

1 Peter J. Grabicki, WSBA No. 05467
2 David J. Groesbeck, WSBA No. 24749
3 RANDALL & DANSKIN, P.S.
4 601 West Riverside Avenue, Suite 1500
5 Spokane, WA 99201
6 Telephone: (509) 747-2052
7 Facsimile: (509) 624-2528

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FEB 10 2003

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

Attorneys for Defendant Northwest Area Foundation

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JULIO ROMERO, on behalf of
himself and all other similarly
situated,

Plaintiff,

vs.

NORTHWEST AREA
FOUNDATION, a Minnesota Non-
Profit Corporation,

Defendant.

Case No. CY-02-3135-AAM

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS FOR LACK OF
STANDING AND FAILURE TO
STATE A CLAIM

INTRODUCTION

Plaintiff Julio Romero ("Romero") complains about a decision to
discontinue an exploratory community venture program that Defendant
Northwest Area Foundation (the "Foundation") had initiated to determine
whether the Yakima Valley could unite and carry on a long-range program
aimed at reducing or eliminating poverty in the region. The Foundation

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS - 1

RANDALL & DANSKIN, P.S.
ATTORNEYS AND COUNSELORS
1500 BANK OF AMERICA FINANCIAL CENTER
601 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201-0653
(509) 747-2052

1 discontinued the exploratory program when it became apparent that its regional
2 community model did not fit the characteristics of the Yakima Valley and its
3 complex mixture of communities.
4

5 Romero's attack on the Foundation's decision is framed by legal claims
6 — novel in this context — of breach of contract, promissory estoppel, quantum
7 merit, and violations of the Washington Consumer Protection Act. The
8 Complaint in effect asks the Court to stretch the law in a way that would create a
9 substantial disincentive to philanthropic innovation at a time when government
10 budget crises are placing growing demands on the private nonprofit sector to
11 address our most difficult social problems. Charities must have the freedom to
12 develop innovative programs that address community needs and to work hand-
13 in-hand with communities to encourage voluntary service in a spirit of trust. At
14 the same time, foundations must not be prevented from fulfilling their fiduciary
15 obligations to discontinue the expenditure of resources if the likelihood of
16 success is too remote, regardless of how disappointing such an outcome may be.
17

18 The Complaint should be dismissed in its entirety for two reasons: (1)
19 Romero lacks standing under Washington law; and (2) none of Romero's claims
20 states a claim for relief under the law.
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BACKGROUND

The Foundation's mission is to help communities throughout an eight-state region¹ reduce poverty. Established in 1934 by Louis W. Hill, the Foundation has granted funds of approximately \$18 million annually.²

This lawsuit has its genesis in a process of important institutional change that began in 1996 when the Foundation first questioned whether its historical approach — granting money for discrete projects through nonprofit organizations — continued to be an effective way to do philanthropy. An increasingly complex fabric of social, economic and environmental problems, together with federal policies delegating ever greater responsibility for social services to local governments, suggested a need for philanthropic organizations to take a longer view than they traditionally had.

In 1998, following a year of searching and review on the part of both staff and the Board, the Foundation made an extremely significant decision. Rather than continuing to operate in accordance with traditional philanthropic models, the Foundation undertook a fundamental shift in its approach. One of the three

¹ Minnesota, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington, and Oregon.

² The factual background in this section, like much of the background recited in the Complaint, largely is derived from information on the Foundation's website.

