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DIVISION II

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

STATE OF WASHINGTON

BY *Ca*
DEPUTY

MICHAEL KERSCHNER INC. a Wyoming corporation, AND
DONALD GARDNER, INC., a Washington corporation, dba
MALONE ADDITION INVESTORS, LLC, a Washington limited
liability company,

Appellants

v.

MORRIS MALONE AND VIOLA MALONE, individuals and a martial
community,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is a dispute over a Real Estate Purchase and Sale Agreement (REPSA). Appellants, referred to herein as MAI, were the buyers, and respondents, Mr. and Mrs. Malone, were the sellers. The parties signed the REPSA in September 2007. Mr. and Mrs. Malone terminated the REPSA on May 1, 2008.

The REPSA contemplated an 18 month period between signing and closing, during which time MAI was to develop the property into a final plat. Also during that period, MAI agreed to make the monthly payments on most of Malone's outstanding loans on the property, with the payments credited to the purchase price at closing. To secure return of those payments in case of a breach by Malone, Mr. and Mrs. Malone signed a deed of trust and recorded it against the property being sold by them to MAI.

In early 2008, Mr. and Mrs. Malone wanted to refinance, and MAI agreed that the deed of trust provided by Malone could be reconveyed to allow the refinance to go through (i.e. to allow the refinance lender to be in first lien position).

Also in early 2008, MAI proposed Addendum No. 5 to the REPSA, which, the trial court found, would have lowered the purchase price for the property if signed.

As of early March 2008, MAI was current on the monthly supplemental payments, and Mr. and Mrs. Malone had not yet refinanced. On March 13, 2008, the deed of trust that was security for the monthly payment was reconveyed.

The March monthly payments by MAI toward Malone's loans and the purchase price were due on March 21, 2008. At the time, the proposed Addendum No. 5 was still out for negotiation.

On March 20, 2008, Malone sent an email reminding MAI that the March payments were due the next day. Mr. Kerschner, of MAI, responded, stating that he was leaving town, and directing Malone to speak with his business partner, Mr. Gardner, who would handle the payment issue and would want an answer on Addendum No. 5.

On the morning of March 21, 2008, Malone responded to Mr. Kerschner, stating that the negotiations of Addendum No. 5 were on hold until Mr. Kerschner and Mr. Gardner were both available to discuss, and that the payments were due "today" regardless of the status of Addendum No. 5.

At Noon on March 21, 2008, Malone sent an email purporting to confirm a telephone conversation with Mr. Kerschner of MAI. The email does not mention payments at all. Rather it purports to confirm a conversation that "Aspen Properties NW is terminating its participation" in the REPSA. It also states that if Aspen elects to go forward with the termination, it will be "handled according to the terms of the Agreement" and Aspen needed to send a written notice.

MAI did not make the monthly supplemental payments that were due on March 21, 2008.

After March 21, 2008, Mr. and Mrs. Malone and MAI continued to negotiate Addendum No. 5.

On May 1, 2008, Mr. and Mrs. Malone terminated the REPSA. The termination notice refers to a March 21, 2008 notice of default sent by Malone, and states: "Since more than ten (10) days have passed since that notification of default and your failure to cure this material breach of the Agreement on that date or since, we are retaining all your deposits and declaring the Agreement terminated."

MAI filed suit and the case went to a bench trial before the Honorable Brian Tollefson, Pierce County Superior Court. There

were two main issues presented by MAI at trial: (1) was MAI justified in withholding the March monthly payments because Mr. and Mrs. Malone prematurely recorded the reconveyance of the deed of trust that was security for the monthly payments, and/or failed to re-record a replacement deed of trust; and (2) did Mr. and Mrs. Malone breach the REPSA by terminating it on May 1, 2008, without first providing a notice and opportunity to cure as required by the REPSA. Only the second issue is in dispute on this appeal.

With regard to the lack of notice and opportunity to cure, rather than comply with the written notice requirement prior to terminating the REPSA, Malone (1) sent an email payment reminder before the payment was due, (2) in that email, demanded that MAI comply with “the terms of the agreement” if MAI wanted to terminate, (3) continued, after the payment was not made, to negotiate an amendment to the REPSA, and (4) then terminated the REPSA without any notice.

As will be shown herein, the trial court erred in Conclusion of Law No. 5 in holding that the REPSA does not require notices to be in writing. The trial court also erred in Supplemental Conclusion of Law 1 in holding that Exhibit 63, the emails sent on March 20 and 21, were proper notice and opportunity to cure. The emails did not

mention past due payments or an opportunity to cure, and were sent before the payment was even due. And the REPSA clearly states that notices “shall be in writing” and “shall” be sent by fax or U.S. Mail to the numbers and addresses listed in the REPSA. The REPSA does not allow notices to be sent by email.

This Court must reverse the trial court, and remand for entry of a judgment in favor of MAI in the amount of \$65,806, the amount paid by MAI toward the purchase price before Mr. and Mrs. Malone improperly terminated the REPSA.

II. ASSIGNMENTS OF ERROR¹

1. The trial court erred in Conclusion of Law No. 5 and Supplemental Conclusion of Law No. 1, in holding that Mr. and Mrs. Malone complied with the contract requirement to provide written notice and an opportunity to cure before they terminated the contract.

2. The trial court erred in holding that the emails sent before the payment was due were sufficient notice of non-payment and opportunity to cure under the contract.

¹ Per the trial court's ruling on September 17, 2010, MAI must make this statement: MAI is not challenging any of the findings of fact or supplemental findings of fact and understands that the findings of fact and supplemental findings of fact are verities on appeal.

3. The trial court erred in holding that the contract allows email notices.

4. The trial court erred in holding that appellants waived the contract requirement for notices to be in writing and sent by fax or mail.

5. The trial court erred in Conclusion of Law No. 2 in holding that MAI's failure to make the payments that were due on March 21, "justified the suspension of performance of any of the contractual obligations of the Defendants."

6. The trial court erred in Conclusion of Law No. 6 in holding that Mr. and Mrs. Malone "are not liable for the return of the payments made by the Plaintiffs pursuant to the terms of the REPSA."

7. The trial court erred in Conclusion of Law No. 7 in holding that Mr. and Mrs. Malone were "entitled to an Order dismissing MAI's claims with prejudice."

