

68066-8

68066-8

No. 68066-8-I

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

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN 18 PM 3:18

HARBOR MARINE MAINTENANCE & SUPPLY, INC., a Washington
corporation,

Appellant,

v.

KIDDER MATHEWS & SEGNER, INC. a Washington corporation,

Respondent.

BRIEF OF RESPONDENT

Michael T. Callan, WSBA #16237
Peterson Russell Kelly PLLC
Attorneys for Respondent
Kidder Mathews & Segner, Inc.

10900 NE Fourth Street, Suite 1850
Bellevue, WA 98004-8341
425-462-4700

TABLE OF CONTENTS

I.	COUNTERSTATEMENT OF THE ISSUE	7
II.	COUNTERSTATEMENT OF THE CASE.....	7
	A. Harbor Marine Signs Exclusive Client Representation Agreement with Kidder Mathews.....	8
	B. Kidder Mathews Researches and Identifies Potential Lease Space for Harbor Marine.	10
	C. Harbor Marine Secretly Negotiates Lease to Avoid Paying the Brokerage Fee to Kidder Mathews.	14
III.	ARGUMENT	16
	A. Kidder Mathews Is Entitled to a Brokerage Fee under the Unambiguous Terms of the CRA.	17
	B. Harbor Marine Breached the CRA by Failing to Require Norton Industries to Pay a Brokerage Fee when the Lease Was Consummated.	22
	C. The Procuring Cause Doctrine Does Not Apply.....	25
	D. Minimal Causal Relationship.....	33
	E. Kidder Mathews Was the Procuring Cause of the Lease..	36
IV.	REQUEST FOR ATTORNEYS' FEES	41
V.	CONCLUSION	42

TABLE OF AUTHORITIES

CASES

<u>Absher Constr. Co. v. Kent Sch. Dist. No. 415</u> , 77 Wn. App. 137, 141, 890 P.2d 1071 (1995).....	17
<u>Botka v. Estate of Hoerr</u> , 105 Wn. App. 974, 979, 21 P.3d 723 (2001)...	16
<u>Feeley v. Mullikin</u> , 44 Wn.2d 680, 686, 269 P.2d 828 (1954)	35
<u>Geoghegan v. Dever</u> , 30 Wn.2d 877, 900, 194 P.2d 397 (1948).....	27
<u>Go2Net, Inc. v. C I Host, Inc.</u> , 115 Wn. App. 73, 84, 60 P.3d 1245 (2003)	18
<u>Harold Wright Co. v. E.I. DuPont De Nemours & Co.</u> , 49 F.3d 308, 310 (7th Cir. 1995).....	35
<u>James S. Black & Co. v. P &R Co.</u> , 12 Wn. App. 533, 535, 530 P.2d 722 (1975).....	18
<u>Lloyd Hammerstad, Inc. v. Saunders</u> , 6 Wn. App. 633, 495 P.2d 349 (1972).....	30, 33
<u>Poggi v. Tool Research & Eng'g Corp.</u> , 75 Wn.2d 356, 451 P.2d 296 (1969).....	35
<u>Professionals 100 v. Prestige Realty, Inc.</u> , 80 Wn. App. 833, 911 P.2d 1358 (1996).....	26
<u>Ragland v. Lawless</u> , 61 Wn. App. 830, 836, 812 P.2d 872 (1991).....	16
<u>Ranger Ins. Co. v. Pierce Cnty.</u> , 164 Wn.2d 545, 552, 192 P.3d 886 (2008).	16
<u>Redburn v. Alaska Airlines</u> , 20 Wn. App. 315, 320-21, 579 P.2d 1354 (1978).....	33
<u>Roger Crane & Assocs. v. Felice</u> , 74 Wn. App. 769, 875 P.2d 705 (1994)	26, 29, 30, 40
<u>Schauerman v. Haag</u> , 68 Wn.2d 868, 873; 416 P.2d 88 (1966).....	30
<u>Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.</u> , 120 Wn.2d 573, 844 P.2d 428 (1998).....	25
<u>Syputa v. Druck, Inc.</u> , 90 Wn. App. 638, 646, 954 P.2d 279 (1998)..	36, 40

<u>Tanner Elec. Co-op v. Puget Sound Power & Light Co.</u> , 128 Wn.2d 656, 911 P.2d 1301 (1996).....	25
<u>Terry Brink v. Airheart</u> , 16 Wn. App. 380, 385, 558 P.2d 304 (1976).....	30
<u>Voorde Poorte v. Evans</u> , 66 Wn. App. 358, 362, 832 P.2d 105 (1992)....	17
<u>Wash. Prof'l Real Estate, LLC v. Young</u> , 163 Wn. App. 800, 809-10, 260 P.3d 991 (2011).....	26, 29, 30, 33
<u>Willis v. Champlain Cable Corp.</u> , 109 Wn.2d 747, 755, 748 P.2d 621 (1988).....	25, 26, 35
<u>Zelensky v. Viking Equip. Co.</u> , 70 Wn.2d 78, 82-83, 422 P.2d 293 (1966)	35

STATUTES

RCW 18.85.011	30, 31, 32
---------------------	------------

OTHER AUTHORITIES

Webster's II New College Dictionary (2d ed. 1999).....	19
--	----

RULES

CR 56(c).....	16
---------------	----

INTRODUCTION

This dispute arose because the Appellant, Harbor Marine Maintenance & Supply, Inc. (“Harbor Marine”), refused to pay its real estate broker, Respondent, Kidder Mathews & Segner, Inc. (“Kidder Mathews”), the commission to which it was entitled under the express terms of an exclusive Client Representation Agreement (the “CRA”) between the parties. The CRA required that Harbor Marine secure payment of the commission from the property owner if Harbor Marine entered into a lease with such owner. Harbor Marine failed to do so and instead secretly took the information that Kidder Mathews researched and prepared for it and negotiated directly with a property owner that Kidder Mathews identified. Harbor Marine inserted a provision in such lease indemnifying the owner against any claims for commissions and then failed to pay the commission claiming then that Kidder Mathews had done “little work.”

