No. 101261-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARSON MOTORS, INC. and RJ 35700, LLC

Petitioners,

v.

JET CHEVROLET, INC., DAN JOHNSON and JIM JOHNSON

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Brothers Dan and Jim Johnson owned and operated the Jet Chevrolet auto dealership in Federal Way for more than 45 years. In 2020, they signed a contract with Larson Motors for Larson to buy the dealership and underlying land. A condition to closing was General Motors' approval of Larson's application for a dealer agreement. Despite the Johnsons' repeated entreaties to GM and willingness to extend the closing deadline five times, GM refused to approve the deal. It turns out that GM didn't like Rob Larson and determined that he did not meet its criteria and standards. Thereafter, Larson (not Jet) terminated the contract.

Even though the contract specifically provided that the deal would terminate if GM refused consent, Larson sued Jet anyway. Larson alleged that Jet's duty to cooperate and duty to act in good faith overrode that express condition precedent, and required Jet to sue GM and to extend the closing deadline for years while the litigation played out. Not only did Larson's theory conflict with the contract's unambiguous language, it was

factually baseless. Indeed, discovery revealed that Larson's sole motive in filing suit was to thwart Jet's efforts to find a new buyer for the dealership: "I want everyone to know, I will bring law suits against everyone to tie up the store for years." CP 365.

This petition for review is just more of the same. Larson cannot satisfy RAP 13.4(b)'s criteria for review. Larson simply repeats the same flawed arguments that the Court of Appeals easily rejected. The Court of Appeals' opinion applies settled law, does not conflict with the decisions of this Court or the appellate courts, and raises no constitutional or statutory questions. To be sure, this ***unpublished***, one-off summary judgment ruling on facts unique to these specific parties does not implicate the public interest. The petition should be denied.

II. COUNTERSTATEMENT OF THE ISSUE

Does the Court of Appeals' unpublished opinion affirming the summary judgment dismissal of Larson's breach of contract claim satisfy the criteria for review under RAP 13.4(b)? **No.**

III. COUNTERSTATEMENT OF THE CASE

A. Jim And Dan Johnson Agree To Sell Jet Chevrolet And Underlying Real Property To Larson Motors.

Jim and Dan Johnson are the principal shareholders of Jet Chevrolet, Inc., which operated a Chevrolet dealership in Federal Way, Washington for more than 45 years. CP 59-62 (¶ 2). As part of their retirement plans, in 2020, the Johnson brothers put the dealership up for sale. *Id.* (¶ 3). On September 5, 2020, the Johnsons entered into a Letter of Intent with Larson Motors, Inc. for the purchase and sale of Jet. *Id.* (¶ 4). Rob Larson, Sr., is the principal owner of Larson Motors. *Id.* (¶ 6).

On October 23, 2020, the Johnsons agreed to sell the dealership, along with the underlying real property, to Larson. CP 59 (¶ 5); CP 39 (¶ 5). In connection with the deal, the parties signed an Asset Purchase Agreement (APA) for the sale of the dealership assets and a Real Estate Purchase and Sale Agreement (REPSA) for the sale of the real property. CP 60 (¶ 7); CP 39 (¶ 5); CP 65-89 (APA); CP 91-101 (REPSA). Pursuant to the

APA, the sale to Larson originally was to close no later than December 20, 2020. CP 39 (¶ 5); CP 78 (§ 6.1(g)); CP 86 (§ 10).

B. Washington Law And The Parties' Contracts Require GM's Consent As A Condition To Closing.

New car dealers have sales and service agreements with the manufacturers of the cars they sell. CP 39 (¶ 6). When a dealer wants to sell its dealership, it must notify the manufacturer of the proposed sale, and the buyer must apply to the manufacturer for its own sales and service agreement. *Id.* Accordingly, a condition precedent to closing the contracts was that Larson "be approved and appointed by General Motors as a franchised Chevrolet dealer" under a "standard Chevrolet Dealer Sales and Service Agreement." CP 80, 81 (§§ 7.4 & 8.5).

