty on parties to act in good faith in the performance of their contractual obligations. **Frank Coluccio Const. Co., Inc. v. King County**, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007)

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<sup>2</sup> “Conditions precedent are those facts and events occurring subsequent to the making of the contract that must exist before there is a right to immediate performance.” **Ashburn v. Safeco Ins. Co.**, 42 Wn. App. 692, 698, 713 P.2d 742, *rev. denied*, 105 Wn.2d 1016 (1986) (citing Restatement (Second) of Contracts § 224 (1982)); *see also* Black’s Law Dictionary (9th ed. 2009) (defining “condition” as “An act or event, other than a precedent lapse of time, that must exist or occur before a duty to perform something promised arises.”).

(“There is an implied duty of good faith and fair dealing in every contract. This duty obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.”) (citation omitted); **Cavell v. Hughes**, 29 Wn. App. 536, 539, 629 P.2d 927 (1981) (condition precedent was excused and defendant was obligated to close real estate contract where it acted in bad faith to prevent condition precedent from occurring); **Egbert v. Way**, 15 Wn. App. 76, 79, 546 P.2d 1246 (1976) (“Each party has the affirmative good faith obligation to perform conditions precedent under a contract and cannot be excused from performance by his own misconduct.”).

In **Cavell**, for instance, the Court of Appeals refused to allow a party to profit from his own bad faith actions that prevented the occurrence of a condition precedent. There the defendant contracted to sell his house to the plaintiff conditioned on the local country club approving plaintiff’s membership application. After deciding he wanted out of the deal, the defendant, a director on the club’s board, prevented the club from approving the plaintiff’s action. The court reversed the trial court’s dismissal of plaintiff’s specific performance action because defendant’s action were not in good faith, but rather for “the specific purpose of frustrating the

sale . . . because he felt he had made a bad bargain.” **Cavell**, 29 Wn. App. at 539. Consequently the appellate court excused performance of the membership condition and held defendant was obligated to complete the sale. 29 Wn. App. at 540.

The cases cited by Commonwealth (App. Br. 32-33) do not undermine this basic principle of contract law. *E.g.*, **CHG Int'l, Inc. v. Robin Lee, Inc.**, 35 Wn. App. 512, 514, 667 P.2d 1127 (“the court should not set aside the limitation and enforce the promise in spite of the non-performance of the condition, *unless the condition has been excused by action of the promisor*”) (emphasis added), *rev. denied*, 100 Wn.2d 1029 (1983); **Badgett v. Sec. State Bank**, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (“There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.”). Here, unlike in the cases cited by Commonwealth, it acted deliberately to frustrate the occurrence of a condition precedent and thus its occurrence was excused and Commonwealth’s obligation to pay Soundbuilt \$3 million became due immediately. Commonwealth was not “standing” on its rights under the Settlement Agreement (App. Br. 33), but rather was acting in direct violation of its obligation under

the agreement to obtain a final judgment “as soon as reasonably possible.”

**2. Commonwealth Breached An Explicit Contractual Duty To Avoid Delay.**

For in addition to these duties, imposed by law on all contracting parties, *Frank Coluccio Const.*, 136 Wn. App. at 764, Commonwealth in this case explicitly agreed to pursue entry of a final judgment establishing DALD/Newhall’s liability “as soon as reasonably possible.” (CP 230) The parties agreed that “Time is of the essence in the performance of the obligations set forth in this Agreement” (CP 233), and Commonwealth further agreed that it would “use its best reasonable efforts to avoid continuance [of] any of the proceedings . . . . needed to obtain a final, non-appealable order.” (CP 231)

The parties intended the Settlement Agreement, and these provisions, to “avoid the expense and risks of litigation.” (CP 232) Instead of complying with its good faith obligations and the terms of the Settlement Agreement, Commonwealth prevented the occurrence of the condition precedent to its obligation to pay Soundbuilt an additional \$3 million – increasing, rather than avoiding, the expense and risk of litigation. Soundbuilt’s deal with

the Newhall trustee would have guaranteed that the condition triggering payment of the final \$3 million would occur. Commonwealth concedes as much on appeal. (App. Br. 9) (effect of agreement would have been “entry of final judgment in favor of Commonwealth against DALD/Newhall for over \$ 8 million.”). Thus, contrary to Commonwealth’s argument, its performance could not be excused by reversal of the Newhall judgment on appeal because it prevented the condition precedent (final judgment) from occurring. (App. Br. 19)

Commonwealth could have obtained dismissal of the Newhall’s appeal, resulting in an \$8 million “final, non-appealable” judgment in its favor, by not objecting to the trustee’s dismissal of the appeal. The Settlement Agreement contemplated that such an “order of dismissal” could be the “final, non-appealable order of the Washington courts” that would trigger its obligation to pay Soundbuilt. (CP 229) But Commonwealth did the exact opposite, objecting to the Newhall deal and actively encouraging the trustee to continue the appeal of its own \$8 million judgment. The trial court properly concluded that Commonwealth breached the Settlement Agreement and prevented the condition precedent from

occurring when on May 6, 2011, it objected to the Newhall deal.  
(CP 815)

