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COURT OF APPEALS  
DIVISION II

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NO. 43138-6-II

STATE OF WASHINGTON

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DEPUTY

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ALEX VON KLEIST,

Respondent,

v.

GRAOCH 161-1 GP, INC., a Washington corporation, GRAOCH 161 GP, L.P., a Washington limited partnership, GRAOCH 160-1 GP, INC., a Washington corporation, GRAOCH 160 GP, L.P., a Washington limited partnership, THE JACKALOPE FUND LIMITED PARTNERSHIP, a British Columbian limited partnership, GARY GRAY and JANE DOE GRAY, and the marital community thereof, LES PIOCH, a Canadian citizen, PAUL J. LUKSHA, a Canadian citizen, and GREGORY COCHRANE, a Canadian citizen,

Appellants.

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REPLY BRIEF OF APPELLANTS  
GREGORY COCHRANE  
AND PAUL LUKSHA

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## I. INTRODUCTION

Respondent Alex von Kleist (“von Kleist”) once again concedes that he did not comply with Washington’s long-arm statute, and did not serve Appellants Gregory Cochrane (“Cochrane”) and Paul Luksha (“Luksha”) in accordance with its terms. Instead, he asserts that personal jurisdiction over Cochrane and Luksha can be based on their supposed consent to alternative service by mail. For the first time, von Kleist also appears to argue that service of process on Cochrane and Luksha’s alleged partners, or on the Graoch entities, suffices as service on Cochrane and Luksha. However, on the undisputed facts here, there is no basis for jurisdiction by consent over Cochrane and Luksha. Moreover, von Kleist’s assertion that service on one partner or a partnership counts as service on all partners, sufficient to bind the partners who were not served to *in personam* judgments, is contrary to established Washington law.

Because von Kleist never properly served Cochrane and Luksha with original process in this matter, the trial court had no personal jurisdiction over them. The default judgments entered against them are void, and the trial court erred as a matter of law by refusing to vacate them pursuant to CR 60(b)(5). The trial court also abused its discretion by failing to vacate the judgments based on irregularities pursuant to CR 60(b)(1). This Court should reverse the trial court and vacate the default judgments entered against Cochrane and Luksha.

## II. ARGUMENT IN REPLY

### 1. There is no genuine, material dispute as to any jurisdictional fact.

None of the material jurisdictional facts in this case is genuinely in dispute. Von Kleist concedes that both Cochrane and Luksha are residents of Ontario, Canada. CP 1261. There is no factual dispute about the manner or timing of von Kleist's service attempts on Cochrane and Luksha, or about von Kleist's failure to timely submit the affidavit required by RCW 4.28.185(4). CP 1260-67, 1297-99, 1415-17.

The parties *do* dispute the nature of the relationship between Cochrane and Luksha, on the one hand, and the previous co-appellants (Gary Gray, Les Pioch, and the various Graoch entities named in the caption), on the other.<sup>1</sup> However, that dispute is not material to this appeal. Cochrane and Luksha's challenge to personal jurisdiction does not depend on the extent of their contacts with Washington (which might depend on the nature of their relationship with the Graoch entities), but rather on whether they were properly served. Even if Cochrane and Luksha were general partners of all of the Graoch entities, von Kleist still had to properly serve them to receive judgments against them.<sup>2</sup> It is von

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<sup>1</sup> Compare CP 1451-54 (Cochrane's declaration responding to facts as alleged in Complaint) and CP 1468-71 (Luksha's declaration responding to facts as alleged in Complaint) with CP 1508-1643 (Von Kleist's declaration, raising new facts not alleged in Complaint).

<sup>2</sup> See, e.g., *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131, review denied, 130 Wn.2d 1004, 925 P.2d 989 (1996) (noting that "[f]irst and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process").

Kleist’s failure to effect proper service—independent of any dispute about the existence of minimal contacts—that deprived the trial court of personal jurisdiction.<sup>3</sup>

Von Kleist also attempts to manufacture a dispute about a key jurisdictional fact. He repeatedly asserts that the forum selection clause in Paragraph 16 of the Subscription Agreement reads in pertinent part as follows: “the undersigned hereby . . . **consent** to the service of process . . . by means of registered or certified mail . . . .”<sup>4</sup> This assertion is demonstrably incorrect: the relevant passage in fact states that “the undersigned hereby . . . **consents** to the service of process . . . by means of registered or certified mail.” CP 1320, 1537. The relevance of this passage is discussed in Section 4 below. The point here is that there is no *genuine* dispute about the words actually used in Paragraph 16.<sup>5</sup> The

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<sup>3</sup> “Under the due process clause, a Washington court may not assert personal jurisdiction over a defendant unless (1) the defendant is given adequate notice and opportunity to be heard, and (2) the defendant has the requisite minimum contacts with the state of Washington.” Karl B. Tegland, 14 *Wash. Prac. Civil Procedure*, § 4.1 (2009) (emphasis added). The issues on appeal here concern exclusively the first, service of process, prong of this due process requirement.

<sup>4</sup> See Respondent’s Brief at p. 10 and p. 17. In their Opening Brief, at p. 30, n. 45, Cochrane and Luksha pointed out that von Kleist had made the same mistaken assertion in previous filings in the trial court.

