

NO. 65498-5-I

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

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.

REPLY AND RESPONSE TO CROSS-APPEAL BRIEF

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INTRODUCTION

The trial court erroneously ruled on summary judgment that the 2008 letter exchange amended the lease to terminate in 2008. Transiplex's first letter did not offer to amend the lease. Cargolux's response letter thus could not (and on its face did not) accept that non-existent offer. This legal error is sufficient to reverse.

The trial court compounded its error by instructing the jury that the 2008 letters amended the lease if the jury "found" that the parties so intended. Only objective written evidence proves mutual intent. Extrinsic evidence must not add to, subtract from, or modify the writings. But the trial court instructed the jury on what the letters meant, commenting on the key evidence. These are additional sufficient reasons to reverse.

The trial court also erred in ruling that hardstand-litigation expenses are not BOC because Transiplex does not lease or own the hardstand. The hardstand is where cargo planes park at the terminal to load and unload: terminal operations. This Court should reverse on this and the other issues discussed below.

Cargolux's cross-appeal lacks merit. Its fee request was plainly inadequate. It raised a meritless duty of good faith claim too late. This Court should affirm these well founded rulings.

REPLY STATEMENT OF THE CASE

Transiplex did not “ignore[]” its June 12 letter – it identified the letter and appended it to the opening brief. *Compare* BR 28 with BA 15, 26 (citing CP 92-93, TX 6). In the June 12 letter, Transiplex plainly stated that it had given Cargolux timely notice of the November 2008 termination, contrary to the court’s conclusion that Transiplex had offered to terminate the lease early. CP 92.

Cargolux claims that the hardstand expansion “had no effect on Cargolux operations” and that Transiplex sued to “reacquire” the hardstand. BR 9, 24. Cargolux was a “primary reason” for the expansion. CP 622-23. Transiplex sought many forms of relief to obtain nose-load parking, including rescission of the amendment deleting the hardstand. *Infra*, Argument § D; CP 326-38.

REPLY ARGUMENT

A. The parties did not modify, terminate, or repudiate the lease – Transiplex invoked the lease’s notice-and-termination provision and offered to renew the lease with increased rent, but Cargolux rejected Transiplex’s offer to renew the lease.

1. Transiplex did not “offer” to terminate the lease – it gave Cargolux notice of termination under the lease and offered Cargolux a renewal with increased rent. (BA 20-21, BR 28-29).

Cargolux argues that “[a]s a matter of law” Transiplex’s May 30 letter contains (1) an offer to increase rent; and (2) an offer to

amend the lease to an earlier termination date. BR 29. The parties' letters and the lease plainly contradict this claim. Cargolux ignores the May letter's language, arguing that it "understood" the letter as an offer to terminate. BR 29 (citing RP 368). Cargolux's subjective understanding is irrelevant.

For six months preceding the May 30 letter, Cargolux rebuffed Transiplex's many offers to raise the rent. CP 87-88. The May 30 letter stated that the lease would terminate on November 30, 2008, and again proposed a lease renewal at an increased rent. *Id.* Invoking the lease's notice-and-termination provision is not an "offer" to amend the lease. *Compare* BR 29 *with* CP 84, 87.

2. Cargolux opposed Transiplex's "position" on the termination date and rejected its offer to renew the lease. (BA 21-24, BR 30-34).

Cargolux argues that its June 11 letter accepted Transiplex's "offer" to "vacate and terminate" the lease. BR 33. The letter itself contradicts this argument. CP 69. Cargolux (1) referred to the termination as Transiplex's "position"; (2) claimed this position breached the lease; (3) stated that it would vacate anyway to avoid business disruption; and (4) threatened to seek damages for Transiplex's supposed breach. *Id.* The adversarial tone of Cargolux's letter belies "accepting" an offer. *Id.*

If Cargolux had accepted an offer, then there was no breach and no damages claim. But adding a new term – a damages claim – was a counter-offer. ***Sea-Van Investments Associates v. Hamilton***, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

Transiplex did not “admit[]” that Cargolux “accepted Transiplex’s offer terminating the lease.” BR 33 (citing CP 2427). Transiplex said that “[a]t best,” Cargolux accepted one part of the supposed offer, rejected the rest, and added a new term, making a “counter-offer never accepted by Transiplex” (CP 2427):

At best, Joyce’s letter accepted only a single portion of Wilson’s offer (“ . . . Cargolux will vacate the premises as of November 30, 2008.”), while rejecting another (“We are not interested in renewing our lease with Transiplex under the conditions described in your letter . . .”) and adding a third new and inconsistent term (“We will then hold Transiplex liable for resulting direct and consequential damages from this breach.”). Joyce’s letter materially changed the terms of any supposed modification offer and was, at best, a counter-offer never accepted by Transiplex.

