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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COLLEGE MARKETPLACE LLP, A WASHINGTON LIMITED
LIABILITY COMPANY,

Appellant,

v.

OLHAVA ASSOCIATES, LP, A WASHINGTON LIMITED
PARTNERSHIP, HD DEVELOPMENT OF MARYLAND, INC.,
A MARYLAND CORPORATION, AND WAL-MART REAL
ESTATE BUSINESS TRUST, A DELAWARE STATUTORY
TRUST,

Respondents.

RESPONDENT HD DEVELOPMENT OF MARYLAND, INC.'S
BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. STANDARD OF REVIEW4

III. STATEMENT OF THE CASE.....5

 A. Shopping Center Development Plan5

 B. Original ECRs6

 C. Amendment of the Original ECRs7

 D. Amended ECRs Recorded.9

 E. College’s Proposed Lease To Sherwin
 Williams10

 F. Procedural History11

IV. ARGUMENT13

 A. The Trial Court Correctly Found That Wal-
 Mart And Olhava Had The Right To Amend
 The Original ECRs As They Did.13

 1. The Trial Court Properly Interpreted
 Section 15 Of The Original ECRs To
 Give Meaning To Its Express Terms.13

 2. The Amended ECRs Are Binding On
 College’s Lot 7-A.17

3.	The Court Correctly Held, In Accord With <i>Wilkinson</i> , That The Amended ECRs Are Consistent With The Center’s General Plan Of Development And Are Related To The Existing Covenants.	18
4.	Neither <i>Wilkinson</i> Nor The Cases It Cites Address The Interests And Reasonable Expectations Of Property Owners Within A Shopping Center.	22
5.	The “Parking Ratios” Provision Of The Original ECRs Has No Effect On Wal-Mart And Olhava’s Right To Modify The ECRs.	23
B.	The Trial Court Properly Excluded Evidence And Argument Relating To Plaintiff’s Unpleaded And Undisclosed Antitrust Claim.	24
1.	Additional Factual Background.	24
2.	Plaintiff’s Antitrust/Public Policy Claim Was Not Pleaded, And Evidence In Support Of That Claim Was Therefore Inadmissible.	27
3.	Even If The Court Had Allowed The Photographs And Summaries Into Evidence, Plaintiff Could Not Have Shown The Amended ECRs Were An Unreasonable Restraint On Trade.	29

8 3

C. The Trial Court Properly Awarded
Attorneys' Fees And Costs To Home Depot
Under Section 13 Of The Amended ECRs.36

 1. The Court Correctly Applied General
 Rules Of Contract Construction To
 Section 13.....37

 2. The Trial Court Correctly Found That
 College Threatened To Breach The
 Amended ECRs In August 2011.....39

 3. The Trial Court Correctly Found That
 Home Depot Is Entitled to Its
 Reasonable Attorneys' Fees Incurred
 In Defense Of College's Tort Claims.40

 4. The Amount Of Fees Awarded To
 Home Depot Was Not An Abuse Of
 The Trial Court's Discretion.43

D. Even If The Court Determines The Trial
 Court Erred, Appellant Is Not Entitled To
 Judgment, As Defendants Have Not Had An
 Opportunity To Present Their Case.46

V. CONCLUSION.....47

TABLE OF AUTHORITIES

Cases, Statutes, Rules, Other Authorities (alphabetical)

Cases

<i>AD/SAT, Div. of Skylight, Inc. v. Associated Press</i> , 181 F.3d 216, 227 (2d Cir. 1999)	32
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 667, 801 P.2d 222 (1990)	37, 40
<i>Brantley v. NBC Universal, Inc.</i> , 675 F.3d 1192, 1197 (9th Cir. 2012)	31
<i>Burrill v. Burrill</i> , 113 Wn.App. 863, 868, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007 (2003)	4
<i>California ex rel. Harris v. Safeway, Inc.</i> , 651 F.3d 1118 (9 th Cir. 2011)	30
<i>Campfield v. State Farm Mut. Auto. Ins. Co.</i> , 532 F.3d 1111, 1118 (10th Cir. 2008)	32
<i>Christofferson Dairy v. MMM Sales, Inc.</i> , 849 F.2d 1168, 1172 (9th Cir. 1988)	32
<i>Colby v. McLaughlin</i> , 50 Wn.2d 152, 156-57, 310 P.2d 527 (1957).....	34
<i>Deep Water Brewing. LLC v. Fairway Resources Ltd.</i> , 152 Wn.App. 229, 277-78, 215 P.3d 990 (2009).....	41, 42
<i>Dewey v. Tacoma School Dist. No. 10</i> , 95 Wash.App. 18, 23, 974 P.2d 847 (1999).....	27
<i>Donald B. Murphy Contractors, Inc.</i> , 112 Wn.App. 192, 199–200, 49 P.3d 912 (2002).....	27
<i>E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority</i> , 362 F.2d 52 (1st Cir. 1966).....	35
<i>Ebel v. Fairwood Park II Homeowners’ Assn.</i> , 136 Wn.App. 787, 792-793 (2007).....	2, 18, 19
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wash.App. 834, 852 (1979).....	5, 27, 41
<i>Export Liquor Sales, Inc. v. Ammex Warehouse Co.</i> ,	

426 F.2d 251, 252 (6th Cir. 1970)	35
<i>Fisher Properties v. Arden-Mayfair, Inc.</i> ,	
115 Wn.2d 364, 375, 798 P.2d 799 (1990).....	5
<i>Gamco v. Providence Fruit & Produce Bldg., Inc.</i> ,	
194 F.2D 484 (1 ST Cir.), cert. denied, 344 U.S. 817 (1952) .	31, 34
<i>Gough v. Rossmoor Corp.</i> ,	
585 F.2d 381 (9th Cir. 1978)	32
<i>Hemenwav v. Miller</i> ,	
116 Wn.2d 725, 743, 807 P.2d 863 (1991).....	41
<i>Hill v. Cox</i> ,	
110 Wn.App. 394, 411-12, 41 P.3d 495 (2002).....	41
<i>Ideal Electronic Security Co., v. International Fidelity Ins. Co.</i> ,	
129 F.3d 143, 151 (D.D. Cir. 1997).....	45
<i>In re Compact Disc Minimum Advertised Price Antitrust Litigation</i> ,	
216 F.R.D. 197 (D.Me. 2003).....	30
<i>In re Hews</i> ,	
108 Wn.2d 579, 595, 741 P.2d 983 (1987).....	4
<i>Kendall v. Visa U.S.A., Inc.</i> ,	
518 F.3d 1042, 1047 (9th Cir. 2008)	31
<i>King Aircraft v. Lane</i> ,	
68 Wn.App. 706, 716, 846 P.2d 550 (1993).....	5
<i>Kirby v. City of Tacoma</i> ,	
124 Wash.App. 454, 469-470, 98 P.3d 827 (2004)	28
<i>Klor's, Inc. v. Broadway-Hale Stores, Inc.</i> ,	
359 U.S. 207 (1959).....	31, 33, 34
<i>Knight, Vale and Gregory v. McDaniel</i> ,	
37 Wn.App. 366680 P.2d (1984).....	35
<i>LK Operating, LLC v. Collection Group, LLC</i>	
181 Wash.2d 48, 331 P.3d 1147 (2014).....	35
<i>Mayer v. Pierce County Med. Bureau, Inc.</i> ,	
80 Wn.App. 416, 420, 909 P.2d 1323 (1995).....	38
<i>McGreevy v. Or. Mut. Ins. Co.</i> ,	
90 Wn.App. 283, 291, 951 P.2d 798 (1998).....	45
<i>Meresse v. Stelma</i> , 100 Wn.App. 857, 865-866,	
999 P.2d 1267 (2000).....	2, 18, 19, 20, 21
<i>Messett v. Cowell</i> ,	

194 Wash. 646, 653, 79 P.2d 337 (1938)34

Morgan v. Kineen,
166 Wn.2d 526, 539, 210 P.3d 995 (2009).....44

Murray Pub. Co., Inc.,
66 Wn.App. at 324.....30, 32, 33

O’Neal v. United States,
258 F.3d 1265 (11th Cir 2001)44

PepsiCo, Inc. v. Coca-Cola Co.,
315 F.3d 101, 105 (2d Cir. 2002).....32

Perry v. Moran,
109 Wash.2d 691, 748 P.2d 224 (1987).....34

Quadrant Corp. v. Am. States Ins. Co.,
154 Wn.2d 165, 171, 110 P.3d 733 (2005).....37

Riverview Community Grp. V. Spencer & Livingston,
181 Wash.2d 888 (2014).....47

Robel v. Roundup Corp.,
148 Wn.2d 35, 42-43, 59 P.3d 611 (2002)4, 5

Savon Gas Stations Number Six, Inc. v. Shell Oil Co.,
309 F.2d 306 (4th Cir. 1962)35

Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.,
76 Wn.App. 267 (1994)1, 2, 14, 18, 19

Sheppard v. Blackstock Lumber Co., Inc.,
85 Wash.2d 929, 540 P.2d 1373 (1975).....35

State v. Black,
100 Wn.2d 793, 799, 676 P.2d 963 (1984).....30

Tradewell Group. Inc. v. Mavis,
71 Wn.App. 120, 130, 857 P.2d 1053 (1993).....41

United States v. Yellow Cab Co.,
332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).....35

W. Stud Welding v. Omark Ind., Inc.,
43 Wn.App. 293, 299, 716 P.2d 959 (1986).....42

Waring v. Lobdell,
63 Wn.2d 532, 387 P.2d 979 (1964).....35

Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.,
123 Wn.2d 891, 913, 874 P.2d 142 (1994).....38

