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No. 66571-5-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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WEDGEWOOD AT RENTON, INC., a Washington corporation,  
Respondent/Plaintiff,

v.

WESTCOTT HOLDINGS, INC., a Washington corporation, and  
VERCELLO, LLC, a Washington limited liability company,  
Appellants/Defendants/Cross-Claim Plaintiffs,

v.

KOLIN TAYLOR and JANE DOE TAYLOR, husband and wife and their  
marital community; and KBS DEVELOPMENT CORPORATION, a  
Washington corporation,  
Respondents/Cross-Claim Defendants.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. LeRoy McCullough)

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**REPLY BRIEF OF APPELLANTS**

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TABLE OF CONTENTS

	<u>Page</u>
I. IT IS UNDISPUTED THAT ADDENDUM G REVIVED, INCORPORATED AND AMENDED THE PSA.....	1
A. <i>Pavey</i> And Other Cases Hold That Parties May Revive An Expired Contract By Amendment .....	2
B. Addendum G Incorporates The PSA By Reference .....	6
II. JUDICIAL ESTOPPEL APPLIES TO ALL RESPONDENTS .....	8
A. Vercello Raised Judicial Estoppel Below.....	8
B. Respondents’ Declarations Are Inconsistent With Their Later Position That Addendum G Was Unenforceable.....	9
C. Respondents’ Inconsistent Factual Positions Create A Perception That The Trial Court Judges Were Misled .....	12
D. Respondent Would Obtain An Unfair Advantage In The Absence Of Judicial Estoppel.....	13
III. THE JUDGMENT CANNOT AND SHOULD NOT BE AFFIRMED ON ALTERNATIVE GROUNDS .....	15
A. Addendum G Was Not Illusory .....	16
B. Disputed Facts Show That Respondents Violated The Right Of First Refusal Before January 6, 2009 .....	18
C. The Right Of First Refusal Did Not Expire On January 6, 2009, But Lasted A Reasonable Time.....	23

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	14
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	22, 24
<i>Brust v. McDonald's Corp.</i> , 34 Wn. App. 199, 660 P.2d 320 (1983).....	7
<i>Carpenters Trust of West. Wash. v. Algene Constr. Co., Inc.</i> , 11 Wn. App. 838, 525 P.2d 834 (1974).....	3, 4
<i>Feider v. Feider</i> , 40 Wn. App. 589, 699 P.2d 801 (1985).....	25
<i>Haslett v. Planck</i> , 140 Wn. App. 660, 166 P.3d 866 (2007).....	8
<i>Humetrix, Inc., v. Gemplus S.C.A.</i> , 268 F.3d 910 (9th Cir. 2001).....	10
<i>Johnson v. Si-Cor Inc.</i> , 107 Wn. App. 902, 28 P.3d 832 (2001) .....	10, 12, 13
<i>Keystone Land &amp; Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	1
<i>King v. Clodfelter</i> , 10 Wn. App. 514, 518 P.2d 206 (1974).....	10, 11
<i>Korean Presbyterian Ch. of Seattle Normalization Comm. v. Lee</i> , 75 Wn. App. 833, 880 P.2d 565 (1994).....	16
<i>Manufactured Housing Communities v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	25

CASES - CONTINUED

	<u>Page</u>
<i>Mid-Town Ltd. Partnership v. Preston</i> , 69 Wn. App. 227, 848 P.2d 1268 (1993).....	4
<i>Morris v. Maks</i> , 69 Wn. App. 865, 850 P.2d 1357 (1993).....	22
<i>Omni Group, Inc. v. Seattle First Nat'l Bank</i> , 32 Wn. App. 22, 645 P.2d 727 (1982).....	16, 18
<i>Pavey v. Collins</i> , 31 Wn.2d 864, 199 P.2d 571 (1948).....	<i>passim</i>
<i>Platts v. Arney</i> , 46 Wn.2d 122, 278 P.2d 657 (1955).....	6
<i>Robroy Land Co. v. Prather</i> , 95 Wn.2d 66, 622 P.2d 367 (1980).....	23, 24, 25
<i>Santos v. Sinclair</i> , 76 Wn. App. 320, 884 P.2d 941 (1994).....	7
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985).....	21
<i>South Kitsap Family Worship Ctr. v. Weir</i> , 135 Wn. App. 900, 146 P.3d 935 (2006) .....	25
<i>Turner v. Wexler</i> , 14 Wn. App. 143, 538 P.2d 877 (1975).....	7
<i>Wharf Restaurant, Inc. v. Port of Seattle</i> , 24 Wn. App. 601, 605 P.2d 334 (1979).....	16

STATUTES AND COURT RULES

RAP 2.4(a).....	16
-----------------	----

MISCELLANEOUS

14A Tegland, Wash. Practice: Civil Procedure § 35.57 (2003) .....	10
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Appellants Wescott Holdings, Inc. and Vercello, LLC (collectively, “Vercello”) submit this single Reply Brief in response to the separate briefs filed by Respondents Wedgewood, KBS and Taylor. The judgment below must be reversed. As explained in Vercello’s opening brief and below, Judge McCullough erred when he found Addendum G unenforceable as a matter of law. As Judge McDermott originally ordered, a trial is necessary to determine disputed facts regarding Respondents’ apparent violation of Addendum G’s right of first refusal.