The APA required Jet to cooperate with Larson in trying to obtain GM's approval, but it did not require Jet to indulge Larson's attempts to do so indefinitely. CP 73, 75, 77 (§§ 5.1, 5.3 & 5.13). On the contrary, the APA provided that if GM had not made a decision on Larson's application by the closing date, Larson could ask for a 30-day extension and the parties could

agree to reasonable extensions thereafter. CP 78-79 (§§ 6.1(c), 6.1(g) & 7.4). However, Larson had no right to an extension of the closing date if GM "informed [Larson] it will ***not*** grant it a sales and service agreement." *Id.* (emphasis added).

C. GM Refuses To Approve Jet's Sale To Larson.

On October 23, 2020, Jet notified GM of the proposed sale and authorized GM to communicate directly with Larson regarding its application. CP 39 (¶ 7). Thereafter, Larson was responsible for completing the application and obtaining approval in accordance with GM's requirements. *Id.* At Larson's request, Jet agreed to extend the closing date multiple times to give Larson additional time to obtain GM's approval: first until January 15, 2021; then until January 29, 2021; and yet again until March 29, 2021. CP 39-40 (¶ 8); CP 222 (45:11-18)

Part of the problem was Larson's delay in getting GM all the information it needed, which Larson did not provide until January 27, 2021—more than a month after the original closing date. CP 44-45. But it wasn't enough. By letter dated March 19,

2021, GM notified Larson and Jet that it had rejected Larson's dealer application. CP 40 (¶ 10); CP 48-49. According to GM, "[b]ased on GM's criteria and standards, and Robert Larson['s] existing dealership's unsatisfactory past performance, GM has determined that approval of the proposal would not be in the best interests of consumers or General Motors." CP 48-49.

Even though it had no obligation to do so, after it received GM's rejection, Jet worked with Larson to keep the deal alive. CP 40 (¶ 11). They agreed to extend the closing date yet again, to April 19, 2021, to give Larson time to convince GM to reverse its decision. Under the terms of the extension, however, Larson was required by April 7, 2021—later extended to April 8, 2021—to either terminate the deal or close the transaction. *Id.* On March 31, 2021, at Larson's request, the parties sent GM a joint letter urging it to reconsider its rejection. *Id.* (¶ 12). Dan Johnson also called GM and asked it to reconsider. CP 212 (15:11-18).

During this time, Larson asked Jet to file an administrative action against GM with the DOL if GM refused to reverse its

decision, and to agree to extend the closing date indefinitely until the litigation was resolved. CP 40 (¶ 13). The deadline to initiate an action with DOL was April 12, 2021—20 days after receipt of GM's rejection of Larson's application. RCW 46.96.200(4). Jet offered to file the action and give Larson until the end of April to get GM's approval; if Larson could not obtain approval by then, however, Jet would withdraw the petition and terminate the deal. Larson rejected that proposal. *Id.*; CP 51-52.

D. Larson Terminates The APA And REPSA.

By letter dated April 8, 2021, GM informed Larson that it would not rescind its rejection of Larson's application—citing (along with the poor performance of Larson's Cadillac dealership and other factors) "[Rob] Larson's profane and unprofessional communications with GM representatives." CP 41 (¶ 14); CP 44-46. That same day, Larson notified Jet that it was terminating the APA and the REPSA due to "a failure to satisfy conditions of closing." CP 41 (¶ 14); CP 54-55. At Larson's request, also on

the same day, the parties signed a Rescission Addendum to formally terminate the proposed deal. CP 41 (¶ 14); CP 57-58.

On April 16, 2021, Larson's attorney wrote Jet's attorney, claiming that Larson signed the rescission only because of Jet's "refusal to extend the agreement, proceed to closing or pursue legal remedies" against GM—and, thus, the "agreements are not rescinded." CP 112-114. Larson demanded that Jet continue to press GM to consent to the sale. *Id.* Larson threatened that failure to do so would be "further evidence" of bad faith that Larson would use in its suit against Jet. *Id.* Jet refused.

