

CASE NO. 70854-6-1

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

DIMENSION FUNDING, LLC,

Respondent / Plaintiff

v.

CALL-O-CALL, INC., a New York corporation,
ANDREY TOVSTASHY, and DOES 1 to 10

Appellant / Defendants.

REPLY BRIEF OF RESPONDENT
DIMENSION FUNDING

Roy T. J. Stegena, WSBA #36402
Krista L. White & Assoc., P.S.
Attorneys for Respondent

Krista L. White & Assoc., P.S.
1417 4th Ave.
Seattle, WA 98101
Telephone: (206) 602-1521

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 19 AM 11:00

TABLE OF CONTENTS

	PAGE NO.
TABLE OF AUTHORITIES	i-iii
I. ASSIGNMENTS OF ERROR	iv
II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR	iv
III. COUNTER STATEMENT OF THE CASE	2
III. ARGUMENT	8
A. STANDARD OF REVIEW FOR GRANT OF SUMMARY JUDGMENT.	8
B. THE UNDISPUTED FACTS ESTABLISH THAT DIMENSION NEITHER REPUDIATED NOR OTHERWISE BREACHED THE TERMS OF THE LEASE.	8
C. THE UNDISPUTED FACTS ESTABLISH CALL-O-CALL'S BREACH AND REPUDIATION OF THE LEASE.	17
D. MATERIAL FACTS REGARDING THE NUMBER OF PIECES OF EQUIPMENT LEASED WERE NOT GENUINELY IN DISPUTE.	19
E. CALL-O-CALL'S CONTENTION THAT THE LOWER COURT'S DECISION IS A WINDFALL FOR DIMENSION IS WITHOUT MERIT.	25
F. CALL-O-CALL'S CLAIM OF A VERBAL OPTION TO PURCHASE THE EQUIPMENT, AND THAT	

ITS RETURN OF CERTAIN EQUIPMENT WAS RESTRICTED BY A THIRD PARTY CONTRACT ARE WITHOUT MERIT.	27
---	----

IV. CONCLUSION	32
----------------	----

TABLE OF AUTHORITIES

A. CASES	PAGE(S)
1. WASHINGTON STATE SUPREME COURT	
<u>Berg v. Hudesman</u> 115 Wn. 2d 657, 801 P.2d 222 (1990)	29
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn. 2d 291, 300, 45 P.3d 1068 (2002)	8
<u>Jones-Scott Co. v. Ellensburg Milling Co.</u> , 116 Wn. 266, 199 P. 238 (1921)	15
<u>Kilgas v. Mother's Grandma Cookie Co.</u> , 156 Wn. 8, 285 P. 1118 (1930)	15
<u>Walker v. Herke</u> , 20 Wn. 2d 239, 147 P.2d 255 (1944)	13, 14
2. WASHINGTON STATE COURT OF APPEALS	
<u>CKP, Inc. v. GRS Const. Co.</u> 63 Wn. App. 601, 821 P.2d 63 (1991)	9
<u>Hemisphere Loggers & Contractors v. Everett</u>	

<u>Plywood Corp.</u> , Wn. App. 232, 499 P.2d 85 (1972)	12
<u>Krikava v. Webber</u> , 43 Wn. App. 217, 716 P.2d 916 (1986)	30
<u>Lovric v. Dunatov</u> , 18 Wn. App. 274, 282, 567 P. 2d 678 (1977)	9
<u>TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.</u> , 140 Wn. App. 191, 209, 165 P.3d 1271 (2007)	10, 23
<u>United Financial Cas. Co. v. Coleman</u> , 173 Wn. App. 463, 471, 295 P.3d 763, 768 (2012)	29
<u>White v. Kent Medical Center, Inc.</u> , 61 Wn. App. 163, 810 P.2d 4 (1991)	8, 21
 B. COURT RULES	
CR 13	29
CR 56	8
 C. MISCELLANEOUS	
Restatement (Second) of Contracts § 235(2) (1981)	11, 23

I. ASSIGNMENT OF ERROR

Respondent Dimension Funding assigns no error to the decision of the court below.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the court below correctly concluded that Dimension, having already performed all of its contractual obligations, did not repudiate any obligations by announcing that it would not accept anything less than the return of all the leased equipment as satisfaction of Call-O-Call's obligation to return that equipment at the end of the lease.
2. Whether the parties' factual dispute over the number of separate items comprising the leased equipment, as identified in Schedule A to the lease, was immaterial where the court below properly viewed the evidence in the light most favorable to Call-O-Call as

the non-moving party, and accepted as true Call-O-Call's version of the disputed fact, and where Call-O-Call failed to return any of the equipment no matter how many separate items it consisted of.

3. Whether the court below erred in directing Call-O-Call to perform its contractual obligation to return the equipment to Dimension on the basis that returning the equipment may be a futile act because Dimension may not be satisfied with Call-O-Call's performance of that obligation.

