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No. 80623-3

BY RONALD R. CARPESUPREME COURT OF WASHINGTON

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE  
TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Petitioners,

v.

LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS  
HOLDINGS, LLC,

Respondents.

APPEAL FROM THE COURT OF APPEALS  
DIVISION 1

RESPONDENTS' ANSWER TO APPELLANTS' PETITION FOR  
REVIEW TO THE SUPREME COURT

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## I. INTRODUCTION

Respondents hereby answer Appellants' Petition for Review.

Respondents do not raise any issue for review by this Court.

## II. STATEMENT OF THE CASE

### A. Initial Development of Lincoln Tower.

In 1997, an unrelated developer began the process of developing a large mixed-use project on five acres in downtown Bellevue. Respondent One Lincoln Tower, LLC, ("OLT") was formed for that purpose. The project was to include 148 luxury residential condominium units. (MCP 75-76; TCP 120-21.)

Excavation and condominium sales began in 2000. Initially, "reservations" were taken for the condominiums. The reservations were later converted to Purchase and Sale Agreements. (MCP 76; TCP 121.)

### B. Petitioners Become Real Estate Agents for Respondent and Purchase Condominiums for Themselves.

On or about November 20, 2000, Torgerson entered into a "Letter of Authorization" with Respondent Bellevue Master, the legal entity selling the condominium units. (MCP 78-81; TCP 123-27.) Pursuant to the Letter of Authorization, Torgerson's company, Torgerson and

Associates (later Miller Torgerson when she merged with Respondent Miller), and Coldwell Banker Bain were authorized to list and sell the units for a specified commission structure. (MCP 82-90; TCP 127-35.)

Early in the sales process, both Torgerson and Miller sought to purchase condominiums for themselves. (MCP 77; TCP 122.) They negotiated that they only pay \$5,000 in earnest money, much less than any other purchaser. (MCP 77; TCP 122.) They were offered the same Purchase and Sale Agreement that they had been “selling” as OLT’s listing agents. (MCP 77; TCP 122.) They applied their expertise in reviewing the document and agreed to its terms. (MCP 77; TCP 122.) They executed Agreements in June 2001. (MCP 91-107; TCP 136-53.)

Torgerson negotiated for, and received, benefits additional to the reduced security deposit. She requested “an independent inspection form” from seller. (TCP 152.) She also negotiated for herself the right to interchange interior finish packages, rather than have to choose from the packages presented to the other buyers. (Id.)

**C. The Petitioners Acknowledge and Accept Remedy Limitation Provision.**

The Agreements unequivocally limit the Buyers and Sellers

remedies in the event of breach:

21. DEFAULTS AND REMEDIES.

If Buyer fails, without legal excuse, to close this transaction as and when required by this Agreement, Seller may terminate this Agreement and all of the rights granted to Buyer herein and retain the Deposit and any interest earned thereon as its sole and exclusive remedy; provided, however, to the extent the Deposit and interest thereon exceed five percent (5%) of the total purchase price under this Agreement or any amendment hereto, the difference represented by such excess shall be returned to Buyer upon Seller's exercise of such remedy.

\* \* \*

Except as otherwise stated in this Agreement, *any default by Seller* under this Agreement which continues to the earlier of (a) fifteen (15) days after Buyer's written notice thereof, or (b) the Closing Date, as the same may be extended pursuant to this Agreement or the written agreement of the parties, *shall enable Buyer, as its sole and exclusive remedy*, to terminate this Agreement and recover from Seller *the portion of the Deposit paid by Buyer* and any nonrefundable sums reasonably paid by Buyer to unrelated third parties that are authorized by Seller in writing to alter or improve the Unit in the manner agreed to by Seller in writing.

(MCP 99; TCP 142, emphasis added.)

Petitioners primary contention has been that the above should be read to limit Buyer's remedies only if the project is not built. Torgerson testified in her deposition:

17 A. My understanding of paragraph 21 is that a buyer  
18 will receive their earnest money back should the seller not  
19 build the project.

