

62034-7

62034-7

NO. 62034-7

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

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SUE CHIN WANG and WEN-SHYAN WANG, husband and wife;  
and MOUNTLAKE INVESTMENT, LLC, a Washington limited  
liability company,

Appellants,

v.

BUSINESS PLANS & STRATEGIES, INC. a Washington  
corporation; and ROSE M. CHISHOLM and TONY CHISHOLM,  
husband and wife and their marital community,

Respondents,

and

KIDDER, MATHEWS & SEGNER, INC., a Washington  
corporation d/b/a GVA KIDDER MATHEWS; JASON M. ROSAUER  
and ANNE M. MARKLEY, husband and wife and their marital  
community;

Defendants.

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**BRIEF OF RESPONDENTS**

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A handwritten signature in black ink is written over a vertical stamp. The stamp contains the text: "CLERK OF COURT", "STATE OF WASHINGTON", "DIVISION I", "NO. 62034-7", and "10:39".

## TABLE OF CONTENTS

INTRODUCTION.....	1
RESTATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE.....	3
A.    The Court should review the evidence in a light that supports the jury’s verdict. ....	3
B.    BPS’s building management agent dealt successfully with window leaks in 2002 and 2003. ....	4
C.    BPS and Chisholm first learned about the siding problems in the fall of 2005.....	5
D.    BPS listed the building for sale, clearly disclosing the need to replace the EIFS cladding.....	7
E.    The parties dispute whether BPS made the documents available to Wang during the feasibility period.....	10
F.    Wang’s own building inspector warned of “possible hidden damage” and “strongly recommended” a more extensive further investigation before closing. ....	10
ARGUMENT .....	14
A.    The evidence strongly supports the jury’s verdict that BPS did not breach the purchase and sale agreement when BPS delivered or made available to Wang all material documents in BPS’s possession or control.....	14
1.    BPS was obligated to deliver <i>or</i> make available to Wang all material documents in BPS’s possession or control regarding the operation and condition of the property.....	14
2.    The evidence strongly supports the conclusion that BPS delivered or produced all material documents. ....	19
3.    The jury was properly instructed on the covenant of good faith and found no breach.....	22

4. Wang failed to prove the element of fraudulent concealment that the structural damage “would not be disclosed by a careful, reasonable inspection by purchaser.”.....27

B. The trial court did not abuse his discretion in admitting the testimony of Vander Veen, an experienced commercial real estate broker, on trade usage and practices in the industry. .... 32

C. The trial court correctly refused to instruct the jury on the language of RCW 18.86.090 and .100, which was unnecessary and would have confused or misled the jury. .... 35

D. The trial court did not abuse his discretion by instructing the jury that he had dismissed all negligent representation claims from the case. .... 42

E. The trial court properly awarded attorney fees at trial and this Court should award fees on appeal.....43

CONCLUSION ..... 44

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<b><i>Alejandro v. Bull,</i></b> 159 Wn.2d 674, 153 P.3d 864 (2007) .....	28, 29, 30
<b><i>Atherton Condo Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev, Co.,</i></b> 115 Wn.2d 506, 523, 799 P.2d 250 (1990) .....	29
<b><i>Badgett v. Sec. State Bank,</i></b> 116 Wn.2d 563, 807 P.2d 356 (1991) .....	23, 24, 25
<b><i>Barrett v. Weyerhaeuser Co. Severance Pay Plan,</i></b> 40 Wn. App. 630, 700 P.2d 338 (1985) .....	24
<b><i>Betchard-Clayton, Inc. v. King,</i></b> 41 Wn. App. 887, 707 P.2d 1361, <i>rev. denied</i> , 104 Wn.2d 1027 (1985) .....	24
<b><i>Boonstra v. Stevens-Norton, Inc.,</i></b> 64 Wn.2d 621, 393 P.2d 287 (1964) .....	31
<b><i>Grayson v. Platis,</i></b> 95 Wn. App. 824, 978 P.2d 1105, <i>rev. denied</i> , 138 Wn.2d 1020 (1999) .....	3
<b><i>Hill v. Cox,</i></b> 110 Wn. App. 394, 41 P.3d <i>rev. denied</i> , 147 Wn.2d 1024 (2002) .....	43
<b><i>Hwang v. McMahill,</i></b> 103 Wn. App. 945, 15 P.3d 172 (2000), <i>rev. denied</i> , 144 Wn.2d 1011 (2001) .....	44
<b><i>Ikeda v. Curtis,</i></b> 43 Wn.2d 445, 261 P.2d 684 (1953) .....	31

<b>Janson v. North Valley Hosp.,</b> 93 Wn. App. 892, 971 P.2d 67 (1999).....	42
<b>Kelsey Lane Homeowners Ass’n v. Kelsey Lane Co.,</b> 125 Wn. App. 227, 103 P.3d 1256 (2005).....	28
<b>Leibergesell v. Evans,</b> 93 Wn.2d 881, 613 P.2d 1170 (1980).....	26
<b>Marriage of Leslie,</b> 90 Wn. App. 796, 954 P.2d 330 (1998), <i>rev. denied</i> , 137 Wn.2d 1003 (1999) .....	23
<b>Miller v. Othello Packers, Inc.,</b> 67 Wn.2d 842, 410 P.2d 33 (1966).....	27
<b>Nguyen v. Doak Homes, Inc.,</b> 140 Wn. App. 726, 167 P.3d 1162 (2007).....	28
<b>Obde v. Schlemeyer,</b> 56 Wn.2d 449, 353 P.2d 672 (1960).....	30, 31
<b>Puget Sound Fin., L.L.C. v. Unisearch, Inc.,</b> 146 Wn.2d 428, 47 P.3d 940 (2002).....	32
<b>Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.,</b> 51 Wn. App. 209, 752 P.2d 1353, <i>rev. denied</i> , 111 Wn.2d 1007 (1988) .....	28, 29, 30
<b>Sloan v. Thompson,</b> 128 Wn. App. 776, 115 P.3d 1009 (2005), <i>rev. denied</i> 157 Wn.2d 1003 (2006) .....	31
<b>Smith v. Behr Process Corp.,</b> 113 Wn. App. 306, 54 P.3d 665 (2002).....	43
<b>State v. Castellanos,</b> 132 Wn.2d 94, 935 P.2d 1353 (1997) .....	32
<b>State v. Crittenden,</b> 146 Wn. App. 361, 189 P.3d 849 (2008), <i>review</i> <i>denied</i> , 165 Wn.2d 1042 (2009).....	40

<b><i>State v. Rosul</i></b> , 95 Wn. App. 175, 974 P.2d 916, <i>rev. denied</i> , 187, 139 Wn.2d 1006 (1999) .....	42
---	----

<b><i>Thorndike v. Hesperian Orchards, Inc.</i></b> , 54 Wn.2d 570, 343 P.2d 183 (1959) .....	27
--	----

**STATUTES**

RCW 18.86.090.....	2, 35, 36
RCW 18.86.100.....	2, 35, 40
RCW 18.86.100(1) .....	36
RCW 18.86.110.....	40

**OTHER AUTHORITIES**

5B K. Teglund, Wash. Prac. Evidence § 801.10 (5 <sup>th</sup> Ed. 2007).....	39
Black’s Law Dictionary 1725 (9th Ed., Garner, 2009).....	26
House Bill Report, 2 EHB 1659 (1996).....	35
Restatement (Third) of Agency § 5.01(1) and (3) (2006)...	38, 39, 40

**RULES**

CR 59 .....	22
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## INTRODUCTION

This is a contract case tried to the jury in which the jury resolved disputed issues of fact. Appellant Wang and her assignee, Mountlake Investment, LLC (collectively "Wang"), bases her appeal on the theory that respondent Business Plans and Strategies, Inc. (BPS) breached the contract by failing to deliver to Wang a repair estimate for \$600,000, delivering instead a different repair estimate for \$175,000. BA 1, 20, 25-26. But Wang fails to quote the key provisions of the contract, which eviscerate her arguments.

Paragraph 5 of the Purchase and Sale Agreement (PSA) gave Wang 30 days to evaluate the feasibility of the purchase, and provided that BPS would make books and records available for inspection by Wang. Paragraph 12 included a representation that BPS had delivered to Wang all material documents relating to the condition of the property, except matters known to Wang or included in "the books, records and documents made available to Buyer." Ex. 49 (original), 50 (more legible copy). A copy of the PSA is Appendix A to this brief.

The combined effect of paragraphs 5 and 12 is that BPS represented that it either delivered or made available to Wang all

material documents regarding the condition of the property. The evidence showed that BPS made all material documents available, including the \$600,000 estimate of which Wang complains. To the extent that the evidence is disputed, the jury resolved the dispute against Wang. The Court should affirm and award attorney fees to BPS.

### **RESTATEMENT OF ISSUES**

1. Does substantial evidence support the jury's verdict that BPS did not breach the Purchase and Sale Agreement?

2. Did the trial court abuse his discretion in admitting the testimony of Vander Veen, an experienced commercial real estate broker, on trade usage and practices relating to the sale of commercial real estate?

3. Did the court abuse its discretion in refusing to instruct the jury on the language of RCW 18.86.090 and .100, and would the proposed the instruction have confused or misled the jury? (A copy of the Court's instructions to the jury is Appendix B to this brief.)

4. Did the trial court abuse his discretion by instructing the jury that he had dismissed the negligent representation claims from the case?

5. Did the trial court abuse his discretion in awarding attorney fees to BPS on the Chisholms?

6. Should the Court award attorney fees on appeal to BPS and the Chisholms?

#### **STATEMENT OF THE CASE**

**A. The Court should review the evidence in a light that supports the jury's verdict.**

After hearing several weeks of testimony, the jury decided this case in favor of BPS and against appellant Wang. The Court should view the facts in the manner that supports the jury verdict, *i.e.*, in the light most favorable to BPS. ***Grayson v. Platis***, 95 Wn. App. 824, 837, 978 P.2d 1105, *rev. denied*, 138 Wn.2d 1020 (1999). Wang's Brief of Appellant improperly cites the facts in the light most favorable to Wang, including in her brief several misleading and inaccurate factual statements. Accordingly, BPS restates the facts more accurately in the light most favorable to BPS.

**B. BPS's building management agent dealt successfully with window leaks in 2002 and 2003.**

BPS purchased the commercial building in this case in late 2001. 20 RP 132.<sup>1</sup> The building was initially managed by Washington Commercial Real Estate Services and administered by Cynthia Montagne of Washington Commercial. 8 RP 66. When Montagne learned of water leaks around the building windows in January 2002, she hired Wayne Carter, doing business as Wayne the Handyman, to fix the leaks. 12 RP 32-33. Montagne did not consider the leaks a "burning issue" because every one of the 20 buildings she had managed in her 18 years of property management has leaked. *Id.* at 40-41.

Wayne the Handyman arranged for an inspection to determine the source of the leaks. 12 RP 35-36. The inspection was performed by Douglas Heck and Wayne the Handyman, 8 RP 89-90, and Heck submitted an inspection report dated September 2, 2003. Exhibit 17.<sup>2</sup> The inspection results were given to Cynthia

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<sup>1</sup> The pagination of the Report of Proceedings is not sequential, but begins with page one on each day of testimony, and sometimes again in the afternoon. This brief adopts the convention of preceding the RP citation with the day of the month; "20 RP" refers to proceedings on May 20, 2008.

<sup>2</sup> The date on Exhibit 17, September 2, 2002, is incorrect; the inspection is dated September 2, 2003. 8 RP 94-95.

Montagne. 8 RP 94. Wayne the Handyman prepared a bid to repair the building and gave his estimate to the property manager, who told him they would not make the repairs. Ex. 19, 8 RP 98-99. He eventually succeeded in stopping the leaks. *Id.* at 101-02.

Tony Chisholm testified that he was aware of window leaks in the building, that Wayne the Handyman caulked the leaks, and, “[e]ventually, the problem seemed to be fixed.” 20 RP 133-34. Chisholm had no recollection of ever receiving the inspection report arranged by Wayne the Handyman, 20 RP 136-38, or of Heck’s proposal to do a more thorough inspection. 20 RP 139-40.

In light of this evidence, it is grossly misleading for Wang to state that “BPS and the Chisholms made multiple efforts to deal with water intrusion in the Building, including drywall repair, window caulking, and siding repair.” BA 6 (emphasis supplied).

**C. BPS and Chisholm first learned about the siding problems in the fall of 2005.**

BPS changed property managers on September 1, 2005, hiring Kidder Mathews and Segner, Inc., dba GVA Kidder Mathews. Exhibit 31. Earl Wayman, a Kidder Mathews senior property manager, was assigned to manage the building. 15 RP 66. Wayman contacted Eastside Glass to evaluate leaks in the

building. 15 RP 67. Eastside's inspection disclosed that there were failures in the EIFS sheathing,<sup>3</sup> recommending that Wayman hire an EIFS contractor for repairs. Exhibit 32.

Wayman notified Chisholm of the Eastside Glass inspection, and Chisholm told Wayman to go ahead and investigate the problem. 20 RP 144-45. Tatley-Grund, Inc., was hired to investigate the EIFS issues. 12 RP 87, Ex. 34. Tatley-Grund found that the EIFS cladding system was in poor condition, and that sheathing and framing beneath the EIFS had decayed in some locations. Ex. 35. Tatley-Grund recommended repairs. *Id.*

Tatley-Grund subsequently estimated that repairs would cost \$600,000 to \$650,000, depending on whether the cladding was replaced with EIFS, stucco, or Hardie Plank. Ex. 38. The bid included an allowance of 15% replacement of gypsum sheathing underneath the EIFS, because the amount of decay was unknown. *Id.* Nothing in the bid addressed replacement of the building frame underneath the sheathing.

