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STATE OF WASHINGTON

CASE NO. 37728-4-II

COURT OF APPEALS
DIVISION II
FOR THE STATE OF WASHINGTON

WASTE CONTROL RECYCLING, INC., a Washington Corporation,
Appellant,

vs.

EMS MULTI MATERIAL MANAGEMENT & MARKETING, a
division of EAST BAY RESOURCES, INC.,
Respondent.

BREIF OF RESPONDENT

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I. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

This brief is submitted on behalf of EMS Multi-Material Management & Marketing, a division of East Bay Resources, Inc. (hereafter "EMS"). EMS was the plaintiff below. The defendant/appellant is Waste Control Recycling, Inc. (hereafter "Waste Control"). EMS restates the issue as follows:

1. The overriding contract issue is whether Waste Control breached its contract as a matter of law when it *admittedly* failed to supply product meeting the express terms of EMS's purchase order.

2. The evidentiary issue is whether extrinsic evidence is ever admissible to vary or contradict the express terms of the written contract between the parties specifying the goods requested. (Restatement of Appellant's Issues Nos. 1 through 3).

3. The procedural issue is whether Waste Control met its burden on summary judgment to produce competent evidence material to its position that it was not bound contractually to perform in accordance with the terms of the purchase order.

4. A final issue is whether the Court should award sanctions under RAP 18.9(a) on grounds that the appellant has failed to comply with the rules of appellate procedure in the preparation of its brief and has filed a frivolous appeal.

II. COUNTER-STATEMENT OF THE CASE

A. Waste Control's Statement of the Case Violates RAP 10.3(a)(5).

RAP 10.3(a)(5) requires “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” This is an ordinary breach of contract action about a contract for the purchase of goods formed by the acceptance of a written purchase order issued in 2006. Waste Control does not discuss the facts related to the 2006 transaction until the bottom of page 17 of its brief. It then devotes a little over 1 page to the facts regarding the subject transaction. See Brief of Appellant at 17-18.

Waste Control’s statement of the facts predominantly addresses an unrelated and completed transaction occurring in 2005 which was performed satisfactorily. Waste Control devotes 14 pages of its brief to this earlier transaction that is not at issue. See Brief of Appellant at 3 – 17. This focus of the appellant’s brief shifts attention to people and events well before the February 2006 contract and not related to it. Ken Simkins, referred to extensively in this statement of the facts, was not even employed by EMS in 2006 and had no involvement whatsoever in the 2006 transaction. Declaration of Ken Simkins (CP 197-198):

In its statement of the “facts”, Waste Control presents opinion and argument about the facts in a manner that inappropriately maligns EMS. This is “argumentative,” it is not “fair” and it is not relevant to the legal issues related to the contractual obligations flowing from Waste Control’s 2006 purchase order. This kind of briefing is not appropriate under RAP 10.3(a)(5). It wastes the time of opposing counsel and hampers the work of the Court to chase these collateral matters.

The appellant’s brief also contains many violations of RAP 10.3 and RAP 10.4. The citations to the record do not correspond to the page numbers in the clerk’s papers. It is difficult and time consuming to find the cited records. It appears that counsel is using Superior Court subfile numbers in lieu of clerk’s paper page numbers. Also, there are many statements of “fact” without any reference to the record. The argument section of the brief also must cite the relevant parts of the record when factual statements are made. RAP 10.3(a)(6). These citations are frequently missing. Finally, this is a breach of contract case and, yet, Waste Control does not place the controlling contract documents in the appendix in violation of RAP 10.4(c).

EMS is seeking sanctions, as set forth in Section D of the Legal Argument, for the numerous violations of the rules, for the uncalled-for

presentation of the facts in a manner that unnecessarily personalizes the dispute and for the baseless introduction of collateral matter.

B. *The Contract to Purchase Scrap Paper from Waste Control.*

As stated in the appellant's brief, both Waste Control and EMS are merchants who deal in recyclable material, including recyclable paper. Brief of Appellant at 2. The participants in this particular transaction were Fritz Sparks of EMS and Rick Campbell of Waste Control. Declaration of Fritz Sparks at ¶4 (CP 22); Declaration of Rick Campbell at ¶12 (CP 150). On February 15, 2006, EMS issued a purchase order to Waste Control for the purchase of 10 containers of scrap paper of "mixed paper grade" quality. Declaration of Fritz Sparks at ¶6 and Exhibit A (CP 22 & 28). A copy of the purchase order is in the appendix. This purchase order expressly specified that the offer was for the purchase of a grade of paper stock known as "**Mixed Paper**". (CP 22 & 28) The purchase order also specified the quantity, price and other details of the purchase. (CP 22 & 28) The "mixed paper" grade is expressly defined in the purchase order with reference to Paper Stock Standards – a recycling industry standard. The purchase order states: "**Unless Otherwise Specified, Grade Is In Accordance with PS Standards.**" (CP 22 & 28)

The industry guidelines for paper stock export transactions define "mixed paper" as "[c]onsist[ing] of a clean, sorted mixture of various

qualities of paper containing less than 10% of groundwood content. Prohibitive Materials may not exceed ½ of 1%. Total Outthrows may not exceed 3%.” Scrap Specifications Circular, 2006 Inst. of Scrap Recycling Industries, Inc. at 32. (Exhibit B to Declaration of Fritz Sparks) (CP 30-32). A copy of this document is in the appendix. “Outthrows” are defined as “all papers that are so manufactured or treated or are in such a form as to be unsuitable for consumption as the grade specified.” *Id.* “Prohibitive Materials” is defined as “any materials which by their presence in a packing of paper stock, in excess of the amount allowed, will make the packaging unusable as the grade specified.” *Id.* For example, non-paper fiber materials, like glass, aluminum and plastics are Prohibitive Materials. Declaration of Fritz Sparks at ¶ 6 (CP 22).

EMS had contracted to supply mixed paper to Newport CH International (“Newport”), another broker located in Brea, California, who in turn sold the 10 containers to a paper mill in China. *Id.* at ¶8 (CP 22). Waste Control accepted the offer from EMS by delivering the material in 10 containers during March 2006 to a shipper leaving from the Port of Tacoma, Washington, for a port in China. *Id.* at ¶ 9 and Exhibit C (CP 23 & 34). Waste Control invoiced EMS upon the delivery of the material to the shipper. (CP 114-123) Copies of the invoices are in the appendix. The Waste Control invoices specified that it was billing EMS for the

delivery of “mixed paper” pursuant to the EMS purchase order. (CP 114-123) EMS paid Waste Control the invoiced sum of \$19,020.04 for these 10 containers upon invoicing and following delivery of the goods to the shipper in Tacoma. *Id.* at ¶7 and Exhibit C (CP 22 & 34).

