

No. 66571-5-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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WEDGEWOOD AT RENTON, INC., a Washington corporation,

Respondent/Plaintiff

v.

WESTCOTT HOLDINGS, INC., a Washington corporation, and  
VERCELLO, LLC, a Washington limited liability company,

Appellants/Defendants/Cross-Claim Plaintiffs

v.

KOLIN TAYLOR and JANE DOE TAYLOR, husband and wife and their  
marital community; and KBS DEVELOPMENT CORPORATION,  
a Washington corporation,

Respondents/Cross-Claim Defendants

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**BRIEF OF RESPONDENT KBS DEVELOPMENT CORPORATION**

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## I. Introduction

The parties in this lawsuit are all business people engaged in buying and selling large tracts of real estate, developing and building homes on lots, and/or marketing them to the public for a profit. In 2007 they entered into a multi-million dollar real estate purchase and sale agreement that anticipated a continuation of the robust real estate industry that had existed during the preceding years. When the real estate market crashed in 2008, so did the parties' business deal.

The parties' real estate purchase and sale agreement was an executory contract that specified that time was of the essence. The parties knew that the contract would expire on January 17, 2008 if the second closing did not take place. The parties discussed, but did not execute an addendum to extend the executory contract before it expired. Thus, after January 17, 2008 the parties' real estate purchase and sale agreement terminated. *After* the agreement terminated, the parties signed what they described as an addendum to the defunct contract, the so-called Addendum G which Appellant Vercello contends is unclear and disputed as to its meaning, therefore necessitating (in Vercello's opinion) a jury trial to unscramble the parties' intentions. Vercello also asserts that

approximately nine months after the main real estate contract expired, Respondents Wedgewood, Taylor and KBS intrigued, conspired and/or connived with a fourth entity not a party to this lawsuit in order to thwart the disputed intentions of the parties to Addendum G; all of which supposed intrigue, conspiracy and conniving (according to Vercello) also requires a jury trial.

Respondent KBS Development Corporation moved for summary judgment. None of the facts material to the KBS motion for summary judgment were disputed.

The core issue presented by KBS Development Corporation to the trial court was, as a matter of law, *after* the original agreement had terminated, whether the parties could put it back together again through an addendum to a defunct contract.

The trial court ruled that under the uncontested facts and circumstances of this case involving an expired executory contract, the defunct executory contract that had expired by its own terms could not be resurrected by an addendum executed after the contract had expired. It was the correct decision as a matter of law and the Court of Appeals should affirm it.

## II. Statement of Issue

The sole issue presented is whether, as a matter of law, the trial court was correct when it concluded that an executory contract that has expired by its own terms was not subject to extension or revival by an addendum executed after the executory contract had already expired.

## III. Statement of the Case

### A. Factual History of the Case

These are the parties in the case:

Appellant **Wedgewood at Renton Inc.** (hereinafter "Wedgewood") is a residential lot developer. CP 423.

Respondent **Westcott Holdings, Inc.** ("Westcott") is a residential builder. It owns a subsidiary company called **Vercello LLC** ("Vercello"). CP 240-241 (Declaration of Edwards, para. 2). Westcott ultimately assigned all of its rights to Vercello, a company specifically created to build homes on the properties at issue in this case. CP 241. (Declaration of Edwards, para. 3). Although Westcott and Vercello, as parent and

subsidiary companies, did different things at different stages of this case (which can, sometimes, make the record confusing) KBS will conform to the practice of the other parties to this appeal and refer to both Westcott and Vercello by the collective nomenclature of "Vercello."

Respondent **KBS Development Corporation** ("KBS") is a real estate development company. It owned some of the lots sold to Vercello. CP 128-129 (Taylor Declaration).

Respondent **Kolin Taylor** is a licensed Washington real estate broker for a non-party real estate company. Separately, he is also the president of KBS. (CP 49, 63). Vercello named "Jane Doe" Taylor, Kolin Taylor's wife, as a defendant. CP 377 (Defendants' Answer, Counterclaims and Cross Claims).

In January 2007, the parties agreed that Wedgewood and KBS would provide a certain number of finished lots in south King County on which the developer Vercello would construct over a hundred houses for the residential market. CP 8-15 (Purchase and Sale Agreement, January 30, 2007).

The 2007 real estate purchase and sale agreement described five "divisions:" Wedgewood would sell to Vercello the lots for Divisions 1, 2,

3 and 5. CP 8-15. According to the agreement, KBS would sell the lots comprising Division 4 to Vercello. CP 8-15. The original 2007 agreement was to be closed in three stages, each stage described in real estate parlance as a separate "take-down" of a specified number of lots. CP 9. According to the agreement, the lots were to be sold to Vercello over time in stages as take-down 1, 2 or 3, each take-down comprising about a third of the approximately one hundred thirteen lots involved in the overall transaction. CP 9.

The closing of each take-down was agreed by the parties to occur by a date certain. CP 9 .

The real estate purchase and sale agreement was an executory contract and it specifically provided that "time was of the essence" in the parties' performance of their contractual obligations. CP 12 (Purchase and Sale Agreement, paragraph 12).

Paragraph 20 of the real estate purchase and sale agreement stated that there were no agency disclosures applicable and paragraph 21 stated that "Purchaser [Vercello] has not been represented by a Real Estate Broker in this transaction."<sup>1</sup> CP 12-13.

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<sup>1</sup> Vercello has stated that Taylor "served as Vercello's real estate agent in the transactions." Brief of Appellant, p. 9. Perhaps Vercello's use of the plural form of

While the original agreement was still in effect, the parties executed various addenda to the 2007 real estate purchase and sale agreement. CP 65-98. Each time they made a change to the existing contract they memorialized their changes by a sequentially lettered written addenda. Thus, the 2007 real estate purchase and sale agreement, while it was still in effect, was modified by written addenda executed at various times through Addendum F. CP 65-98.<sup>2</sup>

The various addenda through Addendum F are not issues in this case. They were all executed before the underlying contract expired and no one denies their efficacy.

The first take-down occurred as agreed and as expected. CP 240-241 (Declaration of Kerek Edwards).

The second take-down, however, did not happen in 2008 as expected because the world economy, like Humpty Dumpty of the children's nursery rhyme, had taken a great fall. CP 241-241 (Declaration

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the word "transactions" saves this statement from being completely inaccurate. Mr. Taylor was the coordinator for the Wedgewood and Vercello home marketing programs, CP 49 (Declaration of Taylor, para. 2). Therefore, Mr. Taylor represented the parties in the subsequent sale of homes after construction. It is misleading and incorrect, however, to imply that Mr. Taylor represented Vercello in the particular real estate purchase and sale transaction currently at issue before the Court of Appeals.

2 Some of the early addenda appear to be mis-labeled and there are gaps in the sequence. For the purposes of this case, however, there are no disputes about the addenda up to and including Addendum F.

of Kerek Edwards, paragraph 6).

Thus by January 2008, when the second take-down was scheduled to close under the parties 2007 real estate purchase and sale agreement, Vercello realized that the economy's downward trajectory made the original transaction financially unrealistic. CP 241-242. Vercello advised Wedgewood and KBS (the sellers of the unimproved lots) that Vercello would rather forfeit the agreed upon earnest money deposit of \$565,000.00 rather than proceed with the second or third take-downs at the agreed upon prices. CP 242.

The parties then entered into negotiations in January 2008 to try to work out an addendum to the 2007 real estate purchase and sale agreement by which the original deal terms could be amended. CP 242 (Declaration of Kerek Edwards, paragraph 7). The underlying contract expired by its own terms on January 17, 2008. CP 581 (Defendants' Opposition to Cross Claim Defendants' Motions for Summary Judgment, ll. 24-25); Brief of Appellant, p. 4. At the time the contract expired the parties had reached no agreement about extending it. CP 575-576 (Deposition of Kerek Edwards, p.38, ll. 9-15).

The parties *failed* to finally negotiate or sign an extension of the

real estate purchase and sale agreement - the so-called Addendum G - until January 30, 2008. CP 598. No one disputes that by this date the original 2007 real estate purchase and sale agreement had already expired on its own terms because the second take-down had not closed when required and because the parties had specified in that contract that the time of performance was essential to the contract.

Addendum G did not require Vercello to contribute any new earnest money or any other new consideration. CP 129-130 (Declaration of Taylor, para. 5).

Addendum G described itself in its first sentence as an addendum to the original contract, not as a new contract. CP 598. Addendum G described the time and manner by which take-downs 2 and 3 would occur and gave both Wedgewood and KBS the right to sell lots to another builder. CP 598. Addendum G also contained language that described a "right of first refusal." CP 598. Addendum G stated that if there was an inconsistency between the terms of Addendum G and the original agreement, then the terms of Addendum G would control. CP 598. However, Addendum G described no other time limit by which the "right of first refusal" would expire; there was, therefore, no inconsistency

between the time limits established by the original agreement (which had already expired) and the addendum.

**B. Procedural History of the Case**

Initially, Wedgewood filed suit for declaratory judgment in response to Vercello's threat to place a *lis pendens* lien on Wedgewood's remaining unsold lots. CP 4.

Wedgewood asked for a declaratory judgment that Vercello had no viable "first right of refusal" under Addendum G. CP 4-7. Vercello filed a counterclaim against Wedgewood for damages. CP 24. Thereafter, Vercello filed its threatened *lis pendens*. CP 32. In response to Wedgewood's motion, CP 36, the trial court canceled Vercello's *lis pendens* on April 16, 2009. CP 126. Wedgewood moved for summary judgment in May 2009 for a declaration that the "right of first refusal" was illusory, CP 203, and in October 2009 Wedgewood renewed its motion to dismiss Vercello's counterclaim for damages asserting that the "right of first refusal," if not illusory, expired in January 2009. CP 318. The trial court denied this motion for summary judgment because there were issues of material fact as to Addendum G and its meaning. CP 477, 481.

Apparently while Wedgewood's summary judgment motion was

pending, Wedgewood and Vercello - the only parties in the case at that time - stipulated that defendant Vercello could amend its pleading to bring in *Kolin Taylor and KBS Development Corporation* as so-called Cross Claim Defendants.<sup>3</sup> CP 352.

After accepting service of Vercello's "cross claims" on November 30, 2009, KBS filed an answer on January 29, 2009 and Kolin Taylor answered on February 16, 2009. CP 482, 492, 867 (Declaration of Reisler).

Thus, before KBS and Kolin Taylor had even answered the "cross-claims" of Vercello, the King County Superior Court had denied Wedgewood's motion for summary judgment to dismiss Vercello's counterclaim for damages. At the time that Wedgewood's motion for summary judgment was filed, neither KBS nor Kolin Taylor were parties to the law suit.

On February 19, 2010 a jury trial demand was filed. CP 880 (Declaration of Downer, para. 5).

After conducting preliminary discovery, KBS and Taylor filed

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<sup>3</sup> Why the two additional parties were designated "Cross Claim Defendants" remains a mystery. Although not necessarily germane to the issues in this appeal, both Respondents Taylor and KBS pleaded affirmative defenses that they were not proper parties to this case, nor could they be "cross claim defendants" when they were not even parties to the original lawsuit.

motions for summary judgment in mid-September 2010. CP 503, 556.

These motions were based on legal challenges to the viability of the underlying contract: because the real estate purchase and sale agreement was an executory contract that had lapsed by its own terms, Addendum G executed after the contract's expiration could not extend it; and if Vercello asserted that Addendum G was a stand-alone new contract, then it did not satisfy the Statute of Frauds. CP 503, 556.

After extensive briefing by all parties and two hearings with oral argument, the trial court granted KBS's and Kolin Taylor's summary judgment motions dismissing Vercello's claims entirely and with prejudice. CP 700.

On January 14, 2011, the trial court heard and granted Wedgewood's partial summary judgment motion based on essentially the same grounds as the KBS and Kolin Taylor motions. CP 825.

Vercello then filed this appeal seeking to reinstate its counter-claim for damages against Wedgewood and its claims for damages against the so-called "cross-claim defendants" KBS and Kolin Taylor.

### **C. Summary of Uncontested Facts**

Based on the record of this case, the following material facts are

not disputed:

1. The 2007 real estate purchase and sale agreement was an executory contract that stated specifically that time was of the essence.<sup>4</sup> CP

12.

2. The 2007 real estate purchase and sale agreement expired by its own terms on January 17, 2008. CP 581 (Defendants' Opposition to Cross Claim Defendants' Motions for Summary Judgment, ll. 24-25; Brief of Appellant, p. 4).

3. The parties did not execute Addendum G purporting to extend the original contract until January 30, 2008, after the original executory contract had already expired. CP 598.

4. Vercello has asserted against Respondents various claims for breach of good faith and fair dealing arising out of Addendum G and the underlying agreement that it purportedly extended. CP 376-385. Vercello has furthermore alleged, essentially, that Wedgewood and Taylor intrigued, conspired and connived with a fourth entity (not a party to this lawsuit) in October 2008 to harm Vercello's business interests by not granting

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<sup>4</sup> "Time is of the essence" is legal shorthand for the fact that the time deadlines for performance expressed in the agreement are material and the parties mean it. 6 S. Williston, *Contracts* § 852 at 208-09 (3d ed. 1962), states: "[I]f time is made essential by the agreement, neither the vendor nor the purchaser can enforce the contract specifically after the agreed day if it is then still wholly executory on both sides; ..."

Vercello a right of first refusal for the purchase of lots that Vercello declined to buy.<sup>5</sup> CP 376-385. These claims are based on events that occurred eight or nine months after the underlying real estate purchase and sale agreement had expired. CP 381. These claims are also based, obviously, on the implicit right of Wedgewood and KBS to actually meet, discuss and make alternative deals with other parties, otherwise there could be no other deals that Vecello ostensibly would have the right to refuse.

5. Wedgewood's motion for summary judgment that was denied by the trial court in 2009 was a substantially different motion than the summary judgment motion brought by KBS and Kolin Taylor and granted by the trial court in October 2010. RP (November 12, 2009) at 15; RP (May 29, 2009) at 18; RP (October 22, 2010) at 46; RP (October 29, 2010) at 4.

#### **IV. Summary of Argument**

Parties may rescind, alter, modify or extend an executory agreement so long as it has not yet expired by its own terms. However, once an executory contract has expired by its own terms, then there is

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<sup>5</sup> KBS did not participate in the October 2008 discussions.

nothing on which an addendum to that contract can operate; nor can such an addendum extend the life of an already defunct contract.

