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NO. 71707-3

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

In this dispute over interpretation of a commercial lease, the superior court ignored all of the applicable principles of contract interpretation and inexplicably adopted the plaintiff's contorted interpretation of the lease. TCAM Core Property Operating Fund LP ("TCAM") leased commercial office space to Pacific Market International, LLC ("PMI"). The sole issue is whether or not the lease requires PMI to pay for a certain number of parking spaces in the building garage. The decision of the court below disregards the plain language in the lease that PMI "shall lease thirty four (34) parking spaces in the Garage."

In each instance, the court misapplied the following rules of contract interpretation:

- The objective manifestation of the parties' intent as expressed in the contract controls over the unexpressed subjective intent of one party.
- Words are given their ordinary meaning, usually the one found in the dictionary.
- Identical language in the contract should be read to have the same meaning and different phrases are presumed to have different meanings.

- The interpretation of the contract that gives effect to all of its provisions should be adopted.
- Courts should avoid reading ambiguity into a contract.
- Specific language in a contract should be given more weight than general language.
- When both parties participate equally in the drafting of a contract, it should not be construed against one of them.
- When the parties ascribe different meanings to the words used, the contract is construed against the party that was aware of the different meanings, rather than the one who was not aware of the discrepancy.
- Extrinsic evidence may be analyzed to ascertain the parties' intent under the "context rule" but not to vary, contradict or modify the written word.

PMI does not dispute that all of these rules apply here. Rather, it artfully twists the facts in a way that defies common sense to promote a result contrary to the applicable rules.

After execution of the lease, PMI claimed that it did not intend to be obligated to pay for all of its parking spaces, but only those it used. It argues that the provision quoted above should be ignored and that a second provision which merely establishes PMI's right to the parking

spaces creates an option to take them or not, even though it says no such thing.

The trial court erred in adopting PMI's arguments on summary judgment. On this Court's de novo review, TCAM asks the Court to adopt a common sense reading of the lease, reverse, and remand for entry of judgment in TCAM's favor.

II. ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of January 31, 2014, denying TCAM's motion for summary judgment and granting PMI's motion for summary judgment.
2. The trial court erred in entering the March 14, 2014 judgment and May 20, 2014 amended judgment in favor of PMI and against TCAM.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Does PMI have a contractual obligation to pay for all of its parking spaces regardless of whether it actually uses them when the commercial office space lease provides in Item 13 that the tenant, PMI, "shall lease thirty four (34) parking spaces in the Garage, pursuant to the provisions of Paragraph 18(a)" and "Tenant's lease of parking spaces hereunder shall increase on a proportionate basis upon addition of each Pocket Space." The lease also imposes a corresponding obligation on the landlord, TCAM, to provide the parking spaces to PMI in Paragraph 18(a): PMI

“shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13.” (Assignment of Error 1.)

Is TCAM, rather than PMI, entitled to a monetary judgment and award of attorneys’ fees and costs under the prevailing party provision in the commercial office space lease? (Assignment of Error 2.)

IV. STATEMENT OF CASE

The parking spaces at issue in this dispute are in a parking garage (the “Garage”) adjacent to and partly underneath the World Trade Center North Office Building located at 2401 Elliot Avenue, Seattle, Washington 98121, (the “Building”), which is currently owned by TCAM and in which PMI is a tenant. CP 548-49 (Declaration of Brian Shea (“Shea Decl.”), ¶ 3).

TCAM purchased the Building from WRC Wall Street, LLC in 2007. CP 67 (Declaration of Keith Awad (“Awad Decl.”), ¶ 3). TCAM is owned by Teachers Insurance and Annuity Association-College Retirement Equities Fund (“Teachers”), a nonprofit organization that manages retirement funds for teachers and public employees. CP 946 (Second Declaration of Keith Awad (“2d Awad Decl.”), ¶ 2).

The Garage is, and always has been, owned by the Port of Seattle. CP 67 (Awad Decl., ¶ 3); CP 947 (2d Awad Decl., ¶ 5); CP 922-934

(Parking Agreement and Covenant). It is three stories with approximately 360 parking spaces. CP 922-934 (Parking Agreement and Covenant, Recitals B); CP 67 (Awad Decl., ¶ 3). It is part of a larger parking complex, known as the Bell Street Parking Garage, owned by the Port of Seattle and includes the parking garages under the Seattle Art Institute Building to the south and the World Trade Center East Office Building immediately south of the Seattle Art Institute Building. CP 923 (Parking Agreement and Covenant, Recitals C); CP 548-49 (Shea Decl., ¶ 3). Between the three garages in the parking complex, there are approximately 1,700 parking spaces. CP 548-49 (Shea Decl., ¶ 3).

The Port of Seattle sold the air rights above a portion of the Garage to WRC Wall Street, LLC, TCAM's predecessor-in-interest, in 1997 to construct an approximately 133,100 rentable square foot office building. CP 923 (Parking Agreement and Covenant, Recitals A). Two years later, in connection with WRC Wall Street, LLC's construction of the Building, the Port of Seattle entered into a parking agreement and covenant with WRC Wall Street, LLC. CP 922-934 (Parking Agreement and Covenant). Pursuant to this agreement, the Port of Seattle agreed to make available on a 24 hour per day basis up to 160 self-park, individual parking spaces in the parking complex (a ratio of 1.2 spaces per 1,000 rentable square feet) and WRC Wall Street, LLC agreed to lease a minimum of 133 parking

spaces (a ratio of 1.0 spaces per 1,000 rentable square feet). CP 923-24 (*Id.*, Recitals D and Paragraph 1). The commencement date for the lease of these parking spaces was the date upon which both the Garage was available for use as a parking garage and the Building was tenant occupied. CP 924 (*Id.*, Paragraph 1). The parking spaces were leased at the prevailing market rate; payments were to be made to the Port of Seattle or the operator of the parking complex. CP 924 (*Id.*, Paragraph 2). TCAM informed PMI that the parking agreement, which includes the legal descriptions of both the Garage and the soon-to-be-built Building, was recorded in the public records. CP 922-934 (*Id.*, Exhibits A and B); CP 346 (5/7/10 Email).

In July 2000, WRC Wall Street, LLC leased the entire Building to RealNetworks, Inc. CP 452-519 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement). The lease term was from October 1, 2000 through September 30, 2010. CP 453 (*Id.*, Sections 1(d) and (e)). The lease required RealNetworks, Inc. to pay for a minimum of 133 parking spaces in the Garage with the option to pay for up to 160 parking spaces. CP 454-55 and 463 (*Id.*, Sections 1(i) and 7).

In April 2005, RealNetworks, Inc. subleased a portion of the office space on the fourth floor to PMI. CP 397-441 (Sublease Agreement). The term of the sublease ended on September 30, 2010, the same date that

RealNetworks, Inc.'s master lease terminated. CP 397 (*Id.*, Section 1). The sublease incorporated certain aspects of the master lease. CP 402-404 (*Id.*, Section 4). However, the sublease did not require PMI to pay for any parking spaces. CP 409-410 (*Id.*, Section 15). Instead, it provided that PMI had "the right, but not an obligation" to pay for up to 1.2 parking spaces per 1,000 rentable square feet, that is, 34 spaces. *Id.* In addition, it required RealNetworks, Inc. to make available to PMI five additional parking spaces until those spaces were needed by RealNetworks, Inc. or other subtenants. *Id.* In the event that those additional five parking spaces become unavailable, RealNetworks, Inc. would take reasonable efforts to make five parking spaces available in another parking garage. *Id.*

After acquiring the Building and upon the expiration of the tenant leases, TCAM negotiated leases with provisions requiring each tenant to pay for 1.2 parking spaces in the Garage per 1,000 rentable square feet of office space. CP 68 (Awad Decl., ¶ 5). All of the agreements regarding the parking spaces are contained in the leases; no tenants have separate agreements with TCAM, the Port of Seattle, or the operator of the Garage. *Id.* As a result, TCAM passes through the monthly rental rate charged by the Port of Seattle to its tenants. *Id.* (Awad Decl., ¶¶ 4-5). TCAM has no employees in the Building and no use for the parking spaces in the Garage.

