

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

FILED IN THE
DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUN 20 2003

JAMES R. LARSEN, CLERK
DEPUTY

NO. CY-02-0135-EFS

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JULIO ROMERO, et al.,)
)
Plaintiffs,)
)
vs.)
)
NORTHWEST AREA FOUNDATION,)
)
Defendant.)

June 18, 2003
Richland, Washington

VERBATIM REPORT OF PROCEEDINGS
MOTION TO DISMISS

BEFORE THE HONORABLE EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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REPORTED BY:

Susan E. Haney, RMR, CRR
U.S. District Court
P.O. Box 1568
Yakima, WA 98907-1568
CCR No. 2643

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

1 (June 18, 2003, 10:10 a.m.)

2 THE CLERK: Matter before the court is Julio Romero
3 versus Northwest Area Foundation, cause No. CY-02-3135-EFS,
4 time set for motion hearing. Counsel, please state your
5 presence for the record.

6 MR. GROESBECK: David Groesbeck, Randall & Danskin,
7 on behalf of defendant Northwest Area Foundation, along with
8 Tom Kimer of Faegre & Benson.

9 THE COURT: Good morning, counsel.

10 MR. METZ: Matthew Metz appearing for the plaintiff
11 Julio Romero.

12 THE COURT: Mr. Metz, good morning. Okay.
13 Mr. Groesbeck, who will be speaking for your side?

14 MR. GROESBECK: Thank you, Your Honor. Mr. Kimer
15 will be speaking as to the motion to dismiss and I'll be
16 handling the status conference, I think which is --

17 THE COURT: Mr. Kimer. Give you 20 minutes.

18 MR. KIMER: Thank you, Your Honor. May it please the
19 court, again, I am Tom Kimer and I'm appearing here this
20 morning on behalf of the Northwest Area Foundation in
21 connection with its motion pursuant to Rule 12(b)(6) to dismiss
22 the complaint. We have moved to dismiss all four counts of the
23 complaint and I will address those, and in addition we have an
24 overall motion to dismiss the case on the grounds that this
25 plaintiff lacks legal standing to bring and maintain this

1 action.

2 THE COURT: Is that a 12(b)(6)? Is a standing motion
3 a 12(b)(6) motion?

4 MR. KIMER: I believe so, yes, sir, Your Honor.

5 By way of brief background because it will lead to
6 two points that I want to make, the community venture program
7 is a different approach by the Northwest Area Foundation to
8 carry out its philanthropic activity. Rather than making
9 traditional grants that people or institutions apply for,
10 the --

11 THE COURT: Mr. Kimer, I really think I understand
12 the approach you're taking based on the materials that have
13 been submitted. I think I understand the thrust of what your
14 client was attempting to do here.

15 MR. KIMER: Okay, thank you.

16 THE COURT: As opposed to the traditional grant
17 model.

18 MR. KIMER: Yes, that's correct, Your Honor. And
19 what the approach the foundation has taken is to enlist the
20 community, to develop within the community, to help the
21 community develop institutions and ways to deal with problems
22 that it identifies and that solve its community problems. The
23 point that I was going to make is that the essence of the
24 approach is that it involves community involvement. And
25 another aspect is that it is not a specific or a defined

1 approach to achieving the result that people are after.

2 The first point leads to the standing argument. And
3 that is, the community is involved in this undertaking.
4 Plaintiff is urging in effect that a charitable trust was
5 created or promised. Now, to be sure, it's the foundation's
6 position that no charitable trust was created. We acknowledge
7 that a charitable trust is the subject of what is attempting to
8 be done in this litigation. We do not believe a charitable
9 trust was formed and I'll address that in connection with our
10 motions to dismiss the breach of contract claim and the
11 promissory estoppel claim but nonetheless, it is a charitable
12 trust that brings us here before the court.

13 THE COURT: Well, let's distinguish between a de jure
14 charitable trust and a de facto. You're talking about a
15 charitable trust that is in existence in Minnesota.

16 MR. KIMER: Right.

17 THE COURT: I say trust per se. I mean, it's a trust
18 by law in Minnesota. Is that correct?

19 MR. KIMER: That's correct. Let me make it clear.
20 The charitable trust that we're dealing with here, if one
21 exists, would be that segregated amount of money that was
22 designated to perform the activities in the Yakima Valley. If
23 a charitable trust exists --

24 THE COURT: So the point is, it's not the character,
25 the legal character of the organization. It's a legal

1 relationship between the parties.

2 MR. KIMER: That's correct. It is not the foundation
3 itself. It is what may have been created in the Yakima Valley.

4 Now, plaintiff doesn't agree that he's here arguing
5 that a charitable trust has been created, but I think if you
6 look at the substance of what the plaintiff claims and you look
7 past the labels you put on it, you come to the conclusion that
8 what we're dealing with is whether or not there is a charitable
9 trust.

10 A charitable trust is defined as an entity that holds
11 property that is intended to be used for charitable purposes.
12 And that's specifically what the plaintiff alleges here, that
13 the foundation designated funds to be used for the community
14 ventures planning process and then failed to use them. That's
15 alleging a promise to create a charitable trust.

