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No. 69445-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant,

v.

COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation and ARVIN VANDERVEEN and JANE DOE VANDERVEEN, and their marital community,

Respondents.

and

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Leibsohn appeals and the trial court must be reversed because the trial court erroneously elevated form over substance by finding that a sham transaction was a deed in lieu of foreclosure that excused the payment of Leibsohn's real estate commission. The trial court also improperly sanctioned the wrongful behavior of Respondents by allowing them to benefit from the fruits of their intentional interference with Leibsohn's Exclusive Sale Listing Agreement.

Leibsohn, a commercial real estate brokerage firm, exclusively listed for sale a large property in SeaTac owned by K & S Developments. Respondent City of SeaTac decided that it wanted to purchase K & S's property without paying real estate excise tax or Leibsohn's commission. With the help of its real estate agents, Respondents Colliers International Advisors (USA), Inc. and Arvin Vander Veen, SeaTac crafted a sham transaction by which it would purchase the debt on the property and then obtain the property via a "deed in lieu of foreclosure." Respondents directly contacted Leibsohn's exclusive client, in violation of specific real estate industry rules and regulations, and induced K & S to modify its Exclusive Sale Listing Agreement with Leibsohn to exempt a "deed in lieu of foreclosure" from commissionable events. Ultimately, SeaTac paid

$12,270,000 for free and clear title to the K & S property and Leibsohn did not receive a commission.

The trial court erred in concluding that Respondents' sham transaction was a deed in lieu of foreclosure as a matter of law and dismissing Leibsohn's tortious interference and Consumer Protection Act claims on summary judgment. The substance of the transaction was unequivocally a sale. Moreover, Respondents cannot profit from a contract modification induced by their wrongful contact with Leibsohn's exclusive client. The trial court must be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Leibsohn's motion for partial summary judgment for a determination that SeaTac's $12,270,000 payment in exchange for free and clear title to K & S's real property was a sale.

2. The trial court erred by granting Respondents' motions for summary judgment and dismissing Leibsohn's tortious interference and Consumer Protection Act claims by allowing Respondents to benefit from the contractual exception that was induced by their wrongful contact with Leibsohn's exclusive client.

3. The trial court erred by granting Respondents' motions for summary judgment, when Respondents' own briefs raised a genuine issue

of material fact as to whether the contract that Respondents relied upon to escape liability was properly entered into by Leibsohn and K & S.

III. ISSUES PRESENTED

1. Where SeaTac paid $12,270,000 and simultaneously received title to K & S's property, and its sole, admitted goal was to purchase the property, did the trial court err in concluding that the transaction was a deed in lieu of foreclosure, not a sale, as a matter of law? (Assignment of Error 1.)

2. Where Respondents violated real estate rules and regulations by inducing Leibsohn's exclusive client to add a deed in lieu of foreclosure exception into its Exclusive Sale Listing Agreement, can Respondents rely on the wrongfully obtained exception to justify their own tortious interference with a contract? (Assignment of Error 2.)

3. Even if the deed in lieu exception were applicable and available, does a genuine issue of material fact exist regarding whether Leibsohn accepted the Exclusive Sale Listing Agreement when he delayed signing it and never delivered the executed agreement to K & S? (Assignment of Error 3.)

IV. STATEMENT OF THE CASE

A. Leibsohn exclusively lists K & S's property and markets it to SeaTac.

Leibsohn Property Advisors, Inc. (a commercial real estate broker owned by Brian Leibsohn, collectively referred to as "Leibsohn") and K & S Developments, Inc. signed an Exclusive Sale Listing Agreement in 2006, which provided that Leibsohn was the sole broker representing K & S in the sale of its commercial property in SeaTac.[1] K & S's property was listed for approximately $28 million in 2008.[2] The Exclusive Sale Listing Agreement provided that Leibsohn would receive a commission of four percent of the gross purchase price or $490,000, whichever was less, upon a transfer of the property.[3] Leibsohn was owed a commission if any of the following took place:

> (a) Broker procures a buyer on the terms of this Agreement, or on other terms acceptable to Owner; (b) Owner sells the property directly or indirectly or through any person or entity other than Broker during the term of this Agreement; (c) Owner sells the property within six months after the expiration or sooner termination of this Agreement to a person or entity that submitted an offer to purchase the property during the term of this Agreement or that appears on any registration list provided by Broker pursuant to this Agreement, or to an "Affiliate" of such a person or entity that submitted an offer or that appears on the registration list; (d) the property is made unmarketable by Owner's voluntary act; or (e) Owner withdraws the

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[1] Clerk's Papers (CP) 1393, ¶ 2.
[2] CP 1160.
[3] CP 638-39.

property from sale, or otherwise prevents Broker from selling it.[4]

K & S and Leibsohn agreed to extend the 2006 Exclusive Sale Listing Agreement in 2007 and 2008 with no material changes to its terms.[5] With the protection of the Exclusive Sale Listing Agreement, Leibsohn spent countless hours marketing the property and invested at least $30,000 of its own money working to sell the property.[6] These efforts included regular contact with both Colliers and SeaTac. Leibsohn provided Colliers and SeaTac with marketing materials on the property, answered their questions, and even shared a booth with SeaTac at an economic forum in which Leibsohn's sole role was to market the property for sale.[7] Leibsohn marketed the property to SeaTac on multiple occasions.[8] Respondents admit that they were aware of Leibsohn's status as the exclusive agent for the property.[9]

By spring 2009, SeaTac developed the goal of purchasing the K & S property. SeaTac hired Colliers, and specifically Vander Veen, to represent it in its attempt to purchase the property and told Colliers it wanted to determine what a "fair (and smart) offer might be for someone

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[4] *Id.*
[5] CP 1393, ¶ 3.
[6] *Id.*, ¶ 4.
[7] CP 1334; 1394, ¶ 7; 1404-12; 1418; 1423; 1429; 1447-50.
[8] CP 1393-94.
[9] CP 1334-35.

to purchase the properties."[10] SeaTac described the property's prospects for the city: "The property is needed to construct public roads, open space, and infrastructure...This is a fantastic opportunity for the City of SeaTac... to purchase a critical piece of property for future public use."[11]

Colliers and SeaTac agreed that SeaTac's identity would not be disclosed to K & S in the process of purchasing the property.[12] A lawsuit recently filed by K & S reveals why SeaTac desired anonymity, as K & S alleges that it never would have sold the property had it known that SeaTac were the buyer.[13]

B. Respondents craft a sham transaction whereby SeaTac will purchase the property without paying Leibsohn's commission or excise tax.