CP 946 (2d Awad Decl., ¶ 3). TCAM does not obtain or hold the access cards to the Garage. CP 947 (*Id.*, at ¶ 7).

The Garage operator, Republic Parking, is responsible for providing the access cards equal to the number of parking spaces specified in the agreement between TCAM and its tenants. CP 1044-1075 (Tenant Handbook). In practice, the tenants' employees receive the access cards to the Garage directly from Republic Parking. CP 947 (2d Awad Decl., ¶ 7); CP 549 (Shea Decl., ¶ 5).

As an amenity to its tenants, TCAM provides visitor and executive parking spaces to its tenants in the loading dock of the Building. CP 68 (Awad Decl., ¶ 6). These spaces are not part of the Garage but are located in the Building owned by TCAM. *Id.*

In the summer of 2009, Keith Awad, the Director of Asset Management for Teachers, came to Seattle to introduce himself as the point-of-contact for the new owner of the Building to PMI's representatives Rob Harris, President and Chief Executive Officer of PMI, and Brian Shea, Chief Financial Officer of PMI. CP 180 (Shea dep. at 23:22-25:3); CP 195-96 (7/24/09 to 7/28/09 Emails); CP 67-68 (Awad Decl., ¶¶ 1, 7, and 8); CP 208 (Schaaf dep. at 10:25-11:6); CP 179 (Shea dep. at 11:10-13). Mr. Awad and Mr. Shea discussed, in general terms,

PMI leasing space in the Building. CP 180 and 185 (Shea dep. at 24:21-25:3 and 42:7-13); CP 68 (Awad Decl., ¶ 8).

In the lease negotiations, the parties were represented by brokers. TCAM's brokers were Jeff Huntington and Garth Olsen of GVA Kidder Mathews. CP 68 (Awad Decl., ¶ 7). PMI's brokers were Paul Suzman and Larry Pflughoeft at Office Lease. CP 180 (Shea dep. at 23:17-19). Once the letter of intent was accepted, the parties' attorneys drafted the lease itself. CP 69 (Awad Decl., ¶ 10). TCAM's attorneys were Richard Moore and Marni Wright of Gordon Derr. CP 68 (Awad Decl., ¶ 7). Margaret "Mig" Schaaf of Davis Wright Tremaine represented PMI. CP 208 (Schaaf dep. at 10:6-11).

TCAM and PMI executed the commercial real estate lease on September 28, 2010 (the "Lease"). CP 104-176 (Executed Lease). The initial lease term is 132 months, with a commencement date of October 1, 2010 and an expiration date of September 30, 2021. CP 106 (*Id.*, BLP 9). The office space initially leased was 28,121 rentable square feet of space on the fourth floor of the Building. CP 105 (*Id.*, BLP 3). PMI is required to take, and pay rent for, additional "pocket space" on the third floor over the term of the Lease. CP 105 and 142 (*Id.*, BLP 3 and SLP 21). The rentable area expanded to 36,754 square feet on October 1, 2012 and will increase again, to 42,791 square feet, on October 1, 2014. *Id.*

Within a month after execution of the Lease, the dispute regarding the parking spaces arose. CP 69 (Awad Decl., ¶ 12); CP 193 (Shea dep. at 82:25-83:5). The parties negotiated the dispute, but ultimately PMI initiated a lawsuit for declaratory judgment and TCAM asserted a counterclaim. CP 529-530 (PMI's MSJ at 7:25-8:3; CP 1-54 (Complaint); CP 55-62 (Answer and Counter Claim). In their cross-motions for summary judgment, the parties agreed that the material facts are undisputed. CP 71-95 (TCAM's MSJ); CP 530 (PMI's MSJ at 8:26).

It is undisputed that TCAM intended PMI to pay for 1.2 parking spaces for each 1,000 rentable square feet, which equates to 34 parking spaces from October 1, 2010 to October 1, 2012, 44 parking spaces from October 1, 2012 to October 1, 2014, and 51 parking spaces for the remainder of the lease term. CP 69 (Awad Decl., ¶ 9); CP 524 (PMI's MSJ at 2:15-16); CP 202 (Suzman dep. at 66:9-20). During the lease negotiations, TCAM was not aware of PMI's parking needs and had no reason to know.¹ CP 941 (Olsen dep. at 14:25-15:2); CP 846 (Moore dep. at 31:21-32:2); CP 938 (Awad dep. at 57:15-25); CP 947 (2d Awad Decl.,

¹ If anything, the evidence reflected that PMI wanted more parking spaces: in its Sublease with RealNetworks, Inc., PMI required RealNetworks, Inc. to make five additional parking spaces available to it above the 1.2 parking spaces per 1,000 rentable square feet it had the option of using. CP 409-410 (Sublease, Section 15).

¶ 4). In fact, only one Building tenant negotiated a provision allowing it to pay for those parking spaces it actually used. CP 68 (Awad Decl., ¶ 5).

TCAM's broker sent a letter of intent reflecting a "must take" arrangement for the parking spaces to PMI's brokers on September 1, 2009. CP 199 (Suzman dep. at 16:15-17:9); CP 229-231 (9/1/09 Letter of Intent). The letter of intent stated that "[t]he parking requirement for the building is 1.2:1000 RSF." CP 229-331 (9/1/09 Letter of Intent) (emphasis added). The first draft of the letter, which was never transmitted to PMI, read "[t]he parking ratio for the building is 1.2:1000 RSF." CP 222-24 (Draft Letter of Intent) (emphasis added). Mr. Awad instructed his broker to change this language to "reflect a 'must take' arrangement." CP 219-220 (8/31/09 Email); CP 69 (Awad Decl., ¶ 9).

Thereafter, the brokers for TCAM and PMI negotiated the letter of intent. Compare CP 229-231 (9/1/09 Letter of Intent) with CP 233-39 (Final Letter of Intent). However, the term regarding the parking spaces in the Garage, "[t]he parking requirement for the building is 1.2:1000 RSF," was not changed nor did PMI request that it be changed. CP 233-39 (Final Letter of Intent); CP 200 (Suzman dep. at 19:8-10); CP 182-83 and 187 (Shea dep. at 31:2-14, 36:4-37:17, 50:4-5, and 51:7-9). Indeed, in a letter of intent PMI's broker drafted on his firm's letterhead and transmitted to TCAM, PMI expressly adopted this language by stating "general parking

as proposed.” CP 242-243 (11/26/09 Letter of Intent). Moreover, neither Mr. Shea nor Mr. Suzman discussed the Garage parking with Mr. Awad or TCAM’s brokers at this time. CP 200 (Suzman dep. at 19:8-10); CP 182-83 and 187 (Shea dep. at 31:2-14, 36:4-37:17, 50:4-5, and 51:7-9).

Thus, the final Letter of Intent stated in relevant part:

Parking: The parking requirement for the building is 1.2:1000 RSF leased at market rates, current \$220 per stall per month. The parking structure is controlled by the Port of Seattle, but the allocation will remain for the duration of the lease. Secured bicycle storage/parking will also be provided.

CP 233-240 (Final Letter of Intent). TCAM drafted and intended this term to mean that PMI was required to pay for 1.2 parking spaces per 1,000 rentable square feet. CP 253-311 (3/2/10 Lease); CP 69 (Awad ¶ 9).²

Once the Letter of Intent was finalized, the parties’ attorneys negotiated and drafted the lease. CP 69 (Awad Decl., ¶ 10); CP 208 (Schaaf dep. at 11:4-14). As a matter of course, the attorneys first reviewed the Letter of Intent. CP 188 (Shea dep. at 57:8-21); CP 208 (Schaaf dep. at 12:1-24); CP 246-47 (Moore dep. at 11:11-18 and 37:13-17). The drafting and negotiation process took place from March 2, 2010

² To avoid voluminous filing and for the sake of efficiency, only the pages of the draft leases related to the relevant negotiated sections of the drafts of the lease were included as exhibits to TCAM’s summary judgment briefing.

to September 28, 2010, when the parties executed the Lease. CP 252-311 (3/2/10 Email and Lease); CP 104-176 (Executed Lease).