In short, Cargolux flatly rejected the alleged offer to terminate early. The trial court should have granted summary judgment that the 2008 letter exchange did not amend the lease.

3. Transiplex did not repudiate the lease – and Cargolux fails to respond. (BA 24-27).

The trial court also erred in denying summary judgment that Transiplex did not repudiate the lease through the 2008 letter

exchange. BA 24-27. Transiplex's May 30 letter relies on the lease, invoking the notice-and-termination provision and expressing hope that Cargolux would renew the lease. CP 87-88, TX 257. Transiplex's June 12 letter reiterates that Transiplex had properly invoked the lease's notice-and-termination provision, but that it would comply with a court ruling establishing the contrary. CP 92, TX 6. While Transiplex may have been mistaken that it gave timely notice, it plainly invoked the lease.

Transiplex subsequently agreed that the lease continued until 2009, as no one had given notice before December 1, 2007. CP 108; CP 362. Even assuming arguendo that Transiplex repudiated, it withdrew the repudiation almost immediately and several times subsequently.

Cargolux does not respond. This Court should remand for summary judgment that Transiplex did not repudiate.

4. The trial court erred in instructing the jury to decide the 2008 letter issue. (BA 27).

As discussed above, the trial court erred in denying Transiplex's motion for partial summary judgment that Transiplex did not modify, terminate, or repudiate the lease via the May 30 and June 11 letter exchange. The court erred again in denying

Transiplex's motion for judgment as a matter of law. BA 27. This Court should reverse and remand.

B. The trial court erroneously excluded Cargolux's Complaint. (BA 27-29, BR 30-33).

In its June 5, 2008 Complaint, Cargolux asserted (1) that Transiplex had not provided sufficient termination notice; (2) that the lease automatically renewed until November 30, 2009; and (3) that Transiplex could not increase the rent. CP 2222. The trial court erroneously excluded the Complaint, which confirmed that Cargolux did not understand Transiplex's termination to be an offer to amend the lease. This Court should reverse.¹

Cargolux argues, without support, that its Complaint was not an "admission," so was inadmissible under RCW 5.40.010. BR 30-31. But the Complaint addressed the only "demand" in the May 30 letter, rejecting Transiplex's right to increase the rent and contradicting the termination date. *Compare* BR 30 *with* CP 2222. These are admissions that should have been admitted. BA 28. And Cargolux does not respond to the controlling authority that it is reversible error to exclude a complaint revealing the plaintiff's

¹ Retrial on this issue is unnecessary if this Court holds, as it should, that the May 30 and June 11 letters did not terminate or modify the lease.

inconsistent positions. **Schotis v. N. Coast Stevedoring Co.**, 163 Wash. 305, 314-15, 1 P.2d 221 (1931).

RCW 5.40.010 does not bar the Complaint – it merely provides that a pleading, by itself, is not proof. This does not mean that the Complaint is not evidence. **Schotis**, 163 Wash. at 314-15.

The Complaint is relevant and is not “duplicative” – it confirms that Cargolux thought that the May 30 letter was a breach, contradicting its later argument that it was accepting Transiplex’s alleged offer to amend the lease. BR 31-33. The June 11 letter shifts positions from the Complaint, stating that Cargolux would vacate on November 30, 2008. *Compare* CP 90 *with* CP 2222.

In short, Cargolux’s Complaint contradicts its argument that it accepted an offer to amend the lease. The Complaint should have gone to the jury. This Court should reverse.

C. The trial court erroneously instructed the jury that the May 30 and June 11 letters were an agreement to amend the lease to terminate the lease, if the jury found that the parties intended to do so. (BA 30-34, BR 36-37).

