

67035-2

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NO. 67035-2-1

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

CORNISH COLLEGE OF THE ARTS, a Washington public benefit
corporation,

Respondent,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a Washington limited
partnership;

Defendant,

DONN ETHERINGTON, JR., an individual,

Appellant.

BRIEF OF APPELLANT

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INTRODUCTION

*Alice laughed. "There' no use trying," she said: "one **can't** believe impossible things."*

"I daresay you haven't had much practice," said the Queen. "When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."

(Lewis Carrol, THROUGH THE LOOKING GLASS,
Chapter 5)

Off with their heads!

(Lewis Carrol, ALICE'S ADVENTURES IN
WONDERLAND, *passim*)

The Court is about to go through the looking glass. Although this Court and the trial court have agreed that Donn Etherington has no interest in the property subject to Cornish's option to purchase, on remand, in supplemental proceedings, the trial court summarily ruled that the option imposed a duty to clear title on Donn, personally. The court even misquotes the option, replacing "its" with "he," and shifting the duty from the corporation (which did own the property) to Donn. But the trial court's jurisdiction in supplemental proceedings is limited to strictly complying with the statute. It did not. Its orders – including holding Donn in contempt – are void. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court (acting in supplemental proceedings after remand) erred in entering its Order re: Termination of Lease and Option to Purchase; and Non-Merger Deed to 1000 Virginia Property, entered on February 10, 2011. CP 964-67.
2. The trial court erred in entering its Order: To Show Cause Why Defendant [*sic*] Donn Etherington, Jr. Should Not Be Held in Contempt; (2) Directing the Etherington Marital Community to Release Its Interest in the Master Lease; and (3) For Award of Attorney's Fees, entered on March 7, 2011. CP 968-70.
3. The trial court erred in ruling that it could order Donn Etherington to "clear title" as required in an option to purchase property, without – by due process – first setting aside prior final orders that Donn held no interest in the property subject to the option, and thus had no duties under the option.
4. The trial court erred in entering its Order Holding Defendant [*sic*] Donn Etherington in Contempt and Imposing Sanctions, entered March 25, 2011. CP 957-60.
5. The trial court erred in holding Donn Etherington in contempt and in imposing a \$1,000 per day penalty, where he had neither the duty nor the ability to comply with the vague and overbroad order.

6. The trial court erred in entering its Order Denying Defendant's [*sic*] Motion to Purge Contempt Citation and Awarding Attorneys Fees, entered April 4, 2011. CP 961-63.

7. The trial court erred in entering its Order Denying Second Motion to Purge Contempt Citation, entered on July 8, 2011. CP 1288-89.

8. The trial court erred in failing (a) to purge the contempt in the face of evidence that Donn Etherington could not comply further than he already had, and (b) to clarify its vague order.

9. The trial court erred in entering its Order Denying Donn Etherington, Jr.'s Motion for Stay of Contempt Sanctions, entered June 8, 2011. CP 1276-77.

10. The trial court erred in entering its Order entered on June 23, 2011, to the extent it denies (or refuses to consider) Donn Etherington's Motion for Reconsideration. CP 1278.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In prior proceedings, Donn Etherington was fully and finally adjudicated to have no ownership interest in real property subject to an option to purchase, and the trial court also refused to disregard the corporation that did own the property. Donn Etherington was therefore dismissed from the claim to enforce the option, but was

found liable on a wrongful eviction claim because he partially owned the Master Lease on the property. Under RCW 6.32.270 and cases interpreting that statute, did a trial court enforcing the judgment in supplemental proceedings after remand have jurisdiction, power, or authority to determine that Donn Etherington fully owned the Master Lease and must release it, where he proved (and Cornish admitted) that others hold interests in the Master Lease, and those others were not made parties?

2. Did the trial court violate Donn Etherington's due process rights and enter a series of void orders in the supplemental proceedings, where it erroneously ordered – without attempting to set aside numerous final orders and a final judgment to the contrary – that Donn Etherington “breached” “his” “duty” to “clear title” under the option and was in contempt for failing to do so?

3. May the trial court hold Donn Etherington in contempt for failing to obtain his wife's signature releasing her share of the community's interest in a Master Lease, where such a release is against the community's interest and she therefore refuses?

4. May the trial court hold Donn Etherington in contempt for refusing to act in a conflict-of-interest situation by signing away a trust interest in the Master Lease that would benefit other

beneficiaries of the trust, where he resigned to avoid the conflict, and the successor trustee refused to agree to such a release?

5. May the trial court order Donn Etherington to breach his fiduciary duties to his wife and as a trustee, on pain of \$1,000 a day sanctions for refusing to do so?

6. Is a contempt order void where, as here, the purge conditions morphed to a degree that they are unrecognizable from the original contempt order?

7. Did the trial court err in repeatedly refusing to purge the contempt order where, as here, the contemnor proved that it was impossible for him to comply with any of the myriad changing versions of purge conditions the court seemed to require?

8. Did the trial court err in refusing to purge the contempt, where Donn Etherington established by uncontradicted evidence that (a) he could not sign away the Trust's interest in the Master Lease due to his fiduciary duties and his resignation as trustee; (b) he could not convince his wife to sign away her interest in the Master Lease; and (c) he had no funds sufficient to buy out either of those interests, much less both of them?

STATEMENT OF THE CASE

- A. **Virginia Limited owned the subject real property, and Donn Etherington, his marital community, and a trust, held interests in a Master Lease on that property.**

1000 Virginia Limited Partnership (“Virginia Limited”) is a Washington limited liability partnership that owned real property at 1000 Virginia Street in Seattle (“the property”).¹ 158 Wn. App. at 210-11. Donn Etherington is the managing member of Virginia-Terry, LLC, which is the general partner of Virginia Limited. *Id.*

In 1992, Virginia Limited leased the property to 2000 Terry Avenue Limited Partnership (“2000 Terry”) for 99 years, executing a Master Lease. CP 691-718, 820. Donn and his wife Kathryn² owned 50% of 2000 Terry. CP 820. Donn’s mother, Pamela Etherington-Rockenbach, owned the other 50%. CP 820.

Pamela died in 1995. CP 820. Her will created the Pamela G. Etherington-Rockenbach Family Trust-Exempt (“Trust”), a generation-skipping trust benefitting her children and grandchildren. CP 820. Pamela appointed her children as trustees of their respective shares in the Trust. CP 764-65, 820. Donn became

¹As discussed below, this dispute arose in supplemental proceedings following remand from ***Cornish Coll. of the Arts v. 1000 Va. Ltd. P’ship***, 158 Wn. App. 203, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011). This brief borrows heavily from the facts in this Court’s decision.

²For clarity, this brief will refer to all Etheringtons by their first names.

trustee of his share, with his children and grandchildren as the primary beneficiaries. CP 820.

In 1997, 2000 Terry assigned its Master Lease interest (a) to Donn (50%); (b) to Donn's share in the Trust (25%); and (c) to Thomas Etherington's share in the Trust (25%). CP 645, 820. Donn and Kathryn subsequently bought Thomas' Trust's interest for \$290,000 in cash and a \$310,000 promissory note. CP 820-21. As a result, the Master Lease interests were held (CP 645-46):

- ◆ Donn – 50%
- ◆ Donn and Kathryn, as husband and wife – 25%
- ◆ The Trust, with Donn as trustee – 25%.

B. Donn subleased space to Cornish College, and Virginia Limited granted Cornish an option to purchase the property.

In 2005, Cornish College, Virginia Limited, and Donn executed a "Commercial Sublease with Option to Purchase." 158 Wn. App. at 211; CP 724-37. As to commercial sublease, the agreement listed Virginia Limited as lessor, Donn as sublessor, and Cornish as lessee. CP 724. Donn signed the agreement as the sublessor. CP 737. Thus, Donn subleased the space to Cornish. 158 Wn. App. at 211; CP 724-25.

As to the option to purchase, Donn signed the agreement on behalf of Virginia-Terry, LLC, the managing member of Virginia Limited. CP 737. Virginia Limited gave Cornish the option to purchase the property (CP 732):

Virginia Limited, as part of the consideration for this Lease agreement which directly benefits Virginia Limited, and Etherington, to the extent of its interest in the Property, grants to Cornish College the privilege . . . to purchase the Property on the terms and conditions set forth hereinafter.

Virginia Limited thus had to deliver title free of the Master Lease, but it could use the sale proceeds to pay off encumbrances:

Title to the Property is to be free of encumbrances or defects, free of the Master lease, and free of any leases to or other claims of any tenants of Lessor's property . . . Encumbrances to be discharged by Virginia Limited may be paid out of purchase money at date of closing.

CP 733.

C. Cornish sued Virginia Limited and Donn for specific performance of the option to purchase and for wrongful eviction, but the trial court dismissed the option-to-purchase claims against Donn (where he had no ownership interest) and refused to disregard the corporation that proffered the option.

Cornish sued Virginia Limited and Donn in 2008, seeking specific performance under the option to purchase and damages for wrongful eviction. 158 Wn. App. at 214; CP 3-17. The trial court dismissed Cornish's option to purchase claims against Donn, finding that he had no authority to convey the property since he did

not personally own it. 158 Wn. App. at 214, 232. The court rejected Cornish's request to pierce the corporate veil to make Donn liable for Virginia Limited's actions. *Id.* at 232.

The trial court ruled that Virginia Limited breached the option to purchase, awarding specific performance and damages totaling \$2.4 million. *Id.* at 214-15. It also ruled that Virginia Limited and Donn wrongfully evicted Cornish, awarding \$69,600 in stipulated damages. *Id.* at 214. The court appointed a receiver to manage the property. CP 265-74.

D. Procedural History

- 1. Donn and Virginia Limited appealed, and this Court affirmed the specific-performance and wrongful-eviction rulings, but reversed the attorney fee award against Donn.**

Cornish did not appeal, but Donn and Virginia Limited did. 158 Wn. App. at 215, 232. This Court affirmed the option-agreement and wrongful-eviction rulings. *Id.* at 210. The Court reversed the trial court's ruling that Donn was jointly and severally liable for all of Cornish's attorney fees, reasoning that the trial court dismissed the option claims against Donn and refused to pierce the corporate veil. *Id.* at 230-34. The Supreme Court denied review. 171 Wn.2d 1014 (2011).

2. **On remand, even though the trial court had dismissed the option claim against Donn, it ruled that he still had a duty to provide “clear title” under the option by releasing the Trust’s Master Lease interest and by asking his wife to release the marital community’s interest.**

On remand, Cornish moved to receive the property. CP 374-84. Virginia Limited had no assets and could not clear title, so Cornish represented that it would take the property with “all valid encumbrances.” 1/7/11 RP 21. The trial court ordered the receiver to transfer Virginia Limited's ownership interest to Cornish and ordered both Virginia Limited and Donn to cooperate. CP 559-60. Closing would occur by February 9, 2011. CP 560.

On February 4, 2011, Cornish reported in a telephone hearing that it had asked Donn to sign documents transferring the property and terminating the Master Lease, but that Donn would only sign for himself. 2/4/11 RP 3-4. As to Kathryn's signature, Cornish acknowledged that, “Obviously, [Donn] can't make her [sign], and neither can the Court.” *Id.* at 4. Donn explained that he did not sign for Virginia Limited because the receiver was specifically authorized to do so, depriving Virginia Limited of the right or obligation to do so. *Id.* at 5. The trial court orally ruled that Virginia Limited and Donn would have continuing obligations under the option after the property transfer, that Donn had to “urge” his

wife to release the marital community's Master Lease interest, and that Donn had to release the Trust's Master Lease interest. 2/4/11 RP 13-14.

3. Donn resigned as trustee to avoid a conflict of interest, and a successor trustee was appointed.

On February 8, 2011, Donn resigned as trustee of the Trust to avoid any conflict of interest with its beneficiaries. CP 810, 817. Specifically, the Trust's counsel advised Donn that he would breach his fiduciary duties if he released the Trust's interest without compensation to satisfy his personal obligations. CP 562. His daughter, Kellie Etherington, became successor trustee. CP 817.

4. Donn attempted to comply with the court's rulings by signing all releases on his own behalf, but his wife and the successor trustee refused to transfer their Master Lease interests.

On February 10, 2011, the trial court ordered Donn to sign the following documents within three days (CP 597):

- ◆ A Non-Merger Deed in Partial Satisfaction of Judgment on behalf of Virginia-Terry, LLC, in its capacity as general partner for Virginia Limited;
- ◆ A Termination and Release of Option Agreement on behalf of both 2000 Terry and Virginia-Terry, LLC, in its capacity as general partner for Virginia Limited; and
- ◆ A Termination and Release of Lease on his own behalf, on behalf of Virginia-Terry, LLC, in its capacity as general partner for Virginia Limited, and on behalf of the Trust.

It also ordered Donn seek Kathryn's signature. CP 597.

The trial court found that the Commercial Sublease with Option to Purchase "obligates [Virginia Limited] and Etherington, 'to the extent of *his* interest in the property,' to transfer to Cornish clear title to the 1000 Virginia Property." CP 596 (emphasis ours). But in fact, the option actually states that, "Virginia Limited, as part of the consideration for this agreement which directly benefits Virginia Limited, and Etherington, to the extent of *its* interest in the Property, grants to Cornish College . . . the exclusive option" to purchase the property. CP 732 (emphasis ours; copy attached). While the option benefits Donn (as sublessor), Virginia Limited alone granted the option to Cornish.

Donn signed the documents on his own behalf and on behalf of Virginia-Terry, LLC. and 2000 Terry. CP 567-79. Donn asked Kathryn to release the marital community's Master Lease interest, but she refused. CP 572-73, 822-23. The successor trustee also refused to release the Trust's interest. CP 572-73, 814-15.

5. The trial court found Donn in contempt, imposing \$1,000-per-day sanctions until he complied with the orders or showed that he could not perform.

Cornish moved for an order to show cause why Donn and Kathryn were not in contempt. CP 620-28. Donn responded that

only Virginia Limited had to clear title and that Kathryn and the Trust were not parties. CP 678-84. He had asked Kathryn to release the marital community's interest, but she refused. CP 765. The trial court granted the motion, ruling that Donn and the marital community breached their obligation to clear title. CP 789-91. The court ordered Donn and Kathryn to sign the Termination and Release of Lease on behalf of the marital community, or show cause why they should not be held in contempt. CP 790.

The trial court found Donn in contempt for violating its orders by failing to release the marital community's Master Lease interest. CP 797. The court ordered Donn to pay \$1,000-per-day sanctions until he complied with the court's orders or showed that he could not perform. CP 797. The court denied Donn's stay request. 3/25/11 RP 11-12.

- 6. Donn immediately moved to purge the contempt, showing that the court did not have jurisdiction, that he had complied with the court's orders to the extent possible, and that he could not perform any further, but the trial court refused.**

Donn moved to purge the contempt, arguing that he complied with the court orders to the extent possible and that he was "factually, legally and financially unable" to perform its remaining orders. CP 806. Kathryn and the successor trustee

agreed – they refused to release their Master Lease interests. CP 815, 822-23. Donn showed that the court “dismissed Donn[] individually from the case.” 4/4/11 RP 14. Donn begged the court to specify what he could do to purge the contempt (4/4/11 RP 15):

[G]iven the hardship and severity of the court’s order, please, if there is anything that is within Mr. Etherington’s power, legal power, that he has not done, please tell us specifically today.

The trial court denied Donn’s motion, ruling that Donn presented insufficient evidence, where the court did not know the costs or the demands for Kathryn or the Trust to release the interests, and it did not know Donn’s available funds. 4/4/11 RP 17; CP 884. Donn again asked how he could satisfy the court that he was financially unable to perform. 4/4/11 RP 17-18. The court refused to provide any guidance, leaving it to Donn to decide what he must submit to comply with its order (4/4/11 RP 18-19):

I’m not sure that I can pre-judge, and tell you exactly what needs to be submitted. I don’t know that that’s an appropriate role for me. My findings stand, and I will leave to you to decide what you wish to submit, and I will wait to hear the response before I rule.

