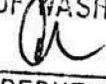


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COURT OF APPEALS  
DIVISION II

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NO. 43138-6-II

STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ALEX VON KLEIST,

Respondent,

v.

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

Appellants.

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BRIEF OF APPELLANTS GREGORY COCHRANE  
AND PAUL LUKSHA

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## I. INTRODUCTION

Respondent Alex von Kleist (“von Kleist”) failed to effect proper service of the Summons and Complaint in this matter on Appellants Greg Cochrane (“Cochrane”) and Paul Luksha (“Luksha”). Both Cochrane and Luksha are residents of Ontario, Canada. Neither was served in compliance with the Washington long-arm statute, RCW 4.28.185. Neither consented to alternative service. Accordingly, the successive default judgments entered against each of them are void for lack of personal jurisdiction.<sup>1</sup>

In addition, the default judgments against Cochrane and Luksha were also voidable for irregularities not related to jurisdiction, and should have been set aside pursuant to CR 60(b)(1). For all of these reasons, the trial court erred when it refused to grant the CR 60(b) Motion to Vacate Default Judgments as to Cochrane and Luksha. This Court should reverse the trial court and vacate the default judgments.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to grant Defendants’ Motion to Vacate Default Judgments as to Cochrane and Luksha.

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<sup>1</sup> As explained in more detail below at pp. 12-14, von Kleist sought and obtained a default judgment against all defendants on January 27, 2010. CP 1273-76. Then, without moving to amend or vacate this judgment, he sought and obtained another default judgment against the “international defendants” on May 10, 2010. CP 1277-79.

2. The trial court erred in so far as it made any oral finding of fact that the forum selection clause in the Subscription Agreement was binding on Cochrane and Luksha.<sup>2</sup> RP (4/6/12) at 7: 1-2.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

#### **A. Issues relating to whether the default judgments against Cochrane and Luksha are void for lack of personal jurisdiction**

1. Did the trial court at all times lack personal jurisdiction over Luksha, because von Kleist never had Luksha personally served in compliance with RCW 4.28.185(2)?

2. Did the trial court at all times lack personal jurisdiction over Luksha, because von Kleist never submitted the affidavit for Luksha required by RCW 4.28.185(4)?

3. Did the trial court lack personal jurisdiction over Cochrane at the time it entered its first default judgment, because von Kleist had not had Cochrane personally served in compliance with RCW 4.28.185(2) prior to the entry of that judgment?

4. Did the trial court at all times lack personal jurisdiction over Cochrane, because von Kleist failed to submit the affidavit required by RCW 4.28.185(4) until after the default judgments had been entered?

5. Did the Subscription Agreement bind either Cochrane or Luksha to accept service by mail?

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<sup>2</sup> Cochrane and Luksha do not believe that the trial court's conclusion on this point is best described as a finding of fact, but include this assignment of error here as a precaution to ensure their compliance with RAP 10.3(g).

6. Did the trial court's lack of personal jurisdiction over Cochrane and Luksha impose on it a non-discretionary duty to void the default judgments entered against them?

B. Issues relating to whether the default judgments against Cochrane and Luksha are voidable on account of non-jurisdictional irregularities

1. Does the fact that von Kleist secured the first default judgment against Cochrane and Luksha before the expiration of the 60 day period stated in the summons render the first default judgment voidable as a matter of right?

2. Did the fact that von Kleist failed to move to vacate or modify the first default judgment before he procured the second default judgment against Cochrane (and possibly Luksha) render the second default judgment voidable as a matter of right?

3. Did von Kleist's failure to secure an entry of default against Luksha prior to securing the second default judgment render that judgment voidable as to Luksha?

4. Did Cochrane and Luksha have strong defenses to von Kleist's claims?

#### **IV. STATEMENT OF THE CASE**

This case arises out of an investment Alex von Kleist made in a Washington limited partnership, Graoch Associates # 161 Limited Partnership (henceforth "Graoch # 161" or "the Partnership"). CP 1221, ¶ 2.1. Apparently believing that he was cheated out of funds due, von Kleist eventually sued Graoch 161 GP, L.P. (a second Washington limited

partnership which is the general partner of Graoch # 161), Graoch 161-1 GP, Inc. (a Washington corporation which is the general partner of Graoch 161 GP, L.P.), two other affiliated Washington entities, a British Columbia limited partnership, and the individuals Gary Gray (“Gray”), Les Pioch (“Pioch”), Greg Cochrane, and Paul Luksha.<sup>3</sup>

The following statement of the case focuses on the subset of facts relevant to von Kleist’s claims against Cochrane and Luksha. Facts or events relevant only to von Kleist’s claims against the other defendants are not discussed.

1. Von Kleist decides to acquire a partnership interest in Graoch # 161.

Von Kleist is a Canadian citizen and resident of West Vancouver, British Columbia. CP 1300, at ¶ 1. At some point during the summer of 2007, he began to consider acquiring a limited partnership interest in Graoch # 161. CP 1301. By his own admission, von Kleist was an “accredited investor” as defined by Regulation D of the Securities Act of 1933. CP 1318.<sup>4</sup> He had also already made “past investments with Graoch” entities, investments which “were always accompanied with

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<sup>3</sup> Von Kleist did not sue Graoch # 161, the Washington limited partnership in which he made the investment at issue, nor did he sue Graoch Associates Limited Partnership, the Ontario limited partnership through which von Kleist alleges Gray, Pioch, Cochrane and Luksha controlled the Washington entities. CP 1219, 1523, 1529 at ¶¶ 4.3-4.4. Hereinafter, Graoch Associates Limited Partnership (Ontario) will be referred to as “GRAOCH.”

<sup>4</sup> See 17 CFR § 230.501(a) (defining “accredited investor”). The SEC’s web site also offers an abbreviated definition of the term at: <http://www.sec.gov/answers/accred.htm>

detailed corporate communication” and an apparently satisfactory “level of detail and service.” CP 1391.

Von Kleist was advised about Graoch # 161 by a Mr. Bob Stewart (“Stewart”) and by Pioch. CP 1301. Stewart and Pioch described Graoch # 161 as a “Loan and Funding vehicle” for another Washington limited partnership, Graoch Associates # 160 L.P. (henceforth “Graoch # 160”). CP 1301. Funds invested in Graoch # 161 would be lent to Graoch # 160, which would use them to purchase real estate assets. CP 1311-12. In exchange, Graoch # 160 would give Graoch # 161 a note, paying interest at 12.25% per annum. CP 1311, 1346. If Graoch # 160 defaulted on the note, it would be obligated to pay default interest to Graoch # 161 at the rate of 18% per annum. CP 1346. Investors in Graoch # 161 would be paid from the interest on the note, and would have a qualified right to wind up their investment after October 15, 2008. CP 1311.

Ultimately, on or about November 15, 2007, von Kleist executed a Subscription Agreement to acquire a limited partnership interest in Graoch # 161. CP 1302. Expressly addressed “To: GRAOCH ASSOCIATES # 161 LIMITED PARTNERSHIP (the ‘Partnership’)”, the Subscription Agreement states in pertinent part as follows:

1. Subscription. The undersigned hereby agrees to make a capital contribution to the Partnership in the amount of \$1,012,000.XX to acquire a limited partnership interest in the Partnership (the ‘Securities’), which funds will constitute a capital contribution of the undersigned to the capital of the Partnership. . . Upon receipt by the Partnership of (a) this Subscription Agreement duly completed and signed by the undersigned, and (b) the Subscription funds in accordance with Schedule “A”, the

undersigned will be admitted as a limited partner of the Partnership, subject at all times to the Partnership's absolute right to accept or reject any Subscription, in the Partnership's sole discretion. Confirmation of acceptance or rejection of this Subscription will be mailed to the undersigned within 5 business days of the date of receipt of both this Subscription Agreement and the Subscription funds by the Partnership. If this subscription Agreement is not accepted by the Partnership, the Subscription funds will be returned to the undersigned, without interest or deduction, to the address of the undersigned set out below.

2. Partnership agreement. Upon acceptance of this Subscription, the undersigned hereby ratifies and agrees to the terms and conditions of the limited partnership agreement of the Partnership dated October 15, 2007 . . . . The undersigned agrees to adopt and be bound as a party to and as a limited partner in the Partnership by the terms of the Partnership Agreement as from time to time amended and in effect.

. . .

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

CP 1311-1320. The Subscription Agreement was signed by Alex von Kleist over a line which states "Signature of Subscriber," and by Pioch over a line which states "Witness to Signature of Subscriber." CP 1321.

Consistent with the Partnership's right of discretionary approval of the Subscription as set forth in paragraph 1 of the Subscription Agreement,

a final, un-paginated sheet appears to have been attached at the end of the Subscription Agreement. CP 1322. This sheet provided a form for the Partnership to accept “[t]he foregoing Subscription Agreement”, stating:

The foregoing Subscription Agreement, admitting \_\_\_\_\_ to the Partnership, is hereby accepted by the undersigned Partnership, effective as of the \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

CP 1322. This text is followed by a signature block:

GRAOCH ASSOCIATES # 161 LIMITED PARTNERSHIP  
A Washington limited partnership.

