

63790-8  
No. ~~63790-1~~, consolidated with 63792-4-1

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

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1000 VIRGINIA LIMITED PARTNERSHIP,  
a Washington limited partnership; DONN ETHERINGTON, JR.,  
an individual,

Petitioner/Appellants,

v.

CORNISH COLLEGE OF THE ARTS,  
a Washington public benefit corporation,

Respondent.

BRIEF OF RESPONDENT CORNISH COLLEGE IN RESPONSE TO  
BRIEF OF APPELLANT 1000 VIRGINIA LIMITED PARTNERSHIP

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**ORIGINAL**

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## I. INTRODUCTION

This appeal presents a classic case of “seller’s remorse.” In April 2005, Appellant 1000 Virginia Limited Partnership (“Virginia Limited”), through its managing agent and co-Appellant Donn Etherington, Jr., entered into the Commercial Sublease with Option to Purchase (“Sublease,” “Option Agreement,” or “Agreement”) with Respondent Cornish College of the Arts (“Cornish”). By that Agreement, Appellants granted Cornish (1) an option to purchase property located at 1000 Virginia Street in Seattle, Washington (the “Property”) for \$3 million, with a closing date of July 1, 2008; and (2) a sublease to occupy that property through December 2008. Two years later, by the time the option was to be exercised—and after Cornish had moved its classes and studios and invested over \$600,000 in renovations on the Property it intended to own—the estimated fair market value of that Property had risen to over \$7 million. When, on January 5, 2007 Cornish took the required steps towards exercising the option by making a payment extending the option period, Virginia Limited rejected tender of that payment on the grounds that it was three days late. This litigation has been motivated by nothing more than Appellants’ desire to escape their contractual obligations to Cornish and to sell the Property on the open market to the highest bidder.

Along the way, Appellants Virginia Limited and Etherington have employed a series of unscrupulous strategies, which two judges have independently called “bad faith.” First, weeks before trial, in a last-ditch effort to escape its Option Agreement obligation to Cornish and in a brazen display of forum-shopping, Virginia Limited attempted to seek the protections of bankruptcy court. In denying Virginia Limited’s motion to reject the Agreement with Cornish, U.S. Bankruptcy Judge Samuel Steiner observed that the litigation had come about “because 1000 Virginia made a bad business decision when it entered into the lease option. In short, 1000 Virginia is taking the position that when there has been an appreciation in value, the optionor does not have to honor its contract.” CP 3054-55, 56. Judge Steiner refused to relieve Virginia Limited of its obligations under the Option Agreement, finding that Virginia Limited’s actions were “hardly in good faith” and that “as to the equities, I think they’re all in favor of Cornish.” CP 3056. Etherington subsequently authorized a voluntary dismissal of Virginia Limited’s bankruptcy petition. RP 396:14-16.<sup>1</sup>

Second, the trial court found, after two and a half days of trial, that Virginia Limited “acted in bad faith in evicting Cornish and in its dealings

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<sup>1</sup> Unless otherwise noted, all references to the Report of Proceedings are to the trial, April 21-23, 2009.

with Cornish regarding the option.” CP 1033. And Cornish is not the only party that has been hurt by Virginia Limited’s reckless and bad-faith disregard of its contractual obligations in the drive to maximize profit. The Property was (and is) subject to a restrictive covenant whereby Virginia Limited promised to provide low-income housing at the site through 2022 in exchange for approximately \$4 million in tax credits. In January 2008, within weeks of the tax benefits expiring, Virginia Limited summarily evicted 61 units of low-income residents, leaving many with nowhere to go and, in Mr. Etherington’s words, “to fend for themselves.” RP 302:19; 59:13-20. The claimed basis for the eviction—the deterioration of the building stemming from its defective construction—could have been avoided if Virginia Limited had spent on repairs any of the \$2.5 million it received in settlement of a defective construction lawsuit against third-party contractors. Instead, Virginia Limited simply pocketed the money, as part of a “planned obsolescence” of the Property, the trial court found, intended “to escape the low income housing obligations and to obtain market value for the real estate.” CP 1030.

And Virginia Limited’s cynical strategies and reckless disregard of the facts have resurfaced here, in the Court of Appeals. Its opening brief contains an astonishing rewriting of history, supported in many cases by nothing more than the testimony of Donn Etherington. Throughout this

case, however, Etherington has given self-serving, inaccurate and in several instances dishonest testimony. Indeed, after two and a half days of trial, the court below rejected nearly every material assertion Etherington made in his testimony. The court stated, in a finding that should not be disturbed on appeal, that Etherington's testimony was "not supported by the surrounding facts or circumstances," and that by giving "inconsistent testimony" and taking "contradictory positions" under oath on a number of issues, Etherington had repeatedly and "significantly" "undermined defendants' credibility" April 24, 2009 RP 7; CP 1032. Indeed, at trial the court caught Etherington in what can only be characterized as blatant dishonesty, noting that although Etherington had testified at trial that he was relying on the bankruptcy petition to clear title to 1000 Virginia, he was forced to admit—after being confronted with proof that he had personally authorized dismissal of the petition just days earlier—that the petition was no longer pending and therefore could not have achieved the results he'd claimed. April 24, 2009 RP 7; CP 1033.

The parties appear to agree that this case is a "battle of the equities." After two and a half days of trial and over half a dozen substantive motions, the trial court came to understand what those equities were, and awarded the equitable relief to Cornish that is the subject of this

appeal. For this reason, and because each of the trial court's rulings were correct, the judgments below should be affirmed.

## **II. COUNTER-STATEMENT OF THE CASE**

### **A. Factual Background**

Cornish disputes several of the key facts and circumstances presented in Virginia Limited's statement of the case. The following section includes both correction of these inaccuracies, and such additional facts necessary for a full understanding of the equities presented below.

#### **1. The Parties**

Respondent Cornish College is a private, non-profit college of approximately 800 students, offering bachelor's degrees in the visual and performing arts. RP 26:16-19. Cornish was founded in Seattle in 1914. RP 26:20-21. In the mid-1990s, Cornish, having outgrown its Capitol Hill campus, developed a "Master Campus Plan," which included relocation to the Denny Triangle neighborhood in downtown Seattle. CP 1234; RP 30:5-32:19. Over the past several years, Cornish has devoted enormous resources to consolidating its campus in the Denny Triangle, and most of Cornish's activities now take place on its new campus. *Id.* Acquisition of the 1000 Virginia Property, located in the heart of Denny Triangle, was (and is) an integral component of Cornish's Master Plan. RP 34:13-21.

Appellant Virginia Limited is the owner of the 1000 Virginia Property, which is its sole asset. CP 1377; RP 303:14-21; 1377 ¶ 2. Virginia-Terry LLC is the general – and currently the only – partner in Virginia Limited. RP 241:25-242:7. Appellant Donn Etherington is the manager and only member of Virginia-Terry LLC.<sup>2</sup> RP 241:13-19; Supp. CP \_\_. Etherington is an experienced Seattle real estate developer, specializing in the development of low-income housing properties. CP 1715-18; 1722-26. Cornish’s dealings with Virginia Limited concerning the Property have been exclusively through Etherington, who has been the primary—if not sole—decision-maker and manager of the Property. *See, e.g.*, RP 236:19-236:6; 240:19-20; CP 1248.

**2. Commercial Sublease with Option to Purchase and Cornish’s Tenant Improvements at 1000 Virginia**

In an email dated April 16, 2004, Etherington wrote to Cornish CFO Jeff Riddell “I have decided to sell my property.” CP 1248. The 1000 Virginia Property to which he was referring is a mixed-use building consisting of two lower concrete floors of commercial storage space, and four upper floors containing 61 units of low-income housing. CP 1235, ¶ 7; RP 246:2-19. Etherington told Cornish that he was interested in getting

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<sup>2</sup> Virginia Limited’s assertion that Etherington “and his family are members” is not supported by the record. VL Br. App. at 6.

out of the storage business, and wanted to lease the commercial space “as soon as possible.” CP 1248-50.

