



TABLE OF CONTENTS

I. OVERVIEW: SUMMIT FUNDAMENTALLY MISCONCEIVES THE ESSENTIALS OF A PURCHASE AND SALE AGREEMENT AND THE NATURE OF AN “EARNEST” MONEY AS SECURITY TO SELLER FOR A “BUYER’S OBLIGATIONS” ..... 1

II. ARGUMENT IN REPLY TO SUMMIT’S RESPONSE..... 6

A. Summit’s “meeting of the minds” contention falls short of invalidating the entire agreement on several legal grounds..... 6

1. Neither Summit nor its transaction counsel made Moore’s initials opposite the “optional” provisions a condition of Summit’s assent to the remaining essential provisions of the Agreement. .... 6

2. A parties’ statement that it would not have entered into contract several years after maintaining in pleadings and declarations that it had entered into a contract requires a clear explanation of the inconsistency and, failing that, does not permit a court to choose which version of a parties’ testimony it will adopt..... 7

3. Even assuming the invalidity of the ‘optional’ provisions, the essential provisions remained in place and should be enforced. .... 9

4. The severability clause addresses invalidity arising from any cause and preserves the “essential” agreement against the alleged failure of the “optional” provisions..... 10

5. Washington case law invalidating purchase agreements for non-compliance with statutory legal description requirements is inapplicable. Even in such cases, the courts have acknowledged “earnest money” is for the

	protection of the seller and is returned to seller when an agreement is held invalid.....	11
6.	Neither public policy declared by the legislature nor language in the Agreement requires that the entire Agreement be thrown out because particular provisions are not initialed.....	13
7.	Summit distorts Moore deposition and trial testimony to support it's assertion that Moore was not bound by the "optional" provisions he had offered and Summit accepted. Moore's deposition and trial testimony are consistent and establish that he had no quarrel with any of the optional provisions.....	15
B.	Financing Contingency.....	18
1.	Summit's alternative claim that it unconditionally terminated the Agreement in accordance with Section 7 is not supported by the language of that section. Summit's conduct and representations in the immediate aftermath of July 24, 2007 render it estopped from making such a claim. The claim is also barred by principles of good faith and fair dealing imposed upon any party purporting to exercise rights under a contract provision. ....	18
2.	Summit satisfied the financing contingency when it obtained financing, and it became obligated to close without regard to whether it satisfied the conditions Timberland required.....	23
3.	The "feasibility" contingency provided by Section 6 was not timely exercised by Summit, and the Court's refusal to make a finding for Summit on an issue Summit had the burden to prove implicitly rejects it. ....	24
4.	Summit's suggestion that a post-execution discussion of supplemental and collateral	

	agreements establishes an abandonment of the comprehensive Purchase and Sale Agreement is a “red herring.” .....	25
III.	ARGUMENT IN RESPONSE TO CROSS APPEAL .....	26
	A. The Court’s award to Moore of a portion of the costs for obtaining the Phase I and 2 environmental clearances is less than what Summit was required to pay under Section 7 of the Agreement, and no cause for complaint by Summit. These costs should have become “deposits” in addition to the “earnest money”. Summit also failed to make other agreed reimbursements.....	26
	B. Denial of interest on the earnest money was proper. ....	27
	C. The trial court did not abuse its discretion in awarding Summit less than all of its claimed attorney fees. ....	27
	D. Moore is entitled to reasonable attorney fees at trial and on appeal.....	28
IV.	CONCLUSION.....	29

## APPENDICES

APPENDIX A - Declaration of Margaret Langston dated March 17, 2007 (Ex. 67)

APPENDIX B - Testimony of Margaret Langston (VRP 4/28/11, pg 102, line 21 - pg 104, line 22; pg 105, line 8 - pg 106, line 13; pg 112, line 24 - pg 114, line 6)

## TABLE OF AUTHORITIES

### Cases

<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 569, 807 P.2d 356 (1991).....	21
<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wn.2d 514, 524, 22 P.3d 795 (2001).....	25
<i>Geonerco, Inc. v. Grand Ridge Properties IV LLC</i> , 146 Wn.App. 459, 465, 191 P.3d 76 (2008) .....	1, 9, 11
<i>Home Realty Lynnwood, Inc. v. Walsh</i> , 146 Wn.App. 231, 237, 189 P.3d 253 (2005).....	11, 12
<i>Ives v. Ramsden</i> , 142 Wn.App. 369, 397; 174 P.3d 1231 (2008).....	27
<i>Jones v. State</i> , 170 Wn.2d 338, 370, 242 P.3d 825 (2010).....	7
<i>Keystone Land Development v. Xerox Corp.</i> , 152 Wash.2d 171, 94 P.3d, 948 (2004).....	14
<i>Klinke v. Famous Recipe Fried Chicken, Inc.</i> , 94 Wn.2d 255, 259, 616 P.2d 644 (1980).....	20, 21
<i>M. A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 584, 998 P.2d 305 (2000).....	17
<i>Marshall v. AC &amp; S, Inc.</i> , 56 Wn.App 181, 185, 782 P.2d 1107 (1989) .....	7, 11
<i>Sea Van Investments Association v. Hamilton</i> , 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).....	6, 7, 11
<i>Short Clove Associates, Inc. v. Ilana Realty, Inc.</i> , 154 B.R. 21, 26-29; 1993 U.S. Dist. Lexis 6305 (S.D.N.Y. 1993).....	16, 17

**Statutes**

RCW 64.04.005 .....13

**Other Authorities**

Restatement Second, Contracts, § 61 (1981) ..... 6

**Rules**

RAP 18.1.....28  
RPC 3.3(a)(1)..... 7  
RPC 3.7(a) ..... 8  
RPC 4.1(a) .....21

**Treatises**

18 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON  
PRACTICE: REAL ESTATE: TRANSACTIONS § 16.1, at 215-216 (2004)  
..... 1

I. OVERVIEW: SUMMIT FUNDAMENTALLY MISCONCEIVES THE ESSENTIALS OF A PURCHASE AND SALE AGREEMENT AND THE NATURE OF AN “EARNEST” MONEY AS SECURITY TO SELLER FOR A “BUYER’S OBLIGATIONS”

Summit Uniserv Council (Summit) argues, at page 2 of its Brief, that the comprehensive Purchase and Sale Agreement (Agreement- Ex. 3 and Appendix A, Appellant’s Brief) is a nullity since “no actual agreement was reached between the parties because they never agreed upon a number of material terms”. [Emphasis supplied] Thus, Summit would erase all of the obligations it undertook in the Agreement and largely fulfilled in the period prior to the “scheduled closing”, including financing of the purchase price. Summit argues the signed Agreement was merely an exchange of “offers”.<sup>1</sup>