Although the trial court granted summary judgment in favor of Kidder Mathews on its claims, Harbor Marine nevertheless appeals, asserting the trial court erred (1) when it did not apply the “procuring cause” doctrine, and (2) when it agreed with Kidder Mathews that it was

entitled to a commission based on the undisputed facts. Harbor Marine pins its hopes on its own subjective and unsupported belief that “the broker has done little work for a sizeable commission.” But Harbor Marine cannot dispute that it secretly negotiated its own lease while the CRA was effective and after Kidder Mathews extensively researched available properties, contacted the owner of the property Harbor Marine ultimately leased, and visited that property with Harbor Marine, among other activities. This Court should affirm the trial court’s decision for two reasons.

First, based upon the undisputed facts, Kidder Mathews was entitled to a commission under the plain language of the CRA. Harbor Marine’s President, Lauren Bivins, has admitted that Kidder Mathews was Harbor Marine’s exclusive agent that located, presented, and toured the property with him with the approval of the property owner. Mr. Bivins also admitted that one week later, he met with the owner of the space he toured with Kidder Mathews and began negotiations, intentionally excluding Kidder Mathews. Harbor Marine also cannot dispute that it ultimately leased this space, and Harbor Marine and the lessor contemplated the payment of a commission to Kidder Mathews in their lease agreements. Because the undisputed facts demonstrate that Kidder Mathews facilitated the lease before Harbor Marine secretly negotiated it

with the landlord in order to avoid paying a commission, this Court should affirm the trial court's decision to grant summary judgment.

Second, the trial court properly applied well-settled Washington law: The "procuring cause" doctrine did not apply because it is a default standard that courts use when a written contract does not exist or is ineffective. Neither of those circumstances exists here. And although Harbor Marine devotes significant real estate in its brief to cases it believes are dispositive, much of its law and analysis is misplaced because Harbor Marine assumes that a plausible interpretation of the CRA is that the procuring cause standard applies, or Harbor Marine presupposes that cases involving distinguishable legal issues and facts are analogous. At the same time, however, Harbor Marine acknowledges that the CRA sets the required standard of performance for Kidder Mathews's entitlement to a commission. Consequently the procuring cause doctrine, which is a "gap-filler" when no agreement exists, simply does not apply.

I. COUNTERSTATEMENT OF THE ISSUE

Whether a commercial leasing client owes a commission to a broker under Washington law when (1) the client signed an exclusive contract which required the client secure payment of a commission upon “consummation of a lease renewal, new lease, or purchase of a facility”; (2) the broker located available commercial space and toured it with a client with the owner’s knowledge and approval of the broker-client relationship; and (3) the client then negotiated directly with the owner of the available commercial space and consummates the lease.

II. COUNTERSTATEMENT OF THE CASE

Kidder Mathews is a commercial brokerage service. CP 121. Matthew Henn and Matthew Hagen are commercial real estate agents with Kidder Mathews with over 30 years of combined expertise in the Everett industrial space market. CP 83, 121.

Harbor Marine is a retail seller of boat equipment and supplies and provides boat maintenance services. CP 61. It is owned and operated by its president, Lauren Bivins. CP 42. Prior to entering into the lease at issue in this dispute, Harbor Marine leased retail and warehouse space from the Port of Everett (the “Port”). CP 42. However, it was on notice that it would be required to relocate its office and warehouse facility with the planned redevelopment of Everett’s north marina. CP 133, 136-138.

In 2009, Mr. Bivins was engaged directly in talks with the Port regarding the possible relocation of Harbor Marine to a new port facility. E.g., CP 44. However, Mr. Bivins was unable to secure new space with the Port, so he sought the assistance of Kidder Mathews to secure Harbor Marine's new space. CP 83-84, 94.

A. Harbor Marine Signs Exclusive Client Representation Agreement with Kidder Mathews.

In approximately January 2010, Harbor Marine's attorney, David Carson, introduced Mr. Bivins to Mr. Henn for the purpose of assisting Harbor Marine in securing a facility to relocate its business. CP 44. On January 29, 2010, Mr. Henn and Mr. Hagen researched and provided Mr. Bivins with Everett area rent comparables, including details on four different properties, to assist Harbor Marine in locating new space. CP 126-30. Two days later, on February 1, 2010, Mr. Bivins, as President of Harbor Marine, signed the CRA with Kidder Mathews so that Harbor Marine could utilize Kidder Mathews' services in securing new space. CP 94. The CRA gave Kidder Mathews the right of exclusive representation of Harbor Marine and entitled Kidder Mathews to a brokerage fee in the event Harbor Marine entered into a "lease renewal, new lease, or purchase of a facility" during the term of the CRA with the amount of fee specified

in the CRA. CP 94. The CRA was for a twelve (12) month term after which it would be extended on a month to month basis. CP 94.

Although Mr. Bivins later testified that Harbor Marine would “engage [Kidder Mathews] to assist in the negotiations with [the Port] only,” CP 44, the CRA does not limit Kidder Mathews to negotiating only with the Port; instead, it confirmed Harbor Marine was looking at various facility alternatives and states, “in the event of the consummation of a lease renewal, new lease, or purchase of a facility,” Kidder Mathews would be entitled to a commission, CP 94. Moreover, as set forth below, Mr. Bivens admits that he directed Kidder Mathews to research and locate another suitable property when continued negotiations with the Port stalled. CP 139. Mr. Bivins admitted he was represented by counsel, (and in fact was introduced to Mr. Henn by his counsel), when he discussed and ultimately executed the CRA. CP 44. There was no confusion as to the nature of the exclusive representation, the duties to be performed by Kidder Mathews, or the fact that Harbor Marine was to secure the payment of the commission from the owner “in the event of the consummation of a lease renewal [or] new lease.” CP 94.

B. Kidder Mathews Researches and Identifies Potential Lease Space for Harbor Marine.

Following execution of the CRA, Mr. Henn immediately became involved as the agent for Harbor Marine in negotiations with the Port, submitting numerous proposals and counterproposals for space in the Port-owned MSRC building. E.g., CP 50-56. However, in March 2010, when negotiations with the Port stalled, Mr. Bivins requested that Mr. Henn conduct a search for and present Harbor Marine with a list of suitable properties other than the Port's MSRC building for possible relocation. CP 133, 139. Mr. Bivins testified as to his directions to Mr. Henn in anticipation of an upcoming March 24, 2010 meeting:

Q. Prior to the meeting did you have a discussion with Mr. Henn about the meeting that you were going to have? In other words, did you discuss the fact that we need to have a meeting and talk about some other options other than the Port of Everett, because those negotiations are stalling so we've got to look at some other options?