C. Waste Control’s Breach of the Contract for Mixed Paper Grade Scrap Paper.

In April 2006, the shipped material arrived in China and was inspected by the Chinese paper mill. The Chinese paper mill contacted Newport and rejected the contents of the 10 containers supplied by Waste Control because the scrap paper in the containers was not the “mixed paper” grade of scrap paper. *Id.* at ¶10 (CP 23). In fact, the material was worthless refuse and contained little paper fiber content. (CP 23-24)

Newport contacted EMS regarding the nonconforming delivery that Waste Control had shipped in the 10 containers. (CP 23). EMS immediately contacted Waste Control to notify it that the paper mill in China had rejected the scrap paper Waste Control had supplied. *Id.* EMS requested that Waste Control travel to China to examine the contents of the containers that Waste Control had supplied. *Id.* Waste Control refused to travel to China to address the problem. *Id.* Waste Control also refused to provide any instructions for EMS as to what to do with the nonconforming material and took no steps to cure. *Id.*

D. Damages Incurred by EMS.

EMS traveled to China to examine the contents of the shipment and provided Waste Control with pictures of the contents of the containers shipped to China. *Id.* at ¶11 (CP 23). Color photographs, revealing the poor quality of these materials, are in the clerk's papers at CP 36-48. EMS discovered and confirmed that the material supplied by Waste Control contained no usable paper fiber. *Id.* at ¶12 (CP 23). The material was of such poor quality it was not usable in any form of recycling operation. *Id.* EMS believed it was of such inferior quality that the Chinese buyers could lose their import permits for bringing such refuse into China. (CP 23-24)

EMS incurred \$1,000.00 in incidental damages related to the trip to China to examine the nonconforming material supplied by Waste Control. *Id.* at ¶13 (CP 24). Additionally, the paper mill in China incurred costs to dispose of these ten containers of unusable waste material in a landfill. *Id.* at ¶14 (CP 24). Newport was required to pay \$18,533.54 to the paper mill for the costs of disposal of the nonconforming goods. *Id.* As a result of Waste Control's failure to provide conforming goods, EMS was required to reimburse Newport the sum of \$28,831.44 for the value of the nonconforming product it had purchased and the sum of \$18,533.54 for the costs of disposal of the nonconforming goods. *Id.* at ¶15 (CP 24).

EMS's payments to Newport as a result of Waste Control's defective performance was in the amount of \$47,364.98. *Id.* at ¶16 (CP 24).

E. Procedural History of the Case.

EMS filed its complaint for breach of contract in November 2007. (CP 3-7) EMS moved for summary judgment in March 2008 on the basis that it issued a purchase order offering to buy mixed paper. (CP 11-20) Waste Control accepted the offer, but did not supply mixed paper. (CP 11-20)

Waste Control opposed the motion but did not contest that it did not supply mixed paper. (CP 59-68) Waste Control contended that the contract was actually for product different from what was specified in the purchase order. (CP 65) Waste Control submitted the declaration of Rick Campbell in opposition to the motion for summary judgment. (CP 148-151) Campbell is a broker with Waste Control. (CP 148) He did not testify materially on the 2006 transaction at issue except to concede that Waste Control did not deliver "mixed paper" to EMS.

Campbell testified that the product "would not fit any definition of 'mixed paper.'" Campbell Declaration at page 3, line 1 (CP 150). ". . . [T]he product could never fit the ISRI standards or even under the old PS standards referred to in EMS' purchase order." *Id.* at page 3, lines 7-8 (CP 150). "The IRSI standard for '(2) mixed paper' can only have prohibited

materials not to exceed one-half of one percent or out throws not to exceed three percent. The shaker mix sold to EMS could not have possibly fit that definition” *Id.* at page 4, lines 3-6 (CP 151). He further testified that “I never represented to Ken Simkins or Fritz Sparks that the KB Recycling product could ever qualify as regular “mixed paper” whether grades (1), (2) of IRSI standards or even (3) of the old PS standards.” *Id.* at page 4, lines 18-20 (CP 151).

Campbell’s declaration otherwise contained predominantly inadmissible hearsay, argumentative assertions, personal opinions, speculation and testimony unrelated to the 2006 transaction. Paragraphs 1 through 3 of his declaration were admissible as to his personal background and as to the fact that there are multiple qualities of scrap paper. (CP 148) However, paragraphs 4 through 11 contained commentary on a different irrelevant transaction occurring in 2005 and his interaction with a Ken Simkins, a former EMS employee, on that different transaction in 2005. (CP 149-150) The testimony from Campbell, at paragraphs 5-12, contains hearsay, opinion and speculation on what Mr. Simkins or Mr. Sparks observed, knew, determined, decided, thought or should have thought in connection with the earlier 2005 transaction. This “evidence” is both incompetent and irrelevant. Paragraph 13 of his declaration did relate to the February 2006 transaction, but the content of it was opinion testimony

irrelevant to the contract issues. (CP 151) Accordingly, EMS moved to strike the foregoing testimony except the limited testimony that was competent and material to the 2006 transaction. (CP 169-176)

Judge Johanson granted EMS' motion for summary judgment after hearing argument from counsel. She stated she was not relying on anything objectionable in the Campbell declaration. RP at 58, lines 9-11. She also did not think the 2005 transaction was relevant. RP at page 58, lines 22-23. She ruled it was "very clear that Campbell knows that what was delivered was not mixed paper." (RP at 59) "It is clear to me, by the Purchase Order, that they asked for mixed paper. They ordered mixed paper. It's clear that Campbell know (sic) what that definition meant" "So, I find that there was a breach, as a matter of law. The terms are clear, you don't go outside the contract. I don't need those definitions, because it was admitted by Campbell that what they delivered was not mixed paper. And that's the grade, its mixed paper." RP at 60. Judgment was entered for \$48,364.98 plus prejudgment interest and costs. (CP 234-235) Damages are not at issue on appeal.

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III. LEGAL ARGUMENT

A. Contract Formation Occurred Upon Shipment of Product Pursuant to the Purchase Order – i.e., Offer and Acceptance.

Summary judgment is proper when the only dispute relates to the legal effect of a written contract. *Pine Corp. v. Richardson*, 12 Wn. App. 459, 468, 530 P.2d 696 (1975). The legal effect of this written contract is governed by the Uniform Commercial Code. The cited UCC provisions are in the appendix. Article Two of the Uniform Commercial Code (U.C.C.), chapter 62A RCW applies to transactions in goods. RCW 62A.2-102. “Goods” includes all things that are movable at the time of identification to the contract for sale. RCW 62A.2-105(1). Waste Control’s sale of the bales of scrap material is a transaction in “goods” governed by Article Two of the Uniform Commercial Code.

Under the U.C.C., a contract for the sale of goods for the price of five hundred dollars or more must be in writing except as otherwise provided in RCW 62A.2-201. The formal contracting process for the purchase of goods begins with an “offer.” On February 15, 2006, EMS sent Waste Control its written formal purchase order for scrap paper, of the specified grade. (CP 28) This is the “offer” document and specifies the grade of the product that EMS is proposing to purchase. The purchase order, signed by EMS, is the formal and final outward manifestation of

intent to contract on the firm, definite and fixed terms set forth in the written order. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement of Contracts (Second) § 2(1) (1981), cited in *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 172, 876 P.2d 435, 442 (1994).

An offer to purchase goods invites acceptance in any manner that is reasonable in the circumstances. RCW 62A.2-206(1)(a). When an order or offer to purchase goods requires shipment of the goods, acceptance of the offer shall be construed either by a prompt promise to ship the goods requested or current shipment of conforming or non-conforming goods. RCW 62A.2-206(1)(b). Waste Control accepted EMS's offer, and a contract was formed when it shipped the 10 containers of non-conforming scrap paper pursuant to the purchase order. RCW 62.2-206(1)(b). It was not disputed that the goods were shipped in response to this offer. Waste Control invoiced for the delivery of "mixed paper" referencing the purchase order. (CP 114-123) The act of shipment constitutes acceptance of the offer. At that point, we have an objective manifestation of assent to the contract terms.

It is fundamental that Washington follows the objective theory of contracts which focuses on the objective manifestations of the agreement.

