No. 17-772

IN THE

Supreme Court of the United States

BRENT NICHOLSON, *et al.*,

Petitioners,

v.

THRIFTY PAYLESS, INC. AND
RITE AID CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's statement of the doctrine of judicial estoppel in *Ah Quin v. County of Kauai Dept. of Transp.* 733 F.3d 267 (9th Cir. 2013) consistent with *New Hampshire v. Maine* and was it correctly applied to a debtor who deliberately omitted interests in or any value for numerous companies in his bankruptcy schedules while contemporaneously and inconsistently threatening litigation seeking $59 million in claims for those companies?

2. Do case by case differences in evidentiary rulings amount to a fundamental conflict in the Circuits regarding the basic rule of *New Hampshire v. Maine?*

3. If an alleged conflict in the circuits did exist, which it does not, is a case from a circuit which clearly follows *New Hampshire v. Maine* the appropriate one for addressing the conflict?

4. Do the multiple additional and alternative grounds for dismissal, other than judicial estoppel, adopted by the district court but not addressed by the petition, preclude granting certiorari?

PARTIES TO THE PROCEEDINGS

Petitioners are Brent Nicholson, an individual real estate developer, and eleven limited liability companies, formed, managed and controlled by him.

Respondents are Rite Aid Corporation, a publicly traded Delaware corporation, and its wholly owned subsidiary, Thrifty Payless, Inc., a California corporation that operates a chain of retail pharmacy stores under the trade name "Rite Aid". Respondent Rite Aid Corporation has no parent organization. No entity or person owns more than ten percent of the outstanding common shares of Rite Aid Corporation.

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**Petitioners filed a Notice of Appeal from these January 8, 2018 Orders on January 19, 2018.*

I. STATEMENT OF THE CASE

A. Summary

Petitioner, Brent Nicholson, is a sophisticated, previously successful, real estate developer who mistimed the market by undertaking to purchase land and to build, own, and then lease to Rite Aid[1] eleven retail stores just prior to the Great Recession of 2008. He formed eleven undercapitalized shell corporations controlled by him, but then due to the 2008 credit crisis, found he could not get adequate financing and he was unable to construct any of the stores.

Nicholson initially took full responsibility for his bad timing and financial losses, but later cast blame on and sought in this case to recover his self-inflicted losses from Rite Aid. Nicholson went into personal bankruptcy and attempted to shield any recovery in this litigation from his creditors by deliberately omitting from his schedules some of his companies or by affirmatively representing that other companies had "0.00" possible value. However, at the same time Nicholson was demanding millions from and threatening suit against Rite Aid. He also entered into agreements with certain business partners promising that they would be paid outside of bankruptcy from any recovery in this litigation.

As revealed by the Opinions Below, during the last six years Nicholson's claims have been exhaustively reviewed by the district court, by the bankruptcy court, by the court

1. "Rite Aid" refers to respondents Thrifty Payless, Inc. and Rite Aid Corporation.

of appeals and again by the district court on remand and have been rejected on alternative and cumulative grounds, including not merely the judicial estoppel doctrine solely emphasized in the petition. Dismissal of his claims by the district court was based additionally and alternatively on the undisputed fact that he was unable to perform the construction of the stores required by the build-to-suit leases through no fault of Rite Aid.

B. Petitioners Failed to Construct the Stores.

Nicholson entered into the leases to construct the projects in 2006 through 2008.[2] The leases contained dates for completion of construction.

By December 2008, Nicholson needed over $18 million in equity and $66 million in loans to complete the stores.[3] In January 2009, Nicholson notified Rite Aid that he was in "serious trouble." None of his friends or partners was willing to invest in any of his projects in the economic climate of the time. Nicholson's financial condition worsened. By March 2009, Nicholson was "flat broke," negotiating with the IRS for the payment of unpaid taxes. He admitted that "[n]o lender in their right mind would make me a loan." Nicholson notified Rite Aid that no bank in California or Washington was willing to finance him. In April 2009, Nicholson notified Rite Aid that he could

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2. Although each lease was entered into by one of the respondent shell companies, all will be referred to as "Nicholson", their creator, manager and controlling person.

3. *See Nicholson et. al. v. Thrifty Payless Inc., et. al*, Case No. 12-cv-01121 RSL, (W.D. Wash.), ECF 88-89 (detailing undisputed evidence).

not service his debts, pay on ground leases or make option extension payments necessary to keep the projects going, that he was defaulting on eight of the projects and he was facing bankruptcy. A week later, Nicholson notified Rite Aid that he was "at the end of [his] rope". He explained everything will start to "unravel very quick." Nicholson then conceded, "[t]he problems are too large for me to fight." Nicholson closed his offices and terminated his staff.

As a consequence of Nicholson's inability to secure the millions of dollars in equity and debt required to perform under the leases, each LLC defaulted on its financial obligations and lost control of each site. Without the sites specified in each lease, petitioners had no ability to perform and provide Rite Aid with stores to lease. Rite Aid thereafter tendered notice of termination of the leases pursuant to their provisions.

C. Nicholson Represented to the Bankruptcy Court that His Companies Had No Potential Value.

On April 22, 2010, Nicholson filed bankruptcy in the Western District of Washington. On June 18, 2010, he filed amended schedules stating that petitioners NMP, Full to the Brem, High Ho Silverdale, Whateverett, Right Angeles and No One to Blaine (collectively, the six "Disclosed LLCs") had "0.00" value. In a bankruptcy court declaration, Nicholson testified that there was not even "a remote possibility of the bankruptcy estate realizing any value" from the Disclosed LLCs, and that the Disclosed LLCs had "no value on the date of filing of the bankruptcy and have no value to the estate today." Nicholson did not list in his schedules *any* interest in San

Pablo Cruise, Oakley Dokely, Holy Rose, or Sunnyboy (collectively, the four "Undisclosed LLCs"). Nicholson never sought to amend or correct those schedule omissions even after Rite Aid filed its motion for summary judgment based on judicial estoppel and other grounds. Nor did he ever seek to amend his schedules to inform creditors that he and the companies had filed this lawsuit, or that the claims valued at $0 in Bankruptcy Court were alleged to be worth $59 million in District Court.

D. Nicholson Intentionally Hid His Claims from the Bankruptcy Court.

Nicholson's Chapter XI bankruptcy plan of arrangement included a provision that any claims of Nicholson would be abandoned back to Nicholson if the appointed Trust Advisory Board (the "Board") did not, within six months of confirmation of the plan, provide notice of the Trust's intent to bring suit for the benefit of all creditors. The members of the Board consisted of Nicholson's business partners and his CPA. But prior to Nicholson's bankruptcy petition, Nicholson and his business partners agreed that he would not list most of his debts to them in his bankruptcy schedules, and that he would later pay them the full amount he owed. Pursuant to this agreement, the roughly $2 million Nicholson owed his business partners on the Board were to have a first priority claim to any funds Nicholson would receive from this lawsuit.

Nicholson's agreement with his business partners ensured that the Board did nothing to prevent the claims from being abandoned back to Nicholson so that he could control them for his benefit and his business partners.

The obvious and undisclosed conflicts of interests stemming from the "side deal" Nicholson made with his business partners are clear and sufficient evidence that the inconsistent representations on the values of the LLC interests on the bankruptcy schedules and in district court pleadings ($0 or $59 million) were intentional.

The undisputed evidence presented to the district court also showed that at the same time Nicholson was omitting the Undisclosed LLCs from his bankruptcy schedules, he was demanding, through his bankruptcy counsel, a nearly $4 million payment from Rite Aid for those four undisclosed entities.

In response to Rite Aid's motion to apply judicial estoppel, Petitioners never argued to the district court that Nicholson's failure to properly disclose the claims on the bankruptcy schedules was due to mistake or inadvertence. Instead, petitioners admitted and defended the non-disclosure and argued that Nicholson's actions were nonetheless appropriate. The facts in the record, exhaustively considered by the district court, demonstrate that Nicholson intentionally omitted that information. There are no facts which support petitioners' present claim that Nicholson made an innocent mistake through inadvertence or that he was deprived of the opportunity to plead inadvertence.

E. After the District Court Dismissed His Claims, Nicholson again Misled the Bankruptcy Court.

After the district court dismissed petitioners' claims on February 5, 2015, Nicholson moved in the bankruptcy court on May 14, 2015 for relief which was inconsistent

with the position he had taken before the district court.[4] Rite Aid objected to the relief requested by Nicholson and informed the bankruptcy court of the issues decided and orders entered by the district court which Nicholson had not provided to the bankruptcy court. The bankruptcy court denied Nicholson's motion and addressed a number of matters related to this litigation.

First, the bankruptcy court made it clear that it was not aware of the Undisclosed LLCs. The bankruptcy court explained that the only document in which these entities were listed, was of the sort to which it would pay little to no attention. The bankruptcy court concluded these entities were not "disclosed directly in the disclosure statement and plan" as required.

Second, the bankruptcy court expressed concern after learning of the conflicting interests of Nicholson and the Board that worked to the detriment of other creditors. The bankruptcy court stated that "I think this case cries out for some review by the U.S. Trustee's Office."

Finally, after reviewing the briefs and supporting evidence filed in the district court on the judicial estoppel motion, the bankruptcy court made no objection to the district court's judicial estoppel ruling and stated that District Court Judge Lasnik's order was "very well analyzed…and I can't say there was anything wrong with what he did."

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4. *In re Nicholson*, Case No. 10-14522 (W.D. Bkr. Wash.), ECF 279-281, 284-285, 290-291. Rite Aid informed the appellate court of Nicholson's subsequent action taken in the bankruptcy court and filed a motion requesting judicial notice of facts from that subsequent proceeding. *See Nicholson et. al. v. Thrifty Payless Inc., et. al*, Case No. 15-35180, (9th Cir.), ECF 25.

F. Nicholson Misrepresented Facts on Appeal.

Petitioners' briefing to the Ninth Circuit argued that there were post-confirmation bankruptcy reports that detailed steps taken in this litigation. Petitioners argued that these reports were filed quarterly and that the detail within these reports adequately informed the bankruptcy court of this litigation. However, the record demonstrates that no post-confirmation report was ever filed prior to the district court's order dismissing this case. When these reports were provided to the bankruptcy court was misrepresented by petitioners in their appeal.

II. REASONS FOR DENYING CERTIORARI

A. No Element of Supreme Court Rule 10 is present.

This case concerns two sophisticated commercial litigants engaged in a private commercial contract dispute of importance only to them. The case does not involve *any* federal question, let alone an *important* federal question that conflicts with a decision by a state court of last resort. The case does not involve any decision that departs from the accepted and usual course of judicial proceedings calling for exercise of the Court's supervisory power. No question of federal law, let alone an important one, was decided in this case. The rules of law on which the courts below based their conclusions were properly stated and applied. There is no conflict with any decision of another United States Court of Appeals.

There is no fundamental conflict in the Circuits with regard to the basic rule of *New Hampshire v. Maine*. Assessing the existence of "inadvertence" or "mistake" is

addressed by all circuits based on the necessarily unique factual circumstances of each case. It is not necessary for the Supreme Court to review the evidence relied on in every case to seek to find a conflict in the fundamental principal. Evidentiary rulings relating to and the application of judicial estoppel are reviewed for abuse of discretion and can be handled by the courts below.

Even if there were a difference in emphasis and evidentiary rulings between circuits, this is not the case to address that issue. The Ninth Circuit here followed the rule that petitioners advocate. A party aggrieved in a case from one of the circuits that petitioners claim misinterprets *New Hampshire*, should be the one seeking review by this Court. This case presents no controversy regarding the applicable rule in the Ninth Circuit as it was followed.

