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King County Superior Court Cause No.09-2-44171-5 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WILLIAM OSERAN,
Plaintiff/Appellant

v.

AARDVARK ENGINEERING SERVICES, INC. d/b/a A.E.S. Inc.,
Defendant/Respondent

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This case is about encouraging settlement and protecting a party's right to vigorously defend its position. The Respondent (defendant) Aardvark Engineering Services, Inc. d/b/a A.E.S. Inc. asserts the parties formed a settlement contract with a "global" release through an informal exchange of e-mail between respective counsel. It argues that the informal agreement and a subsequently prepared formal writing should be enforced and the attorneys' fees and costs it incurred to obtain enforcement should be awarded in equity and under CR 11.

The Appellant (plaintiff) William Oseran asserts the parties formed a settlement contract releasing only the claims in the underlying lawsuit. A contract for a "global" release was not intended; not supported by consideration; beyond Oseran's counsel's scope of authority; not supported by stated material terms; not enforceable by specific performance; and unenforceable under court rule and statute. Attorneys' fees and costs are not available because no equitable basis exists and Oseran's objections are well-founded in fact and law. For these reasons, Oseran requests reversal of the trial court's granting of Aardvark's motion to enforce settlement, denial of Oseran's motion for reconsideration, and its awarding Aardvark attorneys' fees and costs.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it granted Defendant's Motion to Enforce Settlement Agreement. CP 17.

2. The trial court erred when it awarded the Defendant its attorneys' fees and costs to enforce the agreement. CP 17.

3. The trial court erred when it ordered the Plaintiff to sign the Release of All Claims and Settlement Agreement. CP 17.

4. The trial court erred when it denied Plaintiff's Motion for Reconsideration. CP 23.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. Under Washington law, did the trial court err by granting Aardvark's motion to compel settlement and denying Oseran's motion for reconsideration, which, *inter alia*, collectively ordered enforcement of the February 17, 2010, e-mail settlement agreement as a "global" settlement.

2. Under Washington law, did the trial court err by awarding Aardvark its attorneys' fees and costs when no equitable basis for the award existed and Oseran's objections to the award were well-founded in fact and law. (Assignment of Errors 2 and 5.)

III. STATEMENT OF THE CASE

A. Appellant Oseran Hires Respondent Aardvark To Perform Mechanical Engineering Design.

On or about August 17, 2006, Appellant Oseran hired Respondent Aardvark Engineering to provide mechanical engineering design services for Oseran on the renovation of the “Arron’s Storage Building” in Seattle, Washington. CP 1, (App. A), ¶ 4. During construction of the renovations, the City of Seattle informed Oseran that the mechanical design addressing ventilation of the elevator shaft and stairwell, which Aardvark prepared, was inadequate to pass applicable code. *See e.g.*, CP 12, (App. B), p.2, l. 11 – p. 4 l. 12; CP 13, (App. C), ¶¶ 3, 4, and exhibits thereto; CP 14 (App. D) and exhibits thereto. Aardvark acknowledged this deficiency and redesigned the plans to meet code. *Id.* This redesign necessitated additional construction work over and above the general contractor’s original scope of work at additional cost and expense to Oseran. *Id.* A dispute arose between the parties with respect to that portion of these additional costs for which Aardvark was responsible to Oseran. *Id.*

B. The Parties Attempt Settlement.

On December, 8, 2009, Oseran, by and through its counsel of record, Oseran Hahn Spring Straight & Watts, P.S., filed a summons and complaint alleging professional negligence against Aardvark. CP 1 (App. A). Trial was set for May 23, 2011. On or about January 20, 2010,

Aardvark, by and through its counsel of record, Sheer & Zehnder LLP, contacted Oseran's counsel by e-mail and requested Oseran not seek default against Aardvark and for extra time to answer. See CP 14 (App. D), Exhibit A. Oseran granted both requests as a courtesy. *Id.* On January 21, 2010, Aardvark filed a Notice of Appearance, and filed its Answer and Affirmative Defenses to Plaintiff's Complaint on or about February 12, 2010. CP 4 (App. E).

On February 1, 2010, Aardvark's counsel e-mailed Oseran's counsel regarding settling "this matter." CP 14, (App. D), ¶ 9, Exhibit A.

This e-mail states in pertinent part:

I write to propose we attempt to reach a quick settlement/resolution in this matter. At present I have no settlement authority, but I am prepared to request authority consistent with the following.

Based on my review of this matter, it appears the parties are arguing over a relatively small sum – all things considered. Apparently plaintiff is alleging \$11,390 of damages for work that has already taken place (i.e., the money has been spent). My client, who appears to have admitted there was a minor design error – though it appears the admission is protected by ER 408 – initially had offered to resolve the matter for \$3,300. The documents indicate plaintiff believed this amount would be more than sufficient. In that vein, though plaintiff expended \$11,390 – which we will assume is accurate for purposes of trying to resolve this matter – it appears that this expenditure was a "betterment," not simply a correction of Aardvark's error.

. . .

We assume you have equally compelling arguments to all the foregoing. However, based on our review of the file, we do not see that either party may seek their attorney fees and costs in this matter (but please let me know ASAP, and explain, if you see things differently). . . .

For purposes of trying to resolve this matter, I am willing to assume my client's \$3,300 offer was an accurate assessment for a fix (though it probably is lower), and that the \$11,390 for the work performed is an accurate and reasonable billing. With these assumptions, the parties are approximately \$8,000.00 apart. If plaintiff is willing to split the difference to quickly settle this matter, please advise. Please again note that I have no authority at this point, and that this is not an invitation for a counter-offer. My effort here is to simply and quickly cut to the chase. If plaintiff is agreeable, I would go back to my client's insurer and request authority for \$7,300. I believe I can get that amount if I was to hear from you that it would get this matter resolved.

Id. (Emphasis added.)

On February 9, 2010, Oseran's counsel responded to Aardvark's offer of compromise by letter, which states in pertinent part:

We have conferred with our client and have been granted settlement authority consistent with the terms herein. It should be noted, our client's first choice is to not settle, but he realizes the practicality of doing so. In addition, we question the applicability of the betterment doctrine in this case and the sufficiency of \$3,300 as an accurate assessment for a fix. Moreover, our client has incurred direct, out-of-pocket expenses over and above the \$11,390, which only represents the general contractor expense. These additional expenses do not include such

indirect costs as filing fees, cost of service, and the like, which our client has also incurred. Also excluded from the actual contractor-cost amount are consequential losses to our client from delays, such as carrying costs and loss of use.

CP 14, (App. D), Exhibit C. (Emphasis added.) This letter notifies Aardvark's counsel that Oseran's counsel's authority is limited to the ambit of the letter, which deals exclusively with the underling case and the elevator shaft and stairwell pressurization issue.

On February 12, 2009, Aardvark's counsel responded to Oseran by e-mail, which stated:

Thank you for your letter dated February 9 (received Feb. 11) offering to settle this matter for \$9,000.00. I am not a game player, and will simply tell you that between the time of my below e-mail and getting your letter I was able to obtain \$7,300.00 of authority for a "split the difference" settlement (which was my assessment of a split the difference settlement).

If you can tell me your client will accept \$8,000.00, please leave me a voicemail [emphasis in original] to that effect and I am virtually certain I can quickly get that amount. I am not asking you to make a "formal" demand for that amount, which I would have to report. I would rather just be able to tell the insurer if they give me another \$700.00 I am reasonably sure I can get the case done. Your positive voicemail will allow me to do that. I only want to go back to my client's carrier one last time on this (which would be best for both your client and me).

To sweeten the deal, my firm will take the laboring oar in preparing the settlement agreement and dismissal

document, and will handle filing the latter – thereby reducing plaintiff’s fees/costs toward closing this matter out. In that vein, we note that you appear to agree with us that attorneys’ fees are not recoverable here, thus, the monies we are talking about here get your client a quick resolution for little expenditure. Let me know when you get a chance. I will look forward to a positive voicemail from you so we can get this done. In the interim, have a pleasant holiday weekend. Thanks!

CP 16 (App. H), Exhibit 1. (Emphasis added except as noted.)

After discussions with Oseran, his counsel replied to this e-mail by voicemail, on or about February 16, 2010, accepting Aardvark’s offer to settle this matter for \$8,000. CP 14 (App. D), Exhibit B. Aardvark’s counsel responded by e-mail on February 16, 2010, stating:

Pursuant to our exchange of e-mails and your voicemail of this morning, I write to confirm that we have reached a settlement in this matter for the sum of \$8,000.00 [emphasis in original] (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange for a complete release and dismissal of all claims relating to Aardvark’s work (and its employees, agents, insurers . . . etc., per standard settlement agreement language) on the project that is the subject of Oseran’s complaint in this matter (i.e., a complete pay money and close file forever deal). Please respond to this e-mail with an “agreed” and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran’s tax ID number. Thanks!

Id. (Emphasis added except as noted.)

Oseran's counsel replied by e-mail, "Agreed. Payee information forthcoming[,]" on February 17, 2010. *Id.* After counsels exchanged a few informational and gratuitous e-mails, Oseran's counsel followed up on February 18, 2010, with the following e-mail:

John,

Payee: William Oseran and OFLP A Washington
Limited Partnership

TIN: [redacted]

Address: 1601 Calhoun, Seattle, WA 98112

Clarification: Please draft the release specific only to the stair and elevator shaft pressurization issues. (Aardvark did other work for systems in the building to which the release should not apply.)

Thanks,

Roy

Id.

Aardvark's counsel replied this same day with the following e-mail:

Roy:

I note your "clarification." We will not be so limiting the release. Please see the language of my e-mail confirming the settlement, which states we are paying \$8,000.00. . . :

". . . in exchange for a complete release and dismissal of **all claims relating to Aardvark's work** (and its employees, agents, insurers . . . etc., per standard settlement agreement language) **on the project** that is the subject of Oseran's

complaint in this matter (i.e., **a complete pay money and close file forever deal**).”

(Emphasis mine.) This language makes it quite clear that our \$8,000.00 was in exchange for finality, and not to leave open the door for a later suit against Aardvark. That is fairly standard in such litigation, and it was the clear intent here, which I emphasized in the parenthetical language just to make sure.

I hope this is not going to cause things to degenerate. Please speak with you client. If he will not agree, we will be left with no choice but to file a motion with the court to enforce the settlement, regarding which we will be asking for all fees and costs associated with doing so. I would hate to do that given how well this has already gone to date.

Please advise ASAP. Thank you.

Very truly yours,

John E. Zehnder, Jr.

Id. (Emphasis in original.)

Oseran’s counsel replied on February 22, 2010, by e-mail. *Id.* This e-mail outlines Oseran’s disagreement with Aardvark’s position and states:

[o]ur client will agree to provide a complete release and dismissal of the claim alleged in the underlying suit (elevator shaft and stairwell pressurization system design error), which is the subject of this matter and completely consistent with our settlement negotiations.

Id. (Emphasis in original.)

C. The Trial Court Grants Aardvark's Motion To Enforce Settlement And Denies Oseran's Motion To Reconsider.

The parties were unable to resolve their disagreement with respect to the scope of settlement reached and Aardvark filed its Defendant's Motion to Enforce Settlement Agreement on March 10, 2010, which included a copy of a newly produced document entitled "Release Of All Claims And Settlement Agreement." CP 8, Exhibit 2. Oseran filed his response on March 16, 2010, CP 12 (App. B), and Aardvark filed its reply on March 17, 2010, CP 16.

On March 19, 2010, the trial court, without oral argument, granted Aardvark's motion and filed an Order Granting Motion to Enforce Settlement Agreement. CP 17 (App. F). Under this order, the trial found (1) the parties had entered into a settlement agreement on February 17, 2010; (2) the settlement agreement clearly and unambiguously released "all claims" and was a "close file forever deal"; (3) the intentions of the parties was objectively manifested by the February 17, 2010; (4) the Defendant incurred attorneys' fees and costs to enforce the agreement; and (5) the Release of All Claims and Settlement Agreement contained the terms agreed to by the parties under the February 17, 2010, agreement. *Id.* In addition, the trial court ordered (1) the February 17, 2010, "agreement"

be enforced; (2) the Plaintiff to sign the Release of All Claims and Settlement Agreement; (3) the Defendant to submit a bill of costs and attorney's fees incurred to enforce the February 17, 2010, agreement; and (4) the Defendant's bill of costs and attorney's fees, at its election, be deducted from the amount to be paid to Plaintiff under the February 17, 2010, agreement; otherwise Plaintiff is to pay Defendant's reasonable fees and costs. CP 17 (App. F).

Oseran filed his Plaintiff's Motion for Reconsideration on March 24, 2010, CP 19 (App. G). In this motion, Oseran objected, *inter alia*, to the trial court's enforcement of the settlement agreement as a "global" settlement and equitable award of attorneys' fees and costs to Aardvark. Aardvark filed a response on March 31, 2010, CP 22, and Oseran filed its reply on April 2, 2010, CP 23 (App. H). On April 16, 2010, the trial court, without oral argument, denied Oseran's motion and filed an Order Denying Plaintiff's Motion For Reconsideration. *Id.* Under this order, the trial court found (1) the Plaintiff did not object to the award of attorneys' fees and cost in its response to Defendant's motion to enforce settlement and, thus, waived this objection; (2) the Defendant was equitably entitled to its attorneys' fees and costs to enforce the settlement agreement; (3) the court may, upon its own initiative, award attorneys'

fees and costs pursuant to CR 11 because Plaintiff's response to Defendant's motion to enforce settlement was not well grounded in fact and law; and (4) the Defendant did not object to the release and settlement agreement attached to Defendant's motion to enforce settlement and the accompanying proposed order and, thus, waived this objection. *Id.* In addition, the trial court ordered Oseran to comply with the court's March 19, 2010, order to enforce the settlement agreement. Oseran timely filed a Notice of Appeal on May 13, 2010, CP 25.

IV. ARGUMENT

A. **THE TRIAL COURT ERRED WHEN IT ORDERED THE SETTLEMENT AGREEMENT BE ENFORCED.**

This court reviews a trial court's ruling on a motion to enforce settlement *de novo*. As discussed *infra*, this court should find the trial court erred when it ordered enforcement of the settlement agreement because the purpose of the settlement and context surrounding the making of the it shows the parties intended a different scope; there was no consideration for a "global" settlement; Oseran's counsel was authorized to settle only the claims brought in the underlying lawsuit; the settlement agreement(s) lacks material terms and is not enforceable by specific performance; and the settlement agreement(s) is not enforceable under

either CR 2A or RCW 2.44.010. Because Oseran preserved his right to object to the trial court's ruling on the enforcement of the settlement agreement, this court should review this claim of error.

1. The Standard of Review is De Novo.

This court should review this claim of error *de novo*. The standard of review regarding a trial court's ruling on a motion to enforce a settlement is *de novo*. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001) ("The standard of review is *de novo* because the motion to enforce a settlement agreement is like a summary judgment motion").

2. The Purpose Of The Settlement Agreement And Context Surrounding The Making Of It Shows The Parties Intended To Settle Only The Claims Made In The Underlying Lawsuit.

a. The court must seek the intent of the parties by looking to the purpose of the settlement agreement, the circumstances surrounding the making of it, its reasonableness, and may use extrinsic evidence to do so.

The court must interpret the agreement to effectuate the intent of the parties. In Washington, "[t]he touchstone of contract interpretation is the parties' intent." *Lopez v. Reynoso*, 129 Wn. App. 165, 170, 118 P.3d 398 (2005) (citing *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). The court should reject unreasonable and imprudent interpretations and accept those which make

the contract reasonable and just given the purpose of the contract. *See Lake at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27 (1991) (discussing and citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)).

The parties' intent should be discerned by the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations. *Berg v. Hudesman, supra* at 667. "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties intent." *Id.* Cases in this Division demonstrate these principles at work. For example, in *Lake at Mercer Island Homeowners Ass'n v. Witrak, supra* at 177, the homeowners association sought to force a homeowner to remove trees the association claimed violated a restrictive covenant. Using the *Berg* "context rule," this Court looked to the purpose of the covenant, to preserve aesthetics and views, and found the covenant applied to the trees even though it only mentioned fences, walls, and shrubs, not trees. In doing so, this Court reiterated *Berg's* emphasis on rejecting unreasonable interpretations. *Id.* at 181.

And, in *Baker v. Winger* 63 Wn. App. 819, 822 P.2d 315 (1992), a motorcyclist injured in a traffic accident entered into an oral settlement agreement on the record dismissing some defendants with prejudice and taking a “voluntarily nonsuit” against another, which implicated, *inter alia*, the defendants’ contribution rights. In affirming the judgment, this Court used the *Berg* “context rule” and looked at the circumstances surrounding the making of the agreement to infer whether the parties meant the “voluntary nonsuit” to be with or without prejudice. (*Id.* at 723). As discussed *infra*, the settlement ordered by the trial court here was not that intended by the parties and is unreasonable given the purpose and circumstances surrounding the making of the agreement.

c. The purpose of the settlement was to settle “this case” and the circumstances surrounding its making show the parties intended to dismiss only the claims in this case (pressurization claims) in exchange for \$8,000.