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<sup>3</sup> EIFS stands for exterior insulating and finishing system. "EIFS is composed of a 1" thick Styrofoam panel fastened or adhered to wall sheathing. The Styrofoam panels are covered in reinforcing mesh, and covered with a troweled, cementitious coating. An acrylic top coat is applied to create the desired finish appearance." Ex. 65 at 2.

Chisholm was shocked by the bid, 15 RP 71, which he considered ridiculous. 20 RP 157-58. Wayman contacted DOM Construction for another bid. 15 RP 73-74. DOM offered to remove the existing EIFS cladding and replace it with fiber-cement siding (Hardie Plank). Ex. 44. DOM's bid included all labor, materials and supervision for \$175,500. *Id.* DOM's bid expressly stated, “[t]his estimate does not include any structural damage repairs.” *Id.* (emphasis in original) The bid was dated February 28, 2006, but would have been honored at any time through July 2006. 19 RP 55.

**D. BPS listed the building for sale, clearly disclosing the need to replace the EIFS cladding.**

BPS had earlier listed the building for sale in 2005. 15 RP 136-37. The building was offered for \$5.2 million at a time when BPS was not aware of the problems with the EIFS. 15 RP 181-82, 20 RP 146-49, 152. The building did not sell, and when the listing came to an end, BPS was actively investigating the condition of the building. 15 RP 137-39.

BPS listed the property for sale again on March 9, 2006. 20 RP 166; Ex. 45. The property was listed with the same agent, Jason Rosauer of GVA Kidder Mathews. Ex. 45; Ex. 28. The

listing price was reduced by \$725,000 to \$4,475,000. *Id.* Rosauer posted “due diligence materials” on the GVA Kidder Mathews website. 15 RP 143-44. Any person viewing the site was required to acknowledge that the materials were not complete (Ex. 102):

[This confidential information] does not purport to be all-inclusive or to contain all the information which a prospective purchaser may desire. Neither GVAKM nor Owner make any representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information and no legal liability is assumed or is to be implied with respect thereto.

A print version of the confidential information was admitted as Ex.118. 15 RP 154-56.

Exhibit 118 expressly cautions the reader that the siding on the building needs to be replaced (page GVA 00131):

The siding on the building needs to be replaced. It needs to be stripped and reapplied in order to maintain the structural integrity of the building. Sell[er] will consider offers that include an escrow holdback of up to \$180,000 at Closing, in order to correct this defect. Please view the cost estimate of repair under the “Additional Information” section of this website.

The DOM bid to replace the cladding for \$175,500 was also included. Ex. 118 at GVA 00193. As noted earlier, the DOM bid states that it “**does not include any structural damage repairs.**” *Id.* (emphasis in original).

Commercial real estate agent Douglas Plager notified Wang about the building. 12 RP 184-88. Plager and Wang agreed to the website confidentiality terms and visited the website. *Id.* at 189-90. Plager and Wang reviewed the DOM bid to replace the cladding for \$175,000. *Id.* at 213-14. Plager drew up an offer to purchase the building for \$4.4 million. *Id.* at 201. The offer included a hold back of \$300,000 in an escrow account “to cover the costs of siding replacement and possible damages, as yet undiscovered, to the structure [of] the building.” Ex. 103 at GVA/JR 00233 (emphasis in original). Plager explained that the \$300,000 hold back was higher than the DOM bid because it was possible “that there might be some additional issues that he would uncover once the cladding was removed from the building.” 12 RP 217.<sup>4</sup>

BPS countered and the parties agreed on a price of \$4,225,000 (the listing price less the \$175,000 bid to replace the EIFS cladding). 13 RP 48-51. The addendum was changed from the holdback of \$300,000 to state, “Buyer acknowledges Seller[’s]

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<sup>4</sup> Wang’s brief inaccurately describes the purpose of the holdback as being “to cover the cost of siding replacement.” BA 13, citing 12 RP 216. The offer itself recites that the funds are to cover the cost of siding replacement “and possible damages, as yet undiscovered, to the structure [of] the building,” Ex. 103 at GVA/JR 00233, as Plager testified. 12 RP 216-17.

Disclosure of EIFS siding decay on the building, AND THE PURCHASE PRICE REFLECTS ANY DAMAGE OR EXPENSE ARISING THEREFROM.” Ex. 49/50, Addendum.

**E. The parties dispute whether BPS made the documents available to Wang during the feasibility period.**

The parties agree that the Purchase and Sale Agreement (PSA) was accepted by both parties on June 17, 2006. 13 RP 53; 15 RP 166-67. Mutual acceptance triggered a 30-day contingency period for Wang to evaluate the feasibility of the purchase. Exhibit 49/50 ¶¶ 5. It also triggered a five-day period by which BPS would “make available for inspection by Buyer and its agents . . . all documents in Seller’s possession or control relating to the ownership, operation, renovation or development of the Property . . . .” *Id.* at ¶¶ 5a.

The evidence regarding this dispute, which Wang’s brief ignores, is discussed in the argument section, *infra*. The jury resolved this factual dispute in favor of BPS.

**F. Wang’s own building inspector warned of “possible hidden damage” and “strongly recommended” a more extensive further investigation before closing.**

The PSA gave Wang the right to inspect the building during the feasibility period to determine whether to complete the

purchase. Ex. 49/50 ¶ 5b. A few days after mutual acceptance, Rosauer reminded Plager to coordinate a property inspection with Rosauer and Wayman. 15 RP 188, Ex. 53. Rosauer made sure the building engineer was present and that Plager had full access to allow the inspectors an understanding of the problems and their scope. 15 RP 188-89. On Plager's recommendation, Wang hired Seattle/Eastside Building Inspections (SEBI) to conduct the inspection. 13 RP 66-67. Wang and Plager were present for the inspection. 13 RP 66; 21 RP 74.

Three SEBI employees inspected the building. 19 RP 59. There were no limitations on where they could go, and building representatives were present to answer questions. *Id.* at 59-60. The SEBI report was admitted as Exhibit 55, with a color copy as Exhibit 110. 13 RP 69-70. The SEBI report warned of "indications of possible hidden damage" (Ex. 110 at 2):

All of these problems or potential problems warrant more extensive and most likely destructive further investigation. As both the investigation as well as proper repairs will be expensive, it is strongly recommended that the former take place prior to closing so that an accurate estimate of repair costs can be obtained prior to closing.

The summary at the conclusion of the report again emphasized that, "it is strongly recommended that such examinations be

conducted prior to closing so that an accurate estimate of repair costs can be obtained.” *Id.* at 15.

Wang testified that she was satisfied with the results of the inspection, claiming that the inspectors told her that “the foundation is good.” 21 RP 74-75. Wang claimed she thought that “the foundation including the framing inside.” *Id.* at 76. No such statement appears in the SEBI Report. 21 RP 101. SEBI inspector Taylor denied ever telling Wang that the foundation was good. 19 RP at 79. The SEBI report cautioned that, “[w]e are not Engineers and this is not an Engineering Report,” recommending Wang contact a qualified engineering firm if she was concerned about the building’s structure. Ex. 110 at 2.

Wang testified that she was not concerned about the potential structural damage identified in the SEBI report because neither Rosauer nor Wayman had said that there were any structural problems, 21 RP 103, and she assumed that the DOM bid would be adequate to repair any damage. 21 RP 104-06. But the DOM bid expressly states that it “**does not include any structural damage repairs.**” Ex. 44 (emphasis in original).

Wang was cross-examined about her first offer to purchase the building, which stated that, “Seller agrees to place \$300,000 of

sales proceeds in an escrow account to cover the cost of siding replacement and *possible damage as yet undiscovered to the structure of the building.*” 21 RP 103 (emphasis supplied). Wang was asked, “if you didn’t know there were possible problems in the structure of the building, why in the world did you use the words ‘structural problems’ in the addendum that you signed?” *Id.*

Two days after closing, Wang and Plager met with Wayman for a “turnover meeting” to pick up relevant documents in Wayman’s possession. 13 RP 81-83. Wayman had about two lineal feet of documents to give Wang. *Id.* at 119. Wayman gave Plager and Wang the Tatley-Grund report, as well as the Tatley-Grund bid to repair for \$600,000 to \$650,000. 21 RP 88-89. Plager admitted on cross-examination that he turned to Wang and said to her, “Sue, this is the siding issue. You knew about this. There is no surprise here.” 13 RP 120.

Wang’s theory at trial and on appeal was that BPS had withheld the Tatley-Grund report, which would have disclosed the structural problems to Wang. *E.g.*, BA 1. In fact, the Tatley-Grund report said nothing that had not already been disclosed by Wang’s own SEBI inspection. *Compare* Ex. 35 (“Decay of sheathing and framing members was observed as some of these openings were

made”) *with* Ex. 110 at 15 (the EIFS system is “of major concern, especially given the probability that there could be hidden damage. . . . [I]t is strongly recommended that [further and possibly destructive examinations] be conducted prior to closing so that an accurate estimate of repair costs can be obtained.”)

After closing, Wang obtained the more extensive investigation that had been “strongly recommended” by SEBI. Ex. 65. This was a destructive (invasive) test involving the removal of EIFS panels to evaluate the structural condition of the sheathing and framing in areas of suspected decay. The investigation discovered extensive structural decay, noting that, “[t]hese types of damages or defects could not be assessed without destructive (invasive) type testing.” *Id.* at 2.

## ARGUMENT

- A. The evidence strongly supports the jury’s verdict that BPS did not breach the purchase and sale agreement when BPS delivered or made available to Wang all material documents in BPS’s possession or control.**
- 1. BPS was obligated to deliver or make available to Wang all material documents in BPS’s possession or control regarding the operation and condition of the property.**

This case was tried to the jury to resolve the dispute whether BPS delivered or made available all material documents in its

possession or control. The jury was instructed that Wang had the burden of proving that BPS breached the contract and damaged Wang. Instruction 9, CP 1023. Instruction 11, CP 1025, identified the breaches at issue: "The duties at issue are the defendant's duties under Paragraph 5 (a) and Paragraph 12 of the Real Estate Purchase and Sale Agreement." Under Paragraph 5 (a), BPS was obligated to "make available for inspection by Buyer and its agents" all documents in BPS's possession or control relating to ownership, operation, renovation or development of the property, including a variety of specified documents. Paragraph 5a provided:

**a. Books, Record, Leases, Agreements.** Seller shall make available for inspection by Buyer and its agents within 5 days. . . after Mutual Acceptance all documents in Seller's possession or control relating to the ownership, operation, renovation or development of the Property, excluding appraisals or other statements of value, and including: . . . studies and maintenance records . . . .

Exhibit 49/50, Paragraph 5a. Paragraph 12 consisted of representations by BPS as follows:

**12. SELLER'S REPRESENTATIONS.** Except as disclosed to or known by Buyer prior to the satisfaction or waiver of the feasibility contingency stated in Section 5 above, including in the books, records and documents made available to Buyer . . . Seller represents to Buyer that to the best of Seller's actual knowledge, each of the following selected paragraphs is true as of the date hereof . . . :

. . .

b. The books, records, leases, agreements and other items delivered to Buyer pursuant to this Agreement comprise all material documents in Seller's possession or control regarding the operation and condition of the Property;

...

h. Seller is not aware of any concealed material defects in the Property except as disclosed to Buyer in writing during the Feasibility Period . . . .

In other words, BPS satisfied its obligations under Paragraph 12 by delivering to Wang or making available to Wang all material documents.

This is the natural reading of Paragraph 12 and is consistent with commercial real estate practice as described by Arvin Vander Veen, a commercial real estate broker for the past 30 years and long time member of the Commercial Broker's Association (CBA). 20 RP 22, 24-25. Vander Veen has handled approximately 700 transactions in commercial real estate, with a total value of over a billion dollars. *Id.* at 27. Vander Veen helped draft the CBA form used for the PSA in this case. *Id.* at 27-28. With respect to Paragraph 5a, the industry practice is that the buyer learns from the seller where the pertinent documents are located, and arranges a time to go look at them. *Id.* at 31-32.

Vander Veen testified to the relationship between Paragraph 5a, requiring the seller to make documents available, and Paragraph 12b, representing that all material documents had been delivered to the buyer:

Well, it just means that all the documents that are available . . . to this buyer in this specific physical location, those are all the documents that the seller has, . . . they are all right there.

*Id.* at 39. BPS satisfied this representation if all of the records relating to the property were made available at the property manager's office.<sup>5</sup> *Id.* at 46.

In 30 years of experience, Vander Veen has never seen a purchaser complete the purchase of a property with as little information as Ex. 118, the due diligence materials delivered by Rosauer to Plager. *Id.* at 57-58. Vander Veen would have known by reviewing Ex. 118 that additional documents existed. *Id.* at 73-74. The CBA form contract is probably used around 40,000 times a year, and the practices described by Vander Veen would be used in all of those transactions. *Id.* at 58-59. In the hundreds of

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<sup>5</sup> This interpretation of the PSA and Vander Veen's testimony about standard practice in the industry are consistent with the deposition of Wang's own expert, John Peehl. BPS offered to prove that Peehl testified in his deposition that the industry standard was that the buyer's agent had the responsibility of going to examine documents made available to the Buyer by the Seller. 20 RP 95-96. The trial court excluded this testimony. 20 RP 88-96.

transactions in which Vander Veen has been involved, he has never once delivered any documents to a Buyer. *Id.* at 71.