Cornish wanted to purchase the 1000 Virginia Property outright, but Etherington would not agree to an immediate sale because the Property was restricted by covenants contained in an agreement known as the Extended Use Agreement (“EUA”) between Virginia Limited and the Washington State Housing Finance Commission (“WSHFC”). CP 1248-49; *see also* CP 1438-65. The EUA, signed in 1992, obligated the owner of the 1000 Virginia Property to provide 61 units of low-income housing over a period of years, in exchange for which Virginia Limited received approximately \$400,000 in IRS tax credits per year for ten years. Supp. CP \_\_\_; \_\_\_. During negotiations over the Option Agreement, Etherington told Cornish that if the Property was sold before the end of 2007, Virginia Limited could lose and be subject to a costly recapture of the tax credits, something he wanted to avoid. *Id.*; CP 1235, ¶ 9, Supp. CP \_\_. Etherington also expressly represented to Cornish that the obligation to provide low-income housing at 1000 Virginia would end December 31, 2007. CP 1249. As it later turned out, however, Mr. Etherington’s representation of Virginia Limited’s obligation to the WSHFC was incorrect. In fact, the low-income housing covenant in the EUA would run for an additional fifteen years, through 2022. CP 1342:7-11; 1343.

On April 29, 2005, Cornish and 1000 Virginia Limited executed the “Commercial Sublease with Option to Purchase.” CP 1208-1221. The Agreement provided for Cornish to sublease the “Leased Premises,” defined in the Agreement as the bottom two floors of the six-storey building, from Etherington, who in turn was leasing the property from Virginia Limited, from May 2005 through December 2008. CP 1209-16. The intent expressed in the Sublease was for Cornish to use the Leased Premises for senior art studios, a scene shop, and other classrooms. CP 12510, ¶ 3.8. In the meantime, Virginia Limited would continue to own and operate the building’s upper four floors of low income housing. The Agreement thus allowed Etherington to get out of the storage business immediately, while maintaining Virginia Limited’s ownership and control of the housing portion of the Property through 2007 for purposes of continuing to receive the valuable IRS tax credits. CP 1252-65; 1249.

The Agreement also granted Cornish an exclusive “Option to Purchase” the entire building and land at 1000 Virginia. CP 1260-63, ¶¶ 4.1 – 4.23. The option period ran through December 2006, and could be extended for an additional year, with a deposit by Cornish of \$50,000, by January 2, 2007. CP 1260-61, ¶ 4.3. Cornish could exercise the option at any time, but the Option Agreement provided a closing date of July 1, 2008, regardless of when the option was exercised. *Id.* ¶¶ 4.2 – 4.5.

Virginia Limited also explicitly agreed to deliver clear title to the Property, “free of encumbrances or defects,” and to demolish the upper four floors of the building, which were in poor condition, leaving the relatively sturdy bottom two floors. CP 1261, ¶ 4.6. Mr. Etherington set the purchase price at \$3 million, the fair market value for the Property at the time. CP 1260, ¶ 4.2; CP 1236, ¶ 11, RP 243:15-24.

Anticipating Cornish’s eventual ownership of the Property, the Agreement expressly authorized Cornish to make “improvements required for Cornish College’s ‘scene shop’ and classrooms.” CP 1254, ¶ 3.10. Pursuant to that authorization, Cornish invested approximately \$600,000 in permanent improvements to the Leased Premises over the next fifteen months. CP 1236-37, ¶¶ 15-18. Cornish built out the scene shop space and offices on the second floor, and installed lighting, bathroom facilities, and a computerized security system. *Id.* Cornish built out the senior art studios on the first floor, and added bathroom facilities, an ADA-compliant ramp, lockers and partitions to create the studios. Finally, Cornish built a theater classroom and installed a “sprung” dance floor and ADA-compliant doors. *Id.*

As Cornish’s Chief Operating Officer Vicki Clayton and Chief Financial Officer Jeff Riddell have each testified, Cornish spent this enormous sum — nearly \$600,000 and innumerable hours of sweat equity

by Cornish's staff — because Cornish intended at all times to exercise its option to purchase the Property. CP 1236-37, ¶¶ 15, 19; CP 1228, ¶ 3. Indeed, Cornish applied for, and was awarded, \$425,000 in grant funds from the Washington State Building for the Arts Fund and the Cultural Development Authority of King County, awarded expressly for the purpose of purchasing the Property, \$350,000 of which cannot be used for any other project and which Cornish is in danger of losing. CP 1302-33; CP 1237, ¶ 19; RP 55:10-56:2.

### **3. The Low-Income Housing Restrictions on 1000 Virginia Property and Cornish's Efforts to Find a Solution**

In June 2006, Cornish learned, through a third party affiliated with the WSHFC, that although the benefits of the IRS tax credits would end in 2007, 1000 Virginia was subject to an additional fifteen-year “extended use period” under the EUA, pursuant to which the owner of 1000 Virginia would be required to provide 61 units of low-income housing through 2022. CP 1228-29. This was contrary to what Etherington had repeatedly told Cornish during the negotiations to purchase the Property. *See* CP 1249 (“My commitment . . . to provide affordable housing . . . will end on December 31, 2007.”). Cornish conveyed the information about the extended use period to Etherington in a meeting on July 24, 2006. Etherington initially denied it, but claims to have realized at some point

later that year that the low-income housing restrictions would in fact continue through 2022. CP 1335, 1238; 1342, 1343.

To protect its option and to ensure clear title to the Property it intended to acquire, Cornish initiated efforts to help Virginia Limited find a solution to the housing restrictions. CP 1238, ¶ 23. Cornish administration officials and trustees met multiple times with Mr. Etherington, with Cornish's lawyers (including a newly retained expert in housing law), with officials from the WSHFC, and with various low-income housing groups, to try to craft a solution that would be acceptable to Cornish, Virginia Limited, and the WSHFC. *Id.* Between July 2006 and mid-summer 2007, Ms. Clayton and Mr. Riddell spent hundreds of hours in negotiations and investigations trying to find a way to help Mr. Etherington meet his obligation to Cornish to deliver clear title under the Option Agreement. CP 1238-39, ¶ 25; 1229, ¶ 6.

#### **4. The Late Option Extension Payment and Continued Negotiations**

On December 18, 2006, Mr. Riddell requested disbursement of a \$50,000 check to extend the option period, and intended to deliver the check to Mr. Etherington at a meeting at Cornish scheduled for December 28, 2006. CP 1229, ¶¶ 7-8. But Etherington never appeared. Instead, in a call to Cornish trustee Mike McKernan, Etherington cancelled his meeting

with Mr. Riddell, telling Mr. McKernan the “discouraging news” he had learned at a meeting with the Commission that morning: that the housing restrictions would not expire for another 15 years. CP 1223, ¶ 7. He told Mr. McKernan that he was on his way home (to Wenatchee), and that there was “nothing left to do.” *Id.* When Mr. Riddell learned that the meeting had been canceled, he made an initial effort to send Etherington the check by mail, but the postage meter inside the College had already been set ahead, to January 1, 2007. CP 1229, ¶ 11. So he returned the check to his briefcase. *Id.*

On January 5, 2007, Etherington called Mr. McKernan and asked him where the option payment was. CP 1224, ¶ 9; CP 1344:1-20. Mr. McKernan responded that he did not know, and called Mr. Riddell to inquire. At that point, Riddell realized he had forgotten to send the check, and mailed it to Etherington immediately, three days after the deadline.<sup>3</sup> CP 1230, ¶ 12. In a telephone conference with Cornish five days later, on January 10, 2007, Etherington told Cornish that he believed the delay meant he was “off the hook.” *Id.*, ¶ 13. He would later tell Mike McKernan that he, Etherington, was “happy” when Cornish’s payment

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<sup>3</sup> The deadline provided in the Option Agreement was January 1, 2007, which was, of course, a holiday. Thus the deadline was actually January 2, 2007. CP 1217-18, ¶ 4.3. The Option Agreement also provided that “[n]otice shall be deemed delivered on . . . the date of postmark if mailed.” CP 1212, ¶ 3.13.

arrived late. CP 1224, ¶ 10. Without attempting to deposit the check or otherwise verify its validity, Etherington returned the check, without comment, on January 22, 2007. CP 1230, ¶ 14.

