No. 98450-6

SUPREME COURT
OF THE STATE OF WASHINGTON

JENNIFER L. HABU and RICHARD Y. CHINN, husband and wife,

Respondents,

v.

CONRADO A. TOPACIO (also known as Conrad A. Topacio and Conrado Jesus Topacio), individually; CARRIE L. TOPACIO (also known as CARRIE LYNN FIELD), individually; the marital community of CONRADO A TOPACIO and CARRIE L. TOPACIO; HENRY L. JACKY, individually; JENNIFER E. JACKY, individually; the marital community of HENRY L. JACKY and JENNIFER E. JACKY; JAMES P. KOORY, individually, and the marital community of JAMES P. KOORY and CRYSTAL B. KOORY; SANDRA E. TUREK, individually; CHJ PROPERTIES LLC, a Washington limited liability company; CHJ FOOD SERVICES LLC, a dissolved Washington limited liability company; DALAWA LLC, a Washington limited liability company doing business as Vantage Commercial Partners; GREEN SKY NW LLC, a Washington limited liability company doing business as Mari J's Highway Pot Shop; JESSICA ELIZABETH-ANN JORDAN, individually; and MERCHANTS BONDING COMPANY (MUTUAL), a surety bond company registered in the State of Washington,

Petitioners.

ANSWER TO PETITION FOR REVIEW

Kim Maree Johannessen
WSBA #21447
Johannessen & Associates, P.S.
5413 Meridian Avenue N., Suite B
Seattle, WA 98103-6166
(206) 632-2000

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondents
Jennifer Habu and Richard Chinn

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A. INTRODUCTION

The CHJ petitioners have filed a frivolous petition for review calculated to delay this case until the Everett City Council amends its marijuana sales ordinance, allowing them to lease the property, contrary to the parties' "settlement," to a new tenant for a marijuana shop. Division I's unpublished opinion faithfully applied this Court's controlling precedents on CR 2A agreements and contract formation, correctly discerning that the parties had not entered into a final settlement, but rather had a mere agreement to agree. The parties also had unresolved disputes over material terms of the alleged settlement, barring specific performance of it. The CHJ petitioners' post-mediation conduct also confirmed that the term sheet was not an enforceable settlement contract. The petitioners fail to establish that any of the criteria of RAP 13.4(b) are met by Division I's thoughtful opinion. This Court should deny review.

B. STATEMENT OF THE CASE

Division I's opinion correctly sets forth the facts and procedure. Op. at 2-6. The CHJ petitioners' statement of the case is selective at best, demonstrably false in many respects.

Those petitioners try to blame respondents' counsel for the CR 2A term sheet's imprecision. That effort is unavailing to them. The CHJ petitioners incorrectly portray the mediation as a complete and exhaustive

negotiation capped with an enforceable agreement "drafted by Appellants' counsel." Pet. at 2. In reality, while the mediation lasted two days, the parties were starting from scratch in a complex case and under intense pressure. And not all of the petitioners' co-defendants even went to the mediation. CP 962. Then, the parties crafted the term sheet in a rush at the end of mediation, with the petitioners pressuring Habu/Chinn to wrap up. CP 744, 965. In this rush, Habu/Chinn's attorney did not "draft" the term sheet, but rather merely served as a scrivener of the first draft. CP 744. In this rush to resolution, the term sheet clearly postponed major issues for a later decision making it clear that the term sheet was *not* a final agreement according to its own words. CP 662-64.

The CHJ petitioners imply that the parties' CR 2A term sheet was complete in all respects, when that is patently untrue, and they gloss over the fact that there was a distinct disagreement between the parties on the payment terms, relegating that critical dispute to a bald assertion that the payment terms were clear, pet. at 4, and a footnote that actually *concedes* that the payment terms were, in fact, unclear. Pet. at 6 n.1. And Habu/Chinn were correct to be concerned about the CHJ respondents and the term sheet.[1]

[1] Habu/Chinn had every right to be extraordinarily cautious about their dealings with the CHJ petitioners who had repeatedly misled them as to key dealings in the sale of the property. *See* Br. of Appellants at 3-7; Reply br. at 17-18 (specifying conduct in violation of term sheet). Moreover, several of the petitioners were charged with and

What is clear from the term sheet[2] is that the parties did not settle all aspects of their dispute; numerous important matters were left for future negotiations:

- Term 4: The term sheet specified that a settlement agreement was to include mutual liability releases, but it did not include any language for such releases. CP 662. This deficiency alone made the agreement unenforceable. *See Howard v. Dimaggio*, 70 Wn. App. 734, 738, 855 P.2d 335 (1993) (holding a settlement agreement unenforceable because the parties "did not reach an agreement on the terms of the hold harmless and release documents").

- Term 5: The term sheet did not specify which defendants would be liable for the initial payment of "the $200,000 portion of the settlement funds," leaving it for the future contract to "identify the parties responsible." CP 662. Who exactly would Habu/Chinn sue if these payments were not made? The term sheet does not say. This silence speaks loudly, because in the 25 months since the mediation, no party has paid the $200,000 to Habu/Chinn despite the petitioners' insistence that the term sheet is a contract.