The K & S property was encumbered by four loans, totaling $14,120,000 in principal.[14] K & S had defaulted on these obligations, and Centrum, the second-position lender, began a judicial foreclosure action against the property.[15]

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[10] CP 1070-71.
[11] CP 1067-68. *See also* CP 1102-03.
[12] CP 614.
[13] *K & S Developments v. City of SeaTac; Stephen Butler; Jeffrey Robinson; Craig Ward; Todd Cuts; Colliers International WA LLC*, King County Superior Court No. 12-2-40564-6 SEA (2012).
[14] CP 1076.
[15] CP 469-82.

SeaTac wished to purchase the property for less than the total amount of debt against it.[16] Instead of simply presenting an offer to purchase through Leibsohn, SeaTac had Vander Veen communicate with Thomas Hazelrigg III, who Vander Veen described as the "king pin between all of these lending entities."[17] Hazelrigg was a co-member of Centurion Financial Group with Scott Switzer (the "S" in K & S, Leibsohn's exclusive client).[18] Hazelrigg was also (1) the father of the first-position lien holder's managing member (2) responsible for placing the loans for the third and fourth-position lien holders, and (3) a guarantor on much of the debt.[19] Vander Veen said in an email to SeaTac on July 17, 2009:

> If the [City Manager] tells me he is sure that the city will buy it at the right price I can then go to Hazelrigg and he can use his mussel [sic] to convince everyone to just sell it and to negotiate some reduced payoffs but I don't want to do that until someone tells me they are pretty sure the city will do the deal, confidentially.[20]

SeaTac's purchase that Vander Veen describes in his email would ordinarily have been a "short sale," that is, a purchase of the property for less than the total amount of the debt against it. *See* WASHINGTON

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[16] CP 1067-68, 1076.
[17] CP 1088, 1121.
[18] CP 1109.
[19] CP 1121, 1124.
[20] CP 1070.

DEPARTMENT OF LICENSING & WASHINGTON DEPARTMENT OF FINANCIAL INSTITUTIONS, SHORT SALE SELLER ADVISORY (2010), *available at* http://www.dfi.wa.gov/consumers/pdf/short-sale-advisory.pdf (hereinafter, "SHORT SALE ADVISORY").[21] A short sale would require the lenders to collectively agree to accept less than they were owed. *Id.* Short sales are subject to real estate excise tax in King County and a commissionable event under the Exclusive Sale Listing Agreement. *See* RCW 82.45.060; WAC 458-61A-103; CP 637-39.

Instead, Vander Veen, SeaTac and their attorneys concocted a plan to achieve the exact same result – free and clear title to SeaTac – without paying excise tax or Leibsohn's commission by styling the transaction as a "deed in lieu of foreclosure." A deed in lieu of foreclosure is a transaction in which, as a substitute for foreclosure, a borrower deeds title to a lender in satisfaction of a mortgage debt. BLACK'S LAW DICTIONARY (9th ed. 2009), deed. No real estate excise tax is due on a deed in lieu of foreclosure where no additional consideration passes between the parties. WAC 458-61A-208(3)(a).

To create the appearance that SeaTac's purchase was a "deed in lieu of foreclosure," SeaTac's attorneys drafted and compiled 414 pages of

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[21] The entire text of this document is included in the Clerk's Papers at CP 642-47.

legal documents, which set forth the following basic transactions: (1) rather than purchasing the property, SeaTac "purchased the debt" directly from K & S's lenders, (2) the lenders released their claims against K & S, and (3) K & S deeded the property to SeaTac, its new "debt holder."[22] By the documents' terms, all parts of the transaction were all contingent on other components of the transaction occurring. The "Deed in Lieu of Foreclosure Agreement" was not effective until the releases were provided,[23] the releases were not effective until the lenders were paid,[24] and SeaTac would not make the payment until the "Deed in Lieu of Foreclosure Agreement" was executed.[25] In short, the agreements were written so that there was no possibility that SeaTac would end up merely holding K & S's bad debt and not owning the property. Substantively, the transaction was identical to a short sale.

Respondents readily concede that the purpose of the transaction was for SeaTac to purchase the property, not the debt. As the SeaTac City Manager stated:

> Q. And the goal of the City of SeaTac was never to actually possess the loans?
>
> A. That's correct.

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[22] CP 652-1065.
[23] CP 960.
[24] *Id.*
[25] CP 719, 863-64.

> Q. The goal at all times when we're discussing any part of this transaction was to purchase the property?
>
> A. Through the deed in lieu, yes.[26]

The parties' contemporaneous communications confirm that styling the transaction as a "deed in lieu of foreclosure" had two goals: (1) avoiding excise tax and (2) avoiding Leibsohn's commission. In one email, Vander Veen explained the trick they were playing with the excise tax:

> *To make sure my guy avoids excise tax* the doc's [sic] will require the deed in lieu go directly to the lender in exchange for the release so when my guy closes on the loans the deed in lieu will already be with the loan. Of course all this happens at the same time in the loan purchase closing, make sense to you and will Centrum be OK with that? [27]

Later during the drafting process, Colliers' counsel confirmed the other goal was avoiding Leibsohn's commission:

> The City should not object to my changes. *They are designed to make it tougher for Liebson [sic] to make a claim for a share of the $300k fee as a co-broker*...The more distance we can put between SeaTac's purchase of the chattel paper and the deed in lieu the better.[28]

C. Respondents wrongfully contact Leibsohn's exclusive client and induce it to modify the Exclusive Sale Listing Agreement.