Despite Etherington's rejection of Cornish's option extension payment, he repeatedly indicated that he still intended to "move forward" with Cornish. CP 1239, ¶ 29. But at some point in 2007, Etherington commissioned an appraisal of the Property. The appraisal estimated that the value of the Property could exceed \$7 million. CP 1626. The parties' negotiations approached an impasse as it became clear that Mr. Etherington would refuse to honor the Option Agreement, claiming that the option was no longer valid because Cornish had made the payment three days late, and that he therefore was entitled to a purchase price greater than \$3 million. CP 1239, ¶ 29. On December 20, 2007, Cornish sent Etherington a letter, attempting to exercise its option. CP 1719-20. Virginia Limited rejected that attempt, and it is this dispute that led to the filing of this lawsuit.

**5. The Deterioration of the Building at 1000 Virginia and the Eviction of Cornish and 61 Units of Low-Income Residents**

The building at 1000 Virginia consists of a concrete two-storey base constructed in the early 1900's, on top of which Virginia Limited, as general contractor, built four stories of wood-frame housing in 1992. RP

246-47. As Etherington testified at trial, “[s]ubsequent to construction of the project, it was discovered there were construction defects that were leading to water intrusion in the building that was compromising the structure.” RP 248. These defects were the basis of a lawsuit Virginia Limited brought in 2002 against the building’s subcontractors. CP 1753-56. Virginia Limited eventually settled the lawsuit for approximately \$2.5 million in payments made in 2005 and 2007. RP 249; CP 1733:6-21. Although the building continued to deteriorate, and by at least one estimate could have been repaired for \$1.5 million, Virginia Limited decided not to use any of that money—or at most, “over time . . . thousands and thousands”—to repair the construction defects that were the subject of the litigation.<sup>4</sup> CP 1755; RP 249-50; CP 1733-34.

In a letter dated December 20, 2007, (eleven days before the IRS tax credits were set to expire) Virginia Limited’s structural engineer, Todd Perbix, opined that certain portions of the 1000 Virginia building “have exceeded the limits established as ‘Dangerous’” by the relevant building codes. CP 1743-44; RP 51:2-5. Virginia Limited immediately forwarded that letter to the WSHFC, and advised the WSHFC that the building

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<sup>4</sup> Virginia Limited asserts that the “cure for the defects required complete reconstruction.” VL App. Br. at 7. But Virginia Limited’s only support for this assertion is the self-serving declaration and trial testimony of Etherington, who is neither qualified to give such opinions, nor a credible witness. CP 1033-34. This assertion should be rejected.

should be vacated and demolished; that Virginia Limited did not have the resources to rebuild; and that the Property would thus be out of compliance with the EUA. CP 2290-91. Virginia Limited sought the WSHFC's "cooperation and proactive assistance in resolving this difficult issue." CP 1291. One month later, in a letter dated January 31, 2008, Virginia Limited advised the tenants of the building's poor condition and ordered them to vacate their homes immediately. CP 1757.

On April 3, 2008, Etherington delivered to Cornish a "Notice of Lease Termination," ordering Cornish to vacate the Leased Premises, nine months before the end of its lease term. CP 2152. The reason given was that the building had become unsafe for occupancy. Supp. CP \_\_\_\_. But even Perbix testified that he "did not feel the building was near collapse," and Cornish's structural engineer opined "there did not appear to be any significant sign of deterioration and it appears that the two-story base structure has the required elements for a complete gravity system." CP 2174; 2180. In fact, Etherington himself has admitted that "There was never any questions about habitability of the units themselves." Supp. CP \_\_\_\_. As he stated in deposition just months after the eviction:

**Q. Were you ever concerned of the danger that the top four floors would implode on the bottom two and create a problem?**

**A. No.**

Supp. CP \_\_\_.

Moreover, the evidence below established that Etherington could have eliminated the danger posed to the Leased Premises by demolishing the top four floors, which the Option Agreement required in any event. CP 1219, ¶ 4.22. In fact, Cornish proposed to Etherington that he undertake such demolition as an alternative to evicting Cornish. Supp. CP \_\_\_. Etherington rejected this proposal.<sup>5</sup> CP 1745-46. Had he agreed and allowed Cornish to continue to occupy the Leased Premises until resolution of this lawsuit, he and Virginia Limited could have avoided causing Cornish over \$2.4 million in damages resulting from the wrongful eviction and the failure to meet the Option Agreement obligations, and could have continued to collect rent. *See* RP 15-23.

Instead, Etherington forced Cornish to surrender the Leased Premises. Cornish's eviction came at great inconvenience and expense to it. In an attempt to salvage classes held in the Leased Premises through the end of its academic year, and due to an extremely limited availability of replacement real estate and the complicated logistics of moving,

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<sup>5</sup> Etherington apparently considered the demolition option during this time, obtaining his own estimate for the project. He decided not to demolish after conducting his own "cost-benefit analysis." Supp. CP \_\_\_.

Cornish had extremely limited time to mobilize moving efforts, identify replacement space, and arrange for the moving of massive amounts of equipment and other property from 1000 Virginia to the new spaces. CP 238-39, ¶ 3; RP 67:8-68:2. Deprived of the use of the Leased Premises at 1000 Virginia, Cornish was forced under exigent circumstances to lease and build out three separate spaces, for a monthly rent of \$21,000 in excess of what it had been paying at 1000 Virginia, and a construction cost to prepare classroom and studio space of nearly \$800,000 (not including an additional \$200,000 of Cornish staff time for which Cornish did not seek damages). *Id.* ¶ 5; RP 70:10-71:6; 85:15-87:15; 91:15-92:24. In total, the trial court awarded Cornish damages of over \$2.4 million for expenses associated with this forced move and Virginia Limited's failure to honor the Option Agreement. CP 1038.

**B. Procedural History**

Cornish does not dispute Virginia Limited's recitation of the procedural history of this case, except as it relates to Virginia Limited's bankruptcy petition, filed on March 5, 2009. Virginia Limited represents that it filed for bankruptcy protection "due to its lack of operating funds." Brief of Appellant 1000 Virginia Limited Partnership ("VL App. Br.") at 11. U.S. Bankruptcy Judge Samuel Steiner found, however, that "the filing of this bankruptcy was a litigation tactic rather than a bona fide

effort to reorganize, and that this dispute should not be in this court.” CP 3054:11-14. Virginia Limited subsequently agreed to voluntary dismissal of its petition, but not before Cornish had expended in excess of \$55,000 in fees defending its interests in bankruptcy court. RP 396:2-6; CP 3120.

