

No. 74128-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
8-19-16

Court of Appeals
Division I

SOUNDBUILT NORTHWEST, LLC, a Washington limited liability
State of Washington company and successor-in-interest to SOUND BUILT HOMES, INC.,
Appellant,

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY, a
Nebraska insurance company; and LAWYERS TITLE INSURANCE
CORPORATION, a Nebraska insurance company,
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE RICHARD F. MCDERMOTT

BRIEF OF APPELLANT

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I. INTRODUCTION

Soundbuilt¹ is for the first time an appellant in the fourth appeal arising from the unwise and unjust decision of respondents Commonwealth² to “insure around” Soundbuilt’s agreement to purchase property in Covington, Washington. Commonwealth’s conduct allowed seller DALD and its principal Greg Newhall to sell the land in 2003 wrongfully, to a higher bidder. Commonwealth’s business decision to conceal the true status of title to the property – a decision made because DALD/Newhall indemnified it against the risk – allowed the new purchaser to develop and sell homes to 22 innocent homeowners. Each home buyer purchased a title insurance policy from Commonwealth that did not even list as an exception Soundbuilt’s prior right to purchase the property. As Commonwealth’s counsel admitted, the issuance of title policies placed the Homeowners at risk of a complete loss of title.

In the first appeal,³ this Court in 2007 affirmed the decision of (then-superior court judge) Stephen Gonzalez that Soundbuilt was entitled to specific performance of its agreement to purchase the Covington property.

¹ Soundbuilt Northwest, LLC, the Appellant, is a successor by merger to Sound Built Homes, Inc., the original plaintiff in this matter. Both entities are homebuilders.

² Title insurers Commonwealth Land Title Insurance Company and Transamerica Land Title Insurance Company, subsequently acquired by Lawyers’ Title, are collectively referred to as Commonwealth in this brief.

³ *Sound Built Homes, Inc. v. Dale Alan Land Dev. Co.*, 137 Wn. App. 1055, 2007 WL 959942 (2007).

Faced with the catastrophic financial and practical consequences to Commonwealth if Soundbuilt's decree of specific performance was enforced against the 22 innocent homeowners who had purchased title insurance from it, Commonwealth agreed to pay Soundbuilt \$8 million, in exchange for Soundbuilt's assignment of its established right to acquire title to the 22 homes in the "SBNW/CW Agreement." \$5 million was payable immediately. \$3 million was payable when Commonwealth "obtained a final non-appealable order against . . . DALD/Newhall" pursuant to DALD/Newhall's agreement to indemnify Commonwealth from its business decision to hide from the homeowners Soundbuilt's right to purchase the property.

Commonwealth purposefully "took a dive" in the second appeal.⁴ After Commonwealth obtained a judgment against DALD/Newhall for indemnification, DALD/Newhall filed for bankruptcy. Although it seemed doubtful the bankruptcy trustee would pursue an admittedly weak appeal of that judgment, Commonwealth inexplicably failed to defend the judgment aggressively on appeal, going so far as to argue that the judgment might be reversed – and thus claiming that it did not yet have the obligation to pay the second \$3 million installment required by its agreement with Soundbuilt, on the grounds no "final non-appealable order" had been

⁴ No. 62991-3-I, dismissed February 29, 2012.

entered against DALD/Newhall. After months of delay and prevarication by Commonwealth – which the jury in this case found to be a breach of the Commonwealth/Soundbuilt settlement agreement as of July 13, 2010 – Soundbuilt accepted the bankruptcy trustee’s invitation to terminate the DALD/Newhall appeal by promising to pay \$225,000 to the trustee in exchange for dismissal of the appeal (“Trustee Agreement”).

The third appeal⁵ concerned Soundbuilt’s efforts to force Commonwealth to comply with its obligations under the settlement agreement, in summary proceedings before Judge Richard McDermott, who had presided over Commonwealth’s indemnification claims. In May, 2013, this court reversed the summary judgment entered in favor of Soundbuilt, holding that Commonwealth was entitled to assert defenses and counterclaims, to discovery, and to trial before Soundbuilt could enforce its rights under the settlement agreement.

The parties went back to the trial court. After months of discovery, unsuccessful motions for summary judgment by both parties, and six days of trial, the indisputable facts remained that Commonwealth had breached the parties’ agreement by deliberately delaying and failing to defend the

⁵ *Commonwealth Land Title Ins. Co. v. Soundbuilt Nw. LLC*, 175 Wn. App. 1004, 2013 WL 2325847 (2013).

judgment it had obtained against DALD/Newhall, causing Soundbuilt to act to terminate the appeal in a manner that the parties' agreement in no way prohibited. In the face of undisputed evidence that the parties had negotiated, and relied upon, the "time is of the essence" provisions of the SBNW/CW Agreement, the jury inexplicably found Commonwealth's breach not to be material. The jury also inexplicably, and without substantial evidence, found that Soundbuilt's letter to the Bankruptcy Trustee two months later, accepting the Trustee's invitation to pay money in exchange for dismissal of the appeal of the DALD/Newhall judgment, was a material breach of the agreement. The trial court denied Soundbuilt's CR 50 and CR 59 motions for judgment or new trial. This fourth appeal follows from the dismissal of Soundbuilt's claims for the second installment due under the SBNW/CW Agreement.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering its judgment dismissing Soundbuilt's claims against Commonwealth. (CP 2532-38)

B. The trial court erred in denying Soundbuilt's motions for judgment on the verdict, judgment as a matter of law, reconsideration, or for new trial. (CP 2382-2410, 2539-51)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. In light of the multiple provisions in the SBNW/CW Agreement that the prompt completion of the pending litigation by Commonwealth was an express condition of Soundbuilt's agreement to assign Soundbuilt's specific performance right in the litigation to Commonwealth, was the jury's finding that Commonwealth's breach was *not* material contrary to the language of the SBNW/CW Agreement and the substantial evidence introduced at trial?

2. Does contract law and substantial evidence support Commonwealth's contention and the jury's decision that the parties to the SBNW/CW Agreement negotiated for or agreed on a term or covenant in the SBNW/CW Agreement that limited Soundbuilt's ability to obtain a "final non-appealable order" without Commonwealth's permission?

3. Given that the trial court excluded evidence relating to the profits Soundbuilt would have earned if DALD had performed, did the trial court err by allowing Commonwealth to elicit testimony on those lost profits and argue to the jury that it should rule in Commonwealth's favor because the settlement amount was greater than Soundbuilt's losses?

4. Where the jury was instructed that damages were an essential element of a breach of contract claim, the jury found that Commonwealth had breached the SBNW/CW Agreement, and the trial

court reserved to itself the determination of the amount of damages, did the trial court err by not awarding any damages to Soundbuilt and dismissing this action?

IV. STATEMENT OF THE CASE

Commonwealth entered into an agreement to compensate Soundbuilt in exchange for Soundbuilt's assignment to Commonwealth of Soundbuilt's right to acquire title to the 22 homes. The settlement payment was to be made in 2 tranches as described in Instruction No. 5 as follows:

Under the terms of the contract, Commonwealth paid Soundbuilt \$5 million, and was to pay up to \$3 million when it obtained a final non-appealable order against Dale Alan Land Development Company LLC and the Newhalls ("DALD/Newhall") as provided in the Settlement Agreement.