## **V. Argument**

### **A. Standard of Review**

This Court reviews a summary judgment *de novo*. It performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29.34, 1 P.3d 1124 (2000). The facts and all reasonable inferences are viewed in a light most favorable to the nonmoving party. *Id.* Should there be no genuine issue of material fact, then summary judgment will be granted if the moving party is so entitled as a matter of law. *Id.*

A material fact is a fact "that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). A party cannot rely on speculation, argument or conclusory statements in affidavits to be accepted at face value. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

### **B. Estoppel and Waiver Are Not At Issue In This Case.**

All parties agree that "waiver" and "estoppel" are not issues on Appeal. Respondent KBS accepts Vercello's assertion that it "doesn't rely on waiver or estoppel to extend the [real estate purchase and sale

agreement]" and that "[t]his case has nothing to do with waiver or estoppel." Brief of Appellants, pps. 2, 18.

KBS agrees. Because Appellant does not seek relief based on these equitable concepts, neither will Respondent KBS brief those issues, thereby simplifying the issue on appeal.<sup>6</sup>

Because all parties to this lawsuit now agree that neither waiver nor estoppel apply to this case, the parties' *conduct*, both before and after Addendum G, is not relevant. According to Appellant Vercello, the only relevance that the parties' *conduct* has to this case is as an indicator of their *intentions* with respect to Addendum G. KBS does not agree that the parties' intentions regarding Addendum G are material at all, but KBS will, in this brief, argue the issue of the parties' intentions as Vercello has framed it.

**C. Once an Executory Contract Expires, It Cannot Be Extended by an Addendum to the Expired Contract.**

In *Mid-Town Ltd. Partnership v. Preston*, 69 Wa. App. 227, 848

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<sup>6</sup> We note, however, that Vercello has not made a great concession in acknowledging the inapplicability of the equitable issues of waiver and estoppel. As KBS made clear in its summary judgment briefs before the trial court, Vercello simply has no legal argument based on "waiver" or "estoppel" in any event. CP 567-572, 695-699. The concession is, thus, more of a dramatic flourish than anything substantive.

P.2d 1268 (Div. 1 1993), this Court wrote that:

A provision in an agreement making time of the essence is generally treated as evidence of a mutual intent that specified times of performance be strictly enforced. In *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968), the court held that when an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered. In accord is *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142, 632 P.2d 911, *review denied*, 96 Wn.2d 1017 (1981). See also 6 S. Williston, Contracts § 852, at 208-09 (3d ed. 1962), stating as follows:

[I]f time is made essential by the agreement, neither the vendor nor the purchaser can enforce the contract specifically after the agreed day if it is then still wholly executory on both sides; ... [.] (Footnotes omitted)..

*Mid-Town Partnership v. Preston*, 69 Wn. App. at 233.<sup>7</sup>

This Court further held in *Mid-Town Partnership*, citing to established legal precedence, that "once a termination date expires, in the absence of an existing waiver or estoppel the agreement is *dead*." *Id.* at 235 (Italics added).

Apparently, Vercello does not contest the *legal holding* of *Mid-*

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<sup>7</sup> See also *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142, 632 P.2d 911, *review denied*, 96 Wn.2d 1017 (1981). In this case, Division 3 of the Washington Court of Appeals also found that there had been no waiver or estoppel to extend the expiration of the underlying real estate purchase and sale agreement because, as the Court stated, "the agreement expired by its own terms."

*Town Partnership*, ie, that when an executory contract expires by its terms, then it is defunct and cannot be resurrected. Instead, Vercello argues that because the *specific* addendum at issue in *Mid-Town Partnership v. Preston* was not ruled ineffective that, therefore, *any* addendum executed after an executory contract expires resurrects the expired contract.

However, this Court absolutely did *not* hold in *Mid-Town Partnership* that any addendum executed after an executory contract expires serves to revive the defunct contract. There were apparently two addenda discussed in *Mid-Town Partnership* - the first addendum appears nowhere in the record of that case report to have even been contested by the parties to *Mid-Town Partnership*. One can *speculate* what the result in *Mid-Town Partnership v. Preston* might have been had the first addendum been contested, but that speculation would have had to turn on the law of the holding in that case.

The *statement of law* in *Mid-Town Partnership* is on point. Where a contract states that time is of the essence, then the parties will be held to their express intentions. When an executory contract remains unfulfilled when the deadline passes, then the contract is dead. Absent waiver or estoppel, it cannot be resuscitated by an addendum to a dead contract.

The basic premise of contract law cited by this Court in *Mid-Town Partnership* traces back to the Washington Supreme Courts holding in *Pavey v. Collins*, 31 Wn. 2d 864, 199 P.2d 571 (1948). The contract at issue in *Pavey* was a brokerage fee agreement that had expired. Among the multiple reasons why the commission was not owed, the Supreme Court held:

[A] contract which by its terms has expired is legally defunct and, since the vitality which it once had has ceased, there is nothing upon which an extension may legally operate. So long as a contract remains executory, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but when the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an *existing* agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms.

31 Wn. 2d 870 (emphasis the Court's)<sup>8</sup>

The word "extension," as used by the Washington Supreme Court in *Pavey*, means the same as an addendum that would purportedly extend the time for performance of an expired contract.<sup>9</sup>

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<sup>8</sup> This same language appears in 17A C. J. S. Contracts §407, p. 480 (1999),

<sup>9</sup> Vercello in Appellant's Brief referred to a handful of non-Washington State cases to support its position. KBS does not believe it is necessary or economical to debate foreign case law in the context of an appeal before the Washington State Court of

#### **D. Addendum G was an Addendum, Not a New Contract.**

One of Vercello's core arguments is that Addendum G constituted a "new agreement," *ergo*, a "new contract" in the language of *Pavey*. Brief of Appellant, pp. 17-18. Vercello expands this argument contending that Addendum G, by "incorporating the PSA by reference [...] successfully revived and modified the [real estate purchase and sale agreement]." Brief of Appellant, p. 19.<sup>10</sup>

The argument is pure sophistry.

First, we note that Addendum G does not incorporate the real estate

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Appeals dealing with Washington parties and Washington law. KBS would submit, however, that in reviewing the smattering of foreign cases cited by Vercello, it is difficult to ascertain whether in all these cases the foreign courts are talking about executory contracts where there had not been at least part performance and where the time of performance was expressly stated to be the essence of the contract. The foreign cases cited in the Brief of Appellant included *Krol v. Doctor's Associates, Inc.*, 3 F.3d 1167 (7th Cir. 1993) (Wisconsin franchise agreement renewed - the mechanism how it was done unclear), *Curreir v. Heritage Prop. Invest. Trust, Inc.*, 48 A.E.3d 505, 852 N.Y.S.2d 278 (N.Y. 2008) (Common law indemnity for personal injuries; unclear whether original contract was partly performed or whether it contained "time is of the essence") and *Kahler v. Weiss*, 539 N.W.2d 86 (S.D. 1995) (South Dakota law provides method for extending contract without consideration; unclear whether original contract contained "time is of the essence").

<sup>10</sup> Vercello cites as authority for this premise *Brust v. McDonald's Corp.*, 34 Wn. App. 199, 207, 660 P.2d 320 (1983), a pre-*Berg v. Hudesman* case involving the admissibility of parol evidence. In *Brust*, there is no mention of any expired contract extended by a post-expiration addendum. An analogous case is *Carpenters Trusts of Western Washington v. Algene Const. Co., Inc.*, 11 Wn.App. 838, 525 P.2d 834 (Div. 1 1974) in which this Court affirmed the extension of a labor contract involving a collective bargaining agreement where, so it appears from the reported case, the extension occurred before the main contract expired and where it was not clear whether the contract was still executory or whether time was of the essence.

purchase and sale agreement by reference. Rather, it is the other way around. Addendum G states in its very first paragraph that it is an *addendum* to the original contract. CP 598 . "This Agreement" referred to in the last words of the first paragraph of Addendum G does not mean Addendum G *by itself*, but *collectively* "[t]he Real Estate Purchase and Sale Agreement *and all addenda thereto.*" (CP 598, emphasis added)

Thus, Addendum G did not incorporate the original agreement by reference; it purported to become *a part of the original contract*. That is what a *timely, enforceable and effective* addendum does: it attaches to a preexisting, *not-yet-expired* contract and changes it.

The "new contract" mentioned by the Washington Supreme Court in *Pavey* and by this Court in *Mid-Town* means precisely that: a *new* contract that embodies the terms of the defunct contract. Obviously, if one takes Addendum G and examines it in isolation, it fails to meet the criteria of a written real estate contract. That is why the trial court found that the Statute of Frauds was not satisfied by Addendum G - it could not be a stand-alone contract, and it did not incorporate the defunct contract by reference. CP 700. Rather it attempted to attach itself to the defunct contract.

What Vercello is arguing is like saying that if they throw a saddle onto a dead horse, the horse comes back to life and they can ride it into the sunset.

Vercello's argument also makes no sense because, by logical extension, *every* addendum to *any* expired contract would serve to resuscitate the expired contract. Every addendum must refer to the underlying contract that it purports to modify, or else one would not know to what contract it pertains. Wherefore, according to Vercello's logic, *every* addendum must *ipso facto* incorporate the defunct contract "by reference." Thus, according to Vercello's argument, old executory contracts never die - they just hang around forever waiting for an addendum to revive them some day.

**E. The Interpretation of a Contract by Ascertaining the Parties' Intent Comes Only *After* the Court Determines, as a Matter Of Law, Whether There Is a Contract.**

Vercello contends that the resolution of this case rests on ascertaining the intention of the parties. Vercello argues that if the parties intended to make a contract extending the expired real estate purchase and sale agreement, then a contract was, as a matter of law, created by their

intentions. Brief of Appellants, pp.13-16.

However, the ascertainment of the parties' intent can come only *after* the Court determines whether there is a contract. That first step - is there a viable, enforceable contract in all its elements - that *first step* is a question of law. "[W]hether or not the instrument sued on embraces all the necessary elements of a contract, such as parties, subject-matter, mutual assent, and consideration, is just as undoubtedly a legal question to be determined by the court." *Durand v. Heney*, 33 Wash. 38, 41, 73 P. 775 (Wash. 1903).

Thus, the entire line of post- *Berg v. Hudesman*<sup>11</sup> cases relied upon by Vercello is good law, generally speaking, but these *Berg* cases add nothing to the *threshold question*: whether, regardless of the parties' intent, could they, as a matter of law and in the absence of conduct giving rise to waiver or estoppel,<sup>12</sup> "intend" the resuscitation of a defunct contract by an addendum to the defunct contract?

Pictures are truly worth a thousand words, so we return to the earlier analogy of the dead horse. If the parties throw a saddle onto our

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<sup>11</sup> *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

<sup>12</sup> Vercello has submitted that it will not rely on waiver or estoppel in this appeal. Brief of Appellants, pps. 2, 18.

poor deceased equid believing that they can ride it, will their belief suffice to make the horse shake its *rigor mortis* and rise up on its legs?

People can agree to many things and they can believe many things, both legal and illegal; they can even fully perform agreements that are not otherwise legally enforceable. But just because they *intend* to agree (or, for that matter, even if they perform pursuant to their "agreement") does not mean that they have created a legally enforceable contract. Thus, regardless of "intent," an agreement without consideration fails. *See Durand v. Heney*, 33 Wash. 38, 41, 73 P. 775 (Wash. 1903), *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (Wash. 1994). An agreement too indefinite to comprehend will not be enforced. *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957). A contract that is unconscionable will not be enforced. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131-132, 896 P.2d 1258 (1995). A real estate purchase and sale agreement that does not satisfy the Statute of Frauds will not be enforced. *Berg v. Ting*, 125 Wn.2d 544, 551, 896 P.2d 564 (1995). An agreement to agree is unenforceable. *Keystone Land and Development Company v. Xerox Corporation*, 152 Wn.2d 171, 175-176, 94 P.3d 945 (Wash. 2004)

The expiration of the underlying executory real estate purchase and

sale agreement at issue in this case was automatic when the parties did not perform on time because time was of of the essence. *See, e.g., Mid-Town, supra, Nadeau, supra, Pavey, supra.*

It is possible, nonetheless, to ascertain the intent of the parties as to certain things. They intended to make the underlying real estate purchase and sale agreement time-critical when they specified that "time was of the essence." CP 598. They intended to write an addendum to an expired executory contract because, in the very first paragraph of Addendum G and in its title, they said this was intended to be an addendum to a contract, not a brand new contract. CP 598.

There is no need for an evidentiary hearing whether the parties intended to create *a new contract* when their intentions were objectively and unambiguously to create an *addendum* to a contract. Their objective intentions were manifest in the language and title of the document itself. *See McGuire v. Bates*, 169 Wn.2d 185, ¶ 6, 234 P.3d 205 (2010) ("The subjective intent of the parties is generally irrelevant if we can impute an intention corresponding to the reasonable meaning of the actual words used.") Addendum G - *as ineffective and unenforceable as it was* - was, by its own terms, *intended* to be an "addendum" to the underlying 2007

Agreement. The parties simply failed to accomplish their intentions as a matter of law because a void, terminated contract cannot be resurrected by an addendum, notwithstanding what the parties intended.

Just like the laws of nature cannot be violated, neither can the law of contracts. Addendum G, in the absence of waiver or estoppel (as agreed by Appellants) simply was ineffective regardless what the parties intended.

One of the reasons why the Washington Supreme Court refused to resurrect the contract in *Pavey v. Collins* was because "an extension, to be binding, must be for *a time that is definite and certain or capable of being made so by some future event, which is sure to occur.*" 31 Wn. 2d at 870 (emphasis added). In short, Addendum G, even if a "new business deal," still could not create a "right of first refusal" of indefinite duration as suggested by Vercello. The trial court, on Wedgewood's original motion for summary judgment, could not determine the parties' intent as to the duration of the "right of first refusal contained in Addendum G, thus establishing that the addendum was neither definite nor certain nor capable of being made so by some further event which is sure to occur. CP 481, RP (November 12, 2009, pp. 15-16). Thus, according to *Pavey*, it still could not be a valid addendum.

Vercello's argument that intentionality determines whether Addendum G created a "new contract" also runs afoul of the rule that there must be new consideration and an expression of intent that is neither doubtful nor ambiguous. The Supreme Court wrote in *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980): "[I]ntent cannot be based on doubtful or ambiguous factors. See, *White Pass Co. v. St. John*, [citation omitted]. There must also be consideration separate from that of the original contract. *Rosellini v. Banchemo*, 83 Wash.2d 268, 273, 517 P.2d 955 (1974)." In this case, Vercello provided no new consideration for Addendum G separate from the original contract and, whatever the intentions of the parties, they were apparently too ambiguous to be determined without a jury trial. (CP 129-130, 481). Vercello's argument about the intent of the parties regarding Addendum G is based on an intent that, according to the trial court's ruling in 2009, is ambiguous. CP 481. Therefore, the very ambiguity as to the parties' intent means that intent cannot be the determining factor whether the parties meant to create a "new" contract.