1 programs that the Foundation created to implement its new model, the
2 Community Ventures program, is involved in this case. The goal of Community
3 Ventures is to work collaboratively with up to 16 different communities in 10-
4 year engagements.³ The Foundation dedicated approximately \$150,000,000 to
5 implement these partnerships over a 10-year period with communities which
6 were to be selected on the basis of the Foundation's research. The Foundation
7 anticipated that some communities might already have developed plans and the
8 potential to move quickly toward a long-term partnership. Other communities,
9 like the Yakima Valley, would be selected instead for preliminary development
10 and exploration.
11
12
13
14
15

16 In the course of its work in Yakima, it became apparent to the Foundation
17 that, despite the hard work of many community members, consultants, and
18 Foundation staff, the regional community model that is the basis of the Ventures
19 program did not fit with and would not work in the Yakima Valley. The
20 Foundation acknowledged that it had underestimated the complexity of the
21 region, and decided that it would be wrong and irresponsible to continue to force
22
23
24
25

26 ³ To date, the Foundation has committed to 10-year Ventures partnerships with
27 three communities: Central Oregon; Miner County, South Dakota; and the
28 Indian Land Tenure Community, a community of interest spanning the eight-
state region.

1 an unworkable model on the Yakima Valley. In August 2002, the Foundation
2 officially communicated its deep regrets to those individuals in the Yakima
3 Valley who had participated to any extent in the exploration process, and
4 announced that it would not pursue the exploratory program further.
5

6
7 **ARGUMENT**

8 In ruling on a motion to dismiss, the Court must construe the Complaint in
9 the light most favorable to the Plaintiff and regard all allegations as true. *In re*
10 *Hanford Reservation Litigation*, 780 F. Supp. 1551, 1565 (E.D. Wash. 1991);
11 *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp.2d 1186, 1190 (E.D. Wash.
12 2000) (applying same standard on motion to dismiss for lack of standing).
13
14

15
16 **I. PLAINTIFF LACKS STANDING TO ENFORCE**
17 **A CHARITABLE TRUST.**

18 For purposes of diversity jurisdiction, a federal court is “in effect, only
19 another court of the State,” *Guarantee Trust Co. of New York v. York*, 326 U.S.
20 99, 108 (1945), and it cannot provide a forum where the state’s courts provide
21 none.
22

23
24 [A] right which local law creates but which it does not supply
25 with a remedy is no right at all for purposes of enforcement in a
26 federal court in a diversity case; . . . where in such cases one is
27 barred from recovery in the state court, he should likewise be
28 barred in the federal court.

1 *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).

2
3 Here, although the Complaint asserts counts in contract, quasi-contract,
4 and state consumer protection law, it is apparent from the allegations that
5 Romero in substance seeks to enforce a charitable trust for the benefit of the
6 Yakima Valley community. Because Washington specifically reserves to its
7 Attorney General exclusive responsibility and authority to enforce charitable
8 trusts, Romero has no standing to do so and the Complaint must be dismissed.
9

10
11 A charitable trust is “any real or personal property held by an entity or
12 person that is intended to be used for charitable purposes.” WAC 434-120-
13 025(2). Under Washington’s charitable trust act, RCW 11.110 *et seq.*, the
14 definition of “trustee” includes a corporation holding assets subject to limitations
15 permitting their use only for charitable, religious, eleemosynary, benevolent,
16 educational, or similar purposes. RCW 11.110.020. The Complaint
17 acknowledges that the Foundation designated funds to be used for a particular
18 charitable purpose, (*see* Complaint at ¶ 2), and in substance accuses the
19 Foundation of failing to use those funds for their designated purpose.
20
21

22
23 The Washington Supreme Court has noted that the defining feature of
24 charities is that they confer benefits “on the public at large, or some portion
25 thereof, or upon an indefinite class of persons.” *Samuel & Jessie Kenney*
26
27
28

1 *Presbyterian Home v. State*, 174 Wash. 19, 39 (1933). Indeed, the size and
2
3 indefiniteness of the class of beneficiaries of a charitable trust are the
4 characteristics which make it inappropriate for a single individual or group of
5 beneficiaries to enforce the trust. Here, the intended beneficiaries of the
6 Foundation's charitable work in the Yakima Valley would have included all
7 residents, businesses, nonprofit organizations and governmental entities of the
8
9 Valley, and may have extended to persons outside the Valley as well.
10

