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DIVISION II

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STATE OF WASHINGTON

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NO. 43138-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX VON KLEIST,
Respondent,

v.

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

Appellants.

Respondents Brief

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INTRODUCTION

This case is an appeal by Appellants Cochrane and Luksha of the April 6, 2012 Order Denying Defendants' Re-Filed Motion to Vacate Default Judgments (CP 2084-2086). This appeal was filed on April 6, 2012, (CP 2076-2081), and Cochrane and Luksha are parties named in the April 6, 2012 Notice of Appeal along with other defendants. The other defendants in this action and the claims on appeal in the consolidated action Pierce County Case No. 11-2-15464-1 have been dismissed by this court on November 20, 2012. Cochrane and Luksha filed a separate notice of appeal on May 7, 2012 (CP 2087-2092).

The Order Denying Defendants' Re-Filed Motion to Vacate Default Judgments (CP 2084-2086) was entered on reconsideration of an order dismissing Appellants motion to set aside default which was decided on March 11, 2011 (CP 1721). The motion to set aside default was heard approximately 14 months after the entry of default judgment on January 27, 2010 (CP 1270-1272).

STATEMENT OF THE CASE

This case arises out of a transaction where the defendant entities ("the Graoch defendants" (*gray-ok*)) took from Von Kleist One Million Twelve Thousand Dollars (\$1,012,000) pursuant to a Subscription Agreement. (CP 1536-1552). Von Kleist took default judgment against all defendants on January 27, 2010. (CP 1270-1272). The Graoch Defendants ignored the default judgment for nearly a year, and brought a

CR 60 motion for the first time in March, 2011, which was dismissed without prejudice. (CP 1721). The CR 60 motion was re-noted for a hearing on March 11, 2011, however, the motion was not denied until April 6, 2012. Appellants Cochrane and Luksha filed their notice of appeal of the Order Denying Defendants' Re-Filed Motion to Vacate Default Judgments on May 7, 2012. Cochrane and Luksha have never appealed the default judgment itself.

As part of the record, Von Kleist provided evidence that both Cochrane and Luksha were partners and General Partners of the defendant entities. Cochrane responded with his own affidavit; Luksha did not, and the court considered these affidavits and exhibits as part of its decision to rightfully deny the motion to set aside default. Jurisdiction and third party liability was considered by the trial court, and the standard of review to reverse that decision is to find that Judge Cuthbertson abused his discretion.

Cochrane and Luksha as General Partners/partners/owners of the defendant entities are bound by the actions of the partner who executed the written agreement between the defendants entities and Von Kleist. Accordingly, the long arm statute is not applicable to attaching personal jurisdiction on the Appellants, because Appellants have already submitted themselves to jurisdiction by means of their forum selection clause.

Appellants seek to obscure the fact that they have not appealed the default judgment entered in this case; nor have they appealed the decision

of the court to dismiss without prejudice their initial motion to set aside default, which was decided more than one year after the default judgment was entered. The Appellants arguments as to the underlying judgment are moot, as this court is without jurisdiction to hear an appeal of an order that was entered 27 months before the Notice of Appeal was filed, and is an order that the Appellants are not appealing.

PROCEDURAL BACKGROUND

Forum Selection Clause: Von Kleist began this action by means of service in strict accord with the demands of the contract between Von Kleist and the Appellants (described as the “undersigned” in the paragraph below), to wit:

“The undersigned hereby submits to the nonexclusive jurisdiction of the courts of the State of Washington and of the federal courts in the Western District of Washington with respect to any action or legal proceeding commenced by any person or entity relating to or arising out of this Subscription Agreement, the Partnership or the Partnership’s business, [underline added] and **consent to the service of process in any such action or legal proceeding by means of registered or certified mail, return receipt requested**, in care of the address set forth below on the signature page or such other address as the undersigned shall furnish in writing to the Partnership.” (CP 1538, ¶ 16).

Effective Service On All Defendants: Service was accomplished as to all defendants when made pursuant to the Subscription Agreement on the corporate offices located at 999 West Hastings Street, Suite 1300, Vancouver, B.C., V6C 2W2 and 5399 Eglinton Ave. W, suite 201, Toronto, Ontario, Canada M9C 5K6, on December 11, 2009. In addition, Luksha and Cochrane were also served on December 11, 2009 by means of certified mail return receipt requested. (CP 1523-1525).

Default Judgment Was Properly Taken: The action was then filed in the Pierce County Superior Court on January 26, 2010, and the following day, default judgment was taken against all defendants. Prior to default judgment being taken, the Graoch entities and Gary Gray, a Tacoma resident, were personally served. The Graoch entities were served through the office of their registered agent, attorney Bruce Weiland, on December 9, 2009, (CP 1688-1691) and Gray was served at his house twice: once on December 18, 2009 and again on December 21, 2009 (CP 1677-1679).