By June 20, 2007 the parties had agreed on the “essential” terms of a comprehensive purchase and sale agreement, albeit Summit later raised issues about the financing contingency and “optional” provisions. This Agreement was not designed to be an

---

<sup>1</sup> “Purchase and sale agreements, also called ‘earnest money agreements,’ are contracts ‘whereby essentially an owner promises to convey, and the purchaser to pay. . . for real estate.’ (WPI). These agreements do not themselves convey title; instead, purchase and sale agreements are promises to convey title in the future.” 18 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 16.1, at 215-216 (2004). See *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn.App. 459, 465, 191 P.3d 76 (2008). This essence of all such agreements is unambiguously set forth at Paragraph 2(a) of the Agreement. “Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Unit on the Scheduled Closing Date. . . in accordance with the terms hereof.” These are bi-lateral obligations, not mere offers.

ongoing negotiation of “offers”. Rather it is a classic Contracts 101 contract of mutual promises with Buyer’s “earnest” money specified to be “security for the performance of Buyer’s obligations.” (Ex. 3, § 4)

Summit’s Answer to Ticor and Cross-Claim against Moore alleged in April, 2008 at Section 4, page 2 (CP 29) and Moore’s responsive pleading at Section II, page 2 (CP 58) admitted that:

“Summit and Moore entered into a Purchase and Sale Agreement for certain real property located in Puyallup, Washington, a copy of which is attached as Exhibit ‘A’.”

In November, 2008, Summit’s President, with guidance from counsel, submitted a Declaration attaching a copy of the Agreement with Moore’s uninitialed optional provisions and attested it was an agreement. (Ex. 66, § 3) That remained the official state of the pleadings for over three years, through the close of discovery and two trial date postponements by the court, until Summit filed an amended pleading on the day before trial.<sup>2</sup> Authorized by the court’s *sua sponte* order, Summit alleged in substance that the Agreement was a nullity because Moore had not initialed three “optional” provisions, and Summit would not have entered into the Agreement if these provisions were unenforceable. (CP 138) However, Summit continued to assert,

---

<sup>2</sup> Summit correctly asserts the Civil Rules permit inconsistent pleading. Whether this amendment contradicting Summit’s prior submissions was properly granted presents a different issue.

in the alternative without detailing the language of the provision, that it had “terminated” the contract on July 23, 2007 under the financing contingency, Section 7 of the Agreement. (CP 138)

Only a month before trial commenced in April, 2011, Summit made a second motion for summary judgment supported by a sworn declaration from the Summit contract signatory paraphrased as follows:<sup>3</sup>

1. On June 8, 2007 Summit signed a draft purchase and sale agreement and initialed all three optional provisions “with the express intent to include those paragraphs in the PSA.” (CP 67, § 3)

2. Moore had not signed or initialed the June 8th purchase and sale agreement, but “on June 13th he submitted a signed PSA reflecting increased footage in the unit requested by Summit.” The Agreement signed by Moore on June 13<sup>th</sup>, like the June 8<sup>th</sup> draft purchase and sale agreement, lacked Moore’s initials on the interior pages, but Summit again signed and initialed the Agreement and optional provisions on June 20, 2007. (CP 67, §§ 4 and 5)

3. “We expected that Moore would agree to the three alternate paragraphs as they had been in all the draft documents and he had never disputed those paragraphs. Since we heard nothing from

---

<sup>3</sup> A complete copy of Margaret Langston’s March, 2011 Declaration is attached as Appendix A.

Moore after we delivered the PSA . . . , we always believed those terms were part of the PSA.” (Ex. 67, § 6)

At trial, however, Summit’s counsel elicited testimony from the declarant, without explanation or acknowledgment of the contradiction of the declarant’s earlier declaration, that she had received and signed only the signature page on June 20, 2007. (VRP 4/28/11, pg 102, line 21 – pg 104, line 22; pg 105, line 8 - pg 106, line 13; pg 112, line 24 – pg 114, line 6, and Appendix B).

The trial court apparently missed the major contradiction (CRP 4/28/11, pg 114, lines 14-17): the Summit signatory, in a declaration prepared by counsel barely a month before trial, stated that she had also initialed the optional provisions, appearing only on interior pages 4 and 10 of Exhibit 3. (Ex. 67, § 5) Yet she testified at trial that she had received by fax only a single page of the Agreement, the signature page 15, on June 20<sup>th</sup>. (VRP 4/28/11, pg 100, lines 17-22; pg 102, lines 21-25 to pg 103, lines 1-10)

Had Summit’s signatory initialed the optional provisions on June 20<sup>th</sup> as she declared, and on June 8, and maybe also June 12 as she testified, she would have seen Moore’s initials were absent. She and Summit’s counsel were fully capable of ascertaining that his initials were missing between June 8 and June 20 when the Agreement was

signed by Summit. Indeed, on June 18 Moore's counsel sent Summit's counsel an email marked "High" importance, attaching both a clear and redlined copy of the Agreement Moore had signed for his review. (Ex. 53) It is also clear from cross-examination that the presence or absence of Moore's initials was not discussed at all with the dual agent Ethan Offenbecher on June 20. (VRP 4/28/11, pg 114, lines 1-6)

On the first page of the Agreement, after the typed word "June", a handwritten "20" is inserted. Similarly, on the last page is a handwritten entry "20" after a typed "June" and before a typed "2007". The Agreement is initialed in handwriting on two widely separated pages, pages 4 and 10, manifesting Summit's acceptance of the "optional" provisions offered by Moore. Only by ignoring the handwritten date on the first page, the initials on several intervening pages, and Summit's pleading and sworn declarations can it be credibly argued that Summit and its counsel were unaware of Moore's missing initials. If such a proposition is to be plausibly maintained, Summit had the burden and the obligation to objectively communicate to Moore that he must also initial the optional provisions to complete the Agreement.

II. ARGUMENT IN REPLY TO SUMMIT'S RESPONSE

- A. Summit's "meeting of the minds" contention falls short of invalidating the entire agreement on several legal grounds.

There are several independent and sufficient answers to Summit's "meeting of the minds" proposition:

1. Neither Summit nor its transaction counsel made Moore's initials opposite the "optional" provisions a condition of Summit's assent to the remaining essential provisions of the Agreement.

There is no evidence in the record that Summit or its counsel, on June 8, 2007 or any time thereafter, communicated to Moore or Moore's transaction counsel that Summit's signature on the Agreement on June 8, June 12 or June 20 was conditioned upon Moore's initials opposite the optional provisions. Even if Summit had requested that Moore initial each of the optional provisions, Summit's signature at the end of the Agreement is an acceptance of the Agreement so long as Summit or its counsel did not objectively communicate that initialing by Moore was a condition of Summit's acceptance. See Restatement Second, Contracts, § 61 (1981),<sup>4</sup> approved in substance by *Sea Van Investments Association v.*

---

<sup>4</sup> "An acceptance which requests additional terms is not invalidated unless it is made to depend on assent to those terms."

*Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). Summit does not address the Restatement in its Brief.

2. A parties' statement that it would not have entered into contract several years after maintaining in pleadings and declarations that it had entered into a contract requires a clear explanation of the inconsistency and, failing that, does not permit a court to choose which version of a parties' testimony it will adopt.

As the Supreme Court declared in *Jones v. State*, 170 Wn.2d 338, 370, 242 P.3d 825 (2010), in adopting the holding in *Marshall v. AC & S, Inc.*, 56 Wn.App 181, 185, 782 P.2d 1107 (1989):

“When a party has given clear answers to unambiguous . . . questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts without explanation, previously given clear testimony.”

When testimony is given in a sworn declaration prepared by counsel, who was both transaction counsel and trial counsel, and he later elicits trial testimony at significant variance with the earlier declaration, a more stringent application of *Jones* is compelled.<sup>5</sup> As argued in Appellant's Opening Brief, the late injection of the “meeting of the minds” issue deprived Moore and his counsel of any opportunity to conduct pre-trial discovery on this issue and thus prejudiced

---

<sup>5</sup> See also RPC 3.3(a)(1).

Moore's presentation of his response.<sup>6</sup> If the *Jones, supra*, holding is applied, the unexplained inconsistency between the witness' sworn declaration and her trial testimony precludes a finding and conclusion based on a choice between contradictory versions of a key event by the same witness, especially on an issue upon which the proponent had the burden of proof.

The trial court's finding no. 7, that only a signature page was signed by Summit on June 20, 2007, when the first page of the Agreement contains a handwritten entry of June "20" in the same handwriting, and pages 4 and 10 were initialed by Summit on June 20<sup>th</sup> according to the witness' earlier sworn declaration, is directly contrary to the evidence.

Summit's President, who assumed office in June, 2007 and acted as such through October, 2007, also submitted a sworn Declaration on November 6, 2008 stating:

"On or about June 20, 2007 Summit and Moore entered into a Purchase and Sale Agreement to acquire Unit A of the project (the 'Agreement') and Summit deposited \$61,522 in earnest money in escrow with Ticor Title. A true and correct copy of the Purchase and Sale Agreement for Tenth & East Main Commercial Condominium is attached as Exhibit A." (Ex. 66, § 3, lines 15-20)

---

<sup>6</sup> The new contention implicated Summit's counsel's role as transaction counsel and thus a potential witness [RPC 3.7(a) and gave rise to attorney client privilege issues.

Exhibit A attached to that declaration lacks Moore's initials on the "optional" provisions, pages 4 and 10, but clearly manifest Summit's assent to them. (Ex. 3)

3. Even assuming the invalidity of the 'optional' provisions, the essential provisions remained in place and should be enforced.

In *Geonerco supra*, at pg 465, this court upheld a summary judgment enforcing a purchase and sale agreement against a contention that there was no "meeting of the minds," ruling as follows:

"An enforceable contract requires a 'meeting of the minds' on the essential terms of the parties' agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wash.App. 576, 579, 675 P.2d 1266 (citing *Peoples Mortgage Company v. Vista View Builders*, 6 Wash.App. 744, 496 P.2d 354 (1972)), review denied, 101 Wash.2d 1010, 1984 WL 287410 (1984). The court may consider trade usage in course of dealing between parties to interpret a contract's terms, even absent any ambiguity in its terms. *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wash.2d 428, 434, 47 P.3d 940 (2002) (citing RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981))."

"Optional" provisions by definition are not "essential" provisions. Summit alone bears the responsibility for communicating to Moore that his initials opposite the "optional" liquidated damages provision was a condition to its acceptance of all other provisions in

the Agreement. The signature of both parties on the Agreement obligated both parties to the “essential” provisions of the Agreement.

4. The severability clause addresses invalidity arising from any cause and preserves the “essential” agreement against the alleged failure of the “optional” provisions.

As noted in Appellant’s Opening Brief, the Agreement explicitly addressed the possibility that some provision or portion might be declared unenforceable and provided:

“Should any provision or portion hereof be declared invalid or in conflict with any law . . . the validity of all other provisions and portions hereof shall remain unaffected and in full force and effect.” [Emphasis supplied] (Exhibit 3, and Appendix A to Opening Brief, pg 12 § 22)

When courts are faced with a decision to invalidate all or simply a portion of a contract, the court should respect and enforce this provision rather than invoke the radical remedy of nullifying the entire contract, especially when both of the parties, by their course of conduct, were implementing the other “essential” provisions of the Agreement until the anticipated closing date. As the trial court noted in its oral decision, the parties acted as though the Agreement “was valid in its entirety”. (VRP 4/5/11, pg 4, lines 2-5).<sup>7</sup> One party’s statement, years after formally acknowledging in pleadings and declarations the

---

<sup>7</sup> “The fact . . . all of you were exchanging emails regarding an extension . . . did indicate you were considering it valid in its entirety.”

existence of the Agreement, does not provide a reasonable basis for a trial court to reach a different conclusion based on Summit's self-serving claim that it would not have signed the Agreement had it seen that Moore had not initialed a bi-lateral limitation of liability. *Marshall v. A. C. & S, Inc., supra*, at page 185.

5. **Washington case law invalidating purchase agreements for non-compliance with statutory legal description requirements is inapplicable. Even in such cases, the courts have acknowledged "earnest money" is for the protection of the seller and is returned to seller when an agreement is held invalid.**

Summit's reliance on *Sea Van Investment Association v. Hamilton, supra*, centers on a statutory requirement pertaining to legal descriptions described by the Court in *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 237, 189 P.3d 253 (2005) as "the strictest in the nation". Adequacy of legal description was not an issue raised or litigated in this case. Many cases in this line of cases involved appeals from summary judgment where the courts determined that a fuller development of the factual record by the trial court was required before imposing the harsh and radical result of invalidation of the entire contract.

This court, in *Geonerco, Inc. v. Grand Ridge Properties IV, LLC, supra* at page 467, however, had no difficulty upholding a summary

judgment rejecting a claim that there was no “meeting of the minds.” The Court emphasized the “course of dealing” between the parties in a project in the process of redevelopment like the one at bar. The Court ascertained that the parties treated the Agreement as enforceable prior to litigation.