<i>Wilkinson v. Chiwawa Communities Ass'n.</i> , 180 Wn.2d 241, 327 P.3d 614 (2014).....	2, 3, 13, 14, 18, 19, 20, 21, 22, 24
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986).....	4
<i>Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.</i> , 964 So.2d 261, 263 (Fla. App. 2007).....	22

Other Authorities

“ <i>The Antitrust Implications of Restrictive Covenants in Shopping Center Leases</i> ”, 86 Harv. L. Rev. 1201	31
97 A.L.R.2d 4, <u>Validity, Construction, and Effect of Lessor’s Covenant</u> (1964).....	22

I. INTRODUCTION

The College Marketplace Shopping Center (“Center”) was planned and developed to incorporate two major retail anchors that would attract business to the Center for the mutual benefit of all the Center’s tenants. The first major anchor was Wal-Mart, followed by Home Depot. Plaintiff and Appellant College Marketplace LLC (“College” or “Plaintiff”) purchased its property in the Center, Lot 7-A, subject to recorded Easements with Covenants and Restrictions (“ECRs”) that, among other things, prohibited certain retail and other uses within the Center. Those Original ECRs expressly provided they could be modified by agreement between Wal-Mart and the Center’s developer, Olhava Associates, LP (“Olhava”). College had both constructive and actual knowledge of the terms of the Original ECRs and knew they could be amended. After Home Depot joined the Center as the second major anchor, Wal-Mart and Olhava exercised their right to modify the ECRs in several respects including adding Home-Depot as a party and modifying the list of restricted uses to include, among other things, paint stores.

Washington Courts have long recognized in the context of planned residential communities that restrictive covenants may be amended or modified by fewer than all of the affected property owners, provided that such power is expressly reserved and that the amendment is enacted “in a reasonable manner consistent with the general plan of the development.” *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267 (1994). ***The right to amend such covenants includes the right***

to add additional restrictions that are consistent with the general plan of development and are related to existing covenants. Wilkinson v. Chiwawa Communities Ass'n., 180 Wn.2d 241, 327 P.3d 614 (2014) .

Washington case law does not address the scope of such an express right to amend covenants governing a shopping center or other commercial development, in which the expectations and common interests of sophisticated property owners, such as College, are likely to be very different than the interests and expectations of homeowners. Nevertheless, assuming that the rules enunciated by existing case law for residential developments – including the Supreme Court’s recent decision in *Wilkinson* – apply to the retail development at issue here, those rules amply support the trial court’s order dismissing College’s declaratory judgment and quiet title claims against Home Depot.

Contrary to College’s argument, *Wilkinson* is not a departure from prior Washington law on the subject of the amendment of restrictive covenants. In fact, the *Wilkinson* court expressly embraced and approved the rules previously set out in *Shafer, supra, Meresse v. Stelma*, 100 Wn.App. 857, 865-866, 999 P.2d 1267 (2000) and *Ebel v. Fairwood Park II Homeowners’ Assn.*, 136 Wn.App. 787, 792-793 (2007). Those rules, which the trial court applied here, include:

- Washington law does not require that restrictive covenants be strictly construed but, rather, seeks to “give effect to those purposes intended by the covenants.” 180 Wn.2d at 250.

- ECRs are to be interpreted according to established rules of contract interpretation, “with a special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” *Id.*
- Restrictive covenants may be amended pursuant to an express reservation of power by fewer than all subject property owners as long as the power is “exercised in a reasonable manner consistent with the general plan of the developments.” *Id.* at 256.
- The power to amend restrictive covenants includes the power to add restrictions so long as they are not “inconsistent with the general plan of development or have no relation to existing covenants.” *Id.* at 249.

Applying these rules, the trial court correctly found that Olhava and Wal-Mart had the express right to modify the recorded Original ECRs, including to add Home Depot as a party to the agreement. The trial court also properly found that the 2008 modifications of the Original ECRs were consistent with the general plan of development for the Center, and were reasonable to accommodate the presence of Home Depot as the second anchor tenant, according to the plans for the Center that had been in place since the earliest stages of its development. The trial court’s finding that the amended version of the Original ECRs is valid and binding over all the lots within the Center should be affirmed.

The trial court also properly excluded evidence offered by College in support of a new antitrust/public policy theory that College disclosed only upon the eve of trial. Since the pleadings had provided no notice of such

claims, and therefore no discovery had been conducted and no experts retained to respond to such claims, the court acted well within its discretion in concluding that the Defendants would be unduly prejudiced if College were allowed to raise those claims at trial. In addition, even if College had been allowed to introduce the excluded evidence, it would have been insufficient as a matter of law to make a *prima facie* showing of any antitrust or public policy violation.

Finally, the court properly awarded Home Depot its attorneys' fees incurred in defending against College's threatened breach of the Amended ECRs and effort to invalidate them.

Home Depot therefore respectfully requests that this Court affirm the Judgment in favor of Home Depot.

II. STANDARD OF REVIEW

Unchallenged findings of fact "are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). Any finding of fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting*, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Each finding of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews*, 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Findings of fact that are properly challenged are reviewed for substantial evidence in the record. *Burrill v. Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007 (2003).

An unchallenged conclusion of law is the law of the case. *King Aircraft v. Lane*, 68 Wn.App. 706, 716, 846 P.2d 550 (1993). Challenged conclusions of law are reviewed *de novo*. *Robel, supra*, 148 Wn.2d at 43.

The trial court’s decision to exclude evidence on an unpleaded theory “will not be disturbed on appeal absent a manifest abuse of discretion.” *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 852 (1979).

Whether a contract allows for an award of attorney’s fees is a question of law subject to *de novo* review. *Robel, supra*. The trial court’s determination of the amount of reasonable fees is reviewed for abuse of discretion. *See, e.g., Fisher Properties v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990).

III. STATEMENT OF THE CASE

A. Shopping Center Development Plan

The Center is a 215-acre mixed-use project developed by Olhava pursuant to a Master Plan approved by the City of Poulsbo in 1998. (Clerk’s Papers (“CP”) 521 (Oct. 3, 2014 Findings of Fact (“FF”) 1-4).)

Development of a shopping center generally starts with securing one or more anchor stores, which are the principal drivers of business to the Center. (CP 521 (FF 4, 5).) Here, the Master Plan contemplated two major anchor stores. (CP 521 (FF 4).) The first anchor in the Center was Wal-Mart, which purchased its parcel in 2003 and closed escrow in 2004. (CP 521 (FF 6).) Shortly thereafter, Home Depot became the second anchor in the Center when it entered into a purchase agreement in March 2004. (CP 521 (FF 7).) Home Depot’s purchase and sale agreement was conditioned upon

amendment of the ECRs to include, among other things, Home Depot's customary restrictions on certain competing businesses in the Center. (CP 2268 at ¶ 6; CP 1776-1777 at ¶¶ 3-7.) Both Wal-Mart and Home Depot were open for business by January 2006. (CP 521, 523 (FF 7, 17).)

B. Original ECRs

On or about June 8, 2004, Wal-Mart and Olhava executed and recorded "Easements with Covenants and Restrictions Affecting Land" ("Original ECRs") that placed certain burdens, obligations and restrictions on all plots of land in the Center. (CP 521 (FF 8), 569-589.) Sections 2 and 3 of the Original ECRs contain certain restrictions on uses of lands. (CP 521 (FF 9), 570-572.) In particular, Section 2 prohibits certain uses within 400 feet of the Wal-Mart tract and Section 3, entitled "Competing Business," provided that no portion of the Center would be used for the operation of "a membership warehouse club, . . . a pharmacy exceeding 12,000 square feet, a discount department store exceeding 30,000 square feet, a grocery store exceeding 12,000 square feet, or a variety, general or 'dollar' store." (CP 521 (FF 8, 9), 572.) The Original ECRs also contained provisions regarding, among other things, building design and construction, use of the Center's common areas, maintenance, insurance requirements, and signage. (CP 569-589.)

Section 15 of the Original ECRs provided that the agreement "*may be modified or canceled* only by the mutual agreement of (a) [Wal-Mart] as long as it or its affiliate has any interest as either owner or Lessee of the [Wal-Mart Tract], or its successor in interest, and (b) [Olhava], as long as it

or its affiliate has any interest as either owner or Lessor of the Developer Tract, or its successors in interest.” (CP 522 (FF 12), 525-526 (Conclusion of Law “CL” 1-2), 580 (emphasis added).) There is no limit on which provisions of the Original ECRs may be amended, nor any prohibition against amending the ECRs to add new parties. (CP 522 (FF 12), 580.)

Exhibit 1-A to the Original ECRs is two maps depicting the development plan for the Center. (CP 522 (FF 13), 585-87.) The second map depicts the entire Center, including the “Retail Tract” where Wal-Mart was to open its store, as well as a large adjacent lot to the north, where another anchor was intended to open a store and which became the Home Depot parcel. (CP 522 (FF 13), 587.) The inclusion of two anchor stores in the depicted locations was part of the plan for the Center from its inception, and through the planning and environmental review process required to obtain permits from the City. (CP 521-522 (FF 4); Report of Proceedings (“RP”) August 19, 2014, Zenger, at 17: 9-15.) The parties do not dispute that the Original ECRs were properly recorded in June 2004 and were binding on Lot 7-A. (CP 522-523 (FF 14-15).)

