

No. 69039-6

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE

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

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT  
(Hon. George N. Bowden)

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**APPELLANTS' OPENING BRIEF**

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## ASSIGNMENTS OF ERROR

1. The trial court erred in making findings of fact 33, 61, 77, 80, and 82 in its initial and in its amended Findings of Fact and Conclusions of Law.<sup>1</sup> CP 61-62, CP 5326-27.
2. The trial court erred in making findings of fact 4, 8, 10, and 13 in its Supplemental Findings of Fact and Conclusions of Law for Award of Attorney's Fees. CP 5331-33.
3. The trial court erred by setting a purchase price and entering the Decree of Specific Performance and Judgment. CP 61, FOF 77; CP 5309-13 (Decree).
4. The trial court erred in crediting Mukilteo Retirement Apartments, LLC ("MRA"), all the rents it paid from June 15, 2008 through July 15, 2012, as consequential damages and offsetting that amount against the court's purchase price. CP 62, FOF 82; CP 63, COL 4.
5. The trial court erred in granting MRA's untimely motion to amend the initial Findings of Fact and Conclusions of Law and in entering the Amended Findings of Fact and Conclusions of Law. CP 5314-29.
6. The trial court erred in reversing its dismissal of MRA's claims against Campbell Homes Construction, Inc., and in granting MRA's untimely motion to amend the initial findings and conclusions to hold Campbell Homes jointly and severally liable with Mukilteo Investors, L.P. *See* CP 5327-28, COL 2.
7. The trial court erred in finding that the unsuccessful claim of improper influence by Campbell Homes was "inseparably intertwined" with issues upon which MRA prevailed and thus awarding attorney's fees and costs spent pursuing claims against Campbell Homes. RP (8/14/2012) 39; CP 5330-35.

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<sup>1</sup> Mukilteo Investors will meet its obligations under RAP 10.4(c) pertaining to findings of fact by attaching copies of the written rulings setting forth those findings, as follows: *Appendix A*: Findings of Fact and Conclusions of Law; *Appendix B*: Amended Findings of Fact and Conclusions of Law; *Appendix C*: Supplemental Findings of Fact and Conclusions of Law for Award of Attorney's Fees; *Appendix D*: Decree of Specific Performance and Judgment.

## STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Where an option agreement requires that the purchase price be the greater of three values and the trial court finds there was never a meeting of the minds with respect to the factors to be accounted for in determining two of the three values, may the trial court nevertheless rewrite the contract to set its own purchase price and grant specific performance of the agreement and other relief? (Assignments of Error 1 and 3.)
2. Does a trial court err when it awards the optionee as consequential damages a credit of rents paid through entry of judgment where the plaintiff's own conduct was the cause of a substantial portion of that delay? (Assignment of Error 4.)
3. Does a trial court err when it awards the optionee as consequential damages a credit of rents paid without offsetting either the interest the optionee would have been obligated to pay on its mortgage or interest due the optionor on the purchase price? (Assignment of error 4.)
4. Does a trial court err when it grants a motion to amend findings and conclusions that is untimely under CR 52(b)? (Assignment of Error 5.)
5. Does a trial court err when it holds an entity jointly and severally liable with another defendant for breach of contract based on its status as a general partner of that defendant, where the entity was no longer a general partner when the contract -- a purchase and sale agreement arising from exercise of an option -- was purportedly formed? (Assignment of Error 6.)
6. Does a trial court err when it awards attorney's fees and costs incurred in pursuing claims that were properly dismissed? (Assignments of Error 2 and 7.)
7. Does a trial court err when it awards attorney's fees for time spent pursuing a theory that was later abandoned and was never an ultimate basis for liability? (Assignment of Error 7.)

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Mukilteo Retirement Apartments, LLC (“MRA”), agreed in October 1999 to lease a retirement and assisted living facility from Mukilteo Investors, L.P., for 20 years. The parties also entered into an option agreement, under which MRA would have an option to purchase the facility eight years after initial occupancy. The Option Agreement provided that the purchase price would be the greater of three values: (1) replacement cost, (2) fair market value, and (3) the value according to a 1999 appraisal, increased by three percent annually (the “Schedule D” value). The agreement provided for determination of the replacement cost and fair market value of the facility by appraisal as of the date MRA exercised its option.

In the fall of 2007, MRA attempted to exercise its option eight months before commencement of the option exercise period. MRA then sued Mukilteo Investors and its former general partner, Campbell Homes Construction, Inc. (“Campbell Homes”), in August 2008, for specific performance based on the invalid exercise date. Until November 2010, when the trial court granted summary judgment to Mukilteo Investors that the option period commenced June 15, 2008, MRA’s insistence upon the invalid exercise date precluded determination of the purchase price (and thus any progress toward closing) and delayed trial. MRA further delayed trial by pursuing a baseless claim that Campbell Homes improperly

influenced Mukilteo Investors' appraiser -- a claim MRA did not abandon until the start of trial in May 2012.

The case was tried to the bench on the issues of price and the claim that Mukilteo Investors breached its duty of good faith and fair dealing. ***The trial court found the parties never reached a meeting of the minds regarding the factors to be accounted for in determining either replacement cost or fair market value.*** This meant there was no mutual assent to a material term -- the price -- and thus no contract. But instead of dismissing MRA's claims with prejudice because the failure to reach agreement on how to determine price rendered the Option Agreement an unenforceable agreement to agree, the trial court instead rewrote the parties' contract and enforced *its own* terms. The court (1) threw out replacement cost; (2) set a price based on fair market value determined by *its own* method; and (3) granted specific performance based on that price, giving the parties nine months from July 15, 2012, to effect closing. If the sale could not be closed by then, the court gave MRA the right to terminate the lease and seek additional damages for the loss of its business -- a right that did not exist in the contract as written. The court found Mukilteo Investors had breached its duty of good faith and fair dealing and awarded some \$6 million in consequential damages by granting a credit against the purchase price -- an amount arrived at by relieving MRA of the

obligation to pay rent from June 15, 2008 (the earliest date from which MRA could properly have exercised its option), through July 15, 2012. The court also awarded MRA over \$525,000 in attorney's fees and costs.

The trial court erred in rewriting and enforcing the Option Agreement. The court could not determine a price based on the intent of the parties because, as it found, there never was a meeting of the minds on how to determine either replacement cost or fair market value. An option agreement must contain the material terms of a purchase and sale agreement, including the price. Absent mutual assent on the material terms, the option is not a binding contract but merely an unenforceable "agreement to agree." Neither equity jurisdiction nor a finding of a breach of the duty of good faith and fair dealing authorized the court to write a contract for the parties when none was formed because minds never met on an essential term: the price.

Even assuming the Option Agreement were enforceable, the trial court erred in crediting to MRA as consequential damages all the rents it paid from June 15, 2008, through July 15, 2012. An award of consequential damages in addition to specific performance must be in the nature of an accounting between the parties, and must not be punitive or give the plaintiff a windfall. Here, the award assumed that Mukilteo Investors should be blamed for a four year delay in closing, when MRA's

pursuit of a premature option exercise date caused at least half that delay, and its pursuit of a baseless conspiracy claim against Campbell Homes added to that delay. Second, the trial court failed to account for (1) the interest MRA would have been paying on its new loan in lieu of the rent it would have been paying to Mukilteo Investors or (2) interest on the purchase price.

The trial court further erred in holding Campbell Homes jointly and severally liable with Mukilteo Investors after initially dismissing MRA's claims against Campbell Homes. The dismissal was proper because the obligation MRA sought to enforce was the purchase and sale agreement that forms by operation of law upon the valid exercise of an option, and Campbell Homes was not a partner of Mukilteo Investors as of the earliest date when MRA could properly have exercised its option. Moreover, the trial court was barred from granting a motion under CR 52(b) to amend its findings and conclusions to hold Campbell Homes liable because MRA's motion was untimely and the court had no authority to grant relief from that untimeliness.

This Court should reverse the judgment and dismiss all claims against Mukilteo Investors and Campbell Homes because the Option Agreement under the trial court's findings is an unenforceable agreement to agree. In the alternative, this Court should: (1) reverse half the

consequential damages award (because MRA was solely responsible for that portion of any delay in closing), and remand for recalculation of the remainder (taking account of the further delay caused by MRA's pursuit of the baseless conspiracy claim against Campbell Homes, as well as the need to account for the interest that MRA would have paid in lieu of rent following any closing); (2) reverse the judgment against Campbell Homes and order that all claims against Campbell Homes be dismissed with prejudice; and (3) vacate the fee award and remand for recalculation by eliminating fees and costs incurred by MRA in pursuing both the baseless conspiracy claim and the judgment against Campbell Homes.

## **II. STATEMENT OF THE CASE**

### **A. Mukilteo Investors and MRA Agreed to a Sale and Leaseback Subject to a Purchase Option.**

Ronald Struthers and Duane Clark have owned and operated retirement apartments since the mid-1980s, when they developed two facilities in Mount Vernon, Washington. RP I 105-07. A decade later, they began to discuss developing a third facility. RP I 108-10. In 1998, an entity they owned purchased seven acres of bare land in Mukilteo, Washington. RP I 108-10, 120, 144. In the spring of 1999, after working with an architect, meeting with potential contractors, and researching financing requirements, they concluded they lacked the money to complete the project on their own. RP I 111-13. They decided to ask Carl

W. Campbell, a successful developer of retirement facilities, if he would provide the necessary financing. RP I 113-14. They contacted Gene Hiner, who they knew worked with Campbell. RP I 113-14. Campbell, through Hiner, expressed interest. RP I 115.

After preliminary discussions with Hiner, the parties orally agreed to a deal in which Mukilteo Investors would purchase the land, build the facility, and lease it back to MRA. RP I 114-18. The lease would have a 20-year term; MRA would also receive an option to purchase that would become exercisable eight years after initial occupancy under the lease. RP I 118. Campbell Homes Construction, Inc., was initially the general partner of Mukilteo Investors, and would build the facility. RP VIII 86.

**B. The Parties Failed to Reach a Common Understanding of the Price Term of the Option Agreement.**

The parties negotiated the terms of the lease and option agreements; MRA was represented by Edward Beeksma, and Mukilteo Investors by Keith Therrien. RP I 119, 121-23, 126. As a starting point, Therrien provided a form of a Lease Agreement and separate Option Agreement used by Campbell-related entities in other, similar transactions. RP I 117-19, 127; RP VIII 94; Exh. 4. In the fall of 1999, Therrien and Beeksma exchanged written comments and draft language and discussed various issues by telephone. RP VIII 96, 102, 109-10; RP IX 8-9. Beeksma's communications to Therrien were based on instructions from

Struthers and Clark, who were fully involved in the contract negotiations process. RP I 123-24; RP III 152-53; CP 53, FOF 8.

The purchase price provision of the Option Agreement was a significant focus of the negotiations. *See* Exhs. 206 at 2-3, 211 at 2, 216 at 5, 219 at 3-4, and 221 at 1-2. As finally executed, the Option Agreement<sup>2</sup> provided that the price would be the greater of three values as of the option exercise date:

The option purchase price (“Option Purchase Price”) for the Facility shall be *the greater of*

- (i) the Facility’s fair market value as of the date the Option to Purchase is exercised;
- (ii) the Facility’s replacement cost as of the date the Option to Purchase is exercised; or
- (iii) the prospective fair market value at stabilized occupancy of the Leased Property as determined by James Brown & Associates Inc.’s [October 1999] appraisal of the Leased Property for Bank of American N.A. [sic], a national banking association, increased annually on January 1 of each year, beginning January 1, 2001, by a sum equal to three percent (3%), as adjusted annually by the three percent (3%) amount, a schedule of which is or will be upon completion, attached hereto as Exhibit D.

Exh. 225 at 1-2 (emphasis and line spacing added).<sup>3</sup> The Option Agreement defined “Facility” as including the real property, the improvements, and the personal property. Exh. 225 at 1.

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<sup>2</sup> A copy of the Option Agreement (Exh. 225), without its exhibits, is attached as Appendix E.

<sup>3</sup> The parties and the trial court commonly referred to the third value as the “Schedule D value.” *See* CP 61, ¶ 77.

Under the agreement, if the parties could not agree on fair market value within 15 days of MRA's notice of exercise of the option, each was to appoint an independent appraiser certified as a Member of the Appraisal Institute (MAI). Exh. 225 at 2-3. Each appraiser was to determine the fair market value as of the date the option was exercised. *Id.* If the valuations differed by less than 10%, they would be averaged, and if they differed by more than 10%, a third MAI-certified appraiser would determine a value, with the ultimate fair market value to be 50% of the sum of the two appraisals closest in value. Exh. 225 at 2; *see also* RP IX 33-34. The agreement provided that replacement cost would be determined solely by the appraiser selected by Mukilteo Investors. Exh. 225 at 2.

The negotiations over the price provision focused primarily on replacement cost. Providing his first written comments on the Option Agreement in early September 1999, Beeksma asserted that "replacement cost" needed to be defined:

The concept sets a formula for determining a price, a means of determining fair market value but does not address how to calculate the replacement cost. The Option Price apparently is to be the greater of those 3. If replacement cost is to remain as one of the Options, we need to define how that is determined.

RP I 130-31; Exh. 7 at 2. Two weeks later, Beeksma proposed in a memorandum that the parties "[d]elete...the method of establishing the purchase price as the replacement cost." RP I 134-35; Exh. 11 at 5. Alternatively, Beeksma proposed to define "replacement cost" as the cost

to replace the building and improvements.<sup>4</sup> RP II 18; RP III 118-20; RP VIII 111-12, 119; RP IX 8-9; Exh. 221 at 2. This definition was consistent with Struthers and Clark's claimed understanding of the term as meaning the cost to replace the building and other improvements, but excluding the land value. RP I 139-40; RP II 21-22, 24-25; RP V 71-72.<sup>5</sup>

Within a few days of Beeksma's memorandum, Struthers called Hiner and echoed Beeksma's request to define "replacement cost" or delete it. RP I 135-38. Struthers made the "prophetic" prediction that the parties would later find themselves in a "*big mess*" if they did not define the term. RP II 18, 141 (emphasis added). According to Struthers, Hiner encouraged him to drop the issue so the project could proceed, noting that construction season was near and assuring him that "Mr. Campbell is an honorable man." RP I 136.

Although Struthers and Hiner did not discuss the meaning of "replacement cost," RP I 137-38, RP VIII 33-34, Therrien and Beeksma

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<sup>4</sup> Beeksma's proposed definition was as follows:

Replacement cost shall equal the fixed price turn key contract amount to [Mukilteo Investors] to construct all of the then existing improvements currently situated upon the Real Property and replacement of the Personal Property at the time the Option to Purchase is exercised pursuant to a fixed price turn key contract with an independent contractor having a bonding capacity of \$25,000,000 or more, and having experience in the construction of retirement, assisted living and Alzheimer's facilities.

Exh. 221 at 2.

<sup>5</sup> Struthers and Clark's definition would also have conformed the Option Agreement to the Lease Agreement's definition of replacement cost. Mukilteo Investors, however, did not want replacement cost in the Option Agreement defined that way. See RP V 143; RP VIII 111-12, 119; RP IX 8-9; Exh. 221 at 2.

did. Therrien informed Beeksma that his proposed definition was inconsistent with Mukilteo Investors' "business intent," which was that Mukilteo Investors receive sufficient funds, should MRA exercise its option, to obtain replacement property of equal investment value (*i.e.*, property that would generate equivalent net operating income) -- even if it had to develop a new facility.<sup>6</sup> RP VIII 120; RP IX 8-9, 41-42. Therrien thus rejected Beeksma's proposed definition. RP V 143; RP VIII 111-12, 119; RP IX 8-9; *see* Exh. 221 at 2 (strikeout indicating deletion of Beeksma's proposed language).

Without reaching a common understanding of the term "replacement cost," the parties executed the Option Agreement containing the option price formula as previously quoted. RP I 138-39; Exh. 225 at 1-2; *see* CP 60, FOF 70 ("At a minimum, there was never a meeting of minds with respect to what was to be included in determining replacement cost for the facility.").<sup>7</sup> The Option Agreement recited that it had been submitted to both parties' counsel "and therefore shall be interpreted without regard to either party having drafted same." Exh. 225 at 8.

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<sup>6</sup> Consistent with Mukilteo Investors' intent, the Option Agreement contained a provision requiring MRA to cooperate should Mukilteo Investors elect to make a like-kind exchange under section 1031 of the Internal Revenue Code. RP IX 41-42; Exh. 225 at 6-7.

<sup>7</sup> The parties *also* did not share a common understanding of what needed to go into determination of fair market value, and the trial court likewise found a failure of the minds to meet on *this* term. CP 60, FOF 72.

**C. The Option Agreement Provided a Defined Period Within Which to Exercise the Option, and Which the Conduct of the Parties Subsequently Fixed as Commencing No Earlier Than June 15, 2008, With a Closing Date of No Later Than June 1, 2009. Under the Agreement, the Purchase Price Would Be Determined as of the Option Exercise Date.**

The parties executed their agreements in October 1999. Exh. 225 at 10. Campbell Homes constructed the facility, named Harbour Pointe Retirement and Assisted Living Center, in 2000. Harbour Pointe received its certificate of occupancy from Snohomish County on June 15, 2000. RP I 145, 147.

Although the Lease Agreement was executed on October 21, 1999, it provided that the lease term would commence upon the earlier of (1) the issuance of a certificate of occupancy or (2) the lessee taking possession for purposes of installing fixtures or other property or equipment for use in operation of the facility. Exh. C to Exh. 225 at 2. The issuance of the certificate of occupancy, on June 15, 2000, proved to be the earlier of these dates and thus became the commencement date of the lease term. Exh. 229 at 1 (noting parties' agreement to June 15, 2000, lease commencement date); Exh. 230.

The opening of the period during which the option was exercisable was based on the lease term commencement date. The Option Agreement provided that the option would be "exercisable by MRA only during the period commencing on the...eighth (8th) anniversary of the

commencement date of the Facility Lease Agreement” and terminating on the first day of the twelfth month thereafter.<sup>8</sup> Exh. 225 at 3-4; *see* RP IV 4. The Option Agreement required that the sale close within this up-to-eleven-and-a-half month period, subject to Mukilteo Investors’ right to extend the closing deadline by up to 90 days. Exh. 225 at 3-4. Thus, MRA could exercise its option during an eight month period commencing on June 15, 2008; and if the option was exercised at the beginning of that period, the sale could close as late as August 28, 2009, at Mukilteo Investors’ discretion.

The property’s fair market value and replacement cost were to be appraised as of the date of exercise of the purchase option, for purposes of determining the purchase price. RP VIII 139, 147-48; Exh. 225 at 1-2. Thus, given an option period commencing on June 15, 2008, and an exercise of the option on that date, fair market value and replacement cost would be determined as of June 15, 2008.

**D. Subsequent Loan Restrictions Precluded Closing a Sale Before December 31, 2008.**

The parties’ agreements contemplated that Mukilteo Investors’ construction loan would be replaced by permanent financing. MRA agreed in the Lease Agreement that it would subordinate its rights to the

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<sup>8</sup> The Option Agreement provided for a different commencement date if Mukilteo Investors constructed an addition on the property, but that never occurred. Exh. 225 at 3-4.

lender. Exh. C to Exh. 225 at 50. Such refinancing occurred in 2003 when Mukilteo Investors and other Campbell-related entities refinanced their debts on a total of four properties into a consolidated loan. RP II 36-37; RP VIII 127-28. Mukilteo Investors notified MRA of the prospective loan, and MRA executed a waiver and subordination agreement in December 2003. RP II 37; RP VIII 128; Exh. 234.

Under the terms of the new loan, the borrowers could have been subject to a prepayment penalty on the entire consolidated debt if they paid any of it before December 31, 2008. RP VIII 127. But one exception to this “lockout” provision was negotiated so that, after December 31, 2008, Mukilteo Investors could pay off the part of the loan related to Harbour Pointe and owe a prepayment penalty only on that part. RP VIII 127. As a practical matter, this meant no sale of Harbour Pointe could close until after December 31, 2008. *See* CP 54, FOF 23.

In February 2006, to avoid any complications the lockout provision might cause with respect to MRA’s option, Mukilteo Investors proposed amending the Option Agreement to set a fixed closing deadline of May 15, 2009. RP II 42; Exh. 235 at 2-3.<sup>9</sup> MRA counter-proposed that the parties sidestep the Option Agreement and enter into a purchase and sale

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<sup>9</sup> As a matter of contract right under the Option Agreement, assuming MRA exercised its option on June 15, 2008, Mukilteo Investors was under no obligation to close any sooner than June 1, 2009, and had the right to extend that date by another 90 days, to August 29, 2009. Exh. 225 at 3-4.

agreement with a closing date after December 31, 2008. RP II 65-66; Exh. 238. The parties never agreed to either of these proposals, and the Option Agreement remained as executed. RP II 61-63, 65-66. This exchange, however, prompted MRA to engage counsel to review its rights. RP II 67.

**E. MRA Attempted to Exercise Its Option Eight Months Prematurely.**

Before the fall of 2007, all parties understood the option would become exercisable on June 15, 2008. RP II 40-41, 67-69; RP IV 11; RP V 55-56, 151; Exh. 60. But in November 2007, after MRA received advice of counsel that there was “another way of possibly interpreting” the option period, MRA took the position that the option period opened on October 21, 2007, eight years after *execution of the Lease Agreement* rather than eight years after *commencement of the lease term*. RP II 67-69; RP IV 11; RP V 55-56. MRA gave notice of its purported exercise of its option pursuant to this other “possibl[e] interpret[ation]” by letter dated November 12, 2007. RP IV 11; Exhs. 66 (239), 67 (240).

Mukilteo Investors notified MRA that its attempted exercise was premature and ineffective. RP II 70; RP IX 139; Exh. 70 (243). After further communications, Mukilteo Investors proposed that the parties avoid any dispute by amending the Option Agreement to establish June 15, 2008, as the option period commencement date. RP VIII 141; Exh. 81 (251). MRA never responded to that proposal. RP VIII 149; *see* Exh.

252. Instead, it continued to insist that the option was exercisable as of October 21, 2007, and thus properly exercised by MRA in November 2007. RP VIII 149; Exh. 252. MRA even asserted the sale should *close* in June 2008. RP II 54, 75, 84-85.

MRA had at least two motives to insist upon an exercise date in 2007 and closing on or before June 15, 2008. First, MRA wished to avoid a rent increase effective June 15, 2008. RP II 14; RP IV 34-35, 157-58; CP 879, 884; Exh. C to Exh. 225 at 11. Second, MRA wished to avoid an increase of \$466,737 in the Schedule D value effective January 1, 2008.<sup>10</sup> RP II 19; RP IV 37-38; CP 55, FOF 29; Exh. D to Exh. 225 at 1-2. Struthers and Clark were convinced that the Schedule D value would be the greatest value under the option price provision, and thus determine the purchase price, and they wanted to take advantage of the lower, 2007 Schedule D value.<sup>11</sup> RP IV 49, 63; RP V 46-47; RP X 112; CP 55, FOF 28; *see also* Exh. 242.

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<sup>10</sup> Rather curiously in light of its attempt to exercise the option as of the fall of 2007, MRA asserted in a letter dated December 19, 2007, that the applicable purchase price was the Schedule D value effective January 1, 2008, \$16,024,643. Exh. 225 at Exh. D to Exh. C; Exh. 242. Then in February 21, 2008, MRA provided a draft purchase and sale agreement based on the 2007 Schedule D value. Exh. 253 at 2-3.