There cannot be an offer unless Transiplex intended to offer, and there cannot be an acceptance unless Cargolux intended to accept. **Indus. Electric-Seattle, Inc. v. Bosko**, 67 Wn.2d 783, 793, 410 P.2d 10 (1966) (contract requires objective manifestation

of mutual intent amounting to offer and acceptance). Whether there was an offer and acceptance, and whether the parties intended an offer and acceptance, are the same question. The trial court plainly erred in instructing the jury that the May 30 and June 11 letters were a written lease amendment, but that the jury had to decide whether the parties intended to amend the lease. CP 2391.

This is not “form over substance” – the issue on appeal is not whether letters are a sufficient writing. *Compare* BA 30-34 with BR 36-37; CP 28. The point is that Transiplex did not offer to amend the lease to an early termination date and that Cargolux did not “accept” in any event. *Supra*, Argument § A. The letters do not amend the lease because there was no offer, acceptance, or objective manifestation of mutual intent in the letters – not because letters are an insufficient writing. BR 36-37.

Cargolux does not otherwise address Transiplex’s point that Instruction 14 was an improper comment on the evidence. BR 36-37. Instruction 14 improperly told the jury to evaluate the parties’ intent independent of the letters’ language. But the letters are the only objective manifestation of intent. This improper comment on the evidence vouched for Cargolux. This Court should reverse.

D. Transiplex's legal expenses from the Port hardstand litigation are BOCs properly charged to Cargolux (and other tenants). (BA 34-44, BR 20-28).

Cargolux's primary argument on the BOC issue is that Transiplex does not lease or operate the hardstand, so "can have no 'operating expenses' related to the hardstand parking area." BR 22. This argument is meritless – Transiplex also does not lease or operate the runway, but without it there are no cargo planes, so no "air cargo purposes." CP 17. The hardstand-litigation expenses were incurred in operating the terminal because the hardstand was essential to operating the terminal. This Court should reverse.

Saying that the hardstand is unrelated to operating the terminal because Transiplex does not own it makes as little sense as saying that bus stops are unrelated to operating buses because the bus company does not own the sidewalk. The Transiplex/Cargolux lease is for "air cargo purposes." CP 17. Needless to say, that includes loading and unloading cargo airplanes. CP 343 n.2. Equally needless to say – though somehow lost on Cargolux – loading and unloading planes requires a place to park the planes.

The purpose of the hardstand expansion was to improve terminal parking. Transiplex relinquished the hardstand in

exchange for nose-load parking. CP 217-18. When the Port reneged, Transiplex sued the Port to obtain nose-load parking. CP 622-23. CP 218, 622-23. As this Court put it:

¶5 The primary focus of this litigation is the sixth numbered paragraph of the lease amendment. Transiplex contends that the language of paragraph six requires the Port to provide it with “two angled nose-load parking positions” on the Deleted Premises. Based on this assertion, Transiplex claims the Port breached the lease amendment by not providing this parking configuration.

¶6 Transiplex also claims that the Port breached the duty of good faith and fair dealing by its actions in connection with the lease amendment.

¶7 Transiplex next argues that the Port tortiously interfered with Transiplex’s beneficial relationship with Cargolux, a subtenant. Transiplex makes a similar claim as to other subtenants.

Sea-Tac Air Cargo Ltd. P’ship v. Port of Seattle, 156 Wn. App. 1022, ¶ 5, 6, 7, *rev. denied*, 169 Wn.2d 1031 (2010) (unpublished). Hardstand-litigation fees were thus part of terminal operations included in BOC.

Cargolux misses the point, arguing (untruthfully) that it did not have a stake in Transiplex’s suit against the Port. BR 26-27. The issue is whether the Transiplex/Port litigation implicated terminal operations, not whether it benefited Cargolux. The BOC provision is a standard provision in a triple-net lease, requiring all

tenants to share business operating costs regardless of whether a specific tenant reaps a particular benefit.

