

JUDGE: DOUGLASS A. NORTH
COURTROOM: ROOM C-203
HEARING TIME: 10:00 AM
HEARING DATE: DECEMBER 14, 2018

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

S 212th ST LLC, a Washington limited liability
company,

Plaintiff,

v.

FORTERRA NW, a Washington public benefit
nonprofit corporation, and FORTERRA
ENTERPRISES, INC., a Washington corporation,

Defendants.

NO. 18-2-55191-9 SEA

**DECLARATION OF SIDDHARTH
JHA IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

I, Siddharth Jha, declare as follows:

I am over the age of 18 years and competent to testify as follow:

1. I am a Managing Director for S 212th St LLC, a Washington limited liability company (“Company”).
2. Attached as **Exhibit A** is a true and correct copy of the Vacant Land Purchase and Sale Agreement (“Agreement”) for the purchase, sale and deed to Plaintiff property legally described in the Complaint as property owned by Defendants.
3. Attached as **Exhibit B** is a true and correct copy of Form 34 of the Agreement, extending the Feasibility Period (defined under Section 15 of the Agreement) for 30-business days.

DECLARATION OF SIDDHARTH JHA - 1

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1 4. Attached as **Exhibit C** is a true and correct copy of Form 34 of the Agreement,
2 extending the Feasibility Period until October 11, 2018.

3 5. Attached as **Exhibit D** is a true and correct copy of Form 34 of the Agreement,
4 extending the Feasibility Period until November 21, 2018.

5 6. Attached as **Exhibit E** is a true and correct copy of Form 34 of the Agreement,
6 extending the Feasibility Period until December 5, 2018.

7 7. Attached as **Exhibit F** is a true and correct copy of an email I sent on behalf of the
8 Company on May 27, 2018 to Thai Nguyen, the real estate broker representing the Company, seeking
9 clarification on numerous missing and incomplete documents we believe Defendants failed to
10 provide.

11 8. Attached as **Exhibit G** is a true and correct copy of an email sent by Lindsay Weimer,
12 who forwarded me the June 20, 2018 email by Darcey Hughes, Senior Project Manager for Forterra,
13 which Ms. Hughes wrote in response to my May 27, 2018 email. The documents provided by way of
14 Ms. Hughes's June 20, 2018 email were transmitted to the Company on June 21, 2018—the 50th day
15 of the 67-day Feasibility Period, and 43 days after the Document Due Date (defined in the Complaint
16 as May 9, 2018).

17 9. Attached as **Exhibit H** is a true and correct copy of a letter I sent on August 16, 2018
18 on behalf of the Company to Forterra, outlining in detail various documents we believe were missing,
19 incomplete or otherwise hadn't been provided by Forterra—even after Forterra shared additional
20 documents by way of its June 20, 2018 email (*Exhibit G*).

21 10. Attached as **Exhibit I** is a true and correct copy of various emails I received on August
22 21 and 22 from Adam Draper, Forterra's former Corporate Counsel, in response to my August 16,
23 2018 letter (*Exhibit H*) stating that (1) Forterra had conducted a diligent search, (2) provided all
24 documents in its possession, and (3) had no additional documents it could provide the Company.

25 11. Attached as **Exhibit J** is a true and correct copy of various emails between Dan
26 Grausz, Senior Director of Strategic Projects for Forterra; Kristen Karabensh, current Corporate

1 Counsel for Forterra; Darcey Hughes; Wendy Lyon, the Company's trial counsel, and myself. Mr.
2 Grausz's November 16, 2018 email to Ms. Lyon, Ms. Karabensh, Ms. Hughes and myself stated in
3 relevant part:

4 Forterra has searched multiple times for documents that your client appears to believe
5 that we have. We do not have them nor am I aware of any other Property Documents (as
6 that term is defined in the PSA) that are in our possession.

7 12. Attached as **Exhibit K** is a true and correct copy of part of a land use permit
8 application with the City of Kent ("City") for a Pre-Application Conference that Forterra submitted
9 to the City ("Application"). The Application was obtained from the City under the City's file number
10 PA-2014-31.

