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No. 66207-4

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**COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION I**

TROIANI SEATTLE, LLC, PAUL S. (SIC) MACKAY SR. AND GAIL MACKAY,  
CHAD MACKAY AND JENNIFER MACKAY, KENNETH SHARP AND JANE  
DOE SHARP AND RICHARD TROIANI ,

Appellants,

v.

EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.,

Respondent.

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**REPLY OF APPELLANTS**

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- I. **Expeditors does not address the two issues central to this appeal: That restraint on the alienation of Troiani's rights of assignment exists only to the extent expressly agreed to; and that except for assignment to an affiliate, the Lease expresses no restraint on assignment to independent third parties.**

In their opening brief appellants described Washington law establishing that leasehold interests and other real estate interests are freely assignable to anyone. Alienation of those rights of assignment is never assumed or implied. Instead, any provision purporting to alienate those rights is construed "with the utmost strictness," to determine whether the words "admit of no other meaning," and are then enforced "to operate within their exact limits." See Brief of Appellant pp. 14-16, quoting from numerous Washington cases, including *Burns v. Dufresne*, 67 Wash. 158, 161, 121 P. 46 (1912), and *Alby v. Banc One Financial*, 119 Wn. App. 513, 523, 82 P.3d 675 (2003).

Also in their opening brief appellants pointed out that the Lease in this case is an integrated contract. Appellants explained at length that construing or enforcing the Lease as though it prohibits assignment to a third party would violate the parol evidence rule. See Brief of Appellant pp. 22-31.

Those are the two legal issues on which this appeal rests. Yet respondent addresses neither one of them. Expeditors does not dispute appellants' legal arguments, nor try to distinguish appellants' legal authorities. Indeed, Expeditors neither discusses those arguments nor mentions those authorities. Words such as "parol evidence rule" are entirely missing from respondent's brief.

With Expeditors having said nothing about the two legal issues at the center of this appeal, appellants have nothing to supplement their original briefing on those subjects.

In lieu of responding to appellants' arguments, Expeditors instead asserts that the Lease should not be interpreted to mean what it actually says. The Lease has just one affirmative declaration on the subject of assignment: "Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that . . . ." This clause acknowledges Tenant's right to assign to an affiliate, and puts conditions on an assignment to an affiliate. Neither this clause nor any other provision in the Lease says anything about assignments to independent third parties.

To reach its desired conclusion, Expeditors argues that the Lease must be read as though it includes a provision that is not

there: A provision declaring that Troiani relinquishes its right to assign to an independent third party, and limits itself to the conditional assignment right to an affiliate that is expressly addressed in the Lease. Expeditors argues that the Lease must be construed to read as though it had been written this way: "Tenant shall have the right to assign or sublease the Premises under this Lease **only** to an affiliate. . . ." Expeditors waives away the literal meaning of the language the parties agreed to in their Lease. Expeditors says that interpretation "defies both logic and common sense." Brief of Respondent p. 20.

Nowhere does Expeditors point to contract language actually stating the construction Expeditors seeks. Expeditors simply declares that construction as fact. "The Lease unambiguously limited Troiani Seattle's right to assign the Lease to its corporate affiliates . . ." Brief of Respondent p. 19.

But the actual language of the Lease says no such thing. It imposes conditions only on Troiani's freedom to assign to an affiliate. Nowhere does it restrict assignment to anyone else. Nowhere does it declare that the **only** allowable assignments are those affirmatively provided for by Section 12 of the Lease. Not even the heading to that section of the Lease ("Assignment and

Subletting“) could serve to support Expeditors’ argument, because the parties expressly agreed to the contrary in the Lease.

**35. HEADINGS.** The headings of the paragraphs of this Lease are inserted solely for the convenience of the parties, and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

CP 95. Having declined to write the Lease so that it said that the *only* assignment permissible would be assignment to an affiliate, Expeditors was not entitled to partial summary judgment in its favor. Troiani never agreed to such a restraint, and the trial court erred by reading it into the parties’ contract.