E. The Court Of Appeals Affirms Summary Judgment.

Larson sued Jet, alleging breach of contract. CP 1-5. Jet moved for summary judgment. With respect to Larson's claim that Jet's contractual duty to cooperate required it to sue GM on Larson's behalf and agree to endless extensions pending the litigation, the trial court aptly noted with incredulity:

> COURT: So … we have a closing date but [Jet], just under the language in this cooperation clause … might have to wait to close the deal for four months, six months, nine months, a year, two years, let's say

> if, you know, there's litigation that happens against GM and, you know, that has to go up on appeal three years, five years. Seriously? I mean, wouldn't that be in the contract somewhere?
>
> LARSON'S COUNSEL: That is the question of fact. What does this cooperation clause mean[?]
>
> COURT: No, that's a question of law.

Tr. (9/10/21) at 47-48. The court concluded that "there simply isn't any evidence nor is there taking the facts in the light most favorable to the plaintiff any reasonable inference that this Court can see that the defendants breached the contract." *Id.* at 62. With that, the court entered summary judgment for Jet. CP 376-379.

In an unpublished opinion, the Court of Appeals unanimously affirmed. The court concluded that "Larson's proposed interpretation of the contract … would functionally eliminate Jet's right to terminate for lack of GM's approval." Op. at 10. It further held that Jet's refusal "to agree to petition [DOL] and extend the closing date—in other words, to negotiate new terms—does not constitute evidence of bad faith with regard to the original contract." Op. at 12.

IV. ARGUMENT AGAINST REVIEW

A. The Court Of Appeals' Correct Interpretation Of The Parties' Contract Does Not Warrant Review.

Larson first argues that, following GM's refusal to grant consent, the APA's cooperation clause "mandated" that Jet file suit against GM—and extend the closing date indefinitely—in the hope that DOL or the courts would force GM to approve the deal. Pet. at 12. Larson cannot show that the Court of Appeals' routine application of established rules of contract interpretation conflicts with any decision of this Court. RAP 13.4(b)(1). Just as importantly, Larson doesn't come close to showing that the Court of Appeals' interpretation was wrong. It wasn't.

By its plain and unambiguous terms, the parties' contract required Jet to cooperate with Larson in asking GM to approve the deal, not to sue GM if it ultimately refused. The APA's specific cooperation clause provided in part:

> **5.1 Cooperation; Further Action.** Each Party will fully cooperate with the other Party … in connection with any steps required to be taken as part of its obligations under this Agreement. Each Party will use its reasonable best efforts to cause all

> conditions to this Agreement and the transactions described in this Agreement to be satisfied as promptly as possible and obtain all consents and approvals necessary for the due and punctual performance of this Agreement …

CP 73 (§ 5.1). Like the implied duty of good faith discussed below, this clause did not impose a stand-alone duty on either party. Rather, the duty to cooperate was specifically tethered to the "obligations," "conditions," and "approvals" described in the APA. *Id.* Jet's duty to cooperate therefore must be read in light of the contracts' condition that GM approve Larson's application for a dealer agreement prior to closing. CP 80, 81 (§§ 7.4 & 8.5).

The APA spelled out Jet's obligation to work with Larson in obtaining GM's approval in two clauses. The first is the APA's general third-party consent clause, which provided:

> **5.3 Third Party Consents.** Prior to the Closing, the Seller and Purchaser will endeavor to procure in writing, all third-party consents and approvals as may be required to consummate the transactions contemplated hereby. …

CP 75 (§ 5.3). This clause cannot be construed, as Larson argues, as an obligation "to appeal on Larson's behalf to DOL." Op. Br.

at 10-11. The requirement that Jet help Larson apply to GM for a dealer agreement is materially different than a requirement that Jet sue GM if it rejects that application. Notably, the clause limits Jet's duty to help Larson procure GM's approval "[p]rior to closing"—because, if GM refused, it would mean a condition to closing failed, thereby triggering Jet's right to terminate.[1]

The second clause relevant to obtaining GM's approval required Jet to provide certain information to GM and Larson in connection with Larson's application for a dealer agreement:

> **5.13 Notice to Manufacturers.** … Seller will (i) submit to General Motors written notice of the proposed transaction authorizing General Motors to discuss with Purchaser all relevant matters pertinent to completing this transaction as contemplated by

[1] Jet's duty to cooperate with Larson in obtaining GM's consent did not, contrary to Larson's assertion, extend "beyond closing." Pet. at 11. The APA required Larson to assume certain contracts. CP 68, 80 (§§ 1.10, 7.6). The third-party consent clause survived closing only for the purpose of obtaining assignments for these existing contracts. CP 75 ("Failure to obtain consent to an assignment before Closing shall not relieve Purchaser from the financial obligation associated with the contract … The parties agree post-closing to continue to work together to obtain such consents."). Larson could not assume Jet's existing dealer agreement; it had to apply for a new one.

