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No. 68608-9-1

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

SERGEY SAVCHUK,

Appellant,

v.

CHRISTINE SAMS and METRO REALTY, INC.,

Respondents.

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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I. **INTRODUCTION**

Respondents, Christine Sams (“Sams”) and Metro Realty, Inc. (“Metro Realty”) have taken the position, adopted by the trial court, that a Washington real estate agent/licensee has discharged all duties to her buyer/client once she has induced that client and a seller to sign something called a “purchase and sale agreement”, even if that “agreement” is hopelessly ambiguous, defective and contains provisions that are obviously contrary to her client’s interests. Since this Draconian view is not supported by Washington statutes or applicable case law, the resulting summary judgment granted to Sams and Metro Realty should be reversed, allowing a trial to proceed on Petitioner Sergey Savchuk’s claims that he incurred substantial damages because Sams and Metro Realty breached numerous statutory and common law duties they owed to him.

II. **ASSIGNMENTS OF ERROR**

A. **General Assignment of Error**

1. The trial court erred in entering the Order Granting Sams and Metro Realty’s Motion for Summary Judgment, dated March 23, 2012.

B. Specific Assignments of Error

2. The trial court erred in ruling that Sams and Metro Realty owed Savchuk no duty with respect to his claims for: negligence; breach of a duty to exercise reasonable skill and care under RCW 18.86.030; breach of a duty to deal honestly and in good faith under RCW 18.86.030(1)(b); breach of a duty to disclose all material facts under RCW 18.86.030; breach of a duty of loyalty under RCW 18.86.050(1)(a); breach of a duty to timely disclose conflicts of interest under RCW 18.86.050(1)(c); breach of a duty to advise the buyer to seek expert advice on matters beyond the agent's expertise under RCW 18,86.050(1)(c); breach of fiduciary duty; and violation of the Consumer Protection Act, RCW 19.86.090.

3. The trial court erred in granting summary judgment dismissing claims raised by Savchuk that were not addressed in Sams' and Metro Realty's motion.

4. The trial court erred in granting summary judgment dismissing Savchuk's negligence claim.

5. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of a duty to exercise reasonable skill and care under RCW 18.86.030(1)(a).

6. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of a duty to deal honestly and in good faith under RCW 18.86.030(1)(b).

7. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of a duty to disclose all material facts under RCW 18.86.030(1)(d).

8. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of a duty of loyalty under RCW 18.86.050(1)(a).

9. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of a duty to timely disclose conflicts of interest under RCW 18.86.050(1)(b).

10. The trial court erred in granting summary judgment dismissing Savchuk's claim for breach of fiduciary duty.

11. The trial court erred in granting summary judgment dismissing Savchuk's claim for duty to advise the buyer to seek expert advice on matters beyond the agent's expertise under RCW 18.86.050(1)(c).

12. The trial court erred in granting summary judgment dismissing Savchuk's claim for violation of the Consumer Protection Act, RCW 19.86.090.

C. Issues Presented

1. Is the duty of a buyer's real estate agent limited to inducing a seller and buyer to sign a document entitled "purchase and sale agreement", no matter how ambiguous, defective or contrary to the buyer's interest that agreement might be, where there are no contractual provisions between the agent and the buyer addressing or setting any limit to the scope of the realtor's agency? (Assignments of Error 1-11)

2. Is it error for a trial court to grant summary judgment dismissing all of a plaintiff's claims, when the moving party's motion for summary judgment does not address several of the plaintiff's claims for relief? (Assignments of Error 1-3)

3. Where a buyer's real estate agent participated in negotiating and drafting a real estate purchase and sale agreement and an attorney opined that the agent's conduct violated the reasonable standard of care among attorneys, is it error to grant summary judgment to the buyer's agent on the buyer's negligence claim? (Assignments of Error 1-2, 4)

4. Is it error to grant summary judgment to a buyer's real estate agent dismissing the buyer's negligence claim where a real estate agent/licensee opined that the agent's conduct violated the

reasonable standard of care among real estate agents/licensees?

(Assignments of Error 1-2, 4)

5. Is it error to grant summary judgment to a buyer's real estate agent dismissing the buyer's claim that the agent breached her duty of reasonable skill and care under RCW 18.86.030(1)(a), where a real estate agent/licensee opined that the agent's conduct breached that duty? (Assignments of Error 1-2, 5)

6. Is it error for a trial court to grant summary judgment to a buyer's real estate agent dismissing the buyer's claim that the agent breached her duty to deal honestly and in good faith under RCW 18.86.030(1)(b), where the subject purchase and sale agreement was ambiguous about whether installment deposits totaling \$500,000 were nonrefundable, the agreement had a "Safe Harbor" provision limiting seller's remedies to a \$20,000 earnest money deposit, the agent knew about the legal effect of that Safe Harbor provision and did not disclose that to the buyer, the agent received interim commission payments from buyer's installment payments without disclosing that fact and a real estate agent/licensee opined that such conduct constituted a breach of that duty? (Assignments of Error 1-2, 6)

7. Is it error for a trial court to grant summary judgment to a buyer's real estate agent dismissing the buyer's claim that the agent breached her duty to disclose material facts under RCW 18.86.030(1)(d), where the subject purchase and sale agreement was ambiguous about whether installment deposits totaling \$500,000 were nonrefundable, the agreement had a Safe Harbor provision limiting seller's remedies to a \$20,000 earnest money deposit, the real estate agent knew about the legal effect of that Safe Harbor provision and did not disclose that to the buyer, the real estate agent received interim commission payments from buyer's installment payments without disclosing that fact, and a real estate agent/licensee opined that such conduct constituted a breach of that duty? (Assignments of Error 1-2, 7).

8. Where a buyer's real estate agent participated in negotiating and drafting a real estate purchase and sales agreement, abandoned the buyer in connection with negotiating and drafting a material agreement addendum, told the buyer to rely on the seller's agent, which the buyer did to his detriment, an attorney opined that this conduct violated the standard of care among attorneys and a real estate agent/licensee opined that such conduct constituted a breach of the agent's duty of loyalty, is it error

for a trial court to grant summary judgment to the agent dismissing the buyer's claim that the agent breached her duty of loyalty under RCW 18.86.050(1)(a)? (Assignments of Error 1-2, 8)

9. Is it error for a trial court to grant summary judgment to a buyer's real estate agent dismissing the buyer's claim that the agent breached her duty to timely disclose conflicts of interest under RCW 18.86.050(1)(b), where the agent received nonrefundable commission payments from buyer's installment payments without disclosing that to the buyer, and then abandoned the buyer in connection with negotiating a material agreement addendum, told the buyer to rely on seller's agent, which buyer did to his detriment and a real estate agent/licensee opined that this conduct violated that duty? (Assignments of Error 1-2, 9)

10. Is it error for a trial court to grant summary judgment to a buyer's real estate agent dismissing the buyer's claim for breach of fiduciary duty, where the subject purchase and sale agreement was ambiguous about whether installment deposits totaling \$500,000 were nonrefundable, the agreement had a Safe Harbor provision limiting seller's remedies to \$20,000 earnest money deposit, the real estate agent knew about the legal effect of that Safe Harbor provision and did not disclose it to the buyer, the

real estate agent received interim commission payments from the buyer's installments without disclosing that fact, the agent abandoned the buyer in connection with negotiating and drafting a material agreement addendum, told the buyer to rely on seller's agent, which the buyer did, to his detriment, an attorney opined that this conduct violated the standard of care among attorneys and a real estate agent/licensee opined that such conduct constituted a breach of the agent's fiduciary duty? (Assignments of Error 1-2, 10)

11. Is it error for a trial court to enter summary judgment in favor of a buyer's real estate agent dismissing the buyer's claim for breach of a duty to advise the buyer to seek expert advice on matters beyond the agent's expertise under RCW 18.86.050(1)(c), where a purchase and sale agreement contained ambiguous and contradictory terms, provided for the buyer's payment of substantial installments, without correspondingly transferring the subject property to the buyer, the agent abandoned the buyer in connection with negotiating and drafting a material agreement addendum, told the buyer to rely on the seller's agent, which the buyer did to his detriment, an attorney opined that this conduct violated the standard of care among attorneys, and a real estate/licensee

opined that such conduct constituted a breach of that duty?

(Assignments of Error 1-2, 11)

12. Is it error for a trial court to enter summary judgment in favor of a buyer's real estate agent dismissing the buyer's Consumer Protection Act claim where: the agent participated in negotiating and drafting the subject purchase and sale agreement, that contained a Safe Harbor provision, as well as providing for installment deposits totaling \$500,000, the agent was aware of the legal effect of the Safe Harbor provision and did not disclose that to the buyer; received non-refundable installment payments of commission from the buyer's contact installment payments without disclosing that commission arrangement to the buyer, represented to the buyer at the time the agreement is signed that the buyer could pay by note and deed of trust, but no note or deed of trust was ever provided nor tendered and then abandoned the buyer with respect to a material addendum, encouraging him to rely upon the sellers' agent, which the buyer did to his detriment?

(Assignments of Error 1-2, 12)

III. STATEMENT OF THE CASE

A. Facts

1. Background

After emigrating here from Kazakhstan, in 1989, Savchuk worked his way up through ranks in the local construction trades. In 1999, he started his own subcontracting business, and in 2003, Savchuk began building “spec” houses, through Arrow Construction, Inc. and then Arrow Construction & Excavation, Inc. (“Arrow”). Prior to 2006, Savchuk’s real estate transactions had been limited to the purchase of buildable lots, on which, through Arrow, he built “spec” houses and then sold them using bank financing. CP 159-160.

Savchuk’s native language is Russian. Since arriving in the United States, Savchuk has learned passable conversational English and can carry-on relatively simple English conversations. He does not understand more complicated and technical English conversations. His understanding of written English is even more limited. CP 160.

Because of his English language limitations, Savchuk has relied on trusted professional for assistance in matters requiring sophistication in English. From 2003 through 2006, Christine Sams

became one of the trusted real agents on which Savchuk relied.

Before 2006, all of the deals on which he personally had worked with Sams involved the purchase of buildable lots through bank financing. CP 160-161.

2. Initial PSA

In August 2006, Sams approached Savchuk and encouraged him to buy the subject property. Savchuk was initially hesitant, because he had doubts about his capacity at that point to obtain bank financing, and he had not previously taken on a project requiring the developing raw land through seller financing. After Sams' repeated urgings, Savchuk finally relented and gave her permission to enter an offer on the subject Douglas Road property. CP 160.

Sams drafted this first offer, which was accepted by the sellers, the Jerdes. It was signed by Savchuk on October 2, 2006 and, through Sams, presented to the Jerdes, who signed it on October 3, 2006 (the "Initial PSA"). CP 19, 43-54, 93, 161. App 1-11.

At the end of the due diligence period set forth in the Initial PSA, Savchuk decided not to go forward with that deal. As a result, in December 2006, Savchuk's agent, Sams, and the Jerdes' agent,

Anne Inman, negotiated and exchanged written proposals for the terms of a new Purchase and Sales Agreement. CP 39-42, 77-90, 94-95, 161-162, 177-190.

3. PSA

The resulting Purchase and Sales agreement, which became the subject of this lawsuit (the “PSA”, a copy of which is attached as Appendix B), was drafted by both Sams and Inman. Among other things, portions of the PSA appear to be in Sams’ handwriting and several pages are portions from the Initial PSA that were simply attached as sections or addenda to the PSA. In many instances, these pages continued to show the October execution date associated with the Initial PSA. *Id.*

On its face, the PSA is a crazy quilt of ambiguities and contradictions. Aside from the conflicting dates of execution, mentioned above, the PSA creates confusion regarding such basic matters as the terms of payment and whether contemplated installment deposits would be “nonrefundable”.

While the PSA clearly acknowledged Savchuk’s initial payment of a \$20,000 earnest money deposit, the terms for payment of the remaining balance are hopelessly ambiguous and confused. The front page makes a clear reference to payment

through a promissory note. Handwritten language inserted in the blank following Paragraph 14, under "specific terms", entitled "Addenda", states: "Payment Terms: Adden #34...promissory note...." CP 77, 177.

