

ORIGINAL

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/Cross-Appellant,

vs.

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

Appellant.

RESPONDENT/CROSS-APPELLANT BRIEF

MARSTON ELISON, PLLC

Jami K. Elison WSBA #31007
16880 NE 79th Street
Redmond, WA 98052
Telephone: (425) 861.5700
Facsimile: (425) 861.6969

The Collins Law Group, PLLC

Sheri Lyons Collins
Adam C. Collins
2806 NE Sunset Blvd., Ste. A
Renton, WA 98056-3180

Attorneys for Respondent

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COURT OF APPEALS
DIVISION I

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR AND RELATED ISSUES.....3

STATEMENT OF PROCEDURE.....4

STATEMENT OF FACTS.....7

 Transiplex v. Port of Seattle Litigation History.....9

 Transiplex charged tenants Port Litigation Expenses as BOCs..10

 Communications and conduct manifest mutual agreement to
 modify the lease termination date 13

AUTHORITY.....17

 Standards of Review 17

 B. The trial court properly found that the Port of Seattle
 hardstand litigation expenses were not chargeable
 BOCs under the parties lease 20

 1. Transiplex’s cited cases do not support its argument 22

 2. This is not a situation where access to Transiplex
 Terminal was ever restricted or denied 26

 C. The trial court properly submitted to the jury the
 question of whether the parties intended to terminate
 the lease on November 30, 2008 and the jury had
 substantial evidence justifying their verdict 28

 1. The May 30, 2008 letter demanded agreement to a
 base rent increase in order for Cargolux to remain in
 the premises past November 30, 2008 28

 2. The June 5 Complaint was not a rejection of the May
 30, 2008 letter—the Trial Court correctly excluded it..... 30

 3. Cargolux’s June 11, 2008 letter accepted the offer to
 terminate the lease on November 30, 2008 and on
 June 12, 2008 Transiplex acknowledged the
 acceptance 33

 4. There was sufficient consideration for the
 modification 34

 5. As an alternative to modification, the court would
 have been correct to rule that Transiplex repudiated

the contract and waived rights to rents after November 30, 2008.....	35
6. Transiplex repeatedly argued that an agreement could only come in one from and because that misstates the law, the Court correctly instructed the jury with Instruction No. 14 that intent to agree is what matters	36
D. Cargolux is entitled to an award of prevailing party fees	37
1. Cargolux made reasonable reductions to its fee total when petitioning for fees	38
2. The trial court imposed unreasonable burden and erred by stating analysis at zero and not amount requested.	41
E. The court erred in granting a directed verdict dismissing Cargolux’s claim for breach of duty of good faith and fair dealing regarding pass through of litigation costs as BOCs	44
1. Transiplex’s Duty to Administer and Operate the Terminal	46
2. Transiplex’s duty to limit BOCs to charges that actually pertain to the Terminal	48
3. Transiplex had a duty to disclose charges such that they could be reasonably understood and accounted for	49
F. The Court of Appeals should award Cargolux fees on appeal	50
CONCLUSION.....	50

TABLE OF AUTHORITIES

TABLE OF CASES

WASHINGTON

<i>Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.</i> , 85 Wn. App. 354, 933 P.2d 417 (1997).....	35
<i>Absher Constr. Co. v. Kent Sch. Dist. No. 415</i> , 79 Wn. App. 841, 848 (1995).....	42, 43
<i>Alexander v. County of Walla Walla</i> , 84 Wn. App. 687, 929 P.2d 1182 (1997).....	19
<i>Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000).....	19, 39, 44
<i>Arizona Oddfellow-Rebekah Housing Inc. v. U.S. Dept. of Housing and Urban Dev't</i> , 125 F.3d 771 (9 th Cir. 1997).....	23, 24
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991) (citations omitted).	44
<i>Barnes v. Treece</i> , 15 Wn.App. 437, 440, 549 P.2d 1152 (1976)....	24, 28, 29
<i>Burke v. Pepsi-Cola Bottling Co.</i> , 64 Wn.2d 244, 391 P.2d 194 (1964).....	18
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	18
<i>Celotex Corp. v. Catrell</i> , 477 U.S. 317, 106 S.Ct. 2548, 01 L.Ed.2d 265 (1986).....	20
<i>Chevron U.S.A., Inc. v. United States</i> , 20 Cl. Ct. 86 (1990).	25
<i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203, 242 P.3d 1 (2010).....	43
<i>Crest Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 115 P.3d 349 (2005).....	40
<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, 959 P.2d 1104 (1998).....	20
<i>Fischer-McReynolds v. Quasim</i> , 101 Wn. App. 801, 808 6 P.3d 30 (2000).	20
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).	19
<i>Knox v. Microsoft Corp.</i> , 92 Wn. App. 204, 962 P.2d 839 (1998).....	19

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	42-43
<i>Malnar v. Carlson</i> , 128 Wn.2d 521, 910 P.2d 455 (1996)	20
<i>Pacific Northwest Group A v. Pizza Blends, Inc.</i> , 90 Wn.App. 273, 951 P.2d 826 (1998)	37
<i>Phelps v. Wescott</i> , 68 Wn.2d 11, 410 P.2d 611 (1966)	18
<i>Quality Food Centers v. Mary Jewell T, LLC</i> , 134 Wn. App. 814, 817, 142 P.3d 206 (2006).....	37-38, 44
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007).	19
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	19
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 859 P.2d 1210 (1993).....	43
<i>Sea-Tac Air Cargo Ltd P'ship v. Port of Seattle</i> , 156 Wn. App. 1022, rev. denied, 169 Wn.2d 1031 (2010)(unpublished)	10
<i>Sherman v. Lunsford</i> , 44 Wn. App. 858, 723 P.2d 1176 (1986)	36
<i>State v. O'Connell</i> , 83 Wn.2d 797, 839, 523 P.2d 872, (1974).....	18
<i>State v. Howard</i> , 127 Wn. App. 862, 113 P.3d 511 (2005).....	31
<i>Valente v. Bailey</i> , 74 Wn.2d 857, 447 P.2d 589 (1968).....	17
<i>Wallace Real Estate Invests., Inc. v. Groves</i> , 124 Wn.2d 881, 881 P.2d 1010 (1994)	35
<i>Westco Realty, Inc. v. Dreyway</i> , 9 Wn. App. 734, 515 P.2d 513 (1973)....	29
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	20
STATUTES & RULES	
RCW 4.84.330	4, 37
RCW 5.40.010	30, 31
RAP 18.1	50
TREATISES AND MISCELANNEOUS	
1 A. Corbin, Contracts s 34 (1963).....	28
1 S. Williston, Contracts § 21, at 43 (3d ed. W. Jaeger 1957).....	28
77 A.L.R.3d 874.....	18

INTRODUCTION

Appellant Sea-Tac Air Cargo L.P. (“Transiplex”) is a sophisticated commercial landlord that repeatedly went too far in its dealings with tenant Respondent Cargolux Airlines International, S.A. (“Cargolux”). The Transiplex partnership consists of Canadian-based individuals who have operated facilities at Sea-Tac for many years generating passive income through substantial rents from “captive” tenants that desire a presence at the airport. Transiplex sued the Port of Seattle pursuing numerous claims with no benefit to tenants. (*Sea-Tac Air Cargo Ltd. Partnership v. Port of Seattle*). That matter was litigated to this same Court of Appeals. Transiplex lost. Transiplex surreptitiously charged tenants for these litigation costs by grouping them with “building operating costs” as part of the triple net obligations of the tenants under the parties’ lease.

Transiplex concealed and disguised those charges for years. The trial court correctly ruled that almost all those litigation costs were not chargeable building operating costs (“BOCs”) to the Transiplex tenants. Those costs exclusively concerned a piece of property (the “hardstand”) that was outside the contractually defined scope of the lease. The lease limited BOCs to “operating and administrative expenses of every kind and nature incurred by Landlord in the operation of the Terminal....” “The Terminal” was a defined geographic area that did not include the

hardstand. Transiplex's suit against the Port to reacquire, *inter alia*, its own leasehold interests over the hardstand and damages resulting from reduced rents payable by the tenants were not expenses incurred to operate its other leasehold property (the "Terminal") at the airport. The contract's definitions are legal questions suitable for summary judgment. This Court of Appeals should affirm on that question.

