

64198-1

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NO. 64198-1-I

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

KEN JACOBSON,

Appellant,

v.

WILLIAM C. COWIN and REBECCA NYBERG, husband and wife;
GEORGE CODDINGTON and KAY CODDINGTON, husband and wife;
and BCSCBN, INC., a Washington corporation,

Respondents.

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Appeal from the Superior Court for King County
Cause No. 07-2-35604-5 SEA

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

This is a case about a dreamer (appellant Ken Jacobson) with grandiose ideas for buying and developing a piece of property in Vantage, WA (“Vantage Bay property”) but who had no money to fulfill those dreams. He sold his right to purchase and develop the Vantage Bay property to respondents Bill Cowin and his company BCSCBN, Inc. in return for money to buy another piece of property nearby (“Motel 6 property”). Cowin loaned Jacobson a total of \$333,500 so he could buy the Motel 6 property.

Shortly thereafter, Jacobson and respondent George “Skip” Coddington signed a contract (“Term Outline”) with Cowin that contained terms outlining each party’s role and responsibilities in the development of the Vantage Bay property. BCSCBN ultimately purchased the Vantage Bay property for \$3M and began the development process. As the owner of the property, BCSCBN had complete control over the development. Jacobson and Coddington agreed to work on the Vantage Bay development as consultants to BCSCBN by way of their legal entities in return for monthly fees.

A dispute arose between Jacobson and Cowin as to the rights and obligations each of them had under the Term Outline, specifically but not

limited to whether BCSCBN had to continue paying Jacobson any further monthly fees.

Cowin and Coddington sued Jacobson to obtain a judicial determination of what the rights and obligations of the parties were under the Term Outline. Jacobson countersued Cowin and Coddington and sued BCSCBN seeking the same basic determination as well as money damages for alleged breaches of the Term Outline.

In late 2008 and 2009 the United States economy spun into an unprecedented recession that made conventional financing for such a real estate development very difficult, if not impossible to obtain and caused the second home market contemplated by the Vantage Bay development to virtually disappear. Cowin, as president of BCSCBN and exercising his right under the Term Outline, notified both Coddington and Jacobson of his determination that the project was no longer financially viable and requested that they repay their shares of development costs as they had agreed under the Term Outline. Coddington began negotiations with Cowin to repay but Jacobson refused.

A non jury trial before retired judge George Finkle, acting *pro tem*, began on July 13, 2009. Jacobson's attorney withdrew from representing him right before the trial started. Jacobson represented himself. After

listening to four days of testimony from eight different witnesses and considering over 150 exhibits, Judge Finkle rejected most of Jacobson's claims and contentions and ruled in favor of Cowin, Coddington and BCSCBN in extensive Findings of Fact and Conclusions of Law. Key points of the Court's rulings included: (1) BCSCNB had a right to stop the monthly payments to Jacobson; (2) Jacobson had to repay BCSCBN his share of the development costs incurred by BCSCBN; (3) Jacobson had to repay the Motel 6 loan within a reasonable time set by the Court; and (4) Jacobson had a right under the Term Outline to exercise a First Right of Refusal to buy from BCSCBN the Vantage Bay property and development rights within a reasonable time set by the Court.

Jacobson filed a motion for reconsideration that reargued certain points raised and overruled at trial but that also sought new and different relief, seeking to rewrite both the Term Outline and the Motel 6 note by adding new and sweeping terms not agreed to by the parties.

Jacobson's former attorney then reappeared at the last minute to argue Jacobson's motion. Judge Finkle refused to reconsider his rulings, denied Jacobson's motion and entered a declaratory judgment and a monetary judgment against Jacobson. Jacobson's attorney filed this appeal raising the same points rejected by Judge Finkle and seeking to set

aside parts of the Trial Court's adverse decision that are based on the court's discretionary rulings and substantial evidence.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Can an independent contractor relationship be terminated at the will of either party without cause? (Assignment of Error 1)
2. If cause was required to terminate the monthly payments to Jacobson, was there substantial evidence of such cause to support the Trial Court's unchallenged Findings of Fact 5.17(b), 5.29 and 5.32 and challenged Finding of Fact 5.30 that justify the entry of Conclusion of Law 5(a)? (Assignment of Error 1)
3. Was unchallenged Finding of Fact 5.33 that determined the amount of development costs incurred by BCSCBN supported by substantial evidence? (Assignments of Error 2 and 3)
4. Was it an abuse of discretion for the Trial Court to admit Exhibits 52 and 53 that set forth the indirect costs incurred in the development of the project and that were used in part as the basis for Finding of Fact 5.33? (Assignments of Error 2 and 3)
5. Was the amount of time determined by the Trial Court for Jacobson to exercise the First Right of Refusal reasonable under all the circumstances or did that determination constitute an abuse of discretion? (Assignment of Error 4)
6. Should the Trial Court have rewritten the Term Outline to insert a new term that required BCSCBN to sell the property and related rights before BCSCBN could recoup from Jacobson his 33% share of the development costs? (Assignments of Error 5, 6 and 7)

7. Should the Trial Court have rewritten the Motel 6 note to insert a new term that required Cowin to sign the short plat as a condition to Jacobson paying the note by the deadline set by the Court as a reasonable time for payment? (Assignment of Error 8)

III. COUNTER STATEMENT OF FACTS

Respondents do not take issue with the general recitation of facts by Appellant but believe the following additions, corrections and clarifications should be made. Respondents also refer the Court to the Trial Court's Findings of Fact and Conclusions of Law (Appendix E hereto) and to the Vantage Bay Timeline, Ex. 64 (Appendix A), that describes critical events with reference to dates and trial exhibits.

A. Substantive Underlying Facts

While the Vantage Bay property that is the subject of this litigation may be in a "prime" location near the town of Vantage south of I-90, it does not have access to the Columbia River and is arid desert land. *See Ex 2, 58.* Jacobson needed investors to purchase the Vantage Bay property because he had no financial resources of his own. *FF 5.3.* Investors were needed to provide the estimated \$15-20,000,000 in funding needed to purchase the property and pay for the expected development costs. *Id.*

Jacobson's proposals to Cowin during the fall of 2005 and early 2006 all had Jacobson controlling the development and having final say on

all of its aspects while contributing none of the capital or financial resources necessary for the development. *FF 5.5. Ex. 107, 110, 113, 114, 117.* Cowin repeatedly rejected Jacobson's proposals as to how the relationship among the parties should be structured. *FF 5.5.*

As part of his proposals Jacobson asked Cowin to provide the funding for Jacobson to purchase land just north of I-90 in the town of Vantage on which he planned to develop a Motel 6. *FF 5.7.* Jacobson envisioned the Motel 6 as his "cash cow" and the foundation for the financial security that had eluded him. *FF 5.7; 714RP 139; 715RP 62(3-19); 716RP 29(17-22).* Jacobson had secured the right to purchase the Motel 6 property and the franchise right to build a Motel 6 on the Motel 6 property provided he could obtain the financing to do so. Cowin and Coddington made it clear to Jacobson that there would be no financing of the Motel 6 project without first obtaining an assignment of Jacobson's rights in the Palelek PSA. *FF 5.7. Ex. 119, 120, 121.*

By February 2006 Jacobson's window to secure financing for purchase of the Motel 6 property was rapidly running out. To avoid losing the Motel 6 property, Jacobson assigned his interest in the Palelek PSA (without having yet secured Palelek's consent) to BCSCBN on February 23, 2006. *FF 5.8; Ex. 3 and 122.* On February 24, 2006 Cowin advanced

\$22,000 to Jacobson for his use in acquiring the Motel 6 property. *FF 5.9; Ex. 18.*

Jacobson then signed a promissory note to Cowin dated February 28, 2006, *Ex. 15*, together with a deed of trust dated March 3, 2006, *Ex. 17 and 127*, in return for another advance of \$237,500 from Cowin to close on the Motel 6 Property and pay the franchise Fee (“Motel 6 Loan”). *Ex. 18; FF 5.10 and 5.11.* Exhibit A to the deed of trust makes the loan expressly subject to the assignment of the Palalek PSA. *Ex. 17.*

On March 28, 2006, Jacobson made another proposal to Cowin and Coddington outlining his dream of what their proposed relationship should look like for development of the Vantage Bay property: a three-way partnership with equal participation and equal rights to lead the development. *Ex. 135 and 136.* The proposal was entitled “Vantage Bay LLC Partnership.” *Ex. 20 and 136; FF 5.13.*

Cowin rejected Jacobson’s idea outright. *FF 5.14; 713RP 148-149.* Cowin’s rejection was a reiteration of his position that there would be no partnership because Jacobson had no “skin in the game”, i.e., equity in the form of cash to contribute. *713RP 134-135; 714RP 148-149.* Cowin insisted that BCSCBN be the owner of the property and that it (along with Cowin) would provide the financing. *FF 5.14.* Both Jacobson and

Coddington would be paid consultants working for BCSCBN to further the development of the Vantage Bay property. *FF 5.14.*

Coddington modified Jacobson's proposal, *Ex. 20*, to reflect Cowin and Coddington's views. *FF 5.14; Ex. 59 (redline version).* The new document was called a "Term Outline." *Ex. 21 and 137; FF 5.15.* The meeting to negotiate and modify the terms of the Term Outline occurred on April 3, 2006 and consisted of 90 minutes of forceful negotiations and give and take. *FF 5.16.* Exhibit 60, attached hereto as Appendix D, shows the key terms of the Term Outline in a schematic format.

A critical part of the negotiated Term Outline was that both Jacobson and Coddington would contract with BCSCBN through their respective legal entities, not as individuals. Exhibit 61 (page 1) highlights the sections of the Term Outline that deal with this subject. *See also Argument, Section IV B below.*

Palelek consented to the Assignment of the Palelek PSA on or about April 4, 2006 and Jacobson and BCSCBN executed a new version of the Assignment with Palelek's signature on that same day. *Ex. 4 and 139; FF 5.18.* The Assignment contained no limitations or conditions as to how BCSCBN could develop the property, a point acknowledged by

Jacobson. 714RP 143(17)-144(6) and 716RP 50-51(discussing Ex. 3 which is identical to Ex. 4 except for the absence of the Palelek signature).

When Jacobson objected to the proposed Consulting Agreement sent to him in mid-October 2006, Cowin responded forcefully, "There will be no Partnership." Ex. 24; FF 5.22.

The work done to secure entitlements to the property was done primarily by Skip Coddington (through his entity) with only a small contribution by Jacobson. FF.5.32; Ex. 25-49. See Argument, Section IV B 2 below. Cowin repeatedly complained about Jacobson's lack of work and contribution to obtaining the entitlements and about Jacobson's failure to form a separate legal entity as required by the Term Outline. FF 5.30; Ex. 142, 146, 173, 182, 184. See Argument, Section IV B 2 below. After Cowin terminated payments to Jacobson in September 2007, Coddington continued to work on securing necessary governmental approvals until February, 2009 when BCSCBN stopped the monthly fee payments to his entity. 715RP 38-39, 86.

Cowin's letter of June 23, 2009 to Jacobson and Coddington advising them of his determination that the project was no longer financially viable, was based on the severe economic recession that caused the second home market contemplated by the Vantage Bay development to

virtually disappear making financing prohibitively difficult to obtain.. *FF 5.34 and 5.35.* Coddington had no objection to paying his share of the development costs and he and Cowin were negotiating the terms of repayment. *715RP 86(23)-87.*

BCSCBN purchased the Vantage Bay property. *Ex. 10.* Total land acquisition costs (including financing costs and property taxes) total \$3,686,222. *Ex. 63.*

B. Procedural Facts

Jacobson's attorney, the same one who now represents him on this appeal, filed a notice of intent to withdraw effective July 9, 2009, just four days before the start of the trial. *CP 87.* As a result, Jacobson represented himself at trial.

The trial was non-jury before retired King County Superior Court Judge George Finkle, acting *pro tem.* It lasted four days. *RP July 12 – July 16, 2009.* The Court heard the testimony of six witnesses for the Respondents and three for the Appellant. Respondents called consultant Ray Miller (*713RP 52-82*), attorney Jeff Slothower (*714RP 4-70*), attorney Mark Peterson (*714RP 70-109*), banker James Owens (*714 RP 110- 124*), William Cowin (*714RP 124-199 – 715RP 4-48*) and George Coddington (*715RP 51-112*). The Court allowed Ken Jacobson to testify by narrative,

716RP 11-88, and to call Bill Cowin as an adverse witness. 715RP 154-170. Jacobson also called Joyce Palelek as a witness. 715RP 115-148. The Court admitted more than 150 exhibits. CP 140-161.