Form 34, to which the preceding passage apparently refers, sets forth the following pertinent payment terms:

4. Payment Terms: Note & Deed of Trust. Interest pmts to be paid monthly on unpaid balance, 7% interest....
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, 2007.¹

The incorporated "Payment Terms Addendum", Form 22C, also bears on this issue. Among other provisions, it contains a checked box next to a paragraph entitled "**NOTE AND DEED OF TRUST**", which goes on to recite that:

Buyer agrees to pay \$525,000.00 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 from the date of Closing at 7% per annum on the unpaid principal, on or before the 15th day of each

¹ CP 89, 189.

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.

Under the heading "Promissory Note," this addendum also provided that Buyer would agree to sign a certain form of promissory note and deed of trust, "which must be attached to this Agreement." CP 81, 181.

However, no deed of trust was attached. The only attached document, entitled, "Promissory Note", contained numerous blanks, none of which had been filled-in. CP 65-66. 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.* Thus, the only form of payment specified in the PSA was through a note and deed of trust, the terms of which were never attached to the agreement.

To add confusion to ambiguity, Form 22C calls for a note and deed of trust in the amount of \$525,000. Yet, the installments itemized on Form 34 total \$250,000, which would leave a contradictory unpaid principal balance to be financed of \$475,000.

In addition, Form 34 says nothing about whether the itemized future installments were to be refundable or not. However, in Paragraph 7, under “Specific Terms”, in a provision entitled “Default”, a check appears next to “Forfeiture of Earnest Money.” CP 77, 177. The corresponding “General Terms” Paragraph p sets forth this “Safe Harbor” election as follows:

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 7, shall apply:

- 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.²

None of the addenda to the PSA ever specifically negated or excluded this Safe Harbor provision. Sams also admitted in her deposition that she knew that the Safe Harbor provision in the standard-form purchase and sale agreement limited a seller's remedy to forfeiture of the earnest money deposit. CP 92. Yet, she never advised her client, Savchuk, regarding this important limitation on his potential liability. CP 99, 162-163.

² CP 80, 180 [underline added].

4. August Extension

By August 2007, Savchuk had deposited \$200,000 toward the purchase price. At that time, however, Savchuk had determined that he could not obtain financing for the remaining \$525,000 purchase price balance. Consequently as an alternative to a cash closing, through their agent, the Jerdes proposed that Savchuk enter into an extension requiring additional deposits. These would ultimate total \$500,000 in principal, plus interest, toward the purchase price with a May 31, 2008 closing date.

During this critical August 2007 period, Savchuk made numerous attempts to contact Sams. However, Sams was out of the country, and ultimately told Savchuk that he should rely on the Jerdes' agent, Anne Inman, who Sams said would treat Savchuk fairly. CP 99, 162-163.

As a consequence, Savchuk did, indeed, rely on Anne Inman for this critical extension. The two of them tentatively agreed on the due dates and amounts of deposit installment payments. Inman then drafted the extension and presented it to Savchuk while he was working on a job site. Savchuk reviewed it to confirm that the dates and amounts were consisted with his previous understanding and signed it. Inman did not tell him, and he did not

notice at the time, language purporting to make all deposits “nonrefundable” (the “August Extension”). CP 13-14, 90, 162-163, 189. Having appointed Inman as her agent, Sams did not review the August Extension, nor provide any advice to Savchuk regarding it. CP 140.

5. Post August Extension Events

At the end of the extension period, on May 31, 2008, Savchuk could not obtain financing for the remaining balance of approximately \$225,000. The Jerdes also did not accept a note and deed of trust as payment for the remaining balance, and the transaction did not close. CP 162-163.

Until the spring of 2011, Savchuk was not aware that Sams and the Jerdes’ agent, Inman, had been receiving nonrefundable commission payments from the purchase price deposits that he had been making. If Savchuk had known of the nonrefundable installment commission payments at the time he entered into the PSA, he would have become distrustful of his agent, Sams, and would not have signed the PSA without obtaining advice from a more trustworthy realtor or an attorney. CP 13-14, 163.

Sams failed to inform or advise Savchuk that the attempt by the Jerdes to retain \$500,000 in deposits on a \$725,000 purchase

price would likely be unenforceable as a penalty. She also never suggested or advised Savchuk to obtain legal counsel with respect to the August Extension or any other aspect of the transaction. If she had so advised him, Savchuk would have obtained counsel. CP 13-14, 162.

Sams additionally did not advise Savchuk against paying so-called "interest" payments in addition to installment principal, even though the Jerdes had not loaned any money to Savchuk. Had she so informed Savchuk, he would not have made \$20,737.00 in interest installment payments between January 2007 and May 2008. CP 13-14, 164.

Ultimately, when the transaction did not close, the Jerdes kept all of the installment payments and interest paid to them by Savchuk in the approximate amount of \$525,737, along with the subject property. This lawsuit was instituted to obtain a refund/damages from the Jerdes for all or most of Savchuk's deposits of principal and interest.

B. Procedural Posture

On February 5, 2009, Savchuk filed his Complaint For Breach Of Contract & Refund Of Payments Made, seeking, among other things, a refund from the Jerdes of at least \$480,000 of

Savchuk's deposit in connect with this transaction. The Jerdes filed a Motion for Summary Judgment on June 9, 2009. On July 31, 2009, the trial court issued an initial Summary Judgment Order in favor of the Jerdes and against Savchuk, and entered its Final Judgment relating to this order on September 15, 2009. See this Court's opinion in Case No. 64269-3-1 ("First Appeal Opinion"), App 26-36.

Savchuk appealed the trial court's judgment in favor of the Jerdes. Through First Appeal Opinion, this Court reversed the trial court and remanded for a determination whether Savchuk's \$480,000 deposits constituted an unenforceable penalty or permissible liquidated damages.

After remand, Savchuk obtained leave for, and filed, his First Amended Complaint, asserting claims of breach of common law duties and those arising under RCW 18.86.030 and 18.86.050 against new defendants Sams and Metro Realty. CP 466-473, 476-508.

As a result of a mediation held in January 2012, Savchuk and the Jerdes agreed to settle all claims between one another. In connection with the settlement, Savchuk expressly retained all of is claims against Sams and Metro. CP 25-30. On February 3, 2012,

Savchuk obtained leave for, and filed, his Second Amended Complaint, adding claims against Sams and Metro for violation of the Consumer Protection Act, RCW 19.86. CP 271-301, 349-325.

On February 24, 2012, Sams and Metro served, but did not file, Sams and Metro Realty's Motion for Summary Judgment, along with a note for motion docket, purporting to set the Motion for hearing on March 23, 2012. CP 260-262. Since trial was scheduled to begin four days following this noted hearing date and Sams and Metro Realty had not obtained leave from the court to hear a summary judgment motion less than 14 days before trial, as required under CR 56, Savchuk promptly filed and served Plaintiff Sergey Savchuk's Motion to Shorten Time; Strike Defendants Sams and Metro Realty, Inc's Motion for Summary Judgment and for CR 11 Sanctions, on February 27, 2012. CP 263-264. On shortened time, the trial court heard that motion on March 2, and the trial court granted Sams and Metro Realty leave for the court to hear their summary judgment motion on March 23, 2012, just four days prior to trial. CP 226-228.

Sams and Metro Realty subsequently filed their Motion for Summary Judgment on March 8, 2012, for hearing 21 days later. CP 211-225. It was factually supported only by the accompanying

three-page Declaration of Christine Sams in Support of Motion for Summary Judgment. CP 211-213.

In opposition, Savchuk submitted: his own, detailed declarations, with exhibits from the record; two expert declarations, of James W. Bjerke, a real estate agent/licensee, and Larry Daugert, an attorney; and excerpts from the depositions of Christine Sams and Seller, Darlyce Jerde, attached to a declaration by James E. Britain. CP 13-14, 35-190, 194-208, 229-246.

Through this extensive evidentiary support in the record, Savchuk's Opposition demonstrated viable claims for: 1) negligence; 2) breach of fiduciary duty; 3) breach of the duty to exercise reasonable skill and care under RCW 18.86.030(1)(a); 4) breach of the duty to deal honestly and in good faith under RCW 18.86.030(1)(b); 5) breach of the duty to disclose all material facts under RCW 18.86.030(1)(d); 6) breach of the duty of loyalty under RCW 18.86.050(1)(a); 7) breach of the duty to timely disclose to buyer any conflicts of interest under RCW 18.86.050(1)(b); 8) breach of a duty to advise the buyer to seek expert advice on matters relating to transactions that were beyond the agent's expertise under RCW 18.86.050(1)(c); and 9) violation of the Consumer Protection Act. CP 194-208. Despite all this, the trial

court granted Sams and Metro Realty's motion for summary judgment, offering as explanation only: "I find myself in agreement with Mr. Tingvall's decision". RP 48.

From the Order Granting Sams and Metro Realty's Motion for Summary Judgment, dated March 23, 2012. CP 10-11. Savchuk timely filed his Notice of Appeal. CP 5-9.

IV. **ARGUMENT**

A. **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.³ When reaching a summary judgment determination, the court must consider all facts submitted and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.⁴

On appeal, this Court conducts a *de novo* review, engaging in the same inquiry as the trial court. Accordingly, this Court should

³ 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).

⁴ *Id.*; *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982)

review the record available to the trial court and make all reasonable inferences from facts in favor of Savchuk.⁵

B. Sams and Metro Realty Owe Savchuk a Duty.

Although the basis for the trial court's decision is far from clear, it apparently adopted Sams' and Metro Realty's argument that they owed Savchuk no duty with respect to any of his claims. In particular, they maintain that once Sams induced Savchuk and the Sellers to sign a document called a "Purchase and Sale Agreement", all of her common law and statutory duties were satisfied. Fortunately, for all those who may consider utilizing the services of a real estate agent, this is not the law of the State of Washington.

In part, Sams and Metro Realty premise their position on the proposition that a real estate agent's duty terminates once her commission has been earned. Despite *dicta* in some cases making reference to this notion,⁶ Washington has not adopted the categorical rule of law that a real estate agent's duty terminates

⁵ *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).

⁶ *See, e.g., Cogan v. Kidder, Matthews & Segner, Inc.*, 97 Wn. 2d 658, 663-664, 648 P.2d 875 (1982); *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn. App. 157, 161-163, 872 P.2d 69 (1994); *Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984).

upon the execution of a purchase and sale agreement. At most, some cases hold that an agent's scope of duty to a seller turns on the terms in the pertinent agency contract relating to the earning and payment of commissions.

Cogan is illustrative. The Seller in *Cogan* sought recovery against his real estate agent for breach of a fiduciary duty based on conduct occurring after the purchase and sale agreement had been signed, but before closing. In response to the realtor's argument that its duty to the seller expired when the "earnest money agreement" was signed, the Washington Supreme Court responded:

We disagree with Kidder, Matthews' contention the signing of the earnest money agreement ended its agency relationship. *Cogan* included language in the earnest money agreement which conditioned Kidder, Matthews' commission on 'if and when the sale closes.' To the extent Kidder, Matthews continued to work towards closing, it continued as agent of *Cogan*. The trial court and the Court of Appeals found the principal-agent relationship between *Cogan* and Kidder, Matthews existed at the time Kidder, Matthews asked *Cogan* for an extension of the closing agreement, and we concur in their findings.⁷

⁷ 97 Wn. 2d at 663-664.

Other cases falling into this line of authority confirm that the scope of a seller's agent's duty varies with the terms of the pertinent agency contract.⁸

The interpretation of duty for which Sams and Metro Realty argue also cannot be squared with several Washington cases under which liability has been imposed upon a seller's real estate agent for conduct occurring after a purchase and sale agreement. In *Harstad v. Frol*,⁹ for example, an agent was held liable to a seller for breach of fiduciary duty and violation of the Consumer Protection Act for conduct occurring after the pertinent purchase and sale agreement had been executed. Commenting on the scope the fiduciary duty, *Burien Motors, Inc. v. Balch*,¹⁰ additionally observed that a real estate agent:

[M]ust protect his client's interest out of a sense of loyalty, good faith, and duty to exercise reasonable

⁸ See, e.g., *Ward* [terms of agency contract extended duty through closing]; *Langston* [duty limited by listing agreement provisions under which commission earned upon execution of purchase and sale agreement]; *Pilling v. Eastern & Pac. Enterprises Trust*, 41 Wn. App. 158, 702 P.2d 1232 (1985) [same].

⁹ 41 Wn. App. 294, 704 P.2d 638 (1985).

