

No. 72907-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LUCKY STAR ENTERPRISES, LLC, a Washington limited liability
company,

Respondent and Plaintiff,

v.

KENT HILL PLAZA LLC, aka KENT EAST HILL PLAZA LLC, a
Washington limited liability company,

Appellant and Defendant.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred in granting specific performance of the Lease in favor of Lucky Star.

Issue: Was the Lease too indefinite to specifically enforce?

Issue: Was the court bound by a stipulation between the parties on an issue of law?

Assignment of Error No. 2. The trial court erred in requiring Kent Hill to relocate the HVAC units.

Assignment of Error No. 3. The trial court erred in allowing Lucky Star to require Kent Hill to make changes to the *exterior* of the building.

Assignment of Error No. 4. The trial court erred in finding that Lucky Star's requirement to relocate the HVAC units was reasonable.

Assignment of Error No. 5. The trial court erred in holding that acts or occurrences involving Surinder Khela after the Lease was signed were imputed to Kent Hill.

Assignment of Error No. 6. The trial court erred in awarding damages to Lucky Star.

Assignment of Error No. 7. The trial court erred in awarding attorney's fees to Lucky Star.

NATURE OF THE CASE

This is an action by the tenant under an alleged commercial lease to compel the landlord to cut new holes in the roof of the building to install the HVAC system in accordance with the tenant's specifications. The landlord contends that the lease fails to contain the essential elements of an enforceable lease and is too indefinite to be enforceable. Alternatively, the landlord maintains that relocating the new HVAC units is unnecessary and unreasonable and that installing new HVAC units in the locations of the old units would satisfy its obligations without requiring expensive analysis and retrofitting of the building and undermining the integrity of the roof membrane.

STATEMENT OF THE CASE

Lucky Star Enterprises, LLC ["Lucky Star"] is a Washington limited liability company owned and operated by members of the Odum family. Generally speaking, Lucky Star is in the business of owning and operating "Planet Fitness" franchises, a work-out and sun tanning facility, somewhat similar to other national franchises such as L.A. Fitness. FOF 1.

Kent Hill Plaza, LLC ["Kent Hill"] is a Washington limited liability company owned by three businessmen in the south King County region: Manmohan Dhillon, Navdeep Gill and Jagpal Basra. The three men formed the Kent Hill LLC with respect to their shared property

located at 24022 104th Avenue, Suite A in Kent, Washington [“the Property”]. FOF 2.

The negotiations for the Property’s lease took months, according to both parties. Surinder Khela, Kent Hill’s broker, testified that discussions between the two groups went all for three quarters of 2011 and the first quarter of 2012. FOF 3.

Part of the delay flowed from Kent Hill's principals being concerned about Lucky Star’s ability to meet its rent obligations. Accordingly, in spring 2012, Kent Hill's principals undertook a site visit to one of Lucky Star's other Planet Fitness facilities in Renton, Washington prior to signing the Lease. The principals observed Lucky Star’s Renton Planet Fitness operations and were satisfied that Lucky Star could meet its monthly rental obligations. FOF 4. The purpose of the site visit was to observe the operation and determine whether it looked like a viable use for the Kent Hill Property. The parties did not inspect or discuss the HVAC system at the site visit. RP 450-51, 508.

There were numerous Letters of Intent (LOIs) exchanged during the almost year-long back and forth between Kent Hill and Lucky Star. Among the more hotly contested issues was the extent of tenant improvements to be undertaken by the landlord and what, if any, rent abatement would be included in the Lease. FOF 5.

Mr. Odum, Sr. recounted that Kent Hill wished to pay for very few tenant improvements. At one point, Lucky Star walked away from the negotiations. Kent Hill re-contacted Lucky Star and the parties eventually contracted for a period of free rent (a critical consideration for Lucky Star) and a division of other work, including the installation of a demising wall and water line to the building. FOF 6.

The negotiations and site visits ultimately resulted in Lucky Star's broker drafting a proposed lease agreement. FOF 7. As part of the lease review process, Mr. Khela, Kent Hill's agent, specifically testified that he went through the lease with each member of Kent Hill and strongly encouraged the members to have an attorney review the lease before signing it. This was a standard recommendation that Mr. Khela would make to his clients. Each of the Kent Hill principals testified that they had the benefit of legal counsel in reviewing the lease. FOF 8. Each of the Kent Hill principals testified that he understood completely the lease's terms and Kent Hill's obligations under it. FOF 9. The parties signed the Lease in June 2012. Exhibit 11. FOF 10.

The key provision that is subject to this lawsuit is Exhibit B to the Lease. Exhibit B is titled "Description of Landlord's Work." Its opening paragraph describes the parameters of Kent Hill's responsibilities: "the Landlord, at its sale cost and expense, shall provide the following

minimum improvements to the Leased Premises as part of Landlord's 'vanilla box' delivery of premises." Subparagraph A states as follows:

"New HVAC system per Tenant's architect's drawings and specifications of 2.5 ton per 1,000 SF (47.5 ton) in good working condition, on a separate thermostat and balance tested. HVAC system to be warranted for a period of 10 (ten) years." FOF 11.

The parties never agreed upon or even discussed what the term "vanilla box" meant. However, "vanilla box" is a term of art in commercial leasing, which means that the interior surface of the exterior walls of the premises is ready for installation of the tenant improvements. With respect to the HVAC system, principals for both parties testified that they understood "vanilla box" to mean that the landlord (Kent Hill) was responsible for the portion of the HVAC system above the roof and the tenant (Lucky Star) was responsible for the portion below the roof. RP 97-98, 220-21.

Throughout the Lease, in addition to Exhibit B, there were additional references to the new HVAC system. Those references included: Paragraph 2 concerning the delivery of the HVAC system sixty days after Lucky Star took possession of the premises; Paragraph 6, in which the parties contracted for Lucky Star to be responsible for the costs of any repairs to the roof (where the new HVAC system would be installed) as a result of Lucky Star's "negligence;" and paragraph 25,

concerning Kent Hill's agreement to improve the premises in accordance with the work description outlined in Exhibit B. The installation of the new HVAC system was a central part of this bargain between the two parties. FOF 12.