Here, the language, objective, circumstances surrounding, and reasonable interpretation of the settlement agreement shows the parties intended to settle only the claims in the underlying lawsuit (elevator shaft and stairwell pressurization design error) for \$8,000.¹

¹ Extrinsic evidence may be used to determine whether the writing is intended to be the final expression of the agreement. *Lopez v. Reynoso*, 129 Wn. App. 165, 170, 118 P.3d 398 (2005). In this case, the email exchange between Oseran’s counsel and Aardvark’s counsel was not intended as the final expression of the parties agreement. Aardvark’s

The record shows that the parties correspondence and negotiations, and the underlying lawsuit, involved only dollar damages caused by the defective design of the elevator shaft and stairwell pressurization system for Oseran's construction project. See e.g., CP 12 (App. B), 2:11 – 4:12; CP 13 (App. C), ¶¶ 3, 4, and exhibits thereto; CP 14 (App. D) and exhibits thereto. In accord, the objective of the settlement agreement, to settle the underlying lawsuit, is manifested in the language used by the parties in their correspondence surrounding the making of the agreement. To begin, the direct correspondence between Oseran and Aardvark prior to representation involved only the pressurization aspects of the project. *Id.* Accordingly, when Aardvark's counsel first approached Oseran's counsel it was to "reach a quick settlement/resolution in this matter," which Aardvark's counsel described as involving "a minor design error." CP 9 (App. O), Exhibit A. (Emphasis added.) For the purpose of resolving "this matter," Aardvark's counsel offered to seek its client's approval to pay \$7,300 for the \$11,390 "work performed" for "a fix" to the underlying design error. *Id.* (Emphasis added.) Aardvark's counsel was hopeful that

counsel contemplated preparing a "settlement agreement and dismissal document" in his email dated February 12, 2009, as confirmed by his reference to a subsequent "standard settlement agreement" in his February 16, 2009, email, CP 14 (App. D), Exhibit B. This agreement, which eventually took the form of the "Release of All Claims and Settlement Agreement" CP 9 (App. O), Exhibit 2, remains unsigned.

by addressing “this expenditure” the parties could “get this matter resolved.” *Id.* (Emphasis added.) In response to a follow up letter sent by Oseran’s counsel, CP 14 (App. D), Aardvark’s counsel responded with regard to settling “this matter.” CP 16. Further, Aardvark’s counsel reiterated this objective in his e-mail dated February 16, 2010, when he stated “[p]ursuant to our exchange of e-mails . . . we have reached a settlement in this matter for the sum of \$8,000.00 [emphasis in original] . . .” CP 14 (App. D), Exhibit B. (Emphasis added.) (This settlement was to take the form of “standard settlement agreement language.” *Id.*)

Moreover, the record shows that neither party nor their counsel discussed many of the provisions contained in the Release of All Claims and Settlement Agreement, CP 9 (App. I), Exhibit 2. First, Paragraph 2 of the agreement requires Oseran to release “any and all claims, demand, damages, losses, liabilities, suits, litigation, and causes of action whatsoever kind, nature, or description, present and future, now known or hereafter to be discovered, whether arising in law or equity, upon contract or tort, under state, federal, or common law, or otherwise, which the Releasers now have, have had, or hereafter may have or claim to have, against any one or more of the respective Released Parties” The

parties never negotiated “global” release language of this kind. Second, Paragraph 4 of the writing requires Oseran to “satisfy all debts or liens . . . owed to any source whatsoever” and “defend, indemnify, and hold the Released party harmless from any and all such liens” CP 9 (App. I), Exhibit 2. Lien releases were not previously discussed and is not indicative of a writing using “standard settlement agreement language.” Third, Paragraph 6 of the writing requires Oseran to personally sign the document. The record shows that nothing in the settlement negotiations, or in the February 16, 2010, e-mail upon which the trial court relied in enforcing the settlement, provided for a personal signature by the plaintiff. Finally, the writing contains a separate “Attorney’s Guarantee,” which again was never negotiated or discussed.

At bottom, to interpret the parties agreement to extend “globally” beyond the pressurization claims in the underlying lawsuit is unreasonable and inconsistent with the objectively manifested intent of the parties.

3. There Was No Consideration To Support A “Global” Release.

a. The parties did not bargain for the exchange of a “global” release for \$8,000.

There was no consideration for the “global’ settlement the trial court ordered enforced. A contract must be supported by consideration to

be enforceable. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.2d 945 (2004) (citing *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)). “[B]efore an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise.” *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 767, 106 P.3d 290 (2005) (citing *King*, 125 Wn.2d at 505).

Aardvark did not bargain for a “global” release from Oseran. As discussed *supra*, the parties negotiated for settlement of the “pressurization system” dispute only. It was at the last minute when Aardvark’s counsel, in his e-mail dated February 16, 2010, apparently enlarged the settlement beyond that which the parties had agreed. See CP 14 (App. D), Exhibit B. This going from a settlement of a specific discreet claim to a “global” settlement was without consideration and violates fundamental contract law.

b. A “global” settlement is a modification to the true settlement and as such lacks consideration.

As a modification, the “global” settlement is not supported by new consideration. A modification must be supported by new consideration independent of the consideration involved in the original agreement.

Wagner v. Wagner, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980).

As discussed *supra*, the record shows Oseran agreed to dismiss the claims made in underlying lawsuit (“this matter”), which included only the elevator shaft and stairwell code pressurization issues, in exchange for \$8,000. The “global” settlement the trial court ordered enforced is at best a modification to the narrower settlement agreement negotiated and reached by the parties. The parties did not bargain for an exchange of \$8,000 for a “global” release; rather, they bargained for an exchange of \$8,000 for dismissal of this lawsuit with prejudice.

c. Oseran’s agreement to enter into a subsequent agreement with “standard settlement agreement language” is unenforceable.

To the extent Oseran agreed to enter into a subsequent agreement with “standard settlement agreement language,” this later agreement required a further meeting of the minds.² Thus, any agreement to enter into such a subsequent agreement is an “agreement to agree” and is unenforceable. An agreement to agree is “an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.” *Keystone Land & Dev. Co.*, 152 Wn.2d at 175-76 (citing *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d

² This “subsequent agreement” eventually took the form of the Release of All Claims and Settlement Agreement, CP 9 (App. I), Exhibit 2, which the trial court ordered Oseran to sign.

428 (1957)). Agreements to agree are unenforceable in Washington because they do not satisfy the requirements for the formation of a contract (such as consideration), which is necessary to avoid trapping parties in surprise contractual obligations. *See Id.* at 176, 178.

As discussed *supra*, the parties contemplated entering into a subsequent settlement agreement that would take the form of a writing with “standard settlement agreement language” to be prepared by Aardvark’s counsel. CP 14 (App. D), Exhibit B. Aardvark produced this writing, the “Release of All Claims and Settlement Agreement,” with its motion to enforce settlement, CP 9 (App. I), Exhibit 2.

Oseran has refused to sign this agreement because it reflects neither the meeting of the minds between the parties nor the consideration underlying the original agreement; to wit, to settle “this matter” for \$8,000. As discussed *supra*, the record shows that neither party nor their counsel discussed many of the provisions contained in the agreement such as a “global” release, lien satisfaction, indemnification and hold harmless obligations, and an “Attorney’s Guarantee.” These provisions are “surprise contractual obligations” for which there was no bargained for exchange of legal value; i.e., consideration. They require a further meeting of the minds and, as a result, any agreement to agree to them is unenforceable.

4. Oseran's Counsel Had Authority To Release Only The Claims Brought By Oseran In The Underlying Lawsuit.

Oseran's counsel had authority to release only the claims brought by Oseran in the underlying lawsuit (elevator shaft and stairwell pressurization system design error), which it agreed to release on Oseran's behalf. See CP 9 (App. I), Exhibit A. Oseran's counsel did not have authority to agree to a "global" release, which is how the trial court enforced the disputed February 17, 2010, e-mail agreement and contemplated by the Release of All Claims and Settlement Agreement. "Absent express authority or an informed consent or ratification, attorneys may not waive, compromise or bargain away a client's substantive rights." *Morgan v. Burks*, 17 Wn. App. 193, 199-200, 563 P.2d 1260 (1977).

The rule under *Morgan* has been confirmed by the Supreme Court of Washington in *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 313 (1980). In *Taggares*, where the court stated, in part, that an attorney "is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing. However, in his [or her] capacity as attorney, he [or she] has no authority to waive any substantial right of his [or her] client. Such waiver, to be binding upon the client, must be specially authorized by him [or her]." *See also, State v. Super. Ct.*

In and For Clallam County, 151 Wash. 413, 418, 276 P. 98 (1929) (special authorization from the client is ordinarily necessary to permit a dismissal of an action with prejudice); *Grossman v. Will*, 10 Wn. App. 141, 516 P.2d 1063 (1973) (a client is not bound by a settlement agreement to which the client has not consented; RCW 2.44.010 does not change the common law rule that an attorney has no implied authority to waive client's substantive rights).

In *Morgan v. Burks*, an apparent settlement agreement was made in open court between plaintiffs' counsel and defendants' counsel. Both parties were present and discussed dismissal of the action, settlement amount, time for payment, and interest arrangements. However, plaintiffs subsequently refused to sign the releases once they came to fully understand the effect of the settlement. Finding the plaintiffs' could not have authorized their attorney to stipulate to a settlement agreement they did not fully understand, the court affirmed the trial court's vacation of its (the trial court's) own order to dismiss because an attorney may not settle away a client's substantive rights without authority.

Here, Oseran, unlike the plaintiffs in *Morgan*, was not a party to the counsels' general settlement discussions. Moreover, Oseran, like the plaintiffs in *Morgan*, did not fully understand the scope of the

agreement(s) and, more importantly, did not authorize his counsel to settle the case with a “global” release.³ Rather, Oseran authorized his counsel to provide a complete release and dismissal of the underlying lawsuit and claims therein, CP 14 (App. D), Exhibit B, which comprise the elevator shaft and stairwell pressurization system design error and were the subject matter of the underlying negotiations. *See e.g.*, CP 12 (App. B), p.2 l. 11 – p.4 l. 12; CP 13 (App. C), ¶¶ 3, 4, and exhibits thereto; CP 14 (App. D) and exhibits thereto.

5. The Settlement Agreement(s) Is Not Enforceable and Cannot Be Specifically Performed Due to a Lack of Material Terms and Uncertainty.

Settlement agreements are governed by general principles of contract law. *Lavigne v. Green*, 106 Wn. App. at 20 (*citing Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983)); *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002). As discussed *infra*, contracts require reasonably certain terms to be enforceable and for specific

³ Oseran’s counsel notified Aardvark’s counsel of the limited nature of its authority in its February 9, 2010, letter, which deals exclusively with the underling case and the elevator shaft and stairwell pressurization issue. CP 14 (App. D), Exhibit C (“We have conferred with our client and have been granted settlement authority consistent with the terms herein”). And Oseran’s counsel offered to settle this case within the scope of this authority. CP 14 (App. D), Exhibit B (“[o]ur client will agree to provide a complete release and dismissal of the claim alleged in the underlying suit (elevator shaft and stairwell pressurization system design error) . . .”).

performance to be ordered thereupon. Here, the settlement agreement(s) fail for a lack of certainty.

a. The parties did not include the material terms of the settlement agreement in the February 17, 2010, e-mail and those leading up to it.

The February 17, 2010, e-mail agreement is not enforceable as a settlement agreement per se because the parties failed to state therein all material terms of the settlement agreement. In determining whether informal writings are sufficient to establish a contract where the parties contemplate signing a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris v. Maks*, 69 Wn. App. 865, 869, 850 P.2d 1357 (1993).

With respect to the second prong of the *Morris* “test,” the parties must address all the material terms of the agreement during settlement discussions, not only the amount of settlement, where they contemplate a subsequent formal agreement but one party seeks enforcement based upon the underlying informal discussions. *Lavigne v. Green*, 106 Wn. App. at 20 (citing *Morris v. Maks, supra* at 869 (parties must state all terms in the informal writings)). A trial court is without authority to enforce a

settlement where the parties' attorneys did not reach agreement on the material terms of the agreement. *Howard v. Dimaggio*, 70 Wn. App. 734, 737, 855 P.2d 335 (1993). The party seeking to enforce the stipulation has the burden to prove there is no genuine dispute regarding the existence and material terms of a settlement. *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

In *Lavigne*, the parties ostensibly settled the case in mediation. However, Mr. Lavigne refused to sign the subsequent settlement agreement arguing, *inter alia*, that it contained material terms the parties neither discussed nor agreed upon. Finding that Mr. Lavigne raised genuine issues of fact as to whether the settlement was disputed under CR 2A and whether the parties had reached an enforceable agreement, the court remanded for an evidentiary hearing. In doing so, the court relied upon the rules under *Dimaggio* and *Morris* that the parties must address all the material terms of the agreement in both the informal and formal writings for either to be enforceable.⁴

Here, the parties contemplated entering into a formal settlement agreement. See CP 16, Exhibit 1 ("my firm will take the laboring oar in

⁴ Mr. Lavigne also had second thoughts about the amount of the settlement; the court noted that these second thoughts did not render the agreement disputed. Unlike in *Lavigne*, Oseran had no second thoughts with respect to the amount of the settlement because it was in exchange only for a dismissal of the underlying lawsuit with prejudice.

preparing a settlement agreement”). And, unlike in *Morris* but like in *Lavigne*, the attorneys for Oseran and Aardvark did not discuss the material terms of the settlement in the February 17, 2010, e-mail and those leading up to it, and they never discussed the material terms Aardvark wrote into the Release of All Claims and Settlement Agreement. Rather, the attorneys discussed only releasing the claims in the underlying lawsuit in exchange for \$8,000.

b. Specific performance of the February 17, 2010, e-mail settlement agreement in the “global” manner ordered by the trial court is unavailable due to uncertainty.

The ostensible agreement reached in the February 17, 2010, e-mail is incomplete, indefinite, and uncertain in its terms and, therefore, cannot be specifically performed. Specific performance is unavailable where the terms of the contract are incomplete, indefinite, and the precise act sought to be compelled is not clearly ascertainable. *See State v. Bisson*, 156 Wn.2d 507, 524, 130 P.2d 820 (2006); *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 965-67, 167 P.2d 1002 (1946) (“one of the fundamental rules respecting the specific performance of contracts is that performance will not be decreed where the contract is not certain in its terms”). When specific performance is sought, there must be “clear and unequivocal” evidence that “leaves no doubt as to the terms, character, and existence of

the contract.” *Powers v. Hastings*, 93 Wn.2d 709, 713-117, 612 P.2d 371 (1980).

The February 16, 2010, e-mail, which is part of the February 17, 2010, agreement the trial court ordered specifically performed as a “global” release, CP 17 (App. L), states the parties “have reached a settlement in this matter for the sum of \$8,000 . . . in exchange for a complete release and dismissal of all claims relating to Aardvark’s work on this project” under “settlement documents and dismissal pleadings” to be prepared by Aardvark’s counsel. (Emphasis added.) This e-mail is loose at best and like the preliminary agreements in *Doernbecher* and *Hemp*, to be discussed *infra*, lacks the material and essential terms necessary to provide certainty. The most the court can direct based upon this e-mail, and those leading up to it, is a dismissal with prejudice of “all claims” made by Oseran against Aardvark in the underlying lawsuit in exchange for \$8,000.

c. Specific performance of the Release of All Claims and Settlement Agreement based upon the February 17, 2010, e-mail settlement agreement is unavailable due to uncertainty.

Specific performance of the Release of All Claims and Settlement Agreement cannot be directed under the disputed February 17, 2010, e-mail settlement agreement because this e-mail agreement neither

contained the material and essential terms of the Release of All Claims and Settlement Agreement nor incorporated it by reference. A contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943 at 965-67 (citing 6 R.C.L., p. 617, § 38.). A contract to enter into a future contract must specify all of the material and essential terms of the future contract before a court may order specific performance. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (citing *Hubbell v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952)).

In *Doernbecher*, the parties entered into a preliminary agreement for the sale of assets of a radio broadcasting company. The preliminary agreement concerned the essential terms to be embodied in a subsequent formal agreement but contemplated both parties adding minor conditions to that subsequent agreement. The court denied specific performance upon the preliminary agreement because it was apparent that certain details were deferred making the preliminary agreement incomplete.

In *Hemp*, the lessee of real property sought specific performance of an option contained in the lease to purchase the real property under an installment contract. The lease included the price, down payment, monthly

payment, term, and rate of interest for the purchase but contemplated the signing of a subsequent installment contract and, thus, excluded other terms material to such a transaction. Specific performance was denied because the lease failed to set forth all the material and essential terms, which were contained in the installment contract not made a part of or incorporated by reference into the lease.

Here, like in *Doernbecher* and *Hemp*, the parties contemplated entering into a subsequent formal agreement under the disputed February 17, 2010, e-mail agreement and those leading up to it, but they did not discuss or agree to the material and essential terms to be included in the formal agreement in these preliminary negotiations and/or agreements. Moreover, the parties never discussed a “global release.” At bottom, the settlement agreement ostensibly reached here, based in part on loose language in the February 16, 2010, e-mail to settle “this matter” for \$8,000, is far more uncertain than the preliminary agreements entered by the parties in *Doernbecher* and *Hemp* and likewise cannot be specifically enforced.

6. Neither Settlement Agreement is Enforceable Under Either CR 2A or RCW 2.44.010 Because the Purport of Each is Disputed and Oseran Signed Neither.

Neither the February 17, 2010, e-mail agreement nor the Release of All Claims and Settlement Agreement is enforceable under CR 2A or RCW 2.44.010 because their existence and terms are disputed and Oseran signed neither the e-mail nor the subsequent agreement.

CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 2.44.010 provides in part:

An attorney and counselor has authority: (1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney[.]

Both CR 2A and RCW 2.44.010 require a stipulation in open court on the record, or a writing acknowledged by the party to be bound. *Bryant*

v. Palmer Coking Coal Co., 67 Wn. App. 176, 178, 858 P.2d 1110 (1992). The purpose of CR 2A and RCW 2.44.010 is to avoid disputes and to give certainty and finality to settlements and compromises, if they are made. *Eddleman v. McGhan*, 45 Wn.2d 430, 275 P.2d 729 (1954). While the compromise of litigation is to be encouraged, negotiations toward a compromise are not binding upon the negotiators. *Id.* Where it is disputed that the negotiations culminated in an agreement, noncompliance with the rule and statute leaves the court with no alternative; it must disregard the conflicting evidence as they direct. *Id.* The party seeking to enforce the stipulation has the burden to prove there is no genuine dispute regarding the existence and material terms of a settlement. *In re Marriage of Ferree*, 71 Wn. App. at 41 .

Unlike Division Three of the Court of Appeals of Washington, this Division One requires strict compliance with CR 2A and RCW 2.44.010. *See Stottlemire v. Reed*, 35 Wn. App. 169, 665 P.2d 1383 (1983) (strict compliance is not required and where attorney stated on the record that he negotiated an oral settlement of a personal injury lawsuit with the approval of his client, the requirements of RCW 2.44.010 were satisfied); *but see Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. at 178 (“We do not find

Stottlemire to be persuasive in this context”⁵; *Morris v. Maks*, 69 Wn. App. at 869, 871 (1993) (letters containing materials terms, one of which was signed by party to be bound, sufficient to establish binding settlement agreement); *Lavigne v. Green*, 106 Wn. App. at 18 (Division One reasoned that strict compliance was required in *Bryant*). Moreover, the Supreme Court of Washington has held that where it is disputed that a settlement agreement was reached, noncompliance with the statute and court rule governing settlements dictates that the agreement is unenforceable. *Id.*

In *Bryant v Palmer Coking Coal*, the Bryants, Palmer, and their attorneys met to negotiate a settlement. The Bryants’ attorney sent a letter detailing the agreement reached but not, as found by the trial court, constituting the agreement itself. Palmer then decided to proceed no further and did not sign a settlement agreement. After laying much of the framework discussed *supra*, this Court held the alleged settlement agreement was, in light of the purpose of the cited rule and statute, unenforceable because it was not stipulated to on the record in open court or memorialized by a writing signed by the party to be bound.

⁵ *But see In Re Patterson*, 93 Wn. App. 579, 584-85, 969 P.2d 1106 (1999) (settlement agreement signed by party enforceable as if the attorney had participated).

In *Morris v. Maks*, the attorneys for the parties conducted two settlement teleconferences to discuss and confirm seven material terms of a settlement agreement and the client's agreement thereto. Thereafter, the attorneys exchanged confirmation letters which again discussed the terms of the agreed settlement and the party to be bound confirmed the settlement agreement by signature and acknowledgement in a letter to his bank. This Court found the settlement agreement was enforceable because the "settlement agreement is set forth in writings exchanged by the parties, including a letter signed by the party to be bound." *Id.* at 870.

