

No. 49640-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANTONE PRYOR, individually, and the marital community composed of
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Defendants & Third Party Plaintiffs/Appellants,

vs.

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;
LANDMARK, LLC, a Washington limited liability company,

Plaintiffs and Third Party Defendants/Respondents.

And

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;
LANDMARK, LLC, a Washington limited liability company,

Cross-Appellants,

vs.

ANTONE PRYOR, individually, and the marital community composed of
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Cross-Respondents.

BRIEF OF APPELLANTS PRYOR

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I. INTRODUCTION

This case has long legs. In 2009, promptly after this appellate court affirmed an earlier trial court ruling that Doug Nelson had made numerous false representations, doctored or concealed documents, and provided false testimony at trial in a lawsuit against the Sakai QTIP Trust¹, Doug Nelson, his wife Karina, and Landmark LLC engaged in wholesale fraudulent transfers of Landmark's assets to a new entity called Apex Construction LLC that was solely owned by the Nelsons. (FF# 15, CP428.) Those transfers were made solely for the benefit of the Nelsons, and to the detriment of both the Sakais, who were denied the recovery due them from the Sakai I judgment, and to the Nelson's business partners, Antone Pryor and Kim Young Oak, who were then forced to bear the burden of both the subsequent Sakai II fraudulent conveyance action and the instant lawsuit. After rendering Landmark insolvent, FF#15, the Nelsons transferred as much as possible of the burden of Sakai II onto the Pryors. Remarkably, the Nelsons were rewarded here at the trial court level for their serial fraudulent conduct with a substantial—but fundamentally erroneous—judgment against the Pryors. That wrong must be rectified, and to do so the trial court judgment must be reversed.

¹ Landmark LLC v. The Sakai QTIP Trust, et al., Court of Appeals Cause # 36663-1-II, found at Appendix to Brief of Appellants Pryor, Tab 4, p.7, hereinafter "Sakai I."

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by entering a principal judgment for \$105,999.05 in favor of Landmark and Douglas and Karina Nelson. (Judgment, CP 679, App. Tab. 7.) Landmark and the Nelsons should have received nothing.

Assignment of Error 2: The trial court erred by awarding Landmark and Douglas and Karina Nelson prejudgment interest in the amount of \$32,346.47. (Judgment, CP 679, App. Tab. 7.) They should have received nothing, but even if the principal judgment amount remains unchanged, the amount should have been no more than \$4,065.71.

Assignment of Error 3: The trial court erred by including in the judgment an award of fees and costs in the amount of \$114,842.94 in favor of Landmark and Douglas and Karina Nelson. (Judgment, CP 679, App. Tab. 7.) Landmark and the Nelsons should have received nothing.

Assignment of Error 4: The trial court erred by including Landmark as a judgment creditor, as it has no contractual right of recovery, and by including in the judgment a provision authorizing recovery of fees during supplemental collection proceedings.

Assignment of Error 5: The trial court erred by not entering judgment in favor of the Pryors for \$652,592.45.

Assignment of Error 6: The trial court erred by not awarding Pryor fees and costs of at least \$71,421.10 and \$4,682.94, respectively.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Due to constraints of space, only major issues are listed here.

Issue # 1: Did the trial court err by finding that the Nelsons had not breached their fiduciary duties to the Pryors? Answer: Yes.

Issue # 2: Did the trial court err by finding that the Nelsons had not committed fraud? Answer: Yes.

Issue # 3: Did the trial court err by failing to order the Nelsons to indemnify the Pryors for all losses caused by the breach of their fiduciary duties, e.g., the fraudulent conveyance to Apex in 2009? Answer: Yes.

Issue # 4: Did the trial court err by concluding that the Pryors had breached the 2006 Redemption Agreement? Answer: Yes.

Issue # 5: Did the trial court err by finding that a release of claims, known or unknown, contained in ¶5 of the 2012 Purchase Agreement applies to the damages that arose from the Nelsons' fraudulent transfer of Landmark's assets to Apex in 2009? Answer: Yes.

Issue # 6: Did the trial court err by misconstruing and misapplying the 2012 Purchase Agreement, including relying on a materially-misquoted provision from ¶7 regarding the Sakai II litigation? Answer: Yes.

Issue # 7: Did the trial court err by not giving effect to the integration clause in the 2012 Purchase Agreement, ¶10(c)? Answer: Yes.

Issue # 8: Did the trial court err by disregarding the terms of the 2012 Purchase Agreement that put all costs of any settlement of the Sakai II litigation on the Nelsons? Answer: Yes.

Issue # 9: Did the trial court err by awarding the Nelsons fees and costs as damages in their main case when they did not meet their burden of proof? Answer: Yes.

Issue # 10: Did the trial court err by not applying the doctrine of unclean hands to bar any recovery by the Nelsons? Answer: Yes.

Issue # 11: Did the trial court err by concluding that Sportsman Park owed Landmark \$746,330.66 at the end of 2007? Answer: Yes.

Issue # 12: Did the trial court err by misapplying the right-to-rely in the Pryors' claim for fraud against their fiduciary? Answer: Yes.

Issue # 13: Did the trial court err by not finding Green Rock liable for the \$412,678 balance owed on its note to Pryor? Answer: Yes.

III. STATEMENT OF THE CASE

Douglas C. Nelson was a realtor in the 1990s. In 1999, Nelson formed a real estate development company called Retirement Ventures, LLC, which later became known as Landmark. (FF#1-2, CP425.) Dr.

Antone Pryor² and with his spouse Kim Young Oak³ met Nelson in the late 1990s while looking for a home on Bainbridge Island.

In 2000, Pryor purchased a 50% interest in Landmark via a \$60,000 note. (FF#3, CP426; Ex. #1, CP712-715.) Pryor testified that the note had been paid within 3 months of its signing, RP1160, and the financial records of Landmark reflected that no outstanding promissory note owed by Pryor was being carried as an asset on the company books. Accordingly, the Pryors agree with the Court's CL#1 that the Nelsons failed to prove that the Pryors breached the 2000 note.⁴

Nelson and Pryor invested in numerous other entities together, one of which was Sportsman Park, LLC ("SP" or "SPLLC"). Nelson and Pryor each owned 50% of SP, which was formed for the purpose of developing a commercial complex on Bainbridge Island. Nelson and Pryor agreed that

² Dr. Pryor is a psychologist with a 1971 Ph.D. from the University of Utah. He taught at the University of Maryland and began his private practice in approximately 1978. He moved to Kitsap County in 1985, where he opened a practice called the Front Street Clinic. Front Street Clinic has 11 total practitioners. Kim Young Oak is one of those practitioners. Pryor has served as the head of the addiction unit at the Bremerton Navy Hospital and has a contract with the US government to assess individuals at risk in terms of their security clearances. (RP 1151, l. 23 - RP 1156, l.5.)

³ Kim Young Oak is an Advanced Registered Nurse Practitioner who has specialized in psychiatric mental health. She has two board certifications. (RP 1304)

⁴ The Pryors object to that part of CL#1 where it states that "there is insufficient evidence establishing that Pryor paid the Note," because it was the Nelsons' initial obligation to prove that the Pryors had not paid that note, which burden they failed to meet. CPA Stevenson testified that the note would be recorded as a long-term note payable. (RP 813, l.13-814, l. 12.) Landmark's records show it was not so recorded. *See, e.g.*, Ex. 507, CP1423, GL 17800; Ex. 515, HS 1439, GL 17800; Ex. 119, CP923 ¶2; Ex. 491, CP1407 (deletion of company note receivable from third party); Ex. 494, CP1410, GL 17800; Ex. 121, CP927 (no note receivables); Ex. 527, CP1455 (no note receivables).

Landmark would be the contractor for the SP development. (FF#9, CP 427.) The 50/50 ownership of SP remained until June 6, 2012. At all material times, Nelson was the managing member of Landmark, SP, and Green Rock. As such, Nelson had the authority to, and did, cause those entities to engage in conduct relevant to this case. (FF#11, CP427.)

In April 2004, Landmark sued The Sakai QTip Trust, et al. (collectively “Sakai”) under Kitsap County Superior Court cause number 04-2-00950-2 (“Sakai I”). (FF#12, CP428.) In 2006, while Sakai I was pending, Pryor and Nelson negotiated a buyout of Pryor’s interest in Landmark. The contract is called the “2006 Redemption Agreement.” It was signed in October 2006. (FF#s 17-20, CP429; Ex. 2, CP716-730.)

Under the 2006 Redemption Agreement, Nelson and Pryor contributed their interests in Landmark to a holding company called Green Rock Holdings, LLC (“Green Rock”). Green Rock then redeemed Pryor’s 50% interest in Green Rock in part for \$480,000, which was reflected in a promissory note in the same amount. (Ex. 2, CP 724-5.) The parties agreed on how to deal with Landmark’s ongoing litigation, that Landmark would continue building SP at cost plus 6% overhead, and that a Nelson affiliate known as “Western Devco” would receive one half of the profits on the sale of a separate piece of land owned by Pryor and known as the Pinnacle property, but only *if* Nelson paid one half of the ownership costs of that

property. (Ex. 2, CP 719-20, ¶5, ¶6.) As a part of that 2006 agreement, Green Rock became the sole member of Landmark and, eventually, Nelson became the sole member of Green Rock. (CP429 - FF#s 21-26.)

In July 2007, the Sakai I litigation went to trial. At its conclusion Landmark was awarded judgment against Sakai. (FF#12, CP428.) Neither Landmark nor the Sakais were satisfied; both appealed. (FF#13, CP428.) Pursuant to the 2006 Redemption Agreement, Landmark continued to build SP. Nelson affirmatively represented to Pryor at the time, and contended at trial, that by the end of 2007 Sportsman Park owed Landmark \$746,330.66. The trial court (erroneously) agreed with that contention. (FF#27A, CP430, ll.22-24.) In fact, as Nelson admitted in his then-confidential Landmark Company Meeting minutes dated January 5, 2008, SP “owed us a couple hundred thousand for work completed and still unpaid”, rather than the \$746,330.66 used in what came to be called the “2008 Debt Swap.” (Ex. 43, CP846.) The circumstances surrounding this “2008 Debt Swap”, and the fraud perpetrated by Nelson on Pryor as a result, are the subject of discussion below, and are the subject of the trial court’s erroneous FF#s 28-34. As demonstrated below at pp. 40 to 48, however, Nelson falsely presented debts of ~\$500,000 owed to Landmark *by tenants and other third parties* as being the debts of SP, convinced the Pryors that that meant they each owed Landmark one-half of \$746,330,

and that the Pryors could most easily pay that sum by permitting Green Rock to divert payments on the 2006 Green Rock note to Landmark as opposed to Pryor. The trial court (erroneously) concluded that Pryor had not meet his burden of proof with respect to the Debt Swap and rejected the claim that he was defrauded in that transaction. (CL #s 11-13, CP 453.)

Meanwhile, as the events surrounding the 2008 “Debt Swap” were unfolding, the appeal of Sakai I proceeded before Division II. Ultimately, this appellate court issued its opinion dated July 7, 2009. That unpublished opinion is submitted as a matter of judicial notice and GR 14.1 at App. Tab 4. In its decision, this appellate court reversed the Sakai I trial court in part and remanded in part, finding at page 7 that Nelson and engaged in numerous acts of false representation, had doctored, concealed or changed documents, and had testified falsely at trial. As the trial judge here observed, “One cannot read the unchallenged trial court findings listed in the Unpublished Opinion of the July 7, 2009 Court of Appeals decision without raised eyebrows.” (FF#82, CP442, App. Tab 5.)

Consistent with this behavior in Sakai I, the trial court here made similar findings regarding the Nelsons’ fraudulent conveyance in 2009 of Landmark’s assets to their solely-owned new entity, Apex, for the purpose of avoiding payment of the Sakai judgment. (FF#15, CP428.) Contemporaneously with these fraudulent transfers, the insolvent Landmark filed a

petition for review to the Supreme Court. On March 3, 2010, that petition was denied, and this Court filed its mandate on March 17, 2010. (FF#13, CP428.) During the Sakai I proceedings on remand, the trial court entered two judgments in favor of Sakai and against Landmark for \$50,189.95 and \$77,702.70. (FF# 14, CP 428.) Of course, by that time Karina and Doug Nelson had rendered Landmark insolvent by transferring \$124,131.87 of assets to Apex, their solely-owned company, along with the stream of business promised to Landmark from SP under the 2006 Redemption Agreement. (RP380, ll.15-16; Ex. 2, CP719; RP571, ll.9-15.)

The evidence at trial is completely devoid of any notice to the Pryors of the Nelsons' fraudulent transfers to Apex, and since they were not owners of Apex, they received no benefit therefrom. Instead, as a former member in Landmark, and as a participant in the 2008 "Debt Swap," the Pryors were the subject of the Sakais' 2011 supplemental proceedings as they tried to collect their judgments. (FF#s 58-60.) Unable to receive any satisfaction for those judgments, on February 17, 2012, the Sakais sued Nelson, the Pryors, the now long-insolvent Landmark, and SP in Kitsap County Superior Court under cause number 12-2-00372-8 ("Sakai II", or the "Second Lawsuit.") (FF#74, CP440.) In that Second Lawsuit, the Sakais sought to "pierce the corporate veil" of Landmark and

alleged that Landmark had fraudulently transferred its assets to Nelson, Pryor and others as to avoid paying the Sakai judgments. (FF#75, CP440.)

Given the examples of the Nelson's multiple, fraudulent activities described in App. Tab 4, p. 7, it is not surprising that the Sakais seized on the wrong fraud—namely the 2008 Debt Swap that was aimed at the Pryors—rather than the 2009 fraudulent transfers to Apex, when they filed Sakai II. The bottom line, though, is that the Sakais focused on the wrong transaction and, in doing so, named some parties as defendants when they should not have been named, specifically, Dr. Pryor and his wife, for the Pryors were not transferees of the Landmark assets that rendered that entity insolvent under RCW Ch. 19.40 et seq. Instead, those assets were transferred by the Nelsons to their new entity Apex.

While the Sakais were undertaking their collection efforts, and then filing Sakai II, Nelson and Pryor were negotiating the sale of Pryor's interest in SP and Central Plaza. (FF#s76-78, CP440-1, Ex. 297, CP1147-9.) SP and Central Plaza were entities under the sole control of Nelson, for which he owed fiduciary duties to the Pryors. (FF#62, CP438; CL 5, CP451.) Nowhere in the evidence does one see the Nelsons disclosing to the Pryors that in 2009 they had transferred the assets of Landmark to Apex and received nothing in return, thereby rendering the former entity insolvent and creating the but-for cause of the Sakai II litigation.

A fundamental error made by the trial court was to confuse the Pryors' knowledge of the 2008 "Debt Swap" with the 2009 Apex Fraud. The trial court's confusion in this regard can be seen scattered through its decision, e.g., in FF#19; in FF#s92-3; in its discussions of the email at Ex. 346, dated 5/9/12 at CP1195-99, which relates only to the 2008 Debt Swap and not to the 2009 Apex Fraud;⁵ in FF#57 and the email dated 7/16/10 at Ex. 441, CP1299-1300, where Pryor asks Nelson to "Please explain to me what "money shuffling" we are talking about here", and Nelson responds aggressively by ridiculing Pryor for not remembering the 2008 Debt Swap; in its FF#s80-82, CP442, where the trial court discusses other emails dealing strictly with the 2008 Debt Swap, along with this Court's July 7, 2009 decision; and in its CL#6, CP 452, ll.7-8 where the trial court makes a factually-unsupported conclusion that "Pryor knowingly acquiesced to the Debt Swap and all other transactions complained of in this matter". (Emphasis added.) Based on this confusion and lack of evidence to support the conclusion that the Pryors had knowledge of, or at any time approved of, the 2009 Apex Fraud, the trial court then failed to make the connection between the Nelsons' 2009 Apex Fraud and the Nelsons' breach of their fiduciary duties to the Pryors.

⁵ Ex. 346 refers to Pryor's intent not to assume personal liability on behalf of Landmark to the Sakais for the 2008 Debt Swap, which did not render Landmark insolvent and provided no grounds for personal liability under RCW 19.40 et seq.

Another area of inquiry relates to the 2012 Purchase Agreement for the Pryors' interests in SP, which was negotiated in the second quarter of 2012 and signed on June 7, 2012. (Ex.3, CP 731-739, at App. Tab 3.) It contains three key provisions that the trial court either or both misread and misapplied. One is the release provision at ¶5, which the trial court erroneously applied to release the Nelsons and their entities, for instance, from the damages caused by the 2009 Apex Fraud. (FF# 95, Ex. 3, CP 734-5.) The second misconstrued provision of the 2012 agreement is ¶7, which relates to the allocation of risk for Sakai II. As discussed below, the trial court materially misquoted that part of the 2012 agreement by leaving out key language on the attorney the parties agreed to hire, and by omitting key provisions of when, if and how Pryor might be responsible for Sakai II itself. (*Compare* FF #96, CP 446 to Ex. 3, CP 735.)

As the 2012 Purchase Agreement states in ¶7.b, if a court holds Pryor personally liable for engaging in fraudulent transfers, then Pryor would contribute to the judgment. The fraudulent conveyances, however, occurred in 2009 when the Nelsons caused Landmark to transfer to Apex all of its then-current receivables and its future assets in the form of guaranteed work from SP. The trial court accordingly erred when it held Pryor one-half responsible for the fraud committed by the Nelsons alone.

The third provision of the 2012 agreement of particular note is the integration clause, at ¶10(c). As discussed below, the trial court found that provision to apply but then proceeded erroneously to forget that finding by awarding Landmark and the Nelsons attorneys' fees and costs in the amount of \$105,999.05 as damages in the case in chief under the 2006 Redemption Agreement. (FF #s 97, 102-104, CP 446-449; CL#2.)

IV. ARGUMENT

A. STANDARD OF REVIEW

This case was tried to the bench, the Honorable Kevin Hull of Kitsap County Superior Court presiding. A judgment resulting from a bench trial is reviewed in two steps. First, the appellate court asks whether substantial evidence supports the trial court's challenged findings of fact. Then, the appellate court asks whether those findings of fact support the trial court's conclusions of law. Irvin Water Dist. v. Jackson Partnership, 109 Wn.App. 113, 119, 34 P.3d 840 (2001). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. If this standard is satisfied, the appellate court will not substitute its judgment for the trial court's. Sunnyside Valley Irrigation Dist. V. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). By comparison, the appellate court reviews questions of law and conclusions of law de novo. Id.

B. THE TRIAL COURT FAILED TO COMPREHEND THE CONSEQUENCES OF THE NELSONS' 2009 FRAUD

1. THE NELSON ENGINEERED THE 2009 APEX FRAUD TO AVOID PAYING THE SAKAIS

Finding of Fact No. 15 is central to the proper understanding and resolution of this portion of the Pryors' appeal. It reads in part:

Karina Nelson is married to Doug Nelson. . . . Doug and Karina Nelson created Apex Construction, LLC, in 2009, at least in part, as a reaction to the entry on appeal of the judgment against Landmark and in favor of the Sakai Family Trust. . . . The Nelsons caused Landmark. . . to transfer its remaining assets to Apex **As a result, Landmark became insolvent.** These assets totaled \$124,131.87 as of September 2009. **It is likely this scheme was designed so that Landmark would not have the assets to pay the Sakai I judgment.**

(CP 428, emphasis added.) This finding of fact establishes, on a more probable than not basis, that the Nelsons' 2009 Landmark transfers to Apex were fraudulent transfers under RCW 19.40.041(a) and RCW 19.40.051. In re Det. of Moore, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (“Likely to engage . . .” is defined as “the person more probably than not will engage . . .”); City of Bellevue v. Raum, 171 Wn.App. 124, 136, ¶15, 286 P.3d 695 (2012) (medical expert testifying using “more probably than not” and “likely” interchangeably).

Because Landmark and Apex were under the Nelsons' common control (FF#11, CP427; RP336, 1.14-337, 1.7 & Ex. 47, CP851-2), the

2009 Apex Fraud was between statutory affiliates and insiders. RCW 19.40.011. As spouses, and as statutory insiders and affiliates, it was their burden to prove by clear, cogent and convincing evidence that the transfers from Landmark to Apex, which rendered the former insolvent and unable to pay the Sakai I judgment, were not fraudulent. RCW 19.40.081(a); In re Agricultural Research & Tech. Group, Inc., 916 F.2d 528, 535-36 (9th Cir. 1990)(burden of proving *objective* good faith is on debtor); RCW 26.16.210; Clayton v. Wilson, 145 Wn.App. 86, 102, 186 P.3d 348 (2008) (burden imposed on the Wilson community to prove their good faith under RCW 26.16.210); In re Estate of Barbee, 182 Wn. 644, 650, 47 P.2d 1023 (1935) (clear, cogent and convincing standard). Based on FF#15, this the Nelsons failed to do, and they are liable for any damages caused by their fraudulent conveyance of Landmark's assets.

Indeed, the Nelsons' conduct, both personally and through the entities they controlled (Landmark, Green Rock, Apex, SP) triggered eight of the eleven "badges of fraud" set forth in RCW 19.40.041(b)(1), (2), (3), (4), (5), (7), (9) & (10). The case law construing the Uniform Fraudulent Transfer Act holds that a creditor need not establish all or even a majority of the factors to establish actual intent to hinder, delay, or defraud under RCW 19.40.041(a)(1). As the 9th Circuit stated, "[t]he presence of a single badge of fraud may spur mere suspicion; the confluence of several can

constitute conclusive evidence of actual intent to defraud, absent ‘significantly clear’ evidence of a legitimate supervening purpose,” a burden the transferees (i.e., Apex and the Nelsons) bear. Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994). Further contributing to this heavy burden of proof on the marital community of Doug and Karina Nelson is RCW 26.16.210. As explained by Clayton v. Wilson, 145 Wn.App. at 103:

Irrespective of the motive actuating the transfers by the husband of his separate property to his wife, it is clear that, at the time the transfers were made to appellant, her husband was insolvent; hence, the act of transferring the property is conclusive evidence of fraud, and the intent is presumed from the act.

Id., *citing* Davison v. Hewitt, 6 Wn.2d 131, 135-6, 106 P.2d 733 (1940).

The testimony of Karina Nelson, and the exhibits reviewed and explained by her, provide more than ample evidentiary support for FF#15. *See* Karina Nelson’s testimony and related exhibits at RP334, 1.22-335, 11.7, 17-20 (degree in finance and accounting); RP336, 1.14-337, 1.7; RP 343 & Ex. 47, CP851-2 (4/16/09 Karina assumed bookkeeping duties for Landmark, SP, SP Phase One, Green Rock, Western Devco, Central Plaza & others); Ex. 47, CP851-2, Ex. 50, CP855-6, RP673, 1.4–676, 1.17 (April 16 & June 1, 2009, Karina refuses to become a part owner of Landmark and insists on a new corporation); transfers to Apex (RP343, 1.23 to RP 363, 1.10); Ex. 173, CP1012-14 (Landmark assets of \$124,131.87

transferred to Nelson & Apex); Ex. 176, CP1015-16, RP356, l.17-363, l. 12 (Apex booking receivable owed by SP to Landmark); Ex. 631, CP1782-3 (9/13/09 Stevenson email confirming transfer to Apex); RP 363-373; Ex 573, CP1578-80 (2008 Debt Swap distinguished from the 2009 Apex transfers); RP374, l.6-375, l.23 (Landmark and Apex both construction businesses, with Apex assuming Landmark's business), RP 375, l.24-380, Ex. 49, CP853-4 (5/22/09 Landmark Meeting Minutes with Doug Nelson shutting down Landmark, claiming that there were \$100,000 in current bills and only \$40,000 in receivables, but Karina sees no problem with Doug taking a check from Apex for \$50,500 that same summer (RP383, l.25-384, l.10); RP381, ll.2-12 (Karina Nelson did not tell the Sakais that Landmark had transferred its assets to Apex, and that Apex had allegedly assumed Landmark's liabilities in exchange).

As Ms. Nelson testified, Ex. 173 reflected *Landmark's* \$124,131.87 receivable for its 6% overhead charge earned from SP pursuant to ¶5(d) of the 2006 agreement, Ex. 2, CP719. (RP 347, ll.11-15, & RP349, l.1-351, l.17.) Those assets, plus the then-future stream of revenue that was to be generated from the ongoing SP work, contractually was to have remained available to Landmark, which Landmark could then have used to pay its judgment obligation to the Sakais. (Ex. 2, CP719; RP672, l.2-20.) These future revenues were no mere matter of speculation,

either, as on February 15, 2012, or just two days before the Sakais started their Second Lawsuit (FF#74, CP440), Nelson was demanding that Pryor make additional capital contributions to SP so that SP could pay Apex \$66,852 related to three TI jobs. (Ex. 297, CP1149.) Likewise, the financials of Apex reflect the healthy revenues enjoyed by that Landmark-successor over the years after the 2009 fraudulent transfer. Specifically, Apex earned gross profit of \$137,600.30, \$170,410.21, \$121,296.15 and \$108,124.16 in 2009, 2010, 2011 and 2012 respectively, with the 2009 statement reflecting the fraudulently-transferred intercompany income. (Ex. 611, CP1718; Ex. 612, CP1721; RP757, 1.22 RP; 765, 1.2.)

Finally, Ms. Nelsons' testimony and Apex's financials for 2009 to 2012, at Exs 611 & 612, fail to meet the Nelsons' burden of establishing that any "value" was provided to support the 2009 transfers to Apex. For context, in cases of fraudulent transfers done with actual intent to hinder, delay or defraud any creditor, the provision of value by the transferee to the transferor is not relevant. RCW 19.40.041(a)(1). In the case at bar, given the large number of "badges of fraud" implicated by the Nelsons' conduct, actual intent is proven. Acequia, 34 F.3d at 806 (Presence of several badges of fraud can constitute *conclusive* evidence).

However, for "unintentional" fraudulent conveyances, a defense may be available if "a reasonably equivalent value" is provided by the

transferee to the transferor. RCW 19.40.041(a)(2). This issue was directly addressed at trial with Ms. Nelson regarding the \$122,878.63.

Q. And if you were going to describe the value that Apex provided for this accounts receivable, what would your description be of the value provided?

A. It did all of the follow-up calls on the warranty work if there was any at the property. So if something that Landmark oversaw or build or did the construction of failed, Landmark wasn't around to do that work anymore to remedy it during its warranty period, and Apex assumed the liability and the burden, I guess.

(RP360, 1.13–21; Ex. 176, CP1016.) The problem about this “guess” is that the financials of Apex—as prepared by Ms. Nelson, CP356, 11.9-12—do not reflect any warranty work from 2009 to 2012. At most, if one speculatively assumes that “Maint & Repair” could include such warranty work, one sees expenses of \$0.00 in 2009, \$1,239.84 in 2010, \$2,630.09 in 2011, and \$622.63 in 2012, for a total of \$4,492.46 over that four year period. (Ex. 611, CP 1718; Ex. 612, CP 1722.) Presumed warranty work of such a small amount—even if the presumption be true—cannot satisfy the Nelsons’ burden of proof of reasonably equivalent value for a \$122,878.63 receivable under RCW 19.40.041.

2. THE PRYORS NEITHER APPROVED NOR BENEFITTED FROM THE 2009 APEX FRAUD

Given the clarity of this evidence, the Pryors have struggled to understand how a judgment could be entered requiring them to pay the

Nelsons for half of the expense of the liabilities that sprung from the Nelsons' 2009 fraudulent transfers, to wit, \$35,000 for one-half of the Sakai II settlement (FF# 103) and \$70,999.05 for half of the Nelsons' legal expenses (FF#102, 104) incurred in defending the Nelsons in a suit caused solely by the Nelsons' own fraudulent conduct. The Pryors conclude that the trial court erroneously conflated Pryor's (correct) belief that the 2008 "Debt Swap" did not render Landmark insolvent, and thus did not defraud the Sakais, as somehow also indicating that Pryor knew of and benefited from the 2009 Apex Fraud. Nothing is further from the truth, and there is no evidence to support such conclusions.

Put differently, any finding of fact or conclusion of law based on an erroneous assumption that Pryor knew of and approved the 2009 Apex Fraud is not supported by substantial evidence and constitutes reversible error. The Court's FF#s 16, 92, 93 & 106 either explicitly state or reflect this material error by the trial court, as does CL#6, CP452 ("Pryor knowingly acquiesced to the Debt Swap and all other transactions complained of in this matter."). The trial court did seem to be impressed (wrongly) with a particular email dated May 9, 2012, and discussed in FF#16. (CP 428-9.) The fundamental problem with FF#16 is that it confuses and improperly conflates (a) Pryor's belief in May 2012 that he had not engaged in a fraudulent transfer in conjunction with the 2007-2008 "debt swap" with

(b) the trial court's conclusion that Pryor knew of, approved and somehow must have benefitted from the 2009 Apex Fraud that left Landmark insolvent, and that was the but-for cause of the Sakai II litigation. Quite simply, the appellate panel will search in vain through the referenced email at Ex. 346, CP 1195-99, as well as through the rest of the record, for any proof that Pryor knew of and approved that 2009 Apex fraud.

While the trial court confused and conflated the 2008 "Debt Swap" with the 2009 Apex Fraud, the Nelsons made no such mistake. They understood the import of their actions, as is seen in this September 26, 2013 email by Kristina Nelson to her Sakai II legal team:

The contemplation and the implementation of the debt swap was not a scheme to defraud Sakai. In that moment, Landmark LLC was the creditor and honestly Sakai was never a consideration in the transaction. The net effect of the debt swap had no bearing on the entities, as without the write off contemplated on Landmark's books in 2009, it had a \$200,000 profit.

