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STATE OF WASHINGTON
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NO. 38975-4-II

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

NORMAN C. IVERSON,

Respondent,

v.

KIRI JOINT VENTURE, et al.,

Appellants.

REPLY BRIEF

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INTRODUCTION

The Brief of Respondent focuses primarily on the issues surrounding whether a majority of Kiri's members ever voted to pay Nick Iverson a management fee. Nick's efforts to cobble together a majority vote are based on new arguments regarding Kiri's ownership that Nick never raised before the trial court on summary judgment. These arguments are improperly raised on appeal. Even if the Court considers Nick's new arguments the Court will find that they reveal additional fact questions, making summary judgment improper.

Nick's remaining responses cannot undermine the simple facts of this case. Although the JVA provides that Kiri's members could agree to elect Nick as manager and pay him a fee only with the unanimous consent of Kiri's members after a member-meeting, Kiri did not have a member meeting until 2003 at which time Kiri's members unequivocally told Nick that he did not and could not manage Kiri. And any alleged promise to pay Nick a fee is illusory, where is says nothing about what Nick was supposed to do.

Although improper, Nick Iverson's new arguments raise numerous fact questions making summary judgment improper. This Court should reverse and remand for a trial on the merits.

REPLY TO RESTATEMENT OF THE CASE

A. Nick Iverson's brief reveals new fact disputes regarding Kiri's ownership in 1995, when Nick Iverson first produced the Management Agreement.[1] (BA 4-6, BR 4-5).

Nick Iverson's new factual assertions reveal more disputed fact issues adding to the impropriety of summary judgment. By the end of 1994, the Iverson parents had: (1) conveyed their 25.5% Kiri membership interest to the Norbeck trust, which in turn conveyed the interest to the three Iverson children in equal shares; and (2) conveyed their 25.5% Kiri membership interest held by the Iverson trust to Iverson Real Estate, LLC, owned equally by the Iverson children. BA 5-6. From then on, Kiri was owned as follows: Penny Duke, 8.5%; Jeff Iverson, 8.5%; Nor Rae trust (Nick Iverson), 8.5%; Iverson Real Estate, LLC, 25.5%; Knutsen, 24.5%; Redford, 24.5%. CP 163-64.

Nick Iverson states that in 1995 the Iverson parents still had a 6% interest in Kiri and that the Iverson trust still had a 25.5% interest in Kiri. BR 5. As discussed below, this is a new argument, impermissibly raised for the first time on appeal. Argument § A,

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[1] The Management Agreement is the first of many agreements Nick Iverson claims entitle him to a management fee. Copy attached as Appendix A to Brief of Appellant. Although Nick originally argued that the Management Agreement was signed in 1977, he now concedes that it was signed in 1995. *Compare* BA 8 *with* BR 5.

infra. If Kiri[2] is correct about Kiri's ownership in 1995, then less than a majority of its members signed the Management Agreement, not 56% of Kiri's members as claimed in Nick's new argument. *Compare* BA 5-6 *with* BR 5.

B. Nick Iverson's brief reveals new fact disputes regarding Kiri's ownership in 1996, when Nick alleges that Kiri's members ratified the Management Agreement. (BA 12-14, BR 6-7).

Some of Kiri's members signed an "Agreement Among Partners" in 1996, which Nick Iverson claims ratified the Management Agreement. BA 11-12. The following entities signed the Agreement Among Partners: the Iverson parents, Norman Iverson on behalf of the Iverson trust and Iverson Real Estate, LLC, the NorRea Trust, the Iverson children, and Knutsen. Copy attached as Appendix B to the Brief of Appellant. The Iverson parents and the Iverson trust had no Kiri membership interest in 1996. BA 13-14. Although Norman Iverson signed on behalf of Iverson Real Estate, LLC, he had no interest in or authority to bind Iverson Real Estate, LLC in 1996. *Id.* As such, the only signatories with a Kiri membership interest were Knutsen and the Iverson

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[2] This Reply Brief uses "Kiri" to refer to Kiri's members other than Nick Iverson, all of whom are appellants.

children. *Id.* Thus, less than a majority of Kiri's members signed the Agreement Among Partners. *Id.*

Nick Iverson now claims for the first time that 75.5% of Kiri's ownership interest signed the Agreement Among Partners. BR 6. Although Nick does not spell it out, his argument depends on (1) the Iverson trust having had an interest in 1996; or (2) Norman Iverson having had authority to bind Iverson Real Estate, LLC. *Id.* Either way, Nick's new claim creates another fact question.

