

No. 36414-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOVRAN LLC,
a Washington limited liability company,

Plaintiff/Appellant,

vs.

MICKELSEN DAIRY, INC.,
a Washington corporation;

MICKELSEN PROPERTIES,
a Washington general partnership,
and its general partners,
CLINTON P. MICKELSEN, DENNIS H. MICKELSEN,
WILLIAM W. LINDEMAN and SUSAN J. LINDEMAN,
and their respective marital communities;

MICKELSEN LAND & TIMBER,
a Washington general partnership,
and its general partners,
CLINTON P. MICKELSEN, DENNIS H. MICKELSEN and
SUSAN J. LINDEMAN,
and their respective marital communities,

Defendants/Respondents

APPELLANT'S OPENING BRIEF

DORSEY & WHITNEY LLP
James R. Hermsen, WSBA #1332
Brian W. Grimm, WSBA #29619

U.S. Bank Centre
1420 Fifth Avenue, Suite 3400
Seattle, Washington 98101
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

Attorneys for Plaintiff/Appellant,
Sovran, LLC

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF THE CASE.....	4
	A. SOVRAN IDENTIFIES A PROPERTY DEVELOPMENT OPPORTUNITY IN WINLOCK, WASHINGTON.....	4
	B. SOVRAN ENTERS INTO PURCHASE AND SALE AGREEMENTS WITH THE MICKELSENS.....	5
	C. THE PURCHASE AND SALE AGREEMENTS CONTAIN A “WATER RIGHTS TRANSFER” CONDITION PRECEDENT.....	6
	D. THE WATER RIGHTS TRANSFER CONDITION IS SATISFIED.....	7
	E. THE PURCHASE AND SALE AGREEMENTS CONTAIN AN “AUTHORIZATION FOR PROPERTY DEVELOPMENT” CONDITION PRECEDENT.	8
	F. THE AUTHORIZATION FOR PROPERTY DEVELOPMENT CONDITION IS WAIVED.....	9
	G. THE MICKELSENS TRY TO TERMINATE THE AGREEMENTS.	11
	H. SOVRAN FILES SUIT.....	13
	I. THE TRIAL COURT DENIES SOVRAN’S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTS THE MICKELSENS’ CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.	13
	J. THE TRIAL COURT GRANTS THE MICKELSENS’ MOTION FOR SUMMARY JUDGMENT.	14
	K. SOVRAN APPEALS THE TRIAL COURT’S DECISIONS TO THIS COURT.....	15
V.	ARGUMENT.....	15
	A. STANDARD OF REVIEW.....	15

B.	SOVRAN IS ENTITLED TO PARTIAL SUMMARY JUDGMENT THAT ALL CONDITIONS PRECEDENT WERE SATISFIED OR WAIVED.....	16
1.	The Mickelsens' Purported Notices of Termination Were Invalid.....	16
2.	Sovran Had the Right to Waive the Authorization for Property Development Condition Precedent.....	19
C.	THERE ARE DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE MICKELSENS WITH RESPECT TO §18.3.....	20
1.	The Court Can Determine as a Matter of Law That §18.3 Was Satisfied; It Cannot Determine as a Matter of Law That §18.3 Was Not Satisfied.....	20
2.	The Parties Dispute Whether the Deadline to Terminate Was December 31, 2004 Or December 26, 2005.....	21
3.	The Parties Dispute Whether the Mickelsens Were Satisfied By the Terms Under Which the Water Rights Would Be Transferred.....	23
D.	THERE ARE DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE MICKELSENS WITH RESPECT TO §18.4.....	24
1.	The Parties Dispute Whether They Intended §18.4 To Be For the Benefit of Sovran or Both Sovran and the Mickelsens.....	25
2.	The Parties Dispute The Scope of What "Lewis County Approvals" Are Required.....	26
E.	THE MICKELSENS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON SOVRAN'S CLAIM THAT THE MICKELSENS BREACHED THEIR CONTRACTUAL DUTY OF GOOD FAITH AND FAIR DEALING.....	27
F.	THE MICKELSENS ARE NOT ENTITLED TO THEIR COSTS AND ATTORNEYS' FEES.....	29
G.	SOVRAN REQUESTS ITS COSTS AND ATTORNEYS' FEES ON APPEAL.....	29
VI.	CONCLUSION	30

APPENDIX

1. Agreement for Purchase and Sale (CP 337-48)
2. First Amendment to Agreement for Purchase and Sale (CP 375-76)
3. Notice of Termination (CP 257)

TABLE OF AUTHORITIES

CASES

Ashburn v. Safeco Ins. Co. of Am.,
42 Wn. App. 692, 713 P.2d 742 (1986)27

Avis Rent-a-Car System, Inc. v. Crown High Corp.,
165 Conn. 108, 345 A.2d 1 (1973).....18

Bort v. Parker,
110 Wn. App. 561, 42 P.3d 980 (2002)22

Chelan County Deputy Sheriffs' Ass'n v. County of Chelan,
109 Wn.2d 282, 745 P.2d 1 (1987)15

Crowther v. Avis Rent-a-Car System, Inc.,
284 F.Supp. 668 (W.D. Wash. 1968)17, 18, 19

Miller v. Othello Packers, Inc.,
67 Wn.2d 842, 410 P.2d 33 (1966)27

Omni Group, Inc. v. Seattle First Nat'l Bank,
32 Wn. App. 22, 645 P.2d 727 (1982)23

W.M. Dickson Co. v. Pierce County,
128 Wn. App. 488, 116 P.3d 409 (2005)22, 25

Yuille v. State,
111 Wn. App. 527, 45 P.3d 1107 (2002)27

RULES

CR 56(c)15

CR 56(f).....2, 14, 28

RAP 2.4(g).....15

RAP 18.129

I. INTRODUCTION

Sovran LLC (“Sovran”) and the Mickelsens¹ entered into agreements on September 9, 2002 for the purchase and sale of approximately 201 acres of land in Lewis County, Washington, owned by the Mickelsens. The property was part of a larger area of agricultural land which Sovran had assembled for the purpose of commercial development. On the eve of closing, in December 2005, the Mickelsens tried to terminate the agreements, on the pretense that certain conditions precedent had not, according to the Mickelsens, been satisfied. Apparently, the Mickelsens believed they could get a better price for their land in 2005 than they had been able to negotiate in 2002. Not only had all conditions precedent been satisfied or waived, however, obligating the Mickelsens to close and precluding any right to terminate the agreements, the Mickelsens’ termination notices were themselves deficient. Specifically, the Mickelsens purported to terminate the agreements effective December 31, 2005, yet any right to do so had expired by December 26, 2005.

The trial court, the Honorable Nelson E. Hunt, Lewis County Superior Court, awarded summary judgment to the Mickelsens on all of Sovran’s claims. Sovran respectfully requests that this Court reverse the trial court’s orders, and remand with directions to grant partial summary

¹ Sovran will refer to the defendants and respondents in this case, collectively, as “the Mickelsens.” This includes Mickelsen Dairy, Inc., a Washington corporation; Mickelsen Properties, a Washington general partnership, and its general partners, Clinton P. Mickelsen, Dennis H. Mickelsen, William W. Lindeman, and Susan J. Lindeman, and their respective marital communities; and Mickelsen Land & Timber, a Washington general partnership, and its general partners, Clinton P. Mickelsen, Dennis H. Mickelsen, and Susan J. Lindeman, and their respective marital communities.

judgment in favor of Sovran on its claim for a declaratory judgment that all conditions precedent to closing had been satisfied or waived and the Mickelsens' purported termination notices were invalid, and for trial on Sovran's remaining claims, which involve disputed issues of material fact.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Sovran's motion for partial summary judgment.

2. The trial court erred by granting the Mickelsens' cross-motion for partial summary judgment.

3. The trial court erred by denying Sovran's motion for reconsideration of the trial court's order on Sovran's motion for partial summary judgment and the Mickelsens' cross-motion for partial summary judgment.

4. The trial court erred by granting the Mickelsens' motion for summary judgment.

5. The trial court erred by denying Sovran's CR 56(f) request to continue the Mickelsens' motion for summary judgment.

6. The trial court erred by awarding the Mickelsens their costs and attorneys' fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Relating to Assignment of Error No. 1.

1. Whether the §18.3 condition precedent, "Water Rights Transfer," in the purchase and sale agreements was satisfied because Sovran "was satisfied that a bonafide water right exists on the property

and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water.”

2. Whether §18.3 was satisfied because the Mickelsens failed to terminate the agreements by December 26, 2005, and “[f]ailure of Seller to provide written termination shall be deemed a satisfaction of this condition to closing.”

3. Whether the §18.4 condition precedent, “Authorization for Property Development,” in the purchase and sale agreements could be waived by Sovran pursuant to §17, under which “Buyer, at his sole option, may . . . waive such condition precedent and proceed to closing.”

B. Issues Relating to Assignments of Error Nos. 2 and 3.

4. Whether a disputed issue of material fact exists regarding whether the deadline for the Mickelsens to terminate the purchase and sale agreements, pursuant to §18.3, was December 31, 2004 or December 26, 2005.