On a separate question, there is substantial evidence to support the jury's verdict that Cargolux and Transiplex modified their lease to terminate on November 30, 2008. When Cargolux objected to paying for the *Port of Seattle* litigation costs, Transiplex threatened to seize the property and raise the rent. In its relentless efforts to coerce a higher rental rate, Transiplex demanded that Cargolux accept the increase or, in the alternative, to vacate the premises by the specified date. Cargolux vacated by that date. Rather than admit the consequences of its own demands, Transiplex later argued to the jury that the date for vacating was actually a typographical error. Transiplex asked the jury to require that Cargolux continue paying Transiplex rent for the period of time after Cargolux vacated despite the agreement to the contrary. The jury rejected this. The jury properly found that, regardless of when the lease would have terminated under its original terms, the parties agreed to terminate the lease as of November 30, 2008 in accordance with an exchange of letters and the

actual conduct of the parties in 2008.

The lease between Cargolux and Transiplex contains a prevailing party attorneys' fee clause. Each party spent almost the same amount of money on attorneys' fees. Cargolux prevailed on the issues that constituted 88% of the case's value. Although the trial court found that Cargolux prevailed, and, although Cargolux documented actual fees incurred, the trial court failed to issue an attorneys' fee award. Rather than start the analysis at the total fees incurred and then proceed to make discounts, the trial court started at zero and declined to find that any fee award was proven under the improperly high level of rigor it imposed. On a motion for reconsideration the trial court identified the amount it would order (\$308,354) if required to make an award. An award is mandatory under the contract and on this question the Court of Appeals should reverse.

**APPELLEE'S (CROSS-APPELLANT'S) ASSIGNMENTS OF
ERROR AND SUB-ISSUES**

This court must now decide:

a) whether to affirm the summary judgment ruling that the *Port of Seattle* litigation costs were not chargeable building operating costs under the parties' lease;

b) whether substantial evidence supports the jury verdict that the parties modified their lease to terminate on November 30, 2008;

c) whether the court erred in denying Cargolux prevailing party attorney fees after determining that Cargolux was the prevailing party; and

d) whether the trial court erred in dismissing Cargolux's claims based on breach of the duty of good faith and fair dealing because questions of material fact existed on those claims.

Assignments of Error

1. The trial court failed to issue a fee award to Cargolux.

Sub-Issues: (i) Lease contained prevailing party fee clause so award was mandatory under RCW 4.84.330; (ii) Court ruled that Cargolux prevailed and Cargolux documented total fees incurred; (iii) Total fees for Cargolux and Transiplex are substantially similar; (iv) Cargolux calculated a discount proportional to results obtained and requested less than full award; (v) line-by-line analysis of billing records is not required by existing law but court erroneously required line-by-line analysis and then declined to accept it; (vi) trial court erred by starting calculation at zero and by imposing unreasonable burden for "reasonableness" ultimately ruling that no fee award was a reasonable result; (vii) court identified \$308,354 by making sweeping and overly aggressive reductions to the petition and should have at least ordered that sum.

2. The court erred in dismissing Cargolux's claim for breach of duty of good faith and fair dealing pertaining because it used the improper legal standard, the duty is implied in every contract, and Cargolux had demonstrated that there was sufficient evidence to take the matter to a jury.

STATEMENT OF PROCEDURE

On June 5, 2008, Cargolux pursued a temporary restraining order to prevent Transiplex from evicting Cargolux. CP 2217-25. The Complaint

used for the pursuit of this injunctive relief was not served on Transiplex. CP 92. As is common, injunctive relief was sought *ex parte*. After two hearings on this issue, the court denied Cargolux's motion for injunctive relief. The June 5, 2008 Complaint seeking injunctive relief was never served and never became operative. CP 92. Cargolux paid the disputed amount under a reservation of rights and pursued its claims against Transiplex with respect to the BOCs and the termination of the lease. CP 66-67. On June 20, 2008, Cargolux filed an Amended Complaint which was served on Transiplex. CP 1.

After numerous cross motions for summary judgment on both the BOC issue and the termination of the lease, on December 10, 2008, the trial court concluded that the portion of the litigation expenses dealing with the hardstand issue were not an expense of operating the Terminal. CP 935-44. The court held that under the language of the lease Transiplex's expenses in litigating the hardstand issue are not "Additional Expenses" because they relate to other property, not to the Terminal as "physically defined." CP 942. With regard to the parties' lease, the Court found that the 2000 Amendment created a lease relationship that was "a year-to-year tenancy with automatic renewal and no provision for increase in base rent." CP 938.

On October 9, 2009, after another round of summary judgment motions, the Court granted Transiplex's motion and held that the litigation expenses not associated with the hardstand could be charged as BOCs. CP 1491-93.

On December 11, 2009, the Court issued an order on Transiplex's November 6, 2009 summary judgment motion that, *inter alia*, dismissed Cargolux's fraud claim and declined to dismiss Cargolux's claim for breach of the duty of good faith and fair dealing. CP 1968-69. Nonetheless, the Court later dismissed that claim during trial. RP 100-03, 155-56, 159-60, 1144-45. During the trial's preliminary rulings the Court also determined that segregation of operating costs had been designated by the parties as a legal question for the Court to resolve after the jury trial. RP 100-01, 152.

After two and a half weeks of trial in January 2010, the jury returned a verdict in favor of Cargolux finding that the parties modified their lease to terminate on November 30, 2008 and in favor of Transiplex on two minor issues not subject to this appeal (dock bumper repairs and security deposit claims). CP 2397-98. Having decided that the lease had been modified, the jury did not reach the alternative question of whether Transiplex repudiated the lease. CP 3186.

On April 23, 2010, the trial court ruled that nearly all of the *Port of Seattle* litigation expenses arose from litigating the hardstand issue and ordered the BOCs associated with those expenses refunded to Cargolux. CP 3113-43 (Order), 3164-66 (Judgment).

The lease provides for a prevailing party attorneys' fees award. CP 259. Both parties moved for fees. CP 3167 (Cargolux); CP 4102 (Transiplex). Each party incurred almost the same amount of fees. The court found that Cargolux was the prevailing party but did not award any fees. CP 4364. The trial court did not find fees or time unreasonable, but ruled "reasonableness" had not been proven. *Id.* Cargolux moved for reconsideration. CP 4411. In its denial of reconsideration, the court noted that if remanded for an award it would establish a tentative lodestar amount of \$616,708 and reduce it by 50% to exclude any wasteful or duplicative hours and hours pertaining to unsuccessful claims and thereby award \$308,354 to Cargolux. CP 4391, 4466-67.

Both parties appealed. CP 4468, 4590.

STATEMENT OF FACTS

Respondent/Cross-Appellant Cargolux is an all-cargo air carrier operating at Seattle-Tacoma International Airport ("Sea-Tac") with four flights per week. CP 1. Appellant Transiplex leases a portion of the airport premises at Sea-Tac from the Port of Seattle under a "ground

lease” and owns the buildings located on the leased land, including a cargo terminal and offices. CP 215. From 1992 until November 30, 2008, Cargolux leased a cargo terminal and administrative offices at Sea-Tac from Transiplex. CP 548. The cargo terminal is industrial warehouse space with direct airport access. CP 877-79. Cargolux paid a base rent for the premises and an estimated amount for the monthly BOCs. CP 3629, 216. The actual monthly BOCs were reconciled in an annual statement in March of the following year resulting in either a refund to or a debit from Cargolux. CP 216.

The instant litigation arose as a direct result of two events that occurred on May 30, 2008. CP 1811-12. First, Transiplex sent Cargolux a Notice of Intent to Declare a Default (dated May 29, 2008) that threatened eviction if Cargolux did not pay \$76,564.92 in added BOCs that included amounts for the litigation expenses from the *Port of Seattle* lawsuit. CP 1811. Second, Transiplex sent Cargolux a letter proposing a modification to the lease. CP 87-88. Transiplex stated that the lease would expire on November 30, 2008 (a year early) unless Cargolux agreed to an increased base monthly rental rate of \$35,422 beginning December 1, 2008. *Id.* It is important to note that the parties’ lease did not contain a provision regarding rent increases, leaving any increases to the parties’ mutual agreement. CP 14-33, 35-36. Also, under the lease,

Transiplex had no right to terminate the lease without one year's prior notice. CP 35-36. Thus, to terminate the lease on November 30, 2008, notice would have been required prior to December 1, 2007. *Id.* No such notice was given.

A. Transiplex v. Port of Seattle Litigation History

In September 1982, Transiplex entered into a lease with the Port of Seattle (the "Port") for premises located at Sea-Tac Airport to be used for air cargo transport and related operations. CP 215. Transiplex sublet the premises to various air carriers and air cargo handlers. CP 2. Cargolux was one of its tenants at Sea-Tac until November 30, 2008. CP 1812.