At the conclusion of the trial the Court requested briefing on the question of whether it had the authority to set a reasonable due date for payment of the Motel 6 note in the absence of a specific date in the note and whether it had the authority to set a reasonable date for the exercise of the first right of refusal for Jacobson to buy the property, assuming that right was applicable. Respondents submitted a Post Trial Brief on these issues. *Exhibit B to Appellant's Motion to Supplement Record*. Jacobson responded to that Brief with emails to the Court but not to Respondents' counsel. *Exhibits C and D to Appellant's Motion to Supplement Record*.

The Trial Court entered Findings of Fact and Conclusions of Law on July 22, 2009 in favor of Respondents, CP 162-183. In CL 5(f) the Court set September 30, 2009 as the reasonable date for Jacobson to exercise the so-called First Right of Refusal to buy the property and development rights. In CL 5(c) the Court set June 30, 1010 as the reasonable date for Jacobson to pay the Motel 6 note.

Respondents noted a date for presentation of judgment on August 24, 2009. CP 184-221. Jacobson responded with a pro se motion for

reconsideration, *CP 224-228*, and then with a supplemental motion for reconsideration, *CP 239-241*. Because the Trial Court did not call for a response, Respondents did not respond. *See King County Local Rule 59(e)*.

Jacobson's attorney then reappeared on August 24, 2009, *CP 239-241*, the date set for the hearing on Jacobson's motions and the presentation of judgment. The Trial Court heard argument of Jacobson's counsel but denied Jacobson's motions. *824RP 21(8-9)*. At the Court's request, the parties modified the proposed judgment and the Declaratory Judgment in favor of Respondents was entered August 28, 2009. *CP 242-251*. Appellant filed a timely notice of appeal of the Declaratory Judgment and the Findings of Fact and Conclusions of Law. *CP 252-288*.

After Jacobson failed to exercise the First Right of Refusal within the required time, the Trial Court entered a Supplemental Judgment in favor of Respondents against Jacobson in the amount of \$ 342,536.04 to enforce section 4(f) of the Declaratory Judgment. *Exhibit A to Appellant's Motion to Supplement Record*. Jacobson filed a timely Amended Notice of Appeal from that Supplemental Judgment. *CP294-296*.

IV. ARGUMENT

A. Standards of Review

1. Conclusions of Law

On appeal from a bench trial, conclusions of law are reviewed de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

2. Findings of Fact

Unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Findings of fact are reviewed under the substantial evidence rule. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1950). Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Substantial evidence exists “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” King County v. Wn. State Boundary Review Bd., 122 Wn.2d 648, 675, 860 P.2d 1024 (1993).

When reviewing a trial court’s finding of fact for substantial evidence, the evidence is viewed in the light most favorable to the

prevailing party and the appellate court defers to the trier of fact on issues of witness credibility. *Lopez v. Reynoso*, 129 Wn. App. 165, 170, 118 P.3d 398 (2005). See also *Simpson v. Thorslund*, 151 Wn. App. 276, 287, 211 P.3d 469 (2009) (appellate court must defer to the trial court's decisions regarding conflicting evidence) citing *Weyerhauser v. Tacoma-Pierce County Health Dept.*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

3. Findings of Fact Based on Documents and Live Testimony

Although an appellate court is not necessarily bound by the trial court's findings of fact when based *solely* upon written or graphic evidence, *State v. Rowe*, 93 Wn.2d 277, 609 P.2d 1348 (1980), the court will follow the substantial evidence rule when the findings are based partly on documentary evidence and partly on live testimony. *Boeing v. SHARE*, 106 Wn.2d 212, 220-21, 721 P.2d 918 (1986) (“After reviewing the entire record, which includes a full day of live testimony, numerous affidavits, and approximately 100 photographs, we conclude substantial evidence exists to support the trial court's findings.”)

4. This Court Is Not Bound by Trial Court Labels

A finding of fact incorrectly labeled as a conclusion of law will be reviewed as a finding of fact and vice versa. *Willener v. Sweeting*, 107

Wn.2d 388, 394, 730 P.2d 45 (1986); Woodruff v. McClellan, 95 Wn.2d 394, 622 P.2d 1268 (1980).

5. Abuse of Discretion Standard

A reviewing court will find an abuse of discretion only where there is a clear showing that the discretion was manifestly unreasonable or was exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).* “A court’s decision is *manifestly unreasonable* if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on *untenable grounds* if the factual findings are unsupported by the record; it is based on *untenable reasons* if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (emphasis supplied).*

6. Admissibility of Evidence

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).*

7. Reconsideration or Reopening Case -- CR 59(g)

A decision regarding the reopening of a judgment is reviewed for abuse of discretion. *City of Seattle v. Pacific States Lumber Co.*, 166 Wn. 517, 532-33, 7 P.2d 967 (1932); *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002)(same – CR 59 motion for new trial).

8. Interpretation / Reformation of Contract

Jacobson asserts that courts can equitably adjust contracts and that their actions are subject to the abuse of discretion standard. *Brief of Appellant at page 20*. The cases he cites, *In re Riddell*, 138 Wn. App. 485, 491-921 57 P.3d 888 (2007), and *Niemann v. Vaughn Community Church*, 154 Wn.2d 887, 894, 568 P.2d 764 (1977) are inapplicable to this case. Those cases dealt with unique facts and applied the equitable deviation doctrine to charitable trusts.

Respondents dispute that the Trial Court did anything more than interpret the Term Outline using the standards for the context rule adopted and set forth in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (citation omitted):

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the

contract, and the reasonableness of respective interpretations advocated by the parties.

B. BCSCBN Had the Right to Terminate Monthly Fee Payments to Jacobson.

The primary issue before the Trial Court was the meaning and effect of certain provisions of the Term Outline agreed to by Cowin, Coddington and Jacobson. The Court interpreted that agreement by determining the parties' intent using the criteria set forth in the leading case of *Berg v. Hudesman*, *supra*. *See Conclusion of Law 4:*

The Term Outline signed by Cowin, Coddington and Jacobson is not a model of clarity. Because certain key provisions are unclear, I have had to consider the context in which the agreement was executed to determine the parties' intent. I have considered the testimony of the witnesses who testified for each side and has [sic] considered the subject matter and objective of the agreement, the circumstances surrounding its formation, the subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advocated by the parties, the statements made by the parties in preliminary negotiations, and the usage of trade and course of dealings.

The Term Outline provides for monthly payments to the entities of both Jacobson and Coddington. *See Ex.61 (page 1) that highlights the provisions related to monthly payments.* But the Term Outline provides no end date for the payments. *Id.*

The Trial Court entered Finding of Fact 5.30 that states:

From April 2006 through August 2007, BCSCBN, Inc. made fee payments of \$6,500 per month to Jacobson totaling \$110,500. BCSCBN stopped making such payment in August 2007 because at that time the development was largely “on hold” due to the delay in obtaining necessary entitlements and also because Cowin was dissatisfied with Jacobson’s performance of the tasks he was entrusted to perform.” See *Defendant Exhibits 142, 146, 173, 183, 184.*

The Court then entered Conclusion of Law 5(a):

Monthly Fee. Jacobson has received all monthly payments that he is entitled to receive. His services were far less than the parties had contemplated in the Term Outline, he did not form the independent entity as required, and Cowin reasonably terminated his services. No further amount is due.

Jacobson argues that this conclusion of law is erroneous as a matter of law because there was no substantial evidence to support a finding of “cause” to support the termination, *Brief of Appellant at page 28*, and specifically that Finding of Fact 5.30 is not supported by substantial evidence and does not support this legal conclusion, *Brief of Appellant at page 22*.

Jacobson is wrong for two reasons: (1) he assumes “cause” was required to terminate the payments; and (2) his argument glosses over or does not address at all the very substantial evidence presented at trial on the context of the Term Outline agreement, the intent of the parties in

providing the monthly payment, Jacobson's conflicting and unreasonable interpretations of the provisions of the Term Outline dealing with the monthly payment, Jacobson's responsibilities in return for the monthly payment, and his failure to perform those responsibilities. In all, this evidence is more than substantial to support both Finding of Fact 5.30 and the other Findings of Fact to which no error is assigned, all of which justify the entry of Conclusion of Law 5(a).

1. "Cause" to terminate the monthly payments is not required.

Jacobson concedes that his relationship with BCSCBN was as an independent contractor. *Brief of Appellant at page 22*. He then argues this relationship should be analogized to an employment relationship so that he can avail himself of *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984) and its progeny, which hold that an employment contract, otherwise terminable at will, is terminable only for cause if: (1) there is an express or implied agreement to that effect or (2) the employee gives consideration in addition to the contemplated service. (emphasis added).

Jacobson makes his analogy without citation to authority or rationalization. He does so because there appear to be no cases in Washington that impose a "termination for cause" requirement on a non-

employment contract of indefinite duration. In fact, the law is just the opposite. When a contract for continuing performance fails to specify the intended duration, it is construed as being terminable at will by either party after a reasonable time and reasonable notice. *See Cascade Auto Glass, Inc. v. Progressive Casualty Insurance Company*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006). That law applies. Jacobson received \$110,500 in total compensation over a period of 17 months. 714RP 198; Ex. 64 (items 11 and 24). Cowin notified Jacobson that the monthly payments would be stopped unless Jacobson formed an independent legal entity which he failed to do. *See Ex. 146* (“no more checks until you are an entity”) and discussion thereof at 714RP 192(25)-194(14) which form the basis for FF 5.29 and CL 5(a) (“...Cowin reasonably terminated [Jacobson’s] services.”)

Even if an independent contractor relationship should be treated as an employment relationship, there is no basis in this case to apply the “for cause” exception to the termination at will doctrine. Jacobson’s reliance on *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 12109 (1991) does not support his argument. In that case there was evidence that, in addition to his contemplated service, a newly hired employee provided substantial additional consideration in the form of a monetary

investment in and a loan to the business of his employer and divestment of an interest in a partnership. The court held that the evidence at trial, although conflicting, was sufficient to support a jury verdict based on a finding that by making these contributions the employee “purchased a job” rather than merely purchased a minority interest in a closely held corporation and that therefore termination of his employment must be based on cause. *Id. at 505-506.* The court said “[t]he relevant inquiry is whether, in the circumstances of the particular case, the employee’s decision to [provide additional consideration] is the type of decision that would ordinarily be made in the absence of something more than an offer of at-will employment. Further, the consideration must be an integral part of the employment agreement . . .” *Id. at 506 (emphasis added; citations omitted).*

Here Jacobson argues, without any citation to the record, that the additional consideration offered by him was the “assignment to BCSCBN of the Palelek PSA which he had worked so many years to put together.” *Brief of Appellant at page 23.* Jacobson has not, however, satisfied the “relevant inquiry” required by *Malarkey*. First, he offers no explanation or citation to the record to demonstrate that the assignment was an “integral part of the [independent contractor] agreement.” Furthermore,

the unchallenged findings of fact that detail the consideration provided for the PSA and the overall context of how the Term Outline came together refute Jacobson's contention entirely. The primary consideration for the assignment was to enable Jacobson to obtain financing for the Vantage Bay development and to obtain the funds for his purchase of the Motel 6 property and not to obtain a position of employment terminable only for cause. *See Findings of Fact:*

5.3 (Jacobson needed investors to buy the property and fund the development because he had no financial resources of his own);

5.6 (assignment of the PSA was to obtain financing for the project);

5.7 (additional consideration for the assignment was Jacobson's request for funding of a loan to buy the Motel 6 property);

5.10 (note for the Motel 6 loan was expressly conditioned and subject to the assignment of the Palelek PSA);

5.14 (rejection of Jacobson's proposed partnership idea; substitution of paid consultant role instead);

5.16 (negotiation of the Term Outline; no partnership; only consulting relationship);

5.17b (provisions of Term Outline dealing with consulting relationship); and

5.20, 5.21 and 5.22 (proposed Consulting Agreement following Term Outline; Jacobson rejection; Cowin response).

In short, there is no legal or factual basis for finding that BCSCBN must have “cause” before it could terminate the monthly payments to Jacobson.

2. **If “cause” to terminate the monthly payments is required, there is substantial evidence in the record to support the Trial Court’s Findings of Fact and to justify the entry of Conclusion of Law 5(a).**

Jacobson’s argument on “cause” addresses only Finding of Fact 5.30 but ignores and does not assign error to other findings of fact, namely, 5.17(b), 5.29 and 5.32. Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp., supra*. RAP 103(g) requires separate assignments of error for each finding of fact that is being challenged on appeal. All of these Findings of Fact and FF 5.30 are supported by substantial evidence that justifies the entry of Conclusion of Law 5(a).

Finding of Fact 5.17(b) states at the end:

Although no end date for the payment of the monthly fees is specified, the parties intended that such fees would continue so long as work was productive and was satisfactory to Cowin.

Finding of Fact 29 states:

Jacobson did not form a separate legal entity for use in connection with the Vantage Bay project, instead operating under the d/b/a ‘Platypus Creative.’ Cowin objected to the lack of a legal entity because he did [sic; missing the word “not”] want to be responsible

to or for Jacobson as an employee. *Defendant Exhibit 146*.