Defendants Knew Of The Default Judgment In January, 2010: Defendants then sought counsel from Lane Powell, and communications began on January 28, 2010. It is believed that Lane Powell had actual knowledge of the default judgment in late January, 2010, and Attorney David Spellman began negotiations to set aside the default judgment in February. (CP 1472-1483).

Defendants Sat On Their Rights To Challenge Default:

Defendants did nothing, anticipating the bringing of a CR60 motion just prior to the expiration of claims, as a dilatory strategy to retain Von Kleist's million dollar investment in breach of the obligation to return the funds pursuant to the Subscription Agreement.

History of Graoch's First Motion: On January 4, 2011, Plaintiff filed an affidavit indicating that the out-of-state defendants could not be served in Washington (CP 1415-1425). The Graoch Defendants then filed their motion prior to the expiration of the year in mid-January, 2011, but the motion was not heard until March 11, 2011. The Graoch Defendants had failed to provide the court with working copies, and had failed to personally serve Von Kleist with their motion as required under CR 60(e). The court then dismissed their motion without prejudice, and defendants promptly thereafter refilled their motion to set aside both the default judgment of January 27, 2010 and the second default judgment of May 10, 2010.

History of Graoch's Second Motion: On May 13, 2011, a hearing was held on Graoch's refiled motion to set aside default judgment, and the court having weighed the evidence and having considered the pleadings and affidavits before it, the records and files of the case to the court's satisfaction, and otherwise being fully advised in the premises, took the argument under advisement, but did not render a decision until the issue was re-noted for hearing on April 6, 2012.

ARGUMENT

i. Cochrane and Luksha are General Partners of the defendant entities.

The record indicates that the partnership liability of Cochrane and Luksha was in dispute and considered by the trial court at the time of the motion to set aside default. Von Kleist set forth a body of evidence (CP 1508-1643) demonstrating that Cochrane and Luksha had held themselves out as partners, General Partners and in one case, even an owner. Luksha claimed he was “the Vice President and General Partner of each of the Limited Partnership ownership entities launched since 2001.” (CP 1520). At all material times, Luksha was Cochrane’s business partner. (CP 1515). While Luksha has made no argument in his defense, Cochrane did argue to the court that he was not a partner. (CP 1451-1454).

However, Von Kleist provided evidence to the trial court that Cochrane did in fact claim he was a General Partner in his full disclosure to the Ontario Securities Commission for Pareto Corp, (CP 1515), a publicly traded company in Ontario, Canada; in his disclosure to Kensington Capital Partners in November, 2009, (CP 1516); in a letter on behalf of Diversified Productions Inc. (CP 1517); on a website for the Centre Gray Health Foundation, where he was represented as a general partner of Graoch Associates, with offices in Toronto, Vancouver, and Tacoma, Washington, (CP 1518). Cochrane even represented on his Linked In page that he was an “owner” of Graoch Associates, (CP 1519).

All of the documentation provided by Von Kleist has gone without objection or refutation, and was part of the record at the time the trial court decided the underlying motion to set aside default. Therefore, the standard of review for the trial court's decision is an abuse of discretion standard. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

The Appellate court reviews a trial court's ruling on a motion to vacate a default judgment for an abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004), *In Re Estate of Stevens*, 94 Wash.App. 20, 29, 971 P.2d 58 (1999). A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision. *Stevens*, 94 Wash.App. at 29, 971 P.2d 58. Accordingly, if a trial court's ruling "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Showalter, op. cit., citing Stevens*, 94 Wash.App. at 30, 971 P.2d 58 (quoting *Lindgren v. Lindgren*, 58 Wash.App. 588, 595, 794 P.2d 526 (1990)).

Pursuant to RCW 25.05.010(6) "a partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

A "partnership" is an "association of two or more persons to carry on as co-owners a business for profit," irrespective of whether they intended to form a partnership. RCW 25.05.055(1). A partnership with a

limited purpose or scope is a joint venture. *Pietz v. Indermuehle*, 89 Wn. App. 503, 510, 949 P.2d 449 (1998).

Whether a partnership existed depends on the parties' intentions, which are facts based on the parties' actions and conduct and the surrounding circumstances. *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). Formation does not require any filing, formality, explicit statement, or consideration. RCW 25.05.055. We presume that one who received a share of the business's profits is a partner, unless he or she received the profit in a debt, rent, or loan interest payment, or as payment for independent contractor or employee services. RCW 25.05.055(3)(c). "Each partner is an agent of the partnership for the purpose of its business" and an agent and co-principal for every other partner. RCW 25.05.100(1); *Poutre v. Saunders*, 19 Wn.2d 561, 565-66, 143 P.2d 554 (1943).