**I. IT IS UNDISPUTED THAT ADDENDUM G REVIVED, INCORPORATED AND AMENDED THE PSA.**

In their 100-plus pages of briefing, Respondents do not cite to a single case, legal authority or policy that supports the trial court’s ruling that an expired contract cannot be revived by a signed amendment to that contract. No such rule exists because, if it did, it would arbitrarily defeat the most basic tenet of contract formation: mutual assent. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (a contract is formed if parties “objectively manifest their mutual assent”). There can be no dispute about mutual assent here. Respondents concede that, when the parties negotiated Addendum G, they intended to revive, extend and amend the PSA, and they likewise concede that, once Addendum G was signed, the parties closed a multi-million dollar real estate deal according to its terms. Wedgewood Br. at 4; Taylor Br. at 6.

**A. *Pavey* And Other Cases Hold That Parties May Revive An Expired Contract By Amendment.**

Respondents' heavy reliance on *Pavey v. Collins*, 31 Wn.2d 864, 199 P.2d 571 (1948), is misplaced. *Pavey* does not hold, as Respondents repeatedly state, that parties to an expired contract cannot revive that contract with a "mere amendment." See Taylor Br. at 16. Indeed, *Pavey* stands for the opposite proposition. In *Pavey*, the court refused to find that an expired contract was extended based on a letter unilaterally sent by one party to the other. The letter did not purport to amend the contract, but, more importantly, there was no agreement between the parties: not only did one of the parties refuse to sign the letter, the letter did not obligate *either* party to do anything; in fact, it expressly confirmed expiration of the prior contract. *Pavey*, 31 Wn.2d at 866-67. The Court rejected the appellant's theory that the letter extended the expired contract on several grounds, but Respondents focus on this single sentence: "To bring the terms of an extinguished contract into renewed existence requires a *new contract* embodying such terms." *Id.* at 870 (emphasis added).

Respondents misread the phrase "new contract" to mean that the parties could only revive the PSA with a "stand-alone" or "free-standing" contract, not an "addendum." Wedgewood Br. at 13-17; KBS Br. at 18-20; Taylor Br. at 15-25. No court has ever construed *Pavey* to create such a distinction because there is no legal difference between the two; whether

characterized as a “new contract” that incorporates an expired contract, or an “addendum” that revives one, the parties’ intent is precisely the same. Respondents would read *Pavey* to exult form over substance, but that is not what *Pavey* is about. The whole point of *Pavey*’s “new contract” requirement is that the parties may *mutually agree* to bring an expired contract into renewed existence. Where, as here, the parties do so through a signed amendment, Respondents’ so-called “*Pavey* rule” is satisfied.

That is what this Court held in *Carpenters Trust of West. Wash. v. Algene Constr. Co., Inc.*, 11 Wn. App. 838, 525 P.2d 834 (1974). In *Carpenters*, the parties’ 1968 collective bargaining agreement expired in 1971. Later in 1971, the parties entered into another agreement, which they “termed an **amendment** to the 1968 agreement.” *Id.* at 839 (emphasis added).<sup>1</sup> Just like here, relying on *Pavey*, one of the parties argued that the post-expiration amendment was “inoperative and ineffective for any purpose.” *Id.* This Court flatly rejected that argument:

The respondent ... argues that the *Pavey* decision is distinguishable on its facts, and inapposite. We agree. ...

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<sup>1</sup> Respondents suggest that the 1971 “amendment” was executed *before* the expiration of the 1968 collective bargaining agreement. KBS Br. at 19 n.10; Taylor Br. at 17 n.2. Not so. The 1968 agreement expired on June 1, 1968. *Carpenters*, 11 Wn. App. at 839. The 1971 amendment included a term making certain benefits “retroactive to June 21, 1971” (*id.*), which can only mean that the amendment was entered into sometime *after* the June 1971 expiration of the 1968 contract.

In the case at bar ... when the 1970 compliance agreement is read together with the 1968 and 1971 collective bargaining agreements ..., it is clear that there is a continuing and coordinated agreement between the parties. Thus, the agreement contains a recital that it is an amendment to the 1968 agreement. When such a recital is examined in light of the subsequent conduct of the parties, it is apparent that that [the parties] proceeded in a manner consistent with the belief that the successive collective bargaining agreements constituted a coordinated and continued agreement.

*Id.* at 840. The same is true here. When read together, the PSA and Addendum G constitute a “coordinated and continued agreement,” which is further shown by the parties’ subsequent conduct. As in *Carpenters*, it doesn’t matter that the parties called their new agreement an addendum; what matters is that they mutually agreed to revive the expired contract.

This same result is compelled by *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 848 P.2d 1268 (1993)—another case that Respondents cite, but that supports Vercello. In *Mid-Town*, like here, *after* the parties’ contract expired, they signed an “addendum” to revive the contract and create a new, second, closing date. *Id.* at 230. No one, including this Court, questioned whether the addendum was enforceable. The only issue was whether the second closing date could be extended even further by waiver or estoppel. Because, unlike the first time, there was no evidence that the parties *mutually agreed* to another extension, the Court held the parties to the second closing date. *Id.* at 231-235.