In any event, Cargolux's connection to the Transiplex/Port litigation is obvious:

- ◆ Transiplex relinquished the hardstand to the Port in exchange for the Port's promise to expand the hardstand for Transiplex's tenants, including Cargolux. CP 217-18.
- ◆ Transiplex always understood that the hardstand expansion would provide nose-load parking. CP 622.
- ◆ Cargolux was a "primary reason" for Transiplex's agreement to the hardstand expansion – and the need for nose-load parking in particular. Since late 1999, Cargolux's aircraft had been improperly intruding into the taxiway corridor during loading operations. CP 622-23.
- ◆ Cargolux consented to the lease amendment necessary to the hardstand expansion. CP 218.
- ◆ When the Port completed the hardstand expansion, Cargolux asked the Port to assign its aircraft to the expanded hardstand. CP 623.
- ◆ The Port refused to allow nose-load parking. CP 1621.

Cargolux attempts to distinguish the case law upon which Transiplex relies, which holds that expenses incurred in litigation that benefits the project are "operating expenses":

With respect to attorneys' fees, it is widely accepted that they are operating expenses, if they are incurred in legal actions that benefit the project.

Ariz. Oddfellow-Rebekah Hous. Inc. v. U. S. Dep't of Hous. & Urban Dev., 125 F.3d 771, 774 (9th Cir. 1997); see also ***Chevron***

U.S.A., Inc. v. United States, 20 Cl. Ct. 86, 87-88 (Cl. Ct. 1990) (legal fees incurred defending against a personal injury action are business operating costs). Cargolux argues that (1) ***Arizona*** does not involve commercial leases; (2) the lease language is not “identical or even remotely similar” to the Transiplex/Cargolux lease; and (3) Arizona was defending a suit. BR 23-25

It is irrelevant that the contract at issue in ***Arizona*** was regulatory, not commercial – Cargolux never explains why this distinction makes a difference. BR 23-24. The issue in ***Arizona*** is very similar to the issue at hand:

- ◆ ***Arizona***: whether “operating expenses” include legal fees incurred in lawsuits arising from the day-to-day operation of a low-income housing project.
- ◆ ***Here***: whether “business operating expenses” include legal fees incurred in a lawsuit arising from the day-to-day operation of the terminal.

While Cargolux argues that the lease language is not similar to the language at issue in ***Arizona***, it never actually discusses the lease language. BR 24-25. 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. In other words, BOC include anything Transiplex spends to operate the terminal. *Id.*

If anything, the language in *Arizona* is more restrictive. The *Arizona* agreement prohibited HUD from spending project revenues for anything other than “reasonable operating expenses.” *Arizona*, 125 F.3d at 773. The Ninth Circuit defined operating expenses as those expenses that primarily benefit the project, not the owner. *Id.* at 774. The lease language here is even broader, and is not limited to expenses that benefit terminal operations.

Cargolux provides no authority or rationale for its argument that litigation expenses incurred pursuing (rather than defending) a suit cannot be operating expenses. BR 25. Transiplex’s suit pursued the parking it believed it was due. If Transiplex had prevailed and obtained the nose-load parking Cargolux wanted, the litigation expenses would obviously be BOC. Under the lease’s plain language, the result does not differ based on who wins.

Cargolux’s response to Transiplex’s apt analogy is telling. Compare BA 43-44 with BR 26-27. If the Port suddenly stopped allowing Transiplex’s tenants to use the taxiway accessing the terminal, resulting litigation costs would plainly be incurred in terminal operations. BA 43-44. It would be irrelevant that the taxiway is not part of the physical “terminal” – Transiplex cannot operate the terminal if its tenants cannot get there. *Id.*

But Cargolux responds that the hardstand litigation is different: it was not about access, but about control over parking. BR 27. This is a distinction without a difference: parking *is* access for “air cargo [loading] purposes.” CP 17.

In sum, litigating how tenants could use the hardstand to load and unload their cargo planes was part of operating the terminal. Cargolux’s responses uniformly lack merit. This Court should reverse and remand for a redetermination of BOC amounts Cargolux owes Transiplex.

