No. 439409

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

C.P.B. & L. Trust

Appellant,

v.

The Port of Tacoma,

Respondent.

BRIEF OF RESPONDENT

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I. Introduction

The Trial Court properly granted Respondent Port of Tacoma's ("Port") summary judgment motion because the Port established based solely on undisputed facts, that it was entitled to receive the escrow funds at issue in this case. These funds were held in a $500,000 escrow account created to address environmental liability in a 2006 real property purchase and sale transaction in which the Port purchased land from sellers who are not parties to this litigation.

Due to environmental concerns arising from the industrial history of the subject property, the parties to the purchase and sale agreement (PSA) agreed to set aside a portion of the purchase funds in escrow to be used to reimburse the Port for remedial action costs incurred dealing with environmental contamination discovered within five years after closing. Appellant CPB&L Trust ("Trust") was entitled under the escrow terms to receive unused funds, if any remained. The terms of the PSA and the applicable escrow agreement are undisputed.

It is also undisputed that in 2009 and 2010, the Port discovered environmental contamination on the subject property which it subsequently remediated at a cost of more than $2.6 million, and that the

Port notified the escrow agent and the Trust of the Port's claim for the escrow funds on May 23 and May 26, 2011. The trial court properly found the Port's notice to be timely. Despite having conducted its discovery, the Trust proffered no competent evidence to controvert any of these material facts. The trial court did not err in determining that upon this undisputed factual showing the Port established its right to the escrow funds.

Neither did the trial court err in rejecting the Trust's attempt to bar the Port's recovery based on the argument that the Port did not provide the Trust with notice of its remedial action plan 21 days prior to implementing it as provided in the escrow agreement. The trial court correctly determined that the lack of the 21-day non-binding comment period was not a material breach and did not excuse the Trust's obligation to forgo the escrow funds in favor of the Port. Despite having had ample opportunity, the Trust has never proffered any comment whatsoever that it would have made during the non-binding comment period–much less any comment that would have presented a viable remedial alternative that could have resulted in sufficient savings to reduce the cleanup cost from $2.6 million to something less than the $500,000 in the escrow account.

The trial court's summary judgment can and should be affirmed

simply on the basis of the foregoing. As discussed below, the Trust's remaining assignments of error are either unintelligible, are devoid of any citations to the record or to supporting legal authority, or were not raised before the trial court.

II. Statement of the Case

A. Background

In 2006, the Port bought a large, piece of industrial property located at 1621 Marine View Drive in Tacoma, Washington ("the Property") from seller Marine View, Inc., which the Port intended to use as a habitat mitigation site. As such, the Port was particularly concerned about unknown environmental conditions at the Property. CP 89. Therefore, the Port negotiated for inclusion in the PSA[1], a requirement for the establishment of an escrow account to hold a portion of the purchase price for reimbursement of costs the Port might incur cleaning up contamination discovered after the closing date. CP 89. At the time of the sale, Marine View Inc. owed money to certain creditors, so the seller requested that the escrow account be set up such that any unused would be disbursed to the seller's creditors, including the Trust, rather than to the

[1]The final 2006 Purchase and Sale Agreement is located at CP 183-226.

seller. [2] CP89. Pursuant to the PSA (and a settlement agreement between the seller and the Trust), the seller, the Port, the escrow agent, and the Trust entered into the escrow agreement which is the subject of this litigation. CP 183-226 & CP 238-262. In that escrow agreement, the Trust was provided a 21-day period in which to make non-binding comments on the Port's remedial plans if the Port discovered contamination on the Property. CP 229-230.

The Port discovered contamination requiring remediation while it was in the midst of designing and constructing its $13.6 million habitat mitigation project on the Property. CP 71. Due to economic necessity and regulatory deadlines, the Port proceeded with remediation of the contaminated materials that it discovered. The Port did not provide notice to the Trust prior to remediation because the Port's files did not contain a copy of the Escrow Agreement at the time. Thus, the Trust was not

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[2]The PSA involved the sale of both 1621 Marine View Drive (the property at issue which was owned at one time by the Trust's predecessors-in-interest) 1625 and 1635 Marine View Drive (previously owned by the Foran family). The PSA required the escrow account to provide funds for contamination discovered on either parcel, with unused funds to be disbursed to either the Trust or the Foran family, depending upon where the contamination was located. CP 183-226. Separate escrow agreements were then executed. CP 228-236. The contamination at issue in this litigation was located on the property formerly owned by the Trust's predecessors. CP 228. Thus, the only escrow agreement at issue in this litigation is the one involving the Trust. This escrow agreement is attached as Appendix A to this brief and is also located at CP 228-236.

afforded its 21-day non-binding comment period. CP 71-74 & CP 866. The Trust has attempted to use this minor, immaterial breach to claim all of the funds in the escrow account despite the fact that the Port has incurred more than $2.6 million remediating the contaminated materials at issue; despite the fact no comments by the trust could have reduced the $2.6 million cleanup cost to less than $500,000; and despite the fact that the Port has strictly complied with every other term in the escrow agreement. CP 73-74 & CP 865-867.

B. The Purchase

The Property was historically used as a depository for construction debris and other materials. CP 258; CP 397. The Port successfully bargained for $500,000 from the purchase price to be set aside in an escrow account for the benefit of the Port, to reimburse it for costs it may incur as a result of removing materials or remediating hazardous substances discovered on the Property after the closing date. CP 188-189 & CP 229. The Port released the Trust and the Trust's beneficiary from any future environmental claims.[3] CP 189 & CP 230-231.

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[3]The Trust admitted its status as a successor-in-interest to prior owners of the Property. The Escrow Agreement, which was signed by the Trust states:

> The Trust is the sucessor-in-interest to Camille Fjetland and B&L

On May 26, 2006, the Trust, Marine View, Inc., the Port, and the escrow agent entered into the subject escrow agreement and established an escrow account of $500,000 from the purchase funds. CP 228-236. The Trust and the Port did not negotiate directly regarding the terms of the resulting escrow agreement, rather the Port and the Trust each negotiated independently with the seller Marine View Inc. CP 90. The Trust and Marine View, Inc. had a separate settlement agreement not involving the Port, wherein the Trust received $900,000 from the sale proceeds and stood to gain as much as $500,000 via the escrow agreement if no contamination was discovered within five years. CP 238-257.

C. The Remediation

In 2009, the Port discovered certain metals and petroleum contamination on the Property. CP 71. Because the metals contamination was contained in soil that the Port expected to remove during construction of the $13.6 million habitat mitigation area, no further pre-construction

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Trucking and Construction, Inc., the prior owners of the Property, who sold the Property to Marine View, Inc.

CP 228. Thus, without the releases provided in the PSA in partial consideration for the promises set forth in the Escrow Agreement, the Trust and/or its beneficiary Camille Fjetland, would have faced liability under the Model Toxics Control Act (RCW 70.105D, *et seq.*) ("MTCA") as prior owners and/or operators for their share of the $2.6 million spent on environmental remediation. CP 188-189.

investigation of this contamination appeared necessary and none was undertaken at that time. CP 71.

As the Port began construction in 2010, the Port discovered that the metals contamination was far more extensive than initially believed and would require removal beyond that which was necessary for the habitat mitigation project. The Port also discovered additional areas of petroleum contamination. CP 71-72. Because the Port's contractor and most of the equipment needed to excavate the contaminated soil were already mobilized to the property under the habitat construction project, the Port proceeded to remove this additional contamination between July and October, 2010. CP 72. This allowed the Port to take advantage of the pre-arranged highly competitive disposal rates for the habitat project, which were extended to the remediation of the newly identified contamination. CP 73.

The Port's investigations eventually determined that the metals contamination was associated with sand and gravel-sized slag casts that were present in gravel-fill material used as a road base and as fill for the foundation of a house that was built in the ravine on the Property sometime prior to July of 1988. CP 71-72. The slag-bearing fill material

and associated arsenic contamination extended to depths of up to five feet in places and overlay uncontaminated, native material. CP 71-72.

Contrary to the Trust's assertion that the Port "released" the hazardous materials by exposing them during the construction of the habitat mitigation project (which theory is based upon a misunderstanding of the term hazardous substances as defined by federal and state statutes[4]), it is undisputed that these materials have been on the Property since well before the 2006 sale to the Port. The Trust concedes that, as to the Arsenic slag:

> What ever was there, had apparently been sitting there for decades, bothering no one and there is no evidence that the Trust or even Mrs. Fjetland, the Trust's beneficiary ever put any of it there.
>
> . . .
>
> There was no MTCA Toxic waste until the Port sought to release it to build a Wildlife Babitat [sic]. It was being well contained by the Property as it was and bought by the Port.