C. Amendment of the Original ECRs

Olhava, Wal-Mart and Home Depot began in approximately 2004 and 2005 to negotiate an amended version of the ECRs. (CP 523 (FF 16).) Although the parties had reached a near-final version of the amended ECRs in July 2005, the Amended ECRs were not completed and recorded until November 2008. (CP 523-524 (FF 18-28).)

In and around 2007, Olhava sold multiple lots to other parties, including Lot 7-A which was sold to College. (CP 523-524 (FF 18, 22).) College's managing principal is Terrence Lien, an experienced real estate developer. (CP 523 (FF 20); RP Aug. 19, 2014 Lien Cross, at 6:11-7:6; 8:8-19.) Mr. Lien has been in the development business at least since the mid-1980s and has developed many commercial and retail projects. (CP 523 (FF 20).) Mr. Lien was very familiar with the concept of exclusive use clauses in the sale and leasing of property in the retail industry and employed this concept himself, including on Lot 7-A. (RP Aug. 19, 2014, Lien Cross at 16:12-24; CP 2816 at 20:3-14.) Mr. Lien also acknowledges that Home Depot's presence in the Center made it possible for College to lease part of its property to Office Max. (RP August 19, 2014, Lien Cross at 19:18-23; CP 2816 at 20:3-14.) In fact, College's lease with OfficeMax refers to Home Depot and Wal-Mart as the "inducement tenants" – *i.e.*, the retail stores whose presence in the Center was a material inducement to OfficeMax's agreement to lease space from College. (CP 1808 at 59:1-6.)

As part of College's due diligence for the purchase of Lot 7-A, Mr. Lien reviewed the Original ECRs, including the amendment authority in Section 15. (RP Aug. 19, 2014 Lien Cross, at 30:22:31:1; CP 524 (FF 23).) Mr. Lien also reviewed the exclusive use restrictions contained in the Original ECRs. (RP Aug. 19, 2014 Lien Direct, 7:19-8:4.) Thus, at the time College purchased Lot 7-A, it was aware that Wal-Mart and Olhava could modify the Original ECRs, and that the Original ECRs prohibited certain retail and other commercial uses within the Center. (CP 524 (FF 23); RP

Aug. 19, 2014 Lien Direct, p. 7:19-8:4.) Mr. Lien also sent the Original ECRs to his attorney to review, and he discussed the Original ECRs with his lender and his broker, Steve Ruggiero. (CP 524 (FF 23).) Mr. Lien never asked Olhava about Section 15 and the possibility of amendments to the Original ECRs. (RP Aug. 19, 2014 Lien Direct, at 31:2-10.)

D. Amended ECRs Recorded.

On November 21, 2008, an instrument entitled “Restated Easements with Covenants and Restrictions Affecting Land” (“Amended ECRs”) was recorded, with signatures of Olhava, Wal-Mart, and Home Depot (“Defendants”), which was designed and intended to govern all lands in the Center, including Lot 7-A. (CP 524 (FF 23), 640-71 (Trial Ex. 56).) Section 3 of the Amended ECRs was modified to include use restrictions for the benefit of Home Depot. (CP 525, 647-49.) One of the modifications to Section 3 was the inclusion of paint stores as a restricted use. (CP 647-49.)

Section 3 of the Amended ECRs does not prevent neighboring businesses in the Center from selling paint, or any other product identified in Section 3. (CP 647-649.) Instead, it allows for “incidental sale of such items” which is defined as “the lesser of (i) twenty percent (20%) of the total Floor Area of any such business, or (ii) 5,000 square feet of sales and/or display area, relating to such items individually or in the aggregate of any such business.” (CP 648.) Specifically, Section 3(b) states:

Developer and Wal-Mart covenant that as long as Home Depot, or any affiliate of Home Depot, is the user of the Home Depot Tract, either as owner or lessee, and operates a retail home improvement store, no portion of the Shopping Center

other than the Home Depot Tract shall be used for a home improvement center or for any business which sells, displays, leases, rents or distributes the following items or materials, singly or in any combination: lumber, hardware, tools, plumbing supplies, electrical supplies, paint, wallpaper and other wallcoverings, hard and soft flooring (including tile, wood flooring, rugs and carpeting), gardening and garden nursery supplies, Christmas trees, indoor and outdoor lighting systems and light fixtures, cabinets, large kitchen and household appliances, or closet organizing systems, except for the incidental sale of such items and except for business on the approved Letter Agreement Regarding Permitted Users between Developer and Home Depot dated July 19, 2004. An "incidental sale of such items" is one in which there is no more than the lesser of (i) twenty percent (20%) of the total Floor Area of any such business, or (ii) 5,000 square feet of sales and/or display area, relating to such items individually or in the aggregate of any such business.

CR 648 (Exh. 56, p. 8).

E. College's Proposed Lease To Sherwin Williams

In 2011, College was prepared to lease a portion of Lot 7-A to Sherwin Williams, a retail business that almost exclusively sells paint. (CP 1510-1511 (Findings of Fact on Attorney Fee Motion "Atty. Fee FF" 13, 19-20).) Upon discovering the use restriction in the Amended ECRs that limits the sale of paint in the Center, College asked Defendants to remove the restriction so that College could enter into the lease with Sherwin Williams. (CP 1510 (Atty. Fee FF 14-15).) College told Defendants that if the restrictions against selling paint were not lifted, College would file a lawsuit to invalidate the 2008 ECRs. (CP 1510 (Atty. Fee FF 16).) When Defendants refused to lift the restriction, College filed the instant lawsuit in August 2011. (CP 1510 (Atty. Fee FF 17).)

F. Procedural History

College's original Complaint against Olhava alleged that College had entered into successful negotiations with Sherwin Williams to lease a portion of Lot 7-A, but that the lease was "on hold due to the underhanded process utilized by Defendant to execute the [Amended ECRs]." (CP 8.) College also alleged that the Amended ECRs were invalid for four reasons: (1) the Amended ECRs were a "new agreement"; (2) College had no notice of the Amended ECRs when it purchased Lot 7-A because they had not been recorded "in a timely manner"; (3) College had no notice because it was excluded from the negotiations of the Amended ECRs; and (4) Olhava had no right to place restrictions on Lot 7-A. (CP 7-8.) College subsequently amended its Complaint to name Wal-Mart and Home Depot as Defendants. (CP 71-78.) Home Depot and Olhava filed counterclaims for declaratory judgment and for injunctive relief to prevent College from entering into the lease with Sherwin Williams. (CP 525 (FF 32).)

College later amended its complaint to add various tort claims against Defendants. (CP 150-161, 162-180.) From the original through the Third Amended Complaint, College never alleged that the Amended ECRs were invalid under any antitrust law or public policy theory. (CP 3-9, 73-78, 150-161, 162-180.)

In September 2013, on Defendants' motion for partial summary judgment, the trial court dismissed all tort claims against Wal-Mart and Home Depot. (CP 878-79.) College does not appeal this ruling. (CP 537-

558.) The remaining tort claims against Olhava were later voluntarily dismissed. (CP 878-79, 1512 (Atty. Fee FF 30).)

Trial was originally set for November 2013, but was continued *at College's request* and reset to August 19, 2014. (CP 508-13.) On August 7, 2014, College served Defendants for the first time with an Evidence Rule 1006 Disclosure and attached photographs which College advised it intended to offer in support of a "public policy" theory on the grounds that the Amended ECRs were an alleged illegal restraint of trade. (CP 301-02 at ¶13-14.) Home Depot moved in limine for an order precluding College from offering the photographs or other evidence in support of any antitrust or public policy theory because it had not been pleaded in any of the four versions of College's complaints, and Defendants would be unduly prejudiced if forced to proceed to try such a wholly new claim. (CP 290-98.) The court granted Home Depot's motion. (RP Aug. 15, 2014 hearing at 37:19-39:15.)

The bench trial on College's equitable claims (declaratory judgment, quiet title, and injunctive relief) took place on August 19 and 20, 2014. At the close of College's case, Home Depot moved for dismissal pursuant to CR 41(b)(3). (CP 512; RP August 20, 2014 Hearing at 9:8-41:15.) The motion was granted and the court subsequently issued Findings of Fact and Conclusions of Law. (CP 520-531.)

Home Depot moved to recover its attorneys' fees pursuant to Section 13 of the Amended ECRs. (CP 1269-1281.) That motion was granted on

November 26, 2014, and the court issued additional Findings of Fact and Conclusions of Law on February 20, 2015. (CP 1486-1503, 1508-1526.)

Additional relevant factual background is described below.

IV. ARGUMENT

A. **The Trial Court Correctly Found That Wal-Mart And Olhava Had The Right To Amend The Original ECRs As They Did.**

Applying established rules of contract interpretation, the trial court found that Section 15 of the Original ECRs means just what it says – that the Original ECRs can be modified in any respect or even canceled so long as Wal-Mart and Olhava agree. (CP 580, 522 (FF 12).) The Original ECRs placed no limits or conditions upon any such agreement between Wal-Mart and Olhava. They do not preclude Wal-Mart and Olhava from modifying the Agreement to add new parties or from changing the use restrictions within the Center. Wal-Mart and Olhava were therefore well within their rights to modify the ECRs to incorporate the provisions Home Depot required as a condition of its joining the Center as the second major anchor.

1. **The Trial Court Properly Interpreted Section 15 Of The Original ECRs To Give Meaning To Its Express Terms.**

The Original ECRs are covenants that run with the land. (CP 580 at § 14.) Interpretation of such covenants presents a question of law based upon application of rules of contract interpretation. *Wilkinson v. Chiwawa Communities Assoc.*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014).

