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STATE OF WASHINGTON

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No. 48566-4-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

CRJ KIM, INC., a Washington corporation,

Plaintiff/Respondent,

vs.

JKI INVESTMENTS, INC., a Washington corporation,

Defendant/Appellant.

Clallam County Superior Court No. 15-2-00346-4,
the Honorable Christopher Melly presiding

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

CRJ Kim asserts in its response that the price for the real property component of the sale of the business can be readily determined from the four corners of the agreement. But it never tells the Court what the price is. Without agreement on the price of the real property, the sale cannot be specifically performed.

Likewise, CRJ Kim fails to identify the alleged conflict between the two financing contingency provisions in the agreement. Instead, it asserts that the Financing Addendum, which its broker prepared and both parties initialed, was not part of the agreement. The trial court correctly rejected this argument, but erred in failing to properly harmonize all provisions of the contract.

II. ARGUMENT

A. **The agreement to sell JKI's business assets lacks essential terms.**

Citing *Tombari v. Griep*, 55 Wn.2d 771, 350 P.2d 452 (1960), CRJ Kim asserts that specific performance is “freely available,” but fails to address the high evidentiary standard for specific performance: there must be “clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract.” *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 55-56, 223 P.3d 513 (2009).

One of the essential terms in a contract for the sale of real property is the consideration that is to be paid for that real property. *Hubbell v. Ward*, 40 Wn.2d 779, 787, 246 P.2d 468 (1952). Despite CRJ Kim’s contention that all of the “material details and terms . . . to form a viable and enforceable agreement are present in the Purchase and Sale Agreement and the related Addenda,” Br. Resp. at 13, it is completely unable to identify the price for the real property. The “purchase price” of \$3.5 million was for the assets of the hotel *business*, which included the real property, and also for a noncompetition agreement with David Kim. The purchase price for the *real property*, however, cannot be found within the four corners of the agreement.

According to CRJ Kim, this failure is not fatal because the real property’s purchase price can be determined by deducting the value of the personal property, as determined under PSA Paragraph 14, from the purchase price for the business. That provision only applies to determining the value of *tangible* personal property:

This sale includes all right, title and interest of Seller to the following tangible personal property The value assigned to the personal property shall be \$ _____ (if not completed, the County-assessed value if applicable, and if not available, the fair market value determined by an appraiser selected by the Listing Broker and Selling Broker).

CP 141. An itemized list of the tangible personal property was given to CRJ Kim as provided in PSA Paragraph 14. CP 355-59. But the agreement contains no method for determining the price for the *intangible* property, such as goodwill, or the covenant not to compete.¹

CRJ Kim's proposed solution to that omission is to either *negotiate* the missing terms or treat the covenant not to compete as "part of the overall purchase price with no deduction." Br. Resp. at 17-18. CRJ Kim's suggestion of either alternative is an admission that the PSA lacked essential terms, and therefore could not be specifically enforced.

First, if the purchase price of the real property still needed to be negotiated in March 2015, then all of the essential elements of an enforceable contract were not present, and it cannot be specifically enforced. *Hubbell*, 40 Wn.2d at 787.

Second, if no new, separate consideration was given for the covenant not to compete, the agreement not to compete would have been unenforceable, *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). CRJ Kim argues that the PSA was fully integrated. Br. Resp. at 12-13. There is no severance clause in the PSA. The failure of a portion

¹ The importance of the non-compete to CRJ Kim is seen not only in Addendum Paragraph 12, CP 150, but also in Addendum Paragraph 13, which gives CRJ Kim the "right . . . to terminate this contract if any competition motel and hotel plan to build within 20 miles before closing." CP 151.

of a non-severable contract voids the entire contract. *Mut. of Enumclaw Ins. v. Cox*, 110 Wn.2d 643, 649, 757 P.2d 499 (1988); *Saletic v. Stamnes*, 51 Wn.2d 696, 699-700, 321 P.2d 547 (1958). In a fully integrated contract without a severance clause, if the non-compete is unenforceable for lack of consideration, the entire agreement is unenforceable. *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1263 (Pa. 2015), *cert. denied sub nom. GGNSC Gettysburg LP v. Wert*, 136 S. Ct. 1201 (2016).