TCAM's counsel started drafting from a form lease used by Teachers. CP 851-911 (Form Lease); CP 247 (Moore dep. at 37:9-19). However, the World Trade Center North Office Building is a unique building among Teachers' real property due to the fact that the Garage is owned by a third party. CP 947 (2d Awad Decl., ¶ 5). Thus, the form lease was heavily revised to reflect this fact and the terms of the Letter of Intent. CP 851-911 (Form Lease).³

All of the drafts that were exchanged, as well as the executed lease, are divided into two sections: the Basic Lease Provisions and the Standard Lease Provisions. The Basic Lease Provisions is a compendium of the key terms of the lease. CP 247 (Moore dep. at 36:16-38:25). They are found on the first several pages of the lease and include important operative terms such as the base rent, the term, and the commencement date, most of which are not found in the Standard Lease Provisions. CP 105-108

³ TCAM's counsel testified: "When you draft a lease for a landlord, like, for instance, Teachers, typically you would take the LOI, and that would give you the details about how to modify the lease to create a form to propose a contract. Some of those revisions, maybe even the majority of them in the first draft, would happen in the basic lease provisions." CP 247 (Moore dep. at 37:13-19.)

(Executed Lease). The Standard Lease Provisions elaborate upon the provisions in the Basic Lease Provisions. CP 109-147 (Executed Lease).

The obligations regarding the parking spaces in the Garage are found in both the Basic Lease Provisions and the Standard Lease Provisions. CP 107 and 135 (Executed Lease, Item 13 and Paragraph 18(a)). The Teachers form lease provided two alternative parking provisions in the Basic Lease Provisions:

_____ () [uncovered, unreserved]
parking spaces throughout the Initial Term (See Paragraph 18)

or

Tenant shall have the right to lease up to _____ () [reserved or unreserved] stalls in the Project's garage at the prevailing market rate, currently \$__ per stall per month, and may contract directly with the parking garage vendor for additional stalls, all pursuant to the provisions of Paragraph 18(a) below. There will be an additional charge for each access card to provide access to garage outside of garage opening hours.

CP 855 (Form Lease, Item 13). As this language did not reflect the "requirement" described in the Letter of Intent, TCAM's counsel replaced it before sending the first draft to PMI. *Id.*; CP 252-311 (3/2/10 Lease).

After TCAM's counsel's revisions, Item 13 of the Basic Lease Provisions matched the language of the Letter of Intent: PMI is required to pay for 1.2 parking spaces in the Garage per 1,000 rentable square feet, which equaled 34 spaces at the commencement of the Lease. To wit:

Tenant shall lease thirty four (34) parking spaces in the Garage, pursuant to the provisions of Paragraph 18(a) below. All such parking shall be on an unassigned self-park basis at the rate established by the Port of Seattle (its successor or assigns) or its parking operator from time to time (collectively, the "Garage Owner"), which rate is currently \$220 per month per stall. Tenant's lease of parking spaces is pursuant to a ratio of 1.2 spaces per 1,000 rentable square feet of Premises, and thus Tenant's lease of parking spaces hereunder shall increase on a proportionate basis upon addition of each Pocket Space as set forth in Paragraph 21.

Compare CP 233-240 (Final Letter of Intent) with CP 252-311 (3/2/10 Lease). The language of Item 13 was not revised during the negotiations of the Lease. Rather, the same language in the first draft is found in the executed Lease. Compare CP 252-311 (3/2/10 Lease) with CP 104-176 (Executed Lease).

TCAM's corresponding obligations regarding the parking spaces in the Garage are laid out in Paragraph 18(a) of the Standard Lease Provisions. CP 135 (Executed Lease, Paragraph 18(a)). Again, TCAM's counsel started with the Teachers form lease and revised it as follows:

Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the ~~Project~~Building specified in Item 13 of the Basic Lease Provisions for the parking of operational motor vehicles used by Tenant, its officers and employees only. ~~Landlord reserves the right, at any time upon written notice to Tenant, to designate the location of Tenant's parking spaces as determined by Landlord in its reasonable discretion. The use of such spaces shall be subject to the rules and regulations adopted by Landlord from time to~~

~~time for use of the parking areas. Landlord further reserves the right to make such changes to the parking system as Landlord may deem necessary or reasonable from time to time; i.e., Landlord may provide for one or a combination of parking systems, including, without limitation, self parking, single or double stall parking spaces, and valet assisted parking. Except as otherwise expressly agreed to in this Lease, Tenant agrees that Tenant, its officers and employees shall not be entitled to park in any reserved or specially assigned areas designated by Landlord from time to time in the Project's parking areas. Landlord may require execution of an agreement with respect to the use of such parking areas by Tenant and/or its officers and employees. A default by Tenant, its officers or employees in the payment of such charges, the compliance with such rules and regulations, or the performance of such agreements(s)~~ Parking fees for each month shall be paid to Landlord simultaneously with Rent. Parking fees shall equal the parking fees charged by the Garage Owner. In addition, Tenant shall have the right to one (1) executive parking stall located in the loading area of the Building at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner, which as of the date of this Lease amounts to a monthly charge of \$330 per stall. Landlord shall also provide a secured area for the storage of bicycles. Tenant acknowledges that because Landlord does not own the parking garage, Landlord cannot guarantee the condition or availability of the same; provided that Landlord agrees to use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces hereunder. Tenant agrees at all times to comply with rules and regulations established by the Garage Owner with respect to use of the parking garage. A default by Tenant, its officers or employees with respect to such rules and regulations shall constitute a material default by Tenant hereunder. Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's officers, employees, suppliers, shippers, customers or invitees to be loaded, unloaded or parked in areas other than those designated by Landlord or Garage Owner for such activities. If Tenant permits or allows any of the

prohibited activities described in this Paragraph, then Landlord or Garage Owner shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

CP 881-82 (Form Lease, Paragraph 18(a)). The first draft of the lease provided to PMI incorporated the revised language but did not show the redline changes. CP 252-311 (3/2/10 Email and Lease).

After reviewing the first draft of the lease, PMI's brokers discussed the parking obligation with PMI. CP 202 (Suzman dep. at 67:20-68:13.) Mr. Suzman and Mr. Plughoeft drafted a list of comments for Mr. Shea. *Id.*; CP 343-44 (2/19/10 Letter). Mr. Shea's brokers informed him that "Item 13 makes it an obligation." CP 343-44 (2/19/10 Letter). Mr. Shea, on the other hand, does not recall any conversations with anybody about the parking requirement in Item 13. CP 189 (Shea dep. at 59:19-60:11).

However, PMI only addressed Item 13 with TCAM once during the lease negotiation. In Ms. Schaaf's first set of requested revisions to the draft lease she wrote the following, in relevant part:

39. Parking. (§ 13) The provisions of Section 13 should be modified to conform to Section 18 which correctly describes the agreement between the parties. Tenant should also be entitled to use two visitor stalls in the loading area free of charge.

CP 210 (Schaaf dep. at 24:6-22); CP 322 (3/18/10 Letter). Item 13 of the Basic Lease Provisions contains three sentences yet Ms. Schaaf's

comment does not provide any detail on what part she wanted changed, nor does she propose any revised language. *Id.*⁴

TCAM's counsel used the common approach in negotiating contracts by responding to PMI's counsel with a revised draft of the lease containing only those revisions acceptable to TCAM. CP 250 (Moore dep. at 58:21-59:15). TCAM's counsel explained:

A common approach to negotiating contracts is to respond with a draft. And it's common to respond with a draft that is something your client would agree to, that, for example, may have addressed half of the things in this letter. So our client might say, I won't do any of Items 1 through 20, or I'll do all of 1 through 20 but none of the rest. And we'd give it to the other lawyer, and it would be their obligation to come back and ask for things.

CP 250 (Moore dep. at 58:24-59:8). This approach was used for other terms as well, such as the calculation of management fees. Compare CP 349 (5/7/10 Lease) with CP 365 (6/11/10 Email) and with CP 370 (8/17/10 Lease).