A. **Yes.**

Q. And when you had that discussion with Mr. Henn, what was his response?

A. **He would see what he could find.**

Q. He told you he'd go out and search and see what he could find that was available on the market that might suit your needs; right?

A. **Right.**

...

Q. And in response to the discussions that you were going to have with regards to locating some new property, he went out and found some comparable properties that might interest you. Is that right?

A. Well, yeah, he put some things on the table to see if they would work

CP 133, 139.

In response to Mr. Bivin's request, and prior to the March 24, 2010 meeting, Mr. Henn and Mr. Hagen performed a search of available properties that might be suitable for Harbor Marine. CP 84. As part of their research Mr. Hagen contacted Jim Schack, President of Norton Industries, Inc., the owner of the TC Systems building. CP 84, 117. The TC Systems building was currently under lease, but Kidder Mathews understood from its ongoing communications with Mr. Schack that the TC Systems building could become available within the next few weeks. CP 117. In the phone and e-mail exchanges between Kidder Mathews and Mr. Schack, Kidder Mathews clearly laid the ground work for Harbor Marine's eventual lease of the building, as Mr. Hagen's March 17, 2010 e-mail to Mr. Schack demonstrates:

Hello Jim:

Hope all is well!

Per the VM I left earlier for you, I want to shoot over a quick email to inquire about the status of the TC Systems Buildings.

Matt Henn and I exclusively represent Harbor Marine and feel that your building would be a decent fit for their operations.

They need approximately 30,000 SF and would be willing to commit to a 10 year lease.

Would your buildings [sic] worth putting on our preliminary list or have you secured a long term deal w/ the new ownership of TC Systems?

We'll stay tuned to hear back from you.

Talk to you soon.

Matthew Hagen.

CP 117, 132.

Mr. Schack responded approvingly, welcoming the opportunity to work with Kidder Mathews to secure Harbor Marine as a lessee:

Dear Matt and Kraig:

Jackie and I have been skiing and will be away until the weekend. I have been in negotiations with the prospective purchasers of TC Systems and have come to a tentative agreement on terms, pending a successful purchase of the business from TC systems. TC lease extension runs out at the end of March.

I would like to be included on the preliminary list. Should sale of TC fall apart, I would be interested in working with you on Harbor Marine.

Yours truly

Jim Schack

CP 122-123, 132.

On March 24, 2010, Mr. Henn and Mr. Hagen met with Mr.

Bivins, Harbor Marine's attorney, Mr. Carson, and Mark VanWyngarden,

Harbor Marine's accountant, at Carson's law office. CP 85. At this

meeting, Mr. Henn presented Mr. Bivins with a Preliminary Industrial Space Available Survey of properties and included the TC Systems building within the report. CP 96-114. Mr. Henn also updated Mr. Bivins with the communications with Jim Schack of Norton industries regarding the availability of the building. CP 96-114. Mr. Bivins confirmed receipt of the TC Systems information from Kidder Mathews testifying:

Q. ...You did request that he put together a survey of alternative buildings, didn't you?

A. **And which he did, and some were suitable and some were not.**

Q. And the TC Systems building that was identified in his survey was one of those suitable buildings, wasn't it?

A. **Yeah, a property he identified, yes.**

CP 133, 151.

Mr. Bivins specifically made the point that it was a property that *Mr. Henn* identified for Harbor Marine. CP 133, 151. And, although Mr. Bivins now claims he was generally familiar with the TC Systems building and had contact with Mr. Schack in November or December of the prior year (a claim unsupported by any evidence), he admits he had no knowledge prior to the March 24, 2010 meeting with Kidder Mathews that the facility was coming available. CP 133, 143. Kidder Mathews' identification of the building's availability triggered Mr. Bivins's desire to

see it immediately. CP 133, 143. Mr. Bivins left the meeting with Mr. Henn and Mr. Hagen and immediately toured the facility. CP 133, 143.

C. Harbor Marine Secretly Negotiates Lease to Avoid Paying the Brokerage Fee to Kidder Mathews.

Although aware of its obligations to Kidder Mathews under the CRA, Mr. Bivins admitted that within a week of the March 24, 2010 meeting with Kidder Mathews and his tour of the building with Mr. Henn, he contacted Mr. Schack directly about leasing the TC Systems building:

Q. Let's see if I can put the time sequence together. So in November or December you spoke with Schack and you understood that the building, the TC Systems building was unavailable?

A. Correct.

Q. You negotiate with the Port of Everett for a building and those negotiations came to a standstill; correct?

A. They stalled, yes.

Q. You scheduled a meeting with Matt Henn and your attorney to talk about some other potential properties.

A. Right.

Q. Correct?

A. Right.

Q. And in anticipation of the meeting Mr. Henn does some research to find out what buildings might be available and he provides you the preliminary survey in anticipation of the meeting; correct?

A. Right.

Q. And in the meeting he advises you that the TC Systems building may be available now in the future; correct?

A. **That was his claim.**

Q. And he went and toured the building with you then that same day; correct?

A. **We did that.**

Q. And one week later you met with Mr. Schack to talk about the building, the TC Systems building; correct?

A. **We seem to be missing some components, but yes.**

CP 133, 143.

Mr. Bivins and Mr. Schack then met and began discussing the terms of a lease, without including Kidder Mathews. CP 133, 142. Mr. Bivins further failed to disclose to Kidder Mathews or Mr. Henn that he was engaging in these discussions. CP 123. In the meantime, Kidder Mathews continued to call Mr. Schack, who now was avoiding their phone calls. CP 85-86, 122-123.

When Mr. Henn found out that Mr. Bivins and Mr. Schack were secretly negotiating the lease, he contacted them reminded both parties of the exclusive CRA between Kidder Mathews and Harbor Marine by sending them an e-mail and a copy of the CRA. CP 86, 116. Both Harbor Marine and Norton Industries acknowledged the CRA and proceeded to execute a ten year Commercial Lease for the TC Systems buildings B and C on May 21, 2010 ("Lease"). CP 133-34, 153-61. Recognizing that a fee would be owed to Kidder Mathews, Harbor Marine and Norton Industries

included an indemnification provision in the Lease whereby Harbor Marine agreed to indemnify Norton Industries against any fee Harbor Marine owed. CP 155. Despite the CRA's contractual obligation of Harbor Marine to require that a fee be paid by the property owner, Harbor Marine failed to do so. CP 94. After the Lease was signed, Kidder Mathews demanded its fee in accordance with the CRA and Harbor Marine refused. Kidder Mathews then filed this action to recover the brokerage fee owed. CP 186-92. Summary judgment was entered in favor of Kidder Mathews on September 23, 2011. CP 9-10.