11 Because the Complaint seeks to enforce a charitable trust, it falls within
12 the ambit of Washington's charitable trust act, RCW 11.110 et seq. (hereinafter
13 the "Act"), which was enacted to "facilitate public supervision over the
14 administration of public charitable trusts and similar relationships and to clarify
15 and implement the powers and duties of the attorney general and the secretary
16 of state with relation thereto." RCW 11.110.010. No one individual or group
17 of beneficiaries has a direct interest in the charitable trust, only the general
18 public does. For this reason, Washington, like most states, delegates to its
19 attorney general the responsibility and the authority to ensure, on behalf of the
20 public, that charitable trusts are used for their designated purposes. *See*
21 RESTATEMENT (SECOND) OF TRUSTS § 364 (1959 & Supp. 2002). The Act
22 grants the attorney general power to investigate, to "institute appropriate
23
24
25
26
27
28

1 proceedings to secure compliance” with the Act, and “to secure the proper
2 administration of any trust or other relationship” to which the Act applies.

3
4 RCW 11.110.100, .110.120.⁴

5 Washington courts consistently have ruled that the “attorney-general is
6 the only one who can properly invoke the superintending power of the courts
7 over the administration of such trusts.” *Kenney Presbyterian*, 174 Wash. at 40
8 (quoting 2 R.C.L. p. 923 § 12); *see also State of Wash. v. Taylor*, 58 Wn.2d
9 252, 257 (1961) (same). The Washington Supreme Court has emphasized that a
10 charitable trust “is of public concern and the attorney-general is the protector of
11 the interests of the public.” *Kenney Presbyterian*, 174 Wash. at 40 (quoting 2
12 R.C.L. p. 923 § 12). Just a few months ago the Washington Court of Appeals
13 reaffirmed that the attorney general is “the only proper person to institute
14 proceedings for the enforcement of a public trust or charity.” *Lundberg v.*
15 *Coleman*, ___ Wn. App. ___, 60 P.3d 595, 599 (2002).

16 The rule granting standing exclusively to the state attorney general
17 ensures that the interests of the public — rather than those of particular
18
19
20
21

22
23
24
25
26 ⁴ The attorney general also must be notified “of all judicial proceedings
27 involving or affecting the charitable trust or its administration in which, at
28 common law, he is a necessary or proper party as representative of the public
beneficiaries.” RCW 11.110.120.

1 individuals — are served by charitable trusts, and helps to prevent harassing or
2 duplicative litigation.
3

4 The courts usually require that suits for enforcement be
5 brought by the Attorney General so that the trustees may not
6 be vexed by frequent suits, possibly based on inadequate
7 investigation and brought by irresponsible parties, and so that
8 the courts may not find their calendars clogged with an
unnecessarily large amount of litigation.

9 G.G. Bogert and G.L. Bogert, *The Law of Trusts and Trustees* (2d ed., rev.
10 1991) § 414; *see also, Clevenger v. Rio Farms*, 204 S.W.2d 40 (Tex. App.
11 1947) (standing denied to low-income farmers who were potential beneficiaries
12 of nonprofit program).
13

14
15 Some courts have permitted an individual with a “special interest” in a
16 charitable trust to bring an action to enforce the trust.⁵ A special interest has
17 been found where a particular plaintiff is entitled to receive a benefit under the
18 trust, where particular persons are entitled to receive a preference in receiving
19 benefits under the trust, or where the class of beneficiaries of the trust is small.
20
21 RESTATEMENT (SECOND) OF TRUSTS § 391, cmt. c. None of these special
22 circumstances exists in the instant case, and Romero has alleged no special
23 interest in this matter. As a member of a broad community that may have
24
25
26

27
28 ⁵ Defendant has located no Washington case addressing this issue; however, the
trend in the law is to recognize a limited avenue for individuals with a “special
interest” to bring actions to enforce a charitable trust.