Critically, if Respondents' reading of *Pavey* were correct, this Court never would have undertaken that factual analysis because the post-expiration addendum (and second closing date) would have been void *ab initio*.

At bottom, Respondents' flawed argument that *Pavey* establishes a bright-line rule with respect to post-expiration amendments is simply an effort to deflect inquiry away from the parties' undisputed intent. On that issue, Respondents amazingly argue that the parties' intent is irrelevant. *See* KBS Br. at 21-26; Taylor Br. at 23. Respondents do not explain why intent matters to determine whether an expired contract is revived by a "new contract," or even by waiver, but not by an amendment. Certainly, there is no public policy basis to fulfill the parties' intent in one situation and thwart it in the other.<sup>2</sup> Both types of documents objectively manifest the parties' intent to revive, extend and amend the underlying contract; both contain the same exact terms; and both are signed. This Court should reject Respondents' reading of *Pavey* and refuse to create an artificial distinction that has no basis in law, fact or common sense.

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<sup>2</sup> For this reason, KBS's laundry list of situations where courts refuse to enforce contracts despite the parties' intent is a red herring. KBS Br. at 23. There is no issue here with respect to consideration, illegality, unconscionability, or the statute of frauds. If Addendum G were enforceable if signed one day *before* the PSA expired, what public policy would be offended by enforcing Addendum G if signed one day *after* the PSA expired? Respondents never say.

**B. Addendum G Incorporates The PSA By Reference.**

Respondents concede that, even under their cramped reading of *Pavey*, Addendum G is enforceable as a “stand-alone” contract (and would satisfy the statute of frauds) if it incorporates the PSA by reference. Respondents’ argument on this issue is even more obtuse, if possible. In an exercise in circularity, Respondents argue that—regardless of what it says and what the parties intended—Addendum G cannot incorporate the PSA by reference because it is, of all things, an addendum. Put simply, Respondents claim that because Addendum G purports to **add** terms to the PSA, it cannot also **incorporate** terms from the PSA. Wedgewood Br. at 13-15; KBS Br. at 20; Taylor Br. at 27-30. Not surprisingly, Respondents provide no legal authority for this “chicken-or-the-egg” argument.

Indeed, Respondents’ argument is contrary to the purpose of the incorporation by reference doctrine and the language of Addendum G—both of which Respondents ignore. “Several writings signed by the party to be charged, though executed at different times, may be construed together for the purpose of ascertaining the terms of a contract, and for the purpose of [satisfying] ... the statute of frauds, if it appears, from the instruments themselves, that they are part of the same transaction.” *Platts v. Arney*, 46 Wn.2d 122, 127, 278 P.2d 657 (1955). Not only does Addendum G specifically refer to the PSA, the two writings must be

construed together because, by definition, they are part and parcel of the same transaction. See *Brust v. McDonald's Corp.*, 34 Wn. App. 199, 209, 660 P.2d 320 (1983) (“Since the 1973 amendment to lease refers to the 1969 lease, they should be read in conjunction with each other.”) (citing *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975)).

Out of all the Respondents, only Wedgewood actually argues that the language of Addendum G does not “clearly and unequivocally” incorporate the PSA by reference. Wedgewood Br. at 16 (citing *Santos v. Sinclair*, 76 Wn. App. 320, 884 P.2d 941 (1994)). However, Wedgewood studiously avoids actually quoting Addendum G—for obvious reasons:

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007 together with all related addendums and exhibits, by and between Vercello, LLC ... and Wedgewood at Renton, Inc. and KBS Development Corporation .... In the event of any inconsistencies between this Addendum and the Real Estate Purchase Agreement, the terms of this Agreement shall control. ***The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as “this Agreement” ...***

CP 253 (emphasis added). Without question, Addendum G clearly and unequivocally incorporates the PSA and manifests the parties’ intent that they be construed together as “this Agreement.” Because no one disputes that the PSA sufficiently describes the land at issue (for both the second and third closings), Addendum G satisfies the statute of frauds as well. In sum, even if viewed as a “new contract,” Addendum G is enforceable.

## **II. JUDICIAL ESTOPPEL APPLIES TO ALL RESPONDENTS.**

This Court doesn't need to reach the issue of judicial estoppel. The same equitable result is achieved if the Court simply reverses the trial court's erroneous ruling regarding the enforceability of Addendum G and remands this action for trial. If the Court does reach the issue, however, it should find an abuse of discretion. "In short, judicial estoppel prevents a litigant from playing fast and loose with the courts." *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (internal quotation marks and citations omitted). That is exactly what Respondents did here.

### **A. Vercello Raised Judicial Estoppel Below.**

Taylor argues that Vercello waived the issue of judicial estoppel by not raising the issue in the trial court. Taylor Br. at 33-43. Notably, KBS—Taylor's own company—who moved for summary judgment at the same time as Taylor, doesn't even bother making a similar waiver argument. There's no merit to Taylor's waiver argument in any event.