At the time of signing, Lucky Star had not yet prepared or supplied to Kent Hill its architect's drawings and specifications regarding the HVAC system. RP 284. Kent Hill principals were aware that Lucky Star would be providing the drawings and specifications for the HVAC system, FOF 13, but expected the drawings and specifications to call for replacement of the old HVAC units in their existing locations. RP 436.

Milton Odum testified that a primary concern for Lucky Star in negotiating the lease was its ability to design the HVAC system to be used in the building. He explained, and his testimony was corroborated by architect Daniel Mullin, that Lucky Star needed to have an efficient and well-designed HVAC system to accommodate people using the exercise equipment, tanning booths, showers and bathrooms in the Planet Fitness facility. With eight (8) showers envisioned for the locker rooms, Lucky Star needed the ability to “pull moisture out of the bathrooms.” It also needed the ability to move air conditioning to accommodate the facility's eight (8) planned tanning booths. According to Mr. Odom, Sr. the HVAC system was “key to the whole thing from cost, efficiency and comfort for

the members in our gym. Our number one concern was to pay attention to make sure that the building is at a sufficient temperature.” FOF 14. None of Mr. Odum’s concerns were expressed to Kent Hill before the Lease was signed.

Mr. Mullin testified concerning the work he had undertaken for Lucky Star in designing the HVAC system. He had significant experience working with Planet Fitness and its franchisees, having designed approximately 350 Planet Fitness facilities. He testified similarly as Mr. Odum, Sr. with respect to his justification for the HVAC system design. FOF 15.

Mr. Mullin noted that Planet Fitness corporation followed a general design requirement for each of franchisee projects. The general HVAC requirements called for an open ceiling design (for the cardio and strength equipment areas). The locker rooms and wet areas required lower ceiling clearance and would be equipped with duct air systems (to remove moisture). Pursuant to Planet Fitness guidelines, the open areas were to be equipped with a concentric air supply, utilizing a number of big fans (referred to as "Big Ass Fans") to move air once it was delivered to the general area. FOF 16. None of Planet Fitness’s guidelines were communicated to Kent Hill before the Lease was signed.

The goal behind this design, as Mr. Mullin testified, was to ensure

aesthetic consistency across Planet Fitness facilities. For the concentric air supply in particular, the design sought to minimize conflict with the air supply system and the lighting and fans and to ensure a "clean ceiling" look for the facility. FOF 17.

The design for the Kent Hill property combined Planet Fitness guidelines as well as particular consideration for the realities of the Property itself. Mr. Mullin inspected the King Hill property before the Lease was signed, but never told Kent Hill that the HVAC units would have to be relocated. Some of the variables Mr. Mullin considered were the building's dimensions, including its volume, the building's occupancy load, and the anticipated equipment use of Planet Fitness customers. FOF 18.

As a result of these considerations, Mr. Mullin proposed capping and sealing of a number of existing HVAC locations on the property's roof and to install (or cut) new spaces for the HVAC system. This would accomplish a more equal distribution of air flow within the main areas of the building. FOF 19.

Mr. Mullin testified that it would be problematic to use the building's existing HVAC unit roof locations because of their placement with respect to the demising wall (the wall that would separate Planet Fitness from another tenant in the building). More specifically, the

distribution of air would be negatively impacted by the existing HVAC placement compared to his design. His proposal to relocate the HVAC units allowed for air distribution to be maximized (*i.e.*, delivered more efficiently while accounting for building aesthetics), which the existing placements did not allow. FOF 20.

Mr. Mullin discounted the use of a duct system plus air "diffusers" to deliver air versus a concentric air system. He testified that a duct system (which Kent Hill preferred because it could maintain the existing roof placement of the HVAC units) did not allow for the maximum distribution of air into a big open space or for air to be optimally distributed all four directions from a mid-point space (both considerations being important to the design of Planet Fitness facilities). FOF 21.

Mr. Mullin was not able to quantify the difference in efficiency between using the HVAC system he proposed compared to Kent Hill's proposal of using the existing HVAC placement and a combination of ducts and fans to distribute air. FOF 22. He was never asked to evaluate the system proposed by Kent Hill to use the existing HVAC unit locations. RP 327. He did not testify that the existing locations would not work – he testified that it was not “optimum.” RP 323.

Mr. Mullin consistently testified that the design he contemplated for the Property was the most efficient, economical and aesthetically

superior way to move air, particularly when taking into consideration the open ceiling design of Planet Fitness franchises, the air volume loads, the placement of lights and the heat generated by the exercise equipment and tanning salons. Mr. Mullin also testified that the HVAC system design for the Property was within industry standards. FOF 23.

In considering Mr. Mullin's professional experience, the number of Planet Fitness facilities he has designed, and his knowledge of the facts surrounding this case, the Court found Mr. Mullin's testimony to be persuasive. FOF 24.

The Court also found that Lucky Star's desire to have their Planet Fitness facility followed the franchise guidelines for aesthetical and comfort purposes was a reasonable request. FOF 25.

The Odums testified that within a short period of the lease signing, they delivered to Surinder Khela a schematic drawing of their proposed HVAC system. Exhibit 13. FOF 26.

Mr. Khela confirmed he received the schematic but could not recall when he received it. He did say that he passed it along to the Kent Hill principals. Mr. Dhillon, one of Kent Hill's principals, testified that he received the schematic one month after signing the lease. FOF 27. He later corrected his testimony that he first saw the schematic at the October meeting. RP 435-36.

Kent Hill's reaction to Lucky Star's proposed replacement of the HVAC system was, and has been, a steadfast refusal to accept it. Mr. Khela testified that the Kent Hill principals would not move the existing HVAC roof top units. Mr. Khela further testified that on learning his clients refused to move the existing HVAC placements he attempted to bridge the differences between Lucky Star and Kent Hill by obtaining bids for the cost of replacing the existing HVAC units. Exhibits 15 and 16 are two bids for new HVAC systems for the Property, dated July 16, 2012 and July 23, 2012, respectively. Both are addressed to Mr. Khela. FOF 28.