7. **Donn again moved to purge the contempt, asking the court to review *in camera* and file under seal numerous records showing that he was financially unable to comply.**

Donn again moved to purge the contempt. CP 887-98.

Kathryn and the successor trustee again verified that Donn asked them to release their Master Lease interests, but they refused. CP 917, 921. They could not ascertain the value of their interests, but Donn did not have money to buy them anyway. CP 917, 921.

Donn again argued that he had no obligation to deliver clear title under the option to purchase, where the court dismissed the option claims against him. CP 890-92. He also was still financially unable to perform. CP 888-89. He submitted his redacted 2009 joint-income-tax filing and his redacted answers to Cornish's interrogatories on supplemental proceeding, showing that Donn had a negative 2009 adjusted gross income of over \$683,000 and that he had very few assets. CP 1014, 1044-47.

In support of his motion, Donn submitted approximately 5,000 pages of financial records showing his inability to comply. He asked the court to review those documents *in camera* and file them under seal. CP 932. Donn then timely appealed the contempt order and the first purge denial. CP 953-70.

8. Cornish sought to join Donn's wife and the successor trustee, who submitted affidavits of prejudice, and Donn asked to stay the sanctions.

Cornish sought to join Kathryn and the successor trustee as parties to the supplemental proceedings under RCW 6.32.270. CP 1064. Cornish asserted that this was the “exclusive procedure” to clear title. CP 1054-55, 1059 (quoting *Junkin v. Anderson*, 12 Wn.2d 58, 66, 120 P.2d 548 (1941)) (Cornish's emphasis). Kathryn and the successor trustee subsequently submitted affidavits of prejudice. CP 1117-24. Donn also moved to stay the sanctions pending appeal. CP 1125-31.

9. After the trial court joined Kathryn and the successor trustee and a new judge was assigned, the new judge denied Donn's motion to stay.

Cornish, Kathryn, and the successor trustee stipulated to joining Kathryn and the successor trustee as parties. CP 1216-17. They also stipulated to have a new judge. CP 1217. The trial court entered the agreed order, joining Kathryn and the successor trustee as parties, and re-assigning the case to a new judge. CP 1218.

The new judge denied Donn's motion to stay, labeling it as a motion to reconsider. CP 1221. The judge ruled that Donn could renew the motion at a later time. CP 1221.

Donn moved to reconsider the stay denial, arguing that additional parties had been joined and that the court had not ruled on the pending motions to purge and to review financial records *in camera*. CP 1226-28. The new judge denied reconsideration, but said he would decide the pending motions after the parties resubmitted their materials. CP 1270-71. Donn timely appealed the stay and reconsideration denials. CP 1272-79.

10. The new judge denied Donn's second motion to purge, but sealed his financial records.

Also in his second motion to purge, Donn again argued that he did not have to clear title, but Virginia Limited did. 7/8/11 RP 33-34. Kathryn and the successor trustee also noted that the option's terms applied only to Virginia Limited, but the new judge ruled that they were "not a party to the motion" so were not allowed rebuttal. 7/8/11 RP 15-18, 37.

The new judge had received Donn's financial records, but he did not review them before denying Donn's second motion to purge. 7/8/11 RP 5. The Court ruled that at some point "the issue of impossibility does become right [*sic*]," but he did not "believe it's right [*sic*] at this time."³ 7/8/11 RP 38; CP 1288-89. Donn again

³While the transcript says "right" twice, based on the context, it is possible that the court actually said "ripe" both times. 7/8/11 RP 38.

asked the new judge to clarify what Donn could do to purge, but the new judge refused to provide guidance, stating that he would not provide an “advisory opinion.” 7/8/11 RP 39. Four days later, the new judge granted Donn’s motion for *in camera* review and sealed Donn’s financial records. CP 1280-84.

Donn timely appealed the order denying his second motion to purge. CP 1285-89. This Court later consolidated the three appeals. See Comm’r Ruling dated Aug. 16, 2011.

ARGUMENT

A. Standards of Review

Jurisdiction is a question of law reviewed *de novo*. **Crosby v. Cnty. of Spokane**, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). It may be raised for the first time on appeal. RAP 2.5(a)(1). A contempt order entered in the absence of jurisdiction is void. See, e.g., **Harbor Enterprises, Inc. v. Gudjonsson**, 116 Wn.2d 283, 293, 803 P.2d 798 (1991); **State v. Coe**, 101 Wn.2d 364, 370, 679 P.2d 353 (1984) (“a contempt conviction will fall if the underlying order was not within ‘the scope of the jurisdiction of the issuing court’”). Specifically here, if all property interests are not joined in a supplemental proceeding, any purported adjudication is void:

If in a supplemental proceeding such a question of title is presented for determination, in the absence of voluntary

appearance by the third party, any purported adjudication of the title is void, if jurisdiction over the parties or the property has not been obtained in some manner within the requirements of the section.

Junkin v. Anderson, 12 Wn.2d 58, 67, 120 P.2d 548 (1941).

“Void orders . . . may be vacated irrespective of lapse of time.” ***In re Marriage of Maxfield***, 47 Wn. App. 699, 702, 737 P.2d 671 (1987) (citations omitted). “There is no question of trial court discretion when a judgment is void.” ***Maxfield***, 47 Wn. App. at 703. “The court has a non-discretionary duty to grant relief.” *Id.* (citations omitted).

Cornish brought its show cause motion under the contempt statutes, RCW Ch. 7.21.030. CP 627. The remedies authorized under this statute are designed to coerce compliance, not to punish. See, e.g., ***In re Personal Restraint of King***, 110 Wn.2d 793, 756 P.2d 1303 (1988). Either way, due process is required. See, e.g., ***In re Dependency of A.K.***, 162 Wn.2d 632, 645, 174 P.3d 11 (2007); ***In re Matter of Silva***, 166 Wn.2d 133, 144-45, 206 P.3d 1240 (2009). But if the sanctions are punitive, full criminal due process is required. ***Silva***, 166 Wn.2d at 141.

Further, our courts apply a rule of strict construction to the contempt statutes, rejecting unclear or ambiguous orders:

In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. The facts found must constitute a plan violation of the order. **State v. Int'l Typographical Union**, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); 17 C.J.S. CONTEMPT § 12 (1963). Although such proceedings are appropriate means to enforce the court's orders, since the results are severe, strict construction is required.

Johnston v. Beneficial Mg't Corp. of Am., 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982); see also **Graves v. Duerden**, 51 Wn. App. 642, 647-48, 754 P.2d 1027 (1988) (rejecting orders that are "unclear or ambiguous, or that fail to explain precisely what must be done"). As discussed below, this is a particular problem here.

The trial court's authority to impose sanctions and purge conditions presents a question of law, reviewed *de novo*. **Silva**, 166 Wn.2d at 140; **In re Dependency of A.K.**, 162 Wn.2d 632, 644, 174 P.3d 11 (2007); **In re Interest of M.B.**, 101 Wn. App. 425, 454, 3 P.3d 780 (2000). Contempt findings are reviewed for abuse of discretion. **M.B.**, 101 Wn. App. at 454. Other legal questions are reviewed *de novo*. **Go2Net, Inc. v. FreeYellow.com, Inc.**, 158 Wn.2d 247, 253, 143 P.3d 590 (2006).

As specifically relevant here, a civil contempt order is erroneous if it cannot be purged or if it does not clearly specify the purge conditions. **Brittannia Holdings Ltd. v. Greer**, 127 Wn.

App. 926, 934, 113 P.3d 1043 (2005); *In re Marriage of Wulfsberg*, 42 Wn. App. 627, 631-33, 713 P.2d 132 (1986) (Coleman, J. concurring). The trial court must sufficiently specify the purge conditions. *In re Interest of N.M.*, 102 Wn. App. 537, 542 n.11, 7 P.3d 878 (2000); *Wulfsberg*, 42 Wn. App. at 632-33. And it must properly find that the contemnor has the present ability to purge the contempt. *Brittannia*, 127 Wn. App. at 934.

B. The trial court lacked jurisdiction, power, or authority, to adjudicate non-parties' interests in the Master Lease, rendering its initial orders void and also voiding the contempt and subsequent orders.

The trial court's rulings regarding Donn's, the Trust's and Kathryn's interests in the Master Lease, made without first joining them as parties, are void. Under long-standing Washington law, RCW 6.32.270 is the exclusive procedure for determining the right to possession of real property in supplemental proceedings. See, e.g., *Junkin*, 12 Wn.2d at 66. Where, as here, the trial court ordered Donn to release not only his own interest, but those of Kathryn and the Trust, without first joining either of them, its order⁴ is void. *Id.* at 67. Its subsequent order to show cause (CP 968-70) and contempt order (CP 957-60) against Donn based on the

⁴ Order dated February 10, 2011. CP 964-67.

original void order are, of course, also void. See, e.g., **Harbor Enterprises**, 116 Wn.2d at 293; **State v. Coe**, 101 Wn.2d at 370.⁵

To levy execution, a judgment creditor must comply with court rules and procedural statutes, including CR 69 and RCW Chapter 6.32. Specifically, where “it appears to the court that a judgment debtor may have an interest in . . . any real property, and such interest . . . is disclaimed by the judgment debtor or disputed by another person,” RCW 6.32.270 applies. In that event, “the court may, **if the person or persons claiming adversely be a party to the proceeding**, adjudicate the respective interests of the parties . . . and may determine such property to be wholly or in part the property of the judgment debtor.” RCW 6.32.270 (emphasis added). But where, as here, “the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto.” *Id.*

In **Junkin**, a judgment creditor sought and obtained execution on a car that the judgment debtor asserted belonged to her son-in-law, who was not joined as a party to the supplemental

⁵ This moots the remaining orders: Order dated April 4, 2011 (CP 961-63); Order dated July 8, 2011 (CP 1288-89); Order dated June 8, 2011 (CP 1276-77); Order dated June 23, 2011 (CP 1278-79).

proceedings. 12 Wn.2d at 60. The Court held that in such circumstances, “any purported adjudication of the title is void.” *Id.* at 67. The Court thus reversed.

Despite Donn’s insistence that Kathryn’s and the Trust’s absence left the court without any authority to proceed, neither the court nor Cornish made them parties to the supplemental proceedings until after the court had ordered Donn to release their interests and held him in contempt.⁶ Under RCW 6.32.270, the court had no authority to adjudicate the ownership of the Master Lease without them. ***Junkin***, 12 Wn.2d at 66. And because they were not parties to the supplemental proceedings, the court’s orders granting Cornish’s contempt motions are void. *Id.* at 67.

Lest there be any doubt on this point, when Cornish finally moved to join Kathryn and the new trustee in late April 2011, Cornish itself argued to the trial court that RCW 6.32.270 is the “exclusive procedure” in these circumstances, citing ***Junkin***. CP 1054-55. Yet Cornish did not then ask the court to withdraw its

⁶ While Kathryn and the new trustee filed affidavits prior to being joined, “Appearance of a nonparty as a witness is not an appearance for the purpose of submitting to the jurisdiction of the court.” ***In re Special Inquiry Judge***, 78 Wn. App. 13, 16, 899 P.2d 800 (1995) (cites omitted). A “party is ‘an interested litigant whose name appears of record as a plaintiff or defendant, or in some other equivalent capacity, and over whom the court has acquired jurisdiction.’” *Id.* (quoting ***Junkin***, at 71).

February order requiring Donn to sign, or its March contempt order. Rather, Cornish continued to defend the contempt sanctions against Donn, even after Kathryn and the Trust were joined and that action was (and is) ongoing.

Cornish's failure to acknowledge its own error in not joining Kathryn and the new trustee at the outset is troubling. This Court should reverse and dismiss the contempt action against Donn (who has personally complied with the court's orders to the extent possible, as discussed below). This will allow the pending action against Kathryn and the Trust to proceed. This is an independently sufficient ground on which to reverse and dismiss the contempt against Donn.

C. Donn had no duty to "clear title" under the option – to which he was never a party – and the trial court's orders requiring him to do so violate court rules, statutes, and Donn's due process rights, and are thus void.

The trial court's orders requiring Donn to "clear title" under the option agreement are legally baseless, contradict existing final orders, and violate Donn's right to due process, and are therefore void. The trial court dismissed Donn from Cornish's option claim. 158 Wn. App. at 214, 232. This Court also noted that he was not a party to the option and that the trial court rejected Cornish's attempt

to disregard Virginia Limited's corporate form. *Id.* Cornish did not petition for review on these issues. *Id.*

Yet on remand, the trial court summarily ruled that the option "obligates . . . Etherington, 'to the extent of *his* interest in the property,' to transfer to Cornish clear title" CP 596 (emphasis added). As noted above, however, this internal quote is a misquote of the option agreement, which actually says:

Virginia Limited, as part of the consideration for this Lease agreement which directly benefits Virginia Limited, and Etherington, *to the extent of its interest in the Property*, grants to Cornish College the privilege . . . to purchase the Property on the terms and conditions set forth hereinafter.

CP 732 (emphases added). Donn has been fully adjudicated a non-party, so he has no legal duty under the option agreement.⁷

Yet the trial court went on to enter an order to show cause, ruling that Donn (and his marital community, which also has no interest or duty under the option) "breached their obligation under the . . . Option to Purchase to deliver Cornish clear title, 'free of the Master lease and free of any leases to or other claims of any tenants.'" CP 790. It did so even though Donn had signed all necessary documents to release Virginia Limited's ownership

⁷ Donn was the lessor under the sublease portion of the agreement, but that interest would create no personal duty to "clear title" to property that Donn did not own under any legal theory.

interest. CP 567-79. The court then held Donn in contempt for failing to “specifically perform” “his” “obligations” under the option agreement. CP 797.

The trial court grossly violated Donn’s right to due process, disregarding prior final orders, court rules, and required statutory procedures. As noted above, due to the limited jurisdiction of courts in supplemental proceedings, orders that fail to comply with court rules and statutory procedures are void. *Junkin*, 12 Wn.2d at 65-67. Here, both the trial court and this Court had recognized – in final orders/holdings – that Donn is not a party to the option and has no duties under it. If the trial court wished to somehow re-litigate that issue – a questionable proposition under principles of claim and issue preclusion – at the very least it would have had to hold a hearing in which the issue was re-adjudicated. As explained above, assuming any further proceeding on the subject is proper, under the statute Donn would be entitled to a jury trial regarding his alleged “ownership” interest. RCW 6.32.270. And even if a summary proceeding were possible, at the very least there would have to be some kind of proper motions practice (CR 56? CR 60?). The trial court’s orders imposing a duty on Donn to “clear title” are void and should be reversed.

D. The trial court erred in ordering Donn to demand Kathryn's signature over her consistent objections and in violation of his statutory and fiduciary duties.

Donn was ordered to ask Kathryn to sign documents releasing her share of the community's 25% interest in the Master Lease. See, e.g., CP 597. Kathryn repeatedly told Donn that she would not release her undivided one-half community interest. CP 823, 921. As discussed below, Donn cannot release Kathryn's interest without violating his fiduciary duty to Kathryn and his statutory duty to manage assets for the community's benefit. The trial court had no legal authority to impose this condition on Donn, much less to hold him in contempt for failing to comply.

Community property "is a special form of partnership," under which each spouse owns an undivided one-half interest in every community asset. *Peters v. Skalman*, 27 Wn. App. 247, 251, 617 P.2d 448 (1980). Spouses owe each other "the highest fiduciary duties" and a statutory duty to manage assets for the community benefit. *Peters*, 27 Wn. App. at 252 (citing H .Cross, *The Community Property Law in Washington*, 49 Wash. L. Rev. 729 (1974)). Thus, while either spouse "acting alone, may manage and control community property" (RCW 26.16.030), he or she may "act alone only if he or she acts 'in the community interest'":

A spouse is required to act in good faith when managing community property, and a disposition of community funds is within the scope of a spouse's authority to act alone only if he or she acts "in the community interest."