Finding of Fact 5.32 states in part:

The vast majority of this work [efforts of Cowin and Coddington to obtain entitlements, water rights and a sewer treatment plan, after April 3, 2006 and into 2007] was coordinated by Coddington; Jacobson did little productive or substantive work on entitlements or otherwise after April 3, 2006.

The following testimony supports *FF 5.30 and 5.17(b), 5.29 and 5.32*.

a. Testimony of Bill Cowin

Bill Cowin testified at length about the genesis of the relationship between himself, Ken Jacobson and Skip Coddington and explained how he was adamant that there not be a partnership, as advanced by Jacobson, but rather a consulting relationship. *714RP 155(15)–157(23)*. The reason Cowin testified that he wanted to limit his exposure to potential liability brought about by a person who wanted to be a partner or who could be considered an employee but who did not contribute any financing to the project. *Id.* For that reason he wanted a separate entity with a separate legal identity, not merely a person operating as a business. *Id.* He made that point “perfectly clear” to Jacobson. *714RP 157(19-23)*.

Cowin's views carried the day during the negotiations on the Term Outline and that is the reason why that document repeatedly refers to Ken Jacobson's "entity." See, for example, "Ken Jacobson through a to be formed entity will be retained ... Each firm will work ... Ken Jacobson entity will receive a fee Ken Jacobson entity will receive a leased 2007 GMC XL Denali" These provisions are highlighted on *Ex. 61, pages 1 and 5*.

Cowin then explained the provisions of the Term Outline that deal with both consultants (Jacobson and Coddington) and the work they would perform and the fees they would receive through their respective entities. *714RP 159-162*.

Although no specific end date to the fees was discussed during the negotiations, it was Cowin's intent that the fee not last indefinitely or act like an annuity. *714RP 164*. Most importantly, Cowin tied the fee to performance. *714RP 165*. As Cowin explained,

If he wasn't performing some quantifiable work for the corporation, then it didn't seem where he would be getting paid. When I get up in the morning and go to work, no one pays me for doing nothing. *714RP 165(17-21)*.

Sometime after all three parties signed the Term Outline, Cowin proposed a finalized document for Jacobson to sign. Because of the

importance of the consulting arrangement, it was labeled “Consulting Agreement.” Jacobson refused to sign, again pushing his view that there should be a partnership agreement instead. Cowin retorted, “There will be no partnership.” *714RP 180-185.*

Under the Term Outline, Jacobson’s entity was to set up a website and work with Grant County PUD and other Public entities to obtain entitlements. *Ex. 61, page 1.* Although Jacobson did establish a web site, he failed to perform any meaningful or significant work on obtaining entitlements or necessary government approvals. *714RP 186 – 190.* Skip Coddington, the other consultant, performed ninety-five percent of this work with Jacobson contributing “a little bit.” *714RP 186(3-16).*

Cowin was not satisfied with Jacobson’s work during the period of April 2006 to August 2007. *714RP 190-198.* According to Cowin, Jacobson failed to provide any of the required biweekly reports, *714RP 191(10-17)* and failed to perform other tasks requested of him, *714RP 192(10-15).* “[H]e stonewalled me. He did this routinely. He’d stonewall me, would not follow directions, wouldn’t follow requests to things for me.” *714RP196(11-22).* Most importantly for Cowin, Jacobson failed to form the separate entity as required by the Term Outline. *714RP 193(25)–194(14).*

Illustrative of these failings and Cowin's dissatisfaction were the exhibits that are referenced in Finding of Fact 5.30. *See discussion of Exhibits 142, 146, 182 and 184 at 714RP 191-196.* But as evidenced by Cowin's testimony, they are not the only support for that Finding.

Jacobson did very little on cross-examination to change Cowin's views. Cowin repeated that Skip did most of the work on obtaining entitlements and Jacobson did only very little. *715RP 30-31.*

When Jacobson called Cowin as an adverse witness, Cowin reiterated his views of Jacobson's limited work, *715RP 155-159.* While acknowledging that Jacobson provided one introduction of a government official to Coddington that Jacobson tried to claim was significant, Cowin countered, "I could hardly classify an introduction as months and hours and weeks and hundreds of hours -- there's 160 hours work hours in a month -- and an introduction, a meeting here and there, being full time working on the project which you were drawing a salary for." *715RP 159(1-5).*

b. Testimony of George "Skip" Coddington

Coddington's testimony supports Cowin's testimony as to the limited work provided by Jacobson versus the substantial work provided

by Coddington in obtaining entitlements and government approvals necessary for the development. *See 715RP 51-87, especially 80-86.*

Coddington also shed light on the negotiation of the “entity” that Cowin required by testifying as to the reasons Cowin expressed for wanting a separate entity and Jacobson’s agreement to that and apparent understanding of what Cowin was saying. *715RP 70-71.*

c. Testimony of other witnesses

Testimony of other witnesses corroborates Cowin’s and Coddington’s testimony.

Ray Miller, the branch manager of the civil engineering firm hired by Cowin’s company, *713RP 53*, didn’t know Jacobson, never met him and never talked to him. *713 RP 56(17-22).*

Mark Peterson is the Wenatchee water rights attorney, *714RP 70-72*, who had “consistent and persistent” contact with Skip Coddington to obtain water rights for the Vantage Bay property. *714RP 81.* Skip found the critical water right necessary for the Vantage Bay development. *714RP 82-85.* Peterson had never met nor had any dealings with Jacobson; in fact, he was “unsure of his name until today.” *714RP 85(18-22).*

James Owens, assistant vice president for Homestreet Bank, 714RP 110, was contacted by Skip regarding possible funding by the bank for the development. 714RP 114-115. He did not know Jacobson. 714RP 112(12-13).

d. Testimony of Ken Jacobson

Alone against this collective testimony stands the testimony of Ken Jacobson. On direct examination the Court allowed him to present a narrative of his position. 716RP 4-31. He hardly touched on the subject of the consulting agreement other than to say that there was no predetermined plan or budget to work from, 716RP18, and to claim that he “was never given any marching orders. And I have, constantly asked Bill what he wanted me to do, and he, constantly says, well you’re not doing anything I want you to do.” 716RP 21(23)–22(1). He then claimed he did not realize that the new entity mentioned in the Term Outline meant an entity he was to form. 716RP 22(2-9). Contrary to the testimony of Cowin and Coddington, he claimed he set Skip up with most of the fundamental entitlement[s] and provided key introductions and provided the momentum of the project that was proven out by the quickness of getting the preliminary plat approval. 716RP 23(1-9).

The exhibits listed in Jacobson's Appeal Brief at pages 13-14 were not discussed or even mentioned by Jacobson during his testimony.

On cross examination, Jacobson's testimony on the subject of the monthly fee was not only contrary to the testimony of Cowin and Coddington, it was contrary to the explicit terms of the Term Outline and was internally inconsistent and illogical. *716RP 69(12)-77(2)*. For instance, he testified that the payments were to go on "forever" but then modified that to say they were to last "until the last lot was sold or by mutual agreement" even while conceding that the Term Outline did not contain any such provision. *716RP 69(16)-70(14)*. Although he didn't recall any specific discussion about the fee being paid for work provided, he did acknowledge that the Term Outline prepared by Coddington "identified" that requirement. *716RP 72(17-24); 71(1-8)*.

On the subject of the entity to be formed, his testimony is illogical, inconsistent and bewildering. *716RP 73(5)-77(2)*. He first said he thought the entity to be formed did not refer to the entity he was to form but rather to "Vantage Bay LLC", *716RP 74(23-25)*, an entity that is not even mentioned in the Term Outline. In answer to the question – why the Term Outline says the Ken Jacobson entity will receive a fee of \$6500 – he replied with gibberish: "That's a word that was stuck in there in some

divisive manner.” 716RP 74(22-23). While conceding that Cowin wanted him to form something more than a DBA, 716RP 75(22)-76(12), he said he did not understand Cowin’s reason for why he wanted a separate legal entity. 716RP 76(20)-77(2).

e. Conclusion

In the face of Jacobson’s contradictory and illogical testimony rebutted by the clear and convincing testimony of the other witnesses in the trial, it is no surprise that the Trial Court weighed the testimony, assessed credibility and came to the conclusion that Jacobson failed to abide by the monthly fee provisions of the Term Outline and that Cowin had ample justification to terminate the monthly fee payments when he did. As set forth above, substantial evidence supports the Findings of Facts entered by the Trial Court and those Findings justify the entry of Conclusion of Law 5(a) upholding the termination of the monthly payments to Jacobson. Jacobson’s request for reversal of that Conclusion of Law and for entry of a judgment in his favor should be denied in its entirety.

C. The Trial Court Did Not Err in Entering Unchallenged Finding of Fact 5.33 That Determines the Amount of the Development Costs Incurred to Date. Substantial Evidence Exists to Support Finding of Fact 5.33 and It Was Not an Abuse of Discretion to Admit the Supporting Exhibits.

Finding of Fact 5.33 states:

The net cost of development incurred by Cowin to date totals \$1,041,613 consisting of Work in Progress (“WIP”) costs of \$736,753, Plaintiff Exhibits 50 and 51, and Expenses of \$312,860, Plaintiff Exhibits 52 and 53. Cowin’s testimony substantiated such costs. (Coddington was overpaid \$8000 for the fees due him under the Term Outline, which must be deducted to arrive at the net cost.)

While Jacobson has failed to assign any specific error to this finding as required by RAP 10.3(g), he nevertheless argues the Trial Court erred in determining the dollar amount of development costs that were actually expended by BCSCBN and properly allocable to Jacobson under the Term Outline (Assignment of Error 3) and further argues the Trial Court’s determination of recoverable development costs resulted in an “excessive” dollar amount which Jacobson was required to pay (Assignment of Error 4).

Jacobson objects to three items that are part of expenses summarized on Exhibit 50 and supported by Exhibit 51: accrued shareholder loan interest, and vehicle lease and insurance payments. The objection is that these items are not expenses actually paid to a third party as “contemplated” by the Term Outline and that the costs are excessive. Jacobson’s arguments misapply the applicable standards of review, ignore

or misstate trial testimony and objections, and read provisions into the Term Outline that are simply not present.

The premise of Jacobson's argument is that although the Term Outline does not define "all costs incurred or expended," the Term Outline somehow "clearly contemplated" that such costs must **actually be paid by BCSCBN to third parties** in order to be subject to "reimbursement." *Brief of Appellant at p. 29 (emphasis in Brief)*. Jacobson provides no testimony, authority or citation to the Term Outline to support that contention. Furthermore, the contention is not supported by the common definition of costs and is directly contrary to the only testimony on the subject.

Courts must read each contract as an average person would read it without giving it strained or forced meaning. *Mid-Century Insurance Co. v. Henault*, 128 Wn.2d 207, 905 P.2d 379 (1995). This includes looking at the contract as a reasonable person would in the same circumstances that existed when the parties to the contract entered into it. The words used in a contract should be given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005). "Ordinary meaning" is considered to be the dictionary

definition of the word. *Bellevue School District No. 405 v. Bentley*, 38 Wn. App. 152, 684 P.2d 793 (1984)

The dictionary definition of the noun “cost” is: the amount of money or the like asked or paid for a thing; price; the amount spent in producing or manufacturing a commodity; the amount paid for something by a dealer, contractor, etc.; the amount of money, time, effort, etc. required to achieve an end. *Webster’ New Twentieth Century Dictionary Unabridged, Second Edition*. “Expend” means: to disburse; to pay out; to spend. *Id.* “Incur” means: to come into, acquire, or meet with (something undesirable), especially through one’s own actions; to bring upon oneself. *Id.* These definitions do not require payment to third parties. The definitions are broad and do not include such a limitation. Jacobson’s argument is an attempt to add a condition to the Term Outline that is not there. Such attempts are contrary to well established legal authority. *See cases cited below, Argument, Section IV E.*

Mr. Cowin testified about the costs BCSCBN incurred in the development of the Vantage Bay project. *715RP 8–11*. The costs are divided into two categories: Work in Progress (“WIP”) summarized on Exhibit 50 and supported by backup invoices and checks contained in Exhibit 51 for amounts paid to “the people ... hired to perform the

different entitlements getting the conditions done that we needed done” *715RP 8(11-13)*; and separate [indirect] expenses for the project broken out from WIP as required by generally accepted accounting principles (“GAAP”) for items such as finance charges, insurance, printing and reproduction, legal fees, accounting fees and real estate taxes summarized on Exhibit 52 with the back up provided in Exhibit 53, *715RP 9(17)–10(15)*. Specifically mentioned by Cowin were the vehicle lease and insurance payments challenged by Jacobson. *RP715 10(16-22)*. All of these payments were made by Cowin or BCSCBN for expenses related to the development. *RP 715 10(23)–11(4)*.

