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KEVIN STOCK  
COUNTY CLERK  
NO: 16-2-12121-2

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF PIERCE

9 LINCOLN and CYNTHIA GLENISTER; AN  
10 HUYNH; HEATHER HANSTAD; MIKE and  
11 WENDY REYNOLDS; TREVOR and  
12 ROCHELLE PETTINGILL; JONATHAN and  
13 DENISE SOKOLOWSKI; BRAD and SUE  
14 COLBO; DAVID and TERRI ASPLUND;  
15 TINH V. NGUYEN; STEVE and JEANINE  
16 BARNDT; RON BEESLEY and KIM  
17 NORRIS; DAVID and CLAIRE  
18 GORENSTEIN; BILL NIX and VICTORIA  
19 JIMANO; DAN and JANET WOJTALA;  
20 RUSS and PEGGY BARSTOW; BRENT and  
21 DANA EGGLESTON; RUSS and JENNIFER  
22 CRUTCHER; ALAN and NORMA  
23 OREJANA; SEAN and SHANNON BROWN;  
24 COE and EILEEN LINDNER; SCOTT and  
25 SUZANNE BERGESON; BOB and RUBY  
26 CHARNESS; MARK and IZZY BOYD;  
GRAHAM and ERIKA STAINES; ERNEST  
and PAMELA PETERSON; JEFF ROCKOFF  
and CHARLENE HUTCHINS; LUTHER and  
LORELLI AGUILAR; TINH NGUYEN and  
PHUNG LE,

Plaintiffs,

vs.

BOARD OF DIRECTORS OF SILVER  
CREEK ASSOCIATION, a Washington  
nonprofit corporation, dba SILVER CREEK  
HOME OWNER'S ASSOCIATION,

Defendant.

NO. 16-2-12121-2

PLAINTIFFS' MOTION TO ENFORCE  
CR2A AGREEMENT



1 adopting the View Maintenance Guidelines as agreed at mediation and attached to the CR 2A as  
2 Exhibit A. The Defendant, by and through a majority of its Directors, further agreed that the  
3 parties would cooperate in preparing a draft communication to the Silver Creek residents to be  
4 published on the Silver Creek website that would generally inform the residents of the resolution  
5 of the litigation and the establishment of the View Maintenance Guidelines and further, to work  
6 collaboratively to refrain from communicating any derogatory information about the process or  
7 parties involved. Not only has Mr. Morrey disseminated false information about their request to  
8 members of the Association, but at the HOA Board Meeting to adopt the View Maintenance  
9 Guidelines on August 17, 2017, Mr. Morrey voted *against* the resolution to formally adopt the  
10 View Maintenance Guidelines in direct derogation from his obligations and express agreement  
11 under the CR 2A Agreement—executed on August 8, 2017.

12 In sum, if Mr. Morrey did not agree with the adoption of the View Maintenance Guidelines  
13 as provided for in the settlement agreement, he should not have signed it. The Court should enforce  
14 the CR 2A Agreement and award Plaintiffs their fees and costs in bringing this motion.

## 15 **II. STATEMENT OF FACTS**

16 The Court is aware of the underlying facts and circumstances of this case. The facts relevant  
17 to this issue are as follows:

18 1. The Plaintiffs in this lawsuit constitute several homeowners within the Grayhawk  
19 subdivision of the Silver Creek Master Plan. *See* Pls.’ Compl. at 2–3. The Grayhawk neighborhood  
20 sits above one of the master community’s shared community parks, which is more or less an urban  
21 native growth area. *Id.* at 4. Residents along the rim of the community park area (“Community  
22 Park”) referenced in these proceedings as the “Rim Residents,” primarily because they line the rim of  
23 the hillside, overlooking the Community Park below, with views of Mt. Rainier and the surrounding  
24 foothills. *Id.*

25 2. This litigation arises out of a request made by certain Rim Residents for tree trimming  
26 and view maintenance in the Community Park area below the rim for purposes of preserving view

1 corridors that once existed when the homes were initially marketed and sold. *Id.* Such requests have  
2 historically been made approximately every six years. *Id.* at 5–6.

