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No. 70064-2-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

THE McNAUGHTON GROUP, LLC,
a Washington limited liability company,

Plaintiff/Respondent,

v.

HAN ZIN PARK and REGINA KYUNG PARK, husband and wife,
and the marital community property comprised thereof,

Defendants/Appellants.

Plaintiff/Respondent's Brief in Opposition

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ORIGINAL

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I. INTRODUCTION

In 2004, Han Zin and Regina Kyung Park (collectively, the "Parks") entered into negotiations with The McNaughton Group, LLC ("TMG") for the sale of the Parks' property in Edmonds to TMG. Those negotiations failed when the Parks insisted on the right to accept offers from other potential purchasers during the feasibility period when TMG would be investigating the property's development potential.

In February 2005, about six months later, the Parks approached Julie Manolides, the Windermere agent who had represented TMG in 2004 on its prior offer to the Parks, and asked her to try to sell their property. Ms. Manolides suggested offering the property to TMG a second time, and the Parks agreed. TMG and the Parks negotiated for a period of 10 days, at the end of which the parties had a signed purchase and sale agreement ("2005 PSA"), under which TMG was obligated to purchase the Park property for $2,425,000 if feasibility studies were satisfied. A year and a half and several closing extensions later, in the summer of 2006, the parties were preparing to close.

But in the summer of 2006, the Parks manufactured a disagreement over the price of the Parks' property and the validity of the PSA, culminating in the Parks' refusal to appear at closing on September 11. Shortly after the failed closing, TMG filed suit. The case did not go to trial until six years later. At trial, the jury found for TMG. Contrary to the Parks' assertions, the trial court did not err in granting summary judgment on the statute of frauds, instructing the jury, or allowing in evidence over the Parks' objections.

II. COUNTER STATEMENT RE ASSIGNMENT OF ERRORS

1. The trial court correctly concluded that the statute of frauds does not void the 2005 PSA, because tax parcel numbers may substitute for a legal description in a real estate purchase and sale contract and in any event the 2005 PSA incorporated by reference a document that did contain complete legal descriptions. (Assignment of Error ("AE") 1).

2. The trial court correctly struck the Parks' defense of statute of frauds because they failed to plead that defense until the discovery deadline had passed. (AE 1).

3. Even if the PSA is void under the statute of frauds, the case should be remanded to the trial court to rule on TMG's unjust enrichment and restitution claim.

4. The lis pendens filed by TMG on the Parks' property was lawful, and the trial court did not err in so instructing the jury. (AE 2).

5. The trial court appropriately ordered the Parks' former attorney to answer a jury question and testify on non-privileged matters. (AE 3).

6. The trial court appropriately admitted evidence prejudicial to the Parks under ER 404(b) to show a common scheme or plan. (AE 3).

III. STATEMENT OF THE CASE

A. Objection to Introduction to Inadmissible Evidence

Before trial, TMG moved in limine to exclude evidence of Mark and Marna McNaughton's and TMG's bankruptcy. RP 4:17-8:18. The trial court granted the motion with reservations should any of that evidence be introduced in direct. Id. No evidence of the bankruptcies came in at trial, and TMG objects to the Parks raising the issue in their opening brief. Park Brief at p. 19.

B. The Parks are Sophisticated and Well Educated

The Parks would have this Court believe that they are unsophisticated Korean immigrants who were taken advantage of by TMG. Park Brief at p. 5. But the Parks are educated, bright, and sophisticated individuals. Indeed, Julie Manolides, the real estate broker

acting as dual agent in this matter, testified that the Parks understood everything that she told them related to the 2005 PSA. RP 489:19-491:13.

Dr. Park received his education in South Korea and came to the United States in 1958, after he married, as a fellow at Vanderbilt University in the department of medicine with the intention of studying medicine. RP 368:18-370:8. Thereafter he changed his area of study to medical sciences and studied at Baylor University. RP 370:3-371:3. Ultimately he received his Ph.D. from Rice University in endocrinology, biochemistry, and bio-organic chemistry. RP 371:5-372:2. He went to work as an associate director of the Atomic Energy Commission, Division of Biology and Medicine and also was appointed an assistant professor at the University of Utah Medical School. RP 372:4-20. In 1973, he came to the University of Washington as an assistant professor in the department of medicine. RP 373:3-8. In 1971 alone, he published 21 articles in various medical journals. RP 523:4-9.

Mrs. Park holds a B.S. degree from a university in South Korea and completed one year of graduate school in the United States. RP 354:7-14; 583:20-584:5. She worked as a rheumatology, arthritis specialist initially but then obtained a position at the Diabetes Research Center where she worked for 20 years. RP 584:20-23.

The Parks also have experience purchasing real estate. Dr. Park testified that they owned property in Utah while living there. RP 374:1-5. They purchased property when they moved to Washington, which they sold and replaced with a larger property. RP 374:6-375:12. Over the years the Parks added two more parcels to the larger property until it became the assemblage it is today (four lots, three parcels). RP 377:2-378:10.

In 1980, the Parks attempted to purchase commercial property across the street from their assemblage. Ex. 117. That attempted transaction resulted in litigation that then resulted in a published appellate decision. The facts from the 1985 litigation are strikingly similar to the facts presented below. Ex. 174. That is, the transaction did not close because the Parks attempted to insert an additional term into the purchase and sale agreement. Ex. 174; RP 548:14-550:5; 555:1-11.

Moreover, the Parks had entered into a purchase and sale agreement with the City of Edmonds to purchase what is referred to as the "City Parcel," discussed infra., Section III.D.3. Finally, the Parks tried to sell their property in 2001, to Michelle Construction. Ex. 173; RP 527:20-528:9, 529:10-530:20. That deal fell apart, although Dr. Park denied it

was because he wanted thousands of dollars from Michelle Construction when it requested more time to deal with the City of Edmonds. Id.

C. TMG First Approached the Parks in 2004

TMG first sought to purchase the Parks' property in 2004. On August 6, 2004, TMG presented the Parks with a proposed Vacant Land Purchase and Sale Agreement ("2004 PSA"). RP 41:2-43:3; Ex. 1. The Parks countered with a five-page, 18-paragraph addendum written by their attorney ("Park Addendum"). RP 46:15-47:20; Ex. 4. Notably, the Park Addendum contains not only tax parcel numbers for each of the parcels, but also complete legal descriptions. See Ex. 4.

