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THE HONORABLE JUSTIN L. QUACKENBUSH

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 PAUL GRONDAL, a Washington)
9 resident; and THE MILL BAY) NO. 09-CV-00018-JLQ
10 MEMBERS ASSOCIATION, INC., a)
11 Washington Non-Profit Corporation,) MEMORANDUM IN SUPPORT OF
12 Plaintiffs,) PLAINTIFFS' **FIRST** MOTION FOR
13 vs.) SUMMARY JUDGMENT
14 UNITED STATES OF AMERICA;) RE: CONTRACT TERMS
15 UNITED STATES DEPARTMENT OF)
16 THE INTERIOR; THE BUREAU OF)
17 INDIAN AFFAIRS, and FRANCIS)
18 ABRAHAM, CATHERINE GARRISON,)
19 MAUREEN MARCELLAY, MIKE)
20 PALMER, JAMES ABRAHAM, NAOMI)
21 DICK, ANNIE WAPATO, ENID)
22 MARCHAND, GARY REYES, PAUL)
23 WAPATO, JR., LYNN BENSON,)
24 DARLENE HYLAND, RANDY)
25 MARCELLAY, FRANCIS REYES,)
LYDIA W. ARMEECHER, MARY JO)
GARRISON, MARLENE MARCELLAY,)
LUCINDA O'DELL, MOSE SAM,)
SHERMAN T. WAPATO, SANDRA)
)

1 COVINGTON, GABRIEL)
 2 MARCELLAY, LINDA MILLS, LINDA)
 3 SAINT, JEFF M. CONDON, DENA)
 4 JACKSON, MIKE MARCELLAY,)
 5 VIVIAN PIERRE, SONIA)
 6 VANWOERKOM, WAPATO)
 7 HERITAGE, LLC, LEONARD)
 8 WAPATO, JR, DERRICK D. ZUNIE, II,)
 9 DEBORAH L. BACKWELL, JUDY)
 10 ZUNIE, JACQUELINE WHITE PLUME,)
 11 DENISE N. ZUNIE and)
 12 CONFEDERATED TRIBES OF THE)
 COLVILLE RESERVATION, Allottees of)
 MA-8 (known as Moses Allotment 8),)
 Defendants.)

I. BACKGROUND FACTS

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 14 This case involves the unilateral attempt by Defendant United States, Bureau of
 15 Indian Affairs ("BIA"), allegedly acting on behalf of the Defendant MA-8 Allottees, to
 16 cancel the Plaintiffs' 183 camping resort memberships in the Mill Bay Resort, a
 17 campground located on Indian trust land (Moses Allotment 8) on the shores of Lake
 18 Chelan. In recent years, the purchase prices for various memberships within the resort
 19 were in excess of \$100,000. (Plaintiffs' Fact #114, 115)

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 22
 23 By way of historical background, MA-8 Allottee William Evans entered into
 24 a "Master Lease" with the BIA (on behalf of all of the MA-8 Allottees) to lease MA-
 25

1 8 for the purpose of opening the Mill Bay Resort. In 1985, Evans exercised an Option
2 to Renew the Master Lease, extending that Lease through 2034. (Plaintiffs' Fact #69)
3
4 The Mill Bay Resort members were granted the right to use the resort property by
5 purchasing a membership interest under "Membership Sale Agreements," which stated
6 that the duration of the memberships were coextensive with the extension of the Master
7 Lease through 2034. (Plaintiffs' Fact #97)
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9
10 Then, in 2003, the management of Mill Bay Resort announced that they were
11 losing money and would close the park. (Plaintiffs' Fact #121) The same Plaintiffs as
12 herein sued the Estate of Bill Evans (Wapato Heritage's predecessor in interest) in
13 Chelan County Superior Court. The parties, with the BIA's participation and
14 involvement, entered into a 2004 Settlement Agreement, wherein the Plaintiffs agreed
15 to reduce the amount of land subleased and pay increased rental payments to the MA-8
16 Allottees. (Plaintiffs' Fact #167, 178) The same Defendants as herein confirmed the
17 Plaintiffs' right to use and occupy the Mill Bay Resort through 2034.
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21 The Plaintiffs' peace was short-lived. Notwithstanding its approval of the
22 Plaintiffs' membership agreements and its involvement in the 2004 settlement, in late
23 2007 the BIA took the position that, over 20 years prior, Evans did not properly
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1 exercise the Option to Renew, and that the Plaintiffs' tenancy expired, in February
2 2009, along with the Master Lease. (Plaintiffs Fact #195)
3

4 The Plaintiffs request that this Court put a final end to the protracted attempts to
5 dispossess the Plaintiffs to benefit one Allottee, the Colville Tribe.
6

7 II. LAW AND ARGUMENT

8 A. The Terms of the Master Lease and Approved Subleases Entitle Plaintiffs 9 to Use and Occupy the Mill Bay Resort Until 2034.