> this Agreement; and (ii) provide necessary documentation and information requested by Purchaser to facilitate completion of a new dealer sales and service application to General Motors.

CP 77 (§ 5.13). Like the third-party consent clause, this clause required Jet to cooperate with Larson when it applied for a GM dealer agreement in the first instance. Neither required Jet to sue GM (or do anything) once GM rejected Larson's application. On the contrary, the APA expressly provided that Jet's duty to cooperate would end—along with the deal itself—in that event.

This is clear from the APA's closing and termination clauses. The original closing date was December 20, 2020. The APA permitted Jet to terminate the deal if the conditions to sale were not satisfied by that date, including GM's approval of Larson's application. CP 78 (§ 6.1(c)). The parties recognized, however, that GM might not act on Larson's application by the December 20 deadline, so the APA specifically provided:

> …[I]n the event Closing cannot occur by on or before December 20, 2020 because Purchaser has not received General Motors' commitment to issue it a standard Dealer Sales and Service Agreement … in Purchaser's sole discretion, the Closing date

> of December 20, 2020 is extended thirty (30) days ***unless General Motors has informed Purchaser it will not grant it a sales and service agreement***.

CP 78-79 (§ 6.1(g) (emphasis added)). The APA also provided that the parties could agree to extend the termination date "for a reasonable period of time." CP 78 (§ 6.1).

Taken together, these provisions entitled Larson to one 30-day extension of the closing date if GM had not made a decision on its application by December 20; if GM still hadn't decided by that point, the parties could agree to reasonable extensions (which Jet did, on four different occasions). But nothing in the APA remotely contemplated an extension in the event GM ***rejected*** Larson's application. Thus, as the Court of Appeals correctly recognized, Larson's theory of "cooperation" was not only inconsistent with the contract's terms, it would "functionally eliminate" Jet's right to terminate. Op. at 10.

Larson's effort to compare this case with *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), is specious. *Tran* holds that an insurer may deny an insured's claim

when it is prejudiced by the insured's failure to cooperate with the insurer's investigation. This Court simply enforced the plain meaning of the cooperation clause at issue there. The *Tran* Court did not do what Larson asked the courts below to do here: impermissibly interpret the clause to impose obligations not required by the contract (sue GM and extend the closing date indefinitely) and nullify rights afforded by the contract (terminate if Larson failed to obtain GM's consent). The Court of Appeals' correct interpretation of Jet's duty to cooperate does not implicate any basis for review under RAP 13.4(b).

B. The Court Of Appeals' Rejection Of Larson's Implied Duty Of Good Faith Claim Does Not Warrant Review.

Larson's good faith claim is also unworthy of review and devoid of merit. Larson tries to drum-up conflict between the Court of Appeals' opinion and *Rekhter v. Dep't of Soc. & Health Servs.*, but the conflict is illusory. Pet. at 16-17. *Rehkter* noted that a party can breach the covenant of good faith without breaching a specific contractual term. 180 Wn.2d 102, 111, 323 P.3d 1036 (2014). The Court of Appeals did not hold otherwise.

Rather, it correctly recognized that the covenant is not free-floating, and only "applies to the performance of specific contractual obligations." Op. at 11. That is precisely what this Court held in *Rekhter*, 180 Wn.2d at 113, and *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

Indeed, it is Larson's expansive theory of good faith that conflicts with this Court's precedent. The implied duty "does not … obligate a party to accept a material change in the terms of its contract," nor can it be used to "inject substantive terms into the parties' contract." *Badgett*, 116 Wn.2d at 569 (cleaned up). Thus, a party does not breach its duty of good faith when it "stands on its rights to require performance of a contract according to its terms." *Id.* at 570. Relying on this authority, the Court of Appeals correctly held that the duty did not obligate Jet to "negotiate new terms"—which is exactly what Larson wanted. Op. at 12.