5. Whether a disputed issue of material fact exists regarding whether the Mickelsens were satisfied, or should have been satisfied, with the terms under which the water rights would be transferred.

6. Whether a disputed issue of material fact exists regarding whether the parties intended §18.4 to benefit Sovran or both Sovran and the Mickelsens.

7. Whether a disputed issue of material fact exists regarding whether §18.4 was satisfied.

C. Issues Relating to Assignments of Error Nos. 4 and 5.

8. Whether a disputed issue of material fact exists regarding whether the Mickelsens acted in good faith.

9. Whether the trial court abused its discretion by not granting Sovran's request for a continuance to take discovery relating to the issues raised in the Mickelsens' motion for summary judgment.

D. Issue Relating to Assignment of Error No. 6.

10. If the trial court's summary judgment award is reversed, the Mickelsens are not entitled to recover their costs and attorneys' fees, and the trial court's award of costs and attorneys' fees to the Mickelsens must also be reversed.

IV. STATEMENT OF THE CASE

A. Sovran Identifies a Property Development Opportunity in Winlock, Washington.

Sovran is a Washington limited liability company in the land development business. CP 330. Sovran's particular expertise is to increase the value of real property through regulatory agency actions. CP 330. This business requires not only expertise but also substantial investments of time and money for each project. CP 331. Even this is no guarantee of success with respect to any given property. CP 330-31.

In the late 1990's, Sovran identified Winlock, Washington, as an attractive area for commercial development of agricultural land. CP 331, 393. In particular, Winlock is along the Interstate 5 corridor, well-positioned between Seattle/Tacoma and Portland/Vancouver. CP 331. Additionally, the Southwest Washington Public Development Authority

had secured a significant amount of land in the area and was planning the development of a theme park there. CP 331.

Sovran sought to enter into contracts with owners of agricultural land in the Winlock area, under which Sovran could close and purchase the properties after it had obtained the proposed change in land use. CP 331. Eventually, Sovran assembled approximately 500 acres of contiguous property bounded by Highway 505 on the south, North Military Road on the west, and Interstate 5 on the east. CP 331. Included among these 500 acres were approximately 201 acres owned by the Mickelsens. CP 331. At that time, agricultural property in the area generally was assessed between \$2,000 and \$4,000 per acre. CP 331. The total assessed value of the Mickelsen property was \$1,063,400, including improvements. CP 331.

B. Sovran Enters Into Purchase and Sale Agreements With the Mickelsens.

On September 9, 2002, Sovran entered into purchase and sale agreements with the Mickelsens. CP 332. Because the ownership of the Mickelsen property was in three different entities, it was necessary to have three agreements. CP 332. The agreements are identical except for the identity of the seller, the description of the property to be purchased, and the purchase price. CP 332. Combined, the agreements provide for the purchase and sale of the 201.39 acres owned by the Mickelsens for \$4,027,800, far above the \$1,063,400 assessed value of the property. CP

337, 350, 363. The \$20,000 per acre paid by Sovran was also far above the \$2,000 to \$4,000 per acre agricultural land value for the area. CP 331.

The purchase and sale agreements provided that before the transaction would close, five conditions precedent would have to be satisfied or waived: (1) condition of title; (2) buyer's inspection of property and review of seller's information; (3) water rights transfer; (4) authorization for property development; and (5) determination of area. CP 341-44 (§§18.1-18.5). Whether the third and fourth conditions precedent were satisfied or waived is at issue in this case.

C. The Purchase and Sale Agreements Contain a "Water Rights Transfer" Condition Precedent.

Section 18.3 of the purchase and sale agreements provides as follows:

Water Rights Transfer. Buyer shall be satisfied that a bonafide water right exists on the property and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water. Buyer and Seller shall remove such contingency no later than two hundred forty (240) days from the date of this Agreement.

Any transfer of water rights is conditioned on the ability of Buyer and Seller to enter into an agreement with the City of Winlock or other water purveyor that adequately provides for the use of and financial reimbursement for the water rights transferred. The terms of the agreement with the City of Winlock or other water purveyor must be satisfactory to the Seller and Buyer.

Buyer shall provide Seller with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Buyer, in Buyer's sole opinion. Failure of Buyer to provide written termination shall be deemed a satisfaction of this condition to closing.

Seller shall provide Buyer with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Seller, in Seller's sole opinion. Failure of Seller to provide written termination shall be deemed a satisfaction of this condition to closing.

CP 342-43 (emphasis added).

Two details of §18.3 are of particular significance here. First, the provision does not require that the water right actually be transferred; rather, it merely requires that Sovran be satisfied that a bona fide water right exists and "is transferable." Second, by its very terms, this condition is deemed satisfied if neither party terminates the agreements within two hundred forty days. The parties amended the agreements to extend this deadline until December 31, 2004. CP 375.

D. The Water Rights Transfer Condition Is Satisfied.

On April 16, 2003, the parties entered into a Water Services Area Agreement with the City of Winlock (the "WSA Agreement"), under which the Mickelsens' water rights would be transferred to the City. CP 383-391. The WSA Agreement could be nullified if final approval of the Service Area Expansion and/or transfer of the Mickelsen water rights did not occur within two years. CP 408. Because this did not occur within two years, the WSA Agreement expired in accordance with its terms on April 16, 2005. CP 408. However, on December 6, 2005, the Lewis County Board of County Commissions passed Resolution No. 05-326 which was the required predicate for the City of Winlock to approve the Service Area Expansion thereby establishing the necessary framework to allow for the ultimate transfer of the Mickelsen water rights to the City.

CP 409. The City “is now in a position to accept the water rights under the previous agreement entered into by the parties or if necessary, enter into a new agreement.” CP 288.

As a result of all of this, Sovran was satisfied that a bona fide water right existed on the property and was transferable to the City. CP 333. Moreover, the water rights condition was also satisfied, by its own terms, because neither party terminated the agreements by December 31, 2004. CP 333.

E. The Purchase and Sale Agreements Contain an “Authorization for Property Development” Condition Precedent.

Section 18.4 of the purchase and sale agreements provides as follows:

Authorization for Property Development: Buyer, at its sole cost and expense, shall apply for and diligently prosecute governmental authorization for Buyer’s intended development with the appropriate governmental agencies.

This Agreement is expressly conditioned on Buyer securing from Lewis County approvals necessary for Buyer’s planned development. Seller shall cooperate with Buyer in Buyer’s application for governmental approvals and shall sign any documents reasonably requested by Buyer.

Buyer shall have a period of two hundred forty (240) days from the date of this Agreement to satisfy this condition and provide Seller with written notification that this condition has been satisfied. Failure to secure the approvals and provide such notification within such two hundred forty (240) days shall terminate the Agreement.

Notwithstanding anything to the contrary contained herein, no change shall be made to the property’s comprehensive plan designation, zoning or land-use status without Seller’s written consent if such change would cause Seller to lose its ability to operate a commercial dairy farm before

expiration of the applicable lease periods set out in paragraph 6.

Buyer is aware that Seller has pending a request to change the designation of the property from Agricultural Resource to RDD. The parties agree Seller's RDD request may move forward. If the RDD request at any time creates a conflict with Buyer's application for governmental approvals, Buyer may request, that Seller withdraw its RDD request. Buyer's request shall be in writing. If Seller, within 20 days of receipt of such written request, does not agree to withdraw its RDD request, Buyer shall be entitled to terminate this agreement and shall be entitled to a refund of all deposits.

CP 343-44. As with the water rights transfer condition, the parties extended the deadline to satisfy this condition until December 31, 2004.

CP 375.

The rationale for Sovran paying millions of dollars above the assessed property value was the potential for development. This rationale would be destroyed if Sovran were unable to develop the property. Thus, Sovran drafted this provision for inclusion in the agreements. CP 193. However, once Sovran became comfortable that its development would be approved, it had the option to "waive such condition precedent and proceed to closing." CP 341 (§17).

F. The Authorization for Property Development Condition Is Waived.

It became clear to Sovran that it would not be able to obtain the change of use approval from Lewis County by December 31, 2004. CP 334. Therefore, Sovran exercised its contractual right to extend this deadline. Section 19 of the purchase and sale agreements provides as follows:

Extension of Time. If the Buyer determines that any of the conditions precedent set out in Section 18 cannot be made within the allocated time periods an additional ninety (90) days will be granted with the payment of an additional \$15,000 to the Seller. This time extension period may be repeated three additional times with same payment. These payments will be applicable to the purchase price and are nonrefundable.

CP 344.

Pursuant to §19, Sovran extended the deadline by ninety days four times, and paid \$15,000 per agreement for each extension, for a total of \$180,000. CP 334. The deadline was therefore extended from December 31, 2004 to March 31, 2005; then to June 29, 2005; then to September 27, 2005; and finally to December 26, 2005.

Sovran made substantial investments of time and money towards the project. In particular, Sovran worked closely with the City of Winlock and Lewis County for more than five years to plan the economic growth of the Winlock community. CP 393. It employed planning, regulatory process, engineering, landscape architecture, real estate, and legal professionals. CP 393. It worked hard to resolve municipal infrastructure, growth management, and land use issues. CP 393. And, it undertook an extensive marketing program to attract new businesses, home builders, and major employers to the community. CP 393.