## **F. The Doctrine of Judicial Estoppel Does Not Apply to This Case.**

### **1) Judicial Estoppel Does Not Apply to Points of Law.**

Although there were several motions for summary judgment in this case presented to the trial court, the factual background for the motions was always the same. The only difference between the several summary judgment motions was the legal issue before the court.

In the recent case of *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn.App. 35, ¶ 67, 244 P.3d 32 (Div. 1, 2010) this Court cited to the earlier case of *King v. Clodfeler*, 10 Wn.App. 514, 521, 518 P.2d 206 (Div. 1 1974): "[T]he heart of the doctrine [of judicial estoppel] is the prevention of inconsistent positions as to facts. It does not require counsel to be consistent on points of law."

This makes sense because the law is what it is. The law does not change because everyone might not correctly understand it; rather, our understanding evolves to conform to the correct principle of law. The attorneys or the trial court in a particular case might go through a learning process to fully appreciate what law applies to the facts of a given case. However, just because the attorneys or the trial court may not apply the dispositive legal analysis in the first place cannot prevent the correct

application of law in the end... or else the doctrine of judicial estoppel itself would lead to inconsistencies from case to case.

What is true with courts of law is also true in life. If people once believed that the Sun revolved around the Earth, that the Earth was flat and that heavier objects fall faster than lighter ones, their beliefs must eventually yield to the true laws of physics. People are not estopped from accepting the laws of physics because they once did not comprehend them.

**2) None of the Rulings on Summary Judgment in this Case are Inconsistent.**

Vercello has stated part of the correct test for the application of the doctrine of judicial estoppel (Brief of Appellant p. 22). However the criteria are not met in this case.

First, throughout Appellant's Brief, Vercello sometimes refers to Mr. Kolin Taylor as though he was always a "party" to this law suit (Brief of Appellant, pp. 22). The truth is that Mr. and Mrs. Taylor and his company, KBS, were sued by Vercello and made parties only after Wedgewood had submitted Kolin Taylor's testimony as a witness. CP 352. It is uncontested that neither Taylor nor KBS became "parties" to this case until after Wedgewood's initial motions for summary judgment. Thus,

whatever statements Kolin Taylor made in written declarations submitted by Wedgewood, they were witness statements by an unrepresented individual, not the position of a party to the lawsuit. The doctrine of judicial estoppel ought not to apply in this circumstance.

Second, contrary to Vercello's assertion at page 22 of Appellant's brief, nowhere in the declarations referenced by Vercello did Kolin Taylor describe Addendum G as "a valid addendum;" and if Kolin Taylor in his witness statements "did not question the enforceability of Addendum G" (Brief of Appellant, p. 9) what obligation was there for a non-party witness to express any opinion of law in this case? In any event, such statements would have been legal conclusions, not facts.

Nor, for that matter, ought Vercello, in all fairness, to criticize Kolin Taylor and KBS *for not requesting cross-review of the earlier denials of summary judgment* to Wedgewood, motions presented to the trial court before either Taylor or KBS even had been formally joined to the case by Vercello. (*see*, Brief of Appellant, p. 9, fn 3)?

Third, there is no contradiction between the 2009 trial court rulings denying Wedgewood's initial motions for summary judgment and the 2010

rulings of the trial court summarily dismissing Vercello's claims.<sup>13</sup>

Clearly, Wedgewood's 2009 motion for summary judgment (noted before KBS and Kolin Taylor were parties to the lawsuit) concerned the parties' intentions about the duration of the "right of first refusal" contained in Addendum G and the applicability of the Rule Against Perpetuities to that "right of first refusal." CP 203-214, 318-333. That is what the trial judge observed at the summary judgment hearing on November 12, 2009. RP (November 12, 2009) at 15. That is what Vercello's counsel argued at the original hearing of Wedgewood's summary judgment hearing. RP (May 29, 2009) at 18.

Indeed, at the hearings of KBS's and Kolin Taylor's later summary judgment motions in 2010, the trial judge zeroed right in on the fact that the KBS/Taylor motions were fundamentally different than the 2009

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<sup>13</sup> Counsel for KBS and Kolin Taylor do not know whether to feel offended or complimented by the imprecations in Vercello's brief that somehow all was well in this case "at least until Taylor's and KBS's lawyers arrived on the scene," (Brief of Appellant, p. 7); or that counsel for KBS and Kolin Taylor "devised" a new theory (Brief of Appellant, p. 1); or that, apparently, counsel for KBS and Taylor apparently hoodwinked the trial court such that the judge "bought the argument wholesale," (Brief of Appellant, p. 16); or the implication that counsel for KBS and Kolin Taylor exquisitely timed their motions within a few days to coincide with the transfer of the case by the presiding department from one trial court judge to another (Brief of Appellant, p. 10). The old lawyer's adage is apparently true that if you have the facts, then hammer the facts; if you have the law, then hammer the law; and if you have neither the facts nor the law, then hammer opposing counsel. *See generally*, <http://quoteinvestigator.com/2010/07/04/legal-adage/>

Wedgewood motion; and, moreover, counsel for Vercello agreed that they were fundamentally different. RP (October 22, 2010) at 46; RP (October 29, 2010) at 4.

## **VI. Conclusion**

The ultimate analysis in considering a motion for summary judgment is whether there are any disputed material facts. In this case, none of the material facts that relate to the trial court's summary judgment orders are disputed. The underlying 2007 real estate purchase and sale agreement was an executory contract in which the parties had specified that time was of the essence. The agreement expired on its own terms. Addendum G was ineffective because it could not resuscitate the expired contract.

The parties agree that the issues of waiver and estoppel are not germane to this appeal.

If the intentions of the parties about the meaning and effect of Addendum G are ambiguous or uncertain, then Vercello's argument must fail that the parties, by signing Addendum G, created a brand new contract by their intentions.

The undercurrent running beneath Vercello's appeal in this case is

that notwithstanding the parties' failure to observe both the form and substance for properly extending a contract that was about to, and ultimately did expire, the Court, in essence, should just let a jury try to sort the whole thing out. KBS submits, by contrast, that would not only be a meaningless task, but contrary to law and good judicial policy.

For all of the foregoing reasons, as a matter of law, the trial court correctly entered summary judgment in favor of KBS and dismissing Vercello's claims against KBS.

This Court should affirm the trial court.

Respectfully submitted this 10 day of May 2011

A handwritten signature in black ink, appearing to read "Steven A. Reisler", written over a horizontal line.

Steven A. Reisler, WSBA #9384

Attorney for Respondent

KBS Development Corporation

# Appendix A

**PURCHASE AND SALE AGREEMENT**

**January 30, 2007**

**Finished Lots at Plat of Wedgewood and Wedgewood Lane**

The undersigned Purchaser, Westcott Holdings, INC., a Washington Corporation, agrees to buy and Seller(s), Wedgewood at Renton, Inc. (with respect to Wedgewood Lane Divisions 1, 2, 3 and 5) and KBS Development Corporation (with respect to Wedgewood Lane Division 4), agree to sell, on the following terms, finished vacant subdivision lots in the proposed Plat of Wedgewood and Wedgewood Lane, located in the City of Renton, in the State of Washington, County of King, to be legally described as Lots Numbered 1-18 of Division 1, 1-45 of Division 2, 1-40 of Division 3, 1-10 of Division 4, and 1-13 of Division 5 based upon the approved Final Plat with the City of Renton and recorded with King County. (See Attached Exhibit A)

KBT 1-31-07  
PJS 1/31/07

(The parties hereto hereby authorize agent to insert over their signatures, as soon as available the correct legal description of the below designated property if unavailable at the time of signing, or to correct the legal description entered if erroneous or incomplete and to complete legal and volume and page subsequent to plat recordation)

- 1. Earnest Money Receipt. Purchasers have signed this date, One Earnest Money Promissory Note payable to Escrow in the amount of Six Hundred Thirty Thousand and 00/100 Dollars (\$630,000.00). The Earnest Money Promissory Note shall be converted to cash or readily available funds and released immediately to Seller(s) in accordance with procedure outlined on Promissory Note attached. The Earnest Money deposit shall be applied towards the Purchase Price at the Final 42-Lot Closing. The Earnest Money shall become non-refundable at such time as the Earnest Money Promissory Note is converted to cash and deposited in Escrow.
- 2. Purchase Price. The Total Purchase Price shall be Thirty Million Nine Hundred Thirty Five Thousand Five Hundred Twenty and 00/100 Dollars (\$30,935,520.00), including the Earnest Money, payable upon closing. This transaction shall be subject to financing satisfactory to Purchaser, which financing shall be determined prior to the end of the Feasibility Period.
- 3. Allocation of Purchase Price. Purchase price is allocated to the lot(s) purchased as described above as follows:

126 Approved Lots @ an average of \$245,520.00 per lot  
(Individual Lot Prices applied at each closing according to attached takedown price schedule) Exhibit C

KBT 1-31-07  
PJS 1/31/07

- 4. Title and Deed. Title of Property is to be marketable at closing. The following shall not render the title unmarketable: (i) rights, reservation and easements now or hereafter of public record; (ii) conditions, covenants or restrictions now or hereafter recorded that are of applicability to the plat when recorded; (iii) easements, restrictions and exceptions not inconsistent with use as dwelling site; (iv) other exceptions not inconsistent with use as dwelling site; (v) other encumbrances or defects agreed to by Purchaser; (vi) any item set forth on the face of or anywhere in the final recorded plat, and; (vii) Seller will assist Purchaser with any changes to Covenants, Conditions and Restrictions "(CC&R's)." Conveyance shall be by statutory warranty deed subject to the foregoing exceptions.

PJS 1/30/07  
KBT 1/31/07  
PJS 1/31/07

Encumbrances to be paid or released at Closing by Seller shall not be deemed encumbrances if provisions are made in escrow for release or payment of same at closing.

5. Payment of Purchase Price; Closing Schedule; Escrow Fees and Closing Costs. "Closing" as used hereunder shall be the date documents are recorded and funds are made available to Seller from the Escrow Agent. Closing, recording and the disbursement of funds shall occur within 48 hours.

All funds required for Closing shall be paid in full, in cash, to Escrow Agent, prior to closing. Seller's proceeds and Seller's Lender(s) proceeds are to be released by Escrow Agent upon written issuance of King County recording numbers to Purchaser's Lender(s).

If said date is not a business day, then closing(s) shall be on the next succeeding business day. The closing dates referred to in this Section 5 herein, shall be referred to from time to time in subsequent sections of this paragraph as the "Scheduled Closing Dates".

a) Scheduled Closing Date

Closing shall occur according to the following schedule:

- i. Closing of first 42 lots on or before the later of either Sixty (60) days from mutual acceptance of this Agreement OR within Seven (7) days following Sellers written notice to Purchaser that the lots have been recorded with the County of King and "finished" per the definition in Paragraph 8 of the Purchase and Sale Agreement dated January 30, 2007.
- ii. Closing of the Second 42 lots shall be no later than 6 months from the date of the first closing, or earlier at Purchaser's discretion.
- iii. Closing of the Final 42 lots shall be no later than 12 months from the date of the first closing, or earlier at Purchaser's discretion. The Final 42 lots shall bear interest from the date of the second closing to the date of the final closing at a rate of 4% per annum, added to the purchase price and payable at the final closing.
- iv. Purchaser shall identify specific lots for each closing during feasibility study.

b) Escrow Fees and Closing Costs

Seller and Purchaser shall each pay one-half of the standard escrow fees. Purchaser shall pay all recording costs and Purchaser's portion of all costs pro-rated at the Closing. Seller shall pay the real estate excise taxes due to King County, and the title insurance premium for the owner's standard policy of title insurance in the amount of the purchase price for the lots, and Seller's portion of all costs pro-rated at Closing.

Taxes for the current year, utilities, general and special assessments approved by Purchaser, if any, will be prorated at the Closing of each lot.

6. Escrow. The designated escrow agent shall be First American Title and Escrow or other escrow office as mutually agreed to by Purchaser and Seller. Escrow will be opened upon execution of this Agreement so that documents and instruments can be deposited with said escrow agent that may be necessary, convenient or proper to facilitate or comply with closing requirements.

AR E 1/30/07  
KBT 1/31/07  
RJB 1/31/07

- 7. Registration. The parties acknowledged that the lot(s) subject to this Agreement are not registered under the Federal Interstate Land Sales Act, and are not registered under the Washington Land Development Act, or any similar law or statute. Seller may, at Seller's option, so register said lots, but shall not be obliged to do so. Purchaser warrants that in purchasing said lots that Purchaser is a licensed contractor and is acquiring said lots for the purpose of construction of a residential dwelling thereon, and this is not a consumer transaction for the personal, family or household use of Purchaser.
- 8. Plat Improvements. Seller warrants that all required plat improvements have been or will be installed and will comply with all conditions and requirements of the City of Renton and King County, relating to the plat, prior to Closing.

Improvements shall include water, sewer, storm stubs deep enough to adequately serve the house at the designed finish floor elevation of each lot(s), as noted on the drawings and discussed at the walk-through, as well as electric, telephone, gas, and cable service to the building lot(s). All property corners shall be staked, including any point in which any arc, starts, stops or changes.

The definition of finished lots shall be:

- a) All lots to be staked and pinned or plugged.
- b) Purchaser to verify lot grading and dimensions of each lot.
- c) All power to be activated. Purchaser to have accurate plan drawings of all power systems.
- d) All utilities, except telephone, to be unconditionally 100% complete and ready for hookups, permits, and use. Utilities are defined as drinking water, storm sewer, sanitary sewer, telephone, cable TV, natural gas and underground power. Purchaser to be provided with as-built drawings of water, storm drainage and sanitary sewer utilities, and accurate plan drawings of telephone, cable TV, natural gas and underground power. Telephone will be 100% available after the utility completes its area-wide facility upgrades and improvements.
- e) All installations of utilities and improvements and any maintenance bonds to be accepted by local governments and proof of same given to Purchaser.
- f) Plat to be recorded with King County prior to closing.
- g) Seller to pay for the following fees / mitigations prior to recording:
  - Water assessment
  - Sewer assessment / System Development Charge
  - Park Mitigation Fee
  - Fire Mitigation Fee
  - Transportation Mitigation Fee

Seller Initials: KBT PJH

Purchaser Initials: ARE

- h) Purchaser to pay for the following fees / mitigations:
  - Building Permit Fee
  - Plan Check Fee
  - Water Meter Fee
  - Water Hook-up / GFC
  - Side Sewer Permit Fee
  - Schools Mitigation
    - i. Renton Schools \$ N/A
    - ii. Issaquah Schools \$ (Paid By Purchaser)

Purchaser will verify all fees and mitigations prior to removal of Feasibility. If Purchaser takes out a building permit prior to closing and is charged a fee/charge to be paid by Seller

*Handwritten notes:*  
 ARE  
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 KBT  
 PJH 1/31/07

than the Purchase Price shall be reduced by that amount at closing. Otherwise, all fees shall be paid in accordance with subparagraphs (g) and (h) of this section.