The parties came very close to finalizing the deal, including an agreement on the price of $2,425,000, but the Parks insisted on the right to continue marketing the property to third parties during TMG's feasibility period, a proposition that TMG refused to accept; thus, the deal fell apart. RP 50:5-51:7; 60:12-14. The 2004 PSA and Park Addendum play an important role in the ultimate agreement reached between TMG and the Parks in February 2005.

D. The Parks Again Market Their Property in February 2005

About six months after negotiations ended between TMG and the Parks, Dr. Park contacted Ms. Manolides and asked that she help them sell

their property. RP 168:23-170:2. Ms. Manolides asked if the Parks would prefer she contact TMG so as to reduce her commission, and they agreed. Id.; see also RP 172:2-14. On February 19, 2005, TMG presented an offer to the Parks for the purchase of their property ("2/19 TMG Offer") with the following material terms:

- Purchase Price: $2,400,000;
- Earnest Money: $100,000;
- Seller's sole remedy on default of buyer is retention of earnest money.

RP 60:24-61:25; Ex. 6.

An addendum to the 2/19 TMG Offer contains these additional material terms:

- A list of the tax parcel numbers that TMG would be purchasing;
- Feasibility Period: 45 days.

See Ex. 6.

The Parks rejected the 2/19 TMG Offer. The Parks submitted a counter offer that contained the following differences from the 2/19 TMG Offer but was otherwise identical in all respects:

- Purchase Price: $2,425,000 (the same purchase price that had been agreed to in the 2004 negotiations);

- Earnest Money: $200,000, and changes to the timing of these payments;
- Change of closing date from March 31 to March 15, 2006;
- Feasibility Period: changed from 30 days to 45 days;
- "Counter Addendum + 3 pages" added to page 1 of the proposed purchase and sale agreement.

RP 63:8-74:13; Ex. 7; see also Ex. 2. As Mark McNaughton testified at trial, the term "Counter Addendum + 3 pages" referred to "Addendum B to Purchase and Sale Agreement Dated 2/19/05" and the three pages that followed, all of which the Parks attached to the 2/19 TMG Offer. RP 63:8-74:13.

TMG accepted the Parks' additional terms except that they insisted that the feasibility period remain at 45 days and extended the time of acceptance from February 25 to February 28. RP 74:14-77:21; Ex. 8. The Parks accepted TMG's changes. Id., Exh. 7, 9; RP 491:14-497:25. The parties then proceeded to perform under the fully executed purchase and sale agreement (i.e., the 2005 PSA). RP 77:22-78:7; 85:5-87:16; Ex. 10.

1. The Counter Addendum + 3 Pages

The Parks argue that they had a different understanding of what document the term "Counter Addendum + 3 Pages" referred to, but this assertion is belied by the testimony of Mark McNaughton, supra, and Julie

Manolides, the real estate broker who acted as a dual agent in the 2005 negotiations. RP 174:15-175:21; 187:21-188:5. As they testified, and as the jury apparently believed, it was Dr. Park who insisted on including this language and the pages that were attached. RP 175:18-178:19; 195:16-196:8; 198:19-199:6.

2. The Legal Description

The Parks argue that the 2005 PSA does not contain any legal description; this argument is incorrect. The Addendum to Purchase and Sale Agreement attached by TMG to its 2/19 TMG Offer, contains the tax parcel numbers for each parcel TMG proposed to purchase. RP 319:18-321:16; 336:19-337:25; Ex. 10 at p. 5. Moreover, the Counter Addendum + 3 Pages added by the Parks contain the following language:

> 3. In the event, if there arise any dispute over the scope of the applicable clause(s) on Specific terms of Addendum 1 through 14, (dated 2/19/05)., (sic) Precious (sic) agreement executed on September 8, 2004, page 1 through 13, supercedes (sic) and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on February 19, 2005.

Ex. 10 at p. 10. This language refers to the Park Addendum to the 2004 PSA that the parties negotiated but never completed. See id; Ex. 4; RP

110:6-112:20. And the legal descriptions for each parcel are located on pages one and two. See Ex. 4.

3. The City Parcel

The Parks also complain that the list of tax parcel numbers contained in the 2005 PSA include the tax parcel number for what is referred to as the "City Parcel." TMG and the Parks initially included the City Parcel in the deal because the Parks claimed to have the right to purchase it from the City of Edmonds for $110,000. RP 308:18-310:5. The Parks would purchase the City Parcel for the contract price and then convey it to TMG as part of the closing on the 2005 PSA. RP 310:6-12.

But the City Parcel was released by TMG and not required to be conveyed at the time of closing. As Brian Holtzclaw, in-house counsel for TMG at the time, explained, TMG met with City of Edmonds officials and were told that the City believed it no longer had a contract with the Parks. RP 310:13-311:10. TMG then proceeded to enter into a separate purchase and sale agreement with the City of Edmonds to obtain the City Parcel. RP 311:11-16.

To avoid any confusion over the Parks' obligations at closing, TMG wrote to the Parks stating that it would not require the City Parcel to be conveyed at closing as required by the 2005 PSA. Further, TMG did

not require any reduction of the purchase price as a result of failing to acquire that parcel. RP 311:17-313:14; 335:8-336:8; Ex. 35.

The 2005 PSA refers to an agreement to agree regarding the legal description. The Parks latch onto this language to argue that no agreement existed as to which parcels, listed by tax parcel number, were to be transferred. RP 356:8-357:6, 634:16-635:4. But the trial court found that this language referred to the City Parcel and whether it would or could be part of this transaction. 358:18-359:10.

Moreover, Exhibit 4, a document written by the Parks' attorney for the 2004 transaction, and incorporated by reference into the 2005 PSA, contains the correct legal description of the Parks' parcels. Id. And the Parks point to nothing in the record that demonstrates that the tax parcel numbers were incorrectly stated in the 2005 PSA.

4. TMG Made Significant Payments to the Parks Under the 2005 PSA

TMG made the following payments to the Parks under the 2005 PSA: (1) Earnest money ($200,000), (2) Extension payments ($60,000), and (3) Rental mitigation fees of $2,000 per month (totaling $34,000). RP 342:21-343:21; 344:6-24; 344:25-345:13; Exs. 52-61.

