No. 97069-6
(Court of Appeals No. 77770-0-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC, a Washington limited liability company,

Petitioner,

v.

WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., a Delaware corporation; and WHOLE FOODS MARKET, INC., a Texas corporation,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDING PARTY 1

II. INTRODUCTION AND RELIEF REQUESTED 1

III. STATEMENT OF THE CASE 2

A. WFM and BS Negotiate a Lease to Place a Grocery Store in a Mall and Allocate Risk of Failure Between the Parties 2

B. The Store Suffers Severe Losses, Causing WFM to Close It 4

C. BS Backs Away from Mitigation and Sues WFM 5

D. The Court of Appeals Interprets the Lease Language to Deny BS's Request for an Injunction 6

IV. ARGUMENT 6

A. Review Under RAP 13.4(b)(4) Is Not Justified 6

1. The Opinion Resolved the Parties' Dispute on the Lease Terms Rather than Public Policy Grounds 6

2. The Opinion Is Consistent with Washington Law Regarding the Use of Injunctions 9

B. Review Under RAP 13.4(b)(1), (2) Is Not Warranted Because the Opinion Does Not Conflict with Existing Washington Law 12

1. The Court of Appeals Applied the Proper Standard of Review and Was Not Required to Comment on Extrinsic Evidence 12

2. The Court of Appeals Correctly Interpreted the Clause Governing BS's Right to Continue the Lease 14

3. The Court of Appeals Properly Considered the Consequential Damages Waiver Provision in the Lease 17

4. The Court of Appeals Correctly Considered the Duty to Mitigate Provision in the Lease 19

V. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

8600 Associates, Ltd. v. Wearguard Corp.,
737 F. Supp. 44 (E.D. Mich. 1990)..... 10

Aspon v. Loomis,
62 Wn. App. 818, 816 P.2d 751 (1991)..... 15

Cahalan Inv. Co. v. Yakima Cent. Heating Co.,
113 Wash. 70, 193 P. 210 (1920)..... 10

Crafts v. Pitts,
161 Wn.2d 16, 162 P.3d 382 (2007)..... 9

Fedway Marketplace W., LLC v. State,
183 Wn. App. 860, 336 P.3d 615 (2014)..... 13

Foster v. Nehls,
15 Wn. App. 749, 551 P.2d 768 (1976)..... 10

Hamilton W. Dev., Ltd. v. Hills Stores Co.,
959 F. Supp. 434 (N.D. Ohio 1997)..... 11

New Park Forest Assocs. II v. Rogers Enters., Inc.,
195 Ill.App.3d 757, 552 N.E.2d 1215 (1990)..... 10

Simon Property Group, L.P. v. Starbucks Corp.,
No. 49D01-1708-PL-032170 (Nov. 27, 2017)..... 11

State v. Watson,
155 Wn.2d 574, 122 P.3d 903 (2005)..... 9

Taplett v. Khela,
60 Wn. App. 751, 807 P.2d 885 (1991)..... 13

Tyler Pipe Indus., Inc. v Dep't of Revenue,
96 Wn.2d 785, 638 P.2d 1213 (1982)..... 7

Washington Tr. Bank v. Circle K Corp.,
15 Wn. App. 89, 546 P.2d 1249 (1976) 9

Rules

RAP 13.4(b) ..... passim

I. IDENTITY OF RESPONDING PARTY

Respondents Whole Foods Market Pacific Northwest, Inc., and Whole Foods Market, Inc. (collectively "WFM")—defendants at the trial court level, and petitioners before the Court of Appeals—are the parties that file this Respondents' Answer to Petition for Review.

II. INTRODUCTION AND RELIEF REQUESTED

WFM respectfully requests that the Court deny the Petition for Review ("Petition") filed by Bellevue Square, LLC ("BS"), seeking review under RAP 13.4(b)(1), (2), and (4) of a decision of the Court of Appeals in *Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc.*, Case No. 77770-0-I, -- Wn. App. --, 432 P.3d 426 (Wash. Ct. App. 2018) (the "Opinion"). *See* Appendix to Petition for Review ("App.") at 1-15.