<sup>11</sup> Struthers and Clark's concerns were understandable, as they had obtained preliminary underwriting for a loan amount of only \$14,450,000, based on a purchase price and closing costs totaling \$17,414,320. Exh. 241 at MRA 162. This meant MRA would have to make up the nearly \$3 million difference either from Struthers and Clark or a third-party investor.

In December 2007, without having obtained an appraisal and thus not knowing whether it was the greater of the three values of the option price provision, MRA asked Mukilteo Investors to confirm that Schedule D would control the purchase price. RP V 120; Exh. 242. In February 2008, still without any appraisal, MRA sent Mukilteo Investors a draft purchase and sale agreement based on the 2007 Schedule D value, \$15,557,906. RP IV 50-51; Exh. D to Exh. 225; Exh. 253 at 2-3.

**F. After Unsuccessful Attempts to Resolve the Parties' Differences and Alleviate MRA's Financial Concerns by Negotiating an Alternative to the Purchase Option, MRA Filed Suit against Mukilteo Investors and Campbell Homes, Seeking Specific Performance Based on the Premature Option Exercise Date.**

In the spring of 2008, the ownership of Mukilteo Investors was changed through a series of amendments to the partnership agreements and assignments of interests. RP IX 155-56; Exh. 90 at 3; Exh. 254. As of May 1, 2008, Campbell Homes no longer held any interest, and Cimco Properties, LLC, an entity whose managing member was Thomas H. Dye, became the general partner. *Id.*; RP X 92-93, 114. In addition, LK Partners, L.P., an entity in which Keith Therrien was a limited partner,

acquired a 24.5% limited partnership interest in Mukilteo Investors. RP IX 54; Exh. 90 at 3.<sup>12</sup>

In March 2008, before the ownership changes were finalized, Clark sent Mukilteo Investors a compilation of tax-assessed values and sale prices of other retirement facilities, stating he hoped it would be useful in putting together a purchase and sale agreement. RP II 48-49; Exh. 256. Within a few days, Dye contacted Struthers and Clark requesting a meeting, which was set for April 2, 2008. RP II 82, 84-85; RP X 96-97.

At the April 2 meeting, the parties became acquainted and discussed the option price and appraisal process. RP II 83-89; RP X 97-99, 104. As the manager of Mukilteo Investors' incoming general partner, Dye floated the concept of an alternative to the option that would involve Struthers and Clark becoming partners in Mukilteo Investors. RP X 105-06. Dye believed such a proposal might be attractive to Struthers and Clark because they had indicated they did not have the down payment funds needed to complete the option purchase. RP X 100-01, 109, 137. Although the initial reception for this concept was unenthusiastic,

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<sup>12</sup> The trial court found L.K. Partners was "in the process of acquiring directly and through other investment entities an ownership interest estimated at roughly 50% to 74%." CP 56, FOF 35.

Struthers stated in a follow-up telephone call that he would be willing to listen. RP X 106-07.

The parties next met on May 6, 2008. RP II 95; RP V 67; RP X 113. Dye presented a proposal for Struthers and Clark to acquire a 20% stake in Mukilteo Investors, to be fully financed through rent discounts and net revenues of the partnership. RP V 67; RP IX 12-15; RP X 113, 115; Exh. 91. Struthers and Clark were unenthusiastic about this proposal. RP IV 143; RP IX 17; RP X 119, 122-23; Exh. 96. They initially rejected Dye's overtures regarding a third meeting to discuss additional proposals. Exh. 96.

On June 3, 2008, Mukilteo Investors notified MRA it was planning to appoint James Brown & Associates as an appraiser pursuant to the Option Agreement. RP II 132; RP V 75-76; Exh. 102 at 1. Mukilteo Investors noted that the option exercise date still needed to be resolved and that it had not yet authorized Brown to proceed with the appraisal, but would do so upon MRA's confirmation that it was not interested in continuing to discuss alternative proposals. RP X 127; Exh. 102 at 1-2. MRA did not respond directly to this letter, but sent an e-mail clarifying the number of apartment units at Harbour Pointe for appraisal purposes. Exh. 109. MRA did not disclose that it had already engaged an appraisal

firm, Tellatin, Short, Hansen & Clark (“Tellatin”), on May 20, 2008. RP II 131, RP IV 75; Exh. 98.

Despite their initial rejection of a third meeting, Struthers and Clark eventually agreed to meet with Dye on June 20, 2008. RP II 135; RP V 82; RP X 130, 132. In the meantime, they asked him to defer, pending further negotiations, the rent increase that was set to take effect on June 15, 2008. RP IV 87; RP V 80, 132-34; RP X 130-31. Mukilteo Investors accommodated this request. RP IV 87; RP V 132-34; RP X 131; Exh. 271.

At the June 20 meeting, Struthers and Clark agreed they would accept a 40% stake in Mukilteo Investors and an option to purchase the remaining interests for a fixed price after 10 years. RP IV 72-73; RP V 83-84, 86, 88; RP IX 23-25; RP X 140; *see* Exh. 92. Although Struthers and Clark did not prefer this arrangement to exercising the existing option, they were nevertheless willing to accept a proposal that would lead to ownership of the facility. RP IV 107; RP V 85-86. Dye stated he would submit this proposal to the other Mukilteo Investors partners for review. RP V 86, 88; RP X 140-41.

The following week, contrary to the outcome of the Option Agreement contract negotiations during which Mukilteo Investors rejected a definition of replacement cost that excluded the value of the land, *Clark*

*instructed the Tellatin appraisers not to include the value of the land in their replacement cost figure.* RP III 26-29; Exh. 281. Tellatin provided its report to MRA on June 26, 2008, stating a fair-market value of \$18,820,000 and a replacement cost of \$16,780,000, both as of June 17, 2008. Exh. 110 at 1-2. The replacement cost figure included only the undepreciated cost of the building, site improvements, and equipment -- not the land, which had an assessed value of \$2,477,800.<sup>13</sup> Exh. 110 at 42, 201-03. Contrary to Struthers and Clark's belief that Schedule D would be the greatest of the three values of the option price provision, Tellatin's fair market value and replacement cost figures both exceeded the 2007 and 2008 Schedule D values of \$15,557,906 and \$16,024,643, respectively. RP IV 91; Exh. 225, Exh. D. *MRA did not then inform Mukilteo Investors of the results of the Tellatin appraisal.* RP III 93.

In early August 2008, Dye reported to Struthers and Clark that the other Mukilteo Investors partners disagreed with the proposal outlined on June 20. RP V 94; RP IX 23-25. Dye provided an alternative proposal that did not include a buyout provision. RP V 94; Exh. 93. MRA responded by filing suit in Snohomish County Superior Court on August 28, 2008, seeking specific performance based on its claimed right to

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<sup>13</sup> The land would later be appraised by Mukilteo Investor's appraiser, Aaron Brown, at \$3,200,000. Exh. 107 at 76-77.

exercise the option as of the fall of 2007. RP II 141-42; RP V 96. MRA included Campbell Homes in its suit, alleging that Campbell Homes, as the former general partner of Mukilteo Investors, was responsible for Mukilteo Investors' acts and omissions. CP 1277-78.

**G. Rebuffing an Offer to Deem the Option Exercised as of June 15, 2008, MRA Continued to Insist Upon Its Premature and Invalid Option Exercise Date, Effectively Precluding Moving Forward on Determination of the Purchase Price Until the Issue Was Resolved in November 2010 by a Summary Judgment in Mukilteo Investors' Favor.**

In early September 2008, Mukilteo Investors engaged Aaron Brown, an MAI-certified appraiser with James Brown & Associates, to appraise the property. RP XI 6-7; Exhs. 120, 301. Mukilteo Investors notified MRA of this engagement by e-mail on September 10, 2008. Exh. 123; *see also* Exh. 124. MRA still did not inform Mukilteo Investors of the Tellatin appraisal. RP IX 34.

Despite filing suit, MRA's counsel said his client wanted to "continue discussions." Exh. 304 at 1. Seeking to resolve the dispute over the exercise date and thus permit determination of the option price, Mukilteo Investors offered in an October 6, 2008 letter to *deem* the option exercised as of June 15, 2008. Exh. 306 at 1. But MRA continued pressing for the November 12, 2007, exercise date, despite having caused Tellatin to value the property as of June 2008. *See* CP 5012-27; Exh. 110 at MRA 849.

Brown provided his final appraisal report to Mukilteo Investors on October 10, 2008, stating an appraised fair-market value of \$24,000,000 and a replacement cost of \$27,000,000, both as of June 15, 2008. Exh. 107. Unlike Tellatin's replacement cost figure, but consistent with the Option Agreement's definition of "Facility," Brown's replacement cost figure was undepreciated and included the land value.<sup>14</sup> Exh. 107 at 89-90. Mukilteo Investors wrote to MRA on November 10, 2008, enclosing Brown's report. Exh. 136. Mukilteo Investors observed that replacement cost was the greatest of the three values under the option price provision and stated it would prepare a purchase and sale agreement accordingly. Exh. 136. MRA disputed the Brown appraisal in a letter dated November 19, 2008. RP IV 93, 95-97; Exh. 311. In doing so, MRA finally notified Mukilteo Investors of the fact of the Tellatin appraisal, providing certain pages of the report and contending Tellatin's valuations were more accurate than Brown's. RP IV 95-97; Exh. 311 at 4-5.

When the parties failed to agree on a purchase price, MRA amended its complaint in July 2009 to allege updated facts and broader

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<sup>14</sup> Using undepreciated costs and including the land value was consistent with Mukilteo Investors' intent that the purchase price provision compensate for concessions made to MRA in the earlier years of the lease. For instance, the trial court found that, when Mukilteo Investors took over the project, it paid \$114,000 in outstanding obligations owed by MRA. CP 53, FOF 7. Mukilteo Investors also subsidized MRA's "lease up" costs by not charging rent the first two months and placing a moratorium on rent increases for the first five years of the lease. RP I 116-17, RP II 163-64; RP VIII 105-06; Exh. C to Exh. 225 at 11, ¶ 3.2.

claims, and the parties proceeded to litigate the pending lawsuit. CP 1277-85. In October 2010, Mukilteo Investors moved for summary judgment on the option period commencement date issue. CP 5033. Mukilteo Investors asked the trial court to rule that the earliest date upon which MRA could exercise its option was June 15, 2008. CP 5033. The trial court, Judge Thomas J. Wynne, granted Mukilteo Investors' motion on November 30, 2010, ruling that the option period opened on June 15, 2008. CP 4753-54.<sup>15</sup>

**H. MRA Further Delayed Proceedings With Unproductive Discovery Aimed at Establishing a Baseless Claim That Campbell Homes Improperly Influenced Mukilteo Investors' Appraiser.**

Although its alleged theory of liability against Campbell Homes was mere vicarious liability as a former general partner, MRA conducted extensive discovery trying to establish that Campbell Homes exerted improper influence over James Brown & Associates in its appraisal of the property. CP 5374 at ¶ 7.

MRA persistently asserted throughout discovery that it believed the Brown appraisal was improperly influenced by a business relationship with Campbell Homes. CP 5374 at ¶ 7. In discovery requests served in January 2010, MRA asked the defendants to produce "all appraisals,

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<sup>15</sup> Even after the summary judgment, MRA did not stop attempting to justify the November 2007 exercise date, and the issue was not definitively laid to rest until the start of trial in May 2012. *See* RP IV 32-33; RP XIV 41-43; RP (8/14/2012) 42.

engagements and related correspondence on any projects on which James A. Brown & Associates was in any way involved with either defendant or any of its members or shareholders at any time.” CP 5374 at ¶ 7. In a March 2010 deposition, Aaron Brown denied having spoken to anyone at Campbell Homes regarding the Harbour Pointe appraisal. CP 5377-78 at ¶ 21. Nevertheless, MRA spent the next nine months pursuing discovery via a subpoena to James Brown & Associates for appraisals in which defendant Campbell Homes *might* have had some direct or indirect interest in the past 12 years. CP 5374-75 at ¶¶ 8, 9, 11-13. This required court hearings in both Washington and Oregon, and the Oregon court entered a protective order narrowing the scope of the subpoena. CP 5375-76 at ¶¶ 9, 11-14.

Even though the subpoena turned up no evidence of improper influence, this subject was a focus of the February 2011 deposition of James Brown. CP 5376-78 at ¶¶ 14, 21. MRA then served additional discovery requests on this subject and moved to compel responses in the spring of 2011. CP 5376-77 at ¶¶ 14, 20. MRA continued to pursue the Campbell Homes influence issue and did not abandon it until the trial in May 2012. CP 5376 at ¶ 14; CP 5379-81 at ¶¶ 26, 28.

**I. After a Bench Trial, the Trial Court Found That the Parties Never Had a Meeting of the Minds on the Replacement Cost and Fair Market Value Components of the Option Price Provision. Nevertheless, the Court Set a Purchase Price Based on *Its* Notion of Fair Market Value, Granted Specific Performance, and Awarded Consequential Damages as a Credit against That Price.**

Because the trial court had ruled that the option period opened June 15, 2008, and because Mukilteo Investors had deemed the option exercised as of that date, the case went to trial on just two principal issues: (1) the purchase price and (2) MRA's claim of breach of the duty of good faith and fair dealing.

MRA put on evidence showing it had requested a definition of replacement cost in the Option Agreement to avoid a "big mess"; that its proposed definition was rejected; that replacement cost was never defined; and that its principals, Struthers and Clark, signed the agreement anyway. *See* RP I 32-34, 138-39; RP II 18, 141; Exh. 7 at 2; Exh. 221 at 2. MRA portrayed Keith Therrien and Tom Dye as conspiring for their own benefit to deny MRA the opportunity to exercise its option. *See* RP I 43-50. MRA presented no evidence or argument regarding its claims against Campbell Homes. CP 63, COL 2; CP 5377-78 at ¶¶ 21, 23.

After fourteen days of trial in May and June 2012, the trial court drafted its own findings of fact and conclusions of law and entered them

on July 2, 2012. CP 50-63.<sup>16</sup> On the price issue, the court found that both parties agreed the price should be determined as of June 15, 2008, and that the price was to be the highest of either replacement cost, fair market value, or the applicable Schedule D value. CP 59, FOF 63-64. But the court also found *there was never a meeting of the minds as to the factors the appraisers should account for in determining either replacement cost or fair market value*. CP 59-60, FOF 66-69, 70-72.

Due to the absence of a common understanding of “replacement cost,” the court concluded it was “impossible to give effect to that pricing method and unnecessary for the court to sort out the differences of opinion of the different appraisers or their calculations.” CP 60, FOF 70. Although this meant that the court could not give effect to the Option Agreement’s price provision because it could not determine which of the three values was the greatest, the court nevertheless set a purchase price. Although the court found it would be “appropriate to rely on the Sched. D value, which as of June 15, 2008 was listed to be \$16,024,643,” the court chose to set a higher price of \$18,725,000. CP 61, FOF 77-78. The court employed *its own* method to reach this figure, taking the midpoint of the range derived by Anthony Gibbons, an appraiser who testified for MRA,

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<sup>16</sup> Unless otherwise stated, citations to the Findings of Fact and Conclusions of Law are to the original, not the amended version.

and observing that it matched Tellatin's fair market value number. CP 61, FOF 78. The court granted specific performance of the option at this price. CP 63, COL 3-6.

Having set the purchase price, the court proceeded to find that Mukilteo Investors breached its duty of good faith and fair dealing. CP 61-62, FOF 79. The court based this finding on (1) "the refusal of defendant after [June 15, 2008,] to discuss pricing or a closing date," (2) "the repeated effort to lure plaintiff into meetings in which the only discussion was a refinance of the facility to allow them to acquire a minority interest," (3) "the lack of candor or recollection of Mr. Dye with regard to his efforts to stall and subvert their exercise of rights under the Option," and (4) "the concerted effort of defendant to inflate the purchase price through submission of the belated and altered appraisal of Aaron Brown." CP 62, FOF 80.

Turning to damages for this breach, the trial court found "[w]ith this court's ruling of November, 2010 establishing that the Option did not commence until June 15, 2008, it is clear that defendant [Mukilteo Investors] was under no duty to negotiate a purchase price or set a closing date until after that date." CP 58, FOF 58. The court assessed consequential damages for delay running from June 15, 2008, finding that MRA "faithfully made every lease payment" to Mukilteo Investors and

that “[m]ost” of its payments between June 15, 2008, and July 15, 2012, “could have gone toward reducing their underlying mortgage had their attempts to purchase the facility not been frustrated by defendant.” CP 62, FOF 82. The court ruled that it would offset these damages as a credit toward the purchase price, resulting in a net purchase price of \$12,691,195. CP 63, COL 4.

**J. The Trial Court Granted an Untimely Motion by MRA to Amend and Add to the Findings of Fact and Conclusions of Law, Reversing Its Prior Dismissal of Claims Against Campbell Homes, and Instead Holding Campbell Homes Jointly and Severally Liable With Mukilteo Investors. The Trial Court Also Awarded Over \$500,000 in Fees and Costs to MRA, against Both Mukilteo Investors and Campbell Homes.**

The trial court initially dismissed MRA’s claims against Campbell Homes on the basis that it was not a partner in Mukilteo Investors on or after June 15, 2008, the date on which MRA was deemed to have exercised its option. CP 63, COL 2. The trial court entered its Findings of Fact and Conclusions of Law on July 2, 2012. CP 50. Because they included all the elements of a final judgment, including directions in the Conclusions of Law establishing a process by which the parties were to effect a closing nine months from July 15, 2012, Mukilteo Investors filed a notice of appeal from that judgment (on July 13, 2012). CP 1-14. Mukilteo Investors sent a working copy of its notice to the trial court, with a letter advising the court of Mukilteo Investors’ understanding that the court’s Findings and Conclusions constituted a final judgment; MRA was

served with a copy of this letter along with Mukilteo Investors' notice of appeal. CP 5485-88.

MRA filed a motion to amend and add to the findings on July 30, 2012, 18 days after the deadline for such a motion under CR 52(b) assuming the court's Findings and Conclusions constituted a final judgment. CP 5579-5600. MRA did not file a protective notice of cross-appeal from the dismissal of its claims against Campbell Homes, which had to be filed no later than August 2, 2012, if the court's Findings and Conclusions constituted a final judgment. *See* RAP 5.2(f) (notice by another party must be filed within the later of 30 days after entry of final judgment or 14 days after filing of prior notice).

The most significant of MRA's requested revisions was to reverse the dismissal of its claims against Campbell Homes. *See* CP 5582. MRA argued that a general partner remains subject to joint and several liability for all partnership obligations incurred during its tenure as a general partner, even after withdrawal from the partnership. CP 5582-83. This theory had nothing to do with the discovery MRA conducted on improper influence.

Mukilteo Investors and Campbell Homes responded that MRA's motion was untimely. CP 5492-94.<sup>17</sup> They also pointed out that the valid exercise of an option automatically gives rise to a new contract -- a purchase and sale agreement -- and this was the contractual obligation MRA was seeking to enforce. CP 5495. Campbell Homes was not a general partner as of June 15, 2008, the date MRA's option was deemed exercised. *Id.*

The trial court granted MRA's untimely motion and reversed its dismissal of MRA's claims against Campbell Homes. CP 5300-01, COL 2. The trial court also awarded fees totaling \$525,828.95 -- including fees for MRA's pursuit of its claims against Campbell Homes -- plus \$7,992.76 in costs. CP 5334, COL 6; CP 5332, FOF 10; RP (8/14/2012) 39. The court entered a written decision entitled "Decree of Specific Performance and Judgment." CP 5309-13. Mukilteo Investors filed an amended and supplemental notice of appeal, joined in by Campbell Holmes, designating for review the amended findings and conclusions, separate supplemental findings and conclusions entered in support of the court's fees and cost

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<sup>17</sup> Shortly after receiving Mukilteo Investors' notice of appeal, this Court set a hearing on a motion to determine appealability. Ultimately, the Commissioner chose not to resolve the issues raised by that motion because, as a practical matter, Mukilteo Investors would be amending its initial notice of appeal to designate the so-called "judgment" that the trial court was being asked to enter by MRA. *See* Commissioner's Ruling dated August 24, 2012 (on file).

award, and the decision denominated the court's "Decree of Specific Performance and Judgment." CP 5280-5308.

### III. STANDARD OF REVIEW

This Court reviews *de novo* whether the conclusions of law are supported by the findings of fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Soltero v. Wimer*, 159 Wn.2d 428, 433, 435-36, 150 P.3d 552 (2007); *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 778, 275 P.3d 339 (2012). Conclusions of law erroneously labeled as findings of fact are reviewed *de novo*. *Wright*, 167 Wn. App. at 778.

While a trial court's fashioning of an equitable remedy is generally reviewed for an abuse of discretion, whether equitable relief is appropriate, and the extent of the court's authority, are questions of law subject to *de novo* review. *Niemann v. Vaughn Comm'ty Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). The measure of damages is a question of law, and a trial court necessarily abuses its discretion if it awards damages based upon an improper method of measuring damages. *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011); *see also In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (holding that a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons).

#### IV. ARGUMENT

**A. Because the Parties Did Not Mutually Assent to the Price Term in the Option Agreement, That Agreement Is an Unenforceable “Agreement to Agree,” and It Was Error to Grant Specific Performance.**

**1. An Enforceable Purchase Option Is Formed Only if the Parties Reached Mutual Assent on All the Material Terms of a Purchase and Sale Agreement, Including Price.**

“Mutual assent” is the modern expression for the concept of “meeting of the minds.” *Swanson v. Holmquist*, 13 Wn. App. 939, 942, 539 P.2d 104 (1975). No contract forms unless the parties mutually assent to the material terms. *Id.*; *Rimov v. Schultz*, 162 Wn. App. 274, 282, 253 P.3d 462 (2011). Mutual assent is absent where each party has a different understanding of a material term and (1) neither party knows or has reason to know the meaning attached by the other *or* (2) each party knows or has reason to know the meaning attached by the other. RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981).<sup>18</sup>

A purchase option contract, like any contract, requires mutual assent. Once a purchase option is exercised, it becomes a contract of

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<sup>18</sup> See, e.g., *State v. Nason*, 96 Wn. App. 686, 691-92, 981 P.2d 866 (1999) (affirming criminal conviction, notwithstanding plea agreement, due to lack of mutual assent between defendant and prosecution on meaning of provision, “No Other Charges Will Be Filed”); *Swanson v. Holmquist*, 13 Wn. App. 939, 942-43, 539 P.2d 104 (1975) (affirming judgment of dismissal based on lack of mutual assent between home builder and purchaser on terms governing which party would absorb loan fees in excess of a specified amount); *Shuck v. Everett Sports Cars, Inc.*, 12 Wn. App. 28, 31, 527 P.2d 1321 (1974) (affirming judgment for plaintiff against automobile dealer that retained plaintiff’s trade-in vehicle despite lack of mutual assent on price term).

purchase and sale binding on the parties. *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 318, 481 P.2d 17 (1971); *see also Turner v. Gunderson*, 60 Wn. App. 696, 700-01, 807 P.2d 370 (1991). And because an option contract is, in essence, a contract to enter into a future contract, the parties must reach mutual assent on all the material terms of the future contract. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

A putative option contract that omits one or more material terms of the future purchase and sale agreement is a mere “agreement to agree,” unenforceable under Washington law. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004). Price is a material term. *Valley Garage*, 4 Wn. App. at 318; *cf. Shuck v. Everett Sports Cars, Inc.*, 12 Wn. App. 28, 31, 527 P.2d 1321 (1974) (holding no contract was formed absent a meeting of the minds on price).<sup>19</sup> Absent a definite price, a purchase option is a mere “agreement to agree” and cannot be enforced. *See Sea-Van Investments Assocs. v. Hamilton*, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994) (holding that a contract for the sale of real estate was

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<sup>19</sup> *See also* 18 W. STOEBCUK, WASH. PRAC. § 16.3 (2d ed.) (recognizing price as a material term of a real estate contract); *Lipton-U. City, LLC v. Shurgard Storage Ctrs., Inc.*, 454 F.3d 934 (8th Cir. 2006) (holding that an option was unenforceable once the price term was rescinded due to mistake); *Drost v. Hill*, 639 So.2d 105 (Fla. 3d Dist. Ct. App. 1994) (holding that an option was unenforceable where there was never a meeting of the minds on price and that the court lacked authority to order the parties to agree on a reasonable price).

unenforceable where there was no meeting of the minds as to any of the material terms except price); *see also Kruse*, 121 Wn.2d at 723.<sup>20</sup>

**2. Substantial Evidence Supports the Trial Court's Finding That the Parties Did Not Mutually Assent to the Replacement Cost and Fair Market Value Components of the Option Agreement's Price Provision.**

The trial court found that the parties never reached mutual assent regarding the factors to be accounted for in determining replacement cost or fair market value. Those findings must be deemed verities because no error is assigned to them. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002) (holding that unchallenged findings are verities on appeal).