1 benefited had the Foundation invested a portion of the trust in the Yakima
2 Valley, Romero appears to be a potential beneficiary of the trust. That fact
3 alone, however, does not entitle him to maintain a suit to enforce it. *See id.*

4
5 Prosecuting the lawsuit as a class action does not change this rule or
6 allow Romero to obtain standing where he otherwise has none. *See e.g. Allee v.*
7 *Medrano*, 416 U.S. 802, 829 (1974) (“Standing cannot be acquired through the
8 back door of a class action.”) Washington grants such standing exclusively to
9 its Attorney General. Even in those jurisdictions in which standing has been
10 granted in class actions involving a charitable trust, it has been based on the fact
11 that *every member* of the class had a special interest. *See, e.g., Hooker v. Edes*
12 *Home*, 579 A.2d 608, 613 (D.C. 1990) (citing sharply defined class of limited
13 number). In contrast, no member of Romero’s proposed class is alleged to have
14 any special interest in the charitable trust in question beyond his or her general
15 interest as a potential member of the large and indefinite class of persons who
16 might have benefited had a portion of the trust been used to fund long-term
17 work in the Yakima Valley. It is precisely because such an interest is so
18 attenuated that most jurisdictions throughout the country, including
19 Washington, delegate responsibility for enforcing charitable trusts and
20
21
22
23
24
25
26
27
28

1 protecting the public's interest in their proper administration to the state
2 attorney general.
3

4 Romero should not be permitted to undermine the policies embodied in
5 the Act by trying to gain standing through the back door. Because Romero
6 lacks standing under Washington law, the Complaint should be dismissed.
7

8
9 **II. THE COMPLAINT FAILS TO STATE ANY CLAIM
UPON WHICH RELIEF MAY BE BASED**

10 Because the Complaint struggles to find a theory under which Romero
11 has standing to raise what is in effect a broad public interest in the regulation of
12 charitable activities, it is not surprising that the contractual, quasi-contractual
13 and consumer protection theories asserted do not accommodate the substance of
14 the Complaint. The doctrines have been stretched almost beyond recognition,
15 and as a result the Complaint fails to state a claim under any of its four counts.
16
17

18
19 **A. COUNT I ALLEGES THE EXISTENCE OF TERMS THAT ARE
20 TOO INDEFINITE TO BE ENFORCEABLE.**

21
22 Romero's first theory of recovery alleges that the Foundation breached a
23 unilateral contract. A unilateral contract has two essential elements, "a promise
24 on the part of the offeror and performance of the requisite terms by the offeree."
25 *Multicare Med. Ctr. v. D.S.H.S.*, 114 Wn.2d 572, 583 (1990). Romero must
26 adequately plead all the terms and conditions of the alleged contract, *see Family*
27
28

1 *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 31 (1998), including the
2 performance he alleges the Foundation required of him (the “performance
3 term”).
4

5 In basic contract terms, Romero claims that the Foundation promised to
6 provide money in exchange for a performance consisting of Romero and others
7 in the community “actively participat[ing] in developing a comprehensive
8 community plan.” (Complaint at ¶ 28.)⁶ Even if Romero could prove the
9 existence of this promise, he still would have failed to state the existence of a
10 unilateral contract because the putative performance term — that he “actively
11 participate” — is too vague and indefinite to form the basis of an enforceable
12 contract.
13
14
15
16

17 It is black letter law that the terms and conditions of a contract must be
18 “reasonably certain.” RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979).
19

20 To be enforceable, a contract must be ‘definite enough so that
21 when it is coupled with the acceptance, it can be determined
22 with at least a reasonable degree of certainty what the nature
23 and extent of the obligation is . . .’

24 *Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wn. App. 361, 376
25 (2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33 (“The terms of a
26

27
28 ⁶ The Foundation, of course, contends that it did no more than share its
aspirations for the region, and vigorously disputes that it ever made any
“promise.”