Although Jacobson objected to the admission of Exhibits 50 - 53, the only grounds he stated were that there were many [unspecified] checks written without invoices and that the exhibits should be subject to an independent audit to ferret out [unspecified] claimed commingling of costs with other projects. *715RP 12(10)–13(6)*. The Trial Court denied the request for an audit since the parties were already in trial, *715RP 13(7-9); 13(23)–14(2)*, but emphasized to Jacobson that he would “have both an opportunity to cross-examine Mr. Cowin, to testify yourself, [and] to present other evidence that touches on the points you’ve made.” *715RP*

13(11-14). The Court said it would defer its decision on admissibility until after Jacobson's cross examination. *715RP 14(16-18)*.

Jacobson had every opportunity to cross examine Cowin as to these exhibits and expenses but chose not to do so. *See 715RP 30 -37*. On limited re-cross examination, he inquired only briefly about checks written to Coddington. *715RP 41*. Jacobson had another opportunity to examine Cowin when he called Cowin as an adverse witness as part of Jacobson's case, but again, Jacobson did not ask any questions about this subject. *See 716RP 11-31*.

The Court deferred the issue of admissibility of exhibits until the end of the trial. Cowin moved again to admit Exhibits 50–53 (and other exhibits). *716RP 90–93*. In response, Jacobson merely reiterated his “primary concern” about an apparent mixing of other projects charged to Vantage Bay in Exhibits 52 and 51. *716RP 93(20-24)*. The Trial Court admitted Exhibits 50 -53 noting that any objections as to completeness or accuracy went to weight but not admissibility. *716RP 94(8-13)*.

After trial, for the first time, Jacobson raised the points he is making before this court. *See Jacobson's Response Re: Form of Judgment and Supplemental Motion for Reconsideration, CP 232-32 at pages 2-6*. The Trial Court did not request any responsive briefing from Defendants

and could not grant the motion without obtaining such briefing. *King County Local Rule 59(e)*. Nevertheless the Trial Court heard Jacobson's attorney's arguments on those points at the hearing on presentation of the findings, conclusions and judgment. *824RP 10-12 and 24-25*. Jacobson's attorney argued then, as he has argued in his appellate brief, both without citation of any authority, that the lease and insurance payments were excessive. *Brief of Appellant, page 32; 824RP 12, 24*. After listening to Jacobson's counsel's arguments, the Trial Court did not change its trial ruling. *824RP 23(22)–24(2);25(8-9)* (“I understand your arguments and as I stated, I’m ruling adversely.”)

Admission of exhibits at trial is judged by the abuse of discretion standard. Under the facts set forth above, that standard has not been met. The same standard is applied to the review of a trial court's decision on a motion for new trial or reconsideration. These facts also establish substantial evidence to support Finding of Fact 5.33. The Trial Court did not err in admitting Exhibits 52 and 53 and in entering unchallenged Finding of Fact 5.33. There is no reason to reverse and remand with instructions to delete the accrued interest, lease and insurance amounts from the amount Jacobson owes Cowin.

D. The Amount of Time Granted by the Trial Court to Jacobson to Exercise the First Right of Refusal Under the Term Outline Was Reasonable and Was Not an Abuse of Discretion.

The so-called “First Right of Refusal” was handwritten into the Term Outline, *Ex. 21*, at the bottom of the first page. It reads:

Ken Jacobson will retain a first right of refusal to re-purchase from BCSCBN, Inc. the rights to the Vantage Bay property, to include payment of all cost of project to date, plus cost of Motel 6 paid by BCSCBN, Inc. to Jacobson.

At trial, Cowin and Coddington maintained that this right was intended to apply only if Cowin determined at any time during the entitlement process that the project ceased to be viable. *715RP 75-77*. That was because the handwritten First Right of Refusal provision was inserted during negotiations following discussion of the immediately preceding printed sentence that reads:

At any time during the entitlement process that this project ceases to be viable in Bill Cowin’s sole discretion, the [2007 GMC XL Denali] vehicle will immediately be returned to the Lessor in good condition.

Emphasis added.

Jacobson disagreed and maintained that his first right of refusal applied at any time that Cowin determined the project to be not financially

viable, a right Cowin had as set forth in the last printed section of the Term Outline on page 2. 716RP 77(14)-79.

Having heard the testimony and having applied the context rule of contract interpretation as mandated by Berg v. Hudesman, see Conclusion of Law 4, the Trial Court determined that the right was unconditional and it entered Conclusion of Law 5(f) that allowed Jacobson to exercise that right. Because the Term Outline did not specify a time period for the exercise of that right, the Trial Court asked for briefing on what the time period should be. Jacobson did not submit any briefing on this subject. Respondents' Post Trial Brief discussed the following authority. See Exhibit B to Appellant's Motion to Supplement Record.

When no time of performance is specifically agreed upon, a reasonable time for performance, under the circumstances, will be presumed as intended by the parties to the contract. Robinson v. Davis, 158 Wash. 556, 559, 291 P. 711, 713 (1930). See also Noord v. Downs, 51 Wn.2d 611, 614, 320 P.2d 63 (1958); Foelkner v. Perkins, 197 Wash. 462, 466, 85 P.2d 1095 (1938). What constitutes a reasonable time is a question of fact dependent upon the subject matter of the contract, the situation of the parties, their intention and the circumstances attending performance. Spahn v. Pierce County Medical Bureau, Inc., 7 Wn. App.

718, 502 P.2d 1029 (1972). See also Vance v. Mutual Gold Corp., 6 Wn.2d 466, 108 P.2d 789 (1940); Brower Co. v. Garrison, 2 Wn. App. 424, 427-429, 468 P.2d 469 (1970).

The Trial Court agreed with Respondents and entered Conclusion of Law 5(f) that cites the first three of these cases and sets forth the Court's reasoning and basis for selecting a deadline of September 30, 2009 for Jacobson to exercise the right.

Jacobson does not contest the right of the court to set a reasonable time. He objects only to the length of time provided, contending that the September 30, 2009 allowed him only 36 days which he says was "unreasonable" and an abuse of discretion. He counts from the date of entry of the Declaratory Judgment that repeated CL 5(f). But the Findings of Fact and Conclusions of Law were filed on July 22, 2009, almost a month earlier, giving Jacobson 70 days to exercise this right. And Jacobson himself only requested a period of time until January 31, 2010. *716RP 31(9-13)*. The Trial Court's determination was almost a half way point between the zero days argued by Respondents and the 192 days (in effect) advocated by Jacobson.

Jacobson also contends that the Trial Court did not specify the circumstances on which it relied in selecting the time. But CL 5(f) does

precisely that and it is based on the Trial Court's consideration of all the evidence it heard at trial and the post trial briefing. That Conclusion of Law reads in part:

... I believe that a much shorter time for exercise is appropriate than in the case of the Motel 6 loan discussed above. One frame of reference is suggested by the PSA that allowed Jacobson the first right to purchase Palelek's remaining 17 acres [discussed in Plaintiffs' Post Trial Brief at pp. 10-11]. I do not believe that the property, and the final determination of the central issues in this proceeding, should effectively be in suspension for more than a very limited period of time to permit Jacobson to attempt to exercise his first right of refusal.

The Trial Court did not abuse its discretion in selecting the date of September 30, 2009 as a reasonable time for performance. It was within the range of acceptable choices given the facts of the case. There is no basis for reversing that determination on appeal.

E. The Trial Court Did Not Abuse Its Discretion by Declining to Add a Term to the Term Outline Directing BCSCBN to Sell the Vantage Bay Property.

Jacobson concedes that Cowin has the right under the Term Outline to determine the project to be not viable and has the further right to seek reimbursement of costs incurred in the development from both Jacobson and Coddington. He does not object to the Trial Court's

conclusion that Cowin's determination was supported by substantial evidence and was reasonable. *Conclusion of Law 5(b)*.

Nonetheless, Jacobson argues that the Trial Court abused its discretion by failing to re-write the Term Outline as agreed by the parties. *Brief of Appellant at page 42*. He says that the Trial Court's failure to do so was unreasonable and inequitable. *Id.* He now wants this court to insert an entirely new provision into the Term Outline -- one with sweeping scope that was never discussed or negotiated by the parties -- that requires BCSCBN, as part of Cowin's right to declare the project not viable, to sell the property and related rights that it owns and apply the proceeds to reimbursement of costs recoverable under the Term Outline before it is allowed to seek any judgment of reimbursement from Jacobson. *Id.* Jacobson cites no authority that allows or requires the court to do so, and Washington law does not support Jacobson's position.

Interpretation of a contract by the reviewing court must be based upon the intent of the parties as reflected in the language of the agreement. *Kinne v. Kinne*, 82 Wn.2d 360, 362, 510 P.2d 814 (1973). The court may not add to the terms of the agreement or impose obligations that did not previously exist. *King v. Bilsland*, 45 Wn. App. 797, 800-801, 727 P.2d 694, 697 (1986); *In re Marriage of Mudgett*, 41 Wn. App. 337, 341, 704

P.2d 169 (1985). Nor can a court make a contract for the parties based upon general considerations of abstract justice. *Wagner v. Wagner*, 95 *Wn.2d 94, 104, 621 P.2d 1279 (1980)*.

In effect, the Trial Court followed this authority. Its interpretation of the Term Outline was consistent with the standards enunciated in *Berg v. Hudesman*. *See Supra*, at page 16. The Trial Court did not abuse its discretion by refusing to rewrite the Term Outline agreement or in failing to find implied terms that were not written into the Term Outline.

Furthermore, it would be grossly inequitable to require BCSCBN to sell the property under the current economic conditions, *see FF 5.34 and 5.35*, and face a possible, if not probable, loss on the substantial investment that BCSCBN, and only BCSCBN, has made in purchasing the Vantage Bay property. *See FF 5.25 and 5.26. 249*). At trial that amount expended to purchase the Vantage Bay property was calculated to be \$3,686,222 (including finance charges and property taxes). *Ex. 63*. That amount includes the \$1,500,000 that BCSCBN borrowed to fund the down payment on the purchase price. *See Ex. 12 (promissory note to Karl Hagen)*. That promissory note has not been repaid and Cowin and his wife are personally liable on the note. *Id.* Development costs, as

calculated by the Trial Court in the Declaratory Judgment, total \$1,041,641. *CP 245.*

The likelihood of BCSCBN selling the Vantage Bay Property at this time to generate sufficient proceeds to recapture the \$3.7M in acquisition costs, much less putting a dent in the \$1.0M of development costs is extraordinarily remote. Jacobson's absurd proposed term would require BCSCBN to now sell the Vantage Bay property for a certain loss that it alone would bear. This proposed term is but another example of Jacobson's preposterous one way street proposals that were rejected time and time again by Cowin before the Term Outline was signed.

Taken to its logical conclusion, Jacobson's argument, if accepted by this Court, would impose severe financial harm on the only person and his company who put any money at risk into this venture based on a term that was never bargained for or agreed to. By comparison, Jacobson has not contributed one cent to the purchase price.

There is no basis for this Court to overturn the Trial Court's decision and no legal or equitable justification for this court to add an entirely new provision that was never discussed, never negotiated and never agreed upon by the parties. The Trial Court did not abuse its discretion and Jacobson's requested relief should be denied.

F. The Trial Court Did Not Abuse Its Discretion by Denying Jacobson's Request to Add an Additional Term to the Motel 6 Note.

The Trial Court set June 30, 2010 as a reasonable date for payment of the Motel 6 Note by Jacobson. Both parties and the Trial Court were operating on the premise that the Motel 6 Note, *Ex. 124*, did not contain a specific due date for payment but instead contained methods of repayment which were based on future events that had not occurred and were not likely to occur in the near future. *See FF 5.10, citing Ex. 124, Exhibit C, and CL 5(c); Plaintiff's Post Trial Brief.*

Jacobson does not take issue "in the abstract" with the date set by the Trial Court but argues the date was unreasonable because of the Court's failure to impose a condition not set forth in the Motel 6 Note, namely, requiring Cowin to sign the short plat mylars, "a condition to recording the short plat and creating legally salable lots." *Brief of Appellant at page 43.*

It is wrong for courts to impose terms not agreed to by the parties. *See cases cited in section above.* That reason alone is sufficient to deny Jacobson's requested relief. Further, Jacobson cites no legal authority for the proposition that the short plat must be recorded before the lots can become "legally salable." Nor has he cited any evidence that with a

recorded short plat Jacobson would have a better opportunity to sell or lease the property. His testimony at trial was that the prospects of selling even short platted parcels were “questionable.” 716RP 56-57.

Jacobson’s request that the Trial Court direct Cowin to sign the mylars came to the Trial Court’s attention only in Jacobson’s email response to Plaintiff’s Post Trial Brief, Exhibits C and D to Appellant’s Motion to Supplement Record. Exhibits C and D should have been stricken from the record or should be given limited weight in the absence of proof that they were ever served on Respondents. *See Notation Ruling of Commissioner James Verellen 4/7/10 on Appellant’s Motion to Supplement Record.*

Jacobson has not presented any compelling argument to demonstrate that the Trial Court abused its discretion by refusing to impose the condition that Jacobson seeks. There is no basis for overturning the Court’s conclusion that Jacobson has until June 30, 2010 to pay the Motel 6 Note.