III. COUNTER-STATEMENT OF THE CASE

Respondent Dimension Funding ("Dimension") and Appellant Call-O-Call entered into a written commercial lease agreement pursuant to which Dimension leased to Call-O-Call certain items of phone equipment for an initial term of 36 months, CP 142. The lease provides that Dimension shall purchase the equipment from a supplier, NACT Telecommunications, Inc. ("NACT"), and lease it to Call-o-Call. CP 142. The leased equipment is specifically identified in Schedule A to the lease. CP 148.

Defendant Andrey Tovstashy executed a personal guarantee pursuant to which he guaranteed the performance of Call-O-Call's obligations under the lease. CP 151.

This written lease contains several terms of particular relevance to this appeal. Call-O-Call does not contend that any provisions of the lease are ambiguous or require interpretation through extrinsic evidence or otherwise.

The lease contains an integration clause stating that the written lease constitutes the parties' entire agreement, which shall not be modified except by a signed writing, CP 143, ¶ 20. No such modifications were made.

Paragraph 16 of the lease provides that if Call-O-Call does not return the equipment to Dimension within 10 days of the expiration of the initial 36 month lease term, Dimension had the option of renewing the lease for an additional 12 month term. Call-O-Call did not return the equipment at the end of the initial 36 month term, and Dimension exercised its option to renew the lease for an additional 12 month term. CP 139, ¶ 16.

The lease also states in ¶ 16 that Call-O-Call “. . . acquires no ownership rights in the Equipment, and has no option to purchase it.” Paragraph 16 requires Call-O-Call to return the equipment to Dimension at the end of the lease by *shipping* it back to Dimension at a specified address. The lease does not require anything further in that regard. In particular, it does not require that Call-O-Call first offer to ship the

equipment or obtain Dimension's agreement to accept it in satisfaction of Call-O-Call's obligation to return it. Indeed, the lease does not require that Dimension accept delivery at all. Rather, Call-O-Call's contractual obligation at the end of the lease is to simply ship the leased equipment back to Dimension.

The lease states in ¶ 3 that there are no side agreements between Call-O-Call and the equipment's supplier, NACT. It further provides that 'no representation, guarantee or warranty' made by NACT is binding on Dimension, and that no breach by NACT or anyone else will excuse Call-O-Call's performance of its obligations under the lease. *Id.*

As the initial 36 month lease term was nearing its expiration, the parties communicated with each other about whether Call-O-Call would return the equipment to Dimension at that time, or retain it and have the lease renewed for another 12 month term, at Dimension's option. Although the lease itself did not provide Call-O-Call an option to purchase the equipment at an agreed price, the parties also discussed the possibility of Call-O-Call purchasing the equipment from Dimension at the end of the lease term, but were unable to agree on a purchase price.

The parties were also unable to resolve a disagreement over whether the leased equipment identified on Schedule A to the lease, CP 148,

consisted of two or three separate items. More specifically, the dispute involved whether the equipment identified somewhat cryptically as “E1/T1, 155 BOARD” on Schedule A to the lease consists of a single item or two separate ones. Dimension believed, based on the report of an inspector it hired, that the ‘board’ consisted of two separate items. CP 139, ¶ 15.

Call-O-Call stated in a series of written communications that it was either unable or unwilling to return one of the items of equipment, i.e. the ‘rack,’ because of an alleged contractual obligation Call-O-Call owed to NACT under a separate contract to which Dimension was not a party. CP 161, 164 - 167, communications dated January 19, 24 and 26, 2007.

Dimension was neither a party to nor beneficiary of any contract or other agreement between Call-O-Call and NACT. CP 137, ¶ 8. Furthermore, the lease specifically states that there were no side agreements between Call-O-Call and NACT, and that even if there had been such an agreement, it would not be binding on Dimension. It further provided that a breach of any such agreement, had one existed, would not excuse Call-O-Call from performing its obligations under its lease with Dimension in any event. CP 142, ¶ 3.

It is undisputed that Call-O-Call made none of the required lease payments during the 12 month renewal term, even though it retained

possession of all of the equipment during that time, CP 139 ¶ 17. Thus, Call-O-Call breached its contractual obligations before the lease's (renewal) term expired by refusing to make any of the rental payments. It breached another one of its obligations by failing to return any of the equipment to Dimension at the expiration of the lease.

Although Call-O-Call *offered* to return a *portion* of the equipment as the initial 36 month term was about to expire, it did not actually return, or even agree to return all of the leased equipment as the lease requires. *Id.* Dimension therefore had the option pursuant to ¶ 16 of the lease to renew the lease for an additional 12 month term, which it exercised. CP 139, ¶ 16. The lease was thereby renewed beyond the initial 36 month term for another 12 month term, during which Call-O-Call continued to maintain possession of the equipment. The 12 month renewal term expired on December 10, 2007. CP 140, ¶ 19, 20.