(Ex. 573, CP1579; RP363, 1.25-364, 1.18, RP369, 1.7-21 (Karina Nelson acknowledges the "write-off" mentioned above relates to the receivable owed to Landmark by SP.) Further, when questioned about the negative impact of that 2009 transfer from Landmark to Apex on Landmark's ability to pay the Sakai judgment, Karina Nelson aggressively denied that Pryor had any interest in ensuring that SP's receivables went to the entity guaranteed them by the 2006 Redemption Agreement. (Ex. 2, CP719; RP

690-693, at 691, ll.11-13: “And so if you talk about the receivable and what he [Pryor] was entitled to in that respect, it would be nothing.”)

To reiterate, it was the Nelsons’ 2009 Apex Fraud that constituted breaches of the fiduciary duties owed to the Pryors, and that were the but-for-cause of the Pryors’ exposure to the Sakai II lawsuit. It was that 2009 fraudulent transfer that left Landmark insolvent (FF# 15), that deprived Landmark of the future stream of income from work it was entitled to from SP (Ex. 297, CP 1149 [\$66,852 owed 2 days before the Sakais filed suit]), and that then left Landmark unable to pay the Sakai judgment. That insolvency was the but-for cause of the Sakai II litigation, because a solvent Landmark could have been required to pay that liability, either via a settlement or through the supplemental proceedings that the Sakais actually employed. (*See* FF#s 58-60, CP 437.) Thus, Nelson’s personal payment of \$70,000 to settle Sakai II, and now, the Nelsons’ ongoing, wrongful efforts to impose on the Pryors the expense of the fees and expenses related to defending Sakai II and the instant litigation, all occurred only because of the Nelsons’ own fraud.

C. THE NELSONS AND THEIR ENTITIES ARE LIABLE TO THE PRYORS FOR THEIR DAMAGES

The trial court erred by concluding, at CL #4, CP 450, that the Pryors had failed to prove their causes of action.

1. THE NELSONS ARE LIABLE TO THE PRYORS FOR FRAUD, BREACH OF FIDUCIARY DUTIES & CONTRACT AND FOR INDEMNITY

(a) BREACH OF CONTRACT

The breach of contract pertinent to this portion of the appeal is easy to identify. As the trial court correctly found at FF#22, CP429, “[u]nder the 2006 Redemption Agreement, the parties acknowledged that Landmark would continue building the SP development at cost plus 6% overhead.” In fact, the agreement is more definite than the trial court’s finding indicates, insisting “that Landmark will continue to build the property known as “Sportsman Park”.” (CP719, Ex. 2, ¶5(d), emphasis added.) The Nelsons caused Green Rock and Landmark, as the contracting parties to the 2006 agreement, to breach this provision by engaging in the 2009 fraudulent transfer of Landmark’s receivables and stream of work from SP. Given the clarity of this evidence and logical application of the terms of the 2006 agreement, the trial court erred at CL# 5, CP450, when it found that the Pryors had not proven their breach of contract claim.

(b) BREACH OF FIDUCIARY DUTIES & FRAUD

The trial court’s Conclusions of Law on fiduciary duties are #s 4-10, at CP450-3. As the trial court correctly concluded in CL#5, Nelson owed Pryor fiduciary duties, and his fiduciary duties arose by virtue of the parties’ trust relationship. CP 451. As the trial court further properly

observed, an “LLC manager is entitled to rely in good faith on other managers.” CP 451, *citing* Bishop of Victoria Corp. Sole v. Corporate Business Park, 138 Wn.App. 443, 456-7, 158 P.3d 1183 (2007). LLC members, like partners, are held accountable to each other and to the business as fiduciaries. Id.

The trial court continued in CL# 5 to observe (correctly) that “the Pryors have the burden of coming forward with evidence of a breach of fiduciary duty.” (CP451, ll.14-15.) Once that is done, “the burden of proving good faith is on the officer or director because of his fiduciary capacity.” CL#5, CP451, *citing* Saviano v. Westport Amusements, Inc., 144 Wn.App. 72, 79 (2008). The trial court correctly held that:

. . . once that initial burden has been met, the Nelsons have the burden to prove (a) that Doug Nelson at all times acted in good faith and (2) to provide a sufficient accounting to disprove, for instance, that he did not wrongly profit from his activities, in violation of his fiduciary obligations.

(CL#5, CP 451-2.) Because the trial court correctly found that the Nelsons’ fraudulently transferred Landmark’s assets of in 2009, which included accounts receivable owed by SP, the Court erred by finding that the Pryors failed to meet their burden of proving fraud and breach of fiduciary duties. If this point needs further explanation: As Pryor’s fiduciary in SP and Landmark, Nelson owed Pryor the duty to ensure that the assets of SP went to Landmark so that both Pryor and Nelson could

“profit” from those payments via Landmark’s satisfaction of the Sakai I judgment. Instead, those assets were transferred solely for their benefit.

2. THE BUSINESS JUDGMENT RULE PROVIDES NO PROTECTION TO THE NELSONS

The trial court erroneously concluded, at CL#7, that the Pryors’ breach of fiduciary duty claims were barred by the business judgment rule. (CP 452.) That rule does not allow a fiduciary to commit fraud, such as the 2009 transfers to Apex, at the expense of those to whom he owes his duties. RCW 23B.08.300(1)(a) & (3); RCW 23B.08.420(1)(a) & (3). Nursing Home Blg. Corp. v. De Hart, 13 Wn.App. 489, 498, 535 P.2d 137 (1975) (“The “business judgment rule” immunizes management from liability . . . where there is a reasonable basis to indicate that the transaction was made in good faith”). *See* W. Fletcher, 3A Cyclopedia of the Law of Corporations §1040 (“To gain the protection of the business judgment rule, a director must have been disinterested, independent, and informed”). In short, courts will not interfere with the business judgment of the directors unless there is evidence of “fraud, dishonesty, or incompetence.” In re Spokane Concrete, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). Here there is more than just mere evidence of fraud, for Nelson fraudulently transferred Landmark’s assets in violation of the 2006 agreement and violated his fiduciary duties to Pryor as a member of SP,

Landmark and Green Rock. CL#s 7 & 8 are not supported by substantial evidence and are erroneous conclusions of law.

The trial court also erred in CL#10 by misconstruing the apparent good faith of professionals used (i.e., manipulated) by the Nelsons as somehow anointing them with actual good faith, despite the Nelsons' fraudulent transfers. For instance, the Pryors believe the trial court correct in finding, at FF#37, ll.5-7, that *Stevenson did not intend* to participate in any fraudulent transactions. As Stevenson explained to Pryor in a 11/27/13 email during the *Sakai II* litigation, though, "My role was to perform the accounting. The transactions were complex and I only had a limited understanding as to the business purpose of some of the events." (Ex. 441, CP 1303.) Stevenson's testimony is consistent with her "limited understanding" and relevant to the fraudulent transfers embodied in Exs 172, 173, & 176. *See* RP 982, l.10 – 984, l.19, where Stevenson's evident confusion about the fraudulent nature of the 2009 Apex transfers comes through. Simply stated, the Nelsons used Stevenson—without her realizing it—to perform the Landmark side of the fraudulent transfers that rendered Landmark insolvent, while Karina did the Apex side. RP 681, l.25–RP685, l.11; Ex. 172, CP1007-11 (CP1008: "Apex should accrue a fee of \$124,131.87. This represents the unpaid construction fee on the SPLLC jobs."); RP687, l.21–RP688, l.20; Ex. 173, CP1012-4 (Apex side

of transfer). Both under RCW 19.40.041 & RCW 19.40.051, and FF#15, CP428, those transactions were fraudulent, and Stevenson's work directly contributed to them. But, the Nelsons' manipulation of Stevenson in no way gives them the right to leverage that manipulation into a valid finding that they could "rely" on someone they misled to take advantage of the business judgment rule. Such a finding would contradict RCW 23B.08.300(3) and RCW 23B.08.420(3).

The role of attorney Brian Danzig, currently Director of Corporate Counsel for Starbucks (FF#49; RP1106, l.6), is another example of the trial court confusing the fact that Danzig "clearly adheres to professional ethics and the rules of conduct," FF#52, with the unsupported belief that the Nelsons also adhere to such standards. As Danzig described his role, he simply acted as a qualified scribe who never met Pryor (RP 1107) but instead was assigned in January 2010 by the Nelsons with "corporate housekeeping" duties (RP 1110, RP 1117; RP 1129), which involved a body of typed and handwritten documents (RP1111; RP1125-6) that were represented to him by Nelson as being contemporaneous corporate minutes (RP1111-2), which Danzig and his staff then turned into typed "minutes", etc., with standard language included (RP1115; RP1121, ll.15-22). Danzig then delivered those completed documents to the Nelsons, and returned the originals to the Nelsons. (RP1125, ll.17-22) As he

acknowledged: “I would have no way of knowing the event occurred.” (FF#s 48-53; RP1132, l.20; RP1134, ll.7-18) For his part, Nelson then “relegated [the originals] to the shredder or the garbage. They weren’t kept.” (RP 313, l.14-RP 314, l.11.) Naturally, that disposal prevented the Pryors, Sakais, or anyone else from examining the same for possible fraud, raising serious spoliation questions.

In sum, the Nelsons certainly used professionals to generate financial and corporate documents pursuant to their instructions. That, however, in no way permits the Nelsons to generate from whole cloth a basis to claim reliance on those documents as evidence of their own good faith. Thus, to the extent the trial court reached findings or conclusions of law on such an inaccurate analysis, they are erroneous.

3. INDEMNITY

The Pryors’ fourth counterclaim was for indemnification. In asserting that claim, the Pryors did not limit themselves to either contractual or equitable indemnity, but instead preserved their right to assert either or both. (CP73, ¶¶45-46.) The trial court erred when it rejected this claim at CL#s 4 & 20, CP 450 & 455 by not even considering the claim of equitable indemnification, RP 32, the elements of which are:

- (1) a wrongful act or omission by A . . . toward B . . . ;
- (2) such act or omission exposes or involves B . . . in litigation with C . . . ; and
- (3) C was not connected

with the initial transaction or event . . . , viz., the wrongful act or omission of A toward B.

Blueberry Place Homeowners Ass'n v. Northward Homes, 126 Wn.App. 352, 358-359 (Div. 1, 2005). All three elements must be satisfied to create liability. The trial court's decision that equitable indemnity is satisfied and the ABC rule applies is a legal question subject to *de novo* review. Id.

On March 12, 2012, through their then-counsel Mr Broughton⁶, the Pryors tendered the defense of Sakai II to the Nelsons, which tender was refused. (Ex. 316, CP1173-75; RP353–361, 1.2.) As is seen in that letter, as of March 2012 the Pryors and their counsel were unaware of the 2009 Apex Fraud and were instead focusing on the 2008 Debt Swap as the basis of the suit and the indemnity demand. (Ex.316, CP1174, RP354–6, 1.11.)

As this case unfolded, however, the evidence established that what rendered Landmark insolvent, and thus the event that was the but-for cause of the Sakai II litigation, was the 2009 Apex Fraud. Thus, the Blueberry Place test properly focuses on that when applying the ABC rule:

(1) a wrongful act or omission by A [the 2009 Apex fraud by Nelson, et al.] toward B [the Sakais]; (2) such act or omission exposes or involves B [the Sakais] in litigation with C [the Pryors]; and (3) C [the Pryors] were not connected with the initial

⁶ Broughton, a member of the WSBA since 1979, has worked in the Kitsap County prosecutor's office, was the City Attorney for Bremerton for 5 years, and has had his own civil practice since the early 1990s. Broughton has tried close to 100 jury trials and hundreds of bench and arbitration cases. (RP 345–347, 1.20.)

transaction or event [the 2009 Apex Fraud], viz., the wrongful act or omission of A toward B.

Under the applicable *de novo* standard of review, the Pryors submit that equity demands the Nelsons and their entities to indemnify the Pryors.

The trial court judgment to the contrary should be reversed.⁷

4. THE PRYORS SHOULD RECOVER SIGNIFICANT DAMAGES

The Pryors are entitled to recover damages under the theories of breach of fiduciary duty, breach of contract, and indemnity as a result of the 2009 Apex Fraud conducted by the Nelsons and their entities. The following elements of damages are recoverable:

First, the Pryors should recover all expenses of the Sakai II suit and the follow-on litigation between the Nelsons and the Pryors. For example, if the Pryors were truly liable to the Nelsons or Landmark under either the 2006 or 2012 agreement—which they properly are not—then those sums would also constitute offsetting damages owed back to the Pryors by the Nelsons. These damages include \$65,606.14 as the Pryors' share of the Nelsons' legal expenses (FF# 102), \$35,000 as the Pryors' share of the Sakai II settlement (FF# 103), and \$5,392.91 as the Pryor's share of the Sakai II litigation expenses (FF# 104). CL#s 2 & 3. These awards would offset, dollar for dollar, the supposed contractual liability

⁷ The Pryors also have contract indemnity rights under §6 of the 2012 agreement (Ex. 3).

owned by the Pryors for the same, thereby eliminating the judgment entered by the trial court in the Nelsons' and Landmark's favor.

Second, the Pryors are entitled to an affirmative award as a recovery for the costs of defending the Sakai II case that was wrongfully inflicted on them. Those damages are recoverable due to the Nelsons' breach of contract and fiduciary duties, and indemnity, all flowing from the 2009 Apex Fraud. Those damages include \$1,333.33 in fees paid to Bertram Dispute Resolution, and fees in the amount of \$8,586.25 paid to the Broughton Law Group, per attorney Broughton's testimony and Exs. 6 & 7. (CP742-749; RP377, 1.25–378, 1.24; RP362, 1.6 – 366, 1.17.)

Third, as noted by the trial court near the end of CL#5, once the Pryors met the initial burden of proving a breach of fiduciary duty (most obviously via the 2009 Apex Fraud), "the Nelsons have the burden to prove (a) that Doug Nelson at all times acted in good faith and (2) to provide a sufficient accounting to disprove, for instance, that he did not wrongly profit from his activities, in violation of his fiduciary obligations." (CP 451-2.) One such incident occurred in August 2009 (the same time as the Apex fraud) involving \$8,500 in triple net ("NNN") income that was collected from tenants from Central Plaza. It had not been spent and was available for distribution. Stevenson explained that half of that money was owned by/owed to Pryor and that Nelson could choose one of

two options. First, Landmark could make the \$8,500 disappear through some accounting maneuvers, or second, Landmark could cut Pryor a check for \$4,250. (Ex. 170, CP 000.) Nelson chose the accounting maneuver, saying “I will select option 1 on the Central Plaza true up of NNN receivables. Let’s get er done”, to which Blaine Scott responded “Wow. . . Looks like Doug understands. . .” (Ex. 171, CP1004.) Scott⁸ explained at trial what was under discussion in those two exhibits. He testified that Nelson avoided disbursing income of \$4,250 to Pryor by choosing the “journal entry” approach. (RP 508, 1.13–RP509, 1.21; Stevenson confirms: RP 976, 1. 21 – 977, 1.13.) Thus, Nelson breached his fiduciary duty to Pryor to avoid secret profits, self-dealing, and conflicts of interest by converting that \$4,250 in NNN income. Bishop of Victoria Corp. Sole, 138 Wn.App. at 456-7. He also failed to provide the accounting, here and elsewhere, that the trial court misapprehended in CL#21.

Next, as the trial court found at FF#s 86-87, CP443-4, Nelson created three backdated agreements for ReMax’s management of the SP commercial property. *See* Exs. 706-712, CP1906-54, RP566, 1.1–575; RP 577, 1.7–595. For example, Ex. 708 was supposedly signed on December

⁸ Scott was the office manager of the Remax office owned by Nelson. Before beginning to work for Nelson, Scott was a Cryptologic Technician with the US Navy, with his last posting at the N.S.A. in Fort Meade, Maryland. Scott retired from the Navy after 22 years as a Chief Petty Officer. RP 470-472.

21, 2006, but was actually signed on March 26, 2012. FF#87. These backdated documents were part of a scheme by the Nelsons to double the commissions paid by SP to ReMax from 2.5% or 3% to 5% or 6%. Again, Nelson owned ReMax, but was only a 50% owner of SP. (RP 564, ll.8-14.) So, a backdated increase of the commission rate at the latter's expense for the former's benefit violates Nelson's fiduciary duties to Pryor.⁹

D. THE TRIAL COURT ERRED IN ITS RULINGS ON THE 2006 AND 2012 AGREEMENTS

The trial court erred by awarding plaintiffs \$105,999.05 under the 2006 Redemption Agreement and the 2012 Purchase Agreement.

1. THE INTEGRATION CLAUSE ELIMINATED THE NELSONS' ABILITY TO RECOVER UNDER THE 2006 AGREEMENT

The attorneys' fees, costs and legal liability provision of the 2006 agreement is fully subject to the integration clause of the 2012 agreement. (FF# 97; Ex. 3, CP738.) Thus, there is no surviving contractual obligation under the 2006 agreement requiring the Pryors to pay any such amounts. Despite correctly finding the integration clause to apply, the trial court then erred by ordering the Pryors to pay exactly the same amount under the 2006

⁹ This Court should compare the 2.5% commission rate on the April 2006 lease for Thuasne North America. (RP562, l.5-25; RP564, ll.3-21; Ex. 704, CP1896, l.624) to the management agreement at Ex. 708 that purported to charge a lease commission of 6% on the renewed lease in 2007. (Ex. 708, CP1933, 34, 36.) By comparison, in an email between Nelson and Pryor from February 2008, Nelson represented to Pryor that he was charging 2.5%, which the backdated agreement contradicts. (Ex. 151, CP981.)

agreement—\$105,999.05—as was awarded under the 2012 Purchase Agreement. CL #2 & 3 are thus erroneous.

2. THE TRIAL COURT MATERIALLY MISQUOTED AND MISAPPLIED ¶7 OF THE 2012 AGREEMENT

The trial court's FF# 96, CP446, which purports to quote ¶7 of the 2012 agreement, CP735, both misquotes and omits material language from that provision and, thus, is not supported by substantial evidence. For instance, FF#96 omits key parts of the contract, like the requirement that a court hold Pryor personally liable for the alleged fraudulent transfers. This excludes liability to Pryor for a settlement that Nelson alone agreed to in order to limit his own personal liability. Of course, while the trial court found at FF#15 that the Nelsons had engaged in a fraudulent transfer with respect to the 2009 Apex Fraud, no comparable finding was made with respect to the Pryors, or with respect to the 2008 Debt Swap. In short, if Sakai II had gone to trial, presumptively whomever was the trial judge in that case would have made a finding similar to FF#15 which would have led to imposition of personal liability for Landmark's insolvency on the Nelsons, but ***not*** on the Pryors. The Pryors, then, can have had no responsibility for the Landmark judgment because the condition precedent to that liability under the 2012 Agreement, ¶7(b), is absent.

To illuminate the problem another way, the trial court bound the Pryors to the obligations of the 2012 Purchase Agreement at least in part due to the integration clause at ¶10(c), but then the trial court improperly denied the Pryors the benefits of that integration clause, and the benefits of the specific terms the Pryors negotiated in the 2012 agreement to protect themselves from the risks that the Nelsons may have engaged in fraudulent conduct unknown to them. Again, in the 2006 agreement, the Pryors explicitly agreed “to reimburse Landmark for one half of all costs and expenses, including . . . amounts paid in settlement, incurred by Landmark. . . .” (Ex. 2, ¶5(c)(i) (emphasis added).) By contrast, the comparable provision in the 2012 agreement contains no such promise.

This, then, brings us to the final point of this section, namely the omission in FF#96 of key language that appears in ¶7(a) of the 2012 agreement. Specifically, the Pryors agreed to hire only attorney Bruce Johnston to represent the common interests of the Pryors, Nelson and Landmark, yet FF#96 entirely omits that limitation of the Pryors’ agreement. In short, the Pryors agreed to none of the Nelsons’ other law firms, and the rampant conflicts of interest¹⁰ that those attorneys’ work for

¹⁰ Broughton: RP 368 1.1 – 371. 1.6. Pryor objects to the trial court’s ruling at RP371. 1.6. Broughton was qualified under ER 701 to provide the testimony at RP 369, ll. 6-8.

the Nelsons created. Thus, at most, under proper circumstances the Nelsons might have been liable for half of the Johnston firm's expenses.¹¹

**3. PLAINTIFFS FAILED TO PROVE IN THEIR CASE
IN CHIEF ANY ENTITLEMENT TO DAMAGES
FOR FEES AND EXPENSES**

The trial court erred when it awarded \$70,999.05 in fees and costs to the Nelsons under CL#s 2 & 3, including time incurred by the CPAs they hired to provide expert testimony on their behalf during the Sakai II litigation. Most simply stated, all of the fees and expenses incurred by the Nelsons and Landmark arose from their unclean hands and fraud when they orchestrated the 2009 Apex Fraud, thereby rendering Landmark insolvent and leading to the fraudulent transfer Sakai II suit. (FF#15.) As the Nelsons well know from the final appellate decision in Sakai I, they are not entitled to recover after having engaged in conduct falling within the scope of the affirmative defense of unclean hands, CP65, ¶13, especially because those "unclean hands" were used to fraudulently transfer assets from Landmark that then led directly to the Sakai II litigation for which they seek recovery. *See App. Tab 4, pp. 7, 16-17.*

Next, assuming that all of their other misdeeds are ignored, the Nelsons simply failed to meet their burden of proof to establish their entitlement to a fee and expense award in their case in chief. This failure

¹¹ FF# 102 assigns \$17,122.78 as the Pryors' share of Johnston's fees.

of proof applies regardless of whether this Court were to apply only the 2012 agreement, or also the 2006 agreement. To explain, the \$70,999.05 erroneously granted under the 2006 agreement and the 2012 agreement are breach of contract damages alleged in ¶¶4.1-5.3 of the complaint. (CP11-12.) As such, those alleged damages are subject to stricter proof requirements as compared to the traditional post-trial motion practice seeking fees as the cost of litigation. Those stricter proof requirements include the need to present *expert testimony*, which is something that Doug Nelson could not do.¹²

This distinction is explored in detail in a number of cases, including Newport Yacht Basin Ass'n v. Supreme Northwest, Inc., 168 Wn.App. 86, 285 P.3d 70 (2012). In Newport Yacht Basin, a party appealed from a fee award entered against him as an element of contract

¹² Plaintiffs failed to gain admission of any of the exhibits needed to establish the fees and expenses they contend were incurred in the Sakai II litigation. (RP 141, l.12 to RP 164, l.2.) The trial court acknowledged the deficiency inherent in Nelson's testimony: "Well, I don't know how much weight I am going to give to the rough estimate of legal fees because some of that litigation may be completely unrelated to what we are talking about here." (RP 152, ll.18-21.) Indeed, Nelson estimated spending a million dollars on legal fees in the last ten years, making it effectively impossible to determine any proper fee award without a detailed segregation by the service providers. (RP 151, ll. 5-12; RP 152, ll.1-17.) Those rejected exhibits were Ex. 4, the Johnston Lawyers invoice, Ex. 8, the Davidson, Davidson & Hawkins, CPAs invoice, Ex. 9, the Rekdal Hopkins Howard PS invoice, Ex. 10, the Miller Nash invoice, Ex. 11, the Smith & Hennessey invoice, and Ex. 12, the Sanchez, Mitchell, Eastman & Cure PS "Detail Transaction File List." None was admitted; none was supported, allocated or justified by an appropriate professional; none was preserved for review on appeal through an offer of proof. ER 103(a)(2). Instead, Nelson testified as a mere consumer of legal services. (RP 151, 154, 157.)

damages, which is comparable to the indemnity claims asserted here by

Nelson. In granting the appeal, the court held that:

attorney fees sought pursuant to a contractual indemnity provision are an element of damages that must be proved to the trier of fact. . . . Accordingly, a party seeking the recovery of attorney fees pursuant to an indemnity provision bears the burden of presenting evidence regarding the reasonableness of the amount of fees claimed. . . .

Newport Yacht Basin, 168 Wn.App. at 102, cites omitted. Jacob's

Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 162 P.3d

1152 (2007) gives an example of what is required, *specifically including expert testimony*, to prove the reasonableness and necessity of fees:

Furthermore, a jury may be aided in its consideration of this issue by the use of expert testimony. The party seeking recovery of attorney fees as damages bears the burden of presenting evidence as to the reasonableness of the amount of fees claimed. *Am. Med.*, 235 Ga. App. at 466 (“reasonableness and necessity of the expenses of litigation and attorney fees are matters for expert opinion”); *Lesikar*, 33 S.W.3d at 307 (“Generally, the issue of reasonableness and necessity of attorneys' fees requires expert testimony.”);

Jacob's Meadow Owners, 139 Wn.App. at 761-762. In the case at bar

Nelson was not identified as an expert on the reasonableness and necessity

of attorney fees incurred by the numerous firms he claimed worked on

Sakai II and his other legal matters, and even if he had been so identified,

he was not qualified to do so. Instead, he was limited to testifying as a

consumer of legal services. Such “consumer” testimony is not sufficient

to meet the requirement for qualified expert testimony on the reasonableness and necessity of the claimed expense as it related to the Nelsons' contractual damages claims. Because the Nelsons failed to prove their claim, the trial court's damage award of \$70,999.05 was erroneous.¹³

4. THE NELSONS FAILED TO PROVE IN THEIR CASE-IN-CHIEF ANY RIGHT TO EXPENSES

The trial court erred by awarding the Nelsons expenses. First, the Pryors should not have been assessed with \$666.67 of Nelsons' cost of the Bertram Dispute Resolution mediation, as the Pryors had already paid their one-third share of \$1,333.33. (RP 378.) Requiring the Pryors to pay \$2,000 for Bertram's services and the Nelsons to pay only \$666.66 is not in compliance with the terms of the 2012 agreement. Second, while Jim Davidson, CPA, testified at trial, the Nelsons did not have him authenticate his invoice at Ex. 9 and acknowledge its payment. There is, then, no evidence from him of the purpose, reasonableness or necessity of that claimed \$5,000.50 expense, except for Davidson's testimony that the Nelsons had not paid around \$30,000 of his firm's invoices. (RP 1029, l. 14 – 1030, l.14.) There is, therefore, no cost to reimburse the Nelsons for, and the award at FF#104 and CL#s 2 & 3 was improper. Third, the

¹³ As noted by the Jacob's Meadow court, 139 Wn.App. at 762, n. 8: "Because SSB failed to present to the jury evidence on the question of the amount of attorney fees it was entitled to recover as damages, it may not recover such damages."

Nelsons hired Jason Newman to justify both the Nelsons' defrauding of the Sakais, and the Nelsons' self-dealing with the Pryors. Newman was not, as a result, hired to jointly pursue the interests of Nelson, Pryor and Landmark, and there is no basis to divide that cost in two. (FF#104)

5. THE ¶5 RELEASE OF THE 2012 AGREEMENT IS INVALID

Like in Sakai I, the Nelsons' failure to disclose the 2009 Apex Fraud during the negotiations over the 2012 agreement, and their unclean hands in general, should bar the effectiveness of the ¶5 release. At a minimum, the release cannot be expanded to benefit entities not expressly covered, such as Landmark and Green Rock. Ex. #3, CP 734-5. Coson v. Roehl, 63 Wn.2d 384, 386, 387 P.2d 541 (1963) (e.g., fraud vitiates the contract); National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). Accordingly, CL#14 errs in holding that Pryor released any and all claims against Nelson, SP, and Central Plaza, including known and unknown claims.

E. THE NELSON ENTITIES ARE LIABLE FOR THE 2008 "DEBT SWAP" AND FALSE CAPITAL CONTRIBUTIONS

1. NELSONS, LANDMARK AND GREEN ROCK DEFRAUDED THE PRYORS IN 2008 DEBT SWAP

While Pryor agreed to a transaction that became known as the "2008 Debt Swap", he did so under false statements of existing fact, *contra* CL#12-13, as demonstrated by the financial records presented at

trial related to the false receivable of \$746,330.66, which was erroneously accepted as a true statement of the amount owed by the trial court at FF #27A.¹⁴ CL #6. The Pryors first apologize for the complexity of the financial documents about to be reviewed, but it is that very complexity that contributed to and was used by the Nelsons to mislead the Pryors. The appellate court should also review these exhibits in light of the Nelsons' fiduciary duties and their duty to prove their good faith.

To begin, Nelson represented to Pryor in 2007 that SP owed Landmark \$746,330.66. (Ex. 412, CP1226.) In fact that representation was false, as Nelson admitted to himself in his internal, January 5, 2008 "Company Meeting" minutes for Landmark, LLC (Ex. 43, CP846), where he wrote that SP "owed [Landmark] a couple hundred thousand for work completed and still unpaid", Western Devco (a solely owned company of Green Rock) owed Landmark "a few hundred thousand . . . for unreimbursed construction costs from 2007 and the year before", and that Landmark was making good progress on collecting from the tenants at SP for all the TI work we have been doing.

¹⁴Regarding CL# 15-19, Nelson misrepresented as existing fact the claim that Sportsman Park owed \$746,330.66 to Landmark when the financials establish that only "a couple hundred thousand" was owed on January 5 2008. Ex. 43, CP 846. There is no evidence that Ex. 43 was available to Pryor, undermining the finding that he was informed.