At the same time that Respondents were concocting their "deed in lieu of foreclosure" scheme, Leibsohn and K & S were discussing the

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[26] CP 606.
[27] CP 1100 (emphasis added).
[28] CP 1094 (emphasis added).

extension of the Exclusive Sale Listing Agreement.[29] The 2008 agreement was set to expire on November 1, 2009.[30] Leibsohn met with K & S's principals, who agreed to extend Leibsohn's exclusive listing for another year at a reduced list price of $14,500,000.[31] Following this meeting, Leibsohn sent K & S a proposed extension of the Exclusive Sale Listing Agreement that included the new, lower list price, but otherwise contained the same terms as the previous agreements.[32]

On October 1, 2009, Scott Switzer, one of the principals of K & S, emailed Leibsohn that he was almost ready to sign the extension that reduced the asking price to $14,500,000:

> *I think I can now sign the agreement.* I will see if I can read the document you sent, sign it, and get it back to you.[33]

Unfortunately for Leibsohn, Vander Veen contacted Switzer right after he emailed Leibsohn and proposed the sham "deed in lieu of foreclosure" to K & S.[34] This contact induced K & S to propose an exception to Leibsohn's Exclusive Sale Listing Agreement that stated:

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction

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[29] CP 1394, ¶ 8.
[30] CP 1104-07.
[31] CP 1394, ¶ 8.
[32] CP 1431-36.
[33] CP 1438.
[34] CP 1086-88.

> in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.[35]

Switzer explains that the first and second sentences of this exception refer to the same transaction.[36] As Switzer emailed to Leibsohn: "I wrote in a fee exclusion for the proposed deed in lieu transaction proposed through Tom Hazelrigg and Arvin Vander Veen."[37]

Appellant's real estate practices expert, Jim Clark, testified at summary judgment that Vander Veen's offer to purchase the property should have been presented to Leibsohn and that it was wrongful under applicable practices and customs to circumvent the Exclusive Sale Listing Agreement.[38] Knowing that Vander Veen was aware of these rules and nonetheless violated them, Leibsohn responded to Switzer with frustration at the interference:

> As for the Deed in Liu [sic], just know that I share your frustration. It is always aggravating when Real Estate Brokers (like Arvin and Colliers) and Real Estate Buyers (like Colliers Client) intentionally circumvent the Seller and Sellers Broker and try to deal directly with the Lenders. This is never a good formula for me or my Clients (Sellers). Especially when the real estate offering is so apparent and duly presented as an opportunity to those same Real Estate Brokers and Real Estate Buyers.[39]

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[35] CP 1443.
[36] CP 1586-87.
[37] CP 1441.
[38] CP 1349-52.
[39] CP 1454.

Leibsohn also asked Vander Veen to let him do the work he was contractually entitled (and obligated) to do:

> Arvin, oh no, not again! I can't believe you are going around me yet again. Say it ain't so Arvin. Don't we have more productive things to do then [sic] go through that again? This property is listed exclusively with me. Let me know how I can help facilitate with your Buyer, who is trying to buy the property ultimately, right? What's the CBA policy on your actions? What's Colliers policy? C'mon now, Brian [40]

D. Leibsohn continues to market the property, while Respondents continue to use improper means to rebuff his efforts to participate in the sale.

When Leibsohn received the modified Exclusive Sale Listing Agreement signed by Switzer, he immediately began marketing the property at the lower price.[41] However, troubled by the handwritten exception, he did not immediately sign the Exclusive Sale Listing Agreement as modified.[42]

Leibsohn instead turned to the Commercial Brokers Association ("CBA") – the self-regulatory group tasked with resolving disputes between commercial brokers – to stop Colliers and Vander Veen from continuing to violate CBA rules.[43] On October 16, 2009, while Colliers and Vander Veen were in the midst of tortiously interfering with

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[40] CP 1452.
[41] CP 1447-49.
[42] CP 1394-95, 1153.
[43] CP 53-54.

Leibsohn's Exclusive Sale Listing Agreement, Leibsohn delivered a two-page letter to the CBA formally notifying it of his complaints against Vander Veen and Colliers.[44] The CBA's counsel was Chris Osborn, who was simultaneously representing SeaTac, Colliers, and Vander Veen in the transaction to purchase K&S's property.[45] Osborn was the legal mastermind behind the "deed in lieu of foreclosure" sham.

CBA responded to Leibsohn's letter by email:

> CBA staff, independent of any communications from Colliers, Mr. Vander Veen, Foster Pepper and Chris Osborn, has concluded that your complaint against Mr. Vander Veen cannot be arbitrated[.] ... CBA has concluded that it has no authority and will take no action.[46]

The CBA then directed all future communications on the matter to Osborn.[47] Osborn rejected Leibsohn's complaint by email dated October 23, 2009, telling Leibsohn that his claim was "not a matter which is arbitrable" and that "CBA has no authority whatsoever to interject itself into your dispute with Colliers and Vander Veen."[48] Osborn's rejection shielded his other clients, SeaTac, Colliers, and Vander Veen, from Leibsohn's claim against them.

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[44] CP 97, 243.
[45] CP 990, 7-13, 54, 68-72, 614.
[46] CP 104.
[47] *Id.*
[48] CP 258.