III. ARGUMENT

The standard of review on appeal from summary judgment "is de novo and the appellate court performs the same inquiry as the trial court." Botka v. Estate of Hoerr, 105 Wn. App. 974, 979, 21 P.3d 723 (2001). A trial court properly grants summary judgment when there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). While trial courts consider evidence in the light most favorable to the nonmoving party, the nonmoving party must offer more than "conclusory allegations, speculative statements, or argumentative assertions of the existence of

unresolved factual issues.” Ragland v. Lawless, 61 Wn. App. 830, 836, 812 P.2d 872 (1991).

If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. Voorde Poorte v. Evans, 66 Wn. App. 358, 362, 832 P.2d 105 (1992); see also Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995) (reaffirming rule that courts construe unambiguous contracts as a matter of law). When it evaluates a written contract, this Court must ascertain intent from reading the contract as a whole and not read ambiguity into the contract. Here, the contract is unambiguous as to whether Harbor Marine must require an Owner to pay a brokerage fee. By failing to require the owner (Norton Industries) to pay the brokerage fee as promised in the CRA, Harbor Marine breached the CRA. The measure of damages is the amount of the fee set forth in the CRA. No facts regarding the transaction are in dispute. Consequently, the trial court properly granted summary judgment in favor of Kidder Mathews.

A. Kidder Mathews Is Entitled to a Brokerage Fee under the Unambiguous Terms of the CRA.

Washington courts apply three basic rules to construe written contracts: “(1) the intention of the parties must control; (2) the intent must be ascertained from reading the contract as a whole; and (3) where the

language used is not ambiguous, ambiguity will not be read into the contract.” E.g., James S. Black & Co. v. P & R Co., 12 Wn. App. 533, 535, 530 P.2d 722 (1975). While courts may consider extrinsic evidence to aid interpretation, courts may not consider “evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term,” “evidence that would show an intention independent of the contract,” or “evidence that varies, contradicts or modifies the written language of the contract.” Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 84, 60 P.3d 1245 (2003). Thus, courts should endeavor to “ascertain what is written in the contract, and not what the parties intended to be written.” Id. at 85.

The unambiguous terms of the CRA provide as follows:

Harbor Marine, Inc. shall hereinafter be referred to as “Client.” . . . It is hereby confirmed that GVA Kidder Mathews, hereinafter referred to as “Agent”, exclusively represents Client.

It is hereby confirmed that in the event of the consummation of a lease renewal, new lease, or purchase of a facility, Client hereby requires that a brokerage commission in consideration of brokerage services rendered shall be paid by Owner to Agent as follows:

Lease Agreement: Owner Agrees to pay Agent a Commission in the amount of five percent (5%) of the total base rents of years 1-5 of the Lease Term and two and one-half percent (2.5%) for years 6-10 of the lease terms, one-half

(1/2) payable at mutual execution of Lease Agreement, one-half (1/2) due at Commencement Date of the Lease Agreement.

CP 94 (emphasis added).

An “event” is “something that takes place: occurrence.”

Webster’s II New College Dictionary (2d ed. 1999). “Consummate” or “consummation” means “to bring to fruition: conclude.” *Id.* at 242.

Under the plain language of the CRA, then, Kidder Mathews was entitled to a commission when a lease was concluded. This language is unambiguous, and the intent of the parties is apparent: Kidder Mathews provided brokerage services for which it would be paid when a lease – not just a lease with the Port – was consummated.

Harbor Marine cannot offer any facts – other than Mr. Bivins’s conclusions and speculation – that undermine the trial court’s decision to grant summary judgment in favor of Kidder Mathews. Following execution of the CRA, Kidder Mathews unequivocally provided brokerage services to Harbor Marine. *E.g.*, CP 126-30. Mr. Henn researched and educated Mr. Bivins as to comparable industrial rental rates in the Everett area. CP 83-84, 88-92, 121-122, 126-130. Kidder Mathews also provided brokerage services to Harbor Marine by negotiating a potential lease with the Port of Everett for the MSRC building. CP 50-56. And, in March 2010, when those discussions stalled, Kidder Mathews performed further

brokerage services for Harbor Marine, including the research and analysis of other suitable market properties which revealed the TC Systems building. CP 84, 96-115. It contacted the owner, Mr. Schack, and determined the conditions under which the building was to come available. CP 117. It then provided these viable options to Harbor Marine in a March 24, 2010 report and meeting with Mr. Bivins and Harbor Marine's attorney and accountant. CP 96-115.

During that meeting, Kidder Mathews informed Mr. Bivins of the potential availability of the TC Systems building within the following two weeks. CP 85. Mr. Bivins admitted that until the meeting with Kidder Mathews, he understood that the TC Systems building was unavailable. CP 43-44, 133, 141. Mr. Bivins was so enamored with the prospect of leasing the TC Systems building that he left that meeting and immediately toured the TC Systems building with Mr. Henn and Mr. Hagen. CP 133, 143. Kidder Mathews had already received positive feedback from Mr. Schack, the owner of the TC Systems building, acknowledging Kidder Mathews as the exclusive agent for Harbor Marine and agreeing to work with Kidder Mathews as Harbor Marine's agent upon the space becoming vacant. CP 122-123, 132.

Although Mr. Bivins and Mr. Schack attempted to keep their lease negotiations secret, Mr. Henn became aware of the discussions and

notified both parties that Kidder Mathews was entitled to a commission in the event a lease was consummated during the term of the exclusive CRA. CP 86. Despite this knowledge, on May 21, 2010, Harbor Marine executed leases with Norton Industries for the TC Systems buildings B and C. CP 133-34, 153-61. Upon execution of the leases, Kidder Mathews was entitled to a brokerage fee under the plain language because a “new lease” was “consummated.” Harbor Marine has offered no facts that establish a genuine dispute as to whether Kidder Mathews rendered brokerage services in order to receive a commission under the exclusive CRA. This point is especially true where, as here, Harbor Marine attempted to avoid its contractual obligations by interfering with Kidder Mathews’ performance, i.e., secretly negotiating a lease with a building owner after Kidder Mathews identified the building as available, researched and analyzed its viability, and contacted the building owner.¹

¹ Harbor Marine argues at length in its opening brief that it was confused by the terms of the CRA and understood that a potential owner/lessor, not Harbor Marine, would be responsible for any commission to Kidder Mathews. E.g., Appellant’s Opening Brief at 19. However, Harbor Marine was represented by counsel, Mr. Carson, when it signed the CRA and included an indemnification provision regarding the commission in its lease with Norton Industries. CP 139, 153-61. Its arguments on appeal are unsupported by the record.