Generally, partners are vicariously liable for torts that a partner committed (1) while acting in the scope of partnership business or (2) with the authority of his or her copartners. RCW 25.05.120; RCW 25.05.125. A partnership or agency relationship can cause a person to be liable vicariously for another's trespass. *Bloedel Timberlands Dev.*, 28 Wn. App. at 676-77.

This is the case here. Pursuant to RCW 25.05.030 (1) "except as otherwise provided in subsection (2) of this section, the law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and the partnership." Here, the chief

executive office is and always has been 750 Market Street, Tacoma, Washington. Pursuant RCW 25.05.100(1) “each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority. Here, the record indicates that founding partner Les Pioch is the signing party on behalf of the defendant entities.

Pursuant to RCW 25.05.120 (1) “A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.” Additionally, (2) “If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.”

Finally, each General Partner, in this case Cochrane and Luksha, are liable subject to the provisions of RCW 25.05.125(1) “Except as otherwise provided in subsections (2), (3), and (4) of this section, all

partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”

The signature of Les Pioch therefore bound all of the partners to the subscription agreement, and its forum selection clause.

The trial court considered this on the record and reached its conclusion rightly.

ii. Defendants were properly served by certified mail, return receipt requested in December, 2009.

Defendants required that process be by certified mail, return receipt requested in their Subscription Agreement which set forth the means by which defendants took One Million Twelve Thousand Dollars from Plaintiff, pursuant to forum selection clause of their own drafting, to wit:

“The undersigned hereby submits to the nonexclusive jurisdiction of the courts of the State of Washington and of the federal courts in the Western District of Washington with respect to any action or legal proceeding commenced by any person or entity relating to or arising out of this Subscription Agreement, the Partnership or the Partnership’s business, [underline added] and **consent to the service of process in any such action or legal proceeding by means of registered or certified mail, return receipt requested**, in care of the address set forth below on the signature page or such other address as the undersigned shall furnish in writing to the Partnership.” (CP 1538, ¶ 16).

Defendants were served by certified mail, return receipt requested, on December 9-11, 2009. (CP 1523-1525).

A forum selection clause is **prima facie valid** and should be enforced unless the challenger clearly shows enforcement would be ‘unreasonable and unjust.’ *Voicelink Data Services, Inc. v. Datapulse, Inc.*,

86 Wn. App. 613; 937 P.2d 1158; 1997 Wash. App. LEXIS 932 (1997). This is consistent with the test set forth by the U.S. Supreme Court. *See Burger King*, 471 U.S. at 472 n.14; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

“Thus, even where a forum selection clause establishes a remote forum for resolution of conflicts, ‘the party claiming [unreasonableness] should bear a heavy burden of proof.’ *M/S Bremen*, 407 U.S. at 17. *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 80, cmt. c (Supp. 1989) (‘the burden of persuading the court that stay or dismissal of the action would be unfair or unreasonable is upon the party who brought the action’); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984)

Most importantly, the Court of Appeals made it clear that “absent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties.” *Voicelink* at 618.

The forum selection clause is valid and enforceable. It was drafted and presented by the Appellants. Appellants have controlled nearly a billion dollars in assets and have raised at least \$58 million by means of their web of Washington companies (both incorporated and not incorporated). (CP 1508-1528). The bargaining power falls all in their

side of the camp.

Defendants were served as they demanded.

iii. Washington's long arm statute is not applicable to forum selection clauses which consent by contractual agreement to personal jurisdiction in the State of Washington.

Long arm jurisdiction and jurisdiction-by-consent require separate and distinct analyses. While jurisdiction via minimum contacts under the long arm statute requires an affidavit that personal service was not possible in Washington and that personal service be completed outside Washington, personal jurisdiction is deemed to have been consented to by a forum selection clause contained in a contract signed by the defendant in question. *Voicelink*, op. cit. Therefore, the strict service-of-process requirements of the long arm statute do not apply. Other statutes and/or court rules determine the proper method of service.

In *Voicelink*, the court made specific reference to the issue of whether forum selection clauses are enforceable without minimum contacts being established according to the long arm statute. The court held that forum selection clauses - and the consent to personal jurisdiction embodied therein - are valid and enforceable despite the defendant not having minimum contacts in Washington:

“Federal courts and most state courts, including Washington, have expressly held that a choice of forum clause constitutes consent to personal jurisdiction. *See Chanv. Society Expeditions, Inc.*, 39 F.3d 1398, 1406 (9th Cir. 1994), *cert. denied*,

514 U.S. 1004, 131 L. Ed. 2d 196, 115 S. Ct. 1314 (1995); *Heller Financial Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1292 n.4 (7th Cir. 1989); *Kysar v. Lambert*, 76 Wn. App. at 485 ('a choice-of-forum clause shows consent to personal jurisdiction, . . . even though it refers only to venue'). Personal jurisdiction, unlike subject matter jurisdiction, may be conferred by agreement, even though the selected court might otherwise lack 'minimum contacts' under the due process clause." *Voicelink* at 620. (Bold added.)