**II. Expeditors purports to justify summary judgment in its favor by raising two new grounds for relief never presented to the trial court. Expeditors’ argument is barred by RAP 9.12.**

In its appellate brief Expeditors defends its award of summary judgment on two grounds: That Troiani waived any breach by Expeditors in rejecting the assignment to Cerro Blanco; and that any breach by Expeditors, including a breach excusing further performance by Troiani, could have no affect on the guarantors’ liability to pay all remaining lease payments under the Lease.

Expeditors never raised either of those issues in the trial court. Expeditors' motion for partial summary judgment did not seek a determination on either issue. See CP 38 *et seq.* (Plaintiff's Motion for Partial Summary Judgment). Plaintiff's motion neither argued nor even mentioned either issue. *Id.* Expeditors' reply papers to the trial court likewise never sought relief based upon – nor argued or even mentioned – either issue. See CP 162 *et seq.* (Plaintiff's Reply on Motion for Partial Summary Judgment).

Expeditors' motion papers in the trial court were instead based upon its theory that the only breach of contract in the case was committed by Troiani, and that the guarantors were jointly and severally liable for the damages flowing from Troiani's breach. CP 44-47. On the subject of whether its rejection of the tendered assignment to Cerro Blanco might have been a breach, Expeditors asserted only one position in its summary judgment papers: That the contract prohibited assignment to an independent party. "Troiani Seattle had no right to assign and Expeditors had no obligation to consent to any assignment unless the assignee was a corporate affiliate of Troiani Seattle and certain other conditions were satisfied." CP 41. Expeditors asserted no grounds for

excusing its breach, if its rejection of the assignment constituted a breach.

Likewise, Expeditors' motion did not contend that Troiani waived any claim of breach, or that Expeditors' breach was excused as a matter of law, or that the guarantors were liable for lease payments even if Expeditors' breach excused Troiani from further performance. Expeditors devoted less than two pages of its motion for partial summary judgment to the liability of the guarantors. See CP 44-46. The only theory for partial summary judgment against the guarantors asserted in the motion was that Troiani was at fault, and the guarantors were jointly and severally liable for damages recoverable against Troiani for Troiani's default. "Per the terms of the Guaranty, Defendants Paul Mackay, Chad Mackay, Richard Troiani, and Kenneth Sharp are jointly and severally liable for payment to Expeditors of all sums due under the Lease because of Troiani Seattle's breach." CP 46.

Perhaps sensing that grounds for relief never raised in the trial court might not be a viable basis to justify the trial court's entry of summary judgment, Expeditors' appellate brief prominently declares the existence of pertinent trial court determinations that do not, in fact, actually exist. On page one of its appellate brief

Expeditors asserts: “The trial court . . . determined correctly that no action or inaction by Respondent would strip Respondent’s right to seek recourse for and satisfaction of its damages, as supported by the individual Appellants’ personal guarantees.” Expeditors offers no citation to the record for these trial court determinations. No citation exists because no such determinations exist.

The trial court entered four orders relating to Expeditors’ motion for partial summary judgment. See CP 169 (Order granting motion for partial summary judgment); CP 354 (Order dismissing defendant’s counterclaim); CP 224 (Order denying motion for reconsideration); CP 338 (Order denying motion for CR 60(b) relief). Those orders are the entirety of the record regarding the trial court’s determinations. None of those orders contains the “determinations” Expeditors attributes to the trial court.

Because Expeditors never moved on, argued for, or even mentioned in its summary judgment papers the two grounds it now proffers to justify summary judgment in its favor, Troiani had no opportunity to prepare its summary judgment record and arguments opposing Expeditor’s latest theories. The trial court had no opportunity to review or rule upon those issues. An appellate court will therefore not entertain them on review. Rule of Appellate

Procedure 9.12 bars Expeditors from raising them here: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” See *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 700, 994 P.2d 911 (2000) (where theories for desired relief were not raised in the trial court, adversary did not know to respond to them, and the appellate court “will not consider them on appeal.”)

