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

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

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.

CORRECTED
BRIEF OF RESPONDENT CORNISH COLLEGE IN RESPONSE TO
BRIEF OF APPELLANT DONN ETHERINGTON, JR.

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I. INTRODUCTION

At the conclusion of 17 months of litigation, which included multiple motions and a two-and-a-half-day trial, the trial court awarded Cornish College of the Arts ("Cornish"), the substantially prevailing party, the full measure of its attorneys' fees and costs against Appellants 1000 Virginia Limited Partnership ("Virginia Limited") and Donn Etherington, Jr. Appellants now seek reversal of this award—the only award that would make Cornish whole—and remand to the trial court for a recalculation of fees under a rule that the parties did not bargain for, and that is unnecessary, unjust and unworkable under these circumstances.

The Commercial Sublease with Option to Purchase ("Sublease," "Option Agreement," or "Agreement") on which this lawsuit is predicted contains an attorneys' fees provision providing for an award of fees to the "substantially prevailing party" in any action brought to enforce that Agreement. Notwithstanding the parties' explicit selection of the "substantially prevailing party" rule, Appellants Virginia Limited and Etherington ask the Court to apply the so-called "proportionality rule," crafted by this Court for use in exceptional cases in which the "substantially prevailing party" is "extremely subjective and difficult to assess," and where application of the "substantially prevailing party" rule

would be unfair and unjust. *See Marassi v. Lau*, 71 Wn. App. 912, 916-17, 859 P. 2d 605 (1993).

This is not such a case. As Cornish has repeated again and again, this case was brought to enforce two related rights in the parties' Agreement: to purchase property located at 1000 Virginia Street in Seattle, Washington ("Property") in accordance with the terms of the Option Agreement; and to occupy the Leased Premises (the bottom two floors of the Property) in accordance with the terms of the Sublease. The Court's final "Judgment for Plaintiff" awarded Cornish victory on both counts. If and when Appellants comply with the judgment entered, and if Cornish collects the full amount of attorneys' fees it seeks, Cornish will be made 100% whole. Which party "substantially prevailed" is not subjective or difficult to assess, let alone "extremely" so.

Nor does application of the "substantially prevailing party" rule produce an unfair or unjust result. Although the trial court held that Etherington personally did not possess an ownership interest in the Property and thus was not liable to Cornish for its sale, the disastrous consequences of Etherington's reckless and cavalier actions on behalf of himself and Virginia Limited, the owner of the Property, permeate this lawsuit. He is the managing agent, beneficial owner, and the sole member of the sole partner of Virginia Limited. *See infra* § II.A. Cornish's

dealings with Virginia Limited have been exclusively through Etherington. Throughout the parties' relationship, Etherington repeatedly referred to the Property and to the actions of Virginia Limited as his own. And Virginia Limited, which the trial court found acted in bad faith in its dealings with Cornish, is now insolvent, and will in all probability not be able to satisfy the fee award assessed against it. Under these circumstances, the trial court was correct in finding that application of the parties' chosen "substantially prevailing party" rule was fair and just.

While application of the proportionality rule may be required in some cases to ensure a just result, its use in all but the most exceptional cases is unnecessary, unfair, and unduly burdensome. In this case in particular, in which the "substantially prevailing party" rule was chosen by the parties and adequately takes into account less-than-total victory; where Etherington's deliberate actions on his own behalf and on behalf of his company caused Cornish massive harm; and where a fair and accurate apportionment of fees between the two claims would be impossible, Appellants' request for remand to the trial court for an evaluation of the parties' fee request under the proportionality rule should be rejected, and the trial court's award of fees should be affirmed.[1]

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[1] Appellants seek only remand with instructions to the trial court to evaluate each party's entitlement to fees under the *Marassi* proportionality rule. They have not requested that

II. COUNTER-STATEMENT OF THE CASE[2]

A. Cornish, Virginia Limited and Donn Etherington Execute the Commercial Sublease and Option Agreement

Appellant Donn Etherington, Jr. is, and/or at all times relevant to this lawsuit was, the sole member of Virginia-Terry, LLC, which is the sole partner in Virginia Limited, the owner of the property located at 1000 Virginia Street in Seattle, Washington ("Property"). CP 1377; RP 303:14-21; RP 241:25-242:7; Tr. Ex. 26, 300:2-8.[3] Although Etherington has stated that he has occasionally consulted with his wife regarding the Property, he is the only representative of Virginia Limited with whom Cornish has dealt in connection with the matters giving rise to this lawsuit. Tr. Ex. 25, 137:21-25; *see, e.g.,* RP 236:19-236:6; 240:19-20; CP 1248.

Appellants have repeatedly claimed that Virginia Limited is insolvent or on the brink of insolvency, and that the Property is the

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this Court reverse the trial court's finding that Cornish was the substantially prevailing party against Virginia Limited, and have not requested that this Court find either Virginia Limited or Etherington are entitled to an award of fees incurred below, or in what amount. They have also not challenged the reasonableness of Cornish's attorneys' rates or the number of hours billed or, apart from fees attributable to Virginia Limited's foray into bankruptcy court, of the amount awarded to Cornish under the "substantially prevailing party" standard.

[2] A complete Counter-Statement of the Case, incorporated herein by reference, is included in Cornish's Brief of Respondent filed in response to Brief of Appellant 1000 Virginia Limited Partnership. To minimize duplication, this Counter-Statement of the Case is a broad overview and contains such additional facts as are directly relevant to Etherington's appeal.

partnership's sole asset. CP 1377; RP 303:14-21. In fact, after this lawsuit was filed, Virginia Limited, by and through its managing agent Etherington, bought out Virginia-Terry LLC's limited (and only) partner, U.S. Bancorp Community Development ("USBCD"), for $900,000, paid half in cash and half by a $450,000 promissory note secured by the Property. RP 306:14-25. On June 1, 2009, USBCD filed a lawsuit against Virginia Limited and Etherington, alleging that that promissory note is in default. *See U.S. Bancorp Community Dev. v. 1000 Virginia Limited Partnership et al.*, King County Superior Court No. 09-2-21115-9.[4]

Etherington is an experienced real estate developer, specializing in low-income housing; 1000 Virginia--a mixed use building comprised of two lower floors of commercial space and four upper floors of apartments --is his third low-income housing project in the Seattle area. CP 1715-18; 1722-26; Tr. Ex. 25, 9:21-10:8. He has testified that he acquired an interest in 1000 Virginia in 1989, for development as low-income housing. *Id.*, 6:4-7;13:17-21. He continues "as of today to have an interest in, either

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[3] Unless otherwise noted, all references to the Report of Proceedings are to the trial, April 21-23, 2009.

[4] Cornish was also named as a defendant in that lawsuit, and has counter/cross-claimed against USBCDC, Virginia Limited and Etherington that Virginia Limited's $900,000 purchase of USBCD's partnership interest was a fraudulent transfer that should be voided.

directly or through entities that [he] own[s] or control[s], in 1000 Virginia." *Id.*, 9:4-7.

In 2004, Etherington emailed Cornish College "I have decided to sell my property." CP 1248. On April 29, 2005, Etherington, Virginia Limited and Cornish executed the "Commercial Sublease with Option to Purchase" ("Sublease," "Option Agreement" or "Agreement"), which granted Cornish an option to purchase the Property from Virginia Limited for $3 million, with a closing date of July 1, 2008. CP 1208-21. Under the Sublease portion of the Agreement, Etherington also granted Cornish the right to occupy the bottom two floors of the Property ("Leased Premises") through December 2008. CP 1252-53. The Sublease is structured such that Cornish subleased the Leased Premises from Etherington, who in turn was leasing the Property from Virginia Limited. Etherington signed the Agreement twice, on behalf of Virginia Limited as owner, and on his own behalf, as landlord. CP 1221.