By: Graoch 161 GP, L.P., a Washington limited partnership,  
Its General Partner

By Graoch 161-1 GP, Inc., a Washington corporation,  
Its General Partner

By: \_\_\_\_\_  
Gary M. Gray, President

CP 1322. The blanks in this form and the signature line do not appear to have ever been completed. CP 1322. However, on December 12, 2007, Gray sent von Kleist a letter acknowledging receipt of the wire transfer of the subscription amount, and thanking von Kleist for choosing to invest with the Partnership. CP 1326. Gray signed the letter as President of Graoch 161-1 GP, Inc. CP 1326.

In addition to the Subscription Agreement, von Kleist also received a copy of the “Agreement of Limited Partnership of Graoch Associates # 161 Limited Partnership” (the “Partnership Agreement”). CP 1302, 1327-49. The Partnership Agreement identifies Graoch 161 GP, L.P. a Washington limited partnership, as general partner of the Partnership. It also “designates Bruce P. Weiland, whose address is 151 Finch Place SW,

Suite A, Bainbridge Island, Washington, 98110 as [the Partnership's] registered agent for service of process." CP 1327.

There is no allegation, and no indication in the record, that von Kleist had any interaction with either Cochrane or Luksha before he made his investment in Graoch # 161. CP 1452-53, 1469-70, 1511. By von Kleist's account, the first interaction he had with Cochrane occurred on or around July 17, 2009, some twenty months after von Kleist executed the Subscription Agreement. CP 1305. Von Kleist does not provide a date for his first interaction with Luksha, but the only evidence suggests that it occurred around the same time as von Kleist's first contact with Cochrane. CP 1469-70. However, von Kleist eventually alleged that prior to making his investment in Graoch # 161, Pioch told him that "Graoch had expanded to include a Toronto Office. . . and that the office included the two additional General Partners, namely Greg Cochrane and Paul Luksha." CP 1511.

2. Von Kleist decides to withdraw from the Partnership.

Under the terms of the Partnership Agreement, each partner was to have a capital account. CP 1331, ¶ 3.07. Each such account was to be "increased by such Partner's capital contributions actually made to the Partnership and such Partner's allocable share of Profits of the Partnership, and decreased by such Partner's allocable share of Losses of the Partnership and distributions made to such partner." CP 1331. Investments in the Partnership were to have an initial term of approximately one year. CP 1311. At the expiration of that term, each

partner was to receive a written “option to either (a) remain as limited partners of the Partnership for a further twelve month term, or (b) withdraw as limited partners of the Partnership, with up to 100% of their outstanding capital (and accrued distributions) returned to them within seven business days of the then current Loan Repayment Date.” CP 1311.

October 15, 2008 was set as the first “Loan Repayment Date.” CP 1311. That date came and went without von Kleist receiving the required written option to renew or withdraw. CP 1302. As a consequence, von Kleist again attempted to contact Pioch, this time to inquire about terminating his investment. CP 1302, ¶¶ 5-6. After leaving “numerous messages” for Pioch, von Kleist was finally able to meet with him on or around December 10, 2008. CP 1303. Von Kleist informed Pioch that he wished to withdraw from the partnership. CP 1385. Pioch promised to give von Kleist a re-payment schedule, but the schedule never materialized. CP 1303. Over the next several months, from December 2008 to April 2009, von Kleist left “multiple phone messages” for Pioch and exchanged several email messages with him but did not have his questions answered, and was not able to cash out his capital account. CP 1303-04. However, von Kleist did receive an amount of “distributions” which is impossible to quantify from the record. CP 1389.<sup>5</sup>

Eventually, on or about April 14, 2009, von Kleist was able to talk directly with Gray. CP 1304. By means of a follow-up email, Gray told

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<sup>5</sup> CP 1389 is an email from Von Kleist to Pioch dated April 1, 2009 in which he acknowledges “distributions sent to us after October 15<sup>th</sup>.”

von Kleist that the Partnership “will make all efforts possible to redeem your \$1,000,000.00 US partnership interest by no later than June 15, 2009.” CP 1390. However, on or about June 15, 2009, von Kleist allegedly received an email from Gray (not contained in the record) informing him that repayment would not be forthcoming. CP 1304, 1391.

It was only after this point, more than eight months after first seeking to withdraw from the Partnership, and more than twenty months after ostensibly learning that Cochrane and Luksha were general partners of GRAOCH, that von Kleist first attempted to contact Cochrane.<sup>6</sup> CP 1305, ¶ 14. Cochrane promptly responded to von Kleist’s inquiry by sending him certain documents. CP 1392. However, von Kleist noted that he still “wish[ed] to simply unwind my investment with Graoch.” CP 1392.

By mid-September, 2009, von Kleist was sufficiently frustrated with his inability to withdraw from the Partnership that he had his attorney write a demand letter addressed to Graoch 161-1 GP, Inc. and to Graoch # 161. CP 1408. The letter is not addressed to any of the individual defendants (Gray, Pioch, Cochrane, or Luksha) in their individual capacities, nor does it attempt to articulate any basis for individual liability to von Kleist. CP 1408. However, it demands repayment in full (presumably by either Graoch 161-1 GP, Inc. or Graoch # 161) of von

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<sup>6</sup> Von Kleist has made no allegations concerning (and provided no evidence of) any communications with Luksha. Luksha acknowledges exchanging emails with von Kleist, at some unspecified dates “after the investment by [von Kleist] in the limited partnership.” CP 1469-70.

Kleist's initial capital investment, without any adjustment for von Kleist's share of Partnership losses, if any (or even any acknowledgment of the possibility of such an adjustment). CP 1410. It also demanded payment of default interest at a rate of 18% per annum, apparently based on a provision found in the note from Graoch # 160 to Graoch # 161. CP 1410, 1346. Von Kleist received no response to his attorney's demand letter. CP 1306.

3. Von Kleist prepares a Complaint, and attempts to serve it.

On or about November 18, 2009 von Kleist's attorney signed, and von Kleist verified, a Complaint against various Graoch entities, the Jackalope Fund, Gray and his wife, Pioch, Luksha, and Cochrane. CP 1219, 1234. Conspicuously missing from the list of defendants are Graoch # 161, the partnership in which von Kleist had invested, and GRAOCH, the Ontario entity expressly described in the Subscription Agreement as being in "direct[] control[]"—along with Gary Gray—of Graoch 160 GP, L.P. and the Jackalope Fund. CP 1219, 1312 ¶ 4.4.

The Complaint asserts claims for an accounting, securities fraud, violation of the Consumer Protection Act, appointment of a receiver, intentional misrepresentation, negligent misrepresentation, and breach of contract. CP 1224-1232. At no point does the Complaint specifically allege that either Cochrane or Luksha engaged in any wrongful act. Instead, the Complaint simply alleges that all defendants "worked in concert" on all of the claims set forth. CP 1221, ¶ 1.6. The Complaint also alleges that some or all of the "[d]efendants are general partners of

Graoch 160 and 161, and are the officers and managers of all limited partnerships named herein.” CP 1226. The Complaint does not allege that Cochrane and Luksha are general partners of GRAOCH.

According to the Complaint, “[j]urisdiction as to all defendants is proper under RCW 4.28.185(1)(a) & (b), as at all material times, defendants joined together to transact business within this state and to commit tortuous [sic] acts.” CP 1221, ¶ 1.7. The Complaint does not cite or allude in any way to any other basis for the trial court’s jurisdiction over the non-resident Defendants, including Cochrane and Luksha. CP 1221.

Despite the fact that the Complaint relies exclusively on the long-arm statute for jurisdiction over Cochrane and Luksha, von Kleist attempted to affect service on them by registered or certified mail. CP 1261, ¶ 4; 1263-65. The summonses that accompanied the Complaint specifically stated that “you must respond to the complaint . . . within 60 days (for non-residents) after service of the summons.” CP 1247, 1259. The Post Canada receipts offered as proof of service on Cochrane and Luksha each show that the mail with purported service was sent to an address in Etobicoke, Ontario and delivered on or about December 11, 2009. CP 1263-65.

4. Von Kleist seeks and receives an initial default judgment against all Defendants.

On January 27, 2010—well short of 60 days after the purported service by mail on Cochrane and Luksha—von Kleist moved for an order

and judgment of default against all of the defendants. CP 1260-62. The Order of Default, entered that same day, was printed on the pleading paper of von Kleist's attorney, and states specifically that the Defendants, including "PAUL J. LUKSHA, a Canadian citizen, and GREGORY COCHRANE, a Canadian citizen, jointly and severally, are in default." CP 1271, ¶ 1.2. Similarly, the Default Judgment specifically names Luksha and Cochrane in both the judgment summary and the judgment proper. CP 1273-76.

5. Von Kleist seeks and obtains a second default judgment against a subset of the "International Defendants"

Over the next two months, von Kleist's attorney had several conversations with attorneys from Lane Powell about the case. CP 1287. Von Kleist's attorney even signed a stipulation, prepared by Lane Powell, to dismiss the default judgments against the individual Canadian defendants. CP 1287, ¶ 4; 1473, ¶ 3; 1482-83.