3 3. When first constructed, Benum Enterprises, the contractor primarily responsible for  
4 the construction of the homes within Grayhawk, sought and obtained approval from the Pierce County  
5 Department of Planning and Land Services (the “County”) as well as the Silver Creek Development  
6 Company to conduct pruning and limbing in the Community Park area in order to clean up the views  
7 for the lots along the rim. *Id.* at 5. This request was approved by the County by letter dated November  
8 10, 1999, and by the Developer by letter dated January 20, 2000. *Id.*

9 4. Then again in 2006, certain Rim Residents collectively submitted a second request to  
10 the HOA for tree trimming and view maintenance. *Id.* That request was acknowledged by the Silver  
11 Creek Homeowners’ Association Manager, who requested an arborist report at the time. *Id.* An  
12 arborist report was obtained and the request was ultimately conditionally approved, conditioned solely  
13 upon the view maintenance being carried out in compliance with the Arborists’ and HOA’s  
14 guidelines. *Id.*

15 5. Then in 2013, certain Rim Residents made their third request for tree trimming and  
16 view maintenance to preserve view corridors. *Id.* at 6. This time, in addition to a certified arborist  
17 report, the Board also requested a geotechnical engineer review. *Id.* In responding to this request, on  
18 August 8, 2014, A Geotechnical Engineering Services, LLC (“AGES, LLC”) issued its geotechnical  
19 evaluation, concluding that the site’s condition was stable and would remain stable after the proposed  
20 work was completed. *Id.*

21 6. Notwithstanding the supporting expert reports, concluding that there was no risk to  
22 the stability of the hillside or the health of the forest, the Board voted to deny the request for tree  
23 trimming and view maintenance on April 16, 2015. *Id.* at 7.

24 7. The Rim Residents appealed this decision in June 2015; however, the request for  
25 reconsideration was once again denied on August 17, 2015; no substantive reasons were ever given  
26 for the denial. *Id.*

1           8.       This lawsuit was filed on October 20, 2016, asserting among other claims the Board's  
2 arbitrary and capricious denial of the tree trimming and view maintenance requests, contrary to the  
3 express and implied intent, terms and conditions of the Master CCRs and HOA. *Id.*

4           9.       On May 4, 2017, the parties met at the Silver Creek Homeowners Lounge to attempt  
5 an informal sit-down to resolve the claims between the parties. *See* Decl. of Jason M. Whalen in  
6 Support of Plaintiffs' Motion to Enforce CR 2A Agreement ("Whalen Decl.") at 2. In attendance was  
7 Bob Schultz, Mike Morrey, and counsel for the HOA Board, and David Gorenstein, Bob Charness,  
8 and counsel for the Plaintiffs, as well as certified arborist Bryce Landrud from Thundering Oaks,  
9 LLC, geotechnical engineer Bernie Knoll from AGES, LLC, and Paul Barber from the Pierce County  
10 Land Services Division by phone. *Id.*

11           10.       Following the parties' informal sit-down, the parties agreed and attempted to work  
12 collaboratively to arrive at a set of View Maintenance Guidelines to be reviewed and approved by  
13 Bryce Landrud, Bernie Knoll and certified forester, Galen Wright, before being sent to the County  
14 and finally, the Board, for a final vote. *Id.* at 2. Unfortunately, the collaborative process broke down  
15 in early August but work continued to resolve any concerns as to the guidelines. *Id.* Both the forester  
16 and the geotech provided updated reports to address and alleviate any concerns over the proposed  
17 guidelines. *Id.*

18           11.       The parties then agreed to a formal half-day mediation with Mark Honeywell to take  
19 place on August 8, 2017. *Id.* at 2-3.

20           12.       On August 8, 2017, counsel for the Silver Creek Board of Directors, represented in  
21 attendance by Board Member Robert Schultz, Jr., Board President, Mike Morrey, and via telephone  
22 by Board Member Phil Durben, and counsel for the Rim Residents, represented in attendance by  
23 David Gorenstein and Robert Charness, executed a CR 2A Agreement. *See* Whalen Decl., **Exhibit**  
24 **B.**

25           13.       The CR 2A Agreement was thoroughly negotiated between the persons signing the  
26 same after what turned into a full-day mediation. *Id.*



1 in the minutes, or unless the evidence thereof shall be in writing and subscribed by  
2 the attorneys denying the same.

