

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EGT, LLC, a Delaware Limited Liability
Company,

Plaintiff,

v.

PORT OF LONGVIEW, a municipal
corporation and political subdivision of the
State of Washington,

Defendant,

INTERNATIONAL LONGSHORE &
WAREHOUSE UNION, LOCAL 21,

Intervenor-Defendant.

No. 11-5036 RBL

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
Friday, September 23, 2011

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
No. 11-5036 RBL

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I. INTRODUCTION AND RELIEF REQUESTED

This case raises the single question: whether Plaintiff EGT, LLC ("EGT") agreed to incorporate a separate agreement between Defendant Port of Longview ("Port") and ILWU 21 ("Working Agreement") into EGT's lease with the Port ("Lease"). EGT believes that the Court's inquiry should begin and end with the actual language of the Lease, which does not contain any language incorporating the Working Agreement by reference or otherwise indicate that EGT was bound by the Working Agreement. Consideration of the undisputed¹ extrinsic evidence set forth below also proves that EGT never agreed to incorporate the Working Agreement into the Lease and never agreed to be bound by the Working Agreement. As a result, EGT respectfully requests that the Court enter an order confirming that the Lease did not incorporate the Working Agreement by reference and that EGT is not contractually obligated to utilize union labor at the grain facility located on the leased property ("Facility").

II. UNDISPUTED FACTS

A. The Port's Lead Negotiator, Ken O'Hollaren.

Ken O'Hollaren has served as the Port's Executive Director or General Manager² since 1988 and has acted as the Port's lead negotiator for all significant contracts during this 23-year period. P25, L9-22.³ Mr. O'Hollaren admitted to possessing significant experience negotiating contracts, including negotiating at least five to six leases before taking the lead role in negotiating the Lease. P25, L23-P27, L16. Mr. O'Hollaren also employed two different law firms to review drafts of the Lease and provide him with advice during the negotiations between the Port and EGT. P39, L15-P40, L13; P158, L22-P159, L6. Based on his experience and the advice that he has received during this 23-year period, Mr. O'Hollaren also admitted that he knew that the actual terms of a final written agreement control the

¹ Unless otherwise noted, all of the facts cited herein come from testimony of Ken O'Hollaren, the Port employee with primary responsibility for negotiating the Lease and from whom the Port previously submitted a declaration in support of its own motion for summary judgment.

² These titles are interchangeable at the Port. P20, L25-P21, L3.

³ The full transcript of Mr. O'Hollaren's deposition is attached as Exhibit A to the supporting Declaration of Michael A. Moore. EGT will hereafter refer to specific sections of Mr. O'Hollaren's deposition testimony by page and line number only.

1 parties' contractual relationship, not drafts or assurances allegedly made during the course of
2 the parties' negotiations. P99, L13-P100, L5; P150, L1-P152, L6.⁴

3 While he served as the Port's lead negotiator, Mr. O'Hollaren did not possess the
4 authority to actually agree to the Lease or bind the Port. That authority is vested solely with
5 the Port's commissioners. P28, L21-P29, L15. As a result, Mr. O'Hollaren repeatedly
6 admitted during his deposition that: (1) there was no binding agreement with regard to the
7 terms of the Lease at any time prior to the Port Commissioners' decision to approve and adopt
8 the Lease on June 1, 2009; and (2) drafts of the Lease exchanged between the parties prior to
9 the Port's formal acceptance were not in any way final agreements that were binding on the
10 parties. P62, L10-P63, L15; P70, L1-P71, L12; P104, L21-P105, L5; P106, L15-P107, L1;
11 P110, L20-P111, L5; P119, L15-P120, L10; P132, L8-P133, L21; P132, L12-P133, L21,
12 P161, L12-17; P167, L6-P168, L11; P169, L5-P170, L14. Indeed, Mr. O'Hollaren admitted
13 that the same Port attorney responsible for negotiating the Lease (Don Donaldson) had taken
14 the position in response to a public records act request made in October of 2007 that the
15 parties had not even "reached the point of having a preliminary draft of the lease agreed upon
16 by counsel."⁵ P138, L7-P140, L11.

17 Mr. O'Hollaren also admitted that the Lease was drafted through the joint efforts of
18 the both the Port and EGT. While EGT distributed the initial proposed template for the
19 Lease, the parties' counsel met and conferred about that draft on numerous occasions, the
20 Port's counsel suggested revisions to the draft, EGT's counsel revised the Lease to
21 incorporate the Port's suggested changes, and the parties both negotiated from these revised
22 drafts of the Lease. P105, L6-P106, L14; P106, L3-14; P165, L6-21; P185, L15-22.

23 Finally, and perhaps most importantly, Mr. O'Hollaren also admitted that he
24 understood the meaning of the phrase "incorporated by reference" and that the parties
25

23 ⁴ Q. So things that may have been said to you or may not have been said to you during the
24 process of negotiating that agreement, they don't control if they're not in the final agreement, correct?

25 A. That's correct, to my understanding.

⁵ Despite Mr. O'Hollaren's testimony to the contrary, the Port's cross motion for summary judgment appears to
imply that the parties somehow reached a binding, final agreement with regard to the contents of Labor Warranty
in August of 2007. EGT will address this issue in its opposition to the Port's motion.

generally used express incorporation by reference language when they intended to incorporate a separate document into the Lease.⁶ P107, L19-P108, L15. Just by way of example, as discussed below, an August of 2007 draft of the Lease contained the phrase “incorporated by reference” or similar language expressly incorporating separate documents into the draft nine different times.⁷ P124, L10-P127, L8; P128, L5-P129, L24.

B. EGT’s Rejection of Port’s Request that EGT Contractually Agree to be Bound by the Working Agreement and Agree to the ILWU’s Jurisdiction Over the Facility.

EGT raised the issue of union labor early in the negotiations between the Port and EGT, repeatedly and consistently stating its position that it could not and would not agree to concede union jurisdiction over jobs at the Facility. Indeed, Mr. O’Hollaren admitted during his deposition that he received emails from EGT’s negotiators setting forth this position as early as July of 2006, almost three years before the parties finalized and agreed to the terms of the Lease.⁸ P67, L24-P68, L3.

Mr. O’Hollaren first responded to EGT’s stated position that it would not concede to the ILWU’s jurisdiction or otherwise agree to obligate itself to use union labor at the Facility in early 2007 during the parties’ negotiation of the initial Memorandum of Understanding between the parties (“MOU”). Specifically, Mr. O’Hollaren sent EGT representatives a letter in February of 2007 indicating:

⁶ Q. And so if you intended to incorporate a second document by reference, you would just put something to the effect of “document two was incorporated by reference,” correct?