The stipulation was ultimately not filed, but von Kleist's attorney did acknowledge on the record that "[a]lthough default judgment was entered as to all defendants in this action on January 27, 2010, the international defendants were not personally served" at that time. CP 1282-83. Attempting to remedy this defect, von Kleist secured personal service on Cochrane on February 18, 2010. CP 1297-99. Von Kleist also had the Jackalope Fund served via delivery of the Summons and Complaint to its registered agent in Vancouver, British Columbia. CP 1294-96. Finally, von Kleist secured personal service on Pioch on or

about March 1, 2010 in Santa Fe, New Mexico. CP 1280-81. However, von Kleist did not secure personal service on Luksha, nor is there any evidence in the record that he attempted to do so.

Fortified by these new service attempts, von Kleist filed a new Motion for Default Judgment as to Certain International Defendants on May 10, 2010. CP 1412-13. Before filing this new motion, Von Kleist did not attempt to vacate or modify the prior default judgment entered against all of the Defendants on January 27, 2010. The new motion for default judgment expressly asked for “default judgment against certain international defendants, namely THE JACKALOPE FUND LIMITED PARTNERSHIP, GREGORY COCHRANE, and LES PIOCH.” CP 1282 (capitalization as in original). The new motion did not mention Luksha. CP 1282-83. Neither did the declaration filed by von Kleist’s attorney in support of the new motion. CP 1286-93.

In response to these filings, the Pierce County Superior Court Commissioner signed both an Order of Default as to Certain International Defendants and a Default Judgment as to International Defendants. CP 1284-85. Consistent with von Kleist’s pleadings, the second Order of Default made no reference to Luksha. CP 1285. However, the second Default Judgment, although it omits Luksha from the list of judgment debtors in the judgment summary, includes Luksha in the list of debtors in the body of the judgment. CP 1278-79.

6. Defendants'/ Appellants' Motion to Vacate Default.

Lane Powell entered a limited appearance on behalf of all the Defendants on December 29, 2010. CP 1412-13. Only after this appearance, approximately eleven months after the first default judgment was entered and almost eight months after the second default judgment was entered, did von Kleist file an affidavit affirming that Pioch, Cochrane, and the Jackalope Fund were each non-residents of the State of Washington, and that none of them could be served in the State of Washington. CP 1415-25. The affidavit makes no reference to Luksha.

Defendants served their Motion to Vacate Default Judgments (“Motion to Vacate”) by email on von Kleist’s attorney on January 6, 2011, and filed it with the trial court on January 11, 2011. CP 1426. The Motion to Vacate was initially noted to be heard on January 21, 2011, but was set over by order of the court until February 11, 2011. CP 1449; 1501. On February 4, 2011, von Kleist filed a Motion for Continuance, asking that the hearing on the Motion to Vacate be further set over until March 11, 2011. CP 1503. In his affidavit accompanying the Motion for Continuance, von Kleist acknowledged receiving the Motion to Vacate on January 6, 2011. CP 1504. Defendants subsequently re-noted their motion for March 11, 2011. CP 1507.

On March 7, 2011 von Kleist filed his Response to Defendants’ Motion to Set Aside Default Judgment (“Response”), along with the accompanying Declaration of Alex von Kleist in Response to Motion to Vacate Default. CP 1508; 1644. In the Response, von Kleist for the first

time claimed that the trial court had personal jurisdiction over Cochrane and Luksha based on their purported consent to the terms of paragraph 16 of the Subscription Agreement. CP 1645.

The trial court initially denied the Motion to Vacate without prejudice, holding that “Defendants may refile and renote.” CP 1721. Defendants followed the trial court’s direction, and promptly filed and served Defendants’ Re-filed Motion to Vacate Default Judgments. CP 1725. At the new hearing, held on May 12, 2011, the trial court took the matter under advisement, making no findings of fact or conclusions of law. RP (5/13/11) at 28:19-21. In fact, the trial court did not issue a ruling on the Motion to Vacate until the following year, after Defendants filed their Re-Filed Motion to Vacate on March 28, 2012. CP 1928; 2084-86.

On April 6, 2012, the trial court denied the Re-filed Motion to Vacate, indicating that it had made a ruling back in 2011 but never filed it or delivered it to the parties. RP (4/6/2012) at 6. The trial court based its decision to deny the Motion to Vacate (and the Re-filed Motion to Vacate) on its belief “that the initial forum selection clause is dispositive.” RP (4/6/2012) at 7. A Notice of Appeal was filed on behalf of all Defendants on April 6, 2012. CP 2076. Out of an abundance of caution, Appellants Cochrane and Luksha filed a separate, timely Notice of Appeal on Monday, May 7, 2012. CP 2087.

## V. SUMMARY OF THE ARGUMENT

Without proper service of process on a defendant, a court has no personal jurisdiction.<sup>7</sup> Without personal jurisdiction, any judgment entered against a defendant is void.<sup>8</sup> Here, von Kleist failed to serve both Cochran and Luksha in compliance with Washington law governing service on non-residents. Moreover, neither Cochran nor Luksha ever consented to alternative service. Accordingly, the default judgments against Cochran and Luksha are void, and should have been set aside under CR 60(b)(5).

In the alternative, default judgments are also voidable under CR 60(b)(1) for irregularities in the procurement of the judgment. Here, von Kleist secured his first default judgment without waiting for sixty days to elapse from the date of purported service on the international defendants. He then secured a second default judgment against the same defendants, without first attempting to vacate or modify the original judgment. Von Kleist also failed to secure an entry of default against Luksha before procuring the second default judgment. These are irregularities that warrant voiding each of the judgments. Moreover, Cochran and Luksha each have strong defenses on the merits of the claims against them. Hence, even if von Kleist somehow properly served Cochran and Luksha,

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<sup>7</sup> See, e.g., *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131, review denied, 130 Wn.2d 1004, 925 P.2d 989 (1996).

<sup>8</sup> *Id.* at 6 (noting that “[f]irst and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process”).

the default judgments should be voided on these alternative, non-jurisdictional grounds.

## VI. ARGUMENT

### 1. The standards of review

Because Defendants' Motion to Vacate raised arguments under both CR 60(b)(5) and CR 60(b)(1), this appeal implicates two different standards of review.

This Court typically performs a *de novo* review of a trial court's denial of a motion brought pursuant to CR 60(b)(5) to vacate a default judgment for lack of jurisdiction.<sup>9</sup> When jurisdictional facts are not in dispute, the question of whether those facts support personal jurisdiction is a pure question of law on which no deference is due the trial court.<sup>10</sup> As demonstrated in detail below, the dispositive jurisdictional facts relating to Cochrane and Luksha are not in dispute. Hence *de novo* review is appropriate for the issue of whether Cochrane and Luksha were properly served in compliance with the long-arm statute.<sup>11</sup> *De novo* review is also

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<sup>9</sup> *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585, 225 P.3d 1035, review granted, 169 Wn. 2d 1029, 241 P.3d 786 (2010). *See also Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007) (noting that a “court reviews *de novo* the trial court's denial of a motion to vacate a final order for lack of jurisdiction”).

<sup>10</sup> *See, e.g., Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999).

<sup>11</sup> *See, e.g., Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405, (2011) (noting that “[w]hether service of process was proper is a question of law that this court reviews *de novo*”).

appropriate for the issue of whether Cochrane and Luksha are bound by a contractual provision allowing service by mail.<sup>12</sup>

As for Cochrane and Luksha's arguments brought under CR 60(b)(1), the trial court's ruling is reviewed for abuse of discretion.<sup>13</sup> Discretion is abused "when it is exercised on untenable grounds or for untenable reasons."<sup>14</sup> A trial court necessarily abuses its discretion if its decision is based on an erroneous view of the law.<sup>15</sup> Moreover, an abuse of discretion is more likely to be found if the default judgment is upheld than if it is set aside.<sup>16</sup>

2. A default judgment entered without personal jurisdiction over a defendant is void as to that defendant.

When a court lacks personal jurisdiction over a party, any judgment entered against that party is void.<sup>17</sup> If a judgment has been entered by default, and the judgment is later shown to be void for lack of personal jurisdiction, the trial court may vacate the judgment *at any time*

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<sup>12</sup> See, e.g., *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995) (noting that the interpretation of an unambiguous contract is a question of law).

<sup>13</sup> *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

<sup>14</sup> *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309-10, 989 P.2d 1144 (1999) (quoting *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996))

<sup>15</sup> See, e.g., *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858 P.2d 1054 (1993).

<sup>16</sup> *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

<sup>17</sup> *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 146, 111 P.3d 271 (2005).

under CR 60(b)(5).<sup>18</sup> Indeed, the courts have a mandatory duty to vacate such judgments.<sup>19</sup> This is true regardless of whether the defendant has a defense to the merits of the underlying claims.<sup>20</sup>

The lack of personal jurisdiction may even be raised for the first time on appeal, provided that the issue has not been waived.<sup>21</sup> Cochrane and Luksha not only did nothing to waive their claims that the trial court lacked personal jurisdiction over them, but also raised the issue of personal jurisdiction below by means of their repeated motions to vacate. CP 1426, 1725, 1928. The issue of whether the default judgments entered against Cochrane and Luksha are void is properly before this Court.<sup>22</sup>

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<sup>18</sup> See, e.g., *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317, 877 P.2d 724 (1994) (judgment vacated five years after entry, even though defendant learned of judgment only a few months after it was entered); *In re Marriage of Markowski*, 50 Wn. App. 633, 749 P.2d 754 (1988).