Here, unlike the parties in *Bryant* and *Morris*, Oseran and Aardvark never met or exchanged writings detailing the agreement reached. Moreover, like in *Palmer* and unlike in *Morris*, Oseran signed no writing (e-mail, letter, form of agreement, or otherwise) memorializing or constituting a settlement agreement. Lastly, the Release of All Claims and Settlement Agreement, CP 9 (App. O), Exhibit 2, which the trial court ordered enforced, CP 23 (App. M), was not even produced until such time as Aardvark sought to enforce the same by motion. The purport of this document is deeply disputed by Oseran, as discussed *supra*, and it remains unsigned by Oseran.

7. Oseran Preserved His Right to Object to the Enforcement of the Settlement Agreement and Specifically the Release of All Claims and Settlement Agreement; Moreover, This Issue is Reviewable at This Court's Discretion.

a. This objection was not dependent upon new facts.

Oseran raised his objection to the Release of All Claims and Settlement Agreement in his motion for reconsideration and this objection was not dependent upon new facts. In a non-jury trial, an issue or theory not dependent upon new facts may be raised for the first time through a motion for reconsideration and thereby be preserved for appellate review. *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4, 814 P.2d 1212 (1991). Here, Oseran's objection was in response to the trial court's order to enforce settlement and was based upon facts already before the trial court. Namely that the document contained provisions addressing issues not a part of the underlying lawsuit, the document was not a "standard form," the document was not part of the February 17, 2010, e-mail agreement, and it incorporated an "Attorney Guarantee" not previously discussed. See CP 19 (App. K). Not only was Oseran's objection not raising a new issue or theory of the case but also it was not dependent upon new facts. Thus, Oseran was able to raise it for the first time in his motion for reconsideration.

b. This objection brought the error to the trial court's attention.

Oseran's objection in his motion for reconsideration brought the error to the trial court's attention so that the court could correct it without the necessity for appeal and ensure that substantial justice would be done. The purpose of preserving error and motion for reconsideration is to promote judicial efficiency by correcting errors occurring at trial without the necessity for retrials and appeals. *See e.g., Koboski v. Cobb*, 161 Wash. 574, 297 P. 771 (1931); *Postema v. Postema Enter., Inc.*, 118 Wn. App. 185, 72 P.3d 1122 (2003). CR59(a)(9) is a catch-all provision allowing a new trial on the basis that "substantial justice has not been done." *See e.g., W. Asphalt Co. v. Valle*, 25 Wn.2d 428, 171 P.2d 159 (1946).

Oseran brought his objection to the award of attorneys' fees and costs to the trial court's attention. To begin, Aardvark's motion to enforce settlement contained the new settlement document as an exhibit to an underlying declaration. CP 9 (App. I), Exhibit 2. Oseran objected to this motion in its entirety. CP 12 (App. B). The first line of Oseran's response to Aardvark's motion reads, "Plaintiff Oseran asks the court to Deny the motion of defendant Aardvark Engineering Services pursuant to CR 2(a)."

Id. (Emphasis added.) Then, as soon as the trial court ordered Oseran to sign this document, Oseran objected in his motion for reconsideration. CP 19 (App. G), p.1, l. 13 - p.2, l. 10; p.4, ll. 2-9. Oseran brought the error to the trial court's attention so the error could be corrected without the necessity for appeal and substantial justice could be done.

c. This Court has the discretion to review this issue.

Lastly, the first sentence in RAP 2.5(a) reads, "The appellate court may refuse to review any claim of error which was not raised in the trial court." (Emphasis added.) Because the rule uses the term "may," its application is discretionary, not mandatory; it does not operate as an absolute bar against review of an issue first raised on appeal. Even if this Court finds Oseran waived his objection to the enforcement of the Release of All Claims and Settlement Agreement, this Court has the discretion to allow Oseran to raise the issue for the first time on appeal and should do so to ensure this issue is decided on the merits, not procedure.

For the reasons discussed *supra*, this court should find that the trial court erred when it ordered enforcement of the settlement agreement. The settlement(s) varies from that intended by the parties as shown by the purpose and context of the agreement, lacks consideration, exceeded the scope of Oseran's counsel's authority, lacks material terms, is not

enforceable by specific performance, and is not enforceable under either CR 2A or RCW 2.44.010.

B. THE TRIAL COURT ERRED WHEN IT AWARDED AARDVARK ITS ATTORNEYS' FEES AND COSTS BASED UPON EQUITY AND CR 11.

This Court reviews objections to the equitable award of attorneys' fees and cost *de novo*. As discussed *infra*, this court should find the trial court erred when it awarded Aardvark its attorneys' fees and cost because the trial court did not have an equitable basis upon which to do so and Oseran's objections were well founded in law and fact for the purposes of CR 11. Because Oseran preserved his right to object to the trial court's award of attorneys' fees and costs, this Court should review this claim of error made by Oseran.

1. The Standard of Review is De Novo.

This court should review this claim of error *de novo*. Whether a recognized ground in equity authorizes an award of attorney fees is a legal question. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).⁶ Questions of law are reviewed *de novo*, *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994) ("We review the trial court's conclusions of law *de novo*"). When equitable grounds are relied on, the

⁶ *But see Hous. Auth. of City of Everett v. Kirby*, 154 Wn. App. 842, 849, 226 P.3d 222 (2010).

court of appeals reviews the trial court's factual findings to determine whether they support the court's legal decision to award fees. *See Tradewell v. Mavis*, 71 Wn. App. at 126-27 (citing *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990) (appellate court reviews factual findings to see if they support trial court's legal conclusions)). Oseran challenges the award of attorneys' fees (not the amount of the award), which is a question of law to be reviewed *de novo*.

2. The Trial Court Did Not Have an Equitable Basis Upon Which to Award Attorneys' Fees and Costs Because Oseran Did Not Act in Bad Faith and Sanson v. Brandywines Homes, Inc. is Not Binding.

a. The trial court relied upon the equitable ground of bad faith to award of attorneys' fees, which is disfavored.

Attorneys' fee awards are disfavored in Washington. *In re Eaton*, 48 Wn. App. 806, 814, 740 P.2d 907 (1987) (citations omitted). In Washington, attorneys' fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity. *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983) (citations omitted). The trial court granted Aardvark's request for attorneys' fees and cost based upon equity (and CR 11, which is discussed *infra*), CP 23 (App. M), and Aardvark impliedly concedes there is no

statute or contract upon which to award attorneys' fees and costs. CP 22 (App. L), p.5, ll. 6–7 (“The request for attorney fees and costs was made “as a matter of equity”).

More specifically, Aardvark based its request for attorneys' fees and costs on the alleged bad faith of Oseran. See CP 22 (App. L), p.5, l. 17 through p. 7, l. 8. In Washington, there are four recognized equitable grounds for awards of attorney fees: bad faith conduct of the losing party, preservation of a common fund, protection of constitutional principles, and private attorney general actions. *Dempere v. Nelson*, 76 Wn. App. at 407 (citing *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984)). (Emphasis added.) As discussed next, courts construe the bad faith basis narrowly.

b. The definition of “bad faith” is narrow and places a significant burden on the party claiming fees on this basis.

Aardvark, in its motion opposing Oseran's motion to reconsider, made certain to inform the trial court that bad faith includes “‘obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right,” “vexatious” conduct during the litigation, or the intentional bringing of a frivolous claim or defense with improper motive” under *Union Elevator v. Wash. Dept. of Transp.*, 152 Wn. App. 199, 211,

215 P.3d 257 (2009). See CP 22 (App. L), p.5, ll. 17–24. What Aardvark left out was the statement made by the *Union* court immediately preceding the definition of bad faith. Specifically, that the definition of “bad faith” is narrow and places a significant burden on the party claiming fees on this basis. *Id.* at 208 (Citing *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999)). (Emphasis added.) Moreover, this Division One of the Court of Appeals in Washington has called into question bad faith as a recognized equitable ground for an award of attorney fees in Washington as “debatable at best.” *Dempere v. Nelson*, 76 Wn. App. at 409. (Emphasis added.) As discussed next, courts apply this basis reluctantly.

c. Courts in Washington have been reluctant to award attorneys’ fees using bad faith as a basis and Aardvark did not meet its significant burden of showing Oseran acted in bad faith.

The record shows that Oseran did not act in bad faith, the trial court did not find Oseran acted in bad faith, and Aardvark did not show Oseran acted in bad faith. Courts in Washington have been reluctant to award attorneys’ fees using bad faith as a basis, as discussed *infra*, and require significant malfeasance by the losing party such as advancing a claim without any basis in fact, conduct the trial court specifically found

as bad faith, contempt of court, retaining property adjudged to belong to another, or failure to disclose material facts.

i. Courts have been reluctant to award attorneys' fees upon bad faith.

Bad faith as a ground for the award of attorneys' fees is "debatable at best." For example, in *Union*, the owner of a grain elevator sued the State of Washington in a reverse condemnation action. 152 Wn. App. 199. Union claimed, *inter alia*, the State was responsible for Union's attorneys' fees under the equitable ground of bad faith because the State had failed to follow its own regulation, took an unsupportable position, and unreasonably delayed entering a final decision upon an administrative hearing. This Court found no bad faith for the simple reason there were facts in the case that supported the State's position.

In addition, in *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557, P.2d 342 (1976), a partner sued another partner for an accounting and dissolution of a partnership.. The trial court awarded the plaintiff his attorneys' fees and costs, which the court of appeals reversed. The Supreme Court of Washington, which reversed and awarded attorneys' fees and cost upon another basis (an identifiable fund), held that the bad faith exception does not apply where the trial court does not find bad faith conduct.

Lastly, in *Dempere*, the plaintiff sued the defendant for several intentional torts and claimed, *inter alia*, that she was entitled to her attorneys' fees and costs because of the bad faith nature of the defendant's conduct. Prior to holding that bad faith in underlying tortious conduct is not a recognized equitable ground for award of attorneys' fees in Washington, and thus rejecting the plaintiff's claim, this Court discussed the status of the bad faith basis in Washington at length. *Id.* at 407-11. In doing so, this Court traced this basis, which it characterized as "debatable at best," to *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941), and bad faith conduct such as contempt of court, retention of property adjudged to belong to another party, or failing to disclose material facts to the court (e.g., community property to dissolution court). *Id.* at 408. As discussed next, none of the above are present here.

ii. The record shows that Oseran did not act in bad faith, the trial court did not find Oseran acted in bad faith, and Aardvark did not show Oseran acted in bad faith.

The record shows Oseran did not act in bad faith, and such bad faith was neither found by the trial court nor shown by Aardvark. Here, like the trial court in *Hsu Ying Li v. Tang*, the trial court did not find (and Aardvark did not show) Oseran acted in bad faith, which appears required by the Supreme Court of Washington. Rather, the trial court only found

the request for attorneys' fees and cost was based on "a recognized ground in equity." CP 23 (App. M).

In addition, like the State of Washington in *Union*, Oseran based its disagreement with Aardvark (as to the scope of the contemplated settlement agreement) upon material facts. These facts include but are not limited to those outlined next.

Oseran's lawsuit involved only defects in the design of the elevator shaft and stairwell pressurization systems. See e.g., CP 12 (App. B), page 2, l. 11 through page 4, l. 12; CP 13 (App. C), ¶¶ 3, 4, and exhibits thereto; CP 14 (App. D) and exhibits thereto. Aardvark's counsel approached Oseran's counsel to settle "this matter" by addressing the \$11,390 Oseran expended to fix the underlying design error. CP 9 (App. I), Exhibit A. In response to Oseran's counsel's follow up letter, CP 14 (App. D), Exhibit C, Aardvark's counsel offered to prepare the settlement agreement and dismissal documents to get the parties a "quick resolution for little expenditure." CP 16. In good faith, Oseran's counsel accepted Aardvark's counsel's offer via voicemail, as urged. *Id.*

Aardvark's counsel then sent an e-mail confirming the parties had reached settlement in "this matter" and seeking payee information, which Oseran had not yet provided. CP 14 (App. D), Exhibit B. (Emphasis

added.) Oseran's counsel replied "agreed," *Id.*, as a mere acknowledgement the parties had reached an agreement in principle, Oseran's counsel would forward Oseran's payee information, and Aardvark's counsel would prepare a memorializing agreement. From the facts in this case and record, a reasonable person could conclude the parties had negotiated a settlement of the elevator shaft and stairwell pressurization issue, not a "global" settlement as the trial court ordered. Like the State in *Union*, Oseran based his position upon facts in this case.

Further, in accord with *Dempere* and *Marci*, the trial court did not find (and Aardvark did not show) Oseran in contempt of court, to have retained property adjudged to belong to Aardvark, or to have failed to disclose material facts. Lastly, the trial court did not find (and Aardvark did not show) that Oseran had engaged in any of the conduct included in bad faith under *Union*, such as obstinate conduct that necessitated legal action to enforce a clearly valid claim or right, vexatious conduct during the litigation, or the intentional bringing of a frivolous claim or defense with improper motive.

That Aardvark was able to persuade the trial court it was entitled to attorneys' fees and cost "in equity" does not render Oseran's positions obstinate, vexatious, or frivolous or otherwise show that Oseran acted in

bad faith. For this Court to find that it does will be to discourage parties from attempting settlement for fear of disagreement and from vigorously pursuing their legal rights under our judicial system.

d. Sanson v. Brandywine Homes, Inc. is not binding.

This Court need not look to authority from other jurisdictions to decide this matter. (Aardvark places heavy reliance on *Sanson v. Brandywine Homes, Inc.*, 599 S.E.2d 730, 215 W.Va. 307 (2004) (App. P), in its underlying pleadings.) First, courts in Washington have adequately analyzed this issue, as discussed *supra*. Second, authority from other jurisdictions merely serves as persuasive authority and is not binding. *See State v. Chenoweth*, 160 Wn.2d 454, 471, 158 P.3d 595 (2007).

Third, there are key differences between *Sanson* and this case. To begin, the trial court in *Sanson* held an evidentiary hearing upon the issue; none was held in this case. In addition, the appellants in *Sanson* disputed the amount of the settlement; Oseran does not dispute the amount. Moreover, the court in *Sanson* found the respondent had fully performed under the settlement agreement. *Sanson* at 735. The appellants in *Sanson* had accepted delivery of the settlement agreement and check and then waited three months to return the check and reject the settlement agreement. Here, Oseran's counsel immediately informed Aardvark's

counsel of Oseran's disagreement with the proposed scope of the contemplated and undrafted settlement agreement and no formal settlement agreement or settlement check has ever been delivered and accepted. Lastly, the appellants in *Sanson* were impliedly found to have acted in bad faith. *Sanson* at 735. Oseran, as discussed *supra*, did not act in bad faith.

3. Oseran's Pleadings Were Well-Founded in Law and Fact; Thus CR 11 Sanctions Were Unwarranted.

As Oseran has demonstrated *supra*, his opposition of Aardvark's motion to enforce, Oseran's motion for reconsideration, and his reply, were all well-founded in fact and law. Thus, the trial court's finding in the order denying Oseran's motion for reconsideration that it may award attorneys' fees and cost under CR11 was erroneous.

4. Oseran Preserved His Right to Object to the Attorneys' Fees and Costs Award Because This Objection Was Not Dependent Upon New Facts and Was Brought to the Trial Court's Attention; Moreover, This Issue is Reviewable at This Court's Discretion.

a. This objection was not dependent upon new facts.

Oseran raised his objection to the award of attorneys' fees and costs in his motion for reconsideration and this objection was not dependent upon new facts. *See Reitz v. Knight*, 62 Wn. App. 575, cited *supra*. Oseran's objection was in response to the trial court's order and

was based upon facts already before the trial court. Namely that the underlying contract lacked an attorneys' fees provision and Oseran had neither agreed to nor signed the settlement agreement included in Aardvark's motion to enforce settlement. See CP 19 (App. G). (Oseran acknowledges Aardvark's request was made in equity and discussed this basis *supra*.) Oseran's objection not only was not raising a new issue or theory of the case but also was not dependent upon new facts. Thus, Oseran was able to raise it for the first time through his motion for reconsideration.

b. This objection brought the error to the trial court's attention.

Oseran's objection in his motion for reconsideration to the award of attorneys' fees and costs brought the error to the trial court's attention so that the court could correct it without the necessity for appeal and ensure that substantial justice would be done. *See e.g., Koboski v. Cobb*, 161 Wash. 574; *Postema v. Postema Enter., Inc.*, 118 Wn. App. 185; CR 59 (a); and *W. Asphalt Co. v. Valle*, 25 Wn.2d 428 as cited *supra*.

To begin, Aardvark's motion to enforce settlement contained its request for attorneys' fees and cost. CP 8. Oseran objected to this motion in its entirety. CP 12 (App. B). The first line of Oseran's response to

Aardvark's motion reads, "Plaintiff Oseran asks the court to Deny the motion of defendant Aardvark Engineering Services pursuant to CR 2(a)." *Id.* (Emphasis added.) Then, as soon as the trial court granted Aardvark's motion, Oseran objected to the award in his motion for reconsideration. CP 19 (App. G), p.2, ll. 5-10; p.4, l. 8 – p.5, l. 5. Oseran brought the error to the trial court's attention so the error could be corrected without the necessity for appeal and substantial justice could be done.

c. This Court has the discretion to review this issue.

As discussed *supra*, this Court has the discretion under RAP 2.5(a) to hear this issue for the first time on appeal.

For the reasons discussed *supra*, this court should find the trial court erred when it awarded Aardvark its attorneys' fees and cost because the trial court did not have an equitable basis upon which to award attorneys' fees and costs and Oseran's objections were well-founded in fact and law for the purposes of CR 11.

V. CONCLUSION

For the reasons set forth herein, Appellant Oseran respectfully requests the Court reverse (1) the trial court's granting of Aardvark's Motion to Enforce Settlement Agreement and (2) the trial court's awarding Aardvark its attorneys' fees and costs.

DATED: August 5, 2010.

OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

By 

CHARLES E. WATTS, WSBA #2331
ROY L. LUNDIN, WSBA #41657
Attorneys for Appellant

CERTIFICATE OF MAILING/SERVICE

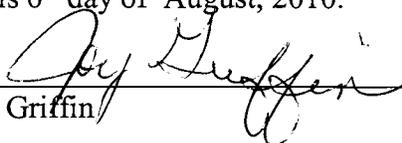
The undersigned, Joy Griffin, certifies that on the 6th day of August, 2010, she caused to be served via e-mail and U.S. Mail, postage prepaid, a copy of the foregoing Appeal Brief to the Court of Appeals/ Division I, Cause No. 65409-8-I and to the following:

VIA US MAIL

John Zehnder, Jr.
Gregory Paul Thatcher
Scheer & Zehnder LLP
701 Pike St., Suite 2200
Seattle, WA 98101-2358

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

Dated at Bellevue, WA this 6th day of August, 2010.