BS mischaracterizes the Opinion, claiming it creates a "policy shift" that conflicts with existing authority. Pet. 9-11. This is far from the truth. In reality, the Court of Appeals engaged in the well-worn business of interpreting a lease entered by two sophisticated commercial actors, BS and WFM (the "Lease"). BS asked the Court of Appeals to vindicate its request for a mandatory injunction compelling WFM to reopen a shuttered grocery store. The Court of Appeals declined to do so, concluding (1) the Lease did not contain an express agreement allowing injunctive relief of continued operations, and (2) in the absence of such an agreement, the

Court would not entertain an injunction. App. 1-2. In other words, the Opinion turns on the interpretation of the specific Lease language here and is of little precedential effect beyond the confines of these parties' dispute.

The Court should deny the Petition under RAP 13.4(b) because the Opinion does not involve an issue of substantial public interest nor is it in conflict with any decision of the Court of Appeals or this Court.

III. STATEMENT OF THE CASE

A. WFM and BS Negotiate a Lease to Place a Grocery Store in a Mall and Allocate Risk of Failure Between the Parties

In 2014, BS—a prominent, successful retail shopping mall in Bellevue, Washington—sought a grocery store to fill vacant space. CP 559 ¶ 6; CP 304. After BS selected WFM (*id.*), WFM opened a store at the mall (the "Store"). The Store occupied only a small fraction of the mall (App. 2) and WFM was not an anchor tenant. *See* CP 367-72, 379-81.[1]

Both parties understood that BS had never offered a grocery store within the mall and the Store carried significant risk of failure. CP 559 ¶ 7. Accordingly, the parties negotiated to allocate risk if the Store was not successful. For example, if WFM could not hold the Store open at specified hours during the first 10 years, WFM would be responsible for liquidated damages. CP 448-49 ¶ 7.2(b), (c). The parties agreed to other

[1] As explained further below, WFM ultimately vacated the premises during the Lease term, but it continues to pay rent and meet its other Lease obligations.

remedies too. *See id*. ¶ 7.2(d). Absent among these negotiated remedies was an agreement to allow BS to pursue a mandatory injunction. *See id.* This is unlike other Lease provisions wherein the parties expressly agreed to injunctive relief. *Compare id. with* CP 445 ¶ 7.1(b), 447 ¶ 7.1(d)(iii).

In general, the parties agreed that BS would have two options if WFM breached the Lease: (1) terminate the Lease, take immediate surrender of the premises, and accelerate rent payments due and owing (CP 450-51 ¶ 10.1(b)(i)), or (2) continue the Lease and maintain WFM's right of possession (CP 451 ¶ 10.1(b)(ii)). Under either scenario, however, the Lease expressly recognized that WFM may vacate and discontinue the Store. Even if BS elected to "continue" the Lease (as it ultimately did here), the Lease would continue "whether or not Tenant has vacated or abandoned the Demised Premises." *Id.* The Lease provision explained:

> In such event Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right to recover the Rent, damages from Tenant's default or breach, and any other payments as they may become due hereunder, and to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches ….

Id. Here, BS focuses on the meaning of the phrase "specifically enforce Tenant's obligations hereunder." *See* Pet. 15. Yet, as the Court of Appeals concluded and will be explained further below, this phrase does not reach specific performance of the "operating covenant" when it is read in context of the full Lease. Most telling in this regard is the fact that, just

sentences earlier, the Lease recognizes that WFM may have "vacated or abandoned the Demised Premises." CP 451 ¶ 10.1(b)(ii).