B. Breach of the Option Agreement and Sublease and the Filing of this Lawsuit

It became clear throughout the course of 2006 and 2007 that the value of the Property had increased beyond $3 million. *See, e.g.,* CP 1626. At the same time, Etherington claims to have discovered certain costs and complications associated with clearing title to the Property (a

prerequisite to sale under the Option Agreement), the true extent of which he had grossly misrepresented to Cornish prior to execution of the Agreement. *See* CP 1342:7-11; 1343; 1217, ¶4.6; 1249. Specifically, since 1992 the Property had been subject to certain restrictions whereby the owner was required to provide 61 units of low-income housing at the Property over a period of years, in exchange for which Virginia Limited received approximately $400,000 in IRS tax credits per year for ten years. Tr. Ex. 25, 18:15-23; Tr. Ex. 26, 342:20-7, 349:12-17. During negotiations over the Option Agreement, Etherington had expressly represented to Cornish that the obligation to provide low-income housing would end December 31, 2007, the year before closing. CP1249. But as Cornish discovered sometime in 2006, the low-income housing restrictions would in fact run for an additional 15 years, through 2022. CP 1342:7-11; 1343.

In January 2007, Etherington, on behalf of Virginia Limited, rejected Cornish's attempt to extend the option period as provided in the Option Agreement; one year later, Etherington's attorney rejected Cornish's tender of payment attempting to exercise the option. CP 1382, ¶ 21; 1637.

In the meantime, in late 2007 and early 2008, just as the 15-year period related to the IRS tax credits was set to expire, Etherington indicated that he intended to empty the building of tenants, including the

61 units of low-income residents and Cornish. CP 2290-91; RP 59:2-10. In a letter dated January 31, 2008, Virginia Limited advised the residential tenants that the building was in poor condition and ordered the them to vacate their homes immediately. CP 1757. Those residents living at 50% or less of the area median income were entitled to a relocation payment; half was paid by Etherington, and the other half by the City of Seattle. RP: 13-17. Those who did not qualify for such payment (*i.e.* were living above 50% of the median income), in Etherington's words, "were left to fend for themselves." RP 302:19.

And on April 3, 2008, Etherington as landlord 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. As set forth more fully in the Brief of Respondent Cornish College in Response to Brief of Appellant 1000 Virginia Limited Partnership ("Cornish Brief in Response to Virginia Limited"), § II.A.5.a., Etherington's decision to evict Cornish before the end of its lease term caused massive disruption of its academic programs. Cornish incurred millions of dollars in damages in identifying, leasing and building out space necessary to replace 1000 Virginia on an extremely short timeline. *See* Cornish Brief in Response to Virginia Limited at 17.

The reason Etherington gave for Cornish's eviction was that the building had become unsafe for occupancy; despite having received over $2.5 million in settlement of a defective construction lawsuit, Virginia Limited spent almost none of it on repairs, and the building had continued to deteriorate.[5] Tr. Ex. 25, 70:11-73:3. But Virginia Limited's own expert 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, at various times Etherington himself has admitted that "**There was never any questions about habitability of the units themselves.**" Tr. Ex. 25, 75:6-9. As he stated in deposition just months after the eviction:

> Q. What did you believe was the danger, then, to Cornish?
>
> A. The report from the structural engineer believed that the danger was that the stucco may peel off the exterior of the building and strike somebody in and around the structure.

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[5] Etherington has claimed that Virginia Limited did not have the funds to repair the building. The evidence demonstrates, however, that Etherington failed to investigate any remediation or mitigation option that would have been within Virginia Limited's budget. Tr. Ex. 26, 330:6-12 ("Q. After you received the sums from settlement of the construction litigation, did you follow up with [demolition contractor] Western Exteriors . . . to determine whether the work that's described in this estimate was work that could have been done to repair 1000 Virginia? A. No.").

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.

Tr. Ex. 25, 76:7-10.

Even if there had been a threat that the upper four floors could collapse, Etherington testified he could have eliminated that danger by demolishing the top four floors of rotten wood-frame housing, which the Option Agreement required in any event. Tr. Ex. 26, 316:19-23 ("Q. Tell me what, in your mind, demolition of the top four floors would have accomplished. A. It would have removed the uncertainty of the deterioration of the structure, and the uncertainty of the safety for the public."); CP 1219, ¶ 4.22 ("If the Purchase Option is exercised, Virginia Limited shall commence . . . demolition of the Property above the second floor, all at Virginia Limited's sole cost and expense."). In fact, Cornish proposed to Etherington that he undertake such demolition as an alternative to evicting Cornish. Tr. Ex. 21. Etherington rejected this proposal.[6] CP 1745-46. Had he agreed to demolish the upper four floors 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 from Cornish. *See* RP 15-23. Instead, Etherington forced Cornish to surrender the Leased Premises.

On January 20, 2008, Cornish filed this lawsuit against both Etherington and Virginia Limited to enforce the two distinct but related rights granted under the Agreement: to purchase the Property and to occupy the Leased Premises. The complaint, as amended, set forth seven claims. The first three (for specific performance, damages, and declaratory judgment) were alternative theories of recovery related to Cornish's right to purchase the Property in accordance with the Option Agreement. CP 1198-1200. The last three claims (for breach of contract and the covenant of quiet enjoyment, and for nuisance) were alternative theories of recovery related to Cornish's right to occupy the Leased Premises through December 2008 in accordance with the Sublease. CP 1202-05. Cornish also sought a preliminary injunction related to enforcement of both of its rights under the Option Agreement and the Sublease. CP 1200-02. Cornish later amended the Complaint to add

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[6] Etherington apparently did consider 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." Tr. Ex. 26, 314:13-315:34.

allegations related to Etherington's actual eviction of Cornish from 1000 Virginia. CP 12-13, ¶¶ 26-28.

In a series of motions before trial, Cornish moved for and was granted summary judgment affirming its right to purchase the Property in accordance with the terms of the Option Agreement, and specific performance of the option. Cornish was also granted summary judgment on its claim for wrongful eviction against both Virginia Limited and Etherington, and won summary judgment dismissal of Virginia Limited's counterclaims against it. In addition, Cornish prevailed on nearly every motion that was filed in this case. *See, inter alia*, Order Granting Cornish's Motion for Change of Trial Date (CP 2130-31); Order Denying defendants' Motion for Change of Trial Date and Amendment of Case Schedule (CP 98-99); Order Denying Defendants' Motion for Stay and Accept Property as Security (CP 2353-54); Order Granting Cornish's Motion to Strike Answer to Second Amended Complaint & Counterclaims, and Order Denying defendants' Motion for Leave to Amend (CP 409-11).

Cornish also won unequivocal victories before both this Court of Appeals and the U.S. Bankruptcy Court, in detours Appellants forced this lawsuit to take. On October 2, 2008, Etherington and Virginia Limited filed a "Notice of Appeal" of the Court's Order of Specific Performance.

CP 2058. After voluminous briefing and oral argument on cross-motions, the Court of Appeals rejected the putative appeal and denied the motion for discretionary review on November 20, 2008. CP 66-67. And Cornish incurred substantial fees in connection with Appellants' failed and frivolous efforts to avoid enforcement of the Agreement by filing a petition for bankruptcy in U.S. Bankruptcy Court, which U.S. Bankruptcy Judge Samuel Steiner found had been filed in bad faith. CP 3056. These efforts required Cornish to retain bankruptcy counsel with the law firm of Lane Powell at a cost of $55,559.30, and included multiple court appearances and motions, on all of which Cornish prevailed, and an eventual voluntary dismissal. CP 3117-37.