<sup>19</sup> See, e.g., *Scott*, 82 Wn. App. at 6.

<sup>20</sup> See, e.g., *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1979) (noting that “[t]he defendant need not offer a meritorious defense if the challenge to the judgment is based upon lack of personal jurisdiction”).

<sup>21</sup> See, e.g., *Robb v. Kaufman*, 81 Wn. App. 182, 188, 913 P.2d 828 (1996) (noting that “personal jurisdiction cannot be raised for the first time on appeal by a party who has made a general appearance or entered a responsive pleading which did not dispute personal jurisdiction”) (emphasis added). Cochrane and Luksha did not enter a general appearance, or fail to dispute personal jurisdiction in any pleading.

<sup>22</sup> Below, von Kleist argued that Appellants’ purported failure to comply with the service provisions of CR 60(e)(3) barred the trial court from hearing their challenge to personal jurisdiction. CP 1661-63. Since personal jurisdiction can be raised for the first time on appeal, this argument is moot here. It was also incorrect, as demonstrated by *Lindgren v. Lindgren*, 58 Wn. App. 588, 593, 794 P.2d 526 (1990) (holding that “[a]s long as the party [opposing vacating a judgment] has a meaningful opportunity to be heard and adequate time to prepare, this technical

3. Neither Cochrane nor Luksha was ever properly served with original process under the terms of the Washington long-arm statute, RCW 4.28.185.

Proper service of the summons and complaint is necessary to confer personal jurisdiction.<sup>23</sup> On the undisputed facts of this matter, neither Cochrane nor Luksha was ever properly served with original process in accordance with the terms of the long-arm statute, RCW 4.28.185. It follows that the trial court could not assume jurisdiction over Cochrane and Luksha based on that statute, the only grounds for such jurisdiction alleged in von Kleist's Complaint.

RCW 4.28.185 provides in pertinent part as follows:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;

....

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

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deviation from proper procedure [for service set by CR 60(e)(3)] is inconsequential”).

<sup>23</sup> See, e.g., *In re Marriage of Markowski*, 50 Wn. App. 633, 635–36, 749 P.2d 754 (1988); *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App. 366, 370-71, 203 P.3d 1069, (2009); and *Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405 (2011).

....

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state. . . .

In order for jurisdiction to attach under the long-arm statute, its service requirements must be strictly adhered to.<sup>24</sup> Here, von Kleist failed to comply with at least two different statutory requirements. Either of those failures suffices to defeat personal jurisdiction under the long-arm statute.

First of all, the long-arm statute requires *personal* service outside of the state. Washington courts have consistently interpreted the language of RCW 4.28.185(2), to the effect that “[s]ervice of process upon any person who is subject to the jurisdiction of the courts of this state . . . *may* be made by personally serving the defendant outside this state . . .” as *requiring* personal service.<sup>25</sup> This is surely at least in part because of the

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<sup>24</sup> See, e.g., *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 177-78, 744 P.2d 1032, 1075 (1987) *amended*, 109 Wash. 2d 107, 750 P.2d 254 (1988) (noting that “statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, [and] they must be strictly pursued”).

<sup>25</sup> For example, in *Haberman*, the State Supreme Court found that “[t]he Washington long-arm statute was clearly not strictly pursued” when “service upon [a defendant] was neither made upon him personally, nor upon a person of suitable age or discretion at his home. . . . [but] [r]ather, the summons and complaint were either *mailed to him*, or dropped off at his place of business”). *Haberman*, 109 Wn.2d at 177-78 (emphasis added). See also *Kennedy v. Korth*, 35 Wn. App. 622, 626, 668 P.2d 614 (1983) (finding service by mail on resident of Germany to be inadequate); *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 225 P.3d 1035, *review granted*, 169 Wn. 2d 1029, 241 P.3d 786 (2010); and Karl B. Teglund and Douglas J. Ende, 15A *Wash. Prac.: Handbook on Civil Procedure* § 10.7 (2010–11 ed.) (stating that “the long-arm statute requires that the respondent be personally served”).

statutory context, including RCW 4.28.185(2)'s reference to RCW 4.28.180, which itself discusses only personal service, and RCW 4.28.185(4), which also refers exclusively to "personal service." In any event, service by mail has been expressly found *not* to be adequate under the long-arm statute.<sup>26</sup>

Here, Luksha was never served other than by mail. CP 1261, ¶4. This suffices to deprive the trial court of jurisdiction over him under the long-arm statute. Unless Luksha consented to service by mail—a possibility analyzed and rejected in Section 4 below—then both default judgments entered against him are void.<sup>27</sup> As for Cochrane, prior to the first default judgment he, too, was only served by mail. CP 1261, ¶ 4. Hence, the trial court did not have personal jurisdiction over him at the time it issued the first default judgment, unless he had somehow consented to service by mail.<sup>28</sup>

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<sup>26</sup> See, e.g., *Haberman*, 109 Wn.2d at 177-78, *Kennedy*, 35 Wn. App. at 626; and *Ralph's Concrete Pumping, Inc.*, 154 Wn. App. at 587.

<sup>27</sup> Von Kleist's Motion for Default Judgment as to Certain International Defendants and the pleadings offered in its support make no reference at all to Luksha, and *a fortiori* offer no new evidence of personal service on him. CP 1282-83; 1286-1293. Nor is Luksha mentioned in either the trial court's Order of Default as to Certain International Defendants (CP 1284-85), or in the Judgment Summary of the Default Judgment as to International Defendants. CP 1278. However, Luksha—identified as a Canadian citizen—is still named in the body of the judgment. CP 1279.

<sup>28</sup> By the time von Kleist filed his Motion for Default Judgment as to Certain International Defendants, he had secured personal service on Cochrane. CP 1297-99. However, this does not change the fact that the first default judgment is void as to Cochrane in so far as it depends on the long-arm statute for personal jurisdiction.

Secondly, the long-arm statute specifically states that “[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.”<sup>29</sup>

Washington case law is unanimous that the affidavit “must be filed prior to judgment.”<sup>30</sup> Failure to file the affidavit before a default judgment is entered strips a court of jurisdiction under the long-arm statute.<sup>31</sup>

The undisputed facts here show that *no* affidavit consistent with RCW 4.28.185(4) was *ever* filed regarding Luksha. *Cf.* CP 1415-1416.<sup>32</sup> As a result, neither default judgment against him can stand if jurisdiction is predicated on the long-arm statute. The same result also holds for Cochrane. Although the Affidavit of Stephen Pidgeon as to Service on Out of State Defendants does aver that “Gregory Cochrane is not a resident of the State of Washington, and at no time could service be made upon Gregory Cochrane in the State of Washington,” this Affidavit was not filed until January 5, 2011. CP 1415. This was almost a year after the

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<sup>29</sup> RCW 4.28.185(4).

<sup>30</sup> *Sharebuilder*, 137 Wn. App. at 334. See also *Barer v. Goldberg*, 20 Wn. App. 472, 482, 582 P.2d 868 (1978) (stating that “[n]o particular time of filing is required *as long as it precedes the judgment*”) (emphasis added).

<sup>31</sup> See, e.g., *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 534 P.2d 1036 (1975); and *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 791-92, 591 P.2d 1222, 1224 (1979) (noting that “[a]t the time judgment was entered . . . there had not been substantial compliance with the statute. Indeed, there had been no compliance at all insofar as the affidavit required by subsection (4) is concerned. The court acquired no jurisdiction and so its judgment is void . . . . Any other holding would eliminate the statutory requirement of the affidavit . . . .”) (internal citations omitted).

<sup>32</sup> This is the only affidavit consistent with RCW 4.28.185(4) in the record, and it makes no reference to Luksha.

first default judgment was entered, and eight months after the Default Judgment as to International Defendants. CP 1275; 1279. According to Washington law, it follows that the trial court had no jurisdiction over either Luksha or Cochrane under the long-arm statute.<sup>33</sup> Unless there was some other basis for the trial court to exercise personal jurisdiction over them, both default judgments it entered against them are void.

4. Neither Cochrane nor Luksha ever consented to service by mail

Von Kleist first alleged that the “International Defendants” had consented to service by mail only after Defendants filed their Motion to Vacate Default Judgments. CP 1645. According to this new theory, all of the Defendants, including Cochrane and Luksha, are bound by the service provisions of Paragraph 16 of the Subscription Agreement. That paragraph provides in pertinent part as follows:

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

CP 1320.