¹⁰ 9 Wn. App. 573, 513 P.2d 582 (1974).

care. Such protection may well involve the duty to investigate the law and facts applicable to the transaction and to disclose the results to his client. The duty is similar to the duty to disclose imposed on a trustee who must disclose all material facts concerning the transaction the trustee knows or should know. Restatement Second of Torts § 170(2) (1959).¹¹

Significantly, none of these cases, including all of those cited by Sams and Metro Realty, and none that counsel for Savchuk has found, holds that the duty of a buyer's agent expires once a "purchase and sale agreement" has been executed. Presumably this is because buyer rarely enters into a written listing agreement containing language limiting the scope of the agent's duty.

Here, Sams and Metro Realty were serving as Savchuk's agent as the buyer in this transaction. No agreement existed limiting the scope of their duty to the mere execution of a purchase and sale agreement. As a consequence, Sams' and Metro Realty's duty did not terminate with the execution of the PSA.

Even assuming, for the sake of argument, that Sams' and Metro Realty's duty terminated with the execution of the PSA, they still breached their duties to Savchuk with respect to several of

¹¹ 9 Wn. App. at 577. See also *Wilkinson v. Smith*, 31 Wn. App. 1, 639 P.2d 768 (1982) [CPA violation].

Savchuk's claims that arise out of the terms of the PSA itself, These include claims for: 1) negligence; 2) breach of the duty to exercise reasonable skill and care under RCW 18.86.030(1)(a); 3) breach of a duty to deal honestly and in good faith under RCW 18.86.030(1)(b); 4) breach of the duty to disclose material facts under RCW 18.86.030(1)(d); 5) breach of a duty to advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise under RCW 18.86.050(1)(c); 6) breach of fiduciary duty; and 7) violation of the Consumer Protection in the drafting of the PSA and arising out of terms of the PSA. Moreover, Savchuk's claim that Sams breached her duty to timely disclose any conflicts of interest under RCW 18.86.050(1)(b) with respect to the payment of commission to Sams on an undisclosed nonrefundable installment basis arose prior to, or at the time that, the PSA was executed.

Thus, Sams and Metro Realty clearly owed Savchuk a duty with respect to most, if not all, of his claims asserted in this matter. The trial court, accordingly, erred in dismissing all of Savchuk's claims based upon a purported lack of duty.

C. The Trial Court Erred in Dismissing Claims Asserted by Savchuk that Were Not Addressed in the Summary Judgment Motion.

Other than a rather ambiguous assertion that Sams and Metro Realty owed Savchuk no duty, addressed in Section B, above, the summary judgment motion sought dismissal of only six of Savchuk's claims.¹² Thus Sams' and Metro Realty's motion failed to address several of Savchuk's claims. These includes that: 1) by abandoning Savchuk and telling him instead to rely upon Seller's agent, Sams breached her duties of reasonable skill and care, loyalty and to avoid conflicts of interest; 2) Sams' conduct constituted a breach of her fiduciary duties to Savchuk; and 3) through Sams' failure to advise Savchuk against paying interest when the Jerdes had not loaned him any funds, she breached a duty of reasonable skill and care and fiduciary duty. See CP 200-203.

¹² These were that Sams and Metro Realty: 1) violated the reasonable standard of care or created a conflict of interest by accepting nonrefundable installment commission payments prior to closing; 2) breached a duty by failing to advise Savchuk not to enter into contracts requiring "nonrefundable" payments; 3) breached a duty to advise Savchuk that the nonrefundable payments under the PSA constituted an unenforceable penalty; 4) breached a duty by failing to advise Savchuk that he could have tendered performance at closing through a note and deed of trust; 5) were negligent by failing to review the August Extension; and 6) violated the Consumer Protection Act. CP 214-225.

As a consequence, Sams' and Metro Realty's motion was facially inadequate to support dismissal of all of Savchuk's claims. CR 56 authorizes entry of summary judgment only to the extent that such a motion is filed 28 days before hearing and sets forth the precise legal and factual basis from which a court can determine that: "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the trial court had no authority to dismiss any of claims not addressed in the summary judgment motion and reversal is required as to all such claims.

D. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's Claims of Negligence and Breach of the Duty to Exercise Reasonable Skill and Care.

The evidence presented in connection with Savchuk's Opposition was more than adequate to establish that there is a genuine issue for trial with respect to Savchuk's claims based on negligence and breach of the duty of reasonable skill and care under RCW 18.86.030(1)(a). Among other evidence, the expert opinions introduced through the declarations of James Bjerke and Larry Daugert provided a basis upon which a trier of fact could

conclude that Sams was both negligent and breached her duty of reasonable skill and care.¹³

Specifically, Mr. Bjerke's Declaration opined that Sams breached her duty to Savchuk by: 1) failing to clarify the conflict between the Safe Harbor provision, limiting Savchuk's liability to his \$20,000 earnest money deposit, and other provisions of the PSA, including Forms 22C and 34, setting forth conflicting schedules of installment payments that might be viewed as nonrefundable; 2) failing to advise Savchuk that his liability would be limited to the \$20,000 earnest money in the PSA, under the Safe Harbor provision in the PSA, even though Sams understood that Safe Harbor provisions generally limit a seller's remedy to the earnest money deposits; 3) including language in the PSA under which a portion of the purchase price would be paid under a note and deed of trust, without attaching any form note and deed of trust, and leaving the provisions regarding the payment of the purchase price ambiguous; 4) failing to include terms in the PSA requiring the

¹³ Since negligence is established through evidence showing that a defendant failed to exercise reasonable skill and care required under the circumstances, Savchuk's common law and statutory claims are established through comparable evidence. It also is axiomatic that the standard of care applicable for a profession or trade, such as real estate agent or attorney, may be established through expert testimony. See, e.g., *Walker v. Bangs*, 92 Wn. 2d 854, 601 P.2d 1279 (1979); *Lynch v. Republic Publ'g Co.*, 40 Wn. 2d 379, 243 P.2d 636 (1952); *Baechler v. Beaunaux, DVM*, 167 Wn. App. 128, 272 P.2d 277 (2012).

transfer of title to Savchuk in exchange for a deed of trust, mortgage or real estate contract, or to advise Savchuk that the commonly accepted means by which a buyer purchases property on an installment basis is such a security instrument; 5) failing to advise Savchuk that the sellers' retention of \$575,000 on a \$750,000 purchase is inappropriate and probably unenforceable; 6) including provisions in the PSA permitting sellers' inappropriately to collect interest payments, even though the sellers' had not loaned Savchuk any money; 7) entering into an arrangement under which Sams received nonrefundable installment commission payments prior to closing and despite the fact that the transaction never closed, without disclosing this arrangement to Savchuk; and 8) abandoning Savchuk and advising him to rely upon the adversary's agent's advice and counsel, rather than providing necessary input and advice with respect to the August Extension. CP 156-158, 302-348.

Savchuk also presented a viable claim resting on Sams' negligence for failing to comply with the standard of reasonable skill and care among attorneys. As Sams and Metro Realty have conceded below, a real estate agent is held to the standard of reasonable skill and care of an attorney, at least with respect to:

...the selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and arrangements modifying those documents....¹⁴

The attorney standard of care correspondingly extends to a duty to disclose material facts and information, that in the exercise in due care, the agent should know.¹⁵

The Declaration of Larry Daugert established that Savchuk had a viable negligence claim based on Sams' breach of the standard of reasonable skill and care among attorneys. In particular, Mr. Daugert expressed the expert opinion that Sams breached this duty because: 1) the PSA contained an ambiguity regarding the extent to which deposits would be refundable in the event that the transaction did not close, in light of the conflict between the effect of the Safe Harbor provision and installment terms set forth in Form 34 of the PSA; 2) Sams failed advise Savchuk about the distinctions between unenforceable penalties and liquidated damages, and that, to the extent that the deposits set forth in the August Extension might be deemed non-refundable,

¹⁴ *Caltum v. Heritage House Realtors, Inc.*, 103 Wn. 2d 623, 627, 694 P.2d 630 (1985).

¹⁵ See *Burien Motors*, 9 Wn. App at 577, citing *Restatement of Torts*, §552, Comments D & E.

the provision would be unenforceable; and 3) Sams failed to advise Savchuk with respect to the August Extension, instead advising her client to trust the sellers' representative to assist him in negotiating drafting the terms of that extension. CP 153-155.

Thus, Savchuk submitted ample evidence to support his claims based on negligence and breach of a duty of reasonable skill and care under RCW 18.86.030(1)(a). The trial court, accordingly, erred in granting summary judgment with respect to these claims.

E. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's Claims for Breach of Fiduciary Duty and the Duty to Disclose Material Facts

In addition to the duties of real estate agents/licenseses specified in RCW Ch. 18.86, real estate agents in Washington are subject to common law duties, including a fiduciary duty.¹⁶

Consistent with this duty:

Real estate brokers have a duty of full disclosure to their clients. This requires the utmost good faith and avoidance of representing any unknown interest antagonistic to their clients.¹⁷

¹⁶ See, e.g., *Jackowski v. Borchelt*, 151 Wn. App. 1, 14, 209 P.3d 514 (2009) ["Chapter 18.86 RCW does not abrogate professional and fiduciary duties of a real estate agent"]; *Harstad*, 41 Wn. App. at 298; *Wilkinson*, 31 Wn. App. at 5; *Burien Motors*, 9 Wn. App. at 576-578.

¹⁷ *Harstad*, 41 Wn. App. at 298, citing *Wilkinson*, 31 Wn. App. at 5.

Thus, this fiduciary duty standard is comparable to the duty to disclose all existing material facts set forth in RCW 18.86.030(1)(d).

Savchuk presented significant evidence to create a material issue for trial on these issues. For example, even though Sams knew that Safe Harbor provisions limit the buyer's liability to the earnest money deposit, she failed to disclose this material knowledge to Savchuk. As a consequence, an ambiguity or contradiction remained as to whether or not Savchuk's various installment payments would be treated as refundable or not.

At the same time that Sams withheld her knowledge regarding the effect of Safe Harbor provisions, she was secretly accepting nonrefundable commission payments from Savchuk's various installments. Significantly, if Savchuk had known or had been told that the realtors were receiving nonrefundable commission payments with each of his installments before he signed the PSA, he "would have become suspicious of [his] agent, Christine Sams, and would not have signed the PSA without obtaining advice from a most trustworthy realtor or an attorney." CP 163.

To make matters worse, when it came time to negotiate, draft and execute the critical August Extension, Sams abandoned Savchuk, telling him to rely on the sellers' agent to "take care of him." Had Sams simply informed Savchuk, based on her years of knowledge and experience as a real estate agent, that Savchuk's liability under the PSA was limited to his \$20,000 earnest money, evidence indicates that the August Extension would not have been signed as drafted and Savchuk's liability would have been limited to his \$20,000 deposit. CP 13-14, 162-164.

In addition, Sams knew that the PSA called for payment through a note and deed of trust. This is consistent with Sams' representation, at the time the PSA was signed, that the transaction could be closed by a note and deed of trust. CP 162. Yet, Sams never disclosed to Savchuk that no form note and deed of trust was attached to the PSA, nor explained to him his right to insist upon closing based upon the tendering of a note and deed of trust.

Finally, Sams knew that the PSA called for Savchuk's payment of interest to the Sellers on his installment payments. She also knew the material fact that the Sellers had not loaned Savchuk any assets on which interest could properly be charged. Yet, she failed to disclose these material facts to Savchuk. CP 164.

Thus, on its face, the record is replete with evidence supporting the viability of Savchuk's claims for breach of fiduciary duty and failure to disclose material information. Evidence of Savchuk's breach of these duties is further buttressed by the expert opinions of James Bjerke and Larry Daugert. CP 153-158, 302-348.

F. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's Claim for Breach of a Duty to Deal Honestly and in Good Faith.

Savchuk submitted evidence sufficient to establish the viability of his claim that Sams and Metro Realty breached their duty to deal honestly and good faith with him under RCW 18.86.030(1)(b). As established above, Sams failed to honestly and in good faith disclose her knowledge that the Safe Harbor provision should operate to limit Savchuk's liability to his \$20,000 earnest money deposit. At the same time, she failed to honestly and in good faith disclose to Savchuk that she was receiving nonrefundable commission payments out of his installments, a fact that is facially inconsistent with treating those installment payments as refundable. Had Sams operated honestly and in good faith consistent with her knowledge regarding the effect of the Safe Harbor provision, Savchuk's exposure would have been limited to

his \$20,000 earnest money deposit and his additional losses would have been avoided.

As a consequence, the evidence facially sufficient to create material issues for trial with respect to these claims. The expert opinions of James Bjerke and Larry Daugert further supported this conclusion.

G. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's Claims for Breach of a Duty of Loyalty and to Timely Disclose Conflicts of Interest.

In addition to other breaches of duty, when Sams abandoned her client, Savchuk, with respect to the August Extension and told him to rely on the Sellers' agent, to Savchuk's detriment, she breached her duty of loyalty under RCW 18.86.050(1)(a). Clearly, a duty of loyalty cannot be squared with Sams' recommendation that Savchuk trust and seek advice from the adversary's agent. It is further inconsistent with the admonition in the case law that an agent is to avoid "representing any unknown interest antagonistic to" her client.¹⁸

Similarly, Savchuk presented sufficient evidence for submission to the trier of fact on Sams' and Metro Realty's breach

¹⁸ *Wilkinson*, 31 Wn. App. at 5. See, e.g., *Burien Motors*, 9 Wn. App. at 577.

of their duty to timely disclose conflicts of interest. Undoubtedly, countenancing and encouraging Savchuk to rely on the adversary's agent with respect to the critical August Extension creates a conflict of interest. This is especially true where, as here, an agent has the added incentive of continuing to receive undisclosed, nonrefundable commission payments from Savchuk's installments made to the seller. A trier of fact could reasonably conclude that this undisclosed commission payment arrangement provided inducement for Sams to take action that would result in continuing the flow of commission payments in direct conflict with her client's interests.

Accordingly, evidence from fact witnesses and pertinent documents provide a sufficient basis to withstand summary judgment with respect to these claims. As with other claims addressed above, expert opinion provides additional support for the viability of these claims.

H. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's Claim for Breach of a Duty to Advise Savchuk to Seek Expert Advice.

As established above, the PSA purchase price terms were ambiguous and self-contradictory. In addition to these inherent

deficiencies, the structure of this realtor-concocted transaction, cried out for legal expertise and representation to protect the buyer's interest.

To the extent that the PSA could be interpreted to require the buyer to make installment payments in excess of \$500,000 on a \$725,000 purchase price, without correspondingly receiving title to the real estate, it imposed unacceptable risk upon him. A real estate attorney would view this transaction as unusual and complex, at the very least. More properly analyzed, this transaction lay beyond the range of structures that a reasonable attorney would consider acceptable from a buyer's perspective. As attorney Daugert opined, in this context:

[T]he attorney should advise the client to refuse to agree to make them [nonrefundable deposits] or, if necessary for the deal, to either describe the dangers of penalties or, better, advise the client to take title to the property and give the seller a deed of trust, mortgage or real estate contract for the balance of the price.¹⁹

Even assuming, for the sake of argument only, that the PSA's material terms for paying the purchase price could even be sensibly discerned, the risk to the buyer associated with the proposed structure were unusual enough to lie well beyond Sams'

expertise. Consistent with RCW 18.86.050(1)(c), she, accordingly, had a duty to advise Savchuk to seek expert advice on the pertinent terms of the PSA. By failing to do so, she breached this duty.

By abandoning Savchuk with respect to the negotiation and drafting of the critical August Extension, and recommending that he trust the adversary's agent, Sams exacerbated this failure. Since the August Extension required Savchuk to make additional unsecured installment payments, it magnified the unacceptable risk imposed on Sams' client, Savchuk. The necessity for advice from an attorney became correspondingly more critical at that juncture. Sams' failure to advise Savchuk to obtain such counsel at this point constituted a further breach of her duty under RCW 18.86.050(1)(c).

I. The Trial Court Erred in Granting Summary Judgment Dismissing Savchuk's CPA Claim.

Savchuk has asserted a claim that Sams' and Metro Realty's conduct gives rise to a violation of the Consumer Protection Act,

¹⁹ CP 154.

RCW 19.86.090 ("CPA"). As summarized in *Leingang v. Pierce County Medical Bureau, Inc.*:²⁰

To prevail in a private action brought under the Consumer Protection Act, RCW 19.86.090, the plaintiff must establish that: (1) the defendant has engaged in an unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public interest; (4) the plaintiff has suffered injury in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury.²¹

Sams' and Metro Realty's real challenge to Savchuk's CPA was directed to the first element, unfair or deceptive practice, and the fourth, impact on public interest.²²

Savchuk submitted sufficient evidence to withstand summary judgment on the unfair or deceptive element.

For conduct to be unfair or deceptive, it is not necessary that an intent to deceive be shown, so long as the action has the capacity to deceive a substantial portion of the public.²³

²⁰ 131 Wn. 2d 133, 930 P.2d 288 (1997).

²¹ 131 Wn. App. at 149, citing *Industrial Indem. Co. of Northwest v. Kallevig*, 114 Wn. 2d 907, 792 P.2d 520 (1990); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784-85, 719 P.2d 531 (1986).

²² In their motion, for example, Sams and Metro Realty appropriately conceded that Savchuk satisfied the "in trade or commerce" element. Moreover, Savchuk's suffered injury to his business or property in the form of his lost installment payments. And, the causal link was supplied through evidence that Savchuk would not have entered into the transaction or made all of these installments but for Sams' various duty breaches.

²³ *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 592, 675 P.2d 193 (1983).

Bowers provides substantial support for the viability of Savchuk's CPA claim. In connection with a seller-financing real estate transaction, the Washington Supreme Court held that an escrow agent committed a CPA violation when he prepared a promissory note for a buyer's signature without also preparing and tendering a deed of trust to secure those payment obligations. Holding the agent to the standard of care required of attorneys, the Court concluded that the agent's conduct breached that standard and correspondingly constituted an unfair or deceptive practice.²⁴ *Bowers* alone should provide an adequate basis for Savchuk's claim to withstand summary judgment. As with the agent in *Bowers*, Savchuk presented ample evidence to establish a material issue on whether Sams breached the applicable standard of care among attorneys.

Not only did Sams engage in comparable misconduct to the agent in *Bowers*, she also has continued to solicit business, including at least one additional instance where she has collected nonrefundable installment payments prior to closing and without

²⁴ *Id.* See also *Nuttal v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) [CPA liability imposed on realtor for unintentional misrepresentation relating to the acreage of subject property].

regard to whether closing occurs. CP at 223. All the while, Sams has unapologetically continued to maintain that her only duty is to induce two parties to sign a purchase and sale agreement, no matter how deficient that document may be. Thus, Savchuk has submitted ample evidence to establish a material issue that Sams' and Metro Realty's offending conduct is capable of repetition in satisfaction of the unfair or deceptive element.

Savchuk also has submitted sufficient evidence on the public interest element. Comparable to the unfair or deceptive factor, this requirement is satisfied where there is a likelihood that "additional plaintiffs have been or will be injured in exactly the same fashion."²⁵

This is determined by analyzing the following factors:

(1) whether defendant was acting in the course of his or her business, (2) whether defendant advertised to the general public, (3) whether defendant actively solicited this plaintiff, and (4) whether the parties were unequal bargainers.²⁶

Here, the answer to the first three of these queries is an unequivocal "yes". See CP 92-101, 161, 211-213, 233. While the fourth is more uncertain, Sams arguably possessed greater overall

²⁵ *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997), quoting *Hangman Ridge*, 105 Wn. 2d at 790.

²⁶ *Hangman Ridge*, 105 Wn. 2d at 794

pertinent expertise and definitely did so with respect to the English language. On balance, application of the four factors argues in favor of establishing the public interest element.

Along with the capacity for repetition, as demonstrated above, Savchuk has presented enough evidence to establish a genuine issue of fact on the public interest element.²⁷ This conclusion is buttressed by the fact that the Act should be liberally interpreted to effectuate its general deterrent purposes.²⁸

V. CONCLUSION

As established above, the trial court's order granting summary judgment to Sams and Metro Realty should be reversed. Contrary to Sams and Metro Realty's assertion, Washington does not apply a categorical rule limiting a real estate agent's duty to simply inducing a buyer and seller to sign a "purchase and sale agreement", and nothing in Savchuk's contractual arrangement with Sams imposed any such limitation. Moreover, on all of Savchuk's claims, he introduced sufficient evidence to establish disputed evidence of material fact. Summary judgment was, accordingly, not

²⁷ See, e.g., *Bowers*; *Edmonds*; *Wilkinson*.

warranted, and the case should be remanded for trial on all of Savchuk's claims.

RESPECTFULLY SUBMITTED this 14th day of July 2012

BRITAIN & VIS PLLC

BY: 
JAMES E. BRITAIN, WSBA # 6455
Attorney for Petitioner Sergey Savchuk

²⁸ *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59, 81, 170 P.3d 10 (2007); *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 40, 204 P.3d 885 (2009).

**APPELLANT'S OPENING BRIEF
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NWMLS Form 25
Vacant Land Purchase & Sale
Revised 6/06
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VACANT LAND PURCHASE AND SALE AGREEMENT
SPECIFIC TERMS

1. Date: October 2, 2006 MLS No.: 26147441
2. Buyer: Sergey Savchuck and or Assigns
3. Seller: Jerde
4. Property: Tax Parcel Nos.: 3902300833000000 (Whatcom County)
Street Address: 2439 Douglas Dr, Ferndale Washington 98248
Legal Description: attached

5. Purchase Price: \$910,000.00 Nine hundred ten thousand dollars- see optional clauses (22d)
6. Earnest Money: (To be held by Selling Broker Closing Agent)
Personal Check: \$ 20,000 becomes non-refundable at end of feasibility period &
Note: \$ disbursed to seller
Other (): \$ _____
7. Default: (check only one) Forfeiture of Earnest Money Seller's Election of Remedies
8. Title Insurance Company: Whatcom Land Title Co.
9. Closing Agent: a qualified closing agent of Buyer's choice Deanne Hanley
10. Closing Date: 12/18/2006
11. Possession Date: on Closing Other see optional clauses (22d)
12. Offer Expiration Date: _____
13. Counteroffer Expiration Date: _____
14. Addenda: 22C(Payment Trms) 22D(Opt. Clauses) 22M(Promissory N) 22S(Septic Add.)
42(Agency Dscl.): 35 F feasibility
15. Agency Disclosure: Selling Licensee represents Buyer Seller both parties neither party
Listing Agent represents Seller both parties
16. Subdivision: The Property is subdivided must be subdivided on or before _____
 is not legally required to be subdivided
17. Feasibility Contingency Expiration Date: 60 days after mutual acceptance _____

[Signature] 10/2/06
Buyer's Signature Date

[Signature] 10-3-06
Seller's Signature Date

Buyer's Signature Date

[Signature] 10-3-06
Seller's Signature Date

Buyer's Address

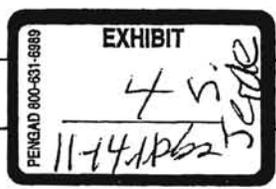
Seller's Address

City, State, Zip

Ferndale, WA
City, State, Zip

360-961-2911
Phone Fax

360-383-0523
Phone Fax



Buyer's E-mail Address

Seller's E-mail Address

Remax/Metro 7008
Selling Broker MLS Office No.

Muljat Group 9838
Listing Broker MLS Office No.

Christine Nelson
Selling Licensee (Print)

Anne Inman
Listing Agent (Print)

206-322-5700 206-322-7576
Phone Fax

360-733-3030 360-671-4124
Phone Fax

NWMLS Form 25
Vacant Land Purchase & Sale
Revised 6/06
page 2 of 4

VACANT LAND PURCHASE AND SALE AGREEMENT
GENERAL TERMS
(continued)

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- 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. **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. 22-28
- d. **Title Insurance.** Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for a standard form owner's policy of title insurance, with homeowner's additional protection and inflation protection endorsements if available at no additional cost, from the Title Insurance Company. 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 said standard form 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. 29-38
- e. **Closing.** This sale shall be closed by the Closing Agent on the Closing Date. "Closing" means the date on which all documents are recorded and the sale proceeds are available to Seller. 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. 39-42
- f. **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. 43-44
- g. **Closing Costs and Prorations.** Seller and Buyer shall each pay one-half of the escrow fee. 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. 45-49
- h. **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. 50-54

Initials: BUYER: SI DATE: 10/2/06 SELLER: 365 DATE: 10-3-06 55
 BUYER: _____ DATE: _____ SELLER: RJG DATE: 10/3/06 58

2020503490
 Page: 1 of 1
 5/05/2002 3:43 PM
 DEED \$3.00
 Whatcom County, WA
 Request of CHICAGO TITLE INSURANCE

After Recording Return to:
 Steven G. Jerde
 2450 Thornton Road
 Ferndale WA 98248



2020600410
 Page: 1 of 1
 5/05/2002 10:58 AM
 DEED \$3.00
 Whatcom County, WA
 Request of CHICAGO TITLE INSURANCE

Filed for Record at Request of
**CHICAGO TITLE
 INSURANCE COMPANY**
 PO Box 1115
 1816 Cumwall Avenue, Suite 115
 Bellingham, WA 98225

Escrow No.: 159851-TKG

Re-Reworded Statutory Warranty Deed.
 To Correct Error amount.