The case of *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 182 P.3d 985 (2008), is on point. The plaintiff suffered injury when shot by an unknown assailant outside a nightclub. The plaintiff sued the nightclub and its security contractor for negligence, contending they failed to provide reasonable security given the history of violence from previous events at the nightclub. The security firm and nightclub both moved for summary judgment, contending they owed no duty to the plaintiff. The trial court denied both parties’ motions. The nightclub then settled with plaintiff, and the security contractor obtained interlocutory review of the summary judgment denial.

On appeal the security firm argued it owed no duty to the plaintiff, just as it had argued to the trial court. In response, the

plaintiff raised two theories *not* raised with the trial court: That the security firm owed plaintiff a duty under either the rescue doctrine or under its contract with the nightclub. This court refused to consider either issue and reversed the trial court's summary judgment order:

An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. . . . We decline to consider whether Titan had a duty under the rescue doctrine or arising from its contract.

144 Wn. App. at 509.

**III. Expeditors' new theory of waiver could not justify summary judgment even if it had been raised below.**

In its appellate brief Expeditors argues that if its rejection of the assignment to Cerro Blanco was a breach, Troiani waived the breach by not giving written notice and 30 days' opportunity to cure. Expeditors argues those were mandatory steps under Sections 19.2 and 20.2 of the Lease, and that Troiani waived its right to assert a breach by not following them.

Beyond the fatal deficiency of never raising this issue below (and thus giving defendants the opportunity to prove and explain their opposition), Expeditors' new theory suffers from three failings. First, it assumes the Lease precludes legal consequence from

Expeditors breach unless written notice and opportunity to cure were furnished; but that is not what the Lease actually says. Second, it declares as “uncontested” that notice and an opportunity to cure were never afforded, when the record is entirely silent because Expeditors did not raise the issue. And third, it assumes Expeditors could enforce those provisions to effect a waiver by Troiani, when Troiani had tendered full performance of its obligations and Expeditors breached its duty to accept that performance.

Sections 19 and 20 of the Lease explicitly define certain events as “Events of Default under the terms of this Lease.” CP 91. Those sections then provide for certain procedures and remedies available to the parties in the event of an “event of default.” CP 91-93. Expeditors would have this Court believe that failure to follow those procedures within some period of time precludes any legal consequence from a breach such as Expeditors’ rejection of the assignment to Cerro Blanco. But that is not what the Lease says. Rather, the parties expressly agreed in the Lease that the notice-and-cure procedures in Section 19 relate to the remedies expressly provided for in the Lease in the event of Lease-defined “events of default.” Hence, Section 19.1 begins, “The doing of any of the

following by Tenant shall constitute an Event of Default under the terms of this Lease,” and section 19.2 begins, “The doing of the following by Landlord shall constitute an event of default under the terms of the Lease”. CP 91.

But nowhere does the Lease state that a party *waives* its legal rights flowing from the other party’s breach unless written notice is given within some period of time. Such a provision was never part of the parties’ contract. Indeed, the Lease expresses very much the opposite. It recites that the remedies expressly provided for in the lease (which flow from Lease-defined “events of default”) are entirely separate from the parties’ rights that exist by operation of law. Section 21 of the Lease goes unmentioned in Expeditors brief, but directly contradicts Expeditors’ new argument:

Upon any breach, any and all rights and remedies which either party may have under this Lease *or* by operation of law *or* equity, ***shall be distinct, separate, and cumulative*** and shall not be deemed inconsistent with each other. No such right or remedy whether exercised by said party or not, shall be deemed to be in exclusion of any other right or remedy, and any two or more of all such rights and remedies may be exercised at the same time or separately as desired.