<sup>5</sup> Inaccurate quotation of a written contract does not create a genuine dispute about the contract’s language. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (holding in the summary judgment context that a dispute is “genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”).

Subscription Agreement speaks for itself in this regard, and this Court may confirm its actual language by reviewing CP 1320 or 1537, at ¶ 16.<sup>6</sup>

**2. Review of the trial court's jurisdictional conclusions is *de novo*.**

This Court conducts *de novo* review of a trial court's denial of a CR 60(b)(5) motion to vacate a default judgment for lack of personal jurisdiction.<sup>7</sup> Von Kleist's argument for an abuse-of-discretion standard of review of the jurisdictional issues fails because it relies exclusively on cases which do not concern jurisdictional challenges to default judgments.<sup>8</sup> Both *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004), and *In Re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999) concern motions to vacate default judgments based on excusable neglect under CR 60(b)(1), not lack of jurisdiction under CR 60(b)(5).

Von Kleist also implies that the order on appeal here was an order on a motion for reconsideration.<sup>9</sup> If this were true, it might support

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<sup>6</sup> For the convenience of the Court, a copy of CP 1320 is attached as Appendix A to this Reply Brief.

<sup>7</sup> See, e.g., *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007) (noting that a "court reviews *de novo* the trial court's denial of a motion to vacate a final order for lack of jurisdiction"), and *Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405, (2011) (noting that "[w]hether service of process was proper is a question of law that this court reviews *de novo*").

<sup>8</sup> Respondent's Brief, at p. 14. As previously noted at p. 19 of their Opening Brief, Cochrane and Luksha agree that this Court applies an abuse-of-discretion standard of review for *the non-jurisdictional issues* raised under CR 60(b)(1).

<sup>9</sup> See, e.g., Respondent's Brief at p. 8 (asserting that "[t]he Order Denying Defendants' Re-Filed Motion to Vacate Default Judgments (CP 2084-2086) was entered on reconsideration of an order dismissing Appellants motion to set aside default which was decided on March 11, 2011") (emphasis added),

application of the abuse of discretion standard of review, even to issues of personal jurisdiction.<sup>10</sup> However, the Order Denying Defendants' Re-filed Motion to Vacate Default Judgment was not an order on a motion for reconsideration. CP 2084-86. It was the trial court's first (and only) final decision on the merits of the issues first raised by Defendants Motion to Vacate Default Judgments. CP 1426. That motion was re-filed after it was dismissed "without prejudice," and with leave to re-file. CP 1721. The Defendants' Re-filed Motion to Vacate Default Judgment did not seek reconsideration of the trial court's previous dismissal without prejudice, and the trial court did not understand it to do so. CP 1725-44; CP 1752 (Order to Show Cause setting procedure for treating re-filed motion under CR 60(e)).<sup>11</sup> Neither did von Kleist. CP 1762-91.<sup>12</sup> The trial court order

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and p. 39 (alleging that "Cochrane and Luksha . . . brought a second, untimely motion for reconsideration").

<sup>10</sup> See e.g., *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (noting that denial of a motion for reconsideration is reviewed for abuse of discretion).

<sup>11</sup> Counsel for Cochrane and Luksha timely drafted a *separate* Motion for Reconsideration of the trial court's denial without prejudice of their initial Motion to Vacate, (CP 1875-78, showing a signing date of March 21, 2011), which however was not filed until May 11, 2011. CP 1880-85. The Motion for Reconsideration—unlike the Re-filed Motion to Vacate—was simply never ruled on by the trial court. RP (5/13/2011) at 28:19 to 30:4 (taking all matters under advisement); and RP (4/6/12) at 8:25 to 9:3 (asserting that the final order addressed the CR 60 motion).

<sup>12</sup> Von Kleist's Response to Defendants' Re-Filed Motion to Set Aside Default Judgment makes no reference to CR 59 and does not argue that the re-filed motion was really a motion for reconsideration. See also CP 1910-12 and RP (5/13/2011) at 3:24 to 4:2 (counsel for von Kleist acknowledging that there were two separate motions pending).

on appeal here was not a ruling on a motion for reconsideration, and the jurisdictional component of that order is clearly reviewed *de novo*.

**3. Von Kleist concedes that his purported service on Cochrane and Luksha did not comply with the terms of the long arm statute.**

Despite having relied on Washington’s long-arm statute, RCW 4.28.185, to support personal jurisdiction in his Complaint (CP 1221, at ¶ 1.7), von Kleist effectively abandoned that assertion when he first responded to the defendants Motion to Vacate. CP 1644-76 (making no attempt to defend long-arm jurisdiction). He continues that abandonment on appeal. His Respondent’s Brief expressly asserts that “personal jurisdiction is not being sought via . . . the long arm statute.”<sup>13</sup> Hence, it is not necessary to belabor the ways—previously analyzed in detail in Cochrane and Luksha’s Opening Brief—in which von Kleist’s purported service on Cochrane and Luksha did not comply with RCW 4.28.185. The following recap simply summarizes the two key points of non-compliance, both of which independently suffice to deprive the trial court of personal jurisdiction to issue the default judgments in question in so far as personal jurisdiction depended on the long-arm statute.<sup>14</sup>

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<sup>13</sup> Respondent’s Brief at p. 22.

