

71707-3

71707-3

NO. 71707-3

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

PMI's interpretation of the Lease is completely untethered from the plain language of the Lease and common sense. PMI cites the same set of facts as TCAM, yet comes to an entirely opposite and untenable conclusion: that although the Lease states that "Tenant shall lease thirty four (34) parking spaces," PMI only has to pay for parking spaces "as needed." To reach this conclusion, PMI attempts to infuse ambiguity into the phrase "shall lease," claims that it was not aware of facts that it surely knew or, at the least, should have known, and relies on tortured analyses of the extrinsic evidence. In sharp contrast, TCAM's interpretation is based upon the actual Lease language, complies with all of the rules of contract interpretation, and comports with common sense. The trial court erred by granting PMI's motion for summary judgment.

II. SUPPLEMENTAL STATEMENT OF CASE¹

PMI's attempt to divert attention from the fact it signed a Lease which states "Tenant shall lease thirty four (34) parking spaces" after signing a Letter of Intent that defined the "parking requirement" is unpersuasive. PMI simply does not address the crux of the case. Instead, it focuses on its sublease, an agreement entered into with a prior master tenant when the Building was under different ownership with entirely

¹ TCAM incorporates the Statement of Case in its opening brief, including the defined terms.

different language than the Lease at issue, and relies on an entirely inaccurate portrayal of how leases are negotiated.

PMI's recitation of the facts surrounding its sublease is misleading because it makes it appear as if the Lease at issue was effectively a renewal of the sublease. PMI's Brief at p. 1 ("same arrangement PMI previously had"); p. 6 ("parking costs were not passed down to PMI under the Real Sublease"); p. 7 ("Both the prior Real Sublease, and now the Lease, harmonize PMI's limited need for parking with the general shortage of parking"); p. 8 ("parking would continue to be offered to PMI on an as-needed basis"); p. 28 ("an 'as needed' parking arrangement, consistent with the then-existing Real Sublease"); p. 29 ("general parking under the existing Real Sublease was on an 'as needed' basis...that procedure would continue..."); p. 34 ("TCAM became the landlord under the Real Sublease in 2007"; "TCAM had been PMI's landlord for approximately two years at the time, and must have been familiar with the terms of the existing sublease"); fn. 7 ("contracts it assumed"). On the contrary, the Lease was an entirely new transaction, not a renewal of the RealNetworks sublease.

TCAM did not negotiate and was not a party to the RealNetworks sublease, and did not become PMI's landlord upon purchasing the Building. PMI entered into a sublease with RealNetworks, which at the

time was five years into a ten year master lease of the entire Building with WRC Wall Street, LLC, the prior owner of the Building. CP 452-519 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement). PMI subleased a portion of RealNetworks’ office space on the fourth floor. CP 397-441 (Sublease Agreement). When TCAM purchased the building in 2007, it assumed the master lease between WRC Wall Street, LLC and RealNetworks; TCAM did not assume PMI’s sublease with RealNetworks and was not PMI’s landlord. *See* PMI’s Brief at p. 3 and p. 34, fn. 7.

The existence of the sublease actually cuts against PMI’s position in this case. First, it establishes that PMI knew or should have known in 2005 of the obligation imposed by the Port of Seattle on the Building owner to pay for a minimum of 133 parking spaces in the Garage with the option to pay for up to 160 parking spaces. As it does throughout its brief, PMI makes statements that are directly contradicted by the facts. PMI’s Brief at p. 17 (“Nor did PMI have any reason to know that ‘TCAM is required to lease 133 parking spaces in the Garage and will be forced to absorb that cost if it cannot pass it on to its tenants’”), p. 21 (“unless the Parking Agreement is incorporated into the Lease, which it was not”), and p. 31 (“the Parking Agreement was never shared with PMI...PMI was not aware of its contents...”). CP 454-55 and 463 (2000 WRC Wall Street

LLC – RealNetworks, Inc. Lease Agreement, pp. 2-3 and 11, Sections 1(i) and 7); CP 922-934 (Parking Agreement and Covenant). Yet, the sublease expressly referred to the master lease with the Building owner, including certain obligations, excluding others, and attaching the master lease as an exhibit. CP 399 and 402-04 (Sublease Agreement, pp. 3 and 6-8, Exhibits and Sections 4.1 and 4.2). The master lease, in turn, identified the parking agreement and covenant by its King County Recording Number. CP 459 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement, p. 7, Section 4(b).)