It is well established in Washington that the absence of an essential term in a proposed real estate transaction invalidates the agreement. *Sea-Van Inv. Assocs. v. Hamilton*, 125 Wn.2d 120, 128-29, 881 P.2d 1035 (1994); *Setterlund v. Firestone*, 104 Wn.2d 24, 27, 700 P.2d 745 (1985); *Lager v. Berggren*, 187 Wash. 462, 467, 60 P.2d 99 (1936). The price of the real property is an essential term. *Hubbell*, 40 Wn.2d at 787. Although CRJ Kim argues that lack of allocation of the purchase price should not invalidate the PSA, it completely disregards both the basic Washington rule that price is an essential term and compelling authority from other jurisdictions that without an allocation of the purchase price in a contract that includes other property, specific performance is not an available remedy. *Biegler v. Kraft*, 924 F. Supp. 2d 1074, 1092 (D.S.D. 2013); *Mission Denver Co. v. Sound Corp. of Colo.*, 515 P.2d 1151, 1152 (Colo. App. 1973).

The most critical consequence of the lack of allocation – *i.e.*, having no agreement as to the price of the real property – is that the statutory warranty deed to the property cannot be recorded without also filing an excise tax affidavit. WAC 458-61A-303(2). CRJ Kim points out that the parties have 30 days after closing to file the excise tax affidavit, but that begs the question: whether the affidavit is filed on the closing date or 30 days later, the parties still must reach agreement on the purchase price. This was clearly recognized by the “Escrow Attorney,” CP 343, who presented an addendum to the agreement for the parties to “negotiate[],” CP 366, because “[b]oth parties must agree upon the allocation.” CP 348. He recognized that the parties (and their representatives) used the wrong form of agreement for the purchase of business assets, and that an addendum was needed to specify the price of the real property.

A party seeking specific performance cannot ask the trial court to “undertake the writing of contracts for sellers and buyers who have failed or refused, rightly or wrongly, to come to terms between themselves.” *Haire v. Patterson*, 63 Wn.2d 282, 287, 386 P.2d 953 (1963).² CRJ Kim is

² “Among the problems with requiring specific performance . . . is that this Court would have to arrive at the appropriate valuation of the home, thereby supplying an essential term on which the parties could not agree.” *Biegler v. Kraft*, 924 F. Supp. 2d 1074, 1092 (D.S.D. 2013).

unable to identify the purchase price of the real property. Because that is an essential term in a contract involving the sale of real property, the trial court erred in granting specific performance.

CRJ Kim attempts to deflect the absence of agreement on the missing essential term – the purchase price of JKI’s real property – by citing two federal cases regarding the tax consequences of business purchase price allocations. Both cases held that a sham allocation by one or both parties of the purchase price to non-compete agreements, solely to obtain otherwise unallowable deductions, was not binding on the IRS. *Gen. Ins. Agency v. Comm’r of Internal Revenue*, 401 F.2d 324 (4th Cir. 1968)³; *Leslie S. Ray Ins. Agency v. United States*, 463 F.2d 210 (1st Cir. 1972). Here, the issue is not if the IRS must accept a party’s unilateral assertion of deductions, but whether the sale of real property can be specifically enforced without agreement on an essential term – the purchase price.

Section 1060(a)(2) of the Internal Revenue Code provides:

If in connection with an applicable asset acquisition, the transferee and transferor agree in writing as to the

³ “The negotiations between [the parties] affirmatively establish that the parties never bargained over the covenant not to compete and never intended that it be included as an element of value in the over-all purchase price.” 401 F.2d at 330. Here, the Addendum makes clear that the non-compete was specifically negotiated and was important to CRJ Kim. CP 150 (Addendum Paragraph 12); CP 151 (Addendum Paragraph 13).

allocation of any consideration, or as to the fair market value of any of the assets, such agreement shall be binding on both the transferee and transferor unless the Secretary determines that such allocation (or fair market value) is not appropriate.

26 U.S.C. § 1060(a)(2). The “residual” method described in the regulations for calculating gain or loss applies in the *absence of an agreement* between the parties on the price allocation. CRJ Kim concedes this point. Br. Resp. at 19. That is exactly the reason the contract fails; there was no *agreement* on the price of the real property owned by JKI. Without agreement on price there can be no specific performance.

B. The agreement expired by its own terms.

CRJ Kim argues that Paragraph 1 of the Financing Addendum (“NEW FINANCING”) was not part of the parties’ agreement because the box next to it is not checked. Br. Resp. at 26-28. This is contradicted by overwhelming evidence of the parties’ intent.