By December 2005, it looked as if Sovran's vision and investment were going to pay off. Positive government action was taken which gave Sovran confidence that the property use would change and that Sovran would be permitted to move forward with the development. CP 334. At a

hearing on December 6, 2005, Lewis County approved an expanded Urban Growth Area. CP 188.

Following the hearing, Sovran informed the Mickelsens that it was now satisfied that all necessary government approvals could be obtained. CP 188. Sovran therefore waived the §18.4 condition precedent. CP 335. Sovran made arrangements with the escrow agent under the agreement, Transnation Title Insurance Company (“Transnation”), to close the transactions. CP 188. On December 27, 2005, Transnation gave written notice to the Mickelsens that a closing would take place. CP 199.

G. The Mickelsens Try to Terminate the Agreements.

By December 2005, more than six years after Sovran began working on this project, and more than three years after it entered into the purchase and sale agreements with the Mickelsens, the Mickelsens apparently decided that the \$4,027,800 they were to be paid for their property was no longer enough. The Mickelsens sent to Sovran “formal notice[s] of termination pursuant to paragraph 18.3” of the purchase and sale agreements. CP 256. The Mickelsens purported to “terminate[] the Agreement[s] for Purchase and Sale effective midnight December 31, 2005.” CP 256 (emphasis added).

However, any right the Mickelsens had to terminate the agreements under §18.3 expired a year earlier, on December 31, 2004. CP 342-43 (deadline 240 days after execution of agreement); CP 375 (deadline extended to December 31, 2004). Even if Sovran’s payment to the Mickelsens of \$180,000 for extensions pursuant to §19, so that Sovran

would have additional time to ascertain whether it would be able to obtain necessary regulatory approvals from Lewis County, also extended the time for the Mickelsens to terminate the agreements pursuant to §18.3, the deadline for the Mickelsens to terminate lapsed on December 26, 2005. CP 334. The Mickelsens apparently miscalculated the length of the extension as a one-year extension, to December 31, rather than what it actually was, four ninety-day extensions, to December 26. The Mickelsens therefore “terminated” the agreements, pursuant to §18.3, five days after the deadline passed for them to do so.

A cover letter accompanying the purported termination notices suggests the Mickelsens’ motive: “the Mickelsens are happy to discuss alternative proposals with Sovran independent of the existing Purchase and Sale Agreements.” CP 255 (emphasis added). Documents uncovered in discovery confirm that the Mickelsens’ plan was to nullify their agreements with Sovran and then enter into a new, more profitable agreement for the sale and/or development of the property. A handwritten note of Clinton P. Mickelsen warns, “Avoid any mention of land prices until after 12-31-05 [the purported termination date].” CP 162 (emphasis original). Two weeks after the purported termination, Mr. Mickelsen met with Winlock’s mayor to discuss the project. CP 161.

Mr. Mickelsen was right that, as a result of Sovran’s investment to date and the development potential, the land was substantially more valuable by 2005 than the \$4,027,800 for which the Mickelsens agreed to

sell it in 2002. Sovran's damages, as a result of the Mickelsens' refusal to close, exceed \$20 million. CP 411.

H. Sovran Files Suit.

On March 23, 2006, Sovran filed a lawsuit against the Mickelsens in Lewis County Superior Court. CP 405-12. Sovran sought (1) a declaratory judgment that the conditions precedent contained in §§18.3 and 18.4 were satisfied and/or waived, that the Mickelsens' notices of termination were untimely and had no effect, and that Sovran is entitled to have the transaction close; (2) either specific performance of the purchase and sale agreements or recovery of Sovran's damages as a result of the Mickelsens' breach of the agreements; and (3) recovery of Sovran's costs and attorneys' fees, pursuant to the attorneys' fees provision in §24 of the agreements. CP 411-12.

I. The Trial Court Denies Sovran's Motion for Partial Summary Judgment and Grants the Mickelsens' Cross-Motion for Partial Summary Judgment.

On April 27, 2006, Sovran moved for partial summary judgment on its declaratory judgment claim. CP 319-329. On May 15, 2006, the Mickelsens responded and asked for partial summary judgment in their favor on Sovran's declaratory judgment claim. CP 291-318. Sovran provided the trial court with two declarations from K. Frank Kirkbride, Co-Manager of Sovran, with exhibits attached thereto. CP 330-96, 187-99. The Mickelsens provided the trial court with a declaration from Clinton P. Mickelsen, with exhibits attached thereto. CP 214-90.

The trial court heard oral argument on June 12, 2006. RP (June 12, 2006) 1-50. At the hearing, the trial court stated that it was going to deny Sovran's motion, and grant the Mickelsens' cross-motion, for partial summary judgment. RP (June 12, 2006) 48. Sovran subsequently filed a motion for reconsideration, on the ground "that, at a minimum, when the Court views the evidence in the light most favorable to Sovran, numerous factual questions exist which require a full trial on the merits." CP 173-74.

On July 5, 2006, the trial court issued an order denying Sovran's motion, and granting the Mickelsens' cross-motion, for partial summary judgment. CP 168-70. The trial court also issued a separate order denying Sovran's motion for reconsideration. CP 171-72.

J. The Trial Court Grants the Mickelsens' Motion for Summary Judgment.

On April 19, 2007, the Mickelsens moved for summary judgment with respect to Sovran's remaining claims. CP 163-67. In its response, Sovran argued that the motion should be denied, or at least continued pursuant to CR 56(f). CP 148-58, 160. In support of its argument, Sovran provided the trial court with several documents obtained in discovery. CP 161-62. The Mickelsens provided the trial court with a declaration from Clinton P. Mickelsen, with exhibits attached thereto. CP 139-47.

The trial court heard oral argument on the Mickelsens' motion on June 1, 2007. RP (June 1, 2007) 1-27. The same day, the trial court issued an order granting the Mickelsens' motion. CP 26-27. On June 20,

2007, the trial court awarded the Mickelsens their costs and attorneys' fees, in the amount of \$83,735.83, pursuant to §24 of the purchase and sale agreements. CP 1-3.

K. Sovran Appeals the Trial Court's Decisions to This Court.

Sovran timely appealed the trial court's orders denying Sovran's motion for partial summary judgment, granting the Mickelsens' cross-motion for partial summary judgment, denying Sovran's motion for reconsideration, and granting the Mickelsens' motion for summary judgment. Pursuant to RAP 2.4(g), Sovran also appeals the trial court's award of costs and attorneys' fees.

V. ARGUMENT

A. Standard of Review.

The Mickelsens' motions should have been denied unless "there is no genuine issue as to any material fact" and the Mickelsens were "entitled to judgment as a matter of law." CR 56(c). This Court "must engage in the same inquiry as the trial court." Chelan County Deputy Sheriffs' Ass'n v. County of Chelan, 109 Wn.2d 282, 294, 745 P.2d 1 (1987). The appellate court "must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party" and the trial court should be reversed unless "reasonable persons could reach but one conclusion from all the evidence." Id. at 294-95. "Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper." Id. at 295.

B. Sovran Is Entitled to Partial Summary Judgment That All Conditions Precedent Were Satisfied Or Waived.

Sovran's motion for partial summary judgment presents two legal issues to the Court. First, the Court must determine whether, as a matter of law, the Mickelsens' purported notice of termination was invalid, because the effective date of termination was after the deadline for the Mickelsens to terminate expired. If so, Sovran is entitled to partial summary judgment that the §18.3 condition precedent, "Water Rights Transfer," was satisfied. Second, the Court must determine whether, as a matter of law, Sovran had the right to waive the §18.4 condition precedent, "Authorization for Property Development." If so, Sovran is entitled to partial summary judgment that §18.4 was waived.

1. The Mickelsens' Purported Notices of Termination Were Invalid.

Section 18.3 of the purchase and sale agreements, the "Water Rights Transfer" condition precedent, required only that "[Sovran] shall be satisfied that a bonafide water right exists on the property and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water." CP 342. Sovran was so satisfied. It originally was satisfied based on the April 16, 2003 WSA Agreement. Even after the WSA Agreement expired, on April 16, 2005, Sovran remained satisfied that a bona fide water right exists and is transferable. CP 333.

If the Mickelsens objected to the terms under which the water rights would be transferred to the City, the Mickelsens had the option to terminate the agreements. CP 343. However, they were required to do so

by December 31, 2004. CP 342 (original deadline); CP 375 (deadline extended to December 31, 2004). The Mickelsens had no right to terminate after this date. Thus, §18.3 was also satisfied because “[f]ailure of [the Mickelsens] to provide written termination shall be deemed a satisfaction of this condition to closing.” CP 343.

The Mickelsens argue that Sovran’s extension of its time to satisfy §18.4, the “Authorization for Property Development” condition precedent, for which Sovran paid \$180,000 to the Mickelsens, also extended the Mickelsens’ time to terminate the agreements pursuant to §18.3. Even assuming this were true, the time was only extended to December 26, 2005. CP 334. The Mickelsens’ notices of termination, although dated December 14, 2005, purported to terminate the agreements “effective midnight December 31, 2005.” CP 396 (emphasis added). As a matter of law, these notices of termination were invalid.