A. Correct.

⁷ Q. It’s pretty clear that the parties knew how to use specific language that called out when they wanted to incorporate a document, separate document by reference into the lease, correct? They did it nine times in this draft:

A. That’s correct.

Q. On each of those nine occasions when the parties wanted to incorporate a separate document by reference into the lease, they used the phrase “incorporated by reference,” correct?

A. Correct.

⁸ Q. So it appears approximately three years before the signing of the lease, EGT and Bunge had at least set forth their position that they didn’t believe union labor needed to be used inside the facility; is that correct?

A. Yes.

As we discussed this week, we will need to see in the final MOU a provision where the Port will require evidence of a general agreement between EGT and the ILWU with regard to the manning of the facility prior to entering into any lease agreement. It is not our intent here to see actual manning levels, but rather [an MOU-type document acknowledging jurisdiction for certain jobs.

P71, L14-P73, L10.

EGT rejected the Port's request and only revised the draft MOU to indicate that it would agree to meet and confer with the ILWU "regarding the ILWU's claimed jurisdiction with respect to the representation of the facility." P73, L12-P75, L2. Mr. O'Hollaren initially deemed this to be an "unacceptable" response to his demand that EGT contractually agree to acknowledge the ILWU's jurisdiction over the Facility. P76, L15-18.

The parties discussed the issue during a phone conference in late March of 2007. Mr. O'Hollaren admitted that EGT again indicated to him during that call that it would not and could not enter into an agreement conceding jurisdiction to the ILWU with regard to jobs at the Facility⁹ and that EGT subsequently had its attorneys provide legal precedent to the Port's attorney (Don Donaldson) explaining why EGT could not and would not agree to do so.¹⁰ P80, L1-7; P82, L15-P83, L18; Exhibit A-9.¹¹ Despite the fact that he could not recall what (if anything) his counsel told him about the validity of EGT's position or doing anything further to inform himself about that position, Mr. O'Hollaren dropped his request and agreed to language in the MOU that merely required EGT to meet and confer with the ILWU. P83, L19- P85, L12; P86, L22-P87, L7; P88, L16-P89, L14; P92, L18-P93, L5; P94, L20-P95, L3; P95, L13-P96, L18. In summary, it is undisputed that: (1) Mr. O'Hollaren demanded that EGT agree to contractually obligate itself to use union labor at the Facility during the Parties'

⁹ Q. So as of March 2007, you knew EGT had told you they couldn't enter into an agreement that specifically reserved the ILWU's jurisdiction with regard to jobs at the facility at the Port, correct?

A. As of that time in writing.

Q. That's correct?

A. That's correct.

¹⁰ The email by which EGT's counsel communicated this information to the Port's attorney, Mr. Donaldson, is attached to the Moore Declaration as Exhibit A-9. As explained below, contractually agreeing to the ILWU's jurisdiction for jobs at the Facility before it was operational would constitute an illegal "pre-hire" agreement.

¹¹ For the Court's ease of reference, exhibits used during Mr. O'Hollaren's deposition and referred to herein are included within Exhibit A and are cited using the same numbering system used during the deposition.

negotiation of the MOU in 2007 and agree to be bound by the Working Agreement; (2) EGT expressly rejected that request, instead clearly and unequivocally indicating that it would not and could not agree to do so; (3) this was at least the second time that EGT had informed Mr. O'Hollaren of this position; and (4) Mr. O'Hollaren responded to EGT's position by dropping his demand and agreeing to language in the Parties' MOU that merely required EGT to meet and confer with the ILWU.¹² P86, L22-P87, L7. Mr. O'Hollaren has admitted that he never received a contrary representation from EGT with regard to this issue.¹³ P216, L15-P217, L4.

C. The Structure of the Lease.

EGT circulated an initial draft of the Lease soon thereafter in May of 2007. Exhibit A-12; P100, L15-P101, L23. As set forth in the index to the initial draft of the Lease, the May 2007 Draft included 24 separate "Articles" with separate sub-paragraphs within each of these sections. *See* Exhibit A-12 at EGT 197-201. Every subsequent draft of the Lease mirrored this structure.

¹² Q. You made a request of EGT that EGT agree [that] the ILWU would have jurisdiction over certain jobs at the facility, correct?

A. Correct.

Q. And that the Working Agreement would apply to those jobs, correct?

A. Correct.

Q. Okay. EGT responded to that request by saying "We cannot and will not make that kind of contractual commitment," correct?

A. In the MOU, that's correct.

¹³ Q. EGT had represented to you at least I think three or four times during the parties' negotiations that it could not and would not concede to the jurisdiction of the ILWU with regard to the grain facility jobs; correct?

A. With respect to a legal opinion they had received in connection with the MOU and the language inserting that language in the MOU, it was in that context.

Q. Okay. And in the amended, agreed-upon and consolidated MOU, too; correct?

A. That's correct.

Q. And you never received a contrary written representation changing that position from EGT, did you?

A. Not before the lease was executed.

Q. Okay. How about after?

A. No.

Several of the Articles imposed obligations on EGT. Most significantly, Article 7, entitled "Development, Operation, and Maintenance by Lessee" specifically detailed the obligations imposed upon EGT by the Lease with regard to the development and operation of the Facility. Despite the fact that one would have expected this Article to address any alleged obligation imposed on EGT to use union labor during the subsequent "Operation" of the Facility, not a single draft Article 7 exchanged between the parties during the more than two years of their negotiations ever purported to impose any such obligation upon EGT.

Other Articles set forth in the Lease imposed obligations on the Port, the most notable of which was Article 6, entitled "Lessor Warranties." The initial draft of this Article set forth four distinct warranties that EGT requested the Port to provide in the Lease: (1) the Port's "warranty" that it held "good fee simple title" to the property subject to the Lease (Section 6.1); (2) the Port's "warranty" that it was not aware of hazardous materials located on the property (Section 6.2); (3) the Port's "covenant[]" that EGT would have unfettered possession of the leased premises (Section 6.4); and, most significantly, (4) Section 6.3, the "Warranty of Labor" provision under which EGT requested the Port to "warranty" that:

There are no agreements or restrictions affecting the Port, whether Lessor is a party to the same or otherwise, requiring union labor or prevailing wage compliance in connection with (a) the construction of the Lessee Projects or other Improvements on or about the Premises, or (b) the operation of the Facility, except only as expressly disclosed on Exhibit D-3 with respect to the operation of the Dock.

Id. at EGT 210-11. Exhibit D-3, in turn, was entitled "Labor Condition" and left blank. *Id.* at EGT 238. Neither provision contained language incorporating the Working Agreement by reference or otherwise obligating EGT to employ union labor at the Facility.

Mr. O'Hollaren admitted that EGT was the party who requested the Warranty of Labor provision (as opposed to it being a provision drafted to address his abandoned demand that EGT concede to the use of ILWU labor at the facility), drafted the initial version of the provision set forth in the May 2007 Draft, and placed it in the May 2007 Draft before providing it to the Port for review and comment. P103, L16-P104, 6.