In *Home Realty Lynnwood, Inc. v. Walsh*, *supra* at page 240, the court discussed whether even a statutory violation entitled a Buyer to recovery of its earnest money:

“Washington’s rule is that, even if a contract for the sale of land is unenforceable because it does not satisfy the statute of frauds, a purchaser may not obtain restitution of its earnest money if the vendor is ready, willing and able to perform as agreed.’ *18 Stoebeck & and Weaver, supra*, at 250 (citing *Schweiter v. Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961) and *Dubke v. Kassa*, 29 Wn.2d 486, 187 P.2d 611 (1947)). This is the general rule followed by a great majority of other jurisdictions. See 169 A.L.R. 187 (2008). The rationale is that ‘a purchaser should not be allowed to use his own breach to escape his contractual obligations—in effect to have an election not to perform what he has agreed to do.’ *18 Stoebeck & Weaver, supra*, at 250.

It has been said that the purpose of the statute, so far as it relates to the sale of land, is to protect the vendor only, and that the vendee, seeking to recover purchase money, cannot set up the statute against a vendor who is ready and willing to perform, and the contract cannot be considered void so long as the vendor, for the protection of whose rights the statute exists, is willing to treat and consider the contract good.”

There was never a claim or allegation by Summit that Moore was in breach of any of his many reciprocal obligations under the Agreement, all of which had been substantially completed prior to Summit's decision to walk away from the contract. Summit, by contrast, was found by the Superior Court to have walked away from additional monetary obligations it undertook to pay, including construction upgrade costs and reimbursement for the cost of obtaining the environmental clearance required by Summit's lender. (Finding of Fact No. 5, CP 169, lines 2-8).

6. Neither public policy declared by the legislature nor language in the Agreement requires that the entire Agreement be thrown out because particular provisions are not initialed.

Summit, at page 10 of its Brief, accurately notes that the predecessor statute requiring initialing of a liquidated damage provision had been judicially construed to invalidate an entire purchase and sale agreement in a residential context, where parties are often unrepresented by counsel. RCW 64.04.005, the current statute enacted in 2005, reflects a legislative determination that neither residential nor commercial real estate purchase and sale agreements are to be invalidated on the basis of the absence of initials tied to a particular liquidated damages liability limitation. See

Appendix B attached to Moore's Opening Brief for the legislative history underlying the current statute.

While parties could hypothetically agree that an entire contract is to be deemed invalid if a particular provision is not initialed, no language remotely requiring that extreme result is in this Agreement. On the contrary, the Agreement has a severability provision preserving all remaining terms and rendering them fully enforceable. Indeed, the language of the Agreement, quoted by Summit in its Brief at pages 10 and 11, specifically limits its operation to "the terms of this section". [Emphasis supplied]

Nothing in *Keystone Land Development v. Xerox Corp.*, 152 Wash.2d 171, 94 P.3d, 948 (2004) cited by Summit holds that a lack of initials on a specific provision invalidates an entire contract. Rather, the court there enforced a condition to final agreement, that further review and approval of terms would be required before a draft contract would become a final agreement. Summit's transaction counsel required no such precondition prior to Summit's final execution of the Agreement, even though Summit looked at the Agreement without Moore's initials on the "optional" provisions on June 8, perhaps again on June 12, on or around June 18 after receiving the email from Moore's counsel, and again on June 20.

7. **Summit distorts Moore deposition and trial testimony to support its assertion that Moore was not bound by the “optional” provisions he had offered and Summit accepted. Moore’s deposition and trial testimony are consistent and establish that he had no quarrel with any of the optional provisions.**

Summit argues, at pages 12-13 of its Brief, that Moore, at his deposition and in his trial testimony, contended the absence of his initials on the limitation of liability clause permitted him to pick and choose which portions of the Purchase and Sale Agreement could be enforced, and that he was not bound by the “optional” provisions.

Although Moore’s deposition was published but not admitted as evidence at trial, Summit’s quotation from it unmistakably establishes that Moore expressed no legal opinion whether the liquidated damages limitation was enforceable or unenforceable. Moore’s deposition and trial testimony establish that he had “no problem” with any of the “optional” provisions. (VRP 4/28/11, p.31)

Moore in his trial testimony (VRP 4/28/11, pgs 31-38) and in his Opening Brief on appeal, maintained that, had Summit relinquished the earnest money at the time it decided to abandon the Agreement in October, 2007, that would have been as he testified at trial “the end of it” with or without his initials opposite the provision. (VRP 4/28/11; pg 86, lines 17-25, 87, line 1) By that time, however, Summit had walked away from the contract without paying monies advanced by

and owed to Moore for construction upgrades and environmental assessments. The assessments were required by Summit's bank under Paragraph 7 of the Agreement requiring that "Buyer shall pay all costs associated with financing. . ." Pursuant to Paragraph 4 of the Agreement, the money deposited by Summit was specifically stated to be "security for Buyer's obligations under this agreement. . ."

The court in *Short Clove Associates, Inc. v. Ilana Realty, Inc.*, 154 B.R. 21, 26-29; 1993 U.S. Dist. Lexis 6305 (S.D.N.Y. 1993), held that a Buyer who fails to relinquish an earnest money deposit to the Seller without proof that the Seller is in breach of contract has abrogated the contract, and renders itself liable for the carrying charges of interest, real property taxes, and maintenance costs that relinquishment of the earnest money would have otherwise mitigated. Summit does not address this case in its Brief.<sup>8</sup>

Summit dismissed Moore's proposal for alternative dispute resolution<sup>9</sup> (Ex. 64) Only then did it become necessary for Ticor, as

---

<sup>8</sup> It is correct as noted at Page 13 of Respondent's Brief that Moore's counsel observed "Moore never did approve this section [Paragraph 14] and is therefore not bound by any limitation on damages. CP 487. A trial brief, like opening statement, may contain various assertions which are not borne out by the evidence.

<sup>9</sup> The court should note arbitration was one of the "optional" provisions Summit had agreed upon. There is no small irony that Summit rejected one of the optional provisions, it now argues was material and essential to the validity of the entire agreement.

agreed closing agent and escrowee, to take itself out of the dispute and interplead the funds.

A party seeking shelter from liability beyond liquidated damages has the obligation under *Short Clove, supra*, to release the deposit to a non-breaching party, particularly if it wishes the protection of a liability limitation. If it fails to pay the liquidated or stipulated damages and forces the non-breaching party into expensive litigation, it forfeits the protection of that limitation. The holding in *Short Glove* basically requires such a party to “use it or lose it”.

Summit's insistence that Moore was not bound by Summit's acceptance of the “optional” provisions, including the limited liability provision, became immaterial when Summit refused to invoke the shelter by relinquishing the deposit, breached its agreement to reimburse Moore for construction upgrades and financing costs, and otherwise breached the Agreement without allegation or proof of any breach by Seller. *M. A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 584, 998 P.2d 305 (2000), cited in Moore's Opening Brief, determined as a matter of law that mutual assent to a limited liability limitation existed on facts far less compelling than those here. Summit does not address this case in its Brief.