**3. Commonwealth's Statutory "Rights" As A Bankruptcy Creditor Did Not Excuse Its Breach Of The Settlement Agreement.**

Commonwealth's protestations that its actions in the Newhall bankruptcy were in good faith ring hollow in light of the fact that it was acting *against* its interests as a creditor in the bankruptcy proceeding, and that the only possible justification for its actions was to delay accrual of its payment to Soundbuilt. It was undisputed that the \$225,000 payment by Soundbuilt would have *increased* Commonwealth's distribution from the bankruptcy estate, but it still objected, with almost entirely procedural and irrelevant objections. (CP 14-15, 222-23, 289-93, 572-78, 592-97, 627-39) The only substantive argument Commonwealth ever made was that it could not be relied upon to perform its obligation to pay Soundbuilt the \$3 million it owed under their Settlement Agreement. (CP 575-77)

Commonwealth had no good faith reason to object to the Newhall trustee's recommendation to dismiss the Newhall appeal against Commonwealth. Commonwealth agreed that its obligation to pay Soundbuilt was not dependent on its ability to collect on that

judgment. (CP 231) The only reason for objecting was to avoid triggering the condition precedent in its Settlement Agreement with Soundbuilt. Commonwealth may have had statutory “right” to object in the bankruptcy court (App. Br. 30), but its right was as a creditor, and the trial court correctly determined that exercising it was in violation of its agreement with Soundbuilt to use its “best reasonable efforts” and to act “as soon as reasonably possible” to obtain a “final, non-appealable” judgment against DALD/Newhall. To the extent Commonwealth had a “right” to drag out the bankruptcy proceedings by acting against its own interests, it waived that right by agreeing to pursue final judgment “as soon as reasonably possible,” and that “time [was] of the essence.” (CP 230, 233) See *Wynn v. Earin*, 163 Wn.2d 361, 381, 181 P.3d 806 (2008) (“Generally, statutory rights can be waived”).

The bankruptcy court also saw through Commonwealth’s “good faith” argument that it was protecting its “rights” by worsening its position in the bankruptcy. Commonwealth’s true motivations, and that it was not acting in good faith, were “quite clear” to the bankruptcy court. (CP 388: “It’s not Commonwealth wearing his hat as concerned creditor that truly in good faith believes that if this compromise were turned down and the estate

went forth in litigation on the Sound Built claim, that it's in fact going to receive a greater distribution.") As the bankruptcy court noted, Commonwealth had "plenty of opportunity" to offer a better deal to the bankruptcy estate, but never did so. (CP 388) Instead, Commonwealth deliberately acted against its interests as a creditor so that it could delay or outright avoid paying the additional \$3 million it owed to Soundbuilt.

The trial court correctly concluded that Commonwealth breached the Settlement Agreement as a matter of law when it prevented the entry of a final judgment in its favor. (CP 815) As the trial court concluded, "Commonwealth cannot rely on its own breach of the [Settlement Agreement] and Commonwealth's deliberate frustration of the condition precedent to payment to avoid payment to [Soundbuilt]." (CP 815) Although Commonwealth's actions in breach of the Settlement Agreement were sufficient to justify the court's judgment, they were also in bad faith, as both the bankruptcy court and the trial court concluded. (CP 388-89, 815) This court should affirm.

**B. Soundbuilt Properly Brought Its Motion To Enforce The Settlement Agreement In The Underlying Action Before The Court That Had Presided Over All Proceedings.**

Commonwealth's assertion that Soundbuilt was required to bring a separate action to enforce the Settlement Agreement is wrong as a matter of law, fact, and public policy. Parties routinely enforce settlements in the court presiding over their original claims pursuant the civil rule that authorizes such motions, Civil Rule 2A. A decisional rule requiring otherwise would waste judicial resources. Commonwealth's reliance on this argument is further evidence of its breach of the Settlement Agreement and bad faith delay of enforcement of its obligation to pay Soundbuilt an additional \$3 million.

**1. CR 2A Expressly Authorizes Enforcement of Settlement Agreements In The Underlying Action.**

Commonwealth cites no authority for its assertion that a party to an action is required to bring a separate action to enforce a settlement agreement. (App. Br. 16-19) To the contrary, parties routinely enforce settlement agreements in the court that presided over the original claims. *See, e.g., Marriage of Ferree*, 71 Wn. App. 35, 45, 856 P.2d 706 (1993) (App. Br. 22-23); *Kwiatkowski*

*v. Drews*, 142 Wn. App. 463, 474, 176 P.3d 510, *rev. denied*, 164 Wn.2d 1005 (2008); *see also Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 377, 89 P.3d 265 (2004) (determination of reasonableness of settlement agreement under RCW 4.22.060 was properly made in underlying personal injury action, not subsequent bad faith case), *rev. denied*, 153 Wn.2d 1009 (2005).

This practice is jurisprudentially sound, given that the trial court is already familiar with the claims, and that CR 2A specifically authorizes this procedure: “No agreement or consent between parties or attorneys *in respect to the proceedings in a cause*, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.” CR 2A (emphasis added).

