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SUPREME COURT
OF THE STATE OF WASHINGTON

ROSS B. HANSEN, as single person, and NORTHWEST
TERRITORIAL MINT, LLC, a Washington limited liability company,

Petitioners,

v.

AUBURN VALLEY INDUSTRIAL CAPITAL LLC,
a Washington limited liability company,

Respondent

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CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF ANSWERING PARTY

Respondent Auburn Valley Industrial Capital, LLC (“Auburn”) files this Answer to the Petition for Review filed by Petitioners Ross B. Hansen and Northwest Territorial Mint, LLC (collectively “NW Mint”).

II. THE COURT OF APPEALS DECISION

NW Mint seeks review of an unpublished decision filed by Division I of the Court of Appeals on July 14, 2014 (“Decision”).

III. COUNTERSTATEMENT OF ISSUES RAISED BY THE PETITION FOR REVIEW AND SUMMARY OF REASONS FOR DENYING REVIEW

NW Mint’s Petition presents two issues. First, NW Mint contends that the Decision held NW Mint liable merely for “using” metals in its manufacturing operations. Petition at 1. Second, NW Mint contends that the Decision was based on an “absolutist interpretation” requiring removal of “every molecule of any ‘hazardous substance’ from leased premises, regardless of ... actual risk of harm or legal liability.” *Id.* at 2.

NW Mint’s entire Petition rests on the erroneous contention that the Decision failed to consider whether NW Mint’s hazardous substance metal dust contamination posed a threat to human health. Petition at 1-2, 7-8. In fact, the Court of Appeals cited and relied upon extensive evidence that the contamination posed a significant human health threat.

Auburn provides the following counterstatement of issues:

- 1. Is the Decision, holding NW Mint liable under the Lease for “releases” of hazardous substances that posed a threat to human health, consistent with “Supreme Court precedent requiring that contracts be construed in a reasonable business fashion according to their purpose and circumstances?”** Petition at 1.

2. **Is the Decision, based on a record demonstrating both “an actual risk of harm” and legal liability, “facially inconsistent with most commercial and manufacturing activities” so as to raise a question of public interest? Petition at 2.**

Auburn raises one additional issue pursuant to RAP 13.4(d) regarding an issue raised but not decided in the Court of Appeals. Auburn raises this third issue conditionally, as an alternative ground for affirming the Decision, but only if the Court were to grant review of the Petition:

3. **Does the record support affirming the Decision based on NW Mint’s liability under the Model Toxics Control Act (“MTCA”)?**

As set forth below, NW Mint’s Petition does not meet any of the criteria in RAP 13.4(b) governing acceptance of review. The Petition fails to acknowledge that, in determining NW Mint’s liability under the Lease, the Court of Appeals relied upon evidence of “releases” of hazardous substance metal dusts that posed a human health threat. The Petition also fails to demonstrate that the Decision conflicts with any decision of this Court or the Court of Appeals. Moreover, NW Mint has not identified any issue of substantial public interest that should be determined by this Court.

IV. COUNTERSTATEMENT OF FACTS

NW Mint operated a metal fabrication business at Auburn’s facility from 2002 to 2010 under a commercial/industrial lease (the “Lease”).¹ Ex.1. Following expiration of the Lease in April 2010, Auburn discovered high levels of hazardous substance metal dusts and residues inside and outside of the facility resulting from NW Mint’s operations. Ex.

¹ “The building was new when this lease began, and [NW Mint] was the first tenant in suite 101.” Decision at 2.

58; CP 1719-21 (FF Nos. 92-104). NW Mint refused to clean up the contamination.² Auburn cleaned the facility and filed a cost-recovery action.³ After a three-week bench trial, the trial court awarded Auburn \$869,746.53.⁴ CP 1738-43. The trial court entered a supplemental judgment on June 4, 2013, awarding Auburn \$1,582,046.61 for its attorney fees and costs. CP 3583-84.

NW Mint appealed both judgments, but the only portion of the November 2012 judgment it appealed was the \$391,573.23 awarded for “remedial action” costs.⁵ Auburn has two separate and independent legal grounds for recovering these costs: (1) the Model Toxics Control Act (“MTCA”), RCW 70.105D.080 and (2) the Lease. Ex. 1, §§ 11, 13.

The Court of Appeals affirmed both judgments based on NW Mint’s breach of the Lease. It did not reach the issue of NW Mint’s liability under MTCA. Decision at 26-27.

² Exs. 60, 63, 67-69, 78, 91; CP 1722, 1725 (FF Nos. 111-128); CP 1731 (CL No. 14).

³ Ex. 173; CP 0001-0228; CP 1722-23 (FF Nos. 113-22).

