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No. 69039-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company,

Respondent,

v.

MUKILTEO INVESTORS L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation,

Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

1. Appellant admitted the Option was a valid and binding contract in its Answer. Should this Court refuse to allow appellant to argue about the enforceability of the Option for the first time on appeal when it admitted enforceability in its Answer?

2. An enforceable contract for the cash sale of real property merely requires that the parties agree to a method to determine price. Should this Court find the Option enforceable when the parties agreed to have price determined by disinterested appraisers?

3. The Option contained three methods to determine price and a broad severability clause. Even if two of the three methods are assumed to be invalid, should this Court find the Option enforceable when a valid pricing method still exists?

4. A party that acts in good faith is permitted equitable remedies. Is a party entitled to the equitable remedy of specific performance when it is found to have acted in good faith?

5. A party is entitled to consequential damages in addition to specific performance in order to make that party whole. Should this Court affirm the trial court's award of consequential damages when the award reasonably attempts to make the respondent whole?

6. CR 52(b) permits a court to amend findings of facts and conclusions of law by motion brought 10 days after entry of judgment. Is a trial court permitted to amend preliminary findings of fact and conclusions of law prior to the entry of any judgment?

7. A general partner of a limited partnership remains jointly and severally liable for the breach of a contract signed by the general partner even after the general partner withdraws from the partnership. Should this Court affirm a general partner's liability for the breach of a contract the general partner signed on behalf of the partnership?

8. Respondent's efforts to obtain records from appellant's appraiser contributed greatly to a determination to disregard the appraiser's opinions at trial. Should this Court affirm an award of reasonable attorneys' fees for the time spent obtaining these records?

I. INTRODUCTION

This case arises from appellant Mukilteo Investors Limited Partnership's ("MILP") refusal to sell a senior living facility to Mukilteo Retirement Apartments LLC ("MRA") under the terms of purchase option agreement. Notwithstanding MRA's compliance with its obligations and timely and diligent efforts to exercise its option, MILP engaged in a pattern of delay, obstruction and resistance in a deliberate effort to prevent MRA from buying the facility so that MILP could continue to receive millions of dollars in lease payments.

The trial court heard trial testimony from eleven witnesses, including three appraisers, and received nearly 300 exhibits into evidence over more than three weeks of a bench trial. The trial court found MILP breached the option agreement, failed to comply with the covenant of good faith and fair dealing, and caused MRA substantial damages.

Exercising its equitable power, the trial court established a purchase price consistent with the option agreement, granted specific performance, and awarded consequential damages in order to place MRA in the position it would have been in but for MILP's wrongful conduct. The net result was to preserve for MILP the amount of the purchase price to which it was entitled at the time MRA was ready, willing and able to purchase the property and to give MRA credit against the purchase price

for lease payments it should not have had to make.

II. STATEMENT OF THE CASE

MILP's statement of the case widely deviates from the trial court's findings of fact and represents an attempt to "retry" the case on appeal. MRA disputes the facts and circumstances presented in MILP's statement of the case as "fact." The following section corrects these inaccuracies and provides such additional facts as are necessary for a full understanding of the equities presented below.

A. The Parties

In 1997, Duane Clark and Ron Struthers purchased undeveloped real property in Mukilteo, Washington. FOF 1. Together, they already owned two smaller, but successful retirement facilities. FOF 61; RP I 105-06; RP IV 165-67. It was their dream to build and operate an assisted living and retirement facility in Mukilteo. RP IV 11, 169. After some initial development of the property, however, they realized they were undercapitalized to construct the facility themselves. FOF 2.

Carl Campbell and his company, Campbell Homes Construction, Inc. ("Campbell Homes"), was a large builder of similar facilities in the Northwest. FOF 2. Clark and Struthers contacted Gene Hiner, a representative of Campbell, to see if Campbell would be interested in the Mukilteo property and project (the "Facility"). RP I 113-14.

Struthers began negotiations with Hiner in the spring of 1999. FOF 3. They discussed a deal in which Campbell Homes would purchase the property, build the Facility and lease it back to Clark and Struthers with an option to buy in eight years. FOF 3; RP I 114-18. From the start, Struthers explained that he and Clark were only interested in entering into a transaction if they received an option to purchase the Facility. RP I 111-18; RP II 161; RP VIII 2; FOF 11.

In the fall of 1999, the parties formalized their discussions. Campbell Homes' long-time attorney, Keith Therrien, of Powers & Therrien, drafted agreements for the transaction and created MILP as the entity to purchase, construct, and lease the Facility to Clark and Struthers. FOF 4.

Campbell Homes owned 2% of MILP and was designated as its general partner. FOF 5-6. Carl Campbell was the president of Campbell Homes and Kristopher Campbell was the vice president. Ex. 16; FOF 5. Kristopher Campbell and HD Retirement Investors, LLC were the initial limited partners of MILP, each owning a 49% interest.[1] FOF 6.

Clark and Struthers formed MRA as the entity to lease the Facility. FOF 1. In July 1999, MRA engaged an attorney, Edward Beeksma, to provide advice on the transaction so that Clark and Struthers could

[1] HD Retirement Investors, LLC was equally owned by Hiner and Jim Deal. FOF 6.

negotiate directly with MILP's representatives. RP I 123-24; RP V 3, 141; Ex. 2. Contrary to MILP's claim in its brief (see p. 10-11), Beeksma did not draft or revise any of the transaction documents and did not negotiate the terms of the parties' agreements. *Id.*; RP II 176-77; RP V 4, 140.

B. The Negotiations

Therrien sent a lengthy draft option agreement to Clark and Struthers on September 1, 1999. Ex. 4. On September 7, Beeksma wrote to Therrien noting that the draft contained a method in which the price for the Facility would be the greatest of three, different pricing methods, including "fair market value" and "replacement cost." Ex. 7. Beeksma asked that "replacement cost" be defined. *Id.*

On September 21, 1999, Therrien sent a revised option agreement to Clark and Struthers with the understanding that it would be forwarded to Beeksma. Ex. 9. On September 22, Beeksma confirmed his understanding that Clark and Struthers would be discussing the fundamental terms of the transaction with the Campbell side and that they would then advise him of the results of these discussions. Ex. 10.

On September 23, Beeksma sent Therrien a memorandum regarding the draft option. Ex. 11. Beeksma asked that "replacement cost" be deleted as a method of establishing the purchase price. *Id.*

Shortly after the September 23 memorandum, Struthers had a

conversation with Hiner and asked that "replacement cost" be defined in the document itself. RP I 135; FOF 66. Hiner declined and urged MRA to sign the transaction documents so that construction could start before the upcoming rainy season. RP I 137-38; RP II 17-18; FOF 66. Hiner told Struthers to "trust us." *Id.* Hiner *never* told Struthers what "replacement cost" meant to MILP. RP I 137-38; RP VIII 32-36. Indeed, Hiner did not negotiate or discuss the language of any of the pricing provisions of the draft option with Struthers. RP VIII 21.

On October 12, 1999, Therrien wrote to Beeksma. Ex. 14. With regard to Beeksma's prior concern about "replacement cost," Therrien wrote: "See the last sentence of Section 2." Ex. 14.[2] The revised last sentence of Section 2 stated: "Replacement cost shall be determined by the

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[2] MILP claimed at trial and continues to claim on appeal that language contained in a supposed October 12, 1999 "redline" of the Option (Ex. 221) – defining "replacement cost" as the cost to replace the building and improvements – was proposed by Beeksma. Appellant's Brief at 10-11, 27. This false allegation forms the basis of MILP's claim that the parties had different understandings of what "replacement cost" meant when they signed the agreement. Id. at 37. Other than Therrien's testimony, however, no evidence supports the allegation that this language came from Beeksma. There is substantial evidence to the contrary. The original option agreement (Ex. 221) referenced Alzheimer's facilities, which Clark and Struthers did not have and did not plan to have at the Facility. RP III 154; RP V 4. Struthers testified that Beeksma did not draft, share a copy, or even discuss Ex. 221 with MRA. RP III 151-54; RP IV 5-7, 119-20. The only party that did have facilities with Alzheimer's residents was Campbell Homes. RP VIII 44-45. Moreover, Hiner testified that he did not remember having conversations with Struthers about Alzheimer's units. RP VIII 79-80. Therrien had form documents for option agreements that his office used on behalf of Campbell Homes. RP VIII 93-94. Therrien apparently used one of those forms. The trial court did not make a finding regarding this conflicting evidence. Nonetheless, on appeal MILP asks this Court to accept its version.

appraiser selected by MILP pursuant to the next succeeding paragraph, and shall be the amount included in the appraiser's appraisal report on the Facility." Ex. 16.