PSA Paragraph 1 refers specifically to the Financing Addendum. The parties agreed that the purchase price for the business is payable “[a]ll cash at closing contingent on *new financing* in accordance with the Financing Addendum.” CP 137 (emphasis added). Likewise, PSA Paragraph 3 specifies that the Financing Addendum is a part of the agreement. Both parties initialed the pages of the agreement containing these provisions. Both parties also initialed the Financing Addendum.

When a contract specifically incorporates a contractual provision by reference, that provision becomes part of the contract. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009).

Further, CRJ Kim's president acknowledged that the "NEW FINANCING" provision in the Financing Addendum was part of the agreement:

Q. . . . Let me ask you to look back on the financing addendum. . . . If you look at the paragraph one, the last sentence. . . . It says, "The agreement shall terminate and buyer shall receive a refund of the earnest money unless buyer gives notice that this condition is satisfied or waived on or before 60 days following mutual acceptance."

A. Right.

Q. Is that part of the agreement between you and JKI Investments?

A. Okay. Between JKI Investments and CRJ.

Q. CRJ Kim, yes.

A. Yes.

CP 98 (ll. 9-22). CRJ Kim attempts to divert attention from its concession by pointing to later testimony by its president that CRJ Kim complied with the notice requirement by providing a notice of satisfaction of the feasibility contingency under PSA Paragraph 5. Br. Resp. at 10. His belief that providing separate notice "was not necessary" under the provision confirms, not contradicts, his intent that the provision was part of the parties' agreement. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83-

84, 60 P.3d 1245 (2003) (“The touchstone of contract interpretation is the parties’ intent.”).

The trial court rejected CRJ Kim’s argument that the “NEW FINANCING” provision was not part of the agreement, but refused to give effect to the automatic termination provision because of an unidentified conflict between the typed language of Addendum Paragraph 2 and the printed language of the “NEW FINANCING” provision. The trial court did not specify the conflict between the two provisions, other than to point out that Addendum Paragraph 2 did not contain any “duration for viability of the offer nor automatic termination of the agreement” CP 22.

A typewritten clause in a contract should prevail over a printed clause only if the two provisions are irreconcilable. *Preugschat v. Hedges*, 41 Wn.2d 660, 664, 251 P.2d 166 (1952). In this case there is nothing irreconcilable between the two provisions – they can easily be construed together. “A writing which gives effect to all of its provisions is to be favored over one which renders some of the language meaningless or ineffective.” *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). “Where possible, we harmonize clauses that seem to conflict in order to give effect to all of the contract’s provisions.” *Lui v. Essex Ins. Co.*, No. 91777-9, 2016 WL 3320769 (Wash. June 9, 2016) (citing *Realm, Inc. v.*

City of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012)). There is no irreconcilable conflict between Addendum Paragraph 2 and the Financing Addendum, and their provisions can easily be harmonized.

CRJ Kim tries to create a conflict between these two provisions by repeating an argument it made in the trial court, that “Phase 1 and 2 Reports” could take more than 60 days to complete. Br. Resp. 25-26 (citing CP 83). However, there is no admissible evidence in the record on this point; it is merely an assertion by CRJ Kim’s counsel. “Counsel’s arguments are not evidence,” *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

C. Any ambiguity must be construed against CRJ Kim, whose agent acknowledged that he intentionally introduced the ambiguity.

CRJ Kim argues at length that any ambiguities should not be construed against it because “both parties . . . drafted the final Agreement.” Br. Resp. at 21-23. However, the language in both Addendum Paragraph 2 and the Financing Addendum was supplied by CRJ Kim’s broker, Sung Woon Yop, on October 28, 2014. CP 381-82. In his declaration dated October 15, 2015, Mr. Yop identified himself “[a]s the broker who drafted the PSA.” CP 382.

“Where language is ambiguous, the party selecting, drafting, and presenting the contract . . . containing such misleading language should

suffer any consequences, “ *Seattle-First Nat’l Bank v. B.C. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977). To the extent there is any ambiguity between Addendum Paragraph 2 and the “NEW FINANCING” paragraph in the Financing Addendum, both of which were supplied by CRJ Kim’s agent, the ambiguity must be resolved against CRJ Kim and in favor of JKI. *Pierce County v. State*, 144 Wn. App. 783, 813, 185 P.3d 594 (2008).