Although Call-O-Call retained all of the equipment throughout the 12 month renewal period, it failed to make any of the rental payments that became due during that time totaling \$17,377.08. CP 140, ¶ 21. Furthermore, even after the renewal term expired, Call-O-Call still refused to return all of the leased equipment to Dimension Funding in breach of its obligation to do so. Indeed, Call-O-Call retained possession of the

equipment until the court below ordered Call-O-Call to return it when it granted summary judgment in favor of Dimension.

The parties' disagreement over how many separate items the leased equipment consisted of was of no consequence to Dimension's summary motion for several reasons. First, regardless of whether the leased equipment consisted of two or three discrete pieces, Call-O-Call announced its refusal to return one of the leased items to Dimension, thereby repudiating its obligation to do so. Indeed, Call-O-Call did not return *any* of the equipment until it was ordered to do so by the court below.

Second, because the lower court reviewed the record in the light most favorable to Call-O-Call as the non-moving party, Dimension necessarily conceded for purposes of that motion that there were a total of two pieces of equipment as Call-O-Call contended, rather than three as Dimension believed based on the report of its inspector. CP 139, ¶ 15, CR 160.

The court below correctly ruled that Call-O-Call breached its obligations under the lease to pay the agreed-upon rentals during the 12 month renewal period, and to return the equipment to Dimension at the end of the lease. The lower court's decision should be affirmed for the reasons outlined below.

IV. ARGUMENT

A. STANDARD OF REVIEW FOR GRANT OF SUMMARY JUDGMENT.

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.” Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Pursuant to CR 56 (c), the moving party is entitled to entry of summary judgment in its favor where the record shows “. . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The facts of record and inferences reasonably drawn from the facts are viewed in the light most favorable to the non-moving party. White v. Kent Medical Center, Inc., 61 Wn. App. 163, 810 P.2d 4 (1991).

B. THE UNDISPUTED FACTS ESTABLISH THAT DIMENSION NEITHER REPUDIATED NOR OTHERWISE BREACHED THE TERMS OF THE LEASE.

Call-O-Call erroneously contends that Dimension repudiated the lease by insisting that the leased equipment consisted of three rather than two separate items, and by stating that it would ‘refuse to accept as satisfaction’ the return of anything less than all of the leased equipment at

the end of the lease. To the contrary, Dimension demanded the return of only those items specifically identified on Schedule A to the lease. CP 166, e-mail from Dimension 1/26/07, CP 166, e-mail from Dimension 2/5/07.

What constitutes repudiation or an anticipatory breach is well established in Washington. The court in CKP, Inc. v. GRS Const. Co. 63 Wn. App. 601, 821 P.2d 63 (1991), stated:

An anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract *prior to the time for performance*. The law requires a positive statement or action indicating distinctly and unequivocally that the repudiating party *will not substantially perform his contractual obligations*. Lovric v. Dunatov, 18 Wn. App. 274, 282, 567 P. 2d 678 (1977).

Id. at 620. (Emphasis added.)

Clearly, one can only repudiate or anticipatorily breach one's contractual obligations *before* the time the performance of such obligations is due, and certainly not after they have actually been performed. Dimension's obligations under the lease were to purchase the agreed-upon equipment from a supplier, NACT, and transfer possession to Call-O-Call in exchange for its payment of the agreed-upon rental charges, CP 142. Once Dimension purchased the

equipment and transferred possession of it to Call-O-Call, it fully performed all of its obligations under this lease. No further performance was due from Dimension. Having performed all of its obligations, it was therefore no longer possible for Dimension to breach them, anticipatorily or otherwise.

Call-O-Call asserts that Dimension repudiated its obligations by communicating that it would 'refuse to accept as satisfaction' anything less than all of the leased equipment from Call-O-Call as full performance of its obligation to return the equipment. It should first be noted that Dimension is entitled to Call-O-Call's full performance of its obligations under the lease, including its obligation to return the equipment at the end of the lease. It is well settled that anything less than full performance of one's contractual obligation constitutes a breach. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 209, 165 P.3d 1271 (2007), Restatement (Second) of Contracts § 235(2) (1981). Thus, Dimension is entitled to the return of *all* of the leased equipment as the parties agreed, and Call-O-Call's failure to return it is a breach of its obligation under ¶ 16 of the lease to do so.

Because Dimension had already performed all of its obligations,

and had no contractual obligation to accept or agree to accept the equipment's return as satisfaction of Call-O-Call's obligation to return it, whatever Dimension communicated by way of acceptance, agreement to accept or refusal to accept the equipment's return as satisfaction cannot constitute a breach, anticipatory or otherwise. In short, Dimension did not repudiate any of its contractual obligations because it had already satisfied them all.

Indeed, the only obligation imposed on either party by the lease regarding the return of the equipment is Call-O-Call's obligation to ship it to Dimension at a specified address. CP 143, ¶ 16. The court below correctly ruled that Call-O-Call's failure to return the equipment breached its obligation to do so.