At the hearing on Taylor's motion, Vercello told the trial court that Taylor had submitted several declarations that were inconsistent with his later position. RP (10/22/2010) at 42-43. When the court continued the hearing for a week, Vercello made the same point in a sur-reply brief, which noted expressly that "Taylor submitted sworn declarations that directly contradict the position he now takes on this motion," and that

Taylor should be “bound by his prior sworn testimony.” CP 655-657. Both Taylor and KBS substantively responded to Vercello’s supplemental brief prior to the continued hearing date. CP 682-689; CP 695-699.<sup>3</sup>

The trial court also considered the issue in connection with Wedgewood’s follow-up motion for summary judgment. In its response to that motion, Vercello expressly argued that judicial estoppel barred Wedgewood from taking inconsistent positions. CP 718-725. At the hearing, Vercello reminded the trial court Taylor too had filed prior inconsistent declarations and asked the court to reconsider and reverse its prior summary judgment ruling as to Taylor and KBS. RP (1/07/2011) at 9-11. Plainly, then, the trial court had ample opportunity to, and did in fact, consider whether judicial estoppel should apply to all the parties, including Taylor. Taylor’s waiver argument must be rejected.

**B. Respondents’ Declarations Are Inconsistent With Their Later Position That Addendum G Was Unenforceable.**

As an initial matter, the fact that Taylor and KBS were not yet parties when Taylor submitted *four* declarations in these proceedings does not preclude application of judicial estoppel as to them. As later events would show, Taylor (a signatory to the PSA and Addendum G) was hardly

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<sup>3</sup> Taylor objected and moved to strike Vercello’s supplemental filing, but the order granting summary judgment lists the supplemental briefing among the items reviewed and considered. CP 701-702. Taylor does not challenge the trial court’s apparent denial of its motion to strike.

a disinterested witness and, regardless, judicial estoppel applies equally to parties and *non-parties*. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 907, 28 P.3d 832 (2001) (“The majority of courts that have considered the matter have concluded that privity of the parties ... [is] inapplicable to the doctrine of judicial estoppel”); 14A Teglund, Wash. Practice: Civil Procedure § 35.57, at 512 (2003) (judicial estoppel “may be invoked ... against a party who was ... a witness in, the first suit”).

Nor is there any merit to Taylor’s suggestion that parties cannot be judicially estopped from taking inconsistent positions in the same case. Taylor Br. at 32. Washington and federal case law stands for the opposite proposition. *See King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974) (“purpose of judicial estoppel is to bar ... declarations by a party which would be contrary to sworn testimony the party has given in the same or prior judicial proceedings”); *Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910, 917 (9th Cir. 2001) (judicial estoppel “prohibits a litigant from asserting inconsistent positions in the same litigation”).

What matters is whether Gilroy (on behalf of Wedgewood) and Taylor (on behalf of KBS and himself) represented that Addendum G was an enforceable amendment to the PSA, contrary to their later, inconsistent, position that it was not. On this issue, there can be no dispute:

- “Addendum G was the result of protracted negotiations due to significant changes in the housing market between January 2007,

when the [PSA] was entered into, and January 2008, when Addendum G was finally executed. ... Based on input from the principals of the parties, I did some redrafting which was included in the final executed version of Addendum G. ... The key deal points in the REPSA which were changed by Addendum G are as follows: ...” CP 129 (Taylor Decl., ¶ 5); CP 146 (Gilroy Decl., ¶ 3); CP 336 (Gilroy Decl., ¶ 3); CP 342 (Taylor Decl., ¶ 5); and

- “[B]oth parties recognized the realities of the changing market and the possibility that Vercello would not close on those lots, and as part of the trade-offs involved, ... Wedgewood wanted to be able to attempt to find other buyers for the lots without waiting until Vercello either closed on the third takedown or let the REPSA expire.” CP 130-31 (Taylor Decl., ¶ 6); CP 147 (Gilroy Decl., ¶ 5); CP 337 (Gilroy Decl., ¶ 5); CP 343 (Taylor Decl., ¶ 6).

Indeed, Wedgewood’s factual theory regarding the effect of Addendum G is wholly inconsistent with Respondents’ later effort to recharacterize the substance of the parties’ agreement. Taylor helped draft Addendum G (CP 129 (Taylor Decl., ¶ 5); Wedgewood filed suit seeking a declaration that it had *satisfied* Addendum G (CP 4-7); Wedgewood argued that “the [PSA] along with the Addenda constitute an integrated contract” (CP 119); and Wedgewood admitted that Addendum G has “got to be read in conjunction with the [PSA]” (RP (11/12/2009) at 21).

Respondents claim that it doesn’t matter that they took inconsistent positions regarding Addendum G because judicial estoppel does not apply to legal arguments. KBS Br. at 27-28; Taylor Br. at 36-37. While judicial estoppel “does not require *counsel* to be consistent on points of law,” *King* 10 Wn. App. at 521 (emphasis added), that is not Vercello’s argument nor

the basis for judicial estoppel here. Gilroy and Taylor unequivocally took the *factual* position that the parties wanted a new deal, negotiated a new deal, and then mutually performed the new deal—which was set forth in Addendum G. Respondents cannot claim, on the one hand, that *Pavey* allowed the parties to revive the PSA if they agreed to a “new contract,” while, on the other hand, disclaiming their own prior sworn factual statements showing that Addendum G was intended to be such a contract. Respondents’ earlier position is clearly inconsistent with their later one.