In re Marriage of Chumbley, 150 Wn.2d 1, 9, 74 P.3d 129 (2003) (citing ***In re Marriage of Schweitzer***, 81 Wn. App. 589, 597, 915 P.2d 575 (1996) (quoting ***Hanley v. Most***, 9 Wn.2d 429, 461 115 P.2d 933 (1941))). When one spouse acts in the community interest, then the other "is without power to frustrate [his] acts." ***Chumbley*** 150 Wn.2d at 9 (citing H. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 82-83 (1986)).

Even before RCW 26.16.030 was enacted, a husband exclusively managing community property "had to act for the best interests of the community." H. Cross, *Equality for Spouses in Washington Community Property Law-1972 Statutory Changes*, 48 Wash. L. Rev. 527, 541 (1973) (citing ***Hanley***, 9 Wn. 2d at 461; ***Jarrett v. Arnerich***, 44 Wn.2d 55, 265 P.2d 282 (1954)). If he did not, his transactions were voidable. ***Proctor v. Forsythe***, 4 Wn. App. 238, 242, 80 P.2d 511 (1971). RCW 26.16.030 does not extinguish this duty, but extends it to both spouses, ***In re Marriage of Matson***, 107 Wn.2d 479, 484, 730 P.2d 668 (1986):

The demise of the rule in this state that the husband was deemed to be the sole manager of all community property in favor of the “equal manager” concept (see RCW 26.16.030) has not resulted, however, in the demise of a fiduciary duty. Rather, the duty has become gender neutral.

As ordered, Donn encouraged Kathryn to release her interest. CP 822. Kathryn refused – she would have been releasing her interest without compensation. CP 823. When Donn re-raised the issue, Kathryn still declined, adamantly refusing to release or to sell her interest (CP 921):

I have made clear to my husband, Donn, that I am not going to relinquish whatever legal right I have or control with regard to the Lease. I have heard various perspectives on what value my interest in the Lease may have. In light of the various opinions and competing perspectives, I have not reached a conclusion and do not have any confidence in any number. Accordingly, I have made clear to Donn, each time he has raised the subject, not only that I will not release my interest, but my interest is not for sale – period.

Donn “alone” could release Kathryn’s interest only if it was in the community interest. RCW 26.16.030; **Chumbley**, 150 Wn.2d at 9; Cross, 48 Wash. L. Rev. at 535. It is not in the community interest to release Kathryn’s interest for no consideration and against her wishes. Thus, Donn simply has no statutory authority to act alone in this matter. Cross, 48 Wash.L.Rev. at 541. If he did, Kathryn could void the release. **Proctor**, 4 Wn. App. at 242.

And Donn would breach his fiduciary duty to Kathryn if he released her interest in the Master Lease. Acting alone to release Kathryn's interest would be entirely self-interested, purging Donn's contempt, but depriving Kathryn of her interest. As further discussed below (*infra*, § F), acting for his own benefit to Kathryn's detriment – and against her express wishes – would plainly breach his fiduciary duty, and the court could not order him to do so.

E. The trial court erred in holding Donn in contempt for failing to sign away the Trust's interest because Donn had properly resigned as trustee.

The trial court erred in holding Donn in contempt for failing to sign away the Trust's Master Lease interest because Donn properly resigned as trustee on advice of counsel to avoid an obvious conflict of interest. The trial court orally ordered Donn to sign away the Trust's interest in the Master Lease on February 4, 2011. 2/4/11 RP 14. On advice of counsel, Donn resigned as trustee on February 8, 2011, avoiding his obvious conflict of interest with the Trust's beneficiaries – the children and grandchildren – were he to sign away their interests simply to avoid a contempt citation. CP 810, 817, 820. The trial court entered its written order requiring Donn to sign on February 10, 2011. CP 597. Long after Donn had resigned, the trial court finally entered its contempt order on March

25, 2011, still finding that Donn “refused to perform acts that are within his power to perform.” CP 796-99.

As noted above, a coercive contempt order must proffer the contemnor the keys to his prison: he must be able to comply with the court’s order and thereby purge his contempt. ***M.B.***, 101 Wn. App. at 439. But here, Donn was no longer the trustee when the court “found” that he had the present ability to comply by signing as trustee. It was then literally impossible for Donn to sign as trustee, rendering the contempt order purely punitive. See, e.g., ***M.B.***, 101 Wn. App. at 438-40 (“should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears”). Since Donn was not afforded full due process protections before this punitive sanction was imposed, this contempt order must fall. *Id.* (citing, *inter alia*, ***United Mine Workers v. Bagwell***, 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994); ***King***, *supra*, 110 Wn.2d 793).

And Donn’s decision to resign was legally compelled:

A fiduciary faced by a problem of conflict of interest should not use his dual position to deal for his own self-interest . . . in the disposition of . . . trust property without prior court approval. . . . He cannot serve two masters, and if he has a conflict . . . he must resign or seek the direction of the court in advance.

Estate of Rothko, 84 Misc. 2d 830, 838 (N.Y. Sur. Ct. 1975), *aff'd*, 372 N.E.2d 291 (1977); *accord Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 403, 663 P.2d 104 (1983) (“The trustee owes to the beneficiaries . . . the highest degree of good faith, care, loyalty, and integrity”) (citing ***Esmieu v. Schrag***, 88 Wn.2d 490, 498, 563 P.2d 203 (1977); ***Monroe v. Winn***, 16 Wn.2d 497, 508, 133 P.2d 952 (1943)). There is no question that the beneficiaries would be harmed by losing a valuable trust asset without consideration. Donn simply could not place his interests before those of the beneficiaries.

Thus, the trial court’s boilerplate March 25 “finding” that Donn could sign away the beneficiaries’ interests lacks any evidentiary support: Donn was no longer the trustee. Since it was impossible for Donn to comply, the contempt order is void.

F. The trial court could not order Donn to breach his fiduciary duties to his wife and the Trust and then hold him in contempt for refusing to do so.

As explained above, Donn plainly owed fiduciary duties to his wife (regarding marital property) and the Trust beneficiaries (regarding trust property). He could not comply with the trial court’s orders to sign away their property rights without violating those duties. On advice of counsel, he resigned as Trustee and refused

to sign away Kathryn's interest. This Court should hold the trial court's contempt orders were beyond its authority and, therefore, void. See, e.g., **State ex rel. Rohde v. Sachs**, 2 Wash. 373, 26 P. 865 (1891) (where trial court had no authority to order attorney to apologize to court, its contempt order void); **State ex rel. Martin v. Pendergast**, 39 Wash. 132, 81 P. 324 (1905) (same).

Whether the court had the authority to order Donn to violate his fiduciary duties is a question of law, reviewed *de novo*. **A.K.**, 162 Wn.2d at 644; **M.B.**, 101 Wn. App. at 454. Donn told the trial court that he could not give away trust property, or marital property, without violating his fiduciary duties. The trial court did not make findings or rulings to the contrary, but simply maintained the requirement and the \$1,000 per day sanctions. This Court should reverse on this independently sufficient ground.

G. The contempt order was not sufficiently clear to permit Donn to purge his contempt.

As discussed above, contempt orders must sufficiently specify the purge conditions. **N.M.**, 102 Wn. App. at 542 n.11; **Wulfsberg**, 42 Wn. App. at 631. Without "specific direction, or a specific time frame for the purge requirement," the contemnor does

not carry “the keys” to his freedom. *N.M.*, 102 Wn. App. at 542 n.11 (citing *M.B.*, 101 Wn. App. at 439).

After Donn signed documents releasing all interest in the Master Lease that he held in a personal capacity (including his one-half interest in the community’s interest in the Lease), the court ordered him to sign documents releasing the Master Lease on behalf of the Trust and on behalf of 2000 Terry and Virginia-Terry, LLC. CP 597. The court also ordered Donn to “take all reasonable measures to secure” Kathryn’s signature releasing her community Master Lease interest. *Id.* Cornish acknowledged that neither Donn nor the court could force Kathryn’s hand, stating “[o]bviously he can’t make her, and neither can the Court.” 2/4/11 RP 4.

On his own behalf, on behalf of 2000 Terry, and on behalf of Virginia-Terry, LLC, Donn signed documents releasing the Master Lease. CP 567-79. Donn resigned as Trustee to avoid a conflict of interest. CP 810, 817. He asked Kathryn to release the marital community’s Master Lease interest, but she refused. CP 572-73, 822-23. The successor trustee refused Donn’s requests to release the Trust’s interest. CP 572-73, 814-15.

In its subsequent show cause order, the court ordered Donn and Kathryn to sign the Termination and Release of Lease,

releasing the community's Master Lease interest. CP 790. This was the first time the court ordered Kathryn – who was not a party – to affirmatively act. *Id.* The court did not repeat its directive that Donn try to convince Kathryn to release her one-half interest in the community's Master Lease interest. *Id.* Nor did the court address its prior order that Donn sign on behalf of the Trust. CP 789-91.

The contempt order does not specifically address the court's prior orders (1) requiring Donn to persuade Kathryn to release her interest; (2) requiring Kathryn to sign the Termination and Release of Lease; and (3) requiring Donn to sign on behalf of the Trust. CP 796-99. A very generous reading of the court's contempt order is that Donn failed to use reasonable measures to obtain Kathryn's signature: "By its March 7, 2001 [show cause order] the Court found that Etherington had intentionally disobeyed the Court's February 10, 2011 order." CP 796-97. But Donn's uncontested declaration unequivocally stated that in compliance with the February 10 order, he asked Kathryn to release her Master Lease interest, but she refused. CP 765.

The contempt order then seems to hold Donn in contempt for failing to provide clear title, without specifically addressing what Donn allegedly failed to do that was within his power:

In the March 7 Order, the Court further ordered Etherington, on behalf of himself and his marital community, to specifically perform his obligations under ¶ 4.6 of the parties' Commercial Sublease with Option to Purchase, particularly as it concerns clearing title to 1000 Virginia of the Master Lease. Etherington has failed to specifically perform his obligations pursuant to this direction in the Court's Order as well, and furthermore has failed to appear or otherwise submit testimony establishing efforts he has made, if any, to secure release of the Master Lease, or otherwise establish that such release was impossible. The Court therefore further finds that Etherington has intentionally disobeyed the Court's Order for this reason as well.

CP 797. The court held Donn in contempt, finding that he "refused to perform acts that are within his power to perform," again without stating the "acts" Donn failed to perform. *Id.*

The purge condition provides that the \$1,000 per day sanction "shall cease upon Etherington's performance of his obligations pursuant to this Court's Order," or by establishing that he cannot perform. *Id.* This is not, in any sense, a "specific direction . . . for the purge requirement." *N.M.*, 102 Wn. App. at 542 n.11. At most, the purge condition directs Donn to clear title, but Donn had already informed the court that he could not persuade Kathryn to release her interest. CP 765. Nor could he sign for the Trust when he was no longer the trustee. CP 810, 817. In short, Donn could not provide clear title – or at least it is entirely unclear how he could have done so.

- H. **Although this too is unclear, the court appears to have ordered Donn to purge the contempt by purchasing releases from Kathryn and from the Trust, without finding that Donn had the present ability to comply.**

When the trial court denied Donn's motion to purge, it suggested for the first time, and without directly stating, that Donn had to buy out Kathryn's and the Trust's interests. But the contempt order (and its predicate orders) never addressed a buy-out. This new purge condition was not clear enough to give Donn the keys to his prison. And the court not only failed to find that Donn had the present ability to comply, but admitted that it did not know what it would cost to comply or what "funds exist[ed]." 4/4/11 RP 17. This Court should reverse.

To provide the due process guaranteed in contempt proceedings, the trial court must find – as a threshold matter – that the contemnor has the "*current* ability to perform the act previously ordered." *Britannia*, 127 Wn. App. at 934 (emphasis in original). If a purge condition includes a financial obligation, then the court must find that the contemnor "had a *present* ability to pay the purge amount." 127 Wn. App. at 934 (emphasis in in original). Without such a finding, the contempt is "not coercive but impermissibly penal." *Id.* While the court need not "identify a specific fund," it

must establish “control of sufficient assets” to pay the purge amount. *Id.*

Three days after the court entered the contempt order, Kathryn submitted a declaration stating that Donn had “encouraged” her to release her interest, but that she “informed Donn that [she] would not sign the document and that [she] did not and would not authorize him to sign [her] signature for [her].” CP 822. The successor trustee also refused to release the Trust’s interest. CP 815, 822. Donn confirmed that he could not convince Kathryn or the successor trustee to release their interests and that he did not have the funds to purchase their releases. CP 810. The court heard argument reiterating the same. 4/4/11 RP 6-7.

Donn unequivocally argued that he had done everything he could do to comply – attempting to obtain releases from Kathryn and from the successor trustee and releasing every interest he had the authority to release. *Id.* at 7-8. Donn begged the court to tell him what else he could do to comply (*id.* at 15-16):

If there is anything that is within Mr. Etherington’s power, legal power, that he has not done, please tell us specifically today. We are not here because we are interested in playing any sorts of games. We have signed every document, whether we agreed with them or not, that was drafted. . . . We believe this evidence, this together with the supplemental record, evidences a man who has complied

with the court's order. Who has done all that he can. And that there is nothing yet he can do that is possible to perform further.

The court denied Donn's motion to purge. *Id.* at 17. The court did not address Donn's efforts to persuade Kathryn and the successor trustee to release their interests. *Id.* at 17-19. Without stating that Donn was required to purchase those interests, the court's rationale for denying the purge motion appears to have been that Donn could – but did not – purge the contempt by purchasing releases from Kathryn and from Trust (*id.* at 17):

We do not know what the cost would be, what the demands are, and how much it would take to release or to gain the release from the Trust or from Kathryn Etherington. We do not know what funds exist, except for the bald assertion that: "I don't have enough to pay." I find the evidence before me insufficient to purge, and for that reason deny the request today.

The court's written order is even more unclear, stating that "Etherington has failed to submit competent, credible, and reliable evidence that he is unable to comply with the prior orders of this Court, as is his burden." CP 884. The "prior orders" never even mentioned the idea of Donn purchasing releases from Kathryn and from the Trust. CP 597, 790, 797. But the court must have been referring to Donn's inability to purchase the releases when it stated that the evidence was lacking – there was abundant uncontested

evidence that Donn had repeatedly asked Kathryn and the trustee to release the interests, to no avail. CP 810, 815, 822.

Thus, it appears that the court ruled that its contempt order (and its predicate orders) required Donn to buy out Kathryn and the Trust. The only other possibility is that the court was – for the first time on the purge motion – adding an additional purge condition. Either way, due process is lacking.

The purge condition in the contempt order does not address a buy-out. CP 797. It simply provides that Donn can purge by performing his “obligations pursuant to this Court’s Order,” which also does not mention a buy-out. *Id.* To read a buy-out purge condition into the contempt order, one would have to go back to the court’s February 10 order, directing Donn to “take all reasonable measures to secure” Kathryn’s signature releasing the Lease. CP 597. This is not a “specific direction” to buy out Kathryn, and no reading of this language could require Donn to buy out the Trust. ***N.M.***, 102 Wn. App. at 542 n.11.

The oral ruling on the purge motion also fails to provide “specific direction.” 102 Wn. App. at 542 n.11. Again, the court seems to suggest that Donn can purge by purchasing releases from Kathryn and from the Trust. 4/4/11 RP 17. But the court does

not order Donn to do so or specifically state that he can purge the contempt by doing so. *Id.* The written order only confuses the issue further, failing to address a buy-out altogether. CP 884.