- Terms 4 and 19: "The parties will also negotiate in good faith to reach an agreement confirming that 9506 LLC," a nonparty, would not sue. CP 662. This unresolved issue was plainly material, because the non-party 9506 LLC was controlled by Habu/Chinn and was a creditor of CHJ Properties LLC under loan documents that were not modified by the term sheet. CP 1144, 1147.

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convicted of criminal misconduct in connection with this transaction. Petitioners Topacio, Koory, and Jacky were charged in Snohomish County on criminal theft charges associated with obtaining the SBA-guaranteed loan, misrepresenting the loan's purpose. *See State v. Topacio,* (Snohomish Cause No. 18-1-03069-31); *State v. Koory,* (Snohomish Cause No. 19-1-00308-31); *State v. Jacky,* (Snohomish Cause No. 19-1-00309-31). They pleaded guilty. Zachariah Bryan, *Trio admits to theft in loan to open pot shop in Everett,* Everett *Herald,* November 25, 2019, https://www.heraldnet.com/news/trio-admits-to-theft-in-loan-to-open-pot-shop-in-everett/.

[2] A copy of the term sheet is attached in the Appendix.

- Term 14: The term sheet provided that "Plaintiffs and CHJ Properties LLC will negotiate in good faith to resolve any alleged environmental liabilities as part of the sale of the property upon mutually acceptable terms …" CP 663.

- Term 17: The term sheet did not discuss what would happen if the sale proceeds were insufficient to provide for payment of both the loan from 9506 LLC and the $350,000 to Habu/Chinn.

- Term 18: The term sheet did not address the disposition of the property if not sold within two years of listing (which was the litigation stand-down period for the parties' other, unreleased claims). Nor did it address if the CHJ petitioners would still owe the $350,000 if the property were sold after the two year stand-down period.

- Term 22: "The parties shall attempt to negotiate a reasonable, mutual nondisparagement provision as part of the Settlement Agreement." CP 664.

Indeed, the CHJ petitioners *admit* the term sheet calls for more negotiations and a written agreement to finalize a settlement. Pet. at 3.

The parties did not agree on critical payment terms of the alleged settlement, Terms 5 and 17. The parties intended that Habu/Chinn be paid $550,000, $200,000 initially and $350,000 at the time the property was sold.[3] The CHJ petitioners assert that the $350,000 payment was contingent

[3] The term sheet outlined provisions that would be included in the final settlement agreement. CP 662-65. *See* Appendix. Habu/Chinn would receive $550,000 in settlement funds in exchange for dismissing all but their MTCA claims. CP 662-64. The "initial settlement payment" of $200,000 would be paid in two separate installments, $50,000 within 40 days and $150,000 within 60 days from the effective date of the settlement agreement. CP 662. The rest of the $350,000 in settlement funds would be delayed so that

on such a sale, but it was not, particularly where such a condition precedent is disfavored in Washington law. Reply br. at 21-25; CP 662-65.

Finally, post-settlement events are relevant here, as Habu/Chinn argued in their reply brief and answer to petitioners' motion for reconsideration at Division I. Reply br. at 17-20; Resp. to MFR at 12-13. *The CHJ petitioners themselves did not believe the term sheet was an enforceable agreement*. When they had the chance to treat the term sheet as an enforceable contract, they didn't. They never made the initial $200,000 in settlement payments to Habu/Chinn, as Term 5 required. Also, in violation of Term 8, they *unilaterally* chose a listing broker and then listed the property for sale on February 3, before the date of their Division I motion for reconsideration. CP 1118-19, 1219-24. They then tried to negotiate a 24-month deadline for the later payment of $350,000. CP 1140, 1144. That deadline appeared *nowhere* in the term sheet. This newly minted expiration date for the CHJ petitioners' payment obligation would allow them to run out the clock on the property sale without having to pay Habu/Chinn a dime. These acts belie any true belief that the term sheet constituted an enforceable settlement.

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the timing of the payment could coincide with the eventual sale of the property. CP 663. All of the settlement funds were specified as being "damages paid to resolve Plaintiffs' non-MTCA claims and shall not be characterized as reimbursement of remedial action costs or remedial action attorneys' fees." CP 664.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

Division I's opinion applied this Court's well-established principles in determining that the trial court erred in forcing Habu/Chinn to execute a final settlement agreement. The burden was on the CHJ petitioners to establish the existence of an enforceable contract. *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). They, not Habu/Chinn, brought the motion in the trial court asking for specific performance of the term sheet. CP 644-55.[4] Because the CHJ petitioners sought specific performance, their burden was even higher.[5] They failed to meet their burden of proving an enforceable settlement agreement existed. Op. at 8-12.

[4] The CHJ petitioners did not merely request an order requiring Habu/Chinn to *negotiate,* rather, they asked the trial court to force Habu/Chinn to *execute* a final settlement. *See* CP 646 ("[T]he Court should enter an order requiring Plaintiffs to execute a long-form settlement agreement …."). They argued it was enforceable as a matter of law. Consistent with CHJ's request for relief, the trial court ordered Habu/Chinn not merely to negotiate, but to "*enter into* a long-form settlement agreement … by October 18, 2018." CP 1048 (emphasis added).