### III. AUTHORITY

**A. This Court Should Affirm the Trial Court’s (1) Period of Grace, (2) Order of Specific Performance, and (3) Award of Equitable Damages**

**1. Counter-Statement of the Standards of Review**

**a. Standard of Review of Decisions in Equity is *de Novo* and Abuse of Discretion**

Virginia Limited presents two primary issues in its appeal of the equitable remedies of a period of grace, an order of specific performance, and an award of equitable damages: (1) whether equitable principles should apply in this case; and (2) whether the equitable relief granted was appropriate. Contrary to Virginia Limited’s position, only the first question—whether equity applies to this case—is a question of law to be reviewed *de novo*. Once it is determined that “a court does have the equitable authority to relieve a party of an otherwise legally required obligation, we will intrude upon its decision only if there was an abuse of discretion.” *Rufer v. Abbott Labs.*, 154 Wn. 2d 530, 551, 114 P.3d 1182 (2005). Sitting in equity, the court “may fashion broad remedies to do

substantial justice to the parties and put an end to litigation.” *Hough v. Stockbridge*, 150 Wn. 2d 234, 236, 76 P.3d 216, 217 (2003). Under an abuse-of-discretion review, the relief “will not be disturbed on appeal except on a clear showing [that the] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

The case of *Pardee v. Jolly* highlights, under nearly identical circumstances, this distinction between *whether* to apply equitable principles in a certain case, and *how* those principles should be applied. 163 Wn. 2d 558 (2008). In that case, optionee Pardee brought a lawsuit seeking specific performance of an option contract, which optionor Jolly claimed terminated when Pardee failed to tender the final option payment on time. The trial court found that Pardee had performed under the option contract, and ordered Jolly to sell Pardee the property. The Court of Appeals reversed, finding that Pardee had not properly performed, and that the option had thus terminated.

The Supreme Court agreed that Pardee had not performed under the contract, but remanded the case to allow the trial court to determine whether Pardee was nevertheless entitled to equitable relief. In doing so, the Supreme Court held, as a matter of law, that “the law regarding

equitable forfeitures applies in this case.” 163 Wn. 2d. at 576. This conclusion was based on the court’s determination that “[t]he termination of the option to purchase in this case is analogous to a forfeiture because the optionee was allowed to occupy the property and make substantial improvements thereon.” *Id.* at 573. Based on “the unique facts and contractual provisions in this case,” the court held as a matter of law that “the equitable principles regarding forfeitures apply.” *Id.* at 574. But the Supreme Court drew a distinction between this *legal* question and the *equitable* question of whether “Pardee is entitled to an equitable grace period.” *Id.* at 574. That was a question for the trial court.

On remand, the Supreme Court instructed the trial court that “whether an equitable grace period is appropriate depends on the facts and circumstances of a case and **is largely within a trial court’s discretion.**” *Pardee*, 163 Wn.2d at 575, citing *Heckman Motors, Inc.* 73 Wn. App. at 88 (1994) (emphasis added). The court reiterated that “forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Id.* at 574. Thus, once it is determined that equitable principles should apply, whether to award equitable relief – including the period of grace, the order of specific performance, and the award of equitable damages – “is largely within a trial court’s discretion,” to be disturbed only upon a showing of abuse. *Id.* at 575.

**b. This Court May Consider All Facts and Issues Contained in the Record**

Virginia Limited asserts, without citation, that this Court's review "must be based only on evidence presented in the summary judgment motion and may not be modified or bolstered by evidence presented at trial." VL App. Br. at 13. This is not an accurate statement of law. Tellingly, on appeal Virginia Limited itself repeatedly cites to trial testimony, even in reference to the court's rulings on pretrial motions. *See, e.g.*, VL App. Br. at 16, 20, 25, 30.

Rule of Appellate Procedure 2.5 provides a "party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." Although RAP 9.12 provides that "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court," this rule does not preclude the appellate court from "affirm[ing] a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn. 2d 214, 222, 67 P.3d 1061, 1064 (2003), citing RAP 2.5; *see also Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 48 P.3d 334 (2002) (affirming trial court's 12(b)(6) dismissal of

one group of defendants, based on issues raised only by second group's later summary judgment motion, though such issues had not been before the court at the time of the first motion); *McDaniel v. City of Seattle*, 65 Wn. App. 360, 369, 828 P.2d 81 1992) (affirming trial court's pre-trial dismissal of claim, on alternative grounds not relied upon by trial court, based on findings subsequently made by jury). Application of RAP 9.12 is not appropriate in this case, where Cornish relies only on evidence and issues that *were* "called to the attention of the trial court," either at summary judgment or during the subsequent bench trial.

According to commentary, for purposes of judicial economy, "[w]hile appellate courts are reluctant to *reverse* on a basis not raised in the trial court, a decision will be *affirmed* on any proper grounds." Tegland, 15A Wash. Prac., Handbook Civil Procedure § 88.2 (2009-10 ed.) (emphasis added). This sensible rule avoids reversal of pretrial motions for insufficiencies that are later cured at trial, "based upon the belief that if the trial court's decision was correct, albeit for a different reason than that cited by the trial court, a retrial of the case would serve no useful purpose." Tegland, Author's Comments § 46, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed.). This reasoning is particularly appropriate in a bench trial where, as here, the same decision-maker

presided over all proceedings, including all motions and the trial, and where the results would therefore not be expected to change on remand.

Furthermore, this Court may also consider the entire record on appeal because after trial, the court entered its Findings of Fact and Conclusions of Law and a final judgment – affirming and subsuming all prior rulings of the court – based upon *all* of the issues that had been “called to the attention of the trial court.” *See, e.g.* CP 1035 (“The Court reaffirms its earlier rulings that defendant Virginia Limited has breached the Option Agreement.”). Thus, in reviewing the trial court’s rulings on pretrial motions, this Court may consider issues and proof presented at trial, and where this Court finds that the pleadings and proof below support the trial court’s rulings on any ground – whether considered by the trial court at trial or before – affirmance is proper.

**2. Equitable Principles Designed to Prevent Forfeitures Apply to this Case**

The court below correctly invoked its equitable powers in granting Cornish the relief it sought, finding “Cornish would suffer an inequitable forfeiture” and that it had “the authority in equity to determine and award what damages, if any, flow from defendant Virginia Limited’s breach of the Commercial Sublease with Option to Purchase.” CP 1921, 1035. This conclusion should be affirmed.

In *Pardee v. Jolly*, which is materially indistinguishable from the instant case, the Supreme Court held that equitable principles should apply to prevent forfeiture under an option contract that grants “the right to occupy and improve the property during the option period.” 163 Wn. 2d at 574. This holding is based on the age-old principle that “forfeitures are not favored in the law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Id.*

The Supreme Court rejected the optionor’s position that equitable principles did not apply because Pardee “did not forfeit ownership in an asset,” and found instead that although a “pure” option contract is to be “strictly constructed,” an option contract giving the optionee “the right to occupy and improve the property during the option period” is to be governed by “equitable principles regarding forfeitures.” *Id.* at 574-76.

The *Pardee* court ruled that it was an error of law for the trial court *not* to have applied equity, and remanded the case ordering it to do so. *Id.* at 573-74. In its instructions on remand, the court relied heavily on this Court’s decision in *Wharf Restaurant v. Port of Seattle*, which held that equitable principles may apply to an option contract where an inequitable forfeiture is threatened. 24 Wn. App. 601, 610, 605 P.2d 334 (1979). In *Wharf*, plaintiff Wharf Restaurant, Inc. had leased restaurant space from the Port of Seattle for 25 years, periodically renewing the term of the

lease. But the restaurant failed to meet the January 3, 1977 deadline to give notice to the Port that it intended to renew the lease for another five years, because it “simply forgot to do so.” *Id.* at 603. Approximately two months after the deadline, the Port notified Wharf Restaurant of its failure to give notice, and refused to renew the lease. Wharf Restaurant then sued for specific performance of its option to renew the lease, and the trial court granted it that relief.