Stevenson's accounting records further substantiate the preceding facts. For instance, Ex. 527, at CP1468-71, is the Landmark Income Statement for January 1 to December 31, 2007. (RP941, 1.12-943.) At Ex. 527, CP1468, GL 40100 Overhead Reimbursement, Landmark reports Operating Income of \$244,775.14, with an accompanying "Note #1" that reads on CP1470 as: "See subledger for details. Largely overhead reimbursements charged to Sportsman Park at 6% of construction costs. Also, included are profits on tenant TI's at Sportsman Park." The referenced subledger appears at CP1471 and reveals that \$99,864.84 of that 6% "overhead compensation" actually related to tenant improvement profits and taxes, and other similar charges, in violation of the 2006 agreement. All of those sums are carried forward in their entirety to Landmark's General Ledger 11505 "*SPLLC Construction Receivable*", at Ex. 409, CP1222, which was then rolled forward into the "demand" to Pryor at, e.g., Ex. 410, CP1224, last two lines, and Ex. 412, CP1226; RP 934-6 (Nelson directed Stevenson to complete journal entry).

The trail continues back to 2006 from the top right line of Ex. 409, CP1222, which records a balance forward from 2006 in GL 11505 (again *SPLLC Construction Receivable*) of \$591,608. That sum appears in Landmark's balance sheet for December 2006, at Ex. 121, CP27, and again in the December 31, 2006 "Analysis of Construction Costs Incurred

to Amounts Reimbursed” at CP937 of Ex. 126. That analysis shows, in its last six lines, that \$431,139.61 of the 2006 balance of \$591,608 was owed by tenants, not SP.¹⁵

Ultimately, the genesis of this bookkeeping fraud, whereby debts of third parties like tenants were included in a General Ledger entry titled “GL 11505 SPLLC [Sportsman Park LLC] Construction Receivable”, was a 2006 email exchange at Ex. 87, CP898. There, Stevenson asks Nelson: “Hi Doug, I am looking at DC-3’s deposit for TI’s of \$50K. Is it alright to mix this into SPLLC’s Operating account? I don’t see where it says that we can’t. It looks like this is a deposit for their share of the TI’s. I am thinking that Landmark will bill SPLLC for these costs and we will need to reimburse Landmark the \$50k.” In response Nelson writes: “Yes. We can commingle the funds. . . .”

The evidence further shows GL 1203, for the tenant Notes Receivables, being transferred from SP to its new, wholly owned subsidiary, SP Phase I, which was created as part of the permanent financing for the first six buildings in SP. (Ex. 613, CP 1733-4 (Medius note receivable of \$32,372.34 on CP1734), & Ex. 619, CP 1759 (Medius TI note).) This transfer had the effect of removing the stream of income

¹⁵ Nelson and Stevenson acknowledged that tenant improvement dollars were amortized and received over the terms of the tenants’ leases. (Ex. 102, CP903; Ex. 110, CP909.)

from Sportsman Park's books to SP Phase I. Jason Newman, CPA, further testified to the accounting records recording the receipt of the income from substantial tenant payments between 2007 and 2012. (Exs 575, 577, 578, 579, 580, & 581, CP 1586-1604; RP 1571-9.)

The point is this: In 2007 & 2008 Nelson gave Pryor a picture of SP alone owing Landmark \$746,330, which had to be paid by Nelson and Pryor alone, while the *reality* was that tenants owed substantial portions of that debt to SP and continued to pay those debts over time. Evidence showing the improper calculation of those TI liabilities appears in a series of complex accounting records that show a debt due and owing from SP to Landmark. (Ex. 408, CP1220 ("This entry is to record the shortfall due from SPLLC for their WIP balances as compared to the amounts received for deposits."); Ex. 409, 410, 412, CP 1221-26; *compare* Ex. 560, CP 1558, GL 11505 "SPLLC Construction Receivable" to the "Landmark Balance Sheet" GL 11505 Recv Related Party Jobs," Ex. 527, CP1455.)

The trial court's general confusion regarding the 2008 Debt Swap may be partially explained by its error in FF#44, where it found that the Pryors' expert witness CPA Frank Miller "concluded that the Debt Swap was beneficial to Pryor." (CP434, l.15.) In fact, Miller testified precisely the opposite, stating that it was a good deal for Nelson and a particularly bad deal for Pryor. (RP1454.) Miller explained:

The result of this, Mr. Nelson got 100 percent ownership in Green Rock. And the ownership of Sportsman Park remained at 50/50, and Dr. Pryor lost the balance of the note due of \$412,000, plus the interest he would have earned on that had it continued.

(CP1454, ll.14-9.) The trial court also erroneously found, at FF#33, CL#12, that the record is void of any evidence regarding the assertion that “Nelson falsely represented that he was going to put \$373,165.22 of his own money . . . as a matching contribution to . . . the Debt Swap. (CP431-2.) In fact, the record contains emails saying that in general, round numbers. Ex. 158, CP983, top ¶; Ex. 161, 2008, CP988 last ¶ Nelson email (“money I had advanced Sportsman (\$750,000).”); CP 993, middle email (“I did not earn any interest on the money I lent Sports--man. 8% for a year on \$375,000 works out close to the \$27,000 you refer to.”)

2. THE NELSONS DEFRAUDED THE PRYORS THROUGH FALSE CAPITAL CONTRIBUTIONS

The evidence demonstrates that the Nelsons used false imbalances in capital contributions between Nelson and Pryor in SP to pressure the Pryors to either contribute more cash to SP, or sell their interest to the Nelsons. (Ex. 696, CP1842 9/20/11 Nelson to Pryor and French, a consultant: “To meet these capital needs I want to see the Capital Accounts brought even and then a 50/50 contribution to each of the partners.”) On January 2, 2012, Nelson wrote to Pryor and sent updated capital accounts with the message: “My goal is to get this evened out as these TI’s or other

expenses come along.” Those capital accounts showed Pryor with a capital balance of \$862,760.32 and Nelson with a balance of \$954,931.89. (Ex. 253, CP1054-6.) And on April 6, 2012, Pryor wrote to Nelson to confirm: “The Capital Accounts as they stand is; Doug \$953,829 and Tony \$845,760. Is that correct?” (EX. 339, CP1194.) Given Nelson’s fiduciary duties, he was obligated to respond to Pryor if Pryor’s understanding was incorrect. Yet, no evidence was presented showing the Nelsons disagreeing with Pryor’s reading of those documents.

All of this would have been well and good, except for the fact that the Nelsons falsified the capital contribution balance to make it appear that the Pryors owed more money. One way they did this was to pad their “capital contributions” with commissions supposedly earned but unpaid to ReMax. As Blaine Scott testified, Nelson was keeping two sets of books and falsifying the records of his capital contributions to SP. Scott testified that those falsified capital contributions were linked to the backdated property management agreements, as previously discussed at Exhibits 706, 707, 708, 712. (CP1906-46; RP 568-70, l.19). Karina Nelson also made this connection between her husband’s asserted commissions and the Nelson capital account in her testimony at RP 700, l.13 – RP 701, l.12.

The contribution reports in Ex 253 demonstrate the misrepresentation of the comparative capital contributions of the Pryors and

Nelsons. For instance, the Nelsons understated Pryor's contributions, at Ex. 253, CP1055, by \$41,603.29, as shown by Ex. 703, CP1869. (RP697, l.6-699, l.20.) The Nelsons then used the alleged unpaid brokerage commissions in Ex. 300, CP1150-7, and Ex. 302 to falsely justify claimed contributions by Nelson of \$184,141.58 on Ex. 253, CP1056, at the Journal Entries dated Sept 13, 14 and 23, 2011. (RP702, l.15–RP722.) Knowing this problem was there, Ms. Nelson hedged and skirted it during her testimony. (RP700, l.13–701, l.12.) Again, recognizing the impropriety of listing those commissions as contributions, they removed them from their capital account after purchasing Pryor's interest in SP in June 2012. (*Compare* Ex. 253, CP1056 to Ex. 628, CP1774 and Ex. 720, CP1962.) Finally, the Nelsons claimed a contribution of \$373,165.33, on March 24, 2008, as part of the debt swap for which they have admitted no cash flowed. (Ex. 253, CP1056; Ex. 720, RFA#7, CP1959-60.) Given the fiduciary duties owed by the Nelsons to Pryor, these misrepresentations regarding the parties' capital contributions are unquestionable breaches of those duties and caused \$225,744.87 in damages to the Pryors.

3. GREEN ROCK IS LIABLE ON ITS NOTE

The trial court rejected Pryor's breach of contract claim against Green Rock at CL#s 14-9. CL# 14 holds that Pryor released any claims against Green Rock in the 2012 Purchase Agreement, Ex. 3, ¶5, CP734;

yet, that release applies only to Nelson, SP, and Central Plaza. It therefore does not apply to Green Rock's obligations.

With respect to CL#s15-9, the evidence shows that Pryor was misled into believing that SP owed \$746,330.66 to Landmark when, in fact, the underlying financials establish that only "a couple hundred thousand" was owed by SP to Landmark on January 5, 2008. *See, e.g.*, Ex. 43, CP846. There is no evidence that critical documents like Ex. 43 were made available to Pryor, which undermines CL#6's conclusion that that Pryor "knowingly acquiesced" to the Debt Swap" with its resulting impact on the note. Furthermore, as late as February 23, 2012, Pryor was still asking the Nelsons about the unpaid balance of the Green Rock note. (RP722, 1.22-723, 1.21; RP730-RP735, 1.10; Ex. 302, CP1161; Ex. 574, CP1583 (admitting at a minimum that Green Rock had not paid \$39,000.)

Because the underlying premise of the 2008 "Debt Swap" was fraudulent, Green Rock breached its obligations to pay cash to or on behalf of Pryor under the promissory note found at Ex. 2, CP724-5, as of September 1, 2007. (Ex. 127, CP939.) At the time of the breach, \$412,678 was due. (Ex. 571, CP1575) That sum was liquidated and bears interest at 8% per annum from September 1, 2007. (Ex. 2, CP724.)

F. THE TRIAL COURT ERRED POST-TRIAL IN ITS AWARD OF FEES AND EXPENSES AS COSTS

1. CAUSES OF ACTION WITH ENFORCEABLE ATTORNEY FEE PROVISIONS

Given the large number of claims asserted by the Nelsons against the Pryors, and vice versa, remarkably few have prevailing-party attorney fee provisions. For instance, the fiduciary duty claims carry with them no right to recover prevailing-party fees. Shoemaker v. Ferrer, 143 Wn.App. 819, 831, 182 P.3d 992 (2008)(fees not recoverable for breach of fiduciary duty claim). The same result applies to claims of fraud, which together with the breach of fiduciary duty claims encompassed a large portion of the prosecution and defense of the case. Kittilson v. Ford, 23 Wn.App. 402, 408, 595 P.2d 944 (1979)(“fees generally would not be allowed in an action based upon common-law fraud or misrepresentation.”) Thus, however those issues are resolved on appeal, neither plaintiffs nor defendants should recover their fees and costs once properly allocated to those claims.¹⁶ The trial court accordingly erred in its supplemental FF#3 and CL#s 2 & 3, at CP674, 676, when it entered an award based up the Nelsons’ unsegregated, simplistic request for fees and costs.¹⁷

¹⁶ If the appellate court disagrees with this particular point and believes that there should be no segregation, the Pryors request a full award of their fees and costs, as opposed to the detailed, segregated fee and cost request that was submitted below.

¹⁷ Compare the Nelsons’ fee submission, at CP 583-602 to the Pryors’ submission at CP 485-569. The Nelsons’ submission should have been rejected outright as inadequate.

Instead, the claims that have potential for an attorney fee right are those based on contract. Newport Yacht Basin, 168 Wn.App. at 97 (“The general rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney fees are not available as either costs or damages.”) We accordingly turn our attention to the contracts in the case.

(a) THE JULY 7, 2000 PROMISSORY NOTE CONTAINS A FEE PROVISION

The July 7, 2000 note contains the following at Ex. 1, CP715:

If this Note shall be placed in the hands of an attorney for collection, or if suit is brought to collect any of the balance due on this Note, the Buyer promises to pay reasonable attorneys’ fees, and all court and collection costs.

RCW 4.84.330 turns this “one way” attorney fee provision into a prevailing party fee provision. Under the trial court’s CL#1, the Pryors are the prevailing parties. The trial court erred as a matter of law by not awarding them fees pursuant to their request. (CP 457-569.)

(b) GREEN ROCK’S NOTE HAS NO FEE PROVISION

The Green Rock note, Ex. 2, CP724, contains nothing like the provision quoted above from the July 2000 note. Instead, there is one reference, in ¶2, to applying payments to attorneys’ fees and collection costs, but there is in fact no actual grant of the right to recover the same. As noted in the trial court’s CL# 15, “[i]t is the duty of the court to determine the meaning of what is written, not what one party intended the

writing to mean.” Stein v. Geonerco, 105 Wn.App. 41, 48, 17 P.3d 1266 (2001). Here, what was written does not include a prevailing party fee provision. Thus Green Rock, which presented no evidence of spending any fees or incurring any costs, has in any event no right of recovery.

**(c) THE 2006 REDEMPTION AGREEMENT
CONTAINS A FEE PROVISION**

A sound way to test the conclusion related to the Green Rock note is to look at the 2006 Redemption Agreement. There the parties agreed:

(c) Attorneys’ Fees. If any party needs to engage an attorney to enforce the terms of this Agreement, regardless of whether a lawsuit or arbitration is commenced, the prevailing party shall, in addition to other relief, be entitled to recover from the party in default reasonable attorneys’ fees and costs, including any on appeal.

(Ex. 2, CP721.) The parties clearly knew how to include a fee provision when they wanted one, and that was not the case in the Green Rock note.

Returning to the 2006 agreement, the 2012 Agreement contains an integration clause. (Ex. 3, CP738.) That 2012 clause eliminates the legal expenses splitting provision found at ¶5(c) of the 2006 Redemption Agreement (Ex. 2), with respect to everything in the scope of the 2012 contract. *Compare* the 2012 agreement, at Ex. 3, ¶7, CP735 to ¶5(c) of the 2006 agreement at Ex. 2, CP719. Thus, despite the erroneous CL#2, the Nelsons have no right to recover Sakai II expenses under the 2006 agreement, making the Pryors the prevailing parties on the Nelsons’ ¶5(c)

contract claim under that 2006 agreement. Instead, presuming that the Nelsons' principal award survives in part appellate review, they must look to the 2012 agreement to determine any entitlement to a fee recovery.

By contrast, the 2012 integration clause does not impact the Pryors' status as the prevailing parties under ¶6 of the 2006 Redemption Agreement with respect to the Pinnacle Park property, as there are no provisions in the 2012 contract that relate to that real property. Finally, regarding plaintiffs' allegations (complaint ¶¶2.25 to 2.30, 4.3, CP8-11) that Pryor entered into a Joint Prosecution Agreement with the Sakais and thereby breached the confidentiality provisions of the 2006 Redemption Agreement, the Pryors are the prevailing parties. This is the case even though the Nelsons supposedly dismissed that claim voluntarily in response to defendants' motion for summary judgment because, as stated in the contract, the Pryors are entitled to fees and costs "regardless of whether a lawsuit or arbitration is commenced". (Ex. 2, CP721.) In summary, then, the Pryors are the prevailing parties on all claims under the 2006 agreement, and they are entitled to fees and costs thereunder.

**(d) THE 2012 AGREEMENT CONTAINS NO
PREVAILING FEE PROVISION**

Remarkably, the 2012 Purchase Agreement contains no prevailing party attorney fee provision. That such a provision would be missing from

that contract seems surprising, especially given the provision of ¶7 with respect to the expenses of the Sakai Lawsuit. (Ex. 3.) For the instant analysis, however, the following provision of ¶3 truly stands out:

. . . . Each party will be responsible for his own attorneys' fees, accountant fees' and other costs incurred in connection with this transaction.

(Ex. 3, CP734.) That is as close as the 2012 agreement gets to a fee provision. Because “that which is written” is not sufficient to create a fee right, neither party can recover fees incurred related thereto. The trial court erred by not segregating those costs from its award to the Nelsons.

(e) PRYOR IS THE ONLY PREVAILING PARTY WITH ENFORCEABLE FEE RIGHTS

The court must determine which party prevailed on particular claims for purposes of its segregated fee and expense awards. Newport Yacht Basin, 168 Wn.App. at 98-99. As established in the preceding analysis, the Pryors are the only parties to have prevailed on a claim with an enforceable fee and expense recovery right, and judgment was properly entered in their favor quieting title to the Pinnacle Park property. They are, as a result, the only prevailing parties, and the trial court erred when it awarded the Nelsons \$104,399.86 in attorney's fees and costs of \$10,443.08. (CP680.) This error is particularly startling when one grasps that (a) Nelson is a party to only the 2012 agreement and no other, (b) that 2012 contract

contains no prevailing party fee rights, and (c), no evidence was presented proving that anyone but the Nelsons incurred fees and expenses.

2. THE TRIAL COURT IMPROPERLY DENIED THE PRYORS' REQUEST FOR FEES AND EXPENSES

The trial court erred by not awarding the Pryors at least some portion, if not all, of their fees and expenses, as requested at CP 457-484, 485-569, 641-645. After entry of the decision in this case, the Pryors ask the Court to remand this matter to Kitsap County Superior Court with instructions to make a fee and expense award consistent with the appellate decision in an amount of at least \$71,421.10 and \$4,682.94. CP 651.

3. THE JUDGMENT FORM CONTAINS ERRORS

There are a series of errors contained within the judgment, some of which reflect the broader flaws that run through the case and others that simply appear in the judgment form. (CP678-81, App. #7.) First, Landmark is improperly listed as a judgment creditor. This reflects the error just discussed—only Landmark had a right to recover fees under the 2006 agreement, which right was eliminated by the 2012 integration clause, and Landmark was not a party to the 2012 agreement. Furthermore, Landmark was insolvent since 2009, and it spent nothing on this or the Sakai II litigation. Thus, Landmark must be struck as a judgment creditor and, with it, the award of prevailing party fees and costs to Nelson.

Second, the prejudgment interest of \$32,346.47 was erroneously calculated because the amount due was liquidated only on May 10, 2016, running through the judgment entry date of November 1, 2016, if one assumes that the trial court's judgment stands unchanged. (CP 614-616, 679-80.) Prier v. Refrigeration Eng'g. Co., 74 Wn.2d 25, 35, 442 P.2d 621 (1968). Therefore, prejudgment interest could be no more than $175/365$ times 8% times \$105,999.05 = \$4,065.71, with the 8% rate being drawn from the parties' agreements. Third, the judgment rate is also wrong because it too should be 8%. (Ex. 2, CP 724; Ex. 3, CP 733.)

Finally, ¶1 on CP 681, at ll.1-3, is classic overreaching in its effort to create out of whole cloth a right to fees during collection proceedings when no such right exists in an underlying contract. It accordingly must be struck from the judgment. Caine & Weiner v. Barker, 42 Wn.App. 835, 836-838, 713 P.2d 1133 (1986)(Upon entry of a judgment on a contract, the obligation evidencing the note merges with and is extinguished by the judgment. Any subsequent action to collect the judgment is based on the judgment, not on the contract, and carries with it no right to recovery additional attorneys' fees and costs).

G. DEFENDANTS ARE ENTITLED TO THEIR FEES AND EXPENSES ON APPEAL

The Pryors request an award of their fees and expenses on appeal as the prevailing party under the July 2000 promissory note (Ex. 1), under the 2006 Redemption Agreement (Ex. 2), and pursuant to the principals of equitable indemnity, all as briefed above.

VI. CONCLUSION

Based on the above, the Pryors ask for entry of a decision (A) reversing the trial court's judgment in all respects except for the quiet title provisions at CP680, ll.8-13, and 681, ll.4-11; (B) remanding for an award to the Pryors of their fees and costs in superior court; (C) awarding judgment against Green Rock, the Nelsons, SP, Central Plaza and Landmark, in the amount of \$412,678, plus prejudgment interest, for the unpaid note; (D) awarding judgment for \$225,744.87 flowing from the false capital contributions claimed by the Nelsons; (E) awarding judgment for \$4,250, plus interest on the misappropriated NNN income owed to Pryor; (F) awarding judgment for indemnity of the fees and expenses incurred by the Pryors, including the \$1,333.33 paid to Bertram Dispute Resolution and the \$8,586.25 paid to the Broughton Law Group; (G) awarding prevailing party fees and expenses on appeal under the promissory note (Ex. 1), under the 2006 Redemption Agreement (Ex. 2);

and under principles of equitable indemnity; and (H), imposing joint and several liability against Douglas C. Nelson, individually, the marital community of Douglas and Karina Nelson, Landmark, Green Rock, and Sportsman Park.

DATED this 13th day of March, 2017.

KINSEL LAW OFFICES, PLLC

By: /s/ William A. Kinsel

William A. Kinsel, WSBA #18077

Attorney for Antone Pryor and Kim Young Oak

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that he caused to be delivered on or before March 13th, 2017, copies of Plaintiffs' Brief of Appellants to the following:

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howard@washingtonappeals.com
Appeal Attorney for Respondents

via email (JISLink) and US Mail

DATED this 13th day of March, 2017.

s/William A. Kinsel
WILLIAM A. KINSEL

KINSEL LAW OFFICES
March 13, 2017 - 4:33 PM
Transmittal Letter

Document Uploaded: 1-496402-Appellants' Brief.pdf

Case Name: Antone Pryor v. Douglas Nelson, et al.

Court of Appeals Case Number: 49640-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Ashley R Stalwick - Email: ashley@kinsellaw.com

A copy of this document has been emailed to the following addresses:

wak@kinsellaw.com

kwc@Spinnakerbldg.com

howard@washingtonappeals.com

patricia@washingtonappeals.com

ashley@kinsellaw.com

No. 49640-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANTONE PRYOR, individually, and the marital community composed of
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Defendants & Third Party Plaintiffs/Appellants,

vs.

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;
LANDMARK, LLC, a Washington limited liability company,

Plaintiffs and Third Party Defendants/Respondents.

And

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;
LANDMARK, LLC, a Washington limited liability company,

Cross-Appellants,

vs.

ANTONE PRYOR, individually, and the marital community composed of
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Cross-Respondents.

APPENDIX TO BRIEF OF APPELLANTS PRYOR

William A. Kinsel, WSBA #18077
Attorney for Antone Pryor and Kim Young Oak
Defendants & Third-Party Plaintiffs/Appellants
Kinsel Law Offices, PLLC
2401 Fourth Avenue, Suite 850
Seattle, WA 98121
(206) 706-8148

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11	Uniform Fraudulent Transfer Act – Defenses, liability, and protection of transferee	RCW 19.40.081
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DATED this 13th day of March, 2017.

KINSEL LAW OFFICES, PLLC

By: 
William A. Kinsel, WSBA #18077
Attorneys for Antone Pryor and Kim Young Oak

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that he caused to be delivered on or before March ^{13th} 2017, copies of Plaintiffs' Appendix to Brief of Appellants to the following:

Kevin W. Cure
Sanchez, Mitchell, Eastman & Cure PSC
4110 Kitsap Way, Suite 200
Bremerton, WA 98312
kwc@spinnakerbldg.com
Trial Attorney for Respondents

Via U. S. Mail and E-Mail

Howard M. Goodfriend
Howard M. Goodfriend
Smith Goodfriend, P.S.
1619 8th Ave N.
Seattle, WA 98109
howard@washingtonappeals.com
Appeal Attorney for Respondents

Via U. S. Mail and E-Mail

DATED this ^{13th} day of March, 2017.


WILLIAM A. KINSEL

Tab 1

STATE Exhibit No. 1
 PLAINTIFF DEFENDANT
 PETITIONER RESPONDENT
 OTHER _____

Case No. 14-2-00059-8

NELSON, et ux, et al vs. PRYOR, et al

[] Admitted [] Refused
[] Withdrawn [] Not Offered
Date of Court's Ruling: MAR 15 2016

Agreement For Purchase and Sale of Units In Retirement Ventures, LLC

Dated this 7th day of July, 2000.

Parties:

1. Seller: Retirement Ventures, LLC, a Washington Limited Liability Company, hereinafter referred to as "Seller";
2. Buyer: Antone Pryor, a married man, hereinafter referred to as "Buyer";

RECITALS

1. Retirement Ventures, LLC, a Washington Limited Liability Company ("Company") has issued and outstanding 400 units of ownership interest, all of which is owned by the Seller.
2. The Seller desires to sell and to transfer 200 units of the Company owned by the Seller to the Buyer on the terms and conditions set forth herein.
3. The Seller and the Buyer have determined that the price of \$300 per units is fair and all parties concerned and that 200 units of the Seller should be purchased by Buyer on the terms and conditions set forth herein.

Now, therefor, in consideration of mutual promises set forth below, the parties agree:

- A. Purchase Price. Seller hereby sells and delivers to Buyer and Buyer hereby purchases from Seller 200 units of the Company for the sum of \$60,000.
- B. Manner of Payment. Seller acknowledges full payment for the units sold hereunder by receipt of the sum of \$60,000 in the form of a promissory note as here attached.
- C. Transfer of Units. Concurrently with the execution hereof, the Seller has delivered to the Buyer Certificate No. 2 for 200 units of the Company duly endorsed for transfer to Buyer, receipt of which is hereby acknowledged by Buyer.
- D. Representations of Seller. Seller represents and warrants that he is the owner, free and clear of any encumbrances, of all of the units of the Company sold and delivered by him hereunder.
- E. Survival of Representations and Warranties. All representations and warranties made hereunder shall survive the delivery of the units of Seller sold hereunder.
- F. Notices. All demands and notices given hereunder shall be sent by registered mail addressed to the respective parties at the addresses hereafter set forth, or to such other address as each may hereafter designate by registered mail.

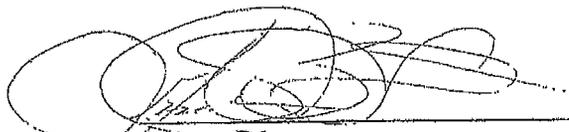
- G. Arbitration. Any dispute or controversy arising out of or in connection with this Agreement, or the breach thereof, shall be determined and settled by arbitration in Seattle, Washington in accordance with the rules of the American Arbitration Association. Any award rendered therein shall be final and binding on the parties hereto and judgement may be entered thereon in any court having jurisdiction thereof.
- H. Benefit. This agreement shall be binding upon and inure to the benefit of Retirement Ventures, Douglas C. Nelson, and Antone Pryor and their respective legal representatives, beneficiaries, successors and assigns.
- I. Further Action. Each of the parties hereto shall execute such documents and take such action as may be reasonably requested by the other party to carry out the provisions and purposes of this Agreement.
- J. Headings. The descriptive headings preceding the paragraphs herein are inserted for convenience and reference only, and do not form part of this agreement, nor are they to affect the construction or interpretation thereof.
- K. Entire Agreement. This Agreement constitutes the entire agreement between the parties with reference to the subject matter and may not be changed or modified orally.
- L. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one instrument.
- M. Limited Liability Company Agreement Dated January 19, 1999. The Buyer agrees to be bound by the Limited Liability Company Agreement dated January 19, 1999, for the Company.
- N. Applicable Laws, Venue. This agreement shall be construed in accordance with the laws of the State of Washington. Venue for any action in connection with this Agreement shall be in King County, Washington.
- O. Closing. As used in this Agreement, the term "Closing Date" shall mean the ____ day of July, 2000. The actual closing of this agreement shall occur simultaneously.

Seller:



Retirement Ventures LLC
By Douglas C. Nelson - Manager
345 Knechtel Way NE, Suite 205
Bainbridge Island WA 98110

Buyer:



Antone Pryor
10646 South Beach Dr. NE
Bainbridge Island WA 98110



Promissory Note

\$60,000

Bainbridge Island, Washington

FOR VALUE RECEIVED, Antone Pryor "Buyer" agree(s) to pay to the order of Retirement Ventures LLC "Seller" the sum of Sixty Thousand Dollars (\$60,000) as needed by the company in whole or in part. When needed the company shall give a minimum of seven days notice to Buyer in which event Buyer shall have to deposit said amount in to the company account. The amount deposited shall reduce this note by an equal amount.

This Note is evidence of the obligation to pay for units of ownership in Retirement Ventures LLC between Buyer and Seller dated 7th July, 2000. Buyer's failure to pay the Promissory Note strictly as above shall constitute default on said purchase of units as well as on this note.

If this Note shall be placed in the hands of an attorney for collection, or if suit is brought to collect any of the balance due on this Note, the Buyer promises to pay reasonable attorneys' fees, and all court and collection costs.

Date: 7 July 2000

Buyer: _____

Tab 2

STATE Exhibit No. 2
 PLAINTIFF DEFENDANT
 PETITIONER RESPONDENT
 OTHER _____

Case No. 14-2-00059-8

NELSON, et ux, et al vs. PRYOR, et al

[] Admitted [] Refused
[] Withdrawn [] Not Offered

Date of Court's Ruling: MAR 15 2016

REDEMPTION AGREEMENT

This Redemption Agreement is dated as of October 19, 2006, by and between Green Rock Holdings, LLC, a Washington limited liability company ("Company"), Landmark, LLC, a Washington limited liability company ("Landmark"), Landmark Management LLC, a Washington limited liability company ("Landmark Management"), Western Devco LLC, a Washington limited liability company ("Western") and Antone Pryor ("Pryor").

RECITALS

- A. The Company was formed on October 17, 2006. Pryor and Doug Nelson ("Nelson") are the sole members of the Company.
- B. The Company is the sole owner of Landmark and Western.
- C. Nelson is the sole owner of Landmark Management.
- D. Pryor and the Company have agreed that the Company shall redeem all of Pryor's economic, voting and other interests in the Company ("Redeemed Interest") as provided herein.
- E. All capitalized terms not defined herein shall have the meaning ascribed to them in the Operating Agreement.