⁴ The November 14, 2012 judgment consisted of the following:

| | | |
|--------------------------|---------------------|--------------|
| “Remedial action” costs: | \$391,573.23 | (CP 1736) |
| 2009 lawsuit damages: | \$9,995.77 | (CP 1732) |
| Lost rent: | \$299,947.20 | (CP 1731-32) |
| Property damages: | <u>\$168,230.33</u> | (CP 1725-26) |
| TOTAL | \$869,746.53 | (CP 1738) |

⁵ NW Mint did not appeal the trial court’s award of the “2009 lawsuit damages.” NW Mint Op. Br. at 3, footnote 3. In addition, NW Mint did not present any argument on appeal regarding the trial court’s award of “lost rent” (\$299,947.20) or “property damages” (\$168,230.33).

V. WHY REVIEW SHOULD BE DENIED

A. NW Mint's Petition misconstrues the Decision and ignores evidence of human health risks cited by the Court of Appeals.

Contrary to NW Mint's Statement of Issues and supporting arguments, the Decision did not find NW Mint liable for cleanup costs under the Lease (1) based on the mere "use" of hazardous substances in its operations or (2) based on an "absolutist interpretation" of the Lease that would require cleanup of "every molecule" of any hazardous substance regardless of risk of harm or legal liability. Petition at 1-2.

NW Mint's entire Petition is based on one sentence:

The lease prohibited any storage, generation, disposal, or other releases of hazardous materials, regardless of whether the releases posed a risk to human health or the environment.

Decision at 17.⁶

Based on this single sentence, NW Mint contends the Court of Appeals held NW Mint liable for cleaning up the contamination without regard to human health risks or legal liability. Petition at 2. In fact, both the trial court and the Court of Appeals relied on extensive evidence of

⁶ This sentence is a paraphrased reference to the first sentence in Section 11 of the 93-page Lease, which states:

Tenant shall not store, generate, dispose of, or otherwise allow the release of any hazardous waste or materials, in, or under the Premises, Property or Project or any adjacent property, or in any improvements placed on the Premises.

Ex. 1, § 11. A copy of the full text of Section 11 of the Lease, reformatted for ease of review, is attached to this Answer as **Appendix A**.

health risks in finding that NW Mint breached two separate sections of the Lease.⁷

B. The Court of Appeals cited and relied upon evidence of “releases” of hazardous substances that posed a risk to human health.

1. The Decision was based on evidence of “releases” of hazardous substance metal dusts and residues, not mere “storage” or “use” of “bulk quantities of metals.”

NW Mint contends the Decision effectively imposed liability on NW Mint “from its first day of operation” because it “stored and used bulk quantities of metals (*e.g.*, silver, copper, nickel) that the lease defined as ‘hazardous materials.’” Petition at 8. In fact, neither the trial court nor the Court of Appeals found NW Mint liable based on its “use” or “storage” of “bulk” metals, as alleged by NW Mint. *Id.* at 8, 11.

This case was never about the “storage” or “use” of metals in “bulk” forms, such as coins, jewelry or bars of metal.⁸ NW Mint breached the Lease based on “releases” of hazardous substance metal dusts from its operations, especially the very fine metal particulate residues and dusts released throughout the facility that posed the greatest respiratory threat to

⁷ CP 1720-22 (FF Nos. 95-101, 108-10); CP 1729 (CL Nos. 4-5); Decision at 6-7, 9-11, 16-17. *See* Ex. 58; Ex. 160 (¶ 16); RP 8/6 at 8, 26-27, 35-37, 845-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 26-29, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197.

⁸ **Appendix B** is an excerpt of the cross-examination of Auburn’s representative, during which the trial court intervened to confirm for the benefit of NW Mint’s counsel that it understood the case was about “metallic dust” and was not about bulk metals such as coins (“a whole nickel”) or “silver jewelry, or anything like that.” Appendix B (RP 7/30 at 190-91).

human health.⁹ The Court of Appeals understood that this case was about metal dust “releases,” not the “use” or “storage” of “bulk metals.”

The record shows that NW Mint ... “released hazardous materials” on the premises and did not notify Auburn of these releases. The trial court found, “Hazardous substance metal fumes, dust and residues were dispersed throughout the facility and were also released to the ‘environment,’ as evidenced by high levels of hazardous substance metal dust/residue found outside of the building, both on the roof and on the loading dock area outside of the building.”

Decision at 16, quoting CP 1720 (FF No. 101).

No one reading this unpublished Decision could conclude that NW Mint was found liable for mere “storage” or “use” of metals in any “bulk” form. The Decision was based on extensive evidence of “releases” of “hazardous substance metal fumes, dusts and residues.” *Id.*

2. The Decision is based on extensive evidence that the hazardous substance metal dusts from NW Mint’s operations posed a threat to human health.