1 contract are reasonably certain if they provide a basis for determining the
2 existence of a breach and for giving an appropriate remedy.”). If the alleged
3 offer for a unilateral contract provides no “criteria to determine when rights to
4 such benefits have been breached, or what standard to apply to enforce them,” a
5 court may dismiss the complaint for failure to state a claim. *See e.g. Martens v.*
6 *Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 744 (Minn. 2000).
7
8
9

10 The allegation that Romero was required to “actively participate” is so
11 vague and indefinite that it provides no basis for the Court to determine whether
12 or when a contract was formed. Assuming that, as alleged, Romero attended
13 frequent and lengthy committee meetings, (Complaint at ¶ 3, 21), the Court still
14 has no basis to determine whether Romero or any other putative class member
15 “actively participated.”⁷ While all contracts are susceptible to a degree of
16 interpretation, the speculation needed to impart content to an indefinite term
17
18
19
20
21
22
23
24
25

26 ⁷ If “active participation” were construed instead as a collective performance
27 term applying to an entire class, it would be even more indefinite because
28 there would be no basis for the Court to determine how many or which
potential class members would have to act for the class as a whole to “actively
participate.”

1 like “actively participate” would require the Court to create, rather than to
2 enforce, a contract.⁸
3

4 Courts refuse to create contracts in situations where the putative terms
5 are this vague. A classic example is *Shetney v. Shetney*, 181 N.W.2d 516 (Wis.
6 1970), in which an alleged agreement that “the plaintiff . . . would assist the
7 defendant herein in securing a doctor’s degree in Music Theory from Indiana
8 University, and that the defendant herein would assist the plaintiff in securing a
9 doctor’s degree upon his completion of the same” was held too indefinite as a
10 matter of law to determine “the nature and extent of the agreement which the
11 parties allegedly entered into.” *Id.* at 522; *see also, Bumpus v Bumpus*, 19 N.W.
12 29 (Mich. 1884) (promise to provide all funds necessary for brother’s education
13 and “necessary expenses” too vague to be enforced). “Such agreements, which
14 the court said ‘must rest for their performance upon the honor and good faith of
15 the parties,’ are not enforceable as a contract.” *Shetney*, 181 N.W.2d. at 522
16 (*quoting Bumpus*, 19 N.W. at 30. Similarly, in *Barton v. Spinning*, the
17 Washington Supreme Court held that an action on an option contract could not
18
19
20
21
22
23
24

25
26 ⁸ For example, would attending meetings alone satisfy the condition of “active
27 participation” and, if so, how often? Would other acts be required? Should
28 “active participation” be measured on a one-time basis, a week-to-week basis,
or some other basis? The questions that arise are almost without limit.

1 be sustained where the alleged consideration for the option was that the
2 plaintiffs “use their best endeavors, through the Tacoma Ledger, to advance the
3 value” of land in which the defendant had an interest. *Barton v. Spinning*, 8
4 Wash. 458, 460 (1894). The court concluded that this term had been “left so
5 indefinite that no legal right or obligation could be founded thereon.” *Id.*
6
7

8 Because Romero may not prevail upon the Court to create an after-the-
9 fact, unilateral contract based on a vague and indefinite performance term like
10 “actively participate,” Count I should be dismissed.
11
12

13 **B. COUNT II FAILS TO ALLEGE AN UNEQUIVOCAL PROMISE**
14 **AND PROVIDES NO BASIS FOR THE ALLEGATION THAT**
15 **ENFORCEMENT IS NECESSARY TO AVOID INJUSTICE.**