The *Voicelink* court cited the earlier Washington Court of Appeals case, *Kysar v. Lambert*, 76 Wn. App. 470, 484, 887 P.2d 431, 440 (1995), *review denied*, 126 Wn.2d 1019, 894 P.2d 564 (1995), as precedent. *Kysar* provides the best direct answer to the issue of whether the long arm statute may be disregarded when you have jurisdiction by consent so that minimum contacts and the higher requirements for service of process are not necessary. *Kysar* was also cited a third time by the *Voicelink* court:

Florida and Alabama require a showing of long-arm jurisdiction, regardless of consent by a forum selection clause, *See Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 918 (11th Cir. 1989); *White-Spunner Constr. v. Cliff*, 588 So. 2d 865, 866-67 (Ala. 1991); however this was acknowledged as contrary authority in *Kysar v. Lambert*, 76 Wn. App. at 485 n.30. *Voicelink* at 620.

The Alabama court went on to state that personal jurisdiction over

a foreign defendant requires minimum contacts via their long arm statute. That statute is essentially similar to Washington's long arm statute. The Washington Court of Appeals, however, in both *Voicelink* and *Kysar* went out of their way to distinguish the law in Alabama as being contrary to the law in Washington (and most other states as well as federal law). In *Kysar*, the court stated:

“In this case, the parties' agreement contained consent to personal jurisdiction. As already noted, it said:

The terms and conditions of the order documents applicable to this transaction shall be interpreted under the case and statutory law of the State of Washington. In the event any action is brought to enforce such terms and conditions, venue shall lie exclusively in Clark County, Washington.

“The first sentence was only a choice-of-law clause and is not pertinent here. The second sentence, however, is highly pertinent, for the only way in which venue could ‘lie exclusively in Clark County’ was if the parties were intending to consent to personal jurisdiction in Washington. Thus, their agreement exhibits such consent, and the trial court did not err by denying Lambert's motion to dismiss.” *Kysar* at 487.

Also, as pointed out by the *Voicelink* court, footnote 30 of the *Kysar* decision states that Alabama is contrary. The law in Washington is clear: where you have consent to personal jurisdiction under a forum selection clause, you do not have to establish minimum contacts, nor do you have to comply with the service requirements of the long arm statute.

The forum selection clause attaches to all of those parties identified

in the Subscription Agreement. Graoch Associates Limited Partnership is managed by general partners, namely, Gray, Pioch, Cochrane and Luksha. (CP 1508-1528). In addition, all of the entities identified in the Subscription Agreement are hopelessly intertwined with numerous other entities, all of which are being governed by the same group from the same offices. (CP 1508-1643).

iv. CR 4(i)(1)(D) allows foreign Defendants to be served abroad by certified mail

Since personal jurisdiction is not being sought via one of the acts listed in the long arm statute, the plaintiff is entitled to rely upon the alternative methods of service allowed for in the Court Rule since there is no conflict of laws.

CR 4(i)(1)(D) states:

(i) Alternative provisions for service in a foreign country

(1) Manner. When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) upon an individual, by

delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or (E) pursuant to the means and terms of any applicable treaty or convention; or (F) by diplomatic or consular officers when authorized by the United States Department of State; or (G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

(2) Return Proof of service may be made as prescribed by section (g) of this rule, or by the law of the foreign country, or by a method provided in any applicable treaty or convention, or by order of the court. When service is made pursuant to subsection (1)(D) of this section, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. *See* Motion and Declaration for an Order of

Default, January 27, 2010, Exhibits B, C and D, thereto.

4(i)(1)(D) is a court rule, whereas the long arm statute is a law drafted by the legislature. Since the long arm statute does not apply in this case, service by certified mail under 4(i)(1)(D) is proper. Furthermore, no affidavit is necessary showing that an attempt was made to serve the defendants in Washington. All that is required is evidence of delivery to the addressee satisfactory to the court. Exhibits B, C, and D, set forth signatures of the receiving parties, attached to Canadian postal records indicating that the documents were received.

The conflict between service requirements of the long arm statute, RCW 4.28.185, and CR 4(i)(1)(D) is addressed in *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581; 225 P.3d 1035; 2010 Wash. App. LEXIS 353 (2010). The defendant pointed out the following in their brief:

“Ralph's does not argue that the Court of Appeals' interpretation would render CR 4(i) moot or meaningless. Rather, Ralph's argues that CR 4(i) would "rarely be applicable." Petition at 9. However, under a plain reading of the rule, CR 4(i) will continue to apply in some cases, e.g., in cases where the statute invoked as authorizing jurisdiction generally authorizes out-of-state service yet fails to prescribe the manner of service, **or in cases where parties contractually agree to submit to jurisdiction.**”

CR 4(i)(1)(D) is specifically suited to situations like the one in this case, where personal jurisdiction attaches by contractual consent. This is a text book situation contemplated by CR 4(i). Since the long arm statute does not apply, the court rule *does* apply and service was proper.

v. All Defendants including the Canadian partners are Third Party Beneficiaries of the Subscription Contracts at issue.