(CP 2338) The condition precedent to the second payment due Soundbuilt was an order which determined "the liability of DALD and Greg Newhall and his marital community for payments made by Commonwealth to [Soundbuilt] pursuant to this Agreement." (Ex. 26 at 2-3) However, the SBNW/CW Agreement also included a condition subsequent which reduced the amount of the second tranche based on the extent of DALD/Newhall's liability in that final non-appealable order. (Ex. 26 at 3-4)

Before Commonwealth could obtain the final order described in the SBNW/CW Agreement, both DALD and Newhall filed bankruptcy petitions, halting the state court litigation. (RP 455; Ex. 41) To put this in context, the

SBNW/CW Agreement is dated July 29, 2008. (Ex. 26 at 2) The Order on Summary Judgment, which later became the final non-appealable order, was entered in January 2009. (Ex. 40) The jury found that Commonwealth breached the SBNW/CW Agreement as of July 13, 2010. (CP 2329-30) Commonwealth did not move for the relief from stay necessary to obtain the “final non-appealable order” until October 2010. (RP 550-51)

Because of Commonwealth’s failure to act timely, Soundbuilt, with the knowledge of Commonwealth, negotiated an agreement with the Newhall bankruptcy trustee (the “Trustee Agreement”) that resulted in the entry of a final, non-appealable order dismissing the Trustee’s appeal in 2012. (Ex. 113) Dismissal of the appeal made the judgment in favor of Commonwealth Insurers a final order, triggering the obligation to pay the remaining \$3 million due Soundbuilt.

Commonwealth’s claims are based on two contentions:

1. The SBNW/CW Agreement required that the issue of the indemnity be litigated to conclusion on the merits, so that Commonwealth could delay payment of the remaining \$3 million to Soundbuilt as long as possible; and/or,
2. Soundbuilt could not, without Commonwealth’s consent, purchase the right of Newhall to appeal the trial court’s summary judgment order from the Newhall bankruptcy trustee, because Soundbuilt had assigned all its rights to participate in the case and its appeal to Commonwealth.

These contentions must fail. There is no express provision in the SBNW/CW Agreement stating any limitation on how the “final non-

appealable order” could be achieved. The parties agree that the contingency that the Newhall appeal would fall under the control of a bankruptcy trustee is not addressed in the SBNW/CW Agreement. Nevertheless, Commonwealth claimed that Soundbuilt breached the SBNW/CW Agreement, excusing Commonwealth from paying the \$3 million balance due Soundbuilt under its terms, by making an agreement to acquire the appellate rights from the Newhall Trustee. (CP 7-8)

At trial, the jury found that Commonwealth breached the SBNW/CW Agreement first as a result of a delay in Commonwealth’s pursuit of a conclusion of the case. (CP 2329) The jury found that the breach of the “time is of the essence” provisions of the SBNW/CW Agreement were not material, the first error. (CP 2329)

The jury also found that Soundbuilt breached the SBNW/CW Agreement by entering into the Trustee Agreement, which had concluded the Newhall appeal successfully and triggered the obligation of Commonwealth to make the second payment, the second jury error. (CP 2330) There was no written evidence or testimony to support Commonwealth’s assertion of Soundbuilt’s breach; neither the SBNW/CW Agreement, nor the testimony concerning the context for its execution, provided any evidence that either (1) Commonwealth could delay payment by continuing to litigate its successful summary judgment, even if the Newhall bankruptcy trustee concluded not to

go forward, or (2) Soundbuilt could breach the Agreement by using its own means – the purchase of the Trustee’s appellate rights against Commonwealth – to end the litigation and trigger payment. Instead, the jury accepted Commonwealth’s premise that Commonwealth bargained for the right to delay and *lose* its case in order to avoid its obligation to pay Soundbuilt.

The Trustee Agreement actually implemented the same strategy Commonwealth’s bankruptcy counsel Jack Cullen proposed – a strategy Commonwealth argued to the jury was precluded under the SBNW/CW Agreement. In response to a July 2010 letter from Soundbuilt’s counsel, David Kerruish, proposing settlement with the Trustee (Ex. 69), Mr. Cullen wrote:

I have discussed this with my client and they would prefer we move for relief from stay to complete the state court litigation. We’ll do so and see if the trustee has the stomach for an appeal, which I doubt.

(Ex. 70) The only reason to suggest seeing whether the Newhall bankruptcy trustee “has the stomach for it” was because Mr. Cullen believed the trustee would abandon the appeal anyway, without an agreement – in other words obtain a final non-appealable order without litigation to conclusion. As Mr. Kerruish testified:

A. The way I understood his communication was he didn’t feel he had to give up anything because the trustee would very shortly abandon the appeal anyway.

(RP 718)

As a result of the Trustee Agreement, Commonwealth got exactly what it bargained to get; a final non-appealable order holding Newhall liable to Commonwealth for indemnification, for the full extent of the settlement amount. It appears that the jury concluded, wrongly, that Soundbuilt's representation to the Newhall Trustee that it would prepare a settlement agreement based upon payment by Soundbuilt to the Trustee of a share of the \$3 million balance due Soundbuilt from Commonwealth was a material breach of the SBNW/CW Agreement, while Commonwealth's failure to take any action to bring the litigation to a conclusion from early 2009 through July 2010 was treated by the jury as only a technical breach, and immaterial to Commonwealth's duties. As discussed below, the evidence at trial simply does not support those conclusions:

A. Evidence Related to Materiality of Commonwealth's Breach:

The jury found that Commonwealth breached the SBNW/CW Agreement as of July 13, 2010. (CP 2329) However, the jury found that the breach was not material despite being instructed to apply the following definition:

A "material breach" is one that ... relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

(Instruction No. 9, CP 2343) Neither the agreement nor the evidence at trial supports the jury's conclusion.

The SBNW/CW Agreement contains three different provisions relating to the time of performance. ¶ 5.3 provides, in pertinent part:

Commonwealth shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify Commonwealth for sums paid to SBH, ... ***as soon as reasonably possible*** after Commonwealth's payment of the \$5,000,000 described in Paragraph 5.2.

¶ 5.5 of the Agreement provides:

Commonwealth agrees that it will use ***its best reasonable efforts to avoid continuance [of] any of the proceedings***, either before the trial court or on appeal, needed to obtain a final, non-appealable order related to the legal matters described in this Agreement, affecting SBH's collection of the balance due SBH.

¶ 5.17 Agreement provides:

Time is of the essence in the performance of the obligations set forth in this Agreement.

(Ex. 26) (emphasis added)

A principal objective of Soundbuilt in entering into settlement discussions was to avoid further delay in bringing the issues pertaining to Soundbuilt's right to purchase the property to conclusion. Soundbuilt was already four years into acquiring the property at issue when negotiations for settlement began. (RP 357-58) Soundbuilt's right to take title to the property through the order of specific performance had been already upheld by this Court in a decision the Supreme Court declined to review. (RP 339, 354-55)

In one of the earlier communications between Mr. Kerruish and Commonwealth's attorney Chris Brain regarding settlement, dated June 6, 2008, Mr. Kerruish wrote:

My concern, as expressed in our conference call, is that the introduction of additional issues related to the indemnity will provide an opportunity for a participant, such as DALD, to seek delay of the enforcement of the court's order - a delay which, added to the delay of three years that has denied SBH resolution of the case, will stretch even further into the future. My client wants to complete the performance of the purchase and sale agreement and take possession of its property immediately.

(Ex. 11 at 2) In other words, introducing the indemnity issue into the case was going to cause delay Soundbuilt did not want.

Mr. Kerruish went on to state that any agreement would have to include the following:

SBH would continue to monitor progress in the case, and benchmarks for pursuing the litigation must be set. No continuances could be given voluntarily to the indemnities, and summary judgment would be sought by the insurer to try to expedite the process. No extensions would be conceded during any appellate process.

(Ex. 11 at 3) Mr. Kerruish testified Commonwealth's representatives had no objection to these provisions:

No. The discussion among the attorneys participating in the drafting of the agreement was that it was in both parties' best interests to do that.