[5] In order for specific performance to be ordered, a court must be able to determine with reasonable certainty the duties of the parties and the conditions under which performance is due; the court can have no reasonable doubt of what is to be accomplished. *Haire v. Patterson,* 63 Wn.2d 282, 287, 386 P.2d 953 (1963). The CHJ petitioners had to produce "clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract." *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (quotation omitted).

(1) Division I's Opinion Is Consistent With This Court's Decisions on CR 2A Agreements and Contract Formation[6]

(a) Division I Correctly Ruled that the Parties Failed to Agree on All Material Terms

Settlement agreements are contracts. Op. at 8 ("The common law of contracts applies to settlement agreements." Division I relied upon this Court's key decision in *Condon v. Condon*, 177 Wn.2d 150, 161, 298 P.3d 86 (2013)), a case the CHJ petitioners *nowhere* cite. There, this Court reaffirmed that Washington's "objective manifestation of assent theory of contracts" applies to settlement agreements, and the parties' intent is "paramount in settlements." *Id*.

To have an enforceable contract, there must be a "meeting of the minds" on all material contract terms. *Gaskill v. City of Mercer Island,* 19 Wn. App. 307, 308, 576 P.2d 1318, *review denied,* 90 Wn.2d 1015 (1978). In other words, a valid contract requires mutual assent to the essential terms. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). Indeed, the CHJ petitioners had to show "clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract." *Kruse*, 121 Wn.2d at 722 (quotation omitted). An agreement is unenforceable under CR 2A if a genuine dispute exists over the agreement's

[6] A motion to enforce a settlement agreement is treated like a summary judgment motion. *Lavigne v. Green,* 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

existence and material terms; the CHJ petitioners had the burden of proving that there is no genuine dispute regarding the existence and material terms of a settlement agreement. *Condon,* 177 Wn.2d at 162; *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

Consistent with that principle, this Court has also repeatedly held that agreements to agree are unenforceable. *Keystone Land & Dev. Co. v. Xerox Corp.,* 152 Wn.2d 171, 180, 94 P.3d 945 (2004), *cert. denied,* 544 U.S. 905 (2005); *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957) (the Court declined to enforce a written employment contract's provision for payment of a bonus or commission to the employee, because the provision contemplated future negotiations); *Haire*, *supra* (this Court declined to order specific performance of a written earnest-money agreement, even though purchase and sale agreements were standardized). There was no meeting of the minds on all material terms of the alleged settlement because key future terms remained to be negotiated. This was, at best, an agreement to agree.

The CHJ petitioners rely on two cases in their petition at 9-11 that actually support Habu/Chinn's position, not theirs: *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, *review denied,* 100 Wn.2d 1015 (1983) and *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357, *review denied*, 122 Wn.2d 1020 (1993). In *Stottlemyre*, the court applied the same rule

advanced by Habu/Chinn here: a "contract exists" where "the intention of the parties is plain *and the terms of a contract are agreed upon*." 35 Wn. App. at 171 (emphasis added). Unlike here, however, the parties there did not dispute whether they had agreed to all the essential and material terms of a settlement agreement. Instead, the sole issue was whether their oral agreement had to be memorialized in a formal writing. *Id*. at 171-72. The *Stottlemyre* court *nowhere* said that trial courts may order parties to negotiate a final agreement based on an incomplete and indefinite tentative agreement. That case confirms that all material terms must be clear and agreed.

Morris is similar. There, the parties exchanged letters memorializing an oral settlement agreement. Although the parties expected to negotiate a detailed final agreement, their letters set out all the material terms of their agreement, including liabilities and potential termination of a lease agreement. 69 Wn. App. at 869-70. The *Morris* court did not hold that trial courts may impose a final settlement agreement on parties whose preliminary agreement was incomplete or indefinite. Rather, the court applied the rule that an agreement may be enforced only *if* it includes all the material and essential terms. *See id*. at 872.

The term sheet here *repeatedly* left material terms for future negotiations. CP 662-64. If an agreement requires more negotiations for

"a further meeting of the minds," it is fatally incomplete. *Sandeman*, 50 Wn.2d at 541-42. In Term 3, the parties agreed themselves to use "best efforts" to enter a final agreement. CP 662. Then, in Term 23 the parties agreed "to make a good faith effort to mediate and resolve those disagreements or disputes" that might arise. CP 664. The parties intended to have more negotiations. Other terms reinforce this reading. Terms 4 and 5 refer to the duties which the final settlement agreement "shall" and "will" define. CP 662. Then, in Terms 6, 7, and 8, the term sheet provides for parties to complete certain duties only after the parties negotiate a final settlement agreement. *Id.* The term sheet shows the intent to be bound to a settlement agreement drafted *in the future*, not to a *present* intention to be bound.

