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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
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JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**

10 JULIO ROMERO, on behalf of himself and
11 all others similarly situated,

12 Plaintiffs,

13 vs.

14 NORTHWEST AREA FOUNDATON,
15 A Minnesota Non-Profit Corporation,

16 Defendants.

Case No. CY-02-3235-AAM

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

17 **I.**
18 **INTRODUCTION**

19
20 In the period from December, 2001 to February, 2002, Defendant made and repeated a
21 clear, unequivocal and binding promise to Plaintiff Julio Romero and to the other unpaid
22 participants in the Yakima community planning process (hereinafter "Plaintiffs"). Defendant
23 promised to provide \$750,000 to Plaintiffs to use in hiring technical consultants to assist in
24 developing their community plan, and to additionally provide \$500,000 worth of technical and
25 logistical assistance to support Plaintiffs in the planning effort. In return, Plaintiffs agreed to
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PLAINTIFFS' MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS 1

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ORIGINAL

1 produce and began to produce a comprehensive community plan according to a detailed
2 procedure and timeline established by Defendant. Plaintiffs expended thousands of
3 uncompensated hours and unreimbursed dollars in said effort.

4 In March, 2002, Defendant, motivated by internal staffing changes, suspended the
5 planning process and froze the expenditure of funds. In August, 2002, Defendant formally
6 reneged on its contract.

7 Defendant states in its reply brief that its "Community Ventures" program in the
8 Yakima Valley was merely "exploratory". Unfortunately, it failed to communicate the
9 supposedly "exploratory" nature of the project to the Plaintiffs who participated in the program.
10 Plaintiffs justifiably believed that the Foundation would stand behind its promises when it said
11 that it would provide \$1.25 million in assistance to Plaintiffs for use in the planning effort. At
12 no time between the start of work by Defendants in December, 2001 and the cancellation of the
13 project in August, 2002 did Defendant state or indicate that the project was "exploratory" and
14 that its promises were meaningless.

15 The first three causes of action upon which this action are based are well-established
16 theories of breach of contract, promissory estoppel, and quantum meruit. The fourth cause of
17 action is based on the Washington Consumer Protection Act, which is aimed at a wide spectrum
18 of unfair and deceptive actions directed towards the public.

19 Defendant's untimely¹ Motion to Dismiss should be denied in its entirety because (1)
20 Plaintiff Julio Romero clearly has standing under Washington law to litigate breach of contract
21 and other claims, and (2) because all of Plaintiffs' claims state a valid claim for relief under
22 Washington law. In addition, sanctions should be awarded to Plaintiffs because Defendant's
23

24 ¹ Pursuant to F.R.C.P. 81(c), Defendant had until January 4, 2003, or 20 days from the date that it
25 accepted service on December 13, 2002 to "answer or present the other defenses or objections available
26 under these rules...". Defendant did not file its motion until February 10, 2003, 36 days past the
deadline.

1 motion legal arguments are without merit and misrepresent the applicable doctrines of law, and
2 because Defendant's untimely motion was brought for the purpose of harassment and
3 increasing costs for Plaintiffs and their attorney.

4 II.

5 ARGUMENT

6 A. Standard for Review

7 In ruling on a F.R.C.P. 12(b)(6) motion, the court must (1) construe the complaint in the
8 light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and
9 (3) determine whether plaintiff can prove any set of facts to support a claim that would merit
10 relief. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996). A complaint
11 should not be dismissed for failure to state a claim unless it appears beyond doubt that the
12 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
13 Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

14 B. Plaintiffs Do Not Seek to Enforce a Charitable Trust

15
16 Plaintiffs' complaint is grounded in theories of contract, promissory estoppel, quasi-
17 contract, and consumer protection. Plaintiffs do not allege in the complaint any right to direct,
18 control, or otherwise enforce the purposes of a charitable trust. They make no allegation that
19 Defendant acted inconsistently with the trust instrument.

20 As set forth fully in the complaint, Defendant promised to provide \$1.25 million to
21 Plaintiffs for their use in developing a community plan, and then reneged on that promise.
22 Plaintiffs' lawsuit simply seeks to enforce said promise.

23 Defendant's suggestion that a large and indefinite group may have benefited from its
24 activities had it continued with the planning process is irrelevant. The proposed Plaintiff class
25
26

1 is a clearly defined group of planning process participants who expected to use the funds
2 promised by Defendant for the purpose of developing a plan. At trial, Plaintiffs intend to prove
3 that there was a clear and enforceable agreement between the parties, and that such agreement
4 was breached by Defendant.

5 Defendant's novel and factually and legally unsupported legal theory relating to
6 charitable trusts would, if carried to its logical conclusion, effectively immunize charities from
7 lawsuits. According to Defendant's logic, any plaintiff with a breach of contract claim against a
8 charity would essentially be barred from suing for damages on the grounds that the plaintiff
9 seeks to direct the charity's expenditure of funds. There is no support in the statutory or
10 decisional law for such an extreme and unfair result.

11 The cases cited by Defendant to support its position do not relate to situations such as
12 the one at bar where a plaintiff alleged a clear contractual commitment, but rather to situations
13 in which the plaintiffs alleged that the defendant trustees were not meeting their obligations to
14 the trust's beneficiaries.

15
16 **C. Plaintiffs state a valid claim for breach of contract**

17
18 Plaintiffs' complaint clearly sets forth the terms of the contract between Plaintiffs and
19 Defendant. The nature of Plaintiffs' obligation was clearly defined, namely, that Plaintiffs
20 undertake a planning process according to the timeline and in a manner defined by Defendant
21 and set forth in part in Exhibit A (a timeline prepared by Defendant) to Plaintiffs' Complaint.
22 The nature of Defendant's obligation is also clearly alleged in the complaint—that Defendant
23 provide \$750,000 in planning funds and access to \$500,000 in non-cash logistical support and
24 technical assistance.

1 The court should apply the standard set forth in Cahill v. Liberty Mut. Ins. Co., 80 F.3d
2 336 (1996) in evaluating the sufficiency of Plaintiffs' breach of contract allegation. In Cahill,
3 the court stated that in reviewing a motion to dismiss, "*All allegations of material fact are*
4 *taken as true and construed in the light most favorable to the nonmoving party.* A complaint
5 should not be dismissed unless a plaintiff can prove *no* set of facts in support of his claim
6 which would entitle him to relief." 80 F.3d at 338 (emphasis added)(citations omitted.)

7 Defendant's nitpicking over the alleged vagueness of the term "actively participating" is
8 not probative. Plaintiff's First Cause of Action for breach of contract incorporates all
9 allegations made in Paragraphs 1-26 in the complaint. Paragraphs 19 and 20 set forth in detail
10 the precise terms of the contract between the Plaintiff class and Defendant. Therefore,
11 Defendant's focus on the words "actively participating" is inapposite and excessively narrow.

12 Defendant fails to reach either of the high bars set forth under the Cahill standard.
13 Construing facts in the light most favorable to Plaintiffs, Plaintiffs' contractual allegations are
14 clearly sufficient to establish an offer and acceptance of a contract. Second, Plaintiffs can and
15 will establish a set of facts at trial which will establish their entitlement to relief by showing
16 that a well-defined contract existed between Plaintiffs and Defendant.

17 In conclusion, Plaintiffs present a straightforward breach of contract cause of action in
18 which the offer, acceptance, and breach are clearly alleged. Defendant has fallen far short of
19 establishing the legal insufficiency of Plaintiffs' breach of contract cause of action.

20
21 **D. Plaintiffs' complaint successfully alleges the five elements of a promissory estoppel**
22 **claim.**

23
24 Plaintiffs' promissory estoppel allegations set forth in the second cause of action are
25 straightforward and clearly meet the five necessary elements for a promissory estoppel claim in
26

1 Washington. In Corbit v. J.I. Case Co., 70 Wn.2d 522, 539 (1967), the Washington Supreme
2 Court set forth the five elements of a promissory estoppel claim, namely:

- 3 (1) "A promise which
4 (2) the promisor should reasonably expect to cause the promisee to change his position
5 and
6 (3) which does cause the promisee to change his position
7 (4) justifiably relying upon the promise, in such a manner that
8 (5) injustice can be avoided only by enforcement of the promise." Corbit at 539.
9

10 Plaintiffs' complaint sets forth the following allegations which support its promissory
11 estoppel cause of action:

- 12 (1) Promise—the complaint alleges that Defendant promised to provide \$1.25 million in
13 cash and other assistance to the planning effort²;
14 (2) Reasonable expectation of change in position—The complaint alleges that the planning
15 process was Defendant's idea and that Defendant's offer to provide \$1.25 million was
16 calculated by Defendant to spur Plaintiffs' planning effort;
17 (3) Change in position by promisee—The complaint alleges that the Plaintiffs dedicated
18 thousands of hours to the planning process because of Defendant's promises;
19 (4) Justifiably relying upon—Plaintiffs' complaint alleges that Defendant is a large
20 foundation with \$425 million in assets and that Defendant never indicated that the
21 planning process would not be completed nor that its completion was conditional;
22
23

24 ² Plaintiff's Second Cause of Action incorporates all allegations made in Paragraphs 1-31 in the
25 complaint. Paragraphs 19 and 20 set forth in substantially more detail the precise terms of the
26 transaction between Plaintiffs and Defendant. Therefore, Defendant's focus on the word "underwrite"
is inapposite and excessively narrow.

1 (5) Injustice—The complaint alleges that Plaintiffs were induced to dedicate thousands of
2 hours of their time and that they expended considerable resources for travel, child care
3 and other expenses in attending meetings for a project actively promoted and then
4 unfairly abandoned by Defendant.

5
6 Clearly, the complaint's allegations are more than sufficient to survive a 12(b)(6) motion in
7 that they effectively allege each element of the promissory estoppel cause of action.

8 Much of Defendant's argument regarding the promissory estoppel issue consists of factual
9 argument relating to the "reasonableness" of Plaintiffs' reliance, and Plaintiffs' failure to
10 sufficiently demonstrate "injustice". Pursuant to the standard in Cahill discussed above, in
11 which all allegations are to be construed in the light most favorable to Plaintiffs, Plaintiffs
12 clearly have alleged a set of facts more than sufficiently robust to support a viable promissory
13 estoppel cause of action. Defendant should not be permitted to usurp the Court's fact-finding
14 function by merely alleging its conclusions as established facts, then bootstrapping said
15 allegations into a 12(b)(6) motion.

16
17 **E. Plaintiffs' complaint successfully pleads the five elements of a quantum meruit cause**
18 **of action.**

19
20 In Bailie Comms., Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159, the Washington
21 Court of Appeals stated that the four elements required for recovery in quantum meruit are:

- 22 (1) valuable services were rendered,
23 (2) for a person sought to be charged,
24 (3) which services were accepted, used and enjoyed by the person sought to be charged,
25 (4) under circumstances providing reasonable notice that the plaintiff expected to be paid.
26

1 Plaintiffs' complaint sets forth the following allegations which support its quantum meruit
2 cause of action:

- 3 (1) Valuable service rendered—Plaintiffs' planning effort;
- 4 (2) Person sought to be charged—Defendant, who sought to use the planning effort to
5 demonstrate the viability of its Community Ventures Program;
- 6 (3) Services were accepted, used and enjoyed—Paragraph 24 of the Complaint alleges that
7 Defendant wrote to Plaintiffs on April 12, 2002, well after that planning process was
8 underway, that Defendant "remain fully committed to working toward a plan for
9 partnership."
- 10 (4) Under circumstances providing reasonable notice that the plaintiff expected to be
11 paid—Here, based on the allegations of paragraphs 19 of Plaintiffs' complaint, the
12 payment that Plaintiffs were expecting was Defendant's financial contribution to the
13 planning process. This was the subject of the contract as alleged in the complaint.
14 Thus, Plaintiffs sought a collective benefit to aid in their planning effort, not an
15 individual benefit.

16 Defendant's motion inappropriately focuses on an alleged individual benefit which
17 Plaintiffs never sought. Said benefit was never alleged anywhere in the complaint or in the
18 prayer for relief.
19

20 Rather, Plaintiff's seek a collective compensation for the thousands of hours of service that
21 they provided at Defendant's behest and with Defendant's promise of financial support.
22

23 In conclusion, Plaintiffs have made out the elements of a quantum meruit cause of action.
24
25
26

1 **F. Plaintiffs' fourth cause of action makes a valid claim under the Washington**
2 **Consumer Protection Act**
3

4 Defendant challenges Plaintiffs' fourth cause of action on the basis that Defendant's
5 conduct did not constitute "trade or commerce" as defined by the act.