Knowledge of a claim coupled with a failure to disclose it in schedules filed under oath is information pertinent to determining whether the omission was deliberate. Knowledge alone might be sufficient proof of deliberateness in some cases; in other cases it may yield a strong presumption, or merely a rebuttable presumption that the omission was deliberate. Each case is unique. Slight differences in addressing this issue between the circuits is not a significant conflict requiring Supreme Court review.

B. There is No Fundamental Split in the Circuits to Resolve.

Petitioners argue that five circuit courts investigate into the intent of a debtor while six circuits do not consider

whether failure to disclose an asset in bankruptcy was inadvertent.[5] Petitioners are incorrect. All of the circuits promote investigation into the specific facts relating to each case to determine whether application of the doctrine of judicial estoppel is appropriate. The circuits agree that the district courts have discretion to apply the doctrine or not. Petitioners' reading of the cases does not alter the actual standard used by the appellate courts. All circuits review the "totality of the circumstances" regarding the debtor's failure to list assets.

"[I]t is well established that a failure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel, barring the debtor from pursuing the claim in a later proceeding." *Guay v. Burack*, 677 F.3d. 10, 17 (1st Cir. 2012). "[E]very circuit that has addressed the issue has found that judicial estoppel is justified to bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case." *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010). There is no split on this issue.

The First Circuit does not guide its district courts to overlook facts which may show that failure to disclose a claim was inadvertent. In the case cited by petitioners, the appellate court took care to explain the total circumstances surrounding the party's failure to

5. Petitioners acknowledge that the Ninth Circuit applies the standard petitioners promote. The circuits that petitioners claim to apply a wrong standard include the First, Third, Fifth, Eighth, Tenth and District of Columbia.

schedule known claims. *See Guay*, 677 F.3d. at 18-21. The appellate court determined that given all of the facts in the record, it could not conclude that the district court abused its discretion in applying the doctrine because the facts showed that the debtors had repeatedly denied the existence of the claims and belatedly brought them to the bankruptcy court's attention only after being caught concealing them in a later matter. *See id*. at 21. The First Circuit did not rule that evidence of inadvertence or mistake would not be considered in all cases.

The Third Circuit has not ruled that the facts surrounding a debtor's failure to disclose should be disregarded. In *Krystal-Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors*, relied on by petitioners, the appellate court made clear that in applying the doctrine, "equity requires that the presiding court give the party to be estopped a meaningful opportunity to provide an explanation for its changed position." 337 F.3d 314, 320 (3rd Cir. 2003). In that case the court evaluated the "totality of the circumstances" and found that the debtor intentionally concealed the claims. The appellate court explained that if the debtor establishes it did not act in bad faith, the doctrine should not be applied. *See id*. at 324-25 (explaining that in another case the "totality of circumstances...lead us to conclude that the debtor did not omit any information in bad faith.").

The Fifth Circuit also considers the circumstances surrounding the debtor's failure to disclose claims. This circuit has emphasized that "[b]ecause judicial estoppel is an equitable doctrine, courts apply it flexibly to achieve substantial justice." *Reed v. City of Arlington*, 650 F.3d 571, 576 (5th Cir. 2011). The circuit has repeatedly explained

that the elements for the doctrine of judicial estoppel "are neither inflexible nor exhaustive and numerous considerations may inform the doctrine's application in specific factual contexts." *Galaz v. Katona*, 841 F.3d 316, 326 (5th Cir. 2016).

The Eighth Circuit has explained that "judicial estoppel does not apply when a debtor's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, (8th Cir. 2006). It has explained that in evaluating a matter where a claim was not disclosed in bankruptcy, "the specific facts of a case may weigh against" applying the doctrine. *Id.*

The Tenth Circuit and District of Columbia Circuit have recently addressed a perceived split between the circuits. These circuits concluded that "in practice, even those courts that have followed the Fifth Circuit's lead, like the Tenth Circuit, have not been as rigid as one would expect in practice." *Anderson v. Seven Falls Co.*, 696 Fed Appx. 341, 348 (10th Cir. 2017); *see also Marshall v. Honeywell Technology Sys.* Inc., 828 F.3d. 923, 932 (D.C. Cir. 2016) (unable to ascertain if there is a split between the circuits). As the District of Columbia Circuit explained, the circuit courts that supposedly do not analyze the debtors' subjective intent still recognize that "judicial estoppel requires a holistic, fact-specific consideration of each claim…" *Marshall*, 828 F.3d. at 932 (quotation and citation omitted). The circuits all agree that the doctrine of judicial estoppel, when applied to cases involving a debtor's bankruptcy disclosures, is a "flexible equitable doctrine that does not lend itself to rigid rules." *Id.*

The different circuits, in analyzing different specific factual situations, have stated the doctrine of judicial estoppel in slightly different fashions. However, the circuits have all been mindful that rigid rules need not be applied to the doctrine and that the district courts have discretion to apply the doctrine flexibly to achieve substantial justice.

C. The Panel Properly Applied the Doctrine.

There was no evidence in the record that demonstrated Nicholson's failure to properly disclose the claims in this litigation was the result of mistake or inadvertence. Nicholson made no effort to correct his schedules. He did not attempt to subsequently inform all creditors that petitioners were asserting claims for $59 million against Rite Aid. He did not refute that he made side deals with his business partners to ensure that proceeds from this litigation would go to friends and family to the detriment of other creditors. Contrary to petitioners' argument, Nicholson had full opportunity to correct and explain his conduct to the district court. He chose not to do so.

The record was amply sufficient to support the district court's finding that Nicholson's omissions were knowing and deliberate. While schedules were being prepared by expert bankruptcy counsel and reviewed by Nicholson, those same individuals were making inconsistent demands and assertions to Rite Aid.

D. Petitioners Misstate the Underlying Facts.

Petitioners make a number of factual statements which find no support in the record.

First, petitioners never argued to the district court that Nicholson's failure to disclose the potential value of his claims in this matter was "inadvertent." Although Nicholson did file a declaration in response to Rite Aid's motion for summary judgment, he was silent as to why he failed to disclose the claims. He also failed to address the various side deals with his business partners and friends who were to gain from any proceeds from this litigation.[6] Moreover, Nicholson's bankruptcy attorney did not claim there was any mistake made or that the claims were inadvertently not disclosed. Instead, Nicholson's bankruptcy attorney declared that the claims were fully disclosed and that it was the bankruptcy court's "independent obligation to insure that the final disclosure statement included sufficient disclosure information."[7]

Second, petitioners' characterization of the LLCs' being "innocent" is misguided. The LLCs were shell companies formed by Nicholson for the sole purpose of each Rite Aid project. Nicholson owned an 85 percent ownership in nearly all of the LLCs. As the district court explained, the undisputed facts showed that Nicholson "managed the business affairs of the LLCs, and acted as their virtual representative in both an operational and litigation capacity." Petitioners' Appendix ("Pet. App.") at 24. Moreover, the LLCs all signed on to the agreement regarding payment of any funds recovered from this litigation, which was to the detriment of Nicholson's creditors.

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6. *See Nicholson et. al. v. Thrifty Payless Inc., et. al*, Case No. 12-cv-01121 RSL, (W.D. Wash.), ECF 94. Petitioners' assertion that "Nicholson never had the chance to offer much explanation," Petitioner Brief at 27, is false.

7. *See id.*, ECF 92 (¶¶15-16).

Third, petitioners' claim that a "0.00" valuation for the Disclosed LLCs was never proven to be inconsistent with his claims in this litigation is mistaken. In the summer of 2010, when questioned about the potential value the Disclosed LLCs would have for the creditors, Nicholson declared there was "no remote possibility" that these entities could provide the creditors "any value." Yet, during that same summer, petitioners were demanding millions of dollars and/or new lease terms for these same entities. Indeed, petitioners were doing so through Nicholson's bankruptcy counsel. As explained by the district court, in his bankruptcy "Nicholson ignored the existence of the claims entirely and did not even attempt to calculate their value before announcing that the LLCs were worthless." Pet. App. at 20.

Fourth, petitioners' claim that the Periodic Report filed in Nicholson's bankruptcy disclosed the claims is misleading. The Periodic Report was *never* provided to Nicholson's creditors. Moreover, the bankruptcy court subsequently explained that the Periodic Report is not where it would look to determine the valuation of a debtor's assets. Indeed, the bankruptcy court confirmed it had not reviewed the Periodic Report. Having reviewed the bankruptcy docket, the district court explained that "[e]ven if the … periodic report contained a full, fair, and accurate disclosure of Nicholson's personal interests in the claims asserted here (it did not), such a disclosure was buried amidst hundreds of other documents in which he was not so forthcoming." Pet. App. at 18. It is undisputed that Nicholson never amended his schedules or disclosure statement to indicate any valuation for these assets.[8]

8. Nicholson's attempt to later receive a ruling from the bankruptcy court that differed from the district court also

E. Petitioners' Claims Were Alternatively Dismissed for Reasons Unrelated to the Petition.

Respondents gave notice of termination of the leases only after petitioners had become insolvent and had undisputedly demonstrated a complete inability to perform on the leases. By the time the leases were terminated, petitioners already had defaulted on existing bank loans, filed for bankruptcy, and lost store sites in foreclosure or through defaults on ground leases. As a result, petitioners' inability to build the stores was clear and there was no valid claim for damages.

Although the court of appeals found it unnecessary to address this basis for affirming dismissal of petitioners' claims, the district court reviewed substantial information relating to each of the projects and ordered that petitioners' claims were alternatively dismissed because "the evidence shows that the repudiation of the leases (*i.e.* the issuance of the termination letters), did not materially contribute to or otherwise cause plaintiffs' inability to finance and deliver the buildings as specified in the agreements." Pet. App. at 28.

The district court further explained that there was no evidence presented on which any reasonable juror could find that the any damage could be attributed to Rite Aid because the "evidence [demonstrated] that the properties

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demonstrates his lack of disclosure. As the bankruptcy court explained, "[s]o perhaps [the district court]…signal[ed] the debtor, you know, you better come clean. I'm not sure that this motion was coming clean, because as [Rite Aid's counsel] points out, it didn't reveal any of these facts. It's a very bland motion. I don't know what I would have done with it had I not had the response."

were lost, that plaintiffs could not build and deliver the buildings, and that the repudiation had nothing to do with those facts." *Id.* at 30. For this reason the district court found that "plaintiffs' contract-based claims fail as a matter of law." *Id.* at 31. The district court additionally explained that there was no evidence to demonstrate that there was any violation of Washington's Consumer Protection Act Claims. *See id.*

F. There Are Additional Grounds to Affirm Dismissal of Petitioners' Claims.

Rite Aid presented both the district court and the appellate court with additional grounds beyond those relied on by those courts for dismissal of petitioners' claims. First, petitioners failed to comply with clear and unambiguous lease provisions regarding financing and store completion dates. Petitioners argument to the district court that these dates were informally extended, does not comport with applicable Washington or California statutes of fraud.

Second, as each of the projects was governed by a written lease, the promissory estoppel claims should be barred. Under both Washington and California law, promissory estoppel is "not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract." *Walker v. KFC Corp.*, 728 F.2d 1215, 1220 (9th Cir. 1984).

Third, one of the petitioner's claims should have been dismissed due to collateral estoppel. A bankruptcy court had previously determined that the lease at issue was no longer effective because the delivery date for the store had passed. The district court declined to rule on this issue.

Given that there are numerous alternative reasons to affirm the dismissal of petitioners' claims, there is little reason for the Court to review the sole issue addressed by petitioners at this time. As this Court has explained, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation… Resolution [of a conflict between the circuits]…can await a day when the issue is posed less abstractly." *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

There are numerous grounds for dismissal of petitioners' claims in this matter other than the doctrine of judicial estoppel.

There is no fundamental conflict in the circuits in the application of *New Hampshire v Maine*. The Ninth Circuit applied the doctrine of judicial estoppel in the form advocated by petitioners. The district court based its finding that Nicholson acted intentionally in failing to inform his creditors of his companies' alleged claims for $59 million on substantial evidence. There was no abuse of discretion in applying the doctrine of judicial estoppel to the facts of this case.