The case of Crowther v. Avis Rent-a-Car System, Inc., 284 F.Supp. 668 (W.D. Wash. 1968) illustrates this point very well. That case involved a license agreement between Avis and a licensee, Crowther, executed on April 1, 1963. Id. at 668. The license agreement provided that Avis could terminate the agreement without cause within the first five years, i.e., by April 1, 1968. Id. To do so, however, Avis had to give written notice “at least 90 days prior to the January 1, or April 1 or July 1 or October 1 preceding or coinciding with such termination date[.]” Id. at 669. Avis gave notice on November 27, 1967 that it was terminating the license agreement “effective as of midnight, March 31, 1968.” Id.

Crowther moved for summary judgment that the termination was ineffective. Id. at 668. The court granted the motion. Id. at 670. If Avis had stated in its notice that the termination was “effective April 1, 1968,” its November 27, 1967 notice would have been valid, because it would have been “at least 90 days prior to the . . . April 1 . . . preceding or coinciding with such termination date[.]” Id. at 669 (emphasis added). However, because Avis carelessly stated that the termination was effective on March 31, 1968, its notice was required “at least 90 days prior to the January 1 . . . preceding . . . such termination date,” and its November 27, 1967 notice was therefore invalid. Id. (emphasis added). Accordingly, Avis lost its right to terminate the agreement without cause, even though it sent a notice which otherwise would have been timely, because it put an “effective” date into the notice which rendered it invalid. Id. at 670.²

The court noted that “this is a harsh result, because the notice of termination would have been valid if it had provided, ‘effective as of 12:01 a.m. April 1st, 1968.’ This is not a case, however, where the outcome is to be determined by a balancing or weighing of the equities, and this court is without power to . . . reform the wording of the notice of termination. Avis . . . drafted the notice of termination, and must now live

² In Avis Rent-a-Car System, Inc. v. Crown High Corp., 165 Conn. 608, 345 A.2d 1 (1973), the court reached the opposite result based on analogous facts involving Avis’s license agreement. However, the disagreement between the Washington and Connecticut courts was over whether “midnight” in the termination notice was part of the day preceding midnight (making the notice invalid) or following midnight (making the notice valid). Compare Crowther, 284 F.Supp. at 670 with Crown High, 345 A.2d at 4. This disagreement is, of course, inapposite here. The salient point is that if the terminating party puts an “effective” date in the termination notice which makes the termination notice untimely, the notice is without legal effect; it is not whether Avis in fact did so.

with the result.” Id. (emphasis added). The same is true for the Mickelsens.

Just as Avis could have made its termination effective April 1, but did not, the Mickelsens could have made their termination effective December 26, but did not. Just as Avis lost the right to terminate its license agreement with Crowther because it did not do so within five years, the Mickelsens lost their right to terminate their purchase and sale agreements with Sovran because they did not do so by December 26, 2005.

Sovran is entitled to judgment as a matter of law that the Mickelsens’ purported termination notices were invalid and, accordingly, that the §18.3 condition precedent was satisfied.

2. Sovran Had the Right to Waive the Authorization for Property Development Condition Precedent.

Section 18.4 of the purchase and sale agreements, the “Authorization for Property Development” condition precedent, protected Sovran by ensuring that if Sovran were unable to get necessary approvals from Lewis County to develop the property, Sovran would not be required to purchase the property. CP 343-44. This provision also obligates the Mickelsens to “cooperate” with Sovran in its efforts to obtain these approvals. CP 343. If Sovran were unable to obtain all specific approvals prior to the closing date, but had confidence that it would be able to do so, it had the option to waive this condition:

If any of the conditions precedent to Buyer's obligation to close have not occurred or been satisfied on or before any specified deadlines prior to the closing date, Buyer, at his sole option, may a) terminate this Agreement by written notice delivered to Seller on the closing date or on such earlier deadline, in which event, Buyer shall be entitled to a full return of any deposits made, or b) waive such condition precedent and proceed to closing.

CP 341 (emphasis added). Sovran paid \$180,000 to the Mickelsens to extend the deadline for it to do so until December 26, 2005. CP 334.

Following the December 6, 2005 Lewis County hearing, Sovran was satisfied that all necessary government approvals would be obtained, and it waived the §18.4 condition precedent. CP 188, 335. Sovran is entitled to judgment as a matter of law that the §18.4 condition precedent was waived.

C. There Are Disputed Issues of Material Fact Precluding Summary Judgment in Favor of the Mickelsens With Respect To §18.3.

1. The Court Can Determine as a Matter of Law That §18.3 Was Satisfied; It Cannot Determine as a Matter of Law That §18.3 Was Not Satisfied.

To award the Mickelsens judgment as a matter of law that §18.3 was not satisfied, the Court would have to determine that the Mickelsens' notices of termination were valid. To do this, the Court would have to resolve two factual disputes in favor of the Mickelsens. First, the Court would have to determine that Sovran intended to extend the deadline for the Mickelsens to terminate pursuant to §18.3 from December 31, 2004 to December 26, 2005; if the deadline were December 31, 2004, the Mickelsens' notices, dated December 14, 2005, were untimely regardless

of the import of the “effective” date. Second, the Court would have to determine that the Mickelsens were not satisfied with the terms under which the water rights would be transferred. Because all facts must be viewed in the light most favorable to Sovran, the Court should reverse the trial court’s award of partial summary judgment to the Mickelsens on this issue.

Note that this is quite different from Sovran’s motion for partial summary judgment on this issue. Resolving all factual disputes in favor of the Mickelsens, Sovran is still entitled to partial summary judgment that §18.3 was satisfied, because the Mickelsens’ notices of termination were invalid as a matter of law. Whether the deadline was December 31, 2004 or December 26, 2005, and whether the Mickelsens were satisfied regarding the terms of the transfer, are irrelevant to the dispositive legal issue presented by Sovran’s motion.

2. The Parties Dispute Whether the Deadline to Terminate Was December 31, 2004 Or December 26, 2005.

The testimony of Frank Kirkbride, Co-Manager of Sovran, supports Sovran’s position that the deadline for the Mickelsens to terminate the agreements pursuant to §18.3 was December 31, 2004, not December 26, 2005. By the time Sovran exercised its option to extend the deadline to satisfy §18.4, the “Authorization for Property Development” condition precedent, there was no dispute regarding §18.3, the “Water Rights Transfer” condition precedent. The WSA Agreement was in place. CP 333. “[A]s of December 31, 2004, the only condition remaining was

Section 18.4” CP 334. Sovran could not have intended to extend the deadline for the Mickelsens to terminate the agreements pursuant to §18.3, because there simply was no outstanding issue regarding §18.3. This is also supported by the cover letter accompanying the first \$45,000 payment to the Mickelsens, which discusses government approval issues at length and contains no reference whatsoever to water rights issues. CP 393.

“When interpreting a contract,” such as Sovran’s option to extend deadlines to satisfy conditions precedent and its exercise thereof, the court’s “primary objective is to discern the parties’ intent.” W.M. Dickson Co. v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409 (2005) (reversing summary judgment on contract claim because more than one reasonable interpretation of contract was possible). “As a general rule,” the court “consider[s] the parties’ intentions questions of fact.” Id. Moreover, “[i]f a contract has two or more reasonable meanings when viewed in context, a question of fact is presented.” Bort v. Parker, 110 Wn. App. 561, 575, 42 P.3d 980 (2002).

At minimum, Mr. Kirkbride’s testimony creates a disputed issue of material fact regarding whether Sovran’s intent was to extend only the deadline to satisfy or waive §18.4, or to extend all deadlines relating to the

conditions precedent.³ If the deadline was not extended, and remained December 31, 2004, the Mickelsens' purported termination notices would be untimely, and therefore invalid, regardless of whether the December 14, 2005 service date or December 31, 2005 effective date is operative.

3. The Parties Dispute Whether the Mickelsens Were Satisfied By the Terms Under Which the Water Rights Would Be Transferred.

Under §18.3, the Mickelsens had the ability to terminate the purchase and sale agreements if the terms under which the water rights would be transferred “is not satisfactory to” the Mickelsens. CP 356. Whether the Mickelsens were satisfied, or should have been satisfied, is a question of fact. See Omni Group, Inc. v. Seattle First Nat'l Bank, 32 Wn. App. 22, 25-26, 645 P.2d 727 (1982) (in case involving real estate purchase agreement with condition precedent that feasibility report be “satisfactory to purchaser” the appellate court held that “[w]hether the promisor was actually satisfied or should reasonably have been satisfied is a question of fact”). Id. at 25-26.