<sup>14</sup> Despite von Kleist’s failure to mention the fact that there are *two* default judgments at issue here (see Respondent’s Brief, pp. 10-12), the Court will recall that von Kleist took a default judgment against all defendants on January 27, 2010, and then took a second default judgment—labeled as a Default Judgment as to International Defendants, but in fact naming all defendants—on May 10, 2010. CP 1273-76; CP 1277-79.

First, the long-arm statute requires *personal service* on non-residents.<sup>15</sup> Here, von Kleist *never* had Luksha personally served. Both default judgments entered against Luksha are void for this reason, if jurisdiction depended on the long-arm statute. Cochrane was personally served on February 18, 2010, but this was after the first default judgment was entered on January 27, 2010. CP 1298-99; 1273-75. Hence, the first default judgment entered against Cochrane is void if jurisdiction were to rest on the long-arm statute.

Second, under RCW 4.28.185(4), “[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.” Here, no such affidavit was *ever* filed for Luksha. Von Kleist did file an affidavit for Cochrane, but only well after both default judgments were entered. CP 1415-17. Hence, the absence of a timely affidavit defeats long-arm jurisdiction over both Luksha and Cochrane, with regard to both default judgments.<sup>16</sup>

Von Kleist’s current nonchalance about the failure of his attempts at service to comply with the long-arm statute can’t obscure the fact that he needs to show *some* proper basis for personal jurisdiction over

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<sup>15</sup> See, e.g., *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 177-78, 744 P.2d 1032, 1075 (1987) *amended*, 109 Wash. 2d 107, 750 P.2d 254 (1988); and 14 *Wash. Prac.* Civil Procedure § 4:3 (noting that “[w]hen personal jurisdiction is predicated upon the long arm statute, personal service of process is required”).

<sup>16</sup> See, e.g., *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 534 P.2d 1036 (1975); and *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 791-92, 591 P.2d 1222, 1224 (1979).

Cochrane and Luksha. Unless service of process by mail on non-residents is authorized by *some* valid principle of law, the first default judgment against Cochrane and Luksha is void. Unless service out of state on non-residents is authorized even without the affidavit required by RCW 4.28.185(4), both default judgments against both Cochrane and Luksha are void. As the following sections of this Reply Brief show, on the undisputed facts of this case there is no valid principle of law authorizing the sort of “service” that von Kleist accomplished. Accordingly, the default judgments entered against Cochrane and Luksha are both void.

**4. Cochrane and Luksha did not consent to service by mail.**

The only alternative basis for personal jurisdiction expressly advocated by von Kleist is consent. Clearly, non-resident parties can consent to personal jurisdiction in Washington by executing a valid forum selection clause.<sup>17</sup> More pertinently, there is “no reason of public policy why a defendant should not be able to authorize delivery [of original process] in a manner not enumerated in the statute.”<sup>18</sup> Hence, Cochrane and Luksha could have consented to service by mail. Unfortunately for von Kleist, they did not do so.

That Cochrane and Luksha did not consent to service by mail follows directly from the established facts of this matter. Von Kleist’s

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<sup>17</sup> See, e.g., *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997).

<sup>18</sup> *Thayer v. Edmonds*, 8 Wn. App. 36, 41-42, 503 P.2d 1110 (1972).

argument to the contrary focuses on the forum selection clause contained in Paragraph 16 of the Subscription Agreement. CP 1320. It is undisputed that neither Cochrane nor Luksha signed this document. CP 1321. Hence, von Kleist's argument for consent gets off to a shaky start: as a matter of both common sense and the law, "[a] forum selection clause is not binding on a third party who did not agree to the contract in which the clause is found."<sup>19</sup>

Von Kleist's argument does not improve when he attempts to argue that Graoch Associates # 161 L.P's ("the Partnership's") acceptance of the Subscription Agreement means that Cochrane and Luksha effectively consented to service by mail. True, the Partnership did accept the Subscription Agreement. CP 1326. It is also true that in a proper case there may be "an alternative basis for [a non-signatory] to be subjected to [a] contract, such as a third party beneficiary theory."<sup>20</sup> However, as previously explained in Cochrane and Luksha's Opening Brief, and as is undisputed by von Kleist, all methods for imputing consent to a non-contracting party necessarily presume that an aligned contracting party was himself or herself bound by the obligation to be imputed.<sup>21</sup> If the

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<sup>19</sup> *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 250, 178 P.3d 981, 989 (2008). *Oltman* effectively neutralizes von Kleist's lengthy discussion of the fact that "forum selection clauses are prima facie valid." Respondent's Brief, at pp. 17-19. A forum selection clause may be "prima facie valid," but only between parties who have manifested an intent to be bound by it (or to whom such an intent can be properly imputed).

<sup>20</sup> *Id.*

<sup>21</sup> See Cochrane and Luksha's Opening Brief at pp. 32-39.

signatory is not bound by the obligation in question, there is nothing to impute, and no basis for binding an aligned non-signatory.

Critically, just because the Partnership accepted von Kleist's offer as expressed in the Subscription Agreement, it does not follow that the Partnership took on obligations that the Subscription Agreement assigned to von Kleist alone.<sup>22</sup> To use a simple example, von Kleist offered in the Subscription Agreement to make an approximately \$1 million capital contribution to the Partnership. CP 1311. When the Partnership accepted von Kleist's offer, the Partnership did not become obligated to make a \$ 1 million capital contribution to itself. The obligation to make a capital contribution was assigned to von Kleist, and von Kleist alone.