20 Q. Could you show me where it says that. For  
21 example –

22 A. You asked me what my understanding was, and  
23 that's in general what I feel my understanding is.

24 Q. With respect to the -- what language in section  
25 21 leads you to the understanding that if the project isn't  
1 built seller gets their money back? Which sentence?

2 A. There isn't a specific sentence that says that.  
3 That's my understanding of this paragraph.

\* \* \*

11 Q. If your eyes are on that, you see where it says  
12 "Except as otherwise stated in this agreement," do you see  
13 where it says "any default by seller under this agreement"?

14 A. Yes.

15 Q. The words "any default," doesn't that lead you  
16 to believe it's more inclusive than just failure to build  
17 the unit?

18 A. It isn't to me.

19 Q. So "any default" means only if they don't build  
20 the condominium, is that correct?

21 A. That's correct.

(TCP 78-79.)

Significantly, the Agreement expressly addresses the situation of  
which Torgerson spoke. Paragraph 6.1 of the Agreement provides:

6.1. Completion of Construction. Seller estimates, but  
does not represent or guarantee, that the Unit will be  
substantially completed by March 31, 2003. If the Unit has  
not been substantially completed by December 31, 2003,

Buyer shall have, as its sole remedy for such failures, the right to rescind this Agreement by giving Seller written notice of revocation. Upon Seller's receipt of a notice of revocation, the Deposit shall be returned to Buyer and except as otherwise stated herein the parties shall have no further rights or liabilities under this Agreement.

(MCP 95; TCP 138.)

**D. The Original Project Fails and Is Sold.**

For a variety of reasons, the project stalled and construction was suspended in June 2002. The project was offered for sale and eventually Respondent LS Holdings, LLC ("LSH") acquired the project in August 2003. When LSH purchased the property, only a 2,000 car underground garage and limited above grade structures had been partially completed.

(MCP 76; TCP 121.)

After LSH purchased the project, a new commission agreement was entered into on November 7, 2003 with Miller Torgerson & Associates, LLC. (MCP 82-90; TCP 127-35.)

At the time of the purchase there were 86 Purchase and Sale Agreements which LSH assumed. Significantly, and for several reasons, LSH knew that it would be necessary to terminate the original contracts and enter into new contracts. Primarily, several changes in the project

made the original Purchase and Sale Agreements essentially void because they required Seller to build a condominium that could not, in fact, be built. (MCP 76; TCP-121.)

Petitioners knew that the project would have to be “re-papered”. Torgerson testified that she “intuitively” knew that a new owner would need to redo the contracts. (TCP 79.) Ultimately, LSH entered into new Agreements with 76 of the original 86 buyers. Eight chose not to sign new agreements and were refunded their earnest money. (MCP 76; TCP 121.)

**E. Respondents Terminate Agreements with Petitioners.**

On May 3, 2004, LSH terminated the Agreements with Petitioners by letters to each of them. (MCP 111; TCP 157.) LSH learned that Torgerson had, on at least one occasion, referred an unrepresented buyer to an outside agent. (MCP 77; TCP 122.) This was a blatant breach of fiduciary duty. Petitioners also refused to increase the amount of their earnest money to match the amount deposited by purchasers of comparable units. (MCP 77; TCP 122.) Significantly, it was only Petitioners’ contracts that were terminated. All of the other original buyers were offered their units at the original price.

LSH later learned that Petitioners’ divided loyalties were even

more pervasive. An email from their broker, Michael Grady, seemingly in response to a request from Torgerson, recommends that she could make additional money under the new commission agreement through a “Buyer Referral Program.” (TCP 83-84.) Torgerson denied knowledge of what this meant; however, she was unable to explain how such a program could be consistent with her fiduciary duties and acknowledged that such a program would be a breach of duty. (TCP 80-82.)