Hearst Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). There was objective agreement on product, price and quantity. Waste Control was obligated to perform according to the objective terms of the contract. Its unilateral or subjective intent or belief as to what product it thought it could supply is not relevant under the governing contract law principles. *Id.* at 503-504.

Additionally, Waste Control invoiced for the shipment of “mixed paper.” (CP 114-123) An invoice is not a contract document because contract formation has already occurred by the time of invoicing. However, the invoice is formal written evidence of the contract, meeting the requirements of RCW 62A.2-201, and shows that Waste Control understood it was supplying product pursuant to a purchase order for mixed paper. Waste Control invoiced, not one time, but nine separate times because there were nine deliveries to the Port of Tacoma. (CP 114-123) Thus, both the seller and buyer documentation identifies the grade of product as mixed paper and performance is measured by that standard.

B. *Extrinsic Evidence is Inadmissible to Contradict the Term of the Contract Specifying Mixed Paper.*

Campbell does not controvert receiving this purchase order. (CP 148-151) Campbell does not testify to telling Sparks the purchase order or offer was unacceptable or that Waste Control could not supply the ordered

goods on those terms. *Id.* Campbell does not controvert delivering the material to the shipper at the Port of Tacoma, at EMS's request, commencing in March 2006. *Id.* Campbell does not deny invoicing for "mixed paper", and receiving and accepting payment. *Id.*

"When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Contract formation on these terms is established by these uncontroverted facts. The only remaining question is whether performance was to these terms. The answer to that question, as observed by the lower court, is equally clear because Waste Control admitted it did not supply mixed paper as required by the contract which establishes breach as a matter of law.

Waste Control offered no legal authority to the lower court that the foregoing contract analysis on contract formation was wrong. Judge Johanson commented on Waste Control's brief and the lack of any citation to any legal authority whatsoever. (See Waste Control's Brief in Response to Summary Judgment Motion at CP 59-68) Judge Johanson observed the absence of "any case law or any law" in Waste Control's brief and inquired whether counsel for Waste Control agreed "that the contractual law that's set out here by the Plaintiffs is the law to be applied

here in this case?” RP at 16. Counsel responded: “Well, yes.” *Id.* Judge Johanson replied “So, I just wanted to make clear that the law – we don’t have a dispute as to what the law is here.” *Id.* Counsel for Waste Control stated “That’s correct.” *Id.*

The argument from Waste Control was that there was a different contract. That is, it was their contention that EMS contracted to purchase product different from mixed paper specified in the purchase order. Waste Control’s first argues, at pages 20-23 of its appellate brief, that an oral contract was formed between Campbell and Sparks prior to the purchase order and that this agreement was for product different than mixed paper. Campbell’s testimony related to the 2006 transaction, at paragraphs 12-14 of his declaration, is conclusory and insufficient on any alleged exchange of oral promises. (CP 150-151) He states conclusions, but does not testify to evidentiary facts regarding offer and acceptance. (CP 150-151) Spark’s testimony, however, is specific that he issued the purchase order offering to purchase mixed paper. (CP 22) This writing is not controverted. It is the formal offer required by the UCC to avoid any confusion. See, e.g., RCW 62A.2-201.

However, the threshold legal issue is whether extrinsic evidence is even admissible to contradict the express terms of the purchase order. Under the common law, parol evidence is not admissible for the purpose

of adding to, modifying, contradicting, or varying the terms of a written contract, in the absence of fraud, accident, or mistake. *St. Yves v. Mid State Bank*, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988).

The parol evidence rule is codified by the Uniform Commercial Code at RCW 62A.2-202. Under the Uniform Commercial Code, this purchase order is the final written expression of the terms of the proposed agreement and upon acceptance it “may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement” RCW 62A.2-202. Extrinsic evidence may be admissible to explain or supplement a contract, but not to contradict it or make a different contract. Under the UCC, express terms also control over inconsistent course of dealing or course of performance. See RCW 62A.1-205(4) & RCW 62A.2-208(2).

Waste Control cites to *Berg v. Hudesman*, 115 Wn.2d 657, 807, P.2d 222 (1990) to support the admission of extrinsic evidence under the context rule. However, *Berg* does not support the use of extrinsic evidence to contradict the contract. Under the common law, “Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of specific words and terms used’ and not to ‘show an intention independent of the instrument’

or to ‘vary, contradict or modify the written word.’” *Hearst Communications, Inc. v. Seattle Times*, *supra* 154 Wn.2d 493 at 503.

Campbell acknowledges that the “shaker mix” he sold to EMS “would not fit any definition of ‘mixed paper.’” Campbell Declaration at page 3, line 1 (CP 150). See also, Campbell Declaration at page 4, line 4-5, and page 4, lines 18-19 (CP 151). Yet, Waste Control would ask the Court to rewrite the purchase order which specifies “mixed paper” to specify “shaker mix or KB mix” - a different material according to Waste Control. Upon the legal authority cited above, the Court cannot vary, contradict or modify the written word. Waste Control was bound to perform to the terms of the offer or reject it.

Waste Control argues that the purchase order was “inaccurate.” Brief of Appellant at 22. Waste Control cites to no authority that this is a circumstance that provides a legal basis for re-writing the contract. The law establishes that the express terms of the purchase order are controlling. See, e.g. RCW 62A.2-202; RCW 62A.1-205(4); RCW 62A.2-208(2). Subjective intent or beliefs are irrelevant. Again, there is no competent evidence of a prior agreement contradicting the terms of the purchase order – nothing but the argumentative assertions and conclusions of Campbell -- but even if there was competent evidence, it still is not admissible to contradict the written terms of the offer.

Waste Control continues on with legally insufficient argument offering the Court an assortment of twisted argument in an attempt to rewrite the clear terms of the purchase order. For example, it argues about the industry standards for defining “mixed paper”. Brief of Appellant at 24 – 27.¹ Waste Control accuses counsel for EMS of “bootstrapping” arguments with misrepresentations about the industry standards and “surreptitiously” changing definitions to hide issues. Brief of Appellant at 25-27.² Waste Control argues for changing the contract term for “mixed paper” based on allegations regarding the price, profit, devious schemes and “ruses,” course of performance or course of dealing. Brief of Appellant at 27-30.

Much of this argument is stated without citation to the record and without citation to any supporting legal authority, except *Berg* and RCW 62A.2-208(1). Brief of Appellant at 30 & 32. There is no need to interpret “mixed paper” when, as the lower court observed, Waste Control

¹ The industry standard is attached to the Declaration of Fritz Sparks, CP 31-32, and referenced in the purchase order (CP 28). Sparks testifies that this is a true and correct copy of the relevant portions of the year 2006 Scrap Specifications Circular setting forth the Paper Stock Standards for ‘mixed paper’ grade scrap paper” CP 22. Campbell did not controvert that these are the Paper Stock Standards for the scrap paper industry in use in 2006. CP 148-151

² This argument is wholly unprofessional and undeserving. It has its origin in a typographical error in quoting the standard when the motion for summary judgment was typed. It was corrected by a Praecipe for Correction of Typographical Error. CP 226-227. The error has no significance to any issue because all parties agree Waste Control did not supply “mixed paper”.

concedes it did not supply mixed paper fitting any definition. Moreover, express terms are controlling under the UCC. RCW 62A.1-205(4); RCW 62A.2-202. RCW 62A.2-208(1), cited by Waste Control, is not applicable because this purchase order involved a single performance – a single shipment of 10 containers to China – not repeated performances under a single contract. In any event express terms control over course of performance under RCW 62A.2-208(1) just like express terms control over course of dealing under RCW 62A.1-205(4).