The Court of Appeals upheld the trial court’s order of specific performance. The Court first acknowledged the general rule regarding strict compliance with the terms of an option contract. *Id.* at 610. Nevertheless, noting “equity’s abhorrence of a forfeiture,” the Court of Appeals held that “there is one sort of case in which it has been held that the power of acceptance [of an option] continues to exist for a short time after the expiration of a time limit.” *Id.* at 611. Such a case exists where “the holder of the option neglected to give notice of acceptance within the time fixed although he had made valuable permanent improvements with intention to give the notice.” *Id.*, citing 1 A. Corbin, *Corbin on Contracts* § 35, at 146-47 (1963). The court stated:

The power of the holder of an option to buy or renew, contained in a lease, is not necessarily terminated by failure to give notice within the specified time. **If, in expectation of exercising the power, the lessee has made valuable improvements, and the delay is short without any**

**change of position by the lessor, the lessee will be given specific performance of the contract to sell or renew.**

This is for the purpose of avoiding an inequitable forfeiture.

*Id.*, citing 1A Corbin, Corbin on Contracts § 35 (1963) (emphasis added).

The threshold question of law in this case, therefore, is whether “in expectation of exercising the [option], the lessee has made valuable improvements, and the delay is short without any change of position by the lessor.” *Id.*; see also *Pardee*, 163 Wn. 2d at 573 (“This section begins with a discussion of whether the termination provision in this option contract may be treated like a forfeiture . . . because the optionee was allowed to occupy the property and make substantial improvements thereon.”). If strictly enforcing the deadline in the Option Agreement would work “a significant forfeiture,” this case “should be analyzed using the equitable principles set forth in *Wharf Restaurant*.” *Id.* at 576.

Like the option agreement in *Pardee*, the Commercial Sublease with Option to Purchase in this case contains both an option to purchase, and the right to occupy and make improvements on the Property. See CP 1208, ¶ 2.1, 1210 ¶ 3.10; *supra* § II.A.2. And in fact, as described above, Cornish has invested approximately \$600,000 in remodeling and improving the space for its classrooms, scene shop and studios, and invested considerable time and expense in attempting to resolve the Property’s low-income-housing restrictive covenant. See CP 1236-39.

Virginia Limited's argument that these improvements are not "conclusive evidence" that Cornish would exercise the option is beside the point; the issue is whether the strict enforcement of the deadline would work an inequitable forfeiture. *Pardee*, 163 Wn. 2d at 574-76; *Wharf Restaurant*, 24 Wn. App. at 611-12. Because the evidence below is undisputed that it would have, the trial court's finding that "Cornish would suffer an inequitable forfeiture of time and money invested in the Property" was correct as a matter of law. CP 1921.

The magnitude of the threatened forfeiture in this case is highlighted by the Supreme Court's discussion of the issue in *Pardee*: "If the option is deemed terminated, Pardee [will] lose the \$20,669.58 he invested in repairing the house and the 2,500 hours that he spent working on the house so that he could use it as collateral for a mortgage. This is a *significant forfeiture* that should be analyzed using the equitable principles set forth in *Wharf Restaurant* and *Heckman Motors*." *Pardee*, 163 Wn. 2d at 977. Indeed, the value of Cornish's forfeiture would be orders of magnitude greater than what the Supreme Court found to be "significant" in *Pardee*.

None of the "inequities" of which Virginia Limited claims Cornish is guilty precludes application of equitable principles in this case. First, the record does not support Virginia Limited's claim that Cornish was not

vigilant. Cornish has acknowledged its option extension payment was several days late; but a late payment does not preclude relief in equity. *See Pardee*, 163 Wn. 2d at 573. Moreover, the evidence is undisputed that Bank of America (which held the account on which the option extension check was drawn) would have “honor[ed] a check that on its face indicated that two signatures were required for withdrawal, but in fact is signed by only one person.” CP 1917-18. And Cornish did not attempt to “cure” the “defective” check because Virginia Limited had already “promptly” returned the first one, stating unequivocally it was late and would not be honored. CP 1382. Resending another check would have been pointless, not vigilant.

Second, Cornish has not acted with unclean hands. There is simply no evidence in the record that Cornish acted in anything other than good faith. The undisputed facts demonstrate that Cornish undertook negotiations with Virginia Limited in 2006 and 2007 in an attempt to seek a solution to the problem posed by the fifteen additional years of housing restrictions on the Property. *See supra* § II.A.2. In fact, Etherington himself testified that Cornish made efforts to renegotiate the Option Agreement because it “needed to have some kind of certainty that I could deliver title as required under the agreement.” Supp. CP \_\_\_. There is nothing nefarious or improper about this motive. Indeed, it should be

noted that the trial court found that if anything, it was Virginia Limited that “acted in bad faith,” and that “Virginia Limited’s desire . . . to escape the obligations from the property without payment of a penalty to the [WSHFC] created complexity and confusion in the parties’ relationship.” CP 1033.

Virginia Limited attempts to cast doubt on Cornish’s good-faith motives behind these negotiations, claiming that had Cornish “timely and unequivocally” exercised its option, Virginia Limited would have been able to clear title by the July 1, 2008 closing date by putting the Property through what it has termed an “opt-out” provision contained in the EUA. VL App. Br. at 16. That provision outlines the “Qualified Contract Process” (“QCP”) by which the owner may engage the help of the WSHFC in finding a buyer willing to continue to operate the Property as low-income housing. *See* CP 1452-53, ¶ 4.3. If, after one year, no such buyer is found, the restrictions will, after three years, be released. CP 1453, ¶ 4.3.4. Virginia Limited’s argument that Cornish somehow thwarted this process by the delay in delivering the option payment was explicitly rejected by the court at trial. First, as the trial court noted, Cornish had a right to exercise the option at any time through December 31, 2007; initiating the year-long QCP at that point would not have cleared title by July 1, 2008. CP 1032.

Second, even if Cornish *had* exercised the option in December 2006, as Virginia Limited suggests it should have, and Virginia Limited had immediately initiated the QCP, the process would not have cleared title to 1000 Virginia by closing but, at the earliest, by December 2010. The EUA provides that at the end of the one-year period of the QCP, if no buyer is found, “[t]his Agreement shall continue to apply to such Building until termination of . . . the Three-Year Period,” defined as three years following “the last day of the one-year period” of the QCP. CP 1453 § 4.3.4; 1446 § 1.32; *see also* CP 1452 ¶ 4.1. Indeed, the QCP would not have allowed Virginia Limited to opt out of the EUA by the closing date even if Cornish had exercised the option on the day the Option Agreement was signed. Clearly, the QCP did not present a viable way of enabling Virginia Limited to perform its obligations under the Option Agreement.<sup>6</sup>

Further, Cornish’s alleged incidental “breaches” of the Sublease simply do not amount to the kind of inequitable conduct necessary to overcome equity’s abhorrence of a forfeiture. *See Esmieu v. Hsieh*, 20 Wn. App. 455, 460, 580 P.2d 1105 (1978) (“[C]onditions of forfeiture must be substantial before they will be enforced.”). Indeed, the trial court

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<sup>6</sup> Indeed, the trial court found, given that the building had been declared *uninhabitable*, putting the Property through the QCP – by which the WSHFC would be asked to find a buyer willing to repair the building to habitability and operate low-income housing for an additional fifteen years, without any of the tax benefits already reaped by Virginia Limited – was nothing more than a “sham.” CP 1031.

dismissed Virginia Limited's claims based on these "breaches" for failure to demonstrate that they caused Virginia Limited any injury, a ruling that Virginia Limited has not challenged on appeal. CP 214-16; 414-16. And there is no evidence whatsoever that any of these purported breaches were committed in bad faith.

Finally, Virginia Limited failed below and fails again to demonstrate that it suffered any prejudice resulting from the three-business-day delay of the option extension check. CP 1345:23-1350:3. As discussed above, the delay of several days in delivering the extension check had no effect on whether Virginia Limited was able to clear title to the Property. Application of the principles of equity in this case is therefore appropriate.