8. The trial court erred in Conclusion of Law No. 10 in concluding that Mr. and Mrs. Malone were the prevailing party and were entitled to attorneys' fees and costs.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where section 15(b) of the REPSA states that “all notices” required by the REPSA “shall be in writing,” did the trial court err in Conclusion of Law 5 holding that the REPSA “does not say that the notices must be or shall be in writing.”

2. Did the trial court err in Supplemental Conclusion of Law No. 1 in holding that Mr. and Mrs. Malone complied with the notice requirements of the REPSA before they terminated the REPSA?

3. Did the trial court err in Supplemental Conclusion of Law No. 1 by holding a notice sent before the payment was due was sufficient notice under the REPSA?

4. Did the trial court err in concluding that Exhibit 63 met the REPSA’s requirement for written notice of a missed payment and opportunity to cure?

5. Did the trial court err in holding that an email was proper notice under a contract that requires notice to be sent either by fax or by U.S. Mail?

6. Did the trial court err in Conclusion of Law No. 5 in concluding that “plaintiffs obtained the necessary notice to cure?”

7. Did the trial court err in Conclusion of Law No. 2 in holding that the failure to make the March 21, 2008 payments “justified the suspension of performance of any of the contractual obligations of the Defendants.”

8. Did the trial court err in Supplemental Conclusion of Law No. 2 by holding that “the plaintiffs waived any right to enforce any requirement of the REPSA that required Defendants to provide notice in a manner other than the notice that was provided by Defendants in this case?”

9. Did the trial court err in refusing to award MAI a judgment for the return of the \$65,806 in deposits it made toward Mr. and Mrs. Malone’s loans and toward the purchase price?

10. Did the trial court err in holding that Mr. and Mrs. Malone were the prevailing parties entitled to attorneys’ fees?

IV. STATEMENT OF THE CASE

Respondents Mr. and Mrs. Malone are the owners of a preliminarily approved short plat in Puyallup Washington called “The Malone Addition.”

In September 2007, appellants Michael Kerschner Inc. and Donald Gardner Inc., dba Malone Addition Investors, LLC,

(hereinafter referred to as "MAI") agreed to purchase The Malone Addition from Mr. and Mrs. Malone.

On September 19, 2007, Mr. and Mrs. Malone, as sellers, and MAI, as buyers, entered into a Real Estate Purchase and Sale Agreement (REPSA). The Malone Addition is located in Puyallup, and is planned to consist of 38 lots. (CP 77 - FOF 6; Ex. 1)

At the time of the REPSA, Mr. and Mrs. Malone had three bank loans secured by deeds of trust on the Malone Addition property. (CP 77-FOF 7) The REPSA obligated MAI, as buyers, to take over the payments on two of Malone's three loans, and half of the payments on the third loan. With regard to these loans, sections 3(b) – 3(d) of the REPSA, entitled Supplemental Payments, state:

b. As a condition of this agreement Buyer agrees to make the monthly principal and interest payments for each loan, on behalf of Seller. ...

c. Accordingly, each month thereafter until the closing of this transaction, the Buyer will provide certified funds to the Seller in advance of the due date of each of the three loans as stated. ... Seller shall submit a monthly copy of each of the three loan statements to the Buyer at least fifteen (15) calendar days in advance of the payment due date. All payments are applicable to the purchase price at closing.

d. Within three (3) business days of Buyer notifying Seller of the removal of the feasibility contingency, Seller shall record a Deed of Trust against the Property in favor of buyer in the amount of \$284,155 (18 months supplemental payments). (CP 77-78 - FOF 7; Ex. 1)

Closing of the sale of Malone Addition to MAI was to occur within 30 days after the lots met the definition of "Finished Lots" under section 12 of the REPSA. "Finished Lots" included such things as all lot corners staked, all utilities completed and ready for hook-up, water system approval, all utilities and improvements constructed or bonded as required for final plat approval, the final plat approved and recorded, etc. (Ex. 1 §§ 6 & 12)

In sum, the supplemental payments under REPSA section 3, paid toward Malone's three loans and the purchase price, were expected to be paid for 18 months, at which time MAI, as buyer, would be ready to close. That is why section 3 required a deed of trust from Malone to MAI in the amount of \$284,155 – it was to secure the sum of the 18 expected monthly supplemental payments in case Malone breached the REPSA. (Ex. 1)

On September 25, 2007, Mr. and Mrs. Malone signed the Deed of Trust in favor of MAI as required by section 3 of the REPSA. (CP 78 - FOF 13; Ex. 6)

Pursuant to section 3 of the REPSA, MAI began making the monthly supplemental payments for the month of November 2007. (Exs. 11-16) MAI made each month's payments from November 2007 through February 2008. Through February of 2008, MAI had paid \$65,806.05 toward Malone's three loans and toward the purchase price of the Malone Addition plat. (Exs. 1, 11-16; CP 80-FOF 22)

In November 2007, the interest rate on one of Mr. and Mrs. Malone's loans adjusted, and Mr. and Mrs. Malone sought to refinance. In early February 2008, their attempt to refinance was denied due to insufficient property value, and an inability to obtain satisfactory lien priority. (CP 79 - FOF 17)

MAI then agreed to reconvey the Malone deed of trust to assist Mr. and Mrs. Malone in their efforts to refinance one of their three loans on the property. (CP 79 - FOF 19)

On March 13, 2008, the Deed of Trust required by section 3 of the REPSA and executed by Mr. and Mrs. Malone in favor of MAI as security for the monthly supplemental payments, was reconveyed. (CP 80 - FOF 23)

As of early March, 2008, MAI was current on the monthly supplemental payments. (CP 80 - FOF 22) The March monthly

supplemental payment toward the Malone's loans and the purchase price was due on March 21, 2008. (CP 80 - FOF 22)

On March 20, 2008, Mr. and Mrs. Malone's assistant sent an email to MAI reminding them that the "supplemental payments" were owed by March 21, 2008. Mr. Kerschner, of MAI, responded that he was leaving town, and that Mr. Malone should speak with Mr. Gardner of MAI about the payments and Addendum No. 5 (Ex. 63).