B. Harbor Marine Breached the CRA by Failing to Require Norton Industries to Pay a Brokerage Fee when the Lease Was Consummated.

The unambiguous terms of the CRA provide that Harbor Marine would ensure that the Owner of the property pay the brokerage fee as part of any lease transaction. The CRA signed by Harbor Marine provides:

It is hereby confirmed that in the event of the consummation of a lease renewal, new lease, or purchase of a facility, Client hereby requires that a brokerage fee in consideration of brokerage services rendered shall be paid by Owner to Agent.

CP 94 (emphasis added).

Harbor Marine was well aware of this provision when Mr. Bivins and Mr. Shack of Norton Industries discussed it during their first visit:

Q. Did you make even a request in writing to Mr. Schack that he pay a fee in relation to this transaction?

A. We had a verbal conversation about it.

Q. Tell me about your verbal conversation.

A. I made him aware of this agreement and that we were positive that Matt Henn was going to come after some kind of fee for the transaction.

...

Q. And so I want to know how many times you had the conversation with Mr. Schack about this issue, the issue of whether or not a fee would be paid to Kidder Mathews.

A. Once or twice.

Q. And did you have that first conversation right out of the blocks when you first started talking about a draft of the lease?

A. No. It was in the first week.

Q. Within the first week of you contacting him following your tour of the building with Kidder Mathews?

A. Yes.

...

Q. Did you tell him, oh, by the way, Jim, I've got a client representation agreement where I'm supposed to require that you pay a fee as part of any transaction. Did you tell him that?

A. I didn't tell him that specifically. I shared the agreement with him at some point.

CP 133, 149-150.

Rather than comply with the CRA he executed, Mr. Bivins instead completed the ten year lease transaction without requiring that Norton Industries pay the brokerage fee:

Q. So the lease was executed on May 21st of 2010. You knew by the 12th of 2010 that Kidder Mathews had been in contact with Jim Schack and the TC Systems building; correct?

A. Yes.

Q. And you knew that Matt Henn was claiming that he was entitled to a fee according to his representation agreement; correct?

A. Claiming, right.

Q. And you saw the representation agreement; right?

A. I did see that.

Q. And you moved forward with the transaction knowing that that claim for a fee was being made by Kidder Mathews; correct?

A. That he was making a claim about that?

Q. Yes.

A. Yes, I did.

CP 133, 147-148.

Q. Did you require that a brokerage commission be paid by the owner in this transaction that you executed with Mr. Schack and Norton Industries for the TC Systems building?

A. I don't know how to do that.

CP 133, 149.

Q. After this conversation with Mr. Henn, did you continue to refuse to make any arrangements to get a fee paid to Kidder Mathews?

A. Correct.

CP 133, 151.

Harbor Marine's obligation to Kidder Mathews was to require as part of any lease transaction that the owner of the property pay the brokerage fee. Harbor Marine had the option of either requiring Norton Industries pay the commission, paying the commission itself or not consummating the lease with Norton Industries. Both Harbor Marine and Norton Industries were aware of the ramifications of Harbor Marine's conduct by drafting and including an indemnification provision in their lease agreements, whereby Harbor Marine agreed to remain responsible for the commission rather than require the owner, Norton Industries to pay as Harbor Marine promised in its CRA with Kidder Mathews. CP 153-61. However, by failing to require that payment as part of the transaction, and failing to pay the commission itself, Harbor Marine breached its exclusive

CRA with Kidder Mathews. The measure of damages is the fee outlined in the CRA.

Although Harbor Marine offers speculation and conclusions on this point, Harbor Marine has offered no admissible facts to create a genuine issue of material fact to avoid summary judgment. As such, Kidder Mathews was properly granted judgment as a matter of law against Harbor Marine for the brokerage fee due under the CRA.

C. The Procuring Cause Doctrine Does Not Apply.

Harbor Marine claims that Kidder Mathews was not entitled to a commission because it was not the “procuring cause” of the transaction. To make this argument, Harbor Marine relies at length on two cases, Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc., 120 Wn.2d 573, 844 P.2d 428 (1998), and Tanner Elec. Co-op v. Puget Sound Power & Light Co., 128 Wn.2d 656, 911 P.2d 1301 (1996), reasoning that a “reasonably plausible” interpretation of the CRA is that Kidder Mathews had to be the “procuring cause” of the lease, so summary judgment was inappropriate. Yet, these cases are inapposite because “procuring cause” is not a necessary condition for payment of the brokerage fee when an effective contract governs the parties’ relationship. E.g., Willis v. Champlain Cable Corp., 109 Wn.2d 747, 755, 748 P.2d 621 (1988). Washington courts apply the “procuring cause” doctrine only when the parties have no

written agreement, or a written agreement is “ineffective due to illegality, lack of capacity, or otherwise.” Wash. Prof'l Real Estate, LLC v. Young, 163 Wn. App. 800, 809-10, 260 P.3d 991 (2011); Professionals 100 v. Prestige Realty, Inc., 80 Wn. App. 833, 837, 911 P.2d 1358 (1996); Roger Crane & Assocs. v. Felice, 74 Wn. App. 769, 776, 875 P.2d 705 (1994); Willis, 109 Wn.2d at 755. For example, in Willis, the court noted, “[the procuring cause] rule is applied to allow agents commissions on sales completed after a principal has terminated their employment if the sales resulted from the agent’s efforts.” 109 Wn.2d at 754 (finding procuring cause rule inapplicable in employment case where the written contract provided “the manner by which termination [could] be effected as well as how commissions [would be] awarded when an employee or agent [was] terminated”). Similarly, in the most recent case, Washington Professional Real Estate, LLC, the court noted that the procuring cause doctrine “provides a *default* standard for liability to pay a commission where the parties have not yet agreed on a different standard, or where the parties’ agreement as to when a commission will be paid proves ineffective.” 163 Wn. App. at 810 (emphasis added). To the extent that the procuring cause doctrine is consistent with the parties’ written agreement, “case law dealing with the procuring cause standard applies.” Id. at 810. Notably, however, “a contract can provide for payment of commissions to a broker

for being something less than the procuring cause of sale and when it does, the terms of the contract control unless the contract is ineffective.” Id.