E. Transiplex is entitled to attorney fees as a prevailing party. (BA 45-47).

Where distinct and severable claims are at issue, this Court applies “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 Coll. of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 232, 242 P.3d 1 (2010) (citing *Marassi v. Lau*, 71 Wn. App. 912, 918, 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)), *rev. denied*, 171 Wn.2d 1014 (2011). As it currently stands, both parties prevailed on some issues. As

such, a proportionality approach is appropriate unless the Court agrees that Cargolux should not prevail on any issue. BA 47. If Transiplex prevails on any issue on appeal, this Court should reverse and remand for redetermination of attorney fees. *Id.*

Cargolux does not directly respond. BR 37-44.

F. This Court should award Transiplex fees and deny Cargolux fees. (BA 47, BR 50).

As discussed above, Transiplex should prevail on appeal. The Court should award Transiplex appellate fees and deny Cargolux fees. *Cornish*, 158 Wn. App. at 236.

RESPONSE TO CROSS-APPEAL

Cargolux does not dedicate a section of its brief to its cross-appeal. Cargolux's reply should be limited solely to its RAP 10.3(c) arguments.

A. The trial court correctly denied Cargolux's fee request, where Cargolux refused to comply with the court's order regarding fee calculations. (BR 37-44).

From the tenor of Cargolux's argument, this Court would hardly know that the trial court issued a detailed 38-page memorandum decision. The court denied Cargolux's fee request because its indecipherable timesheets failed to provide the minimum information required under *Mahler v. Szucs*, 135 Wn.2d

398, 434, 957 P.2d 632, 966 P.2d 305 (1998). CP 4379-4401. The trial court was within its broad discretion. This Court should affirm.

“[T]he party seeking fees bears the burden of proving the reasonableness of the fees.” *Mahler*, 135 Wn.2d at 434. The moving party must provide contemporaneous timesheets informing the court the number of hours worked, the type of work performed, and the category of attorney performing the work. 135 Wn.2d at 434. This is a “minimum” requirement. *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 292, 951 P.2d 798 (1998).

Contrary to Cargolux’s incredible assertions (BR 41-42) the trial court “adequate[ly]” explained its rulings that Cargolux fell below minimum requirements:

- ◆ Elison: – “All [timekeepers] are unidentified. . . . There is no effort to identify the total number of hours worked by whom and the type of work performed. There is no Absher showing that is necessary if one or more of the timekeepers is a paralegal. There is no showing that duplicative or unproductive time has been eliminated.” CP 4392. Elison’s reply did not correct these “deficiencies.” CP 4392 n.27.
- ◆ Collins: “[T]here is no effort to identify the total number of hours worked by whom and the type of work performed. There is no showing that duplicative or unproductive time has been eliminated. . . . The court is left either to speculate or to accept the fee statements at face value. Neither option is permissible under the applicable law. . . .

Moreover, there is no effort to relate fees charged to fees recoverable under the parties’ contract.” CP 4393-94.

- ◆ Clements: “[T]he shortcomings of the Clements declaration are similar to those of the Elison and Collins’ declarations; however, in reviewing the 57 pages of billing statements, the court encountered immediate difficulties . . . The Clements declaration does not speak to duplication or unproductive work.” CP 4395, 4397.

The court discussed at length the problems with Clements’ “block-billing,” and provided examples of duplicative work and work for things that could not be collected under the lease. CP 4396-98 n.32.

Cargolux misunderstands its burden, suggesting that it must “provide contemporaneous records documenting the hours worked,” after which “the burden shifts to the court with regard to reductions from the fee request.” BR 42-43 (citing *Mahler*, 135 Wn.2d at 434). There is no such burden-shifting scheme: “[t]he burden of demonstrating that a fee is reasonable always remains on the fee applicant.” *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995).

And Cargolux omits a key part of *Mahler’s* holding – contemporaneous time records must “inform the court . . . of hours worked, of the type of work performed, and the category of attorney who performed the work” 135 Wn.2d at 434. Just providing contemporaneous time records is not enough (CP 4399);

Mahler v. Szucs, *supra*, teaches, among other things, that a party seeking a fee award, in order to carry that party's burden to persuade the court by the preponderance of the evidence of the reasonableness of the requested fee award, must provide "contemporaneous records documenting the hours worked," Mahler, 135 Wn.2d at 424. But that is just one requirement. This does not mean that a party may carry its overall burden of proof by stating, in effect, as Cargolux has done, "Here are all of our bills. We won't tell the court the number of hours or the type of work performed, but our bills total \$713,509. All of our fees are reasonable. We won 88% of the monetary relief at issue. Therefore, an award of attorney fees in the amount of \$627,884.40 is reasonable."