On March 21, Malone's assistant sent two emails purporting to confirm conversations with Mr. Kerschner of MAI. The first email states that discussion of proposed Addendum No. 5 is on hold, and that those discussions have no bearing on the payments that were due "today." (Ex. 63)

The second email, sent by Malone's assistant at 12:06 p.m. on March 21, purports to confirm a conversation that "Aspen Properties NW is electing to terminate their participation in the Purchase/Sales Agreement pertaining to the Malone Addition. This termination will be handled according to the terms of the Agreement if you desire to go forward with this decision. ... If you elect to continue with the termination, please provide a Letter of Recession within ten (10) days." (Ex. 63)

MAI did not respond to the email, and did not elect to terminate the REPSA. (CP 81 - FOF 27-28) MAI also did not make the March payments that were due on March 21, 2008. (CP 80 - FOF 25)

Per the trial court's findings, Addendum No. 5 had been proposed by MAI in January, 2008. (CP 79 - FOF 20; Ex 115) The trial court believed it would have reduced the purchase price if signed by Mr. and Mrs. Malone. (CP 79 - FOF 20; Ex. 115) The trial court found that MAI "wanted Addendum No. 5 signed as a condition of moving forward with the real estate deal and as a condition of making any further payments Plaintiffs were obligated to make under the REPSA." (CP 83 - FOF 39)

The trial court also found that after MAI did not make the March 2008 payment, Mr. and Mrs. Malone continued to discuss the terms of Addendum No. 5 with MAI. (CP 83 - FOF 39).

On May 1, 2008, and without sending anything in writing (or by email) to MAI since the March 21 emails, Mr. and Mrs. Malone terminated the REPSA. The Notice of Termination from Mr. and Mrs. Malone is dated April 18, 2008, but was sent on May 1, 2008 via fax and U.S. Mail to the fax numbers and addresses stated in section 15 of the REPSA. (CP 81 - FOF 27-28; Ex. 20; Ex. 1 § 15)

In the termination letter, Mr. and Mrs. Malone claim to have provided a notice of default on March 21, and refer to the 10-day cure period under § 14(b) of the REPSA. (Ex. 20) Mr. and Mrs. Malone also stated they were retaining the \$65,608 in “deposits” that MAI paid toward the purchase price.

On May 8, 2008, MAI responded to Mr. and Mrs. Malone’s termination, objecting to the termination, and reminding Mr. and Mrs. Malone as to why they had not made the monthly payments. Mr. Gardner, for MAI, reminded the Malones that he was withholding these payments because Mr. and Mrs. Malone had prematurely released the deed of trust that was securing the monthly payments, and that Mr. and Mrs. Malone had not refinanced and had not recorded a replacement deed of trust as agreed. (Ex 21)

In May 2008, MAI filed suit in Pierce County Superior Court. The case went to trial before Judge Brian Tollefson in January 2010. At trial, MAI had two main arguments. First, it argued that Mr. and Mrs. Malone breached the REPSA by prematurely recording the reconveyance of the deed of trust that was securing the monthly payments, and that because the deed of trust was reconveyed by Malone, and Malone did not refinance or record a

replacement deed of trust, MAI was excused from making the March payments. Second, MAI argued that even if it was not excused from making the March payment, Mr. and Mrs. Malone still breached the REPSA because they terminated the REPSA on May 1, 2008 without first providing the notice and opportunity to cure that is required by the REPSA. (CP 39-47)

Only the second issue - lack of written notice and opportunity to cure - is in dispute on this appeal. With regard to that issue, Section 14(b) of the REPSA provides: "In the event Seller fails to receive any payment or notice required herein, Seller shall so notify Buyer and Buyer shall then have ten (10) days to cure performance." (Ex. 1, emphasis added).

Section 15 of the REPSA provides:

15. NOTICES – All notices provided for herein may be telecopied, sent by recognized overnight courier, personally delivered, or mailed by U.S. registered or certified mail, return receipt requested. ...

...
(b) All notices required hereunder and by the terms of the Agreement shall be in writing and shall be sent or delivered to the parties hereto at their respective addresses and shall be effective on the earlier of (i) receipt or refusal by the addressee; or (ii) three (3) days after mailing."

Buyers Address: Michael Kerschner
Inc.

Dbal Malone Addition Investors, LLC
10009 89th Ave. E.
Puyallup, WA 98373 ...

And with a copy to: Donald L. Gardner
Inc.

Dbal Malone Addition Investors, LLC
6902 Ford Drive NW
Gig Harbor WA 98335 ...

On January 26, 2010, at the close of trial, Judge Tollefson verbally ruled in favor of Mr. and Mrs. Malone. In his verbal ruling on the notice issue, MAI's counsel understood Judge Tollefson to rule that the REPSA does not require notices to be in writing. (CP 60-61)

On May 21, 2010, Judge Tollefson entered Findings of Fact and Conclusions of Law that were proposed by Mr. and Mrs. Malone. (CP 75-86)

Trying to hide from the notice issue, Mr. and Mrs. Malone's initial proposed findings and conclusions did not address that issue. MAI pointed this out in its objections. (CP 60-61) MAI also pointed out the error in the trial court's oral ruling on the notice issue wherein the court had stated that nothing in section 15 required notices to be in writing. (CP 60-61)

In spite of the objection from MAI, and in spite of the plain language of sections 14 and 15 of the REPSA, the trial court still entered Conclusion of Law No. 5 holding that section 15 “does not specify that notice shall be in writing.” As quoted above, section 15 very clearly states that “all notices ... shall be in writing.”

Always an optimist, on June 1, 2010, MAI filed a Motion for Reconsideration challenging Conclusion of Law No. 5 on the issue of lack of written notice and opportunity to cure. (CP 87-98) On the motion for reconsideration, that issue was framed as follows: “Where section 15(b) of the REPSA states that ‘all notices’ required by the REPSA ‘shall be in writing’ did the Court err in concluding that the REPSA ‘does not say that the notices must be or shall be in writing?’” (CP 90)

The motion for reconsideration was heard on June 11, 2010. The trial court denied the motion. Out of the ashes of the motion came the August 20, 2008, Supplemental Findings of Fact and Conclusions of Law² aimed at addressing the error in Conclusion of

² The Supplemental Findings and Conclusions were entered after the filing of the Notice of Appeal, and after the Designation of Clerk’s Papers was due. Appellants have filed a motion for permission to allow the filing of an Amended Notice of Appeal to include the Supplemental Findings and Conclusions, which is pending. Once it is granted, Appellants will file a supplemental Designation of Clerks’ Papers to include the Amended Notice of Appeal and the Supplemental Findings and Conclusions.