As Division I correctly determined, op. at 11-12, the material terms that were left unresolved were *extensive* and defeated the CHJ petitioners' contention that the term sheet was an enforceable contract. That is fully consistent with this Court's teachings. *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 521, 408 P.2d 382, 386 (1965) ("If the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out … the preliminary negotiations and agreements do not constitute a contract." (quotation omitted)). In challenging Division I's conclusion, the petitioners do not argue that

Division I applied the wrong legal standard or changed, modified, or clarified the law. Indeed, the petitioners admit that Division I "recognized that *Keystone* was binding authority regarding the enforceability of forward-looking contracts in Washington," and they acknowledged that *Keystone* is "[t]he authoritative Washington decision on this issue." Pet. at 12, 14. The CHJ petitioners' only real complaint is that Division I's *application* of the law to this case's *particular facts* was in error—a far cry from a proper basis for this Court to accept review. Of course, the petitioners repeatedly insist that the term sheet was complete and included all material terms, pet. at 1, 11, 14, but their petition fails to show that Division I's difference of opinion on the term sheet's completeness was not sustainable under Washington law. Division I disagreed with the CHJ petitioners' factual premise as to the completeness of the terms, op. at 11-12, but this is not a basis for this Court's review. RAP 13.4(b).

As Division I correctly recognized, moreover, the term sheet conditioned most of the parties' obligations on the parties reaching a final settlement agreement, something that had not occurred. CP 662. Given the term sheet's language, Division I concluded that "[a]ll of the timelines within which the parties must act run from the effective date of the final settlement agreement." Op. at 12. These conditional obligations included (1) the preparation of an environmental report on the property, (2) an

appraisal, (3) the exchange of names for and agreement on a listing broker, and (4) payments to Habu/Chinn totaling $200,000. CP 662. Given these extensive obligations, Division I's application of this Court's precedent was sustainable. *Plumbing Shop, Inc.*, 67 Wn.2d at 521 ("[I]f an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract." (quotation omitted)).

Finally, as noted *supra*, the CHJ petitioners themselves did not act as though there was a mutual meeting of the minds on all material terms such that a final, binding settlement contract was formed. Their conduct after the negotiation of the term sheet *belied* any such relief. This Court may look to the "subsequent conduct of the contracting parties" when determining "the parties' intent." *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). The CHJ petitioners acted in contravention of the term sheet. CP 1108-30.

Division I correctly applied this Court's clear rule forbidding enforcement of "agreements" that leave too many vital issues for resolution.[7] Review is not merited. RAP 13.4(b).

[7] The petitioners see a contradiction in Division I's opinion. Pet. at 14-15. But Division I did *not* "expressly f[ind] that the CR 2A Agreement's forward-looking terms were contracts to negotiate." Pet. at 14. Instead, Division I simply said that the term sheet "arguably" was such a contract. Op. at 10. But even if the term sheet were such a contract

(b) The Alleged Settlement's Terms Were Too Indefinite to Enforce

Alluded to by Division I, op. at 11-12, an additional reason sustaining Division I's disposition of the case is that the term sheet's material terms were also woefully indefinite, further demonstrating the lack of an objective intention to be bound to the term sheet rather than a future settlement agreement. *See Keystone*, 152 Wn.2d at 178 ("[T]he terms assented to must be sufficiently definite."). The CHJ petitioners *admitted* as much in their motion to enforce below, where they described the term sheet as "the general structure that a settlement … would take," with the parties agreeing "to hash out the specific terms of the ultimate settlement." CP 645. For example, the parties had a fundamental disagreement about the financial terms. The term sheet did not address what happens if the property is not sold or the sale proceeds are insufficient to cover the loan balance plus the $350,000 portion of the settlement sum. Nor was there language making sufficient sale proceeds a condition precedent to the

to negotiate, Division I recognized it would not make a difference to its reversal of the trial court, because a "contract to negotiate is not breached by failure to agree on substantive provisions." Op. at 10 (citing *Keystone*, 152 Wn.2d at 176). Here, the petitioners' motion in the trial court asked for an order forcing Habu/Chinn to negotiate and to then enter final agreement, and the trial court granted that request. CP 646, 1048. But Habu/Chinn had already negotiated exhaustively, and the petitioners would have no right under the term sheet, even if it were a contract to negotiate, to a final enforceable contract. *See Keystone*, 152 Wn.2d at 176 "[N]o breach occurs if the parties fail to reach agreement on the substantive deal."); *id*. at 180 ("We decline to create and impose a duty to go forward in the absence of an enforceable contract.").

$350,000 payment obligation, as the CHJ petitioners have contended.

The term sheet apparently was so indefinite that the CHJ petitioners even believed that they could change it during the court-ordered negotiations. CP 1061, 1067-68, 1081. They claimed that Term 18 created an expiration date for their payment obligation, meaning that they would not have to pay the $350,000 at all if the property did not sell within 24 months. CP 1144.