All the legal authority is contrary to Waste Control and supports the decision reached by the lower court. Waste Control's subjective beliefs and apparent misunderstanding or mistake about what they thought EMS was ordering is irrelevant and cannot be used to change the contract. *Jansen v. Phillips*, 73 Wn.2d 174, 178, 437 P.2d 189 (1968) (subjective beliefs, reservations, doubts and desires are of no effect). Admissible extrinsic evidence does not include evidence of a party's unilateral or subjective intent as to the contract's meaning. *Hearst Communications, Inc. v. Seattle Times*, *supra* 154 Wn.2d at 503 citing to *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003).

The lower court cut through all this fact-spinning decisively as follows:.

The Court: Well, it looked like Campbell had said – defines it as, ‘There is no way that what they purchased was mixed paper, it wouldn’t fit any of the definitions.’

RP at 47.

Mr. Olson: . . . And we can walk through the standards and guidelines and circulars, or whatever synonymous terms he wants to use, but they’re saying it doesn’t fit any of those definitions, and they weren’t supplying mixed paper.

RP at 53.

Mr. Olson: . . . the paperwork he filed [the declaration of Rick Campbell], which is more important than his [counsel’s] argument, concedes that they didn’t supply mixed paper, and if we accept that the contract term was to supply it, that’s the end of the case.

RP at 56.

The Court: . . . [T]o me, [it is] very clear that Campbell knows that what was delivered was not mixed paper. He – he said under no definition, and so the definitions argument is really not argument.

So, if I’m not making myself clear, I am adopting the reasoning of the Plaintiff in this case. It is clear to me, by the Purchase Order, that they asked for mixed paper. They ordered mixed paper. It’s clear that Campbell know [sic] what that definition meant, and even though in argument Counsel tries to say that that’s kind of confusing, I don’t believe that that’s what the declarations say.

So, I find that there was a breach, as a matter of law. The terms are clear, you don’t go outside the contract. I don’t need those definitions because it was admitted by Campbell that what they delivered was not mixed paper. And that’s the grade, is mixed paper.

RP at 59-60.

Waste Control was bound to perform to the objectively stated terms of the order. Waste Control objectively manifested assent to these terms by performing and shipping product pursuant to this order. If it could not supply the requested product at the stated price, then it should have communicated that the terms were not acceptable and rejected the offer.

C. *Even if Extrinsic Evidence were Admissible to Change the Contract, Waste Control Did Not Meet Its Burden to Produce Competent Evidence.*

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Civil Rule 56(e). The rule requires the adverse party to “set forth specific facts showing that there is a genuine issue for trial.” *Id.* This requires presentation of evidentiary facts; ultimate conclusions or opinions unsupported by foundational facts are inadmissible. See, e.g., *Henry v. St. Regis Paper Co.*, 55 Wn.2d 148, 151, 346 P.2d 692 (1959). “Unless an affidavit sets forth facts, evidentiary in nature, that is, information as to ‘what took place, an act, an incident, a reality as distinguished from supposition or opinion’, the affidavit does not raise a genuine issue for trial. . . . Ultimate facts, conclusions of fact, or conclusory statements are insufficient to raise a question of fact.” *Roger*

Crane & Associates, Inc. v. Felice, 74 Wn. App. 769, 779, 875 P.2d 705 (1994). Furthermore, facts presented only in counsel's brief may be disregarded. See *Bravo v. Dolsen Companies*, 71 Wn. App. 769, 777, 862 P.2d 623 (1993), reversed on different point, 125 Wn.2d 745, 888 P.2d 147 (1995).

To preclude summary judgment, facts shown to be in dispute must be "material," that is, facts upon which the outcome of the litigation depend, and mere argumentative assertions are insufficient. *Cranwell v. Mesec*, 77 Wn. App. 90, 103, 890 P.2d 491 (1995). It is not enough to rely on speculation, opinion, hearsay or argumentative assertions to prevent summary judgment. The opposition must be supported by evidence. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 855, 719 P.2d 98 (1986); *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

In *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court held that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The federal approach was cited with approval and relied upon in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The

burden on the nonmoving party is to designate “specific facts showing that there is a genuine issue for trial.” *Celotex, supra*, 477 U.S. at 324. Colorable arguments and speculative inferences are not sufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Conserving the resources of the courts by isolating and disposing of factually unsupported claims is in keeping with the primary function of summary judgment.

Even if a prior or contemporaneous oral agreement was admissible to contradict the terms of the accepted purchase order, Waste Control never presented competent evidence of such an agreement. Campbell does not testify to the 2006 transaction until paragraph 12 of his declaration. He testifies to being contacted by Fritz Sparks of EMS. He then states “Ultimately, agreement between Fritz Sparks and myself was for EMS to purchase 10 additional containers.” He then goes on to testify as to what “should have been known by Fritz Sparks.” (CP 150-151)

These are not evidentiary facts. There is no testimony as to what took place or what promises were exchanged. Rather, there is only the ultimate conclusion that there was an agreement of an unspecified nature without supporting evidentiary facts. Any conclusion or opinion that there was an agreement to purchase something other than “mixed paper” is not

evidence and is contrary to the declaration of Fritz Sparks and also contrary to both the seller's and buyer's confirming documentation.

Waste Control's record is equally devoid of any evidence of fraud. Waste Control's appellate brief contains numerous unsupported allegations of fraud. At page 3, Waste Control's counsel accuses EMS of "semi-fraudulent" conduct, whatever that means. At page 11-13, counsel accuses Simkins and Sparks of coming up with a plan to trick others. At page 27 and 28, counsel makes further argumentative assertions that EMS deceived Newport or perpetrated a "ruse" to get the product into China in 2006. At page 33, counsel argues that the insertion of the words "mixed paper" in the purchase order "was part of a fraudulent scheme that the Respondent was using to sneak KB mix into China."

Proof of fraud requires clear, cogent and convincing evidence of a false representation of material fact. *In Re Patterson*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999). Campbell never testifies to any fraudulent conduct. There is nothing at all deceptive, false or fraudulent about EMS's purchase order specifying an offer to purchase "mixed paper." Waste Control knew what mixed paper is and was not deceived by the term. "Mixed paper is a highly valuable recyclable paper product containing very little non-fibrous materials and few out-throws." Brief of Appellant at 5. The fraud claim is preposterous under the circumstances

of this case where we simply deal with an order for the purchase of goods that are expressly identified in the order document.

Counsel for Waste Control advances these arguments without either supporting evidence or citation to legal authority. Waste Control never even has asserted fraud or mistake as an affirmative defense to the claim. (CP 8-10) Fraud and mistake must be pleaded with particularity. Civil Rule 9(b). Waste Control alleges as its only affirmative defense that “the damages, if any, were solely the result of the Plaintiff’s own fault in taking a chance or risk that the product known as ‘shaker mix’ would pass inspection when delivered to the mill in China.” (CP 10) The appellate court need not consider issues neither pleaded nor argued with proper factual and legal support.

D. Request for Sanctions under RAP 18.9(a)

RAP 18.9(a) authorizes the appellate court to impose attorney fees as a sanction against frivolous claims and defenses or the abuse of court rules and procedures. “Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages.” *Eugster v. City of Spokane*, 139 Wn. App. 21, 34, 156 P.3d 912 (2007). “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Id.*

Division II addressed the issue in a case where an appeal was brought without supporting legal authority or adequate support in the record. “Andrus then filed this appeal and asserted arguments that lack any support in the record or are precluded by well-established and binding precedent that he does not distinguish. We award the City attorney fees and costs . . .” *Andrus v. Department of Transportation*, 128 Wn. App. 895, 900-01, 117 P.3d 1152 (2005) (“About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop,” quoting *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983).