Moreover, those findings are supported by substantial evidence. *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) (holding that an appellate court lacks authority to substitute its findings for the trial court's on any disputed fact question if the trial court's findings are supported by substantial evidence). Substantial

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<sup>20</sup> *See also SS-II, LLC v. Bridge Street Assocs.*, 293 Conn. 287, 977 A.2d 189 (2009) (holding that an option was unenforceable for lack of mutual assent where the price term was left open to adjustment by future agreement of the parties); *Connor v. Harless*, 176 N.C. App. 402, 626 S.E.2d 755 (2006) (holding that an option was unenforceable for lack of mutual assent where the price term, when provided for determination of the price by two appraisals, failed to provide a mechanism to address discrepancies between the appraisals).

evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley*, 149 Wn.2d at 879.

MRA claimed to have understood “replacement cost” to mean the depreciated cost to replace the building and improvements, only. RP I 139-40; RP II 18, 21-22, 24-25; RP IV 118-20; RP V 71; RP VIII 111-12, 119; RP IX 8-9; Exh. 221 at 2. Mukilteo Investors understood it to represent the actual cost to obtain a substitute property of equal investment value, which necessarily included not only the building and improvements but the land and the business. RP VIII 120; RP IX 8-9, 41-42.

Through the discussions of the parties and their attorneys, each party knew the other attached a different meaning to the term “replacement cost.” *See* RP VIII 111-12, 119-20; RP IX 8-9, 41-42; Exh. 221 at 2. In the end, it was left undefined. Exh. 225 at 1-2. Struthers admitted he knew this lack of a common understanding could result in a “big mess[.]” RP II 18. Indeed, Struthers’ prediction came to fruition as the parties caused their respective appraisers to include or exclude the land value consistent with their respective understandings of “replacement cost.” Because the parties lacked a common understanding of that term, and each knew of the other’s (contrary) understanding, they never reached mutual assent to this material term. *See* RESTATEMENT (SECOND) OF CONTRACTS § 20(1).

Substantial evidence also supports the trial court's finding that the parties never reached mutual assent regarding the factors to be accounted for in appraising the fair market value. As the trial court found, "[e]ach of the appraisers indicated that one method for determining fair market value was a capitalization approach to the business, in other words valuing the facility by valuing the existing business that Mr. Struthers and Mr. Clark had established and projecting that value forward." CP 60, FOF 71; *see* RP III 24-25 (Fryday) and Exh. 283; RP XII 92-128 (Brown), Exh. 310; Exh. 108 (Gibbons). And as the trial court further found, while Therrien testified that any purchase would include the business value, this was not expressly included in the price provision of the Option Agreement. CP 60, FOF 71; RP IX 47. Based on this evidence, the court was justified in finding there was never "a meeting of the minds as to the inclusion of the value of plaintiff's business for purposes of determining fair market value." CP 60, FOF 72.

**3. The Option Agreement Was an Unenforceable "Agreement to Agree." The Trial Court Erred in Invoking Its Equity Jurisdiction to Write a Contract for the Parties to Which They Never Agreed and Then Enforcing that Contract.**

Equity jurisdiction is not a license to write a contract for the parties; the court must enforce a contract only as written, and must give effect to every word so as not to render any word superfluous. *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963); *Rimov*, 162 Wn.

App. at 282. A contract “must be definite enough on material terms to allow enforcement without the court supplying those terms.” *Sea-Van Investments*, 125 Wn.2d at 120, quoting *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985). “Where the parties have not reached agreement, there is nothing for equity to enforce.” *Haire*, 63 Wn.2d at 286 (emphasis added).

The Option Agreement provided that the purchase price would be “the greater of” three specified values. Because the parties never had a meeting of the minds about the factors to be accounted for in determining two of those values, there was no mutual assent on the price, a material term, and the court should have declared the Option Agreement unenforceable and dismissed MRA’s claims. Instead, the court set a purchase price based on its own method of determining fair market value, enforced the option against Mukilteo Investors based on that price, and awarded consequential damages, fees, and costs to MRA.<sup>21</sup> See CP 61,

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<sup>21</sup> In fashioning its decree, the trial court not only rewrote the price provision of the Option Agreement, it disregarded or changed other terms. For instance, the court (1) required Mukilteo Investors to pay the mortgage prepayment penalty, when the Option Agreement placed this obligation on MRA, CP 63, COL 8; Exh. 225 at 3; (2) eliminated Mukilteo Investors’ right to structure the transaction as a 1031 exchange, CP 63, COL 5; Exh. 225 at 6-7; (3) set its own dates and times for performance, when the Option Agreement specified a schedule, CP 63, COL 5; see Exh. 225 at 3-4; and (4) authorized MRA unilaterally to prepare any documents needed to close the purchase, when the Option Agreement provided that the terms must be acceptable to Mukilteo Investors, CP 63, COL 5; Exh. 225 at 6; and (5) allowed MRA, should it fail to obtain sufficient financing, to terminate the lease and seek additional damages for the loss of its business, when the Lease Agreement did not allow termination by the lessee. CP 63, COL 10; Exh. C to Exh. 225 at 14-15. See also CP 5310 (Decree).

FOF 77; CP 63, COL 3-4; CP 5331, COL 4. This requires reversal because the findings of fact that there was no meeting of the minds on price do not support the court's legal conclusion that it could enforce the Option Agreement. *See Soltero*, 159 Wn.2d at 433, 435-36; *Wright*, 167 Wn. App. at 778; RAP 2.5(a)(2).<sup>22</sup> That unsupported conclusion must therefore be vacated. *Id.*

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<sup>22</sup> Mukilteo Investors is entitled to raise this issue for the first time on appeal under RAP 2.5(a)(2), and was not required to first move for reconsideration or for a new trial under CR 59 or to amend the findings and conclusions under CR 52. RAP 2.5(a)(2) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. *However*, a party may raise the following claimed errors for the first time in the appellate court: ... (2) failure to establish facts upon which relief can be granted.

(Emphasis added.) This is not a matter of discretion. Although some Court of Appeals panels after the 1976 adoption of the RAPs initially characterized application of the exceptions in RAP 2.5(a) as discretionary, *see, e.g., State v. Scott*, 48 Wn. App. 561, 568-69, 739 P.2d 742 (1987), the Supreme Court subsequently clarified that only the first part of the rule is discretionary, and the exceptions are mandatory. *State v. WWJ Corp.*, 138 Wn.2d 595, 601-02, 980 P.2d 1257 (1999). Addressing subsection (3) of RAP 2.5(a) (on constitutional issues), the court explained:

At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. ... When this court adopted the Rules of Appellate Procedure in 1976, RAP 2.5(a) replaced the common law rule for newly raised issues on appeal. ... The plain language of subsection three states a party may challenge for the first time on appeal a manifest error that affects a constitutional right. We have recognized that civil parties may raise constitutional issues on appeal if they satisfy the criteria listed in RAP 2.5(a)(3).

*Id.* This interpretation has been confirmed and applied in subsequent cases involving RAP 2.5(a)(2). *See Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (holding that RAP 2.5(a) contains exceptions to its otherwise "discretionary nature" and noting that appeal is the first time sufficiency of the evidence may realistically be raised); *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 204, 258 P.3d 70 (2011) (observing that the exceptions in RAP 2.5(a) are exceptions to the court's discretion to refuse to consider issues first raised on appeal, citing *Roberson*). If any party was obligated to make a post-trial motion to amend the findings and conclusions to address the ramifications of the lack of mutual assent, it was MRA, as it had the burden of proving the elements of an enforceable agreement, including mutual assent.

**4. The Duty of Good Faith and Fair Dealing Applies Only to Performance of the Specific Terms to Which the Parties Agreed, and Does Not Provide Authority to Write a Contract for the Parties. MRA's Bad Faith, on the Other Hand, Bars It from Receiving the Equitable Relief of Specific Performance.**

The duty of good faith and fair dealing exists only in relation to performance of the specific terms agreed to by the parties. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). It does not obligate a party to accept materially changed terms, nor may it be used to inject substantive terms. *Id.* The Supreme Court in *Badgett* expressly rejected the notion of a “free-floating duty of good faith” that obligates a party to consider alternate terms or proposals beyond those actually agreed to, or that entitles the opposing party to relief in damages or otherwise based on a breach of such terms or proposals. *Id.* Once the trial court found there was no meeting of the minds on a material term of the Option Agreement, rendering that agreement unenforceable, whether the parties acted in good faith was immaterial under *Badgett*. The trial court’s finding that Mukilteo Investors breached the duty did not authorize it to impose a contract upon the parties where none existed or to rewrite the option price term so that the price did not need to be the greatest of the three values specified -- or, indeed, *any* of the three values.<sup>23</sup>

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<sup>23</sup> Neither does the finding of breach of the duty of good faith provide any basis to conclude that Mukilteo Investors somehow waived the right to benefit from the trial  
(Footnote continued on next page)

Even assuming the parties' good faith and fair dealing were material, the trial court's findings on that issue were untenable as the court applied a double standard in judging the parties' conduct. *See* CP 62, FOF 80, 82. For instance, the court faulted Mukilteo Investors for refusing to discuss pricing or a closing date after June 15, 2008.<sup>24</sup> CP 62, FOF 80. But because the price was linked to the option exercise date, Exh. 225 at 1-2, MRA's steadfast insistence upon an invalid exercise date precluded determination of the price until after the November 30, 2010, summary judgment.<sup>25</sup> *See* CP 5012-27. Furthermore, absent a price, discussion of a closing date was premature.

As further evidence of Mukilteo Investors' bad faith, the court cited its "effort...to inflate the purchase price through submission of the belated and altered appraisal of Aaron Brown." CP 62, FOF 80. But the alterations suggested to Brown, if anything, resulted in a *reduction* of the replacement cost figure, as Therrien pointed out a \$500,000 inconsistency between two figures, the lower of which turned out to be the correct one.

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court's finding that there was no meeting of the minds. Mutual assent is essential to the formation of a contract without regard to whether the purported contract is performed in good faith. *See Swanson*, 13 Wn. App. at 942.

<sup>24</sup> The court correctly found that Mukilteo Investors "was under no duty to negotiate a purchase price or set a closing date until after [July 15, 2008]," CP 58, FOF 58. *See also* CP 56, FOF 40 (pre-June 15, 2008, offer by Mukilteo Investors to extend the option exercise period).

<sup>25</sup> This reality was confirmed by MRA's own lawyer billing records, which showed MRA did not retain Anthony Gibbons, who became their primary appraiser expert at trial, until after MRA had lost the exercise date fight. CP 5539 (1/28/2011).

See Exh. 132 at 90. Moreover, MRA was meanwhile attempting to *deflate* the purchase price by (1) insisting on an invalid exercise date and that the 2007 Schedule D value should control and (2) instructing its appraisers to exclude the land value from their replacement cost appraisal.<sup>26</sup> RP III 26-29; Exh. 111. MRA knew that Mukilteo Investors had rejected its proposed definition of “replacement cost,” which excluded the land, because (1) Hiner said as much to Struthers, RP I 137; (2) Struthers admitted knowing the lack of a definition would cause a “big mess,” RP II 18; and (3) Therrien explained to Beeksma that Mukilteo Investors was rejecting the proposed definition because it would not adequately compensate Mukilteo Investors in the event MRA exercised its option.<sup>27</sup> RP VIII 120; RP IX 8-9, 41-42. Given this knowledge, MRA could not in

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<sup>26</sup> MRA had a powerful motivation to deflate the price. MRA had obtained preliminary underwriting for a loan amount of only \$14,450,000, based on a purchase price and closing costs totaling \$17,414,320. Exh. 241 at MRA 162. This would have required MRA to make up the nearly \$3 million difference. (To the extent the trial court’s statements in findings of fact 33 and 61 about securing a commitment for a purchase price of \$17 million can be read as finding that the bank was ready to loan the full purchase price, those statements are not supported by substantial evidence. CP 56, 59.) Although Struthers testified he and Clark were “ready, willing, and able” to pay that amount to close the transaction, RP IV 123, and the trial court accepted this, CP 59, FOF 61, the law requires more than an unsupported assertion of ability to perform. *Record Realty, Inc. v. Hull*, 15 Wn. App. 826, 830, 552 P.2d 191 (1976). Moreover, MRA had less than \$250,000 cash on hand as of year-end 2009, RP V 110; Exh. 336 at 2, and Struthers and Clark admitted to Dye that they would need to find an (unknown) equity investor to complete the purchase. RP X 100-01, 109, 137. Faced with this quandary, despite their knowledge that Mukilteo Investors had rejected their proposed definition of “replacement cost” to exclude the land, Struthers and Clark instructed Tellatin to exclude the land value from its replacement cost appraisal. RP III 26-29; Exh. 111.

<sup>27</sup> Beeksma, the only witness in a position to contradict Therrien, was not called by MRA to testify.

good faith seek to apply the substance of that very definition and take the position that “replacement cost” included only the depreciated cost to replace the building and improvements, not the land.<sup>28</sup> Yet that is precisely what MRA did.

Even assuming the findings of bad faith by Mukilteo Investors were tenable and could vest the court with authority to write a contract for the parties, it could not do so where MRA also acted in bad faith. Equity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands. *Cornish College of the Arts v. 1000 Virginia Ltd. P-ship*, 158 Wn. App. 203, 216, 242 P.3d 1 (2010), *review denied*, 171 Wn.2d 1014, 249 P.3d 1029 (2011), citing *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90 (1947). MRA’s hands were anything but clean, and this condition alone should have moved the trial court to dismiss MRA’s complaint with prejudice.

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<sup>28</sup> The trial court correctly refused to apply the principle that ambiguous contract language is construed against the party who drafted it, for two reasons. *See Roberts, Jackson & Assocs. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985). First, the attorneys for both sides negotiated the option price term, and the Option Agreement recited that it had been submitted to both parties’ counsel “and therefore shall be interpreted without regard to either party having drafted same.” Exh. 225 at 8. Second, application of this principle is not warranted where the parties’ mutual intent can be gleaned from extrinsic evidence such as the circumstances surrounding the making of the contract. *See Roberts*, 41 Wn. App. at 69. Here, the extrinsic evidence shows that MRA signed the agreement knowing that its proposed definition of “replacement cost” had been rejected and thus did not reflect the parties’ mutual intent.

**B. Even Assuming the Option Agreement Were Enforceable, It Was Error to Credit to MRA as Consequential Damages All the Rents It Paid from June 15, 2008, Through July 15, 2012.**

A trial court has equitable discretion to award consequential damages in addition to specific performance. *Cornish College*, 158 Wn. App. at 229; *Rekhi v. Olason*, 28 Wn. App. 751, 757-58, 626 P.2d 513 (1981). Such damages “are not awarded for breach of contract, but are awarded so that the purchaser, unable to have exact performance because of the delay, may have an accounting of any losses caused by the delay, so that he can be restored as nearly as possible to the position he would have been in had the seller performed.” *Rekhi*, 28 Wn. App. at 757. “The result is more like an accounting between the parties than an assessment of damages.” *D-K Inv. Corp. v. Sutter*, 19 Cal. App. 3d 537, 549, 96 Cal. Rptr. 830 (1971), quoting *Ellis v. Mihelis*, 60 Cal.2d 206, 220, 32 Cal. Rptr. 415, 384 P.2d 7 (1963). The trial court thus abuses its discretion where it awards damages that put the plaintiff in a better position than it would have been but for the failure to perform at the required time. *See Cornish College*, 158 Wn. App. at 229; *Rekhi*, 28 Wn. App. at 758.

The trial court here abused its discretion in awarding MRA as consequential damages the rent it paid from the start of the option period, June 15, 2008, through July 15, 2012, for two reasons:

*First*, for at least half the period for which the trial court awarded consequential damages -- until the November 30, 2010, summary

judgment -- MRA was insisting incorrectly that the option period opened in October 2007 such that it validly exercised its option in November 2007. This was despite Mukilteo Investors' offer to deem the option exercised as of June 15, 2008. And because the price depended upon the exercise date, MRA's insistence upon an invalid exercise date precluded any progress toward closing.

No conduct of Mukilteo Investors between June 15, 2008, and November 30, 2010, can be said to have delayed MRA's purchase of Harbour Pointe when MRA's own insistence upon an invalid exercise date precluded determination of the price. The trial court concluded MRA failed even to raise an issue of material fact on this issue. It was untenable to award consequential damages for delay during that period, and the trial court therefore abused its discretion in making such an award.

Furthermore, MRA continued to delay proceedings after November 2010 through its unproductive efforts to investigate the baseless claim that Campbell Homes improperly influenced Aaron Brown's appraisal. *See* CP 5374-81 at ¶¶ 7-9, 10-14, 20-21, 23-28. Indeed, that MRA had abandoned this theory did not become clear until the close of MRA's case-in-chief at trial. *Id.*

Had MRA not pursued the invalid exercise date or the baseless claims against Campbell Homes, the case could have been tried within a

few months of November 2008, when Mukilteo Investors provided Brown's appraisal to MRA, and the decree and judgment could have been entered years sooner than actually occurred. It was an abuse of discretion to award consequential damages for delay running through July 15, 2012, without accounting for the portion of that period for which only MRA was to blame.

*Second*, the court gave MRA a windfall when it completely relieved MRA of its obligation to pay rent for that period while failing to account for the interest MRA would have been obligated to pay on its mortgage or interest due Mukilteo Investors on the purchase price. The finding that "most" of MRA's rent payments could have gone toward reducing its mortgage was not supported by substantial evidence where only a small percentage of MRA's payments in the first few years of its mortgage would have gone toward the principal balance, and the majority would have gone toward interest. CP 62, FOF 82. It was thus error to credit MRA the full amount of rents paid because this put MRA in a better position than it would have been but for the breach. *Rekhi*, 28 Wn. App. at 758.

Furthermore, any credit to MRA should have been offset by interest on the purchase price during the period of delayed performance. *See Paris v. Allbaugh*, 41 Wn. App. 717, 719, 704 P.2d 660 (1985), citing

*Stratton v. Tejani*, 139 Cal. App. 3d 204, 187 Cal. Rptr. 231, 236 (1982), and *D-K Inv. Corp.*, 96 Cal. Rptr. at 837. Consequential damages may do no more than put a party in the position they would have been in had the opposing party fully performed its contractual obligations. *Rehki*, 28 Wn. App. at 758. MRA's theory of the case was that it would have been able to close a sale by mid-2009. But while a closing would have relieved it of its obligation to pay rent, that obligation would have been replaced by an obligation to pay interest on the loan financing its purchase. The trial court's failure to account for this undeniable financial reality gave a windfall to MRA.

In determining consequential damages, the trial court apparently analogized to *Cornish College*, which was brought its attention during Clark's testimony on damages. RP V 116-17. But *Cornish College* is clearly distinguishable. The landlord there not only rejected tenant Cornish College's attempted exercise of its option but evicted Cornish, forcing it to lease substitute space and pay for renovations. 158 Wn. App. at 213. The trial court granted specific performance and awarded Cornish these expenses as a credit against the purchase price. *Id.* at 215. The Court of Appeals affirmed on the basis that this award was necessary to place Cornish in the position it would have been had the landlord performed. *Id.* at 230. Here, Mukilteo Investors never evicted MRA, and

it remains in possession to this day. The trial court therefore gave MRA a windfall by crediting all rents paid without offsetting (1) the interest MRA would have been obligated to pay on its mortgage or (2) interest to Mukilteo Investors on the purchase price.

**C. The Trial Court Erred in Holding Campbell Homes Liable Where (1) MRA's CR 52(b) Motion Was Untimely and (2) Campbell Homes Was Not the General Partner of Mukilteo Investors When the Relevant Contract Was Formed.**

**1. MRA's CR 52(b) Motion Was Untimely.**

The trial court erred by considering MRA's late motion for revision. The Civil Rules allow only 10 days from entry of judgment after a bench trial to move to amend the findings or for additional findings. CR 52(b) ("Upon motion of a party *filed not later than 10 days* after the entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.") (emphasis added). Here, entry of judgment -- in the form of the trial court's findings and conclusions dismissing Campbell Homes and ordering Mukilteo Investors to sell its facility and pay damages -- occurred on July 2, 2012. *See* CR 58(b) ("Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing[.]"); CR 54(a)(1) ("A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.").

The findings and conclusions are a “judgment” under CR 54(a)(1) because they embody “the final determination of the rights of the parties in the action.” For purposes of that rule, a “judgment is considered final on appeal if it concludes the action by resolving the plaintiff’s entitlement to the requested relief.” *Purse Seine Vessel Owners Ass’n v. State*, 92 Wn. App. 381, 387-88, 966 P.2d 928 (1998). That the trial court did not formally call the findings and conclusions a “judgment” or intend that document to be the final judgment does not matter, as the determination of finality is one of substance, not form. *Nestegard v. Inv. Exch. Corp.*, 5 Wn. App. 618, 623, 489 P.2d 1142 (1971) (holding that a written decision denominated an “order” was nevertheless the final judgment because it effected the final determination of the parties’ rights). Where the findings and conclusions which are signed by the judge and filed with the clerk resolve the plaintiff’s entitlement to the requested relief, a judgment has been entered for the purposes of CR 54(a). The trial court’s letter about entertaining additional findings or conclusions does not change the substance and effect of the document.

The July 2 findings and conclusions finally determined the parties’ rights because there were no remaining claims. In the findings and conclusions, the trial court dismissed the claims against Campbell Homes with prejudice. CP 63, COL 2. The court ruled that Mukilteo Investors

breached its agreement to sell the facility and ordered a sale to MRA for \$18,725,000 within nine months. CP 62-63, COL 1-6. The court further ruled that MRA was entitled to a credit of lease payments made to Mukilteo Investors from June 15, 2008, to July 15, 2012. CP 63, COL 4. Finally, the court directed the parties to effect a closing within nine months of July 15, 2012. CP 63, COL 5.<sup>29</sup> These determinations resolved all claims as to all parties.<sup>30</sup> Accordingly, the findings and conclusions were a “judgment” under CR 54(a)(1), triggering a ten-day period for revisions that expired on July 12, 2012, according to CR 52(b).