Seller Initials: PKK  
KBT

Purchaser Initials: KRC

- i) All improvements to be accepted by local jurisdiction for continuous maintenance and proof of same are supplied to Purchaser.
- j) Lots to be cleared of all construction debris, stock piled material, chip piles, junk trees and large rocks, those not being used to benefit neighborhood. Purchaser and Seller to walk site within one week of mutual acceptance to identify any necessary remedies.
- k) All roads and sidewalks to be completed and paved at no cost to Purchaser.
- l) Water, storm sewer and power to be located with a stake or obvious means of location on each lot.
- m) Seller warrants each lot is compacted at a minimum of 95% density with not more than 18" of uncompacted soil spread over the top within the building setback lines.
- n) Purchaser understands that they will be required to install street trees in accordance with the approved landscaping/tree plan. This plan will be provided to Purchaser during the Feasibility Period.

Other Plat Improvements and Conditions:

- a) Seller agrees to cooperate with Purchaser in obtaining permit(s) for construction of up to Three (3) Model Homes on the site prior to closing or recording of the plat.
- b) Prior to closing, Seller and Purchaser shall inspect sidewalks and curbs for any damage and sign off in writing. Seller shall be responsible for the repair of damage, prior to closing and Purchaser shall be responsible for the repair of damage after closing. Seller shall repair damage immediately following notice from Purchaser. See attached Exhibit B for further lot improvements and maintenance responsibilities.

9. Purchaser's Warranties. Purchaser acknowledges and agrees that in the event Purchaser, Purchaser's agents, employees, associates, contractors, subcontractors, material suppliers or other third parties under the control or direction of the Purchaser, should damage or remove any of the plat improvements referred to in this Agreement (unless improperly designed, constructed or installed) then the same shall be promptly repaired, restored and/or replaced, in a good workmanlike manner, to a condition equal to the condition of said plat improvement prior to damage of the same. See attached Exhibit for further plat maintenance responsibilities.

Purchaser warrants that it has authorized the individual executing this agreement to do so and that they/he/she is further authorized to bind the corporation on its behalf. The individual executing this agreement also warrants that they have the authority to do so and that such authority has been granted by the Purchaser.

10. Default and Attorney's Fees/Liquidated Damages. In the event the Purchaser fails, without legal excuse, to complete the purchase of the property, the Earnest Money deposit made by the Purchaser shall be forfeited to the Seller as the sole and exclusive remedy available to the Seller for such failure. This limitation shall include any claims for attorney fees, interest, and actual or consequential damages. It is agreed that the Earnest Money represents the reasonable estimate by the parties of the amount of damages that Seller would suffer by reason of Purchaser's default under this Agreement. Seller hereby waives any other remedy it may have.

KRC 1/30/07  
KBT 1/21/07  
PKK 1/21/07

- 11. Possession. Purchaser shall be entitled to possession at the time of Closing.
- 12. Title Insurance. Seller authorizes closing agent, at Seller's expense, to apply for a preliminary commitment for a standard form owner's policy of title insurance to be issued by First American Title and Escrow. Seller shall cause closing agent to deliver or make available to Purchaser said preliminary commitment for title insurance and Purchaser shall notify Seller in writing of any title objections within Ten (10) days thereafter. If title is not in compliance with this Agreement and cannot be brought into compliance prior to Closing, the Earnest Money shall, unless Purchaser elects to waive such defects or encumbrances, be refunded to the Purchaser as its sole remedy, and this Agreement shall be null and void.
- 13. Entire Agreement. There are no verbal or other agreements that modify or affect this Agreement. All parties agree that there are no representations other than those set forth in writing herein made by Seller, Purchaser or real estate agent.
- 14. Legal Advice. The agent is not authorized to offer legal advice to either Seller or Purchaser, or on behalf of Seller. It is acknowledged by the parties that no such legal advice has been requested or given. If any party has a question as to his or her rights under this Agreement, he or she should consult an attorney of their choice.
- 15. Time. Time is of the essence.
- 16. Notices. All notices, demands or request required or permitted under this Agreement shall be in writing. All such notices, demands or requests shall be deemed to have been properly made if served personally, telecopy, or sent by United States mail, postage prepaid. Notices shall be given to the following:

If to Seller: Dick Gilroy  
 Wedgewood at Renton, Inc Phone: (425) 747-1726  
 1520 140<sup>th</sup> Avenue NE, Suite 200 Fax: (425) 747-4157  
 Bellevue, WA 98005  
[dick@landtrustinc.net](mailto:dick@landtrustinc.net) OR [patrick@landtrustinc.net](mailto:patrick@landtrustinc.net)

If to Purchaser: Westcott Holdings, INC. Phone: (425) 485-1590  
 Kerek Edwards Fax: (425) 485-1597  
 19515 North Creek Parkway, Suite 300  
 Bothell, WA 98011  
[kedwards@westcotthomes.com](mailto:kedwards@westcotthomes.com)

- 17. Binding Effect. The terms and conditions hereof shall extend to and inure to the benefit of the successors and assigns of the respective parties hereto.
- 18. Warranties and Agreements Shall Survive Closing. The warranties and agreements set forth herein and promises executed by the parties shall survive the Closing of this transaction and shall not be merged in the conveyance by deed from Seller to Purchaser.
- 19. Recording of This Agreement.
- 20. Agency Disclosure. N/A

Wedgewood\_Lane\_PSA\_013007

*Handwritten signatures and dates:*  
 RBT 1/31/07  
 [Signature] 1/30/07  
 [Signature] 1/31/07

21. Commission. Purchaser has not been represented by a Real Estate Broker in this transaction.
22. Feasibility Study Contingency.
- a) This transaction is subject to Purchaser receiving a feasibility analysis report prepared by Purchaser or by consultants of Purchaser's choice which, in Purchaser's sole opinion, verifies that Purchaser's proposed use of the Property will be economically viable, and architecturally feasible. Purchaser agrees to pay all costs of said reports. Purchaser's feasibility study is solely for the benefit of the Purchaser and may be waived or removed unilaterally by the Purchaser. If said reports are satisfactory to the Purchaser, Purchaser shall notify Seller of his intent to remove and waive this contingency by delivering written notice to Seller. If the Notice of Intent to remove and waive this contingency is not delivered to Seller within Fifteen (15) Business Days of Mutual Acceptance of the Purchase and Sale Agreement dated January 30, 2007, this transaction shall be considered null and void and the Earnest Money shall be returned to Purchaser. Mutual Acceptance shall be the date which Purchaser accepts receipt of executed agreement.
- b) The Seller hereby grants to Purchaser and Purchaser's agents, employees and/or consultants the right to enter upon the Property at any reasonable time prior to closing of this transaction for the purpose of making surveys, engineering studies, soils test, and any other test or studies which the Purchaser may deem necessary in connection with the feasibility analysis of the Property. Any soils testing or sampling that disturbs the compaction of the soil will be replaced and re-compacted by purchaser to a minimum 95% density under the observation of a licensed soils engineer.
23. Counter Offer/Time for Acceptance. Purchaser offers to buy this property on the above terms and conditions. Acceptance is not effective until Purchaser has received a signed original and/or facsimile copy. If this offer is not accepted, it shall lapse and become null and void.
24. Other Conditions:

1031 Exchange. Seller has the right to use the Property sale in a 1031 Exchange at no cost to Purchaser.

Sellers Warranties. Seller hereby represents and warrants that Seller is the owner of the real estate and/or is authorized to enter into this agreement. Seller further warrants that there are no other transactions pending regarding this property, and will deliver clear title, free of any liens, to the property to the Purchaser at Closing. All fees resulting from latecomer agreements which affect the property or the ability to connect to utilities shall be paid by Seller prior to closing. Seller's warranties and representations contained in this agreement shall not be deemed merged into the deed, and shall survive closing and continue in full force and effect.

Declaration of Covenants, Conditions and Restrictions. Seller shall cooperate with Purchaser to amend CC & R's if reasonable and necessary to carry out Purchaser's intentions with the community.

Toxic Waste. Seller warrants that, to the best of Seller's knowledge, no toxic and/or hazardous waste has been disposed of on subject property. Seller holds Purchaser harmless and agrees to reimburse Purchaser for any damages incurred or for any liability of such waste, if any. If any toxic or contaminated materials or soils are discovered, they shall be removed by Seller, or Seller's agent, at no cost or delay to Purchaser. This

Wedgewood\_Lanc\_PSA\_013007

PE  
1/30/07  
KBT  
1/31/07  
PSB  
1/31/07

## VERCELLO-DIVISION 4 RENTON SCHOOLS

LOT #	LOT PREMIUM	NOTES
1	\$ 10,000.00	\$ 242,631.00
2	\$ 7,000.00	\$ 239,631.00
3	\$ 22,000.00	\$ 254,631.00
4	\$ 20,000.00	\$ 252,631.00
5	\$ 22,000.00	\$ 254,631.00
6	\$ 15,000.00	\$ 247,631.00
7	\$ 7,000.00	\$ 239,631.00
8	\$ 7,000.00	\$ 239,631.00
9	\$ 7,000.00	\$ 239,631.00
10	\$ 28,000.00	\$ 260,631.00
TOTAL	\$ 145,000.00	
10 LOTS	\$ 14,500.00	\$ 247,131.00
	AVERAGE	AVERAGE

## VERCELLO-DIVISION 5 RENTON SCHOOLS

LOT #	LOT PREMIUM	NOTES
1	\$ 7,000.00	\$ 239,631.00
2	BASE	\$ 232,631.00
3	\$ 7,000.00	\$ 239,631.00
4	\$ 20,000.00	\$ 252,631.00
5	\$ 20,000.00	\$ 252,631.00
6	\$ 20,000.00	\$ 252,631.00
7	\$ 20,000.00	\$ 252,631.00
8	\$ 25,000.00	\$ 257,631.00
9	\$ 20,000.00	\$ 252,631.00
10	\$ 25,000.00	\$ 257,631.00
11	\$ 20,000.00	\$ 252,631.00
12	\$ 20,000.00	\$ 252,631.00
13	\$ 20,000.00	\$ 252,631.00
TOTAL	\$ 224,000.00	
13 LOTS	\$ 17,230.77	\$ 249,861.77
	AVERAGE	AVERAGE

CC&R Requirements ACC Approval: Square Footage, Architectural Approval, Roof specs and Exterior Color  
 Landscaping Requirements  
 Earnest Money deposit \$5,000 per lot  
 Lot Deposit: \$500 per lot

RJG 1/31/07  
 RBT 1-31-07

warranty shall only apply to toxic and/or hazardous waste that may have been introduced to the property prior to the date of closing.

Assignment. Seller agrees that Purchaser may assign this agreement with the prior written consent of the Seller.

PJS 1/21/07  
KBT 1/31/07  
GEC 1/30/07

**PURCHASER:**

Westcott Holdings, INC.



By: Kerek Edwards  
Its: VP of Land Acquisition  
Date: 1/30/07

**SELLER:**

(DIVISIONS 1, 2, 3, AND 5)  
Wedgewood at Renton, Inc.



By: PATRICK J. GURROY  
Its: DIRECTOR OF ENTITLEMENTS - LANDTRUST, INC.  
Date: 1/31/07

**SELLER:**

(DIVISION 4)  
KBS Development Corporation



By: \_\_\_\_\_  
Its: President  
Date: 1-31-07

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**PURCHASER'S RECEIPT.** Purchaser acknowledges receipt of a Seller signed copy of this Agreement on \_\_\_\_\_, 2007.

By: Kerek Edwards  
Its: VP of Land Acquisition

**EARNEST MONEY  
PROMISSORY NOTE**

**\$630,000**

**January 30, 2007**

FOR VALUE RECEIVED, the undersigned ("Purchaser") agree(s) to pay to the order First American Title and Escrow ("Escrow") the sum of Six Hundred Thirty Thousand and 00/100 Dollars, (\$630,000.00), as follows:

Cash or readily available funds in the amount of Six Hundred Thirty Thousand and 00/100 Dollars, (\$630,000.00), will be deposited into escrow within Three (3) days following Purchaser's acceptance of feasibility period as outlined in Paragraph 22 of the Purchase and Sale Agreement dated January 30, 2007 and released immediately to Seller(s) by Escrow.

This note is evidence of the obligation to pay earnest money under a real estate Purchase and Sale Agreement between Westcott Holdings, INC. and/or Assigns ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Seller") dated January 30, 2007. Purchaser's failure to pay the earnest money strictly as stated above shall constitute default on said Purchase and Sale Agreement as well as on this note.

Earnest Money will become Non-Refundable upon Purchaser's inspection and written approval of Feasibility Study. In the event that Purchaser does not approve of its Feasibility Study, Earnest Money Note will be refunded to Purchaser and contract will become null and void, with no further obligations by Purchaser or Seller.

If this note shall be placed in the hands of an attorney for collection, or if suit shall be brought to collect any of the balance due on this note, the Purchaser promises to pay a reasonable attorney's fee as fixed by the Court, and all court and collection costs.

**PURCHASER:  
Westcott Holdings, INC.**



By: Kerek R. Edwards  
Its: VP of Land Acquisition

*Rig 1/31/07  
Rt 1-31-07*

EXHIBIT A - LEGAL DESCRIPTION

DIVISION 1:

LOT 2 OF CITY OF RENTON SHORT PLAT NO. LUA-03-052-SHPL, ENTITLED: BINDER SHORT PLAT, ACCORDING TO PLAT RECORDED JULY 21, 2004 UNDER RECORDING NO. 2004072190001, IN KING COUNTY, WASHINGTON.

DIVISION 2:

PARCEL "A"

PARCEL A OF CITY OF RENTON WEDGEWOOD LAKE LOT LINE ADJUSTMENT LUA-05-108-LLA AS RECORDED UNDER RECORDING NO. 2005122290001, IN KING COUNTY, WASHINGTON.

