

NO. 65498-5-I

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

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CARGOLUX AIRLINES INTERNATIONAL, S.A., a Luxembourg  
corporation,

Respondent,

v.

SEA-TAC AIR CARGO L.P., a Washington limited partnership,  
acting by and through its general partner TRANSIPLEX  
(SEATTLE), INC., a Washington corporation,

Appellant.

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**BRIEF OF APPELLANT**

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DAVIS WRIGHT TREMAINE LLP MASTERS LAW GROUP, P.L.L.C.

F. Ross Boundy  
WSBA 403  
Ambika Kumar Doran  
WSBA 38237  
1201 Third Avenue, Ste 2200  
Seattle, WA 98101-3045  
(206) 757-8201

Kenneth W. Masters  
WSBA 22278  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorney for Appellant

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## INTRODUCTION

The primary issue at trial and on appeal of this commercial leasehold case is whether the lessor, Transiplex, and the lessee, Cargolux, agreed to terminate their lease in 2008 (instead of 2009) by an exchange of letters in 2008. Transiplex's first letter (May 30, 2008) says nothing about modifying or terminating the lease, so it cannot be an "offer" to terminate the lease. The trial court erred as a matter of law in ruling on summary judgment that this letter exchange constituted a contract to terminate the lease in 2008 if the parties so intended, leaving the intent issue for trial.

Even if the May 30 letter had been an offer to terminate the lease, however, Cargolux rejected termination when it filed this suit on June 5, 2008. Cargolux's June 5 Complaint asserted that Transiplex's proposed alleged termination breached the lease and that Transiplex was liable for the breach. This rejected any so-called offer in the May 30 letter. The trial court erred.

In addition to other issues discussed below, both parties claimed prevailing-party attorney fees under the lease. The trial judge held that neither party proved its fees were reasonable and denied any fees to either party. Both parties appeal this ruling. This Court should reverse and remand.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its order granting/denying motions for summary judgment on December 9, 2008, holding that the 2008 letter exchange constituted a written offer and acceptance that Cargolux would vacate rather than pay increased rent, that trial was required to determine the parties' intent, and that Transiplex could not pass on certain charges to Cargolux as Building Operating Costs ("BOC"). CP 935.
2. The trial court erred in denying Transiplex's subsequent motions for summary judgment that the letter exchange neither modified nor repudiated the lease and that certain charges could not be included in the BOC. CP 1489, 1968.
3. The trial court erred in refusing to admit into evidence the Cargolux complaint initiating this lawsuit, in which Cargolux made allegations directly contrary to its theory at trial. RP 456.
4. The trial court erred in giving Jury Instruction 14 that the 2008 letter exchange constituted an agreement if the parties intended it to be an agreement. CP 2391 (Copy attached).
5. The trial court erred in denying Transiplex's CR 50(a) motion to dismiss Cargolux's claim that the 2008 letter exchange modified or repudiated the lease. CP 2370.

6. The trial court erred in entering its Order Denying Transiplex's CR 50(b) and CR 59(a) motions for judgment as a matter of law or for a new trial. CP 2846.
7. The trial court erred in entering segregation Finding of Fact (FF) 14 that expenses attributable to the hardstand aircraft parking area could not be passed on to Cargolux as BOC. CP 3122-23. (A copy of the Findings of Fact and Conclusions of Law Re Segregation, CP 3117-43, is attached).
8. The trial court erred in entering Segregation FF 15 to the same effect as FF 14. CP 3123.
9. The trial court erred in entering Segregation FF 19 calculating overcharges to be refunded to Cargolux. CP 3124-25.
10. The trial court erred in entering Segregation FF 20 & 22, calculating a refund to Cargolux based on hardstand issues. CP 3125.
11. The trial court erred in entering Segregation FF 21 that Transiplex must refund to Cargolux \$102,143 of BOC. CP 3125.
12. The trial court erred in entering Conclusions of Law based on these findings. CP 3126.
13. The trial court erred in entering judgment in favor of Cargolux. CP 3164.

14. The trial court erred in entering its order denying attorney fees to Transiplex. CP 4364.

15. The trial court erred in observing in its order denying Cargolux's motion for partial reconsideration that if it were ordered to award fees, the Court's "probable ruling on remand" would be that Cargolux should recover 50% of its fees. CP 4466-67.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the 2008 letter exchange modify, terminate or repudiate the lease where Cargolux rejected the Transiplex offer and Transiplex repeatedly invoked the provisions of the lease? (Issue pertaining to AE 1,2,5,6,13)

2. Was it error to exclude from evidence Cargolux's intervening Complaint, which directly contradicted Cargolux's theory at trial? (AE 3,6,13)

3. Did the trial court err in giving Jury Instruction 14, which told the jury that the first two letters of the 2008 letter exchange were an agreement in writing if the jury found that the parties intended to modify the lease to terminate it? (AE 4,6,13)

4. Did the trial court err in holding that Transiplex's expenses incurred in litigation with the Port over the hardstand aircraft-parking area were not operating or administrative expenses

incurred in the operation of the Terminal for the sole reason that the hardstand itself had been deleted from the legal description of the Transiplex leasehold? (AE 1, 7-13)

5. Was Transiplex a “prevailing party” entitled some portion of its attorney fees under a proportionality analysis? (AE 14, 15)

6. Is Transiplex entitled to attorney fees on appeal?

### **STATEMENT OF PROCEDURE**

Cargolux commenced this action on June 5, 2008, seeking: a temporary restraining order to prevent Transiplex from attempting to evict Cargolux from the leased premises; declaratory relief that Cargolux was not required to pay Transiplex’s legal fees arising from underlying litigation with the Port of Seattle as part of the Building Operating Costs (BOC); damages for breach of contract. CP 2217, 2223-24. Cargolux alleged that the lease should continue to November 30, 2009, because Transiplex had not given timely notice of termination. CP 2222.

The trial court denied Cargolux’s motion for a TRO, and Cargolux paid Transiplex the disputed BOC, reserving a claim for refund. CP 6. Cargolux then amended its Complaint to reverse its initial allegation that the lease would continue to November 30,

2009, claiming by amendment that the lease would instead terminate a year earlier, in 2008. *Id.*

Transiplex's Answer to the First Amended Complaint alleged that the lease terminated on November 30, 2008. CP 99. Transiplex then reversed its position and argued that the lease continued into 2009. CP 108. Judge Armstrong denied Cargolux's partial summary judgment motion. CP 303-04. Transiplex's First Amended Answer alleged the lease continued to 2009. CP 362.

The parties filed cross-motions on whether the lease terminated in 2008 or 2009. CP 443 (Transiplex MSJ), CP 520 (Cargolux MSJ). The parties also filed cross-motions on whether Transiplex could properly charge Cargolux as BOC legal expenses Transiplex incurred in litigation with the Port of Seattle over a hardstand aircraft parking area in front of one of Transiplex's buildings. CP 339 (Transiplex MSJ), 533 (Cargolux MSJ). Judge Armstrong entered a single order resolving all four motions and holding: (a) the 2008 letter exchange was an agreement terminating the lease in November 2008, but there was a genuine issue of fact whether the parties intended to terminate the agreement, which required trial; and (b) Transiplex cannot include in BOC Transiplex's litigation costs over the hardstand. CP 935-44.

On October 14, 2009, the trial court (the Honorable Hollis Hill) ruled on three motions for partial summary judgment by Cargolux and two motions by Transiplex. Judge Hill refused to revisit Judge Armstrong's prior rulings that litigation expenses related to the hardstand issue were not BOC and that a trial was required on whether the parties intended to modify the lease or whether Transiplex repudiated the lease. CP 1491-92. But Judge Hill also ruled that as to eight specific issues in the litigation between Transiplex and the Port the legal fees were properly included in BOC. CP 1491.

The case was tried to a jury in January 2010. The jury made the following findings by special verdict: (a) Transiplex and Cargolux modified their lease agreement to agree it would terminate in 2008; (b) Transiplex did not breach the lease by failing to repair dock bumpers; and (c) Cargolux breached the lease agreement by failing to leave the premises in the condition required by the lease, damaging Transiplex in the amount of \$92,000. CP 2397-98.

The trial court (the Honorable Jay White) did not submit to the jury the allocation of Transiplex's legal fees between those properly included in BOC and those not properly included. Instead,

Judge White reviewed the records and determined that Transiplex must refund to Cargolux \$102,143 in BOC charges. CP 3113-16. Judge White entered findings regarding segregation of fees, CP 3117, and a judgment in favor of Cargolux. CP 3164.

Both parties appealed. CP 3470, 3510.

The lease provided for attorney fees. CP 259. Judge White denied fees to both parties, ruling that Transiplex was not a prevailing party and that neither party had carried its burden to establish the reasonableness of its fees. CP 4364. The court denied Cargolux's motion for reconsideration, but observed that if this court determined that an award was mandatory, the trial court would likely award 50% of Cargolux's fees. CP 4457, 4466-67. Both parties appealed from the rulings on fees. CP 4468, 4590.

## **STATEMENT OF FACTS**

### **A. Transiplex leases space at Transiplex's Sea-Tac terminal to Cargolux for transferring cargo to and from Cargolux airplanes.**

Transiplex develops and operates air cargo facilities at airports, including Sea-Tac. RP 759. Transiplex leases ground at airports and builds terminal facilities for the movement of air cargo. RP 883. Transiplex basically provides a "home" for air cargo forwarders, and others involved in air cargo movement. *Id.*

In the early eighties, the Port of Seattle invited Transiplex representatives to visit Sea-Tac to discuss developing a multi-use air cargo facility at Sea-Tac. RP 759. In 1982, Transiplex signed a long-term Ground Lease with the Port of Seattle for the construction and operation of an air cargo terminal and related operations. CP 215. Transiplex constructed extensive facilities that it sublets to subtenants such as Cargolux. *Id.*

Cargolux is an international all-cargo air carrier with its principal place of business in Luxemburg. CP 1. In 2007, Cargolux had gross revenue of \$1.7 billion and operated 15 Boeing 747-400F cargo planes that carried 700 million tons of cargo during the year. CP 319. Cargolux does not carry packages like Federal Express, but transports very large shipments of items such as Boeing spare parts, engines, animals, pharmaceuticals, and other cargo. RP 272. Cargolux operates four flights per week into Sea-Tac. RP 273-74. Cargolux contracts with ground handling agents to load cargo onto pallets, typically 8-foot-by-10-foot aluminum sheets that can be easily loaded onto and off of the aircraft. RP 281.

Cargolux entered into its first lease with Transiplex in 1992. RP 277. Transiplex and Cargolux renewed their lease in 1999, but failed to sign a new lease agreement. CP 209. Transiplex initially

sent a proposed new lease to Cargolux providing for a five-year term and an option to renew. *Id.* Cargolux refused to sign a five-year lease, and Transiplex sent a second lease with a one-year term and no renewal option. *Id.* It appears that neither lease was signed by either party. *Id.* The two leases were identical in all significant respects except for ¶ 2 (term) and ¶ 2.3 (option to renew). *Id.*

In 2000, the parties signed “Amendment No. 1”. *Id.* A copy of this Amendment is found at CP 265 and is appended to this brief. The amendment recites that it amends a lease dated October 21, 1999, without apparent recognition that no one signed the 1999 lease and without stating whether the amendment changes the five-year lease or the one-year lease. Judge Sharon Armstrong held on summary judgment that the 2000 amendment is valid and incorporates all provisions of the 1999 leases except term and termination/renewal provisions, which are modified by the amendment. CP 938. Amendment No. 1 provides for a one-year term with automatic renewal on the first day of December unless “written notice [is given] at least one (1) year prior to the December first anniversary . . . .” CP 265. Amendment No. 1 thus provided the operative language for this litigation.

**B. Cargolux disputed paying its proportionate share of Transiplex's legal costs for litigation against the Port of Seattle as part of the Building Operating Costs (BOC) charged by Transiplex to all tenants.**

Nearly all of Transiplex's leases, including the Cargolux lease, are "triple net" leases in which the tenants agree to pay all costs incurred in operating the terminal in addition to a base rent. CP 216. These charges are referred to as Building Operating Costs, or BOC. *Id.* The 1999 leases list specific expenses included in BOC, adding that BOC includes "all other operating and administrative expenses of every kind and nature incurred by Landlord in the operation of Terminal," subject to exceptions not relevant here. CP 223-24 (five-year lease), CP 245 (one-year lease agreement).<sup>1</sup>

In 2005, the Port of Seattle attempted to raise Transiplex's rent without giving notice required under this lease. The Port's action led to litigation over this and other issues. CP 216-17. Transiplex included its legal fees from the Port litigation in the BOC and charged each tenant its proportionate share of the legal expenses. CP 218. For two years, Cargolux paid the BOC

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<sup>1</sup> In the balance of this brief, cites to the 1999 lease are to the five-year lease, since it is identical in all relevant respects to the one-year lease.

including the legal fees, but in 2008, Cargolux refused to pay its portion of the legal fees. CP 218. This dispute is further discussed below, in the argument section.

**C. The primary dispute in this case is whether the parties contracted to terminate the Transiplex/Cargolux lease through the 2008 letter exchange.**

The Transiplex/Cargolux lease does not provide for an increase in the base rate. CP 223. Accordingly, the only way to increase the rent was to negotiate in connection with the automatic renewal of the lease each year. By 2007, Transiplex had not increased Cargolux's base monthly rent for 12 years. CP 418. In a 2007 letter exchange shortly before the automatic renewal date of December 1, Transiplex proposed a rent increase but the parties never reached agreement. CP 418-19. At Cargolux's request, Transiplex first reduced the proposed increase, CP 422-23, and then spread the rental increase over five years, CP 425. Cargolux did not accept these proposals. CP 367.

Soon after commencing this lawsuit, Cargolux moved for summary judgment that the 2007 letter exchange constituted notice that the lease would terminate one year later, on November 30, 2008. CP 75-76. The trial court denied the motion, CP 303, and Cargolux then abandoned this theory.

In March 2008, Transiplex sent a letter to all of its tenants, including Cargolux, explaining that the 2007 BOC charges under the lease had been higher than projected due to the litigation with the Port of Seattle. CP 218, 287. Transiplex invoiced each tenant for its proportionate share of the excess BOC expenses, which in the case of Cargolux was \$76,564. CP 290. After several months of discussion, Cargolux refused to pay the increased BOC. CP 219. Transiplex served Cargolux with a Notice of Intent to Declare Default on May 29, 2008. *Id.*

Simultaneously with the BOC dispute, Transiplex proposed an increased base rent for the lease term beginning December 1, 2008. The first letter in the 2008 letter exchange is the Transiplex May 30, 2008 letter to Cargolux. CP 87-88, Trial Exhibit (“TX”) 257 (copy appended to this brief). The letter explains that Transiplex offered possible renewal options prior to the beginning of the December 1, 2007 lease term, but “[u]nfortunately, Cargolux has not accepted any of the aforementioned proposals offered to you over six months ago.” *Id.* The letter continued, “[y]our lease with Transiplex and your rights to occupy the premises will expire on November 30, 2008.” *Id.* Transiplex proposed an increased base rent and asked for a decision by June 11 whether Cargolux would

renew at that rent; otherwise, on June 11, 2008, Transiplex would begin to market the premises to other interested parties. *Id.*

The major dispute in this lawsuit – but not the only dispute – is whether the Transiplex May 30, 2008 letter (a) was an offer to terminate the lease as of November 30, 2008 that Cargolux subsequently accepted, or (b) was a request to increase the base rent. Cargolux claims that the letter was an offer to terminate or else an anticipatory repudiation of the lease. The trial court held on summary judgment that the letter exchange could be a modification or repudiation, but that a trial was necessary to determine the intent of the parties. CP 940-41. At trial, the jury found that Transiplex and Cargolux modified their lease agreement through the letter exchange. CP 2397.

Cargolux did not immediately respond to the Transiplex May 30 letter, but instead filed this lawsuit on June 5, 2008. CP 2206. In its June 5 Complaint, Cargolux asked for declaratory relief (a) that it was not required to pay Transiplex's legal fees arising from the Port litigation and included in the BOC and (b) that it was not in default under the lease. CP 2222. Cargolux alleged that "Transiplex has not provided sufficient notice under the Lease to terminate and thus the Lease automatically renewed until

November 30, 2009, on the December 1, 2007, anniversary date; [and] that Transiplex may not seek any adjustment to the base monthly rental rate for the duration of Lease and that such base rate remains \$24,362.10 until at least November 30, 2009 . . . .” *Id.* Cargolux did not immediately serve its June 5 Complaint on Transiplex, but served a copy of its motion for a TRO. CP 2676. The court denied Cargolux's TRO and Cargolux then paid the BOC under protest. CP 219.