Wang's own prior experience supported Vander Veen's description of the relationship between Paragraphs 5 and 12. Wang had purchased two other commercial buildings prior to the BPS building. One was a small building with only a few documents and the seller delivered the documents to Wang. 21 RP 44. For the larger building, the seller had about six feet of documents, and told Wang to review the documents in their accountant's office. *Id.* at 44-45. Wang went to the accountant's office and reviewed the documents there. *Id.* at 47.

Wang's Brief of Appellant consistently misstates the relationship between 5a and 12, repeatedly asserting that BPS had the responsibility for delivering all relevant documents to Wang, whether or not those documents were "made available" to Wang. *E.g.*, BA 1-2, 13-14, 20, 22-23, 25-26, 29. Wang's interpretation of Paragraphs 5a and 12 is contrary to the language of the agreement and the industry practice.

**2. The evidence strongly supports the conclusion that BPS delivered or produced all material documents.**

The parties agree that Rosauer timely printed out all of the due diligence information to send to Plager. 13 RP 58-59; 15 RP 220. Plager personally picked up the documents. *Id.* Rosauer's office was in Seattle, but Wayman was in the property management office in Bellevue. 15 RP 221-22. Rosauer put Plager in touch with Wayman so that, "he could get with Earl Wayman and all the experts that have been working on this and get all the information related to the building, all the historical information and understand what the problem was to a greater extent than . . . I did." 15 RP 180. Rosauer told Plager to go to Wayman's office and look in the "war room," where all books and records relating to the property were stored. 15 RP 196. He expected that Plager would do exactly that. *Id.*

The Tatley-Grund report was available at Wayman's office. 15 RP 220-21. Plager admitted that Rosauer put him in touch with Wayman and told him to call Wayman about any questions regarding the building. 13 RP 112. Plager did call Wayman on several occasions. *Id.* at 112-13. Plager knew that as property manager, Wayman would have possession of files relating to the

operation of the building and that those files would contain far more information than the due diligence materials given to Plager in Ex. 118. *Id.* at 113.

Plager admitted that he talked to Wayman about what Kidder Mathews had done to investigate replacing the siding. *Id.* at 113-14. Plager learned that “essentially they had just looked into doing the same thing.” *Id.* at 114-115. Plager admitted that he did not ask Wayman for copies of any other bids (13 RP 115):

Q: Now, you did not ask Earl Wayman when you had that discussion, hey Earl, in the course of looking at those options, in the course of looking at putting up the same siding again, can I see any bids you got or any proposals? You never asked for those?

A: No, I don't recollect exactly stating it in that sense.

Wayman similarly testified that he told Plager that he had gone out and obtained different bids to do that same kind of siding. 15 RP 121-22. Plager never asked to see those bids. *Id.* at 122. Based on these conversations, Wayman concluded that Plager apparently knew about the problems with the building. *Id.* at 121.

Plager contacted Wayman during the feasibility period to ask for financial information prior to 2005. 13 RP 62. Wayman provided a profit and loss statement for 2005, but was unable to provide earlier information since Kidder Mathews only began

managing the property in mid 2005. *Id.* at 62-63, Ex. 58. Plager called Wayman on other occasions as well. 13 RP 113.

The jury obviously believed Rosauer and Wayman, and rejected Plager's testimony that he was told there were no more documents available, which was not credible. Plager admitted at 13 RP 112-115, 62-63: Rosauer told Plager to call Wayman with any questions regarding the building; Plager did call Wayman on several occasions; Plager knew that Wayman would have possession of files containing far more information than the due diligence materials given to Plager to Rosauer in Exhibit 118; Plager discussed with Wayman what Kidder Mathews had done to investigate the siding to the building, but did not ask Wayman for copies of any other bids; when Plager asked Wayman for additional financial information, Wayman provided a profit and loss statement for 2005.

If the jury had believed that Plager was told that there were no other documents at Rosauer's or Wayman's offices, the jury would undoubtedly have found that BPS had not made all material documents available and would have found a breach of contract. The jury's defense verdict necessarily rejected any implication from

Plager's testimony that he was ever told that additional documents were not available.

**3. The jury was properly instructed on the covenant of good faith and found no breach.**

Wang devotes almost half of the argument section of her brief to arguing that BPS breached the implied covenant of good faith and fair dealing. BA 20-26. The jury was instructed on the covenant of good faith and rejected Wang's claim that BPS breached the covenant. Accordingly, it is unclear what relief Wang seeks under her argument that BPS breach the implied covenant of good faith and fair dealing. None of her assignments of error claim that the trial court should have entered judgment notwithstanding the verdict. BA 2-3. Wang assigns error to denial of her CR 59 motion for new trial, but she did not argue for breach of the duty of good faith and fair dealing in her motion or reply on the motion. CP 1036-1070, 1088-1114. Nor has Wang argued in her appellate brief that there is any relationship between the motion for new trial and the duty of good faith.

Assignment of error 5 is the only assignment even tangentially related to the covenant of good faith. BA 3. But Wang fails to argue assignment 5 or offer any explanation how it relates to Wang's argument of the duty of good faith. Wang has waived the

assignment of error by failing to argue it in her brief. **Marriage of Leslie**, 90 Wn. App. 796, 807 n.4, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). It would be unfair to permit Wang to argue the assignment in her reply brief when she has never argued it in her opening brief.<sup>6</sup>

Wang argues that BPS breached the covenant of good faith and fair dealing by “depriving the buyers of the benefit of the contractual feasibility condition” and by disclosing the DOM bid without disclosing the Tatley-Grund bid. BA 21. Wang strays down the wrong path because she fails to discuss, or even cite, the leading case in Washington on the duty of good faith and fair dealing. **Badgett v. Sec. State Bank**, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The **Badgett** court noted that every contract includes an implied duty of good faith and fair dealing which

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<sup>6</sup> Wang’s only objection to instruction No. 11 (CP 1025) (copy in App. B), was that it is limited to BPS’s duties under Paragraphs 5a and 12, not mentioning the duty of good faith and fair dealing. 27 RP 29-30. But Instruction 16 advised the jury on the duty of good faith and fair dealing. Since, as discussed *infra*, the duty of good faith only exists with respect to terms of the contract, instruction 11 and 16 properly instructed the jury on the law and allowed Wang to argue her case. As for the Court’s refusal to give plaintiff’s proposed 22A, the Court observed that the instruction would tell the jury that BPS had the duty both to make documents available and to deliver documents. 27 RP 17. Given the dispute over the scope of the duty, the Court concluded the instruction would have been a comment on the evidence. *Id.* at 17-18.

obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id.* at 569. The Court cautioned that the duty of good faith arises only in connection with terms agreed to by the parties (*Id.* at 569-70):

However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. ***Betchard-Clayton, Inc. v. King***, 41 Wn. App. 887, 890, 707 P.2d 1361, *review denied*, 104 Wn.2d 1027 (1985). Nor does it "inject substantive terms into the parties' contract". Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. ***Barrett v. Weyerhaeuser Co. Severance Pay Plan***, 40 Wn. App. 630, 635 n.6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties.

The Badgetts proposed that defendant Bank modify the conditions of the Badgett's loan. When the Bank refused, the Badgetts argued that the Bank had breached its duty of good faith. The Supreme Court rejected the argument (*Id.* at 570):

By urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract – a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. [citations omitted] As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms. [citations omitted]

The jury in this case was properly instructed on the duty of good faith (Inst. 16, CP 1030) (copy in App. B):

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of its contract.

The parties agreed on giving this pattern instruction. 27 RP 22.

As the **Badgett** Court held, “[t]he duty to cooperate exists only in relation to performance of a specific contract term.” 116 Wn.2d at 570. Wang’s theory is that BPS withheld the Tatley-Grund report and estimate. BA 22, 23. But the facts were disputed, as discussed above. The jury obviously found against Wang on this point. That is why we have juries – to decide facts.

Wang argues that BPS failed to deliver the Tatley-Grund bid, effectively concealing it. BA 25-26. The PSA only required BPS “make available” the documents and ample evidence supports the jury verdict that it did so. Wang asks this Court to do exactly what the Supreme Court refused to do in **Badgett**, “to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract – a free-floating duty of good faith unattached to the underlying legal document.” 116 Wn.2d at 570.

Wang repeatedly refers in Paragraph 12 as “an express warranty.” BA 25-26. Wang is confused. Paragraph 12 is titled “seller’s representations”, and a representation is not a warranty. Compare BLACK’S LAW DICTIONARY 1725 (9<sup>th</sup> Ed., Garner, 2009) with BLACK’S at 1415. Paragraph 13 of the PSA, the “as is” clause, disclaims any seller representation or warranties except as specifically included in the agreement, and BPS makes no warranty in the PSA. Ex. 49/50. Paragraph 13 also includes the only warranty in the PSA – Wang warranted that she is sufficiently experienced to rely on her own pre-closing inspections and investigations: “Buyer represents and warrants to Seller that Buyer has sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations.” *Id.* Wang’s warranty of expertise, together with her prior experience, doubtless influenced the jury in rejecting her claim of the breach of good faith and fair dealing.

Wang’s warranty of experience readily distinguishes this case from one of Wang’s lead cases, *Leibergesell v. Evans*, 93 Wn.2d 881, 884, 613 P.2d 1170 (1980) Defendant persuaded plaintiff to invest funds with his company in return for a very high interest rate. The Court held that defendant had a duty to disclose

to plaintiff that his proposed interest rate was usurious because the plaintiff was “a widowed schoolteacher with neither expertise in business nor any knowledge of the concept of usury” who relied on defendant lender “for investment advise and regarded him as a financial counselor and guide.” Wang, by contrast, was an experienced investor who warranted that her experience was sufficient.

Ironically, Wang relies on *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 410 P.2d 33 (1966) (BA 20). *Miller* holds, “This is merely another factual appeal. We affirm the trial court on the authority of *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).” 67 Wn.2d at 842. The *Miller* court also observed, “[t]he fact that the parties had a contract does not prevent the decisive issue from being entirely factual.” *Id.* at 843. As in *Miller*, Wang’s argument about good faith is entirely factual.

**4. Wang failed to prove the element of fraudulent concealment that the structural damage “would not be disclosed by a careful, reasonable inspection by purchaser.”**

The trial court properly dismissed Wang’s claim for fraudulent concealment on summary judgment. Wang knew there was potential structural damage. Under well-established case law, Wang was unable to prove that a careful, reasonable inspection

would not have disclosed the defect. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353, *rev. denied*, 111 Wn.2d 1007 (1988).

In *Alejandre*, the purchaser of a home sued the seller for fraudulently or negligently misrepresenting the condition of the septic system. *Alejandre* at 677. The Supreme Court affirmed the dismissal of the negligent misrepresentation claim under the economic loss doctrine. But the Court considered the merits of the plaintiff's fraudulent concealment claim as an exception to the economic loss rule. The Court noted that the elements of fraudulent concealment include proof that the defect was unknown to the purchaser of residential property<sup>7</sup> and that the defect would

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<sup>7</sup> The first element of fraudulent concealment is that "the residential dwelling has a concealed defect." *Alejandre* at 659. The Court need not address Wang's claim of fraudulent concealment because Wang has not argued that the fraudulent concealment exception to the economic loss rule applies to the sale of commercial properties. This Court's two most recent cases addressing fraudulent concealment similarly involve the sale of residential property. *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 731-33, 167 P.3d 1162 (2007) (home); *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn. App. 227, 232, 103 P.3d 1256 (2005) (condominium complex). Both *Nguyen* and *Kelsey* repeat the first element of the fraudulent concealment test as the presence of a concealed defect in a residential dwelling. *Nguyen*, 140 Wn. App. 732; *Kelsey*, 125 Wn. App. at 232; *see also Alejandre*, 159 Wn.2d at 659. Nguyen explains that the fraudulent

not be disclosed by a careful, reasonable inspection by the purchaser. *Id.* at 659. **Alejandro** affirmed dismissal of the fraudulent concealment claim because an inspection report disclosed that the inspection was incomplete, and a more thorough inspection would have discovered the defect. *Id.* at 659-60.

In **Dalarna Mgmt. Corp.**, the plaintiff purchased an apartment building that turned out to have substantial water leak problems and sued the seller for fraudulent non-disclosure. (The economic loss rule was apparently not raised in **Dalarna**.) This Court concluded that where an inspection reveals some water penetration, the buyer must make inquiries of the seller, and that absent inquiry, “the seller had no duty to affirmatively report its historical experience with water penetration problems.” **Dalarna**, 51 Wn. App. at 215.

The **Dalarna** Court distinguished prior cases of constructive fraud, noting that those cases have limited constructive fraud to situations where no evidence of the defect is apparent, an

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concealment doctrine “rests on the recognition that in the sale of residential dwellings, ‘the doctrine of caveat emptor no longer applies . . . .’” 140 Wn. App at 731 (quoting **Atherton Condo Apartment-Owners Ass’n Bd. Of Dirs. v. Blume Dev, Co.**, 115 Wn.2d 506, 523, 799 P.2d 250 (1990)). Wang does not address whether the fraudulent concealment doctrine provides an (continued) exception to the economic loss rule, where, as here, the property at issue is commercial.

approach that “balances the harshness of the former rule of caveat emptor with the equally undesirable alternative of the courts standing in loco parentis to parties transacting business.” 51 Wn. App. at 215, citing, among other cases, **Obde v. Schlemeyer**, 56 Wn.2d 449, 353 P.2d 672 (1960).