Law No. 5. Conclusion of Law No. 5, however, was not changed. Rather, Judge Tollefson entered supplemental findings and conclusions holding that Exhibit 63, the March 20-21 emails, was sufficient notice under the REPSA, and holding, for the first time, that MAI had waived the contractual requirement that notices be sent by U.S. Mail or facsimile, and thus email was sufficient.

V. ARGUMENT

Standard of Review: MAI is challenging the conclusions of law entered by the trial court. This does include portions of Supplemental Finding of Fact No. 1 because those portions are legal conclusions and were mistakenly designated as findings of fact. The standard of review for challenges to legal conclusions, whether denominated as findings or as conclusions, is de novo.³ The Court of Appeals is to determine whether the unchallenged findings of fact support the conclusions adopted by the trial court.⁴

³ Clayton v. Wilson, 168 Wn.2d 57, 62, 227 P.3d 278 (2010); City of Tacoma v. William Rogers Co., 148 Wn.2d 169; 181, 60 P.3d 79 (2002) (“If a conclusion of law is incorrectly denominated as a finding of fact, it is reviewed as a conclusion of law”).

⁴ Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573 (1999).

A. CONCLUSION OF LAW 5 IS AN ERROR OF LAW.

Conclusion of Law 5 is an error of law in concluding that notice of default and opportunity to cure does not have to be in writing under the REPSA.

Section 14(b) of the REPSA provides: “In the event Seller fails to receive any payment or notice required herein, Seller shall so notify Buyer and Buyer shall then have ten (10) days to cure performance.” (Ex. 1, emphasis added).

Section 15 of the REPSA provides:

15. NOTICES – ...

(b) All notices required hereunder and by the terms of the Agreement shall be in writing and shall be sent or delivered to the parties hereto at their respective addresses and shall be effective on the earlier of (i) receipt or refusal by the addressee; or (ii) three (3) days after mailing.”

Buyers Address: Michael Kerschner
Inc.
Dbal Malone Addition Investors, LLC
10009 89th Ave. E.
Puyallup, WA 98373 ...

And with a copy to: Donald L. Gardner
Inc.
Dbal Malone Addition Investors, LLC
6902 Ford Drive NW
Gig Harbor WA 98335 ...

Section 15 governs how section 14 notices must be given. Contrary to Conclusion of Law 5, section 15(b) specifically states that “All notices required hereunder and by the terms of the Agreement shall be in writing.” Clearly, a section 14 notice of a missed payment is a notice “required hereunder and by the terms of the Agreement.” As such, the notice “shall be in writing.” Thus, Conclusion of Law No. 5 is an error of law in holding that section 15 “does not specify that notice shall be in writing.”

B. SUPPLEMENTAL CONCLUSION OF LAW NO. 1 IS AN ERROR OF LAW.

Supplemental Conclusion of Law No. 1 reads: “To the extent the REPSA requires written notice, such a requirement in this case was satisfied when the Defendants sent email communication to the Plaintiffs.” This must be read in conjunction with Supplemental Finding of Fact No. 1, which states the same thing, with additional clarity: “Defendants’ email to Plaintiffs as set forth in Exhibit 63 meets any requirements of written notice.”

The quoted portion of Finding of Fact No. 1 is actually a legal conclusion. It is precisely the same as Supplemental Conclusion of Law No. 1, except that it clarifies that the “email communication” referred to is Exhibit 63. That clarification does not make the

quoted provision a finding of fact. Like Supplemental Conclusion of Law No. 1, it is a ruling on the meaning of the notice provision of the REPSA, which is a conclusion of law.⁵

Supplemental Conclusion of Law No. 1 and the quoted portion of Supplemental Finding of Fact No. 1, are errors of law for two independent reasons. First, Exhibit 63 is a chain of emails sent by Mr. and Mrs. Malone's assistant on March 20-21, which was before the due date of the missed payment, and the emails do not allege that a payment was late, that there had been any "missed payment," or that MAI has an opportunity to cure. Second, the conclusions are incorrect because the REPSA does not allow contractual notices to be sent by email.

1. The Trial Court Erred in Holding that Exhibit 63 Could be the Contractually Required Notice of a Missed Payment and Opportunity to Cure.

Section 14(b) reads: "In the event of Buyer's Material Breach of this Agreement, any Deposit paid to Seller shall be forfeited to the Seller as their exclusive remedy. In the event Seller fails to receive any payment or notice required herein, Seller shall

⁵ Hearst v. Seattle Times Co., 120 Wn. App. 784, 791, 86 P.3d 1194, 1198 (2004), aff'd 154 Wn.2d 493, 503 - 504 (2005)

so notify Buyer and Buyer shall then have ten (10) days to cure performance.”

Section 14(b) requires a notice to MAI if “the seller fails to receive any payment ... required herein.” It also contemplates a default by MAI in that MAI has 10 days to “cure performance.”

Exhibit 63 is a chain of emails dated March 20-21, 2008, with the last email sent at 12:06 p.m. on that day. The March 20 email reminds MAI that the March payments are due tomorrow, March 21. Mr. Kerschner of MAI responded to that email and directed Mr. Malone to speak with Mr. Gardner of MAI about the payments and Addendum No. 5.

The first March 21, 2008, email again reminds MAI that the March payments are due “today,” states that even though there has been no decision on Addendum 5, MAI must still pay, and says Malone will be present to provide a receipt until 4:00 p.m. that day.

The last email, sent at 12:06 on March 21, 2008, does not mention payments at all. Rather it purports to confirm a conversation that “Aspen Properties NW is terminating its participation” in the REPSA. It also states that if the termination is to go forward, it will be “handled according to the terms of the Agreement” with a formal written notice.