Most problematic, however, is that the court never found that Donn had the present ability to comply with a purge condition requiring him to buy out Kathryn and the Trust. ***Britannia***, 127 Wn. App. at 934. ***Britannia*** plainly requires a finding on present ability to comply – without one, the contempt is impermissibly penal. *Id.* The absence of a finding that Donn was presently able to comply alone requires reversal. *Id.*

Reversal is also required where the court failed to identify that Donn had “control of sufficient assets” to pay the purge amount. *Id.* The court acknowledged that it did “not know what funds exist.” 4/4/11 RP 17. Nor could the court possibly determine whether Donn had sufficient assets, where the court had no idea how much would be required to purge; *i.e.*, to purchase releases from Kathryn and from the Trust. *Id.*

Finally, the new purge condition could not depend on Kathryn and the Trust selling their interests, where the court had no idea what it would cost to buy out Kathryn and the Trust, what the “demand” would be, and whether they would sell at all. 4/4/11 RP

17-18. A purge condition is valid only if the contemnor can “immediately purge.” **Silva**, 166 Wn.2d at 142 n.5. A contemnor cannot immediate purge if he must depend on third parties to act. *Id.* (reversing a purge condition requiring the contemnor to enroll in treatment, where third parties had to facilitate his enrollment). Donn cannot control whether Kathryn and the Trust sell, and Kathryn unequivocally stated that she would not sell. CP 921. Thus, Donn’s ability to purge by purchasing the releases is “outside of his control.” **Silva**, 166 Wn.2d at 142 n.5.

In sum, the contempt order has at best been a moving target. First Donn was simply to sign for himself, the community and the Trust. Then Donn had to obtain Kathryn’s signature. Then Kathryn – a non-party – also had to sign. Then, despite learning of his legally-required resignation as trustee, the trial court maintained that Donn still had to sign as trustee. Then Donn had to obtain the successor Trustee’s release. No contempt order has ever required Donn to buy-out the Trust and community interests, yet the trial court orally stated that Donn had failed to “prove” that he could not. As discussed below, he did prove it, but the trial court denied his second purge motion without even reading the documents. The contempt order is void for vagueness.

I. **Donn proved that he did not have sufficient assets to purge by purchasing Kathryn's and the Trust's interests.**

Beginning with the first motion to purge and culminating with 5,000 pages of sealed financial records, Donn presented detailed evidence showing that he did not have sufficient assets to purchase the other Master Lease interests. The trial court and the new judge ignored this evidence, denying Donn's motions to purge.

In Donn's first motion to purge, he plainly told the court that he could not purchase Kathryn's and the Trust's interests. CP 806, 811; 4/4/11 RP 8, 13. Denying Donn's motion, the court acknowledged that it "d[id] not know what funds exist[ed]." 4/4/11 RP 17. Donn begged the court for guidance on how to "satisfy" the court that he could not pay, apologizing for having failed to do so. *Id.* at 17-18. The court refused, ruling that it would not "pre-judge." *Id.* at 18.

Donn then submitted 5,000 pages of financial records, asking the court to review them *in camera* and seal them. CP 930-32. These records prove that Donn did not have sufficient assets to

buy out Kathryn and the Trust.⁸ Cornish acknowledged that it had copies of these records for more than a year. CP 972.

Donn moved to purge a second time, providing additional financial information showing that he had negative income and insufficient assets to buy out Kathryn and the Trust. CP 887-98. In 2009, Donn's adjusted gross income was negative \$683,395. CP 1014; 4/26/11 RP 3-4. Donn and Kathryn's home had \$53,000 in equity. CP 1044. Donn had personal property worth \$34,000, and his bank accounts totaled \$24,430. CP 1045, 1047. Donn and Kathryn were still encumbered by a \$310,000 promissory note. CP 1045.

What little Donn had was far less than Kathryn's and the Trust's interests were worth. CP 917, 921. In 2007, the Master Lease was appraised at \$1.25 million. CP 1045. Neither Kathryn nor the successor trustee could precisely estimate the value of their interests. CP 917, 921. As mentioned above, this is why Kathryn refused to sell. CP 921. In any event, Donn could not pay.

⁸ These records are under seal, so Donn will not refer to specific information. CP 1280-84. Donn refers the Court to the sealed records pages DE 00171-75 and DE 02046-49 for an overview of Donn's assets and liabilities.

By the time of the ruling on Donn's second purge motion, the new judge had been assigned. CP 1216-19. He did not review the financial records before denying Donn's motion, ruling that the "issue of impossibility" was not yet ripe. 7/8/11 RP 5, 38.⁹

In short, Donn proved that he did not have "control of sufficient assets" to purge the contempt. *Britannia*, 127 Wn. App. at 934. Since he did not hold the keys to his prison, the contempt is impermissibly penal. *Id.*

CONCLUSION

Curiouser and Curiouser!

(Lewis Carrol, ALICE'S ADVENTURES IN WONDERLAND, Chpt. 2)

The Court should reverse.

RESPECTFULLY SUBMITTED this 21st day of December, 2011.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
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⁹ Four days later, the new judge granted the order to review the financial records *in camera*. CP 1280-82.

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 21st day of December 2011, to the following counsel of record at the following addresses:

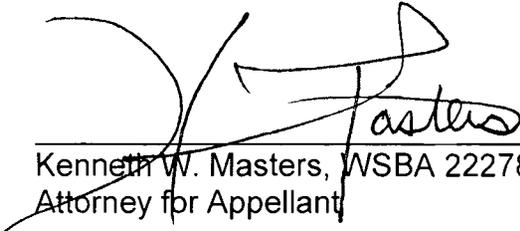
Attorney for Respondent
Cornish College of the Arts:

Richard C. Yarmuth
Rachel L. Hong
Yarmuth Wilsdon Calfo PLLC
818 Stewart St Ste 1400
Seattle, WA 98101-3311

Attorney's for Kathryn
Etherington and the Pamela G.
Etherington-Rockenbach Family
Trust

Neil A. Dial
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 22 AM 10:35


Kenneth W. Masters, WSBA 22278
Attorney for Appellant

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- B. Order re: (1) Termination of Lease and Option to Purchase;
and (2) Non-Merger Deed to 1000 Virginia Property
- C. Signed agreements:
Signed Termination and Release of Option Agreement
Signed Termination and Release
Signed Non-Merger Deed in Partial Satisfaction of Judgment
- D. Order: (1) to Show Cause Why Defendant [sic] Donn
Etherington, Jr. Should Not Be Held in Contempt; (2)
Directing the Etherington Martial Community to Release Its
Interest in the Master Lease; and (3) for Award of Attorneys'
Fees
- E. Order Holding Defendant [sic] Donn Etherington in Contempt
and Imposing Sanctions; and for Award of Attorneys' Fees
- F. Order Denying Defendant's Motion to Purge Contempt
Citation and Awarding Attorneys' Fees
- G. Order Denying Second Motion to Purge Contempt Citation
- H. Statutes and Court Rules

BEST AVAILABLE IMAGE POSSIBLE

1500000
copy

Return Address:

Mr. Theodore A. Finegold
Jeffer's, Danielson, Sonn & Aylward, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688

1 COMMERCIAL SUBLEASE
2 WITH OPTION TO PURCHASE

3 Grantors (Lessor/Sublessor): 1000 Virginia Limited Partnership, a Washington limited
partnership; Donn Etherington, Jr.
4 Grantee (Lessee): Cornish College of the Arts, a Washington public benefit corporation
Legal Description (abbreviated): Lots 1 and 2, Block 40, Second Addition to the Town of
5 Seattle, King County, Washington. Additional legal on page 1.
Assessor's Tax Parcel ID#: _____

6

7 Parties

8 1.1 Lessor/Virginia Limited. 1000 VIRGINIA LIMITED PARTNERSHIP, a
Washington limited partnership.
9
10 1.2 Sublessor/Etherington. Donn Etherington, Jr.
11 1.3 Lessee/Cornish College. CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation.

12 Sublease Agreement

13 2.1 SubLease. Etherington hereby subleases to Cornish College and Cornish
College hereby subleases from Etherington the Leased Premises (as defined in Section 3.1) on
14 the terms and conditions set forth herein..

15 2.2 Master Lease. This Lease is a sublease, entered into by Sublessor in
accordance with the terms of that certain _____ dated 11-92 between Virginia
16 Limited as lessor and Sublessor as lessee (the "Master Lease"). Virginia Limited and Sublessor
represent and warrant to Lessee that (i) the copy of the Master Lease provided to Lessee is a
17 true and correct copy of the Master Lease and all amendments or modifications thereof, if any, (ii)
the Master Lease is in full force and effect and has not been amended or modified, and (iii) no
18 default on the part of Virginia Limited or Sublessor exists under the Master Lease.
Notwithstanding the existence of the Master Lease, Virginia Limited and Sublessor agree that all
19 of the obligations of Cornish College with respect to the Leased Premises are set forth in this
Sublease, and that Cornish College has no responsibility, obligation or liability with respect to any
20 obligation of Sublessor under the Master Lease.

COMMERCIAL LEASE WITH OPTION TO PURCHASE
Page 1
Sublessor/Virginia Limited Partnership (509) 265-031

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Exhibit A

1
2 2.3 Consent of Lessor/Recognition Agreement. Lessor hereby consents to
3 this Lease, and agrees that in the event the Master Lease terminates for any reason, including
4 without limitation, by reason of (i) any default by Sublessor thereunder, (ii) any exercise by any
5 party thereto of any right of termination provided therein, or (iii) as the result of the mutual
6 agreement of the parties thereto, such termination of the Master Lease shall not result in the
7 termination of this Lease, and Lessor shall recognize this Lease, and this Lease shall continue,
8 as a direct lease between Virginia Limited as lessor and Cornish College as Lessee.

9
10
11
12 Terms

13 3.1 The Leased Premises. The Leased Premises is the bottom two floors,
14 except the garbage chute and dumpsters, mechanical rooms, emergency egress stairs,
15 apartment lobby (top and bottom), electrical room, elevator room and first floor loading dock, of
16 that property (the "Property") commonly known as 1000 Virginia/2000 Teny Avenue, Seattle,
17 Washington, and more fully described as follows:

18 Lots 1 and 2, Block 40, Second Addition to the Town of Seattle,
19 as laid off by the heirs of Sarah A. Bell "Deceased", commonly
20 known as heirs of Sarah A. Bell's 2nd Addition to the City of
21 Seattle, according to the plat recorded in Volume 1 of Plats,
22 page 121, in King County, Washington.

23 Lessee shall also have the rights to use the first floor loading dock, run a ventilation duct
24 up the side of the trash chute chase to the roof of the building located on the Property (the
25 "Building") and place a fan on the roof of the Building. Lessee agrees that its use of the loading
26 access on the first floor shall be non-exclusive, and that Sublessor and other occupants of the
Building may use such loading access for its intended use and as a location for the dumpsters
serving the upper four floors of the Building. Lessee shall be responsible for all costs of installing
and maintaining such ventilation duct and fan, and shall hold Sublessor harmless against and
from any liability arising out of such installation and maintenance. Sublessor will provide Lessee
with keys to all rooms on the first two floors of the Building (e.g. mechanical and electrical rooms)
notwithstanding that they are not included within the Leased Premises.

18 3.2 Term of Lease. This Lease shall commence on the 1st day of June, 2005.
19 This Lease shall terminate on the 31st day of December, 2008. Notwithstanding the foregoing,
20 Lessee shall have access to the Leased Premises commencing on May 1, 2005 for the purpose
of commencing its improvements in the Leased Premises, without payment of rent.

21 3.3 Monthly Rent. The monthly rental shall be (i) Five Thousand and No/100
22 Dollars (\$5,000.00) for the period from June 1, 2005 through December 31, 2005, and (ii) Seven
23 Thousand Five Hundred and No/100 Dollars (\$7,500.00) thereafter. All payments shall be in
U.S. currency. All rental payments shall be payable in advance on the 1st day of each calendar
month.

24 3.4 Emptying of Storage Units/Demolition of Interior Walls. Prior to May 1,
25 2005, Etherington will cause all storage units in the upper floor of the Leased Premises to be
26 emptied, and all trash remaining to be removed from such upper floor. Prior to May 31, 2005,
Etherington shall cause all storage units in the Leased Premises to be emptied, and all trash
remaining to be removed from the Leased Premises. If any storage unit contents or trash remain
in the Leased Premises after such dates, Lessee may arrange for the storage off-site of any such
contents and dispose of any such trash, and deduct the cost of any such storage and/or disposal

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 2

SubleaseWithOptionToPurchase(5)4-29-051

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1 from the first month's rent coming due hereunder. Demolition of the existing interior walls in the
2 Leased Premises will be the responsibility of Cornish College, at its own cost. If any permits are
3 required for the demolition of the interior walls, Cornish College shall be responsible for obtaining
4 the required permits.

5 3.5 Place of Payment. All payments of rents shall be made at:

6 Donn Etherington, Jr.
7 1200 Washington Street
8 Wenatchee, WA 98801

9 or at such other place as Etherington may direct in writing.

10 3.6 Late Payment Penalty. If payment is received later than 5:00 p.m. on the
11 10th day of the month, there shall be a late payment penalty in addition to the rental payment
12 due. The late payment penalty shall be five percent (5%) of the late payment.

13 3.7 Assignment or Subletting. Cornish College may not assign this Lease or
14 sublet the Leased Premises, without the prior written consent of Etherington, which consent shall
15 not be unreasonably withheld.

16 3.8 Use. The Leased Premises shall be used by Cornish College for the
17 purpose of conducting a private education business, and for no other purpose. Sublessor
18 acknowledges that the initial contemplated use of the Leased Premises for a "scene shop" and for
19 classrooms is permitted as a component of Cornish College's private education business.

20 3.9 Condition and Care of Leased Premises. Subject to the performance by
21 Etherington of his obligations under Section 3.4, Cornish College accepts the Leased Premises in
22 its present condition and agrees to keep the Leased Premises in a good clean condition; to
23 commit no waste thereon; to obey all laws and ordinances affecting the Leased Premises; to
24 replace all glass broken or cracked; and, subject to the provisions of Section 3.11, to repair all
25 damage to the Leased Premises caused by Cornish College or its agents, employees, or
26 invitees. Etherington shall be responsible for the repair of any damage to the Leased Premises
caused by occupants of the Building other than Lessee.

3.10 Structural Changes or Remodeling. Except for the demolition work
contemplated by Section 3.4, and the construction of the tenant improvements required for
Cornish College's "scene shop" and classrooms, which are hereby approved by Etherington and
Lessor, Cornish College shall not make any structural or remodeling changes without prior
written approval of Etherington. Cornish College understands any improvements made shall not
abate the rent and shall be the property of Etherington at the termination of this Lease, unless
otherwise agreed to in writing by Etherington, and unless Cornish College exercises the Purchase
Option (as defined in Section 4.1)

3.11 Destruction of Leased Premises.

(a) Partial Destruction. In case of partial destruction or injury to the Leased
Premises by fire, the elements or other casualty, and if this Lease is not terminated by either
Etherington or Lessee pursuant to the provisions of this Section 3.11, Etherington shall, unless
otherwise agreed in writing, repair the Leased Premises to its condition prior to such casualty as
soon as reasonably practical after the date of such casualty, provided that Etherington's

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 3

Sublease with Option to Purchase (6) 4-29-05.1

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1 obligation to so rebuild shall be limited to the amount of the proceeds of the insurance that are
2 required to be carried pursuant to Section 3.15(a) (whether or not such insurance is in effect). If
3 the casualty is uninsured (e.g., earthquake), or if the proceeds of the insurance are for any
4 reason insufficient to rebuild the Leased Premises to substantially their condition prior to the
5 casualty, and Etherington does not rebuild the Leased Premises to substantially their condition
6 prior to the casualty, Cornish College may elect to terminate this Lease by written notice given to
7 Etherington, in which event Cornish College shall be reimbursed by Etherington for the cost of the
8 tenant improvements constructed by Cornish College, The rent shall be equitably abated until
9 completion of any repairs.

6 (b) Substantial Destruction. If the damage to the Leased Premises is so
7 substantial that repair of such damage will require more than 180 days to complete (or will require
8 more than 90 days to complete if such casualty occurs after January 1, 2008), then either
9 Etherington or Lessee may elect, by written notice given to the other not later than thirty (30) days
10 after the date of such casualty, to terminate this Lease effective as of the date of such casualty.