Sovran presented substantial evidence that the Mickelsens were satisfied, or should have been satisfied. In particular, the fact that the Mickelsens signed the WSA Agreement establishes that the Mickelsens

³ The trial court did not reach this issue, because it determined that the parties intended §18.3 to require not only that “Buyer shall be satisfied that a bonafide water right exists on the property and that such right is transferable,” which is what the agreement states, but also that there be a “water services agreement currently in existence[.]” RP (June 12, 2006) at 48 (emphasis added); see also id. at 49 (“there is no need to provide a termination notice since . . . there is no agreement in place”). This finding is contrary to the language of the purchase and sale agreements themselves. Even if there were evidentiary support for such a finding, however, this contract interpretation question would raise a factual issue.

were satisfied with the terms under which the water rights would be transferred to the City. CP 386-88. Moreover, Mr. Kirkbride stated in his declaration that the Mickelsens never advised Sovran, prior to the purported termination in December 2005, “that they had any objection to the condition detailed in Section 18.3 . . . a condition long deemed satisfied.” CP 334-35. The WSA Agreement and Mr. Kirkbride’s testimony create a disputed issue of material fact regarding whether the Mickelsens found, or should have found, the terms of the water rights transfer to be “satisfactory.”

Based on these two central disputed issues of material fact – (1) whether the parties intended to extend the deadline to terminate and (2) whether Sovran was satisfied by the terms of the water rights transfer – the Court should reverse the trial court’s award of summary judgment to the Mickelsens with respect to §18.3. If either of these factual issues are resolved in favor of Sovran, and the trial court was required to resolve both of them in favor of Sovran, §18.3 would be deemed satisfied.

D. There Are Disputed Issues of Material Fact Precluding Summary Judgment in Favor of the Mickelsens With Respect To §18.4.

Sovran was entitled to partial summary judgment that §18.4 was waived. At minimum, however, there were disputed issues of material fact that precluded summary judgment in favor of the Mickelsens. First, the parties dispute whether §18.4 was intended to benefit Sovran or both Sovran and the Mickelsens. This was the basis for the trial court’s determination that Sovran was not entitled to waive §18.4. Second, the

parties dispute whether §18.4 was satisfied, regardless of whether or not there was a waiver.

1. The Parties Dispute Whether They Intended §18.4 To Be For the Benefit of Sovran or Both Sovran and the Mickelsens.

The trial court explicitly based its ruling that §18.4, the “Authorization for Property Development” condition precedent, was not waived by Sovran on its finding that the parties intended “that paragraph 18.4 benefited at least both parties and can’t be waived by either[.]” RP (June 12, 2006) at 49. The trial court described this as a “finding as a matter of law,” but it was a decidedly factual finding. RP (June 12, 2006) at 49.

As discussed above, “[w]hen interpreting a contract,” such as §18.4, the court’s “primary objective is to discern the parties’ intent.” W.M. Dickson Co., 128 Wn. App. at 493. “As a general rule,” the court “consider[s] the parties’ intentions questions of fact.” Id. The language of §18.4 supports Sovran’s position that this condition was included for the benefit of Sovran. In fact, it requires that the Mickelsens “cooperate” with Sovran to get the government approvals it seeks. CP 343. So does the fact that this language was included in the agreements at the request of Sovran. CP 187-88. At minimum, whether §18.4 was for the benefit of the Mickelsens as well as Sovran is a question of fact.

2. The Parties Dispute The Scope of What “Lewis County Approvals” Are Required.

The parties also dispute whether §18.4 was satisfied, regardless of whether or not it was waived. Sovran’s position is that its obligation to “secur[e] from Lewis County approvals necessary for Buyer’s planned development” was satisfied on December 6, 2005, when Lewis County approved the expanded Urban Growth Area. CP 273 (“On December 6, 2005, the approvals from Lewis County were obtained and Sellers were so notified.”). If this were not enough, Sovran provided additional notice, in writing, that §18.4 was satisfied. CP 273-74.⁴ At minimum, Mr. Kirkbride’s testimony creates a disputed issue of fact regarding what the parties intended §18.4 to require. Even the Mickelsens appear to concede that whether §18.4 was satisfied is a disputed issue of fact. CP 276 (“the parties may disagree over whether paragraph 18.4 has been satisfied”).

Based on these two disputed issues of material fact – (1) whether the parties intended §18.4 to be for the benefit of Sovran or both parties and (2) what the parties intended the scope of the “Lewis County approvals” to be – the Court should reverse the trial court’s award of summary judgment to the Mickelsens with respect to §18.4. If either of these factual issues is resolved in favor of Sovran, §18.4 would be deemed waived or satisfied.

⁴ The Mickelsens state that, due to the holiday season, they gave Sovran five “additional days to satisfy” §18.4, from December 26, 2005 to December 31, 2005. CP 317. Taking the Mickelsens’ statement at face value, Mr. Kirkbride’s December 28, 2005 letter gave notice, before the deadline to satisfy §18.4, that this condition was satisfied.

E. The Mickelsens Are Not Entitled to Summary Judgment on Sovran's Claim That the Mickelsens Breached Their Contractual Duty of Good Faith and Fair Dealing.

In addition to granting the Mickelsens partial summary judgment on July 5, 2006 that §18.3 was not satisfied and §18.4 was not satisfied or waived, the trial court granted the Mickelsens summary judgment on Sovran's remaining claims on June 1, 2007. Sovran's remaining claims are rife with factual issues which should have precluded summary judgment.

In particular, even if the Mickelsens' notices of termination otherwise were effective, the Mickelsens were obligated to act in good faith. "There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of performance." Miller v. Othello Packers, Inc., 67 Wn.2d 842, 844, 410 P.2d 33 (1966). "Good faith is wholly a question of fact." Yuille v. State, 111 Wn. App. 527, 533, 45 P.3d 1107 (2002). Moreover, "[c]onditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain." Ashburn v. Safeco Ins. Co. of Am., 42 Wn. App. 692, 698, 713 P.2d 742 (1986).

The evidence suggests that the Mickelsens did not have a good faith basis to terminate the agreements pursuant to §18.3 and, in fact, that the Mickelsens sought to get out of the agreements so that they could negotiate a more favorable, "alternative" deal. This is shown by the

Mickelsens' correspondence at the time of the purported termination. CP 255 (“the Mickelsens are happy to discuss alternative proposals with Sovran independent of the existing Purchase and Sale Agreements”) (emphasis added). It is also evidenced by Clinton Mickelsen’s own notes. CP 162 (“Avoid any mention of land prices until after 12-31-05”); CP 161 (discussing project with Winlock’s mayor immediately following the purported termination).

Moreover, if the Mickelsens could show at trial that they had a good faith basis to terminate the agreements, then they almost certainly acted in bad faith by requiring Sovran to make four \$45,000 payments, for a total of \$180,000, to extend the time for Sovran to obtain Lewis County approval, while intending all along to terminate the agreements as soon as they had squeezed the maximum amount of money they could out of Sovran. The Mickelsens accepted several payments after the WSA Agreement expired. At minimum, whether the Mickelsens breached the contract by violating their obligation of good faith and fair dealing is an issue of fact that must be tried.

Finally, Sovran requested that the trial court at least continue the Mickelsens’ summary judgment motion, pursuant to CR 56(f), so that Sovran could take further discovery on these issues. This was particularly warranted in light of what Sovran already had been able to discover from documents obtained in discovery. CP 159-62. Depositions and additional document discovery likely would have provided Sovran with even more evidentiary support for its breach of contract claim, at least sufficient to

defeat a summary judgment motion. Discovery was “far from complete.” CP 149. The trial court abused its discretion in denying Sovran’s request.⁵

F. The Mickelsens Are Not Entitled to Their Costs and Attorneys’ Fees.

Because the trial court erred in awarding summary judgment in favor of the Mickelsens, the trial court also erred in awarding to the Mickelsens their costs and attorneys’ fees pursuant to the attorneys’ fees provision of the purchase and sale agreements. That provision provides for an award of attorneys’ fees to the prevailing party. CP 345 (§24). Should the Court reverse the trial court’s award of summary judgment in favor of the Mickelsens, the Court should also reverse the trial court’s award of costs and attorneys’ fees to the Mickelsens.

G. Sovran Requests Its Costs and Attorneys’ Fees on Appeal.

Sovran requests, pursuant to RAP 18.1, an award of its costs and attorneys fees on appeal, to the extent they would be recoverable now rather than on remand to the trial court. The purchase and sale agreements provide that “[i]n the event either Buyer or Seller brings any action or other proceeding with respect to the subject matter or enforcement of this Agreement, the prevailing party as determined by the court, agency or other authority before which such suit or proceeding is commenced shall, in addition to such other relief as may be awarded, be entitled to recover

⁵ The trial court stated, erroneously, that “there wasn’t really a request for” a CR 56(f) extension, and if Sovran “wanted a motion under 56(f) [it] should have said so[.]” RP (June 1, 2007) at 26. Sovran had requested a CR 56(f) extension, both in its brief in opposition to the Mickelsens’ motion, and in the supporting declaration of its counsel. CP 157, 160.

attorneys' fees, expenses and cost of investigation as actually incurred." CP 345. Thus, if Sovran is deemed to be the prevailing party, it is entitled to recover its costs and attorneys' fees.

VI. CONCLUSION

At oral argument below, the Mickelsens claimed that Sovran is "trying to . . . steal the land, and I don't think that's too strong of a word. They're trying to get the land for nothing." RP (June 12, 2006) at 17 (emphasis added). This could not be farther from the truth. Sovran does not want to "steal" the Mickelsens' land, to get it "for nothing." What Sovran wants to do is pay the Mickelsens \$4,027,800 for their property, the purchase price negotiated by the parties and stated in their agreements.