None of the cases cited by Virginia Limited in which a court strictly construed an option contract deadline involved an inequitable forfeiture, the very issue on which the question of equitable relief should turn. *Pardee*, 163 Wn. 2d at 5773-76; *see* VL App. Br. at 21-22, n. 14. Moreover, by its course of conduct, Virginia Limited waived strict enforcement of the "time is of the essence" provision in the contract. *See Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 782, 215 P.2d 425 (1950). The record demonstrates that Virginia Limited, albeit under protest, accepted late payments on multiple occasions. CP 1729-30.

Virginia Limited is no more entitled to strict construction of the option deadline than were defendants in *Pardee* or *Wharf Restaurant*.

**3. The Court Did Not Abuse Its Discretion in Granting Cornish a Period of Grace**

Applying equitable principles to the dispute before it, the trial court properly “analyzed [the case] using the equitable principles set forth in *Wharf Restaurant* and *Heckman Motors*.” *Pardee*, 163 Wn. 2d at 576. Given that “courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed,” the trial court did not abuse its discretion in ordering that Cornish was entitled to an equitable period of grace.<sup>7</sup> *Moeller*, 25 Wn. 2d at 783.

*Wharf Restaurant* sets forth more particularly the kinds of “special circumstances” that compel a court sitting in equity to forgive untimely notice, including: (1) that the failure to give notice was purely inadvertent; (2) that permanent improvements had been made on the premises by the lessee with the intention of exercising its option; (3) that failure to give timely notice did not cause optionor to suffer prejudice; (4) that the lease was intended to be for a long term; and (5) there was no undue delay in

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<sup>7</sup> As discussed *supra* § III.A.1., the proper standard of review of the court’s equitable remedy review is abuse-of-discretion. However, even reviewed *de novo*, the trial court’s ruling was correct.

giving the notice, and (6) the optionor contributed to cause the delay. *Wharf* at 612-13.

Under this analysis, there can be no doubt that the trial court did not abuse its discretion in holding that the undisputed facts of Cornish's case demonstrated that Cornish was entitled to the "period of grace" outlined in *Wharf* and reaffirmed most recently in *Pardee*:

Cornish's failure to give timely notice was purely inadvertent. CFO Riddell intended to deliver the \$50,000 check to Etherington at the December 28, 2006 meeting. CP 1229, ¶¶ 7, 8. In the confusion of the abruptly canceled meeting, however, Riddell first tried unsuccessfully to mail it that same day, then returned the check to his briefcase, where it remained over the holiday weekend. *Id.* Upon being reminded that the payment was due, Riddell immediately sent the check to Etherington. *Id.* Exactly as in *Wharf*, Riddell "simply forgot" to send the check. It is undisputed that the failure to give notice was purely inadvertent.

Cornish has made significant permanent improvements to the Leased Premises. It is undisputed that Cornish invested massive financial and other resources to improve the space at 1000 Virginia for its classrooms, scene shop and studios, in anticipation of owning the Property. CP 1236-37. The forfeiture at issue in *Pardee* – some \$20,000 – pales by comparison.

Cornish's delay did not cause Etherington any prejudice. Virginia Limited's claim that Cornish's delay is responsible for its failure to initiate the QCP in time to clear title is unfounded. *See supra* § III.B.2. Defendants have not identified any change of position or prejudice they suffered during the three business days the option payment was delayed. CP 1345:23-1350.

There was no undue delay in giving the notice. In *Wharf*, the lessee was two months late in exercising its option. *Id.* at 603-04. Cornish, by comparison, was only three days late in extending its option, and Mr. Riddell sent the check to defendants within hours of discovering his oversight. CP 1230, ¶ 12.

Virginia Limited contributed to the delay. After trial, the court reversed its summary judgment conclusion that Virginia Limited had no fault in causing the delay, finding "Virginia Limited's desire to remove the low-income tenants from 1000 Virginia and to escape the obligations from the property without payment of a penalty . . . created complexity and confusion in the parties' relationship," and that Virginia Limited "is partly responsible for such delay." CP 1033. Virginia Limited's assertion that "no evidence" was presented at trial that it had caused the delay is perplexing. VL App. Br. at 26 n. 15. The events and circumstances leading up to Cornish's attempt to exercise the option, including the

actions and inactions of Virginia Limited in thwarting that attempt, was one of the primary focuses of the trial. *See* CP 1030-33.

Virginia Limited has not pointed to any evidence in the record calling into question any of these material facts, and none of the distinctions it attempts to draw between *Wharf* and this case is material. Under *Pardee* and *Wharf*, there can be little doubt that the trial court acted within its broad discretion in granting Cornish a period of grace.

**4. The Court Did Not Abuse Its Discretion in Granting Cornish Specific Performance**

As Virginia Limited acknowledges, the trial court's order of specific performance should be reversed only upon a finding of abuse of discretion. VL App. Br. at 28. The Order of Specific Performance, pursuant to which Virginia Limited was to sell Cornish the Property in compliance with the terms of the Option Agreement, was well within the court's discretion.

In its decision, the court found as a matter of law that: (1) the Option Agreement was a valid contract; (2) Cornish properly extended the option period and exercised the option; (3) Cornish did not act inequitably in any way that would preclude relief; (4) Virginia Limited had breached its obligations by failing to sell Cornish the 1000 Virginia Property in accordance with the terms of the Option Agreement; and (5) the Property

was unique to Cornish and monetary damages would not adequately compensate Cornish for that breach. CP 2029. After hearing the evidence presented at trial, the court “reaffirm[ed] its earlier rulings that defendant Virginia Limited has breached the Option Agreement.” CP 1035.

On appeal Virginia Limited first argues that it did not breach or threaten to breach the Option Agreement because the obligation to sell Cornish the Property did not exist until the trial court granted Cornish the period of grace to extend the option. VL App. Br. at 28-29. This argument fails for several reasons. First, Cornish’s untimely delivery of the option extension payment did not relieve Virginia Limited of its obligation to comply with the Option Agreement, and would only have done so if timely delivery of the check had been a material breach of that Agreement, constituting default. 25 Wash. Prac. § 10.2 (Contract Law and Practice) (“[A] breach may or may not result in default, depending upon the materiality and magnitude of the breach.”). But Virginia Limited failed to demonstrate *any* prejudice resulting from the three-day delay, or otherwise establish that the delay was material. *See supra* § III.B.2.; *see also* CP 1345:23-1350:3. The trial court’s ruling that the delay did not constitute a default was correct as a matter of law. And second, even if the untimely check had constituted default, Washington law provides a party with “reasonable time” to cure a default, particularly when faced

with forfeiture. *See Pacific Fin. Corp. v. Webster*, 161 Wash. 255, 259, 296 P. 809 (1931). Yet Virginia Limited rejected the check summarily, denying Cornish any opportunity to cure. The court's finding that Virginia Limited breached the Option Agreement was correct.

Virginia Limited next argues that the trial court failed to "balance the equities" in granting Cornish specific performance. VL App. Br. at 29. It claims first that specific performance under the Option Agreement was impossible. "Impossibility" is a term of art, and a standard that Virginia Limited has failed to meet. *See Carpenter v. Folkerts*, 29 Wn. App. 73, 77, 627 P.2d 559 (1981) ("The fact that performance becomes more expensive than originally anticipated does not justify setting the contract aside."). In a letter to Cornish dated March 13, 2007, Etherington explicitly told Cornish that "[t]here was always a manner in which I could deliver free title by potentially paying some penalties and opting out of that agreement. . . . [A]t no time did I ever say that I could not deliver free title, *because that is simply not the case.*" CP 1611 (emphasis added). Indeed, the WSHFC would have accepted a one-time payment in exchange for removing the housing restrictions, but Etherington refused to even attempt to negotiate. CP 2733-34; RP 289:4-290:3; Supp. CP \_\_.