D. The Parties' Subsequent Negotiation of the Warranty of Labor Provision.¹⁴

1. The August 8, 2007 Draft.

EGT subsequently revised the May 2007 Draft to reflect revisions requested by the Port. P105, L6-P106, L14. The parties exchanged the next revised draft on August 8, 2007. Exhibit A-13; P105, L6-P106, L9. While there were only minor revisions to the Warranty of Labor provision, the August 8, 2007 Draft contained the parties' first attempt at drafting the language of the previously blank Labor Condition exhibit. Exhibit A-13 at POL 1674, 1703. The Labor Condition exhibit stated:

Lessor refers Lessee to the applicable provisions of Article XI of the Working Agreement between the ILWU Local 21 and the Port, dated 1999-2002, as extended through the date of this Lease, for Longview, Washington, all of which provisions are set forth as follows:

[LANGUAGE OF THE ARTICLE XI TO BE INCORPORATED VERBATIM]

Exhibit A-13 at POL 1703 (emphasis added).

Mr. O'Hollaren testified that the language in brackets reflected the Port's attorney's request (Don Donaldson) that the Lease set forth verbatim the entire contents of Section XI of the Working Agreement in the Lease. P109, L20-P110, L19. EGT's chief negotiator, Bailey Ragan, testified that the phrase "applicable provisions" required the Port to eventually identify the sections of Working Agreement that the Port believed actually applied to the Lease of the property. Exhibit C, excerpts of Ragan Transcript at P76, L3-P78, L14; P143, L3-16. Mr. Ragan further indicated that, despite multiple requests over the course of the parties' negotiations, Mr. O'Hollaren refused to identify exactly what the "applicable provisions" of Section XI the Port believed applied to EGT's lease of the property. *Id.*

The parties discussed the Port's suggested revisions in late August of 2007. In follow-up to this conference, the Port's counsel (again, Mr. Donaldson) sent EGT's counsel (George Murray) an email setting forth his understanding that the Lease would "set forth verbatim on Exhibit D-3 of the Lease, Section XI of the Working Agreement referred to therein." Exhibit A-14 at POL 226. EGT's attorney (Mr. Murray) immediately responded to the Port's email

¹⁴ A chart setting forth the revisions made to each draft of the Lease is attached as Exhibit B to the supporting declaration of M. Moore.

by expressly rejecting Mr. Donaldson's claim that EGT had agreed to incorporate the contents of Section XI of the Working Agreement into the Lease, indicating that he "made no such agreement" and that he was recommending to EGT that it simply "acknowledge[] the disclosure of the Section XI [of the Working Agreement] and no more." *Id.* at POL 225. Mr. O'Hollaren received this email from EGT's counsel and understood it to indicate that: (1) EGT was only willing to either incorporate a single sentence from the Working Agreement into the Lease or merely acknowledge EGT's receipt of the Working Agreement; and (2) EGT would not agree to incorporate Section XI of the Working Agreement into the Lease.¹⁵ P114, L9-P115, L22.

The Port's attorney, Mr. Donaldson, responded to Mr. Murray's email by indicating: Let me be equally clear. I will not recommend that the port Commission execute a lease with Exhibit D-3 referred to in Section 6.3 of the proposed lease that does not contain therein the verbatim language of Section XI of the Working Agreement.

Exhibit A-15 (emphasis added). Mr. O'Hollaren was copied on this email and understood it to mean that his own counsel was advising the Port not to agree to the Lease unless it contained the verbatim language of Section XI of the Working agreement. P116, L7-P117, L9.

2. The August 31, 2007 Draft and the Inclusion of Express Incorporation by Reference Language in That Draft.

The Parties generated the next draft on August 31, 2007. Exhibit A-16. The August 31, 2007 Draft was significant in several respects.

First, the new draft of the Labor Condition exhibit (now called "Labor Matters") was revised to read:

Lessor refers lessee to the applicable provisions of Article XI of the Working Agreement Between the ILWU Local 21 and the Port, dated 1999-2002, as

¹⁵ Q. And Mr. Murray responded by expressly rejecting that claim, instead taking the position that EGT had not and would not agree to do that, correct?

A. Correct.

Q. Mr. Murray instead indicated that the only thing EGT would agree to do was incorporate either a single sentence from the Working Agreement Section 11 or indicate that we acknowledge, we being EGT, acknowledge the receipt of the Working Agreement, correct?

A. That's what he says here, correct.

extended through the date of this Lease, for Longview, Washington, which provisions are incorporated by this reference.

Exhibit A-16 at EGT 496 (emphasis added). Thus, it is undisputed that the August 31, 2007 Draft included express language proposing to incorporate the yet-to-be-identified “applicable provisions” of the Working Agreement by reference, the very issue now before the Court. Again, Mr. O’Hollaren admitted under oath that this draft language was just that: a draft proposal exchanged between the parties that was not in any way binding upon them. P116, L13-P120, L10.

Second, the August 31, 2007 Draft included nine separate instances where the parties used similar, express “incorporated by reference” language to convey their intent to incorporate collateral documents into the Lease. P124, L10-P127, L8; Exhibit A-16.¹⁶ Again, Mr. O’Hollaren admitted that the use of this express incorporation by reference language confirmed that the parties knew how to express their intention to incorporate a separate document into the Lease and that they generally used such language when they intended to incorporate a separate document into the Lease. P128, L5-P129, L24.

3. The September 5, 2007 Draft and EGT’s Third Express Rejection of Requests from the Port to Contractually Agree to Use Union Labor at the Facility.

After the parties exchanged another draft of the Lease on September 5, 2007, a version that did not materially diverge from the August 30, 2007 Draft, their negotiation of the Labor Warranty ceased for approximately a year due to the Port’s need to file a condemnation action to secure property necessary to finalize the development of EGT’s proposed grain terminal. P141, L3-18. The negotiations began again in October of 2008. On October 21, 2008, one of the EGT negotiators involved in the parties’ discussions (Rob Cresswell) sent an email to EGT’s lead negotiator, Mr. Ragan. The email received by Mr. Ragan memorialized a

¹⁶ See Exhibit A-16 at EGT 480 (“[a]ttached to this Lease, and incorporated into and made a part of this Lease by this reference, are the following”); 487 (“SEE THE PLATS ATTACHED AND INCORPORATED BY THIS REFERENCE”); 496 (“which provisions are incorporated by this reference”); 500 (“all improvements, materials, and specifications outlined in the Ship Dock Design Criteria (incorporated by this reference” and “all improvements, materials, and specifications outlined in the Barge Design Criteria (incorporated by this reference”); 501 (“the grading and site elevation plan prepared by Hagedorn, Inc. . . . (incorporated by this reference”); 505 (“Section 2. Incorporation. These provisions shall be incorporated into and made a part of the Lease”); 507 (“Section 6. Incorporation. This Addendum shall be incorporated into and made a part of the Lease”); 509 (“Section 6. Incorporation. This Addendum shall be incorporated into and made a part of the Lease”).

discussion that occurred between Mr. Creswell and Mr. O'Hollaren the week before in which, for the third time, EGT specifically indicated that it could not and would enter into any agreement obligating it to use union labor at the Facility. Exhibit A-19. Specifically, the email indicated:

Ken [Mr. O'Hollaren] told me when I saw him last week at the pre-construction meeting his board is very concerned and nervous about labor relations as we move forward with our project. He was asking me to give him any kind of assurance regarding our intentions.