9 (c) Purchase Option. The termination of this Lease by either Etherington or
10 Lessee pursuant to the provisions of this Section 3.11 shall not terminate the Purchase Option,
11 which Purchase Option shall remain in full force and effect notwithstanding any such termination
12 of this Lease.

12 3.12 Condemnation of Leased Premises.

13 (a) Partial Taking. If part of the Leased Premises shall be taken by any
14 competent authority for any public or quasi public use or purpose, but the portion of the Leased
15 Premises not taken continues to be suitable, in the judgment of Lessee, for the conduct of
16 Lessee's business, this Lease shall not terminate, but the rent shall be equitably abated.

15 (b) Total Taking. If the whole of the Leased Premises shall be taken by any
16 competent authority for any public or quasi public use or purpose, or if such authority shall take
17 such portion of the Leased Premises that the portion not taken is not suitable, in the judgment of
18 Lessee, for the conduct of Lessee's business, then Lessee may elect, by written notice given to
19 Etherington not later than thirty (30) days after the date of such taking, to terminate this Lease
20 effective as of the date of such taking

19 (c) Entitlement to Damages. All damages awarded for any taking shall
20 belong to and be the property of Etherington, except that (i) Cornish College shall be entitled to
21 that portion of the award allocable to the Purchase Option, (ii) nothing herein shall be construed
22 as precluding Cornish College from asserting any claim Cornish College may have against such
23 public authority for taking of the property of Cornish College, disruption or relocation of Cornish
24 College's business, and any such damages shall belong to Cornish College, and (iii) if the taking
25 arises out of the physical condition of the Property (rather than the condemnor's need to use the
26 Property for another purpose), Cornish College shall be entitled to make a separate claim for the
27 value of the tenant improvements constructed or installed by Cornish College, notwithstanding
28 that such tenant improvements may be considered fixtures or part of the realty and would be the
29 property of Etherington upon the termination of this Lease..

25 3.13 Service of Notices. All notices shall be in writing. All notices to be given
26 to Cornish College may be served on Cornish College personally, or on any person of majority at
the demised Property, or by leaving said notice on the demised Property, or by sending notice by
U. S. Mail, postage prepaid, addressed as follows:

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 4
Sublease With Option to Purchase (04-25-05)

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Attention: Vicki Clayton
Cornish College of the Arts
1000 Lenora Street
Seattle, WA 98121

or such other place as Cornish College may direct in writing.

All notices to be given to Virginia Limited or Etherington may be served on Virginia Limited or Etherington personally, or by sending notice by U. S. Mail, postage prepaid, addressed to Virginia Limited or Etherington at:

1000 Virginia Limited Partnership
1200 Washington Street
Wenatchee, WA 98801

or such other place as Virginia Limited or Etherington may direct in writing.

Notice shall be deemed delivered on the date of delivery if personally delivered or on the date of postmark if mailed. All notice periods shall begin and end on midnight.

3.14 Vacating Upon Termination. Cornish College further covenants and agrees that upon the expiration of said term (if Cornish College elects not to purchase the property as set forth herein), or upon the termination of the Lease for any cause, Cornish College will at once peacefully surrender and deliver up the whole of the Leased Premises together with all improvements thereon to Etherington, Etherington's agents or assigns unless Cornish College shall have acquired the right to remain through another written agreement or written extension of this Lease. Cornish College will return the Leased Premises broom clean, and in good condition and repair, reasonable wear and tear and damage by casualty excepted. Lessee shall have no obligation to restore the Leased Premises to any prior condition (including, without limitation, no obligation to replace any storage units demolished pursuant to Section 3.4 and no obligation to remove any improvements or alterations made in accordance with Section 3.10). Cornish College agrees to pay Three Hundred and No/100 Dollars (\$300.00) per day for each day Cornish College remains upon the Leased Premises after expiration of the Lease. Remaining on the Leased Premises and paying the Three Hundred and No/100 Dollars (\$300.00) penalty shall not create a new Lease term or a new tenancy of any kind.

3.15 Insurance.

(a) Property Insurance. Etherington or Virginia Limited shall at its expense, maintain on the Property a policy of standard fire insurance with extended coverage in an amount of its replacement value.

(b) Personal Property. Cornish College shall be responsible for providing fire and casualty insurance on Cornish College's own personal property, records and business equipment.

(c) Liability Insurance. Cornish College shall at Cornish College's expense maintain comprehensive liability insurance on the Leased Premises in an amount not less than One Million and No/100 Dollars (\$1,000,000.00). Etherington and 1000 Virginia shall be an additional insured on such policy.

(d) Delivery of Policy. Cornish College shall deliver to Etherington a copy of the policies and the declaration pages prior to entry on the Property.

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 5
Sublease with Option to Purchase (S) 23-051

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3.16 Waiver of Subrogation. Etherington and Cornish College shall each procure, if obtainable without payment of an additional premium, an appropriate clause in, or an endorsement on, any policy of fire or extended coverage insurance covering the Property or the Leased Premises, and the personal property, fixtures and equipment located in or on the Property or the Leased Premises and any liability policy for the Property or the Leased Premises, pursuant to which the insurance companies waive subrogation or consent to a waiver of right of recovery, and, conditioned upon a party having obtained such clauses or endorsements or waiver of subrogation or consent to a waiver of right of recovery, such party hereby agrees that it shall not make any claim against or seek to recover from the other for any loss or damage to its property, or the property of the other, resulting from fire or other hazards covered by such insurance, notwithstanding other provisions of this Lease; provided, however, that the release, discharge, exoneration and covenant not to sue herein contained shall be limited by the terms and provisions of the waiver of subrogation clauses or endorsements consenting to a waiver of right of recovery, and shall be coextensive therewith. If either Etherington or Cornish College is unable to obtain such clause or endorsement or is able to obtain such clause or endorsement only upon payment of an additional premium, such party shall promptly give the other party notice to that effect, in which event the other party shall have the right to pay such additional premium, and upon such payment, the party whose insurer requires such payment shall promptly procure such clause or endorsement.

3.17 Taxes. Etherington shall pay all real property taxes on the Property. Cornish College will pay all personal property taxes for equipment or inventory maintained on the Leased Premises and will pay all other taxes relative to the operation of any business by Cornish College on the Leased Premises. Cornish College as a non-profit educational institution may apply for property tax relief for the Property. If any such relief is granted, the amount of any reduction in real property taxes otherwise payable by Etherington shall be credited against the payments or rent next coming due hereunder.

3.18 Maintenance and Repair by Etherington. Etherington shall be responsible for maintaining the roof, the outside appearance of the Building, and the structural integrity of the Building to the extent it affects the Leased Premises.

3.19 Maintenance and Repair by Cornish College. Cornish College shall be responsible for all interior maintenance and repair of the Leased Premises, including paint, carpet, plumbing, electrical and mechanical.

3.20 Utilities. Cornish College shall be responsible for and pay all utilities serving the Leased Premises including, but not limited to water, sewer, garbage, gas and electricity. 1000 Virginia currently pays the entire water and sewer bill for the Property. Cornish College shall reimburse 1000 Virginia at a 1/63rd pro rated share of such costs within 30 days of delivery of the applicable utility bill. Garbage, gas and power are separately metered to the Leased Premises.

3.21 Security System/Fire Alarm. Cornish College shall assume the lease with Guardian of the existing security system for the Leased Premises, and shall be responsible for all costs thereof, but Etherington shall pay the expense associated with any false alarms due to occupants of that portion of the Property not included within the Leased Premises ("Lessor's Property").

3.22 Inspection. Etherington shall have the right at all reasonable times during the business hours to enter and inspect the Leased Premises.

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 6
Sublease with Option to Purchase (514-25-051)

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1
2 3.23 Indemnity/Hold Harmless. Cornish College agrees that at the sole option
3 of Etherington, Cornish College shall either indemnify or shall defend and hold Etherington and its
4 officers, employees, contractors and agents harmless from all claims (including claims of Cornish
5 College's employees or agents) for damages to persons or property occurring on the Leased
6 Premises during the term of the Lease, except for claims arising from the sole or concurrent
7 negligence of Etherington or Virginia Limited or their respective tenants, agents or employees.
8 Cornish College waives its immunity under Industrial Insurance, Title 51 RCW, to the extent
9 necessary to effectuate this indemnification/hold harmless agreement.

10 3.24 Cornish College's Environmental Indemnification/Hold Harmless.
11 Cornish College agrees that at the sole option of Etherington, Cornish College shall either
12 indemnify or shall defend and hold Etherington and its officers, employees, contractors and
13 agents harmless from all costs or liabilities arising from any environmental contamination or
14 noncompliance with any applicable federal, state or local environmental law, regulation or
15 ordinance now or hereafter in force, resulting from the operations of Cornish College, its agents,
16 employees, contractors or invitees. This indemnification/hold harmless includes, without
17 limitation, all claims, judgments, damages (including natural resource damages), penalties, fines
18 and costs incurred in connection with any site investigation to determine the presence or extent of
19 any contamination, as well as the costs of any cleanup, removal or remedial work, whether or not
20 it is required by any regulatory agency. Such costs shall include reasonable environmental
21 consultant's and attorney fees. This indemnification/hold harmless clause shall survive the
22 expiration or earlier termination of this lease.

23 3.25 Cornish College's Compliance with Environmental Laws. Cornish
24 College shall not use, or permit the Leased Premises to be used, in a manner that violates any
25 applicable federal, state or local law, regulation, or ordinance now or hereafter in force. This
26 includes, but is not limited to, any law, regulation, or ordinance pertaining to air or water quality or
emissions; the handling, transportation, storage, treatment, usage or disposal of toxic or
hazardous substances; or any other environmental matters. Compliance shall be at the sole cost
and expense of Cornish College and its agents, employees, contractors or invitees. Cornish
College shall immediately notify Etherington of any spills, releases, or other potential failures to
comply with applicable environmental laws and regulations, and of any inspections, notices,
orders, fines or communications originating from environmental regulatory agencies. Etherington
and his employees, contractors, or agents shall have the right, upon reasonable notice to Cornish
College, but not the duty, to inspect the Leased Premises and Cornish College's records
pertaining to compliance with applicable environmental laws and regulations. If Cornish College
is found to be in violation of this Lease agreement or any applicable environmental law or
regulations, or if environmental contamination is detected, Cornish College shall be responsible
for all costs associated with such contamination or noncompliance.

27 3.26 Lessor's/Sublessor's Environmental Indemnification/Hold Harmless.
28 Lessor and Sublessor agree that at the sole option of Cornish College, Lessor and Sublessor
29 shall either indemnify or shall defend and hold Cornish College and its officers, employees,
30 contractors and agents harmless from all costs or liabilities arising from any environmental
31 contamination or noncompliance with any applicable federal, state or local environmental law,
32 regulation or ordinance now or hereafter in force, resulting from any cause other than the
33 operations of Cornish College, its agents, employees, contractors or invitees. This
34 indemnification/hold harmless includes, without limitation, all claims, judgments, damages
35 (including natural resource damages), penalties, fines and costs incurred in connection with any
36 site investigation to determine the presence or extent of any contamination, as well as the costs
of any cleanup, removal or remedial work, whether or not it is required by any regulatory agency.

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE

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SubleaseWithOptionToPurchase(B)4-26-03

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1 Such costs shall include reasonable environmental consultant's and attorney fees. This
2 indemnification/hold harmless clause shall survive the expiration or earlier termination of this
lease.

3 3.27 Lessor's/Sublessor's Compliance with Environmental Laws. Neither
4 Lessor nor Sublessor shall use, or permit the Lessor's Property to be used, in a manner that
5 violates any applicable federal, state or local law, regulation, or ordinance now or hereafter in
6 force. This includes, but is not limited to, any law, regulation, or ordinance pertaining to air or
7 water quality or emissions; the handling, transportation, storage, treatment, usage or disposal of
8 toxic or hazardous substances; or any other environmental matters. Compliance shall be at the
9 sole cost and expense of Lessor and Sublessor, and their respective agents, employees,
10 contractors or invitees. Lessor and Sublessor shall immediately notify Cornish College of any
11 spills, releases, or other potential failures to comply with applicable environmental laws and
12 regulations, and of any inspections, notices, orders, fines or communications originating from
13 environmental regulatory agencies. If Lessor or Sublessor is found to be in violation of this Lease
14 agreement or any applicable environmental law or regulations, or if environmental contamination
15 is detected, Lessor and Sublessor shall be responsible for all costs associated with such
16 contamination or noncompliance.

17 3.28 Leasehold Fixtures. Cornish College may install on the Leased
18 Premises such equipment as is customarily used in the type of business conducted by Cornish
19 College on the Leased Premises. Upon the expiration or sooner termination of this Lease,
20 Cornish College may remove from the Leased Premises all such equipment and all other property
21 of Cornish College and shall repair any damage to the Leased Premises occasioned thereby.
22 Any equipment or fixtures not removed by the expiration or sooner termination of this Lease, shall
23 become the property of Etherington, unless the Purchase Option is exercised..

24 3.29 Cancellation, Termination or Default. If Cornish College defaults in the
25 payment of rent and such default shall not have been cured within three (3) days after such
26 default, Etherington may re-enter and take possession of the Leased Premises, remove all
persons and property and Etherington may at Etherington's option, terminate this Lease.
Etherington may at Etherington's option, be entitled to recover from Cornish College any rents
and charges equivalent to all rent reserved in this Lease, less the fair market rental value of the
Leased Premises.

If Cornish College defaults in the payment of any other item to be paid by
Cornish College or in the performance of any other term or covenant and such default shall not
have been cured within thirty (30) days after such default, Etherington may re-enter and take
possession of the Leased premises, remove all persons and property and Etherington may at
Etherington's option, terminate this lease. Etherington may at Etherington's option, be entitled to
recover from Cornish College any rents and charges equivalent to all rent reserved in this Lease,
less the fair market rental value of the Leased Premises.

If Etherington elects to re-enter and take possession of the Leased Premises
without terminating this Lease, Etherington shall use commercially reasonable efforts to relet the
Leased Premises for such term or terms (which may be for a term extending beyond the term of
this lease), at such rental or rentals and upon such other terms and conditions as Etherington at
Etherington's sole discretion may deem advisable with the right to make alterations and repairs to
the Leased Premises. Upon any such reletting, Etherington shall receive and collect the rents
therefor, applying the same first to the payment of such expenses as Etherington may have paid,
assumed or incurred in recovering possession of the Leased Premises, including costs, expenses
and attorney's fees and for placing the same in good order and condition, or repairing or altering

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
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1 the same for reletting and all other expenses, commissions and charges paid, assumed and
2 incurred by Etherington in or about reletting the Leased Premises, and then to the fulfillment of
the agreements of Cornish College.

3 Whether or not the Leased Premises or any part thereof is relet, Cornish College
4 shall pay to Etherington until the end of the term of this Lease the equivalent of the amount of all
rent and other charges required to be paid by Cornish College under the terms hereof, less the
5 balance, if any, of such reletting after payment of the expenses of Etherington and the same shall
be due and payable on the rent days specified herein.

6 Notwithstanding such reletting without termination or re-entry without termination,
7 Etherington may at any time thereafter elect to terminate this Lease for any previous breach.

8 Notwithstanding any of the foregoing, Etherington reserves all remedies allowed
9 by law or equity.

10 Option to Purchase

11 4.1 Option. Virginia Limited, as a part of the consideration for this
Lease agreement which directly benefits Virginia Limited, and Etherington, to the extent of its
12 interest in the Property, grants to Cornish College the privilege at any time during the term of this
Lease agreement up to and including January 1, 2008 (or, if an Acceleration Notice is given after
13 November 1 2006, up to and including May 1, 2008), subject to the provisions of Sections 4.3 and
4.16 below, AND PROVIDED, Cornish College is not in default on the Lease, and after written
14 notice to Virginia Limited, the exclusive option (the "Purchase Option") to purchase the Property
on the terms and conditions set forth hereinafter.