Given Hiner's verbal assurance that MRA could trust Campbell Homes and MILP, MRA signed the final documents, which included a Facility Lease Agreement ("Lease") and the Option Agreement ("Option"). RP I 138-39; Ex. 15, 16; FOF 3. Carl Campbell, as president of Campbell Homes, signed on MILP's behalf. Ex. 15, 16. The parties' signatures to the Lease and the Option were notarized. *Id.*

Thereafter, MILP secured a construction loan and commenced construction. FOF 7. MRA took possession of the Facility on or about June 1, 2000. FOF 7, 24. An occupancy permit was issued on June 15, 2000. FOF 24.

C. Terms of the Lease and Option

The initial term of the Lease was twenty years and the initial monthly base rent was $104,315 or $1,251,780 per year. Ex. 15; RP II 13; CP 2186. The Lease provided for annual increases in the monthly base rent beginning in the fifth year.[3] *Id.*

MRA agreed to pay what it believed to be above-market rents as

[3] By the time of trial, MRA's annual rent obligations had risen to $1,539,540 per year. CP 2186.

means to an end. RP II 39, 141-42, 155. In order to get the Facility built it was willing to accept MILP's lease terms because it expected to exercise its option after eight years. *Id.* MRA frequently reiterated its intent before and during the lease period. FOF 43, 48, 60. They never wandered from this course. *Id.*

The Option identified the parties, MILP and MRA, and described the Facility by an attached legal description. Ex. 16. The Option plainly stated MILP was granting MRA the right to buy the "Facility," which was defined as the real property, as improved, together with certain personal property. *Id.*; FOF 60. The parties agreed that appraisers would determine the purchase price. Ex. 16.

Paragraph 2 of the Option Agreement addressed how the purchase price for the Facility would be determined upon exercise of the option:

> 2. Option Purchase Price. The option purchase price ("Option Purchase Price") for the Facility shall be the greater of (i) the Facility's fair market value as of the date the Option to Purchase is exercised; (ii) the Facility's replacement cost as of the date the Option to Purchase is exercised; or (iii) the prospective fair market value at stabilized occupancy of the Leased Property as determined by James Brown & Associates Inc.'s appraisal of the Leased Property for Bank of American [sic] N.A., a national banking association, increased annually on January 1 of each year, beginning January 1, 2001, by a sum equal to three percent (3%), as adjusted annually by the three percent amount, a schedule of which is or will be upon completion, attached hereto as Exhibit D. Replacement cost shall be determined by the appraiser selected by MILP pursuant to the next succeeding

> paragraph, and shall be the amount included in the appraiser's appraisal report on the Facility.

Id. The "next succeeding paragraph" described how the parties could appoint "disinterested appraisers" to determine the Facility's market value. *Id.* If a party was going to appoint an appraiser to determine fair market value, this appointment had to be made within fifteen days of option election. *Id.* The appraisers then had "thirty (30) days after the date of the notice appointing the first appraiser" to "proceed to appraise the Facility to determine the Fair Market Value[.]" *Id.* If an appraiser failed to timely make a determination, that appraiser's determination was discarded. *Id.*

If MILP appointed an appraiser, its appraiser would also be tasked with determining "the Facility's replacement cost" for purposes of method (ii) above. *Id.* This determination, however, had to be "included in the appraiser's appraisal report on the Facility." *Id.* The parties specifically agreed that the appraiser determinations would be final and binding upon the parties "except as otherwise provided by applicable law." *Id.*

Although "replacement cost" was undefined in the Option itself, a definition of "full replacement cost" was contained in the Lease, which was incorporated into the Option. Ex. 16. The Lease definition did not include any reference to either the land or the value of MRA's business and arguably related to fire and hazard insurance. FOF 66.

Paragraph 5 of the Option stated that the option was "exercisable by MRA only during the period commencing on . . . the eighth (8^{th}) anniversary of the commencement date of the Facility Lease Agreement[.]" Ex. 16. MRA agreed to be responsible for all of MILP's closing costs. FOF 14.

D. MILP Refinances Its Construction Loan Without Providing Required Advance Notice to MRA

The parties contemplated that the original construction loan for the facility would be replaced by permanent financing and MRA agreed to subordinate its rights to any such refinancing obtained by MILP. FOF 12. Because such refinancing could affect MRA's lease payments, it was to receive 120 days of notice and an opportunity to obtain more favorable financing which, in turn, might reduce its monthly lease payments. *Id.*

In late December 2003, MILP replaced its construction loan with permanent financing through Washington Capital Management. FOF 21. MILP failed to provide MRA with proper notice and failed to disclose the terms of the proposed financing. *Id.* Instead, MILP presented a subordination agreement on December 24, 2003 and asked MRA to sign it before year-end. RP II 37; RP V 27-29; Ex. 44. MRA signed. FOF 22.

The failure by MILP to timely disclose the terms of the refinance precluded MRA from seeking out more favorable financing. FOF 23.

Moreover, while the balance of the construction financing was approximately $8.1 million, Therrien negotiated a new $22.7 million loan, secured by not only the Facility but also by three properties controlled by Campbell Homes. FOF 23. This amount of refinancing was never agreed to or discussed between the parties.[4]

E. MRA Exercises its Option

In spring 2007, Hiner visited Struthers at the Facility. FOF 27. Hiner encouraged MRA to agree to a reduction in the amount of the annual rent escalators rather than exercise its option. FOF 27. Hiner told Struthers that the price under the Option would likely be $27 million. RP II 47. MRA was stunned as this figure far exceeded what it believed the Facility to be worth. RP II 48.

In October 2007, Clark and Struthers met with Kris and Carl Campbell seeking information on the Facility purchase price. FOF 28. Carl Campbell told them at this meeting that he wanted to restructure his assets in order to segregate his family's ownership interests from the interests of other investors, like Hiner and Deal. FOF 28. Clark and Struthers expressed their desire that ownership of the Facility remain within the Campbell family because they believed that Carl and Kris

[4] The new loan also included substantial prepayment penalties and a five-year lock-out, which would preclude conveyance of the Facility to MRA at any time prior to December 31, 2008. FOF 23.

would treat them fairly. *Id.* Clark and Struthers also expressed their desire to purchase the Facility by June 15, 2008 or sooner. FOF 29.

The window which MRA had to exercise their one-time option was limited. Ex. 16. If not timely exercised within the narrow window defined in the Option, the option right was lost forever. *Id.* MRA wanted to exercise the option as soon as possible in order to obtain financing and close the purchase by June 15, 2008. RP II 75, 85. Accordingly, Clark and Struthers asked attorney Jerry Kindinger to review the Option. RP II 66-70. He advised that the option period may run from the date on which MRA signed the lease and option agreement (October 21, 1999) as opposed to the date the certificate of occupancy was issued (June 15, 2000). *Id.* MRA now believed that the Option period began eight years from the date the parties signed the Lease. FOF 24. Not wanting to risk losing their option right by failing to timely act, MRA exercised its option on November 14, 2007. RP II 66-70.

MILP ignored the notice of exercise. FOF 32. This prompted MRA's counsel to send another letter, dated December 19, 2007, asking MILP to confirm a purchase price of $16,024,643 (which reflected the Sched. D price as of June 15, 2008) and advising that MRA was arranging financing. FOF 32; Ex. 69.