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

AGREEMENT

1. Redeemed Interest Purchase and Sale. In reliance on the representations and warranties contained herein, Pryor does hereby agree to sell, assign, transfer, grant and convey to the Company and the Company does hereby agree to purchase from Pryor all of Pryor's right, title and interest in the Redeemed Interest, free and clear of any and all liens and claims of any nature.

2. Purchase Price, Terms and Method of Payment. In consideration for the purchase of the Redeemed Interest, the Company shall pay and transfer to Pryor as follows (the "Redemption Payment"):

(a) The Company shall transfer to Pryor units representing a two percent (2%) percentage interest in Western, transferred at Closing; and

(b) Delivery of a promissory note in the original principal amount of Four Hundred and Eighty Thousand Dollars (\$480,000), from Green Rock as Maker to Pryor as Holder, in the form attached as Exhibit A ("Note"). The Note shall be secured by a Pledge Agreement in the form attached as Exhibit B.

3. Closing. The closing under this Agreement ("Closing") shall be effective as of October 19, 2006.

4. Representations and Warranties.

(a) Pryor. Pryor hereby represents and warrants to the Company that, as of the date of this Agreement:

(i) Authority. Pryor has full power and authority to enter into this Agreement and to deliver and perform his obligations and undertakings set forth herein. This Agreement has been duly executed and delivered by Pryor and constitutes his legal, valid and binding obligation, enforceable in accordance with its terms. Pryor is not a party to or restricted by or obligated under any contract or other obligation which might be violated by the making or performance of this Agreement.

(ii) Ownership. Pryor has good and valid title to the Redeemed Interest, free and clear of all liens, encumbrances and restrictions on the right of Pryor to transfer the Redeemed Interest. On Closing, Pryor shall execute and deliver to the Company an Assignment of Interests ("Assignment") in the form attached hereto as Exhibit C, pursuant to which Pryor shall transfer and assign to the Company good and valid ownership to the Redeemed Interest, free and clear of all liens, claims, options, charges, encumbrances and commitments of any nature. There are no options, warrants or other rights outstanding which entitle any person or entity to purchase the Redeemed Interest.

(iii) No Proceedings. No bankruptcy or other arrangement with creditors, voluntary or involuntary, affecting Pryor or any of its assets or properties are pending, and Pryor has not made any assignment for the benefit of creditors or taken any action with a view to, or which would constitute the basis for, the institution of any such proceedings. There is no claim, action, suit, litigation or other proceeding pending or, to Pryor's knowledge, threatened against Pryor which in any way would affect the ability of Pryor to enter into and perform his obligations hereunder or affect the Redeemed Interest.

(b) The Company. The Company hereby represents and warrants to Pryor that, as of the date of this Agreement:

(i) Authority. The Company has the full power and authority to enter into this Agreement and to deliver and perform its obligations and undertakings set forth herein. This Agreement has been duly executed and delivered by the Company and constitutes its legal, valid and binding obligation, enforceable in accordance with its terms. The Company is not a party to or restricted by or obligated under any contract or other obligation which might be violated by the making or performance of this Agreement.

(ii) No Proceedings. No bankruptcy or other arrangement with creditors, voluntary or involuntary, affecting the Company or any of the assets or

properties of the Company are pending, and the Company has not made any assignment for the benefit of creditors or taken any action with a view to, or which would constitute the basis for, the institution of any such proceedings. There is no claim, action, suit, litigation or other proceeding pending or, to the Company's knowledge, threatened against the Company which in any way would affect the ability of the Company to enter into and perform the Company's obligations hereunder.

5. Post Closing Covenants. The parties agree as follows with respect to the period following closing:

(a) In case at anytime after the closing any further action is necessary or desirable to carry out the purposes of this Agreement, each of the parties will take such further action as another party reasonably may request.

(b) Landmark currently owns two certificates of deposit, in the total original principal amount of \$250,000, issued by Kitsap Bank (Account No.s 0840624330 and 0840624329), which have been assigned to the Washington State Department of Labor and Industries. Upon release of the assignments, and after maturity, one half (1/2) of the balance shall be paid to Pryor.

(c) Landmark is currently engaged in three relevant litigation matters: Landmark, LLC v. West Sound Design Center, Inc., Kitsap County Cause No. 05-2-02418-8; Landmark LLC v. The Sakai QTIP Trust, Kitsap County Cause No. 04-2-00950-4; and Landmark LLC v. Michael Cappelletti, et al., Kitsap County Cause No. 06-2-01235-8 (collectively, the "Lawsuits"). With regard to the Lawsuits, the parties agree as follows:

(i) Pryor agrees to reimburse Landmark for one half of all costs and expenses, including, without limitation, attorneys fees and costs, damages, judgments and amounts paid in settlement, incurred by Landmark or an affiliate in prosecution or defense of the Lawsuits, within ten (10) days of receipt of any invoice.

(ii) Landmark shall pay to Pryor one half of any income received by Landmark related to the Lawsuits, after deduction for all expenses related to such Lawsuit, within thirty (30) days of receipt by Landmark.

(d) The parties acknowledge that Landmark will continue to build the property known as "Sportsman Park" on Bainbridge Island, and any other project owned by Pryor and Nelson, at cost plus six percent (6%) overhead.

(e) Landmark Management shall pay to Pryor one half (1/2) of any amount received by Landmark Management from the Ferncliff Avenue Latecomers Agreement, dated February 9, 2005, and recorded in Kitsap County under Auditors file number 200504120013, within thirty (30) days of receipt by Landmark Management.

(f) Upon the sale of the property identified in the attached Exhibit D (the "Pinnacle Property"), to any purchaser other than Landmark, Pryor shall pay to Western one half (1/2) of its Profit on the sale. For purposes of this section, "Profit"

shall be the sum of (a) the sales price, less all costs of selling, including, without limitation, any sales commissions and real estate excise tax, minus (b) \$635,000, increased at the rate of 8% simple interest from the date of this Agreement to the date of the sale. Until such time as the Pinnacle Property is sold Western agrees to reimburse Pryor for one half of all costs and expenses associated with the ownership of the Pinnacle Property including special assessments, taxes and/or utilities.

(g) Upon the refinancing of the debt on building 4 at Sportsman Park, the parties agree that the funds generated will first be used to pay Kitsap Federal Credit Union (Loan #254451-96) in full for the debt assumed on Pinnacle Park for the benefit of Sportsman Park LLC.

6. Right of First Refusal.

(a) Grant of Right of First Refusal. In the event that Pryor desires to sell the Pinnacle Property to a third party purchaser, Pryor shall obtain from such third party purchaser a bona fide written offer to purchase the Pinnacle Property, stating the terms and conditions upon which the purchase is to be made and the consideration offered therefor. Pryor shall give written notice to Western of its desire to accept the offer for the Pinnacle Property, which shall set forth the complete terms of the written offer to purchase and the name and address of the proposed third party purchaser. Western or assigns shall have the first right to purchase the Pinnacle Property upon the same terms and conditions stated in the notice given pursuant to this section by giving written notice to Pryor within thirty (30) days after such notice from Pryor.

(b) Purchase and Sale. If Western has elected to purchase the Pinnacle Property, Pryor shall sell the Pinnacle Property to Western upon the same terms and conditions specified in the notice required by Section 6(a), and Western shall have the right to close the purchase within one hundred and twenty (120) days after receipt of the initial notification from Pryor. If Western does not elect to purchase the Pinnacle Property, then Pryor shall be entitled to sell the Pinnacle Property to the third party purchaser in accordance with the terms and conditions upon which the purchase is to be made as specified in the notice under Section 6(a).

(c) Recording. Upon execution of this Agreement, Western shall have the right to record a memorandum of this right of first refusal.

7. Confidentiality. Pryor acknowledges that information (including but not limited to customer lists, trade secrets, and operational information such as budgets) received as a member of the Company and as a former member of Landmark is and continues to be property of the Company and its subsidiaries, and agrees not to disclose or use the information in any manner that competes with or is injurious to the Company and its subsidiaries.

8. Miscellaneous Provisions.

(a) Entire Agreement. The parties agree that this Agreement represents the complete and exclusive agreement between them, which supersedes all

proposals or prior agreements, oral or written, and all other communications between them relating to the subject matter of this Agreement.

(b) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the state of Washington, without regard to conflicts of laws provisions. The parties hereby consent and submit to the jurisdiction and venue of any state or federal court within the city of Seattle in any litigation arising out of this Agreement.

(c) Attorneys' Fees. If any party needs to engage an attorney to enforce the terms of this Agreement, regardless of whether a lawsuit or arbitration is commenced, the prevailing party shall, in addition to any other relief, be entitled to recover from the party in default reasonable attorneys' fees and costs, including any on appeal.

(d) Survival. All covenants, provisions, agreements, representations and warranties provided in this Agreement will survive the execution of this Agreement.

(e) Binding Effect. This Agreement shall be binding upon and inure to the benefit of the respective parties and their legal representatives, successors, assigns and heirs.

(f) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original and all of which shall constitute part of a single Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first set forth above.

Green Rock Holdings LLC



Doug Nelson, Manager



Antone Pryor

Landmark, LLC



Doug Nelson, Manager

Landmark Management, LLC



Doug Nelson, Manager

Western Devco LLC



Doug Nelson, Manager

000723

EXHIBIT A
PROMISSORY NOTE

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110206/1738/63031.00001

-vii-

LM

146

PROMISSORY NOTE

\$480,000

October 19, 2006
Bainbridge Island, Washington

For value received, Green Rock Holdings LLC, a Washington limited liability company ("Maker") promises to pay, in lawful money of the United States of America, to the order of Antone Pryor (hereinafter "Holder"), at 10646 South Beach Drive N.E. Bainbridge Island, Washington 98110, or such other place as Holder may designate in writing from time to time, the principal amount of Four Hundred and Eight Thousand Dollars (\$480,000).

1. Interest Rate: The unpaid principal balance of this Note shall bear simple interest at rate of eight percent (8%).
2. Payment: This Note shall have a term of five (5) years and shall be paid as follows: equal monthly payments of principal and interest on the last day of the month, beginning October 31, 2006, with the principal balance of this Note and any unpaid accrued interest thereon, due and payable on September 30, 2011 (the "Maturity Date"). All payments made shall be applied first to the payment of accrued interest; second, at the option of the Holder hereof, to the payment of attorneys' fees and collection costs; and third, to reduction of the then unpaid principal balance of this Note.
3. Prepayment: This Note may be prepaid in part or in full at any time on or before the Maturity Date.
4. Default: If default be made in the payment of any installment under this Note, and if such default is not cured within thirty (30) days after written notice of default is given to Maker, the entire principal balance and all other amounts payable under the Note shall, at Holder's option, be immediately due and payable and Holder may exercise any and all other rights or remedies available to it. A failure by Holder to exercise its option to accelerate this Note upon the occurrence of a default, acceptance of a partial or past due payment, or indulgences granted from time to time shall not constitute a waiver of the right to exercise such option in the event of a continuation of the default or in the event of any subsequent default.
5. Governing Law. This Note will be construed and the rights, duties and obligations of the parties will be determined in accordance with the laws of the State of Washington without regard to its choice of law provisions. Holder and Maker hereby consent to the exclusive personal jurisdiction of the state and federal courts located in Kitsap County, State of Washington, for purposes of enforcement of this Note and the resolution of any disputes arising under or related to this Note.
6. Miscellaneous. Maker waives presentment for payment, demand, protest and notice of demand, protest and nonpayment, and all other notices required by law, except as specifically set forth in this Note. If from any circumstances whatsoever,

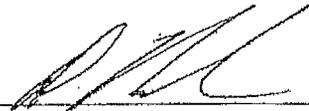
291/546913.02
110206/1741/63031.00001

fulfillment of any provision of this Note, at the time performance of such provision is due, involves exceeding the legal limit on interest under any applicable usury statute or any other applicable statute, law or regulation, then the interest accruing shall be reduced to the limit prescribed by such usury statute or other statute, law or regulation. Time is of the essence of this Note and of the payments and performances under this Note.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LEND MONEY, EXTEND CREDIT OR TO FOREBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

Green Rock Holdings LLC

By
Its



Manager

EXHIBIT B
FORM OF PLEDGE AGREEMENT

SECURITY AGREEMENT

THIS SECURITY AGREEMENT is made effective as of October 19, 2006 by and between Antone Pryor ("Secured Party") and Doug Nelson ("Nelson").

RECITALS

A. Green Rock Holdings LLC, a Washington limited liability company ("Green Rock") has issued to Pryor has a Promissory Note in the original principal amount of Four Hundred Eighty Thousand Dollars (\$480,000) (the "Note") in partial payment for the redemption of Pryor's interest in Green Rock.

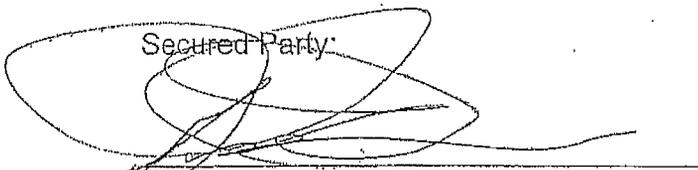
B. Nelson is the sole owner of Green Rock, and as such will benefit from the redemption.

AGREEMENT

1. This Security Agreement secures the payment and performance of all indebtedness and obligations of Green Rock to Secured Party pursuant to the Promissory Note issued by Green Rock to Secured Party, dated of even date herewith, in the original principal amount of \$480,000, including all related interest, fees, charges and expenses thereon.
2. As security for Green Rock's full payment and performance under the Note, Nelson hereby grants to Pryor a security interest in the following (the "Collateral"): all of Nelson's present and future right, title and interest in its membership and ownership interest in Central Plaza LLC, a Washington limited liability company ("Central").
3. The construction, interpretation, application and performance of this Agreement and of all transactions based upon it shall be governed by the laws of the State of Washington, and any litigation hereunder shall be brought in a court of competent jurisdiction, located in Kitsap County. The parties hereby agree to submit to the jurisdiction of said Court and waive any and all right to deny venue or jurisdiction in any claim or litigation brought in said Court.
4. Should any litigation be commenced between the parties hereto arising from or relating to this Agreement, the substantially prevailing party shall be entitled to its reasonable attorneys' fees and costs of litigation, including expert fees.
5. All notices, requests, demands, and other communications hereunder shall be in writing and delivered to the addresses specified in the Note or otherwise designated by the parties from time to time.
6. Nelson expressly authorizes Pryor to file UCC Financing Statements, Amendments or Continuation Statements as deemed appropriate by Pryor until the obligations under the Note are paid in full.

ORAL AGREEMENTS, PROMISES, OR COMMITMENTS TO: (1) LOAN MONEY, (2) EXTEND CREDIT, (3) MODIFY OR AMEND ANY TERMS OF THE LOAN DOCUMENTS, (4) RELEASE ANY GUARANTOR, (5) FORBEAR FROM ENFORCING REPAYMENT OF THE LOAN OR THE EXERCISE OF ANY REMEDY UNDER THE LOAN DOCUMENTS, OR (6) MAKE ANY OTHER FINANCIAL ACCOMMODATION PERTAINING TO THE LOAN ARE ALL UNENFORCEABLE UNDER WASHINGTON LAW.

Secured Party:


Antone Pryor

Date: October 19, 2006

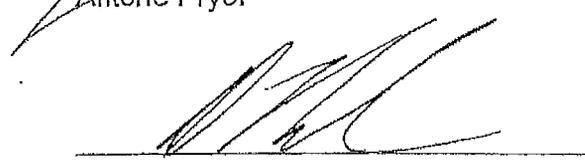

Doug Nelson
290 Madison Avenue
Bainbridge Island, WA 98110

EXHIBIT C

Assignment of Interests

ASSIGNMENT OF LIMITED LIABILITY COMPANY UNITS

For value received, the receipt and sufficiency of which are hereby acknowledged, Antone Pryor ("Assignor") hereby assigns and transfers to Green Rock Holdings LLC, a Washington limited liability company ("Company"), all of Assignor's Units, and all other rights and interests of Assignor, in Company.

This Assignment is made in accordance with that Redemption Agreement dated October 19, 2006, between Assignor and Company ("Redemption Agreement").

IN WITNESS WHEREOF, Assignor has executed this assignment as of October 19, 2006.

ASSIGNOR:


Antone Pryor

ACCEPTANCE OF ASSIGNMENT

The undersigned hereby accepts the Units in the Company subject to all the terms and conditions hereof and of the Redemption Agreement.

Dated October 19, 2006.

COMPANY:

Green Rock Holdings LLC

By 
Doug Nelson, Manager

EXHIBIT D
LEGAL DESCRIPTION OF THE PINNACLE PROPERTY

03261E

LOT A, BEING THAT PORTION OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER LYING WEST OF STATE HIGHWAY NO. 21 AND EAST OF COUNTY ROAD, SECTION 3, TOWNSHIP 26 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON; EXCEPT THE NORTH 200 FEET THEREOF (AS MEASURED ALONG HIGHWAY NO. 21) THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER, SECTION 3, TOWNSHIP 26 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON; EXCEPT COUNTY ROAD.

Tab 3

STATE Exhibit No. 3
 PLAINTIFF DEFENDANT
 PETITIONER RESPONDENT
 OTHER _____

Case No. 14-2-00059-8

NELSON, et ux, et al vs. PRYOR, et al

[] Admitted [] Refused
[] Withdrawn [] Not Offered

Date of Court's Ruling: MAR 15 2016

**PRYOR LLC MEMBERSHIP UNITS
PURCHASE AGREEMENT**

THIS AGREEMENT (the "Agreement") is entered into on the 7th day of June, 2012 (the "Effective Date") by Antone Pryor (the "Selling Member") and Douglas Nelson (the "Purchasing Member").

RECITALS

- A. The Selling Member owns 100 membership units in Sportsman Park, LLC, a Washington limited liability company ("Sportsman Park"). Selling Member also owns 50 membership units in Central Plaza, LLC, a Washington limited liability company ("Central Plaza").
- B. The Purchasing Member currently owns 110 membership units in Sportsman Park and 56 membership units in Central Plaza. Together, he and the Selling Member own all of the outstanding membership units in the two companies.
- C. Sportsman Park owns the following assets:
- a. All of the outstanding membership units in SP Phase I LLC, a Washington limited liability company that owns the following improved real property (which is legally described on Exhibit A.)
 - i. 9415 Coppertop Loop - Bainbridge Island WA 98110
 - ii. 9419 Coppertop Loop - Bainbridge Island WA 98110
 - iii. 9431 Coppertop Loop - Bainbridge Island WA 98110
 - iv. 9437 Coppertop Loop - Bainbridge Island WA 98110
 - v. 9453 Coppertop Loop - Bainbridge Island WA 98110
 - vi. 9459 Coppertop Loop - Bainbridge Island WA 98110
 - b. 9723 Coppertop Loop - Bainbridge Island WA 98110 which is legally described on Exhibit B.
 - c. 9727 Coppertop Loop - Bainbridge Island WA 98110 which is legally described on Exhibit B.
 - d. 9720 Coppertop Loop - Bainbridge Island WA 98110 which is legally described on Exhibit B.
 - e. An additional parcel of land (also legally described on Exhibit B) upon which is planned another 23,000 sq. ft. building.
 - f. The overall property site plan for the Sportsman Business Park depicted on the attached Exhibit B.
- D. Sportsman Park currently has the liabilities set forth on the attached Exhibit C.

- E. Central Plaza owns the real property and improvements located at 19980 10th Avenue, Poulsbo, WA. 98370 and legally described on the attached Exhibit D.
- F. Central Plaza currently owes Wells Fargo \$2,434,537 on a non-recourse loan originated in 2006 that comes due in 2016 (Loan Number 41-0904396). The loan is amortized over a 360 month period and bears interest at the rate of 6.34% per annum. The loan is secured by a first lien deed of trust on the property described in Exhibit D.
- G. Selling Member wishes to sell and Purchasing Member wishes to purchase all of Selling Member's membership units in Sportsman Park and Central Plaza (the "Conveyed Units") on the terms set forth in this Agreement. Upon closing of the purchase of the Conveyed Units the Selling Member will cease to be a member of Sportsman Park and Central Plaza and Purchasing Member will own all of the outstanding membership units in those companies. In addition, all outstanding obligations now or hereafter owing from either company to Selling Member will be deemed satisfied and paid in full other than the specific obligations arising under this Agreement.

AGREEMENT

NOW THEREFORE, in consideration of the covenants, promises, and agreements contained in this Agreement, the parties agree as follows:

1. **Purchase of the Selling Member's Membership Interests.** The Selling Member agrees to sell and the Purchasing Member agrees to purchase the Conveyed Units upon the terms and conditions set forth in this Agreement.
2. **Purchase Price of Selling Member Interest.** Purchasing Member will pay to the Selling Member for the Conveyed Units, the following amounts:
 - a. The sum of Five Hundred Fifty Thousand Dollars (\$550,000.00) by way of a promissory note (the "Note") bearing interest at the rate of 8% per annum, payable by monthly interest payments in the amount of \$3,666.67. The unpaid principal balance will be due and payable in full one year following the closing of the purchase of the Conveyed Units. The form of the note is attached hereto as Exhibit E. Repayment of the Note will be secured by a pledge of the Conveyed Units in the form attached as Exhibit F.
 - b. Payment within one year of the closing of the purchase of the Conveyed Units the principal balance of the loan from Kitsap Federal Credit Union to Selling Member (Loan Number 302118-90) in the current approximate principal balance of \$191,000 (the "Kitsap Note"). Purchasing Member or Sportsman Park will make the monthly payments coming due on the Kitsap Note until such time as it pays off the loan balance. Attached as Exhibit G is a Promissory Note from Purchasing Member to Selling Member that reflects the obligations set forth in this paragraph.

c. Repayment to Selling Member within one year of the closing of the purchase of the Conveyed Units the sum of \$120,000.00 advanced by him for the refinance of the loan on the 9723 Coppertop Loop - Bainbridge Island WA 98110. Attached as Exhibit H is a Promissory Note from Purchasing Member to Selling Member that reflects the obligations set forth in this paragraph.

3. **Closing of Purchase.** The purchase of the Conveyed Unit will be closed in the offices of the Purchasing Member within 30 days of execution of this Agreement. At closing the Purchasing Member will deliver to Selling Member the Notes attached as Exhibits E, G & H together with the Deeds of Trust and Pledge Agreements attached as Exhibits F, I & J and any funds required to complete the purchase and Selling Member (and his spouse) will execute and deliver to Purchasing Member the Assignment Separate From Certificate for his membership units in each company, in the form set forth in the attached Exhibit K. The Selling Member and Purchasing Member believe that the Real Estate Excise Tax does not apply to this transaction. However, if the tax should apply the Selling Member and Purchasing Member will share equally in any excise tax that arises as a result of the sale of the Conveyed Units to the Purchasing Member including penalties, interest and any fees and costs incurred in contesting the assessment. Each party will be responsible for his own attorneys' fees, accountant fees and other costs incurred in connection with this transaction.

4. **2nd Deeds of Trust.**

a. At Closing, Sportsman Park will grant Selling Member a 2nd lien Deed of Trust in the form attached as Exhibit I, on the property located at 9720 Coppertop Loop - Bainbridge Island, WA 98110 to secure repayment of the \$191,000 promissory note to be delivered to Selling Member pursuant to paragraph 2b above. Upon payment in full of the Kitsap Note, Selling Member will within 10 days direct the trustee on the deed of trust to reconvey it.

b. At Closing, Sportsman Park will grant Selling Member a 2nd lien Deed of Trust in the form attached as Exhibit J, on the property located at 9723 Coppertop Loop - Bainbridge Island, WA 98110 to secure repayment of the \$120,000.00 note delivered to Selling Member under the provisions of paragraph 2c above. Upon payment in full of those sums, Selling Member will within 10 days direct the trustee on the deed of trust to reconvey it.

c. If Sportsman Park refinances the debt on either of the above properties and eliminates Selling Member's personal liability on the existing debt on that properties then Selling Member will subordinate his deed of trust on the subject properties to the lien of the deed of trust securing the new loan on building 7, 8, and 9 so long as the combined value of the new loan does not exceed \$3,800,000. If Purchasing Member's monthly payments on the refinanced obligations are reduced he will apply the reduction amount on a monthly basis to the principal amounts due on the Selling Member's Promissory Note.

5. **Satisfaction of Obligations/Release.** Effective upon closing of the purchase and sale of the Conveyed Units, all outstanding obligations of Sportsman Park, Central Plaza or the Purchasing

Member to the Selling Member will be deemed satisfied and paid in full other than the specific obligations arising under the terms of this Agreement or any document executed pursuant to the terms of this Agreement. By closing the purchase and sale of the Conveyed Units, the Selling Member will be deemed to have released Sportsman Park, Central Plaza and the Purchasing Member from any and all claims, liabilities, damages, attorneys' fees and other costs arising from or related to his ownership of the Conveyed Units and the operation of the companies, whether such claims are known or unknown, except such claims as arise under the specific terms of this Agreement or any document executed pursuant to the terms of this Agreement. Selling Member will also be deemed to have released all of his right, title and interest in Sportsman Park and Central Plaza and in all of the assets owned by each company.

6. **Ongoing Company Obligations.** Selling Member acknowledges that even though Purchasing Member is purchasing the Conveyed Units that the outstanding obligations of Sportsman Park and Central Plaza to its lenders (and any vendors for which Selling Member has signed a personal guarantee) will remain in place and that Selling Member will continue to remain liable on those debts until such time as the companies either pay them in full or elect to refinance them and that Selling Member has no right to force the Purchasing Member or either company to satisfy or refinance any of these obligations. The Purchasing Member and the respective companies will indemnify Selling Member from any and all debts, liabilities, fees or costs arising from or related to these debts and obligations and from the ongoing operations of the companies after the closing of the purchase. The companies over time will use their best effort to refinance the debts and thereby eliminate the Selling Member's potential personal liabilities.

7. **Sakai Lawsuit.**

- a. Selling Member and Purchasing Member are subject to a lawsuit involving Sportsman Park, SP Phase I, Landmark, LLC, the Sakai QTIP Trust, Kimiko R. Sakai, John D. Sakai, Paul D. Sakai, Mary Ann R. Arnone and others, currently pending in Kitsap County Superior Court under Cause No. 12 2 00372 8 (the "New Suit"). They have retained Bruce Johnston to represent them in that action. The Court has previously entered judgment against Landmark, LLC in favor of the Sakai Parties in the principal amount of \$77,702.70 in Cause No. 04-2-005950-4 (the "Landmark Judgment"). In the New Suit the Sakai Parties are alleging that the Selling Member and the Purchasing Member engaged in fraudulent conveyances and are seeking to "pierce the corporate veil" of Landmark to hold Selling Member and Purchasing Member personally liable for the Landmark Judgment.
- b. The terms of this Agreement notwithstanding, Selling Member and Purchasing Member agree that they will continue to share equally in the cost of that litigation, including all attorneys' fees and costs, when and as they become due. If the Court in the New Suit holds Selling Member and Purchasing Member personally liable for the Landmark Judgment, then the Selling Member's total liability for the final judgment and accrued interest (but not for attorneys' fees and costs) in the New Suit, after expiration of all appeals, will not exceed \$200,000.00. Purchasing Member will be responsible for any judgment and accrued interest amount (excluding attorneys' fees and costs) in the New Suite that exceeds \$400,000.00 after expiration of all appeals.

Sportsman and Landmark

~~c. Selling Member at all times agrees to support the Companies and the Purchasing Member's positions in the New Suit and to not cooperate with the Sakai's or their attorneys by supporting the positions that they are taking in the New Suit. If Selling Member fails to support the Companies and the Purchasing Member's positions in the New Suit or if he cooperates with the Sakai in their attempts to hold the Purchasing Member personally liable for the Landmark Judgment then the limitation set forth in paragraph 7b above will be eliminated and Purchasing Member may receive contribution from Selling Member for one-half of all sums for which he is held liable in the New Suit together with one-half of all legal fees and costs for which the Selling Member has not previously reimbursed Purchasing Member.~~

Attorney They will not sabotage the company defense.

8. Representations and Warranties of the Selling Member. The Selling Member represents and warrants to Sportsman Park, Central Plaza and Purchasing Member as of the Effective Date and as of the date of the closing of the purchase of the Conveyed Units that:

- a. **Authority.** The Selling Member has the full power and authority to enter into and perform all of its obligations under this Agreement. By executing this Agreement the Selling Member binds his marital community and his spouse to the terms and conditions set forth herein. This Agreement has been duly executed and delivered by Selling Member and constitutes his legal, valid and binding obligation, enforceable in accordance with its terms. Selling Member is not a party to or restricted by or obligated under any contract or other obligation which might be violated by the making or performance of this Agreement.
- b. **Title to Interest.** The Selling Member has good and marketable title to the Conveyed Units and such title is not encumbered by any security interests, charges, restrictions, or other encumbrances of any nature.
- c. **Other Interest.** By executing this Agreement, the Selling Member agrees to sell all of his membership interests in Sportsman Park and Central Plaza including the balances in his capital accounts and to satisfy all obligations owing from those entities or their members to the Selling Member. The Selling Member has not granted (and will not grant during the term of this Agreement) any options, rights, warrants or other interests that entitle (or will entitle) any person or entity to purchase or otherwise acquire the Conveyed Units or the Selling Member's interest in either company.
- d. **No Violation or Breach.** Neither the execution nor delivery of this Agreement nor the carrying out of the transactions it contemplates will violate or breach any law, governmental regulation or court order or decree applicable to the Selling Member or the Conveyed Units.
- e. **Proceedings.** No bankruptcy or other arrangement with creditors, voluntary or involuntary, affecting Selling Member or any of his assets or properties are pending, and Selling Member has not made any assignment for the benefit of creditors or taken any action with a view to, or which would constitute the basis for, the institution of any such

proceedings. There is no claim, action, suit, litigation or other proceeding pending (other than the New Suit) or, to Selling Member's knowledge, threatened against Selling Member which in any way would affect the ability of Selling Member to enter into and perform its obligations hereunder or affect the Conveyed Units.