C. After the Hawk's Prairie sale fell though in 1996, Nick Iverson lied to Kiri's members, had almost no contact with his siblings for seven years, and was repeatedly told that he did not represent Kiri. (BA 15-20).

Nick Iverson offers no response to the following:

- Nick Iverson falsely told Knusten and Redford that "the Iversons" had agreed to pay Nick a management fee, among other things. BA 15-16.
- Nick Iverson had almost no contact with Penny Duke and Jeff Iverson between 1996 and 2003, and they had no idea what Nick was doing with regard to the property. BA 16-17.
- Kiri held its first meeting on October 15, 2003, prompted by Nick Iverson's representation to a third party that Jeff Iverson was trying to "remove" Nick as Kiri's manager. BA 17.
- At the October 2003 meeting, Kiri's members unequivocally told Nick Iverson that he was not and never was Kiri's manager and that he had no authority to represent Kiri in any management capacity. BA 17-18.
- After receiving word that Nick Iverson was still purporting to represent Kiri, Kiri's members unanimously agreed that they

never had and never would support any partner receiving a fee. BA 19-20.

D. Nick Iverson argues for the first time on appeal that the Iverson parents still have a Kiri membership interest. (BR 8-10).

By the end of 1994, the Iverson parents had transferred their entire 25.5% Kiri membership interest to the Iverson children in equal 8.5% shares. BA 5-6 (citing CP 163, 275, Penny Duke's declarations). This occurred in four separate transactions: 2% to each Iverson child in 1989 (CP 282); 2% each in 1990 (CP 292); 2% each in 1992 (CP 296); and 2.5% each in 1994 (CP 299). Copy attached as Appendix E to the Brief of Appellant. The 1989 transfer was documented in an Amendment to the JVA (also signed in June 1989). CP 282.[3] The 1990, 1992, and 1994 transfers were accomplished by documents titled "Assignment and Transfer." CP 292, 296, 299.

Before the trial court, Nick agreed that the Iverson children each have an 8.5% Kiri membership interest and that the Iverson parents had no Kiri membership interest, stating without elaboration that Kiri's current ownership is as follows: 25.5% Iverson Real

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[3] Nick Iverson argues that the 1989 transfer was ineffective. BR 18 n.9. Kiri addresses his argument below. Argument § B, *supra*.

Estate, LLC "a successor to the Iverson Trust";[4] 24.5% Redford; 24.5% Knutsen; 8.5% Jeff Iverson; 8.5% Nick Iverson; 8.5% Penny Duke. CP 128 ¶5; *see also* Nick's Complaint, CP 2-3, 25-26.

Nick now claims that each of the Iverson children has never had more than a 6.5% Kiri membership interest and that the Iverson parents (now deceased) still retain a 6% Kiri membership interest. BR 10, 18. Not only is this argument new, it plainly contradicts Nick's sworn statements before the trial court. *Compare* CP 128 *with* BR 10, 18.

Nick Iverson arrives at a 6.5% interest for each Iverson child by ignoring the 1989 transfer in his statement of the case. BR 9-10. He later argues that the 1989 transfer was ineffective because the JVA Amendment documenting the transfer (CP 282-84) was not signed by all of Kiri's members. BR 18 n.9. Apparently referencing the same JVA Amendment, Nick Iverson also argues that the 1990, 1992, and 1994 transfers were "ineffective," where "Appellants [have not] submitted any evidence that these attempted

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[4] As discussed below, Nick Iverson's admission that Iverson Real Estate, LLC has a 25.5% Kiri membership interest plainly contradicts his new claim on appeal that Iverson Real Estate has never had an interest in Kiri. *Compare* CP 128 *with* BR 18.

assignments were consented to as required by the [original JVA]." BR 9, 10.

The JVA amendment, signed in 1989, states that the Iverson parents "transferred an undivided 2% interest in the Joint Venture Agreement to each of [their] three children . . . ." CP 282. The Amendment further reflects in an accounting of each members' interest that each Iverson child had a 2% interest and that Norbeck Trust (which held the Iverson parent's interest), had a 19.5% interest (reduced by 6% from 25.5%). *Id.* The Amendment also provides that consent to the transfer of a membership interest is not required where the transfer is to a lineal descendent. CP 283.