If any party is trying to get something for nothing in this dispute, it is the Mickelsens. Sovran spent six years working on this project. The Mickelsens are now trying to take the benefit of that work, the increased value of the land, for themselves.

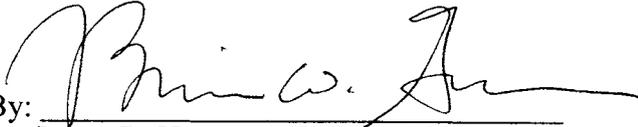
The §18.3 condition precedent was satisfied; the §18.4 condition precedent was waived. The Mickelsens should be required to specifically perform under the agreements or pay Sovran its damages as a result of the Mickelsens' breach. They are not entitled to an "alternative" deal simply because they believe they can negotiate a more favorable one now than they were able to do in 2002.

Sovran respectfully requests that this Court reverse the trial court's orders and remand with directions to enter partial summary judgment in

favor of Sovran on its declaratory judgment claim and for trial on all remaining issues.

Respectfully submitted this 15th day of October 2007.

DORSEY & WHITNEY LLP

By: 

James R. Hermsen, WSBA #1332
Brian W. Grimm, WSBA #29619

U.S. Bank Centre
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

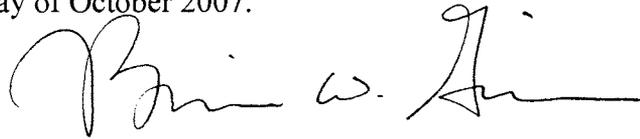
Attorneys for Plaintiff/Appellant,
Sovran, LLC

PROOF OF SERVICE

I caused copies of the foregoing Appellant's Opening Brief, the attached Appendix, and the Verbatim Report of Proceedings, to be served today, by legal messenger, on:

Kevin A. Bay
RYAN, SWANSON & CLEVELAND PLLC
1201 Third Ave., Suite 3400
Seattle, WA 98101-3034
Attorneys for Defendants/Respondents,
Mickelsen Dairy, Inc., et al.

DATED this 15th day of October 2007.



Brian W. Grimm



APPENDIX 1

AGREEMENT FOR PURCHASE AND SALE

THIS Agreement is made this 9th day of September 2002, between Sovran LLC, a Washington limited liability company, and/or assigns (hereinafter referred to as "Buyer"), and Mickelsen Dairy, Inc. (hereinafter referred to as "Seller").

WHEREAS, Buyer desires to purchase all of the land and improvements owned by Seller comprising approximately 26.97 acres of land located in Lewis County, Washington, Lewis County tax parcel numbers 015352001000, 015353002001. The legal description of the land to be purchased is attached hereto and made a part hereof as Exhibit A. The land and improvements shall be hereinafter referred to as the "property."

(The parties hereby authorize Escrow Holder to insert the correct legal description if the same is not available at time of signing, or to correct the legal description if erroneous or incomplete.)

NOW, THEREFORE, the parties agree as follows:

1. Purchase and Sale. At the closing, as hereinafter described, Buyer agrees to purchase from Seller and Seller agrees to sell to Buyer the property as is determined to be owned by Seller prior to closing; and conveyance shall be by Statutory Warranty Deed with exceptions satisfactory to Buyer.

2. Purchase Price. The purchase price for the property owned by Seller shall be as follows:

Five Hundred Thirty Nine Thousand Four Hundred and No/100 Dollars
\$539,400.00

3. Purchase Terms. Buyer shall pay the purchase price under the following terms:

3.1 Earnest Money: A Promissory Note in the form attached hereto as Exhibit B (which shall be executed by Buyer within 48 hours of acceptance by Seller of this Agreement) in the sum of Ten Thousand and no/100 dollars (\$10,000.00). These funds shall be due and payable upon removal of all contingencies contained in Section 18 and prior to Closing. The Promissory Note will be paid by the Buyer depositing with the Escrow Holder, in cash, certified funds or wire transfer, the above sum which shall be held in an interest bearing account accruing to the Buyer's benefit.

3.2 Closing: On or before closing, a deposit with the Escrow Holder, in cash or certified funds or the wire transfer of immediately available funds, for

[321302.01]

Buyer's Initials JK

Seller's Initials _____

EXHIBIT A
000337

the benefit of the Seller the additional sum of \$529,400.00, subject to section 19.

3.3 Concurrent Closing: Buyer agrees the property cannot be closed separately from the parcels owned by Mickelsen Properties, Mickelsen Land & Timber and Dennis and Linda Mickelsen, all of which are subject to separate purchase and sale agreements between the Buyer and the owners of those parcels, without the written permission of the Seller, at Seller's sole option.

4. Transaction Costs. Buyer shall be responsible for the payment of any fees relating to any financing secured by Buyer for this transaction including, without limitation, private mortgage insurance, loans or mortgage applications, origination or commitment fees and any other loan fees, deeds of trust, security deposits and insurance premiums. Seller shall pay any transfer, excise tax or sales tax due on the sale of the property. Buyer and Seller shall equally share the escrow fees and recording costs.

5. Closing Date and Closing Documents. The closing date shall be no more than one hundred eighty (180) days after the date upon which the conditions set forth in Section 18 have been satisfied or waived, whichever date is later. The escrow shall take place in the office of the Escrow Holder. The parties agree that the Escrow Holder shall be Transnation Title Insurance Company, Olympia, Washington. The following documents, which shall be mutually agreed to, shall be executed by the appropriate parties and deposited with the Escrow Holder prior to the closing date:

- Statutory Warranty Deed
- Title Insurance Policy
- Escrow Instructions
- Any other documents the parties agree are necessary to effectuate this transaction.

6. Existing Operations. Buyer and Seller each acknowledge that the property is currently used as part of a commercial dairy operation. Buyer agrees to grant Seller a lease back of the subject property for \$1.00 per month from the date of Closing for the purpose of operating the existing dairy. Buyer agrees to lease the property to Seller for use for dairy operations for the following term after the closing date:

If the closing date is within the period August through February: Nine (9) months lease.

If the closing date is within the period March through July: Six (6) months lease.

Seller shall vacate the property no later than the last day of the term of the lease.

Seller agrees to dredge to their original depth and dimensions the existing lagoons located on the property within 18 months from the closing date. Buyer shall provide to Seller adequate access to perform the necessary dredging. If access is denied or hindered,

the dredging requirement shall be deemed waived. Buyer may elect to not enforce this provision if an earlier date for occupancy of the lagoons is desired, at the Buyer's sole discretion.

Buyer agrees that no livestock or farm equipment is included in this purchase agreement. Buyer further agrees to allow Seller to remove any or all milking equipment from the property at Seller's discretion and to allow Seller access for such purpose.

7. Brokers. Buyer and Seller each acknowledge that there are no brokers in this transaction representing either party. No brokerage commission is due any party. Buyer shall indemnify, defend and hold harmless Seller from any claims by brokers made through Buyer against Seller and Seller shall indemnify, defend and hold harmless Buyer from any claims made by brokers through Seller against Buyer.

8. Real Estate Taxes. The Escrow Holder as of closing shall prorate all real property taxes relating to the property. In the event any taxes are not yet due prior to the closing date, Seller shall deposit sufficient funds to pay such amounts due, and/or the Escrow Holder shall pay Seller's portion of such amounts to Buyer out of Seller's sale proceeds.

Buyer will cooperate with Seller to minimize the penalties and costs associated with the removal of the Open Space Agriculture designation on the property.

9. Title Insurance. Seller shall provide to Buyer at closing an ALTA owner's standard title insurance policy in the amount of the total purchase price. Seller shall, in accordance with the preliminary commitment, provide such policy to Buyer. Buyer may, at its option, upgrade the policy to an ALTA owner's extended title insurance policy. If the cost of the extended policy is greater than the owner's insurance policy, Buyer shall pay for such additional cost.

10. Insurance. Seller shall keep its liability insurance on the property current through date of closing. Buyer shall be responsible for procuring insurance for the property for the period commencing immediately after the date of the closing. After closing, Seller may, at its sole option, maintain its current policy or obtain another policy for the period it is dredging the lagoons and/or leasing the property.

11. As Is, Where Is. Buyer acknowledges that Seller makes no representations, express, implied or statutory with respect to the property, its current condition, or its fitness or suitability for any particular purpose. Seller is selling and Buyer is buying "as is, where is," and Buyer confirms that he is relying solely upon his investigation and knowledge of the present condition of the property, and all governmental laws and ordinances which may affect their use and development. Neither Buyer nor Seller shall indemnify the other for hazardous waste, toxic substances or possible pollutants on the property. Seller has adequately informed Buyer of a hand dug well and water rights on the property.

12. Seller Representations. Seller, to the best of its knowledge, expressly represents and warrants the following to be true on the date of this Agreement and shall be true on the date of closing unless prior notification is made to the Buyer.