15 Notwithstanding the foregoing, if Virginia Limited provides Cornish College with
16 written notice that vacation of the Property above the second floor of the Building is required (an
"Acceleration Notice"), then the Purchase Option will terminate on the date (the "Early
17 Termination Date") that is (i) if the Acceleration Notice is given during the period from May 1
through November 1 of any calendar year, May 1 of the following calendar year, or (ii) if the
18 Acceleration Notice is given during the period from November 2 of any calendar year through
April 30 of the following calendar year, the second May 1 occurring after the giving of the
19 Acceleration Notice, unless the Purchase Option is exercised by Cornish College on or before the
Early Termination Date.

20 4.2 Purchase Price and Terms of Payment. The purchase price shall be
21 payable in cash at closing. Subject to the provisions of Section 4.21, (i) if an Acceleration Notice
is given on or before November 1, 2005, the purchase price shall be Two Million Eight Hundred
22 Thousand and No/100 Dollars (\$2,800,000.00), (ii) if an Acceleration Notice is given after
November 1, 2005 but on or before November 1, 2006, the purchase price shall be Two Million
23 Nine Hundred Thousand and No/100 Dollars (\$2,900,000.00), and (iii) if an Acceleration Notice is
given after November 1, 2006, the purchase price shall be Three Million and No/100 Dollars
24 (\$3,000,000.00). If Cornish College exercises the Purchase Option and no Acceleration Notice is
25 given, the purchase price shall be Three Million and No/100 Dollars (\$3,000,000.00).

26 4.3 Deposits. If Cornish College has not exercised its option to purchase the
Property prior to January 1, 2007, and has not received an Acceleration Notice, then on January
1, 2007, Cornish College may, at its option, pay a payment of Fifty Thousand and No/100 Dollars

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
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Sublease With Option to Purchase 15/1-23-051

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4.9 Conveyance. Title shall be conveyed by Statutory Warranty Deed..

4.10 Condition of Premises. Cornish College acknowledges that it will be in exclusive possession of the bottom 2 floors of the property during the term of the lease, and therefore, subject to the provisions of Sections 3.4, 3.18, 4.21 and 4.22, shall accept the Property at the closing of the sale pursuant to the Purchase Option in its present condition, "AS IS, WHERE IS", with all faults, defects and deficiencies, whether patent or latent.

4.11 Closing. The sale shall be closed in the office of closing agent, Chicago Title Insurance Company. Cornish College, Etherington, and Virginia Limited shall deposit with closing agent all instruments, documents and monies necessary to complete the sale in accordance with this agreement.

4.12 Closing Costs and Proration. Closing escrow fees shall be split between Virginia Limited and Cornish College. Virginia Limited shall pay real estate excise tax. Taxes for the current year and charges constituting liens shall be prorated as of closing. Virginia Limited shall pay all costs of title insurance and attorney's fees for documentation.

4.13 Payment of Utilities. All water and other utility charges not constituting liens shall be paid and/or prorated outside escrow directly between Cornish College and Virginia Limited.

4.14 Date of Closing. For purposes of this agreement, "date of closing" shall be construed as the date upon which all appropriate documents are executed and the proceeds of this sale are available for disbursement to Virginia Limited. Funds held in reserve accounts pursuant to escrow instructions shall be deemed, for purposes of this definition as available for disbursement to Virginia Limited.

4.15 Possession. Cornish College is currently in possession of a portion of the property pursuant to the Lease. Cornish College shall be entitled to possession of the remainder of the Property on closing.

4.16 Casualty Loss. If, prior to the exercise of the Purchase Option, this Lease is terminated pursuant to Section 3.11, the Purchase Option shall remain in effect (if not previously expired pursuant to Section 4.3), but in such event the Purchase Option will expire, if not exercised prior to that date, on December 31 of the year in which the Lease is terminated, and such date may not be further extended pursuant to Section 4.3. If, after the exercise of the Purchase Option, but prior to closing, Improvements in the Leased Premises are destroyed or materially damaged, Cornish College may elect to rescind its exercise of the Purchase Option, in which event any deposits made pursuant to Section 4.3 shall be refunded to Cornish College. Such right of rescission must be exercised by Cornish College by the date which is the earlier of (i) sixty (60) days after the date of the casualty, and (ii) ten (10) days before the scheduled Closing Date, provided that if the casualty occurs within ten (10) days of the Closing Date the closing shall be extended for the number of days required to afford Cornish College not less than ten (10) days to so rescind its exercise of the Purchase Option. If as of the closing date hereunder, any damage to the Leased Premises has not been repaired by Etherington or Virginia Limited, any insurance proceeds attributable to such damage shall be assigned to Cornish College or, if previously paid to Virginia Limited or Etherington, shall be credited against the purchase price and, in either case, the deductible under the applicable policy shall be credited against the purchase price, and if the loss is uninsured, Cornish College shall receive a credit against the purchase price in the amount of the cost of the tenant improvements constructed or installed by Cornish College.

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
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4.17 Notices. All notices to be given to Virginia Limited and Cornish College shall be served as set forth in paragraph 3.13, *Service of Notices*, above.

4.18 Computation of Time. Unless otherwise expressly specified herein, any period of time specified in this Agreement shall expire by midnight of the last calendar day of the specified period of time, unless the last day is Saturday, Sunday or a legal holiday, as prescribed in RCW 1.16.050, in which event the specified period of time shall expire at midnight of the next business day. Any specified period of five (5) days or less shall include business days only.

4.19 Intentionally Omitted.

4.20 Assignment. Cornish College's rights under the Purchase Option may not be assigned to a party other than a party related to or affiliated with Cornish College without the prior written consent of Virginia Limited, which consent shall not be unreasonably withheld.

4.21 Removal of Other Tenants. If the Purchase Option is exercised, Virginia Limited shall cause all occupants of the Property other than Cornish College to vacate the Property prior to June 1 of the year of closing. Virginia Limited shall provide Cornish College with monthly progress reports on the status of tenant vacations. If all such occupants have not vacated the Property by June 1 of the year of closing under the Purchase Option, Cornish College may, at its option, postpone the closing to the first business day of May of the following calendar year, but in such event, notwithstanding the provisions of Section 4.2, the purchase price shall be the same as at the deferred closing as it would have been had the closing proceeded as originally scheduled.

4.22 Demolition. If the Purchase Option is exercised, Virginia Limited shall commence no earlier than May 15 of the year of closing, and complete by no later than the date of closing, demolition of the Property above the second floor, all at Virginia Limited's sole cost and expense. Demolition shall include taking such actions as are necessary to weather and water seal the "roof" above the second floor of the Building, including capping off all plumbing and other penetrations of such roof, except that Cornish College shall, at its expense, make weathertight the openings for the two fire stairs, the trash chute, and the elevator. Except for the Leased Premises, Virginia Limited shall deliver on closing a vacant building to Cornish College. If the required demolition work has not been completed by July 1 of the year of closing, Cornish College may, at its option, hire a contractor of its choice to complete such demolition, and deduct the cost of such work (including project management fees, permits, fees, and taxes) from the purchase price of the Property at closing. If the demolition is not completed by closing (whether or not Cornish has hired its own contractor pursuant to the preceding sentence) Cornish College may, at its option, elect to close with such demolition uncompleted, in which event (i) Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) of the purchase price shall be retained in escrow until such demolition is completed, and (ii) Cornish College may hire a contractor of its choice (if it has not already done so) to complete the demolition and the costs of such demolition (including project management fees, permits, fees, and taxes) shall be paid from the escrowed funds. Any funds remaining in escrow upon the completion of the demolition shall be released to Virginia Limited within thirty (30) days after the completion of the demolition.

4.23 Tenant Relocation Claims. Virginia Limited and Etherington shall be responsible for, and shall indemnify Cornish College against, any claims of any occupants of Lessor's Property arising out of the termination of their rights to occupy the Property.

Miscellaneous

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
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SubleaseWithOptionToPurchase(BY-23-25)

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5.1 Right to Mortgage. Virginia Limited may encumber the Property by mortgage, securing such sum or sums and upon such terms and conditions as Virginia Limited may desire, but any such mortgage or mortgages so given shall be subject to the rights of Cornish College herein, and shall not affect this agreement.

5.2 Number, Gender, Permissive Versus Mandatory Usage. Where the context permits, references to the singular shall include the plural and vice versa, and to the neuter gender shall include the feminine and masculine. Use of the word "may" shall denote an option or privilege and shall impose no obligation upon the party which may exercise such option or privilege; use of the word "shall" shall denote a duty or an obligation.

5.3 Captions and Construction. The captions in this agreement are for the convenience of the reader and are not to be considered in the interpretation of its terms.

5.4 Savings Clause. Nothing in this Agreement shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this Agreement and any material statute, law, public regulation or ordinance, the latter shall prevail, but in such event, the provisions of this Agreement affected shall be curtailed and limited only to the extent necessary to bring it within legal requirements.

5.5 No Other Offers. There are no other verbal or other agreements which modify or affect this agreement. Time is of the essence of this agreement.

5.6 Facsimile Copies. The parties agree that this agreement may be transmitted between them by facsimile machine. The parties intend that faxed signatures constitute original signatures and that a faxed agreement containing the signatures (original or faxed) of all the parties is binding on the parties.

5.7 Memorandum. Unless both parties consent thereto in writing, this Commercial Sublease With Option to Purchase shall not be placed of record. Virginia Limited and Cornish College agree to execute and place of record an Instrument, in recordable form, evidencing the commencement date and expiration date of this Lease and the existence of the Purchase Option.

5.8 Entire Agreement. This Commercial Sublease With Option to Purchase contains the entire agreement between the parties hereto, and there are no verbal or other agreements which modify or affect this agreement except as referenced herein.

5.9 Attorneys Fees and Venue. In the event that Cornish College, Etherington, or Virginia Limited shall commence proceedings or institute action to enforce any

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
Page 13
SubleaseWithOptiontoPurchase(5)4-23-05

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rights hereunder, the venue for any such proceeding or action shall be in King County, Washington, and the substantially prevailing party shall be entitled to costs and reasonable attorney's fees, including those for appeal.

"LESSOR/VIRGINIA LIMITED"

1000 VIRGINIA LIMITED PARTNERSHIP
A Washington Limited Partnership

By *Donn Etherington*
Virginia-Terry, LLC, General Partner
By Donn Etherington, Jr., Member

Date: 4.29.05

"SUBLESSOR/ETHERINGTON "

Donn Etherington, Jr.
Donn Etherington, Jr.,

Date: 4.29.05

"LESSEE/CORNISH COLLEGE"

CORNISH COLLEGE OF THE ARTS
A Washington Public Benefit Corporation

By *Wade Clark*
Exec + Ops Off.

Date: 4-29-05

COMMERCIAL SUBLEASE
WITH OPTION TO PURCHASE
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SubleaseWithOptionToPurchase(B)4-25-041

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FILED
KING COUNTY WASHINGTON
FEB 10 2011
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation,

Judgment Creditor,
v.

1000 VIRGINIA LIMITED PARTNERSHIP; a
Washington limited partnership; ONE
THOUSAND VIRGINIA, a general partnership
and DONN ETHERINGTON, JR., an
individual,

Judgment Debtors.

No. 08-2-04029-1SEA

~~[PROPOSED]~~ ORDER RE:
(1) TERMINATION OF LEASE AND
OPTION TO PURCHASE; AND
(2) NON-MERGER DEED TO 1000
VIRGINIA PROPERTY

This matter came before the Court on Plaintiff Cornish College of the Arts' request for a telephone conference, which was held on February 4, 2011. Having heard the argument of counsel for the parties, and being fully advised, the Court finds and rules as follows:

- 1. Title to the 1000 Virginia Property is encumbered by, *inter alia*, (1) a 99-year lease, held by Donn Etherington, Jr.; his wife Kathryn Etherington; and the Pamela G. Etherington Rockenbach Family Trust; and (2) a Memorandum of Option to Purchase, held by 2000 Terry Limited Partnership. Donn Etherington has signing authority for both the Trust, as trustee, and the 2000 Terry Limited Partnership, as general partner.

1 2. Cornish presented to Etherington a Termination and Release of Lease, a
2 copy of which is attached hereto as Exhibit A; and a Termination and Release of Option
3 Agreement, a copy of which is attached hereto as Exhibit B, for his signature on behalf of
4 himself and the other entities holding an interest in the lease and the option. Cornish also
5 asked that Etherington request that his wife Kathryn sign the Termination and Release of
6 Lease, terminating her interest in the lease. Etherington refused to sign on behalf of the
7 Trust, and refused to ask his wife to sign the Termination and Release of Lease.

8 2. The Commercial Sublease with Option to Purchase (“Agreement”), entered
9 into by Cornish, Etherington and 1000 Virginia Limited Partnership (“1000 Virginia LP”)
10 on April 29, 2005, obligates 1000 Virginia LP and Etherington, “to the extent of his interest
11 in the property,” to transfer to Cornish clear title to the 1000 Virginia Property.

12 3. On January 7, 2011, the Court found that the \$3 million purchase price for
13 the Property was offset by a portion (specifically, \$3,010,059.32) of the judgments entered
14 in this case against 1000 Virginia LP in favor of Cornish, and ordered transfer of the
15 Property accordingly.

16 4. Cornish subsequently presented to Etherington for his signature on behalf of
17 1000 Virginia LP the “Non-Merger Deed in Partial Satisfaction of Judgment,” a copy of
18 which is attached hereto as Exhibit C (“Deed”). Etherington refused to sign the Deed.

19 5. The Deed explicitly reserves, and does not extinguish, Cornish’s rights: (1)
20 to pursue that portion of its judgments against 1000 Virginia that have not been satisfied by
21 transfer of the 1000 Virginia Property; (2) to enforce 1000 Virginia LP and Etherington’s
22 obligations under the Agreement, and seek additional damages resulting from 1000 Virginia
23 LP and/or Etherington’s breach of the Agreement, including but not limited to 1000
24 Virginia LP’s failure to deliver clear title and to otherwise fulfill certain specified
25 conditions prior to closing; and (3) to prevent conveyance of the Property from affecting the
26

1 priority of any judgment resulting from the above-captioned case. The Deed does not effect
2 a merger of the fee ownership and the rights granted to Cornish under the Agreement.

3 6. Pursuant to the Agreement, the judgments entered in this case, and the
4 Court's January 7, 2011 Order, Cornish is entitled to execution of the Deed in the form
5 attached as Exhibit C. Execution of the Deed shall not extinguish Cornish's rights to
6 enforce its judgments or the Agreement against 1000 Virginia LP or Etherington.

7 7. Within 3 days of entry of this order, Donn Etherington, Jr., shall sign the
8 Termination and Release of Lease, a copy of which is attached hereto as Exhibit A, on his
9 own behalf; on behalf of Virginia-Terry, LLC, in its capacity as general partner of 1000
10 Virginia LP; and on behalf of the Donn Etherington, Jr. share of the Pamela G. Etherington-
11 Rockenbach Family Trust. Etherington shall also take all reasonable measures to secure the
12 signature of his wife, Kathryn Etherington, on the Termination and Release of Lease.

13 8. Within 3 days of entry of this order, Etherington shall sign the Termination
14 and Release of Option Agreement, a copy of which is attached hereto as Exhibit B, on
15 behalf of Virginia-Terry, LLC, in its capacity as general partner of 1000 Virginia LP; and
16 on behalf of 2000 Terry Avenue Limited Partnership.

17 9. Within 3 days of entry of this order, Etherington shall sign the Non-Merger
18 Deed in Partial Satisfaction of Judgment, a copy of which is attached hereto as Exhibit A,
19 on behalf of Virginia-Terry LLC, in its capacity as general partner of 1000 Virginia LP.