10 1. *No expiration of sub-tenancies upon termination of Master Lease.*

11 Paragraph 8 of the Master Lease provides that any subleases and sub-tenancies
12 shall be valid upon termination of the Lease, which includes normal expiration.
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14 Paragraph 8 "Status of Subleases on Conclusion of Lease" specifically states:
15

16 Termination of (this) Lease by cancellation or otherwise,
17 **shall not serve or cancel subleases or sub-tenancies**, but
18 shall operate as an assignment to Lessor of any and all
19 subleases or sub-tenancies and shall continue to honor those
20 obligations of Lessee under the terms of any sublease
21 agreement...

22 Further, Paragraph 30 "Delivery of the Premises" states:

23 The Lessee hereby agrees that at the *termination of this Lease*,
24 *by normal expiration or otherwise*, Lessee will peaceably and
25 without legal process deliver up the possession of the

1 premises...[Emphasis added]

2 Thus, termination included expiration of the Lease. Paragraph 8's provision that
3 states "termination, by cancellation or otherwise," does not affect the rights of sub-
4 lessees and sub-tenancies upon a termination by expiration. The BIA's "position" that
5 the Plaintiffs' tenancy expired with the expiration of the Master Lease is not supported
6 by the contract, and must be rejected.
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10 **2. Defendants approved the Plaintiffs' sublease.**

11 The purpose of the Master Lease was to develop MA-8. The Master Lease
12 specifically allowed the Lessee to sublease the property upon approval of the Secretary:
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14 The Lessee may sublease all, part or portions of the leased
15 premises for lawful purposes upon written approval of the
16 Secretary of the Interior or his authorized representative, which
17 approval or rejection must be in writing within thirty (30) days
18 of written application therefore or approval will be conclusively
presumed.

19 (Master Lease, ¶7)

20
21 Paragraph 35, "Lessors' Determination, Consent or Approval" states:

22 Whenever in this Lease it is provided that the Lessors may
23 exercise any right or discretion or make any determination,
24 consent or approval, the action of those Lessors or the
25 successors in interest holding the majority interest in the

1 ownership of the leased premises shall constitute the action of
2 all the Lessors for the purposes of this Lease.

3
4 The Plaintiffs' tenancy/sublease was approved by the Lessors. The BIA
5 approved the Expanded Membership Agreements by receiving the agreements, signing
6 a letter stating the "Expanded Membership Concept" was approved, and not rejecting
7 those agreements within the requisite 30 days of receiving those agreements in 1989.
8 Thereafter, the landowners accepted the benefits of those agreements over the course of
9 more than 20 years.
10

11
12 Further, the BIA received the 2004 Settlement Agreement in writing prior to the
13 time that the Secretary could have rejected it. The BIA did not reject this agreement
14 within the requisite thirty (30) days, thus deeming the Settlement Agreement as an
15 approved sublease under the Master Lease. That approval of the Plaintiffs' sub-tenancy
16 is further evidenced by the Landowners acceptance of the benefits of that Settlement
17 Agreement.
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21 The provisions of the Master Lease necessarily protect the interests of
22 Washington consumers, like the Plaintiffs, from losing their rights to use and occupy
23 the land after their tenancy was accepted by the Lessors. The approval provision also
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1 protects the Lessors because no sublease may continue if not specifically approved by
2 Lessors and the Secretary. The Mill Bay Members' sublease/sub-tenancy was approved
3 by the landowners and the Secretary. Their attempt to now refute the validity of that
4 sublease/sub-tenancy must be rejected.
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7 B. The 2004 Settlement Agreement Modifies the Terms of the Master Lease
8 and Bars the BIA's Action for Trespass.