TCAM's counsel was confident that the two parking provisions were correctly drafted to reflect TCAM's intent and there was no inconsistency between them. CP 250 (Moore dep. at 60:8-12). Thus, in

⁴ Although Ms. Schaaf surely knew what she meant and wanted changed, her comment made no sense. The letter addresses each item of the Basic Lease Provisions, and then each paragraph of the Standard Lease Provisions in sequential order. This comment sits between comments regarding surrounding paragraphs of the Standard Lease Provisions and references Section 13, not BLP 13. CP 322 (3/18/10 Letter). Section 13 does not address parking and the comment does not specify how Section 13 "should be modified to conform." CP 132 (Executed Lease, Section 13).

response to Ms. Schaaf's March 18, 2010 letter, Ms. Wright provided a revised lease "incorporating many of the comments," but did not make any changes to Item 13. CP 327 (4/6/10 Email). The only revision related to the Garage parking in Paragraph 18(a) was to a sentence about the Garage rules and regulations. CP 350 (4/6/10 Lease). The redlined version of Paragraph 18(a) read as follows:

Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13 of the Basic Lease Provisions for the parking of operational motor vehicles used by Tenant, its officers and employees only. In addition, there will be two (2) visitor parking spaces available to visitors of tenants of the Building on a non-exclusive basis. Parking fees for each month shall be paid to Landlord simultaneously with Rent. Parking fees shall equal the parking fees charged by the Garage Owner. In addition, Tenant shall have the right to one (1) executive parking stall located in the loading area of the Building at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner, which as of the date of this Lease amounts to a monthly charge of \$330 per stall. Landlord shall also provide a secured area for the storage of bicycles. Tenant acknowledges that because Landlord does not own the parking garage, Landlord cannot guarantee the condition or availability of the same; provided that Landlord agrees to use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces hereunder. Tenant agrees at all times to comply with rules and regulations established by the Garage Owner and/or Landlord with respect to use of the parking garage, including without limitation hours of availability. A default by Tenant, its officers or employees with respect to such rules and regulations shall constitute a material default by Tenant hereunder. Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or

Tenant's officers, employees, suppliers, shippers, customers or invitees to be loaded, unloaded or parked in areas other than those designated by Landlord or Garage Owner for such activities. If Tenant permits or allows any of the prohibited activities described in this Paragraph, then Landlord or Garage Owner shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

Id.

Even though TCAM's attorneys did not make any change to Item 13 of the Basic Lease Provisions and no substantive change to Paragraph 18(a) regarding the Garage parking obligation, PMI did not follow up on the requested revision or repeat the request. CP 522 (Wright dep. at 23:1-13); CP 250 (Moore dep. at 58:21-59:15).

Instead, the parties continued to negotiate changes to Paragraph 18(a) to reflect their agreement in the Letter of Intent regarding the visitor and executive spaces. The Letter of Intent provided, in pertinent part:

Executive Parking: The landlord will provide one executive parking stalls [*sic*] located in the loading area. The cost of these stalls will be one and a half the cost of parking that is being charged by the Port of Seattle. This will make the current cost \$330.00 a month for the executive stalls.

Visitor Parking: Landlord is looking at providing, for all tenants in the building, up to two visitor parking stalls in the loading dock area. These two parking stalls can be reserved through property management. The exact rules are to be determined by property management.

CP 233-240 (Final Letter of Intent).

On April 14, 2010, Ms. Schaaf responded with 33 additional revisions to the draft lease. CP 333-35 (4/14/10 Email). Regarding parking, she wrote:

22. Parking. (Sec. 18) Tenant's executive parking space and the two visitor parking spaces should be striped and signed to clearly demarcate them, or otherwise ensure that such spaces are not blocked by delivery vehicles. The 4th sentence should clarify that the fee for the executive stall is \$330, not 150% of \$330; the last phrase could be reworded "parking fees charged by the Garage Owner; such cost is \$330 per stall as of the date of this Lease." The word "reasonable" should be added before "rules and regulations" in the 8th sentence."

CP 334 (4/14/10 Email).

As these revisions were acceptable to TCAM, on April 21, 2010, Ms. Wright provided another draft of the lease incorporating Ms. Schaaf's revisions to Paragraph 18(a). CP 337-351 (4/21/10 Email and Lease).

Paragraph 18(a) of this draft read as follows:

...In addition, Tenant shall have the right to one (1) executive parking stall located in the loading area of the Building at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner, such cost is \$330 per stall ~~which~~ as of the date of this Lease. The visitor spaces and executive parking stall amounts to a monthly charge of \$330 per stall. Landlord shall be striped and numbered. ~~also provide a secured area for the storage of bicycles.~~... Tenant agrees at all times to comply with reasonable rules and regulations established by the Garage Owner and/or Landlord with respect to use of the parking garage, including without limitation hours of availability.

CP 340 (4/21/10 Lease).

Later in April 2010, the parties had an in-person meeting during which the executive parking spaces in the loading dock were discussed; the parking spaces in the Garage were not discussed. CP 209 and 211 (Schaaf dep. at 15:7-15 and 42:11-21); CP 205 (Suzman dep. at 94:24-95:10).

On May 7, 2010 Ms. Wright emailed another revised version of the lease. CP 346-351 (5/7/10 Email and Lease). Paragraph 18(a) included the following redlining:

...The visitor spaces and the executive parking stall shall be striped, ~~and~~ numbered and marked with signs that state that such spaces shall not be blocked....

CP 350 (5/7/10 Email).

On May 20, 2010, Ms. Schaaf emailed Ms. Wright with sixteen revisions. Regarding the executive parking spaces, she wrote: “9. Parking. (Par. 18(a)) Please change the comma to a semi-colon after ‘Garage Owner’ in the fifth sentence.” CP 353-54 (5/20/10 Email). Ms. Schaaf did not address the Garage parking spaces. *Id.*

On May 29, 2010, Ms. Wright emailed Ms. Schaaf with a revised lease. CP 356-361 (5/29/10 Email and Lease). As requested, Ms. Wright substituted the comma for a semi-colon in the sentence regarding the cost of the executive parking space:

...at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner; such cost is \$330 per stall as of the date of this Lease...

CP 360 (5/29/10 Lease).

The parties' attorneys exchanged additional draft leases and revisions on June 4, June 11, August 17, August 25, September 1, September 7, September 14, September 16, and September 21, 2010. However, no further revisions to Paragraph 18(a) were requested or made. CP 363 (6/4/10 Email); CP 365 (6/11/10 Email); CP 367-372 (8/17/10 Email and Lease); CP 374-75 (8/25/10 Email); CP 377-789 (9/1/10 Email; 9/7/10 Email); CP 380-384 (9/14/10 Email and Lease) CP 386-87; (9/16/10 Email); CP 389-395 (9/21/10 Email and Lease).

It is undisputed that the parties did not discuss the parking spaces in the Garage, either in person, over the phone, or by email, other than as described above. CP 948 (PMI's Oppo. at 1:21-25).

In total, the parties exchanged approximately nine drafts of the letter of intent and eight drafts of the lease. CP 812-843 (Drafts of Letter of Intent); CP 252-311, 327-331, 337-341, 346-351, 356-361, 367-372, 380-384, and 389-395 (Drafts of Lease). Further, PMI's counsel sent approximately eight letters or emails with substantive revisions, often providing the requested language. CP 313-325, 333-35, 353-54, 365, 374-75, 377-78, 386, and 919-920 (Ms. Schaaf's Correspondence). Counsel

for the parties also spoke by phone and met in person. CP 944 (Schaaf dep. at 13:23-14:17). In sum, both parties were actively engaged in the lease negotiations. This reality is reflected in Paragraph 19(u):

Joint Product. This Agreement is the result of arms-length negotiations between Landlord and Tenant and their respective attorneys. Accordingly, neither party shall be deemed to be the author of this Lease and this Lease shall not be construed against either party.

CP 139 (Executed Lease, Paragraph 19 (u)).

