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**No. 97872-7**

**SUPREME COURT OF THE STATE OF WASHINGTON**

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No. 77265-1-I
(Consolidating Case Numbers 77265-1-I, 77461-1-I and 77462-0-I)

**IN THE COURT OF APPEALS**
**OF THE STATE OF WASHINGTON**
**DIVISION II**

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RON AMUNDSON and EDEL AMUNDSON,
husband and wife, and their marital community,

Petitioners,

v.

JAMES ROGER LEMCKE and DONNARAE LEMCKE,
husband and wife, and their marital community;
KENNETH HARTUNG and JEANETTE BETH MEANS,
husband and wife, and their marital community; and
TRAVIS KRANT and STACI KRANT,
husband and wife, and their marital community,

Respondents.

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# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This case involves an attempt to sell a houseboat dock on Lake Union in Seattle. The dock is owned by Respondents Donnarae and James Lemcke. The Lemckes rent slips for houseboat moorage. By agreement with the Lemckes, the Respondent Moorage Tenants had a right of first refusal in the event that the dock was put up for sale.

In 2016, the Lemckes offered the dock for sale and received a $1.8 million offer from the Amundsons, who are the Appellants. After receiving notice of the Amundsons' offer, the Moorage Tenants agreed to match the full $1.8 million amount and all other material terms of the offer. The Moorage Tenants and the Lemckes were prepared to close the $1.8 million sale over three years ago on September 12, 2016, but the Amundsons upended the closing by filing this lawsuit and a notice of *lis pendens* under RCW 4.28.320, *et seq*. The *lis pendens* has prevented the Lemckes from transferring clear title to the property.

This matter is before the Supreme Court on Appellant Amundsons' petition for discretionary review following summary judgment in favor of Respondents in the Superior Court and a decision by the Court of Appeals affirming the trial court. For the reasons stated below, the Respondents assert that there is no basis under RAP 13.4 for acceptance of review by this Court.

## II. COUNTER STATEMENT OF THE CASE

### A. Procedural Summary

The Amundsons commenced the Superior Court action from which this appeal is derived on August 11, 2016, by filing a complaint for specific performance and declaratory relief against the Lemckes and the Moorage Tenants. (CP 1-22) On that same day, the Amundsons encumbered the Property by recording a notice of *lis pendens*. (CP 254-269).

On June 16, 2017, the Amundsons filed a motion for summary judgment seeking an order requiring that the Lemckes convey the property to the Amundsons and declaring the Moorage Tenants' Purchase and Sale Agreement ("PSA") to be null and void. (CP-90-112) The Moorage Tenants filed a cross motion for summary judgment requesting that the Court enter judgment dismissing Amundson's complaint. (CP 254-269)

On July 20, 2017, the Superior Court granted the Moorage Tenants' motion for summary judgment and dismissed the Amundsons' complaint with prejudice. (CP 373-377). The Amundsons appealed the trial court's ruling, and on October 21, 2019, the Court of Appeals issued an unpublished opinion which in all respects affirmed the trial court.

### B. Facts

1. The Property is a floating home moorage site owned by the Lemckes, on which three floating homes are moored to an overwater dock. The floating homes are separately owned personal property of the Moorage Tenants. (CP 63-66, 39-42)

2. Tenants Beth Means and Kenneth Hartung have lived in their floating home on the Property for 43 years. Tenants Staci and Travis Krant purchased their floating home in 2015. (CP 39-42)

3. Donnarae Lemcke promised the tenants that, if the Property was ever sold, the tenants would have a right of first refusal to purchase the Property, and that promise was memorialized in the Krants' moorage rental agreement. (CP 1-22, 39-42, 63-66)

4. In May 2016, the Lemckes received an offer in the form of a written PSA at a purchase price of $1.8 million from the Amundsons. (CP 1-22, 66-69) The Amundson PSA, which was accepted and signed by the Lemckes on May 5, 2016, required that the purchase price be payable "all cash at closing," but it was subject to a 45-day feasibility contingency in favor of the buyer. It required that the buyer deposit $100,000 as earnest money upon waiver by the buyer of the feasibility contingency. (CP 1-22)

5. The Amundson PSA included an addendum which, as relevant to this appeal, contained three additional contractual provisions. First, the addendum states that the:

> Buyer agrees to provide proof of funds sufficient for closing on or before 5 PM on May 9, 2016 or this contract is null and void. (CP 1-22, 63-66)

Second, the addendum recognizes that the Amundsons' right to purchase the property is subject to the Moorage Tenants' right of first refusal:

> Pursuant to the terms of existing floating home moorage site rental agreements, each of the three moorage site tenants have a 60 day right of first refusal allowing them

> individually or collectively to match any offer received by the seller. **Any Purchase and Sale Agreement secured through this listing shall be subject to and contingent upon the expiration or waiver of the right of first refusal**…". [emphasis added] (CP 1-22, 63-66)

Third, in order to protect the sellers, the addendum contains a provision restricting the buyers' right to transfer their interest in the property under the PSA prior to closing:

> The buyer, Ron Amundson, may only assign this contract to an LLC controlled by himself and/or his immediate family members. (CP 1-22)

6. On May 9, 2016, as his proof of funds submission, Ron Amundson provided the Lemckes with pages 1 and 3 of a 47-page Merrill Lynch investment account statement showing investments of approximately $9.5 million, but it also contained a notation that the funds in the account were "**PLEDGED" to ML LENDER**. (CP 307-332, 333-337) The Amundson proof of funds submission contained no additional information or explanation concerning whether any portion of the funds in the account were exempt from the "pledge" in favor of Merrill Lynch. (CP 251-253)

7. Even though the Amundson proof of funds evidenced only funds that were pledged as security for a debt obligation owing by Amundson to Merrill Lynch, it was accepted by the Lemckes as adequate to satisfy the proof of funds for closing requirement of the Amundson PSA. (CP 63-66, 60-62, 338-341)

8. The Lemckes' attorney then sent certified letters to all the Moorage Tenants, enclosing the Amundson PSA, and informing them that, under the terms of the right of first refusal, they had 60 days "to match the offer tendered for the purchase of the property" by the Amundsons. (CP 39-42, 60-62)

9. On July 8, 2016, the Moorage Tenants submitted a matching $1.8 million offer in the form of a PSA which was in all material respects identical to the Amundson purchase and sale agreement. (CP 1-22, 39-42, 63-66, 145-155) Both the Amundson PSA, and the Moorage Tenants' PSA were prepared on Commercial Brokers Association form CBA PS-1A, Rev. 1/2011.

10. The Moorage Tenants' PSA includes an addendum with a "proof of funds sufficient for closing" requirement identical to that contained in the addendum to the Amundson PSA. It also includes a provision restricting the buyers' freedom to assign their purchase rights prior to closing. (CP 1-22, 145-155) That provision states:

> Buyer may assign this contract to a Washington non-profit corporation to be operated as a cooperative in which the named individuals comprising buyer collectively own not less than a 50% interest.

11. On July 14, 2016, the Lemckes accepted the Moorage Tenants' proof of funds submission and signed the Moorage Tenants' PSA. (CP 60-62, 43-59)

12. As proof of funds for closing the Moorage Tenants submitted documents showing cash on hand and liquid assets totaling

approximately $1.2 million, no portion of which was pledged or encumbered as security for any debt obligation, together with a prequalification loan approval letter from Sound Community Bank indicating that the Moorage Tenants had conditionally qualified for a loan sufficient to permit them to purchase the Property at a purchase price of $1.8 million with a down payment to be made by them in the amount of $620,000. (CP 60-62, 39-42)

13. Thereafter, within the time permitted under their PSA, the Moorage Tenants gave notice of waiver of the feasibility contingency and deposited $100,000 in earnest money with the escrow agent. (CP 43-59, 63-66)

14. By the closing date set in the Moorage Tenants' PSA all required closing documents had been executed, and the loan had been approved by Sound Community Bank. (CP 1-22, 43-59, 67-69)

15. It is undisputed that sole reason why the sale of the property to the Moorage Tenants did not close on September 12, 2016 was the cloud on title to the Property created by the *lis pendens* and this lawsuit. (CP 43-59-67-69)

## III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Although the Moorage Tenants were ready, willing and able to pay exactly the same price for the Property, the Amundsons argue that the Moorage Tenants' purchase and sale agreement did not match the Amundsons' offer in two respects.

First, they argue that the Moorage Tenants failed to satisfy the "proof of sufficient funds for closing" requirement of their PSA, because they were relying in part on a bank loan to buy the Property.

Second, they argue that a minor variation in language between the Amundsons' and Moorage Tenants' PSAs relating to the possible assignment prior to closing of the purchasers' rights under the PSAs was a material variation within the meaning of *Northwest Television Club, Inc. v. Gross Seattle, Inc*., 96 Wn.2d 973 (1981) and *Matson v. Emory*, 36 Wn. App. 681 (1984).

Neither of these arguments has a valid factual or legal basis, and neither presents an issue of substantial public interest. Nor does the Court of Appeals' decision conflict in any way with prior case law.