I told him I understood his situation since all three of his board members are or were involved with unions. However, we are not allowed by law to discuss with any union jurisdictional issues and we will not be doing that. I suggest we repeat the talking points we used last year: 1. We can not discuss or commit to [union] jurisdiction by law

Exhibit A-19 (emphasis added). Mr. O'Hollaren admitted to discussing the labor issue with Mr. Creswell at that point in time and further admitted that he could not deny that Mr. Creswell made these points during their discussion. P 141, L19-P146, L11.

4. The December 4, 2008 Draft.

The parties distributed the next draft of the Lease on December 4, 2008. Exhibit A-22. The December 4, 2008 Draft did not contain any revisions to either the Warranty of Labor or the Labor Matters exhibit and the express incorporation by reference language remained in the draft. *Id.*; P160, L9-P161, L11. Once again, Mr. O'Hollaren acknowledged that this draft language was not in any way final or binding on the parties. P161, L12-17.

The Port's attorney from a second law firm, Doug Smart, reviewed the December 4, 2008 Draft and subsequently generated a letter providing eight pages of comments to EGT. Exhibit A-24. In addition to again demonstrating that the Lease resulted from the joint effort of both parties, the letter was significant in two respects.

First, Mr. Smart's letter clearly reiterated the parties' intention that the Labor Warranty was intended to be a "warranty concerning labor agreements," not a provision obligating EGT in any way. *Id.* at EGT 2849 ("[t]his warranty concerning labor agreements must be limited to 'as of the date of this Lease'; the Port can only say what labor contracts are presently in force"). Second, Mr. Smart's letter also confirmed that his revisions were merely "comments . . . offered in the spirit of moving negotiations along" that did "not . . . bind the

1 Port to particular language” and that the “Port Commission . . . must ultimately meet to
2 approve any proposed final wording” *Id.*; P167, L6-P170, L11.

3 **5. The April 26, 2009 Draft.**

4 The next draft of the Lease was distributed on April 26, 2009. Exhibit A-25. The
5 primary change set forth in the April 26, 2009 Draft was the movement of the express
6 incorporation by reference language from the Labor Matters section into the Warranty of
7 Labor provision itself. Exhibit A-25 at EGT 1225. The April 26, 2009 Draft was distributed
8 in an email from EGT’s attorney calling out the fact that, again, the April 26, 2009 Draft was
9 not intended to bind the parties and was subject to further revision and actual approval by
10 EGT. *Id.* at POL 1203. Mr. O’Hollaren also agreed that the April 26, 2009 Draft was merely
11 a non-binding draft. P169, L5-P170, L17.

12 **6. The May 19, May 22, and May 26, 2007 Drafts.**

13 The parties exchanged the next draft of the Lease on May 19, 2009. Exhibit A-26.
14 The May 19, 2009 Draft was again accompanied by an email from EGT’s counsel confirming
15 that the exchange of these drafts was “part of a collaborative effort” to reach a final agreement
16 and that they remained “subject to approval and, perhaps, further input and/or revisions on
17 behalf of EGT.” *Id.* Mr. O’Hollaren also confirmed that the May 19, 2009 Draft was not a
18 final document that bound the parties and that the language of the Warranty of Labor was still
19 in flux between the parties. P174, L20-P176, L1; P176, L19-P177, 20; P178, L22-P179, L25.

20 The May 19, 2009 Draft contained a revised draft of the Warranty of Labor intended
21 to clarify EGT’s understanding that there were no “applicable provisions” of the Working
22 Agreement that actually applied to the operation of the Facility. Specifically, EGT revised the
23 Warranty of Labor provision to indicate that the reference to the “applicable provisions of
24 Section XI of the Working Agreement” only applied to the operation of the “Ship Dock,” as
25 opposed to the operation of the Facility itself. Exhibit A-26 at POL 1014.

Mr. O’Hollaren objected to this change and the Port responded by sending EGT a
revised draft of the Lease on May 22, 2009. Exhibit A-27. According to Mr. O’Hollaren, the
May 22, 2009 Draft was intended to reject the changes to the Warranty of Labor provision
made by EGT in the May 19, 2009 Draft and he understood that the parties had still not

reached a final agreement with regard to the provision. P178, L5-P184, L18. EGT responded by sending another draft of the Lease to the Port on May 26, 2009 that expressly rejected the changes proposed by the Port in its May 22, 2009 Draft. P186, L18-P187, L25; Exhibit A-28 at POL 784. Mr. O'Hollaren understood, therefore, that the language of the Warranty of Labor provision was still in flux and open to continuing negotiations. *Id.*

7. The Parties' "All Hands" Meeting and the Deletion of the Express Incorporation by Reference Language in the Final Warranty of Labor Provision.

Recognizing that they had potentially reached an impasse with regard to the contents of the Warranty of Labor provision, Mr. O'Hollaren requested that the parties hold an "all hands" meeting on May 28, 2009 ("All Hands Meeting") to try and resolve all outstanding issues. Mr. O'Hollaren's counsel (Doug Smart) sent out an email on May 27, 2009 summarizing the agenda items for the All Hands Meeting set to take place the following day. P190, L20-P191, L20. Mr. Smart's email indicated that Mr. O'Hollaren wanted to discuss the Warranty of Labor provision and characterized the latest changes to the provision as "expanding substantially the Port's obligation to now warrant, in effect, that its existing labor contract [the Working Agreement] doesn't reach either the barge dock or operations on the leased premises." *Id.* at L2-8 (emphasis added). Mr. Smart did not take the position that the provision was actually intended to incorporate the Working Agreement or otherwise obligated EGT to employ union labor at the Facility.

EGT sent one final proposed version of the Warranty of Labor provision via email to Mr. O'Hollaren and his counsel just prior the All Hands Meeting ("Final Labor Warranty"). Exhibit A-30. As the Court will note, the Final Labor Warranty sent to Mr. O'Hollaren was "redlined" to illustrate the revisions made to the provision.