PARCEL "B"

THE SOUTH HALF OF THE NORTH HALF OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, EXCEPT THE WEST 170 FEET THEREOF.

PARCEL "C"

THE SOUTH 30 FEET OF WEST 170 FEET OF THE NORTH HALF OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, EXCEPT THE WEST 30 FEET CONVEYED TO KING COUNTY FOR AMELIA SCHEME ROAD EXTENSION BY DEED RECORDED UNDER RECORDING NO. 3081014.

PARCEL "D"

THE NORTH 30.6 FEET OF THE SOUTH 330 FEET OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, EXCEPT THE WEST 30 FEET CONVEYED TO KING COUNTY FOR AMELIA SCHEME ROAD EXTENSION BY DEED RECORDED UNDER RECORDING NO. 3081014.

PARCEL "E"

THE WEST 170 FEET OF THE NORTH HALF OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON; EXCEPT THE NORTH 82.75 FEET; ALSO EXCEPT THE SOUTH 141.00 FEET; AND EXCEPT THE WEST 30 FEET CONVEYED TO KING COUNTY FOR AMELIA SCHEME ROAD EXTENSION BY DEED RECORDED UNDER RECORDING NO. 3081014.

PARCEL "F"

THE SOUTH 141.00 FEET OF THE WEST 170 FEET OF THE NORTH HALF OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON; EXCEPT THE WEST 30 FEET CONVEYED TO KING COUNTY FOR AMELIA SCHEME ROAD EXTENSION BY DEED RECORDED UNDER RECORDING NO. 3081014; AND EXCEPT THE SOUTH 30.00 FEET THEREOF.

DIVISION 3:

PARCEL "A"

THE WEST HALF OF THE SOUTH 10 ACRES OF THE NORTH 50 ACRES OF THE EAST HALF OF THE NORTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON.

PARCEL "A-C"

AN EASEMENT FOR INGRESS AND EGRESS OVER THE SOUTH 30 FEET OF THE SOUTH 10 ACRES OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST OF THE WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON; EXCEPT THE EAST 30 FEET THEREOF; AND EXCEPT ANY PORTION THEREOF LYING WITHIN THE ABOVE DESCRIBED PARCEL "A".

PARCEL "B"

PARCEL B OF CITY OF RENTON WEDGEWOOD LAKE LOT LINE ADJUSTMENT LUA-05-108-LLA AS RECORDED UNDER RECORDING NO. 2005122290001, IN KING COUNTY, WASHINGTON.

*Pjg 1/31/07*

*LEE 1/30/07*

*KBT 1-31-07*

**DIVISION 4:**  
THE NORTH 15 FEET OF THE WEST HALF OF THE NORTHEAST QUARTER OF THE  
SOUTHWEST QUARTER OF THE NORTHEAST QUARTER EXCEPT THE WEST 30 FEET THEREOF  
FOR ROAD;

AND THE NORTH 315 FEET OF THE EAST HALF OF THE NORTHEAST QUARTER OF THE  
SOUTHWEST QUARTER OF THE NORTHEAST QUARTER;

ALL IN SECTION 10, TOWNSHIP 23 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY,  
WASHINGTON.

**DIVISION 5:**  
THE SOUTH HALF OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF THE NORTHWEST  
QUARTER OF THE NORTHEAST QUARTER OF SECTION 10, TOWNSHIP 23 NORTH, RANGE 5  
EAST, W.M. IN KING COUNTY, WASHINGTON.

EXCEPT THE WEST 30 FEET THEREOF AS CONVEYED TO KING COUNTY FOR ROAD  
PURPOSES BY DEED RECORDED UNDER RECORDING NO. 3261692.

Seller Initials:           *PJW*          

          *KBT*          

Purchaser Initials:           *RE*

EXHIBIT B

CONSTRUCTION SITE MAINTENANCE; DAMAGE DEPOSIT

**A. Maintenance.** Before Purchaser or its Contractors, Subcontractors, Agents or Employees move any equipment onto the Property, in connection with Purchaser's improvement thereof, authorized representatives of Seller and Purchaser shall jointly inspect the Property and complete a written report describing any existing damage to the Seller's Work (the "Written Damage Report"), or other improvements installed or bonded by Seller. After said joint inspection of the Property, Purchaser accepts the improvements in "AS-IS" condition, excepting any items noted on the Written Damage Report. Thereafter, Purchaser and its Contractors, Subcontractors, and Agents at their sole expense shall: (a) maintain all drainage, erosion and sedimentation control facilities for or affecting the Property and any surrounding area; (b) install effective temporary erosion and sedimentation control devices immediately after any grading and clearing is begun, and maintain such devices until final landscaping is complete; (c) protect from damage, or promptly replace, to their prior condition if damaged by Purchaser or its Contractors, Subcontractors, Agents or Employees, all Seller's work or other improvements installed by Seller, including, but not limited to: curbs, sidewalks, asphalt, street trees, mailboxes, entry landscaping, monuments, fencing, wetland buffer and mitigation plantings, retaining walls, utility vaults and pedestals.

**B. Maintenance Fee and Damage Deposit.** To ensure performance of the construction site-maintenance performance requirements described in this Addendum, Purchaser shall pay to and deposit with, at closing, Five Hundred and No 100ths Dollars (\$500.00), per lot as a damage deposit not applicable to, and in addition to the Purchase Price (the "Damage Deposit"). The Damage Deposit is refundable according to the terms set forth in the paragraph below.

**C. Remedies.** Once Purchaser has completed the development of the Property, and the City of Renton has issued an Occupancy Permit for the last home, the authorized representative of the Seller and Purchaser shall again jointly inspect the Property and complete a written report describing any repairs that may need to occur (the "Repairs") due to damage that may have occurred since the Written Damage Report completed prior to Closing. Also, the storm drainage system, including the detention pond, shall be inspected for any accumulation of silt and construction debris. Purchaser will have fourteen (14) days to complete the Repairs or perform any cleanup described in the report. If Purchaser fails to complete such work at its own expense, Seller will complete the work and apply the Damage Deposit against the cost thereof. If the cost the Repairs exceeds the total amount of the Damage Deposit, Purchaser shall pay to Seller the excess cost within 10 days of demand thereof. Seller shall have the right to lien the Property if said excess costs are not reimbursed to Seller within the timeframe set forth above. Seller shall promptly return the remaining balance of the Damage Deposit, if any, once the Repairs are completed.

Seller Initials:   DJY    
  KBF  

Purchaser Initials:   AE

# EXHIBIT C

## VERCELLO TAKEDOWN PRICE SCHEDULE

VERCELLO-DIVISION 1 RENTON SCHOOLS

LOT #	LOT PREMIUM	TOTAL PRICE
1	\$ 8,000.00	\$ 240,631.00
2	\$ 8,000.00	\$ 240,631.00
3	\$ 8,000.00	\$ 240,631.00
4	\$ 10,000.00	\$ 242,631.00
5	\$ 10,000.00	\$ 242,631.00
6	\$ 10,000.00	\$ 242,631.00
7	\$ 15,000.00	\$ 247,631.00
8	\$ 4,000.00	\$ 236,631.00
9	BASE	\$ 232,631.00
10	\$ 2,000.00	\$ 234,631.00
11	BASE	\$ 232,631.00
12	BASE	\$ 232,631.00
13	\$ 7,000.00	\$ 239,631.00
14	\$ 8,000.00	\$ 240,631.00
15	\$ 21,000.00	\$ 253,631.00
16	BASE	\$ 232,631.00
17	BASE	\$ 232,631.00
18	BASE	\$ 232,631.00
TOTAL	\$ 111,000.00	
18 LOTS	\$ 6,167.00	\$ 238,797.67
	AVERAGE	AVERAGE

VERCELLO-DIVISION 2 RENTON SCHOOLS

LOT #	LOT PREMIUM	TOTAL PRICE
1	\$ 4,000.00	\$ 236,631.00
2	\$ 4,000.00	\$ 236,631.00
3	\$ 5,000.00	\$ 237,631.00
4	\$ 3,000.00	\$ 235,631.00
5	\$ 3,000.00	\$ 235,631.00
6	\$ 3,000.00	\$ 235,631.00
7	\$ 3,000.00	\$ 235,631.00
8	\$ 3,000.00	\$ 235,631.00
9	\$ 3,000.00	\$ 235,631.00
10	\$ 4,000.00	\$ 236,631.00
11	\$ 6,000.00	\$ 238,631.00
12	\$ 15,000.00	\$ 247,631.00
13	\$ 17,000.00	\$ 249,631.00
14	\$ 20,000.00	\$ 252,631.00
15	\$ 20,000.00	\$ 252,631.00
16	\$ 23,000.00	\$ 255,631.00
17	\$ 23,000.00	\$ 255,631.00
18	\$ 15,000.00	\$ 247,631.00
19	\$ 2,000.00	\$ 234,631.00
20	\$ 2,000.00	\$ 234,631.00
21	\$ 2,000.00	\$ 234,631.00
22	\$ 2,000.00	\$ 234,631.00
23	\$ 4,000.00	\$ 236,631.00
24	\$ 4,000.00	\$ 236,631.00
25	\$ 4,000.00	\$ 236,631.00
26	\$ 2,000.00	\$ 234,631.00
27	\$ 2,000.00	\$ 234,631.00
28	\$ 2,000.00	\$ 234,631.00
29	\$ 2,000.00	\$ 234,631.00
30	\$ 2,000.00	\$ 234,631.00
31	\$ 2,000.00	\$ 234,631.00
32	BASE	\$ 232,631.00

LOT #	LOT PREMIUM	TOTAL PRICE
33	BASE	\$ 232,631.00
34	BASE	\$ 232,631.00
35	BASE	\$ 232,631.00
36	\$ 4,000.00	\$ 236,631.00
37	BASE	\$ 232,631.00
38	BASE	\$ 232,631.00
39	\$ 6,000.00	\$ 238,631.00
40	\$ 6,000.00	\$ 238,631.00
41	\$ 10,000.00	\$ 242,631.00
42	\$ 4,000.00	\$ 236,631.00
43	\$ 4,000.00	\$ 236,631.00
44	\$ 4,000.00	\$ 236,631.00
45	\$ 4,000.00	\$ 236,631.00
TOTAL	\$ 248,000.00	
45 LOTS	\$ 5,511.00	\$ 238,142.11
	AVERAGE	AVERAGE

*KBT 1-31-07*  
*PJG 1-31-07*

VERCELLO-DIVISION 3 ISSAQUAH SCHOOLS

LOT #	LOT PREMIUM	NOTES
1	\$ 25,000.00	\$ 257,631.00
2	\$ 20,000.00	\$ 252,631.00
3	\$ 18,000.00	\$ 250,631.00
4	\$ 18,000.00	\$ 250,631.00
5	\$ 18,000.00	\$ 250,631.00
6	\$ 13,000.00	\$ 245,631.00
7	\$ 18,000.00	\$ 250,631.00
8	\$ 18,000.00	\$ 250,631.00
9	\$ 18,000.00	\$ 250,631.00
10	\$ 18,000.00	\$ 250,631.00
11	\$ 18,000.00	\$ 250,631.00
12	\$ 13,000.00	\$ 245,631.00
13	\$ 10,000.00	\$ 242,631.00
14	\$ 15,000.00	\$ 247,631.00
15	\$ 20,000.00	\$ 252,631.00
16	\$ 25,000.00	\$ 257,631.00
17	\$ 25,000.00	\$ 257,631.00
18	\$ 28,000.00	\$ 260,631.00
19	\$ 28,000.00	\$ 260,631.00
20	\$ 35,000.00	\$ 267,631.00
21	\$ 30,000.00	\$ 262,631.00
22	\$ 18,000.00	\$ 250,631.00
23	\$ 18,000.00	\$ 250,631.00
24	\$ 18,000.00	\$ 250,631.00
25	\$ 20,000.00	\$ 252,631.00
26	\$ 20,000.00	\$ 252,631.00
27	\$ 20,000.00	\$ 252,631.00
28	\$ 24,000.00	\$ 256,631.00
29	\$ 30,000.00	\$ 262,631.00
30	\$ 27,000.00	\$ 259,631.00
31	\$ 28,000.00	\$ 260,631.00
32	\$ 28,000.00	\$ 260,631.00

LOT #	LOT PREMIUM	NOTES
33	\$ 28,000.00	\$ 260,631.00
34	\$ 28,000.00	\$ 260,631.00
35	\$ 28,000.00	\$ 260,631.00
36	\$ 23,000.00	\$ 255,631.00
37	\$ 28,000.00	\$ 260,631.00
38	\$ 28,000.00	\$ 260,631.00
39	\$ 28,000.00	\$ 260,631.00
40	\$ 23,000.00	\$ 255,631.00
TOTAL	\$ 896,000.00	
40 LOTS	\$ 22,400.00	\$ 255,031.00
	AVERAGE	AVERAGE

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RJS 1/31/07  
KBT 1-31-07

**ADDENDUM B**  
**Wedgewood and Wedgewood Lane**  
**126 Lots**  
**March 6, 2007**

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007, by and between Westcott Holdings, Inc. ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement."

Pursuant to the Agreement, Purchaser and Seller hereby agree to the following:

- 1) The Feasibility Study Contingency Period discussed in Paragraph 22 of the Agreement is simultaneously extended to March 6, 2007 and removed by mutual execution of this Addendum, below.
- 2) Lots 1 through 13 of Division 5 are removed and not a part of this Purchase and Sale Agreement.
- 3) Pursuant to Paragraph 1 of the Agreement, the Earnest Money Promissory Note and Deposit shall now be Five Hundred Sixty Five Thousand and No 100ths Dollars (\$565,000.00).
- 4) Total Purchase Price (Paragraph 2) shall be Twenty Seven Million Six Hundred Eighty Seven Thousand Three Hundred Three and No 100ths Dollars (\$27,687,303.00).
- 5) Allocation of Purchase Price, Payment of Purchase Price and Scheduled Closing Date (Paragraph 3 and 5a of the Agreement, respectively) shall be amended to read as follows:
  - a) The purchase of the first 37 lots (the "First Closing"<sup>1</sup>), shall be comprised of Lots 43 and 44 of Division 2 and Lots 1 through 35 of Division 3. The Purchase Price for each lot shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule." The First Closing shall occur on or before the latter to occur of: a) 55 days following the Removal of Feasibility Study Contingency pursuant to Paragraph 22 of the Agreement, or b) 5 days following the completion of the lots pursuant to Paragraph 8 of the Agreement.
  - b) The Second Closing shall be 38 lots, comprised of lots 36 through 40 of Division 3, lots 1 through 10 of Division 4, lots 1 through 18 of Division 1, and lots 1 through 4 and lot 45 of Division 2. The Purchase Price for each lot in the Second Closing shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule." The Second Closing shall occur no later than 170 days from the date of the first closing.
  - c) The Third Closing shall be the remaining 38 lots not included in any of the previous closings. The Purchase Price for each lot in the Third Closing shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule," plus interest as specified in paragraph 5a(ii) of the Agreement. The Third Closing shall occur no later than 365 days from the date of the first closing.