- f. **Company Assets and Obligations.** Selling Member is not aware of any assets or liabilities of Sportsman Park or Central Plaza that are not set forth in this Agreement or the exhibits thereto nor is he aware of any potential or contingent liabilities, obligations, claims or the like, that could affect the value of either company or the Conveyed Units and that are not reflected in this Agreement or the exhibits thereto.

9. **Representations and Warranties of the Purchasing Member.** The Purchasing Member represents and warrants to the Selling Member as of the Effective Date and as of the date of the closing of the purchase of the Conveyed Units that:

- a. **Authority.** The Purchasing Member has the full power and authority to enter into and perform all of its obligations under this Agreement. By executing this Agreement the Purchasing Member binds his marital community and his spouse to the terms and conditions set forth herein. This Agreement has been duly executed and delivered by Purchasing Member and constitutes its legal, valid and binding obligation, enforceable in accordance with its terms. Purchasing Member is not a party to or restricted by or obligated under any contract or other obligation which might be violated by the making or performance of this Agreement.
- b. **No Violation or Breach.** Neither the execution nor delivery of this Agreement nor the carrying out of the transactions it contemplates will violate or breach any law, governmental regulation or court order or decree applicable to the Purchasing Member.
- c. **Proceedings.** No bankruptcy or other arrangement with creditors, voluntary or involuntary, affecting Purchasing Member or any of his assets or properties are pending, and Purchasing Member has not made any assignment for the benefit of creditors or taken any action with a view to, or which would constitute the basis for, the institution of any such proceedings. There is no claim, action, suit, litigation or other proceeding pending (other than the New Suit) or, to Purchasing Member's knowledge, threatened against Purchasing Member which in any way would affect the ability of Purchasing Member to enter into and perform his obligations hereunder.
- d. **Company Assets and Obligations.** Purchasing Member is not aware of any assets or liabilities of Sportsman Park or Central Plaza that are not set forth in this Agreement or the exhibits thereto nor is he aware of any potential or contingent liabilities, obligations, claims that could affect the value of either company or the Conveyed Units and that are not reflected in this Agreement or the exhibits thereto.

10. Miscellaneous Provisions

- a. **Survival of Provisions.** All covenants, provisions, agreements, representations, and warranties provided in this Agreement will survive the execution of this Agreement and the closing of the purchase and sale of the Conveyed Units.
- b. **Governing Law.** This Agreement was made in the State of Washington and will be governed by and construed and enforced in accordance with the laws of the State of Washington.
- c. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement. There are no other commitments or agreements between the parties with respect to such matters. This Agreement may be amended only by a written instrument executed by the parties.
- d. **Notices.** All notices or other communications required or permitted by this Agreement will be deemed given only if in writing and mailed certified mail, return receipt requested, postage prepaid, and addressed as follows:

If to the Purchasing Member, then:

Doug Nelson
6440 Haley Loop NE
Bainbridge Island, WA 98110

If to the Selling Member, then:

Antone Pryor
10646 South Beach Drive
Bainbridge Island WA 98110

The notice will be deemed given three days following the date it is mailed with proper postage affected. At any time, a party may change the address to which notices or other communications must be sent by providing to the other parties written notice of a new address within the United States. Any change of address will be effective five (5) days after notice of the change is given.

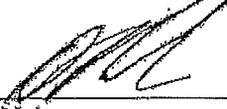
- e. **Headings.** The captions or headings provided in this Agreement are for convenience only and will not be deemed to be a part of this Agreement.
- f. **Confidentiality.** This Agreement, this transaction, and all information learned in the course of this transaction or during the time of his ownership in Sportsman Park and Central Park will be kept confidential by Selling Member, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Selling Member in connection with this transaction. Selling Member will immediately advise Purchasing Member in writing of any legal action that could potentially result in a

disclosure of such information and will cooperate with Purchasing Member's efforts to prevent any such disclosure.

IN WITNESS OF THEIR AGREEMENT, the parties have executed and delivered this Agreement as of the day and year first above written.

PURCHASING MEMBER:

SELLING MEMBER:



Doug Nelson



Antene Pryor

The undersigned spouses of the above members agree that any actual or presumptive interest that they may have in the Conveyed Units or in Sportsman Park or Central Plaza are bound by the terms and conditions of this Agreement. Further, they agree to execute such documents as are reasonably necessary to reflect their assent to the terms and conditions of this Agreement.

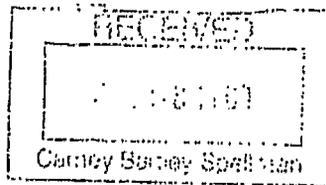


Karina Nelson



Young Oak Kim

Tab 4



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LANDMARK LLC,

No. 36663-1-II

Appellant/Cross Respondent,

v.

UNPUBLISHED OPINION

THE SAKAI QTIP TRUST; THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; KIMIKO R. SAKAI, individually and as co-trustee of the SAKAI QTIP TRUST; J. ANTHONY HOARE, as co-trustee of the SAKAI QTIP TRUST and as trustee of THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; JOHN D. SAKAI; PAUL D. SAKAI; MARY ANN R. ARNONE; JOHN DOES 1 through 20,

Respondents/Cross Appellants.

ARMSTRONG, J. — In 1998, Landmark LLC entered into a purchase and sale agreement to purchase land from its co-owners, the Sakai QTIP Trust and The Grandchildren of Kimiko R. Sakai Trust (Kimiko Sakai, John Sakai, Paul Sakai, and Mary Ann Arnone) (collectively Sakai). Over the next several years, the parties attempted to renegotiate that transaction several times but never reached a new agreement. Landmark then sued Sakai for breach and specific performance of the agreement, equitable estoppel, breach of the covenant of good faith and fair dealing, and unjust enrichment. Sakai counterclaimed for trespass based on storm water retention tanks Landmark had installed partly on Sakai property. Both parties now appeal. Landmark argues that the trial court erred in (1) dismissing its first three claims on summary judgment, (2) awarding damages contingent on future events on its unjust enrichment claim, and (3) awarding Sakai attorney fees for prevailing on the contract claims but not to Landmark for prevailing on its

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unjust enrichment claim. Sakai argues that the trial court erred in awarding any relief on Landmark's unjust enrichment claim and in failing to award relief on its trespass claim. We affirm the trial court's summary judgment decision on the contract claims and its decision awarding attorney fees to Sakai and not to Landmark; we reverse the trial court's awards for unjust enrichment and contingent future damages, and remand for the trial court to grant Sakai relief on the trespass claim.

FACTS¹

On November 11, 1998, the parties entered into a Purchase and Sale Agreement (Agreement) wherein Sakai agreed to sell two nine-acre parcels of land to Landmark for \$2,050,000. At the time, Landmark intended to build a retirement community on the property, and Sakai executed an owner/applicant agreement that allowed Doug Nelson, Landmark's agent in the transaction, to pursue land use approval from the city of Bainbridge Island on its behalf. John Sakai² acted as the Sakai "contact person" with Nelson.

The Agreement provided a 120-day period for Nelson to complete a "feasibility study" of the project and close the deal if Landmark was satisfied with the results. Clerk's Papers (CP) at 62. If Landmark did not exercise the contingency within that period, the parties had 12 months

¹ On its contract claims, Landmark "relies exclusively on the sworn testimony of Sakai, the conduct of Sakai, and the email correspondence authored by Sakai." Br. of Appellant at 27 n.8. But where the record provides additional facts that support Landmark's position, we include them even though Landmark does not argue them. See *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (in reviewing order on summary judgment, court reviews all facts in light most favorable to the nonmoving party). We do not include facts developed at the subsequent bench trial. See *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (following summary judgment, a reviewing court takes the position of the trial court and examines those pleadings, affidavits, and depositions before it at the time).

² For clarity, we refer to John Sakai by his first name. We intend no disrespect.

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to close the transaction at the contract price. Thus, without extensions, the Agreement expired on March 11, 2000. The Agreement also provided that Landmark could "secure up to [18] . . . 30 day extensions of the closing date" by paying \$13,500 for each extension. CP at 62. Under that term, the Agreement could be extended to September 11, 2001. The sale was contingent on the city's approval of the proposed development. The Agreement also contained a "[t]ime is of the essence" clause. CP at 59.

A few months after executing the Agreement, Landmark concluded that a retirement community development was not feasible. Landmark did not invoke its right to revoke the Agreement and later agreed on two addenda on other matters. During the remaining months of the contract period, Landmark worked on a new plan for a "high density" development of apartments or condominiums, the "Sakai Village." This project was to be completed in two phases, with Phase I on the Madison Glen property north of the Sakai property and Phase II on the Sakai property.

John and Nelson met on March 31, 2000, after the Agreement's expiration date. According to Nelson, he was ready to make the first extension payment to John, but John "wouldn't take [his] money," instead promising to "honor the original agreement" while they renegotiated the price. CP at 316, 341. John testified that Sakai had decided to allow Nelson to continue pursuing the new development, but he told Nelson that Sakai was still "willing" to sell the property and that it would negotiate with Landmark in good faith regarding the price. CP at 227. Both parties agreed that the purchase price would be the fair market value of the property.

Over the next several months, Nelson obtained the Phase I property and worked with the city to obtain approval of that part of development. In the summer of 2000, Nelson initiated

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attempts to "close" the sale transaction with Sakai, even preparing a new purchase and sale agreement that he described in an e-mail to John as "a bit sweeter" so that he would "like it." CP at 78. The deal did not close, however, because Landmark's lender wanted city approval of Phase II before it financed the purchase.

Landmark began construction of Phase I in 2001. While putting in storm water retention tanks, Nelson asked Sakai for permission to install tanks on the Sakai property because "it was cheaper to do it all at once." CP at 137. Sakai granted permission but told Nelson that "you put [them] in at your own risk. If you do not buy the property, you must take them out." CP at 137.

When it appeared that the city was close to approving the project in June 2001, Nelson wrote Sakai that "[a]s we get closer, we will need to tie up a few of these loose ends," including that "[w]e are out of contract and need to get that buttoned up."³ CP at 368. But soon after, Sakai told Nelson that it wanted to sell Landmark only one of the two lots originally included in the sale.⁴ Nelson protested, writing Sakai on August 10, 2001, that:

[T]here is a fundamental issue that must be resolved before we can proceed. We have always had an agreement to sell me both ten acre parcels. There shouldn't be any question as to whether I will be purchasing the property. When that agreement initially expired you assured me that you would honor it and did not require me to make the extension payment because of the hold ups in the City. I have also agreed to pay what ever appreciation the property may have incurred as time as past [sic]. All of my actions to date have been done in justifiable reliance upon your families' promise to sell me both parcels.

CP at 373. Nevertheless, Nelson engaged in "serious negotiations" for a reduced sale of property. CP at 136. Those negotiations failed months later because of a dispute over

³ In his deposition, Nelson stated that his phrase "out of contract" was "a nice way of saying that [Sakai] had breached the [A]greement by their unwillingness to close." CP at 416.

⁴ John testified in his deposition that they had started to doubt Nelson's judgment on the project because the type of buildings that Nelson was building did not fit with the neighborhood and would not be marketable.

easements.

Between December 2001 and October 2003, Landmark and Sakai had little contact. Nelson's Phase I units were not selling because of poor design and a depressed market after September 11, 2001. In October 2003, negotiations reopened regarding Landmark's desired purchase of the Sakai property. But those negotiations ultimately failed as well.

Landmark filed this action for breach of contract, specific performance, unjust enrichment, equitable estoppel/detrimental reliance, and breach of the covenant of good faith and fair dealing. Sakai counterclaimed for trespass by Landmark's storm water detention tanks, seeking an order that Landmark remove them. It also asked for attorney fees under the Agreement.

A. Summary Judgment on Claims Enforcing Sale

Sakai moved for summary judgment on Landmark's contract, equitable estoppel, and good faith and fair dealing claims. Sakai argued that (1) the Agreement had expired, (2) any verbal contract that remained did not comply with the statute of frauds, and (3) specific performance was not available where the parties had not agreed on price and where Landmark was in default. Landmark argued that the Agreement had not expired because (1) Sakai never communicated such to Landmark, and (2) Sakai had "waived any such expiration date" by waiving the extension payments the Agreement required. CP at 38. Instead, Landmark reasoned, Sakai's agreement in March 2000 to sell the property for fair market value "changed the 1998 'fixed price' Purchase and Sale Agreement into an agreement with an open term." CP at 449.

On Landmark's equitable estoppel claim, Sakai argued that it had never asserted there

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was a contract after the Agreement's expiration date, and Landmark's belief to the contrary was unreasonable because so many essential terms of the deal were constantly "in a state of flux." CP at 287. It further argued that Nelson knew or should have known that they were "out of contract" yet "conduct[ed] himself with a careless indifference" to that information. CP at 286, 288 (quoting *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 192 Wash. 1, 33, 72 P.2d 311 (1937)). Landmark responded that *promissory* estoppel principles obligated Sakai to sell the property as promised to Landmark for fair market value. Sakai responded that it had made no promise to sell the property and that if Landmark relied on Sakai's statements to continue to negotiate, such reliance was unjustifiable.

The trial court granted Sakai's motion for summary judgment on the breach of contract and specific performance claims, ruling that "there is no specific performance of a contract for which the price blank is missing" and that a contract with "an open-ended term in terms of fair market value" was not enforceable as a matter of law. Report of Proceedings (RP) (March 25, 2005) at 2-3. The trial court also summarily dismissed Landmark's equitable estoppel claim, reasoning that even if the doctrine applied, the court had no contract to enforce. In addition, the court dismissed Landmark's claim for breach of the covenant of good faith and fair dealing because it is "not an independent claim and must attach to a contract." RP (March 25, 2005) at 4.

B. Unjust Enrichment Claim

Landmark subsequently moved for summary judgment on its unjust enrichment claim, requesting \$750,000 in damages for its costs in obtaining the site plan approval for the Sakai property and the enhanced property value as a result of the approval. Sakai responded that it was

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not enriched because it had not acted on the approval, which would also expire in January 2007. Landmark countered that the eventual expiration of the approval was "irrelevant" under the Restatement (Second) of Contracts section 370 comment a, and the trial court agreed, ruling "[a]s a matter of law, that the Site Plan Approval may expire does not change the fact of enrichment or benefit, as a benefit wasted is still a benefit." CP at 997. It therefore granted Landmark's motion in part, ruling that a question of fact remained "as to whether the enrichment is 'unjust'" and as to the amount of the benefit. CP at 997.

After a bench trial, the trial court concluded that Nelson had unclean hands because he had (1) submitted doctored plans when he asked Sakai to approve installing the storm tanks in March 2001; (2) falsely represented that he had procured easements from other abutting owners when he sought an easement from Sakai; (3) concealed from Sakai that his development plans used a phase line different from the boundary line between the Phase I and Phase II properties; (4) made a number of false representations during the 2001 negotiations regarding costs and obligations he accrued in reliance on his belief Sakai would sell; (5) falsely represented that he could not close any sales in Phase I without various easements that he wanted from Sakai; (6) attempted to "slip in" provisions into drafts of a new purchase and sale agreement that had either not been discussed or that were contrary to prior oral agreement; (7) after agreeing on a purchase price of \$28,000 per unit, claimed that his development included only 93 units when the site map showed 97 units; and (8) falsely represented in March 2004 that Landmark's shareholders had terminated him as the Landmark manager. The trial court also found that several parts of Nelson's testimony at trial were false, as was his claim that he had lost certain evidence.

The trial court concluded, however, that although Landmark's unclean hands would

ordinarily deprive it of any equitable relief, Sakai's retention of the enhanced value of its property was unjust because "the Sakai Family also ha[d] dirty hands." CP at 1290. Specifically, the trial court concluded that "[u]nder the circumstances of this case, the Sakai Family had a duty to speak," and "[b]ecause the family remained silent, their silence under these circumstances is tantamount to deception." CP at 1290. It further ruled that Sakai's "failure to rescind the Owner Applicant [Agreement] is equivalent to a request that Nelson continue to proceed to procure Site Plan Review approval for the Sakai Property." CP at 1290. Accordingly, within the context of the "Volunteer Rule," Nelson was not a volunteer. CP at 1290.

The trial court concluded that Sakai had breached a "duty to speak" because it (1) did not advise Nelson that it had lost confidence in his integrity in March 2000, thereby permitting him to assume that it held a continuing interest in the relationship; (2) outwardly supported Landmark's development proposals, even providing family names to use in naming the streets in it; (3) discussed among the family the "significant leverage" it had because of "non-market considerations" during both the 2001 and 2003-04 negotiations; (4) left the owner applicant agreement in place in October 2003 without communicating its distrust and lack of confidence to Nelson; (5) told Nelson that it would consider his November 2003 comparable sales analysis even though it had already concluded that the price was unfair and had "no intention" of accepting it; (6) purposefully provided very little input or participation in the city approval process; (7) calculated its own fair market price in February 2004 but never communicated it to Nelson or otherwise countered Landmark's \$2.6 million offer; and (8) did not mention its reservations about dealing with Nelson until March 2004. CP at 1278, 1281. The trial court also

noted that Sakai knew that Nelson was pursuing the Phase I development because he believed he would be successful in negotiating a new purchase agreement with it. Based on these facts, the trial court found that Sakai shared "some of the blame for the problematic negotiations." CP at 1287. It concluded that under these circumstances, Sakai should reimburse Landmark for any benefit conferred by the site plan approval.

The trial court awarded Landmark \$125,000 in unjust enrichment damages for the reasonable costs and fees it incurred in procuring Phase II site plan review approval. It also concluded that Landmark had a valid claim based on a sewer lift station it had built. The sewer lift station was on the Phase I property but had enough capacity to serve Phase II as well. The trial court found that it was "likely that the city will require a [future] developer of the Sakai property to hook up to this station." CP at 1286. But it was "not known" whether any buildings on the Sakai properties *could* connect to the station "because of (1) topography, gravity flow and soil considerations; (2) the unknown capacity of the storage tanks in the lift station; (3) the apparent absence of an easement over the [Phase I] Property to the lift station . . . ; and (4) the unknown status of the City's position regarding a hook-up versus other alternatives." CP at 1279. Therefore, the trial court concluded, "[A]n award of damages is only appropriate if and only if the developer of the Sakai property does hook up." CP at 1286. It ruled that "[i]f, in connection with the subsequent development of the Sakai Property, a connection is made to the Sewer Lift Station on the Sakai Village Phase I Property, the Sakai Family (or their then successors-in-interest), should pay the principal sum of \$100,000.00 without interest to Landmark at the time of the connection." CP at 1291.

C. Trespass Claim

On Sakai's trespass counterclaim, the trial court found that the storm tanks placed by Landmark "straddle[d] the property line resulting in a physical invasion of the Sakai Family property." CP at 1287-88. As a result, "a 'no-build zone'" existed on that part of the property. CP at 1288. Nonetheless, the trial court denied Sakai any trespass relief because (1) it had failed to prove actual and substantial damages resulting from the trespass and (2) removal of the tanks was "not required" because "[t]he damages to non-parties and innocent homeowners far outweighs the uncertain benefit of removal to the Sakai Family." CP at 1288. Specifically, removal would be "difficult" because the tanks would have to be replaced or substituted for the current residents of Phase I, at great inconvenience and unknown cost. CP at 1288.

D. Attorney Fees

The 1998 Agreement provides that "[i]f Buyer [or] Seller . . . institutes suit concerning this Agreement . . . the prevailing party is entitled to court costs and a reasonable attorney's fee." CP at 60. After the bench trial, both parties moved for fees under this provision, although Sakai limited its request to fees incurred for defending Landmark's contract claims. The trial court granted Sakai's motion, ruling that Landmark's specific performances and breach of contract claims "'concerned' or arose from the parties' written Agreement" because the Agreement was "central" to those claims. CP at 1289. It denied Landmark's motion for fees because the unjust enrichment claim "did *not* 'concern'" or arise from the expired written Agreement and because that Agreement was not central to that claim. CP at 1289 (emphasis added).

The trial court entered judgment against Sakai for \$74,810.05 after offsetting Sakai's attorney fee award against the unjust enrichment damages.

ANALYSIS

I. SUMMARY JUDGMENT

Landmark argues that the trial court erred in granting summary judgment to Sakai on its claims for breach of contract, equitable estoppel, and breach of the implied covenant of good faith and fair dealing. A trial court properly grants a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We review an order on summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wn.2d at 26.

A. Contract Claim for Specific Performance

Landmark argues that the trial court erred by ruling that contracts with open price terms are unenforceable as a matter of law because “Washington law recognizes agreements with open terms.” Br. of Appellant at 22 (emphasis omitted). The case on which Landmark relies, however, does not support this assertion; the court explicitly stated that the issue of contracts with open terms was not before it. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176 n.9, 94 P.3d 945 (2004). Moreover, we need not consider whether contracts with open terms are enforceable because the agreement here was unenforceable for other reasons.

Landmark argues that a binding contract remained in effect after March 2000 because Sakai was still “willing” to sell the property to Landmark. Br. of Appellant at 7. But a contract requires offer, acceptance, consideration, and, in the case of a contract to purchase real estate, compliance with the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 366, 183 P.3d 334, review denied, 165 Wn.2d 1005 (2008). Specifically, a contract for the conveyance of land must occur

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by a deed complying with RCW 64.04.020. *Berg*, 125 Wn.2d at 551. Here, the parties' 1998 Agreement complied with all of the requirements of a contract, but it expired either on March 11, 2000, or on September 11, 2001.⁵ Thereafter, the parties had at most an agreement to agree in the future on two critical components of the negotiations: the price and the amount of land to be purchased. And "[a]greements to agree" are not enforceable in Washington. *Keystone*, 152 Wn.2d at 176.

Landmark argues that the Agreement remained effective despite its expiration because Sakai "ratified" it at the March 2000 meeting.⁶ Br. of Appellant at 27 (emphasis omitted). This argument fails because the doctrine of ratification applies only to *voidable* contracts, i.e., those that continue to be effective unless one party takes action to avoid them. See *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 793-94, 150 P.3d 1163 (2007); see generally *Stabbert v. Atlas Imperial Diesel Engine Co.*, 39 Wn.2d 789, 792, 238 P.2d 1212 (1951). Contracts that have expired are *void* and therefore incapable of being enforced regardless of the parties' actions. *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993) (citing *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968)). Ratification cannot save an expired contract.

Finally, Landmark argues that the parties had an "agreement to negotiate" that "provides an alternative basis to specifically enforce the purchase and sale transaction." Reply Br. of Appellant at 14-15. But Landmark fails to acknowledge the language that it quotes from

⁵ Because the Agreement expired, we do not consider Landmark's arguments regarding its "time is of the essence" clause.

⁶ A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract's benefits. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 793-94, 150 P.3d 1163 (2007); see generally *Power v. Esarey*, 37 Wn.2d 407, 417, 224 P.2d 323 (1950).

Keystone in its own brief: “Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal. . . . [N]o breach occurs if the parties fail to reach agreement on the substantive deal.” *Keystone*, 152 Wn.2d at 176. Again, an “agreement to agree” is not enforceable. *Keystone*, 152 Wn.2d at 176. The trial court did not err in granting summary judgment on Landmark’s claim for specific performance.

B. Estoppel

Landmark argues that the trial court erred in dismissing its equitable estoppel claim. The record is somewhat confusing as to whether Landmark intended to bring an equitable estoppel or a *promissory* estoppel claim. Because the trial court treated the claim as one for promissory estoppel with the parties’ acquiescence,⁷ we consider only promissory estoppel.

A promissory estoppel claim is based on the existence of a promise and may be used offensively to enforce that promise even if there is no mutual assent or consideration. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 398, 879 P.2d 276 (1994); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980). Here, the evidence shows at most that Sakai promised only to continue negotiating with Landmark; it never promised to sell a set quantity of land at a set price. Landmark argues, however, that the promise to sell at fair market value is enforceable.

But in the absence of evidence that the parties had agreed on a particular appraiser who would set a fair market value according to an objective formula, any promise to sell at “fair

⁷ Both parties discussed the claim as one for promissory estoppel in at least some of their summary judgment briefing. And although Landmark’s complaint pleaded equitable estoppel, it alleged that “Defendants are equitably estopped from refusing to *honor their agreement* to complete the purchase and sale transaction.” CP at 8 (emphasis added). Also, when the trial court ruled on the motions, it framed the estoppel issue as if Landmark was seeking to enforce a promise to sell the land. Sakai did not object.

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market value” is illusory and unenforceable. Moreover, the claimed promises here were oral and therefore subject to the statute of frauds.⁸ See *Greaves*, 124 Wn.2d at 401 (declining to adopt Restatement (Second) of Contracts section 139). Promises to convey real property are not enforceable without a written deed. Landmark’s promissory estoppel claim fails.

C. Implied Covenant of Good Faith and Fair Dealing

Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007) (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). But the duty exists only “in relation to performance of a specific contract term”; there is no “free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.” *Keystone*, 152 Wn.2d at 177 (quoting *Badgett*, 116 Wn.2d at 570).

Landmark’s assertions of bad faith revolve around Sakai’s failure to “disabuse Landmark of the existence of their Agreement” and its attempt to take advantage of Landmark’s expenditures and improvements to obtain a “premium price” instead of a “fair market value.” Br. of Appellant at 36. The conduct did not arise from performing a contract term; indeed, there was no contract in place at the time. The trial court did not err in dismissing this claim.

⁸ There is one narrow circumstance in which promissory estoppel may provide an exception to the statute of frauds, but it does not apply in this case: “A party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped [from] interpos[ing] the statute as a defense to the enforcement of the contract by another who relied on it to his detriment.” *In re Estate of Nelson*, 85 Wn.2d 602, 610-11, 537 P.2d 765 (1975) (citing 1 RESTATEMENT (FIRST) OF CONTRACTS § 178 cmt. f).

II. UNJUST ENRICHMENT

Both parties assign error to the trial court's disposition of Landmark's unjust enrichment claim after trial. Landmark challenges the trial court's contingent imposition of damages for the sewer lift system, arguing that (1) Sakai's current "right" to hook up to the lift station adds real present value to its property and (2) a "wasted" benefit is still a benefit for purposes of unjust enrichment. Br. of Appellant at 48. Sakai argues that the trial court erred in awarding Landmark any unjust enrichment damages at all, particularly because that relief is not available where both parties have unclean hands. The trial court ruled that the legal significance of Landmark's "dirty hands" was overcome by Sakai's "dirty hands." CP at 1290.

We review bench trial decisions in two steps: we first ask whether substantial evidence supports the trial court's challenged findings of fact; we then ask whether those findings of fact support the court's conclusions of law. *See Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. If this standard is satisfied, we will not substitute our judgment for the trial court's. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). We review questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880.

Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where, absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A party seeking an unjust enrichment award must show that (1) the defendant has received a benefit, (2) the benefit was at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain

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the benefit without payment. *Young*, 164 Wn.2d at 484-85. In such situations, a “quasi contract” or “contract implied in law” exists between the parties. *Young*, 164 Wn.2d at 484 (citing *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949)).

Generally, a court applying equitable principles will not “balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly.” *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941); 15 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 44.16, at 239 (1st ed. 2003). Thus, equitable relief is not available where *both* parties have unclean hands. Rather, “[e]quity leaves the parties in *pari delicto* to fight out their own salvation and remedy their own wrongs in the law court.” *J.L. Cooper*, 9 Wn.2d at 72.

Landmark contends, however, that the trial court correctly declined to apply the unclean hands doctrine because its “dirty hands” conduct had no “causal relationship” with “the substance of the equitable claim at issue.” Reply Br. of Appellant at 23. It is true that equity disqualifies a plaintiff with unclean hands only where the inequitable behavior is “in the very transaction concerning which he complains.” *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (quoting *J.L. Cooper & Co.*, 9 Wn.2d at 73) (emphasis omitted).

Here, the underlying transaction was Sakai’s sale of real estate to Landmark, to be developed by Landmark. The sale was contingent on city approval of the proposed development, and Sakai granted Nelson authority to pursue that approval. Thus, the sale and the development project were intimately connected. And much of Nelson’s misconduct centered on the approval procedure, which was in turn connected with Landmark’s development of its adjoining property. The trial court found in unchallenged findings that (1) Nelson refused to work with the adjoining

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developer for shared access routes with the Sakai property as the city requested and did not advise Sakai of the request, (2) after filing the new Sakai plan on June 28, 2000, Nelson made no effort to move the application along, (3) Nelson moved the "phase line" of his northern parcel well south into the Sakai property, showing some of the northern property units on Sakai property, (4) Nelson falsely claimed that the northern property storm water facilities, built partly on Sakai property, were designed and built to serve the Sakai property also, (5) when seeking Sakai's permission to put part of the northern property's storm water system on Sakai property, Nelson "whited out" the altered phase line showing northern property units on Sakai property, (6) Nelson falsely represented to Sakai that he had already obtained easements from the other owners along the proposed sewer line, while seeking sewer line easements from Sakai, (7) Nelson concealed the altered phase line from Sakai, (8) Nelson falsely represented a number of his development costs during negotiations with Sakai, (9) Nelson falsely represented in part his need to obtain easements from Sakai to sell his northern property units, and (10) on December 7, 2001, Nelson asked the city to put his Sakai site plan application on hold without telling Sakai. CP at 1275.