Both the trial court and the Court of Appeals cited and relied upon extensive evidence of human health risks in concluding that NW Mint was liable under the Lease for cleaning up the metal dust contamination.¹⁰ The Petition ignores specific evidence cited in the Decision regarding the human health threat posed by the metal dust contamination. For example,

⁹ Experts on both sides testified that very small dust particles/residues pose a greater human health risk than larger particles of hazardous substances due to the potential for inhalation of these fine particles deep into the lungs of persons exposed to the contamination. RP 8/6 at 35-36; RP 8/9 at 18-20; RP 8/20 at 175.

¹⁰ CP 1720-22 (FF Nos. 95-101, 108-10); CP 1729 (CL Nos. 4-5); Decision at 6-7, 9-11, 16-17. *See* Ex. 58; Ex. 160 (¶ 16); RP 8/6 at 8, 26-27, 35-37, 845-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 26-29, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197.

the Decision quotes the “Site Cleanliness Investigation Report” issued by Auburn’s environmental consultant shortly after the Lease expired:

[A]ll of the five (5) composite samples had sufficient contamination to indicate that the facility is contaminated with a number of toxic metals and should not be leased or occupied without further cleaning and decontamination.

Decision at 6-7, footnote 4 (quoting Ex. 58, p. 2)

The Decision also references specific inhalation and skin contact risks associated with NW Mint’s hazardous substance metal dusts:

EBI concluded, “Inhalation of the toxic metal dusts or skin contact of settled dust could have significant harmful health effects.” Further, “[a]ny settled dusts or metal fines would likely be listed or characterized as a regulated hazardous waste.” EBI recommended that workers properly trained in exposure to hazardous substances clean the facility.

Decision at 7 (quoting Ex. 58, pp. 2-3)

The Decision even cites a report issued by NW Mint’s own expert, who “conclud[ed] ... that the premises posed a potential hazard” and who found that the elevated levels of metal dust released at the facility “were not attributable to background contamination from natural and human sources.”¹¹ Decision at 9 (citing Ex. 219, p. 4).

The trial court made specific findings that NW Mint’s hazardous substance metal contamination posed a threat to human health and the

¹¹ The Decision also noted that NW Mint’s own consultant:

recommended that an “experienced abatement firm with training in hazardous waste operations” conduct a “thorough cleaning” “according to a protocol prepared by a certified industrial hygienist.”

Decision at 10 (quoting Ex. 219, p. 4).

environment. CP 1720-22 (FF Nos. 95-101, 108-10). For example, the trial court found:

At the end of the Lease in April 2010, the condition of the former NW Mint facility posed a threat or potential threat to human health or the environment. The facility was not safe for occupancy by a future tenant without conditions or limitations for any of the uses allowed under Auburn's zoning code, such as residential, daycare, preschools, nursery schools, health and fitness clubs, restaurants, and other uses.

CP 1721 (FF 108).

NW Mint's Petition does not contend that this finding (or any other trial court finding) is in error. Experts on both sides testified that the hazardous substances at the Auburn facility posed a "threat or potential threat" to human health.¹² The entire Petition is based on the erroneous contention that the Court of Appeals failed to consider human health risks. In fact, it carefully considered health risks in determining NW Mint's liability under the Lease. Decision at 6-7, 9-11, 16-17.

The most compelling evidence of human health risks cited by the Court of Appeals is the human health risk assessment conducted by Auburn's toxicology expert, Dr. John Schell. Ex. 160 (¶ 16); RP 8/9 at 38-39. Dr. Schell's risk assessment proved that the hazardous substance metal dusts at the Auburn facility posed a threat to human health, and he concluded that removal of the contamination was required to make the

¹² RP 8/6 at 8, 26-27, 36-37, 45-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197.

facility safe for future occupants.¹³ Both the trial court and the Court of Appeals relied upon Dr. Schell's risk assessment in determining NW Mint's liability under the Lease.¹⁴ CP 1720 (FF No. 99); Decision at 11.

No one reading the unpublished Decision could conclude that the Court of Appeals failed to consider the risks to human health when it held NW Mint liable under the Lease for the cost of cleaning up this hazardous substance metal dust contamination.

C. The Decision correctly determined that NW Mint breached both Section 11 and Section 13 of the Lease.

1. NW Mint breached Section 11 of the Lease by allowing and failing to remediate "releases" of hazardous substances that posed a threat to human health or the environment.

NW Mint's potential liability for hazardous substance contamination under the first sentence of Section 11 of the Lease is broad. It does not explicitly require proof of actual harm to human health or the

¹³ Dr. Schell performed a toxicological assessment of the facility, established health-based cleanup standards, and confirmed that the metal dusts posed a threat to human health. Ex. 160 (¶ 16); RP 8/9 at 10-29, 38-39. None of NW Mint's experts challenged Dr. Schell's ultimate conclusion: that hazardous substance metal dusts at the Auburn facility exceeded MTCA cleanup standards based on this human health risk assessment. RP 8/9 at 38-39; Ex. 160 (¶ 16). NW Mint's consultants did not perform any risk assessments, and they provided no evidence that the facility was safe for use by future occupants. *Id.* (¶ 17).