Leibsohn believed that a third-party buyer (in contrast with a legitimate lender like Centrum) could not complete a deed in lieu of foreclosure.[49] More than a month after receiving the 2009 Exclusive Sale Listing Agreement, Leibsohn signed it, concluding the exception would not cover a sale of the real property to a third party.[50]

Leibsohn continued attempting to participate in the transaction, but Respondents consistently excluded him from having any part in it.[51] In December, as SeaTac's closing was nearing, Hazelrigg wrote to Leibsohn:

> Brian, I will say this only once. You are completely out of line even contacting the note purchasers attorney or even having the nerve to think that you have a fee owing from anyone when all that is happening is a note purchase. If i [sic] were Scott I would sue your pants off...KEEP YOUR BUTT OUT OF THIS DEAL NOW OR YOU WOULD BE TRULY TORTUOUSLY [sic] INTERFERING WITHOUT ANY RIGHTS.[52]

E. SeaTac purchases the property and Leibsohn receives no commission.

On December 31, 2009, Respondents closed their sham "deed in lieu of foreclosure" transaction.[53] SeaTac paid $12,270,000 in exchange

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[49] CP 1394-95.
[50] *Id.*; CP 1153.
[51] *E.g.*, CP 1394, ¶ 10.
[52] CP 1453.
[53] CP 1055.

for free and clear title to K & S's property.[54] The proceeds from the $12,270,000 that SeaTac paid into escrow were distributed as follows:

- $7.15 million to first-position lien holder Avatar
- $4 million to second-position lien holder Centrum
- $100,000 each to third and fourth-position lien holders Dan Kirby and Velocity
- $26,021.71 to satisfy a mechanic's lien
- $562,623.58 to King County to bring property taxes current
- $10,000 for outstanding utilities
- $275,000 to Colliers and Vander Veen[55]

In turn, the encumbrance holders released their interests in K & S's property. Thomas Hazelrigg III received a $25,000 fee;[56] a payment that violated RCW 18.85.361(4) and RCW 18.85.301 by compensating an unlicensed broker for commercial real estate services. Leibsohn received nothing, and no real estate excise taxes were paid. Thus, the "kingpin" got a significant payment, and the exclusive broker who had spent years and over $30,000 of its own money on marketing the property for sale to the same buyer who purchased it got nothing.

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[54] *Id.*; CP 990-93.
[55] CP 1055.
[56] CP 1333.

Subsequently, the Washington Department of Revenue audited the transaction and concluded that it was a sale, not a deed in lieu of foreclosure, and assessed unpaid excise tax against K & S.[57] The DOR Manager responsible for auditing the transaction stated:

> The Department of Revenue determined that the transfer was a sale and that the claimed exemption under WAC 458-61A-208(3)(a) for a transfer by deed in lieu of foreclosure did not apply.[58]

The DOR filed a tax warrant and has initiated a collection action against SeaTac.[59]

F. The trial court dismisses Leibsohn's claims on summary judgment, concluding the transaction was a deed in lieu of foreclosure.

Leibsohn moved for partial summary judgment, asking the trial court to conclude that SeaTac's acquisition of the property was a sale, not a deed in lieu of foreclosure.[60] Respondents each cross-moved for summary judgment, asking the court to dismiss Leibsohn's claims.[61] Respondents' motions relied on the "deed in lieu of foreclosure" exception in Leibsohn's Exclusive Sale Listing Agreement.[62]

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[57] CP 1125-26, 1540-42.
[58] CP 1125-26.
[59] CP 1140-42, 1582-83.
[60] CP 582-99.
[61] CP 400-21, 1127-40.
[62] *Id.*

The trial court denied Leibsohn's motion, explaining in its order that: "The court's decision is based on the conclusion that the transaction was a deed in lieu of foreclosure."[63] The trial court granted Respondents' summary judgment motions and dismissed Leibsohn's claims.[64] Leibsohn appealed to this Court.[65]

The trial court's order and verbatim report of proceedings prove that the basis for granting Respondents' motions was the determination that the transaction was a deed in lieu of foreclosure and that Leibsohn was not entitled to compensation in such a transaction.[66] On this basis alone, the trial court dismissed Leibsohn's tortious interference with business expectancy/contract and Washington Consumer Protection Act claims.[67] This brief will incorporate without discussing the portions of the summary judgment pleadings below that establish the elements of each of Leibsohn's claims. Instead, this brief will focus on the incorrect basis for the trial court's decision.

V. ARGUMENT

Respondents crafted a sham "deed in lieu of foreclosure" transaction under which SeaTac paid $12,270,000.00 to K & S in

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[63] CP 1655-57.
[64] CP 1660-64.
[65] CP 1665-67.
[66] CP 1655-57.
[67] *Id.*

exchange for free and clear title to K & S's property. Real estate excise tax and Leibsohn's commission were not paid as part of the sale. Respondents also wrongfully contacted Leibsohn's exclusive client, K & S, and induced it to exclude a "deed in lieu of foreclosure" as a commissionable event. Respondent's contact with Leibsohn's exclusive clients violated commercial real estate rules and regulations.

The court's determinations that the transaction actually was a deed in lieu of foreclosure, and that Respondents could rely on the wrongfully obtained "deed in lieu" exception to avoid liability, were erroneous as a matter of law. Under the plain language of the Exclusive Sale Listing Agreement, the transaction was a sale, not a deed in lieu of foreclosure. Furthermore, equity does not permit Respondents to use the fruit of their own wrongdoing to escape liability. Finally, even if the transaction were a deed in lieu of foreclosure and Respondents could invoke the exception to escape liability, a genuine issue of material fact exists about whether Leibsohn accepted the modified Exclusive Sale Listing Agreement.