But the CHJ petitioners had never proffered that interpretation before—not during post-mediation negotiations, nor in their motion to enforce the settlement. CP 1068. As conceded by the CHJ petitioners during oral argument before Division I,[8] Term 18 simply does not say that and there is no temporal limitation on payment in any other provision of the term sheet. CP 663, 1081. Were it otherwise, CHJ Properties could "slow play" the sale and avoid all its responsibilities under a final settlement agreement. When the petitioners proposed a final settlement agreement that reflected this two-year expiration date, CP 1140, 1144, they were making a counteroffer. *City of Roslyn v. Paul E. Hughes Constr. Co., Inc.*, 19 Wn. App. 59, 63, 573 P.2d 385, *review denied*, 90 Wn.2d 1012 (1978). If the

[8] The audio recording of the oral argument may be accessed at https://www.courts.wa.gov/content/OralArgAudio/a01/20200107/5.%20Habu%20v.%20Topacio%20%20%20791524.mp3. This concession was in minutes 15:21-16:10 of the audio recording.

term sheet was so indefinite that it was subject to this significant change, it was never enforceable.

Simply put, there was also no agreement on the meaning of Term 17. The trial court erroneously believed a sale of the property was a condition precedent to Habu/Chinn being paid the full settlement proceeds of $550,000. Rather, the sale was merely a date for the performance of the CHJ petitioners' payment obligation, as this Court clearly held 62 years ago in *Noord v. Downs*, 51 Wn.2d 611, 320 P.2d 632 (1958).

Critically, at least some of the CHJ petitioners *admitted* that there was no mutual assent to this condition, conceding in the trial court that they would agree to the meaning ascribed to the term sheet by Habu/Chinn if that is what the trial court concluded the term sheet intended. CP 1009, 1013; RP 70. Green Sky/Jordan also conceded that Habu/Chinn's understanding of Term 17 was correct; in their joinder to the motion to enforce, the petitioners confirmed that section 3.1.2 of Habu and Chinn's draft formal settlement agreement "mirrored the [Term 17] language" but "albeit in a bit more detail." CP 722.

Thus, the parties attached different meanings to the $350,000 payment obligation with different interpretations by Habu/Chinn, the CHJ petitioners, and even the trial court. CR 2A bars enforcement of an alleged settlement agreement if it is genuinely disputed. *Ferree*, *supra*.

In sum, far from documenting a basis for review of Division I's unpublished opinion, the CHJ petitioners only demonstrate that Division I's careful opinion on contract formation was sound, and consistent with this Court's decisions. Review is not merited. RAP 13.4(b)(1-2).

(2) Division I's Unpublished Opinion Does Not Implicate Significant Issues of Public Importance Meriting Review under RAP 13.4(b)(4)

The CHJ petitioners claim that review is merited because Division I's unpublished decision will somehow undermine our state's policy favoring settlements. Pet. at 15-17. They are wrong. There is a simple, practical solution for parties who want to express a present intention to be bound to agreements at the close of mediation: say so *expressly* in a CR 2A agreement. If parties have a present intention to be bound to their mediation memorandum of agreement, even if they cannot agree on a final long-form settlement agreement, they can simply express that intention in the CR 2A agreement. Their agreement can also expressly state that it contains all material terms of their agreement, leaving for the long-form agreement only minor matters that would not affect the enforceability of the settlement contract. No such language appears in the term sheet here. CP 662-65.

Apart from their mistaken belief that settlements will be deterred by requiring their terms to be definite and actually agreed to by the parties, the CHJ petitioners *ignore* the crucial public policies that underlie Washington

jurisprudence on contract formation. Washington law is designed "to avoid trapping parties in surprise contractual obligations." *Keystone*, 152 Wn.2d at 178 (quotation omitted). This Court has confirmed that the objective manifestation of assent theory governs, and parties' intent is paramount. *Condon*, 177 Wn.2d at 162. Washington law preserves the freedom of parties to contract, keeping trial courts out of the impossible business of writing contracts for the parties. *See Haire*, 63 Wn.2d at 287 ("It is unthinkable that courts should undertake the writing of contracts …."). These rules make it *more* likely, not less, that parties will enter settlement negotiations, because they know that they will not be prematurely forced into a settlement contract if they do not see eye to eye on all material issues. Moreover, Washington courts *routinely* decline to enforce CR 2A settlement agreements where the court discerns that the parties have not come to an actual agreement on all settlement terms.[9]

[9] *See, e.g., Cruz v. Chavez,* 186 Wn. App. 913, 347 P.3d 912 (2015) (Division I upheld the denial of a motion to enforce a settlement agreement under CR 2A because there was a genuine dispute as to whether an agreement existed where a party on advice of counsel engaged in misconduct, persuading another party to sign the agreement without the advice or assistance of his counsel); *Cambridge Decision Science v. Markman,* 198 Wn. App. 1018, 2017 WL 1055730 (2017) (Division I reversed order enforcing settlement where parties failed to mutually agree to all of the terms of the putative settlement); *Goebel Design Group, LLC, v. Clear NRG, LLC,* 4 Wn. App. 2d 1070, 2018 WL 3738201 (2018) (Division I reversed order enforcing settlement where emails between counsel regarding settlement evidenced a lack of an objective manifestation of assent to the settlement terms); *In re Marriage of Green,* __ Wn. App. 2d __, 2020 WL 1025257 (2020) (Division I reverses trial court order enforcing settlement where parties failed to agree on disposition of husband's retirement account); *Veith v. Xterra Wetsuits, L.L.C.,* 144 Wn. App. 362, 367, 183 P.3d 334, *review denied,* 165 Wn.2d 1005 (2008) (Division III holds that settlement

Washington courts *advance* public policy by being vigilant in ensuring that actual settlements were achieved by the parties. Review of Division I's unpublished opinion under RAP 13.4(b)(4)[10] is not merited.