Joy Griffin

FILED
COURT OF APPEALS DIV. #1
STATE OF MASSACHUSETTS

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APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM OSERAN,
Plaintiff,
v.
AARDVARK ENGINEERING SERVICES, INC.
d/b/a A.E.S. Inc.,
Defendant.

No. *09-2-44171-5 SEA*
COMPLAINT FOR DAMAGES

Plaintiff states as follows:

1. Plaintiff is the owner of real property located in the City of Seattle, King County, Washington, whose street address is 2030 Dexter Ave. No., Seattle.
2. Plaintiff is a resident of the City of Seattle, King County, Washington.
3. Defendant Aardvark Engineering Services has its principal office in the City of Seattle, King County, Washington. Defendant Aardvark Engineering Services ("Aardvark") does business as A.E.S., Inc.
4. On or about August 17, 2006, plaintiff and defendant entered into a contract for engineering services whereby defendant was to provide mechanical engineering services to plaintiff in connection with the renovation of the structure described above known as the "Arron's

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1 Storage Building.” The contract was in writing in the form of a proposal dated August 3, 2006 and
2 identifies the work to be performed by defendant for plaintiff as owner of the property with the
3 following language:

4 Thank you for contacting our firm and providing the opportunity to
5 work with you on this interesting project. We have prepared the
6 following **revised** proposal for mechanical engineering design for
7 the renovation of the Arron’s storage building on Dexter Avenue.
8 The revision essentially changes the project from two stages into
9 one. The entire shell design will be submitted to the city, then the
10 correction submittal will include the completed design, less the TI of
11 the first floor.

12 5. Defendant negligently and beneath professional standards performed its work on
13 the contract project for the 2030 Dexter Avenue North building and as a result, plaintiff has
14 suffered damages which include, but are not limited to:

- 15 a. Costs of repair and correction; and
- 16 b. Consequential damages in the form of delay, lost income, carrying costs,
17 and other consequential damages which will be established at time of trial.

18 6. Defendant has admitted negligence and performance below professional standards
19 in connection with the work, but defendant, notwithstanding repeated demands, has refused and
20 neglected to compensate plaintiff for the results of such admitted negligence and below-standard
21 performance.

22 7. Defendant has tendered in “full settlement” various amounts, which tenders have
23 been rejected by plaintiff as being insufficient.

8. The King County Superior Court has jurisdiction of the parties and subject matter
of this proceeding.

1 WHEREFORE, based upon the foregoing allegations, plaintiff prays for the following
2 relief:

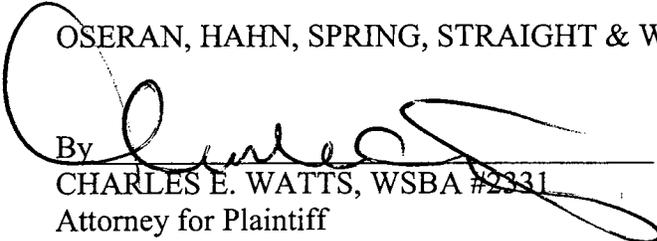
3 1. For judgment in favor of plaintiff against defendant in the amount of damages by
4 reason of the admitted failure of defendant to perform its mechanical engineering services in a
5 workmanlike and non-negligent manner pursuant to the contract between the parties; and

6 2. For plaintiff's taxable costs and disbursements herein; and

7 3. For such other and further relief as the court may deem proper under the
8 circumstances.

9 DATED this 7th day of December, 2009.

10
11 OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

12 By 
13 CHARLES E. WATTS, WSBA #2331
14 Attorney for Plaintiff

APPENDIX B

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FILE COPY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM OSERAN,

Plaintiff,

No. 09-2-44171-5

v.

**RESPONSE OF PLAINTIFF
OSERAN TO DEFENDANT'S
CR 2(A) MOTION**

AARDVARK ENGINEERING SERVICES, INC.
d/b/a A.E.S. Inc.,

Defendant.

RELIEF REQUESTED

Plaintiff Oseran asks the court to Deny the motion of defendant Aardvark Engineering Services pursuant to CR 2(A). The motion should be denied for the following reasons which will be argued below:

1. Counsel for William Oseran had no authority to stipulate settlement of any claim except the "pressurization system" claim.
2. The claimed settlement agreement is too vague to specifically enforce.
3. Any claimed "global" release is not supported by new consideration.
4. The contract of settlement (if any) reached between the parties was specifically for settlement of "this claim" limiting the scope of the settlement to a specific identified claim.

RESPONSE OF PLAINTIFF OSERAN TO
DEFENDANT'S CR 2(A) MOTION - 1
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OSERAN HAHN SPRING STRAIGHT & WATTS P.S.
10900 NE Fourth Street #850
Bellevue WA 98004
Phone: (425) 455-3900
Facsimile: (425) 455-9201

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1 Aardvark wrote Mr. Oseran about the shaft pressurization problems, including the “shaft
2 pressurization fans.”

3 On September 10, 2008, Reed Lyons wrote Bill Oseran about problems that arose with
4 respect to the Aardvark design of the shaft pressurization fans, conceding that Aardvark had
5 “caused this mix-up.” In this September 10, 2008 communication, Mr. Lyons of Aardvark states
6 that he and his company, Aardvark, “. . . will take financial responsibility for the additional costs
7 associated with my error.” A day earlier, Mr. Lyons of Aardvark writes Bill Oseran a lengthy
8 memo discussing the “pressurization fan” problems that have been created by the poor
9 engineering services supplied by Aardvark to the Oseran remodel project. He states in part
10 “. . . we probably need a larger fan.”

11 On November 11, 2009, counsel for Oseran wrote Reed Lyons of Aardvark Engineering
12 Services “. . . regarding the admitted error in the design of the elevator shaft and stairway
13 ventilation system on the renovation project for property located at 2030 Dexter Avenue No.,
14 Seattle.” The letter reviews earlier correspondence between Oseran and Lyons on the subject
15 and indicates that counsel has “. . . carefully reviewed all of the e-mail correspondence between
16 you on the subject, including correspondence dated September 10, 2008 where you concede that
17 Aardvark has ‘mis-[sic]sized both the shaft AND stairway pressurization fans.’” The letter then
18 reviews the differences between Oseran and Aardvark as to the cost of correction of the
19 substandard engineering provided by Aardvark. Page 2 of the letter identifies an estimate of
20 costs obtained by Oseran for the correction of the pressurization fan sizing issue in the amount of
21 \$11,390.53. The letter indicates that Mr. Oseran is willing to forego claims for additional
22 damages beyond that amount if the amount is paid not later than November 18, 2009. Because

1 of a possible mis-addressing of the first letter from counsel to Aardvark, it was resent on
2 December 7, 2009.

3 Suit was filed and counsel appeared for Aardvark. On February 1, 2010, counsel for
4 Aardvark (Mr. John Zehnder) e-mailed counsel for Oseran reciting in part that the “. . . parties
5 are arguing over a relatively small sum – all things considered. Apparently, plaintiff is alleging
6 \$11,390 of damages for work that has already taken place (i.e., the money has been spent).” Mr.
7 Zehnder then continues in this e-mail that the amount for this corrective work is excessive and
8 represents a “betterment.” The entire e-mail refers only to the work with respect to the specific
9 item which was the subject of all prior correspondence, the shaft and elevator pressurization fans.
10 Mr. Zehnder proposes “splitting the difference” between the Aardvark position of \$3,300 and the
11 Oseran position of \$11,390 to reach a settlement. He indicates that if Oseran agreed to accept
12 \$7,300, he would recommend it to his client.

13 Mr. Roy Lundin, a recently-hired associate fresh out of law school in the office of
14 Oseran’s attorneys, responded to the Zehnder settlement offer by e-mail dated February 9, 2010.
15 This letter indicates that the proposed “split the difference” between \$3,300 and \$11,390 is not
16 acceptable to Oseran, however, Oseran “. . . is agreeable to accepting \$9,000 as a settlement.” A
17 few days after that, on February 12, 2010, Aardvark Engineering Services through the offices of
18 Mr. Zehnder, files its answer and affirmative defenses to the Oseran Complaint. The answer
19 essentially denies the operative allegations of the Complaint.

20 After submitting its answer and affirmative defenses, Aardvark through Mr. Zehnder e-
21 mailed Mr. Lundin of the Oseran law firm rejecting the \$9,000 settlement proposal but indicating
22 that if Oseran would accept \$8,000 as he was “. . . virtually certain I can get that amount.” In the

1 same communication, he indicated that his firm would take the laboring “oar” in preparing the
2 settlement documents.

3 On February 16, 2010, Mr. Zehnder writes to confirm the \$8,000 settlement entered into
4 “pursuant to our exchange of e-mails and your voice mail [Roy Lundin’s] of this morning . . .”
5 (emphasis supplied). On February 17, Mr. Lundin responds to Mr. Zehnder “agreed. Payee
6 information forthcoming.”

7 Never, in all of the communication between counsel leading up to the conclusion of the
8 exchange of e-mails regarding the \$8,000 settlement, had there been any discussion of any claim
9 by Oseran against Aardvark other than the claim regarding the pressurization fans. The
10 settlement of the claim was reached as a compromise between the estimated costs to Oseran of
11 correcting the results of the poor engineering by Aardvark, and Aardvark’s estimate of the cost
12 of doing so “without betterment.” There was never any discussion leading up to the
13 February 16/17 exchange of correspondence about any other claims or any other future claims
14 between Aardvark and Oseran relating to the project.

15 The project itself represented the remodel of an entire structure to convert it from
16 industrial purposes to residential purposes. It was a major remodel engineered by Aardvark,
17 involving much more than simply the pressurization fans in the stairway and elevator shaft areas.
18 In the February 16 e-mail from Aardvark counsel Zehnder to Roy Lundin specifically limits the
19 settlement to the pressurization fan issue by stating that:

20 I write to confirm that we have reached a settlement in this matter
21 for the sum of Eight Thousand Dollars (\$8,000). (Emphasis
22 supplied.)

1 Roy Lundin, on behalf of Oseran, was accepting an \$8,000 settlement negotiated with
2 respect to the dispute about the costs of remedying defective work supplied by Aardvark for
3 elevator and stairway shaft pressurization fans. Nothing else. That is “this project” which was
4 the “subject of the Oseran Complaint in this matter. . . .” Never did the parties negotiate a
5 “global settlement” as the only claim by Oseran against Aardvark known to Oseran counsel was
6 the shaft pressurization issue. That is the only claim that was intended to be settled, it was the
7 only claim that was negotiated, and the dollar amounts involved specifically relate only to the
8 admitted fault of Aardvark Engineering Services in designing the elevator shaft and stairway
9 pressurization fans to comply with City fire codes.

10 At no time did plaintiff William Oseran ever authorize his counsel to enter into a “global
11 settlement” of all claims known or unknown between him and Aardvark. The only authorized
12 settlement was the \$8,000 for the shaft and stairwell pressurization fan sizing mistake by
13 Aardvark. This is all that had ever been discussed between Oseran and Aardvark, and this was
14 all that was ever discussed between the attorneys in terms of dollar amounts. Nothing was paid
15 by Aardvark for a “global settlement,” and none was negotiated by Oseran’s counsel. The
16 settlement refers to “this matter” and the claims by Oseran in “this Complaint,” referring only to
17 the shaft and stairwell pressurization fan sizing issue.

18 STATEMENT OF ISSUES

19 Did counsel for Oseran have authority to stipulate for settlement of anything other than
20 stair and elevator shaft pressurization system? Can the CR 2(A) “agreement” be specifically
21 enforced in spite of its vagueness? Did the parties have a “meeting of the minds” on the scope of
22 the claims to be released in the settlement? Was the settlement limited to the shaft and stairwell

1 pressurization fans from which the dispute arose? Did the parties intend a “global settlement” of
2 all claims known or unknown between Oseran and Aardvark on this major building remodel
3 project? Is there any consideration for a global settlement where the parties negotiated with
4 respect to a specific claim only? Was the exchange of e-mails on February 16-17, 2010 the
5 result of mutual mistake and/or unilateral mistake on the part of Oseran’s attorney precipitated
6 by the Aardvark attorney? If there was a settlement “contract,” should it be rescinded?

7 **EVIDENCE RELIED UPON**

8 The Declaration of Roy L. Lundin and Charles E. Watts.

9 **ARGUMENT/AUTHORITY**

10 1. **Counsel lacked authority** – Special authorization from the client is ordinarily
11 necessary to permit a dismissal of an action with prejudice. *State Ex Rel Gould v. Superior*
12 *Court for Clallam County*, 151 Wash. 413, 418, 276 Pac. 98 (1929); *Tegland*, 3A Washington
13 Practice, p. 23. Here the attorneys had authority to settle the claim that was discussed between
14 the parties from the inception and throughout the negotiations, but not to settle all other
15 “unknown claims.”

16 2. **Specific performance of the Settlement Agreement is impossible because of**
17 **vagueness** – In order to specifically perform a contract, the terms of the contract in the
18 memorandum must be complete. *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 965-7, 167 P.2d
19 1002 (1946) (“one of the fundamental rules respecting the specific performance of contracts is
20 that performance will not be decreed where the contract is not certain in its terms”). Here the
21 specific terms of the proposed release document are not complete, nowhere in the negotiations
22

1 was a “global release” discussed, and the acceptance by Lundin representing Oseran was only to
2 settle a specific claim as had been offered by counsel for Aardvark.

3 3. There was no new consideration for a “global release” – Every contract must
4 be supported by consideration. The parties in this case had negotiated for a settlement of the
5 “pressurization system” dispute only. Then at the last minute, counsel for Aardvark attempts
6 (apparently) to enlarge the settlement already reached beyond that agreed to. Going from a
7 settlement of a specific discreet claim to a “global settlement” with out additional consideration
8 violates the fundamental law of contracts requiring consideration. There was none to support a
9 global settlement, and therefore, any effort to enforce a global settlement should fail. A contract
10 must be supported by consideration to be enforceable. *Keystone Land & Development Company*
11 *v. Xerox Corporation*, 152 Wn.2d 171, 175-7, 94 P.2d 945 (2004) (“we adhere to our long-
12 standing juris prudence that agreements to agree are enforceable”). The absence of new
13 consideration for the “global” settlement is fatal to the Aardvark claim.

14 4. Settlement should be limited to “this claim” – meaning the pressurization
15 system claim – A clear reading of all of the negotiations leading up to the settlement disclose
16 that the only issue discussed between the parties was related to the dollar damages from the
17 defective design of the elevator shaft and stairwell pressurization system. This had been
18 discussed between Aardvark and Oseran prior to the filing of the lawsuit, and had been discussed
19 between counsel after the filing of the lawsuit. Never was any discussion had between the
20 parties or their counsel about unasserted or unknown claims being resolved in settlement
21 negotiations. Counsel had no authority to enter into a global settlement and did not intend to do
22

1 so. A contract should be given a reasonable meaning, not a strained interpretation. *Dickson v.*
2 *Hausman*, 68 Wn.2d 368, 413 P.2d 378 (1966).

3 5. **Contract is subject to rescission for mutual mistake** – Where there is a bona
4 fide mistake regarding material facts to a contract without culpable negligence on the part of the
5 party asserting mistake, the contract may be avoided and equity will decree a rescission.
6 *Lindeberg v. Murray*, 117 Wash. 483, 201 Pac. 759 (1921). Here each party was talking about,
7 apparently, a different brand of settlement. Oseran was talking about settling a specific claim
8 and believed that Aardvark was doing the same. Aardvark, on the other hand, apparently thought
9 it was talking about a global settlement. The parties were as “ships passing in the night.”
10 Rescission is the appropriate remedy.

11 6. **Even if there was only a unilateral mistake on the part of the Oseran**
12 **attorneys, the contract should be rescinded** – Unilateral mistake entitles a party to reform a
13 contract only if the other party engaged in fraud or inequitable conduct. That conduct is the
14 failure to disclose a material fact that it has a duty to disclose to the other party. Here, clearly,
15 during the negotiations, Aardvark’s counsel should have disclosed that it was negotiating for a
16 global settlement instead of referring only to “this matter” and similar limiting language in the
17 settlement negotiations.

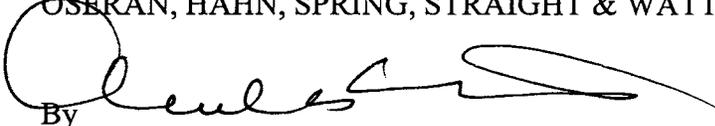
18 7. **Reformation is the appropriate remedy** – Reformation of a contract is an
19 equitable remedy employed to bring a writing that is materially at variance with the parties’
20 agreement into conformity with that agreement. Courts are not permitted to rewrite a contract
21 under the guise of reformation. *McKelvie v. Hackney*, 58 Wn.2d 23, 360 P.2d 746 (1961).

1 **CONCLUSION/RELIEF SOUGHT**

2 The court should decline to enforce any claimed "global settlement" as asserted by
3 Aardvark. The court should instead limit the settlement to the claim at issue, the elevator shaft
4 and stairwell pressurization systems, and dismiss without prejudice the remainder of the
5 Complaint. The contract with Aardvark is over, the construction is completed, and therefore, the
6 "claims" statute under construction law would govern commencement of claims based on future
7 discoveries. Any such future claims should be dismissed without prejudice as no separate
8 consideration was negotiated and no authority was had by the Oseran attorneys to make such a
9 global settlement. All of the contract principles and CR 2(A) require that the settlement
10 negotiations either be nullified, or that they be limited to the single issue which was the subject
11 of all the negotiations.

12 A proposed order is attached.

13 Dated: March 16, 2010.

14 OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.
15 
16 By _____
17 CHARLES E. WATTS, WSBA #2331
18 Attorney for Plaintiff Oseran
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APPENDIX C

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM OSERAN,
Plaintiff,
v.
AARDVARK ENGINEERING SERVICES, INC.
d/b/a A.E.S. Inc.,
Defendant.

No. 09-2-44171-5

**DECLARATION OF
CHARLES E. WATTS**

Charles E. Watts states and declares under penalty of perjury and upon his personal testimonial knowledge that he is in all respects competent to testify in this matter. Declarant states as follows:

1. Declarant is one of the attorneys for plaintiff William Oseran.
2. Declarant was the "lead attorney" in the law firm representing William Oseran. Declarant assigned this matter to Roy L. Lundin, a newly-hired associate in the firm. Mr. Lundin had recently graduated from Seattle University Law School after spending many years in the construction industry and Declarant felt that it would be a very good fit for his talents.
3. Declarant was responsible for the preparation, service and filing of the Complaint in this action. While the Complaint is general in nature, the only matter to the Declarant's

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1 knowledge that was in dispute between Oseran and Aardvark Engineering was the elevator shaft
2 and stair pressurization systems. Attached to this letter is correspondence of September 10, 2008
3 between Mr. Reed Lyons of Aardvark Engineering. Also attached is August 11, 2009 letter of
4 Aardvark Engineering to Oseran. Also attached is November 11, 2009 letter from counsel for
5 Oseran to Aardvark Engineering (re-sent on December 7, 2009).