Abbreviated Legal.
 Additional Legal(s) on page:
 Assessor's Tax Parcel No.: 3502310 083300 0000

STATUTORY WARRANTY DEED

THE GRANTOR Leon E. Hamilton, and Janine L. Hamilton as tenants in common for and in consideration of TEN DOLLARS AND OTHER VALUABLE CONSIDERATION in hand paid, conveys and warrants to Steven G. Jerde and Darlyce J. Jerde husband and wife the following described real estate, situated in the County of Whatcom, State of Washington:

A tract of land in the Northwest quarter of Section 30, Township 39 North, Range 2 East of W.M., described as follows:

Beginning at the Southwest corner of the Northwest Quarter of said Section 30; thence East 660 feet to the true point of beginning; thence East 290 feet; thence North to the South line of the Douglas Road; thence Southwesterly along the Southerly line of Douglas Road to a point North of the true point of beginning; thence South 686 feet, more or less, to the true point of beginning.

Situate in Whatcom County, Washington.

Handwritten: 10/3/06
 305 10-3-04



Dated: May 8, 2002

Leon E. Hamilton
 Leon E. Hamilton
Janine L. Hamilton
 Janine L. Hamilton

STATE OF WASHINGTON
 COUNTY OF WHATCOM

I certify that I know or have satisfactory evidence that Leon E. Hamilton and Janine L. Hamilton the person(s) who appeared before me, and said person(s) acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the purposes therein mentioned in this instrument.

Dated: 5/10/02
Tami K. Gluck



Tami K. Gluck
 Notary Public in and for the State of Washington
 Residing at Bellingham
 My appointment expires: March 6, 2005

4-87 (30) - 1-1-00

NWMLS Form 22C
Payment Terms Addendum
Rev. 03/03
Page 1 of 2

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

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The following is part of the Purchase and Sale Agreement dated October 02, 2006 1
between Sergey Savchuck and or Assigns ("Buyer") 2
and Jerde ("Seller") 3
concerning 2439 Douglas Dr, Ferndale, WA 98248 ("the Property") 4

METHOD OF PAYMENT (Check and complete each applicable paragraph). 5

NOTE AND DEED OF TRUST. Buyer agrees to pay \$525,000.00 6
down, including Earnest Money, at Closing and the balance of the Purchase Price to Seller in monthly installments of 7
interest only on principal balance or more at Buyer's option, including interest from 8
the date of Closing at the rate of 7 % per annum on the unpaid principal, on or before 9
the 15th day of each month, commencing: 30 days following the Closing 10
 . This indebtedness shall be evidenced by a Promissory Note and a 11
 first position second position (first, if not filled in) Deed of Trust, as set forth below. 12

Due Date. The entire balance of principal and interest shall be due and payable 13
years from the date of Closing on 08/31/2007 14

Default and Default Interest. The principal shall bear interest at the rate of 18 % per annum (18% if not 15
filled in) or the maximum rate allowed by law, whichever is less, during any period of Buyer's default. A late charge of 16
5 % of the installment payment (5% of the installment 17
payment if neither is filled in) shall be added to any installment payment more than 15 days 18
days late (15 days if not filled in). If Buyer has not cured any default within 30 days (30 days if not filled in) 19
after written notice, Seller may declare all outstanding sums immediately due and payable. 20

Promissory Note. Buyer agrees to sign at Closing the NWMLS Form 22M Promissory Note (revised 7/99 or later) 21
(LPB Form 28A) and LPB Form 22 Deed of Trust securing the Property, or an equivalent form, which must be 22
attached to this Agreement. 23

Due on Sale. Unless the Commercial Property clause is initialed by Buyer and Seller, the Due on Sale clause is the 24
only optional clause that applies. The following language shall be added to the form Deed of Trust: 25

This Property may not be sold or transferred without Beneficiary's consent. Upon breach of this provision, 26
Beneficiary may declare all sums secured by this Deed of Trust immediately due and payable, unless 27
prohibited by applicable law. 28

(NOTE: If the Property is primarily for agricultural purposes, then a nonjudicial foreclosure/forfeiture remedy is avail- 29
able only by using a real estate contract.) 30

REAL ESTATE CONTRACT. Buyer agrees to pay _____ down, including Earnest Money, at 31
Closing and the balance of the Purchase Price in monthly installments to Seller of _____ 32
or more at Buyer's option, including interest from the date of Closing at the rate of _____ % 33
per annum on the declining principal balance, on or before the _____ day of each month, commencing: 34
 30 days following the Closing of this sale . The first payment shall be adjusted to 35
include any interest accrued. The parties agree to sign Limited Practice Board Form 44 Real Estate Contract secur- 36
ing the Property which must be attached to this Agreement. The "Due on Sale" clause is the only optional clause 37
which will apply unless other optional clauses are initialed by both parties. In addition, the following shall be added to 38
the form Real Estate Contract: "It is further agreed that Buyer will pay real estate taxes and hazard insurance as they 39
come due, and that Buyer will provide Seller with evidence of those payments." 40

Cash Out. The entire balance of principal and interest shall be due and payable: 41
years from the date of Closing on _____ 42

Initials: BUYER: S.S DATE: 10/02/2006 SELLER: 365 DATE: 10-3-06 43
BUYER: _____ DATE: _____ SELLER: 218 DATE: 10/3/06 44

NWMLS Form 22D
Optional Clauses Addendum
Rev. 6/05
page 1 of 2

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**OPTIONAL CLAUSES ADDENDUM
TO PURCHASE & SALE AGREEMENT**

The following is part of the Purchase and Sale Agreement dated October 02, 2006 1
between Sergey Savchuk and or Assigns ("Buyer") 2
and Jerde ("Seller") 3
concerning 2439 Douglas Dr, Ferndale, WA 98248 ("the Property"). 4

CHECK IF INCLUDED: 5

- 1. **Square Footage/Lot Size/Encroachments.** The Listing Agent and Selling Licensee make no representations concerning: (a) the lot size or the accuracy of any information provided by the Seller; (b) the square footage of any improvements on the Property; (c) whether there are any encroachments (fences, rockeries, buildings) on the Property, or by the Property on adjacent properties. Buyer is advised to verify lot size, square footage and encroachments to Buyer's own satisfaction within the inspection contingency period. 6-10
- 2. **Standard Form Owner's Policy of Title Insurance.** Notwithstanding the "Title Insurance" clause in the Agreement, Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for a standard form Owner's Policy of Title Insurance (ALTA 1992 or equivalent), together with homeowner's additional protection and inflation protection endorsements if available at no additional cost, from the Title Insurance Company rather than the Homeowner's Policy of Title Insurance. 11-15
- 3. **Extended Coverage Title Insurance.** Notwithstanding the "Title Insurance" clause in this Agreement, Buyer's lender or Closing Agent is directed to apply for an ALTA or comparable extended coverage policy of title insurance, rather than the standard form owner's policy. Buyer shall pay the increased costs associated with the extended coverage policy including excess premium over that charged for a standard coverage policy and the cost of any survey required by the title insurer. 16-20
- 4. **Property And Grounds Maintained.** Until possession is transferred to Buyer, Seller agrees to maintain the Property in the same condition as when initially viewed by Buyer. The term "Property" includes the building(s); grounds; plumbing, heat, electrical and other systems; and all Included Items. Should an appliance or system become inoperative or malfunction prior to transfer of possession, Seller agrees to either repair or replace the same with an appliance or system of at least equal quality. Buyer reserves the right to reinspect the Property within 5 days prior to transfer of possession to verify the foregoing. Buyer and Seller understand and agree that the Listing Agent and Selling Licensee shall not, under any circumstances, be liable for the foregoing or Seller's breach of this clause. 21-28
- 5. **Items Left by Seller.** Any personal property, fixtures or other items remaining on the Property when possession is transferred to Buyer shall thereupon become the property of Buyer, and may be retained or disposed of as Buyer determines. However, Seller agrees to clean the interiors of any structures and remove all trash, debris and rubbish on the Property prior to Buyer taking possession. 29-32
- 6. **Utilities.** To the best of Seller's knowledge, Seller represents that the Property is connected to a: public water main well public sewer main septic tank. 33-34

Initials: BUYER: SS DATE: 10/02/2006 SELLER: SGJ DATE: 10-3-06 35
BUYER: _____ DATE: _____ SELLER: ADJ DATE: 10/3/06 36

NWMLS Form 22D
Optional Clauses Addendum
Rev. 6/05
Page 2 of 2

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**OPTIONAL CLAUSES ADDENDUM TO
PURCHASE & SALE AGREEMENT**
(continued)

7. **Insulation - New Construction.** If this is new construction, Federal Trade Commission Regulations require the following to be filled in. If insulation has not yet been selected, FTC regulations require Seller to furnish Buyer the information below in writing as soon as available: 37-39

WALL INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ 40
CEILING INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ 41
OTHER INSULATION DATA: _____ 42

8. **Selling Broker's Commission.** If there is no written listing agreement, Seller agrees to pay Selling Broker a commission of _____ % of sales price or _____ If the Earnest Money is retained as liquidated damages, any costs advanced or committed by Selling Broker shall be reimbursed or paid therefrom; and the balance shall be divided equally between Seller and Selling Broker. 43-46

9. **Leased Property.** Buyer hereby acknowledges that Seller leases the following items of personal property, possession of which shall pass to Buyer on Closing: 47-48

propane tank security system satellite dish other _____ 49

Buyer shall assume the lease for the items selected, perform all of the obligations of the lease, and hold Seller harmless from and against any further obligation, liability, or claim arising from the lease. 50-51

10. **Other.** 52

- a. Sellers have option to continue living in, or use the home and outbuildings until 4/16/07 at no cost. 53-54
- b. Sellers will maintain insurances and utilities while living in or using the said property. 55-56
- c. Sellers have salvage right till 4/16/07 57-58
- d. possession upon closing 59-60
- e. price is based upon \$35,000. for up to 26 residential lots 61-63
- f. additional residential lots determined at preliminary plat shall be \$35,000. each, \$42,000. per double lot, \$49,000. for triple lot. 64-66
- g. Commission shall be: 4% Listing Office and 2.5% Selling office to be paid by the seller. 67-73

Initials: BUYER: S-S DATE: 10/02/2006 SELLER: SGT DATE: 10-3-06 64
BUYER: _____ DATE: _____ SELLER: [Signature] DATE: 10/3/06 65

NWMLS Form 22M / 24A
CBA Form No. N-1A
LPB 28A
Promissory Note
Rev. 12/99
Page 1 of 2

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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)

NWMLS Form 22S
Septic Addendum
Rev. 6/05
page 1 of 1

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**SEPTIC 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").

THIS ADDENDUM SUPERSEDES ANY OTHER PROVISIONS OF THIS AGREEMENT RELATING TO THE ON-SITE SEWAGE SYSTEM ("OSS") SERVING THE PROPERTY.