The trial court also resolved the rights and duties of the parties should certain contingencies arise. For example, should Mukilteo Investors’ mortgage loan lender assess a penalty for being paid off early incident to a purchase of the property pursuant to the court’s findings and conclusions, the trial court ruled that Mukilteo Investors would be liable for that penalty. CP 63, COL 8. Similarly, if MRA was unable to close

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<sup>29</sup> The trial court also retained jurisdiction to award attorney fees and costs. CP 63, FOF 11-12. RAP 2.2(a)(1), however, expressly allows parties to appeal from final judgments “regardless of whether the judgment reserves for future determination an award of attorney fees and costs.”

<sup>30</sup> Alaska law on finality is virtually identical to the standard set forth in *Nestegard*: “In determining whether an order is ‘final’ for appeal purposes, we look to the substance and effect, rather than the form, of the rendering court’s judgment, focusing primarily on operational, or ‘decretal,’ language.” *D.L.M. v. M.W.*, 941 P.2d 900, 902 (Ala. 1997) (quotations and citations omitted). In *D.L.M.*, the trial court’s Findings of Fact and Conclusions of Law were deemed to constitute the final judgment because that document effectively disposed of both the pending petition and motion and contained the key operational language. *Id.*

the sale within the nine months set by the court, the court ruled that MRA would be allowed to apply for an extension. CP 63, COL 9. And in the event MRA was unable to obtain financing, the trial court ruled that Mukilteo Investors could be held liable for damages instead of specific performance. CP 63, COL 10. All of these matters involve contingencies that may never come to pass, not matters that must be resolved for there to be a complete adjudication of claims.

Those contingent rulings or retention of jurisdiction to address possible future orders have no effect on whether the findings and conclusions entered on July 2 are a final determination of the rights of the parties. Where a written trial court determination is otherwise a final judgment, it continues to occupy that status “even if it directs performance of certain subsidiary acts in carrying out the judgment, the right to the benefit of which is adjudicated in that judgment, and even if it is followed by subsequent orders with regard to those subsidiary acts.” *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994), citing *Nestegard*, 5 Wn. App. at 623-24. Thus, “a decree may be final although leave is given to apply for further relief, or the court reserves the right to

make further orders.” *Nestegard*, 5 Wn. App. at 624, quoting *Beebe v. Russel*, 60 U.S. (19 How.) 283, 285, 15 L. Ed. 668 (1857).<sup>31</sup>

Regardless of the trial court’s intent, its July 2 letter to the parties offering to entertain requests for additional findings or conclusions did not, and could not, provide authority to submit proposed changes or revisions beyond the ten-day time limit. *See* CP 52. That is because CR 6(b)(2) prohibits the enlargement of time for taking any action under CR 52(b), stating that the trial court “may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b)” (emphasis added). *See Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) (holding that the trial court did not have the discretionary authority to extend the similarly worded time limit -- *i.e.*, “not later than 10 days after the entry of the judgment” -- for filing a motion for reconsideration under CR 59(b)); *Stork v. Int’l Bazaar, Inc.*, 54 Wn. App. 274, 288-89, 774 P.2d 22 (1989) (a trial judge’s personal court rule regarding procedures for

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<sup>31</sup> *See also Bishop v. Lynch*, 8 Wn.2d 278, 281-82, 111 P.2d 996 (1941) (decree entered in partition proceeding was a final judgment where it declared the respective interests of the parties in the subject real estate even though it remained unknown what actual partition would result from the final decree since the referees appointed to partition the property had not yet made their report); *Rhodes v. D&D Enters., Inc.*, 16 Wn. App. 175, 177-78, 554 P.2d 390 (1976) (decree settling all issues except which specific portion of the property would be conveyed was a final judgment; later order directing conveyance of specific portion of property was simply a final order, not the “final judgment”); *Gazin v. Hieber*, 8 Wn. App. 104, 113-14, 504 P.2d 1178 (1972) (order to deliver deed was final order even where order determined liability without fixing the amount of damages for failure to perform).

post-trial matters is not controlling where it is inconsistent with a Civil Rule requiring filing within 10 days after entry of the judgment).

If MRA desired revisions pursuant to the trial court's July 2 letter, it was required to do so within the time allowed by the Civil Rules. Instead, MRA waived its right to move to amend the findings and conclusions by failing to file such a motion by July 12, as required by CR 52(b).<sup>32</sup>

**2. Campbell Homes Was Not the General Partner of Mukilteo Investors When the Relevant Contract Was Formed.**

The trial court erred by holding Campbell Homes liable for failing to sell the facility at MRA's desired price because Campbell Homes was no longer the general partner to Mukilteo Investors when it incurred that supposed obligation. Under an option to purchase property, the owner agrees that the other party shall have the privilege of buying the property within a specified period of time upon the terms and conditions expressed in the option. *Whitworth v. Enitai Lumber Co.*, 36 Wn.2d 767, 770, 220 P.2d 328 (1950). The option agreement thus embodies a continuing offer open for acceptance during a fixed period of time, which, until exercised,

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<sup>32</sup> The trial court appeared to believe that CR 60 allowed it to amend its judgment more than 10 days after entry, CR 52(b) notwithstanding. Relying on CR 60 to circumvent CR 52(b)'s time limits is error. "CR 60 cannot be used merely to circumvent time constraints in other rules." *Wiley v. Rehak*, 143 Wn.2d 339, 346-47, 20 P.3d 404 (2001), quoting *Pybas v. Paolino*, 73 Wn. App. 393, 398, 869 P.2d 427 (1994).

“creates no obligation to pay or perform in accordance with the option terms.” *Harrison v. Puga*, 4 Wn. App. 52, 59, 480 P.2d 247 (1971).

The exercise of an option “changes the legal relations of the parties.” *Turner*, 60 Wn. App. at 701. “Once an option is exercised, it becomes a new contract of ‘purchase and sale.’” *Id.*, quoting *Valley Garage*, 4 Wn. App. at 318. *See also Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 160, 724 P.2d 1077 (1986) (attempt to exercise option contract during specified period of time, created a purchase and sale contract binding on property owner). “Closing a sale after the execution of a purchase and sale contract is ‘the fulfillment of the obligations created by the contract.’” *Turner*, 60 Wn. App. at 701, quoting *Duprey v. Donahoe*, 52 Wn.2d 129, 135, 323 P.2d 903 (1958).

Here, to the extent Mukilteo Investors incurred any obligation to close the sale of the facility with MRA at the price MRA wanted, Campbell Homes was no longer general partner. Mukilteo Investors was under no obligation to close the sale of the facility according to the terms of the Option Agreement before June 15, 2008, the date the option was deemed exercised. *See Harrison*, 4 Wn. App. at 59. The exercise of the option changed the legal relationship between MRA and Mukilteo Investors and by operation of law gave rise to a new purchase and sale contract. Campbell Homes was not a general partner then; it had

withdrawn in the spring of 2008. CP 57, FOF 46, 47. Because the obligation of closing the sale was not incurred while Campbell Homes was a general partner, there is no basis to hold it jointly and severally liable for the breach of an obligation incurred after withdrawal. See RCW 25.05.260(1) (“A dissociated partner is not liable for a partnership obligation incurred after dissociation.”).

Even though the trial court deemed the option exercised as of June 15, 2008, it incorrectly believed a new contract in the form of a purchase and sale agreement was never entered: “Where I disagree with [counsel for Mukilteo Investors] is the assertion that there was a new contract entered in the form of a purchase and sale agreement.” RP (8/14/2012) 16. This was contrary to *Turner, Valley Garage*, and *Barnett*. This Court should reverse the granting of the CR 52(b) motion and reinstate the dismissal of all claims against Campbell Homes with prejudice.

**D. Regardless of Whether This Court Reinstates the Dismissal of Campbell Homes, It Should Reverse the Fees and Costs Portion of the Judgment and Remand for Segregation of Fees and Costs Spent Pursuing Claims against Campbell Homes.**

Washington courts apply the lodestar method to determine the amount of a fee award, the starting point of which is to multiply the hours reasonably expended by each attorney’s reasonable hourly rate. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). The

party requesting fees bears the burden of establishing reasonableness. *Id.* at 151.

Reasonable fees do not include time spent on unsuccessful claims. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The court therefore “must” segregate and exclude such time from its award. *Id.*; *Travis v. Wash. Horse Breeders Ass’n*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988). Because segregation is essential to the reasonableness of the award, “[t]he burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.” *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004) (vacating fee award and remanding for segregation, if possible, or alternatively denial of fees).<sup>33</sup> If this Court reinstates the dismissal of Campbell Homes, under *Bowers* it should remand for segregation of the attorney’s fees and costs spent pursuing the claim against Campbell Homes.

But even if this Court does not reinstate the dismissal, it should remand for segregation of most of MRA’s fees and costs spent on

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<sup>33</sup> *Accord Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501-02, 859 P.2d 26 (1993) (vacating fee award after observing that “plaintiff can be required to segregate its attorney’s fees between successful and unsuccessful claims”); *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 171, 795 P.2d 1143 (1990) (denying fees because “the attorney fee declaration...does not segregate”); *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 514-15, 821 P.2d 1235 (1991) (ordering defendants to “segregate the time dedicated to the legal theories for which fees are allowed”).

Campbell Homes. Segregation is required not only for unsuccessful claims but for duplicative or wasteful efforts and otherwise unproductive time. *Pham v. City of Seattle*, 159 Wn.2d 527, 538-39, 151 P.3d 976 (2007), citing *Bowers*, 100 Wn.2d at 597. For instance, in *Pham*, the Supreme Court upheld the trial court's refusal to award fees for time spent on unsuccessful motions, a complaint that was never filed, failed settlement discussions, an unsuccessful request for a multiplier, and more. 159 Wn.2d at 538-39. Here, the trial court's finding that the unsuccessful claim of improper influence by Campbell Homes was "inseparably intertwined" with issues upon which MRA prevailed was not supported by substantial evidence. RP (8/14/2012) 39; CP 5332-33, FOF 8, 10, 13. MRA invested significant time and money on unproductive efforts to establish the claim of improper influence by Campbell Homes. See CP 5374-79 at ¶¶ 7-9, 10-14, 20-21, 23-28. But this was not the theory on which the trial court held Campbell Homes liable. Segregation is required.

#### **V. RAP 18.1 ATTORNEY'S FEES REQUEST**

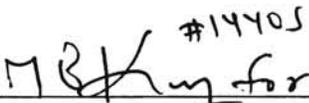
Mukilteo Investors and Campbell Homes request an award of their fees in the trial court and on appeal, under the authority of the fees and costs provision of the Option Agreement, which was the basis for the trial court's award of fees and costs to MRA. CP 5331, FOF 2; Exh. 225 at 8, ¶ 16.

## VI. CONCLUSION

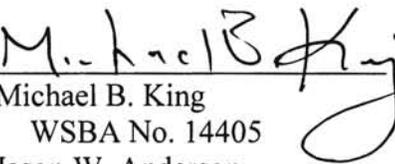
Because the Option Agreement was a mere agreement to agree, this Court should reverse and dismiss MRA's complaint with prejudice and award Mukilteo Investors its fees and costs incurred at trial and on appeal. In the alternative, this Court should vacate the consequential damages award and remand with directions that damages should be limited to delay for which MRA was not responsible, and further reduced to account for expenses that MRA would have incurred if a sale of the Facility had closed. All claims against Campbell Homes should be dismissed, and any fee award retained by MRA should be reduced for its pursuit of baseless claims against Campbell Homes.

RESPECTFULLY SUBMITTED this 20 day of November, 2012.

LARSON BERG & PERKINS, PLLC

By  #14405  
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WSBA No. 13330

CARNEY BADLEY SPELLMAN, P.S.

By   
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*Attorneys for Appellants Mukilteo Investors, L.P. and  
Campbell Homes Construction, Inc.*

***APPELLANTS' OPENING BRIEF: INDEX TO APPENDICES***

<b>Appendix</b>	<b>Sub No./Trial Ex. No.</b>	<b>Date Filed</b>	<b>Document Description</b>	<b>CP Pages/Ex. #</b>
A	211	7/2/2012	Findings of Fact and Conclusions of Law	52-63
B	243	8/28/2012	Amended Findings of Fact and Conclusions of Law	5314-5329
C	242	8/28/2012	Supplemental Findings of Fact and Conclusions of Law for Award of Attorney Fees	5330-5335
D	244	8/28/2012	Decree of Specific Performance and Judgment	5309-5313
E	225	5/8/2012	Option Agreement	Ex. 225 (Excerpt)

# **APPENDIX**

## **A**

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Filed in Open Court

July 2, 2012

SONYA KRASKI  
COUNTY CLERK

By Debbie J. Horn  
Deputy Clerk

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

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

Plaintiff,

v.

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

Defendants.

No. 08-2-07119-5

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

THIS MATTER having come on for trial before the undersigned judge of the  
above court May 7-24 and June 4-6, 2012, the plaintiffs appearing and being represented by  
their attorneys, Ryan, Swanson and Cleveland, PLLC, through Jerry Kindinger and Robert  
R. King, and the defendants appearing and being represented by their attorneys, Larson,  
Berg and Perkins, PLLC, through James A. Perkins, and the court having taken testimony  
from Ron Struthers, Duane Clark, Anthony Gibbons, David Fryday, Mark Mitchell, Keith  
Therrien, Tom Dye, Gene Hiner, Jim Deal, Aaron Brown, and Kris Campbell (by  
deposition) and having reviewed the exhibits admitted into evidence, the legal memoranda  
submitted by the attorneys and the argument of counsel, and being fully advised, the court  
now enters the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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FINDINGS OF FACT

1. In 1997, Ron Struthers and Duane Clark, through their company, Logan Creek, purchased undeveloped real property in the Harbor Pointe area of Mukilteo and subsequently formed Mukilteo Retirement Apartments, LLC (MRA), with the purpose of developing the property into an independent living and assisted living facility for seniors.
2. They secured permits and obtained architectural plans over the next year; but by the spring of 1999 they realized that they were undercapitalized to construct the facility and so contacted Carl Campbell whose construction company, Campbell Homes Construction, Inc., was a leading builder of similar facilities in the northwest.
3. Negotiations with representatives of Campbell Homes continued through the summer months and a contract was entered into in the fall of 1999 for the purchase, construction and lease back of the facility.
4. Campbell Homes' attorney, Keith Therrien of Powers and Therrien, drafted the agreements and formed Mukilteo Investors Limited Partnership (MILP) as the legal entity to purchase, construct and lease back the facility to plaintiff.
5. The general partner of defendant MILP was Campbell Homes Construction, Inc. of which Kris Campbell was then vice president, who oversaw the bookkeeping and represented the defendant MILP through the end of 2007.
6. Ownership of MILP initially consisted of Campbell Construction, Inc. (2%), Kris Campbell (49%) and HD Retirement Investors, LLC (49%), the latter company being equally owned by Gene Hiner (who was to oversee construction) and Jim Deal (who was to be the construction superintendent for the project).
7. MILP secured a construction loan with Bank of America for the purchase and construction of the facility; as a part of the purchase price of roughly \$1.7 million, defendant paid some \$114,000 in outstanding obligations owed by plaintiff for architectural and other fees, and \$400,000 of the purchase price was provided in the form of a promissory note which payments were to be offset by the plaintiff's initial monthly lease payments.
8. During the negotiations leading up to the contracts, plaintiff obtained legal advice from an attorney, Ed Beeksma, who corresponded with them and also with Mr. Therrien.
9. The plaintiff agreed to undertake the expenses of advertizing and marketing the facility and signed a 20-year lease to staff and operate the facility, including responsibility for all upkeep and maintenance.
10. Defendants agreed to purchase the property and construct the facility according to the building plans for which plaintiff had secured permits from the City of Mukilteo.
11. An overarching goal of plaintiff was to be able to purchase the facility from defendant; as a part of their agreement, defendant included an Option Agreement, allowing plaintiff to purchase the facility after eight years.
12. As a part of the contract, the parties contemplated that the construction loan would be replaced by permanent financing and plaintiff agreed to subordinate its rights to any such refinancing obtained by defendant. Because such refinancing could materially affect plaintiff's scheduled lease payments, plaintiff was given a window of 120 days

- 1 to obtain more favorable financing which, in turn, might reduce their monthly lease  
2 payments.
- 3 13. The parties agreed that the purchase price under the Option was to be the highest of  
4 three pricing methods: fair market value for the facility, replacement value as  
5 determined by MILP's appraiser, or the appraised value of the leased facility upon  
6 completion with an annual increase of 3% (which schedule, referred to as Schedule  
7 D, was to be appended to the Option). That schedule was finally provided to plaintiff  
8 several years after completion of the project.
- 9 14. In the event plaintiff exercised their rights under the Option to purchase the facility,  
10 they agreed to be responsible for all of defendant's closing costs.
- 11 15. As constructed, the facility was significantly larger than plaintiff believed the  
12 demographics would then support, but they agreed to the construction, which was  
13 more economical for defendant, in exchange for various concessions, including  
14 forbearance of annual 3% increases in lease payments for the first five years and  
15 because of the value they placed on the option to purchase.
- 16 16. Once plaintiff took possession of the facility, the contract obligated them to waive  
17 any construction defects.
- 18 17. They presented a punch list of defects in construction or appearance to the builder,  
19 Jim Deal, who corrected most of the deficiencies.
- 20 18. However, several significant problems remained, including leakage in some of the  
21 shower stalls for certain of the assisted living units, breaks in the water supply lines  
22 to the building, and insufficient heat caused by a failure to install the heating system  
23 as originally designed.
- 19 19. Plaintiff accepted the facility and undertook to make what repairs could be effected,  
20 as problems arose.
- 21 20. The heating system remains defective, and plaintiff has utilized dozens of individual  
22 space heaters to provide additional heat to some of the living quarters during cold  
23 weather. Work remains to be done to repair the water supply line(s) and leaking  
shower stalls.
- 21 21. Defendant extended its construction loan with Bank of America in 2002, although  
22 there is no evidence that plaintiff was provided advance notice of that. In December  
23 of 2003, defendant replaced that loan with permanent financing through Washington  
Capital Management, Inc. at an interest rate of 6.65%.
- 18 22. The refinance was negotiated by Keith Therrien on behalf of MILP. Kris Campbell  
19 acknowledged that sec. 3.1 of the lease agreement obligated MILP to disclose to  
20 plaintiff the terms of such proposed financing (see his email contained in Ex. 226)  
21 but that was not done until December of 2003. Plaintiff was requested to execute  
22 consents to subordinate their rights to this new loan, which they were told needed to  
23 close by the end of December, 2003. The consent was executed by plaintiff on Dec.  
30, 2003 and the loan closed.
- 21 23. The failure by defendant to timely disclose the terms of the refinance effectively  
22 precluded plaintiff from seeking out more favorable financing. Moreover, while the  
23 balance of the construction financing was approximately \$8.1 million, Mr. Therrien  
negotiated a new \$22.7 million loan, secured by not only the Harbor Pointe property  
but also by three other senior housing properties in Oregon. Included in the refinance  
were terms for substantial prepayment penalties and a 5-year lock-out, which would

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

- 1 preclude conveyance of the Harbor Pointe property to plaintiff at any time prior to  
2 December 31, 2008.
- 3 24. Plaintiff wished to exercise the Option to purchase as soon as possible and believed  
4 the commencement date of the option was 8 years from the date of execution of the  
5 lease agreement, the last signatures to that agreement being notarized on October 20,  
6 1999. However, the agreement also contained language specifying that the Option  
7 could not be exercised until 8 years from the date plaintiff took possession or the date  
8 of issuance of a certificate of occupancy, whichever occurred first. Plaintiff took  
9 possession on or about June 1, 1999, but a letter to them from the general partner  
10 (Ex. 229) suggests the parties agreed upon a commencement date of June 15, 1999,  
11 consistent with the date of issuance of the certificate of occupancy.
- 12 25. Plaintiff was also of the opinion that their purchase of the facility needed to close by  
13 December 1, 2008 or they might forfeit their rights under the Option. That view was  
14 consistent with defendant general partner's understanding of the contract language,  
15 which he set forth in a letter to plaintiff dated February 1, 2006 (Ex. 235).
- 16 26. In his letter, Kris Campbell disclosed that the refinance agreement barred defendant  
17 from closing a sale to plaintiff before December 31, 2008, and he suggested  
18 extending the option. Plaintiff was amenable, but no effort was made by MILP to  
19 extend the Option.
- 20 27. Gene Hiner made a visit to the facility in the spring of 2007, after plaintiff had  
21 indicated that they wished to exercise the Option to purchase the facility; in his  
22 discussions with Mr. Struthers, he suggested that plaintiff agree to an extension of  
23 their lease and a reduction of the 3% annual lease escalator to a more favorable 2%,  
rather than going forward with a purchase of the property.
- 24 28. Believing that the Sched. D pricing information was above market values, plaintiff  
25 attempted to gather information about comparable sales and made inquiries of Kris  
26 Campbell relative to the cost of construction, and they arranged to meet with Kris  
27 and his grandfather, Carl Campbell at their offices in Wenatchee. At that meeting,  
28 they were informed of Carl Campbell's interest in restructuring his assets to  
29 segregate his family's ownership interests from the interests of other investors.  
30 Plaintiff strongly expressed their desire to have the Harbor Pointe facility remain  
31 with the Campbell family assets as they had faith that Carl and his grandson would  
32 treat them fairly.
- 33 29. Plaintiff hoped to close their purchase of the facility by June 15, 2008, or sooner,  
both out of concern that financing costs might increase and also because if the price  
was keyed to the Sched. D values, the price would increase again on that date. They  
expressed that view clearly to Carl and Kris Campbell.
- 34 30. Plaintiff followed up their meeting with an email to Kris Campbell dated October 10,  
2007 (Ex. 65), suggesting that instead of addressing an extension of the Option that  
they work on a purchase and sale agreement to address pricing, financing and a  
closing date.
- 35 31. That email was followed by a letter from plaintiff's counsel dated November 14,  
2007 (Ex. 67) enclosing a notice dated November 12, 2007 (Ex. 66), in which  
plaintiff sought to exercise its rights pursuant to the terms of the Option Agreement.  
The letter expressed some willingness to negotiate a closing date, but also noted that  
time was of the essence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