¹⁴ MTCA requires that human health risk assessments consider the potential future use of a facility. WAC 173-340-740(1)(a). Dr. Schell based his risk assessment on future residential use of the property, which is the "reasonable maximum exposure scenario" required under MTCA regulations. WAC 173-340-740(1)(a); RP 8/9 at 30-31, 96-97. Residential use of the Auburn facility is allowed under the City of Auburn Zoning code. Ex. 203, pp. 1-2; RP 8/9 at 16. NW Mint's toxicologist, Dr. Mackay, agreed with the residential land use assumption used in Dr. Schell's risk assessment. RP 8/20 at 78. NW Mint erroneously contends that the cleanup of the facility was based on future use of the facility as a "day care center." Petition at 6.

environment. Ex. 1, § 11. However, other requirements in Section 11 provide a broader context for determining NW Mint’s liability under the Lease with respect to Hazardous Waste. For example, the fourth sentence in Section 11 requires NW Mint to “comply with all statutes, regulations and ordinances ... relating to the ... cleanup of Hazardous Waste.”¹⁵ *Id.*

The trial court and the Court of Appeals reasonably considered all provisions of Section 11, including the requirement to comply with MTCA, in determining that NW Mint had breached Section 11 of the Lease by allowing “releases” of hazardous substances.¹⁶ Indeed, determining that NW Mint had breached the Lease was virtually unavoidable in light of indisputable evidence (including the human health risk assessment), which showed that the contamination exceeded MTCA cleanup levels established for the protection of human health. *See, e.g.*, Ex. 160 (¶ 16).

2. NW Mint breached Section 13 of the Lease by failing to keep the premises “in a sanitary condition.”

NW Mint acknowledges that the Court of Appeals “affirmed the trial court’s decision based entirely on its construction of sections 11 and

¹⁵ In addition, the indemnity clause in the eighth sentence of Section 11 focuses on losses due to “the release of any Hazardous Waste,” and requires NW Mint to: “indemnify ... [Auburn] against any and all ... cleanup costs, remedial actions, costs and expenses ... incurred or paid by ... [Auburn] ... by reason of, or in connection with ... the acts or omissions of [NW Mint] ... resulting in the release of any Hazardous Waste.”

Ex. 1, § 11(emphases added).

¹⁶ CP 1719-1722 (FF Nos. 94-112); CP 1729-31 (CL Nos. 4-5, 11-16, 18); CP 1736 (CL No. 17); Decision at 2-4, 7-11, 15-17.

13 of the Lease.” Decision at 6-7. However, the Petition focuses almost exclusively on NW Mint’s liability under Section 11 of the Lease, with only passing references to the requirements of Section 13, which requires NW Mint to “keep the Premises ... neat, clean and in good order, repair and in a sanitary condition.” Ex. 1, § 13. NW Mint largely ignores the trial court’s and Court of Appeals’ specific references to the scope of NW Mint’s liability under Section 13 of the Lease. Decision at 15-17; CP 1720-22 (FF Nos. 98-99, 108-12); CP 1731 (CL No. 18).

NW Mint argues that the “neat and broom clean” language in Section 13 is the Lease’s only “cleanliness standard.” Petition at 11. The trial court and the Court of Appeals both rejected this argument.¹⁷ The Court of Appeals correctly concluded that when “NW Mint rejected Auburn’s requests to clean the premises to enable Auburn to relet it to a new tenant,” it breached both Section 11 and Section 13. Decision at 17.

It was also reasonable for the Court of Appeals to consider MTCA’s health-based cleanup standards in determining that NW Mint had breached the “sanitary condition” standard of Section 13 of the Lease. Decision at 11. The Court of Appeals reasonably determined that leaving a facility contaminated with hazardous substance metal dusts/residues at levels posing a threat to human health (based on MTCA regulatory standards) does not satisfy a contractual requirement to leave a facility in a “sanitary condition.” Decision at 11, 15-17. Because NW Mint’s

¹⁷ Decision at 15-17; CP 1720-22 (FF Nos. 98-99, 108-12); CP 1731 (CL No. 18).

contamination exceeded MTCA cleanup standards, the facility was not suitable for use by future tenants. CP 1720-22 (FF Nos. 98-99, 108-10); CP 1731 (CL No. 18); Ex. 160 (¶ 16). The Court of Appeals applied a reasonable standard for determining compliance with Section 13 of the Lease. Decision at 11, 15-17.