- 12.1 There are no uncured violations of laws, ordinances, codes, conditions or restrictions claimed to be applicable to the property.
- 12.2 There are no threatened or pending condemnation proceedings, or any suits, proceedings or claims affecting all or any part of the property.
- 12.3 The mineral rights have not been sold to a third party and are part of the transaction. The oil and gas rights on one or more parcels have been leased to a third party and the Seller's interest or lessor is part of this Agreement. Seller retains all oil and gas lease revenue received up to the date of closing.
- 12.4 There has been no construction, remodeling or other work performed on, or materials delivered to the property for which a lien could be hereafter filed against the property.
- 12.5 The signatories to this Agreement represent all the Sellers that are required to execute this Agreement and all signatories have the authority and power to enter into this transaction.
- 12.6 Seller has received no notice of violation or investigation relating to the Comprehensive Environmental Response Compensation and Liability Act; Federal Water Pollution Control Act or the Washington Model Toxics Control Act. Seller and Buyer each acknowledge that the property has been used as a commercial dairy and that throughout that use there has been cow manure on the property in various locations and concentrations. Nonetheless, Seller is aware of nothing, including the cow manure, that would constitute hazardous wastes or toxic substances contained in the soil or groundwater of the property or within any structure or improvement thereon.

13. Title. Seller shall convey the property owed by Seller to Buyer free of all liens and encumbrances and shall comply with the exceptions noted by Buyer pursuant to Paragraph 18.1.

14. Indemnity. Seller agrees to indemnify Buyer for claims relating to the property accruing on or before the closing as a result of Seller's actions, or as a result of unauthorized trespass upon the property. Seller grants Buyer the inspection rights set out in paragraph 18.2 and Buyer agrees to indemnify Seller for any claims arising from inspection or relating to the property after closing. Buyer agrees to carry liability insurance for any inspection and tests conducted on the property and provide Seller a

copy of such insurance policy. Buyer agrees that it will indemnify Seller against Buyer's failure to remove debris and/or comply with ordinances covering the same.

15. Escrow Instructions. Buyer and Seller shall execute escrow instructions mutually agreed to by the parties.

16. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Venue shall be in the Superior Court of the county in which the property is located.

17. Failure of Conditions; Default. If any of the conditions precedent to Buyer's obligation to close have not occurred or been satisfied on or before any specified deadlines prior to the closing date, Buyer, at his sole option, may a) terminate this Agreement by written notice delivered to Seller on the closing date or on such earlier deadline, in which event, Buyer shall be entitled to a full return of any deposits made, or b) waive such condition precedent and proceed to closing. Buyer shall provide Seller with copies of all inspections reports and governmental submittals.

If Seller is deemed to be in default hereunder for failure to comply with any one or more of the terms or conditions of the Agreement, Buyer, at his sole option may a) terminate this Agreement by written notice delivered to Seller on the closing date or on such earlier deadline, in which event, Buyer shall be entitled to a full return of any deposits made, b) waive such condition precedent and proceed to closing, c) enforce specific performance of this Agreement, or d) exercise any of the rights or remedies available at law or equity.

If Buyer is deemed to be in default hereunder, Seller, at its sole option may a) terminate this Agreement by written notice delivered to Seller on the closing date or on such earlier deadline, in which event, all earnest money and deposits shall be forfeited to Seller, b) enforce specific performance of this Agreement, or c) exercise any of the rights or remedies available at law or equity.

18. Conditions Precedent. The closing of this proposed transaction is specifically conditioned upon the following items. The failure to meet these conditions shall result in a termination of the transaction; however, Buyer shall be obligated to purchase property upon the satisfaction of all of the following items:

18.1 Condition of Title. The property is free of liens, attachments and encumbrances except those that are acceptable to Buyer and such property contains at least the acreage set forth hereinabove. Upon execution of this Agreement by Seller and Buyer, Seller shall cause a licensed title insurance company to issue a preliminary title commitment for the property in favor of Buyer. Upon receipt of the preliminary title commitment as required herein from such title insurance company, Buyer shall have twenty (20) days to examine such commitment and to deliver to Seller, in writing, Buyer's objections to any liens, attachments, or encumbrances shown or contained in

[321302.01]

- 5 -

Buyer's Initials *MLK*

Seller's Initials _____

000341

such commitment. In the event Buyer does not so object to any conditions to such title commitment within such 20-day period, it shall be deemed that Buyer has accepted the condition of the title to the property and that this condition precedent to closing has been satisfied. Should Buyer deliver to Seller his written objections to any lien, attachment, encumbrance or condition, Seller shall have thirty (30) days from receipt of same to remove such objection or provide assurances acceptable to Buyer that the same shall be removed at or before closing. Should Seller be unable or unwilling to cure any objections or provide assurances, Buyer may, at its option, terminate this Agreement and receive a full refund of any deposits made.

- 18.2 Buyer's Inspection of Property and Review of Seller's Information: Buyer shall have one hundred eighty (180) days after Buyer's acceptance of the preliminary commitment for title insurance, at its sole cost and expense, to inspect the property. Inspection shall be done in phases. A Level I environmental risk assessment shall be completed within ninety (90) days after Buyer's acceptance of the preliminary title commitment. A copy of the Level I study shall be given to both Seller and Buyer. If the Level I study recommends a Level II review of the property or if Buyer desires further invasive testing of the property, Seller shall have the right to terminate this agreement. The decision to terminate shall be at Seller's sole discretion. If Seller elects to terminate this agreement, it must notify Buyer of its election within twenty (20) days of receipt of the Level I study and all earnest money and deposits shall be returned to Buyer. If Seller elects not to terminate this Agreement, Buyer shall be entitled to conduct a Level II review of the property and conduct whatever other testing and feasibility studies Buyer deems necessary. If, at the end of the inspection and review period, the results of the inspection are not satisfactory to Buyer, in Buyer's sole opinion, Buyer shall provide Seller with written termination of this Agreement. Failure of Buyer to provide written termination shall be deemed satisfaction of this condition to closing.

Reasonable access to the property shall be made available to Buyer and Buyer's experts and consultants immediately after execution of this Agreement. Seller shall provide Buyer with all information in Seller's possession or which Seller has access, including but not limited to surveys, soils studies, wetland studies, traffic studies, site plans, and topography maps.

- 18.3 Water Rights Transfer: Buyer shall be satisfied that a bonafide water right exists on the property and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water. Buyer and Seller shall remove such contingency no later than two hundred forty (240) days from the date of this Agreement.

Any transfer of water rights is conditioned on the ability of Buyer and Seller to enter into an agreement with the City of Winlock or other water purveyor that adequately provides for the use of and financial reimbursement for the water rights transferred. The terms of the agreement with the City of Winlock or other water purveyor must be satisfactory to the Seller and Buyer.

Buyer shall provide Seller with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Buyer, in Buyer's sole opinion. Failure of Buyer to provide written termination shall be deemed a satisfaction of this condition to closing.

Seller shall provide Buyer with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Seller, in Seller's sole opinion. Failure of Seller to provide written termination shall be deemed a satisfaction of this condition to closing.

- 18.4 Authorization for Property Development: Buyer, at its sole cost and expense, shall apply for and diligently prosecute governmental authorization for Buyer's intended development with the appropriate governmental agencies.

This Agreement is expressly conditioned on Buyer securing from Lewis County approvals necessary for Buyer's planned development. Seller shall cooperate with Buyer in Buyer's application for governmental approvals and shall sign any documents reasonably requested by Buyer.

Buyer shall have a period of two hundred forty (240) days from the date of this Agreement to satisfy this condition and provide Seller with written notification that this condition has been satisfied. Failure to secure the approvals and provide such notification within such two hundred forty (240) days shall terminate the Agreement.

Notwithstanding anything to the contrary contained herein, no change shall be made to the property's comprehensive plan designation, zoning or land-use status without Seller's written consent if such change would cause Seller to lose its ability to operate a commercial dairy farm before expiration of the applicable lease periods set out in paragraph 6.

Buyer is aware that Seller has pending a request to change the designation of the property from Agricultural Resource to RDD. The parties agree Seller's RDD request may move forward. If the RDD request at any time creates a conflict with Buyer's application for governmental approvals, Buyer may request, that Seller withdraw its RDD request. Buyer's request

shall be in writing. If Seller, within 20 days of receipt of such written request, does not agree to withdraw its RDD request, Buyer shall be entitled to terminate this agreement and shall be entitled to a refund of all deposits.

18.5 Determination of Area. Prior to closing, Buyer and Seller shall in writing agree to the amount of acreage contained in the property.

19. Extension of Time. If the Buyer determines that any of the conditions precedent set out in Section 18 cannot be made within the allocated time periods an additional ninety (90) days will be granted with the payment of an additional \$15,000 to the Seller. This time extension period may be repeated three additional times with same payment. These payments will be applicable to the purchase price and are nonrefundable.

20. Notices. All notices and other communications hereunder shall be in writing and shall be sent by registered mail, certified mail, or express mail service, postage prepaid or nationally utilized overnight delivery service or United States Post, addressed to the parties as follows or personally served.