The trial court properly dismissed Wang’s claim for fraudulent concealment because, as in **Alejandre** and **Dalarna**, Wang knew of the potential problem and further inspection would have disclosed the extent of the problem. Indeed, Wang had far more notice than the purchasers in **Alejandre** and **Dalarna**: the due diligence material reviewed by Wang disclosed the need to strip and replace the siding (Ex. 118 at GVA 00131); BPS provided Wang with the DOM bid, which expressly noted that it does not include any structural damage repairs, *id.* at GVA 00193; Wang knew that BPS made no representation as to the accuracy or completeness of the information provided, Ex. 102; Wang’s initial offer acknowledged “possible damages, as yet undiscovered, to the structure [of] the building,” Ex. 103 at GVA/JR 00233; Wang’s own inspection report by SEBI warned of “indications of possible hidden damage, and “strongly recommended” more extensive and likely destructive further investigation before closing, Ex. 110; Wang

warranted in the PSA that she had “sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations.” Ex. 49/50 ¶ 13.

Wang misplaces her reliance on a potpourri of cases in which the plaintiff/purchaser could not have discovered the true facts through a reasonable investigation, or in which defendant/seller lied to the purchaser in response to direct questions. *Obde v. Schlemeyer, supra*, 56 Wn.2d at 453 (“[A]t the time of the sale of the premises, the condition was clearly latent – not readily observable upon reasonable inspection.”); *Ikeda v. Curtis*, 43 Wn.2d 445, 449, 461, 261 P.2d 684 (1953) (plaintiff purchaser was falsely told that the hotel was primarily occupied by permanent guests, with only two or three vacancies during the week filled by transients, without being told that most of the income of the hotel was derived from renting rooms for prostitution); *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.3d 1009 (2005), *rev. denied* 157 Wn.2d 1003 (2006) (“The experts in this case testified that the defective framing of the lower level would not have been noticeable to a trained eye if covered from view by sheetrock and/or plywood walls and ceilings.”). Nor is Wang’s argument supported by *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 393 P.2d

287 (1964), which has nothing to do with fraudulent concealment in the sale of property.

**B. The trial court did not abuse his discretion in admitting the testimony of Vander Veen, an experienced commercial real estate broker, on trade usage and practices in the industry.**

Although unmentioned and unargued in Wang's brief, evidentiary rulings are reviewed for abuse of discretion. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The trial court did not abuse its discretion in admitting the testimony of Vander Veen as to trade usage and industry practices because, "[t]rade usage and course of dealing are relevant to interpreting a contract and determining the contract's terms." ***Puget Sound Fin., L.L.C. v. Unisearch, Inc.***, 146 Wn.2d 428, 434, 47 P.3d 940 (2002).

Wang's brief ignores the procedural history of this issue. Wang moved in limine to exclude or limit Vander Veen's testimony on industry standards. CP 776. The trial court reserved the issue for trial. CP 978. Before Vander Veen began testifying, Wang objected to the following testimony, and the trial court ruled as follows: value of the property, 20 RP 4; testimony excluded, *id.* at 15; testimony that Wang did not meet her duty of due diligence, *id.*

at 4, granted, *id.* at 15; testimony “as to the meaning of due diligence disclosures and the SEBI inspection report,” *id.* at 4, granted as to testimony about what Wang would have learned from her inspector, *id.* at 15-16; opinion testimony that the problems with the building were fully disclosed, *id.* at 4, denied, Vander Veen may testify why there was full disclosure, *id.* at 16; testimony about the meaning of the “as is” term of the contract, *id.* at 4, denied to the extent that Vander Veen may discuss the purpose of the “as is” clause, *id.* at 16; testimony that Plager breached his duty of care, *id.* at 4-5, granted, *id.* at 16; testimony about customs and usage in the industry, *id.* at 5, denied to the extent that Vander Veen may testify about the CBA form agreement and how it is designed to operate, *id.* at 15.

Turning to Wang’s specific objections to Vander Veen’s testimony, Wang argues that evidence of industry custom and usage regarding the terms “deliver” and “make available” was irrelevant and contradicted the trial court’s definition of these terms. BA 31. Although she does not specify any testimony, Wang is apparently referring to testimony at 20 RP 32-33 and 68. BA 17-18. Vander Veen’s testimony at 20 RP 32-33 is clearly testimony of industry practice, which is admissible to aid in interpreting the

contract. Vander Veen's testimony at 20 RP 68 responds to Wang's cross-examination that, "[s]o it's your belief that the words 'make available' mean the same thing as the word 'delivered'?" Vander Veen testified that was the standard in the industry and that the representation in Paragraph 12 (b) of the PSA must be read together with the preamble. *Id.* at 68-70. The trial court did not abuse his discretion in permitting Wang's own attorney to vigorously cross-examine Vander Veen.

Wang complains that Vander Veen testified that BPS had met any "duty of care." BA 31. Wang did not argue that Vander Veen should not be permitted to testify that BPS met its duty of care, but only that Wang and Plager did not meet their duty of care. 20 RP 4-5. Moreover, Wang's counsel cross-examined Vander Veen about his opinion of BPS's duty to disclose documents, whether the documents were made fully available to Wang, and Vander Veen responded hypothetically to cross-examination that it would not be "right" if Wayman told Plager that there were no other reports or surveys regarding the condition of the building. 20 RP 65-66, 73, 75. Following this cross-examination, Kidder Mathews' attorney asked Vander Veen on redirect whether the documents in Wayman's office were made available and whether that complied

with Paragraphs 5a and 12(b) of the contract, and Vander Veen testified that it did. 20 RP 112-113. Wang failed to object that Vander Veen's opinion was inadmissible.

Wang also objects to Vander Veen's testimony at 20 RP 115, BA 32, but the testimony clearly deals with customary practices in the industry. There was no abuse of discretion.

**C. The trial court correctly refused to instruct the jury on the language of RCW 18.86.090 and .100, which was unnecessary and would have confused or misled the jury.**

Wang makes a cursory argument that the trial court should have instructed the jury on the provisions of RCW 18.86.090 and .100 regarding liability of a principal for the act, error or omission of an agent in a real estate transaction and limiting imputed knowledge or notice to the principal. BA 32-33. Neither party has apparently located any case that interprets these two statutes. Wang's skeletal argument is inadequate to show error.<sup>8</sup>

RCW 18.86.090 and .100 were part of a package of changes intended to clarify the law on the duties and responsibilities of real estate agents. House Bill Report, 2 EHB 1659 (1996) (copy

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<sup>8</sup> Moreover, to the extent that Wang might elaborate on this argument in her Reply Brief, BPS would have no opportunity to respond.

attached as Appendix C). The Report explains that the bill was intended to clarify the law on vicarious liability and imputed knowledge for the benefit of consumers:

Most buyers and sellers have no knowledge about the notions of vicarious liability and imputed knowledge. They do not know that the buyer or the seller could be responsible for what the agency says or does, including an agent misrepresentation.

The language of the statutes reflects this legislative intent. RCW 18.86.090, titled "Vicarious liability," limits the liability of a principal for "an act, error, or omission by an agent" unless the principal "participated in or authorized the act, error or omission . . . ." On its face, Section .090 does not help Wang, because BPS never sought to impose liability on Wang for the actions of her agent, Plager. Section .090 might have benefited BPS, but Wang was not prejudiced by the failure to give an instruction favorable to BPS.

RCW 18.86.100(1) limits the imputed knowledge doctrine: "Unless otherwise agreed to in writing, a principal does not have knowledge or notice of any facts known by an agent or subagent of the principal that are not actually known by the principal." It was unnecessary to instruct the jury on § 100 because this case does not turn on imputed knowledge.

Wang's burden was to prove that BPS breached the PSA by failing to perform BPS's duties under Paragraphs 5a and 12, or breaching the covenant of good faith and fair dealing. Instruction 9, 11, 16, CP 1023, 1025, 1030. The dispute in the case was whether BPS "made available" documents under Paragraph 5a, and either delivered or made available all material documents relating to the condition of the property under Paragraph 12. BPS either complied with the contract or not; imputed knowledge was neither an element nor relevant to BPS's performance of its duties. The trial court explained why the instruction was unnecessary (27 RP 41):

I concluded that I didn't need to give the instruction because it was a breach of contract issue, and BPS either did or did not perform under the contract. And it really doesn't matter who did what. If it didn't happen, it's BPS's fault.

The parties dealt with one another exclusively through their real estate agents. The Chisholms, principals of BPS, never met or spoke with either Wang or Plager prior to litigation. 20 RP 178. Wang never spoke to Rosauer. 21 RP 136-37. "All the transaction, I go through the agents." 21 RP 137. The PSA itself identifies Plager as Wang's agent and Rosauer as BPS's agent. Ex. 49/50 ¶¶ 19. In order to deliver the due diligence documents to Wang, Rosauer delivered them to Plager, not to Wang. Ex. 52. Rosauer

scheduled Wang's property inspection with Plager, not with Wang. Ex. 53. When Wang wanted more profit and loss statements, she asked Plager, who asked Wayman, who responded to Plager. Ex. 58. When Wang waived both the feasibility contingency and the financing contingency, she addressed the waiver to the Chisholms in care of Rosauer, and gave the waiver to Plager, who sent it to Rosauer. Ex. 61.

In short, both BPS and Wang dealt exclusively through their agents. It is absurd to argue, as Wang does, that none of the acts of the agents were acts of the principals, or that none of the notifications under the contract should be imputed to the principals because they were conducted through the agents.

The RESTATEMENT (THIRD) OF AGENCY § 5.01(1) and (3) (2006) distinguishes between "notification," which is a manifestation affecting legal rights and duties (such as contract compliance as in this case), and "notice of a fact" which has to do with knowledge of the fact:

(1) A notification is a manifestation that is made in the form required by agreement among parties or by applicable law, or in a reasonable manner in the absence of an agreement or an applicable law, with the intention of affecting the legal rights and duties of the notifier in relation to rights and duties of persons to whom the notification is given.

(2) A notification given to or by an agent is effective as notification to or by the principal as stated in § 5.02.<sup>9</sup>

(3) A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.

(4) Notice of a fact that an agent knows or has reason to know is imputed to the principal as stated in §§ 5.03 and 5.04.

*Comment c* to § 501 states that, “Notification’ is a narrower term than ‘notice.’” The comment continues, “In all cases, however, a person who gives a notification intends by so doing to affect that person’s legal relations with persons to whom the notification is given . . . .”

The Rules of Evidence incorporate a similar distinction. Statements “in issue” or “verbal acts” are not considered hearsay because they have independent legal significance. 5B K. Teglund, Wash. Prac. Evidence § 801.10 (5<sup>th</sup> Ed. 2007). Teglund gives as examples statements showing the formation and rescission of a contract as “verbal acts.” *Id.* Similarly, here the issue is not notice

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<sup>9</sup> Section 5.02(1) provides:

A notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification, unless the person who gives the notification knows or has reason to know that the agent is acting adversely to the principal as stated in § 5.04.

to the parties, but the verbal act or manifestation of complying with contract terms.

The Court should hold that “notification” as defined in the THIRD RESTATEMENT is distinct from the imputation of knowledge and notice limited by RCW 18.86.100, and remains valid after the adoption of the statute. The Legislature provided that the Act superseded only “the duties of the parties under the common law”, providing that, “the common law continues to apply to the parties in all other respects.” RCW 18.86.110. The Legislature could not have intended the absurd result that the statute effectively prevented principals from conducting a real estate transaction through their agents. The trial court correctly refused to instruct the jury on sections .090 and .100.

Moreover, plaintiffs’ proposed instruction 31A would have been confusing and misleading because it refers to liability of the principal for any act, error or omission by the agent. CP 994 (BA App. D). A trial court is under no obligation to give a misleading instruction. ***State v. Crittenden***, 146 Wn. App. 361, 189 P.3d 849 (2008), *review denied*, 165 Wn.2d 1042 (2009). Since BPS was not claiming liability against Wang, the instruction would have been confusing. To the extent that the instruction could be interpreted to

mean that none of Plager's acts were the acts of Wang, the instruction is clearly incorrect because Wang certainly acted through Plager.

It was harmless to refuse the instruction because it provided that Wang would be liable for Plager's acts, errors, or omissions if she "participated in or authorized the act, error or omission . . . ." *Id.* In fact, Wang did participate in or authorize most, if not all, of Plager's dealings with Rosauer and Wayman. 21 RP 61, 70-71, 73-74, 77-78, 80-81, 100, 101-02, 104-05, 120-21, 123, 133, 139.

Wang argues that the trial court's instruction 6 prejudiced her by allowing BPS to argue that anything Plager knew was imputed to Wang. BA 33. Wang is confused. Instruction 6 refers only to corporations, specifically to Mountlake Investment, LLC, the corporation to which Wang assigned her interest in the PSA, and defendant BPS. CP 1020, BA App. B. Wang is not a corporation and this instruction could not be used against her. The record is unclear on when Wang formed Mountlake investment and assigned her interest to it, but Wang was indisputably the buyer under the PSA and Wang, not Mountlake Investment, and Wang not Mountlake Investment, waived the feasibility and finance contingencies. Ex. 61. The entire issue over Plager's acts,

omissions and knowledge predates the waiver. Accordingly, Instruction 6 does not even apply to Wang, and there is no evidence that Plager was ever Mountlake Investment's agent. The instruction correctly states the law as to corporations and did not prejudice Wang.<sup>10</sup>

Finally, Wang was not prejudiced by the Court's refusal to give Wang's proposed instruction 11, which would have told the jury that Wayman was an agent of BPS, that his acts or omissions were acts or omissions of BPS, and that Wayman's knowledge was imputed to BPS. CP 930, BA App. C. The trial court's instruction 6 conveyed the same message to the jury.