In principle, nothing in Washington law stood in the way of the contracting parties similarly agreeing that one party would be "unilaterally" obligated to accept service by mail.<sup>23</sup> Indeed, *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 815, 225 P.3d 213 (2009) strongly suggests such a provision would be acceptable so long as it is not "so 'one-sided' and 'overly harsh' as to render it unconscionable."<sup>24</sup> Far

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<sup>22</sup> See Cochrane and Luksha's Opening Brief at pp. 27-29 (explicating the consequences of the fact that the Subscription Agreement originally functioned as an offer from von Kleist to the Partnership).

<sup>23</sup> Von Kleist certainly has not identified any such law.

<sup>24</sup> *Satomi* concerns an arbitration provision, and notes that "[a] unilateral provision in an arbitration agreement is substantively unconscionable only if it is shown that the disputed provision is so 'one-sided' and 'overly harsh' as to render it unconscionable." *Satomi*, 167 Wn.2d at 815. However, arbitration provisions are really just a particular form of forum selection clause. See, e.g., *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974).

from being so “one-sided” or “overly harsh” as to be unconscionable, an agreement to oblige von Kleist to accept jurisdiction in Washington and service by mail, but not assigning the same obligation to the Partnership, would have made perfect sense. After all, the Partnership, as a Washington entity, was already subject to general jurisdiction in Washington, and was also required to maintain an agent for service of process in Washington.<sup>25</sup> Imposing an obligation to accept jurisdiction in Washington, and service by mail, on von Kleist alone would have contributed to a symmetrical relationship between the parties.

So what did von Kleist and the Partnership actually agree to regarding service of process? This Reply Brief will not once again survey all of the textual evidence that mandates the conclusion that von Kleist and the Partnership agreed to assign von Kleist—but not the Partnership—a duty to accept service by mail. Instead, it will simply cite to the full text of the forum selection clause:

16. This Subscription Agreement and all rights hereunder shall be governed by, and interpreted in accordance with, the laws of the State of Washington. The undersigned hereby submits to the nonexclusive jurisdiction of the courts of the State of Washington and of the federal courts in the Western District of Washington with respect to any action or legal proceeding commenced by any person or entity relating to or arising out of this Subscription Agreement, the Partnership or the Partnership’s business, and consents to the service of process in any such action or legal proceeding by means of registered or certified mail, return receipt requested, in care of the address set forth below on the signature page or such

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<sup>25</sup> See RCW 25.10.121 (requiring a Washington limited partnership to retain an agent for service of process in the state).

other address as the undersigned shall furnish in writing to the Partnership.

CP 1320. Plainly, it is “the undersigned” who “**consents** to the service of process . . . by means of registered or certified mail.” Equally plainly, this passage differentiates between “the undersigned” and “the Partnership.”<sup>26</sup> Moreover, the only “subscriber” (effectively a synonym for “undersigned”) executing the Subscription Agreement was von Kleist, with Les Pioch signing in the clearly denoted capacity as “Witness to Signature of Subscriber.” CP 1321.

It is in this context that von Kleist’s repeated misquotation of this passage, asserting that the supposedly *plural* “undersigned”—allegedly including both von Kleist and the Partnership—“**consent**” to service by mail, becomes relevant.<sup>27</sup> Because von Kleist has persisted in repeating this error despite it having been brought to his attention, it strongly suggests that he knows he has no valid argument based on the actual text of Paragraph 16.<sup>28</sup>

Interpreting an unambiguous contract is a question of law.<sup>29</sup> Here, the Subscription Agreement unambiguously assigns the duty to accept service by mail to “the undersigned,” Alex von Kleist.<sup>30</sup> It does not assign

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<sup>26</sup> As does the rest of the Subscription Agreement. See CP 1311-22, and Cochrane and Luksha’s Opening Brief at pp. 29-30.

<sup>27</sup> See Respondent’s Brief, at p. 10 and p. 17, both times with the improper “consent” emphasized in bold.

<sup>28</sup> See Cochrane and Luksha’s Opening Brief, at p. 30, note 45.

<sup>29</sup> *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995).

<sup>30</sup> Even if the Court were to conclude that the Subscription Agreement is ambiguous regarding the referent of the term “undersigned” in Paragraph

a duty to accept service by mail to the Partnership. Because the Partnership did not consent to accept service by mail, there is no basis for imputing any such consent to Cochrane and Luksha, *even if they are assumed to be general partners of the Partnership*. The trial court erred as a matter of law when it concluded otherwise. RP (4/6/2012) at 7:1-2.