16 And, Your Honor, I submit the law in Washington is
17 clear. If the subject involves a charitable trust, the
18 Washington attorney general has standing to enforce or deal
19 with it. And there's good reason why the responsibility falls
20 to the attorney general. The real beneficiaries of the
21 community ventures program are not the class members defined in
22 plaintiffs' lawsuit and represented by learned counsel, but the
23 beneficiaries are the entire community, the region or the state
24 even.

25 Now, certainly to the extent that poverty can be

1 alleviated, the persons in poverty that are directly helped may
2 be benefited more, but society, the community, the state are
3 benefited as well, benefited by government programs not needed,
4 benefited by greater prosperity, benefited by the things that
5 greater prosperity brings. Even plaintiff acknowledges in his
6 brief that a large and indefinite group may have benefited from
7 the foundation's work.

8 According to the restatement of trust, the
9 indefiniteness of the beneficiaries is a hallmark of the
10 charitable trust. The fact of the matter is, the class defined
11 by the plaintiff is deficient. It's too narrow. It really
12 isn't a class at all. It's the general public. And when you
13 look at it in terms of the general public as having the
14 interest here, it seems to me it needs to become more apparent
15 why it falls to the attorney general to evaluate and deal and
16 have the exclusive right to deal with the charitable trust.

17 This actually illustrates one of the public policy
18 issues we wanted to bring to your attention this morning.
19 Plaintiff and the class that is defined in the complaint and
20 represented by counsel are attempting to intercede in the
21 foundation's charitable activities to usurp and take control
22 over both the foundation's judgment in this matter and the
23 public's interest in this program. The relief requested, for
24 example, in the complaint is the establishment of a community
25 type trust that presumably they, not the attorney general, not

1 the public, would control and be involved with and that's not
2 good public policy.

3 A related public policy is implicated and that is
4 preserving the ability of charitable institutions like the
5 Northwest Area Foundation to try the unknown, to make forays
6 into untested charitable activities and programs without the
7 risk of having those programs taken over by class action
8 lawyers or activist contingents in the community. And that's a
9 big deal in the philanthropic community. An important policy
10 reason underlying the established law that the attorney general
11 is vested with authority to deal with charitable trust is to
12 prevent special interests from steering the administration of a
13 charitable trust to their own control or their interest or to
14 their own benefit.

15 The restatement identifies several other policies
16 underlying why the attorney general is responsible for
17 charitable trusts such as no threat of multiple or inconsistent
18 litigation. The attorney general, not a single person like
19 plaintiff, is said -- can be said to be broadly representative
20 of the public interests and such a standing rule that's well
21 established in Washington promotes the decisions in broad
22 public interest instead of favoring one interest or contingent
23 over another.

24 We submit, Your Honor, that since this lawsuit seeks
25 to impose a charitable trust under well established Washington

1 law, plaintiff lacks the legal standing to bring and maintain
2 this lawsuit. And this wouldn't be the first case, I believe,
3 Your Honor, that would be dismissed pursuant to a Rule 12(b)(6)
4 in Washington on this standing argument. My recollection is
5 that a fairly recent Washington case, and it may have been the
6 case where the wood processing company -- well, I'm mixed up on
7 that, but I believe, Your Honor, that it is appropriate to
8 dispose of a case on a motion such as this.

9 Your Honor, I would then like to direct my attention
10 to our motion to dismiss the breach of contract claim on the
11 grounds that it fails to state the legal elements required of
12 such a claim.

13 THE COURT: Go ahead.

14 MR. KIMER: Plaintiff alleges that a contract was
15 made between the foundation and plaintiff and persons defined
16 in the class that participated in community meetings relating
17 to the project. The contract was complete, a planning process,
18 and the contract was breached. But first I note at the outset
19 that the planning process was to be completed and then the
20 foundation would determine in its unfettered discretion whether
21 it would then go ahead and fund this ten-year major poverty
22 reduction program. And there's no question in this lawsuit and
23 there's no issue in this lawsuit but that the foundation had
24 that unfettered discretion to make that decision at that time
25 and that issue isn't -- that issue isn't involved in this

1 lawsuit.

2 But it seems to me, Your Honor, that the plaintiff is
3 seeking to enforce a futile act or process. The foundation has
4 determined that the community structure wasn't workable, the
5 plan, community plan was not coming together, and that's why
6 the venture was discontinued. Plaintiff now seeks to enforce a
7 contract imposing more effort and activity leading to the same
8 decision by the foundation at a later point.

9 But that's an aside. To deal directly with the
10 elements of plaintiffs' contract claim, they seek to impose a
11 unilateral contract on the foundation. A unilateral contract
12 is distinguished from a bilateral contract by the method of
13 acceptance. A bilateral contract is formed by mutual promises:
14 I promise to combine 160 acres of your wheat; you promise to
15 pay me X dollars an acre. In a unilateral contract, the
16 acceptance component is satisfied by the offeree actually doing
17 a specifically agreed act of performance.

18 But the most important thing I've got to say on this
19 issue is that a meeting of the minds or mutual intent to form a
20 contract is still required in a unilateral contract just as it
21 is in a bilateral contract.