6 4. All of the correspondence between Oseran and Aardvark and all of the
7 correspondence between counsel and Aardvark related only to the elevator shaft and stairwell
8 pressurization system. Never did counsel understand that any other issues existed between the
9 parties at this time.

10 5. The reason the Complaint is drafted in more generalized language was to take into
11 account the time that might elapse between the filing of the Complaint and trial when other
12 issues might arise between the parties on this very extensive and complex building remodel
13 project.

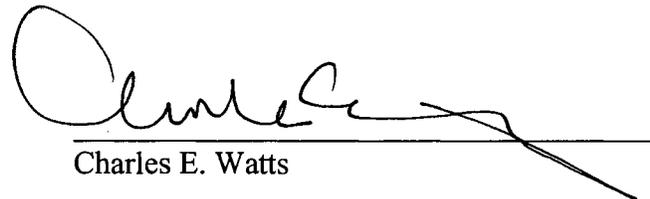
14 6. At no time did this firm have authority from Mr. William Oseran to settle all
15 claims that he might have in the future have against Aardvark. I was not aware of any other
16 claims that Mr. Oseran presently has against Aardvark, but I certainly never discussed with Mr.
17 Oseran the existence of future claims which he might not know about (for obvious reasons), nor
18 did I discuss with Mr. Oseran a global settlement of the claims that might arise in the future.
19 This settlement never would have happened if it had been presented as a global settlement during
20 negotiations.

21 7. During the negotiations, Mr. Lundin kept me apprised of what was going on and
22 at all times both he and I believed that we were settling a single claim asserted that gave rise to

1 the lawsuit, the claim for the "pressurization system." The correspondence with Mr. Zehnder
2 referred to "this matter" repeatedly, and the only "matter" we ever talked about, was the
3 pressurization system issue.

4 I certify, under penalty of perjury, under the laws of the State of Washington that the
5 foregoing is true and correct.

6 Dated this 16th day of March, 2010 at Bellevue, Washington.

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9 Charles E. Watts

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AES INC
Aardvark Engineering Services, Inc.
2940 Westlake Avenue North Suite 301 Seattle WA 98109
(206) 281-7379 fax (206) 352-7231

August 11, 2009

William Oseran

RE: Shaft pressurization costs.

Bill,

Regarding the costs from the contractors:

The original shaft pressurization scheme included two fans and hoods with motorized dampers. The third opening was for the elevator relief, which remained as-is and should not be included in this cost estimate.

First, Kyle shows that he spent \$1022.50 to cut openings in the shaft. As noted above, there were three openings cut but only two holes are part of the original pressurization system. The third opening was for elevator shaft relief, which remained unchanged. At the time the openings were cut, there was only a wood framed structure, sheathed in plywood. The openings were shown on the drawings prior to the construction of the shafts, so they should have been headed out during the framing. If they were not headed out, then that is an oversight of the contractor.

Kyle shows 24 hours; 15 supervision and 9 hours carpenter, to frame out three holes. Only one of these holes was un-used in the final configuration.

I spent 15 years in the field as a union carpenter before I became an engineer. During my career I spent several years as a general contractor and as a mechanical estimator. As an engineer I am required to constantly provide cost estimates as well as review bids and change order costs; I know what construction costs. It doesn't take nine hours to cut and frame three holes in a wood framed wall. Fifteen hours of supervision? I believe the invoice for cutting one un-used opening is highly questionable. One hole = one hour is more realistic, in my opinion..

Regarding the MCC invoice: It was essentially a lump sum, and hard to follow. Dave listed the following scope of work:

1. smoke dampers (none required, this application only requires low leak dampers, as I had specified)
2. hoods (there were two, one was re-used)
3. Motorized dampers (these are the same as item #1)
4. Pressurization power blower assemblies (the assemblies included the same hoods, sleeves and dampers as listed in items 1,2&3)
5. Dampers (these are the same as items 1,3 &4)
6. Louvers (there was one louver, but this was elevator relief, not part of the pressurization system)
7. Labor and materials

The actual unused equipment and materials that I am responsible for was one hood, two fans, and one motorized damper. Dave's numbers don't make sense to me, so I got fan assembly costs from a supplier:

Two fans with motorized shutters, wall collars, electronic speed control and weather hoods.

- Suppliers cost to the contractor \$1200.00 for two (2) fans and accessories.

Labor to install two small prop fans: 4 hours (per MEANS construction cost data)

I spent about twenty hours re-designing the shaft pressurization system. As I told you, the most straightforward approach would have been to remove the old fans and replace them with larger fans, which, by the way, were only nine inches larger than the original. To design a replacement using larger fans, my expended time would have been less than one hour. Additional time was spent showing you dozens of alternatives, locations, sizes, etc. This re-design was at your request, and realistically, should have been additional services. 20 hours = \$2,000. I have not charged you for these additional services.

The roofing, relocation of the sprinkler heads, cutting of additional openings in the shaft were due to your not wanting to enlarge the existing fan opening in the wall. I would have simply cut larger openings and installed larger fans. Your assertion that you had no extra quantities of some rare, expensive, imported cladding is an oversight on whoever ordered the material and not my responsibility. By the way, cutting openings larger does not require additional cladding.

Total costs incurred are then, as follows:

Cut one un-used opening in the shaft; One hour carpenter, one hour supervision	\$87.50
(2) fans with wall collars, motorized shutters, electronic speed controls & weather hoods	\$1200.00
Install two fan assemblies. 4 hours	\$200.00
Remove two fans. 2 hours	\$100.00
Relocate two electrical circuits.2 hours	\$100.00
Misc. materials	\$100.00
Sub Total	\$1787.50
Sales Tax 8%	\$143.00
15% overhead and profit	\$290.00
Total	\$2,220.50

I sent you a check over six months ago (check number 7159, dated 12/31/09 in the amount of \$3,300), which you have chosen not to cash. At that time, I considered my share of the costs solely based on the numbers Dave Shdo had provided. As you stated in your response to me at the time “ The \$3300 looks like it should be close....it may even be high for all I know...” Well, now that I have researched the actual costs for myself, it was a high number.

At this point, I think the cost of the un-used equipment was nearly equivalent to by my re-design costs. However, as I previously stated, I will not charge you for the re-design. I have enclosed a check for \$2,220.50 to cover the cost of the un-used equipment and labor to install and remove it. I have voided the six-month old check, which has remained un-cashed.

In my professional opinion, the cost estimates provided by your contractors, are unsubstantiated. My calculation of the actual costs was based on actual equipment quotes, MEANS construction cost data and my 42 years of experience in the construction industry as a tradesman, estimator, contractor and Professional Engineer.

Sincerely,



Reed Lyons, P.E.

Aardvark Engineering Services, Inc.

Re: Shaft pressurization

From: **William Oseran** (oseranwm@msn.com)
Sent: Fri 9/12/08 4:59 PM
To: Reed Lyons (reed@aardvarkengineering.us)

Reed this all sounds like a tremendous amount of overkill to me..... 900 pounds and 50" tall is shocking. I can say 'yes' to the door at the bottom of the stair, but I will leave the rest of the decisions up to you with maybe some amount of aesthetic comment from me. If there is anything else we can do to mitigate this 'fix' lets discuss it.
It's been one hell of a week and I need a drink.
I will talk to you on Monday.
WO

----- Original Message -----

From: Reed Lyons
To: WILLIAM OSERAN
Sent: Friday, September 12, 2008 4:35 PM
Subject: Re: Shaft pressurization

Bill,

I looked at the stair riser vents, and found some flattened expanded metal that would work well. We can get carbon steel or stainless steel, with 3/4" tall mesh opening that would give us a 75% free area. I think we need to do all nine (9) of the risers from the upper landing to the roof.
If we use a smaller mesh, the free area is decreased and air flow will be restricted.
Additionally, we would need three (3) 20"x42" egg crate grilles in the ceiling of the forth floor landing. This assumes installing an additional door to the roof stairs as we discussed.

The roof mounted fan or fans: Dave Shdo suggest that two smaller fans might be easier to handle.
If we use one fan, it weighs about 900 lbs, which means we need a crane,
If we use two fans, they weigh 325 lbs each, which we could roll into the elevator and hoist with a duct hoist from the deck.
A single large fan is 50" tall above the curb it would sit upon. The two small fans are 36" tall above the curb.
I'll put together a preliminary drawing next week.
Have a great weekend.

Reed Lyons P.E
Aardvark Engineering Services inc
(206) 281-7379
fax (206) 352-7231

----- Original Message -----

From: WILLIAM OSERAN
To: Reed Lyons
Sent: Wednesday, September 10, 2008 8:02 PM
Subject: RE: Shaft pressurization

Reed,

Thanks for staying on top of this. Lets make sure we get it right this time and we can discuss the financial part later.

Do the fans have to be on the roof?

Can we keep the fans we have and add additional smaller fans to get to where we need to be as we may have structural issues if we make the holes to big?

Can we use higher RPM motors to keep the size down?

Please coordinate with Dave Shdo.

Do we need to add any doors to make the new design work?

When you are sure you have all the design criteria we need to meet, lets have a site meeting with Dave Shdo, Kyle, the inspector (?) and (if need be) the structural engineer. There will probably be several ways to achieve the same result and we all want to minimize the amount of necessary work.
Please keep me posted on the progress and let me know how I can help.

Date: Wed, 10 Sep 2008 16:30:25 -0700
From: reed.lyons@verizon.net
Subject: Re: Shaft pressurization
To: oseranwm@msn.com; Kyle@keeverandassociates.com
CC: ed@ldgarchitects.com; coolingatmcc@aol.com

William,

Sorry to take so long to get back to you: I've been in meetings all day. My response to Ed's comments are as follows:

1. I tried to call Shawn as listed in Ed's e-mail, but it was a bad number. I've asked Ed to check again and get me the right number. I was agast at the number of 1000 CFM per door, so I called another engineer I have worked with to get a sanity check. He said that he also uses 1000 CFM per door, but has been told by numerous contractors that that number is way too high.
The problem with trying to calculate the fan size is that the engineer has no way of knowing how tight the shaft is constructed nor what the elevator door gap dimension will be. Never-the- less, it appears I have miss sized both the shaft AND stairway pressurization fans.
2. I have re-selected the fans based on 1000 CFM per door . The new fans will require larger openings. We will have to remove and replace the existing pressurization fans with these new fans.
My new selection is a 24" prop fan, 5000 CFM @ .25" S.P Greenheck model SS1-24-428-B5, 1/2 HP 120 v 1160 RPM direct drive.
3. As far as a buy-out by the elevator inspector, I think it is all about getting in contact with Shawn. He can verify the design and do the testing. I don't know if the elevator inspector actually does the testing, or just witness it. I'll know more when I talk to Shawn.

Sorry to have caused this mix-up. I will take financial responsibility for the additional costs associated with my error.

Reed Lyons P.E
Aardvark Engineering Services inc
(206) 281-7379
fax (206) 352-7231

----- Original Message -----

From: William Oseran
To: Reed Lyons ; Kyle Keever
Sent: Wednesday, September 10, 2008 12:33 PM
Subject: Fw: Shaft pressurization

Reed,

What do Ed's comments mean in relation to how you designed the current system? If your design will not meet these specs, what additional work would need to be done? How do we get buyoff from the head elevator inspector that Ed's comments are correct and complete?

WO

----- Original Message -----

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

*James H. Clark
Ginger Edwards Buetow
Gerald M. Hahn
Thomas M. Hansen
William C. Hsu
Robert C. Kelley*

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*M. Edward Spring
Matthew B. Straight
David M. Tall
Charles E. Watts*

Of Counsel:
Michel P. Stern

November 11, 2009

VIA U.S. MAIL AND CERTIFIED, RETURN RECEIPT REQUESTED MAIL

Reed Lyons, P.E.
Aardvark Engineering Services, Inc.
150 Nickerson, Suite 201
Seattle, WA 98109

RE: My Client: Bill Oseran / Arrons Storage Building Renovation

Dear Mr. Lyons:

Bill Oseran has referred to this office correspondence between your company and himself regarding the admitted error in the design of the elevator shaft and stairway ventilation system on the renovation project for property located at 2030 Dexter Ave. No., Seattle. I do not need to describe to you the background of the problem as it is thoroughly discussed in previous correspondence between you and Bill Oseran. I have carefully reviewed all of the e-mail correspondence between you on the subject, including correspondence dated September 10, 2008 where you concede that Aardvark has "miss [sic] sized both the shaft AND stairway pressurization fans." In the same e-mail you understandably, and to the credit of your firm, accept "financial responsibility for the additional costs associated with [Aardvark's] error." The same acknowledgment of responsibility is contained in your e-mails to Bill Oseran of September 9, 2008 where you acknowledge that your designs were based upon an outdated Elevator Code section of the Seattle Building Code.

Notwithstanding your frank, and laudable, admission of responsibility and undertaking to pay the resulting additional costs of bringing the pressurization system into compliance with applicable Building Codes, the issue remains of the amount of your responsibility. I have reviewed carefully your correspondence (with accompanying tenders of checks which have been rejected) regarding the cost of the redesign and reinstallation of the correct pressurization system. Your letter of August 11, 2009 suggests that the work can be done at a total additional cost to Mr. Oseran of \$2,220.50. Your figure, however, adopts a rather cavalier approach of placing yourself in a superior position to the building owner and general contractor in determining how to correct the defects in design which your firm created. You suggest that using "larger fans"

would be a preferable method. However, you fail to take into account the reasons why Mr. Oseran and the general contractor believe that larger fans are not an acceptable or appropriate cure.

The law only requires Mr. Oseran to take "reasonable steps" to mitigate any losses he might suffer as a result of your professional errors. Plainly, Mr. Oseran is not required to redesign and reconstruct his building as you wish in order to save you money which results from losses incurred by Mr. Oseran from your errors. Rather, Mr. Oseran is entitled to reasonably respond to the problem, and he has certainly done so here by the steps he has taken to obtain Code compliance.

Your obvious self-interest in minimizing the damages suffered by Mr. Oseran as a result of your errors in engineering, call into question your motives in diminishing the dollar amount of his losses. Because of your self-interest, I am satisfied that a judge or arbitrator would pay almost no attention to your claims of being in a better position to design a cure for the problem than Mr. Oseran and his general contractor and other consultants have accomplished. While a person with self interest in the outcome can testify, my experience is such testimony is given little weight in the outcome of disputes either by judge or arbitrator.

Keever & Associates, general contractors, have, in conjunction with the Mechanical Climate Control Corporation, prepared a bid/estimate for the necessary corrective work and its estimated costs. I enclose a copy of the Keever invoice dated November 2, 2009 and the Mechanical Climate revised invoice dated September 11, 2009. The total estimated cost of the corrective work is \$11,390.53. Your critique of this estimate fails to take into account several legal factors which I suggest you review with your attorney. First, in construction contract breach disputes, the courts or arbitrators offer wide latitude to the injured owner in calculating losses arising out of a construction defect or breach of contract. The reason for this is that the owner faces understandable difficulties in calculating the losses exactly. Second, in addition to the cost of correction of any defective work, the owner is entitled to recover consequential damages measured by lost income, carrying costs such as debt service, taxes and insurance, engineering expenses, construction expenses, tear-out expenses, and any other costs incurred or likely to be incurred that are proximately related to the contract breach or error in performance.

Mr. Oseran is willing to forego any claims for damages beyond the total of the Keever invoice which is enclosed with this letter which totals \$11,390.53. The earlier tenders of lesser amounts have been and remain rejected. If the foregoing amount is not received by Mr. Oseran on or before 4:00 PM on November 18, 2009, this offer of settlement will be withdrawn and Mr. Oseran has authorized me to commence suit or arbitration as he may elect to collect all damages, including consequential damages, arising out of your admitted design error and admitted financial responsibility.

Reed Lyons
November 11, 2009
Page 3

I encourage you to take this matter up with your attorney, but I also encourage you to respond appropriately within the time specified in this letter.

Very truly yours,

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

A handwritten signature in cursive script that reads "Ed Watts".

Charles E. Watts

Enclosure

cc: Bill Oseran
Ed Spring

OSERA , HAHN, SPRING, STRAIGHT & WATTS, P.S.

James H. Clark
Ginger Edwards Buetow
Gerald M. Hahn
Thomas M. Hansen
William C. Hsu
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M. Edward Spring
Matthew B. Straight
David M. Tall
Charles E. Watts

Of Counsel:
Michel P. Stern

December 7, 2009

VIA U.S. MAIL AND CERTIFIED, RETURN RECEIPT REQUESTED MAIL

Reed Lyons, P.E.
Aardvark Engineering Services, Inc.
2940 Westlake Ave. No, Suite 301
Seattle, WA 98109

RE: My Client: Bill Oseran / Arrons Storage Building Renovation

Dear Mr. Lyons:

I enclose a copy of my recent letter to you which has not received a response to this point in time. Mr. Oseran has authorized this firm to commence suit to obtain damages by reason of the errors in engineering services provided by your firm which resulted in additional costs to the project incurred by Mr. Oseran, together with consequential damages also incurred.

I notice in our file we have checks 1076 (August 11, 2009) and 7159 (January 13, 2009) which have been rejected and, consequently, not negotiated by Mr. Oseran. I return the originals of these checks to you with this letter. If you have a response to the recent letter from this office regarding the Oseran claim on the Arrons' Storage Building Renovation, please provide it immediately as I am in the process of preparing the suit papers for filing with the King County Superior Court and service on your organization.

Very truly yours,

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.



Charles E. Watts

Enclosure

cc: Bill Oseran
Ed Spring

APPENDIX D

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM OSERAN,

Plaintiff,

v.

AARDVARK ENGINEERING SERVICES, INC.
d/b/a A.E.S. Inc.,

Defendant.

No. 09-2-44171-5

DECLARATION OF ROY L. LUNDIN

Roy L. Lundin states and declares under penalty of perjury and upon his personal testimonial knowledge that he is in all respects competent to testify in this matter. Declarant states as follows:

1. Declarant is one of the attorneys for plaintiff William Oseran. Declarant was brought into this case by a senior partner in the firm, Charles E. Watts. Declarant had all of the contacts with counsel for defendant Aardvark, Mr. John Zehnder, Jr.

2. At all times in communicating with Mr. Zehnder regarding the claim of Oseran, the discussions were entirely about the stairwell and elevator shaft "pressurization system" issues. At no time did Mr. Zehnder nor I discuss any other claims between Oseran and Aardvark, if any exist. I have been not made aware of any other claims currently pending

ORIGINAL

3/16

1 between Oseran and Aardvark other than the pressurization system issues. That does not mean
2 there may not be claims in the future, only that there appear to be none known at this time.