Appellant's Brief at pp 18, 22. In support of its motion for summary judgment, the Port presented undisputed evidence that this material was present at the time the purchase closed because it is consistent with historical evidence of site use prior to the Port's purchase of the Property, and inconsistent with site use after the purchase closed. CP 863, CP 925

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[4] *See, e.g.* RCW 70.105D.020 (10)

& CP 928. Similarly, the Port presented evidence that the petroleum contamination (located more than 20 feet below ground surface) was clearly present at the time of closing. CP 84; CP 303. The Trust did not present any evidence to dispute this fact, and now only argues that:

> The same can be said for the petroleum deposits buried under thirty feet or more of overburden and dating from who knows when or how they got there?

Appellant's Brief at 23.[5]

The Port incurred more than $650,000 to remediate the metals contaminated soil alone. CP 73. The petroleum-related remediation costs amounted to over $2 million. CP 73.

D. Notice to the Trust.

On May 23 and May 26, 2011, the Port tendered notice of the discovery of both the metals and petroleum contamination to the escrow parties accompanied by an accounting of costs incurred in remediating the metals contaminated soil. CP 283-299 The Port requested all of the escrow funds because the costs for remediating the metals contamination alone exceeded the $500,000 available in the escrow account. CP 286. The Trust

[5] The exact timing of petroleum deposits is irrelevant. The Escrow Agreement only requires that the materials existed at the time of the closing, which the Trust concedes.

objected to the Port's demand for reimbursement primarily based upon its argument that the lack of the 21-day non-binding comment period prior to clean up precluded the Port from receiving *any* reimbursement whatsoever and entitled the Trust to receive the full amount of the escrow account. CP 41-42; CP 50-55. After the Trust objected to the disbursement of any escrow funds to the Port as reimbursement for the Port's cost to remediate the metals contamination, the Port provided additional documentation to the Trust detailing the amount of money spent on the petroleum-related remediation and demanding reimbursement for those costs as well. CP 41-42; CP 301- 350.

II. Argument

A. Summary judgment Standard.

Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the non-moving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); CR 56 (c). Here, there is no genuine issue of material fact. There is only a disagreement as to the legal

meaning and effect of specific language found in the Escrow Agreement between the Trust and the Port.

Unambiguous contracts are to be interpreted by the courts as a matter of law. *Paradiso v. Drake*, 135 Wn. App. 329, 334, 143 P.3d 859 (2006). Summary judgment is appropriate in cases revolving around the breach of an unambiguous contract "even if the parties dispute the legal effect of a certain provision." *State v. Brown*, 92 Wn. App. 586, 594, 965 P.2d 1102 (1998). The Escrow Agreement is an unambiguous contract that can be interpreted as a matter of law and summary judgment is appropriate to resolve the immateriality of the comment provision.

The timing and content of the Port's notice to the Trust pursuant to the Escrow Agreement is undisputed, and the Trust did not provide *any* competent evidence to contradict the fact that the Port incurred more than $2.6 million to remove hazardous substances from the Property. "When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

B. The Port is Entitled to the Escrow Funds Pursuant to the Parties' Agreement

The Trust's first four assignments of error all appear to be based upon the assertion that the Port should be completely barred from recovering any of the escrow funds, despite the millions of dollars it spent removing hazardous substances, because the Trust did not get an opportunity to make *non-binding* comments on the Port's remedial plans prior to the cleanup. The trial court properly rejected this argument, and the Trust has provided no authority in its appellate brief to support its position that such a minor technical breach of an escrow agreement should completely bar the Port's legitimate claim to the escrow funds specifically set aside to pay for removal of hazardous substances.

The terms of the Escrow Agreement and the material facts surrounding the Port's discovery and removal of contamination on the Property are undisputed. Under the Escrow Agreement, the Port is entitled to the escrow funds set aside to pay for contamination discovered within five years after the sale fo the Property CP 228-236. Within the five years of the closing, the Port provided notice that it had discovered contamination on the Property and that the cost to remediate this contamination was more than $2.6 million CP 283-299.

The breach of a promise to provide time to make non-binding

comments is not a material breach that excuses the Trust's performance under the agreement. At most, the Trust was entitled to make its comments after it received notice and argue for a reduction in the Port's reimbursement if the Trust could prove that its comments would have been acceptable to the Port and would have reduced the cost of the remediation.[6]

1. The immateriality of the comment provision is clear from the four corners of the Escrow Agreement.

The comment provision is an immaterial part of the contract that merely governed the parties' interactions if contamination was discovered. The Escrow Agreement can be interpreted within the four corners of the document and no extrinsic evidence is necessary to ascertain the understanding of the parties to the Agreement with respect to this issue. The cleanup obligations clause of the Escrow Agreement provides, in part:

> If within five(5) years of the "Closing Date" under the Purchase Agreement, the Port discovers . . .hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date . . . [T]he Port **shall give notice** to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which

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[6]In order to actually reduce the amount the Port is entitled to from the escrow account, the Trust would need to show that its comments would have reduced the remediation costs from more than $2.6 million to less than $500,000.

> notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or to remediate such hazardous substances... After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust **shall each have a reasonable period of not less than 21 days** with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5-day periods to run concurrently) **to comment** upon the proposed remediation before work on said remediation shall commence, except in case of emergency threatening life or limb of persons on the Property or immediate destruction of the Property.

CP 229 (emphasis added). In Washington, courts follow the objective manifestation theory of contracts which requires the court to "attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Further, courts "generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id.* at 504. Extrinsic evidence may be introduced if "relevant for determining mutual intent" where the intent is unclear from the language of the contract, but *such evidence cannot be introduced to contradict or modify the written word.*

Id. at 502-03.

In a case applying these rules, the Court of Appeals strictly enforced the objective manifestation of the intent of the parties where the parties had allocated environmental risks for three years after the sale of property and, subsequent to that time period, the buyer informed the seller it was a potentially liable party under the Model Toxics Control Act. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 399-400, 245 P.3d 779 (2011). The Court of Appeals held that the language did not support the arguments by the sellers that they were completely absolved of all environmental responsibility after the three years because the contract did not objectively manifest that intent. *Id.* at 400.

Applying the objective manifestation theory of contracts here, the intent of the parties was to set aside funds in escrow for the potential future discovery of contamination. The plain language of the contract indicates that the comment provision merely provided the Trust with an opportunity to remark upon the planned cleanup. CP 229. The clause did not provide the Trust with the authority to change the course of the planned cleanup or otherwise impact the remediation on the Port's property. Upon conclusion of the cleanup, the Port was entitled to

reimbursement from the escrow account. CP 229.

The only evidence offered by the Trust relates only to the reasons why it requested the 21-day notice provision. CP 9-10. However, there is no evidence that the Trust communicated this reasoning to the Port, and certainly no evidence of a mutual intent on the part of the Port and the Trust for the comment period to be a material term. To the contrary, the Port provided extrinsic evidence that demonstrates a mutual intent for the comment provision to be an immaterial part of the Escrow Agreement. The Port proffered an earlier version of the PSA, which included language that would have afforded the Trust more rights, above and beyond a comment period, to influence the Port's cleanup plan. CP 93-175. Specifically, earlier language provided that the Port could not proceed with cleanup without the approval of Marine View, Inc. CP 93-133. The Port rejected this language because it would have been unacceptable for a third party to control when and how the Port remediated contamination on its property. CP 90. Nothing even approaching that language was included in the Escrow Agreement. Additionally, during the negotiations for the Escrow Agreement, an attempt to lengthen the 21-day non-binding comment period to 45-days was unsuccessful and was rejected. CP 177-

178. The parties' subsequent agreement upon final language of a 21-day non-binding comment period without an obligation to accept the comments, evidences a mutual intent to restrict the ability of the Trust to control the Port's cleanup plans. CP 90-91.

2. The lack of a 21-day non-binding comment period does not discharge the Trust's obligations.

The Trust cannot be absolved from performance solely based on the lack of the 21-day non-binding comment period. Under the cleanup clause of the escrow agreement the Trust is entitled to comment on the proposed remediation, however, the clause does not confer any rights upon the Trust to control the remediation. CP 289-230. The clause does not constitute a material part of the contract such that the Trust is excused from performance.

a. The comment provision is not material to the escrow agreement.

The comment provision is not a material part of the escrow agreement, accordingly, the Trust's performance under the agreement cannot be excused. A contracting party has the right to terminate a contract only if the breach was material. *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951). A material breach occurs where there is "a

substantial or total failure of consideration." *Cartozian and Sons v. Ostruske-Murphy, Inc.*, 64 Wn.2d 1, 6, 390 P.2d 548 (1964). In other words, the breach must be one that "'substantially defeats the purpose of the contract.'" *Park Ave. Condo. v. Buchan Devs.*, 117 Wn. App. 369, 383, 71 P.3d 692 (2003) (quoting *Mitchell v. Straith*, 40 Wn. App. 405, 410, 698 P.2d 609 (1985)).