3 RCW 2.44.010 states in relevant part:

4 (1) To bind his or her client in any of the proceedings in an action or special  
5 proceeding by his or her agreement duly made, or entered upon the minutes of the  
6 court; but the court shall disregard all agreements and stipulations in relation to the  
7 conduct of, or any of the proceedings in, an action or special proceeding unless such  
8 agreement or stipulation be made in open court, or in presence of the clerk, and  
9 entered in the minutes by him or her, *or signed by the party against whom the same  
10 is alleged, or his or her attorney*[.]

11 In Washington, a trial court's authority to compel enforcement of a settlement agreement  
12 is governed by CR 2A and RCW 2.44.010. *Morris*, 69 Wn. App. at 868. The underlying purpose  
13 of CR 2A and RCW 2.44.010 is to "avoid disputes regarding the existence and terms of settlement  
14 agreements." *Id.* "Settlement agreements are governed by general principles of contract." *Id.*

15 **A. Subject Matter and Agreed Upon Material Terms**

16 In the instant case, the agreed upon subject matter and the material terms are found in the  
17 CR 2A. Counsel for the Board, Bob Schultz and Mike Morrey actively participated in the  
18 negotiating and drafting of the CR 2A and View Maintenance Guidelines incorporated therein. At  
19 no time did Mr. Morrey reject the View Maintenance Guidelines or refuse to sign the CR 2A  
20 Agreement adopting the same. Had he done so, it is highly unlikely that the matter would have  
21 settled. Ultimately, 3 of the 4 Board Members executed the CR2A and approved the View  
22 Maintenance Guidelines attached thereto. Importantly, the CR2A also allowed the Plaintiffs'  
23 longstanding view maintenance request from 2013 to proceed, under the auspices of the now  
24 approved View Maintenance Guidelines.

25 **B. Intent to Be Bound**

26 Here, the plain language of the CR 2A makes clear that the settlement agreement between  
the parties is enforceable. As the rule requires, the agreement was reached and signed by counsel

1 for the parties, in addition to the parties themselves. There is nothing to show that Mr. Morrey did  
2 not intend to be bound by the CR 2A Agreement.

3 **C. Request for Fees and Costs.**

4 Plaintiffs' request an award of their reasonable attorneys' fees and costs for having to bring  
5 this motion. Awarding attorneys' fees is left to the sound discretion of the trial court and will not  
6 be disturbed on appeal absent a clear showing of abuse. *See Matter of Pearsall-Stipek*, 136 Wn.2d  
7 255, 961 P.2d 343 (1998). Attorneys' fees may be awarded on three bases; (1) where authorized  
8 by private contract, (2) provided by statute; or (3) based on recognized equitable grounds. *See*  
9 *Rogerson Hiller Corp. v. Port Angeles*, 96 Wn. App. 918, 926–27, 982 P.2d 131 (1999).  
10

11 First, contractually, the Master CCRs for the Silver Creek Association provide, at Article  
12 11.4 for the recovery of prevailing party attorney's fees: "In the event of a suit or action to enforce  
13 any provision of this Declaration or to collect any money due hereunder or to foreclose a lien, the  
14 unsuccessful party in such suit or action shall pay to the prevailing party all costs and expenses,  
15 including title reports and all attorneys' fees that the prevailing party has incurred in connection  
16 with the suite (sic) or action in such amounts as the court may deem to be reasonable therein..."  
17 Declaration of Jason M. Whalen, at **Exhibit A**. Here, as described in Plaintiffs' Complaint, this  
18 action was based, in part, on the Defendant Board's failure to comply with its responsibilities for  
19 maintenance of the common areas under Article 7, Section 7.3 of the Master CCRs. The Court  
20 has sufficient grounds to award Plaintiffs their attorneys' fees and costs based on the contractual  
21 provisions of the Master CCRs—the contract between these parties.  
22

24 Second, the Plaintiffs' request for fees is based on RCW 64.38.050 and this Court's  
25 inherent equitable powers to award of attorneys' fees. *See Hsy Ying Li v. Tang*, 87 Wn.2d 796,  
26 799, 557 P.2d 342 (1976); *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

1 RCW 64.38.025(1) provides in pertinent part:

2 ... the board of directors shall act in all instances on behalf of the association. In  
3 performance of their duties, the officers and members of the board of directors shall  
4 exercise the degree of care and loyalty required of an officer or director of a  
corporation organized under RCW 24.03.