**5. Von Kleist's argument that Cochrane and Luksha are bound by the service of process clause as "third party beneficiaries" fails for multiple reasons.**

Von Kleist's specific argument that Cochrane and Luksha are required to accept service by mail as third-party beneficiaries of the Subscription Agreement is subject to the fatal objection set forth in Section 4 above: since the Partnership was not bound by the service of process clause, neither are Cochrane and Luksha. This is true even if, as von Kleist maintains, Cochrane and Luksha were third party beneficiaries of the Subscription Agreement.<sup>31</sup> Further, it is also true even if "a third party beneficiary has the same rights and obligations . . . under a choice of forum clause, as the direct party."<sup>32</sup>

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16, extrinsic evidence shows that von Kleist initially understood that he was the only "undersigned" bound to accept service by mail. When von Kleist commenced this action, he needed to serve the Graoch entities. He attempted to do so *by personal service* on their registered agent. CP 1236-1237; 1261 ¶ 2. He did not assert a contractual right to serve the Graoch entities *by mail* until March 7, 2011, in his Response to Defendants' Motion to Set Aside Default Judgment. CP 1645.

<sup>31</sup> Respondent's Brief, at pp. 25-27.

<sup>32</sup> Respondent's Brief at p. 26, purporting to rely on *Shaffer v. McFadden*, 125 Wn. App. 364, 104 P.3d 742 (2005).

In fact, however, Cochrane and Luksha were not third party beneficiaries of the Subscription Agreement. Moreover, it is not true that “a third party beneficiary has the same rights and obligations . . . as a direct party.”<sup>33</sup> Each of these points provides an independent basis for rejecting von Kleist’s third party beneficiary theory for binding Cochrane and Luksha to accept service by mail.

First of all, under Washington law, “[t]he creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.”<sup>34</sup> Here, the Partnership was the “promisor” (von Kleist was putting in money up front, in return for certain promises from the Partnership).<sup>35</sup> There is no evidence in the record here that von Kleist and the Partnership intended the Partnership to “assume a direct obligation” to Cochrane or Luksha. To the contrary, von Kleist surely intended and believed that the Partnership was assuming obligations to him, not to Cochrane and Luksha. Further, the Partnership’s performance under the contract would not “necessarily and directly

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<sup>33</sup> *Id.*

<sup>34</sup> See *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983), (citing *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979)).

<sup>35</sup> The analysis reaches the same conclusion—that Cochrane and Luksha were not third party beneficiaries—if von Kleist is treated as the “promisor.” See Cochrane and Luksha’s Opening Brief, at p. 37.

benefit” Cochrane and Luksha.<sup>36</sup> It follows that Cochrane and Luksha were not third-party beneficiaries of the Subscription Agreement.

Secondly, the fact that “a third-party beneficiary can *enforce* a contract provision only to the extent that the parties to the contract can enforce it” does not imply that a purported third party beneficiary who is *not* claiming any rights under a contract can be bound by obligations arising from it.<sup>37</sup> Cochrane and Luksha are not seeking to enforce the Subscription Agreement. Von Kleist cites to no Washington authority holding that a third-party beneficiary who is not claiming rights under a contract can be bound by the obligations assumed by the direct parties. Counsel for Cochrane and Luksha has found no such authority, and the law of many other jurisdictions is to the contrary.<sup>38</sup>

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<sup>36</sup> *Shaffer v. McFadden*, 125 Wn. App. 364, 368, 104 P.3d 742 (2005). Neither would von Kleist’s performance under the contract necessarily and directly benefit Cochrane and Luksha. There is no evidence, or even any allegation in the Complaint, that Cochrane and Luksha actually personally benefited from von Kleist’s capital contribution. Cf. CP 1219-35.

<sup>37</sup> *Shaffer*, 125 Wn. App. at 369 (italicized emphasis added).

<sup>38</sup> See, e.g., *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (holding that “[a] third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be *bound* to a contract it did not sign or otherwise assent to”); *Drury v. Assisted Living Concepts, Inc.*, 245 Or. App. 217, 224, 262 P.3d 1162 (2011) (noting that to bind a third party beneficiary to the obligations of the contracting parties effectively “allow[s] contracting parties to alter the rights of a third party, based on whatever consideration the contracting parties intended to provide to the third party, and without regard for whether the third party deems that consideration to be an adequate exchange for the contractual obligations”); and *Motorsport Eng’g, Inc. v. Maserati SPA*, 316 F.3d 26, 29 (1st Cir. 2002) (noting that “[i]f the signatories so intend, a third party

In sum, von Kleist's argument that Cochrane and Luksha were bound to accept service by mail as third party beneficiaries of the Subscription Agreement fails for at least three reasons: 1) Cochrane and Luksha are not third party beneficiaries; 2) third party beneficiaries who do not seek to enforce a contract are not bound by the contract's obligations; and 3) the Subscription Agreement does not bind the Partnership to accept service by mail, and accordingly, could not bind Cochrane and Luksha.

**6. Service of process on the Partnership, or on Gray or Pioch, does not constitute service of process on either Cochrane or Luksha.**

Although Respondent's Brief is less than clear, von Kleist may now be asserting that service on the entities, or on Gray or on Pioch, counts as service on Cochrane and Luksha, since they were allegedly partners with Gray and Pioch in the Graoch entities.<sup>39</sup>

Cochrane and Luksha dispute that they were partners of the relevant Graoch entities. CP 1451-54, 1468-70. However, *even if they were partners* (either general or limited), no judgment can be had against them personally unless they were served. "[W]hile notice to one partner is

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can enforce the contract against the signatory so obligated. . . . But the third-party beneficiary, who did not sign the contract, is not liable for either signatory's performance and has no contractual obligations to either" (emphasis added).