In 2002, the Ground Lease between Transiplex and the Port was modified by the Seventh Amendment which deleted a portion of the property (the "hardstand") from Transiplex's leasehold. CP 549. This change had no effect on Cargolux operations but did affect the amount of rent that Transiplex could charge. *Id.* The hardstand is an area for aircraft parking and is located adjacent to the Terminal. *Id.* Under the Seventh Amendment, the Port resumed control over the hardstand including which aircraft could park there and when. CP 679, 924-28. This Court may take judicial notice that SeaTac, as an international airport, has many locations for parking aircraft.

On August 25, 2005, Transiplex filed a complaint for declaratory judgment and damages against the Port for claims arising from its lease with the Port. CP 3, 216-17. Transiplex sought, *inter alia*, rescission of the Seventh Amendment (regarding possession of the hardstand) and damages for breach of contract, breach of duty of good faith and fair dealing, and for tortious interference with contractual relations and business expectations. CP 326-37. Transiplex was seeking to charge tenants more money for a hardstand that the tenants already had a right to use from the Port. CP 878, 882. Unbeknownst to Cargolux, Transiplex was charging Cargolux for that litigation. CP 1808, 1810. On April 8, 2008, the court granted the Port's motion for summary judgment concerning its obligations to Transiplex regarding the aircraft cargo parking area (hardstand) deleted from the Lease. CP 4. This court affirmed that ruling. *Sea-Tac Air Cargo Ltd P'ship v. Port of Seattle*, 156 Wn. App. 1022, rev. denied, 169 Wn.2d 1031 (2010)(unpublished).

B. Transiplex charged tenants the Transiplex v. Port litigation expenses as BOCs

Upon initiation of its lawsuit against the Port, Transiplex began charging its tenants for the litigation fees and costs arising from that lawsuit. CP 60-61. The charges were included in the BOCs.¹ *Id.*

¹ Some of the litigation fees charged to Transiplex's tenants were for the costs associated with Transiplex's challenge to the Port's efforts to increase the ground rent. CP 60-61.

On March 28, 2006, after performing its annual reconciliation, Transiplex sent Cargolux an invoice for \$4,588.16 representing Cargolux's payment shortage for its portion of the 2005 "BOCs" for the Terminal. CP 4, 41-46. Transiplex explained the increased charges and square footage costs were due to "disputing a late notice received from the Port of Seattle regarding a land rental increase" and indicated that it "incurred professional fees" in the amount of \$142,291. *Id.* In the attached accountant's report, the amount of \$142,291 is described as "Legal-Lease Negotiations." CP 41-46

On March 28, 2007, Transiplex sent Cargolux an invoice for \$11,757.16 representing Cargolux's payment shortage for its portion of the 2006 "additional operating expenses" for the Terminal. CP 5, 47-51. Transiplex explained that the increased charges and square footage costs were due to "legal expenses associated with the Port of Seattle appealing the original ruling regarding the land rental increase." *Id.* Transiplex did not state the amount of the legal expenses; nor that it initiated the lawsuit in 2005; nor that the Port did not file an appeal; nor that the land rental increase issue was decided by summary judgment in December 2005; nor

The trial court held that these litigation charges, among others, were properly billed as BOCs and performed an allocation of the litigation expenses that specifically identified charges relating solely to the hardstand. CP 3113 *et seq.* Neither party has appealed this decision. Thus, this appeal concerns only those BOC amounts relating to the hardstand issue.

that most of the legal expenses were incurred by litigating the issue concerning the Port's hardstand aircraft parking area. CP 5, 47-51

On March 26, 2008, Transiplex sent Cargolux an invoice for \$76,564.92 representing Cargolux's payment shortage for its portion of the 2007 "additional operating expenses" for the Terminal. CP 5, 53-55. Transiplex explained that the unprecedented supplemental charges and increase in square footage costs were due to "legal expenses associated with the port of Seattle's breaches of the Transiplex (Seattle), Inc. Ground Lease at our facility at Sea Tac International Airport." CP 5, 53-55.

On April 8, 2008, Cargolux responded by letter to Transiplex stating that the referenced legal fees did not relate to the operation of the Terminal and may not be properly billed to Cargolux under the terms of the Lease. CP 5, 57-58. On April 15, 2008, Transiplex responded to Cargolux's letter and disclosed that the amount of the legal expenses associated with the lawsuit against the Port were \$162,898 in 2005; \$168,591 in 2006 and \$560,001 in 2007 and that Transiplex included all said expenses in the operating costs for the leased premises in those respective years. CP 5, 60-62.

All 1999 versions of the lease between Transiplex and Cargolux contain the following provision under Article 3.2:

In addition to the Base Rent . . . Tenant shall pay to the 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 . . . [Base Expenses]. Additional Expenses shall include, but not be limited to, ground rental and charges imposed by The Port of Seattle . . . 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**

CP 15-16. Nowhere does §3.2 of the Lease or any other provision of the parties’ agreement provide that expenses incurred in operation of Transiplex’s business as a property manager/developer are an “Additional Expense.” Section §3.2 does not allow Transiplex to charge Cargolux for operating and administrative expenses related to property, such as the hardstand, that is not part of the contractually defined Terminal.

Nonetheless, Transiplex continued to insist that Cargolux pay for the litigation expenses arising from Transiplex’s lawsuit against the Port over the hardstand aircraft parking area. CP 1811. By May 30, 2008, Transiplex threatened to evict Cargolux for failing to pay these charges. CP 64. The formal notice dated May 29, 2008 threatens all remedies which included locking out Cargolux from its operations. *Id.*

- C. Communications and conduct manifest mutual agreement to modify the lease termination date.

At some point prior to October 21, 1999, the Parties entered into discussions regarding a new lease for the premises. CP 548. The Parties were unable to locate an executed lease agreement dated October 21, 1999, but both Cargolux and Transiplex located different versions of an October 21, 1999 lease in their files. CP 548, 209. Cargolux's version was a five-year lease with a five-year option to renew. CP 548. Transiplex's version was a one-year lease. CP 209. Both versions set the base monthly rental rate of \$24,362.10. CP 3. In 2000, the parties executed "Amendment No. 1," which purports to amend a Lease Agreement dated October 21, 1999 "to reflect a one year notice of cancellation of the Lease." CP 2, 35-36. The 2000 amendment does not contain any provisions regarding rental rates or renewal rates or duration. CP 35-36. The only operative provisions of this Amendment address termination and cancellation. *Id.*

On May 30, 2008, in addition to the Notice of Intent to Declare a Default (dated May 29, 2008), Transiplex sent Cargolux a letter:

[Cargolux's] rights to occupy the premises will expire on November 30, 2008 ... [unless Cargolux] indicate[s] prior to June 11, 2008 if [Cargolux] wish[es] to renew [its] lease with Transiplex under the following conditions: [a five year lease at a base monthly rental rate of \$35,422.00 and estimated monthly additional operating costs of \$11,115.00].

CP 87-88. Transiplex also stated that it would market the premises to other potential tenants beginning June 11, 2008. *Id.*

On June 11th, Cargolux responded to Transiplex, by letter, stating that it would not pay the higher rental rate and, although Cargolux disagreed with Transiplex as to whether adequate notice of termination was provided under the 2000 amendment, would indeed vacate the premises by November 30, 2008, thereby relinquishing its rights to occupy the premises for another year. CP 69.

On June 12, 2008 Transiplex reiterated its position by notifying Cargolux that unless it accepted the higher proposed rents, the lease would terminate on November 30, 2008 because proper notice to terminate under the 2000 Amendment was sent. CP 92-93. Transiplex never withdrew nor revoked its clearly expressed intentions that Cargolux was not entitled to remain a tenant past November 30, 2008 at the original base rental rate of \$24,362.10. CP 1812. At trial, Transiplex's president stated that the November 30, 2008 date was a typographical error and that he intended to write 2009. RP 827-28. He admitted, however, that neither he nor anyone else at Transiplex ever indicated to Cargolux that there was a typographical error prior to November 30, 2008. RP 828-29.

Based upon this exchange of letters, Cargolux vacated the Transiplex premises on November 30, 2008. CP 1812; RP 1062-64.