### A. The "Proof Of Funds Sufficient For Closing" Provisions Of The Purchase And Sale Agreements Were Not Orally Modified To Require "Cash in Hand" Or To Preclude The Use Of A Loan To Close The Sale

The Amundsons argue that the words "proof of funds sufficient for closing," which appear in identical form in both PSAs, must be interpreted to mean that within four days after signing the PSAs the buyers had to prove not only that they would have sufficient funds available by the closing date, but that they had to demonstrate that they had cash in hand equal to the total purchase price and therefore would not need to rely on a loan in order to close the sale. The Amundsons have dubbed this the "cash now" standard, but no such language appears in the contracts, and

no such "cash now" requirement was ever communicated to the Moorage Tenants.

The Amundsons claim that the so-called "cash now" proof of funds standard was inserted into their PSA during a telephone conversation between the Lemckes' and Amundsons' brokers. According to the Amundsons, in the course of the telephone conversation the Lemckes' broker said that buyer had to have cash-in-hand in the amount of the total purchase price by the deadline for submission of proof of funds, which was four days after the signing of the PSA. The Amundsons say that they interpreted that to mean that the Moorage Tenants were not allowed to rely on a loan to prove that they would have the cash needed to close the sale.

The Amundsons argue that the Court of Appeals erred when it excluded evidence of the broker's purported oral modification of the Amundson PSA, but as the Court of Appeals noted, under Washington law a broker has no authority to construe contract language and a principal is not bound by the representations a broker may have made in that regard (Citing *Gile v. Tsutakawa*, 109 Wash. 366, 375, 187 Pac. 323 (1920) and other Washington case law authority). In addition, the Court of Appeals decision pointed out that the Amundson PSA contains a provision stating specifically that "the sellers' broker had made no 'representations or warranties… concerning the legal effect of this agreement'" and an integration provision stating that

> This Agreement and any addenda and exhibits thereto state the entire understanding of Buyer and Seller regarding the

> sale of the Property. There are no verbal or other agreements which modify or affect the Agreement. (CP 1-22).

Moreover, as noted by the Court of Appeals, there is nothing in the record in this case evidencing that Mark Anderson, the sellers' broker, had the sellers' authority to add terms to the purchase and sale agreement:

> There is no indication that Anderson had the sellers' express authority to define, and add to, the contractual terms. Thus, because the record demonstrates that Anderson lacked the ability to add clarifying terms to the PSA addenda, his statement regarding the meaning of the proof of funds contingency is nonbinding and inadmissible". (Court of Appeals Opinion at page 14).

The Amundsons argue that the Court of Appeals' rejection of the purported oral modification of the contract conflicts with *Brogan v. Lamphier*, 165 Wn.2d 773, 202 P. 3d 960 (2009), but the facts of *Brogan* are readily distinguished from the facts of this case. The issue in *Brogan* involved the date when the buyer was entitled to take possession of the purchased property. The form of the purchase contract in *Brogan* allowed the parties to check one of three boxes: the first was possession "on closing," the second was possession "a certain number of days after closing," and the third was possession "at any other agreed time." It was a necessary term of the contract, but none of the boxes were checked. However, the evidence showed that the buyer and seller had orally agreed that the seller would have up to one year after closing to vacate and move a building from the property.

In this case, by comparison, the statement purporting to define the meaning of the proof of funds provision (which the Amundsons characterize as a "cash now" requirement) was alleged to have been made in a phone conversation between brokers, not the parties. There is no claim that the buyer and seller agreed upon, or even discussed, whether the buyer had to have $1.8 million available in cash within four days of signing the purchase contract. To the contrary, under both PSAs the parties specifically agreed in writing that the buyer had to have "cash at closing" and that there were no "verbal or other agreements which modify or affect the Agreement." Also, the Amundsons' self-styled "cash now" requirement was never communicated to the Moorage Tenants, and the Amundsons do not contend that it was.

The Amundsons also argue that the Court of Appeals erred by not adding the term "cash now" to the contracts under an exception to the hearsay rule (citing *Patterson v. Kennewick Pub. Hosp.*, 57 Wn. App. 739 (1990)), but the claimed "cash now" standard was not rejected on the grounds of hearsay. Rather, it was rejected because the broker did not have authority to modify or clarify the terms of the contract and it conflicted with other clear terms of the contract.