Contemporaneously, MRA secured a preliminary financing

commitment, subject to a valid purchase and sale agreement, full underwriting analysis and an appraisal sufficient to support the mortgage loan. FOF 33. Without a signed purchase and sale agreement, it was impossible for MRA to go forward and obtain a firm commitment for the loan. FOF 33; Ex. 68.

On December 28, 2007, MILP, through its attorney, Therrien, wrote MRA stating that the Option could not be exercised until June 15, 2008. FOF 34.

On January 2, 2008, Struthers emailed Kris Campbell requesting a purchase and sale agreement so that MRA could complete its financing arrangements. Ex. 74. Campbell never responded.

On January 4, 2008, MRA attorney Kindinger faxed a letter to Therrien responding to his letter of December 28. Ex. 78. He explained his interpretation of the option exercise date, asked if there were any other agreements or understandings, and advised that MRA was arranging financing. Ex. 78. On January 15, Therrien responded by stating that MILP would respond when MILP had completed its review of the issues. Ex. 80. For nearly two months there was no substantive response. Ex. 85.

On February 25, 2008, MRA sent MILP a draft purchase and sale agreement and requested comments and discussion "regarding closing dates, etc." Ex. 84; Ex. 43; FOF 41.

MRA continued to attempt to communicate with Kris Campbell during the spring of 2008 about the Option. FOF 46. However, the ownership of MILP was being restructured by Therrien at that time. FOF 46. The result was to divest Kris Campbell, Campbell Homes, and Hiner of their interests in MILP to entities owned or controlled by Powers & Therrien. FOF 46-47. Cimco Properties, LLC, a wholly owned entity of Thomas Dye, became MILP's general partner. FOF 46. The re-structure became effective May 1, 2008. FOF 47.

Before the re-structure was complete, however, Dye began a series of meetings with MRA. FOF 48. Dye wanted to discuss "proposals" other than MRA's option purchase and closing. FOF 49. From the outset, MRA made clear its desire to purchase the Facility and that time was of the essence. FOF 48; RPII 82-85. Time was not of the essence for MILP, however. *Id.* It was receiving monthly lease payments from MRA which approximated $30,000 per week. FOF 48. At no time did Dye or MILP deny or dispute MRA's option right to purchase the Facility. RPII 94-95.

On May 6, Dye met with MRA. FOF 50. Dye did not discuss the purchase price, closing date, or financing. *Id.* Instead, MILP offered to sell a 20% interest in MILP. *Id.* This offer was based upon a written proposal by Therrien which assumed the fair market value of the facility was $18,240,000. FOF 50-51; Ex. 91. MRA was not interested. FOF 52.

MRA believed that it was being flim-flamed and that further discussions would be useless. FOF 53; Ex. 96. On May 20, 2008, MRA hired its own appraisal firm, Tellatin & Short, to determine the Facility's fair market value. Ex. 97; FOF 54.

At Dye's request another meeting was held on June 20, 2008. FOF 55; Ex. 92. Although the June 15 option date asserted by MILP had passed, MILP made no offer to sell the Facility outright to MRA. FOF 55. Instead, Dye presented another written proposal, drafted by Therrien, offering to sell MRA a minority interest (24.5%) in MILP. Ex. 92. This proposal "assumed" the Facility's fair market value to be $16,750,000, which more closely approximated the value MRA believed to be correct. FOF 55. The proposal included a promise that MRA could purchase the entire interest in the Facility after ten years. *Id.* MRA verbally accepted the offer subject and awaited final documents to be drawn up. FOF 55.

MILP stalled for another month and a half. FOF 56. During this time, MRA repeatedly asked Dye about the status of their agreement. Exs. 112-117. Ultimately, MILP reneged. On August 4, 2008, Dye sent another proposal drafted by Therrien. FOF 57. This proposal withdrew the option to purchase the entire Facility after ten years. *Id.*

F. MRA Sues to Enforce its Option

Frustrated by MILP's delay tactics, MRA filed a complaint for

specific performance of the Option, monetary damages, declaratory and other relief on August 28, 2008. CP 5603-07.

G. MILP Manipulates Appraiser Brown

Beginning in January 2008, Therrien and Powers entered into a series of agreements with Oregon appraiser James Brown & Associates.[5] The first, dated January 3, 2008, was for an "Analysis of the Facility Lease Agreement and Option Agreement to determine the proper method of determining the Option Purchase Price under the Option Agreement for the assets subject thereto." FOF 35. The second, in May 2008, contained the same language. FOF 38. James Brown provided Therrien and Powers with oral reports regarding the fair market value of the Facility. FOF 49, 51. James Brown failed to maintain work files for these assignments – an admitted violation of the Uniform Standards of Professional Appraisal Practice – and failed to produce written reports even though called for by the contracts. FOF 37, 38. MRA was never told of James Brown's conclusions. FOF 37.

On September 17, 2008, after MRA commenced its lawsuit, MILP, through Therrien and Powers, engaged James Brown to perform a fair market and replacement cost analysis of the Facility. Ex. 120-22; 125. MILP notified MRA on September 19, 2008. Ex. 126. James Brown

[5] Carl Campbell and Keith Therrien had worked with James Brown on dozens of projects over thirty years. See FOF 36.

assigned the project to his son, Aaron Brown. FOF 68.

Contrary to MILP's claim, James Brown did not complete its final report on October 10, 2008. Appellant's Brief at 24. Evidence at trial established that James Brown completed a *draft* report on October 10, 2008 and sent a copy to Therrien. RP XIII 79-87; FOF 68. The draft contained data and analysis for an appraisal date of September 24, 2008. Ex. 163. James Brown sent Therrien another draft in late October 2008. Ex. 132-35.

Therrien made a number of changes to the drafts. FOF 68. Most significantly, he deleted depreciation which James Brown had initially included.[6] FOF 68. James Brown accepted all of Therrien's changes. Ex. 132-35; 107.

James Brown issued its "final" report on November 7, more than thirty days from September 19 and four months after June 15, 2008. Ex. 135. The transmittal letter, however, still bore a date of October 10, 2008. Ex. 107. James Brown opined that the Facility had a fair market value of $24 million and an "undepreciated replacement cost" of $27 million. Id.

On November 10, 2008, MILP offered to sell the Facility to MRA for only the $27 million "replacement cost" value determined by James

[6] This change alone increased James Brown's valuation of "replacement cost" by $3 million dollars. RP VI 57.

Brown. Ex. 136; FOF 43. MILP stated that this figure was "not subject to challenge" and that it "accepts the replacement cost of $27 million as the purchase price under the agreement." Ex. 136. MRA disagreed.

H. Multiple Motions for Summary Judgment Prior to Trial

The parties remained at an impasse with respect to the Option exercise date until November 30, 2010. FOF 45. On that date, the trial court ruled that the Option period began on June 15, 2008. FOF 45.

On April 4, 2011, Campbell Homes brought a motion for partial summary judgment asking that it be dismissed as a defendant. CP 4617-30. Consistent with its theory of the case at the time and as presented at trial, MRA opposed the motion arguing that a general partner of a limited partnership remains jointly and severally liable for the breach of all contracts entered into by the partnership while acting as general partner. CP 4343-67. The trial court denied the motion. CP 4247-48.

In March 2012, both parties moved for summary judgment. MILP sought a determination that the Option had been exercised and asked that the $27 million "replacement cost" figure be set as the purchase price. CP 3241-70. MRA sought a determination that MILP had breached the Option by refusing to sell except at the untimely and substantially defective "replacement cost" price set by James Brown. CP 3095-3123. These motions were denied. CP 1368.

I. Trial Court Finds MILP Breached the Option and the Implied Covenant of Good Faith and Fair Dealing

A bench trial before Judge George Bowden commenced on May 7, 2012 and concluded on June 5, 2012. MRA called Struthers, Clark, two appraisers, David Fryday and Anthony Gibbons, and a damages expert to testify. MILP called Therrien, Dye, Hiner, Deal, Aaron Brown and a damages expert to testify. The trial court admitted nearly 300 exhibits. Following closing arguments, the court took its decision under advisement in order to fully consider the testimony and all exhibits.