Furthermore, regardless of election, the Lease imposed on BS a duty to mitigate its damages and find another tenant in an event of default. CP 451 ¶ 10.1(c)(i). As WFM argued below, such provision would be surplusage under the "continue the Lease" election if BS had the right to compel continued operations. The Court of Appeals agreed. App. 13.

Finally, the Lease contains an express agreement that WFM would be liable for direct and liquidated damages, but not for downstream "consequential" damages resulting from its cessation of business:

> [I]n no event shall [WFM] be liable to [BS] for any indirect or consequential damages including but not limited to, lost rent, revenue, or other payments from other tenants, loss in value of the Development, and/or lost profits.

CP 452 ¶ 10.1(c)(iv); *see* CP 451 ¶ 10.1(c)(ii). This clause reflects the deal the parties struck to manage the risk of placing the Store in a retail mall: If the Store failed, WFM would be liable for direct damages and BS would be liable for consequential damages. The Court of Appeals correctly concluded this provision too weighs against an injunction here. App. 14.

B. The Store Suffers Severe Losses, Causing WFM to Close It

As it happens, the parties' negotiation regarding Store failure was prescient: Despite WFM's good faith efforts, after a year of operations, it could not make the Store financially viable. CP 776 ¶ 3. BS knew this. It

never received percentage rent under the Lease. *Id*.; *see* CP 309-10.

Accordingly, on October 12, 2017, WFM notified BS that it intended to close the Store. *See* CP 551. On October 14, WFM closed the Store and let go or reassigned all Store employees. CP 561 ¶ 5. Today, the Store has no employees and is closed, with all perishable stock removed. *Id.* ¶ 6. WFM has complied with every obligation incumbent upon it since closure, including rental payments and maintenance. CP 561 ¶ 7.

C. BS Backs Away from Mitigation and Sues WFM

In response, BS turned away from its contractual duty to mitigate and sued WFM, asking the trial court to enjoin WFM to reopen the Store for up to nine years, subject to judicial supervision and on pain of contempt (even though the Store had lost millions of dollars during its one year of operation). CP 1. In doing so, BS recognized that this request was without precedent anywhere in the country. *See* CP 588.

On December 7, 2017, the trial court granted an injunction:

> Defendant is ENJOINED from breaching the Operating Covenant in Section 7.2 of the Lease, and is ordered by then to reopen for business and work in good faith with Bellevue Square to fulfill the purposes of the Lease.

CP 756. WFM appealed and sought an emergency stay. On December 20, 2017, the Court of Appeals granted discretionary review and stayed the trial court's order. App. 1. The parties then briefed the issues and the Court of Appeals heard oral argument on June 11, 2018.

D. The Court of Appeals Interprets the Lease Language to Deny BS's Request for an Injunction

On December 17, 2018, the Court issued the 15-page Opinion reversing the trial court's order. The Court spent the majority of those pages analyzing the Lease text, in particular focusing on the "operating covenant" and the related remedies provisions (CP 448-49 ¶ 7.2) and the Landlord's Remedies provisions (CP 450-52 ¶ 10.1). *See* App. 7-15. WFM and BS agree that those are the most relevant provisions here. *See, e.g.*, Pet. 2-5; CP 367-71. Following its analysis, the Court concluded:

> Because [1] Bellevue Square has only a limited legal right to specific performance under the terms of the [L]ease that is unrelated to the operating covenant and [2] the [L]ease gives Bellevue Square a plain, complete, speedy, and adequate remedy at law, we reverse and remand.

App. 1-2 (numeration added). Thereafter, BS filed a motion for reconsideration lodging many of the same arguments it presents again here. *See* App. 16. The Court denied reconsideration. *Id.* BS's Petition for Review followed, seeking review under RAP 13.4(b)(1), (2), and (4).