Here, the CRA grants Kidder Mathews the right to exclusive representation of Harbor Marine, which entitles Kidder Mathews to its fee upon Harbor Marine’s execution of a lease, regardless of whether the broker is the procuring cause. See Geoghegan v. Dever, 30 Wn.2d 877, 900, 194 P.2d 397 (1948) (holding “when property is listed with a real-estate broker under an exclusive agency contract, and the property is sold by the owner through another broker while the exclusive agreement is still in force, the broker in the original exclusive contract is entitled to his commission”); CP 94. Consequently, Kidder Mathews is entitled to its commission so long as it is the exclusive agent of Harbor Marine, and Harbor Marine entered into a lease during the term of the brokerage agreement, which it did. CP 94. Harbor Marine acknowledges that the CRA itself provides the standard for performance and therefore substitution of a procuring cause standard is not appropriate. All conditions of the CRA were fulfilled. Harbor Marine has introduced no facts to genuinely contest that it granted Kidder Mathews an exclusive right of representation; it agreed to require a brokerage fee to be paid as part of any lease; and during the term of the CRA, it entered into a lease with Norton Industries. CP 94, 153-56. Kidder Mathews is therefore

entitled to the fee under the contract and requests summary judgment for the amount of the fee due.

Harbor Marine argues that the language of the CRA somehow converts the CRA from an exclusive CRA into a procuring cause CRA. Furthermore, Harbor Marine argues that summary judgment was inappropriate because (i) Kidder Mathews did not have minimum causal relationship to the landlord and (ii) there are genuine issues of material facts that as to the parties' intention with respect to payment of a commission. None of these arguments have merit.

In making its argument that the procuring cause doctrine is applicable, Harbor Marine points to certain language requiring Kidder Mathews to "utilize reasonable effort and diligence to achieve the purpose of this Agreement" and to provide "brokerage services" in consideration of the commission. CP 94. From this language, Harbor Marine reasons that because Kidder Mathews had to provide some level of service, the provision of services automatically changes the CRA from being an exclusive agreement to a procuring cause agreement. Harbor Marine then argues that as the term "brokerage services" is not explicitly defined by the parties, the court must apply "procuring cause" as the default standard. However, a simple analysis reveals that Harbor Marine's leaps of logic are nothing more than leaps of faith.

First, although the CRA required Kidder Mathews to utilize reasonable efforts and diligence to provide brokerage services, this fact in no way precludes Kidder Mathews from receiving a commission “in the event of the consummation of a lease renewal, new lease, or purchase of a facility.” Nor does such language mirror or even resemble those of a procuring cause standard. Roger Crane & Assocs., Inc., 74 Wn. App. at 776 (stating procuring cause standard as “[w]hen a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, he is entitled to a commission regardless of who makes the sale if he was the procuring cause of the sale”). In particular, the CRA does not require Kidder Mathews to procure a landlord or seller, only to use reasonable efforts in providing brokerage services. CP 94.

Second, Harbor Marine simply ignores the fact that per the language of the CRA, Kidder Mathews is still, indisputably, Harbor Marine’s exclusive agent, and the CRA is an exclusive agreement. CP 94. The fact that Kidder Mathews is to provide a certain level of service in order to receive a commission does not detract its right to a commission under the CRA. This point is finely illustrated in Harbor Marine’s own argument regarding minimal causal relationships. As stated in Washington Professional Real Estate, LLC, even in an exclusive tail arrangement, the broker had to prove some level of service before the

broker is entitled to a commission. 163 Wn. App. at 810-11.² Here, it is uncontested that Kidder Mathews provided brokerage services which warrant payment under the CRA.

Third and finally, Harbor Marine simply assumes that since the term “brokerage services” is not explicitly defined by the parties, it necessarily means “procuring cause.” This assumption is contrary to Washington law because courts give undefined contractual terms their ordinary meaning, barring some indication that the parties intended differently. Terry Brink v. Airheart, 16 Wn. App. 380, 385, 558 P.2d 304 (1976); see also Schauerman v. Haag, 68 Wn.2d 868, 873, 416 P.2d 88 (1966). Furthermore, Washington statutes conveniently provide a definition applicable to all brokers operating within the state of Washington.” RCW 18.85.011(2); (16). Under RCW 18.85.011:

(2) "Broker" means a natural person acting on behalf of a real estate firm to perform real estate brokerage

² Lloyd Hammerstad, Inc. v. Saunders, 6 Wn. App. 633, 495 P.2d 349 (1972) and Roger Crane & Assocs., Inc., 74 Wn. App. at 776, are readily distinguishable for different reasons. First, in Lloyd Hammerstad, the court analyzed a tail provision and found “literally *no* connection between the broker’s activities and the sale. 66 Wn. App. at 636; Wash. Prof'l Real Estate, LLC, 163 Wn. App. at 813. Lloyd Hammerstad involved a different issue (a tail provision) and distinguishable facts (no connection) from the issue (the terms of the CRA) and facts (Harbor Marine’s secret negotiations) in this case. And while Roger Crane & Associates, Inc. did not involve a tail provision, the court analyzed the facts in that case under the procuring cause doctrine because the court held that the listing agreement did not create a binding contract, a fact which does not exist here. 74 Wn. App. at 775-76.

services under the supervision of a designated broker or managing broker.