On June 11, 2008, Cargolux responded to the Transiplex May 30 letter. CP 90, TX 5 (copy appended to this brief). This is the second letter in the 2008 letter exchange. The Cargolux letter disputed Transiplex's position that the lease terminated on November 30, 2008 (*Id.*):

We consider Transiplex's position a breach of our lease. It is our position that your failure to provide notice of termination prior to December 1, 2007 resulted in continuation of the lease under the automatic renewal provision of the First Amendment. . . .[I]n order to avoid the sudden disruption to our business that could result from such a notice, Cargolux will vacate the premises as of November 30, 2008. We will then hold Transiplex liable for the resulting direct and consequential damages from this breach.

The third letter in the 2008 letter exchange is Transiplex's June 12, 2008 reply to Cargolux. CP 92-93, TX 6 (copy appended to this brief). Transiplex repeated its position that it properly gave

notice of termination before December 1, 2007, but emphasized that it would abide by a court ruling on the termination date (*Id.*):

Because Cargolux is currently occupying the facility and conducting its operations as usual, we request that if Cargolux truly believes that the notice was inadequate, they should present the matter to a judge for an immediate ruling. If the court rules that the notice was inadequate, Transiplex, of course, would comply with the court's ruling and Cargolux would remain for an additional year under the rental terms set by the court.

Cargolux did not respond. Instead, it subsequently moved for summary judgment in August 2008, but reversed its position, arguing that the lease terminated in 2008. CP 70. Transiplex also reversed its position, arguing that the lease would not terminate until 2009. CP 108. The trial court denied Cargolux's motion; nonetheless, Cargolux vacated the premises in 2008. CP 959.

## ARGUMENT

**A. The 2008 letter exchange neither modified, terminated nor repudiated the lease where Cargolux rejected the Transiplex offer and Transiplex repeatedly invoked the provisions of the lease.**

**1. Introduction.**

Judge Armstrong ruled on summary judgment that the 2008 letter exchange was an agreement that Cargolux would vacate the premises rather than pay increased rent, that the agreement was in writing, and that there was consideration for the agreement. CP

940. But the court also held that the parties' prior pattern of formal negotiations with a formal amendment to the lease created at least an issue of fact whether the parties actually intended to modify the lease. *Id.* The court also found that issues of fact precluded summary judgment on Cargolux's alternative theory that Transiplex repudiated the lease through the 2008 letter exchange. CP 940-41.

The various Judges erred by denying summary judgment to Transiplex, refusing to revisit the issue, denying Transiplex's motions for judgment as a matter of law both during and after trial, and by other trial errors. This Court should hold that the 2008 letter exchange could not have been a modification or repudiation of the lease as a matter of law, reverse and remand.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). This Court reviews a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. ***Khung Thi Lam v. Global Med. Sys.***, 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005). "In the contract interpretation context, '[s]ummary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective

manifestations, has two “or more” reasonable but competing meanings.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003) (quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997)).

Washington follows the objective manifestation theory of contracts. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). This court attempts “to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Id.* “Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 503-04. This Court “do[es] not interpret what was intended to be written but what was written.” *Id.* at 504.

**2. An offer must be accepted according to its terms and any additional material change is a counter-offer, not an acceptance.**

Well-accepted principles of contract law govern this case. When a party offers to enter into a contract, the other party’s acceptance of the offer must be identical in all material respects with the offer: “The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no

contract.” ***Sea-Van Investments Associates v. Hamilton***, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) (quoting ***Blue Mt. Constr. Co. v. Grant Cy. Sch. Dist.***, 49 Wn.2d 685, 688, 306 P.2d 209 (1957)). A purported acceptance that changes or adds a material term constitutes a counter-offer, not an acceptance. ***Sea-Van***, 125 Wn.2d at 126. Whether a variation from the offer is material depends on the particular facts of the case. *Id.*

In ***Sea-Van***, the purchaser offered to buy two parcels from two different owners to close together with 20% down and the balance on interest-only two-year notes at 10% interest. *Id.* at 123. The sellers purported to accept the offer, but asked for interest to be paid quarterly and for the parcels to close separately. The Supreme Court held that these material changes were never accepted by the purchaser, resulting in a lack of mutual assent and preventing the formation of a valid contract. *Id.* at 126-27.

***Sea-Van*** is consistent with a long history of Washington precedent. *E.g.*, ***Blue Mt Const. Co.***, *supra* (1957); ***St. Paul & Tacoma Lumber Co. v. Fox***, 26 Wn.2d 109, 127, 173 P.2d 194 (1946) (“An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term

into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement”). The principle is well-nigh universal. See, e.g., RESTATEMENT (SECOND) CONTRACTS § 58 (1981) (“An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered”).

**3. The Transiplex May 30 letter only offered to continue the lease at increased rental rates.**

The trial court erroneously interpreted the Transiplex May 30 letter as an offer to terminate the lease.<sup>2</sup> CP 939-41. This was error because Transiplex’s letter never offers to terminate the lease. Rather, the letter states unequivocally that the lease will terminate: “Your lease with Transiplex and your rights to occupy the premises will expire on November 30, 2008.” CP 87. Transiplex never says that it is offering to terminate the lease; that would be an irrational reading of the letter, which unequivocally states that the lease will expire on November 30. Transiplex may have been incorrect in this assertion – and indeed withdrew the assertion soon

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<sup>2</sup> The trial court expressed this in several different ways: “Cargolux argues that the parties thereby modified the 2000 amendment and terminated the lease early”; “the parties agreed Cargolux would vacate rather than pay increased rent”; “there is a genuine issue of material fact as to whether the parties have terminated their lease.” CP 939-41.

after writing this letter – but there is not a hint in its letter of a suggestion or request that Cargolux enter into a new agreement that the lease terminates in 2008.<sup>3</sup>

The only offer in the May 30 Transiplex letter was to renew the lease under an increased base rent. CP 87. There simply are no words in the letter than can be interpreted as a proposal by Transiplex to prematurely terminate the written lease.

**4. The Cargolux June 11 letter neither accepted increased rental rates nor agreed that the lease would terminate in 2008.**

Cargolux did not immediately respond to the Transiplex May 30 letter, but instead filed its June 5, 2008 Complaint that initiated this lawsuit. CP 2217. As discussed above, Cargolux took the position that the lease had not been terminated and was automatically renewed until November 30, 2009. CP 2221-22. Even if the Transiplex May 30 letter had been an offer to terminate the lease in 2008, Cargolux's June 5 Complaint rejected the offer by asserting that the lease did not terminate in 2008, but in 2009.

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<sup>3</sup> Scott Wilson, Transiplex Chief Operating Officer, testified at trial that the reference to "November 30, 2008" was a typographical error, which should have read 2009. RP 827-28. But since Wilson never told Cargolux that he meant "2009" (RP 870-71) testimony that it was a typo is not relevant under the objective-manifestation theory of contracts.

Cargolux argued that the contents of the June 5 Complaint were not communicated to Transiplex before Cargolux “accepted” the 2008 lease termination by its June 11 letter. CP 2676. The flaw in this argument is that Transiplex was served with the TRO on June 5, giving Transiplex notice that Cargolux had filed its Complaint. *Id.* Notice of the filing of a lawsuit gives constructive notice of the contents of the lawsuit because it invites inquiry about the contents, which are available as a public record. ***Aberdeen Fed. Sav. & Loan Ass'n v. Hanson***, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990) (filing a document for public record gives constructive notice of its contents to anyone who has reason to examine the record); ***W. Wash. Laborers-Employers Health & Sec. Trust Fund v. Harold Jordan Co.***, 52 Wn. App. 387, 391, 760 P.2d 382 (1988) (notice that a document is filed in the public record gives notice of its contents to anyone for whom the notice invited further inquiry). Accordingly, notice to Transiplex that Cargolux filed its TRO constructively notified Transiplex that Cargolux rejected the idea that the lease would terminate in 2008. Cargolux’s June 5 Complaint rejected any arguable May 30 offer by Transiplex to terminate the lease, ending any possibility of acceptance of the so-called offer.

When Cargolux responded to the Transiplex May 30 letter on June 11, it unequivocally stated that it refused to pay increased rent and that it did not believe the lease had terminated. CP 90, TX 5. To the contrary, Cargolux considered Transiplex's position that the lease terminated in 2008 to be a breach of the lease, which was the premise of its lawsuit. *Id.* Cargolux asserted that the failure to provide notice of termination of the lease prior to December 1, 2007, resulted in automatic renewal of the lease from December 1, 2008 to December 1, 2009. *Id.* Cargolux agreed to vacate the premises to avoid disruption of its business, but unequivocally asserted that, "[w]e will then hold Transiplex liable for the resulting direct and consequential damages from this breach." *Id.*

No one can read this letter as an "agreement" to terminate the lease or to modify the lease to provide that it would terminate on November 30, 2008. If the lease were modified to terminate in 2008, Cargolux would have no claim for damages because there would be no breach of the lease. Nor does Cargolux say that it is agreeing that the lease will expire in 2008, but asserts to the contrary that Transiplex's position is itself a breach of the lease.

Accordingly, even if the Transiplex May 30 letter could be considered an offer to terminate or modify the lease, Cargolux flatly

rejected that offer. Furthermore, Cargolux added a distinctly new term when it reserved the right to sue Transiplex for damages for breach of the lease. The trial court therefore should have granted summary judgment that the 2008 letter exchange was not a modification or termination of the lease as a matter of law. The lease therefore remained in effect until November 30, 2009, and the trial court erroneously denied damages to Transiplex for Cargolux's breach of the lease. Remand is required.

**5. Transiplex never repudiated the lease and repeatedly invoked the provisions of the lease.**

The trial court also denied Transiplex's motion for summary judgment that it did not repudiate the lease through the 2008 letter exchange. The issue was submitted to the jury, which never reached repudiation, having found that the lease was modified or terminated. CP 2397. Neither the evidence on summary judgment nor the evidence at trial was sufficient to establish repudiation. The trial court erred in denying summary judgment and in submitting this issue to the jury.

A party repudiates a contract by stating clearly that the party either will not or cannot perform its contractual obligations. ***Wallace Real Estate Inv. Inc. v. Groves***, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). A party's intent not to perform may not be

implied from doubtful and indefinite statements that performance may or may not take place. *Lovric v. Dunatov*, 18 Wn. App. 274, 282, 567 P.2d 678 (1977). Rather, an anticipatory breach is a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.” *Id.*

Thus, in *Wallace Real Estate*, a letter stating that the party could not perform and requesting a new agreement was an anticipatory breach, or a repudiation of the contract. 124 Wn.2d at 898. By contrast, a letter questioning the extent of services is not a repudiation. *Olson Media v. Energy Sciences, Inc.*, 32 Wn. App. 579, 648 P.2d 493, *rev. denied*, 98 Wn.2d 1004 (1982). Nor is a statement that the defendants “may” not be able to perform. *Lovric, supra*. Even after a repudiation, a party may withdraw the repudiation if the other party has not relied on it and changed its position. *Hemisphere Loggers & Contractors, Inc. v. Everett Plywood Corp.*, 7 Wn. App. 232, 234, 499 P.2d 85, *rev. denied*, 81 Wn.2d 1007 (1972).

The 2008 letter exchange cannot be read as a repudiation of the lease. The May 30 TransiPLEX letter relies on the lease and expresses the hope that Cargolux would continue to lease from

Transiplex. CP 87-88, TX 257. The most that can be said is that Transiplex relied on a mistaken impression of the facts (that notice was properly given under the lease prior to the December 1, 2007 renewal date). But Transiplex also relied on the terms of the lease: this was an affirmation of the lease, not a repudiation.

Moreover, in response to the June 11 letter from Cargolux, Transiplex immediately responded that it would comply with any court ruling establishing that the lease would not terminate in 2008. CP 92, TX 6. A party's expression of willingness to comply with a lease is the antithesis of repudiation. The trial court erred.

In any event, Transiplex soon after changed its position and argued that the lease did not terminate in 2008 because no one gave notice prior to December 1, 2007. On August 22, 2008, Transiplex opposed the Cargolux motion for partial summary judgment, arguing, "when Cargolux failed to give timely notice prior to December 1, 2007 . . . the lease automatically renewed for an additional year." CP 108. On September 17, 2008, Transiplex amended its answer to allege that the lease did not terminate in 2008. CP 362. In short, Transiplex never repudiated; if one could argue that Transiplex repudiated, it withdrew the repudiation almost immediately and several times subsequently.

**6. The trial court erred in submitting the issue of the 2008 letter exchange to the jury.**

For all the reasons discussed above, the trial court erred in denying Transiplex's motion for partial summary judgment that Transiplex neither modified, terminated, nor repudiated the lease, and in denying Transiplex's motion for judgment as a matter of law at the close of Cargolux's case. The Court should reverse and remand for further proceedings based on the correct legal analysis that the 2008 letter exchange did not modify, terminate, or repudiate the lease.

**B. Cargolux's June 5 Complaint directly contradicted Cargolux's theory at trial and should have been admitted into evidence.**

Cargolux's central theory on summary judgment and at trial was that Transiplex had offered to terminate the lease and that Cargolux accepted the offer through its June 11 letter. This theory was undermined by Cargolux's June 5 Complaint, alleging that Transiplex had not provided sufficient notice under the Lease to terminate and thus that the Lease "automatically renewed until November 30, 2009, on the December 1, 2007, anniversary date. . . ." CP 2222. The trial court erred in excluding the June 5 Complaint. Exclusion of this important evidence is an independent reason to reverse the result of trial (although, as argued above, the

Court should rule that there was neither termination nor modification of the lease, making retrial of this issue unnecessary).

“An admission in a pleading is treated like any other admission and may be introduced as evidence.” **5B K. Tegland, Washington Practice: Evidence** § 801.53 at 426 (5<sup>th</sup> Ed. 2007). Our Supreme Court has held that a judge committed reversible error by refusing to admit into evidence the complaint in the case as well as a complaint in a former action:

The appellant was entitled to have all of the complaints in this case and the complaint in the former action in the superior court and the two libels in the admiralty suit admitted in evidence. There were palpable inconsistencies in them which the appellant had a right to have the jury consider, even though it seemed likely that the respondent might have some reasonable explanation for some or all of them.

**Schotis v. N. Coast Stevedoring Co.**, 163 Wash. 305, 314-15, 1 P.2d 221 (1931). Pleadings in the case do not constitute proof by themselves, RCW 5.40.010, but they are certainly admissions on which the jury may rely.

TransiPLEX offered the Cargolux Complaint as an Exhibit through the testimony of a Cargolux North America manager, but the trial court refused to admit it. RP 456. The trial court

subsequently denied Transiplex's motion for a new trial based on the refusal to allow the Complaint into evidence. CP 2430.

The refusal to admit the June 5 Complaint was prejudicial to Transiplex. Cargolux asserted in its Complaint that the lease would not terminate until November 2009 because Transiplex had not given notice of cancellation by November 30, 2007. Six days later, Cargolux sent its June 11 letter to Transiplex, and later claimed that the June 11 letter accepted Transiplex's offer to terminate the lease. In short, Cargolux's position at trial directly contradicted its position in its Complaint. The jury should have had the benefit of that Complaint in answering Special Verdict Question One, "[d]id Transiplex and Cargolux modify their lease agreement to agree that it would terminate on November 30, 2008?" CP 2397. The fact that Cargolux sought a declaration that the lease was not terminated would have been extremely important to the jury and would probably have changed its decision. The Court should reverse for this reason alone.

**C. Instruction 14 erroneously told the jury that the first two letters of the 2008 letter exchange were an agreement in writing if the jury found that the parties intended to modify the lease to terminate it.**

The trial court's Jury Instruction No. 14 improperly told the jury that if the parties intended to modify the lease, then Transiplex's May 30 letter and Cargolux's June 11 letter constituted an agreement in writing:

If you find that the parties intended by the correspondence between Scott Wilson (Exhibit 257) and Joseph Joyce (Exhibit 5) to modify the lease to terminate it as of November 30, 2008, then that correspondence constitutes an agreement in writing executed by the parties within the meaning of paragraph 32 of the parties' lease (Exhibit 1).

The lease is a contract and any modification of a lease is a contract. Once a contract has been entered into, mutual assent of the contracting parties is essential to any modification of the contract.

To establish a modification, Cargolux must prove by a preponderance of the evidence, through the words or conduct of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

CP 2391 (copy attached). This instruction relieved the jury from evaluating whether the Transiplex letter was an offer and the Cargolux letter was an acceptance. Instead, the jury was simply left to evaluate the parties' intent independent of the language of

the letters. This was erroneous as a matter of contract law and unconstitutional as a comment on the evidence.