On July 2, 2012, Judge Bowden sent a letter to the parties' counsel enclosing copies of his "Findings of Fact and Conclusions of Law." CP 51; CP 3-14. Judge Bowden's letter stated:

> Rather than issue a letter decision, it seemed preferable to go ahead and draft my own findings and thus save you both further disagreement and ongoing attorney fees as you might attempt that process following receipt of a letter.
>
> If either of you feel that specific additional findings or conclusions should be provided, I remain willing to entertain such requests.

CP 51. The court asked the parties to confer and agree upon a briefing schedule to address attorneys' fees and recommended that the parties complete their briefing by the end of August. *Id.*

Judge Bowden's preliminary findings and conclusions noted that this case presented primarily a dispute about the purchase price for the

Facility under the Option. CP 12; FOF 79. He found that MILP had not only breached the Option but also breached the implied duty of good faith and fair dealing. CP 12-14; FOF 79; COL 1. The court found that MILP refused to discuss pricing or a closing date for the Facility after June 15, 2008. FOF 80; CP 13. Instead, MILP made repeated efforts to lure MRA to discuss other proposals and subvert MRA's option rights. *Id.* Most importantly, the court found that MILP had tried to prevent MRA from buying the Facility by relying upon the untimely and inflated James Brown appraisal. FOF 80; CP 13. The court found that MRA had performed all of its obligations in good faith. FOF 82; CP 5300. The court initially dismissed all claims against Campbell Homes. CP 14.

Judge Bowden construed the Option to set a purchase price. Although the court stated that it might be appropriate to set the price at $16,024,643 (according to Schedule D), the court chose a higher price of $18,725,000. FOF 77; CP 12. This figure represented the mid-point between MRA's appraisers' determinations of fair market value as of June 15, 2008. FOF 78; CP 12.

Judge Bowden did not find any credibility at all in Aaron Brown's trial testimony or in James Brown's appraisal. FOF 69; 74; CP 11-12. The court found that Aaron Brown abandoned his integrity and independence in performing the appraisal. *Id.* The court rejected Aaron

Brown's opinions for several reasons, including, but not limited to: violating USPAP standards; using a higher quality of construction score to increase the ultimate valuation;[7] including costs and values (like softs costs, developer's profit, and stabilized occupancy)[8] not specified in the Option itself; accepting Therrien's direction to exclude depreciation, double counting sales tax;[9] arbitrarily backdating his report from September 24, 2008 to June 15, 2008 even though all of the analysis contained in this report was for a valuation date of September 24, 2008;[10] and for failing to complete the report within the 30-day limit required in the Option. FOF 74; CP 12, 5298.

The court awarded MRA consequential damages for MILP's substantial delay in selling the Facility to MRA.[11] COL 4; CP 14, 5301. At all times after June 15, 2008, MRA continued to make every lease payment called for under the Lease. FOF 82; CP 13, 5300. Most of those payments would have gone toward reducing MRA's underlying mortgage

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[7] In its 2002 and 2003 appraisals, James Brown gave the Facility a quality construction rating of 2.5 out of 4. RP XIII 149; Exs. 31, 42. In 2008, Brown assigned a rating of 3 out of 4. RP XIII 149; Ex. 107. The higher the quality construction score, the more the ultimate value. RP VI 51. It was estimated that this change increased Brown's "replacement cost" value by $2,180,000. RP VI 51-52.

[8] By including the value of MRA's stabilized occupancy of the Facility, Brown increased its "replacement cost" valuation by $1,900,000. RP VI 58; Ex. 107. By including "developer's profit," Brown increased its "replacement cost" analysis by an additional $2,200,000. RP VI 62.

[9] Ex. 107, 152. This double count increased the "replacement cost" valuation by $1,485,000. RP VI 60-61.

[10] RP XIII 69; RP XIII 56-66; Ex. 107, 163.

[11] MILP was motivated to continue to receive the monthly rents under the Lease throughout the litigation, which exceeded $30,000 per week. FOF 48.

had its attempts to purchase the Facility not been frustrated by MILP. *Id.* As a result, the court exercised its discretion in awarding consequential damages in the amount of rent MRA paid to MILP from June 15, 2008 through July 15, 2012. COL 4; CP 14, 5301.

The court granted MRA up to nine months to close the transaction from July 15, 2012. COL 6; CP 14, 5301. However, between July 15, 2012 and the date of closing, the court ruled that MRA would be obligated to continue to make monthly rent payments of $132,144. *Id.* MRA has continued to make monthly rent payments during this appeal.

J. MILP Claims the Findings and Conclusions Constitute a Judgment

On July 13, MILP's new appellate counsel sent a letter to Judge Bowden announcing that MILP was filing a Notice of Appeal appealing the July 2 Findings and Conclusions. CP 5485-88. MILP claimed that the findings and conclusions constituted a "judgment" under CR 54. *Id.*

Pursuant to Judge Bowden' July 2 letter, the parties conferred and agreed to a briefing schedule. MRA filed a motion to amend the preliminary findings and conclusions and for an award of attorneys' fees on July 30, 2012. CP 5579-5600. At the subsequent hearing on August 14, 2012, Judge Bowden revised the preliminary findings and conclusions. RP 8/14/12 14-17. Most notably, he reversed the dismissal of all claims

against Campbell Homes, finding that a general partner remains jointly and severally liable for the breach of a contract signed by the general partner even after the general partner withdraws. CP 5582; RP 8/14/12 17. Finally, the court awarded MRA attorneys' fees as the prevailing party pursuant to Paragraph 16 of the Option. RP 8/14/12 36-45.

On August 28, 2012, the court entered a Decree of Specific Performance and Judgment, Amended Findings of Fact and Conclusions of Law, and Supplemental Findings of Fact and Conclusions of Law supporting an award of attorneys' fees. CP 5282-5308. MILP and Campbell Homes have filed an Amended Notice of Appeal. CP 5280-5308.

III. ARGUMENT

A. Standard of Review

MILP challenges a few of the trial court's findings of fact and conclusions of law. Findings of fact and conclusions of law are reviewed to determine whether substantial evidence supports the findings and, in turn, whether the findings support the conclusions of law. *Pilcher v. Dep't of Revenue*, 112 Wn. App. 428, 435, 49 P.3d 947 (2002).

Unchallenged findings are verities on appeal. *State v. Stenson,* 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). The party challenging a finding bears the burden of showing that it is not supported by substantial

evidence. *Standing Rock Homeowners Ass'n v. Misich,* 106 Wn. App. 231, 243, 23 P.3d 520 (2001). Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement. *Cingular Wireless, LLC. v. Thurston Cy,* 131 Wn. App. 756, 768, 129 P.3d 300 (2006). "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). A reviewing court considers all of the evidence and reasonable inferences in the light most favorable to the prevailing party. *Cingular Wireless*, 131 Wn. App. at 768. Conclusions of law are reviewed de novo. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

MILP claims the trial court erred in awarding consequential damages, specific performance, and attorneys' fees. The fashioning of equitable remedies is reviewed for an abuse of discretion. *Cornish College of the Arts v. 1000 Virginia, L.P.*, 158 Wn. App. 203, 221, 242 P.3d 1 (2010). An award of attorneys' fees is also reviewed for an abuse of discretion. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Cornish*, 158 Wn. App. at 221.

B. This Court Should Reject MILP's Attempt to Raise the Enforceability of the Option for the First Time on Appeal

MILP's primary argument on appeal is that the Option is unenforceable because the parties never reached an agreement on an essential term, price. This Court should refuse to consider this argument because MILP is raising the enforceability of the Option for the first time on appeal. MILP previously admitted *in its Answer* that the Option was a valid and binding contract between the parties. MILP should not be permitted to reverse this position on appeal.

RAP 2.5(a) provides that an appellate court "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). It is the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from raising them on appeal. *In re Audett*, 158 Wn.2d 712, 725, 147 P.3d 982, 988 (2006).

One reason for this rule is to ensure that the trial court has an opportunity to correct errors at trial and avoid unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Another reason is to give opposing parties an opportunity to respond to possible claims of error and to shape their cases to issues and theories before the trial court, rather than face newly asserted errors, theories, or issues for the first time on appeal. *Audett*, 158 Wn.2d at 725.