If Nick had argued on summary judgment that the JVA Amendment was ineffective, he would have had the burden to show that it was not signed by all of Kiri's members. He did not do so. Kiri did not submit evidence that all Kiri members signed the JVA Amendment because there was no reason to – Nick agreed at trial that each Iverson children had an 8.5% interest and that the parents no longer had a personal interest. CP 128 ¶5; *see also* Nick's Complaint, CP 2-3, 25-26. Kiri could not (and did not need to) rebut an argument that Nick never raised. If Nick had raised this argument on summary judgment, Kiri could have submitted

evidence contradicting Nick's new claims. RAP 9.12 prevents Kiri from submitting this evidence to this Court.

E. Nick Iverson argues for the first time on appeal that the Iverson trust never conveyed its interest to Iverson Real Estate, LLC. (BR 8-10).

By the end of 1994, the Iverson parents had transferred their 25.5% interest held by the Iverson trust to Iverson Real Estate, LLC, owned equally by the Iverson children. BA 5-6 (citing CP 163 Penny Duke's declaration). Before the trial court, Nick Iverson agreed that Iverson Real Estate, LLC owns a 25.5% interest in Kiri. *Compare* BR 9, 18 *with* CP 2-3, 25-26, 128 ¶ 5. Nick took contradictory positions as to when the Iverson trust transferred its interest to Iverson Real Estate, LLC. *Compare* CP 376 ¶ 8 *with* CP 375-76, 391-92. Although Nick at one point stated that Iverson Real Estate, LLC did not obtain its 25.5% Kiri membership interest until 2004, his arguments on summary judgment indicate that Iverson Real Estate, LLC obtained its 25.5% interest from the Iverson trust before 1996. CP 375-76, 391-92.

For example, to support his argument that a majority of Kiri's members signed the Agreement Among Partners in 1996, Nick repeatedly claimed that either Norman Iverson's signature, Nick Iverson's signature, or the Iverson children's signatures bound

Iverson Real Estate, LLC. *Id.* And the Addendum to the 1996 PSA Nick relied on had a signature line for Iverson Real Estate, LLC, but not for the Iverson trust. CP 165-66. Nick even went so far as to explain that the Iverson trust (and the Iverson parents) signed the Agreement Among Partners only "with respect to any residual interest they may have had in Kiri." CP 391. Nick's arguments on summary judgment plainly rely on Iverson Real Estate, LLC having owned a 25.5% Kiri membership interest in 1996.

Nick Iverson now claims for the first time that the Iverson trust never transferred its 25.5% Kiri membership interest to Iverson Real Estate, LLC and that the Iverson children "recognized" that the transfer had never occurred.[5] BR 9 (citing CP 388); BR 18. Clerk's Papers 388 actually states that the Iverson trust needed to terminate in 1994, but "mistakenly" attempted to convey to the Iverson children an interest in the real property when the trust had only an interest in Kiri. *Compare* BR 9 *with* CP 388. Penny Duke

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[5] Nick Iverson makes a similar claim with respect to the transfer from the Iverson parents to the Iverson children, stating that the Iverson children "recognized" that the deeds conveying the Iverson parents' interest in the property did not convey an interest in Kiri. BR 9 (citing CP 387). Clerk's Papers 387 actually states that the Iverson parents mistakenly transferred a property interest to the children in 1986, when they intended to transfer an interest in Kiri. *Compare* BR 9 *with* CP 387. In any event, Kiri does not rely on the deeds to document the Iverson parents' transfer of the Kiri interest to the Iverson children – it relies on the Amended JVA (CP 282) and the "Assignment and Transfer[s]." CP 292, 296, 299.

states that the Iverson trust successfully transferred its Kiri membership interest to Iverson Real Estate, LLC before the end of 1994, explaining that although there were title issues that were later corrected, all Kiri members "recognized and acted upon" the 1994 transfer to Iverson Real Estate, LLC as a valid transfer. CP 275-76. After the 1994 transfer, Iverson Real Estate, LLC paid assessments to Kiri consistent with its 25.5% ownership interest. CP 275.

Finally, Kiri's 1995 tax return reflects that Iverson Real Estate, LLC, not the Iverson trust, was a 25.5% owner no later than January 1, 1995. CP 188-90. Kiri's 1995 tax return includes a schedule K-1 (Partner's Share of Income, Credits, Deductions, etc) for Iverson Real Estate, LLC, but not for the Iverson trust.[6] CP 188-90. This is consistent with Penny Duke's sworn statement that Iverson Real Estate, LLC paid income taxes on any income from Kiri (or took a taxable loss) after the 1994 transfer. CP 275-76.