Second, the sublease establishes that PMI knew or should have known that the Building owner was limited in guaranteeing the availability of the parking spaces. The master lease between WRC Wall Street, LLC and RealNetworks reflected this reality:

Tenant shall be obligated to lease 133 parking spaces in the Garage, and shall have the option to lease up to 160 parking spaces in the Garage. **Such parking shall be made available to Tenant in accordance with and subject to the terms of the Parking Agreement. Landlord shall have no obligation to provide parking except under and in accordance with its right under the Parking Agreement.**

CP 463 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement, p. 11, Section 7) (emphasis added).

Third, the sublease illustrates the language that PMI could have negotiated with TCAM if it did not want a “shall lease” parking arrangement. The sublease to PMI did not pass on RealNetworks’ requirement to pay for parking spaces. CP 409-410 (Sublease, pp. 13-14, Section 15). Thus, it provided that PMI had “the right, but not an obligation” to pay for up to 1.2 parking spaces per 1,000 rentable square feet, that is, 34 spaces. *Id.* It further provided that the parking was subject to “[t]he extent [the parking spaces are] available to Sublandlord under the Master Lease and in accordance with and subject to the terms of the Master Lease.” *Id.*

PMI specifically negotiated for access to additional parking spaces. CP 409-410 (Sublease, pp. 13-14, Section 15); CP 444 (First Amendment to Sublease, p. 2, Section C). This fact undermines PMI’s claims of pursuing environmental sustainability. PMI’s Brief at p. 7. Whether there is really a “parking scarcity” is not developed by the record. CP 549 (Shea Decl., ¶ 3 (discussing parking issues in Garage but not in neighborhood)). Contrary to PMI’s unsubstantiated claims of ignorance, the record establishes that TCAM was not aware of PMI’s parking needs. CP 947 (2d Awad Decl., ¶ 4). TCAM’s motive was clear and understandable: to pass on the cost imposed by the Port of Seattle for the parking spaces in the Garage to the Building tenants which would actually

be using the parking spaces, as opposed to TCAM which had no need for parking. CP 946 (2d Awad Decl., ¶ 3).

While the sublease is relevant to the history of the Building owner passing on to the master tenant the obligation to take and pay for the parking spaces and the limitations on the Building owner in doing so, it simply was not a lease the parties renewed.

PMI's description of how lease negotiations work is also shockingly out of touch with reality. Lease negotiations do not rely upon "warnings" and are not subject to estoppel type arguments. PMI's Brief at p. 2 (TCAM "never made any effort to follow up"), pp. 10-11, and pp. 40-41. The common approach to negotiating contracts is for counsel to respond to opposing counsel with a revised draft of the lease containing only those revisions acceptable to the client. CP 250 (Moore dep. at 58:21-59:15). TCAM's counsel explained:

A common approach to negotiating contracts is to respond with a draft. And it's common to respond with a draft that is something your client would agree to, that, for example, may have addressed half of the things in this letter. So our client might say, I won't do any of Items 1 through 20, or I'll do all of 1 through 20 but none of the rest. And we'd give it to the other lawyer, and it would be their obligation to come back and ask for things.

CP 250 (Moore dep. at 58:24-59:8). This approach was used by the attorneys in this case, for example with the calculation of management

fees. Compare CP 349 (5/7/10 Lease) with CP 365 (6/11/10 Email) and with CP 370 (8/17/10 Lease). The relevance of Ms. Schaaf's letter is not that it served as a warning to TCAM or set up an estoppel argument, rather it proves that PMI knew TCAM's intent at the outset of the lease negotiations and failed to change the Lease language accordingly. CP 732 (Schaaf Letter, p. 10, ¶ 39). As with the sublease, Ms. Schaaf's letter actually cuts against PMI's arguments.