IV. ARGUMENT

A. Review Under RAP 13.4(b)(4) Is Not Justified

1. The Opinion Resolved the Parties' Dispute on the Lease Terms Rather than Public Policy Grounds

BS argues that the Opinion affects a far-reaching "policy shift" in Washington, allowing all commercial tenants "to ignore an operating

covenant" in their leases. Pet. 9-10. Accordingly, BS asserts that review should be accepted under RAP 13.4(b)(4) because the Opinion and BS's Petition present "an issue of substantial public interest." Pet. 7-11.

BS's premise is deeply flawed. In fact, the Court of Appeals resolved this appeal on extremely narrow grounds—whether the parties to this Lease agreed to allow specific performance of the operating covenant provision. App. 6, 14. The Opinion did not announce or modify policy in Washington, either regarding injunctions or real estate law. And, contrary to BS's suggestion, the Opinion does not foreclose enforcement of commercial "operating covenants" writ large.

As the Court of Appeals explained, a party seeking a preliminary injunction carries the burden of demonstrating three factors, the first of which is that "he has a clear legal or equitable right." App. 5 (quoting *Tyler Pipe Indus., Inc. v Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). In a contract case, the question of whether a right exists depends on the language of the contract at issue. App. 6. Here, "[w]hether BS has a clear legal and equitable right to specific performance is governed by the language of the lease." *Id.*

The Court of Appeals scrutinized the Lease language at issue and found that the parties did not expressly agree to allow BS the right of specific performance of the operating covenant provision. App. 7-15. This

close analysis spanned no fewer than nine pages—the large majority of the Opinion. *Id.* Indeed, the Court of Appeals recited and analyzed virtually every relevant Lease provision. *Id.* BS simply ignores this reasoning and context for the Opinion. Indeed, BS barely even cites the Opinion in crafting its RAP 13.4(b)(4) argument. Pet. 7-11.

The Court of Appeals concluded: "under the express terms of the [L]ease, the right of BS to specific performance and injunctive relief does not apply [to the operating covenant]." App. 14. By resolving the case on this antecedent issue, the Opinion's precedential value is very limited.

There are countless ways the Court could have—but chose not to—issue a precedential or broad policy opinion. The Court could have concluded, as courts in other jurisdictions have, that a continuous operation clause is unenforceable except against non-anchor tenants. It did not. The Court could have concluded, as other courts have, that a continuous operation clause is unenforceable absent "existential" risk to a commercial landlord. Again, it did not. The Court could have determined that it was contrary to Washington judicial policy to invoke equity where it would place courts in the business of managing ongoing commercial relationships. Here, again, the Opinion hued narrowly.

Instead, the Court of Appeals concluded only that these parties to this Lease did not agree to allow specific performance of the purported

operating covenant, and, in the absence of such provision, the Court would not intercede in equity. App. 1-2. This contract law opinion is not an issue of "public interest." *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (issue is of "substantial public interest" where it controls other public interest litigation). The Court should decline review.

2. The Opinion Is Consistent with Washington Law Regarding the Use of Injunctions

To the extent the Opinion has any precedential value, it does not create "new" law. To the contrary, the Opinion faithfully implements Washington law governing injunctions. As BS has itself recognized, "[i]t has been held in Washington that there is an adequate remedy at law in damages for the breach of a lease agreement." CP 326 (quoting *Washington Tr. Bank v. Circle K Corp.*, 15 Wn. App. 89, 93, 546 P.2d 1249 (1976)). Here, the Court of Appeals found that the record was devoid of evidence that BS has suffered harm insusceptible to compensation through an award of monetary damages. App. 6, 14.[2] This is dispositive.

Crafts v. Pitts, 161 Wn.2d 16, 162 P.3d 382 (2007), is not suggestive or controlling of a different outcome here. *Crafts* concerned an option to purchase land contained in a lease. It has long been held, in

[2] The record amply supports this result. WFM presented evidence (from a forensic accounting and damages expert) and argument that BS's damages were purely hypothetical, and to the extent not hypothetical, monetary in nature. *See* CP 383-85. The Court agreed with WFM, correctly noting that if harms may be remedied by money damages, an injunction is improper. App. 6.