6 Trade or commerce³ is defined by the Washington Consumer Protection Act to include
7 "...*any* commerce directly or indirectly affecting the people of the state of Washington."
8 R.C.W. 19.86.010(2). (emphasis added).

9 At this time, the court does not have a sufficient factual record to make a ruling on this
10 question. The determination of whether Defendant's conduct constituted "trade or commerce"
11 is essentially a factual one, and therefore wholly inappropriate at this stage of the proceedings.
12 Discovery would need to be conducted regarding the financial, tax⁴, public relations, and other
13 benefits that Defendant sought to gain from its activities in Yakima. For example, it is possible
14 that the plan Plaintiffs sought to develop and implement could have included loans from
15 Defendant to Plaintiffs' community.
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20 ³ Black's Law Dictionary (5th ed. 1991) defines the term "Trade and commerce" as follows:

21 The words "trade" and "commerce" *when used in juxtaposition impart to each other enlarged*
22 *signification, so as to include practically every business occupation* carried on for subsistence
23 or profit and into which the elements of bargain and sale, barter, exchange or traffic, enter.
(emphasis added)

24 ⁴ For example, charitable foundations such as Defendant are required under federal tax law, upon threat
25 of substantial financial penalty, to make annual distributions equaling 5% of their corpus. Internal
26 Revenue Code 4942. Thus, Defendant may have gained financial benefit by expending funds through
the Community Ventures Program. Naturally, such a determination is a factual one, and can be made
fairly only after Plaintiff has had the opportunity to conduct discovery.

1 Plaintiffs allege a number of facts which support the proposition that the activity in question
2 was trade or commerce. As stated in Paragraph 16 of the Complaint, both Defendant and the
3 Community Venture Program are very large. Defendant's assets exceed \$425,000,000. The ten
4 year budget for the Community Venture Program, the program in which the Plaintiffs
5 participated, exceeds \$150,000,000. Defendant intends for its program to operate in numerous
6 communities. Programs and projects of this size clearly give rise to the supposition that
7 Defendant was engaged in "trade or commerce".
8

9 One Washington court has held that the activities of a non-profit can constitute "trade or
10 commerce" for the purposes of the Washington Consumer Protection Act. See e.g. Buren v.
11 Anderson Creek School, 1996 WL 257491 (Wash.App.Div.3) (unpublished decision), where
12 the court found that the educational activities of a not for profit school constituted "trade or
13 commerce" for the purposes of the Act.
14

15 In conclusion, the determination of whether Defendant's activities constituted trade or
16 commerce is essentially a factual one, and should not be made at this very early stage in the
17 process. Under the standard set forth in Cahill and discussed above, it is appropriate to grant a
18 12(b)(6) motion only when no set of facts which Plaintiffs may be able to prove would give rise
19 to a valid claim. This standard is clearly not met by Defendant, where it is easy to speculate
20 upon a set of facts giving rise to a valid claim that Defendant's Community Venture Program
21 constitutes "trade or commerce."
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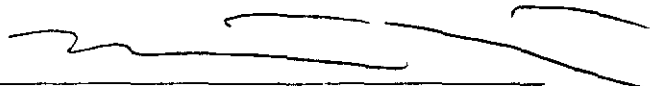
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III.
CONCLUSION

For the foregoing reasons, Defendant's untimely motion to dismiss should be denied in its entirety, and sanctions should be awarded to Plaintiffs.

DATED this 21st day of February, 2003.

LAW OFFICES OF MATTHEW N. METZ

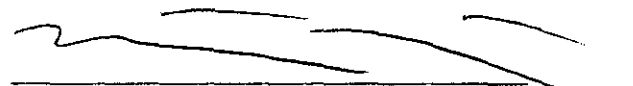


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the Defendant by and through its counsel, via hand delivery by Storey and Miller, at its offices located at 601 W. Riverside Ave., Ste. 1500, Spokane, WA 99201, this 21st day of February, 2003.


Matthew N. Metz