Contrary to College's assertion, *Washington law does not require that such covenants be strictly construed* but, rather, recognizes that

restrictive covenants governing a planned development “tend to enhance, not inhibit, the efficient use of land.” *Wilkinson, supra*, 180 Wn.2d at 250.

[T]he clear trend in this country is in the direction of moderating the previous approach of strict construction of covenants. ***Rather than being disfavored as restraints on alienation, modern courts see them as being positive vehicles for the proper and ordered development of land.***

Shafer v. Bd. of Tr. of Sandy Hook Yacht Club Estates, Inc., 76 Wn.App. 267, 274 fn. 8, 883 P.2d 1387 (1994) 74, fn. 8 (emphasis added). The Supreme Court in *Wilkinson, supra*, noted:

While Washington courts once strictly construed covenants in favor of the free use of land, we no longer apply this rule where the dispute is between homeowners who are jointly governed by the covenants. . . . Rather than place a thumb on the scales in favor of the free use of land, the court’s goal is to ascertain and give effect to those purposes intended by the covenants. Courts place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.

180 Wash. at 249-250 (internal quotes and citations omitted). Although the *Wilkinson* court was specifically referencing the covenants governing the residential community at issue in that case, the Court’s rationale applies equally, if not with even greater force, to covenants governing properties within a commercial development designed to take advantage of the benefits conferred by the presence of anchor tenants such as Wal-Mart and Home Depot. Thus, the trial court was not required to strictly construe the Original ECRs but, instead, the court properly interpreted the plain language of Section 15 to arrive at the interpretation that protects the collective interests of the owners in the Center.

That “collective interest” was to develop and maintain the Center as an attractive shopping destination for consumers and a desirable location for a variety of retailers by establishing anchor stores to drive business to the Center. (CP 521 (FFs 4-5).) The evidence of College’s purchase, development, marketing and leasing of Lot 7-A establishes that this common interest is promoted by the presence of Home Depot, without which College admittedly would not have secured its own anchor tenants, Office Max and Big 5 (each of which, notably, has its own “exclusive use” provisions governing Lot 7-A even while College complains about the exclusive use provisions to which it is bound). (RP August 19, 2014 Lien Direct, at 5:14-20, Lien Cross, at 19:18-23); CP 2816 at 20:3-14.)

College presented no evidence at trial to show any ambiguities in the Original ECRs, which was a fully integrated agreement. (CP 522-523 (FF 11).) In fact, the only witness called at trial who was a signatory to the Original ECRs was Olhava’s representative, Mr. Zenger, who testified that the parties intended Section 15 of the Original ECRs to mean precisely what it says on its face – that the ECRs could be modified by the mutual agreement of Wal-Mart and Olhava. Under questioning by College, Mr. Zenger testified unequivocally and without contradiction from any other witness that there was “no limit” on Wal-Mart’s and Olhava’s right to modify the Original ECRs. (RP August 19, 2014, Zenger, at 20:5-7, 20:10-19.)

Mr. Zenger’s understanding is consistent with the ordinary meaning of the language of Section 15 that Olhava and Wal-Mart had the express right to modify the Original ECRs by their mutual agreement. That express right

is not limited to modifications directly impacting Wal-Mart's or Olhava's business needs. Nor is there anything in the express terms of the Original ECRs that prohibits their amendment to include another party. Olhava and Wal-Mart had the right to amend in any manner that would help achieve the overall success and the collective interests of the Center, which would benefit both Olhava and Wal-Mart and protect their substantial investments in the Center. Thus, the evidence at trial provided no support for College's argument that the Original ECRs could not be modified to include Home Depot as a new party.

Nor did College present any evidence to support the notion that Olhava and Wal-Mart had to obtain the consent of the other owners in the Center before they exercised their express rights under Section 15. In fact, to read such a requirement into Section 15 would negate the express provision that the ECRs could be "modified or cancelled only by the mutual agreement" of Wal-Mart and Olhava. Although College introduced evidence that, at one time, Wal-Mart, Olhava and Home Depot contemplated adding all of the Center owners as additional parties to the modified ECRs, that evidence does not and cannot alter or contradict the express terms of Section 15, or create a contractual obligation where none exists in the Agreement. There was no evidence whatsoever that the parties to the Original ECRs intended, notwithstanding those express terms, to require the addition of all the Center owners to any modified version of the ECRs. In fact, Karen Booth, a paralegal working for Home Depot's outside counsel, testified that, although consideration had been given to adding all of the

owners to the Amended ECRs, the decision was made to “rely on the Section 15 that was already of record in the original recorded EC&Rs.” (RP August 19, 2014, Booth, at 21:15-17)

The trial court therefore correctly concluded as a matter of contract interpretation and based on the evidence presented that the Amended ECRs were properly and validly adopted pursuant to the express terms of the Original ECRs and are binding on Lot 7-A.

2. The Amended ECRs Are Binding On College’s Lot 7-A.

College does not dispute that the Original ECRs were binding on Lot 7-A. (CP 523 (FF 15).) The evidence at trial showed the Original ECRs were adopted in the early phases of what was expected to be a multi-phase retail development which would include Wal-Mart and at least one other major anchor retailer who would attract shoppers to the Center, to the benefit of the smaller retail operations as well as the anchors. (CP 521 (FF 4-8).) At the time the Original ECRs were recorded, Home Depot was in contract to purchase its portion of the Center, and its contract required additional use restrictions, consistent with Home Depot’s practice in every shopping center in which its stores are located. (CP 1775-1778.)

College was well aware of the Original ECRs when it purchased Lot 7-A. College’s principal, Terrence Lien, a sophisticated real estate purchaser and developer, personally reviewed the recorded Original ECRs, including Section 15, before the purchase. (CP 524 (FF 24); RP August 19, 2014, Lien Direct, at 7:10-9:1, Lien Cross, at 24:7-19, 30:22-31:1). Mr. Lien also discussed the Original ECRs with his broker, Mr. Ruggiero, and his lender,

and he had them reviewed by legal counsel. (RP (Aug. 19, 2014, Lien Cross, at 24:7-25:9, 28:12-18, 30:8-16); CP 524 (FF 24).) Thus, the evidence at trial established that College had both constructive and actual knowledge of the Original ECRs, including Section 15 providing that they could be modified or cancelled by Olhava and Wal-Mart. Having purchased its property subject to the Original ECRs, College is therefore bound by the subsequent modification of the ECRs pursuant to Section 15.

3. The Court Correctly Held, In Accord With *Wilkinson*, That The Amended ECRs Are Consistent With The Center's General Plan Of Development And Are Related To The Existing Covenants.

Washington law has long recognized and affirmed, in the context of residential communities, that restrictive covenants governing the use of property may be amended pursuant to an express reservation of power without consent of all subject property owners as long as “such power is exercised in a reasonable manner consistent with the general plan of the development.” *Shafer, supra*, 76 Wn.App. at 273-74; *Ebel v. Fairwood Park II Homeowners' Assn.*, 136 Wn.App. 787, 792-793 (2007); *Wilkinson, supra*, 180 Wn.2d at 249-250. When deciding whether the amended covenants are “consistent with the general plan of the development,” the court must look at the language of the covenants, their apparent import, and the surrounding facts. *Meresse v. Stelma*, 100 Wn.App. 857, 865-866, 999 P.2d 1267 (2000). The trial court did precisely that in granting Home Depot's motion to dismiss.

Contrary to College's argument, the Supreme Court in Wilkinson did not change Washington law, but adopted the principles articulated in Shafer, Meresse, and Ebel, supra. Nor did the Supreme Court hold that the right to amend ECRs cannot be exercised to add new covenants. Rather, the Court adopted and applied existing law that, where there is a right to amend ECRs, new covenants may be added unless they either are “*inconsistent with the general plan of development or have no relation to existing covenants.*” *Wilkinson, supra*, 180 Wn.2d at 249 (emphasis added). *The appropriate question, then, is not whether new covenants were or were not added to the Amended ECRs, but whether any new covenants were inconsistent with the general plan of development or unrelated to existing covenants.* If the Supreme Court had intended the result that College urges, it would simply have said there can be no additions whatsoever to existing covenants unless the right to modify the covenants includes an express right to add thereto. But that is not what the Court said, nor is it consistent with the law as previously articulated by *Shafer, Meresse* and *Ebel*. To apply *Wilkinson* as College urges would be to distort the plain meaning of the Court's decision and omit the highlighted language above.

Meresse provides an example of a new covenant that was impermissible because it was not related to any existing covenant. In that case, the parties' residential development included a road maintenance agreement requiring the homeowners to contribute to maintenance of the common road, including “removal of snow and other hazards or obstruction as well as graveling, repairs, and additional constructions.” 100 Wn.App. at

859. Fewer than all of the homeowners voted to amend the agreement in order to relocate the road so that it more heavily burdened the plaintiff's property and imposed a "scenic" easement on either side of the roadway. *Id.* at 862. The court held the amendment was invalid because it imposed burdens and restrictions that were wholly different in nature from the original requirement that the parties contribute to maintaining the road. The court stated: "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Id.* at 866. In *Meresse*, there was a clear qualitative difference between the existing agreement to maintain the road and the new provisions moving and enhancing the roadway. The agreement to contribute to road maintenance would not have put homeowners on notice that the agreement could be amended to move the road and create new easements imposing greater burdens on a few of the homeowners.