As to Seller:

Clint Mickelsen
Mickelsen Dairy
202 North Military Road
Winlock, Washington 98596

As to Buyer:

K. Frank Kirkbride
4404 7th Avenue SE, Suite 301
Lacey, Washington 98503

Any notice in accordance herewith shall be deemed received when delivery is received or refused as the case may be. Notice may be given by telephone facsimile transmission, provided that an original copy of said transmission shall be delivered to the addressee by a nationally utilized overnight deliver service or by United States Postal Service within three (3) days following such transmission. Telephone facsimile shall be deemed delivered on the date of such transmission.

21. Multiple Counterparts. This Agreement may be executed in two or more identical counterparts. If so executed, all of such counterparts shall, collectively, constitute one agreement.

22. Time is of the Essence. The parties hereto expressly agree that time is of the essence with respect to this Agreement.

23. Entire Agreement. This Agreement embodies the entire agreement of the parties with respect to the transaction herein contemplated and supercedes all prior agreements, whether oral or written. Any amendment hereto shall be in writing and executed by the parties hereto.

24. Attorneys' Fees. In the event either Buyer or Seller brings any action or other proceeding with respect to the subject matter or enforcement of this Agreement, the prevailing party as determined by the court, agency or other authority before which such suit or proceeding is commenced shall, in addition to such other relief as may be awarded, be entitled to recover attorneys' fees, expenses and cost of investigation as actually incurred.

25. Successors and Assigns. This Agreement and all of the terms and conditions herein shall inure to the benefit of and be binding upon the heirs, executors, personal representatives, transferees, successors and assigns of the parties hereto.

26. Computation of Time. Any period of time shall expire at 5:00 p.m. on the last calendar day of the specified time period unless the last day is a weekend day or holiday in which event, the last day shall be the next business day.

27. Assessments. Seller represents that there are no outstanding public assessments pending or against the property. If there is an assessment for any Local Improvement District or Utility Local Improvement District which may emerge against the property during the course of this Agreement, the amount of that assessment shall be deducted from the purchase price, it shall not be deemed a defect in Seller's titles at the time of closing.

28. Offer to Purchase. The presentation of this Agreement by Buyer to Seller requires the Seller to sign and return this Agreement to Buyer within fourteen (14) days of the presentation. In the event Seller fails to comply, this offer is deemed withdrawn as a matter of law.

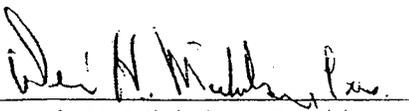
IN WITNESS WHEREOF, the parties hereto have executed this Agreement as to the date first hereinabove provided.

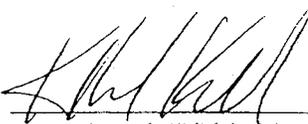
SELLER

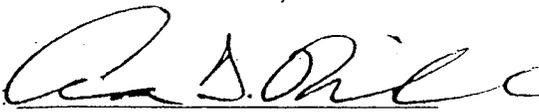
BUYER

MICKELSEN DAIRY, INC.

SOVRAN LLC

By: 
Dennis H. Mickelsen, President

By: 
K. Frank Kirkbride, Co-Manager

By: 
Aaron D. Mickelsen, Vice President

[321302.01]

By: *Denny P. Mickelsen*
Denny P. Mickelsen, Vice President

By: *William W. Lindeman*
William W. Lindeman, Secretary

By: *Clinton P. Mickelsen*
Clinton P. Mickelsen, Treasurer

EXHIBIT A

to

AGREEMENT FOR PURCHASE AND SALE

Legal Description of Property:

[321302.01]

- 11 -

Buyer's Initials AK

Seller's Initials _____

000347

EXHIBIT B

PROMISSORY NOTE

\$10,000.00

Date: _____

For value received, the undersigned (the "Promisor"), promises to pay to the order of Seller, Mickelsen Dairy, Inc. (the "Payee"), at Transnation Title Insurance Company, Olympia, Washington office to close the transaction for the purchase and sale of property pursuant to that certain Purchase and Sale Agreement between the parties; the sum set forth above, without interest until due, and thereafter at the rate of prime plus 2% as reported by the Wall Street Journal annually compounded.

The sum shall be payable upon removal of all contingencies in Section 18 of the certain Purchase and Sale Agreement between the parties. All payments on this Note shall be applied first in payment of costs of collection, then to accrued interest and any remainder in payment of principal.

If any payment obligation under this Note is not paid when due, the Promisor promises to pay all costs of collection including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

If any one or more of the provisions of this Note are determined to be unenforceable, in whole or in part, for any reason, the remaining provisions shall remain fully operative.

All payments of principal and interest on this Note shall be paid in the legal currency of the United States. Promisor waives presentment for payment, protest, and notice of protest and nonpayment of this Note.

No renewal or extension of this Note, delay in enforcing any right of the Payee under this Note or assignment by Payee of this Note shall affect the liability of the Promisor. All rights of the Payee under this Note are cumulative and may be exercised concurrently or consecutively at the Payee's option.

This Note shall be construed in accordance with the laws of the State of Washington.

SOVRAN LLC

By: _____
K. Frank Kirkbride, Co-Manager

[321302.01]

- 12-

Buyer's Initials _____

Seller's Initials _____

000348

APPENDIX 2

FIRST AMENDMENT TO AGREEMENT FOR PURCHASE AND SALE

THIS AGREEMENT is made by and between Sovran LLC (the "Buyer") and Mickelsen Dairy, Inc. (the "Seller").

WHEREAS, by an Agreement for Purchase and Sale executed by and between the parties, dated September 9, 2002 (the "Purchase Agreement"), Buyer agreed to purchase from Seller the land and improvements owned by Seller comprising approximately 26.97 acres in Lewis County, Washington, as identified in the Purchase Agreement, which is incorporated herein by this reference;

AND WHEREAS, the Buyer and the Seller wish to amend the Purchase Agreement in accordance with the terms and conditions hereof;

NOW THEREFORE in consideration of the promises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The Purchase Agreement is hereby modified and amended as follows.
 - a. Article 3.1 Earnest money Deposit: Buyer will pay to Seller \$150.00 of non-refundable and non-applicable funds at signing of this Amendment.
 - b. Article 18.3 Water Rights Transfer: The provision to remove the contingency identified in said article "not later than two hundred forty (240) days from the date of this Agreement" is changed and amended to "not later than December 31, 2004."
 - c. Article 18.4 Authorization for Property Development: The provision that "Buyer shall have a period of two hundred forty (240) days from the date of this Agreement to satisfy this condition and provide Seller with written notification that this condition has been satisfied" is changed to "Buyer shall have until December 31, 2004 to satisfy this condition and provide Seller with written notification that this condition has been satisfied"
2. The Seller and the Buyer hereby confirm that:
 - a. All other terms and conditions of the Agreement for Purchase and Sale are in full force and effect, unamended except as expressly provided in this Agreement, and
 - b. Time shall remain of the essence.

3. This Agreement may be executed in one or more counterparts, each of which when so executed shall be deemed to be an original and such counterparts together shall constitute one and the same instrument

EXHIBIT D

000375

4. The Seller and the Buyer acknowledge that signatures transmitted by facsimile machine are considered original signatures and binding upon the parties.

IN WITNESS WHEREOF this Agreement has been executed by the parties hereto as of the date shown.

SELLER

BUYER

Mickelsen Properties

Sovran LLC

Dennis H. Mickelsen
By: Dennis H. Mickelsen

Frank Kirkbride
By K. Frank Kirkbride, Co-Manager

Date: 11-6-03

Date: 11.7.03

Clinton P. Mickelsen
By: Clinton P. Mickelsen

Date: 11-6-03

Susan J. Lindeman
By: Susan J. Lindeman

Date: 11-6-03

William W. Lindeman
By: William W Lindeman

Date: 11/6/03

APPENDIX 3

Kevin A. Bay

direct dial 206-654-2250
direct fax 206-652-2950
bay@ryanlaw.com
Ref. No. 436855.01/014936.00001

December 14, 2005

Mr. K. Frank Kirkbride
Sovran Development Group
4405 Seventh Avenue SE, Suite 301
Lacey, WA 98503

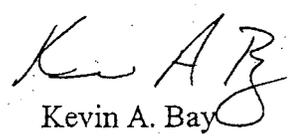
Re: Mickelsen Dairy, Inc. Purchase and Sale Agreement

Dear Mr. Kirkbride:

This shall serve as formal notice of termination pursuant to paragraph 18.3 of that Agreement for Purchase and Sale between Sovran, LLC and Mickelsen Dairy, Inc. dated September 9, 2002, as amended. The conditions of the water right transfer to the City of Winlock have not been satisfied and it does not appear there will be an acceptable agreement in place between Sovran, Mickelsen Dairy, Inc. and the City prior to December 31, 2005. In addition, Sovran has not obtained the approvals from Lewis County as required by paragraph 18.4 of the Agreement. Mickelsen Dairy, Inc. therefore terminates the Agreement for Purchase and Sale effective midnight December 31, 2005.

This notice does not affect any other right of termination granted by the Purchase and Sale Agreement.

Best regards,


Kevin A. Bay

KAB:mmj

cc: Mr. Clint Mickelsen