In *Cartozian*, the Court found that a breach of an agreement to install carpets by a certain date in an apartment building did not constitute a material breach because the agreement did not include any "time is of the essence" language and the building was not ready to have carpets installed on the due date of the agreement. 64 Wn.2d at 5-6. Similarly, here, the Escrow Agreement does not include any language that makes the comment provision an integral part of the agreement and, even if the Trust had been provided the 21 days to comment prior to construction, the Trust provided no evidence that its non-binding comments would have reduced a more than $2.6 million remediation to an amount less than $500,000. CP 73-74; CP 228-236.

The immateriality of this provision is especially clear when all of the agreements in this property transaction are viewed together. Where

several instruments are part of the same transaction, they will be read together and "construed with reference to [each] other." *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995) (internal quotations and citations omitted). Therefore, in order to excuse the Trust of its only obligation under the Escrow Agreement, namely to allow disbursement of escrow funds to the Port if the Port incurs remediation costs, the Trust must prove that the breach of the Port's promise to provide 21 days for the Trust to make non-binding comments resulted in a "substantial or total failure of consideration" with respect to this complex property transaction that included the PSA, the Settlement Agreement, and the escrow agreement.

As stated in the agreement itself, the purpose of the escrow agreement was to "establish an escrow for the payment of certain remediation costs relating to the Property arising under the Purchase Agreement. CP 228. In exchange for a market-purchase-price for property that was known to be contaminated, as well the Port's release of environmental liability, the Port received the right to access escrow funds if it incurred remedial costs for contamination discovered after the sale. CP 189 & CP 230-231. The fact that the Trust did not have the chance to

comment on the Port's remediation plan does not substantially defeat the purpose of the contract. Instead, the terms of the contract indicate that the 21-day period was merely a courtesy to allow the Trust to comment on the Port's cleanup plans. CP 229. There were no further rights conferred on the Trust by this requirement and the purpose of the contract is not defeated if the 21-day notice is not provided.

The lack of a material breach is further supported by the Restatement of Contracts which provides five factors to be considered in determining whether a breach is material:

> (1) whether the breach deprives the injured party of a benefit which he reasonably expected, (2) whether the injured party can be adequately compensated for the part of that benefit which he will be deprived, (3) whether the breaching party will suffer a forfeiture by the injured party's withholding of performance, (4) whether the breaching party is likely to cure his breach, and (5) whether the breach comports with good faith and fair dealing.

Bailie Commc'ns, Ltd. v. Trend Bus. Sys., 53 Wn. App. 77, 83, 765 P.2d 339 (1988) (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a)-(e) (1981)); *see also TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 209, 165 P.3d 1271 (2007) (citing same); *see also Crowe v. Bolduc*, 334 F.3d 124, 138-39 (1st Cir. 2003) (using same factors to affirm that violation of notice provision of

agreement did not constitute a material breach). Under the Restatement factors, the failure to provide a comment period does not rise to the level of a material breach.

(i) The Trust is not deprived of a benefit reasonably expected.

The only 'benefit' that the Trust could have been reasonably expected from the provision was the opportunity to make non-binding comments on the remediation plans. The language of the comment provision provides nothing further. CP 229. In particular, neither this provision nor any other part of the agreement provides the Trust an opportunity to inspect the premises or requires the Port to follow any comments made by the Trust. Moreover, there was no monetary benefit to the 21-day notice period that could not have been achieved by allowing the Trust to prove how it could have reduced a $2.6 million remediation cost to less than $500,000.[7]

(ii) The Trust could have been adequately compensated for the absence of the opportunity to make comments.

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[7]It is undisputed that the technical data from the remediation on the Property is available today to the Trust to perform its own analysis. Thus, any argument that the removal of the contaminated materials prevents such an analysis is unfounded. The Trust has made no request for this data, or for any other evidence. CP 756-757. Nor did the Trust ask for additional discovery under CR 56 (f).

If the Trust had provided evidence that comments it would have made would have reduced the remedial cost, the Trust could have been compensated for the loss of the comment period by arguing for a setoff based on the difference between the remediation it would have suggested the Port perform, and the remediation that was actually performed. "To the extent possible, the law of contracts seeks to protect an injured party's reasonably expected benefit of the bargain." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002). Contract damages are thus calculated to give the injured party the benefit of their bargain by awarding a sum of money that puts the injured party in the same position had the contract been performed. *Id.* (*citing Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142 (1990)). Because the remediation work was done with competitively-bid unit disposal prices for large quantities and the total remediation for contamination discovered after the purchase amounted to more than $2.6 million, the Trust was unable to provide evidence that any comments could have reduced the remediation costs to an amount less that $500,000. CP 73-74; CP 865-867. This is because the Trust suffered no damages from the lack of opportunity to provide comments.

(iii) The Port would suffer forfeiture.

The Trust seeks to escape the entirety of its performance due under the contract based solely on the lack of an immaterial non-binding comment period. If the Trust is successful, the Port would certainly suffer forfeiture. This would be contrary to the purpose of the contract, which absolved the Trust of its statutory environmental liabilities to the Port, in exchange for the promise to allow disbursement of escrow funds to the Port in the event that contamination was discovered on the property. Because the comment provision did not supply the Trust with any ability to control the clean up operation on the Port's property, the Trust cannot now argue that the Port should forfeit its rights under the Escrow Agreement based solely on the absence of the comment period.

The outcome sought by the Trust is untenable. Under the Settlement Agreement between the Trust and Marine View, Inc., the Trust received $900,000 from Marine View, Inc. afer the sale of the Property closed. CP 239. In addition, the Port released the Trust and its beneficiary from all future contribution claims for environmental contamination on the Property. CP 189 & CP 230-231. If the Trust's position prevails, the Trust will have received far more than the benefit of its bargain: $1.4 million

and, *in addition*, a release from environmental liability. At the same time, the Port will be left with more than $2.6 million in remediation costs and no ability to pursue the parties responsible for the contamination all while having paid an increased purchase price based on the promise that these funds would be available to pay for environmental remediation.

(iv) The breach has been cured.

The Port provided notice of the discovery of contamination and its remediation after the work was complete. However, the Trust still could have commented on the work that was done and any changes to the remedial plans that it would have recommended. It has not done so.

(v) The Port has acted in good faith and has dealt fairly.

Finally, the Port's failure to provide the Trust with a comment period prior to construction was due to unintentional human error, not any bad faith by the Port. CP 71-73; CP 866. In fact, the Port acted in an economically and environmentally responsible manner when it immediately cleaned up the contamination it discovered in order to meet regulatory deadlines and take advantage of the cost savings of competitively-bid disposal prices and already mobilized equipment and contractors. CP 71-73. This decision should not be punished due to a

minor technicality wherein the Trust would have had the opportunity to simply comment on the project, especially given that there is no evidence that any comment would have resulted in a reduction in cleanup costs or any other benefit to the Trust. Accordingly, there was no material breach and the Trust's performance is not excused based on the lack of a comment period.

b. The Time is of the Essence Clause Has no Bearing on the Materiality of the Comment Provision.

Although not identified in its assignment of errors, the Trust argues in its brief that the time is of the essence clause somehow bars the Port's recovery of any escrow funds. Brief of Appellant at p 29. The Trust cites to authority construing an option contract (*Olsen v. Northern S. S. Co.*, 70 Wn. 493, 495, 127 P. 112 (1912), and cases construing real estate agreements wherein parties have failed to tender the purchase price or payments on earnest money notes within specified time frames. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (Wash. Ct. App. 1991); *Mid-Town P'ship v. Preston*, 69 Wn. App. 227, 848 P.2d 1268 (Wash. Ct. App. 1993). These cases are wholly inapposite to the facts at issue in this case.

The failure to timely tender payment for real property is certainly a material breach. The purchase price is usually the entire consideration for the transfer of the real property. In contrast, as discussed above, the failure to provide a non-binding comment period prior to removal of hazardous substances does not "substantially defeat the purpose of the contract." The Trust's reliance on this authority is misplaced.

c. The 21-day non-binding comment period is not a condition precedent to the Trust's performance.

Aside from the immateriality of the comment provision, there is no other basis for excusing the Trust's performance under the agreement or otherwise barring the Port's recovery of escrow funds. Compliance with the comment provision is *not* a condition precedent to the Port's access to escrow funds under the agreement. The trial court recognized that the language in the Escrow Agreement regarding the 21-day non-binding comment period did not create a condition precedent. During the first hearing on this issue, the trial court stated:

> I've read this paragraph very carefully several times, and one of the problems I have with it, even assuming your interpretation, it looks to me like the purpose was to allow your client to comment. . . Which might give you a cause of action for damages, I don't know. But this paragraph does not say it's a condition precedent. And you've been practicing a very long time. You know what those words

mean.

CP 842-843.

A condition precedent is a condition where its occurrence "triggers a duty of performance that had not arisen previously." *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007) (internal citations omitted). In *Tacoma Northpark, LLC v. NW, LLC*, the court stated, in pertinent part:

> Whether a contract provision is a condition precedent or a contractual obligation depends on the intent of the parties. We determine this intent from a fair and reasonable construction of the language used, taking into account all the surrounding circumstances. Where it is doubtful whether words create a promise (contractual obligation) or an express condition, we will interpret them as creating a promise. But words such as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' and 'after' suggest a conditional intent, not a promise.