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[6] Kiri's 1995 tax return also does not have a K-1 for the Iverson parents, despite Nick Iverson's new claim that they still had a Kiri membership interest in 1995. CP 173-190. Consistent with the ownership interest Kiri describes, the K-1s are for Iverson Real Estate, LLC, Jeff Iverson, Penny Duke, the Nor-Rea Trust (for Nick Iverson), Redford, and Knutsen. *Id.*

REPLY ARGUMENT

A. Nick Iverson's entirely new argument on appeal is improper under RAP 9.12, and actually supports reversal, where it creates more fact questions making summary judgment inappropriate.

1. This Court should not consider Nick Iverson's new argument on appeal.

RAP 9.12 provides that "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12; ***Nelson v. McGoldrick***, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (refusing to consider the respondent's new argument on appeal); ***Bldg. Indus. Ass'n of Wash. v. McCarthy***, 152 Wn. App. 720, 733-34, 218 P.3d (2009) (in which this Court stated, "Our review is limited, however, to the evidence and issues presented to the trial court"); ***Sourakli v. Kyriakos, Inc.***, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (refusing to consider respondent's new arguments on appeal under RAP 9.12), *rev. denied*, 165 Wn.2d 1017 (2009)). The purpose of RAP 9.12's limitation "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court" when reviewing a summary judgment order. ***Wash. Fed'n of State Employees, Council 28 AFL-CIO v. Office of Fin. Mgmt.***, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

This Court should refuse to consider Nick Iverson's entirely new argument that the Iverson children have less than an 8.5% Kiri membership interest. RAP 9.12. Nick repeatedly stated before the trial court that the Iverson children each had an 8.5% Kiri membership interest. Statement of the Case § D, *supra*. He cannot now claim otherwise. RAP 9.12.

The Court should also refuse to consider Nick Iverson's entirely new argument that Iverson Real Estate, LLC never had any interest in Kiri. RAP 9.12. Nick Iverson's complaints and sworn declaration plainly stated that Iverson Real Estate, LLC had a 25.5% Kiri membership interest. CP 2-3, 25-26, 128 ¶ 5. And Nick repeatedly asserted Iverson Real Estate, LLC's 25.5% Kiri membership interest when advantageous to a position he was advancing. Statement of the Case § D, *supra*.

2. Nick Iverson's new arguments create more fact disputes making summary judgment improper.

Even if this Court considers Nick Iverson's new arguments, they create fact questions making summary judgment improper. Nick's new arguments contradict Penny Duke's declarations and supporting documents. CP 163, 275. His arguments also contradict his own pleadings, as well as many of his arguments before the trial court. Statement of the Case § D, *supra*.

B. A majority of Kiri's members never agreed to the Management Agreement. (BA 23-27, BR 15-21).

1. Nick Iverson's entire argument that a majority signed the Management Agreement in 1995 is based on his impermissible new argument.

Nick Iverson now concedes that the Management Agreement was not signed until 1995, at which time Knutsen was the only signatory with a Kiri membership interest. *Compare* BA 26-27 *with* BR 16. Although the Iverson parents and Iverson trust signed, they had already conveyed their interest to the Iverson children and Iverson Real Estate, LLC. BA 26-27; Statement of the Case § D, *supra*.

Nick Iverson's response is based on his new argument that in 1995 the Iverson parents still had a 6% Kiri membership interest and that the Iverson trust still had a 25.5% membership interest, in which case 56% of Kiri membership interest agreed to the Management Agreement. BR 18-20. This Court should refuse to consider this new argument. Argument § A, *supra*.

2. Nick Iverson's arguments regarding the Iverson parents' transfers to the children are meritless.

Nick Iverson faults the other Kiri members for relying solely on Penny Duke's declaration and the attached documents to support Kiri's arguments about Kiri's ownership interest. BR 21. Contrary to Nick's assertions, the documents attached to Penny

Duke's declaration plainly support her sworn statement about the transfers from the Iverson parents to the Iverson children, and from the Iverson trust to Iverson Real Estate, LLC.[7] Statement of the Case § D, *supra*. Nick Iverson forgets that this Court must take all reasonable inferences in Kiri's favor. ***King v. Rice***, 146 Wn. App. 662, 668, 191 P.3d 946 (2008), *rev. denied*, 165 Wn.2d 1049 (2009). This Court should not reject Penny Duke's well-supported account in favor of Nick's new story, which does not have any documentary support and plainly contradicts the position Nick advanced before the trial court.