On April 24, 2009, following the two-and-a-half-day bench trial, the trial court rendered its decision on the amount of damages resulting from Appellants' breaches of the Option Agreement and the Sublease, awarding Cornish over $2.4 million, the entire amount—in addition to specific performance and except for attorneys' fees—necessary to make Cornish whole. CP 1039-41.

At the conclusion of trial, Appellants moved for dismissal of Cornish's fifth, sixth and seventh causes of action, asserting that no evidence was adduced and no damages were claimed therefor. RP 428-29. Cornish did not object, and the court granted the motion. Cornish has not

appealed dismissal of these causes of action. Etherington then moved for dismissal of the first cause of action, for specific performance, "on the ground that they did not own the property that is the subject of the option to sell." RP 428:19-25. Etherington argued that since he personally had "no interest in the real property, they cannot be subject to a specific performance order to convey. They have nothing they can convey." RP 432:16-19. The court dismissed the first cause of action for specific performance against Etherington, finding he lacked a personal ownership interest in the 1000 Virginia Property. Cornish has not appealed this ruling either.

The court did not "absolve" Etherington of responsibility for his actions, and in its Findings of Fact and Conclusions of Law repeatedly referred to Etherington's actions and inactions giving rise to his and his company's liability:

- "In 2005 the defendant, that is the defendant partnership, but also through its managing agent, Mr. Etherington, solicited Cornish as a buyer and proposed a price." April 24, 2009, RP 5.

- "defendants developed subsidized housing in exchange for certain tax benefits and the subject property." *Id.* at 3.

- "those proceeds [from the insurance settlement] were not used by the defendants to repair the structure." *Id.* at 4.

- "defendants did not intend to repair the residential portion." *Id.*

- "the defendants appeared to have been planning to escape the low income housing obligations and to obtain market value for the real estate." *Id.* at 4-5.

- "the defendants wish[ed] to sell at market rate." *Id.* at 8

- "the defendants did not honor the obligation to the low [income] tenants, to the commercial tenant Cornish, to the Washington State Housing and Finance Commission or Cornish as purchaser under the option agreement." *Id.* at 9.

The court entered the "Judge for Plaintiff" in this matter on June 18, 2009. CP 1039-41. The Judgment summarized and reaffirmed Cornish's pretrial and trial victories on the granting of a period of grace, on specific performance, on wrongful eviction, on Virginia Limited's counterclaims, and on Cornish's equitable damages. CP 1040-41. In accomplishing these results, Cornish through trial incurred approximately $624,427.60 in attorneys' fees and costs, including $568,868.30 to the law firm of Yarmuth Wilsdon Calfo PLLC, and $55,559.30 to the law firm of Lane Powell in connection with 1000 Virginia's bankruptcy petition. *See* CP 3044-47. These figures include a 15% and 10% discount given by the law firms, respectively, in recognition of Cornish's nonprofit status. CP 3046; 3119-20.

At all times prior to this appeal, Etherington and his company were represented by the same attorneys at the law firm of Ryan, Swanson & Cleveland, and were not billed separately. CP 788. In early 2009, due to

the "financial straits of Virginia Limited," Etherington entered into a fee arrangement with Ryan Swanson by which he agreed to be personally liable for all litigation costs of Virginia Limited. CP 790. Appellants have repeatedly claimed Virginia Limited is insolvent or on the brink of insolvency. *See, e.g.*, RP 303:14-21.

III. AUTHORITY

A. The Trial Court's Award of Attorneys' Fees and Costs Against Appellants Virginia Limited and Donn Etherington, Jr. Should Be Affirmed

1. Standard of Review

"In order to reverse an attorney fee award made pursuant to a statute or contract, an appellate court must find the trial court manifestly abused its discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law." *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn. 2d 11, 17, 216 P.3d 1007, 1010 (2009).

Whether a party is a "prevailing party" is a mixed question of law and fact, to be reviewed under an error-of-law standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000). In addition, "the use of the word 'substantially' to modify 'prevailing' implies that the trial judge has some discretion in deciding whether a party

prevailed significantly enough to become entitled to the mandatory attorney fee award." *Guillen v. Contreras*, 147 Wn. App. 326, 335, 195 P.3d 90 (2000). Once entitlement to fees is established, the amount of the court's award will be disturbed only on a finding of abuse of discretion. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185, 1204 (2006).

As set forth in the Cornish Brief in Response to Virginia Limited, this Court may take into account all proceedings below, whether before or at trial, in its evaluation of all matters raised in this appeal. Cornish explicitly incorporates herein Section III.A.1.b. of that brief by reference.

2. Cornish is the Only "Substantially Prevailing Party" in this Litigation and Therefore is Entitled to an Award of Attorneys' Fees Against Virginia Limited and Etherington

Cornish seeks an award of fees and costs pursuant to a provision in the Agreement, which states:

> In the event that Cornish College, Etherington, or Virginia Limited shall commence proceedings or institute action to enforce any rights hereunder, the venue for any such proceeding or action shall be in King County, Washington, and the substantially prevailing party shall be entitled to costs and reasonable attorney's fees, including those for appeal.

CP 1220-21, ¶5.9 ("Fees Provision").[7] On June 18, 2009, this Court entered its "Judgment for Plaintiff," confirming that:

> [A]t the conclusion of the trial, the Court rendered an oral decision in favor of Plaintiff Cornish College of the Arts on its claims for damages resulting from defendants' failure to honor obligations contained in the parties' Commercial Sublease with Option to Purchase.

CP 1040. The Judgment also reiterated that "defendant Virginia Limited shall honor Cornish's right to exercise the option and purchase the 1000 Virginia property." *Id.* The second, fifth, sixth and seventh causes of action were dismissed against both defendants, as was the cause of action for specific performance, against Etherington. CP 1041.

Which party "substantially prevails" is "a determination that turns on the extent of the relief afforded the parties." *Marassi,* 71 Wn. App. at 916. This Judgment represents the culmination of 17 months of litigation, during which Cornish was awarded all of the substantive relief it sought. Based upon the extent of relief afforded Cornish, the trial court correctly deemed it the substantially prevailing party in this lawsuit, and properly held it was entitled to an award of its attorneys' fees. *See Riss v. Angel,* 131 Wn.2d 612, 633-34 (1997) ("Plaintiffs will essentially be able to build

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[7] Etherington repeatedly refers to the attorneys' fees provision here as "boilerplate," implying that it is therefore less worthy of enforcement. This of course is not the law. *See, e.g., Dugan v. R.J. Corman R. Co.*, 344 F.3d 662, 667 (7th Cir. 2003) ("[A] person is bound by all provisions in a contract, including standard provisions colloquially described as 'boilerplate.'").

the house they sought to have approved. The trial court correctly concluded that the Plaintiffs are prevailing parties."). Indeed, Cornish has not appealed any of the trial court's rulings; Appellants have appealed nearly all.

Etherington argues that Cornish's status as the substantially prevailing party must be evaluated against each defending party separately. This is not the rule the Fees Provision prescribes; the provision names all three parties in a single breath and makes no distinction between or among them, though it easily could have. The only question presented by ¶ 5.9 of the Agreement is which of the three parties is the "substantially prevailing party." Given the lack of ambiguity, it would be improper and unnecessary for the court to read an additional step into the evaluation of fees entitlement. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 773, 750 P.2d 1290 (1988) ("Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed."). Neither of the cases Etherington cites in support of his argument on this point involves interpretation of an unambiguous (or any) attorneys' fees provision, and they are thus not on point. *See* Brief of Appellant Donn Etherington, Jr. ("DE App. Br.") at 19, *citing Grayson v.*

Platis, 95 Wn. App. 824, 838, 978 P. 2d 1105 (1999); *Klaas v. Haueter*, 49 Wn. App. 697, 708, 745 P.2d 870 (1987).