The forum selection clause drafted by the defendants reads in operative part as follows:

The undersigned hereby submits to the nonexclusive jurisdiction of the courts of the State of Washington and of the federal courts in the Western District of Washington **with respect to any action or legal proceeding commenced by any person or entity relating to or arising out of this Subscription Agreement, the Partnership or the Partnership's business.** (CP 1538) [bold added].

Gray, Pioch, Cochrane and Luksha are General Partners of GALP, (Graoch Associates Limited Partnership) one of the limited partnerships expressly named in the Subscription Agreement, and were the intended and actual beneficiaries of the contract. Literature and reference to these partners and their financial holdings was given to the plaintiff as inducement to enter the contract. (CP 1508-1528). Gary Gray and Les Pioch have held themselves out as founding partners of Graoch. Gregory Cochrane and Paul Luksha have held themselves out consistently as General Partners of Graoch. Luksha, by his own admission, is a General Partner of every Graoch entity formed since 2001. (CP 1520-1522). The Canadian partners have submitted themselves to non-exclusive jurisdiction

of the state of Washington, and are third party beneficiaries subject to personal service by consent via the forum selection clause. Service of process by certified mail pursuant to the forum selection clause establishes personal jurisdiction over each of them in Washington.

The Washington Court of Appeals clearly stated the test for third party beneficiary status in *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192; 49 P.3d 912; 2002 Wash. App. LEXIS 677 (2001):

“A third-party beneficiary contract exists when the contracting parties intend to create one. *Postlewait Construction, Inc. v. Great American Ins. Companies*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986). The test of intent is an objective one: whether performance under the contract would necessarily and directly benefit the third party. *Postlewait*, 106 Wn.2d at 99. ‘The contracting parties’ intent is determined by construing the terms of the contract as a whole, in light of the circumstances under which it is made.’ *Postlewait*, at 100.

The issue of third party beneficiary status with regard to whether a forum selection clause implies consent to personal jurisdiction for such third party is discussed in *Robert L. Shaffer v. Murray McFadden*, 125 Wn. App. 364; 104 P.3d 742; 2005 Wash. App. LEXIS 98 (2005). Under *Shaffer*, a third party beneficiary has the same rights and obligations, under the choice of forum clause, as the direct party:

A forum selection clause can be enforced by, and enforced against, a third party beneficiary, as long as the clause is enforceable against the direct parties. Since the Canadian parties are third party beneficiaries the Subscription Agreement as well, then they are subject to the forum selection clause, and Washington has personal jurisdiction over them if the simple requirements of 4(i)(1)(D) have been satisfied.

vi. Service on Luksha and Cochrane is sufficient to demonstrate that the Canadian partners were served as third party beneficiaries.

Since the Canadian Partners are third party beneficiaries, service of process upon the party(s) listed in the contract justly implies that the Canadian partners should be aware of the action against them. In this case, however, the Canadian Partners actually received service by certified mail, return receipt requested in the second week of December, 2009. (CP 1508-1528).

The cases in Washington are consistent; service will be deemed proper upon a foreign entity, if the person served is in a position which *justly implies* that the entity in general would be on notice of the action. In *Patti Hartley, et al, v. American Contract Bridge League*, 61 Wn. App. 600; 812 P.2d 109; 1991 Wash. App. LEXIS 215 (1991), the court held that “it is not necessary that express authority to receive or accept service of process shall have been conferred by the corporation on the person served. It is sufficient if authority to receive service may be reasonably and justly implied.” *Hartley, supra, citing Crose*, 88 Wn.2d at 58 (*quoting*

State ex rel. Western Canadian Greyhound Lines v. Superior Court, 26 Wn.2d 740, 757, 175 P.2d 640 (1946)).

In *Reiner*, the court concluded that a manager of “site support services” at Hanford’s No. 2 site had sufficient discretionary authority to act in a representative capacity to accept service of process. *Reiner*, 101 Wn.2d at 478, finding that “It is reasonable to infer that Brown would turn over the process to those called upon to answer.” See *Croze v. Volkswagenwerk Aktiengesellschaft*, *supra*. Service of process was had on a proper party. *Hartley* at 61 Wn. App. 604. (Emphasis added.)