Virginia Limited attempts to blame Cornish's (understandable) refusal to tender the \$3 million purchase price for its purported inability to

clear title. But as the trial court found after trial, “Cornish had no obligation, contractual or otherwise, to tender the \$3 million purchase price, either to Virginia Limited or into escrow, prior to closing.” CP 1036. The provision in the Option Agreement allowing Virginia Limited to use purchase funds to clear title did *not* authorize it to deliver such title beyond the closing date. Virginia Limited failed below to establish that it intended to deliver clear title by the closing date, prior to which Cornish had no obligation to tender the purchase price.

And while Cornish does not dispute that it would have taken time and effort to obtain the necessary permits for the demolition required before closing, there is no credible evidence in the record (1) that doing so prior to February 2, 2009—the date specified in the trial court’s order of specific performance—would have been impossible; or (2) that Virginia Limited even attempted to submit the necessary applications. *See* RP 201:9-21. In fact, Cornish offered to cooperate with Virginia Limited in getting the necessary permits. RP 66:8-67:2; 200:20-2; Supp. CP \_\_. This offer was rejected. CP 1745-46. Virginia Limited’s description of the circumstances (most of which is supported only by the testimony of Donn Etherington, which the trial court found to be not credible, CP 1032-33), even if true, demonstrate at most that compliance with the specific performance order would have been expensive and difficult, but not

impossible. Based on the record below, it was not an abuse of discretion for the trial court to impose on Virginia Limited this burden.

Virginia Limited also argues that the court did not balance the equities, because it failed to consider that performance would have caused it extreme hardship, and been a windfall for Cornish. Virginia Limited suggests that it should not bear the consequences of (1) the deterioration of the building, (2) the WSHFC's refusal to remove the housing obligations (for which Virginia Limited was generously compensated) early; or (3) its decision not to comply with the terms of the Option Agreement and instead, to incur the risks and expenses of litigation. But the hardships that Virginia Limited claims are of its own making, and not due to any delay or inequitable actions by Cornish. *See, e.g.*, CP 1030 (despite having received \$2.5 million in settlement of a defective construction lawsuit, “[d]efendants did not repair the building.”). Under similar circumstances, the Court of Appeals affirmed an award of specific performance, finding that “[a]ny expenses which the [defendants] will have to incur in clearing title to the land were within the foreseeable contemplation of the parties when the lease-option was executed. The [defendants] voluntarily assumed these self-induced obligations and performance was not prevented by an Act of God or through any fault of the [plaintiffs].” *Carpenter*, 29 Wn. App. at 78. And it was Virginia

Limited that chose to take on the risks of non-compliance and litigation, rather than comply with the terms of its obligations. It is more than fair that it bear the consequences (*i.e.* equitable damages caused by non-compliance and attorneys' fees) of taking these risks.

Finally, it is not a "windfall" to Cornish, or an inequitable hardship to Virginia Limited, that the value of the Property now exceeds the agreed-upon option price. That the value of property subject to an option may increase (or decrease) is precisely the risk that parties to an option bargain for. *See Spokane Sch. Dist. v. Parzybok*, 96 Wn. 2d 95, 99-100, 633 P.2d 1324 (1981) ("The loss of a possible increase in market value is a risk that the optionor has assumed in exchange for the price paid for the option.").

**5. The Trial Court Properly Awarded Cornish Equitable Damages in Addition to Specific Performance**

As demonstrated above, only the question of whether equity applies should be reviewed *de novo*. However, as with the other equitable remedies the trial court granted in this case, the award of \$2,425,474.64 in equitable damages "should be left to the equitable discretion of the trial court," and disturbed only if the court abused its discretion fashioning the remedy. *See supra* § III.A.1.a.

In an attempt to avoid application of equitable principles, Virginia Limited relies on an “election of remedies” analysis, arguing that the “remedy of specific performance is inconsistent with damages for breach of contract” and that Cornish was bound to elect one remedy or the other. VL App. Br. at 35. This analysis is inappropriate here. As this Court has recognized, when a defendant against whom specific performance is ordered has delayed that performance, courts routinely award equitable damages *along with* specific performance to account for the harm incurred between the time performance should have occurred and actual performance:

[A] decree for specific performance seldom brings about performance within the time that the contract requires. In this respect such a decree is nearly always a decree for less than exact and complete performance. For the partial breach involved in the delay, *money damages will be awarded along with the decree for specific performance.*

*Rekhi v. Olason*, 28 Wn. App. 751, 758, 626 P.2d 513, *quoting* Restatement of Contracts § 365 cmt. d (emphasis added). In *Rekhi*, the Court of Appeals found that the trial court had abused its discretion in *not* awarding the plaintiff consequential damages incurred between the time the sale of real property should have occurred, and when it actually occurred pursuant to a specific performance order. In fact, Virginia

Limited has already conceded that equitable damages, in addition to specific performance, may be available. In a motion filed below, it stated:

Under certain circumstances, courts of equity (not juries) can supplement a prior specific performance decree to equitably account for unwarranted delay in complying with the decree. . . . In such a case, damages may be awarded, not for breach of contract, but so that the injured party, unable to have exact performance because of the delay, may have an accounting of losses caused by the delay.

CP 427, *citing Rekhi*, 28 Wn. App. at 758; *see also Carpenter v. Folkerts*, 29 Wn. App. 73, 79, 627 P.2d 559 (1981). Cornish is not seeking “double redress for a single wrong,” but a single equitable remedy: specific performance supplemented by equitable damages, necessary to make it whole.

And the court’s award of equitable damages was not an abuse of discretion. The court below concluded that “specific performance . . . is alone insufficient to place Cornish in the position it would have been in had defendant Virginia Limited not breached its obligations under the Option Agreement.” CP 1036. The court further found that “Virginia Limited’s failure to deliver the 1000 Virginia property . . . [was] unwarranted and unjustified by the circumstances,” and that “[t]he equities of this case support an award of damages to Cornish . . . in addition to the ordered sale to Cornish of the property.” *Id.*

These findings were amply supported by the record, both before and at trial. As a result of Virginia Limited's failure to sell Cornish the Property in July 2008, Cornish had very little time to identify, lease and build out adequate replacement spaces to accommodate its fall academic programs. CP 69:1-70:24. At trial, Cornish presented substantial evidence—including Vicki Clayton's testimony regarding the exigency of the circumstances created by the timing of the eviction and the academic calendar, the unique challenges posed by the special purposes for the needed spaces, the extremely difficult real estate and construction market, the unavailability of the longer-term leases, and massive individual efforts by Cornish staff; and Etherington's testimony confirming Virginia Limited's intent to appeal this case, for years if necessary, among other issues—that Virginia Limited's breach of the Option Agreement forced Cornish to incur significant additional expenses to replace the space it would have occupied at 1000 Virginia had Virginia Limited performed. *See* RP 66:8-92:24; 283:7-15; 386:22-87:11. Such expenses necessarily included, as Cornish also demonstrated at trial, obligations on three separate leases and renovations performed under extremely exigent circumstances.<sup>8</sup> CP 238-39; RP 70:10-71:15; 85:15-89:7. There was no

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<sup>8</sup> Contrary to Virginia Limited's assertion at n. 24, the trial court's admission of the invoices (Exhibit 12) and summary exhibit (Exhibit 13) validating the exact expenses

evidence presented at trial that the space was unnecessary or that the cost of the leases or improvements was excessive, or that the damages amount was speculative or unreasonable. The court properly found these expenses to be “reasonable and necessary” to “replicate the space at the subject property that Cornish would otherwise have owned” but for Virginia Limited’s failure to perform. CP 1034.

Virginia Limited also argues that equitable damages in addition to specific performance are available only when the delay is “significant” and “unwarranted.” CP 1036; VL App. Br. at 36. As of the date of the trial, the delay of performance had been nearly a year; to date, Cornish has been waiting for over a year and a half for Virginia Limited to deliver clear title; obviously, the delay is “significant,” and ongoing.<sup>9</sup> Furthermore, as discussed above, Virginia Limited’s delay of performance was not warranted, as the Option Agreement was valid and enforceable,

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Cornish incurred was not an abuse of discretion. The court found the evidence required foundation, which was provided. RP 81:18-83:25. After hearing extensive argument regarding the exhibits’ admissibility, and “afford[ing] defense additional time to review [the exhibits], which defense declined,” the court properly admitted the evidence. RP 414:22-415:7.