Call-O-Call also asserts that Dimension insisted on receiving a piece of equipment that was never part of the lease. It is rather telling that Call-O-Call has not identified any item of equipment that Dimension insisted upon having returned to it that was not furnished by Dimension or not identified on Schedule A to the lease. The actual dispute between the parties was whether the "E1/T1, 155 BOARD" identified in Schedule A to the lease consisted of one or two separate items. Either way, all of the leased equipment is specifically identified on Schedule A. Call-O-Call

has neither contended nor established that Dimension ever demanded the delivery of any equipment other than what is specifically identified on Schedule A as subject to the lease. See CP 166, e-mail from Dimension 1/26/07, CP 168, e-mail from Dimension 2/5/07. Dimension demanded only the return of those items specifically identified on Schedule A to the lease.

Dimension was well within its rights under ¶ 16 of the lease to insist on the return of all the leased equipment at the end of the lease. Such insistence was not a repudiation of any of Dimension's obligations. Rather, it was a demand that Call-O-Call perform its own obligations. Call-O-Call's failure to return *any* of the equipment clearly breached its obligations under ¶ 16 of the lease.

Indeed, the only repudiation established by the record is Call-O-Call's announced refusal to return the 'rack' notwithstanding its obligation to do so. It was therefore Call-O-Call rather than Dimension that repudiated its contractual obligations. Although Dimension performed all of its obligations by furnishing the equipment to Call-O-Call, even if it thereafter still had obligations to perform, any such performance would have been excused by Call-O-Call's repudiation by refusing to return the rack. Hemisphere Loggers & Contractors v.

Everett Plywood Corp., 7 Wn. App. 232, 499 P.2d 85 (1972).

Call-O-Call relies on three appellate decisions involving repudiation claims where the parties' agreement required the delivery of possession and ownership of some item or commodity in a purchase transaction rather than a lease. Each of these cases is factually distinguishable from the present case.

In Walker v. Herke, 20 Wn.2d 239, 147 P.2d 255 (1944), the defendant agreed to sell plaintiff 36 head of steers, and the plaintiff buyer *specifically agreed to accept delivery* at a certain location. However, the plaintiff buyer thereafter refused to accept delivery without any legal excuse, and announced that he would not accept the steers unless the defendant also paid certain of plaintiff's expenses to which the parties had not agreed. The court found that by announcing his refusal to accept delivery contrary to his specific promise to do so, the plaintiff repudiated his obligation.

The facts in the present case are materially different. The buyer in Walker specifically agreed to accept delivery (and ownership) of the steers at a certain location in a *purchase* transaction. He therefore undertook a specific contractual obligation to accept delivery of the steers. His stated refusal, without justification, to accept delivery *as he*

agreed to do clearly constitutes a repudiation of an obligation not yet performed.

Furthermore, the present case involves a lease rather than a purchase, and the delivery at issue here involves the return of property that Dimension clearly owns, rather than the transfer of possession *and* ownership as in Walker.

Unlike the agreement in Walker, the agreement in the present case is silent regarding acceptance of delivery of the equipment by Dimension at the end of the lease. Unlike the buyer in Walker, Dimension had already performed all of its obligations specified in the lease before delivery in question became due. Dimension had no contractual obligation to accept delivery as satisfaction of Call-O-Call's obligation, to agree to accept delivery or anything else regarding delivery. Because Dimension had no obligations regarding acceptance of the equipment to be shipped back by Call-O-Call, there was no obligation regarding acceptance it could have repudiated.

Similarly distinguishable is Kilgas v. Mother's Grandma Cookie Co., 156 Wash. 8, 285 P. 1118 (1930). In Kilgas, the defendant agreed *to purchase and accept delivery* of 1,000 cases of raisins. However, after accepting delivery of a portion of the raisins, the defendant buyer

announced that he would not accept or pay for any more of the raisins. This was properly found to constitute a repudiation.

Once again, the present case is distinguishable on its facts. The equipment in the present case was supposed to be returned at the end of the subject lease transaction, after all of Dimension's contractual obligations had already been performed. The lease imposed no obligations on Dimension regarding acceptance of delivery.

Finally, Jones-Scott Co. v. Ellensburg Milling Co., 116 Wash. 266, 199 P. 238 (1921) is also distinguishable. Jones-Scott involved an agreement for the purchase of 10,000 bushels of wheat. Unlike in the present action, the delivery at issue in Jones-Scott was the subject of a purchase contract at the outset of the transaction, when both parties still had agreed-upon obligations to perform regarding delivery. The respondent / purchaser in Jones-Scott cancelled the first shipment, and thereafter announced that he would not pay for any of the wheat, none of which had yet been delivered. The court ruled that in light of the purchaser's announcement that he would not perform his obligation to pay for the wheat, the seller's obligation to deliver it was excused by the purchaser's anticipatory breach of his obligation to pay for it.