CP 93 (emphasis added). The notice-and-cure provisions in the Lease address “default” and “events of default” for the remedies

expressly provided for in the Lease. But as Section 21 states, the Tenant's "rights and remedies" flowing by operation of Washington law from a material breach by Expeditors are "distinct, separate, and cumulative and shall not be deemed inconsistent" with the express remedies set out in the Lease. Nowhere does the Lease say that **those** rights and remedies are waived unless Troiani gives written notice of a breach, or does so in any particular manner or within any particular time. Expeditors' notion that lack of written notice exonerates it from the legal consequences of its breach is a notion contradicted by Section 21 of the parties' contract.

Even as to the remedies provided for in an "event of default," Expeditors has no basis for contending it is "uncontested" that defendants never furnished written notice of breach or an opportunity to cure. See Brief of Respondent p. 17 ("Assuming *arguendo* that Expeditors did not comply with its obligations under the Lease, it is undisputed that Troiani Seattle thereafter failed to comply with the relevant Lease terms.") Whatever notices were given are absent from the trial court record because Expeditors did not raise the issue in the trial court. Yet even without any summary judgment record, we know at least *one* written notice of breach was given to Expeditors, and that Expeditors did not cure its breach. In

April 2010 defendants served written notice on Expeditors in the form of defendants' Answer and Counterclaims, alleging in detail Expeditors' breach. CP 12-13. Although Expeditors' breach was such that a cure was never likely to have been possible, from the limited record available we know that instead of effecting a cure Expeditors denied it had ever breached. CP 19-20 (denial of defendants' counterclaim allegations).

Finally, Expeditors argues that it should be entitled to be in breach of both the substantive and procedural requirements of the Lease while simultaneously enforcing procedural requirements of the Lease against Troiani, the non-breaching party. That position is contrary to Washington law. As Troiani explained in its opening brief, Expeditors contends Section 12 of the Lease applies to all assignments, including the assignment to Cerro Blanco. Section 12 requires the Landlord to give notice objecting to a tendered assignment within fifteen days. CP 88. Yet Expeditors came nowhere near meeting that procedural requirement, taking five weeks before making any response. CP 140. A party in breach of both the substantive and procedural provisions of a contract is not entitled to enforce procedural provisions against the non-breaching party. See, e.g., *Woodinville v. Northshore United Church of Christ*,

166 Wn.2d 633, 647, 211 P.3d 406 (2009) ("If a party materially breaches a contract, the other party may treat the breach as a condition excusing further performance."); *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 81, 765 P.2d 339 (1988) ("A material failure by one party gives the other party the right to withhold further performance") (*quoting* Restatement (Second) of Contracts § 241, comment e); *Campbell v. Hauser Lumber Co.*, 147 Wash. 140, 145, 265 P. 468 (1928) ("[I]f the breach be of a substantial part of an entire contract, as distinguished from a part that is immaterial or inconsequential, though the breach may not render a performance of the remainder impossible or impractical, an abandonment of the whole is justified.").

Following reversal of the summary judgment order in this case and remand for further proceedings, if Expeditors chooses to pursue its theory that the absence of written notice exonerates it of its breach, other factual issues will require resolution. For example, although raised for a different reason, the summary judgment record shows disputed issues of fact over Expeditors' inducements that Troiani *not* declare the contract in breach, but instead spend several months attempting to renegotiate the Lease on terms that

Expeditors had indicated would be favorable, but that Expeditors eventually reneged on. See CP 141-42.

**IV. Expeditors' new theory of the unrestricted scope of the guarantees contradicts basic Washington law, and could not justify summary judgment even if it had been raised below.**

In its motion for summary judgment Expeditors argued that Troiani was the only party in breach, and the individual guarantors were jointly and severally liable for the damages flowing from Troiani's breach. On appeal, Expeditors has a new theory. It argues that even if summary judgment must be reversed as to Troiani because of Expeditors' breach, summary judgment should be affirmed against the guarantors because a breach against Troiani is no legal justification from liability under the guaranty.