There are several cases giving warning that sanctions may be awarded under these circumstances. For example, an award of attorney fees is appropriate under RAP 18.9 where the appellant’s brief cites to no judicial authority and no authority is cited for reversal based on existing law, nor does it make a rational, good-faith argument for modification of existing law. *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997). “This appeal is not based on subtle or gross distinctions of law.” *Fidelity Mortgage Corp. v. Seattle Times*, 131 Wn. App. 462, 473, 128 P.3d 621 (2005). “Fidelity’s brief on appeal is totally devoid of any relevant authority to support its arguments, and its claims do not have any

basis in law. There was no possibility of reversal in this case, and reasonable minds could not differ as to the proper outcome.” *Id.* at 474.

In addition, as stated above, RAP 18.9 authorizes sanctions for violation of court rules and procedures. In *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992), the court stated:

RAP 10.3(a)(4) and RAP 10.3(b) require that reference to the relevant parts of the record must be included for each factual statement contained in the sections of the parties’ brief devoted to the statement of the case and to argument. RAP 10.4(f) provides that references to the record should designate the page and part of the record which supports each factual statement contained in the statement of the case and argument.

Although not explicitly stated in RAP 10.3(a)(5), it is implicit in the rule that the citations to legal authority contained in the argument in support of a party’s position on appeal should relate to the issues presented for review and should support the proposition for which such authority is cited.

The purpose of these rules is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority.

In *Hurlbert*, the court sanctioned counsel for egregious violations of these rules. The purpose served by compliance with RAP 10.4(c) is stated at length and very clearly in *Thomas v. French*, 99 Wn.2d 95, 99-101, 659 P.2d 1097 (1983). “Fair warning has been given . . . that this court expects full compliance with RAP 10.4(c) and the failure to do so

may result in measures as severe as nonconsideration of the claimed error.
. . . If there is to be a rule, there must be a point at which failure to comply therewith can no longer be tolerated.” *Id.* at 101.

Upon the authority cited above, sanctions are proper in this case for the following reasons:

1) Waste Control’s argument on appeal is precluded by well-established legal authority that the express terms of the contract control and that extrinsic evidence is not admissible to contradict those terms;

2) Waste Control’s argument lacks any support in the record, not even from its own witness who admits that Waste Control did not supply mixed paper as specified in the purchase order;

3) Waste Control’s brief is devoid of any judicial authority supporting its argument. It cites only to *Berg* and *Berg* does not support the proposition that extrinsic evidence may used to modify, vary or contradict the express terms of the contract;

4) Waste Control’s argument is contrary to the statutory authority that express terms of the contract control over any prior oral agreements, course of dealing or course of performance;

5) Waste Control argues fraud which is not pleaded as an affirmative defense nor is the argument presented with any citation to legal authority or legal reasoning on how EMS’s purchase order, which

clearly states the product it was offering to purchase, is a false representation of material fact;

6) Waste Control's brief violates RAP 10.3 (a)(5) which requires a "fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." Waste Control's statement of the facts is argumentative and raises collateral matters about an unrelated transaction that is not fairly presented;

7) Waste Control's brief violates RAP 10.3(a)(5) which requires references to the record for each factual statement. The brief either provides no citation to the record for a factual statement or provides a citation that is not to the page number of the clerk's papers. This requires opposing counsel and the Court to comb through the record to find the document allegedly supporting the statement of facts;

8) Waste Control's brief violates RAP 10.3(a)(6). "[I]mplicit in the rule that the citations to legal authority contained in the argument in support of a party's position on appeal should relate to the issues presented for review and should support the proposition for which such authority is cited." *Hurlbert v. Gordon, supra* 64 Wn. App. at 399. As stated above, Waste Control's brief cites no authority for the allegation of fraud. Its citation to *Berg* for admission of extrinsic evidence to contradict the

contract requirement for the specified product is not supported by that authority;

9) Waste Control's brief violates RAP 10.4(c) because it does not attach the contract documents in the appendix. The purpose of the rule is stated at length in *Thomas v. French, supra* 99 Wn.2d at 99-100. It promotes efficient and expeditious review for both the Court and opposing counsel;

10) Waste Control's brief also personalizes the dispute in a manner that is demeaning to the opposing party and counsel without contributing to the resolution of the dispute on the merits.

This appeal has unreasonably added to the cost of this litigation. As stated by Division II in *Andrus v. Department of Transportation, supra* 128 Wn. App. at 900-01, client and counsel must know when to stop or bear the consequence. It is not sufficient to search for some way to fashion an argument for the client. Attorneys must be prepared to say "no" to their clients when the circumstances so dictate. Attorneys are not battle combatants. Those who think they are, are in the wrong profession.

The growing cost and burden of civil litigation is a substantial concern for everyone. The contract rules that are in play on this case exist to provide order and predictability to commercial transactions. Resort to baseless defenses and harassment of one's opponent is unfortunate and too

frequent. That such practices do not often succeed is not an adequate response to the problem.

Waste Control's arguments on this appeal are unsupported by reasonable analysis of the law and the facts. These arguments lack support in the record, as observed by the lower court, and are precluded by well-established contract law precedent. The testimony Waste Control offers is largely not 'evidentiary facts' that are relevant to the issues. Instead, they offer predominantly argumentative conclusions, opinions and speculation. Waste Control cites to not a single case supporting its position. To persist in these defenses has extended this litigation beyond a point where it should be tolerated. Accordingly, we respectfully submit that EMS should be awarded its attorneys' fees on appeal pursuant to RAP 18.9.

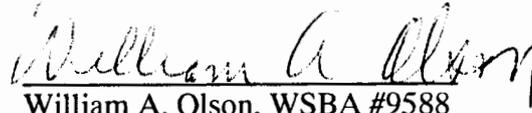
///

V. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm and award attorneys' fees as sanctions under RAP 18.9(a).

DATED this 16th day of September 2008.

AIKEN, ST. LOUIS & SILJEG, P.S.



William A. Olson, WSBA #9588
Richard Furman, Jr. WSBA #31101
Attorneys for Respondent

APPENDIX

Multi Material Management & Mktg (L...
405 14th Street, Suite 1800
Oakland, CA 94612
510-783-0101 Tel.
510-272-0863 Fax

Attn: Rolly

PURCHASE ORDER

Rick Campbell
WASTE CONTROL
1150 3RD AVE.
Longview WA 98632

PO No 020614
Order Date 2/15/06
Grade MIXED PAPER
Number Purchased 10 CONTAINERS
Min. Wght 44,000
Price-US Ton \$79.00
Price-Met Ton
SS Co LLOYD TRIESTINO AMERICA
Vessel IRENES REMEDY
Voyage 0202-0098W
Booking No 688511841
Depart TACOMA
Dest ZHANGJIAGANG
Cut Off 3/9/2006
Cont Type 40' STD
Del. To DOCK

Net Terms
30 days from date of completion

Comments
BALED DRY MIX
PHOTOS & WGT TICKETS REQUIRED
FROM SUPPLIER OF EACH LOAD

UNLESS OTHERWISE SPECIFIED, GRADE IS IN ACCORDANCE WITH PS STANDARDS. THE SUPPLIER IS COMMITTED TO THE TIME OF DELIVERY AND THE PRICE INDICATED UNLESS SPECIFICALLY RELEASED BY EMS.