16 Romero’s second theory of recovery is that a contract was formed by
17 promissory estoppel when he reasonably relied on the Foundation’s promise to
18 “underwrite” a planning process. (Complaint at ¶ 33.) Washington courts
19 require five elements to state a claim of promissory estoppel, one of which is a
20 promise that the promisee “justifiably rel[ied] upon.” *See Corbit v. J.I. Case*
21 *Co.*, 70 Wn.2d 522, 539 (1967). A party is justified in relying on a promise that
22 is “clear and definite,” *see Seattle-First Nat’l Bank v. Westwood Lumber, Inc.*,
23 65 Wn. App. 811, 825 (1992), or that is an “unequivocal promise (or statement
24 equivalent thereto).” *Havens v C & D Plastics, Inc.*, 68 Wn. App. 159, 165
25
26
27
28

1 (1992). The allegation here — that the Foundation promised to “underwrite” a
2 planning process — is both ambiguous and indefinite because there is no limit
3 to the time or quantum of resources that might be required to “underwrite” a
4 comprehensive plan of the sort envisioned by the Ventures program. The
5 completion of such a plan is contingent on many factors outside the control of
6 the Foundation; indeed, in this case, the Foundation ultimately concluded that
7 the completion of such a plan was not possible. Romero has alleged no facts
8 that support the conclusion that he was justified in relying on anything more
9 than the Foundation’s best efforts to engage the community.
10
11
12
13

14 It is also prerequisite for relief based on promissory estoppel that
15 “injustice can be avoided only by enforcement of the promise.” *Corbit*, 70
16 Wn.2d at 539. The Complaint fails to allege facts sufficient to support such an
17 inference. To the contrary, the facts alleged make it clear that the Foundation
18 already invested considerable time and resources in the program, (*see, e.g.*,
19 Complaint at ¶¶ 17-20), and support a conclusion that fulfilling Romero’s
20 demand for \$1.25 million would bring the community no closer to a
21 comprehensive poverty reduction plan.
22
23
24
25

26 Because the Complaint falls far short of alleging an unequivocal promise
27 and fails to allege facts sufficient to support the allegation that injustice can be
28

1 served only by granting Romero the remedy he seeks, Count II must be
2 dismissed.
3

4 C. COUNT III FAILS TO PLEAD THE ELEMENTS OF
5 QUANTUM MERUIT.

6 Romero alternately seeks relief in the form of quantum meruit. Quantum
7 meruit is “not a legal obligation, but is rather a remedy.” *Heaton v. Imus*, 93
8 Wn.2d 249, 252 (1980). It is “a reasonable amount for work done, regardless of
9 the existence of a contract.” *Id.* Recovery in quantum meruit “is limited to the
10 reasonable value of services rendered.” *Bailie Comms., Ltd. v. Trend Bus. Sys.,*
11 *Inc.*, 61 Wn. App. 151, 159 (1991).⁹ The elements to recover in quantum
12 meruit are (1) valuable services were rendered, (2) for a person sought to be
13 charged, (3) which services were accepted, used and enjoyed by the person
14 sought to be charged, (4) under circumstances providing reasonable notice that
15 the plaintiff expected to be paid. *Id.*
16
17
18
19
20

21 The Complaint fails to allege any circumstance that reasonably would
22 have notified the Foundation that Romero expected to be paid for his time or
23
24

25 ⁹ Romero’s prayer for relief demands a recovery of \$1.25 million in quantum
26 meruit, (*see* Complaint at p. 14, ¶ 1), an amount equal to the damages sought
27 for breach of contract. Even if Romero’s quantum meruit “claim” could
28 withstand dismissal, there is no support in the law for this measure of
damages.

1 participation. Because that is a required element, the omission is fatal to this
2 claim. The allegation that the Foundation knew that Romero's services "were
3 provided with an expectation of substantial financial contribution" to the
4 planning effort, (Complaint at ¶ 38), does not plead this element because
5 Romero's expectation of contribution to a planning process is legally irrelevant
6 to his claim for recovery in quantum meruit. He may only seek the reasonable
7 value of his services. *Bailie*, 61 Wn. App. at 159. He therefore was required to
8 allege circumstances which reasonably would have notified the Foundation that
9 he expected such compensation.