<sup>39</sup>See, e.g., Respondent's Brief at pp. 13-16 and 27-30, making arguments that could be charitably read as asserting that even if Cochrane and Luksha did not consent to service by mail, service on the other partners or the Graoch entities sufficed to establish personal jurisdiction over Cochrane and Luksha.

notice to all . . . that does not mean that service on one partner is such service on all partners that an in personam judgment can be taken against partners not personally served . . . . *In no case . . . will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served.*<sup>40</sup> Any judgment so entered is void.<sup>41</sup>

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<sup>40</sup> *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 485-86, 674 P.2d 1271 (1984) (vacating default judgment entered against un-served parties who were allegedly partners of served parties) (italicized emphasis in original). See also *McCoy v. Bell*, 1 Wash. 504, 511, 20 P. 595 (1889) (holding as follows: “The defendants are alleged in the complaint to be partners, but only one of them, Con O'Brien, was served. Judgment (personal) was rendered against both defendants. *This was error. Judgment could only be rendered against the defendant served*”) (emphasis added). The Washington courts’ position on this point is arguably mandated by due process. See, e.g., *Valley Nat. Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1336 (9th Cir. 1997) (citing with approval to *Detrio v. United States*, 264 F.2d 658, 660 (5th Cir.1959) for the proposition that “[u]ndoubtedly the partnership law that requires personal service on a partner to bind his individual assets is required by concepts of procedural due process”); and *Nisenzon v. Sadowski*, 689 A.2d 1037, 1048 (R.I. 1997) (holding that “[t]o the extent the judgment purports to bind the unnamed . . . partners in their individual capacities without their having been afforded notice and an opportunity to be heard, it is void as violative of their due process rights”). For secondary sources supporting the Washington approach, see 59A *Am.Jur.* 2<sup>nd</sup> Partnership § 890 (2003) pp. 512-13 (noting that “[t]here can be no judgment against partners individually unless they have been named and served”), and 68 *C.J.S.* Partnership § 193(b) (1998), p. 395 (noting that “[t]he law normally does not authorize entry of a personal judgment against an unnamed and unserved partner in an action against his or her partnership, and partners must be served with summons as parties in their individual capacities before they can be subjected to individual liability to a judgment creditor of the partnership”).

<sup>41</sup> *Mid-City Materials*, 36 Wn. App. at 486.

CR 20(d) reinforces this point. It provides in part as follows:

When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

(1) If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served.

(2) If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

The condition precedent set up by the preface to CR 20(d) clearly applies here: von Kleist has brought an “action . . . against two or more defendants and the summons [has been properly] served on one or more but not on all of them.”<sup>42</sup> By clear negative implication from CR 20(d)(1) and (2), the rule does not allow von Kleist to proceed to judgment against defendants who have not been properly served.

That each partner must be served if judgment is to be taken against him individually is also the implicit message of the Washington Uniform Limited Partnership Act, Chapter 25.10 RCW.<sup>43</sup> First of all, RCW 25.10.021(1) specifies that “[a] limited partnership is an entity distinct

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<sup>42</sup> If von Kleist *is* arguing that service on some of the alleged partners (or entity defendants) suffices as service on Cochrane and Luksha, even if they were not personally served, then he is conceding, at least for the sake of this argument, that Cochrane and Luksha were not properly served.

<sup>43</sup> The Washington entity defendants are either limited partnerships, or corporations. CP 1219. Hence, von Kleist’s repeated citations to Washington’s Revised Uniform Partnership Act, Chapter 25.05 RCW (see, e.g., Respondent’s Brief at pp. 14-16) would be of limited relevance, even if they were otherwise topical.

from its partners.” This decisively undermines any claim that service on a limited partnership is the same thing as service on the partners. Furthermore, RCW 25.10.016(8) states that “[a] general partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge of, notice to, or receipt of a notification by the limited partnership” (emphasis added). Assuming for the sake of argument that this applies to the service of process, it would establish that service on a general partner counts as service on the limited partnership, but not on the other partners.<sup>44</sup>

Finally, even if Cochrane and Luksha had appointed Gray or Pioch as their agent for service of process (of which there is of course no evidence, or even allegation), or even if Gray and Pioch were deemed by law to be agents of service of process for co-partners (and under *Mid-City Materials*, they are not), von Kleist would still have had to provide Gray and Pioch with copies of the Complaint and summonses directed to Cochrane and Luksha.<sup>45</sup> The record shows no evidence of this having

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<sup>44</sup> The point that service on a limited partnership is not the same thing as service on the partners is further reinforced by RCW 25.10.151(1), which states that “[a]n agent for service of process appointed by a limited partnership . . . is an agent of the limited partnership . . . for service of any process, notice, or demand required or permitted by law to be served upon the limited partnership. . . .” (emphasis added). An agent for service of process on a limited partnership is not—at least not by statute—an agent for service of process on the partners.