**F. Trial Court Results.**

Petitioners commenced lawsuits against the current owner of the project and the two prior sellers. (MCP 1-65; TCP 1-63.) They sought specific performance or money damages. (Id.) LSH answered and contended that Appellants were bound by the limitation of remedies provisions in the Agreements. (MCP 66-69; TCP 64-67.)

Respondents moved for summary judgment and Petitioners cross-moved. On May 9, 2005, the trial court entered orders granting Respondents’ motion for summary judgment. (MCP 243-45; TCP 326-28.) The dismissals of their cases were conditioned only on the return of the earnest money, which was promptly tendered. (Id.)

On May 23, 2005, Petitioners filed motions for leave to amend

their complaints. The trial court denied the motions to amend. (MCP 355-56; TCP 380-81.) Both parties were denied their requests for attorney fees by the trial court.

**G. The Court of Appeals Decision.**

In an unpublished opinion, the Court of Appeals rejected all of Petitioners' arguments, affirming the trial court's ruling, but reversed the decision not to award attorney fees and costs to Respondents.

Respondents were awarded attorney fees and costs incurred on appeal and at the trial court.

**III. ARGUMENT**

**A. No Conflict with Any Supreme Court Decision Exists. The Cases Cited by Petitioners Are Neither Identical nor Applicable.**

Review before this Court based on a direct conflict with a prior decision requires that the cases be identical involving the same issues. Such is not the case here. Petitioners are essentially asking this Court to interpret the issues and analogize from completely different facts and circumstances. While the underlying legal theories advanced by Petitioners may be similar, the facts are so dissimilar as to render any review under a conflict analysis moot.

**1. The Cases Cited Involving Substantive Unconscionability Involve Entirely Different Facts and Circumstances.**

Relying on *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004) and *Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007), Petitioners contend that the Court of Appeals' opinion is in direct conflict. This is simply not true and Petitioners' contention otherwise is the result of misunderstanding what constitutes a "conflict" between reported decisions.

In *Zuver*, an employee of Airtouch claimed that her employment contract was both procedurally and substantively unconscionable. This Court rejected the claim of procedural unconscionability but held that the agreement was substantively unconscionable. Specifically, this Court struck the confidentiality and limitation of remedies provisions because they were too one sided. Because they applied only to Airtouch and not to *Zuver*. *Zuver*, 153 Wn.2d at 318.

*Zuver* involved an employee/employer relationship and a dispute surrounding an arbitration agreement. The mere fact that this Court struck down the limitation of remedies provision in *Zuver* does not create a conflict mandating review of this case. The cases are reconcilable on their very

different facts. In *Zuver* this Court held that the arbitration provision which read "you hereby waive and release all rights to recover punitive or exemplary damages in connection with any common law claims, including claims arising in tort or contract, against U.S. West," is substantively unconscionable because the provision is unilateral and applies only to her.<sup>1</sup> *Id.*

Here, the fact that the seller's remedy is limited to the return of funds proffered (and any expenses they have incurred) does not render the provision unconscionable. The Petitioners are experts in the real estate industry. They negotiated and contracted to purchase property with an Agreement containing a limitation of remedies clause. Most significantly, unlike *Zuver*, the remedy afforded Petitioners is not very different from that afforded Respondents in the event of Petitioners' breach.<sup>2</sup> Seller's "sole and

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<sup>1</sup> Interestingly, in *Zuver* (and in this case) the Petitioner argues that the court should adopt the standards applied to the validity of warranty disclaimers in consumer transactions set forth in *Berg v. Stromme*, 79 Wn.2d 184, 194-95, 484 P.2d 380 (1971). The court refused to do so there and for the reasons cited below should again decline.

<sup>2</sup> Petitioners contend that if Buyers had breached the Agreement, that Sellers would have received \$131,000 from Torgerson and \$16,611 from Miller and Ringer based on their respective commissions. This is untrue and was rejected by the Court of Appeals who noted "since their assigned commissions were not due until closing or immediately before closing, this value never passed to Sellers."

exclusive remedy” was the retention of \$5,000 which was the Buyer’s earnest money, the same remedy as that of the Buyer. The Court of Appeals correctly noted that in a downward pricing market the Buyer could escape from the sale by only losing \$5,000. There has never been any claim that the termination of the Agreements was motivated by profit. Only two were cancelled - those of the allegedly self-dealing real estate agents.