The Parks take issue with the extension payments made by TMG to them. The 2005 PSA called for two 90-day extensions at $10,000 each. Ex. 10. Ultimately, though, TMG ended up paying for six 30-day extensions at $10,000 each. RP 207:16-208:14. That is, the Parks benefited by receiving an extra $40,000, and TMG was willing to make that change to the 2005 PSA because it provided the opportunity to close earlier than the 90-day extensions. RP 208:7-14. TMG does not understand why the Parks continue to complain about this contract modification.

In all, the Parks received $294,000 in earnest money, rental mitigation fees, and extension payments from TMG before closing. Exs. 52-61. In addition, before the closing date in September 2006, TMG spent approximately $132,143 on outside expenses to obtain preliminary plat approval for the Parks' property. RP 345:14-351:3; Exs. 62-113.

E. The Parks Began Seeking Additional Money From TMG in June 2006

In June 2006, the Parks contacted TMG asking for more money under the 2005 PSA. RP 91:22-93:17; 210:13-212:21; Ex. 22. Their June 29, 2006, letter to TMG provided: "certain unexpected difficulties arising" related to their purchase of a property for which they hoped to use the

proceeds from the TMG transaction. Ex. 22. The Parks indicated that they would like to get additional funds from TMG to address the rising cost of maintaining their property and other issues: "I asked Michael whether there is a possibility of receiving facilitated payment for 'the relocation expense' in early September before another extension." Id. The Parks also wrote: "We realize that these matters are deviation (sic.) from the terms and condition of contract (sic), but we are hoping for the expression of good will by McNaughton group..." Id. (emphasis added); see also RP 210:13-212:21.

TMG responded to the Parks' request, pointing out that the 2005 PSA does not require that TMG pay $180,000 for the Park residence unless needed for development. Because TMG did not need the residence for development, it would not be paying the Parks. RP 212:22-215:1; Ex. 23.

On August 26, 2006, the Parks again wrote proposing that the deal be renegotiated. RP 215:2-219:2; Ex. 26. TMG again rejected the idea, relying instead on the contract already in existence. RP 215:2-219:2. Then on August 30, 2006, the Parks wrote to TMG claiming that another document existed that was missing from the 2005 PSA. RP 219:3-221:14; Ex. 31.

During this time period, the Parks' behavior became increasingly aggressive. They repeatedly used foul language with Ms. Manolides. RP 199:17-200:2; 501:14-503:21. They also cursed at Mr. Hanchett. RP 225:1-25, 238:3-11. Mr. Hanchett attempted to have them get an attorney involved on their behalf so that productive communication could take place. RP 226:8-13. Given the toxic and unpleasant dealings Ms. Manolides had with the Parks, and given the fact that Mr. Hanchett was attempting to get an attorney involved, Mr. Hanchett told Ms. Manolides that she did not need to speak with the Parks anymore. RP 226:16-21. Indeed, the Parks fired her several times over the course of the summer of 2006, so that it was unclear that she even represented them at that point. Ex. 31, 37; RP 479:18-25, 501:21-503:21.

F. The Mysterious Counter Addendum

As stated above, the Parks claimed that a "Counter Addendum" existed that differed from the Park Addendum that they had insisted on including in the 2005 PSA. Ex. 37. When TMG requested the document that the Parks relied on to make that claim, the Parks refused to provide it. RP 93:4-24; 611:3-613:21.

Without citation to the record, the Parks claim that Ms. Manolides provided the Parks with both the 2005 PSA and the Counter Addendum on

March 1, 2005, the day after the 2005 PSA was signed around. Park Brief at p. 13. And without citation to the record, the Parks claim that Ms. Manolides drafted the Counter Addendum and presented the document to the Parks. Park Brief at p. 11. And, again without citation to the record, the Parks claim that the Counter Addendum was lost. Park Brief at p. 12.

These facts were never established at trial. Ms. Manolides testified that she did not draft the Counter Addendum or present it to the Parks. RP 182:10-23. Indeed, Ms. Manolides did not have the alleged Counter Addendum in her files at Windermere and, in fact, does not recall ever seeing it at any point before closing. RP 181:12-182:6.

The Parks also assert that a fax number on the bottom of the Counter Addendum is that of TMG. Park Brief at p. 13; see also Ex. 160A. But no evidence in the record supports this assertion. See RP 121:13-132:5; Ex. 160A. Mark McNaughton was not asked about it. RP 128:25-132:5. Dr. Park was not asked about it. See RP 414:6-420:11, 461:19-466:7. And Ms. Manolides denied faxing it to the Parks from TMG's office. RP 194:16-18. Indeed, the trial court found that the fax number on the Counter Addendum to be illegible. RP 128:25-132:5.

Moreover, it is entirely possible that the fax number came to be on the Counter Addendum after September 11, 2006, the date of closing, as

the Parks did not provide any party with the document under after that date. Ex. 47; RP 234:20-237:22. This fact was definitively established at trial: TMG never signed the Counter Addendum. Ex. 115, 160A; RP 97:9-100:6, 181:15-184:15, 235:24-236:9.

Only after closing did the Parks revealed that the Counter Addendum, dated and initialed by the Parks on February 20, 2005, called for a purchase price of $2,580,000. Ex. 47; RP 233:10-20, 234:4-237:22. TMG's initials appear nowhere on this document, and the Parks never asked for TMG to sign it. Ex. 47 at p. 5, 115, 160A; RP 235:21-236:9. The document contains the original price offered by TMG of $2,400,000, to which is added $180,000; thus, indicating that it was an old document that had never been agreed on as the purchase price ultimately was settled at $2,425,000, and the purchase of the Parks' home was included in that amount. Ex. 47 at p. 5; RP 236:10-22.

G. TMG Determines to Proceed to Closing on September 11, 2006

Rather than give into the Parks' demands that TMG pay more money and extend the closing date until March 2007, TMG decided to proceed to closing under the terms of the 2005 PSA (and various extensions). Exs. 15-21, 37; RP 216:5-19, 223:14-224:12. Some confusion existed regarding the closing date. On August 24, Dr. Park

wrote to TMG stating that closing would take place on September 12, 2006. Ex. 26. TMG agreed and notified the Parks that it would close on that date. Ex. 34; RP 223:2-13.