And even if Cornish's entitlement to fees is assessed against each party separately, Cornish substantially prevailed against both Virginia Limited and Etherington, and thus is entitled to collect fees against both. As noted above, use of the word "substantial" "implies that the trial judge has some discretion in deciding whether a party prevailed significantly enough to become entitled to the mandatory attorney fee award." *Guillen*, 147 Wn. App. at 335. It was not an abuse of this discretion (or an error of law) for the court to determine that Cornish substantially prevailed over Virginia Limited *and* Etherington. The court was familiar with the claims Cornish brought, and the factual, legal and equitable issues and relative importance of each. The court was advised, for example, that for the first half of 2008, Cornish was intensely focused on remaining at 1000 Virginia through the end of its academic year: that Cornish had good reason to believe the building was safe, but as a school, had no choice but to defer to Etherington's having played the "safety card;" and that Cornish had suggested demolition, which would have drastically reduced Cornish's damages by allowing Cornish to remain in the Leased Premises—an offer that Etherington rejected. *See supra* § II.B.; RP 65:14-66:7; 66:8-13; CP 1745-46. The court heard, through the undisputed testimony of Cornish

COO Vicki Clayton, about the intensely disruptive impact of Etherington's actions on the College; about the burden of scrambling to find 28,000 square feet of replacement space in an extremely short amount of time; and about all of the intangible consequences of the wrongful eviction. CP 238-39, ¶ 3; RP 67:8-68:2; 70:10-71:6; 85:15-87:15; 91:15-92:24.

And the court was familiar with the equities of this case: of Etherington's decision, on behalf of Virginia Limited, not to use any of the $2.5 million received in settlement of the defective construction lawsuit to repair the defects in the building, which ultimately led to Cornish's eviction; and of the impact of Etherington's decision, on behalf of Virginia Limited, to evict 61 units of low-income housing, leaving many tenants with nowhere to go. CP 1030; *see* RP 59:13-20 ("Cornish was receiving physical visits in my office by some of the tenants asking, 'Can you please help me with the landlord? I don't know what I'm going to do. I don't know where to move to.'"). As the court found, "[d]efendants did not repair the building, and it appears defendants had no intention of doing so, as part of planned obsolescence for the units." *Id.* And the trial court was witness to Etherington's disrespect for the residents at 1000 Virginia, and

found that he had failed to meet his obligations not just to Cornish, but to those resident as well.[8] CP 1030, 1033.

The court also heard first-hand testimony regarding the degree of control Etherington exercised over Virginia Limited, and had access to all of the facts necessary to determine whether Etherington could truly be said to have "prevailed" in any meaningful sense when the company over which he maintains sole control and ownership was found liable for millions of dollars of damages. Having presided over multiple pretrial motions and oral arguments and the trial itself, the trial court was well-informed in its evaluation of the relative values of "the extent of the relief afforded the parties," and its finding that "Cornish College, and no other party, was the substantially prevailing party in this lawsuit" was amply supported by the record and the law. CP 1162.

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[8] This disrespect was apparent in Etherington's testimony. *See, e.g.,* Tr. Ex. 26, 365:9-16. Regarding the common areas of the Property, he testified:

Q: Is [pest control] a routine service?

A. For this kind of occupancy, yes.

Q. Meaning?

A. Affordable housing, low income tenants, yes.

Q. And why would that be?

A. They're – generally their sanitation habits are less than ideal.

Etherington urges this Court to assess whether Cornish substantially prevailed based upon (1) what percentage the dollar value of Cornish's recovery against him was of its total recovery, or (2) the number of theories of recovery brought compared to the number prevailed upon. DE App Br. at 17-18. But Etherington cites no legal support requiring adoption of either of these measures, and neither is compelling. Under the first measure, whether Cornish prevailed against Etherington would be evaluated according to how much his co-defendant lost; presumably, if the court had not awarded Cornish any damages against Virginia Limited, the $69,600 award against Etherington would have unequivocally rendered Cornish the "substantially prevailing party" entitled to fees assessed against him. Such measure is arbitrary and has nothing to do with "the relief afforded the parties," and would produce unfair and inconsistent results. Under the second, a "substantially prevailing" party would be evaluated according to the number of theories of recovery stated in the complaint, not the substance of the parties' victories, ignoring the varying importance of the claims and the extent to which each was litigated (if at all), and a plaintiff's right to bring claims in the alternative would be unduly hindered.

Etherington's argument that the fees award is disproportionate to the judgment against him will not support reversal of the fees award. As

this Court acknowledged in *Taliesen Corp. v. Razore Land Co.,* "it is within the scope of the trial court's discretion to award [a party] fees in an amount that greatly exceeds the underlying judgment." 136 Wn. App. at 144. In *Taliesen*, this Court affirmed the trial court's fees awards, where one defendant was assessed $537,000 in attorneys' fees on a $3,400 judgment, and another was assessed $500,000 in fees on a $34,000 judgment. *Id.* at 118. The fact that Cornish's fee award against Etherington was "10 times" the judgment against him will not support reversal of that award, particularly where Etherington's "egregious [actions] permeated the history of" this case. *Id.* at 145.[9]

For these reasons, a party's entitlement to fees is determined by the *substance* of the overall relief sought and received, not by a bean-counting of victories on individual theories of recovery. *Riss v. Angel*, 131Wn.2d at 633-34 (awarding fees to plaintiffs, though defendants prevailed on some claims, because "Plaintiffs will essentially be able to build the house they sought to have approved"). Cornish was awarded all relief it sought in this lawsuit, and was limited only in which party it could seek some of that relief from. By contrast, the court merely found that Etherington did not have an ownership interest in the Property; he did not "prevail" when the

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[9] *Taliesen* involved attorneys' fees awarded under a statute, and is thus not in all ways on point. There is no reason, however, to limit its holding that the disproportionate size of

court found he was not bound to sell Cornish the Property, because that is not something he possessed in the first place. And the court unequivocally found Etherington liable for wrongful eviction, both on summary judgment and again at trial. CP 414-19; 1033, ¶ 18.7.

Having overseen the entire course of this lawsuit, including over a dozen motions and trial, the court evaluated Cornish's success according to the final judgment entered and the overall relief it was afforded. CP 1161-62 ("Cornish sought and was granted relief based on only two distinct claims. . . . Cornish College, and no other party, was the substantially prevailing party in this lawsuit."). This was well within its discretion and was correct as a matter of law. *See Riss*, 131 Wn. 2d at 633 (who is the "substantially prevailing party . . . depends upon the extent of relief afforded the parties.").

3. The Proportionality Rule Does not Apply to Award of Fees

a. The Parties Explicitly Selected the "Substantially Prevailing Party" Rule

The court in *Marassi* articulated three alternative rules for awarding attorneys' fees – the affirmative judgment rule, the substantially prevailing party rule, and the no prevailing party rule – and added a fourth, the proportionality rule. 71 Wn. App. at 915-17. As set forth above, the

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the fees award and the judgment is not conclusive evidence of abuse of discretion.

Fees Provision in this case explicitly provided for an award of fees to the "substantially prevailing party." CP 1220-21, ¶5.9. The plain terms of the Fees Provision are unambiguous, and under Washington law, "[w]here the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed," and reliance on cases interpreting other fees provisions under other circumstances is not necessary or appropriate. *Marine Enterprises*, 50 Wn. App. at 774, citation omitted.