SUPPLIER INSTRUCTIONS
2/28/06 ATTN:ROLLY

~~ROLLED FROM LAUSANNE 2/23 CUT OFF. EMPTY PICKUP AT PORTLAND CONTAINER 9449 N. BURGARD WAY 503/286-5961.~~

3/1 Per Rolly will p/v mtg in Tacoma.

KS,
JEVE

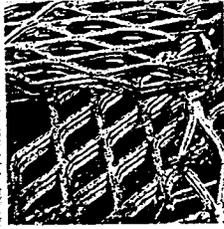
Accepted by WASTE CONTROL

FOR EMS
BY *SC*

Please sign and return copy

2nd Order

Scrap Specifications Circular



2006

Guidelines for Nonferrous Scrap • Ferrous Scrap • Glass Cullet
Paper Stock • Plastic Scrap • Electronics Scrap • Tire Scrap



Voice of the Recycling Industry

Institute of
Scrap Recycling
Industries, Inc.

Guidelines for Paper Stock: PS-2006—Export Transactions

Paper Stock: Export Transactions

Preamble

These Guidelines apply to paper stock for repulping only and are for use in export transactions from the U.S. and Canada.

Basic to the success of any Buyer-Seller relationship is an atmosphere of "good faith."

In keeping with this, the following underlying principles have been accepted as necessary to the maintenance of amicable international dealings:

1. Seller must use due diligence to ascertain that shipments consist of properly packed paper stock and that shipment is made during the period specified.
2. Arbitrary rejections, deductions and cancellations by the Buyer are counter to acceptable good trade practice.
3. Seller shall deliver the quality of paper stock agreed upon but shall not be responsible for its use or the paper or paperboard manufactured therefrom.
4. Unless otherwise mutually agreed to by both Buyer-Seller, all transactions shall conform to the trade practice outlined in these Guidelines and the grade descriptions shown in the PSI Standards and Practices Circular.

I. The Purchase Agreement

Each transaction covering the purchase or sale of paper stock should be confirmed in writing and include agreement on the following items:

1. **Quantity**
Where possible, the quantity shall always be specified in terms of a definite number of metric tons of 2,204.6 pounds each, or short tons of 2,000 pounds each.
 - a. If the quantity is specified in tons, the order shall be considered completed when aggregate shipments are 5% under or over the quantity ordered (unless Letter of Credit restrictions apply).
 - b. If the quantity is specified in truckload and/or container load, this is defined as full visible capacity but not in excess of legal or freight line limits.
2. **Grades**
Where possible, each grade purchased shall be specified in accordance with the grade as defined in the latest Paper Stock Industries Chapter Standards and Practices Circular. Any deviation from the grades listed in the Paper Stock Industries Chapter Standards and Practices Circular should be specified and agreed to by both parties.
3. **Packing**
Whether units are to be bales, skids, rolls, pallets, boxes, or bundles should be stated. Where possible, approximate sizes or weights should be specified.

4. Price

The price agreed upon shall be clearly stated in U.S. dollars and cents.

5. Transportation Charges

These shall be clearly indicated with the use of the following phrases such as: "F.A.S. harbor," or "C&F," "C.I.F.," or "container yard" (CY), "ex-ship," "ex-frontier."

6. Shipping

- a. Instructions—Should be provided by Buyer at time of order. Information should include: consignee; party to be notified; identification marks; insurance information; and freight payment information.
- b. Time Frame—Shipment to be completed within 30 days of receipt of order, Letter of Credit and instruction information, unless otherwise specified.

7. Terms

Payment shall be made in U.S. dollars by means of an irrevocable Letter of Credit confirmed by a U.S. bank.

8. Method of Invoicing

Invoicing instructions shall be clearly stated in Letter of Credit.

II. Fulfillment by the Seller

Practices of the Seller shall be in accordance with the following:

1. **Acceptance**
All orders shall be confirmed in writing.
2. **Grading**
Paper stock which is sold under the grade names appearing in the PSI Standards and Practices Circular shall be warranted to conform to those grading definitions.
3. **Baling**
Each bale must be secured with a sufficient number of bale ties drawn tight to insure a satisfactory delivery.
4. **Tare**
Sides and headers must be adequate to make a satisfactory delivery of the bale but must not be excessive. The weight of skids or iron cores should be deducted from a gross invoice weight.
5. **Loading**
Paper stock shall be loaded as follows:
 - a. Before they are loaded, cars, trucks, and containers shall be in sound condition and free from odors and objectionable materials.
 - b. Grades should be loaded in straight loads unless otherwise agreed to. When two or more grades are included in the same shipment, units of each grade should be kept together in a separate part of the container.

5. Moisture Content

All paper stock must be packed air dry. A moisture content of 12% is deemed to be air dry.

Where excess moisture is present in the shipment, the Buyer has the right to request an adjustment. Whenever possible, such adjustment shall be made on an average air dry basis.

6. Replacement of Shipment

In the event that any shipment is rejected due to quality:

Whether or not the shipment is to be replaced is to be decided by mutual agreement between Buyer and Seller.

7. Promptness of Shipment

- a. In the event that Buyer causes shipment to be postponed:

On instructions of the Buyer, the Seller shall have the option of extending the time limit of the order by the same number of days of the postponement, or of canceling that portion of the order on which shipment was postponed. Seller shall promptly notify Buyer of option selected.

- b. In the event that Buyer causes shipment to be postponed:

On instructions of the Seller, the Buyer shall have the option of extending the time limit of the order by the same number of days of the postponement, or of canceling that portion of the order on which shipment was postponed. Buyer shall promptly notify Seller of option selected.

8. Outthrows

Outthrows shall be understood to be all papers that are so manufactured or treated or are in such form as to be unsuitable for consumption as the grade specified.

9. Prohibitive Materials

- a. Any materials which, by their presence in a packing of paper stock, in excess of the amount allowed, make the packing unusable as the grade specified.
- b. Any materials which, by their presence in a package of paper stock, pose a risk of damage to the equipment.

Note: In connection with Items 8 and 9, a material can be classified as an "Outthrow" in one grade and as a "Prohibitive Material" in another grade. Carbon paper, for instance, is "UNSUITABLE" in Mixed Paper and is, therefore, classified as an "Outthrow"; whereas it is "UNUSABLE" in White Ledger and in this case classified as a "Prohibitive Material."

V. Arbitration

In the event of a total disagreement between Buyer and Seller, the dispute should be submitted to ISRI arbitration.

In all cases, the cost of arbitration shall be borne by the party found to be at fault, or split in the event of compromise, as determined by the arbitrators.

VI. Grade Definitions

The definitions which follow describe grades as they should be sorted and packed. CONSIDERATION SHOULD BE GIVEN TO THE FACT THAT PAPER STOCK AS SUCH IS A SECONDARY MATERIAL PRODUCED MANUALLY AND MAY NOT BE TECHNICALLY PERFECT. Definitions may not specifically address all types of processes used in the manufacture or recycling of paper products. Specific requirements should be discussed between Buyer and Seller during negotiations.

Outthrows

The term "Outthrows" as used throughout this section is defined as "all papers that are so manufactured or treated or are in such a form as to be unsuitable for consumption as the grade specified."

Prohibitive Materials

The term "Prohibitive Materials" as used throughout this section is defined as:

- a. Any materials which by their presence in a packing of paper stock, in excess of the amount allowed, will make the packaging unusable as the grade specified.
- b. Any materials that may be damaging to equipment.