Unfortunately for von Kleist, his claim that Cochrane and Luksha

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<sup>33</sup> See, e.g., *Hatch*, 13 Wn. App. at 380; and *Schell*, 22 Wn. App. at 791-92.

consented to service by mail is untenable as a matter of law. The critical point developed below is not just that neither Cochrane nor Luksha ever signed any of the relevant contract documents. If this were the gist of Cochrane and Luksha’s defense, there could be factual disputes about whether they might be bound to the contract by some form of implied or inferred consent.<sup>34</sup> Instead, the crucial point is that neither the Partnership nor anyone aligned with it accepted the obligations imposed by Paragraph 16. Since the Partnership—the direct party to the contract with von Kleist—did not consent to service by mail, there is no basis for inferring that Cochrane and Luksha consented.<sup>35</sup> Moreover, this is true regardless of the facts about the relationship, if any, between Cochrane and Luksha and the Partnership. Accordingly, this Court can resolve this issue as a matter of law.

- a. The law governing the interpretation of unambiguous contracts establishes that the Partnership did not consent to service by mail, only von Kleist did.

The interpretation of an unambiguous contract is a question of law.<sup>36</sup> In construing a written contract, Washington courts are guided by the following principles: “(1) the intent of the parties controls; (2) the

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<sup>34</sup>See, e.g., *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 250, 178 P.3d 981, 989 (2008) (holding that “[a] forum selection clause is not binding on a third party who did not agree to the contract in which the clause is found,” but also implying that in a proper case there could be “an alternative basis for [a non-signatory] to be subjected to the contract, such as a third party beneficiary theory”).

<sup>35</sup>It bears repeating that the Partnership—Graoch 161 L.P.—is not a party to this lawsuit.

<sup>36</sup>See, e.g., *Absher*, 77 Wn. App. at 141.

court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.”<sup>37</sup>

A contract provision is ambiguous “when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.”<sup>38</sup> A provision, however, is not ambiguous merely because the parties suggest opposing meanings. “[A]mbiguity will not be read into a contract where it can be reasonably avoided.”<sup>39</sup> Moreover, “[w]ords in a contract are generally given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”<sup>40</sup>

Application of these principles to the facts here is straightforward. First of all, as von Kleist has himself asserted, the Subscription Agreement must be seen as part of a broader contract between himself and Graoch # 161.<sup>41</sup> Indeed, the Subscription Agreement itself is clearly best understood as originally being an offer *from* von Kleist *to* the

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<sup>37</sup> *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (citing to *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965)).

<sup>38</sup> *Id.* at 421 (citing *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994)).

<sup>39</sup> *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

<sup>40</sup> *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

<sup>41</sup> See, e.g. CP 1221, ¶ 2.1. Cochrane and Luksha do not need to agree with von Kleist about the details concerning which precise documents are part of the contract to endorse the principle that the Subscription Agreement is part of a broader whole.

Partnership.<sup>42</sup> Not only is this document expressly addressed “To: GRAOCH ASSOCIATES # 161 LIMITED PARTNERSHIP,” and signed by von Kleist as the “Subscriber”, it also expressly reserves to “the Partnership” the “absolute right to accept or reject any Subscription.” CP 1311, at ¶ 1. The drafters of the document clearly foresaw that the Partnership’s acceptance or rejection of the offer made by the Subscription Agreement could be expressed on a separate page that referred to “[t]he foregoing Subscription Agreement.” CP 1322 (emphasis added). Ultimately, this form does not appear to have been used, but instead a separate written acceptance was provided in the form of Gary Gray’s letter to von Kleist dated December 12, 2007. CP 1326.

Since the Subscription Agreement originally functioned as an offer from von Kleist to the Partnership, it makes sense that it was only signed by the offeror, von Kleist. CP 1321 (Pioch’s signature is that of a witness only). Although the offer was subsequently accepted by the Partnership, the fact that it was accepted obviously does not mean that the Partnership took on *the offeror’s* obligations.<sup>43</sup> The Partnership (as offeree) would be

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<sup>42</sup> See, e.g., 1 Richard A. Lord, *Williston on Contracts* (4<sup>th</sup> ed.) § 4.4 (defining “offer” as “the offeror’s manifestation of willingness to enter into a proposed bargain communicated in such a manner that the offeree may understand that by assenting the bargain will be concluded”).

<sup>43</sup> When an offeree accepts an offer, it becomes bound by the obligations *assigned to it* by the offer. It does *not* become bound by the offeror’s obligations. To take a simple example, suppose A offers to pay B \$1,000 for Blackacre. If B accepts this offer, she becomes bound to sell Blackacre to A for \$1,000. B does *not* become bound to pay \$1,000 for Blackacre. That is and remains exclusively A’s obligation, despite the fact that B is bound by the offer.

bound to accept service by mail only if the parties intended the Partnership to be so bound.

That the parties to the agreement (von Kleist and the Partnership) did not so intend flows naturally from the “clear and unambiguous” language of the contract. Only “the undersigned” is bound to accept service by mail. CP 1320. The term “the undersigned” is consistently used in the Subscription Agreement in a manner that can only be a reference to “the subscriber.”<sup>44</sup> It is not just that “the undersigned” is routinely used in the singular. It is much more that “the undersigned” is continuously distinguished from, and contrasted with, “the Partnership.”

For example, “[t]he undersigned hereby agrees to make a capital contribution *to the Partnership*.” CP 1311, ¶ 1 (italicized emphasis added, as in all subsequent quotes in this paragraph). “If this Subscription Agreement is not accepted *by the Partnership*, the Subscription funds will forthwith be returned *to the undersigned*.” Id. “Upon acceptance of this Subscription, *the undersigned* hereby ratifies and agrees to the terms and conditions of the limited partnership agreement of *the Partnership*.” CP 1311, ¶ 2. “*The undersigned* is aware of the business of the *Partnership*.” CP 1311, ¶ 3. “*The undersigned* represents, warrants, and covenants to *the Partnership* as follows.” CP 1314, ¶ 5.” “*The undersigned* hereby

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<sup>44</sup> According to Black’s Law Dictionary (6<sup>th</sup> ed. 1990), at p. 1427, “subscribe” means “[l]iterally to write underneath, as one’s name. To sign at the end of a document. Also, to agree in writing to furnish money or its equivalent . . . .” In the Subscription Agreement, the “undersigned” is plainly the “subscriber” in both of these senses.

represents, warrants and covenants to *the Partnership* . . . [that] [t]he *undersigned* is an ‘ACCREDITED INVESTOR.’” CP 1318, ¶ 8. “*The undersigned* understands the meaning and legal consequences of the representations and warranties contained herein, and agrees to indemnify, defend and hold harmless *the Partnership*.” CP 1319, ¶ 11.

Turning to Paragraph 16 itself, it states in pertinent part that:

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

CP 1320 (emphasis added). Even taken in isolation, this paragraph confirms the point that “the undersigned” *unambiguously* means the subscriber, von Kleist, and *not* the Partnership. The term “undersigned” is used exclusively in singular constructions (the undersigned “submits” and “consents”, and the undersigned is to provide a singular “address”), and the “undersigned” has a duty to the Partnership (to provide it an address) which would be nonsensical if “the undersigned” included “the Partnership.”<sup>45</sup> The only reasonable construction of this provision is that

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<sup>45</sup> At CP 1645, line 13, von Kleist misquoted this passage, asserting in bold text that the passage says that “the undersigned . . . **consent to the service of process** . . . .” Von Kleist repeated this mistake at CP 1526, 1763, 1916, and 2019. Although surely an innocent mistake, it is still a

“the undersigned” is von Kleist, not the Partnership, and that only the undersigned, and not the Partnership, has consented to service of process by mail.

In addition, a key undisputed fact sheds strong light on the reasonable intentions of the parties at the time they entered the contract.<sup>46</sup> It is undisputed that Graoch # 161 (“the Partnership”) is a Washington entity. CP 1327, ¶ 1.01. As such, it is amenable to the general jurisdiction of Washington courts regardless of any contractual consent.<sup>47</sup> Similarly, the Partnership was required by law to maintain a registered agent for the service of process in Washington.<sup>48</sup> Paragraph 1.04 of the Partnership Agreement directly responds to this requirement, as it designates Bruce P. Weiland as the Partnership’s agent for the service of process. CP 1327, ¶ 1.04. In light of these statutory requirements binding on the Partnership

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mistake, and a telling one: in the wording actually used, the consistently singular undersigned “consents” (emphasis added).

<sup>46</sup> Recall that the purpose of contractual interpretation is to ascertain the intent of the parties. *See, e.g., Mayer*, 80 Wn. App. at 420. Washington courts use an objective, rather than subjective, standard of intent. *See, e.g., Sherman v. Lunsford*, 44 Wn. App. 858, 861, 723 P.2d 1176 (1986).

<sup>47</sup> *See, e.g., RCW 25.10.031* (conferring on Washington limited partnerships the power to sue and be sued). *See also* Lea Brilmayer, et al., “*A General Look at General Jurisdiction*,” 66 Tex. L. Rev. 721, 735 (noting that “[d]omicile, place of incorporation, and principal place of business are paradigms of bases for general jurisdiction”).