Then on September 10, Dr. Park wrote to TMG stating that closing must take place on September 11. Ex. 37. Again, TMG agreed and notified the Parks and escrow that it was willing to close on the eleventh. RP 224:13-225:7; RP 263:10-23. But the Parks refused to close. Contrary to the Parks' assertion that they were never contacted about the September 11 closing, Kevin Hanchett testified that he spent several hours on the telephone with the Parks on September 11, attempting to convince them to go forward with closing. 231:16-232:21. And the Parks admit to receiving at least one telephone call from him on that date. RP 484:10-485:24.

Call log records from Escrow 1 indicate that Dr. Park had several conversations with Juanita Koura, the escrow agent for the transaction. Ex. 38; RP 264:1-268:14. In those conversations, Dr. Park claimed that no valid contract existed with TMG, and that TMG was "making up documents." Id. Ultimately, the log indicates that on September 11, 2006, Dr. Park informed Ms. Koura that they would not close. Ex. 38; RP 267:12-22.

The Parks did not contact Ms. Koura after September 11, 2006, seeking to close. Nor did Ms. Koura ever receive any signed closing documents from them. RP 268:4-22.

TMG proceeded to closing on September 11, 2006. TMG transferred the balance of the purchase price due under the Complete 2005 PSA to escrow – $2,230,847.07. Ex. 39; RP 228:7-229:25, 273:5-22. And TMG provided its original signature on the deed of trust, promissory note, and other required documents. Ex. 40; RP 228:13-229:25. Thus, TMG fully performed as agreed under the 2005 PSA. The Parks did not.

IV. PROCEDURAL HISTORY

TMG filed its complaint on September 28, 2006, seeking specific performance of the 2005 PSA. CP _ (Dkt. #2). TMG also filed a lis pendens on the Park property to provide notice to any future purchasers that dispute over title existed. CP 651-52. The Parks filed an answer in December 2006, and thereafter amended it to add third parties Windermere Real Estate Co. and Julie Manolides. CP _ (Dkt. #7), CP __ (Dkt. #9). Thereafter the parties engaged in extended negotiations for purposes of resolving the dispute. RP 313:22-315:14; 329:7-330:2.

Moreover, TMG continued with the platting of the Parks' property in hopes a settlement could be reached. 146:24-147:11, 303:17-304:11.

At trial, TMG did not seek reimbursement for any fees incurred post-September 11, 2006. RP 303:17-304:23.

Negotiations failed to bring about a resolution. Two and one-half years after filing its complaint, in March 2009, TMG amended it and dropped its claim for specific performance, changing its claim to one for damages. CP 608-50; RP 315:15-317:19. The Parks stipulated to TMG's filing the amended complaint. CP __ (Dkt. #27); RP 317:8-19. TMG also released it lis pendens at that time. CP 606-07. The Parks responded to TMG's complaint and asserted a counterclaim of their own for breach of the 2005 PSA, alleging that TMG had breached the 2005 PSA by failing to pay $2,580,000. CP 562-605. Nowhere in the Parks' answer and counterclaim is there any indication that the Parks believed that the 2005 PSA was void under the statute of frauds. Id. Rather, the Parks asserted exactly the opposite. Id.

The Parks argue that TMG's lis pendens caused their property to be unmarketable during the 31 months that it was recorded against their property. But they never attempted to market their property. Nor did they ever seek a release of the lis pendens from TMG because of a pending sale. RP 317:20-318:4. Moreover, the trial court found that the lis

pendens was for a legitimate purpose and so instructed the jury. RP 258:12-259:19; CP 114.

After TMG amended its complaint to assert a claim for damages rather than specific performance, a trial date was set and continued several times, negotiations continued, and discovery continued. Not once during that time period did the Parks indicate that they believed that the 2005 PSA was void under the statute of frauds. CP 515-16.

Discovery closed under Snohomish County Local Rules on May 11, 2012. SCLRC 26; CP 446-48; CP 182-84. In May of 2012, the Parks brought a motion for summary judgment seeking to dismiss TMG's claim for breach of contract under the theory that the 2005 PSA was void under the statute of frauds, claiming that the legal description was inadequate. CP 524-33. Although the Parks claim that an affirmative request to find that the statute of frauds was not sought in this motion, by its very nature it required such a decision. See CP 524-33. Such a ruling would bind all the parties, not just those involved in the motion.

The Honorable Michael T. Downes heard the motion on May 30, 2012. Judge Downes denied the motion substantively and also held that the Parks were precluded from raising the statute of frauds as a defense because they never pled such a defense – in fact had pled the opposite –

and discovery had closed. CP 446-48; see also CP 182-84. At that time, trial was set to commence on June 25, 2012. CP __ (Dkt. #67). The Parks moved for reconsideration, which was denied by order of July 26, 2012. CP 182-84.

In addition to the Parks' motion for summary judgment, Windermere and Julie Manolides brought a motion for summary judgment seeking dismissal of the Parks' counterclaims. CP __ (Dkt. # 78). That motion was heard by the Honorable Janice E. Ellis, also on May 30, 2012. Judge Ellis took the matter under advisement and on June 6, 2012, issued a several-page order that resolved some of the counterclaims and left others for trial. CP 449-53. Most importantly from TMG's perspective, Judge Ellis found that no material issue of fact existed as to the fact that the Parks had accepted the 2005 PSA and that the alleged counter addendum was not part of that contract: "Parks averment that there was another Addendum that Manolides negligently failed to manage on behalf of Park is defeated by Exhibit 4 to Manolides Declaration, which is the 'final sign off' of the 2005 [PSA] and was transmitted by Park to Manolides." CP 452. Thus Judge Ellis resolved one of the main issues between the parties – the price for the Parks' property – holding that the Parks and TMG had agreed to a price of $2,425,000. Id. The Parks

moved for reconsideration, which was denied. Judge Ellis issued a Revised Order on July 31, 2012, confirming her holding of June 6, 2012, as to the purchase price (among other holdings). CP 162-181.