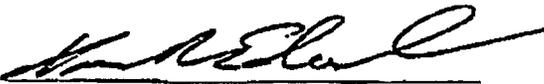
<sup>1</sup> Each of the three closings will hereinafter be referred to in their order of succession, such as "First Closing," "Second Closing," etc.

*Handwritten:*  
 KAE  
 3/6/07  
 3/6/07

- 6) Seller warrants the condition of all lots by: 1) agreeing to perform all necessary restoration and repair of damage and/or defective workmanship prior to closing, and 2) Guaranteeing the quality of original work and, when needed, repair of defective and/or incomplete workmanship. Within one week of feasibility removal, Seller and Purchaser shall perform a formal walk-thru of the entire property to complete Written Damage Report (as required by Exhibit B to the Agreement). Additional walk-thrus will take place two weeks prior to each closing. Purchaser shall be responsible for damage caused solely and directly by the construction activities of Purchaser or Purchaser's Agents, Contractors, or Subcontractors, whether the lots have been closed by Purchaser or not. Seller shall be responsible for damage as a result of defective workmanship or as a result of settling or erosion that occurs and is not a direct result of Purchaser's construction activities.
- 7) With respect to the lots that Purchaser has purchased and closed on, he/she shall have unilateral authority to modify the CC&R's and will replace Seller in any and all capacities as it relates to the HOA, HOA Articles of Incorporation, Architectural Control Committee, and the CC&R's. The builder(s) who purchase Division 5 shall be required to conform to the CC&R's and shall present construction plans for review by the Architectural Control Committee; said plans shall demonstrate that the builder's product is the same or better than the quality of construction and finish of the homes produced by Westcott Holdings, Inc.
- 8) Seller agrees to complete the following work, at no additional cost to Purchaser, prior to the First Closing:
  - a) In Division 3, move the common boundary between Lots 7 and 8 three feet to the north.
  - b) In Division 3, move the common boundary between Lots 10 and 11 three feet to the south.
  - c) In Division 1, move the common boundary between Lots 10 and 11 three feet to the west.
  - d) In Division 1, move the common boundary between Lots 12 and 13 three feet to the east.
  - e) In Division 2, move the common boundary between Lots 40 and 41 two feet to the west.
  - f) Install additional fire hydrants to serve Lots 1-45 in Division 2 and Lots 2 through 40 in Division 3, to the extent that it will allow Purchaser to construct, without the installation of individual in-house sprinkler systems, houses greater than 3,600 feet in size.

**PURCHASER:**

Westcott Holdings, INC.



By: Kerek Edwards  
Its: VP of Land Acquisition  
Date: 3/6/07

**SELLER:**

(DIVISIONS 1, 2, 3, AND 5)  
Wedgewood at Renton, Inc.



By: MANAGING MEMBER  
Date: 3/6/07

**SELLER:**

(DIVISION 4)  
KBS Development Corporation

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

Exhibit C Vercello Takedown Price Schedule				
Division	Lot	Base Price	Premium	Total Lot Price
1	1	\$ 232,631	\$ 8,000	\$ 240,631
1	2	\$ 232,631	\$ 8,000	\$ 240,631
1	3	\$ 232,631	\$ 8,000	\$ 240,631
1	4	\$ 232,631	\$ 10,000	\$ 242,631
1	5	\$ 232,631	\$ 10,000	\$ 242,631
1	6	\$ 232,631	\$ 10,000	\$ 242,631
1	7	\$ 232,631	\$ 15,000	\$ 247,631
1	8	\$ 232,631	\$ 4,000	\$ 236,631
1	9	\$ 232,631		\$ 232,631
1	10	\$ 232,631	\$ 2,000	\$ 234,631
1	11	\$ 232,631		\$ 232,631
1	12	\$ 232,631		\$ 232,631
1	13	\$ 232,631	\$ 7,000	\$ 239,631
1	14	\$ 232,631	\$ 8,000	\$ 240,631
1	15	\$ 232,631	\$ 21,000	\$ 253,631
1	16	\$ 232,631		\$ 232,631
1	17	\$ 232,631		\$ 232,631
1	18	\$ 232,631		\$ 232,631
2	1	\$ 232,631	\$ 4,000	\$ 236,631
2	2	\$ 232,631	\$ 4,000	\$ 236,631
2	3	\$ 232,631	\$ 5,000	\$ 237,631
2	4	\$ 232,631	\$ 3,000	\$ 235,631
2	5	\$ 232,631	\$ 3,000	\$ 235,631
2	6	\$ 232,631	\$ 3,000	\$ 235,631
2	7	\$ 232,631	\$ 3,000	\$ 235,631
2	8	\$ 232,631	\$ 3,000	\$ 235,631
2	9	\$ 232,631	\$ 3,000	\$ 235,631
2	10	\$ 232,631	\$ 4,000	\$ 236,631
2	11	\$ 232,631	\$ 6,000	\$ 238,631
2	12	\$ 232,631	\$ 15,000	\$ 247,631
2	13	\$ 232,631	\$ 17,000	\$ 249,631
2	14	\$ 232,631	\$ 20,000	\$ 252,631
2	15	\$ 232,631	\$ 20,000	\$ 252,631
2	16	\$ 232,631	\$ 23,000	\$ 255,631
2	17	\$ 232,631	\$ 23,000	\$ 255,631
2	18	\$ 232,631	\$ 15,000	\$ 247,631
2	19	\$ 232,631	\$ 2,000	\$ 234,631
2	20	\$ 232,631	\$ 2,000	\$ 234,631
2	21	\$ 232,631	\$ 2,000	\$ 234,631
2	22	\$ 232,631	\$ 2,000	\$ 234,631
2	23	\$ 232,631	\$ 4,000	\$ 236,631
2	24	\$ 232,631	\$ 4,000	\$ 236,631
2	25	\$ 232,631	\$ 4,000	\$ 236,631
2	26	\$ 232,631	\$ 2,000	\$ 234,631
2	27	\$ 232,631	\$ 2,000	\$ 234,631
2	28	\$ 232,631	\$ 2,000	\$ 234,631
2	29	\$ 232,631	\$ 2,000	\$ 234,631
2	30	\$ 232,631	\$ 2,000	\$ 234,631
2	31	\$ 232,631	\$ 2,000	\$ 234,631
2	32	\$ 232,631		\$ 232,631
2	33	\$ 232,631		\$ 232,631
2	34	\$ 232,631		\$ 232,631
2	35	\$ 232,631		\$ 232,631
2	36	\$ 232,631	\$ 4,000	\$ 236,631
2	37	\$ 232,631		\$ 232,631
2	38	\$ 232,631		\$ 232,631
2	39	\$ 232,631	\$ 6,000	\$ 238,631
2	40	\$ 232,631	\$ 6,000	\$ 238,631

*KRS*  
*3/5/07*  
*D.A.*  
*3/6/07*

Exhibit C				
Vercello Takedown Price Schedule				
2	41	\$ 232,631	\$ 10,000	\$ 242,631
2	42	\$ 232,631	\$ 4,000	\$ 236,631
2	43	\$ 232,631	\$ 4,000	\$ 236,631
2	44	\$ 232,631	\$ 4,000	\$ 236,631
2	45	\$ 232,631	\$ 4,000	\$ 236,631
3	1	\$ 232,631	\$ 25,000	\$ 257,631
3	2	\$ 232,631	\$ 20,000	\$ 252,631
3	3	\$ 232,631	\$ 18,000	\$ 250,631
3	4	\$ 232,631	\$ 18,000	\$ 250,631
3	5	\$ 232,631	\$ 18,000	\$ 250,631
3	6	\$ 232,631	\$ 13,000	\$ 245,631
3	7	\$ 232,631	\$ 18,000	\$ 250,631
3	8	\$ 232,631	\$ 18,000	\$ 250,631
3	9	\$ 232,631	\$ 18,000	\$ 250,631
3	10	\$ 232,631	\$ 18,000	\$ 250,631
3	11	\$ 232,631	\$ 18,000	\$ 250,631
3	12	\$ 232,631	\$ 13,000	\$ 245,631
3	13	\$ 232,631	\$ 10,000	\$ 242,631
3	14	\$ 232,631	\$ 15,000	\$ 247,631
3	15	\$ 232,631	\$ 20,000	\$ 252,631
3	16	\$ 232,631	\$ 25,000	\$ 257,631
3	17	\$ 232,631	\$ 25,000	\$ 257,631
3	18	\$ 232,631	\$ 28,000	\$ 260,631
3	19	\$ 232,631	\$ 28,000	\$ 260,631
3	20	\$ 232,631	\$ 35,000	\$ 267,631
3	21	\$ 232,631	\$ 30,000	\$ 262,631
3	22	\$ 232,631	\$ 18,000	\$ 250,631
3	23	\$ 232,631	\$ 18,000	\$ 250,631
3	24	\$ 232,631	\$ 18,000	\$ 250,631
3	25	\$ 232,631	\$ 20,000	\$ 252,631
3	26	\$ 232,631	\$ 20,000	\$ 252,631
3	27	\$ 232,631	\$ 20,000	\$ 252,631
3	28	\$ 232,631	\$ 24,000	\$ 256,631
3	29	\$ 232,631	\$ 30,000	\$ 262,631
3	30	\$ 232,631	\$ 27,000	\$ 259,631
3	31	\$ 232,631	\$ 28,000	\$ 260,631
3	32	\$ 232,631	\$ 28,000	\$ 260,631
3	33	\$ 232,631	\$ 28,000	\$ 260,631
3	34	\$ 232,631	\$ 28,000	\$ 260,631
3	35	\$ 232,631	\$ 28,000	\$ 260,631
3	36	\$ 232,631	\$ 23,000	\$ 255,631
3	37	\$ 232,631	\$ 28,000	\$ 260,631
3	38	\$ 232,631	\$ 28,000	\$ 260,631
3	39	\$ 232,631	\$ 28,000	\$ 260,631
3	40	\$ 232,631	\$ 23,000	\$ 255,631
4	1	\$ 232,631	\$ 10,000	\$ 242,631
4	2	\$ 232,631	\$ 7,000	\$ 239,631
4	3	\$ 232,631	\$ 22,000	\$ 254,631
4	4	\$ 232,631	\$ 20,000	\$ 252,631
4	5	\$ 232,631	\$ 22,000	\$ 254,631
4	6	\$ 232,631	\$ 15,000	\$ 247,631
4	7	\$ 232,631	\$ 7,000	\$ 239,631
4	8	\$ 232,631	\$ 7,000	\$ 239,631
4	9	\$ 232,631	\$ 7,000	\$ 239,631
4	10	\$ 232,631	\$ 28,000	\$ 260,631
TOTAL		\$ 26,287,303	\$ 1,400,000	\$ 27,687,303

*KAC*  
*3/5/07* *Q/d.*  
*3/6/07*

**ADDENDUM C**  
**Wedgewood and Wedgewood Lane**  
**126 Lots**  
**March 23, 2007**

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007, by and between Westcott Holdings, Inc. ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement."

Pursuant to the Agreement, Purchaser and Seller hereby agree to the following:

- 1) Allocation of Purchase Price, Payment of Purchase Price and Scheduled Closing Date (Paragraph 3 and 5a of the Agreement, respectively) shall be amended as follows:
  - a) The First Closing shall be comprised of 37 Lots ~~42 through 45~~ of Division 2, lots 1 through 12, 14 through 17, 21, and 25 through 40 of Division 3. *x RBT 3/24/07*
  - b) The Second Closing shall be 38 lots, comprised of Lots 1 through 18 of Division 1, Lots 29 through 31 of Division 2, Lots 13, 18 through 20, and 22 through 24 of Division 3, and Lots 1-10 of Division 4.
- 2) Seller agrees to cooperate with Purchaser's efforts to, for the purposes of Construction, locate a Job Shack on lots 15 and 16 of Division 2, to occur prior to closing.
- 3) For clarity of Boundary Line Adjustments, Paragraph 8 of Addendum B is amended as follows:
  - a) In Division 1, move the common boundary between Lots 10 and 11 three feet to the west.
  - b) In Division 1, move the common boundary between Lots 12 and 13 four feet to the east.
  - c) In Division 1, move the common boundary between Lots 14 and 15 five feet to the west.
  - d) In Division 2, move the common boundary between Lots 39 and 40 two feet to the west.
  - e) In Division 3, move the common boundary between Lots 4 and 5 three feet to the south.
  - f) In Division 3, move the common boundary between Lots 7 and 8 three feet to the north.
  - g) In Division 3, move the common boundary between Lots 10 and 11 three feet to the south.

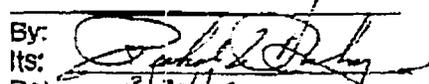
**PURCHASER:**

Westcott Holdings, INC.

  
By: Kerek Edwards  
Its: VP of Land Acquisition  
Date: 3/23/07

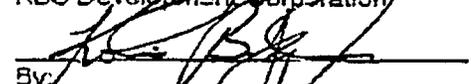
**SELLER:**

(DIVISIONS 1, 2, 3, AND 5)  
Wedgewood at Renton, Inc.

  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: 3/24/07

**SELLER:**

(DIVISION 4)  
KBS Development Corporation

  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: 3/24/07

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

VerCello/Wedgewood Divisions 1, 2, 3 and 4  
March 15, 2007

WESTCOTT HONES  
NORTHWARD

03/26/2007 09:14 42548 97  
03/24/2007 10:37 FAX 4257474157

*Handwritten:* KBT  
*Handwritten:* FRE

- 1) Remove all debris from the lots, including wood, branches, metal, PVC pipe, concrete and general trash.  
**REMOVE ALL TRASH FROM COMMON TRAILS**
- 2) NOTE: There are several locations throughout the project where runoff has eroded or softened some of the soil at the back side of the sidewalk; specifically, along the fronts of Division 2 Lots 3-14, Division 1 Lots 16-18, Division 3 Lots 12-13, Division 4 Lots 1-2 and 8-10.
- 3) Repair sections of split rail fence throughout the project.
- 4) NOTE: Landscaping is guaranteed for one year from the dates of installation, which were September 2000 for Divisions 1-3, and December 2000 for Division 4.
- 5) All streets and catch basins within the project will be cleaned once prior to the First Closing, after which point they are the responsibility of the Purchaser. Purchaser is aware that it will need to clean the catch basins at the City's satisfaction prior to release of Seller's Maint. Bonds.
- 6) In Division 4, all driveway approaches on NE 10th Street were substandard, and not of good quality workmanship - LandTrust will replace.  
**↳ SIDEWALKS**
- 7) NOTE: The sidewalks along NE 10th Street east of Lot 18 of Division 3 were not reviewed as a part of this walk-through.
- 8) NOTE: The sidewalks along NE 10th Street west of Lot 1 of Division 4 were not reviewed as a part of this walk-through.