The Supreme Court has many important matters to consider. This case is not one of them. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35180
D.C. No. 2:12-cv-01121-RSL
Western District of Washington, Seattle

BRENT NICHOLSON, AN INDIVIDUAL; *et al.*,

Plaintiffs-Appellants,

v.

THRIFTY PAYLESS, INC., A CALIFORNIA CORPORATION AND RITE AID CORPORATION, A DELAWARE CORPORATION,

Defendants-Appellees.

No. 15-35242
D.C. No. 2:12-cv-01121-RSL
Western District of Washington, Seattle

BRENT NICHOLSON, AN INDIVIDUAL; *et al.*,

Plaintiffs-Appellees,

Appendix A

v.

THRIFTY PAYLESS, INC., A CALIFORNIA CORPORATION AND RITE AID CORPORATION, A DELAWARE CORPORATION,

Defendants-Appellants.

Before: D.W. NELSON, M. SMITH, and CHRISTEN, Circuit Judges.

Appellees/Cross-appellants' Motion to Transfer Consideration of Attorney Fees on Appeal to the District Court is **GRANTED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED FEBRUARY 18, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

February 18, 2014, Decided
February 18, 2014, Filed

ORDER GRANTING IN PART THRIFTY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on "Thrifty's Motion for Partial Summary Judgment Dismissing Lease and Good Faith Counts." Dkt. # 25. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. *L.A. Printex Indus.*,

Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) and identifying those portions of the materials in the record that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to identify specific factual disputes that must be resolved at trial. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of evidence in support of the non-moving party's position will not preclude summary judgment, however, unless a reasonable jury viewing the evidence in the light most favorable to the non-moving party could return a verdict in its favor. *U.S. v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties in the light most favorable to plaintiffs and having heard the arguments of counsel, the Court finds as follows:

Background

Plaintiff Brent Nicholson has been in the business of developing real estate since approximately 1991. Starting in 2006, Nicholson formed the plaintiff limited liability companies to finance and develop eleven Rite Aid pharmacies in Washington and California. The general

business model was as follows: defendants [1] would propose and approve construction of a Rite Aid pharmacy in a certain location, identifying Nicholson as the developer. Nicholson, through one of his companies, would acquire property on which to build the pharmacy to defendants' specifications. At some point during the process, defendant Thrifty Payless, Inc., would enter into a written lease agreement for each project with the limited liability company formed for that purpose.[2] Plaintiffs would bear all of the carrying, permitting, and development costs during the build in exchange for Thrifty's agreement to lease the building for a period of twenty years, with options, thereby allowing plaintiffs to recoup their costs and earn a profit.

Plaintiffs assert breach of contract and breach of the covenant of good faith and fair dealing claims against Thrifty arising out of its termination of the leases. The viability of these claims turns, in large part, on the intent of the parties regarding the date on which each project was to be delivered to Thrifty. Defendant argues that the delivery date (or range of dates) set forth in each lease was cast in stone and binding on the parties unless and until a written modification of the lease, signed by both parties, was made. Plaintiffs, on the other hand, argue

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1. Because the contract-based claims at issue in this motion were asserted against only defendant Thrifty Payless, Inc., defendant Rite Aid Corporation is not a moving party. The record shows, however, that both defendants were involved in the underlying events.

2. The Poulsbo project is an exception: the parties did not reach agreement on a material term, and the lease was never signed.

that the specified delivery date (or range of dates) was intended to be a target, to be adjusted by agreement of the parties as the acquisition, permitting, and construction activities proceeded.

The form of the leases at issue changed over time. The first six leases signed — for Blaine, Bremerton, Concord, Everett, Port Angeles, and Silverdale — required plaintiffs to:

> complete Landlord's Work within __ months following the date hereof (the "Delivery Period"). If Landlord fails (for any reason, including *force majeure* events, however excluding Tenant caused delays, in which event the Delivery Period shall be extended one day for each day of delay) to complete Landlord's Work by [] such date, then Tenant may (in addition to any other rights of Tenant under this Lease or available at law or in equity): (i) terminate this Lease on written notice to Landlord, which termination shall be effective on the date which is thirty (30) days from Landlord's receipt of such notice unless during such 30-day period Landlord has completed construction of the Premises . . . .

See, e.g., Decl. of E. Birch Frost (Dkt. # 27), Ex. 15 at ¶ 7. The time periods for completion ranged from twelve to thirty months. The Port Angeles and Silverdale leases remained of this type, but the other four leases were amended so that they and all subsequent leases included the following delivery date provision:

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> The Delivery Date shall occur no earlier than _____ and no later than _____ (the "Anticipated Delivery Date"). Landlord agrees to use diligent efforts to deliver possession of the Leased Premises to Tenant, with Landlord's Work substantially completed, on the Anticipated Delivery Date; and Landlord agrees to provide written notice to Tenant of any delays respecting completion of the Anticipated Delivery Date within five (5) days after becoming award of the cause for delay.

See, e.g., Decl. of E. Birch Frost (Dkt. # 27), Ex. 5 at ¶ 6(i). The Anticipated Delivery Date was generally set one to three years into the future and lasted for two to four months. A separate termination provision containing essentially the same language as the original form of lease allowed defendant to terminate the lease upon thirty days' notice if plaintiffs failed to complete the landlord's work by the Anticipated Delivery Date (unless the delay were caused by Thrifty). *See, e.g.*, Decl. of E. Birch Frost (Dkt. # 27), Ex. 5 at ¶ 7.

Over the course of the eleven development projects, the parties reported and apparently relied upon delivery and fixture dates that were inconsistent with the dates specified in the leases. Most of these changes were not memorialized in a formal modification or lease amendment, although they were recorded in a computer program maintained by defendants. In May 2008, with six leases already signed, defendants did a "Pipeline Review" and determined that they needed to restructure

the development program, pushing back store opening dates and increasing the rents in order to offset the resulting increase in carrying costs. Decl. of Jeffrey M. Thomas (Dkt. # 36), Ex. F.[3] At the time of the "Pipeline Review," the delivery dates for Blaine, Bremerton, and Concord had already been delayed, apparently without a "writing . . . signed by the Landlord and the Tenant." *See, e.g.*, Decl. of E. Birch Frost (Dkt. # 27), Ex. 5 at ¶ 43. For Port Angeles, both the "current" and "potential" store opening dates set forth in the "Pipeline Review" actually preceded the delivery date specified in the lease. In January 2009, defendants requested that the delivery date for the Oakley store, which had already been pushed past the dates specified in the lease, be delayed even further. Decl. of Jeffrey M. Thomas (Dkt. # 36), Ex. N. Plaintiffs, meanwhile, were running into all sorts of financing and permitting issues. They kept Thrifty apprised through biweekly teleconferences during which the parties discussed the progress at each site and defendants' store opening plans and, if necessary, adjusted the date on which Thrifty would take delivery and begin installing fixtures. Defendants maintained a detailed computerized program, called Site Trak or T-Rex, which identified each project and the proposed, revised, and actual dates on which key development events occurred or were scheduled to occur. Decl. of Jeffrey M. Thomas (Dkt. # 36), Ex. A (11/30/09 T-Rex report), Ex. R (7/24/09 T-Rex report), Ex. V (5/21/09 T-Rex report), Ex. H (4/30/09 T-Rex report),

3. The liquidity crisis related to the burst of the housing bubble in the United States began in the summer of 2007, with most economists agreeing that the economy was in recession by the end of that year.

Ex. Q (3/23/09 T-Rex report, and Ex. I (7/29/08 Site Trak report). Following the biweekly meetings, defendants updated these reports to reflect the new dates to which the parties had agreed, then sent the report to plaintiffs in anticipation of the next biweekly meeting.

Plaintiffs did not make delivery on any of the projects by the delivery dates specified in the leases. On June 2, 2009, Thrifty provided written notification of their intent to terminate the lease related to the San Pablo pharmacy "due to the landlord's failure to deliver possession of the premises to us by the outside delivery date set forth in the Lease." Decl. of E. Birch Frost (Dkt. # 27), Ex. 27. The lease included a delivery window of February 2, 2009, to June 2, 2009. According to the March 23, 2009, T-Rex report, however, the project deadlines had been revised such that groundbreaking would not occur until May 2009. The parties apparently estimated a sixteen week build, and defendants revised the dates related to their installation of fixtures, stocking, and store opening accordingly. Although the columns in the T-Rex report do not track the lease in that it does not have a column entitled "Anticipated Delivery Date," the report and the remaining lease terms, when taken in the light most favorable to plaintiffs, shows that the parties agreed to delay the delivery date until approximately November 9, 2009. That was the revised date for fixture installation (*i.e.*, the date on which the landlord's work would be substantially complete and defendants planned to make improvements to the building) and would provide a reasonable period of time after the scheduled groundbreaking and before the store opening date to accomplish all necessary

tasks. Thus, there is evidence that, when Thrifty sent the termination letter for San Pablo on June 2, 2009, the parties had previously agreed to postpone the delivery date until November 2009.

For a number of other projects, the parties apparently agreed to postpone construction indefinitely. They inserted a placeholder store opening date of January 1, 2025, in T-Rex and simply left the fixture and stocking dates blank. The projects were essentially on hold, with the parties hoping that the economy would pick up, producing increased product demand and financing options, at which point they would negotiate a more realistic and timely construction schedule/delivery date. When Thrifty sent termination notices for Concord, Port Angeles, Everett, Blaine, Santa Rosa, Oakley, and Sunnyvale, T-Rex showed that those projects were not scheduled to open until the distant future and that plaintiffs had no pending construction deadlines.

With regards to Poulsbo, the project proceeded in much the same way as the others except that a lease was never signed. Defendants approved the construction of the store in Poulsbo, Nicholson formed an LLC to acquire and develop the property, and progress on the project was recorded in T-Rex. The last entries in the record show that the parties had agreed to a "Fixture Date" of January 24, 2011, and a store opening date of March 10, 2011. Plaintiffs did not, however, provide a statement of the architectural and engineering costs associated with the project: those costs were to be used to calculate the rent on the project. In their absence, a lease was never signed,

although Nicholson avers that "[b]oth sides understood that we had a deal in place for approximately $880,000 in rent per year . . . ." Decl. of Brent C. Nicholson (Dkt. # 35) at ¶ 16. In May 2010, plaintiffs were informed that defendants had drafted termination letters for all of plaintiffs' deals and would terminate the leases in the near future. Decl. of Brent C. Nicholson (Dkt. # 35) at ¶ 14.[4] Plaintiffs attempted to renegotiate the terms of the leases in order to save the projects and recoup some of their investment, but discussions broke down on August 12, 2010. Plaintiffs concluded that all of the deals, including Poulsbo, were terminated at that point.

With regards to the Silverdale and Bremerton projects, the latest date shown in T-Rex for the installation of fixtures was June 14, 2010, with a store opening date of July 29, 2010. At a meeting on February 17, 2010,

4. Thrifty's objections to consideration of statements made at the February and May 2010 meetings are overruled. Federal Rule of Evidence 408 precludes consideration of certain evidence, namely offers or a willingness to compromise a claim and statements made in attempts to settle a claim. Courts regularly find Rule 408 inapplicable, however, where the compromise negotiations, in and of themselves, give rise to a cause of action. For example, conduct or statements made during settlement negotiations will be considered where (a) an insurer's settlement offer is the basis for a bad faith claim, (b) the substance of the discussions are necessary to prove a subsequent breach of the settlement agreement, and/or (c) the negotiations involved threats or other wrongdoing that forms the basis for a claim. *See* Advisory Committed Notes to 2006 Amendment. If, as plaintiffs allege, defendants chose to terminate their leases at what was nominally billed a "settlement" conference, evidence of that conduct would be admissible when determining whether a breach occurred.

defendants informed plaintiffs that these projects, among others, did not meet defendants' revised return on investment ("ROI") criteria and would be terminated. The parties continued to work toward bringing the projects within the new ROI standards, including the May 2010 meeting described above. The fixture and store opening dates set forth in T-Rex came and went: there is no indication that the parties agreed to any further delays or extensions of the time for delivery of the buildings. Thrifty provided written notification of termination for Silverdale on December 2, 2010, and for Bremerton on December 9, 2010.