D. Waiver of a deadline must occur before the deadline passes.

Like the trial court, CRJ Kim focuses on the wrong period of time for waiver: conduct waiving a deadline must take place *before* the deadline passes. *Mid-Town Ltd. P’ship v. Preston*, 69 Wn. App. 227, 234, 848 P.2d 1268 (1993) (“CAYA had the contract right to have the sale agreement closed on or before June 1, 1989. Any conduct waiving the June 1 date had to take place prior to June 1.”). “[O]nce a termination date expires, in the absence of an *existing* waiver or estoppel the agreement is dead.” *Id.* at 235 (emphasis added). CRJ Kim must, but fails, to demonstrate that JKI waived its right *before* the deadline “by unequivocal acts or conduct which are inconsistent with any intention other than to waive.” *Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). CRJ Kim attempts to distinguish *Mid-Town* by the fact that the deadline in *Mid-Town* was the closing date, whereas the deadline here was a notice

requirement. It fails, however, to explain why that should make any difference. A deadline is a deadline. PSA Addendum Paragraph 6 specifically stated that CRJ Kim must “remove all the contingencies on or before the end of each contingencies [*sic*],” and that if it did not, the agreement “shall become null and void.” CP 149. Further, the Agreement specifically stated that it “shall terminate . . . unless Buyer gives notice that this [financing] condition is satisfied or waived on or before . . . 60 days . . . following mutual acceptance of the Agreement.” CP 153 (Financing Addendum Paragraph 1). Like the parties in *Mid-Town*, there is no evidence that the parties discussed an extension or waiver of the 60-day notice deadline prior to the expiration date of March 3, 2015. No estoppel or waiver exists.

In contrast, the Court in *Sienkiewicz v. Smith*, 97 Wn.2d 711, 717, 649 P.2d 112 (1982) reviewed conduct of the parties and their agents *before* the contract termination date to determine that the sellers had waived the right to enforce the deadline – the sellers’ agent requested a delay of the closing date and the buyer agreed. *Id.* at 717-18. There was no request or acquiescence here.

CRJ Kim’s reliance on an older case, *Carpenters Trust of W. Wash. v. Algene Constr. Co.*, 11 Wn. App. 838, 535 P.2d 824 (1974), is also misplaced. There, the employer executed a compliance agreement

with a union in 1970, which incorporated by reference a 1968 collective bargaining agreement (“CBA”). Under the CBA, the employer was required to contribute a fixed amount per employee-hour worked to a health and retirement benefits trust fund. Although the 1968 CBA expired on June 1, 1971, the employer continued making contributions to the fund under the rate prescribed in the CBA. Later in 1971, the parties executed a new CBA, called an amendment of the 1968 CBA, which required trust fund contributions at a higher rate, retroactive to June 21, 1971. Although the employer refused to pay the higher rate in 1971, it contributed to the trust fund at the 1968 CBA rate throughout 1971 and contributed at the 1971 CBA rate throughout 1972. *Carpenters Trust*, 11 Wn. App. at 841 n.1. The employer later argued that it was not bound by the 1971 CBA because it was called an amendment of the expired 1968 CBA. But it treated the 1971 CBA as valid by making contributions to the trust fund for over 18 months after the 1968 CBA expired. Here, David Kim’s communications with CRJ Kim and its lender after March 3 are not comparable to the employer’s continued contract performance in *Carpenters Trust*.

CRJ Kim’s actions after March 3 also support a conclusion that the PSA was neither final nor binding on the parties when JKI’s conduct allegedly “waived” its termination. On March 7, CRJ Kim notified JKI it

required a *second* inspection of the business, involving both a prospective lender and others.⁴ CP 333. CRJ Kim sought to have JKI enter into employment contracts with its workforce (creating new intangible assets of the business), which could be assigned to the buyer. CP 336. Absent the termination provision, the inclusion by the buyer's agent of the second financing provision (Addendum Paragraph 2) would have permitted CRJ Kim to walk away from the "agreement" at any time until it actually closed. JKI's brief dalliance with CRJ Kim's new requests, demands, and maneuvering did not revive the expired agreement.

E. Strong expressions of dislike after being sued do not amount to tortious interference.

CRJ Kim asserts that JKI refused to sell the business because its president, David Kim, "hated the buyer." This is pure fiction – CRJ Kim tries to bootstrap a post-litigation statement into a pre-termination intent, completely mischaracterizing the testimony of real estate broker Juliana May. David Kim's statement, if made, occurred more than two months after JKI's attorney notified CRJ Kim that the agreement was terminated and a month after this lawsuit was filed. Ms. May visited David Kim at the

⁴ This second inspection demand prompted expressions of concern from JKI because the prior inspection had caused the loss of employees. CP 333. Inspection by a lender of the business may be part of its underwriting decision-making, but expanding the inspection to include other participants is inconsistent with the buyer's due diligence being concluded, or a binding agreement's existence "but for" financing.

hotel on May 29, 2015 to see if there was any way the sale to CRJ Kim could go forward. CP 91. He told her that given the lawsuit, JKI would only reconsider selling the business to CRJ Kim if the purchase price were increased by \$1,000,000.00. CP 91. According to Ms. May, David Kim told her at that time that he did “not want to sell to this particular Buyer because [he] hate[d] him 100%.” CP 376. “Hate him 100%” stands for the unremarkable proposition that people don’t like people who sue them.

If this Court agrees that the trial court erred in granting specific performance and/or that the agreement expired by its own terms, then David Kim cannot be liable for tortious interference and CRJ Kim’s claim should have been dismissed. If the Court disagrees with both of JKI’s arguments, then JKI acknowledges that there are issues of fact to be resolved at trial.

F. Respondent’s Brief contains a number of misstatements of fact and mischaracterizations.

Respondent’s Brief repeatedly asserts that JKI “terminated” the transaction between the parties. Br. Resp. at 1, 2, 15, 16, 18, 38, 39. It has always been JKI’s position that the PSA terminated by its own terms, in accordance with the express language of Paragraph 1 of the Financing Addendum. See Part II.B, *supra*.

Respondent's Brief also contains unsupported allegations concerning David Kim's state of mind or subjective intentions after the PSA was signed. *See, e.g.*, Br. Resp. at 2 ("he wanted out so he could get more money for the property"); Br. Resp. at 15 ("in their mind there was no real or actual purchase price because of what it believed (*sic*)"); Br. Resp. at 18 ("It is clear allocation was not the reason JKI terminated the Agreement."); Br. Resp. at 27 ("at all times material, JKI did not believe that the 60-day deadline applied"). None of these allegations should be given any weight by the Court in deciding this case, for two reasons. First, there is no admissible evidence in the record to support them. Second, they all refer to David Kim's alleged state of mind after mutual acceptance of the PSA. "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions." *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

III. CONCLUSION

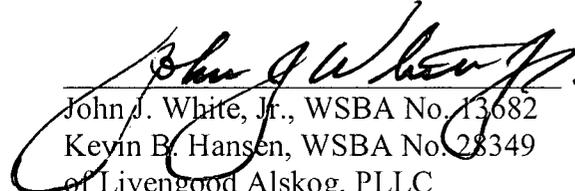
The transaction between the parties involved the sale of an ongoing hotel business. The sale was to include real property (land and hotel building), tangible personal property (furniture, fixtures and equipment), and intangible personal property (goodwill and a covenant not to compete). The agreed purchase price for all these items was

\$3,500,000.00. However, the parties never agreed as to how the price would be allocated among these items, with the result that the specific purchase price for the real property was never agreed upon. Without that essential term, the contract for the sale of the real property is unenforceable.

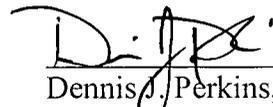
The PSA contained a Financing Addendum, which among other things provided that the PSA would automatically terminate if CRJ Kim did not give timely written notice to JKI of waiver or satisfaction of the financing contingency. CRJ Kim never gave this notice. The PSA also included a somewhat duplicative financing contingency provision, but the two provisions are not inconsistent with one another. Both clauses were supplied by CRJ Kim's agent, so any ambiguity should be construed against CRJ Kim and in favor of JKI.

Based on the foregoing, the trial court's order and judgment should be reversed, and summary judgment should be granted to JKI and David Kim.

Respectfully submitted this 27th day of June, 2016



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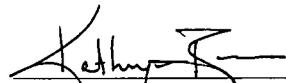
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 27, 2016, I caused service of the foregoing to the following counsel of record:

<i>Attorneys for Plaintiff:</i> Aaron S. Okrent Scott R. Scher Sternberg Thomson Okrent & Scher, PLLC 520 Pike Street, Suite 2250 Seattle, WA 98101 WSBA #18168 Ph: 206-623-4846 Email: okrentlaw@msn.com ; scott@schernet.com	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> E-Service <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
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Dated: June 27, 2016



Kathryn Barr