Note: The maximum quantity of "Outthrows" indicated in connection with the following grade definitions is understood to be the TOTAL of "Outthrows" and "Prohibitive Materials."

A material can be classified as an "Outthrow" in one grade and as a "Prohibitive Material" in another grade. Carbon paper, for instance, is "UNSUITABLE" in Mixed Paper and is, therefore, classified as an "Outthrow"; whereas it is "UNUSABLE" in White Ledger and in this case is classified as a "Prohibitive Material."

Glossary of Terms

A supplemental glossary of paper stock terms is located on page 29. The purpose of this limited list of terms is to help the user better understand specific grade definitions contained within this Circular.

(1) Soft Mixed Paper

Consists of a mixture of various qualities of paper not limited as to type of baling or fiber content.

Prohibitive Materials may not exceed	2%
Total Outthrows may not exceed	10%

(2) Mixed Paper

Consists of a clean, sorted mixture of various qualities of paper containing less than 10% of groundwood content.

Prohibitive Materials may not exceed	1/2 of 1%
Total Outthrows may not exceed	3%

(3) (Grade not currently in use)**(4) Boxboard Cuttings**

Consists of new cuttings of paperboard used in the manufacture of folding cartons, set-up boxes, and similar boxboard products.

Prohibitive Materials may not exceed	1/2 of 1%
Total Outthrows may not exceed	2%

(33)	
(34)	
(35)	
(36)	
(37)	
(38)	
(39)	
(40)	
(41)	
(42)	
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(45)	
(46)	

RCW:	(ii) 23.80.220(1)
	(iii) 61.20.010
	(iv) 63.04.755(1)
	(v) 81.32.531(1)
RCW:	(i) 22.04.585(1)
	(ii) 23.80.220(1)
	(iii) 61.20.010
	(iv) 63.04.755(1)
	(v) 81.32.531(1)
	None
	None
RCW	61.20.010
	None
RCW:	(i) 22.04.585(1)
	(ii) 23.80.220(1)
	(iii) 61.20.010
	(iv) 62.01.025
	(v) 62.01.026
	(vi) 62.01.027
	(vii) 62.01.191
	(viii) 63.04.755(1)
	(ix) 81.32.531(1)
RCW:	(i) 22.04.020
	(ii) 63.04.755(1)
RCW	62.01.191

The repeal of RCW sections 81.32.010 through 81.32.561 " . . . shall not affect the validity of sections 81.29.010 through 81.29.050, chapter 14, Laws of 1961 (RCW 81.29.010 through 81.29.050)." Section 10-102(a)(xvii) Chapter 157, Laws of 1965 ex. sess.

- Effective date—2001 c 32: See note following RCW 62A.9A-102.
- Effective date—2000 c 250: See RCW 62A.9A-701.
- Effective date—1993 c 230: See RCW 62A.11-110.
- Recovery of attorneys' fees—Effective date—1993 c 229: See RCW 62A.11-111 and 62A.11-112.
- Short title—Severability—1992 c 134: See RCW 63.19.900 and 63.19.901.
- Effective date—1981 c 41: See RCW 62A.11-101.

62A.1-202 Prima facie evidence by third party documents. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document to the third party. [1965 ex.s. c 157 § 1-202.]

Repealed by amendment to Evidence Act: RCW 5.40.020, 5.40.030, 5.40.040.
Repealed by Evidence Act: Chapter 5.45 RCW.

62A.1-203 Obligation of good faith. Every contract or duty within this Title imposes an obligation of good faith to its performance or enforcement. [1965 ex.s. c 157 § 1-203.]

62A.1-204 Time "reasonable time" ("seasonably"). (1) Whenever this Title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.
(2) What is a reasonable time for any action depends on the nature, purpose and circumstances of such action.
(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time. [1965 ex.s. c 157 § 1-204.]

62A.1-205 Course of dealing and usage of trade. (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade, and course of dealing controls usage of trade.
(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter. [1965 ex.s. c 157 § 1-205. Cf. former RCW sections: (i) RCW 63.04.100(1); 1925 ex.s. c 142 § 9, RRS § 5830.9; (ii) RCW 63.04.160(5); 1925 ex.s. c 142 § 15, RRS § 5830.15; (iii) RCW 63.04.190(2); 1925 ex.s. c 142 § 18, RRS § 5830.18; (iv) RCW 63.04.700; 1925 ex.s. c 142 § 71; RRS § 5830.71.]

62A.1-206 Statute of frauds for kinds of personal property not otherwise covered. (1) Except in the cases described in subsection (2) of this section, a contract for the sale of personal property is unenforceable by way of action unless the contract is evidenced by a writing which indicates that a contract for sale has been made between the parties at a time and place stated or stated to be stated in the writing, the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods, RCW 62A.1-201, or of securities, RCW 62A.1-208, or of interests in real estate, RCW 62A.1-209, or to contracts for the sale of goods, RCW 62A.1-206. Cf.

62A.2-702	Seller's remedies on discovery of buyer's insolvency.
62A.2-703	Seller's remedies in general.
62A.2-704	Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.
62A.2-705	Seller's stoppage of delivery in transit or otherwise.
62A.2-706	Seller's resale including contract for resale.
62A.2-707	"Person in the position of a seller".
62A.2-708	Seller's damages for non-acceptance or repudiation.
62A.2-709	Action for the price.
62A.2-710	Seller's incidental damages.
62A.2-711	Buyer's remedies in general; buyer's security interest in rejected goods.
62A.2-712	"Cover"; buyer's procurement of substitute goods.
62A.2-713	Buyer's damages for non-delivery or repudiation.
62A.2-714	Buyer's damages for breach in regard to accepted goods.
62A.2-715	Buyer's incidental and consequential damages.
62A.2-716	Buyer's right to specific performance or replevin.
62A.2-717	Deduction of damages from the price.
62A.2-718	Liquidation or limitation of damages; deposits.
62A.2-719	Contractual modification or limitation of remedy.
62A.2-720	Effect of "cancellation" or "rescission" on claims for antecedent breach.
62A.2-721	Remedies for fraud.
62A.2-722	Who can sue third parties for injury to goods.
62A.2-723	Proof of market price: Time and place.
62A.2-724	Admissibility of market quotations.
62A.2-725	Statute of limitations in contracts for sale.

PART 1
SHORT TITLE, GENERAL CONSTRUCTION
AND SUBJECT MATTER

62A.2-101 Short title. This Article shall be known and may be cited as Uniform Commercial Code—Sales. [1965 ex.s. c 157 § 2-101.]

62A.2-102 Scope; certain security and other transactions excluded from this Article. Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. [1965 ex.s. c 157 § 2-102. Cf. former RCW 63.04.750; 1925 ex.s. c 142 § 75; RRS § 5836-75.]

62A.2-103 Definitions and index of definitions. (1) In this Article unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

"Acceptance."	RCW 62A.2-606.
"Banker's credit."	RCW 62A.2-325.
"Between merchants."	RCW 62A.2-104.
"Cancellation."	RCW 62A.2-106(4).
"Commercial unit."	RCW 62A.2-105.
"Confirmed credit."	RCW 62A.2-325.
"Conforming to contract."	RCW 62A.2-106.
"Contract for sale."	RCW 62A.2-106.