“When a motion is made to enforce a settlement agreement on grounds that its existence and material terms are not genuinely disputed, the issue is also whether a genuine dispute of fact exists.”

*Ferree*, 71 Wn. App. at 43 (relying on CR 2A and CR 56).<sup>3</sup> “The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action; indeed, the compromise of litigation is to be encouraged.” 71 Wn. App. at 40-41. “[CR 2A] is not served by barring enforcement of an alleged settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, and should be, summarily resolved without trial.” 71 Wn. App. at 41.

*Ferree* demonstrates a trial court’s power to enforce a settlement agreement once the moving party meets the requirements of CR 2A. There a husband disputed that a settlement agreement had been reached with his wife in their dissolution. The court of appeals affirmed the trial court’s enforcement of the agreement because reasonable minds could reach only one conclusion – that an agreement existed and that the purport of the agreement was not disputed under CR 2A. 71 Wn. App. at 45. Thus, “the court was empowered to enforce their settlement agreement.” 71 Wn. App. at 45.

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<sup>3</sup> *Ferree* also noted that a court should resolve a motion to enforce a settlement agreement on affidavits and that live testimony “would seem needlessly wasteful of judicial resources.” 71 Wn. App. at 42 n.9.

As in *Ferree*, here the trial court was empowered to enforce the settlement agreement because Commonwealth does not dispute the existence of the Settlement Agreement or its purport. (App. Br. 21-23). Commonwealth only argues that Soundbuilt's motion to enforce was procedurally flawed because it did not bring a separate action. (App. Br. 16-19) Notably, Commonwealth conceded below that a summary judgment motion was the proper mechanism for resolving Soundbuilt's assertion that Commonwealth breached the Settlement Agreement. (CP 476 (“[Soundbuilt’s] proper course of action would have been to bring a summary judgment motion alleging a breach.”) But, as explained above, a motion to enforce is treated like a summary judgment motion under CR 2A where, as here, the “existence and material terms are not genuinely disputed.” 71 Wn. App. at 43. Thus, as in *Ferree*, the trial court was fully empowered to enforce the Settlement Agreement in *this* action.<sup>4</sup>

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<sup>4</sup> As explained in § IV.A, although the record undisputedly demonstrates Commonwealth's bad faith in opposing the settlement with the bankruptcy trustee, even if those actions were in good faith, it would not raise a *genuine* dispute because Commonwealth cannot dispute that but for its objection to the trustee settlement a final judgment would have been expeditiously entered. *See 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 in such a way as to raise a genuine issue of fact.”).

Commonwealth *confirms* that the trial court properly enforced the Settlement Agreement in this action by citing ***Lavigne v. Green***, 106 Wn. App. 12, 23 P.3d 515 (2001) (App. Br. 22-23). Citing ***Ferree, Lavigne*** confirms that “[t]he purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action.” 106 Wn. App. at 19. The court fully recognized that a settlement agreement is enforceable under CR 2A where its material terms or existence are undisputed, but remanded only because the parties had failed to address critical terms in their settlement and thus it was disputed. ***Lavigne***, 106 Wn. App. at 19-21. In stark contrast, here, Commonwealth does not dispute the existence of the agreement’s terms.

Contrary to Commonwealth’s assertion that CR 2A does not authorize Soundbuilt’s motion (App. Br. 22-23), CR 2A and the cases interpreting it confirm that the trial court who presided over claims is in the best position to determine whether a settlement agreement should be enforced. *See also* Tegland, 15 Wash. Prac., Civil Procedure § 53.26-27 (2009) (noting that “the appropriate recourse is a motion to enforce” when settlement agreement is breached while an action is pending, and that a separate action is

required only if “a settlement agreement is breached without suit ever having been filed”); *see also* §53.28 (If a settlement is repudiated following dismissal of action, party should file “a motion to enforce the settlement” under the original cause number). It would be a waste of judicial resources to require a new judge to review the Settlement Agreement and the underlying claims it resolved before enforcing it, and this motion was properly brought in the underlying action where all the parties’ disputes were litigated and settled.

**2. Soundbuilt’s Assignment To Commonwealth Of Its Lis Pendens Claims And The Forum Selection Clause Are No Impediment To Soundbuilt’s Right To Enforce The Settlement Under CR 2A.**

Soundbuilt’s assignment of its lis pendens claims to Commonwealth in the Settlement Agreement, and Commonwealth’s subsequent substitution to *expeditiously* pursue them (App. Br. 19-22), does not change this principle authorizing a CR 2A motion to enforce a settlement in a pending action by motion in the underlying litigation. Commonwealth itself chose to bring its indemnity action as an intervenor in Soundbuilt’s original specific performance action (CP 516), taking advantage of the civil rules’ provisions for liberal interpretation of the rules to insure that

related claims can be considered together. CR 24; **Olver v. Fowler**, 161 Wn.2d 655, 664, 168 P.3d 348 (2007) (“we liberally construe our rules in favor of intervention”). Commonwealth thus insured that Soundbuilt would remain a party to this action. The Settlement Agreement itself made clear that Soundbuilt remained an interested party, and that it had an interest in the Newhalls being found liable to Commonwealth. And the substitution of Commonwealth for Soundbuilt was only partial. Soundbuilt retained the right to certain claims, and did not directly assign the judgment against DALD/Newhall. (CP 230) The notice of appeal filed by the Newhalls recognized Soundbuilt’s interest, identifying Soundbuilt as a party to the appeal. (CP 351-64)