In *Croze v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50; 558 P.2d 764; 1977 Wash. LEXIS 735(1977), the Washington Court of Appeals issued very strong language on this issue, stating:

We find from all the surrounding facts that Riviera Motors occupied such a responsible representative status in relationship to VW-Germany and VW-America to make it reasonably certain that it would turn over the process to those called upon to answer. Thus, service on its agent, CT Corporation, was adequate service on VW-Germany and VW-America. *Fiat Motor Co. v. Alabama Imported Cars, Inc.*, 292 F.2d 745 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 898, 7 L. Ed. 2d 94, 82 S. Ct. 175 (1961). That CT Corporation failed to advise its principal of the service in no way affects the validity of such service. We base our conclusion on the previously discussed intricate linking of VW-Germany, VW-

America and Riviera in the worldwide manufacture, sales, and distribution network. *Cruse*, 88 Wn.2d at 58. (Bold added.)

David Spellman of Lane Powell indicates in his own declaration that Lane Powell and all of the underlying defendants were aware of the action, and were aware that a default judgment had been taken as to all of the defendants as early as February, 2010. (CP 1472-1483). Lane Powell was negotiating a release of the default during the month of March, 2010, however, they never bothered to file a Notice of Appearance, and no defendant, even knowing that a default judgment was taken against them, appeared.

vii. Liability extends to Luksha and Cochrane and all other affiliated entities.

Les Pioch, on behalf of Graoch Associates Limited Partnership, and deploying the limited liability entities Graoch #161, Graoch #160, Graoch #110, and the Jackalope Fund Limited Partnership, offered to sell and did in fact sell and unregistered security to the plaintiff. (CP 1529 - 1643). The sale of unregistered securities is prohibited by Washington statutes. RCW 21.20.430. This particular statute also declares that “every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under

the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.” RCW 21.20.430(3).

Paul Luksha is a General Partner and has had an interest in every Graoch entity since 2001, and Gregory Cochrane is a General Partner and the head of Investor Relations. All of these gentlemen knew or should have known of the arrival of an additional million dollars in cash to their coffers in the fall of 2007. As a consequence, all of the defendants are jointly and severally liable, and the incidence of such joint and several liability is sufficient to establish a third party beneficiary relationship.

viii. Plaintiff was under no obligation to notify the defendants of a motion for default

Defendants make hay that somehow the defendants did not receive notice that a default judgment was being taken, and that default judgment was taken the day after the case was filed (at least initially). CR 55 provides, in part, that “when a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.” CR55(a)(1). No defendant

has ever appeared in this action. Even now, the defendants are all before the court on a limited appearance basis. CR 55(a)(3) states with clarity: “Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A)”, (longer than a year later).

ix. Sixty days were not required before entering default.

CR 12 provides that “a defendant shall serve his answer within the following periods: (1) within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4. The only instances in which defendants may have 60 days to answer are set forth in CR12(a)(2), where the defendants are served by publication; or as set forth in CR12(a)(3), where defendants are served personally in accordance with RCW 4.28.180 (personal service out of state) or RCW 4.28.185 (long-arm statute), or if service was accomplished through the Secretary of State pursuant to RCW 46.64.040.

None of these provisions apply, because Appellants drafted and ascribed to a forum selection clause that required service by certified mail return receipt requested. Cochrane and Luksha were required to answer within 20 days – which in this case would have been by December 31, 2009. None have ever answered. Default was therefore appropriate as to each and every defendant beginning on January 2, 2010. Default was taken on January 27, 2010, more than 37 days following service. The

answer is due after the service of the summons and complaint, not after the date of filing.

x. The CR60(b)(4) claims were deficient and rightfully dismissed

Appellants have sought to make an argument under CR60(b)(4) claiming that service was fraudulent and misleading. Defendants were properly and completely served on December 11, 2009 by certified mail, return receipt requested.

“Where a party makes its claim, files its lawsuit, serves the parties and waits for a response – there is no fraud or misconduct under CR60(b)(4). *Matia Investment Fund, Inc. v. City of Tacoma*, 129 Wash. App. 541, 119 P.3d 391 (2005), *Freibe v. Supercheck*, 98 Wash. App. 260, 297, 992 P.2d 1014 (1999).

xi. The CR60(b)(11) claims are deficient and should be dismissed

Appellants have also sought to use CR60(b)(11) in a desperate attempt to circumvent the time limitation for failing to file such a motion within one year of the judgment. CR60(b)(11) may not be used to circumvent the time limitation of CR6 and CR60(b)(1). *Suburban Janitorial Services v. Clark American*, 72 Wash. App. 302 (1993). CR60(b)(11) only applies to extraordinary situations not covered by other sections of the rule; it does not support relief from judgment for all conceivable reasons. *Luna v. Household Finance Corp.*, 137 Wash. App. 1010 (2007), citing *State v. Keller*, 32 Wn.App. 135, 140-141, 647 P.2d 35

(1982). CR 60 (b)(11) should only be used in a situation involving extraordinary circumstances that are not covered by any other section of CR60(b). *Yearout v. Yearout*, 41 Wash. App. 897, 902, 707 P.2d 1367 (1985). Defendants are actually claiming that they were not properly notified of the complaint, when the principal agent Gary Gray was personally served twice at his home in Tacoma more than 20 days before the default judgment hearing, when the registered agent for the Washington corporate entities was personally served almost 50 days ahead of the hearing, and when all of the entities had been served pursuant to the forum selection clause at both corporate offices 38 days ahead of the default judgment.