III. ARGUMENT

A. The Lease Creates a "Shall Lease" Parking Arrangement

As much as PMI would like to avoid the Lease language, and especially Item 13, the proper starting point in interpreting the Lease is the Lease itself. *See* PMI's Brief at p. 12 ("parties' manifested intent is **often** found in the writing itself; however..."; "The only place the Court could even theoretically find such an intention are in the Lease itself...") (emphasis added). The parties' intent is based upon the "objective manifestations of the **agreement**, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis added). Even though it is more logical to begin the analysis with Item 13 as it appears first in the Lease, the same conclusion is reached even if the analysis starts

with SLP 18(a): the Lease creates a “shall lease” parking arrangement.

See PMI’s Brief at p. 13.

1. SLP 18(a) Creates a Right in PMI and a Duty on TCAM But is Silent as to Whether Parking is “As Needed” or “Shall Lease”

SLP 18(a) creates a right in PMI to use 44² unreserved parking spaces and a corresponding duty on TCAM to make those spaces available to PMI. This right is created by the following language: “PMI shall have the right to the nonexclusive use of the number of parking spaces located in the parking areas of the Building specified in Item 13.” CP 135 (Executed Lease, p. 31, SLP 18(a)). There is nothing in this language, or the rest of SLP 18(a), that qualifies this right as applying to the spaces only “as needed” or giving PMI the ability “to pay for what it actually needs and uses,” and certainly does not prevent the existence of a “shall lease” parking arrangement.³ PMI’s Brief at p. 14. Contrary to PMI’s assertion, there was no need to use the phrase “PMI shall be obligated to pay for” or “PMI shall be required to lease” in SLP 18(a) because language to this effect is in Item 13. *See* PMI’s Brief at p. 15. The

² Item 13 provides for 1.2 parking spaces for each 1,000 rentable square feet, which equates to 34 parking spaces from October 1, 2010 to October 1, 2012, 44 parking spaces from October 1, 2012 to October 1, 2014, and 51 parking spaces for the remainder of the lease term. CP 105-107 (Executed Lease, pp. 1-3, Items 3 and 13).

³ If Item 13 did not exist, then a possible **inference** from SLP 18(a) could be that PMI would pay for the spaces it uses. However, PMI can point to nothing in SLP 18(a) that **expressly states** that PMI will only pay for the spaces it uses. Whether the spaces are on a “shall lease” or “as needed” basis is determined by Item 13. In point of fact, the term “as needed” does not appear anywhere in the Lease with respect to parking.

purpose of the reference in SLP 18(a) to Item 13 in the quoted language is to incorporate the formula for calculating the parking spaces (i.e., 1.2 per 1,000 rentable square feet). This reference to one part of Item 13 does not obviate the rest of the language in Item 13.

This sentence simultaneously creates a duty on TCAM. As the commentary to the Black's Law Dictionary's entry for "right" explains, "right is correlative to duty, where there is no duty there can be no right."⁴ Black's Law Dictionary (9th ed. 2009). PMI misses this point. It mischaracterizes the corresponding duty and whose duty it is. PMI's Brief at p. 16 (PMI's "obligation to pay for all of the parking spaces"). A right does not create a corresponding duty on the holder of the right, but rather upon another party. Having the "right" to vote creates a duty upon the government to allow such a right holder to vote. *See* PMI's Brief at p. 15. Similarly, having the "right" to freedom of speech creates a duty upon the government not to restrict speech in certain ways. The duty is owed by TCAM, to provide 44 parking spaces.⁵

⁴ The fourth definition is the most applicable. Definitions 2 ("Something that is due to a person by just claim, legal guarantee, or moral principle <the right of liberty>") and 5 ("*often pl.*) The interest, claim, or ownership that one has in tangible or intangible property < a debtor's rights in collateral> <publishing rights>") are not "more consistent" with a right that is created by a contract, the breach of which gives rise to a legally enforceable claim. PMI's Brief at p. 15.