Later that summer, TMG sought summary judgment on the theory that since the legal description and price disputes had been resolved, a trial was unnecessary. CP __ (Dkt. #144). The trial court denied TMG's motion on the grounds that a factual dispute did exist – that is, whether the reference in the 2005 PSA to "Counter Addendum + 3 pages" referred to the "Addendum B" that the Parks had insisted be included. CP 159-61.

The trial date was continued at least two more times. CP _ (Dkt. #120, #170). Before trial, the Parks settled with Windermere and Ms. Manolides, leaving trial to take place only between the Parks and TMG. CP __ (Dkt. #151). Ultimately the case proceeded to trial on January 22, 2013. RP 31. At no time did the Parks seek to amend their answer to assert a defense of the statute of frauds nor did they seek to reopen discovery. The Parks attempted to reargue Judge Downes' order at the beginning of trial, at the end of TMG's case-in-chief, and after trial. RP 8:20-14:2, 356:8-359:8; CP 74-90. The trial judge, the Honorable Richard T. Okrent, denied each attempt to relitigate this issue. RP 13:24-14:2, 358:18-359:8; CP 6-7. In fact, in denying the Parks' motion for directed

verdict, Judge Okrent found the evidence at trial showed that the 2005 PSA contained the tax parcel numbers of the Parks' property to be conveyed and that the Park Addendum, which contained complete legal descriptions, had been incorporated by reference. Thus the statute of frauds was satisfied. RP 358:18-359:8.

The trial court also addressed the admissibility of certain evidence at issue on appeal. First, after Dr. Park testified on direct examination about advice his attorney, Greg Home, gave him regarding the purchase price, the jury asked Mr. Home whether he provided "a letter to Mr. Park stating legal opinion that the $180,000 was in addition to the purchase price and was indeed part of the contract? And did this event, this opinion, occur in 2004, 2005 or 2006?" RP 476:2-6; 598:20-24. The jury also asked a second question: "Dr. Park testified that TMG, the McNaughton Group, retained you as their attorney, as the Parks attorney, on his behalf against his wishes. Did that occur?" RP 599:8-10. Mr. Home's answer to the first question was "I don't recall," and to the second question, "no." RP 599:2-6; 11.

Second, the trial court admitted impeachment evidence and ER 404(b) evidence regarding the Parks' previous real estate transactions. The first was a purchase and sale agreement the Parks entered into with

Michelle Construction in 2001, admitted as impeachment evidence after Dr. Park testified he made no attempt to list the Property until 2004, had no intention of selling the Property before 2004, and specifically did not intend to sell the Property in 2001. RP 380:6-23; Ex. 173.

Next, the trial court admitted a judgment that the Parks failed to disclose in response to discovery requests. Exh. 117; 544:14. The issue underlying the judgment involved a second case in which Dr. Park had attempted to insert a term in a purchase and sale agreement against a developer. RP 536:10-13. Because TMG's case alleged that the Parks attempted to insert a new term (a different price) into the PSA after the parties already had a deal, the trial court admitted evidence of the prior case pursuant to ER 404(b) to show a common scheme or plan. RP 537:7-11; 540:13-17.

V. ARGUMENT AND AUTHORITY

A. Standard of Review

The Court of Appeals reviews a trial court's findings of facts to determine whether substantial evidence supports those factual findings, and, if so, whether those findings support the trial court's conclusions of law. Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555, 132 P.3d 789 (2006). "Substantial evidence" exists when there is a sufficient

quantity of evidence to persuade a fair-minded, rational person that a finding is true. In re Estate of Jones, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). The Court of Appeals reviews questions of law and conclusions of law de novo. Hegwine, 132 Wn. App. at 556.

B. The Parks Never Asserted the Statute of Frauds as Defense

Civil Rule 8(c) requires a defendant to affirmatively allege the statute of frauds as a defense: "In a pleading to a preceding pleading, a party shall set forth affirmatively ... statute of frauds ..." (Emphasis added). The appellate court reviews a trial court's decision that an affirmative defense has been waived for abuse of discretion. Bickford v. City of Seattle, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001). An abuse of discretion occurs when a trial court exercises its discretion on untenable grounds or for untenable reasons. Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 805, 929 P.2d 1204 (1997).

The Parks assert that the trial court's order continuing the trial date mooted Judge Downes' decision striking their affirmative defense of the statute of frauds. What the Parks fail to state, is that they moved for reconsideration after Judge Downes moved the trial date to December

2012.[1] Compare CP 188-218 and CP 446-48. On reconsideration, Judge Downes upheld his prior ruling – holding that the defense of the statute of frauds had been waived and denying the Parks' motion on its merits. CP 182-84. Thus, even if the trial court erred in holding that the defense had been waived, as explained below, it did not err in holding that the Parks did not prove that the statute of frauds voided the 2005 PSA.

C. The Parks Did Not Raise the Defense of Uncertainty in the Trial Court

The Parks now argue that the 2005 PSA "is so confusing" and "uncertain" that no meeting of the minds took place. Park Brief at p. 12. But the Parks did not raise the defense of uncertainty during trial. See CP 562-607 (Answer), CP __ (Dkt. #194) (Proposed JIs); RP 356:8-366:18 (Mot. Dir. Verdict), 618:4-624:5 (JIs Arg.) Thus, they are precluded from raising it in this appeal. Prater v. City of Kent, 40 Wn. App. 639, 642, 699 P.2d 1248 (1985) (refusing to entertain claim of retaliatory termination based on sex discrimination because the issue was not raised below).

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[1] The Parks also fail to state that as of the date the trial was continued, the discovery cutoff had passed. The orders continuing the trial date did not reopen discovery. See CP __ (Dkt. #120, 170). Nor did the Parks seek to amend their answer to assert the statute of frauds as a defense at any time before the case went to trial.

To the extent that the Court entertains this issue, Mark McNaughton and Julie Manolides explained the four exchanges that resulted in the 2005 PSA: (1) TMG's offer; (2) the Parks' Counter; (3) TMG's Counter; (4) the Parks' acceptance. See Exs. 6-10; RP 60:15-78:7; 491:14-497:25. Was the 2005 PSA messy? Yes. Was it uncertain? No.

Moreover, the Court may rely on the parties' subsequent conduct when interpreting a contract. 25 David K. DeWolf, Keller W. Allen, *et al.*, Washington Practice: Contract Law and Practice §5.3 (Supp. 2012) ("The role of the court is to determine the mutual intentions of the contracting parties according to the reasonable meaning of their words and acts.") (emphasis added); see also Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990) ("In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.") (emphasis added).