The Decision can be affirmed solely based on NW Mint's breach of Section 13, even if NW Mint's arguments regarding Section 11 had merit, which they do not.

D. MTCA provides a separate and independent basis for affirming the Decision, and, if this Court were to grant review of the Decision, it should also review whether Auburn is entitled to prevail under MTCA.

The Decision upheld two trial court judgments awarding remedial action costs, attorney fees and litigation expenses to Auburn under the Lease. Auburn has cost-recovery rights under MTCA (RCW 70.70D.080), which is a separate and independent basis for affirming the Decision. Auburn raises this issue conditionally pursuant to the requirements of RAP 13.4(d), because the issue of NW Mint's MTCA liability was raised but not decided in the Court of Appeals. NW Mint's liability under MTCA is discussed below, but is presented for consideration only in the event the Court grants review of the Petition.

The trial court entered specific findings regarding NW Mint's liability under MTCA.¹⁸ NW Mint does not argue that these findings are in error. They are supported by substantial evidence regarding each

¹⁸ CP 1710-1724 (FF Nos. 94, 99, 105, 107, 124); CP 1729-1730 (CL Nos. 1-9).

element of MTCA liability.¹⁹ The trial court’s legal conclusions holding NW Mint liable under MTCA for cleanup costs, attorney fees, and litigation expenses are well supported by this evidence. CP 1729-30 (CL Nos. 1-9).

Although the Decision did not reach the issue of NW Mint’s MTCA liability, the Court of Appeals cited specific evidence relied upon

¹⁹ The trial court made findings that the metal dusts found at high levels at the Auburn facility (arsenic, lead, chromium, selenium, silver, copper, and zinc) are “hazardous substances” under MTCA. CP 1719 (FF Nos. 93-94). Experts on both sides agreed that the metals found at the Auburn facility were “hazardous substances” under MTCA. RCW 70.105D.020(10). *See, e.g.*, RP 8/1 at 65-66; RP 8/14 at 123; RP 8/20 at 116.

NW Mint operated the “facility” at the time of “releases” of “hazardous substances” that posed a “threat or potential threat” to “human health or the environment.” RCW 70.105D.040(1)(b). *See, e.g.*, Ex. 1; Ex. 58; Ex. 160 (¶ 16); RP 8/6 at 8, 26-27, 35-37, 845-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 26-29, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197. CP 1720-22 (FF Nos. 95-101, 108-10); CP 1729 (CL Nos. 4-5); Decision at 6-7, 9-11, 16-17.

NW Mint is liable for “all remedial action costs” incurred by Auburn due to “releases or threatened releases of hazardous substances.” RCW 70.105D.040(2). Substantial evidence supports the trial court’s findings that there were both actual releases and threatened releases of hazardous substances to the environment at the Auburn facility. CP 1720-21 (FF Nos. 100-06). *See, e.g.*, Exs. 58, 79, 170 (Tab F, photos 44-49), 173 (pp. 127, 481, 588-89); RP 8/14 at 57; RP 8/20 at 22.

The trial court found that Auburn’s cleanup costs qualified as “remedial action costs” under RCW 70.105D.020(33) because they were incurred “to identify, eliminate and minimize the threat or potential threat to human health or the environment posed by hazardous substances at the Auburn Property.” CP 1724 (FF No. 126); CP 1736 (FF No. 125). *See, e.g.*, Exs. 109, 158, 188, 189, 193, 292.

The trial court also found that Auburn’s cleanup met the “substantial equivalence” standard of RCW 70.105D.080, because it “resulted in an effective removal of the hazardous substances that posed a threat or potential threat to human health or the environment.” CP 1725 (FF No. 127). *See, e.g.*, Ex. 173.

by the trial court in determining NW Mint's MTCA liability.²⁰ *See, e.g.*, Decision at 16, quoting CP 1720 (FF No. 101); *Id.* at 11, citing Dr. Schell's human health risk assessment, Ex. 160 (¶ 16); CP 1720 (FF No. 99).

As NW Mint acknowledges, most of the parties' appeal briefing was devoted to MTCA issues. Petition at 6. The focus of the trial was also mostly on MTCA issues. However, from the outset, Auburn asserted its right to recover its cleanup costs (and attorney fees and costs) under either MTCA or the Lease, or both. CP 0012-0017.

Most of the evidence in support of Auburn's MTCA cost-recovery claim also supports its cost-recovery claim under the Lease. This includes evidence regarding the nature and extent of the contamination, the human health risks associated with the metal dusts, applicable regulatory cleanup

²⁰ Contrary to NW Mint's contentions (Petition at 6), the Department of Ecology has no "responsibility" or "authority" to make any determinations regarding NW Mint's MTCA liability. Such determinations are exclusively within the jurisdiction and authority of Washington courts, not Ecology.