Transplex excepted to Instruction 14,<sup>4</sup> triggering a lengthy colloquy. RP 1268-81. Judge White explained that Instruction 14 followed Judge Armstrong's prior summary judgment ruling. RP 1271. Judge Armstrong had ruled that paragraph 32 of the 1999 lease required a writing executed by the parties to modify or amend the lease. CP 939. Judge Armstrong ruled that the letters constituted a written agreement that "Cargolux would vacate rather than pay increased rent, and the agreement was reached through written offer and acceptance contained in the parties' signed correspondence." CP 940. But she also ruled that the inconsistency between prior formal negotiations and the relatively informal exchange of letters created an issue of fact on whether the parties intended to modify the lease. CP 940. Judge White explained that the purpose of Instruction 14 was "basically, to take Paragraph 32 out of the debate, that this exchange of correspondence satisfies Paragraph 32." RP 1271.

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<sup>4</sup> The exceptions were taken on January 25. On January 26, the court explained that he had added new Instruction 13, and renumbered the remaining instructions. RP 1301. As a result, the exceptions refer to the critical instruction as number 13, but it was renumbered 14 the following day.

Transiplex argued that the instruction was a comment on the evidence that two (of the three) letters constituted an agreement. RP 1277. When Transiplex asked why the instruction states that the two letters constitute an agreement in writing, Judge White replied (RP 1278-79):

Because that's exactly what I ruled that it does do. But it has a huge condition attached to it, as a finding by the jury, proof by a preponderance of the evidence, if you find that the parties agree by that correspondence to modify the lease.

The flaw in Instruction 14 is precisely that it instructed the jury that the Transiplex letter and the Cargolux response were in fact an agreement in writing and that all that remained was a finding of intent to modify the lease. This was error for all of the reasons discussed in the first argument, *supra*, because Cargolux did not accept the so-called offer in the May 30 letter and added additional terms not part of the Transiplex offer in response. It was also a comment on the evidence because Instruction 14 told the jury that these two letters were the relevant letters and that they constituted an agreement if the jury simply found intent. Equally troubling, the instruction wholly omits Cargolux's intervening June 5 Complaint.

Our Constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but

shall declare the law.” Const., art. IV, § 16; see *also* CR 51(j). The purpose of this constitutional prohibition is to prevent the judge’s opinion of the evidence from influencing the jury. ***City of Kirkland v. O’Connor***, 40 Wn. App. 521, 523, 698 P.2d 1128 (1985) (reversing a DUI conviction, holding that instructing the jury not to infer anything from the absence of a breathalyzer test is an unlawful comment on the evidence).

A jury instruction impermissibly comments on the evidence if it allows the jury to infer the judge’s opinion regarding the “credibility, weight or sufficiency of some evidence introduced at the trial.” ***Kirkland***, 40 Wn. App. at 523; ***Hamilton v. Dep’t of Labor & Indus.***, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); ***Adair v. Weinberg***, 79 Wn. App. 197, 205, 901 P.2d 340 (1995). Whether the instruction is an improper comment turns on the facts and circumstances of each case. ***Kirkland***, 40 Wn. App. at 523.

Instruction 14 commented on the evidence by bolstering the testimony of Cargolux’s Mr. Joyce that his understanding of Transiplex’s letters was that the lease was terminated as of November 30, 2008. RP 372. It also undermined the testimony of Transiplex’s Mr. Wilson that he did not consider his May 30 letter to be either an offer to modify or a repudiation. RP 1005-06. In

essence, the trial court vouched for Cargolux in preference to Transiplex. Such comments are improper and highly prejudicial.

Instruction 14 was also internally inconsistent. The first paragraph told the jury all it needed to find was intent, while the third paragraph told the jury it must find agreement on all essential terms through words or conduct of the parties, together with the intent to alter the contract. CP 2391. A reasonable juror would conclude that the court had already found agreement in the letter exchange and that all the jury had to do was find intent.

The trial court erred in giving Instruction 14 and in denying Transiplex's motion for new trial based on the Instruction. This Court should reverse on this independently sufficient ground.

**D. Transiplex's expenses incurred in litigation with the Port over the hardstand aircraft parking area are Building Operating Costs chargeable to the tenants because they are operating or administrative expenses incurred in the operation of the terminal.**

This Court reviews summary judgment *de novo* and follows the objective manifestation theory of contracts, as discussed above. Here, the trial court erred in granting partial summary judgment that the legal expenses incurred in connection with the hardstand aircraft parking area ("hardstand") are not BOC because that lawsuit arose out of the deletion of the hardstand from a legal

description in Transiplex's lease with the Port. CP 935, 942. This was error because BOC broadly include "all other operating and administrative expenses of every kind and nature incurred by [Transiplex] in the operation of [the] Terminal . . . ." CP 15-16.

As further discussed below, Cargolux was integrally involved in negotiations over the Seventh Amendment to the Transiplex Ground Lease with the Port, and expressly approved it. *E.g.*, CP 343-44. Paragraph Six of the Seventh Amendment provides that the Premises is to be used for activities "incidental to the handling, receipt, and dispatch of air cargo and freight, including the loading and unloading of aircraft operated by airlines handling [Transiplex's] tenants' shipments of such air cargo and freight." *E.g.*, CP 343 n.2. When the Port disputed the tenants' right to 747 nose-load parking on the expanded hardstand, Transiplex was forced to litigate the issue. The costs of Transiplex's attempt to protect its tenants' rights (including Cargolux's rights) under this provision are the very costs giving rise to this litigation. In a triple-net lease, these are standard BOC. Yet the trial court erroneously ruled that they were not BOC. This Court should reverse and remand.

## 1. Factual Background

The Transiplex/Cargolux lease, like leases with other Transiplex tenants, requires the lessee to pay BOC in addition to base rent (CP 223-24, emphasis added):

3.2 Additional Expenses: In addition to the Base Rent provided in Section 3.1 above, Tenant shall pay to Landlord in monthly installments as additional rent (hereinafter "Additional Expenses") the Tenant's portion of any increase in the operating expenses of the Terminal in excess of those amounts set forth herein in Exhibit C (hereinafter "Base Expenses"). Additional Expenses shall include, but not be limited to, ground rental and charges imposed by The Port of Seattle (hereinafter "Port") pursuant to that certain Lease Agreement with Landlord dated September 28, 1982 (as amended), assessments or charges imposed by any federal, state or municipal authority or government including leasehold excise taxes and real and personal property taxes, all maintenance and repairs, heat, air conditioning, power, water, and sewer charges, janitorial services, security services, insurance premiums for fire, extended coverage, liability, and any other insurance that Landlord deems necessary for the operation of the Terminal, interest on Landlord's indebtedness for Terminal, parking charges pursuant to Section 22.2 hereof **and all other operating and administrative expenses of every kind and nature incurred by Landlord in the operation of Terminal;**

By contrast, the exclusions from BOC are very narrow (*id.*)

- (a) Any expenditure made by the Landlord for payment of principal against the debt incurred by Landlord described in Section 3.2.2 hereof;
- (b) Any tax on profits earned by Landlord;
- (c) Any costs arising from the construction of any addition or modification of any building not required for the operation or maintenance of said building;

- (d) Any amount directly chargeable by the terms of this lease to a particular tenant other than the Tenant which is a party to this Agreement.

The lease further provides that Transiplex will estimate BOC periodically and charge tenants, with an annual adjustment at the end of the calendar year. *Id.*

Cargolux paid the BOC without comment or protest until 2008. CP 623. The BOC charges included legal fees relating to the dispute with the Port. CP 623-24. As early as 1994, Cargolux proposed changing the BOC to “cap” the expenses over which Cargolux had no control. CP 624-25. Transiplex declined and Cargolux continued to sign leases and amended leases. *Id.*

In 2005, the Port improperly attempted to unilaterally raise Transiplex’s ground-rental rates without proper notice, which would have resulted in passing the increase on to Transiplex’s tenants. CP 216-17. Transiplex litigated the issue with the Port, along with other issues, including the hardstand issue (CP 217):

As a last resort, Transiplex pursued litigation to prevent the Port from improperly increasing rates, to assure adequate aircraft parking for current and future tenants and to address other issues related to the use of the leasehold. Each claim advanced by Transiplex impacts the operation of our efforts to maintain a full-service air cargo terminal at Sea-Tac.

Transiplex obtained summary judgment in its favor with respect to the Port’s attempted rental increase, saving its tenants

considerable money. CP 217. The lawsuit involved a number of other issues, including the hardstand issue. Transiplex's original lease with the Port included an aircraft-parking area in front of Transiplex's Building A, the building in which Cargolux was located. CP 922 (copy attached) is a drawing of the Transiplex leasehold, showing an airplane parked on the parking area included in Transiplex's leasehold. Transiplex Building A is immediately to the north of the aircraft and the taxiway is immediately to the south. The aircraft sits on a rectangular section of hardstand sufficient to support the weight of a fully-loaded Boeing 747-400 cargo plane.

In 2000-2002, the Port proposed that Transiplex relinquish Transiplex's leasehold interest in the aircraft parking area. CP 622. In return, the Port would expand the hardstand in order to accommodate Transiplex's tenants' 747 nose-load parking on the expanded hardstand. *Id.* As noted above, Paragraph 6 of the proposed Seventh Amendment provides that the Premises is to be used for activities "incidental to the handling, receipt, and dispatch of air cargo and freight, including the loading and unloading of aircraft operated by airlines handling [Transiplex's] tenants' shipments of such air cargo and freight." *E.g.*, CP 343 n.2. "Cargolux was a primary reason for the amendment because since

late 1999, their aircraft had been improperly intruding into the taxiway corridor during their loading operations.” CP 622-23.

Cargolux’s consent was required for any amendment because Cargolux (and other tenants) had rights to use the aircraft parking area under their leases with Transiplex. CP 623. Cargolux was one of Transiplex’s primary tenants and had long used the Transiplex parking area for nose-load operations for its 747-400 cargo jets. *Id.* Transiplex, Cargolux and other tenants met with Port representatives, who explained this proposed Seventh Amendment to the Transiplex/Port Ground Lease. *Id.* Port representatives told Cargolux and Transiplex that the Port would guarantee continued nose-load parking for Transiplex’s tenants, including Cargolux, on the expanded hardstand, to be shared with other Sea-Tac cargo operators. *Id.* Cargolux agreed with the proposal and its lease was amended accordingly. *Id.*

Following completion of the hardstand expansion, Cargolux asked the Port to reassign its aircraft parking to the expanded hardstand. CP 218. But the Port declined to allow the promised nose-load parking, which then became a major issue when Transiplex sued to enforce the Port’s contractual obligation under paragraph 6 of the Seventh Amendment. CP 622-23. Ultimately,

the trial court held that the Port was not required to provide nose-load parking in the expanded hardstand, and this Court affirmed. ***Sea-Tac Air Cargo Ltd. P'ship v. Port of Seattle***, 156 Wn. App. 1022, *rev. denied*, 169 Wn.2d 1031 (2010) (unpublished).

In March 2008, Transiplex notified all tenants, including Cargolux, that the 2007 BOC was higher than projected due to the legal expenses associated with the Port litigation. CP 53. When Cargolux failed to pay the increased BOC after an exchange of correspondence, Transiplex sent a notice of intent to declare a default. CP 64. Cargolux then filed this lawsuit, seeking a TRO against Transiplex, CP 2217, which the trial court denied. CP 219. Cargolux then paid the increased expenses under protest. *Id.*

The parties filed cross-motions for summary judgment on whether the hardstand expenses could be included in BOC. Judge Armstrong granted partial summary judgment that the hardstand expenses could not be included within BOC because the hardstand had been deleted from the legal description in the lease and was no longer within the definition of the "terminal" (CP 941-42 (emphasis added)):

The Additional Expenses authorized by Paragraph 3.2 of the lease do not expressly include litigation costs or attorney fees. They do include, however, "all other operating and

*administrative expenses* of every kind and nature incurred by Landlord in the operation of Terminal”, with exceptions not relevant here.

“Terminal” is a defined term. It includes the Transiplex Air Cargo Terminal as legally described in Exhibit B to the Lease. The Ground Lease between Transiplex and The Port of Seattle was modified in 2002 by deleting a portion of the property (the hardstand) leased by Transiplex from Sea-Tac and previously used to park planes. Cargolux was required to agree to this seventh amendment to the Ground Lease. After 2002, the legal description of the Terminal no longer included the hardstand.

## **2. Legal Analysis.**

As a threshold matter, legal expenses incurred in litigation arising out of the operation of a leasehold are well within the broad definition of BOC in the lease: “other operating and administrative expenses of every kind and nature incurred by Landlord in the operation of the Terminal . . . .” The only cases cited by the parties hold that legal costs involved in litigation are operating costs within the meaning of contracts. *Ariz. Oddfellow-Rebekah Hous. Inc. v. U. S. Dep’t of Hous. & Urban Dev.*, 125 F.3d 771 (9th Cir. 1997); *Chevron U.S.A., Inc. v. United States*, 20 Ct. Cl. 86 (Ct. Cl. 1990). *Arizona* interpreted language in regulatory agreements between HUD and owners of low-income housing projects. The agreement at issue prohibited the owner from spending project revenues for anything other than “reasonable operating expenses.” 125 F.3d at

773. The issue was whether legal fees spent in defending discrimination lawsuits arising from the day-to-day operation of the project constitute “operating expenses.”

The Ninth Circuit held, “[w]ith respect to attorneys’ fees, it is widely accepted that they are operating expenses, if they are incurred in legal actions that benefit the project.” *Id.* at 774. The Ninth Circuit concluded that legal expenses incurred in suits arising out of the project’s day-to-day business do indeed benefit the project and should be considered “operating expenses.” *Id.* at 775. The Court reached the same result in ***Chevron U.S.A.***, holding that expenses of defending against a personal injury action are “costs of . . . operating the [petroleum] reserve . . . .” 20 Ct. Cl. at 87.

The trial court erred in concluding on summary judgment that “[l]itigation over the hardstand is not an expense of operating the Terminal because the hardstand is not part of the Terminal.” CP 942. The lease focuses on expenses “of every kind and nature incurred by Landlord in the operation of Terminal . . . .” CP 223-24 (emphasis supplied). The focus is on the “operation of Terminal” – not on the physical dimensions of the hardstand – and the operation of the Terminal necessarily extends to the premises immediately adjoining the Terminal.

Indeed, the entire purpose of the lease was solely “for air cargo purposes . . . .” CP 225 (§ 4.1). And paragraph 6 of the Seventh Amendment to the Ground Lease similarly provides that the Premises is to be used for activities “**incidental to** the handling, receipt, and dispatch of air cargo and freight, including the loading and unloading of aircraft operated by airlines handling [Transiplex’s] tenants’ shipments of such air cargo and freight.” *E.g.*, CP 343 n.2 (emphasis added). It is impossible to handle air cargo without moving the cargo to and from the airplane.

Access to the airplane is accordingly an essential function of operation of the Terminal. Transiplex relinquished the hardstand to the Port in return for the Port’s paragraph 6 promise to expand the hardstand for the use of Cargolux and others. Cargolux agreed to the proposal and asked that its aircraft be assigned to the expanded hardstand immediately upon completion of the project. The litigation directly arose from the operation of the terminal. The lessor must be able to cover Business Operating Costs that arise in litigating over facilities directly necessary to its tenants’ business operations.

One can easily visualize other similar examples of litigation incurred in connection with the operation of the terminal. If the Port

refused to allow any cargo plane to use the taxiway accessing the Transiplex terminal, any litigation between Transiplex and the Port relating to the use of the taxiway would clearly be an expense incurred by Transiplex in the operation of the Terminal, even though it concerned an area nowhere near the legal description of the Terminal. Similarly, if the Port simply blocked all cargo-carrying trucks from accessing the Terminal, litigation to open those crucial routes would also be a BOC. This case is no different.

Transiplex's legal expenses incurred with respect to the hardstand were operating expenses within the reasoning of *Arizona* and *Chevron*. As the Ninth Circuit reasoned, attorney fees are operating expenses "if they are incurred in legal actions that benefit the project." 125 F.3d at 774. Restoring access to the Transiplex terminal was undeniably for the benefit of the tenants of the Terminal. The trial court erred as a matter of law in granting summary judgment on this issue. This Court should reverse and remand for a redetermination of amounts Cargolux owes Transiplex for BOC.

**E. TransiPLEX is entitled to attorney fees as a prevailing party.**

The lease provides for attorney fees: “In the event that suit is brought, attorney’s fees and costs are to be awarded to the prevailing party.” CP 237, 259.