**C. Respondents’ Inconsistent Factual Positions Create A Perception That The Trial Court Judges Were Misled.**

Taylor argues that judicial estoppel can apply only if Judge McDermott actually accepted Respondents’ earlier inconsistent position regarding the enforceability of Addendum G. Taylor Br. at 37-41. Taylor claims that because the enforceability issue was never considered by Judge McDermott, Respondents’ shifting position cannot create a perception that either Judge McDermott or Judge McCullough were misled. *Id.* Again, Taylor overstates the rule to try to escape its result. The requirement that the court “accept” a party’s prior inconsistent position, “does not mean that ... there must be a prior specific inconsistent court order.” *Johnson*, 107 Wn. App. at 909. It is sufficient that the court “implicitly accepts” the party’s initial position. *Id.* Judge McDermott plainly accepted Respondents’ prior position that Addendum G was enforceable.

It was Wedgewood who filed a declaratory judgment action; it was Wedgewood who moved for summary judgment; and it was Gilroy and Taylor who, in support of that motion, filed several declarations—all of which expressly recognized the enforceability of Addendum G; the only issue was whether Respondents breached Addendum G’s terms. In ruling that trial was necessary to decide that issue, Judge McDermott “implicitly accepted” Respondents’ prior position that Addendum G was enforceable; by definition, all of Respondents’ declarations and arguments assumed and relied on that fact. When Respondents later asked Judge McCullough to ignore Judge McDermott’s ruling *and* the prior factual assertions upon which it was predicated, they undermined the integrity of the proceedings.

**D. Respondents Would Obtain An Unfair Advantage In The Absence Of Judicial Estopped.**

Taylor’s claim that judicial estoppel does not apply unless Vercello shows that it detrimentally relied on Respondents’ prior position is flat wrong. Taylor Br. at 41. The court of appeals has held:

We agree with Professors Orland and Tegland that because the doctrine of judicial estoppel is designed to protect courts, courts should not impose elements of related doctrines like equitable and collateral estoppel, which are intended primarily to protect litigants. ... *We further conclude that the doctrine may be applied even if there is no reliance, no resultant damage, and no final judgment entered in the first action.*

*Johnson*, 107 Wn. App. at 909 (emphasis added). What matters is

“whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007). Unless judicially estopped, Respondents’ inconsistent position would perpetuate both kinds of unfairness here.

Even though they could have walked away from the PSA when it expired, the parties mutually agreed to a significantly restructured deal embodied in Addendum G. Respondents benefited greatly from that new deal; instead of simply keeping half a million dollars in forfeited escrow funds, they received nearly nine million dollars as a result of the second closing. When Vercello (justifiably) accused Respondents of violating Addendum G’s right of first refusal, Respondents ran to court with Addendum G in-hand and told Judge McDermott that they had fulfilled their end of the bargain. Only after Judge McDermott ruled in Vercello’s favor did Respondents repudiate their own prior reliance on Addendum G. Simply put, Respondents can’t have their cake and eat it too.

Finally, application of judicial estoppel would not require the court to “hold the parties to the necessarily void addendum,” as Taylor suggests. Taylor Br. at 41. Even under Respondents’ cramped reading of *Pavey*, the alleged unenforceability of Addendum G is not a “simple application of controlling law.” *Id.* As noted above, Respondents admit that an expired

contract can be revived through a “new contract” that incorporates the old by reference. Putting aside Respondents’ unsupported argument that an amendment adds to, but does not incorporate, the terms of the old contract, Respondents’ prior sworn declarations to Judge McDermott speak directly to the parties’ intent and the purpose of Addendum G. There is no dispute about what those declarations say: the parties wanted a new deal on new terms, which they set out in Addendum G. It would be patently unfair if Respondents were permitted to disavow their own stated intent when it is admittedly dispositive to the enforceability issue.

### **III. THE JUDGMENT CANNOT AND SHOULD NOT BE AFFIRMED ON ALTERNATIVE GROUNDS.**

Wedgewood, but none of the other Respondents, asks that judgment be affirmed on three alternative grounds: (1) Addendum G was illusory; (2) Addendum G’s right of first refusal was not triggered prior to January 6, 2009; and (3) Addendum G’s right of first refusal expired on January 6, 2009. Wedgewood Br. at 18-31. These same three arguments were the basis of Wedgewood’s first two motions for summary judgment. CP 203-214; CP 318-333. Judge McDermott denied both motions and found that trial was necessary to resolve disputed issues of fact. CP 314-315; 477-478; CP 481. Judge McDermott also specifically held that the expiration date of Addendum G’s right of first refusal could only be determined by the court after hearing the facts at trial. CP 478.