"Cover."	RCW 62A.2-712.
"Entrusting."	RCW 62A.2-403.
"Financing agency."	RCW 62A.2-104.
"Future goods."	RCW 62A.2-105.
"Goods."	RCW 62A.2-105.
"Identification."	RCW 62A.2-501.
"Installment contract."	RCW 62A.2-612.
"Letter of credit."	RCW 62A.2-325.
"Lot."	RCW 62A.2-105.
"Merchant."	RCW 62A.2-104.
"Overseas."	RCW 62A.2-323.
"Person in position of seller."	RCW 62A.2-707.
"Present sale."	RCW 62A.2-106.
"Sale."	RCW 62A.2-106.
"Sale on approval."	RCW 62A.2-326.
"Sale or return."	RCW 62A.2-326.
"Termination."	RCW 62A.2-106.

(3) The following definitions in other Articles apply to this Article:

"Check."	RCW 62A.3-104.
"Consignee."	RCW 62A.7-102.
"Consignor."	RCW 62A.7-102.
"Consumer goods."	RCW 62A.9A-102.
"Dishonor."	RCW 62A.3-502.
"Draft."	RCW 62A.3-104.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article. [2000 c 250 § 9A-803; 1965 ex.s. c 157 § 2-103. Cf. former RCW 63.04.755(1); 1925 ex.s. c 142 § 76; RRS § 5836-76; formerly RCW 63.04.010.]

Effective date—2000 c 250: See RCW 62A.9A-701.

62A.2-104 Definitions: "Merchant"; "between merchants"; "financing agency". (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (RCW 62A.2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. [1965 ex.s. c 157 § 2-104. Cf. former RCW sections: (i) RCW 63.04.160(2), (5); 1925 ex.s. c 142 § 15; RRS § 5836-15. (ii) RCW 63.04.170(c); 1925 ex.s. c 142 § 16; RRS § 5836-16. (iii) RCW 63.04.460(2); 1925 ex.s. c 142 § 45; RRS § 5836-45. (iv) RCW 63.04.720;

1925 ex.s. c 142 § 71; RRS § 5836-71. (v) RCW 81.32.351; 1961 c 14 § 81.32.351; prior: 1915 c 159 § 35; RRS § 3681; formerly RCW 81.32.440. (vi) RCW 81.32.371; 1961 c 14 § 81.32.371; prior: 1915 c 159 § 37; RRS § 3683; formerly RCW 81.32.460.]

62A.2-105 Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit". (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (RCW 62A.2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole. [1965 ex.s. c 157 § 2-105. Subds. (1), (2), (3), (4), cf. former RCW sections: (i) RCW 63.04.060; 1925 ex.s. c 142 § 5; RRS § 5836-5. (ii) RCW 63.04.070; 1925 ex.s. c 142 § 6; RRS § 5836-6. (iii) RCW 63.04.755; 1925 ex.s. c 142 § 76; RRS § 5836-76; formerly RCW 63.04.010.]

62A.2-106 Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation". (1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (RCW 62A.2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when

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they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance. [1965 ex.s. c 157 § 2-106. Subd. (1) cf. former RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. Subd. (2) cf. former RCW sections: (i) RCW 63.04.120; 1925 ex.s. c 142 § 11; RRS § 5836-11. (ii) RCW 63.04.450; 1925 ex.s. c 142 § 44; RRS § 5836-44. (iii) RCW 63.04.700; 1925 ex.s. c 142 § 69; RRS § 5836-69.]

62A.2-107 Goods to be severed from realty: Recording. (1) A contract for the sale of minerals or the like including oil and gas or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. [1981 c 41 § 3; 1965 ex.s. c 157 § 2-107. Cf. former RCW sections: (i) RCW 63.04.755(1); 1925 ex.s. c 142 § 76; RRS § 5836-76; formerly RCW 63.04.010. (ii) RCW 65.08.040; Code 1881 § 2327; 1863 p 413 § 4; 1854 p 404 § 4; RRS § 5827.]

Effective date—1981 c 41: See RCW 62A.11-101.

PART 2 FORM, FORMATION AND READJUSTMENT OF CONTRACT

62A.2-201 Formal requirements; statute of frauds. (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not

[Title 62A RCW—page 9]

enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (RCW 62A.2-606). [1965 ex.s. c 157 § 2-201. Cf. former RCW 63.04.050; 1925 ex.s. c 142 § 4; RRS § 5836-4; prior Code 1881 § 2326.]

Statute of frauds: RCW 19.36.010.

62A.2-202 Final written expression: Parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (RCW 62A.1-205) or by course of performance (RCW 62A.2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. [1965 ex.s. c 157 § 2-202.]

62A.2-203 Seals inoperative. The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such contract or offer. [1965 ex.s. c 157 § 2-203. Cf. former RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

Corporate seals—Effect of absence from instrument: RCW 64.04.105.

62A.2-204 Formation in general. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. [1965 ex.s. c 157 § 2-204. Cf. former RCW sections: (i) RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. (ii) RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

62A.2-205 Firm offers. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. [1965 ex.s. c 157 § 2-205. Cf. former RCW sections: (i) RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. (ii) RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

62A.2-206 Offer and acceptance in formation of contract. (1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. [1965 ex.s. c 157 § 2-206. Cf. former RCW sections: (i) RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. (ii) RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

62A.2-207 Additional terms in acceptance or confirmation. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish

a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Title. [1965 ex.s. c 157 § 2-207. Cf. former RCW sections: (i) RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. (ii) RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

62A.2-208 Course of performance or practical construction. (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (RCW 62A.1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance. [1965 ex.s. c 157 § 2-208.]

62A.2-209 Modification, rescission and waiver. (1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (RCW 62A.2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. [1965 ex.s. c 157 § 2-209.]

62A.2-210 Delegation of performance; assignment of rights. (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in RCW 62A.9A-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially

the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) of this section unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (RCW 62A.2-609).

(7) Notwithstanding subsections (2) and (3) of this section, an assignment that would be a breach but for the provisions of RCW 62A.9A-406 may create reasonable grounds for insecurity with respect to the due performance of the assignor (RCW 62A.2-609). [2000 c 250 § 9A-804; 1965 ex.s. c 157 § 2-210.]

Effective date—2000 c 250: See RCW 62A.9A-701.

PART 3 GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

62A.2-301 General obligations of parties. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. [1965 ex.s. c 157 § 2-301. Cf. former RCW sections: (i) RCW 63.04.120; 1925 ex.s. c 142 § 11; RRS § 5836-11. (ii) RCW 63.04.420; 1925 ex.s. c 142 § 41; RRS § 5836-41.]

62A.2-302 Unconscionable contract or clause. (1) If the court as a matter of law finds the contract or any clause of

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CASE NO. 37728-4-II

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FOR THE STATE OF WASHINGTON

WASTE CONTROL RECYCLING, INC., a Washington Corporation,
Appellant,

vs.

EMS MULTI MATERIAL MANAGEMENT & MARKETING, a
division of EAST BAY RESOURCES, INC.,
Respondent.

CERTIFICATE OF SERVICE

AIKEN, ST. LOUIS & SILJEG, P.S.

By: William A. Olson
Attorneys for Respondent

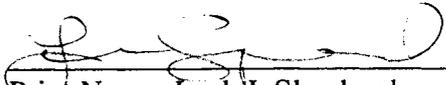
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I hereby certify that on the 16th day of September 2008, I sent out for service by U.S. Mail, postage prepaid, a true and correct copy of Brief of Respondent and this Certificate of Service, to the individual named below in the specific manner indicated:

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Print Name: Leah J. Shepherd
Dated: September 16, 2008

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