The cases relied upon by Commonwealth (App. Br. 20) are not to the contrary, and would not divest Soundbuilt of its rights to enforce its agreement with Commonwealth in this action. **Puget Sound Nat’l Bank v. Dep’t of Revenue**, 123 Wn.2d 284, 868 P.2d 127 (1994) merely authorized an assignment of claims for tax refunds against the State. **Estate of Jordan v. Hartford Accident & Indem. Co.**, 120 Wn.2d 490, 844 P.2d 403 (1993), similarly confirmed that rights under fidelity bonds are assignable. And in **Amende v. Town of Morton**, 40 Wn.2d 104, 241 P.2d

445 (1952), the Court recognized that the agreement at issue did *not* have the effect of divesting the assigning party of its original rights in the bonds at issue.

These cases have nothing to do with the enforcement of the Settlement Agreement by a party to the agreement here. Nor does ***River Park Square, L.L.C. v. Miggins***, 143 Wn.2d 68, 17 P.3d 1178 (2001) (App. Br. 21), support Commonwealth's argument that Soundbuilt lacked standing to file a motion to enforce in this action. In ***Miggins***, the court refused to grant relief to a party who was never a party to the action and who did not comply with the requirements for seeking intervention under CR 24. In contrast, Soundbuilt was a party from the inception of this case and remained a party after it partially assigned its rights to Commonwealth.

Commonwealth's reliance on the forum selection clause of the Settlement Agreement (App. Br. 17) is equally misplaced. The parties agreed that "[a]ny action to enforce this Agreement shall be brought in the King County Superior Court." (CP 232) Soundbuilt *did* bring its motion to enforce in the King County Superior Court. The Settlement Agreement neither requires nor suggests that the "action" must be commenced by separate complaint in a separate

action, when Commonwealth and Soundbuilt were already parties to the litigation in which this settlement was reached.

Nor was Commonwealth prejudiced by being unable to bring a “counterclaim” in a new action. Commonwealth asserts that it was “unable to plead or litigate its claim that Soundbuilt breached the Settlement Agreement by appearing improperly before the bankruptcy court.” (App. Br. 18) But it had no such counterclaim. Soundbuilt was fully entitled to appear in the bankruptcy court, and to reach a settlement with Newhalls’ bankruptcy trustee. *See, e.g.*, 11 U.S.C. § 1109 (“A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.”); Fed. R. Bankr. P. 2018(a) (“In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.”). Nothing in the parties’ agreement prohibited Soundbuilt from resolving the indemnity claim as it did.

And if Commonwealth did have such a claim, the place to litigate it was in the bankruptcy court. Indeed, it *was* fully litigated

in the bankruptcy court proceedings, where Commonwealth made these exact same arguments against the settlement. (CP 577-78, 692-94) Finally, Commonwealth could prove no damages, because it is undisputed that Soundbuilt *improved* Commonwealth's distribution in the bankruptcy by agreeing to pay the trustee \$225,000 to dismiss the appeal. (CP 14-15, 222-23)

Soundbuilt sought to expeditiously enforce its settlement agreement with Commonwealth by bringing a CR 2A motion before the trial court that was already familiar with the case. According to Commonwealth, it was instead required to bring its claim before a judge completely unfamiliar with the case after commencing a separate action between these two parties who were already parties to the pending litigation. Had Soundbuilt brought a separate action, Commonwealth would assuredly argue that it was required to enforce its settlement in this action. Commonwealth's purpose is clear: delay, delay, delay. This court should not reward its tactics by imposing a decisional limitation on CR 2A that is not justified by the language of the rule or by the policies underlying it. Soundbuilt properly brought its motion to enforce the Settlement Agreement before the court that had presided over all the proceedings.

**C. RAP 7.2 By Its Terms Authorizes This CR 2A Motion, And Any Further Procedural Impediments To Enforcement And Entry of Judgment Are Moot.**

Commonwealth concedes that there is no dispute over the terms of the Settlement Agreement. (App. Br. 22-23) Nor does it dispute that the condition precedent requiring it to pay Soundbuilt has now occurred.<sup>5</sup> (App. Br. 13) There being no genuine issue of material fact, the trial court appropriately entered judgment. *Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993) (motion to enforce should be summarily resolved where “there is no genuine dispute regarding the existence and material terms of a settlement agreement”). Commonwealth nevertheless completes its circuit of meaningless procedural objections by complaining that the trial court could not enter judgment while the Newhall appeal was pending. This contention too is without merit, and is further now moot.