The cooperation and extension of closing provisions focus exclusively on ensuring Larson had the information and time it needed to apply to GM for a dealer agreement—because GM's

approval was a condition to closing. CP 75, 77, 80 (§§ 5.3, 5.13, 7.4). Nothing in the APA, however, obligated Jet to do anything once GM rejected Larson's application—much less agree to an endless extension of the closing date. Indeed, the termination clause stated that Larson had no right to ask for extension of the closing date where, as here, GM "has informed [Larson] it will ***not*** grant it a sales and service agreement." CP 79 (§6.1(g) (emphasis added)). In that event, the APA is clear that Jet had an absolute right to terminate the contracts. CP 78 (§6.1(c)).

It would alter, contradict and inject new terms into the APA if Jet had a duty to sue GM and delay closing indefinitely. Without question, cooperating with Larson in seeking GM's approval is materially different than suing GM. And reasonable extensions are materially different than indefinite ones. Implying such duties entailed far more than the "simple step" of "signing" a petition to DOL. Pet. at 13, 15, 19. Not only was the outcome of litigation against GM uncertain, it would entail significant delay (perhaps years beyond the original closing date), expense,

employee uncertainty and attrition, and damage to Jet's 46-year relationship with GM—none of which it bargained for. CP 145, 147, 167; CP 220-224, 227 (40:16-42:2, 44:20-45:10, 50:1-12, 54:10-14, 67:2-14).[2] If the parties intended the APA to impose such burdens on Jet, it would have spelled them out expressly.

Larson argues that it was reasonable to expect Jet to undertake these supposedly implicit burdens because, for its part, Larson offered to pay Jet's attorneys' fees, to indemnify Jet, and to purchase of the dealership even if DOL ruled in GM's favor. Pet. at 5, 18-19, 22-23. Larson's various inducements don't show

[2] Larson repeatedly suggests that suing GM would impose no cost on Jet because Larson offered to pay Jet's fees. Pet. at 5, 18-19, 22-23. But Larson made this offer *after* it terminated the contract, so it is irrelevant to assessing Jet's good faith under the contract. CP 107 (¶16). Larson is wrong in any event. Larson ignores the fact that the expiration of Jet's long-term loan had forced it to pay costly month-to-month financing fees with each extension of the closing date; litigating against GM would only add to those expenses. CP 221 (44:20-25); CP 223 (50:1-20); CP 147-148. Larson also ignores the harm Jet might suffer if it burned bridges with GM. Because of their good relationship, GM had not required Jet to spend the $800,000 to $1 million needed to bring its facilities up to GM standards. CP 228 (71:1-72:1). GM may not have been so forgiving had Jet filed suit against it.

that Jet failed to cooperate; they prove that Larson wanted Jet to renegotiate the APA to include vastly different terms, offering new consideration for new consideration. After all, the APA did not expressly or implicitly obligate Larson to pay for any of these things either, and they too would constitute material changes to the terms of the APA—not the least of which was elimination of the condition precedent that GM approve the deal.[3]

It was entirely proper for Jet to stand on its rights under the existing APA. *Badgett*, 116 Wn.2d at 570. "While the parties may choose to renegotiate their agreement, they are under no

[3] The Court of Appeals' recitation of the facts referred to Larson's offer to purchase Jet's dealership even without GM's authorization, which was based on an April 9, 2021 email by Rob Larson. Op. at 4; CP 374-75. Not only does this post-termination email propose an entirely new deal, it is not in the summary judgment record. Larson did not submit it with its opposition to summary judgment. Counsel referred to it for the first time at the hearing, and filed it ***after*** the hearing. Tr. (9/10/21) at 49-51, 53, 57-59; CP 370-371. The trial court specifically ruled that it would not consider the email. Tr. (9/10/21) at 64-65 ("you can file whatever you want to file," but "my obligation is to decide the case based on the record that's before me at the present time, not things that might come in later"). It is not identified on the summary judgment order. CP 376-379; *see* RAP 9.12.