Plaintiffs filed this lawsuit in King County Superior Court on June 1, 2012, asserting breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, promissory estoppel, breach of fiduciary duty, state consumer protection act, and tortious interference claims. Defendants removed based on federal diversity jurisdiction. Thrifty filed this motion seeking dismissal of plaintiffs' contract-based claims.

Discussion

I. Breach of Contract

Thrifty argues that plaintiffs' breach of contract claim fails as a matter of law because (a) the leases preclude oral modifications of the delivery date, (b) the statute of frauds precludes oral modifications of a multi-year lease, (c) there was no contract related to the Poulsbo project, and (d) Thrifty properly terminated the leases after the

delivery date specified in the leases had passed. Each argument is considered below.

A. Oral Modification of Delivery Date

Thrifty argues that plaintiffs cannot rely on the revised construction and delivery schedules set forth in T-Rex because the leases contained the following language: "It is expressly agreed . . . that the terms, covenants, conditions and agreements of this Lease cannot be altered, changed, or modified or added to except in writing and signed by the Landlord and the Tenant." There are issues of fact regarding the intent of the parties at the time of contracting, waiver, and materiality that preclude summary judgment on this ground.

(1) Interpretation of Delivery Period and Anticipated Delivery Date

Defendant's argument — that the lack of a formal modification, signed by both parties, means that the dates or ranges of dates set forth in the leases control — presumes that the various Delivery Periods or Anticipated Delivery Dates were fixed covenants, such that a modification of the agreement was necessary to make any adjustment to the construction schedule. What the parties intended when they established a Delivery Period or an Anticipated Delivery Date is an open question, however. Was the date fixed and set in stone, as defendants argue, and therefore subject to the "no oral modifications" provision? Or did the parties intend the date to be a target, a preliminary schedule, subject to on-going negotiation and frequent informal alteration as the development process unfolded?

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Under Washington and California law, contract language must be interpreted to reflect the parties' intent at the time of contracting. *See, e.g., Berg. v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (quoting A. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L. Quar. 161, 162 (1965)); Cal. Civil Code § 1636. "Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). *See also Morey v. Vannucci*, 64 Cal. App. 4th 904, 75 Cal. Rptr.2d 573, 578 (Cal. App. 1998). Extrinsic evidence regarding the context in which the contract was made is admissible as an aid in ascertaining the parties' intent. *Berg*, 115 Wn.2d at 667 (adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981)); *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (Cal. 1968).

There is ample evidence from which one could conclude that the parties intended the Anticipated Delivery Dates contained in the Concord, Bremerton, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale leases to be an estimate or guide that was subject to change as the project progressed. The contract does not expressly make time of the essence. To the contrary, after setting forth an "anticipated" delivery date which spanned a period of months, the lease simply requires plaintiffs to use "diligent

efforts" to make timely delivery and provides a notice mechanism if a delay arises. While the lease makes the failure to deliver the project by the Anticipated Delivery Date cause for termination, the possibility that the date would be adjusted is clearly contemplated: if that were the intent of the parties, the nature of the undertaking and the contract as a whole suggest that a corresponding delay in the right to terminate would arise. The conduct of the parties after contracting also supports an interpretation of Anticipated Delivery Date that makes the specified range of dates a target to be adjusted by simple agreement of the parties. The parties met regularly to discuss the projects so that all parties were aware of problems and scheduling issues as they arose, both sides proposed and agreed to changes in the delivery date without resorting to a formal lease amendment or modification, the agreed-upon revisions were recorded in T-Rex and relied upon by the parties as the development progressed, and formal modifications occurred only when required by a third party that did not have access to T-Rex.[5] Because there is an issue of fact regarding the intended interpretation of paragraph 6(i) of the leases for Concord, Bremerton, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale, Thrifty is not entitled to summary judgment on the breach of contract claim for those projects.

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5. Thrifty correctly points out that extrinsic evidence cannot be used to add to, modify, or contradict the terms of a written contract. *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944). In the circumstances presented here, however, the evidence of the biweekly meetings and other conduct of the parties is being used to interpret the term Anticipated Delivery Date in the first instance.

The leases for Silverdale and Port Angeles were materially different, however. These leases (and the first version of the leases for Concord, Bremerton, Everett, and Blaine) specified the period in which delivery was to occur without modifiers such as "anticipated" and without any suggestion that delays were expected or would be accommodated through a simple notice process. Assuming the factfinder finds in favor of Thrifty on the contract interpretation issue in the Silverdale and Bremerton leases, one could argue that the "no oral modifications" provision invalidates the parties' informal attempts to adjust the delivery dates through T-Rex and that the original delivery dates remained in place. The issues then become whether Thrifty waived the "no oral modification" provision and/or whether the failure to complete the landlord's work within the specified Delivery Period was a material breach justifying termination.

(2) Waiver

The Court will assume, for purposes of this part of the analysis, that the parties intended at the time of contracting that the delivery date, whether described as a Delivery Period or an Anticipated Delivery Date, be set in stone and could be modified only by a writing signed by both parties. Nevertheless, a party may subsequently waive contractual provisions made for its benefit, and may do so through express declaration or through conduct. Either way, the party asserting a waiver must establish that the waiver was intentional: mere negligence or oversight will not waive a contractual provision. *Reynolds Metal Co. v. Electric Smith Constr. & Equipment Co.*,

4 Wn. App. 695, 700, 483 P.2d 880 (1971); *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619, 636 (Cal. 1995). In the circumstances presented here, the jury could find that Thrifty either intended to effect a change in the delivery dates without formal modification (through the T-Rex report) or intended to mislead plaintiffs into believing that such a change had been made while secretly intending to enforce the original delivery dates. If the former, there would be a waiver of the "no oral modification" provision: despite full awareness of the contractual provision requiring a modification to be in writing and signed by both parties, Thrifty regularly ignored that requirement to alter the schedule. If the latter, plaintiffs may not have a breach of contract claim, but other claims, such as breach of the covenant of good faith and fair dealing or estoppel, might be available. What Thrifty intended when it repeatedly agreed to extend construction deadlines without going through a formal modification process is for the jury to decide.

(3) Materiality

If the Court assumes that the parties intended that the delivery dates set forth in the leases were immutably fixed and that there was no waiver of the "no oral modifications" provision, plaintiffs could still prevail by showing that the failure to deliver by the original date was not a material breach. Materiality is an issue of fact that depends upon the circumstances of each case. *Jacks v. Blazer*, 39 Wn.2d 277, 235 P.2d 187 (1951); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 402-03, 814 P.2d 255 (1991). *See also Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d

1032, 241 Cal. Rptr. 487, 495 (Cal. App. 1987) ("Where the line is drawn between important and the trivial [breach] cannot be settled by a formula. . . . The same omission may take on one aspect or another according to its setting.") (quoting 2 Williston on Contracts § 841). In determining the materiality of a breach, the factfinder should consider:

> (1) whether the breach deprives the injured party of a benefit which he reasonably expected, (2) whether the injured party can be adequately compensated for the part of that benefit [of] which he will be deprive, (3) whether the breaching party will suffer a forfeiture by the injured party's withholding of performance, (4) whether the breaching party is likely to cure his breach, and (5) whether the breach comports with good faith and fair dealing.

Bailie Commc'ns, Ltd. v. Trend Bus. Sys., 53 Wn. App. 77, 83, 765 P.2d 339 (1988) (citing Restatement (Second) of Contracts § 241 (1981)). *See Sackett v. Spindler*, 248 Cal. App. 2d 220, 56 Cal. Rptr. 435, 441 (Cal. App. 1967) (adopting similar test set forth in Restatement (Second) of Contracts § 275). The situation of the parties must be viewed "as of the time for performance and in terms of the actual failure." *Bailie*, 53 Wn. App. at 83 (quoting Restatement (Second) of Contracts § 237 cmt. b (1981)). In the context of this case, where the parties acted as if the delivery date were a movable target and Thrifty repeatedly agreed to alterations and modifications of the dates, a reasonable jury could determine that failure to deliver the project by the date set forth in the original

contract was not a material breach and did not discharge defendant's obligations under the contract.

B. Statute of Frauds

The purpose of the statute of frauds is "the prevention of fraud arising from uncertainty inherent in oral contractual undertakings. Where no uncertainty exists in the oral agreement, the reason for the statute's application similarly disappears." *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971). For all projects other than Poulsbo, Thrifty acknowledges that the leases and amended leases attached to the Declaration of E. Birth Frost (Dkt. # 28) satisfy the statute of frauds. Defendant argues, however, that the statute of frauds makes the lease modifications asserted by plaintiffs and reflected in the T-Rex reports invalid and unenforceable. The revisions to the construction schedule, including the dates by which defendants would have access to the buildings, were reduced to writing and are contained in defendants' computerized tracking program. Defendants not only recorded the changes made by the parties at the biweekly meetings, they also distributed the revisions to the parties as the basis for the on-going projects. Defendants do not deny that they agreed to the changes, created the reports, sent them to plaintiffs via company emails, or intended that the parties rely on them. Their argument apparently boils down to the contention that the modified dates, which defendants reduced to writing and to which they objectively manifested their assent, should have no legal effect because they did not take pen to paper and "sign" the T-Rex report.

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The type of ambiguities that are inherent in oral undertakings are not at issue in this case. Nor is there any real issue regarding defendant's intent: in the chosen medium of communication, handwritten signatures, whether original or digital, are rarely used. By affixing a typed name on the cover email, defendant announced its adoptions of the contents of the T-Rex report and authenticated the attached writing. *See Marks v. Walter G. McCarty Corp.*, 33 Cal. 2d 814, 205 P.2d 1025, 1028 (Cal. 1949) ("The statute of frauds does not demand that the signature of the party to be charged be placed at the end of the writing relied upon if a proper signature be found elsewhere on the instrument. Furthermore the signature need not be manually affixed, but may in some cases by printed, stamped or typewritten. But it is a universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied upon as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words the defendant must intend to appropriate the name as a signature.") (internal citations omitted).

There being no ambiguity as to the parties' mutual agreement to the revisions set forth in the T-Rex report or the content of the revised terms, the Court finds the statute of frauds satisfied as to Concord, Silverdale, Bremerton, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale.

C. Poulsbo

The same analysis does not apply to Poulsbo, however. Although a draft lease was exchanged between the parties, a key term — the rent to be paid upon delivery of the building — had not been agreed upon. That term was not supplied by later modifications and cannot be supported by parol evidence without eviscerating the statute of frauds: there would be too much potential for fraud if one could bind an opposing party to twenty years of rental payments at an amount of his choosing based on nothing more than an intent to negotiate a reasonable rent in the future. *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967) (in order to satisfy the statute of frauds, the writing must "be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking."); *Pruitt v. Fontana*, 143 Cal. App. 2d 675, 300 P.2d 371, 379 (Cal. App. 1656) ("Where material or essential terms of a contract within the statute of frauds are not reasonably expressed in a note or memorandum, their absence may not be supplied by parol.").