Whether Seller had or had not assented to the “optional” provisions is ultimately immaterial. Summit’s failure to avail itself of limited liability by relinquishing the “earnest money,” its failure to make Moore whole for the costs it had agreed to reimburse and for which the deposits were specified to be “as security” for Buyer’s performance, and the absence of proof of any statutory violation or alleged breach by Moore renders the question moot. Summit’s seemingly counterintuitive argument, at pages 10-11 of its Brief, insisting that Moore had not assented to the optional provisions, is implicit recognition of the weakness of its alternative claims under the contract.

**B. Financing Contingency.**

1. Summit’s alternative claim that it unconditionally terminated the Agreement in accordance with Section 7 is not supported by the language of that section. Summit’s conduct and representations in the immediate aftermath of July 24, 2007 render it estopped from making such a claim. The claim is also barred by principles of good faith and fair dealing imposed upon any party purporting to exercise rights under a contract provision.

With minimal reference to any of the detail set forth in Section 7 of the Agreement and relying solely on a factually tortured interpretation of two emails sent by Summit’s counsel to Moore’s counsel on July 24, 2007, Summit contended and the trial court

concluded that Summit “terminated” the Agreement. This “interpretation” is refuted by Summit’s conduct following the alleged “termination”, and is not in accord with the language of Section 7.

The financing provision of the Agreement is specific and provides:

“7. FINANCING. Buyer’s obligation to purchase the unit pursuant to the agreement is conditioned on Buyers obtaining financing for a portion of the purchase price. The following provision applies to the agreement: Buyer shall apply for financing within three (3) days after mutual execution of the agreement. Buyer shall have until forty-five (45) business days after mutual execution of the agreement to provide Seller with written notice that Buyer’s financing contingency has been satisfied or waived along with a copy of the approval of financing from Buyer’s lender. If Buyer has not, within forty-five (45) business days of mutual acceptance given notice that Buyer is unable to obtain financing, then this financing contingency shall be deemed waived. If Buyer gives notice that Buyer is unable to get financing within the above-mentioned time frame then, unless extension is granted by Seller, this offer shall terminate and the earnest money shall be returned to Buyer.” [Emphasis supplied]

Following Summit’s emails of July 24, Moore offered open extensions to enable Summit to obtain financing. On August 2, 2007, nine days after the alleged “termination”, Summit’s transaction counsel, Mark Roberts, sent an email entitled “Summit Amendment to PSA” to Moore’s transaction counsel, Erica Baurecht, with copies to the Summit principals, stating as follows:

“I want to be fair to Bill and not set the date any further out than is necessary. As we discussed, Summit is very excited about this purchase and is looking forward to closing. However, until we have the loan funded, we are stuck.

The soonest we can meet with the bank to confirm they have everything is August 13. I understand that the results of the Phase II will be available by August 16. We will then immediately provide that to the bank. If they can stick to their 7 business days timing, we should know by the last week of August if they will fund the loan. So I would think we will need to extend the contingency period to August 31. Then it will be a matter of getting the closing documents together and closing, which should not take very long.” (Ex. 58)

This is hardly consistent with a claim that the financing contingency had been exercised, and is certainly not a “notice that Buyer is unable to get financing”. No reasonable person would conclude a lawyer that claimed to have “terminated” per the financing contingency on July 24 would state his client “is looking forward to closing” nine days later. Indeed, Summit did obtain a financing commitment, and sent to the Bank both its acceptance of the commitment and its \$5,000 commitment fee on September 20, 2007. (Ex. 63)

The only reasonable interpretation of Summit’s communication of August 2 is that it was undertaking, implicitly or explicitly, to satisfy the Section 7 financing contingency and proceed to closing as contemplated by the Agreement. *Klinke v. Famous Recipe Fried*

*Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980) holds that in such circumstances a party undertaking an action will not be heard to later deny any obligation to proceed with that action to the other parties' detriment. Also as noted in *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991), action undertaken under an express contract provision must also accord with the legally implicit obligation of good faith and fair dealing.

The email of August 2 from Summit's counsel specifically assured that Summit will act in a manner "fair" to Seller, assuring actions would be taken to provide as quick a closing as possible, and that only the uncertainty of how long this might take prevented it from setting a specific date for closing the purchase. This was followed by an August 10 email promising "to try to firm up when the loan will be funded and a closing date." (Ex. 10) There was no hint of a need for further negotiations. These assurances were consistent with Summit's obligation of good faith and fair dealing.<sup>10</sup> Later efforts to convert the July 24 emails into an unconditional notice of inability to obtain financing were clearly inconsistent with this obligation.

Likewise, if Summit insists, as it has at pages 10 and 11 of its Brief, that Moore is not bound by the liability limitation, the question

---

<sup>10</sup> See also RPC 4.1(a).

arises why Moore should resist. Summit's August, 2007 decision to proceed with the purchase and sale and closing<sup>11</sup> renders Moore's assent to the "optional" provisions irrelevant.

Once Summit obtained an acceptable financing commitment, the operative portions of the Agreement, Sections 2(a) and 1(k), set in motion its obligation to close within 10 business days. This Summit did not do, thereby also setting in motion the provisions of Section 8 which provides as follows:

"If escrow does not close on the scheduled closing date referred to above due solely to Buyer's default, escrow holder is hereby authorized and instructed to debit or charge Buyer and credit Seller carrying charges at the rate of \$200 per day from the scheduled closing date to the date that Buyer's funds are disbursed by Buyer or Buyer's lender to Seller or the date that the deed transferring title to Buyer is recorded, whichever first occurs."<sup>12</sup>

After Summit initiated its suit to recover the entire deposit, Moore's cross-claim alleging Summit's default rendered Summit liable in accordance with Section 30 of the Agreement, which provides that Moore shall have those remedies provided in this Agreement in addition to all other remedies.

---

<sup>11</sup> See Court's Oral Decision, VRP 5/11/11, pg 4, lines 1-7.

<sup>12</sup> The carrying charges of \$200 per day assessed for failure to close on the Agreement closing date is a liquidated damage provision covering the variables of real estate taxes, maintenance charges, mortgage, interest and utility bills. It is not a supplement to, but an alternate for those charges.

2. Summit satisfied the financing contingency when it obtained financing, and it became obligated to close without regard to whether it satisfied the conditions Timberland required.