(RP 374)

The provisions requiring timely performance by Commonwealth were explicitly bargained for by Soundbuilt as a “fundamental” requirement of the Agreement. There was no testimony or evidence to the contrary. Mr. Kerruish testified with respect to the time is of the essence provision:

Q. Drawing upon your discussions with Mr. Chris Brain and Mr. Leggett, why are there three time provisions in this agreement?

A. The “time is of the essence” clause addressed the entirety of the agreement, which was a fundamental element --

It was a fundamental element of the entire settlement structure, because Commonwealth, in conjunction with this, was intervening in the case, and there had to be a choice made among all the participants.

There needed to either be litigation, which would have the effect of interfering with or changing the title relationships of all the homeowners, or there had to be a dismissal of the homeowners to get them out of the litigation and to pursue collection of the sums due under the indemnity.

And so all of our negotiations were based upon the urgency of either letting Soundbuilt pursue its purchase of the property and complete that, as ordered by the Court, or to have Commonwealth take the alternative route of seeking compensation from Mr. Newhall.

(RP 377-78) In short, Soundbuilt had an immediate remedy available to it – proceed against the homeowners. If Soundbuilt was going to forego that remedy, Soundbuilt required terms in the contract that the alternative would be obtained as soon as possible. Without the contractual covenants assuring no avoidable delay, there would not have been a SBNW/CW Agreement.

As Commonwealth's attorney Chris Brain testified, the "time was of the essence" as provided in ¶ 5.17 was all pervasive:

Yes, I would say that that was time of the essence in the performance of the obligations set forth in this agreement, but that includes payment of the 5 million; it includes all of the other stuff we had to do.

Q. That includes everything in the agreement?

A. Everything.

(RP 453) Mr. Brain also acknowledged that the Newhall bankruptcy filing "did not change" this obligation. (RP 455)

Commonwealth itself viewed that timely performance was material to the contract even after the Newhall bankruptcy. First, following the Newhall bankruptcy, Chris Brain immediately referred his client to bankruptcy counsel. (RP 456) Then, within weeks of the bankruptcy filing in December 2008, lawyers from Chris Brain's office obtained an agreement to stipulate to relief from stay. (RP 458-61; Exs. 41, 43) Following Mr. Cullen's retention as Commonwealth's bankruptcy counsel, nothing was done to pursue relief from stay by Commonwealth until October 2011. Nevertheless, as Chris Brain testified:

Q. And to move forward as soon as reasonably possible, pursuant to the settlement agreement, would a relief from stay be necessary as an option?

A. You also had an appeal, which was filed. So you had the bankruptcy, you had an appeal, and there was some confusion about what would be done. You technically need a relief from stay to proceed with the appeal.

(RP 461)

On July 6, 2010, two full years after the SBNW/CW Agreement, Mr. Kerruish wrote to Commonwealth counsel complaining of the delay:

Although some delay in the final resolution of the claims against Newhall was expected at the time Newhall filed his bankruptcy petition, the extended delay which has occurred – without any action seeking relief from the stay to obtain a final adjudication against Newhall consistent with the settlement agreement – was not anticipated. Commonwealth controls the conduct of the litigation under the settlement agreement, and thus controls the timing in which Soundbuilt receives the balance of the settlement funds due. At some point the delay in pursuing the litigation becomes a breach of the settlement agreement[.]

(Ex. 69 at 2) On July 13, 2010, Mr. Cullen responded that Commonwealth was not interested in pursuing settlement with the Newhall Trustee. (Ex. 70) This is the date on which the jury found Commonwealth to be in breach. (CP 2329)

B. Commonwealth's Contentions:

Commonwealth first asserted that the SBNW/CW Agreement required litigation of the appeal to conclusion on the merits on February 6, 2012:

[P]art of Commonwealth's bargained-for exchange with Sound Built was that any additional potential liability would be based on a judicial determination of the Newhalls' liability to Commonwealth under the indemnity agreement. ... *[T]he settlement agreement contemplated that the Commonwealth/Newhall claim would be fully litigated up to and through an appeal.*

(Ex. 117 at 3) (emphasis added) As Commonwealth's counsel argued to

the jury:

Instead of waiting for that decision to come down, Soundbuilt did an end run around the terms of the settlement agreement, and they decided that they would pay off the trustee, the bankruptcy trustee, money in exchange for getting that appeal dismissed to guarantee what was a conditional payment to guarantee their best case scenario of getting \$3 million. And that is contrary to the terms of the agreement,

(RP 271)

But these contentions are mutually exclusive. If the Agreement required resolution on the merits, even Commonwealth would have no authority to obtain a resolution by other means. If the final non-appealable order could be obtained by other means, litigation to conclusion on the merits could not be a requirement of the Agreement.

1. Evidence Relating to “Litigation to Conclusion on the Merits”:

The dispute in this regard centers on ¶ 5.1 and 5.3 of the SBNW/CW Agreement. (Ex. 26) ¶ 5.3 states:

Commonwealth shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify Commonwealth for sums paid to SBH, and that Commonwealth’s payments to SBH were not made as a volunteer. Such determination shall be sought by Commonwealth as soon as reasonably possible after Commonwealth’s payment of the \$5,000,000 described in Paragraph 5.2.

¶ 5.3 thus states explicitly who is supposed to get the “determination,” and, when and where it is to be obtained. This obligation was fully performed in

2008 when Commonwealth sought summary judgment. (RP 447)

¶ 5.1 states in pertinent part:

Commonwealth shall pay the remaining \$3,000,000.00 balance of principal, and all accrued interest, within thirty (30) days of entry of a final, non-appealable order of the Washington courts (including orders of dismissal) determining the liability of DALD and Greg Newhall and his marital community for payments made by Commonwealth to SBH pursuant to this Agreement.

(Ex. 26) ¶ 5.1 specifies when Commonwealth's obligation to pay matures. But, by contrast to ¶ 5.3, ¶ 5.1 does not specify where, how or by whom the condition, a "final, non-appealable order," is to be obtained. ¶ 5.1 does not, on its face, condition Commonwealth's obligation to pay the second tranche upon the Newhall judgment being "*fully litigated up to and through appeal,*" as Commonwealth contended in Ex. 117.

From the inception of the negotiations, the discussion was not about a final judgment on the merits. The discussion was never focused on the nature of the Order, only that the Order enforced Commonwealth's rights:

The insurer must promise SBH that if the insurer is successful in establishing its right to enforce the indemnity agreement, defeating the indemnitors' claims that by settling with SBH the insurer becomes a volunteer, then the insurer, upon entry of a final order establishing the right to enforcement, will pay to SBH an additional \$2,000,000 for transfer of SBH's rights under the court's order.

(Ex. 11 at 3)

Every witness involved in the negotiations of the SBNW/CW Agreement, on behalf of either party, said exactly the same thing – there never was any discussion of a provision requiring “litigation to the conclusion on the merits.” Soundbuilt was represented in the negotiations by Mr. Kerruish and Paul Brain. Mr. Kerruish was explicit that the subject was never discussed in the course of the negotiations:

Q. Did they ever tell you that they wanted the right to appeal a decision to the end?

A. No.

Q. Did you express to them that you wanted the right to appeal if the decision wasn't good enough?

A. No. They controlled whether or not there was going to be an appeal or not.

Q. Did they express to you that if there was an appeal, they wanted to make sure it was seen through, to the end?

A. No.

Q. Does an appeal -- in the context of negotiating this, did the agreement get negotiated? Was anyone saying any appeal that's started must be finished?

A. No.

Q. Was there any discussion like that?

A. None.

(RP 380. *See also* RP 379)

Paul Brain, Soundbuilt's other counsel, testified about the negotiations with Mr. Larry Leggett and Chris Brain, representing Commonwealth, that: “it was never a discussion about, ‘We’re going to

litigate this to final conclusion on the merits.’ That never was talked about.” (RP 1045. *See also* RP 1054-55)

Commonwealth’s only witness as to the negotiations, its attorney Chris Brain, was explicit that litigation to conclusion on the merits was not the only mechanism by which the final non-appealable judgment could be obtained:

Q. Which, for example, did not necessarily mean you had to take it to the end if you could get the other side to dismiss their appeal?

A. No.

(RP 450)

Q. There were many options in terms of how you, on behalf of Commonwealth, could get to that final non-appealable order?

A. Correct.

(RP 451)

In response to Mr. Kerruish’s July 2010 letter proposing settlement with the Trustee (Ex. 69), Mr. Cullen wrote:

I have discussed this with my client and they would prefer we move for relief from stay to complete the state court litigation. We’ll do so and see if the trustee has the stomach for an appeal, which I doubt.

(Ex. 70) As Mr. Kerruish testified:

Q. Now, translated, to you from Mr. Cullen, what do you understand his tactical -- what tactic is he conveying to you here? What’s he trying to achieve?

A. The way I understood his communication was he didn't feel he had to give up anything because the trustee would very shortly abandon the appeal anyway.

(RP 718)

When Commonwealth's counsel argued to the jury about an "end run," he was asserting that Soundbuilt precluded Commonwealth from litigating the appeal to conclusion on the merits – potentially thereby depriving Commonwealth of the benefit of the condition subsequent in ¶ 5.3, under which the amount of the second tranche could be reduced based on the extent of the indemnity in the "final non-appealable order." However, there is no evidence or reasonable inference to be drawn from the evidence that the SBNW/CW Agreement required litigation to conclusion on the merits. Indeed, the only reasonable conclusion to be drawn from the evidence is that Commonwealth's obligation was to use its best efforts to "as soon as reasonably possible" obtain an order *maximizing* Newhall's liability to Commonwealth under the indemnity by whatever mechanism was available. By Commonwealth's own admission, this included, for example, inducing the Trustee to simply abandon the appeal – precisely the strategy that resulted in the "final non-appealable order" contemplated by the SBNW/CW Agreement.

The contention that Commonwealth was deprived of the benefit it bargained to get through this provision is unsupported by any evidence.

Simply put, while the parties may have recognized the theoretical potential that Newhall's liability could be reduced, Soundbuilt entered into the SBNW/CW Agreement based on Commonwealth's representations that, as a practical matter, Newhall would be held fully responsible. The potential for a reduction in payment was not what was driving the settlement.

Chris Brain testified: "the reason I wanted to get the deferral of the \$3 million was a couple of reasons. One, time." (RP 423) Then Mr. Brain testified "You know, title companies don't like to write big checks if they don't have to, and this is a big check for a title company." (RP 423)

What did Chris Brain mean by that reference to time? What was in fact driving the settlement for Commonwealth was not a concern about the scope of the indemnity but, rather getting the "homeowners out of the crosshairs." (RP 497) As Chris Brain testified:

There was a motion, and I think probably the most important thing that caused a settlement and put this case in the status where it had to be settled was that Soundbuilt brought a motion to join all of the individual homeowners as parties to the existing litigation. And that was the precursor to then being able to take their property.

(RP 410) The objective was:

And what we were trying to do was come up with a settlement and keep the homeowners out of everything. And, frankly, that was going to happen, no matter what.

(RP 484)

From our standpoint, the bomb would be that the minute that order entered, somebody from one of the television stations or the newspapers would pick up on this, they'd get interviewed, it would be all over the place, and it would have been devastating to the company.

(RP 484) And further:

But the bomb, and let me make it very clear, it was always the threat that they would take these homes, and it was not something that was -- it was our biggest concern.

(RP 483)

Paul Brain testified, based on his discussions with Commonwealth's representatives:

I recall the conclusion that it would be easier to get a settlement approved if Commonwealth could take down the total dollars in two bites.

(RP 1041-42) "[T]he the discussions always were, 'Let's break this up into two pieces because it's easier for Commonwealth to swallow.'" (RP 1044) So, the testimony from both sides was that the split payment was intended to make it easier for Commonwealth to swallow the total dollar figure, expedite the settlement and "keep the bomb from being dropped."

According to Chris Brain, Commonwealth's counsel in the negotiations, Commonwealth was confident both that it could enforce the indemnity and collect from the indemnitor:

We thought there were assets to collect, and we thought the indemnity agreement was enforceable. In fact, we were sure the indemnity agreement was enforceable.

(RP 429. *See generally* RP 428-31) Indeed, representations by Commonwealth's representatives that the indemnity was fully enforceable were a material factor in the decision to accept the structured payment:

During the discussions with Larry Leggett and Chris [Brain], preliminary to the settlement agreement, we had discussed at great length the conclusions that Larry Leggett and Chris held regarding the potential that the liability under the indemnity could be avoided by Newhall ... and they both basically said, "We don't think there's any potential that Newhall won't be held liable for the entire amount of the settlement agreement under the indemnity in its current form, because it's extremely broad indemnity."

(RP 1042-43) Mr. Kerruish said the same thing:

Q. So, between Mr. Brain and Mr. Leggett, what did they tell you in terms of what they expected to be able to do with whatever they paid to Soundbuilt?

A. They expected to seek and recover it from Mr. Newhall.

Q. Every penny?

A. Yes.

(RP 363) Chris Brain never denied these representations. Commonwealth asserts it was deprived of a benefit Commonwealth represented it never expected to receive based on an event it told Soundbuilt would never happen. This was a risk Commonwealth took.

2. Commonwealth's Claim of Exclusive Right to Settle:

The other contention by Commonwealth was that how the Newhall appeal was resolved was under the *exclusive* control of Commonwealth. The contingency that the appeal might end up in the hands of a

Bankruptcy Trustee was never considered or discussed by the parties. The testimony was, again, uniformly that a prohibition on Soundbuilt negotiating with a bankruptcy trustee for its abandonment or sale of the appellate rights was never considered.

For example, Chris Brain testified:

Q. Now, I want to ask you a question about the agreement. Did this agreement contemplate whether or not either side might buy assets in a bankruptcy?

A. It was never discussed.

(RP 462) Chris Brain also testified:

Q. Was bankruptcy specifically put in the agreement?

A. No, it was not.

(RP 452) As Chris Brain testified, the SBNW/CW Agreement was “the full understanding of the parties.” (RP 440) There is no provision in the SBNW/CW Agreement which was intended to address this contingency. So, right from the beginning, there is no evidence and no inference to be drawn reasonably from the evidence that the SBNW/CW Agreement was intended to preclude a deal with the Trustee.

To get around this, Commonwealth asserted a non-litigated result creating a “final order” was under the exclusive control of Commonwealth. Such an interpretation is actually contradictory to all evidence.

¶ 5.3 of the SBNW/CW Agreement expressly requires Commonwealth to seek immediately an order on the indemnity issue from

the King County Superior Court. (Ex. 26) By contrast, ¶ 5.1 does not specify by whom or how the “final non-appealable order” may be obtained. The only version of the language in ¶ 5.1 pre-dating the SBNW/CW Agreement is found in an “outline of the deal points” to which Chris Brain believed the parties had agreed. Mr. Brain describes when and how the condition to payment of the second tranche will be met: “Within 10 days of Commonwealth obtaining a final non-appealable judgment (after all appeals). . . .” (Ex. 17 at 1) However, the final version of the SBNW/CW Agreement does not include any restriction that the “final order” be obtained by Commonwealth, or the requirement of a judgment on the merits. This is the only evidence in the trial record deriving from the negotiations relating to this issue and the evidence supports only the conclusion opposite from that argued by Commonwealth.

Chris Brain was asked to identify the provisions in the SBNW/CW Agreement “relevant to determining whether or not Soundbuilt had a right, on its own, *without permission of Commonwealth*, to pay the trustee money to dismiss the appeal.” (RP 513) The real issue is whether there is any evidence or inference to be drawn from the evidence that Commonwealth’s permission was required.

Chris Brain did not in fact reference ¶ 5.3 or 5.1. He cited to two other provisions. (RP 513) One provision referenced by Chris Brain was ¶

5.7 of the SBNW/CW Agreement:

SBH agrees to cooperate with all reasonable requests of Commonwealth to join in and support the litigation efforts of Commonwealth to enforce Commonwealth's rights against DALD and Newhall. Cooperation may include, in Commonwealth's discretion, execution of pleadings prepared by SBH's counsel or Commonwealth's counsel and appearances before the court by SBH's counsel, as reasonably needed by Commonwealth.

(Ex. 26) This provision was requested by Chris Brain. Here is his testimony as to why:

What I wanted to be able to do was if I needed a declaration, in other words, a sworn statement from one of the principals of Soundbuilt, that I could get that. I'd prepare it; I'd discuss it with them, obviously. They'd have to make sure it was the truth. In other words, I didn't expect them to sign anything that wasn't absolutely true, but I needed to be able to have that access. And if I needed to call them as a witness at trial, I wanted to make sure that they had a duty to cooperate, which means that they would be there, and I wouldn't have to worry about subpoenaing them, or tracking them down.

So, to me, this -- frankly, number one, this was not an issue, was never in contest, ***and it is not a material term of the agreement*** from the standpoint that it was negotiated or ever objected to. I asked for it; they said, "Sure, no problem."

Q. While you were actively involved in the case, did Soundbuilt comply and cooperate when requested?

A. Yes.

(RP 443) (Emphasis added) The purpose of this provision was to require Soundbuilt to provide information or testimony in the on-going litigation against Newhall ***if and when requested by Commonwealth.***

Chris Brain said that it was his subjective interpretation that ¶ 5.7 imposed a general duty on Soundbuilt not to interfere:

They weren't free to do anything without our consent. I mean, it was our job to go forward. That's my interpretation of it.

(RP 444) The reason why is instructive:

But how we proceeded under our indemnity, I didn't want them interfering with, because we had the defenses that we expected to be raised by DALD and Newhall about valuation and about -- because it listed the policy, and also about the volunteer. And so I didn't want them doing anything that would be in conflict with positions we might take.

(RP 447) Commonwealth intended this provision to keep Soundbuilt from doing anything that would interfere with Commonwealth enforcing the indemnity to the full \$8 million. This provision was not about litigating to conclusion on the merits. It was about Commonwealth making sure it would *win*.

The assertion is that Soundbuilt breached the Agreement by not seeking Commonwealth's permission to negotiate with the Trustee, even though Commonwealth's own bankruptcy counsel endorsed the concept of inducing the Trustee to abandon the appeal. If this provision was not material to the Agreement, then its breach under the instructions offered by Commonwealth could not result in an excuse of performance.

But what the Trustee Agreement actually achieved is exactly what Commonwealth covenanted to use its best efforts to promptly accomplish.

If litigation to conclusion on the merits was not required under the SBNW/CW Agreement, then Soundbuilt did not interfere with anything. Rather, Soundbuilt caused the result Commonwealth wanted and covenanted to promptly obtain, and was actively pursuing according to Mr. Cullen, fulfilling the principal objective of the SBNW/CW Agreement.

¶ 5.7, on its face, requires that any duty owed by Soundbuilt is triggered by Commonwealth. The provision would be breached only if Commonwealth made a request and Soundbuilt failed to comply. Assuming that the very limited duty to cooperate in providing evidence can be expanded to include a duty not to interfere, it is still re-writing ¶ 5.7 to assert that the alleged duty can be breached without notice from Commonwealth. In other words, Soundbuilt would have a duty to stop only if Commonwealth asserted that Soundbuilt was interfering with Commonwealth's claimed exclusive rights.

Similarly, the "course of performance" contains no support for Commonwealth. The settlement discussions with the Newhall trustee commenced in October 2009. (Ex. 58) Commonwealth, through Mr. Cullen, was aware of the negotiations by mid-December. (Ex. 59) Mr. Cullen was either a participant in or kept apprised of the settlement negotiations through January 2011. (See Exs. 63-66, 68, 69, 71, 77 and 84) The testimony relating to Mr. Cullen's involvement in the process of

gaining approval of the Trustee Agreement is extensive. (RP 615-633) Commonwealth's objections to Soundbuilt's efforts were entirely procedural and not based on the assertion that the Trustee Agreement was a violation of the SBNW/CW Agreement. (RP 615, 621)

Nowhere is there any evidence that: (1) at the time, Commonwealth considered Soundbuilt's conduct interference, (2) Commonwealth requested that Soundbuilt cease interfering or, (3) Commonwealth objected to Soundbuilt's conduct. As Mr. Kerruish testified:

Q. Now, did you ever receive any word from Mr. Cullen or from Mr. [Chris] Brain's office that Soundbuilt couldn't negotiate with the trustee?

A. No, I did not.

(RP 713-14)

The very first time the issue is raised is *after* the Trustee Agreement was approved by the Bankruptcy Court, became binding, and was in the process of being implemented. (Ex. 117) Exhibit 117 is Commonwealth's opposition to dismissal of the Newhall appeal. So, the course of performance evidence is that for a period of about two years, Commonwealth was fully aware of and made no objection to conduct which it now contends was in violation of the Agreement and materially compromised its rights, where Commonwealth's own lawyer ties the duty

not to interfere to a “non-material” provision in the Agreement requiring notice from Commonwealth to trigger any duty.

When asked about provisions relevant to the claimed limitation, Chris Brain also referenced ¶ 5.2:

Upon deposit of the \$5,000,000.00 in the trust account of David S. Kerruish, P.S., the right, title and interest of SBH in the PSA, the Lawsuit and the lis pendens shall transfer to Commonwealth, without further action by the parties.

(Ex. 26)

The “Lawsuit” is defined in ¶ 4 of the SBNW/CW Agreement as the lawsuit against DALD that resulted in the Order of Specific Performance. (Ex. 26) ¶ 2 of the SBNW/CW Agreement states:

The purpose of this Agreement is to state the terms and conditions of transfer by SBH to Commonwealth of all right, title and interest of SBH in (a) the purchase and sale agreement dated October 14, 2003 (“PSA”), between SBH, as buyer and Dale Alan Land Development Company, LLC (“DALD”), seller, for the purchase and sale of the Real Property described in paragraph 3 herein; (b) SBH’s rights and responsibilities as such are described in the Lawsuit, defined in paragraph 4 herein, related to the PSA, except such rights reserved by SBH described herein, and (c) all right, title and interest of SBH in any claims against the persons who acquired an interest in the Real Property subsequent to the filing of SBH’s lis pendens, King County Recording Number 20040525000774, in exchange for the consideration set forth herein and Commonwealth’s full and complete performance of this Agreement.

(Ex. 26) At the time of the execution of the SBNW/CW Agreement and assignment of claims, Commonwealth's claims against Newhall *were not part of the Lawsuit.*

¶ 5.2 is in fact the mechanism by which Commonwealth acquired the "claims" against the Homeowners which were then released. So, Soundbuilt's obligation under ¶ 5.2 was fully performed and Commonwealth received the full benefit of this provision before Commonwealth even sought summary judgment on the indemnity. There was nothing for Soundbuilt to interfere with several years later when the Trustee Agreement was being negotiated.

In discussing how the assignment affected the rights of the parties, Chris Brain testified:

They assigned us all of their rights in that judgment, so we owned that judgment, and we had the duty to go forward with processing our rights, and we wanted them to cooperate with us.

(RP 445) But the judgment which was assigned was the *judgment and order of specific performance enforceable against the homeowners* which was fully and completely released before the Summary Judgment. What Commonwealth was thereafter litigating was its own claims against Newhall under the indemnity. This provision had absolutely nothing to do with ensuring the litigation against Newhall would proceed to conclusion

on the merits or barring Soundbuilt from dealing with the Newhall Trustee. It only had to do with the claims against the homeowners.

C. The Lost Profits Issue:

A large part of the evidence relied on by Commonwealth was extraneous to the contract issues the jury was supposed to decide. This is particularly true of Commonwealth's focus on the profits Soundbuilt would have earned if DALD had performed in relation to the settlement payment Commonwealth committed to make. For example:

Q. Okay. And was one of the rationales for specific performance, for choosing specific performance rather than damages, including lost profits, was because, economically, that looked like a better path for Soundbuilt?

MR. HOWARD: Objection; relevance to this matter, and previous objections.

THE COURT: Overruled. He can testify.

THE WITNESS: I'm not sure what you mean by "economically." The fact of the matter is that DALD was a single asset entity which had sold its only asset to Chelan Homes. So there was no realistic basis without extended litigation to recover a damages claim from DALD.

(RP 1000-01) At closing, Commonwealth's counsel asserted:

Now, the \$8 million that they demanded, and you heard about that demand, that had nothing to do with the amount of money that Soundbuilt was out of pocket. It didn't pay anything on the deal that fell through. It had nothing to do with their lost damages and their lost profits.

MR. HOWARD: Objection, Your Honor; inappropriate argument, given the rulings.

(RP 1189) Commonwealth argued that the jury should ignore the SBNW/CW Agreement because to find for Soundbuilt would be to effectively give Soundbuilt a windfall in relation to the actual losses it incurred as a result of DALD's non-performance. Commonwealth was clearly intimating that Soundbuilt's settlement demand was nothing more than extortion through leverage against the homeowners. There are two reasons why asking the jury to draw this inference and ignore the contract is improper. First, there is absolutely no evidence from which to draw the inference. Chris Brain was explicit that what had created the risk to the Homeowners was the issuance of title policies to the Homeowners. (RP 531)

In asserting a right to specific performance, Soundbuilt was doing nothing more than exercising its legal rights – something it was absolutely entitled to do. Soundbuilt's right to take title to the lots through the order of specific performance had been upheld by the Court of Appeals: (RP 339, 354-55) To influence the jury improperly, Commonwealth's counsel accused Soundbuilt of improper conduct by exercising Soundbuilt's legal rights in a situation entirely of Commonwealth's making.

Chris Brain agreed with Paul Brain's valuation of Commonwealth's liability if the Homeowners lost title:

The numbers, I remember, were the numbers that Paul provided me, Paul Brain, regarding what he believed the

value of those properties were. And I think that was in the \$12 million to \$13 million range.

Q. And did that seem reasonable to you at the time?

A. Yes.

(RP 411-12) Chris Brain also testified that the settlement demand of \$8 million was reasonable in light of the amount of liability. (RP 423-24) Commonwealth's counsel asserted that Soundbuilt was greedy, based on a settlement amount that Commonwealth's prior counsel conceded was reasonable.

There never was, in fact, any evidence offered as to "the amount of money that Soundbuilt was out of pocket" or Soundbuilt's "lost damages and their lost profits," to use Mr. Lawrence's phrases (RP 1189), because the trial court had excluded it on Soundbuilt's Motion in Limine. (CP 2308) The Motion was prompted by Commonwealth identifying as a trial exhibit a 2005 expert report on Soundbuilt's damages. (CP 2313; proposed Ex. 3) Soundbuilt sought to exclude any evidence relating to Soundbuilt's damages from DALD's breach on the following basis. (CP 2208-09)

In his oral ruling granting the motion, the trial court stated:

And the jury has to know that this was a mutual agreement that both parties had something to lose, something to gain, and they entered into the agreement with that in mind. And I think if they know that, then you can go ahead and make your arguments. But I don't think the details of it have to be specified

(RP 241) The formal order contains the following qualification: “Commonwealth may introduce evidence/argument to show Soundbuilt did share risk ...” (CP 2308)

But the jury never heard or saw any evidence of any kind regarding Soundbuilt’s damages from DALD’s breach. Nevertheless, on the basis of no evidence whatsoever, Commonwealth’s counsel was allowed to argue that Soundbuilt was never entitled to the amounts owed under the Agreement, and that Soundbuilt is seeking “a windfall” – precisely the argument that the ruling on the Motion in Limine was intended to preclude.

D. Damages:

Instruction No. 6 (CP 2340) told the jury that damages are a necessary element of a breach of contract claim. However, under that Instruction the trial court reserved the issue of damages for determination. Accordingly, the jury verdict form did not ask the Jury to determine Soundbuilt’s damages. Because the jury found that Commonwealth first breached the SBNW/CW Agreement, the jury had to have concluded that Soundbuilt suffered damages as a result of Commonwealth’s breach.

Although Soundbuilt asserted a right to damages in the post-trial briefing (*see* CP 2390-93), the judgment entered by the trial court (CP 2534) finds expressly that Soundbuilt is not entitled to damages. The Judgment thus is irreconcilable with the jury verdict.

V. ARGUMENT

A. Materiality:

The issue of materiality was sent to the jury under the following instruction:

A “material breach” is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she expected.

(Instruction No. 9; CP 2343) The jury’s finding that Commonwealth’s breach was not material is not supported by substantial evidence under this instruction and the parties’ agreement.

In this case, not only was time of the essence, but Commonwealth was required to obtain a determination of the scope of Newhall’s liability “as soon as reasonably possible;” ¶ 5.3, and by using “its best reasonable efforts to avoid continuance;” ¶ 5.5. On the face of the SBNW/CW Agreement, the timeliness of Commonwealth’s performance was material. “Time is of the essence of a contract whenever it appears to have been the intention of the parties to make time of the essence.” *University Properties, Inc. v. Moss*, 63 Wn.2d 619, 621-22, 388 P.2d 543 (1964).

In the presence of a “time is of the essence” provision, a breach by a failure to perform timely is material as a matter of law:

Therefore, it would appear that neither the written nor the oral part of the contract expressly provided that time was to be of the essence. Where there is no such express provision

the question as to whether a delay in performance is a material breach depends upon the surrounding circumstances. *Jacks v. Blazer* (1951), 39 Wn.2d 277, 235 P.2d 187.

Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc., 64 Wn.2d 1, 5, 390 P.2d 548 (1964). Rephrasing this quotation – Where there is an express “time is of the essence” provision, whether a delay in performance is a material breach ***does not depend*** on the surrounding circumstances.

The testimony and evidence relating to the negotiations for the Settlement Agreement on the importance of timely performance consisted almost exclusively of the testimony of Mr. Kerruish, and was unchallenged – “The time is of the essence” clause was “a fundamental element of the entire settlement structure” (RP 377-78) Soundbuilt had already incurred four years of delay in vindicating its rights and was not willing to forego taking title without Commonwealth’s commitment to act timely. The only other testimony on this subject was from Chris Brain, who described the impact of this provision as pervasive – governing the entire performance by Commonwealth under the SBNW/CW Agreement. (RP 453) There would have been no SBNW/CW Agreement without these commitments.