Because there was never agreement to a material term of the alleged contract, the doctrine of "part performance" cannot save plaintiffs' contract claims related to Poulsbo. The problem is not that the parties failed to unequivocally indicate their assent to an agreement in writing: they actually failed to agree. Both sides knew that additional information would be necessary to resolve the outstanding issue of the amount of rent to be paid for the Poulsbo store. Because an agreement had

not, in fact, been reached, plaintiffs cannot argue that they partly performed because they thought they had a valid, though technically unenforceable, contract. Plaintiffs have not proven and were not relying on the existence of an oral agreement. The doctrine of part performance is therefore not applicable. *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 559, 608 P.2d 266 (1980); *Sutton v. Warner*, 12 Cal. App. 4th 415, 15 Cal. Rptr.2d 632, 636 (Cal. App. 1993). Plaintiffs' breach of contract claim related to Poulsbo fails as a matter of law.

D. Expiration of Delivery Periods

As discussed above, there are genuine issues of material fact regarding the intent of the parties with regards to the delivery dates specified in the leases, waiver, and the materiality of any breach. If these issues are decided in plaintiffs' favor, the leases were modified by the parties and the delivery dates were extended as set forth in T-Rex. For most of the projects, the modified delivery date had not passed when defendants terminated the agreements. Plaintiffs' breach of contract claim regarding Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale may therefore proceed.

With regards to Silverdale and Bremerton, however, the last T-Rex report in the record shows a fixture date of June 14, 2010, and a store opening date of July 29, 2010. These dates came and went before defendants issued their notices of termination in December 2010. Plaintiffs argue, however, that Thrifty anticipatorily repudiated the

leases for Silverdale and Bremerton when they announced in February 2010 that they were going to terminate the leases because they did not meet defendants' revised ROI criteria and/or when they stated in May 2010 that the termination letters had been drafted. Although anticipatory repudiation is an issue of fact, there must be a clear and positive statement or action that expresses an intent not to perform under the contract. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). In the circumstances presented here, the parties clearly contemplated that some additional step would be necessary to affect a termination, namely the delivery of termination letters and the passage of the thirty-day cure period. Plaintiffs have not raised a genuine issue of fact regarding the dates on which the Silverdale and Bremerton projects were terminated. In the absence of a viable theory of breach given that the December 2010 termination letters were sent after the projects should have been completed, plaintiffs' breach of contract claim related to Silverdale and Bremerton fails as a matter of law.

II. Breach of the Covenant of Good Faith and Fair Dealing

Defendant argues that there is no independent claim for breach of the covenant of good faith and fair dealing under either Washington or California law. Defendant is wrong. Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of the bargain. *Badgett v. Sec. State Bank*, 116

Wn.2d 563, 569, 807 P.2d 356 (1991); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 81 Cal. Rptr.3d 72, 100 (Cal. App. 2008). While it is true that the obligation arises only in the context of an existing contract, a breach of the duty of good faith and fair dealing gives rise to a separate and independent cause of action that is regularly heard by the courts of those states. *See Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 764-66, 150 P.3d 1147 (2007); *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 8 Cal. Rptr.3d 233 (2004).

Plaintiffs have produced evidence from which one could conclude that Thrifty undertook a course of action which, while not an actual breach of an express contractual obligation, was designed and intended to deprive plaintiffs of the full benefit of performance. Thrifty's arguments suggest that, despite agreeing to alter delivery dates and affirmatively stating that plaintiffs had additional time in which to acquire property, obtain financing, and complete the landlord's work, defendants secretly intended to hold plaintiffs to the original dates. Thrifty did not have to extend the delivery dates: if time were of the essence or it otherwise needed the projects delivered as scheduled, it could have insisted on compliance with the leases as written. It did not. The record currently before the Court would support a finding that Thrifty's actions were not necessary to the protection of its own interests, were detrimental to plaintiffs, and were unfair and in bad faith. Plaintiffs' implied covenant claims may proceed.[6]

6. Although not argued by defendant, plaintiffs are unlikely to succeed on their good faith and fair dealing claim regarding

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CONCLUSION

For all of the foregoing reasons, Thrifty's motion for summary judgment (Dkt. # 25) is GRANTED in part and DENIED in part. Plaintiffs' breach of contract claim regarding Poulsbo, Silverdale, and Bremerton is hereby DISMISSED. Their other contract-based claims against Thrifty may proceed.

Dated this 18th day of February, 2014.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

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the Poulsbo, Silverdale, and Bremerton projects. In the absence of a contract regarding the Poulsbo site, the implied duties did not arise. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). With regards to Silverdale and Bremerton, even if Thrifty misled plaintiffs into believing that they had until June 2010 to make the projects available for tenant improvements, plaintiffs were actually given the additional time and still could not substantially complete the landlord's work. It is doubtful that plaintiffs will be able to establish any harm from the alleged breach of the covenant of good faith and fair dealing.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED FEBRUARY 18, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

February 18, 2014, Decided
February 18, 2014, Filed

ORDER GRANTING IN PART RITE AID'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Rite Aid's Motion for Summary Judgment Dismissing Plaintiffs' Third Through Tenth Causes of Action." Dkt. # 31. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. *L.A.*

Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) and identifying those portions of the materials in the record that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to identify specific factual disputes that must be resolved at trial. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of evidence in support of the non-moving party's position will not preclude summary judgment, however, unless a reasonable jury viewing the evidence in the light most favorable to the non-moving party could return a verdict in its favor. *U.S. v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties in the light most favorable to plaintiffs and having heard the arguments of counsel, the Court finds as follows:

A. Quantum Meruit (Third Cause of Action)

A party to an express contract may not bring an action based on an implied or quasi-contract related to the same matter. *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943); *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 51 Cal. Rptr.2d 622, 628 (Cal. App. 1996). Plaintiffs' right to recover for

services rendered and/or costs expended was established by the terms of the leases that governed the Concord, Silverdale, Bremerton, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale projects. Plaintiffs do not challenge the validity of those contracts, but simply argue that a quasi-contractual theory should be available to them if the contracts do not provide recovery. Neither Washington nor California law support such a proposition.

With regards to the Poulsbo project, plaintiffs may not get around the statute of frauds by supplying the missing terms by implication. *Henry v. Green*, 143 Wn. App. 1007 (2008) (quoting *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 687, 135 P. 660 (1913)). Nor have plaintiffs raised a reasonable inference that Poulsbo Holding's acquisition of property and preliminary attempts to develop a pharmacy on the site provided any benefit to Rite Aid. It is undisputed that the pharmacy was never built, and there is no evidence that the real property or any other asset was turned over to Rite Aid. Plaintiff's conjecture that its work "provided Rite Aid with valuable information regarding these markets" and an "opportunity to develop the stores" is unsupported. Dkt. # 44 at 5. Rite Aid sought to lease a pharmacy from plaintiffs, not acquire options on empty lots or obtain plat approvals that were never developed. Absent evidence that Rite Aid obtained possession of an asset or that the work plaintiffs did materially advanced subsequent efforts to build a pharmacy in Poulsbo, plaintiffs have not raised a genuine issue of fact as to the benefit prong of a quantum meruit claim.

B. Promissory Estoppel (Fourth Cause of Action)

Promissory estoppel requires, "(1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967). *See also U.S. Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 28 Cal. Rptr.3d 894, 901 (Cal. App. 2005). Plaintiffs' promissory estoppel claim is an alternative to or adjunct of its breach of contract claim: if the factfinder were to conclude that the agreed-upon extensions of the delivery dates for Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale lacked consideration or were otherwise unenforceable in contract, plaintiffs may seek a balancing of the equities in order to avoid injustice. *See Corey v. Pierce County*, 154 Wn. App. 752, 768, 225 P.3d 367 (2010); *Kim v. Dean*, 133 Wn. App. 338, 346-47, 135 P.3d 978 (2006); *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 96 Cal. Rptr. 2d 747, 1 P.3d 63, 66 (Cal. 2000). Plaintiffs may, therefore, proceed on their promissory estoppel claim as to Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale.[1]

1. In reply, Rite Aid argues that plaintiffs will not be able to establish damages arising from their reliance on the delivery dates set forth in the T-rex reports. This issue was not timely raised and has not been considered in ruling on this motion.

The promissory estoppel claim fails with regards to the Silverdale, Bremerton, and Poulsbo projects, however. Promissory estoppel requires, in the first instance, a promise: "although promissory estoppel may apply in the absence of mutual assent or consideration, the doctrine may not be used as a way of supplying a promise." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994). There is no evidence that defendants promised to extend the delivery dates for the Silverdale and Bremerton projects beyond December 2010, when the termination letters were sent.

With regards to Poulsbo, the Washington Supreme Court has consistently declined to adopt Restatement (Second) of Contracts § 139, which would allow a party to use promissory estoppel to avoid the statute of frauds. *See Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 398-401, 879 P.2d 276 (1994). While there is some indication that Washington courts might be willing to ignore the statute if its application would be "grossly unjust" (*Lectus, Inc. v. Rainier Nat'l Bank*, 97 Wn.2d 584, 588, 647 P.2d 1001 (1994)), that is not the case here. As discussed more fully in the "Order Granting in Part Thrifty's Motion for Partial Summary Judgment," the parties never reached an agreement regarding a key term of the Poulsbo lease — the rental amount. Defendants made no promises as to the amount they would pay in rent, no lease was signed, and plaintiffs were fully aware of these facts. Plaintiff Nicholson was an experienced real estate developer who knew the requirements of the statute of frauds and yet failed to provide defendants with the cost and expense data they needed to calculate the rental payment and finalize

the contract. There is no indication that defendants misled plaintiffs into believing that a partial oral agreement for a twenty year lease of real property would be effective: plaintiffs' efforts to develop the Poulsbo site were made on the hopeful assumption that the parties would eventually reach agreement, not in reasonable reliance on any promise made by defendants. If the equities in *Greaves* did not warrant the adoption of Restatement (Second) of Contracts § 139, the circumstances of this case certainly do not.

C. Breach of Fiduciary Duty (Fifth Cause of Action)

Plaintiffs have abandoned their breach of fiduciary duty claim.

D. Washington Consumer Protection Act ("CPA") (Sixth Cause of Action)

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Defendant argues that the termination of the leases was not "unfair or deceptive" and that this private contract dispute does not affect the public interest.

Appendix C

The CPA does not define "unfair or deceptive." It is up to the courts, through a "gradual process of judicial inclusion and exclusion," to determine whether a particular act is unfair or deceptive. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179 (2013) ("Given that there is no limit to human inventiveness, courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA.") (internal quotation marks omitted); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). In making that determination, courts consider whether defendants misrepresented something of material importance (*Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006)), whether the statement or act has the capacity to deceive a substantial portion of the population (*Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997)), and whether the act constitutes a per se violation of a statute or a violation of the public interest (*Klem*, 176 Wn.2d at 787). The Court will assume, for purposes of this motion, that agreeing to extend a contractual deadline, accepting continuing performance as if the contract had been extended, and then unilaterally enforcing the original deadline is an "unfair" practice.

To be actionable under the CPA, the unfair practice must also affect the public interest. *Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007). Where the transaction is a private, contractual dispute affecting no one but the

parties, it is ordinarily not an act or practice affecting the public interest. *Hangman Ridge*, 105 Wn.2d at 790.

> [I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest. . . . Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?

Hangman Ridge, 105 Wn.2d at 790-91 (internal citation omitted). Plaintiffs argue that the public interest element is satisfied because defendants terminated thirty-three development projects between January 1, 2008, and December 31, 2011. Eleven of those terminations represent plaintiffs' projects. The remaining twenty-two projects were handled by nine other preferred developers. Although it is clear that any statements and acts aimed at these nine developers occurred in the course of defendants' business, there are no facts from which one could infer that the business relationships grew out of advertisements to the general public, that defendants solicited the developers, that any such advertisements or solicitations misled or misrepresented a material fact, or that the contracting parties occupied unequal bargaining positions. There is also no indication that any of these nine developers

suffered the "unfair" practice alleged by plaintiff: the circumstances surrounding the twenty-two terminations are unknown. Plaintiffs request an opportunity to conduct discovery regarding this critical element of their CPA claim. Because discovery is not scheduled to close for another six months, the motion for judgment on the CPA claim is denied without prejudice to its being raised again.