123 Wn. App. 73, 80, 96 P.3d 454 (2004) (Internal citations omitted). Here, the words regarding the 21-day non-binding comment period create a promise not an express condition to the payment of escrow funds. In fact, directly after the comment provision, the Escrow Agreement states: "Upon completion of the removal or remediation, as determined by certification of the qualified independent contractor to the Port, Marine View Inc., the Trust, and Escrow Agent, the Port **shall** be entitled to

reimbursement out of the Escrow Funds held in the Escrow Account..." CP 229 (emphasis added). There is no conditional language anywhere that links the comment period to the disbursement of escrow funds.

The Port explicitly rejected proposed contract wording that would have conditioned the Port's right to reimbursement on approval during the comment period. A previous draft of the PSA included language which provided that the Port could not proceed with a planned cleanup effort without the approval of Marine View, Inc. CP 93-133 This language was only proposed in that particular draft and was rejected before preparation of the final version.[8] CP 90; CP 135-175; CP 183-226. Thus, there was no intent to create a condition precedent in the comment provision or otherwise link the Port's access to escrow funds to the Trust's ability to make its comments. As a result, the immaterial breach of the *promise* to provide a 21-day non-binding comment period does not amount to a condition precedent to the Port's recovery of escrow finds.

d. The Escrow Agreement is not a guaranty.

The Trust's fifth assignment of error again asserts that the Port's

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[8]Additionally, during the negotiations for the Escrow Agreement an attempt to lengthen the 21-day comment period to 45-days was unsuccessful as it did not make it to the final agreement. CP 90-91 & CP 177-178.

claims are barred because the Trust was denied the opportunity to make non-binding comments prior to cleanup, but this time it justifies its interpretation by calling the escrow agreement a guaranty. This argument is clearly contrived solely to take advantage of the strict compliance required under guaranty agreements, and is not supported by fact or law.

The Escrow Agreement here is just what it purports to be - an escrow agreement, not a guaranty. Accordingly, the rules applying to guaranty situations are wholly inapplicable. A guaranty is defined as "a promise to answer for the debt, default, or miscarriage of another person." *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943) (internal quotations omitted) (citing 24 Am. Jur. 873-4, § 2). It is "a collateral engagement for the performance of an undertaking of another." *Id.* "An offer to become a [guarantor] commonly invites the offeree to accept by advancing money, goods, or services on credit." RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 8 cmt a (1996).

The Port and Marine View Inc. agreed to put $500,000 of the sale proceeds into escrow to reimburse the Port for future environmental cleanup costs. CP 179-350 at CP 183-236. The Trust and other parties were released from MTCA liability under the PSA as a result. CP 179-350

at CP 183-226. Any unused escrow funds were to be released to the Trust after five years to satisfy *Marine View Inc. 's* debt to the Trust, an obligation and transaction to which the Port was a complete stranger. If no environmental cleanup were required, the Trust would receive the $500,000 at the end of the five years. CP 228-236. The Trust did not promise to answer for the debt, default, or miscarriage of Marine View Inc. or any other party. Nor did the Trust advance any money, goods, or services on credit as a means to accept the role of guarantor. In fact, the Trust contributed no funds to the $500,000 held in escrow. Rather, as part of a settlement with Marine View Inc., the Trust stood to gain $500,000 set aside from the property transaction at the end of a five-year period. Thus, the Trust was not acting as a guarantor.

This arrangement cannot be construed as anything other than an escrow agreement. Escrow is defined as

> [A]ny transaction... wherein any person or persons, for the purpose of effecting and closing the sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property to another person or persons, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition or conditions, when it is then to be delivered by such third person, in compliance with instructions under

> which he or she is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.

RCW 18.44.011. The Washington Supreme Court has held that "[a]n escrow is a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent with a stranger or third person, . . . to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect." *Lechner v. Halling*, 35 Wn.2d 903, 912, 216 P.2d 179 (1950) (internal citations and emphasis omitted). For the purpose of closing the sale of the Property, the Port and Marine View Inc. delivered $500,000 of the proceeds from the sale to Chicago Title until any new contamination requiring removal was discovered on the Property, at which point the Port would be reimbursed for its clean-up costs. If no contamination was discovered, the Trust would receive the money. The Escrow Agreement is an escrow, not a guaranty or any other legal arrangement.

Furthermore, there is no language in the Escrow Agreement that "specifically" sets forth the Trust as a guarantor. In fact, there is no mention of a "guaranty" much less a "guarantor" in the Escrow

Agreement. The Trust reached a settlement with Marine View Inc. that entailed the escrow arrangement that is subject of this litigation. Because the Property was known to be contaminated to a certain degree, the Trust took a risk in allowing the $500,000 it was owed by Marine View Inc. be held back from the sale and tied to the requirement that no additional contamination would be discovered within five years. The Trust's motivation and consideration for taking this risk is unknown to the Port. It is between the Trust and the Sellers. The Port cannot now be punished for the discovery and cleanup of contamination while the Trust receives a windfall and is excused from performance.

None of the cases cited by the Trust are applicable here because none of the cases involve the determination of whether a contract is a guaranty or an escrow agreement. All but one of the cases involved a guaranty contract that stated by its terms that it was a guaranty, or the parties did not dispute that they had agreed to a guaranty contract.[9]

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[9] *See Wilson Court Ltd. Partnership v. Toni Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998) (indicating that the parties agreed that a guaranty was intended and executed by the parties, however, there was a dispute about the terms of the guaranty); *Hansen Service Inc. v. Lunn,* 155 Wash. 182, 184, 283 P. 695 (1930) (quoting the language of the agreement identifying it as a "guarantee" and providing no discussion of any argument about whether a guaranty existed); *Old Nat'l Bank of Wash. v. Seattle Smashers Corp.*, 36 Wn. App. 688, 690-91, 676 P.2d 1034 (1984) (referencing agreement identifying contract as "a continuing guaranty" and discussing meaning of terms of guaranty); *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760, 764-67, 469 P.2d 969 (1970) (summarily noting the existence of a guaranty agreement and going on to determine whether it was an absolute or conditional guaranty agreement); *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 252-57, 562 P.2d 260 (1977) (stating at the outset

The Trust attempts to cherry-pick legal theories by calling the Escrow Agreement something it is not and then applying its choice of favorable rules to its case. The agreement here is an escrow agreement, not a guaranty. Accordingly, the rules applying to guaranty situations are wholly inapplicable.

e. The Doctrine of Equitable Estoppel Does Not Bar the Port's Recovery.

Nor does the doctrine of equitable estoppel bar the Port's recovery of the escrow funds. The Port was obligated to provide notice to the Trust within five years after closing. The failure to do so prior to removal of the materials is not inconsistent with the Port's claim for the escrow funds. Even if the Trust could establish that the Port acted inconsistently with its escrow claim, the Trust has not proven that it detrimentally relied upon the Port's silence. The authority cited by the Trust holds that while a party may be estopped from insisting upon a forfeiture by its conduct (which the Port is not), the doctrine of estoppel *cannot* be used to create a contract that does not exist or create a liability contrary to the express terms of the contract. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335-336 (1989).

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that there was a guaranty at issue and proceeding to interpret the contract); *Amick v. Baugh*, 66 Wn.2d 298, 302-04, 402 P.2d 342 (1965) (indicating that the parties disagreed about whether one party signed the document as a surety or absolute guarantor and holding the individual was an absolute guarantor primarily because of the use of words like "guarantor" in the agreement).

Here the express terms of the contract only allowed for a non-binding comment period, no more. The Trust did not prove any detriment from its inability to make these comments, so the doctrine of equitable estoppel is inapplicable.

3. The Port Established that it Discovered and Provided Notice of Hazardous Substances Within Five Years After Closing

The Escrow Agreement requires the escrow funds to be disbursed to the Port if within five years after the closing, the Port provides notice of the discovery of hazardous substances on the Property, which were not deposited after the closing. CP 228-236. The Port provided uncontroverted evidence that each of these terms were satisfied, and the escrow funds were properly disbursed to the Port.

a. The Undisputed Facts Establish that the Hazardous Substances Were Placed Prior to the Sale

The Port's environmental programs project manager Leslee Conner, and its independent consultant Mark Dagel, each testified that the contamination discovered by the Port pre-existed the 2006 PSA, that the contamination found by the Port is inconsistent with use of the Property by the Port post-purchase, and that it is consistent with the use of the Property pre-purchase. CP 863; CP 925; CP 928. The Trust provided no competent evidence to dispute these facts. The only evidence it provided in

opposition to the Port's summary judgment motion was the unfounded musings of the Trust's counsel that because a map allegedly annotated by William Fjetland with locations of buried Asarco slag did not identify the Property, then the deposits must not have been significant enough to include on the map. CP 396-407. Counsel has provided no foundation for the map or for any inferences that might be drawn from missing information. This "evidence" would be inadmissible at trial, and thus is insufficient to create a disputed material fact to overcome summary judgment. In addition, neither this "evidence," nor any other evidence provided by the Trust contradicted the Port's evidence that the petroleum contamination existed prior to the sale. And finally, the Trust's argument in its appellate brief that the Port somehow "exposed and released" materials that already existed at the time of sale, thus making them hazardous substances only after the sale, completely misconstrues the environmental laws referenced in the Escrow Agreement. *See, e.g.* RCW 70.105D.020 (10), (25); RCW 70.105D.030

b. The May 26, 2011 letter was timely under the terms of the Escrow Agreement.