**D. The trial court did not abuse his discretion by instructing the jury that he had dismissed all negligent representation claims from the case.**

A trial court has broad discretion in selecting the exact wording or language of jury instructions, so long as the instructions correctly state the law and allow each party to argue its case. *State v. Rosul*, 95 Wn. App. 175, 187, 974 P.2d 916, *rev. denied*, 187, 139 Wn.2d 1006 (1999); *Janson v. North Valley Hosp.*, 93

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<sup>10</sup> Wang complains that BPS's counsel argued imputed knowledge based on Instruction 6. BA 33. But the jury was instructed in this case, as in virtually every jury case, to disregard the lawyer's arguments that are not supported by the law in the judge's instructions. CP 1014.

Wn. App. 892, 904, 971 P.2d 67 (1999). The trial court's instruction that it had dismissed the negligent representation claims as well as the claims against Rosauer's wife and Rose Chisholm correctly stated the law and were within the judge's broad discretion. They were certainly no more a comment on the evidence than the instructions approved in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 335, 54 P.3d 665 (2002) and *Hill v. Cox*, 110 Wn. App. 394, 408-09, 41 P.3d, 495 *rev. denied*, 147 Wn.2d 1024 (2002).

**E. The trial court properly awarded attorney fees at trial and this Court should award fees on appeal.**

Wang makes a one sentence argument against the award of attorney fees to BPS and the Chisholms, limited to ten words – “including the Chisholms, who were not parties to the contract . . . .” BA 36. There are circumstances under which one not a party to a contract may recover attorney fees and they are discussed in the Findings of Fact and Conclusions of Law supporting the attorney fee award. CP 1213-24. The Court should give no further consideration to Wang's argument, since she has neither made an argument nor assigned error to any findings of fact regarding attorney fees.

This Court should award fees to BPS and the Chisholms on appeal. *Hwang v. McMahon*, 103 Wn. App. 945, 954, 15 P.3d 172 (2000), *rev. denied*, 144 Wn.2d 1011 (2001) ("A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party.")

### CONCLUSION

For all of these reasons, the Court should affirm the judgment of the trial court and award attorney fees to BPS and the Chisholms on appeal.

RESPECTFULLY SUBMITTED this 20 day of August,  
2009.

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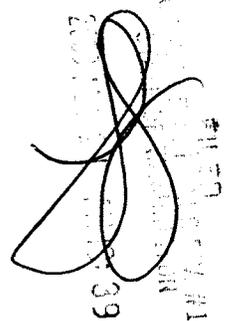
CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 20 day of August 2009, to the following counsel of record at the following addresses:

Catherine W. Smith  
Edwards Sieh Smith & Goodfriend PS  
1109 First Avenue Suite 500  
Seattle, WA 98101-2988



Charles K. Wiggins, WSBA 6948  
Counsel for Respondent



60  
18/08/09  
11:51 AM  
18/08/09



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Rev. 5/06
Page 1 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT

This has been prepared for submission to your attorney for review and approval prior to signing. No representation is made by licensee as to its sufficiency or tax consequences.
CBA Text Disclaimer: Text deleted indicated by strike. New text inserted indicated by small capital letters.

Reference Date: June 9, 2006

Shuchin Wang ("Buyer") agrees to buy and Business Plans & Strategies, Inc. ("Seller") agrees to sell, on the following terms, the commercial real estate and all improvements thereon (collectively, the "Property") commonly known as 6405 Building; 6405 SW 218th St in the City of Mount Lake Terrace, Snohomish County, Washington, legally described on attached Exhibit A. The Reference Date above is intended to be used to reference this Agreement, and is not the date of "Mutual Acceptance." Mutual Acceptance is defined in Section 23 below.

1. PURCHASE PRICE. The total purchase price is Four Million Four Hundred Thousand Dollars (\$4,400,000.00) payable as follows (check only one):

FOUR MILLION TWO HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$4,225,000.00)

M
6-15-06/SW
6/16/06

- All cash at closing with no financing contingency.
All cash at closing contingent on new financing in accordance with the Financing Addendum (attach CBA Form PS\_FIN).
\$ \_\_\_ / \_\_\_ % of the purchase price in cash at closing with the balance of the purchase price paid as follows (check one or both, as applicable):
Buyer's assumption of the outstanding principal balance as of the Closing Date of a first lien note and deed of trust (or mortgage), or real estate contract, in accordance with the Financing Addendum (attach CBA Form PS-Fin);
Buyer's delivery at closing of a promissory note for the balance of the purchase price, secured by a deed of trust encumbering the Property, in accordance with the Financing Addendum (attach CBA Form PS-Fin).
Other: \_\_\_

2. EARNEST MONEY. The earnest money in the amount of \$200,000.00 (Two Hundred Thousand) shall be in the form of Cash Personal check Promissory note (attached CBA Form EMN) Other: \_\_\_

The earnest money shall be held by Selling Licensee Closing Agent.

Buyer shall deliver the earnest money no later than:

- 5 days after Mutual Acceptance.
On the last day of the Feasibility Period defined in Section 5 below.
Other: \_\_\_

Selling Licensee may, however, transfer the earnest money to Closing Agent.

If the earnest money is to be held by Selling Licensee and is over \$10,000, it shall be deposited to: Selling Licensee's pooled trust account (with interest paid to the State Treasurer) A separate interest bearing trust account in Selling Licensee's name. The interest, if any, shall be credited at closing to Buyer. If this sale fails to close, whoever is entitled to the earnest money is entitled to interest.

Selling Licensee shall deposit any check to be held by Selling Licensee within 3 days after receipt or Mutual Acceptance, whichever occurs later. Buyer agrees to pay financing and purchase costs incurred by Buyer. Unless otherwise provided in this Agreement, the earnest money shall be applicable to the purchase price.

3. EXHIBITS AND ADDENDA. The following Exhibits and Addenda are made a part of this Agreement:

- Exhibit A - Legal Description
Earnest Money Promissory Note, CBA Form EMN

INITIALS: Buyer S.W. Date 6/9/06 Seller M Date 6-15-06
Buyer Date Seller Date



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Rev. 5/06  
Page 2 of 13

COMMERCIAL & INVESTMENT REAL ESTATE  
PURCHASE & SALE AGREEMENT  
(CONTINUED)

- Promissory Note, LPB Form No. 28A/CBA Form N1-A
- Short Form Deed of Trust, LPB Form No. 20
- Deed of Trust Rider, CBA Form DTR
- Utility Charges Addendum, CBA Form UA
- FIRPTA Certification, CBA Form 22E
- Assignment and Assumption, CBA Form PS-AS
- Addendum/Amendment, CBA Form PSA
- Back-Up Addendum, CBA Form BU-A
- Vacant Land Addendum, CBA Form VLA
- Financing Addendum, CBA Form PS\_Fin
- Tenant Estoppel Certificate, CBA PS\_Tec
- Other \_\_\_\_\_

4. **SELLER'S UNDERLYING FINANCING.** Unless Buyer is assuming Seller's underlying financing, Seller shall be responsible for confirming the existing underlying financing is not subject to any "lock out" or similar covenants which would prevent the lender's lien from being released at closing. If Seller is required to substitute securities for the Property as collateral for the underlying financing (known as "defeasance"), then the parties shall close the transaction in accordance with the three-day closing process required by the servicer of Seller's underlying financing and as described generally below. Prior to the end of the Feasibility Period described in Section 5 below, Seller shall engage a defeasance coordinator and shall provide Buyer with an outline of the three-day closing process required by the documents evidencing Seller's underlying financing. Notwithstanding anything to the contrary in Section 7 below, the date of closing shall be Day Three, which shall be the date possession of the Property is delivered to Buyer and risk of loss passes to Buyer. However, Buyer shall receive a credit at Closing for the interest which accrued from Day Two until Closing on the amount funded on Day Two.

a. **Day One.** Seller shall cause its defeasance coordinator to set up a conference call involving Seller, Seller's attorney, Buyer, Buyer's lender, Buyer's attorney, and Closing Agent to confirm that all conditions for funding the purchase of the Property on Day Two other than Seller's performance have been satisfied. Buyer shall cause its lender and attorney to participate in this call. Buyer shall be in material breach if its lender does not assure Seller that conditions are satisfied for funding on Day Two.

b. **Day Two.** Buyer and Seller shall execute and deliver to Closing Agent all documents and funds necessary to close the sale of the Property including documents necessary to release the Property from the lien securing the underlying financing, and the balance of the purchase price. This means Buyer must arrange with its lender to fund the loan on the day before the lien of the underlying financing is released and the day before Buyer's lender's lien is recorded.

c. **Day Three.** After receiving confirmation of delivery to an intermediary of the securities being used to defease the Property, Closing Agent shall disburse that portion of the funds deposited into escrow which are necessary to purchase the securities. After receiving confirmation of the purchase of the securities, Closing Agent will record the deed and reconveyance documents in accordance with the closing instruction letter from the servicer for Seller's underlying financing, and disburse the remaining closing proceeds in accordance with Closing Agent's settlement statement.

6. **FEASIBILITY CONTINGENCY.** This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives written notice to Seller within ~~45~~ 30 days (30 days if not filled in) of Mutual Acceptance stating that Buyer is satisfied, in Buyer's sole discretion, concerning all aspects of the Property, including its physical condition; the presence of or absence of any hazardous substances; the contracts and leases affecting the property; the potential financial performance of the Property; the availability of government permits and

(30 DAYS) - THIRTY DAYS

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06  
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

6-15-06  
S.W.

Appendix A



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Rev 5/06
Page 3 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

approvals; and the feasibility of the Property for Buyer's intended purpose. If such notice is timely given, the feasibility contingency stated in this Section 5 shall be deemed to be satisfied. As used in this Agreement, the term "Feasibility Period" shall mean the period beginning upon Mutual Acceptance and ending upon the satisfaction or waiver of the feasibility contingency.

a. Books, Records, Leases, Agreements. Seller shall make available for inspection by Buyer and its agents within 5 days (2 days if not filled in) after Mutual Acceptance all documents in Seller's possession or control relating to the ownership, operation, renovation or development of the Property, excluding appraisals or other statements of value, and including: statements for real estate taxes, assessments, and utilities; property management agreements; service contracts, and agreements with professionals or consultants; leases of personal property or fixtures; leases or other agreements relating to occupancy of all or a portion of the Property and a suite-by-suite schedule of tenants, rents, prepaid rents, deposits and fees; plans, specifications, permits, applications, drawings, surveys, studies and maintenance records; and accounting records and audit reports. Buyer shall determine within the feasibility period stated in the preceding introductory paragraph whether it wishes and is able to assume, as of closing, some or all of the foregoing leases, contracts, and agreements which have terms extending beyond closing. Buyer shall be solely responsible for obtaining any required consents to such assumption and the payment of any assumption fees. Seller shall cooperate with Buyer's efforts to receive any such consents but shall not be required to incur any out-of-pocket expenses or liability in doing so. Seller shall transfer the leases, contracts and agreements as provided in Section 17 of this Agreement. Seller shall remain responsible for any leases, contracts or agreements which Buyer does not assume including any termination fees or penalties.

b. Access. Seller shall permit Buyer and its agents, at Buyer's sole expense and risk to enter the Property at reasonable times subject to the rights of and after legal notice to tenants, to conduct inspections concerning the Property and improvements, including without limitation, the structural condition of improvements, hazardous materials, pest infestation, soils conditions, sensitive areas, wetlands, or other matters affecting the feasibility of the Property for Buyer's intended use. Buyer shall schedule any entry onto the Property with Seller in advance and shall comply with Seller's reasonable requirements including those relating to security, confidentiality, and disruption of Seller's tenants. Buyer shall not perform any invasive testing including environmental inspections beyond a phase I assessment or contact the tenants without obtaining the Seller's prior written consent, which shall not be unreasonably withheld. Buyer shall restore the Property and improvements to the same condition they were in prior to inspection. Buyer shall be solely responsible for all costs of its inspections and feasibility analysis and has no authority to bind the Property for purposes of statutory liens. Buyer agrees to indemnify and defend Seller from all liens, costs, claims, and expenses, including attorneys' and experts' fees, arising from or relating to entry onto or inspection of the Property by Buyer and its agents. This agreement to indemnify and defend Seller shall survive closing. Buyer may continue to enter the Property in accordance with the foregoing terms and conditions after removal or satisfaction of the feasibility contingency only for the purpose of leasing or to satisfy conditions of financing.