C. Chronological Summary of Pertinent Facts

- **2000** Transiplex and Cargolux amend their lease to provide for a one year notice of termination. CP 35-36.
- **2002** Transiplex and the Port sign the Seventh Amendment deleting the aircraft hardstand parking area from the definition of the Transiplex Terminal. CP 549, 1807.
- **August 25, 2005** Transiplex files a complaint against the Port of Seattle. CP 3.
- **December 23, 2005** Transiplex is granted summary judgment against the Port on the rent issue. CP 268-70.
- **March 28, 2006** Transiplex sends annual BOC reconciliation statement for 2005 to Cargolux attributing raise in BOC rates to lease negotiations. CP 4, 41-46.
- **March 27, 2007** Transiplex sends annual BOC reconciliation statement for 2006 to Cargolux attributing raise in BOC rates to Port of Seattle appealing the rent increase issue. CP 4-5, 47-51
- **March 26, 2008** Transiplex sends annual BOC reconciliation statement for 2006 to Cargolux attributing raise in BOC rates to legal expenses associated with the Port's breach of the Transiplex lease. CP 5, 53-55.
- **April 8, 2008** Cargolux refuses to pay the additional BOCs because they do not relate to the operation of the Terminal and may not be properly billed to Cargolux under the terms of the Lease. CP 5, 57-58.
- **April 14, 2008** the court granted the Port's motion for summary judgment concerning its obligations to Transiplex regarding the aircraft cargo parking area (hardstand) deleted from the Lease. CP 3197.
- **April 15, 2008** Transiplex responded and disclosed that the amount of the legal expenses associated with the lawsuit against the Port were \$162,898 in 2005; \$168,591 in 2006 and \$560,001 in 2007 and that Transiplex included all said expenses in the operating costs for the leased premises in those respective years. CP 5, 60-62.
- **May 29, 2008** Notice of Intent to Declare a Default (received by Cargolux on May 30, 2008) presenting deadline of June 9, 2008 to pay disputed BOCs or face eviction/lockout. CP 6, 64.

- **May 30, 2008** Transiplex Letter demanding rate increase as of December 1, 2008 or early termination by November 30, 2008. CP 87-88.
- **June 5, 2008** Cargolux files for TRO with required corresponding Complaint to prevent threatened eviction/lockout on June 9th based on the language in the Notice of Intent to Declare a Default. CP 2217-25.
- **June 9, 2008** Court denies TRO and Cargolux pays discounted BOCs under protest. CP 6, 66-67.
- **June 11, 2008** Cargolux accepts Transiplex demand in the May 30th letter and agrees to vacate the leased premises by November 30, 2008. CP 6, 69.
- **June 12, 2008** Transiplex acknowledges Cargolux's decision to vacate by November 30, 2008, insists that Transiplex provided adequate notice of termination under the lease, and states that it has not been served the June 5th Complaint. CP 92-93.
- **June 20, 2008** Cargolux serves the Amended Complaint on Transiplex and provides a courtesy copy of the June 5th Complaint. CP 1.

AUTHORITY

Transiplex presents appeals that involve different standards of review because they challenge jury verdicts, judicial rulings regarding instruction and evidence, and also a grant of summary judgment on a legal question. Cargolux appeals the failure to provide a mandatory fee award and improper dismissal of claims on summary judgment.

A. Standards of Review

Generally, a verdict will not be set aside or overturned unless it can be said that substantial evidence does not support the verdict. *Valente v. Bailey*, 74 Wn.2d 857, 859, 447 P.2d 589 (1968). Our Supreme Court

established the controlling law in *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Overturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence.

Our Washington Supreme Court has explained:

This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. *Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

Id. (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872, 77 A.L.R.3d 874 (1974)). The jury rightly found that the parties modified their lease to terminate November 30, 2008. There was substantial evidence for them to conclude that given Transiplex's demand in May for a higher rent beginning December 1, 2008, the parties agreed to termination to afford Transiplex the opportunity to find a different tenant. It was solely within the jury's discretion to evaluate the veracity of the witnesses and to weigh the evidence.

Summary judgment orders or any other judgment of law,² however, are reviewed de novo. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A trial court properly grants summary judgment when no genuine issues of material fact exist, thereby entitling the moving party to a judgment as a matter of law. CR 56(c). All reasonable inferences from the facts are drawn in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). And questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997). The moving party bears the burden of demonstrating both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 207, 962 P.2d 839 (1998). A material fact for summary judgment purposes is one upon which the outcome of the litigation depends. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)

² A “JNOV is proper only when the court can find, as a matter of law, that there is neither evidence nor reasonable inference there from sufficient to sustain the verdict.” *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000) (citation and internal quotation marks omitted).

Once the moving party meets its burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the nonmoving party has the burden to show otherwise. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000). If a plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” summary judgment is proper. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)).

If reasonable minds could reach two different conclusions from the evidence concerning whether the claimant should prevail on the claim, then summary judgment is not appropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998). In reviewing the propriety of the trial court's dismissing Cargolux's good faith and fair dealing claim, this Court must consider the facts and all reasonable inferences from the facts in the light most favorable to Cargolux. *Malnar v. Carlson*, 128 Wn.2d 521, 524, 910 P.2d 455 (1996).

B. The trial court properly found that the *Port of Seattle* hardstand litigation expenses were not chargeable BOCs under the parties lease.

The trial court held that:

The Court concludes that litigation over the hardstand is not an expense of **operating** the terminal because the hardstand is not part of the Terminal. Thus Transiplex may pass through its legal expenses related to the Terminal as physically defined, but it may not pass through its legal expenses related to other property.

There is no genuine issue of material fact that legal fees related to the hardstand are not “Additional Expenses” under Paragraph 3.2 of the lease.

CP 942. The trial court correctly reasoned that just because a cost or expense may have some tangential relationship to the terminal by virtue of mere physical proximity, it does not follow that it is therefore an Additional Expense under §3.2 if it does not pertain to the operations of the Terminal as defined in the lease. *Id.* The lease itself recognizes this, and expressly excludes certain expenses that relate to Transiplex’s business with respect to the Terminal but are not expenses to operate it.

CP 15-16. Excluded expenses include: payments on principal, taxes on profits, costs of constructing an addition or modifying any building not required for operation or maintenance (such as a capital improvement), and amounts directly chargeable to another tenant.³ CP 16. These are other expenses that a landlord (Transiplex) would incur that might *pertain* to the

³ (a) Any expenditure made by the Landlord for payment of principal against that 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.

Terminal but are not considered operational expenses of the Terminal as defined in the lease.

The hardstand parking area is not a part of Cargolux's leasehold (nor the leasehold of any other Transiplex tenant), nor is it any longer under the control of Transiplex nor part of its leasehold. CP 38. Transiplex does not operate the hardstand parking area. *Id.* Thus, it can have no "operating expenses" related to the hardstand parking area. Nor can any expenditures to regain control over the area be considered "incurred . . . in the operation of Terminal." Transiplex's suit against the Port for control over the hardstand parking area reflects its dissatisfaction over the Seventh Amendment⁴ of its lease agreement with the Port, and the Port's subsequent conduct. The litigation over the hardstand parking area has nothing whatsoever to do with the operation of the Terminal, and Transiplex cannot show that it does. The *Port of Seattle* litigation was clearly an attempt by Transiplex to improve the value of its leasehold, by adding property to it (akin to a capital improvement).

1. Transiplex's Cited Cases Do Not Support its Argument

The fact remains that Transiplex has cited no legal authority, Washington or otherwise, in which *any* commercial lease provision was

⁴ Contrary to Transiplex's assertion, the mere act of Cargolux agreeing to the Seventh Amendment does not mean agreement with Transiplex's unilateral decision to file a lawsuit against the Port over an alleged breach of the Amendment.

interpreted to allow a landlord recovery of its expenses arising from its suit against a third party as a triple net operating cost.

Transiplex again relies principally upon an Arizona case in which the Ninth Circuit Court of Appeals interpreted “language routinely used in regulatory agreements between . . . [HUD] and owners of low-income housing projects.” See *Arizona Oddfellow-Rebekah Housing Inc. v. U.S. Dept. of Housing and Urban Dev’t*, 125 F.3d 771, 773 (9th Cir. 1997). *Arizona Oddfellow* did not concern a commercial lease at all. In that case, HUD provided mortgage insurance for petitioner’s housing project in exchange for requiring the project to place all its revenues in a fund that could be used only for “reasonable operating expenses” absent HUD’s prior written approval. *Id.* The court held that, under the “HUD regulatory agreement,” used by HUD with every housing project, costs incurred in defending discrimination suits and complaints arising from day-to-day business are “operating costs,” reasoning that they are “unavoidable costs of running a [low income housing] project.” *Id.* at 774-75. The court distinguished expenses incurred in defending discrimination lawsuits from actions that “benefit the owner,” such as actions to create or preserve the owner’s ownership interest. *Id.*

Transiplex’s reliance upon *Arizona* is misplaced. The Ninth Circuit was not ruling on the meaning of the “operating expenses” in a commercial

lease under Washington law. First, the purposes and types of agreements at issue are different: In *Arizona*, the court was interpreting a HUD agreement, not a commercial lease. The purpose of the HUD agreement was to protect its financial interest in the project. If the low-income housing project could not defend (or pay judgments upon) discrimination matters, the project could not fulfill its mandate and thus operate. On the other hand, the instant case concerns a commercial lease with none of those considerations. Moreover, lease Section 3.2, is not identical or even remotely similar to the provision of the HUD agreement at issue in *Arizona*. CP 15-16.