11 13. Attached as **Exhibit L** is a true and correct copy of the Application's attendance sheet
12 for the meeting that occurred at the City. This document was obtained through a public records request
13 to the City.

14 14. Attached as **Exhibit M** is a true and correct copy of the City's follow-up letter to
15 Forterra after the meeting that occurred at the City. This document was obtained through a public
16 records request to the City.

17 15. Attached as **Exhibit N** is a true and correct copy of the City's Notice of Application
18 and Proposed Determination of Nonsignificance for the City's project no. ENV-2016-10 under
19 application name "S 212th St Erosion Repairs", a City public works project that directly relates to the
20 Property as work was done on and around the Property. This document was obtained through a public
21 records request to the City.

22 16. Attached as **Exhibit O** is a true and correct copy of the City's Environmental Checklist
23 Application Form for the City's project no. ENV-2016-10 under application name "S 212th St Erosion
24 Repairs", a City public works project that is material to the Property as work was done on and around
25 the Property. This document was obtained through a public records request to the City.

26 17. Attached as **Exhibit P** is a true and correct copy of an appraisal of the Property

1 prepared by Integra Realty Resources on September 16, 2016 for the City.

2 18. Attached as **Exhibit Q** is a true and correct copy of a one (1) page environmental
3 diagram produced by Environmental Science Associates (“ESA”) in or around 2012 under project
4 name “Forterra Wetland Assessment” and ESA job no. “120085”.

5 19. Attached as **Exhibit R** is a true and correct copy of a one (1) page environmental
6 diagram produced by Environmental Science Associates (“ESA”) in or around 2012 under project
7 name “Forterra Wetland Assessment” and ESA job no. “120085” that contains additional depictions
8 regarding a proposed development area and a proposed trail system. Exhibit Q and Exhibit R are two
9 different versions of what appears to be the same document.

10 20. Attached as **Exhibit S** is a true and correct copy of a lien for special connection
11 charges by Soos Creek Water and Sewer District in the amount of \$104,810.00, recorded on
12 November 19, 2015 under King County Recording No. 20151119000429.

13 21. Attached as **Exhibit T** is a true and correct copy of a Developer Extension
14 Reimbursement Agreement with the Soos Creek Water and Sewer District in the amount of
15 \$112,907.51, recorded on November 19, 2015 under King County Recording No. 20151119000431.

16 22. Attached as **Exhibit U** is a true and correct copy of Form 17C, the Seller’s Disclosure
17 Statement, executed by Michelle Connor, Forterra’s current CEO, on February 1, 2017 and provided
18 to the Company in connection with the Property’s sale.

19 23. Attached as **Exhibit V** is a true and correct copy of an April 30, 2018 preliminary
20 commitment for title insurance from First American Title Insurance Company for the Property and
21 naming the Company as the proposed insured.

22 24. Attached as **Exhibit W** is a true and correct copy of Form 34 of the Agreement,
23 extending the Feasibility Period until December 14, 2018.

24 25. Attached as **Exhibit X** is a true and correct copy of a letter dated November 30, 2018
25 from the Company’s trial counsel to Forterra outlining possible next steps to avoid further litigation
26 after a meeting at Forterra’s office on November 28, 2018 between Mr. Grausz, Ms. Karabensh, Ms.

1 Hughes, Ms. Lyon and myself.

2 26. Attached as **Exhibit Y** is a true and correct copy of a December 1, 2018 email from
3 Mr. Grausz in response to the letter dated November 30, 2018 from the Company's trial counsel. Mr.
4 Grausz's response confirms that, at the very least, Forterra has additional documents in its possession
5 that fall within the scope of Property Documents that it has not yet provided.

6 27. On November 28, 2018, Ms. Lyon and I met with Forterra and its representatives at
7 its offices in Seattle, Washington. In the meeting, Forterra described the search process it undertook
8 to locate documents and what documents, if any, it had not provided the Company. Forterra showed
9 us several documents it did not provide based solely on its own subjective belief that some documents
10 were "not relevant to the Property's development". In my opinion, the documents Forterra has not
11 provided to date, are documents that relate to the Property and would be important in our evaluation
12 of any future development.