Critically, the changes to the Warranty of Labor provision set forth in the Final Labor Warranty included the deletion of the language expressly incorporating the "applicable provisions" of the Working Agreement by reference. The Final Labor Warranty read:

Lessor warrants that there are no agreements or restrictions affecting the Port, whether Lessor is a party to the same or otherwise, requiring union labor or prevailing wage compliance (a) in connection with the construction of the Lessee Projects or other Improvements on or about the Premises, ~~(b)~~ or (b) except only as expressly set forth on Exhibit G-1 hereto, in connection with the

operation of the Ship Dock except only that Lessor expressly refers Lessee to the applicable provisions of Section XI of the Working Agreement between the ILWU Local 21 and the Port, dated 1999-2002, as extended through the date of this Lease, for Longview, Washington, ~~which provisions are incorporated by this reference~~, or (c) in connection with the operation of the Barge Dock and and the Barge Dock, the handling of cargo at the Facility and the operation of the Facility.”

Id. at POL 779 (emphasis added).

Mr. O'Hollaren has admitted to: (1) receiving the Final Labor Warranty on May 28, 2009; (2) personally reviewing the Final Labor Warranty prior to the All Hands Meeting; (3) discussing the revisions set forth in Final Labor Warranty with his counsel; (4) discussing the revisions again with EGT's representatives during the All Hands Meeting; and (5) knowing that the express “incorporated by reference” language had been deleted from the provision.¹⁷ P193, L6-P194, L19. The Final Labor Warranty was emailed to Mr. O'Hollaren and his counsel for their review a second time on May 29, 2009. Exhibit A-31. Again, Mr. O'Hollaren admitted that: (1) he received the Final Labor Warranty for a second time on May 29, 2009; (2) he reviewed the Final Labor Warranty again; (3) he discussed the revisions again with his counsel; (4) he knew and understood that the express language incorporating sections of the Working Agreement had been deleted from the provision; (5) he did not take the position during the subsequent negotiations with EGT that the “incorporation by reference” needed to be added back into the parties' draft; (6) he did not do so because the deletion of the language “was not the focus of [his] concern” at the time; (7) his counsel had every opportunity to make that request if the Port had truly intended to insist on incorporating the Working Agreement into the Lease; (8) the Port's counsel did not do so and instead indicated that he was “okay with the final changes made” by EGT; and (9) the final version of the Lease subsequently agreed to by Mr. O'Hollaren and approved by the Port did not contain the incorporation by reference language negotiated out of the Lease during the parties' final negotiations. P194, L20-P196, L22; P197, L12-P200, L16; P201, L21-P202, L19; P205, L7-P206, L9; P206, L18-P211, L9.

¹⁷ Q. So you were aware of the fact that the “incorporated by reference” language included in this revised version of 6.3 had been stricken as of May 28th, 2009, correct?

A. That's correct.

Despite these admissions, Mr. O'Hollaren took the position in his deposition that the mere fact that the final version of the Labor Matters exhibit contains language that "refers" EGT to Working Agreement was sufficient in his mind to incorporate the Working Agreement by reference. P197, L12-23; P199, L3-12. He was not able, however, to point to any evidence indicating that EGT had expressed an intention to bind itself or agree to incorporate the Working Agreement by reference, any evidence indicating that EGT ever reversed its previously expressed position that it could not and would not agree to contractually bind itself to the Working Agreement, or any evidence generated by the Port after execution of the Lease that supported his current interpretation, such as emails or letters that he drafted about the labor issue prior to the inception of this litigation. P210, L2-P211, L9; P214, L21-P217, L4.

The final version of the Lease was accepted and agreed to by both the Port and EGT on June 1, 2009. A copy of the final version of the Lease agreed to by the Port is attached to the Moore Declaration as Exhibit A-34. It is undisputed that the final version of the Lease did not contain express incorporation by reference language in either the Warranty of Labor provision or the Labor Matters exhibit. Consistent with their use of such language during the course of negotiations and Mr. O'Hollaren's testimony that the parties used such language when they actually intended to incorporate a collateral document into the Lease, however, express incorporation language was used elsewhere in the final version of the Lease at least seven different times. Exhibit A-34 at 864 (Section 29.1), 885 (Exhibit C), 932 (Exhibit E), 956 (Exhibit G), 960 (Exhibit I), 966-67 (Exhibit J).

III. ARGUMENT

The interpretation of a contract is a question of law where the facts are undisputed or there is only one inference that can be drawn from extrinsic evidence. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996). When interpreting a contract under Washington law, courts must only give life to the objective manifestations of the parties, imputing to the parties an intention that corresponds to the reasonable meaning of the agreement's words and the context in which the agreement was executed. 25 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE §

5:3, at 131-32 (2007). In doing so, courts view the contract as a whole and will consider: (1) the contract's subject matter and objective, (2) all of the circumstances surrounding the contract's making, (3) the parties' subsequent acts and conduct, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in negotiations, and (6) usage of trade and course of dealings. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502 (2005); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351-52 (2004).

A. The Language of the Lease Does Not Indicate that EGT Assented to Incorporate the Working Agreement by Reference.

Courts must interpret contracts as written and may not read ambiguity into a written agreement where none exists. *Bryant v. Country Life Ins. Co.*, 414 F. Supp. 2d 981, 990 (W.D. Wash. 2006) (if the language of a "contract is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists"); *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 698, 871 P.2d 146 (1994) (when a "contract is clear and unambiguous, it must be enforced as written" and courts may "not modify clear and unambiguous language or revise [a] contract under the theory of construing it"). The overall organization of a contract is also critical to its interpretation, as the fact that a provision was placed in a specific section of an agreement is evidence of the parties' intent with regard to the meaning of that provision. *Engelhard Corp. v. N.L.R.B.*, 437 F.3d 374, 381 (3rd Cir. 2006); *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995).

Courts must also give life to each provision of an agreement and may not interpret it in such a way as to render portions of the parties' agreement meaningless. *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957) ("[a] fundamental rule of construction is that a court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage in arriving at the intention of the contracting parties"); *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950) (when interpreting contracts, "every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible"); *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487 (2009) ("Courts should not adopt a contract interpretation that renders a term ineffective or meaningless"). Finally, courts must avoid interpreting a contract in a way that would render it unlawful or unenforceable. *Walsh v.*

1 *Schlecht*, 429 U.S. 401, 408 (1977) (“ambiguously worded contracts should not be interpreted
 2 to render them illegal and unenforceable where the wording lends itself to a logically
 3 acceptable construction that renders them legal and enforceable”); *United States v.*
 4 *Sacramento Municipal Utility Dist.*, 652 F.2d 1341 (9th Cir. 1981) (“[i]t is a well-settled
 5 principle that ambiguously worded contracts should not be interpreted to render them illegal if
 6 a legal construction is plausible”).