- 1 32. Defendant did not respond to that notice, which prompted plaintiff's counsel to send  
2 another letter dated December 19, 2007 (Ex. 69) asking defendant MILP to confirm a  
3 purchase price of \$16,024,643 (which reflects the Sched. D purchase price as of June  
4 15, 2008) and noted that plaintiff was in the process of securing financing.
- 5 33. Contemporaneously, plaintiff had secured a preliminary financing commitment from  
6 Prudential Huntoon Paige for a purchase price of \$17,000,000 subject to a valid  
7 purchase and sale agreement, full underwriting analysis and appraisal sufficient to  
8 support the mortgage loan. Without a purchase and sale agreement, it was  
9 impossible for plaintiff to go forward and obtain a firm commitment for such loan.
- 10 34. Defendant replied to counsel's letter through their attorney, Keith Therrien, by letter  
11 dated December 28, 2007 rejecting the attempted exercise of the Option, indicating  
12 that the earliest the Option could be exercised would be June 15, 2008 and inviting  
13 plaintiff to send another notice at that time (Ex. 70).
- 14 35. While Mr. Therrien testified that it would have been impossible to determine a price  
15 for the facility prior to June 15, 2008, his law partner, Les Powers had negotiated a  
16 contract with James A. Brown and Associates dated January 3, 2008 for "Analysis of  
17 the Facility Lease Agreement and Option Agreement to determine the proper method  
18 of determining the Option Purchase Price under the Option Agreement for the assets  
19 subject thereto" (Ex. 246). The agreement was entered into between the appraiser  
20 and LK Partners, LP, which had an ownership interest in defendant MILP and was in  
21 the process of acquiring directly and through other investment entities an ownership  
22 interest estimated at roughly 50% to 74%.
- 23 36. James A. Brown and Associates had provided many appraisals over the years for  
retirement facilities constructed by Carl Campbell or investment groups related to  
those construction projects, and it was the appraisal firm which Mr. Therrien had  
specifically identified in the Option to determine the value of the facility.
37. Plaintiff was not timely informed that James Brown appraisers had been retained and  
was never provided a copy of any report. Aaron Brown testified at trial that no  
working file was maintained for this work and no written report or memorandum was  
prepared, despite contract language which called for written documents to be  
provided to the client and in violation of Uniform Standards of Professional  
Appraisal Practice (USPAP).
38. Another contract was entered into between Powers and Therrien and James A. Brown  
and Associates in May of 2008 and another payment was remitted (Ex. 266). Once  
again, no working file was maintained by the appraiser as required by USPAP,  
according to the testimony of Aaron Brown at trial.
39. Plaintiff's counsel replied by letter dated January 4, 2008 (Ex. 78) reasserting his  
opinion that the Option had been validly exercised and drawing a distinction between  
the triggering date of the execution of the Lease Agreement, October 21, 1999, for  
purposes of determining when the Option could be exercised and the triggering date  
under that Agreement for determining when lease payments would begin, namely  
issuance of the certificate of occupancy or plaintiff taking actual possession, which  
was some eight months after the lease was signed.
40. Mr. Therrien responded by letters dated January 15, 2008 (Ex. 80), January 21, 2008  
(Ex. 81) and February 7, 2008 (Ex. 82), again rejecting plaintiff's position but

- 1 offering to extend the Option window, presumably due to the lock-out which would  
preclude closing prior to December 31, 2008.
- 2 41. Plaintiff thereafter sent a draft purchase and sale agreement for a purchase price of  
\$15,557,906 via email dated February 21, 2008 and inviting further negotiation or  
3 revision "regarding closing dates, etc." (Ex. 84).
- 4 42. Mr. Therrien's partner, Les Powers, responded to that offer by letter dated March 14,  
2008, again rejecting plaintiff's attempt to exercise the Option as premature.
- 5 43. Defendant MILP was well aware that plaintiff was steadfast in its desire to exercise  
the Option and purchase the facility and when there was no forthcoming effort to set  
6 a purchase price, plaintiff filed suit in August of 2008. Plaintiff continued attempts  
to reach agreement thereafter, but the first (and only) proposal by defendant was an  
offer to sell the facility for \$27 million by letter dated November 10, 2008 (Ex. 136).
- 7 44. In June of 2009, plaintiff made another written offer to purchase at a price of \$19  
million (Ex. 143).
- 8 45. Until this court's decision by Judge Wynne of November 30, 2010, the parties  
remained at an impasse with respect to the date upon which the Option could first be  
9 exercised by plaintiff. Judge Wynne determined that the Option period began June  
15, 2008.
- 10 46. While Mr. Struthers and Mr. Clark continued to communicate with Kris Campbell  
during the fall of 2007 and into the spring of 2008, the ownership of MILP was being  
11 restructured by Mr. Therrien. The result of that restructuring was to divest Kris  
Campbell and Campbell Construction, Inc. of its interests in MILP, and Gene Hiner  
12 subsequently conveyed his interest in defendant MILP to LK Partners, a partnership  
consisting of Les Powers and Keith Therrien. The new general partner became  
13 Cimco Properties, a wholly owned entity of Thomas Dye.
- 14 47. As a result of this restructuring, by May 1, 2008, ownership of defendant MILP was  
as follows: Cimco Properties, LLC (1%), HRM Realty, LLC (16%), Kennewick  
15 Holding, LLC (34%), Jim Deal *et ux* (10.7%), Travis Deal Trust (6.9%), Casey Deal  
Trust (6.9%), and LK Partners, LP (24.5%). (Ex. 90)
- 16 48. Mr. Dye met with Mr. Struthers and Mr. Clark in early April of 2008. They  
discussed with him their ongoing desire to purchase the facility and made it clear  
17 that, for them, time was of the essence. Time was *not* of the essence for defendant,  
which was receiving monthly lease payments which came to nearly \$30,000 *per*  
18 *week*. At their initial meeting, Mr. Dye outlined the restructuring of MILP and, at  
plaintiff's request, subsequently confirmed that restructuring and his authority as  
19 general partner by letter (Ex. 99 and 102).
- 20 49. While Mr. Dye repeatedly expressed a desire to be accommodating to plaintiff, and  
acknowledged their concern over price, financing and a closing date, he never  
21 discussed with them a purchase price for the facility. Rather, he requested that they  
meet with him in early May to discuss a "proposal" from the investor group,  
22 defendant MILP. He also indicated that he would try to get a time line for an  
appraisal which plaintiff understood had been requested from James Brown and  
Associates. It's unclear if Mr. Dye was aware that James Brown had already  
23 provided a valuation for the facility to the defendant investors.
50. They met with Mr. Dye on May 6, 2008. He did not discuss a price or a closing date  
or any financing terms. Rather he presented them a proposal which had been drafted

1 by Keith Therrien. Instead of offering to sell the facility to them, MILP offered only  
2 to refinance the facility in a manner that would provide plaintiff with only a 20%  
ownership interest.

- 3 51. Significantly, the drafted proposal reflected an "assumed" fair market value of  
4 \$18,240,000 for the facility. James Brown had earlier communicated a value for the  
5 facility to Powers and Therrien pursuant to the contract entered into by LK Partners  
6 in January of 2008, which had specifically referenced the Option to purchase, but  
7 defendant continued to assert throughout trial that the price under the Option was  
8 unknown until a later appraisal from James Brown and Associates which Mr.  
9 Therrien received in November of 2008. Mr. Therrien confirmed at trial that the  
10 defendant partners believed the value of the Harbor Pointe facility in May of 2008  
11 was the amount referenced in the proposal, yet no offer to sell was extended to  
12 plaintiffs even at that price.
- 13 52. Plaintiff had no interest in this proposal, but Mr. Dye imposed on them to meet with  
14 him again once Keith Therrien had back to his office (Ex. 95).
- 15 53. Mr. Clark believed he and his partner were just being flim-flamed and further  
16 discussions would be useless (Ex. 96).
- 17 54. Plaintiff then engaged an appraisal firm, Tellatin and Short, to determine the fair  
18 market value for the property on May 20 (Ex. 97). They did not inform Mr. Dye that  
19 they were going ahead with their own appraisal.
- 20 55. Mr. Dye persuaded them to meet with him again, and they did so on or about June  
21 20, 2008. Once again, there was no offer from defendant MILP to sell the facility  
22 outright to plaintiff. Mr. Therrien had drafted another proposal, this time to convey a  
23 slightly larger ownership interest (24.5%) to be financed, in part, by a new mortgage  
loan on the property (Ex. 92). This proposal referenced an "assumed" fair market  
value of \$16,750,000, which was more in line with what Mr. Struthers and Mr. Clark  
believed the facility to be worth. Significantly, the proposal included a promise that  
they could purchase the entire facility at the end of another ten years through exercise  
of yet another Option to purchase. Through further negotiations at that meeting, Mr.  
Struthers and Mr. Clark reluctantly agreed to purchase a 40% interest in their Harbor  
Pointe facility with an option to purchase the remaining 60% at the end of another ten  
years. They shook hands and awaited final documents to be drawn up.
56. For the next month and a half, Mr. Dye stalled. Plaintiff continued to email him  
about the status of their agreement. The investors met to discuss that agreement and  
according to Mr. Dye's testimony at trial, they also began looking at replacement  
properties at the end of July, 2008.
57. Mr. Dye met with Mr. Struthers and Mr. Clark again on August 4, 2008 and  
presented another proposal drafted by Mr. Therrien. While that offer included  
acquisition of a 40% ownership in the facility, defendant MILP fundamentally  
renegeed on its agreement by withdrawing the option to purchase the remaining 60%.  
Plaintiff thereafter filed this suit for specific performance.
58. With this court's ruling of November, 2010 establishing that the Option did not  
commence until June 15, 2008, it is clear that defendant MILP was under no duty to  
negotiate a purchase price or set a closing date until after that date. There was also  
nothing to preclude them from doing so, other than the 5-year lock-out which Mr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7

- 1 Therrien had incorporated in the refinance loan with Washington Capital, which may  
2 have prevented a closing before the end of December of 2008.
- 3 59. Plaintiff's counsel argues that defendant breached its duty under para. 18 of the  
4 Option to cooperate with plaintiff to timely effectuate the exercise of their Option.  
5 There were occasions when it appears defendant ignored correspondence from  
6 plaintiff or their attorney over matters of pricing, closing or extension of the Option  
7 term. There were also occasions when plaintiff appeared to ignore correspondence  
8 from defendant MILP, for example when MILP asked for direction about going  
9 forward with the appraisal from James Brown or holding off and when defense  
10 counsel sought agreement that June 15, 2008 would mark the commencement of the  
11 Option window. Given the parties' disagreement about the commencement date for  
12 the Option, I haven't focused on those lapses.
- 13 60. The contract clearly granted plaintiff an opportunity to purchase the Harbor Pointe  
14 retirement facility at the end of eight years, and they clearly sought to do so. For  
15 defendant to argue that a valid written exercise of that Option was never tendered by  
16 plaintiff during the period of the Option is disingenuous, particularly given the  
17 ongoing communications from plaintiff and the filing of this suit before that Option  
18 had expired.
- 19 61. While it is incumbent upon plaintiff to show that it had the ability to perform, which  
20 would include its ability to pay the purchase price, I find that they were able to fully  
21 perform at the time they hoped to close (June 15, 2008). They had a preliminary  
22 financing commitment from Prudential Huntoon Paige for a purchase price of up to  
23 \$17 million, which exceeded the Sched. D pricing information and predated any  
higher appraised value. They were the owners of two successful but smaller  
retirement facilities in Skagit County (Logan Creek and Cap Sante) and they were  
operating this facility successfully and profitably.
62. In the absence of agreement by the parties, this court is called upon to determine the  
purchase price of the facility and set a time frame for plaintiff to secure financing and  
close the transaction.
63. Both parties agree that pricing of the facility should be determined as of June 15,  
2008.
64. The parties' contract specified that the purchase price was to be the highest of either  
fair market value, the Sched. D values inclusive of annual 3% increases (as  
indicated), or replacement cost for the facility.
65. In drafting the contracts, Keith Therrien defined the "Facility" to include "the real  
property, as improved, and the personal property" which would include the building,  
the land and the personalty. It is unclear if the personal property listed on Sched. B  
to the Lease was included or not. Since much of the personal property was  
purchased by plaintiff, it would be incongruous to believe the parties intended that  
plaintiff should be obligated to repurchase their own personal property (see para. 1 of  
Option, Ex. 16).
66. In correspondence to Mr. Therrien when the contracts were being drawn up, Mr.  
Beeksmas pointed out that the term replacement cost was not defined and  
recommended that that concept either be defined or omitted as one of the pricing  
methods (Ex. 7). Notwithstanding his request, and that of Mr. Struthers and Mr.  
Clark in their dealings with Gene Hiner, Mr. Therrien chose not to define

1 "replacement cost" for purposes of setting a purchase price. There is a definition of  
2 "full replacement cost" contained in the Lease and incorporated in the Option as  
3 Exhibit C (Ex. 16); that definition does not include any reference to either the land or  
4 the plaintiff's business, and arguably that section of the Lease relates to fire and  
5 hazard insurance.

6 67. In determining replacement cost, did the parties intend to refer to the cost of a brand  
7 new facility or the construction of a comparable, used building with the construction  
8 defects as noted upon inspection? Would replacement cost include a developer's  
9 "soft costs"? Would it include profit to the contractor? The pricing terms in the  
10 Option (para. 2) said only that this undefined price would be determined by the  
11 appraiser selected by MILP.

12 68. The appraiser retained by MILP for that purpose was Aaron Brown of James A.  
13 Brown and Associates. He testified that the replacement cost language was not  
14 normal language that he deals with in his practice, and he acknowledged that the  
15 contract did not define what was or was not to be included in replacement cost. He  
16 chose not to talk with plaintiff about its understanding of that term, but did talk with  
17 Keith Therrien. When he completed his draft appraisal report in October, 2008, he  
18 sent a copy to Mr. Therrien who made a number of changes. Most significantly, Mr.  
19 Therrien deleted depreciation which the appraiser had initially included and wrote  
20 into the appraiser's report that the then inflated price reflected the *undepreciated*  
21 replacement cost per the Option.

22 69. Mr. Brown abandoned his own independence and integrity and followed Mr.  
23 Therrien's directions to change his final report.

70. At a minimum, there was never a meeting of minds with respect to what was to be  
included in determining replacement cost for the facility. It is therefore impossible to  
give effect to that pricing method and unnecessary for the court to sort out the  
differences of opinion of the different appraisers or their calculations.

71. In addition to the land, the building and the furniture, fixtures and equipment, a  
significant part of the value of the facility is the value of plaintiff's business. At the  
end of the lease, plaintiff would be obligated to leave most of its business behind,  
subject to a sales price for various personal property they had purchased. Each of the  
appraisers indicated that one method for determining fair market value was a  
capitalization approach to the business, in other words valuing the facility by valuing  
the existing business that Mr. Struthers and Mr. Clark had established and projecting  
that value forward. At trial, Mr. Therrien testified that any purchase would include  
the value of plaintiff's existing business, in addition to the improved realty and  
personal property. He acknowledged that he failed to include any reference to  
plaintiff's business as a part of the facility or to including the value of their business  
in calculating a purchase price.

72. This was not an inconsequential omission. Plaintiff offered evidence at trial from an  
expert in business valuation with respect to the presumptive loss of value of their  
business. And it was a cornerstone of the calculations of the appraisers as to fair  
market valuation. Again, because of that omission, I do not find that there was ever a  
meeting of minds as to the inclusion of the value of plaintiff's business for purposes  
of determining fair market value.

- 1 73. The opinion of Aaron Brown was that the fair market value of the facility as of June  
2 15, 2008 was \$24 million.
- 3 74. I chose to disregard his opinions, in their entirety, for a number of reasons. His firm  
4 repeatedly violated USPAP standards by not keeping working files or written  
5 memoranda of oral opinions given to MILP. He chose to upgrade the quality of  
6 construction to "good", disregarding the quality indicated by his own inspector, Mr.  
7 Ivy, and disregarding his firm's determination of a lower quality of construction in  
8 each of two earlier appraisals, which effectively inflated his valuation for purposes of  
9 this Option agreement. If the Marshall and Swift calculations were thought to  
10 underreport actual construction costs, he could have provided some adjustment and  
11 called that out as an "extraordinary assumption" consistent with recognized appraisal  
12 practices. He included soft costs, a contractor profit margin and stabilized operating  
13 expenses, although none of those items were specified in the contract language. He  
14 withdrew his inclusion of depreciation from his draft report to his final version, as  
15 noted above. He ignored his inspector's report of water damage and construction  
16 defects. He added sales tax when the Marshall and Swift reference already included  
17 sales tax in its valuation service guide. He utilized valuation data from October of  
18 2008 in determining a value as of June 15, 2008. He used an effective age of 5 years  
19 for the building, which was actually 8 years old. He used income and expense data  
20 from plaintiff through August, 2008 to determine a value two months *earlier*. He  
21 used an occupancy rate of 93% when the actual occupancy rate was 82%. He  
22 assumed going forward the business was not at any appreciable risk of decline, even  
23 though occupancy had gone down some 8% from 2007 to 2008. The report was not  
generated within the 30-day time called for in the Option. And when his report was  
drafted at the end of October, 2008 and he was told the appraisal was for an effective  
date of June 15, 2008, he simply backdated his report without making any changes.  
His inexplicable explanation at trial was that 2008 was simply a "flat year". If it was  
indeed a flat year for sales of these properties, then how could the value increase  
from \$18,240,000 in May of 2008 to \$24,000,000 a month later?
75. While Aaron Brown and his appraisal firm has sufficient experience, education and  
training and he has some particular expertise in appraising similar retirement  
facilities, I did not find any credibility to his report or testimony at trial.
76. Inclusion of the cost approach in any of the appraisals, as indicated above, includes a  
method whereby the value of plaintiff's business is capitalized, something which was  
not defined in the contract nor agreed to by the parties.
77. It would be appropriate to rely upon the Sched. D value, which as of June 15, 2008  
was listed to be \$16,024,643. However, I choose to value the facility as of June 15,  
2008 to be \$18,725,000.
78. The sales comparison approach referred to by Anthony Gibbons, of ReSolve, whom I  
found to be the most experienced and most credible of the appraisers who testified at  
trial, was found to range from \$18,190,000 to \$19,260,000, with a midpoint of  
\$18,725,000 (Ex.108). The sales comparison approach used by Tellatin and Short  
(Ex. 110) interestingly came to exactly the same amount: \$18,725,000.
79. This has been primarily a contract dispute in which the parties could not agree on the  
purchase price of the facility under the Option, but I also find that defendant MILP

- 1           breached its duty under para. 18 of the Option and the implied covenant of good faith  
and fair dealing.
- 2       80. While what took place prior to June 15, 2008 may have helped to set the stage for the  
3       continued unwillingness of defendant to work with plaintiff so that Mr. Struthers and  
4       Mr. Clark might have been able to purchase their Harbor Pointe facility, the refusal  
5       of defendant after that date to discuss pricing or a closing date, the repeated effort to  
6       lure plaintiff into meetings in which the only discussion was a refinance of the  
7       facility to allow them to acquire a minority interest, the lack of candor or recollection  
8       by Mr. Dye with regard to his efforts to stall and subvert their exercise of rights  
9       under the Option, and the concerted effort of defendant to inflate the purchase price  
10      through submission of the belated and altered appraisal of Aaron Brown,  
11      cumulatively can only be found by the court to have been a deliberate effort to  
12      prevent plaintiff from purchasing the facility.
- 13     81. It was Mr. Beeksma who specifically insisted upon inclusion of an express covenant  
14      of good faith and fair dealing (Ex. 7). Similar language to what he requested is  
15      contained in para. 18 of the Option. And a specific covenant was included at para.  
16      35.12 of the Facility Lease Agreement. However, in his testimony at trial, Keith  
17      Therrien acknowledged the existence of those provisions but said that while there  
18      was talk about that covenant of good faith and fair dealing in the original discussions  
19      he had specifically excluded that covenant from the Option agreement. I conclude  
20      that he really did not perceive a duty of good faith and fair dealing with defendant's  
21      dealings with plaintiff with regard to the Option. Of course, it is elemental that an  
22      implied covenant of good faith and fair dealing is a part of every contract. And this  
23      case underscores the importance of that obligation.
82. From June 15, 2008 until today, plaintiff has faithfully made every lease payment to  
defendant, presumably including annual increases of 3%. Most of those payments  
could have gone toward reducing their underlying mortgage had their attempts to  
purchase the facility not been frustrated by defendant, and it reflects significant  
consequential damages resulting from defendant's breach.
83. While the Option included language that would have allowed defendant to extend the  
closing date, particularly in order to facilitate a like property exchange for tax  
purposes, no closing date was ever discussed, so it also falls to the court to determine  
a reasonable time frame for plaintiffs to secure their financing and close this  
transaction, if they are now able to do so.
84. Plaintiff argued that a closing date should be set out nine months from the court's  
decision, which appears to be a reasonable estimate of the time necessary to arrange  
financing and prepare whatever reports and documents may be needed prior to such  
closing.

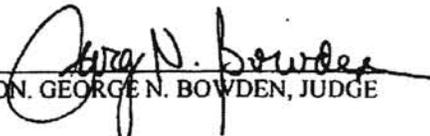
From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. Defendant Mukilteo Investors, LP [MILP] breached its Option contract with plaintiff  
Mukilteo Retirement Apartments, LLC [MRA] as set forth above, which resulted in

- 1 substantial damages to plaintiff in the form of continued lease payments, costs and  
fees.
- 2 2. Liability on the part of defendant Campbell Homes Construction, Inc., which was no  
3 longer a part of the defendant MILP at the time of commencement of the Option on  
4 June 15, 2008 and had no subsequent contractual involvement with plaintiff  
5 thereafter, has not been proven; and that defendant should be dismissed from the  
6 action with prejudice.
- 7 3. The price to plaintiff to purchase the facility, consisting of the land, building and all  
8 related improvements, furniture, fixtures and effects, should be set at \$18,725,000.
- 9 4. All lease payments made by plaintiff from June 15, 2008 to July 15, 2012 should be  
10 deducted from that purchase price.
- 11 5. Plaintiff should have nine months from July 15, 2012 in which to secure financing,  
12 obtain reports and draft whatever documents may be needed to close the purchase of  
13 the facility.
- 14 6. Closing should occur on the earliest date that plaintiff is able to do so, and defendant  
15 MILP shall cooperate in good faith with them to close the sale at such earliest  
16 opportunity.
- 17 7. Plaintiff will continue to be obligated to defendant for lease payments from July 15,  
18 2012 forward to such date of closing, at the current scheduled leasehold payment as  
19 of June 15, 2012, and such payments going forward should not be deducted from the  
20 purchase price.
- 21 8. Defendant MILP should be obligated for any prepayment penalty which may be  
22 assessed by Washington Capital because of the failure to timely disclose to plaintiff  
23 the terms of that refinance and the inclusion of such prepayment penalties.
9. The court should retain jurisdiction to extend the closing if circumstances warrant  
and upon such terms as may be warranted.
10. The court should retain jurisdiction to compute and award damages to plaintiff and,  
if requested, to release them from any further obligations under the Facility Lease  
Agreement in the event that they are unable to obtain financing sufficient to close  
this purchase, given the changed circumstances in the market from June 15, 2008 to  
the present.
11. The court should retain jurisdiction to award attorney fees and costs, subject to  
further briefing and argument by counsel.
12. In that regard, the court concludes that plaintiff is the prevailing party, but defendant  
Campbell Homes Construction has also prevailed in its defense of this action; and the  
court also notes the contract contains provisions for both attorney fees and binding  
arbitration. Finally, the court also notes that defendant MILP prevailed, in part, on  
summary judgment with respect to its position that the Option did not commence  
until June 15, 2008.

DATED this 2<sup>nd</sup> day of July, 2012.

  
HON. GEORGE N. BOWDEN, JUDGE

# **APPENDIX**

## **B**

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SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

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

Plaintiff,

v.

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

Defendants.