Even beyond the fact that the circumstances, contract and contract language at issue in *Arizona* are completely different from the instant situation, the court in *Arizona* held only that *defending* employment discrimination suits and complaints were operating expenses. However, it did not hold that instigation of tangential lawsuits to benefit itself could be an operating expense of the project – in fact the court noted that suits that benefit the owner were not operating expenses.

In the instant case Transiplex seeks this court to rule that Transiplex's initiation of litigation against the Port to reacquire, *inter alia*, its own leasehold interests over the hardstand and for economic damages resulting from reduced rents payable by the tenants to Transiplex is an

“operating expense” within the meaning of §3.2. Such litigation, which was voluntarily undertaken by Transiplex, is hardly either “unavoidable” or incurred in operation of the terminal. Indeed, Transiplex’s suit is more in the nature of an action that “benefits the owner” and incurred in operation of Transiplex. *See id.* at 774. The action was undertaken primarily for Transiplex’ economic benefit. It affected only Transiplex’s contracts and operations, not the terminal’s operation. *Arizona* does not support Transiplex’s claim for its litigation expenses. Indeed, the reasoning therein shows that Transiplex’s litigation expenses are not an operating expense. Cargolux should not be required to fund Transiplex’s litigation, which Transiplex undertook solely for its own economic benefit and not the benefit of the Terminal.

Transiplex also relies upon *Chevron U.S.A., Inc. v. United States*. The court in *Chevron U.S.A.* held that both parties to a contract to develop and operate the Naval Petroleum Reserve must bear the legal fees and judgment incurred in *defending* a lawsuit brought by two employees for injuries sustained on the job due to the operator’s negligence. *Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 86-87 (1990). The petroleum contract’s language bears no meaningful similarity to the language at issue in the instant suit. The contract did not address the types of expenses to be included as BOCs under a lease, but rather it required the parties to share

“all costs expenses incurred ... in the exploration, prospecting, development and operation of the Reserve as a unit under this contract.” *Id.* at 88. The Chevron court found that in accordance with that provision, the U.S. was required to share the costs of defending a third-party lawsuit. This would be analogous to Transiplex and Cargolux agreeing to share the cost of Cargolux’s operations at the terminal. Transiplex’s cited cases and argument provide no support for its position that its hardstand litigation expenses are Additional Expenses under the parties lease.

2. This is not a situation where access to the Transiplex Terminal was ever restricted or denied

Transiplex argues that expenses arising from Port litigation are operating expenses incurred in the operation of the leased Terminal under a series of strained hypotheticals. Transiplex contrives scenarios involving the Port’s “refus[al] to allow any cargo planes to use the taxiway accessing the Transiplex Terminal” or “block[ing] all cargo-carrying trucks from accessing the Terminal.” App Brief 43-44. In reality, Transiplex’s tenants parked their aircraft on multiple and various hardstand locations; moved cargo to and from the aircraft and the Terminal; and trucked cargo to and from the Terminal. CP 877-79, 881-82. Simply put, the Port controls the taxiways and hardstands and assigns aircraft parking locations based upon request, need, and priority. *Id.* Transiplex’s tenants, including Cargolux

simply ask the Port for parking locations and receive assignments based upon their requests. *Id.*

Transiplex was fighting with the Port over the right to tell its tenants where to park and the right to collect the appropriate fees and increase rent based on additional square feet of leasehold. Moreover, this is not a situation where the Port has prevented any of Transiplex's tenants from having access to the tarmac or taxiways. It is simply that Transiplex does not control the parking area. Cargolux and the other Transiplex tenants continued to conduct their air cargo transportation operations from the Transiplex terminal even after the Port acquired control over the hardstand. Transiplex's hardstand litigation with the Port was irrelevant to both the tenants' ability to conduct their business operations and the ability of the Terminal to operate.

The parties' lease requires that Additional Expenses, at minimum, be "operating" expenses incurred "in the operation of the Terminal." Transiplex assumes that any legal expenses *must* have been incurred in operation of the Terminal. That argument in the abstract cannot survive analysis of the actual lease which provides specific geographic definitions for the scope of the lease. Transiplex has incurred legal expenses for the hardstand litigation it voluntarily initiated against the Port, which is primarily for "expansion" of its leasehold in an effort to increase its

revenues. Transiplex's "management prerogative" does not include the right to assess *corporate* operating expenses, including expenses designed primarily for its own economic benefit and to increase the value of its leasehold, on its tenants in the guise of operating the *Terminal building*.

C. The Trial Court Properly Submitted to the Jury the Question of Whether the Parties Intended to Terminate the Lease on November 30, 2008 and the Jury Had Substantial Evidence Justifying Their Verdict.

Transiplex argues that plain contract language and unambiguous meaning must be altered because of an undisclosed and implausible typographical error; it argues that an attempt at injunctive relief negates ongoing and after-occurring discussions; and it ignores the June 12, 2008 letter (not referenced anywhere in their brief) where Transiplex had a chance to correct its previously stated intentions but instead affirmed the agreement to terminate the lease on November 30, 2008.

1. The May 30, 2008 Letter Demanded Agreement to a Base Rent Increase In Order for Cargolux to Remain in the Premises Past November 30, 2008.

Washington law holds: "[i]t is the objective manifestations of the offeror that count and not secret, unexpressed intentions." *Barnes v. Treece*, 15 Wn.App. 437, 440, 549 P.2d 1152 (1976) (citing 1 A. Corbin, *Contracts* s 34 (1963); 1 S. Williston, *Contracts* s 21, at 43 (3d ed. W. Jaeger 1957)). Contrary to the existing lease terms, Transiplex expressed

the clear message to Cargolux: pay a higher monthly rent starting December 1, 2008 or vacate by November 30, 2008. The jury's determination that Cargolux's acquiescence to this demand constituted an agreement was a reasonable finding.

“If a party's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of the party's mind on the subject.” *Barnes*, 15 Wn.App. at 440 (citing *Wesco Realty, Inc. v. Dreyway*, 9 Wn.App. 734, 735, 515 P.2d 513, 515 (1973)). In *Barnes*, a public offer made by a vice-president of a punchboard corporation to pay \$100,000 to anyone who could find a crooked punchboard was a binding offer, even though the vice-president intended it as a joke. *Barnes*, 15 Wn.App. at 440-41.

Transiplex's assertions of mistake or lack of intent fail because they were never expressed to Cargolux. Transiplex did, however, communicate an objective demand in its May 30, 2008 letter that Cargolux agree to a rent increase or to terminate the lease as of November 30, 2008. CP 87-88. That is what Cargolux understood that letter to say. RP 368. As a matter of law, the May 30, 2008 letter contained an offer to either agree to a higher rent or vacate by a specific date. It set a deadline to respond by June 11, 2008.

2. The June 5 Complaint Was Not a Rejection of the May 30, 2008 Letter – The Trial Court Correctly Excluded it.

Before answering the May 30, 2008 demand, and in response to the May 29 Notice of Intent to Declare Default, Cargolux attempted to advance the dispute by obtaining injunctive relief and correspondingly filed a complaint on June 5, 2008. Transiplex argues repeatedly that the Complaint constituted a rejection of the May 30, 2008 demand. The trial court correctly prevented confusion and excluded the irrelevant document. A complaint is generally not proof: “Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party.” RCW 5.40.010. This is not a case where the Complaint contained any admissions that would be relevant to the dispute at trial.

The June 5 Complaint did not address the demand presented in the May 30 letter. The Complaint was necessary to pursue injunctive relief to prevent a lockout on June 9, 2008 and presented a legal conclusion – that under the parties’ lease the termination date was November 30, 2009 and neither party had properly terminated as of December 1, 2007 in accordance with the termination provisions of the 2000 Amendment. CP 2222. The May 30 demand to terminate early rather than face a potential eviction for failure to pay a higher rent as of December 1, 2008 was

neither accepted nor rejected by the June 5 Complaint. Cargolux did not answer that until June 11 when Cargolux expressly answered the May 30 letter.

The Court refused to allow the admission of the June 5 Complaint on the basis of relevance and confusion under ER 403 and also under statutory mandate of RCW 5.40.010. RP 454-456, 1072-73. There was no error in refusing admission of the Complaint and no prejudice since it was duplicative.