7 In terms of the incorporation of a collateral document by reference, such documents
 8 may become part of an existing contract only where the party claiming incorporation by
 9 reference carries its burden of proving that the other party to the contract clearly and
 10 unequivocally assented to the incorporation of such documents by reference. *W. Wash. Corp.*
 11 *of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494 (2000); *Santos v.*
 12 *Sinclair*, 76 Wn. App. 320, 325 (1994); *see also State v. Ferro*, 64 Wn. App. 195, 198 (1992)
 13 (“[t]he burden of proving incorporation by reference is upon the party claiming it”). The
 14 purpose for which the contract discusses the collateral document is critical: if the
 15 incorporated terms are referred to only for a limited or specific purpose, they will become part
 16 of the contract only for such purpose and will be treated as irrelevant for all other purposes.
 17 *Seventh Day Adventists*, 102 Wn. App. at 499-501.

18 EGT respectfully submits that the Port cannot demonstrate that the language of the
 19 Lease incorporated the Working Agreement for several reasons.

20 First, the structure of the Lease makes it clear that the parties did not intend the
 21 Warranty of Labor provision or the related Labor Matters exhibit to bind EGT to the Working
 22 Agreement. To the contrary, the Warranty of Labor provision was merely a “warranty”
 23 provision requested by EGT for EGT’s benefit, a fact made clear when this “warranty”
 24 provision is read in context of the entire Lease. The provision is entitled “Labor Warranty”
 25 and appears in Article 6 of the Lease, the section of the Lease setting forth each of the
 warranties provided by the Port to EGT as part of the Lease, including: (1) the Port’s
 “warranty” that it held “good fee simple title” to the property at issue; (2) the Port’s
 “warranty” that it was not aware of hazardous materials located on the property; and (3) the
 Port’s “covenant[]” that EGT would have unfettered possession of the leased premises. The

1 Warranty of Labor provision was not part of Article 7 of the Lease, the portion of the Lease
 2 detailing the affirmative obligations imposed upon EGT by the Lease. Reading the Warranty
 3 of Labor in conjunction with its surrounding provisions and giving effect to all of the Lease's
 4 terms and structure – as this Court must do – makes it clear that the “Labor Warranty” was
 5 simply that: a warranty requested by EGT and provided by the Port in response that does not
 6 impose any obligations on EGT, much less “clearly and unequivocally” manifest EGT's
 7 assent to incorporate the Working Agreement by reference.

8 The same analysis and conclusion holds true for the Labor Matters exhibit referred to
 9 in the Labor Warranty provision. Again, the structure of the Lease makes it clear that this
 10 “exhibit” was merely intended to provide additional information that relates back to the Labor
 11 Warranty provision, namely, the Port's identification of specific labor agreements. Nothing
 12 about the structure of the Lease supports the premise that the parties intended this exhibit to
 13 impose any affirmative obligation on EGT, much less evidence an affirmative agreement by
 14 EGT to bind itself to the Working Agreement.

15 Second, the language of the Warranty of Labor provision and the Labor Matters
 16 exhibit does not support the premise that EGT assented to the incorporation of the Working
 17 Agreement by reference through these provisions. As Mr. O'Hollaren admitted on multiple
 18 occasions during his deposition, the Warranty of Labor provision does not contain any
 19 language incorporating the Working Agreement by reference, as the parties agreed to delete
 20 the express incorporation by reference language present in prior drafts of this provision.
 21 Similarly, the language of the Labor Matters exhibit does not contain any language that
 22 signifies EGT's agreement to incorporate the Working Agreement by reference. While the
 23 exhibit “refers” to the existence of the Working Agreement, it is well settled that contractual
 24 language merely referring to a collateral document is not sufficient to incorporate that
 25 document by reference, as a mere reference to a collateral document does not establish that
 the parties actually intended to incorporate it into the primary contract. *Sucesion J. Serralles, Inc. v. United States*, 46 Fed. Cl. 773, 785-86 (Fed. Cl. 2000) (noting that, while “[m]aking the performance of the supply contract contingent on the prior execution of a land lease and attaching a draft copy of the land lease to the contract solicitation certainly establishes the

close interrelationship of the two contracts . . . it does not satisfy the legal requirements” for incorporation by reference); *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 664-66 (7th Cir. 2002) (mere reference to another contract or document is not sufficient to incorporate its terms, as there must be an express intent to incorporate); *Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co.*, 328 F. Supp. 2d 1319, 1333 (S.D. Fla. 2004) (same); *Kantner v. Boutin*, 624 So.2d 779, 781 (Fla. App. 1993) (same); *United Cal. Bank v. The Prudential Ins. Co. of Am.*, 681 P.2d 390, 412 (Ariz. App. 1983) (a contract’s reference to another document was only descriptive in nature and was not a clear and unequivocal expression of intent to incorporate by reference).

In short, had the parties actually intended to incorporate the Working Agreement by reference, the Lease would have affirmatively stated that fact in a clear and purposeful manner. It does not do so. As a result, the Port cannot carry its burden of demonstrating that the language of the Lease manifests a “clear expression” of EGT’s alleged “intent to be bound by” the Working Agreement.¹⁸ *Seventh Day Adventists*, 102 Wn. App. at 494.

Third, reinterpreting the language of either of these provisions to now include unstated incorporation by reference language would impermissibly render the parties’ express incorporation by reference language meaningless. As detailed above, it is undisputed that the parties (including Mr. O’Hollaren) knew how to incorporate collateral documents by reference, that they used language expressly incorporating such documents by reference when they actually intended to do so, and that the final version of the Lease contained seven separate examples of the parties using such express incorporation by reference language to memorialize their intent to incorporate collateral documents into the Lease. There would be

¹⁸ Even if the Court were to hold that the mere reference to the Working Agreement in the Labor Matters exhibit somehow incorporated the Working Agreement by reference, any such incorporation would be limited by the purpose of that reference. *Seventh-Day Adventists*, 102 Wn. App. at 499-501. The Labor Matters exhibit refers to the Working Agreement for the sole purpose of identifying the labor agreements to which the Port was a party. Any intent by the parties to incorporate the Working Agreement for that limited purpose does not illustrate an agreement by EGT to more broadly incorporate the Working Agreement into the lease or be bound by its terms. See, e.g., *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010) (merely acknowledging that the referenced material is relevant to the contract is not enough to fully incorporate that material into the contract); *United Cal. Bank v. The Prudential Ins. Co. of Am.*, 381 P.2d 390, 411 (Ariz. App. 1983) (“[a] reference to an earlier document for descriptive purposes will not operate to make the earlier document a part of the later agreement”).

absolutely no reason for the Port and EGT to include express incorporation by reference language elsewhere in the Lease if they had intended to incorporate the Working Agreement in absence of such language. To hold otherwise would render the express incorporation by reference language actually used by the parties meaningless and violate one of the most basic tenets of contract construction. *Hathaway*, 242 F.2d at 900; *Ball*, 37 Wn.2d at 83; *Cambridge Townhomes, LLC*, 166 Wn.2d at 487.