VI. CONCLUSION

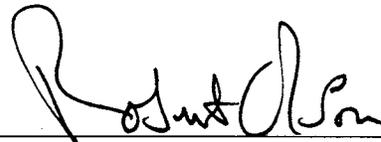
This court should not reverse the Findings of Fact and Conclusions of Law and the Judgments entered by the Trial Court. The Findings are supported by substantial evidence and the Court’s rulings that support the

Findings, Conclusions and Judgments are not based on any abuse of discretion. The Trial Court's decision should be affirmed in all respects.

Dated this 26th day of April, 2010.

Respectfully submitted,

SCHIFFRIN OLSON SCHLEMLEIN
& HOPKINS, P.L.L.C.

A handwritten signature in black ink, appearing to read "Robert Olson", written over a horizontal line.

Robert L. Olson, WSBA # 05496
1601 Fifth Avenue, Suite 2500
Seattle, Washington 98101
(206) 448-8100
Attorneys for Respondents

VI. APPENDIX

- A. Vantage Bay Timeline (Exhibit 64)**
- B. Redline Version of Term Outline (Exhibit 59)**
- C. Term Outline (Exhibit 21 and Exhibit 137)**
- D. Vantage Bay Project
– Relationship of Parties (Exhibit 60)**
- E. Findings of Fact and Conclusions of Law**

Appendix A

Vantage Bay Timeline (Exhibit 64)

Vantage Bay Timeline

Event	Date	Exhibit
1 PSA for Vantage Bay - Palelek to Jacobson	5/27/2005	2, 100
2 Jacobson Closing Deadline for Motel 6 property purchase	2/24/2006	Jacobson Trial Brief
3 Cowin advances Jacobson \$22,000 for Motel 6	2/24/2006	18
4 Assignment of Vantage Bay PSA from Jacobson to BCSCBN	2/24/2006	3, 122
5 Promissory Note from Jacobson to Cowin for Motel 6 Property	2/28/2006	15, 124
6 Cowin Advances Jacobson \$237,500 on Motel 6 Loan	2/28/2006	18
7 Jacobson proposal "Vantage Bay LLC Partnership Agreement"	3/28/2006	20, 136
8 Term Outline	4/3/2006	21, 127
9 Assignment of Vantage Bay PSA with Palelek Consent	4/4/2006	4, 139
10 PSA Amendment Extends End of Feasibility Period from 6/30/06 to 12/29/06	4/25/2006	5
11 Monthly Payments to Jacobson start	April, 2006	51
12 Archaeological Survey for BCSCBN by NW Geocultural Consulting	7/1/2006	44
13 Applications Filed with DOE to Change/Transfer Water Rights	8/18/2006	28, 34
14 HCWL Wastewater Management Preliminary Analysis Final Report	8/24/2006	39
15 Proposed Consulting Agreement, Cowin to Jacobson	10/22/2006	22, 177
16 Response of Jacobson to Proposed Consulting Agreement	10/22/2006	23, 178
17 Reply of Cowin to Jacobson on Proposed Consulting Agreement	10/23/2006	24, 179
18 Application to Parks Commission for Easements	11/30/2006	47
19 Kittitas County Approves Vantage Bay re-zone and prelim plat	12/5/2006	26, 191
20 Vantage Bay PSA Closes	1/30/2007	4-14
21 Jacobson Signs Amended Note for Motel 6	3/26/2007	16
22 ESM (Ray Miller) Contracts for Engineering Services	6/14/2007	27
23 Kittitas County Water District Sewer Availability Letter	8/16/2007	40
24 Monthly Payments to Jacobson stop; Totals Payments = \$110,500	August, 2007	51
25 DOE Preliminary Permit to Drill New Wells	1/16/2008	34
26 BCSCBN pays \$375,000 on Palelek Note	2/1/2008	
27 Peterson Advice - Do Not Commit Substantial \$\$ Before Receiving Permits	2/11/2008	35
28 Jacobson Lis Pendens Recorded	3/21/2008	56
29 RH2 Hydrological Evaluation Report	8/5/2008	36
30 BCSCBN pays \$360,000 on Palelek Note	2/1/2009	
31 DOE approves Water Rights Change	4/17/2009	37
32 Parks Commission Easements Recorded	5/21/2009	49
33 Draft Closing Statement for Transfer of Water Rights	6/9/2009	38
34 Cowin Notice of Determination of Non Viability; Development Costs = \$1,079,568	6/23/2009	54-55; 50-53 (costs)
35 Payment of \$1,500,000 due to Hagen by BCSCBN	1/31/2010	
36 Payment of \$345,000 due to Palelek by BCSCBN	2/1/2010	
37 Payment of \$330,000 due to Palelek by BCSCBN	2/1/2011	
38 Preliminary Plat expires	12/5/2011	57
39 Payment of \$315,000 due to Palelek by BCSCBN	2/1/2012	

Ex 64

Appendix B
Redline Version of Term Outline (Exhibit 59)

Vantage Bay LLC

PARTNERSHIP AGREEMENT

TERM OUTLINE

The partners are **Ken Jacobson, Bill Cowin, personally and as p** President of BCSCBN, Inc., Bill Cowin and **George Coddington**. ~~The Partnership will serve as the developer of the project to be named "Vantage Bay". BCSCBN, Inc., Bill Cowin and George Coddington~~ will provide all the financing for the project. Ken Jacobson through a to be formed entity will be retained as a Marketing Sales consultant setting up a website working with Grant County PUD and other Public entities to obtain entitlements and George Coddington through Late's Landing, Inc. will be retained as the development consultant reporting biweekly to Bill Cowin, President of BCSCBN. Each firm will work on a predetermined plan of budgeting, purchase orders and accountability. ~~will not be required to provide funding or financial signatures on any financing required by VANTAGE BAY LLC. The three partners will act collectively as the management team of the Partnership and determine goals, strategy and allocation of resources. Each will work on a predetermined plan of budgeting, purchase orders and accountability with individual responsibility. All work related to the project will be shared by the three partners. BCSCBN, Inc will provide legal and accounting of all activity on a weekly basis.~~

The term of the partnership shall be until the last lot is sold or by unanimous agreement.

The vested owner (of the 58 +/- acres of the Palelek property in Vantage, Washington) will be BCSCBN, Inc, with Bill Cowen as president, ~~dba VANTAGE BAY LLC~~. Ken Jacobson and George Coddington will contract with BCSCBN, Inc. for monthly fees, expenses and a percentage of profits.

~~Ken Jacobson, Bill Cowin and George Coddington will work for VANTAGE BAY LLC for monthly compensation, expenses and a percentage of profits. The three partners will represent the partnership as "partners" and shall have authority to make expenditures predetermined by the approved budget or by collective management team approval.~~

Profit sharing is defined as follows:

GROSS SALES PROCEEDS less acquisition costs, manager fees, engineering, planning, legal, advertising, accounting, guarantee fee, real estate fees, closing costs, appraisal, wages, vehicles, interest and all other costs directly attributable to acquisition, development and sale of the property.

KEN JACOBSON

Ken Jacobson will receive a Note and subordinated Deed against the property in the amount of \$1,600,000 with interest at 6%. The note will be paid as profits are distributed from the partnership from Jacobson's entity's share. Ken Jacobson will sign partial or full title releases

~~Strikeout are deleted sections~~

Red text is new additions

Blue text are handwritten additions

for sales as needed. Additionally, Bill Cowin will assist Jacobson by ~~privately~~ loaning Jacobson \$400,000 to purchase and develop the Motel 6 property, as well as, co-signing on the construction and take out loans to build the Vantage Motel 6 provided, however, Bill Cowin's obligation in this respect is conditional upon Ken Jacobson's entity value in the Vantage Bay project being equal to the guarantee required by Bill Cowin. The obligation will be secured by Ken Jacobson personally and with his firm's interest in Vantage Bay to Bill Cowin.

~~if it is not possible for Jacobson to get the funding on his own-~~

~~Ken Jacobson will receive his first choice of a lot in Vantage Bay free and clear-~~

Ken Jacobson will receive a salary fee of \$6,500 per month starting on April 1, 2006

Ken Jacobson will receive a leased 2007 GMC XL Denali with insurance when the new model is released. At any time during the entitlement process that this project ceases to be viable in Bill Cowin's sole discretion, the vehicle will immediately be returned to the Lessor in good condition. Ken Jacobson will retain a first right of refusal to re-purchase from BCSCBN, Inc. the rights to the Vantage property to include payment of all cost of project to date, plus cost of Motel 6 paid by BCSCBN, Inc. to Jacobson.

Ken Jacobson's Firm profit sharing percentage will be 34%. 33%

BILL COWIN

BCSCBN, Inc will take title of the property listed on the assignment agreement(s). ~~Bill Cowin~~ BCSCBN, Inc. will use the land and ~~his~~ Bill Cowin's personal financial statement to acquire (at preliminary plat approval) the necessary loan (~~estimated between \$16,000,000 and \$20,000,000~~) to fully develop the property in phases if needed in Bill Cowin's sole discretion depending on market demand. ~~—hopefully, within six months. Bill Cowin will fund, from a line of credit during~~ Bill Cowin will provide during the feasibility period, the funds necessary to achieve preliminary plat approval, fees, expenses, etc. through preliminary plat approval. acquisition and development. BCSCBN, Inc. will be reimbursed all monies expended plus interest at prime plus 2 points at time of receipt of development funds from Bank (TBD) for development loan.

~~Bill Cowin will assist Jacobson in acquiring and building a Motel 6 secured by a note, the properties, and the \$1,600,000 Note and Deed-~~

~~Bill Cowin will receive his choice of a lot in Vantage Bay free and clear-~~

~~Bill Cowin will receive \$5,000 per month starting on April 1, 2006-~~

Bill Cowin's profit sharing percentage will be 33%.

BCSCBN, Inc. shall be paid a guarantee fee of 3% of all funds borrowed. **BCSCBN, Inc.'s profit sharing percentage will be 34%.**

GEORGE (Skip) CODDINGTON

George Coddington

~~Strikeout are deleted sections-~~

Red text is new additions

Blue text are handwritten additions

~~'s company, Tate's Landing Development Co. will be the contractor of record at recording of the loan and will sign any and all loan, liability and insurance~~ guarantee or other documents required by Homestreet Bank or bank chosen to do financing of project. ~~approved by Ken Jacobson.~~ George Coddington will use his financial statement to assist in acquiring (at preliminary plat approval) the necessary loan ~~(estimated between \$16,000,000 and \$20,000,000)~~ to fully acquire and develop the property. George Coddington will receive no fees, markups or compensation other than salary fees and expenses, from work performed on the project except as provided herein. George Coddington will receive an option to purchase 1 lot in each division. Ken Jacobson will receive an option to purchase 1 lot in each division. Bill Cowin will receive an option to purchase 1 lot in each division.

~~George Coddington will receive his choice of a lot in Vantage Bay free and clear.~~

George Coddington will receive ~~\$5,000~~ \$5,500.00 per month starting on April 1, 2006.

George Coddington's profit sharing percentage will be 33%.

Bill Cowin as President of BCSCBN, Inc. may terminate the development of this project at any time Bill Cowin determines, in his sole discretion, that the project is not financially viable. In the event Bill Cowin determines the project is not financially viable, he will prepare and present to Ken Jacobson and George Coddington a summary of all costs incurred to date in the prosecution of the development. Jacobson's entity and Coddington's entity each agree to reimburse BCSCBN, Inc. 33% of the costs expended to date. The obligation to reimburse BCSCBN, Inc. in the event the project is terminated shall be personally guaranteed by Ken Jacobson and George Coddington.

We signed below to agree to this attached agreement as drafted with final agreement within the next 30 days.

Skip Coddington	04/03/06
Bill Cowin	04/03/06
Ken Jacobson	04/05/06

Agreed this _____ day of _____ 2006

~~Ken Jacobson~~

~~Bill Cowin, Personally~~

~~Bill Cowin, Pres. BCSCBN, Inc.~~

George (Skip) Coddington

~~Strikeout are deleted sections~~

Red text is new additions

Blue text are handwritten additions

Appendix C

Term Outline (Exhibit 21 and Exhibit 137)

Vantage Bay

1.6
HOTEL 300+
1/3
6.5 -

TERM OUTLINE

Bill Cowin, as President of BCSCBN, Inc., Bill Cowin and George Coddington will provide all the financing for the project. Ken Jacobson through a to be formed entity will be retained as a Marketing /Sales consultant setting up a website working with Grant County PUD and other Public entities to obtain entitlements and George Coddington through Tate's Landing, Inc. will be retained as the development consultant reporting biweekly to Bill Cowin, President of BCSCBN. Each firm will work on a predetermined plan of budgeting, purchase orders and accountability.