Attorney fees and costs may be awarded when authorized by contract. **Cornish Coll. of the Arts v. 1000 Virginia Ltd. P’ship**, 158 Wn. App. 203, 231 ¶¶58, 242 P.3d 1 (2010). As a general rule, the prevailing party is the one receiving an affirmative judgment in its favor. **Marassi v. Lau**, 71 Wn. App. 912, 915, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). This Court recently explained in **Cornish** that where distinct and severable claims are at issue, “we apply the proportionality approach, pursuant to which each party is awarded attorney fees for the claims on which it succeeds or against which it successfully defends and the awards are then offset.” **Cornish** at 232 ¶¶ 59, citing **Marassi**, 71 Wn. App. at 918. In determining attorney fees, Washington follows the lodestar method, under which “the party seeking fees bears the burden of proving the reasonableness of the fees.” **Mahler v. Szucs**, 135 Wn.2d 398, 433-34, 957 P.2d 632,

966 P.2d 305 (1998). Hours pertaining to unsuccessful theories or claims must be excluded. **Mahler**, 135 Wn.2d at 434.

The trial court issued a detailed 38-page Memorandum and Order Denying Attorney Fees. CP 4364 *et. seq.* The court concluded that Cargolux was the prevailing party under the circumstances of this case (CP 4377-78):

Cargolux clearly prevailed on the major claims which have driven this case from its inception: whether the parties' lease was terminated on November 30, 2008 (an issue on which Cargolux achieved an economic benefit between \$448,243 and \$627,444) and whether Transiplex could pass on to Cargolux 17.4517 percent of litigation expenses Transiplex incurred concerning its ground lease with the Port of Seattle (an issue on which Cargolux achieved an economic benefit of \$224,582).

But the trial court also concluded that neither party carried its burden of proving that the respective fee requests were reasonable. CP 4383 *et seq.* The court carefully analyzed the Cargolux billings and found them insufficient. CP 4391 *et. seq.*

The trial court denied Cargolux's motion for reconsideration, noting that Cargolux had not addressed the many deficiencies identified by the Court in the Cargolux fee application. CP 4457 *et. seq.* The court reasoned that any ruling based on the pleadings so far would be arbitrary. CP 4464. Nonetheless, the court ruled that if this Court ordered him to make an award based on the pleadings

before him, he would likely award 50% of Cargolux's fees. CP 4466-67.

A proportionality approach is appropriate here, unless this Court agrees that Cargolux should not prevail on any issues. In any event, if this Court reverses on any of the trial court's key rulings, then the denial of attorney fees should be reversed and the case remanded for a redetermination of attorney fees.<sup>5</sup>

**F. The Court should award attorney fees to Transiplex on appeal.**

Transiplex should prevail on appeal for all of the reasons discussed above. The Court should award attorney fees to Transiplex for the appeal. *Cornish, supra*, 158 Wn. App. at 236 ¶¶ 70-71.

### CONCLUSION

The Court should hold as a matter of law that the 2008 letter exchange neither modified, terminated nor repudiated the lease and that the lease continued in effect until November 30, 2009. The Court should remand for calculation of damages to Transiplex,

---

<sup>5</sup> The trial court found that Transiplex's declarations and billing records were insufficient to support its fee requests. CP 4383. We disagree, but in the event of reversal and remand, it will be necessary to re-determine Transiplex's attorney fees.

consisting of unpaid rent and BOC because of Cargolux's premature abandonment of the lease.

The Court should also hold that the trial court erred in denying admission of Cargolux's June 5 Complaint into evidence and in giving Jury Instruction 14, for which the trial court should be reversed. To the extent that jury issues remain on remand, a new trial should be held.

The Court should also hold that the trial court erred in calculating the building operating costs to be charged to Cargolux and remand for recalculation.

Finally, the Court should remand for recalculation of attorney fees and award fees on appeal to Transiplex.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of January 2011.

~~MASTERS LAW GROUP, P.L.L.C.~~

  
Kenneth W. Masters, WSBA 22278  
241 Madison Avenue North  
Bainbridge Is, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

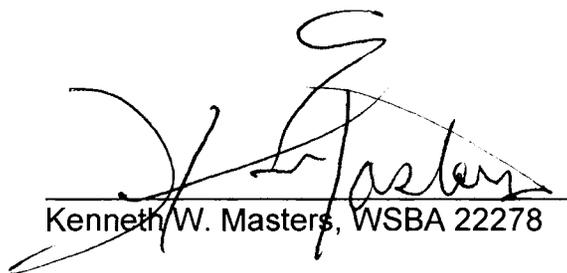
I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 13<sup>th</sup> day of January 2011, to the following counsel of record at the following addresses:

F. Ross Boundy  
Ambika Kumar Doran  
DAVIS WRIGHT TREMAINE LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045

Jami K. Elison  
MARSTON ELISON, PLLC  
Anderson Park Building  
16880 N.E. 79<sup>th</sup> Street  
Redmond, WA 98052-4424

Sheri Lyons Collins  
Adam C. Collins  
THE COLLINS LAW GROUP, PLLC  
2806 NE Sunset Blvd Ste A  
Renton, WA 98056-3180

Roxanne Clements, Pro Hac Vice  
LACHTER + CLEMANTS, LLP  
1150 Connecticut Avenue, Suite 900  
Washington, DC 20036



Kenneth W. Masters, WSBA 22278



**TRANSIPLEX**  
(SEATTLE) INC.

May 30, 2008

Mr. Joseph M. Joyce  
Manager Operations, Compliance & Security  
Cargolux Airlines International S.A.  
Area Office, the Americas  
238 Lawrence Ave., Suite D  
South San Francisco, CA 94080

Reference: Air Cargo Facility - Sea Tac International Airport

Dear Mr. Joyce:

Under separate cover I have sent your company a Notice of Intent to Declare Default. This letter assumes that that issue is cured prior to the deadline set forth in that notice.

On October 26, 2007, November 2, 2007, and again on November 13, 2007, we offered possible renewal options for your existing premises at our Sea Tac International Airport, Air Cargo Facility.

Unfortunately, Cargolux has not accepted any of the aforementioned proposals offered to you over six months ago.

Your lease with TransiPLEX and your rights to occupy the premises will expire on November 30, 2008. We are requesting that you indicate prior to June 11, 2008, if you wish to renew your lease with TransiPLEX under the following conditions:

- Five Year Lease Term
- 28,676 sq. ft. of Distribution space @ \$14.82 per sq. ft. per year \$425,064.00
- Estimated Building Operating Cost @ \$5.00 per sq. ft. per year 143,380.00
- Estimated Gross Monthly Rental Cost \$ 568,444.00

After June 11, 2008 TransiPLEX will begin to market the premises to interested parties.

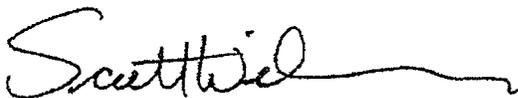
Mr. Joseph M. Joyce  
May 30, 2008  
Page 2 of 2

Cargolux has received many advantages, including lower rental rates for several years now and Transiplex needs to receive market rental rates for your premises at the end of your current lease term.

We thank you for your past business and hope that you'll continue to lease from Transiplex as we do appreciate having you as a tenant and trust that you value the benefits of locating at our air cargo facility.

Should you have any questions regarding the above, please contact me directly.

Most sincerely,  
Transiplex (Seattle) Inc.



Scott J. Wilson  
Vice President

cc: I. Morgan, VP, the Americas  
J. Piontkowski, Regional Manager, N.W. USA



Mr. Scott Wilson  
Vice President  
SEA-TAC Air Cargo, LP  
Transiplex (Seattle), Inc. General Partner  
P.O. Box 68515  
Seattle, Washington 98168  
By email: transiplex@aol.com

June 11, 2008

Re: Cargolux Lease

Dear Mr. Wilson:

This letter is in response to your letter dated May 30, 2008 addressed to me. It is unfortunate that Transiplex has taken the position that "Cargolux's rights to occupy the premises will expire on November 30, 2008." We consider Transiplex's position a breach of our lease. It is our position that your failure to provide notice of termination prior to December 1, 2007 resulted in continuation of the lease under the automatic renewal provision of the First Amendment. Despite our position, however, it is clear from your letter that unless Cargolux agrees to an unprecedented rate increase effective December 1, 2008, Transiplex will again assert that Cargolux is delinquent and issue another Notice of Intent to Declare Default. Thus, in order to avoid the sudden disruption to our business that could result from such a notice, Cargolux will vacate the premises as of November 30, 2008. We will then hold Transiplex liable for the resulting direct and consequential damages from this breach.

We are not interested in renewing our lease with Transiplex under the conditions described in your letter nor under any conditions that require Cargolux to pay for the litigation expenses arising from your lawsuit with the Port of Seattle.

Sincerely,  
Cargolux Airlines International, S.A.

Joseph M. Joyce  
Manager Operations, Compliance & Security  
North America - Western Region

cc: I. Morgan, J. Piontkowski, R. Clements  
jmj009.08

Area 1 Western Region Operations Office  
270 Lawrence Avenue, Suite A  
South San Francisco, CA 94080

Tele: (650) 589-6680 ext 12  
Fax: (650) 225-0988

**SCHNEIDLER & SCHNEIDLER, PLLC**  
ATTORNEYS AT LAW

JON G. SCHNEIDLER  
ANDREW J. SCHNEIDLER

TELEPHONE (206) 624-9400  
TELECOPIER (206) 587-0579

VIA EMAIL AND U.S. MAIL

June 12, 2008

Ms. Roxanne S. Clements  
Lachter + Clements LLP  
Attorneys at Law  
1150 Connecticut Avenue, Suite 900  
Washington, D.C. 20036

Re: Cargolux Airlines International S.A.

Dear Ms. Clements:

I am writing in response to the June 11, 2008 letter from Mr. Joyce of Cargolux to Scott Wilson of Transiplex. We are disappointed to learn that Cargolux no longer wishes to remain a tenant in the Transiplex facility. We hope that they might reconsider.

However, Mr. Joyce also states that Cargolux intends to hold Transiplex liable for a breach of the lease due to an alleged failure to give proper notice of termination prior to December 1, 2007. We believe that such notice was properly given. Because Cargolux is currently occupying the facility and conducting its operations as usual, we request that if Cargolux truly believes that the notice was inadequate, they should present the matter to a judge for an immediate ruling. If the court rules that the notice was inadequate, Transiplex, of course, would comply with the court's ruling and Cargolux would remain for an additional year under the rental terms set by the court. By bringing this matter up for determination now, it would be resolved and allow the parties to plan accordingly and avoid any damages beyond the expense of the legal fees and court costs. Indeed, if Cargolux elects not to bring the matter up for determination now, Transiplex will take the position in any later proceeding that Cargolux waived its opportunity to resolve the matter early and avoid damages.

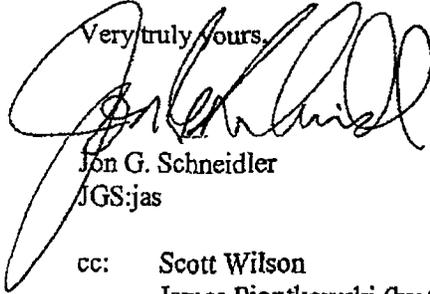
This should not pose a significant burden since your client already has a lawsuit against Transiplex under Cause No. 08-2-19293-8 KNT in King County Superior Court. By the way, neither our client nor counsel have received the summons or complaint. I believe that Mr. Boundy has already communicated to Mr. Collins, your local counsel, that we are authorized to accept service on behalf of the client.

1301 FIFTH AVENUE, SUITE 2600, SEATTLE, WASHINGTON 98101-2622  
WWW.SCHNEIDLERLAW.COM

Ms. Roxanne S. Clements  
June 12, 2008  
Page 2

In accordance with the requirements of the Lease, we are sending a copy of this letter to Mr. Piontkowski, the party designated by Cargolux for receipt of all such notices.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Jon G. Schneider".

Jon G. Schneider  
JGS:jas

cc: Scott Wilson  
James Piontkowski (by Certified Mail/Return Receipt Requested)  
F. Ross Boundy

**AMENDMENT NO. 1  
TO  
LEASE AGREEMENT**

THIS AGREEMENT NO. 1 TO LEASE AGREEMENT (this "Amendment") is entered into this 25th day of October, 2000, by and between SEATAC AIR CARGO LIMITED PARTNERSHIP, a Washington Limited Partnership, acting by and through its general partner TRANSIPLEX (SEATTLE), INC. (the "LANDLORD") and CARGOLUX AIRLINES INTERNATIONAL S.A., (the "TENANT") for the purpose of amending that certain Lease Agreement dated October 21, 1999, (referred to as the "Lease") to reflect a one year notice of cancellation of the Lease for the premises.

**WITNESSETH**

WHEREAS, LANDLORD and TENANT desire to amend and modify the terms, covenants, provisions and conditions of the Lease to create a year to year periodic tenancy, all in a manner hereinafter specified:

NOW, THEREFORE, for good and valuable consideration, the mutual exchange and receipt of which are hereby acknowledged by the parties, it is mutually understood and agreed by and between LANDLORD and TENANT that the Lease is hereby altered, modified and amended in the following respects:

1. (Section 2.1) The term of the Lease Agreement is amended to add that the TENANT shall have the right to notify the LANDLORD that the TENANT intends to discontinue business operations at Sea-Tac International Airport and shall give at any time during the term, one (1) years notice in writing to the LANDLORD to terminate the Lease and vacate the premises; provided, however, this amendment is conditioned upon Tenant discontinuing all business operations at Sea -Tac International Airport.
2. This lease will renew automatically on the first day of December until written notice at least one (1) year prior to the December first anniversary is given by either party.

In all other respects, except as herein provided for, the terms, provisions, conditions and covenants of the Lease shall remain in full force and effect.

AMENDMENT NO. 1  
CARGOLUX AIRLINES INTERNATIONAL S.A.  
PAGE 2 of 2

IN WITNESS WHEREOF, the parties have executed this Amendment  
as of the day and year first mentioned above.

WITNESSED BY:

SEA-TAC AIR CARGO LIMITED  
PARTNERSHIP  
BY: TRANSIPLEX (SEATTLE), INC.,  
General Partner

Ainley Dickson

By: Scott W.

Title: VICE PRESIDENT

WITNESSED BY:

CARGOLUX AIRLINES INTERNATIONAL S.A.

[Signature]

By: Joseph M. [Signature]

Title: AREA OPERATIONS MGR. N.A.



INSTRUCTION NO. 14

If you find that the parties intended by the correspondence between Scott Wilson (Exhibit 257) and Joseph Joyce (Exhibit 5) to modify the lease to terminate it as of November 30, 2008, then that correspondence constitutes an agreement in writing executed by the parties within the meaning of paragraph 32 of the parties' lease (Exhibit 1).

The lease is a contract and any modification of a lease is a contract. Once a contract has been entered into, mutual assent of the contracting parties is essential to any modification of the contract.

To establish a modification, Cargolux must prove by a preponderance of the evidence, through the words or conduct of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

Hon. Jay White  
Hearing Date/Time: March 26, 2010/9:00am  
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CARGOLUX AIRLINES INTERNATIONAL,  
S.A.,  
a Luxembourg corporation,

Plaintiff,

vs.

SEA-TAC AIR CARGO L.P., a Washington  
limited partnership, acting by and through its  
general partner TRANSIPLEX (SEATTLE),  
INC.,  
a Washington corporation,

Defendant.