6. TITLE INSURANCE.

a. Title Report. Seller authorizes Buyer, its Lender, Listing Agent, Selling Licensee and Closing Agent, at Seller's expense, to apply for and deliver to Buyer a [ ] standard [X] extended (standard, if not completed) coverage owner's policy of title insurance. If an extended coverage owner's policy is specified, Buyer shall pay the increased costs associated with that policy including the excess premium over that charged for a standard coverage policy, and the cost of any survey required by the title insurer. The title report shall be issued by Chicago Title (Seller's choice, if not completed).

b. Permitted Exceptions. Buyer shall notify Seller of any objectionable matters in the title report or any supplemental report within the earlier of: (1) twenty (20) days after mutual acceptance of this Agreement; or (2) the expiration of the Feasibility Period. This Agreement shall terminate and Buyer shall receive a refund of the earnest money, less any costs advanced or committed for Buyer, unless within five (5) days of Buyer's notice of

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-19-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

(10 Days) TEN DAYS W-16-06
S.W. 6-16-06

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Page 4 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

such objections (1) Seller agrees to remove all objectionable provisions or (2) Buyer notifies Seller that Buyer waives any objections which Seller does not agree to remove. If any new title matters are disclosed in a supplemental title report, then the preceding termination, objection and waiver provisions shall apply to the new title matters except that Buyer's notice of objections must be delivered within five (5) days of delivery of the supplemental report and Seller's response or Buyer's waiver must be delivered within two (2) days of Buyer's notice of objections. The closing date shall be extended to the extent necessary to permit time for these notices. Buyer shall not be required to object to any mortgage or deed of trust liens, or the statutory lien for real property taxes, and the same shall not be deemed to be Permitted Exceptions; provided that the lien securing any financing which Buyer has agreed to assume shall be a Permitted Exception. Except for the foregoing, those provisions not objected to or for which Buyer waived its objections shall be referred to collectively as the "Permitted Exceptions." Seller shall cooperate with Buyer and the title company to clear objectionable title matters but shall not be required to incur any out-of-pocket expenses or liability other than payment of monetary encumbrances not assumed by Buyer and proration of real property taxes, and Seller shall provide an owner's affidavit containing the information and reasonable covenants requested by the title company. The title policy shall contain no exceptions other than the General Exclusions and Exceptions common to such form of policy and the Permitted Exceptions. PAULA ADAMS - CHICAGO TITLE BELLEVUE

S.W.
6-15-06/6/16/06

- 7. CLOSING OF SALE. This sale shall be closed on or before (30) Thirty Days after the removal of the Feasibility & Financing Contingencies... (closing) by Chicago Title ("Closing Agent")...
8. CLOSING COSTS AND PRORATIONS. Seller shall deliver an updated rent roll to Closing Agent not later than two (2) days before the scheduled closing date in the form required by Section 5(a) and any other information reasonably requested by Closing Agent to allow Closing Agent to prepare a settlement statement for closing. Seller certifies that the information contained in the rent roll is correct as of the date submitted. Seller shall pay the premium for the owner's standard coverage title policy. Buyer shall pay the excess premium attributable to any extended coverage or endorsements requested by Buyer, and the cost of any survey required in connection with the same. Seller and Buyer shall each pay one-half of the escrow fees. Real estate excise taxes shall be paid by the party who bears primary responsibility for payment under the applicable statute or code, which is typically Seller. Real and personal property taxes and assessments payable in the year of closing; collected rents on any existing tenancies; interest; utilities; and other operating expenses shall be pro-rated as of closing. If tenants pay any of the foregoing expenses directly, then Closing Agent shall only pro rate those expenses paid by Seller. Buyer shall pay to Seller at closing an additional sum equal to any utility deposits or mortgage reserves for assumed financing for which Buyer receives the benefit after closing. Buyer shall pay all costs of financing including the premium for the lender's title policy. If the Property was taxed under a deferred classification prior to closing, then Seller shall pay all taxes, interest, penalties, deferred taxes or similar items which result from removal of the Property from the deferred classification. At closing, all refundable deposits on tenancies shall be credited to Buyer or delivered to Buyer for deposit in a trust account if required by state or local law. Buyer shall pay all sales or use tax applicable to the transfer of personal property included in the sale.

or before August 29, 2006

a. Unpaid Utility Charges. Buyer and Seller [ ] WAIVE [X] DO NOT WAIVE the right to have the Closing Agent disburse closing funds necessary to satisfy unpaid utility charges affecting the Property pursuant to RCW

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

S.W.
6/17/06

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Rev. 5/06
Page 5 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

60.80. If "do not waive" is checked, then attach CBA Form UA ("Utility Charges" Addendum). If neither box is checked, then the "do not waive" option applies.

9. POST-CLOSING ADJUSTMENTS, COLLECTIONS, AND PAYMENTS. After closing, Buyer and Seller shall reconcile the actual amount of revenues or liabilities upon receipt or payment thereof to the extent those items were prorated or credited at closing based upon estimates. Any bills or invoices received by Buyer after closing which relate to services rendered or goods delivered to the Seller or the Property prior to closing shall be paid by Seller upon presentation of such bill or invoice. At Buyer's option, Buyer may pay such bill or invoice and be reimbursed the amount paid plus interest at the rate of 12% per annum beginning fifteen (15) days from the date of Buyer's written demand to Seller for reimbursement until such reimbursement is made. Notwithstanding the foregoing, if tenants pay certain expenses based on estimates subject to a post-closing reconciliation to the actual amount of those expenses, then Buyer shall be entitled to any surplus and shall be liable for any credit resulting from the reconciliation. Rents collected from each tenant after closing shall be applied first to rentals due most recently from such tenant for the period after closing; and the balance shall be applied for the benefit of Seller for delinquent rentals owed for a period prior to closing. The amounts applied for the benefit of Seller shall be turned over by Buyer to Seller promptly after receipt. Seller shall be entitled to pursue any lawful methods of collection of delinquent rents but shall have no right to evict tenants after closing.

10. OPERATIONS PRIOR TO CLOSING. Prior to closing, Seller shall continue to operate the Property in the ordinary course of its business and maintain the Property in the same or better condition than as existing on the date of Mutual Acceptance, but shall not be required to repair material damage from casualty except as otherwise provided in this Agreement. After the Feasibility Period, Seller shall not enter into or modify existing rental agreements or leases (except that Seller may enter into, modify, extend, renew or terminate residential rental agreements or residential leases in the ordinary course of its business), service contracts, or other agreements affecting the Property which have terms extending beyond closing without first obtaining Buyer's consent, which shall not be unreasonably withheld.

11. POSSESSION. Buyer shall be entitled to possession [X] on closing [ ] (on closing, if not completed). Buyer shall accept possession subject to all tenancies disclosed to Buyer during the Feasibility Period. Prior to closing, Seller shall remove all personal property not included in the sale and not owned by existing tenants, and deliver the Property in "broom clean" condition.

12. SELLER'S REPRESENTATIONS. Except as disclosed to or known by Buyer prior to the satisfaction or waiver of the feasibility contingency stated in Section 5 above, including in the books, records and documents made available to Buyer, or in the title report or any supplemental report or documents referenced therein, Seller represents to Buyer that, to the best of Seller's actual knowledge, each of the following selected paragraphs is true as of the date hereof (select those which apply):

- [X] a. Seller is authorized to enter into the Agreement, to sell the Property, and to perform its obligations under the Agreement;
[X] b. The books, records, leases, agreements and other items delivered to Buyer pursuant to this Agreement comprise all material documents in Seller's possession or control regarding the operation and condition of the Property;
[X] c. Seller has not received any written notices that the Property or the business conducted thereon violate any applicable laws, regulations, codes and ordinances;
[X] d. Seller has all certificates of occupancy, permits, and other governmental consents necessary to own and operate the Property for its current use;
[X] e. There is no pending or threatened litigation which would adversely affect the Property or Buyer's ownership thereof after closing;

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Page 6 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

- f. There is no pending or threatened condemnation or similar proceedings affecting the Property, and the Property is not within the boundaries of any planned or authorized local improvement district;
g. Seller has paid (except to the extent prorated at closing) all local, state and federal taxes (other than real and personal property taxes and assessments described in Section 8 above) attributable to the period prior to closing which, if not paid, could constitute a lien on Property (including any personal property), or for which Buyer may be held liable after closing;
h. Seller is not aware of any concealed material defects in the Property except as disclosed to Buyer in writing during the Feasibility Period;
i. There are no Hazardous Substances (as defined below) currently located in, on, or under the Property in a manner or quantity that presently violates any Environmental Law (as defined below); there are no underground storage tanks located on the Property; and there is no pending or threatened investigation or remedial action by any governmental agency regarding the release of Hazardous Substances or the violation of Environmental Law at the Property.

If prior to closing Seller or Buyer discovers any information which would cause any of the representations initiated above to be false if the same were deemed made as of the date of such discovery, then the party discovering the same shall promptly notify the other party in writing. If the newly-discovered information will result in costs or liability to Buyer in excess of five percent (5%) of the purchase price, or will materially adversely affect Buyer's intended use of the Property, then Buyer shall have the right to terminate the Agreement and receive a refund of its earnest money provided Buyer elects to do so within five (5) days of discovering or receiving written notice of the new information.

13. AS-IS. Except for those representations and warranties specifically included in this Agreement: (i) Seller makes no representations or warranties regarding the Property; (ii) Seller hereby disclaims, and Buyer hereby waives, any and all representations or warranties of any kind, express or implied, concerning the Property or any portion thereof, as to its condition, value, compliance with laws, status of permits or approvals, existence or absence of hazardous material on site, occupancy rate or any other matter of similar or dissimilar nature relating in any way to the Property, including the warranties of fitness of a particular purpose, tenantability, habitability and use; (iii) Buyer otherwise takes the Property "AS IS;" and (iv) Buyer represents and warrants to Seller that Buyer has sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations.

14. PERSONAL PROPERTY.

a. This sale includes all right, title and interest of Seller to the following tangible personal property: [X] None [ ] That portion of the personal property located on and used in connection with the Property, which Seller will itemize in an Addendum to be attached to this Agreement within ten (10) days of Mutual Acceptance (None, if not completed). The value assigned to the personal property shall be \$ (if not completed, the County-assessed value if available, and if not available, the fair market value determined by an appraiser selected by the Listing Agent and Selling Licensee). Seller warrants title to, but not the condition of, the personal property and shall convey it by bill of sale.

b. In addition to the leases, contracts and agreements assumed by Buyer pursuant to Section 5a above, this sale includes all right, title and interest of Seller to the following intangible property now or hereafter existing with

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 06-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Rev. 5/08
Page 7 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

respect to the Property including without limitation: all rights-of-way, rights of ingress or egress or other interests in, on, or to, any land, highway, street, road, or avenue, open or proposed, in, on, or across, in front of, abutting or adjoining the Property; all rights to utilities serving the Property; all drawings, plans, specifications and other architectural or engineering work product; all governmental permits, certificates, licenses, authorizations and approvals; all rights, claims, causes of action, and warranties under contracts with contractors, engineers, architects, consultants or other parties associated with the Property; all utility, security and other deposits and reserve accounts made as security for the fulfillment of any of Seller's obligations; any name of or telephone numbers for the Property and related trademarks, service marks or trade dress; and guaranties, warranties or other assurances of performance received.

- 15. CONDEMNATION AND CASUALTY. Seller bears all risk of loss until closing, and thereafter Buyer shall bear the risk of loss. Buyer may terminate this Agreement and obtain a refund of the earnest money if improvements on the Property are destroyed or materially damaged by casualty before closing, or if condemnation proceedings are commenced against all or a portion of the Property before closing. Damage will be considered material if the cost of repair exceeds five percent (5%) of the purchase price stated in this Agreement. Alternatively, Buyer may elect to proceed with closing in which case at closing Seller shall assign to Buyer all claims and right to proceeds under any property insurance policy and shall credit to Buyer at closing the amount of any deductible provided for in the policy.
16. FIRPTA - TAX WITHHOLDING AT CLOSING. Closing Agent is instructed to prepare a certification (CBA or NWMLS Form 22E, or equivalent) that Seller is not a "foreign person" within the meaning of the Foreign Investment in Real Property Tax Act. Seller agrees to sign this certification. If Seller is a foreign person, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service.
17. CONVEYANCE. Title shall be conveyed by a Statutory Warranty Deed subject only to the Permitted Exceptions. If this Agreement is for conveyance of Seller's vendee's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a contract vendee's assignment sufficient to convey after acquired title. At closing, Seller and Buyer shall execute and deliver to Closing Agent CBA Form No. PS-AS Assignment and Assumption Agreement transferring all leases, contracts and agreements assumed by Buyer pursuant to Section 5a and all intangible property transferred pursuant to Section 14b.
18. NOTICES AND COMPUTATION OF TIME. Unless otherwise specified, any notice required or permitted in, or related to, this Agreement (including revocations of offers and counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and must be delivered to Seller and Listing Agent with a courtesy copy to Seller's attorney if one is identified in this Agreement. A notice to Seller shall be deemed delivered only when received by Seller, Listing Agent, or the licensed office of Listing Agent. Notices to Buyer must be signed by at least one Seller and must be delivered to Buyer with a copy to Selling Licensee with a courtesy copy to Buyer's attorney if one is identified in this Agreement. A notice to Buyer shall be deemed delivered only when received by Buyer and Selling Licensee, or the licensed office of Selling Licensee. Selling Licensee and Listing Agent have no responsibility to advise of receipt of a notice beyond either phoning the represented party or causing a copy of the notice to be delivered to the party's address provided in this Agreement. Buyer and Seller must keep Selling Licensee and Listing Agent advised of their whereabouts to receive prompt notification of receipt of a notice. If any party is not represented by a licensee, then notices must be delivered to and shall be effective when received by that party.

Unless otherwise specified in this Agreement, any period of time in this Agreement shall mean Pacific Time and shall begin the day after the event starting the period and shall expire at 5:00 p.m. of the last calendar day of the specified period of time, unless the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, in which case the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of five (5) days or less shall not include Saturdays, Sundays or legal holidays.