14 Romero cannot allege such circumstances without contradicting facts set
15 forth in the Complaint. The only fair inference from the facts alleged is that
16 any contribution Romero made to the Foundation's charitable enterprise was a
17 voluntary community service, which carries no expectation of compensation.
18 *See, e.g., Thomas v. Kearney Little League Baseball Assoc.*, 558 N.W.2d 842,
19 845-46 (Neb. Ct. App. 1997).

23 In our society, a great many people are asked to render a
24 community service, and they do so without expecting or
25 receiving compensation for their services. If [plaintiff's]
26 position was correct, all such persons would be entitled to
27 demand payment . . . unless it was specifically agreed that the
28 services were to be rendered gratuitously. . . . We think the
lack of cases on the subject is probably due to the fact that
most people agreeing to render such community service

1 would not think of suing the sponsoring organization for
2 compensation

3 *Id.* at 845 (noting other jurisdictions to address the issue have consistently held
4 that there is no implied promise to compensate volunteer community service).
5

6 Count III must be dismissed because Romero's voluntary participation as
7 a community servant is inconsistent with an *ex post facto* demand for
8 compensation.
9

10 D. COUNT IV FAILS BECAUSE THE FOUNDATION'S
11 CHARITABLE ACTIVITIES DO NOT OCCUR IN "THE
12 CONDUCT OF TRADE OR COMMERCE."

13 Romero's claim under the Washington Consumer Protection Act
14 ("CPA") is without merit. To prevail in a private action under the CPA,
15 Romero "must prove five *distinct* elements," one of which is that the act
16 complained of must "occur[] in trade or commerce." *Hangman Ridge Training*
17 *Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Washington
18 courts have stated that an act is not within the sphere of trade or commerce if it
19 "did not involve any form of trade or commercial relationship between the[]
20 parties," *Merchant v. Peterson*, 38 Wn. App. 85, 86 (1984), and have
21 characterized the kind of activity that falls within the scope of the CPA as
22 "entrepreneurial" or related to profit-making. *State Farm Fire & Cas. Co. v.*
23 *Huynh*, 92 Wn. App. 454, 458 (1998) ("[A]cts done for the purpose of
24
25
26
27
28

1 increasing profits are within the sphere of trade, are commerce, and are subject
2 to the Consumer Protection Act.”).


3
4 The Complaint alleges no facts that even suggest that the Foundation’s
5 activities in Yakima Valley involved a trade or commercial relationship
6 between the parties or that the Community Ventures program is a profit-making
7 activity. Even if a charitable foundation is capable of engaging in commercial
8 or profit-making activity, in this case, the Foundation’s activities in Yakima
9 Valley were strictly charitable and involved no trade, commerce or profit. As
10 nothing in the Complaint supports an inference to the contrary, Count IV must
11 be dismissed.
12
13
14
15

16 **CONCLUSION**

17
18 For the foregoing reasons, the Complaint should be dismissed in its
19 entirety.

20
21 DATED this 10 day of February, 2003.

22 RANDALL & DANSKIN, P.S.

23
24 

25 Peter J. Grabicki, WSBA # 05467
26 David J. Groesbeck, WSBA #24749
27 601 W. Riverside Ave., #1500
28 Spokane, WA 99201
(509) 747-2052
Attorneys for Defendant

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS - 20

RANDALL & DANSKIN, P.S.
ATTORNEYS AND COUNSELORS
1500 BANK OF AMERICA FINANCIAL CENTER
601 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201-0653
(509) 747-2052

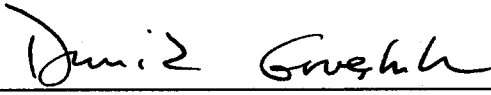
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the plaintiff by its counsel, at the address and in the manner indicated, this 10 day of February, 2003.

Matthew N. Metz, Esq.
999 Third Ave., Suite 2525
Seattle, WA 98104

- Via First Class Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery



David J. Groesbeck