No. 08-2-19293-8KNT

~~REVISED~~  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
CARGOLUX'S RE-NOTED MOTION  
FOR JUDICIAL SEGREGATION PER  
DECEMBER 10, 2008 ORDER  
GRANTING/DENYING MOTIONS FOR  
SUMMARY JUDGMENT

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court, and Cargolux Airlines International, S.A. ("Cargolux"), having appeared through its attorneys of record, Adam C. Collins and Sheri Lyons Collins, Jami K. Elison and Roxanne Clements *pro hac vice*, and defendant Sea-Tac Air Cargo, Inc., acting by and through its general partner Transiplex (Seattle), Inc., ("Transiplex"), having appeared through its attorney of record, F. Ross Boundy, *and Ambika Doras, On* on March 26, 2010, *On* and the court having heard arguments of counsel and reviewed the following:

\* Please note corrections and additions to this list, *recompacted*  
~~REVISED (4/2/10) PROPOSED FINDINGS OF FACT~~  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 1

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

*have by reference, in the court's order granting in part  
Cargolux's Re-noted Motion for Judicial Segregation, etc., entered July  
4-23-10. JW*

1. Cargolux's Re-Noted Motion for Judicial Segregation of Disallowed Attorneys Fees Per December 10, 2008 Order Granting/Denying Motions for Summary Judgment and all attached exhibits;
2. 2/5/2010 Declaration of Adam C. Collins Re: Cargolux's Re-Noted Motion for Judicial Segregation of Disallowed Attorneys Fees Per December 10, 2008 Order Granting/Denying Motions for Summary Judgment and all attached exhibits;
3. December 10, 2008 Order Granting/Denying Motions for Summary Judgment;
4. 2/4/09 Declaration of Andrew J. Schneider in Support of Transiplex's Supplemental Briefing on Segregation of Attorney's Fees with all attached exhibits;
5. First Amended and Supplemental Complaint for Declaratory Judgment, Injunctive Relief, Damages and Rescission filed in King County Superior Court Cause No. 05-2-28089-1SEA;
6. Transiplex's Opposition to Cargolux's Motion for Judicial Segregation of Fees and Cross-Motion for Evidentiary Hearing;
7. Transiplex's Supplemental Briefing on Segregation of Attorney's Fees dated 2/4/09;
8. 2/4/09 Declaration of F. Ross Boundy in Support of Supplemental Briefing on Segregation of Attorney's Fees;
9. Transiplex's Opposition to Cargolux's Motion for Judicial Segregation of Disallowed Attorney Fees dated 8/6/09;
10. 8/6/09 Declaration of Scott Wilson in Opposition to Cargolux's Motion for Judicial Segregation;

~~REMOVED~~ PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 2

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2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.6788

- 1 11. 8/6/09 Declaration of F. Ross Boundy in Opposition to Cargolux's Motion for
- 2 Judicial Segregation;
- 3 12. Transiplex's Supplemental Briefing on Allocation of Attorney's Fees dated
- 4 10/23/09;
- 5 13. 2/23/09 Supplemental Declaration of Andrew J. Schneider in Support of
- 6 Transiplex's Supplemental Briefing on Segregation of Attorney's Fees;
- 7 14. Cargolux's Reply in Support of its Re-Noted Motion for Judicial Segregation of
- 8 Disallowed Attorney Fees;
- 9 15. Supplemental Declaration of Adam C. Collins in Support of Cargolux Airlines
- 10 International, S.A.'s Re-Noted Motion for Judicial Segregation of Disallowed
- 11 Attorney Fees Per December 10, 2008 Order Granting/Denying Motions For
- 12 Summary Judgment; and
- 13 16. The docket in *Sea-Tac Air Cargo, Inc., acting by and through its general partner*
- 14 *Transiplex (Seattle), Inc. v. Port of Seattle*, King County Superior Court Cause No.
- 15 05-2-28089-1SEA ("Port litigation");
- 16

17 and the Court being fully advised in the premises, now, therefore, makes these  
18 findings of fact and conclusions of law with regard to Plaintiff Cargolux's Re-Noted Motion  
19 for Judicial Segregation of Disallowed Attorneys Fees Per December 10, 2008 Order  
20 Granting/Denying Motions for Summary Judgment as follows:

21 **FINDINGS OF FACT**

22  
23 1. At all relevant times, Cargolux leased from Transiplex 17.4517% of the  
24 leasable space at the Transiplex air cargo facility at Sea-Tac International Airport (the  
25 "Premises").

26 ~~REVISED 11/23/09 PROPOSED~~ FINDINGS OF FACT  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 3

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

1           2.       Cargolux paid all Building Operating Costs charged to it by Transiplex for the  
2 years 2005, 2006, and 2007. Building Operating Costs for those years include legal fees  
3 incurred by Transiplex.

4           A.       Port Litigation

5           3.       In August 2005, Transiplex initiated a lawsuit against the Port of Seattle ("Port"),  
6 the Port litigation *supra*, with respect to an increase in the ground rent by the Port, issues  
7 involving a portion of property owned by the Port adjacent to the Premises known as the  
8 "hardstand" and a *de minimus* claim of trespass concerning a 107 sq.ft. guard shack built by the  
9 Port on Transiplex's leasehold. The hardstand and rent issues appear from the docket and  
10 evidence submitted to have been the two primary issues initially litigated by Transiplex.  
11

12           4.       While the docket in the Port of Seattle litigation indicates that the rent issue was  
13 the predominant subject of legal work from August 2005 through December 2005, including a  
14 motion for summary judgment on the issue, Transiplex also filed a substantive Declaration of  
15 Scott Wilson concerning the hardstand at that time as well and it can be inferred from the  
16 evidence that Transiplex's attorneys would have spent time during that period investigating the  
17 basis for the hardstand claims.

18           5.       On December 23, 2005, Transiplex was granted summary judgment on the rent  
19 issue, with reconsideration denied without response by Transiplex on January 18, 2006. After  
20 the December 23, 2005 Order, <sup>PRIMARY</sup> the remaining issues to be resolved were the hardstand and the <sup>an</sup>  
21 trespass claims.  
22

23           6.       From December 23, 2005 to February 2008, however, it appears from the docket  
24 and evidence presented that the hardstand, <sup>with exceptions noted elsewhere herein,</sup> was the only issue being litigated by Transiplex.  
25 There were two major rounds of summary judgment on the hardstand issues during this period

26 ~~REVISED (10/10) PROPOSED FINDINGS OF FACT~~  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 4

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2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

1 7. In approximately November 2007, Transiplex asserts that a tortious  
2 interference claim against the Port arose due to actions allegedly taken by Port personnel, but  
3 there was no evidence of fees being incurred on this claim nor was it included in the Port  
4 Litigation until Transiplex amended its Complaint in February 2008. In February 2008,  
5 Transiplex amended its complaint to add claims for tortious interference with its tenants and  
6 additional claims concerning the hardstand.

7  
8 8. On April 14, 2008, the Port was granted summary judgment on the hardstand  
9 issue. Transiplex filed a motion for reconsideration, and the Court ordered further briefing  
10 and discovery on the motion. Further briefing and discovery occurred on the hardstand issue,  
11 including Transiplex's September 2008 depositions of Mssrs. Joyce and Piontkowski from  
12 Cargolux for 3 full days on issues substantially relating to the hardstand. The April 14, 2008  
13 order on summary judgment concerning the hardstand issue was reconfirmed upon  
14 Reconsideration on October 22, 2008.

15 9. On or about January 12, 2009, the Port was granted summary judgment on all  
16 remaining claims except the guard shack. The latter claim went to mandatory arbitration in  
17 October 2009 and Transiplex was awarded approximately \$15,000.

18 **B. Transiplex's Legal Fees**

19 10. Transiplex has submitted to Cargolux and the Court copies of its attorney  
20 billing invoices for 2005, 2006, and 2007, which this Court shall hereafter refer to as the  
21 "Filed Billings." This Court notes that, upon examination, the Filed Billings contain "block"  
22 or "bulk" billing entries which include multiple tasks in a "block" and showing only one total  
23 time entry for all tasks together on a particular date and not per task. Further, the entries are  
24 vague and unclear as to what tasks pertain to what issues. As a result, some billing entries  
25

26 ~~REVISED (7/2/10) PROPOSED FINDINGS OF FACT~~  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 5

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2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

1 may include hardstand-related fees along with non-hardstand-related fees, making it virtually  
2 impossible without more specificity <sup>from Transplex</sup> for this Court to segregate the exact amount of time spent <sup>on</sup>  
3 by Transplex's attorneys on hardstand-related issues. The Parties agree and this Court  
4 concurs that, based on the state of the Filed Billings, a segregation of hardstand-related legal  
5 expenses cannot be gleaned with any accuracy from the Filed Billings, so this Court must  
6 make a determination of such segregation based on other evidence submitted by the Parties.

7  
8 11. In 2005, Transplex incurred \$162,898 in legal fees that it sought to pass on to  
9 its tenants as part of the building operating cost portion of the rent it charged to them under  
10 their leases with Transplex. Cargolux was billed and paid 17.4517 percent of the \$162,898 in  
11 legal fees billed to it in 2005. That amount was \$28,428.47.

12 12. In 2006, Transplex incurred \$168,591 in legal fees that it sought to pass on to  
13 its tenants as part of the building operating cost portion of the rent it charged to them under  
14 their leases with Transplex. Cargolux was billed and paid 17.4517 percent of the \$168,591 in  
15 legal fees billed to it in 2006. That amount was \$29,422.00.

16 13. In 2007, Transplex incurred \$560,001 in legal fees that it sought to pass on to  
17 its tenants as part of the building operating cost portion of the rent it charged to them under  
18 their leases with Transplex. Cargolux was billed and paid 17.4517 percent of the \$560,001 in  
19 legal fees billed to it in 2007. That amount was \$97,729.69.

20 14. Transplex asserts that it did not bill Cargolux for any Port Litigation expenses  
21 incurred in 2008 because the instant litigation was pending and the Court had ruled in  
22 December 2008 that hardstand-related litigation expenses could not be passed to Cargolux  
23 under its lease with Transplex. Transplex incurred \$703,829.60 in legal fees that it sought to  
24 be able to pass on to its tenants as part of the building operating cost portion of the rent it  
25

26 ~~REDACTED~~ PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 6

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

1 charged to them under their leases with Transiplex. 100% of the fees from GVA Kidder  
2 Mathews (\$1,375.00) and Wiggins & Masters (\$868.58) for 2008 are attributable to the  
3 hardstand and thus must be deducted from the legal expenses for 2008 prior to making an  
4 apportionment for the year. Thus, the Port litigation expense number for the year 2008 should  
5 be \$701,586.02.

6 15. Cargolux paid its proportion of all Port litigation expenses for the years 2005-  
7 07, including GVA Kidder Mathews, Cain & Hayter, JAMS and Wiggins & Masters. 100%  
8 of the fees from GVA Kidder Mathews (\$14,281.00); Cain & Hayter (\$1,134.00); and JAMS  
9 (\$1,825.00) for 2007 are attributable to the hardstand. The multiplier applied to Cargolux is  
10 17.4517. Thus, Cargolux is owed a refund of \$3,008.67 as a result of the charges from these  
11 specific firms.

12  
13 **C. Hardstand Allocation**

14 16. It appears from the Port litigation docket and the evidence and argument  
15 presented by the Parties that there is evidence that 20% of the Port Litigation expenses for  
16 2005 are attributable to hardstand issues and were therefore overcharged to Cargolux. While  
17 there was a summary judgment motion and hearing on the rent issue in 2005, which was the  
18 predominant issue being litigated at that time, it is realistic and fair to conclude that 80% of  
19 Transiplex's 2005 Port Litigation billings pertained to the rent issue.

20 17. In 2006 and 2007, however, it is clear from the Port litigation docket and the  
21 evidence and argument presented by the Parties <sup>limited few exceptions,</sup> that the sole issue being litigated during that  
22 time was the hardstand. While there is mention by Transiplex in a declaration that a tortious  
23 interference claim against the Port arose in the fall of 2007, there is <sup>limited</sup> ~~no~~ evidence to support a  
24 finding that there were any legal expenses incurred by Transiplex or passed through to  
25

26 ~~RECOMMENDED~~ PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 7

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2806 NE SUNSET BLVD., SUITE A  
BENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

1 Cargolux concerning that issue during that time. Further, it appears from the docket and the  
2 evidence and argument presented by the Parties that while the trespass issue was alive during  
3 this time period, there is <sup>little or</sup> ~~no~~ evidence that Transiplex incurred any legal expenses or passed  
4 any legal expenses through to Cargolux concerning the trespass claim during that time. If any  
5 legal work not related to the hardstand was performed, the evidence demonstrates that such  
6 work was negligible. Accordingly, it is realistic and fair to conclude that <sup>95%</sup> ~~100%~~ of the Port  
7 Litigation billings for 2006 and 2007 pertained to hardstand issues.

8  
9 18. In 2008, it is clear that despite the filing of an amended complaint in February  
10 adding a claim for tortious interference and more hardstand-related claims against the Port, the  
11 bulk of the legal work performed totaling \$703,829.60 pertained to hardstand issues. From  
12 January to October the litigation is consumed by a summary judgment motion and order  
13 dismissing the hardstand issues and court-ordered briefing and discovery upon reconsideration  
14 of that order. The evidence shows that there was some time spent on arbitrating the \$15,000  
15 trespass issue during this time, but the time spent on issues other than the hardstand in 2008  
16 could not have been more than 20% according to the docket and evidence and arguments of  
17 the Parties. Accordingly, it is realistic and fair to conclude that 80% of the Port Litigation  
18 billings for 2008 pertained to hardstand issues.

19  
20 19. This Court finds, according to the evidence presented which is supported by the  
21 record, that there is evidence that 20% of the Port Litigation expenses for 2005 and <sup>95%</sup> ~~100%~~ of  
22 both 2006 and 2007 Port Litigation expenses are attributable to the hardstand issues and were,  
23 therefore, overcharged. Accordingly, Transiplex overbilled and Cargolux paid the following  
24 amounts as Building Operating Costs under Article 3.2 of the operative lease between them  
25 that were attributable to hardstand issues in the Port Litigation:

26 ~~REVISED (10/10) PROPOSED FINDINGS OF FACT~~  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 8

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

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- 2005 - \$162,898 x .174517 x .2 = \$5,685.69;
- 2006 - \$168,591 x .174517 ~~x \$29,422.00;~~ <sup>x .95 = 27,951.00</sup> *OW*
- 2007 - \$560,001 (less \$17,240) x .174517 ~~x \$94,721.02;~~ <sup>x .95 = 89,985.00</sup> *OW*
- 2007(see FoF #15 above) = \$3,008.67;
- Total overcharged to Cargolux for Building Operating Costs improperly charged to but paid by Cargolux for the years 2005, 2006 and 2007 - ~~\$132,837.38.~~ <sup>\$126,630.00</sup> *OW*

20. This Court finds, based on the evidence, that there is evidence that at least 80% of the litigation expenses incurred by Transplex in 2008 pertained to hardstand issues alone, and therefore, Transplex may only pass through 20% of the Port Litigation expenses as Building Operating Costs for 2008 as follows:

- 2008 - \$701,586.02 x .174517 x .2 = ~~\$24,439.05.~~ <sup>\$24,487.00</sup> *OW*

21. Accordingly, this Court finds that Transplex owes Cargolux and must refund to it ~~\$102,398.33,~~ <sup>102,143</sup> *OW* which is the amount Cargolux overpaid in Building Operating Cost charges for 2005-07 less the amount Cargolux would owe to Transplex for previously unbilled Building Operating Cost charges for 2008.

22. While Transplex argues for a much reduced calculation of the fees attributable to the hardstand issues than this Court has allocated based solely on Transplex's counsel's own "informed opinion," this Court finds that counsel's opinion is unsupported by any evidence or analysis.

//  
//

~~REDACTED~~ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CARGOLUX'S RE-NOTED MOTION FOR JUDICIAL SEGREGATION - 9

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2875  
FAX: 425.271.0788

1 **CONCLUSIONS OF LAW**

2 1. Under the operative lease between Cargolux and Transiplx for the Premises,  
3 Cargolux was required to pay 17.4517% of the actual Building Operating Costs, which is its  
4 pro-rata share of such costs.

5 2. Under paragraph 3.2 of the operative lease between Cargolux and Transiplx  
6 for the Premises, Transiplx was not, as a matter of law, allowed to pass through as building  
7 operating costs any Port Litigation (King County Cause No. 05-2-38089-1SEA) expenses  
8 incurred by Transiplx attributable or related to the hardstand issues in that litigation because  
9 the hardstand is not part of the leased Premises.  
10

11 3. All Port Litigation (King County Cause No. 05-2-38089-1SEA) expenses  
12 incurred by Transiplx attributable to the hardstand issue that were allocated to and paid by  
13 Cargolux as Building Operating Costs under Article 3.2 of the operative lease for the years  
14 2005, 2006, 2007 and 2008 were, as a matter of law pursuant to this Court's December 10,  
15 2008 Order as amended in this matter, an overcharge to Cargolux and must be returned.