3 3. In our discussions, Mr. Zehnder and I agreed that the claim is a small one and that
4 the differences between our clients were something that could be settled by a form of “splitting
5 the difference.” Again, always we were talking about the specific shaft pressurization plan, and
6 never did we discuss a global settlement and complete release of all claims that Oseran might
7 have now or in the future against Aardvark arising out of the entire building remodel project.

8 4. In the correspondence between Mr. Zehnder and me, we evaluated the claim as
9 small, we directed our efforts at settlement between the Aardvark number and the Oseran
10 number, and we dealt with only with the elevator shaft and stairwell pressurization corrective
11 issues. Mr. Zehnder made clear to me that his client thought there was a “betterment” and that
12 the Oseran damages for the pressurization system repair were excessive. I, on the other hand,
13 repeated the estimates that Oseran had received from contractors for the pressurization repair
14 work. That created the difference between the parties and it was this difference which was
15 settled by us for \$8,000 together with a release of the Oseran claims for this issue.

16 5. My e-mail to Mr. Zehnder of February 18, 2010 (copy attached as part of Exhibit
17 B) accurately states my belief as to what we were negotiating about in settling “this claim.” We
18 were only settling the “stair and elevator shaft pressurization issues.”

19 6. In Mr. Zehnder’s e-mail to me of February 16, 2010, he refers several times to the
20 settlement of “this matter.” In addition, the letter of February 16 refers to settlement of “all
21 claims,” and as far as I knew at the time, the only claim that Oseran had asserted against
22 Aardvark was the stairwell and elevator shaft pressurization dispute. The way I read

1 Mr. Zehnder's letter and the reason I agreed to it was that we were settling only claims that had
2 been asserted but amounted to something less than \$12,000 on the part of Oseran, for his out-of-
3 pocket expenses (exclusive of other costs and consequential damages). On the other hand,
4 Aardvark had admitted liability, and had already offered something over \$3,000 in settlement.
5 The \$8,000 settlement Mr. Zehnder and I reached was based on a rough "split the difference"
6 between those two numbers and was only for the claim involving this "pressurization system."

7 7. At no time did Mr. Zehnder and I agree or negotiate for the issuance by Oseran of
8 a complete release of all claims known or unknown. At no time did Mr. Oseran give us authority
9 to make such a release as our only authority received from Mr. Oseran was to settle the stairwell
10 and elevator pressurization system issue that was being negotiated. Never did Mr. Oseran
11 authorize me or this firm to negotiate for a global release of all claims known or unknown.

12 8. Never did Mr. Zehnder authorize payment on behalf of his client for any sums in
13 addition to the settlement of the stairwell and elevator shaft pressurization system. His client
14 paid nothing toward obtaining a global settlement of claims that are known and unknown. There
15 was never any need for settlement of unknown claims or any claims between the parties because
16 the only claim at issue and the only claim discussed was the pressurization system.

17 9. Attached to this declaration (as a part of Exhibit A) is a February 1, 2010 letter
18 from Mr. Zehnder where in the penultimate paragraph he states in the first sentence that he is
19 "trying to resolve this matter, . . ." He then offers to settle for something between the Aardvark
20 and Oseran numbers with respect to the pressurization system issue. He offers nothing for a
21 global settlement. In the final sentence of the same paragraph he again refers to the fact that he
22 believes a split the difference settlement will "get this matter resolved." I believe then and

1 continue to believe that the term "this matter" meant only the shaft pressurization issue and
2 nothing else. It was on that basis that I agreed to the settlement offer proposed. Indeed,
3 throughout the February 1, 2010 e-mail from Mr. Zehnder to me, he refers to "this matter" as
4 being the dispute about the shaft pressurization system only. The third paragraph in that e-mail
5 describes the components of that system as fans and openings, not all of the other engineering
6 aspects of the entire project.

7 10. On February 9, 2010, I responded to Mr. Zehnder's settlement proposal (copy
8 attached as Exhibit C) advising him that the case was "only about damages, . . . since your client
9 has admitted liability. . . ." Obviously, the only claim that I was referring to in that letter was the
10 claim in which Aardvark had admitted responsibility, the claim relating to elevator shaft and
11 stairway pressurization systems. I then discussed with Mr. Zehnder the fact that we agree the
12 claim is a small one. Throughout my negotiations with Mr. Zehnder I believed that we were
13 only settling the elevator and stairwell pressurization claim and not discussing a global release.

14 11. Attached hereto are true copies of e-mails between Mr. Zehnder and myself dated
15 February 1, 2010, February 2, 2010 (attached as Exhibit A), February 16, 2010, February 17,
16 2010 (two), February 18, 2010 (attached as Exhibit B).

17 I certify, under penalty of perjury, under the laws of the State of Washington that the
18 foregoing is true and correct.

19 Dated this 16th day of March, 2010 at Bellevue, Washington.

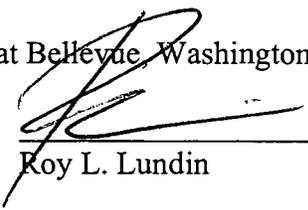
20 
21 _____
22 Roy L. Lundin

EXHIBIT A

Roy L. Lundin

From: Roy L. Lundin
Sent: Tuesday, February 02, 2010 3:18 PM
To: 'John Zehnder'
Cc: Ted Watts
Subject: RE: ER 408 Settlement Proposal -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John,

Thank you for this correspondence. We will get back to you in the next few days after discussing with our client.

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Monday, February 01, 2010 3:44 PM
To: Ted Watts; Roy L. Lundin
Cc: Greg Thatcher
Subject: ER 408 Settlement Proposal -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

ER 408: PRIVILEGED, INADMISSIBLE AND CONFIDENTIAL

Gentlemen:

As you know, we represent defendant Aardvark Engineering in the above-referenced matter. I write to propose we attempt to reach a quick settlement/resolution in this matter. At present I have no settlement authority, but I am prepared to request authority consistent with the following.

Based on my review of this matter, it appears the parties are arguing over a relatively small sum – all things considered. Apparently plaintiff is alleging \$11,390 of damages for work that has already taken place (i.e. the money has been spent). My client, who appears to have admitted there was a minor design error – though it appears the admission is protected by ER 408 – initially had offered to resolve the matter for \$3,300. The documents indicate plaintiff believed this amount would be more than sufficient. In that vein, though plaintiff expended \$11,390 – which we will assume is accurate for purposes of trying to resolve this matter – it appears that this expenditure was a “betterment,” not simply a correction of Aardvark’s error.

That is, the simple fix to Aardvark’s oversight would have been to replace the fans with larger fans, and enlarging the openings to accommodate them. However, what plaintiff decided to do was choose an alternate location for the entire system, which is why the fix plaintiff chose was \$11,390 instead of several thousand dollars or

less. This constitutes, essentially, a “value added” change order for which plaintiff would have had to pay for. Of course, we also have arguments about whether \$11,390 was otherwise reasonable for the work that was done.

We assume you have equally compelling arguments to all the foregoing. However, based on our review of the file, we do not see that either party may seek their attorney fees and costs in this matter (but please let me know ASAP, and explain, if you see things differently). As such, litigation of this matter will quickly eat up plaintiff’s net recovery and he will spend a dollar (or more) to get a dollar. My client has a \$2,500 deductible on his policy – which my client assumes is gone no matter what is done here – and thereafter has no further liability. Thus, you are essentially dealing with an insurer that has unlimited funds to litigate this matter if it so chooses. That is not a threat, just a reality as to my client having no skin in the game at this point. In any event, though litigating this matter would be nice for my bank account, I think it would be better for both sides to reach a quick settlement, as proposed next.

For purposes of trying to resolve this matter, I am willing to assume my client’s \$3,300 offer was an accurate assessment for a fix (though it probably is lower), and that the \$11,390 for the work performed is an accurate and reasonable billing. With these assumptions, the parties are approximately \$8,000.00 apart. If plaintiff is willing to split the difference to quickly settle this matter, please advise. Please again note that I have no authority at this point, and that this is not an invitation for a counter-offer. My effort here is to simply and quickly cut to the chase. If plaintiff is agreeable, I would go back to my client’s insurer and request authority for \$7,300. I believe I can get that amount if I was to hear from you that it would get this matter resolved.

We look forward to hearing from you. Thank you for your consideration.

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

Roy L. Lundin

From: Roy L. Lundin
Sent: Thursday, January 21, 2010 3:37 PM
To: 'John Zehnder'
Cc: Ted Watts
Subject: RE: Extension for Answer -- RE: Oseran v. Aardvark Engineering

John: I understand and think that will be fine. If you can get it to us beforehand, please do. Otherwise, we will expect it by the 12th. Thanks for letting me know. Best, Roy

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Thursday, January 21, 2010 3:00 PM
To: Roy L. Lundin
Cc: Ted Watts
Subject: Extension for Answer -- RE: Oseran v. Aardvark Engineering

Roy:

Thank you, but can you give us to February 12? My client just left and will be out of the state for over a week, and when he gets back I am out or otherwise unavailable the following week. My week of February 8 looks pretty open, and we will not wait to February 12 if we can file earlier. OK? Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248
e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]
Sent: Thursday, January 21, 2010 2:09 PM
To: John Zehnder
Cc: Ted Watts
Subject: Oseran v. Aardvark Engineering

Hi John,

I am working with Ted Watts on the Oseran v. Aardvark Engineering matter. He asked me to reply to your email from yesterday.

We are happy to consider your email a notice of appearance and not seek a default against Aardvark. Although I do not have the exact dates before me, I believe your answer is otherwise due on or about January 25. If you are able to answer not later than February 5, that would be fine.

Please let me know if this arrangement is not agreeable. Otherwise, please feel free to contact me at any time with respect to this matter.

Best regards,

Roy Lundin
OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.
Skyline Tower, Suite 850
10900 N.E. 4th Street
Bellevue, WA 98004
phone: 425.455.3900
fax: 425.455.9201

EXHIBIT B

Roy L. Lundin

From: Roy L. Lundin
Sent: Tuesday, February 23, 2010 10:02 AM
To: 'John Zehnder'
Cc: Ted Watts
Subject: RE: Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

Your correct, we disagree. Our client will not agree to execute a release with the scope outlined in your e-mail of February 16, 2010. We note your client has answered and will file a Confirmation of Joinder and proceed to trial.

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Monday, February 22, 2010 4:50 PM
To: Roy L. Lundin; Ted Watts
Cc: Greg Thatcher
Subject: Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Ted and Roy:

Suffice it to say we disagree with your position and your attempts to justify same.

We prepared a written settlement agreement, pursuant to CR2A. As you well know, it is not a “courtesy” but a critical requirement of settlement that the critical terms be put in writing with the party’s agreeing to same. In that regard, you received the e-mail and read it within minutes of my sending it (per the message read confirmation we received). You then waited more than 24 hours to contemplate the words of my e-mail, raise any questions you might have had, and then respond. No questions or issues were raised. You then responded with an “agreed.”

You are bound by your response, and cannot characterize your responsive “agreed” e-mail as an errant key stroke nor as a mistake simply because you failed to read the e-mail carefully or misunderstood its clear import. In fact, as noted in my first e-mail on this dispute, I highlighted the scope and intent of the settlement agreement by adding the following to be absolutely clear: **“a complete pay money and close file forever deal”**. Your “agreed” binds your client to that. As you know, parties are bound by their clear written agreements. The written agreement here is beyond clear, particularly given the foregoing language I added. When you responded with an “agreed,” we had (and have) a right to rely upon that.

Next, it is black letter law that as to defendant Aardvark your client’s instruction and authority are not relevant to this dispute. As your client’s agent, your client is bound. I have litigated this precise issue before, and the Court has always agreed with me (which should be obvious because, if it were otherwise, no settlement agreement (or other contract) struck between attorneys/agents would ever be binding – and that is not the law.) To the degree you exceeded

your client's authority, that is now between you and your client, and it does not involve Aardvark nor impact the binding nature of the settlement agreement here.

Next, as you know, it is standard operating procedure for the parties in such cases to reach full and complete settlement agreements to completely and forever end the potential for further litigation. It is not standard for parties to reach piecemeal resolutions (which piecemeal resolution *would* be unusual). It is well understood that defendants, in particular, want and expect finality. That was our reasonable expectation here, and why we put that expectation and understanding in writing, so there would be no mistake about it. If there were open issues, you had the opportunity to raise them. You failed to do so, which brings us to the final issue.

It simply may be that your client is suffering buyer's remorse, and your firm is caught in the middle. On the other hand, it may be that your client is seeking to engage in some kind of trick. That is, plaintiff seeks to raise the elevator issue, collect monies, and then raise another issue out of the blue to continue to collect monies. Does your client have any such new issues in mind? Is there something your client is not telling us? If there is not a real potential issue out there, is this really worth the effort (and the significant unreimbursed cost) for your client? In any event, the only thing that matters here is that my client has a binding settlement agreement, and a right to enforce it.

To bring this matter to a quick conclusion, we are requesting that by or before end of business Friday, February 26, 2010, you confirm your client will execute a release in scope consistent with my e-mail of February 16, 2010 and our subsequent exchange on this dispute. If we do not receive confirmation by or before that date, we will proceed to file a motion to enforce the settlement agreement. In addition, should our motion be unsuccessful, you can expect that this matter will then be fully litigated on appeal (before, and if necessary after, trial).

We look forward to hearing from you. Thank you.

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]

Sent: Monday, February 22, 2010 10:50 AM

To: John Zehnder

Cc: Ted Watts

Subject: RE: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

Ted Watts and I have reviewed the file and discussed this issue. We are disappointed we have come to impasse. Moreover, we are at a complete loss to understand your position. Frankly, it would seem that your February 16, 2010 email, which you have now more fully explained and emphasized, was less a courtesy and more an attempt to expand the scope of settlement far beyond that which had clearly been contemplated by all of us up to that point.

Going back to the beginning of this process, you approached us, without settlement authority, in an attempt to "reach a quick settlement/resolution in this matter," which you described as involving "a minor design error." For the purpose of resolving "this matter," you offered to seek your client's approval to pay our client \$7,300 for the \$11,390 "work performed" for "a fix" to the underlying design error; you were hopeful that by addressing "this expenditure" we could "get this matter resolved." Even though we were led to believe you were operating without authority, we went to the effort of discussing your "offer" with our client and, with authorization, responded with our letter dated February 18, 2010 in regard to settling "this case."

In response to our letter, you graciously offered to prepare the settlement agreement and dismissal documents to "sweeten the deal" and get our client a "quick resolution for little expenditure." In good faith, we accepted your offer via voicemail, as you urged. Even though the correspondence between us up to this point accurately contemplated the scope of our agreement, you felt compelled to send us the email currently at issue. With respect to the forthcoming documents, we construed the purpose of this email as a merely confirmatory in nature. After all, we had reached "settlement in this matter" and you were going to forward "standard settlement agreement language" to "close file." Otherwise, the true purpose of this email seemed to be to request payee information, which was necessary information not yet provided. It is now clear to us that we misread your intent. As a result, our responding with a casual "agreed" was a mistake, a mistake engendered by the previous limits of our negotiations and our reliance on upon you to accurately memorialize the settlement agreement as we had negotiated.

The bottom line, all of our correspondence involved only the single claim brought by our client against Aardvark in the underlying complaint. Thus, we are skeptical whether you reasonably expected that our client would settle not only the claim in this matter but also any and all "claims" that may arise from the work now or in the future (i.e., all potential claims), which you appear to insist upon. Further, this limited deal was all that our client authorized. See e.g., *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303-05, 616 P.2d 1223 (1980); *Morgan v. Burks*, 17 Wn. App. 193, 199-200, 563 P.2d 1260, (Div. 2 1977). Our client will agree to provide a complete release and dismissal of the claim alleged in the underlying suit (elevator shaft and stairwell pressurization system design error), which is the subject of this matter and completely consistent with our settlement negotiations. If this scope is not agreeable, we will proceed to trial.

Best regards,

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]

Sent: Friday, February 19, 2010 2:55 PM

To: Roy L. Lundin

Subject: RE: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

No worries. I'm in no rush to run off to the court house. Have a pleasant weekend. Thanks.

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]

Sent: Friday, February 19, 2010 2:33 PM

To: John Zehnder

Subject: RE: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

I have been out of the office today and Ted is gone for the afternoon. I spoke with him briefly over the phone, and we plan on getting back to you Monday. Sorry for the short delay.

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]

Sent: Thursday, February 18, 2010 4:31 PM

To: Roy L. Lundin

Cc: Greg Thatcher

Subject: RE: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Thank you. I will look forward to hearing from you. Suffice it to say, it would pain me to have to litigate this. Love to simply put this to bed. Thank you.

Very truly yours,

John E. Zehnder Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]

Sent: Thursday, February 18, 2010 2:50 PM

To: John Zehnder

Subject: RE: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

I disagree with your position, but I will review the file and discuss the issue with Ted Watts. I hope to get back to you tomorrow afternoon. (I am in court in the morning.)

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]

Sent: Thursday, February 18, 2010 1:08 PM

To: Roy L. Lundin

Cc: Ted Watts; Greg Thatcher

Subject: Problem -- RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Importance: High

Roy:

I note your "clarification." We will not be so limiting the release. Please see the language of my e-mail confirming the settlement, which states we are paying \$8,000.00...:

"...in exchange for a complete release and dismissal of **all claims relating to Aardvark's work** (and its employees, agents, insurers...etc., per standard settlement agreement language) **on the project** that is the subject of Oseran's complaint in this matter (i.e. **a complete pay money and close file forever deal**)."

(Emphasis mine.) This language makes it quite clear that our \$8,000.00 was in exchange for finality, and not to leave open the door for a later suit against Aardvark. That is fairly standard in such litigation, and it was the clear intent here, which I emphasized in the parenthetical language just to make sure.

I hope this is not going to cause things to degenerate. Please speak with you client. If he will not agree, we will be left with no choice but to file a motion with the court to enforce the settlement, regarding which we will be asking for all fees and costs associated with doing so. I would hate to do that given how well this has already gone to date.

Please advise ASAP. Thank you.

Very truly yours,

John E. Zehnder Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]

Sent: Thursday, February 18, 2010 11:34 AM

To: John Zehnder

Cc: Ted Watts

Subject: RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John,

Payee: William Oseran and OFLP A Washington Limited Partnership

TIN: 91-1705562

Address: 1601 Calhoun, Seattle, WA 98112

Clarification: Please draft the release specific only to the stair and elevator shaft pressurization issues. (Aardvark did other work for systems in the building to which the release should not apply.)

Thanks,

Roy

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Thursday, February 18, 2010 11:07 AM
To: Roy L. Lundin
Cc: Greg Thatcher
Subject: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Sorry, also need to know how check is to be made out, of course. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248
e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: John Zehnder
Sent: Thursday, February 18, 2010 11:06 AM
To: Roy L. Lundin
Cc: Greg Thatcher
Subject: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Thank you. The insurer requested the following to cut the check:

"Will need the name of the payee, the address of the payee and the Tax I.D. number of the payee"

I have your address, but not your client's. Please get me the address for your client at time of sending me their tax ID.

Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

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Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248
e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]
Sent: Thursday, February 18, 2010 8:50 AM
To: John Zehnder
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Thanks, John; the feeling is mutual. Oseran Hahn's TIN is 91-0917335; I will forward our client's tax identification number when received. Roy

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Wednesday, February 17, 2010 4:09 PM
To: Roy L. Lundin
Cc: Ted Watts; Greg Thatcher
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Excellent! Nice to actually get one done quickly for a change. It has been a real pleasure working you folks. We will get the settlement and dismissal documents over to you shortly. Thanks!

Very truly yours,

John E. Zehnder Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248
e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]
Sent: Wednesday, February 17, 2010 2:47 PM
To: John Zehnder
Cc: Ted Watts
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

Agreed. Payee information forthcoming.

Best,

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Tuesday, February 16, 2010 1:38 PM
To: Roy L. Lundin
Cc: Greg Thatcher
Subject: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)
Importance: High

ER 408

Roy:

Pursuant to our exchange of e-mails and your voicemail of this morning, I write to confirm that we have reached a settlement in this matter for the sum of \$8,000.00 (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange for a complete release and dismissal of all claims relating to Aardvark's work (and its employees, agents, insurers...etc., per standard settlement agreement language) on the project that is the subject of Oseran's complaint in this matter (i.e. a complete pay money and close file forever deal). Please respond to this e-mail with an "agreed" and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran's tax ID number. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

EXHIBIT C

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

James H. Clark
Gerald M. Hahn
Thomas M. Hansen
William C. Hsu
Robert C. Kelley
Roy L. Lundin

ATTORNEYS AT LAW
10900 N.E. Fourth Street #850
Bellevue, Washington 98004
Telephone (425) 455-3900
Facsimile (425) 455-9201
www.ohswlaw.com

M. Edward Spring
Matthew B. Straight
David M. Tall
Charles E. Watts

Of Counsel:
Michel P. Stern

February 9, 2010

Mr. John Zehnder
Scheer & Zehnder, LLP
701 Pike Street, Suite 2200
Seattle, Washington 98101

Re: *Oseran v. Aardvark Engineering*
Oseran Response to Aardvark's ER 408 Settlement Proposal

Dear John:

As you know, we received your email dated February 1, 2010, which outlined your suggested approach to resolving this case. The purpose of this letter is to respond to that proposal. THIS RESPONSE, LIKE YOUR PROPOSAL, SHOULD BE CONSTRUED AS AN OFFER TO COMPROMISE AND IS THEREFORE, PRIVILEGED, INADMISSIBLE, AND CONFIDENTIAL UNDER ER 408 AS WELL.

Because this case is only about damages, and since your client has admitted liability, we are in a relatively strong position under the law. The owner is given a lot of latitude in proof of the amount of loss once liability is established. *V.C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1381 (1973).

We have conferred with our client and have been granted settlement authority consistent with the terms herein. It should be noted, our client's first choice is to not settle, but he realizes the practicality of doing so. In addition, we question the applicability of the betterment doctrine in this case and the sufficiency of \$3,300 as an accurate assessment for a fix. Moreover, our client has incurred direct, out-of-pocket expenses over and above the \$11,390, which only represents the general contractor expense. These additional expenses do not include such indirect costs as filing fees, cost of service, and the like, which our client has also incurred. Also excluded from the actual contractor-cost amount are consequential losses to our client from delays, such as carrying costs and loss of use.

As a result, our client views both figures as unreasonably low, and is uncomfortable simply "splitting the difference." However, he is agreeable to accepting \$9,000 as settlement. Please note, this figure is not meant to be a counteroffer to your proposal. We note that your proposal was conveyed without authority and as such cannot view it as a bona fide offer of compromise. This comment is not mean disparagingly; to the contrary, we appreciate your taking the initiative and respect your work.

John Zehnder
February 9, 2010
Page 2

Please present this offer of compromise to your client at your earliest convenience. We look forward to hearing from you and resolving this matter in accordance with the terms outlined above.

Very truly yours,

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

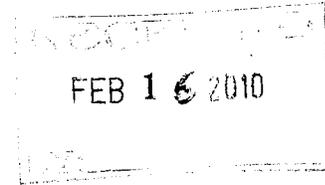
A handwritten signature in black ink, appearing to be "Roy L. Lundin", written over the printed name.

Roy L. Lundin

cc: Ted Watts

APPENDIX E

1 THE HONORABLE JULIE SPECTOR



8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR KING COUNTY

10 WILLIAM OSERAN,

11 Plaintiff,

NO. 09-2-44171-5

12 v.

13 AARDVARK ENGINEERING SERVICES,
INC, d/b/a A.E.S. Inc.,

ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S
COMPLAINT

14 Defendant.

15 NOW COMES defendant, by and through counsel, Scheer & Zehnder LLP, and
16 hereby submits its Answer and Affirmative Defenses to plaintiff's Complaint by admitting,
17 denying, and alleging as follows:
18

19 **ANSWER**

20 1. Defendant lacks sufficient information and knowledge to form a reasonable
21 belief as to the truth of the allegations in paragraph 1 and therefore denies them.

22 2. Defendant lacks sufficient information and knowledge to form a reasonable
23 belief as to the truth of the allegations in paragraph 2 and therefore denies them.

24 3. Defendant admits the allegations in paragraph 3.
25
26

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S
COMPLAINT – Page 1

18 230 gb110902

COPY

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

2/12

1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the State of Washington, that the
3 following is true and correct:
4

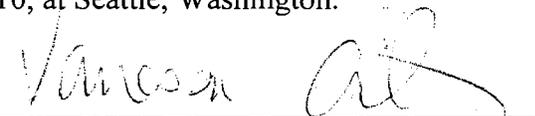
5 I am employed by the law firm of Scheer & Zehnder LLP.

6 At all times hereinafter mentioned, I was and am a citizen of the United States of
7 America, a resident of the State of Washington, over the age of eighteen (18) years, not a
8 party to the above-entitled action, and competent to be a witness herein.

9 On the date set forth below I served the document(s) to which this is attached, in the
10 manner noted on the following person(s):
11

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
CO/ Plaintiff William Oseran Charles E. Watts Oseran Hahn Spring Straight & Watts PS 850 Skyline Tower 10900 NE 4th St. Bellevue, WA 98004-5873	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail

12 DATED this 12th day of February, 2010, at Seattle, Washington.

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17 
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19 Vanessa Acierto

APPENDIX F

Mij

THE HONORABLE JULIE SPECTOR
March 18, 2010
ORAL ARGUMENT REQUESTED

RECEIVED
MAR 22 2010

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

WILLIAM OSERAN,

Plaintiff,

NO. 09-2-44171-5

v.

~~PROPOSED~~ ORDER GRANTING
MOTION TO ENFORCE SETTLEMENT
AGREEMENT

AARDVARK ENGINEERING SERVICES,
INC. d/b/a A.E.S. Inc.,

Defendants.

[Clerk's Action Required]

I. BACKGROUND

This matter coming before the Court on defendant's Motion to Enforce Settlement Agreement, and the Court being fully advised in the premises;

This Court having reviewed:

1. Defendant's Motion to Enforce Settlement Agreement;
2. Emails between attorneys for the parties;
3. Release of All Claims and Settlement Agreement;
4. _____;
5. _____;

~~PROPOSED~~ ORDER GRANTING MOTION TO ENFORCE
SETTLEMENT AGREEMENT – Page 1

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

ORIGINAL

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II. FINDINGS

This Court finding that the parties entered into a settlement agreement on February 17, 2010;

This Court finding that the terms of the settlement agreement, and in particular that it released "all claims" and was a "close file forever deal," were clear and unambiguous;

This Court finding that the objective intentions of the parties can be determined from the words used in the February 17, 2010, settlement agreement;

This Court also finds that defendant Aardvark incurred attorney fees and cost to enforce the clear and unambiguous February 17, 2010, settlement agreement;

This Court finding that the Release of All Claims and Settlement Agreement contains the terms agreed to by the parties in their February 17, 2010, settlement agreement;

This Court additionally finding Reserved

1 CERTIFICATE OF SERVICE

2 I certify under penalty of perjury under the laws of the State of Washington, that the
3 following is true and correct:
4

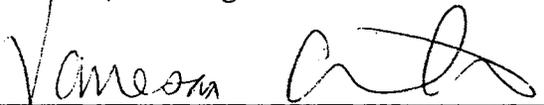
5 I am employed by the law firm of Scheer & Zehnder LLP.

6 At all times hereinafter mentioned, I was and am a citizen of the United States of
7 America, a resident of the State of Washington, over the age of eighteen (18) years, not a
8 party to the above-entitled action, and competent to be a witness herein.

9 On the date set forth below I served the document(s) to which this is attached, in the
10 manner noted on the following person(s):
11

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<p>12 <u>CO/ Plaintiff William Oseran</u> 13 Charles E. Watts 14 Roy L. Lundin 15 Oseran Hahn Spring Straight & Watts PS 16 850 Skyline Tower 10900 NE 4th St. Bellevue, WA 98004-5873</p>	<p> <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Hand Delivery (Delivered on <input checked="" type="checkbox"/> Via E-Mail 3/10/10) <input type="checkbox"/> Via Overnight Mail </p>

17 DATED this 9th day of March,2010, at Seattle, Washington.

18 
19 _____
20 Vanessa Acierto

10/15/11

10/15/11

10/15/11

EXHIBIT A

RELEASE OF ALL CLAIMS AND SETTLEMENT AGREEMENT

1. Defendant AARDVARK ENGINEERING SERVICES, INC., d/b/a A.E.S., INC., agrees to pay the total sum of eight thousand dollars (\$8,000.000) in full settlement of the lawsuit and all claims as set forth in the email settlement (hereafter, "Email Agreement") entered into on February 17, 2010. The Email Settlement, attached hereto as Exhibit A, is fully incorporated and integrated into this Release of All Claims and Settlement Agreement (hereafter, "Release").

2. For and in consideration of payment of the above-referenced amount, the receipt and sufficiency of which is hereby acknowledged, Plaintiff WILLIAM OSERAN, as well as his successor, heirs, and assigns (collectively, "Releasers"), does hereby agree to forever release, acquit, and discharge Defendant, as well as its attorneys, insurers, adjusters, employees, agents, successors or assigns, predecessors, parent and subsidiary companies, and all other persons or entities who are claimed to be or may be liable for Defendant's actions (collectively, "Released Parties"), of and from any and all claims, demand, damages, losses, liabilities, suits, litigation, and causes of action of whatsoever kind, nature, or description, present and future, now known or hereafter to be discovered, whether arising in law or equity, upon contractor or tort, under state, federal, or common law, or otherwise, which the Releasers now have, have had, or hereafter may have or claim to have, against any one or more of the respective Released Parties for or by reason of any act, omission, matter, cause or otherwise in any way arising from and/or relating to the August 16, 2006, contract between Plaintiff and Defendant, all work performed by Defendant on behalf of Plaintiff, as well as Plaintiff's action in the Superior Court of King County, State of Washington, Cause No. 09-2-44171-5 SEA (the "Lawsuit"). The Releasers will execute all necessary pleadings to dismiss the lawsuit with prejudice and without fees and costs. The Releasers and Released Parties each bear their own attorney fees and costs.

3. This Release forever discharges the Released Parties from any cause of action or obligation, known or unknown, and whether the same may hereafter arise, develop, be discovered, including, without limitation the generality of the foregoing, any and all claims and demands which the Releasers have asserted or could have asserted against the above Released Parties arising out of and/or related to the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, and the Lawsuit.

4. Also in consideration of the above-referenced payment, Releasers agree to satisfy all debts or liens, including, but not limited to, mechanics liens and construction liens, owed to any source whatsoever. In the event that a lienholder seeks repayment from any of the Released Parties, Releasers agree to defend, indemnify, and hold the Released Parties harmless from any and all such liens – and the related losses and liabilities – and to pay the reasonable attorney fees incurred by the Released Parties in defending against any such claims and legal or other actions relating hereto.

5. The Releasers agree that this Release, and the giving of consideration therefore, is not an admission of liability by any one or more of the Released Parties – which liability

is expressly denied – and is given in full settlement and compromise of all claims, present and future, known or unknown, and also is expressly intended to discharge all actions for any and all future claims, including effects or consequences thereof not now known but which may later develop or be discovered, and all causes of action therefore. Releasors agree to cooperate to enforce and implement this Release and its intent.

6. The undersigned Releasor – Plaintiff WILLIAM OSERAN – does hereby declares the he has fully read and understood the terms of this Release and the he voluntarily accepts these terms for the purpose of making a full and final compromise and settlement of any and all claims – past, present, future, disputed or otherwise, both known and unknown – on account of the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, and the Lawsuit. The Releasor also declares that he has had the opportunity to review this Release with legal counsel, and has either availed himself of such opportunity or has elected not to consult an attorney in this regard. In either case, the Releasor represents that he has fully read and understood all terms of this Release and that he enters it knowingly and willingly, with complete understanding of its import and effect. The Releasor represents that he is of sound mind and is fully capable of entering this Release as his own willful and volitional act. The Releasor further understands that the express purpose of this Release is to forever bar any further or additional claims of any kind whatsoever arising out of or in any way connected with, or related to, the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, or the Lawsuit.

7. This Release extends to – and discharges, binds, and inures to the benefit of – the Releasors, the undersigned Plaintiff and all heirs, executors, successors, assigns, administrators, representatives, underwriters, beneficiaries, attorneys, and agents.

8. The Release is entered into in the State of Washington and is to be construed under Washington law.

[SIGNATURES ON PAGE 3]

IN WITNESS THEREOF, dated this _____ day of _____, 2010.

WILLIAM OSERAN, Plaintiff

ATTORNEY'S GUARANTEE

The undersigned attorney for Plaintiff WILLIAM OSERAN, in connect with the matters and things set forth in the foregoing Release, hereby:

1. Acknowledges that he has explained the terms and conditions of the foregoing Release to Plaintiff, and that the foregoing settlement and Release is fully understood and approved Plaintiff signing this Release and his attorney;
2. Guarantees that the signature to this Release is the signature of WILLIAM OSERAN, plaintiff in Oseran v. Aardvark Engineering Services, King County Cause No. 09-2-44171-5 SEA; and
3. Agrees and guarantees that, in return for naming the undersigned attorney on the settlement draft, the undersigned attorney will ensure that no funds are disbursed to Plaintiff until the Release and the stipulated order for dismissal with prejudice has been executed and returned to Defendant's counsel of record, and that all known liens will be satisfied from the settlement funds deposited in the undersigned attorney's trust account.

DATED this _____ day of _____, 2010.

Roy L. Lundin, WSBA No. 41657
Attorney for Plaintiff WILLIAM OSERAN

APPENDIX G

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Judge Julie Spector
Hearing: March 31, 2010
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM OSERAN,

Plaintiff,

v.

AARDVARK ENGINEERING SERVICES, INC.
d/b/a A.E.S. Inc.,

Defendant.

No. 09-2-44171-5

PLAINTIFF'S MOTION FOR RECONSIDERATION

RELIEF REQUESTED

The proposed "release" is not "standard" –

Attached to the March 19, 2010 order of the court in this matter is a document entitled "Release of All Claims and Settlement Agreement." For example, paragraph 4 has nothing to do with this case since there cannot be liens enforceable against the engineer, Aardvark. This demonstrates that there is simply no "standard form" release and, therefore, the agreement enforced by the court over the objection of Oseran is illusory as to any such document. All that should take place here based on the decision of the court enforcing pursuant to CR 2(A), a settlement, is that the complaint of Oseran should be dismissed with prejudice against Aardvark. Paragraph 6 requires Oseran personally to sign the release document. Nothing in the settlement negotiations or in the e-mail upon which the court relied in enforcing the settlement provided for

ORIGINAL

2/5/11

1 a personal signature by the plaintiff. Finally, the “attorney’s guarantee” was never negotiated or
2 discussed. How can the court enforce a “standard form” release document when no such
3 document is shown to exist by a sworn statement from any credible source?

4 **Attorney’s fee award –**

5 Plaintiff/Oseran requests that the court modify its order of March 19, 2010 in this matter
6 to delete any reference to an obligation to pay attorneys’ fees. The request is based on the fact
7 that the original contract between Oseran and Aardvark has no provision for attorneys’ fees in
8 the event of litigation. Apparently, the court awarded attorneys’ fees based upon a “Settlement
9 and Release Agreement” that was proffered by Aardvark but has never been agreed to or
10 executed by Oseran.

11 **STATEMENT OF FACTS**

12 The e-mail upon which the court based its decision is not sufficiently specific about a
13 “standard form” release to allow the court to determine that such a document exists in the law or
14 in fact. For example, nothing in the February 16, 2010 e-mail from the Aardvark attorney to
15 counsel for Oseran states anything about an “attorney’s guarantee.” Nothing in the e-mail
16 requires a personal signature of the plaintiff as compared with signature of counsel. There is no
17 form document attached to the e-mail that would suggest the type of release document meant by
18 the “. . . complete release and dismissal of all claims . . .” language in the e-mail.

19 The facts are straightforward on the attorneys’ fee question. The original contract
20 between the parties had no attorneys’ fees clause in it. The only basis for award of attorneys’
21 fees by the court would have been the acceptance of an unsigned and un-accepted document
22

1 proffered by Aardvark counsel purporting to be a "standard-form release agreement." This
2 document also has no attorneys' fees clause in it.

3 **STATEMENT OF ISSUES**

4 The issue presented is the following:

5 Where there is no attorneys' fees clause in the original contract
6 between the parties, can the court award attorneys' fees in a motion
to enforce a settlement under CR 2(A)?

7 * * *

8 In addition, where the court orders the parties to sign a Settlement
9 Agreement as attached to the March 19, 2010 order, where in the
Settlement Agreement is there any provision allowing the court to
make an award of attorneys' fees?

10 * * *

11 Where is there evidence of a "standard agreement" releasing claims? Where is there a
12 requirement in the February 16, 2010 e-mail that the plaintiff individually signed a release?
13 Where is there provision in the e-mail for an "attorney's guarantee"? There is simply no
14 evidence upon which a multi-page release document can be based contained in the February 16,
15 2010 e-mail.

16 **EVIDENCE RELIED UPON**

17 The evidence relied upon is the contract between Aardvark and Oseran which contains no
18 provision for attorneys' fees and which is attached to the Declaration of Charles E. Watts filed
19 herewith. Also, the court is asked to take notice of its March 19, 2010 order which has the
20 "release of all claims and Settlement Agreement" enforced by the court attached. This document
21 also appears not to have any provision for award of attorneys' fees to the prevailing party in it.