5 RCW 24.03.127 states:

6 A director shall perform the duties of a director ... in good faith, in a manner such  
7 that director believes to be in the best interests of the corporation, and with such  
8 care, including reasonable inquiry, as an ordinarily prudent person in a like position  
would use under similar circumstances.

9 RCW 64.38.050 further provides:

10 Any violation of the provision of this chapter entitles an aggrieved party to any  
11 remedy provided by law or in equity. The court, in an appropriate case, may award  
12 reasonable attorneys' fees to the prevailing party.

13 Here, Board President, Mike Morrey, knowingly and voluntarily executed the CR 2A  
14 Agreement at the mediation on August 8, 2017, in his capacity as President of the Silver Creek  
15 HOA Board. Mr. Morrey's willful violation of the CR 2A Agreement on August 17, 2017, by  
16 voting against the Board Resolution to formally adopt the View Maintenance Guidelines in  
17 accordance with the terms of the CR 2A Agreement, demonstrates, that either: (a) Mr. Morrey did  
18 not attend mediation in good faith and knowingly entered into a Settlement Agreement that he had  
19 no intent of performing; or (b) Mr. Morrey, after entering into a binding CR 2A Settlement  
20 Agreement, is now knowingly and in bad faith, repudiating that agreement. Neither represents the  
21 best interests of the Association. Mr. Morrey has failed to perform his duties in good faith and in  
22 observance of the duty of care and loyalty required of an officer of the Board. Accordingly,  
23 Plaintiffs seek entry of an award of fees in favor of Plaintiffs and against the Defendant Board  
24 and/or Mr. Morrey, individually, pursuant to RCW 64.38.050.  
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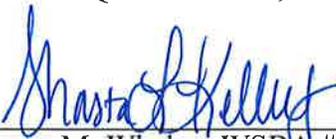
1 Finally and alternatively, on a purely equitable basis, our Washington Supreme Court has  
2 confirmed that in discharging its equitable powers, “bad faith litigation can warrant the equitable  
3 award of attorney fees.” *In re Recall of Pearsall-Stipek*, 136 Wn.2d at 267 & n.6. Although the  
4 court in *Pearsall-Stipek* did not explain what constitutes “bad faith,” other decisions have,  
5 including *State v. Sizemore*, defining bad faith as “actual or constructive fraud” or a “neglect or  
6 refusal to fulfill some duty...not prompted by an honest mistake as to one’s rights or duties, but  
7 by some interested or sinister motive.” *State v. Sizemore*, 48 Wn. App. 835, 837, 741 P.2d 572,  
8 review denied, 109 Wn.2d 1013 (1987). In this case, Mr. Morrey had a very clear duty to execute  
9 the perfunctory Board Resolution to formally adopt the agreed upon View Maintenance Guidelines  
10 within 14 days of mediation; however, when the Board meeting came to pass, he refused to perform  
11 his duties and to the contrary, voted against the resolution, thus necessitating this motion.  
12  
13

14 **VI. CONCLUSION**

15 In sum, Plaintiffs respectfully requests that the Court enforce the CR 2A Agreement.  
16 Plaintiffs are deserving of obtaining the benefit of the CR 2A Agreement that was fully negotiated  
17 and finally executed, based on the good work of the parties with the aid of the expertise of the  
18 experts involved on the issues of forestry health and maintenance. Assuming the Court grants  
19 Plaintiffs’ request for attorneys’ fees, a fee declaration will be provided at the time of the hearing,  
20 with fees estimated at approximately \$2,000.

21 DATED this 25th day of August, 2017.

22 LEDGER SQUARE LAW, P.S.

23  
24 By:   
25 Jason M. Whalen, WSBA # 22195  
26 Shasta L. Kelley, WSBA # 47822  
Attorneys for Plaintiffs

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**Certificate of Service**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

<b>Gabriella Wagner</b> Wilson Smith Cochran Dickerson 901 Fifth Ave., Suite 1700 Seattle, WA 98164 <a href="mailto:wagner@wscd.com">wagner@wscd.com</a>	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 25th day of August 2017 at Tacoma, Washington.



Jennifer K. Fernando  
Legal Assistant to Jason M. Whalen and Shasta L. Kelley