The Court of Appeals has previously refused review in a case with almost identical facts. In *Neiffer v. Flaming*, 17 Wn. App. 443, 563 P.2d 1300 (1977), a seller argued on appeal that an option was unenforceable because it did not contain sufficient terms necessary to sell real property. *Id.* at 446. The court squarely refused to consider the argument, noting that it was being raised for the first time on appeal. *Id.*

As in *Neiffer* and consistent with RAP 2.5(a), MILP should not be permitted to raise enforceability of the Option for the first time on appeal. On July 29, 2009, MRA filed an Amended Complaint. CP 1277-1367. In Paragraph 24 of the Amended Complaint, MRA alleged:

> The Option Agreement that contains all material terms of the parties' obligations is a valid and binding contract for plaintiff's option to purchase the real property and was granted in exchange for valuable consideration.

CP 1282. In its Answer, MILP responded: "Answering Complaint paragraph 24, MILP *admits the option agreement was a valid and binding contract as between the parties.*" CP 1270 (emphasis added). MILP also asserted a counterclaim that MRA was in breach of the Option by refusing to pay the $27 million dollar "replacement cost" figure determined by James Brown. CP 1273-74.

MILP never changed its position during more than three years of litigation, numerous motions, and three weeks of trial. As the issue of

enforceability was not even contested before the trial court, MILP is foreclosed from raising it for the first time on appeal. MRA was never on notice that the enforceability of the Option was a contested issue and has had no opportunity to shape its case or present evidence regarding enforceability or mutual assent before the trial court. Likewise, the trial court has had no opportunity to address any issues relating to enforceability of the Option as this was not even an issue before the court.

Citing RAP 2.5(a)(2), MILP argues that it is entitled to raise this issue for the first time on appeal. RAP 2.5(a)(2) does provide a limited exception to the general rule for "failure to establish facts upon which relief can be granted."[12] However, this Court has specifically *prohibited* appellants from relying upon this exception when the appellant took a contrary position before the trial court. *See e.g., Hemenway v. Miller*, 55 Wn. App. 86, 97, 776 P.2d 710 (1989) (party could not rely upon RAP 2.5(a)(2) to argue a new issue on appeal when that party presented

[12] RAP 2.5(a)(2) is primarily invoked in criminal cases allowing defendants to argue for the first time on appeal that the evidence presented by the State did not satisfy the State's burden of proof of beyond a reasonable doubt. *See, e.g., City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989) (stating sufficiency of the evidence in a criminal prosecution is a question of constitutional magnitude). Additionally, this exception has been applied to prevent injustice when the *undisputed* facts show the failure to state a valid claim. For example, in *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978), it was undisputed that the appellant was under the age of 40 making it impossible for him to maintain an antidiscrimination action based on a statute that protected only persons over the age of 40 from discrimination. Here, RAP 2.5(a)(2) has no application because the undisputed facts show that the parties had a valid contract. If the parties had a binding contract, there can be no valid claim that MRA failed to state a claim so long as MRA can show MILP breached the contract.

precisely the contrary argument before the trial court), *rev'd on other grounds*, 116 Wn.2d 725 (1991). Thus, RAP 2.5(a)(2) provides no authority for MILP to reverse its admission that the Option was enforceable before the trial court.

C. The Option Agreement is Valid and Enforceable Because All the Material Terms Required For A Cash Sale are Stated With Reasonable Certainty.

MILP's claim that the Option (which it drafted) is an unenforceable "agreement to agree" fails because the Option states all the material terms to sell real estate for cash with reasonable certainty. MILP's claim that the parties failed to sufficiently agree on a price is wrong as a matter of law. Where, as here, the parties have agreed to a method to determine price, the law will not invalidate the contract for indefiniteness.

Parties must objectively manifest their mutual assent for a contract to form. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Thus, a contract "must embody all of the essential and material parts of the [agreement] with sufficient clarity and certainty to show that the minds of the parties have met on all the material terms with no material matter left for future agreement or negotiation." *Friedl v. Benson*, 25 Wn. App. 381, 383, 609 P.2d 449 (1980). "Mutual assent does not require both parties, however, to have an

actual and identical understanding of all the nuances of the bargain." 25 WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 2.8, at 43 (2d ed. 2007). Generally, mutual assent takes the form of an offer and acceptance. *Yakima County Fire Prot. Dist. No. 12*, 122 Wn.2d at 388-89.

Very few points of mutual assent are necessary to create an enforceable contract. *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 266, 68 P. 715 (1902). For the cash sale of real property under an option, the written agreement must merely state the parties, the property, and the price. *Neiffer,* 17 Wn. App. at 446; *Varacalli v. Williams*, 8 Wn. App. 129, 131-32, 504 P.2d 790 (1972); *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 318, 481 P.2d 17 (1971).

An enforceable contract requires manifestation of assent to material terms that are reasonably certain. *Howard v. Fitzgerald*, 58 Wn.2d 403, 405-06, 363 P.2d 386 (1961). Contract terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979). With regard to price, Washington courts have repeatedly held that price is stated with reasonable certainty where the parties agree to have price determined by a practicable method, without any new expression by the parties. *Howard*, 58 Wn.2d at 405-06; *Valley Garage, Inc.*, 4 Wn. App. at 318.

Valley Garage is instructive. *Valley Garage* similarly involved a written lease with an option to sell the property at a "reasonable price" as determined by three appraisers. *Id.* at 317. Affirming the trial court's award of specific performance, this Court held that the agreement contained all the essential elements of a cash sale for the sale of real property because it identified the parties, described the property for sale and included a "method for the determination of a price[.]"[13] *Id.* at 318.

Other jurisdictions, leading commentators, and authorities agree with this approach. *See, e.g., LaMore Rest. Group, LLC v. Akers*, 748 N.W.2d 756, 762 (S.D. 2008) (options are sufficiently definite if a practicable mode is provided by which price can be determined without any new expression by the parties); *Tonkery v. Martina*, 78 N.Y.2d 893, 895, 577 N.E.2d 1042 (N.Y. 1991) (price term sufficiently definite since it "indicate[d] clearly that the parties both intended to commit the calculation of price to a third party, and agreed to be bound by that result."); *Goodwest Rubber Corp v. Munoz*, 170 Cal. App. 3d 919, 921, 216 Cal Rptr. 604 (Cal. Ct. App. 1985) (option to purchase at "fair market value" was certain enough to be specifically enforced); *Schreck v. T&C*

[13] In *Valley Garage* having "a reasonable price" as determined by three appraisers supported the *higher* threshold remedy of specific performance. In general, a greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 692, 184 P.2d 90 (1947). It is hard to conceive how the agreed pricing method in this case is less certain than the provision in *Valley Garage*.

Sanderson Farms, Inc., 37 P.3d 510, 513 (Colo. Ct. App. 2001) (Option stating price to be determined by appraisal was sufficiently definite to support an award of specific performance); *Portnoy v. Brown*, 243 A.2d 444, 447-48 (Pa. 1968) (holding option price for property to be determined by "current market value at the end of the final term" was sufficiently certain to permit specific performance); J.R. Harvey, Annotation, *Requisite Definiteness of Price to be Paid in Event of Exercise of Option for Purchase of Property,* 2 A.L.R.3d 701, 703 (1965) ("Option agreements have generally been held or recognized to be sufficiently definite as to price to justify their enforcement if either a specific price is provided for in the agreement or a practicable mode is provided by which the price can be determined by the court without any new expression by the parties themselves."); 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS, § 4.3, at 567–68 (Rev. ed. 1993) ("If the parties provide a practicable method for determining [the] price or compensation there is no such indefiniteness or uncertainty as will prevent the agreement from being an enforceable contract.").

The general rationale for requiring only reasonable certainty when evaluating contracts was well stated by the high court in New York:

> Contracting parties are often imprecise in the use of language, which is, after all, fluid and often susceptible to different and equally plausible interpretations. Imperfect expression does not

> necessarily indicate that the parties to an agreement did not intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contract parties. Thus, where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain. Striking down a contract as indefinite and in essence meaningless "is at best a last resort."