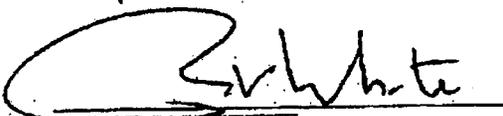
16 4. On January 26, 2010, the jury returned a verdict finding that the lease between  
17 Cargolux and Transiplx terminated on November 30, 2008. As a result of that verdict,  
18 Cargolux has no obligation to pay any rent or Building Operating Costs for any period  
19 incurred after November 30, 2008.  
20

21 5. Transiplx has the burden for identifying and segregating hardstand-related  
22 fees, which must be supported by evidence beyond declarations of its attorneys. Cargolux is  
23 entitled to the benefit of the doubt and all reasonable presumptions and inferences concerning  
24 any failure of proof by Transiplx.  
25

26 ~~REVISED (2/27/10) PROPOSED FINDINGS OF FACT~~  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 10

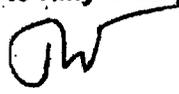
THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
BENTON, WA 98056  
TEL: 425.271.2375  
FAX: 425.271.0788

DONE IN OPEN COURT this 23 day of April 2010. \*

  
JUDGE JAY WHITE

Presented by:

/s/ Adam C. Collins  
Adam C. Collins, WSBA No. 34960  
Sheri Lyons Collins, WSBA No. 21969  
Jami K. Elison, WSBA No. 31007  
Roxanne Clements, *Pro Hac Vice*  
Attorneys for Plaintiff

\* NOTE: The following 16-page Addendum  
to the foregoing Findings of Fact and  
Conclusions of Law is fully incorporated  
herein by reference   
4/23/10

Approved as to form, Notice of  
Presentation Waived:

F. Ross Boundy, WSBA No. 403  
Sarah K. Duran, WSBA No. 38954  
Attorneys for Defendant

~~RE-OPENED~~ PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW RE: CARGOLUX'S  
RE-NOTED MOTION FOR JUDICIAL  
SEGREGATION - 11

THE COLLINS LAW GROUP PLLC  
2806 NE SUNSET BLVD., SUITE A  
RENTON, WA 98056  
TEL: 425.271.2575  
FAX: 425.271.0788

**ADDENDUM TO FOREGOING FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**FULLY INCORPORATED THEREIN BY REFERENCE**

In addition to Finding of Fact No. 11, proposed by Cargolux and adopted by the court, the court also adopts the following as the court's Finding of Fact No. 22, proposed by TransiPLEX:<sup>1</sup> The parties agree that the Court need only decide which expenses incurred in the Port litigation were related to the hardstand, and which expenses were unrelated to the hardstand. The parties do not dispute the reasonableness or the amount of the expenses incurred in the Port litigation for purposes of this allocation. The parties also agree that because a review of each entry on each invoice would be impracticable, the court should adopt percentages reflecting the amount of expenses attributable to the hardstand issue.

Nevertheless, notwithstanding Finding of Fact Nos. 11 and 22, the court undertook the arduous task to compare the billing entries for fees incurred by TransiPLEX in TransiPLEX v. Port of Seattle, No. 05-2-28089-1 SEA to corresponding entries in a "timeline of significant events in that case, which I believe accurately reflects the most significant filings made, hearings, and discovery taken." Declaration of Andrew J. Schneider in Support of TransiPLEX's Supplemental Briefing on Segregation of

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<sup>1</sup> Defendants' [Second Proposed] Order on Allocation of Attorneys' Fees at 3 (proposed Finding of Fact No. 2).

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

Attorneys' Fees, dated February 4, 2009, at 1-2, and Exhibit A attached thereto.<sup>2</sup> In so doing, the court also undertook a reasonable effort to review the billings in their entirety. The court's comments are included in the chart which follows:

Date	Chronology entry	Court's comment
August 25, 2005	TransiPLEX files Complaint relating primarily to rent increase and Port's improper placement of guard shack on leasehold, secondarily to hardstand	Most of the August, 2005, billings appear to relate to the rent issue.
September 14, 2005	Port serves first discovery requests on TransiPLEX, relating primarily to rent increase but some to hardstand	Most of the September, 2005, billings appear to relate to work on a motion for summary judgment re rent issue
October 12, 2005	TransiPLEX Reply to Port's counterclaim regarding rent	Most of the October, 2005, billings appear to the rent issue, although there were a couple entries related to the hardstand (7 <sup>th</sup>

<sup>2</sup> See Absher Construction Co. v. Kent School District No. 415, 79 Wn. App. 841, 848 (1995), where the court stated:

The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. An "explicit hour-by-hour analysis of each lawyer's time sheets" is unnecessary along as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded [citation omitted]. An award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers, and explain why discounts were applied.

The issue before the court does not involve an award of attorneys' fees by reason of a contract, statute or some reason in equity; rather, it involves enforcement of a contractual provision, section 3.2 of the parties' lease, which permits the landlord (TransiPLEX) to pass on to the tenant (Cargolux) the tenant's proportional share of Terminal operating expenses. The burden of proof is on the party seeking to enforce the contract (TransiPLEX). Although the language in Absher is instructive, the case law relating to attorney fee awards is inapplicable. Accordingly, TransiPLEX bears the burden to prove to provide the court with a reasonable basis for segregating expenses that can be passed on to the tenant as "non-hardstand" expenses. Because this case involves enforcement of a contract claim, not an attorney fee award, the law does not permit TransiPLEX to recover the entirety of its expenses on the ground that they are inseparable, unnecessarily complex to segregate, or so interrelated as to make the segregation of expenses impossible without being arbitrary. See Kastanis v. Educational Credit Union, 122 Wn. 2d 483, 501 (1993); Schmidt v. Cornerstone Investments, 115 An. 2d 148, 170 (1990); Blair v. Washington State University, 108 Wn. 2d 558, 571-572 (1987).

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2

		amendment issue) on 10/26 and 10/27 (.8 hour) and several billings related to "Federal Express property problem" on 10/14 and 10/18 (unclear how to allocate). There also is a bill for \$76.20 for "meal and entertainment" on 10/14/05, at Union Square Grill (purpose not identified in legal bill for 10/14/05)
October 12, 2005	Transiplex motion for summary judgment on rent increase	See comment to 10/12/05 (same date)
October 31, 2005	Port serves first discovery requests on Transiplex relating to rent increase	See comment to 10/12/05
December 8, 2005	Hearing on Transiplex's Motion for Summary Judgment relating to rent increase	No reference to November billings, but they appear to relate to document production, including paralegal time, and the summary judgment motion. There are costs of \$16,590.96 on 11/30/05 for "U.S. Associates - Vancouver travel, multiple telephone conf. and meetings, draft brief, Gibbons & Whyte"; no reference to this activity in the billing records for 11/30/05 by either Christensen firm or Gibbons & Whyte. The Gibbons & Whyte billings reflect travel to Vancouver and back for 7.9 hours related to document production on 11/3/05 (unclear how to allocate)
December 28, 2005	Order granting Transiplex's Motion for Summary Judgment relating to rent increase	Most of the December billing appears related to the summary judgment motion

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

January 3, 2006	Port Motion for Reconsideration on rent increase	Billings through 1/18/06 appear to relate to successful defense of Port's motion for reconsideration re rent issues
January 18, 2006	Order denying Port Motion for Reconsideration on rent Increase	See comment to 1/3/08
February 18, 2006	Transiplex serves its first discovery requests on Port, relating primarily to guard shack but also to hardstand	Cargolux contends 100 percent of billings from February 2006 through February 2008 relate to hardstand. The events designated by Transiplex in this chronology appear substantially consistent with Cargolux's contention, except (as further noted below) at least some activity may have related to non-hardstand issue, e.g. on 2/8/06 (.3 hour) and 2/21/06 (.3 hour) the billings reference correspondence regarding the guard shack issue. After 2/18/06, the next event in the chronology is on 8/8/06. The court apparently is invited to undertake Transiplex's burden to review the interim billings in an effort to speculate as to anything that may not relate to hardstand, e.g. "Port dump trucks" (3/8); "interference with leasehold access" (3/13); "unauthorized contact with Korean Airlines" (3/22); "Cunningham firing" (5/17) "possible settlement" (5/8) "pending issues" (5/18); "review lease provisions" (6/12)

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

August 8, 2006	Transiplex serves second set of discovery requests on Port relating to damages	Apparently related to hardstand. Not referenced in billing records. Various billings in August and September billings re "AMB rent rolls" (unclear how to allocate)
August 21, 2006	Port files third (mis-labeled "second") set of discovery on Transiplex relating to the hardstand	Apparently all hardstand
October 10, 2006	Port files fourth set of discovery on Transiplex relating to the hardstand	Apparently all hardstand
December 15, 2006	Port counsel tells Transiplex the Port believes Transiplex has no right to parking on the hardstand	November and December billings apparently mostly hardstand
January 3, 2007	Port deposes Kenneth Galka	Apparently related to hardstand
January 23, 2007	Transiplex files third set of discovery requests to Port relating to hardstand	Apparently all hardstand
February 8, 2007	Parties agree to interim agreement on hardstand issues	Apparently all hardstand
March 30, 2007	Port serves fifth set of discovery requests on Transiplex relating to parking	Apparently all hardstand
September 20, 2007	Cross-Motions for Summary Judgment relating to the hardstand issues	Apparently all hardstand
October 12, 2007	Port Official Louis Navarro begins conduct forming basis for tortious interference claim	No reference to tortious interference; 3.5 hours were billed re hardstand issues
October 22, 2007	Parties agree to interim agreement on hardstand issues	7.5 hours were billed re mediation apparently re hardstand issues
October 29, 2007	Navarro continues tortious interference.	No reference to tortious interference. 1.8 hours billed apparently re hardstand issues. On 10/29/07, 1.8 hours were

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

		billed, and there is reference to a telephone conference and correspondence re Port's "unauthorized contact" with a tenant which would appear to relate to a tortious interference activity, as well as other tasks.
November 7, 2007	Navarro continues tortuous interference	No reference to tortuous interference, 1.8 hours billed; however, on 11/8/07 there is a reference to "Navarro interference" during the course of billing 1.9 hours, part of which apparently related to hardstand issues.
November 9, 2007	Transiplex deposes John Faulkner on hardstand issues.	1.6 hours billed, no reference to Faulkner deposition; unspecified time re "unauthorized contact with Transiplex tenant and analysis"
December 11, 2007	Port first deposes Scott Wilson on general issues	9.5 hours billed, mostly re Wilson deposition; no reference to non-hardstand issues
December 12, 2007	Transiplex deposes Mark Coates on hardstand issues	7.2 hours billed, including Coates deposition; no reference to non-hardstand issues
December 13, 2007	Transiplex first deposes Cowdin on hardstand issues	7.5 hours billed, including Cowdin preparation; no reference to non-hardstand issues
December 14, 2007	Hearing on hardstand Motions for summary judgment	6.5 hours billed, including SJ hearing; no reference to non-hardstand issues
December 17, 2007	Transiplex deposes Louis Navarro	5.8 hours billed, including Faulkner deposition; no reference to Navarro deposition or non-hardstand issues
December 21, 2007	Order allowing extrinsic	No reference in the billing

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

	evidence on hardstand issues	to non-hardstand issues; court docket indicates order on SJ motion
January 3, 2008	Transiplex motion to amend complaint	It appears that the primary non-hardstand issue involved in the motion to amend was the addition of a claim for tortious interference. The billing records do reference breach of a covenant of quiet enjoyment, e.g. 12/26/07, but there is little specific reference to non-hardstand issues. There is no specific reference to non-hardstand issues in the January and February billings. There was activity concerning the motion to file an amended complaint, which was denied, but ultimately allowed on February 28, 2008 upon the court's granting of a motion for reconsideration.
January 8, 2008	Transiplex completes deposition of Dan Cowdin on parking.	4.0 hours was billed for this; unclear that the deposition addressed non-hardstand issues
January 10, 2008	Transiplex deposes Dennis Heffring	4.8 hours billed; unclear that deposition addressed non-hardstand issues
January 11, 2008	Transiplex first deposes Janene Axt on hardstand issues	5.6 hours billed; apparently all hardstand
January 15, 2008	Order denying leave to file amended complaint	See comment for 1/3/08; 2.2 hours billed other matters, apparently all hardstand
January 28, 2008	Transiplex's motion for reconsideration on amended complaint	See comment for 1/3/08; 1.8 hours billed for other matters, apparently all hardstand
January 31, 2008	Transiplex completes deposition of Janene Axt on	4.3 hours billed; apparently all hardstand

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7

	hardstand issues	
February 13, 2008	Order granting motion for reconsideration on Transiplex's motion to file amended complaint	See comment for 1/3/08; 3.4 hours billed, apparently all hardstand
February 13, 2008	Order to compel Transiplex's disclosure of the limited partners	See preceding comment for 2/13/08 (same day)
February 28, 2008	Transiplex files Amended Complaint	See comment for 1/3/08
February 28, 2008	Supplemental memoranda on Contextual Evidence	One of numerous entries for February and on 3/3/08 re the supplemental brief, apparently all hardstand
March 11, 2008	Port's [sic] serves sixth set of discovery requests on Transiplex re interference, hardstand, and rescission	1.8 hours billed, apparently all hardstand; reference to quiet enjoyment issue on 3/7 and 3/10 re settlement activity
March 28, 2008	Hearing on supplemental memoranda	Numerous billings culminating with this hearing on summary judgment; no specific reference to non-hardstand issues
April 16, 2008	Order granting partial Motion for Summary Judgment for the Port	The first of a series of entries re a motion for reconsideration of summary judgment on hardstand in favor of Port of Seattle; no specific references to non-hardstand issues. The motion ultimately was denied on 10/22/08.
April 24, 2008	Transiplex's Motion for Reconsideration	See comment for 4/16/08
June 6, 2008	Hearing on hardstand issues	Most of the billing for May was on the motion for reconsideration which continued through June 6; apparently all hardstand issues
June 19, 2008	Port completes deposition of Scott Wilson on general issues	Apparently predominantly hardstand; no specific reference to non-hardstand issues

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 8

July 14, 2008	Transiplex deposes Gina Marie Lindsey on hardstand issues	4 hours billed; apparently all hardstand issues
July 25, 2008	Transiplex's Summary of Evidence and Law	11.9 hours billed by three lawyers; apparently predominantly hardstand issues re motion for reconsideration; other July billings are similar; some settlement activity
August 8, 2008	Transiplex serves fourth set of discovery requests on Port related to tortious interference and hardstand issues	No reference to this discovery, although there was a "draft discovery requests" entry on 8/6/08; apparently predominantly hardstand issues, but there are references to the guard shack issue in several billings, e.g., 8/8 - 8/12/08
August 15, 2008	Port's [sic] serves eighth set of discovery requests on Transiplex relating to guard shack, parking and tortious interference	No reference in 8/15 billing, but there are references to interference claim on 8/20 and 8/22 and guard shack issues on 8/22 and 8/28/08
August 19, 2008	Transiplex deposes Shawn Thibault on interference claims	5.5 hours billed, including the deposition re tortious interference claim; there was a 1.4 "no charge entry" by a second attorney to attend the deposition; balance of billing apparently related to an anticipated motion for summary judgment and preparation for oral argument on reconsideration without specific reference to non-hardstand issues
August 20, 2008	Hearing on Motion for Reconsideration	4.6 hours billed, apparently predominantly related to hardstand issues; some reference to a telephone conferences re interference claim and Padilla deposition
August 21, 2008	Transiplex deposes Eugene Mann relating to tortious	5.5 hours were billed re Eugene Mann deposition;

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 9

	interference	apparently all tortious interference issues
September 11, 2008	Transiplex deposes Abe Padilla relating to tortious interference	5.2 hours billed, including Padilla deposition re tortuous interference (no time specified); balance may be hardstand issues although it is not clear what issues were involved in "Port privilege log" and "Hanjin document production"
September 26, 2008	Port's Motion for summary judgment on remaining claims	7.7 hours billed by 4 attorneys entries, plus other billings in September and October re the Port's motion, as well as Transiplex's motion for preliminary injunction, apparently predominantly non-hardstand issues, e.g. 9/20 (Interference and quiet enjoyment), 9/24 (damages for tortious interference)
October 3, 2008	Transiplex's Motion for Preliminary Injunction on remaining claims	See comment for 9/26/08
October 17, 2008	Hearing on Transiplex's Motion for Preliminary Injunction	Little reference to this hearing in Davis Wright billings for the day of the hearing (.7 hours); Transiplex was represented by attorneys other than Davis Wright; the motion was denied
October 21, 2008	Order Granting Port's Motion for a Protective Order	The court was unable readily to determine what billings may have related to this order. As an aside, the court noted a billing entry for 1.3 hours 10/20 re research as to whether the Port is responsible for Transiplex's fees in its lawsuit against Cargolux

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 10

		which clearly is not recoverable on the motion before the court
October 24, 2008	Motion for Summary Judgment on Remaining Claims continued to November 3.	No related billing entry. Many of the billing entries after 10/22 relate to appellate and other issues after the court on that date denied Transiplex's motion for reconsideration of the summary judgment in favor of the Port re hardstand issues
October 28, 2008	Transiplex files Notice of Appeal on hardstand issue.	See comment for 10/24/08
November 6, 2008	Transiplex deposes Wayne Norris on hardstand issue.	3.8 hours billed, apparently all related to hardstand issues
November 12, 2008	Transiplex deposes Thomas Green on tortious interference	5.5 hours, apparently all related to tortious interference
November 17, 2008	Transiplex deposes Dan Cowdin on hardstand issues	5.5 hours billed re depositions of Dan Cowdin (apparently re hardstand) and Louis Navarro (apparently re tortious interference); it would appear reasonable to attribute half the billed time to each
November 17, 2008	Transiplex deposes Louis Navarro on tortious interference	See note for 11/17/08 (same day)
November 25, 2008	Hearing on summary judgment on remaining claims	5.3 hours billed, apparently predominantly related to the Port's motion to dismiss non-hardstand claims; the Port's motion ultimately was granted on January 12, 2009 as to all claims except the guard shack issue.

