NO. 44509-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FEDWAY MARKETPLACE WEST, LLC, a Washington limited liability company, and GARLAND & MARKET INVESTORS, LLC, a Washington limited liability company, on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

This case concerns whether a termination provision in Washington State Liquor Control Board (Board) leases for two former state-run liquor stores had the effect of terminating the leases due to the passage of Initiative 1183 (I-1183). That initiative required the Board to close all state liquor stores and cease the sale of liquor by June 1, 2012.

The trial court correctly entered judgment on the pleadings for the Board because no factual issues exist and the termination provision of the leases clearly and unambiguously provides for the leases to terminate upon enactment of a law, such as I-1183, that prevents the Board from complying with or carrying out the terms of the leases. Specifically, the passage of I-1183 prevented the Board from complying with the terms of the lease because the new law required the Board to close all state liquor stores and refrain from selling liquor, which conflicted with provisions in the lease requiring and permitting the Board to occupy and use the premises solely for the sale of alcohol and lottery products.

Further, because the terms of the leases caused them to terminate due to I-1183, and the Board had a right to rely on those terms, the trial court correctly ruled that the Board did not act in bad faith in declaring the leases terminated.

Finally, because the leases were terminated by virtue of their own termination provision, the trial court correctly ruled that I-1183 did not impair any contractual rights or take any property in violation of the state or federal constitutions.

II. STATEMENT OF ISSUES

1. Did the trial court err in dismissing the claim for anticipatory termination of the leases when the leases state that they will terminate if a law prevents a party from complying with or carrying out the lease, the leases require and permit the Board to occupy and use the premises solely for selling liquor and lottery products, and a law was passed requiring the Board to close its liquor stores and refrain from selling liquor?

2. Did the trial court err in concluding that the Board did not breach any duty of good faith and fair dealing when the theories that Fedway asserts for a breach of the duty of good faith and fair dealing are free-floating and unconnected to any specific terms of the leases?

3. Did the trial court err in dismissing the claims for impairment of contract and taking of property because the leases were not impaired when they terminated due to their own termination provision and because once the leases terminated, no property right existed to be taken?

4. Did the trial court err in striking the evidence that Fedway[1] submitted when the evidence fails to meet the extrinsic evidence standard that it must be relevant to determining the meaning of the specific words and terms of the leases in question?

III. STATEMENT OF THE CASE

A. The Leases and Initiative 1183

In March of 2010, Fedway Market Place West, LLC, leased to the Board 5,489 square feet of commercial space for Washington State Liquor Store No. 015, Federal Way-South. The Fedway lease had a 10-year term ending December 31, 2019. Resp't App. 1, ¶ 3 at CP 22.

In September of 2007, Garland and Market Investors, LLC, leased to the Board 5,708 square feet of commercial space for Washington State Liquor Store No. 051, Spokane-Hillyard. The Garland Lease had a 10-year term ending February 28, 2017. Resp't App. 2, ¶ 3 at CP 33.

Two paragraphs contained in both leases are a central focus of this litigation. Paragraph 2 in both leases states:

> The premises shall be occupied by the Washington State Liquor Control Board and used solely for the purposes of selling alcoholic beverages and lottery products. The Board shall and may peaceably and quietly have, hold and enjoy the premises for these purposes.

[1] This appeal involves two appellants, Fedway Marketplace West, LLC (Fedway), and Garland and Market Investors, LLC (Garland). For ease of reference, the brief refers to both appellants as "Fedway" unless the reference in context is only to "Fedway" individually.

Resp't App. 1 at CP 21-22, Resp't App. 2 at CP 32.

Paragraph 3 in both leases also states:

> In the event of the issuance of any proclamation or order by any department of the executive branch of the government of the United States of America which shall prevent or make wholly unfeasible the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor; or in the event that the enactment of any law or the decision of any court of competent jurisdiction shall prevent either party hereto from complying with or carrying out the terms of this Lease; or in the event that the operation of a liquor store upon the above-described premises is made unlawful as the result of an election held under RCW 66.40, then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

Resp't App. 1 at CP 22, Resp't App. 2 at CP 33.

I-1183 was approved by the voters at the November 8, 2011 general election. Section 101 of the initiative states that it will "privatize and modernize wholesale distribution and retail sales of liquor in Washington state." Appellants App. 1 at 1-2. As part of achieving this goal, I-1183 required the Board to close all state liquor stores by June 1, 2012:

> The Board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by chapter 2, Laws of 2012.

Section 102(2) (codified at RCW 66.24.620(2)).[2]

B. The Proceedings Below

Fedway's Complaint raises six claims. The First Claim alleges that the State incorrectly interpreted paragraph 3 of the leases to terminate the Leases no later than June 1, 2012, due to I-1183. Complaint ¶¶ 34-41 (CP 12-14). The Second Claim asserts that the Board's termination of the leases breached an alleged duty of good faith and fair dealing. Complaint ¶¶ 42-47 (CP 14-15). The Third through Sixth Claims plead impairment of contract and taking claims brought under both the state and federal constitutions alleged to arise from the termination of the Leases. Complaint ¶¶ 48-68 (CP 16-18). The two leases were attached to the Complaint.

The Board moved for judgment on the pleadings. CP 54-92. Fedway opposed the motion and filed a large volume of evidence that it asserted proved the existence of issues of fact such that the court should convert the matter to a motion for summary judgment and deny the motion. CP 93-471. The Board moved to strike the proffered evidence as irrelevant and in violation of the parol evidence rule that "extrinsic evidence is relevant only to determine the meaning of specific words and

[2] When I-1183 passed, the State operated approximately 167 liquor stores, all of which included the same provisions contained within paragraphs 2 and 3 of the Fedway leases. All state-run liquor stores were closed by June 1, 2012. Complaint ¶¶ 15, 25, 28 (CP 7-8, 10, 12).

terms used, not to show an intention independent of the instrument or to vary, contradict or modify the written word." *Oliver v. Flow Int'l Corp.,* 137 Wn. App. 655, 660, 155 P.3d 140 (2006) (citations omitted).[3]

Following oral argument on February 1, 2013, the trial court granted the Board's motion to strike. CP 544-45. In particular, the trial court found irrelevant to Fedway's contract claims the evidence Fedway submitted concerning whether the Board "misinterpreted" the provisions of I-1183 requiring the Board to auction the right to sell liquor at the locations of the former stores, and whether I-1183 prevented the leases from being assigned or the leases were assignable. Fedway submitted this evidence only in connection with its contract claims against the State based on the leases and did not bring any claims under the Administrative Procedures Act (RCW 34.05) for purposes of enforcing the provisions of I-1183. *See* Complaint (CP 3-42).

After striking the evidence, the trial court granted the Board's motion for judgment on the pleadings. CP 542-43.

IV. ARGUMENT

A. Standard of Review

As noted above, the trial court granted judgment on the pleadings under CR 12(c) after striking Fedway's extrinsic evidence. The Court

[3] The Board's motion to strike is at CP 472-505.

reviews this evidentiary ruling de novo. *See Cornish College of the Arts v. 1000 Virginia Ltd. P'ship,* 158 Wn. App. 203, 215, 242 P.3d 1 (2010) (summary judgment motion).