Here, until August 24, 2006, the Parks treated the purchase and sale agreement that they accepted on February 28, 2005 – the 2005 PSA – as complete and enforceable. Indeed, they accepted $60,000 in extension payments and $34,000 in rental mitigation payments under the contract. Exs. 15-21, 61. On June 29, 2006, the Parks asked for more money from

extension payments. Ex. 22. And on August 24, they asked again for the same thing – they did not mention any ambiguities or vague terms that they felt made the document unenforceable. Ex. 26. Those allegations did not arise until August 31, and then the Parks complained that the price was incorrect. Ex. 31. Thus, the Parks' behavior before the September 11, closing date demonstrates their belief that the contract was complete and enforceable and, if any dispute existed, it related to the purchase price.

Moreover, when the Parks answered TMG's complaint, they crossclaimed on the grounds that the 2005 PSA was an enforceable contract and that TMG had breached the 2005 PSA by failing to tender the correct price. See CP 574-76. Like the Parks' failure to raise the issue of uncertainty during trial in either their motion for directed verdict or proposed jury instructions, the fact that the Parks sought to actually enforce the contract, albeit at a different price, demonstrates that they believed all terms other than price to be certain and enforceable.

D. The 2005 PSA Complies With the Statute of Frauds

Washington's statute of frauds requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010. That is, Washington requires "a description of the land

sufficiently definite to locate it without recourse to oral testimony" or "a reference to another instrument which does contain a sufficient legal description." Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) (citing Bingham v. Sherfey, 38 Wn.2d 886, 234 P.2d 489 (1951)).

1. Tax Parcel Numbers May Substitute for a Legal Description

Bingham v. Sherfey, 38 Wn.2d 886, 234 P.2d 489 (1951), held that references to tax parcel numbers in a real estate contract complies with the statute of frauds. Id. at 889. Courts have found such incorporation by reference to be valid because tax parcel numbers refer to another instrument that contains a sufficient description – namely the assessor's roll. Id. at 888-89. For example, in City of Centralia v. Miller, 31 Wn.2d 417, 197 P.2d 244 (1948), cited with approval in Bingham at 888-89, the Court held that tax parcel numbers were sufficient to "afford[] an intelligent means for identifying the property and do[] not mislead." Id. at 424. "In other words, if a person of ordinary intelligence and understanding can successfully use the description in an attempt to locate and identify the particular property sought to be conveyed, the description answers its purpose and must be held sufficient." Id.

Here, the 2005 PSA sets forth not only the address of the properties, but also the tax parcel numbers. Any person of "ordinary intelligence and understanding" would successfully locate the Park property that was the subject of the 2005 PSA. On this basis alone, the statute of frauds is satisfied.

The Parks argue that no witness proved that the tax parcel numbers in the 2005 PSA correlated with information in the tax assessor's office. Park Brief at p. 29. But, as the trial court found in denying their motion for a directed verdict on this issue:

> The contract in Exhibit 10 does refer to the legal descriptions via the tax parcel numbers, and via a reference to the prior agreement from 2004. And when I read that in context with Exhibit 4, which clearly has legal descriptions, which have been admitted as evidence, it's clearly a jury question at this point.

RP 363:19-25.

Relying on Bingham v. Sherfey, supra, and Tenco, Inc. v. Manning, 59 Wn.2d 479, 368 P.2d 372 (1962), the Parks argue that the ability to include tax parcel numbers in a real estate contract applies only to contract for the sale of unplatted property. Park Brief at pp. 27-28. But neither the Bingham case nor the Tenco case stands for that proposition. The Bingham court dealt with a contract for the sale of unplatted property

and never reached the issue of whether tax parcel numbers could also be used for platted property. Bingham, 38 Wn.2d at 490.

The Tenco court only mentioned metes and bounds in passing: "Martin v. Seigel has since been qualified to a certain extent but, along with Bingham v. Sherfey [citation omitted], which sets forth description requirements for unplatted property, and other cases …." Tenco, 59 Wn.2d at 484-85. But the Tenco court addressed the issue of whether a legal description based on mutual mistake could be reformed despite the statute of frauds. The trial court answered that question in the affirmative and never addressed whether tax parcel numbers could be used in real estate contracts for the sale of platted property. Id. 485. Indeed, no viable public policy exists that supports the limitation suggested by the Parks, and the Parks have cited to none.

2. The Park Addendum, Ex. 4, Contains the Complete Legal Description for Each of the Park's Parcels

Similarly, in addition to listing tax parcel numbers the Court permits incorporation of other documents by reference into a contract. Wash. State Major League Baseball Stadium Pub. Facilities v. Huber, 176 Wn.2d 502, 517, 296 P.3d 821 (2013) ("In general, '[i]f the parties to a contract clearly and unequivocally incorporate by reference into their

contract some other document, that document becomes part of their contract.'") (quoting Satomi Owners Ass'n v. Satomi LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009); W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) ("Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate ... agreement to which they are not parties, and including a separate document which is unsigned.'") (quoting 11 Williston on Contracts § 30:25, at 233-34 (4th ed. 1999)). Indeed, the doctrine of incorporation by reference does not require that the document referred to actually be attached to the contract. Knight v. Am. Nat'l Bank, 52 Wn. App. 1, 4-6, 756 P.2d 757 (1988) (finding that lease complied with statute of frauds even though the two exhibits to which it referred , and which contained the legal description, were not physically attached to the lease itself).

Here, the 2005 PSA incorporated the Park Addendum by reference: "In any event, if there arise any dispute over the scope of the applicable clause(s) on Specific terms of Addendum, 1 through 14, (dated 2/19/2005)[] Pre[v]ious agreement executed on September 8, 2004, page 1 through 13, super[s]edes and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on

February 19, 2005." Ex. 10 at p. 10. The Park Addendum contains complete legal descriptions for each of the Parks' parcels on pages one and two. See Ex. 4. Indeed, in denying the Parks' motion for a directed verdict, the trial court found that the 2005 PSA incorporated the Park Addendum, thus satisfying the statute of frauds by reference. See RP 363:19-25.