The vested owner (of the 58 +- acres of the Palelek property in Vantage, Washington) will be BCSCBN, Inc, with Bill Cowin as President. Ken Jacobson and George Coddington will contract with BCSCBN, Inc. for monthly fees, expenses and a percentage of profits.

Profit Sharing Is Defined As Follows:

GROSS SALES PROCEEDS less acquisition costs, manager fees, engineering, planning, legal, advertising, accounting, guarantee fee, real estate fees, closing costs, appraisal, wages, vehicles, interest and all other costs directly attributable to acquisition, development and sale of the property.

Ken Jacobson

Ken Jacobson will receive a Note and a subordinated Deed against the property in the amount of \$1,600,000 with interest at 6%. The Note will be paid as profits are distributed from the development from Jacobson's entity's share. Ken Jacobson will sign partial or full title releases for sales as needed. Additionally, Bill Cowin will assist Jacobson by loaning Jacobson \$400,000 to purchase and develop the Motel 6 property, as well as co-signing on the construction and take out loans to build the Vantage Motel 6 provided, however, Bill Cowin's obligation in this respect is conditional upon Ken Jacobson's entity value in the Vantage Bay project being equal to the guarantee required by Bill Cowin. The obligation will be secured by Ken Jacobson personally and with his firm's interest in Vantage Bay to Bill Cowin.

Ken Jacobson entity will receive a fee of ~~\$5,500.00~~ ⁶⁵⁰⁰ per month starting on April 1, 2006

Ken Jacobson entity will receive a leased 2007 GMC XL Denali with insurance when the new model is released. At any time during the entitlement process that this project ceases to be viable in Bill Cowin's sole discretion, the vehicle will immediately be returned to the Lessor in good condition.

Ken Jacobson will retain a first right of refusal to re-purchase from BCSCBN, Inc. the rights to the Vantage property. To include payment of all cost of project to date, plus cost of Motel 6 paid by Jacobson to BCSCBN, Inc.

EXHIBIT 137

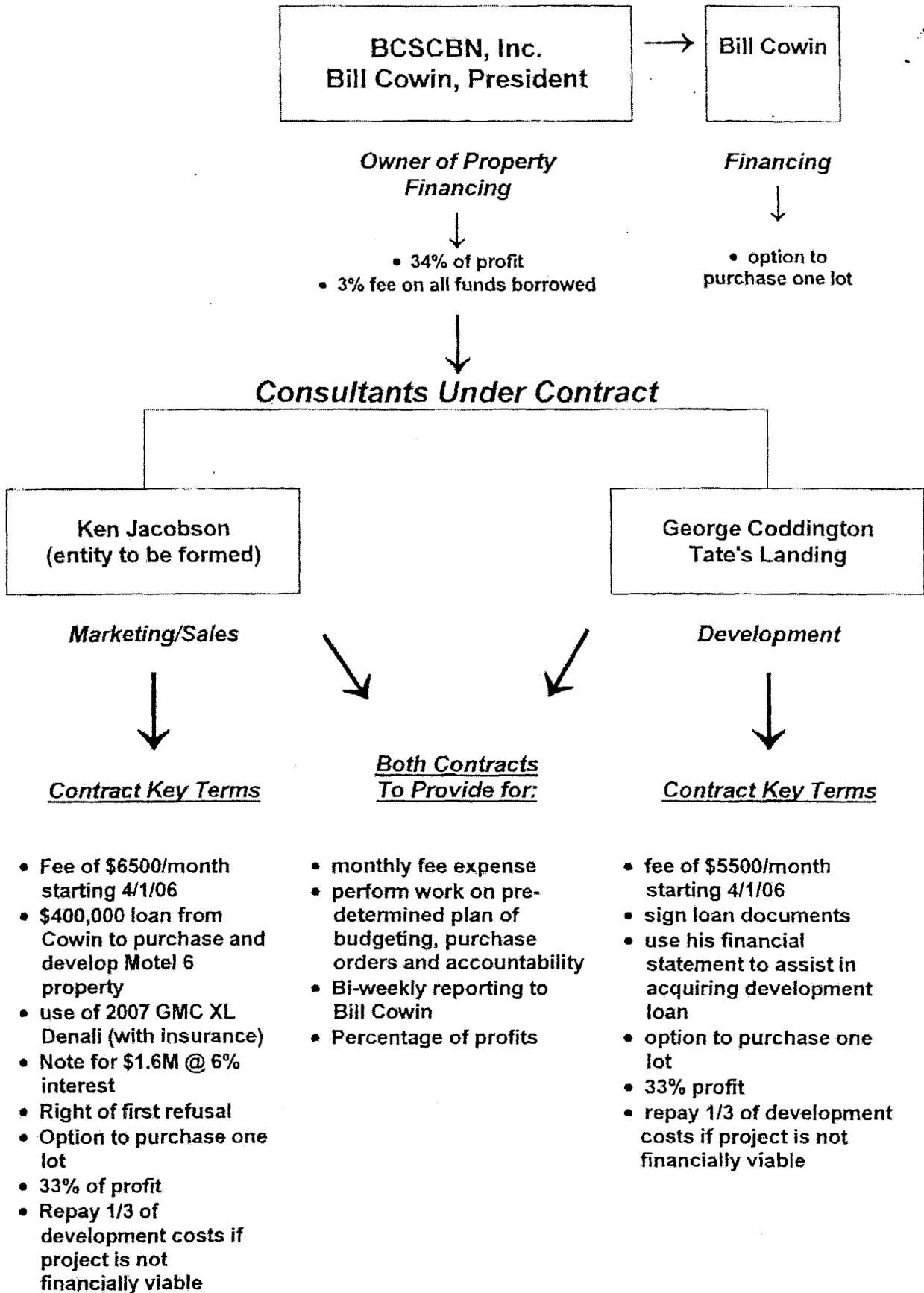
04/03/06

B.C.
04-03-06

Appendix D

Vantage Project Relationship of Parties (Exhibit 60)

Vantage Bay Project
 Relationship of Parties
 (Per Term Outline)



Ex 60

Appendix E

Findings of Fact and Conclusions of Law

FILED
KING COUNTY, WASHINGTON
JUL 22 2009
DEPARTMENT OF
JUDICIAL ADMINISTRATION

09 JUL 22 PM 1:55
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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

WILLIAM C. COWIN and GEORGE
CODDINGTON

Plaintiffs,

v.

KEN JACOBSON AND JANE DOE
JACOBSON, husband and wife, and
the marital community comprised
thereof;

Defendants.

KEN JACOBSON, a single man,

Third Party
Plaintiff

v.

BCSCBN, Inc., a Washington
corporation; REBECCA NYBERG,
wife of William C. Cowin, and KAY
CODDINGTON, wife of George
Coddington,

Third Party
Defendants

NO. 07-2-35604-5 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

I. PARTIES

1.1 Plaintiffs William C. Cowin ("Cowin") and George Coddington
("Coddington") are residents of King County, Washington.

1 accountability. ... Ken Jacobson and George Coddington will contract with BCSCBN, Inc for
2 monthly fees, expenses and a percentage of profits. ... Ken Jacobson entity will receive a fee
3 of \$6,500.00 per month starting on April 1, 2006." The Term Outline does not specify any
4 end date for the monthly fees.

5 b. \$1.6M Note. "Ken Jacobson will receive a Note and a subordinated
6 Deed against the property in the amount of \$1,600,000 with interest at 6% The Note will be
7 paid as profits are distributed from the development from Jacobson's entity's share. Ken
8 Jacobson will sign partial or full title releases for sales as needed."

9 c. Motel 6 Loan. "Additionally, Bill Cowin will assist Jacobson by
10 loaning Jacobson \$400,000 to purchase and develop the Motel 6 property, as well as co-
11 signing on the construction and take out loans to build the Vantage Motel 6 provided,
12 however, Bill Cowin's obligation in this respect is conditional upon Ken Jacobson's entity
13 value in the Vantage Bay project being equal to the guarantee required by Bill Cowin. The
14 obligation will be secured by Ken Jacobson personally and with his firm's interest in Vantage
15 Bay to Bill Cowin."

16 d. Right of First Refusal. "Ken Jacobson will retain a first right of refusal
17 to re-purchase from BCSCBN, Inc. the rights to the Vantage property to include payment of
18 all cost of project to date plus cost of Motel 6 paid by BCNBCS, Inc. to Jacobson."
19

20 e. 2007 Denali. "Ken Jacobson entity will receive a leased 2007 GMC
21 XL Denali with insurance when the new model is released. At any time during the
22 entitlement process that this project ceases to be viable in Bill Cowin's sole discretion, the
23 vehicle will immediately be returned to the Lessor in good condition."
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1 f. Termination of Project. "Bill Cowin as President of BCSCBN, Inc.
2 may terminate the development of this project at any time Bill Cowin determines, in his sole
3 discretion, that the project is not financially viable. In the event Bill Cowin determines the
4 project is not financially viable, he will prepare and present to Ken Jacobson and George
5 Coddington a summary of all costs incurred to date in the prosecution of the development.
6 Jacobson's entity and Coddington's entity each agree to reimburse BCSCBN, Inc. 33% of the
7 costs expended to date. The obligation to reimburse BCSCBN, Inc. in the event the project is
8 terminated shall be personally guaranteed by Ken Jacobson and George Coddington."

10 g. Final Agreement. "We signed below to agree to this attached
11 agreement as drafted with final agreement with the next 30 days."

12 3.5 A draft Final Agreement was circulated several months after the agreed 30 day
13 period, but Jacobson refused to execute the same without substantial modifications.

14 3.6 Jacobson has demanded payment from Cowin for sums Jacobson contends are
15 owed to him pursuant to the Term Outline, specifically the Monthly Fee, as well as the
16 performance of other acts which Jacobson contends Cowin is obligated to do pursuant to the
17 Term Outline.
18

19 3.7 Cowin and Coddington dispute Cowin has the obligations for payment and
20 performance that Jacobson contends.
21

22 3.8 Since the execution of the Term Outline, BCSCBN has taken the following
23 actions: acquired title to the Vantage Bay Property; paid Jacobson \$110,500 (as the Jacobson
24 Monthly Fee from April 2006 to August 2007); expended more than \$1 Million in
25 development costs; and loaned Jacobson \$333,500.00 (not including interest that now exceeds
26 \$100,000.00) on the Motel 6 Loan.
27

1 3.9 On March 21, 2008 Jacobson recorded with the Kittitas County Auditor a
2 Notice of Claim of Interest against the Vantage Bay property setting forth his claims allegedly
3 arising from the Term Outline ("Lis Pendens").

4 3.10 In light of current economic conditions and acting pursuant to the above
5 referenced Termination of Project section of the Term Outline, Cowin on June 23, 2009
6 notified both Jacobson and Coddington of his determination that the project was no longer
7 financially viable. The notice was sent via email and certified mail, return receipt requested.
8 Cowin attached a summary of costs totaling \$1,079,568 and requested that Coddington and
9 Jacobson each contribute one-third of the total or \$ 359,856 each. Neither Jacobson nor
10 Coddington responded to the notice by the requested deadline of June 26, 2009.
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IV. ISSUES

The parties have asked the Court to decide on the meaning and effect of the following provisions of the Term Outline and the related issues set forth below:

- 4.1 Monthly Fee -- Is Jacobson entitled to any further payments of the Monthly Fee and if so, in what amount?
- 4.2 \$1.6 M Note -- Is Cowin and/or BCSCBN obligated to provide Jacobson with this note?
- 4.3 Motel 6 Loan --
- a. Is Cowin obligated to advance to Jacobson an additional \$66,500 as part of the Motel 6 Note?
 - b. Is Jacobson entitled to damages based on Cowin's alleged delays in making advances under the Note?
 - c. When is Jacobson obligated to repay the amount advanced under the Note?
- 4.4 Termination of Project --
- a. What if any amount is due from Jacobson to Cowin for Jacobson's 33% share of all costs incurred to date in the prosecution of the development?
 - b. When is such payment if any from Jacobson due?
- 4.5 2007 Denali -- In light of the Termination of the Project, is Cowin free to terminate lease payments on the 2007 Denali?
- 4.6 Right of First Refusal -- In light of the Termination of the Project, does Jacobson have the first right to purchase the property from Cowin?
- 4.7 Cancellation of the Lis Pendens -- Should Jacobson's Lis Pendens be cancelled?

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V. FINDINGS OF FACT

5.1 On or about May 27, 2005, Jacobson entered into a Purchase and Sale Agreement with Joyce Palelek for the purchase of the 58-acre Vantage Bay Property, at a price of \$3,000,000 ("Palelek PSA"). *Plaintiff Exhibit 2; Defendant Exhibit 100*. The Palelek PSA was subject to one-year feasibility, rezoning and other contingencies, extendable for two additional six month periods, with closing to occur within 30 days following the removal of contingencies. Under section 16, the Palelek PSA was assignable by defendant Jacobson, subject to the Paleleks' consent, not to be unreasonably withheld.