In addition, there is no dispute as to the purpose for which the proof of funds provision was included in the contracts. Such provisions are meant to provide the seller with a level of comfort that the buyer will be able to conclude the transaction. As Ron Amundson testified at paragraph 8 of his declaration, he understood that the Lemckes "wanted to

sell to a financially strong buyer who had cash available to close…" (CP 251-253) Consistent with that purpose, shortly after the Amundsons and the Moorage Tenants submitted their proof of funds documentation, the Lemckes informed each of them that they had satisfied the proof of funds sufficient for closing requirement.

Not only does the so-called "cash now" requirement not appear in either PSA, it conflicts with terms that **do** appear in those documents. For example, the Amundsons assert that the Moorage Tenants were not permitted to rely on a loan to buy the Property, which would be an unusual term, to say the least, in a real estate purchase contract, but both PSAs state at Paragraph 6a that the buyer's "Lender" can apply for a title report. Moreover, while neither agreement includes a requirement for "cash now" on the proof of funds date, both agreements do specify precisely when the buyers are required to have cash available. Paragraph 1 of both PSAs require that the buyer have "**cash at closing**." In short, the Amundsons' claimed "cash now" requirement conflicts with other clear terms of the contract.

### B. The Lower Courts Were Correct When They Applied A Good Faith Standard To The Lemckes' Acceptance Of Both Potential Buyers Proof Of Funds Submissions

The Amundsons argue that the Court should accept this case for review, because the lower courts applied a "good faith and fair dealing" standard to the Lemckes' decision to accept the Moorage Tenants' proof of funds submission. Specifically, the Court of Appeals held that:

> In this case there is no evidence that the sellers acted in bad faith or unreasonably when they considered the purchaser proof of funds and determined that the tenant's financial resources were adequate.

The Amundsons contend that the Court of Appeals erroneously "imported" a good faith and reasonableness standard from *Matson v. Emory, supra*. In *Matson*, a third party offered three parcels of property, plus a cash "boot" in exchange for the seller's property, and the right of first refusal holder made a cash offer that he claimed was equivalent in value to the third party's real estate and the cash. The *Matson* Court considered the good faith and reasonableness of the seller's conduct in determining whether the offers were matching.

According to the Amundsons, *Matson* stands for the proposition that the good faith and reasonableness standard is only applicable to right of first refusal cases involving an "exchange of properties," but the *Matson* case says no such thing. To the contrary, the *Matson* court specifically noted that a reasonable conduct standard is applied in all contract cases, including those in which one party must perform to the satisfaction of another. The *Matson* court stated:

> Implying a standard of reasonable conduct is in accord with general contract law, which imposes a duty of reasonableness and good faith when one party must perform to the satisfaction of the other party. E.g., *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P. 2nd 385 (1983); *Miller v. Othello Packers, Inc*. 67 Wn.2d 842, 844, 410 P. 2d 33 (1966) (implied covenant of good faith and fair dealing).

The Court of Appeals in this case did not import a so-called "property exchange" standard from *Matson* in determining whether the moorage tenants' proof of funds submission was adequate. Rather, the Court of Appeals simply invoked the well-settled law in this State that every contract is subject to an implied term of good faith and fair dealing, including contracts under which one party must perform a contract term to the satisfaction of the other party. In the instant case, the Court of Appeals held that there was no evidence of bad faith on the part of the Lemckes in accepting the Moorage Tenants' proof of funds sufficient for closing submission.

In support of their claim that the lower courts should not have applied the good faith standard in this case, the Amundsons also cite *Badgett v. Security State Bank*, 116 Wn.2d 563 (1991), but the facts in that case differ significantly from this case.

In *Badgett* a borrower argued that a bank violated its duty of good faith when it refused to renegotiate the payment terms of a loan agreement. The Court rejected that argument and held that, although every contract includes an implied duty of good faith and fair dealing, that duty does not require rewriting the original contract, but rather requires good faith and fair dealing in the performance of existing contract terms. *Id*. at 570. In this case, by comparison, it is the Amundsons who are arguing that the original contract language must be modified.

There was no error on the part of the Court of Appeals in holding that the standard of good faith and reasonableness applied to the Sellers'

acceptance of the Moorage Tenants' proof of funds submission in this case, and the fact that the Court of Appeals did so does not give rise to an issue of substantial public interest that should be determined by the Supreme Court.

### C. There Are No Material Differences Between The Assignment Clauses In The Two Contracts

Although the assignment restriction provisions in the addenda to the two PSAs are not identical, they vary only slightly, and they are identical in purpose. Both are intended to protect the interests of the seller by restricting an assignment prior to closing to an assignee who may not have the ability to close the sale. As the Amundsons acknowledged in their Petition, the purpose of the assignment restrictions was to protect the Lemckes. Petition at 4.