E. California Business and Professions Code § 17200 (Seventh Cause of Action)

California's Unfair Competition Law ("UCL") precludes "unlawful, unfair or fraudulent business act[s] or practice[s] . . . ." Cal. Bus. & Prof. Code § 17200. "While the scope of conduct covered by the UCL is broad, its remedies are limited. A UCL action is equitable in nature; damages cannot be recovered." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 (Cal. 2003). Section 17203 of the Business and Professions Code authorizes injunctive relief and the restoration "to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

Plaintiffs seek to recover "restitution for benefits conferred on another party." Dkt. # 44 at 12. As noted above, however, there is no evidence that plaintiffs' unsuccessful attempts to acquire and develop property in various locations bestowed a benefit on defendants or, in the parlance of § 17203, that defendants "acquired" any money or property by means of their allegedly deceptive promise to extend the delivery deadlines. The pharmacies were never built and there is no indication

that the aborted developments aided defendants in any way. An order for restitution under the UCL is one that compels "defendant[s] to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property . . . ." *State v. Altus Finance, S.A.*, 36 Cal. 4th 1284, 32 Cal. Rptr. 3d 498, 116 P.3d 1175, 1188 (Cal. 2005) (quoting *Kraus v. Trinity Mgmt. Serv., Inc.*, 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718, 725 (2000)). Plaintiff's conjecture that its work benefitted defendants is insufficient to raise a genuine issue of fact regarding an essential element of their UCL claim.[2]

F. Punitive Damages (Eighth Cause of Action)

Plaintiffs have abandoned their claim for punitive damages.

G. Tortious Interference (Ninth Cause of Action)

Plaintiffs have abandoned their tortious interference claim.

H. Liability on Guaranties (Tenth Cause of Action)

Rite Aid argues that it can have no liability on its guaranty of defendant Thrifty's lease obligations because

2. To the extent plaintiffs seek recovery of costs and expenses incurred in reliance on defendants' promises to extend the delivery due dates on the projects, the claim is one for damages that are not recoverable under the UCL.

the leases were validly terminated. For the reasons stated in the "Order Granting in Part Thrifty's Motion for Partial Summary Judgment," plaintiffs cannot establish liability on the leases for the Poulsbo, Silverdale, and Bremerton projects: Rite Aid cannot be liable as guarantor if the principal obligor is not liable. Plaintiffs may, however, seek to hold Rite Aid liable on its guaranties related to Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale.

For all of the foregoing reasons, Rite Aid's motion for summary judgment is GRANTED in part and DENIED in part. Plaintiffs' quantum meruit, fiduciary duty, UCL, punitive damage, and tortious interference claims against Rite Aid are dismissed in their entirety. Plaintiffs' promissory estoppel claim is dismissed as to the Poulsbo project only. Plaintiffs' guaranty claim is dismissed as to the Poulsbo, Silverdale, and Bremerton projects. Plaintiffs may proceed on their promissory estoppel claim as to Concord, Silverdale, Bremerton, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale and on their guaranty claim as to Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale. Plaintiffs may also proceed with discovery related to their CPA claim.

Dated this 18th day of February, 2014.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED MAY 22, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR RECONSIDERATION

On February 18, 2014, the Court dismissed plaintiffs' claims regarding the Silverdale and Bremerton projects on the ground that the last agreed-upon date for delivery had already passed when defendants sent the termination letters for those projects. Plaintiffs filed a timely motion for reconsideration. Dkt. # 60. Plaintiffs argue that a June 15, 2010, email indicating defendants' willingness to extend the delivery dates constitutes a modification of the leases and/or a waiver of the no oral modification provision. In the alternative, plaintiffs argue that the

email is evidence that the delivery dates were not material and can form the basis of a promissory estoppel claim. Pursuant to Local Civil Rule 7(h)(3), the Court gave defendants an opportunity to respond to the motion for reconsideration. Dkt. # 63.

Having reviewed the submissions of the parties, the Court finds that the email string evidencing defendants' willingness to extend the delivery dates does not constitute a modification of the lease, a waiver of the "no oral modifications" provision, or a promise on which a promissory estoppel claim could be based. It is, however, evidence from which a reasonable fact finder could conclude that the breach of which defendants complain was not material. Given the circumstances of this case, including defendants' acknowledgment that they did not want the stores to be delivered too far in advance of an expiring lease and their willingness to extend the deadlines of these and other leases, a reasonable jury could determine that the failure to deliver the Silverdale and Bremerton projects by the dates set forth in the original leases was not a material breach and did not discharge defendant's obligations under the contracts.

Dated this 22nd day of May, 2014.

/s/
Robert S. Lasnik
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED MAY 22, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

May 22, 2014, Decided
May 22, 2014, Filed

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

On February 18, 2014, the Court granted in part and denied in part defendants' summary judgment motions. Defendants filed a timely motion for reconsideration on a number of issues. Dkt. # 59. Pursuant to Local Civil Rule 7(h)(3), the Court gave plaintiffs an opportunity to respond to the motion for reconsideration: no reply was requested. Dkt. # 62. The Court expressed particular

interest in defendants' arguments regarding San Pablo and Santa Rosa and the acknowledgment requirement under Washington law. Each of defendants' arguments are considered below.

A. San Pablo and Santa Rosa

Defendants argue that plaintiffs repudiated the leases for San Pablo and Santa Rosa, thereby excusing defendants' performance under the leases and immunizing them from any liability arising out of the letters of termination. While this argument was not clearly asserted in the underlying motion for summary judgment with regards to San Pablo,[1] defendants did provide evidence from which a reasonable fact-finder could conclude that plaintiffs told defendants that they were walking away from both projects. With regards to Santa Rosa, plaintiff Nicholson let defendants know that he was "dropping this deal as [he] could not go forward without 100% certainty from RAD now." Dkt. #28-4 at 109. With regards to San Pablo, Nicholson announced on April 1, 2009, that he had "lost control of the San Pablo deal," that he had lost all of the money he had invested in the project, and that he

1. The thrust of defendants' argument in the underlying summary judgment motion with regards to San Pablo was that plaintiffs breached the lease when they failed to complete the projects prior to the stated delivery dates. Dkt. # 25 at 14. Plaintiffs were likely unaware, as was the Court, that defendants were actually asserting a claim of anticipatory breach via a footnote. Dkt. # 25 at 14 n.6. Because the nature of defendants' argument was unclear, the Court has considered the additional evidence plaintiffs submitted with their opposition regarding San Pablo.

could not make the required deposit and close on the land purchase in a timely manner. Dkt. # 28-4 at 32.

Anticipatory repudiation requires a clear and positive statement or action that expresses an intent not to perform under the contract. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). Both statements, standing alone, could be interpreted as declarations that plaintiffs would not be completing the projects. Taken in the larger context of the parties' relationship, however, the meaning of the statement regarding Santa Rosa is less clear. The day before Nicholson made the statement, defendants had demanded changes to the original Santa Rosa lease in order to accommodate their new return on investment requirements. Nicholson then sent the "dropping this deal" email, essentially indicating that he could not agree to the proposed changes for that project. In context, the email appears to be part of the restructuring that defendants had initiated. The conduct of the parties thereafter also supports a finding that the statement was not intended to be and was not interpreted as a repudiation. The parties continued to discuss the project and agree to revised delivery dates, and defendants ultimately issued a termination letter based on the failure to timely deliver the project. Defendants are not entitled to judgment as a matter of law on their assertion that plaintiffs repudiated the Santa Rosa lease.

With regards to the San Pablo project, the repudiation is both clear and positive. Unrelated to any on-going negotiations between the parties, Nicholson told defendants that he had lost control of the site and the money he

had invested and that defendants no longer needed to worry about the project. Defendants expressed regret about the demise of the project and removed it from the T-Rex tracking system. Repudiation does not, however, automatically terminate a contract. *Hemisphere Loggers & Contractors, Inc. v. Everett Plywood Corp.*, 7 Wn. App. 232, 234, 499 P.2d 85 (1972). While the non-repudiating party has the option to treat the contract as broken, it need not do so: "[i]t is commonly said that there is no breach or that the repudiation does not operate as a breach until such repudiation is treated as a breach by the other party." *Walker v. Herke*, 20 Wn. 2d 239, 254, 147 P.2d 255 (1944) (quoting 12 Am. Jur, *Contracts* § 395). While the non-repudiating party would be entitled to rely on the repudiation to excuse his own performance or to file an immediate action for damages without having to wait for the repudiating party to actually fail to perform (*Hemisphere Loggers*, 7 Wn. App. at 234-35; *Trompeter v. United Ins. Co.*, 51 Wash. 2d 133, 316 P.2d 455 (1957)), it could also treat the contract as still in existence and insist on performance. The option to choose expires, however, if the repudiating party withdraws the repudiation before the non-repudiating party has materially changed its position in reliance on the repudiation.

Shortly after sending the "lost control" email, plaintiffs made it clear that they were still working to regain control of the San Pablo site and declined to sign a lease termination document presented by defendants. Defendants were aware that plaintiffs believed San Pablo was still in play, yet they did not declare an anticipatory breach, withhold their own performance, or otherwise

make a material change of position in reliance on the alleged repudiation. Rather, defendants waited until the day the original delivery window expired to issue a termination letter based on an actual, rather than an anticipated, breach. Having chosen to proceed as if the contract were still in force, there is an issue of fact regarding whether plaintiffs effectively withdrew the repudiation.

B. Concord and Sunnyvale

Defendants argue that, because Nicholson declined to take part in a conference call scheduled for December 2, 2009, the T-Rex report that it sent to him the previous day is a nullity. The argument is factually unsupported and logically tenable. The T-Rex report at issue reflected agreements reached during the previous conference call. There is no indication that those dates were not mutually agreed upon or that Nicholson otherwise rejected the November 30, 2009, T-Rex report.

C. Abandonment of All Projects

Defendants argue that plaintiffs abandoned all of the projects months before the termination letters were issued. To the extent defendants are arguing that plaintiffs repudiated all of the leases, the argument is untimely and defendants have not identified the necessary clear and positive statement as to each project.

D. Ability to Perform

Defendants argue that plaintiffs cannot prevail in this action because they have not shown that they were willing and able to perform under the leases. Plaintiffs were, however, taking steps to develop the projects: in other words, they were performing. Defendants seem to be arguing that plaintiffs are barred from bringing a breach of contract claim unless they were ready, willing, and able to make immediate delivery of the projects. The "ready, willing, and able" requirement arose in circumstances where the party asserting a breach was also in default. *See Willener v. Sweeting*, 107 Wn. 2d 388, 394, 730 P.2d 45 (1986); *Kreger v. Hall*, 70 Wn. 2d 1002, 1009, 425 P.2d 638 (1967). Those circumstances do not apply here if the factfinder determines that the delivery dates for the various leases were extended into the future. If that were the case, the time for plaintiffs' performance had not yet come when defendants issued the termination letters. In addition, Nicholson has stated that, despite the woes that beset the construction industry during the national liquidity crisis, plaintiffs would have been able to raise the additional funds necessary to complete the projects if defendants had not breached their promises to extend the delivery dates. While that assertion is rather doubtful as to the San Pablo project (which had a revised delivery date in 2010), defendants cut off any chance plaintiffs had of performing under the leases as modified. Defendants have not established, as a matter of law, that plaintiffs would not have been ready, willing, and able to perform on time and as scheduled if given the benefit of the revised construction schedules.[2]

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2. Nor is it clear that the case law involving anticipatory repudiation governs plaintiffs' claims. Plaintiffs have alleged an

Appendix E

E. Acknowledgment for Washington Real Estate Transactions

Defendants argue, as they did in the underlying motion, that Washington law requires modifications of a multi-year lease to be both in writing and acknowledged.[3] If the fact finder determines that the "Anticipated Delivery Dates" in the Blaine, Everett, and Bremerton leases are simply estimates or guides subject to change as the project progressed, the promises contained in the T-Rex reports would "not purport to rise to the dignity of a modification of the lease" and would not, therefore, require an acknowledgment. *Broxson v. Chicago, Milwaukee, St. Paul and Pac. R.R. Co.*, 446 F.2d 628, 631 (1971). Even if the parties intended the delivery dates to be set in stone, the statute of frauds applies to the creation and modification of a tenancy of real estate for a period longer than one year. The modifications at issue here — namely alterations to the construction timeline — do not affect the boundaries of the leased property, the term of the lease, or the rent paid. Defendants have not identified, and the Court has not found, any case in which the modification of such a non-essential item was found to trigger the statute of frauds anew.[4] Finally, Washington law gives courts the

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actual breach, namely the premature termination of the leases in violation of parties' agreements, not an anticipatory statement of an intent not to perform.