*Handwritten:* KBT  
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INITIAL SELLER

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Page 1 of 10

INITIAL BUYER

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*Handwritten date:* 3/23/07

March 16, 2007

Div. #1

WESTCOTT HOMES

NORTHEAST

4254851597

09:14

03/26/2007

03/24/2007 10:37 FAX 42574741

KBT  
FPC  
Q20

Lot No.	Comments
1	None.
2	None.
3	None. NOTE: HAILLINE CRACKS ON BACK OF SIDEWALK NEAR WEST PROP. LINE
4	None.
5	None.
6	None.
7	None.
8	None.
9	Add and compact backfill between the back of sidewalk and the water meter box near the NE property corner.
10	None.
11	NOTE: soft soils at backside of driveway apron at the property line with Lot 12
12	See above.
13	None.
14	None.
15	None.
16	NOTE: Backfill behind sidewalk has been eroded due to runoff.

INITIAL SELLER

*Q20*  
*KBT*

INITIAL BUYER

*FPC*  
*3/28/07*

03/26/2007 09:14 4254 597  
03/24/2007 10:37 FAX 4237474157

WESTCOTT HOMES  
NORTHWARD

PAGE 08/11  
2/006

Vertebral/Waagnwail Divisions 1, 2, 3 and 4  
March 15, 2007

Div #1

Lot No.	Comments
17	NOTE: Backfill behind sidewalk has been eroded due to runoff.
18	NOTE: Backfill behind sidewalk has been eroded due to runoff; street light pad has two parallel cracks.

INITIAL SELLER

*[Handwritten Signature]*  
KBT

Page 3 of 10

INITIAL BUYER

*[Handwritten Signature]*  
2/22/07

WESTCOTT HOMES 4254 597 PAGE 08/11



Verde/Wedgewood DIVISIONS 1, 2, 3 and 4  
March 15, 2007

Div # 2

Lot No.	Comments
17	NOTE: Street light pad has a hairline crack.
18	None.
19	Fence posts on rear property line are leaning -- LandTrust will reset.
20	Fence posts on rear property line are leaning -- LandTrust will reset; hairline crack in curb line at drive cut
21	Fence posts on rear property line are leaning -- LandTrust will reset.
22	Fence posts on rear property line are leaning -- LandTrust will reset.
23	Fence posts on rear property line are leaning -- LandTrust will reset.
24	Fence posts on rear property line are leaning -- LandTrust will reset; remove pea-gravel, other rocks and concrete from the lot.
25	None.
26	Install rebar and stake at NW and SW corners on east side of wall denoting offset to property pin.
27	Install rebar and stake at SW property corner on east side of wall denoting offset to property pin.
28	Install rebar and stake at SW property corner on east side of wall denoting offset to property pin.
29	Install rebar and stake at SW property corner on east side of wall denoting offset to property pin.
30	Install rebar and stake at SW property corner on east side of wall denoting offset to property pin.
31	Install rebar and stake at SW property corner on east side of wall denoting offset to property pin; repair tire marks in adjacent landscaping strip to the south.

INITIAL SELLER

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Page 5 of 10

INITIAL BUYER

*[Handwritten initials]*  
3/23/07

VerCala/Wedgewood Divisions 1, 2, 3 and 4  
March 16, 2007

*Div # 2*

Lot No.	Comments
32	None.
33	None.
34	None.
35	None.
36	None.
37	None.
38	Patch and restabilize slope at the NE property corner.
39	NOTE: Street light pad has a hairline crack.
40	None.
41	None.
42	NOTE: Street light pad has a hairline crack; hairline crack in curb line just north of driveway.
43	Small section of sidewalk is discolored/has a poor finish - LandTrust will replace.
44	None.
45	Street light pad is leaning to the north and the pad has come away from the sidewalk - LandTrust will remove the pad, shore-up and pour additional concrete around the base of the light, repair the pad and reset the light pole.

INITIAL SELLER

*[Handwritten Signature]*  
KBT

INITIAL BUYER

*[Handwritten Signature]*  
12/102

Var/Galler/Wedgewood Divisions 1, 2, 3 and 4  
 March 15, 2007  
 DU # 3

KST  
 AR  
 Q/A

KST  
 AR  
 Q/A

Lot No.	Comments
1	NOTE: Hairline crack in the gutter line of the driveway apron.
2	Raise PSE, Comcast and Qwest utility boxes. <b>to BACK OF SIDEWALK GRADE. to extent feasible</b>
3	None.
4	NOTE: There is a crack in the curb line, parallel with the sidewalk.
5	None.
6	None.
7	None.
8	None.
9	None.
10	None.
11	NOTE: 2 hairline cracks in the sidewalks at the north end of the lot.
12	NOTE: Street light pad has two cracks. The SE property corner pin has fallen out of the curb, leaving a dent in the curb line -- LandTrust will reset pin and repair curb.
13	None.
14	NOTE: There is a crack in the curb line, parallel with the sidewalk at the SE corner of the lot. Tract 1 to the east has two cleanouts which need to be dropped to grade level; a hairline crack was noted in the curb at the NE corner of the tract; LandTrust will clean up the dirt and rock debris covering the grass.
15	NOTE: Along the bridge south of Lot 15, the following damage was noted: 2 cracks in the curb line at the south end of the bridge, west side.
16	None. <b>RENU CONTAINER TO BE REMOVED + RUST/RUNOFF CLEANED</b>

X  
 X  
 X

INITIAL SELLER Dad  
 KST

INITIAL BUYER AR  
 3/23/07

VorCello/Wadgewood Divisions 1, 2, 3 and 4  
March 15, 2007

Div. # 3

Lot No.	Comments
17	NOTE: Hairline crack on the sidewalk on the west side of the driveway apron.
18	The slope near the south property line is eroding - LandTrust will patch and restabilize.
19	None.
20	None.
21	The slope at the SE property corner is eroding - LandTrust will patch and restabilize.
22	None.
23	None.
24	None.
25	In the landscaping tract at the NW corner of the lot, the iron cap to the gas main sits above grade - LandTrust will lower the cap.
26	None.
27	None.
28	None.
29	The slope at the south property line is eroding - LandTrust will patch and restabilize. + CLEAN OUT DRAINAGE STRUCTURES THAT REGION HAS COVERED.
30	The slope at the east bank of Pond A is eroding - LandTrust will patch and restabilize.
31	None.

KAT  
KAT

INITIAL SELLER

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KAT

Page 8 of 10

INITIAL BUYER

*[Handwritten initials]*  
3/23/07

VorCello/Wedgewood Divisions 1, 2, 3 and 4  
March 15, 2007

DIV # 30

Lot No.	Comments
32	The 15-floor mailbox at this lot was damaged - LandTrust will replace the mailbox and pedestal.
33	None.
34	Reshape the branch at the NE corner of the lot to allow standing water on this lot to drain into the pond.
35	None.
36	Remove the leftover rip-rap rock from the lot.
37	None.
38	None.
39	None.
40	Patch and restabilize slope at SE corner of lot; remove branches from lot. To the east, adjacent to Tract H the following damage was noted: hairline crack in the curb, a patch in the east edge of the sidewalk, and some discoloration to the sidewalk - LandTrust will remove discoloration.

INITIAL SELLER

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KBT

Page 9 of 10

INITIAL BUYER

*[Handwritten initials]*  
3/23/07

March 15, 2007

Doc # 4

WESTCOTT HOMES

NORTHWARD

03/26/2007 09:14 425485157  
03/24/2007 10:39 FAX 4257474157

KPT  
Q/A  
APE

KPT  
Q/A  
APE

KPT  
Q/A  
APE

Lot No.	Comments
1	A tree was blown down in the landscaping strip to the west of this lot - LandTrust will replace the tree.
2	Install mailboxes in front of this lot.
3	Cut down dangerous/leaning trees near the rear property line. + REMOVE STUMPS / DEBRIS
4	Cut down dangerous/leaning trees near the rear property line; the asphalt edge is sinking near the front corner of the lot - LandTrust will repair. + REMOVE STUMPS / DEBRIS
5	NOTE: Water meter box sits a few inches high in relationship to the asphalt. However, it is not known at this time if Westcott intends to raise the grade of the private access road - if they do not, LandTrust will lower the meterbox.
6	None.
7	None.
8	Raise PSE, Comcast and Qwest utility boxes. TO BACK OF SIDEWALK GRADE TO EXTENT FEASIBLE
9	NOTE: There is a hairline crack in the curb line of the driveway, near the expansion joint.
10	NOTE: There is a hairline crack in the curb line of the driveway, near the expansion joint.

SELLER ACCEPTANCE

*[Signature]*

*[Signature]*

Date 3/26/07

PURCHASER ACCEPTANCE:

*[Signature]*

Date 3/23/07

INITIAL SELLER

*[Initials]*  
KPT

Page 10 of 10

INITIAL BUYER

*[Initials]*  
2/23/07

ADDENDUM/AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated January 30, 2007 1  
between Westcott Holdings, Inc. ("Buyer") 2  
and Wedgwood at Renton, Inc. and KBS Development Corporation ("Seller") 3  
concerning 113 lots in Divisions 1-4 of Wedgwood (see addendum A) Renton, KC, Washington ("the Property") 4

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS. 5

1. Purchaser and Seller agree that the final walk-thru has been completed (see revised Exhibit D attached 6  
hereto) and all items triggering closing have been completed by Seller and closing shall proceed ~~within 5 days~~ 7  
~~hereto~~ ON JULY 31, 2007. 8  
9

2. Seller shall still have the responsibility of completing items 4,6 and 9 from page 1 of attached Final 10  
Walk-Thru Exhibit D and both Purchaser and Seller acknowledge their respective responsibilities outlined in 11  
Exhibits B and D before and after First Closing. 12  
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38

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged 41

AGENT (COMPANY) John L. Scott- KMS 42

BY: [Signature] 43

Initials: BUYER: ARE DATE: 7/23/07 SELLER: [Signature] DATE: 7/23/07 44  
BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: KBT DATE: 7/23/07 45

# EXHIBIT D

## FINAL WALK-THROUGH

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

### GENERAL COMMENTS

- 1) The lots are generally clean and free of trash and debris
- 2) At the time of this walk-through, several locations throughout the project where it was previously noted that runoff had eroded or softened some of the soil at the back side of the sidewalks appeared stable and the soils had hardened. *SELLER WARRANTS sidewalks noted in original written damage report against future damage caused in whole or in part by lack of original soil compaction. Except in areas where Purchaser or its subcontractors have caused further erosion of the soils at the backside of the sidewalks by neglecting to maintain appropriate erosion control measures, or when sidewalk damage occurs as a result of Purchaser or its subcontractors running heavy equipment over the sidewalk.*
- 3) Sections of split rail fence have been repaired.
- 4) Landscaping is guaranteed for one year from the dates of installation, which were September 2006 for Divisions 1-3, and December 2006 for Division 4  
 Currently Five pine trees  
 Currently One pine tree
- 4) *LandTrust will remove dead pine trees in the Common Area Tracts in Division 2 along Hoquiam and at the entry, in Division 4 along NE 10th Street and in Division 3 along NE 10th Street prior to the First Close; we will replace prior to the end of the warranty period.*
- 5) All streets and catch basins within the project were cleaned on Wednesday, June 27, 2007. They are now the responsibility of the Purchaser. Purchaser is aware that it will need to clean the catch basins at the City's satisfaction prior to release of Seller's Maint. Bonds.
- 6) The west side of the berm in Pond A has eroded -- LandTrust will repair prior to October 15, 2007.  
 Seller indemnifies purchaser against any and all liability associated with repair of berm in Pond A and warrants ~~the~~ work to satisfaction of local jurisdiction
- 7) Sidewalks in Division 4 were replaced
- 8) *Any punchlist items noted in bold italics are items that must be accomplished in order for lots to be deemed "finished" by Purchaser, pursuant to Paragraph 8 of the Purchase and Sale Agreement; First Closing shall commence upon completion of these items. And sign off and acceptance of work by Purchaser*
- 8) All lot missing lot staking, curb plugs and pins noted on the walk-through will be corrected prior to the First Closing, after which maintenance of the lot staking and any re-staking due to damage or vandalism will be the responsibility of the Purchaser
- 9) Land Trust will ~~complete work~~ at entry of Division Two immediately following ~~Quest's completion of area-wide infrastructure work.~~  
*install handicap ramp, remove two poles, and restore holes left by poles*  
**THE SIDEWALK IMMEDIATELY TO THE EAST & ADJACENT TO THE HANDICAP RAMP.**

QALB 7/18/07 FRC 7/18

QALB 7/18/07

QALB 7/18/07 FRC 7/23/07

No Later than 7/29/07  
 QALB FRC 7/23/07 7/23/07

QALB 7/23/07 FRC 7/23/07

INITIAL SELLER

*QALB*  
*KBT*

INITIAL BUYER

*QALB*  
*7/18*

Page 86

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4  
July 17, 2007

Page 87

*Q/S  
7/18/07 KRE*

*Q/S  
7/18/07 KRE*

*Q/S  
7/18/07 KRE*

DIVISION 1	
Lot No.	Comments
1	None.
2	None.
3	None Note: hairline cracks on back of sidewalk near West property line.
4	None.
5	None.
6	None.
7	None.
8	None.
9	None.
10	None
11	NOTE: soft soils noted during March walk through at backside of driveway apron had stabilized and hardened. Subject to item two of General Comments.
12	See above.
13	None.
14	None
15	None.
16	NOTE: Backfill behind sidewalk that had been eroded due to runoff during the March walk-through appeared to be well-stabilized. Subject to item two of General Comments.

INITIAL SELLER *[Signature]*  
*K13T*

INITIAL BUYER *[Signature]*  
*7/18*

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

DIVISION 1	
Lot No.	Comments
17	NOTE: Backfill behind sidewalk that had been eroded due to runoff during the March walk-through appeared to be well-stabilized.
18	NOTE: Backfill behind sidewalk that had been eroded due to runoff during the March walk-through appeared to be well-stabilized; street light pad has two hairline cracks.