13 28. Some of the documents Forterra has failed to provide include, but are not limited to,
14 environmental evaluations, scope of work for various environmental evaluations, and other
15 environmental maps and site plans. In addition to the documents themselves, Forterra has other,
16 supplemental documents in its possession that (1) relate to the Property and (2) are necessary to
17 comprehend the other documents produced. For example, Forterra repeatedly averred that the
18 document under **Exhibit Q** is only one page, however, despite producing another version of the one
19 page, which varies from the one page the produced later (**Exhibit R**), Forterra refuses to provide the
20 scope of work or contract it entered into with ESA for commissioning the one page. The scope of
21 work and contract would provide valuable insight as to how the one page was created, and provide
22 the Company with necessary information to determine how the Property was evaluated by ESA.
23 Without the scope of work and contract—which Forterra admits it has readily in its possession—the
24 Company is disadvantaged as no other documents in Forterra's possession would help explain the
25 one page produced by ESA. Without it, it is difficult, if not impossible, to determine the parameters
26 used by ESA in producing the one page—leaving the Company in a position that is no better than not

1 having the one page altogether.

2 29. Based on my understanding of the documents Forterra identified (but would not
3 produce) at the meeting, Forterra has a wide range of highly relevant Property Documents that it has
4 not provided. For example, Forterra stated it was required to grant the City a Temporary Construction
5 Easement (“TCE”) in connection with the S 212th St Erosion Project under the City’s file no. ENV-
6 2016-10. Forterra also stated the TCE was negotiated for and executed by Adam Draper, Forterra’s
7 former counsel. However, Forterra also admitted that despite searching Mr. Draper’s emails, it found
8 no results relating to the TCE. It seems implausible that no written communications exist when taking
9 into consideration Forterra’s other averments that Mr. Draper communicated with and granted the
10 City a TCE for work in connection with the S 212th St Erosion Project.

11 30. Despite repeated requests, Forterra has failed to provide a copy of the TCE. During
12 the November 28 meeting, Forterra also stated that “it did not believe the TCE had anything to do
13 with the Property’s development.” The TCE granted to the City for work the City actually performed
14 on and around the Property is relevant to the Property, and falls within the purview of the Property
15 Documents, as defined in Section 4 of the Agreement. Forterra’s opinion of the TCE’s materiality to
16 future development is irrelevant to its obligation to produce, and Forterra is incorrect. Without
17 reviewing the TCE, the Company is unable to determine what work was done by the City, the extent
18 and magnitude of said work, along with the purposes for granting the TCE. Absent review of the
19 TCE, as is the case with several other documents, the Company cannot fully investigate matters
20 relating to the Property.

21 31. Despite repeated requests, Forterra has only offered to allow Plaintiff to review a few
22 select documents from the “Green Folder,” and will only allow that limited review if the Company
23 waives its right to production of all other Property Documents. The Company has not waived its
24 rights and is entitled to all documents in the “Green Folder,” which Forterra identified as including:
25 temporary access easement(s) related to the First/Second Erosion Projects; steep slope and hazardous
26 areas maps; various studies, reports, diagrams, maps, and photos of the Property produced by several

1 engineering and environmental consultants, including Barghausen Engineering; agreements and
2 contracts with consultants, including, the scope of work for work done by ESA and EAI; the
3 Property’s site plans; printed email and letter correspondences with the City and with the donor who
4 deeded the Property; draft agreements and proposals for potential joint ventures; internal
5 correspondences and Forterra’s board resolutions related to the Property; property management
6 agreements with neighbors about the Property’s temporary use; preliminary title reports; invoices and
7 schedule of signage revenue associated with the Property; and another copy of the one page ESA
8 report (*Exhibit Q*).

9 32. During the November 28 meeting, Forterra stated it believed the language used in the
10 Agreement was not akin to standard language used in the real estate industry, and as a result, the
11 forgoing documents were exempt from the purview of Property Documents. I expressed to Forterra
12 that I disagreed with that assessment because the language in the Form 34 controls regardless of what
13 Forterra believes is “standard,” and because the Form 34 language is in fact similar to the language
14 used in the “standard” Commercial Broker’s Association Purchase and Sale Agreement CBA Form
15 PS_1A. The two are compared side by side on the next page.