(3) The CHJ Petitioners' Petition Is Filed for Purposes of Delay

The CHJ petitioners' petition is an abuse of the appellate rules under RAP 18.9(a), meriting an award of fees to Habu/Chinn as a sanction.[11]

RAP 18.9(a) permits an appellate court to impose sanctions where a party uses the rules to delay or for an improper purpose. RAP 18.7 specifically incorporates the provisions of CR 11. *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990), *aff'd*, 119 Wn.2d 210, 223, 829 P.2d 1099 (1992) (party filed motion on appeal to disqualify opposing

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agreement was unenforceable where "the parties had not yet agreed upon all of its material terms."); *Engelland v. First Horizons Home Loans,* 180 Wn. App. 1018, 2014 WL 1316182 (2014) (failure to agree on date payments commenced and negative escrow balance meant lack of meeting of minds on settlement).

[10] That Division I's opinion is unpublished is consequential for any application of RAP 13.4(b)(4). An opinion that is unpublished hardly represents a matter of public importance requiring this Court's ultimate assessment. Indeed, recognizing that Division I's opinion applied well-developed contract principles, the petitioners did not move to publish it. They could not meet the stringent requirements for publication set forth in RAP 12.3(e) that are certainly akin to the requirement of RAP 13.4(b)(4).

[11] RAP 18.9(a) states:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

counsel); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83, *review denied,* 113 Wn.2d 1016 (1989). Use of the rules for delay is an improper purpose under RAP 18.9(a).[12]

That an appeal may be sanctionable as brought for an illegitimate purpose, even if the appeal is not technically "frivolous," is also supported by CR 11 jurisprudence. *See, e.g., Suarez v. Newquist,* 70 Wn. App. 827, 855 P.2d 1200 (1993) (attorney filed multiple affidavits of prejudice); *Skilcraft Fiberglass, Inc. v. Boeing Co.,* 72 Wn. App. 40, 863 P.2d 573 (1993) (attorney obtained default judgment improperly).

Here, as noted, *supra,* this petition is a delaying tactic to allow the CHJ petitioners to improperly list the property in violation of the alleged "settlement" they claim exists; it is designed to delay proceedings until their plan to set up a marijuana shop on the premises can be facilitated. This Court should sanction them for their transparent delaying tactics. RAP 18.9(a).

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[12] In *Harvey v. Unger,* 13 Wn. App. 44, 533 P.2d 403 (1975), for example, the court concluded that an appellant filed an appeal only for purposes of delay and imposed $1000 in terms to discourage appeals taken only to delay. *Id.* at 48. *See also, Trohimovich v. Director, Dep't of Labor & Indus.,* 21 Wn. App. 243, 249, 584 P.2d 467 (1978), *review denied*, 91 Wn.2d 1013 (1979) (sanctions imposed in appeal where appellant asserted that U.S, currency was not properly used to pay premiums for workers; appeal was delaying tactic); *Shutt v. Moore,* 26 Wn. App. 450, 457, 613 P.2d 1188 (1980) (same); *Rich v. Starczewski,* 29 Wn. App. 244, 250, 628 P.2d 831, *review denied*, 96 Wn.2d 1002 (1981) (sanctioning appellant for multiplicity of delaying motions, nothing that courts are not "designed to provide recreational activity for litigants"); *In re Marriage of Hitz,* 188 Wn. App. 1018, 2015 WL 3766737 (2015) (recognizing delay as a distinct basis for RAP 18.9(a) sanctions).

D. CONCLUSION

Division I correctly applied well-established contract law to hold that the trial court erred in forcing Habu/Chinn to execute a settlement contract with the CHJ petitioners.

A "settlement" that does not reflect mutual assent of the parties to its essential material terms, and on its face is not final, is unenforceable under Washington law. The trial court erred in enforcing the term sheet in this case. The petition for review here fails to meet any of the RAP 13.4(b) criteria, and it should be denied. Costs on appeal, including reasonable attorney fees, should be awarded to Habu/Chinn.

DATED this 11th day of May, 2020.

Respectfully submitted,

/s/ Philip A. Talmadge

_____

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Kim Maree Johannessen, WSBA #21447
Johannessen & Associates, P.S.
5413 Meridian Avenue N., Suite B
Seattle, WA 98103-6166
(206) 632-2000

Attorneys for Respondents
Jennifer Habu and Richard Chinn

APPENDIX

CR 2A:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 2.44.010:

An attorney and counselor has authority:

(1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney.