Of note, those bids indicate that the estimated cost of replacing the existing HVAC units with new ones (and not moving their locations) was roughly between \$110,000 and \$147,000. There was no dispute that the existing units needed to be replaced. Todd Lovison, a HVA contractor retained by Kent Hill, testified that all of the existing units were beyond repair. FOF 29.

The Court found, based on Mr. Dhillon's testimony, Mr. Khela's testimony and the receipt of the two bids contained in Exhibits 15 and 16, as well as Mr. Odum, Sr.'s testimony that Kent Hill principals received the Lucky Star schematic drawing, which details the placement of Lucky Star's proposed HVAC system, in July 2012. FOF 30.

The schematic plainly details the new HVAC unit rooftop

locations and the proposed sealing of existing locations. There is little ambiguity in this schematic as to Lucky Star's wishes. FOF 31. The schematic was not provided to Kent Hill prior to signing the Lease nor was the schematic made an exhibit to the Lease.

Lucky Star timely paid its first month's rent on June 29, 2012 in the amount of \$25,879. 17 (which includes a \$10,000.00 security deposit). Kent Hill cashed the check and has retained its proceeds. FOF 32.

There appeared to have been little if any contact between Lucky Star and Kent Hill's principals during July, August and September 2012. FOF 33.

On October 3, 2012, Lucky Star's architect received a "Correction Letter" from Bill Zeitler, a plans examiner with the City of Kent. Exhibit 22. The letter detailed a number of things that would need to occur before the City would complete its plan review. Among the requirements (most of which were generally routine) was the completion of "a structural analysis of the proposed HVAC system (see paragraph 6) and a structural analysis of the building (see paragraph 10). Also, because of the change of use and occupancy of the building, the City required a seismic study of the building to be completed as well. Exhibit B(I) of the Lease required Kent Hill to obtain those studies and to ensure permitting at its sole cost. FOF 34.

On October 10, 2012, Kent Hill obtained a bid to complete a structural engineering assessment of both its preferred and Lucky Star's HVAC system. The letter from 2KS consulting engineer Kevin Hinkley was directed to Mike Dhillon, one of Kent Hill's principals. Exhibit 24. Kent Hill received another bid for a structural analysis on October 22, 2012 (this one addressed to Mr. Khela). Exhibit 28. It does not appear that Kent Hill took any further steps to secure these assessments and at the time of trial it was not apparent that those studies had been completed. Kent Hill's explanation for not obtaining the analyses was that until the HVAC system issue was resolved, it made no sense to undertake them. FOF 35.

In October 2012, Lucky Star representatives met with Kent Hill representatives so that Lucky Star could do a walk-through of the Premises and take possession. No work had been completed on the HVAC system, as the Lease gave Kent Hill 60 days after delivery possession to complete the HVAC system. Ex 11. It appears that some (perhaps minimal) effort was made to resolve the parties' differences regarding the HVAC system themselves, but without success. FOF 36.

In response to entreaties by Lucky Star for Kent Hill to meet its obligations under the Lease, Kent Hill communicated throughout October, November and December 2012 that it would not install Lucky Star's

proposed HVAC system. Kent Hill stated, through counsel, that it was in compliance with the Lease and that it was not required to follow the HVAC system design specifications submitted by Lucky Star, as they were beyond the scope of the parties' agreement and unreasonable. FOF 37.

Kent Hill had two primary objections to Lucky Star's proposed HVAC system. The first was costs associated with cutting new locations in the roof (and all of the attendant risks that accompanied such cutting). The second, as noted by Kent Hill's principals, was a desire to maintain some flexibility should another tenant (in the other half of the building) or future tenant for Lucky Star's space have different heating, ventilation or AC requirements. Mr. Basra perhaps captured that sentiment best when he remarked "we don't want to make it [an HVAC system] just for this tenant." In essence, Kent Hill asserted that Lucky Star's requested HVAC system was unreasonable and beyond the scope of the parties' agreement. FOF 38. In addition, Lucky Star's plans called for five thermostats, whereas the Lease called for one thermostat. RP 366.

Kent Hill offered the testimony of Todd Lovison, an HVAC contractor and owner of A1 Heating, as noted above, and Charles Williams, a civil and structural engineer. FOF 39.

Mr. Lovison's testimony centered on a "redesign" of Kent Hill's

existing HVAC locations to distribute air within the building via a duct system. At the time of trial, Mr. Lovison did not retain a copy of his schematic or plan, because he did not get the job. RP 344-45. Mr. Lovison testified that he was never asked to bid on Lucky Star's proposed HVAC system. He also testified that he did not have expertise in structure or weight issues. Nevertheless, with the assistance of a "ductulator" he was able to sketch plans that could deliver air via duct systems using the existing HVAC locations. He did not testify concerning the efficacy of such a system or its aesthetics. FOF 40. Such a system would have been worked in this case without cutting any new holes in the roof or retrofitting the structure. RP 364-65.

Lovison also testified that he recently had a similar situation on a different project, in which a landlord leased a space to a new tenant. The tenant's mechanical plans showed the HVAC units in a different location than the existing units. The tenant agreed to redesign their mechanical plans to the location of the existing units. The system works fine. RP 348.

Mr. Williams testified generally about risks associated with cutting holes in tile roof of buildings of similar ages. He opined, based on his review of Exhibit 13 and his experience, that there was a potential for water leaks if new holes were made. He also testified that there would need to be a structural, seismic and calculation done prior to such an

undertaking. In preparing his report and his trial testimony, Mr. Williams acknowledged that he had not reviewed copies of the building's plans or specifications for Lucky Star's HVAC system. He also acknowledged that he was unaware of the City of Kent's permitting requirements for the building. FOF 41.

Mr. Williams' opinion testimony was general in nature and not tied to the specific requirements of the Property, other than to assert that he would, in a modification for an existing structure as proposed, want the property to be evaluated for structural and seismic issues, and that the Property probably would have to be retrofitted structurally, if the HVAC units were relocated. FOF 42.