In *Wilkinson, supra*, the existing covenants governing the planned residential community contained only limited use restrictions. Properties within the community could be used only for a single-family residence, and only for residential purposes "consistent with permanent or recreational residence." 180 Wash.2d at 246. Owners were prohibited from using their properties for industrial, commercial, "nuisance or offensive" uses, a dump or keeping certain livestock. *Id.* The Court noted that owners had been renting their properties "on a short-term, for-profit basis *for decades* without controversy," and that existing regulations regarding signage contemplated

rental uses. *Id.* (emphasis added). Under those circumstances, the Court held that a ban on short term rentals – which the Court found were among the “residential uses” permitted under the existing covenants – could not be imposed by fewer than all of the property owners. Notably, there was no restriction in the existing covenants on any particular residential use, so owners would not have foreseen that amendment of the covenants could restrict their residential use of their property.

Unlike the new covenants at issue in *Meresse and Wilkinson*, Sections 2 and 3 of the Amended ECRs are not different in nature from the existing use restrictions in the Original ECRs. Here, the development plan for the Center always contemplated that there would be two anchor stores, which would generate customers for the other businesses in the Center. The Original ECRs prohibited a list of retail uses within the Center. Unlike *Wilkinson*, in which residential uses (including residential rentals) were previously allowed without limitation, retail uses in the Center were always subject to restrictions on categories of retail uses. (CP 521 (FF 8-9), 572.) Section 15 of the Original ECRs provided that the ECRs – including the restrictions on competing businesses – could be modified by agreement between Wal-Mart and Olhava. Thus, every purchaser of property in the Center was on notice that the use restrictions could be modified to, for example, exclude paint stores if Olhava and Wal-Mart agreed to the change. It was therefore not unexpected that Olhava’s and Wal-Mart’s right to amend the existing ECRs could be exercised to change the existing use restriction or

add additional restrictions as Wal-Mart and Olhava deemed appropriate for the good of the Center.

4. Neither *Wilkinson* Nor The Cases It Cites Address The Interests And Reasonable Expectations Of Property Owners Within A Shopping Center.

Wilkinson and the earlier cases on which it relies specifically address the rights and expectations of “*homeowners*” in private, planned residential developments. They do not address the types of use restrictions at issue here, which are widely recognized as standard and important features of shopping centers. *See, e.g.,* 97 A.L.R.2d 4, Validity, Construction, and Effect of Lessor’s Covenant (1964) (“While these covenants are by no means a recent legal development, their importance has perhaps been enhanced by the rise of the modern shopping center with its basic plan of a grouping of basically noncompetitive and diversified, but interrelated, businesses designed not to serve just one need but as many needs of the consumer as is feasible within the economic framework of the shopping center”); *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So.2d 261, 263 (Fla. App. 2007) (“Shopping plaza exclusives...are customary and standard throughout the industry, especially with regard to anchor tenants. Sophisticated tenants...encounter exclusives in almost every shopping center in which they do business.”)

If *Wilkinson* and the earlier cases it affirmed apply in this case, then the trial court properly applied the rationale of those cases here. However, the trial court could logically have concluded that the express right to modify use restrictions governing a shopping center should be interpreted more broadly, given the relative sophistication of purchasers of retail property and

the extent to which retail enterprises within such a center are inter-dependent and, in particular, dependent upon the ability of strong anchors to drive business to the center. In this case, for example, the evidence was that College's members have decades of experience in purchasing and developing property. (RP August 19, 2014, Lien Cross at 10:20-11:2.) College acknowledged that the presence of Home Depot was a significant inducement to Office Max to lease part of College's property, and that College entered into its own "exclusives" to satisfy the requirements of its lessees. (RP August 19, 2014, Lien Cross, at 19:18-23; CP 1808 at 59:1-6, 2816 at 20:3-14.)

5. The "Parking Ratios" Provision Of The Original ECRs Has No Effect On Wal-Mart And Olhava's Right To Modify The ECRs.

Asserting a new argument that was never raised in the trial court, College now contends that Wal-Mart and Olhava were not entitled to modify the ECRs to exclude paint stores because Section 6 of the Original ECRs, entitled "Parking Ratios" refers to the possibility that "smaller parking requirement(s)" may be warranted for certain uses "(such as a hotel, motel, carpet store, paint store, or furniture store) as allowed by applicable code." (CP 576.) This reference in the "Parking Ratios" provision simply reflects that, under the Original ECRs, paint stores were not a restricted use. Home Depot has never contended that paint stores were precluded under the Original ECRs. *The reference to parking ratios for a potential paint store, however, could not rationally be construed as a limitation on Olhava's and*

Wal-Mart's right to amend the ECRs to add additional use restrictions, including restrictions on paint stores.

Perhaps, College is attempting to draw a parallel between this Parking Ratios provision and the provision regarding signs for property rental in *Wilkinson*. That attempt fails because the *Wilkinson* court did not base its decision solely on the signage provision of the existing ECRs, but also on the fact that property owners had, “for decades” offered their properties for short-term rentals and there were no existing limitations on any residential use of properties within the community. Under those specific circumstances, the property owners had no reason to expect that the ECRs could be changed to add a wholly new restriction on activity that had long been occurring without controversy in the neighborhood. Here, the *potential* for a paint store (none existed) referenced as examples in the Parking Ratios provision has no effect on Olhava and Wal-Mart’s right to amend the ECRs as they did, as the owners in the Center had ample notice that any part of the ECRs could be amended, including the use restrictions.

For all of these reasons, the trial court correctly held that the ECRs had been properly amended and that the Amended ECRs, including the restriction on paint stores, was both consistent with the general plan of development and related to the existing covenants.

B. The Trial Court Properly Excluded Evidence And Argument Relating To Plaintiff's Unpleaded And Undisclosed Antitrust Claim.

1. Additional Factual Background.

None of the four versions of College's Complaint alleged that the Amended ECRs were invalid because they constitute an illegal horizontal restraint on trade or violate public policy. Nor did College raise such claims in support of its own motion for summary judgment or in opposition to Defendants' motions for summary adjudication. (CP 301-302 at ¶¶ 6-16.)

With trial originally scheduled to begin on November 12, 2013, discovery closed on July 15, 2013. (CP 301 at ¶ 9.) No discovery was conducted on antitrust or public policy issues and no party designated an expert on such issues. (CP 302-303 at ¶ 16.) Approximately two weeks before the scheduled trial date, *Olhava's* counsel (not counsel for College), mentioned to Home Depot that College may be contemplating a new antitrust theory. (CP 302 at ¶ 15.) When College then moved to continue the trial date, Home Depot specifically asked the Court not to allow College to raise novel theories, including any theory under antitrust law, if the trial was continued. (*Id.*) The trial date was continued to August 19, 2014. (CP 376-377.) College never sought leave to amend its pleading to add any antitrust or public policy claim to the Complaint. (*Id.*)

On July 14, 2014 – a year after the close of discovery – College served Defendants with its Evidence Rule 1006 Disclosure, consisting of (1) “a chart summarizing the same and/or comparable categories of products offered for sale on both the Wal-Mart and Home Depot websites” and (2) “[a] photographic summary of the same and/or comparable products displayed and offered for sale at both the Wal-Mart and Home Depot retail stores at College Marketplace Shopping Center.” (CP 379-380.) The

Disclosure stated that the photographs comprising the “photographic summary” were taken in November 2013 and May 2014. (*Id.*) However, they had not previously been disclosed to Defendants. (CP 301 at ¶ 12.) On August 7, 2014, in response to Home Depot’s inquiry about the 1006 Disclosure, College advised Home Depot for the first time that College intended to try to show that the Amended ECRs constitute an illegal horizontal restraint on trade between competitors and therefore violate public policy. (CP 301-302 at ¶¶ 13-15.)

Home Depot moved to exclude College’s Rule 1006 summaries and the photographs described therein. (CP 290-298.) The Court granted the motion, stating in pertinent part:

Well, obviously we are on the eve of trial. We're starting the trial on Tuesday. The first time I heard about these issues was based upon the motion brought by defense to exclude this claim. However it wants to be presented, whether it's an antitrust claim or common law theory, it appears to me based upon what I have read to be a claim brought under RCW 19.86.030, and that through our courts has been determined to be the same as a Sherman Antitrust Act violation, and those types of claims need to be pled. If I were to adopt the plaintiff's point of view, any claims such as that under the veil of a common law theory could just come up unannounced in a trial under the guise of a common law theory, public policy issue. I don't believe that is what our court rules or our Supreme Court ever intended. This is a notice -- We have pleadings, we have notice through the pleadings. There has not been notice in this case. . . .

Certainly under Rule 15(a) there could have been a motion or leave of court to make a change to the pleadings. That was never done. I do believe that there is not just delay, but undue delay given where we are. This is unfair surprise in this case, and it would be unduly prejudicial. I don't believe it would be

fair for the defendants to be at this late stage trying to think of what evidence or what theories it's going to pursue, and second of all, there should have been opportunity for full discovery as well. . . .

It is too late to be amending the pleadings at this time. That will not be the theory proceeded upon at trial.

(RP August 15, 2014 at 37:19-39:15.)

2. Plaintiff's Antitrust/Public Policy Claim Was Not Pled, And Evidence In Support Of That Claim Was Therefore Inadmissible.

“The decision to proceed with the introduction of evidence on a theory which has not been pleaded is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. The test is whether the opposing party is prepared to meet the new issue.” *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 852, 942 P.2d 1072 (1979). There was no abuse of discretion in the trial court’s exclusion of evidence offered in support of College’s undisclosed antitrust/public policy claim.

The essential purpose of a complaint under Civil Rule 8 is to “give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Dewey v. Tacoma School Dist. No. 10*, 95 Wash.App. 18, 23, 974 P.2d 847 (1999). Defendants are entitled to rely on the allegations in the plaintiff’s complaint to know which theories are to be put at issue at trial. See *e.g., Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 199–200, 49 P.3d 912 (2002).