- Type of OSS.** The Property is served by:
 Private Septic System
 Shared Septic System
- Seller's Representations.** Seller represents that, to the best of Seller's knowledge, the OSS serving the Property (a) does not require repair other than pumping and normal maintenance; (b) complies with all applicable local, state, and federal laws, standards, and regulations; and (c) has no other material defects.
- Inspection and Pumping of OSS.** Seller shall have the OSS inspected and, if necessary, pumped by an OSS service company at Seller's expense. ~~Seller shall provide Buyer with a copy of the inspection report within _____ days (10 days if not filled in) of mutual acceptance. If Seller had the OSS inspected and pumped within 12 months of mutual acceptance by an OSS service company and Seller provides Buyer with written evidence thereof, including an inspection report, Seller shall have no obligation to inspect and pump the system unless otherwise required by Buyer's lender.~~
 Buyer's Right to Attend Inspection. If checked and if Seller has not already conducted an inspection, Buyer shall have the right to observe the inspection. Seller shall provide Buyer with 3 days notice of the date and time of the inspection.
- ~~**OSS Inspection Contingency.** This Agreement is conditioned on Buyer's approval of the inspection report from the OSS service company. This contingency shall be deemed waived unless Buyer gives notice of disapproval of the inspection report within _____ days (5 days if not filled in) after receipt of the inspection report. If Buyer gives timely notice of disapproval, the Agreement shall terminate and the Earnest Money shall be refunded to Buyer.~~
- Other.**

Initials: BUYER: SS DATE: 10/02/2006 SELLER: SDJ DATE: 10-3-06
 BUYER: _____ DATE: _____ SELLER: AS DATE: 10/3/06

NWMLS Form 42
Agency Disclosure
Rev. 1/97
Page 1 of 1

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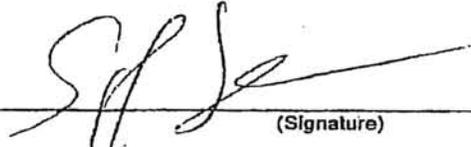
AGENCY DISCLOSURE

Washington State law requires real estate licensees to disclose to all parties to whom the licensee renders real estate brokerage services whether the Licensee represents the Seller (or Lessor), the Buyer (or Lessee), both the Seller/Lessor and Buyer/Lessee, or neither.

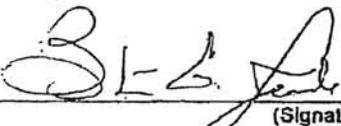
YOU ARE ADVISED THAT THE UNDERSIGNED IS THE AGENT OF THE BUYER UNLESS OTHERWISE STATED HERE:

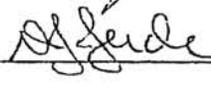
THE UNDERSIGNED REPRESENTS: Buyer, Sergey Savchuk

THE UNDERSIGNED BUYER/LESSEE OR SELLER/LESSOR ACKNOWLEDGES RECEIPT OF A COPY OF THE PAMPHLET ENTITLED "THE LAW OF REAL ESTATE AGENCY"

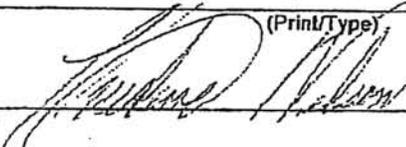
BUYER  (Signature) DATE 10/2/06

BUYER _____ (Signature) DATE _____

SELLER  (Signature) DATE 10-3-06

SELLER  (Signature) DATE 10/3/06

LICENSEE Christine Nelson (Print/Type)

LICENSEE'S SIGNATURE 

COMPANY NAME AS LICENSED Remax/Metro (Print/Type)

NWMLS Form 35F
Feasibility Contingency Addendum
Rev. 6/06
- Page 1 of 1

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FEASIBILITY CONTINGENCY ADDENDUM

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

Feasibility Contingency. Buyer shall verify within 30 days (10 days, if not filled in) after mutual acceptance (the "Feasibility Contingency Expiration Date") the suitability of the Property for Buyer's intended purpose including, but not limited to, whether the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. This Feasibility Contingency SHALL CONCLUSIVELY BE DEEMED WAIVED unless Buyer gives notice of disapproval on or before the Feasibility Contingency Expiration Date. If Buyer gives a timely notice of disapproval, then this Agreement shall terminate and the Earnest Money shall be refunded to Buyer. Buyer should not rely on any oral statements concerning feasibility made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry shall include, but not be limited to: building or development moratoria applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any services connection charges; and all other charges that must be paid.

Buyer and Buyer's agents, representatives, consultants, architects and engineers shall have the right, from time to time during the feasibility contingency, to enter onto the Property and to conduct any tests or studies that Buyer may need to ascertain the condition and suitability of the Property for Buyer's intended purpose. Buyer shall restore the Property and all improvements on the Property to the same condition they were in prior to the inspection. Buyer shall be responsible for all damages resulting from any inspection of the Property performed on Buyer's behalf.

AGREEMENT TERMINATED IF NOTICE OF SATISFACTION NOT TIMELY PROVIDED. If checked, this Agreement shall terminate and Buyer shall receive a refund of the Earnest Money unless Buyer gives notice to Seller on or before the Feasibility Contingency Expiration Date that the Property is suitable for Buyer's intended purpose.

Initials: BUYER: S-S DATE: 10/02/2006 SELLER: SGT DATE: 10-3-06
BUYER: _____ DATE: _____ SELLER: [Signature] DATE: 10/3/06

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

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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
11. 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 Date: <u>1/8/07</u>	<u>[Signature]</u> Seller's Signature Date: <u>10/2/06</u>
_____ Buyer's Signature Date: _____	<u>[Signature]</u> Seller's Signature Date: <u>10/2/06</u>
_____ 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> Selling Broker Christine Sams <u>25330</u> Selling Licensee (Print) <u>360-739-8887</u> Phone _____ Fax <u>206-322-7576</u>	<u>The Muljat Group</u> Listing Broker Anne Inman <u>25825</u> Listing Agent (Print) <u>360-201-2918</u> Phone _____ Fax <u>360-392-6017</u>

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: SET DATE: 10/2/06 52
 BUYER: _____ DATE: _____ SELLER: DEI 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. 54-55
- 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). 56-66
- 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. 67-71
- 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. 72-75
- k. 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. 76-88
- 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. 89-96
- 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. 97-100
- 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. 101-103

Initials: BUYER: S.S. DATE: 1/8/07 SELLER: [Signature] DATE: 10/2/06 104
 BUYER: _____ DATE: _____ SELLER: [Signature] DATE: 10-2-06 105

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. 106-108
- 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: 109-110
 - 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. 111-112
 - 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. 113-116
- 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. 117-118
- 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. 119-122
- 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. 123-129
- 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." 130-136
- 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. 137-143
- 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 22.J) after mutual acceptance, Buyer may rescind this Agreement at any time up to 3 days thereafter. 144-146
- 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. 147-153

Initials: BUYER: S.S DATE: 1/8/07 SELLER: SAI DATE: 12/2/06 154
 BUYER: _____ DATE: _____ SELLER: DA DATE: 10-2-06 155

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

The following is part of the Purchase and Sale Agreement dated October 02, 2006 1
between Sergey Savchuck and or Assigns ("Buyer") 2
and Jerde ("Seller") 3
concerning 2439 Douglas Dr, Ferndale, WA 98248 ("the Property") 4

METHOD OF PAYMENT (Check and complete each applicable paragraph). 5

NOTE AND DEED OF TRUST. Buyer agrees to pay \$525,000.00 6
down, including Earnest Money, at Closing and the balance of the Purchase Price to Seller in monthly installments of 7
interest only on principal balance or more at Buyer's option, including interest from 8
the date of Closing at the rate of 7 % per annum on the unpaid principal, on or before 9
the 15th day of each month, commencing: 30 days following the Closing 10
 This indebtedness shall be evidenced by a Promissory Note and a 11
 first position second position (first, if not filled in) Deed of Trust, as set forth below. 12

Due Date. The entire balance of principal and interest shall be due and payable 13
years from the date of Closing on 08/31/2007 14

Default and Default Interest. The principal shall bear interest at the rate of 18 % per annum (18% if not 15
filled in) or the maximum rate allowed by law, whichever is less, during any period of Buyer's default. A late charge of 16
5 % of the installment payment (5% of the installment 17
payment if neither is filled in) shall be added to any installment payment more than 15 days 18
days late (15 days if not filled in). If Buyer has not cured any default within 30 days (30 days if not filled in) 19
after written notice, Seller may declare all outstanding sums immediately due and payable. 20

Promissory Note. Buyer agrees to sign at Closing the NWMLS Form 22M Promissory Note (revised 7/99 or later) 21
(LPB Form 28A) and LPB Form 22 Deed of Trust securing the Property, or an equivalent form, which must be 22
attached to this Agreement. 23

Due on Sale. Unless the Commercial Property clause is initialed by Buyer and Seller, the Due on Sale clause is the 24
only optional clause that applies. The following language shall be added to the form Deed of Trust: 25

This Property may not be sold or transferred without Beneficiary's consent. Upon breach of this provision, 26
Beneficiary may declare all sums secured by this Deed of Trust immediately due and payable, unless 27
prohibited by applicable law. 28

(NOTE: If the Property is primarily for agricultural purposes, then a nonjudicial foreclosure/forfeiture remedy is avail- 29
able only by using a real estate contract.) 30

REAL ESTATE CONTRACT. Buyer agrees to pay _____ down, including Earnest Money, at 31
Closing and the balance of the Purchase Price in monthly installments to Seller of _____ 32
or more at Buyer's option, including interest from the date of Closing at the rate of _____ % 33
per annum on the declining principal balance, on or before the _____ day of each month, commencing: 34
 30 days following the Closing of this sale _____. The first payment shall be adjusted to 35
include any interest accrued. The parties agree to sign Limited Practice Board Form 44 Real Estate Contract secur- 36
ing the Property which must be attached to this Agreement. The "Due on Sale" clause is the only optional clause 37
which will apply unless other optional clauses are initialed by both parties. In addition, the following shall be added to 38
the form Real Estate Contract: "It is further agreed that Buyer will pay real estate taxes and hazard insurance as they 39
come due, and that Buyer will provide Seller with evidence of those payments." 40

Cash Out. The entire balance of principal and interest shall be due and payable: 41
years from the date of Closing on _____. 42

Initials: BUYER: S.S DATE: 10/02/2006 SELLER: JJS DATE: 10-3-06 43
BUYER: _____ DATE: _____ SELLER: JJS DATE: 10/3/06 44

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

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

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

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

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

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

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

Initials: BUYER: SS DATE: 10/02/2006 SELLER: SGT DATE: 10-3-06
BUYER: _____ DATE: _____ SELLER: SS DATE: 10/3/06

**OPTIONAL CLAUSES ADDENDUM
TO PURCHASE & SALE AGREEMENT**

The following is part of the Purchase and Sale Agreement dated October 02, 2006 1
between Sergey Savchuk and or Assigns ("Buyer") 2
and Jerde ("Seller") 3
concerning 2439 Douglas Dr, Ferndale, WA 98248 ("the Property"). 4

CHECK IF INCLUDED: 5

1. **Square Footage/Lot Size/Encroachments.** The Listing Agent and Selling Licensee make no representations concerning: (a) the lot size or the accuracy of any information provided by the Seller; (b) the square footage of any improvements on the Property; (c) whether there are any encroachments (fences, rockeries, buildings) on the Property, or by the Property on adjacent properties. Buyer is advised to verify lot size, square footage and encroachments to Buyer's own satisfaction within the inspection contingency period. 6-10
2. **Standard Form Owner's Policy of Title Insurance.** Notwithstanding the "Title Insurance" clause in the Agreement, Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for a standard form Owner's Policy of Title Insurance (ALTA 1992 or equivalent), together with homeowner's additional protection and inflation protection endorsements if available at no additional cost, from the Title Insurance Company rather than the Homeowner's Policy of Title Insurance. 11-15
3. **Extended Coverage Title Insurance.** Notwithstanding the "Title Insurance" clause in this Agreement, Buyer's lender or Closing Agent is directed to apply for an ALTA or comparable extended coverage policy of title insurance, rather than the standard form owner's policy. Buyer shall pay the increased costs associated with the extended coverage policy including excess premium over that charged for a standard coverage policy and the cost of any survey required by the title insurer. 16-20
4. **Property And Grounds Maintained.** Until possession is transferred to Buyer, Seller agrees to maintain the Property in the same condition as when initially viewed by Buyer. The term "Property" includes the building(s); grounds; plumbing, heat, electrical and other systems; and all included items. Should an appliance or system become inoperative or malfunction prior to transfer of possession, Seller agrees to either repair or replace the same with an appliance or system of at least equal quality. Buyer reserves the right to reinspect the Property within 5 days prior to transfer of possession to verify the foregoing. Buyer and Seller understand and agree that the Listing Agent and Selling Licensee shall not, under any circumstances, be liable for the foregoing or Seller's breach of this clause. 21-28
5. **Items Left by Seller.** Any personal property, fixtures or other items remaining on the Property when possession is transferred to Buyer shall thereupon become the property of Buyer, and may be retained or disposed of as Buyer determines. However, Seller agrees to clean the interiors of any structures and remove all trash, debris and rubbish on the Property prior to Buyer taking possession. 29-32
6. **Utilities.** To the best of Seller's knowledge, Seller represents that the Property is connected to a: public water main well public sewer main septic tank. 33-34