In light of that lack of specificity, the Court found that Mr. Williams' opinion did not preclude the implementation of Lucky Star's HVAC system. On the contrary, it cautions that in doing so, the issue(s) would need to be studied prior to the commencement of any project. This appears to be the same requirement that the City of Kent has imposed on the property before it will issue any permits for occupancy or usage. FOF 43.

Kent Hill's principals, none of whom were qualified as experts in structural engineering, all opined that they believed that cutting new holes in the roof would be expensive and risky. One member recalled an

experience he had in another building he owned, where costs came close to \$200,000.00. FOF 44.

Another principal, Mr. Gill, testified that a seismic study for the building had been contemplated in 2009. But no such study was produced in discovery or at trial. FOF 45.

Mr. Gill also testified that it was his belief that Lucky Star would have presented its schematic drawings under Exhibit B for the HVAC system to the City of Kent rather than Kent Hill's principals. He also believed that the seismic study required by the City was due to the change in roof structure and not, as Mr. Zeitler wrote, due to an occupancy change. FOF 46.

Kent Hill was certainly concerned about the cost of adopting Lucky Star's HVAC system. The worst-case scenario estimate from Kent Hill was that the work would run approximately \$200,000 to follow through with Lucky Star's plan, over the cost of installing new HVAC units in their existing locations. Kent Hill, however, did not produce any competent evidence from an independent source to corroborate this estimate. The trial court found that Kent Hill's estimate to be unreliable. FOF 48.

The trial court did not accept the representations, without independent engineering analysis of the Property, that the scenario that

Mr. William and Kent Hill suggests (*e.g.*, disruption of the existing waterproof roof membrane, disruption of drainage flow, or retrofitting of support trusses) will actually come to pass. FOF 49.

The total gross value of the 10-year lease was \$2,621,968.00. Exhibit 11. Assuming, *arguendo*, that Kent Hill's \$200,000 estimate to install Lucky Star's HVAC system is correct, that represents just over 7% of the total value of the contract. Even considering this unsupported figure, this is not an unreasonable cost for this ten-year multi-million dollar lease. FOF 50.

The evidence supports a finding that Lucky Star was, at all times, willing and able to perform its obligations under the Lease. FOF 51.

The trial court found that Lease terms were unambiguous (even accounting for the reference to a "vanilla box" delivery). Exhibit B required Kent Hill to install, at its own cost, an HVAC system in accordance with Lucky Star's specifications. There was no provision that Kent Hill could submit an equivalent system of its own design. FOF 52.

Lucky Star has estimated that it incurred lost profits from the date it anticipated occupation of the property to September 2014 was \$410,972.87. This is based on comparable profit and loss statements provided by the company for its Renton facility. Exhibit 36. It does not include the 2011 P&L statement for its Renton facility, for which Lucky

Star made roughly \$88,000.00. As Mr. Odum, Sr. pointed out, Planet Fitness (corporate) engaged in a national marketing campaign after 2011 and sponsored a popular T.V. show known as “The Biggest Loser.” FOF 53.

After considering Mr. Odum, Sr.'s testimony, the P&L statements for 2012 through 2014, and Lucky Star's 2012 and 2013 partnership returns, the Court found the figure of \$339,906 to be a reasonable estimate of lost profits (including first year start-up costs and factoring in Planet Fitness' new marketing campaign). This amounts to a three year monthly average (2011 through 2013) of net profits of approximately \$16,186.00 a month. FOF 54.

The Court did not accept Lucky Star's estimate of increased construction costs for completing its work at the Property as Mr. Odum, Sr.'s estimate was largely speculative. FOF 55.

ARGUMENT

1. The Lease is too indefinite to specifically enforce.

“It seems necessary to reiterate once again that negotiation, not litigation, is the proper method for agreeing upon these vital terms. Agreements to buy and sell real estate ‘must be definite enough on material terms to allow enforcement without the court supplying those terms.’ *Setterlund [v. Firestone]*, 104 Wn.2d at 25, 700 P.2d 745. The facts of this case demonstrate the very ambiguity which renders an alleged agreement unenforceable. There was no meeting of the minds here as to any of the material terms of the

contract except for the price. This is not enough to form an enforceable contract for the purchase and sale of real property.”

Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994) (refusing to enforce a real estate purchase and sale agreement where the only ambiguity was that the note and deed of trust forms for seller-financing were not attached to or identified in the agreement).

Here, there was no meeting of the minds on all material terms of the Lease, such that no contract was created at all. The trial court found that “[t]he installation of the new HVAC system was a central part of this bargain between the two parties.” Yet, the parties never agreed on specifications for the new HVAC system, other than it would be new, rated at 47.5 tons, in good working condition, on a separate thermostat and balance tested. Ex 11. For such a “central part” of the bargain, the parties should have attached the drawings or at least the schematic (Ex 13) to the Lease, as they had done with the site plan (Exhibit A). Ex. 11. The trial court should have denied specific performance and simply left the parties where it found them. “It is unthinkable that courts should undertake the writing of contracts for sellers and buyers who have failed or refused, rightly or wrongly, to come to terms between themselves.” *Haire v. Patterson*, 63 Wn.2d 282, 287, 386 P.2d 953 (1963).

“An enforceable contract requires a ‘meeting of the minds’ on the essential terms of the parties’ agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn.App. 576, 579, 675 P.2d 1266 (citing *Peoples Mortgage Co. v. Vista View Builders*, 6 Wn.App. 744, 496 P.2d 354 (1972)), *review denied*, 101 Wn.2d 1010, 1984 WL 287410 (1984).” *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn.App. 459, 465, 191 P.3d 76 (2008). According to Lucky Star’s own testimony and the trial court’s findings, the design of the HVAC system was an essential term of the Lease. The parties had no “meeting of the minds” on this essential term. Therefore, no contract was formed.