This Court should not review Judge McDermott's prior summary judgment rulings. At least as to the arguments concerning the right of first refusal, anything less than reversal on all grounds would result in remand with affirmative relief. As such, Wedgewood was required to cross-appeal those adverse earlier rulings. RAP 2.4(a); *Korean Presbyterian Ch. of Seattle Normalization Comm. v. Lee*, 75 Wn. App. 833, 839 n. 5, 880 P.2d 565 (1994) ("We will not grant respondents any affirmative relief from the summary judgment ruling due to their failure to perfect an appeal."). Because Wedgewood failed to do so, and neither KBS nor Taylor challenge the rulings, this Court should refuse to reach these issues. Even if it does consider them, it should affirm Judge McDermott's prior rulings.

**A. Addendum G Was Not Illusory.**

Wedgewood's argument that Addendum G cannot be enforced because it was illusory can be rejected out of hand. A promise for a promise is sufficient consideration to support a contract. *See Omni Group, Inc. v. Seattle First Nat'l Bank*, 32 Wn. App. 22, 24, 645 P.2d 727 (1982). An illusory promise, on the other hand, is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor. *See Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 609, 605 P.2d 334 (1979). There was nothing illusory or optional about Addendum G.

When the parties negotiated Addendum G, the PSA had expired, Vercello had no right to buy any more lots, and Respondents could keep \$565,000 in earnest money. But both parties saw economic incentives in reviving the PSA and restructuring the deal. Addendum G reflects that new deal. Addendum G gave Vercello the right to buy, and obligated Respondents to sell, the second set of lots for nearly \$9 million, with the earnest money going toward the price. Addendum G also gave Vercello the right to buy the third set of lots, but gave Respondents the right to sell those lots to another buyer. In exchange, Respondents gave Vercello the right of first refusal. These terms are reflected on the face of Addendum G, and no one disputes their meaning. CP 253; CP 129-130 (Taylor Decl., ¶ 5); CP 146 (Gilroy Decl., ¶ 3); CP 242-244 (Edwards Decl., ¶¶ 7-13).

The second closing occurred on schedule. To be sure, Vercello's payment of nearly \$9 million is more than adequate consideration for Respondents' reciprocal promises in Addendum G, including its promise to give Vercello a right of first refusal. Vercello's vice president testified that Vercello would not have signed Addendum G or gone forward with the second closing absent the right of first refusal. CP 243 (Edwards Decl., ¶ 10). Just as important, Gilroy and Taylor testified:

[B]oth parties recognized the realities of the changing market and the possibility that Vercello would not close on those lots, and as part of the trade-offs involved, especially the fact that the earnest money was utilized for partial

payment of the second takedown, Wedgewood wanted to be able to attempt to find other buyers for the lots without waiting until Vercello either closed on the third takedown or let the [PSA] expire. Vercello wanted to be able to protect its position and to take advantage of any opportunity to buy at a reduced price, so the parties came up with the concept of allowing Wedgewood to find other buyers for the lots, but gave a right of first refusal to Vercello.

CP 130-131 (Taylor Decl., ¶ 6); CP 147 (Gilroy Decl., ¶ 5). In short, there is no dispute, and Respondents' own testimony conclusively shows, that the right of first of refusal was a critical "trade-off" given in exchange for Respondents' right to market the third set of lots. Even putting aside Vercello's \$9 million payment, that exchange of promises alone was more than adequate consideration. *See Omni Group*, 32 Wn. App. at 24. Judge McDermott properly rejected Wedgewood's illusory argument.

**B. Disputed Facts Show That Respondents Violated The Right Of First Refusal Before January 6, 2009.**

Addendum G gave Vercello "the right of first refusal to match any bona fide offer to purchase any of the remaining lots." CP 253. Although, as discussed below, there is no expiration date on the right of first refusal, even Wedgewood agrees that it lasted at least until January 6, 2009—the deadline for the third closing. Judge McDermott held that genuine issues of fact existed as to whether Respondents' dealings with American Classic Homes ("ACH") prior to January 6, 2009 violated the right of first refusal

and/or Respondents' implied duty of good faith and fair dealing, and he denied summary judgment on that basis. CP 314-315; 477-478.

The record amply supports Judge McDermott's decision to let this issue go to trial. In opposition to Wedgewood's motion, Vercello set forth material facts showing that, prior to January 6, 2009, Wedgewood had agreed to sell lots included the third takedown to ACH for \$175,000 with no down payment—far less than Vercello would pay under Addendum G:

- On October 23, 2008, Taylor sent ACH a detailed email containing “what I believe was discussed for terms of a mutually beneficial agreement.” CP 415. Those terms included: “The base sales price per lot to be \$175,000 ...” *Id.* Taylor closed by asking ACH to “[p]lease let me know if I’ve missed anything important or if you disagree [sic] with my interpretation [sic].” *Id.*
- In an apparent effort to avoid triggering the right of first refusal before January 6, 2009, Taylor also wrote in that same email: “I am not suggesting using this an agreement (in fact I insist on not using it), but it might be good at a future date (say early [sic] next year), to formalize an agreement with an attorney that might be more comprehensive and keep all parties happy.” *Id.*
- On October 31, 2008, Taylor again wrote an email to ACH, this time to set forth the parties’ “memo of current understanding.” CP 417. The memo contained specific and enumerated terms, including, “[t]he sales price ... shall be \$175,000 each.” *Id.* The email ended, as before, with: “Please let me know if I’ve missed anything important. And again, I think this should be rewritten by an attorney to make sure it covers all that it needs to cover and protects all parties from future misunderstandings.” *Id.*
- On November 2, 2008, Michael Gladstein, ACH’s managing member, responded to Taylor’s “memo of current understanding” and agreed that: “this sounds right.” CP 419.