A. Standard of review.

An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court, considering all matters *de novo*. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). Both the law and the facts will be reconsidered by the

appellate court. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Summary judgment is appropriate only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (quoting *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

B. The transaction was a sale, not a deed in lieu of foreclosure.

Under the plain language of the Exclusive Sale Listing Agreement, SeaTac's acquisition of the property was a commissionable sale, not a deed in lieu of foreclosure subject to the exception.

1. A sale is a conveyance of property for valuable consideration.

The Exclusive Sale Listing Agreement provides that Leibsohn is entitled to a commission if he "sells the property."[68] The Exclusive Sale Listing Agreement contains a broad but circular definition of "sells": "the term 'sell' (and similar phrases) as used in this agreement shall mean and

[68] CP 637-39.

include *sell*, contract to sell, exchange, lease for over 5 years, and/or an option to purchase."[69] (emphasis added.)

To interpret the undefined term "sell," the court must use the word's "plain, ordinary, and popular meaning." *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007) ("When interpreting a contract, we give undefined terms their plain, ordinary, and popular meaning."). The ordinary meaning of "sale" is found in Washington's excise tax statutes, which provide:

> the term "sale" has its ordinary meaning and includes any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property...for a valuable consideration.

RCW 82.45.010.

One subset of a "sale" under RCW 82.45.010 is a "short sale." In a short sale, the purchase price is insufficient to cover the debt secured by the property and the seller cannot pay the difference. SHORT SALE ADVISORY, *supra*, at 1. "Every short sale is dependent upon the seller's lender(s) consenting to the transaction and agreeing to release the lender's security interest in exchange for less than what is owed." *Id.* Although the funds in a short sale are paid directly to the seller's lender rather than to the seller itself, they are still valuable consideration to the seller and

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[69] CP 637.

subject to excise tax, just as if they were paid to the seller directly. WAC 458-61A-103.

2. A deed in lieu of foreclosure is a remedy for default.

The Exclusive Sale Listing Agreement, as modified by the induced exception, provided that no commission would be due in the case of a "deed in lieu of foreclosure."[70] As with "sell," the term "deed in lieu of foreclosure" is undefined. The ordinary meaning of a deed in lieu of foreclosure is "[a] deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and *as a substitute for foreclosure*." BLACK'S LAW DICTIONARY (9th ed. 2009), deed (emphasis added). A deed in lieu of foreclosure does not extinguish senior or junior liens, mechanics' or materialmen's liens, or property tax obligations. For example, had Centrum (the second-position lienholder that had initiated the judicial foreclosure action against K & S) obtained a deed in lieu of foreclosure from K & S, Centrum would have received title to the property subject to the first, third, and fourth-position liens plus the taxes and materialmen's liens.

Foreclosure is a remedy afforded to the holder of a mortgage or deed trust where the obligor defaults on its debt. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE

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[70] CP 1443.

§§ 19.1, 20.1 (2d ed. 2007). The right to obtain property by foreclosure arises only if the obligor defaults on the primary obligation:

> The most fundamental statement we can make about obligation and mortgage is that the obligation is primary and the mortgage ancillary to it....A mortgage exists to secure the payment of a debt or performance of some other obligation that can be reduced to a money judgment. Only if the obligor defaults in performing the obligation may the holder of the mortgage realize on the mortgage security as a substitute for performance.

Id. § 18.2. *See also* 2 JOHN A. GOSE AND SCOTT B. OSBORNE, WASHINGTON REAL PROPERTY DESKBOOK § 20.4(2) (2009) ("A mortgage does not exist in a vacuum. The mortgage secures an obligation, which is usually denominated as a debt."). The rights of judicial and non-judicial foreclosure are created and circumscribed by statute. 2 WASH. REAL PROPERTY DESKBOOK, *supra*, at § 20.14(1); 18 WASH. PRACTICE, *supra*, at § 20.1-20.2. The deed in lieu of foreclosure is an alternative designed to save mortgagor and mortgagee time, trouble and expense where "a mortgagor is hopelessly in default and has no serious defense to foreclosure." 18 WASH. PRACTICE, *supra*, at § 18.30.

A transaction cannot simultaneously be a "sale" and a "deed in lieu of foreclosure"; RCW 82.45.010(3)(i) specifically exempts deeds in lieu of foreclosure from the definition of a sale. This mutual exclusivity prevents the application of excise tax twice in rapid succession where a

lender accepts a deed in lieu of foreclosure and then immediately sells the property to mitigate its losses.

3. The nature of a transaction depends on its substance, not the parties' self-serving labels.

Having defined the terms "sale" and "deed in lieu of foreclosure," the question becomes how to determine into which category SeaTac's acquisition of the property falls. Washington law answers this question by looking at the substance of the transaction, not the parties' self-serving labels.

Courts will not recognize a sham transaction that is created for the sole purpose of gaining an unjustifiable tax benefit. At the federal level, this principle is embodied in the "economic substance" or "sham transaction" test, under which a transaction receives tax recognition only if it has "economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached." *Frank Lyon Co. v. U.S.*, 435 U.S. 561, 583-84, 98 S. Ct. 1291, 55 L. Ed. 2d 550 (1978). In applying the test, courts consider two factors: (1) does the transaction have a business purpose other than tax avoidance? and (2) does the transaction have economic substance beyond the creation of tax benefit? *Casebeer v. Comm'r*, 909 F.2d 1360, 1363

(9th Cir. 1990). If the court concludes that the transaction has no practical effect beyond tax avoidance, it will disallow the claimed tax benefits. *Id.* Washington courts apply the same principle. In *Baugh v. Dunstan & Dunstan*, 67 Wn.2d 710, 711, 409 P.2d 658 (1966), the Washington State Supreme Court held that a promissory note was unenforceable when it was secured by a sham real estate contract, created for the sole purpose of unlawfully obtaining an income tax advantage.