Cargolux failed to do the "minimum" – provide the court with the hours worked, the type of work performed, and the category of attorney. **McGreevy**, 90 Wn. App. at 292; CP 4399. And nothing prohibits a trial court from requiring more, if more is necessary to make an informed decision.

In any event, the trial court's memorandum decision reflects significant time and effort trying to understand Cargolux's fee request. CP 4379-4401. The court ultimately rejected Cargolux's fee request not because it was unwilling to do the work, but because it could not make heads or tails of Cargolux's timesheets. CP 4392-98.

Cargolux also argues that the trial court set the bar too high, claiming that the "the trial court notified counsel . . . [that it] prefers, expects or requires more detailed analysis than required by our

Courts of Appeals in” **Absher**, 79 Wn. App. at 848. BR 42. Actually, the trial court stated that where, as here, a fee request involves “voluminous fee entries,” the parties and the court may need to engage in “something approaching” an hour-by-hour analysis of the timesheets:

Only then will the court be able, without being arbitrary or basing its decisions 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.*

CP 4394 n.29. The court was mindful that where timesheets are “sufficiently brief . . . the court reasonably and readily could determine independently the number of hours, type of work, and category of the performing attorney or paralegal.” CP 4399-4400. This was not such a case. *Id.*

Absher is easily distinguished in any event. **Absher** was resolved on summary judgment. **Absher**, 79 Wn. App. at 848. That fee request was not nearly as complex as Cargolux’s request:

The Absher court was reviewing a fee award of \$34,648.86 in 1995 (which the Court of Appeals reduced to \$23,697) where the highest rate before the court was that of a partner in practice for 20 years who billed 104.2 hours at \$225 per hour.

CP 4401 n.41. And **Absher** has little to do with the issue at hand here – **Absher** is about whether a party may recover fees for non-attorney time. 79 Wn. App. at 843.

In short, Cargolux's timesheets are indecipherable and its fee declarations fall far short. The trial court made a valiant effort to analyze fees, ultimately deciding that Cargolux had not met its burden. This Court should affirm.

B. The trial court correctly dismissed Cargolux's claim that Transiplex breached a duty of good faith and fair dealing in including the hardstand-litigation expenses in BOC. (BR 44-50).

Almost one year after the trial court first ruled as a matter of law that Cargolux had to pay non-hardstand-litigation expenses as BOC, Cargolux raised for the first time that it did not have to pay any litigation expenses if Transiplex breached a duty of good faith and fair dealing. The trial court correctly refused to instruct the jury on this issue, which plainly could have led to a verdict contradicting the court's orders. Caroglux did not preserve this argument in any event. This Court should affirm.

Cargolux confuses the trial court's straightforward rulings on this issue. BR 44-50. Judge Sharon Armstrong entered a single order resolving four partial summary judgment motions, ruling in

part that Transiplex could pass on as BOC litigation expenses related to the terminal, but that hardstand-litigation expenses were not related to the terminal. CP 935-44. Her ruling triggered various attempts to segregate litigation expenses, but neither party formally asked Judge Armstrong to segregate. RP 77.

Ruling on three additional partial summary judgment motions, Judge Hollis Hill reiterated Judge Armstrong's ruling, delineating terminal-related litigation expenses. CP 1490-91. Judge Hill referred to a pending motion for segregation, inviting the parties to submit still more briefing. RP 77-78. Both parties submitted additional briefing, but neither asked Judge Hill to segregate expenses. *Id.*

Almost a year after Judge Armstrong's ruling and six weeks after Judge Hill's ruling, Cargolux argued for the first time that it should not have to pay any litigation expenses, including those related to the terminal, if Transiplex breached a duty of good faith and fair dealing. CP 1771, 1781; RP 78-83. This new argument was apparently the product of new counsel taking a fresh look at the case. RP 78-79, 93. The trial court dismissed Cargolux's claim, ruling that it was inconsistent with the court's summary judgment rulings:

But this seems like it's already been a legal ruling, and there's no acknowledgement in the orders that it says that before the Court segregates fees and makes an award that there has to be a litigation over whether nothing at all need be paid because of a breach of duty of good faith and fair dealing. I don't see that. Neither order says that. It's over.