In the present case, Dimension repudiated none of its

contractual obligations because it already performed them all by purchasing the equipment and transferring possession to Call-O-Call as agreed. Dimension had no obligations left to perform regarding its return, thereby precluding any possibility of a repudiation.

Thus, none of the three cases Call-O-Call relies on involved leases or the return of the leased commodity at the end of the lease when, as in the present case, the lessor had already performed all of its contractual obligations. Rather, those cases all involve purchases and the delivery of the purchased items to the buyer at a time when the parties both had agreed-upon obligations to perform regarding delivery.

Unlike Dimension, the buyers in each of these three cases *agreed* to accept delivery and therefore had a contractual obligation to do so. These three cases upon which Call-O-Call relies are therefore all distinguishable from the present case, and provide no authority upon which to reverse the court below.

Finally in this regard, Call-O-Call argues that the court below erred by directing it to perform a ‘futile act,’ specifically shipping the equipment back to Dimension in light of its announcement that “nothing less [than the return of all the leased equipment identified on Schedule A] will be accepted in satisfaction per paragraph 16 of the

lease agreement regarding the return of the equipment.”

Clearly, Call-O-Call undertook a specific obligation under paragraph 16 of the lease to return the equipment at the end of the lease to Dimension, which at all times owned the equipment. It is difficult to imagine how the performance of one’s promise, one’s contractual obligation, could ever be viewed as ‘futile.’ Call-O-Call is not excused from performing a specifically agreed-upon obligation simply because it believes Dimension may not be satisfied with that performance, especially under a contract that is silent regarding Dimension’s satisfaction (or lack thereof) with the returned equipment.

In summary, Dimension completed the performance of all of its contractual obligations by purchasing the equipment from the agreed-upon supplier and transferring possession to Call-O-Call. Dimension had no further obligations to perform, particularly with respect to ‘accepting as satisfaction’ the equipment to be returned by Call-O-Call, which it did not in fact do prior to the entry of summary judgment in any event.

Call-O-Call’s obligation to return the equipment was simple and clear. All it had to do was ship the equipment back to Dimension as it promised to. Because it failed to do so, the court below properly found

that Call-O-Call breached its obligation to return the equipment.

C. THE UNDISPUTED FACTS ESTABLISH CALL-O-CALL'S BREACH AND REPUDIATION OF THE LEASE.

The lease establishes in ¶ 16 that if Call-O-Call did not return the equipment at the expiration of the initial 36 month term, then Dimension had the option to renew the lease for an additional 12 month term. Call-O-Call did not return the equipment at the expiration of the initial 36 month term, and Dimension exercised its option to renew the lease for an additional 12 month term. CP 139, ¶ 16.

Although Call-O-Call continued to possess the equipment during the 12 month renewal term, it made none of the rent payments required by the lease during that renewal term, CP 139, ¶ 17. Call-O-Call does not contend otherwise. Accordingly, Call-O-Call is undeniably in breach of its obligation to make the agreed-upon rental payments for the entire 12 month renewal period, totaling \$17,377.08.

Furthermore, by announcing its refusal to return the 'rack' even after the expiration of the lease, Call-O-Call repudiated its obligation to do so. Call-O-Call continued to retain possession of the equipment up until the entry of summary judgment. Thus, even assuming (but certainly not conceding), that Dimension still had any obligations to perform after furnishing the equipment to Call-O-Call, any such

performance would have been excused by Call-O-Call's repudiation in any event. Hemisphere Loggers & Contractors v. Everett Plywood Corp., 7 Wn. App. 232, 499 P.2d 85 (1972).

D. MATERIAL FACTS REGARDING THE NUMBER OF
PIECES OF EQUIPMENT LEASED WERE NOT
GENUINELY IN DISPUTE.

Call-O-Call contends that the court below erred in granting summary judgment because a material fact, i.e., the number of leased items of equipment, was genuinely in dispute. This contention lacks any arguable merit.

Schedule A to the lease identifies the leased equipment as follows:

1- STX GATEWAY STYSTEM GATEWAY
SWITCHBAY- 19" RACK MOUNT
ENCLOSURE ["the rack"]
1- E1/T1, 155 BOARD ["the board"]

CP 148.

As the end of the lease approached, the parties could not agree on whether the E1/T1, 155 BOARD ("the board") consisted of one or two discreet items. Dimension reasonably believed that the 'board' consisted of two separate pieces based on the report of its inspector of the equipment. CP 130, ¶ 15, CP 160.

However, there is no question that Dimension delivered the 'E1/T1, 155 BOARD,' however many separate pieces it consists of, to Call-O-Call, and there is no question that the lease obligates Call-O-Call to return it. Furthermore, although Call-O-Call argues (unpersuasively) that its ability to return the 'rack' was restricted, it makes no claim that its ability to return the 'board,' whether it consists of one piece or two, was restricted in any way. Accordingly, by announcing its refusal to return the rack, Call-O-Call repudiated its obligation under ¶16 of the lease.