Initials: BUYER: SS DATE: 10/02/2006 SELLER: SST DATE: 10-3-06 35
BUYER: _____ DATE: _____ SELLER: AS DATE: 10/3/06 36

**OPTIONAL CLAUSES ADDENDUM TO
PURCHASE & SALE AGREEMENT**
(continued)

7. **Insulation - New Construction.** If this is new construction, Federal Trade Commission Regulations require the following to be filled in. If Insulation has not yet been selected, FTC regulations require Seller to furnish Buyer the information below in writing as soon as available: 37
38
39
WALL INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ 40
CEILING INSULATION: TYPE: _____ THICKNESS: _____ R-VALUE _____ 41
OTHER INSULATION DATA: _____ 42
8. **Selling Broker's Commission.** If there is no written listing agreement, Seller agrees to pay Selling Broker a commission of _____ % of sales price or _____ 43
44
If the Earnest Money is retained as liquidated damages, any costs advanced or committed by Selling Broker shall be reimbursed or paid therefrom, and the balance shall be divided equally between Seller and Selling Broker. 45
46
9. **Leased Property.** Buyer hereby acknowledges that Seller leases the following items of personal property, possession of which shall pass to Buyer on Closing: 47
48
 propane tank security system satellite dish other _____ 49
Buyer shall assume the lease for the items selected, perform all of the obligations of the lease, and hold Seller harmless from and against any further obligation, liability, or claim arising from the lease. 50
51
10. **Other.** 52
a. Sellers have option to continue living in, or use the home and outbuildings until 4/16/07 at no cost. 53
54
b. Sellers will maintain insurances and utilities while living in or using the said property. 55
56
c. Sellers have salvage right till 4/16/07 57
58
d. possession upon closing 59
60
e. price is based upon \$35,000. for up to 26 residential lots 61
62
63
f. additional residential lots determined at preliminary plat shall be \$35,000. each, \$42,000. per double lot, \$49,000. for triple lot. 64
65
66
67
g. Commission shall be: 4% Listing Office and 2.5% Selling office to be paid by the seller. 68
69
70
71
72
73

Initials: BUYER: S.S DATE: 10/02/2006 SELLER: S.G.T DATE: 10.3.06 64
BUYER: _____ DATE: _____ SELLER: RLB DATE: 10/3/06 65

**SEPTIC 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").

THIS ADDENDUM SUPERSEDES ANY OTHER PROVISIONS OF THIS AGREEMENT RELATING TO THE ON-SITE SEWAGE SYSTEM ("OSS") SERVING THE PROPERTY.

1. **Type of OSS.** The Property is served by:
 Private Septic System
 Shared Septic System
2. **Seller's Representations.** Seller represents that, to the best of Seller's knowledge, the OSS serving the Property (a) does not require repair other than pumping and normal maintenance; (b) complies with all applicable local, state, and federal laws, standards, and regulations; and (c) has no other material defects.
3. **Inspection and Pumping of OSS.** Seller shall have the OSS inspected and, if necessary, pumped by an OSS service company at Seller's expense. Seller shall provide Buyer with a copy of the inspection report within days (10 days if not filled in) of mutual acceptance. ~~If Seller had the OSS inspected and pumped within 12 months of mutual acceptance by an OSS service company and Seller provides Buyer with written evidence thereof, including an inspection report, Seller shall have no obligation to inspect and pump the system unless otherwise required by Buyer's tender.~~
 Buyer's Right to Attend Inspection. If checked and if Seller has not already conducted an inspection, Buyer shall have the right to observe the inspection. Seller shall provide Buyer with 3 days notice of the date and time of the inspection.
4. **OSS Inspection Contingency.** ~~This Agreement is conditioned on Buyer's approval of the inspection report from the OSS service company. This contingency shall be deemed waived unless Buyer gives notice of disapproval of the inspection report within days (5 days if not filled in) after receipt of the inspection report. If Buyer gives timely notice of disapproval, the Agreement shall terminate and the Earnest Money shall be refunded to Buyer.~~
5. **Other.**

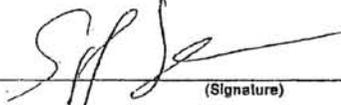
Initials: BUYER: SS DATE: 10/02/2006 SELLER: 365 DATE: 10-3-06
BUYER: DATE: SELLER: RSB DATE: 10/3/06

AGENCY DISCLOSURE

Washington State law requires real estate licensees to disclose to all parties to whom the licensee renders real estate brokerage services whether the Licensee represents the Seller (or Lessor), the Buyer (or Lessee), both the Seller/Lessor and Buyer/Lessee, or neither. 1
YOU ARE ADVISED THAT THE UNDERSIGNED IS THE AGENT OF THE BUYER 2
UNLESS OTHERWISE STATED HERE: 3
4
5

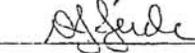
THE UNDERSIGNED REPRESENTS: Buyer, Sergey Savchuk 6

THE UNDERSIGNED BUYER/LESSEE OR SELLER/LESSOR ACKNOWLEDGES RECEIPT OF A 7
COPY OF THE PAMPHLET ENTITLED "THE LAW OF REAL ESTATE AGENCY" 8

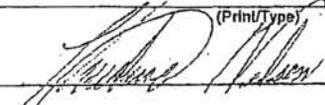
BUYER  DATE 10/2/06 9
(Signature)

BUYER _____ DATE _____ 10
(Signature)

SELLER  DATE 10-3-06 11
(Signature)

SELLER  DATE 10/3/06 12
(Signature)

LICENSEE Christine Nelson 13
(Print/Type)

LICENSEE'S SIGNATURE  14

COMPANY NAME AS LICENSED Remax/Metro 15
(Print/Type)

FEASIBILITY CONTINGENCY ADDENDUM

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

Feasibility Contingency. Buyer shall verify within 30 days (10 days, if not filled in) after mutual acceptance (the "Feasibility Contingency Expiration Date") the suitability of the Property for Buyer's intended purpose including, but not limited to, whether the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. This Feasibility Contingency SHALL CONCLUSIVELY BE DEEMED WAIVED unless Buyer gives notice of disapproval on or before the Feasibility Contingency Expiration Date. If Buyer gives a timely notice of disapproval, then this Agreement shall terminate and the Earnest Money shall be refunded to Buyer. Buyer should not rely on any oral statements concerning feasibility made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry shall include, but not be limited to: building or development moratoria applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any services connection charges; and all other charges that must be paid.

Buyer and Buyer's agents, representatives, consultants, architects and engineers shall have the right, from time to time during the feasibility contingency, to enter onto the Property and to conduct any tests or studies that Buyer may need to ascertain the condition and suitability of the Property for Buyer's intended purpose. Buyer shall restore the Property and all Improvements on the Property to the same condition they were in prior to the inspection. Buyer shall be responsible for all damages resulting from any inspection of the Property performed on Buyer's behalf.

AGREEMENT TERMINATED IF NOTICE OF SATISFACTION NOT TIMELY PROVIDED. If checked, this Agreement shall terminate and Buyer shall receive a refund of the Earnest Money unless Buyer gives notice to Seller on or before the Feasibility Contingency Expiration Date that the Property is suitable for Buyer's intended purpose.

Initials: BUYER: S-S DATE: 10/02/2006 SELLER: 303 DATE: 10-3-06
BUYER: _____ DATE: _____ SELLER: 229 DATE: 10/3/06

NWMLS Form 34
Addendum/Amendment to P & S
Rev. 5/98
Page 1 of 1

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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: Anne Inman 43

Initials: BUYER: SS DATE: 1/02/07 SELLER: DI DATE: 10/2/06 44
BUYER: _____ DATE: _____ SELLER: DI DATE: 10-2-06 45

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.

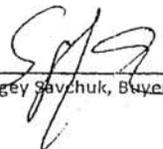
Summary of Contract and Payments and Fees

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

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

SERGEY SAVCHUK,)
)
 Appellant,) No. 64269-3-1
 v.)
) UNPUBLISHED OPINION
 STEVEN G. JERDE and)
 DARLYCE J. JERDE, husband and wife)
)
 Respondents.)
 _____) FILED: November 1, 2010

2010 NOV -1 AM 11:55

COPIES FILED

SCHINDLER, J. — Steven and Darlyce Jerde (the Jerdes) entered into a real estate purchase and sale agreement (REPSA) with Sergey Savchuk (Savchuk). Savchuk agreed to purchase the property for \$725,000. Savchuk made a number of installment payments but did not have the funds to close. At Savchuk's request, the parties entered into an agreement to extend the closing date by nine months, to May 2008. Savchuk agreed to a new payment schedule and to immediately pay the Jerdes \$250,000. The extension agreement also provides that "[a]ll payments are nonrefundable in the event of failure to close." When Savchuk did not close, the Jerdes retained the \$500,000 in payments made by Savchuk. Savchuk sued the Jerdes for breach of contract and refund of \$480,000. On summary judgment, the trial court ruled that the nonrefundable payment provision was unambiguous, dismissed Savchuk's lawsuit, and awarded the Jerdes attorney fees. Because there are material issues of fact as to whether the

nonrefundable payment provision is an enforceable liquidated damages clause or an unenforceable penalty, we reverse and remand for trial.

FACTS

Steven and Darlyce Jerde own a home and several acres of property in Ferndale, Washington. In 2006, the Jerdes listed their property for sale. Sergey Savchuk (Savchuk), a local real estate developer, offered to purchase the property for \$950,000, contingent on a subdivision feasibility study. Based on the analysis of the number of potential lots that could be developed on the property, Savchuk offered the Jerdes \$725,000.

On October 2, 2006, the Jerdes signed a real estate purchase and sale agreement (REPSA) to sell the property for \$725,000. The REPSA scheduled January 8, 2007 as the counteroffer expiration date and August 31, 2007 as the closing date. The terms of the "Payment Terms Addendum" state that the buyer agrees to pay \$525,000 down, including \$20,000 in earnest money. The balance of the purchase price was to be paid to the Jerdes in installments of "interest only on the principal balance" at a rate of seven percent. The agreement states that "[t]his indebtedness shall be evidenced" by a promissory note and deed of trust. A blank form promissory note is attached. The entire balance was due at closing on August 31, 2007.

On January 8, 2007, Savchuk entered into a REPSA that contained an "Addendum/Amendment to Purchase and Sale Agreement" with different payment terms. Instead of paying \$525,000 as a down payment, Savchuk agreed to pay a \$20,000 nonrefundable earnest money deposit, followed by a payment of \$30,000 due in January 2007, and four payments of \$50,000 over a five-month period, with a final

payment of the balance on August 31, 2007. Savchuk also agreed to make interest payments on the unpaid balance at seven percent. The amendment again refers to a "Note and Deed of Trust." Savchuk paid the Jerdes \$200,000 but was unable to pay the balance due before the scheduled closing date of August 31. Savchuk contacted the Jerdes' to request an extension of the closing date. The Jerdes agreed to extend the closing date another nine months, to May 30, 2008. In the "Extension of Closing Date Addendum" the parties agreed to new payment terms. Savchuk agreed to pay an additional \$250,000 to the Jerdes on August 31 and \$25,000 on September 7, with the condition that "[a] penalty of 5% of payment due shall accrue" on any late payments. The extension agreement also included a \$10,000 fee to extend the closing date from August 31 to May 30, 2008, and increased the interest rate on the unpaid balance to seven and a half percent per year. The extension agreement does not include any reference to a promissory note or a deed of trust.

The payment schedule in the extension agreement required payments of \$25,000 on 9/7/07, 10/10 [sic]/07, 12/1/07, 2/1/08, and 4/1/08, with a late fee of five percent for payments not made within three business days of the due date. The remaining balance of \$188,908.20 was due on May 30, 2008. The extension agreement states that "[a]ll payments are non-refundable in the event of failure to close."

Savchuk made payments of \$15,000 on October 18, \$10,000 on November 9, and \$25,000 on December 10. Savchuk made no further payments after December, and did not close on May 30.¹

On February 5, 2009, Savchuk filed a lawsuit against the Jerdes, seeking to recover \$480,000 of the \$500,000 in payments made to the Jerdes. Savchuk alleged breach of contract and that the nonrefundable payment provision in the REPSA was void as an unenforceable penalty. The Jerdes filed a motion for summary judgment dismissal, asserting the nonrefundable payment provision was unambiguous and enforceable. The trial court granted the motion, dismissed the lawsuit, and awarded the Jerdes attorney fees.