Within a month after the Lease was executed, TCAM billed PMI for the 34 parking spaces in the Garage and has continued to bill PMI for its proportionate share of the parking spaces. CP 69 (Awad Decl., ¶ 12); CP 193 (Shea dep. at 82:25-83:5). In October 2012, PMI increased the size of its rentable square feet and thus its proportionate share of parking spaces increased to 44. CP 69 (Awad Decl., ¶ 12). Since the beginning of the lease term, PMI, or its employees, has paid the Port of Seattle directly for approximately 13 to 19 parking spaces and TCAM has credited PMI for these payments. CP 69 (Awad Decl., ¶ 12); CP 549 (Shea Decl., ¶ 4). However, PMI refused to pay the remaining amount owed. CP 69 (Awad Decl., ¶ 12). Instead, as PMI is required under the Lease to be current on all payments to TCAM in order to do any projects on the Premises, such as a remodel, it has made several payments for the amounts then owed

under protest. *Id.* As of January 2014, PMI owed TCAM approximately \$35,710.40. *Id.*

After the parties engaged in discovery, the parties filed cross-motions for declaratory judgment, asking the trial court to interpret the Lease to determine whether PMI is required to pay for its proportionate share of parking spaces. CP 71-95 (TCAM's MSJ); CP 523-547 (PMI's MSJ). In its briefing, PMI claimed that it did not intend to be required to pay for all of its parking spaces, but only those that it actually used, and argued that the Lease reflects its intent. CP 546 (PMI's MSJ at 24:13-14); CP 971 (PMI's Oppo. at 24:24-26). Specifically, PMI argued that Paragraph 18(a) provided that PMI was not obligated to pay for all of its parking spaces and that this provision supersedes Item 13. CP 531 (PMI's MSJ at 9:22-24). In making this argument, PMI relied on an internal conflict provision in the Lease which provides that "[i]n the event of any conflict between the provisions of the Basic Lease Provisions and the provisions of the Standard Lease Provisions, the Standard Lease Provisions shall control." CP 107-108 (Executed Lease at p. 4); CP 531 and 537 (PMI's MSJ at 9:8-10 and 15:6-9); CP 948 (PMI's Oppo. at 1:19-20). This is the argument that the trial court adopted in granting PMI's Motion for Summary Judgment and denying TCAM's cross-motion. CP 1100-1102 (Amended Judgment).

V. ARGUMENT

A. The Standard of Review is De Novo

The parties and trial court agreed that there are no disputed issues of material fact. CP 530 (PMI's MSJ at 8:26); CP 71-95 (TCAM's MSJ); CP 1089-1091 (1/31/14 Order). Rather, the issue is a matter of contract interpretation: the application of the rules of interpretation and construction applied to the facts of this case. *See, e.g., Wash. Imaging Servs., LLC v. Wash.n State Dep't of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011) (application of law to the facts of a case is a question of law reviewed de novo); *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (same); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993) (same). Thus, it is a question of law reviewed de novo.

B. Application of the Rules of Contract Interpretation Support TCAM's Interpretation of the Parking Agreement

Within their Lease, the parties entered into a contractual agreement regarding the parking spaces in the Garage. For lack of a better term, TCAM used the word "lease" to describe PMI's obligation: "Tenant shall lease thirty four (34) parking spaces in the Garage...Tenant's lease of parking spaces hereunder shall increase on a proportionate basis upon addition of each Pocket Space." CP 104-176 (Executed Lease, Item 13).

However, as TCAM does not own the Garage, technically the required parking provision constitutes neither a lease nor a license. CP 67 (Awad Decl., ¶ 3); CP 922-934 (Parking Agreement and Covenant). Instead, the parties entered into a comprehensive lease contract, and this is one of the terms in that contract. The parties do not dispute that it is enforceable under basic contract principles; they dispute the scope of PMI's obligation.⁵

Each and every rule of contract interpretation supports TCAM's position that PMI is required to pay for 1.2 parking spaces per 1,000 rentable square feet. The Court applies these rules in the context of the overarching theme of "freedom of contract," which leads to the assumption that the bargaining process and negotiations between parties produced a fair contract. *Liebergessell v. Evans*, 93 Wn.2d 881, 892, 613 P.2d 1170 (1980).

1. The Objective Manifestation of the Parties' Intent is Determinative

"The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The Court determines the

⁵ In its summary judgment briefing, PMI also argued that the agreement failed to satisfy the requirements for a lease for real property and the Statute of Frauds. CP 952-55 (PMI's Oppo.). The superior court agreed with TCAM that it was a contract provision within the Lease, not a separate lease.

parties' intent by examining the "objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc 'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (acknowledging that Washington follows the objective manifestation theory of contracts).

There is no document that more accurately represents the parties' objective manifestation of their intent than the Lease itself, which the parties negotiated, reviewed, and ultimately executed.

2. The Ordinary Meaning of the Lease Terms is That PMI is Required to Pay for All of Its Garage Parking Spaces

In conducting its analysis of the Lease to determine the parties' intent, the Court "impute[s] an intention corresponding to the reasonable meaning of the words used" and "give[s] words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst Commc 'ns, Inc.*, 154 Wn.2d at 503. This reflects that "the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used" and the Court does "not interpret what was intended to be written but what was written." *Id.* at 503-504.

Here, the ordinary meaning of the operative language of the first phrase in Item 13 is indisputable. "Tenant shall lease thirty four (34)

parking spaces in the Garage” means just that: PMI is required to take and pay for 34 parking spaces in the Garage and, when it takes more rentable square feet, its proportionate share of additional parking spaces.⁶ The word “shall” in Item 13 is unambiguous and presumptively creates an imperative obligation. *Clark v. Horse Racing Comm’n*, 106 Wn.2d 84, 91, 720 P.2d 831 (1986). PMI conceded that it interprets this provision in the same way. CP 914 (Suzman dep. at 66:9-19).

The second phrase in Item 13—“pursuant to the provisions of Paragraph 18(a) below”—incorporates the parts of Paragraph 18(a) relevant to PMI’s obligation. CP 107 (Executed Lease, Item 13).

“Pursuant to” is defined as:

1. In compliance with; in accordance with; under <she filed the motion pursuant to the court's order>. **2.** As authorized by; under < pursuant to Rule 56, the plaintiff moves for summary judgment>. **3.** In carrying out <pursuant to his responsibilities, he ensured that all lights had been turned out>.

Black’s Law Dictionary (9th ed. 2009). Thus, the first sentence of Item 13 imposes a duty on PMI to pay for all of its parking spaces and to do so in accordance with Paragraph 18(a), which includes such requirements as paying the parking fee together with the rent.

⁶ As explained below, Item 13 further provides that the number of parking spaces PMI is required to pay for will increase on a proportionate basis with the amount of space it takes. CP 107 (Executed Lease, Item 13).

The next sentence, “All such parking shall be on an unassigned self-park basis at the rate established by the Port of Seattle (its successors or assigns) or its parking operator from time to time (collectively, the “Garage Owner”), which rate is currently \$220 per month per stall,” means that the spaces are nonexclusive and unreserved and the price therefor is set by the Port of Seattle. CP 107 (Executed Lease, Item 13).

The last sentence, “Tenant’s lease of parking spaces is pursuant to a ratio of 1.2 spaces per 1,000 rentable square feet of Premises, and thus Tenant’s lease of parking spaces hereunder shall increase on a proportionate basis upon addition of each Pocket Space as set forth in Paragraph 21,” means that PMI is required to pay for a number of parking spaces proportionate to its rentable square footage.⁷ CP 107 (Executed Lease, Item 13).

Importantly, the parties do not dispute that Item 13 precisely reflects TCAM’s intent. CP 202 (Suzman dep. at 66:9-20).

The meaning of Paragraph 18(a) turns on the word “right.” Paragraph 18(a) provides: “Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking

⁷ This ratio is not the same as the “proportionate share” defined in Item 4 of the Basic Lease Provisions and Paragraph 3 of the Standard Lease Provisions. CP 118 (Executed Lease, Paragraphs 4(c) and 5(a)). These provisions require PMI to pay its proportionate share of defined operating expenses.

areas of the Building specified in Item 13 of the Basic Lease Provisions for the parking of operational motor vehicles used by Tenant, its officers and employees only.” CP 135 (Executed Lease, Paragraph 18(a)).