Ecology will not determine whether your independent remedial action is the substantial equivalent of an Ecology-conducted or Ecology-supervised remedial action. Such determinations are made by a court, not by Ecology. *See* RCW 70.105D.080.

CP 3911-12 ("VCP Overview" Department of Ecology website: <http://www.ecy.wa.gov/programs/tcp/vcp/vcp2008/vcpservices.html>)

At trial, the Ecology employee subpoenaed by NW Mint refused to support NW Mint's contentions about Ecology's "opinions," and authority. The Ecology employee testified repeatedly that Ecology did not have authority to make determinations regarding MTCA liability under RCW 70.105D.080 because such determinations are made by the court. RP 8/13 at 77-78, 97, 120, 150, 162-66, 168-69, 211-12, 217-19.

levels, and the appropriate “remedial action” measures needed to investigate and clean up the contamination. *See* footnote 19 *supra*.

The Decision includes numerous references to evidence offered by Auburn to prove NW Mint’s liability both under the Lease and under MTCA. For example, the Decision cited Dr. Schell’s human health risk assessment, conducted pursuant to MTCA regulations, which established that the metal dust contamination “exceeded the MTCA cleanup standards” and posed a human health threat. Decision at 11. The Decision cites MTCA as a relevant legal standard under Section 11 of the Lease. *Id.* at 3. The Decision also cites “remediation standards set by MTCA” and notes that “a ‘cleanup level’ under the MTCA is a protective level that is safe for human health.” *Id.* at 11 (emphasis added). These specific references to MTCA belie NW Mint’s contentions that the Court of Appeals “ignored lease provisions keyed to the MTCA,” “ignored remediation standards set by the MTCA,” and “determin[ed] that the Mint’s compliance with [MTCA] was irrelevant.”²¹ Petition at 11.

E. The Decision is not in conflict with any decision of the Supreme Court or the Court of Appeals, and no substantial public interest warrants review of the Decision.

NW Mint contends that review should be granted “because the Decision violates cannons [sic] of contract and lease construction adopted by the Supreme Court,” including “cannons [sic] requir[ing] that contracts

²¹ NW Mint makes these contentions without any citation to the record. In fact, NW Mint’s entire 20-page Petition does not include a single citation to any factual evidence in the record.

be construed in a reasonable business fashion according to their purpose and circumstances.” Petition at 8. NW Mint contends that the Court of Appeals ignored the main purpose of the Lease, which was:

to provide industrial space for the operation of business that, by its nature, necessarily used in its manufacturing process materials the lease defined as hazardous.

Petition at 11 (emphasis added).

As discussed in Section V.B.1 of this Answer, the Decision did not hold NW Mint liable under the Lease for the mere “storage” or “use” of hazardous substances or for using metals in bulk form. It held NW Mint liable for “releases” of hazardous substance metal dusts that exceeded MTCA cleanup levels (established for the protection for human health) and for failing to surrender the leased premises in a “sanitary condition” suitable for use by future occupants. Decision at 3-4, 6-11, 13, 15-17.

Auburn agrees that the Washington cases cited by NW Mint establish legal standards for contract interpretation under Washington law.²² Petition at 9-10. However, NW Mint has failed to show that the Decision violated any of these standards. Ironically, NW Mint accuses the Court of Appeals of “[taking] a phrase out of context when context was

²² 224 *Westlake, LLC, 156 v. Engstrom Props., LLC*, 169 Wn. App. 700, 716, 281 P.3d 693 (2012); *Litowitz v. Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261 (2002), cert. denied 537 U.S. 1191, 123 S.Ct. 1271 (2003); *Tanner Elec. v. Puget Sound*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Tacoma v. Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012); *Felton v. Menan Starch Co.*, 66 Wn.2d. 792, 797, 405 P.2d 585 (1965); *Carroll Construction Co. v. Smith*, 37 Wn.2d 322, 331, 223 P.2d 606 (1950); *Largent v. Ritchey*, 38 Wn.2d 856, 859-60, 233 P. 2d 1019 (1951); *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 122, 118 P.3d 322 (2005).

essential for a proper interpretation of the lease.” *Id.* at 10-11. NW Mint ignores the fact that its entire Petition is based on one sentence in the 27-page Decision, which NW Mint reads in isolation and out of proper context. *Id.* at 1-2, 7-8. In contrast, the Court of Appeals cited and relied upon the full context of both Section 11 and Section 13 of the Lease. Decision at 2-4, 10-11, 15-17.