ANALYSIS

Savchuk asserts the trial court erred in dismissing his lawsuit on summary judgment because (1) the REPSA violates the statute of frauds; (2) he did not breach the terms of the REPSA; and (3) the nonrefundable payment provision was an unenforceable penalty.

Standard of Review

We review the decision to grant summary judgment de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). "A 'material fact' is a fact upon which the outcome of the litigation depends" Morris

¹ According to Anne Inman, Savchuk contact the Jerdes after the closing date to offer to close for \$500,000, the amount he had already paid. The Jerdes rejected his offer.

No. 64269-3-1/5

v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Summary judgment is appropriate if, in view of all the evidence, reasonable persons could reach only one conclusion.

Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). However, where competing inferences may be drawn from the evidence, the case must be resolved by the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 887, 441 P.2d 532 (1968).

Statute of Frauds

Savchuk asserts the REPSA violates the statute of frauds because the parties did not agree to the terms of the promissory note that was part of the original REPSA.

The statute of frauds requires all real estate contracts to be in writing and to contain all essential and material terms. RCW 64.04.010; Family Med. Bldg., Inc. v. State, Dep't. of Soc. and Health Servs., 104 Wn.2d 105, 108, 702 P.2d 459 (1985).

Savchuk contends two material terms are missing from the REPSA: the amount of monthly installment payments and applicable amortization. While the initial REPSA may have violated the statute of frauds, the extension agreement contains these and all material payment terms.² But the case Savchuk cites, Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 881 P.2d 1035 (1994), is distinguishable.

² In Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citing Hubbell v. Ward, 40 Wn.2d 779, 782-83, 246 P.2d 468 (1952)) the Washington Supreme Court identified the 13 material terms for a real estate contract:

- (a) time and manner for transferring title; (b) procedure for declaring forfeiture;
- (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

All of these terms are contained in the REPSA and extension agreement.

In Sea-Van, because the note and deed of trust were not completed, the court would not attempt "to order execution of documents that might contain very material, but unknown terms," and held that the only material term agreed upon was the price. Sea-Van, 125 Wn.2d at 129 (quoting Setterlund v. Firestone, 104 Wn.2d 24, 26, 700 P.2d 745 (1985)).

Here, unlike in Sea-Van, the extension agreement contains all the material terms necessary for the promissory note, including the identities of the parties, the principal amount to be paid, the rate of interest, the date interest would begin to accrue, the amount and date for the installment payments, the final due date, the interest rate in the event of default, and fees for late payments. Without question, all the terms necessary for a promissory note are contained in the extension. We conclude the REPSA does not violate the statute of frauds.³

Breach of Contract

Savchuk also contends that the Jerdes failed to show he breached the contract. We disagree. The undisputed evidence in the record shows that Savchuk stopped making the agreed upon scheduled payments in December 2007.

Nonrefundable Payments Provision

Savchuk further argues that the nonrefundable payment provision in the extension is an unenforceable penalty. Savchuk relies on RCW 64.04.005 to assert that the Jerdes' remedy in the event of breach is limited to the \$20,000 earnest money

³ Savchuk also argues that the reference in the initial REPSA to a note and deed of trust creates ambiguity suggesting that mention of the note and deed of trust requires additional seller financing. But unlike in Halbert v. Forney, 88 Wn. App. 669, 676, 945 P.2d 1137 (1997), the blank note does not "seemingly anticipate a second contract that would necessarily include numerous terms to which the parties never agreed." And while the original terms of the REPSA may have been ambiguous, the extension agreement is not. This court will not read ambiguity into a contract where it can reasonably be avoided by reading the contract as a whole. McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

deposit and the nonrefundable payment provision is an unenforceable penalty. The Jerdes contend the \$480,000 in payments made by Savchuk is not an earnest money forfeiture or a liquidated damages provision under the statute, but nonrefundable installment payments "not conditioned upon the default of the purchaser."

RCW 64.04.005 provides:

(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.

The meaning of a statute is a question of law subject to de novo review. City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802 (2006). The court's objective is

to ascertain and carry out the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the meaning of a statute is plain on its face, then the court must give effect to that plain meaning as the expression of legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10. It is well established that an unambiguous statute is not subject to the rules of statutory construction. State v. Watson, 146 Wn.2d 949, 955, 52 P.3d 1 (2002).

There is no dispute that the payments of \$480,000 exceed five percent of the purchase price. Under the plain and unambiguous language of RCW 64.04.005(3), the common law governs the question of whether the nonrefundable payment provision in the extension agreement is a liquidated damages provision. We also reject the Jerdes' argument that the statute does not apply because the nonrefundable payment provision is not labeled as liquidated damages. The language of RCW 64.04.005 does not impose such a restriction.

In Washington, a provision for liquidated damages will be upheld unless it is a penalty or otherwise unlawful. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 887, 881 P.2d 1010 (1994) (citing Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 558, 730 P.2d 1340 (1987); Brower Co. v. Garrison, 2 Wn. App. 424, 432, 468 P.2d 469 (1970)). A liquidated damages agreement that is fairly and understandingly entered into by experienced parties, with a view to just compensation for the anticipated loss, should be enforced. Walter Implement, 107 Wn.2d at 558 (citing Wise v. United States, 249 U.S. 361, 39 S. Ct. 303, 63 L. Ed. 647 (1919)). A liquidated damages provision permits parties to allocate risks, lends certainty to the parties' agreements and permit parties to

resolve disputes in the event of a breach. Watson v. Ingram, 124 Wn.2d 845, 851, 881 P.2d 247 (1994).

In determining if a liquidated damages provision is enforceable, the court looks to whether the provision is a reasonable prospective estimate of loss. Wallace, 124 Wn.2d at 897. The party seeking to enforce a liquidated damages provision does not need to prove actual damages under the reasonableness test, but courts can consider such damages in evaluating the reasonableness of the damages forecast. Wallace, 124 Wn.2d at 893. The sophistication of the parties is a relevant consideration in determining the fairness of a stipulated damages provision. Wallace, 124 Wn.2d at 896.

In Wallace, the court upheld a liquidated damages provision as a reasonable forecast of damages in the event of breach. The liquidated damages provision in

Wallace stated:

Seller shall retain all payments made to date (earnest money and extension payments), as liquidated damages and not as a penalty, in order to indemnify the Seller against loss as a result of breach of this agreement. It is agreed that damages that result to Seller include: freezing the purchase price at a time when real estate land values were escalating at unprecedented rates; compensating seller for holding the property off the market and losing the time value of its property were the property liquidated and funds invested; lost opportunity for larger profits; and related costs.

Wallace, 124 Wn.2d at 885. Prior to default, the buyer paid earnest money followed by a series of \$15,000 extension payments totaling \$260,000 of the \$1.5 million dollar purchase price. The expert testimony at trial supported the seller's position that the payments were a reasonable forecast of damages in the event of default. Wallace, 124 Wn.2d 894. The court concluded that:

Wallace's expertise supports the enforceability of the liquidated damages provision and also highlights the inequity of allowing him to now challenge the provisions as penalties simply because they constitute too large a percentage of the contract price.

Wallace, 124 Wn.2d at 897.

By contrast, a provision in a contract that bears no reasonable relation to actual damages will be construed as a penalty. Walter Implement, 107 Wn.2d at 559 (citing Northwest Collectors, Inc. v. Enders, 74 Wn.2d 585, 594, 446 P.2d 200 (1968)). The reasonableness of the prospective estimate of loss is judged as of the time the contract was entered. Walter Implement, 107 Wn.2d at 559. A penalty is not an attempt to estimate damages in the event of a breach, but is punitive in nature.

'As distinguished from liquidated damages, a penalty is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment. . . . Its essence is a payment of money stipulated as in terrorem of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damages.'

Lind Building Corp. v. Pacific Bellevue Developments, 55 Wn. App. 70, 75, 776 P.2d 977 (1989) (quoting 15 Am. Jur. Damages § 241, at 672 (1938)).

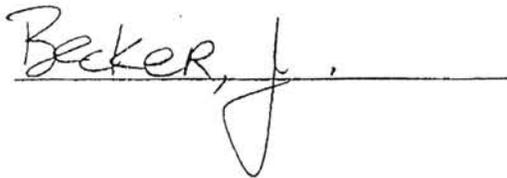
In Walter, the court held that courts must look to the intent of the parties in deciding whether a liquidated damages provision is enforceable, "Courts will look to the intention of the parties to make an accurate assessment of the clause's purpose." Walter Implement, 107 Wn.2d at 559. The court concluded that the liquidated damages provision in the equipment lease agreement did not reflect a reasonable forecast of actual harm. Walter Implement, 107 Wn.2d at 561.

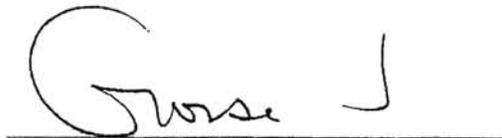
Here, there is no evidence of the parties' intent as to the nonrefundable payment provision. The trial court also did not address the question of whether the nonrefundable payment provision is an unenforceable penalty, and there is no evidence that Savchuk agreed to forfeit the \$480,000 in payments that he made to purchase the property for \$725,000. On the other hand, if the nonrefundable payment provision was an attempt to estimate damages in the event of default, there are also material issues of fact as to the reasonableness of the prospective estimate of potential losses, including fluctuation in the real estate market, the unique position of the parties when drafting the extension agreement, the level of sophistication of the parties, and evidence of actual damages.

We reverse the trial court's decision to dismiss Savchuk's lawsuit and the award of attorney fees, and remand for trial.



WE CONCUR:





West's RCWA **19.86.090**

West's Revised Code of Washington Annotated Currentness

Title 19. Business Regulations--Miscellaneous (Refs & Annos)

Chapter 19.86. Unfair Business Practices--Consumer Protection
(Refs & Annos)

**→19.86.090. Civil action for damages--Treble damages
authorized--Action by governmental entities**

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

West's Revised Code of Washington Annotated Currentness

Title 18. Businesses and Professions (Refs & Annos)

Chapter 18.86. Real Estate Brokerage Relationships

→18.86.030. Duties of licensee

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2) (e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the licensee renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

West's Revised Code of Washington Annotated Currentness

Title 18. Businesses and Professions (Refs & Annos)

Chapter 18.86. Real Estate Brokerage Relationships

→18.86.050. Buyer's agent--Duties

(1) Unless additional duties are agreed to in writing signed by a buyer's agent, the duties of a buyer's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

(a) To be loyal to the buyer by taking no action that is adverse or detrimental to the buyer's interest in a transaction;

(b) To timely disclose to the buyer any conflicts of interest;

(c) To advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;

(d) Not to disclose any confidential information from or about the buyer, except under subpoena or court order, even after termination of the agency relationship; and

(e) Unless otherwise agreed to in writing after the buyer's agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a property for the buyer; except that a buyer's agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there is no written agreement to pay compensation to the buyer's agent.

(2)(a) The showing of property in which a buyer is interested to other prospective buyers by a buyer's agent does not in and of itself breach the duty of loyalty to the buyer or create a conflict of interest.

(b) The representation of more than one buyer by different licensees affiliated with the same broker in competing transactions involving the same property does not in and of itself breach the duty of loyalty to the buyers or create a conflict of interest.

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SERGEY SAVCHUK,
Plaintiff/Appellant

v.

CHRISTINE SAMS and
METRO REALTY, INC.

Respondents

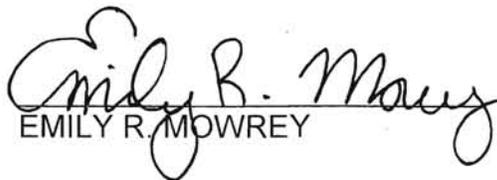
NO. 68608-9-1

(Superior Court
No. 09-2-00357-9)

**DECLARATION OF
SERVICE**

I, Emily R. Mowrey, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on July 9, 2012 I sent via regular first-class U.S. mail, postage pre-paid, a true copy of 1) Appellant's Opening Brief; and 2) Verbatim Report of Trial Court Proceedings to Douglas Tingvall, 8310 154th Ave SE Newcastle WA 98059-9222

Signed this 9th day of July, 2012


EMILY R. MOWREY

ORIGINAL

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COURT OF APPEALS DIV I
STATE OF WASHINGTON