Expeditors couches its new argument in terms of the difference between conditional and unconditional guarantees. Because the guaranty in this case is unconditional, it is irrelevant (in Expeditors' view) that the breach was by Expeditors rather than by Troiani. Expeditors argues that while its breach could excuse Troiani from further performance, the guarantors nevertheless must make all the remaining Lease payments for the remaining term of the Lease. In Expeditors' view, no matter what breach it may

commit against Troiani, that breach is no defense to the guarantors. So if (to take a hypothetical) Expeditors had ejected Troiani from the premises a week into the Lease without any justification, in Expeditors' view the guarantors would nevertheless have to make all the lease payments for the balance of the Lease term.

Expeditors' argument fundamentally misstates the most basic premise of guaranty law. An unconditional guaranty is not the same as an unconditional promise to pay or an unconditional promise to perform. An unconditional guaranty is a promise to guaranty the principal's performance, without other conditions. While the law in this State and fairly universally elsewhere does indeed recognize a difference between conditional and unconditional guarantees, the "unconditional" part of an unconditional guaranty relates to conditions *other than a default by the principal*. Where the principal does not default on its obligations, the guarantor is not called upon to perform the guaranty.

The Washington Supreme Court explained this very point, citing black letter guaranty law, in *Robey v. Walton Lumber*.

The contract of guaranty is an undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another,

and which binds the obligor to performance *in the event of nonperformance by such other*, the latter being bound to perform primarily.

*Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943) (emphasis added; *quoting* Am. Jur. with approval).

The contract of guaranty may be absolute or it may be conditional. An absolute guaranty is an unconditional undertaking on the part of the guarantor that the debtor will pay the debt or perform the obligation. A conditional guaranty contemplates, as a condition to liability on the part of the guarantor, the happening of some contingent event *other than the default of the principal debtor* or the performance of some act on the part of the obligee.

17 Wn.2d at 255-56 (*quoting* Am. Jur. with approval, with emphasis supplied by Supreme Court).

A guarantee like a contract of suretyship may be absolute; i.e., matured at the moment the debt is in default; or conditional; i.e., matured when conditions precedent to liability have been satisfied or excused and the debt is in default. [Citation.] The promise of an unconditional guarantor is similar to the promise of a surety. The surety's promise is to do the same thing promised by the principal. The guarantor's promise is to perform if the principal does not.

*McAllister v. Pier 67, Inc.*, 1 Wn. App. 978, 983, 465 P.2d 678 (1970); see 38 Am. Jur. 2d Guaranty § 15 (2010) (“An absolute guaranty is a contract in which the guarantor promises that if the debtor does not perform the principal obligation, the guarantor will perform some act (such as the payment of money) for the creditor’s

benefit, *the only condition being the principal's default.*") (emphasis added).

Expeditors' argument that it was free to breach the lease yet nevertheless require the guarantors to pay all remaining lease payments is irreconcilably at odds with these basic principles. Expeditors cites no authorities for its remarkable view of the law. The *National Bank of Washington* case cited by Expeditors actually undercuts its position, setting forth the same relevant law as in *Robey*:

An absolute guaranty is an unconditional undertaking on the part of the guarantor that the debtor will pay the debt or perform the obligation. A conditional guaranty contemplates, as a condition to liability on the part of the guarantor, the happening of some contingent event *other than the default of the principal debtor* or the performance of some act on the part of the obligee.

*National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 917-18, 506 P.2d 20 (1973) (*quoting Robey*, with emphasis from that original).

The other cases relied on by Expeditors are *Fruehauf* and *Coughlin*. Both are readily distinguishable. Both cases hinged on contracts in which the guarantors affirmatively promised

performance above and beyond their guarantees. In both cases the Court held that the contracts were to be enforced as written.

In *Fruehauf Trailer Co. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966), the guarantors agreed not only to guaranty the principal's payment, but also to pay up to 10 percent of the amount owing in the event of default, regardless of whether the obligee settled with or otherwise discharged the principal from payment after a default. The Court held that the guaranty contract, including the additional performance promised beyond the promise of guaranty, would be enforced as written.