22 THE COURT: What was the subject, as you understand
23 the plaintiffs, what was the subject of this unilateral
24 contract?

25 MR. KIMER: That the act of performance that would

1 make the contract was the people of the Yakima Valley going to
2 meetings.

3 THE COURT: Well, was it a contract to plan or was
4 the contract to plan and fund?

5 MR. KIMER: To fund and plan a planning process as I
6 understand it.

7 THE COURT: But what about the larger step of funding
8 the plan?

9 MR. KIMER: The ten-year funding thing? That is, as
10 I look at the lawsuit, that is not implicated in this lawsuit.
11 That -- it is recognized that that comes within the complete
12 discretion of the foundation and the complaint is that a
13 contract was formed to engage in a planning process and expend
14 funds in connection with that planning process and that was
15 breached because the process was not completed.

16 THE COURT: Okay.

17 MR. KIMER: But since a meeting of the minds or a
18 mutual intent is still required in a unilateral contract,
19 that's why there needs to be precision in defining the actions
20 of performance that will constitute acceptance. In other
21 words, there has to be certainty by both parties in knowing
22 exactly what actions, if performed, will result in a contract
23 springing into existence. It's the certainty and specificity
24 of those terms that evidence the meeting of the minds.

25 Now, plaintiff claims the action of acceptance was

1 that citizens actively participate in the meeting process. But
2 the acts of acceptance have to be definite enough that a court
3 can determine what the mutually agreed promise was and whether
4 there was a breach. The court's called on to enforce
5 contracts, not create contracts, and I think what this court is
6 being asked to do is to create a contract. What does "actively
7 participate in meetings" mean? How many meetings? Do you have
8 to accomplish anything? Do you have to reach a consensus? Do
9 you have to agree to a plan? How many people have to attend?
10 The questions are endless. What we had here was a group of
11 citizens engaging in a civic process, and that's a good thing.
12 And not every human endeavor that we engage in is the result of
13 a contract or results from a contract.

14 THE COURT: Why do they do it?

15 MR. KIMER: They did it as volunteers to participate
16 in a community process that looked like it would benefit them
17 and benefit the community. And that's why the foundation did
18 it. And it didn't work out, and that's really too bad. And
19 the foundation feels bad about it. The foundation didn't go
20 into this hoping that they wouldn't have a success, but it just
21 didn't work out. But the fact of the matter is that there was
22 no contract that accompanied it.

23 THE COURT: Is it undisputed that the foundation
24 committed manpower and/or people power and money in terms of
25 salaries or whatever to folks that came here and participated

1 on behalf of the foundation?

2 MR. KIMER: Yes. I mean, certainly for this motion
3 it is and I believe that to be a true fact.

4 THE COURT: Okay. You were saying then --

5 MR. KIMER: Well, in order for there to be a
6 contract, there had to be a meeting of the minds going in as to
7 what acts of performance would be expected to form a contract,
8 and in this situation the statement of actions that were done
9 to form acceptance is just too broad. In my view there's never
10 been a case that is -- that would so broadly construe this
11 general statement to be an act of performance that would seal a
12 unilateral contract.

13 The activities engaged by the foundation were too
14 open ended and indefinite to form a contract by taking a
15 specific action. And that's a good thing. It's a good thing
16 to encourage community and civic action and that's a respected
17 activity and it ought to be encouraged and one of the concerns,
18 and I'll probably mention it again, is that to the extent that
19 activities like this can start down the road and then somebody
20 comes in behind and seeks to impose a contract where it was not
21 intended by the parties going in, will have a chilling effect
22 on the philanthropic community to try to engage in what can be
23 very helpful activity for society. But here in a court of law
24 we can say that this activity simply didn't meet the elements
25 required of unilateral contract.

1 The next claim, Your Honor --

2 THE COURT: You'd best think in terms of summing up.
3 You have about five minutes left.

4 MR. KIMER: Thank you.

5 THE COURT: Summing up your positions on each of
6 those remaining things without perhaps the detail you would
7 otherwise like.

8 MR. KIMER: I understand.

9 THE COURT: I'll give you a brief period of time to
10 respond as well.

11 MR. KIMER: That's fine. The next argument is
12 promissory estoppel and it too fails for lack of a clear and
13 definite promise on the part of the foundation. Promissory
14 estoppel is not an open-ended cause of action without
15 standards. And the standard, the glue that holds it together
16 that makes it the cause of action so that it doesn't cover
17 everything that occurs between parties is that a promise is
18 given and it must be relied upon and detrimental action taken
19 in reliance upon it. But that reliance must be reasonable.
20 That's what the law says and says it for good reason.

21 To be reasonable, the reliance on the promise
22 requires that the promise be very specific and clear and
23 definite. And that's the standard that is not met in this case
24 and that's the standard that makes a promissory estoppel claim
25 a real cause of action. It's what makes imposing a contract

1 pursuant to promissory estoppel fair because the party you're
2 going to stick that contract on knows that it's coming because
3 of the clearness and definiteness of the offer that he should
4 see it coming.