- Gilroy admitted that “[b]y the end of November 2008 Wedgewood and ACH had reached an agreement in principle on the business deal points ...” CP 300-301 (Gilroy Decl., ¶ 2); ACH’s Gladstein also testified that “we agreed upon the key business deal points by the end of November, 2008.” CP 304 (Gladstein Decl., ¶ 3).
- Taylor testified that when he asked Gilroy if Wedgewood would consider offering a similar deal to Vercello, Gilroy “replied that he would not as ... the chemistry was not good.” CP 345 (Taylor Decl., ¶ 7).
- On January 9, 2009, just three days after the January 6, 2009 closing date, Taylor forwarded the “memo of current understanding” email to Wedgewood’s counsel and wrote: “We may come up with some other tweaking here and there, but this is the general idea.” CP 421.
- Respondents kept all this secret from Vercello, and did not present the ACH offer to Vercello. It wasn’t until January 27, 2009 that Respondents first informed Vercello of the ACH deal. CP 433 (Donner Decl., ¶¶ 3 & 4).
- Respondents and ACH formalized their deal in a February 6, 2009 agreement. CP 423-431. Critically, however, ACH applied for permits and began significant construction activities on the lots weeks before they executed the formal agreement documents. CP 441 (Edwards Decl., ¶ 19).

These documents and admissions—particularly, the “memo of current understanding” and Gilroy’s and Gladstein’s testimony that they “agreed upon the key business deal points”—raise a genuine issue of material fact as to whether the Wedgewood/ACH deal had progressed to a “bona fide offer.” The fact that, just days after January 6, 2009, Wedgewood and ACH quickly moved forward to reduce the memo to a formal contract with essentially the same terms only strengthens that inference.

None of Wedgewood's legal arguments dispel these genuine issues of fact. To begin with, Addendum G does not require a "signed" offer as a prerequisite to Vercello's right of first refusal. Addendum G states:

***Purchaser retains the right of first refusal to match any bona fide offer to purchase any of the remaining lots.***  
Seller shall provide written notice and a copy of [a] signed bona fide offer, from third party to Purchaser ...

CP 253 (emphasis added). The key sentence is the first, and it gives Vercello a right of first refusal for "any" bona fide offer. The second sentence requires Wedgewood to provide Vercello "written notice" and, if the offer is signed, a copy of it. There are no facts to suggest a contrary interpretation. Indeed, Wedgewood's claim that all offers must be "signed" would render the first sentence meaningless, contrary to settled rules of construction. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). In any event, a jury could reasonably find that the parties' emails were sufficient to constitute a "signed" offer.

Wedgewood's reliance on "hornbook" offer-and-acceptance law to characterize the Wedgewood/ACH deal as mere negotiation is equally misguided. The issue is not whether the memorandum or any other communication was a binding offer as a matter of law, but whether it was a "bona fide offer" within the meaning of Addendum G. That is a question of contractual intent, and Wedgewood offered no facts to suggest

that the parties intended the term to carry anything other than a common sense meaning. On that issue, Vercello's vice president testified:

In entering into Addendum G, Wedgwood and Vercello agreed that it was the intent of the parties [that] the right of first refusal would apply to situations where a different builder would end up building homes on the Remaining Lots while owing or paying a significantly lesser price per lot (than the amount Vercello paid for the lots), which would give the different builder a competitive advantage in selling homes in the development.

CP 439 (Edwards Decl., ¶ 14). In short, there is sufficient evidence to show that the right of first refusal was intended to encompass the very scenario created by Wedgewood's deal with ACH. At bottom, what the parties intended "bona fide offer" to mean, and whether Respondents breached the right of first refusal, is for the trier of fact to decide. *See Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990) (contract interpretation is a question for a trier of fact if it depends on the credibility of extrinsic evidence or a choice among reasonable inferences).<sup>4</sup>

Finally, Vercello asserted claims for breach of the covenant of good faith and fair dealing against all the Respondents. CP 376 & 383.

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<sup>4</sup> Indeed, the evidence raises a reasonable inference that the "memo of current understanding" was an actual agreement between the parties, thereby qualifying as an offer *per se*; after all, Gilroy and Gladstein admitted that they had agreed upon the "deal points." CP 300-301 (Gilroy Decl., ¶ 2); CP 304 (Gladstein Decl., ¶ 3). The fact that the parties contemplated more formal documentation (which Taylor insisted happen after January 6, 2009) does not make their informal agreement any less viable. *Morris v. Maks*, 69 Wn. App. 865, 872, 850 P.2d 1357 (1993).