Commonwealth erroneously relies on RAP 7.2 to assert that the trial court lacked jurisdiction when it entered judgment against Commonwealth. (App. Br. 23-25) To the contrary, RAP 7.2(l) authorizes a trial court to continue to act “in a case involving

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<sup>5</sup> The Court of Appeals dismissed the Newhall appeal before the trial court entered its order on appeal here, and issued the mandate less than two months later. (CP 868-71)

multiple parties,” and states the trial court “retains full authority to act in the portion of the case that is not being reviewed by the appellate court.” The trial court expressly entered its judgment under CR 54(b), concluding that the other issues in the case did not concern Soundbuilt and that delay in the entry of judgment would prejudice Soundbuilt. (CP 819)

Here, the Court of Appeals was *only* reviewing the entry of judgment in favor of Commonwealth against the Newhalls, not whether Commonwealth breached its obligations to Soundbuilt. (CP 352) Thus, the trial court had full authority to enter judgment against Commonwealth.

Even if it did not have full authority to act, the trial court had authority to consider the CR 2A motion to enforce pending appeal, and if necessary authority could have been sought for formal entry of the judgment. RAP 7.2(e): “The trial court has authority to hear and determine . . . post judgment motions authorized by the civil rules. . . The post judgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to formal entry . . .” This rule confirms first, that the

trial court had the authority to decide this motion authorized by the civil rules – including CR 2A – and second, that because the trial court’s decision would not have changed a decision then being reviewed by the appellate court (as the enforceability of the Commonwealth/Soundbuilt settlement was not before this court in the Newhall appeal), the appellate court’s permission was not necessary before entry of the trial court’s order enforcing the Settlement Agreement.

Commonwealth’s entire appeal is premised on the condition precedent to its obligation – a final judgment against the Newhalls – having not occurred when the trial court entered its judgment. But there is *no dispute* that, with return of the mandate in the Newhall appeal, that condition has now been met. (CP 868-69) Commonwealth in fact concedes its obligation to make this payment. (App. Br. 13) This appeal is also, therefore, moot. ***Thompson v. Ezzell***, 61 Wn.2d 790, 379 P.2d 990 (1963) (appeal dismissed where affirmance of judgment on another appeal rendered case moot). This court should affirm the judgment because there is no dispute that the trial court, or a new trial court, would enter the exact same order on remand. To require an entirely new proceeding when the condition precedent for payment

has undisputedly occurred would be a waste of judicial resources and would reward the obstructionist and bad faith actions by Commonwealth.

**D. All Fees Assessed By The Trial Court Are Proper, And Soundbuilt Is Entitled To Its Fees On Appeal.**

This court should reject Commonwealth's complaints that the trial court imposed fees that were expressly provided for in the Agreement it signed. Commonwealth's only objection to the late fees and default fees is that its payment was not yet due. (App. Br. 35-36) But as explained above, Commonwealth's payment became due when it prevented the Newhall case from proceeding to final judgment. Thus, the late and default fees applied under the terms of the parties' agreement.

The trial court also properly awarded Soundbuilt attorney's fees for the time Soundbuilt was forced to spend in the bankruptcy court because of Commonwealth's willful breach of the Settlement Agreement. The Settlement Agreement expressly contemplated that fees might be incurred in bankruptcy court, and provided that they would be recoverable in any action to enforce the Settlement Agreement. (CP 232: "In the event a party takes action to enforce any of the terms of this Agreement, including action in the United

States Bankruptcy Court, the prevailing party shall be awarded its costs, litigation expenses and reasonable attorney's fees.")

Soundbuilt's fees were incurred because of Commonwealth's delaying tactics in the bankruptcy court. These fees would not have been incurred if Commonwealth had allowed the Newhall appeal to proceed to final judgment, as it was required to under the Settlement Agreement. Thus, these fees were properly awarded as part of the enforcement of the Settlement Agreement.

This action was taken to enforce the settlement agreement and thus Soundbuilt is also entitled to its fees on appeal. (CP 232) RAP 18.1; *Renfro v. Kaur*, 156 Wn. App. 655, 667, 235 P.3d 800, *rev. denied*, 170 Wn.2d 1006 (2010) ("Because the buyers prevailed below and on appeal, they are entitled to attorney fees and costs based on the contract's fees and costs provision. ").

## V. CONCLUSION

Washington law does not reward parties such as Commonwealth who take every possible avenue to undermine an agreement they signed. Neither should this court. This court should affirm the judgment against Commonwealth and award Soundbuilt its fees and costs on appeal.

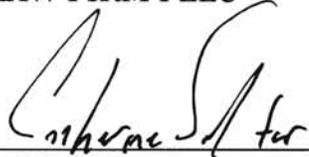
Dated this 15<sup>th</sup> day of August, 2012.

SMITH GOODFRIEND, P.S.