This remedy simply does not meet the high standard for substantive unconscionability; it is not one-sided, and certainly is not “shocking to the conscience, monstrously harsh, and exceedingly calloused.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). The appellate decision in this case in no way conflicts with the decision in *Zuver*.

Similarly, in *Scott*, this Court held that a provision in an arbitration agreement prohibiting class action lawsuits was unconscionable. Given the small amount of recovery on an individual basis, this virtually exculpates Cingular from any legal liability. “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Scott*, 160 Wn.2d at 855 (quoting Judge Posner in *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (2004)). This provision was found to be substantially unconscionable because it virtually

left the consumers with zero remedies. Again, simply because *Scott* is an example of the court striking down a remedies clause, does not mean there is a conflict here. The cases are obviously distinguishable.

First, the subject dispute was not a consumer transaction without negotiation. This was a real estate transaction between sophisticated parties, both of whom have significant knowledge in this industry. Second, unlike in *Scott*, and as discussed above, Buyers were not left with zero remedies. They were afforded the same rights as that of the Seller. Third, Petitioners-Buyers were also entitled to recover as damages any additional expenses they incurred pursuant to the terms of the Purchase and Sale Agreement. This Court should not accept review because nothing in the Court of Appeals' decision conflicts with established law.

**2. There is No Conflict with Any Established Law Regarding Whether the UCC Should Be Applied to Real Estate Contracts.**

Petitioners cite two additional cases which they argue conflicts with the Court of Appeals' decision. Even a cursory reading demonstrates that there is no conflict. Simply because a court uses the UCC by analogy in some other non-real estate context, does not mean that Division One's refusal to do so in a real estate dispute creates a conflict.

*Yakima County Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993), involved agreements in which landowners were required to sign stating that they would sign a petition to annex their property at any such time as the city might request. *Yakima* is not a case which employed the UCC by analogy. All the court did was cite a rather broad definition of unconscionability from *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 259-60, 544 P.2d 20 (1975), a UCC case, and state that the definition is “applicable beyond the Uniform Commercial Code context.” *Id.* at 391. The UCC was not used in *Yakima* in any real sense and even if it were, *Yakima* is such a different case in all other respects there still would not be a conflict among the different Washington Divisions requiring a resolution by this Court.

In *Olmstead v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1994), the buyer of real property sued the seller for breach of warranty with respect to the sewer and well. The court held that an “as is” provision in the purchase and sale agreement did not disclaim the preprinted warranties in the agreement. The court held that “Although the Uniform Commercial Code is not directly applicable to the sale of real estate, U.C.C. Article 2 provides us with some guidance on disclaimers of warranties.” *Id.* at 177. Again, the argument that there is some conflict between the subject decision and

*Olmstead* is completely untrue. The court in *Olmstead* merely chose to employ certain legal principles expressed in the UCC on warranties to a breach of warranty regarding a septic system and well. Specifically, the court said that the UCC is not directly applicable to the sale of real estate which is exactly what the Court of Appeals has opined here.

The only question for the previous court on this issue was whether or not the UCC should have been interpreted by analogy. Previous courts have done so when persuaded to do so. This court was not so persuaded. The issue is not that the court did not interpret the UCC by analogy, the issue is that they did not see a necessary reason for doing so. In order for there to be conflicting authority, Petitioners must show a case with identical facts in which the court did in fact use this type of analysis. They cannot, and therefore there is no conflict.