3. The most common form of an "acknowledgement" as that term is used in Washington law is the certification of a Notary Public. See RCW 42.44.100; RCW 64.08.050.

4. The parties apparently did not believe the statute applied to every alteration of the original leases, having eschewed

authority to enforce leases "that do not fully comply with statutory requisites when under the facts it would be inequitable for the challenging parties to assert invalidity of their own agreements." *Tiegs v. Watts*, 135 Wn. 2d 1, 15, 954 P.2d 877 (1998). Because it would be inequitable for defendants to avoid their undisputed, written promises to extend the delivery dates, thereby inducing plaintiffs to continue working on and incurring costs related to the projects, the type of equitable estoppel discussed in *Tiegs* applies here.

F. Functional Equivalent of "Delivery Date"

Defendants argue that there is no evidence that the parties intended any of the column headings in the T-Rex reports to be "functionally identical" to the delivery date found in the leases. On summary judgment, the evidence is viewed in the light most favorable to the non-moving party. The record, when viewed favorably to plaintiff, shows that the "Fixture Date" is the functional equivalent of the "Delivery Date" and that the "Official Open Date" is approximately six to twelve weeks after the "Fixture Date." Thus, when the parties agreed to push the "Official Open Date" off into the distant future (January 1, 2025, was the placeholder date entered into T-Rex), the reasonable inference is that the "Fixture Dates" for Concord, Port Angeles, Everett, Blaine, Santa Rosa, Oakley, and Sunnyvale were postponed to a two month window in late 2024.

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acknowledgments on the formal amendments generated for third parties.

G. Defined Terms Cannot be Ambiguous

Defendants disagree with the Court's finding that the parties' intent with regards to the term "Anticipated Delivery Date" is ambiguous. The Court declines to reconsider its prior ruling.

H. No Independent Claim for Breach of Duty of Good Faith and Fair Dealing

Defendants disagree with the Court's finding that a breach of the duty of good faith and fair dealing gives rise to a separate and independent cause of action that is regularly heard by the courts of Washington and California. The Court reiterates that plaintiffs can establish a duty of good faith and fair dealing only in the context of an existing contract (which obviously exists in this case) and declines to reconsider its prior ruling.

For all of the foregoing reasons, defendants' motion for reconsideration is DENIED.

Dated this 22nd day of May, 2014.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JANUARY 8, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

January 8, 2018, Decided
January 8, 2018, Filed

ORDER DENYING MOTION TO RELEASE FUNDS

This matter comes before the Court on plaintiff Brent Nicholson's "Motion for Release of Funds" held in an escrow account to secure the judgment in this matter. Dkt. # 163. Nicholson argues that because the award of attorney's fees against him in his individual capacity was vacated and remanded by the Ninth Circuit for further consideration, there is no longer a judgment that needs to be secured. Nicholson also argues that, on remand, the

Court should conclude that he is not personally liable for the fee award.[1]

Nicholson's liability for the attorney fee award has not been finally resolved. The Ninth Circuit found that the undersigned's analysis of the issue was insufficient. It therefore vacated the award and remanded the matter for further explication. Dkt. # 161 at 6-7. For the reasons discussed below, the Court again finds that Nicholson is jointly and severally liable for the $1,819,340.21 in fees and costs defendants incurred in successfully defending against plaintiffs' claims. Commerce Bank shall, therefore, continue to hold the funds in the escrow account until one of the events specified in ¶ 4 of the Escrow Deposit Agreement occurs.

Plaintiff Nicholson and the eleven LLCs he formed to acquire land and build defendants' stores sued defendants for losses they incurred when defendants delayed and/or terminated projects in which Nicholson had invested hundreds of thousands of dollars. Dkt. # 1-2 at ¶¶ 3.44-3.47. According to the complaint, Nicholson would identify potential locations for defendants' stores, perform preliminary investigations, zoning, and architectural work, and negotiate a rental agreement with defendants before forming an LLC to sign a lease with defendants and develop each site. The leases at issue contained the following attorney's fee provision:

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1. This matter can be decided on the papers submitted. Defendants' request for oral argument is DENIED.

Appendix F

> In the event that any suit or action is instituted by either of the parties hereto against the other to enforce compliance with any of the terms, covenants or conditions of this Lease or for damages for breach of this agreement, the non-prevailing party shall, in addition to costs and disbursements provided by statute, pay to the prevailing party such actual attorney's fees incurred in such suit or action, including appeal from any judgment rendered therein.

Dkt. # 125-1 at 2. All of the plaintiffs, including Nicholson, asserted a breach of contract claim against defendants based on the lease agreements. Dkt. # 1-2 at 29.

Nicholson argues that, because he was not a party to the lease agreements, he cannot be personally liable for attorney's fees under the contracts. Under both Washington and California law, however, a nonsignatory can be bound by a fee provision if, in fashioning his complaint, he asserts a colorable claim "on the contract" (*see* RCW 4.84.330 and Cal. Civ. Code § 1717) and would be entitled to a fee award if he were to prevail on that claim (*P.T. Ida Muda Seafoods, Int'l v. Ocean Beauty Seafoods, Inc.*, 135 Wn. App. 1025, 2006 WL 3059959, at *3 (Oct. 23, 2006); *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 158 Cal. Rptr. 1, 599 P.2d 83 (1979)). The Court need not determine that the breach of contract claim actually has merit, only that it is colorable and would trigger an award of fees if successful. If that were not the case, when a defendant successfully defends a contract claim by showing that the plaintiff lacks standing or that

the contract is unenforceable, the right to attorney's fees would effectively be unilateral: plaintiff would have been entitled to fees if it succeeded but would avoid them if the claim failed. *See Richards v. Silva*, 2016 Cal. App. Unpub. LEXIS 7620, 2016 WL 6123917, at *3 (Cal. App. Oct. 20, 2016); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 192-97, 692 P.2d 867 (1984).

Under both Washington and California law, the Court determines whether a nonsignatory is subject to a contractual fee award by evaluating whether plaintiff would be entitled to fees if he won on his contract claim, not whether he will actually win. In *Real Property Servs. Corp. v. City of Pasadena*, 25 Cal. App.4th 375, 30 Cal. Rptr. 2d 536 (1994), for example, a sublessee identified as the future tenant in a lease agreement between the city and the developer of a movie theater complex sued when the parties to the lease terminated their relationship. Even though the sublessee was not a party to the lease, it asserted a breach of contract claim. The city successfully defended the claim by showing that the sublessee was not a third-party beneficiary under the lease and therefore lacked standing to enforce its covenants. The breach of contract claim was dismissed. The court nevertheless found that the facts alleged gave rise to a colorable third-party beneficiary claim against the city, making the city potentially liable for the alleged breaches and an award of attorney's fees under the contract. The reciprocity rationale of Cal. Civ. Code § 1717 resulted in an award of attorney's fees against the sublessee and in favor of the city as the prevailing party.

In this case, Nicholson opted to assert a breach of contract claim against defendants based on a contract that contained a clear attorney's fee provision.[2] Although he does not specifically allege the legal theory under which he sought to enforce the contracts, the factual allegations of the complaint suggest that the LLCs were his alter egos and/or that he was a third-party beneficiary of the lease agreements. As defendants were aware, Nicholson invested significant funds into each development project before creating the LLCs and signing the lease agreements on their behalf. He was the controlling owner and manager of the LLCs and the person with whom defendants did business. Based on the allegations of the complaint and the way he pursued the litigation, Nicholson treated the LLCs' claims as if they were his personal claims, with the damages representing an amalgam of expenses paid by Nicholson and the LLCs to bring each development to fruition. Had Nicholson been able to establish standing to enforce the terms of the lease agreements and defendant's breach, he would have prevailed on the contract claim and been entitled to reasonable attorney's fees. As was the case in *Real Property Servs.*, 25 Cal. App.4th at 383, "it is apparent that [Nicholson] agreed with this concept,

2. The cases on which Nicholson relies, *Niederle v. T.D. Escrow Servs., Inc.*, 114 Wn. App. 1046 [published in full-text format at 2002 Wash. App. LEXIS 2944], 2002 WL 31648772, at *5 (2002), and *Richards*, 2016 Cal. App. Unpub. LEXIS 7620, 2016 WL 6123917, at *4, are distinguishable in that neither of those cases involved a claim on a contract. The nonsignatory plaintiff in *Niederle* eschewed a contract claim and sued for unjust enrichment while the nonsignatory plaintiff in *Richards* alleged fraud based on misrepresentations rather than breach of the purchase agreement.

because in the original complaint, [plaintiffs] prayed for an award of attorney fees pursuant to the contract." *See* Dkt. # 102 at 34. Therefore, under the reciprocity concept set forth in both Washington and California law, defendants, as the prevailing parties, are entitled to an award of fees against Nicholson, a nonsignatory plaintiff, who sued under and to enforce the terms of the lease agreements.

For all of the foregoing reasons, Nicholson's motion for release of funds (Dkt. # 163) is DENIED. All twelve named plaintiffs are jointly and severally liable for the reasonable fees and costs defendants incurred in successfully defending this litigation, in the amount of $1,819,340.21.

Dated this 8th day of January, 2018.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JANUARY 8, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

ORDER GRANTING IN PART MOTION FOR ATTORNEY'S FEES ON APPEAL

This matter comes before the Court on "Defendants' Motion for Attorney Fees on Appeal." Dkt. # 174. The Ninth Circuit transferred consideration of defendants' request for fees and costs on appeal to the undersigned, and defendants seek an award of $429,294.00 under the fee-shifting provisions of the lease agreements and RCW 4.84.330. Plaintiffs oppose the request, arguing that defendants are not the prevailing party on appeal, that any award of fees must be segregated by issue, that the hours expended were unreasonable, that certain

categories of fees are not recoverable, and that plaintiff Brent Nicholson is not liable under the contracts. Having reviewed the dockets in this matter and on appeal as well as the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

A. Prevailing Party and Segregation of Fees

On appeal, the parties challenged the undersigned's judicial estoppel, contract, attorney's fees, and pre-judgment interest rulings, virtually all of which arose out of or resolved plaintiff's contract claim. Neither side achieved complete victory. Defendants obtained favorable rulings on judicial estoppel, the joint and several liability of the LLCs, and Nicholson's personal liability for overpayments to No One to Blaine. They also obtained a remand for further consideration of their claim for prejudgment interest. Plaintiffs, on the other hand, were able to overturn Nicholson's personal liability for fees under the lease agreements. Under these circumstances, the Court must determine whether there was a prevailing party on appeal or "whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees" under the contract. *Zintel Holdings, LLC v. McLean*, 209 Cal. App.4th 431, 439-40, 147 Cal. Rptr. 3d 157 (2012). *See also Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wn. App. 768, 772-73, 750 P.2d 1290 (1988). When deciding whether there is a prevailing party on the contract, "the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar

sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions." *Hsu v. Abbara*, 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804, 813 (Cal. 1995) (alteration in original). *See also Riss v. Angel*, 131 Wn.2d 612, 633-34, 934 P.2d 669 (1997) ("If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of relief afforded the parties.").