College asserts that it “never intended to insert a new claim,” and that its public policy theory was “clearly relevant” to its claims for declaratory judgment and quiet title. That argument ignores the requirement that a plaintiff must not only assert a claim for relief, but also identify “*the legal grounds upon which the claims rest.*” *Kirby v. City of Tacoma*, 124 Wash.App. 454, 469-470, 98 P.3d 827 (2004) (emphasis added). “Declaratory judgment” and “quiet title” are merely *remedies* which may be available under any number of legal theories. To state that one is seeking either of these remedies does nothing to apprise the defendant of the *ground* upon which the claim for relief rests. The various versions of College’s Complaint *did* allege the grounds upon which College was seeking to invalidate the Amended ECRs – *i.e.*, that the Amended ECRs exceeded Wal-Mart and Olhava’s rights to amend the Original ECRs and that College had no notice of the amendment. (CP 3-9, 73-78, 150-180.) The question of whether the Amended ECRs violated public policy as an illegal restraint on trade has no bearing on whether Wal-Mart and Olhava acted within the rights reserved to them under Section 15 of the Original ECRs.

Moreover, College’s argument that it was not seeking to assert a new claim is belied by the evidence. College first raised the issue by seeking to introduce new evidence in the form of photographs of purportedly “competitive” products. Had College’s antitrust/public policy claim been at issue throughout the case, Home Depot would have marshaled its own evidence by conducting discovery and retaining experts to testify regarding such a claim, and the claims would have been addressed in pretrial motion

proceedings. (CP 302-303 at ¶ 16.) None of those things occurred. In fact, College itself did not even obtain the photographs of the allegedly “competitive” Wal-Mart and Home Depot products until several months after the July 2013 close of discovery. (CP 379-380 at ¶ 1.) College does not and cannot cite to any event prior to October 2013 that would have given Defendants knowledge that College intended to raise such claims. (See Appellant’s Opening Brief (“AOB”) at p. 32.) Of course, the very limited information that came to Home Depot – just two weeks before the original trial date – was not provided by College, but by Olhava’s counsel.

Under these circumstances, the trial court correctly concluded that the antitrust/public policy claim was not raised by the pleadings and Defendants would have been unduly prejudiced if College were permitted to offer evidence at trial on that undisclosed theory.

3. Even If The Court Had Allowed The Photographs And Summaries Into Evidence, Plaintiff Could Not Have Shown The Amended ECRs Were An Unreasonable Restraint On Trade.

The only evidence College proffered in support of its restraint of trade claim were the photographs and summaries of photographs of “the same and/or comparable categories of products offered for sale” by both Wal-Mart and Home Depot. (CP 380.) That evidence, even if admitted, would have been patently insufficient to prove College’s antitrust/public policy theory. It is well-established that an antitrust claim requires extensive expert testimony on various issues, such as the relevant geographic and product market in which trade was unreasonably restrained or monopolized,

as well as testimony on the economic effects of the alleged restraint on trade. See, e.g., *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1145 (9th Cir. 2011) (determination of unreasonable restraint involves “rigorous and exhaustive [] analysis that requires a full-scale duel of economic experts over complicated and sophisticated market issues”); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D.Me. 2003) (such a claim “will require expert testimony defining the market (geographically and by product)” and “the opportunity to assert business justifications” and their economic effects). College could not offer such evidence as it admitted it would not offer any expert testimony at trial. (CP 424.) The fact that two retailers offer the same “or comparable categories” of products does not begin to prove that an agreement between them is an illegal restraint of trade.

College argues here, as it did in the trial court, that its restraint of trade theory was not really an antitrust claim. The authorities upon which College relies tell a very different story. College’s public policy theory is based on RCW 19.86.030, which is Washington’s equivalent of the Federal Antitrust Statute, the Sherman Act. *Murray Pub. Co., Inc. v. Malmquist*, 66 Wn.App. 66 Wash.App. 318 at 324, 832 P.2d 493 (1992). Accordingly, RCW 19.86.030 and federal antitrust precedent are co-extensive with each other. *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984). Indeed, the very terminology College uses to describe its theory – *i.e.* that the Amended ECRs are a “horizontal agreement in restraint of trade” – is terminology grounded in antitrust law. (CP 430 at ¶ 3.) College’s labeling of its theory as

“common law” or “public policy” does nothing to change the nature of the claim.

The federal authorities upon which College relies are likewise grounded in antitrust law. For example, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Gamco v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2D 484 (1 ST Cir.), *cert. denied*, 344 U.S. 817 (1952) both involved claims for violation of the Sherman Act. College also relies on a law review article regarding antitrust claims: “*The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*”, 86 Harv. L. Rev. 1201, 1248 (1973) (emphasis added).

Under Section 1 of the Sherman Act, and thus under RWC 19.86.030, only “unreasonable” restraints on trade are prohibited. See, e.g., *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). A plaintiff asserting such a claim must prove “(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which *actually injures competition.*” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (emphasis added).

To amount to an unreasonable restraint of trade the anticompetitive conduct *must have an effect greater than its effect upon the plaintiff's business.* As it has often been stated, the antitrust laws were enacted for the protection of Competition, not Competitors. The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged.

Gough v. Rossmoor Corp., 585 F.2d 381, 386 (9th Cir. 1978) (emphasis added). “[T]he plaintiff must show an injury to *competition*, rather than just an injury to plaintiff’s business.” *Christofferson Dairy v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988) (emphasis in original).

Thus, a claim under Section 1 of the Sherman Act must allege and prove a relevant geographic and product market in which trade was unreasonably restrained or monopolized. See, e.g., *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) (“Failure to allege a legally sufficient market is cause for dismissal”). “The relevant market for purposes of antitrust litigation is the ‘area of effective competition’ within which the defendant operates.” *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999). “A relevant product market consists of ‘products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.’” *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002).

Washington law under RCW 19.86.030 is in accord. “In order to show actual injury to competition, an antitrust claimant must generally present evidence delineating the ‘relevant market’ and demonstrating the effects of the challenged conduct upon competition within that market.” *Murray Pub. Co., Inc. v. Malmquist*, 66 Wn.App. 318, 326-327 (1992) (internal citations omitted). The “relevant market” includes both the geographic market, *i.e.*, the area of effective competition within which buyers can turn for alternative sources of supply, and the product market, which encompasses “all products that are ‘reasonably interchangeable,’ and so can be said to compete with each other for

the same buyers' dollars.” *Id.* Failure to prove the relevant product and geographic market coupled with economically sound analysis of the impact on competition in those markets is grounds for reversing an antitrust judgment. See, e.g., *Murray Pub. Co. supra*, 66 Wn.App. at 326-327.

College made no offer of proof whatsoever to show that it was prepared to present competent evidence of the relevant geographic or product markets. Without such evidence, the introduction of photographs of products sold by Home Depot and Wal-Mart could not have supported a finding that the Amended ECRs constitute an unlawful restraint of trade.

College appears to take the position that it could establish a violation of the public policy underlying RWC 19.86.030 without actually proving that the Amended ECRs violate that section. College cites no authority for that position. Indeed, it would be extremely hazardous to the orderly conduct of business throughout Washington if contracts could be deemed invalid under Section 19.86.030 for “public policy” reasons without proof of an actual violation of that Section.

College also argues that the Amended ECRs violate public policy merely because they impose restrictive covenants on a shopping center and are therefore “potentially harmful to competition and to consumers.” (AOB 24.) The cases cited cannot be construed to support that claim. For example, *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) involved an alleged “group boycott” of the plaintiff appliance store by “a wide combination consisting of manufacturers, distributors and a retailer” which, if proven, would constitute a per se antitrust

violation. *Id.* at 212. The *Klor's* case simply has nothing to do with use restrictions adopted for a shopping center. Nor did *Gamco v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952) involve use restrictions within a shopping center. That case concerned the expulsion of a produce seller from a Rhode Island building that effectively had monopoly power over produce sales in the area. Here, College cannot seriously contend that the exclusion of paint stores from the Center effectively barred paint stores from the relevant market.

The Washington authorities College cites actually undercut its argument that the Amended ECRs constitute an illegal restraint on trade. For example, College relies heavily on *Colby v. McLaughlin*, 50 Wn.2d 152, 156-57, 310 P.2d 527 (1957), in which the Court found that an agreement that no drugstore or business selling wine, beer or ice cream would be maintained on certain premises *was enforceable* because “[i]t is not suggested that a restriction as limited as that imposed upon the defendant could tend to create a monopoly or enhance prices.” *See also, Messett v. Cowell*, 194 Wash. 646, 653, 79 P.2d 337 (1938) (holding that “though public policy forbids unreasonable restraint of trade, and therefore forbids a system of contracts attempting to control prices on resale, *there seems no reason why it should prohibit contracts which reasonably protect a business* of either buyer or seller without tending to affect the public injuriously by monopoly or enhancement of prices”) (emphasis added).¹

¹ The other Washington authorities cited by Plaintiff in support of its antitrust/public policy theory have no bearing on the facts of this case as they involve non-compete agreements in employment contracts (*Perry v. Moran*, 109 Wash.2d 691, 748 P.2d 224 (1987); *Sheppard v.*

Moreover, *there are numerous cases holding that exclusivity agreements with respect to the use of premises do not violate antitrust laws.* See, e.g., *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947) (railroad company could enter into an exclusive lease arrangement with one taxi company to serve the terminal); *Export Liquor Sales, Inc. v. Annex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (party with control over “unique location essential to the conduct of a certain kind of business can lease a part of that location to one entity”); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966) (agreement making defendant the exclusive operator at airport, thus excluding a claimed competitor, did not violate sections 1 and 2 of the Sherman Act); *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962) (exclusive contract between a shopping center and Shell which excluded any other gas station from using shopping center property not a violation of antitrust laws).