CR 2A TERM SHEET

1. The defendants will notify the court via e-mail transmitted before midnight, February 22, 2018, that the motions currently scheduled for hearing on February 23, 2018, April 20, 2018, and May 18, 2018 are withdrawn.
2. Plaintiffs shall dismiss all non-MTCA claims against all parties with prejudice and without attorneys' fees and costs, and all MTCA claims against CHJ Properties LLC without prejudice and without attorneys' fees and costs, within ten (10) days of the date that Plaintiffs are notified by their banking institution that the $200,000 portion of the settlement funds have cleared. The parties shall take no action in the lawsuit pending such dismissal other than filing the statement of arbitrability and confirmation of joinder as required by the case schedule.
3. The parties agree to memorialize and use their best efforts to fully execute a final Settlement Agreement within thirty (30) days of the mediation.
4. The Settlement Agreement shall contain mutual releases by and between Plaintiffs and all named defendants releasing and forever discharging all known and unknown claims, demands, causes of actions, and/or liabilities that were or could have been asserted or raised in the pending action, other than the MTCA claims as between Plaintiffs and CHJ Properties LLC. The parties will also negotiate in good faith to reach an agreement confirming that 9506 LLC, though not a party to this agreement, will not bring any claims against the defendants arising out of the released claims.
5. The Settlement Agreement will call for a payment of $50,000 to Plaintiffs within 40 days of the Effective Date of the Settlement Agreement (but in no event later than 30 days after Plaintiffs have signed the final Agreement) and a payment of $150,000 within 60 days after Plaintiffs have signed the final agreement. The Settlement Agreement shall identify the parties responsible for the $200,000 initial settlement payment.
6. Within 60 days of the Effective Date of the Settlement Agreement, CHJ Defendants will obtain, at their own costs, an appraisal of the property (as though clean) by a mutually agreeable appraiser, and shall direct the appraiser to provide a copy of the appraisal report directly to the Plaintiffs at the same time that it is submitted to the CHJ Defendants.
7. Within 60 days of the Effective Date of the Settlement Agreement, Plaintiffs will fund the cost of G-Logics finalizing their pending environmental report and will compile a package of the environmental reports in their possession, which shall include a copy of the final version of the pending G-Logics Report, and provide said package to the CHJ Defendants.
8. Within 15 days of the Effective Date of the Settlement Agreement, Plaintiffs and CHJ Properties LLC will exchange names of acceptable listing brokers and use their best efforts to agree upon a listing broker unaffiliated with any of the parties to list the property. Within 30 days of receipt and exchange of the appraisal report and the package of environmental reports, whichever is later, the property shall be listed with a mutually agreeable listing agent. CHJ Properties agree to pay all commissions under that listing agreement (Plaintiffs shall not be responsible for any sale commissions either to the listing broker or the selling broker).
9. All communications from the broker or any prospective buyers shall be made to Jim Koory. Any inquiries or offers to purchase shall be provided to Plaintiffs within two days of receipt. There shall be no communications by the CHJ Defendants with any prospective buyers or brokers about the 9506 loan or the environmental conditions at the property without the

Plaintiffs' participation (either by conference call or via in-person meeting). The listing broker shall copy Plaintiffs on all communications with the CHJ Defendants regarding the property, and CHJ Defendants will waive any restrictions on the confidentiality of those communications. Plaintiffs shall be able to communicate directly with the listing broker.

10. All purchase and sale terms shall be subject to the Plaintiffs' approval, including but not limited to the sales price. In the course of the negotiations, the parties will act in good faith.

11. Any counteroffers have to be reviewed by Plaintiffs prior to response and shall be subject to modification and/or approval by Plaintiffs. In the course of the negotiations, the parties will act in good faith.

12. CHJ Properties LLC shall continue to make payments on the existing loan by the required due date.

13. Plaintiffs shall make G-Logics reasonably available, at Plaintiffs' cost, to consult with any prospective buyers' consultant regarding the environmental condition of the property; provided, however, G-Logics shall not be required to prepare any documents or written costs estimates for any prospective purchaser.

14. Plaintiffs and CHJ Properties LLC will negotiate in good faith to resolve any alleged environmental liabilities as part of the sale of the property upon mutually acceptable terms, with the parties agreeing to consider options for resolution, such as environmental holdbacks, a reasonable reduction in the purchase price, and/or an assignment of any party's claims against BP/Arco. In the event that Plaintiffs and CHJ Properties LLC cannot agree upon mutually acceptable terms for the sale of the property or the resolution of those alleged environmental liabilities, or if there is a dispute over any sale terms, Plaintiffs and CHJ Properties LLC agree to return to mediation with Judge Kallas to make a good faith effort to mediate and resolve those disagreements or disputes. Any resolution of the environmental liabilities as between CHJ Properties and Plaintiffs shall include a mutual and explicit release and waiver of any MTCA claims, as well as agreement on the parties' retention or assignment of claims against BP/Arco to any other party, including (if requested) the buyer.