(16) "Real estate brokerage services" means any of the following services offered or rendered directly or indirectly to another, or on behalf of another for compensation or the promise or expectation of compensation, or by a licensee on the licensee's own behalf:

(a) Listing, selling, purchasing, exchanging, optioning, leasing, renting of real estate, or any real property interest therein; or any interest in a cooperative;

(b) Negotiating or offering to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate, or any real property interest therein; or any interest in a cooperative;

(c) Listing, selling, purchasing, exchanging, optioning, leasing, renting, or negotiating the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, lease, exchange, or rental of the land upon which the manufactured or mobile home is or will be located;

(d) Advertising or holding oneself out to the public by any solicitation or representation that one is engaged in real estate brokerage services;

(e) Advising, counseling, or consulting buyers, sellers, landlords, or tenants in connection with a real estate transaction;

(f) Issuing a broker's price opinion. For the purposes of this chapter, "broker's price opinion" means an oral or written report of property value that is prepared by a licensee under this chapter and is not an appraisal as

defined in RCW 18.140.010 unless it complies with the requirements established under chapter 18.140 RCW;

(g) Collecting, holding, or disbursing funds in connection with the negotiating, listing, selling, purchasing, exchanging, optioning, leasing, or renting of real estate or any real property interest; and

(h) Performing property management services, which includes with no limitation: Marketing; leasing; renting; the physical, administrative, or financial maintenance of real property; or the supervision of such actions.

Harbor Marine has admitted that Kidder Mathews provided rent surveys, *see* RCW 18.85.011(16)(e), engaged in various lease negotiations with the Port, *see* RCW 18.85.011(16)(b), and provided research, analysis and advice of alternative properties which may suit (and one in fact did suit) Harbor Marine's needs, *see* RCW 18.85.011(16)(e). E.g., CP 96-114, 126-30. These services were unquestionably real estate brokerage services. Kidder Mathews is entitled to its commission because it provided these services, and Harbor Marine has successfully entered into a lease agreement. Therefore, this Court should affirm the trial court's decision to grant summary judgment.

D. Minimal Causal Relationship.

Harbor Marine cites the cases Washington Professional Real Estate, LLC and Lloyd Hammerstad for the proposition that the broker claiming a commission must establish that there is some minimal causal relationship between the broker's action and the transaction consummated. E.g., Appellant's Opening Brief at 26, 30. Yet, Harbor Marine has misstated the law. In both Washington Professional Real Estate and Lloyd Hammerstad, the courts state explicitly that the minimal causal relationship requirement was limited to the extension or tail periods of such cases: "The underlying purpose of extension provisions such as that contained in the instant contract is stated in Clients' Serv., Inc.... Implicit in this underlying purpose is the fact that there must be some minimal causal relationship between the activities of the broker during the listing period and the ultimate sale." Lloyd Hammerstad, 6 Wn. App. at 635-36 (emphasis added); see also Wash. Prof'l Real Estate, LLC, 163 Wn. App. at 809-10 (noting, "[d]ecisions since Lloyd Hammerstad have not provided further guidance on the required 'minimal causal relationship' when a broker claims entitlement to a commission under a tail provision") (emphasis added); Redburn v. Alaska Airlines, Inc., 20 Wn. App. 315, 320-21, 579 P.2d 1354 (1978)(reasoning that the "minimal causal relationship" test applies after the listing period to limit "the broker's

absolute right to commission during the extension period”). Here, Harbor Marine offers no evidence to show that the CRA was ever terminated before it leased the TC Systems Building or that any tail provision was otherwise in effect.

Even if the minimal causal relationship test applied during the term of the CRA, which it does not, Kidder Mathews has established a minimal causal relationship (at the very least) with the TC Building transaction to allow it to receive a commission. Harbor Marine cannot dispute that Kidder Mathews informed it of the availability of the TC Systems building in March 2010. CP 133, 143. Harbor Marine cannot dispute that Kidder Mathews provided it with details of the building, including square footage, building dimensions and lease rates. CP 96-114. It cannot dispute that Kidder Mathews toured the building with the express approval of Harbor Marine and Jim Schack, the building owner. CP 133, 143. Harbor Marine cannot dispute that Kidder Mathews provided it with the tools necessary to negotiate the lease through by providing comparable buildings and rental rates. CP 96-114, CP 133, 143. Harbor Marine’s president, Mr. Bivins, admitted he knew nothing about the building (other than its size) or its availability before Kidder Mathews’ actions. CP 133, 141.

Harbor Marine now claims that Kidder Mathews did not have a minimal causal relationship with the TC Building Transaction, but it was

Harbor Marine who deliberately prevented Kidder Mathews from assisting with the transaction and closing. Because Harbor Marine “in bad faith deprive[d] the broker of the opportunity of consummating the sale to a purchaser whom he has produced and with whom he is negotiating, the broker may be considered as the proximate and procuring cause of the sale as a matter of law.” Feeley v. Mullikin, 44 Wn.2d 680, 686, 269 P.2d 828 (1954); Poggi v. Tool Research & Eng'g Corp., 75 Wn.2d 356, 451 P.2d 296 (1969); See Zelensky v. Viking Equip. Co., Inc., 70 Wn.2d 78, 82-83, 422 P.2d 293 (1966). See also Willis, 109 Wn.2d at 755; Harold Wright Co. v. E.I. Du Pont De Nemours & Co., Inc., 49 F.3d 308, 310 (7th Cir. 1995).

Finally, both Harbor Marine and Norton Industries contemplated the ramifications of Harbor Marine’s conduct by drafting and including an indemnification provision in their lease agreements, whereby Harbor Marine agreed to remain responsible for the commission rather than require the owner, Norton Industries to pay as Harbor Marine promised in its CRA with Kidder Mathews. CP 153-61. Harbor Marine’s argument on appeal that it did not understand that it could be responsible for the commission under the CRA is misplaced.

E. Kidder Mathews Was the Procuring Cause of the Lease.

Even if the CRA did not provide a standard or was in some way ineffective, which Harbor Marine cannot show, Kidder Mathews is still the procuring cause and is still entitled to the brokerage fee. The standard for the procuring cause doctrine is “activity that sets in motion the chain of events or negotiations culminating in a sale.” Syputa v. Druck, Inc., 90 Wn. App. 638, 646, 954 P.2d 279 (1998). In his deposition, Mr. Bivins, confirmed Kidder Mathews’ actions “set in motion” the activity that led to the execution of the lease. CP 133, 143. As of March 24, 2010, Mr. Bivins was convinced that the TC Systems building was not available to lease. CP 44, 133, 143. It was not until Kidder Mathews made contact with the owner, Mr. Schack of Norton Industries on March 17, 2010, and determined the TC Systems building could become available within a few weeks that Mr. Bivins was aware of its availability. CP 133, 143. Kidder Mathews conveyed that information to Mr. Bivins on March 24, 2010, who took that information and secretly negotiated his own deal to avoid paying Kidder Mathews its commission:

Q. So you spoke with Schack in you say November, early December of 2009?

A. Mm-hmm.

Q. Is that correct?

A. Mm-hmm.

MR. FOSTER: Yes?