If this Court, like the trial court, excludes the extrinsic evidence, then the standard of review is the standard that applies to a CR 12(c) motion for judgment on the pleadings. The standard of review for a CR 12(c) motion for judgment on the pleadings is de novo. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638, 642 (2012). To render judgment on the pleadings, the allegations in the pleadings must be construed strictly against the moving party, and only where it appears that there are no factual issues requiring trial and the issues can be determined as a matter of law can a motion for judgment on the pleadings be granted. *Hodgson v. Bicknell,* 49 Wn.2d 130, 136, 298 P.2d 844 (1956). On a CR 12(c) motion, the "plaintiffs allegations are presumed to be true and a court may consider hypothetical facts not included in the record." *Tenore v. AT&T Wireless Servs.,* 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

If this Court allows some or all of the extrinsic evidence to be considered, then as to any claim for which such evidence is submitted, the

standard is that of a CR 56 motion for summary judgment.[4] CR 12(c) converts a motion for judgment on the pleadings to a CR 56 motion for summary judgment if admissible evidence beyond the complaint (or a contract attached to it[5]) is considered. *Stevens v. Murphy,* 69 Wn.2d 939, 421 P.2d 668 (1966) (overruled on other grounds by *Merrick v. Sutterlein,* 93 Wn.2d 411, 610 P.2d 891 (1980)).

The standard of review applied to a CR 56 motion for summary judgment is also de novo. CR 56(c) provides that a motion for summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). A non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain to be tried. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). When evaluating a summary judgment motion, the Court must consider any evidence and inferences therefrom in the light most favorable to the

[4] *See Martin v. Ward*, 132 Wn. App. 1025 (2006) (claims for which no evidence admitted ruled on under CR 12; claims for which evidence admitted ruled on under CR 56).

[5] In *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 205, 289 P.3d 638, 642 (2012), the Court ruled that a contract attached to a pleading is considered part of the pleading for purposes of a CR 12(c) motion for judgment on the pleadings. The Board brought its motion under 12(c) based on the *P.E. Sys.* case and the fact that even if all facts alleged in the Complaint and any hypothetic facts consistent with those are assumed true, Fedway's allegations as a matter of law fail to state a justiciable claim.

non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment should be granted if reasonable minds could reach only one conclusion based on the facts in evidence. *White*, 131 Wn.2d at 9.

As to motions for both judgment on the pleadings and summary judgment, the same rules of contract interpretation apply:

> "Washington follows the objective manifestation test for contracts." . . . Mutual assent to definite terms is normally a question of fact for the fact finder. But a question of fact may be determined as a matter of law if reasonable minds could not differ.

P.E. Sys., 176 Wn.2d at 207 (re CR 12(c) motion) (citations omitted); *see also Spradlin Rock Prod., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 654-55, 266 P.3d 229, 235 (2011) ("[S]ummary judgment on an issue of contract interpretation is proper where 'the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.") (citations omitted).

As discussed below, under either the CR 12(c) or CR 56 standard, the trial court properly granted judgment to the Board. Under the CR 12(c) standard, assuming the truth of the allegations in the complaint and the "hypothetical" facts that Fedway submitted in the form of additional evidence, no material factual issues exist, and as a matter of law, under the unambiguous terms of the lease, reasonable minds would conclude that the leases terminated and the Board is entitled to judgment.

Similarly, under the CR 56 standard, the additional evidence Fedway submitted did not raise any genuine issues of material fact, and under the unambiguous terms of the leases, reasonable minds would conclude that the leases terminated and the WSLCB is entitled to summary judgment.

B. Fedway's Argument That the Board "Misinterpreted" I-1183 by Allowing Auction Winners to Change Locations Is Irrelevant to the Issue of Lease Termination

Fedway argues that the Board "misinterpreted" I-1183 by allowing auction winners to change locations from the original stores. Br. at 22-25, 30-31. However, this argument is simply irrelevant to the termination issue in question. The auctions were required by I-1183 (*see* RCW 66.24.620(4)(c)) and are in no way mentioned in or connected to the leases or lease termination. Whether or not I-1183 allows the Board to authorize auction winners to move their liquor store from the location of the former stores has nothing to do with whether the termination provision of the leases was triggered. The leases do not mention, allude to, or involve any auction.[6]

[6] As noted above, Fedway did not bring any claims under the APA (RCW 35.04) seeking to enforce the provisions of I-1183, but rather raises this argument solely in the context of its contract claims.

C. I-1183 Triggered the Termination Provision of the Leases Because It Prevented the Board From Complying With or Carrying out the Duties and Permissions of Paragraph 2

1. The leases provide for termination if an enactment of law prevents the Board from complying with the duties or carrying the permissions of the leases

Paragraph 3 of both leases lists three separate grounds for lease termination.[7]

Ground one reads:

> In the event of the issuance of any proclamation or order by any department of the executive branch of the government of the United States of America . . . shall prevent or make wholly unfeasible the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor . . . then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

Ground one focuses exclusively on the inability of the Board to sell or store liquor resulting from a federal executive order or proclamation. It does not cover new federal laws, such as an act of Congress or a federal Constitutional amendment. Rather, new laws in general are addressed in ground two.

Ground two reads:

> [I]n the event that the enactment of any law or the decision of any court of competent jurisdiction shall prevent either

[7] Paragraph 3 is found at Resp't App. 1 at CP 22 (Fedway lease) and Resp't App. 2 at CP 33 (Garland lease).

> party hereto from complying with or carrying out the terms of this Lease . . . then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

Ground two is much broader in scope than either ground one or, as discussed shortly below, ground three. Ground two applies to the enactment of any law, which would include federal or state laws, whereas ground one applies only to federal executive orders and proclamations. Ground three applies only to local city and county elections under RCW 66.44; it does not include any state-wide laws or federal laws. Further, ground two applies to all decisions of any court of competent jurisdiction whereas neither ground one nor two cover any court decisions. Finally, ground two applies not to just one of the parties, but to both such that if an enactment or decision prevents *either party* from complying with or carrying out the terms of the lease, the lease terminates.

Significantly, ground two triggers lease termination not only when a party is unable to "comply with" any lease term but also when a party is unable to "carry out" any lease term. The latter expression "carry out" the terms of this lease in normal usage extends to carrying out the uses of the premises that are permitted under the lease terms. As discussed below, paragraph 2 provides that the premises shall and may be occupied, used,

held, and maintained for purposes of "selling alcoholic beverages and lottery products."[8]

Ground three reads:

> [I]n the event that the operation of a liquor store upon the above-described premises is made unlawful as the result of an election held under RCW 66.40, then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

RCW 66.40 provides authority for cities and unincorporated county areas to prohibit the sale of liquor within those borders. Thus, ground three is limited to the narrow circumstances where a city or county votes to prohibit the sale of liquor.

To summarize, grounds one and three evidence intent to terminate the Leases due to certain acts that prevent the Board from selling or storing liquor. Ground two more broadly applies to all new laws or court orders that prevent either party from "complying with or carrying out" the lease terms.

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[8] The use of the word "or" in the second ground to separate the terms "complying with" or "carrying out" reinforces that those terms do not have identical meaning. *See Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950) ("in the interpretation of contracts . . . every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible.").

2. I-1183 prevents the Board from both complying with the duties and carrying out the permissions of paragraph 2

I-1183 prevents the Board from complying with the terms of the lease because it prevents the Board from complying with duties and carrying out permissions set forth in the two sentences of paragraph 2. The first sentence of paragraph 2 states: "The premises shall be occupied by the Washington State Liquor Control Board and used solely for the purposes of selling alcoholic beverages and lottery products." Such "occupy and use" provisions in leases have legal significance and are enforceable obligations. *Capps v. W. Talc Co.,* 114 Wn. 94, 194 P. 554 (1921); *Daniels v. Ward*, 35 Wn. App. 697, 702, 669 P.2d 495, 499 (1983). Thus, if the leases were affective and the Board had ceased to occupy the premises or used the premises to sell products other than alcoholic beverages and lottery products, Fedway could have brought suit to enforce the duties in the first sentence of paragraph 2.

As noted above, I-1183 required the Board to close the state stores and stop selling liquor. *See* RCW 64.24.620(2). By closing the stores and forbidding the Board from selling liquor, I-1183 necessarily prevented the Board from complying with its duties under the first sentence of paragraph 2 both to occupy the premises to sell alcoholic beverages and to

use the premises "solely for the purposes of selling alcoholic beverages and lottery products."