“Right” is defined by Black’s Law Dictionary as:

1. That which is proper under law, morality, or ethics < know right from wrong>. 2. Something that is due to a person by just claim, legal guarantee, or moral principle <the right of liberty>. 3. A power, privilege, or immunity secured to a person by law <the right to dispose of one's estate>. 4. A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong <a breach of duty that infringes one's right>. 5. (*often pl.*) The interest, claim, or ownership that one has in tangible or intangible property < a debtor's rights in collateral> <publishing rights>. 6. The privilege of corporate shareholders to purchase newly issued securities in amounts proportionate to their holdings. 7. The negotiable certificate granting such a privilege to a corporate shareholder.

Black’s Law Dictionary (9th ed. 2009). (Emphasis added.) The fourth definition is applicable in the context of this Lease, the purpose of which is to define the parties’ obligations. The dictionary’s commentary explains:

“Right is a correlative to duty; where there is no duty there can be no right. But the converse is not necessarily true. There may be duties without rights. In order for a duty to create a right, it must be a duty to act or forbear. Thus, among those duties which have rights corresponding to them do not come the duties, if such there be, which call for an inward state of mind, as distinguished from external acts or forbearances. It is only to acts and forbearances that others have a right. It may be our duty to love our neighbor,

but he has no right to our love.” John Chipman Gray, *The Nature and Sources of the Law* 8–9 (2d ed. 1921).

...

“[In Hohfeldian terminology,] A is said to have a right that B shall do an act when, if B does not do the act, A can initiate legal proceedings that will result in coercing B. In such a situation B is said to have a duty to do the act. Right and duty are therefore correlatives, since in this sense there can never be a duty without a right.” E. Allen Farnsworth, *Contracts* § 3.4, at 114. n.3 (3d ed. 1999).

Id. In this hypothetical, PMI is “A” and TCAM is “B.”⁸

Thus, the sentence “Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Project specified in Item 13 of the Basic Lease Provisions for the parking of operational motor vehicles used by Tenant, its officers and employees only” imposes a duty on TCAM to make the number of unreserved parking spaces designated in Item 13 available to PMI. This duty is created by giving PMI the “right to the nonexclusive use” of the parking spaces.

This sentence complements Item 13 which obligates PMI to pay for its proportionate share of parking spaces. In other words, Item 13 and Paragraph 18(a) create mutual obligations upon the parties: TCAM will

⁸ Notably, the definition and commentary say nothing about whether the holder of a right has or does not have a related duty. It simply means that a right in one person places a duty on another. The word “right” does not mean that the holder of the right does not have duties.

make the parking spaces available and PMI will pay for them, regardless of whether it uses them.

The remaining sentences in Paragraph 18(a) regarding the parking spaces in the Garage bolster this meaning. They explain the mechanics of the parking agreement and what constitutes a breach:

Parking fees for each month shall be paid to the Landlord simultaneously with Rent. Parking fees shall equal the parking fees charged by the Garage Owner... Tenant agrees at all times to comply with reasonable rules and regulations established by the Garage Owner and/or Landlord with respect to use of the parking garage, including without limitation hours of availability. A default by Tenant, its officers or employees with respect to such rules and regulations shall constitute a material default by Tenant hereunder. Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's officers, employees, suppliers, shippers, customers or invitees to be loaded, unloaded or parked in areas other than those designated by Landlord or Garage Owner for such activities. If Tenant permits or allows any of the prohibited activities described in this Paragraph, then Landlord or Garage Owner shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to the Tenant, which cost shall be immediately payable upon demand by Landlord.

CP 135 (Executed Lease, Paragraph 18(a)). Although Paragraph 18(a) imposes a duty on TCAM, that duty is limited by the fact that the Port of Seattle, not TCAM, owns the Garage. Thus, Paragraph 18(a) qualifies the duty it imposes on TCAM with the following:

Tenant acknowledges that because Landlord does not own the parking garage, Landlord cannot guarantee the condition or availability of the same; provided that Landlord agrees to use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces hereunder.

Id. However, this qualification does not affect PMI's obligation to pay for the parking spaces. In fact, although PMI alleged that "in approximately 2008 or 2009, PMI (along with other tenants) complained to the property manager about the lack of parking," tellingly, it did not bring any claims against TCAM. CP 548-49 (Shea Decl., ¶ 3). It knew of and did not dispute the reasonable and necessary limitation on TCAM's duty regarding the parking spaces.⁹

TCAM's counsel's revisions to the Teachers form lease further evince TCAM's intent. In the Teachers form lease, one alternative of Item 13 read as follows:

Tenant shall have the right to lease up to _____ () [reserved or unreserved] stalls in the Project's garage at the prevailing market rate, currently \$__ per stall per month, and may contract directly with the parking garage vendor for additional stalls, all pursuant to the provisions of Paragraph 18(a) below. There will be an additional charge for each access card to provide access to garage outside of garage opening hours.

⁹ TCAM is the successor-in-interest to WRC Wall Street's parking agreement and covenant with the Port of Seattle, which obligates TCAM to lease a minimum of 133 parking spaces and obligates the Port of Seattle to make up to 160 self-park parking spaces available. Accordingly, TCAM controls up to 160 unassigned self-park parking spaces and, therefore, has an enforceable right to subcontract their use to its tenants.

CP 851-911 (Form Lease). However, this language would not impose an obligation on PMI to pay for all of its parking spaces. Instead, it would have solely imposed a duty on TCAM to provide PMI with a certain number of parking spaces. Thus, TCAM's counsel completely removed this language from Item 13. Unsurprisingly, similar language appears in Paragraph 18(a) as it creates a complementary and mutual duty on TCAM to make the parking spaces available.

3. TCAM's Interpretation Allows Identical Language to Be Read the Same

“When the same word is used in different parts of a contract it is presumed that the word means the same throughout.” *Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 159, 684 P.2d 793 (1984).

The word “right” is used again in Paragraph 18(a) with the same definition, i.e., a legally enforceable claim that another will do or will not do a given act. Paragraph 18(a) provides:

Tenant shall have the right to one (1) executive parking stall located in the loading area of the Building at a cost of one hundred and fifty percent (150%) of the parking fees charged by the Garage Owner, which as of the date of this Lease amounts to a monthly charge of \$330 per stall.

CP 135 (Executed Lease, Paragraph 18(a)). Thus Paragraph 18(a) provides for Landlord obligations, which is the counterpart to tenant rights: “the right to the nonexclusive use” of parking spaces and “the right to one (1) executive parking stall.” The word “right” should be read to

mean the same thing in each context. However, there is an important distinction between these two tenant rights: Item 13 contains a separate obligation for PMI to pay for a certain number of spaces regardless of whether it uses them but there is no corresponding provision requiring PMI to pay for the executive parking space unless it uses it. The obligations regarding Garage parking are mutual, while the obligation regarding the loading dock parking is unilateral. This makes practical sense, as PMI is already required to pay for the parking spaces in the Garage, so it should only pay for the executive space if PMI's executives choose to park there instead of in the Garage. Further, TCAM owns the loading dock area and does not incur any cost to provide parking there. But TCAM is required to lease 133 parking spaces in the Garage and will be forced to absorb that cost if it cannot pass it on to its tenants.

The word "right" is used in two other instances in the Lease but in different phrases which necessitate a different meaning. *Bellevue Sch. Dist. No. 405*, 38 Wn. App. at 159 (where two different terms are used separately in different parts of the agreement, it is presumed that they do not mean the same thing). The Lease provides that TCAM has "the right but not the obligation" to release liens and make repairs. CP 118 (Executed Lease, Paragraphs 4(c) and 5(a)). This phrase expressly excludes the possibility that TCAM has any corresponding obligation to

PMI complementing these rights. If PMI intended to have a right but not an obligation to pay for the parking spaces, it should have used this language in Item 13 or Paragraph 18(a), as it did in Paragraphs 4 and 5.