It was these March 20-21 emails that the trial court found to be sufficient written notice under sections 14 and 15 of the REPSA. (Supp. COL 1; Supp. FOF 1)

MAI was current on its monthly supplemental payments as of early March, 2008. (CO 80 – FOF 22) Under Finding of Fact No. 22, the March 2008 payment was due on March 21. As such, payment of the March monthly payments would have been timely any time before midnight on March 21. Hence, the email reminders stating the deadline for the payments sent on March 20 and the morning of March 21 were sent before the payments were due. As of a matter of law, those cannot be a notice of a missed payment for the simple reason that no payment had yet been missed.

Moreover, after MAI missed the March 21, 2008, payment, the parties continued to discuss amending the REPSA in negotiating Addendum No. 5. (CP 83 - FOF 39). Then, without any notice and an opportunity to cure, Malone terminated the REPSA on May 1, 2008. (CP 81 – FOF 27-28)

Other than emails on March 21 – emails which did not allege any default, did not allege any missed payments, did not provide 10 days to cure, and were sent before the deadline for payment - no notices were provided by Malone until Malone terminated the

REPSA on May 1. Malone never provided written notice and the 10-day opportunity to cure as required by section 14(b). This is true for both the March and April 2008 supplemental payments.

Emails reminding MAI of the payment deadline and demanding payment on time, sent before the deadline, are no different than an invoice sent by a landlord or a lender. An invoice would clearly not be written notice of default or a failure to pay. And neither can an email sent before the deadline for payment.

Moreover, in the second March 21, 2008, email from Malone, and in response to what was purportedly an oral termination of the REPSA, Mr. and Mrs. Malone demanded that if MAI wanted to terminate the REPSA, it had to follow “the terms of the agreement” and provide a written notice. (Ex. 63) Malone cannot simultaneously demand that MAI comply with “the terms of the agreement” if MAI elected to terminate, but then refuse to comply when Malone chose to terminate the REPSA on May 1, 2008.

Rather than comply with the written notice requirement, Malone (1) sent an email payment reminder before the payment was due, (2) demanded that MAI comply with “the terms of the agreement” if it wanted to terminate (as opposed to an oral

termination), (3) continued to negotiate an amendment to the REPSA after March 21, and (4) then terminated the REPSA without any notice.

Even assuming that emails were a proper form of notice under the REPSA (they were not, see B-2 below), any notice provided prior to the deadline for a payment cannot, by definition, be a proper notice under section 14 of the REPSA. Section 14 contemplates a notice of a missed payment and a 10-day opportunity to cure that default. Before the deadline for a payment passes, there cannot be a failure to receive a payment required by the REPSA. There also cannot be a default or breach of performance until after the deadline for payment. And the contents of emails were merely reminders of the due date for payment. They were not notices of a missed payment and demand for cure. Finally, Malone cannot simultaneously demand that MAI comply with the agreement if it elected to terminate, and then terminate themselves without such compliance.

2. The REPSA Does Not Allow Notices By Email and the Trial Court Erred in Concluding Otherwise

The trial court erred in Supplemental Conclusion of Law No. 1 and Supplemental Finding of Fact No. 1 in concluding that the REPSA allows contractual notices by email.

This is not a challenge to a finding of fact, but rather to a conclusion of law. The interpretation of the REPSA is a conclusion of law.⁶ When a conclusion of law is mistakenly identified as a finding of fact, it will be treated as a conclusion of law and reviewed de novo.⁷

MAI challenges that portion of Supplemental Finding of Fact No. 1 which reads: "Paragraph 17(j) of the REPSA addresses facsimile transmissions and electronic mail. The REPSA specifically allowed for email communication ... Defendants email to Plaintiffs as set forth in Exhibit 63 meets any requirement of written notice." As noted above, the last sentence is a duplication of Supplemental Conclusion of Law No. 1, except that it clarifies that the specific email referred to is Exhibit 63.

For starters, it is not clear why Mr. and Mrs. Malone proposed, and the trial court adopted, a finding that addresses

⁶ Hearst v. Seattle Times Co., 120 Wn. App. 784, 791.

⁷ City of Tacoma v. William Rogers Co., 148 Wn.2d 169, 181.

“email communication” rather than “notices.” That the parties, on two occasions (Exs. 17, 63), communicated by email, is not relevant to what the contract says about contractually required notices. In any event, the REPSA certainly does not allow contractually required notices to be sent by email.

Section 15(b) requires that “all notices required ... by the terms of this Agreement shall be in writing and shall be sent or delivered to the parties hereto at their respective addresses.” Section 15(b) requires written notice to both Michael Kerschner Inc. and Donald Gardner Inc. at two separate addresses or fax numbers. It does not allow email or verbal notice.

The supplemental finding relies on section 17(j) of the REPSA for the conclusion of law that the REPSA allows notices by email. Section 17(j) does not address how notices must be sent. And other than mentioning “electronic mail” in the section heading, it also does not address email. Section 17(j) only addresses telecopied or electronic signatures on “the documents effecting the transaction contemplated by this Agreement.” Nothing in section 17(j) even addresses how to send notices. It is section 15 that specifically addresses notices and how to send them. Section 17(j)

merely addresses the enforceability of signatures on the REPSA and any amendments thereto.

In sum, this Court must hold that the trial court erred in concluding that section 17(j) allows section 14(b) notices of default and opportunity to cure to be sent by email. Section 15 governs how to send notices under section 14(b).

C. THE TRIAL COURT ERRED IN CONCLUSION OF LAW NO. 5 FINDING THAT MAI RECEIVED THE "NECESSARY NOTICE TO CURE."

On the motion for reconsideration, MAI pointed out that Conclusion of Law No. 5 was wrong because it held that notices do not have to be in writing, and it held that MAI received the "necessary notice." The trial court denied the motion and entered supplemental findings and conclusions to address these issues, concluding that Exhibit 63, the emails sent on March 20-21, was sufficient notice (Supp. FOF 1; Supp. COL 1).

It is MAI's belief and understanding that in concluding that MAI received the "necessary notice," the trial court was only referring to the March 20-21 emails that are Exhibit 63. The trial court appears to have confirmed this in adopting Supplemental Finding of Fact No. 1 and Supplemental Conclusion of Law No. 1 in response to MAI's Motion for Reconsideration. But since it is not

entirely clear whether Conclusion of Law No. 5's reference to "necessary notice" is *only* referring to Exhibit 63, MAI challenges this conclusion out of an abundance of caution.