The Trust argues that the five year period specified for the Port to provide notice of the discovery of hazardous substances ended at midnight on May 25, 2011, and therefore the Port's May 26, 2011 letter was

untimely. Appellant's Brief at p 30. This argument is not supported by the language of the agreement.

> If within five(5) years of the "Closing Date" . . . the Port discovers . . .hazardous substances . . . [T]he Port shall give notice to Marine View Inc. and the Trust . . .
>
> . . .
>
> Upon the . . . fifth (5th) anniversary of the Closing Date . . .the balance remaining in the Escrow Account (as to which no claim has been given by the Port as set forth herein . . .) . . . shall be released to the Trust.

CP 229-230. It is undisputed that the sale of the Property closed on May 26, 2006. CP 8; CP 385. The trial court properly rejected the Trust's argument, holding that the anniversary date is included in calculating the due date for the Port's claim. The trial court stated in pertinent part:

> And the five years doesn't work either, as I read this very carefully, because – which I was concerned about – because if it was five years, that would end on the 25th . . . But this actually says on the fifth anniversary, which would possibly mean the same day five years later. . . And which is the day you did get notice.

CP 844.

The Trust does not cite any authority to support its interpretation of how the five years should be counted, and the Trust's argument is contrary to over 150 years of precedent on this issue:

> The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus

> designated, and to include the last day of the specified period.

Sheets v. Selden's Lessee, 69 U.S. 177, 190 (1865) (also cited by *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 439 (1931)).

> [I]n computing time under statutes and contracts the law disregards fractions of a day, unless on account of the subject matter, or for other important reasons, justice requires that they should be regarded... In reckoning from a day or a date, the rule generally adopted excludes the day from which the reckoning runs.

Perkins v. Jennings, 27 Wash. 145, 149, 67 P. 590 (1902) (internal quotations and citations omitted).

Because the closing occurred on May 26, 2006, the first day of the five year count began on May 27, 2006, and the last day of the five years occurred on May 26, 2011. Thus, the Port's notice was timely. CP 283-299.

The Trust also argues that the Port's claim for reimbursement for petroleum contamination is time barred, alleging that it was first raised in July 2011. Appellant Brief at p 37. However, the evidence clearly establishes that the Port provided notice of the discovery of both petroleum contamination and metals contamination by May 26, 2011. CP 283-299. The Port's notice letter sent to the Escrow agent and Marine View on May 23, 2011, and to the Trust on May 26, 2011, stated several times that the Port was emphasizing the contaminated metals claim because, standing alone, that claim exceeded the $500,000 in the Escrow

Agreement. CP 283-299. However, this letter also identified and specifically provided notice of other contamination found, including petroleum contaminated soils. The letter stated as follows:

> The Port discovered high levels of contamination of the Property in 2009 and 2010 during wildlife mitigation pre-design and construction activities on the Property. The Port's discoveries included:
>
> 1. Metals contamination soils, including arsenic, chromium, copper, lead, and zinc;
> 2. **Petroleum contaminated soils**;
>
> . . .
>
> To expedite review and processing of this claim against the $500,000 in escrow, the Port presents itemized costs for only a portion of the Port's remediation expenses: those arising out of the metals-contaminated fill material.

CP 287-289 (emphasis supplied). Thus, the Port provided timely notice of the discovery of both the metals *and the petroleum* contaminated soils.

4. The Undisputed Facts Establish that the Port Incurred Significantly More Costs than the Available Escrow Funds to Remediate the Hazardous Substances

The Port's evidence establishes that the clean-up costs expended by the Port for the remediation of the newly discovered contamination is over $2.5 million. Yet, the Port is limited to recovering the $490,000 in the Court's registry. CP 865-875.

The declarations of Mr. Dagel and Ms. Conner describe why MTCA required the remediation undertaken by the Port, and that there was no less costly method of remediation available that complied with MTCA.

CP 860-870; CP 923-929. Further, Ms. Conner testified that the Port was motivated to comply in the least expensive manner possible since it knew clean-up costs would greatly exceed the $500,000, and it was aware of no other entities liable to reimburse the Port. CP 869. The Trust provided no competent evidence to controvert these facts and meet its burden to raise a genuine issue of material fact to overcome the Port's motion for summary judgment.

In fact, the Trust did not support any of its allegations in response to the Port's Motion with admissible evidence. It merely provided argument, and conclusory statements and opinions of its counsel. CP 7-49; CP 392-395; CP 396-407; CP988-1016. Courts may not consider inadmissible evidence when ruling on motions for summary judgment, thus, courts are required to disregard legal opinions expressed in declarations because they constitute inadmissible evidence. *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Additionally, conclusory statements in a brief that are unsupported will not be considered by the court when deciding a motion for summary judgment. *Kirk v. Moe*, 114 Wn.2d 550, 557, 789 P.2d 84 (1990). The only evidence provided by the Trust during this litigation were the declarations of its counsel Mr. Campbell. Mr. Campbell's various declarations are rife with unsupported, conclusory

statements, none of which are competent evidence that may be considered by the Court. CP 943-987 and CP 1222-1224. Moreover, the numerous legal opinions expressed by Campbell in his declarations must be disregarded. None of the actual evidence supplied by the Trust was relevant to the determination of whether the terms of the Escrow Agreement required disbursement of the escrow funds to the Port.

5. The Trust's Criticisms of the Port's Evidence Are Without Merit

In lieu of requesting the data and samples collected by the Port's consultant, and hiring an expert to analyze this data to provide admissible evidence regarding the existence of hazardous substances or the timing of their placement, the Trust merely complains about the Port's evidence. The Trust unbelievably asserts that testimony the Port provided in the form of a declaration from its environmental manager should not have been considered because it was not provided in open court at trial. Appellant's Brief at p 4. This flies in the face of CR56, which specifically authorizes the use of affidavits in support of summary judgment motions. Furthermore, there are no triable issues of fact if the Trust cannot provide *any* admissible evidence to contradict the material facts established by the Port. CR 56.

The Trust also asserts that because the contamination was

removed, the trial court should not have considered the Port's evidence of its costs. Appellant's brief at p 3. This seventh assignment of error is without merit, as no evidence was destroyed,[10] and the Trust provides no authority to support its assertion.

C. The Determination of the Trust's (or its beneficiary's) MTCA Allocation Absent the Contractual Release is Irrelevant and a Red Herring

The Trust's sixth, eighth, and sixteenth assignments of error confuse the Port's contractual claims to recover escrow funds set aside to pay for remedial costs with a statutory claim for contribution under MTCA. The only relevance that the Trust's (or its beneficiary's) MTCA liability has to this matter is the fact that the Port provided a release of that liability (whatever it might be) under the PSA in exchange for access to the escrow funds pursuant to the Escrow Agreement if the Port discovered and removed hazardous substances on the Property. CP 188-189. Whether the Trust would ultimately be held liable under MTCA and the amount that it (and other parties) would be allocated in a contribution action had the Port not agreed to release those claims, is irrelevant to the determination of the parties' contractual obligations.

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[10]See footnote 8, *supra*, regarding the available data and soil samples. Regardless, the spoilation doctrine is inapplicable here because at the time the hazardous substances were removed, the Port did not anticipate litigation. *EEOC v. Fry's Elecs., Inc.*, 874 F. Supp. 2d 1042, 1044 (W.D. Wash. 2012).

The Trust also mischaracterizes the Port's arguments at the trial court level. The Port has never asserted that it should be excused from its contractual obligations based (somehow) on the Trust's pre-existing MTCA liability. Appellant's Brief at pp 2-3. The Port has always maintained that the 21-day comment provision was an immaterial term and that the failure to perform this promise did not excuse the Trust's performance. CP 65-66; CP 351-376.

Although the Trust's comprehension and application of MTCA to the facts of this case is seriously flawed[11], the Port will not refute each of the Trust's argument as they are wholly irrelevant to this litigation. Neither the Port (as the Trust claims in its sixth assignment of error), nor the Trust, has asserted *any* statutory contribution claim under MTCA. CP 2-6; CP 539-551. Furthermore, the trial court never made a finding that the Trust had MTCA liability, because it is irrelevant to the parties' claims under the Escrow Agreement.