Nevertheless, Virginia Limited and Etherington ask the court to supplant the parties' chosen attorneys' fees provision with the "proportionality rule" set forth in *Marassi v. Lau*, 71 Wn. App at 916-17. Under that rule, each party is awarded fees related to the claims on which that party prevailed. *Id.* But application of this alternative rule is inappropriate in this case given the parties' explicit selection of the substantially prevailing party rule in the Fees Provision. *See City of Blaine v. Golder Associates, Inc.*, 2006 WL 3000131, * 3 (W.D. Wash. 2006) ("**[H]ad the parties intended to apply the proportionality approach from *Marassi v. Lau* to determine the prevailing party for purposes of an attorney's fee award, they could have incorporated it into their 1998 agreement.** But, they did not. Instead, the parties expressly included a 'substantially prevailing party' standard, the meaning

of which is defined by the Washington Supreme Court in *Riss v. Angel.*") (emphasis added, citations omitted); *see also Marine Enterprises,* 50 Wn. App. at 773. In *Marine Enterprises*, the parties had "contracted that if neither wholly prevailed, then the substantially prevailing party would be awarded attorney's fees." 50 Wn. App. at 773. The Court of Appeals concluded that "the court should have determined which party was the 'substantially prevailing party' since neither party wholly prevailed," and reversed the trial court's award, which had "ignored the parties' specific contract language regarding attorney's fees." *Id.* None of the cases on which Appellants rely for application of the proportionality rule involved parties who had, as here, explicitly provided for an award of fees to the "substantially prevailing" party.[10] *See, e.g., Marassi*, 71 Wn. App. at 915 (fees award to "successful party"); *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217 130 P.3d 892 (2006) (fees to "prevailing party"); *cf. City of Blaine*, 2006 WL 3000131 at *2-3 (awarding fees to substantially prevailing party where parties had chosen "substantially prevailing party" rule).

As Etherington states in his opening brief, "if the parties had intended to contract around applicable common law to select the

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[10] Etherington's assertion that these cases "all involved contract fee provisions allowing for fees to the substantially prevailing party" is unsupported and inaccurate. DE App. Br.

substantially prevailing party rule to calculate fees, then the lease would have to clearly indicated the parties' intent to do so." DE App. Br. at 28. In this case, it did. It would be improper for the Court to alter the plain terms of the parties' attorneys' fees provision, and the "substantially prevailing party" standard should be applied.

b. The Proportionality Rule is Applicable only Where There are Several Distinct and Severable Claims and the Substantially Prevailing Party Rule is Unjust

Even if the parties had not explicitly selected the substantially prevailing party rule (which they did), the general rule in Washington is that the prevailing party is the one for whom an affirmative judgment is entered; and where neither party wholly prevails, the party who substantially prevails – as determined by the extent of the relief afforded the parties – is considered the prevailing party. *Marassi v. Lau*, 71 Wn. App. 912, 915 (1993). The proportionality rule exception is applicable only where (1) "the question of which party has substantially prevailed becomes extremely subjective and difficult to assess" because "several distinct and severable" claims are at issue, and (2) the substantially prevailing party standard "does not obtain a fair or just result." *Id.* Neither situation is presented here.

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at 24.

(1) This case does not involve "several distinct and severable claims"

First, this case does not involve "several distinct and severable claims," as did *Marassi*. In that case, plaintiffs had brought twelve legally and factually independent claims for (among other things) monetary relief for damage done to two distinct areas of the property at issue, for failure to properly hydroseed the property, and for failure to extend a water line; and distinct claims for specific performance of placement of underground utilities, replacement of culverts, reconstruction of an access road, and improvement of a security gate. 71 Wn. App. at 913-14. There was no argument that these claims were merely alternative theories of recovery for the same claim. Before trial, plaintiffs voluntarily dismissed five of the specific performance claims and the parties settled defendants' single counterclaim and plaintiffs' damages claim for failure to extend the water line. Of the seven claims remaining for trial, plaintiffs prevailed on two, but were awarded only $15,000 of the $88,450 they sought. Under these circumstances, the court held that determining the prevailing party "becomes extremely subjective and difficult to assess." *Id.*

By contrast, as Cornish repeatedly asserted throughout this litigation, Cornish brought this lawsuit to enforce two related rights under the Agreement: (1) to purchase the Property; and (2) to occupy the Leased

Premises through December 2008. *See, e.g.*, CP 227, Motion for Partial Summary Judgment Re: Wrongful Eviction ("As Cornish has set forth in other pleadings before this Court, this case involves essentially two claims: (1) for enforcement of defendants' obligations to sell the 1000 Virginia Property to Cornish under the Commercial Sublease with Option to Purchase; and (2) for Cornish's wrongful eviction from the 1000 Virginia property, prior to the end of the term of tenancy."). The claims articulated in Cornish's complaint were not distinct and severable; they were alternative avenues of relief for breach of these two obligations in the Agreement. *See* Amended Complaint ¶ 35, CP 1199 ("In the event the Court finds that specific performance of the Option Agreement is not possible, Cornish seeks an award of damages."); *see also* DE App. Br. at 16-17 ("Cornish's third claim for a declaratory judgment affirming Cornish's right to enforce the terms of the option agreement was presumably subsumed in the partial summary judgment extending the option to purchase the property."). Appellants moved for dismissal of the fifth, sixth and seventh causes of action, repeating that "no evidence was adduced" and that there were "no damages claimed as a result" of those causes of action, and Cornish expended no fees exclusively on the alternative theories on which it did not recover. CP 427:10-428:9. Cornish did not appeal this dismissal.

Thus, this case does not involve "several" distinct claims, but two. *See The American Heritage Dictionary of the English Language* (4th ed.) 2009 (defining "several" to mean "being of a number **more than two or three** but not many") (emphasis added). The operative principles are therefore set forth not in *Marassi*, but in *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.,* 36 Wn. App. 762, 677 P.2d 773 (1984). In *Silverdale Hotel*, the plaintiff proved that the defendant had breached a contract between the parties and was awarded damages as a result. However, the trial court found that the plaintiff was not entitled to consequential damages from the breach in the form of costs, expenses, and potential liabilities. *Id.* at 772. The contract at issue provided for recovery of attorneys' fees, but because the defendant prevailed on significant issues in the litigation relating to damages, the trial court declined to award attorneys' fees to the plaintiff. The Court of Appeals reversed, holding that the plaintiff was entitled to fees even though the plaintiff recovered far less than it had sought. *Id.* at 774. "A party need not recover its entire claim in order to be considered the prevailing party." *Id.*[11] *See also City of Blaine*, 2006 WL 3000131 at * 3, *citing Marassi*, 71 Wn. App. at 917

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[11] In carving out the proportionality rule exception to the general prevailing party rule, the *Marassi* opinion explicitly left undisturbed the holding of *Silverdale Hotel*, noting that in that case "plaintiff was suing on a single breach of contract with several damages theories; it did not seek recovery for multiple distinct and severable breaches, as did the Marassis." 71 Wn. App. at 917.

(awarding fees to plaintiff under parties' chosen "substantially prevailing party" rule because "[t]he five causes of action that were dismissed arose under the same set of facts as the two causes of action that went to trial" on which plaintiff prevailed).

To paraphrase *Riss*, Cornish "will essentially be able" to acquire the property it sought to purchase, and will receive the damages it sought as compensation for its wrongful eviction. As the trial court was in a perfect position to judge, it is not "extremely subjective" or "difficult to assess" which of the three parties to this lawsuit substantially prevailed. The trial court's ruling that Cornish had not brought several distinct and severable claims was not in error.

Furthermore, even the two distinct claims asserted in this lawsuit are not "severable." As discussed in more detail below, Cornish's claims brought on the Option Agreement and the Sublease are factually and legally conjoined, and fairly and accurately apportioning fees to the work done on each would be an impossible task. *See infra* § III.A.3.c. *Marassi* requires application of the proportionality rule only when claims are distinct *and* severable. Even if the two claims in this case are distinct, as a practical matter, they are inextricably intertwined, not severable.