The second sentence of paragraph 2 reads: "The Board shall and may peaceably and quietly have, hold and enjoy the premises for these purposes." The purposes, as stated in the first sentence, are "selling alcoholic beverages and lottery products."

The use of the words "shall" and "may" in their ordinary and popular use connote that the second sentence was intended to impose a duty through "shall" and also to confer permission through "may." "Shall" is mandatory; "may" is permissive.[9] In particular, the use of "shall" in the second sentence imposes the duty on the Board to "peaceably and quietly have, hold and enjoy the premises for [selling alcoholic beverages and lottery products]." Because I-1183 forbids the Board from selling alcoholic beverages, it unquestionably prevents the Board from complying with the "shall" duty in the second sentence.

Further, the use of "may" in the second sentence confers permission on the Board to "peaceably and quietly have, hold and enjoy the premises for [selling alcoholic beverages and lottery products]." Because I-1183 forbids the Board from selling alcoholic beverages after

[9] *Paterson v. Paterson*, 70 Wn.2d 204, 422 P.2d 474 (1967) ("usual interpretation of 'may' as permissive"); *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 480, 945 P.2d 1149, 1151 (1997) ("The word "may" is permissive . . . .").

June 1, 2012, it logically follows that the Board cannot after that date also exercise its permission to "peaceably and quietly have, hold and enjoy the premises for [selling alcoholic beverages]."

In summary, both of the sentences of paragraph 2 contain clear, unambiguous terms, and reasonable minds could not differ in concluding that I-1183 prevents the Board from complying with and carrying out those terms. Accordingly, the trial court properly granted the State's motion to dismiss pursuant to CR 12(c).

D. Fedway's Arguments That I-1183 Does Not Prevent the Board From Complying With or Carrying out the Terms of the Leases Are Not Persuasive

1. The fact that I-1183 did not direct the Board to stop paying rent or forbid the Board from assigning the leases is irrelevant to the Board's basis for termination

Fedway argues that I-1183 did not have the effect of terminating the Leases because I-1183 did not prohibit the Board from paying rent or require that the Board "break" the store leases. Br. at 26-27. But the termination clause in the leases does not require that a new law direct the Board to stop paying rent or to terminate the leases. Rather, as discussed above, the termination clause in the lease is triggered when a law prevents a party from complying with or carrying out any of the terms of the lease—not just the rent payment terms. Fedway would have the Court rewrite paragraph 3 to add the provision that "no ground two termination

may occur unless the enactment in question expressly provides for termination of the leases or cessation of rent payments." The Leases must be read as written, not according to after-the-fact arguments made in litigation nor according to "unexpressed subjective intent." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005).[10]

Similarly, Fedway argues that the Board was not prevented from complying with or carrying out the terms of the leases because the leases were an asset that could be sold by assignment, and nothing in I-1183 or the leases prevented the Board from assigning and requiring the bid winners to assume the unexpired leases. Br. at 26-27, 30-31. Again, Fedway's argument ignores the terms of the leases. The termination clause did not require either party to assign the lease if a law passed that prevented the party from complying with the lease; rather, the termination clause provided that if such a law passed, the lease would terminate.

The Board does not agree that the Leases were assignable without the consent of both Fedway and the Board as the leases were specific to

[10] Fedway's attempt to add an exception to ground two of paragraph 3 is further precluded by the integration clause of the leases, which provides: "[N]o guarantees, express or implied, representations, promises or statements have been made by the Lessee unless endorsed herein in writing. Any amendment or modification of this Lease must be in writing and signed by both parties." Fedway lease ¶ 17 (Resp't App. 1 at CP 26); Garland lease ¶ 16 (Resp't App. 2 at CP 36).

the Board and state processes. For example, paragraph 4[11] provides that "[t]he rental . . . shall be paid only from the Liquor Revolving Fund. . . ." At a minimum, the Leases would have to be amended by mutual consent of Fedway and the Board to remove that language. The integration clause of the leases requires lease amendments to be in writing signed by both parties. Resp't App. 1, ¶ 17 at CP 26; Resp't App. 2, ¶ 16 at CP 36.

Even if the Board could have assigned the leases, that does not change the fact that the prohibition in I-1183 on state liquor sales prevented the Board from complying with or carrying out its paragraph 2 duties/permissions to use the premises to sell liquor. Indeed, if a paragraph 3 termination occurred, there would be no lease left to assign. To make the question of assignability relevant, one would again have to radically rewrite paragraph 3, ground two, by adding a duty on the Board to seek to assign the Lease prior to termination and then by conditioning termination on the Board's inability to find an assignee.

2. Ground two of the paragraph 3 termination clause does not contain an unstated exclusion that would prevent termination on the ground an enactment forbids the Board from selling liquor

Fedway attempts to rewrite ground two to exclude an enactment that forbids the Board from selling liquor. Specifically, Fedway argues

[11] Resp't App. 1 at CP 22; Resp't App. 2 at CP 33.

that because ground one refers to proclamations or executive orders that "prevent or make wholly infeasible the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor," ground two must be read by implication to exclude enactments that would prevent the Board from selling liquor as a basis for termination because that basis is not expressly stated in ground two. Br. at 28-30.

Fedway's reliance upon *Ball v. Stokely Foods,* 37 Wn.2d 79, 83, 221 P.2d 832 (1950) , to support such a rewriting is misplaced. That case holds that "in the interpretation of contracts . . . every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible . . . ." The Board's interpretation of paragraph 3 does not deny meaning to any words. Ground one applies exactly as it is stated as does ground two. By contrast, Fedway's interpretation would insert an unstated exclusion into ground two that would deny that provision the full effect of its meaning.

Not only would Fedway's argument result in a wholesale redrafting of ground two to add an exclusion, it is contrary to the plain meaning of the words used in paragraph 2 and to the obvious and broader purpose of ground two.

Termination under ground two arises from new laws or court decisions that prevent the parties from complying with or carrying out the

"terms" of the lease. The "terms" of the lease unquestionably include those in paragraph 2 that require and permit the Board to occupy, use, have, hold, and enjoy the premises for selling liquor. Thus, ground two of paragraph 3 directly links to the inability to sell liquor through its reference to the terms of paragraph 2 that impose/confer the duty/permission on the Board to occupy and use the premises to sell liquor. In short, it was not necessary in ground two of paragraph 3 to separately reference the inability to sell liquor as a ground for termination because ground two already did so through its reference to the "terms" of the lease, which include the duties/permissions of paragraph 2 to occupy and use the premises to sell liquor.

Fedway's rewriting of ground two to ignore the link to paragraph 2 and its language in effect rewrites ground two to add an imagined exception or covenant ("except this provision shall not apply to the terms of paragraph 2"). Such a rewriting of the Leases runs afoul of the integration clause of the leases which provides "no guarantee, express or implied, representations, promises or statements have been made by the Lessee unless endorsed herein in writing." Resp't App. 1, ¶ 17 at CP 26; Resp't App. 2, ¶ 16 at CP 36. Further, such a rewriting also runs afoul of

the objective manifestation test, which provides:

> [courts] 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, 154 Wn.2d at 503 (citations omitted).

Moreover, Fedway's implication of a covenant restricting ground two cannot meet the exacting test required for a court to find an implied covenant. At a minimum, proof of the existence of an implied covenant requires one to show "legal necessity arising from the terms of the contract." *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 134, 539 P.2d 868 (1975). Certainly, Fedway has not met the test for "legal necessity."