Summit argues that Moore did not fulfill all of the conditions of the Timberland Bank commitment dated September 6, 2007, which Summit had accepted on September 20, 2007. (Summit Brief, pgs 23-24) The financing provisions of the Agreement provide “with respect to any financing required or obtained by Buyer, Buyer shall be solely responsible for maintaining any approval for financing in full force until the sale is completed”. (Ex. 3, § 7) Moore undertook no obligation with respect to the financing commitment accepted by Summit. The trial court’s finding and conclusions on this point are not relevant to the issues between Summit as Buyer and Moore as Seller.

As noted earlier, Section 2, the very essence and object of the Agreement, provided “Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Unit on the Scheduled Closing Date (as defined in Section 8) or such other date as specified herein in accordance with the terms hereof.” (Ex. 3, § 2)

Section 1(k) states “Scheduled Closing Date” means. . . (ii) ten (10) business days following the date that the conditions described in Section 6(a) and Section 7 below are satisfied or waived in writing by Buyer.” [Emphasis supplied]

3. The “feasibility” contingency provided by Section 6 was not timely exercised by Summit, and the Court’s refusal to make a finding for Summit on an issue Summit had the burden to prove implicitly rejects it.

In its initial pleading filed July 15, 2008, Summit made no allegation about either the availability or the exercise of the feasibility contingency. (CP 28-31) Although the feasibility contingency available to Summit was mentioned in general terms during the testimony at trial, the trial court, in the findings prepared by Summit as prevailing party, made no findings or conclusions with respect to it.

The Agreement feasibility contingency provides in pertinent part:

“Buyer shall have until a date thirty calendar days following the mutual execution of this agreement to (1) determine whether the unit is suited to Buyer’s intended purposes and whether the acquisition of the Unit is feasible; and (2) deliver to Seller (if Buyer desire to terminate this Agreement) its written notice of disapproval of the feasibility of the Unit and the matters referred to Section 6(a)(i) above.”

The Agreement was expressly stated to be “effective” June 20, 2007, thereby rendering July 20, 2007 the last date for exercise of the Section 6 contingencies. There is also no evidence of any written notice delivered to Moore exercising these contingencies in the specific terms required by the Agreement.

Summit failed in its burden of proof on the feasibility contingency and the trial court's failure to make a finding on this point is implicit rejection of it. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

4. **Summit's suggestion that a post-execution discussion of supplemental and collateral agreements establishes an abandonment of the comprehensive Purchase and Sale Agreement is a "red herring."**

At pages 7-8 of its Brief, Summit implies various post-execution addenda and collateral agreements regarding parking restrictions on an adjoining property owned by Moore that were not executed by Summit proves no final agreement existed, and that the parties were simply still in "negotiations". The Court in its oral decision labeled the failure of the parties to legally finalize a parking restriction on an adjoining parcel owned by Moore "as sort of a red herring." (VRP 5/11/11, pg. 8, lines 5-8) Parties to a Purchase and Sale Agreement, particularly for a project in development, often address issues or concerns that come up. These do not and should not be considered an abandonment of the terms already mutually agreed upon or a re-entry into blanket negotiations of an entirely new agreement.

Similarly, addenda providing formal agreement for financing time extensions, as requested by Summit on July 24, also reciting that other contingencies have been satisfied and that the contract remains

in force, even though unsigned by either party, simply do not establish either that no contract exists or that contingencies which have expired become resurrected. Such a ruling would be fatal to almost every purchase and sale agreement.

### III. ARGUMENT IN RESPONSE TO CROSS APPEAL

- A. The Court's award to Moore of a portion of the costs for obtaining the Phase I and 2 environmental clearances is less than what Summit was required to pay under Section 7 of the Agreement, and no cause for complaint by Summit. These costs should have become "deposits" in addition to the "earnest money". Summit also failed to make other agreed reimbursements.

Paragraph 7 of the Agreement, applicable to financing, unambiguously states that "Buyer shall pay all costs associated with financing, including but not limited to, application, processing and closing costs thereof". (Ex. 3, §7) Both the Phase I and the Phase II Environmental Assessments were required to enable Summit to secure the loan commitment for this project.

That Summit was only required by the Court to reimburse Moore for a portion of these costs was favorable to Summit, not a harm to Summit that provides the basis for an appeal. Moore asks only that the awarded sums be added to the amount specified as "Earnest Money" and not be taken from that sum.

**B. Denial of interest on the earnest money was proper.**

The Superior Court denied Summit 12% interest on the earnest money deposit. In this case, the collective deposits stated “as security for Buyer’s obligation under this agreement” were held by Ticor “in an interest-bearing account”. (Ex. 3, § 4)

The earnest money deposit, by its terms, was to be held “as security” for Moore, not for Summit. The evidence established and the court found that Summit had failed to pay Moore sums that were agreed to be paid. The deposits were held by Ticor, not Moore, and Summit failed to establish, as it strenuously argues to this day, that it was entitled to the entire deposit. Summit’s blanket demand for all the money, including sums owed by Summit to Moore, was properly rejected by the trial court. The court was correct in refusing to award prejudgment interest to Summit.

**C. The trial court did not abuse its discretion in awarding Summit less than all of its claimed attorney fees.**

The Court of Appeals reviews a trial court’s award of attorney fees for abuse of discretion. A trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *Ives v. Ramsden*, 142 Wn.App. 369, 397; 174 P.3d 1231 (2008). . Here the Trial Court’s award of attorney fees to Summit did not constitute an abuse of discretion.

Here the Trial Court was entitled to consider that fees were requested for traveling to and attending a Summit executive board meeting, and revising the minutes of that meeting. (CP 225) There were also numerous conferences with the same witnesses in April, 2010 and April, 2011, at least one of which was attended by both Summit's trial counsel and one of his partners. (CP 226-229) On one day of trial Summit was represented by two attorneys. (CP 234) Summit also made two separate motions for summary judgment when there is no valid reason why the issues raised in the second motion could not have been presented and resolved in the first. (CP 223-225, 231-233) Finally, the Court was entitled to consider the extra expense and disruption caused by Summit's late amendment to its pleadings, adding a new claim the day before trial.

**D. Moore is entitled to reasonable attorney fees at trial and on appeal.**

The judgment for Summit awarding attorney fees and costs should be vacated, and Moore should be awarded his attorney fees and costs at trial and on appeal pursuant to RAP 18.1 should he become the prevailing party.

#### IV. CONCLUSION

On June 20, 2007 Summit agreed, with guidance from counsel, to buy Unit A of the commercial condominium developed by Moore for Summit, subject to usual and limited contingencies common to all purchase agreements. Summit never advised Moore it was unable to secure financing. Indeed, it did obtain financing, utilizing the environmental clearances it had requested. It agreed to reimburse Moore for the cost of obtaining these clearances. After Moore secured the clearances, Summit, through its transaction counsel, provided assurances that it was eager to close. It failed to do so, instead demanding return of "earnest" money posted as security to Moore for "performance of buyer's obligations". It also failed to tender amounts it had agreed to pay Moore, or tender the earnest money as a "safe harbor" from further liability. Then it claimed years later that it thought it could invoke this limitation on liability, but could not because it was not validated by Moore's initials, initials not required by any case or statute in the State of Washington.