Similarly, Washington courts will not countenance a seller's use of a sham transaction to avoid the obligation to pay a real estate broker's commission. In *David Meyers, Inc. v. Anderson*, 48 Wn. App. 381, 739 P.2d 102 (1987), a real estate broker procured a $600,000 offer for a building. The seller and a tenant then pretended the tenant was exercising its right of first refusal for $600,000, while in fact, the tenant agreed to pay only $570,000, cutting out the broker's commission. *Id.* at 383. To cover up this scheme, the closing documents listed the purchase price as $600,000, and the owners repaid the $30,000 difference by promissory note. *David Meyers*, 48 Wn. App. at 387. The tenant conceded that its goal was simply to buy the property for $570,000, but that it structured the documents as it did "to prevent any unnecessary litigation." *Id.* at 388. The court concluded that the broker's tortious interference claim must survive summary judgment:

> Although the owners and lessee vigorously argue that they were legally entitled to bypass the brokers, they were not. Construing all reasonable inferences from the foregoing facts in favor of the brokers, as we must in this summary judgment case, a trier of the fact could conclude as follows: that there was a valid contract between the property owners and the brokers whereby the owners would owe the brokers a $30,000 commission if they found an acceptable buyer; that the lessee knew of this contract; that the lessee intentionally induced the owners to breach the contract in order to save $30,000 on the price of the property; that illusory promissory notes were given, a misleading closing statement prepared and incorrect real estate excise taxes calculated, all for the purpose of concealing the true facts from the brokers and [the broker's would-be purchaser] as to the actual purchase price paid by the lessee; and that the brokers were damaged thereby.

Id.

These cases illustrate that the characterization of a transaction must be determined by its substance; self-serving labels applied to avoid taxes or commissions cannot be used to escape this reality.

4. The true nature of SeaTac's acquisition of the property was a sale, not a deed in lieu of foreclosure.

The substance of SeaTac's acquisition of K & S's property was a sale—specifically, a short sale—not a deed in lieu of foreclosure. SeaTac paid $12,270,000 in valuable consideration to K & S in exchange for title to K & S's real property. WAC 458-61A-103 makes clear that the payment is valuable consideration regardless of the fact that it was made to K & S's lenders, not K & S directly. As the Department of Revenue already concluded in its audit, this was a sale for purposes of

RCW 82.45.010.[71] The Exclusive Sale Listing Agreement's term "sells" compels the same conclusion.

The label "deed in lieu of foreclosure," and Respondents' creative drafting, cannot change the practical reality of the transaction. For a legitimate holder of a mortgage or deed of trust, the re-payment obligation is primary; foreclosure is merely a remedy afforded in the case of default and lenders generally abhor the idea of taking back the property as satisfaction for its loan. *See* 18 WASH. PRACTICE, *supra*, at § 18.2 (2007). In contrast, SeaTac never valued K & S's obligation to pay off the promissory notes or intended to collect on that obligation.[72] SeaTac only wanted to buy the property without encumbrances on title. Vander Veen sent an especially telling email to SeaTac on November 12, 2009, where he admitted the substance of the transaction was a short sale:

> [T]he numbers look like this. Remember we could not do a PSA [Purchase and Sale Agreement] earlier because it was listed and now that listing has expired.
>
1st	$7,150,000
2nd	4,000,000
3rd	100,000
4th	100,000
Title ins.	14,826
Extended prem.	4,448
Escrow fee	4,216
Recording fee	100
Commission	300,000
Excise	202,035

[71] CP 1125-26; 1540-42.
[72] CP 606.

Total $11,875,625 [73]

The numbers for the potential Purchase and Sale Agreement transaction Vander Veen describes are the exact same reduced payoffs to the lenders that were in fact paid by SeaTac. Vander Veen admits that the substance of the transaction is a sale by including a line for excise tax, which would only be due on a sale. The difference between Vander Veen's proposed Purchase and Sale Agreement and the actual transaction that occurred is nothing more than the documents counsel drafted to create the appearance of a deed in lieu of foreclosure and the decision to not pay excise tax. These factors alone do not change the substance of the transaction.

SeaTac is not a lender, never held the debt, and had no possibility of collecting on the debt in the ordinary course. SeaTac's admitted goal, and what it accomplished, was "to purchase the property."[74] As in *Baugh* and *David Meyers*, this Court should reject Respondents' inaccurate labels as non-dispositive because the sole purpose of calling the transaction a "deed in lieu of foreclosure" was to avoid excise tax and Leibsohn's commission.

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[73] CP 1112.
[74] CP 606.

5. Public policy strongly supports the determination that SeaTac's purchase of K & S's property was a sale.

Public policy considerations support classifying the transaction as a sale under the Exclusive Sale Listing Agreement. Leibsohn's exclusive listing agreement was a standard form contract from the Commercial Brokers Association. There are thousands if not tens of thousands of similar contracts currently in effect in Washington. If the transaction here does not qualify as a sale under the Exclusive Sale Listing Agreement, then every commercial broker's exclusive listing agreement could be avoided merely by a willing buyer, seller, and lender agreeing to convey the property with the same set of documents as Respondents used. This result is absurd. Exclusive listing agreements, which Washington courts have enforced and protected for decades, should not be so easily rendered meaningless. *See F.D. Hill & Co. v. Wallerich*, 67 Wn.2d 409, 407 P.2d 956 (1965) (seminal Washington case recognizing a cause of action for tortious interference with an exclusive listing agreement).

Similarly, the public policy supporting excise tax collection would be eviscerated if parties could so easily avoid payment. In interpreting tax regulations, a court's "paramount concern is to ensure that the regulation is interpreted in a manner that is consistent with the underlying policy of the statute." *Dept. of Revenue v. Nord Northwest Corp.*, 164 Wn. App.