BRAIN LAW FIRM PLLC

By:  \_\_\_\_\_

Catherine W. Smith  
WSBA No. 9542  
Ian C. Cairns  
WSBA No. 43210

By:  \_\_\_\_\_

Paul E. Brain  
WSBA No. 13438

Attorneys for Respondent Soundbuilt Northwest LLC

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 15, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Paul E. Brain Brain Law Firm PLLC 1119 Pacific Ave Ste 1200 Tacoma, WA 98402-4323	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
David S. Kerruish Attorney at Law PS 7016 35th Ave NE Seattle, WA 98115-5917	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Sarah C. Johnson Paul Lawrence Matthew J. Segal Pacifica Law Group LLP 1191 Second Ave., Suite 2100 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
James Rigby, Jr. Attorney at Law 600 Stewart Street, Suite 1908 Seattle, WA 98101-1220	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

Stephen J. Sirianni Sirianni Youtz Meier & Spoonemore 999 3rd Avenue, Suite 3650 Seattle, WA 98104-4038	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 15th day of August,  
2012.

  
\_\_\_\_\_  
Victoria K. Isaksen

## SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into in Seattle, Washington, on July 29, 2008, by and among the parties set forth in paragraph 1 below.

1. Parties. The parties to this Agreement are as follows:

1.1 Sound Built Homes, Inc., a Washington corporation ("SBH"); and

1.2 Commonwealth Land Title Insurance Company and Transnation Title Insurance Company (collectively, "Commonwealth").

2. Purpose. The purpose of this Agreement is to state the terms and conditions of transfer by SBH to Commonwealth of all right, title and interest of SBH in (a) the purchase and sale agreement dated October 14, 2003 ("PSA"), between SBH, as buyer and Dale Alan Land Development Company, LLC ("DALD"), seller, for the purchase and sale of the Real Property described in paragraph 3 herein; (b) SBH's rights and responsibilities as such are described in the Lawsuit, defined in paragraph 4 herein, related to the PSA, except such rights reserved by SBH described herein, and (c) all right, title and interest of SBH in any claims against the persons who acquired an interest in the Real Property subsequent to the filing of SBH's lis pendens, King County Recording Number 20040525000774, in exchange for the consideration set forth herein and Commonwealth's full and complete performance of this Agreement. This Agreement shall also serve as a full and final settlement between SBH and Commonwealth of all claims between them, whether asserted or not, related to the Lawsuit and the lis pendens.

3. Real Property. The real property (hereafter the "Real Property") involved in this Agreement is located in the County of King, State of Washington, and is legally described in Exhibit A.

4. Lawsuit. The Lawsuit is the action pending in the King County Superior Court, Cause Number 04-2-09599-9 KNT.

5. Agreement. In consideration for each others' assent to this Agreement, the parties represent, warrant and agree as follows:

5.1 Payment by Commonwealth to SBH. On or before August 8, 2008, Commonwealth shall pay to the trust account of David S. Kerruish, P.S. by wire transfer the initial sum of Five Million and 00/100 Dollars (\$5,000,000.00) for the benefit of SBH. David S. Kerruish, P.S. is authorized to distribute the \$5,000,000.00 to or on behalf of SBH, upon receipt of the funds. Commonwealth also promises to pay SBH an additional sum of up to Three Million and 00/100 Dollars (\$3,000,000.00), with interest thereon from August 8, 2008 until paid at the rate of eight percent (8%) per annum, for a total payment to SBH of up to Eight Million and 00/100 Dollars (\$8,000,000.00). Commonwealth shall pay the remaining \$3,000,000.00 balance of principal, and all accrued interest, within thirty (30) days of entry of a final, non-appealable order of the Washington courts (including orders of dismissal) determining the liability of DALD

SETTLEMENT AGREEMENT - 1

and Greg Newhall and his marital community for payments made by Commonwealth to SBH pursuant to this Agreement.

If payment is not made within thirty (30) days of the date the sums described herein are due, Commonwealth shall pay a late charge of two percent (2%) of the amount of the payment to defray the expenses to SBH caused by the delay. If default be made in payment of this obligation, then the entire indebtedness of Commonwealth to SBH shall bear interest at the rate of twelve percent (12%) per annum until paid in full.

5.2 Assignment of Rights Related to Lawsuit and Lis Pendens. Upon deposit of the \$5,000,000.00 in the trust account of David S. Keruish, P.S., the right, title and interest of SBH in the PSA, the Lawsuit and the lis pendens shall transfer to Commonwealth, without further action by the parties. SBH agrees to execute such documents as reasonably requested by Commonwealth to document the transfer of the right, title and interest of SBH in the Lawsuit to Commonwealth. This assignment by SBH shall not, however, include the sums (a) awarded to SBH by the court in the Judgment dated December 16, 2004, filed December 19, 2004 (which has been collected by SBH), (b) in the Order Granting Plaintiff's Motion for Relief From Stay and Other Relief dated May 23, 2008 (which has been collected by SBH), and (c) in the Order Granting Plaintiff's Supplemental Motion for Award of Attorney's Fees and Costs dated July 22, 2008 (which has not been collected fully by SBH). The sums described in these judgments shall be retained by SBH and are not included within the rights assigned in this Agreement. The \$30,950.90 awarded to SBH from DALD for attorney's fees and costs in excess of the sums to be paid SBH from the court registry in the July 22, 2008 order shall also be excluded from the assignment of rights described herein. This Assignment shall preserve SBH's right to collect the \$30,950.90 excess described in the July 22, 2008 judgment from DALD, in any manner it sees fit.