Summit secured the financing required for the purchase and sale, but breached its obligation to close imposed by the Agreement and independently promised in emails from counsel on August 2 and 10, 2007. Instead of relinquishing the "Earnest" money stipulated by

the Agreement "as security for performance of Buyer's obligations" and reimbursing the additional costs to Moore as it had agreed, Summit aggressively pursued expensive litigation, not only over Moore's right to the Earnest" money, but also over Moore's right to reimbursement of costs Summit had undertaken to repay.

Years into the litigation, after submitting pleadings and a sworn declaration acknowledging the existence of an enforceable contract, and facing mounting damage claims under the contract from Moore in what had turned a Seller's market in 2007 into a nationwide failed market, Summit decided the Agreement was a nullity because of missing initials on three "optional" provisions.

Summit, however, produced no evidence that it had invoked the uninitialed liability limitation by offering to relinquish the "Earnest" money for that purpose or was even willing to do so years later. Instead it sought to establish that it had been deprived of that right by its own failure to insist that the Seller initial the provisions at the time it signed the Agreement on June 20, 2007. The argument by Summit is a "red herring", a distraction from its breach of the quintessential provision of every purchase and sale agreement.

For such a breach, the Agreement provides for "all remedies". Upon reversal and remand, the damages to Seller should be

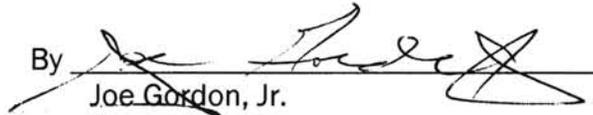
determined by the trial court, or in an arbitration should it be requested. Moore is entitled to recover his attorney fees at trial and on appeal. The judgment for attorney fees and costs awarded to Summit should be vacated, and amounts paid to satisfy the judgment should be returned to Moore together with statutory interest.

Dated this 16<sup>th</sup> day of May, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



Joe Gordon, Jr.  
Attorneys for Appellant  
WSBA No. 01804

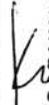
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on May 16, 2012, I did serve via email and U.S. Mail, true and correct copies of the foregoing by addressing and directing for delivery to the following:

***Counsel for Respondent:***

Mark Roberts  
Roberts Johns & Hemphill PLLC  
7525 Pioneer Way, Suite 202  
Gig Harbor, WA 98335  
[mark@rjh-legal.com](mailto:mark@rjh-legal.com)

  
\_\_\_\_\_  
Joe Gordon, Jr.  
Attorney for Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
2012 MAY 17 PM 1:07  
STATE OF WASHINGTON  
BY   
DEPUTY

APPENDIX A

March 18 2011 3:13 PM

THE HONORABLE KATHERINE M. STEGEMAN, COUNTY CLERK  
Hearing Date: April 15, 2011  
Hearing Time: 9:00 AM  
NO: 08-2-06920-1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

TICOR TITLE COMPANY, a  
Washington corporation,  
  
Plaintiff Interpleader,  
  
vs.  
  
SUMMIT UNISERV COUNCIL, a  
Washington Non-Profit organization,  
  
Defendant Buyer,  
  
And  
  
WILLIAM B. MOORE, an individual,  
  
Defendant Seller.

Case No. 08-2-06920-1

DECLARATION OF  
MARGARET LANGSTON

DECLARATION OF  
MARGARET LANGSTON -- 1

ROBERTS JOHNS & HEMPHILL, PLLC  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I, MARGARET LANGSTON, hereby declare under penalty of perjury as follows:

1. I am over the age of 18 and am competent to testify in this matter. I make this declaration based on my personal knowledge.

2. From July 2001 to June 2007, I was the President of Summit Uniserv Council ("Summit").

3. In 2007, Summit began negotiating with William B. Moore (Moore) to purchase a commercial condominium unit in a building that Moore was developing. On June 8, 2007 I signed a document entitled "Purchase and Sale Agreement for Tenth & East Main Commercial Condominium" (the "PSA") on behalf of Summit as Summit's original offer to purchase the property. A copy of that document is attached as Exhibit A. The PSA includes three alternate paragraphs relating to Moore providing a public offering statement, limiting Summit's exposure to damages and using arbitration as the mechanism for dispute resolution. I initialed each of those paragraphs on the lines provided in the PSA as it was mine and Summit's express intent to include those paragraphs in the PSA.

4. Moore never signed that PSA and on June 13, 2007 submitted a revised PSA back to Summit containing his counteroffer. A copy of that document is attached as Exhibit B. In his revised PSA, Moore changed the square footage of the condominium unit and increased the purchase price.

DECLARATION OF  
MARGARET LANGSTON -- 2

**ROBERTS JOHNS & HEMPHILL, PLLC**  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

81

1  
2 Moore did not initial any of the three alternate paragraphs in the PSA that I had  
3 initialed in Summit's original offer.

4         5.     On June 20, 2007, I again initialed all three of the alternate  
5 paragraphs in Moore's proposed PSA as it was still Summit's intent to have  
6 those terms be a part of the PSA. Those alternate paragraphs, and in  
7 particular the paragraph limiting Summit's liability to its earnest money, were a  
8 critical and material part of Summit choosing to sign the PSA. If those  
9 paragraphs were not going to be part of the PSA, Summit would not have  
10 signed the PSA.  
11

12         6.     We then returned the revised PSA to Moore's realtor / listing  
13 agent. We expected that Moore would agree to the three alternate paragraphs  
14 as they had been in all of the draft documents and he had never disputed  
15 those paragraphs. Since we heard nothing from Moore after we delivered the  
16 PSA to his realtor / listing agent, we always believed that those terms were part  
17 of the PSA. Consequently, Summit then deposited its earnest money into  
18 escrow in the amount of \$61,522.

19         7.     We learned after this dispute arose that Moore had not initialed  
20 the paragraphs nor did he intend to be bound by those paragraphs.  
21 Consequently, Summit and I do not believe we ever reached an agreement  
22 with Moore.  
23  
24  
25

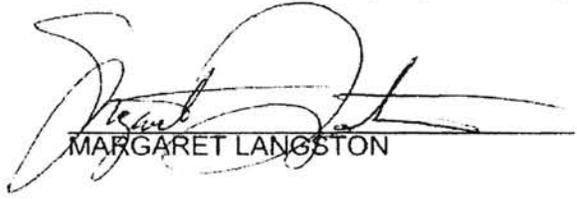
26 DECLARATION OF  
MARGARET LANGSTON -- 3

**ROBERTS JOHNS & HEMPHILL, PLLC**  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND  
CORRECT.

Executed this 17th day of March 2011, in Puyallup, Washington.