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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CBA Form PS\_1A
Purchase & Sale Agreement
Rev. 5/06
Page 8 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

Notwithstanding the foregoing, references to specific dates or times or number of hours shall mean those dates, times or number of hours.

19. AGENCY DISCLOSURE. At the signing of this Agreement,

Selling Licensee Doug Plager of Leibsohn & Co.

(Insert names of Licensee and the Company name as licensed)

represented Buyer

(Insert Seller, Buyer, both Seller and Buyer or neither Seller nor Buyer)

and the Listing Agent Jason Rosauer of GVA/Kidder Mathews

(Insert names of Licensee and the Company name as licensed)

represented Seller.

(Insert Seller, Buyer, both Seller and Buyer or neither Seller nor Buyer)

If Selling Licensee and Listing Agent are different salespersons affiliated with the same Broker, then Seller and Buyer confirm their consent to Broker acting as a dual agent. If Selling Licensee and Listing Agent are the same person representing both parties, then Seller and Buyer confirm their consent to that person and his/her Broker acting as dual agents. If Selling Licensee, Listing Agent, or their Broker are dual agents, then Seller and Buyer consent to Selling Licensee, Listing Agent and their Broker being compensated based on a percentage of the purchase price or as otherwise disclosed on an attached addendum. Buyer and Seller confirm prior receipt of the pamphlet entitled "The Law of Real Estate Agency."

20. ASSIGNMENT. Buyer [X] may [ ] may not (may not, if not completed) assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless provided otherwise herein. If the "may not" option is selected and the words "and/or assigns" or similar words are used to identify the Buyer, then this Agreement may be assigned with notice to Seller but without Seller's consent only to an entity which is controlled by or under common control with the Buyer identified in this Agreement. Any other assignment requires Seller's consent. The party identified as the initial Buyer shall remain responsible for those obligations of Buyer stated in this Agreement notwithstanding any assignment and, if this Agreement provides for Seller to finance a portion of the purchase price, then the party identified as the initial Buyer shall guarantee payment of the Seller financing.

21. DEFAULT AND ATTORNEY'S FEE.

a. Buyer's default. In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then (check one):

[X] Seller may terminate this Agreement and keep the earnest money as liquidated damages as the sole and exclusive remedy available to Seller for such failure; or

[ ] Seller may, at its option, (a) terminate this Agreement and keep as liquidated damages the earnest money as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity.

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Purchase & Sale Agreement
Rev. 5/08
Page 9 of 13

COMMERCIAL & INVESTMENT REAL ESTATE
PURCHASE & SALE AGREEMENT
(CONTINUED)

b. Seller's default. In the event Seller fails, without legal excuse, to complete the sale of the Property, then (check one):

[X] As Buyer's sole remedy, Buyer may either (a) terminate this Agreement and recover all earnest money or fees made by Buyer whether or not the same are identified as refundable or applicable to the purchase price; or (b) bring suit to specifically enforce this Agreement and recover incidental damages provided Buyer must file suit within sixty (60) days of the scheduled date of closing or any earlier date Seller has informed Buyer in writing that Seller will not proceed with closing; or

[ ] Buyer may, at its option, (a) bring suit against Seller for Buyer's actual damages, (b) bring suit to specifically enforce this Agreement and recover any incidental damages, or (c) pursue any other rights or remedies available at law or equity.

Neither Buyer nor Seller may recover consequential damages such as lost profits. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses. In the event of trial, the amount of the attorney's fee shall be fixed by the court. The venue of any suit shall be the county in which the Property is located, and this Agreement shall be governed by the laws of the state where the Property is located.

22. MISCELLANEOUS PROVISIONS.

a. Complete Agreement. The Agreement and any addenda and exhibits to it state the entire understanding of Buyer and Seller regarding the sale of the Property. There are no verbal or other written agreements which modify or affect the Agreement.

b. Counterpart Signatures. The Agreement may be signed in counterpart, each signed counterpart shall be deemed an original, and all counterparts together shall constitute one and the same agreement.

c. Electronic Delivery. Electronic delivery of documents (e.g., transmission by facsimile or email) including signed offers or counteroffers and notices shall be legally sufficient to bind the party the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will replace electronically delivered offers or counteroffers with original documents.

d. Section 1031 Like-Kind Exchange. If either Buyer or Seller intends for this transaction to be a part of a Section 1031 like-kind exchange, then the other party agrees to cooperate in the completion of the like-kind exchange so long as the cooperating party incurs no additional liability in doing so, and so long as any expenses (including attorneys fees and costs) incurred by the cooperating party that are related only to the exchange are paid or reimbursed to the cooperating party at or prior to closing. Notwithstanding Section 20 above, any party completing a Section 1031 like-kind exchange may assign this Agreement to its qualified intermediary or any entity set up for the purposes of completing a reverse exchange.

23. ACCEPTANCE; COUNTEROFFERS. Seller has until midnight of \_\_\_\_\_ (if not filled in, the third business day following the last Buyer signature date below) to accept this offer, unless sooner withdrawn. If this offer is not timely accepted, it shall lapse and the earnest money shall be refunded to Buyer. If either party makes a future counteroffer, the other party shall have until 5:00 p.m. on the \_\_\_\_\_ business day (if not filled in, the second business day) following its receipt to accept the counteroffer, unless sooner withdrawn. If the counteroffer is not timely accepted or countered, this Agreement shall lapse and the earnest money shall be refunded to the Buyer. No acceptance, offer or counteroffer from the Buyer is effective until a signed copy is received by the Seller, the Listing Agent or the licensed office of the Listing Agent. No acceptance, offer or counteroffer from the Seller is effective until a signed copy is received by the Buyer, the Selling Licensee or the licensed office of the Selling Licensee. "Mutual Acceptance" shall occur when the last counteroffer is signed by the offeror, and the fully-signed counteroffer has been received by the offeror, his or her licensee, or the licensed office of the licensee. If any party is not represented by a licensee, then notices must be delivered to and shall be effective when received by that party.

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Page 10 of 13

COMMERCIAL & INVESTMENT REAL ESTATE  
PURCHASE & SALE AGREEMENT  
(CONTINUED)

- 24. **INFORMATION TRANSFER.** In the event this Agreement is terminated, Buyer agrees to deliver to Seller within ten (10) days of Seller's written request copies of all materials received from Seller and any non-privileged plans, studies, reports, inspections, appraisals, surveys, drawings, permits, application or other development work product relating to the Property in Buyer's possession or control as of the date this Agreement is terminated.
- 25. **CONFIDENTIALITY.** Until and unless closing has been consummated, Buyer and Seller shall follow reasonable measures to prevent unnecessary disclosure of information obtained in connection with the negotiation and performance of this Agreement. Neither party shall use or knowingly permit the use of any such information in any manner detrimental to the other party.
- 26. **SELLER'S ACCEPTANCE AND BROKERAGE AGREEMENT.** Seller agrees to sell the Property on the terms and conditions herein, and further agrees to pay a commission in a total amount computed in accordance with the listing or commission agreement. If there is no written listing or commission agreement, Seller agrees to pay a commission of 4% of the sales price or \$\_\_\_\_\_. The commission shall be apportioned between Listing Agent and Selling Licensee as specified in the listing or any co-brokerage agreement. If there is no listing or written co-brokerage agreement, then Listing Agent shall pay to Selling Licensee a commission of 2% of the sales price or \$\_\_\_\_\_. Seller assigns to Listing Agent and Selling Licensee a portion of the sales proceeds equal to the commission. If the earnest money is retained as liquidated damages, any costs advanced or committed by Listing Agent or Selling Licensee for Buyer or Seller shall be reimbursed or paid therefrom, and the balance shall be paid ~~one-half~~ to Seller and ~~one-half~~ to Listing Agent and Selling Licensee according to the listing agreement and any co-brokerage agreement. In any action by Listing Agent or Selling Licensee to enforce this Section, the prevailing party is entitled to reasonable attorneys' fees and expenses. Neither Listing Agent nor Selling Licensee are receiving compensation from more than one party to this transaction unless disclosed on an attached addendum, in which case Buyer and Seller consent to such compensation. The Property described in attached Exhibit A, is commercial real estate. Notwithstanding Section 25 above, the pages containing this Section, the parties' signatures and an attachment describing the Property may be recorded.
- 27. **LISTING AGENT AND SELLING LICENSEE DISCLOSURE.** EXCEPT AS OTHERWISE DISCLOSED IN WRITING TO BUYER OR SELLER, THE SELLING LICENSEE, LISTING AGENT, AND BROKERS HAVE NOT MADE ANY REPRESENTATIONS OR WARRANTIES OR CONDUCTED ANY INDEPENDENT INVESTIGATION CONCERNING THE LEGAL EFFECT OF THIS AGREEMENT, BUYER'S OR SELLER'S FINANCIAL STRENGTH, BOOKS, RECORDS, REPORTS, STUDIES, OR OPERATING STATEMENTS, OR OTHER MATTERS RELATING TO THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE PROPERTY'S ZONING, BOUNDARIES, AREA, COMPLIANCE WITH APPLICABLE LAWS (INCLUDING LAWS REGARDING ACCESSIBILITY FOR DISABLED PERSONS), OR HAZARDOUS OR TOXIC MATERIALS INCLUDING MOLD OR OTHER ALLERGENS. SELLER AND BUYER ARE EACH ADVISED TO ENGAGE QUALIFIED EXPERTS TO ASSIST WITH THESE DUE DILIGENCE AND FEASIBILITY MATTERS, AND ARE FURTHER ADVISED TO SEEK INDEPENDENT LEGAL AND TAX ADVICE RELATED TO THIS AGREEMENT.

80% Seller  
20% Broker  
N. S. W.  
6-16-06

3.75% - 1.75% GVA Kidder Mathews - Jason Rosauer / 2% Leibsohn & Company

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06  
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

Appendix A

Doug Plager  
6-15-06/S.W.  
6-16-06



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Page 11 of 13

COMMERCIAL & INVESTMENT REAL ESTATE  
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(CONTINUED)

28. IDENTIFICATION OF THE PARTIES. The following is the contact information for the parties involved in this Agreement:

Buyer: Shuchin Wang

Contact: Sue Wang shuchin wang

Address: 7203 79<sup>th</sup> Ave SE

Mercer Island, WA 98040

Business Phone: \_\_\_\_\_

Mobile Phone: 425-788-8439

Fax: 206-788-8439

Email: suewang-sai@comcast.net

Selling Licenses

Name: Doug Plager

Address: 40 Lake Bellevue, Suite 270

Bellevue, WA 98005

Business Phone: 425-588-4848

Mobile Phone: 425-241-6212

Email: dplager@leibsohn.com

Fax: 425-455-2198

MLS Office No.: \_\_\_\_\_

Buyer's Attorney

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Business Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Mobile Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Seller: Rose Chisholm 6-15-06

Contact: 425-442-3527

Address: \_\_\_\_\_

Business Phone: \_\_\_\_\_

Mobile Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: Business@ROSECHISHOLM.COM

Listing Agent

Name: Jason Rosauer

Address: 601 Union St Suite 4720

Seattle, WA 98101

Business Phone: 206-298-9608

Mobile Phone: \_\_\_\_\_

Email: jrosauer@qvakm.com

Fax: \_\_\_\_\_

MLS Office No.: \_\_\_\_\_

Seller's Attorney

Name: \_\_\_\_\_

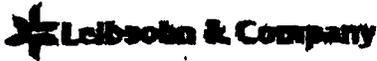
Address: \_\_\_\_\_

Business Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Mobile Phone: \_\_\_\_\_

Email: \_\_\_\_\_



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Rev. 3/04  
Page 13 of 18



**COMMERCIAL & INVESTMENT REAL ESTATE  
PURCHASE & SALE AGREEMENT  
(CONTINUED)**

IN WITNESS WHEREOF, the parties have signed this Agreement intending to be bound.

Buyer SHUCHIN WANG  
Printed name and type of entity  
Buyer [Signature]  
Signature and title  
Date signed 6/9/06  
Seller Boe M Chisholm  
Printed name and type of entity  
Seller [Signature]  
Signature and title  
Date signed 6-15-06

Buyer \_\_\_\_\_  
Printed name and type of entity  
Buyer \_\_\_\_\_  
Signature and title  
Date signed \_\_\_\_\_  
Seller \_\_\_\_\_  
Printed name and type of entity  
Seller \_\_\_\_\_  
Signature and title  
Date signed \_\_\_\_\_

Appendix A

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 06-15-06  
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Rev. 5/08  
Page 14 of 14

COMMERCIAL & INVESTMENT REAL ESTATE  
PURCHASE & SALE AGREEMENT  
(CONTINUED)

EXHIBIT A

LEGAL DESCRIPTION EXHIBIT  
(Paragraph 4 of Schedule A continuation)

PARCEL A:

THE SOUTH HALF OF LOT 4, BLOCK 2, LAUREL ADDITION TO LAKE MCALEER, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 6 OF PLATS, PAGE 29, RECORDS OF SNOHOMISH COUNTY, WASHINGTON;

TOGETHER WITH THAT PORTION OF VACATED SUMMIT STREET ADJACENT TO THE SOUTH HALF OF SAID LOT 4.