Washington and elsewhere, that land purchase agreements are uniquely appropriate for the specific performance remedy. *See Foster v. Nehls*, 15 Wn. App. 749, 753, 551 P.2d 768 (1976). BS has never cited any authority ordering specific performance on any other type of lease term that can be remedied by an award of damages.

Even if it were otherwise, Washington law and policy is clear that the courts will not extend the extraordinary power of equity to mandate and monitor actions of private commercial actors over an extended period of time. In *Cahalan Inv. Co. v. Yakima Cent. Heating Co*., 113 Wash. 70, 74–75, 193 P. 210 (1920), this Court announced that the judiciary would not step in and retain oversight over a private enterprise for an extended time period because such a function is inconsistent with the role of the judicial system.[3] The Opinion is consistent with that authority too.

Furthermore, the Opinion closely patterns authority from other jurisdictions regarding the availability of injunctive relief to enforce continuous operation clauses where the parties did not expressly agree to such enforcement. For example, in *Hamilton W. Dev., Ltd. v. Hills Stores*

[3] The overwhelming majority of jurisdictions have denied a landlord's request to enjoin a tenant's continuous operation for this reason. *See, e.g.*, *8600 Associates, Ltd. v. Wearguard Corp.*, 737 F. Supp. 44, 46 (E.D. Mich. 1990) ("If a court would be required to assume continuous duties of supervision, injunctive relief is inappropriate and must be denied."); *New Park Forest Assocs. II v. Rogers Enters., Inc.*, 195 Ill.App.3d 757, 552 N.E.2d 1215, 1220 (1990) (denying an injunction due to "enforcement problems for a court" since "the court would find itself in the business of managing a shopping center").

Co., 959 F. Supp. 434, 439 (N.D. Ohio 1997), a case cited by both parties below, the federal court considered a closely analogous operating covenant. In that case, the court denied an injunction because it found the parties did not expressly agree to specific enforcement of a clear continuous operation clause. The same reasoning applies here.[4]

BS's only rejoinder is to intentionally conflate this case with litigation to enforce restrictive covenants. Pet. 10. BS argues the Opinion will have "massive implications" for restrictive covenant litigation. *Id.* This too is incorrect. Nowhere does the Opinion state that a commercial landlord is forbidden from proving irreparable, non-monetary harm for violation of a restrictive covenant. The Court of Appeals merely found that BS had failed to prove non-monetary harms necessary to sustain a request for a mandatory, compelled-operations injunction here. App. 1-2. The Opinion has no precedential value for restrictive covenant litigation.

In sum, this may be a fact pattern of "first impression" in Washington but the Court of Appeals resolved the parties' dispute on antecedent and well-worn contract and injunction law issues. There is no "substantial public interest" in review here.

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[4] In contrast, in *Simon Property Group, L.P. v. Starbucks Corp.*, No. 49D01-1708-PL-032170 (Nov. 27, 2017), another case cited by the parties below, the court reached a different result but only because the parties repeatedly and unambiguously agreed to specific enforcement of a clear continuous operation clause within the continuous operation clause itself. *Id.* at FOF 17. As carefully detailed by the Court of Appeals here, the Lease language differs starkly. *See* App. 7-15.

B. Review Under RAP 13.4(b)(1), (2) Is Not Warranted Because the Opinion Does Not Conflict with Existing Washington Law

1. The Court of Appeals Applied the Proper Standard of Review and Was Not Required to Comment on Extrinsic Evidence

BS next argues that this Court should accept review under RAP 13.4(b)(1), (2) because, while the Court of Appeals interpreted the Lease as a matter of law under a de novo standard (App. 6), it should have applied a substantial evidence standard since BS presented extrinsic evidence below. Pet. 11. BS is incorrect for at least three reasons.