Because the Amundsons are a husband and wife and the Moorage Tenants include unrelated individuals, the language of the two agreements differ slightly. In the Amundson PSA, the provision states that Amundson may assign the contract, but "only…to an LLC controlled by himself and/or his immediate family members," while the Moorage Tenants' PSA says that they may assign the contract to "a non-profit corporation to be operated as a cooperative in which the Moorage Tenants collectively own not less than a 50% interest."

The provisions permit both the Amundsons and the Moorage Tenants to bring in outside parties but prohibit them from "flipping" the property and walking away before closing. The purpose and the effect of

each of the provisions is the same. And, under the authority of both *Northwest Television* and *Matson,* "exact identity of offers is not required." *Matson* at 685. What is required is that the terms of the right of first refusal holder's offer be such that it does not "materially vary" from the purchase offer by the third party. *Northwest Television* at 980, 981.

In addition, the Amundsons' argument that the assignment clause in their PSA is more restrictive than the that of the Moorage Tenants is incorrect. If anything, the assignment restriction language in the Moorage Tenants' PSA is more restrictive, not less. The Amundsons' PSA permits Ron Amundson to assign his position under the contract to an LLC controlled by either himself "or his immediate family members." In other words, Appellant Amundson could assign 100 percent of his position under the contract **to an entity in which he had no ownership interest whatsoever** so long as the entity was controlled by one or more of his immediate family members.

Furthermore, the assignment restriction language in the Amundson Agreement did not prohibit the Amundsons from assigning the contract to an entity in which nonfamily members held ownership interests, so long as nonfamily members did not own a controlling interest.

The Amundsons argue that the presence of the word "only" in the Amundson addendum and the absence of the word "only" in the Moorage Tenants' addendum constitutes a material variation thus rendering the entirety of the Moorage Tenants PSA non-matching. The Amundsons

contend that the absence of the word "only" in the addendum to the Moorage Tenants' PSA results in a "broadening" of the scope of potential assignees to whom the Moorage Tenants can assign their purchase rights under their PSA. (Petition Pages 7-8). But this argument ignores the fact that section 20 on page 8 of each PSA (entitled "ASSIGNMENT") states that

> …this agreement may be assigned with notice to the Seller but without Seller's consent **only** to an entity which is controlled by or under common control with the Buyer identified in this agreement (emphasis added).

The assignment language in each addendum to the PSAs must therefore be read in conjunction with the language of section 20 of each PSA, and when so read the restriction represented by the word "only" in Section 20 is operative and applies to the assignment language found in the addendum to each of the PSAs. The fact that the word "only" is not reiterated in the addendum to the Moorage Tenants' PSA is irrelevant because "only" is supplied by the language of section 20 of the PSA.

The Court of Appeals held that the assignment clauses in the two contracts are not materially different. It cited *Northwest Television Club Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973 (1981), a right of first refusal case in which both the third-party buyer and the holder of the right of first refusal made otherwise identical offers, but each offer was contingent on the sale of a different piece of property. Under those circumstances, the *Northwest Television* Court held that where there are no material differences between the two competing contracts, the courts will not

require an "exact match" if doing so would render the right of first refusal "illusory." *Id.* at 983.

The Court of Appeals holding that the minor differences in assignment language between the two agreements are not material is not contrary to or inconsistent with any prior appellate court cases and does not involve an issue of substantial public interest that should be determined by the Supreme Court.

## IV. LEMCKES' REQUEST FOR ATTORNEYS' FEES INCURRED IN RESPONDING TO THE AMUNDSONS' APPEAL

The Amundson Purchase and Sale Agreement provides at Section 21 that "if Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." (CP 15) Both the Superior Court and the Court of Appeals found that the Lemckes were the prevailing party and awarded them attorneys' fees and expenses pursuant to the contract. The Lemckes request that this Court enter an order compensating the Lemckes for fees and expenses incurred in preparing this Answer.

## V. CONCLUSION

The Moorage Tenants' offer matched the Amundsons' offer in all material respects, and the lower courts were correct in rejecting the Amundsons' claims to the contrary. There is no legitimate basis under RAP 13.4 for the Supreme Court to accept discretionary review in this case.

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DATED this 19th day of December, 2019.

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## CERTIFICATE OF SERVICE

I do hereby certify that on this 19th day of December, 2019, I caused to be served a true and correct copy of the foregoing *Answer to Petition for Review* by the method indicated below and addressed to the following:

| | |
|---|---|
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DATED this 19th day of December, 2019.

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## Transmittal Information

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