5.2 Following his execution of the Palelek PSA, Jacobson initiated discussions and applications with various governmental agencies regarding rezoning the Vantage Bay Property and providing it with the water, sewer, roads, access and other rights necessary for its development as an approximately 300-lot vacation or second home residential plat.

5.3 Jacobson also began looking for investors to provide the \$15-20,000,000 funding that he expected would be needed in order to obtain the necessary governmental approvals, close the purchase of the Vantage Bay Property, pay for required road and utility enhancements, construct the physical plat improvements and amenities, etc. Jacobson needed these investors and financing because he had no financial resources of his own.

5.4 Sometime during the summer of 2005 Jacobson approached George Coddington, a business acquaintance, about the possibility of Coddington providing the funding necessary for the development. Coddington then approached his business associate

1 William Cowin. Both Coddington and Cowin expressed some interest provided the terms and
2 conditions were favorable.

3 5.5 During the late 2005 and early 2006, Jacobson proposed a number of scenarios
4 to Cowin and Coddington about a how a business relationship for the development should be
5 structured. Such scenarios all involved Jacobson controlling the development and having
6 final say on all of its aspects, while contributing none of the capital or financial resources
7 necessary for the development. *Defendant Exhibits 107, 110, 113, 114, 117.* Cowin and
8 Coddington rejected Jacobson's proposals, but continued to express interest, assuming the
9 terms and conditions related to control and ownership of the development and ownership were
10 changed.
11

12 5.6 By late December 2005, the discussions between plaintiffs and Jacobson
13 had reached a point that prompted Jacobson to inform Palelek of his intent to assign his rights
14 under the PSA in order to obtain financing for the project and requested her consent to the
15 assignment. *Defendant Exhibit 115.* Paleleks' attorneys responded to Jacobson's
16 notice by stating that a decision on whether to consent could not be made pending the
17 receipt of additional financial and other information from the purported assignees.
18 *Defendant Exhibit 118.*
19

20 5.7 Jacobson expressed to Cowin and Coddington his intense interest in obtaining
21 financing from Cowin for purchasing land and constructing a Motel 6 in Vantage, just north
22 of Interstate 5 and the Vantage Bay property, referring to the Motel 6 project as his "meal
23 ticket." *Testimony of Cowin and Coddington.* Cowin and Coddington made it clear to
24 Jacobson that there would be no financing of the Motel 6 project without obtaining in advance
25 an assignment of Jacobson's rights in the Palelek PSA. *Defendant Exhibits 119, 120, and 121.*
26
27

1 5.8 Jacobson assigned his rights under the Palelek PSA to Cowin's company,
2 BCSCBN, Inc. on February 23, 2006. This assignment was provisional only, since it did not
3 include the required consent from Palelek. *Plaintiff Exhibit 3; Defendant Exhibit 122.*

4 5.9 On February 24, 2006 Cowin advanced \$20,000 to Jacobson for his use in the
5 acquisition of the Motel 6 property. *Plaintiff Exhibit 18.*

6 5.10 On February 28, 2006 Jacobson needed additional funds in the near future to
7 close on the purchase of the Motel 6 property. On that day he obtained and agreed to a
8 promissory note in favor of Cowin in the amount of \$ 312,500.00 ("Note"). *Plaintiff Exhibit*
9 *15 and Defendant Exhibit 124.* In return, Cowin advanced Jacobson \$237,500 on that same
10 day. *Plaintiff Exhibit 18.* The Note provides for the accrual of interest on the unpaid
11 principal balance "at the rate of Eight percent (8%) per annum as follows or never less
12 than prime plus 2%." The Note is expressly conditioned and subject to the Assignment
13 of the Palelek PSA and notes the provisional nature of the Assignment by making the
14 Note immediately due if the Assignment is subject to cancellation or determined to be
15 void. *Defendant Exhibit 124 and Exhibit A thereto.* The Note required installment
16 payments, and is repayable out of the proceeds from the sale of portions of the subject
17 property not needed for the Motel 6 development, from 50% of the profits to be earned
18 from operation of the Motel 6, and/or from distributed proceeds from the profits of the
19 Vantage Bay project. *Defendant Exhibit 124, Exhibit C.*

20 5.11 Although the Note is dated February 28, 2006, Jacobson apparently did not
21 sign it until March 3, 2006, the same day he executed a Deed of Trust to Cowin as security for
22 the note. *Plaintiff Exhibit 17 and Defendant Exhibit 127.*

1 5.12 Cowin recorded the Deed of Trust and the Note on March 31, 2006. *Plaintiff*
2 *Exhibit 17 and Defendant Exhibit 127.* The recorded documents contain another set of
3 exhibits to the Note and Deed of Trust (page 5 of 9), Exhibit A of which recites that this
4 agreement (i.e, the Note and Deed of Trust) is subject to the acceptance and approval by
5 Joyce Palelek of the Assignment to BCSCBN, Inc. This Exhibit A also supplies terms
6 missing from the original Note, that is, how will the Note be repaid if there is no Vantage Bay
7 Development or no profits. Subparagraphs b and c to Exhibit A make the Note and Deed of
8 Trust subject to BCSCBN's "sole and absolute discretion" to determine if the Vantage Bay
9 project is or is not suitable for development and in the event it was determined that it was not
10 suitable for development, the Note (principal plus all interest) would be due immediately
11 upon demand. *Plaintiff Exhibit 17 and Defendant Exhibit 127, Exhibit A (page 5 of 9).*

13 5.13 On February 28, 2006, Cowin advanced Jacobson \$237,000 on the Motel 6
14 loan and Jacobson executed a promissory note. On March 28, 2006, Jacobson emailed Cowin
15 and Coddington yet another proposal, "Vantage Bay LLC Partnership Agreement," outlining
16 his thoughts on how a business relationship between the parties should be structured. *Plaintiff*
17 *Exhibit 20 and Defendant Exhibit 136.* He called this document

19 5.14 Cowin and Coddington rejected Jacobson's proposed partnership. Instead, they
20 insisted that BCSCBN be the owner of the property and would provide the financing (along
21 with Cowin). Both Jacobson and Coddington would be paid consultants working for
22 BCSCBN to further the development. Coddington modified Jacobson's document to reflect
23 the Cowin and Coddington views.

25 5.15 Coddington's changes to Jacobson's proposal were the typed portion of the
26 Term Outline. *Plaintiff Exhibit 21 and Defendant Exhibit 137.*

1 5.16 Jacobson, Cowin and Coddington met on April 3, 2006 to discuss the Term
2 Outline. For approximately 90 minutes, all three men forcefully negotiated the terms of
3 the Term Outline. Jacobson succeeded in modifying a number of terms from the typed
4 Term Outline prepared by Coddington. Cowin expressed in clear and emphatic
5 language that there would be no partnership; rather there would be a consulting
6 relationship for both Jacobson and Coddington working through separate entities for
7 BCSCBN on the Vantage Bay development. After making and initialing additional
8 handwritten changes, Jacobson, Cowin and Coddington individually signed and initialed
9 the Term Outline on April 3, 2006 by. (Despite the dates of 4-04-06 and 04/05/06 that
10 appear next to Jacobson's initials his signature, the parties agree that all of them signed on
11 April 3, 2006.) The Term Outline was freely entered into by all three parties and is binding.
12

13 5.17 The parties agreed to the following key terms reflected in the language of the
14 Term Outline, though not always artfully expressed:
15

- 16 a. The owner of the property will be BCSCBN, Inc.
- 17 b. Coddington, through his entity Tate's Landing, Inc., and Jacobson,
18 through a legal entity to be formed, will be employed by BCSCBN, Inc. by way of consulting
19 contracts. The Jacobson entity will be retained as a Marketing / Sales Consultant "working
20 with Grant County PUD and other Public entities to obtain entitlements" and the Coddington
21 entity will be retained as a development consultant. Both Jacobson and Coddington will
22 report to Cowin as president of BCSCBN biweekly. "Each firm will work on a predetermined
23 plan of budgeting, purchase orders and accountability." The Jacobson entity will receive a fee
24 of \$6,500.00 per month for doing this work; the Coddington entity will receive a fee of
25 \$5,500.00 per month for doing this work. Both fee payments would start on April 1, 2006.
26
27

1 Although no end date for the payment of the monthly fees is specified, the parties intended
2 that such fees would continue so long as work was productive and was satisfactory to Cowin.

3 c. The financing for the project will be provided by BCSCBN, Inc., Bill
4 Cowin and George Coddington.

5 d. In the event the project is able to proceed as a profitable development
6 (profit = "gross sales proceeds less acquisition costs, manager fees, engineering, planning,
7 legal, advertising, accounting, guarantee fee, real estate fees, closing costs, appraisal, wages,
8 vehicles, interest and all other costs directly attributable to acquisition, development and sale
9 of the property"), the parties will split those profits: 34% to BCSCBN; 33% to the
10 Coddington entity; and 33% to the Jacobson entity.

11 e. Jacobson repeatedly expressed a desire to obtain a note backed by his
12 interest in the Vantage Bay development to enhance his personal financial statement. Cowin
13 and Coddington made it clear to Jacobson, and Jacobson understood, that any such note was
14 not repayment for any contribution of his to the development, that it was not to be recorded,
15 and that it would be paid only out of his share of the profits, if any. Consistent with that
16 understanding, the Term Outline provides that "Ken Jacobson will receive a Note and
17 subordinated Deed against the property in the amount of \$1,600,000 with interest at 6%. The
18 Note will be paid as profits are distributed from the development from Jacobson's entity's
19 share. Ken Jacobson will sign partial or full title releases for sales as needed."
20

21
22
23 5.18 The consent to assignment of the Palelek PSA was finally accomplished
24 on or about April 4, 2006, when Jacobson and BCSCBN, Inc. re-executed the
25 Assignment of Real Estate Purchase and Sale Agreement and it was also signed by the
26 Paleleks. *Plaintiff Exhibit 4 and Defendant Exhibit 139.*
27

1 5.19 The parties to the Term Outline all expected that it would be replaced
2 by a more detailed consistent agreement. At the time the Term Outline was
3 signed, they stated above their signatures: "We signed below to agree to this
4 attached agreement as drafted, with the final agreement within the next 30 days."

5 5.20 Preparation of the proposed final agreement was delayed, but on
6 October 19, 2006 Cowin emailed Jacobson a draft "Consulting Agreement." *Plaintiff*
7 *Exhibit 22.*

8 5.21 Jacobson responded with an email of October 22, 2006 that objected to
9 Cowin's proposed terms, repeating his view that there should be instead a partnership
10 agreement. *Plaintiff Exhibit 23.*

11 5.22 Cowin replied on October 23, 2006, stating: "There will be no Partnership.
12 We agreed to that in every meeting we ever had and it clearly states it in the 1st paragraph.
13 We will not renegotiate the original deal." *Plaintiff Exhibit 24.*

14 5.23 There was no further effort by either party to draft a final agreement
15 consistent with the Term Outline.

16 5.24 On December 5, 2006, the Kittitas County Board of Commissioners
17 granted final approval to the rezone of the Vantage Bay Property and the additional
18 property still owned by the Paleleks, as well as preliminary plat approval for a 315-lot
19 subdivision to be built thereon. *Plaintiff Exhibit 26 and Defendant Exhibit 191.* Under the
20 Kittitas County Code, Title 16 related to subdivisions (section 16.12.250), a preliminary plat
21 approval is valid for a period of only five (5) years, with no extension permitted. *Plaintiff*
22 *Exhibit 57.* Unless a final plat is prepared and accepted by the County on or before December
23 5, 2011, the approval of the preliminary plat will expire and will no longer be valid. (A Code
24
25
26
27

1 amendment permitting such extension is before the Board of Commissioners, but is not
2 certain to be adopted.)

3 5.25 On or about January 15, 2007, based upon the rezone and preliminary
4 plat approval, BCSCBN, Inc. removed its contingencies and closed the purchase of
5 the Vantage Bay Property pursuant to the provisions of the Palelek PSA assigned
6 to it by Jacobson. Under the terms of purchase, BCSCBN, Inc. paid \$1,500,000 down
7 at closing, and is obligated to pay the Paleleks \$300,000 in principal plus accrued interest
8 at 5% per annum (another \$75,000) on or about January 15, 2008, with future payments
9 of interest and principal due each January thereafter, through 2012. *Plaintiff Exhibits 6 – 13.*

11 5.26 BCSCBN has made the payments to Palelek that were due in January 2008
12 and January 2009.