Call-O-Call makes the rather disingenuous assertion that Dimension demanded more equipment than it actually leased to Call-O-Call. Significantly however, Call-O-Call produced no evidence that Dimension insisted on receiving any equipment that is not specifically referenced in Schedule A to the lease. In fact, Dimension did not demand the 'return' of any equipment that is not identified on Schedule A, and nothing in the record establishes otherwise. See CP 166, e-mail from Dimension 1/26/07, CP 168, e-mail from Dimension 2/5/07, establishing that Dimension demanded the return of only those items specifically listed on Schedule A.

The dispute was simply whether the 'board' consists of two or three separate items.

That dispute, however, was not material to Dimension's motion for summary judgment. Because the court below was required to view the facts in the light most favorable to Call-O-Call as the non-moving party, White v. Kent Medical Center, Inc., P.S., 61 Wn. App. 163 810 P.2d 4 (1991), Dimension necessarily conceded for purposes of its motion that the equipment consisted of two separate items as Call-O-Call maintained, rather than three items as Dimension reasonably believed based upon the report of its inspector. CP 139, ¶ 15, CP 160.

Even assuming as true Call-O-Call's contention that the 'E1/T1, 155 Board' consists of a single item, Dimension was still entitled to judgment in its favor as a matter of law. That is because Dimension demanded, as it was entitled to under the terms of the lease, the return of *all* of the leased equipment, but Call-O-Call refused to return a leased item identified as "STX Gateway System, Gateway Switch Bay – 19" Rack Mount Enclosure," i.e., the rack. CP 165, e-mail 1/26/07. Call-O-Call offered to return the 'board' but did not actually return it, and it refused to return the 'rack' altogether. CP 140, ¶ 20.

The lease does not require that Call-O-Call first tender the equipment to Dimension at the end of the lease, or obtain Dimension's acceptance of in satisfaction of Call-O-Call's obligation to return it. The

lease merely requires in ¶ 16 that Call-O-Call ship it back to Dimension. Had Call-O-Call done so, it would have satisfied its obligation to return the equipment whether Dimension accepted it as satisfaction of Call-O-Call's obligation to return it or not.

'Tendering' the equipment for Dimension's approval at the end of the lease is not what the lease requires of Call-O-Call. The lease requires Call-O-Call to actually ship it back to Dimension, regardless of whether Dimension accepts it in satisfaction of Call-O-Call's obligation to return it. *Id.*

Thus, Call-O-Call's tender was deficient regardless of whether the 'board' was comprised of one or two discrete items because Call-O-Call did not ship the equipment back to Dimension as the lease specifically requires. Instead, it merely *offered* to return the board, *refused* to return the rack, but did not actually ship any of the equipment to Dimension before the court below ordered it to do so.

Call-O-Call's tender was also deficient because Dimension was entitled to the return of *all* of the leased equipment, but Call-O-Call expressed a willingness to return only the 'board.' There is no requirement in the lease or under principles of contract law that Dimension accept anything less than full performance of Call-O-Call's contractual obligations.

It is well settled that anything less than full performance of one's contractual obligation constitutes a breach. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 209, 165 P.3d 1271 (2007), Restatement (Second) of Contracts § 235(2) (1981).

Call-O-Call's refusal to return the rack at the end of the lease's initial 36 month term is not itself a breach, because the lease specifically provides for that possibility and affords Dimension the option of renewing the lease for another 12 month term if the equipment is not returned within 10 days of the end of the 36 month initial term. However, Call-O-Call's refusal to return the rack after the lease's 12 month renewal term expired, coupled with its failure to make any rental payments during the renewed 12 month term, clearly constitute breaches of the lease. Furthermore, Call-O-Call's continuing refusal to return the rack and its failure to return the board to Dimension also constituted continuing breaches.

Thus, regardless of whether the E1/T1, 155 Board consists of one or two items, Call-O-Call breached the lease by not returning whatever it consists of, and by refusing to return the rack at all.

Call-O-Call's rationalization for refusing to return the 'rack' is also without merit. Call-O-Call maintains that it entered into a separate contract to lease or otherwise acquire a larger 'system' from the equipment's supplier

NACT, and that its contract with NACT restricts Call-O-Call's ability to remove any of the equipment from that system in order to return it to Dimension. This argument fails for a variety of reasons.

First, Dimension is not a party to any contract between Call-O-Call and NACT, and is therefore not bound by any restrictions or other terms of any such contract. CP 136, ¶ 8.

Second, the written lease between Call-O-Call and Dimension specifically states in ¶ 3 that "Supplier [NACT] has not made any side agreements with Lessee [Call-O-Call] regarding the Equipment . . ." It further provides that 'no representation, guarantee or warranty' made by NACT is binding on Dimension, and that no breach by NACT or anyone else will excuse Call-O-Call's performance of its obligations under the lease. *Id.*

Thus, the lease specifically provides that there are no agreements between Call-O-Call and NACT, and even if there had been such an agreement, notwithstanding Call-O-Call's representation to the contrary, it would neither bind Dimension nor excuse Call-O-Call from performing its obligations to Dimension.