The rule is even more important and more stringent when specific performance is sought. “When specific performance is sought, rather than legal damages, a higher standard of proof must be met: ‘clear and unequivocal’ evidence that ‘leaves no doubt as to the terms, character, and existence of the contract.’ *Powers v. Hastings*, 93 Wn.2d 709, 717, 713, 612 P.2d 371 (1980) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971)).” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). This is so because the trial court is called upon to enforce the contract as agreed and not to write the contract for the parties.

“In order for a court of equity to decree specific performance of a contract, the court must be able to determine what must be done to

constitute performance. The indefiniteness of an agreement is an adequate reason for refusal to direct specific performance thereof. The contract itself must make the precise act which is to be done clearly ascertainable. 49 AM.JUR. 34, § 22, cited in *Keys v. Klitten*, 21 Wn.2d 504, 151 P.2d 989.” *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 132, 173 P.2d 194 (1946).

In *Keys v. Klitten*, 21 Wn.2d 504, 151 P.2d 989 (1944), the parties entered into an earnest money receipt and agreement for the sale of a hotel and restaurant business and a lease of the building. After signing the earnest money receipt, the parties could not agree on the terms of the lease, the deal fell apart, and the buyer/tenant sued for specific performance. The court held that the earnest money receipt lacked material terms required for the lease and denied specific performance.

“It may be admitted that decisions can be found where courts have decreed specific performance of a contract for lease or other instrument, even though the contract did not describe in detail all the conditions and provisions of the instrument to be later drawn and executed. However, we think the courts have gone no further than to enforce such contracts for lease where the contract contains a definite statement of the particular elements of the lease, but is silent as to the general, usual, and ordinary covenants and conditions. In such cases some courts have held that these usual and ordinary covenants would be implied, and have granted specific performance of the contract. *See Bennett v. Moon*, 110 Neb. 692, 194 N.W. 802, 31 A.L.R. 495.

...

“It is apparent to us from the testimony that it was not intended by the earnest money receipt to fix the terms and conditions of the lease, and it is just as apparent that the parties are unable to agree on the terms and conditions of such lease. In order, then, to specifically enforce this earnest money receipt, it would first be necessary for us to determine what terms and conditions should be included in a *proper* lease. To do this would, in our opinion, be writing a lease, the terms and conditions of which were not covered by the earnest money receipt, and upon which the minds of the parties had never met. This, a court of equity will not do.

“To paraphrase a statement found in *Weldon v. Degan*, 86 Wash. 442, 446, 150 P. 1184, the earnest money receipt is no more than an agreement for a lease, or, in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete, and to which either of the parties might object if proposed. A contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. 6 R.C.L., p. 617, § 38. In order for a court of equity to decree specific performance of a contract, the court must be able to determine what must be done to constitute performance. The indefiniteness of an agreement is an adequate reason for refusal to direct specific performance thereof. The contract itself must make the precise act which is to be done clearly ascertainable. 49 AM.JUR., p. 34, § 22.

“In *Thompson v. Weimer*, 1 Wn.2d 145, 95 P.2d 772, 775, we quoted with approval from 25 R.C.L., SPECIAL PERFORMANCE, p. 218, § 17:

‘One of the fundamental rules respecting the specific performance of contracts is that performance will not be decreed where the contract is not certain in its terms. The terms must be complete and free from doubt or ambiguity, and must make the precise act which is to be done clearly ascertainable.’

“While in the instant case it is true that the earnest money receipt contains some of the terms of a proposed lease, the receipt clearly contemplates that the term of the lease shall not begin to run, nor shall appellant have possession of the premises, until a proper lease has been executed. It is plain to us that what the terms of this proper lease were to be was something which was to be later agreed upon by the parties. The parties have been unable to agree, and we are of the opinion the term proper lease is so indefinite that this court cannot compel specific performance of the contract, because it cannot tell, and should not attempt to say, what the parties meant by a proper lease.

“An agreement to enter into a lease should not be enforced if any of the terms of the lease are left open to future settlement. Until the minds of the parties have met on all material matters, a court should not direct specific performance. *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 6 Cir., 125 F.2d 288, 289. *See, also*, BENNETT, LAWS OF LANDLORD AND TENANT, pp. 514, 515, § 362; *Woods v. Matthews*, 224 Mass. 577, 113 N.E. 201.”

Keys v. Klitten, 21 Wn.2d 504, 517-20, 151 P.2d 989 (1944).

Here, the parties contemplated replacing the HVAC units with new units per “architect’s drawings and specifications of 2.5 ton per 1,000 SF (47.5 ton) in good working condition, on a separate thermostat and balance tested.” This provision identifies the capacity of the units (47.5 tons), the requirement of a separate thermostat and the requirement that the system be balance tested. It did not say anything about cutting new holes in the roof to place the new units in different locations. Yet, Lucky Star and its architect, who had visiting the Property before the Lease was signed, said nothing about relocating the units. Kent Hill did not

contemplate that Lucky Star's architect drawings and specifications would purport to require Kent Hill to *relocate* the HVAC units. The location of the HVAC units is very important to Kent Hill and Lucky Star claims it is important to it, too. Based on the evidence, the court should have found there was no meeting of the minds on a material term of the Lease and decline to grant specific performance to either party, even though both parties requested it.

Lucky Star is expected to argue that the parties are bound by a stipulation signed by their attorneys, which stated that the Lease "is valid and enforceable in all respects, and plaintiff and defendant shall each have the right to specific performance of its terms and conditions, or such other relief as the Court may deem appropriate." CP 73. Parties are bound by stipulations on issues of fact, but not issues of law. Whether the Lease is binding and enforceable and whether the parties are entitled to specific performance are issues of law. In *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567-68, 44 Tex.Sup.Ct. J. 605 (Tex. 2001), the parties stipulated to the date when a cause of action accrued for statute of limitations purposes. In holding that the court was not bound by the stipulation, the court concluded that "the parties' agreement about the acceleration and accrual date was an impermissible attempt to stipulate to a legal question." Likewise, here, the court is not bound by a stipulation

that the Lease is binding or subject to specific performance. These are legal issues for the court. This is especially true with equitable remedies, such as specific performance, where the court may have to supervise the performance ordered.