First, the Court of Appeals was not required to apply a substantial evidence standard because it did not reach the issue of extrinsic evidence at all. App. 7-15. And, it was not required to do so. While BS correctly cites law that a Court may consider extrinsic evidence in applying the words in a contract, no Washington law requires a Court to look beyond unambiguous language. *See RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 315, 358 P.3d 483 (2015) ("[E]xtrinsic evidence relating to the context in which a contract is made may be examined …." (emphasis added)). This is particularly true where, as here, the contract contains a merger clause. *See id.* (extrinsic evidence not "admissible under the parol evidence rule to add to the terms of a fully integrated written contract"); CP 455 ¶ 18.12 ("This Lease embodies the entire agreement between Landlord and Tenant with respect to the subject matter hereof and

supersedes and cancels any and all previous negotiations ….").

Second, even if it were otherwise, the extrinsic evidence obliquely referenced by BS here—concerning BS's subjective and unexpressed beliefs and internal deal requirements—is not relevant or admissible extrinsic evidence in the first instance. *See RSD AAP, LLC*, 190 Wn. App. at 315-16. The negotiations cited by BS below do not reveal any mutual understanding of relevant terms, much less an understanding that varies the language. CP 16-112. Even under the authority BS cited here, this evidence is irrelevant. *See Fedway Marketplace W., LLC v. State*, 183 Wn. App. 860, 872, 336 P.3d 615 (2014). It was error for the trial court to rely on this evidence. *See id.*; *RSD AAP, LLC*, 190 Wn. App. at 315-16. It was not error for the Court of Appeals to reject consideration of this evidence.

Third, BS is incorrect insofar as it implies the Court of Appeals' failure to expressly reject BS's extrinsic evidence was error. Where the Court does not specifically analyze issues, Washington law presumes that those issues were resolved against the party with the burden of proof. *See Taplett v. Khela*, 60 Wn. App. 751, 759, 807 P.2d 885 (1991). Here, BS bore the burden of proving the Lease supported its request for a mandatory injunction. App. 5-6. The Opinion is consistent with a judicial conclusion that the extrinsic facts were either improper, irrelevant, or did not carry significance in interpreting the plain language of the Lease.

2. The Court of Appeals Correctly Interpreted the Clause Governing BS's Right to Continue the Lease

Next, BS criticizes the Court of Appeals' reading of the Lease provision at Paragraph 10.1(b)(ii), which provides that, if the Landlord elects to continue the Lease notwithstanding a default, the "Landlord shall be entitled … to specifically enforce Tenant's obligations hereunder." CP 451 ¶ 10.1(b)(ii). The Court determined that the entitlement to specific performance "hereunder" meant specific performance of further defaults. App. 13. BS claims this reading must be incorrect because it would allow specific performance of monetary obligations only. Pet. 15. BS is wrong.[5]

The specific provision governs BS's right to "continue the Lease" if WFM breaches. CP 450-51 ¶ 10.1(b)(ii). In such case, BS may:

> Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant has vacated or abandoned the Demised Premises. In such event Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right to recover the Rent, damages from Tenant's default or breach, and any other payments as they may become due hereunder, and to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches ….

Id. This paragraph recognizes that the status quo at the time of BS's election may be that WFM "has vacated or abandoned" the premises. The

[5] As a threshold matter, it must be noted that, even if BS's contract interpretation were correct (and it is not), this does not justify review under RAP 13.4(b)(1) or (2), which rules allow review only if the decision below conflicts with established authority. Interpretation of an idiosyncratic contract provision does not and cannot conflict with established authority. BS does not and cannot present authority to the contrary.

provision contains no language suggesting BS has the right to change that status quo. To the contrary, the clause lays out remedies BS may have "[i]n such event"—i.e. given this circumstance. *Id.* The only reference to an injunction in the paragraph plainly applies to "further" breaches by WFM.[6] This is revealing of the parties' intent. *See Aspon v. Loomis*, 62 Wn. App. 818, 826, 816 P.2d 751 (1991) (in construing contracts "the expression of one thing is the exclusion of another"). If the parties had intended to allow BS to obtain a court order forcing WFM to operate a Store for up to a decade, the Lease would have mentioned it. It does not.