20 10. The Court clarifies that the January 7, 2011 "Order Directing Receiver to
21 (1) Release Interest in 1000 Virginia and (2) Sign Letter of Authorization" did not divest
22 1000 Virginia LP or Etherington of any authority to transfer the Property existing prior to
23 entry of that order. *tm*

24 DATED this 10 day of February, 2011.



Honorable Steven Gonzalez
Superior Court Judge

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Presented by:

YARMUTH WILSDON CALFO PLLC

By: 
Richard C. Yarmuth, WSBA #4990
Rachel L. Hong, WSBA #33675
Attorneys for Plaintiff

Copy Received; Notice of
Presentation Waived:

RYAN, SWANSON & CLEVELAND, PLLC

By: _____
Jerry Kindinger, WSBA # 5231
Attorneys for Defendant

510 01 5024504 8/11

[PROPOSED] ORDER RE: (1) TERMINATION OF
LEASE AND OPTION; AND (2) NON-MERGER
DEED - Page 4



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SEATTLE WASHINGTON 98101
T 206.516.3800 F 206.516.3888

When recorded return to:
Glenn Amister
Lane Powell LP
1420 - 5th Ave, Suite 4100
Seattle, WA 98101-2338

TERMINATION AND RELEASE OF OPTION AGREEMENT

Grantor: 1000 Virginia Limited Partnership

Grantee: 2000 Terry Avenue Limited Partnership

Legal Description (Abbr.): Lots 1 & 2, Block 40, Volume 1 of Plats, Page 121 (full legal description set forth in Exhibit A)

Tax Parcel No.: .066000-1445-02

Recording Numbers of Documents Affected: 9207211118

This Termination and Release of Option Agreement is made this _____ day of February, 2011, by and between 1000 Virginia Limited Partnership, a Washington limited partnership ("Owner/Optionor"); and 2000 Terry Avenue Limited Partnership ("Optionee").

WITNESSETH:

WHEREAS, Owner/Optionor and Optionee, entered into a certain Option Agreement dated July 2, 1992, affecting the property located at 1000 Virginia Street (sometimes referred to as 2000 Terry Avenue), Seattle, Washington (as legally described in Exhibit A attached hereto)("Property"), which is memorialized by the Memorandum of Option recorded in the King County Auditor's Office under Recording No. 9207211118 (the "Option Agreement")

WHEREAS, the parties desire to terminate and release the Option Agreement in order to fulfill the Owner's/Optionor's obligation under that certain Commercial Sublease and Option to Purchase between Owner and Cornish College of the Arts dated March 20, 2007;

NOW, THEREFORE, it is agreed by the parties hereto as follows:

Owner/Optionor and Optionee hereby terminate and cancel the Option Agreement and all of the parties rights and obligations under the Option Agreement are hereby extinguished.

200593.0020/Cornish_2000Terry Release of Option.DOC.1

IN WITNESS WHEREOF, the parties hereto have caused this Termination and Release of the Option Agreement to be duly executed as of the date first above written.

1000 Virginia Limited Partnership,
a Washington limited partnership

By: Virginia-Terry, LLC, a Washington
limited liability company

By: Donn Etherington, Jr.
Donn Etherington, Jr., Member

2000 Terry Avenue Limited Partnership,
a Washington limited partnership

Donn Etherington, Jr.

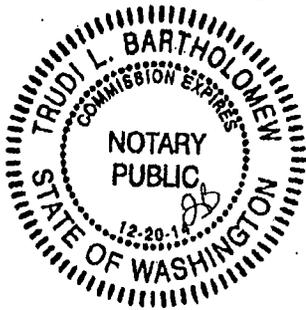
Donn Etherington, Jr.,
General Partner

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know DONN ETHERINGTON, JR. is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he is authorized to execute the instrument and acknowledged he is the authorized member of Virginia-Terry, LLC, a Washington limited liability company, which is the General Partner for 1000 Virginia Limited Partnership; a Washington limited partnership, and to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

DATED: February 11, 2011

Trudi L Bartholomew



Print Name: Trudi L Bartholomew
NOTARY PUBLIC for the State of Washington,
Residing at: Wenatchee, WA

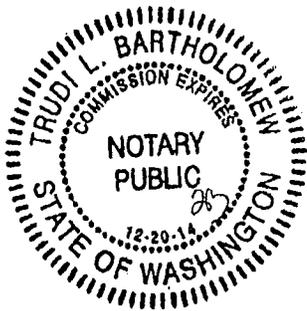
My appointment expires:
12-20-2014

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know DONN ETHERINGTON, JR. is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he is authorized to execute the instrument and acknowledged he is the General Partner of 2000 Terry Avenue Limited Partnership, a Washington limited partnership, and to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

DATED: February 11, 2011

Trudi L Bartholomew



Print Name: Trudi L Bartholomew
NOTARY PUBLIC for the State of Washington,
Residing at: Wenatchee, WA

My appointment expires:
12-20-2014

Exhibit A
Legal Description

Lots 1 and 2, Block 40, Second Addition to the Town of Seattle, as laid off by the heirs of Sarah A. Bell "deceased", commonly known as Heirs of Sarah A. Bell's Second Addition to the City of Seattle, according to the Plat recorded in Volume 1 of Plats, page 121 in King County, Washington.

When recorded return to:
Glenn Amster
Lane Powell LP
1420 - 5th Ave, Suite 4100
Seattle, WA 98101-2338

TERMINATION AND RELEASE OF LEASE

- Grantors:**
1. Etherington, Jr., Donn;
 2. Etherington, Kathryn K.; and
 3. Donn Etherington, Jr. as Trustee of the Donn Etherington, Jr. share of the Pamela G. Etherington-Rockenbach Family Trust-Exempt u/w/d July 8, 1994, as to an undivided 25% tenant-in-common interest.

Grantee: 1000 Virginia Limited Partnership

Legal Description (Abbr.): Lots 1 & 2, Block 40, Volume 1 of Plats, Page 121 (full legal description set forth in Exhibit A)

Tax Parcel No.: 066000-1445-02

Recording Numbers of Documents Affected: 9207211116

This Termination and Release of Lease is made this _____ day of February, 2011, by and between 1000 Virginia Limited Partnership, a Washington limited partnership ("Lessor/Owner"); and Donn Etherington, Jr. and Kathryn K. Etherington, husband and wife, as to an undivided 25% tenant-in-common interest; Donn Etherington, Jr., as to an undivided 50% tenant-in-common interest; and Donn Etherington, Jr., as Trustee of Donn Etherington, Jr.'s share of the Pamela G. Etherington-Rockenbach Family Trust-Exempt u/w/d July 8, 1994, as to an undivided 25% tenant-in-common interest (collectively "Lessees").

WITNESSETH:

WHEREAS, Lessor/Owner and 2000 Terry Avenue Limited Partnership, as Lessee, entered into a Lease dated July 1, 1992, affecting property located at 1000 Virginia Street (sometimes referred to as 2000 Terry Avenue), Seattle, Washington (as legally described in

Exhibit A attached hereto)("Property"), which lease is recorded in the King County Auditor's Office under Recording No. 9207211116 (the "Lease"); and

WHEREAS, Lessees are the successors-in-interest to 2000 Terry Avenue Limited Partnership, which assignment is documented by an Assignment of Lease recorded in King County Auditor's Office under Recording No. 9808281510; and

WHEREAS, the parties desire to terminate and release the aforementioned Lease in order to fulfill the Lessor/Owner's obligation under that certain Commercial Sublease and Option to Purchase between Lessor/Owner and Cornish College of the Arts dated March 20, 2007;

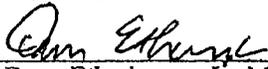
NOW, THEREFORE, it is agreed by the parties hereto as follows:

Lessor/Owner and Lessee hereby hereby terminate and cancel the Lease and all of the parties rights and obligations under the Lease are hereby extinguished.

IN WITNESS WHEREOF, the parties hereto have caused this Termination and Release of Lease to be duly executed as of the date first above written.

1000 Virginia Limited Partnership,
a Washington limited partnership

By: Virginia-Terry, LLC, a Washington
limited liability company

By: 
Donn Etherington, Jr., Member

Donn Etherington, Jr. and Kathryn K.
Etherington, husband and wife, as to an
undivided 25% interest


Donn Etherington, Jr.

Kathryn K. Etherington

[additional signatures on following pages]

Donn Etherington, Jr. as Trustee of Donn

200593.0020/Cornish_2000TerryTermination (2).DOC

Etherington's share of the Pamela G.
Etherington-Rockenbach Family Trust-
Exempt u/w/d July 8, 1994, as to an undivided
25% tenant-in-common interest

By:

Donn Etherington, Jr., Trustee

[^]
AND KATHRYN K. ETHERINGTON, HUSBAND
Donn Etherington, Jr., as to an undivided 50% AND WIFE,
tenant-in-common interest

Donn Etherington

Donn Etherington, Jr., ~~individually~~

KATHRYN K. ETHERINGTON

STATE OF WASHINGTON)

200593.0020/Comish_2000TerryTermination (2).DOC

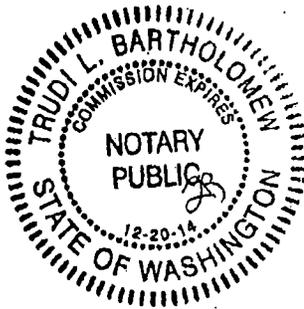
COUNTY OF KING

) ss.
)

I certify that I know DONN ETHERINGTON, JR. is the person who appeared before me, and said person acknowledged that he signed this instrument , on oath stated that he is authorized to execute the instrument and acknowledged he is the authorized member of Virginia-Terry, LLC, a Washington limited liability company, which is the General Partner for 1000 Virginia Limited Partnership, a Washington limited partnership, and to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

DATED: February 11, 2011

Trudi L Bartholomeu



Print Name: Trudi L Bartholomeu
NOTARY PUBLIC for the State of Washington,
Residing at: Wenatchee WA

My appointment expires:
12-20-2014

STATE OF WASHINGTON)

) ss.
)

COUNTY OF KING

I certify that I know DONN ETHERINGTON, JR. is the person who appeared before me, and said person acknowledged that he signed this instrument , on oath stated that he is authorized to execute the instrument and acknowledged he is the Trustee of Donn Etherington's share of the Pamela G. Rockenbach-Etherington Family Trust-Exempt u/w/d July 8, 1994, as to an undivided 25% tenant-in-common interest, and to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

DATED: _____

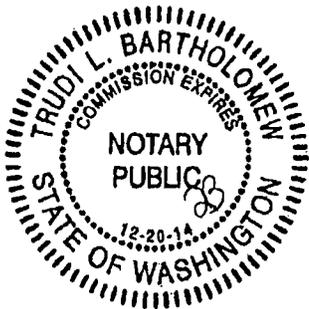
Print Name: _____
NOTARY PUBLIC for the State of Washington,
Residing at: _____

My appointment expires:

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know DONN ETHERINGTON, JR. is the person who appeared before me, and said person acknowledged that he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in this instrument.

DATED: February 11, 2011 Trudi Bartholomew



Print Name: Trudi L Bartholomew
NOTARY PUBLIC for the State of
Washington, residing at
Wenatchee, WA

My appointment expires:
12-20-2014

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know KATHRYN K. ETHERINGTON is the person who appeared before me, and said person acknowledged that she signed this instrument and acknowledged it to be her free and voluntary act for the uses and purposes mentioned in this instrument.

DATED: February 11, 2011 Trudi Bartholomew



Print Name: Trudi L Bartholomew
NOTARY PUBLIC for the State of
Washington, residing at
Wenatchee, WA

My appointment expires:
12-20-2014

Exhibit A
Legal Description

Lots 1 and 2, Block 40, Second Addition to the Town of Seattle, as laid off by the heirs of Sarah A. Bell "deceased", commonly known as Heirs of Sarah A. Bell's Second Addition to the City of Seattle, according to the Plat recorded in Volume 1 of Plats, page 121 in King County, Washington.

Return Address:

Lane Powell PC
Attn: Glenn Amster
1420 5th Avenue, Suite 4100
Seattle, WA 98101-2338

Please print or type information **WASHINGTON STATE RECORDER'S Cover Sheet (RCW 65.04)**

Document Title(s) (or transactions contained therein); (all areas applicable to your document <u>must</u> be filled in)	
1. <u>Non-Merger Deed in Partial Satisfaction of</u>	2. _____
Judgment	
3. _____	4. _____
Reference Number(s) of Documents assigned or released:	
Additional reference #'s on page _____ of document	
Grantor(s) Exactly as name(s) appear on document	
1. <u>1000 Virginia Limited Partnership</u>	, a <u>Washington limited partnership</u>
2. _____	_____
Additional names on page _____ of document.	
Grantee(s) Exactly as name(s) appear on document	
1. <u>Cornish College of the Arts</u>	, a <u>Washington public benefit corporation</u>
2. _____	_____
Additional names on page _____ of document.	
Legal description (abbreviated: i.e. lot, block, plat or section, township, range)	
<u>Lots 1 & 2, Block 40, Volume 1 of Plats, Page 121</u>	
Additional legal is on page _____ of document.	
Assessor's Property Tax Parcel/Account Number	<input type="checkbox"/> Assessor Tax # not yet assigned
<u>088000-1445</u>	
The Auditor/Recorder will rely on the information provided on this form. The staff will not read the document to verify the accuracy or completeness of the indexing information provided herein.	
"I am signing below and paying an additional \$50 recording fee (as provided in RCW 36.18.010 and referred to as an emergency nonstandard document), because this document does not meet margin and formatting requirements. Furthermore, I hereby understand that the recording process may cover up or otherwise obscure some part of the text of the original document as a result of this request."	
_____ Signature of Requesting Party	
Note to submitter: Do not sign above nor pay additional \$50 fee if the document meets margin/formatting requirements	

NON-MERGER DEED IN PARTIAL SATISFACTION OF JUDGMENT

THIS NON-MERGER DEED IN PARTIAL SATISFACTION OF JUDGMENT, made as of February _____, 2011, by and between 1000 Virginia Limited Partnership, a Washington limited partnership ("Grantor"), and Cornish College of the Arts, a Washington public benefit corporation ("Grantee").

RECITALS

- A. Title to the Property is held by Grantor.
- B. Title is subject to encumbrances of record in favor of Grantee described as:
 - 1. Commercial Sublease and Option to Purchase the Property, as defined herein, by and among Grantor, Grantee and Donn Etherington Jr., individually, notice of which was filed for record in the records of King County, Washington under Recording No. 20070320000367 on March 20, 2007 ("Sublease and Option").
 - 2. A pending action in King County Superior Court, Cause No. 08-2-04029-1, seeking enforcement of the Sublease and Option and damages ("Pending Action"), notice of which was recorded by a lis pendens in the records of King County under Recording No. 20080125001035 on January 25, 2008 ("Lis Pendens").
 - 3. Judgments to date in amounts that together exceed the purchase price agreed to by Grantor and Grantee in the Sublease and Option.
- C. By Order dated January 7, 2011, a copy of which is attached hereto as Exhibit A ("Court Order"), the King County Superior Court has ordered Grantor to convey the Property to Grantee and to abate and offset a portion (specifically, \$3,010,059.32) of the judgments thus far obtained by Grantee in the Pending Action against the purchase price agreed upon by Grantor and Grantee in the Sublease and Option, which setoff results in a total abatement of the purchase price.
- D. Grantee desires to obtain title to the Property, but does not want the conveyance to: (i) affect its right to additional damages resulting from Grantor's breach of the Sublease and Option including, but not limited to, Grantor's failure to deliver clear title and to otherwise fulfill certain specified conditions prior to closing, nor (ii) affect the priority of any judgment resulting from the Pending Action.

WITNESSETH:

Pursuant to the Court Order, Grantor does hereby grant and convey to Grantee, its heirs, successors and assigns forever, all that certain real property located in King County, State of Washington more particularly described on Exhibit B (the "Property") attached hereto and incorporated herein by this reference.

Honorable Steven González

[Faint stamp]

RECEIVED

MAR -9 2011

Ryan Swanson Cleveland

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation,

Judgment Creditor,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a
Washington limited partnership; ONE
THOUSAND VIRGINIA, a general partnership
and DONN ETHERINGTON, JR., an
individual,

Judgment Debtors.