MARGARET LANGSTON

DECLARATION OF  
MARGARET LANGSTON -- 4

**ROBERTS JOHNS & HEMPHILL, PLLC**  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

83

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

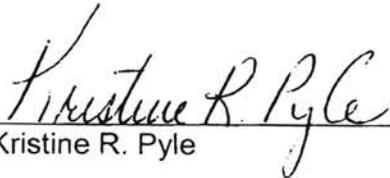
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing DECLARATION OF MARGARET LANGSTON on the following individuals in the manner indicated:

Joe Gordon, Jr.  
1201 Pacific Avenue, Suite 2200  
Tacoma, Washington 98401-1157

- (XX) Via Email to JGordonJR@gth-law.com
- (XX) Via U.S. Mail
- ( ) Via Facsimile
- ( ) Via Hand Delivery
- ( ) Via ECF
- ( ) ABC Legal Services

SIGNED this 18<sup>th</sup> day of March, 2011 at Gig Harbor, Washington.

  
\_\_\_\_\_  
Kristine R. Pyle

DECLARATION OF  
MARGARET LANGSTON -- 5

**ROBERTS JOHNS & HEMPHILL, PLLC**  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

## APPENDIX B

(VRP 4/28/11, pg 102, line 21 – pg 104, line 22):

- “Q. Okay. Now, you described getting a fax after that. Explain to me what fax you received.
- A. We were told that Mr. Moore had signed the purchase and sale agreement, and would we please - - well, Ethan Offenbecher was going to fax up the signature page; so we, kind of, waited, thinking we would get the PSA and the signature page, but all that came was the signature page; and during this time, my assistant, at that time Marilyn Heaton, was with me. We received only that one page.
- Q. Okay, So you just received - -
- A. The signature.
- Q. -- the signature page --
- A. Mm-hmm.
- Q. -- that we're looking at here as page 15?
- A. Right.
- Q. Now, when you received that page, was Mr. Moore's signature on it?
- A. Yes.
- Q. Was your signature on it?
- A. No.
- Q. After you received that page from Mr. Offenbecher by fax, what did you do next?

- A. We called Mr. Offenbecher and asked why we received only the signature page because I had already signed the signature page. Why wasn't Mr. Moore's signature on the signature page with mine, and why do I have to sign it again?
- Q. And then what happened?
- A. And he said that Mr. Moore had agreed --
- MR. GORDON: Objection; hearsay, Your Honor.
- THE COURT: I'll sustain the objection.
- Q. (By Mr. Roberts) Based on this conversation with Mr. Offenbecher, what was your understanding as to why you needed to sign this document?
- A. Basically, he wanted both signatures on the same page.
- Q. At that point, what did you do to make sure that both you and Mr. Moore were agreeing to the same terms?
- A. I -- I questioned Mr. Offenbecher on whether or not this was exactly the same PSA that I had signed in his office, and I inquired: Is -- Did Mr. Moore agree to that PSA, the entirety? And -- and that's what I inquired.
- Q. And what happened?
- A. And I felt comfortable with the answer --
- Q. Which was?
- A. -- to sign it. Which was, yes, he had agreed to it; and -- and it was exactly the same PSA, so everything was agreed on. It's fine. I could sign it.

Q. So your understanding was that Mr. Moore had, also, initialed all three of those paragraphs?

A. Yes. That was my understanding.

THE COURT: Okay, counsel, it's a quarter till; so we'll go ahead and take the afternoon recess."

After a break, Summit's signatory resumed direct examination reasserting only one, the signature page was seen on June 20. (VRP 4/28/11, pg 105, lines 8-25; 106, lines 1-13):

"DIRECT EXAMINATION (Cont'd.)

BY MR. ROBERTS:

Q. Okay. And, Margaret, we left off our discussion with Exhibit No. 3, the purchase and sale agreement, and going back to the signature page, again, on page 15 - -

A. Okay.

Q. - - you signed that on the 20<sup>th</sup>?

A. Yes, I did.

Q. Okay. And based on Offenbecher's assurances that Mr. Moore agreed to everything in this purchase agreement, you signed?

A. Yes. Mr. Offenbecher said that Mr. Moore had agreed to it and - and that it was fine to sign that one sheet. That was all we saw at that time.

Q. What did you do with your signature page at that point?

A. We faxed one back to Mr. Offenbecher and got the other one down - the hard copy back down to

them somehow. It was either mailed or - - or delivered, one of the two.

Q. Did you get copies of this document?

A. We can't find them; so usually, we make copies but for some reason could not find a copy of this document.

Q. Did you get copies of the entire agreement?

A. We requested it from Mr. Offenbecher that we get the entire purchase and sale agreement because I did want to make sure that all signatures were in place and initials and requested it several times; but ten days later, my stint in office, as president, was over; and Karen McNamara came on as the new president.

Q. Now, during that time period from the date that you signed the agreement to when your term expired, had you heard any objections from Mr. Moore or anybody else about the way in which this purchase and sale agreement had been completed?

A. No, not to my knowledge."

On cross-exam, Seller's counsel required (VRP 4/28/11, pages 112, lines 24-25, 113, lines 1-25, 114, lines 1-6):

"Q. There doesn't seem to be anything in this declaration that states that you signed an agreement on June 12<sup>th</sup>. Is there a reason for that?

A. Oka. The June 20<sup>th</sup> PSA, I signed on the 20<sup>th</sup>; and - - and so that's what I referred to; and - -

Q. At line 15, you say: Since we heard nothing from Moore after we delivered the PSA to his realtor/listing agent, we always believed that those terms were part of the PSA. Did you have

any discussion at all with Mr. Moore about those terms?

A. We had discussions with the realtor, and our attorney had discussions with his attorney; so prior to that, June 20<sup>th</sup>, I'd never met Mr. Moore.

Q. Did you discuss these terms with Mr. Offenbecher?

A. What terms?

Q. The three paragraphs that you had initialed.

A. Those specific ones with Mr. Offenbecher? Okay. I'm sorry. I'm not sure what you're trying to ask me.

Q. I'm trying to ask you if you had a discussion about those three specific paragraphs that you initialed with Mr. Offenbecher?

A. I had a discussion with Mr. Offenbecher about the entire -- entire PSA.

Q. Well, I'm asking, now, about those -- I don't think you're telling me that you discussed every single paragraph in the PSA with him?

A. No. I said the entire.

Q. Did you have any discussion directed specifically to those three paragraphs?

A. Just, you mean, single -- singling those three paragraphs out?

Q. Yes.

A. No."