⁵ For the same reasons, PMI's analysis of the use of the word "right" or the phrase "shall have the right" in other Lease provisions is incorrect. PMI's Brief at pp. 17-18. In those instances, a corresponding duty was created, but in the other party. For example, SLP 19(l) imposes a duty on PMI to allow TCAM to install signs and SLP 9(c) imposes a duty on TCAM to allow PMI to

This duty is not chimerical. PMI's Brief at p. 16. It is more than PMI claims. PMI's Brief at p. 14 ("TCAM would try to make some parking spaces available to PMI"). TCAM must "use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces." CP 135 (Executed Lease, p. 31, SLP 18(a)). The duty is simply limited by the fact that the Port of Seattle, not TCAM, owns the Garage. However, as the successor-in-interest to WRC Wall Street's parking agreement and covenant with the Port of Seattle, TCAM has an enforceable right to subcontract the use of up to 160 unassigned self-park parking spaces to its tenants. *See* CP 922-934 (Parking Agreement and Covenant). Nonetheless, TCAM proposed and PMI agreed to language in SLP 18(a) to limit its liability because it does not own the Garage. CP 135 (Executed Lease, p. 31, SLP 18(a)). WRC Wall Street, LLC did the same before it. CP 463 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement, p. 11, Section 7). PMI could have negotiated this language, including "language waiving or forgiving payment for unavailable parking spaces," but did not do so.⁶ PMI's Brief at p. 20. In any event, when the

terminate the Lease if there is a fire. CP 126 and 138 (Executed Lease, pp. 22 and 34, SLP 9 and SLP 19).

⁶ PMI's counterargument to TCAM's position that it could have negotiated the use of the phrase "right, but not an obligation" is tenuous. PMI's Brief at p. 17. Perhaps RealNetworks drafted the sublease, yet PMI was able to negotiate provisions that provided that it had "the right, but not an obligation" to use and pay for not only the 1.2 parking spaces per 1,000 rentable feet but an additional five parking spaces in a nearby garage. CP 409-410 (Sublease, pp. 13-14, Section 15).

availability of parking in the Garage became an issue in 2008 or 2009, the issue was resolved. CP 548-49 (Shea Decl., ¶ 3). Moreover, there is nothing in the record to show that TCAM could, or even would, sell PMI's parking spaces to someone else, as PMI suggests. PMI's Brief at p. 14. Further, the record shows that PMI "received" the parking spaces. TCAM does not have the access cards; the Garage operator, which is not TCAM's "agent," distributes them directly to the users. CP 947 (2d Awad Decl., ¶ 7); PMI's Brief at p. 48. There is no evidence in the record to support PMI's description of the Garage operator as TCAM's "agent." PMI's Brief at p. 48.

The reference to "parking fees" in SLP 18(a) comports with the "shall lease" parking arrangement. It does not create an "as needed" parking arrangement. The fee is paid in exchange for TCAM providing the parking spaces, which it has a duty to do, although that duty is reasonably limited as explained above. *See* PMI's Brief at p. 19. In fact, the exact same language was used in the lease between WRC Wall Street, LLC and RealNetworks which created a "shall lease" parking arrangement. CP 463 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement, p. 11, Section 7).

While it is true that TCAM's position is that PMI must pay for its parking spaces regardless of whether PMI actually uses them, it is an

entirely different question (based upon a different set of facts) whether PMI would be obligated to pay for the parking spaces if none of them were actually available. PMI's Brief at p. 20. Assuming this were the case, PMI would likely have a cause of action against TCAM for breach of its duty "to use reasonable efforts to assist Tenant in obtaining the right to use its parking spaces." CP 135 (Executed Lease, p. 31, SLP 18(a)). However "harsh" PMI perceives the parking obligation to be, this does not mean that the Lease does not impose this obligation.