Nick Iverson also argues that the Iverson parents retained their full 25.5% interest, where Kiri's other members did not consent to the transfer to the Iverson children. BR 22-23. If correct, then a majority of Kiri's members signed the Management Agreement in 1995. But Nick Iverson ignores that the Iverson parents obtained consent for the 1989 transfer and that Kiri amended the JVA such

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[7] Nick Iverson also claims that Penny Duke's declaration contradicts her statement that the Iverson parents attempted to transfer a 2% Kiri membership interest to each of the Iverson children in 1985. BR 21 (citing CP 387). Penny Duke readily acknowledges this point in her declaration and explains that her parents successfully transferred the 8.5% interest in four increments between 1989 and 1994. CP 163, 275. These statements are not contradictory. BR 21.

that consent was not required for the 1990, 1992, and 1994 transfers. Statement of the case § D, *supra*.

Finally, Nick Iverson asks this Court to infer from the Iverson parents' signatures on the Management Agreement that the Iverson parents must have had a 6% interest in Kiri. BR 23. This new argument contradicts Nick's claim before the trial court that the Iverson parents signed only in case they had a residual interest. CP 392. In any event, this Court must make inferences in Kiri's favor, not Nick Iverson's favor. ***King v. Rice***, 146 Wn. App. at 668.

3. Nick Iverson's arguments regarding the transfer from the Iverson trust to Iverson Real Estate, LLC are meritless. (BR 21, 32).

Nick Iverson argues that Iverson Real Estate, LLC is not a Kiri member, where the quitclaim deed transferring the Iverson trust's interest to Iverson Real Estate, LLC transferred an interest in the real property, not a Kiri membership interest. BR 21, 32. The deed at issue references the real property. CP 300. Penny Duke unequivocally stated that the deed transferred the Iverson trust's Kiri membership interest, and that all Kiri members, including Nick, treated the transfer as effective. CP 163, 276. This is consistent with Kiri's tax returns, with Iverson Real Estate, LLC's membership payments to Kiri, and with Nick Iverson's own arguments.

Statement of the Case § D, *supra*. Even assuming for argument's sake that the deed is insufficient, there is a fact question as to whether Kiri's members ratified the transfer to Iverson Real Estate, LLC.

Penny Duke does not, as Nick Iverson claims, acknowledge that the quitclaim deed conveying the Iverson trust's 25.5% interest to Iverson Real Estate, LLC was "inoperative." *Compare* BR 21, 32 *with* CP 388. Penny Duke acknowledges that there were problems with title that were later straightened out. CP 276, 388. Again, the deed, the tax records, and the Kiri members' actions are sufficient to create at least a fact question as to whether the Iverson trust transferred its 25.5% interest to Iverson Real Estate, LLC in 1994.

C. Kiri's members did not ratify the Management Agreement. (BA 28-35, BR 26-31).

1. A majority of Kiri's members never signed the Agreement Among partners.

The trial court apparently found that the 1996 Agreement Among Partners ratified the Management Agreement, but a majority of Kiri's then members did not sign the Agreement Among Partners. BA 28-31. Knutsen and the Iverson children signed the Agreement Among Partners, totaling only 50% of Kiri's then membership interest. BA 13.

Nick Iverson argues that the Norman Iverson's signature for the Iverson trust brings the total to 75.5%. BR 27. This argument is of course based on Nick Iverson's new argument on appeal that the Iverson trust never transferred its Kiri membership interest to Iverson Real Estate, LLC. As above, the Court should disregard this unsupported argument. RAP 9.12.

Alternatively, Nick Iverson argues if the Iverson trust had transferred its interest to Iverson Real Estate, LLC, then Iverson Real Estate, LLC ratified the Agreement Among Partners. BR 32-35. Nick argues that there is no evidence that Norman Iverson could not bind the Iverson Real Estate, LLC (BR 32), but Penny Duke plainly states that Norman Iverson had no interest in or authority to bind Iverson Real Estate, LLC, which is (and was at the time) owned and controlled by the Iverson children. CP 163. In any event, Nick has the burden of proof since he puts forth the argument that Norman could bind Iverson Real Estate, LLC.