(2) Application of the substantially prevailing party rule does not produce an unfair or unjust result

Second, the proportionality rule is also not appropriate or necessary in this case because application of the substantially prevailing party rule would not produce an unfair or unjust result. *Marassi*, 71 Wn. App. at 916. Etherington does not explain in what way the fees award against him is unfair or unjust. It is not. The "substantially prevailing party" standard is the one the parties chose. CP 1220-21. Furthermore, as the history of this case makes clear, Etherington was not an unrelated party or even a passive owner, unable or unwilling to control decisions made by his company. As Virginia Limited's only managing agent, he was intimately involved at every step, possessing sole control over Virginia Limited on every decision the company made affecting Cornish. CP 1031. Although the court determined he did not have an ownership interest in the Property, the court nevertheless decided that holding Etherington liable for Cornish's fees was appropriate given the degree to which Etherington's actions on Virginia Limited's behalf caused Cornish harm.

Indeed, Virginia Limited has already once attempted to file for bankruptcy and has repeatedly represented that it is insolvent. CP 1377; RP 303:14-21. It is likely that Cornish will not recover against Virginia

Limited the fees (by now hundreds of thousand of dollars in excess of $600,000) it has incurred in enforcing the Agreement, and that Etherington will escape entirely the consequences of the irresponsible and bad-faith actions he took both on behalf of himself and on behalf of Virginia Limited. Under these circumstances, applying the "substantially prevailing party" rule is hardly unfair or unjust.

Finally, application of the "substantially prevailing party" rule is not unjust because even if the proportionality rule were to apply here, Etherington would still be liable for all or nearly all of the fees Cornish incurred in this case. *See infra* § III.A.3.c. Even under a proportionality analysis, Cornish should be awarded all fees sought against Virginia Limited and Etherington because as outlined below, the work performed in pursuit of the claim on which Cornish prevailed against Etherington cannot be segregated from the work performed in pursuit of the claim on which it did not. Because "no reasonable means exist for segregating the non-recoverable costs from the recoverable costs," Cornish should be awarded the full measure of its fees. *See Blair v. Washington State University*, 108 Wn. 2d 558, 740 P.2d 1379 (1987) (affirming full award of fees to plaintiffs under civil rights statute where "plaintiffs had prevailed on many significant issues, and the evidence presented and

attorney fees incurred for the successful and unsuccessful claims were inseparable").

c. The Proportionality Rule Should be Used Only in "Extreme" Situations

As *Marassi* made clear, courts should make use of the proportionality rule only in "extreme" cases, where determining the substantially prevailing party is "*extremely* subjective and difficult to assess," and where doing otherwise would produce unjust results. 71 Wn. App. at 917 (emphasis added). As outlined above, this is not such a case. The "substantially prevailing party" rule—the one the parties chose to apply to this case—is more than adequate to address the circumstances presented, where Cornish so clearly substantially prevailed, albeit with some qualification. This rule, providing that where "neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties," acknowledges that victories will not always be total and absolute, and makes provision for an award of all fees in the case of *substantial* victories. *Id.* at 916.

Broadening the applicability of the proportionality rule to more than only the most exceptional cases would further complicate the already-burdensome secondary litigation that occurs over parties' entitlement to

fees. Inevitably, courts would be asked to parse out each individual "claim," making a determination as to whether each was truly a distinct and severable claim, an alternative theory of relief, or a hybrid of both. A court would then have to assign the degree to which each party succeeded on each distinct claim, deciding first how to measure that success: by dollar value of the award (as measured against the total award sought in the litigation, or on that claim alone); by number of claims won; by number of "major" claims won; by percentage of a partial success in relation to the total relief requested; by total fees or time expended on an individual claim, either in prosecution or defense of it; or by some other measure. The court would then have to ascribe the proper amount of fees to each claim on which a party prevailed, assessing, among other things, whether (and at what percentage) a particular deposition or discovery request pertained to a prevailing claim, or whether a motion (say, to compel discovery) was related to one claim or another.

That is what Appellants are asking this Court to instruct the trial court to do. In this case in particular, where the totality of the indivisible circumstances necessarily informed all of the court's equitable rulings, and where most of the facts related to the two claims are inextricable, such process would be all but impossible. Which of Cornish's fees are attributable to enforcement of the Option Agreement, and which to the

Sublease, cannot accurately be parsed out; the division of fees proposed in Etherington's opening brief is just one possibility, and one that Cornish rigorously disputes. For example, Etherington claims he should not be liable for any fees incurred before the filing of the Second Amended Complaint on November 7, 2008, claiming that only then was the wrongful eviction claim pled in this case. DE App. Br. at 21. But Etherington delivered the Notice of Lease Termination seven months earlier, on April 3, 2008. CP 2152-54. In addition, Cornish's counsel spent myriad (and ultimately fruitless) hours in the spring of 2008 attempting to negotiate a means by which Cornish might be allowed to stay in the Leased Premises. *See, e.g.,* Tr. Ex. 21; CP 3062. And the wrongful eviction claim was anticipated (and in Cornish's view, adequately pled) in Cornish's Amended Complaint, filed February 20, 2008. *See, e.g.*, CP 1202, Am. Comp. ¶ 45.b. (seeking injunction to prohibit defendants from "initiating proceedings to evict Cornish from the premises"); *see also* CP 2057, Plaintiff's Motion for Change of Trial Date, filed September 30, 2008 (seeking earlier trial date for "resolution of the wrongful eviction claims."). The Second Amended Complaint merely added allegations related to events taking place after filing of the Amended Complaint. *See* CP 13, ¶¶ 27-28. Starting the fee clock only after the administrative step had been taken of adding those allegations to

the Complaint would arbitrarily and unfairly deprive Cornish of the substantial fees associated with the wrongful eviction work conducted prior to the amendment.

In another illustration of the impossible task Etherington is asking the trial court to undertake, Etherington argues that he should not be liable for fees associated with Virginia Limited's bad-faith petition for bankruptcy. DE App. Br. at 1, 22. While only Virginia Limited filed for bankruptcy, it is clear under the circumstances that the filing was not a *bona fide* attempt to seek the protections of bankruptcy court, but a tactical move designed to avoid the trial court's ruling on, among other things, the wrongful eviction summary judgment motion, the very claim on which Cornish prevailed against Etherington. CP 3054-55, 56. Cornish (and the trial court) received notice of the filing of the petition (and the consequent automatic removal of the lawsuit to U.S. Bankruptcy Court) literally minutes before oral argument in the trial court on Cornish's motions for summary judgment on (1) Virginia Limited's counterclaims and (2) wrongful eviction, which argument was abruptly canceled. CP 1043. And as U.S. Bankruptcy Judge Samuel Steiner found, the petition for bankruptcy was filed in bad faith, in an effort to escape the jurisdiction of the trial court and the terms of the Agreement. CP 3054-56. Cornish's fees associated with the bankruptcy petition were, in other words, incurred

at least in part in pursuit of the claim on which it prevailed against Etherington – enforcement of its right to occupy the Property. Furthermore, it was Etherington alone who controlled Virginia Limited's decision to file the petition for bankruptcy, and who ultimately agreed to its voluntary dismissal (a fact, incidentally, that Etherington testifying on the stand deliberately attempted to obscure from the trial court). RP 396:14-16; *see also* RP 393:21-22 (Etherington testimony stating "*we* filed for bankruptcy and part of *our* bankruptcy petition was a declaratory action…"). It was not unfair or improper for the trial court to assess fees associated with the bankruptcy petition to Etherington as well as Virginia Limited.