**C. This is Not a Matter that Substantially Affects the Public Interest and There are No Public Policy Arguments Sufficient for this Court to Review the Court of Appeals Decision.**

Petitioners make a “blanket” claim that the Agreement violates public policy. The “public policy” cases refuse to enforce agreements that have a “tendency to evil, to be against the public good, or to be injurious to the public.” *Marshall v. Higginson*, 62 Wn. App. 212, 216, 813 P.2d 1275

(1991). *Marshall* was the only case cited by Petitioners in their initial briefing for the public policy exception. *Marshall* addressed an agreement that an attorney forced her client to sign agreeing not to sue her for malpractice before she would assist the client at a trial that was already underway when the agreement was signed. *Marshall*, 62 Wn. App. at 214. This prohibition against an attorney's overreaching cannot be compared to two sophisticated parties entering into a real estate transaction upon their own volition.

**1. There is Nothing in the Record to Support Petitioner's Argument that the Sale of a Dwelling Should Be Treated as a Consumer Transaction is a Matter Which Substantially Affects The Public Interest.**

Petitioners continue to assert that the principles enunciated in the Uniform Commercial Code should have been applied here. They claim the Court of Appeals' holding which refused to apply the UCC in this case conflicts with previous decisions by this Court and further, that failure to treat the sale of real estate as a consumer transaction is a violation of public policy. Essentially, Petitioners request that this court totally alter Washington law with respect to the sale of real estate. This should not be done and this is certainly not the case to do it.

As set out by RCW 62A.2-102, the UCC is not and has not ever

been applicable to the sale of real estate. Further, the courts have repeatedly declined to apply the UCC's provisions to real estate transactions. *Southcenter View Condominium Owners' Association v. Condominium Builders, Inc.*, 47 Wn.App. 767, 771, 736 P.2d 1075 (1986).

The only question for the previous court on this issue was whether or not the UCC should have been interpreted by analogy, to which the court held:

Although the Washington Supreme Court has held that the unconscionability doctrine may be applied by analogy beyond the UCC context, no Washington court has applied UCC principles in the real estate context. And, in *Southcenter View Condominium Owners' Ass'n v. Builders, Inc.* we explicitly stated that the UCC does not apply to contracts for the sale of real estate and declined to apply its provisions by analogy. Because Buyers present nothing to persuade us that we need to revisit that holding, we decline to consider their UCC-based unconscionability and failure of essential purpose arguments.<sup>3</sup>

Petitioners also continue to assert that these transactions were consumer transactions. They then argue that because they are consumer transactions the "Baker-Berg Special Rule" applies and requires Respondents to establish the conscionability of the provision. They continue to support this argument using the UCC's definition of

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<sup>3</sup> Opinion, Pg. 6.

“consumer goods” as “goods that are used or bought primarily for personal, family, or household purposes.” RCW 62A.9A-102(23).

However, as discussed above and as the Court of Appeals held, the UCC does not apply to these transactions and there is no public policy argument sufficiently advanced to alter this established holding.

These were not consumer transactions, but Petitioners cannot establish procedural unconscionability no matter which theory is applied. The purpose of developing a consumer exception to the unconscionability rule was to protect unsophisticated, unsuspecting people of limited bargaining power. Appellants are not such people, regardless of the purpose for which they bought the property. They had intimate knowledge of the project, the Agreement, and the Sellers. This was a sophisticated transaction for luxury condominiums between two sophisticated parties. They, as real estate agents, were not entitled to or in need of, the protections offered in consumer oriented transactions.

**2. Petitioners’ Other Public Policy Reasons to Review the Decision Are Without Merit.**

Petitioners claim that transactions such as these are a matter of substantial public interest because of the regularity of such transactions. There is absolutely nothing in the record to support this claim. The

Petitioners want the Court to believe that this case arose out of a common, everyday transaction. This was a unique transaction, which involved luxury condominiums, being purchased by sophisticated real estate professionals (allegedly overreaching) from sophisticated sellers, of condominiums that had not yet been built. There was nothing common about this transaction.