An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. Because the error here resulted from violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent “harmless error beyond a reasonable doubt” standard. Instead, we apply “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.

State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511, 516 (2005) (internal citations omitted). The June 5, 2008 Complaint added nothing that would have materially affected the outcome here. Cargolux had until June 11, 2008 to answer the May 30 demand. Before answering the letter Cargolux was fully entitled to try to resolve a separate order through an injunctive order. Cargolux did not obtain that relief. Without injunctive relief, Cargolux was still facing the demands presented in the May 30, 2008 letter and specifically a deadline to respond by June 11, 2008.

On June 11, 2008 Cargolux expressly accepted the offer of the May 30, 2008 letter. CP 69. Consistent with the June 5 Complaint, Cargolux explained that its legal understanding was that its rights to occupy the space would have continued until 2009. Because the June 11, 2008 letter is in the record and was considered by the jury, the June 5 Complaint is duplicative even if it had been admissible. RP 365. Although Cargolux believed it had occupancy rights until 2009, it was not worth the risk of being locked out or the expense of litigating the question with an aggressive landlord. Consequently, regardless of who was right about when the lease would have expired otherwise, on June 11, 2008 Cargolux accepted the terms presented by Transiplex. If it had been error to excluded the June 5, 2008 Complaint, it certainly did not affect the outcome because it was duplicative of information already in the record.

There was never a rejection communicated to Transiplex⁵ – only an acceptance on June 11, 2008. And there was never a rescission by Transiplex of its demand—only an acknowledgement in the July 12, 2008 letter and then silence while Cargolux moved out by November 30, 2008.

⁵ Moreover, the June 5, 2008 Complaint was never served. It was filed on June 5, 2008 as a procedural prerequisite to allow Cargolux to move for a TRO and prevent the lockout threatened by Transiplex in its Notice of Intent to Declare Default over non-payment of disputed BOCs. Cargolux did not serve the Complaint at that time. In the June 12, 2008 letter from Jon Schneider on behalf of Transiplex, he admits neither he nor Transiplex had received the Complaint. CP 92. Scott Wilson at trial testified that, as of June 12, 2008, he had no idea what he was being sued for because he was not served with the Complaint. RP 888-89.

Against this overwhelmingly clear and consistent record, Transiplex asks this Court to conjure a “constructive notice” application and completely alter what actually happened. Even if Cargolux had sent the Complaint to Transiplex, there is nothing inconsistent in seeking injunctive relief first and later answering the May 30 demand. Transiplex suggests the June 5 Complaint is inconsistent with the position at trial. That is false. Transiplex only wanted to use the Complaint to try to create confusion where none existed.

3. Cargolux’s June 11, 2008 Letter Accepted the Option to Terminate the Lease on November 30, 2008 and on June 12, 2008 Transiplex Acknowledged the Acceptance.

The demand in the May 30, 2008 letter contained a clear ultimatum: either accept a base rent increase effective November 30, 2008 or the lease will terminate on November 30, 2008. The options were mutually exclusive. Transiplex admits that Cargolux, through its June 11, 2008 letter, accepted Transiplex’s offer terminating the lease. CP 2427. Cargolux stated in the June 11, 2008 letter that it was not interested in renewing, providing further confirmation of acceptance to vacate and terminate. CP 69. Cargolux vacated on November 30, 2008: the ultimate manifestation of the acceptance. Cargolux did not go to trial asking for remedies for early departure from the premises. The offer was accepted as presented except for the fact that Transiplex later wanted another year

of rent. Disagreements about what was legally required under the original lease terms do not in any case constitute different terms for the acceptance. Transiplex's June 12, 2008 response expressly acknowledged the agreement and difference of opinion on the legal conclusions when it said that 1) the lease terminates on November 30, 2008, and 2) the parties could go to court if necessary. CP 92-93. The June 11, 2008 letter was a clear acceptance of the November 30, 2008 termination date. And the June 12 Transiplex letter was an acknowledgement of that acceptance. The jury agreed. CP 2397.

4. There Was Sufficient Consideration for the Modification.

At trial, both Cargolux and Transiplex presented evidence that Cargolux would vacate the premises early and Transiplex could market the property to other potential tenants for the higher rent it was seeking. CP 87-88; RP 367-69, 866, 870-71, 1054-56, 1062-64. Without the modification, Cargolux had a right to remain in the premises after November 30, 2008 at the original base monthly rent. Giving up that right prematurely is a forbearance separate and distinct from terms of the lease. Transiplex had no right under the lease, without the modification, to make the premises available to other tenants while Cargolux still had a right to occupy it. By Cargolux vacating early, Transiplex was able to market the premises for the higher rent it sought. This is what Judge

Armstrong found in her December 2008 Order. CP 935. There are substantial legal and factual bases for the finding that there was a valid modification – offer, acceptance and consideration. Transiplex is not entitled to reversal of the jury verdict or a new trial on this issue.

5. As an alternative to modification, the court would have been correct to rule that Transiplex repudiated the contract and waived rights to rents after November 30, 2008.

A repudiation of a contract is an anticipatory breach, and “occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance.” *Wallace Real Estate Invests., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (citation omitted). An “anticipatory breach must be a clear and positive statement or action that expresses an intention not to perform the contract.” *Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.*, 85 Wn. App. 354, 365, 933 P.2d 417 (1997) (quoting *Wallace, supra*, at *id.*). Here Transiplex, by its May 30, 2008 letter clearly stated that Cargolux must either vacate by November 30, 2008, or pay a higher rent. CP 87-88. Transiplex thereby clearly and positively repudiated the idea that it would allow Cargolux to remain in the premises at the old rental rate after that date. On June 11, 2008, Cargolux informed Transiplex that it would vacate by November 30, 2008 rather than pay increased rent, per Transiplex’s May 30, 2008 letter. CP 69. Transiplex never withdrew its

repudiation - demand for higher rent. On the other hand, Cargolux immediately began looking for new space and moved out by November 30, 2008. Accordingly, the lease terminated as of November 30, 2008, the day Cargolux moved out, because Transiplex repudiated the lease and did not withdraw its repudiation before Cargolux acted in reliance upon it.

The parties' correspondence of May 30, 2008, June 11, 2008 and June 12, 2008 evidences an express waiver by Transiplex of its rights, if any, to demand rent from Cargolux past November 30, 2008. CP 87-88, 69, 92-93. An agreement to forego a known right constitutes a waiver that excuses the other party's obligations under the contract. *See Sherman v. Lunsford*, 44 Wn. App. 858, 723 P.2d 1176 (1986). Accordingly, Transiplex repudiated any later termination date and expressly waived its right to demand rent from Cargolux past November 30, 2008.

6. Transiplex repeatedly argued that an agreement could only come in one form and because that misstates the law, the Court correctly instructed the jury with Instruction No. 14 that intent to agree (substance) is what matters.

Transiplex repeatedly argued form over substance by suggesting that even if the parties intended an agreement the letters were insufficient. That is not Washington law. Jury Instruction No. 14 was a limited instruction pertaining to the effect of the integration clause of the lease, paragraph 32. CP 2391. Contract interpretation is a legal question

squarely within the court's bailiwick. The instruction states that if the jury finds that the May 30, 2008 and June 11, 2008 letters constitute an agreement between the parties, then the writing requirement in paragraph 32 is met and need not be considered. *Id.* It does not in any way suppose the agreement to modify exists nor does it comment on the evidence, which is why it starts out "if you find...." Transiplex does not cite a single case to refute this theory of contract formation.

In any event, paragraph 32 is unenforceable to require a writing to modify the contract because under Washington law, "a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification." *Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn.App. 273, 277-78, 951 P.2d 826 (1998). Transiplex argued with the court over this instruction⁶ even succeeding in getting the court to alter it per Transiplex's direction. There was no error.

D. Cargolux Is Entitled To An Award Of Prevailing Party Fees

The litigation arose from a dispute over a commercial lease that contained a prevailing party attorney fee clause. CP 28. "And while the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees." *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817,

⁶ RP 1268-83 (note: instruction 14 was formerly 13).

142 P.3d 206 (2006). The trial court erred by failing to provide a fee award. Cargolux prevailed at trial, proved entitlement to fees under a binding contract, and documented the total fees incurred providing descriptions for services performed. The total fees by each side in this litigation are strikingly similar and the trial court would have been justified in concluding that the fees incurred are presumptively reasonable in this circumstance.