Further, the broad scope of ground two indicates that it was intended to cover not just termination where the Board is unable to carrying out its paragraph 2 duties and permissions to use the premises to sell liquor, but also termination in circumstances where other lease terms cannot be complied with or carried out. That is, the trigger for ground two is not limited to the inability to sell liquor through its reference to the terms of paragraph 2, but also applies to the inability to comply with or carry out any other lease terms. Thus, termination under ground two would also occur if a new law prevented the Board from complying with

its paragraph 4[12] duties to pay rent for a liquor store or to pay only from the Liquor Revolving Fund. Similarly, termination under ground two would occur in the case of a zoning change or restriction on sales near a school that prevented Fedway from complying with its paragraphs 1 and 2 (CP 21, 31) duties to provide the premises for a liquor store.

Fedway's attempt to rewrite ground two is contrary to the manifest intent of paragraph 2 and ground two. As paragraph 2 indicates, the lease was intended to provide premises for the Board to sell liquor and lottery products. Rewriting ground two to exclude the inability to sell liquor as a reason for lease termination would eliminate one of the most obvious reasons why the lease terms might be frustrated. No reason is manifest in the leases why the loss of the ability to sell liquor on the premises would not be an equal concern for termination under ground two as well as the other grounds. Certainly, no reason exists that would reasonably justify inserting an exception into ground two.

In summary, ground two provides broad protection to both parties from the effect of laws that would frustrate parties from complying with or carrying out the lease terms.[13] It would be unreasonable to read the

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[12] Resp't App. 1 at CP 22; Resp't App. 2 at CP 33.

[13] Fedway alludes to the fact that the Board previously described ground two as a type of contractual frustration of purpose clause and raised "frustration of purpose" as an alternative affirmative defense (Br. at n.4 and CP 52). Fedway argues, citing case law that applies to the common law defense of frustration of purpose, that the defense of

unqualified reference to lease "terms" in ground two to exclude the terms of paragraph 2. *See Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 671, 230 P.3d 625, 639 (2010) ("A court will give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.").

E. Fedway Fails to State a Claim for Breach of a Duty of Good Faith and Fair Dealing

Fedway argues that its complaint and the hypothetical facts set forth in their excluded evidence state a claim that the Board's termination of the Lease breached a duty of good faith and fair dealing. Br. at 32-37. Fedway provides three factual theories why the Board allegedly breached a duty of good faith and fair dealing: (1) the Board had a policy to allow auction winners to move store locations and did not require auction winners to accept assignment of the leases unless the landlord "opted out" (Br. at 35-36); (2) the Board did not honor an alleged "commitment" it made in February 2012 after I-1183 passed to pay for unamortized tenant improvements (Br. at 37); and (3) the State Department of Revenue did

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frustration of purpose does not apply to a foreseeable cause of frustration that the parties should have provided for in the contract. Here, as discussed above, the plain language of paragraph 2 linked to paragraph 3 does in fact provide for lease termination in the event that an enactment prevents the Board from selling liquor. Further, the Board's theory for dismissal is not based on the common law frustration of purpose defense, but rather on the enforcement of termination provision of paragraph 3.

not carry out the direction of I-1183 to issue administrative rules and procedures "to address claims that [I-1183] unconstitutionally impairs any contract." Br. at 37.

To state a proper good faith and fair dealing claim, the claim must refer to "a specific contract term" that is alleged not to have been executed in good faith. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945, 949 (2004) ("we have consistently held there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract. . . . The duty exists only 'in relation to performance of a specific contract term.' ") (citations omitted). The duty of good faith and fair dealing does not apply in the abstract. Rather, the duty of good faith only applies:

> "when the contract gives one party discretionary authority to determine a contract term." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wash.App. 732, 738, 935 P.2d 628 (1997). But covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract. *Id.* at 739-40, 935 P.2d 628.

Myers v. State, 152 Wn. App. 823, 828, 218 P.3d 241, 244 (2009).

Fedway's three theories why termination may result in a breach of the duty of good faith are "free-floating" in that they do not seek to enforce the good faith execution of a *term specifically set forth in the*

leases.[14] None of the theories identify any language of the leases that was not executed in good faith. Nor do the theories even involve the lease termination.

The first theory involves only the auction—allowing auction winners to relocate and not requiring auction winners to accept assignment of the leases. The auction is solely a creature of I-1183 and is not referenced in the leases. Thus, whether the Board properly carried out the auctions simply has no bearing on whether it properly carried out its obligations under the leases, nor on whether the termination clause was triggered.

The second theory deals with an alleged "commitment" to pay for unamortized improvements that was not expressed in the leases but was allegedly made in February 2012 at a Landlord Informational Forum nearly four months after I-1183 passed in November 2011. The alleged "commitment" occurred in a PowerPoint that Board staff presented and contained the following caveat:

> The contents in this document are conceptual drafts. The drafts have been requested to explore alternatives without regard to policy. Policy decisions are left to a higher authority level for application at an appropriate time. Any

[14] Paragraph 3 does not impose a duty on either party to take any discretionary action prior to termination such as engaging in mediation. In fact, the language of paragraph 3 does not require either party to take any action to terminate the lease; rather, the lease simply terminates by operation of the clause if one of the three grounds is satisfied.

> statistics, charts and numbers supplied in draft is research and may not be applied out of context.

CP 449. The alleged "commitment" was not signed by either the parties and therefore could not be part of the leases under the integration provisions contained at paragraphs 17 and 16 of the Fedway and Garland leases. *See* CP 26, 36 ("amendment . . . must be in writing and signed by both parties."). Resp't App. 1 at CP 26; Resp't App. 2 at CP 36. [15]

Fedway's third theory involves the failure of the State Department of Revenue (DOR), which is not a party to the leases, to carry out the direction of I-1183[16] that the DOR issue regulations for filing administrative claims that I-1183 unconstitutionally impaired a contract. Like the two theories before it, the third theory has nothing to do with the leases, but rather with whether the DOR complied with I-1183.[17] Because the theories do not involve performance of a specific contract term, they are free-floating and not a proper good faith claim.

For this reason, Fedway misplaces its reliance on the case of *Frank Coluccio Constr. Co. v. King Cnty.,* 136 Wn. App. 751, 150 P.3d 1147

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[15] The Complaint does not plead a separate claim asserting that the alleged "commitment" to pay constitutes a contractual commitment and then seek to enforce that "commitment." Instead, Fedway raises the alleged failure to keep the "commitment" as evidence of breach of an alleged duty of good faith that is not tied to any specific terms of the Leases.

[16] Appellant App. 1 § 303 at 60 (I-1183, approved November 8, 2011).

[17] Fedway raised the issue of the DOR's failure to issue regulations only in the context of an alleged breach of the contractual duty of good faith and fair dealing, and did not bring an APA cause of action under RCW 34.05 seeking to enforce the I-1183.

(2007). In *Coluccio*, the Court identified three pertinent obligations set forth in the contract and found that the County had not carried out those specific contract terms in good faith. 136 Wn. App. at 766. For example, the first contractual obligation required the County to maintain all-risk builders insurance, and the County not only failed to obtain that insurance but falsely stated in a letter that it had. *Id.* Here, by contrast, Fedway points to no pertinent obligation in the leases.

Fedway's theories for an alleged breach of a duty of good faith and fair dealing are in fact analogous to the theory that the Court rejected in *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356, 360 (1991). The Badgetts had obtained a number of loans for their dairy operation and ultimately decided to quit the dairy business. They proposed to a bank officer that they would pay back part of the loans from a payment they hoped to receive from the federal government. *Badgett,* 116 Wn.2d at 566. The evidence indicated that the bank officer apparently misrepresented the proposal to the bank's loan committee, which allegedly rejected it due to the misrepresentations. *Id.* at 567. The Badgetts sued, alleging the bank breached the duty of good faith by not accurately representing their proposal to its loan committee. Ultimately, the Supreme Court ruled that there was no duty on the part of the bank to consider loan restructuring proposals and thus there could be no breach of

the duty to execute that underlying duty in good faith. *Id.* at 570. The Court stated:

> By urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract—a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

Badgett, 116 Wn.2d at 570 (citations omitted).