Furthermore, Call-O-Call did not ship *any* of the equipment back to Dimension when the lease expired, not even the board which Call-O-

Call does not contend is subject to any restriction. Call-O-Call *offered* to return the board, but offering to ship it does not satisfy its contractual obligation to actually ship it to Dimension.

Thus, regardless of whether the equipment consisted of two or three separate items, and regardless of whether Dimension would have been satisfied with whatever Call-O-Call may have shipped back to it, Call-O-Call's failure to ship any of the equipment back to Dimension entitles Dimension to judgment in its favor. The lower court's entry of judgment should be affirmed.

E. CALL-O-CALL'S CONTENTION THAT THE LOWER COURT'S DECISION IS A WINDFALL FOR DIMENSION IS WITHOUT MERIT.

Call-O-Call raises the rather perplexing contention that the lower court's entry of judgment constitutes a windfall to Dimension by in effect requiring Call-O-Call to 'pay for' the equipment *three times*.

The parties' agreement is a lease agreement, not a purchase agreement. It specifically provides in ¶ 16 that Dimension retains ownership of the leased equipment. Thus, the agreement does not require that Call-O-Call 'pay for' the equipment in the sense of purchasing title to it. Rather, the lease requires that Call-O-Call make the agreed-on rental payments in exchange for its right to possess and use the equipment during

the lease term.

What Call-O-Call actually paid Dimension for was its right to possess and use the equipment during the initial 36 month lease term. Thereafter, Dimension properly exercised its option to renew the lease for another term of 12 months. Although Call-O-Call continued to retain possession of the equipment throughout the renewal term, it refused to make any of the rental payments. Call-O-Call does not contend otherwise.

The court below therefore properly ordered Call-O-Call to pay the agreed-upon rent that became due during the 12 month renewal term while the equipment was in Call-O-Call's possession. In no way can this be characterized as requiring Call-O-Call to 'pay for' the equipment *again*. The court merely enforced Call-O-Call's obligation to pay the agreed-upon rent for the period during which Call-O-Call failed to do so.

Call-O-Call next makes the equally perplexing argument that by requiring it to return the equipment to Dimension now that the lease term has expired, and as the lease specifically requires, the lower court's order improperly requires Call-O-Call to 'pay for' the equipment a *third* time.

This argument is specious. The lower court simply enforced the unambiguous terms of the lease which specifically require Call-O-Call to pay the agreed-upon rent and return the equipment at the end of the lease

to Dimension, which holds title to it as the lease also specifically states, CP 143, ¶ 12, 16. The lower court properly directed Call-O-Call to live up to its promises and satisfy its contractual obligations.

The court below properly enforced the lease agreement so that both parties obtained the benefits of their respective bargains. Neither party receives a windfall as a result the other party performing his bargained-for obligations.

F. CALL-O-CALL'S CLAIM OF A VERBAL OPTION TO PURCHASE THE EQUIPMENT, AND THAT ITS RETURN OF CERTAIN EQUIPMENT WAS RESTRICTED BY A THIRD PARTY CONTRACT ARE WITHOUT MERIT.

Call-O-Call claims in its statement of the case that it had a verbal option to purchase the equipment, and that its return of the 'rack' to Dimension was restricted by a separate contract between it and NACT. Although Call-O-Call argued these matters to the court below and referenced them in its statement of the case, it did not develop them in its appellate brief. Nonetheless, we address them below for sake of completeness.

1. The Parties' Agreement did not Provide Call-O-Call an Option to Purchase the Equipment.

The written lease executed by the parties specifically provides that it is an integrated agreement constituting the parties' entire agreement,

which may not be modified except by a signed writing. Paragraph 20 of the lease states in part:

This Lease constitutes the entire agreement between the Lessor and Lessee. No provision of this Lease shall be modified or rescinded unless in writing signed by an authorized officer of Lessor.

There is no evidence in the record that the parties ever executed any modification to the lease agreement. Accordingly, the parties' entire contract is set forth in the written, integrated lease.

The lease states in ¶ 16 that:

By this Lease, Lessee acquires no ownership rights in the Equipment, and has no option to purchase it.

(*Id.*, Emphasis added.)

Since Call-O-Call produced no written, signed modifications of the lease, the purported purchase option agreement is presumably a verbal one. Such a verbal modification is specifically barred by ¶ 20 of the lease.

Such a verbal modification is also barred by the parol evidence rule, which generally bars the admission of parol evidence for the purpose of adding to, modifying, or contradicting the terms of a written contract. Berg v. Hudesman 15 Wn. 2d 657,801 P.2d 222 (1990). As the court explained in United Financial Cas. Co. v. Coleman, 173 Wn

App. 463, 471, 295 P.3d 763, 768 (2012):

The parol evidence rule requires that “all conversations and parol agreements between the parties prior to a written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.