D. The Trust's Allegation that its Equal Protection Rights Were Violated Simply Because it did not Prevail is Unfounded and Frivolous

The Trust alleges that the trial court did not treat the Trust equally

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[11] For example, the Trust's inability to collect escrow funds pursuant to contract terms is not the same as incurring costs to perform a remedial action that is substantially equivalent to a department led cleanup and for which a private right of contribution exists under MTCA. RCW 70.105D.040. Thus, the Trust's argument that its contribution rights have been impaired are spurious.

because it "favor[ed] the Port on all issues of fact and at law while giving the Trust the least favorable position." Brief of Appellant. This argument is tantamount to saying that the Trust's equal protection rights were violated because it lost.

Equal protection of the laws under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *Campos v. Department of Labor and Industries*, 75 Wn. App. 379; 880 P.2d 543 (1994). The Port and the Trust are not similarly situated. The trial court ruled in favor of the Port because the law required it to do so based upon the undisputed material facts and the terms of the parties' agreement. The Trust's twelfth assignment of error is specious and frivolous, and it should be disregarded.

E. The Trial Court Properly Awarded the Port its Reasonable Attorney Fees and Costs.

The trial court properly awarded the Port attorney fees pursuant to the specific language of the Escrow Agreement that is the basis of the Port's successful claims. That agreement states:

> In the event of litigation between the Parties relating to this Agreement, the Party that is determined by a final non-appealable order of a court of competent jurisdiction to be the prevailing Party shall be entitled to be reimbursed by the other Party for all of the reasonable legal fees and disbursements such prevailing Party has incurred in connection with such litigation, including any appeal therefrom.

CP 232. The Trust's assertion that it should have been awarded fees regardless of the outcome has no basis in fact or law. A party may only recover attorney fees if it is specifically authorized by agreement, by statute, or a recognized ground in equity. *Humphrey Indus., Ltd. v. Clay St. Assocs.*, LLC, 2013 Wash. LEXIS 141 (Wash. Feb. 14, 2013) (citing *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 540, 585 P.2d 71 (1978)). The Trust cites to no statue allowing it to recover fees for a contract action in which it did not prevail. Furthermore, the parties' agreement clearly provides for the prevailing party (the Port) to be reimbursed its reasonable attorney fees.

In its appellate brief, the Trust appears to be making an equitable argument against an award of attorney fees that was not raised below. Appellant Brief at p 5. Again, there is no authority cited for the proposition that the Trust shouldn't have to pay attorney fees when it was " . . .only defending its rights . . ." The Port's failure to provide the 21-day non-binding comment period does not excuse the Trust from compliance with the attorney fees provision any more than it excuses the Trust from performance with respect to the contract in general. The attorney fees provision is not predicated on absolute adherence to each term in the contract. It is predicated on prevailing in litigation over the agreement, which the Port has done.

1. The Trial Court Properly Found that all of the Port's Attorney Fees Were Reasonable

The Trust's fourteenth assignment of error states that the amount of the trial court's attorney fee award was unreasonable, yet there is no corresponding argument in the Trust's brief to support this assignment of error.

The Court of Appeals reviews the reasonableness of the trial court's fee award and will alter its award only if it finds an abuse of discretion. *See Bloor v. Fritz,* 143 Wash.App. 718, 747, 180 P.3d 805 (Div. 2,2008) ("Whether the fee award is reasonable is a matter of discretion for the trial court, which we will alter only if we find an abuse of discretion."); *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.,* 143 Wn.App. 345, 363, 177 P.3d 755 (Div. 1,2008) ("We review whether the amount of a fee award is reasonable for abuse of discretion"). In determining whether the trial court abused its discretion, the Court of Appeals will look to whether the decision was based on tenable grounds or reasons. *Wachovia SBA Lending v. Kraft,* 138 Wn.App. 854, 858-859, 158 P.3d 1271 (Div. 2, 2007) (citing *Taliesen Corp. v. Razore Land Co.,* 135 Wn.App. 106, 141, 144 P.3d 1185 (2006)).

At the July 23, 2012 hearing, the trial court properly granted the Port's fee request in full. CP 1228-1230. Further, the court made specific

findings that the amount of time the Port spent to enforce its contractual rights was reasonable and that the Port's attorney's hourly rates were reasonable. CP 1413-1415. These findings are supported by the record, including testimony from the Port's attorneys regarding their qualifications as well as copies of time entries for the work performed. CP 1265-1349; CP 1350-1355. On appeal, the Trust bears the burden of proof that the trial court abused its discretion. 5 C.J.S. *Appeal and Error* § 908 (2009).

The Trust included no argument whatsoever in its opening brief regarding the amount of the Port's attorney fees, it merely identified the amount of the award as an assignment of error. Brief of Appellant p 5. Further, at the trial court level, the Trust did not dispute the hourly rate of the Port's attorneys or identify any of the specific time entries as unreasonable. The Trust should be barred from disputing the amount of the attorney fee award on appeal. Even if the Trust is permitted to raise this issue on appeal, it has failed to establish that the trial court abused its discretion. It does not cite to anything in the record indicating *how* the trial court abused its discretion, and provides no argument whatsoever regarding the amount of fees.

F. The Remaining Assignments of Error and Arguments Are Nonsensical and/or Unsupported by Fact or Law

The Trust's assertions that Ms. Conner committed perjury are

specious, and unfounded. The statement that it complains of (again without citations to the record) is merely a legal opinion about the application of MTCA and not a factual averment.[12]. Moreover, the statement is not material to the interpretation of the Escrow Agreement and, thus, cannot meet the definition of perjury. RCW 9A.72.020. This statement was provided for context. CP 865-869. As discussed above, the Trust's (or its beneficiary's) liability under MTCA is irrelevant to the parties' claims against the escrow funds. However, even if relevant, it is the admissions made by the Trust in the Escrow Agreement it signed, as well as the prior ownership of the property by Camille Fjetland and B&L Trucking that evidences this liability, not the statements made by Ms. Conner. The Trust's accusations of perjury are frivolous and inflammatory, and they should be disregarded.

The Trust's tenth and fifteenth assignments of error suggest that the trial court excluded or did not consider evidence related to other areas in the Port district that allegedly contain Arsenic slag. Brief of Appellant pp 4, 6. However, the only evidence excluded by the trial court were

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[12] Appellant's brief identifies the following statement from Ms. Conner's declaration:

> [Ms. Conner] stated that the Trust would qualify as an otherwise liable party "under any other legal cost recovery mechanisms, including the private rights of action in MTCA which has no monetary limits."

Appellant's Brief at p 37.

certain statements made by counsel for the Trust in its brief that had no factual support and statements in one of Mr. Campbell's declarations that were arguments rather than factual averments. For example, Mr. Campbell provided the following statement in his declaration:

> If the Port is seriously considering contending that the slag it found on the Marine View property was a contaminant or hazardous waste then it must accept remediation on all those approximately 600 acres of other Port properties we now identify that may not be currently slated for remediation.

CP 991 ln 18-21.The trial court properly struck this statement as unfounded opinion and irrelevant to the determination of any material fact.. CP 1222-1224; CR 56(e); ER 401. The determination of what materials are categorized as hazardous substances and need to be removed is one made by statute and by the Department of Ecology. RCW 70.105D.020 (10); RCW 70.105D.030. The Port's opinion regarding whether certain materials must be removed from various properties or how similar materials were treated in other areas is irrelevant to the Port's contract claims. The trial court's decision to strike certain statements as inadmissible and irrelevant was proper.

Another example of the Trust's frivolous arguments is the assertion that because the trial court did not list each and every pleading filed throughout the litigation in its summary judgment order, the trial court

somehow ignored evidence based upon some preexisting bias. Appellant's Brief at p 35. However, not only did the Port's moving brief specifically incorporate the prior pleadings which Mr. Campbell identifies as missing, but the trial court's summary judgment order identifies "any other documents and pleadings on file in this case" in its list of items considered. CP 755; CP 1228-1230. The Court should disregard thus and the Trust's other unsupported and unintelligible arguments and assignments of error.

IV. The Port Should be Awarded Its Attorney Fees On Appeal

Pursuant to RAP 18.1, the Port requests the Court award its reasonable attorney fees on appeal. Attorney fees, including those incurred on appeal are specifically authorized by the Escrow Agreement. CP 232. The Port prevailed at the trial level and has been forced to expend even more fees to defend the Trust's baseless appeal in front of this Court. The frivolous nature of the majority of the Trust's assignments of error and arguments is an abuse of process, and the Trust should be forced to compensate the Port, as the Escrow Agreement intended, for all of the attorney fees spent litigating to enforce the terms of the parties' contract.

V. Conclusion

For the reasons set forth above, the trial court's July 23, 2012 order granting the Port of Tacoma's Motion for Summary Judgment and

awarding attorney fees, the trial court's August 24, 2012 order determining the amount of attorney fees, and each of the remaining orders identified by the Trust in its notice of appeal, should be upheld. Further, the Port is entitled, pursuant to RAP 18.1, to an award of its reasonable attorney fees on appeal.