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Language Used in the Agreement	Language Used in CBA Form PS_1A
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17</p> <p>4. SELLER'S COVENANT TO COOPERATE BY PROVIDING DOCUMENTS: Within 5 days following Mutual Acceptance, Seller shall provide Buyer with copies of all contracts, documents, reports, and studies relating to the Property and its development, for Buyer's information and review ("Property Documents"). If Seller has any engineering drawings and documents, environmental diagrams and studies, surveys, and other Property Documents for some or all of the Property in its possession, Seller shall deliver copies of such contracts, documents, reports, and studies to Buyer no later than 5 days following Mutual Acceptance.</p>	<p>Seller shall make available for inspection by Buyer and its agents within _____ days (2 days if not filled in) after Mutual Acceptance all documents in Seller's possession or control relating to the ownership, operation, renovation or development of the Property, excluding appraisals or other statements of value, and including: statements for real estate taxes, assessments, and utilities for the last three years and year to date; property management agreements and any other agreements with professionals or consultants; leases or other agreements relating to occupancy of all or a portion of the Property and a suite-by-suite schedule of tenants, rents, prepaid rents, deposits and fees; plans, specifications, permits, applications, drawings, surveys, and studies; maintenance records, accounting records and audit reports for the last three years and year to date; and "Vendor Contracts" which shall include maintenance or service contracts, and installments purchase contracts or leases of personal property or fixtures used in connection with the Property.</p>

18 33. Forterra's refusal to provide Property Documents not only hinders the Company's
19 ability to conduct due diligence as described above, but also is inconsistent with other provisions of
20 the Agreement. For example, paragraph 5 of Form 34 of the Agreement requires, that at the
21 Company's request, an assignment of all "studies, reports, surveys, design documents, warranties,
22 permits, licenses, and any and all other materials or documents that are related to the Property or its
23 development, and related efforts. Without disclosure of such documents, it is impossible for the
24 Company to decide whether to seek an assignment of them. In addition Section U of the Agreement
25 reads, "Seller shall cooperate with Buyer in obtaining permits or other approvals Buyer may
26 reasonably require for Buyer's intended use of the Property...". Without the Property Documents,

DECLARATION OF SIDDHARTH JHA - 8

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1 the Company cannot discern what permits or other approvals it may need Forterra to cooperate with.

2 ***Exhibit A.***

3 34. On or about December 7, 2018, our Company will be filing a public records request
4 with the City in an attempt to locate various Property Documents we believe Forterra has failed to
5 produce.

6 Under penalty of perjury under the laws of the State of Washington, I declare the foregoing
7 to be true and correct to the best of my knowledge.

8 Executed this 6th day of December, 2018 at Seattle, Washington.

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Siddharth Jha

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington that
3 on the date written below, I caused a true and correct copy of the foregoing to be delivered to the
4 following parties in the manner indicated:

5 Name: Dan Grausz, Forterra Via electronic mail per agreement
6 Law Firm: Via U.S. Mail
7 Address: 901 Fifth Avenue, Suite 2200 Via Messenger Delivery
8 Address: Seattle, WA 98164 Via Overnight Courier
9 Phone: 206-669-3899 Via Facsimile
10 Fax: Via FedEx
11 Email: dangrausz@gmail.com

12 Name: Stephen M. Rummage Via electronic mail per agreement
13 Law Firm: Davis Wright Tremaine LLP Via U.S. Mail
14 Address: 920 Fifth Avenue, Suite 3300 Via Messenger Delivery
15 Address: Seattle, WA 98104-1610 Via Overnight Courier
16 Phone: 206-757-8136 Via Facsimile
17 Fax: 206-757-7136 Via FedEx
18 Email: steverummage@dwt.com

19 DATED this 6th day of December, 2018.

20 *s/ Christine F. Zea*
21 _____
22 Christine F. Zea
23 Legal Administrative Assistant
24
25
26