Fourth, interpreting the Warranty of Labor provision or the Labor Matters exhibit as contractual commitments by EGT to incorporate the Working Agreement and obligate itself to use ILWU labor at the facility would render those provisions illegal and unenforceable. As set forth in detail above, it is undisputed that EGT repeatedly and consistently indicated to Port's representatives that it would not and could not contractually commit to be bound by the Working Agreement. EGT took this position because doing so would constitute premature recognition of a union, an unfair labor practice under the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (2). It is well settled that an employer commits an unfair labor practice in violation of the NLRA if it recognizes a union as the collective bargaining representative or enters into a contract with that union before the employer begins normal business operations and hires a "substantial and representative complement" of employees.¹⁹ The reason for this rule is simple: a company's employees must select their bargaining representative. *Cascade Gen.*, 9 F.3d at 734-35; *Elmhurst Care*, 345 N.L.R.B. at 1176-77, 1179. As EGT repeatedly advised the Port, EGT could not have lawfully agreed to be bound

¹⁹ See, e.g., *Cascade Gen. v. Nat'l Labor & Relations Bd.*, 9 F.3d 731, 734-36 (9th Cir. 1993) (employer sanctioned for unfair labor practice where it recognized union as its employees' exclusive bargaining representative at a time when it planned to dramatically expand its operations to require a workforce many times greater than the size of its current workforce); *NLRB v. Cen-Vi-Ro Pipe Corp.*, 457 F.2d 775, 776 (9th Cir. 1972) (employer violated NLRA by negotiating and signing collective bargaining agreement with union before it hired employees to work in its plant); *Hirsch v. Trim Lean Meat Prods., Inc.*, 479 F. Supp. 1351, 1358 (D. Del. 1979) (employer violated NLRA "[b]y recognizing a bargaining representative based upon the desires of a majority of 18 employees, at a time when the plant was not in operation and the work force not fully determined"); *Elmhurst Care Ctr.*, 345 N.L.R.B. 1176, 1177 (2005), *aff'd*, 303 Fed. Appx. 895 (D.C. Cir. 2008) (skilled nursing facility sanctioned for executing collective bargaining agreement when it was not yet engaging in normal business operations and was instead preparing for the facility's opening); *A.M.A. Leasing*, 283 N.L.R.B. 1017, 1023-24 (1987) (meat processor business violated NLRA by signing contract with union before plant was operational); *Hilton Inn Albany*, 270 N.L.R.B. 1364, 1366 (1984) (hotel violated NLRA by executing collective bargaining agreement with union before most of the hired employees had performed any significant work and before the hotel was open to customers).

1 by the Working Agreement at the time it entered into the Lease (i.e., before EGT had begun
 2 normal operations or hired a single employee to do the work at issue). This Court cannot
 3 conclude otherwise without violating established principles of contract law. *See Walsh v.*
 4 *Schlecht*, 429 U.S. 401, 408 (1977) (contracts should not be interpreted in a way that renders
 5 them illegal where the language lends itself to a logically-acceptable and legal construction);
 6 *United States v. Sacramento Municipal Utility Dist.*, 652 F.2d 1341 (9th Cir. 1981) (same).

7 **B. Extrinsic Evidence Proves that EGT Did Not Agree to Incorporate the Working**
 8 **Agreement into the Lease by Reference.**

9 When determining whether the Port can meet its burden of proving that EGT intended
 10 to incorporate the Working Agreement into the Lease, the Court may also consider extrinsic
 11 evidence of the parties' negotiations to aid in its interpretation of the terms actually set forth
 12 within the Lease. *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990). Extrinsic evidence may
 13 not be considered, however, to expand upon obligations set forth in the Lease, or to add,
 14 modify, or contradict terms actually stated therein, and the court may not give life to the
 15 Port's unexpressed or subjective intent. *Id.* at 667-70; *Chew v. Lord*, 143 Wn. App. 807, 817
 16 n.3 (2008); *see also Stephens v. Donobi, Inc.*, 2006 U.S. Dist. Lexis 30454, *2-3 (W.D. Wash.
 17 2006) (Leighton, J.).

18 Applying these principles here, the relevant questions before the Court are whether:
 19 (1) EGT objectively expressed an intention to agree to utilize union labor at the Facility; and
 20 (2) EGT confirmed this position by objectively manifesting an intent to incorporate the
 21 Working Agreement by reference into the final version of the Lease. For several reasons, the
 22 undisputed extrinsic evidence before the Court conclusively demonstrates that the answer to
 23 both of these questions is an emphatic "no."

24 First, there is no evidence from the parties' negotiations to indicate that the parties
 25 intended the Warranty of Labor provision or the Labor Matters exhibit to serve as anything
 other than a warranty provided to EGT for EGT's benefit. The Port's own counsel repeatedly
 and consistently characterized these provisions as warranties, including emails sent by the
 Port's counsel during the final days of the parties' negotiations. Moreover, while the record is
 clear that the parties debated the scope of the warranty that the Port was willing to provide,
 there is no evidence from the parties' negotiations that demonstrates any intent on their part

(much less objective manifestations by EGT) to convert these provisions into obligations agreed to by EGT.

Second, there is no evidence from the parties' negotiations to indicate that EGT ever agreed to utilize union labor at the Facility or agreed to be bound by the Working Agreement. To the contrary, Mr. O'Hollaren has already admitted that: (1) EGT consistently and repeatedly told the Port that it could not and would not contractually agree to utilize union labor at the Facility in statements dating back to the very beginning of the parties' negotiations, almost a full three years before the execution of the Lease; (2) EGT never reversed itself with regard to this position and always rejected Mr. O'Hollaren's overtures on the issue; and (3) Mr. O'Hollaren was not aware of a single document outside of the Lease in which EGT indicated that it would agree to be bound by the Working Agreement or otherwise commit to using union labor at the Facility. P210, L2-P211, L9; P214, L21-P217, L4. As a result, there is no basis for any contention by the Port that EGT somehow agreed to utilize union labor at the Facility or to otherwise agree to be bound by the Working Agreement.

Third, there is no evidence from the parties' negotiations that they intended to incorporate the Working Agreement by merely referring to the existence of that agreement in the Labor Matters exhibit. To the contrary, Mr. O'Hollaren has already admitted that: (a) the parties instead used express "incorporation by reference" language when they actually intended to incorporate collateral documents into the Lease; (b) drafts of the Lease contained as many as nine different references to such express incorporation by reference language; (c) the final version of the Lease contained seven separate examples of the parties using such express incorporation by reference language, and (d) no such language was used in the Warranty of Labor provision or the Labor Matters exhibit.