1. Cargolux Made Reasonable Reductions to its Fee Total When Petitioning For Fees.

Four contract claims were subject to the lease and, therefore, the lease's attorney fee provision: (1) modification/repudiation of the termination date/lease; (2) overcharging of building operating costs (BOCs); (3) building repair costs beyond the security deposit; and (4) responsibility for dock bumper repairs. CP 3186-87. The value of these claims can be established by identifying the damages associated with each of these four contract claims.

Throughout the litigation Transiplex asserted that Cargolux owed \$425,064.00 in base rent (*see* CP 3168, 3181-82) and also additional charges for BOCs for the period December 2008 through November 2009. CP 3168, 3184. This was by far the largest contract claim in this lawsuit and the one that made litigation necessary. The value of this

claim was \$627,444.87 given the actual BOC charges for 2009 depicted on Transiplex's Trial Ex. 244. CP 3184. The jury found in Cargolux's favor on this claim and held that Cargolux was not responsible for rent and BOCs in the period December 2008 – November 2009. CP 3186-87.

The second largest contract claim was the dispute over BOC overcharges from 2005 through November 2008. This Court found the total dollar value at stake for the BOC issue was \$278,019.00. CP 3113-66. The Court held that Transiplex overcharged Cargolux for unauthorized BOC charges in 2005 totaling \$5,685.69, in 2006 totaling \$27,951.00, and in 2007 totaling \$89,985.00. *Id.* The Court also found that, of the \$122,438.69 in Port Litigation-related BOC charges Transiplex sought to pass through to Cargolux for January through November 2008, \$97,951.69 was disallowed. *Id.* Cargolux, therefore, proved that \$224,582.00 of the total \$278,010.85 charged or sought to be charged by Transiplex as BOCs in the period 2005 through 2008 were improper. The improper Port litigation-related BOC charges for 2009 (which Transiplex also sought to recover but was denied as a result of the jury verdict terminating the lease November 30, 2008) were the sum of \$18,313.49 plus \$4,866.17 totaling \$23,179.66. CP 3184. Thus, Cargolux was not required to pay a total of \$247,761.66 in improper Port BOC charges by virtue of winning the BOC claims.

The third dispute pertained to building repair costs. Cargolux agreed throughout that Transiplex could use the security deposit of \$30,336.27 and return any unused portion. Transiplex was successful in proving that \$61,663.73 over the security deposit was owed for building repair costs. CP 3186-87. Transiplex was also successful on an incidental repair issue in proving that it was not responsible for the dock bumper repairs totaling \$9,166.47. *Id.* The Court also found that, with regard to the BOC issue, Transiplex had justifiably charged \$53,437.00 of the \$278,019.00 it charged or attempted to charge Cargolux. CP 3113-6. Accordingly, the total value of the claims on which Transiplex was successful was \$124,267.20.

Comparing the value of the claims on which the parties respectively prevailed, Cargolux prevailed on \$875,206.53 and Transiplex prevailed on \$124,267.20. Of the total value of the all the claims of \$999,473.73, then, Cargolux prevailed on 88%. Clearly, Cargolux was the substantially prevailing party. CP 4364, 4374 *citing Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005).

Cargolux initially requested that the trial court award fees and costs to Plaintiff in the amount of \$644,655.22. CP 3176. That amount constituted a 12% reduction from the total fees incurred, and because the percentages relate to the values at issue in this lawsuit, the requested

award already acknowledged a set-off for small successes by Transiplex. After performing a line-by-line analysis and deducting entries that were duplicative or on unsuccessful theories, Cargolux offered a reasonable reduction requested an award of \$622,540.65. CP 4432 (fees at \$616,708) and CP 4423 (cost portion).⁷ Based on the trial court's own experience with protracted commercial litigation, the trial court could have again found the amount requested presumptively reasonable especially given the similarity to the other side's fees. However, the trial Court adopted a higher level of rigor in considering fee requests than is required under Washington law.

2. The Trial Court Imposed Unreasonable Burden and Erred by Starting Analysis at Zero and Not Amount Requested.

The trial court identified certain billing descriptions or issues where proof was insufficient, but nothing in the court's Memorandum and Order justified a complete, punitive denial of a fee award to Cargolux. The trial Court failed its independent burden: "An award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers, and explain

⁷ The trial court apparently never acknowledged that the request for fees set at \$616,708 was a reduced request resulting from a line-by-line analysis and self-imposed discounts. The Court stated that it would establish a tentative lodestar amount of \$616,708 and reduce it by 50% to exclude any wasteful or duplicative hours pertaining to unsuccessful claims and thereby award \$308,354 to Cargolux. CP 4391, 4466-67. The Court accepted Cargolux petitioned number but did not recognize that it was already a reduction.

why discounts were applied.” *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848 (1995). The trial court did not do that.

Because the trial court notified counsel in fn.29 of its Memorandum and Order (and elsewhere in the Order) that the Court prefers, expects or requires more detailed analysis than required by our Courts of Appeals in *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848 (1995) (containing what this trial court considers to be the ‘overly optimistic’ direction that an “explicit hour-by-hour analysis” is unnecessary [add cite]), Cargolux submitted an additional accompanying Declaration and chart from counsel. CP 4418-32. Cargolux initially submitted all of its legal bills that documented the total fees incurred, the billers, and provided detail descriptions for services performed. CP 3231-414. Cargolux responded to the trial court’s specific request by segregating into categories the type of work performed by each attorney and the associated hours. Despite this, the trial court refused to award any fees whatsoever to Cargolux and thus abused its discretion.

The trial court did not follow *Absher*, 79 Wn.App. 841, 848 (1995). Cargolux met its burden: “Counsel must provide contemporaneous records documenting the hours worked.” *Mahler v.*

Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Beyond that, the burden shifts to the court with regard to reductions from the fee request:

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. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848 (1995) (emphasis added).

Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Mahler v. Szucs* citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (emphasis added).

Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining a successful result may, in rare instances, be adjusted upward or downward in the trial court's discretion. *Mahler v. Szucs*, 135 Wn.2d at 434 (emphasis added).

Our law assumes that, even if it takes a few rounds to get it correct, obtaining the correct outcome is what the law requires. *See id.*, 135 Wn.2d at 435 reinforcing that remand may be the required solution (“absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record”). An award of some amount is required⁸: “And while the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees.”

⁸ While *Cornish Coll. Of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 242 P.3d 1 (2010), cited by *Transplex*, is indeed a new case it did nothing to change the law on attorney fees. *Cargolux* made deductions either on a percentage or line-item basis for unsuccessful claims. *Cargolux* met its burden. Requiring something more than the proof presented by *Cargolux* for proof of “reasonable” treads into something similar to proving beauty. Our law is not that abstract.

Quality Food Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

E. The Court Erred in Granting a Directed Verdict Dismissing Cargolux's Claim for Breach of Duty of Good Faith and Fair Dealing Re. Pass Through of Litigation Costs as BOCs.

Washington law imposes a duty of good faith and fair dealing that requires parties to “perform in good faith the obligations imposed by their agreement.” *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (citations omitted). Bad faith includes, “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.” Restatement (Second) of Contracts §205, cmt. (d). Cargolux’s claim that Transiplex breached its duty of good faith and fair dealing was based upon, *inter alia*, by 1) not performing its management and administrative duties under the lease in good faith by committing the Terminal and its tenants to wasteful, commercially unreasonable litigation that had only the projected benefit to Transiplex and not the Terminal; 2) failing to limit building operating costs to those incurred in the operation of the Terminal as required in the lease; and 3) failing to account for the actual building operating costs as required under the lease. RP 1138-43.

The trial court improperly dismissed these claims at trial. *See Aluminum Co. of Am.*, 140 Wn.2d at 529. To dismiss even a portion of Cargolux's breach of duty of good faith and fair dealing claim, the trial court was required to determine that as a matter of law, that there is neither evidence nor reasonable inference therefrom to present the issue to a jury. *See id.* The trial court, however, made no such determination. To the contrary, the Court improperly used its discretion to dismiss a portion of Cargolux's claim based upon two factors.

Firstly, and primarily, the court reasoned that the claim should be dismissed because an earlier ruling in a summary judgment order dated October 9, 2009 which interpreted the parties' lease and set forth a list of litigation costs for which TransiPLEX was permitted to bill to Cargolux omitted a discussion of how the billing of litigation costs related to Cargolux's claim for breach of duty of good faith and fair dealing. RP 82, 98-101. The court not only utilized an improper standard of dismissal, but the reasoning itself is logically flawed in that the summary judgment motions that were subject of the October 9 order did not contain any request for judgment on the breach of duty of good faith and fair dealing claim. Thus the issue was not before the court on summary judgment and Cargolux's claim for breach of duty of good faith and fair dealing was properly not part of any discussion in the October 9, 2009 order.