<sup>45</sup> See CR 4(a)(1) (stating that “[t]he summons must be directed to the defendant”). The failure to direct a summons to the defendant in question clearly prevents the summons from “perform[ing] the dominant purpose of any summons, namely, to give notice with certainty of the definite time

occurred. Indeed, the affidavit of service on Gray indicates that a single copy of the complaint was served, along with a single summons directed to Gray. CP 1718-20, CP 1254-55. CP 1261.<sup>46</sup> The same is true of the affidavit of service on Pioch: it makes no mention of summonses directed to other parties, and in particular, to Cochrane and Luksha. CP 1280-81.<sup>47</sup>

For all of the reasons surveyed here, von Kleist cannot compensate for his failure to serve Cochrane and Luksha by pointing to potentially valid service on Gray, Pioch, or the Graoch entities. Nothing in *Hartley v. American Contract Bridge League*, 61 Wn. App. 600, 812 P.2d 109 (1991), *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 558 P.2d 764 (1977), or *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn. 2d 475, 680 P.2d 55 (1984), cited to in Respondent's Brief at pp. 27-29, is to the contrary, as all of these cases concern service of process directed to an entity, made to an agent of the entity. Cochrane and Luksha are individuals, not entities; neither Gray nor Pioch is Cochrane or Luksha's agent; and neither Gray nor Pioch was served with process directed to either Cochrane or Luksha.

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prescribed by law within which after service the defendant must appear and defend and to advise him of the consequences of his failure to do so." *Spokane Merchants' Ass'n v. Acord*, 99 Wash. 674, 675-76, 170 P. 329 (1918).

<sup>46</sup> That the person who served Gray claims to have given Gray multiple copies of the same summons, directed to Gray, does not alter the fact Gray was not given any summons to forward to either Cochrane or Luksha.

<sup>47</sup> In any event, personal service on Pioch was not secured until after the first default judgment was entered, rendering it incapable of supporting personal jurisdiction over Pioch—let alone over Cochrane and Luksha—for the first default judgment.

**7. The potential liability of Cochrane and Luksha does not dispense with the requirement that they be properly served.**

Respondent's Brief also devotes considerable space to arguing that Cochrane and Luksha are liable for the debts and torts of their alleged partners.<sup>48</sup> However, potential liability and personal jurisdiction are two separate issues: the existence of the former does not dispense with the need to establish the latter by means of proper service.

[N]otwithstanding the fact that every partner may be potentially liable for torts of other partners, in order to impose personal liability on a vicariously liable partner that partner must be individually named and served in the action; the mere fact that personal liability may exist is only half of the equation, as personal jurisdiction must be obtained over each potentially liable partner for the partner's potential liabilities to be realized.<sup>49</sup>

Thus, even if Cochrane and Luksha *were* liable for the other individuals' and entities' debts, such liability cannot be imposed without due process, including proper service.<sup>50</sup>

**8. The default judgments against Cochrane and Luksha are also voidable for non-jurisdictional defects under CR 60(b)(1).**

In addition to the jurisdictional infirmities attacked under CR 60(b)(5), the default judgments against Cochrane and Luksha were subject

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<sup>48</sup> See Respondent's Brief at pp. 15-17 and pp. 29-30.

<sup>49</sup> 68 C.J.S. Partnership § 193(b) (1998) at p. 395

<sup>50</sup> See, e.g., *Oliver v. Am. Motors Corp.*, 70 Wn.2d 875, 886, 425 P.2d 647 (1967) (noting that "one may be 'subject to liability' but liability may not be imposed because personal jurisdiction can not be constitutionally obtained").

to irregularities that were challenged below under CR 60(b)(1). Those irregularities included: 1) the initial default judgment was procured less than 60 days after the purported service by mail, despite the fact that the summonses stated that non-residents had 60 days to respond (CP 1246-47, 1258-59); 2) the second default judgment was obtained without von Kleist first moving to vacate the initial one; and 3) the second default judgment against Luksha was obtained without prior entry of a valid order of default. CP 1284-85 (Order of Default as to Certain International Defendants, not naming Luksha).

Von Kleist's only serious response to these irregularities is to argue that the CR 60(b)(1) challenge is time-barred due to the one year limitation imposed on such challenges by CR 60(b).<sup>51</sup> However, Cochrane and Luksha's Motion to Vacate Default Judgments was initially filed on January 11, 2011, less than a year after the initial default judgment dated January 27, 2010. CP 1426, CP 1273. Von Kleist then asked for, and was granted, a continuance of the motion until March 11, 2011. CP 1503-06. Von Kleist's declaration in support of his motion for continuance acknowledged his timely receipt of the motion to vacate, and raised no objection to the manner in which the motion was served. CP 1504. Because the hearing on the motion to vacate was deferred for more than a month at von Kleist's request, he should be estopped from

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<sup>51</sup> See Respondent's Brief at pp. 34-37. Von Kleist's argument that Cochrane and Luksha did not have 60 days to respond, despite the summons stating that they did, is facially incorrect. See Respondent's Brief at pp. 31-32.

claiming that the Re-filed Motion to Vacate Default Judgments was untimely. CP 1725.

However, even if this Court concludes that Cochrane and Luksha's CR 60(b)(1) challenges are time-barred as to the first default judgment, they are plainly not time-barred as to the second default judgment.<sup>52</sup> The second default judgment was not entered until May 10, 2010, less than a year before the re-filing of Cochrane and Luksha's motion to vacate. CP 1277; CP 1725. The second default judgment was procured without first moving to vacate the initial default judgment, and no valid entry of default was made against Luksha before the second default judgment was taken against him. These irregularities continue to suffice to provide an independent basis for vacating the second default judgment as to both Cochrane and Luksha.