It is true that the parol evidence rule applies only to written agreements that are integrated, i.e., intended as a final expression of the parties’ agreement. Coleman, *Id.* at 472. However, the parties specifically agreed that the lease was in fact integrated, and so stated in ¶ 20 the lease. CR 56(e) requires that supporting affidavits in opposition to a summary judgment motion be admissible in evidence.

Evidence of an alleged verbal agreement is therefore barred by the parol evidence rule and also by the terms of the written lease. Call-O-Call has produced no competent evidence of any agreement other than the written lease, the terms of which it is bound by.

Furthermore, even if there had actually been a separate option agreement, verbal or written, the parties’ written agreement to the contrary notwithstanding, an alleged breach of such an agreement would constitute a compulsory counterclaim under CR 13(a) that Call-O-Call was required to plead, but did not do so. A claim constitutes a

compulsory counterclaim that must be pled pursuant to CR 13(a) “. . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim . . .” A claim that there existed an option to purchase the equipment that is the subject matter of this action obviously arises out of the transaction at issue before us. Failure to plead a compulsory counterclaim bars the claimant from raising it thereafter. Krikava v. Webber, 43 Wn. App. 217, 716 P.2d 916 (1986).

Call-O-Call’s claim of a separate agreement of a purchase option is therefore barred for the additional reason that it constitutes a compulsory counterclaim that Call-O-Call has not pled. Furthermore, Call-O-Call has never sought leave of court to amend its pleadings to assert such a counterclaim.

2. Call-O-Call’s Failure to Perform was not Excused.

Call-O-Call’s contention that its ability to return the leased equipment was restricted by a separate agreement between it and NACT is similarly without merit. The lease specifically states in ¶ 3 that there are no side agreements between CC and the equipment’s supplier, NACT. It further provides that ‘no representation, guarantee or warranty’ made by NACT is binding on Dimension, and that no breach by NACT or anyone

else will excuse Call-O-Call's performance of its obligations under the lease, *Id.*

Thus, even assuming that a separate contract existed between Call-O-Call and NACT, Call-O-Call's representation in the lease to the contrary notwithstanding, there is no evidence that Dimension was a party to or otherwise bound by any such contract. Call-O-Call merely alleges on page 12 of its appellate brief that Dimension "was well aware of this restriction." However, Call-O-Call cites no authority to support the novel proposition that Dimension could be bound by the terms of a contract to which it was not a party simply by being aware of it. There is in fact no such authority.

Moreover, because the parties agreed that the written lease constitutes their entire agreement, an alleged restriction on Call-O-Call's ability to return the equipment contained in a separate contract to which Dimension was not a party would not be binding on Dimension in any event.

In summary, Call-O-Call had no option under the lease to purchase the equipment at the end of the lease for an agreed-upon price. The parties nonetheless tried to reach an agreement for the sale of the equipment to Call-O-Call. Those negotiations failed, and Call-O-Call never had an actual option to purchase the equipment at some agreed-upon price. Call-

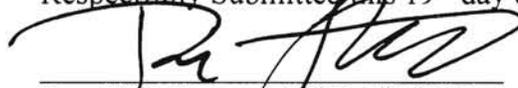
O-Call neither pled nor proved the existence of any such option. Indeed, ¶ 16 of the integrated lease affirmatively establishes that no purchase option in fact existed.

Furthermore, any restriction on Call-O-Call's ability to return the equipment to Dimension contained in a contract between Call-O-Call and NACT to which Dimension was not a party, would neither bind Dimension nor excuse Call-O-Call's breach of its obligations to Dimension as the lease specifically provides in ¶ 3.

IV. CONCLUSION

The court below properly entered summary judgment in favor of Dimension based on the properly admitted facts of record. This Court should affirm that judgment, and should award Dimension its attorney's fees on appeal pursuant to ¶ 19 of the lease.

Respectfully Submitted this 19th day of February, 2014,



Roy T. J. Stegena, WSBA#36402

Krista L. White & Assoc., P.S.

Attorneys for Respondent Dimension Funding, LLC

CERTIFICATE OF SERVICE

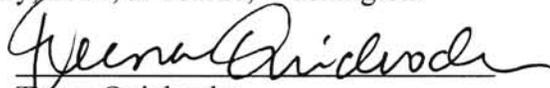
I, Teena Quichocho certify that on the 19th day of February, 2014, I caused the foregoing document, Reply Brief of Respondent Dimension Funding, to be delivered to the following parties in the manner indicated below:

STERNBERG, THOMSON,
OKRENT & SCHER
500 UNION STREET, SUITE 500
SEATTLE, WA 98101

[X] By ABC Legal Messenger
Service

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 19th day of February, 2014, at Seattle, Washington.


Teena Quichocho

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 FEB 19 AM 11:00