2. Kent Hill was not required under the Lease to relocate the HVAC units.

Even if the Lease is sufficiently definite to award specific performance, the drawings and specifications supplied by Lucky Star must be reasonable, consistent with industry standards and within the scope of what the parties contemplated. Lucky Star asserts that the Lease is clear and unambiguous. However, the architect's drawings and specifications did not even exist at the time the Lease was signed, so the Lease is inherently vague with respect to the HVAC system. Under the language of the disputed provision, the architect's drawings and specifications related to the *size* of the HVAC units, "2.5 ton per 1,000 SF (47.5 ton)" – not their *locations*.

Lucky Star had a duty of good faith and fair dealing to submit *reasonable* drawings and specifications – especially with the drawings or specifications being within Lucky Star's control.

“Under Washington law, ‘[t]here is in every contract an implied duty of good faith and fair dealing’ that ‘obligates the parties to cooperate with each other so that each may

obtain the full benefit of performance.’ . . . [T]he implied covenant of good faith and fair dealing cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties. Instead, ‘the duty [of good faith and fair dealing] arises only in connection with terms agreed to by the parties.’

. . .

“In particular, the duty of good faith and fair dealing arises ‘when the contract gives one party discretionary authority to determine a contract term.’ *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 738, 935 P.2d 628 (1997); see *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (‘The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time.’). When asked to apply Washington law in this area, the Ninth Circuit concluded that ‘[g]ood faith limits the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses.’ *Scribner v. WorldCom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001).”

Rekhter v. State, Department of Social and Health Services, 180 Wn.2d 102, 112-13, 323 P.3d 1036 (2014). Quoting the Seventh Circuit with approval, the *Rekhter* court noted:

“‘It is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract.’ *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 1784 (2011). Similarly, the California Supreme Court observed that the ‘breach of a specific provision of the contract is not a necessary prerequisite [to a breach of good faith and fair dealing claim]. Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract.’ *Carma Developers (Cal.), Inc. v.*

Marathon Dev. Cal., Inc., 2 Cal.4th 342, 373, 826 P.2d 710, 6 Cal.Rptr.2d 467 (1992).”

180 Wn.2d at 111-12.

Here, because the “Tenant’s architect drawings and specifications” had not yet been prepared at the time the Lease was signed, Lucky Star had “discretionary authority to determine a contract term” and therefore owed a duty of good faith and fair dealing to prepare the drawings and specifications consistent with the scope of the work contemplated by the parties (*i.e.*, landlord above the roof – tenant below the roof). To allow Lucky Star to dictate changes to the *outside* of the building would be precisely the kind of “blank check” that the *Scribner* court cautioned against. 249 F.3d at 910.

The burden was on Lucky Star to make it clear to Kent Hill if Lucky Star was going to call for changes *above the roof*. Lucky Star knew that it intended to duplicate its Renton facility, as nearly as possible. Lucky Star had superior knowledge, which imposes a greater duty to speak. Kent Hill visited Lucky Star’s Renton facility not to inspect the physical building, but to satisfy itself that Lucky Star was a legitimate business and would be a good tenant. Lucky Star’s architect, on the other hand, surveyed the Kent building *before* the Lease was signed and knew at that time that his design would require relocating four of the five HVAC

units. Lucky Star paid \$1,400 to its architect to survey the building *before* the Lease was signed. Lucky Star paid only \$800 to its architect to prepare the schematic (Ex 13) a month *after* the Lease was signed. Given Lucky Star's secret intention to require changes *above the roof*, Lucky Star could have had its architect prepare the schematic showing the required relocation of the HVAC units and attached it as an exhibit to the Lease, so that Kent Hill fairly could have considered Lucky Star's request to perform work *above the roof* as part of the lease negotiations.

The implied duty of good faith and fair dealing cannot *add* terms to the contract, which is exactly what Lucky Star seeks to do. "[T]he duty of good faith and fair dealing 'does not extend to obligate the party to accept a material change in the terms of its contract,' nor 'inject substantive terms into the parties' contract.' *Badgett [v. Sec. State Bank]*, 116 Wn.2d 563, 807 P.2d 356, 360 (1991)], 807 P.2d at 360." *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083, 1101 (W.D.Wash. 2011).

"Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979). While this duty does not foist substantive terms upon contracting parties, it does obligate the parties to 'perform in good faith the obligations imposed by their agreement.'

Badgett v. Sec. State Bank. 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

Therefore, ‘the duty arises only in connection with terms agreed to by the parties.’ *Badgett*, 116 Wn.2d at 569.

“The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time. The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party. However, it will not contradict terms or conditions for which a party has bargained.”

830 F.Supp.2d at 1101 (*quoting Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 935 P.2d 628, 632 (1997).

Generally, “the contractor [is permitted] to say how the work will be performed so long as that *performance* will produce a result that meets the specifications of the contract.” (Emphasis added.) *City of Seattle v. Dyad Const., Inc.*, 17 Wn.App. 501, 508, 565 P.2d 423 (1977).¹ Lucky Star’s own architect did not testify that the existing HVAC locations could not be used, but simply that it would not be “optimal.” Kent Hill’s HVAC installer testified that his redesign consisting of Ex 19 for the landlord’s work (above the roof) and Ex 21 for the tenant’s work (below the roof) would work using the existing locations without jeopardizing the integrity of the roof.

¹ Although the Lease is not a construction contract, construction cases are analogous because Kent Hill was installing improvements to meet Lucky Star’s requirements.

Kent Hill was ready, willing and able to install the new HVAC system utilizing the existing locations. However, Lucky Star rejected Kent Hill's plan to install new HVAC units at the existing locations and refused to take possession of the premises. By rejecting Kent Hill's plan without justification or even explanation, Lucky Star breached its duty of good faith and fair dealing.