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 11

In addition to providing the court the billing records at issue attached as Exhibits A and B to the undated Declaration of F. Ross Boundy filed March 1, 2010,<sup>3</sup> TransiPLEX relies primarily on the Declarations of F. Ross Boundy, dated February 4, 2009, and March 6, 2009; the Declaration of Andrew J. Schniedler, dated February 4, 2009; and the Supplemental Declaration of Andrew J. Schniedler, dated February 23, 2009.<sup>4</sup> Although the chronology of 66 "Major Events" in the Port of Seattle litigation previously addressed herein is attached as Exhibit A to Andrew Schniedler's February 4, 2009, declaration, none of the declarations articulate reasoning with reference to events in the Port of Seattle litigation to explain the basis for the claimed percentage allocation of expenses relating to hardstand issues:

After my review of this timeline as well as the docket, Mr. Boundy and I conferred and reviewed the legal work performed during each year. During this meeting, Mr. Boundy and I formed a unified opinion as to the percentage of litigation expenses (fees and costs) attributable to the hardstand issue. Per Mr. Boundy's direction, paralegal staff then reviewed the many invoices from four different law firms representing TransiPLEX during 2005-2008 and came up with a total number for legal expenses during those years. In response to Mr. Boundy's directive, I then compiled a chart that shows these total fees and costs incurred, together with the percentage of each year's expenses relating solely to the hardstand issue. As indicated, the conclusion is that for the years 2005-2008, the percentage of litigation expenses related to the hardstand was 5%, 85%, 65%, and 50%, respectively. Applying these percentages to the total tallied expenses resulted in a total of \$914,617.97 of fees relating solely to the hardstand, and \$767,920.54 unrelated to the hardstand, but rather relating to the leasehold and terminal as defined in Judge Armstrong's December 10, 2008 ruling.

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<sup>3</sup> These exhibits are the subject of TransiPLEX's Motion to Seal Attorney Billing Records, dated March 1, 2010, which remains pending before the court.

<sup>4</sup> TransiPLEX also provided the Declarations of Scott Wilson dated August 6, 2009 and March 22, 2010. Although these declarations provide helpful background information about the Port of Seattle litigation and tenant billings for operating expenses, neither addresses the issue of percentage allocation between hardstand and non-hardstand operating expenses

**ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 12**

Mr. Schneider's February 4, 2009, declaration is not credible. It amounts to little more than assertions, not based on fact, even though as discussed previously, the court accepted the implied invitation to explore the 66 "Major Events" in the chronology in an effort to determine a factual basis for the asserted percentage allocations to the billing records. Transplex has failed to carry its burden to prove the percentages it advocates. Ultimately, those percentages are based partially upon hearsay because the underlying total dollar amounts are not a product of Mr. Schneider's personal effort ("paralegal staff reviewed...and came up with a total number....").<sup>5</sup> For the sake of argument the court accepts that the paralegal staff simply added up all the billing entries, a task which this court has declined to duplicate. Nevertheless, no factual basis is articulated to support the "unified opinion as to percentage of litigation expenses (fees and costs) attributable to the hardstand issue." Declaration of Andrew J. Schneider, dated February 4, 2009 at 2.

Mr. Boundy's February 4, 2009 declaration reviews some prior history regarding Transplex's production of attorney fee invoices between December 8, 2008 and January 9, 2009. The only information related to the issue before the court is his representation, "I have reviewed the contemporaneously filed Declaration [of] Andrew J. Schneider, attesting to our efforts to segregate those fees and costs incurred in the litigation with the Port of Seattle which relate solely to the hardstand issue. I have carefully reviewed the allocations referenced therein and believe the same to be accurate and true." Declaration of F. Ross Boundy, dated February 4, 2009, at 3.

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<sup>5</sup> Paralegal fees are scattered throughout the invoices. Although the parties have agreed to accept the reasonableness of the amounts billed, no effort was made to document the credentials of the paralegals in support of their billing rates. See Absher, supra, 79 Wn. App. at 845, for criteria relevant to whether paralegal services should be compensated.

ADDENDUM INCORPORATED INTO FOREGOING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 13

In Mr. Boundy's August 6, 2009, declaration, he offers no explanation as to how the allocations advanced by Transplex relate in some quantitative way to the legal work formed, but he appears to offer rebuttal to Cargolux's contention that 100 percent of the legal work between February 2006 and February 2008 should be allocated to the hardstand issues. See Cargolux's Motion at 5-8; Declaration of Adam C. Collins dated February 5, 2010; Cragolux's Reply, dated February 22, 2010; Supplemental Declaration of Adam C. Collins, dated March 1, 2010.<sup>6</sup> Mr. Boundy states:

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<sup>6</sup> Mr. Boundy's August 6, 2009 declaration predates these pleadings; however, Cargolux's Motion originally was noted to be heard on August 9, 2009 before the Honorable Hollis Hill. The court searched all of the pleadings and declarations submitted by Transplex in an effort to understand where it offered a reasoned analysis to refute that offered in Cargolux's pleadings, as reflected in Cargolux's proposed findings of fact and conclusions of law which have been adopted substantially by the court. In contrast, for example, Transplex's proposed findings offer assertions of percentages the court should adopt without any specific relationship to the events in the Port of Seattle litigation. Transplex's only analysis is stated in its proposed Finding of Fact 3, Defendants' [Second Proposed] Order on Allocation of Attorneys' Fees at 3-4:

Mr. Boundy and prior co-counsel, Andrew J. Schneider, examined the invoices charged to Transplex during the Port litigation for the years 2005, 2006, 2007, and 2008 in detail, and presented their unified professional judgment as to appropriate percentages reflecting the amount of expenses attributable to hardstand. Mr. Boundy's [and Mr. Schneider's] twin declarations evidence considerable background and experience regarding attorney's legal fees and expenses. In deciding which expenses were attributable to the hardstand issue, Mr. Schneider and Mr. Boundy referred to a time line of events in the Port litigation, attached as Exhibit A to Mr. Schneider's February 4, 2009 declaration. This timeline, and counsels' informed opinion, reflect that the following percentage of expenses incurred in the Port litigation were attributable to the hardstand issue: 5 percent in 2005, 85 percent in 2006, 65 percent in 2007, and 50 percent in 2008. Although Cargolux's attorneys disagree with the Boundy/Schneider percentages and argue for uniformly higher hardstand-related expenses, Cargolux offers no opinion challenging Transplex's apportionment conclusions.

Not only does this proposed finding fail to relate the percentages in any specific way to the billing invoices (or the timeline, for that matter), e.g., no effort to explain why more time was spent on hardstand issues in 2006 than in 2007, but also the final assertion that "Cargolux offers no opinion" simply is inaccurate. Cargolux has offered both an opinion as to the proper percentages as well as a reasoned basis for it by specific reference to the events in the Port litigation.

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Numerous filings after February 2006 in Transiplex's litigation with the Port of Seattle were unrelated to the hardstand issue. For example, one claim – trespass – is scheduled for mandatory arbitration in October. As another example, on October 3, 200[8], Transiplex filed a motion for preliminary injunction to prevent the Port from closing a gate to its property. As yet another example, on January 3, 2008, Transiplex sought leave to amend its complaint to include some claims unrelated to the hardstand issue.

Mr. Boundy makes no reference to any filing or billing in the period February 2006 to February 2008. The October 3, 2008, preliminary injunction motion was referenced in Transiplex's chronology as "Transiplex's Motion for Preliminary Injunction on remaining claims". This item is illustrative of Transiplex's failure to offer any estimate of the actual time and fees billed on this or any other non-hardstand activity in an effort to rebut Cargolux contention that 80 percent of the 2008 billings relate to hardstand rather than the 50 percent allocation proposed by Transiplex. The same is true of January 3, 2008, motion to amend the complaint previously discussed in the chart prepared by the court commenting on Transiplex's chronology. Based upon the court's own review of the chronology and associated billing records, Transiplex's assertion that 50 percent of the \$701,586.02 incurred in litigation expenses in 2008, i.e., \$350,793.01, is attributable to non-hardstand issues, strains the court's credulity.<sup>7</sup> The numbers simply are not there or if they are, then they are so well buried in the billing records that even Transiplex cannot point them out. In the court's judgment, Cargolux's request that the court find it responsible for its 17.4517 percent share of 20 percent of Transiplex's 2008 litigation expenses (\$24,487.00) is generous.

Based upon the foregoing, the court substantially has adopted the findings of fact and conclusions of law proposed by Cargolux because the court is satisfied that the

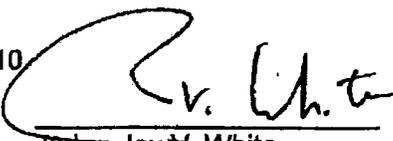
<sup>7</sup> See Defendants' [Second Proposed] Order on Allocation of Attorney Fees at 4 (proposed Finding of Fact No.6). Transiplex also includes its proposed Finding of fact No. 7 that Cargolux is only responsible for its 17.4517 percent share of these non-hardstand fees, i.e. \$81,219.35.

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percentage allocations are not arbitrary. Rather, they are reasonable and supported by the preponderance of the evidence, as well as the record which the court independently has considered. Accordingly, the court's findings indicate at least approximately how the court arrived at the final numbers, and therefore are sufficient for review. See Absher, supra, 79 Wn. App. 841, at 848 previously quoted herein. In that regard, because the court was able to identify minimal activity in the billing invoices for 2006 and 2007 reasonably attributable to non-hardstand issues which properly may be deemed to be operating expenses of the Terminal, the court has reduced the 100 percent allocated to hardstand proposed by Cargolux for each of those years to 95 percent.<sup>8</sup>

At oral argument, Cargolux timely<sup>9</sup> presented a proposed final judgment with the understanding that the court would insert the appropriate dollar amounts based upon its ruling on this motion. The court has determined under the circumstances it would be more appropriate for Cargolux to note a final judgment for presentation, supported by the foregoing findings of fact and conclusions of law, if for no other reason than to give the parties another opportunity to determine if any mathematical errors exist, and the court so orders.

Dated this 23rd day of April, 2010

  
Judge Jay V. White

<sup>8</sup> Transplex asserts that the proper percentages are 85 percent for 2006 and 85 percent for 2007. The court was unsuccessful in determining in what way more expenses could be attributable to hardstand in 2006 than in 2007, especially without any help from Transplex. Accordingly, the court applied the same percentage (85 percent) to each year.

<sup>9</sup> The court again confirms that it is extending the time limit set forth in CR 54(e) to the extent reasonably necessary to enter final judgment in this litigation.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CARGOLUX AIRLINES, INTERNATIONAL, S.A.	)	
	)	
Plaintiff,	)	NO. 08-2-19293-8 KNT
	)	
vs.	)	
	)	
SEA-TAC AIR CARGO L.P., et al.	)	ORDER DENYING CARGOLUX'S MOTION FOR PARTIAL RECONSIDERATION
	)	
Defendant	)	
_____	)	

This matter comes before the court on Cargolux's Motion for Partial Reconsideration of the court's Memorandum and Order Denying Attorney Fees Motions filed July 16, 2010 ("Memorandum and Order"), originally noted for decision on August 3, 2010, and subsequently extended to September 3, 2010.<sup>1</sup> The court considered the motion; supporting Declaration of Roxanne S. Clements, dated July 26, 2010, and Exhibit A attached thereto ("Clements Declaration"); Transiplex's Opposition [Response], filed August 16, 2010; Cargolux's Reply, filed September 3, 2010, and supporting Declaration of Roxanne Clements in Reply, dated September 3, 2010 ("Clements Reply

<sup>1</sup> The court regrets the delay in resolving this matter, which has been pending with the court since the pleadings were complete on September 3, 2010, pursuant to the parties' Stipulation to Extend Deadlines approved by the court in an Order entered August 4, 2010. The court, however, was on leave for a long scheduled vacation September 10 through September 27. While on vacation, the court learned that a significant relative had passed away in Indiana. The court took additional leave in connection with the funeral, including 4 days in Indiana, October 11 through 14. The court appreciates the consideration of counsel and their clients, and regrets any inconvenience caused by the court's delay.

Declaration”). The court also again considered all pleadings, including the voluminous exhibits (primarily billing records), before the court on the underlying motion. *See* Memorandum and Order at 2.

The court succinctly stated the essence of its ruling that Cargolux failed to carry its burden to prove the reasonableness of its \$627,884.40 fee request as follows,

Memorandum and Order at 23:

This court acknowledges that it has an independent responsibility to apply the lodestar methodology but a party seeking fees, not the court, carries the burden of proving the reasonableness of the fee request. Under the applicable law, that burden is not satisfied by conclusory assertions of reasonableness in declarations. Nor is that burden satisfied by the mere attachment of voluminous billing records to conclusory affidavits, leaving to the court the task of searching through and tabulating those records in an effort to determine the number of hours spent by which attorney or paralegal on what type of work and why the number of hours is reasonable and why, when there appears to be more than one attorney engaged in the same task, the hours are not duplicative.

Although Cargolux concedes that “[m]ost of the controlling authorities have already been cited by this court,” Cargolux’s Motion at 4, it asserts that the court somehow has misapplied the applicable law.<sup>2</sup> The court submits that it did apply the applicable law, the most salient feature of which probably is the frequently quoted statement from Absher Construction Co. v. Kent School District No. 415, 79 Wn.App. 841, 848 (1995):

The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties. An “explicit hour-by-hour analysis of each lawyer’s time sheets” is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded [citation omitted]. An award of substantially less than the amount requested should indicate

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<sup>2</sup> “However, the court stretched Cargolux’s legal burden beyond the breaking point of its reason, failed to properly satisfy its own independent burden, and made legal error by failing to take the fee request as the baseline starting point and instead started at zero. In the end, this Court should have provided an attorney fee award at least for the portion of the documented incurred fees that this Court in its judgment found to be reasonable. Certainly, that sum cannot be zero.” Cargolux’s Motion at 4. Cargolux is wrong. As discussed elsewhere herein, the court did not start at zero; it ended at zero.

at least approximately how the court arrived at the final numbers, and explain why discounts were applied.

There is nothing in Absher that holds that the court is excused from its duty to apply the burden of proof. It is axiomatic in a civil action that where a party fails to prove its case by the preponderance of the evidence, there can be no recovery. For reasons set forth in the Memorandum and Order, which was laced with specific examples of the deficiencies identified by the court, this court complied with Absher in making an “award of substantially less than the amount requested” – here, an award of zero recovery – by stating how the court arrived at the final number and otherwise explaining why the fee request was discounted to zero. In doing so, the court may have undertaken a more detailed review of the attorney timesheets than contemplated by Absher in an effort to determine whether any fee should be awarded.<sup>3</sup>

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<sup>3</sup> Cargolux has magnified the court’s footnote 29 grossly to assert that the court “prefers, expects or requires more detailed analysis” than required by Absher, Cargolux’s Motion at 3; “which is more demanding and specific than other colleagues on the King County Bench”, *Id.* at 3; “punitive”, *Id.* at 2, 4; that the court “candidly expressed doubt about that appellate guidance”, *Id.* at 5; that the court’s questions “need not be answered and evidence an overly detailed dissection of litigation that is quite clearly contrary to the guidance from our appellate courts about the degree of rigor required”, *Id.* at 5; and that the court’s decision constitutes an irregularity in the proceedings under CR 59(a)(1) “because existing law does not require the same degree of rigor expected by this Court. Neither this court’s peers nor this party’s opposing counsel expect line-by-line review of billing records. This Court’s divergence from the regular course relates directly to this Court’s reluctance to agree with [Absher].” Plaintiff’s Reply at 2.