4. TCAM's Interpretation Gives Effect to All of the Lease Provisions

Because the Court is determining the parties' intent, it cannot expunge lawful provisions agreed to by the parties. *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 41, 114 P.3d 664 (2005). To that end, the Court does not disregard language used by the parties and prefers a construction of the contract that gives effect to all of its provisions as opposed to one rendering one or more of the provisions meaningless or ineffective. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007); *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012) (“An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.”).

The parties agreed to two provisions regarding parking: Item 13 in the Basic Lease Provisions and Paragraph 18(a) in the Standard Lease Provisions. These provisions must be read together because they are

complementary: Item 13 requires PMI to pay for all of its parking spaces in the Garage, and Paragraph 18(a) requires TCAM to provide the parking spaces, with the caveat that TCAM does not in fact own the Garage. In other words, Item 13 makes paying for the parking spaces a tenant obligation and Paragraph 18(a) makes using the unreserved parking spaces a tenant right.¹⁰

The fact that Item 13 and Paragraph 18(a) provisions can, and should, be read together does not make the Lease's conflict provision ineffective. This provision is only triggered if there is an actual conflict. "A conflict arises when the two provisions are contradictory and cannot coexist." *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044 (2009). Here, the provisions not only co-exist but are complementary and do not trigger the conflict provision. This, in itself, does not read the conflict provision out of the Lease.

PMI's interpretation that it is not required to pay for its proportionate share of parking spaces requires it to ignore Item 13, thus violating the rule of contract interpretation favoring giving effect to all provisions.

¹⁰ Similarly, Paragraph 18(a) makes the use of the executive parking spaces in the loading dock a right, but there is nothing in the Lease that makes it an obligation. There is no conflict in this language either.

5. TCAM's Interpretation Avoids Reading an Ambiguity into the Lease

An ambiguity will not be read into a contract where “it can reasonably be avoided by reading the contract as a whole.” *Carlstrom v. Hanline*, 98 Wn. App. 780, 785, 990 P.2d 986 (2000). There is no conflict in the meaning of Item 13 and Paragraph 18(a). Rather, Paragraph 18(a) creates the complementary, and necessary, duty of TCAM to provide the parking spaces to the extent it can do so. It is only if the strained interpretation of Paragraph 18(a)—that PMI has the option but not the obligation to pay for the parking spaces—is used that a conflict is created. If such a conflict exists, it makes Item 13 superfluous and ineffective, which is contrary to the rules of interpretation.

6. The Language of the Operative Provision (Item 13) is Given More Weight Than the Language of the General Provision (Paragraph 18(a))

“It is a well-known principle of contract interpretation that specific terms and exact terms are given greater weight than general language.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004). Here, Item 13 provides the operative, specific language that PMI is required to lease thirty four parking spaces. It thus should be given greater weight than the language found in Paragraph 18(a) that describes TCAM's obligations and only the mechanics of PMI's obligation, such as when payments are due.

7. The Lease Should Not Be Construed Against TCAM as Landlord

Both parties were actively engaged in the lease negotiations and PMI had just as many opportunities as TCAM to be clear about its position. Further, the Lease includes a provision that expressly disallows the Lease to be construed against either party. CP 139 (Executed Lease, Paragraph 19(u)).

Thus, the general principle that contracts should be construed against the drafter, which, in the real estate context, is often the landlord, is inapplicable. Compare *McGary v. Westlake Investors*, 99 Wn.2d 280, 287, 661 P.2d 971 (1983) (ambiguity construed against lessor as preparer of document), *Wash. Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 327-28, 625 P.2d 138 (1981) (“Where lessor drafts the lease, ambiguities must be resolved in favor of the lessee.”) with *Fuller Mkt. Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 133, 539 P.2d 868 (1975) (ambiguities in lease construed against the tenant as the drafting party).

8. PMI was Aware of the Meaning Attached by TCAM so the Lease Should be Construed Against PMI

If parties to a contract attach different meanings to a term thereof, in certain circumstances it will be interpreted with the meaning attached by one of them. *Berg*, 115 Wn.2d at 669, citing Restatement (Second) of Contracts, § 201 (1981). For the rule to apply, the party whose meaning is

adopted must either (1) not know of any different meaning attached by the other party and the other party must know the meaning attached by the first party, or (2) have no reason to know of any different meaning attached by the other party and the other party must have had reason to know the meaning attached by the first party. Restatement (Second) of Contracts, § 201.

It is undisputed that the parties attached different meanings to Paragraph 18(a) and it is clear that PMI knew or had reason to know that TCAM attributed a different meaning to Paragraph 18(a) than it did, namely that PMI was required to pay for all of the parking spaces. First, the Letter of Intent used the word “requirement” with respect to the parking spaces. Second, Item 13 provided that “Tenant shall lease thirty four (34) parking spaces in the Garage.” Third, PMI’s brokers, after reviewing the first draft of the lease, advised PMI that “Item 13 makes it an obligation.” CP 343 (2/19/10 Letter). Fourth, PMI’s attorney was aware of TCAM’s intent. In her March 18, 2010 letter she wrote that Item 13 needed to be modified to conform to PMI’s intent not to pay for all of the parking spaces but only those it used; TCAM only learned of PMI’s alleged intent after execution of the Lease. CP 322 (3/18/10 Letter). And fifth, PMI’s attorney was aware that TCAM believed that Paragraph 18(a)

did in fact conform to Item 13 when TCAM's counsel did not revise Item 13 after her request. CP 250 (Moore dep. at 58:21-59:15).¹¹

The only evidence that conceivably could be used to argue that TCAM knew or had reason to know of PMI's meaning is the March 18, 2010 letter from PMI's attorney about "modify[ing]" Item 13 "to conform to Section 18." CP 322 (3/18/10 Letter). However, this letter actually cuts against PMI, as Ms. Schaaf never stated how the paragraphs did not conform or propose any clarifying language. Moreover, if TCAM actually knew that PMI believed that Paragraph 18(a) negated PMI's obligation under Item 13, TCAM would have revised Paragraph 18(a) to address this.

The trial court seemed to believe that TCAM was somehow estopped to challenge PMI's interpretation of Paragraph 18(a) because it did not expressly refute Ms. Schaaf's comment. Even if TCAM's attorneys understood the comment, which they did not, in a lease negotiation, their failure to make a change necessarily means it was rejected. The burden then shifted to Ms. Schaaf to push back if it was an important term for her client, which she did on numerous other instances. E.g., compare CP 349 (5/7/10 Lease) with CP 365 (6/11/10 Email) and

¹¹ The likelihood that counsel who proposed changing a comma to a semicolon simply overlooked the clear language "shall lease" is minimal.

with CP 370 (8/17/10 Lease). Yet she did not and Item 13 remained unchanged in the Lease, as executed by the parties.

PMI knew or had reason to know that TCAM believed that Item 13 and Paragraph 18(a) created mutual promises of performance, including PMI's obligation to pay for all of its parking spaces. In contrast, TCAM did not know that PMI had a different interpretation. Thus, the Lease should be interpreted in accordance with the meaning of Item 13 and Paragraph 18(a) attached by TCAM, which is the only sensible interpretation anyway.

C. The Extrinsic Evidence Also Reflects the Objective Manifestation of the Intent of the Parties That PMI is Obligated to Pay for All of Its Parking Spaces in the Garage

Extrinsic evidence may be analyzed to ascertain the parties' intent under the "context rule." Such evidence may include the (1) subject matter and objective of the contract, (2) all circumstances surrounding the formation of the contract, (3) the subsequent acts and conduct of the parties, (4) the reasonableness of the respective interpretations of the parties, (5) statements made by the parties in preliminary negotiations, and (6) usage of trade and course of dealings. *Berg*, 115 Wn.2d at 667.

However, the primary objective in applying the context rule remains the same: to determine the intent of the contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999). As such, an

important caveat is that extrinsic evidence is only relevant where “the evidence gives meaning to words used in the contract.” *Hollis*, 137 Wn.2d at 695. Thus, extrinsic evidence **does not** include:

- Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the instrument; or
- Evidence that would vary, contradict or modify the written word.