22 In fact, the document in the last sentence of paragraph 2 provides that:

1 The Releasors and Released Parties each bear their own attorney
2 fees and costs.

3 **ARGUMENT/AUTHORITY**

4 **The settlement agreement requirement is illusory –**

5 Absent evidence of a single “standard” form of release and settlement agreement (there is
6 none), how can the court enforce a specific set of terms and conditions on Oseran based on the
7 loose language in the February 16, 2010 e-mail? There is no evidence supporting the proposition
8 that there exists a sufficiently standardized settlement agreement to allow the court to enforce
9 that provision.

10 It is well established that a contract, oral or otherwise, is not
11 subject to specific performance unless the precise act sought to be
12 compelled is clearly ascertainable. *State v. Bisson*, 156 Wn.2d
13 507, 524, 130 P.2d 820 (2006).

14 Here, the existence of any form of settlement and release language is completely missing
15 from the February 16, 2010 e-mail, and the court would have to create one for the parties which
16 the parties had not agreed to. Requiring plaintiff Oseran to personally sign any document as
17 proposed by defendant, goes beyond the specific performance authority of the court. The most
18 the court can order based on the decision to enforce the February 16, 2010 e-mail exchange, is a
19 dismissal with prejudice of the plaintiff’s claims against defendant Aardvark.

20 **Attorney’s fees not authorized by contract, statute, or recognized ground in equity –**

21 Attorneys’ fees awards are only authorized in the State of Washington where a contract
22 so provides, a statute so provides, or based upon a recognized ground in equity. CR 2(A) does
not provide for award of attorneys’ fees to a party seeking to enforce a settlement under its
provision. The original contract between the parties does not provide for attorneys’ fees. The

1 Settlement Agreement ordered by the court to be executed by Oseran, does not provide for
2 attorneys' fees. The court did not make a determination that the CR 2(A) motion was required
3 because of a "frivolous" position taken by Oseran counsel. There is, therefore, no basis for an
4 award of attorneys' fees. *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983); *In re*
5 *Eaton*, 48 Wn. App. 806, 814, 740 P.2d 907 (1987).

6 **PROPOSED ORDER**

7 A proposed order accompanies this motion together with two return envelopes.

8 Dated: March 24, 2010.

9 OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

10 
11 By

12 CHARLES E. WATTS, WSBA #2331
13 Attorney for Plaintiff Oseran
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15
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APPENDIX H

Handwritten initials

THE HONORABLE JULIE SPECTOR

RECEIVED
APR 20 2010

Judge's Copy

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

WILLIAM OSERAN,

Plaintiff,

NO. 09-2-44171-5

v.

~~PROPOSED~~ ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION

AARDVARK ENGINEERING SERVICES,
INC. d/b/a A.E.S. Inc.,

Defendants.

I. BACKGROUND

This matter coming before the Court on plaintiff's Motion for Reconsideration, and the Court being fully advised in the premises;

The Court having reviewed:

1. Plaintiff's Motion for Reconsideration and Declaration of Charles E. Watts;
2. Defendant's Response to plaintiff's Motion for Reconsideration;

3. _____;

4. _____;

5. _____;

~~PROPOSED~~ ORDER DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION – Page 1

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

Handwritten signature

Handwritten initials

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II. FINDINGS

This Court finding that plaintiff did not raise his objection to an award of attorney fees and cost in his Response of Plaintiff Oseran to Defendant's CR 2(A) Motion and thus has waived this objection;

This Court finding that defendant's request for attorney fees and costs in its Motion to Enforce Settlement Agreement was based on a recognized ground in equity, and in particular fees and costs incurred to enforce a valid settlement agreement;

This Court finding that upon its own initiative it may award attorney fees and costs, under CR 11, because the Response of Plaintiff Oseran to Defendant's CR 2(A) Motion was not well grounded in fact, was not warranted by existing law, and needlessly increased the costs of litigation;

This Court finding that plaintiff did not raise an objection to the Release and Settlement Agreement, attached to the Declaration of Gregory P. Thatcher and defendant's proposed Order Granting Motion to Enforce Settlement Agreement, in his Response of Oseran to Defendant's CR 2(A) Motion and thus has waived this objection;

This Court additionally finding _____

_____;

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III. ORDER

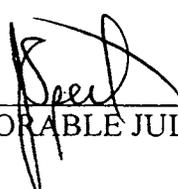
IT IS HEREBY ORDERED that plaintiff's Motion for Reconsideration is
DENIED;

IT IS ORDERED that plaintiff is to comply with this Court's March 19, 2010, Order
Granting Motion to Enforce Settlement Agreement as written;

IT IS ADDITIONALLY ORDERED _____

_____;

Dated this 16th day of April, 2010.



HONORABLE JULIE SPECTOR

Presented by:

SCHEER & ZEHNDER LLP

By: _____

John E. Zehnder, Jr., WSBA No. 29440

Gregory P. Thatcher, WSBA No. 40902

Attorneys for Defendant Aardvark

APPENDIX I

1 THE HONORABLE JULIE SPECTOR
2 March 18, 2010
3 ORAL ARGUMENT REQUESTED

4
5 MAR 18 2010
6

7
8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR KING COUNTY

10 WILLIAM OSERAN,

11 Plaintiff,

NO. 09-2-44171-5

12 v.

13 AARDVARK ENGINEERING SERVICES,
14 INC. d/b/a A.E.S. Inc.,

15 Defendants.

DECLARATION OF GREGORY P.
THATCHER IN SUPPORT OF MOTION
TO ENFORCE SETTLEMENT

16
17 I, Gregory P. Thatcher, declare and state as follows:

18 1. I am over the age of eighteen and competent to testify to the facts stated
19 herein.

20 2. I am an associate at Scheer & Zehnder LLP and have personal knowledge and
21 have investigated all matters attested to in this Declaration.

22 3. Attached as **Exhibit 1** is a true and correct copy of emails, including
23 confirmation of receipt and reading of email, between counsel for plaintiff and defendant
24 Aardvark.
25

26
DECLARATION OF GREGORY P. THATCHER IN SUPPORT OF
MOTION TO ENFORCE SETTLEMENT – Page 1

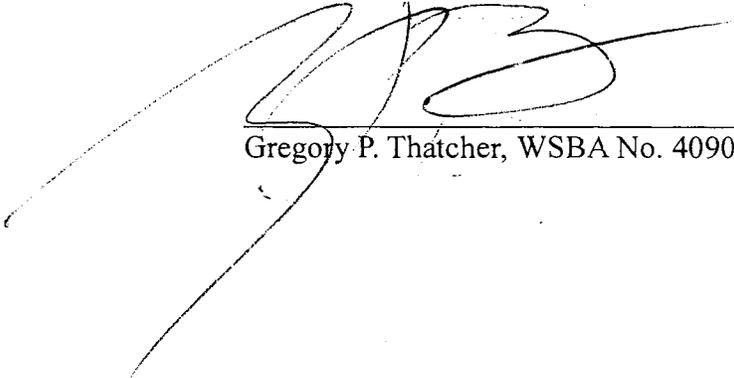
18 230 gb280903

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

1 4. Attached as **Exhibit 2** is a copy of the Release of All Claims and Settlement
2 Agreement to be enforced.

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

5 DATED this 9th day of March, 2010, in the City of Seattle, State of Washington.

6
7
8 
9 _____
10 Gregory P. Thatcher, WSBA No. 40902
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

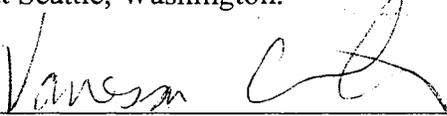
I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>CO/ Plaintiff William Oseran</u> Charles E. Watts Roy L. Lundin Oseran Hahn Spring Straight & Watts PS 850 Skyline Tower 10900 NE 4th St. Bellevue, WA 98004-5873	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Hand Delivery (delivery on 3/10/10) <input checked="" type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Overnight Mail

DATED this 9th day of March, 2010, at Seattle, Washington.



Vanessa Acierto

EXHIBIT - 1

for finality, and not to leave open the door for a later suit against Aardvark. That is fairly standard in such litigation, and it was the clear intent here, which I emphasized in the parenthetical language just to make sure.

I hope this is not going to cause things to degenerate. Please speak with you client. If he will not agree, we will be left with no choice but to file a motion with the court to enforce the settlement, regarding which we will be asking for all fees and costs associated with doing so. I would hate to do that given how well this has already gone to date.

Please advise ASAP. Thank you.

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [<mailto:rlundin@ohswlaw.com>]

Sent: Thursday, February 18, 2010 11:34 AM

To: John Zehnder

Cc: Ted Watts

Subject: RE: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John,

Payee: William Oseran and OFLP A Washington Limited Partnership

TIN: 91-1705562

Address: 1601 Calhoun, Seattle, WA 98112

Clarification: Please draft the release specific only to the stair and elevator shaft pressurization issues.

(Aardvark did other work for systems in the building to which the release should not apply.)

Thanks,

Roy

From: John Zehnder [<mailto:JZehnder@scheerlaw.com>]

Sent: Thursday, February 18, 2010 11:07 AM

To: Roy L. Lundin

Cc: Greg Thatcher

Subject: One more thing -- RE: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

2/28/2010

Sorry, also need to know how check is to be made out, of course. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: John Zehnder

Sent: Thursday, February 18, 2010 11:06 AM

To: Roy L. Lundin

Cc: Greg Thatcher

Subject: Information for check -- RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Thank you. The insurer requested the following to cut the check:

“Will need the name of the payee, the address of the payee and the Tax I.D. number of the payee”

I have your address, but not your client's. Please get me the address for your client at time of sending me their tax ID.

Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [<mailto:rlundin@ohswlaw.com>]

Sent: Thursday, February 18, 2010 8:50 AM

To: John Zehnder

Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Thanks, John; the feeling is mutual. Oseran Hahn's TIN is [REDACTED]; I will forward our client's tax identification number when received. Roy

2/28/2010

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Wednesday, February 17, 2010 4:09 PM
To: Roy L. Lundin
Cc: Ted Watts; Greg Thatcher
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Excellent! Nice to actually get one done quickly for a change. It has been a real pleasure working you folks. We will get the settlement and dismissal documents over to you shortly. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]
Sent: Wednesday, February 17, 2010 2:47 PM
To: John Zehnder
Cc: Ted Watts
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

Agreed. Payee information forthcoming.

Best,

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Tuesday, February 16, 2010 1:38 PM
To: Roy L. Lundin
Cc: Greg Thatcher
Subject: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)
Importance: High

ER 408

Roy:

Pursuant to our exchange of e-mails and your voicemail of this morning, I write to confirm that we have reached a settlement in this matter for the sum of \$8,000.00 (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange for a complete release and dismissal of all claims relating to Aardvark's work (and its employees, agents, insurers...etc., per standard settlement agreement language) on the

2/28/2010

project that is the subject of Oseran's complaint in this matter (i.e. a complete pay money and close file forever deal). Please respond to this e-mail with an "agreed" and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran's tax ID number. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

Greg Thatcher

From: Roy L. Lundin [rlundin@ohswlaw.com]
To: John Zehnder
Sent: Tuesday, February 16, 2010 1:41 PM
Subject: Read: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Your message was read on Tuesday, February 16, 2010 1:40:32 PM (GMT-08:00) Pacific Time (US & Canada).

Greg Thatcher

From: rlundin@ohswlaw.com
Sent: Tuesday, February 16, 2010 1:43 PM
To: John Zehnder
Subject: Delivered: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Follow Up Flag: Follow up
Flag Status: Red

Attachments: ATT00001



ATT00001 (143 B)

Your message was delivered to the recipient.

EXHIBIT - 2

RELEASE OF ALL CLAIMS AND SETTLEMENT AGREEMENT

1. Defendant AARDVARK ENGINEERING SERVICES, INC., d/b/a A.E.S., INC., agrees to pay the total sum of eight thousand dollars (\$8,000.000) in full settlement of the lawsuit and all claims as set forth in the email settlement (hereafter, "Email Agreement") entered into on February 17, 2010. The Email Settlement, attached hereto as Exhibit A, is fully incorporated and integrated into this Release of All Claims and Settlement Agreement (hereafter, "Release").

2. For and in consideration of payment of the above-referenced amount, the receipt and sufficiency of which is hereby acknowledged, Plaintiff WILLIAM OSERAN, as well as his successor, heirs, and assigns (collectively, "Releasers"), does hereby agree to forever release, acquit, and discharge Defendant, as well as its attorneys, insurers, adjusters, employees, agents, successors or assigns, predecessors, parent and subsidiary companies, and all other persons or entities who are claimed to be or may be liable for Defendant's actions (collectively, "Released Parties"), of and from any and all claims, demand, damages, losses, liabilities, suits, litigation, and causes of action of whatsoever kind, nature, or description, present and future, now known or hereafter to be discovered, whether arising in law or equity, upon contractor or tort, under state, federal, or common law, or otherwise, which the Releasers now have, have had, or hereafter may have or claim to have, against any one or more of the respective Released Parties for or by reason of any act, omission, matter, cause or otherwise in any way arising from and/or relating to the August 16, 2006, contract between Plaintiff and Defendant, all work performed by Defendant on behalf of Plaintiff, as well as Plaintiff's action in the Superior Court of King County, State of Washington, Cause No. 09-2-44171-5 SEA (the "Lawsuit"). The Releasers will execute all necessary pleadings to dismiss the lawsuit with prejudice and without fees and costs. The Releasers and Released Parties each bear their own attorney fees and costs.

3. This Release forever discharges the Released Parties from any cause of action or obligation, known or unknown, and whether the same may hereafter arise, develop, be discovered, including, without limitation the generality of the foregoing, any and all claims and demands which the Releasers have asserted or could have asserted against the above Released Parties arising out of and/or related to the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, and the Lawsuit.

4. Also in consideration of the above-referenced payment, Releasers agree to satisfy all debts or liens, including, but not limited to, mechanics liens and construction liens, owed to any source whatsoever. In the event that a lienholder seeks repayment from any of the Released Parties, Releasers agree to defend, indemnify, and hold the Released Parties harmless from any and all such liens – and the related losses and liabilities – and to pay the reasonable attorney fees incurred by the Released Parties in defending against any such claims and legal or other actions relating hereto.

5. The Releasers agree that this Release, and the giving of consideration therefore, is not an admission of liability by any one or more of the Released Parties – which liability

is expressly denied – and is given in full settlement and compromise of all claims, present and future, known or unknown, and also is expressly intended to discharge all actions for any and all future claims, including effects or consequences thereof not now known but which may later develop or be discovered, and all causes of action therefore. Releasors agree to cooperate to enforce and implement this Release and its intent.

6. The undersigned Releasor – Plaintiff WILLIAM OSERAN – does hereby declares the he has fully read and understood the terms of this Release and the he voluntarily accepts these terms for the purpose of making a full and final compromise and settlement of any and all claims – past, present, future, disputed or otherwise, both known and unknown – on account of the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, and the Lawsuit. The Releasor also declares that he has had the opportunity to review this Release with legal counsel, and has either availed himself of such opportunity or has elected not to consult an attorney in this regard. In either case, the Releasor represents that he has fully read and understood all terms of this Release and that he enters it knowingly and willingly, with complete understanding of its import and effect. The Releasor represents that he is of sound mind and is fully capable of entering this Release as his own willful and volitional act. The Releasor further understands that the express purpose of this Release is to forever bar any further or additional claims of any kind whatsoever arising out of or in any way connected with, or related to, the August 16, 2006, contract, all work performed by Defendant on behalf of Plaintiff, or the Lawsuit.

7. This Release extends to – and discharges, binds, and inures to the benefit of – the Releasors, the undersigned Plaintiff and all heirs, executors, successors, assigns, administrators, representatives, underwriters, beneficiaries, attorneys, and agents.

8. The Release is entered into in the State of Washington and is to be construed under Washington law.

[SIGNATURES ON PAGE 3]

IN WITNESS THEREOF, dated this _____ day of _____, 2010.

WILLIAM OSERAN, Plaintiff

ATTORNEY'S GUARANTEE

The undersigned attorney for Plaintiff WILLIAM OSERAN, in connect with the matters and things set forth in the foregoing Release, hereby:

1. Acknowledges that he has explained the terms and conditions of the foregoing Release to Plaintiff, and that the foregoing settlement and Release is fully understood and approved Plaintiff signing this Release and his attorney;
2. Guarantees that the signature to this Release is the signature of WILLIAM OSERAN, plaintiff in Oseran v. Aardvark Engineering Services, King County Cause No. 09-2-44171-5 SEA; and
3. Agrees and guarantees that, in return for naming the undersigned attorney on the settlement draft, the undersigned attorney will ensure that no funds are disbursed to Plaintiff until the Release and the stipulated order for dismissal with prejudice has been executed and returned to Defendant's counsel of record, and that all known liens will be satisfied from the settlement funds deposited in the undersigned attorney's trust account.

DATED this _____ day of _____, 2010.

Roy L. Lundin, WSBA No. 41657
Attorney for Plaintiff WILLIAM OSERAN

EXHIBIT A TO RELEASE

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Wednesday, February 17, 2010 4:09 PM
To: Roy L. Lundin
Cc: Ted Watts; Greg Thatcher
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

Roy:

Excellent! Nice to actually get one done quickly for a change. It has been a real pleasure working you folks. We will get the settlement and dismissal documents over to you shortly. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065
Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com

From: Roy L. Lundin [mailto:rlundin@ohswlaw.com]
Sent: Wednesday, February 17, 2010 2:47 PM
To: John Zehnder
Cc: Ted Watts
Subject: RE: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)

John:

Agreed. Payee information forthcoming.

Best,

Roy Lundin

From: John Zehnder [mailto:JZehnder@scheerlaw.com]
Sent: Tuesday, February 16, 2010 1:38 PM
To: Roy L. Lundin
Cc: Greg Thatcher
Subject: Confirmation of Settlement -- RE: Oseran v. Aardvark Engineering (S&Z#18.230)
Importance: High

ER 408

Roy:

Pursuant to our exchange of e-mails and your voicemail of this morning, I write to confirm that we have reached a settlement in this matter for the sum of \$8,000.00 (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange for a complete release and dismissal of all claims relating to Aardvark's work (and its employees, agents, insurers...etc., per standard settlement agreement language) on the

2/28/2010

project that is the subject of Oseran's complaint in this matter (i.e. a complete pay money and close file forever deal). Please respond to this e-mail with an "agreed" and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran's tax ID number. Thanks!

Very truly yours,

John E. Zehnder, Jr.

Scheer & Zehnder LLP

Seattle, WA Office: 701 Pike Street/Suite 2200/98101 • tel: (206) 262-1200 x197 • fax: (206) 223-4065

Portland, OR Office: 720 SW Washington St./Suite 315/97205 • tel: (503) 542-1200 • fax: (503) 542-5248

e-mail: jzehnder@scheerlaw.com / website: www.scheerlaw.com