5 There is another element and that is that a
6 promissory estoppel won't be enforced unless justice so
7 requires, and I just want to suggest that justice in this case
8 is not owned by the plaintiffs in this case. The substantial
9 injustice would occur, we contend, if a contract in this
10 context is imposed pursuant to promissory estoppel and that
11 dampens the innovative effects of philanthropic organizations
12 to work among communities. And in another sense, I suggest it
13 can't be in the interests of justice to enforce a futile
14 planning process that would end with the foundation exercising
15 its unfettered judgment which it admittedly has when it --
16 well, it would just be a futile process.

17 Your Honor, the elements for quantum meruit have not
18 been made because the complaint fails to --

19 THE COURT: I don't need to hear any argument on
20 quantum meruit.

21 MR. KIMER: The Consumer Protection Act claim, we
22 submit, does not apply here because in this context the
23 activities of the foundation are not engaged in trade or
24 commerce and therefore the act, which applies to
25 entrepreneurial acts, is not applicable. Thank you, Your

1 Honor.

2 THE COURT: Thank you. Mr. Metz. Good morning
3 again, Mr. Metz.

4 MR. METZ: Good morning.

5 THE COURT: Is this a 12(b)(6)?

6 MR. METZ: Well, I assume that because the case would
7 just fail automatically if we weren't entitled to bring it, I
8 mean, I'm willing to treat this as a 12(b)(6) with regard to
9 the standing issue.

10 THE COURT: Okay. I really think it's a standing
11 issue at the outset and then as to the claims in question, I
12 assume you get by standing. I've already concluded that
13 quantum meruit doesn't apply and I'll hear you on the others.

14 MR. METZ: Okay. Thank you, Your Honor. First,
15 there was no promise made to a generalized community. There
16 was a promise made to a group of volunteers and the promise to
17 each of them was that, look, you guys follow our plan, we have
18 a very detailed plan for how this planning process is going to
19 work. There are going to be eight committees, you're going to
20 need to produce this report on this date, you have to come up
21 with your draft plan on this date, your final plan on
22 September, you know, X, and we'll look at the plan and then
23 review it. We'll give you \$750,000 to hire consultants to help
24 you develop the plan. We'll give you another \$500,000 in
25 technical assistance and other forms of aid.

1 THE COURT: To develop the plan.

2 MR. METZ: To develop the plan.

3 THE COURT: So tell me sequentially how this works.
4 You say to develop the plan but the -- there's a process that's
5 brought into the community by the foundation in order to get to
6 a plan which it then decides will or won't work and whether it
7 will or won't fund it.

8 MR. METZ: That's an important point, Your Honor.
9 For example, the foundation did a similar project in Miner
10 County, South Dakota. The plan called, I think, for 16 million
11 dollars to be spent. The foundation was going to provide less
12 than 40 percent of that amount. So the plan had substantial
13 value to the community outside of any contribution from the
14 foundation.

15 In addition, the money would have been spent on very
16 detailed analysis of the housing conditions, of the economic
17 conditions, of health conditions, of educational conditions.
18 It was going to be a very comprehensive plan that was going to
19 have -- do very in-depth studies of these issues and how to
20 address them and that would have had a lot of validity
21 regardless of whether or not the foundation ultimately decided
22 to fund the project or not.

23 THE COURT: So you're suggesting that the initial
24 planning stage has value regardless of funding.

25 MR. METZ: Correct.

1 THE COURT: And in the first steps the foundation
2 comes to the community and says this is the planning process
3 that you have to engage in as a community to satisfy us that
4 there's a -- that this is a worthwhile venture to commit our
5 funds to. Isn't that true? Isn't that how it works?

6 MR. METZ: For them to access the money after the
7 plan was complete. So they said, well, we'll spend this money,
8 we'll spend the million and a quarter to help you complete the
9 plan and then we'll give you some undefined sum of money later
10 as one of a number of funders to implement the plan.

11 THE COURT: So the planning process and the money
12 that was mentioned, was any of that spent?

13 MR. METZ: A portion. I mean, we need to conduct
14 discovery to determine exactly what was spent, but yes, I
15 believe some of that was spent but I cannot specify without
16 discovery exactly what amount was spent. But definitely -- for
17 example, one of the costs that were to be spent were meeting
18 expenses, to rent the room, to provide food, et cetera, et
19 cetera. Some meetings were held. You know, the foundation
20 paid for some of those costs.

21 THE COURT: Was there a Yakima Valley regional
22 planning authority? A Yakima Valley economic development
23 authority? Are there such?

24 MR. METZ: Nothing independent of what the foundation
25 created. I mean, they did it all. They brought in a number of

1 consultants, public relations consultants to gather together
2 the community. The community would never have done this on
3 their own and, again, they brought the people together. They
4 said, look, follow this plan and there's, you know, an
5 excellent chance that we're going to give you this money.
6 You've met our criteria. They actually spent more than a year
7 studying this community before they even decided to go as far
8 as they did. So, you know, their argument that this thing
9 didn't work out or, you know, it was impossible is rather
10 disingenuous because they spent so much time studying it. By
11 all accounts - and I would very much like the opportunity to
12 prove this at trial - the process was proceeding very well.

13 The foundation actually had a number of staffing
14 changes. They changed their lead staff three times on the
15 project during that time and it got lost in the shuffle. And,
16 you know, they decided to quit. Meanwhile, you know, they
17 walked out on 300 people that had put hundreds of hours or
18 thousands of hours into this process. And if Your Honor has
19 the opportunity to look at Exhibit A to the complaint, you'll
20 see there was so many committees. There were eight committees
21 and each one of them were meeting once a week, once every other
22 week, you know, 15, 20, 30 people.

23 THE COURT: Mr. Metz, when this community wanted
24 Washington State University to locate here, it formed a number
25 of committees with Washington State University. And segments

1 of the community had different subparts in order to study the
2 issue and persuade Washington State to locate a branch campus
3 in the Tri-Cities. How -- in that sense, then, the community
4 members were structured with folks from the university. They
5 worked towards -- they planned for this. They wanted to
6 develop criteria, statistics, data that would support the
7 location of the campus here in Tri-Cities, and in that process
8 did they have a right, then, to say that Washington State had
9 to continue with the planning process even though Washington
10 State may say they've decided not to? Or even after the
11 planning process, could they say that Washington State had to
12 locate here or that there was a contract between these entities
13 even though the forces in the community mobilized to try to get
14 to the goal of locating Washington State here?

15 MR. METZ: Well, I think whether Washington State
16 located here perhaps was an either/or situation. I mean,
17 either they were here or they were not. In this case there
18 were substantial benefits to the plan going forward regardless
19 of whether the foundation would prove to be the ultimate
20 funder.

21 THE COURT: Well, whether or not there's benefit is,
22 seems to me, not to be a relevant consideration. The issue is
23 whether there was -- whether the relationship between the
24 foundation and the people of the community, the people who
25 volunteered their time, created an enforceable obligation to

1 participate in the planning process and whether the people
2 themselves had the standing to enforce the -- to force the
3 foundation to continue in the planning process without regard
4 to funding.

5 MR. METZ: Well, Your Honor, first I would like to
6 say that's a very complex question that requires a marshaling
7 of a lot of evidence to prove.

8 THE COURT: It's not the first time I've considered
9 this. I handled the parking garage cases that are developed in
10 Spokane and in the course of that the city sued a number of
11 entities and part of the analysis is what rights does the city
12 have as a public entity in enforcing unwritten, nonformal
13 contractual arrangements with private entities and it's not --
14 it's in the same family of what you're suggesting here. That
15 is, there's an entity, the foundation that by its conduct
16 engages in certain activity, that community members react to
17 that initiative by spending time and, if you will, the
18 equivalent by their gas expenses going back and forth,
19 therefore, they have money and the issue is, then, is that an
20 enforceable relationship.

21 MR. METZ: Well, I would submit that yes, because
22 there was a definite amount of money contemplated, 1.25 million
23 dollars. There was never any doubt that this plan was not
24 going to be completed. You know, there are some writings that
25 show how the planning was going to work. There was never any

1 talk that it would not be completed. They said, even after
2 they paused the project, they said it was going to be
3 completed. Everyone had every belief to go forward -- going
4 forth, that the plan would be completed. They understood that
5 they may not get the full money, but everyone was saying that
6 the plan is going to be completed.

7 And, you know, they mentioned about public policy and
8 how it would be good if -- you know, this would have a chilling
9 effect. But I submit it's good that there be a chilling effect
10 on groups from out of town coming into a community,
11 promising -- making lots of promises, getting people involved,
12 telling them that they're going to have -- be able to create a
13 great plan that they would otherwise not be able to create and
14 then for reasons internal to themselves leave town and leave
15 these people holding the bag.

16 And I'll just submit that in this particular case
17 many of these people were participating in civic action for the
18 first time, many migrant farmworkers, people like that, that
19 this was their first civic activity and when the foundation
20 pulled out it had a horrible effect on the community. Now
21 people don't want to get together. They don't believe that
22 civic activity can work very effectively. It's something that
23 deserves to be chilled in my view.

24 And, you know, they suggest, well, this was an
25 experimental program, but they never told the people this was

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2 they paused the project, they said it was going to be
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22 civic activity can work very effectively. It's something that
23 deserves to be chilled in my view.

24 And, you know, they suggest, well, this was an
25 experimental program, but they never told the people this was

1 an experimental program. They didn't tell these people that
2 they were laboratory rats that could be tested on and treated
3 however they wanted. They told these people that we're going
4 to go forward with your plan.

5 Would you like me to address some of the charitable
6 trust issues quickly?

7 THE COURT: Yes.

8 MR. METZ: Okay. Again, this charitable trust issue,
9 first of all, the defendant says, well, there wasn't a
10 charitable trust and plaintiff is trying to enforce one and to
11 me there's a logical disconnect there. If there was a -- if
12 there wasn't a charitable trust, it wouldn't really make sense
13 for us to enforce one and I don't see how the attorney
14 general --

15 THE COURT: Mr. Metz, I don't want you to rush. You
16 have plenty of time. Just take your time in terms of
17 addressing the charitable trust. There are issues that they've
18 raised. There's the charitable trust in lower case and the
19 charitable trust, if you will, in upper case and in that sense
20 I understand that they're a foundation and organized under the
21 charitable tax laws.

22 That said, the issue as I see them framing it is the
23 way that plaintiffs proceed, they're essentially asserting a
24 charitable trust so they characterize your complaint in order
25 to enable them to say that you're out of court because if

1 that -- that's clearly what you're alleging and therefore it's
2 the AG that enforces. So that's traditional advocacy but why
3 don't you start down that road.

4 MR. METZ: In the cases cited by defendant in their
5 brief, in those cases the plaintiff sought to enforce the trust
6 instrument, the actual document creating the trust or otherwise
7 assert operational control over the charitable organization.
8 In this case there's no trust instrument that we were trying to
9 enforce and -- nor operational control. And in terms of the
10 maybe --

11 THE COURT: I don't understand it to be that. I
12 think I understand it to be, at least in terms of their
13 argument - whether or not it's a good argument or not, it's
14 their argument - is that the relationship between the parties
15 established essentially a trust arrangement of some sort.
16 Perhaps he can -- counsel can elaborate, but that's what I
17 understand.

18 It wasn't that you had a trust document per se. It
19 was that the activities that between the parties created a
20 trust and because the monies were from a foundation it was the
21 essence essentially of charitable trust or, if you will, an
22 equitable trust should be imposed on this because -- it's a
23 variation of an equitable trust argument that because you have
24 acted in a certain way and you're a charitable organization, a
25 certain special relationship developed between the parties and

1 it's an enforceable arrangement. That's what I -- I'm
2 struggling to articulate. There's an enforceable arrangement
3 and they characterize that enforceable arrangement as, that you
4 say is an enforceable arrangement, as a charitable trust;
5 therefore, only the AG can enforce it.

6 MR. METZ: Right. Well, none of the case law that
7 they've brought forward relates to the situation that Your
8 Honor just described.

9 THE COURT: Do you have cases that say that there can
10 develop between members of a community and a charitable
11 organization a special relationship that's enforceable by
12 members of the community? Do you have a case that's
13 precedential for your position?

14 MR. METZ: I'm thinking there's some cases that are
15 on the edges of that.

16 THE COURT: I mean right on all fours. I don't mean
17 that you can analogize to this kind of arrangement or that kind
18 of arrangement, but do you have a case where a circuit court,
19 the United States circuit court or supreme court or court of
20 appeals has said yes, in this instance the people of the
21 community as a class or as a group, separate, perhaps not the
22 community per se in the civic, in the organized civic sense, a
23 municipality or a township, but rather the people or segments
24 of the people can bring an action to force a charitable
25 organization to do X, Y, and Z?

1 MR. METZ: Your Honor, appreciate the opportunity to
2 bring a case forward like that shortly after this hearing.

3 THE COURT: There's always a first. You may be the
4 first. I don't know. I always took great pride in being the
5 first but -- if I could manage that in my career as a lawyer,
6 but you may be the first.

7 MR. METZ: Well, I have been told this is the first
8 case suing a foundation under similar circumstances so, but I
9 would like to do more research on that particular point.

10 THE COURT: All right. We were talking about whether
11 this is a charitable trust and whether the AG has -- whether
12 you have standing or whether it's the AG.

13 MR. METZ: Okay, right. And they say only the AG can
14 defend the public interest. But this is not applicable to this
15 case. We have individuals here that said look, you were going
16 to help us do this. This was -- this process was meaningful to
17 us, to us as individuals and to our group, to be able to do
18 this. And these are flesh and blood people. It's not some --

19 THE COURT: I understand.

20 MR. METZ: -- you know, generalized public. These
21 are real people and they deserve the right to see the promises
22 made to them enforced without having to wonder whether the
23 attorney general is willing to do it or not for them.

24 THE COURT: We'll move on to the specific causes of
25 action.

1 MR. METZ: Okay.

2 THE COURT: And understanding that, what the rules
3 are that apply. What do you understand those to be that affect
4 my ability to analyze them? Is it that there's no reason,
5 there's no set of facts that you could prove that would entitle
6 you to relief? Is that the standard I should employ?

7 MR. METZ: On the --

8 THE COURT: On the causes of action where they're
9 trying to dismiss them on a 12(b)(6).

10 MR. METZ: Correct. Obviously they have an extremely
11 high burden to prove that there's no set of facts that I can
12 prove that would justify me winning at trial and that's an
13 extremely high burden and, you know, I believe that we can do
14 that, that we can really show a pretty specific contract and et
15 cetera.

16 In terms of the acts of acceptance, they said, you
17 know, how do we know that they accepted? Again, Exhibit A to
18 the complaint, that schedule is very specific. You know, it
19 has a lot of meetings and a lot of committees and so the
20 performance was being carried out in precise accordance with
21 that schedule, with that time line, with -- and, Your Honor, I
22 can bring forward many, many cases where the contracts involved
23 are much less defined than that, many, many contract cases that
24 don't have writings and don't have documents as fully set forth
25 as that one.