14 5.27 By early 2007 Jacobson began to realize that his planned Motel 6 project
15 would "not pencil out" because the expected rate of return would not cover the costs of
16 construction. As of late March 2007 Cowin had loaned Jacobson \$293,500 and interest at
17 the rate on the Note had accumulated to over \$22,000. *Plaintiff Exhibit 18.*

19 5.28 On March 26, 2007 Jacobson and Cowin negotiated a new promissory note
20 as an addendum to the original Note of February 28, 2006. This Addendum Note was in
21 the amount of "Up to \$400,000 (to include interest)" and bore interest at the minimum rate
22 of 10% compounded on the first day of each month. Jacobson signed the Addendum Note
23 on March 26 and Cowin made an advance of \$20,000 on April 2, 2007.

25 5.29 Jacobson did not form a separate legal entity for use in connection with
26 the Vantage Bay project, instead operating under the d/b/a "Platypus Creative."

1 Cowin objected to the lack of a legal entity because he did want to be responsible to
2 or for Jacobson as an employee, *Defendant Exhibit 146*.

3 5.30 From April 2006 through August 2007, BCSCBN, Inc. made fee
4 payments of \$6,500 per month to Jacobson totaling \$110,500. BCSCBN stopped
5 making such payments in August 2007 because at that time the development was
6 largely "on hold" due to the delay in obtaining necessary entitlements and also
7 because Cowin was dissatisfied with Jacobson's performance of the tasks he was
8 entrusted to perform. *See Defendant Exhibits 142, 146, 173, 182, 184*.

10 5.31 On March 21, 2008 Jacobson recorded with the Kittitas County
11 Auditor a Notice of Claim of Interest against the Vantage Bay property ("Lis
12 Pendens"). *Plaintiff Exhibit 56*.

13 5.32 During the balance of 2006 after April 3, and into 2007, Cowin and
14 Coddington undertook numerous and substantial efforts to further the development of
15 Vantage Bay by engaging, monitoring and paying a many experts and consultants to
16 obtain entitlements, most significantly water rights and a sewer treatment plan. The vast
17 majority of this work was coordinated by Coddington; Jacobson did little productive or
18 substantive work on entitlements or otherwise after April 3, 2006. *See Plaintiff Exhibits*
19 *25 - 27 (related to plat development, approval and design), 38 - 38 (related to water plan*
20 *and acquisition of water rights), 39 - 41 (related to sewer plan), 42 - 46 (related to*
21 *environmental issues), and 47 - 49 (related to obtaining easements from the Parks*
22 *Commission).*

25 5.33 The net cost of development incurred by Cowin to date totals \$ 1,041,613
26 consisting of Work in Progress ("WIP") costs of \$736,753, *Plaintiff Exhibits 50 and 51*, and
27

1 Expenses of \$312,860, *Plaintiff Exhibits 52 and 53*. Cowin's testimony substantiated such
2 costs. (Coddington was overpaid \$8000 for the fees due to him under the Term Outline,
3 which must be deducted to arrive at the net cost).

4 5.34 The severe ongoing recession in the United States economy has had disastrous
5 consequences for the real estate development industry, both nation-wide and in Washington
6 State. Developments have been stalled and moth-balled as development financing has
7 almost completely dried up. The consequences of the recession are even more severe for the
8 development of rural recreational property in Eastern Washington, which has almost
9 completely ceased. No substantial market exists for the sort of second homes contemplated
10 by the parties in the Term Outline.

11
12 5.35 In light of current economic conditions, Cowin reasonably concluded that
13 the Vantage Bay project was no longer financially viable. In light of that conclusion and
14 pursuant to the Term Outline that gives him the "sole discretion" to determine if the project
15 is financially viable, he provided notice to Coddington and Jacobson on June 23, 2009 that
16 the development of the project was being terminated. *Plaintiff Exhibits 54 and 55*. That
17 notice requested that Coddington and Jacobson each contribute 33% of the costs of
18 development expended to date or \$359,856 each. Jacobson did not respond to Cowin's
19 stated deadline of June 26, 2009.
20
21

22 CONCLUSIONS OF LAW

23 1. An actionable and justiciable controversy exists between and among Cowin,
24 Coddington and Jacobson. This court properly declares the rights, duties, and obligations of
25 the parties hereto pursuant to the declaratory judgment act, RCW 7.24, and CR 57.

26 2. This court has jurisdiction over the subject matter and the persons of this
27

1 litigation.

2 3. Venue is proper because King County is the county in which one or more of
3 the defendants reside.

4 4. The Term Outline signed by Cowin, Coddington and Jacobson is not a model
5 of clarity. Because certain key provisions are unclear, I have had to consider the context in
6 which the agreement was executed to determine the parties' intent. I have considered the
7 testimony of the witnesses who testified for each side and has considered the subject matter
8 and objective of the agreement, the circumstances surrounding its formation, the subsequent
9 acts and conduct of the parties, the reasonableness of the respective interpretations advocated
10 by the parties, the statements made by the parties in preliminary negotiations, and the usage of
11 trade and course of dealings.
12

13 5. The court comes to the following conclusions about the obligations imposed
14 on the parties by the Term Outline:
15

16 a. Monthly Fee. Jacobson has received all monthly payments that he is
17 entitled to receive. His services were far less than the parties had contemplated in the Term
18 Outline, he did not form the independent entity as required, and Cowin reasonably terminated
19 his services. No further amount is due.

20 b. Termination of the Development. Cowin has the right under the Term
21 Outline to terminate the development of the project upon his determination that the project is
22 not financially viable. He has made that determination, which is supported by substantial
23 evidence and is reasonable. With adjustments made by Plaintiffs to deduct overpayments
24 made to Coddington and legal fees and costs related to this litigation, Jacobson owes Cowin
25 \$341,733 for his 33% share of the net development costs incurred by Cowin to date
26
27

1 (\$1,041,641). A judgment against Jacobson will enter for that amount, unless he timely
2 exercises his first right of refusal, as specified below.

3 c. Motel 6 Loan. Cowin is not obligated to advance Jacobson any
4 additional money as part of the Note. Jacobson did not create the entity required by the Term
5 Outline. In any event, Jacobson's value in the Vantage Bay project was not equal to the
6 guarantee required by Cowin. Jacobson is not entitled to damages for any alleged delays in
7 making advances under the Note.
8

9 The due date for repayment of the loan was not set forth in the Note and the related
10 Deed of Trust signed by Jacobson. Instead, the parties merely set forth methods of repayment
11 which were based on future events that have not occurred and are not likely to occur, at least
12 in the foreseeable future. In the absence of a definite time, the Court will infer a reasonable
13 time for repayment. *See, Noord v. Downs*, 51 Wn.2d 611 (1958); *Foelkner v. Perkins*, 197
14 Wash. 462, 466 (1938); *Robinson v. Davis*, 158 Wash. 556 (1930).
15

16 Although almost 3 years and 5 months have past since the Note and Deed of Trust
17 were signed on February 3, 2006, Jacobson has operated under a Note not providing a time
18 for repayment. The Court believes that to require immediate repayment would be unduly
19 harsh and would be inconsistent with the parties' reasonable expectations.
20

21 By June 30, 2010, Jacobson shall repay the principal amount loaned of \$333,500 plus
22 simple interest in the amount of \$ 98,178.23 (accrued to July 6, 2009, as reflected in Plaintiff
23 Exhibit 18 plus \$73.10 per day thereafter). If Jacobson does not pay the amount due by June
24 30, 2010 all principal and interest then due, judgment may be entered against him for the full
25 amount of the principal and interest then due.

26 d. 2007 Denali. In light of the Termination, Jacobson no longer has the
27

1 right to use of this vehicle. Cowin may terminate the lease and Jacobson shall return the
2 vehicle to Cowin or the leasing company within thirty (30) days of the entry of the judgment
3 in this case.

4 e. \$1.6 Million Note. In light of the Termination, there will be no profits
5 generated by the development. This note has no value since there is no source of funds from
6 which it can be paid. Cowin has no obligation to provide this note.

7
8 f. First Right of Refusal. Jacobson's First Right of Refusal is set forth in the Term
9 Outline appears in the Term Outline in the same paragraph as his right to receive a 2007
10 Denali (see above), which right is terminable if at any time during the entitlement process the
11 process ceases to be viable in Bill Cowin's sole discretion.

12 However, Jacobson's first right of refusal is unconditional, and the time for its exercise
13 is not expressly or impliedly limited to Cowin's non-viability declaration during the
14 entitlement process. I conclude that, upon Cowin's declaration of non-viability, Jacobson
15 "retains a first right of refusal to re-purchase from BCSCBN, Inc. the rights to the Vantage
16 property. To include payment of all cost of project to date plus cost of Motel 6 paid by
17 BCSCBN, Inc. to Jacobson."

18
19 Because no time for performance of the conditions to Jacobson's exercise of the first
20 right of refusal is stated, I imply a reasonable time for performance. *See, Noord v. Downs,*
21 *Foelkner, and Robinson, supra.* In the case of a first right of refusal, I believe that a much
22 shorter time for exercise is appropriate than in the case of the Motel 6 loan discussed above.
23 One frame of reference is suggested by the PSA that allowed Jacobson the first right to
24 purchase Palelek's remaining 17 acres. I do not believe that the property, and final
25 determination of the central issues in this proceeding, should effectively be in suspension for
26
27

1 more than a very limited period of time to permit Jacobson to attempt to exercise his first right
2 of refusal.

3 By September 30, 2009, Jacobson may repurchase from BCSCBN the rights to the
4 Vantage Bay property, including both development rights and the underlying land, by paying
5 in cash the full cost of the project to date (which include payments on the Palelek PSA), plus
6 the cost of the Motel 6 paid by BCSCBN to Jacobson. That is, to exercise his first right of
7 refusal to re-purchase from BCSCBN, Inc. the rights to the Vantage property, Jacobson must
8 pay to BCSCBN by September 30, 2009, 1) \$1,041,641 (see Para. b. above); 2) \$333,500,
9 plus simple interest in the amount of \$ 98,178.23, accrued to July 6, 2009, plus \$73.10 per day
10 thereafter (see Para. c. above); and 3) the full amount paid to date by BCSCBN and/or Cowin
11 to Palelek towards the \$3,000,000 price under the Palelek PSA. Jacobson's right to exercise
12 his first right of refusal shall be subject to Palelek's consent to re-assignment to Jacobson as
13 purchaser under the Palelek PSA.
14
15

16 I believe that the inclusion of both development and property rights in the first right of
17 refusal is consistent with the parties' intent, as expressed in the language of the Term Outline.
18 Further, keeping the Vantage Bay property and the development right together is the only
19 practical approach under the circumstances, as the parties could not reasonably be expected to
20 cooperate in future plans for the property for their mutual benefit.
21

22 I recognize that it may be improbable that Jacobson will arrange financing or organize
23 investors to permit him to exercise his first right of refusal, but such improbability does not in
24 my view justify terminating a right that he would otherwise have under the Term Outline.

25 g. Lis Pendens. Unless he timely exercises such first right of refusal,
26 Jacobson will have no further rights in and to the Vantage Bay property. The Lis Pendens
27

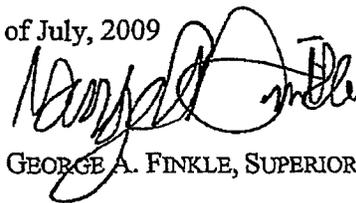
1 filed by Jacobson (Exhibit 56) will then be cancelled; and a judgment or amended judgment to
2 be entered may reflect such cancellation.

3 7. The relationship among Cowin and Coddington on one side and Jacobson on
4 the other side (and their respective entities BCSCBN, Inc., Tate's Landing Development, Inc.
5 and Jacobson's dba Platypus Creative) established by the Term Outline is hereby terminated
6 and, except as set forth in these Conclusions of Law and the judgment to be entered herein
7 and any actions that may be necessary to enforce the judgment, Cowin and Coddington on
8 one side and Jacobson on the other side have no further obligations or rights against each
9 other arising out of the Term Outline or the Vantage Bay property owned by BCSCBN, Inc.
10

11
12 8. There is no right to attorney fees or costs for either side.

13
14 9. Jacobson has not proven his entitlement to damages.
15
16
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18

19 DATED this 21st day of July, 2009

20 
21
22

GEORGE A. FINKLE, SUPERIOR COURT JUDGE (RET.), PRO TEM

CERTIFICATE OF SERVICE

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

1. I am employed by the law firm of Schiffrin Olson Schlemlein & Hopkins, PLLC.

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

3. On April 26, 2010, I served the foregoing Brief of Respondent on the following attorney for Appellant via the method indicated:

Dean Messmer
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
601 Union Street, Suite 2600
Seattle, Washington 98101-4000

- Via U.S. First Class Mail, Prepaid
- Via Legal Messenger
- Via Facsimile

Original filed with:
Court of Appeals, Division I
Court Clerk's Office

Dated at Seattle, Washington this 26th day of April, 2010.


Carolee Crocker

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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