The Court of Appeals’ interpretation of this Lease is not an “absolutist, out of context, and unreasonable interpretation” nor is it an example of “forced or strained constructions that lead to absurd results.” Petition at 9-10. Both the trial court and the Court of Appeals reasonably construed all relevant provisions of the Lease, determined that “releases” of hazardous substance metal dusts in excess of regulatory cleanup levels violated the Lease, and concluded that NW Mint should not be allowed to avoid liability for harmful contamination that precluded safe use of the facility by future occupants.²³

NW Mint devotes eight pages of its Petition to a detailed discussion of one California case, *SDC/Pullman Partners v. Tolo Inc.*, 60 Cal.App.4th 37, 79 Cal.Rptr.2d 62 (1997). However, NW Mint fails to disclose the most important fact in that case. In *Tolo*, the California court explicitly noted that the plaintiff was “unable to point to any health hazard” associated with the alleged contamination. *Id.* 47-48. In contrast, Auburn provided extensive evidence that NW Mint’s hazardous substance

²³ CP 1719-22, 1724-25, 1736 (FF Nos.92-112, 123-25, 127-28); CP 1729 (CL Nos. 1-7, 8-17, 22); Decision at 6-11, 13, 15-17, 26-27.

metal dusts exceeded MTCA cleanup levels and posed a threat to human health.²⁴ Even if it were a Washington case, *Tolo* would not support NW Mint's request for review of the Decision, because the holding in *Tolo* was based on a facility that posed no health hazard. *Id.* NW Mint's own experts acknowledged the human health threat posed by NW Mint's hazardous substance metal dust contamination.²⁵

NW Mint was not held liable under the Lease for "trace and de minimis amounts of certain molecules to avoid purely speculative environmental liability." Petition at 14, quoting *Tolo*, 60 Cal.App.4th at 45. NW Mint's contamination exceeded MTCA cleanup levels, posed a health hazard, and created environmental liability risks for Auburn.²⁶ No reasonable property owner would ignore the high levels of contamination found at the Auburn facility. Auburn took proper steps to remediate the contamination and protect itself from claims by future tenants. It is

²⁴ See, e.g., Ex. 58; Ex. 160 (¶ 16); RP 8/6 at 8, 26-27, 36-37, 845-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 26-29, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197. See also CP 1720-22 (FF Nos. 95-101, 108-10); CP 1729 (CL Nos. 4-5); Decision at 6-7, 9-11, 16-17.

²⁵ See, e.g., RP 8/6 at 8, 26-27, 35-37, 845-46, 56; RP 8/16 at 132-33; RP 8/20 at 167-68, 197.

²⁶ Under MTCA, a current owner of contaminated property can be held "strictly liable" for the cost of cleanup, unless one of several statutory defenses apply. RCW 70.105D.040(1)(a). In fact, NW Mint's counterclaim asserted that Auburn was liable as a "current owner" under MTCA. CP 0237-0237. In light of that, it is disingenuous for NW Mint to claim that Auburn faced no "actual threat of environmental liability." Petition at 20. Ultimately, Auburn's liability as a current owner in this case was avoided because it proved all elements of MTCA's "innocent purchaser" defense. RCW 70.105D.040(2)(b); CP 1711-1714 (FF Nos. 35-51); CP 1730 (CL No. 10); Decision at 6 (footnote 3).

entitled to recover its costs for the cleanup that NW Mint should have conducted.

NW Mint asks this Court to accept review to provide “guidance” regarding “a lessee’s obligations under a hazardous substance clause contained in a commercial lease.” Petition at 11-12. The dearth of Washington case law regarding this issue is compelling evidence that no guidance is needed and that the Decision is not in conflict with any Washington cases. NW Mint has provided no evidence that landlords or tenants in Washington have any problems operating under commercial leases with hazardous materials clauses similar to the Lease in this case or the examples provided by NW Mint. Petition at App. D.

NW Mint asks this Court to fashion a new “reasonableness and common sense” lease interpretation standard based on the California *Tolo* case. Petition at 19. This is a thinly disguised request for a change in Washington law to allow tenants to treat hazardous substance contamination as “tofu and sprouts.” *Id.* at 16. No substantial public policy would be served by adopting a standard that would allow tenants to avoid liability for contamination that poses a human health threat. Responsible tenants and landlords in Washington do not have any problems interpreting and applying hazardous materials clauses similar to Section 11 in the Lease or other similar leases. NW Mint’s Petition is a misguided solution in search of a problem. It should be denied.

VI. AUBURN REQUESTS ATTORNEY FEES AND COSTS

Pursuant to RAP 18.1, Auburn requests an award of attorney fees and costs incurred in responding to NW Mint's Petition for Review.²⁷

VII. CONCLUSION

For the reasons set forth above, Auburn respectfully requests that NW Mint's Petition for Review be denied.

Dated this 10th day of November, 2014.



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²⁷ Auburn bases this request on RCW 70.105D.080, RCW 4.84.330, and the Lease (Ex. 1, § 24), all of which were the bases for the trial court's and Court of Appeals' awards of attorney fees and litigation expenses.