RP 89-90; *see also* RP 96, 100-01. In other words, Cargolux was too late, asserting a new defense after the court had already ruled that it had to pay litigation expenses related to the terminal.

Cargolux does not assign error to, or challenge in any way, the trial court's rulings that Transiplex properly passed on as BOC litigation expenses related to the terminal. BR 4-5. These orders are the law of the case. ***Beltran v. Dep't of Soc. & Health Servs.***, 98 Wn. App. 245, 254, 989 P.2d 604 (1999). This Court need not consider this argument further.

Cargolux misunderstands the court's ruling, arguing that it dismissed the good-faith claim because Judge Armstrong's ruling "omitted a discussion of how the billing of litigation costs related to Cargolux's claim for breach of duty of good faith." BR 45. Cargolux asserts that the court's "reasoning itself is logically flawed," arguing that the issue was not before the court, where Cargolux did not raise good faith on summary judgment. *Id.*

The trial court was well aware that Judges Armstrong and Hill did not decide good faith – the point, however, was that they decided the underlying issue – that Cargolux had to pay some litigation expenses. RP 89-90, 96, 100-01. Cargolux should have raised good faith on summary judgment as a defense to paying any litigation expenses. *Id.* But Cargolux waited – or thought of the argument too late. RP 93, 95. The trial court was well within its broad discretion in refusing to submit a question to the jury inviting a verdict directly contrary to the court’s prior orders.

In any event, Cargolux did not make out a breach of the duty of good faith. The duty of good faith “requires only that the parties perform in good faith the obligations imposed by their agreement.” ***Badgett v. Sec. State Bank***, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). It does not “inject substantive terms into the parties’ contract.” ***Badgett***, 116 Wn.2d at 569.

Transiplex’s only duty was to “deliver to [Cargolux] a written statement setting forth [Cargolux’s] pro-rata share of the actual Additional Expenses” CP 16. Transiplex did so. CP 41-45, 47-51, 53-55.

Transiplex told Caroglux BOC included litigation expenses. CP 41-45, 47-51, 53-55. The lease does not require Transiplex to

differentiate between hardstand and other litigation expenses, and electing not to do so is not “evidence” that “Transiplex did not believe that it had the right to pass on any of the costs of litigation.” BR 48-49. Rather, as the trial court correctly indicated, this distinction became significant only after two court rulings interpreting the lease:

And is there any basis for a jury to find a breach of a duty of good faith and fair dealing in association with the dispute over the meaning of the operating cost clause, which has now been twice ruled on as, basically, a legal decision?

RP 80. Disputing the meaning of a contract clause does not breach a duty of good faith. ***Badgett***, 116 Wn.2d at 569.

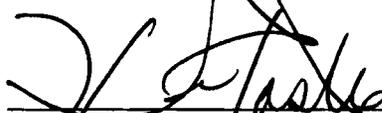
Cargolux’s remaining arguments merely rehash its argument that Transiplex could not include the hardstand-litigation fees as BOC. *Compare* BR 46-50 *with* Argument § D *supra*. Even if this Court were to reject the argument that hardstand-litigation expenses were incurred in terminal operations, Transiplex had a good-faith belief that it could include such expenses in BOC.

CONCLUSION

The Court should hold (1) as a matter of law that the May 30 and June 10 letters did not amend or repudiate the lease; (2) that the trial court erred in (a) refusing to admit Cargolux's Complaint, and (b) giving Jury Instruction 14; (3) as a matter of law that hardstand-litigation expenses are BOC; and (4) that Transiplex is entitled to attorney fees. The Court should also affirm the trial court's order denying Cargolux fees and the order dismissing Cargolux's claim for breach of the duty of good faith.

RESPECTFULLY SUBMITTED this 13th day of May, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 13th day of May 2011, to the following counsel of record at the following addresses:

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