A. Yes. I'm sorry.

Q. (By Mr. Callan) And Mr. Schack told you that the building was not available?

A. Correct.

Q. And had you spoken with -- that was the last time you spoke with him in November or December of 2009, before this March 24th meeting?

A. Yes.

CP 133, 140-141.

Mr. Bivins further confirmed that Mr. Henn had contacted Mr. Schack and researched the TC building:

Q. So did Mr. Henn's comments and inclusion of the TC building in this preliminary survey, did that spur some interest on your part to pursue it?

A. Yes.

Q. And in fact you left the meeting immediately and directly went down to view the building, didn't you?

A. I believe we did.

Q. So --

A. With his encouragement.

Q. Right. Because he indicated that the building might become available in the future; correct?

A. Yes.

Q. And his comments regarding the potential availability is what triggered some interest on your part to go down and look at the building; correct?

A. Yes.

Q. And to pursue the building if it did become available; correct?

A. Sure.

CP 133, 141.

Mr. Bivins also acknowledged that he went behind Mr. Henn's back to secretly negotiate the lease because the CRA with Kidder Mathews was still in place during that time period:

Q As of March 31st when you had your meeting with Mr. Schack, was Mr. Henn and Kidder Mathews still representing you under Exhibit No. 2?

A. By the dates that are on there it meets within that time period.

Q. You hadn't terminated Mr. Henn or Kidder Mathews, had you?

A. No.

CP 133, 144.

Harbor Marine only became aware that the TC Systems building would become available for lease after Kidder Mathews conducted its market research on building availability and contacted Mr. Schack. CP 133, 140-41. Mr. Bivins admitted that the information provided to him by Kidder Mathews triggered him to go see the TC Systems building and to pursue it. CP 133, 141. Kidder Mathews' initiated the contact with Jim Schack that set into motion the chain of events which culminated in execution of the Lease. CP 132. None of these facts are in dispute. Kidder Mathews is therefore the procuring cause, assuming the doctrine applies at all. CP 132.

Particularly where, as here, a client like Harbor Marine secretly pursues a lease in order to deliberately cut out a broker, it is irrelevant that Kidder Mathews did not actually negotiate the terms of the lease. Kidder Mathews procured the opportunity and was therefore entitled to the brokerage fee. The information Kidder Mathews supplied Mr. Bivins contained everything he needed to complete the negotiations. Mr. Bivins admitted he had none of this information related to the TC Systems building before it was provided by Kidder Mathews for his benefit:

Q. Were you aware of what the rents that were being paid at the building were?

A. **No.**

Q. And we're talking about buildings B and C of the TC Systems buildings; correct?

A. **Yeah, I don't have any idea what the rents were.**

Q. And other than the size of the space, did you have any other information about the building?

A. **No.**

Q. So did Mr. Henn's comments and inclusion of the TC building in this preliminary survey, did that spur some interest on your part to pursue it?

A. **Yes.**

CP 133, 141.

Although Kidder Mathews was prevented from actually closing the transaction, this does not free Harbor Marine from its contractual obligation to secure payment of the fee. Under the procuring cause

doctrine, when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, that party is entitled to a fee regardless of who eventually completes the sale. Syputa, 90 Wn. App. at 646; Restatement (Second) of Agency § 454 (1958); see also Roger Crane & Assocs, Inc., 74 Wn. App. at 777. Harbor Marine should not be released from its contractual obligation particularly because it failed to disclose direct negotiations with Mr. Schack:

Q. Did you contact Mr. Henn and tell him that you had met with Mr. Schack with regards to the TC Systems building?

A. Yes.

Q. Did you tell him at the time, March 31st, when you had this meeting?

A. No.

CP 133, 144.

...

Q. Did you tell Mr. Hagen that you were negotiating with Mr. Schack directly?

A. No.

CP 133, 145.

Mr. Bivins never provided Kidder Mathews notice until a deal was essentially done:

Q. How was it that you notified Mr. Henn?

A. Via phone conversation.

Q. And what did you tell him in that phone call?

A. **That basically we made the deal and had a handshake.**

Q. You being you and Mr. Schack of Norton Industries had made a deal for the TC Systems building?

A. **Yes.**³

CP 133, 145-146.

So after being advised by Kidder Mathews that the TC Systems building was available, Mr. Bivins used such information to negotiate a deal directly with Schack. Although Harbor Marine refused Kidder Mathews' offers to assist in the negotiations of the Lease and help close the transaction, Harbor Marine's bad faith actions do not deprive Kidder Mathews of its brokerage fee, or of Harbor Marine's obligations under the CRA.

IV. REQUEST FOR ATTORNEYS' FEES

The CRA allows Kidder Mathews⁴ to seek attorney's fees and costs if it is successful in enforcing the terms of the CRA. CP 94.

Because this Court should affirm summary judgment in favor of Kidder

³ If Harbor Marine indeed believed that it was not contractually obligated to pay Kidder Mathews a commission under the CRA, than it would have no reason to avoid telling Kidder Mathews it had leased the TC Systems Building from Mr. Schack.

⁴ Interestingly, Harbor Marine seeks fees in its appeal, even though the fee provision requires the "Owner" to pay fees. CP 94. Harbor Marine cannot have it both ways. Either it understood that it was obligated under the CRA or it did not. Compare Appellant's Brief at 20 with Appellant's Brief at 33.

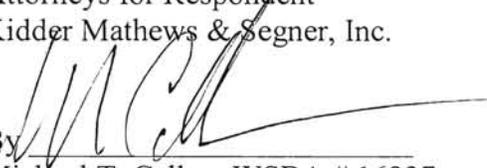
Mathews, Kidder Mathews respectfully requests that this Court award it attorney's fees and costs.

V. CONCLUSION

This Court should affirm the trial court order granting summary judgment in favor of Kidder Mathews.

Respectfully submitted this 18th day of June, 2012.

Peterson Russell Kelly PLLC
Attorneys for Respondent
Kidder Mathews & Segner, Inc.

By 
Michael T. Callan, WSBA # 16237
1850 Skyline Tower
10900 NE Fourth Street
Bellevue, WA 98004-8341
(425) 462-4700