11. HAZARDOUS WASTE.¹

Tenant shall not store, generate, dispose of or otherwise allow the release of any hazardous waste or materials in, on or under the Premises, Property or Project or any adjacent property, or in any improvements placed on the Premises.

Except as otherwise provided, Tenant represents and warrants to Landlord that Tenant's intended use of the Premises does not involve the use, production, disposal or bringing on to the Premises of any Hazardous Waste.

As used herein, the term "Hazardous Waste" includes any substance, waste or material defined or designated as hazardous, toxic or dangerous (or any similar term) by any federal, state or local statute, regulation, rule or ordinance now or hereafter in effect, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, or the Washington Model Toxics Control Act ("MTCA"), RCW 70.105D.OIO et seq.

Tenant shall promptly comply with all statutes, regulations and ordinances, and with all orders, decrees or judgments of governmental authorities or courts having jurisdiction, relating to the use, collection, treatment, disposal, storage, control, removal or cleanup of Hazardous Waste in, on or under the Premises or any adjacent property, or incorporated in any improvements, at Tenant's expense.

After notice to Tenant and a reasonable opportunity for Tenant to effect such, Landlord may, but is not obligated to, enter upon the Premises and take such actions and incur such costs and expenses to effect such compliance as it deems advisable to protect its interest in the Premises; provided, however, that Landlord shall not be obligated to give Tenant notice and an opportunity to effect such compliance if (i) such delay might result in material adverse damage to Landlord or the Property, (ii) Tenant has already had actual knowledge of the situation and a reasonable opportunity to effect such compliance, or (iii) an emergency exists.

Whether or not Tenant has actual knowledge of the release of Hazardous Waste on the Premises or Property or any adjacent property as the result of Tenant's use of the Premises, Tenant shall reimburse Landlord for all costs and expenses incurred by Landlord in connection with such compliance activities.

Tenant shall notify Landlord immediately of any release of any Hazardous Waste in, on, under or from the Premises, Property or Project.

Tenant shall indemnify, defend and hold harmless Landlord against any and all losses, liabilities, suits, obligations, fines, damages, judgments, penalties, claims, charges, cleanup costs, remedial actions, costs and expenses (including, without limitation, consultant fees, attorneys' fees and disbursements) which may be imposed on, incurred or paid by, or asserted against Landlord or the Premises, Property or Project by reason of, or in connection with (i) any misrepresentation, breach of warranty or other default by Tenant under this Lease, or (ii) the acts or omissions by Tenant under this Lease, or (iii) the acts or omissions of Tenant, or any sublessee or other person for whom Tenant would otherwise be liable, resulting in the release of any Hazardous Waste.

This indemnity and Tenant's other duties under this paragraph II shall survive the termination of this Lease.

¹ This copy of Section 11 of the Lease has been reformatted to show each sentence as a separate paragraph.

P. 190 [cross-examination by NW Mint's counsel]

8 Q. All right. Let me go back to my question. My
9 question was, does Auburn contend that Mr. Hansen
10 breached the lease by storing silver on the premises?

11 A. I would have to look at my notes. I don't recall
12 about the actual term "silver."

13 Q. Okay. Well, I will represent to you, and we will
14 concede for this lawsuit, that silver is an element or
15 an item that is listed under CERCLA as being possibly a
16 hazardous substance. So my question would be, going
17 back, assuming that to be true, is it Auburn's
18 contention that by simply having silver on the
19 premises, storing silver, that Mr. Hansen was in breach
20 of the lease?

21 MR. MITCHELL: Objection, your Honor, the
22 question is vague. What form of silver?

23 THE COURT: Well, I think you have dealt with
24 this a little bit in the trial briefs. Haven't there
25 been kind of a stipulation or concession that, like,

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1 a whole nickel, you know, is not a breach? Am I
2 correct on that? It was written in the trial briefs;
3 right?

4 MR. von KALLENBACH: Well, I want to make sure in
5 this lawsuit, because it has changed. And so I want
6 to make sure that we understand that simply having
7 silver in the premises, in and of itself, they are
8 not contending that was a breach.

9 MR. MITCHELL: I think we would state it this
10 way: We didn't bring the case because people had
11 coins in their pockets, we brought the case because
12 of the metallic dust in the premises.

13 THE COURT: Specific enough for you? It is dust.

14 MR. von KALLENBACH: It is dust; is that correct?
15 Counsel.

16 MR. MITCHELL: Yes, your Honor.

17 THE COURT: We are talking about metallic dust;
18 correct?

19 MR. MITCHELL: Yes.

20 THE COURT: Not silver jewelry, or anything like
21 that.

22 MR. von KALLENBACH: All right. Metallic dust.