<sup>48</sup> See the former RCW 25.10.040(2), in effect at the time the Subscription Agreement was signed by von Kleist and accepted by the Partnership. That statute provided in pertinent part that “[e]ach limited partnership shall continuously maintain in this state an agent for service of process on the limited partnership . . . .” RCW 25.10.040(2) (repealed by Laws 2009, ch. 188, § 1305, effective July 1, 2010).

regardless of contract, it makes sense that the parties to the contract intended to use the forum selection clause to impose symmetrical requirements *on the Subscriber*. And this is the natural, unforced reading of what Paragraph 16 does. The undersigned Subscriber accepted jurisdiction in Washington (the Partnership was already required to accept it). The undersigned Subscriber accepted service by mail (the Partnership was already required to accept service of process on its registered agent, which it identified in the Partnership Agreement).

Putting all of this together, Cochrane and Luksha submit that as a matter of law the meaning of the phrase “the undersigned” in Paragraph 16 of the Subscription Agreement is clear. It means the person who actually signed the Subscription Agreement as a party intending to be bound by obligations proposed for the offeror: the Subscriber, Alex von Kleist. It does not mean the Partnership.

- b. Because no one properly aligned with Cochrane and Luksha agreed to service by mail, there is no basis for any theory that would impute such consent to Cochrane and Luksha.

The conclusion that the Partnership did not consent to service by mail is fatal to von Kleist’s contention that Cochrane and Luksha agreed to such service. Obviously, neither Cochrane nor Luksha signed the relevant contractual documents. CP 1321, 1326 (offer and acceptance). It is only slightly less obvious that none of the “ordinary contract and agency principles” that can support binding a non-signatory to an agreement has any purchase over Cochrane and Luksha with regard to the service by mail

provision.<sup>49</sup>

The “ordinary contract and agency principles” that could conceivably result in a non-signatory being bound by a forum selection (and mode of service) clause are: “1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.”<sup>50</sup> Non-signatories “can also seek *to enforce* [forum selection clauses] as third party beneficiaries.”<sup>51</sup> All of these theories are effectively ways of transferring consent from a party that agreed to be bound to a properly aligned party that did not expressly so agree. But since no one aligned

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<sup>49</sup> *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, 811 note 22, 225 P.3d 213 (2009). In *Satomi*, the Washington State Supreme Court was considering the issue of when a non-signatory could be bound to an arbitration provision. However, as previously noted, in *Oltman* that same court acknowledged that there could be circumstances in which a non-signatory could be bound by a forum selection clause. *Oltman*, 163 Wn. 2d at 250. Given the similarity between forum selection clauses and arbitration clauses, courts from other jurisdictions have applied the same sort of analysis to determine if a non-signatory could be bound to either sort of provision. See, e.g., *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974) (characterizing an arbitration provision as “a specialized kind of forum-selection clause”); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1298 n. 9 (3d Cir.1996) (stating that the distinction between arbitration and forum selection clauses “is irrelevant” for the purpose of determining if a non-signatory can be bound); and *Hellenic Investment Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517-18 (5th Cir.2006) (applying the same reasoning to bind non-signatories to forum selection causes as to bind non-signatories to arbitration agreements). Accordingly, the argument that follows will use *Satomi* as a guide to the legal principles that could conceivably result in a non-signatory being bound by a forum selection clause.

<sup>50</sup> *Satomi*, 167 Wn.2d at 811 note 22. See also *Hellenic*, 464 F.3d at 517 (listing the same six factors).

<sup>51</sup> *Satomi*, 167 Wn.2d at 811 note 22 (emphasis added).

with Cochrane and Luksha ever consented to the service by mail provision, none of these approaches has any starting point.<sup>52</sup> In common sense terms, you can't transfer or impute something that doesn't exist in the first place. Hence, each of the six approaches fails as a matter of law to support binding Cochrane and Luksha, regardless of the nature of the relationship between them and the Partnership.

Consider each of the theories in turn. There is no evidence (or even any allegation) that Cochrane and Luksha are express parties to any contract that incorporated by reference the Partnership's obligations under the Subscription Agreement.<sup>53</sup> Moreover, since the Partnership is not bound by the service by mail provision, even if there had been an incorporation by reference it could not incorporate a non-existent obligation. The same is true of assumption—even if Cochrane and Luksha had assumed the Partnership's obligations under the Subscription Agreement (for which there is no evidence), the set of obligations assumed

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<sup>52</sup> Conceivably, Cochrane and Luksha could be bound to the service by mail provision because they are aligned with *von Kleist*. However, not only is there nothing in the record that could support any such contention, but it would also be completely self-defeating. If Cochrane and Luksha were somehow vested with *von Kleist's* rights and obligations under the Subscription Agreement, they would have to have been aligned as plaintiffs, not defendants.

<sup>53</sup> Compare *Cianbro Corp. v. Empresa Nacional de Ingenieria y Tecnologia, S.A.*, 697 F. Supp. 15, 18 (D. Me. 1988) (holding that where a "surety's bond clearly incorporates the subcontract terms by reference, and the incorporated subcontract contains a mandatory arbitration clause, the surety is bound to arbitrate").

does not include acceptance of service by mail.<sup>54</sup>

As for agency, it rests on the point that principals and agents can in proper circumstances each be bound by the other's actions.<sup>55</sup> Even if the Partnership were Cochrane's and Luksha's agent (or if Cochrane and Luksha were the Partnership's agent), the fact that the Partnership did not undertake to accept service by mail means that Cochrane and Luksha can't be bound, either.<sup>56</sup> The veil piercing and alter-ego approaches depend on the idea that what appears to be the act of an independent entity (in this case, either the Partnership or Graoch 161-1 GP, Inc.), is really the act of

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<sup>54</sup> Compare *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002) (finding that one plaintiff had assumed the contractual rights of another under a contract calling for arbitration, and was therefore bound to arbitrate).

<sup>55</sup> For examples of agents being held bound to arbitrate because the principal had agreed to a contract requiring arbitration, see *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 931, 231 P.3d 1252 (2010) (holding that personal representative of estate was bound by decedent's agreement to arbitrate); and *Satomi*, 167 Wn. 2d at 812-13 (holding that Blakely Association was bound by arbitration clause in provisions signed by individual members of the Association). In both of these cases, the agent was a plaintiff actively seeking to enforce rights under the contract in question. Conversely, the point that a principal can be bound by the acts of an agent with actual or apparent authority is hornbook law. See, e.g., *Hoglund v. Meeks*, 139 Wn. App. 854, 866, 170 P.3d 37 (2007). See also *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 458 (9th Cir. 2007) (rejecting claim that one company had acted as agent for another when accepting forum selection clause).

<sup>56</sup> If von Kleist were Cochrane and Luksha's agent, then Cochrane and Luksha could be bound by the fact that von Kleist consented to service by mail. But if von Kleist were Cochrane and Luksha's agent, they would surely either direct him to dismiss the lawsuit, or to give them the proceeds of any judgment.

the party that controls it.<sup>57</sup> But here, the allegedly controlled party (the Partnership) didn't consent to service by mail. Thus, even if Cochrane and Luksha did control the Partnership, they can't be said to have agreed to accept service by mail. Turning to estoppel, it is used to prevent a party that has aggressively attempted to benefit from a contract from later disclaiming obligations under it. But here, there is absolutely no evidence that Cochrane and Luksha ever 'knowingly exploit[ed] the agreement.'<sup>58</sup> Even if they had, and had tried to enforce the Partnership's rights, then although they could be subject to the Partnership's obligations, they could not be bound by an obligation to which the Partnership never agreed.

The last possible basis for binding non-signatories to a contract is third-party beneficiary theory. This is the only basis argued by von Kleist below. CP 1652-56. Specifically, von Kleist asserted that "[s]ince the Canadian parties are third party beneficiaries, then they are subject to the forum selection clause." CP 1656. This contention suffers from at least three fatal defects. First of all, Cochrane and Luksha are not third party beneficiaries of the agreement. Under Washington law, "[t]he creation of a

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<sup>57</sup> See, e.g., *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247, 254 (1971) (discussing the doctrine of corporate disregard in general, and noting that it is to be applied only in "exceptional situations"). Cases holding that a non-signatory can be bound to a forum selection clause (or arbitration provision) because the non-signatory is an alter-ego of the signatory are rare. See, e.g., *Rowe v. Exline*, 153 Cal. App. 4th 1276, 1285, 63 Cal. Rptr. 3d 787, 794 note 3 (2007) (discussing *Retail Clerks Union v. L. Bloom Sons Co.* (1959) 173 Cal.App.2d 701, 344 P.2d 51, and arguing that "[i]mplicit in [its] holding is that a nonsignatory who *was* the alter ego of a signatory *could* be compelled to arbitrate") (emphasis in original).

<sup>58</sup> *Hellenic*, 464 F.3d at 518 (5th Cir. 2006).

third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.”<sup>59</sup>

There is no evidence in the record here that either von Kleist or the Partnership intended to “assume a direct obligation” to Cochrane or Luksha. Surely von Kleist didn’t intend to assume a direct obligation to Cochrane and Luksha. Nor is there any reason to think that the parties intended that the Partnership would assume a direct obligation to Cochrane and Luksha. The fact that the business of the Partnership was to make a loan to another Graoch entity (Graoch # 160) does not establish that “performance under the contract would necessarily and directly benefit” that entity, let alone Cochrane and Luksha.<sup>60</sup> The Partnership could have properly decided not to make the loan, and even if it had made (or did make) the loan, this would not “necessarily and directly” benefit Cochrane and Luksha.<sup>61</sup> It follows that Cochrane and Luksha were not third-party beneficiaries of the Subscription Agreement.