Nick Iverson also argues that the Iverson children's signatures in their personal capacities bound Iverson Real Estate, LLC. BR 33-34. This is at odds with the document itself. None of the children purported to sign on behalf of Iverson Real Estate, LLC. BA 30-31.

Finally, Nick Iverson argues that an Addendum to the 1996 Hawk's Prairie Purchase and Sale Agreement ratified the Management Agreement. BR 32-33. He neglects to mention that after allegations of fraud, all Kiri members – including Nick – signed a second addendum voiding the addendum purporting to give Nick a fee. BA 14-15.

2. The Agreement Among Partners cannot ratify the Management Agreement, where it is not an agreement to pay Nick Iverson a management fee. (BA 31-33).

The Agreement Among Partners does not ratify the Management Agreement, where its only substantive provision does not promise to abide by the Management Agreement or to pay Nick Iverson a management fee. BA 31-33. The language Nick relies on is contained only in the recitals, which are not enforceable contract terms. *Id.* Nick does not respond.

3. The Agreement Among Partners cannot ratify the Management Agreement, where it pertains only to the Hawk's Prairie sale. (BA 33, BR 34).

The Agreement Among Partners twice states that its purpose is to expedite the Hawk's Prairie sale, suggesting that the signatories intended the Agreement Among Partners to apply to the Hawk's Prairie sale, not to the sale at issue, which occurred 12 years later. BA 33. Nick Iverson's only response is that Kiri

produces no declaration or other document stating that the Agreement Among Partners is limited to the Hawk's Prairie sale. BR 34. The point, however, is that the Agreement's plain language creates a fact question as to the Agreement's scope. BA 33.

4. Kiri's members did not impliedly ratify the Management Agreement. (BA 33-35, BR 29-30).

Each Kiri member, including Nick Iverson, was required under the JVA to participate in Kiri's management. BA 34. Kiri's members did not accept the "benefits" of Nick's work simply by allowing him to do what the JVA obligated him to do. *Id.*

Nick Iverson's sole response is that Kiri's members do not contest his claimed work, which (Nick claims) benefitted Kiri even if it did not increase the value of the real property. BR 29-30. But the Iverson trust paid Nick a salary to represent the trust's interest in Kiri into the early 1990s[8] (CP 162, 302), and Kiri's other members participated in Kiri's management without claiming a right to compensation. BA 34-35. Moreover, Kiri's members did not have full knowledge of Nick's acts, a second element of implied ratification. BA 34-35.

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[8] That Nick's salary from the trust terminated in the early 1990s is also consistent with Kiri's argument that the trust transferred its interest to Iverson Real Estate, LLC in 1994.

D. The Kiri members could not agree to pay Nick Iverson a management fee without a member meeting and unanimous vote. (BA 35-40, 12-15, BR 31).

As discussed in the opening brief, JVA paragraph 8 provides that management decision will be made by all Kiri members, voting according to their ownership interest, after the opportunity to meet and fully discuss the issue; and paragraph 18 provides that JVA amendments require a unanimous vote. BA 35-37. Paragraphs 8 and 18 prevented the Iversons, who owned 51% of Kiri, from unilaterally managing Kiri. CP 309.

Nick Iverson argues that Kiri members thought only a majority vote was required to pay Nick a fee, where the Agreement Among Partners states that the signatories believe that Kiri "has the authority under paragraph 8 of the joint venture agreement to enter into a management agreement with Norman C. Iverson subject to the vote of their proportionate interest." BR 13-14. This statement does not indicate that any thought was given to paragraph 18's unanimity requirement. Rather, all it indicates is that the signatories did not think that hiring a manager violated their duty to participate in Kiri's management.

Nick Iverson offers the following equally unavailing responses to Kiri's argument that a meeting was required before

members could elect to pay Nick a fee: that (1) Kiri failed to show that there was no *opportunity* to meet; and (2) everyone's position on the Agreement Among Partners was well known. BR 31. Kiri's first official meeting was not until 2003, and there is no indication that anyone called a meeting any time sooner. CP 276-77, 311. And Redford plainly states that he was not even made aware of the Agreement Among Partners before other Kiri members signed it, alone defeating Nick's argument that there was an opportunity to meet and that everyone's position on the Agreement Among Partners was "well known." *Compare* BR 31 *with* CP 311.