Comments for Lot 17 and Lot 18 subject to item two of General Comments.

*CRE  
7/18  
7/18/07*

INITIAL SELLER

*[Signature]*  
KBT

INITIAL BUYER

*[Signature]*  
7/18

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

**DIVISION 2**

Lot No.	Comments
1	Power meter for irrigation and monument lighting was righted and additional trees installed. Add'l staking was installed.
2	<i>Install rebar and stake at SW property corner on east side of wall denoting offset to property pln (LandTrust will accomplish prior to First Closing)</i>
3	None.
4	NOTE: Backfill behind sidewalk that had been eroded due to runoff during the March walk-through appeared to be well-stabilized. Subject to item two of General Comments.
5	None.
6	None.
7	None.
8	None.
9	None.
10	None.
11	NOTE: Backfill behind sidewalk that had been eroded due to runoff during the March walk-through appeared to be well-stabilized. Subject to item two of General Comments.
12	None.
13	None. Seller warrants East property line against any and all fence line encroachment.
14	None.
15	None.
16	None.

*Q.P.D.  
7/18/07  
KBT*

*Q.P.D.  
7/18/07  
KBT*

*Q.P.D.  
7/18/07  
KBT*

INITIAL SELLER *Q.P.D.*  
*KBT*

INITIAL BUYER *ARE*  
*KBT*

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

DIVISION 2	
Lot No.	Comments
17	NOTE: Street light junction box pad has a hairline crack.
18	None.
19	LandTrust will verify rear property corners are properly staked prior to First Closing.
20	LandTrust will verify rear property corners are properly staked prior to First Closing; NOTE: hairline crack in curb line at drive cut
21	LandTrust will verify rear property corners are properly staked prior to First Closing.
22	LandTrust will verify rear property corners are properly staked prior to First Closing.
23	LandTrust will verify rear property corners are properly staked prior to First Closing.
24	LandTrust will verify rear property corners are properly staked prior to First Closing.
25	LandTrust will verify rear property corners are properly staked prior to First Closing.
26	Install rebar and stake at NW property corner on east side of wall denoting offset to property pin.
27	None.
28	None
29	None
30	Remove asphalt debris from lot. NOTE: Mailbox slightly damaged by Westcott.
31	None

INITIAL SELLER

*[Handwritten Signature]*  
KBT

INITIAL BUYER

*[Handwritten Signature]*  
JLS

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

DIVISION 2	
Lot No.	Comments
32	NOTE: Lot-side edge of drive cut was damaged by Westcott.
33	Damage to lot-side edge of sidewalk, near fire hydrant -- LandTrust will repair.
34	NOTE: The finish on the newly-installed section of sidewalk is stippled. LandTrust does not feel this warrants replacement of the sidewalk. Westcott accepts the substandard quality of sidewalk as is.
35	None.
36	None.
37	None.
38	None.
39	NOTE: Street light pad has a hairline crack.
40	Replace curb plug at common boundary with Lot 41.
41	None.
42	NOTE: Street light pad has a hairline crack; hairline crack in curb line just north of driveway apron
43	None.
44	None.
45	None.

*Handwritten:* 7/18/07  
KRE  
7/18

INITIAL SELLER

*Handwritten initials:* KBF

INITIAL BUYER

*Handwritten initials:* ARE  
7/18

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

**DIVISION 3**

Lot No.	Comments
1	NOTE: Hairline crack in the gutter line of the driveway apron.
2	None.
3	<b>Replace curb plug at common boundary with Lot 4.</b>
4	NOTE: There is a crack in the curb line, parallel with the sidewalk.
5	None.
6	None.
7	None.
8	None.
9	None.
10	None.
11	NOTE: 2 hairline cracks in the sidewalks at the north end of the lot.
12	NOTE: Street light pad has two cracks.
13	None.
14	NOTE: There is a crack in the curb line, parallel with the sidewalk at the SE corner of the lot. A hairline crack was noted in the curb at the NE corner of the tract.
15	<b>Landtrust will repair damage to the lot-side edge of the sidewalk, just south of the drive-cut.</b> NOTE: Along the bridge south of Lot 15, the following damage was noted: 2 cracks in the curb line at the south end of the bridge, west side.
16	NOTE: Hairline crack in driveway apron.

INITIAL SELLER

*[Handwritten initials]*

INITIAL BUYER

*[Handwritten initials]*  
7/18/07

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4

July 17, 2007

**DIVISION 3**

Lot No.	Comments
17	NOTE: Hairline crack on the sidewalk on the west side of the driveway apron.
18	None.
19	None.
20	None.
21	None.
22	None.
23	None.
24	None.
25	None.
26	None.
27	None.
28	None.
29	<i>LandTrust will provide confirmation from a licensed public engineer that the previously eroded slope conditions along the south property line of this lot have not compromised the function of the level spreaders at the toe of the slope.</i> NOTE: Hairline crack in the streetlight pad to the south of this lot.
30	<i>LandTrust will re-stake rear property corners and storm stub location prior to First Closing;</i> NOTE: There are cracks in the mud around the MH collar at the drainage control structure at Pond A.
31	<i>LandTrust will re-stake rear property corners and storm stub location prior to First Closing.</i>

INITIAL SELLER

*[Handwritten initials]*  
KBT

INITIAL BUYER

*[Handwritten initials]*  
7/18/07

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4  
July 17, 2007

DIVISION 3	
Lot No.	Comments
32	LandTrust will re-stake rear property corners and storm stub location prior to First Closing.
33	LandTrust will re-stake rear property corners and storm stub location prior to First Closing.
34	LandTrust will re-stake rear property corners and storm stub location prior to First Closing.
35	LandTrust will re-stake rear property corners and storm stub location prior to First Closing.
36	None.
37	None.
38	None.
39	None.
40	NOTE: To the east, adjacent to Tract H was a hairline crack in the curb, a patch in the east edge of the sidewalk.

INITIAL SELLER

*D/B*  
*KBT*

INITIAL BUYER

*ARE*  
*7/17/07*

**FINAL WALK-THROUGH**

VerCello/Wedgewood Divisions 1, 2, 3 and 4  
July 17, 2007

*Done  
7/18/07  
KST*

DIVISION 4	
Lot No.	Comments
1	None.
2	Reinstall curb plugs and property corner pins at the front and rear of the lot. Land Trust will repair graffiti same as Lot 8 below.
3	None.
4	None.
5	NOTE: Water meter box sits a few inches high in relationship to the asphalt. However, it is not known at this time if Westcott intends to raise the grade of the private access road -- if they do not, LandTrust will lower the meterbox.
6	None
7	Reinstall curb plugs and property corner pins at the front and rear of the lot.
8	LandTrust will skim the sidewalk with a thin layer of concrete to cover up the graffiti.
9	None
10	None

SELLER ACCEPTANCE

*[Signature]*

*[Signature]*

Date 7/18/07

PURCHASER ACCEPTANCE

*[Signature]*

Date 7/18/07

INITIAL SELLER

*[Signature]*  
KST

INITIAL BUYER

*[Signature]*  
7/18/07

**ADDENDUM E**  
**Wedgewood and Wedgewood Lane**  
**113 Lots**  
**July 30, 2007**

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007, by and between Westcott Holdings, Inc. ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement."

Pursuant to the Agreement, Purchaser and Seller hereby agree to the following:

Purchaser assigns all rights, interest, and obligations pertaining to said Agreement to Vercello, LLC, a wholly owned subsidiary of Westcott Holdings, Inc.

**PURCHASER:**  
Westcott Holdings, INC.

**ASSIGNEE:**  
VerCello, LLC



By: Kerek Edwards  
Its: VP of Land Acquisition  
Date: 7/30/07

By: Mark S. Donner  
Its: Manager  
Date: 7/30/07

**SELLER: (DIVISION 1,2,3)**  
Wedgewood at Renton, Inc.

**SELLER: (DIVISION 4)**  
KBS Development Corporation



By: Robert DeLong  
Its: President  
Date: 7/30/07

By: Robert DeLong  
Its: President  
Date: 7/30/07

**ADDENDUM F**  
**Wedgewood and Wedgewood Lane**  
**113 Lots**  
**July 30, 2007**

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007, by and between Westcott Holdings, Inc. ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "the Agreement."

Pursuant to Exhibit B of the Agreement, Purchaser and Seller hereby agree to the following:

The damage deposit, referenced in paragraph B of Exhibit B, for the First Closing of 37 lots shall be in the amount of Eighteen Thousand Five Hundred and No 100ths Dollars (\$18,500.00); and all deposits shall remain in an interest bearing account in escrow and the deposit shall be released upon satisfaction of the terms in Paragraph C of Exhibit B to the Agreement.

The damage deposit for the Second Closing of 38 lots shall be Nineteen Thousand and No 100ths Dollars (\$19,000.00), payable at the Second closing; the deposit shall be released upon satisfaction of the terms in Paragraph C of Exhibit B to the Agreement.

The damage deposit for the Third Closing of 38 lots shall be Nineteen Thousand and No 100ths Dollars (\$19,000.00), payable at the Third closing; the deposit shall be released upon satisfaction of the terms in Paragraph C of Exhibit B to the Agreement.

Pursuant to Paragraph C of Exhibit B to the Agreement, damage deposits for all 113 Lots will not be released until: a) the final certificate of occupancy for the last of the 113 lots has been issued, and b) Repairs, as identified in a walk-through to be completed after issuance of the last occupancy certificate, have been remedied.

**PURCHASER:**

Westcott Holdings, Inc.



By: Kerek R. Edwards  
Its: VP of Land Acquisition and Development  
Date: 7/30/07

**SELLER: (DIVISION 1,2,3)**

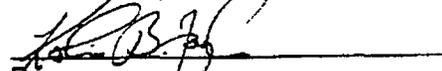
Wedgewood at Renton, Inc.



By: President  
Its: President  
Date: 7/30/07

**SELLER: (DIVISION 4)**

KBS Development Corporation



By: President  
Its: President  
Date: 7/30/07

## Addendum G

Wedgewood and Wedgewood Lane

January 29, 2008

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30<sup>th</sup> 2007 together with all related addendums and exhibits, by and between Vercello, LLC ("Purchaser" via Assignment) and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement".

Pursuant to the Agreement, Purchaser and Seller hereby agree to the following amendment:

- 1.) Earnest Money, Purchase Price, Allocation of Purchase Price and Scheduled Closing Date (Paragraph 1, 2, 3 and 5a of the Agreement respectively) shall be amended as follows as it pertains to the Second and Third Closings:
  - a.) Five Hundred and Sixty-Five Thousand and no/100 Dollars (\$565,000.00) Earnest Money Deposit shall be applied to the Second Closing.
  - b.) The Second Closing shall be 41 lots, comprised of Lots 1 through 41 of Division 2.
  - c.) The Purchase Price for the Second Closing shall be Eight Million Eight Hundred Eighty-Eight Thousand and no/100 Dollars (\$8,888,000.00). Note: the price for Second Closing is a reduced price from the original Exhibit C price schedule. The difference in overall purchase price on these lots shall be reduced from the overall Purchase Price on these lots only.
  - d.) The Second Closing shall occur on or before Thirty Five (35) days from Mutual Acceptance of this Addendum G.
  - e.) The Third Closing of 35 lots is comprised of the remainder of the lots not previously closed on by Purchaser. closing shall be on or before January 6, 2009.
  - f.) The Purchase Price for the Third Closing or additional individual lot closings shall be per Exhibit C schedule, unless otherwise agreed upon between Purchaser and Seller.
- 2.) Seller retains the right to market and sell any of the remaining 35 lots included in the Third Closing to a third party, provided that Purchaser does NOT exercise their Right of First Refusal as provided below.
- 3.) First Right of Refusal. Purchaser retains the right of first refusal to match any bona fide offer to purchase any of the remaining lots. Seller shall provide written notice and copy of signed bona fide offer, from third party to Purchaser and Purchaser shall have Two (2) business days to accept or decline terms of such offer and deliver notice to Seller in writing. If accepted, Purchaser shall deposit an equal amount of Earnest money and proceed to closing per agreed upon price and terms of said bona fide offer. If not so accepted in 2 day period than it shall be assumed declined by Purchaser and Seller may proceed to closing with third party AND the subject lots of said bona fide offer shall be removed from this Agreement. If terms of said offer are materially revised any time after Purchaser's declination, Purchaser shall have the right to exercise this right of first refusal according to the terms herein each time the terms are materially changed.
- 4.) This Addendum must be agreed upon by Purchaser, executed and delivered to Purchaser by delivery fax or email by 5:00 PM January 30<sup>th</sup> 2008 or this addendum is void and the Purchase and Sale Agreement which is the subject of this addendum shall be void.

PURCHASER:

Vercello, LLC

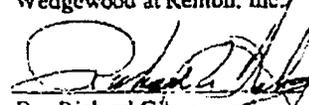
By:  Mark S. Donner

Its: Manager

Date: \_\_\_\_\_

SELLER:

(Divisions 1, 2, 3 and 5)  
Wedgewood at Renton, Inc.,

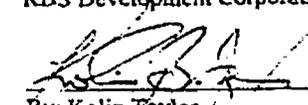
By:  Richard Glitz

Its: President

Date: 1/30/08

SELLER:

(Division 4)  
KBS Development Corporation

By:  Kolin Faylor

Its: President

Date: 1/30/08

**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2011 I caused to be served a copy of the foregoing: Brief of Respondent KBS on the following person(s) in the manner indicated below at the following address(es):

Michael M. Fleming Ryan P. McBride Lane Powell, PC 1420 Fifth Avenue, Ste. 4100 Seattle, WA 98101-2338 <i>FlemingM@LanePowell.com</i>	<input type="checkbox"/> by <b>CM/ECF</b> <input type="checkbox"/> by <b>Email</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class U.S. Mail</b> <input checked="" type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
Jeffrey P. Downer Lee Smart PS, Inc. 1800 Convention Place 701 Pike Street Seattle, WA 98101 <i>jpd@leesmart.com</i>	<input type="checkbox"/> by <b>CM/ECF</b> <input type="checkbox"/> by <b>Email</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class U.S. Mail</b> <input checked="" type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
Joseph C. Calmes Hanson Baker Ludlow Drumheller PS 2229-112th Avenue NE, Ste. 200 Bellevue, WA 98004-2936 <i>jcalmes@hansonbaker.com</i>	<input type="checkbox"/> by <b>CM/ECF</b> <input type="checkbox"/> by <b>Email</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class U.S. Mail</b> <input checked="" type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>



Steven A. Reisler