Secondly, contractual obligations cannot be forced on purported third party beneficiary *defendants* who are not attempting to claim any rights under the relevant contract. That “a third-party beneficiary can *enforce* a contract provision only to the extent that the parties to the

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<sup>59</sup> See *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983), (citing *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979)).

<sup>60</sup> *Shaffer v. McFadden*, 125 Wn. App. 364, 368, 104 P.3d 742 (2005).

<sup>61</sup> *Id.*

contract can enforce it” does not imply that a purported third party beneficiary who is *not* claiming any rights under a contract can be bound by purported obligations arising from it.<sup>62</sup> This is at least in part because third party beneficiary relationships can be created without the consent of the third party. Suppose that “A” agrees to pay “B” in return for “B’s” promise to deliver flowers to “C.” “C” is a third party beneficiary of the contract, regardless of whether he even knows of its formation.<sup>63</sup> Now imagine that “A” paid “B” by means of a bad check, thereby breaching an obligation to pay with good funds. To hold that “B” could sue “C” for payment on the contract—on von Kleist’s theory that “a 3rd party beneficiary has the same . . . obligations . . . as the direct party”—would clearly foster iniquitous results. CP 1654. Since Cochrane and Luksha are not claiming, and never have claimed, any rights under the Subscription Agreement, third-party beneficiary theory does not support binding them to that document’s service of process clause.

Finally, even if third party beneficiaries could be burdened with obligations under a contract they were not trying to enforce, neither the law nor common sense suggests that they could have *more* obligations

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<sup>62</sup> *Shaffer v. McFadden*, 125 Wn. App. 364, 369, 104 P.3d 742 (2005) (italicized emphasis added). See also *Satomi*, 167 Wn.2d at 811 note 22; and *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (holding that “[a] third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be *bound* to a contract it did not sign or otherwise assent to”).

<sup>63</sup> See, e.g., 13 Richard A. Lord, *Williston on Contracts*, § 37.1 (4th ed.) (using flower purchase as example of third-party beneficiary contract).

than does the relevant direct party to the contract. Since the Partnership is not obligated to accept service by mail, no such obligation can pass down from it to Cochrane and Luksha. And it would do von Kleist no good at all to argue that the obligation to accept service by mail passes down *from him* to Cochrane and Luksha. As previously noted, if Cochrane and Luksha possessed von Kleist's rights and obligations under the Subscription Agreement, he would have had to join them to the lawsuit as co-plaintiffs, not as defendants.

- c. Summary of Sections 3 and 4: the default judgments against Cochrane and Luksha are void for lack of jurisdiction.

Cochrane and Luksha respectfully submit that the argument to this point conclusively establishes that the trial court erred as a matter of law in refusing to vacate the default judgments entered against them. The undisputed facts establish that Cochrane and Luksha were not properly served under the long-arm statute, RCW 4.28.185. Basic principles of contract law, applied to the undisputed terms of the contract between von Kleist and the Partnership, establish that Cochrane and Luksha did not consent to service by mail. Since proper service was lacking, the trial court lacked personal jurisdiction over Cochrane and Luksha, and the default judgments entered against them were and are void.

5. In the alternative, the default judgments against Cochrane and Luksha are voidable for non-jurisdictional irregularities.

Even if the trial court had somehow acquired personal jurisdiction over Cochrane and Luksha, each of the default judgments against them still suffered from serious irregularities in the manner in which it was obtained. In particular, the first default judgment was procured less than sixty days after the summons and Complaint were mailed to Cochrane and Luksha. CP 1273-76; 1263-65. The second default judgment was obtained without previously vacating or amending the prior default judgment, and without previously securing an entry of default against Luksha. CP 1277-79; 1284-85. The trial court abused its discretion by refusing to vacate each of these default judgments as to Cochrane and Luksha.

Under CR 60(b)(1), a judgment may be set aside for “mistakes, inadvertence, surprise, excusable neglect or irregularity.” Typically, a motion to vacate based on CR 60(b)(1) is evaluated under a four-part test that looks to whether: 1) there is substantial evidence to support a prima facie defense to the claims; 2) the moving party’s failure to timely appear was occasioned by mistake, inadvertence, surprise, or excusable neglect; 3) the moving party acted with due diligence after notice of entry of default; and 4) substantial hardship will result to the opposing party.<sup>64</sup> However, a “claim of irregularity is not controlled by the[se] four

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<sup>64</sup> *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

factors.”<sup>65</sup> “Irregularities” pursuant to CR 60(b)(1) “occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner.”<sup>66</sup>

The first default judgment was fatally “irregular” because von Kleist obtained it prematurely or “unseasonably.” Under RCW 4.28.180, a summons served on an out-of-state defendant is required to give the defendant sixty days to file an answer. The summonses von Kleist mailed to Cochrane and Luksha in December, 2009 complied with this requirement, and expressly noted that non-residents of Washington had sixty (60) to respond. CP 1247 (Cochrane); CP 1259 (Luksha). There is no dispute that neither Cochrane nor Luksha is a resident of Washington. CP 1261, ¶ 4. The summonses were delivered on or about December 11, 2009 (CP 1264-65). According to both the terms of RCW 4.28.180 and the summonses themselves, neither Cochrane nor Luksha had to answer von Kleist’s Complaint until February 9, 2010. However, von Kleist jumped the gun, and sought and procured the initial default judgment on January 27, 2010. CP 1273. This was clearly “unseasonal,” irregular, and unfair.<sup>67</sup> More importantly, Washington law establishes that “[w]hen an order of default is obtained before the defendant’s time to answer has

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<sup>65</sup> *Kennewick Irrigation Dist. v. 51 Parcels of Real Property*, 70 Wn. App. 368, 371, 853 P.2d 488 (1993) (emphasis added).

<sup>66</sup> *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989)

<sup>67</sup> *Id.*

expired, the disfavored party has the right to have it set aside *unconditionally*.”<sup>68</sup> The trial court abused its discretion in refusing to vacate the first default judgment against Cochrane and Luksha.

As for the second default judgment (regarding the “international defendants”), von Kleist obtained it without first moving to vacate or amend the original default judgment. CP 1277-78. A default judgment that resolves all claims in a lawsuit is a final judgment, like any other.<sup>69</sup> “Once a judgment is final, a court may reopen it only if authorized by statute or court rule.”<sup>70</sup> Here, even though the initial default judgment was defective, it was still a judgment, and it could not be properly re-opened or amended without a motion to that effect, either under CR 59(h) or CR 60. Since von Kleist never filed any such motion, the second default judgment was procured “in an improper manner.”<sup>71</sup> Because of this irregularity, the

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<sup>68</sup> *Kysar v. Lambert*, 76 Wn. App. 470, 492, 887 P.2d 431 (1995) (emphasis added). See also *Whatcom County v. Kane*, 31 Wn. App. 250, 252, 640 P.2d 1075, 1076 (1981) (holding that “[w]here a default judgment is prematurely entered before the time to answer has expired, the defendant is entitled to have the default set aside *as a matter of right*”) (emphasis added); and *Tiffin v. Hendricks*, 44 Wn. 2d 837, 847, 271 P.2d 683 (1954) (holding that “where the court has no authority to enter a default judgment because the defendant is not in default, the court has no discretion to exercise on the question of whether the judgment should be set aside. In the latter instance the defendant may have such a default judgment set aside as a matter of right”).

<sup>69</sup> *Peha's Univ. Food Shop v. Stimpson Corp.*, 177 Wash. 406, 412, 31 P.2d 1023 (1934).

<sup>70</sup> See, e.g., *Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001) (noting that “[f]or purposes of most cases . . . CR 59 and CR 60 set forth the conditions under which a party may seek relief from judgment”).

<sup>71</sup> *Mosbrucker*, 54 Wn. App. at 652.

trial court also should have vacated the second default judgment, and it abused its discretion by failing to do so.

With regard specifically to Luksha, the second default judgment was also “irregular” because it was not preceded by any valid order of default against Luksha. Neither von Kleist’s Motion for Default Judgment as to Certain International Defendants nor the Declaration of Stephen Pidgeon in Support of Motion for Judgment on Default as to International Defendants refers to Luksha in any way. CP 1282-83; 1286-93. Not surprisingly, the Order of Default as to Certain International Defendants does not name Luksha as being in default. CP 1284-85. Since the first Order of Default is invalid against Luksha because it was entered prematurely, the upshot is that no Order of Default against Luksha preceded the entry of the Default Judgment as to International Defendants.<sup>72</sup> The lack of an order of default before entry of default judgment is a clear irregularity, providing an additional basis for vacating the judgment as to Luksha.<sup>73</sup>

As noted, Washington law is clear that whether a default judgment should be voided for irregularity does not hinge on whether the defendant can show a meritorious defense.<sup>74</sup> However, Cochrane and Luksha in fact

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<sup>72</sup> The Default Judgment as to International Defendants itself does not list Luksha as a judgment debtor in the judgment summary, but it does list him as a debtor in the body of the judgment. CP 1278-79.