Drawing back to examine Paragraph 10.1 in full reveals at least three other reasons why BS's interpretation fails. First, the subparagraph addressing BS's cumulative remedies contrasts the terms "remedies hereunder" and "remedy which [BS] may have under this Lease":

> Landlord's remedies hereunder are cumulative and Landlord's exercise of any right or remedy due to a default or breach by Tenant shall not be deemed a waiver of, or to alter, affect or prejudice any right or remedy which Landlord may have under this Lease or by law.

CP 451 ¶ 10.1(b)(iv). Re-phrased, if BS triggers a remedy in accordance with the landlord's remedies Paragraph 10.1 (i.e. "hereunder"), BS does not waive any other "right or remedy which Landlord may have under this Lease." Necessarily, "hereunder" and "under this Lease" have different

[6] A "further" breach might occur if, for example, WFM breached restrictive covenants in the Lease by converting the Store into a tire store. *Infra* p. 17. There is no "further" breach here so that reference is irrelevant.

meanings. This undermines BS's broader interpretation of "hereunder." *Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 159, 684 P.2d 793 (1984) ("When the same word is used in different parts of a contract it is presumed that the word means the same throughout.").

Second, in cases where the parties intended to broadly state "in accordance with this Lease" in Paragraph 10.1, they did so expressly; they did not use the term "hereunder." Paragraph 10.1(a)(iii) describes an Event of Default triggering BS's remedial rights to include WFM's "failure to observe or perform any of the other covenants, conditions, or provisions of this Lease." CP 450. If the term "hereunder" was intended as BS suggests, the parties would have substituted "of this Lease" for "hereunder." They did not. *See Bellevue Sch. Dist. No. 405*, 38 Wn. App. at 159.

Third, as explained further below, Paragraph 10.1 contains a limit on BS's remedies: The duty to mitigate damages. CP 451 ¶ 10.1(c)(i). This duty expressly applies even if BS elects to continue the Lease after WFM vacates. *Id.* This duty is contrary to BS's interpretation, which would create an implicit right to a mandatory injunction for continued operations.

Finally, the broader Lease language reveals that where BS and WFM intended to make injunctive relief applicable to specified covenants and obligations, they did so expressly and within the Paragraphs defining those covenants and obligations. *See, e.g.*, CP 447 ¶ 7.1(d)(iii). There is no

such express agreement in the "operating covenant." *See* CP 448-49 ¶ 7.2. This is telling. *See Bellevue Sch. Dist. No. 405*, 38 Wn. App. at 159.

All of these contextual factors underscore that the Court of Appeals reached the only fair-minded interpretation of the phrase "specifically enforce Tenant's obligations hereunder": It does not create an implicit right to injunctive relief of the operating covenant. App. 1-2.

BS argues that the Court of Appeals' result is incorrect because it would allow "specific performance" only of monetary obligations. Pet. 15-17. BS is wrong. In circumstances where WFM has closed the Store—and therefore abandoned or vacated—there could be proper reasons to seek specific performance of continuing obligations. For example, the Lease limits the use of the premises for only designated purposes: "The Demised Premises shall be used only for the purpose of the operation of a grocery store, food market, and/or supermarket." CP 444 ¶ 7.1(a)(i). If WFM repurposed the vacated premises as office space or a tire store without BS's consent, BS may have the right to petition the courts for an injunction to prevent such unauthorized operations. CP 447 ¶ 7.1(d)(iii).