Finally, College’s argument that the Amended ECRs are invalid because they are not ancillary to any valid transaction likewise ignores the evidence. The amendment of the ECRs was a condition of – and therefore ancillary to – Home Depot’s purchase of its portion of the Center. (CP 2268 at ¶ 6, 1776-1777 at ¶¶ 3-7.) Home Depot’s purchase was not only a valid

Blackstock Lumber Co., Inc., 85 Wash.2d 929, 540 P.2d 1373 (1975); *Knight, Vale and Gregory v. McDaniel*, 37 Wn.App. 366, 369, 680 P.2d (1984)), or an attorneys’ contract deemed unenforceable because it was entered into in violation of the Code of Professional Responsibility (*LK Operating, LLC v. Collection Group, LLC*, 181 Wash.2d 48, 331 P.3d 1147 (2014)), or a contract regarding profits of pinball machines that was deemed unenforceable because the machines were illegal gambling devices (*Waring v. Lobdell*, 63 Wn.2d 532, 533-34, 387 P.2d 979, 981 (1964)).

transaction, but it was what made it possible for College to lease portions of Lot 7-A to Office Max and Big 5. (RP August 19, 2014, Lien Cross, at 19:18-23, Lien Direct, at 5:14-20.)

For all of the above reasons, the trial court properly exercised its discretion in granting Home Depot's motion in limine to exclude College's evidence in support of the unpleaded antitrust/public policy claim.

C. **The Trial Court Properly Awarded Attorneys' Fees And Costs To Home Depot Under Section 13 Of The Amended ECRs.**

Section 13 of the Amended ECRs provides as follows:

13. Breach. In the event of breach or threatened breach of this Agreement, only: (i) all record owners of the Wal-Mart Tract as a group, or (ii) all record owners of the Home Depot Tract as a group, or (iii) a majority of the total record owners of the Developer Tract as a group, or (iv) Wal-Mart so long as it or any affiliate has an interest as owner or lessee of the Wal-Mart Tract, or (v) Home Depot so long as it or any affiliate has an interest as owner or lessee of the Home Depot Tract, or (vi) Developer so long as it or any affiliate has an interest as owner or lessee of any portion of the Developer Tract containing a total of not less than ten (10) acres, shall be entitled to institute proceedings for full and adequate relief from the consequences of said breach or threatened breach. The unsuccessful party in any action shall pay to the prevailing party a reasonable sum for attorney's fees and costs, as set by the court.

(CP 660.) The trial court correctly interpreted Section 13 as providing for Home Depot to recover its reasonable attorneys' fees incurred in this action.

(CP 1513 (Conclusion of Law on Attorneys Fees Motion ("Atty. Fees CL"))

3.) After careful analysis, the court found that the majority of the fees Home Depot sought were reasonably incurred and awarded Home Depot fees and

costs in the amount of \$601,917.90. (CP 1520, 1529-1530 (Atty. Fees CL 55.) The award is supported by the record and was well within the court's discretion.

1. The Court Correctly Applied General Rules Of Contract Construction To Section 13.

Section 13, like any contract provision, is to be construed according to general contract interpretation principles, "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." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). That is precisely what the trial court did. College cites no Washington authority in support of its assertion that a contractual attorney's fee provision must be strictly construed, and the New Jersey and Illinois cases upon which College relies have no bearing on the law in this case.

Nor is there any basis for College's argument that any ambiguities in Section 13 should be construed against Home Depot. A contract is ambiguous only if, on its face, it is fairly susceptible to more than one reasonable interpretation. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Here, College does not even attempt to offer an alternative interpretation of Section 13. A court must not read an ambiguity into a contract that is otherwise clear and unambiguous. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 420, 909 P.2d 1323

(1995); *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 721, 952 P.2d 157 (1998). The trial court correctly found that Section 13 clearly and unambiguously provides that the prevailing party “in any action” is entitled to its reasonable attorneys’ fees and costs.

Section 13 is divided into two sentences. The first, lengthy sentence describes *who* may “institute proceedings” in the event of a breach or threatened breach of the agreement. The second sentence authorizes an award of fees “*in any action*” to the “prevailing party” and against the “unsuccessful party.” (CP 660 (emphasis added).) Neither sentence limits an award of fees to those incurred on any particular type of claim – whether in contract, in tort, at law or in equity. Thus, the trial court correctly found the use of the term “any action” in the second sentence evidences the drafters’ intent that the attorneys’ fees provision is to apply broadly to “any claims in an action regarding a breach or threatened breach” of the agreement. (CP 1516 (Atty. Fees CL 20).)

College does not argue that the trial court misinterpreted the drafters’ intent. Instead, College argues that the evidence does not show it “knowingly” breached or threatened to breach the Amended ECRs. That argument finds no support in the express language of Section 13. See *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 913, 874 P.2d 142 (1994) (party may not add language to a contract). If the drafters had intended to limit Section 13 as College suggests, they would have done so. *Id.* Instead, the clear purpose of Section 13 is to discourage *any* breach or threatened breach, whether knowing or otherwise.

College's argument that Section 13 was designed to *encourage* parties to challenge the Amended ECRs by filing lawsuits is nonsensical. The Amended ECRs were enacted to establish rules to avoid disputes, ensure stability within the Center, and enhance the overall value of the Center. Why, then, would the drafters encourage anyone to file lawsuits to challenge the very rules that govern the Center, and thereby subject the Center to perpetual uncertainty and possible lawlessness? There is nothing in the language of Section 13 suggesting such intent.

2. The Trial Court Correctly Found That College Threatened To Breach The Amended ECRs In August 2011.

It is undisputed that College negotiated a lease with Sherwin Williams in 2011 which, if it had been entered, would have breached the Amended ECRs. (CP 170 at ¶¶48-49, 1491.) College alleged it would have entered the lease if Respondents had not "effectively stopped the lease by enforcing the restrictions on paint stores in the 2008 ECRs." (CP 1491 at 6:16-17.) The trial court found that College's "actions in 2011 in preparing to execute a lease with Sherwin Williams was a 'threatened breach' under paragraph 13." (CP 1514 (Atty. Fee CL 7).) The resulting litigation, including Home Depot's counter-claim for declaratory judgment and injunctive relief, therefore resulted from the event of that threatened breach.

Under its plain terms, Section 13 would apply had Home Depot and the other Defendants immediately raced off to the courthouse in August 2011 to "institute proceedings for full and adequate relief from the consequences of" College's threatened breach of the Amended ECRs. (CP 660.) But

College urges this Court to find that Defendants are not entitled to recover their attorney's fees merely because College filed suit first. This interpretation of Section 13 defies logic and directly contradicts the objective of the contract, which is to discourage challenges to the Amended ECRs. Regardless of which party won the race to the courthouse, the end result is the same: Home Depot had to hire legal counsel and incur significant expense for several years to defend the validity of the Amended ECRs.

By arguing that its preparation to enter into the lease with Sherwin Williams was not a threatened breach, College asks this Court to find that Section 13 was intended to allow an adjoining landowner to demand that the terms of the Amended ECRs be waived, and then to proceed with litigation when the demand is refused, without incurring liability for the prevailing parties' fees and costs. That contention makes no sense in view of the terms and objective of the Amended ECRs as a whole. See *Berg*, 115 Wn.2d at 667. Section 13 was added to provide consequences – potentially expensive ones – against one who wrongfully threatens the rules governing the Center. By allowing attorneys' fees to protect the anchor tenants when forced to defend the Amended ECRs, the intent was to avoid the anchor tenants being faced with the Hobson's choice of either continually conceding to threats by the adjoining landowners who seek waiver of the Amended ECRs' terms, or continually fighting off efforts to invalidate the Amended ECRs with no ability to recover their attorneys' fees when forced to do so.

3. The Trial Court Correctly Found That Home Depot Is Entitled to Its Reasonable Attorneys' Fees Incurred In Defense Of College's Tort Claims.

Under Washington law, a prevailing party may recover attorney fees under a contract if the claim is “on the contract.” *Hemenway v. Miller*, 116 Wn.2d 725, 743, 807 P.2d 863 (1991). “[A]n action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.” *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993). Here, the validity of the Amended ECRs was the *only* subject of the claims between Home Depot and College.

Washington Courts recognize that attorneys fees for tort claims are recoverable under similar circumstances. For example, in *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 277-78, 215 P.3d 990 (2009), the court allowed a restaurant owner to recover its attorneys’ fees in a lawsuit to enforce a covenant protecting the restaurant’s lake view against the parties seeking to build houses that would block the view. The restaurant owner was awarded fees incurred on its tortious interference claim despite *losing* on its breach of contract claim because “the contract is central to the existence of the [tort] claims,” and “enforcement of the agreements and the claims that followed their breach is the essence of the tortious interference with contract claim.” *Id.* at 278. *See also Hill v. Cox*, 110 Wn.App. 394, 411-12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App. 834, 855-56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties’ agreement); *W. Stud Welding v.*

Omark Ind., Inc., 43 Wn.App. 293, 299, 716 P.2d 959 (1986) (contract-related tortious interference claim justified awarding of contract-based fees).