<sup>73</sup> CR 55(b) provides in pertinent part for entry of “judgment *after* default” (emphasis added).

<sup>74</sup> See, e.g., *Kennewick*, 70 Wn. App. at 371 (noting that the *White* factors don’t apply to the case of an alleged irregularity); and *Kysar*, 76 Wn. App.

do have meritorious defenses to von Kleist's claims. Also, von Kleist has shown no "substantial hardship" in the event the default judgments against Cochrane and Luksha are vacated.<sup>75</sup> Both of these factors support the conclusion that vacating the default judgments is not only a matter of right, but is also clearly the equitable result.<sup>76</sup>

First of all, because von Kleist did not contract directly with Cochrane and Luksha (or interact with them at all until well after he began to attempt to unwind his investment), none of his claims can reach them, except on an extended theory of veil piercing. CP 1220, ¶ 1.4.<sup>77</sup> However, veil piercing "is only appropriate where an officer or director commits or condones a wrongful act in the course of carrying out his duties. . . and a lack of good faith can be shown."<sup>78</sup> "Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment."<sup>79</sup>

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at 492 (establishing an "unconditional" right to have a default judgment vacated if it was procured before the defendant's time to answer expired).

<sup>75</sup> *White*, 73 Wn.2d at 352.

<sup>76</sup> See, e.g., *Kennewick*, 70 Wn. App. at 369 (noting that motions to vacate are "equitable in nature," and that the trial court's overriding goal must be to do justice").

<sup>77</sup> Von Kleist's veil-piercing theory is at best poorly pleaded, as he does not even name GRAOCH as a defendant. CP 1219

<sup>78</sup> *Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982).

<sup>79</sup> *Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App. 638, 644-45, 618 P.2d 1017 (1980).

Von Kleist has *never* alleged *any* fraudulent statements or actions by either Cochrane or Luksha. Von Kleist's initial declaration shows that he did not rely on anything Cochrane or Luksha said or did when making his investment. CP 1300-1310.<sup>80</sup> He has presented no evidence that Cochrane or Luksha benefited in any way from his investment, nor has he shown any lack of good faith on their part. Accordingly, Cochrane and Luksha both have strong defenses to any sort of liability on veil piercing grounds.

Secondly, all of the defendants have strong defenses to von Kleist's breach of contract claims. Von Kleist seeks return of his entire initial investment on a breach of contract theory, even though the Partnership Agreement plainly calls for each investor's capital account to be adjusted up *or down* by profits and losses. CP 1232, ¶3.43; CP 1331, ¶ 3.07 (emphasis added). Von Kleist had a conditional contractual right that his *capital account* be returned, not that his *initial investment* be returned. CP 1311, ¶ 3. Von Kleist, by his own account an "accredited investor" (CP 1317-18) with previous investments with Graoch entities (CP 1391) expressly acknowledged that "an investment in the Partnership involves substantial risk." CP 1315, ¶ 5.2. He affirmed that "there have been no representations, guarantees, or warranties made . . . with respect to . . . the percentage of profit and/or amount or type of consideration,

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<sup>80</sup> After Appellants moved to vacate the default judgments, von Kleist for the first time asserted that he had learned that Cochrane and Luksha were general partners of GRAOCH. CP 1511. However, he does not assert that his investment decision depended on this knowledge in any way.

profit or loss . . . to be realized.” CP 1315, ¶ 5.2. This Court may take judicial notice of the fact that von Kleist invested at the peak of the recent U.S. real estate bubble, and reasonably infer that significant losses could be expected through the date of filing of this lawsuit. All defendants have at least a strong prima facie defense to von Kleist’s contractual claim for the return of his initial investment.

In addition, von Kleist also alleges a contractual claim for 18% default interest. CP 1232, ¶ 3.44; 1308. This claim has no textual support in the contract documents. The contract documents call for Graoch 160 to pay Graoch 161 default interest at 18%, but this is a far cry from them calling for Graoch 161 to pay its limited partners a default interest rate at 18%. CP 1346, ¶ 4. Rather than cite to any textual support for his claim to 18 % interest (which in the default judgments is improperly reported as principal--compare CP 1308 and CP 1274)<sup>81</sup>, he claims a pre-contract oral assurance that he would receive 18% interest in the event of default. CP 1301, ¶ 2. Reliance on any such promise is expressly ruled out by the

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<sup>81</sup> As a result, the default judgments award interest on interest, strongly disfavored under Washington law. *See, e.g., Caruso v. Local Union No. 690, Int’l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 50 Wn. App. 688, 689, 749 P.2d 1304, 1305 (1988) (holding that “[i]n Washington, compound interest is never implied—it is permitted only by express language in a statute or an agreement. To create an obligation to pay compound interest there must be an agreement to pay interest upon interest . . .; it is not enough that the note provides for the annual payment of interest”) (internal quotation omitted) (citing to *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391, 404, 83 P.2d 231 (1938)). Here, there was of course no express agreement to pay interest on interest.

contract's integration clause (CP 1320, ¶ 13), the disclaimer of any guaranteed return (CP 1315, ¶ 5.2), and the parol evidence rule.<sup>82</sup>

Finally, von Kleist has shown no "substantial hardship" that would result from vacating the default judgments against Cochrane and Luksha. "[V]acation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits."<sup>83</sup> Von Kleist bears the burden of proof with regard to hardship, and has not carried it.<sup>84</sup>

The bottom line is that *even if* von Kleist somehow secured proper service on Cochrane and Luksha, the trial court abused its discretion by refusing to vacate the default judgments against them. This is because Cochrane and Luksha have an unconditional right to vacate the first default judgment because it was procured before their time for responding had expired, because the second default judgment was voidable since the trial court had no power to enter it without first entertaining a motion for amendment or vacation of the prior judgment, and because as to Luksha, the second default judgment was not preceded by a valid order of default. A finding that the trial court abused its discretion by not vacating the

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<sup>82</sup> See, e.g., *Emrich v. Connell*, 105 Wn. 2d 551, 555-56, 716 P.2d 863 (1986) (noting that "[t]he parol evidence rule, as traditionally stated in Washington, provides: [P]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake").

<sup>83</sup> *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003).

<sup>84</sup> *Id.* (holding that Plaintiff "fails to establish that she will suffer substantial hardship if the default judgment is vacated").

default judgments is not only compelled by Washington law, but is also decisively supported by the equities of the matter. Cochrane and Luksha have strong defenses to von Kleist's claims, and von Kleist can show no substantial hardship that would result from reversing the trial court.

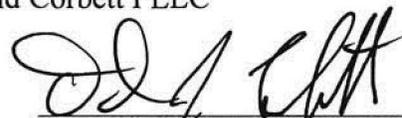
## VII. CONCLUSION

Von Kleist never achieved proper service on either Cochrane or Luksha. Although Cochrane and Luksha are residents of Ontario, Canada, von Kleist's efforts to serve them did not comply with Washington's long-arm statute. Moreover, von Kleist's claim that Cochrane and Luksha consented to service by mail fails as a matter of law. Because Cochrane and Luksha were never properly served, the default judgments entered against them are void, and the trial court erred by refusing to vacate them under CR 60(b)(5). In the alternative, the trial court abused its discretion by refusing to vacate the default judgments for irregularities under CR 60(b)(1). This Court should reverse the trial court and vacate the default judgments against Cochrane and Luksha.

Dated this 26<sup>th</sup> day of September, 2012.

David Corbett PLLC

By:

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

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DIVISION II

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

BY \_\_\_\_\_

I certify under penalty of perjury of the laws of the State of Washington that on September 26, 2012 I sent a copy of the attached Opening Brief of Appellants Cochrane and Luksha ("Opening Brief of Cochrane and Luksha") via email PDF attachment to Stephen Pidgeon, attorney for Respondent Alex von Kleist, at his email address of [stephen.pidgeon@comcast.net](mailto:stephen.pidgeon@comcast.net). Mr. Pidgeon has previously agreed to accept email service of filings in this matter.

On this same date, I also placed copies of the Opening Brief of Cochrane and Luksha in the U.S. Mail, first class postage pre-paid, for delivery to the following persons and entities at the following addresses:

Gary and Jane Doe Gray  
803 North Stadium Way  
Tacoma, WA 98403-2827

Graoch 161-1 GP, Inc., Graoch 161 GP, L.P.  
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The Jackalope Fund Limited Partnership  
c/o Kevin Hanchett  
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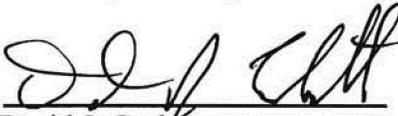
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Les Pioch  
2466 W. 5<sup>th</sup> Ave.  
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Canada

Dated this 26<sup>th</sup> day of September, 2012 at Tacoma, Washington.

By:   
David J. Corbett