Here, like the loan agreement in *Badgett*, the leases did not have any terms that created duties related to the three theories Fedway posits. Namely, no terms of the leases address: (theory 1) the auction, (theory 2) the payment of unamortized tenant improvements, or (theory 3) the provision of I-1183 requiring the Department of Revenue to issue regulations. Like the bank in *Badgett*, the Board is entitled to "stand[] on its rights to require performance of a contract according to its terms." *Id.*

F. The Trial Court Properly Dismissed the Impairment of Contract and Taking Claims

Fedway argues that the trial court should not have dismissed their impairment of contract and unconstitutional taking claims (claims 3-6 of the Complaint) because the Board failed to provide case law support in its

initial motion. Br. at 46-48. The Board's motion contended that once the leases terminated per paragraph 3, (1) no impairment occurred because the parties themselves (not I-1183) terminated the leases through the *agreed upon* paragraph 3, and (2) once the Leases terminated, no property right existed to be taken. CP 69.[18]

Not every argument must be supported by a case (rather than logic, common sense, and the terms of the contract), and ironically, Fedway does not provide any authority for its argument that the State's motion should not have been granted because the State provided no specific case authority. More importantly, the fact that the leases provided for their own termination due to enactments like I-1183, is a sound and logical basis for judgment dismissing both claims.

Simply put, no contractual provision is impaired because the contract provided for its own termination. Washington courts use "a three-part test to determine if there has been an impairment of a public contract: (1) does a contractual relationship exist, (2) does the legislation substantially impair the contractual relationship, and (3) if there is

[18] The Board filed reply briefs in support of its motion for judgment on the pleadings and its motion to strike which provided some case law. CP 514, 533-34. It is notable that in its opposition to the State's motion for judgment on the pleadings Fedway addressed this issue only in a short footnote (CP 117 at n.5) and did not attempt to refute the Board's contentions. Further, at oral argument before the trial court, Fedway did not argue the applicability of the cases and arguments that the Board presented, but rested on their objection that the issue was not fully briefed and so should not be decided. RP at 42:11-21.

substantial impairment, is it reasonable and necessary to serve a legitimate public purpose." *Pierce Cnty. v. State*, 159 Wn.2d 16, 28, 148 P.3d 1002, 1010 (2006).

Here, the second element of the three part test for impairment of contract test is not met because no impairment would occur where a contract terminates due to its own termination clause. A contract that terminates itself is by definition not impaired, but rather carried out according to its terms.

This case is analogous to *Nat'l Bldg. v. State Bd. of Ed.*, 85 N.M. 186, 188, 510 P.2d 510, 512 (1973). In that case the New Mexico State Board of Education entered a lease with a termination provision which gave the State Board the right to terminate the lease, inter alia, "in the event the agency occupying such premises is directed to move its offices by virtue of action of the Legislature." Five years later the Legislature directed the State Board to relocate. The Court rejected the lessor's claim of impairment of contract stating:

> Appellants do not deny entering into the lease. By signing, appellants "* * * expressly covenanted and agreed * * * that * * * in the event the agency occupying such premises is directed to move its offices by virtue of action of the Legislature of New Mexico * * * then Lessee shall have the right to terminate this lease * * *."
>
> Thus by its very terms, the lease contemplates exactly what came to pass: "* * * the agency occupying such premises *

> * * [was] directed to move its office by virtue of action of the Legislature of New Mexico * * *." Rather than violate the federal or state constitutional proscription against governmental impairment of contracts, ch. 327, Laws 1971, merely fulfilled one of the terms expressly contracted for by the parties. We, therefore, hold that ch. 327, Laws 1971, does not violate federal or state constitutional provisions impairing the obligation of contracts.

Nat'l Bldg., 85 N.M. at 188, 510 P.2d at 512 (asterisks and brackets in original).

The Washington Supreme Court later distinguished the *National Building* case on a point of contract interpretation rather than the law of impairment. *Carlstrom v. State*, 103 Wn.2d 391, 395, 391 P.2d 1 (1985). The contract in *Carlstrom* provided salary increases for Yakima Community College teachers and contained a "reservation" stating the contract "is subject to all present and future acts of the legislature." Shortly after the contract was signed, the Legislature deferred the 1982-83 salary increases, and the Yakima teachers sued alleging impairment of contract. The *Carlstrom* Court determined that the parties had not intended the reservation to make the teacher salaries specifically contingent upon future appropriations from the Legislature, particularly because the State had included a specific appropriation reservation in the salary contract it had recently negotiated with teachers of the Shoreline Community College. *Id.* at 394. By contrast, in the present case, the lease

language indicates that the parties *did* intend the termination provision to apply when a law prevented the Board from complying with and carrying out the "occupy, use, hold, and maintain" duties and permissions of paragraph 2. Unlike the circumstances in *Carlstom*, the Board did not enter other leases with more explicit termination provisions which would suggest a difference in intent between the leases. In fact, all of the Board's 167 state store leases had the same termination provision.[19]

As to Fedway's taking claims, if the leases terminate by their own terms there is no property left to be taken. That is, once the leases terminate, there is no right to the future rents that Fedway seeks as

[19] The case of *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs. (DSHS)*, 123 Wn.2d 391, 869 P.2d 28 (1994), is also inapplicable. In that case, the provider agreement between DSHS and a nursing home stated the agreement was governed "by the terms of this contract or as set forth in the laws and regulations of the State of Washington and the United States as now existing or hereafter adopted or amended." *Id.* at 404. DSHS later retroactively amended its own regulations and about a year later the Legislature retroactively amended the statute to change the criteria for the annual reimbursement. *Id.* at 400. The amendments were retroactive in that they were to apply to provider services that had already been provided. The Court rejected the argument that the language "as now existing or hereafter adopted" allowed for a retroactive amendment citing two reasons: (1) the "hereafter adopted" language did not specifically state that the modification could be retroactively imposed; (2) DSHS' interpretation of the language would allow it to unilaterally amend the contract. *Id.* at 406-07. Neither of those reasons apply here. First, unlike the DSHS and legislative amendment of the reimbursement criteria, I-1183 did not modify any terms of the leases either retroactively or prospectively, but rather simply triggered the termination provision of the leases. The intent of the parties to terminate if a new law prevented the Board from selling liquor was clear from paragraphs 2 and 3. Second, unlike DSHS, which had authority to issue regulations that could modify the provider agreements, the Board had no authority to issue regulations to modify terms of the leases or, in the case of I-1183, to directly or indirectly support or oppose I-1183. *See* RCW 42.17A.635 ("No elective official or any employee of his or her office or any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, in any effort to support or oppose an initiative to the legislature.").

damages. *See Andrus v. Allard*, 444 U.S. 51, 64, 100 S. Ct. 318, 326, 62 L.Ed.2d 210 (1979) (no standing to sue for taking without property ownership).

Additionally, the termination clause of ground two of paragraph 3 (CP 22, 33) itself states that once termination of the lease occurs, parties are released from "*any and all liability* for any damage or loss which may result from such inability to comply therewith." (Emphasis added.) The comprehensive release of "any and all liability" would include any liability for impairment or taking that results from termination of the lease duty to pay rent in paragraph 4.[20]

In conclusion, a sound and logical basis consistent with the legal elements for impairment and taking claims exists for dismissing those claims.