Etherington also asserts that the "vast majority" of the fee award in this case was incurred prosecuting claims that Cornish lost against Etherington. DE App. Br. at 32. This assertion is unsupported and inaccurate, and the degree to which it is inaccurate illustrates the morass into which this Court and the trial court are being invited to wade. The challenge of allocating fees between the two claims in this case would be immense (in addition to unfair and unnecessary). To which claim should the court ascribe fees incurred in drafting the motion to amend the complaint, and in drafting the Second Amended Complaint – or for that matter, the Complaint itself? Cornish sent a letter to Appellants' counsel

in April 2008, seeking cooperation in mitigating its damages associated with leaving the building, and another in September, 2008, reminding Appellants of Cornish's mounting damages associated with both the premature eviction, and Virginia Limited's refusal to sell Cornish the Property. Tr. Ex. 21; CP 611-12. Which defending party, under a proportionality analysis, would be liable for fees attributable to those (and similar) letters? Which party is liable for fees associated with discovery requests and depositions related to eviction damages, which produced evidence supporting an award of equitable damages for breach of the Option Agreement? To which claim should the following billing entries, among hundreds of similar entries, be allocated?

- "Review project documents; meetings with [client]; . . . work on draft complaint" (CP 3059);
- "Telephone with [Appellants' attorney] J. Hadley re: filing of lawsuit; letter to Hadley re: demolition issues; review and revise final complaint and related documents – file lawsuit" (CP 3062);
- "Review engineer's report, documents; revise subpoena to U.S. Bank; email with M. Segal re: [Washington State Housing Finance Commission] records request" (CP 3068);
- "Work on trial motion and damages letter" (CP 3090);
- "Draft update memo and agenda for conference call" (CP 3093);
- "Review and revise opposition to Stay motion; prepare for and take depositions of defendant experts Lukes and Perbix" (CP 3103);

- "Prepare stipulation and order re: deadlines; draft reply on summary judgment motions [on wrongful eviction and Virginia Limited's counterclaims" (CP 3107).

Cornish submitted 60 pages of similar entries through April 2009 alone. CP 3059-3116. And when, after hearing testimony at trial the court explicitly reaffirmed its earlier summary judgment ruling on wrongful eviction, at least some percentage of fees incurred at trial should also be ascribed to success on the wrongful eviction claim. *See* CP 1033, Findings of Fact and Conclusions of Law ("Etherington did not honor the obligation to the commercial tenant Cornish."). Clearly, Etherington's arbitrary and careless estimate that Cornish incurred some $16,750 in fees prosecuting the wrongful eviction claim is incorrect. DE App. Br. at 33, citing CP 1015. Under these circumstances, parsing out entitlement to fees at a proportional level is unnecessary, unfair, and impossible. Given the parties' explicit choice of the substantially prevailing party rule, the inapplicability of the proportionality rule where Cornish pursued and prevailed on only two claims, and the equities of this case, this Court should decline Appellants' request for remand to the trial court to do so.

4. The Award Against Both Appellants Was Also Proper Because Once Entitlement to Fees is Found, the Amount Awarded Is Highly Discretionary

The trial court's award of fees against Etherington should also be affirmed because even on appeal, Etherington does not challenge Cornish's entitlement to *some* fee award against him. Once a parties' entitlement to fees is established, the trial court's finding of the correct *amount* of fees to award is highly discretionary, entitled to great deference. *Taliesen Corp.*, 135 Wn. App. at 141. Given the relative equities and the other circumstances of this case as described above, the trial court's award of fees in the entire amount sought was not a manifest abuse of discretion.

B. Appellants' Eviction of Cornish Was Wrongful

Both Appellants have appealed the trial court's ruling that they are jointly and severally liable for damages associated with Cornish's wrongful eviction from the Leased Premises. There is no dispute that Virginia Limited and Donn Etherington evicted Cornish from 1000 Virginia before the end of its lease term. The only question, then, is whether this eviction was justified. As a matter of law, it was not.

The Sublease provided Cornish with a term of tenancy through December 2008. CP 1209. Less than three months after Cornish filed suit against the Appellants in this case for enforcement of its purchase option, they evicted Cornish from 1000 Virginia in a letter and Notice of Lease

Termination dated April 3, 2008, nearly nine months before the end of that term. CP 2152-54.

In his Notice of Lease Termination, Mr. Etherington stated that the cause of the eviction was "the rapid acceleration of deterioration noted by our engineer in late December [2007]" in a letter known as the "Perbix Memo," which was a report on the condition of 1000 Virginia by Virginia Limited's structural engineer, Todd Perbix. CP 2153. The Perbix Memo opined that certain portions of the building "have exceeded limits established as 'Dangerous'" under relevant building codes. CP 1744. But Perbix has since testified that what was "dangerous" about the building was the potential for stucco to flake off, a problem that Etherington testified was largely remedied when Virginia Limited erected scaffolding around the building's perimeter. CP 2173; RP 258:13-16 ("Q. Was the scaffolding sufficient then to solve the problem? A. The immediate problem, according to my structural engineer."). As outlined above, the evidence below did not demonstrate that the building had become uninhabitable. *See supra* § II.B. As also set forth above, even if the upper four floors of residential units had to be vacated, demolition of those floors above the Leased Premises would have allowed Cornish to remain in the Property. *Id.*

Nevertheless, in the eviction notice, Etherington invoked § 3.11(b) of the parties' Sublease. *Id.* That section provides:

> Substantial Destruction. If the damage to the Leased Premises is so substantial that repair of such damage will require more than 180 days to complete (or will require more than 90 days to complete if such casualty occurs after January 1, 2008), then *either Etherington or Lessee may elect, by written notice given to the other not later than thirty (30) days after the date of such casualty, to terminate this Lease effective as of the date of such casualty.*

CP 1210-11 (emphasis added). As the notice makes clear, and as Mr. Etherington confirmed in his deposition, the "casualty" on which he relied in invoking §3.11(b) was that referenced in the Perbix Memo:

> Q. What caused you to send Cornish that [eviction] letter?
>
> A. I was concerned about the safety, their safety, and their tenants' safety, the people that come and go out of the Cornish facility's safety.
>
> Q. And when did you become concerned about that safety?
>
> A. I became concerned about it upon the receipt of Perbix's letter.

CP 2159:4-12. But the Perbix Memo was written on December 20, 2007, *more than three months* before Mr. Etherington sent Cornish the April 3, 2008 Notice of Lease Termination. Thus, Appellants did not evict Cornish in accord with the lease provision they invoked in the eviction

notice, which was the sole provision in the Sublease authorizing them to do so. The eviction was therefore wrongful.[12]

On appeal, Virginia Limited and Etherington offer four reasons that the trial court erred in holding the eviction was wrongful: (1) that the deterioration of the building was caused by third parties; (2) that Cornish assumed the risks by leasing a building it knew was in a state of disrepair; (3) that Cornish remained on the premises even after eviction; and (4) that genuine issues of material fact remained as to when the "substantial destruction" occurred. All four arguments should be rejected.

First, the fact that third-party builders may have defectively constructed the building is irrelevant to whether Appellants are liable for wrongfully evicting Cornish. Obviously, landlords have a responsibility to maintain a property suitable for its intended use as reflected in the lease, regardless of who constructed the leased premises. *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn. 2d 595, 601, 564 P.2d 1137, 1142 (1977) ("A landlord has a duty to maintain, control and preserve retained portions of the premises subject to a leasehold in a manner rendering the

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[12] Appellants state that the trial court's treatment of the parties was inconsistent and unfair, as it relieved Cornish, but not Virginia Limited, of the consequences of a missed deadline. VL App. Br. at n. 30. The obvious distinction – that Cornish's missed deadline posed the threat of inequitable forfeiture, while Appellants' did not – is well-supported in the law; and Virginia Limited has never argued that equity requires forgiveness of its mistake.

demised premises adequate for the tenant's use and safe for occupancy."). In fact, such covenant was expressly included in the parties' Sublease here. *See* CP 1213, ¶ 3.18 ("Etherington shall be responsible for maintaining . . . the structural integrity of the Building to the extent it affects the Leased Premises.").