1 Well, again, you know, they said that, you know, it
2 would be a bad thing, would chill foundations undertaking
3 similar plans, but again, if we were allowed to sue on breach
4 of contract, again, we don't want foundations coming into the
5 community and withdrawing. I've had communications with
6 experts in the field throughout the country and they say that -

7 THE COURT: Excuse me. Excuse me. If it's not of
8 record --

9 MR. METZ: Okay. Okay. Excuse me. In terms of the
10 promissory estoppel argument, again, I think the promise, the
11 same promise argument applies equally well to the contract as
12 to the promissory estoppel. It's basically the same promise
13 made so I won't address that, but in terms of the injustice,
14 the plaintiffs contend that they give thousands of hours to the
15 project, they had a promise and that it was a terrible
16 injustice for defendants to leave plaintiffs high and dry after
17 plaintiffs had put in tens of thousands of hours at defendant's
18 urging. The plaintiffs didn't ask defendants to come to town.
19 Defendants asked plaintiffs to do this planning process. It
20 would never -- they would never have started. They would never
21 have done anything if it hadn't been for defendants studying
22 the community for a year and saying here, guys, here's the
23 plan, go at it and we'll give it to you.

24 And so I really think the equities are on the other
25 side and that the migrant workers and, you know, the lower

1 economic quartile, which was the focus of this project, those
2 are the people that have been done wrong, not the foundation.

3 THE COURT: Well, I'm uncertain of whether Mr. Romero
4 thinks of himself in that fashion. I have no idea. But it
5 would be, seems to me, far too narrow to characterize it as a
6 poverty issue. Poverty affects the entire community. Yakima
7 County would -- and all of its citizens are affected by a study
8 like this if you look at it from the perspective of the breach
9 in itself. And poverty is an issue that affects everybody in
10 the community.

11 Yes, there are those who are poor and they have --
12 they are the ones who are deprived, but this wasn't -- this was
13 an effort by a -- theoretically to develop an approach to the
14 solution or an approach to derive a solution or perhaps a
15 partial solution to the whole idea of poverty rather than to
16 say that those who are impoverished were the ones who were let
17 down the most. It seems to me that this was broader than that
18 in its thrust.

19 It was yes, those were the people who had the
20 condition, but it was an effort on the part of the community to
21 deal with that condition, at least plan, from your perspective,
22 at least plan for a possible solution that would be possibly
23 funded. So I just disagree with you that it's just the poor.
24 It's the poor whose condition was the goal to be dealt with,
25 but it was the entire community that would benefit from the

1 resolution.

2 MR. METZ: Correct. But I think there's a particular
3 injustice, though, where for the first time these people were
4 empowered to make decisions about their community, to think
5 broadly, to think about how their community could be developed.
6 And the attendance at the meetings was great. There was great
7 feeling and the rug was pulled out from under them and, Your
8 Honor, I contend that that is -- that was a serious injustice
9 and did lasting and permanent harm to the -- to that community
10 and to the people involved. And the people involved were the
11 creme de la creme. Those were the people that gave up their
12 time to work on behalf of the community.

13 With respect to the Consumer Protection Act, the act
14 is extremely broad in its definition of trade and commerce.
15 The statute says sale of assets or services and any commerce --
16 sale of assets or services and any commerce directly or
17 indirectly affecting the people of the state of Washington.
18 And I submit that there was an exchange that took place, an
19 exchange of labor by the people in the planning process in
20 exchange for the resources that was to come and that
21 constitutes an exchange. In my brief I cited *Black's Law*
22 *Dictionary* which says any element of trade or exchange is
23 satisfactory.

24 In addition, the plan could have led to other forms
25 of commerce. The foundation gives loans to certain groups.

1 You know, they do program related investments it's called. So
2 there was definitely the possibility that this action could
3 have led to, you know, a completely standard commercial
4 relationship between -- or between the foundation and the
5 public. I mean, there would have been a philanthropic element,
6 but there may well have been a commercial element to it. For
7 example, if they put in a housing loan or something like that
8 in a low income housing project. That could have easily been
9 something that transpired out of this relationship.

10 Finally, the foundation operates a lot like a
11 business. They have 400 million dollars in net worth. Their
12 investments grow every year. They're required to give away
13 money under the tax code. Their CEO makes \$238,000 a year I
14 think it was last year. I mean, this is a major operation and,
15 you know, and they were exchanging services for money and to
16 fill -- you know, basically it's a research lab model where,
17 you know, they wanted to, you know, develop new models of
18 philanthropy. Well, you know, they had to put out resources to
19 do it in exchange and they give people food and this and other
20 promises in exchange for the labor of those people. So I
21 contend that that's -- that looks a lot like trade to me.

22 Your Honor, I just submit anything else I would say
23 would probably be repetitive of what I think I've said before
24 so thank you.

25 THE COURT: Okay, thank you. Mr. Kimer, you have

1 five minutes.

2 MR. KIMER: Your Honor, thank you, but I don't think
3 I'll take five minutes because I see the issues have gone back
4 and forth and recognize the ones that we've addressed in our
5 briefs as well. I'll just make a couple of comments.