G. Fedway's Evidence Is Not Admissible Extrinsic Evidence

Fedway argues that the hundreds of pages of evidence it submitted (CP 118-471), which the trial court struck, is admissible extrinsic evidence. Br. at 38-46. They claim the evidence is admissible (1) under the context rule, (2) to proffer hypothetical facts and to determine the meaning of the lease terms, and (3) to prove its claim for breach of duty of good faith and fair dealing. *Id.*

[20] Resp't App. 1 at CP 22; Resp't App. 2 at CP 33.

Fedway specifically identifies only 4 pages (CP 361, 383, 148-49) out of the 350 plus pages of submitted evidence they claim to be admissible. Br. at 40-46. On that ground alone, Fedway's request for admission should be rejected or at a minimum limited to only the four pages they cite. In any event, the evidence Fedway presented is inadmissible.

1. None of the evidence is admissible under the context rule

The "context rule" that applies to the use of extrinsic evidence to interpret contracts allows the admission of evidence to show "the circumstances leading to the execution of the contract, the subsequent conduct of the parties, and reasonableness of the parties' respective interpretations." *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005). However, the context rule is subject to an important limitation:

> Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of the *specific words and terms used*" and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word." *Id.* at 695-96, 974 P.2d 836 (emphasis added).

Hearst Commc'ns, Inc., 154 Wn.2d at 503 (citations omitted). [21]

[21] Since the 2005 *Hearst* ruling, which limited the scope of the prior *Berg* decision, numerous courts have reiterated the *Hearst* standard. *See Save Columbia Credit Union Comm. v. Columbia Cnty. Credit Union*, 134 Wn. App. 175, 182, 139 P.3d 386,

Thus, Fedway must show that all of the "context" evidence they submitted is relevant to prove the meaning of the *specific words* of the lease and not to vary, contradict, or modify the written word. In this case, the only lease provisions in question are paragraphs 2 and 3.

Fedway initially describes evidence relating to: (1) "the State's foreknowledge of privatization," (2) the auction, including providing "truthful" information about the auction, changes in store location by an auction winner, and various opinions of Board employees about the meaning of auction provisions of the I-1183, and (3) the assignment and assignability of leases. Br. at 41-42. None of this evidence relates to specific terms of paragraphs 2 and 3, and Fedway does not itself offer any argument to show a plausible logical connection.

Fedway later describes evidence that it claims to show:

> [T]he Board considered assigning leases to bid winners unless landlords opted out due to contractual obligations to other parties; computed what it would cost to buy out unexpired leases and pay landlords for unamortized tenant improvements; and acknowledged internally that I-1183 imposed an Existing Location Requirement which, if followed, would have permitted the leases to be honored . . . .

---

390 (2006) ("[W]e use extrinsic evidence only 'to determine the meaning of specific words and terms used' and not 'to show an intention independent of the instrument' or to 'vary, contradict or modify the written word.' "); *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 672, 230 P.3d 625, 639 (2010) ("A court may go outside the plain language of the contract only 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.' ").

Br. at 44.

However, once again, Fedway offers no intelligible explanation how such evidence would show the meaning of the specific terms of paragraphs 2 and 3, and the trial court properly excluded it.[22]

2. None of the evidence is admissible as hypothetical facts

Fedway argues that "the trial court was required to take the allegations of Plaintiff's Complaint as true and as additional 'hypothetical' facts the admissions of the Board presented by evidence." Br. at 43. However, the right of Fedway to submit hypothetical facts to defend a CR 12(c) motion does not equate to a right to have those facts considered admissible. If that were true, every CR 12(c) motion would be converted to a CR 56 motion simply by the non-movant filing of extrinsic evidence that it asserted provides hypothetical facts. The court must consider the facts proffered as hypothetical facts (which the trial court did), but can admit them as evidence only if they pass the extrinsic evidence standard for relevance.

[22] Since this matter comes on a motion for judgment on the pleadings or summary judgment, we do not in this context dispute Fedway's characterization of the evidence or hypothetical facts, although we do not agree with it.

3. None of the evidence is admissible as proof of Fedway's claim of breach of good faith and fair dealing

Finally, Fedway asserts that some evidence is admissible to show the bad faith of the Board in allowing auction winners to relocate and in failing to sell the leases as assets by assigning them. Br. at 45. However, as discussed above, these claims do not relate to enforcement of a duty contained in the leases, and the evidence to support them is therefore irrelevant and inadmissible. If any duties are involved, they are duties under I-1183 and not the lease, and thus, they do not involve breach of the lease.

V. CONCLUSION

The allegations of the Complaint and the "facts" Fedway submitted (either as hypothetical facts or evidence) are simply irrelevant to determine the meaning of the unambiguous lease terms, and at any rate, do not raise any genuine issues of material fact. Reasonable minds could not differ in concluding that I-1183 prevented the Board from complying with or carrying out the terms of paragraph 2 and therefore triggered the paragraph 3 termination clause. Such termination is dispositive of the First Claim (breach of Contract) and the Third through Sixth Claims (impairment and taking under state and federal constitutions). Similarly, the Second Claim (good faith and fair dealing) should be dismissed

because it fails to state a cause of action as Fedway's theories do not involve the enforcement of any specific lease term. Accordingly, the Court should affirm the trial court's ruling dismissing this case and striking Fedway's additional evidence.

RESPECTFULLY SUBMITTED this 30th day of August, 2013.

ROBERT W. FERGUSON
Attorney General

/s/ Brian Faller
BRIAN FALLER
WSBA No. 18508
Assistant Attorney General

Attorneys for Respondent
State of Washington

CERTIFICATE OF SERVICE

I certify that on the 30th day of August, 2013, I caused a copy of the *Respondent's Brief* to be served on the date below as follows:

☒ Electronic Mail Service by mutual agreement with counsel on August 30, 2013 to:

Anthony L. Rafel
arafel@rafellawgroup.com

Trish Bashaw
tbashaw@rafellawgroup.com

Tyler B. Ellrodt
tellrodt@rafellawgroup.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 30th day of August, 2013, in Olympia, Washington.

/s/ Keely Tafoya
KEELY TAFOYA
Legal Assistant

LEASE

Washington State Liquor Store No. 015
Federal Way-South

THIS LEASE is made and entered into between Fedway Marketplace West, LLC. a Washington limited liability company, its heirs, executors, administrators, successors and assigns, hereinafter called the Lessor(s) and the WASHINGTON STATE LIQUOR CONTROL BOARD, hereinafter called the Lessee.

The parties desire to enter into a Lease of the premises described below. In consideration of the terms, conditions, covenants and performances contained herein, IT IS MUTUALLY COVENANTED AND AGREED as follows:

1. The Lessor(s) hereby leases to the Lessee, a portion of the following premises in the Federal Way Marketplace Shopping Center located at 34512 – 16th Avenue S, Suite A, Federal Way, Washington, and described as:

   Tax Parcel # 2500900050
   LOT N-5 OF CITY OF FEDERAL WAY BINDING SITE PLAN NO. 06-100273-00-SU, RECORDED UNDER RECORDING NO. 20061109001720, RECORDS OF KING COUNTY, WASHINGTON, EXCEPTING THOSE PORTIONS HERETOFORE OR HEREAFTER DEDICATED TO GOVERNMENTAL BODIES OR AGENCIES. (said space containing approximately 5,489 square feet of floor area)

   Situate in the City of Federal Way, County of King, State of Washington.

USE

2. The premises shall be occupied by the Washington State Liquor Control Board and used solely for the purposes of selling alcoholic beverages and lottery products. The

Board shall and may peaceably and quietly have, hold and enjoy the premises for these purposes.