Dated this 29th day of March, 2013.

Respectfully Submitted,

The Nadler Law Group, PLLC

By _____
Mark S. Nadler, WSBA No. 18126
Liberty Waters, WSBA No. 37034
Attorneys for Respondent
Port of Tacoma

Appendix A

EXHIBIT C

Escrow Agreement

ESCROW AGREEMENT

This Escrow Agreement ("**Agreement**") is made and entered into as of the ____ day of January, 2006, by and among between **MARINE VIEW, INC.**, a Washington corporation ("**Marine View Inc.**"); the **PORT OF TACOMA**, a Washington municipal corporation ("**Port**"); **KAY KELLER and EDWARD D. CAMPBELL**, as Trustees of the CPB&L Trust under Trust Agreement dated _____ (the "**Trust**"); and **CHICAGO TITLE INSURANCE COMPANY** ("**Escrow Agent**" or "**Title Company**") (collectively, the "**Parties**" and individually a "**Party**").

RECITALS

A. Marine View Inc. and the Port have entered into that certain Purchase and Sale Agreement dated December 9, 2005 (the "**Purchase Agreement**"), pursuant to which Marine View Inc. has agreed to sell and the Port has agreed to purchase certain real property in Pierce County, Washington more particularly described in the Purchase Agreement (the "**Property**"), which property was previously owned by Camille F. Fjetland and B&L Trucking and Construction, Inc.

B. The Trust is the successor-in-interest to Camille F. Fjetland and B&L Trucking and Construction, Inc., the prior owners of the Property, who sold the Property to Marine View Inc.

C. Pursuant to a Settlement Agreement dated December __, 2005, by and between Marine View Inc. and the Trust (the "**Settlement Agreement**"), Marine View Inc. and the Trust have agreed to settle certain outstanding claims, debts and obligations between Marine View Inc. and the Trust.

D. Following closing of the transactions contemplated under the Purchase Agreement, and in accordance with the Purchase Agreement and the Settlement Agreement, the parties have agreed to establish an escrow for the payment of certain remediation costs relating to the Property arising under the Purchase Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties hereby covenant and agree as follows:

1. **Appointment of Escrow Agent.** Marine View Inc., the Port and the Trust hereby designate and appoint Escrow Agent as the escrow agent hereunder to serve in accordance with the terms and conditions of this Agreement.

2. **Acceptance of Appointment.** The undersigned Escrow Agent hereby accepts its appointment as Escrow Agent, accepts the Purchase Agreement and the Settlement Agreement

(the "**Underlying Agreements**") and agrees to act as Escrow Agent thereunder and under this Agreement in strict accordance with the terms hereof.

3. **Escrow Deposit**. Simultaneously with Closing under the Purchase Agreement, the sum of Five Hundred Thousand Dollars ($500,000) (the "**Escrow Funds**") shall be withheld from the payoff amount otherwise payable to the Trust pursuant to the terms of the Settlement Agreement. Such amount shall be maintained by the Escrow Agent in a separate bank account (hereinafter referred to as the "**Escrow Account**"). The Escrow Funds shall be placed and invested in an interest bearing money market or similar account at _____ or other bank or investment firm agreed to in writing by the Parties, in the name of the Escrow Agent (but subject to all the terms and conditions of this Agreement). All interest earned on the Escrow Funds shall become part of the Escrow Funds; provided, however, that within two (2) business days following the end of each calendar month, Escrow Agent shall disburse to the Trust all interest accrued under the Escrow Account for the prior calendar month.

4. **Cleanup Obligations**. Pursuant to the terms of the Purchase Agreement, Marine View Inc. and the Port have allocated the responsibility for the cleanup of construction debris, the remediation of certain hazardous materials, and the remediation of certain other conditions relating to the Property (the "**Negotiated Cleanup Obligations**"). A summary of the Negotiated Cleanup Obligations is more particularly set forth in Exhibit B to the Purchase Agreement, a copy of which has been furnished to the Trust. For purposes of this Agreement, materials discovered on the Property after the Port's final acceptance of Marine View Inc.'s performance of the Negotiated Cleanup Obligations prior to the "Closing Date" under the Purchase Agreement shall be deemed to be outside the scope of the Negotiated Cleanup Obligations. If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers any construction debris or other material on the Property which was not deposited pursuant to a valid permit, or discovers any hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date, and such materials or condition are not within the scope of the Negotiated Cleanup Obligations, the Port shall give notice to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or remediate such hazardous substances. Where practical, the Port shall attempt to obtain a fixed bid for such removal, remediation or resolution. After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5- day periods to run concurrently) to comment upon the proposed remediation before work on said remediation shall commence, except in case of emergency threatening life or limb of persons on the Property or immediate destruction of the Property. Upon completion of the removal or remediation, as determined by certification of the qualified independent contractor to the Port, Marine View Inc., the Trust, and Escrow Agent, the Port shall be entitled to reimbursement out of the Escrow Funds held in the Escrow Account for the actual expenses incurred by the Port with respect to such activity, upon delivery to Escrow Agent, with copies to Marine View Inc. and the Trust, of a written demand, documenting the expenses paid by the Port. Unless the Port's request for payment is objected to by Marine View Inc. or the Trust by written objection (an "**Objection Notice**") given to the Port and Escrow

Agent (with a copy to any other Party) within ten (10) days from the date of receipt of the Port's demand for payment, Escrow Agent shall disburse the requested amount directly to the Port.

5. **Objection to Disbursement; Dispute Resolution**. In the event a Party delivers an Objection Notice pursuant to Section 4 above, no disbursement shall be made from the Escrow Fund with respect to that portion of the amount in dispute until such objection is resolved. Promptly following the delivery of an Objection Notice, the Parties shall attempt to resolve the objection by mediation. If the objection cannot be resolved by mediation within ninety (90) days following the service of the Objection Notice, then the matter may be resolved by litigation.

6. **Foran Escrow**. The Parties acknowledge the existence of a separate escrow established under a separate Escrow Agreement of even date herewith by and among Marine View North LLC, a Washington limited liability company, an affiliate of Marine View Inc., the Port, Escrow Agent, and Richard C. Foran ("**Foran**") (the "**Foran Escrow Agreement**"). If and to the extent Escrow Funds are drawn from the Escrow Account for the payment of claims as provided in this Agreement, Escrow Agent shall release an equal amount of Escrow Funds to Foran under the Foran Escrow Agreement. Likewise, if and to the extent funds are drawn from the escrow account under the Foran Escrow Agreement for the payment of claims as provided in the Foran Escrow Agreement, Escrow Agent shall release an equal amount of Escrow Funds to the Trust from the Escrow Account. By way of example only, if $100,000 were disbursed to the Port to reimburse the Port for a remediation activity on the Property, an equal amount of $100,000 shall be released to Foran under the Foran Escrow Agreement within five (5) business days following payment under this Agreement.

7. **Final Disbursement of Escrow Funds.** Upon the earlier to occur of (i) the fifth (5^{th}) anniversary of the Closing Date, or (ii) the disbursement to the Port of the aggregate amount of $500,000 from the Escrow Account and the escrow account under the Foran Escrow Agreement, the balance remaining in the Escrow Account (as to which no claim has been given by the Port as set forth herein, in the event of condition (i) above), plus all accrued interest thereon, shall be released to the Trust. It is understood and agreed that in no event shall the Port be entitled to draw more than $500,000 in the aggregate from the Escrow Funds under this Agreement and the Foran Escrow Agreement.

8. **Acknowledgment of Release of the Trust.** The Port specifically acknowledges that the Trust is an intended beneficiary of the following release (as a "**Seller Creditor**" and a "**Seller Released Party**"), which provision is set forth in Section 5(d) of the Purchase Agreement and effective as of the Closing Date:

> 5(d) **Release of Sellers and Seller Creditors.** Buyer and its subsidiaries, officers, directors, managers, members, agents, affiliates, and their successors and assigns, each agree that Sellers, their members, shareholders, managers, employees, agents, contractors and their successors and assigns, and the Seller Creditors, and their trustees, officers, shareholders, employees, agents, contractors and their successors and assigns (collectively, the "**Seller Released Parties**"), are hereby released from any and all actions, suits, liabilities, damages, losses, costs, and claims which Buyer may now have or may hereafter have against the Seller Released Parties by reason of any matter relating to or arising

from Sellers' or the Seller Creditors' ownership, operation or use of the Property; or the physical or environmental condition of the Property; provided, however, that the foregoing release shall not extend to, or provide a release from, any representations, warranties, covenants, and indemnifications made by Sellers in this Agreement or in the documents to be delivered at Closing; and provided further, that the foregoing release shall not limit or impair claims against the Special Escrow pursuant to Sections 3(c) and/or 5(c) of this Agreement. Buyer hereby agrees and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to actions, suits, liabilities, damages, losses, costs, or claims, which are presently unknown, unanticipated and unsuspected, and Buyer further agrees, represents and warrants that this Agreement has been negotiated and agreed upon in light of such acknowledgement and that, except as otherwise expressly provided in the preceding sentence, Buyer nevertheless hereby agrees to release the Seller Released Parties as provided in this Section 5(d).