The proposition that "[t]here can be no constructive eviction unless the landlord is at fault" is not relevant to this case; Cornish was not *constructively* evicted – it was *actually* evicted, by the landlord himself. *See* Brief of Appellant Virginia Limited ("VL App. Br.") at 38; CP 2152. Appellants cite no law supporting the proposition that a landlord is not liable for wrongful eviction necessitated by a building's deterioration just because third parties were responsible for construction.

Second, Cornish does not deny that it knew that the upper four floors of the building were in poor condition before it entered into the parties' Agreement. Indeed, the parties' mutual understanding of that condition was *the very reason* that the parties included in the Sublease the specific remedy and rules of lease termination in the event of further deterioration and "substantial destruction." Cornish is now entitled to enforcement of those rules; "when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended

the prescribed remedy as the sole remedy for the condition." *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 309, 540 P.2d 912, 920 (1975). Cornish's knowledge of the condition of the residential portion of the building underscores – not diminishes – the importance of enforcing the parties' expectations memorialized in the specific lease-termination provisions of the Sublease.

Third, it is not relevant that Cornish was unable to vacate the building immediately. Every case defendants cite for the proposition otherwise refers to *constructive* eviction, the occurrence of which may be questionable where the lessee on the one hand claims it was evicted but on the other chooses to remain in the leased premises. Here, of course, Cornish was not constructively evicted; it was, without dispute, actually evicted. CP 2152. And the evidence is undisputed that Cornish vacated the Leased Premises with all due expediency under the circumstances. RP 67:8-71:6.

And fourth, Cornish conclusively established the absence of a genuine issue of material fact as to when "substantial destruction" took place at the Property. Cornish demonstrated that (1) the "substantial destruction" was diagnosed on December 20, 2007 (and therefore must have occurred earlier); (2) an eviction notice was delivered three and a half months later on April 3, 2008; and (3) the Sublease explicitly

provided that one party may terminate the Sublease *only* "by written notice given to the other **not later than thirty (30) days after the date of such casualty**." CP 2169-70; 2152-54; 1211.

Appellants attempt now to create an issue of fact regarding when the substantial destruction took place, relying on the declaration of Donn Etherington, whose testimony the trial court found to be not credible. CP 1032-33. And even that testimony does not create a genuine issue of material fact. Etherington stated in a declaration that "[b]y March 2008, the framing of the building was so deteriorated that the protective wire mesh could not even be attached to the building. That discovery is what triggered the Termination Notice." CP 2356. This self-serving testimony is in direct contravention to Etherington's earlier deposition testimony that it was the December 20, 2007 letter from Todd Perbix that caused him to send Cornish the eviction notice, and that the subsequent failure of the wire mesh solution was not "different from what [Perbix's] diagnosis had been in December 07," but "more of a confirmation." CP 2943:10-12. Etherington's declaration testimony should be rejected because self-serving affidavits contradicting prior deposition testimony cannot be used to create an issue of material fact. *See Klontz v. Puget Sound Power & Light Co.,* 90 Wn. App. 186, 192, 951 P.2d 280, 283 (1998).

Finally, the trial court's wrongful eviction ruling on summary judgment was reaffirmed and further bolstered by the evidence presented at trial. After two and a half days of testimony, the court found that "[t]he evidence does not support defendants' position that Cornish's eviction was justified by the circumstances," and that "Defendant Virginia Limited acted in bad faith in evicting Cornish and . . . Defendants Virginia Limited and Etherington did not honor the obligation to the commercial tenant Cornish." CP 1036, 1033. Thus, even if there had been a genuine issue of material fact at the time the summary judgment on wrongful eviction was decided (which there was not), at trial the court confirmed its ruling that Cornish's eviction had been wrongful. Remand for a trial on this issue would therefore be futile, and the summary judgment ruling should be affirmed on this basis as well. RAP 2.5.

C. Cornish Requests that the Court Award It All Attorneys' Fees Incurred on Appeal; and Deny Etherington'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 Etherington his request for the same. In the alternative, if the Court finds that Etherington 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 Etherington's liability for wrongful eviction; and (2) award of Cornish's attorneys' fees and costs against both Virginia Limited and Etherington.

Dated this 13th day of April, 2010.

Respectfully submitted,

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

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

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.

CORRECTED
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.[1]

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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[1] 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.[2] RP 241:13-19; Tr. Ex. 26, 300:2-8. 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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[2] 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. Tr.Ex. 25, 18:15-23; Tr. Ex. 26, 342:20-7; 349:12-17. 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; Tr. Ex. 25, 203:7-18. 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 15 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. CP12510, ¶3.8. In the meantime, Virginia Limited would continue to own and operate the building's upper 4 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. CP1260-63, ¶¶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." CP1254,¶3.10. Pursuant to that authorization, Cornish invested approximately $600,000 in permanent improvements to the Leased Premises over the next 15 months. CP1236-37, ¶¶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 CEO 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 WA 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. CP1238, ¶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: 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.[3] CP 1230, ¶ 12. In a telephone conference with Cornish five days later, on January 10, 2007, Etherington told Cornish that he believed the delay

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[3] 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.

meant he was "off the hook." *Id.,* ¶13. He would later tell Mike McKernan that he, Etherington, was "happy" when Cornish's payment 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, he 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. RP249; CP1733:6-21. 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.[4] 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

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[4] 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.

that letter to the WSHFC, and advised the WSHFC that the building 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. CP 2152-54. 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." Tr. Ex. 25, 75:6-9. 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.

Id., 76:7-10.

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. *See* Tr. Ex. 21. Etherington rejected this proposal.[5] 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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[5] 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." Tr. Ex. 26, 314:13-315:34.

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 contact 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 r estrictive covenant. *See* C P 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." Tr. Ex.25, 99:21-100-12. 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.[6]

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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[6] 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 Vir ginia 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.[7] *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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[7] 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; Tr. Ex. 25, 185:22-186:4.

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; Tr. Ex. 21. 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 unavoidability 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.[8] CP 238-39; RP 70:10-71:15; 85:15-89:7. There was no

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[8] 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.[9] 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.

[9] 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.[10]

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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[10] 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* contradi ct 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 13th day of April, 2010.

Respectfully submitted,

YARMUTH WILSDON CALFO PLLC

By_____

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Attorneys for Respondent Cornish College

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

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

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

Appellants,

v.

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

Respondent.

CERTIFICATE OF SERVICE

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Cornish College of the Arts

ORIGINAL

I certify that on this date, I caused true and correct copies of the following documents:

1. **CORRECTED** Brief of Respondent Cornish College in Response to Brief of Appellant 1000 Virginia Limited Partnership;

2. **CORRECTED** Brief of Respondent Cornish College in Response to Brief of Appellant Donn Etherington, Jr.; and

3. this Certificate of Service

to be served on Appellants herein as follows:

Jerry Kindinger
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VIA HAND DELIVERY

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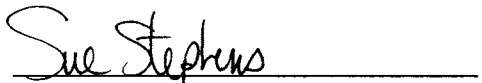
VIA U.S. MAIL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 13, 2010 at Seattle, Washington.



Sue Stephens, Legal Assistant