Contrary to College's argument, nothing in Section 13 limits recovery of fees to those incurred on contract causes of action. Rather, fees are available "*in any action*" that is filed "in the event of" a breach or threatened breach of the Amended ECRs. (CP 1515 (Atty. Fees CL 15).) A cause of action for breach of contract is just one type of claim that might arise from such a breach or threatened breach, and the parties chose not to limit Section 13 to that specific cause of action. The issue of the validity of the Amended ECRs was "central to the existence" of College's tort claims for slander of title, injurious falsehood, and tortious interference. *Deep Water Brewing, LLC, supra, Ltd.*, 152 Wn.App. at 278. By its slander of title claim, College alleged that Respondents slandered its title by "wrongfully and without privilege" recording the Amended ECRs against its property. (CP 176 at ¶¶ 71-74.) College's injurious falsehood claim was based on allegations of "false representations related to Lot 7-A" in the Amended ECRs. (CP 176-77 at ¶¶ 75-81.) College's intentional interference with a contractual relationship claim was based on the allegation that the Amended ECRs were wrongfully recorded against Lot 7-A, and interfered with College's expectancy to enter into the Sherwin Williams lease, which admittedly would have violated the Amended ECRs. (CP 178-79 at ¶¶ 84-92.)

In short, all three tort claims depended upon the central issue of whether the Amended ECRs are valid. As a result, Respondents are entitled to their attorneys' fees and costs in prevailing on these tort claims.

4. The Amount Of Fees Awarded To Home Depot Was Not An Abuse Of The Trial Court's Discretion.

It is obvious from the trial court's Memorandum Opinion and extensive Findings of Fact and Conclusions of Law on Home Depot's motion for attorneys' fees and costs that the court engaged in a thorough and thoughtful analysis of the detailed billing records and declarations presented by Home Depot. (CP 1517-1524 (Atty. Fee CL 29-32, 34-37, 55-93).) Applying the lodestar approach, and considering, among other things, the novelty and complexity of the issues litigated and the degree to which defense counsel's efforts were successful, the court found the majority of the fees and costs Home Depot sought were reasonable and recoverable. (CP 1516-1517 (Atty. Fee CL 25-30).) The court declined to award approximately \$55,000 in fees and costs sought which the court deemed unnecessary. (CP 1522-1524.) For example, the court deemed it unnecessary for Home Depot to have two attorneys present during the trial, and so awarded fees for trial only for the time spent by lead counsel, Steven Roland. (CP 1522 (Atty Fees. CL 66-67).) The court denied Home Depot's request for certain fees incurred by paralegals and IT support staff, as such fees were deemed to be for non-legal work. (CP 1523 (Atty. Fees CL 74, 76-79).) The court also denied Home Depot's request for certain travel expenses, awarding only such costs as would have been incurred for one Seattle attorney to attend trial and hearings. (CP 1525 (Atty. Fees CL 89-93).)

Although it asserts that the amount fees awarded is “grossly excessive on its face,” *College does not point to any particular task that it claims was unreasonable or unnecessary, nor does it claim that the hourly fees charged by Home Depot’s counsel are unreasonable*. Nor does College claim the court erred in applying the lodestar method to its calculation of reasonable fees and costs. See *Morgan v. Kineen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009).

The only particular fees College challenges are those for time entries from which attorney-client privileged information was redacted. Those entries account for less than \$20,000 of the fees incurred by Home Depot. College cites no Washington authority that would permit this Court to refuse to award fees when redactions are made to billing records to protect attorney-client communications (and particularly where, as here, the redacted items were offered for *in camera* review).

Nor do the two foreign cases College cites support such a blanket proposition. In *O’Neal v. United States*, 258 F.3d 1265 (11th Cir 2001), the plaintiff decedent’s estate sought a tax deduction for attorney’s fees as administrative expenses, but refused to provide *any* of the relevant legal fee invoices on the basis of privilege. *Id.* at 1269. Under those circumstances, the court found that the estate had failed to make a proper accounting to support the claimed deduction. *Id.* That case is clearly distinguishable from this case, where Home Depot has produced detailed invoices that permitted the trial court and College to see the nature of the work and amount of time spent throughout the litigation, subject only to minor redactions of material

(3% of the submission) reflecting privileged communications. The Court in *Ideal Electronic Security Co. v. International Fidelity Ins. Co.*, 129 F.3d 143, 151 (D.D. Cir. 1997) recognized that a party “may opt to withhold billing statements under a claim of attorney-client privilege” and that it is “within the trial court’s scope of discretion in determining a reasonable fee award” based on the “nature and amount of proof necessary to determine reasonableness.” *Id.* In this case, Home Depot offered to produce unredacted billing records for an *in camera* review, and the trial court appropriately determined that such a review was unnecessary.

Washington law provides that the reasonableness of a fee award can be established by documentation that provides at least a minimum level of detail of the work performed. *McGreevy v. Or. Mut. Ins. Co.*, 90 Wn.App. 283, 291, 951 P .2d 798 (1998). Here, the trial court had ample documentation in Home Depot’s detailed invoices and declarations from counsel on which to award Home Depot’s reasonable fees and costs. College has failed to identify even a single time entry that it claims was improperly redacted or was redacted in such a way that a reasonable reader cannot determine the nature of the legal services provided.

College has not even attempted to argue that the total amount of fees and costs awarded is unreasonable in light of the issues raised in the case and the potential consequences to the Defendants and the Center if College’s action had been successful. Since the minimal redactions of privileged information from the fee invoices did not deprive the trial court or College of

material information regarding the nature of the services rendered, the Court should affirm the award of fees and costs to Home Depot in its entirety.

D. Even If The Court Determines The Trial Court Erred, Appellant Is Not Entitled To Judgment, As Defendants Have Not Had An Opportunity To Present Their Case.

College requests not only that the Judgment be reversed but that the trial court be directed on remand to enter judgment for College. For the reasons discussed above, there was no error warranting remand. Even if remand were appropriate, College is not entitled to judgment because, since the trial court granted Home Depot's motion to dismiss at the close of College's case, Defendants have not had an opportunity to present their case. Among other things, Defendants are entitled to present evidence that (1) College was well aware that Wal-Mart and Home Depot are co-anchor tenants in numerous locations in Washington and that both companies condition their purchase of property in a retail center on the adoption of restrictions on competing uses by other retailers in the center; (2) it is essentially unknown in the industry not to have such restrictions in shopping center development; (3) College's agents were at all times aware of Home Depot's customary required use restrictions, including restrictions on paint stores; (4) College's own leases with its tenants, including Office Max and Big 5 Sporting Goods, contain "exclusive use" clauses that limit competing uses by other tenants on College's property in the Center and (5) the use restrictions contained in Section 3 of the Amended ECRs are enforceable against Lot 7-A under the doctrine of equitable servitude, as recently affirmed by the Supreme Court in *Riverview Community Grp. v. Spencer &*

Livingston, 181 Wash.2d 888 (2014). Due process requires that, if the case is remanded for any reason, Defendants have an opportunity to be heard on all their defenses to College's claims.

V. CONCLUSION

For all of the above reasons, Home Depot respectfully requests that the Judgment in its favor be affirmed in its entirety and that Home Depot be awarded its costs and fees on appeal.

DATED this 8th day of June, 2015

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 8, 2015, I served a copy of the foregoing document on all counsel of record as indicated below:

<p style="text-align: center;">Plaintiff's Counsel: <i>Counsel for Appellant College Marketplace, LLC</i> Michael E. Kipling, WSBA #7677 Timothy M. Moran, WSBA #24925 Kipling Law Group PLLC 3601 Fremont Avenue N., Suite 414 Seattle, WA 98103 206-545-0345 206-545-0350 (fax) kipling@kiplinglawgroup.com moran@kiplinglawgroup.com</p>	<p style="text-align: center;">Via Legal Messenger</p>
<p style="text-align: center;">Co-Defendants: Attorneys for Olhava Associates: Mark A. Rowley, Garvey Schubert Barer 1191 Second Avenue, Suite 1800 Seattle, WA 98101-2939 206-464-3939 mrowley@gsblaw.com</p>	<p style="text-align: center;">Via Legal Messenger</p>
<p style="text-align: center;">Attorneys for Wal-Mart Real Estate Business Trust: William K. Rasmussen Davis Wright Tremaine LLP 1201 3rd Avenue, Suite 2200 Seattle, WA 98101 206-757-8125 billrasmussen@dwt.com</p>	<p style="text-align: center;">Via Legal Messenger</p>

DATED this 8th day of June, 2015.

Maria S. Tiegen

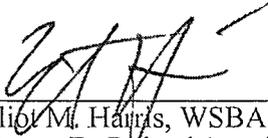
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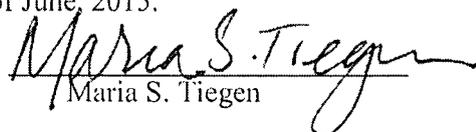
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BY C
DEPUTY

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<p>Plaintiff's Counsel: <i>Counsel for Appellant College Marketplace, LLC</i> Michael E. Kipling, WSBA #7677 Timothy M. Moran, WSBA #24925 Kipling Law Group PLLC 3601 Fremont Avenue N., Suite 414 Seattle, WA 98103 206-545-0345 206-545-0350 (fax) kipling@kiplinglawgroup.com moran@kiplinglawgroup.com</p>	<p>Via Legal Messenger</p>
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<p>Attorneys for Wal-Mart Real Estate Business Trust: Charles E. Maduell Davis Wright Tremaine LLP 1201 3rd Avenue, Suite 2200 Seattle, WA 98101 206-622-3150 chuckmaduell@dwt.com</p>	<p>Via Legal Messenger</p>

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