Id. Again, the purpose is to determine the parties’ intent based on their real meeting of minds, not the unilateral or subjective intent of one party.

Here, the extrinsic evidence consists of the negotiation of the letter of intent, negotiation of the lease, and the pre- and post-lease execution conduct of the parties. These sets of evidence relate to the subject matter and objective of the contract, the circumstances around the formation of the contract, statements made in preliminary negotiations, and the prior and subsequent acts and conduct of the parties. They are each addressed in turn below.

Mr. Shea’s testimony that PMI “took [the LOI] to mean” that “the landlord [was] required to provide us 1.2 spaces per 1,000 square feet” and that “there is nothing in 18(a) to indicate that we did” have an obligation to pay for all of the parking spaces cannot be included in the extrinsic

evidence. CP 184 and 191 (Shea dep. at 40:25-41:12 and 66:17-22); CP 203 (Suzman dep. at 70:20-71:19). This is evidence of PMI's unexpressed unilateral and subjective intent as to the meaning of the Letter of Intent and Lease, this intent is independent of the Lease, and it would contradict the written word of the Lease. *Weimerskirch v. Leander*, 52 Wn. App. 807, 813, 764 P.2d 663 (1988).

Similarly, Ms. Schaaf's March 18, 2010 letter does not constitute extrinsic evidence to the extent that it contradicts Item 13 and Paragraph 18(a).

1. Negotiation of the Letter of Intent

From the beginning of the negotiations it was critical to TCAM, the new owner of the Building, that PMI pay for all of its parking spaces. CP 69 (Awad Decl., ¶ 9). Mr. Awad instructed his brokers to change a sentence in the letter of intent to clearly reflect the "parking requirement." CP 219 (8/31/09 Email). It was only after this important change was made that Mr. Awad approved sending the letter of intent to PMI's broker. CP 69 (Awad Decl., ¶ 9). This evidence reflects the objective manifestation of TCAM's intent to require PMI to pay for its proportionate share of parking spaces.

The objective manifestation of PMI's intent is illustrated by the fact that PMI adopted TCAM's "parking requirement" language "as

proposed” and did not request any changes to this language. CP 243 (11/26/09 Letter of Intent); CP 235 (Final Letter of Intent).

Over the approximately six months that the parties negotiated the Letter of Intent, other provisions were changed but the “parking requirement” language remained the same. CP 233-240 (Final Letter of Intent). In addition, the parties do not dispute that they did not negotiate the Garage parking during this time. CP 182-83 and 187 (Shea dep. at 31:2-14, 36:4-37:17, 50:4-5, and 51:7-9); CP 200 (Suzman dep. at 19:8-10); CP 69 (Awad Decl., ¶ 11). This is evidence of the objective manifestation of both parties’ intent that PMI is required to pay for all of its parking spaces.

2. Negotiation of the Lease

The Lease itself was negotiated over approximately seven months. During this time, numerous provisions were changed. For example, PMI’s counsel requested a vague and confusing revision to Item 13. CP 210 (Schaaf dep. at 24:6-22); CP 322 (3/18/10 Letter). However, TCAM’s counsel did not make a change and PMI and its counsel did not, over the following six months, further request any change to the language in Item 13 reading “Tenant shall lease thirty four (34) parking spaces in the Garage, pursuant to the provisions of Paragraph 18(a) below.” Compare CP 256 (3/2/10 Lease, Item 13) with CP 107 (Executed Lease, Item 13).

Similarly, there was no request for a change or any change made to the part of Paragraph 18(a) reading “Tenant shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13 of the Basic Lease Provisions,” such as adding “the right but not the obligation” as was used elsewhere in the Lease and in PMI’s prior sublease with RealNetworks, Inc. Compare CP 282 (3/2/10 Lease, Paragraph 18(a)) with CP 135 (Executed Lease, Paragraph 18(a)). Instead, other revisions were made to Paragraph 18(a) regarding the executive and visitor spaces. *Id.*; CP 192 (Shea dep. at 74:1-12). Further, PMI did not discuss parking in the Garage with TCAM during the lease negotiations and concedes that it did not negotiate whether there was an obligation on the part of PMI to take the Garage parking. CP 191 (Shea dep. at 66:11-16); CP 69 (Awad Decl., ¶ 11).

The fact that Mr. Shea may not have read the Basic Lease Provisions in their entirety or was not aware of Item 13 does not void the Lease. CP 190 (Shea dep. at 64:3-17). He knew to review the Basic Lease Provisions for the important terms. CP 189-190 (Shea dep. at 61:24-64:2). *Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 937 P.2d 1062 (1997); *National Bank v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (“a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its

contents.”). Thus, the language of the lease that remained unchanged over the half-year-long negotiation process serves as the objective manifestation of the parties’ intent.

3. Pre- and Post-Lease Execution Conduct

The language in PMI’s Sublease from RealNetworks is distinctly different than the language in the lease PMI negotiated with TCAM. In the Sublease, the parties used the language “Subtenant shall have the right, but not an obligation, to lease up to one and one-fifth (1.2) parking stalls” to reflect the intention that PMI had an option rather than an obligation. CP 409-410 (Sublease, Paragraph 15). Mr. Shea’s testimony that he believed that the language in the TCAM lease was “exactly what we had in the sublease” is contradicted by the fact that TCAM was not the landlord which negotiated and entered into the sublease. CP 191 (Shea dep. at 66:17-67:3). Instead, the prior history illustrates TCAM’s intent that PMI is required to pay for all of its parking spaces in the Garage.

The actual practice also reflects TCAM’s intent. TCAM is required to lease 133 parking spaces in the Garage from the Port of Seattle. In turn, PMI is required under the Lease to pay for its proportionate share (1.2 per 1,000 rentable square feet) of those parking spaces. Then those employees of PMI who wish to use one of PMI’s parking spaces effectively subcontract for it from PMI, and pay the

operator of the Garage directly. See CP 549 (Shea Decl., ¶ 5); CP 1080 (Second Supplemental Declaration of Brian Shea (“2d Supp. Shea Decl.”), ¶ 3). TCAM bills PMI for the remainder in order to pay the Port of Seattle. CP 1080 (2d Supp. Shea Decl., ¶ 4); CP 69 (Awad Decl., ¶ 12).

In sum, the evidence of the negotiations of the Letter of Intent and Lease and TCAM’s conduct before and after the execution of the Lease is relevant to the parties’ intent. Unilateral and subjective evidence that shows an intention independent of the parking agreement or contradicts the parking agreement does not reflect the parties’ intent and is inadmissible. *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011). Thus, PMI’s unexpressed and unilateral beliefs regarding the Letter of Intent and parking agreement should be disregarded. The record contains no extrinsic evidence showing a meeting of the parties’ minds that is inconsistent with the plain words of the parking agreement. *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 559, 805 P.2d 245 (1991).

D. TCAM is Entitled to Attorneys’ Fees and Costs

TCAM seeks an award of attorneys’ fees on appeal pursuant to RAP 18.1. In Washington, a prevailing party may recover attorneys’ fees if authorized by statute, equitable principles, or by agreement between the

parties. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). Here, TCAM's Lease provides for fees and costs to the prevailing party. CP 136 (Executed Lease, Paragraph 19(a)). Therefore, if TCAM prevails on appeal it is entitled to costs and its reasonable attorneys' fees incurred at the trial court level and in its appeal.

VI. CONCLUSION

The Court should reverse the superior court's order granting summary judgment in PMI's favor. The superior court failed to apply the rules of contract interpretation and instead adopted PMI's contorted and nonsensical interpretation of the Lease. The superior court erred in holding that PMI was not obligated to pay for parking. As the Lease plainly states that PMI "shall lease thirty four (34) parking spaces in the Garage," the Court should remand this case for entry of an order to this effect. The Court should also award attorneys' fees and costs incurred at the trial court level and on appeal to TCAM as the prevailing party.

Respectfully submitted this 9th day of June, 2014

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VII. CERTIFICATE OF SERVICE

I certify that on the 9th day of June 2014, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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Linda McKenzie

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