215, 229, 264 P.3d 259 (2011). Here, excluding deeds in lieu of foreclosure from excise tax serves the purpose of preventing its payment twice in rapid succession: once on the initial transfer to the lender, and then again when the lender resells the property to satisfy the debt. This objective is not served where, as here, the party taking the alleged deed in lieu of foreclosure has no intention of selling the property and would not have suffered the consequences of a double tax. Instead, by having a third-party (SeaTac) obtain free and clear title to the property, K & S and SeaTac avoided paying excise tax even once—a result fundamentally contrary to the statute's underlying policy.

Courts construe statutes in a manner that avoid absurd results. *Shurtliff v. Dep't of Ret. Sys.*, 103 Wn. App. 815, 825, 15 P.3d 164 (2000). In construing tax statutes, this means rejecting statutory interpretations that facilitate improper tax avoidance. *See, e.g., G-P Gypsum Corp. v. Dept. of Revenue*, 169 Wn.2d 304, 313, 237 P.3d 256 (2010); *Nord Northwest Corp.*, 164 Wn. App. at 229.

Here, the classification of defendants' transaction as a deed in lieu of foreclosure rather than a sale would have the absurd result of effectively eliminating the excise tax by making it extremely easy to avoid. If this transaction is not a "sale," any prospective purchaser of a property with any encumbrances could avoid excise tax by using the same meaningless

legal constructs. Even in the residential context it would work. Imagine a homeowner giving a second deed of trust to a sibling. A buyer agrees to pay off the first-position lien holder and "purchase" the second deed of trust from the sibling (presumably for an aggregate amount near or equal to the property's fair market value) in exchange for the homeowner delivering a "deed in lieu of foreclosure" to the buyer. The real estate brokers and agents are cheated out of their commissions and no excise tax goes to the state, but for the buyer and seller the transaction is exactly the same as a sale. Indeed, if this is legal, an entire cottage industry of creating this type of transaction to avoid commissions and excise tax will be spawned. This is the type of tax evasion that the broad statutory definition of "sale" in RCW 82.45.010 is intended to prevent.

Public policy supports the conclusion mandated by the Exclusive Sale Listing Agreement and canons of contract interpretation: when SeaTac paid K & S $12,270,000 for free and clear title to commercial property, the transaction was a "sale."

C. Respondents cannot profit from their own wrongdoing.

This court should reject application of the "deed in lieu" exception as a matter of law, because it was the direct result of Vander Veen's intentional interference with the Exclusive Sale Listing Agreement and knowing violation of real estate rules and regulations that prohibit

presentation of an offer to an exclusively listed client. Any holding to the contrary would create an absurd result: Respondents tortiously interfered so successfully that they cannot be held liable for doing so.

Washington law recognizes the principle that "no one shall profit by his own wrongdoing." *Hart v. Geysel*, 159 Wash. 632, 635, 294 P. 570 (1930). This principle is applied in all legal fields, from contracts to criminal law:

> [A]ll laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, [and] have their foundation in universal law administered in all civilized countries.

In re Estate of Tyler, 140 Wash. 679, 684-85, 250 P. 456 (1926); *see also State v. Tyler*, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007) ("Basic principles of equity require that a person should not be allowed to profit from his or her own wrongdoing."); *Seattle Int'l Corp. v. Commerce & Indus. Ins. Co.*, 24 Wn. App. 108, 111, 600 P.2d 612 (1979) ("The basic function of the court is to see that no one takes advantage of his own wrong.").

A New Jersey court applied this principle in a case very similar to the one here. In *McCue v. Deppert*, 21 N.J. Super. 591, 91 A.2d 503 (N.J.

1952), a real estate broker sued a purchaser for interfering with his commission where the purchaser secretly contacted the property seller, inaccurately represented that the broker had not introduced him to the property, and then purchased it. The court rejected the argument that the broker could not prove damages because he had not actually earned his commission, concluding that the broker had an actionable loss based on the loss of an opportunity to negotiate for sale of the property:

> Nor is it essential that plaintiff prove that he actually earned his commission under the brokerage agreement. While it is true the procurement of a ready, willing and able purchaser is a condition precedent to the duty of an owner to pay a real estate broker's commission, *if the conduct of the defendant prevented that condition from happening, he cannot rely on his own wrongful acts as a shield from liability*. It is sufficient that plaintiff prove facts which, in themselves or by the inferences which may be legitimately drawn therefrom, would support a finding that, except for the tortious interference by the defendant with the plaintiff's business relationship with the owner, plaintiff would have consummated the sale and made a profit. *The action lies not only for interference with the fulfillment of an executed contract but also for malicious interference with the right to conduct negotiations which might culminate in such a contract.*

Id. at 596-97 (emphasis added). New Jersey law should be particularly persuasive to this court, as the Washington State Supreme Court adopted the language and holding of a New Jersey court in the seminal case recognizing tortious interference for failure to pay a real estate broker's commission. *Wallerich*, 67 Wn.2d 409.

Here, Respondents interfered with the Exclusive Sale Listing Agreement and violated real estate industry rules by presenting their offer directly to K & S, then excluded Leibsohn from the transaction. Washington courts recognize that a violation of "a statute, regulation, recognized rule of common law, or an established standard of trade or profession" qualifies as a wrongful act. *Moore v. Commercial Aircraft Interiors*, 168 Wn. App. 502, 510, 278 P.3d 197 (2012).