6 From what I have heard from counsel, I believe that
7 there is no question but that a charitable trust is what we
8 were talking about here. He was talking about the benefit and
9 the participation in the community and that the benefits may be
10 more far ranging and that they may bring different things to
11 the community and the -- that is the definition of charitable
12 trust. And I think that's what we're arguing about, whether
13 one exists or not, and I'm sure you're clear on what I mean by
14 the charitable trust. It is the little group of money that may
15 be -- it's not little. The group of money that may be
16 dedicated to the Yakima Valley. It is not the institution that
17 is the formal Northwest Area Foundation.

18 THE COURT: I thought that you were referring to the
19 fact that there was a -- that as you read their complaint they
20 were asserting an arrangement that amounted to a charitable
21 trust that involved the -- either the planning money, the one
22 point X million dollars, or in a most broad -- in the broadest
23 possible construction all of the possible monies that might
24 flow from a plan plus an adoption of it and an action agenda
25 after that.

1 MR. KIMER: That's true.

2 THE COURT: Well, that's the trust, if you will, but
3 it's an arrangement, isn't it, that they're asserting? And you
4 characterize the arrangement as a trust and therefore if it's a
5 charitable trust in the sense that it's given, not earned per
6 se, that therefore it has to be enforced by the AG. That's how
7 you approach it, I think.

8 MR. KIMER: Yeah, that's correct. And to the extent
9 I'm up here trying to clarify that, I'm not -- I'm going to
10 quit because you've got it.

11 THE COURT: Okay. Anything else?

12 MR. KIMER: No, Your Honor. Rule 12(b)(6) has a high
13 standard, but it is equally appropriate that you look at the
14 allegations that are in the complaint and you match those with
15 the elements of the cause of action and it's obviously clearly
16 appropriate to dismiss some claims even in accordance with that
17 high standard.

18 THE COURT: Thank you. Folks, I've looked at this,
19 but I want to read a couple cases. Counsel's asked for an
20 opportunity to submit an additional brief. I'm going to limit
21 that to no more than five pages including attachments to be
22 done by the 30th of the month and I'll take this matter under
23 advisement.

24 The parties are -- you're going to have -- you can
25 both submit additional parties if you wish by the 30th, but

1 there will be no response and reply sequencing. You have until
2 the 30th to submit a document, a document, no more than five
3 pages. You will not be entitled to reply or respond to each
4 other. You get one more document, period.

5 Let me say at the outset that there are some
6 considerations and because I've made statements in other
7 settings, I want to make certain that -- that is, in other
8 cases -- I want to reexamine what I said there to make certain
9 that I would not be acting inconsistently here and to that
10 extent I want the option to review those statements that I've
11 made in other cases to ensure that I'm being consistent
12 philosophically in the approach that I take on matters such as
13 this, but they are not so frequent that I have developed a
14 backlog. I think the only other statements I've made were in
15 the parking garage case that I can recall, but that said, I
16 want to review my work on that matter, at least in that very
17 specific or discrete area.

18 On the issue of whether or not there can be developed
19 a relationship between public and private entities and whether
20 that can -- whether, even if there could, that extends to this
21 situation where a foundation initiates, or at least whatever
22 verb you wish to use, there wouldn't be -- wouldn't
23 characterize a legal relationship -- engages with people in the
24 community, at that point does it create legal relationships
25 that are binding and enforceable? And that's at the heart of

1 the case and if I conclude it doesn't, then I'll dismiss. And
2 if I conclude it does, then I'll examine the actions to
3 determine whether or not under 12(b)(6) the causes of action
4 survive.

5 It's certain that quantum meruit does not and if I
6 reach that, I certainly will dismiss that. As to the others, I
7 am uncertain that they survive, but I want to take a look at
8 those.

9 That said, is there anything else before we conclude
10 and I move on to the rest of my criminal docket?

11 Mr. Groesbeck.

12 MR. GROESBECK: Nothing, Your Honor. The status
13 conference, I would presume, would be --

14 THE COURT: That will trail this matter and there
15 will be a status conference if in fact there's a continuing
16 lawsuit. Mr. Metz, anything else?

17 MR. METZ: Your Honor, if we could just define just
18 one more time exactly the precise issue that you would like
19 briefing on just so I can --

20 THE COURT: If you're telling me that a private --
21 that an entity can create a relationship with people in a
22 community that's enforceable by the people. Now, by the
23 people, I mean people like Mr. Romero and others similarly
24 situated. I don't mean the Yakima Regional Planning Council.
25 I don't mean TRIDEC here in Tri-Cities. I don't mean the

1 Spokane such and such. I don't mean a corporate or a business
2 structure where they combine in a public-private partnership,
3 written or unwritten. I'm talking about whether an entity can
4 create -- whether an entity's interaction with people in a
5 community can create an enforceable relationship. I don't know
6 of such a case. Do you have one? You have until the 30th to
7 provide me with it. Okay?

8 And I want to thank counsel for their advocacy. This
9 is a challenging issue and Mr. Metz' approach to this matter on
10 behalf of the citizens that he represents is deserving of my
11 respect as an advocate. Appreciate that. Anything else? All
12 right. Next case.

13 (Adjournment at 11:00 a.m.)

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