good faith obligation to do so." *Id.* at 572. Larson asks how it could protect itself from GM's allegedly arbitrary denial if the duty of good faith did not compel Jet to file suit against GM. Pet. at 21. Simple: the APA could have included an express term requiring Jet to file suit in the event GM denied approval. Larson cannot rely on the implied duty of good faith to excuse its failure to insist on such a term in the first instance. In any event, Larson does have a direct remedy against GM (for tortious interference), which it is pursuing in federal court. *Id.* at 7. There's no basis for review under RAP 13.4(b)(1) & (2) here, either.

C. There Is No Dispute Regarding Jet's Good Faith.

Because the implied duty did not require Jet to agree to materially different terms, the Court of Appeals properly found no dispute that Jet fulfilled its obligations under the APA in good faith. Op. at 12. The day it signed the deal, Jet provided GM notice of the proposed sale and a copy of the APA. CP 39 (¶ 7); CP 60 (¶ 9); CP 139-144. At that point, it was Larson's responsibility to deal directly with GM. *Id.* Nevertheless, Jet and

its brokers repeatedly called and emailed GM regarding the status of Larson's application, urging it to approve the deal. *See* CP 149-154, 158, 167-172; CP 219, 221-222 (35:24-36:11, 43:14-25, 48:14-25). Larson does not contend that Jet hindered its dealings with GM in any way.

Moreover, once it became clear that GM would not decide Larson's application by December 20, Jet agreed three times to extend the closing for over three months total. CP 39-40 (¶ 8); CP 222 (45:11-18). Jet did so even though the delay was due to Larson's failure to timely provide information to GM, *see* CP 44-45, and even though each extension forced Jet to pay significant additional financing fees. CP 221 (44:20-25); CP 223 (50:1-8); CP 147-148. There is no evidence that Jet failed to cooperate during this period. Indeed, Larson's theory of non-cooperation does not even begin until GM rejected Larson's application on March 19, 2021 for reasons that had nothing to do with Jet.

At that point, Jet could have declared the APA terminated because Larson did not satisfy a condition precedent to closing.

CP 78-80 (§§ 6.1(c) & (g), 7.4). Still, Jet hung in there. It agreed to extend the closing date a fourth time, sent a joint letter to GM and called GM urging it to reconsider—even though more delay meant more bank fees and employee turmoil. CP 40 (¶¶ 11 & 12); CP 61 (¶ 14); CP 145-146; CP 212 (15:11-18). To apply pressure on GM, Jet even offered to file a petition with DOL and extend the closing date yet again to give Larson another month to change GM's mind—to no avail. CP 40 (¶ 13); CP 51-52.[4] Jet didn't just satisfy the APA's cooperation clause and its duty of good faith, it went above and beyond them.

[4] Larson complains that Jet's offer to file a petition was not made in good faith because it agreed to extend closing for only one additional month and requested a release. Pet. at 4-5, 22 n. 14. Larson argues that this condition was "*nowhere* permitted by the parties' agreements." *Id.* (emphasis in original). But that is precisely the point. Jet didn't make the offer in order to comply with the APA. It didn't have to; Jet could have just terminated. Jet's broker conveyed the offer in a last-ditch effort to salvage a deal on vastly different terms, and noted that the parties would have to agree upon and sign entirely new documents. CP 51-52.

D. The Opinion Does Not Implicate RCW 46.96.

This case does not address a manufacturer's or selling dealer's obligations under RCW 46.96. Nor will it have any "repercussions in every sale of an auto dealership." Pet. at 24. The statute's requirements were simply a backdrop that informed the parties' mutual contractual obligations. The Court of Appeals' straightforward application of Washington contract law in this unremarkable and unpublished summary judgment case does not implicate the public interest. RAP 13.4(b)(4).

V. CONCLUSION

This Court should deny review.

I certify that this answer to the petition for review contains 4476 words in compliance with RAP 18.17.

Respectfully submitted September 22, 2022,

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I hereby certify that on this 22nd day of September, 2022, I electronically filed this **ANSWER TO PETITION FOR REVIEW** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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