5.3 Contingency for Reduction in Balance Due. Commonwealth shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify Commonwealth for sums paid to SBH, and that Commonwealth's payments to SBH were not made as a volunteer. Such determination shall be sought by Commonwealth as soon as reasonably possible after Commonwealth's payment of the \$5,000,000 described in Paragraph 5.2. In the event that DALD and Newhalls are found to be liable to pay Commonwealth the full \$8,000,000 amount which Commonwealth has agreed to pay SBH, SBH shall be entitled to the remaining \$3,000,000 described in Paragraph 5.1.

In the event that the King County Superior Court fails to find that DALD and Newhall are liable to Commonwealth for all sums that Commonwealth has agreed to pay to SBH, and sets a lower sum (or no sum) as the sum for which DALD and Newhall are liable to Commonwealth, then the balance owed SBH shall be reduced so that, when added to the \$5,000,000 already paid to SBH, the total shall equal the sum that the King County Superior Court determines DALD and Newhall are obligated to pay to Commonwealth (but in any event SBH shall be entitled under this Agreement to retain all \$5,000,000 paid).

SETTLEMENT AGREEMENT - 2

In the event that DALD and Newhall's liability is later increased on appeal, the principal balance due SBH shall likewise be increased to conform with the appellate court's decision increasing the sum that DALD and Newhall are obligated to pay to Commonwealth on account of Commonwealth's payment to SBH; however, in no event shall the appellate court decision increase the principal balance of the additional sum above the \$3,000,000.00 plus interest due SBH. In no event shall Commonwealth's obligation to make payment to SBH be dependent upon Commonwealth's ability to collect the sums adjudged to be due from DALD or Newhall.

5.4 Review of Litigation Activity by Counsel for SBH. David S. Kerruish, P.S. and/or Smith Alling Lane, P.S. shall be entitled to review, prior to filing, all pleadings filed by Commonwealth related to the performance of this Agreement, including, seeking enforcement of an obligation of indemnity by DALD and Newhall, and all ancillary matters and appellate pleading and briefs related to such subjects, except such pleadings related to efforts to seize, garnish or collect funds from DALD and Newhall. This right of review is for informational purposes only, and does not create any right of SBH's counsel to direct the litigation or edit the pleadings filed.

5.5 Minimal Continuances of Further Legal Proceedings. Commonwealth agrees that it will use its best reasonable efforts to avoid continuance any of the proceedings, either before the trial court or on appeal, needed to obtain a final, non-appealable order related to the legal matters described in this Agreement, affecting SBH's collection of the balance due SBH. Continuances consistent with the diligent completion of all litigation related to this Agreement may be requested or granted if, in Commonwealth's discretion, such continuance is reasonably needed to represent effectively Commonwealth's position in the litigation.

5.6 No Third Party Beneficiary. This Agreement is not intended to benefit any party other than Commonwealth and SBH, and no other person (including, but not limited to DALD and Newhall) may claim any interest in or benefits from the terms of the Agreement.

5.7 Cooperation. SBH agrees to cooperate with all reasonable requests of Commonwealth to join in and support the litigation efforts of Commonwealth to enforce Commonwealth's rights against DALD and Newhall. Cooperation may include, in Commonwealth's discretion, execution of pleadings prepared by SBH's counsel or Commonwealth's counsel and appearances before the court by SBH's counsel, as reasonably needed by Commonwealth.

5.8 Counterpart Execution. This Agreement may be executed in counterparts, each of which shall be considered an original of the same instrument when each of the parties has executed and delivered a counterpart.

5.9 Delivery by Fax. Delivery of the executed Agreement may be by fax. An executed original of the Agreement thereafter shall be delivered within five (5) days of any delivery by fax, but failure to deliver the executed original shall not change the effective date of the Agreement.

SETTLEMENT AGREEMENT - 3

5.10 Successors. This Agreement binds the heirs, successors and assigns of the parties.

5.11 Integration. This Agreement contains the entire understanding and agreement among the parties in respect of the subject matter of this Agreement. This Agreement supersedes and replaces all prior negotiations, agreements, representations and/or understandings of the parties.

5.12 Construction. The parties acknowledge that their respective attorneys have each reviewed and/or participated in the preparation of this Agreement, and that the rule of construction requiring that ambiguities be construed against the drafting party does not apply.

5.13 Attorney's Fees. In the event a party takes action to enforce any of the terms of this Agreement, including action in the United States Bankruptcy Court, the prevailing party shall be awarded its costs, litigation expenses and reasonable attorney's fees.

5.13A Warranty of Authority to Settle. Each individual signing this Agreement on behalf of a party warrants that he or she is fully authorized to sign this Settlement Agreement and to bind the party on whose behalf the signature is given.