**9. On appeal, Cochrane and Luksha have not raised any issues under CR 60(b)(4), CR 60(b)(11), or RCW 4.28.200, and von Kleist's discussion of such issues is superfluous.**

Below, Defendants Re-filed Motion to Vacate Default Judgments raised issues under CR 60(b)(4), CR 60(b)(11), and RCW 4.28.200. CP 1740-43. However, Cochrane and Luksha have not pursued these issues on appeal, either because they concerned defenses of other defendants (the CR 60(b)(4) claims) or because they are already sufficiently presented as

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<sup>52</sup> Of course Cochrane and Luksha's jurisdictional challenges, brought under CR 60(b)(5), are not subject to the one-year time limitation of CR 60(b). See, e.g., *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317, 877 P.2d 724 (1994).

challenges under CR 60(b)(1) and CR 60(b)(5). Hence, von Kleist's extensive arguments about these issues do not merit response here.<sup>53</sup>

**10. This appeal is plainly not moot.**

Von Kleist's claim that this appeal is moot is simply ridiculous. Cochrane and Luksha properly challenged the default judgments entered against them by moving to have the judgments vacated.<sup>54</sup> In particular, Cochrane and Luksha alleged that the trial court lacked personal jurisdiction to enter the default judgments. CP 1429-30, 1725-51. For all of the reasons previously stated, the trial court erred when it denied Defendants' Re-filed Motion to Vacate. Cochrane and Luksha timely appealed that denial, and this Court can grant "effective relief" by reversing the trial court and vacating the default judgments.<sup>55</sup> This appeal is not moot.

**III. CONCLUSION**

Von Kleist never achieved proper service on either Cochrane or Luksha. Although Cochrane and Luksha are residents of Ontario, Canada, von Kleist's efforts to serve them did not comply with Washington's long-arm statute. Moreover, von Kleist's claim that Cochrane and Luksha consented to service by mail fails as a matter of law. Service on co-defendants, even if proper, does not substitute for service on Cochrane and Luksha themselves. Because Cochrane and Luksha were never properly

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<sup>53</sup> See Respondent's Brief, pp. 32-37.

<sup>54</sup> See CR 60.

<sup>55</sup> See *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010).

served, the default judgments entered against them are void, and the trial court erred by refusing to vacate them under CR 60(b)(5). In the alternative, the trial court abused its discretion by refusing to vacate the second default judgment for irregularities under CR 60(b)(1). This Court should reverse the trial court and vacate the default judgments against Cochrane and Luksha.

Dated this 15<sup>th</sup> day of January, 2013.

David Corbett PLLC

By:

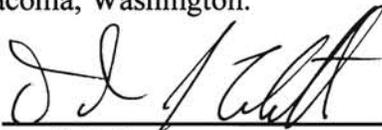


David J. Corbett, WSBA # 30895  
Attorney for Appellants Greg  
Cochrane and Paul Luksha

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on January 15, 2013 I sent a copy of the attached Reply Brief of Appellants Cochrane and Luksha via email PDF attachment to Stephen Pidgeon, attorney for Respondent Alex von Kleist, at his email addresses of stephen.pidgeon@comcast.net and attorney@stephenpidgeon.com. Mr. Pidgeon has previously agreed to accept email service of filings in this matter.

Dated this 15<sup>th</sup> day of January, 2013 at Tacoma, Washington.

By:   
David J. Corbett

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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# **APPENDIX A**

13. Entire Agreement. The agreement resulting from the acceptance of this Subscription Agreement contains the entire agreement of the parties hereto relating to the subject matter hereof and there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referred to herein. Neither the agreement resulting from the acceptance of this Subscription Agreement nor any provisions hereof may be waived, amended or terminated except by an instrument in writing signed by the party against whom any such waiver, amendment or termination is sought.

14. Irrevocability. The undersigned hereby acknowledges and agrees that the Subscription hereunder is irrevocable and that the undersigned is not entitled to cancel, terminate or revoke this Subscription Agreement or any agreements of the undersigned hereunder and that this Subscription Agreement and such agreements shall survive the dissolution, merger, death or disability of the undersigned.

15. Binding Effect. This Subscription Agreement shall be binding upon and inure to the benefit of the undersigned and the undersigned's successors but shall not be assignable by the undersigned without the prior written consent of the Partnership. This Subscription Agreement shall enure to the benefit of the Partnership and upon its acceptance by the Partnership shall be binding upon the Partnership and its successors and assigns.

16. Applicable Law. This Subscription Agreement and all rights hereunder shall be governed by, and interpreted in accordance with, the laws of the State of Washington. The undersigned hereby submits to the nonexclusive jurisdiction of the courts of the State of Washington and of the federal courts in the Western District of Washington with respect to any action or legal proceeding commenced by any person or entity relating to or arising out of this Subscription Agreement, the Partnership or the Partnership's business, and consents to the service of process in any such action or legal proceeding by means of registered or certified mail, return receipt requested, in care of the address set forth below on the signature page or such other address as the undersigned shall furnish in writing to the Partnership.

17. Interpretation. This Subscription Agreement shall be read with all changes of number and gender required by the context.

[the next page is page 11]

EXHIBIT A  
10 of 16  
CP 1320