The Parks argue that since there was no fully signed-around agreement in 2004, then the reference to the "Pre[v]ious agreement" has no meaning. Park Brief at p. 31. But all parties to the 2005 PSA knew to what this sentence referred. Dr. Park insisted that the Park Addendum be incorporated into the 2005 PSA. RP 175:18-178:19; 195:16-196:8; 198:19-199:6. And Mark McNaughton testified that he knew the phrase referred to the Park Addendum that the Parks' attorney, Greg Home, had drafted for the 2004 negotiations that ultimately fell through. RP 72:4-18. While no fully signed-around agreement was reached in 2004, everyone knew the phrase "Pre[v]ious agreement executed on September 8, 2004, page 1 through 13" referred to the Park Addendum. "As noted in Suess v. Heale, 68 Wn.2d 962, 966, 416 P.2d 458 1966): 'Necessary implications are as much a part of an agreement as though the implied terms were plainly expressed.'" Sackman Orchards v. Mountain View Orchards, 56

Wn. App. 705, 707, 784 P.2d 1308 (1990) (refusing to permit "creative lawyers" to exploit a typographical error to "obscure the clear intention of the parties.").

E. TMG's Lis Pendens was Legitimate

While a lis pendens would not be proper in a case where money damages are sought, here, TMG had every right to record a notice of lis pendens while their specific performance claim was pending. Bramall v. Wales, 29 Wn. App. 390, 395, 628 P.2d 511 (1981) (quoting Cutter v. Cutter Realty Co., 265 N.C. 664, 668, 144 S.E.2d 882 (1965)). A plaintiff or defendant may only record a lis pendens "after an action affecting title to the real property has been commenced," such as an action seeking specific performance of a real estate sales contract. RCW 4.28.320. The lis pendens serves as:

> [C]onstructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.

Id.; see also United Sav. & Loan Bank v. Pallis, 107 Wn. App. 398, 405, 27 P.3d 629 (2001).

TMG's lis pendens only remained on title while TMG pursued a claim for specific performance. That is, if TMG had been awarded specific performance during that time period, anyone to whom the Parks attempted to sell the property would be on notice that title was contested.[2] The trial court did not err in instructing the jury that the lis pendens was legitimate.

F. The Trial Court Appropriately Ordered the Parks' Former Attorney to Answer a Jury Question and Testify on Non-Privileged Matters.

The Parks claim that the trial court erred in allowing Mr. Home to testify at trial as to whether he provided the Parks with a written opinion regarding the purchase price. But the Parks fail to acknowledge that they waived any privilege (if one exists) when Dr. Park testified about Mr. Home's opinion during direct examination. Moreover, the trial court did not question Mr. Home regarding the opinion itself, but instead appropriately limited the inquiry to whether an opinion existed. Therefore, the trial court's decision to ask Mr. Home about whether he

[2] Indeed, the Parks offered no evidence to support their claim that TMG's recording of a lis pendens caused them to be unable to market their property or caused their property's value to diminish. Their own expert testified that liens on the property, including a lis pendens, are generally ignored by appraisers when assessing fair market value. RP 445:15-446:22. Thus, his valuation did not account for TMG's lien.

provided a written opinion was not prejudicial because the content of the opinion, if any, was never disclosed.

A client waives the privilege as to an entire confidential communication by testifying about part of that communication. State v. Vandenberg, 19 Wn. App. 182, 186, 575 P.2d 254 (1978) (citing Martin v. Shaen, 22 Wn.2d 505, 513, 156 P.2d 681 (1945) (holding that once testimony is introduced on a material fact that would be privileged, a party cannot hide behind the privilege to prevent further disclosure: "He could not be permitted to disclose so much of the transaction as he saw fit and then withhold the remainder."). Here, Dr. Park introduced testimony regarding Mr. Home during direct examination. Specifically, Dr. Park testified that Mr. Home told the Parks they were entitled to an additional $180,000. RP 476:1-6. By doing so, the Parks waived any privilege as to confidential communications between the Parks and Mr. Home.

Even if the Parks had not waived the privilege, the trial court did not err in allowing Mr. Home to testify because Mr. Home did not disclose any confidential communications. Washington case law stands for the proposition that if the substance of the confidential communications between a client and his attorney are not revealed, the disclosure of information related to the attorney-client relationship is not barred by the

statutory attorney-client privilege. See, e.g., Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 531, 688 P.2d 506 (1984) (citing United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) (recognizing the general rule that fee arrangements usually fall outside the scope of the privilege because such information ordinarily reveals no confidential professional communication between attorney and client).

Here, presumably in response to Dr. Park's direct examination in which he discussed Mr. Home's advice, the jury asked Mr. Home whether he provided "a letter to Mr. Park stating legal opinion that the $180,000 was in addition to the purchase price and was indeed part of the contract? And did this event, this opinion, occur in 2004, 2005 or 2006?" RP 476:2-6; 598:20-24. The jury also asked a second question: "Dr. Park testified that TMG, the McNaughton Group, retained you as their attorney, as the Parks attorney, on his behalf against his wishes. Did that occur?" RP 599:8-10. Mr. Home's answer to the first question was "I don't recall," and to the second question, "no." RP 599:2-6; 11. Mr. Home did not, however, reveal the substance of his communications with the Parks, so the trial court did not err in allowing his testimony.

G. The Trial Court Appropriately Admitted Evidence Over the Parks' Objections

A trial court's evidentiary rulings will not be reversed on appeal absent a showing of abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999).

The Parks argue they were prejudiced by the admission of evidence of two prior real estate transactions. But the trial court properly admitted evidence of one transaction to impeach Dr. Park's direct testimony and properly admitted evidence of the second transaction after balancing, on the record, its probative value against its potential for prejudice. Even if the trial court failed to properly evaluate the evidence, such failure was harmless because the jury heard countless other facts in support of TMG's claim for breach of contract.

1. The Trial Court Properly Admitted Impeachment Evidence

Evidence Rule 607 governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. One method of impeachment is to contradict a witness's testimony regarding a material fact. See Tamburello v. Dep't of Labor & Indus., 14 Wn. App. 827, 828, 545 P.2d 570 (1976) (holding the trial court properly

admitted a motion picture of plaintiff's physical activities to rebut his testimony he was disabled).