Even if the above facts were insufficient to trigger the right of first refusal as a matter of law, they are sufficient to create a genuine issue of fact as to Respondents' bad faith. The facts show that Respondents intentionally tried to avoid triggering Vercello's right of first refusal by, among other things, characterizing the Wedgewood/ACH deal as a "memo of current understanding," "insist[ing]" that formal documentation wait until "early next year," and refusing to extend Vercello the same deal as ACH because of "bad chemistry." Judge McDermott properly denied Wedgewood summary judgment on this basis as well.

**C. The Right Of First Refusal Did Not Expire On January 6, 2009, But Lasted A Reasonable Time.**

Even if the pre-January 6, 2009 conduct did not trigger the right of first refusal, Respondents' post-January 6, 2009 conduct plainly would. Wedgewood therefore asked the trial court to rule that Vercello's right of first refusal expired on January 6, 2009—the deadline for the third closing. CP 209-212; CP 327-333. The trial court rejected that argument and specifically found that "the Rule Against Perpetuities does not apply to the facts of this case and, under the *Robroy* analysis, the Court, based on the facts, will determine the reasonable period of time for the duration of the right of first refusal." CP 478. There was no error here either.

Nothing in Addendum G ties the right of first refusal to the January 6, 2009 closing date. That date appears only in Paragraph 1(e), and it says

the “closing shall be on or before January 6, 2009.” CP 253. The right of first refusal appears in Paragraph 3, and it contains no deadline. On the contrary, it says that “Purchaser retains the right of first refusal ... to purchase any of the remaining lots.” *Id.* Vercello’s witness testified that:

Addendum G did not contain any language which limited the duration or set a termination date for the right of first refusal. During the parties’ negotiations of Addendum G, no party ever stated or proposed that there would be any such duration limit or termination date. ...[¶] In entering into Addendum G, the parties agreed and it was the intent of the parties [that] the right of first refusal would continue until all the Remaining Lots were sold. ...

CP 439-440 (Edwards Decl., ¶¶ 15, 16). The right of first refusal was not tied to the third closing date because its purpose—for which Vercello agreed to go forward with the second closing for \$9 million—was to give Vercello “protection” against another builder buying the remaining lots at a reduced price, which would interfere with Vercello’s ability to sell its own lots. CP 438 (*id.* at ¶ 10). Although Wedgewood now disputes the intent and meaning of right of first refusal, in the absence of an express termination date, the parties’ competing interpretations create an issue of fact that must be resolved at trial. *Berg*, 115 Wn.2d at 667-68.

The trial court also properly rejected Wedgewood’s argument that, without a specific termination date, the right of first refusal violated the Rule Against Perpetuities. In *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 622 P.2d 367 (1980), the Supreme Court held that a right of first refusal is

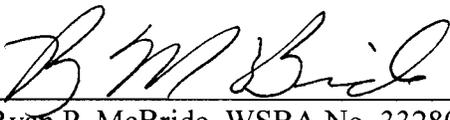
not subject to the Rule Against Perpetuities. *Id.* at 71. The Court further held that where, as here, the right of first refusal does not contain a stated expiration date, the holder of a right of first refusal, in this case Vercello, can exercise the right for a “reasonable time” after its creation, which is a fact-specific determination. *Id.* at 73; *also Feider v. Feider*, 40 Wn. App. 589, 592, 699 P.2d 801 (1985) (same). *Robroy* is good law and controls here.<sup>5</sup> As the trial court found, the duration of a “reasonable time” must be decided by the court based on the evidence at trial. CP 478.

\* \* \*

For the foregoing reasons, the judgment below should be reversed and the case remanded for trial.

RESPECTFULLY SUBMITTED 7th day of June, 2011.

LANE POWELL PC

By   
Ryan P. McBride, WSBA No. 33280  
*Attorneys for Appellants*

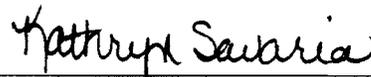
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<sup>5</sup> Contrary to Wedgewood’s suggestion, the Supreme Court did not overrule *Robroy* in *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000). On the contrary, the Court expressly distinguished *Robroy* so that it would retain vitality in cases like this one. *Id.* at 367. Wedgewood’s reliance on *South Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 146 P.3d 935 (2006), is even more misplaced. *Weir* cannot overrule *Robroy* and, in any event, does not hold that a right of first refusal is subject to the Rule Against Perpetuities. Indeed, the *Weir* case contains no discussion of the Rule Against Perpetuities at all.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2011, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

Mr. Jeffrey P. Downer Lee Smart P.S., Inc. One Convention Place 701 Pike Street, Suite 1800 Seattle, WA 98101-3929	<input type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input checked="" type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
Mr. Joseph C. Calmes Hanson Baker Ludlow & Drumheller, P.S. 2229 112th Avenue NE, Suite 200 Bellevue, WA 98004-2936	<input type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input checked="" type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
Mr. Steven A. Reisler Steven A. Reisler, PLLC Springbrook Professional Center 4500 Sand Point Way NE, Suite 250 Seattle, WA 98105	<input type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input checked="" type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>



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Kathryn Savaria