In *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn.App. 576, 675 P.2d 1266 (1984), the seller made a change to a pre-closing rental agreement that the buyers were not made aware of. The buyers took possession of the property, but later refused to complete the purchase. When the seller sued the buyers to collect the earnest money, the buyers argued that the change made by the seller to the pre-closing rental agreement prevented a meeting of the minds, such that no contract was formed. The court held that the change did not relate to a material term of the contract. "By renegeing on the deal without affording [the seller] an opportunity to address their concern, [the buyers] breached their duty to operate in good faith." 36 Wn.App. at 580.

In *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 724 P.2d 1127 (1986), the buyers of a condominium that included a moorage slip backed out of the deal when they discovered that the moorage slip was narrower than specified in the drawings. The seller assured the buyers that

the moorage slip would be corrected before closing, but the buyers lacked confidence in the seller's performance and purported to rescind their offer. The seller sued to collect the earnest money. In rejecting the buyers' defense that the seller's performance failed to comply with the contract, the court held that the buyers' repudiation was "premature and legally insufficient." 45 Wn.App. at 315. As in *McEachren*, the buyers' failure to give the seller an opportunity to address their concern breached their duty of good faith.

Kent Hill was ready, willing and able to install the new HVAC system utilizing the existing locations. However, Lucky Star rejected Kent Hill's plan to install new RTUs at the existing locations and refused to take possession of the premises. By rejecting Kent Hill's plan without justification or even explanation, Lucky Star acted in bad faith, such that Kent Hill was unable to meet its obligation under the terms of the lease. "[I]n every construction contract there is an implied term that the owner will not delay or hinder the contractor." *Nelse Mortensen & Co. v. Group Health Co-op. of Puget Sound*, 17 Wn.App. 703, 717, 566 P.2d 560 (1977). The same principle should apply by analogy to improvements made by a landlord for a tenant.

Kent Hill asked Lucky Star to explain why it believed the HVAC units must be relocated, but Lucky Star's only response was that the Lease

requires it. Lucky Star did not produce any evidence that the relocation of the HVAC units was necessary to the *performance* of the system. Interestingly, *Lucky Star presented no evidence at trial and Lucky Star's own architect did not testify that the HVAC units must be relocated to meet Lucky Star's needs or that Kent Hill's plan to install new units at the locations of the existing units will not work.* Kent Hill even proposed that the parties' respective experts (Lucky Star's architect and Kent Hill's HVAC installer) meet to attempt to resolve the technical issues only – without regard to the legal issues, so that the Premises could be completed, occupied and begin to generate income for the benefit of both parties (“stop the bleeding”). Lucky Star declined the invitation, stating only that “they do not believe it would serve a useful purpose.”

Here, as in *McEachren* and *Bush*, Lucky Star has breached its duty to operate in good faith by refusing (a) to explain to Kent Hill why the RTUs need to be relocated to meet Lucky Star's needs, and (b) to meet with Kent Hill's AC installer to attempt to resolve their technical concerns, if any. Under *McEachren* and *Bush*, if Lucky Star had a legitimate concern, it must give Kent Hill an opportunity to address that concern before backing out of the Lease.

3. Lucky Star had no right to require changes to the exterior of the building.

Exhibit B of the Lease requires Kent Hill to provide minimum improvements as part of the landlord's "vanilla box" delivery of the Premises. The parties never agreed upon or even discussed what the term "vanilla box" meant. However, "vanilla box" is a term of art in commercial leasing, which means that the interior surface of the exterior walls of the premises is ready for installation of the tenant improvements. The plumbing, electrical, HVAC, drop ceiling and drywall inside the exterior walls form the "vanilla box" of the premises. It is common practice to provide a HVAC stub into the interior leased space, from which duct work, diffusers, and thermostat are then installed at the desired locations. Unfortunately, Lucky Star secretly had something else in mind.

Under a "vanilla box" delivery, the tenant has no right to require changes to the *exterior* of the building. With respect to the HVAC system, principals for both parties testified that they understood "vanilla box" to mean that the landlord (Kent Hill) was responsible for the portion of the HVAC system above the roof and the tenant (Lucky Star) was responsible for the portion below the roof. "[E]xtrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. . . . Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836, 843 (1999).

“Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. . . . Both the plaintiff and the defendant were heavily involved in the Washington pea industry, plaintiff as a grower with 8 years of experience and the defendant as a large processor. This fact would indicate that the contract should be construed in light of the usages of the pea industry existing at the time the contract was executed. . . . The definition of ‘adverse weather conditions’ must be determined in light of reasonable industry custom and usage. Once a contract is established, usage and custom are admissible into evidence to explain the terms of the contract. And, parol evidence is admissible to establish a trade usage even though words in their ordinary or legal meaning are unambiguous.”

Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 256, 510 P.2d 221 (1973).

Here, as in *Stender*, the parties’ understanding of “vanilla box,” including all the circumstances surrounding the making of the Lease and reasonable industry custom and usage, is admissible to ascertain the intentions of the parties.

4. Relocating the HVAC units would involve unreasonable economic waste.

In the seminal case of *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921), pipe of similar quality, but of a different brand name than that specified in the contract, was used in the building of a house. In writing

for the majority, Judge Benjamin N. Cardozo held that where a contract has been substantially performed and the cost of replacement of the pipe would be “grossly and unfairly out of proportion” to the difference in value, the court will not order replacement, but only award damages for the difference in value, if any. 230 N.Y. at 244.

Washington courts have adopted the RESTATEMENT (SECOND) OF CONTRACTS § 348, which provides in part that the correct measure of damages is “the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.” *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984). The evidence showed that the cost of relocating the HVAC units would be “clearly disproportionate” to the difference in value of the Premises, if any. In *Weaver v. Fairbanks*, 10 Wn.App. 688, 519 P.2d 1403 (1974), the court held that a seller of a house is required to make repairs to enable the buyer to get financing, so long as “the cost of repairs is not so extensive as to cause a loss to [the seller] of the benefit of his bargain.” 10 Wn.App. at 693. In *Weaver*, the cost of repairs was \$500 and the sales price was \$17,500 (less than 3%). The trial court’s characterization of the estimated cost of retrofitting the building as “not an unreasonable cost” is clearly erroneous. The cost is nearly equal to an entire year’s rent!