Petitioners make outrageous reference to the Interstate Land Sales Full Disclosure Act as they did for the first time on appeal, claiming that remedy limitations such as this are unenforceable. This claim is untrue, unsupported, and lacks jurisdictional foundation. Additionally, this claim was not considered by the Court of Appeals because of its untimeliness.<sup>4</sup> This claim was never addressed by the trial court, and this does not fall into a claim class that may be raised for the first time on review. RAP 2.5(a).

Petitioners again state that the remedy limiting provision fails its essential purpose and therefore substantially affects public interest. Again, this is untrue, and they offer no support for a finding otherwise. As discussed above, Petitioners had full knowledge of the provision and its

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<sup>4</sup>Opinion, Pg. 7.

affect at the time of contracting. They had every opportunity to negotiate the term as they negotiated others. The provision therefore serves its purpose rather than fails it as the Petitioners suggest. There is no substantial public interest in this issue.

**D. It is Not a Matter of Great Public Interest Whether Respondent was Awarded its Attorney Fees.**

Petitioners' final contention for conflicting decisions concerns Respondents' attorney fee award. The Court of Appeals explained in its decision that Respondents after prevailing on summary judgment were in fact the substantially prevailing party, and accordingly the award of fees is appropriate.<sup>5</sup>

Petitioners claim that this case substantially affects the public interest because it expands the awards of attorney fees. As discussed above, Respondents were correctly awarded fees as the substantially prevailing party as defined by the Court's decision in *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000). Petitioners argument is flawed and untrue, there is no support for a substantial public interest argument concerning the award of fees.

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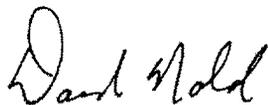
<sup>5</sup> Opinion, Pg. 11.

#### IV. CONCLUSION

Despite contentions to the contrary, there are no cases which conflict with the Court of Appeals decision. There is no substantial public interest at stake. And there are no other public policy grounds to review the subject decision. The Petition for Review should be denied and Respondents should be awarded their fees and costs in defending the Petition for Review.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of October, 2007.

NOLD & ASSOCIATES, PLLC



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as trustee for the TORGERSON  
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v.

ONE LINCOLN TOWER, LLC;  
BELLEVUE MASTER, LLC; and LS  
HOLDINGS, LLC,

Respondents.

NO. 80623-3

DECLARATION OF SERVICE  
OF RESPONDENTS' ANSWER  
TO APPELLANTS' PETITION  
FOR REVIEW TO THE SUPREME  
COURT

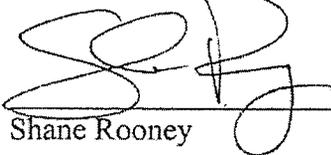
I, Shane Rooney, declare that I am an employee of the firm of Nold & Associates, PLLC, am over the age of 18 and am not a party to the above entitled action. On October 24, 2007, I caused a true and correct copy of the RESPONDENTS' ANSWER TO APPELLANTS' PETITION FOR REVIEW TO THE SUPREME COURT to be served upon the following in the manner indicated:

Dennis McGlothlin - Via Email  
Olympic Law Group  
1221 East Pike, Suite 205  
Seattle, WA 98122

Washington State Supreme Court - Via Email  
415 12<sup>th</sup> Ave SW  
P.O. Box 40929  
Olympia, WA 98504-0929

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

Signed at Bellevue, Washington this 24th day of October, 2007.

  
Shane Rooney

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TO E-MAIL

**OFFICE RECEPTIONIST, CLERK**

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**To:** Shane Rooney

**Subject:** RE: Respondents' Answer to Petition for Review

Rec 10-24-07

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**Sent:** Wednesday, October 24, 2007 1:59 PM

**To:** OFFICE RECEPTIONIST, CLERK

**Cc:** 'Jodi Graham'

**Subject:** Respondents' Answer to Petition for Review

Please find the attached for filing for the following matter:

Michael Miller, et al. v. One Lincoln Tower, LLC, et al.

Case No. 80623-3

Filed by:

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(425) 289-5555  
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WSBA# 33564

Thank you.

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