The second factor was that in the order dated December 11, 2009, that denied Transiplex's request for summary judgment on Cargolux's claim for breach of duty of good faith and fair dealing, the Court did not explain therein that the claim for breach of duty of good faith and fair dealing related to Transiplex's improper billing of costs from the Port litigation. RP 83. Even leaving aside the fact that Cargolux had defeated summary judgment through its presentation of specific evidence supporting its claim for breach of duty of good faith and fair dealing which included discussion of that very point, the December 11 order was a summary disposition that contained no discussion whatsoever. CP 3759-60. The Court erred in failing to use the proper legal standard in dismissing a portion of Cargolux's claim for breach of duty of good faith and fair dealing. In doing so, examining no new evidence submitted by either party, it dismissed a claim with respect to which Cargolux had shown an issue of material fact and which had survived summary judgment. Cargolux, in fact, had a valid claim for breach by Transiplex of its of duty of good faith and fair dealing concerning its conduct related to charging Cargolux for the costs of its litigation with the Port.

1. Transiplex's Duty to Administer and Operate the Terminal

Under Washington law, Transiplex was required to carry out its contractual operating and administrative duties and the exercise of its

“management prerogatives” in good faith. Transiplex even injected the additional caveat that such duties be carried out reasonably, which is consistent with Cargolux’s understanding of the standard of care under which Transiplex agreed to perform those duties under the lease; stating:

We are very mindful of our obligation to Cargolux and the other fine tenants to keep our expenses as reasonable as possible. We do not lightly incur substantial expenses without careful consideration of the value to the tenants and our operating facility. CP 1830.

It was not good faith for Transiplex to engage in wasteful, protracted litigation. Transiplex spent almost \$ 2,000,000.00⁹ over four years pursuing its litigation mainly over seeking to reacquire for itself a piece of property not even part of the Terminal, the hardstand.¹⁰ CP 3772. Even if those problems were part of Transiplex’s contractual duty to operate and administer the Terminal¹¹ and that it was Transiplex’s management prerogative to do so, it had a duty per agreement of the Parties to resolve those problems in a reasonably efficient and effective

⁹ Transiplex has submitted its Port litigation bills to the trial court, and these amounts are verifiable therein. CP 2746-47, 2754, 2760-62, 2764.

¹⁰ To the extent that Transiplex asserts that its litigation over the hardstand was to ensure its tenants could park planes on it, there was never any evidence that the Port of Seattle would not park tenants’ planes there when the tenants asked. Transiplex spent the vast majority of the litigation expenses litigating a dispute that did not even exist, which the Court agreed when it granted summary judgment against Transiplex on the hardstand claims in the Port litigation. Transiplex also argued in its litigation with the Port that on one or two occasions some dump trucks blocked access to the Terminal or tenants complained about fumes in the building or a particular tenant (not Cargolux) had an issue with its relationship with the Port of Seattle.

¹¹ Cargolux contends that the expenses were not incurred in operation of the Terminal as required by the lease.

manner in the best interests of the Terminal. Transiplex's choice, however, was to bring a lawsuit for damages that would accrue to itself, with little, if any, benefit to the tenants or the Terminal's operations. While benefit may not matter whether something qualifies as an "additional expense" under the lease, it does matter when measuring good faith in selecting and pursuing a course of action and incurring the associated expense, and this is a disputed issue of fact. As there is a disputed issue of fact as to whether Transiplex's litigation folly was embarked upon in good faith, the trial court should not have dismissed Cargolux's claim for breach of duty of good faith and fair dealing.

2. Transiplex's Duty to Limit BOCs to Charges That Actually Pertain to the Terminal

Paragraph 3.2 of the parties' lease permitted Transiplex to charge Cargolux its excess operating and administrative expenses incurred in operation of the Terminal as Additional Expenses, but did not permit Transiplex to pass to Cargolux as additional expenses charges that do not pertain to operation of the Terminal. CP 15-16. In charging Cargolux for expenses for the hardstand litigation that were not incurred in operation of the Terminal, Transiplex breached its duty of good faith and fair dealing. Evidence shows that Transiplex did not believe that it had the right to pass

on any of the costs of litigation; for example, hiding the charges in its invoices for additional operating costs, CP 41-46, 47-51, 53-55.¹²

3. Transiplex Had A Duty to Disclose Charges Such That They Could Be Reasonably Understood and Accounted For

Paragraph 3.2.1 required Transiplex to “deliver to [Cargolux] a written statement setting forth [Cargolux]’s pro-rata share of the actual Additional Expenses in excess of the Base Expenses during the preceding year.” CP 1627, 1649. Transiplex’s accounting reports for 2005 and 2006, in particular, hid the actual nature of the expenses incurred in the Port litigation, calling them “lease negotiations” and “appeal” of a ruling regarding a rent increase. CP41-51. It was not until a letter dated April 15, 2008 that Transiplex revealed for the first time that they were litigation expenses from a suit with the Port that involved the hardstand. CP 1830-32. To Cargolux, the 2005 and 2006 charges appeared to contain charges for the lease negotiations on rent. Given the attempt to conceal the actual nature of the charges in violation of the terms of the lease and given the questions of fact surrounding whether Transiplex intentionally hid these charges in bad faith until questioned by Cargolux, there is sufficient evidence to allow the claims to go to the jury for resolution.

¹² The only information regarding the litigation expenses that Transiplex disclosed was that there were some legal fees related to a dispute over a rental increase. Notably absent was any reference to Transiplex’s attempts to regain the hardstand, which accounted for the majority of the litigation expenses.

As Cargolux's breach of duty of good faith and fair dealing had not been addressed in the October 9, 2009 summary judgment order or related motions, and had survived summary judgment per the December 11, 2009 order, and as there was sufficient evidence of such a breach to go to a jury, the trial court improperly dismissed the claim as it related to Transiplex passing through the costs of its litigation with the Port of Seattle to Cargolux. This Court should remand on this issue.

F. The Court of Appeals should award Cargolux fees on Appeal.

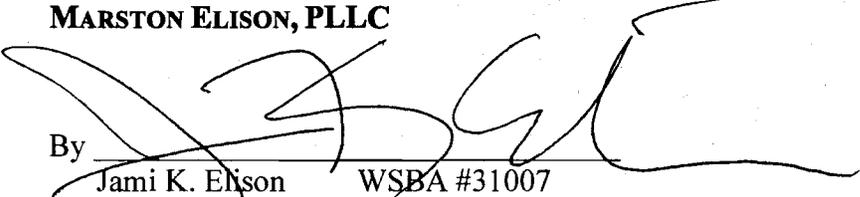
Under RAP 18.1 Cargolux will be entitled to fees for prevailing on appeal and respectfully requests the same.

CONCLUSION

This Court should affirm the trial court's ruling on the hardstand BOCs and uphold the jury verdict. Cargolux is entitled to pursue additional relief arising from Transiplex's wrongful conduct. Cargolux is entitled to a fee award below and on appeal.

DATED this 25th day of February ~~January~~ 2011.

MARSTON ELISON, PLLC

By 

Jami K. Elison WSBA #31007
Attorneys for Respondent/Cross-Appellant
Cargolux Airlines Intl., S.A.

PROOF OF SERVICE

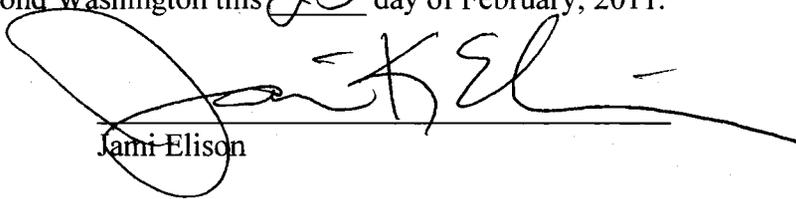
I certify under penalty of perjury that on the 25th day of February, 2011, I served a copy of Respondent/Cross-Appellant's Brief via mail on the following:

Attorneys for Appellant, Transiplex (Seattle)
Kenneth W. Masters
Masters Law Group
241 Madison Avenue North
Bainbridge Island, WA 98110

F. Ross Boundy
Davis Wright Tremaine, LLP
1201 3rd Ave, Ste. 2200
Seattle, WA 98101

Sheri Lyons Collins
Adam C. Collins
The Collins Law Group, PLLC
2806 NE Sunset Blvd., Ste. A
Renton, WA 98056-3180

Dated at Redmond Washington this 25th day of February, 2011.



A large, stylized handwritten signature in black ink, appearing to read 'Jami Elison', is written over a horizontal line. The signature is highly cursive and loops around the line.

Jami Elison