NO. 08-2-07119-5

AMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

THIS MATTER having come on for trial before the undersigned judge of the above court May 7-24 and June 4-6, 2012, the plaintiffs appearing and being represented by their attorneys, Ryan, Swanson and Cleveland, PLLC, through Jerry Kindinger and Robert R. King, and the defendants appearing and being represented by their attorneys, Larson, Berg and Perkins, PLLC, through James A. Perkins, and the court having taken testimony from Ron Struthers, Duane Clark, Anthony Gibbons, David Fryday, Mark Mitchell, Keith Therrien, Tom Dye, Gene Hiner, Jim Deal, Aaron Brown, and Kris Campbell (by deposition) and having reviewed the exhibits admitted into evidence, the legal memoranda submitted by the attorneys and the argument of counsel, and being fully advised, the court now enters the following:

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 1

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**FINDINGS OF FACT**

1. In 1997, Ron Struthers and Duane Clark, through their company, Logan Creek, purchased undeveloped real property in the Harbor Pointe area of Mukilteo and subsequently formed Mukilteo Retirement Apartments, LLC ("MRA"), with the purpose of developing the property into an independent living and assisted living facility for seniors.
2. They secured permits and obtained architectural plans over the next year, but by the spring of 1999 they realized that they were undercapitalized to construct the facility and so contacted Carl Campbell whose construction company, Campbell Homes Construction, Inc., was a leading builder of similar facilities in the northwest.
3. Negotiations with representatives of Campbell Homes continued through the summer months and a contract was entered into in the fall of 1999 for the purchase, construction and lease back of the facility.
4. Campbell Homes' attorney, Keith Therrien of Powers and Therrien, drafted the agreements and formed Mukilteo Investors Limited Partnership ("MILP") as the legal entity to purchase, construct and lease back the facility to plaintiff.
5. The general partner of defendant MILP was Campbell Homes Construction, Inc. of which Kris Campbell was then vice president, who oversaw the bookkeeping and represented the defendant MILP through the end of 2007.
6. Ownership of MILP initially consisted of Campbell Construction, Inc. (2%), Kris Campbell (49%) and HD Retirement Investors, LLC (49%), the latter company being equally owned by Gene Hiner (who was to oversee construction) and Jim Deal (who was to be the construction superintendent for the project).
7. MILP secured a construction loan with Bank of America for the purchase and construction of the facility; as a part of the purchase price of roughly \$1.7 million, defendant paid some \$114,000 in outstanding obligations owed by plaintiff for architectural and other fees, and \$400,000 of the purchase price was provided in the form of a promissory note which payments were to be offset by the plaintiff's initial monthly lease payments.
8. During the negotiations leading up to the contracts, plaintiff obtained legal advice from an attorney, Ed Beeksma, who corresponded with them and also with Mr. Therrien.
9. The plaintiff agreed to undertake the expenses of advertising and marketing the facility and signed a 20-year lease to staff and operate the facility, including

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 2

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responsibility for all upkeep and maintenance.

10. Defendants agreed to purchase the property and construct the facility according to the building plans for which plaintiff had secured permits from the City of Mukilteo.
11. An overarching goal of plaintiff was to be able to purchase the facility from defendant; as a part of their agreement, defendant included an Option Agreement, allowing plaintiff to purchase the facility after eight years.
12. As a part of the contract, the parties contemplated that the construction loan would be replaced by permanent financing and plaintiff agreed to subordinate its rights to any such refinancing obtained by defendant. Because such refinancing could materially affect plaintiff's scheduled lease payments, plaintiff was given a window of 120 days to obtain more favorable financing which, in turn, might reduce their monthly lease payments.
13. The parties agreed that the purchase price under the Option was to be the highest of three pricing methods: fair market value for the facility, replacement value as determined by MILP's appraiser, or the appraised value of the leased facility upon completion with an annual increase of 3% (which schedule, referred to as Schedule D, was to be appended to the Option). That schedule was finally provided to plaintiff several years after completion of the project.
14. In the event plaintiff exercised their rights under the Option to purchase the facility, they agreed to be responsible for all of defendant's closing costs.
15. As constructed, the facility was significantly larger than plaintiff believed the demographics would then support, but they agreed to the construction, which was more economical for defendant, in exchange for various concessions, including forbearance of annual 3% increases in lease payments for the first five years and because of the value they placed on the option to purchase.
16. Once plaintiff took possession of the facility, the contract obligated them to waive any construction defects.
17. They presented a punch list of defects in construction or appearance to the builder, Jim Deal, who corrected most of the deficiencies.
18. However, several significant problems remained, including leakage in some of the shower stalls for certain of the assisted living units, breaks in the water supply lines to the building, and insufficient heat caused by a failure to install the heating system as originally designed.

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 3

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- 1 19. Plaintiff accepted the facility and undertook to make what repairs could be  
2 effected, as problems arose.
- 3 20. The heating system remains defective, and plaintiff has utilized dozens of  
4 individual space heaters to provide additional heat to some of the living  
5 quarters during cold weather. Work remains to be done to repair the water  
6 supply line(s) and leaking shower stalls.
- 7 21. Defendant extended its construction loan with Bank of America in 2002,  
8 although there is no evidence that plaintiff was provided advance notice of  
9 that. In December of 2003, defendant replaced that loan with permanent  
10 financing through Washington Capital Management, Inc. at an interest rate of  
11 6.65%.
- 12 22. The refinance was negotiated by Keith Therrien on behalf of MILP. Kris  
13 Campbell acknowledged that sec. 3.1 of the lease agreement obligated MILP to  
14 disclose to plaintiff the terms of such proposed financing (see his email  
15 contained in Ex. 226) but that was not done until December of 2003. Plaintiff  
16 was requested to execute consents to subordinate their rights to this new loan,  
17 which they were told needed to close by the end of December, 2003. The  
18 consent was executed by plaintiff on Dec. 30, 2003 and the loan closed.
- 19 23. The failure by defendant to timely disclose the terms of the refinance  
20 effectively precluded plaintiff from seeking out more favorable financing.  
21 Moreover, while the balance of the construction financing was approximately  
22 \$8.1 million, Mr. Therrien negotiated a new \$22.7 million loan, secured by not  
23 only the Harbor Pointe property but also by three other senior housing  
24 properties in Oregon. Included in the refinance were terms for substantial  
25 prepayment penalties and a 5-year lock-out, which would preclude conveyance  
26 of the Harbor Pointe property to plaintiff at any time prior to December 31,  
2008.
24. Plaintiff wished to exercise the Option to purchase as soon as possible and  
believed the commencement date of the option was 8 years from the date of  
execution of the lease agreement, the last signatures to that agreement being  
notarized on October 20, 1999. However, the agreement also contained  
language specifying that the Option could not be exercised until 8 years from  
the date plaintiff took possession or the date of issuance of a certificate of  
occupancy, whichever occurred first. Plaintiff took possession on or about June  
1, 2000, but a letter to them from the general partner (Ex. 229) suggests the  
parties agreed upon a commencement date of June 15, 2000, consistent with  
the date of issuance of the certificate of occupancy.

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 4

09/09/02

- 1 25. Plaintiff was also of the opinion that their purchase of the facility needed to  
2 close by December 1, 2008 or they might forfeit their rights under the Option.  
3 That view was consistent with defendant general partner's understanding of the  
4 contract language, which he set forth in a letter to plaintiff dated February 1,  
5 2006 (Ex. 235).
- 6 26. In his letter, Kris Campbell disclosed that the refinance agreement barred  
7 defendant from closing a sale to plaintiff before December 31, 2008, and he  
8 suggested extending the option. Plaintiff was amenable, but no effort was made  
9 by MILP to extend the Option.
- 10 27. Gene Hiner made a visit to the facility in the spring of 2007, after plaintiff had  
11 indicated that they wished to exercise the Option to purchase the facility; in his  
12 discussions with Mr. Struthers, he suggested that plaintiff agree to an extension  
13 of their lease and a reduction of the 3% annual lease escalator to a more  
14 favorable 2%, rather than going forward with a purchase of the property.
- 15 28. Believing that the Sched. D pricing information was above market values,  
16 plaintiff attempted to gather information about comparable sales and made  
17 inquiries of Kris Campbell relative to the cost of construction, and they  
18 arranged to meet with Kris and his grandfather, Carl Campbell at their offices  
19 in Wenatchee. At that meeting, they were informed of Carl Campbell's interest  
20 in restructuring his assets to segregate his family's ownership interests from  
21 the interests of other investors. Plaintiff strongly expressed their desire to have  
22 the Harbor Pointe facility remain with the Campbell family assets as they had  
23 faith that Carl and his grandson would treat them fairly.
- 24 29. Plaintiff hoped to close their purchase of the facility by June 15, 2008, or  
25 sooner, both out of concern that financing costs might increase and also  
26 because the next scheduled 3% rent increase was to occur on June 15, 2008.  
They expressed that view clearly to Carl and Kris Campbell.
30. Plaintiff followed up their meeting with an email to Kris Campbell dated  
October 10, 2007 (Ex. 65), suggesting that instead of addressing an extension  
of the Option that they work on a purchase and sale agreement to address  
pricing, financing and a closing date.
31. That email was followed by a letter from plaintiff's counsel dated November  
14, 2007 (Ex. 67) enclosing a notice dated November 12, 2007 (Ex. 66), in  
which plaintiff sought to exercise its rights pursuant to the terms of the Option  
Agreement. The letter expressed some willingness to negotiate a closing date,  
but also noted that time was of the essence.

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 5

09/07/02

- 1 32. Defendant did not respond to that notice, which prompted plaintiff's counsel to  
2 send another letter dated December 19, 2007 (Ex. 69) asking defendant MILP  
3 to confirm a purchase price of \$16,024,643 (which reflects the Sched. D  
4 purchase price as of June 15, 2008) and noted that plaintiff was in the process  
5 of securing financing.
- 6 33. Contemporaneously, plaintiff had secured a preliminary financing commitment  
7 from Prudential Huntoon Paige for a purchase price of \$17,000,000 subject to  
8 a valid purchase and sale agreement, full underwriting analysis and appraisal  
9 sufficient to support the mortgage loan. Without a purchase and sale  
10 agreement, it was impossible for plaintiff to go forward and obtain a firm  
11 commitment for such loan.
- 12 34. Defendant replied to counsel's letter through their attorney, Keith Therrien, by  
13 letter dated December 28, 2007 rejecting the attempted exercise of the Option,  
14 indicating that the earliest the Option could be exercised would be June 15,  
15 2008 and inviting plaintiff to send another notice at that time (Ex. 70).
- 16 35. While Mr. Therrien testified that it would have been impossible to determine a  
17 price for the facility prior to June 15, 2008, his law partner, Les Powers had  
18 negotiated a contract with James A. Brown and Associates dated January 3,  
19 2008 for "Analysis of the Facility Lease Agreement and Option Agreement to  
20 determine the proper method of determining the Option Purchase Price under  
21 the Option Agreement for the assets subject thereto" (Ex. 246). The agreement  
22 was entered into between the appraiser and LK Partners, LP, which had an  
23 ownership interest in defendant MILP and was in the process of acquiring  
24 directly and through other investment entities an ownership interest estimated  
25 at roughly 50% to 74%.
- 26 36. James A. Brown and Associates had provided many appraisals over the years  
for retirement facilities constructed by Carl Campbell or investment groups  
related to those construction projects, and it was the appraisal firm which Mr.  
Therrien had specifically identified in the Option to determine the value of the  
facility.
- 37. Plaintiff was not timely informed that James Brown appraisers had been  
retained and was never provided a copy of any report. Aaron Brown testified at  
trial that no working file was maintained for this work and no written report or  
memorandum was prepared, despite contract language which called for written  
documents to be provided to the client and in violation of Uniform Standards  
of Professional Appraisal Practice (USPAP).

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 6

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- 1 38. Another contract was entered into between Powers and Therrien and James A.  
2 Brown and Associates in May of 2008 and another payment was remitted (Ex.  
3 266). Once again, no working file was maintained by the appraiser as required  
4 by USPAP, according to the testimony of Aaron Brown at trial.
- 5 39. Plaintiff's counsel replied by letter dated January 4, 2008 (Ex. 78) reasserting  
6 his opinion that the Option had been validly exercised and drawing a  
7 distinction between the triggering date of the execution of the Lease  
8 Agreement, October 21, 1999, for purposes of determining when the Option  
9 could be exercised and the triggering date under that Agreement for  
10 determining when lease payments would begin, namely issuance of the  
11 certificate of occupancy or plaintiff taking actual possession, which was some  
12 eight months after the lease was signed.
- 13 40. Mr. Therrien responded by letters dated January 15, 2008 (Ex. 80), January 21,  
14 2008 (Ex. 81) and February 7, 2008 (Ex. 82), again rejecting plaintiff's  
15 position but offering to extend the Option window, presumably due to the lock-  
16 out which would preclude closing prior to December 31, 2008.
- 17 41. Plaintiff thereafter sent a draft purchase and sale agreement for a purchase  
18 price of \$15,557,906 via email dated February 21, 2008 and inviting further  
19 negotiation or revision "regarding closing dates, etc." (Ex. 84).
- 20 42. Mr. Therrien's partner, Les Powers, responded to that offer by letter dated  
21 March 14, 2008, again rejecting plaintiff's attempt to exercise the Option as  
22 premature.
- 23 43. Defendant MILP was well aware that plaintiff was steadfast in its desire to  
24 exercise the Option and purchase the facility and when there was no  
25 forthcoming effort to set a purchase price, plaintiff filed suit in August of 2008.  
26 Plaintiff continued attempts to reach agreement thereafter, but the first (and  
only) proposal by defendant was an offer to sell the facility for \$27 million by  
letter dated November 10, 2008 (Ex. 136).
- 44. In June of 2009, plaintiff made another written offer to purchase at a price of  
\$19 million (Ex. 143).
- 45. Until this court's decision by Judge Wynne of November 30, 2010, the parties  
remained at an impasse with respect to the date upon which the Option could  
first be exercised by plaintiff. Judge Wynne determined that the Option period  
began June 15, 2008.
- 46. While Mr. Struthers and Mr. Clark continued to communicate with Kris  
Campbell during the fall of 2007 and into the spring of 2008, the ownership of  
MILP was being restructured by Mr. Therrien. The result of that restructuring

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 7

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1 was to divest Kris Campbell and Campbell Construction, Inc. of its interests in  
2 MILP, and Gene Hiner subsequently conveyed his interest in defendant MILP  
3 to LK Partners, a partnership consisting of Les Powers and Keith Therrien. The  
4 new general partner became Cimco Properties, a wholly owned entity of  
5 Thomas Dyc.

6 47. As a result of this restructuring, by May 1, 2008, ownership of defendant  
7 MILP was as follows: Cimco Properties, LLC (1%), HRM Realty, LLC (16%),  
8 Kennewick Holding, LLC (34%), Jim Deal *et ux* (10.7%), Travis Deal Trust  
9 (6.9%), Casey Deal Trust (6.9%), and LK Partners, LP (24.5%). (Ex. 90)

10 48. Mr. Dyc met with Mr. Struthers and Mr. Clark in early April of 2008. They  
11 discussed with him their ongoing desire to purchase the facility and made it  
12 clear that, for them, time was of the essence. Time was *not* of the essence for  
13 defendant, which was receiving monthly lease payments which came to nearly  
14 \$30,000 *per week*. At their initial meeting, Mr. Dyc outlined the restructuring  
15 of MILP and, at plaintiff's request, subsequently confirmed that restructuring  
16 and his authority as general partner by letter (Ex. 99 and 102).

17 49. While Mr. Dyc repeatedly expressed a desire to be accommodating to plaintiff,  
18 and acknowledged their concern over price, financing and a closing date, he  
19 never discussed with them a purchase price for the facility. Rather, he  
20 requested that they meet with him in early May to discuss a "proposal" from  
21 the investor group, defendant MILP. He also indicated that he would try to get  
22 a time line for an appraisal which plaintiff understood had been requested from  
23 James Brown and Associates. It's unclear if Mr. Dyc was aware that James  
24 Brown had already provided a valuation for the facility to the defendant  
25 investors.

26 50. They met with Mr. Dyc on May 6, 2008. He did not discuss a price or a closing  
date or any financing terms. Rather he presented them a proposal which had  
been drafted by Keith Therrien. Instead of offering to sell the facility to them,  
MILP offered only to refinance the facility in a manner that would provide  
plaintiff with only a 20% ownership interest.

51. Significantly, the drafted proposal reflected an "assumed" fair market value of  
\$18,240,000 for the facility. James Brown had earlier communicated a value  
for the facility to Powers and Therrien pursuant to the contract entered into by  
LK Partners in January of 2008, which had specifically referenced the Option  
to purchase, but defendant continued to assert throughout trial that the price  
under the Option was unknown until a later appraisal from James Brown and  
Associates which Mr. Therrien received in November of 2008. Mr. Therrien  
confirmed at trial that the defendant partners believed the value of the Harbor  
Pointe facility in May of 2008 was the amount referenced in the proposal, yet  
no offer to sell was extended to plaintiffs even at that price.

- 1 52. Plaintiff had no interest in this proposal, but Mr. Dye imposed on them to meet  
2 with him again once Keith Therrien had back to his office (Ex. 95).
- 3 53. Mr. Clark believed he and his partner were just being flim-flamed and further  
4 discussions would be useless (Ex. 96).
- 5 54. Plaintiff then engaged an appraisal firm, Tcclatin and Short, to determine the  
6 fair market value for the property on May 20 (Ex. 97). They did not inform Mr.  
7 Dye that they were going ahead with their own appraisal.
- 8 55. Mr. Dye persuaded them to meet with him again, and they did so on or about  
9 June 20, 2008. Once again, there was no offer from defendant MILP to sell the  
10 facility outright to plaintiff. Mr. Therrien had drafted another proposal, this  
11 time to convey a slightly larger ownership interest (24.5%) to be financed, in  
12 part, by a new mortgage loan on the property (Ex. 92). This proposal  
13 referenced an "assumed" fair market value of \$16,750,000, which was more in  
14 line with what Mr. Struthers and Mr. Clark believed the facility to be worth.  
15 Significantly, the proposal included a promise that they could purchase the  
16 entire facility at the end of another ten years through exercise of yet another  
17 Option to purchase. Through further negotiations at that meeting, Mr. Struthers  
18 and Mr. Clark reluctantly agreed to purchase a 40% interest in their Harbor  
19 Pointe facility with an option to purchase the remaining 60% at the end of  
20 another ten years. They shook hands and awaited final documents to be drawn  
21 up.
- 22 56. For the next month and a half, Mr. Dye stalled. Plaintiff continued to email  
23 him about the status of their agreement. The investors met to discuss that  
24 agreement and according to Mr. Dye's testimony at trial, they also began  
25 looking at replacement properties at the end of July, 2008.
- 26 57. On August 4, 2008, Mr. Dye sent Mr. Struthers and Mr. Clark another proposal  
drafted by Mr. Therrien. While that offer included acquisition of a 40%  
ownership in the facility, defendant MILP fundamentally renege on its  
agreement by withdrawing the option to purchase the remaining 60%. Plaintiff  
thereafter filed this suit for specific performance.
58. With this court's ruling of November, 2010 establishing that the Option did not  
commence until June 15, 2008, it is clear that defendant MILP was under no  
duty to negotiate a purchase price or set a closing date until after that date.  
There was also nothing to preclude them from doing so, other than the 5-year  
lock-out which Mr. Therrien had incorporated in the refinance loan with  
Washington Capital, which may have prevented a closing before the end of  
December of 2008.

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 9

06/07/08 02

- 1 59. Plaintiff's counsel argues that defendant breached its duty under para. 18 of the  
2 Option to cooperate with plaintiff to timely effectuate the exercise of their  
3 Option. There were occasions when it appears defendant ignored  
4 correspondence from plaintiff or their attorney over matters of pricing, closing  
5 or extension of the Option term. There were also occasions when plaintiff  
6 appeared to ignore correspondence from defendant MILP, for example when  
7 MILP asked for direction about going forward with the appraisal from James  
8 Brown or holding off and when defense counsel sought agreement that June  
9 15, 2008 would mark the commencement of the Option window. Given the  
10 parties' disagreement about the commencement date for the Option, I haven't  
11 focused on those lapses.
- 12 60. The contract clearly granted plaintiff an opportunity to purchase the Harbor  
13 Pointe retirement facility at the end of eight years, and they clearly sought to  
14 do so. For defendant to argue that a valid written exercise of that Option was  
15 never tendered by plaintiff during the period of the Option is disingenuous,  
16 particularly given the ongoing communications from plaintiff and the filing of  
17 this suit before that Option had expired.
- 18 61. While it is incumbent upon plaintiff to show that it had the ability to perform,  
19 which would include its ability to pay the purchase price, I find that they were  
20 able to fully perform at the time they hoped to close (June 15, 2008). They had  
21 a preliminary financing commitment from Prudential Huntoon Paige for a  
22 purchase price of up to \$17 million, which exceeded the Sched. D pricing  
23 information and predated any higher appraised value. They were the owners of  
24 two successful but smaller retirement facilities in Skagit County (Logan Creek  
25 and Cap Sante) and they were operating this facility successfully and  
26 profitably.
62. In the absence of agreement by the parties, this court is called upon to  
determine the purchase price of the facility and set a time frame for plaintiff to  
secure financing and close the transaction.
63. Both parties agree that pricing of the facility should be determined as of June  
15, 2008.
64. The parties' contract specified that the purchase price was to be the highest of  
either fair market value, the Sched. D values inclusive of annual 3% increases  
(as indicated), or replacement cost for the facility.
65. In drafting the contracts, Keith Therrien defined the "Facility" to include "the  
real property, as improved, and the personal property" which would include the  
building, the land and the personalty. It is unclear if the personal property  
listed on Sched. B to the Lease was included or not. Since much of the  
personal property was purchased by plaintiff, it would be incongruous to

1 believe the parties intended that plaintiff should be obligated to repurchase  
2 their own personal property (see para. 1 of Option, Ex. 16).

3 66. In correspondence to Mr. Therrien when the contracts were being drawn up,  
4 Mr. Beeksma pointed out that the term replacement cost was not defined and  
5 recommended that that concept either be defined or omitted as one of the  
6 pricing methods (Ex. 7). Notwithstanding his request, and that of Mr. Struthers  
7 and Mr. Clark in their dealings with Gene Hiner, Mr. Therrien chose not to  
8 define "replacement cost" for purposes of setting a purchase price. There is a  
9 definition of "full replacement cost" contained in the Lease and incorporated in  
10 the Option as Exhibit C (Ex. 16); that definition does not include any reference  
11 to either the land or the plaintiffs business, and arguably that section of the  
12 Lease relates to fire and hazard insurance.

13 67. In determining replacement cost, did the parties intend to refer to the cost of a  
14 brand new facility or the construction of a comparable, used building with the  
15 construction defects as noted upon inspection? Would replacement cost include  
16 a developer's "soft costs"? Would it include profit to the contractor? The  
17 pricing terms in the Option (para. 2) said only that this undefined price would  
18 be determined by the appraiser selected by MILP.

19 68. The appraiser retained by MILP for that purpose was Aaron Brown of James  
20 A. Brown and Associates. He testified that the replacement cost language was  
21 not normal language that he deals with in his practice, and he acknowledged  
22 that the contract did not define what was or was not to be included in  
23 replacement cost. He chose not to talk with plaintiff about its understanding of  
24 that term, but did talk with Keith Therrien. When he completed his draft  
25 appraisal report in October, 2008, he sent a copy to Mr. Therrien who made a  
26 number of changes. Most significantly, Mr. Therrien deleted depreciation  
which the appraiser had initially included and wrote into the appraiser's report  
that the then inflated price reflected the *undepreciated* replacement cost per the  
Option.

69. Mr. Brown abandoned his own independence and integrity and followed Mr.  
Therrien's directions to change his final report.

70. At a minimum, there was never a meeting of minds with respect to what was  
to be included in determining replacement cost for the facility. It is therefore  
impossible to give effect to that pricing method and unnecessary for the court  
to sort out the differences of opinion of the different appraisers or their  
calculations.