Appellants argument under (b)(11) is actually a failure to serve argument that they made already under CR60(b)(1) which was time barred at the time it was made. This argument fails for the same reasons, and the additional reason that it is simply not an extraordinary situation not covered by other sections of CR60(b).

xii. All rights under RCW 4.28.200 are also extinguished.

Pursuant to RCW 4.28.200 provides that “if the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 (service by publication) and 4.28.180 (personal service out of state), he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner

be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

Appellants' attempt to set aside default in March 2011 was dismissed without prejudice. Appellants sought additional remedies under CR 60 on March 13, 2011, more than one year following the entry of default on January 27, 2010.

xiii. CR60(b)(1) and CR60(b)(4) claims are time barred

CR60(b)(1) provides as follows:

(b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

The argument made by Appellants does not include mistake, inadvertence, surprise, or excusable neglect; rather, they make arguments of irregularity in obtaining the default judgment of January 27, 2010.

CR 6 specifically excludes CR60(b)'s time provisions from enlargement by the court. *Suburban Janitorial Services v. Clark American*, 72 Wash. App. 302, 863 P.2d 1377 (1993), *Lee v. Western Processing Co.*, 35 Wash. App. 466, 667 P.2d 638 (1983), *Miebach v. Colasurdo*, 102 Wash.2d 170, 685 P.2d 1074 (1989), affirming 35 Wash.

App. 803, 670 P.2d 276 (1984) (motion to vacate default judgment on ground of CR60(b)(1) must be made within one year of judgment's entry).

CR60(b) expressly provides that "the motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." As a consequence, the arguments that Von Kleist 1) failed to properly serve any of the defendants with the summons and complaint; 2) obtained default judgment against Cochrane and Luksha less than sixty days after they were received; 3) failed to comply with the long-arm statute for out-of-state service; and 4) obtained a default judgment prior to the time allotted for any response; were all time-barred at the time of the motion.

Further, there is no argument on the record why the time limitation should be enlarged to accommodate claims they could have made in March, 2010, but were not brought until January, 2011, which were then dismissed for the failure to make proper service and then "re-filed" well beyond the one year time bar.

RCW 4.72.010(3) regulates the power of the court to vacate a judgment on the basis of mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order, and RCW 4.72.010(4) regulates the court's power to vacate a judgment on the basis of fraud practiced by the successful party in obtaining the judgment or order. The court's power is to be had only when claims brought under RCW 4.72.010 (2), (3), (4), (5), (6), and (7) are by petition; and *such proceedings must be*

commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability. RCW 4.72.030.

The procedural code may allow for claims to bear wide of the mark, but the court's power to vacate default judgment's based on an "irregularity in obtaining a judgment or order," or based upon "fraud practiced by the successful party in obtaining the judgment or order" must be during proceedings *commenced within one year after the judgment or order was made*. As the motion was brought on March 13, 2011, some six weeks after the one year anniversary of the judgment, the court was without subject matter jurisdiction to vacate the judgment on the basis of CR60(b)(1) and CR60(b)(4) because the proceedings were not commenced within the year.

Further, pursuant to RCW 4.72.050, "the judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered." Pursuant to RCW 4.72.060, the court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action. Cochrane and Luksha did not appear to make a defense, but made a limited appearance for the purpose of challenging the default judgment. No defendant ever made a general appearance to defend on the merits, and the court can therefore only

consider the procedural claims of defendants as to whether or not personal and subject matter jurisdiction attached. As a consequence, the court could adjudicate whether a valid defense to the action existed.

The motion to set aside default was procedurally deficient, and the court correctly decided to dismiss the motion, power or authority to vacate the judgment pursuant to RCW 4.72.060. All of defendants CR60(b)(1) and CR60(b)(4) claims should therefore be dismissed with prejudice.

xiv. Appellants' claim is moot.

On review of an order that denies a CR 60(b) motion to vacate a judgment or order, only the propriety of the denial, not the impropriety of the underlying judgment or order, is before the reviewing court *Barr v. MacGugan*, 119 Wn. App. 43, 48 n.2, 78 P.3d 660 (2003); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451 n.2, 618 P.2d 533 (1980); *see also In re Dependency of J.M.R.*, 160 Wn. App. 929, 938-39 n.4, 249 P.3d 193, review granted, 172 Wn.2d 1017 (2011).