The *Fruehauf* court quoted extensively from *Coughlin v. Smith*, 163 Wash. 290, 1 P.2d 215 (1931). In *Coughlin*, as in *Fruehauf*, the guarantor's contract had promised extensive performance above and beyond guaranty of the principal's performance. The Court held those additional promises should be enforced by the terms in which they were written and executed.

The present case is unlike *Fruehauf* and *Coughlin* in two essential respects. First, the guaranty agreements are exclusively guarantees. They include no promised performance beyond guaranty of Troiani's performance. See CP 133 ("The undersigned hereby guarantees unconditionally the prompt and full performance

of the Tenant of the Lease terms, including the payment of rent and all other sums due under the Lease.”) Second, the guarantors are not liable under their guaranty Troiani did not default on its principal obligations.

Unlike the principal party in both *Fruehauf* and *Coughlin*, Troiani did not default. Troiani tendered complete performance of its obligations under the Lease, in the form of its assignment to Cerro Blanco. The only breach was in Expeditors’ rejection of that tender. Had Expeditors not wrongfully rejected performance of the remainder of the Lease by Troiani’s assignee, Expeditors would have received its remaining Lease payments (or, in the event of a later default by Cerro Blanco, could have demanded performance of the guaranty resulting from *that* default). But what Expeditors cannot do, yet is attempting here, is use its own default as the basis for triggering an obligation to pay from the guarantors.

It is the law that one who is ready, able and willing to tender performance of a contract is relieved of his duty to tender when the other contracting party has by word or act indicated that he will not perform his duties under the contract.

*Kreger v. Hall*, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967). Troiani was not only ready, willing and able to tender full performance,

Troiani *did* tender full performance. The only default was Expeditors' rejection of that tender.

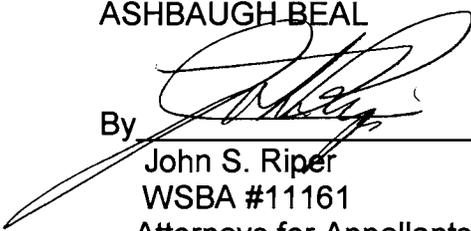
Because Troiani did not default on its obligation to perform, but instead tendered complete performance via its assignment, Troiani never defaulted on its Lease. Without a default by the principal, a guarantor is not required to perform what the principal had promised. The guarantors in this case were never obligated to perform, and the trial court erred by entering partial summary judgment against them.

### Conclusion

Troiani and the individual defendants request reversal of the trial court's Order of partial summary judgment, and of the related Order dismissing Troiani's tortious interference counterclaim. CP 344 & 354.

Respectfully submitted this 15th day of June, 2011.

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#### Conclusion

Troiani and the individual defendants request reversal of the trial court's Order of partial summary judgment, and of the related Order dismissing Troiani's tortious interference counterclaim. CP 344 & 354.

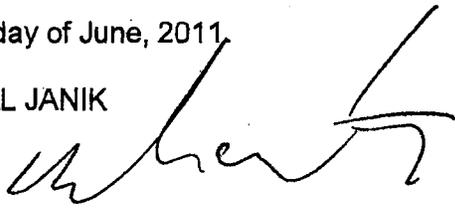
Respectfully submitted this 15th day of June, 2011.

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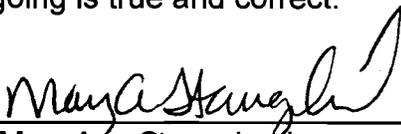
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**Certificate of Service**

IT IS HEREBY CERTIFIED that service of the attached  
REPLY OF APPELLANTS has been made this 15th day of June,  
2011, by sending copies thereof by messenger to the following  
counsel:

Jeffrey M. Thomas  
Gordon Tilden Thomas & Cordell LLP  
1001 4th Avenue, Suite 4000  
Seattle, WA 98154

I declare under penalty of perjury under the laws of the State  
of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Mary Ann Stangeland

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