For convenience in reference here, the court stated in its Memorandum and Order at 31, n. 29:

In the court’s experience, the often quoted statement in Absher, 79 Wn. App at 848, that the “determination of the fee award should not become an unduly burdensome proceeding for the court or the parties,” sometimes appears to be one that is overly optimistic. Where voluminous fee entries are involved, something approaching an “explicit hour-by-hour analysis of each lawyer’s timesheets” inevitably must be undertaken by counsel (and likely the court as well) to convince the court that the fee award requested is reasonable. Only then will the court be able, without being arbitrary or basing its decision on speculation, to make an award within the proper exercise of its discretion “with a consideration of the relevant factors” and with “reasons sufficient for review...given for the amount awarded.” *Id.*

The Memorandum and Order reflects independent effort by this court to determine whether Cargolux had made a showing that would support an award of attorney fees under the parties’ lease that was reasonable, not arbitrary. The court did not express disagreement with Absher; the court applied Absher. The court

After all, the court ruled that Cargolux is the prevailing party entitled to recovery of its proven reasonable attorney fees under the parties' lease and RCW 4.84.330. The court, however, did not undertake an "explicit hour-by-hour analysis of each lawyer's time sheets," *see* Absher, 79 Wn. App. at 848, but it did explore exemplar timesheets in detail in an effort to comply with our state Supreme Court's teaching that the court must "take an *active* role in assessing the reasonableness of fee awards... [and] should not simply accept unquestioningly fee affidavits from counsel," Mahler, 135 Wn. 2d at 434-435 (emphasis in original).

As discussed in the Memorandum and Order, as the court undertook to examine various billing statements, it immediately ran into difficulties in finding that Cargolux had sustained its burden of proof because of the stark inadequacies of the supporting declarations, which are little more than bare assertions of reasonableness. Thus, the court continued to examine the billing statements -- approaching the point where the task was becoming "unduly burdensome" -- in an effort to detect some pattern that would support the court in ascertaining a discount percentage that would not be arbitrary. The court, after considerable effort, ended its inquiry, relying upon the deficiencies in the exemplars and the failings of the declarations to conclude that Cargolux has failed to carry its burden of proof.

As this court stated the Memorandum Decision and Order at 25-26:

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expressed a comment (*dicta*) that where there are voluminous fee entries at issue it "sometimes appears" to be "overly optimistic" to avoid something approaching an "explicit hour-by-hour analysis", *i.e.*, whether the proceeding is "unduly burdensome" or not, a greater effort is necessary to sustain the burden of proof than was made by Cargolux here. This court may have been candid, but it was not crafting new law. It was applying the burden of proof. Even if footnote 29 were stricken, the court's analysis would remain unchanged.

ORDER DENYING CARGOLUX'S MOTION  
FOR PARTIAL RECONSIDERATION- 4

CP 4460

In summary, although both parties cited Mahler v. Szucs, *supra*, neither offered any declaration or even argument explaining why under the application of lodestar methodology, the court should find the requested recovery of fees to be reasonable. In this case, each side is requesting an award of fees in excess of half a million dollars based upon hundreds, if not thousands, of billing entries. This not a case where the court readily and reasonably may make an independent determination of the lodestar amount based solely on the wholesale submission of billing records.

In Scott Fetzer v Weeks, 122 Wn 2d 141, 151 (1993), a relatively simple case turning on an award of fees under the long arm statute, the Supreme Court described the trial court's task as follows:

In adjudging "reasonable hours" under the long-arm statute, courts should attempt to determine the amount of time that it would take a competent practitioner to recognize the jurisdictional issue, research the relevant law, discover the pertinent facts, and then prepare, file and prevail upon a CR 12(b)(2) motion [footnote omitted].

In the present case, Cargolux's showing was insufficient for the court to "attempt to determine the amount of time it would take a competent practitioner" to complete the multitude of tasks reflected in Cargolux's billing statements. This is especially so where, as here, the various tasks were performed by multiple timekeepers, and typically lumped together in block billings.<sup>4</sup> See Memorandum and Order at 33-34, n. 32 (difficulties in utilizing "block billings").

Cargolux asserts that the court "failed to provide an award of fees but such an award is mandatory", citing QFC v. Jewell T, LLC, 134 Wn. App. 814, 817 (2006).

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<sup>4</sup> In Scott Fetzer, the Supreme Court, rather than ordering a remand as would be anticipated today following Mahler and similar authority, made its own determination of a sharply reduced fee award of fees for 70 hours (not quite zero, but just 14.5 percent of what had been requested), rejecting the trial court's award of "a total of 481.89 hours – the equivalent of almost 3 months of interrupted legal work by one attorney -- ... with no examination of the actual reasonableness of these hours [footnote omitted]." Scott Fetzer, 122 Wn. 2d at 152. In that case, the court had the assistance of expert testimony. In this case, Cargolux successfully opposed Transiplex's request for oral argument and expert testimony, see Court's Memorandum Decision and Order at 2, n. 2. Accordingly, it was all the more incumbent upon Cargolux to make prove its case for "reasonableness" through declarations of counsel.

Cargolux's Motion at 4. In that case, the court held that a unilateral provision was present in the parties' lease and therefore RCW 4.84.330 required a remand for the determination and award of reasonable attorney fees in favor of the prevailing party. The trial court had ruled no fees could be awarded as a matter of law; thus, the trial court had not engaged in a lodestar analysis or in applying the burden of proof. QFC has nothing to do with the present case; contrary to the circumstances presented in QFC, this court has ruled that Cargolux is the prevailing party under the parties' lease and this court undertook to determine and award reasonable attorney fees in favor of Cargolux.<sup>5</sup>

Finally, Cargolux urges the court to consider new declarations in an effort to cure deficiencies in its original showing.<sup>6</sup> Although these new declarations come too late and need not be considered by the court, *see* Transiplex's Opposition at 3-4, the court has considered them and finds that the new declarations raise more questions than they answer.

Specifically, although Cargolux has reduced its fee request for purposes of reconsideration by \$11,176.40, from \$627,488.40 to \$616,708, the new declarations do not address the reasonableness of the large number of hours for which an award of fees is

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<sup>5</sup> Cargolux offers no other authority in opposition to this court's ruling other than to assert, "Reconsideration is appropriate under CR 59(a)(1),(3),(5),(6),(7),(8) and (9)." Cargolux's Motion at 3. No argument or authority supports this assertion. In reply, Cargolux states, "Reconsideration is required by at least three provisions of CR 59(a): (1),(6), and (9)." Cargolux's Reply at 2. Cargolux's brief argument, unsupported by authority, is unpersuasive and without merit. *See* Cragolux's Reply at 2-3.

<sup>6</sup> "While reserving objections as to whether this Court's approach varies from the requirements of our appellate courts, having been notified of the court's requirements, Cargolux has submitted an additional declaration and analysis." Cargolux's Motion at 2. *See* Declaration of Roxanne Clements, dated July 26, 2010, and Exhibit A attached thereto; Declaration of Roxanne Clements in Reply, dated September 3, 2010. Cargolux also argues that this court simply could have found that its \$627,884.40 fee request is "presumptively reasonable"; Cargolux Motion at 2. Although the documentation offered by Cargolux "forms the starting point under the lodestar method, it is not dispositive on the issue of the reasonableness of the hours." Scott Fetzer, 122 Wn. 2d at 155, *citing Nordstrom, Inc. v. Tampourlos*, 107 Wn. 2d 735, 744 (1987). There is no authority to support dispositive application of a "presumption" as Cargolux advocates. Even if there were a presumption, a presumption does not substitute for the burden of proof, especially where it cannot withstand reasonable inquiry and independent review by the court. *See* Supplemental Declaration of David D. Hoff, dated May 28, 2010.

requested. The all but *de minimis* reduction proposed by Cargolux is tantamount to a representation to the court that, despite the “line-by-line” analysis Clements undertook of all the billing records, there are no wasteful or duplicative hours, or any hours pertaining to issues that do not relate to the enforcement of the parties’ lease, other than those conceded in the declarations. *See* Clements Declaration at [unnumbered] 2, 4; Clements Reply Declaration at 1-2. Exhibit A, attached to the Clements Declaration, however, is strikingly illustrative of the degree of unexplained duplicate and triplicate effort by counsel on the same or related tasks.

Based upon the foregoing, the court has determined that Cargolux’s motion for reconsideration should be denied. In the interest of judicial economy, however, the court has contemplated the possibility of a remand in the event the Court of Appeals determines that the court’s burden of proof analysis cannot be sustained.

Given the harshness of the result reached by the court, one could argue as Cargolux does, under the rubric that “substantial justice has not been done”, *see* CR 59(a)(9), or otherwise, that *some* fee award should be made.<sup>7</sup> The standard of review is manifest abuse of discretion. Mahler, 135 Wn. 2d at 435. As recently repeated by our state Supreme Court, “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds,

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<sup>7</sup> *But see generally* Tegland, 4 Washington Practice: Rules Practice (5<sup>th</sup> ed.), at 493-495. “In most of the reported cases in which new trials have been granted under the [CR 59(a)(9)] catch-all provision, the circumstances have been fairly egregious and probably would have justified a new trial on other grounds specified in CR 59 – irregularity, insufficient evidence, misconduct, or the like.” *See also* CR 59(f). It appears inapposite to apply CR 59 to the court’s basic ruling that Cargolux did not carry its “burden of proving the reasonableness of the fees,” Mahler, 135 Wn. 2d at 433. Such a result would suggest that substantial justice has not been done in every case where a judge or jury has determined that a party has failed to provide proof by the preponderance of the evidence.

or for untenable reasons.” Marriage of Freeman, 169 Wn. 2d 664, 671 (2010), *quoting* State ex rel. Carroll v. Junker, 79 Wn. 2d 12, 26 (1971).

Accordingly, in the event this court were directed to reconsider its ruling based upon the evidence in the record – including the new declarations from Cargolux -- the court obviously would comply, notwithstanding this court’s view that to do so necessarily would be arbitrary, absent some explanation “to the court why it would be reasonable to award fees in the amount of \$627,884 or \$558,956, as distinguished from \$450,000 or \$200,000 or some other number.” Memorandum and Order at 38. For present purposes, however, the court will assume that that the new declarations offer some explanation.

Applying lodestar methodology, the court need not set forth here a line-by-line analysis of the new declarations, including Exhibit A to the Clements Declaration. Illustratively, the court will refer only to the first “Litigation Category” set forth in Exhibit A, “Initial phase”. To paraphrase the description of the work done in the “Initial Phase” by attorneys Clements, A. Collins, and S. Collins, Clements drafted two complaints, did unidentified research on the law, met with local counsel and the client, reviewed a TRO motion, drafted the Joyce declaration, attended and argued at a TRO hearing, and drafted answers to counterclaims. A. Collins reviewed and revised the same complaints and answers to counterclaims, met with Clements and the client, wrote his own declaration, revised the Joyce declaration, and drafted and argued a TRO motion. S. Collins reviewed and revised the Joyce declaration, the TRO motion, and the answers to counterclaims. To explain the reasonableness of the fees the three attorneys involved, the following statement is offered in Exhibit A:

Transiplex sent Cargolux back-to-back correspondence declaring a Default re BOCs and that the lease would terminate within 6 months unless Cargolux agreed

to a rate increase. Cargolux faced a potential lock-out and had to respond quickly to the correspondence. To enforce its rights under the lease Cargolux sought a TRO and drafted a complaint to preserve its position pending resolution of the dispute. A lock-out and sudden move were potentially very harmful to Cargolux's business.

The court file reflects that the initial 48-page complaint was filed June 5, 2008.

On June 9, 2008, a court commissioner entered a brief Order Denying Cargolux's Motion for a Temporary Restraining Order. Exhibit A states that for the legal services previously described, Clements billed 59.25 hours at \$400 per hour (\$23,700) and 2.5 hours at \$300 per hour (\$750); A. Collins billed 49.3 hours at \$220 per hour (\$10,846); and S. Collins billed 26 hours at \$220 (\$5,720). The total number of hours billed in the aggregate is 137.05 hours and the total requested lodestar fee for the "Initial Phase" is \$41,016.

Exhibit A also lists 108 paralegal hours billed at \$110 per hour (\$11,880). Costs apparently are sought in addition to the total fee request set forth in Exhibit A of \$616,708. These costs sought pursuant to RCW 4.84.010 are \$731.31 (filing fees, not itemized); \$259.09 (service of process, not specified); \$1,000 (witness fee, witness not identified) and \$3,841.25 (deposition transcripts, no apparent allocation as required by RCW 4.84.010(7)). *See* Clements Declaration at [unnumbered] 6.

The court is invited to search for the costs "in the billing records attached to Cargolux's Motion for Prevailing Party Attorney Fees and Costs." *Id.* No attempt is made to account for other costs previously asserted, but now apparently abandoned. *See, e.g.,* Court's Memorandum and Order at 3, n.3; 28 – 31; Declaration of Gregory Soutanian, dated May 24, 2010. Regarding paralegal billings, the only evidence offered is that "[e]ach paralegal has several years of experience (4-7 years) one of whom is currently attending law school at University of Seattle [sic]. For trial preparation it was

necessary, reasonable and cost effective to have paralegals review documents to prepare witness folders, to select mark and organize exhibits, to organize standard instructions and to prepare draft jury instructions with counsel's guidance and to perform other such ordinary litigation tasks." Clements Reply Declaration at 5. These general assertions arguably are insufficient to satisfy the criteria in Absher, 79 Wn. App. at 845; however, for present purposes, the court assumes there are reasonable inferences to support findings that the paralegals were qualified and generally were engaged in services that were legal rather than clerical in nature.

Based upon the foregoing representative sampling of the new Declarations and Exhibit A, and for all of the reasons previously set forth in the Memorandum and Order, fully incorporated herein by reference, the court's probable ruling on remand would be as follows: (1) based on Exhibit A, the court would tabulate the number of hours by category of attorney and hourly rate, and the type of work performed (as summarized on Exhibit A), find (or presume) the number of hours and hourly rates to be reasonable, and thereby establish a tentative lodestar amount of \$616,708;<sup>8</sup> (2) the court would undertake to "exclude from the requested hours any wasteful or duplicative hours and any hours

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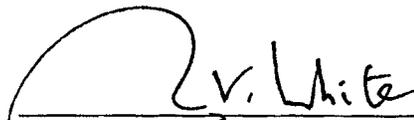
<sup>8</sup> The court would have to reconcile Exhibit A with the Declaration of Jami Elison in Support of Plaintiff's Motion for Prevailing Party Attorney Fees and Costs, and Exhibits A and B thereto. The Elison exhibits, assuming they can be regarded as "contemporaneous records," see Mahler, 135 Wn. 2d at 434; Court's Memorandum and Order at 27, n.25, reflect claimed costs of \$989.80, and several timekeepers, including Elison, billing fees totaling \$80,515. Exhibit A to the Declaration of Roxanne Clements indicates trial preparation fees for Elison of 82.3 hours at \$250 per hour (\$20,575); trial fees for Elison of 106.5 hours at \$250 per hour (\$26,625) and post trial motion fees for Elison of 45 hours at \$250 per hour (\$11,250). The apparent discrepancy is not resolved by Clements' declaration that "Mr. Elison's services were billed through The Collins Group in October, 2009; however, his time was not included in the total computation of time reflected in the Declaration of Sheri Lyons Collins dated May 24, 2010." Clements Declaration at [unnumbered] 4. This court had detected the apparent overlap in the billings for October, 2009. Memorandum and Order at 30. Now the court finds that it would have to reconcile Elison's declaration showing fees from his firm in the amount of \$80,515, Elison Declaration at 2, with Exhibit A to the Clements Declaration showing aggregate fees for Elison of \$58,450. This is another illustration that the new Clements declarations raise more questions than they answer, although they certainly document a great deal of room for duplication and waste. Notably, there are no new declarations from Jami K. Elison, Sheri Lyons Collins, Roxanne Clements, or Gregory Soultanian.

pertaining to unsuccessful theories or claims [not recoverable under the parties' lease]", Mahler, 135 Wn. 2d at 434; and therefore apply a discount of 50 percent to award a lodestar fee \$308,354. This is "substantially less than the amount requested" and therefore the court would "indicate at least approximately how the court arrived at the final numbers, and explain why [the 50 percent] discounts were applied," Absher, 79 Wn. App. at 848. The reasons why the 50 percent discount would be applied are the same reasons set forth in the Court's Memorandum and Order, and in the foregoing analysis of the new declarations and Exhibit A. Finally, the court would allow counsel a final opportunity to address the issue of costs by submission of an appropriate cost bill pursuant to CR 54 (d)(1):

NOW, THEREFORE, based upon the foregoing, together with the Court's Memorandum and Decision dated July 16, 2010,

IT IS HEREBY ORDERED Cargolux's Motion for Partial Reconsideration of the Court's July 16, 2010 Order on Motion for Attorney Fees is DENIED.

DATED this 4<sup>th</sup> day of November, 2010.

  
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Judge Jay V. White