E. The promise to pay Nick Iverson a fee is illusory. (BA 40-42, BR 24-26).

The Management Agreement is illusory, so is unenforceable. BA 41 (citing ***Bakotich v. Swanson***, 91 Wn. App. 311, 317 n.3, 957 P.2d 275 (1998)). The Management Agreement's only substance is a promise to pay Nick Iverson a fee and an explanation of how the fee will be paid. BA 41-42. The Management Agreement fails to define what Nick Iverson was supposed to do, so it would be impossible to determine whether or not he performed. *Id.*

Nick Iverson argues that the Management Agreement is for services he rendered before the Agreement was actually signed, such that the signatories had already witnessed his performance. BR 25. But there is no evidence that Kiri's members had any idea what Nick Iverson was allegedly doing and he was being paid by the Iverson trust for his work in any event. BA 7.

In the same vein, Nick Iverson argues that the lack of specificity in the Management Agreement is excused by his performance after the Agreement was signed in 1995. BR 25-26. But Penny Duke and Jeff Iverson never saw the Management Agreement until the Hawk's Prairie sale was pending in 1996 (BA 11-12) and had almost no contact with Nick Iverson between late 1996 – when the Hawk's Prairie sale fell through, and 2003 – when Kiri's members unequivocally told Nick Iverson that he did not and could not represent Kiri. BA 16-18. There is simply no basis for Nick's argument that Kiri's members were even aware of his alleged part performance. BR 25-26.

F. Nick Iverson's claims under the Management Agreement are barred under the three-year statute of limitations. (BA 43-46, BR 37-42).

A three-year statute of limitations applies where parol evidence is necessary to establish an essential term of a written

contract. BA 43-44 (citing ***DePhillips v. Zolt Constr. Co.***, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998)). The Management Agreement lacks an essential term – "terms and conditions" – where it does not define Nick Iverson's duties or tasks. BA 44 (citing ***DePhillips***, 136 Wn.2d at 31). As such, the three-year limitations period began running on October 15, 2003, when Kiri's members unequivocally terminated any agreement to pay Nick Iverson a fee (maintaining of course that no such agreement existed). BA 44-45 (citing ***Macchia v. Salvino***, 64 Wn.2d 951, 955, 395 P.2d 177 (1964); ***Richards v. Pacific Nat'l Bank***, 10 Wn. App. 542, 549, 519 P.2d 272, *rev. denied*, 83 Wn.2d 1014 (1974)).

Nick Iverson incorrectly asserts that his claims arise out of a written agreement, so the six-year statute of limitations applies. BR 37-40 (citing ***Kloss v. Honeywell***, 77 Wn. App. 294, 299, 890 P.2d 480 (1995)). ***Kloss***, however, is inapposite. In ***Kloss***, the appellate court rejected the argument that a contract was partly oral, such that the three-year limitations period applied, where the employment contract provided for compensation, but did not state a wage. 77 Wn. App. at 299. This decision rests on the rule that when an employment contract fails to provide a specific wage, "the law invokes a standard of reasonableness" to fill in the missing

wage. *Id.* at 298-99. But missing from the Management Agreement is a provision addressing what Nick was supposed to do. While a "standard of reasonableness" can fill in a missing wage, it cannot fill in the performance due.[9]

G. Paying the judgment does not moot the appeal. (BR 42-43).

Nick Iverson incorrectly claims that Kiri's members waived their appellate rights by satisfying the judgment. BR 42-43. This Court summarily rejected the same argument in ***Murphree v. Rawlings***, in which the respondent withdrew funds from the court registry after the appellant deposited the funds without any conditions on their release. 3 Wn. App. 880, 882, 479 P.2d 139 (1970). The Court held that satisfying the judgment did not moot the appeal. 3 Wn. App. at 882-83; *see also* RAP 12.8 (upon reversal, a party who has satisfied a judgment may be entitled to restitution).

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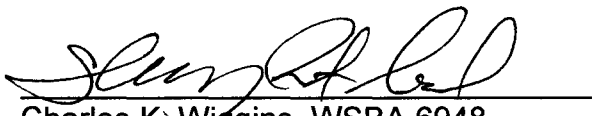
[9] Nick Iverson also incorrectly suggests that his performance excuses the missing contract term. BR 24-26. Nick ignores that his performance is parol evidence and that the three-year limitations period applies when parol evidence is necessary to establish an essential contract term. BA 43-44.

CONCLUSION

There are numerous fact questions making summary judgment inappropriate. This Court should reverse.

DATED this 13th day of January 2010.

WIGGINS & MASTERS, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 13th day of January 2010, to the following counsel of record at the following addresses:

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