Significantly, Lucky Star offered no evidence contradicting Mr. Williams' concerns with disturbing the roof. Secondly, the standard of proof urged by Lucky Star is misplaced. Kent Hill does not have to prove that relocating the HVAC units would require re-roofing the building. Rather, Kent Hill must merely prove that the alternate design proposed by Todd Lovison would provide performance functionally equivalent to Lucky Star's design *without the risk* of creating structural problems or roof leaks. In other words, Kent Hill need not prove that the roof *would* leak if the HVAC units are relocated, but simply that there would be a *risk* of leaks without any corresponding benefit.

5. Acts or occurrences involving Surinder Khela after the Lease was signed are not imputed to Kent Hill.

Kent Hill contends that the court has erred in (a) allowing testimony of alleged statements by Surinder Khela made after the Lease was signed as admissions by a party over Kent Hill's hearsay objection, and (b) imputing notice or knowledge to Kent Hill based on communications with Surinder Khela.

Alleged statements by Surinder Khela made *after* the Lease was signed are hearsay and inadmissible, because Khela was no longer acting as Kent Hill's agent. Under RCW 18.86.070, the agency relationship between a broker and a principal continues until the earliest of completion

of performance by the broker, expiration of the term agreed to by the parties, termination of the relationship by mutual agreement, or termination of the relationship by notice from either party to the other. The relevant inquiry in this case is when there was “completion of performance.”

Completion of performance occurs when the broker has earned his or her commission. *Pilling v. E. & Pac. Enters. Trust.* 41 Wn. App. 158, 165, 702 P.2d 1232 (1985). Commission is generally earned when a seller accepts a purchaser's offer and enters into a binding and enforceable contract. *Langston v. Huffacker*, 36 Wn. App. 779, 789, 678 P.2d 1265 (1984). That is not to say an agent and his principal cannot make an agreement further limiting the right to a commission. For instance, in *Cogan v. Kidder, Mathews & Segner, Inc.* [97 Wn.2d 658, 648 P.2d 875 (1982)], the agency relationship did not terminate when a binding and enforceable contract was entered, because the agent continued to work toward closing and the earnest money agreement expressly provided that the commission would be earned “if and when the sale closes.” 97 Wn.2d 658, 663-64, 648 P.2d 875 (1982).

Likewise, in *Ward v. Coldwell Bank/San Juan Props., Inc.*, 74 Wn. App. 157, 872 P.2d 69 (1994), a sale was contingent upon the buyer obtaining financing. The court concluded that, “[t]o the extent [the agent]

was acting to close the sale, it owed an ongoing duty to the [principal] until the sale closed.” *Id.* at 164. The clear rule emanating from these cases is that a commission is earned when an agreement is entered, all contingencies are waived or satisfied, and the commission itself is not further limited by agreement. No written agreement existed between Kent Hill and Khela which created, extended, or limited duties. To the contrary, paragraph 12 of the Lease itself required notices to be delivered or mailed to the addresses specified in the Lease after the Lease was signed.

The court’s ruling that Khela had apparent authority to act as Kent Hill’s agent after signing of the Lease, based on holding himself out as Kent Hill’s agent, is also erroneous.

“It is also the well-established rule that the apparent or ostensible authority of an agent can be inferred only from acts and conduct of the principal. The extent of an agent’s authority cannot be established by his own acts and declarations.” (citations omitted)

Lamb v. General Associates, Inc., 60 Wn.2d 623, 627, 374 P.2d 677 (1962). To hold that a real estate agent’s authority can be created or extended by the acts of the reputed agent himself would defeat the entire statutory scheme of the Law of Real Estate Agency, ch. 18.86 RCW, which is to create certainty and clarity.

Second, imputing notice or knowledge to Kent Hill based on communications with Surinder Khela is expressly prohibited by statute,

RCW 18.86.100(1), which provides:

“Unless otherwise agreed to in writing, a principal does not have knowledge or notice of any facts known by an agent or subagent of the principal that are not actually known by the principal.”

“‘Principal’ means a buyer or a seller who has entered into an agency relationship with a broker.” RCW 18.86.010(10). “‘Seller’ means an actual or prospective seller in a real estate transaction, or an actual or prospective landlord in a real estate rental or lease transaction, as applicable.” RCW 18.86.010 (14).

Under the clear meaning of RCW 18.86.100(1), Kent Hill is not deemed to have knowledge or notice of any facts known by Khela that are not actually known by Kent Hill. Therefore, evidence of facts communicated to Khela is irrelevant and inadmissible, unless there is also evidence that such facts were actually known by Kent Hill.

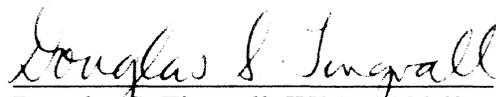
6. Kent Hill should be awarded its attorney’s fees.

The Lease contains an attorney’s fees clause. Ex. 11. A party who successfully challenges the validity of a contract containing an attorney’s fees clause is entitled to fees, even though the contract is held to be unenforceable. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. 188, 692 P.2d 867 (1984).

CONCLUSION

The trial court should have concluded that the parties never had a meeting of the minds, such that no contract was formed. If a contract was formed, Lucky Star breached its duty of good faith and fair dealing by (a) failing to disclose to Kent Hill that its plans for the new HVAC system would require a major expenditure equal to nearly a year's rent, and (b) refusing to consider a reasonable alternative utilizing the existing holes in the roof and requiring no retrofitting or sacrifice in the roof's integrity. The decision of the trial court should be reversed and the case dismissed. Attorney's fees should be awarded to Kent Hill at trial and on appeal.

Respectfully submitted on May 19, 2015.


Douglas S. Tingvall, WSBA 12863
Attorney for Appellant

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I successfully emailed a copy of this document to respondent's attorney of record on May 19, 2015, at Newcastle, Washington.