TERM

3. TO HAVE AND TO HOLD the premises with their appurtenances for the term beginning January 1, 2010, and ending December 31, 2019

In the event of the issuance of any proclamation or order by any department of the executive branch of the government of the United States of America which shall prevent or make wholly unfeasible the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor; or in the event that the enactment of any law or the decision of any court of competent jurisdiction shall prevent either party hereto from complying with or carrying out the terms of this Lease; or in the event that the operation of a liquor store upon the above-described premises is made unlawful as the result of an election held under RCW 66.40, then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

RENTAL RATE

4. That Lessee pay the Lessor(s) as rent for said leased premises, the sum of Thirteen Thousand Eight Hundred Thirty-Two and 83/100 Dollars ($13,832.83) per month from December 1, 2009 thru November 30, 2012, Fifteen Thousand Three Hundred Thirty and No/100 Dollars ($15,330.00) from December 1, 2012 thru November 30, 2015, and Sixteen Thousand Seven Hundred Twelve and No/100 Dollars ($16,712.00) from December 1, 2015 thru November 30, 2019. The rental aforesaid shall be paid only from the Liquor Revolving Fund and shall not be a direct obligation of the State of Washington.

EXPENSES

5. During the term of this Lease, Lessor(s) shall pay all real estate taxes, all property assessments, insurance, garbage, and maintenance and repair as described in Appendix A attached hereto and incorporated herein by this reference.

5A. Lessee shall pay for the following utilities that are directly billed by the utility and/or separately metered, where applicable, to Lessee's space: electricity, natural gas, water, sewer, storm water, garbage, cardboard recycling and telephone. If any of these items are not separately metered, they shall be paid by Lessor.

5B. Lessor(s) shall pay all real estate taxes when due on premises herein leased. The Lessee will reimburse the Lessor(s) for its pro rata share of any real estate tax increase

Exhibit A
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Resp't App. 1

CP 22

over the base year. The base year shall be defined as that year in which the reassessment for the building shall reveal all of the costs of the building construction, build-out, and tenant improvements. Lessor(s) shall submit a voucher with proof of payment each time such taxes are paid. Request for reimbursement must be submitted within six (6) months following tax payment due date or no reimbursement will be allowed. The Lessee will reimburse the Lessor if:

(1) Lessor(s) provides Lessee with copies of all assessed valuation notices and/or value change notices within 30 days of receipt by Lessor(s); and

(2) If Lessee elects to contest the assessed valuation, Lessor(s) agrees to either initiate such action if required by law to do so or to join Lessee in such action.

Lessee occupies 5,528 square feet, or 56.821% percent of the total building, and shall reimburse Lessor(s) 56.821% percent of any increase in real estate taxes over the base year.

PARKING

6. Lessor(s) shall provide (5) spaces marked "15 Minute Parking Only" in front of Tenant's premises as well as additional common area parking spaces for the use of Lessee and its customers.

TENANT IMPROVEMENTS

7. Lessor(s) shall construct the premises to conform to the Washington State Liquor Control Board's "General Specifications for Self-Service Stores" as well as a floor plan, to be provided at a later date by Store Development. Entire interior of Lessee's space will be repainted by Lessor every five (5) years.

RENEWAL/TERMINATION

8. The Lease may not be terminated during the initial ten (10) years of the lease term, except pursuant to Paragraph 3 and Paragraph 13, if applicable, or if Lessor(s) is in default under this agreement and fails to cure such default within 30 days after receipt of written notice of the default.

8A. The Lease may, at the option of the Lessee, be renewed for one (1) consecutive ten (10) year term, with rent to be negotiated at the time the option is exercised. Deferred maintenance, repairs and additional improvements may be subject to negotiation in the event of lease renewal.

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CP 23

FIXTURES AND PERSONAL PROPERTY

9. That all personal property of whatsoever kind or description, including furniture, fixtures, appliances and appurtenances, as well as stocks of merchandise which the Lessee may have on said premises, shall be and remain at all times the property of the Lessee and upon termination of this Lease may be removed by the Lessee, its agents or servants.

SIGNAGE

10. Lessor shall provide two (2) single face halo and routed illuminated signs to Lessee – one over its storefront and one on rear of building facing WalMart. In addition, Lessor shall provide signage for Lessee on the northern-most, lighted, double-sided shopping center pylon sign. Lessor shall, at its sole cost and expense, be responsible for all fabrication, installation, maintenance, and repair of these signs. Electrical service for the two signs on the building shall be on Lessee's electric meter.

LESSEE SATELLITE SYSTEM

11. Lessee shall, at its sole cost and expense, be allowed to place on the roof of the premises a non-penetrating, mounted satellite receiver (approximately 4'0" in diameter) and all accompanying equipment to make said receiver functional (the "Satellite Equipment"). In addition, Lessee shall have the right to install signal-enhancing equipment on the roof of the building at a location above the premises; provided, however, that neither the Satellite Equipment nor the signal enhancing equipment shall be visible from the parking lot, common areas or any other tenants' premises in the shopping center. Following not less than 48 hours' prior written notice to Lessor, Lessee shall have reasonable access to the roof or other areas as deemed necessary in order to maintain, install, repair, remove or modify the satellite dish and signal enhancing equipment and all accompanying equipment. Lessee must remove the satellite dish and repair any damage to the building or the shopping center due to the installation or removal of the satellite receiver or the accompanying equipment within ten 10) days after the expiration or earlier termination of this Lease.

IMINATION

ssor(s) assures and certifies that s/he will comply with all applicable provisions of the ericans With Disabilities Act of 1990 (42 U.S.C. 12101-12213) and the Washington tate law against discrimination, Chapter 49.60 RCW, as well as the regulations opted thereunder.

ER

the event the leased premises are destroyed or injured by fire, earthquake or other ualty as to render the premises unfit for occupancy, and the Lessor(s) neglects /or refuses to restore said premises to their former condition, then the Lessee, may

Exhibit A
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Resp't App. 1

CP 24

terminate this Lease and shall be reimbursed for any unearned rent that has been paid. In the event said premises are partially destroyed by any of the aforesaid means, the rent herein agreed to be paid shall be abated from the time of occurrence of such destruction or injury until the premises are again restored to their former condition, and any rent paid by the Lessee during the period of abatement shall be credited upon the next installment(s) of rent to be paid. It is understood that the terms "abated" and "abatement" mean a pro rata reduction of area unsuitable for occupancy due to casualty loss in relation to the total rented area.

HAZARDOUS SUBSTANCES

14. Lessor(s) warrants to his/her knowledge that no hazardous substance, toxic waste, or other toxic substance has been produced, disposed of, or is or has been kept on the premises hereby leased which if found on the property would subject the owner or user to any damages, penalty, or liability under an applicable local, state or federal law or regulation. Lessor(s) shall indemnify and hold harmless the Lessee with respect to any and all damages, costs, attorney fees, and penalties arising from the presence of any hazardous or toxic substances on the premises, except for such substances as may be placed on the premises by the Lessee.

PREVAILING WAGE

15. Lessor(s) agrees to pay the prevailing rate of wage to all workers, laborers, or mechanics employed in the performance of any part of this contract when required by state law to do so, and to comply with the provisions of Chapter 39.12 RCW, as amended, and the rules and regulations of the Department of Labor and Industries. The rules and regulations of the Department of Labor and Industries and the schedule of prevailing wage rates for the locality or localities where this contract will be performed, as determined by the Industrial Statistician of the Department of Labor and Industries, are by reference made a part of this Lease as though fully set forth herein.

DATE COMPLIANCE

16. All building systems controls which are time or date sensitive shall operate correctly with dates in the 21st century, so that the functions, calculations, and other computing processes of the systems controls perform in a consistent manner regardless of the date in time on which the systems controls are actually performed and regardless of the Date Data input to the systems controls, whether before, during or after the year 2000, and whether or not the Date Data is affected by leap years.