The course of performance by the parties, at least up until the point in time Commonwealth caused a conversion of the Newhall Estate from a

Chapter 11 reorganization to a Chapter 7 liquidation, is fully consistent with both sides recognizing that timely performance was essential, or to use Mr. Kerruish's characterization, "fundamental" to Soundbuilt's agreement to settle. Even there, Chris Brain, Commonwealth's lawyer, testified that the bankruptcy did not affect Commonwealth's obligations to timely perform. (RP 455)

So, what was the evidence before the jury that timely performance was not material? Based on Commonwealth's closing argument, it appears to be the fact that prior to July 10, 2010, Soundbuilt did not instruct Commonwealth to seek relief from stay:

Now, you heard from Mr. Howard, and you heard testimony from Mr. Kerruish, and I think you heard from Mr. Paul Brain, that, well, they assumed that Commonwealth and Jack Cullen and Chris Brain would know that, actually, there was something to do, there was a reason to do something, despite this email. But they didn't tell him. It wasn't their obligation to tell him. You are going to have to ask yourself how credible that is.

(RP 1202) From that, Commonwealth argued that it is a reasonable inference that the delay was not material to Soundbuilt. (RP 1203) But this is not a reasonable inference from the evidence.

Soundbuilt's counsel did indeed testify that Soundbuilt had no duty or obligation to tell Commonwealth to seek relief from stay. (RP 551, 706, 714) However, so did Commonwealth's counsel, Chris Brain: "There was

no provision in this contract which said that Soundbuilt had to provide us notice of a default or Soundbuilt had to do anything if they thought we were not complying with the agreement.” (RP 524-25)

There is no requirement in the SBNW/CW Agreement that Soundbuilt notify Commonwealth of a default. At no time prior to the bankruptcy trustee actually seeking dismissal of the Newhall appeal, for more than two years during which Commonwealth was fully aware of the settlement negotiations, did Commonwealth assert that Soundbuilt could not unilaterally negotiate with the trustee or that the appeal could only be resolved on the merits.

Commonwealth’s position in this litigation was that Commonwealth had unfettered control over the conduct of the litigation. Again, to quote Commonwealth’s closing: “Soundbuilt’s Counsel had no right to direct the litigation, or even edit the pleadings.” (RP 1195) Chris Brain testified: “They weren’t free to do anything without our consent” (RP 444), based on the duty to cooperate in ¶ 5.7. But ¶ 5.7 on its face requires that any duty owed by Soundbuilt is triggered by a request from Commonwealth. Commonwealth made no request.

Commonwealth’s whole claim of breach was predicated on the assertion that Soundbuilt could do nothing that would affect the litigation. The whole contention that timeliness of Commonwealth’s performance

was not material because Soundbuilt did not direct Commonwealth to seek relief from stay appears to be based on the contention that Soundbuilt failed to exercise a right or had a duty Commonwealth vehemently denied ever existed. Commonwealth should not have it both ways.

There is no law that Appellant is aware of, and no instruction was given to the jury, that timely performance is material only where the aggrieved party tells the non-performer that it is untimely. Moreover, the undisputed fact of the matter is that Soundbuilt did tell Commonwealth that its failure to act in a timely fashion would be a breach specifically with respect to the issue of Commonwealth's failure to seek relief from stay to allow the appeal to go forward on July 10, 2010, noting: "*Commonwealth controls the conduct of the litigation under the settlement agreement, and thus controls the timing in which Soundbuilt receives the balance of the settlement funds due.*" (Ex. 69 at 2) (emphasis added) Simply put, there is no inference that can be reasonably drawn from the evidence under which the timeliness of Commonwealth's performance was not material to the SBNW/CW Agreement.

B. Soundbuilt's Breach.

¶ 5.3 of the SBNW/CW Agreement provides in pertinent part:

In the event that the King County Superior Court fails to find that DALD and Newhall are liable to Commonwealth for all sums that Commonwealth has agreed to pay to SBH,

and sets a lower sum (or no sum) as the sum for which DALD and Newhall are liable to Commonwealth, then the balance owed SBH shall be reduced ...

Commonwealth's pitch to the jury was that Soundbuilt had made an "end run" around this liability reduction provision in the SBNW/CW Agreement:

Instead of waiting for that decision to come down, Soundbuilt did an end run around the terms of the settlement agreement[.]

(RP 271)

"[T]here is an implied agreement ... [not to] interfere with the performance of the contract terms." (Instruction No. 11, CP 2345) Commonwealth claims Soundbuilt interfered with some performance by Commonwealth. Commonwealth was asserting that for Soundbuilt to obtain the "final non-appealable order," through a deal with the bankruptcy trustee, Soundbuilt was interfering with Commonwealth's performance. However, this portion of ¶ 5.3 of the SBNW/CW Agreement is not a covenant – it imposes no performance obligation on either party. Instead, it is a condition subsequent:

Where it is doubtful whether words create a promise (contractual obligation) or an express condition, we will interpret them as creating a promise. But words such as "provided that," "on condition," "when," "so that," "while," "as soon as," and "after" suggest a conditional intent, not a promise.

Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 80, 96 P.3d 454 (2004) (citation omitted). A “condition subsequent” is a contractual term that provides that the occurrence of an event will extinguish a duty. *See, e.g., City Nat. Bank of Anchorage v. Molitor*, 63 Wn.2d 737, 745, 388 P.2d 936 (1964). “In the event that” as used in ¶ 5.3 is classic conditional language.

The duty of good faith and fair dealing is not “free-floating,” but “exists only in relation *to performance of a specific contract term.*” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991) (emphasis added); *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 234, 370 P.3d 25 (2016). As the jury was instructed, Soundbuilt’s breach, including breach of the implied duty of good faith, has to be tied to performance of a specific contract term. In Instruction No. 6, the Jury was instructed that Commonwealth would bear the burden of proving “that the contract included the terms” Commonwealth claimed were breached. (CP 2340) Instruction No. 10 (CP 2344) advises that the duty of good faith “does not require a party to accept a material change in the terms of its contract.” Instruction No. 11 states: “there is an implied agreement ... to do nothing that will hinder, prevent, or interfere with *the performance of the contract terms.*” (CP 2345) (emphasis added)

The Jury could not rely on ¶ 5.3 to find a breach because, as a condition, ¶ 5.3 imposes no performance obligation on either Commonwealth or Soundbuilt. Commonwealth's performance obligation was to use its best efforts to timely obtain a "final non-appealable order." Chris Brain testified that ¶ 5.7 imposed a general duty on Soundbuilt not to interfere. (RP 444) The purpose of that duty was to ensure that Commonwealth obtained a "final non-appealable order" enforcing the maximum liability of Newhall under the indemnity:

But how we proceeded under our indemnity, I didn't want them interfering with, because we had the defenses that we expected to be raised by DALD and Newhall about valuation and about -- because it listed the policy, and also about the volunteer. And so I didn't want them doing anything that would be in conflict with positions we might take.

(RP 447) The idea that Soundbuilt would engage in conduct that would cause it to be paid less is really nonsensical. While the parties may have recognized a theoretical potential that the indemnity might not be enforced to the entirety of the settlement amount, and included a condition subsequent to address it, Commonwealth's duty was to use its best efforts to avoid the condition occurring.

There is no reasonable basis for concluding that Soundbuilt interfered with Commonwealth's performance unless "the settlement agreement contemplated that the Commonwealth/Newhall claim would be

fully litigated up to and through appeal.” (Ex. 117) For this proposition, there is not a scintilla of evidence in the record. Every witness, including Commonwealth’s only witness on the negotiations, Chris Brain, testified to the contrary. Soundbuilt’s conduct produced precisely the result Mr. Cullen wrote about in Ex. 70 – that Commonwealth would move for relief from stay “and see if the trustee has the stomach for an appeal, which I doubt.” In the final analysis, Commonwealth’s claim of breach is predicated on exactly the same litigation strategy Commonwealth was proposing to follow. Mr. Cullen’s statement precludes any inference that litigation to conclusion on the merits was a requirement of the Agreement.