Finally, the Lease's treatment of the executive parking stall is consistent with SLP 18(a) creating rights and correlative duties. It also creates the right in PMI to one executive parking stall in the loading dock area. It simultaneously creates a duty on TCAM to provide that stall. However, there is no Lease provision like Item 13 that creates an obligation on PMI to take and pay for that stall. PMI knew or should have known that TCAM, just like the prior Building owner, would pass down the cost of the parking spaces from the Port of Seattle, but had no similar motivation regarding the spaces in the loading dock that did not create any cost for TCAM. PMI's Brief at pp. 20-21; CP 399 and 402-04 (Sublease Agreement, pp. 3 and 6-8, Exhibits and Sections 4.1 and 4.2); CP 459 (2000 WRC Wall Street LLC – RealNetworks, Inc. Lease Agreement, p. 7, Section 4(b)).

In sum, SLP 18(a) creates a right in PMI to parking spaces and a duty on TCAM to provide them. It is silent as to whether the parking arrangement is “shall lease” or “as needed.”

2. Item 13 Creates a “Shall Lease” Parking Arrangement

Item 13 creates the “shall lease” parking arrangement. PMI cannot explain how this is not created by the phrase “Tenant shall lease thirty four (34) parking spaces in the Garage pursuant to the provisions of Paragraph 18(a) below.” CP 107 (Executed Lease, p. 3, Item 13). Just as the use of the verb “lease” does not necessarily create a lease agreement, *Barnett v. Lincoln*, 162 Wash. 613, 620, 299 P. 392 (1931), its use does not make any sentence in which it appears a nullity. PMI’s Brief at p. 21. The verb “to lease” is defined as:

lease, *vb.* (16c) 1. To grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration <the city leased the stadium to the football team>. 2. To take a lease of; to hold by a lease <Carol leased the townhouse from her uncle>.

Black’s Law Dictionary (9th ed. 2009). While perhaps another word would have avoided raising the specter of a separate lease agreement, the verb nonetheless works in this context. Similarly, the use of the phrase “pursuant to” does not eviscerate the “shall lease” language. PMI’s Brief at p. 22. Moreover, the heading of Item 13 cannot limit its meaning, especially where the Lease provides that “[t]he marginal headings and

titles to the articles of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of any part hereof.” CP 139, p. 35, Section 19(o). PMI’s Brief at p. 24. Finally, the placement of the “shall lease” language in the Basic Lease Provisions does not affect its meaning. Even assuming that the Basic Lease Provisions were meant to contain “bare facts” and that all “proportional” fees should be found with the operating expenses in SLP 3, this unambiguous obligation on PMI cannot be read out of the Lease simply based upon its presence in the Basic Lease Provisions, which, in their prominent place at the beginning of the Lease, cannot be missed. CP 189-190 (Shea dep. at 61:24-64:2); PMI’s Brief at p. 24. The sentence must be read to mean that PMI is required to take and pay for 34 parking spaces in the Garage and, when it takes more rentable square feet, take and pay for the additional parking spaces.⁷ In fact, PMI conceded that it interprets this provision in the same way. CP 914 (Suzman dep. at 66:9-19).

3. There is No Conflict Between Item 13 and SLP 18(a)

PMI cannot show that SLP 18(a) provides that the parking spaces are on an “as needed” basis. Instead, the provisions must be read together because they are complementary: Item 13 requires PMI to pay for all of

⁷ Item 13 further provides that the number of parking spaces PMI is required to pay for will increase on a proportionate basis with the amount of space it takes. CP 107 (Executed Lease, p. 3, Item 13).

its parking spaces in the Garage, and Paragraph 18(a) requires TCAM to provide the parking spaces, with the caveat that TCAM does not in fact own the Garage. PMI's interpretation would require Item 13 to be ignored, violating the rule of contract interpretation favoring giving effect to all provisions. *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 41, 114 P.3d 664 (2005); *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007); *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012) (“An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.”).