Where the court can only decide on reconsideration concerning a case whose time for appeal has long expired, such arguments are moot and should be dismissed. "A case is moot if a court can no longer provide effective relief." *SEIU Healthcare 775 NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010).

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CONCLUSION

Cochrane and Luksha have appealed the Order Denying Defendants' Re-Filed Motion to Vacate Default Judgments. They have not appealed any other order in this case. Appeal on all other orders is time barred. As to the motion for reconsideration, Appellants' ability to seek relief under CR60(b)(1), (2) and (3) were lost forever when defendants motion to vacate was dismissed on March 11, 2011 for procedural deficiencies (failure to personally serve the Plaintiff), thirteen months following the entry of default judgment.

Appellants' claim for relief under CR60(b)(4) is without merit, because the record indicates that Cochrane and Luksha were served by service as required under the forum selection clause of their own agreement. The irregularity asserted by Appellants in this claim is time barred under CR60(b)(1) and CR 6. Appellants claim in attempting to assert fraud is deficient because defendants have failed even to plead fraud with particularity as required by CR 9. Even if such allegations were true, the statement was not the cause of the default judgment as to all defendants, which is required under the statute, and finally, the claim was time barred under RCW 4.72.050.

Cochrane and Luksha's claim under CR60(b)(5) is also deficient. The trial court entered the judgment, without any party, including Cochrane and Luksha's partners, one of whom was personally served and

living in Tacoma, appearing. Although Cochrane and Luksha knew of the judgment in January or February, 2010, they did nothing to set aside the judgment for approximately one year. The trial court then entered another final order, dismissing the motion to set aside default without prejudice. Cochrane and Luksha did not file a notice of appeal, but instead brought a second, untimely motion for reconsideration, which was decided by Judge Cuthbertson on the record, but such an order did not get entered until the motion was renoted for hearing in April, 2012.

The trial court affirmed its initial ruling on the second and untimely motion, again on a complete view of the record, and again denied the motion for reconsideration. As a consequence, the judgment of the trial court is not void. Further, the trial judge did not abuse his discretion in entering the order, but did so based on his complete and thorough review of the record before him. This court should not disturb the trier of fact in this decision, given the timing and the record.

The CR60(b)(11) argument made by Appellants is duplicative and ludicrous. All defendants were served pursuant to the forum selection clause at both locations of the offices in Vancouver and Toronto. Appellants intentionally engaged in a dilatory strategy to wait out the year to seek to set aside the default. When their action was dismissed because of procedural errors, they lost all of the claims they might have had before the year expired. CR60(b)(11) cannot be used to circumvent the time bar

for 60(b)(1) motions, and the defendants had nothing new under this motion. This claim too should be dismissed with prejudice.

Finally, Appellants' rights under RCW 4.28.200 are 1) not applicable, because defendants were served pursuant to their forum selection clause, and defendants have submitted themselves to personal jurisdiction of this court under that clause, and 2) are all time barred since the year has expired.

Appellants were general partners of the operation that is Graoch. They were bound to the representations of their partners, who had submitted themselves to the jurisdiction of the courts of the state of Washington, and, who by law (RUPA) were under the jurisdiction of Washington because of the location of their corporate headquarters in Tacoma.

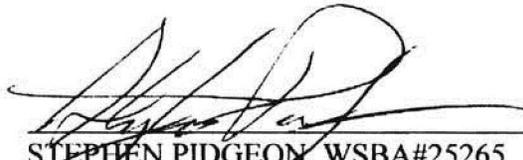
Because Appellants were properly under the jurisdiction of Washington, Appellants could not rely on the 60 day time for response available to out of state defendants, or avail themselves of defenses under the long arm statute. Instead, they were under Washington jurisdiction in the same manner as their partner in Tacoma. As partners, the Subscription Agreement belonged to Cochrane and Luksha, and they were served in accord with terms they themselves demanded.

The trial court found that personal jurisdiction attached. Likewise, the procedural record indicates that subject matter jurisdiction attached.

Service was therefore proper, and a default judgment taken more than 20 days after service was properly entered against them.

The trial court did not err in denying Appellants' motion to set aside default, as the decision was well within the proper reasoning of the court. Therefore, the issue on reconsideration is moot, as the court cannot and should not fashion a remedy for a judgment that has not been appealed.

Dated this 19th day of December, 2011.



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Attorney for Alex Von Kleist, Plaintiff

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 19, 2012, I arranged for service of the foregoing Response to Motion for Stay to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals 950 Broadway, Suite 300 Tacoma, Washington 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-file
David J. Corbett, 2106 N. Steele Street Tacoma, Washington 98406	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-file

Dated in Everett, Washington, this 19th day of December, 2012.



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