166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp., 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (N.Y. 1991) (holding that price to be determined by arbitrator was sufficiently definite and enforceable).

Contract provisions calling for price to be set by appraisers have also been held to be reasonably certain and enforceable despite possible flaws and omissions in the appraisal process not addressed by the parties' agreement. In *Marder's Nurseries, Inc. v. Hopping*, 171 A.D.2d 63, 71, 573 N.Y.2d 990 (N.Y. App. Div. 1991), the court held that price was reasonably certain and enforceable in an agreement that called for "fair market price" to be set by two of three appraisers despite the possibility that the Court might have to "break any stalemate" between the appraisers by determining fair market value itself. The court reasoned:

> [A] contract should not be canceled solely on the grounds that the parties, having stipulated that the purchase price was to be determined by a group of appraisers, failed to foresee all possible obstacles or hindrances which might arise during the course of the appraisal procedure.

Id.

Invalidating contracts for indefiniteness is discouraged. Courts should, whenever possible, resist the destruction of contracts because of indefiniteness or uncertainty. *Olson v. Balch*, 63 Wn.2d 938, 942, 389 P.2d 900 (1964). When parties appear to have tried to reach an agreement expressing their intentions, courts "will not lightly declare a contract void for lack of certainty, but will rather endeavor to discover the true meaning and intent of the parties and give effect thereto." *Westlund Constr. Co. v. Berg*, 35 Wn.2d 824, 833, 215 P.2d 683 (1950).

The Option contains all the essential terms for an enforceable contract for the cash sale of real estate. It identifies the parties (MILP and MRA), describes the real property (by an attached legal description), and provides a detailed method for determining price through the use of possibly three, different pricing alternatives to be determined by appraisers. The parties objectively manifested their assent to these terms most notably by signing the Option and having their respective signatures notarized. Thereafter, the parties continued to expressly affirm their mutual belief that the parties had an enforceable option agreement until this appeal.[14]

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[14] The intent of the parties to a particular agreement may be determined not only from the actual language of the agreement but the subsequent acts and conduct of the parties to the contract. *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993); *see ALSO* RESTATEMENT (SECOND) OF CONTRACTS § 34, cmt c (1979) (subsequent conduct of one or both of the parties may remove any question regarding the

The parties stated their agreement regarding price with reasonable certainty. The Option provides that the highest of possibly three, different valuation methods (assuming all methods were actually and timely invoked) would be used as the purchase price. Further, each of the three designated pricing methods – (i) fair market value at time of exercise; (ii) replacement cost as time of exercise; and (iii) prospective fair market value of the leased property at stabilized occupancy plus 3% per year – was to be determined by unbiased appraisers, not the parties. The parties agreed that these determinations would bind the parties. There was nothing left for the parties to agree upon. As the parties agreed to a designated, multi-faceted procedure to determine price upon election of the Option, the pricing provision was sufficiently definite to be specifically enforceable. *See Valley Garage, Inc.*, 4 Wn. App. at 318 (rejecting a claim that option agreement failed for uncertainty regarding price where the price was to be set by appraisers).

What the trial court struggled with (and what the parties disputed

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parties' manifestation of assent). The parties repeatedly affirmed their mutual understanding that an option agreement existed. For example, MILP asked MRA to subordinate it rights to allow MILP to refinance the property in 2003. Ex. 52. In a February 2006 letter, Campbell Homes confirmed the existence of the Option, describing when it opened and closed. Ex. 60. MILP admitted to the existence of the Option in its Answer and brought a counterclaim against MRA based on the Option. CP 1267-75. In September 2008, MILP engaged an appraiser, James Brown, to perform an appraisal to determine fair market value and replacement cost in an effort to determine the option price. Ex. 125, 136. While there are certainly more examples, these examples remove any doubt regarding the parties' mutual belief that an Option existed between the parties.

at trial) were the details of the meaning of "replacement cost." The parties disagreed whether James Brown could include "soft costs," "developer's profit", and "stabilized occupancy" (the value of MRA's own business) as part of "replacement cost" when none of those items were included in the definition of "Facility" or the definition of "full replacement cost" in the Lease. The parties also disagreed whether "Facility's replacement cost" would permit James Brown to determine the "replacement cost" of an undepreciated, *better quality* building with *higher quality* furniture, fixtures and equipment rather than determining the "replacement cost" of the *actual* facility itself. The fact that parties disagree as to the meaning of a term or did not foresee all possible obstacles or hindrances to the appraisal process is not, standing alone, grounds to invalidate an option agreement. *See Marder's Nurseries, Inc.*, 171 A.D.2d at 71.

MILP makes much of the trial court's "meeting of the minds" language. See FOF 70 and 72. Latching onto this language, MILP argues that the trial court specifically found a lack of a meeting of the minds regarding two pricing methods and this therefore means that the parties never had an enforceable agreement.[15]

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[15] It is highly doubtful that the trial court was attempting to make findings regarding the enforceability of the Option when the question of enforceability was not even an issue before the court. Further, it is doubtful that the court was making findings supporting a conclusion of unenforceability when it ultimately enforced the Option and found MILP in breach. See FOF 3, 60, 79, 80; COL 1, 3.

MILP is viewing this language in isolation and out of context. Read in context, the trial court was stating that the precise details of the meaning of "fair market value" and "replacement cost" were not discussed between the parties. For example, reading Finding of Fact Nos. 71 and 72 together, the trial court found only that the Option does not say whether "fair market value" included the value of MRA's business or not. Similarly, reading Findings of Fact Nos. 66-70, the trial court found that the parties never discussed whether or not "replacement cost" included "soft costs," "developer's profit," or depreciation. The Court heard testimony from appraisers and ultimately ruled that it would not have to determine the meaning of "replacement cost" because the court was rejecting James Brown's replacement cost opinion in any event.

D. The Option is Enforceable Even if the Allegedly Invalid Provisions are Eliminated

MILP's argument that the Option is unenforceable also fails because it ignores the broad severability clause contained in the Option. Paragraph 22 of the Option provides:

> The invalidity or unenforceability of any particular provision of this Agreement *shall not* affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted. Furthermore, in lieu of such illegal, invalid or unenforceable provision there shall be added automatically as part of this Agreement, a provision as similar in terms to such illegal, invalid or unenforceable

provision as may be possible and be legal, valid and enforceable.

Ex. 16 (emphasis added).

The parties agreed to a broad severability clause to avoid invalidation of the Option as a whole. Thus, even if the parties had failed to sufficiently agree as to "replacement cost" or "fair market value," those provisions may be severed from the agreement. If these allegedly invalid provisions are removed, the parties would still have an enforceable agreement as parties, property and price are all still present. If subsections (i) and (ii) of Paragraph 2 are removed, there still remains a valid and certain way to determine price: subsection (iii) or "Schedule D." As parties, property and price remain, the Option is enforceable.

MILP wrongly asserts that the Option required that the parties complete and consider *all* three of the pricing methods in order to determine a price. Appellant's Brief at 39. The parties expressly contemplated that that pricing methods contained in subsections (i) and (ii) might not be used or considered at all in determining a price.

The appraisal processes under subsections (i) and (ii) were not mandatory or self-executing. In order for either to apply the parties *had* to take timely, proactive steps for these subsections to apply. For subsection (i) – fair market value – to apply each party had to timely appoint a

"disinterested appraiser" *no later* than fifteen days after option exercise. Further, the Option specifically *limited* the amount of time the appraisers had to complete their work to thirty days. If an appraiser failed to timely complete the appraisal or was not "disinterested," those opinions were to be discarded.

Similarly, in order for subsection (ii) – replacement cost value – to apply, MILP's appointed appraiser for fair market value would also have to determine "replacement cost." However, this "replacement cost" opinion had to be "included in the appraiser's appraisal report on the Facility," meaning MILP's appointed appraiser had to determine both fair market and replacement cost within the same report that was due "within thirty (30) days." If an appraiser failed to timely complete the appraisal, that opinion was likewise to be discarded.