Presentation of an offer directly to the client of an exclusive listing agreement violates multiple commercial broker rules and regulations, including those of the CBA, Society of Industrial and Office Realtors ("SIOR"), and the National Association of Realtors ("NAR"), all organizations to which Vander Veen belonged and whose rules Vander Veen pledged to follow.[75] (In fact, Vander Veen was a past president of the CBA, as well as its treasurer and a board member at the time of the offenses.)[76] For example, Article 16 of the Code of Ethics and Standards of Practice of the National Association of Realtors states, "realtors shall not engage in a practice or take any action inconsistent with exclusive

[75] CP 1352, 1329.
[76] CP 65, 1329.

representation or exclusive brokerage agreements[.]"[77] The Standards of Practice continues:

> all dealings concerning property exclusively listed, or with buyers/tenants who are subject to exclusive agreement shall be carried on with the client's representative or broker, and not with the client except with the consent of the client's representative or broker or except for such dealings that are initiated by the client.[78]

Jim Clark, Leibsohn's real estate practices expert, testified that Respondents' contact with Leibsohn's exclusive client violated CBA, SIOR, and NAR rules and regulations.[79]

Without Vander Veen's interference with Leibsohn's exclusive client, the deed in lieu of foreclosure exclusion would not have existed. Vander Veen wrote to Thomas Hazelrigg III, who shared an office with Switzer:

> [W]hat about K & S agreeing to the deed in lieu in exchange for their release? Will they sign something quickly so we can make this happen.[80]

Hazelrigg forwarded the email to Switzer with the notation "**Urgent**," and then Vander Veen and Switzer began communicating directly.[81] An exchange ensued in which Vander Veen asked Switzer agree to the

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[77] CP 1359.
[78] CP 1360.
[79] CP 1352.
[80] CP 1088.
[81] CP 1086-88 (emphasis in original).

transaction with his undisclosed client.[82] Switzer then told Vander Veen, "I am working on a letter of intent for you agreeing to a deed in lieu of in exchange for releases from all the debt." [83] The next day, Switzer sent Vander Veen the letter of intent.[84] Switzer's email to Leibsohn containing the "deed in lieu" exception makes clear that Vander Veen's wrongful contact with Switzer was the inducement to change their contract: "I wrote in a fee exclusion for the proposed deed in lieu transaction proposed through Tom Hazelrigg and Arvin Vander Veen."[85]

Respondents cannot now claim that the very exclusion that was created by their wrongful conduct excuses them from liability. SeaTac's short sale purchase of K & S's property should have been Leibsohn's transaction to facilitate. The fact that Respondents' wrongful actions prevented Leibsohn from doing so cannot insulate them from Leibsohn's tortious interference and Consumer Protection Act claims.

D. An issue of fact exists regarding whether Leibsohn accepted the modified Exclusive Sale Listing Agreement.

Even if this court determines the transaction is a deed in lieu of foreclosure and subject to the "deed in lieu" exception, Leibsohn's claims cannot be dismissed as a matter of law.

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[82] CP 1086-89.
[83] CP 1088.
[84] CP 1086.
[85] CP 1441.

For a valid contract to form, both parties must objectively manifest their mutual assent. *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). Whether mutual assent exists is a question of fact. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

When Leibsohn received the modified Exclusive Sale Listing Agreement containing the "deed in lieu" exception, he began marketing the property but did not execute the altered agreement for over six weeks.[86] He then never delivered the agreement to K & S.[87] On summary judgment, Colliers and Vander Veen took the position that these actions did not amount to acceptance and that the 2009 Exclusive Sale Listing Agreement was therefore invalid.[88] SeaTac, in contrast, took the position that the 2009 Exclusive Sale Listing Agreement extension was valid and relied on its "deed in lieu" exception to defeat Leibsohn's claims.[89]

As Respondents' dueling positions on summary judgment suggest, an issue of fact exists regarding whether Leibsohn accepted the 2009 extension of the Exclusive Sale Listing Agreement. If this court accepts that the "deed in lieu of foreclosure" exception is not applicable to

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[86] CP 1447-49, 1394-95, 1153.
[87] CP 1156.
[88] CP 1137.
[89] *See* CP 400-421.

SeaTac's purchase or available for Respondents' benefit, then this issue is immaterial; a commission was due under either the 2008 or 2009 Exclusive Sale Listing Agreement. If the 2008 agreement was in effect, Leibsohn was entitled to a commission under its tail provision, which provided that Leibsohn was owed a commission if the property sold to a buyer (SeaTac) who Leibsohn had introduced to the property or to a party that made an offer while Leibsohn's agreement was in effect.[90] If the 2009 agreement was in effect, Leibsohn was entitled to a commission because a sale occurred during its term.[91] In either case, a commission was due and owing that would have been paid but for Respondents' interference.

If the court determines that SeaTac's purchase of the property was a deed in lieu of foreclosure and Respondents can use the "deed in lieu" exception to avoid liability, however, whether the 2009 agreement was accepted becomes a material issue. If Leibsohn never accepted the 2009 Exclusive Sale Listing Agreement, then he was entitled to a commission under the 2008 agreement's tail provision. Therefore, even if this court agrees with the trial court's legal conclusion that the transaction was a

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[90] CP 638.
[91] CP 1442-45.

deed in lieu of foreclosure, Leibsohn is still entitled to have a trier of fact hear its case.

VI. CONCLUSION

SeaTac paid $12,270,000 in exchange for free and clear title to K & S's real property. This was a commissionable sale, not a deed in lieu of foreclosure. Respondents' false labels and illegitimate desire to avoid excise tax and Leibsohn's commission cannot change this characterization. Nor can Respondents benefit from a contractual provision obtained as a direct result of their own breach of real estate industry rules and regulations. This court should reverse the trial court's denial of Leibsohn's partial summary judgment motion and grant of Respondents' summary judgment motions, and remand for entry of partial summary judgment in Leibsohn's favor and trial on the remaining elements of its claims.

DATED this 21st day of February, 2013.

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DECLARATION OF SERVICE

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