9 Under the terms of the Master Lease, the action of the landowners who represent
10 a majority interest in MA-8 can modify the terms of the lease. The Settlement
11 Agreement modified the terms of the Master Lease. It reduced the subleased space and
12 increased the rent. The Settlement Agreement also reaffirmed the February 1, 2034
13 termination date. The Landowners accepted this modification by accepting the
14 settlement money and other benefits of the settlement.
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18 Generally, when a subsequent contract conflicts with a previous contract between
19 the same parties, the earlier contract is considered rescinded and the new contract
20 substitutes the original. Higgins v. Stafford, 123 Wn. 2d 160, 166, 866 P.2d 31, 34
21 (1994). This situation creates a novation, or substituted contract. Since the new
22 agreement supersedes the original contract, it is considered the only agreement between
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1 the parties, and the parties are barred from making any claims or defenses as to that
2 original contract. Id. at 166.
3

4 A substituted contract may also be characterized as a modification. A
5 modification may incorporate the original contract and only inconsistent provisions of
6 the old contract are invalidated. Accord and satisfaction is similar to a substituted
7 contract in that if the new agreement is found invalid (by fraud, misrepresentation, lack
8 of consideration, etc.), then the original agreement remains in force. If valid and
9 enforceable, however, they both prohibit a party from suing on the original contract for
10 any reason. Wagner v. Wagner, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980); Rosellini v.
11 Banchero, 83 Wn.2d 268, 517 P.2d 955 (1974).
12
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15 The Settlement Agreement modified the original Master Lease by requiring
16 additional rent and changing the terms of the Mill Bay Members' tenancy. The rent
17 was in addition to that already required by the Master Lease. This created a valid and
18 binding contract between the Mill Bay Members and the Allottees and supersedes any
19 conflicting provisions in the Master Lease.
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23 C. Plaintiffs are Entitled to an Award of their Attorney's Fees and Costs.

24 Based upon the terms of the Master Lease and the 2004 Settlement Agreement,
25

1 the Plaintiffs request an award of their attorney's fees and costs incurred in this action:

2
3 If action be brought by Lessor...to enforce performance of any
4 of the covenants or conditions of this lease, the Lessee shall pay
5 the reasonable attorney's fee of the Lessor if the Lessor should
6 prevail...

7 (Master Lease, ¶23) (Danielson Declaration Exhibit 1) A written contract which
8 contains a one-sided provision stating that only one of the parties will be entitled to
9 recover its legal expenses is, by operation of Washington law, read to state that legal
10 expenses will be awarded to either party. RCW 4.84.330 provides in relevant part as
11 follows:
12

13
14 In any action on a contract or lease entered into after
15 September 21, 1977, where such contract or lease specifically
16 provides that attorney's fees and costs, which are incurred to
17 enforce the provisions of such contract or lease, shall be
18 awarded to one of the parties, the prevailing party, whether he
19 is the party specified in the contract or lease or not, shall be
20 entitled to reasonable attorney's fees in addition to costs and
21 necessary disbursements. [. . .] As used in this section
22 "prevailing party" means the party in whose favor final
23 judgment is rendered.

24 The Settlement Agreement likewise provides:

25
26 In any dispute arising out of this Agreement, whether or not a
27 lawsuit is commenced, the non-prevailing party or parties shall
28 pay the prevailing party's or parties' court costs and reasonable

1 attorneys' fees, including costs of appeal.

2
3 (¶5.25 of 2004 Settlement Agreement) (Danielson Declaration Exhibit 2)

4 Further, where a declaratory judgment action is commenced to seek a
5 determination of the rights and obligations of the parties to an underlying written
6 agreement, and the underlying agreement provides that the prevailing party in an action
7 to enforce the terms of the agreement shall be entitled to recover its legal expenses from
8 the non-prevailing party, the party who substantially prevails in the declaratory
9 judgment action is entitled to recover its legal expenses. See, e.g., Brust v.
10 McDonald's, 34 Wn. App. 199, 209, 660 P.2d 320 (1983) (holding in declaratory action
11 to determine rights of parties to a lease that lessor, who prevailed in trial court and on
12 appeal, was entitled pursuant to terms of lease to recover an award of legal expenses
13 incurred at trial court and appellate levels).

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18 **III. CONCLUSION**

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20 Based upon the foregoing, Plaintiffs are entitled to a declaratory judgment
21 confirming the Mill Bay Members' lease term to February 1, 2034 and the trespass
22 action asserted by the BIA must be dismissed. An order on summary judgment should
23 be entered, declaring that the contracts between the parties entitle the Plaintiffs to use
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1 and occupy the Mill Bay Resort through February 1, 2034.

2
3 DATED this 1st day of September, 2009.

4
5 s/JAMES M. DANIELSON

6 WSBA No. 01629

7 Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and via U.S. Mail. Parties may access this filing through the Court's system.

DATED at Wenatchee, Washington this 1st day of September, 2009.

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