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NO. 51875-9-II

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

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REDSTONE BLACK LAKE 1, L.P., and REDSTONE BLACK  
LAKE 2, L.P.,

As successors in interest to Redstone Investments, LLC,

Appellant,

v.

GF CAPITAL REAL ESTATE FUND-INVESTMENT I, LLC,

Respondent.

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BRIEF OF RESPONDENT  
GF CAPITAL REAL ESTATE FUND INVESTMENT I, LLC

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Trevor A. Zandell, (WSBA #37210)  
PHILLIPS BURGESS PLLC  
724 Columbia Street NW, Suite 320  
Olympia, WA 98501  
T: (360) 742-3500  
F: (360) 742-3519

Grant Cowan (*pro hac vice*)  
FROST BROWN TODD LLC  
3300 Great American Tower  
301 East Fourth Street  
T: (513) 651-6745  
F: (513) 651-6981

*Attorneys for Respondent GF Capital  
Real Estate Fund Investment I, LLC*

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## **I. INTRODUCTION**

This case involves two commercial office buildings located in Olympia, Washington, referred to as “Black Lake 1” and “Black Lake 2,” or collectively as the “BL Buildings.” The BL Buildings were owned by Respondent GF Capital Real Estate Fund-Investment I, L.L.C. (“GF Capital”) from 2004 until May 2, 2014 when they were sold to Appellants Redstone Black Lake 1, L.P. and Redstone Black Lake 2, L.P. (as successors in interest to Redstone Investments LLC) (collectively “Redstone”).

Redstone is a sophisticated investor in commercial real estate whose principals have been involved in nearly 100 commercial real estate transactions. Redstone and GF Capital, through their respective commercial real estate lawyers, negotiated a purchase and sale agreement pursuant to which Redstone promised that no representations had been made to it concerning the BL Buildings, that it agreed that it would conduct its own independent due diligence of the BL Buildings, that it was buying the BL Buildings on an “As-Is, Where-Is, and With All Faults” basis, and that it was releasing GF Capital of any and all claims relating to the condition of the BL Buildings.

Thereafter, Redstone engaged contractors and inspection professionals as part of its due diligence and became fully aware of defects

with the BL Buildings, in particular, a history of leaks through the windows, roofs, and HVAC systems which resulted in numerous incidents of water intrusion into the BL Buildings over the years. As a result of its due diligence, Redstone's owner was concerned about "water ingress" into the BL Buildings, and the potential for rot, mold and decay inside the BL Buildings. Despite these concerns, Redstone chose not to "inquire further" of GF Capital, but instead, Redstone sought and obtained a significant reduction to the purchase price of the BL Buildings. In exchange, Redstone provided GF Capital with an additional release of any and all claims relating to the leaks and water intrusion problems—a release which clearly covers the claims filed in this case.

**Two and a half years after** Redstone bought the BL Buildings, a contractor performing work on one of the buildings discovered water damage and mold in an interior wall cavity. Redstone's building envelope expert concluded that the windows and metal panels between the windows were the most likely cause of the water damage and mold. Despite the comprehensive release given by Redstone in the PSA and the Amendment to the PSA, Redstone sued GF Capital.

Redstone contends: "This is not a case where the purchaser identified evidence of a defect at the time of sale, failed to inquire further, and then later claimed to have been unaware of the defect's extent."

(Redstone Brief, pg. 39). But that is **precisely** what happened here. After extensive discovery, GF Capital moved for summary judgment. The Superior Court properly concluded that Redstone’s suit was without merit and granted GF Capital summary judgment on all claims. The Superior Court also awarded GF Capital its attorneys’ fees and expenses incurred in defending against and prevailing upon Redstone’s claims. This Court should affirm.

## **II. STATEMENT OF FACTS—FACTUAL BACKGROUND**

### **A. THE BLACK LAKE BUILDINGS**

The BL Buildings are three-story office buildings built in 1984. CP 439-578 (Deposition of Stephen Passero (“Passero Dep.”) Dep. Exh. 13, May 5, 2014 Marx/Okubo Inspection Report). The BL Buildings have at all relevant times been leased and occupied by the State of Washington Department of Licensing (“DOL” or “Tenant”). From the time that the BL Buildings were built through the time that GF Capital owned the BL Buildings, they were maintained by a property management firm, Sierra Property Management (“Sierra”) (owned by Brad McKinley). CP 989 (Deposition of Brad McKinley (“McKinley Dep.”), pg. 16-17, 21). McKinley periodically engaged contractors and specialty firms to address issues involving leaks and water damage, including on at least one occasion, remediating mold resulting from a leak or water intrusion. (*Id.*,

pg. 58-71). Tom Fitzgerald, the President of Servpro of Olympia, Inc. (“Servpro”), testified that Servpro was hired to remediate water issues at the BL Buildings. CP 1271-1273 (Deposition of Thomas Fitzgerald (“Fitzgerald Dep.”), pg. 9-11). Fitzgerald testified that when Servpro remediated water damage at the BL Buildings, it used devices such as thermal imaging monitors, meters and probes to determine the extent of the water damage. CP 1275-1276 (Fitzgerald Dep., pg. 13-14). Using these tools and devices, Servpro looked everywhere there was water and then would dry the affected area. Servpro then monitored the structure for several days to make sure the structure was dry before Servpro left the job. CP 1274-1275 (Fitzgerald Dep., pg. 12-13). Based on Servpro’s recommendations to the property manager, Servpro’s work at the BL Buildings included removing dry interior walls to determine if there was water damage or mold behind the walls. CP 1277-1280 (Fitzgerald Dep., pg. 27-30). Fitzgerald testified that when he opened up a wall, “it’s my job to keep on going until I find the end of the problem.” CP 1284 (Fitzgerald Dep., pg. 70).

Steve Passero, owner of Rainshine Construction,<sup>1</sup> who performed work on the BL Buildings when GF Capital owned them, confirmed that all remediation work was extensive and thorough. He testified that he

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<sup>1</sup> Passero has served as **Redstone’s** Facility Manager, managing the BL Buildings, since January 1, 2015.

would observe the impacted area “in all six directions, as in—as in **open up and repair the area until you see healthy material** and consider that the repair area.” CP 1288 (Passero Dep., pg. 63) (emphasis added).

In January 2013, a leak in Black Lake 1 resulted in mold in one of the offices. Sierra engaged Rainshine Construction and Servpro to repair the leak and remediate the water damage and mold. CP 604, 606-625 (Dep. Exh. 146, January 8, 2013 McKinley email to Taussig, and Dep. Exh. 160, January 15, 2013 RGA Report, respectively). Fitzgerald testified that Servpro personnel looked for mold until they solved the entire problem. CP 1283-1285 (Fitzgerald Dep., pg. 69-71). Additionally, GF Capital’s property manager engaged RGA Environmental to conduct air quality testing and supervise the mold remediation work performed by Rainshine Construction and Servpro. *See, e.g.*, CP 606-625 (Dep. Exh. 160, January 15, 2013 RGA Report).

McKinley testified that when the BL Buildings were sold to Redstone, he did not believe there was any rot or mold in the BL Buildings. CP 1006 (McKinley Dep., pg. 86). James Taussig, GF Capital’s Managing Director who communicated with McKinley concerning the BL Properties and various maintenance and repair issues, testified that he was unaware of any mold or rot in the BL Buildings when they were sold. CP 1145 (Deposition of James Taussig (“Taussig Dep.”)),

pg. 31, 34).

**B. REDSTONE IS A SOPHISTICATED INVESTOR IN COMMERCIAL REAL ESTATE**

Redstone is one of British Columbia's largest private real estate organizations, with a diversified portfolio of properties spanning Vancouver, Canada and the Western United States. CP 1018 (Deposition of Ali Nanji ("Nanji Dep."), pg. 24). Redstone has two officers: Ali Nanji ("Nanji"), Redstone's owner and President, and Ayaz Velji ("Velji"), Redstone's Vice President/General Manager. CP 1012 (Nanji Dep., pg. 6). Nanji has been involved in over 100 commercial real estate transactions, involving between \$250 million to \$400 million worth of real estate. CP 1015 (Nanji Dep., pg. 9). Velji, who led Redstone's due diligence of the BL Buildings, had been involved in approximately 90-100 commercial real transactions prior to 2014. CP 1035 (Deposition of Ayaz Velji ("Velji Dep."), pg. 14). Redstone, at the time of its purchase of the BL Buildings, had significant knowledge of and experience in the Pacific Northwest commercial real estate market. CP 627-629 (Dep. Exh. 101, February 18, 2014 Sutherland email to Wilson).

**C. REDSTONE KNEW THE BL BUILDINGS LEAKED BEFORE MAKING AN OFFER TO BUY THEM**

Before entering into the PSA, Nanji and Velji met with McKinley. CP 701-709, 711 (Dep. Exh. 103, March 5, 2014 Muromoto email chain to

Wilson; Dep. Exh. 152, March 6, 2014 McKinley email to Taussig, respectively). They admit that McKinley told them that the BL Buildings had a history of leaks from the roofs and the HVAC system. CP 1041 (Velji Dep., pg. 40) (“they had some leaks on the roofs that they had repaired” and “his other concern was HVAC, which was coming up, and had leaked in the buildings that he had fixed as they occurred.”). According to Velji, when he and Nanji asked McKinley about water intrusion issues, McKinley acknowledged “that if at any time there was anything, it was taken care of right away. He would send an email to GF Capital personnel, and they would give him approval to fix whatever it was.” CP 1294-1295 (Velji Dep., pg. 37-38).<sup>2</sup>

#### **D. THE PURCHASE AND SALE AGREEMENT**

Effective March 14, 2014, GF Capital entered into a Purchase and Sale Agreement (“PSA”), pursuant to which GF Capital agreed to sell four commercial real estate buildings (referred to herein as the “Property” or “Properties”) to Redstone. CP 3 (Complaint ¶¶ 15-17). Black Lake 1 and 2, the BL Buildings, were two of the four buildings sold to Redstone pursuant to the PSA. GF Capital also sold Black Lake 3, a building just across the street from the BL Buildings, and a building in Bellingham,

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<sup>2</sup> As discussed below in the Argument section, McKinley’s alleged statements to Redstone cannot form the basis of Redstone’s fraudulent concealment claim.

Washington. Redstone was represented by legal counsel who specialized in commercial real estate transactions and whom Redstone had used for other commercial real estate transactions prior to the Black Lake transactions. CP 662, 1044 (Dep. Exh. 170, PSA Section 23.16; Velji Dep., pg. 47, respectively).

For purposes of this case, the most important provision in the PSA is Section 8.2. In that section, Redstone agreed that it was buying the BL Buildings on an “As-Is, Where-Is, and With All Faults” basis, without representations or warranties of any kind, including relating to the condition of the BL Buildings. CP 643-644 (PSA, Section 8.2). Consistent with the sale being an “As-Is, Where-Is, and With All Faults” sale, **Redstone** made certain promises to **GF Capital**, including (a) that no person acting on behalf of GF Capital was authorized to make any representations about the condition of the Property; (b) that no person had made any such representation; and (c) that, as of the closing, Redstone will have “independently and personally inspected the Properties” and “satisfied itself as to the condition of the Properties...and their suitability for [Redstone’s] intended use.” CP 632-699 (PSA, Section 8.2).

Under the PSA, Redstone was given until the end of the “Due Diligence Period,” or April 24, 2014, to make “any and all inspections, investigations, tests and studies of the Property as [Redstone] elects to

make or obtain.” Under the PSA, Redstone was free to do any testing and inspections it desired of the BL Buildings—including invasive or destructive testing—provided that its testing and inspections did not materially interfere with GF Capital’s or DOL’s use of the Properties and provided that Redstone restored the Properties. CP 655-656 (PSA, Section 20.1).

GF Capital and Redstone agreed in the PSA that GF Capital would provide Redstone with certain specifically enumerated “due diligence materials” identified in Exhibit H to the PSA. CP 643, 1020 (Dep. Exh. 170, PSA Section 7.1; Nanji Dep., pg. 43, respectively). Redstone agreed that it would conduct its own due diligence review of the matters contained in the due diligence materials. CP 643 (Dep. Exh. 170, PSA Section 7.1).

Finally, consistent with the sale being on an “As-Is, Where-Is, and With All Faults” basis, and consistent with the requirement that Redstone conduct its own due diligence concerning the BL Buildings, Redstone gave GF Capital a comprehensive release of all claims (including tort claims such as fraudulent concealment) Redstone has or might have with respect to the condition of the BL Buildings or “any other state of facts that exists with respect to the” BL Buildings. CP 632-699 (Dep. Exh. 170, PSA).

### **E. REDSTONE'S DUE DILIGENCE REVEALED DEFECTS WITH THE BL BUILDINGS**

Redstone conducted due diligence of the BL Buildings, which included exercising its right under the PSA to meet with the Tenant (DOL personnel) to walk-through the BL Buildings. CP 632-699 (PSA, Section 20.3); CP 819 (Dep. Exh. 188, April 29, 2014 Parsons email to Roberts). DOL representatives told Redstone that there were issues with the HVAC systems and that they had leaks periodically. CP 1118-1119 (Deposition of Pamela K. Parsons, pg. 63-64). In addition to Redstone's own inspection of the BL Buildings, Redstone's due diligence included engaging several contractors and an architectural firm to evaluate and inspect the BL Buildings. Each of these contractors and specialists alerted Redstone to various defects with the BL Buildings.

First, Redstone engaged a building envelope specialist, Don Henricksen of Applied Construction Systems, to inspect Black Lake 3 located across the street from Blake Lake 1 and 2. Henricksen told Redstone that there was a possibility if they opened up the walls in Black Lake 3, the sheathing insulation and framing could be damaged "with the possibility of mold in the wall with moisture being there as long as it has." CP 716-718 (Dep. Exh. 174, March 28, 2014 EIFS quote email). Nanji dismissed the concerns about mold in the building as simply "a **scare**

**tactic.”** CP 1022-1023 (Nanji Dep., pg. 50-51).

Redstone also asked Henricksen, as part of its due diligence, to “tell us how we can repair” some of the areas of the thin brick veneer cladding at the BL Buildings. CP 713-714 (Dep. Exh. 173, March 24, 2014 Velji email to Henricksen). Henricksen advised Redstone that there were some “problem areas” on the exterior of the BL Buildings and recommended that Redstone “have a painting contractor re-coat the entire building with a new elastomeric or acrylic finish”. CP 716-718 (March 28, 2014 Henricksen email). Redstone did not discuss the problems areas with Henricksen and did not perform the work he recommended, despite knowing that if water got into the wall cavity of a building, it could damage the materials and potentially lead to mold. CP 1051-1052 (Velji Dep., pg. 65, 69).

Second, on April 4, 2014, Redstone (Velji) asked Capitol Glass, an Olympia commercial and residential window contractor, for a “complete quote on re caulking<sup>3</sup> [sic] and re glazing [sic] all of the windows/seals [in the BL Buildings] and when you feel this work needs to be done.” CP 720-721 (Dep. Exh. 176, April 4, 2014 Velji email). Capitol Glass provided a quote for the window repair work on April 15, 2014. CP 723-

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<sup>3</sup> Caulking is typically used to seal gaps between building components to prevent moisture from getting into the building, and if the caulking has come loose or is not adhered anymore, it allows a pathway for moisture to get into the building. CP 1084 (Middaugh Dep., pg. 19).

724 (Dep. Exh. 177, April 15, 2014 Capitol Glass quote). Capitol Glass advised that some of the “**break metal between the windows is coming off and the caulking has failed**” and “**both buildings need to be checked out and fix the break metal, re seal [sic] it and or re anchored [sic].**” (*Id.*) (emphasis added). Capitol Glass provided an estimate of \$5,000 to \$6,000 “to check each window for need of re seal, and or re anchor of break metal.” (*Id.*). Justin Perry, the Capitol Glass employee who observed the problems with the metal panels between the windows, testified that “some of the break metal was starting to peel off the building and some of the caulking was starting to fail,” raising concerns of “[w]ater and moisture getting in the building.” CP 1093 (Deposition of Justin Perry (“Perry Dep.”), pg. 15). Perry testified that he believed that the BL Buildings needed to be checked and the break metal needed to be fixed to prevent water from getting into the BL Buildings. CP 1094 (Perry Dep., pg. 17). Redstone waited until **after** it bought the BL Buildings to perform the additional investigation recommended by Capitol Glass. CP 824-831 (Dep. Exh. 194, Plastering Plus Building Assessments).

Third, in connection with its due diligence, Redstone engaged Marx/Okubo Associates, Inc. (“Marx”), an architectural and engineering firm specializing in property condition assessments (“PCA”), to perform a PCA for Redstone on the BL Buildings. Marx observed and reported to

Redstone various defects with the BL Buildings, including leaks, evidence of water intrusion, and failed caulking throughout. On April 18, 2014, after inspecting the BL Buildings, Marx provided Redstone with an Executive Summary and Costs. CP 766-782 (Marx Executive Summary). The Executive Summary noted that (a) the BL Buildings had separating cracks<sup>4</sup> at select outside corners in the thin brick veneer siding; (b) one south wall face had a clear surface sealer applied, “indicating possible evidence of past water infiltration” and (c) the various methods of installation and wet sealing of the windows in the BL Buildings “suggest that **there have been numerous repairs over the years due to water infiltration.**” CP 766-782 (Dep. Exh. 181, April 18, 2014 Executive Summary) (emphasis added). Redstone never asked GF Capital if the defects revealed by the Marx inspection, including leaking windows and failed caulking resulting in water infiltration issues, had led to mold in the BL Buildings. CP 1032 (Nanji Dep., pg. 106). Moreover, Redstone understood that it had the right, under the PSA, to have Marx perform invasive testing as part of its PCA, but it didn’t ask Marx to do any invasive testing. CP 1059 (Velji Dep., pg. 88).

Redstone incorrectly asserts that McKinley attended the Marx inspection but was unwilling to discuss the maintenance history of the BL

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<sup>4</sup> A separating crack is one with an opening to it and is not a hairline crack. CP 1108-1109 (Helms Dep., pg. 49-50).

Buildings, citing the testimony of Helms. (Redstone Brief, pg. 18). In fact, Helms acknowledged that others at Marx would have had discussions with McKinley concerning the condition of the BL Buildings, since he (Helms) was only present for “oversight.” CP 1386 (Helms Dep., pg. 30:6-13). Additionally, the ASTM standards governing property condition assessments, which Redstone contends Marx substantially complied with (Redstone Brief, pg. 18, n.4), specifically provide that if the property manager is not available for interview (whether by intent or inconvenience) or fails to respond in full or in part to questions posed by the consultant, “the consultant should disclose such within the PCR [Property Condition Report].” CP 726-751 (ASTM Standard). The Marx report noted that McKinley was present for the inspection but did **not** say that McKinley was unavailable for interview or failed to respond to questions from Marx.

Redstone faults GF Capital for failing to complete a questionnaire prepared by Marx and provided to CBRE (GF Capital’s real estate broker) for GF Capital to complete. (Redstone Brief, pg. 17). GF Capital did not complete the questionnaire because it was not required to do so under the PSA and because CBRE recommended that GF Capital **not** complete the questionnaire. CP 1250-1267 (April 7, 2014 Wilson email to Taussig) (“If you want to answer any of their long list of questions please do that and

I'll return. There's really nothing to gain so **I wouldn't recommend responding.**") (emphasis added).

**F. REDSTONE SOUGHT AND OBTAINED AN AMENDMENT TO THE PSA, REDUCING THE PURCHASE PRICE FOR THE PROPERTIES, BECAUSE OF DEFECTS REVEALED DURING DUE DILIGENCE**

On April 20, 2014, after receiving the Marx Executive Summary and the Capitol Glass quote relating to the window systems at the BL Buildings, Redstone sought to have the PSA amended to reduce the purchase price for the BL Buildings. CP 784-786 (April 20, 2014 Velji email). Part of Redstone's grounds for the requested purchase price adjustment related to a "deficiency" with the window systems and seals in the BL Buildings. (*Id.*). Nanji explained in an email to CBRE, concerning Redstone's request to have the purchase price reduced, that the concern and basis for the purchase price reduction was not just that the windows in the BL Buildings were failing—but also "**the water ingress.**" CP 788-792 (Dep. Exh. 185, April 21, 2014 Wilson email to Nanji) (emphasis added). Nanji testified that the concern about water ingress was that **water could channel into the building, causing rot, decay, and mold.** CP 1028-1029 (Nanji Dep., pg. 78-79). Nanji also said, in his April 21, 2014 email: "Seriously, the areas which we have brought to your attention should not be a surprise nor unexpected to the vendor. There is a

reason why the building manager [McKinley] was told not to provide details to us past a point. **The minimum was spent on these buildings, absolute minimum to keep them going.**” (*Id.*) (emphasis added).

GF Capital agreed to amend the PSA—reducing the purchase price for the Properties by \$500,000. In exchange, Redstone provided GF Capital with a comprehensive release of claims, including all damages caused by and all claims arising from or relating to the matters identified in the Properties Condition Email. CP 794-799 (PSA Amendment). The “Properties Condition Email” specifically identified problems with the window systems and seals (noting that “the window systems and seals should have been regularly replaced and serviced to avoid the accumulated costs currently being faced”). (*Id.*).

#### **G. MARX’S FINAL REPORT REVEALED DEFECTS WITH THE BL BUILDINGS**

Marx provided its final PCA report (the “Marx Report”) to Redstone on May 2, 2014, the day of the closing on the BL Buildings. CP 439-578 (Dep. Exh. 13, May 2, 2014 Marx/Okubo Inspection Report). The Marx Report identified a number of defects with the BL Buildings. Regarding the thin brick cladding, Marx observed that “**there may have been moisture infiltration in the past**” and clear coating on one of the walls possibly indicated “**previous leaks.**” Marx recommended periodic

inspection of spalling and cracking in the thin brick cladding “**to prevent moisture infiltration to the vulnerable gypsum sheathing just below the thin and absorptive mortar coat.**” CP 439-578 (Dep. Exh. 13, May 2, 2014 Marx/Okubo Inspection Report) (emphasis added).

Helms, the Marx professional architect who participated in the PCA of the BL Buildings, testified that the presence of spalling in the thin brick veneer “absolutely” indicated the potential that moisture had infiltrated to the gypsum wallboard behind the thin brick veneer. CP 1112 (Helms Dep., pg. 83). Nanji testified that he understood that, if there is spalling or if there are broken tiles, “depending on the type of damage, you may have also damaged the substructure, in which case now you have cracks that will allow water penetration into the wall cavity of the wall.” CP 1031 (Nanji Dep., pg. 86). Velji testified that he understood that where there is spalling of the thin brick veneer, the gypsum wallboard behind the thin brick veneer could be exposed, and such spalling needs to be replaced because moisture can infiltrate to the vulnerable gypsum sheathing. CP 1068-1070 (Velji Dep., 121, 122-123).

Regarding the windows and metal panels between the windows in the BL Buildings, the Marx Report observed that “[b]oth the windows and spandrel panels have **numerous locations of wet sealing**” and the “various types and methods of spandrel panels installation and wet sealing

suggest **there have been numerous repairs over the years due to water infiltration.**” CP 439-578 (Dep. Exh. 13, May 2, 2014 Marx/Okubo Inspection Report; pg. 28-29, 31) (emphasis added). Redstone understood that “wet sealing” is designed to keep water out of the buildings and that some of the wet sealing had failed. CP 1055 (Velji Dep., pg. 79). Helms testified that Marx observed a bowed metal panel and that bowing “clearly allows water to get behind the surface material.” CP 1114 (Helms Dep., pg. 90). Helms testified that one of the concerns with water infiltration—evidence of which Marx noted in its PCA—is the potential to damage the wood framing inside the BL Buildings, which could result in molds and mildew and other organic growths. CP 1110 (Helms Dep., pg. 61).

Helms testified that Marx communicated to Redstone, in the Marx Report, that there was clear evidence of the potential for water infiltration in the BL Buildings and that it would be up to Redstone to determine what further work needed to be done. CP 1115 (Helms Dep., pg. 92). Velji admitted that, when Redstone purchased the BL Buildings, he was concerned about water getting into the BL Buildings. CP 1058 (Velji Dep., pg. 84). Nevertheless, Redstone bought the BL Buildings.

#### **H. REDSTONE FOUND ROT AND MOLD IN THE BL BUILDINGS IN 2015 AND DID NOTHING**

Roughly a year and a half after closing, Redstone engaged an

exterior plastering and siding company, Plastering Plus Northwest (“Plastering Plus”), to provide Redstone with building assessment reports for Black Lake 1 and 2. CP 824-831 (Dep. Exh. 194, Building Assessment Reports). The October 2015 Plastering Plus building assessment reports showed water damage, rot, and mold behind windows and walls at Black Lake 1; at Black Lake 2, the building assessment report showed extensive water damage and rot to the plywood behind the metal break panels, water damage behind all the windows on the first floor, and other areas of extensive water damage, rot and mold behind the metal break panels. (*Id.*). As a result of Plastering Plus’s findings, Redstone was aware, over a year before mold was discovered by the DOL (in October 2016), that there was significant water damage behind the thin brick veneer that resulted in rot and mold. CP 1072-1075 (Velji Dep., pg. 135-138). Redstone took no action to address any of the areas of concern—including extensive water damage, rot, and mold—found by Plastering Plus in October 2015.

**I. THE DOL DISCOVERED MOLD INSIDE BLACK LAKE 2 IN OCTOBER 2016**

On October 26, 2016, the DOL, while performing a remodeling project at Black Lake 2, discovered water seals and caulking that had failed in two areas, which the DOL believed would “probably lead to a

mold problem.” Redstone was asked to have the BL Buildings inspected immediately. CP 833-834 (Dep. Exh. 197, October 26, 2016 Rajani email). Redstone engaged JRS Engineering, building envelope consultants, to perform a visual assessment of the building envelope at the BL Buildings. CP 580-602 (JRS Report). JRS was requested to provide an opinion on the probable cause of the water damage. (*Id.*). JRS concluded that **“the punched windows and adjacent panels and their interfaces, are the most likely source of water ingress into the wall assembly.”** CP 601 (*Id.*, pg. 13) (emphasis added).

### III. ARGUMENT

#### A. THE SUMMARY JUDGMENT STANDARD

On an appeal from summary judgment, the Court engages in the same inquiry as the trial court. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 484, 176 P.3d 510, 520 (2008). The Court may sustain the trial court on any correct ground, even though that ground was not considered by the trial court. *Id.* (citations omitted).

Each element of fraudulent concealment must be established by clear, cogent, and convincing evidence. *Stieneke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60, 68 (2008) (citing *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966))). A trial court ruling on a motion for summary judgment must view the evidence presented through the lens of the

substantive evidentiary burden, “bear[ing] in mind the actual quantum and quality of proof necessary to support” the plaintiff’s claims. *In re Estate of Thornton*, 189 Wn. App. 1044 (2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)) (holding that heightened evidentiary standard must be considered in deciding a summary judgment motion to dismiss a libel suit).

**B. REDSTONE’S CLAIM IS BARRED BY THE AS-IS, WHERE-IS, WITH ALL FAULTS CLAUSE IN THE PSA**

Redstone’s claims relating to problems and defects with the physical condition of the BL Buildings are barred by the “As-Is, Where-Is, and With All Faults” clause in the PSA. This Court has held:

An “as-is” clause means that the buyer is purchasing property in its present state or condition. “The term [‘as is’] implies that the property is taken with whatever faults it may possess and that the seller or lessor is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property.”

*Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 39, 114 P.3d 664, 668 (Div. II 2005) (alteration in original) (citations omitted) (quoting *Olmstead v. Mulder*, 72 Wn. App. 169, 176, 863 P.2d 1355, 1358-59 (Div. I 1993)).

*Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (Div. I 2005) is factually distinguishable from the present case. *Sloan* involved a home that had faulty framing of a lower floor. The seller was aware of

framing codes and yet proceeded to construct a first-floor frame that the superior court found to be “terrible,” “unsafe,” “unethical,” and “out and out dangerous, based on unrefuted expert testimony. *Id.* at 1015. Because the seller was aware of the defects when he sold the house, the “as-is” clause would not protect him, although the court recognized that “courts routinely enforce such ‘as is’ clauses allocating the risk of *unknown* defects to the buyers...” *Id.* at 1016 (italics in original).

**C. REDSTONE’S CLAIM IS BARRED BY THE PSA RELEASE**

In Section 8.2 of the PSA, Redstone waived, released and discharged GF Capital from all claims based on breach of contract and/or tort and/or any other legal theory, with respect to the physical condition of the BL Buildings and “any other state of facts that exists with respect to the Property.” CP 643-44 (Dep. Exh. 170, PSA). A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851, 856 (1992).

Here, two sophisticated business entities, through legal counsel, negotiated a purchase and sale agreement pursuant to which Redstone represented that no representations had been made to it concerning the condition of the BL Buildings, that Redstone would independently

investigate the BL Buildings to satisfy itself concerning the condition of the BL Buildings, and Redstone was purchasing the BL Buildings on an “As-Is, Where-Is, and With All Faults” basis, without representations of any kind concerning the condition of the BL Buildings.<sup>5</sup> As a result, Redstone agreed to waive and release “any claim or cause of action it has, might have had or may have against” GF Capital, including claims based on tort or any other legal theory. CP 643-44 (PSA, Section 8.2).

Redstone’s reliance on *Hawkins v. Empres Healthcare Management LLC*, 193 Wn. App. 84, 371 P. 3d 84 (Div. I 2016) is misplaced. In *Hawkins*, the release was not a general release (like that in the PSA in this case) covering “every claim that could have existed between the parties,” rather, the release covered claims in plaintiff’s underlying lawsuit and those arising from her care, diagnosis, and treatment at the health care center. *Id.* at 91. The court found that the specific language of the release did not cover the claim that defendant had fraudulently altered plaintiff’s medical records. Here, the broad, general release clearly covers all claims, including tort claims, relating to the condition of the BL Buildings. *See Sorrell v. Young*, 6 Wn. App. 220, 225, 491 P.2d 1312, 1315 (1971) (fraudulent misrepresentation or

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<sup>5</sup> The release also covered claims relating to the “Disclaimed Matters,” a term defined in Section 8.1 of the PSA to include the physical condition of the buildings and “any other matter or thing relating to or affecting the Property.”

nondisclosure has historically been treated as a tort in actions at law). Accordingly, Redstone's fraudulent concealment claim is barred by the release it gave to GF Capital in the PSA.

Finally, Redstone cannot rely on McKinley's alleged statements made prior to entering the PSA to avoid the release in the PSA. Redstone affirmatively acknowledged in the PSA that no person acting on behalf of GF Capital was authorized to make any representations concerning the condition of the BL Buildings and that no such representations had been made to Redstone by anyone. Accordingly, Redstone cannot rely upon McKinley's alleged statements prior to the execution of the PSA to support its claim against GF Capital. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 481–82, 176 P.3d 510, 519 (2008) (fraud, misrepresentation, and equitable estoppel claims have no merit where plaintiff “specifically agreed in paragraph five of the settlement agreement that he did not rely on any representations by any other party when negotiating the settlement agreement.”)<sup>6</sup>.

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<sup>6</sup> Further, because Redstone acknowledged that McKinley was not authorized to make any representations on behalf of GF Capital, his alleged statements to Redstone are inadmissible hearsay. ER 801, 802. A party cannot rely on inadmissible hearsay in response to a summary judgment motion. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 309, 151 P.3d 201, 209 (2006), *as amended* (Jan. 17, 2007), *as amended* (Feb. 6, 2007).

**D. REDSTONE’S CLAIM IS BARRED BY THE PSA AMENDMENT RELEASE**

After entering into the PSA, Redstone conducted its independent due diligence of the BL Buildings. Redstone’s due diligence uncovered defects with the BL Buildings, for which Redstone sought a reduction in the purchase price agreed to in the PSA. The problems included the need to address “deficiencies” with the window systems and seals at the BL Buildings. CP 794-799 (Dep. Exh. 186, Amendment to PSA). GF Capital agreed to the purchase price reduction in exchange for a comprehensive release of all claims, including all damages caused by and all claims arising from or relating to the window systems and seals in the BL Buildings. CP 794-799 (Dep. Exh. 186, Amendment to PSA).

There is **no dispute** that the window systems and seals were the most likely cause of the rot, mold, and decay found in October 2016. Redstone’s building envelope expert, JRS Engineering, hired in October 2016 to determine the probable cause of the rot, mold, and decay, concluded as such. CP 580-602 (JRS Engineering report, pg. 13) (“Based on our visual observations and experience with similar assemblies, **the punched windows and adjacent panels and their interfaces, are the most likely source of water ingress into the wall assembly.**”) (emphasis added). Redstone’s owner, Nanji (who signed the Amendment Release on

behalf of Redstone) admits that the window units and window systems, as described in the Property Condition Email (attached to the PSA Amendment), were a cause of the water issues and problems that occurred in October 2016, as was the failed caulking and loose metal panels. CP 1024, 1026-1027 (Nanji Dep., pg. 60, 76-77) (Q: "...do you have an understanding that the window units as you've described them and the window system as you described them were a cause of the water issues experienced and identified in October 2016? A: Having read JRS's report, that's what I believe.").

Accordingly, all of Redstone's claims are barred by the release in the PSA Amendment.

Redstone contends that the PSA Amendment release does not bar its fraudulent concealment claim "because the claim does not arise from the repair items 'identified in the Property Condition Email.'" (Redstone Brief, pg. 30). Redstone argues that it was relying upon the Capitol Glass quote when it prepared the Property Condition Email and "Capitol Glass's estimate did not include performing work to prevent moisture from intruding into the wall cavities." (Redstone Brief, pg. 23, 30). Redstone's argument is fatally flawed for at least two reasons.

First, the Capitol Glass quote **did** include an estimate to check and re-anchor the metal panels on the BL Buildings. In its quote, Capitol

Glass advised Redstone that some of the **“break metal between the windows is coming off and the caulking has failed”** and **“both buildings need to be checked out and fix the break metal, re seal [sic] it and or re anchored [sic].”** (*Id.*) (emphasis added). Capitol Glass provided an estimate of \$5,000 to \$6,000 “to check each window for need of re seal, and or re anchor of break metal.” (*Id.*) Capitol Glass’s Perry testified that he believed that the BL Buildings needed to be checked and the break metal needed to be fixed **to prevent water from getting into the BL Buildings.** CP 1094 (Perry Dep., pg. 17).

Second, and more importantly, Nanji admitted that when he proposed the purchase price reduction to GF Capital (through CBRE), he was concerned about the very problems—water ingress, rot, mold and decay—that are the subject of Redstone’s fraudulent concealment claim. In Nanji’s email to CBRE, concerning the Amendment issues, he said: **“The windows in SL 1 and SL 2 are failing, not just the seals but the water ingress.”** CP 788-792 (Dep. Exh. 185, April 21, 2014 Wilson email to Nanji) (emphasis added).<sup>7</sup> Nanji testified as to exactly what he meant when he used the term “water ingress” in that email:

Q: And what’s the concern about water ingress, as you’ve described it? What are the potential concerns about water ingress as it may impact the building?

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<sup>7</sup> Nanji testified that his reference to “SL 1 and SL 2” is to Black Lake 1 and Black Lake 2. CP 1029 (Nanji Dep., pg. 79).

A: The same concerns we've discussed over our deposition. That, over time, if not properly maintained, if **there is an opportunity for the water to start building up and start channeling through the cavity into the building**, then obviously the items we discussed would come into play.

Q: And **meaning rot, decay, mold**, those issues?

A: **Yes, sir.**

CP 1029 (Nanji Dep., pg. 79) (emphasis added). Accordingly, there is no dispute that Redstone released all claims against GF Capital arising from, relating to, and/or caused by the window systems and seals in the BL Buildings, and there is no dispute that the window systems and seals were a cause of and related to the rot, mold, and decay discovered in October 2016. Therefore, Redstone's claims are barred by the PSA Amendment release, and GF Capital is entitled to summary judgment on all claims.

**E. GF CAPITAL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON REDSTONE'S CLAIM OF FRAUDULENT CONCEALMENT**

Redstone's claim fails because Redstone cannot prove all of the essential elements of such a claim. According to this Court, on a claim for fraudulent concealment, the seller's duty to speak arises: (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by

the purchaser. *Stieneke v. Russi*, 145 Wn. App. 544, 560, 190 P.3d 60, 68 (2008). Each element of fraudulent concealment must be established by clear, cogent, and convincing evidence. *Id.*

1. If the Defects Were Leaks and Water Intrusion, the Defects Were Not Concealed and Were Known to Redstone

The Washington Supreme Court has held: “Simply stated, fraudulent concealment does not extend to those situations where the defect is apparent.” *Atherton Condo. Apartment-Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 525, 799 P.2d 250, 261 (1990). The “defect” in this case is the history of leaks and water intrusion into the BL Buildings that resulted in rot, mold and decay. Redstone alleges that these incidents of leaks and water intrusion resulted in damage to the interior wall cavities of the BL Buildings.

Redstone’s fraudulent concealment claim fails because Redstone undeniably knew of the history of leaks and water intrusion. Although Redstone claims that it was not aware of the *damage*—rot and mold—caused by the leaks and water ingress, there is no dispute that it was aware of the *defects*—leaks and water ingress—that caused the damage. To summarize, prior to entering into the PSA, Redstone’s concerns about the window systems at the BL Buildings led it to ask Capitol Glass to provide a quote “on re caulking and re glazing all of the windows/seals.” CP 910-

911 (Dep. Exh. 27, April 4, 2014 Velji email). Capitol Glass alerted Redstone, in writing, (a) to problems with the windows and the metal panels between the windows, (b) that the caulking that had failed, and (c) that “both buildings need to be checked out.” CP 913-915 (Dep. Exh. 28, April 15, 2014 Capitol Glass quote). Additionally, the Marx Executive Summary, provided to Redstone on April 18, 2014, stated that the various methods of installation and wet sealing of the windows in the BL Buildings “**suggest that there have been numerous repairs over the years due to water infiltration.**” CP 766-782 (Dep. Exh. 181) (emphasis added).

Redstone does not even try to argue in its brief that it was unaware of numerous incidents of water intrusion into the BL Buildings—nor could it—given the mountain of evidence presented by GF Capital in its motion for summary judgment. Indeed, Redstone candidly admits that it “knew about certain defects in the Black Lake Properties—so much so that it obtained a reduction to the purchase price—**but those defects were unrelated to the concealed defects that eventually formed the basis of the instant claim.**” (Redstone Brief, pg. 41) (emphasis added). But Redstone’s expert—JRS Engineering—concluded that the window systems (windows and metal panels) **were** the most likely cause of the water damage found in the interior wall cavities. CP 601 (Dep. Exh. 40,

JRS Report, pg. 13). Moreover, Redstone's owner, Nanji, admitted that the defects he was concerned about when he sought and obtained the PSA Amendment were not just the windows but also "water ingress," which he worried could cause rot, mold and decay inside the BL Buildings. CP 1029 (Nanji Dep., pg. 79).

Redstone understood that water infiltration into a building can cause rot, mold and decay to drywall and wood in a building. CP 1016-1017, 1079 (Nanji Dep., pg. 16-17; Velji Dep., pg. 161, respectively). Redstone was fully aware that the BL Buildings had a history of leaks and water ingress, due to problems with the window systems and seals and other aspects of the BL Buildings. Because Redstone was fully aware of the leaks and water intrusion, GF Capital is entitled to summary judgment on the fraudulent concealment claim.

2. Redstone Failed to Produce Clear, Cogent, and Convincing Evidence that GF Capital Had Actual Knowledge of Rot, Mold, or Decay in the Interior Wall Cavities When It Sold the BL Buildings

In order to prevail on its fraudulent concealment claim, Redstone must show that GF Capital had "actual, subjective knowledge of the defects." *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 698, 106 P.3d 258, 266 (Div. III 2005). Proof that GF Capital should have known is not enough. *Id.* Knowledge is measured at the time of sale. *Norris v.*

*Church & Co.*, 115 Wn. App. 511, 515, 63 P.3d 153, 155 (2002).

Redstone claims that the “defect” is the rot, mold, and decay discovered in the interior wall cavities in the BL Buildings in October 2016. Redstone, however, failed to produce evidence that GF Capital was aware of the presence of rot, mold, or decay in the interior wall cavities in the BL Buildings when the BL Buildings were sold to Redstone in April 2014. The uncontroverted evidence is that GF Capital was not aware of any rot, mold, or decay in the BL Buildings when they were sold to Redstone. CP 1145-1146 (Taussig Dep., pg. 31, 34). While Redstone’s brief refers to GF Capital’s knowledge of incidents of water intrusion in the BL Buildings which were addressed and repaired by contractors hired by the property manager, and two incidents of mold remediation in 2009 and 2013 (Redstone Brief, pg. 4-8), Redstone produced no evidence that GF Capital had actual, subjective knowledge of the presence of rot, mold, and decay in the interior wall cavities when the BL Buildings were sold to Redstone in April 2014<sup>8</sup>.

Redstone contends that the repairs performed by Sierra and its contractors (e.g., Rainshine Construction, Madison Roofing, and Servpro)

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<sup>8</sup> Taussig testified that prior to the sale of the BL Buildings, he was aware of two occasions, one in 2009 and one in 2013, where mold was discovered and McKinley hired contractors and had environmental testing done to remediate the problem. CP 1147 (Taussig Dep., pg. 35) (cited in Redstone Brief, pg. 33).

were ineffective and GF Capital failed to undertake exterior repairs to prevent water intrusion, and therefore, GF Capital “cannot reasonably disclaim knowledge of the extensive water intrusion and mold issues by claiming it believed past repairs were sufficient.” (Redstone Brief, pg. 33). But the issue is whether Redstone produced clear, cogent, and convincing evidence that GF Capital knew that there was rot, mold, and decay in the interior wall cavities when it sold the BL Buildings to Redstone. There is no such evidence.

Redstone’s contention that the repairs performed at the BL Buildings were limited to the immediate area where water or mold was observed is simply not accurate. As set forth in the Statement of Facts section above, the evidence demonstrates that the professionals hired by the property management firm (McKinley) to remediate water intrusion and mold incidents did so in a thorough manner, refuting any suggestion that the repairs were limited or inadequate and refuting any implication or suggestion that GF Capital should have known of the presence of rot, mold, or decay in the interior wall cavities when the BL Buildings were sold to Redstone. Certainly, Redstone produced no evidence to even suggest that GF Capital believed the repairs were insufficient or ineffective.

3. Redstone Was on Notice of Potential Defects But Failed To Conduct Further Investigation or Inquiry

Washington courts hold that, once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries. *Atherton*, 115 Wn.2d 506, 524–25, 799 P.2d 250, 261 (1990) (“[I]n those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further.”) (citing *Puget Sound Serv. Corp. v. Dalarna Management Corp.*, 51 Wn. App. 209, 752 P.2d 1353 (Div. I 1988) , *review denied*, 111 Wn.2d 1007 (1988)); *see also Douglas v. Visser*, 173 Wn. App. 823, 832, 295 P.3d 800 (Div. I 2013) (“Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.”).

*Dalarna* involved the sale of an apartment building that had a history of extensive water leaks throughout the building. *Dalarna*, 51 Wn. App. at 210-11. It leaked virtually every time it rained. During a six-year period, various repairs were made to try to stop the leaks, including caulking the windows, using weather stripping, and completely sealing the windows on one side of the building. *Id.* at 211. Some of the measures worked and some did not. *Id.* Because of the leaks, the owner decided to sell the building. The buyer’s inspector’s report noted that the inspector

observed evidence of water penetration, including stains, cracked plaster, and loose tiles. *Id.* The report said the leaks were not serious but should be controlled by additional caulking, repainting, and/or replastering. *Id.* The buyer purchased the building without making any further inquiries. After the sale, the water leaks continued and the buyer sued, claiming the seller (Dalarna) failed to disclose “substantial, chronic, and unresolved water leakage problems.” *Id.* at 212. The *Dalarna* court held that, where an actual inspection demonstrates some evidence of water penetration, the buyer must make inquiries of the seller, and the seller had no duty to affirmatively report its historical experience with water penetration problems. *Id.* at 214; *see also Douglas v. Visser*, 173 Wn. App. at 834 (“the law retains a duty on a buyer to beware, to inspect, and to question.”).

In this case, Nanji was concerned with the failing windows and seals and “water ingress” into the BL Buildings. Specifically, Nanji was concerned that water could channel into the building, causing rot, decay, and mold. CP 1028-1029 (Nanji Dep., pg. 78-79). However, rather than make further inquiries about the known and obvious problems with the window systems and seals and water ingress into the BL Buildings, Redstone opted instead to obtain from GF Capital a reduction in the purchase price of the Property and proceed to buy the BL Buildings. CP

794-799 (Dep. Exh. 186, Amendment to PSA). Redstone chose to **not** make further inquiries, preferring instead to negotiate a purchase price reduction. As a result, Redstone’s fraudulent concealment claim fails.

4. The Rot, Mold, and Decay Would Have Been Disclosed by a Careful, Reasonable Inspection

Redstone contends that the mold, rot, and decay in the BL Buildings was not observable without “invasive and destructive” testing. CP 1181 (Opp. to MSJ at 29). There is no dispute that Redstone had the right, under the PSA, to perform destructive and invasive testing. CP 1059 (Velji Dep., pg. 88). Redstone admitted that the rot, mold, and decay in the interior wall cavities would have been observable with “destructive testing” such as that performed by Plastering Plus in 2015—i.e., pulling back the metal panels between the windows and using a knife to peel back caulking. CP 1178, 1181 (Opp. to MSJ at 26, 29). Nevertheless, Redstone asserts that it was reasonable for Redstone not to engage in such destructive testing. (*Id.*). The Court should determine, as a matter of law, that under the circumstances involved in this case, a reasonable and careful inspection would have included simple, inexpensive, destructive testing that would have discovered the rot, mold, and decay.

Redstone knew that, because the sale of the BL Buildings was on an “As-Is, Where-Is, With All Faults” purchase, Redstone “would have to

be more diligent.” CP 1291 (Nanji Dep., pg. 41). Redstone was concerned about water intrusion into the BL Buildings prior to the closing. CP 1058 (Velji Dep., pg. 84). Redstone was aware from the Marx report that some of the seals around the metal panels, which were designed to keep water out of the building, had failed. CP 1055 (Velji Dep., pg. 79). Redstone was aware from the quote provided by Capital Glass that some of the metal panels were coming off of the BL Buildings, the caulking had failed, and “**both buildings need to be checked out** and fix the break metal, re seal [sic] it and or re anchored [sic].” CP 723-724 (Dep. Exh. 177, April 15, 2014 Capitol Glass quote). Redstone was aware from the Marx report that water had penetrated into the BL Buildings, as evidenced by stained ceiling tiles. CP 1298 (Velji Dep., pg. 94). Redstone understood that if water got into building, it can damage the materials and cause mold. CP 1016-1017, 1052, 1079 (Nanji Dep., pg. 16-17; Velji Dep., pg. 69, 161, respectively). Under those circumstances, Redstone’s failure to perform further investigation, including simple destructive testing which Redstone admits would have uncovered the problems about which it now complains, was unreasonable and its inspection was not a careful one.

Filippini (Plastering Plus) testified that he and Velji looked at the BL Buildings in the spring of 2015 and when he peeked behind the panels

or felt underneath them, he found evidence of rotted or wet wood. CP 1127 (Filippini Dep., pg. 20) (“You know, you could feel wet, and you could see, you know, some bad, punky stuff.”). Filippini testified further that he believes that it is highly likely that the conditions he observed would have been observed had he done the same assessment at the time of the sale of the BL buildings. CP 1128-30 (*Id.* at pg. 22; 73-74). Thus, a reasonable, careful inspection in 2014 would have disclosed the presence of rot, decay, and mold in the BL Buildings—had the inspector simply done what Plastering Plus did in 2015.

Additionally, Plastering Plus performed a building assessment of the BL Buildings in October 2015, and observed water damage, rot, and mold in the BL Buildings. CP 824-831 (Building Assessment Reports). The building assessments cost Redstone \$1,414.40. CP 840-849 (October 29, 2015 Plastering Plus Invoice). Filippini testified that it is “highly likely” that the conditions he observed in October 2015 would have been observed had he done the same assessment in April 2014. CP 1129-1130 (Filippini Dep., pg. 73-74). Thus, for less than \$1,500, Redstone could have done what Capitol Glass recommended in April 2014 and would have observed areas of extensive water damage, rot, and mold behind the metal break panels.

Moreover, Redstone admits that the PSA “did not restrict to whom

or on what subjects Redstone was permitted to ask questions or request additional information.” (Redstone Brief, pg. 15). In connection with the due diligence process, GF Capital gave Redstone a General Ledger listing the service providers who performed services at the BL Buildings in 2012 and 2013. That list disclosed that Servpro had performed “water clean” work at the BL Buildings in January 2013. CP 1296-1297 (Velji Dep., pg. 82-83). Redstone flagged the Servpro entry but did not contact Servpro to inquire about the nature of its work. CP 1297 (Velji Dep., pg. 83). Fitzgerald, owner of Servpro of Olympia, testified that if Redstone had contacted Servpro prior to the closing and inquired about issues involving mold at the BL Buildings, he would have told them that he was involved in a mold remediation job in 2013 and he would have described the work performed by Servpro at the BL Buildings. CP 1281-82 (Fitzgerald Dep., pg. 54-55).

Thus, a careful and reasonable inspection would have determined the presence of decayed and rotted wood in the BL Buildings and/or that mold had previously been remediated at the BL Buildings. Accordingly, GF Capital is entitled to summary judgment on Redstone’s fraudulent concealment claim.

**F. THE SUPERIOR COURT PROPERLY AND CORRECTLY GRANTED GF CAPITAL'S MOTION FOR ATTORNEYS' FEES**

1. Standard of Review

The Court reviews the legal basis for an award of attorneys' fees de novo and the reasonableness of the amount of an award for abuse of discretion. *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Tr. v. Port of Everett*, 159 Wn. App. 389, 407, 245 P.3d 779, 788 (2011). There is no challenge to the reasonableness of the fees here.

2. The PSA's Attorneys' Fees Provision Provides for GF Capital's Recovery of Fees and Expenses Incurred in Defending Redstone's Claims

Washington follows the American rule that attorneys' fees are only recoverable in a suit when authorized by statute, contract, or equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (Div. I 1994).

The plain language of the PSA's fee-shifting clause entitles GF Capital to all fees, expenses, and costs incurred in defending any *action* commenced to enforce *any* provision of the PSA. Where "contract language is clear and unambiguous, [a court] must enforce the contract as written." *Ley v. Clark Cty. Pub. Trans. Benefit Area*, 197 Wn. App. 17, 24, 386 P.3d 1128 (Div. II 2016). Thus, in awarding GF Capital its fees incurred in defense of this action, the Court need look no further than

section 23.6 of the PSA. That section of the PSA provides in pertinent part that “if any **action** be commenced . . . to enforce **any** of the provisions of this Agreement,” then “the unsuccessful party therein shall pay **all costs incurred by the prevailing party**” in the action, including reasonable attorneys’ fees and costs. CP 660 (Dep. Exh. 170, PSA) (emphasis added). Thus, the PSA requires two events in order to award attorneys’ fees: (1) commencement of an action to enforce any provision of the PSA and (2) a prevailing party in that action. Once these two prerequisites occur, the PSA mandates an award of fees to the prevailing party in that action.

This action sought to enforce the warranty provision in the PSA and thus constitutes an “Action” under the PSA’s fee-shifting provision.<sup>9</sup> Redstone admits that it “commenced an action” to enforce a provision of the PSA. CP 292 (Opp. to Mot. for Fees at 2). Redstone also admits that GF Capital is the “prevailing party” in this litigation. CP 293, 1203-1217 (Opp. to Mot. for Fees at 3). Redstone even admits that GF Capital is entitled to recover fees for defending Redstone’s breach of warranty claim. CP 297 (Opp. to Mot. for Fees at 7; *see also* Redstone Brief, pg. 43). Thus, under the clear language of the PSA, this ends the analysis. As

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<sup>9</sup> The Complaint asserts three causes of action: (1) fraudulent concealment; (2) negligent misrepresentation; and (3) breach of warranty based on the warranties in the PSA. CP 4-6 (Complaint ¶¶ 24-42). Redstone did not appeal the decision granting summary judgment on the negligent misrepresentation and breach of warranty claims and, thus, GF Capital is without question the prevailing party on those claims.

the prevailing party in an action to enforce a provision in the PSA, GF Capital is contractually entitled to an award of fees under the PSA.

The Washington Court of Appeals has endorsed this reasoning and concluded that the language of the parties' contract controls and can alone support an award of attorneys' fees for all claims in a lawsuit related to the contract. *Boules v. Gull Industries, Inc.*, 133 Wn. App. 85, 134 P.3d 1195 (Div. II 2006), *as amended* (June 14, 2006). In *Boules*, the sellers of an interest in property sued the buyers and others for fraudulent concealment and consumer protection claims related to the sale. *Id.* at 87. The sellers then voluntarily dismissed their claims with prejudice. *Id.* The parties' purchase and sale agreement contained a fee-shifting provision pursuant to which the prevailing party in "any litigation . . . arising out of this transaction" would be entitled to his attorneys' fees. *Id.* The trial court denied an award of attorneys' fees, reasoning that the fraudulent concealment claim was not based on a contract because the alleged wrongdoing occurred before the parties entered into the purchase and sale agreement. *Id.* at 88. The court of appeals reversed, concluding that "the plain language" of the purchase and sale agreement controlled—i.e., the lawsuit was litigation "arising out of this transaction," "namely the purchase and sale agreement" at issue in the case. *Id.* at 89. The court found it unnecessary to resort to RCW 4.84.330 because "we resolve the

issue on the face of the purchase and sale agreement.” *Id.* at n. 5.

The same is true here. GF Capital is the prevailing party in an action seeking to enforce a provision in the PSA and, therefore, resort to RCW 4.84.330 is unnecessary because, on the face of the PSA, GF Capital is entitled to its attorneys’ fees, expenses, and costs incurred in this action.

3. Washington Law and the PSA Require an Award of Fees and Expenses to GF Capital for Its Successful Defense of Redstone’s Action.

Even if Redstone had not asserted a claim for breach of warranty under the PSA, under Washington law, GF Capital would be entitled to its attorneys’ fees and expenses for successfully defending Redstone’s fraudulent concealment and negligent misrepresentation (tort) claims. To determine whether the defense of tort claims will support a claim for attorneys’ fees under a contractual attorneys’ fee provision, “an *action* is on a contract if the *action* arose out of the contract and if the contract is central to the dispute.” *Seattle First Nat. Bank*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991) (emphasis added); *see also Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001) (“Brown’s action for misrepresentation arises out of the parties’ agreement to transfer ownership of Johnson’s home to Brown. Moreover, the purchase and sale agreement was central to her claims.”). Although a plaintiff may elect to proceed on a tort claim rather than an enforcement of contract claim, “if a tort action is based on a

contract central to the dispute including an attorney fee provision, the prevailing party may receive attorney fees.” *Hill v. Cox*, 110 Wn. App. 394, 411, 41 P.3d 495 (Div. III 2002). Thus, the issue is not whether a particular *claim* asserted by Redstone arises out of the PSA, the issue is whether the *action* arises out of the PSA.

There can be no reasonable dispute that Redstone’s action arises out of the PSA. Absent the PSA, there would have been no sale of the Black Lake Buildings and no lawsuit. *Hill*, 110 Wn. App. at 412, 41 P.3d 495 (“Here, there would not have been a timber trespass if the parties had not contracted that the trees within 100 feet of the cabin were not to be cut. Hence, Hill’s action [statutory tort claim] arose out of the contract and the contract was central to the dispute.”). Moreover, a core defense of GF Capital to Redstone’s claims was the release contained in the PSA and the Amendment to the PSA. The PSA was undoubtedly central to the action.

Washington courts have awarded attorneys’ fees to successful parties in contract actions involving tort claims identical or nearly identical to Redstone’s claims here. *Douglas v. Visser*, 173 Wn. App. 823, 834, 295 P.3d 800 (Div. I 2013) (awarding contract-based attorneys’ fees in defense of claims including fraudulent concealment and negligent misrepresentation); *Borish v. Russell*, 155 Wn. App. 892, 907, 230 P.3d 646 (Div. II 2010), *as amended on denial of reconsideration* (June 29,

2010) (same); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855–56, 942 P.2d 1072 (Div. I 1997) (awarding contract-based fees for negligence claim when duty breached was created by parties' agreement).

Redstone's reliance on this Court's decision in *Norris v. Church & Co.*, 115 Wn. App. 511, 517, 63 P.3d 153, 156 (2002) (Redstone Brief, pg. 46) is misplaced. There, the parties' contract provided for attorneys' fees at either the trial or appellate level. But plaintiff only asserted a fraudulent concealment claim and, therefore, the court denied an award of attorneys' fees. *Id.* ("But the Norrises sued for fraud, a tort, not on the contract. Thus, they are not entitled to attorney fees."). Here, there is no dispute that Redstone brought an action on the PSA and the PSA was central to the case.

Redstone's reliance on *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (Div. I 2009) (Redstone Brief, pg. 46) is similarly misplaced. That case was decided prior to *Douglas v. Visser*, 173 Wn. App. 823, 295 P.3d 800 (Div. I 2013), a case relied upon by GF Capital in its motion for fees. The court in *Douglas* awarded attorneys' fees in a hybrid tort-contract action, involving a real estate purchase contract and claims identical to Redstone's. *Id.* at 828. The *Douglas* court awarded contractual attorneys' fees for a successful defense of the fraudulent

concealment and negligent misrepresentation claims because, “[w]hen an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.” *Id.* at 835. The same appellate court (Division I) issued the opinions in both *Boguch* and *Douglas*, and *Douglas* was decided after *Boguch*. Thus, *Douglas* provides more persuasive authority than *Boguch* or perhaps even implicitly supersedes *Boguch*. Moreover, *Douglas* was decided after *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012), the Washington Supreme Court’s decision concerning the independent duty doctrine.

Because all of Redstone’s claims—(1) fraudulent concealment, (2) negligent misrepresentation, and (3) breach of warranty—“arise out of” the PSA and because the PSA is “central to” this dispute, the Superior Court properly granted GF Capital’s motion for fees and expenses, and that decision should be affirmed by this Court.

4. GF Capital Requests an Award of Attorneys’ Fees and Expenses Incurred in Defending this Appeal.

Finally, for all the reasons stated above with respect to the award of fees incurred in the trial court, GF Capital is entitled to its fees and expenses incurred in defending this appeal. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 717–18, 334 P.3d 116 (Div. II 2014) (“When a contract provides for an attorney fee award in the trial

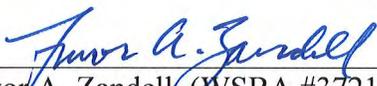
court, the party prevailing before this court may seek reasonable attorney fees incurred on appeal.”); *see also* RAP 18.1. Pursuant to RAP 18.1(b), GF Capital hereby requests an award of attorneys’ fees and expenses incurred in defending this appeal.

**IV. CONCLUSION**

For the reasons set forth in this Brief, GF Capital respectfully requests that the Court affirm the decision of the Superior Court, granting GF Capital summary judgment and its attorneys’ fees and expenses incurred in defending this action and this appeal.

Respectfully submitted this 29<sup>th</sup> day of August 2018.

PHILLIPS BURGESS PLLC  
*Attorneys for Respondent GF Capital  
Real Estate Fund Investment I, LLC*

By:   
Trevor A. Zandell (WSBA #37210)  
PHILLIPS BURGESS PLLC  
724 Columbia Street NW, Suite 320  
Olympia, WA 98501  
T: (360) 742-3500  
F: (360) 742-3519  
E: tzandell@phillipsburgesslaw.com

Grant Cowan (*pro hac vice*)  
FROST BROWN TODD LLC  
3300 Great American Tower  
301 East Fourth Street  
T: (513) 651-6745  
F: (513) 651-6981  
E: gcowan@fbtlaw.com

**PHILLIPS BURGESS PLLC**

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**Superior Court Case Number:** 17-2-01117-4

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REDSTONE BLACK LAKE 1, L.P., and REDSTONE BLACK  
LAKE 2, L.P.,

As successors in interest to Redstone Investments, LLC,

Appellant,

v.

GF CAPITAL REAL ESTATE FUND-INVESTMENT I, LLC,

Respondent.

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DECLARATION OF SERVICE

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Trevor A. Zandell, (WSBA #37210)  
PHILLIPS BURGESS PLLC  
724 Columbia Street NW, Suite 320  
Olympia, WA 98501  
T: (360) 742-3500  
F: (360) 742-3519

Grant Cowan (*pro hac vice*)  
FROST BROWN TODD LLC  
3300 Great American Tower  
301 East Fourth Street  
T: (513) 651-6745  
F: (513) 651-6981  
*Attorneys for Respondent GF Capital  
Real Estate Fund Investment I, LLC*

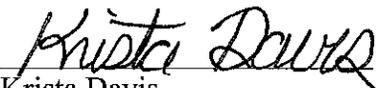
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I, Krista Davis, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am over the age of 18, I am competent to give testimony in court, and I make this declaration based on personal knowledge.

On the date indicated above the signature line below, I served the following documents on the following individuals and in the manner(s) listed below, to the addressees stated below: **(1) Brief of Respondent;** and **(2) Declaration of Service:**

<p>Traeger Machetanz, Esq. Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045</p> <p><i>Of Attorneys for Appellants Redstone Black Lake 1, L.P. and Redstone Black Lake 2, L.P., as Successors in interest to Redstone Investments, LLC</i></p>	<p><input checked="" type="checkbox"/> Regular U.S. Mail <input checked="" type="checkbox"/> E-mail: <a href="mailto:traegermachetanz@dwt.com">traegermachetanz@dwt.com</a> <a href="mailto:DevraSlaughter@dwt.com">DevraSlaughter@dwt.com</a> <a href="mailto:nathanrouse@dwt.com">nathanrouse@dwt.com</a> <input type="checkbox"/> Certified Mail <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Electronic Service via e-file</p>
<p>Grant S. Cowan, Esq. Frost Brown Todd 301 East Fourth Street Great American Tower, Suite 3300 Cincinnati, OH 45202</p> <p><i>Attorneys for Respondent GF Capital Real Estate Fund - Investment I</i></p>	<p><input checked="" type="checkbox"/> Regular U.S. Mail <input checked="" type="checkbox"/> E-mail: <a href="mailto:GCowan@fbtlaw.com">GCowan@fbtlaw.com</a> <a href="mailto:NathanRouse@dwt.com">NathanRouse@dwt.com</a>, <a href="mailto:ErickaMitterndorfer@dwt.com">ErickaMitterndorfer@dwt.com</a>, <input type="checkbox"/> Certified Mail <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Electronic Service via e-file</p>

DATED this 29<sup>th</sup> day of August, 2018, at Olympia, Washington.

  
 Krista Davis  
 Paralegal

**PHILLIPS BURGESS PLLC**

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