Nelson's misconduct delayed Sakai's property sale and reduced its value by some amount by encumbering it with part of the storm water drain system. Nelson may also have caused Sakai to lose the benefit of developing joint access with the previous northern property owner. Moreover, he attempted to encumber the Sakai property with easements to benefit his northern property. We conclude that the trial court erred in granting Landmark unjust enrichment damages.

III. TRESPASS

Sakai claimed that storm water tanks on its land constituted a "continuing trespass," or "an unprivileged remaining on land in another's possession." See *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (quoting RESTATEMENT (SECOND) OF TORTS § 158 cmt. m, at 280 (1965)). Sakai sought an order requiring Landmark to remove the tanks, which is generally the proper remedy to compel the removal of an encroaching structure. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800, 450 P.2d 815 (1968). But although the trial court concluded that the storm tanks resulted in a "physical invasion of the Sakai Family property," it declined to either order an injunction or award damages. CP at 1288-89.

The trial court's decision not to grant an injunction may fall within Washington's recognized exception under *Arnold*, 75 Wn.2d at 152. This exception applies where a mandatory injunction would be "oppressive," and is triggered where the encroacher establishes that (1) he did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently locate the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal equally small; (3) there is ample remaining room for suitable structures and no real limitation on the property's future use; (4) it is impractical to move the encroaching structure; and (5) there is an enormous disparity in the resulting hardships. *Arnold*, 75 Wn.2d at 152.

The trial court's findings of fact support most of these elements. The trial court found that Sakai had not shown "actual and substantial damages," which supports the conclusion that the damage to it was "slight and the benefit of removal equally small." CP at 1292; *Arnold*, 75 Wn.2d at 152. Indeed, the storm tanks merely "straddle the property line," which suggests that they did not encroach more than a few feet. CP at 1287; compare *Arnold*, 75 Wn.2d at 145

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(eight foot encroachment). Considering that the parcel at issue was 10 acres, this finding supports the conclusion that “there [is] ample remaining room” for future structures to be built and is “no real limitation” on the property’s future use. *Arnold*, 75 Wn.2d at 152. The trial court also gave several reasons why removing the tanks would be “difficult” and concluded that “[t]he damages to non-parties and innocent homeowners far outweigh[ed] the uncertain benefit of removal to the Sakai Family.” CP at 1288. The only *Arnold* element potentially not satisfied is the first: whether Landmark took a calculated risk or acted negligently in placing the tanks on Sakai’s land when it did not own it. *Arnold*, 75 Wn.2d at 152. The trial court made no findings on this issue, but John testified that he explicitly told Nelson when he installed the tanks that he would have to remove them if the sale did not go through. Nelson’s decision to go forward despite this warning could be considered taking a calculated risk.

But regardless of whether the *Arnold* exception applies, the trial court was not free to decline *all* relief to Sakai. Sakai is correct that “the law simply cannot allow someone to place improvements on, or appropriate another’s land, with impunity.” Br. of Resp’t at 47-48. In *Arnold*, the court awarded the plaintiff damages equaling the value of the area covered by the encroachments after granting the defendant an easement for that area. *Arnold*, 75 Wn.2d at 153; *see also Proctor v. Huntington*, 146 Wn. App. 836, 851, 192 P.3d 958 (2008) (forced sale of encroached land an acceptable remedy in lieu of injunction), *review granted*, 205 P.3d 132 (2009). On remand, the trial court must either award Sakai damages for the continuing trespass or order Landmark to remove the encroaching structures.

IV. ATTORNEY FEES

Landmark argues that the trial court erred in awarding Sakai, rather than Landmark,

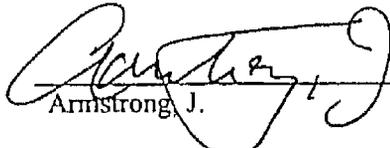
attorney fees. Both parties moved for fees under the Agreement, which provided that “[i]f Buyer [or] Seller . . . institutes suit *concerning this Agreement* . . . the prevailing party is entitled to court costs and a reasonable attorney’s fee.” CP at 60 (emphasis added). The trial court ruled that only Landmark’s breach of contract and specific performance claims “concerned” the Agreement, and because Sakai prevailed on those claims, Sakai was entitled to the fees it expended on them. CP at 1289. We review de novo a trial court’s decision awarding attorney fees under RCW 4.84.330. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009); *Quality Food Ctrs. v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

Landmark argues that it is the “prevailing party” in this case under RCW 4.84.330 because it prevailed on its unjust enrichment claim. It reasons that a “prevailing party” must be one who “obtain[s] relief” such as damages, i.e., only a plaintiff or the person who has judgment rendered in his favor “at the conclusion of the entire case.” Br. of Appellant at 39 (quoting *Stott v. Cervantes*, 23 Wn. App. 346, 348, 595 P.2d 563 (1979) (quoting *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885 (1959))). But we have reversed Landmark’s unjust enrichment award, holding as a matter of law that Landmark is not entitled to such relief. And a party who successfully *defends* against a claim can be the prevailing party. *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984). Sakai successfully defended against all of Landmark’s claims. As the ultimate prevailing party, Sakai is entitled to attorney fees incurred during trial. It is also entitled to fees on appeal in an amount to be set by a commissioner of this court upon compliance with RAP 18.1.

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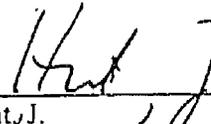
We affirm the trial court's summary judgment decision on the contract claims and its decision to award attorney fees to Sakai; we reverse the trial court's award for unjust enrichment and for contingent future damages, and remand for the trial court to grant Sakai relief on the trespass claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

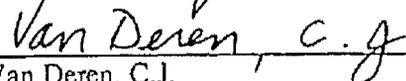


Armstrong, J.

We concur:



Hunt, J.



Van Deren, C.J.

Tab 5

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

DOUGLAS C. NELSON and KARINA
NELSON, husband and wife;
LANDMARK, LLC, a Washington limited
liability company,

Plaintiffs,

vs.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Defendants.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Third-Party Plaintiffs,

vs.

GREEN ROCK HOLDINGS, LLC, a
Washington limited liability company; and
SPORTSMAN PARK, LLC, a Washington
limited liability company,

Third-Party Defendants.

NO. 14-2-00059-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-1

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

92

1 This matter came before the Court for a bench trial on the claims of plaintiffs
 2 Douglas C. Nelson, Karina Nelson, and Landmark, LLC, against defendants Antone Pryor
 3 and Kim Young Oak Pryor, and on the counterclaims and cross claims of defendants and
 4 third-party plaintiffs Antone Pryor and Kim Young Oak Pryor against Douglas C. Nelson,
 5 Karina Nelson, Landmark, LLC, Green Rock Holdings, LLC, and Sportsman Park, LLC.
 6 Testimony was heard on March 15, 16, 17, 21, 22, 23, 24, 28 and 29, with a recess until and
 7 concluding on April 14, 2016.¹ During trial, the Court heard testimony from Douglas
 8 Nelson, Karina Nelson, William Broughton, Esq., Kenner French, Blaine A. Scott, Helen
 9 Stevenson, CPA, James Davidson, CPA, Brian Danzig, Esq., Dr. Antone Pryor, Ph.D., Kim
 10 Young Oak Pryor, Frank Miller, CPA, and Jason Newman, CPA.² In addition, the Court
 11 admitted and considered in excess of 200 exhibits.³

12 The Court makes the following findings of fact and conclusions of law regarding the
 13 testimony heard and evidence taken at trial. To the extent that any finding of fact might be
 14 or may contain a conclusion of law, or vice versa, the Court adopts the same as such.

15 I. FINDINGS OF FACT

16 FINDING OF FACT NO. 1

17 Dr. Antone Pryor ("Pryor") and his spouse, Kim Young Oak, met Douglas C. Nelson
 18 ("Nelson") in the late 1990's when the Pryors were looking to purchase a home on Bainbridge
 19 Island, Washington. Nelson was a realtor at the time and assisted the Pryors in their search.
 20 Shortly thereafter, Pryor and Nelson formed a joint venture and developed Woodland Village, a
 21 housing development on Bainbridge Island, Washington.

22 FINDING OF FACT NO. 2

23 In 1999, Nelson formed a real estate development company called Retirement Ventures,
 24 LLC, which later became known as Landmark, LLC ("Landmark"). In the following years,
 Landmark became a builder of "spec homes," primarily on Bainbridge Island, Washington.

¹ To accommodate an unanticipated health emergency and surgery experienced by Dr. Antone Pryor.

² *Statement regarding credibility of witnesses.* Credibility is the quality of being trusted and believed in. The Court declines to make any blanket statements about the credibility of any particular witness. If contained in the findings of fact, one can presume the Court found the testimony credible as to that noted fact unless specifically stated otherwise.

³ At the request of the Court, counsel provided proposed Findings of Fact and Conclusions of Law. The submissions are both excellent. This document consists of a combination of those documents (with

1 **FINDING OF FACT NO. 3**

2 In 2000, Pryor entered into a purchase and sale agreement for the purchase of a 50%
3 interest in Landmark. The purchase price for Pryor's interest in Landmark was \$60,000, which
4 Pryor agreed to pay in accordance with the terms of a promissory note (the "Note") he made in
5 favor of Landmark in the same amount. [Ex. 1]⁴ The Note has specifically agreed upon terms
6 with regards to demand for payment. [Id.]

6 **FINDING OF FACT NO. 4**

7 Nelson's testimony indicated that those demand procedures were never followed.
8 Nelson testified that he made a verbal demand on Pryor in May 2008 at a meeting at his
9 ReMax office. Nelson's testimony is that Pryor loudly refused to pay and left the office in
10 an agitated manner. Karina Nelson also testified to having been present at this meeting
11 and generally described it in the same manner as Nelson. Pryor testified that this meeting
12 never happened. In addition, Blaine Scott, the manager of the ReMax office, testified that
13 he was routinely present in the office at that time and would have likely observed or heard
14 about such a meeting. He testified, however, that he did not observe or hear about any such
15 meeting.

14 **FINDING OF FACT NO. 5**

15 Given the heated nature of the meeting as described by Mr. and Ms. Nelson, the Court
16 would have expected to have seen some discussion of the Note in email traffic exchanged by
17 Nelson and Pryor contemporaneous with the alleged meeting. Exhibit 161, an 8-page email
18 exchanged between Nelson and Pryor from June 17 to July 10, 2008, is an example of such an
19 exchange, and those communications touch on numerous financial issues relevant to this
20 lawsuit, but nowhere does either Nelson or Pryor make any reference to the alleged May
21 2008 meeting where Mr. and Mrs. Nelson claim to have demanded payment from Pryor.

20 **FINDING OF FACT NO. 6**

21 On May 10, 2013, at Exhibit 389, Nelson sent an email to Pryor in which he
22 mentions the July 2000 promissory note for \$60,000. He does so in the context of the
23 Sakai II litigation. Pryor testified that he viewed that email as a veiled threat that if he did

24 omissions) along with additional information. Some information is duplicated for clarity. The Court
appreciates the quality work product submitted by counsel.

⁴ Citations to specific exhibit numbers are to the exhibits admitted at trial.

1 not comply with Nelson's demands as they related to that Sakai litigation, that Nelson
2 would somehow use the Note against him. The email does not reference any prior
3 confrontation about the Note (as one might expect). Pryor did not respond to this email.

4 **FINDING OF FACT NO. 7**

5 The Note is not specifically referenced in any of the subsequent agreements at issue in
6 this case and signed by the parties. The Note is not a claim or a lien. Nelson is still in
7 possession of the original Note.

8 **FINDING OF FACT NO. 8**

9 In totality, there is insufficient evidence that the Note has been paid. But the parties
10 agreed to specific terms as to how demand on the Note would be made. It is clear (whether a
11 meeting took place or not) that Nelson failed to tender the Note properly in accordance with the
12 agreed upon terms.

13 **FINDING OF FACT NO. 9**

14 In addition to their respective interests in Landmark, Nelson and Pryor invested in and
15 formed numerous other entities together. One such entity was Sportsman Park, LLC
16 ("Sportsman Park"). Nelson and Pryor each owned a 50% interest in Sportsman Park, which
17 was formed for the purposes of developing a commercial condominium complex on Bainbridge
18 Island, Washington, known as Sportsman Park. Nelson and Pryor agreed that Landmark would
19 be the contractor for the Sportsman Park development.

20 **FINDING OF FACT NO. 10**

21 Pryor and his spouse were authorized signors on Sportsman Park's bank account at
22 Kitsap Credit Union. [Ex. 431] Pryor was an authorized signor on Landmark's bank account
23 at Kitsap Bank. [Ex. 432]

24 **FINDING OF FACT NO. 11**

Prior to June 6, 2012, Nelson was a 50% owner of Sportsman Park, LLC, with Pryor
owning the other 50%. At all materials times, however, Nelson was the managing member
of Landmark, Sportsman Park, and Green Rock Holdings. As such, Nelson had the
authority to cause, and did cause, those entities to engage conduct relevant to the issues in
this case.

1 **FINDING OF FACT NO. 12**

2 In April 2004, Landmark sued The Sakai QTip Trust, et al (collectively "Sakai") under
3 Kitsap County Superior Court cause number 04-2-00950-4 (the "First Lawsuit"). The First
4 Lawsuit involved a lengthy bench trial in July 2007. At trial, Landmark was awarded judgment
5 against Sakai.

5 **FINDING OF FACT NO. 13**

6 Sakai and Landmark both appealed the trial court's decision. In an opinion dated July 7,
7 2009, the Court of Appeals reversed the trial court in part and remanded in part. Landmark filed
8 a petition for review to the Washington Supreme Court. On March 3, 2010, the Washington
9 Supreme Court denied Landmark's petition for review and the Court of Appeals filed its mandate
10 with the trial court on March 17, 2010.

10 **FINDING OF FACT NO. 14**

11 As a result of the proceedings on remand, pursuant to the Court of Appeals' mandate, the
12 Kitsap County Superior Court entered two judgments in favor of Sakai and against Landmark in
13 the principal amounts of \$50,189.95 and \$77,702.70, respectively.

13 **FINDING OF FACT NO. 15**

14 Karina Nelson is married to Doug Nelson. She testified regarding financial records
15 and the numerous transactions of Landmark, LLC, Sportsman Park, LLC, Green Rock
16 Holdings, LLC, and a fourth company called Apex Construction, LLC, of which Ms. Nelson
17 was the majority owner. Doug and Karina Nelson created Apex Construction, LLC, in 2009,
18 at least in part, as a reaction to the entry on appeal of the judgment against Landmark and in
19 favor of the Sakai Family Trust (generally known as the "Sakai I" litigation). The Nelsons
20 caused Landmark, LLC, to transfer its remaining assets to Apex Construction, LLC. As a
21 result, Landmark became insolvent. These assets totaled \$124,131.87 as of September 2009.
22 It is likely this scheme was designed so that Landmark would not have the assets to pay the
23 Sakai I judgment.

22 **FINDING OF FACT NO. 16**

23 Prior to the mediation between the Sakais, Nelson and Pryor (to be addressed further in
24 this decision), neither Nelson nor Pryor had any intent on satisfying the Sakai judgment(s).
This point can best be summarized by an email Pryor sent to Nelson dated May 9, 2012, "We

1 may be arguing over nothing here as neither of us has any intention of paying the Sakai's
2 anything." [Ex. 346]

3 **FINDING OF FACT NO. 17**

4 In 2006, Pryor and Nelson began discussions regarding a buyout of Pryor's interest. At
5 Nelson and Pryor's request Landmark's accountant, James Davidson ("Davidson"), a CPA,
6 prepared a valuation of Pryor's interest in Landmark dated September 12, 2006. [Ex. 57] Pryor
7 received a copy of Davidson's valuation.

8 **FINDING OF FACT NO. 18**

9 Nelson and Pryor subsequently agreed on a purchase price for Pryor's interest in
10 Landmark, which was based largely on the valuation prepared by Davidson. Once Nelson and
11 Pryor agreed upon the purchase price and other terms, Landmark hired attorney Pamela
12 Grinter to draft the transaction documents – which are collectively referred to as the 2006
13 Redemption Agreement. [Ex. 2] Ms. Grinter's recommendations are detailed, in part, in an
14 email. [Ex. 94]

15 **FINDING OF FACT NO. 20**

16 On or about October 19, 2006, months before trial in the First Lawsuit, the 2006
17 Redemption Agreement was signed and dated by the parties. Pryor does not contend that he
18 was fraudulently induced to enter into the 2006 Redemption Agreement.

19 **FINDING OF FACT NO. 21**

20 Under the 2006 Redemption Agreement, Pryor and Nelson contributed their interests
21 in Landmark to a holding company called Green Rock Holdings, LLC ("Green Rock"). [Ex.
22 2] Green Rock then redeemed Pryor's 50% interest in Green Rock for \$480,000, which was
23 reflected in a promissory note in favor of Pryor from Green Rock in the same amount (the
24 "Green Rock Note"). [Ex. 2, ex. A]. Green Rock became the sole owner and member of
Landmark and Nelson became the sole owner and member of Green Rock.

FINDING OF FACT NO. 22

Under the 2006 Redemption Agreement, the parties acknowledged that Landmark
would continue building the Sportsman Park development at cost plus 6% overhead. [Ex. 2]

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1 **FINDING OF FACT NO. 23**

2 Paragraph 5 of the 2006 Redemption Agreement contains several "Post Closing
3 Covenants." [Ex. 2] The post closing covenants contained at paragraph 5(c) and 5(c)(i), state, in
4 relevant part, the following:

5 5. Post Closing Covenants. The parties agree as follows with
6 respect to the period following closing:

7 (c) Landmark is currently engaged in three relevant litigation
8 matters: ... Landmark, LLC v. The Sakai QTIP Trust, Kitsap County
9 Cause No. 04-2-00950-4; and ... (collectively, the "Lawsuits"). With
10 regard to the Lawsuits, the parties agree as follows:

11 (i) Pryor agrees to reimburse Landmark for one half
12 of all costs and expenses, including, without limitation, attorneys fees and
13 costs, damages, judgments and amounts paid in settlement, incurred by
14 Landmark or an affiliate in prosecution or defense of the Lawsuits, within
15 ten (10) days of receipt of any invoice.

16 **FINDING OF FACT NO. 24**

17 At the time the 2006 Redemption Agreement was entered into, Pryor owned real
18 property in Poulsbo known as the "Pinnacle Property."

19 **FINDING OF FACT NO. 25**

20 Under paragraph 5(f) of the 2006 Redemption Agreement, Pryor agreed to pay
21 Western Devco, LLC one half of any profit realized on a sale of the Pinnacle Property. [Ex.
22 2]. Western Devco agreed to reimburse Pryor for half of all costs and expenses associated
23 with the ownership of the Pinnacle Property until it was sold. [Id.]

24 **FINDING OF FACT NO. 26**

Under paragraph 6 of the 2006 Redemption Agreement, Pryor granted Western
Devco a right of first refusal to purchase the Pinnacle Property. The right of first refusal was
recorded with the Kitsap County Auditor.

FINDING OF FACT NO. 27

Western Devco is currently an inactive Washington limited liability company.

FINDING OF FACT NO.

Beginning in 2006, Landmark, acting as the general contractor for the Sportsman Park
development, began accruing expenses on behalf of Sportsman Park. By the end of 2007,
Sportsman Park owed Landmark approximately \$746,330.66.

1 **FINDING OF FACT NO. 28**

2 By the end of 2007, Green Rock remained indebted to Pryor on the Green Rock Note in
3 the approximate amount of \$412,000. On January 5, 2008, the parties agreed to restructure
4 certain debts via a transaction that came to be commonly known as the "Debt Swap".

4 **FINDING OF FACT NO. 29**

5 In the Debt Swap, Sportsman Park, which was owned equally between Pryor and
6 Nelson, owed Landmark (which, following the 2006 Redemption Agreement was owned by
7 Green Rock), \$746,330.66. Sportsman Park was not financially able to pay Landmark.
8 Because of existing encumbrances against Sportsman Park's assets, Sportsman Park was not
9 able to borrow the money to pay Landmark. Similarly, Pryor testified he did not have
10 \$373,000 (one half of \$746,000) to contribute to Sportsman to pay Landmark. Nelson
11 likewise testified that he did not have the funds.

11 **FINDING OF FACT NO. 30**

12 As a result, Pryor agreed to forgive the balance due him on the Green Rock Note
13 (\$412,000), and Landmark, which was owned by Green Rock, which was owned by Nelson,
14 agreed to forgive the balance it was owed by Sportsman Park (\$746,000). This agreement was
15 documented in a "Consent of All Members of Sportsman Park, LLC", dated January 5, 2008,
16 which was signed by both Nelson and Pryor. [Ex. 44, 45].

15 **FINDING OF FACT NO. 31**

16 Exhibit 44 is an odd document. It appears to be a hastily produced writing created by
17 Nelson. The dates are obviously inaccurate and the format is unique relative to all of the
18 other documents presented at trial. The wording of the document is not ambiguous.
19 Furthermore, Pryor acknowledges he signed it.

19 **FINDING OF FACT NO. 32**

20 Erroneous dates exist on some of the documents [Ex. 416 for example]. This creates
21 confusion and ambiguity as to when they may have been signed. This is troublesome.
22 However, Pryor acknowledges signing the documents and, unfortunately, all too frequently
23 without reading them.

23 **FINDING OF FACT NO. 33**

24 Pryor contends Nelson misrepresented material facts regarding the Debt Swap to
induce him to enter into it. Pryor asserts that Nelson falsely represented that he was going to

1 put \$373,165.22 of his own money (a cash infusion from another entity called "Seattle
2 Holdings") as a matching contribution to the contribution the Pryors were making as part of
3 the Debt Swap. Kim Young Oak also testified that Nelson said he was going to borrow
4 money from Seattle Holdings to satisfy this contribution. The record is void of any
5 documentation with regards to this assertion. This is not to say that promise was not made,
6 but there is insufficient corroboration or documentation to prove it.

6 **FINDING OF FACT NO. 34**

7 On November 26, 2013, in the Second Lawsuit, Pryor submitted a declaration in
8 support of his motion to amend his answer and to add cross claims against Nelson. [Ex. 436].
9 In his declaration, Pryor testified as follows:

9 "In 2008 or 2009, Nelson approached me and advised me that Sportsman
10 Park had become indebted to Landmark for over \$700,000 and that we
11 each needed to come up with \$350,000 so the Sportsman Park could pay
12 its outstanding debt to Landmark. Nelson then suggested that if I would
13 forgive the debt owed me by Green Rock, he would arrange for the
14 payment of the entire debt by Sportsman Park to Landmark."

13 [Ex. 436]

13 **FINDING OF FACT NO. 35**

14 In the fall of 2007, prior to entering into the Debt Swap, Helen Stevenson
15 ("Stevenson"), Landmark's longtime bookkeeper, had begun analyzing the nature and amount
16 of debt Sportsman Park owed to Landmark. The amount debt owed to Landmark changed
17 often.

17 **FINDING OF FACT NO. 36**

18 Stevenson testified at trial. She graduated with a degree in accounting, passed the
19 Washington CPA exam in 1981, and was the former Vice President of Accounting
20 Operations for Bank of America. She also had experience bookkeeping for other construction
21 contractors. In 1999/2000, Stevenson began working as Landmark's bookkeeper as an
22 independent contractor. Stevenson worked approximately 20 hours a week. Over the years,
23 Stevenson began doing the bookkeeping for various other entities associated with Nelson and
24 Pryor, including Sportsman Park and Central Plaza, LLC.

24 **FINDING OF FACT NO. 37**

Stevenson kept Pryor informed of the nature and amount of the debt Sportsman Park
owed to Landmark. [Ex. 126, Ex. 136, Ex. 145] Stevenson testified that if Pryor or his wife

1 had questions about any of the companies' financials, she would always do her best to
 2 promptly answer. She never ignored any of Pryor's questions or requests for information.
 3 This is evidenced by a slew of emails back and forth between Stevenson and Pryor.
 4 Stevenson also testified that Nelson never prohibited her from speaking with Pryor about the
 5 companies' financials or from sharing information from him. Stevenson is not alleged to be
 6 complicit in any questionable transactions and she would not have participated in any
 transactions that she felt were fraudulent, inaccurate or misleading.

7 **FINDING OF FACT NO. 38**

8 Stevenson recalled a lengthy meeting with Pryor and Kim Young Oak in the fall of
 9 2007. At the meeting, Stevenson explained her analysis of Sportsman Park's indebtedness to
 10 Landmark and answered their questions about the same. [Ex. 1+2] Nelson was not present at
 the meeting.

11 **FINDING OF FACT NO. 39**

12 As to any meeting(s) with Stevenson, Pryor testified as follows:

13 Q. And it's your testimony also that ... you and your wife never followed up
 with a meeting with Ms. Stevenson to ask her these types of questions?
 (173)

14 A. Well, we set up meetings. We never felt like they were really — they were
 15 pressing to us. We thought that we were being treated fairly, and so we had
 questions. But if I look at my due diligence, there wasn't any because for
 16 years I just let things be as they were until late 2011 and — (173)

17 **FINDING OF FACT NO. 40**

18 Pryor testified that Nelson kept him regularly informed what was happening with the
 19 various business entities they shared an interest in. Pryor testified that if Nelson were unable
 to answer a question, Nelson would refer him to Stevenson. Pryor also testified that Nelson
 had offered Pryor the opportunity to audit and review all the books.

20 **FINDING OF FACT NO. 41**

21 Stevenson never ignored any of Pryor's requests for information. Pryor testified he
 22 had the opportunity at any time to ask Stevenson questions about any of the company's
 23 financials and that Nelson never prohibited him from contacting Stevenson. Pryor had access
 24 to the Rent Manager software. Stevenson offered to meet with Pryor to teach him how to use
 it, but he never met with her.

1 **FINDING OF FACT NO. 42**

2 There were no barriers prohibiting Pryor from reviewing company records and
3 asking questions about the same. In an April 2, 2012 email to Nelson, Pryor wrote the
4 following:

5 "My not being more involved with the company is indeed my fault and I
6 blame myself for not learning more."

7 [Ex. 337]

8 **FINDING OF FACT NO. 43**

9 Similarly, as previously indicated, Pryor testified that he did not read the majority of
10 the documents before he signed his name. While this is not fatal to his claims as a matter of
11 law, it is troubling. The accountings are complicated and somewhat confusing. But the
12 agreements and business minutes presented by Nelson to Pryor for signature are not. (With
13 the exception of erroneous dates, indicative of perhaps the haste in which they were produced
14 and signed.) The wording of the minutes and agreements is clear and unambiguous as to the
15 expectations and duties of both Pryor and Nelson.

16 **FINDING OF FACT NO. 44**

17 Frank Miller, a certified public accountant and certified fraud examiner, was retained
18 by Pryor as an expert witness in this case. Miller had originally been retained by Sakai as its
19 expert witness in the Second Lawsuit. As Sakai's expert in the Second Lawsuit, Miller
20 concluded that the Debt Swap was beneficial to Pryor. In this case, Miller testified that the
21 Debt Swap was troubling because it was not recorded in accordance with certain federal tax
22 rules or with generally accepted accounting principles. Miller further testified that
23 Landmark's write off of bad debt was improper because Landmark had not made an effort to
24 collect it and Landmark should have allowed the receivable to sit on its books until such time
Sportsman Park could pay it.

FINDING OF FACT NO. 45

Miller testified that as a result of the Debt Swap, Pryor should have recognized
\$373,000 of income on his 2008 individual tax return. Miller testified that Pryor never
recognized the \$373,000 of additional income in his 2008 tax return or in his tax returns in
subsequent years.

1 **FINDING OF FACT NO. 46**

2 It is understood why Miller would be very helpful to the Sakais. His testimony
3 explains how the Debt Swap and the coinciding actions of Nelson and Pryor could be viewed
4 as an attempt to shield assets from the Sakais.

4 **FINDING OF FACT NO. 47**

5 Miller did not speak with Pryor or any witnesses prior to trial. Miller testified that
6 the legal standard for fraud he used in his analysis of the Debt Swap was a "preponderance of
7 the evidence." This is incorrect. The legal standard for proving fraud is "clear, cogent and
8 convincing" (a substantially higher burden of proof).

8 **FINDING OF FACT NO. 48**

9 In January 2010, Nelson and Pryor hired attorney Brian Danzig to review the
10 existing corporate minutes of Landmark, Sportsman Park, Central Plaza, and the other
11 entities in which Nelson and Pryor shared an interest in, and to put them in proper format.
12 [Ex. 743]

12 **FINDING OF FACT NO. 49**

13 Danzig is currently employed as a Director of Corporate Counsel for Starbucks. Prior
14 to Starbucks, Danzig worked at several large regional law firms in Seattle and has significant
15 business law experience.

15 **FINDING OF FACT NO. 50**

16 Danzig reviewed the existing corporate minutes of the various entities and other
17 collateral materials. He then incorporated the events described in the original minutes into a
18 more formal format, consistent with regular business practices. Danzig testified that the
19 events described in the original company minutes remained substantially the same as the
20 events described in the minutes he drafted.