3. The Court of Appeals Properly Considered the Consequential Damages Waiver Provision in the Lease

BS next argues that the Court of Appeals conflated the concepts of "harm" and "damages" when it cited to the consequential damages waiver

provision in support of its conclusion that BS had an adequate remedy at law. Pet. 17-18. The premise of BS's argument is mistaken. The Court did not "rely" on the consequential damages waiver. To the contrary, the Court's conclusion speaks for itself: The Court found that BS's claimed harms do not go beyond the scope of harms that may be adequately remedied by a damages judgment. App. 14. As explained above, WFM extensively briefed this issue. *Supra* n.2. The Court agreed with WFM, correctly noting that if harms may be remedied by money damages, an injunction is improper. App. 6. The Court did not "rely" on the consequential damages provision in the Lease in reaching this conclusion.

Here, BS fixates on an ancillary argument presented by WFM below. WFM argued that the Lease reflects the parties' decision to allocate the risks of Store's failure: WFM would be responsible for direct harms from failure, while BS would assume the consequential risks to the mall more generally. CP 383-84. WFM cited the consequential damages waiver provision as evidence in support of this Lease reading. *Id*. (WFM cited other provisions too, including the duty to mitigate provision. *Id*.) This Lease interpretation undermines BS's claim that it has suffered relevant harms justifying an injunction because the parties agreed those kinds of far-reaching consequences are non-cognizable for BS.

The Opinion reflects the Court of Appeals' agreement with WFM

on this ancillary argument: "The language of the [L]ease does not support the [trial] court's conclusion" that "no adequate remedy at law exists to compensate BS." App. 14. That said, again, this interpretation merely supports—but is not the only basis for—the Court of Appeals' ultimate decision that BS's claimed harms may be remedied at law.

4. The Court of Appeals Correctly Considered the Duty to Mitigate Provision in the Lease

Finally, BS criticizes the Court of Appeals' analysis by mischaracterizing a single sentence in the Opinion: "The duty to mitigate damages is inconsistent with the trial court's conclusion that BS is entitled Whole Foods to continue operating." App. 13. BS claims that this is incorrect because a landlord may mitigate while a tenant still occupies the premises. Pet. 19. BS misunderstands (or mischaracterizes) the Opinion.

The Court of Appeals is not commenting on the effect or timing of a commercial landlord's duty at law to mitigate damages. Instead, the Court is referring to the negotiated, contractual duty to mitigate that applies to BS even if elects to continue the Lease under the landlord's remedies provision. The Court of Appeals explained:

> The [trial] court concluded the duty to mitigate applies only if Bellevue Square terminates the lease rather than continue it. … The court's interpretation of the limitations on Bellevue Square's remedies is inconsistent with the plain language of the lease. … The limitations of section 10.1(c) apply whether Bellevue Square terminates or continues the lease.

App. 11-12. As WFM argued below, the fact that the contractual duty to mitigate applies in all instances—even if WFM vacated and BS elected to continue the Lease—is significant because it is inconsistent with the notion that the parties agreed to allow BS to compel operations for the full Lease term. *See* CP 382. Here, again, the Court of Appeals agreed with WFM. App. 13. The Lease's contractual duty to mitigate supports a broader conclusion: The parties did not intend to permit BS to seek specific performance of continued operations. *See id.* BS's argument is misplaced.

V. CONCLUSION

WFM respectfully requests that the Court deny the Petition because review is not warranted under RAP 13.4(b)(1), (2), or (4).

RESPECTFULLY SUBMITTED this 13th day of May, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that May 13, 2019, I caused a copy of the foregoing Respondents' Answer to Petition for Review to be served electronically via the Washington State Appellate Courts' Portal to:

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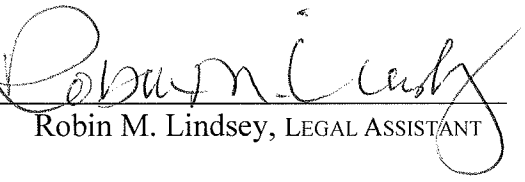
By: 
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