E. Substantial Evidence Supports the Trial Court's Finding that MRA Acted in Good Faith and is Therefore Entitled to Equitable Remedies

MILP argues that MRA's "bad faith" prevents MRA from receiving equitable relief. Appellant's Brief at 44. MILP's claim fails because there is no finding that MRA ever engaged in any "bad faith." To the contrary, the trial court determined that MRA acted in good faith. FOF 82. Substantial evidence supports this finding and MILP makes no effort to carry its burden by showing that the record lacks substantial

evidence to support the trial court's finding. *Standing Rock Homeowners Ass'n*, 106 Wn. App. at 243. As MRA acted in good faith, it is entitled to equitable remedies.

MILP claims that MRA acted in "bad faith" because MRA "knew" MILP had rejected a proposed definition of replacement cost that excluded land and MRA therefore could not seek to apply this same definition at trial. This claim is wholly unsupported by any finding of fact. MILP is wrongfully asking this Court to re-weigh the evidence to find that MRA acted in "bad faith." *See Quinn*, 153 Wn. App. at 717 (appellate courts do not weigh evidence or find facts). In any event, MILP's premise that MRA *knew* MILP had rejected a definition of replacement cost which excluded land is not supported by the record.

There is no evidence in this record that either Clark or Struthers knew that MILP's definition of "replacement cost" excluded land or that either of them even talked to Hiner or Therrien about MILP's alleged definition of "replacement cost." The most MILP can do is point to a conversation Therrien claims to have had with Beeksma where Therrien allegedly expressed this view. The trial court, as the finder of fact, is free to believe Therrien's testimony or not. The trial court did not make any finding indicating any belief in Therrien's self-serving testimony. But even if Therrien did speak to Beeksma, there is no evidence in the record

that Beeksma ever shared this knowledge with Clark or Struthers. As there is no finding that MRA acted in anything but good faith, MRA was entitled to equitable relief.

F. Trial Court's Award of Consequential Damages was Within its Broad Discretion.

Specific performance should place the parties in the condition that they would have been had the contract been performed. *Cornish College of the Arts,* 158 Wn. App. at 221. However, specific performance alone can rarely achieve this objective, especially in cases that involve delay like this one:

> [A] decree for specific performance seldom brings about performance within the time that the contract requires. In this respect such a decree is nearly always a decree for less than exact and complete performance. For the partial breach involved in the delay, money damages will be awarded along with the decree for specific performance.

Rekhi v. Olson, 28 Wn. App. 751, 757-58, 626 P.2d 513 (1981) (quoting RESTATEMENT OF CONTRACTS § 365, cmt. d (1979). Consequential damages are therefore permitted in addition to specific performance because "the contract is being enforced retrospectively, [and] the equities should be adjusted accordingly." *Rekhi*, 28 Wn. App. at 758. "Consequential damages awarded in addition to specific performance are not awarded for breach of the contract." *Cornish*, 158 Wn. App. at 228. "Rather, they are awarded at the equitable discretion of the trial court in an

attempt to make the nonbreaching party whole." *Id.* "[S]uch damages must run from the date at which the contract required performance." *Id.*

MILP claims that the trial court abused its discretion by awarding MRA consequential damages during the period of time the parties were disputing the Option election date (between June 15, 2008 and November 30, 2010). Appellant's Brief at 45. The primary flaw in MILP's argument is that it ignores the parties' concurrent dispute about price. MILP insisted that MRA was in breach of the Option because it failed to pay the $27 million "replacement cost" figure determined by James Brown throughout the entire case. Thus, even if MRA had not contested the option exercise date, the parties' would have still disputed the issue of price. The issue of price was only resolved at trial. The trial court cannot be said to have clearly abused its discretion to award consequential damages from June 15, 2008 when price was at all times being disputed by the parties.

MILP brazenly claims: "No conduct of Mukilteo Investors between June 15, 2008, and November 30, 2010, can be said to have delayed MRA's purchase of Harbor Pointe[.]" Appellant's Brief at 46. This claim utterly ignores the fact that MILP at all times was refusing to sell and suing to enforce a price it manufactured by influencing its own appraiser to arrive at an artificially high value. MILP sought to create for itself a "win-win" scenario in which MRA either purchased the Facility at

the artificially high "replacement cost" price or continued to pay the above-market monthly rents under the Lease as tenants. These wrongful acts unquestionably delayed MRA's purchase of the Facility.

MILP also argues that MRA delayed the case after November 2010 through its "unproductive efforts" to show that James Brown was influenced.[16] Appellant's Brief at 46. MILP's argument is baseless for a number of reasons. First, there is no finding that MRA's discovery regarding James Brown was "unproductive." The trial court actually found to the contrary. See FOF 68,69,74; Supp'l FOF 10. MILP, nonetheless, asks this Court to re-weigh the evidence and make this finding on appeal. The Court should decline this invitation.

Second, as stated above, any alleged period of "delay" was concurrent with the parties' dispute about price.[17] The trial court was well

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[16] MILP attempts to distinguish between MRA's legal theories and discovery efforts regarding Campbell Homes and MILP. In fact, MRA conducted discovery to establish that James Brown could easily be influenced by Campbell Homes or its representatives, including its attorneys, Powers & Therrien. MILP is a single, asset entity and therefore the number of appraisal engagements between it and James Brown was limited to the four appraisals James Brown performed on the Facility. MRA discovered, however, that Campbell Homes served as the general partner for a number of other single asset limited partnerships that owned senior living facilities. As general partners are the entities designated to do business on behalf of limited partnerships, MRA naturally sought discovery of other facilities involving Campbell Homes that James Brown appraised. MRA discovered that James Brown had performed a number of appraisals for Campbell Homes-related entities. Although James Brown and Campbell Homes fought vigorously to prevent this discovery, MRA was ultimately successful in obtaining damaging evidence that it used at trial to show James Brown had been influenced by MILP.

[17] If any party delayed discovery of James Brown it was MILP. MILP forced MRA to initiate formal proceedings in Oregon in order to perform any discovery of James Brown. CP 6278-83. MRA served James Brown with a subpoena requesting all appraisals

within its discretion to conclude that in order to place MRA in the position it would have been but for MILP's proven bad faith, MRA was entitled to an award of consequential damages starting from the date it expected performance.

MILP next claims that MRA should not receive full credit for rent payments made between June 15, 2008 and July 15, 2012 because MRA would have been paying some amount in interest on a hypothetical purchase loan beginning on June 15, 2008. Appellant's Brief at 47. MILP's argument is misplaced. It fails to recognize that MRA will be paying purchase money interest on its loan to purchase this Facility for a full thirty-five years when this transaction closes following appeal. The trial court can hardly be said to have abused its discretion by refusing to reduce the damage award by interest MRA will be paying at some point in the future.

MILP vaguely claims MRA was obligated to pay MILP interest on the purchase price because MRA's theory of the case was that it would have closed its purchase by mid-2009. Appellant's Brief at 48. MILP's

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performed on Campbell-related entities on September 2, 2010. In December 2010, the Circuit Court in Oregon ordered James Brown to produce all responsive appraisals. CP 5427-31. James Brown ultimately produced only the appraisals and working papers for the Facility and the three other Campbell Homes related facilities involved in the Washington Capital refinance. CP 6284-85. James Brown claimed it could produce no further appraisals absent the name or location of additional properties owned or related to Campbell Homes. *Id.* MRA subsequently sought this information from Campbell Homes. Only after a motion to compel and an award of sanctions did Campbell Homes provide the information in May 2011. CP 5448-52, 6173-74, 6291-301.

claim regarding MRA's theory of the case is incorrect. MRA wanted to pay the cash price for the Facility in June 2008, not mid-2009. FOF 29; RP II 75, 85. Further, as a cash sale, no interest would be due. No abuse of discretion is established by failing to reduce an award of consequential damages for interest that was not even called for under the Option.