B. The Extrinsic Evidence Supports the “Shall Lease” Parking Arrangement

PMI strains reason in its analysis of the extrinsic evidence. PMI argues that the sublease, the parking agreement and covenant with the Port of Seattle, and Ms. Schaaf's letter support its “as needed” argument. However, this is the exact opposite of the conclusion that can be reasonably drawn from this extrinsic evidence.

Extrinsic evidence is only relevant where “the evidence gives meaning to words used in the contract.” *Hollis v. Garwall, Inc.*, 137

Wn.2d at 695, 974 P.2d 836 (1999). Thus, extrinsic evidence **does not** include:

- 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 instrument; or
- Evidence that would vary, contradict or modify the written word.

Id. Again, the purpose is to determine the parties' intent based on their real meeting of minds, not the unilateral or subjective intent of one party.

1. PMI Knew or Should Have Known that the Prior Building Owner Passed the Parking Cost to its Tenant and Should Have Expected TCAM to Do the Same

PMI's pervasive, and often misleading, theme in its appellate brief is that the parking arrangement in the Lease was simply "continued" from PMI's sublease. PMI's Brief at pp. 1, 6-8, 28-29, 34, fn. 7. This is false. TCAM did not negotiate and was not a party to the RealNetworks sublease. In addition, TCAM did not become PMI's landlord upon purchasing the Building. However, the sublease gave PMI notice of the Building owner's parking agreement and covenant with the Port of Seattle, which required the owner to pay for up to 160 parking spaces. The sublease also made PMI aware of the fact that the Building owner passed this cost on to its master tenant. The reasonable inference is that TCAM,

as the new Building owner, would continue that business practice, and pass the cost on to PMI as a direct tenant, especially since TCAM had no use for the parking spaces itself.

The fact that the operator of the Garage continued to operate the Garage in the same way it always had done is not relevant to the interpretation of the Lease. *See* PMI's Brief at p. 8 ("This procedure [for parking passes] has remained consistent and unchanged for a number of years, and did not change when the Lease went into effect"). There is no reason to think that the Garage operator, a third party to the Lease managing many more parking spaces in the parking complex than the 133 to 160 connected with the Building, would change its practices based on the lease provisions of one of the several Building tenants. The Garage operator provides the access cards equal to the number of parking spaces specified in the agreement between TCAM and its tenants. CP 1044-1075 (Tenant Handbook). In practice, the tenants' employees receive the access cards to the Garage directly from the Garage operator. CP 947 (2d Awad Decl., ¶ 7); CP 549 (Shea Decl., ¶ 5). TCAM does not obtain or hold the access cards to the Garage. CP 947 (2d Awad Decl., ¶ 7).

2. PMI Knew of the “Shall Lease” Parking Arrangement in the Lease

The negotiation of a lease does not include “warnings” or arguments of estoppel, as PMI implies. PMI’s Brief at p. 10 and pp. 39-41. It is hard to believe that a sophisticated party and its experienced attorneys could display such a lack of knowledge of how leases are negotiated. TCAM is not estopped to challenge PMI’s interpretation of Paragraph 18(a) because it did not expressly refute Ms. Schaaf’s comment. Even if TCAM’s attorneys understood the comment, which they did not, in a lease negotiation, their failure to make a change necessarily means it was rejected. The burden then shifted to Ms. Schaaf to push back if it was an important term for her client, which she did on numerous other issues. *E.g.*, compare CP 349 (5/7/10 Lease) with CP 365 (6/11/10 Email) and with CP 370 (8/17/10 Lease). Yet, she did not request that the Lease be revised to create an “as needed” parking arrangement and Item BLP 13 remained unchanged in the Lease, as executed by the parties.

PMI knew or had reason to know that TCAM believed that Item 13 and SLP 18(a) created mutual promises of performance, including PMI’s obligation to pay for all of its parking spaces. In contrast, TCAM did not know that PMI had a different interpretation. Thus, under the rule set out in Section 201 of the Restatement (Second) of Contracts, the Lease should

be interpreted in accordance with TCAM's understanding of the meaning of Item 13 and SLP 18(a).