As noted, section 15(b) of the REPSA requires notices to be in writing. There is, of course, no other written notice in the record from Malone to MAI that could possibly be the "necessary notice" under section 14(b) of the REPSA. As such, the trial court's conclusion as to "necessary notice" must have been referring only to Exhibit 63. Reliance on any other writing would not be supported by the findings of fact. And as noted in section B above, it was an error of law to conclude that Exhibit 63 is the "necessary notice." In sum, the trial court erred in Conclusion of Law No. 5 in finding that MAI received the "necessary notice."

D. THE TRIAL COURT ERRED IN CONCLUSION OF LAW NO. 2.

Conclusion of Law No. 2 holds that MAI's failure to make the March 21, 2008 payments was the first material breach, and that it "justified the suspension of performance of any of the contractual obligations of the Defendants." This conclusion is not aimed at eliminating the contractual requirement to provide notice and an opportunity to cure. In any event, just in case it is so aimed, MAI seeks reversal of this conclusion.

Clearly, a breach by one party does not suspend all contract obligations. Particularly, it does not suspend the obligation to provide notice of a breach and an opportunity to cure.⁸ In all of the cases cited below in section E there was one party already in breach, but the other party was still required to comply with the contract provision requiring notice and opportunity to cure.⁹ Otherwise, a material breach by one party would eliminate the enforceability of the notice and opportunity to cure clauses in any contract. That is not the law, and was, presumably, not intended by the trial court in entering Conclusion of Law No. 2. If that was the intent, then the conclusion must be reversed.

E. THE FAILURE TO PROVIDE THE CONTRACTUALLY REQUIRED NOTICE AND OPPORTUNITY TO CURE IS A BREACH BY MR. AND MRS. MALONE.

Mr. and Mrs. Malone failed to provide notice under REPSA section 14(b) because either (1) the Exhibit 63 emails sent before the due date for the payment cannot be a contractually required notice of a missed payment an opportunity to cure, and/or (2) because email is not a proper form of notice under the REPSA. The consequences of either ruling by this Court is that Mr. and Mrs.

⁸ See *infra* note 10.

⁹ See *infra* note 10; see also Restatement (Second) Contracts, § 237, cmt. e.

Malone's termination of the REPSA on May 1, without first providing the contractually required notice and opportunity to cure, is a breach of the REPSA entitling MAI to damages.¹⁰

In Gray v. Gregory, a lease allowed the tenant to undertake certain construction at the leased premises, but required that the tenant first provide a bond, cash, or waivers of liens. The lease also had a provision, Clause X, stating: "if either party hereto shall be in default hereunder (except as to default by lessee in the payment of rent) *and if such default shall not be cured within sixty (60) days after written notice thereof*, the party not in default shall have the right, in addition to all other rights, granted hereunder, to terminate this lease."¹¹

The tenant performed construction without first obtaining a bond, cash, or waiver of liens, which was a breach of the lease.

¹⁰ See Gray v. Gregory, 36 Wn.2d 416, 418-419, 218 P.2d 307 (1950); (contractual provision requiring notice and opportunity to cure must be followed); Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 228 P.3d 1289 (2010) (same); Filmline Productions, Inc. v. United Artists Corp., 865 F.2d 513, 518 (2d Cir. 1989) (holding that without contractually required notice and opportunity to cure, "purported termination was in violation of the terms of the Agreement, it was inoperative and plaintiffs are entitled to recover for breach of contract"); See also Bausch & Lomb v. Sonomed, 977 F.2d 720 (2d Cir. 1992) Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003) (holding "procedural contract requirements must be enforced"); Point Prods. A.G. v. Sony Music Entm't, Inc., 2000 U.S. Dist. LEXIS 10066 (SDNY 2000) (holding that party asserting nonperformance must afford a defaulting party any contractually-secured opportunity to cure prior to terminating a contract) relying in part on Filmline (Cross-Country) Productions, Inc. v. United Artists Corp., 865 F.2d 513, 518 (2nd Cir. 1989).

¹¹ Gray v. Gregory, 36 Wn.2d 416, 417.

The landlord terminated the lease and filed suit against the tenant. The tenant defended, claiming that the landlord could not terminate the lease without first providing the notice and opportunity to cure as required by the lease. The landlord argued that it was impossible for the tenant to cure since the lease required a bond, cash, or lien waiver prior to the start of construction, and thus the cure was impossible.

The Washington Supreme Court held:

Clause X of the lease, heretofore set out herein, prescribes the rights and necessary procedure of the parties when an occasion of default arises...[Tenants] have a contractual right to invoke the provisions of clause X for their benefit and protection. We are therefore constrained to hold that [landlord] did not, and could not, allege a cause of action for forfeiture of the lease without alleging a compliance with the requirements of clause X. Since it is not, and cannot be, contended that a summary notice of termination of the lease satisfies the requirement of giving a notice of default, the complaint did not state a cause of action.

In Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 228 P.3d 1289 (2010) Division II of the Washington Court of Appeals reversed this same trial court judge (Judge Tollefson) on the basis that the notices of default provided by the landlord did not comply with the lease. The Court of Appeals cited Gray v. Gregory for support.

In Mike M. Johnson, the Washington Supreme Court noted that “[t]his court, as well as the state appellate courts, has historically upheld the principle that procedural contract requirements must be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.”

In Bausch & Lomb v. Bressler and Sonomed, 977 F.2d 720 (2d Cir. 1992), Bausch & Lomb (B&L) believed that Sonomed was in default, and informed Sonomed that B&L was going to stop its performance under the contract.

Sonomed responded and claimed it had cured its earlier default, and asserted that “B&L’s refusal to purchase products from Sonomed constitutes an anticipatory breach and repudiation of the Agreement.” Sonomed demanded assurances that B&L would abide by the agreement within two days. When B&L refused to provide assurances within two days, Sonomed sued B&L. Then, 17 days after receiving the letter from Sonomed, B&L retracted its earlier repudiation, and said it would comply with the contract. Sonomed refused to accept B&L’s retraction, and declared the agreement had terminated.