20 **FINDING OF FACT NO. 51**

21 Danzig was not present when the minutes were signed by Nelson and Pryor. Danzig
22 instructed Nelson to date the minutes the day they were actually signed by him and Pryor.
23 This did not happen. However, Danzig testified there would be no advantage gained by
24 Nelson over Pryor if the minutes had been dated to reflect the day of the actual meeting as
opposed to the day they were signed.

1 **FINDING OF FACT NO. 52**

2 Danzig also stated that backdating a document to memorialize a prior act or event is a
3 legitimate business practice and that Nelson never asked him to create a corporate minute or
4 other document relating to an act or event that was not reflected by a contemporaneous
5 writing. Danzig clearly adheres to professional ethics and the rules of conduct. He would not
6 have participated in any exercise that would have even remotely infringed upon these duties.

6 **FINDING OF FACT NO. 53**

7 Pryor acknowledges receiving and signing the documents prepared by Danzig. He
8 testified he did so in haste and without reading them.

8 **FINDING OF FACT NO. 54**

9 Following the Debt Swap, the remaining balance owed Pryor on the Green Rock Note
10 was approximately \$39,000 (\$412,000 - \$373,000 = \$39,000). Pryor contends that he never
11 agreed to forgive the balance that was owed to him on the Green Rock Note. This is in
12 dispute. There is contradictory evidence with regards to this.

12 **FINDING OF FACT NO. 55**

13 For example, in a June 21, 2008, email to Nelson, Pryor wrote the following regarding
14 the remaining balance on the Green Rock Note:

15 "A final thought here ... you have noted that you have charged no
16 interest on the leasing commissions and, in the spirit of fairness, it seems
17 to me if we offset the 27,000 (which was to earn interest also) against the
18 leasing commissions which might have charged interest but didn't then
19 we will both have acted in a quid pro quo manner." "That would seem, to
20 me, to be a very fair arrangement."

21 [Ex. 161]

19 **FINDING OF FACT NO. 56**

20 Similarly, at some point during the first six months of 2008, Pryor, Nelson, and the
21 other parties to the 2006 Redemption Agreement, executed a written "Modification to
22 Agreements." [Ex. 417]. Paragraph 3 of the Modification to Agreements, states the
23 following:

24 "The \$480,000 Promissory Note of even date with the Redemption
25 Agreement has been satisfied and paid in full. The Security Agreement to
26 the Promissory Note signed by the parties of even date with the
27 Redemption Agreement is hereby null and void."

See also Ex. 43, and Ex. 44, discussed above.

1 **FINDING OF FACT NO. 57**

2 In an email exchange between Nelson and Pryor on July 16, 2010, Pryor wrote the
3 following to Nelson:

4 "Please explain to me what "money shuffling" we are talking about here
5 ... what have we done that needs explaining."

6 [Ex. 441]

7 Nelson responded to Pryor as follows:

8 "Are you kidding me? You can't say you don't know. What did we hire
9 Brian Danzig to do? He was to make our minutes bulletproof. Shuffling?
10 We moved money from company to company that we owned rather than
11 from company to us to company. You were well aware of this. All of
12 those actions needed to be memorialized by our old corporate minutes to
13 justify. We both paid Brian individually to complete this work."

14 [Id.]

15 Pryor responded to Nelson as follows:

16 "I did realize we moved money from company to company as you
17 described but nothing was illegal in doing so ... at least as far as I
18 know... and yes we did hire Brian to memorialize these transactions. All
19 of those transactions were prior to my departure from Landmark and we
20 owned all of the Companies ... was that illegal? What were we doing
21 wrong? If we did things that were illegal then I guess I need to
22 understand that and exactly what they were doing."

23 [Id.]

24 **FINDING OF FACT NO. 58**

In 2011, Sakai began making efforts to collect their judgments against Landmark. In early 2011, Sakai obtained a court order for supplemental proceedings directed to Pryor.

FINDING OF FACT NO. 59

Following the Court's February 4, 2011 order, Pryor asked Nelson and Stevenson for copies of certain financial documents relating to Landmark.

FINDING OF FACT NO. 60

On or about March 4, 2011, Pryor was deposed by Sakai's attorney, Ron Templeton. At his deposition, Pryor was represented by attorney William Broughton ("Mr. Broughton"). Pryor was asked about the Debt Swap, but had difficulty recalling facts relating to it.

1 **FINDING OF FACT NO. 61**

2 In the months following Sakai's deposition of Pryor, Sportsman Park was facing
3 significant tenant improvement costs that required an infusion of capital from Pryor and Nelson.

4 **FINDING OF FACT NO. 62**

5 In late June 2011, Bank of America, a large commercial tenant of Central Plaza, LLC, an
6 entity owned equally by Nelson and Pryor, began discussions with Nelson to terminate its lease.
7 A couple of weeks later, Sportsman Park was notified that EADS, a long-term commercial
8 tenant at Sportsman Park, would be terminating its lease.

9 **FINDING OF FACT NO. 63**

10 On or about August 19, 2011, Nelson sent Pryor an email informing that Sportsman
11 Park could potentially have significant tenant improvement costs ahead of it. [Ex. 697].
12 Nelson's email concluded with the following:

13 "I know this sounds like a lot, but given the GIANT project value and value
14 of these leases I don't see how it can be avoided. Give me your thoughts.
15 Also, you can use any four letter words in your reply."

16 **FINDING OF FACT NO. 64**

17 On August 23, 2011, Pryor responded to Nelson's email and wrote:

18 "I feel like a guy who committed to a pot in poker and knows he has a
19 poor hand and will probably end up walking away from the whole thing
20 but has committed to the pot."

21 [Ex. 697]

22 **FINDING OF FACT NO. 65**

23 In the same email, Pryor also wrote the following:

24 "I will pass this on to Kenner for his advice and review as he will
probably make a less emotional decision but if the brewery people are a
go and need the café ... well I suspect we will have to do it?"

[Ex. 697].

FINDING OF FACT NO. 66

Kenner French ("French") is a financial advisor and owner of Vast Solutions, Inc. Vast Solutions is a tenant at the Sportsman Park complex. French and Nelson have been long time friends. Nelson introduced Pryor to French in 2005. Pryor became a client of French. On August 23, 2011, upon learning French would be advising Pryor about Pryor's interests in Sportsman Park, Nelson wrote the following in an email to Pryor:

1 "Regarding Kenner ... I caution you in sharing too much with Kenner. I
 2 like Kenner and think he is a smart guy however you should also know that
 3 there is a risk in speaking with a tenant about the situation with others.
 4 Negotiating his current lease was no walk in the park and we don't want
 5 that used against us later. Kenner is good about not sharing personal
 6 information with others ... that's a plus about Kenner. For me though it's a
 7 bit weird having a friend know so much about us."

8 [Ex. 697]

9 **FINDING OF FACT NO. 67**

10 In early September 2011, Sportsman Park had received a notice of default via certified
 11 mail from Kitsap Credit Union, a secured lender at Sportsman Park. [Ex. 235] Kitsap Credit
 12 Union was preparing to foreclose on its deed of trust encumbering a building at the Sportsman
 13 Park complex. The default and pressure from Kitsap Credit Union continued through the middle
 14 of 2012.

15 **FINDING OF FACT NO. 68**

16 On September 20, 2011, Nelson sent Pryor and French another email regarding
 17 upcoming tenant improvement costs at Sportsman Park:

18 "To fund the improvements and refinance the building we need to infuse a
 19 little more than \$200K."

20 [Ex. 696]

21 For Sportsman Park to meet its need for capital, Nelson suggested that the capital
 22 accounts be evened out, and then Nelson and Pryor would make equal contributions going
 23 forward. [Id.]

24 **FINDING OF FACT NO. 69**

On September 28, 2011, Nelson informed Pryor by email that another long-term
 commercial tenant at Sportsman Park, Gravitec, had terminated its lease. [Ex. 241] On
 September 29, 2011, Pryor responded to Nelson's email and wrote the following:

"I guess this means what we both feared is likely to come to pass. I think
 we should talk about how to prepare for that eventuality and explore all
 the disaster scenarios that seem to apply. Obviously we are not in a
 position to support two empty buildings."

[Id.]

1 **FINDING OF FACT NO. 70**

2 In a "Consent to Action in Lieu of the Annual Meeting of the Members of Sportsman
3 Park" dated November 14, 2011, the members of Sportsman Park, Nelson and Pryor, adopted a
4 resolution ratifying and approving the activities of the Manager of Sportsman Park since the last
meeting of its members. [Ex. 63]

5 **FINDING OF FACT NO. 71**

6 In January 2012, French asked Nelson to send him Sportsman Park financial information
7 on behalf of Pryor. Between January 2, 2012 and January 17, 2012, Nelson sent French a series
8 of emails which included capital account information, general ledgers, profit and loss statements,
bank statements, check registers, and rent rolls. [Ex. 253, 254, 255, 262, 267, 700]

9 **FINDING OF FACT NO. 72**

10 French was suspicious of Nelson's motivations and possible self-dealing. [Ex. 702]
11 French testified he believed Nelson was not being forthright about requested accountings and
12 documents. French's unease was not unreasonable. But the concerns do not give rise to clear,
13 cogent and convincing evidence of fraud nor do they prove by a preponderance of the evidence
that Nelson breached any fiduciary duties.

14 **FINDING OF FACT NO. 73**

15 Pryor considered hiring an appraiser to formally determine the value of his interest in
16 Sportsman Park, but the process was lengthy and expensive and Pryor chose not to retain an
appraiser.

17 **FINDING OF FACT NO. 74**

18 On February 17, 2012, Sakai sued, among others, Landmark, Nelson, Pryor, and
19 Sportsman Park, in Kitsap County Superior Court under cause number 12-2-00372-8 (the
"Second Lawsuit").

20 **FINDING OF FACT NO. 75**

21 In the Second Lawsuit, Sakai sought to "pierce the corporate veil" of Landmark and
22 alleged Landmark fraudulently transferred its assets to Nelson, Pryor, and the other defendants,
so as to avoid paying Sakai's judgments.

23 **FINDING OF FACT NO. 76**

24 In response to Nelson's request for an additional contribution from Pryor in the amount
of \$75,000, Pryor sent an email on February 16, 2012 and wrote the following:

1 "It is pretty obvious that we have both reached our limits financially and
2 are at a point the vultures will see an opportunity. With these kind of
3 expenditures along with the refinance starring us in the fact ... no wonder
4 we are both feeling desperate. It is clear that we are in need of an infusion of
5 cash and neither of us are capable of meeting the current demand. This will
6 leave us scrambling and trying to salvage what we can but in the end ...
7 when completely financially exhausted ... negotiating with a predator. Not
8 the place we expected to be 15 years ago."

9 [Ex. 297]

10 **FINDING OF FACT NO. 77**

11 Nelson and Pryor continued communicating about funding expenses at Sportsman Park
12 and a possible buyout of Pryor's interest in Sportsman Park. In an email dated February 16,
13 2012, Pryor wrote the following:

14 "I do realize that a buyout is the only way that this works and
15 accomplishes everything we both want to happen ... you to have the
16 freedom to dictate your new partner and see the works you have spent on
17 this project accrue to you and your family ... we have agreed on that ... I
18 have offered to move aside if you have someone who will step in at this
19 point and have asked only that they pay off my loan ... give me \$575,000
20 and step to the plate at this time."

21 [Ex. 297]

22 In the same email, Pryor continued and wrote:

23 "I know I am not as responsive as I should be during this time but I feel I
24 am perhaps so enmeshed in it I just have lost perspective. I am not a very
25 good partner right now given the multiple pressures from all sides..."

26 [Id.]

27 **FINDING OF FACT NO. 78**

28 On February 17, 2012, Nelson responded to Pryor's email and wrote:

29 "This is the first time you have said a price. That is what I have been asking
30 and asking for."

31 [Ex. 297]

32 **FINDING OF FACT NO. 79**

33 In an email from Pryor to Nelson dated March 3, 2012, Pryor informed Nelson that his
34 wife was "very supportive of giving you [Nelson] every chance to salvage this" rather than
35 proceeding with Mr. Broughton's recommendations. [Ex. 310]

1 **FINDING OF FACT NO. 80**

2 In an email from Nelson to Pryor dated March 30, 2012, Nelson asked Pryor why Mr.
3 Broughton thought Pryor and Sakai were aligned in attacking the Debt Swap:

4 "How is it your attorney sees you aligned with the Sakai's? The transaction
5 they question was a benefit to you and me, we were both involved in it, we
6 both had tax implications from it, we both saved ourselves from having to
7 borrow money, and was smart business trading a debt."

8 [Ex. 337]

9 **FINDING OF FACT NO. 81**

10 On the same day, Pryor wrote a long all caps email response to Nelson, which included
11 the following statements:

12 "Those I have turned to have told me they are very uncomfortable with
13 what they see (at least that was what Kenner's accountants have said along
14 with their attorney ... I think that just refers to the nature of how little
15 knowledge I have and how many different entities doing business in the
16 partnership that you control and they did not get adequate explanations as
17 to how and why things were booked as they were)."

18 [Ex. 337]

19 In regard to Mr. Broughton, Pryor wrote the following:

20 "And Bill ... well, his opinion is less than flattering ... and his views seem
21 to reflect those of the Sakais. This is why he wants me to support the Sakai
22 investigation ... he thinks a forensic review will validate him."

23 [Id.]

24 **FINDING OF FACT NO. 82**

Mr. Broughton is an attorney who has long practiced in Kitsap County. Mr.
Broughton represented Dr. Pryor during the Sakai II litigation. Mr. Broughton articulated
to Pryor and unfavorable opinion of Nelson with regards to the decisions Nelson was
making. This opinion is not unfounded. One cannot read the unchallenged trial court
findings listed in the Unpublished Opinion of the July 7, 2009 Court of Appeals decision
without raised eyebrows. Mr. Broughton recommended to Pryor that a forensic accountant
be hired to dig deeper into the financial records. Under the circumstances, this seems to
have been a prudent recommendation. Pryor declined this advice. Mr. Broughton also
testified regarding the issue of the "Joint Prosecution Agreement" between John Sakai and
Pryor. [Ex. 405.] Mr. Broughton testified that while there were discussions about Pryor
entering such an agreement, Pryor did not sign the Joint Prosecution Agreement.

1 **FINDING OF FACT NO. 83**

2 On March 31, 2012, in response to Pryor's email, Nelson offered to send Pryor the Word
3 version of the buyout agreement so he and his attorney could make redline revisions to it. He
4 also indicated he would have no problem if Pryor wanted to have the company books audited.
5 [Ex. 337]

5 **FINDING OF FACT NO. 84**

6 On April 1, 2012, Pryor responded to Nelson's email and wrote: "My not being more
7 involved with the company is indeed my fault and I blame myself for not learning more." [Ex.
8 337]

8 **FINDING OF FACT NO. 85**

9 On April 4, 2012, while Nelson was in Mexico on vacation, Pryor forwarded the
10 hyperlink he had received from Nelson on March 28, 2012 [See Ex. 334] to Blaine Scott
11 ("Scott") via email. [Ex. 338] Scott was an employee of ReMax on Bainbridge Island,
12 Washington. Nelson was the sole owner of ReMax.

12 **FINDING OF FACT NO. 86**

13 Scott was an employee of the ReMax franchise owned solely by Nelson from
14 December 2004 to mid-2012. Scott testified to the general business practices of Nelson's
15 ReMax franchise with respect to its management of commercial properties owned by various
16 entities, including the Sportsman Park complex owned by Sportsman Park, LLC, which
17 limited liability company was until June 2012 jointly owned by Nelson and Pryor, but
18 managed by Nelson's entity ReMax. Scott testified about Nelson's creation of three
19 Property Management Agreements related to Sportsman Park. [Exhibits 706, 707 and
20 708]

19 **FINDING OF FACT NO. 87**

20 Scott testified that Exhibit 708 was actually signed on March 26, 2012 (*see* Exhibit
21 712) when the document itself purports to have been signed on December 21, 2006. Scott
22 also testified that he observed two separate spreadsheets of commissions earned by ReMax
23 on the leasing of space at Sportsman Park, one prepared by him as he paid those commissions
24 to Nelson, and the other prepared by the Nelsons and presented to the Pryors where the
Nelsons represented to the Pryors that the same commissions had not been paid. Scott

1 further testified that he then saw those commissions recorded as capital account
2 contributions in favor of the Nelsons.

3 **FINDING OF FACT NO. 88**

4 While Nelson was in Mexico, Scott communicated with Colleen Adams. Ms. Adams was
5 a ReMax agent at the time. In an email to Ms. Adams on April 5, 2012, with the subject line "BE
6 CAREFUL", Scott wrote the following:

7 "Please be careful on who and what you say about the office ... I don't want
8 what I said to you getting back to Doug ... It is truly just a feeling I have
9 based on a couple of things I have heard from other people."

10 [Ex. 738]

11 **FINDING OF FACT NO. 89**

12 On April 5, 2012, Scott responded to Pryor's email containing the hyperlink Nelson had
13 sent Pryor on March 28, 2012. [Ex. 338]. Scott informed Pryor that all the invoices were valid,
14 but commented that he thought it was interesting that Nelson was lumping them all together as
15 something Pryor owes a portion of. Scott concluded his email with the following:

16 "As I said I will help in any way ... I will testify but I would like to talk
17 with your lawyers/accountants before hand ... I think there are a lot of
18 ways to get him I just need to talk to the lawyers to see what the options
19 are ... I also think that you should subpoena the rent manager system
20 where all the books for SP/SP1 and CP are held ... it's online and should
21 be easy to do."

22 [Ex. 338]

23 **FINDING OF FACT NO. 90**

24 Between April 6, 2012 and April 7, 2012, while Nelson was still in Mexico, Pryor and
Scott continued to exchange emails. [Ex. 695] Pryor told Scott that he wanted him to be in the
management position at Sportsman Park and wanted to have Nelson's wife Karina removed
from bookkeeping duties. On April 6, 2012, Mr. Scott wrote "Yeah I really would love to talk
with your lawyer ..." [Id.]

FINDING OF FACT NO. 91

Scott came to believe that ReMax was close to shutting its doors. Scott admitted to
sharing real estate leads with competitors of ReMax and to sharing ReMax's proprietary
information with others outside of ReMax. It is likely that he did this in order to secure
employment elsewhere should he lose his job with ReMax. While Scott's testimony is generally

1 accepted as credible, he acknowledges that he breached Nelson's trust and his testimony is
2 clouded for this reason. His testimony neither proves, nor disproves, any asserted issue at trial.

3 **FINDING OF FACT NO. 92**

4 Between May 8, 2012 and May 9, 2012, Nelson and Pryor exchanged several emails
5 regarding the Sakai litigation and a buyout of Pryor's interest in Sportsman Park. [Ex. 346] On
6 May 8, 2012, Nelson questioned Pryor regarding whether they would be unified in their defense
7 against the Sakais:

8 "You want to claim amnesia for your ½ of a simple non-fraudulent
9 transaction. Helen spoke to you about it in advance as well as I did. There
10 were tax consequences acknowledge by both on our returns. We
11 memorialized the decision to trade debts as signed by both of us."

12 [Id.]

13 **FINDING OF FACT NO. 93**

14 On May 9, 2012, Pryor responded to Nelson's email and stated that he was not claiming
15 amnesia of the transaction and that he recalled speaking with Stevenson about it. He also stated
16 that his desire was to move on and that he would be best served to turn Sportsman Park over to
17 Nelson so that Nelson would not be "limited by a partner who can barely keep his half going and
18 is struggling to do so." [Ex. 346] Pryor further stated, in reference to the Debt Swap, that
19 "Helen (Stevenson)" was satisfied with the transaction" and it would not be a problem if she had
20 to testify. [Id.]

21 **FINDING OF FACT NO. 94**

22 Between May 11, 2012 and June 7, 2012, Pryor and Nelson continued negotiations
23 relating to the buyout of Pryor's interest in Sportsman Park. Nelson was represented by
24 attorney Stuart Ainsley. Pryor was represented by attorney Richard Shattuck. Mr. Ainsley and
25 Mr. Shattuck each assisted in the negotiation and drafting of the final agreement, which was
26 signed by Nelson and Pryor on June 7, 2012. [Ex. 3] Although Pryor testified that he did not
27 feel like he had a lot of options, Pryor accepted all of the terms and admitted that he was satisfied
28 with the final form of the 2012 Purchase Agreement.

29 **FINDING OF FACT NO. 95**

30 Under Paragraph 5 of the 2012 Purchase Agreement, Pryor agreed to fully and
31 completely release any and all claims against Nelson, Sportsman Park, and Central Plaza,
32 including known and unknown claims:

1 By closing the purchase and sale of the Conveyed Units, the Selling
 2 Member [Pryor] will be deemed to have released Sportsman Park,
 3 Central Plaza and the Purchasing Member [Nelson] from any and all
 4 claims, liabilities, damages, attorneys' fees and other costs arising from or
 5 related to his [Pryor's] ownership of the Conveyed Units and the
 operation of the companies, whether such claims are known or unknown,
 except such claims as arise under the specific terms of this Agreement or
 any document executed pursuant to the terms of this Agreement.

6 [Ex. 3]

7 **FINDING OF FACT NO. 96**

8 Under the 2012 Purchase Agreement, Pryor restated his earlier agreement to remain
 9 liable for 50% of the Sakai Litigation. Paragraph 7 of the Purchase Agreement provides, in
 relevant part, as follows:

10 7. Sakai Lawsuit.

11 Selling Member [Pryor] and Purchasing Member [Nelson] are subject
 12 to a lawsuit involving Sportsman Park, SP Phase I, Landmark, LLC, the
 13 Sakai QTIP Trust, Kimiko R. Sakai, John D. Sakai, Paul D. Sakai, Mary
 14 Ann R. Arnone and others, currently pending in Kitsap County Superior
 15 Court under Cause No. 12-2-00372-8 (the "New Suit"). The Court has
 16 previously entered judgment against Landmark, LLC in favor of the
 17 Sakai Parties in the Principal amount of \$77,702.70 in Cause No. 04-2-
 00590-4 (the "Landmark Judgment"). In the New Suit the Sakai Parties
 are alleging that the Selling Member and the Purchasing Member
 engaged in fraudulent conveyances and are seeking to "pierce the
 corporate veil" of Landmark to hold Selling Member and Purchasing
 Member personally liable for the Landmark Judgment.

- 18 a. The terms of this Agreement notwithstanding, Selling Member and
 19 Purchasing Member agree that they will continue to share equally in
 the cost of that litigation, including all attorneys' fees and costs,
 when and as they become due.

20 [Ex. 3]

21 **FINDING OF FACT NO. 97**

22 The 2012 Purchase Agreement was intended as the final agreement of the parties as
 23 reflected in an integration provision that was bargained for and agreed upon by the parties:

24 This Agreement constitutes the entire agreement between the parties
 with respect to the subject matter of this Agreement. There or no other
 commitments or agreements between the parties with respect to such

1 matters. This Agreement may be amended only by a written instrument
2 executed by the parties.

3 [Ex. 3, ¶ 10(c)]

4 **FINDING OF FACT NO. 98**

5 In the 2012 Purchase Agreement, Pryor fully and completely released any and all
6 claims against Nelson, Sportsman Park, and Central Plaza, including known and unknown
7 claims.

8 **FINDING OF FACT NO. 99**

9 On June 15, 2012, the Kitsap County Superior Court ordered the First Lawsuit and the
10 Second Lawsuit be consolidated. [Ex. 435] (The "First Lawsuit", together with the "Second
11 Lawsuit", are collectively referred to herein as the "Sakai Litigation")

12 **FINDING OF FACT NO. 100**

13 On December 18, 2013, all the parties to the Second Lawsuit participated in mediation.
14 At mediation, a settlement agreement was reached, however, Pryor was not a signatory to it (the
15 "Settlement Agreement"). [Ex. 548] Under the Settlement Agreement, Nelson, on behalf of
16 Landmark, agreed to pay Sakai \$70,000. In exchange for Landmark's settlement payment, Sakai
17 agreed to (a) enter full satisfactions of their judgments as entered in the First Lawsuit, and (b)
18 dismiss the Second Lawsuit with prejudice.

19 **FINDING OF FACT NO. 101**

20 On or about April 18, 2014, Sakai filed a full satisfaction of judgment for each of its
21 judgments in the First Lawsuit and the Court entered an order dismissing the Second Lawsuit
22 with prejudice. [Ex. 439, 440]

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FINDING OF FACT NO. 102

Nelson testified as to the specific legal fees and costs paid to the following entities:

Event:	Amount Paid:	Pryor's Share:
Attorney's Fees and Costs:		
Smith & Hennessey:	\$33,125.36	\$16,562.68
Sanchez, Mitchell, Eastman & Cure:	\$63,841.36	\$31,920.68
B. Johnston:	\$34,245.57	\$17,122.78
Total:	\$131,212.29	\$65,606.14

Pryor has not paid his half of the following attorney's fees and costs, all of which were incurred by Nelson and/or the entities in defending the Sakai Litigation.

FINDING OF FACT NO. 103

On or about February 12, 2014, pursuant to the Settlement Agreement, Nelson delivered the \$70,000 settlement payment to Sakai. [Ex. 5] Pryor did not pay any portion of the \$70,000 settlement payment to Sakai.

Event:	Amount Paid:	Pryor's Share:
Amounts paid in Settlement:		
Proof of payment to Sakai:	\$70,000.00	\$35,000.00
Total:	\$70,000.00	\$35,000.00

1 **FINDING OF FACT NO. 104**

2 In addition, Nelson incurred the following other costs in defending the Sakai Litigation:

Event:	Amount	Pryor's
	Paid:	Share:
Other Costs:		
Bertram Dispute Resolution		
(mediator fee):	\$1,333.33	\$666.67
Davidson, Davidson & Hawkins		
(Jim Davidson, CPA):	\$5,000.50	\$2,500.25
Rekdal Hopkins Howard (Jason		
Newman, CPA):	\$4,452.00	\$2,226.00
Total:	\$10,785.83	\$5,392.91

11 Pryor did not pay any portion of these costs.

12 **FINDING OF FACT NO. 105**

13 The limited liability company agreements for Landmark and Sportsman Park granted
 14 Nelson, as the managing member of each, broad authority to manage the businesses. [Ex. 14;
 15 Ex. 53] As the managing member of Landmark and Sportsman Park, Nelson had the
 16 authority to hire accountants, lawyers and other professionals to perform services on behalf of
 17 the companies. There is no evidence that any of the professionals hired by Nelson (or Pryor)
 18 at any time engaged in any misconduct. To the contrary, the evidence establishes that all of
 19 the professionals, including those that testified at trial, performed their duties entirely within
 20 the parameters of required ethics and professional conduct.

19 **FINDING OF FACT NO. 106**

20 Throughout their relationship, Nelson and Pryor went through various stages of trust
 21 and distrust. In some emails, it is clear that they were on the same page and unified with
 22 regards to intended results. This is particularly true with the Sakai litigation and the
 23 steadfast desire of both Nelson and Pryor to not pay any judgments obtained by Sakai. Pryor
 24 specifically states in an email dated May 9, 2012 to Nelson, "We may be arguing over nothing
 here as neither of us has any intention of paying the Sakai's anything." [Ex. 346] Other

1 moments in their relationship indicated understandable uncertainly, frustration and tension.
 2 [Ex. 297, 337, 346, 621, 622, 623, 624.]

3 II. CONCLUSIONS OF LAW

4 **HAS IT BEEN PROVEN THAT PRYOR BREACHED THE 2000 PROMISSORY NOTE? NO.**

5 CONCLUSION OF LAW NO. 1

6 Nelson's claim against Pryor for failure to pay the promissory note fails. The parties
 7 agreed to specific terms as to how demand on the Note would be made. While there is
 8 insufficient evidence establishing that Pryor paid the Note, Nelson breached the terms of the
 9 Note by failing to properly make demand on the Note.

10 **HAS IT BEEN PROVEN THAT PRYOR BREACHED THE 2006 REDEMPTION AGREEMENT? YES.**

11 CONCLUSION OF LAW NO. 2

12 It is proven by a preponderance of the evidence that Pryor is obligated under the 2006
 13 Redemption Agreement to reimburse Landmark "for one half of all costs and expenses,
 14 including, without limitation, attorneys fees and costs, damages, judgments and amounts paid
 15 in settlement, incurred by Landmark or an affiliate in prosecution or defense" of the Sakai
 16 Litigation. [Ex. 2, ¶5(c)(i)] Pryor is obligated to Landmark in the principal amount of
 17 \$105,999.05, plus prejudgment interest through the date of judgment.

18 **HAS IT BEEN PROVEN THAT PRYOR BREACHED THE 2012 PURCHASE AGREEMENT? YES.**

19 CONCLUSION OF LAW NO. 3

20 There is insufficient evidence that Pryor was fraudulently induced to enter into the
 21 2012 Purchase Agreement. The 2012 Purchase Agreement's integration provision explicitly
 22 supersedes all previous agreements and representations between Nelson and Pryor. It has been
 23 proven by a preponderance of the evidence that Pryor is obligated under the 2012 Purchase
 24 Agreement to honor his contractual obligations to Nelson to share equally in the costs of the
 Sakai Litigation, "including all attorneys' fees and costs." [Ex. 3, ¶7(b)]. Pryor is obligated
 to Landmark in the principal amount of \$105,999.05, plus prejudgment interest through the
 date of judgment.