The Court finds that defendants substantially prevailed on the contract claims on appeal and are entitled to a fee award under the terms of the lease agreements. Although plaintiffs were able to show error in the undersigned's analysis of Nicholson's personal liability for attorney's fees, plaintiffs failed to reinstate any of their claims, failed to reverse the rent award against Nicholson personally, and failed to convince the Ninth Circuit that fees should be apportioned amongst the LLCs. The LLC plaintiffs obtained nothing through the appellate process, and Nicholson's victory on the fee award was not complete: he did not convince the Ninth Circuit that he was not personally liable for $1,819,340.21 in attorney's fees under the lease agreement, only that the matter should be remanded for further consideration. The Ninth Circuit upheld dismissal of plaintiffs' damages claim (which exceeded $55 million), affirmed Nicholson's obligation to refund $103,500 in rent payments, affirmed the joint and several liability of the LLCs, and remanded Thrifty's claim for prejudgment interest. A comparison

of the relief sought and the relief obtained on any metric shows that defendants prevailed on appeal.

Plaintiffs argue that, even if defendants are the prevailing parties on appeal, they must segregate the fees and costs by issue and the Court should deny fees for time spent on Nicholson's personal liability and the arguments that the Ninth Circuit did not reach in its decision. Washington law recognizes that, in some instances, the prevailing party received so little of what it originally sought and/or failed on a number of distinct, severable contract claims as to make it unfair or unjust to award all of the fees incurred. *See Marassi v. Lau*, 71 Wn. App. 912, 916-17, 859 P.2d 605 (1993), abrogated on other grounds, *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490, 200 P.3d 683 (2009).[1] That is not the case here. Defendants defeated every one of plaintiffs' claims and obtained relief on their only counterclaim. The Ninth Circuit did not need to reach defendants' alternative grounds for the same relief, but once plaintiffs initiated an appeal seeking to reinstate their claims, defendants were entitled to raise all available arguments: there is nothing unfair about shifting the costs of having to do so pursuant to the contractual agreement between the parties. The only remaining open issues (pre-judgment interest and Nicholson's personal liability for attorney's fees) are collateral to the underlying contract claims and do not change the fact that defendants prevailed on all claims asserted in this matter. Because there is no unfairness, the Court declines to exercise

1. Plaintiff does not identify any California cases adopting a similar mechanism.

its discretion under Washington law to ameliorate any harshness or injustice that may arise from application of the "substantially prevailing" standard.

B. Reasonableness of Hours Expended and Unrecoverable Amounts

Plaintiffs argue that the manner in which defendants litigated this case, namely by waiting two years before filing a motion for summary judgment based on judicial estoppel, unreasonably inflated the number of hours spent. To the extent that argument has any merit, the time to raise it was in response to defendants' motion for attorney's fees following the entry of judgment in February 2015. The issue now before the Court is whether defendants are contractually entitled to recover attorney's fees on appeal. This argument has been waived.

Plaintiffs also argue that, although counsel for both parties charge similar rates, plaintiffs' lawyers recorded only $212,106.00[2] in fees since the appeal was filed, whereas defense counsel is seeking $429,294.00 over essentially the same time period. Plaintiffs maintain that this disparity shows that defendants' request for fees "is replete with time entries showing unnecessary, duplicated and wasted effort," but they identify only two specific examples and provide generic references to "multiple-attorney conferences" and "fees related to executing on

2. This number is taken from plaintiffs' memorandum (Dkt. # 179 at 8). The Declaration of Susannah C. Carr supports a lower number (Dkt. # 181 at ¶ 6), but the Court presumes that the missing "Hill Decl. at ¶4" would support the higher value.

and securing the judgment." Dkt. # 179 at 6 and 8. The Court, having reviewed the billing records in detail, discounts the fee request for the following reasons:

1. Fees incurred in the district court after judgment was entered were not "on appeal" and are not properly before the Court. These fees are not recoverable.

2. Fees incurred in an attempt to secure or execute on the judgment were not incurred while pursuing a contract claim or on appeal. They are not, therefore, recoverable in this action, although the applicable garnishment and execution procedures may permit an award of fees in the collateral proceedings.

3. Defendant had six attorneys and three legal assistants working on the appeal in this matter. For the most part, work was appropriately assigned and tasks were staffed commensurate with their importance. Where the need to keep that many people informed led to waste and duplication of effort, however, the Court reduced the overall fees charged by the collective.

4. Certain time entries do not appear to have any relationship to the contract claims for which fees can be recovered, such as the preparation of an audit response. The fees associated with these tasks are not recoverable.

5. Fees related to defendants' failure to comply with the word limits imposed by the Ninth Circuit are not recoverable.

6. Although counsel's time entries are specific as to the work performed, many of them describe more than one type of activity. Where unrecoverable tasks, as set forth above, are included with recoverable tasks, the Court made an effort to allocate the fees whenever there was a reasonable basis for doing so. If no reasonable basis for allocation were apparent from the entries, the fee entry was deducted in its entirety.

After making deductions as described above, the lodestar amount is $247,029.50. No further adjustments are necessary or appropriate.

C. Nicholson's Liability Under the Contracts

For the reasons set forth in the Court's "Order Denying Motion to Release Funds," Nicholson is personally liable for attorney's fees under the lease agreements even though he was not a party to the contracts.

For all of the foregoing reasons, defendants' motion for an award of attorney's fees on appeal is GRANTED in part. Defendants are awarded fees in the amount of $247,029.50 on appeal. All twelve named plaintiffs are jointly and severally liable for that amount.

Dated this 8th day of January, 2018.

Respectfully Submitted

/s/_____
Robert S. Lasnik
United States District Judge

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JANUARY 8, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C12-1121RSL

BRENT NICHOLSON, *et al.*,

Plaintiffs,

v.

THRIFTY PAYLESS, INC., *et al.*,

Defendants.

January 8, 2018, Decided
January 8, 2018, Filed

ORDER ON REMAND

This matter comes before the Court on "Defendants' Motion for Order in Response to Remand." Dkt. # 176. The Ninth Circuit Court of Appeals remanded this matter to the undersigned for (a) further consideration of plaintiff Brent Nicholson's personal liability for attorney's fees under the lease agreements he signed on behalf of the LLC plaintiffs and (b) a determination regarding

defendant Thrifty's entitlement to prejudgment interest on its counterclaim.[1]

A. Personal Liability for Fee Award

For the reasons set forth in the Court's "Order Denying Motion to Release Funds," the Court finds that Nicholson is personally liable for attorney's fees under the lease agreements even though he was not a party to the contracts. All of the plaintiffs, including Nicholson, asserted a breach of contract claim against defendants based on the lease agreements. Dkt. # 1-2 at 29. Given his relationship to and control over the plaintiff LLCs, Nicholson's contract claim was colorable and, had he prevailed on that claim, he would have been entitled to a fee award under the terms of the contract.

B. Prejudgment Interest

Plaintiffs do not dispute that the overpayments made to No One to Blaine, LLC, resulted in a liquidated claim or that prejudgment interest is generally awarded on such claims in order to compensate for the "use value" of the money from the time of loss to the date of judgment. *See Hansen v. Rothaus*, 107 Wn.2d 468, 472-73, 730 P.2d 662 (1986); *Hadley v. Maxwell*, 120 Wn. App. 137, 141-42, 84 P.3d 286 (2004). The parties disagree, however, regarding the appropriate interest rate that applies in this case, the date upon which interest began to accrue, and

1. The Court has not reevaluated Nicholson's personal liability for any award of prejudgment interest. That issue was finally resolved against Nicholson on appeal. Dkt. # 161 at 8.

whether a reduction should be made based on equitable considerations.

Interest on judgments in Washington is governed by RCW 4.56.110, which provides five different interest rates depending on the nature of the claim upon which judgment is entered. "[J]udgments founded on the tortious conduct of individuals or other entities" accrue interest at a rate tied to the published prime rate of the federal reserve system. RCW 4.56.110(3)(b). In this case, that rate is 5.25%. Judgments founded on contracts that do not specify an interest rate accrue interest at 12%. The issue, then, is whether the $103,500 judgment on Thrifty's counterclaim was founded on a tort or a contract theory.

Having reviewed the pleadings and relevant motions in this matter, the Court finds that Thrifty's counterclaim and the resulting judgment were based in tort. Thrifty's counterclaim avoids labels and is based solely on allegations of a contractual obligation to pay rent through August 31, 2010, mistaken payments thereafter, and plaintiffs' failure to repay or reimburse the amounts mistakenly paid. Dkt. # 17 at 22-23. In its motion for summary judgment, Thrifty argued that plaintiffs' "wrongfully retained" the overpayments. Dkt. # 88 at 35. These allegations and arguments mirror a conversion claim, where "a person intentionally interferes with chattel belonging to another, either by taking or unlawfully retaining it, thereby depriving the rightful owner of possession." *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 619, 220 P.3d 1214 (2009). Thrifty did not and could not identify a provision of the lease agreement that was

breached, and the cases on which it relied for the relief requested are based on various tort causes of action. *U.S. Bank v. Henderson*, 2007 U.S. Dist. LEXIS 63837, 2007 WL 2492738, at *2-3 (W.D. Wash. Aug. 29, 2007) (overpayment for stock certificate during merger gave rise to a claim based on the principles "that no one ought unjustly to enrich himself at the expense of another" and that a party who "has received money which in equity and good conscience should have been paid to" another "ought, by the ties of natural justice, to pay it over.") (quoting *Seekamp v. Small*, 39 Wn.2d 578, 584, 237 P.2d 489 (1951)); *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 721, 197 P.3d 686 (2008) (evaluating common law claims of conversion and restitution). Thrifty's counterclaim was based on erroneous payments not required by the contracts: plaintiffs' liability arose when it was unjustly enriched and/or failed to return what, in equity and good conscience, should have been paid over. Thus, the 5.25% interest rate applies.

Prejudgment interest normally begins to accrue at the time of the loss in order to compensate the injured party for the use value of the wrongfully withheld money. Plaintiffs argue that the loss occurred all at once in May 2011, but there is nothing in the record to support such speculation. The lease agreements, the course of conduct between the parties, and plaintiffs' accounting records show that rent was paid monthly in $11,500 installments, not in a lump sum in May 2011.

Finally, plaintiffs argue that the award of prejudgment interest should be reduced based on equitable

considerations, primarily the facts that the overpayment was the result of Thrifty's unilateral mistake and that Thrifty did not make a demand for repayment until it filed its counterclaim on August 17, 2012. Even if plaintiffs arguably did not convert Thrifty's property until demand was made, plaintiffs were unjustly enriched from the moment they received the payments. Despite the chaos of the real estate market in the relevant time frame and the complexity of the parties' business relationship, plaintiffs knew that the interim rent payments after August 2010 were not being used for any purpose that would benefit Thrifty (such as securing the Blaine property and/or building the retail space). Plaintiffs had stopped making payments on the loan in July 2010, negating any justification for the accepting and retaining the interim rental payments after the contractual obligation expired. The equities do not warrant a further reduction in the interest rate or the time over which interest must be paid.

For all of the foregoing reasons, the Court finds that (a) Brent Nicholson is personally liability for attorney's fees under the lease agreements he signed on behalf of the LLC plaintiffs and (b) Thrifty is entitled to prejudgment interest on its counterclaim at the rate of 5.25% from the date of each overpayment. The Clerk of Court is directed to enter judgment in this matter in favor of defendants.

Dated this 8th day of January, 2018.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge