

64269-3

64269-3

No. 64269-3-1

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

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SERGEY SAVCHUK,

Appellant,

v.

STEVEN G. JERDE and DARLYCE J. JERDE,  
husband and wife

Respondents.

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APPELLANT'S OPENING BRIEF

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James E. Britain  
WSBA # 6456  
Britain & Vis PLLC  
805 Dupont St. #1  
Bellingham, WA 98225

Attorney for Appellant

FILED  
STATE OF WASHINGTON  
2009 DEC 23 AM 11:03

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## I. INTRODUCTION

Even though the law abhors a forfeiture, the decision below not only allowed the sellers in a real estate transaction that did not close to retain title to the subject property, it authorized them to keep a windfall, \$500,000 deposit on a purchase price of \$725,000. In return for the buyer's, Petitioner Sergey Savchuk's ("Savchuk") \$500,000 payment, he received nothing! Claiming that a purported purchase and sale "agreement" authorized this harsh forfeiture, the Sellers, Respondents Steven and Darlyce Jerde ("the Jerdes"), moved for, and obtained, summary judgment.

Relying on several trial court errors, Savchuk seeks reversal of this shockingly equitable result relying on several trial court errors. Among other bases, the grant of summary judgment should be reversed because: 1) the purported purchase and sale "agreement" violates the statute of frauds; 2) the record contains genuine issues of material fact making summary judgment improper; 3) the Jerdes failed to establish any breach by Savchuk; and 4) the \$500,000 forfeiture is not a remedy cognizable under Washington law, because it is either an impermissible penalty or would embrace substantively unconscionable contractual provisions.

II. **ASSIGNMENTS OF ERROR**

A. **General Assignments of Error**

1. The trial court erred in entering the Amended Order Granting Summary Judgment and Final Judgment, dated September 15, 2009 (“Final Judgement”)

2. The trial court erred in denying Petitioner Sergey Savchuk’s (“Savchuk”) Motion for Reconsideration by issuing its Order Denying Reconsideration, dated November 4, 2009.

3. The trial court erred in issuing its Order Granting Summary Judgment, dated July 31, 2009 (“Summary Judgment Order”).

B. **Specific Assignments of Error**

4. The trial court erred in entering Finding/Conclusion 1 in the Final Judgment.

5. The trial court erred in entering Finding/Conclusion 2 in the Final Judgment.

6. The trial court erred in entering Finding/Conclusion 3 in the Final Judgment.

7. The trial court erred in entering Finding/Conclusion 4 in the Final Judgment.

8. The trial court erred in entering Finding/Conclusion 5 in the Final Judgment.

9. The trial court erred in entering Finding/Conclusion 6 in the Final Judgment.

10. The trial court erred in entering Finding/Conclusion 1 in the Summary Judgment Order.

11. The trial court erred in entering Finding/Conclusions 2 in the Summary Judgment Order.

12. The trial court erred in entering Finding/Conclusions 2 in the Summary Judgment Order.

13. The trial court erred in entering Finding/Conclusions 3 in the Summary Judgment Order

14. The trial court erred in entering Finding/Conclusions contained in the last paragraph of the Summary Judgment Order.

**C. Issues Presented**

1. Is a real estate purchase and sale “agreement” that provides for partial payment of the purchase price through the buyer’s execution and delivery of a note and deed of trust invalid under the statute of frauds, where material terms of payment of the note are not included and no deed of trust is incorporated?

(Assignments of Error 1-14)

2. Is it error to grant summary judgment to a seller under a real estate purchase and sale agreement based on a buyer's failure to make a cash payment of the unpaid purchase price balance, where: an ambiguity exists on the face of the agreement over whether the unpaid balance of the purchase price would be satisfied through seller financing or require cash at closing and the buyer has submitted evidence that he understood the agreement to call for seller financing? (Assignments of Error 1-14)

3. Where a purchase and sale agreement calls for partial payment of the purchase price through seller financing in the form of a note and deed of trust, may a seller maintain an action for breach against the buyer if the seller has not tendered to the closing agent any form of note or deed of trust or clear title to the subject real estate? (Assignments of Error 1-14)

4. Where a buyer deposits \$500,000 toward a \$750,000 purchase price set forth in a real estate purchase and sale agreement and the transaction does not close, would the forfeiture of the \$500,000 constitute an impermissible penalty? (Assignments of Error 1-14)

5. Are provisions of a real estate purchase and sale agreement that result in the buyer's payment of a \$500,000

forfeiture on a \$725,000 purchase price, seller's retention of title to the subject property, along with improvements made by the buyer, and the buyer receives nothing in return, void as substantively unconscionable? (Assignments of Error 1-14)

6. Where summary judgment is reversed, must the corresponding award of attorneys' fees and costs also be reversed, because the Respondents are no longer the substantially prevailing party? (Assignments of Errors 1-3, and 8)

7. If this Court rules that the Appellant is entitled to summary judgment as a matter of law, is Appellant also entitled to an award of his reasonable attorneys' fees and costs incurred with respect to this Appeal and proceedings in the trial court as the substantially prevailing party? (Assignments of Error 1-14)

### III. **STATEMENT OF THE CASE**

#### A. **Facts**

On October 2, 2006, the Jerdes executed as Sellers a document entitled "RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT SPECIFIC TERMS" with respect to their property located at 2439 Douglas Road, Ferndale, Washington (the

“Initial PSA”). Savchuk executed the Initial PSA, as the buyer, on January 8, 2007.<sup>1</sup>

Among other terms, the first page of the Initial PSA, entitled “SPECIFIC TERMS,” acknowledged that Savchuk had deposited \$20,000 as “Earnest Money.” In the event of Savchuk’s default, the Jerdes elected as their sole remedy, “Forfeiture of Earnest Money.” The blank following Paragraph 14 entitled “Addenda” set forth the following hand-written pertinent provisions: “Payment terms: Adden #34... promissory note....”<sup>2</sup>

Following three pages of standard-form “GENERAL TERMS,” the Initial PSA included two pages entitled “PAYMENT TERMS ADDENDUM TO PURCHASE & SALE AGREEMENT” (the “Payment Terms Addendum”), on which a box is checked for “Note and Deed of Trust.” That paragraph goes on to recite that:

Buyer agrees to pay \$525,000 down, including Earnest Money, at Closing and the balance of the Purchase Price to Seller in equal monthly installments of interest only on principal balance... including interest at 7% per annum on the unpaid balance, on or before the 15<sup>th</sup> day of each month, commencing: ... 30 days following the Closing. This indebtedness shall be evidenced by a Promissory Note and a ... first position deed of trust, as set forth below.

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<sup>1</sup> CP 25-35, 64, 69-72, 98, 102-104.

<sup>2</sup> CP 25, 30.

Under the heading "Promissory Note," this section provides that Buyer would agree to sign a certain form of promissory note and deed of trust, "which must be attached to this agreement."<sup>3</sup>

No deed of trust was attached. The only attached document was entitled, "Promissory Note", contained numerous blanks, none of which had been filled-in.<sup>4</sup> Without the blanks filled in, this attached document provided no pertinent material terms, such as, for example, the principal amount of the loan, the identity of the maker or holder, payment terms, interest, due date, *etc.*<sup>5</sup>

"Form 34" entitled, "ADDENDUM/AGREEMENT TO PURCHASE AND SALE AGREEMENT," was last page attached to the Initial PSA ("Form 34"). In pertinent part, it stated:

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

[\* \* \* \*]

2. \$20,000 earnest money becomes a non-refundable deposit, to be disbursed to Sellers immediately.
3. Purchase price: \$725,000
4. Payment Terms: Note & Deed of Trust. Interest pmts to be paid monthly on unpaid balance, 7% interest. Contract administration by Trust Account Ctr, Anacortes, WA, all costs

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<sup>3</sup> CP 31.

<sup>4</sup> CP 31-34.

<sup>5</sup> See CP 33-34.

- associated paid by Buyer. Payments disbursed by Trust Accounting Ctr to Seller.
5. Principal payments as follows:
    - \$30,000 due 1/15/07
    - \$50,000 due 2/1/07
    - \$50,000 due 4/1/07
    - \$50,000 due 6/1/07
    - \$50,000 due 8/1/07
    - Due in full 8/31/07
  6. Closing date shall be on or before August 31, 2007.<sup>6</sup>

Following the Initial PSA, the Parties executed a document entitled, "EXTENSION OF CLOSING DATE ADDENDUM" (the "Extension Addendum"). Among other things, this document provided that Savchuk would pay the Jerdes an additional \$10,000 for an extension on the closing date and certain installments toward the down payment on the purchase price. Consistent with the Initial PSA, after Savchuk tendered the down payment, an unpaid balance of approximately \$200,000 remained as of Closing. Significantly, nothing contained in the Extension Addendum addressed or negated the seller financing provisions referenced in the Initial PSA.<sup>7</sup> The Extension Addendum was never provided to the Closing Agent.<sup>8</sup>

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<sup>6</sup> CP 35.

<sup>7</sup> CP 36. The purchase and sale agreement, including the Initial PSA and the Extension Addendum, shall be referred to as collectively as the PSA.

<sup>8</sup> CP 73-75.

Neither party tendered performance by the May 30, 2008 closing date set forth in the Extension Addendum.<sup>9</sup> Through the Affidavit of Sergey Savchuk in Opposition of Motion for Summary Judgment, Savchuk introduced evidence that he was willing and able to close, but the Jerdes never tendered performance by providing a form promissory note or deed of trust, and did not, and could not, tender clear title.<sup>10</sup>

By the May 30, 2008 closing date, Savchuk had obtained preliminary approval to subdivide the subject property at his expense, significantly increasing the value of that real estate.<sup>11</sup> Because the transaction did not close, the Jerdes retained title to the subject property, including the value added through the preliminary plat approval Savchuk obtained. They also have refused to return any portion of Savchuk's \$500,000 deposit.<sup>12</sup>

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<sup>9</sup> CP 73-74.

<sup>10</sup> CP 64, 66-67, 73-85. Although the Jerdes similarly maintained that Savchuk failed to tender performance, they also implicitly confirmed that they would not have been in a position to tender clear title by paying off their existing Deed of Trust with Bank of America, since the Jerdes had used Savchuk's deposit payment to purchase other real estate. See, CP 66-67, 99-100.

<sup>11</sup> CP 67-68.

<sup>12</sup> See CP 64-68.

**B. Procedural Posture**

On February 5, 2009, Savchuk filed his Complaint for Breach of Contract and Refund of Payments Made, seeking, among other things, a refund of at least \$480,000 of Savchuk's deposit made to the Jerdes in connection with this transaction.<sup>13</sup> The Jerdes filed their motion for summary judgment on June 9, 2009.<sup>14</sup>

On July 31, 2009, the trial court entered its initial Summary Judgment Order.<sup>15</sup> Savchuk filed a Motion for Reconsideration,<sup>16</sup> which the court denied through its Order Denying Reconsideration, dated September 4, 2009.<sup>17</sup> On September 15, 2009, the trial court entered its Final Judgment,<sup>18</sup> from which Savchuk timely appealed through his Notice of Appeal, dated October 8, 2009.<sup>19</sup>

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<sup>13</sup> CP 123-129.

<sup>14</sup> CP 88-110.

<sup>15</sup> CP 38-39.

<sup>16</sup> CP 19-37.

<sup>17</sup> CP 10-12.

<sup>18</sup> CP 8-9.

<sup>19</sup> CP 4-7.

#### **IV. ARGUMENT**

##### **A. Summary of Argument**

The purported purchase and sale “agreement” refers to seller financing of the remaining purchase price balance through a note and deed of trust, executed and delivered by Savchuk. However, since neither that note nor deed of trust is incorporated into the document on which the Jerdes rely, it does not constitute a valid agreement for the purchase of real estate under the statute of frauds. Accordingly, the judgment below should be reversed, Savchuk’s entire \$500,000 refunded and Savchuk should be awarded his reasonable attorney’s fees and cost incurred in connection with this appeal and the proceedings below.

Even assuming that the PSA withstands scrutiny under the statute of frauds, the trial court nevertheless erred in granting summary judgment because: 1) a genuine issue of material fact exists regarding whether the PSA calls for payment of the unpaid purchase price balance through Savchuk’s note and deed of trust; and 2) the Jerdes failed to establish Savchuk’s breach, since they did not tender the necessary performance. Reversal on these grounds would remand this matter for trial, and correspondingly

require reversal of the award of attorneys' fees and costs to the Jerdes.

Finally, assuming for the sake of argument that the PSA is valid under the statute of frauds and the Jerdes have met the standards necessary for granting summary judgment on the issue of Savchuk's breach of contract, the resulting remedy granted by the trial court, allowing for the forfeiture of Savchuk's \$500,000 deposit on a \$725,000 purchase, is contrary to law either as an impermissible penalty or because it arise out of a forfeiture provision that is void as substantively unconscionable. Reversal on these grounds should lead to entry of judgment in favor of Savchuk, requiring the Jerdes to refund at least \$480,000 of Savchuk's deposit, as well as payment of Savchuk's reasonable attorneys' fees and costs.

**B. Standard of Review**

Summary judgment is appropriate only when the trial court finds that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>20</sup> When reaching a summary judgment determination, the court must

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<sup>20</sup> CR 56(c); *Higgins v. Stafford*, 123 Wn. 2d 160, 169, 866 P.2d 31 (1994); *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn. 2d 573, 580, 844 P.2d 428 (1993).

consider all facts submitted and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.<sup>21</sup>

On appeal, this court conducts a *de novo* review, engaging in the same inquiry as the trial court. In this matter, then, this Court will review the record available to the trial court and make all reasonable inferences from facts in favor of Savchuk.<sup>22</sup>

**C. The Trial Court Erred in Granting Summary Judgment, Because the “Agreement” Is Invalid Under the Statute of Frauds.**

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The Statute of Frauds requires that all instruments evidencing or conveying an interest in real property must be in writing.<sup>23</sup> Washington courts have repeatedly held that: “Agreements to buy and sell real estate ‘must be definite enough on material terms to allow enforcement without the court supplying those terms.’”<sup>24</sup>

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<sup>21</sup> *Id.*; *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982)

<sup>22</sup> *Id.*; *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn. 2d 656, 668, 911 P.2d 1301 (1996); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 811, 828 P.2d 549 (1992).

<sup>23</sup> See RCW 64.04.010 and 64.04.020

<sup>24</sup> *Sea-Van Investments Assoc. v. Hamilton*, 125 Wn. 2d 120, 129, 881 P.2d 1035 (1994) (“*Sea-Van*”), quoting, *Setterlund v. Firestone*, 104 Wn. 2d 24, 26, 700 P.2d 745 (1985) (“*Sutterland*”). See also *Kruse v. Hemp*, 121 Wn. 2d 715, 853 P.2d 1373 (1993) (“*Kruse*”); *Halbert v. Forney*, 88 Wn. App. 669, 945 P.2d 1137 (1997) (“*Halbert*”); *Hagensen v. Petersen*, 29 Wn. App. 721, 630 P.2d 1374 (1981) (“*Hagensen*”).

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This principle specifically applies to real estate purchase and sale agreements, such as the one at issue here, calling for seller financing by reference to a promissory note and deed of trust. Under well-settled Washington law, such an agreement is invalid under the statute of frauds unless the form of the note and deed of trust, containing all material terms, is attached to, or otherwise incorporated into, the agreement.<sup>25</sup>

This PSA makes a vague reference to a note and deed of trust. While the Payment Terms Addendum refers to certain terms that might be included in a buyer's promissory note, the addendum is not a form promissory note and fails to include such material terms as the amount of the monthly installment payment and applicable amortization. Significantly, the Payment Terms Addendum requires the attachment of a promissory note and deed of trust. Yet, no deed of trust is attached. The only attached document, entitled "Promissory Note", consisted of nothing but blanks on which material terms were to be inserted.<sup>26</sup>

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<sup>25</sup> See, e.g., *Sea-Van*; *Setterlund*. See *Kruse* (recitation of terms of future payment without accompanying note, deed of trust or real estate contract inadequate under statute of frauds); *Halbert* (same); *Hagensen* (same where no real estate contract is incorporated).

<sup>26</sup> CP 31. See *supra*. at 6-7.

This PSA is comparable to “agreement” condemned invalid under the statute of frauds in *Hubble v. Ward*, with respect to which the Washington Supreme Court observed:

[I]n so far as it [the agreement] looks to the preparation or execution of a future real estate purchase contract upon which the minds of the parties have not met, is not sufficiently definite....<sup>27</sup>

Thus, the PSA is invalid under the statute of frauds.<sup>28</sup> This court should accordingly reverse the judgment below and enter an order granting summary judgment to Savchuk for the full amount of the \$500,000 he transferred to the Jerdes in connection with this invalid agreement.<sup>29</sup>

**D. The Trial Court also Erred in Granting Summary Judgment, Because the Jerdes Failed to Establish Savchuk’s Breach.**

To support its grant of summary judgment, at a minimum, the trial court had to find that: 1) no issue of disputed material fact existed regarding PSA terms for paying the purchase price; 2) as a

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<sup>27</sup> 40 Wn. 2d 779, 787, 246 P.2d 486 (1952)

<sup>28</sup> *Hagensen*, 29 Wn. App at 722; *Sea-Van*, 125 Wn. 2d at 129 (“negotiation, not litigation, is the proper method for agreeing on these vital terms”). See, *supra*, nn. 24-25.

<sup>29</sup> Where warranted, appellate courts have reversed summary judgment below and remanded for entry of summary judgment in favor of the appellant. See, e.g., *Navlet v. Port of Seattle*, 164 Wn. 2d 818, 194 P.3d 221(2008); *Hearst Communications, Inc. v. Seattle Times Co.*, 120 Wn. App 784, 86 P.3d 1194 (2004).

matter of law, the PSA required the Savchuk to pay the remaining balance in cash; and 3) Savchuk breached his obligation to close.<sup>30</sup> Among other deficiencies, this liability portion of the trial court's decision is erroneous because: 1) the PSA is, at best, facially ambiguous regarding whether the remaining purchase price balance would be financed through a seller's note and deed of trust or require all cash at closing; 2) disputed issues of fact exist in the record regarding this material issue; and 3) the Jerdes never adequately tendered performance to establish Savchuk's breach, at any rate. For these reasons, summary judgment should be reversed.

**1. Facial Ambiguity and Disputed Facts Regarding the Terms for Paying the Purchase Price Balance Require Reversal of Summary Judgment.**

Despite the Jerdes' largely unsupported incantation below, regarding the clarity of the PSA terms relating to the payment of purchase price balance, a review of pertinent language necessarily begs the question "how was the unpaid balance to be paid at

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<sup>30</sup> Finding/conclusion 1 in the Summary Judgment Order states the trial courts finding that the PSA required Savchuk to pay "all cash at closing." CP 39. See RP 33-34. Although more general, the trial court's findings/conclusions 1-6 in Final Judgment necessarily were premised on the above conclusions. See CP 9.

closing?” If anything, pertinent PSA language better supports the conclusion that it unambiguously contemplates seller financing to pay the purchase price, than the strained position advanced by the Jerdes below.

Indeed, the payment terms set forth in Paragraph 14 on the first page of the PSA, entitled “SPECIFIC TERMS”, unequivocally asserts that the payment terms encompass a “promissory note.”<sup>31</sup> The attached Payment Terms Addendum calls for Buyer’s execution of a note and deed of trust for the remaining balance.<sup>32</sup> Form 34, the remaining pertinent portion of the Initial PSA unequivocally states: “Payment Terms: Note/Deed of Trust.”<sup>33</sup>

Despite the Jerde’s protestations to the contrary, the Extension Addendum, subsequently executed by the Parties, does not unequivocally set forth the means by which Savchuk was required to pay the remaining purchase price balance. At most, it states that the remaining balance would be due on May 30, 2008. It neither states that that remaining balance must be paid in cash nor does it contain any language purporting to negate or modify the

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<sup>31</sup> CP 27, *supra.* at 6.

<sup>32</sup> CP 31, *supra.* at 6-7.

<sup>33</sup> CP 35, *supra.* at 7-8.

clear references, in other portions of the PSA, to seller financing through the buyer's delivery of a note and deed of trust.<sup>34</sup>

In light of the pertinent language in the PSA and the record below, summary judgment must be reversed. Either the PSA unambiguously permits payment of the purchase price balance through the execution and delivery of a note and deed of trust,<sup>35</sup> or a factual dispute exists on the record with respect to the intent of the parties and the interpretation of that term in the PSA. In either case, reversal of summary judgment would be required.<sup>36</sup>

Through the Affidavit of Sergey Savchuk in Opposition to Motion for Summary Judgment ("Savchuk Affidavit"), he submitted

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<sup>34</sup> CP 36. Similarly, the last line of Paragraph 5 in Form 34, attached to the Initial PSA, that states, "due in full on August 31, 2007," does not specify the form of that payment. Since Paragraph 5 follows the specific adoption of a note and deed of trust as the terms of payment in Paragraph 4, this portion of the PSA facially appears to support Savchuk's position that the purchase price balance would be seller financed through a note and deed of trust. *See supra.* at 7-8.

<sup>35</sup> A truly unambiguous provision may be enforced as a matter of law. *See, e.g., Mayer v. Pierce County Medical Bureau*, 80 Wn. App 416, 909 P.2d 1323 (1995).

<sup>36</sup> Consistent with the seminal case of *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P.2d 222 (1990) and its progeny, in most instances, the interpretation and meaning with respect to a material term, such as the manner of paying the remaining purchase price, will be determined in light of the testimony of the parties relating to their intent and interpretation of that term. Significantly, in most of the cases cited by the Jerdes below, summary judgment was reversed based on the existence of a disputed issue of material fact derived from extrinsic evidence offered by the appellant. *See, e.g., Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn. 2d 656, 911 P.2d 1301 (1996); *Diamond "B" Constructors v. Granite Falls School Dist.*, 117 Wn. App. 157, 70 P.3d 966 (2003).

evidence in the record supporting his interpretation and intent regarding this pertinent purchase price balance payment issue.

Among other things, he testified that:

Key in the contract was the provision that the seller would carry back seller financing for approximately \$200,000. The Seller financing was to be done on a Note and Deed of Trust. I have never received a proposed Note and Deed of Trust that would be acceptable to sellers. We have never agreed upon the terms and conditions of such a Note and Deed of Trust.<sup>37</sup>

The Jerde's attempted to contradict Savchuk's evidence on the issue through largely inadmissible observations contained in one of the declarations submitted by the Jerde's real estate agent, Anne Inman. Through apparent clairvoyance, Ms. Inman offered the unsupported conclusion that: "There was no 'seller financing', only an agreement for installment payments."<sup>38</sup> On the same page of this document, Ms. Inman offers the similarly inadmissible conclusion that:

If the transaction had closed, there never would have been a promissory note and deed of trust; **Exhibit A** to the Declaration of Jeffrey Solomon was superceded by the Extension of Closing Date Addendum that Savchuk signed in August 2007. The agreement between the parties was for the

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<sup>37</sup> CP 64.

<sup>38</sup> CP 55.

transaction to close at the time that Mr. Savchuk made the final installment payment.<sup>39</sup>

Even if one entertains the rather strained conclusion that these observations by Ms. Inman constituted admissible evidence that could be considered by the trial court in connection with the summary judgment proceedings,<sup>40</sup> given the contrary evidence submitted by Savchuk, at most, her statements would create factual dispute on the material purchase price payment terms issue. The resulting evidentiary conflict properly could not be resolved through summary judgment and must be reserved for trial.<sup>41</sup>

**2. Since Jerdes Failed to Establish that They Tendered Performance, Summary Judgment Based on Savchuk's Breach Must Be Reversed.**

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Summary judgment is inappropriate for the additional reason that the Jerdes have failed to establish breach by Savchuk. The

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<sup>39</sup> *Id.* Even this inadmissible statement fails to conclusively establish that the final "installment payment" must be made in "cash" as opposed to a note and deed of trust.

<sup>40</sup> Consistent with CR 56(e), facts on which a court may rely for summary judgment must be drawn from admissible evidence, *See, e.g., Grimwood v. University of Puget Sound, Inc.*, 100 Wn. 2d 355, 753 P.2d 517 (1988). Inman's speculations regarding the intentions of the actual parties to the documents at issue are inadmissible either because, they are not based on personal knowledge, under ER 602, or are based on inadmissible hearsay, under ER 801-806.

<sup>41</sup> In light of the evidence supporting seller financing of the purchase price balance, the trial court's finding that a cash payment was required is erroneous. *See* CP 39; RP 33-34.

Jerdes prominently relied on the sentence drawn from the Extension Addendum that: "All payments are nonrefundable in the event of failure to close."<sup>42</sup> Presumably, the Jerdes do not have the temerity to assert a right Savchuk's \$500,000 deposit absent a breach by him. Yet, the Jerdes have failed to establish, as a matter of law, that Savchuk has materially breached the PSA.

Consistent with evidence submitted by Savchuk, the Jerdes never tendered performance necessary to establish Savchuk's breach. In addition to his testimony set forth above,<sup>43</sup> Savchuk elaborated as follows:

Nevertheless, I was still ready, willing and able to close using seller financing provided for in the Agreement -- I made all the principal payments required and all I had to do was sign a note and deed of trust at closing and the property would have been mine. At no time did sellers make demand that I close the transaction or present me closing documents (i.e. Promissory Note and Deed of Trust) for me to sign and approve. It was their obligation to prepare these documents and obtain approval of the same. They failed to do so even though I was ready to sign the same. I never received a call from the Closing Agent to appear for closing. When the

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<sup>42</sup> CP 36.

<sup>43</sup> *Supra.* at 19.

closing date came and went I assumed they were still working with me to transfer the property.<sup>44</sup>

Significantly, evidence in the record also established that the Jerdes were not in a position to tender clear title in light of the first deed of trust held by Bank of America.<sup>45</sup> In addition to the unresolved factual/legal issues set forth above, any viable breach claim against Savchuk depends on the Jerdes satisfying their burden to establish that they have tendered performance.

If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance.<sup>46</sup>

[\*\*\*\*]

A vendor selling land may not put the buyer in default until the vendor has offered to perform; the payment of the purchase price and the delivering of the deed are concurrent acts.<sup>47</sup>

Not only did the Jerdes not tender into escrow forms of note and deed of trust reasonable acceptable to them, but as with the

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<sup>44</sup> CP 66. See also CP 67; and Declaration of Deanna L. Handley, the Closing Agent for this transaction, CP 73-74.

<sup>45</sup> CP 73-85; 66

<sup>46</sup> *Willener v. Sweeting*, 107 Wn. 2d 388, 394, 730 P.2d 45 (1986).

<sup>47</sup> *Willener*, 107 Wn. 2d at 395. See *Bendon v. Parfit*, 74 Wn. 645, 134 P. 185 (1913).

defendant in *Williner*, they “did not deposit into escrow the documents required to convey marketable title to plaintiffs.”<sup>48</sup>

Thus, summary judgment must be reversed with respect to the Jerdes’ claim of breach by Savchuk. At the very least, disputed issues of material fact remain with respect to the means for paying the unpaid purchase price balance and the adequacy of the Jerdes’ tender of performance.

**E. The Trial Court also Erred in Granting Summary Judgment, Because the \$500,000 Forfeiture Constitutes an Impermissible Penalty.**

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Through Paragraphs 6 and 7 of the “SPECIFIC TERMS” and Paragraph p.i. of the “GENERAL TERMS” of the Initial PSA, the Jerdes elected forfeiture of Savchuk’s initial \$20,000 earnest money deposit as their sole remedy.<sup>49</sup> The PSA language, through which the Jerdes made this election of remedies, accommodated and, was consistent with, RCW 64.04.005, which provides, in pertinent part, that:

(1) A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of a earnest money deposit to the seller as seller’s sole and exclusive remedy if a party fails, without legal excuse,

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<sup>48</sup> *Willener*, 107 Wn. 2d at 396.

<sup>49</sup> CP 27, 30.

to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.<sup>50</sup>

Assuming, for the sake of argument, that the issues set forth above are resolved in favor of the Jerdes and Savchuk is found to have breached the PSA, then the election of remedy provision of the PSA would limit the Jerdes to retention of that \$20,000 deposit. They would, correspondingly, be required to refund the remaining \$480,000 to Savchuk.<sup>51</sup>

To avoid the limitation on earnest money forfeitures to five percent of the sales price, set forth in RCW 64.04.005, the Jerdes argued below that the remaining \$480,000 deposited by Savchuk was not encompassed within the statutory definition of “earnest money deposit” or “liquidated damages” found in RCW 64.04.005(2)(a) and (b). Indeed, since these deposits are not specifically identified in Form 34 or the Extension Addendum as “earnest money deposits” or “liquidated damages”, they do not fall

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<sup>50</sup> RCW 64.04.005(1) [emphasis added].

<sup>51</sup> This is the primary claim set forth in Savchuk’s Complaint. CP 123-129.

within the definitions of those terms contained in this earnest forfeiture statute.

However, contrary to the Jerdes assertion below, one cannot bootstrap from the realization that the \$480,000 in deposits are not governed by RCW 64.04.005, to plausibly assert that these deposits may not be scrutinized under the law applicable to liquidated damage to determine whether they aggregate to become an impermissible penalty. To promote their slight-of-hand, the Jerdes conveniently failed to cite or quote subsection (3), which, among other things, specifically defers to the common-law of liquidated damages for matters falling outside of the earnest money deposit statute:

(3) This section does not prohibit or supercede the common law with respect to, liquidated damages or earnest money forfeiture provisions in excess of five percent of purchase price. A liquidated damages or earnest money forfeiture provision not meeting the requirements of subsection (1) or this section shall be interpreted and enforced without regarding to this statute.

Consistent with subsection (3), the legislation the Jerdes cited, in an effort to duck the issue, in fact, does not preempt, but rather embraces, the common law to determine whether deposits

constitute permissible liquidated damages or impermissible penalties.

The Jerdes have not, and could not, make a case to plausibly support the retention of Savchuk's \$480,000 deposit as liquidated damages in this transaction. Washington law permits the forfeiture of sums deposited with the non-breaching party in the event of breach only when:

[T]he amount specified as liquidated damages is a reasonable forecast of the compensation necessary to make the seller whole should the buyer breach.<sup>52</sup>

On the other hand, where the sums deposited do not represent a reasonable forecast of a party's damages in the event of breach, they will be disallowed as unlawful penalties.<sup>53</sup>

The Jerdes failed to argue or submit any evidence to support a conclusion that retaining Savchuk's \$500,000 deposit on a \$725,000 transaction arose out of the parties' forecast that the Jerdes were likely incur \$500,000 in damages should Savchuk breach his contractual obligation to close. Since it strains credulity

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<sup>52</sup> *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn. 2d 881, 894, 881 P.2d 1010 (1994).

<sup>53</sup> *Id.*, See also *Watson v. Ingram*, 124 Wn. 2d 845, 881 P.2d 247 (1994).

to assert that the Jerdes' retention of a \$500,000 windfall might stem from a reasonable estimate of their potential damages, this evidentiary deficiency is hardly surprising.<sup>54</sup>

As a consequence, the Jerdes have failed to offer evidence on this material issue. For that reason alone, summary judgment entered below should be reversed.

**F. The Trial Court Additionally Erred in Granting Summary Judgment, Because Provisions Authorizing a \$500,000 Forfeiture Are Unconscionable.**

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The trial court's grant of summary judgment necessarily interprets the provisions set forth in the Extension Addendum to mean that: the Jerdes get to keep Savchuk's entire \$500,000 deposit, retain title to the subject real estate, to which Savchuk had added value by securing preliminary plat approval, and Savchuk receives nothing in return! In the event that appellate inquiry proceed to this point, such an interpretation of the Extension

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<sup>54</sup> Indeed, the Jerdes' proposed retention of roughly two-thirds of the purchase price is a far cry from the permissible damages allowed under applicable precedent. For example, *Wallace* relied, in part, on an economist's expert testimony to support its conclusion that a deposit of roughly 17% of the purchase price could be retained as liquidated damages as a reasonable estimate of damages and acknowledged that 20% may be appropriate under certain circumstances, 124 Wn. 2d at 895. See also *Watson* (\$15,000 permissible liquidated damages on a \$355,000 purchase price).

Addendum provisions should be deemed unenforceable as substantively unconscionable.

Washington law recognizes both procedural and substantive unconscionability.<sup>55</sup> As the Supreme Court recently observed:

We have distinguished between 'procedural' unconscionability, involving blatant unfairness in the bargaining process and a lack of meaningful choice, and 'substantive' unconscionability, or unfairness of the terms or results.<sup>56</sup>

Here, Savchuk maintains that the overreaching interpretation of the Extension Addendum advanced by the Jerdes is substantively unconscionable. Substantive unconscionability provides a basis for invalidating offending contractual provisions without regard to whether procedural unconscionability also may apply.<sup>57</sup>

[S]ubstantive unconscionability involves cases “ ‘where a clause or term in the contract is...one-sided or overly

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<sup>55</sup> *Scott v. Cingular Wireless*, 160 Wn. 2d 843, 161 P.3d 1001 (2007) (“*Scott*”); *Zuver v. Air Touch Communications, Inc.*, 153 Wn. 2d 293, 103 P.3d 753 (2004) (“*Zuver*”).

<sup>56</sup> *Torgerson v. One Lincoln Tower, LLC*, 166 Wn. 2d 510, 518, 210 P.3d 318 (2009).

<sup>57</sup> See, e.g., *Scott*; *Zuver*. Since Savchuk is pursuing only a substantive unconscionability ruling, the potential “evidentiary” conflict that may arise due to largely unsubstantiated conclusions submitted through the “declaration” of Anne Inman to the effect that Savchuk was a “sophisticated developer”, on the one hand, and Savchuk’s own declaration testimony casting doubt both on his sophistication and understanding of the English language, need not be addressed nor resolved to properly analyze this issue.

harsh....” [citations omitted] However, such unfairness must truly stand out. “ ‘Shocking to the conscience” “monstrously harsh” and “exceedingly callous” are terms sometimes used to define substantive unconscionability” [citations omitted].<sup>58</sup>

The retention by the Jerdes of the \$500,000 forfeiture, title of the subject real estate and the attendant benefits provided by Savchuk are one-sided and overly harsh, shocking to the conscience and exceedingly callous. Any interpretation of the provisions in the Extension Addendum that allow for such results should be ruled void as substantively unconscionable.

**G. The Jerdes’ Award of Attorney’s Fees and Costs Should Be Reversed.**

As established above, the grant of summary judgment should be reversed. Although the trial court did not articulate a basis for the award below, it must have arisen out of Paragraph q of the “GENERAL TERMS”, under which “the prevailing party is entitled to reasonable attorneys’ fees and expenses.”<sup>59</sup> With the reversal of the judgment below, the Jerdes will no longer be prevailing parties entitled to attorney’s fees, and that portion of the judgment also must be reversed.

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<sup>58</sup> *Torgerson*, 166 Wn. 2d at 519.

<sup>59</sup> CP 30.

**H. If this Court Remands for Entry of Summary Judgment for Savchuk, then He also Will Be Entitled to an Award of Attorneys' Fees and Costs.**

In the event that the PSA is invalid under the statute of Frauds, or perhaps if the deposit is an invalid remedy, then Savchuk would be entitled to entry summary judgment for return of some or all of the deposit.<sup>60</sup> Since Savchuk also would be the substantially prevailing party in this litigation, he would be entitled to an award of his reasonable attorney's fees and costs incurred both on this appeal and in litigating this matter below.

**V. CONCLUSION**

As established above, the PSA is invalid under the statute of frauds. As a consequence, this Court should reverse the judgment below and enter judgment in favor of Savchuk, requiring the Jerdes to refund all of Savchuk's \$500,000 deposit, plus prejudgment interest at 12 percent per annum, and Savchuk's reasonable attorney's fees and costs incurred in this appeal and in the Superior Court.

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<sup>60</sup> If the "agreement" is invalid under the statute of frauds, then the entire \$500,000 should be returned to Savchuk. If judgment in favor of Savchuk arises because the deposit is an excessive penalty or is based on substantively unconscionable provisions, then Savchuk would be entitled to return of \$480,000. The initial \$20,000 earnest money deposit could possibly be a permissible remedy, under RCW 64.04.005, assuming the Jerdes can establish breach.

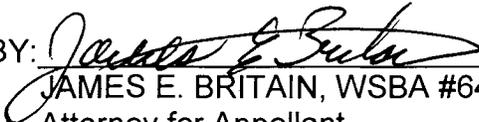
In the alternative, summary judgment nevertheless should be reversed because: 1) a factual dispute remains regarding the material issues of whether the remaining purchase price balance could be paid through delivery of a note or deed of trust; and 2) the record does not establish that the Jerdes tendered performance or a factual dispute regarding that material issue exists. On reversal and remand on these grounds, the trial court's attorney's fees and costs to the Jerdes also must be overturned, and the case remanded for trial below.

At the very least, this Court should reverse entry of summary judgment below, because retention of Savchuk's \$500,000 deposit cannot be justified as liquidated damages and constitutes an impermissible penalty. In the alternative, interpreting the Extension Addendum to permit the Jerdes' retention of Savchuk's \$500,000 deposit renders such contractual provision substantively unconscionable. Reversal on these grounds correspondingly requires that the Jerdes refund to Savchuk at least \$480,000 of his

deposit. Since Savchuk also would be the substantially prevailing party, he would be entitled to an additional award of his reasonable attorneys' fees and costs incurred in this appeal, as well as below.

RESPECTFULLY SUBMITTED, this 18th day of December,  
2009

BRITAIN & VIS, PLLC

BY:   
JAMES E. BRITAIN, WSBA #6456,  
Attorney for Appellant  
Sergey Savchuk

**APPELLANT'S OPENING BRIEF  
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RCW 64.04.005..... APP 22

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**BELCHER SWANSON  
LAW FIRM, P.L.L.C.**

BY \_\_\_\_\_

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

SERGEY SAVCHUK, a married man

Case No. 09-2-00357-9

Plaintiff,

**AMENDED ORDER GRANTING  
SUMMARY JUDGMENT AND  
FINAL JUDGMENT**

vs.

STEVEN G. JERDE and DARLYCE J. JERDE,  
husband and wife and the marital community  
composed thereof,

Defendants.

**JUDGMENT SUMMARY  
(RCW 4.64.030)**

Judgment Creditor:	Steven & Darlyce Jerde
Judgment Debtor:	Sergey Savchuk
Principal Judgment Amount:	\$
Interest to Date of Judgment:	\$
Attorney's Fees:	\$7308.78
Costs:	\$
Other Recovery Amount:	\$
Principal Judgment shall bear interest at 12% per annum.	

Attorney's fees, costs and other recovery amounts shall bear interest at 12% per annum.

Attorney for Judgment Creditor:	Mark Kaiman
Attorney for Judgment Debtor:	Jeffery Solomon

**COPY**

CP 2

**JUDGMENT & ORDER**

1. Defendant's motion for Summary Judgment is granted.
2. Plaintiff's complaint is hereby dismissed in its entirety.
3. Plaintiff Sergey Savchuk is in material breach of the Purchase and Sale Agreement between himself and Defendants Steven and Darlyce Jerde. That contract is hereby terminated.
4. Sergey Savchuk shall forfeit all payments already made to Steven and Darlyce Jerde under the contract, and title to the real property described therein shall remain with Steven and Darlyce Jerde.
5. Steven and Darlyce Jerde are further awarded judgment against Sergey Savchuk for reasonable attorney's fees in the amount of \$7308.78.
6. Any additional claim for damages by Defendants is hereby dismissed.
7. Pursuant to CR 54(b), it is hereby determined that all claims have been adjudicated and there is no just reason for delay of entry of final judgment against Sergey Savchuk. Accordingly, the Clerk is directed to enter final judgment against Sergey Savchuk.

DONE IN OPEN COURT this \_\_\_\_\_ day of September, 2009.

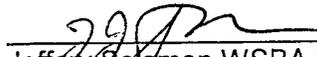
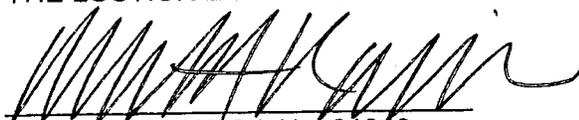
**IRA J. UHRIG**

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HONORABLE IRA J. UHRIG

Presented By:

THE LUSTICK LAW FIRM

BELCHER SWANSON LAW FIRM PLLC



Mark Kaiman WSBA No. 31049  
Attorney for Defendant

Jeffrey Solomon WSBA No. 29722  
Attorney for Plaintiff

*CP-8*

FILED IN OPEN COURT

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WHATCOM COUNTY CLERK

By \_\_\_\_\_ *B*

Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

SERGEY SAVCHUK, a married man

Case No. 09-2-00357-9

Plaintiff,

ORDER GRANTING  
SUMMARY JUDGMENT

vs.

STEVEN G. JERDE and DARLYCE J. JERDE,  
husband and wife and the marital community  
composed thereof,

Defendants.

THIS MATTER having come on for a hearing on the 10<sup>th</sup> day of July, 2009 before the Honorable Ira J. Uhrig upon Defendant's Motion for Summary Judgment, Defendant appearing by and through his attorney Mark Kaiman of the Lustick Law Firm, and Plaintiff appearing by and through his attorney Jeffrey Solomon of Belcher Swanson PLLC, the Court having heard the arguments of counsel, having reviewed the memoranda of law submitted by counsel for all parties, and the evidentiary materials submitted by the parties as listed below:

1. Declaration of Anne Inman;
2. Memorandum in Support of Summary Judgment;
3. Declaration of Darlyce Jerde;
4. Plaintiff's Response to Motion for Summary Judgment;
5. Affidavit of Sergey Savchuk;

6. Declaration of Jeffrey Solomon;
7. Declaration of Deanna Handley;
8. Supplemental Declaration of Anne Inman;
9. Supplemental Memorandum.

**ORDER**

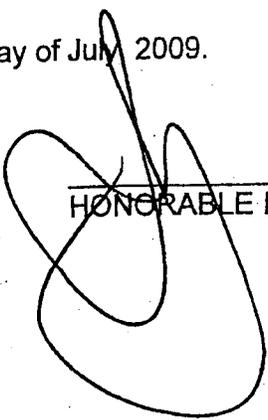
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion for Summary Judgment is hereby granted.

IT IS FURTHER ORDERED that the Plaintiff shall pay as follows:

1. The entire outstanding purchase price balance of \$235,000 pursuant to the Purchase and Sale Agreement and addenda; *ALL CREDIT AT CLOSING.*
2. Pre-judgment interest from 9/1/2007 at the rate of 7.5% per annum in the amount of \$33,046.88, pursuant to the Extension of Closing Date Addendum;
3. A 5% penalty on the unpaid balance in the amount of \$11,750 pursuant to the terms of the Extension of Closing Date Addendum;
- ~~4. Damages in the amount of \$12,000 as a consequence of the Defendant's being required to make the property habitable for renters after the Plaintiff's default;~~
- ~~5. Attorney's fees and costs in the amount of \$5228.20.~~ *RESCINDED.*

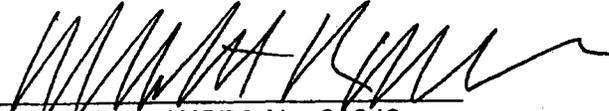
If the Plaintiff fails to close this transaction and pay the amounts indicated as above within thirty (30) days of the date of this order, the Plaintiff shall forfeit the \$500,000 non-refundable payments already made to Defendants, and title to the subject property shall remain in the name of the Defendants. ~~Plaintiff shall pay Defendant's attorney's fees and costs in the amount of \$5228.20.~~

Done in Open Court this 31 day of July 2009.

  
\_\_\_\_\_  
HONORABLE IRA J. UHRIG

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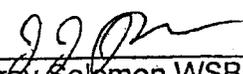
2 THE LUSTICK LAW FIRM

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4 Mark Kaiman WSBA No. 31049  
5 Attorney for Defendant

6 Approved for Entry; Notice of Presentation Waived:

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9 Jeffrey Solomon WSBA No. 29722  
Attorney for Plaintiff

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

SERGEY SAVCHUK,  
a married man,  
  
Plaintiff,

NO. 09-2-00357-9

vs.

DECLARATION OF JEFFERY J.  
SOLOMON IN SUPPORT OF MOTION  
FOR RECONSIDERATION

STEVEN G. JERDE and DARLYCE J.  
JERDE, husband and wife, and the  
marital community composed thereof,  
Defendants.

Judge Ira Uhrig

I, Jeffery J. Solomon, declare under penalty of perjury under the laws of  
the State of Washington that the following is true and correct to the best of my  
knowledge.

1. I am one of the attorneys for Plaintiff Sergey Savchuk, have first  
hand knowledge of the facts contained herein and am competent to testify.

2. Attached hereto are true and correct copies of the following  
documents excerpted from the escrow file provided to me by the parties' Closing  
Agent, Deanna L. Handley:

Exhibit A - Residential Real Estate Purchase and Sale  
Agreement Specific Terms (NWMLS Form 21) dated October 2, 2006.

Exhibit B - Payment Terms Addendum to Purchase & Sale

DECLARATION OF JEFFERY J. SOLOMON IN  
SUPPORT OF MOTION FOR RECONSIDERATION - 1

Belcher | Swanson  
LAW FIRM, PLLC

900 DUPONT STREET, BELLINGHAM WASHINGTON 98225  
TELEPHONE 360 . 734 . 6390 FAX 360 . 671 . 0753  
www.belcherswanson.com

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Agreement (NWMLS Form 22C), signed by Seller October 3, 2006.

Exhibit C - Promissory Note (NWMLS Form 22M, 24A).

Exhibit D - Addendum/Amendment to Purchase and Sale Agreement (NWMLS Form 34), signed by buyer on January 8, 2007.

Exhibit E - Extension of Closing Date Addendum.

SIGNED this 7 day of August 2009 at Bellingham, Washington.

  
\_\_\_\_\_  
JEFFERY J. SOLOMON, WSBA #29722

NWMLS Form 21  
Residential Purchase & Sale Agreement  
Revised 6/06  
Page 1 of 4

**EXHIBIT A**

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**RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT  
SPECIFIC TERMS**

1. Date: October 2, 2006 MLS No.: 26147441

2. Buyer: Sergey Savchuk

3. Seller: Steve & Darlyce Jerde

4. Property: Tax Parcel Nos.: \_\_\_\_\_ ( Whatcom County)  
 Street Address: 2439 Douglas Rd Ferndale Washington 98248  
 Included Items:  stove/range  refrigerator  washer  dryer  dishwasher  hot tub  fireplace insert  
 wood stove  satellite dish  security system  other \_\_\_\_\_  
 Legal Description: See attached

5. Purchase Price: \$725,000.00 Seven hundred, twenty-five thousand dollars

6. Earnest Money: (To be held by  Selling Broker  Closing Agent)  
 Personal Check: \$20,000.00  
 Note: \$ \_\_\_\_\_  
 Other ( \_\_\_\_\_ ): \$ \_\_\_\_\_

7. Default: (check only one)  Forfeiture of Earnest Money  Seller's Election of Remedies

8. Title Insurance Company: Whatcom Land Title

9. Closing Agent:  a qualified closing agent of Buyer's choice  Whatcom Land Title- Deanna

10. Closing Date: 08/31/2007 August 31, 2007 or sooner as mutually agreed  
 Possession Date:  on Closing  Other \_\_\_\_\_

12. Offer Expiration Date: \_\_\_\_\_

13. Counteroffer Expiration Date: Monday, January 8, 2007

14. Addenda: Payment terms, Adden # 34, Notice 90, Legal description, optional clauses, promissory note, septic addend, agency disclosure, feasibility

15. Agency Disclosure: Selling Licensee represents  Buyer  Seller  both parties  neither party  
 Listing Agent represents  Seller  both parties

16. Services of Closing Agent for Payment of Utilities:  Requested (Attach NWMLS Form 22K)  Waived

<u>[Signature]</u> Buyer's Signature	<u>1/8/07</u> Date	<u>[Signature]</u> Seller's Signature	<u>10/2/06</u> Date
_____ Buyer's Signature	_____ Date	<u>[Signature]</u> Seller's Signature	<u>10/2/06</u> Date
_____ Buyer's Address		<u>2439 Douglas Rd</u> Seller's Address	
_____ City, State, Zip		<u>Ferndale, WA 98248</u> City, State, Zip	
_____ Phone	_____ Fax	<u>360-383-0523</u> Phone	_____ Fax
_____ Buyer's E-mail Address		_____ Seller's E-mail Address	
<u>ReMax Metro Realty</u> Listing Broker	<u>7008</u> MLS Office No.	<u>The Muljat Group</u> Listing Broker	<u>9838</u> MLS Office No.
<u>Christine Sams</u> Selling Licensee (Print)	<u>25330</u>	<u>Anne Inman</u> Listing Agent (Print)	<u>25825</u>
<u>360-739-8887</u> Phone	<u>206-322-7576</u> Fax	<u>360-201-2918</u> Phone	<u>360-392-6017</u> Fax

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Residential Purchase & Sale Agreement  
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**RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT**  
**GENERAL TERMS**  
(continued)

- a. **Purchase Price.** Buyer agrees to pay to Seller the Purchase Price, including the Earnest Money, in cash at Closing, unless otherwise specified in this Agreement. Buyer represents that Buyer has sufficient funds to close this sale in accordance with this Agreement and is not relying on any contingent source of funds or gifts, except to the extent otherwise specified in this Agreement. 1-4
- b. **Earnest Money.** Buyer agrees to deliver the Earnest Money within 2 days after mutual acceptance of this Agreement to Selling Licensee who will deposit any check to be held by Selling Broker, or deliver any Earnest Money to be held by Closing Agent, within 3 days of receipt or mutual acceptance, whichever occurs later. If the Earnest Money is held by Selling Broker and is over \$10,000.00 it shall be deposited into an interest bearing trust account in Selling Broker's name provided that Buyer completes an IRS Form W-9. Interest, if any, after deduction of bank charges and fees, will be paid to Buyer. Buyer agrees to reimburse Selling Broker for bank charges and fees in excess of the interest earned, if any. If the Earnest Money held by Selling Broker is over \$10,000.00 Buyer has the option to require Selling Broker to deposit the Earnest Money into the Housing Trust Fund Account, with the interest paid to the State Treasurer, if both Seller and Buyer so agree in writing. If the Buyer does not complete an IRS Form W-9 before Closing, Selling Broker must deposit the Earnest Money or the Earnest Money is \$10,000.00 or less, the Earnest Money shall be deposited into the Housing Trust Fund Account. Selling Broker may transfer the Earnest Money to Closing Agent at Closing. If all or part of the Earnest Money is to be refunded to Buyer and any such costs remain unpaid, the Selling Broker or Closing Agent may deduct and pay them therefrom. The parties instruct Closing Agent to: (1) provide written verification of receipt of the Earnest Money and notice of dishonor of any check to the parties and licensees at the addresses and/or fax numbers provided herein; and (2) commence an interpleader action in the Superior Court for the county in which the Property is located within 30 days of a party's demand for the Earnest Money (and deduct up to \$250.00 of the costs thereof) unless the parties agree otherwise in writing. 5-21
- c. **Included Items.** Any of the following items located in or on the Property are included in the sale: built-in appliances; wall-to-wall carpeting; curtains, drapes and all other window treatments; window and door screens; awnings; storm doors and windows; installed television antennas; ventilating, air conditioning and heating fixtures; trash compactor; fireplace doors, gas logs and gas log lighters; irrigation fixtures; electric garage door openers; water heaters; installed electrical fixtures; lighting fixtures; shrubs, plants and trees planted in the ground; and all bathroom and other fixtures. However, items identified in Specific Term No. 4 are included only if the corresponding box is checked. If any of the above Included Items are leased or encumbered, Seller agrees to acquire and clear title at or before Closing. 22-28
- d. **Condition of Title.** Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Buyer's reasonable use of the Property; and reserved oil and/or mining rights. Monetary encumbrances not assumed by Buyer shall be paid by Seller on or before Closing. Title shall be conveyed by a Statutory Warranty Deed. If this Agreement is for conveyance of a buyer's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a buyer's assignment of the contract sufficient to convey after acquired title. 29-35
- e. **Title Insurance.** Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for an Homeowner's Policy of Title Insurance for One-to-Four Family Residence (ALTA 1998), from the Title Insurance Company. If the Title Insurance Company selected by the parties will not issue a Homeowner's Policy for the Property, the parties agree that the Title Insurance Company shall instead issue a standard form Owner's Policy (ALTA 1992). The Title Insurance Company is to send a copy of the preliminary commitment to both Listing Agent and Selling Licensee. The preliminary commitment, and the title policy to be issued, shall contain no exceptions other than the General Exclusions and Exceptions in the Policy and Special Exceptions consistent with the Condition of Title herein provided. If title cannot be made so insurable prior to the Closing Date, then as Buyer's sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to the Buyer, less any unpaid costs described in this Agreement, and this Agreement shall thereupon be terminated. Buyer shall have no right to specific performance or damages as a consequence of Seller's inability to provide insurable title. 36-46
- f. **Closing.** This sale shall be closed by the Closing Agent on the Closing Date. If the Closing Date falls on a Saturday, Sunday, or legal holiday as defined in RCW 1.16.050, the Closing Agent shall close the transaction on the next day that is not a Saturday, Sunday, or legal holiday. "Closing" means the date on which all documents are recorded and the sale proceeds are available to Seller. Seller shall deliver keys to Buyer on the Closing Date or on the Possession Date, whichever occurs first. 47-51

Initials: BUYER: S.S      DATE: 1/8/07      SELLER: SeJ      DATE: 10/2/06 52  
 BUYER: \_\_\_\_\_      DATE: \_\_\_\_\_      SELLER: DA      DATE: 10-2-06 53

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Residential Purchase & Sale Agreement  
Revised 6/06  
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**RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT**  
**GENERAL TERMS**  
(continued)

- g. **Possession.** Buyer shall be entitled to possession at 9:00 p.m. on the Possession Date. Seller agrees to maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession. 54  
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  - h. **Closing Costs and Prorations.** Seller and Buyer shall each pay one-half of the escrow fee unless this sale is FHA or VA financed, in which case it shall be paid according to FHA or VA regulations. Taxes for the current year, rent, interest, and lienable homeowner's association dues shall be prorated as of Closing. Buyer agrees to pay Buyer's loan costs, including credit report, appraisal charge and lender's title insurance, unless provided otherwise in this Agreement. If any payments are delinquent on encumbrances which will remain after Closing, Closing Agent is instructed to pay them at Closing from money due, or to be paid by, Seller. Buyer agrees to pay for remaining fuel in the fuel tank if, prior to Closing, Seller obtains a written statement as to the quantity and current price from the supplier. Seller agrees to pay all utility charges, including unbilled charges. Unless waived in Specific Term No. 16, Seller and Buyer request the services of Closing Agent in disbursing funds necessary to satisfy unpaid utility charges in accordance with RCW 60.80 and Seller agrees to provide the names and addresses of all utilities providing service to the Property and having lien rights (attach NWMLS Form 22K Identification of Utilities or equivalent). 56  
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  - i. **Sale Information.** The Listing Agent or Selling Licensee is authorized to report this Agreement (including price and all terms) to the Multiple Listing Service that published it and to its members, financing institutions, appraisers, and anyone else related to this sale. Buyer and Seller expressly authorize all Closing Agents, appraisers, title insurance companies, and others related to this Sale, to furnish the Listing Agent and/or Selling Licensee, on request, any and all information and copies of documents concerning this sale. 67  
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  - j. **FIRPTA - Tax Withholding at Closing.** The Closing Agent is instructed to prepare a certification (NWMLS Form 22E or equivalent) that Seller is not a "foreign person" within the meaning of the Foreign Investment In Real Property Tax Act. Seller agrees to sign this certification. If Seller is a foreign person, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service. 72  
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- Notices.** In consideration of the license to use this and NWMLS's companion forms and for the benefit of the Listing Agent and the Selling Licensee as well as the orderly administration of the offer, counteroffer or this Agreement, the parties irrevocably agree that unless otherwise specified in this Agreement, any notice required or permitted in, or related to, this Agreement (including revocations of offers or counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and shall be deemed given only when the notice is received by Seller, by Listing Agent or at the licensed office of Listing Agent. Notices to Buyer must be signed by at least one Seller and shall be deemed given only when the notice is received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. Receipt by Selling Licensee of a Seller Disclosure Statement, Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards, Public Offering Statement or Resale Certificate, or a preliminary commitment for title insurance provided pursuant to NWMLS Form 22T shall be deemed receipt by Buyer. Selling Licensee and Listing Agent have no responsibility to advise of receipt of a notice beyond either phoning the party or causing a copy of the notice to be delivered to the party's address shown on this Agreement. Buyer and Seller must keep Selling Licensee and Listing Agent advised of their whereabouts in order to receive prompt notification of receipt of a notice. 76  
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- l. **Computation of Time.** Unless otherwise specified in this Agreement, any period of time measured in days and stated in this Agreement shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time. Except for the Possession Date, if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of 5 days or less shall not include Saturdays, Sundays or legal holidays. If the parties agree that an event will occur on a specific calendar date, the event shall occur on that date, except for the Closing Date, which, if it falls on a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, shall occur on the next day that is not a Saturday, Sunday, or legal holiday. Time is of the essence of this Agreement. 89  
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  - m. **Facsimile and E-mail Transmission.** Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document. E-mail transmission of any document or notice shall not be effective unless the parties to this Agreement otherwise agree in writing. 97  
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  - n. **Integration.** This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. 101  
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Initials: BUYER: S.S DATE: 1/8/07 SELLER: [Signature] DATE: 10/2/06 104  
 BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: [Signature] DATE: 10-2-04 105

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Revised 6/06  
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**RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT**  
**GENERAL TERMS**  
(continued)

- o. **Assignment.** Buyer may not assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless the parties indicate that assignment is permitted by the addition of "and/or assigns" on the line identifying the Buyer on the first page of this Agreement.106  
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- p. **Default.** In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 7, shall apply:109  
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- i. **Forfeiture of Earnest Money.** That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure.111  
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- ii. **Seller's Election of Remedies.** Seller may, at Seller's option, (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity.113  
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- q. **Attorneys' Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.117  
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- r. **Offer.** Buyer agrees to purchase the Property under the terms and conditions of this Agreement. Seller shall have until 9:00 p.m. on the Offer Expiration Date to accept this offer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Buyer, by Selling Licensee or at the licensed office of Selling Licensee. If this offer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer.119  
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- s. **Counteroffer.** Seller agrees to sell the Property under the terms and conditions of this Agreement. If Seller makes a counteroffer, Buyer shall have until 9:00 p.m. on the Counteroffer Expiration Date to accept that counteroffer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by Seller, by Listing Agent or at the licensed office of Listing Agent. If the counteroffer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer. If no expiration date is specified for a counteroffer, the counteroffer shall expire at 9:00 p.m. 2 days after the counteroffer is delivered by the last party making the counteroffer, unless sooner withdrawn.123  
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- t. **Agency Disclosure.** Selling Broker represents the same party that Selling Licensee represents. Listing Broker represents the same party that the Listing Agent represents. If Selling Licensee and Listing Agent are different salespersons affiliated with the same Broker, then both Buyer and Seller confirm their consent to that Broker representing both parties as a dual agent. If Selling Licensee and Listing Agent are the same salesperson representing both parties then both Buyer and Seller confirm their consent to that salesperson and his/her Broker representing both parties as dual agents. All parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency."130  
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- u. **Commission.** Seller and Buyer agree to pay a commission in accordance with any listing or commission agreement to which they are a party. The Listing Broker's commission shall be apportioned between Listing Broker and Selling Broker as specified in the listing. Seller and Buyer hereby consent to Listing Broker or Selling Broker receiving compensation from more than one party. Seller and Buyer hereby assign to Listing Broker and Selling Broker, as applicable, a portion of their funds in escrow equal to such commission(s) and irrevocably instruct the Closing Agent to disburse the commission(s) directly to the Broker(s). In any action by Listing or Selling Broker to enforce this paragraph, the prevailing party is entitled to court costs and reasonable attorneys' fees.137  
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- v. **Cancellation Rights/Lead-Based Paint.** If a residential dwelling was built on the Property prior to 1978, and Buyer receives a Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (NWMLS Form 22J) after mutual acceptance, Buyer may rescind this Agreement at any time up to 3 days thereafter.144  
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- w. **Property Condition Disclaimer.** Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property. Some properties may contain building materials, including siding, roofing, ceiling, insulation, electrical, and plumbing materials, that have been the subject of lawsuits and/or governmental inquiry because of possible defects or health hazards. In addition, some properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. Real estate licensees do not have the expertise to identify or assess defective products, materials, or conditions. Buyer is urged to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property.147  
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Initials: BUYER: S.S      DATE: 1/8/07      SELLER: SA      DATE: 10/2/06 154  
 BUYER: \_\_\_\_\_      DATE: \_\_\_\_\_      SELLER: DS      DATE: 10-2-06 155

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**EXHIBIT B**  
**PAYMENT TERMS ADDENDUM  
TO PURCHASE & SALE AGREEMENT**

The following is part of the Purchase and Sale Agreement dated October 02, 2006  
between Sergey Savchuck and or Assigns ("Buyer")  
and Jerde ("Seller")  
concerning 2439 Douglas Dr, Ferndale, WA 98248 ("the Property")

**METHOD OF PAYMENT** (Check and complete each applicable paragraph).

**NOTE AND DEED OF TRUST.** Buyer agrees to pay \$525,000.00  
down, including Earnest Money, at Closing and the balance of the Purchase Price to Seller in monthly installments of  
interest only on principal balance or more at Buyer's option, including interest from  
the date of Closing at the rate of 7 % per annum on the unpaid principal, on or before  
the 15th day of each month, commencing:  30 days following the Closing  
 . This indebtedness shall be evidenced by a Promissory Note and a  
 first position  second position (first, if not filled in) Deed of Trust, as set forth below.

**Due Date.** The entire balance of principal and interest shall be due and payable   
years from the date of Closing  on 08/31/2007

**Default and Default Interest.** The principal shall bear interest at the rate of 18 % per annum (18% if not  
filled in) or the maximum rate allowed by law, whichever is less, during any period of Buyer's default. A late charge of  
or 5 % of the installment payment (5% of the installment  
payment if neither is filled in) shall be added to any installment payment more than 15 days  
days late (15 days if not filled in). If Buyer has not cured any default within 30 days (30 days if not filled in)  
after written notice, Seller may declare all outstanding sums immediately due and payable.

**Promissory Note.** Buyer agrees to sign at Closing the NWMLS Form 22M Promissory Note (revised 7/99 or later)  
(LPB Form 28A) and LPB Form 22 Deed of Trust securing the Property, or an equivalent form, which must be  
attached to this Agreement.

**Due on Sale.** Unless the Commercial Property clause is initialed by Buyer and Seller, the Due on Sale clause is the  
only optional clause that applies. The following language shall be added to the form Deed of Trust:

This Property may not be sold or transferred without Beneficiary's consent. Upon breach of this provision,  
Beneficiary may declare all sums secured by this Deed of Trust immediately due and payable, unless  
prohibited by applicable law.

(NOTE: If the Property is primarily for agricultural purposes, then a nonjudicial foreclosure/forfeiture remedy is avail-  
able only by using a real estate contract.)

**REAL ESTATE CONTRACT.** Buyer agrees to pay \_\_\_\_\_ down, including Earnest Money, at  
Closing and the balance of the Purchase Price in monthly installments to Seller of \_\_\_\_\_  
or more at Buyer's option, including interest from the date of Closing at the rate of \_\_\_\_\_ %  
per annum on the declining principal balance, on or before the \_\_\_\_\_ day of each month, commencing:  
 30 days following the Closing of this sale  . The first payment shall be adjusted to  
include any interest accrued. The parties agree to sign Limited Practice Board Form 44 Real Estate Contract secur-  
ing the Property which must be attached to this Agreement. The "Due on Sale" clause is the only optional clause  
which will apply unless other optional clauses are initialed by both parties. In addition, the following shall be added to  
the form Real Estate Contract: "It is further agreed that Buyer will pay real estate taxes and hazard insurance as they  
come due, and that Buyer will provide Seller with evidence of those payments."

**Cash Out.** The entire balance of principal and interest shall be due and payable:   
years from the date of Closing  on \_\_\_\_\_

Initials: BUYER: S.S DATE: 10/02/2006 SELLER: SJS DATE: 10-3-06  
BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: AS DATE: 10/3/06

**PAYMENT TERMS ADDENDUM TO  
PURCHASE & SALE AGREEMENT**  
(continued)

**CASH DOWN TO EXISTING LOAN.** Buyer agrees to assume, at Closing, an existing  Deed of Trust  Mortgage 45  
 Real Estate Contract securing the Property and to pay the balance of the Purchase Price in cash, including Earn- 46  
est Money, at Closing. Seller guarantees that such obligation is assumable provided that Buyer complies with and 47  
agrees to abide by any requirements or conditions imposed by the holder of the obligation to be assumed. Seller 48  
understands that when a loan is "assumed," the Seller remains liable to pay the lender if the Buyer fails to do so. The 49  
assumed loan  is  is not an Adjustable Rate Mortgage (ARM). The monthly payments could increase or decrease 50  
if the assumed loan is an ARM. The assumed loan has a principal balance of approximately \_\_\_\_\_ 51  
and is payable in monthly installments of approximately \_\_\_\_\_ including interest at \_\_\_\_\_ % 52  
per annum computed on the declining principal balance, and including  real estate taxes  hazard insurance. 53  
Seller authorizes Closing Agent to pay any delinquent payments from money due Seller at time of Closing. 54

**SELLER WRAP OF EXISTING LOAN.** Buyer agrees to pay \_\_\_\_\_ down including the Earnest 55  
Money, at Closing and the balance to Seller in monthly installments of \_\_\_\_\_, or more at Buyer's 56  
option, including interest at \_\_\_\_\_ % per annum computed on the unpaid principal, commencing 57  
 30 days following Closing  \_\_\_\_\_. The then unpaid principal balance shall, at 58  
Seller's option, bear interest at the rate of \_\_\_\_\_ % per annum (18% if not filled in) or the maximum rate 59  
allowed by law, whichever is less, during any period of Buyer's default. From the payments by Buyer to Seller, Seller 60  
will pay the monthly payments of \_\_\_\_\_ due on an existing loan by \_\_\_\_\_ 61  
(the lender) having an approximate present principal balance of \_\_\_\_\_ with interest at \_\_\_\_\_ % 62  
per annum computed on the unpaid principal and secured by the Property. Such balance remains the obligation of 63  
the Seller and Seller agrees to pay such obligation in accordance with its terms and conditions. Buyer shall have the 64  
right to remedy any default on the underlying obligation, provided Buyer is not in default to the Seller, and all sums so 65  
paid shall be credited to Buyer's payments to Seller. Buyer and Seller agree to sign, at Closing, the form  Real Es- 66  
tate Contract  Note and Deed of Trust, securing the Property which must be attached to this Agreement. 67

**PAYMENTS TO COLLECTION ACCOUNT.** The above payments are to be made to a contract collection account at 68  
Trust Accounting center Bank, Anacortes Branch, to be established 69  
and paid for by Buyer and Seller equally. 70

**CREDIT REPORT CONTINGENCY.** This Agreement is subject to Seller's approval of Buyer's credit report, which ap- 71  
proval shall not be unreasonably withheld. Buyer agrees to order a credit report and deliver said credit report to Seller 72  
within \_\_\_\_\_ days (7 days if not filled in) of mutual acceptance of this Agreement. Unless Seller gives written 73  
notice to Buyer of Seller's disapproval of Buyer's credit report within \_\_\_\_\_ days (2 days if not filled in) of 74  
receipt of credit report, this contingency shall be deemed satisfied and will no longer be a part of this Agreement. 75

**TITLE INSURANCE.** Buyer agrees to pay the costs of a lender's standard title insurance policy insuring Seller's 76  
security interest. 77

**CONSENT OF HOLDER OF UNDERLYING OBLIGATION.** If there is an existing Deed of Trust, Real Estate Contract or 78  
other encumbrance which is to remain unpaid after Closing and its terms require the holder's consent to this sale, Buyer 79  
agrees to promptly apply for such consent upon mutual acceptance of this Agreement. This Agreement is subject to the 80  
written consent of the holder of the underlying obligation within \_\_\_\_\_ days (15 days if not filled in) after the 81  
mutual acceptance of this Agreement. If the holder's written consent to this Agreement is not obtained by such date, this 82  
Agreement shall terminate, and the Earnest Money shall be refunded to Buyer. 83

Initials: BUYER: S.S DATE: 10/02/2006 SELLER: [Signature] DATE: 10-3-06 84  
BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: [Signature] DATE: 10/3/06 85

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**PROMISSORY NOTE**

\$ \_\_\_\_\_  
Principal Date City State

FOR VALUE RECEIVED, \_\_\_\_\_

hereinafter "Maker" promises to pay to \_\_\_\_\_

hereinafter "Holder" or order at \_\_\_\_\_

or other such place as may be designated by the Holder from time to time, the principal sum of \_\_\_\_\_

dollars (\$ \_\_\_\_\_).

with interest thereon from \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ on the unpaid principal at the rate of \_\_\_\_\_

percent ( \_\_\_\_\_ %) per annum as follows:

1. **INSTALLMENT PAYMENTS:** Maker shall pay, (check one)

- a.  **NO INSTALLMENTS.** No installment payments are required.
- b.  **PRINCIPAL and INTEREST INSTALLMENTS** of \_\_\_\_\_ dollars (\$ \_\_\_\_\_).
- c.  **INTEREST ONLY PAYMENTS** on the outstanding principal balance.

(The following must be completed if "b" or "c" is checked.)

The installment payments shall begin on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and shall continue on the \_\_\_\_\_ day of each succeeding: (check one)

- calendar month       sixth calendar month       other \_\_\_\_\_
- third calendar month       twelfth calendar month

2. **DUE DATE:** The entire balance of this Note together with any and all interest accrued thereon shall be due and payable in full on the \_\_\_\_\_ day of \_\_\_\_\_.

3. **DEFAULT INTEREST:** After maturity, or failure to make any payment, any unpaid principal shall accrue interest at the rate of \_\_\_\_\_ percent ( \_\_\_\_\_ %) per annum (18% if not filled in) or the maximum rate allowed by law, whichever is less, during such period of Maker's default under this Note.

4. **ALLOCATION OF PAYMENTS:** Each payment shall be credited first to any late charge due, second to interest, and the remainder to principal.

5. **PREPAYMENT:** Maker may prepay all or part of the balance owed under this Note at any time without penalty.

6. **CURRENCY:** All principal and interest payments shall be made in lawful money of the United States.

7. **LATE CHARGE:** If Holder receives any installment payment more than \_\_\_\_\_ days (15 days if not filled in) after its due date, then a late payment charge of \$ \_\_\_\_\_, or \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the installment payment (5% of the installment payment if neither is filled in) shall be added to the scheduled payment.

8. **DUE ON SALE:** (OPTIONAL-Not applicable unless initialed by Holder and Maker to this Note). If this Note is secured by a Deed of Trust or any other instrument securing repayment of this Note, the property described in such security instruments may not be sold or transferred without the Holder's consent. Upon breach of this provision, Holder may declare all sums due under this Note immediately due and payable, unless prohibited by applicable law.

\_\_\_\_\_  
Maker (Initials)

\_\_\_\_\_  
Holder (Initials)

CP 33

**PROMISSORY NOTE**  
CONTINUED

9. **ACCELERATION:** If Maker fails to make any payment owed under this Note, or if Maker defaults under any Deed of Trust or any other instruments securing repayment of this Note, and such default is not cured within \_\_\_\_\_ days (30 days if not filled in) after written notice of such default, then Holder may, at its option, declare all outstanding sums owed on this Note to be immediately due and payable, in addition to any other rights or remedies that Holder may have under the Deed of Trust or other instruments securing repayment of this Note. 39-42
10. **ATTORNEYS' FEES AND COSTS:** Maker shall pay all costs incurred by Holder in collecting sums due under this Note after a default, including reasonable attorneys' fees, whether or not suit is brought. If Maker or Holder sues to enforce this Note or obtain a declaration of its rights hereunder, the prevailing party in any such proceeding shall be entitled to recover its reasonable attorneys' fees and costs incurred in the proceeding (including those incurred in any bankruptcy proceeding or appeal) from the non-prevailing party. 43-46
11. **WAIVER OF PRESENTMENTS:** Maker waives presentment for payment, notice of dishonor, protest and notice of protest. 47
12. **NON-WAIVER:** No failure or delay by Holder in exercising Holder's rights under this Note shall be a waiver of such rights. 48
13. **SEVERABILITY:** If any clause or any other portion of this Note shall be determined to be void or unenforceable for any reason, such determination shall not affect the validity or enforceability of any other clause or portion of this Note, all of which shall remain in full force and effect. 49-51
14. **INTEGRATION:** There are no verbal or other agreements which modify or effect the terms of this Note. This Note may not be modified or amended except by written agreement signed by Maker and Holder. 52-53
15. **CONFLICTING TERMS:** In the event of any conflict between the terms of this Note and the terms of any Deed of Trust or other instruments securing payment of this note, the terms of this Note shall prevail. 54-55
16. **EXECUTION:** Each Maker executes this Note as a principal and not as a surety. If there is more than one Maker, each such Maker shall be jointly and severally liable under this Note. 56-57
17. **COMMERCIAL PROPERTY: (OPTIONAL—Not applicable unless initialed by Holder and Maker to this Note).** Maker represents and warrants to Holder that the sums represented by this Note are being used for business, investment or commercial purposes, and not for personal, family or household purposes. 58-60
- ORAL AGREEMENTS: ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, TO EXTEND CREDIT, OR TO FOREBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.** 61-62

\_\_\_\_\_  
Maker (Initials)

\_\_\_\_\_  
Holder (Initials)

18. **DEFINITIONS:** The word Maker shall be construed interchangeably with the words Borrower or Payer and the word Holder shall be construed interchangeably with the words Lender or Payee. In this Note, singular and plural words shall be construed interchangeably as may be appropriate in the context and circumstances to which such words apply. 63-67
19. **ADDITIONAL TERMS AND CONDITIONS:** (check one) 68
- a.  None. 69
- b.  As set forth on the attached "Exhibit A" which is incorporated by this reference. 70
- (Note: If neither "a" nor "b" is checked, then option "a" applies.) 71
20. **THIS NOTE IS SECURED BY**  **DEED OF TRUST,**  **MORTGAGE,**  **OTHER** \_\_\_\_\_ **OF EVEN DATE.** 72

\_\_\_\_\_  
Maker (signatures) 73

\_\_\_\_\_  
74

\_\_\_\_\_  
75

Maker's address for all notices given by Holder under this Note: \_\_\_\_\_ 76

**DO NOT DESTROY THIS NOTE** 77

**WHEN PAID** this original Note together with the Deed of Trust securing the same, must be surrendered to the Trustee for cancellation and retention before any reconveyance can be processed. 78-79

CP 34

NWMLS Form 34  
Addendum/Amendment to P & S  
Rev. 5/96  
Page 1 of 1

**EXHIBIT D**

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Northwest Multiple Listing Service  
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**ADDENDUM/AMENDMENT TO PURCHASE AND SALE AGREEMENT**

The following is part of the Purchase and Sale Agreement dated 10/2/06 1  
between Savchuk ("Buyer") 2  
and Jerde ("Seller") 3  
concerning 2439 Douglas Rd ("the Property") 4

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

- 1. Feasibility contingency is removed. 6
- 2. \$20,000 earnest money becomes a non-refundable deposit, to be disbursed to Sellers immediately. 7
- 3. Purchase price: \$725,000 8
- 4. Payment Terms: Note & Deed of Trust. Interest pmts to be paid monthly on unpaid balance, 7% interest. 9  
Contract administration by Trust Accounting Ctr, Anacortes, WA, all costs associated paid by Buyer. 10  
Payments disbursed by Trust Accounting Ctr to Seller. 11
- 5. Principal payments as follows: 12
  - \$30,000 due 1/15/07 13
  - \$50,000 due 2/1/07 14
  - \$50,000 due 4/1/07 15
  - \$50,000 due 6/1/07 16
  - \$50,000 due 8/1/07 17
  - Due in full 8/31/07 18
- 6. Closing date shall be on or before August 31, 2007. 19
- 7. Seller may reside in residence until closing. Seller has full salvage rights, with options to move barn, 20  
outbuildings, etc. 21

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged. 41

AGENT (COMPANY) The Muljat Group 42

BY: Dee Inman 43

Initials: BUYER: SS DATE: 1/08/07 SELLER: DI DATE: 10/2/06 44  
BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: DI DATE: 10-2-06 45

16/16.

**EXHIBIT E**

**EXTENSION OF CLOSING DATE ADDENDUM**

The following is part of the Purchase and Sale Agreement dated 10/2/2006 between Jerde (Seller) and Savchuk (Buyer) concerning 2439 Douglas Rd, Ferndale, the property.

Extension of closing date: The parties hereby agree to extend the closing date set forth in the agreement until: May 30, 2008

Buyer will pay \$250,000 on 8/31/07 and \$25,000 on 9/7/07  
A penalty of 5% of payment due shall accrue for payments not made by these dates.

Beginning 9/1/2007, interest shall accrue on unpaid balance at a rate of 7.5%

Seller retains possession up to 30 days after closing at no cost.

All payments are non-refundable in the event of failure to close.

Summary of Contract and Payments and Fees

Contract Price	\$725,000.00
Paid to date on principal	(\$200,000.00)
Unpaid Interest—balance due: Feb-August 2007	\$25,608.20
Late fee on Aug principal balance per contract 5%	\$2,500.00
Reimburse Jerdes early withdrawl fee	\$800.00
August 31, 2007 payment	(\$250,000.00)
Fee to extend the closing date from 8/31 to 5/30/08	\$10,000.00
New Balance Forward	\$313,908.20

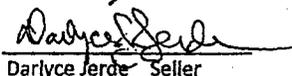
Payments of \$25,000 every other month, due the 1st of every month  
\$25,000 due 10/10/07, 12/1/07, 2/1/08, 4/1/08 and balance 5/30/08

Payments not made within 3 business days of the due date shall accrue a late penalty of 5% of the payment amount.  
This shall apply for both principal and interest payments due.

Singatures:

  
Sergey Savchuk, Buyer

  
Steve Jerde Seller

  
Darlyce Jerde Seller

CP 36

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FILED  
COUNTY CLERK

2009 JUN 29 PM 1:41

WHATCOM COUNTY CLERK  
WASHINGTON

BY \_\_\_\_\_

RECEIVED

JUN 29 2009

LUSTIG & ASSOCIATES  
BELLINGHAM, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

SERGEY SAVCHUK,  
a married man,  
Plaintiff,

vs.

STEVEN G. JERDE and DARLYCE  
J. JERDE, husband and wife, and the  
marital community composed thereof,  
Defendants.

NO. 09-2-00357-9

AFFIDAVIT OF SERGEY SAVCHUK  
IN OPPOSITION OF MOTION FOR  
SUMMARY JUDGMENT

Judge Ira Uhrig

I, Sergey Savchuk, upon penalty of perjury, swear and affirm that the following is true and correct to the best of my knowledge.

1. I am the Plaintiff in this lawsuit. I was originally presented the Purchase and Sale Agreement in October of 2006. I did not sign the agreement until January 8, 2007. Key in the contract was the provisions that the seller would carry back seller financing for approximately \$200,000. The seller financing was to be on a Note and Deed of Trust. I have never received a proposed Note and Deed of Trust that would be acceptable to the sellers. We have never agreed upon the terms and conditions of such a Note and Deed of Trust.

AFFIDAVIT OF SERGEY SAVCHUK  
IN OPPOSITION OF MOTION  
FOR SUMMARY JUDGMENT - 1

Belcher | Swanson  
LAW FIRM, PLLC

900 DUPONT STREET, BELLINGHAM WASHINGTON 98225  
TELEPHONE 360.734.6390 FAX 360.671.0753  
www.belcherswanson.com

APP 18

C. D. H.

1           2.     When the addenda were discussed, all parties agreed that the  
2     total \$500,000 that I paid prior to closing was payments "on principal". These  
3     were payments towards the actual purchase price that were received and  
4     retained by the seller.  
5

6           3.     Anne Inman mischaracterized the circumstances around  
7     drafting and signing the "extension of closing date addendum". She drafted  
8     the entire document on behalf of sellers as their agent. Some terms were  
9     negotiated with me and others were added by her, including the non-  
10    refundable provision. It was never my idea or intent at all of my \$500,000  
11    investment in the property could be completely lost. I did not understand that  
12    would happen. English is not my native language and I do not read it very  
13    well. I believed that what Ms. Inman presented me was based on our  
14    negotiations but I now see that I was taken advantage of.  
15

16          4.     The entire project was dependent upon my obtaining preliminary  
17    plat approval for a long subdivision of the property. I expended tens of  
18    thousands of dollars in engineering and legal work and did obtain preliminary  
19    plat for the property. So instead of there being one legal lot of record for the  
20    property, there are now eighteen (if the preliminary plat is completed and final  
21    plat approval is obtained). This preliminary plat approval is of enormous  
22    financial value to the property owner: creating more legal lots increases the  
23    value of the property; having the preliminary plat completed prior to a variety  
24    of changes in environmental laws made the development more valuable; and  
25    the property is now marketable as multiple lots instead of one big lot. All of  
26  
27

1 a significant lien against their property (approximately \$210,000 as listed on  
2 the Preliminary Commitment attached to the Handley Declaration). As I was  
3 making principal payments to them, they did not use any of this money to pay  
4 off the lien prior to closing. Instead, they bought another house (even though  
5 they were continuing to and still do reside in the residence I was purchasing).  
6 Given the continuing lien against the property, it is my understanding that the  
7 sellers could not close with the seller financing required by the Purchase and  
8 Sale Agreement – the sellers would not receive any cash at closing enabling  
9 them to clear title.  
10

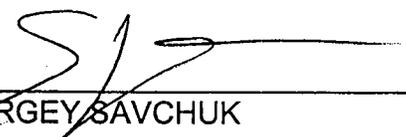
11 8. Let me reiterate that prior to, at, and subsequent to closing, I  
12 have been and continue to be ready, willing and able to close the property  
13 using the seller financing as required in the Purchase and Sale Agreement.  
14 The sellers have failed to undertake any actions to close the deal including,  
15 but not limited to, preparing the Note and Deed of Trust and obtaining  
16 approval of the same. It is also my understanding that they never appeared  
17 on the closing date ready, willing and able to close the transaction.  
18

19 9. If the sellers are able to retain the \$500,000 I will suffer an  
20 enormous penalty. By no stretch of the imagination is the retention of a half  
21 million dollars a reflection of any possible damages the sellers could have  
22 incurred. To the contrary, from the date the Purchase and Sale Agreement  
23 was signed, my unilateral efforts have significantly increased the value of the  
24 property by obtaining preliminary plat approval. While the sellers may have  
25 gone and purchased another property, such unilateral action by the sellers is  
26  
27

1 not reasonably foreseeable and not a consequence of any of the actions  
2 arising out of Purchase and Sale Agreement. Further, the sellers have been  
3 able to reside in the property this entire time, retain the \$500,000 and any  
4 interest income they could have earned off of it. The sellers are receiving an  
5 undisputed windfall for no valid reason.  
6

7 10. I request this court to deny summary judgment and allow this  
8 matter to proceed to trial.  
9

10 SIGNED this 29 day of June 2009.

11  
12   
13 SERGEY SAVCHUK  
14

15 State of Washington )  
16 ) ss.  
17 County of Whatcom )

18 I certify that I know or have satisfactory evidence that Sergey Savchuk is the person  
19 who appeared before me, and said person acknowledged that he signed this instrument and  
20 acknowledged it to be his free and voluntary act for the uses and purposes mentioned in this  
21 instrument.



  
Signature

KRISTEN HOPE CARPENTER  
Printed Name  
My appointment expires: 10/20/2012

C.P. 67

Westlaw

West's RCWA 64.04.005

Page 1

**C**

West's Revised Code of Washington Annotated Currentness

Title 64. Real Property and Conveyances (Refs &amp; Annos)

Chapter 64.04. Conveyances (Refs &amp; Annos)

→ **64.04.005. Liquidated damages--Earnest money deposit--Exclusive remedy--Definition**

(1) A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.

(2) For purposes of this section:

(a) "Earnest money deposit" means any deposit, deposits, payment, or payments of a part of the purchase price for the property, made in the form of cash, check, promissory note, or other things of value for the purpose of binding the purchaser to the agreement and identified in the agreement as an earnest money deposit, and does not include other deposits or payments made by the purchaser; and

(b) "Liquidated damages" means an amount agreed by the parties as the amount of damages to be recovered for a breach of the agreement by the other and identified in the agreement as liquidated damages, and does not include other deposits or payments made by the purchaser.

(3) This section does not prohibit, or supersede the common law with respect to, liquidated damages or earnest money forfeiture provisions in excess of five percent of the purchase price. A liquidated damages or earnest money forfeiture provision not meeting the requirements of subsection (1) of this section shall be interpreted and enforced without regard to this statute.

CREDIT(S)

[2005 c 186 § 1, eff. April 26, 2005; 1991 c 210 § 1.]

## HISTORICAL AND STATUTORY NOTES

**Application--2005 c 186:** "This act applies to all contracts executed after April 26, 2005." [2005 c 186 § 2.]

**Effective date--2005 c 186:** "This act is necessary for the immediate preservation of the public peace, health, or

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