The Second Circuit assumed that B&L breached the contract by refusing to perform. The Court held that even with that breach by B&L, “Sonomed committed a material breach by terminating the Agreement on two days notice to B&L in contravention of § 8.02’s

30 day notice period and by refusing to accept B&L's timely withdrawal of its alleged repudiation."¹²

Under the trial court's Findings and Conclusions, MAI, like B&L, was in default for failing to make the March 21, 2008 payment. As in Sonomed, the REPSA also required a written notice and opportunity to cure a default before it could be terminated. Like Sonomed, Malone terminated the contract without providing notice and opportunity to cure as required by the contract. And, like Sonomed, Malone breached the contract when they terminated it in such a manner, even though the other party (here, MAI) had previously breached the contract. Both Sonomed and Malone deprived the other party to the notice and opportunity to cure – i.e. to the time period during which the other party could consider whether or not its non-performance was justified.

This dispute between Malone and MAI is a good case as to why contract clauses requiring notice and an opportunity to cure are enforced. In this case, the contract had a long development period – about 18 months – before closing. (Ex. 1 §§ 3, 6, 12) During that long period, Malone was required to provide monthly invoices for his loan payments, and defendants were required to make the payments 15 days later. (Ex. 1 § 3) Also during the 18

¹² Bausch & Lomb, 977 F.2d 720, 727.

months, plaintiff MAI was required to develop the property and obtain final plat approval. (Ex. 16 & 12).

During this long period before closing, there could be all sorts of disputes over timing, performance, and/or negotiations over amendments, etc. The main purpose of requiring notice and an opportunity to cure is to give the other side notice that you consider them in breach, notice of the grounds for the alleged breach, notice that you are serious about enforcing performance of the covenant at issue, and an opportunity to cure. The notice provides a clear choice – either perform within 10 days, or the contract is terminated.

The provision requiring notice and an opportunity to cure also gives each side confidence that they have some leeway in performance of their covenants, or leeway to withhold performance as part of a negotiations over amendments, without an unexpected termination. And as in the Bausch & Lomb case, it allows a party who thinks it is justified in stopping performance to re-evaluate that opinion, perhaps with the help of counsel, in light of the information in the notice of default and during the cure period. It is, in sum, a benefit that accrues to both parties by the inclusion of the notice and opportunity to cure requirement in their agreement.

Moreover, under FOF 25 and 39, MAI was withholding the March 21 payments pending a final decision on Addendum No. 5 - and the parties were discussing Addendum No. 5 after March 21.

Then, without any notice whatsoever, Malone terminated the REPSA on May 1. (FOF 27 & 28) If Mr. and Mrs. Malone wanted to terminate those continuing discussions and terminate the contract, they first needed to comply with sections 14 and 15 and provide written notice, either via mail or fax, and a 10-day opportunity to cure.

Rather than comply with the written notice requirement, Malone (1) sent an email payment reminder before the payment was due, (2) demanded that MAI comply with “the terms of the agreement” if it wanted to terminate, (3) continued to negotiate an amendment to the REPSA, and (4) then terminated the REPSA without any notice – without complying with the terms of the agreement. The trial court erred in concluding that this was compliance with sections 14(b) and 15.

Since Mr. and Mrs. Malone unilaterally terminated the REPSA without the notice and opportunity to cure required by the REPSA, they breached the REPSA.

F. MAI DID NOT WAIVE THE REPSA REQUIREMENT OF WRITTEN NOTICE BY FAX OR U.S. MAIL.

The trial court erred in Supplemental Conclusion of Law No. 2 in finding that MAI waived the right to enforce the contract requirement regarding the manner in which a notice is to be sent. Under Washington law

a waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them. To constitute a waiver other than by express agreement, there must be unequivocal acts or conduct of the vendor evincing an intent to waive.¹³

The trial court, over objection, initially ruled that the REPSA “does not specify that notice shall be in writing.” As noted above, section 15 clearly says all notices “shall be in writing.” There was no waiver ruling in the initial findings and conclusions. Rather, the waiver ruling rose from the ashes of MAI’s Motion for Reconsideration.

In ruling on MAI’s Motion for Reconsideration, the trial court signed Supplemental Conclusion of Law No. 2, proposed by Mr. and Mrs. Malone. It added the conclusion that the “Plaintiffs waived any right to enforce any requirement of the REPSA that required Defendants to provide notice in a manner other than the notice that was provided by Defendants in this case.”

The trial court also entered Finding of Fact No. 2 addressing waiver. It provides:

¹³ Birkeland v. Houchen, 51 Wn.2d 554; 565, 320 P.2d 635 (1958).

Paragraph 14(a) of the REPSA addresses Buyer's Remedies. Paragraph 14(a) states, in part, "Buyer, at its option, may elect to waive the performance of any condition, contingency or provision in Buyer's favor set forth in this Agreement." Paragraph 14(a) further states in part, "[i]n the event Buyer fails to receive any notice or documentation required herein, Buyer shall so notify Seller and Seller shall then have ten (10) days to cure performance." After Defendants emailed Plaintiffs as set forth in Exhibit 63, the Plaintiffs did not notify the Defendants that such notice was inadequate in any fashion.

First, it is important to point out that the first sentence of Finding of Fact No. 2 is incomplete. It quotes only a portion of section 14(a) of the REPSA, and leaves out the sentence that actually adds meaning to the quoted provision. Section 14(a) actually reads: "Buyer, at its option, may elect to waive the performance of any condition, contingency or provision in Buyer's favor set for in this Agreement. Waiver of one condition, contingency or provision shall not be deemed a waiver of any other condition, contingency or provision unless expressly stated in writing." (Ex. 1)

Based on section 14(a), the trial court found that MAI was required to demand a proper notice of default from Malone, or, at least object to any improper notice, and that a failure to object to an

improper notice, is a waiver of the requirement to provide notice in a particular manner. This is ridiculous.

The REPSA requires written notice, faxed or mailed, after a missed payment, and a cure period running from the date of notice (plus 3 days if mailed). The REPSA does not require MAI to object to emails sent before the payment was due just in case the other side might later argue that such emails were a written notice of a missed payment required under the contract.