Fourth, and most critically, the only evidence before the Court regarding the parties' negotiation about the specific question of whether they intended to incorporate the Working Agreement by reference conclusively establishes that the parties did not intend to do so. Given Mr. O'Hollaren's clear and unequivocal admissions on the issue, it is: (a) undisputed that the parties specifically negotiated whether to include express "incorporation by reference" language in the Lease during the final weeks of their negotiations early 2009;

(b) undisputed that non-binding drafts of the very same provisions now at issue – the Warranty of Labor provision and the Labor Matters exhibit – included express incorporation by reference language; (c) undisputed that the parties specifically negotiated about that express incorporation by reference language in April and May of 2009; (d) undisputed that EGT took the position that the express incorporation by reference language should be stricken from these provisions; (e) undisputed that, on two separate occasions, EGT provided Mr. O'Hollaren and his counsel with redlined drafts of the revised Warranty of Labor provision illustrating the deletion of the express incorporation by reference language from the Warranty of Labor provision; (f) undisputed that Mr. O'Hollaren received and reviewed drafts deleting that language; (g) undisputed that he discussed the deletion of that language with both his counsel and EGT during the All Hands Meeting in late May of 2009; (h) undisputed that he knew and understood that the language that had previously incorporated sections of the Working Agreement into the Lease had been deleted from the Lease; (i) undisputed that he nevertheless accepted the deletion of that express incorporation by reference language and presented the Lease to the Port's commissioners for approval on June 1, 2009; and (j) undisputed that the final version of the Lease approved by the Port did not contain the express incorporation by reference language present in prior drafts.²⁰ P194, L20-P196, L22; P197, L12-P200, L16; P201, L21-P202, L19; P205, L7-P206, L9; P206, L18-P211, L9.

²⁰ Q. Does the final version of paragraph 6.3 agreed to between the parties as set forth in Exhibit 34 contain that "express incorporation by reference" language that was deleted from the prior versions?

A. It does not.

Q. Okay. Can you turn to Exhibit G-2 titled "Labor Matters" which is, if you're going by your exhibit number, page number 158. Same question with regard to this provision. Does the "Labor Matters" exhibit contain the "express incorporation by reference" language that was deleted from the prior versions?

A. It does not.

Q. So the final version of the lease agreed to between the parties does not in fact contain that "express incorporation by reference" language that was in here at one point, but that was negotiated out by the parties; correct?

A. It does not.

Q. And your answer was, "It does not;" correct?

A. It is not included in that document; that's correct.

Even leaving Mr. O'Hollaren's admissions aside, it is well settled that the inclusion of a term in a draft contract later deleted from the final form of the agreement conclusively establishes that the parties did not intend to include that term in the agreement. *See, e.g., Thrust IV Inc. v. Styles*, 1995 U.S. Dist. Lexis 5634, *13 (N.D. Cal. 1995) (court refused to judicially insert provision into contract where previous drafts contained the provision but the provision was ultimately deleted from the final version; "[i]f plaintiff[s] maintained a contrary intent, as they allege in their papers, the final agreement and preceding drafts speak to the contrary"); *Marcree Sales Corp. v. Jetter*, 476 S.E.2d 840, 842 (Ga. App. 1996) (court declined employer's request to construe an employment contract as containing a "termination for cause" provision where the contract did not contain such a provision, noting that "earlier drafts of the employment contract included a termination clause that might have allowed such actions by [the employer], but those were specifically excluded from the final agreement");

Q. And that language was in the prior drafts that were circulated between the parties; correct, the "express incorporation by reference" language?

A. It had appeared in earlier drafts; that's correct.

Q. And those drafts didn't bind the parties, did they? They weren't final agreements?

A. They were not final agreements.

Q. And the parties instead spent a great deal of time negotiating those agreements; correct?

A. Yes, they did.

Q. We went through draft after draft today that were sent back and forth between the parties; correct?

A. We have.

Q. We've talked about numerous calls the parties had to negotiate the terms of the agreement; correct?

A. That's correct.

Q. And you and your attorney were provided multiple copies, redline copies that contained that language "express incorporation by reference" language; correct?

A. That's correct.

Q. And you were also provided redline copies, at least two of them, where that language was stricken; correct?

A. That's correct.

Q. And you reviewed those redline copies; correct?

A. Correct.

Q. And you had meetings, an "all hands" meeting to discuss that very section; correct?

A. That's correct.

Q. So you were aware that it was deleted; correct?

A. That's correct.

Q. And despite that fact, you agreed to a version of the lease that didn't contain that language; correct?

Q. Well, the lease was executed by the Port, and it doesn't contain that language; correct?

A. That is correct.

P205, L7-P208, L6.

1 *see also World Properties, Inc. v. Arlon, Inc.*, 663 F. Supp.2d 98, 107-08 (D. Conn. 2009) (in
 2 determining whether a covenant not to sue specifically excluded lawsuits related to a
 3 particular patent, the Court noted that the parties had negotiated that point and had rejected a
 4 blanket exception for the patent).

5 There is simply no basis here for the contention that the parties somehow agreed to
 6 incorporate the Working Agreement into the Lease by reference under these facts. This is not
 7 a case where an issue remained undiscussed and unresolved between parties, leading to
 8 ambiguity about their intentions. This is instead a case where the parties specifically
 9 negotiated about the issue of incorporating sections of the Working Agreement into the Lease
 10 and clearly and unequivocally agreed not to do so. The Port cannot now legitimately ask the
 11 Court to re-insert the language that the parties agreed to delete during their negotiations, as “a
 12 court must construe the words as written and not make a new contract for the parties.”
 13 *Bridgestone/ Firestone v. Prince William Square*, 463 S.E.2d 661, 664 (Va. 1995) (“[t]he law
 14 will not insert by construction, for the benefit of a party, an exception or condition which the
 15 parties omitted from their contract by design or neglect”).

16 In short, the undisputed facts before the Court lead to a single conclusion: there is no
 17 evidence in the record that the parties intended to incorporate the Working Agreement by
 18 reference, much less evidence sufficient for the Port to carry its burden of demonstrating that
 19 EGT actually assented to the incorporation of the Working Agreement into the parties’ Lease.
 20 Summary judgment in EGT’s favor is proper.

21 **IV. CONCLUSION**

22 For the foregoing reasons, EGT respectfully requests that the Court grant summary
 23 judgment in EGT’s favor and declare that the parties’ June 1, 2009 Lease does not incorporate
 24 the Working Agreement by reference or otherwise obligate EGT to abide by any provision of
 25 the Working Agreement.

1 DATED this 1st day of September, 2011.

2 CORR CRONIN MICHELSON
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4 s/ Michael A. Moore
5 Michael A. Moore, WSBA No. 27047
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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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