<sup>9</sup> Cornish’s decision not to enforce the Order of Specific Performance pending appeal is reasonable, given the risks associated with doing so before this appeal has concluded.

and Virginia Limited has no legitimate defense to performance. *See supra*, § III.A.4.<sup>10</sup>

The trial court affirmed after two and a half days of testimony that Virginia Limited's "continuing delay in performance is attributable not to an inability to perform, but a deliberate and unjustified unwillingness and failure to undertake the tasks necessary to do so." CP 1035. The court was well within its discretion in determining the delay was both significant and unwarranted, and in its calculation of the amount of Cornish's equitable damages.

**B. The Trial Court Properly Dismissed Virginia Limited's Tortious Interference Claim**

At trial, the court found that Virginia Limited's purported "plan" to put the 1000 Virginia Property through the Qualified Contract Process was a "sham." CP 1032. Indeed, as Virginia Limited's own attorney communicated to the head of the WSHFC in December 2007, "[w]ith [Director of Compliance] Tim Sovold's assistance we have taken a hard

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<sup>10</sup> Virginia Limited's claim that "no evidence was presented at trial regarding whether Virginia Limited's delay . . . was unwarranted" is untenable. VL App. Br. at 37. As Appellants' counsel himself recognized at trial, "the purpose of this court's trial is to receive information in the context of whether there was unwarranted delay in implementing the option." RP 193:7-10. This entire case, including trial, has centered on whether Virginia Limited's failure to deliver the Property was "warranted," including whether, when and under what circumstances the WSHFC would release the housing restrictions, whether and when demolition might be possible, and whether Virginia Limited's refusal to honor the Option Agreement was legally tenable. The trial court's finding that the delay was unwarranted is well-supported in the record.

look at the Qualified Contract process contained in the Regulatory Agreement, and based upon resulting values **believe it to be an unproductive exercise.**” CP 2291 (emphasis added). As explained above, the QCP would not have cleared title to the Property, let alone in time for the July 1, 2008 closing. Nevertheless, Virginia Limited persists in blaming Cornish for the WSHFC’s refusal to partake in this sham.

And even if the rejection of the QCP application had been a cognizable injury, Virginia Limited’s tortious interference claim was properly dismissed on summary judgment. Despite more than a dozen depositions and thousands of documents produced by Cornish and others, defendants have failed to allege any facts that would demonstrate that Cornish’s intentions and actions were either (1) the proximate cause of any of the injuries Virginia Limited claims, or (2) anything other than a good-faith attempt to help Virginia Limited clear title to the Property.

First, the only evidence in the record is that communications between Cornish and the WSHFC were motivated exclusively by Cornish’s desire to protect its legal interest in the Property, and concerned only whether the WSHFC might be willing to release the restrictions on 1000 Virginia in exchange for some other benefit. CP 1238-39; 2164:8-12 (“Q. Do you know anything about the substance of those meetings? A. Not specific knowledge.”). Tellingly, Virginia Limited’s claim that “Cornish’s

purpose was to influence the WSHFC to take an adverse position against Virginia Limited” is unsupported by citation to the record. VL App. Br. at 45. Virginia Limited has failed to present any evidence regarding the allegedly improper motive or means of the communications at issue.

Second, Cornish’s communications with the WSHFC were not the proximate cause of any legally cognizable injury. The WSHFC has repeatedly asserted that its decision to reject the QCP application was made independently of its conversations with Cornish. As Tim Sovold, director of the WSHFC division overseeing compliance with the EUA, has testified, none of the WSHFC’s decisions regarding 1000 Virginia were made based on communications with Cornish:

Q. Were any of those conversations [between Cornish and the WSHFC] regarding the regulatory agreement grounds for the Commission's later determination that the 1000 Virginia property was ineligible for the qualified contract process?...

A. No, absolutely not.

CP 2288:12-22. In fact, the only evidence regarding the WSHFC’s decision to reject Appellants’ attempt to initiate the QCP is that it did so because the building was failing, and because Virginia Limited had already entered into an option contract to sell the Property to a third party, Cornish. CP 2273-74. In other words, the QCP application would have been rejected even if Cornish had never communicated with the WSHFC.

Thus, even taking all of Virginia Limited's unsupported speculations as fact, Cornish's actions were at most incidental to – not a cause of – Virginia Limited's alleged injury.

In the face of this conclusive testimony and the absence of any evidence to the contrary, Virginia Limited's reliance on unfounded speculation and insinuation for purposes of establishing the required causative link between Cornish's alleged acts and Virginia Limited's alleged injury is legally insufficient to raise a genuine issue of material fact. As this Court explained in *Snohomish County v. Rugg*, “[a]ll *reasonable* inferences must be drawn in favor of the nonmoving party upon summary judgment,” but “[u]nreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn.” 115 Wn. App. 218, 229 (2003) (emphasis in original). Virginia Limited's unsupported claims of conspiracy and tortious interference *directly* contradict the clear and undisputed testimony of the WSHFC director responsible for the issue. The trial court's dismissal of Virginia Limited's tortious interference counterclaim was correct.

**C. Cornish is Entitled to an Award of Attorneys' Fees Against Virginia Limited**

Cornish requests affirmance of the trial court's award against Virginia Limited of attorneys' fees and costs for the reasons articulated in

Cornish's Brief of Respondent Cornish College in Response to Brief of Appellant Donn Etherington, Jr. ("Cornish Brief in Response to Etherington") and hereby incorporates the arguments in that brief. To the extent that Etherington is liable for Cornish's attorneys' fees, *a fortiori* Virginia Limited is as well, as Virginia Limited was held liable, without exception, for every measure of relief Cornish sought. Indeed, Virginia Limited does not dispute that Cornish "substantially prevailed" against it.

**D. Appellants' Eviction of Cornish was Wrongful**

Cornish asks the Court to affirm the award of summary judgment on Cornish's wrongful eviction claim. Cornish incorporates herein by reference Section III.B. of the Cornish Brief in Response to Etherington.

**E. Cornish Requests that the Court Award It All Fees Incurred on Appeal; and Deny Virginia Limited's Request for the Same**

Pursuant to RAP 18.1 and the attorneys' fees provision in the parties' Agreement, Cornish requests an award of all attorneys' fees and expenses incurred in this appeal, to be assessed against both Virginia Limited and Donn Etherington, jointly and severally.

Cornish also requests that the Court deny Virginia Limited its request for the same. In the alternative, if the Court finds that Virginia Limited is entitled to an award of fees incurred on appeal, Cornish

requests remand to the trial court for determination as to the proper amount of such award.

#### IV. CONCLUSION

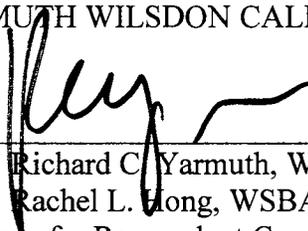
For the foregoing reasons, Respondent Cornish College of the Arts respectfully requests that the Court affirm the judgments entered below and each and every ruling of the trial court, including that court's (1) summary judgment on the period of grace; (2) order of specific performance of the Option Agreement; (3) summary judgment dismissal of Virginia Limited's counterclaims; (5) summary judgment on Virginia Limited's liability for wrongful eviction; (6) award of \$2,425,474.64 to Cornish in equitable damages; and (2) award of Cornish's attorneys' fees and costs against both Virginia Limited and Etherington.

Dated this 15<sup>th</sup> day of March, 2010.

Respectfully submitted,

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By



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