Moreover, if Ms. Schaaf's letter is interpreted as PMI interprets it, it is evidence of PMI's unilateral and subjective intent as to the meaning of the Lease and this intention is independent and contrary to the Lease. As such it would constitute inadmissible extrinsic evidence. *Hollis*, 137 Wn.2d at 695.

PMI's brokers' memo to PMI provides further evidence of PMI's knowledge of TCAM's intent and the meaning of the Lease. After reviewing the first draft of the Lease, PMI's brokers discussed the parking obligation with PMI. CP 202 (Suzman dep. at 67:20-68:13.) Mr. Suzman and Mr. Plughoeft drafted a list of comments for Mr. Shea. *Id.*; CP 343-44 (2/19/10 Letter). Mr. Shea's brokers informed him that "Item 13 makes it an obligation." *Id.* While this memo was not shared with TCAM, it shows that the mutual intent—as expressed by the Lease—was for a "shall lease" parking arrangement. The onus was on PMI to negotiate a change to the Lease if the Lease did not reflect its intent. It did not do so, and therefore is bound by the language it obviously understood.

PMI cannot logically argue, especially not in the same breath, that it "recognized a conflict between BLP 13 and SLP 18(a)" and "[i]t did not know (and had no reason to know) that TCAM intended a 'must take' or

‘must pay’ arrangement.” PMI’s Brief at p. 41. Its recognition of a conflict means that it knew that TCAM intended a “shall lease” parking arrangement.

C. The Lease Language Negates the Application of the Principle *Contra Proferentum*

TCAM and PMI are equally responsible for the language used in the Lease. The parties exchanged approximately nine drafts of the letter of intent and eight drafts of the Lease. CP 812-843 (Drafts of Letter of Intent); CP 252-395 (Emails and Drafts of Lease). Further, PMI’s counsel sent approximately eight letters or emails with substantive revisions, often providing the requested language. CP 252-395 (Emails and Drafts of Lease). Counsel for the parties also spoke by phone and met in person. CP 944-45 (Schaaf dep. at 13:23-14:17.) In sum, both parties were actively engaged in the lease negotiations and PMI had just as many opportunities as TCAM to be clear about its position.

This reality is reflected in Paragraph 19(u) of the Lease:

Joint Product. This Agreement is the result of arms-length negotiations between Landlord and Tenant and their respective attorneys. Accordingly, neither party shall be deemed to be the author of this Lease and this Lease shall not be construed against either party.

CP 139 (Executed Lease, p. 35, SLP 19). This provision negates PMI’s arguments that the Lease should be construed against TCAM. These arguments are based on the general principle that contracts should be

construed against the drafter, which, in the real estate context, is often the landlord. *Compare McGary v. Westlake Investors*, 99 Wn.2d 280, 287, 661 P.2d 971 (1983) (ambiguity construed against lessor as preparer of document), *Wash. Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 327-28, 635 P.2d 138 (1981) (“Where lessor drafts the lease, ambiguities must be resolved in favor of the lessee.”) with *Fuller Mkt. Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 133, 539 P.2d 868 (1975) (ambiguities in lease construed against the tenant as the drafting party).

None of the cases cited by PMI in support of its *contra proferentum* argument included a provision with language like Paragraph 19(u) in the Lease. *See Armstrong v. Maybee*, 17 Wash. 2d, 48 P. 737 (1897); *Wash. Hydroculture, Inc.*, 96 Wn.2d 322; *Carlstrom v. Hanline*, 98 Wn. App. 780, 990 P.2d 986 (2000); *Wilkening v. Watkins Dist., Inc.*, 55 Wn. App. 526, 778 P.2d 545 (1989); *Puget Inv. Co. v. Wenck*, 36 Wn.2d 817, 221 P.2d 459 (1950); *Allied Stores Corp. v. North West Bank*, 2 Wn. App. 778, 469 P.2d 993 (1970).