There is no evidence or inference to be reasonably drawn from the evidence that there is any provision in the Agreement which was intended to address the contingency that the appeal would pass under the control of a Bankruptcy Trustee. All of the witnesses said the same thing: the contingency was never considered. To conclude that the Agreement governs this contingency is simply to rewrite the Agreement.

C. The Lost Profit Issue:

Below, Commonwealth claimed that the financial outcome to Soundbuilt if it had elected to pursue damages against DALD would have supported the contention that Soundbuilt and Commonwealth had agreed to “share the risk” that a Court would reduce Newhall’s liability under the

indemnity. This makes no sense whatsoever. There is absolutely no relationship between Newhall's liability under his contract of indemnity with the Title Insurers and DALD's liability for lost profits under the Purchase and Sale Agreement with Soundbuilt.

Soundbuilt's right to specific performance (not damages) and title to the properties occupied by the homeowners had been fully litigated to conclusion. There is absolutely no question that Soundbuilt was doing no more than exercising a fully legal right by proceeding against the homeowners. The only conceivable rationale for offering this evidence is to assert that Soundbuilt was obtaining some kind of improper windfall at the expense of the homeowners.

But the indisputable effect of the SBNW/CW Agreement was that the title insurers were compelled to honor their insurance contracts with the homeowners, thereby protecting the homeowners from any adverse result. The only reason the homeowners were at risk was because the title insurers facilitated the concealment of the *lis pendens*. As Chris Brain readily acknowledged, the risk to the homeowners was created by Commonwealth.
(RP 531)

Nevertheless, having ordered the exclusion of "lost profits" evidence, the Court, over Soundbuilt's objection, allowed Commonwealth to elicit testimony on this subject and use that testimony in closing:

Now, the \$8 million that they demanded, and you heard about that demand, that had nothing to do with the amount of money that Soundbuilt was out of pocket. It didn't pay anything on the deal that fell through. It had nothing to do with their lost damages and their lost profits.

(RP 1189) This is nothing more than a naked appeal to the jury to punish Soundbuilt for being greedy – an invitation to the jury to simply ignore the parties' agreement. Simply put, it is an effort to prejudice the jury with evidence that simply has no bearing on the relative obligations of the parties under the Agreement.

D. The Trial Court's Failure to Award Soundbuilt Damages.

Soundbuilt requested an award of damages consistent with the Trial Courts reservation of the damages issue for its determination. In its post-trial brief Soundbuilt requested an award of damages consistent with the Jury Instruction No. 6 and the determination by the Jury that Commonwealth had first breached the SBNW/Commonwealth Agreement. (CP 2390-93) The trial court held: "Soundbuilt has failed to establish that it is entitled to any damages as a result of Commonwealth's non-material breach...." (CP 2534)

It is impossible to tell whether the trial court was concluding that a non-material breach did not entitle Soundbuilt to damages as a matter of law or the trial court was making a factual finding or a legal conclusion that a non-material breach precluded damages. If the former, the finding could not

be supported by substantial evidence since it is in conflict with the jury's verdict that Commonwealth breached, which, under the Court's Instruction, required the Jury to find damage. If the latter, this ruling was contrary to the principle that "[a]ny unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages." *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 589, 167 P.3d 1125 (2007) (citing Simpson on Contracts, § 187, at 377 (2d ed. 1965)). If the breach is a partial breach or nonmaterial breach, as the jury has found, plaintiff is entitled to "compensation for the defective performance." *Id.*

The jury found that Commonwealth breached on July 13, 2010. (CP 2329) Commonwealth's breach on that date entitles Soundbuilt to the remedy of its expectation damages. *See Gaglihari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 446, 815 P.2d 1362 (1991) ("damages recoverable for a breach of contract are those which may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract.") (quotation omitted).

The evidence presented at trial demonstrated that—at the time they made the contract—both parties clearly and reasonably contemplated that Commonwealth would obtain a final-non-appealable order against the Newhalls for \$8 million, and that Commonwealth would then pay

Soundbuilt \$3 million pursuant to the Agreement. (RP 363, 428-31, 1042-43) This amount is not speculative but is reasonably certain based on the terms of the Agreement and the evidence regarding the parties' mutual belief regarding the likelihood of success against Newhall under the indemnity agreement. Consistent with this evidence, Soundbuilt's expectation damages arising from Commonwealth's breach are the \$3 million (plus interest) Commonwealth would pay under the Agreement had it performed to timely satisfy the condition precedent. Restatement (Second) of Contracts § 237 makes clear that a "claim for damages that has already arisen as a result of a claim for partial breach is not discharged" by a subsequent material breach. *See* Restatement (Second of Contracts) § 237 comment e. At the least, therefore, Soundbuilt is entitled to judgment for its damages of \$3 million plus interest occasioned by Commonwealth's first breach, offset by any damages that Commonwealth can show were caused by Soundbuilt's subsequent breach.

E. Request for Attorney's Fees.

A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). Here, the SBNW/CW Agreement contains a fee provision. (Ex. 26) This Court should award Soundbuilt attorney fees under the agreement for having to pursue this appeal.

RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

VI. CONCLUSION

The record is devoid of any evidence which would support a reasonable inference that the requirement of timely performance by Commonwealth was not a material term of the SBNW/CW Settlement Agreement. Commonwealth's only argument to the contrary, that Soundbuilt had a duty to and failed to direct Commonwealth to seek relief from stay, is belied by the testimony of its own attorney Chris Brain: "There was no provision in this contract which said that Soundbuilt had to provide us notice of a default or Soundbuilt had to do anything if they thought we were not complying with the agreement." (RP 524-25) If the finding that Commonwealth's breach was not material cannot be sustained, Soundbuilt's subsequent conduct is immaterial and judgment should be entered in its favor.

Commonwealth's contention that the SBNW/CW Agreement required litigation to conclusion on the merits was denied by its own two attorneys, Chris Brain and Jack Cullen; Mr. Cullen stated that he would "see if the trustee has the stomach for an appeal, which I doubt." (Ex. 70) Indeed, the final non-appealable order was obtained through exactly the mechanism Mr. Cullen was proposing – inducing the Trustee to abandon the appeal.

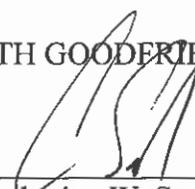
Chris Brain's subjective interpretation that the SBNW/CW Agreement explicitly incorporated a duty not to interfere is linked to a provision which Mr. Brain also characterized as "not material." (RP 443) That same provision would have required Commonwealth to notify Soundbuilt that its conduct was not consistent with the SBNW/CW Agreement, which never occurred.

The Trial Judge precluded evidence of Soundbuilt's lost profits. By allowing Commonwealth to argue that the settlement amount, characterized by Commonwealth's own counsel as reasonable, was actually a windfall Commonwealth skirted the pretrial rulings and advocated to the jury highly prejudicial but entirely irrelevant and unsupported argument. Finally, the failure to award damages by the trial court is simply irreconcilable with the findings of the jury.

Dated this 19th day of August, 2016.

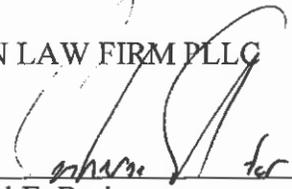
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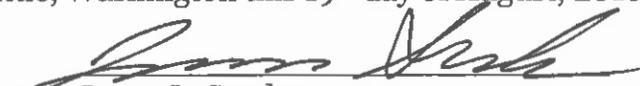
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 19, 2016, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 19th day of August, 2016.


Jenna L. Sanders