The implication from the finding and the waiver conclusion is absurd. It would mean that any time a notice is sent at the wrong time, or in the wrong manner, the burden shifts to the other party to point out the flaw or face a conclusion that they waived the right to enforce the notice requirements of its contract relating to the manner in which notices are sent.

Moreover, when read in full, rather than the selective section quoted in the supplemental finding, section 14(a) allows MAI, "at its option" to "elect" to waive provisions in its favor, and if it so elects, it is not a waiver of any right to pursue any other default. This simply means that MAI is not required to enforce every covenant under the REPSA, and that if it "elects" not to enforce one, it is not a waiver or enforcing others. It does not mean that MAI is required to enforce

every covenant or face a waiver. Mr. and Mrs. Malone, and the trial court, by interpreting section 14(a) as supporting a waiver any time MAI fails to inform Malone of a defect in Malone's performance, have interpreted section 14(a) to mean exactly the opposite of what it says.

Any reliance on the last sentence of section 14(a) is also misplaced. It says: "In the event Buyer [MAI] fails to receive any notice or documentation required herein, Buyer shall so notify Seller [Malone] and Seller shall then have ten (10) days to cure performance."

This is a provision that, perhaps, could be more specific, but it clearly does not address notices of default and opportunities to cure required by section 14(b). How would MAI know that Malone considered it in default and intended to enforce the default such that MAI could provide notice of the lack of notice, or even notice of an improperly sent notice? This is particularly true where, as here, the emails sent were sent before the payment was due, and did not mention a default or an opportunity to cure. Was MAI supposed to send a notice in response to any correspondence that discussed performance issues, just in case Malone might later claim that the

correspondence was a notice of default, albeit an improperly sent notice?

The whole reason for including a notice and opportunity to cure is to require the other party to provide notice of what it considers to be a default and that it intends to enforce that issue, and that the notice be sent in the manner required by the contract so that it is most likely to be received. It is absurd to think that the parties would require a notice and opportunity to cure the failure to give a notice and opportunity to cure, or to give notice of an improperly sent notice.

Even if the provision could be interpreted in that absurd manner, it does not save Mr. and Mrs. Malone. Mr. and Mrs. Malone failed to give the contractually required notice and opportunity to cure under section 14(b). Even if MAI was required to provide Malone with written notice of Malone's failure to provide proper notice, MAI's failure would not justify Malone's termination on May 1, 2008. Malone still terminated the contract without providing notice and an opportunity to cure, and by doing so, they breached the REPSA.

At this point it is also important to pause and be clear about what the trial court held MAI to have waived. Supplemental

Conclusion of Law No. 2's waiver finding only addresses a waiver of the "manner" in which Mr. and Mrs. Malone were to provide the contractually required notices. It says "MAI waived any right to enforce ... notice in a manner other than the notice that was provided by defendants." In other words, the trial court did not hold that Mr. and Mrs. Malone waived the right to notice of a missed payment and an opportunity to cure, only that they waived the right to receive the notice in the manner required by the REPSA (mail or fax) and thus, email was a sufficient manner for providing notice.

There is no finding of fact to support this waiver conclusion. Nothing in the findings of fact shows any "unequivocal acts or conduct" of MAI that were "inconsistent with any other intention than to waive" the right to enforce the manner in which notices were to be sent.

It is also important to note that even if this waiver conclusion is correct (which, as just discussed above, it clearly is not), upholding this conclusion would not affect MAI's challenge to Supplemental Conclusion of Law No. 1 on the basis that Exhibit 63 is not proper notice under section 14(b) (see section B-1 above). If this Court agrees with MAI and holds that Exhibit 63, regardless of the manner in which it was sent, is not sufficient notice under 14(b),

then it must reverse, regardless of whether the trial court erred in its Supplemental Conclusion of Law No. 2.

G. THE PROPER REMEDY IS TO REVERSE THE TRIAL COURT AND REMAND FOR ENTRY OF A JUDGMENT IN FAVOR OF MAI FOR \$65,805.

Mr. and Mrs. Malone's termination of the REPSA on May 1, 2008, done without providing written notice and opportunity to cure as required by section 14(b) of the REPSA, was a breach of the REPSA. This Court should remand to the trial court for entry of a judgment in favor of MAI in the amount of \$65,806.05. That is the amount paid by MAI toward the purchase price (Exs. 11-16) and is the damages sought at trial that were caused by Malone's improper termination.

H. THE FEE AWARD TO MALONE MUST BE REVERSED AND MAI IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL.

The trial court awarded Malone their attorneys' fees and costs under Section 17(a) of the REPSA. If MAI prevails on this appeal, the fee award must be reversed as well since Malone will no longer be the prevailing party.

Additionally, MAI is entitled to fees on appeal. Pursuant to RAP 18.1, MAI seeks an award of its attorneys' fees and costs

against Malone incurred on appeal as REPSA section 17(o) expressly provides for their recovery.

VI. CONCLUSION

This Court must reverse the trial court and remand for entry of a judgment in favor of MAI. Although MAI missed the March 2008 payments that were due on March 21, Mr. and Mrs. Malone never provided written notice of default and an opportunity to cure. Although Mr. and Mrs. Malone had earlier demanded that if MAI wanted to terminate the REPSA, it had to follow the REPSA, Mr. and Mrs. Malone's termination was not done in compliance with the REPSA. Mr. and Mrs. Malone terminated the REPSA without providing the required written notice of default and opportunity to cure. When Mr. and Mrs. Malone terminated the REPSA, they retained the deposits paid by MAI. This Court must remand for entry of a judgment in the amount of those deposits, plus interest and attorneys' fees.

DATED this 20th day of September, 2010

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By 
Matt Adamson, WSBA #31731
Attorneys for Appellants

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I, Patty Schultz, declare as follows:

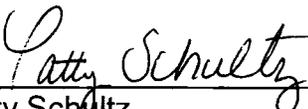
BY 
DEPUTY

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.
2. On September 20, 2010, I deposited with U.S. Mail a copy of the foregoing Appellants' Opening Brief to be served upon all counsel of record at the following address:

Mr. Stuart C. Morgan
Eisenhower & Carlson, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: September 20, 2010, at Seattle, Washington.


Patty Schultz