At trial, a central theme of the Parks was the desire to market their property to multiple developers to obtain the most amount of money for it. RP 44:6-10; 380:24-25. During direct examination, Dr. Park testified that he made no attempt to list their property until 2004, that he had no intention of selling their property before 2004, and specifically did not intend to sell their property in 2001. RP 380:6-23.

TMG obtained a purchase and sale agreement that the Parks entered into with Michelle Construction in 2001. Ex. 173. When asked whether Dr. Park had entered into a purchase and sale agreement with Michelle Construction in 2001, Dr. Park answered no. RP 525:3-6. But after he was shown the purchase and sale agreement, Dr. Park identified his signature. 526:17-527:25.

Finally, when asked whether the transaction fell apart after Dr. Park demanded hundreds of thousands of dollars of additional funds, Dr. Park answered counsel's questions with questions of his own, until counsel finally ended the line of questioning. 529:23-530:22. Because the purchase and sale agreement directly contradicted Dr. Park's claim that he had not entered into the agreement with Michelle Construction, a material

fact bearing on Dr. Park's credibility, the trial court's decision to admit the evidence was proper.

Character evidence is not admissible to prove conformity therewith (see ER 404(a)), but evidence of prior bad acts may be admissible for other purposes, such as proof of motive, intent, common scheme, plan, and knowledge, among others. ER 404(b). When a trial court admits bad acts evidence, it must first identify the purpose for which the evidence is to be admitted. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). The court must then, on the record, balance the probative value of the evidence against its potential for prejudice. Id.

Here, TMG offered, as impeachment evidence, a judgment into evidence that the Parks failed to disclose in response to discovery requests. Ex. 117; 544:14. The case underlying the judgment involved a second case in which Dr. Park had attempted to insert a term in a purchase and sale agreement against a developer. RP 536:10-13. Because TMG's case alleged that the Parks attempted to insert a new term (a different price) into the PSA after the parties already had a deal, TMG offered evidence of the prior case pursuant to ER 404(b) to show a common scheme or plan, or as proof of modus operandi. RP 537:7-11.

The trial court then evaluated whether the probative value of the evidence outweighed its potential for prejudice, concluding that it did:

> So the question is does it have probative value? Yes, it does. Is it prejudicial? Well, most evidence is prejudicial in itself. Could it possibly be used to show preparation, plan, knowledge, common scheme or plan type of things? That answer is yes....

RP 540:13-17.

Even if the trial court had not engaged in this evaluation, such an error is harmless because it did not materially affect the outcome of the trial. Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, even if the trial court erred in failing to exclude the testimony, it likely did not affect the outcome of the trial because the jury heard other evidence that supported TMG's allegation of breach of contract. Specifically, during TMG's first round of negotiations with the Parks, the Parks insisted on the right to continue marketing the property to third parties during TMG's feasibility period. RP 50:5-51:7; 60:12-14. The Parks wanted to continue to market their property to obtain the most

amount of money. RP 44:6-10; 380:24-25. Likewise, after entering into the 2005 PSA with TMG, the Parks demanded additional funds that were not part of the contract. RP 210:13-212:21. When TMG said no, the Parks claimed that a "Counter Addendum" existed that included a higher price but refused to provide TMG with the document. Ex. 37; RP 93:18-24. Finally, having failed to wrest more money from TMG, the Parks refused to close. Ex. 38; RP 267:12-22. Based on this evidence, the jury reasonably concluded that the Parks breached the 2005 PSA with TMG.

H. In the Alternative, TMG is Entitled to Restitution

TMG pled unjust enrichment and restitution as an alternative claim not only because the Parks retained the earnest money and other payments TMG paid to them, but also because TMG spent its own funds obtaining preliminary plat approval for the Parks' property. Moreover, TMG was ready, willing, and able to close on September 11 or 12, 2006, but the Parks unjustly breached the 2005 PSA by refusing to even appear at closing. The trial court bifurcated the unjust enrichment claim from the breach of contract claim. RP 26:22-28:16. Thus, if this Court finds the 2005 PSA void under the statute of frauds, TMG respectfully requests that the Court also remand this case to the trial court for further findings on TMG's unjust enrichment and restitution claim.

I. TMG is Entitled to its Attorneys' Fees and Costs for This Appeal

"Pursuant to RCW 4.84.330, the prevailing party in an action to enforce or defend a contract is entitled to attorney fees and costs where the contract so provides." Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). Here, the 2005 PSA contains a fee shifting provision under which the trial court awarded TMG its fees and costs. Ex. 10; CP __ (Dkt. #217). TMG respectfully requests that the appellate court grant its fees and costs incurred in responding to this appeal pursuant to the contractual language in the 2005 PSA, RCW 4.84.330, RAP 18.1, and RAP 14.

VI. CONCLUSION

For the foregoing reasons, TMG moves the Court to affirm the trial court in all respects. Should the Court void the 2005 PSA on statute of frauds grounds, TMG respectfully requests that the case be remanded to the trial court for resolution of TMG's unjust enrichment and restitution claim. Finally, TMG requests that it be awarded its attorneys' fees and costs for this appeal.

DATED this 27th day of September, 2013.

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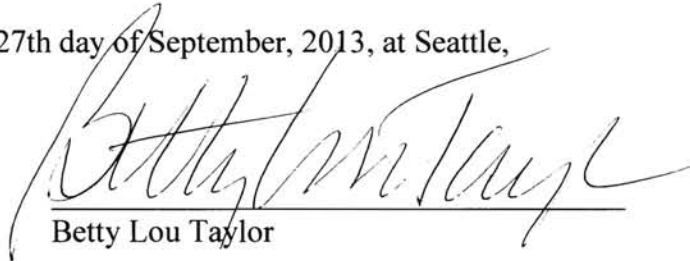
CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 27th day of September, 2013, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Russell James Jensen, Jr., WSBA #40475 MUKILTEO LAW OFFICE 4605 116th Street SW, Suite 101 Mukilteo, WA 98275 *Attorneys for Defendants/Appellants*	☐ ☒ ☐ ☐ ☐	U.S. Mail, postage prepaid Hand Delivered Overnight Courier Facsimile Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 27th day of September, 2013, at Seattle, Washington.



Betty Lou Taylor