71. In addition to the land, the building and the furniture, fixtures and equipment, a  
significant part of the value of the facility is the value of plaintiffs business. At  
the end of the lease, plaintiff would be obligated to leave most of its business

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 11

000770 02

1 behind, subject to a sales price for various personal property they had  
2 purchased. Each of the appraisers indicated that one method for determining  
3 fair market value was a capitalization approach to the business, in other words  
4 valuing the facility by valuing the existing business that Mr. Struthers and Mr.  
5 Clark had established and projecting that value forward. At trial, Mr. Therricn  
6 testified that any purchase would include the value of plaintiff's existing  
7 business, in addition to the improved realty and personal property. He  
8 acknowledged that he failed to include any reference to plaintiff's business as a  
9 part of the facility or to including the value of their business in calculating a  
10 purchase price.

11 72. This was not an inconsequential omission. Plaintiff offered evidence at trial  
12 from an expert in business valuation with respect to the presumptive loss of  
13 value of their business. And it was a cornerstone of the calculations of the  
14 appraisers as to fair market valuation. Again, because of that omission, I do not  
15 find that there was ever a meeting of minds as to the inclusion of the value of  
16 plaintiff's business for purposes of determining fair market value.

17 73. The opinion of Aaron Brown was that the fair market value of the facility as of  
18 June 15, 2008 was \$24 million.

19 74. I chose to disregard his opinions, in their entirety, for a number of reasons. His  
20 firm repeatedly violated USPAP standards by not keeping working files or  
21 written memoranda of oral opinions given to MILP. He chose to upgrade the  
22 quality of construction to "good", disregarding the quality indicated by his own  
23 inspector, Mr. Ivy, and disregarding his firm's determination of a lower quality  
24 of construction in each of two earlier appraisals, which effectively inflated his  
25 valuation for purposes of this Option agreement. If the Marshall and Swift  
26 calculations were thought to underreport actual construction costs, he could  
have provided some adjustment and called that out as an "extraordinary  
assumption" consistent with recognized appraisal practices. He included soft  
costs, a contractor profit margin and stabilized operating expenses, although  
none of those items were specified in the contract language. He withdrew his  
inclusion of depreciation from his draft report to his final version, as noted  
above. He ignored his inspector's report of water damage and construction  
defects. He added sales tax when the Marshall and Swift reference already  
included sales tax in its valuation service guide. He utilized valuation data  
from October of 2008 in determining a value as of June 15, 2008. He used an  
effective age of 5 years for the building, which was actually 8 years old. He  
used income and expense data from plaintiff through August, 2008 to  
determine a value two months *earlier*. He used an occupancy rate of 93%  
when the actual occupancy rate was 82%. He assumed going forward the  
business was not at any appreciable risk of decline, even though occupancy  
had gone down some 8% from 2007 to 2008. The report was not generated

1 within the 30-day time called for in the Option. And when his report was  
2 drafted at the end of October, 2008 and he was told the appraisal was for an  
3 effective date of June 15, 2008, he simply backdated his report without making  
4 any changes. His inexplicable explanation at trial was that 2008 was simply a  
5 "flat year". If it was indeed a flat year for sales of these properties, then how  
6 could the value increase from \$18,240,000 in May of 2008 to \$24,000,000 a  
7 month later?

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75. While Aaron Brown and his appraisal firm has sufficient experience, education  
and training and he has some particular expertise in appraising similar  
retirement facilities, I did not find any credibility to his report or testimony at  
trial.

76. Inclusion of the cost approach in any of the appraisals, as indicated above,  
includes a method whereby the value of plaintiff's business is capitalized,  
something which was not defined in the contract nor agreed to by the parties.

77. It would be appropriate to rely upon the Sched. D value, which as of June 15,  
2008 was listed to be \$16,024,643. However, I choose to value the facility as  
of June 15, 2008 to be \$18,725,000.

78. The sales comparison approach referred to by Anthony Gibbons, of ReSolve,  
whom I found to be the most experienced and most credible of the appraisers  
who testified at trial, was found to range from \$18,190,000 to \$19,260,000,  
with a midpoint of \$18,725,000 (Ex. 108). The sales comparison approach used  
by Tellatin and Short (Ex. 110) interestingly came to exactly the same amount:  
\$18,725,000.

79. This has been primarily a contract dispute in which the parties could not agree  
on the purchase price of the facility under the Option, but I also find that  
defendant MILP breached its duty under para. 18 of the Option and the implied  
covenant of good faith and fair dealing.

80. While what took place prior to June 15, 2008 may have helped to set the stage  
for the continued unwillingness of defendant to work with plaintiff so that Mr.  
Struthers and Mr. Clark might have been able to purchase their Harbor Pointe  
facility, the refusal of defendant after that date to discuss pricing or a closing  
date, the repeated effort to lure plaintiff into meetings in which the only  
discussion was a refinance of the facility to allow them to acquire a minority  
interest, the lack of candor or recollection by Mr. Dye with regard to his efforts  
to stall and subvert their exercise of rights under the Option, and the concerted  
effort of defendant to inflate the purchase price through submission of the  
belated and altered appraisal of Aaron Brown, cumulatively can only be found  
by the court to have been a deliberate effort to prevent plaintiff from  
purchasing the facility.

AMENDED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 13

666970 03

1 81. It was Mr. Becksma who specifically insisted upon inclusion of an express  
2 covenant of good faith and fair dealing (Ex. 7). Similar language to what he  
3 requested is contained in para. 18 of the Option. And a specific covenant was  
4 included at para. 35.12 of the Facility Lease Agreement. However, in his  
5 testimony at trial, Keith Therrien acknowledged the existence of those  
6 provisions but said that while there was talk about that covenant of good faith  
7 and fair dealing in the original discussions he had specifically excluded that  
8 covenant from the Option agreement. I conclude that he really did not perceive  
9 a duty of good faith and fair dealing with defendant's dealings with plaintiff  
10 with regard to the Option. Of course, it is elemental that an implied covenant  
11 of good faith and fair dealing is a part of every contract. And this case  
12 underscores the importance of that obligation.

13 82. Plaintiff performed all of its obligations under the Option agreement in good  
14 faith. From June 15, 2008 until today, plaintiff has faithfully made every lease  
15 payment to defendant, presumably including annual increases of 3%. Most of  
16 those payments could have gone toward reducing their underlying mortgage  
17 had their attempts to purchase the facility not been frustrated by defendant, and  
18 it reflects significant consequential damages resulting from defendant's breach.

19 83. While the Option included language that would have allowed defendant to  
20 extend the closing date, particularly in order to facilitate a like property  
21 exchange for tax purposes, no closing date was ever discussed, so it also falls  
22 to the court to determine a reasonable time frame for plaintiffs to secure their  
23 financing and close this transaction, if they are now able to do so.

24 84. Plaintiff argued that a closing date should be set out nine months from the  
25 court's decision, which appears to be a reasonable estimate of the time  
26 necessary to arrange financing and prepare whatever reports and documents  
may be needed prior to such closing.

From the foregoing Findings of Fact, the Court now enters the following:

#### CONCLUSIONS OF LAW

1. Defendant Mukilteo Investors, L.P. ["MILP"] breached its Option contract with plaintiff Mukilteo Retirement Apartments, L.L.C. ["MRA"] as set forth above, which resulted in substantial damages to plaintiff in the form of continued lease payments, costs and fees.
2. As the general partner that signed the Option contract on behalf of MILP, defendant Campbell Homes Construction, Inc. is jointly and severally liable for MILP's breach. This is true even though Campbell Homes Construction, Inc. withdrew from the partnership in May 2008. A general partner remains

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jointly and severally liable on all contractual partnership obligations entered into as general partner of the limited partnership even after the general partner withdraws from the partnership.

3. Plaintiff is entitled to the remedy of specific performance. The facility is unique and integral to the plaintiff's current business and no adequate remedy at law exists for MILP's breach. The price to plaintiff to purchase the facility, consisting of the land, building and all related improvements, furniture, fixtures and effects, should be set at \$18,725,000.
4. All lease payments made by plaintiff from June 15, 2008 to July 15, 2012 should be deducted from that purchase price. The deduction of the lease payments made by MRA from June 15, 2008 to July 15, 2012 from the purchase price are necessary in order to make MRA whole and place MRA in the position it would have been in had MILP not breached the Option contract.
5. Plaintiff should have nine months from July 15, 2012 in which to secure financing, obtain reports and draft whatever documents may be needed to close the purchase of the facility.
6. Closing should occur on the earliest date that plaintiff is able to do so, and defendant MILP shall cooperate in good faith with them to close the sale at such earliest opportunity.
7. Plaintiff will continue to be obligated to defendant for lease payments from July 15, 2012 forward to such date of closing, at the current scheduled leasehold payment as of June 15, 2012, and such payments going forward should not be deducted from the purchase price.
8. Defendant MILP should be obligated for any prepayment penalty which may be assessed by Washington Capital because of the failure to timely disclose to plaintiff the terms of that refinance and the inclusion of such prepayment penalties.
9. The court should retain jurisdiction to extend the closing if circumstances warrant and upon such terms as may be warranted.
10. The court should retain jurisdiction to compute and award damages to plaintiff and, if requested, to release them from any further obligations under the Facility Lease Agreement in the event that they are unable to obtain financing sufficient to close this purchase, given the changed circumstances in the market from June 15, 2008 to the present.
11. The court should retain jurisdiction to award attorney fees and costs, subject to further briefing and argument by counsel.

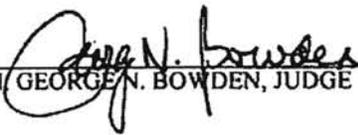
AMENDED FINDINGS OF FACT AND CONCLUSIONS  
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12. In that regard, the court concludes that plaintiff is the prevailing party against MILP and Campbell Homes Construction. The court also notes the contract contains provisions for both attorney fees and binding arbitration. Finally, the court also notes that defendant MILP prevailed, in part, on summary judgment with respect to its position that the Option did not commence until June 15, 2008.

DATED this 28<sup>th</sup> day of August, 2012.

  
HON. GEORGE N. BOWDEN, JUDGE

# **APPENDIX**

## **C**

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**SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY**

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

v.

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

NO. 08-2-07119-5  
**SUPPLEMENTAL FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW FOR AWARD OF  
ATTORNEY FEES**

THIS MATTER, having come on before the above-entitled Court for trial, and the Court having reviewed Plaintiff's motion for an award of attorneys' fees and costs, the supporting declarations and exhibits, the opposition, if any, and declarations in opposition, if any, and the reply, and the Court being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Attorneys' Fees and Costs is GRANTED. This Court hereby issues the following supplemental Findings of Fact and Conclusions of Law in support of the award of attorneys' fees and costs:

**FINDINGS OF FACT**

1. Mukilteo Retirement Apartments, LLC ("MRA") and Defendants Mukilteo Investors Limited Partnership ("MILP") and Campbell Homes Construction, Inc. ("Campbell

SUPPLEMENTAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR ATTORNEY FEES  
- 1

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Seattle, WA 98101-3034  
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1 Homes") entered into two agreements in October 1999. First, MRA, as tenant, and MILP, as  
2 landlord, entered into a Facility Lease Agreement for a large assisted living and retirement  
3 facility in Mukilteo (the "Property"). Second, the parties entered into an Option Agreement  
4 that was intended to allow MRA to purchase the Property after eight years. Campbell Homes,  
5 as general partner, signed both agreements on MILP's behalf.

6 2. Paragraph 16 of the Option Agreement provides: "In the event of any action  
7 arising hereunder, the prevailing party shall be granted its attorneys' fees and court costs."

8 3. MRA filed suit to enforce its option right under the Option Agreement in  
9 August 28, 2008 against both defendants. MRA claimed defendants had breached the Option  
10 Agreement by acting in bad faith to deny selling the Property to MRA under the terms of the  
11 Option Agreement. MRA sought specific performance, damages, and a declaration that the  
12 option period under the Option Agreement opened prior to June 15, 2008.

13 4. Defendants breached the Option Agreement and MRA is entitled to specific  
14 performance. MRA has prevailed in all of its claims against defendants except for its claim  
15 that the option period under the Option Agreement opened prior to June 15, 2008. This Court  
16 ruled by an order dated November 30, 2010 that the option period opened on June 15, 2008.

17 5. MRA was represented by Ryan, Swanson & Cleveland, PLLC of Seattle,  
18 Washington. Defendants were represented by Larson, Berg & Perkins PLLC of Yakima,  
19 Washington.

20 6. MRA's counsel have provided documentation of the hours worked, the type of  
21 work performed, the rates charged, and the category of each timekeeper, including attorneys  
22 and paralegals, that worked on this matter on MRA's behalf. Having examined this  
23 documentation, this Court finds that the rates charged by the various timekeepers to be  
24 reasonable for this locality and the nature of this action. While it is true that the hourly rates  
25 of lawyers and paralegals in Snohomish County tend to be lower than lawyers and paralegals  
26

1 in Seattle, there is no evidence that the rates charged by Ryan Swanson in this matter are  
2 unreasonable. There is probably more litigation in Snohomish County by Seattle based  
3 attorneys than Snohomish County attorneys. It is doubtful that a law firm in Everett could  
4 have taken on this litigation as well as MRA's counsel from Seattle. The hourly rates charged  
5 are reasonable for the level of skill that MRA's counsel brought to this case. There is no  
6 reason to penalize MRA for choosing to hire skillful and experienced Seattle attorneys and  
7 paralegals for this litigation in Snohomish County.

8 7. There is also no reason to judge the rates of MRA's counsel, based in Seattle,  
9 by the rates of defendants' counsel, based in Yakima.

10 8. Having reviewed the documentation provided by MRA's counsel, the total  
11 numbers of hours incurred in this matter were reasonable. No deduction from the total hours  
12 is made for the attorney time spent attending two unsuccessful mediations prior to trial.  
13 Unless MRA's counsel held to an untenable position or refused to mediate in good faith, those  
14 efforts stood to save both parties tens of thousands of dollars if not hundreds of thousands of  
15 dollars in litigation costs.

16 9. A deduction to the total hours has been made for some of the paralegal time  
17 attributable to clerical work. The remaining paralegal time was attributable to non-clerical  
18 matters performed by paralegal professions and is therefore recoverable.

19 10. The total number of hours has not been reduced for any time MRA's counsel  
20 spent obtaining records from defendants' appraiser. The efforts that MRA's counsel  
21 undertook to obtain these records contributed greatly to the determination to disregard the  
22 testimony of defendant's appraiser at trial.

23 11. A deduction to the total hours has been made to reflect attorney time spent on  
24 MRA's unsuccessful claim regarding the Option commencement date. MRA's counsel has  
25 identified at least \$14,082.50 in attorney time spent on this unsuccessful claim. MRA claims  
26

1 it is nearly impossible to segregate any additional time spent on this claims. Because the  
2 Court cannot accurately segregate any additional fees spent on this unsuccessful effort either,  
3 the Court, to the best of its ability, has chosen to deduct an additional \$75,000 in attorneys'  
4 fees attributable to time MRA spent on this unsuccessful claim during this litigation. While it  
5 is virtually impossible for the Court to avoid some measure of arbitrariness in making this  
6 estimation, the fact remains that as MRA was working to obtain discovery to pursue its  
7 successful theories at the same time it was pursuing its unsuccessful claim regarding the  
8 Option commencement date.

9 12. Only those costs recoverable under RCW 4.84 are recoverable under the  
10 Option Agreement. Applying the list under RCW 4.84 to the documentation provided by  
11 MRA's counsel, shows that \$7,992.76 in costs are recoverable here.

12 13. In light of the foregoing, this Court finds that MRA is entitled to a reasonable  
13 amount for attorneys' fees in this litigation in the amount of \$525,836.25 in attorneys' fees  
14 and \$7,992.76 in court costs. The award of attorneys' fees includes an additional \$15,000 for  
15 post-trial work.

16 14. To the extent that any Finding should be more properly characterized as a  
17 Conclusion of Law, or vice versa, it shall be recharacterized as such.

#### 18 CONCLUSIONS OF LAW

19 1. MRA is the prevailing party under the Option Agreement against both  
20 defendants under the terms of the Option Agreement and RCW 4.84.330.

21 2. The attorneys' fees and cost provision of the Option Agreement is applicable  
22 and enforceable:

23 3. MRA is entitled to recover its reasonable attorneys' fees and costs in this  
24 matter.  
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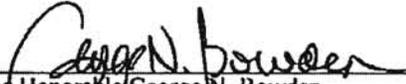
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2 4. Washington follows the "lodestar method" for calculating attorneys' fees  
3 awards. The lodestar is simply the product of reasonable hours times a reasonable hourly rate.  
4 The number of hours billed, the rates charged, and the costs incurred by MRA were  
5 reasonable, given the nature of the action, the amount in controversy, the number of motions  
6 filed in this case, and the nature of the defense asserted by the defendants. The Court does not  
7 lose sight of the fact that the difference between the plaintiff's position believing the subject  
8 facility to be worth somewhere in the range of \$15 to \$19 million dollars and the defense  
9 position at least by the time the case came on for trial of \$24 to \$27 million dollars presented  
10 a significant economic dispute between the parties that justifies the amount of attorneys' fees  
11 awarded here.

12 5. The lodestar of MRA's total attorneys' fees and costs excludes attorney time  
13 attributable to MRA's unsuccessful claim in this case relating the option period  
14 commencement date.

15 6. MRA is entitled to a reasonable amount for attorneys' fees in this litigation in  
16 the amount of \$525,836.25 as reflected above. In addition to this amount, MRA is entitled to  
17 its costs in the amount of \$7,992.76 for a total award of \$533,829.01.

18 IT IS SO ORDERED.

19 DONE IN OPEN COURT this 28<sup>th</sup> day of August, 2012.

20  
21   
22 The Honorable George N. Bowden  
23 Snohomish County Superior Court

1 Presented by:  
2 RYAN, SWANSON & CLEVELAND, PLLC

3  
4 By \_\_\_\_\_  
5 Jerry Kindinger, WSBA #5231  
6 Robert R. King, WSBA #29309  
7 Attorneys for Plaintiff  
8 1201 Third Avenue, Suite 3400  
9 Seattle, Washington 98101-3034  
10 Telephone: (206) 464-4224  
11 Facsimile: (206) 583-0359  
12 kindinger@ryanlaw.com  
13 king@ryanlaw.com

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SUPPLEMENTAL FINDINGS OF FACT AND  
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 Ryan, Swanson & Cleveland, PLLC  
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Seattle, WA 98101 3034  
206 464 4224 | Fax 206 583 0359

# **APPENDIX**

## **D**

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CL15353918

SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

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

Plaintiff,

v.

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

Defendants.

NO. 08-2-07119-5

DECREE OF SPECIFIC  
PERFORMANCE AND  
JUDGMENT

JUDGMENT SUMMARY

1. Judgment Creditor: MUKILTEO RETIREMENT APARTMENTS, LLC.
2. Judgment Debtor: MUKILTEO INVESTORS, L.P. and CAMPBELL HOMES CONSTRUCTION, INC., jointly and severally.
3. Principal Judgment Amount: \$ 6,033,805 *20K*
4. Interest to Date of Judgment: \$ n/a *MOB*
5. Attorneys' Fees: \$525,836.25 *Gab*
6. Costs: \$7,992.70
7. Other Recovery Amounts: \$ n/a
8. Attorneys' Fees and Costs shall bear interest at 12% per annum.

DECREE OF SPECIFIC PERFORMANCE AND  
JUDGMENT - 1

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1 9. Attorneys for Judgment Creditor: Robert R. King and Jerry Kindinger, Ryan,  
2 Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-  
3034.

3 **JUDGMENT**

4 **THIS MATTER**, having come on regularly for hearing this day for presentation of  
5 judgment following a bench trial, with Robert R. King of Ryan, Swanson & Cleveland  
6 appearing for plaintiff Mukilteo Retirement Apartments, L.L.C. ("MRA") and Michael King  
7 of Carney Badley Spellman appearing for the defendants Mukilteo Investors L.P. ("MILP")  
8 and Campbell Homes Construction, Inc. ("Campbell"), the Court's Findings of Fact and  
9 Conclusions of Law having been entered, and the Court being otherwise fully advised in the  
10 premises; now, therefore, it is hereby

11 **ORDERED, ADJUDGED AND DECREED** that MILP breached the Option  
12 Agreement dated October 21, 1999 to sell MRA certain real property, improvements, and  
13 personal property described in the Option Agreement and described in Exhibit A (collectively  
14 the "Property"). MRA is entitled to specific performance of its option right under the Option  
15 Agreement. The purchase price of the Property shall be \$18,725,000 minus all lease  
16 payments made by MRA from June 15, 2008 to July 15, 2012 in the amount of \$6,033,805,  
17 which are the damages necessary to place MRA in the position MRA would have been in  
18 absent MILP's breach. MILP shall convey the Property to MRA for the net purchase price of  
19 \$12,691,195, free of all mortgages, encumbrances, or deeds of trust, and consistent with this  
20 Court's Findings of Fact and Conclusions of Law and cooperate to convey the Property on the  
21 earliest possible date MRA is able to do so and no later than 9 months from July 15, 2012  
22 ("Closing Date").

23 The purchase will be escrowed and closed by a title insurance company of MRA's  
24 choice. MILP shall deliver a <sup>special</sup> ~~statutory~~ warranty deed signed on behalf of MILP to MRA's  
25 chosen title insurance company by no later than the Closing Date. MILP shall be obligated for  
26

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DECREE OF SPECIFIC PERFORMANCE AND  
JUDGMENT - 2

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 Ryan, Swanson & Cleveland, PLLC  
1201 Third Avenue, Suite 3400  
Seattle, WA 98101 3034  
206 464 4224 | Fax 206 583 0359

1 any prepayment penalties that may be assessed by Washington Capital Management, Inc. It is  
2 further

3 **ORDERED, ADJUDGED AND DECREED** that MRA shall continue to be  
4 obligated to MILP for lease payments under the existing lease from July 15, 2012 forward  
5 until the sooner of the Closing Date or nine months from July 15, 2012 at the current  
6 scheduled leasehold payment as of June 15, 2012. These payments shall not be deducted  
7 from the Property purchase price. It is further

8 **ORDERED, ADJUDGED AND DECREED** that neither MILP nor any party acting  
9 on its behalf shall take any steps to encumber or otherwise burden the Property from the date  
10 of this Judgment until the Closing Date without prior consent of MRA or Court approval. It is  
11 further

12 ~~**ORDERED, ADJUDGED AND DECREED** that in the event MILP fails to fully and~~  
13 ~~specifically perform the acts necessary to convey the subject property by the Closing Date and~~  
14 ~~as required by the Findings of Fact and Conclusions of Law, then pursuant to RCA 6.28.010~~  
15 ~~et seq. and/or CR 70, then a person shall be immediately appointed by the Court and~~  
16 ~~authorized and instructed to execute such documents as are necessary to consummate the~~  
17 ~~underlying transaction at the cost of MILP, which costs shall be paid by the Closing Agent out~~  
18 ~~of purchase proceeds. Such person shall serve without bond. It is further~~

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19 **ORDERED, ADJUDGED AND DECREED** that MRA is the prevailing party in this  
20 matter and is entitled under the Option Agreement and RCW 4.84.330 to an award of its  
21 attorneys' fees and costs. MRA is awarded judgment jointly and severally against MILP and  
22 Campbell as follows:

23	1. Principal judgment:	\$6,033,805	PK
24	2. Attorneys' fees:	\$525,836.25	MRA
25	3. Costs:	\$7,992.70	GAD

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DECREE OF SPECIFIC PERFORMANCE AND  
JUDGMENT - 3

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Seattle, WA 98101 3034  
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1 MRA shall receive interest at the rate of 12% per month from and after the date of  
2 judgment on the amounts above stated until paid in full, plus reasonable attorneys' fees and  
3 costs incurred in collection. ~~The above damages may be offset against the net purchase~~  
4 ~~proceeds from the purchase transaction. In the event there is any delay in the transfer of the~~  
5 ~~Property, damages will continue to accrue to MRA and this Court will enter supplemental~~  
6 ~~judgments as necessary.~~ It is further

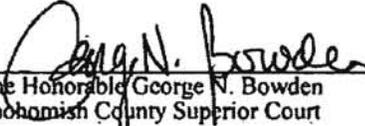
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7 **ORDERED, ADJUDGED AND DECREED** that this Court shall retain jurisdiction:

- 8 (1) to compute and award damages to MRA in the event MRA is unable to obtain financing;  
9 (2) if requested, make such additional awards as may be necessary to make MRA whole in the  
10 event MILP does not comply with the findings, conclusions or judgment herein or fails to  
11 cooperate in facilitating a timely sale of the Property to MRA; and (3) release MRA from any  
12 further obligations under the existing lease agreement between the parties in the event that  
13 MRA is unable to obtain financing sufficient to close its purchase of the Property; (4) to  
14 consider any and all issues and motions relating to damages and/or sale of the Property; and  
15 (5) to hear and decide any subsequent additional award of attorneys' fees and costs as are  
16 necessary. It is further

17 **ORDERED, ADJUDGED AND DECREED** that the counterclaims of defendants  
18 are dismissed with prejudice.