An equally large sum of money is at stake for TCAM as for PMI. Thus PMI bears an equal burden in using clear language. *Gates v. W.B. Hutchinson Inv. Co.*, 88 Wash. 522, 526, 153 P. 322 (1915). TCAM expressed its intent clearly and consistently in each of its communications with PMI: the Lease stated “Tenant shall lease thirty four (34) parking

spaces in the Garage.” CP 107 (Executed Lease, p. 3, Item 13). PMI knew this and simply failed to pursue a change in the Lease language.

D. TCAM is Entitled to Judgment in its Favor

The main thrust of this case is the interpretation of the Lease. The only claims asserted in the complaint and counterclaim were for declaratory judgment regarding the meaning of the Lease. Although failure to mitigate was raised as an affirmative defense in both the answer and reply, it is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment.

In any event, PMI’s argument regarding failure to mitigate damages is spurious. PMI has not surrendered any parking spaces to TCAM. CP 947 (2d Awad Decl., ¶ 8.) PMI is in a far superior position to mitigate its damages than TCAM is: TCAM is not entitled under the Lease to take control of or sublease PMI’s parking spaces and would not even know how many spaces PMI would want to sublease or assign. PMI claims that “its use of the parking spaces is limited to ‘Tenant, its officers and employees only.’” PMI’s Brief at fn. 2. However, nothing in the Lease prohibits PMI from subleasing or assigning its parking stalls.

The only evidence related to the unused parking spaces weighs in TCAM’s favor. On the one hand, Mr. Shea claims to be aware of individuals interested in purchasing monthly parking passes but provides

no evidence that he has pursued them. CP 549 (Shea Decl., ¶ 3). PMI also provides no evidence that it encouraged its employees, to whom PMI passes the cost of the parking spaces, to use the parking spaces. On the other hand, Mr. Awad's standard practice is to connect tenants with extra parking spaces with interested third parties. CP 937 (Awad dep. at 32:4-33:7). Moreover, the exchange cited by PMI does not prove its point. PMI's Brief at p. 49. Mr. Olson stated that "we did not do the [lease in World Trade Center West] transaction so there was no interest in [parking in the Garage]." CP 999-1000 (Olson dep. at 61:18-62:1). Unsurprisingly, there were no "follow-up communications or discussions with anybody about [parking]." *Id.* This exchange does not "completely undercut[] TCAM's implicit assertion that it is stuck with the parking spaces, and has no choice but to pass the cost down to its tenants." PMI's Brief at p. 49. Pursuant to the parking agreement and covenant with the Port of Seattle, TCAM is stuck with the parking spaces and made a reasonable business decision to pass the cost to its tenants.

IV. CONCLUSION

The Lease expressly creates a "shall lease" parking arrangement by stating in Item 13 that "Tenant shall lease thirty four (34) parking spaces in the Garage" and creating a right in PMI and corresponding duty on TCAM in SLP 18(a) for the use of those parking spaces. PMI's argument

that the Lease creates an “as needed” parking arrangement, a term not in the Lease, is at odds with the plain language of the Lease. This interpretation is also not supported by the evidence PMI cites. The evidence instead shows that the Lease was not effectively a renewal of the RealNetworks sublease, PMI knew or should have known that TCAM would pass on the cost of the parking spaces to PMI, to accomplish this the Lease stated that PMI “shall lease” the parking spaces, and PMI knew that the Lease created a “shall lease” parking arrangement. Thus, the Court should reverse the superior court’s order granting summary judgment in PMI’s favor and remand this case for entry of an order to this effect. The Court should also award attorneys’ fees and costs incurred at the trial court level and on appeal to TCAM as the prevailing party.

Respectfully submitted this 10th day of September, 2014

SOCIUS LAW GROUP, PLLC

By 

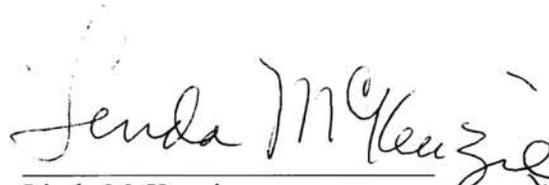
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VII. CERTIFICATE OF SERVICE

I certify that on the 10th day of September 2014, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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