CONCLUSION OF LAW NO. 4

The Court having weighed the evidence and lack of evidence, finds, as a matter of fact,
 that Pryor has failed to prove his claims of fraud, breach of fiduciary duties, breach of contract,
 indemnification and contribution, and accounting claims in this action.

1 HAS IT BEEN PROVEN NELSON BREACHED ANY FIDUCIARY DUTIES? NO.

2 CONCLUSION OF LAW NO. 5

3 As an initial matter, the Court finds that it is undisputed that Nelson acted as the
 4 managing member of Sportsman Park, LLC, during the period when both he and Pryor
 5 were equal owners of that company, and that Nelson served in a similar capacity for
 6 Landmark, LLC, and Green Rock Holdings, LLC, during the periods when Nelson and Dr.
 7 Pryor both owned interests in those respective entities. As a result, the Court finds and
 8 concludes that Nelson owed Pryor fiduciary duties. A member's fiduciary duties arise by
 9 virtue of the parties' trust relationship. *Bishop of Victoria Corp. Sole v. Corporate Business*
 10 *Park, LLC*, 138 Wash. App. 443, 456-7, 158 P.3d 1183 (2007). Because of this:

11 An LLC manager is entitled to rely in good faith on other managers.
 12 *Dickens v. Alliance Analytical Labs., LLC*, 127 Wash. App. 433, 440, 111
 13 P.3d 889 (2005) (citing RCW 25.15.175). The role of members in a
 14 member-managed LLC is analogous to that of partners in a general
 15 partnership, and partners are held accountable to each other and the
 16 partnership as fiduciaries.

13 *Id.*

14 The Court further concludes that the Pryors have the burden of coming
 15 forward with evidence of a breach of fiduciary duty. *Interlake Porsche & Audi, Inc.*
 16 *v. Bucholz*, 45 Wash. App. 502, 603, 728 P. 2d 597 (1986). However,

17 The burden of proving good faith is on the officer or director because
 18 of his fiduciary capacity: As a fiduciary, the officer or director has a
 19 strong influence on how the corporation conducts its affairs, and a
 20 correspondingly strong duty not to conduct those affairs to the unfair
 21 detriment of others, such as minority shareholders or creditors, who
 22 also have legitimate interests in the corporation but lack the power of
 23 the fiduciary.

22 *Saviano v. Westport Amusements, Inc.*, 144 Wash. App. 72, 79, 180 P.3d 874, 877 (2008).

23 In light of the foregoing, the Court finds that the Pryors have the initial burden of
 24 coming forward with sufficient evidence to establish that one or more breaches of fiduciary
 duty occurred, but that once that initial burden has been met, the Nelsons have the burden
 to prove (a) that Doug Nelson at all times acted in good faith and (2) to provide a sufficient

1 accounting to disprove, for instance, that he did not wrongly profit from his activities, in
2 violation of his fiduciary obligations.

3 **CONCLUSION OF LAW NO. 6**

4 A plaintiff cannot claim breach of fiduciary duty if the plaintiff consented to the
5 alleged breach. *Smith v. Pac. Pools, Inc.*, 12 Wn. App. 578, 584, 530 P.2d 658 (1975). If a
6 plaintiff acquiesces in an activity of which he has knowledge, such acquiescence defeats an
7 alleged breach of fiduciary duty. *Id.* Pryor knowingly acquiesced to the Debt Swap and all
8 other transactions complained of in this matter.

9 **CONCLUSION OF LAW NO. 7**

10 Pryor's breach of fiduciary duty claims are also barred by the "business judgment rule."
11 Under the business judgment rule, corporate management is immunized from liability in a
12 corporate transaction where (1) the decision to undertake the transaction is within the power of
13 the corporation and the authority of management, and (2) a reasonable basis exists to indicate
14 the transaction was made in good faith. *Scott v. Trans-Sys, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1
15 (2003).

16 **CONCLUSION OF LAW NO. 8**

17 The business judgment rule prevents a court from substituting its judgment for that of a
18 corporation's directors when they act in good faith. *Spokane Concrete Prods., Inc. v. U.S. Bank of*
19 *Wash.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). Under the business judgment rule, corporate
20 officers cannot be held liable "for mere mistake or errors of judgment ... when they act without
21 corrupt motive and in good faith." *Nursing Home Building Corp. v. DeHart*, 13 Wn. App. 489, 535
22 P.2d 137 (1975) (citation and internal quotations omitted). This is true even if the errors are "so
23 gross that they may demonstrate the unfitness of the directors to manage the corporate affairs."
24 *Id.* at 499.

CONCLUSION OF LAW NO. 9

The limited liability company agreements for Landmark and Sportsman Park granted
Nelson, as the managing member, broad authority to manage the businesses and limited his
liability for decisions made in managing the same.

CONCLUSION OF LAW NO. 10

In discharging his duties as the managing member of Landmark and Sportsman Park,
the law entitles Nelson to rely in good faith upon "information, opinions, reports or

1 statements" furnished to the companies by any of its "employees" or "by any other person."
 2 RCW 25.15.175. There is no evidence that any of the professionals hired by Nelson (or
 3 Pryor) at any time engaged in any misconduct. To the contrary, the evidence establishes that
 4 all of the professionals, including those that testified at trial, performed their duties entirely
 within the parameters of required ethics and professional conduct.

5 **HAS IT BEEN PROVEN NELSON COMMITTED FRAUD? NO.**

6 **CONCLUSION OF LAW NO. 11**

7 The failure to prove by clear, cogent, and convincing evidence any one of fraud's nine
 8 elements "is fatal to recovery." *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 395, 457
 P.2d 535 (1969).

9 **CONCLUSION OF LAW NO. 12**

10 For purposes of a fraud claim, a promise of future performance is not a representation
 11 of an existing fact. *Stiley*, 925 P.2d 194, 204. Whether Nelson represented to Pryor that he
 12 promised to pay cash to Landmark in the Debt Swap remains ambiguous and unclear. But
 even if Nelson had made that promise, it is not a representation of existing fact.

13 **CONCLUSION OF LAW NO. 13**

14 Based on the evidence and lack of evidence, Pryor's claim of fraud fails. Pryor has not
 15 met this high burden of proof of fraud by clear, cogent, and convincing evidence.

16 **HAS BREACH OF CONTRACT BY GREEN ROCK BEEN PROVEN? NO.**

17 **CONCLUSION OF LAW NO. 14**

18 In the 2012 Purchase Agreement, Pryor fully and completely released any and all
 19 claims against Nelson, Sportsman Park, and Central Plaza, including known and unknown
 claims.

20 **CONCLUSION OF LAW NO. 15**

21 In Washington, there is a strong public policy favoring resolution of disputes through
 22 execution of settlement agreements and releases. Where the terms of a release are clear and
 23 unambiguous, a party cannot object to the release based on an unexpressed or subjective
 24 intent. *Stein v. Geonerco*, 105 Wn. App. 41, 48, 17 P.3d 1266 (2001) ("It is the duty of the court
 to determine the meaning of what is written, not what one party intended the writing to
 mean.").

1 **CONCLUSION OF LAW NO. 16**

2 A release generally extends to all matters within the parties' contemplation at the
 3 time it is executed. *Chadwick v. Nw. Airlines, Inc.*, 33, Wn. App. 297, 302, 654 P.2d 1215
 4 (1982) *aff'd*, 100 Wn.2d 221. In *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189
 5 (1992), the Supreme Court held that release language applying "to any and all claims,
 6 damages, actions ... of any kind or nature" was clear and should be interpreted broadly. *Id.* at
 189.

7 **CONCLUSION OF LAW NO. 17**

8 To prevail on a breach of contract claim, a plaintiff must establish that a contract imposes
 9 a duty, the duty is breached, and the breach proximately caused damage to the claimant.
 10 *Northwest Indep. Forest Manuf. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6,
 11 citing *Larson v. Union Inv. & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932). When performance of a
 12 duty under a contract is due, any non-performance is a breach. *Contracts 2d, Restatement*, § 235.

13 **CONCLUSION OF LAW NO. 18**

14 The whole "panoply of contract law rests on the principle that one is bound by the
 15 contract which he voluntarily and knowingly signs." *Skagit State Bank v. Rasmussen*, 109 Wn.2d
 16 377, 381, 745 P.2d 37 (1987). Where a party has ample opportunity to examine a contract in as
 17 great a detail as he cares, "he cannot be heard to deny that he executed the contract, and he is
 18 bound by it." *Lake Air, Inc. v. Duffly*, 42 Wn.2d 478, 480, 256 p.2d 301 (1953).

19 As previously stated, but worth repeating, Pryor was provided all relevant documents
 20 for signature. Pryor is highly intelligent and the documents are not ambiguous. The documents
 21 in controversy are clear as to what the expectations are of the parties. Unfortunately for his case,
 22 Pryor, by his own admission, did not read the documents. Nevertheless, Pryor signed the
 23 documents on his own volition.

24 **CONCLUSION OF LAW NO. 19**

Pryor has failed to establish that Green Rock breached the Green Rock Note. Pryor
 agreed to forgive the balance of the Green Rock Note in 2008. As a result, Green Rock had no
 duty to continue paying Pryor under the Green Rock Note. There is insufficient evidence to
 support Pryor's breach of contract claim against Green Rock relating to the Green Rock Note.

1 **INDEMNIFICATION AND CONTRIBUTION**2 **CONCLUSION OF LAW NO. 20**

3 To prove and indemnity claim, "a plaintiff must demonstrate that there exists a
4 contract containing an indemnity provision that binds the defendant to reimburse the plaintiff
5 for the amount claimed." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc.*, 168
6 Wn.App. 86, 100, 285 P.3d 70 (2012). Pryor has not made a sufficient showing. Pryor's cause
of action for indemnification and contribution fails.

7 **ACCOUNTING**8 **CONCLUSION OF LAW NO. 21**

9 Pryor's claim for an accounting likewise fails. Pryor did not pursue his claim for
10 apportionment of an "independent forensic accountant at the Nelson's expense"
11 [Counterclaim, at ¶ 51] by not requesting or arguing in favor of such relief from the Court
prior to or during the trial.

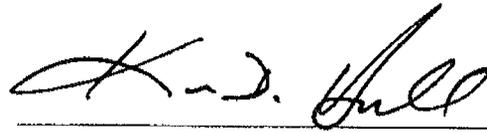
12 **PINNACLE PARK, LLC.**13 **CONCLUSION OF LAW NO. 22**

14 The Pryors have sought declaratory relief resolving the parties competing claims to
15 a piece of real property generally known as "Pinnacle Park" and legally described in
16 Exhibit D to the 2006 Redemption Agreement, found at Exhibit 2, LM 153. During their
17 testimony, both Doug Nelson and Karina Nelson testified that they had not fulfilled their
18 obligations in order to be entitled to exercise any rights in that property. Those
19 admissions are supported by Exhibits 416 & 630, P3891. The Nelsons defended against
20 this claim on the basis that Western Devco, which is called out in ¶6 of the 2006
21 Redemption Agreement (Exhibit 2) as having the first right of refusal to purchase Pinnacle
22 Park. Western Devco has been inactive and administratively dissolved since no later than
23 February 1, 2012. (Exhibit 745.) Because any rights that could have survived Western
24 Devco would have passed to its parent, Green Rock Holdings, and because Green Rock
Holdings is a party to this action, the Court finds and concludes that that defense is
unavailing. The Court according finds and concludes that any rights that Western Devco
or its parent Green Rock Holdings may have had under the 2006 Redemption Agreement
to exercise a right of first refusal under that contract were lost and are void due to those
entities' failure to perform their contractual obligations.

1 ATTORNEY'S FEES AND COSTS.

2 The issue of appropriate attorney's fees and costs related to this action is reserved,
3 pending submissions of declarations and further argument.

4 DATED: This 10th day of May, 2016.

5 

6 THE HONORABLE KEVIN D. HULL

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Tab 6

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

DOUGLAS C. NELSON and KARINA
NELSON, husband and wife;
LANDMARK, LLC, a Washington limited
liability company,

Plaintiffs,

NO. 14-2-00059-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
ATTORNEY'S FEES AND
COSTS AWARDED AGAINST
DEFENDANTS

vs.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Defendants.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Third-Party Plaintiffs,

vs.

GREEN ROCK HOLDINGS, LLC, a
Washington limited liability company;
and SPORTSMAN PARK, LLC, a
Washington limited liability company,

Third-Party Defendants.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: ATTORNEY'S FEES AND COST
AWARDED AGAINST DEFENDANTS-1

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119

1 The Court makes the following Findings of Fact and Conclusions of Law in
 2 regard to its award of reasonable attorneys' fees and costs against the above named
 3 defendants in favor of Landmark.

4 **I. FINDINGS OF FACT**

5 **FINDING OF FACT NO. 1:**

6 The parties entered into a 2006 Redemption Agreement whereby Pryor became
 7 obligated to reimburse Landmark for one half of all costs and expenses incurred in
 8 prosecuting and/or defending certain lawsuits. The Redemption Agreement contains a
 9 prevailing party attorney's fee provision.
 10

11 **FINDING OF FACT NO. 2:**

12 On May 10, 2016, following a 10-day bench trial, the Court found Pryor breached
 13 both the 2006 Redemption Agreement and the 2012 Purchase Agreement. The Court
 14 awarded Landmark \$105,999.05, plus prejudgment interest through the date of
 15 judgment, and reserved the issue of appropriate attorney's fees and costs.

16 **FINDING OF FACT NO. 3:**

17 Landmark is the prevailing party under the 2006 Redemption Agreement claim
 18 and is entitled to an award of its reasonable attorney's fees and costs. With the exception
 19 of the claims Pryor prevailed on, the parties' primary claims are so related, no
 20 reasonable segregation of time can be made.

21 **FINDING OF FACT NO. 4:**

22 The Court has reviewed Nelson's Motion for Fees, the supporting Declaration of
 23 Kevin W. Cure, and the schedule of tasks and time expended, as well as any response
 24 and any reply and finds that the rates charged by attorneys Kevin W. Cure, Katiemarie
 Pepper Wing, Carrie E. Eastman, and Neil R. Wachter are reasonable for attorneys with

FINDINGS OF FACT AND CONCLUSIONS
 OF LAW RE: ATTORNEY'S FEES AND COST
 AWARDED AGAINST DEFENDANTS-2

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1 their experience, skill and expertise in the Puget Sound area. The Court finds that the
2 time expended and the rates charged by the non-attorney timekeepers are reasonable.

3 **FINDING OF FACT NO. 5:**

4 The Court finds that the tasks performed and the time expended on such tasks
5 were reasonable and necessary to prosecute Nelson's claims given the amount in
6 controversy and the defenses raised to the claims, and were reasonable and necessary to
7 defend against Pryor's counterclaims and third-party claims, as well as the motions
8 practice engaged in by the parties and the voluminous discovery.

9 **FINDING OF FACT NO. 6:**

10 Applying the lodestar method and the proportionality rule, the Court finds that
11 \$104,399.86 is a reasonable fee for the services performed.
12

13 **FINDING OF FACT NO. 7:**

14 The Court further finds that the fees awarded are reasonable upon consideration
15 of the factors listed in RPC 1.5(a). In particular, the time expended was reasonable for
16 the work performed; counsel exhibited the skill necessary for the issues raised; a
17 number of the defenses involved complex legal issues; counsel was precluded from
18 accepting other work by the time involved; the fees charged were in line with those
19 customarily charged in this market; and the amount at issue was significant.

20 **FINDING OF FACT NO. 8:**

21 The Court also reviewed the schedule of costs and expenses incurred by Nelson
22 and finds that such costs and expenses were reasonable and necessary to the case in the
23 amount of \$10,443.08.
24

II. CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: ATTORNEY'S FEES AND COST
AWARDED AGAINST DEFENDANTS-3

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1 **CONCLUSION OF LAW NO. 1:**

2 The parties entered into valid and enforceable agreements – the 2006
3 Redemption Agreement and the Green Rock Note – which provided for the
4 reimbursement to the prevailing party of all legal fees and other costs incurred. As
5 prevailing parties, Landmark and Green Rock are entitled to recover their reasonable
6 fees and costs.

7 **CONCLUSION OF LAW NO. 2:**

8 An award of attorney fees for breach of fiduciary duty is discretionary. *Green v.*
9 *McAllister*, 103 Wash.App. 452, 468, 14 P.3d 795 (2000).

10 **CONCLUSION OF LAW NO. 3:**

11 With the exception of the two claims Pryor prevailed on, the parties' primary
12 claims are so related that no reasonable segregation can be made. In light of the
13 interrelated nature of the lawsuit as a whole, the law does not require the court or the
14 parties to attempt to segregate counsel's time between each claim.

15 **CONCLUSION OF LAW NO. 3:**

16 Applying the lodestar method, as required by Washington law, the Court
17 concludes that a reasonable fee in this case is \$104,399.86.

18 **CONCLUSION OF LAW NO. 4:**

19 The Court further concludes that the fees awarded are reasonable under the
20 factors set forth in RPC 1.5(a).

21 **CONCLUSION OF LAW NO. 5:**

22
23
24
FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: ATTORNEY'S FEES AND COST
AWARDED AGAINST DEFENDANTS-4

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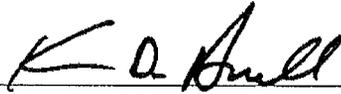
Landmark is entitled to recover its costs pursuant to the terms of the 2006 Redemption Agreement and the Green Rock Note. The reasonable costs awarded to Nelson against Pryor total \$10,443.08.

CONCLUSION OF LAW NO. 6:

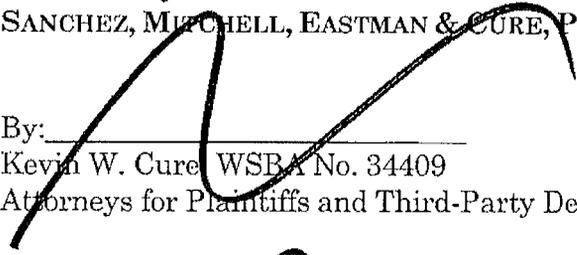
There being no cause for delay, Judgment may be entered forthwith.

DATED: ~~This 10th day of October 2016~~

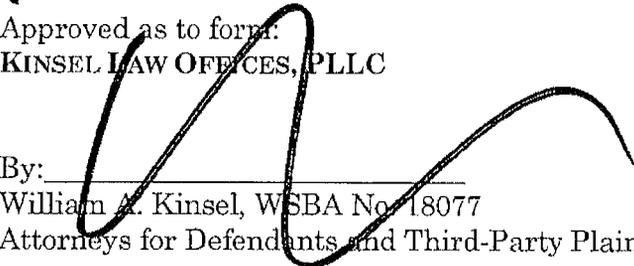
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HONORABLE KEVIN D. HULL

Presented by:
SANCHEZ, MITCHELL, EASTMAN & CURE, PSC

By: 
Kevin W. Cure WSBA No. 34409
Attorneys for Plaintiffs and Third-Party Defendants

Approved as to form:
KINSEL LAW OFFICES, PLLC

By: 
William A. Kinsel, WSBA No. 18077
Attorneys for Defendants and Third-Party Plaintiffs

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: ATTORNEY'S FEES AND COST
AWARDED AGAINST DEFENDANTS-5

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Tab 7

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

DOUGLAS C. NELSON and KARINA
NELSON, husband and wife;
LANDMARK, LLC, a Washington limited
liability company,

Plaintiffs,

vs.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Defendants.

ANTONE PRYOR, individually, and the
marital community composed of ANTONE
PRYOR and KIM YOUNG OAK, husband
and wife,

Third-Party Plaintiffs,

vs.

GREEN ROCK HOLDINGS, LLC, a
Washington limited liability company;
and SPORTSMAN PARK, LLC, a
Washington limited liability company,

Third-Party Defendants.

NO. 14-2-00059-8

JUDGMENT AND ORDER
QUASHING WESTERN DEVCO,
LLC'S RIGHT OF FIRST
REFUSAL

(Clerk's Action Required)

16-9-01881-2

JUDGMENT AND ORDER QUASHING
WESTERN DEVCO LLC'S RIGHT
OF FIRST REFUSAL-1

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120

1 **JUDGMENT SUMMARY**

2 Principal Judgment Amount: \$105,999.05
 3 Prejudgment Interest: \$32,346.47
 4 Judgment Interest Rate: 12%
 5 Attorney's Fees: \$104,399.86
 6 Costs: \$10,443.08
 7
 8 Judgment Debtors: ANTONE PRYOR, individually, and
 9 the marital community composed of
 10 ANTONE PRYOR and KIM YOUNG
 11 OAK, husband and wife
 12
 13 Judgment Creditors: Landmark, LLC; Douglas C. Nelson
 14 and Karina Nelson, husband and
 15 wife
 16
 17 Attorney for Judgment Creditors: Kevin W. Cure
 18
 19 Attorney for Judgment Debtors: William A. Kinsel

20 **JUDGMENT AND ORDER**

21 THIS MATTER came before the Court for a bench trial, the Honorable Kevin
 22 D. Hull presiding, on the claims of plaintiffs Douglas C. Nelson, Karina Nelson, and
 23 Landmark, LLC ("Landmark") against defendants Antone Pryor and Kim Young Oak
 24 Pryor, and on the counterclaims and third-party claims of defendants and third-party
 plaintiffs Antone Pryor and Kim Young Oak against Douglas C. Nelson, Karina
 Nelson, Landmark, Green Rock Holdings, LLC, and Sportsman Park, LLC. Testimony
 was heard on March 15, 16, 17, 21, 22, 23, 24, 28 and 29, with a recess until and
 concluding on April 14, 2016. The Court heard testimony from Douglas Nelson,
 Karina Nelson, William Broughton, Esq., Kenner French, Blaine A. Scott, Helen

JUDGMENT AND ORDER QUASHING
 WESTERN DEVCO LLC'S RIGHT
 OF FIRST REFUSAL-2

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1 Stevenson, CPA, Brian Danzig, Esq., Dr. Antone Pryor, Ph.D., Kim Young Oak Pryor,
2 Frank Miller, CPA, and Jason Newman, CPA. In addition, the Court considered in
3 excess of 200 exhibits.

4 Based on the testimony heard and evidence taken at trial, the Court found
5 Antone Pryor and Kim Young Oak Pryor breached the 2006 Redemption Agreement
6 and the 2012 Purchase Agreement and awarded Landmark damages in the amount of
7 \$105,999.05, plus prejudgment interest through the date of entry of this judgment.
8

9 In addition, the Court found that any rights that Western Devco, LLC or its
10 parent company Green Rock Holdings, LLC may have had under the 2006
11 Redemption Agreement to exercise a right of first refusal to purchase certain real
12 property in Poulsbo, Washington, identified by tax parcel number 032601-1-025-2001,
13 were lost and void due to those entities' failure to perform their contractual
14 obligations.

15 ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that
16 judgment is entered in favor of Landmark and against Antone Pryor, individually,
17 and the marital community composed of Antone Pryor and Kim Young Oak Pryor in
18 the principal amount of \$105,999.05, plus prejudgment interest in the amount of
19 \$32,346.47; plus attorney's fees in the amount of \$104,399.86, plus costs in the
20 amount of \$10,443.08, it is further
21

22 ORDERED that the judgment herein shall bear interest at the rate of 12% per
23 annum; it is further
24

JUDGMENT AND ORDER QUASHING
WESTERN DEVCO LLC'S RIGHT
OF FIRST REFUSAL-3

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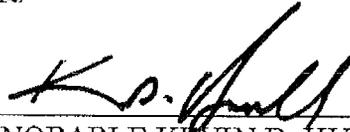
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ORDERED that upon application of the Court, additional attorney's fees and costs shall be awarded on appeal or for further actions incurred in enforcing this judgment; it is further

ORDERED that any rights that Western Devco, LLC or its parent company Green Rock Holdings, LLC may have had under the 2006 Redemption Agreement to exercise a right of first refusal to purchase certain real property in Poulsbo, Washington, identified by tax parcel number 032601-1-025-2001, are lost and void and the Memorandum of Right of First Refusal recorded against said property under Kitsap County Auditor's File Number 200611200420 is hereby quashed and of no further force or effect.

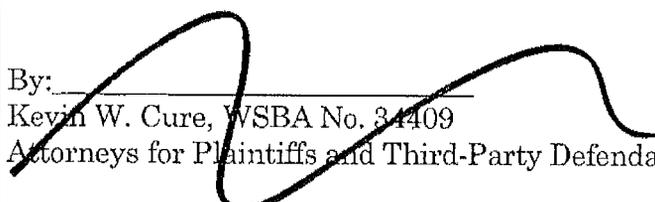
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DATED: This ~~_____ day of October, 2016~~

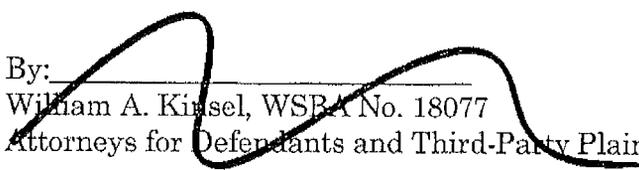


HONORABLE KEVIN D. HULL

Presented by:
SANCHEZ, MITCHELL, EASTMAN & CURE, PSC

By: 
Kevin W. Cure, WSBA No. 34409
Attorneys for Plaintiffs and Third-Party Defendants

Approved as to form:
KINSEL LAW OFFICES, PLLC

By: 
William A. Kinsel, WSBA No. 18077
Attorneys for Defendants and Third-Party Plaintiffs

JUDGMENT AND ORDER QUASHING
WESTERN DEVCO LLC'S RIGHT
OF FIRST REFUSAL-4

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Tab 8

RCW 19.40.011**Definitions.**

As used in this chapter:

- (1) "Affiliate" means:
 - (i) A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;
 - (A) As a fiduciary or agent without sole discretionary power to vote the securities; or
 - (B) Solely to secure a debt, if the person has not exercised the power to vote;
 - (ii) A corporation twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:
 - (A) As a fiduciary or agent without sole power to vote the securities; or
 - (B) Solely to secure a debt, if the person has not in fact exercised the power to vote;
 - (iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or
 - (iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.
- (2) "Asset" means property of a debtor, but the term does not include:
 - (i) Property to the extent it is encumbered by a valid lien; or
 - (ii) Property to the extent it is generally exempt under nonbankruptcy law.
- (3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (4) "Creditor" means a person who has a claim.
- (5) "Debt" means liability on a claim.
- (6) "Debtor" means a person who is liable on a claim.
- (7) "Insider" includes:
 - (i) If the debtor is an individual:
 - (A) A relative of the debtor or of a general partner of the debtor;
 - (B) A partnership in which the debtor is a general partner;
 - (C) A general partner in a partnership described in subsection (7)(i)(B) of this section; or
 - (D) A corporation of which the debtor is a director, officer, or person in control;
 - (ii) If the debtor is a corporation:
 - (A) A director of the debtor;
 - (B) An officer of the debtor;
 - (C) A person in control of the debtor;
 - (D) A partnership in which the debtor is a general partner;
 - (E) A general partner in a partnership described in subsection (7)(ii)(D) of this section; or
 - (F) A relative of a general partner, director, officer, or person in control of the debtor;
 - (iii) If the debtor is a partnership:
 - (A) A general partner in the debtor;
 - (B) A relative of a general partner in, or a general partner of, or a person in control of the debtor;
 - (C) Another partnership in which the debtor is a general partner;
 - (D) A general partner in a partnership described in subsection (7)(iii)(C) of this section; or
 - (E) A person in control of the debtor;
 - (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
 - (v) A managing agent of the debtor.
- (8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained

by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

[1987 c 444 § 1.]

NOTES:

Effective date—1987 c 444: "This act shall take effect July 1, 1988." [1987 c 444 § 16.]

Tab 9

RCW 19.40.041**Transfers fraudulent as to present and future creditors.**

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[1987 c 444 § 4.]

NOTES:

Effective date—1987 c 444: See note following RCW 19.40.011.

Tab 10

RCW 19.40.051**Transfers fraudulent as to present creditors.**

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

[1987 c 444 § 5.]

NOTES:

Effective date—1987 c 444: See note following RCW 19.40.011.

Tab 11

RCW 19.40.081**Defenses, liability, and protection of transferee.**

(a) A transfer or obligation is not voidable under RCW **19.40.041(a)(1)** against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under RCW **19.40.071(a)(1)**, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

- (1) The first transferee of the asset or the person for whose benefit the transfer was made; or
- (2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

- (1) A lien on or a right to retain any interest in the asset transferred;
 - (2) Enforcement of any obligation incurred; or
 - (3) A reduction in the amount of the liability on the judgment.
- (e) A transfer is not voidable under RCW **19.40.041(a)(2)** or **19.40.051** if the transfer results from:
- (1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
 - (2) Enforcement of a security interest in compliance with Article 9A of Title **62A** RCW.

(f) A transfer is not voidable under RCW **19.40.051(b)**:

- (1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;
- (2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or
- (3) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

[**2001 c 32 § 1**; **1987 c 444 § 8**.]

NOTES:

Effective date—2001 c 32: See note following RCW 62A.9A-102.

Effective date—1987 c 444: See note following RCW **19.40.011**.

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Transmittal Letter

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Case Name: Antone Pryor v. Douglas Nelson, et al.

Court of Appeals Case Number: 49640-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Appendix to Brief of Appellants Pryor

Sender Name: Ashley R Stalwick - Email: ashley@kinsellaw.com

A copy of this document has been emailed to the following addresses:

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howard@washingtonappeals.com

patricia@washingtonappeals.com

ashley@kinsellaw.com