15. If requested and the buyer is acceptable to Plaintiffs in their sole discretion, Plaintiffs will agree to authorize 9506 LLC to agree to an assignment of the loan documents, including the promissory note, and (if requested by the buyer) to release the marijuana prohibition in the loan documents, as part of any approved sale of the property.

16. Closing of any sale of the property shall be handled by a mutually acceptable escrow company (which shall not include Grant Anderson or Anderson Law & Escrow PLLC).

17. Upon closing, any debt owed to 9506 LLC (and for which 9506 LLC is not requested to carry the note) shall be paid in full, and the first $350,000 of the sale proceeds over and above the debt repayment shall be paid to Plaintiffs. The balance of any net sale proceeds shall be disbursed to CHJ Properties LLC.

18. There will be a 24-month stand-down period during which CHJ Properties LLC and Plaintiffs agree not to file suit against one another. If the property is not sold within 24 months of the date of listing, CHJ Properties LLC and Plaintiffs shall be free to assert any MTCA claims that they may have against the other. If Plaintiffs file a new action alleging MTCA claims against CHJ Properties LLC, CHJ Properties LLC agrees not to seek (and hereby waive) recovery of any fees or taxable costs pursuant to Civil Rule 41(b)(3)(d).

19. The Settlement Agreement shall not affect, in any way, 9506 LLC's rights under the loan documents; provided, however, that Plaintiffs shall not take affirmative steps to enforce a default against the borrowers during the 24-month stand-down period described above, except for future non-payments.

20. Plaintiffs and CHJ Properties LLC agree that, by entering into this settlement, Plaintiffs shall not have any right to manage or operate property, to share in any rents, or to be obligated for any expenses, taxes or other liabilities.

21. The funds paid under the Settlement Agreement shall be characterized as damages paid to resolve Plaintiffs' non-MTCA claims and shall not be characterized as reimbursement of remedial action costs or remedial action attorneys' fees. Nor shall any funds paid under the Settlement Agreement be characterized as loan payments.

22. The parties shall attempt to negotiate a reasonable, mutual nondisparagement provision as part of the Settlement Agreement.

23. In the event that a dispute arises in negotiating the final Settlement Agreement, the parties agree to return to mediation with Judge Kallas to make a good faith effort to mediate and resolve those disagreements or disputes.

24. All parties executing this Term Sheet represent and warrant that they have authority to sign on behalf of the person or entity upon whose behalf they are signing.

25. The final Settlement Agreement shall be signed by each of the parties before an independent notary public unaffiliated with any of the parties.

PLAINTIFFS

Jennifer L. Habu
Date: 02-22-18

Richard Y. Chinn
Date: 2/22/18

CHJ PROPERTIES LLC

Name: Henry L. Jacky
Its: Managing Partner
Date: 2-22-18

CHJ FOOD SERVICES LLC

Name: James P. Koory
Its: Managing Partner
Date: 2/22/18

DALAWA LLC dba VANTAGE COMMERCIAL PARTNERS

Name: Carrie Field TPaid
Its: Managing Member
Date: 2/22/18

GREEN SKY NW LLC

Name:
Its:
Date:

Sandra E. Turek
Date: 2/22/18

MERCHANTS BONDING COMPANY (MUTUAL)

Name: Shannon Benbow
Its: Attorney
Date: 2/22/18

Henry L. Packy
Date: 2/22/18

Jennifer Jacky for Jennifer
Jennifer E. Jacky
Date: 2/22/18

Jessica E. Jordan
Date:

Conrad A. Topacio
Date: 2-22-2018

Carrie E. Topacio
Date: 2-22-2018

James R. Koory
Date: 2/22/18

J. Koory on behalf of
Crystal Koory
Date: 2/22/18

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 98450-6 to the following:

Kim M. Johannessen, WSBA #21447
Johannessen & Associates PS
5413 Meridian Avenue N., Suite B
Seattle, WA 98103-6166

Steven W. Fogg, WSBA #23528
Blake Marks-Dias, WSBA #28169
Kelly H. Sheridan, WSBA #44746
Corr Cronin, LLP
1001 4th Avenue, Suite 3900
Seattle, WA 91154-1051

Dennis Jordan, WSBA #4904
4202 Hoyt Avenue, Suite A
Everett, WA 98203-2317

Shannon M. Benbow, WSBA #48761
Wood, Smith, Henning & Berman, LLP
520 Pike Street, Suite 1525
Seattle, WA 98101-1351

Original E-filed with:
Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 11, 2020, at Seattle, Washington.

/s/ Sarah Yelle
Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

May 11, 2020 - 12:36 PM

Transmittal Information

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Appellate Court Case Title:	Jennifer L. Habu and Richard Y. Chinn v. CHJ Properties LLC, et al.

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- gary@tal-fitzlaw.com
- kmj@johanassocs.com
- ksheridan@corrcronin.com
- matt@tal-fitzlaw.com
- mdawson@corrcronin.com
- sarah@tal-fitzlaw.com
- sbenbow@wshblaw.com
- sfogg@corrcronin.com

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Sender Name: Sarah Yelle - Email: sarah@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

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