"Date Data" means any data, formula, algorithm, process, input or output which includes, calculates, or represents a date, a reference to a date, or a representation of a date; including, but not limited to the following:

a) No value for current date will cause any interruption in operation. Current date means today's date as known to the equipment or product.
b) Date-based functionality will behave consistently for dates prior to, during, and after year 2000.
c) In all interfaces and data storage, the century in any date will be specified either explicitly or by unambiguous algorithms or inference rule.

NO GUARANTEES

17. It is understood that no guarantees, express or implied, representations, promises or statements have been made by the Lessee unless endorsed herein in writing. Any amendment or modification of this Lease must be in writing and signed by both parties. And it is further understood that this Lease shall not be valid and binding upon the State of Washington, unless same has been approved by the Washington State Liquor Control Board and approved as to form by the Office of the Attorney General.

LIABILITY/INDEMNIFICATION

18. A state agency, which Lessee is, does not have authority to enter into a contract/lease that agrees to hold another party harmless and to indemnify the other party for its loss. No party shall be liable for damages or claims which arise from or relate to the performance or non-performance of this agreement by any other party. Each party shall be responsible only for the negligent acts and omissions of its own officers, employees, and agents, and no party shall be considered the agent of the other.

CONDEMNATION

19. If all the premises or such portions of the Building as may be required for the reasonable use of the premises, are taken by eminent domain, this Lease shall automatically terminate as of the date Lessee is required to vacate the premises and all rentals shall be paid to that date. In case of a taking of a part of the premises, or a portion of the Building not required for the reasonable use of the premises, at Lessee's determination, then the Lease shall continue in full force and effect and the rental shall be equitably reduced based on the proportion by which the floor area of the premises is reduced, such rent reduction to be effective as of the date possession of such portion is delivered to the condemning authority. Lessor reserves all rights to damages and awards in connection therewith, except Lessee shall have the right to claim from the condemning authority the value of its leasehold interest and any relocation benefits.

HOLDING OVER

20. If Lessee remains in possession of the premises after the expiration or termination of the Lease term, or any extension thereof, such possession by Lessee shall be deemed to be a month-to-month tenancy, terminable as provided by law. During such month-to-

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month tenancy, Lessee shall pay all rent provided in this Lease or such other rent as the parties mutually agree in writing and all provisions of this Lease shall apply to the month-to-month tenancy, except those pertaining to term and option to extend.

SUBORDINATION

21. So long as Lessor has fully performed under the terms of this Lease, Lessee agrees to execute, within thirty (30) days of written request by Lessor, the state's standard Tenant Estoppel and Subordination Agreements which have been approved as to form by the Office of the Attorney General.

CAPTIONS

22. The captions and paragraph headings hereof are inserted for convenience purposes only and shall not be deemed to limit or expand the meaning of any paragraph.

GOVERNING LAW/VENUE

23. This Lease shall be construed and interpreted in accordance with the laws of the state of Washington and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

NOTICES

24. Wherever in this Lease written notices are to be given or made, they will be sent by certified mail to the address listed below unless a different address shall be designated in writing and delivered to the other party.

LESSOR: Fedway Marketplace West, LLC
c/o Michael John Klein, CPA
5473 Corsa Avenue, Suite 216
Westlake Village, CA 91362

Copy to: Fedway Marketplace West, LLC
c/o Jeffrey Oliphant, President
P.O. Box 1294
Auburn, WA 98071-1294

Copy to: Anthony Rafei, Esq.
Rafei Law Group
999 – Third Avenue, Suite 1600
Seattle, WA 98104-4030

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LESSEE: Washington State Liquor Control Board
Attn: Store Leasing
P O Box 43082
3000 Pacific Avenue SE
Olympia, WA 98504-3082

IN WITNESS WHEREOF, The parties have subscribed their names.

FEDWAY MARKETPLACE WEST, LLC
a Washington limited liability company

By: Oliphant Real Estate Services, Inc.
a Washington corporation
Its Manager

By: _____
Jeffrey Oliphant, its President

Date: 3/16/2010

WASHINGTON STATE LIQUOR CONTROL BOARD

By: _____
Pat Kohler, Administrative Director

Date: 3/18/10

Approved As To Form

_____
Assistant Attorney General

Date: 3/16/10

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AREAS OF RESPONSIBILITY

A. Lessor responsible to:

1. Maintain and repair roof(s), gutter(s), downspout(s), walls, foundation, floor(s), marquee(s), canopy(s) and doors (both interior and exterior).
2. Patch, repair, repaint any stained/damaged ceilings and/or walls and/or replace stained/damaged ceiling tiles, floor tiles/mouldings and/or fixtures/equipment, which has been damaged/stained as a consequence of water leaks from any source, unless caused by Lessee's employees.
3. Repair/replace any damaged window or door glass, unless damaged by the Lessee's employees.
4. Maintain and repair all structural portions of the building, stairways, sidewalks and shall immediately remedy any infestation of pests, rodents, vermin or the like.
5. Maintain continuous satisfaction of all governmental requirements generally applicable to similar retail buildings in the area (example: fire, building, energy codes, indoor air quality and requirements to provide architecturally barrier-free premises for people with disabilities, pest control, etc.)
6. Maintain the parking area, to include:
   a. Trash/clutter removal.
   b. Snow removal.
   c. Planter or landscaped areas.
   d. Patching and resurfacing any holes or cracks.
   e. Repair and/or replace damaged bumpers, curbs, medians and/or posts.
   f. Repainting (striping) of parking spaces every approximate 24 to 36 months.
7. Provide for the scheduled maintenance/service, and repair:
   a. Heating, ventilating and/or air-conditioning system(s) (including replacement of filters as recommended in equipment service manual).
   b. Automatic door system.
8. Pay for the cost to repair/replace and/or service/maintain:
   a. Water heater(s).
   b. Exterior building and/or parking lot lighting systems.
   c. Floor coverings (does not include janitorial).
   d. Plumbing and electrical (Over $25.00*).
   e. Vertical blinds in lobby area.

Lessor	Lessee
9	

B. Lessee will:

1. Pay for the replacement of interior lighting ballasts and replacement of interior light bulbs/tubes.

* This does not represent a deductible amount. If the cost to repair/replace/service and/or maintain exceeds this amount, it shall be paid in full by the Lessor.

ACKNOWLEDGMENT

State of Washington

ss.

County of King

On this 16th day of February, 2010, personally appeared before me Jeffrey Oliphant to me known to be the person who executed the within and foregoing instrument, and on oath stated that he/she was authorized to execute the instrument and acknowledged it, as President of FEDWAY MARKETPLACE WEST, L.L.C., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

KRISTIN A. NELSON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 9-09-12

Notary Public in and for the State of Washington
Residing at Federal Way
Commission Expires 9-9-12

STATE OF WASHINGTON,

ss.

COUNTY OF THURSTON

On this 16th day of March, 2010, personally appeared before me Pat Kohles, to me known to be the Administrative Director or ~~~~ of the WASHINGTON STATE LIQUOR CONTROL BOARD, State of Washington, and the individual who executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of the Lessee herein, for the uses and purposes therein mentioned, and on oath stated that she/he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

LINDA L. LEWIS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 9-10-11

Notary Public in and for the State of Washington
Residing Thurston Co.
Commission Expires 9-10-11

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7.

8.

B.

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WASHINGTON STATE ATTORNEY GENERAL

August 30, 2013 - 4:42 PM

Transmittal Letter

Document Uploaded: 445093-Respondent's Brief.pdf

Case Name: Fedway Marketplace West LLC v. State of Washington

Court of Appeals Case Number: 44509-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Keely A Tafoya - Email: **keelyt@atg.wa.gov**

A copy of this document has been emailed to the following addresses:

brianf@atg.wa.gov
govolyef@atg.wa.gov
arafel@rafellawgroup.com
tbashaw@rafellawgroup.com
tollrodt@rafellawgroup.com
anne@atg.wa.gov
peterg@atg.wa.gov