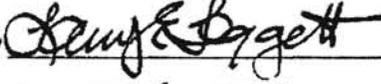
5.14 Purpose of Agreement. This Agreement is intended to compromise disputed claims and avoid the expense and risks of litigation. It is not, and shall not be construed or characterized as, an admission of liability or wrongdoing on the part of any party.

5.15 Amendment or Alteration. This Agreement may not be amended, changed or otherwise altered except by execution by all parties of a written amendment to this Agreement.

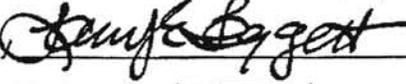
5.16 Law and Forum Selection. This Agreement is governed by the laws of the State of Washington, and any legal proceedings, regarding this Agreement must take place in the State of Washington. Any action to enforce this Agreement shall be brought in the King County Superior Court.

5.17 Time. Time is of the essence in the performance of the obligations set forth in this Agreement.

COMMONWEALTH  
Commonwealth Land Title Insurance Company

By   
Its Claims Counsel

Transnation Title Insurance Company

By   
Its Claims Counsel

SBH  
Sound Built Homes, Inc.

By   
Gary J. Raeca, President

David S. Kerruish, P.S. agrees to accept receipt of the funds described in Paragraph 5.2 from Commonwealth, to be held in a trust account for the benefit of SBH, and agrees to disburse such funds according to the terms and conditions set forth in this Settlement Agreement and SBH's instructions.

David S. Kerruish, P.S.

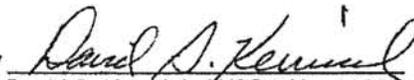
By   
David S. Kerruish, WSBA No. 11090  
President-Attorney for SBH

EXHIBIT "A"

THAT PORTION OF THE SOUTHEAST 1/4 OF THE SOUTHWEST 1/4 OF THE  
NORTHEAST 1/4 OF SECTION 26, TOWNSHIP 22 NORTH, RANGE 5 EAST, W. M., IN  
KING COUNTY, WASHINGTON, KNOWN AS TRACT A, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF SAID SOUTHEAST 1/4 WHICH IS THE  
POINT OF BEGINNING;

THENCE SOUTH  $0^{\circ}44'30''$  WEST ALONG THE EAST LINE 414.073 FEET;

THENCE NORTH  $89^{\circ}19'26''$  WEST 364.49 FEET;

THENCE NORTH  $0^{\circ}47'18''$  EAST 309 FEET;

THENCE NORTH  $89^{\circ}18'22''$  WEST 110 FEET;

THENCE NORTHWESTERLY TO AN INTERSECTION WITH THE NORTHERLY LINE OF  
SAID SOUTHEAST 1/4, A DISTANCE OF 544.15 FEET WESTERLY OF THE NORTHEAST  
CORNER THEREOF;

THENCE SOUTH  $89^{\circ}18'22''$  EAST 544.15 FEET TO THE POINT OF BEGINNING;

TOGETHER WITH A 30 FOOT EASEMENT FOR INGRESS AND EGRESS ALONG THE  
SOUTH PROPERTY LINE OF THE FOLLOWING DESCRIBED PARCEL IN THE SAME  
SOUTHEAST 1/4 OF THE SOUTHWEST 1/4 OF THE NORTHEAST 1/4 OF SECTION 26,  
TOWNSHIP 22 NORTH, RANGE 5 EAST, W. M., KNOWN AS TRACT B, DESCRIBED AS  
FOLLOWS:

THAT PORTION OF THE SOUTHEAST 1/4 OF THE SOUTHWEST 1/4 OF THE  
NORTHEAST 1/4 OF SECTION 26, TOWNSHIP 22 NORTH, RANGE 5 EAST, W. M.,  
DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF SAID SOUTHEAST 1/4;

THENCE NORTH  $89^{\circ}18'22''$  WEST ALONG THE NORTH LINE 544.15 FEET TO THE  
POINT OF BEGINNING;

THENCE CONTINUING NORTH  $89^{\circ}18'22''$  WEST 114.15 FEET TO THE NORTHWEST  
CORNER;

THENCE SOUTH  $0^{\circ}50'06''$  WEST ALONG THE WEST LINE 220.28 FEET;

THENCE SOUTH  $89^{\circ}19'26''$  EAST 294.33 FEET;

THENCE NORTH  $0^{\circ}47'18''$  EAST 115 FEET;

THENCE NORTH  $89^{\circ}18'22''$  WEST 110 FEET;

THENCE NORTHWESTERLY TO THE POINT OF BEGINNING;

TOGETHER WITH AN EASEMENT FOR ROAD AND UTILITY PURPOSES OVER THE  
SOUTH 20 FEET OF THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF THE  
NORTHEAST 1/4 OF SAID SECTION 26;

~~EXCEPT THE WEST 20 FEET THEREOF AND OVER THE SOUTH 20 FEET OF THE WEST~~  
20 FEET OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF THE NORTHEAST 1/4  
OF SAID SECTION 26;

SITUATE IN THE CITY OF COVINGTON, COUNTY OF KING, STATE OF WASHINGTON.