19 DONE IN OPEN COURT this 28<sup>th</sup> day of August, 2012.

20  
21   
22 The Honorable George N. Bowden  
23 Snohomish County Superior Court

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DECREE OF SPECIFIC PERFORMANCE AND  
JUDGMENT - 4

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1 Presented by:

2 RYAN, SWANSON & CLEVELAND, PLLC

3

4 By \_\_\_\_\_

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Robert R. King, WSBA #29309

5 Attorneys for Plaintiff

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6 Seattle, Washington 98101-3034

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7 Facsimile: (206) 583-0359

kindley@ryanlaw.com

8

9 Approved:

10 CARNEY BADLEY SPELLMAN

11

12 By \_\_\_\_\_

Michael King, WSBA #14405

Attorneys for Defendants

13 701 Fifth Avenue, Suite 3600

Seattle, WA 98104-7010

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DECREE OF SPECIFIC PERFORMANCE AND  
JUDGMENT - 5

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# **APPENDIX**

## **E**

## OPTION AGREEMENT

OPTION AGREEMENT ("Agreement") made this 21 day of October, 1999, between MUKILTEO INVESTORS L.P., a Washington limited partnership (hereinafter "MILP") and MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company hereinafter ("MRA").

### R E C I T A L S:

A. MILP owns the real property described in Exhibit A hereto upon which is situated a one hundred fourteen (114) unit independent retirement apartment and assisted living care facility (hereinafter "Real Property"), and owns certain personal property used in conjunction with the operation of the Real Property, a list of which is attached hereto as Exhibit B (hereinafter "Personal Property").

B. MILP, as Lessor, MRA as Lessee, and Ronald D. Struthers and Kathy Struthers, husband and wife, and, Duane R. Clark and Nancy Clark, husband and wife, as guarantors (collectively "Guarantors"), entered into a Facility Lease and Security Agreement ("Facility Lease Agreement") dated effective the 21 day of October, 1999 pursuant to which MILP leased to MRA the Real Property, as improved, and Personal Property to be used in conjunction with the operation of the Real Property. Attached hereto as Exhibit C is a copy of the Facility Lease Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto mutually agree as follows:

1. Grant of Option to Purchase. For good and valuable consideration, receipt of which is hereby acknowledged by each party to this Agreement, MILP hereby grants to MRA, an option to purchase ("Option to Purchase") the Real Property described in Exhibit A hereto, as improved, and the Personal Property described in Exhibit B used in conjunction with the operation thereof. The Option to Purchase and MRA's right to exercise its Option to Purchase the Real Property and Personal Property granted herein is expressly made subject to the terms and conditions of this Agreement. The Real Property, as improved, and the Personal Property is hereinafter collectively referred to as the "Facility".

2. Option Purchase Price. The option purchase price ("Option Purchase Price") for the Facility shall be the greater of (i) the Facility's fair market value as of the date the Option to Purchase is exercised; (ii) the Facility's replacement cost as of the date the Option to Purchase is exercised; or (iii) the prospective fair market value at stabilized occupancy of the Leased Property as determined by James Brown & Associates Inc.'s appraisal of the Leased Property for

Bank of American N.A., a national banking association, increased annually on January 1 of each year, beginning January 1, 2001, by a sum equal to three percent (3%), as adjusted annually by the three percent (3%) amount, a schedule of which is or will be upon completion, attached hereto as Exhibit D. Replacement cost shall be determined by the appraiser selected by MILP pursuant to the next succeeding paragraph, and shall be the amount included in the appraiser's appraisal report on the Facility

If MILP and MRA are unable to agree upon the Facility's fair market value for purposes of subparagraph (i) above within fifteen (15) days of the date of the receipt by MILP of the written notice of MRA's election to exercise its Option to Purchase, then MILP and MRA shall within five (5) days and the expiration of the fifteen (15) day period each promptly appoint an disinterested appraiser who is a member of the American Institute of Real Estate Appraisers (or any successor organization thereto) experienced in the appraisal of facilities like that of the Facility. The appraisers appointed, shall, within thirty (30) days after the date of the notice appointing the first appraiser, proceed to appraise the Facility to determine the Fair Market Value thereof as of the relevant date (giving effect to the impact, if any, of inflation from the date of their decision to the relevant date); provided, however, that if only one (1) appraiser shall have been so appointed, or if two (2) appraisers shall have been appointed but only one (1) such appraiser shall have made such determination within thirty (30) days after the appointment of the first appraiser, then the determination of such appraiser shall be final and binding upon the parties. If two (2) appraisers have been appointed and shall have made their determination within the respective requisite periods set forth above and if the difference between the amounts so determined shall not exceed ten percent (10%) of the lesser of such amounts, then the Fair Market Value shall be an amount equal to fifty percent (50%) of the sum of the amount so determined. If the difference between the amounts so determined shall exceed ten percent (10%) of the lesser of such amounts, then such two (2) appraisers shall have ten (10) days to appoint a third appraiser, but if such appraisers fail to do so, then either party may request appointment of such of appraiser by the then presiding judge of Snohomish County Superior Court acting in his or her private non judicial capacity and the other party shall not raise any question as to such judge's full power and jurisdiction to entertain the application for and make the appointment, and the parties agree to indemnify and hold the presiding judge fully and completely harmless from and against all claims rising out of the presiding judge's appointment of the third appraiser. The third appraiser appointed shall determine the Fair Market Value with thirty (30) days after appointment. The determination of the appraiser which differs most in terms of dollar amount from the determinations of the other two (2) appraisers shall be excluded, and fifty percent (50%) of the sum of the remaining two (2) determinations shall be final and binding upon the parties as the Fair Market Value. This provision for

determination by appraisal shall be specifically enforceable to the extent such remedy is available under applicable law, and any determination hereunder shall be final and binding upon the parties except as otherwise provided by applicable law.

If MRA exercises the Option to Purchase, the Option Purchase Price shall be net to MILP. All costs of sale, including, without limitation, title insurance, surveys, environmental reports, inspection reports of any kind or nature, recording costs, escrow costs, loan prepayment or assumption fees, costs and expenses, transfer or revenue stamps, sales taxes, transfer and excise taxes and recording fees shall be the obligation of MRA and paid by MRA.

3. Conditions Precedent to MRA's Exercise of Option to Purchase. If MRA has faithfully performed each and every term and provision set forth herein and in any other option agreement between MRA and MILP or any affiliate of either, and the Option to Purchase has not lapsed pursuant to Section 4 hereof, MRA may exercise its Option to Purchase granted herein if MRA and its affiliates simultaneously therewith exercises any and all other purchase options granted MRA or its affiliate by MILP or any affiliate thereof then exercisable by MRA or its affiliates and simultaneously closes on each such transaction. Failure to comply with the provision hereof shall result in the lapse of the Option to Purchase granted MRA in Section 1 hereof, unless MILP elects to waive such condition and allows MRA to purchase the Facility subject to the remaining terms of this Agreement.

4. Lapse of Option to Purchase. The Option to Purchase granted herein shall lapse upon the occurrence of any of the following events:

(a) Should MRA default in the performance of any term, condition, duty, obligation, provision, agreement or performance required of MRA under the Facility Lease Agreement, as amended, a copy of which is attached hereto as Exhibit C;

(b) Should MRA, and/or the Guarantors and/or any affiliate of either default in the performance of any agreement or contract between MRA, Guarantors and/or any affiliate thereof and MILP or any affiliate of MILP; and,

(c) Should MRA default in the performance of any term or provision of this Agreement.

Upon the occurrence of any event described in (a) through (c) above, the Option to Purchase granted MRA pursuant to this Agreement shall lapse and become null, void and without further force or effect.

5. Term of Option to Purchase by MRA. The Option to Purchase granted by MILP to MRA is exercisable by MRA only during the period commencing on the latter of (i) the eighth (8th) anniversary of the

commencement date of the Facility Lease Agreement, or (ii) the eighth (8th) anniversary of the last day of the year during which MILP constructs an addition upon the Real Property, and shall terminate on the first day of the twelfth (12th) month after the later of (i) or (ii) (the "Option Period"). MRA must notify MILP in writing of its decision to exercise the Option to Purchase during the Option Period with the purchase and sale of the Facility to close within the Option Period, provided MILP may extend the Closing Date up to ninety (90) days beyond the Option Period at MILP's sole election. The purchase and sale shall be closed at the office designated by MILP.

6. Notice of Exercise. Written notice of MRA's election to exercise its Option to Purchase as granted under the terms of this Agreement must be received by MILP ninety (90) days prior to the expiration date of the Option Period, otherwise the Option to Purchase granted herein to MRA shall lapse and become null, void and of no further force or effect.

7. Condition of Real Property and Personal Property. If the Option to Purchase is exercised, MRA agrees that the Facility shall be conveyed and transferred AS IS, WITHOUT RECOURSE, WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, AND WITH ALL FAULTS AND DEFECTS. MILP shall make no warranty or representation, express or implied (except as provided in Section 8 hereof as to title), with respect to the Facility or any part thereof, either as to its fitness for use, design or condition for any particular use or purpose or otherwise as to quality of material or workmanship therein, latent or patent defects or condition, it being agreed that all such risks are to be borne by MRA. MRA shall not be entitled to, and expressly agrees that it has not relied on MILP or its agents as to (a) the quality, nature, adequacy or physical condition of the Facility including, but not limited to, the structural elements, foundation, roof, appurtenances, access, landscaping, parking facilities, or the electrical, mechanical, HVAC, plumbing, sewage or utility systems, facilities or appliances at the Facility, if any; (b) the quality, nature, adequacy, or physical condition of soils or the existence of ground water at the Facility; (c) the existence, quality, nature, adequacy, or physical condition of any utilities serving the Facility; (d) the development potential of the Facility, its habitability, merchantability or fitness, suitability or adequacy of the Facility for any particular purpose; (e) the zoning or other legal status of the Facility; (f) the Facility's or its operations compliance with any applicable codes, laws, regulations, statutes, ordinances, covenants, governmental entity, or of any other person or entity; (g) the Facility's compliance with any environmental protection, pollution or land use law, rule, regulation, order or requirements; (h) the quality of any labor or materials relating in any way to the Facility; or, (i) the nature, status and extent of any right-of-way, lien, encumbrance, license, reservations, covenant, condition, restriction or any other matter affecting title to the Facility. Further, MRA shall give MILP, its partners, agents, employees, servants, and professionals, such

indemnities as counsel for MILP shall deem necessary regarding the sale of the Facility including, without limitation, complete and absolute indemnities and defense relating to any and all environmental matters.

8. Title to Real Property and Personal Property. If the Option to Purchase granted herein is exercised, MRA agrees to accept title to the Real Property and Personal Property subject to the following:

(a) All rights of parties in possession of the Facility or any part thereof;

(b) All matters disclosed in any title report delivered to MRA, including non financial encumbrances of record;

(c) All rights reserved in federal patents, state or railroad deeds, building or use restrictions general to the area, zoning regulations, easements and water distribution easements and rights of way of record, rights of way and easements shown on the plat therefore or visible by inspection, together with the right of entry for repair or maintenance by the corresponding grantee of record, all encroachments and matters affecting title whether of record or otherwise;

(d) All liens, mortgages, deeds of trust and financial encumbrances and matters of record, the payment of performance of which are not the obligation of MRA under the Facility Lease Agreement and all claims contingent, known or unknown, whether or not reflected by the public record, provided however that any indebtedness which is secured by a mortgage or deed of trust filed of record, shall not exceed the Option Purchase Price; and,

(e) The title to the Real Property shall be conveyed by a limited warranty deed, the form and terms of which shall be acceptable to MILP.

9. MILP's Disclaimer of Warranty and MRA's Waiver of Liability. MRA acknowledges that MRA has or will have had before it exercises its Option to Purchase granted it hereunder, adequate opportunity to become fully acquainted with the nature and condition, in all respects, of the Facility including, but not limited to, the condition of MILP's title thereto, the existence or availability of all permits and approvals from governmental authorities, the soil and geology thereof, and the manner of construction and the condition and state of repair or lack of repair of any improvement upon or incorporated into the Real Property or any improvement thereon. As a material inducement to the execution and delivery of this Agreement by MILP and the performance by MILP of its duties and obligations hereunder, MRA hereby acknowledges, represents, warrants and agrees to and with MILP that: (i) MRA, if it elects to exercise its Option to Purchase provided hereunder, is expressly purchasing the Facility in its then

existing condition "AS IS, WHERE IS AND WITH ALL FAULTS" with respect to any and all facts, circumstances, conditions and defects relating to the Real Property and Personal Property; (ii) MILP has no obligation to repair or correct any such facts, circumstances, conditions or defects, or to compensate MRA for same; (iii) MILP has specifically bargained for the assumption by MRA of all responsibility to inspect and investigate the Facility and of all risk of adverse conditions and has structured the Option Purchase Price in consideration thereof; (iv) MRA has, or will have before it elects to exercise its Option to Purchase under this Agreement, undertaken all such physical inspections and examinations of the Facility as MRA deems necessary or appropriate under the circumstances as to the condition of the Facility, and the suitability of the Facility for MRA's intended use, and based upon same, MRA is and will be relying strictly and solely upon such inspections and examinations and the advice and counsel of its own agents, legal counsel, members or managers, and MRA is and will be fully satisfied that the Option Purchase Price is fair consideration for the Facility; (v) MILP is not making and has not made any warranty or representation with respect to the physical condition or any other aspects of all or any part of the Facility as an inducement to MRA to enter into this Agreement and thereafter to purchase the Facility, or for any other purpose; and, (vi) by reason of all of the foregoing, MRA shall assume the full risk of any loss or damage occasioned by any facts, circumstance, condition or defect pertaining to the Facility.

Without limiting the generality of the foregoing, MRA specifically agrees that MILP shall have no liability to MRA (and MRA hereby waives any right to recourse against MILP, whether arising at law or in equity) under contract, tort law, or statute (specifically including any environmental loss) with respect to the condition of the soil, the existence or nonexistence of hazardous materials, any past use of the Facility, the economic feasibility of the Facility, the Facility's compliance or noncompliance with all laws, rules or regulations affecting the Facility including, without limitation, the requirements of the American's with Disabilities Act, 42 U.S.C.A. Section 12101 et seq., the Fair Housing Amendment Act, or any similar state or local statutes or regulations. The provisions of this Section 9 shall survive any closing by which MRA purchases the Facility from MILP.

10. **Contract of Sale or Exchange.** If the Option to Purchase granted herein is exercised the parties hereto will enter into a formal contract for sale or exchange of the Facility subject to such Option to Purchase, which contract of sale or exchange shall contain the terms and conditions herein set forth and such other terms, indemnifications from MRA environmental or otherwise, and provisions acceptable to MILP and its counsel.

11. **Tax Free Exchange Pursuant to Internal Revenue Code Section 1031.** As a further condition of this Agreement, if the Option to Purchase is exercised pursuant to Section 1 hereof, MILP shall have

the right to require the transaction by which the Facility is transferred be consummated in a manner designed to allow MILP to take advantage of Section 1031 of the Internal Revenue Code of 1986 (or successor statute) regarding like kind exchanges. MRA agrees to cooperate in any reasonable way to allow MILP to accomplish such purpose, provided MILP agrees to hold MRA harmless from any tax occasioned thereby or from any failure of the transaction to qualify for such favorable tax treatment, or from any other loss, liability or damage arising therefrom.

12. Confidentiality. This Agreement and its terms and provisions shall remain confidential between the parties hereto, its contents and its existence shall not be disclosed or recorded without the express written consent of all parties hereto, or as otherwise may be necessary to enforce rights granted herein, or pursuant to a court order.

13. Assignment. MRA's rights herein are personal to it and shall not be assigned without the express written consent of MILP, which consent may be withheld in MILP's sole and absolute discretion. For purposes of this Section 13 "assignment" shall be defined as provided in the Facility Lease Agreement. Any such consent to assignment by MILP shall not be deemed a waiver of the condition of consent for any future assignment by MRA or release MRA of its individual or collective obligations herein set forth in this Agreement. The rights and obligations of MILP hereunder may be assigned by MILP at its sole discretion, provided MILP shall notify MRA in writing of any assignment by MILP of its interest in this Agreement within thirty (30) days of such assignment.

14. Default. Since a breach of certain of the provisions of this Agreement by a party hereto, cannot adequately be compensated by money damages, a party shall be entitled, in addition to any other right or remedy otherwise available to it, at law or in equity, to an injunction restraining such breach or threatened breach or award of specific performance of the terms and conditions of this Agreement and the parties hereby consent to such injunction and to the order of specific performance. All such remedies and rights shall be deemed cumulative to the maximum extent allowable at law except as otherwise elected by the party entitled thereto. Failure by any party to pursue any remedy, if available, shall not be deemed a waiver thereof with respect to that default or any other default.

15. Notices. Any notice required or permitted herein or by applicable law shall be deemed properly given (a) when personally delivered to MRA or MILP, (b) two (2) days following the date sent by United States Mail, certified or registered, postage prepaid, return receipt requested, or (c) one (1) business day following the date sent by Federal Express or overnight United States Mail or other national overnight carrier, and addressed in each such case as set forth below:

MRA: Mukilteo Retirement Apartments, L.L.C.  
1111 32nd St.  
Anacortes, WA 98221  
ATTN: Ron Struthers

MILP: Mukilteo Investors L.P.  
P.O. Box 2045  
Wenatchee, WA 98807-2045  
Street Address:  
625 Okanogan Avenue  
Wenatchee, WA 98801  
ATTN: General Partner

Any party may change its address for notices under this Agreement by giving formal written notice to the other parties specifying that the purpose of the notice is to change the party's address. For purposes of this paragraph, the term "receipt" means the earlier of any of the following: (i) the date of delivery of the notice or other document to the address specified pursuant to this section as shown on the return receipt or by the record of the couriers, (ii) the date of actual receipt of the notice or other document by the office of the person or entity specified pursuant to this section, or (iii) in the case of a refusal to accept delivery or inability to deliver the notice or other document, the earlier of (a) the date of the attempted delivery or refusal to accept delivery, (b) the date of the postmark on the return receipt, or (c) the date of receipt of notice of refusal or notice of nondelivery by the sending party.

16. **Governing Law; Attorneys Fees; Venue.** This Agreement shall be construed in accordance with the laws of the State of Washington. In the event of any action arising hereunder, the prevailing party shall be granted its attorneys fees and court costs. Venue for such action shall lie in the Washington State Superior Court setting in Snohomish County, Washington, State of Washington.

17. **Construction.** This Agreement has been submitted to counsel for both MILP and MRA and therefore shall be interpreted without regard to either party having drafted same.

18. **Further Assurances Additional Documents and Acts.** Each of the parties hereto agrees that it will at any time and from time to time, do, execute, acknowledge and deliver, or shall cause to be done, executed, acknowledged, and delivered, all such further acts, deeds, documents, assignments, transfers, conveyances, and assurances as may reasonably be required by the other parties hereto in order to carry out fully and to effectuate the transaction herein contemplated in accordance with the provisions of this Agreement.

19. **Time of Essence.** Time is the essence of each and every term and provision of this Agreement.

20. **Effect of Captions.** The captions of sections of this Agreement have been inserted solely for convenience and reference, and shall not control or affect the meaning or construction of any of the provisions of this Agreement.

21. **Entire Agreement; Modifications; Waiver.** This Agreement and the Exhibits thereto constitute the entire agreement between the parties hereto, pertaining to the subject matter contained therein, and supersede all prior agreements, representations and all understandings of the parties. No supplement, modification or amendment of this Agreement shall be binding unless expressed as such and executed in writing by the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed or constitute a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless expressed as such in a documents executed by the party making the waiver.

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

23. **Incorporation of Recitals.** All recitals are incorporated in the body of this Agreement as if set forth at length.

24. **Exhibits.** All Exhibits attached hereto and post-exhibits attached hereafter, together with all documents incorporated by reference therein or herein, form an integral part of this Agreement and are hereby incorporated into this Agreement wherever reference is made to them to the same extent as if they were set out full at the point at which such reference is made.

25. **Affiliates of MILP Defined.** For purposes of this Agreement an affiliate of MILP shall include (i) any limited partner in MILP; (ii) any officer, director or shareholder of the general partner of MILP; or, (iii) any entity, person, corporation or partnership in which ten percent (10%) or more of the equity thereof is owned by MILP, the general partner thereof or a limited partner of MILP.

26. **Affiliates of MRA Defined.** For purposes of this Agreement an affiliate of MRA shall include (i) any manager, director or member in MRA; (ii) any entity, person, corporation or partnership in which ten percent (10%) or more of the equity thereof, stock, partnership interest, securities or debt is owned by or held by MRA, or any manager, officer, director or member of MRA.

27. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original; but such counterparts shall together constitute but one in the same instrument. This Agreement may be executed (i) on an original, (ii) a copy of an original, or (iii) by facsimile transmission copy of an original followed within five (5) calendar days with the execution of an original.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

MRA:

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

By: [Signature]  
Its: President

MILP:

MUKILTEO INVESTORS L.P.  
a Washington limited partnership

By: CAMPBELL HOMES CONSTRUCTION, INC.,  
a Washington corporation, Its Sole  
General Partner,

By: [Signature]  
Carl W. Campbell, President

STATE OF WASHINGTON )  
County of Chelan ) ss.

On Oct 15, 1999 before me, the undersigned Notary Public in and for said County and State, personally appeared Carl W. Campbell, the President of Campbell Homes Construction, Inc., a Washington corporation, as General Partner of Mukilteo Investors L.P., a Washington limited partnership, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS MY hand and official seal.



Signature [Signature]  
Name Sharon J Tompkins  
(typed or printed)  
My commission expires: Jan 8, 2003

STATE OF WASHINGTON )  
County of Snohomish ) ss.

ON Oct. 20, 1999 before me, the undersigned Notary Public in and for said County and State, personally appeared DWANE R. CLARK the President of Mukilteo Retirement Apartments LLC, a Washington limited

liability company, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS MY hand and official seal.

Signature  
Name

*Lorrie J. Thompson*  
LORRIE J. THOMPSON

(typed or printed)

My commission expires: 6/2000