G. MRA's Motion to Revise the Preliminary Findings and Conclusions was Timely.

MILP argues that MRA's motion to revise the July 2 Findings and Conclusions was untimely. Appellant's Brief at 49. MILP's argument is entirely based upon the false belief that the July 2 Findings and Conclusions were a "judgment" under CR 54(a).

Following a bench trial, trial courts are required to "find the facts specially and state separately its conclusions of law." CR 52(a)(1). CR 52(b) permits a party to bring a motion asking the court to amend its findings or make additional findings "not later than 10 days *after entry of judgment.*" Emphasis added. Under the plain text of CR 52(b), in order for the 10-day time limit to apply, a "judgment" has to be entered. The question here is whether this Court entered a "judgment" by issuing its July 2 Findings and Conclusions. The answer is no.

CR 54(a)(1) specifically defines a "judgment" as "the final determination of the rights of the parties in the action and includes any

decree and order from which an appeal lies." There was no separate document entitled "Judgment" filed by the Court on July 2.[18] It is readily apparent from the trial court's accompanying letter requesting that the parties submit any desired additions to the Findings and Conclusions that the document was not intended to be a "final" determination of the rights of the parties. Further, Judge Bowden himself specifically stated on August 14 that he did not intend the July 2 Findings and Conclusions to be a "judgment." RP 8/14/11 at 6-7. As the July 2 Findings and Conclusions were not a "judgment" under CR 54(a), the ten-day time limitation in CR 52(b) does not apply.

MILP points out that the determination of what constitutes a final judgment is "a matter of substance and not form." Appellant's Brief at 50 (*citing Nestegard v. Inv. Exch. Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971)). In *Nestegard*, the court held that a decision was a final judgment when it was titled "Order on Summary Judgment," but its contents stated, "*ORDERED, ADJUDGED AND DECREED That Judgment be and it is hereby entered* for the plaintiff and against the defendant in the above entitled matter...." *Id.* at 621 (emphasis added). The disputed order in *Nestegard* said it *was* a final judgment. The July 2 Findings and Conclusions make

[18] It bears noting that CR 54(f)(2) requires the giving of 5 days' notice of presentation before judgment is entered. That no notice was given before the July 2 Findings of Fact and Conclusions of Law were filed only further supports a conclusion that they were not intended to be a "judgment."

no such similar statement.

The title and content of the July 2 Findings and Conclusions conforms to exactly what they were, findings and conclusions. They did not state in substance or in form that they finally determined the parties' rights in this case. As the July 2 Findings and Conclusions were not a "judgment," MRA's motion to revise was timely.

H. Campbell Homes is Jointly and Severally Liable for the Breach of the Option.

MRA and MILP entered into the Option on October 21, 1999. Campbell Homes, as general partner, signed on MILP's behalf. At that moment, Campbell Homes became obligated, jointly and severally, to sell the Property to MRA once MRA made its election. RCW 25.05.125; former RCW 25.10.660 (Laws of 1981, ch. 51, § 66); *cf* RCW 25.10.401(1). Campbell Homes *remained* jointly and severally liable for all obligations under the Option Agreement, even for breaches that occurred *after* Campbell Homes withdrew as general partner on May 1, 2008. RCW 25.05.260; *see also Hewitt Rubber Co. v. Thompson*, 127 Wash. 363, 368, 220 P. 767 (1923) ("One partner may not relieve himself of liability for past debts of the partnership merely by terminating the partnership."); *Goerig v. Cont'l Cas. Co.*, 167 F.2d 930, 933 (9th Cir. 1948) ("We can see no reason why under the Washington law a dormant

partner, any more than any other partner, may escape liability by withdrawing from the partnership."); *8182 Maryland Assoc., L.P v. Sheehan*, 14 S.W.3d 576, 582 (Mo. 2000) ("Once [the partner] signed the lease agreement, he became jointly and severally liable for all existing and *future* obligations under that lease."); *Nolan Road West, Ltd. v. PNC Realty Holding Corp.*, 544 S.E.2d 750 (Ga. Ct. App. 2001). MILP does not contest this law.

MILP cites *Turner v. Gunderson*, 60 Wn. App. 696, 700-01, 807 P.2d 370 (1991) for the proposition that once an option is exercised, it becomes a "new contract for purchase and sale." Based on this language, MILP argues that to the extent MILP incurred any obligation to close the sale of the facility to MRA, Campbell Homes was no longer a party when that occurred on June 15, 2008.

MILP's argument fails because it fails to understand the obligations created by a binding option contract. The court in *Turner* was remarking when an optionee accepts an option right, a new contract for *purchase and sale* is created because the optionee has accepted the optionor's outstanding, irrevocable offer.

Here, it was the offer itself (contained within the Option) that MILP failed to honor. It was the terms of the Option, specifically the pricing methods, that were in dispute. MILP, in bad faith, failed to

comply with the terms of the Option to determine the correct purchase price for the Facility. It is therefore MILP's breach (for which Campbell Homes is jointly and severally liable) of the Option that gives rises to the liability in this case.

I. The Award of MRA's Attorney Fees was Within the Trial Court's Discretion.

MILP asks for remand to segregate attorneys' fees and costs MRA spent conducting supposedly "unproductive" discovery on Campbell Homes' relationship with James Brown. MILP' argument lacks merit.

Washington courts may reduce an attorneys' fees award for time spent on unsuccessful claims or theories. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Washington courts are not required, however, to reduce attorney time for successful claims. Here, the trial court specifically found MRA's efforts to obtain records from James Brown contributed greatly to the determination to disregard the testimony of Aaron Brown. Supp. FOF 10; CP 5305. As such, there is no basis to reduce the attorney time spent on this endeavor as "unsuccessful." As before, MILP asks this Court to improperly re-weigh the evidence in this case and conclude that MRA's efforts to obtain discovery from James Brown was "unproductive." Again, this Court should decline this invitation as it is inconsistent with the role of the

appellate court.

MILP nonetheless claims that the trial court's oral statement at the August 14 hearing that time spent on Campbell Homes relationship with James Brown was intertwined with the other entities or people involved with MILP lacks substantial evidence. Appellant's Brief at 58. Again, MILP's claim is unfounded. As clearly stated by the trial court:

> I do not fault the plaintiff for the time and expense to obtain the records of James Brown and Associates, even if that was in pursuit of a belief that the business relationship between the appraisal firm and Campbell Homes and the entities that comprise MILP called into question the neutrality and objectivity of the Brown appraisal.
>
> I think those are issues that are inseparably intertwined because of the nature of the overlapping entities which now form MILP and the relationship between Powers and Therrien and other principals with Campbell Homes. I think it's easy to think of Campbell Homes in relation to Carl Campbell and Kris Campbell rather than all of the principals that were at play here or involved in this.
>
> The efforts that plaintiff's counsel undertook, it seems to me, contributed greatly to my determination to disregard the testimony of Aaron Brown and his appraisal for the reasons I delineated in my findings. And that was the cornerstone of the defense case to support its view that the value of the facility should be placed at $27 million dollars.

RP 8/14/12 39-40; see also Supp. FOF 10; CP 5305.

The record shows that the trial court correctly recognized that the relationships between Campbell Homes and James Brown were intertwined within the complicated web of the many different entities and

people associated with MILP itself. The trial court did not abuse its discretion in awarding MRA attorneys' fees for time spent conducting successful discovery of James Brown regarding MILP and its numerous tentacles, which included Campbell Homes, Therrien, and Powers.

IV. RAP 18.1 ATTORNEY'S FEE REQUEST

MRA requests an award of its fees on appeal under the authority of Paragraph 16 of the Option and RCW 4.84.330.

V. CONCLUSION

For the foregoing reasons, MRA asks that this Court affirm the trial court's findings of fact, conclusions of law, and judgment in all respects.

RESPECTFULLY SUBMITTED this 21st day of December, 2012.

RYAN, SWANSON & CLEVELAND, PLLC

By _____
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DECLARATION OF SERVICE

I declare that on the 21st day of December, 2012, I caused to be served the foregoing document on counsel for Appellants, as noted, at the following addresses:

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Dated: December 21, 2012

Place: Seattle, WA