No. 08-2-04029-1SEA

~~[PROPOSED]~~ ORDER: (1) TO SHOW
CAUSE WHY DEFENDANT DONN
ETHERINGTON, JR. SHOULD NOT BE
HELD IN CONTEMPT;
(2) DIRECTING THE ETHERINGTON
MARITAL COMMUNITY TO
RELEASE ITS INTEREST IN THE
MASTER LEASE; AND
(3) FOR AWARD OF ATTORNEYS'
FEES

This matter came before the Court on plaintiff Cornish College of the Arts' "Motion for Order (1) to Show Cause Why Defendant Donn Etherington, Jr. Should not be Held in Contempt; (2) Directing the Etherington Marital Community to Release its Interest in the Master Lease; and (3) for an Award of Attorneys' Fees." Having reviewed the pleadings and the evidence submitted, the Court finds and rules as follows:

1. In failing to sign the Termination and Release of Lease, Donn Etherington Jr. has disobeyed the February 10, 2011 "Order Re: (1) Termination of Lease and Option to Purchase and (2) Non-Merger Deed to 1000 Virginia Property" ("Order Re: Termination"). Therefore, this Court is authorized under RCW 7.21.010 *et seq.*, to order Etherington to show cause why he should not be held in contempt of court. A hearing for this purpose

ORIGINAL

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shall be held on March 25th, 2011 at 9:00 a.m./p.m. In addition, if necessary, both Etherington and his wife, Kathryn Etherington, will be given an opportunity to demonstrate why they should not be held in contempt for failing to comply with the order of specific performance, set forth below.

2. By failing to release their interest in the 99-year lease held by, among others, the Etherington marital community, Donn Etherington Jr. and the Etherington marital community have breached their obligation under the Commercial Sublease with Option to Purchase to deliver to Cornish clear title, "free of the Master lease and free of any leases to or other claims of any tenants" of the 1000 Virginia property. Such breach cannot be compensated for monetarily. Therefore, the Court orders both Mr. Etherington and Mrs. Etherington, on behalf of the marital community, to specifically perform the above-stated obligation by signing the Termination and Release of Lease, as presented by Cornish in conjunction with its Order Re: Termination, within 5 days of entry of this Order. In the event they fail to comply with this order of specific performance, the Etheringtons may have the opportunity at the show cause hearing ordered above to demonstrate why they should not be held in contempt for such failure.

3. Pursuant to RCWA 7.21.010 *et seq.* and the attorneys' fees provision in the Commercial Sublease with Option to Purchase, the Court awards Cornish all reasonable fees and costs associated with this motion, including fees incurred at the show cause hearing. The amount of such fees shall be determined at a later date.

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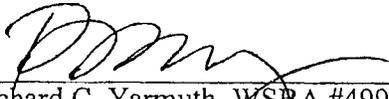
4. The receivership created by the Court's December 11, 2009 Order Granting Plaintiff's Motion and Petition for Appointment of Receiver is hereby terminated, and the receiver, the Justen Company, is relieved of its duties pursuant to that order.

DATED this 7th day of March, 2011.


Honorable Steven Gonzalez
Superior Court Judge

Presented by:

YARMUTH WILSDON CALFO PLLC

By: 
Richard C. Yarmuth, WSBA #4990
Rachel L. Hong, WSBA #33675
Attorneys for Plaintiff

Copy Received; Notice of Presentation Waived:

RYAN, SWANSON & CLEVELAND, PLLC

By: _____
Jerry Kindinger, WSBA # 5231
Attorneys for Defendant

FOSTER PEPPER PLLC

By: _____
Neil A. Dial, WSBA # 29599
Attorneys for Kathryn Etherington and the
Pamela G. Etherington-Rockenbach Family Trust

FILED
KING COUNTY WASHINGTON

MAR 25 2011

CLERK OF SUPERIOR COURT
ANDRE JONES
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation,

Judgment Creditor,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a
Washington limited partnership; ONE
THOUSAND VIRGINIA, a general partnership
and DONN ETHERINGTON, JR., an
individual,

Judgment Debtors.

No. 08-2-04029-1SEA

~~[PROPOSED]~~ ORDER HOLDING
DEFENDANT DONN ETHERINGTON
IN CONTEMPT AND IMPOSING
SANCTIONS; AND FOR AWARD OF
ATTORNEYS' FEES

ORIGINAL

This matter came before the Court on plaintiff Cornish College of the Arts' "Motion for Order (1) to Show Cause Why Defendant Donn Etherington, Jr. Should not be Held in Contempt; (2) Directing the Etherington Marital Community to Release its Interest in the Master Lease; and (3) for an Award of Attorneys' Fees," and the Show Cause Hearing held on March 25, 2011("Hearing"). Having reviewed the pleadings and the evidence submitted, and having presided over the Hearing, the Court finds and rules as follows:

CONTEMPT SANCTIONS

1. Pursuant to RCW 7.21.010 *et seq.*, and Civil Rule 70, the Court is authorized to hold in contempt a party who has intentionally disobeyed "any lawful judgment, decree, order, or process of the court." By its March 7, 2001 "Order (1) to Show Cause Why

1 Defendant Donn Etherington, Jr. Should not be Held in Contempt; (2) Directing the
2 Etherington Marital Community to Release its Interest in the Master Lease; and (3) for an
3 Award of Attorneys' Fees," ("Order"), the Court found that Etherington had intentionally
4 disobeyed the Court's February 10, 2011 order to execute the Termination and Release of
5 Lease. The Court gave defendant Donn Etherington, Jr. notice and an opportunity to
6 demonstrate why he should not be sanctioned for contempt, setting a Show Cause Hearing
7 for March 25, 2001. Etherington declined to appear at that hearing.

8 2. In the March 7 Order, the Court further ordered Etherington, on behalf of
9 himself and his marital community, to specifically perform his obligations under ¶ 4.6 of
10 the parties' Commercial Sublease with Option to Purchase, particularly as it concerns
11 clearing title to 1000 Virginia of the Master Lease. Etherington has failed to specifically
12 perform his obligations pursuant to this direction in the Court's Order as well, and
13 furthermore has failed to appear or otherwise submit testimony establishing efforts he has
14 made, if any, to secure release of the Master Lease, or otherwise establish that such release
15 was impossible. The Court therefore further finds that Etherington has intentionally
16 disobeyed the Court's Order for this reason as well.

17 3. For reasons set forth herein and in the March 7, 2011 Order, and based upon
18 the evidence and argument before the Court, the Court hereby finds that Etherington has
19 refused to perform acts that are within his power to perform, and therefore is in contempt of
20 court. For purposes of coercing such performance, the Court imposes on Etherington the
21 following sanction, until such performance is had:

22 \$1,000 - per day.
23 _____
24 _____

25 This sanction shall cease upon Etherington's performance of his obligations pursuant to this
26 Court's Order, or by his establishment by competent
evidence that performance is not possible.

EG

1 AWARD OF ATTORNEYS' FEES *Reserved*

2 Pursuant to the fee-shifting provision in the parties' April 29, 2005 Commercial
3 Sublease with Option to Purchase, and RCW 7.21.030(3), the Court hereby awards against
4 Etherington Cornish's attorneys' fees incurred in the bringing of this motion, including fees
5 incurred in Cornish's underlying efforts to obtain a release of the Master Lease to the
6 property at 1000 Virginia. The Court finds the fees, as set forth in the Declaration of
7 Rachel Hong, to be reasonable, and hereby awards Cornish \$10,192.59 in fees and costs
8 against Etherington.

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11 DATED this 25th day of March, 2011.

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15 Honorable Steven Gonzalez
Superior Court Judge

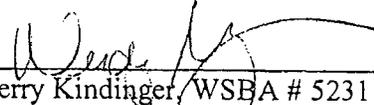
16 Presented by:

17 YARMUTH WILSDON CALFO PLLC

18 By: 
19 Richard C. Yarmuth, WSBA #4990
Rachel L. Hong, WSBA #33675
20 Attorneys for Plaintiff

21 Copy Received; Notice of
22 Presentation Waived:

23 RYAN, SWANSON & CLEVELAND, PLLC

24 By: 
25 Jerry Kindinger, WSBA # 5231
26 Attorneys for Defendant

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FOSTER PEPPER PLLC

By: _____
Neil A. Dial, WSBA # 29599
Attorneys for Kathryn Etherington and the
Pamela G. Etherington-Rockenbach Family Trust



FILED
KING COUNTY WASHINGTON
APR - 4 2011
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation,

Judgment Creditor,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a
Washington limited partnership; ONE
THOUSAND VIRGINIA, a general partnership
and DONN ETHERINGTON, JR., an
individual,

Judgment Debtors.

No. 08-2-04029-1SEA

~~PROPOSED~~ ORDER DENYING
DEFENDANT'S MOTION TO PURGE
CONTEMPT CITATION AND
AWARDING ATTORNEYS' FEES

ORIGINAL

This matter having come before the Court on defendant Donn Etherington's Motion to Purge Contempt Citation, and the Court having reviewed the pleadings and the evidence submitted, and having heard the argument of the parties,

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's Motion to Purge Contempt Citation is denied in its entirety. Etherington has failed to submit competent, credible, and reliable evidence that he is unable to comply with the prior orders of this Court, as is his burden. The Order Holding Defendant Donn Etherington in Contempt and Imposing Sanctions; and For Award of Attorneys' Fees ("Contempt Order"), stands.

1 Etherington is further directed to pay into the Court registry payment of the
2 sanctions accruing pursuant to the Contempt Order every two weeks, beginning on April 8,
3 2011.

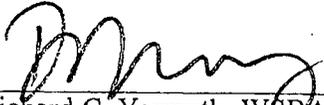
4 In addition, having reviewed Donn Etherington, Jr.'s Opposition to Declaration of
5 Rachel Hong in Support of Award of Attorney's Fees, the Court orders that Cornish is
6 awarded all attorneys' fees and costs incurred in its attempts to clear title to 1000 Virginia
7 Limited of the Master Lease. Upon Cornish's filing of an affidavit setting forth the amount
8 of such fees, Etherington will have five days to object to the amount of such fees (but not to
9 the fact of the award of such fees). Cornish will have three days to reply to Etherington's
10 objections, if any, at which time the Court will rule on the amount to be awarded.

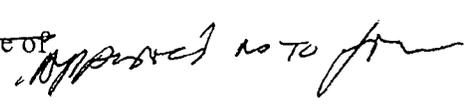
11 DATED this th 4 day of April, 2011.

12 
13 _____
14 Honorable Steven González
15 Superior Court Judge

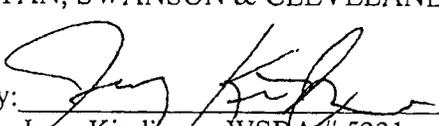
16 Presented by:

17 YARMUTH WILSDON CALFO PLLC

18 By: 
19 Richard C. Yarmuth, WSBA #4990
20 Rachel L. Hong, WSBA #33675
21 Attorneys for Plaintiff

22 Copy Received; Notice of
Presentation Waived: 

23 RYAN, SWANSON & CLEVELAND, PLLC

24 By: 
25 Jerry Kindinger, WSBA # 5231
26 Attorneys for Defendant

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FOSTER PEPPER PLLC

By: _____
Neil A. Dial, WSBA # 29599
Attorneys for Kathryn Etherington and the
Pamela G. Etherington-Rockenbach Family Trust

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CORNISH COLLEGE OF THE ARTS, a
Washington public benefit corporation,

Plaintiff,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a
Washington limited partnership; DONN
ETHERINGTON, JR., an individual,

Defendants.

The Honorable Dean S. Lum

NO. 08-2-04029-1 SEA

~~PROPOSED~~ ORDER **DENYING** GRANTING
SECOND MOTION TO PURGE
CONTEMPT CITATION

DL

THIS MATTER, having come on regularly before the Court on defendant Donn Etherington, Jr.'s Second Motion to Purge Contempt Citation, Second Declaration of Kathryn K. Etherington Re: Order of Contempt, Second Declaration of Kellie Etherington Re Order of Contempt, and Fourth Declaration of Donn Etherington, Jr. in Support of Second Motion to Purge Contempt Citation, and any response and reply, all evidence presented, the Court having reviewed the files and records herein and being otherwise fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that: **THE MOTION IS DENIED.**

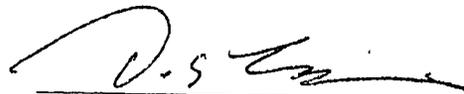
~~1. Donn Etherington has established by competent evidence that it is impossible for him to perform the acts ordered by this Court, and further~~

DL

DENYING
~~PROPOSED~~ ORDER GRANTING SECOND MOTION
TO PURGE CONTEMPT CITATION - 1

1 2. Neither Mr. Etherington, his wife, Kathryn Etherington, nor the Etherington
2 marital community have any obligation to clear title to the 1000 Virginia property;
3 and further
4 1. The following orders are hereby purged and vacated *ab initio*: (a) Order Holding
5 Defendant Donn Etherington in Contempt and Imposing Sanctions; and For Award
6 of Attorneys' Fees dated March 25, 2011; (b) Order Denying Defendant's Motion
7 to Purge Contempt Citation and Awarding Attorneys' Fees dated April 4, 2011; (c)
8 Order Re: (1) Termination of Lease and Option to Purchase; and (2) Non-Merger
9 Deed to 1000 Virginia Property dated February 10, 2011; and (d) Order: (1) Show
10 Cause Why Defendant Donn Etherington, Jr. Should Not Be Held In Contempt;
11 (2) Directing the Etherington Marital Community to Release Its Interest in the
12 ~~Master Lease; and (3) For Award of Attorneys' Fees dated March 9, 2011.~~

13 DATED this 8th day of JULY, 2011.

14
15 

16 JUDGE DEAN S. LUM

17 Presented by:

18 RYAN, SWANSON & CLEVELAND, PLLC

19
20 By _____

21 Jerry Kindinger, WSBA #5231
22 Wendy S. Moullet, WSBA #39599
23 Attorneys for Defendants

24 1201 Third Avenue, Suite 3400
25 Seattle, Washington 98101-3034
26 Telephone: (206) 464-4224
Facsimile: (206) 583-0359
kindinger@ryanlaw.com
moullet@ryanlaw.com

~~PROPOSED~~ **DENYING** ORDER GRANTING SECOND MOTION
TO PURGE CONTEMPT CITATION - 2

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CP 1289

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APPENDIX G

RCW 6.32.270

Adjudication of title to property — Jury trial.

In any supplemental proceeding, where it appears to the court that a judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor or disputed by another person, or it appears that the judgment debtor may own or have a right of possession to any personal property, and such ownership or right of possession is substantially disputed by another person, the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests of the parties in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor. If the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto, and shall set such proceeding for hearing on the first open date in the trial calendar. Any person so made a party, or any party to the original proceeding, may have such issue determined by a jury upon demand therefor and payment of a jury fee as in other civil actions: PROVIDED, That such person would be entitled to a jury trial if the matter was adjudicated in a separate action.

[1923 c 160 § 4; RRS § 638-1.]

RCW 7.21.030

Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

RCW 26.16.030

Community property defined — Management and control.

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:

- (1) Neither person shall devise or bequeath by will more than one-half of the community property.
- (2) Neither person shall give community property without the express or implied consent of the other.
- (3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.
- (4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.
- (5) Neither person shall create a security interest other than a purchase money security interest as defined in *RCW62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse or other domestic partner joins in executing the security agreement or bill of sale, if any.
- (6) Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other: PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

[2008 c 6 § 604; 1981 c 304 § 1; 1972 ex.s. c 108 § 3; Code 1881 § 2409; RRS § 6892.]

CR 56

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere

allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) *Form of Order.* The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

CR 60

Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

CR 69

Execution

(a) Procedure. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.13, 6.15, 6.17, 6.19, 6.21, 6.23, 6.32, 6.36, and any other applicable statutes.

(b) Supplemental Proceedings. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by RCW 6.32.