This Agreement is intended to constitute the "Special Escrow" provided for under Sections 3(c) and 5(c) of the Purchase Agreement.

9. **Other Disputes.** Except as provided in Section 6 above, in the event that any disagreement or dispute shall arise between or among the Parties, and/or any other persons or entities resulting in adverse claims and demands being made on the Escrow Agent, then, at the Escrow Agent's option, (i) the Escrow Agent may refuse to comply with any claims or demands on it and continue to hold any funds or documents deposited into Escrow until (a) the Escrow Agent receives written notice signed by the Parties directing the delivery of such funds or documents, in which event the Escrow Agent shall then deliver such funds or documents in accordance with said direction, or (b) the Escrow Agent receives a certified copy of a final and non-appealable order of any court of competent jurisdiction directing the delivery of all or a portion of such funds or documents, in which event the Escrow Agent shall then deliver such funds or documents in accordance with said direction; or (ii) in the event the Escrow Agent shall receive a written notice advising that litigation over entitlement to such funds or documents has been commenced, the Escrow Agent may deposit such funds or documents with the Clerk of the Court in which said litigation is pending.

10. **Funds in Escrow.** Except as provided in Sections 3 and 4 above, the Escrow Funds shall be the property of the Trust. Accordingly, the Trust (and not the Escrow Agent) shall be obligated to pay any income taxes on the income of the funds held in Escrow. The Escrow Agent shall be obligated to issue or cause to be issued to the Trust all Forms 1099 and other forms reporting taxable income of the Escrow.

11. **Time is of the Essence.** Time is of the essence of each and every provision of this Agreement.

12. **Third Party Beneficiary Rights.** This Agreement is not intended to create, nor shall it be in any way interpreted or construed to create, any third party beneficiary rights in any person not a Party hereto.

13. **Governing Law.** This Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of Washington without regard to its choice of laws rules.

14. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute but one and the same instrument.

15. **Complete Agreement.** Excluding the Underlying Agreements, this Agreement constitutes the entire understanding and agreement of the Escrow Agent, on the one hand, and the other parties hereto, on the other hand, with respect to the Escrow, and supersedes all prior agreements or understandings, written or oral, between such other parties and the Escrow Agent with respect thereto. There are no implied duties under this Agreement. The Escrow Agent is not a party to any other agreement and the Escrow Agent shall not be subject to any other agreement even though reference thereto may be made herein.

16. **Interpretation.** The headings contained in this Agreement are for reference purposes only and, shall not affect in any way the meaning or interpretation of this Agreement. All exhibits and schedules attached to this Agreement are incorporated as part of this Agreement as if fully set forth herein. Should any clause, section or part of this Agreement be held or declared to be void or illegal for any reason, all other clauses, sections or parts of this Agreement which can be effective without such void or illegal clause section or part shall, nevertheless, remain in full force and effect.

17. **Attorneys' Fees.** In the event of litigation between the Parties relating to this Agreement, the Party that is determined by a final non-appealable order of a court of competent jurisdiction to be the prevailing Party shall be entitled to be reimbursed by the other Party for all of the reasonable legal fees and disbursements such prevailing Party has incurred in connection with such litigation, including any appeal therefrom.

18. **Notices.** All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed given when delivered personally to or when received, to be sent either by internationally recognized commercial delivery service (such as Federal Express, UPS, or Airborne with written confirmation of the date of receipt) or by facsimile (with facsimile confirmation of the date of receipt) to the Parties, their successors in interest or their assignees, at the following addresses, or at such other addresses as the Parties may designate by written notice in the manner aforesaid:

To Marine View Inc.: Marine View, Inc.
4001 Berwick Land SE
Olympia, WA 98501
Attn: Mike Parsons
Fax: _____
Phone: (360) 791-7402

And

Greg Books

2539 Perkins Lane West
Seattle, WA 98199
Fax: (206) 358-3487
Phone: (206) 358-3516

With a copy to:

Alston, Courtnage & Bassetti LLP
1000 Second Avenue, Suite 3900
Seattle, WA 98104-1045
Attn: J. Parker Mason
Fax: (206) 623-1752
Phone: (206) 623-7600

To the Port:

Port of Tacoma
One Sitcum Plaza
PO Box 1837
Tacoma, WA 98401
Attn: Real Estate Department
Fax: (253) 593-4534
Phone: (253) 383-5841

With a copy to:

Port of Tacoma
One Sitcum Plaza
PO Box 1837
Tacoma, WA 98401
Attn: Environmental Department
Fax: (253) 428-8679
Phone: (253) 383-5841

And:

Robert I. Goodstein
Goodstein Law Group PLLC
1001 Pacific Ave, Ste 400
Tacoma, WA 98402
Fax: (253) 779-4411
Phone: (253) 779-4000

To Escrow Agent:

Chicago Title Insurance Company
4717 S. 19th Street, Suite 109
Tacoma, WA 98405
Attn: Bruce Judson
Fax: (253) 475-4351
Phone: (253) 671-6618

To the Trust: CPB&L Trust
c/o Edward D. Campbell, Trustee
9534 14th Avenue Northwest
Seattle, Washington 98117-2308
Fax: 206 784 2206
Phone: 206 783 3410

19. **Limitation on Escrow Agent's Liability.**

(a) It is expressly understood that the Escrow Agent acts hereunder as an accommodation to the Parties and as a depository and disbursing facility only. The Escrow Agent shall not be liable for any error of judgment or for any act done or omitted by it in good faith or for any mistake of fact or law, and is released and exculpated from all liability hereunder except for its willful misconduct or negligence.

(b) The Escrow Agent shall not be responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of any notice, written instruction or other instrument furnished to it or deposited with it or for the form of execution thereof, or for the identity, authority or rights of any person executing, furnishing or depositing same.

(c) The duties of Escrow Agent are purely ministerial. The Escrow Agent shall not have any duties or responsibilities except those set forth herein and shall not incur any liability in acting upon a signature, notice, request, waiver, consent, receipt or other paper or document believed by it to be genuine, and the Escrow Agent may assume that any person purporting to give any notice or advise on behalf of any party in accordance with the provisions hereof has been duly authorized to do so. The Parties hereby severally indemnify and agree to hold and save the Escrow Agent harmless from and against any and all loss, damage, cost or expense of any kind or nature whatsoever (including counsel fees and expenses) which Escrow Agent may suffer or incur as the Escrow Agent hereunder unless caused by the willful misconduct or negligence of the Escrow Agent.

20. **Termination.** This Agreement shall immediately and without further action by any one or more of the Parties, terminate, and the Escrow Agent shall be discharged of all further obligations hereunder, at such time as disbursement of the Final Disbursement has occurred; provided, however, that the Escrow Agent's rights to indemnity and to receive payments of its fees and expenses as set forth in this Agreement shall survive any termination of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the date first above written.

[Signatures on following page]

MARINE VIEW INC.:

MARINE VIEW, INC.

By _____
Mike Parsons, President

Date: 4/1/06

PORT:

PORT OF TACOMA

By _____

Its _____

Date: _____

TRUST:

_____
Edward D. Campbell, ~~Trustee~~ of the CPB&L
Trust under Trust Agreement dated 11/13/95

Date: March 8, 2006

_____
Kay Keller, Trustee of the CPB&L
Trust under Trust Agreement dated 11/13/95

Date: 2/28/06

ESCROW AGENT:

CHICAGO TITLE INSURANCE COMPANY

By _____

Its Commercial Closer / Asst. V/P

Date: 5/26/06

MARINE VIEW INC.:

MARINE VIEW, INC.

By _____
Mike Parsons, President

Date: 4/1/06

PORT:

PORT OF TACOMA

By _____
Its Sr Dir Ind. Dev & Real Estate

Date: 5/26/06

TRUST:

_____
Edward D. Campbell, ~~Trustee of~~ the CPB&L
Trust under Trust Agreement dated 11/13/95

Date: March 8, 2006

_____
Kay Keller, Trustee of the CPB&L
Trust under Trust Agreement dated 11/13/95

Date: 2/28/06

ESCROW AGENT:

CHICAGO TITLE INSURANCE COMPANY

By _____

Its _____

Date: _____

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the originals of the preceding Brief of Respondent and Certificate of Service to be filed by messenger in Division II of the Court of Appeals at the following address:

Court of Appeals of Washington, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

And that I arranged for a copy of the preceding Brief of Respondent and Certificate of Service to be served on Appellant at the address below, by legal messenger:

Edward D. Campbell
1225 SW 330th Place
Federal Way, WA 98023

Daniel A. Womac
1200 6th Ave Ste 620
Seattle, WA 98101

Signed this 29th day of March, 2013 in Seattle, WA.

Elise Keim

Elise Keim