ALSO TOGETHER WITH THE EAST 16 FEET OF THE FOLLOWING DESCRIBED TRACT:

THE SOUTH HALF OF LOT 3, BLOCK 2, LAUREL ADDITION TO LAKE MCALEER, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 6 OF PLATS, PAGE 29, RECORDS OF THE AUDITOR OF THE COUNTY OF SNOHOMISH, STATE OF WASHINGTON, EXCEPT THE WEST 30 FEET THEREOF FOR STREET.

(SAID PARCEL A IS ALSO KNOWN AS PARCEL D AND PORTION OF PARCEL B AS DELINEATED ON SHORT PLAT NO. 44 RECORDED UNDER AUDITOR'S FILE NUMBER 7706290175 AS AMENDED BY LOT LINE ADJUSTMENT RECORDED UNDER AUDITOR'S FILE NUMBER 86052702BQ).

PARCEL B:

AN NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS AND UTILITIES OVER, UNDER AND ACROSS THE NORTH 30 FEET OF THE SOUTH HALF OF LOT 3, BLOCK 2, LAUREL ADDITION TO LAKE MCALEER, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 6 OF PLATS, PAGE 29, RECORDS OF SNOHOMISH COUNTY, WASHINGTON;

EXCEPT THE WEST 30 FEET THEREOF; AND

EXCEPT THE EAST 16 FEET THEREOF.

SITUATE IN THE COUNTY OF SNOHOMISH, STATE OF WASHINGTON.

DOCUMENTS TO BE RECORDED TO COMPLY WITH THE REQUIREMENTS OF RCW 65.04. SAID ABBREVIATED LEGAL DESCRIPTION IS NOT A SUBSTITUTE FOR A COMPLETE LEGAL DESCRIPTION WHICH MUST ALSO APPEAR IN THE BODY OF THE DOCUMENT:

LOTS 3 AND 4, BLOCK 2, LAUREL ADDITION TO LAKE MCALEER, VOL. 6, PAGE 29

Appendix A

Initials: BUYER: S.W. DATE: 6/9/06 SELLER: [Signature] DATE: 6-9-06  
BUYER: \_\_\_\_\_ DATE: \_\_\_\_\_ SELLER: \_\_\_\_\_ DATE: \_\_\_\_\_



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Rev 5/06
Purchase & Sale Agreement
Financing Addendum
Page 1 of 3



CBA FINANCING ADDENDUM

This has been prepared for submission to your attorney for review and approval prior to signing. No representation is made by licensee as to its sufficiency or tax consequences.
CBA Text Disclaimer: Text deleted indicated by strike. New text inserted indicated by small capital letters.

The following is part of the Purchase and Sale Agreement dated June 9, 2006 (the "Agreement"), between Shuchin Wang ("Seller"), and Business Plans & Strategies, Inc. ("Buyer"), regarding the sale of the Property known as: 6405 Building.

IT IS AGREED BETWEEN BUYER AND SELLER AS FOLLOWS:

1. NEW FINANCING. If payment of the purchase price is contingent on Buyer obtaining new financing, then Buyer shall submit a complete application within five (5) business days after the Feasibility Period stated in Section 5 of the Agreement, pay required costs and make a good faith effort to procure such financing. Buyer shall not reject those terms of a commitment which provide for a loan amount of at least \$\_\_\_\_\_ or 75% of the purchase price, interest not to exceed eight percent (8%) per annum, a payment schedule calling for monthly payments amortized over not less than twenty-five (25) years, and total placement fees and points of not more than \_\_\_\_\_ percent (\_\_\_\_%) of the loan amount. This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives Seller written notice that this condition is satisfied or waived on or before ~~sixty~~ (30) days (60 days, if not completed) following mutual acceptance of the Agreement.

(30) DAYS
6-15-06 / S.W.
6/16/06

2. ASSUMPTION OF EXISTING FINANCING.

Thirty
6-15-06 / S.W.
6/16/06

a. Approval of Documents. If payment of the purchase price includes Buyer's assumption of a note and mortgage or deed of trust, or a real estate contract, Seller shall deliver to Buyer within five (5) days after mutual acceptance of the Agreement a copy of all documents relating to Seller's underlying financing including the underlying debt instrument(s) to be assumed, guaranties, non recourse carve-outs, and indemnity agreements (the "Underlying Loan Documents"). Buyer shall be deemed to have approved the Underlying Loan Documents unless Buyer gives notice of disapproval during the Feasibility Period.

b. Consent to Assumption. Buyer shall submit a complete application for assumption of the Underlying Loan Documents together with any required application fee within five (5) days after the Feasibility Period. Upon Buyer's request, Seller shall assist Buyer by requesting the lender's consent to the assumption on Buyer's behalf. Buyer's principals shall be required to execute any guaranties and indemnities required by the lender. This Agreement shall terminate and, provided Buyer has timely complied with its obligations under this Addendum, Buyer shall receive a refund of the earnest money unless Buyer gives Seller written notice within \_\_\_\_\_ (\_\_\_\_) days (30 days, if not completed) after the end of the Feasibility Period stating that such consent is available.

c. Assumption Fees and Expenses. Buyer shall pay all costs and expenses attributable to the assumption of the underlying indebtedness including all application fees, processing charges, and assumption fees.

d. Release of Seller and Principals. Seller's obligations under the Agreement  are  are not (are not, if not completed) conditioned upon Seller and all guarantors or indemnitors being released from their obligations arising under the Underlying Loan Documents for the period on and after closing.

Appendix A

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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Page 2 of 3



CBA FINANCING ADDENDUM
(CONTINUED)

3. SELLER FINANCING.

a. Debt Instruments. If Seller is financing a portion of the purchase price, unless different forms are attached to this Agreement, Buyer shall execute and submit to the Closing Agent: (i) LPB Form No. 28A Promissory Note and the DUE ON SALE and COMMERCIAL PROPERTY optional clauses in that form shall apply; (ii) LPB Form No. 20 Short Form Deed of Trust; and (iii) CBA Form No. DTR Deed of Trust Rider. In addition, Buyer authorizes Seller and Closing Agent to file a financing statement to perfect Seller's security interest in the personal property described in the Deed of Trust Rider.

b. Payment Terms. The promissory note shall bear interest at the rate of \_\_\_% per annum, and shall be payable as follows (choose one):

- Monthly installments of interest only;
Monthly installments of \$ \_\_\_;
Equal monthly installments of principal and interest in an amount sufficient to fully amortize the outstanding principal balance at the stated interest rate over \_\_\_ years;
Other \_\_\_;

Payments shall commence on the first day of the first month after closing and continuing on the same day of each succeeding month until (choose one):

- \_\_\_ months from the date of closing;
Other \_\_\_ on which date all outstanding principal and interest shall be due.

Buyer \_\_\_ may \_\_\_ may not (may, if not completed) prepay the outstanding principal balance without premium or penalty. The principal shall, at Seller's option, bear interest at the rate of \_\_\_% per annum (18% or the maximum rate allowed by law, whichever is less, if not filled in) during any period of Buyer's default. If Seller receives any monthly payment more than \_\_\_ days (15 days if not filled in) after its due date, then a late payment charge of \$ \_\_\_ or \_\_\_% of the delinquent amount (5% of the delinquent amount if not filled in) shall be added to the scheduled payment. Buyer shall have \_\_\_ days (5 days if not filled in) after written notice to cure a default before Seller may declare all outstanding sums to be immediately due and payable.

(Note to Buyer and Seller: If the Property is currently used primarily for agricultural purposes, then a non-judicial foreclosure/forfeiture remedy is available to Seller only by using a real estate contract and is not available with a deed of trust.)

4. ESTOPPELS AND SNDAS. If Buyer or its lender require estoppels or subordination, nondisturbance and attornment agreements ("Estoppel/SNDAs") from some or all of the non-residential tenants at the Property, then Seller shall cooperate with Buyer to obtain the required Estoppels/SNDAs. The form of the Estoppels/SNDAs shall be CBA Form PS\_TEC, or any different form required by Buyer's lender which Buyer has delivered to Seller during the Feasibility Period. Promptly after the Feasibility Period, Seller shall use commercially reasonable efforts and diligence to obtain the Estoppel/SNDAs from its tenants provided that Seller shall not be required to incur any liability or out-of-pocket expenses which are not reimbursed by Buyer. Buyer shall have no separate contingency for receipt of the Estoppels/SNDAs other than the Feasibility Contingency or as specifically provided in an addendum signed by Seller.

INITIALS: Buyer [Signature] Date 6/9/06 Seller [Signature] Date 6-15-06



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Page 3 of 8



**CBA FINANCING ADDENDUM**  
(CONTINUED)

6. **ADDITIONAL PROVISIONS.** The terms of the Agreement remain unchanged as supplemented in this Addendum or provided below:

IN WITNESS WHEREOF, the parties have signed this Agreement intending to be bound.

Buyer SHUCHIN WANG  
Name and title of entity

Buyer   
Signature and title

Date signed 6/9/06

Seller Rose A Chisholm  
Name and title of entity

Seller 6-15-06   
Signature and title

Date signed 6-15-06

Appendix A

INITIALS: Buyer S.W. Date 6/9/06 Seller  Date 6-15-06

Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_



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ADDENDUM/AMENDMENT TO
PURCHASE AND SALE AGREEMENT
CBA Text Disclaimer: Text deleted by licensee indicated by strike.
New text inserted by licensee indicated by small capital letters.

The following is part of the Purchase and Sale Agreement dated June 9, 2006,

Between Business Plans & Strategies, Inc. ("Seller")

And Shuchin Wang ("Buyer")

regarding the sale of the Property known as: 6405 Building

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS: Buyer acknowledges Seller Disclosure of EIFS siding decay on the building, Seller agrees to place \$300,000.00 of sales proceeds in an escrow account to cover the costs of siding replacement and possible damages, as yet undiscovered, to the structure of the building. This work shall be completed as expeditiously as possible. The residue of the funds, should there be any, shall be remitted to Seller;

AND THE PURCHASE PRICE REFLECTS ANY DAMAGE OR EXPENSE ARISING THERE FROM.

Handwritten signature and date: 06-15-06 / S.W. 6/16/06

Appendix A

AGENT (COMPANY): \_\_\_\_\_ By: \_\_\_\_\_

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

INITIALS: Buyer S.W. Date 6/9/06 Seller [Signature] Date 6-15-06
Buyer \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

**FILED**  
KING COUNTY, WASHINGTON  
MAY 27 2008  
SUPERIOR COURT CLERK  
BY STEPHANIE WALTON  
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING**

SHU-CHIN WANG and WEN-SHYAN WANG, )  
Husband and wife; and MOUNTLAKE )  
INVESTMENT, LLC, a Washington limited )  
liability company, )

Plaintiffs, )

vs. )

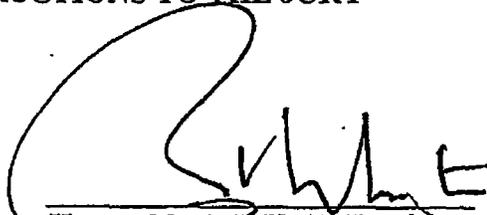
BUSINESS PLANS & STRATEGIES, INC., )  
a Washington Corporation, )

Defendant. )

NO: 06-2-36091-5 SEA

**COURT'S INSTRUCTIONS TO THE JURY**

Dated: 5/27/08



Honorable JAY V. WHITE  
King County Superior Court

**INSTRUCTION NO. 1**

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witnesses. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

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One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

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As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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INSTRUCTION NO. 4

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have liability insurance, business insurance, property insurance, or some other form of coverage.

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INSTRUCTION NO. 5

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

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INSTRUCTION NO. 6

The plaintiff Mountlake Investment, LLC, and the defendant, Business Plans & Strategies, Inc., are corporations. A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee or agent is the act or omission of the corporation.

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INSTRUCTION NO. 7

The Court has dismissed the negligent misrepresentation claims against Tony Chisholm, Kidder Mathews & Segner, Inc. d/b/a GVA Kidder Mathews, and its agent Jason Rosauer. The claims against Anne Markley Rosauer, and Rose Chisholm have also been dismissed. The only remaining claim in this lawsuit is the breach of contract claim against Business Plans and Strategies, Inc., the seller of the building.

During your deliberations on the breach of contract claim, you should not consider, and your deliberations should not be impacted by the fact that the other claims and defendants have been dismissed from this lawsuit.

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INSTRUCTION NO. 8

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Appendix B

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INSTRUCTION NO. 9

Plaintiffs have the burden of proving each of the following propositions on their claims of breach of contract:

(1) That BPS, Inc., breached the contract in one or more of the ways claimed by plaintiffs, and

(2) That plaintiffs were damaged as a result of BPS, Inc.'s breach.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiffs. On the other hand, if either of these propositions has not been proved, your verdict should be for the defendant.

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INSTRUCTION NO. 10

A contract is a legally enforceable promise or set of promises.

Appendix B

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INSTRUCTION NO. 11

The failure to perform fully a contractual duty when it is due is a breach of contract. The duties at issue are the defendant's duties under Paragraph 5 (a) and Paragraph 12 of the Real Estate Purchase and Sale Agreement.

Appendix B

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INSTRUCTION NO. 12

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

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INSTRUCTION NO. 13

The term "make available" means only that the subject matter is accessible or attainable. The term "deliver" means delivery or physical transfer of possession. There is a clear distinction between these words which you may not ignore.

**INSTRUCTION NO. 14**

When a buyer of real property discovers evidence of a defect, the buyer is obligated to inquire further. When a buyer's inspection demonstrates some evidence of a defect, the buyer must make inquiries of the seller to ascertain the extent of the problem. Stated differently, where a buyer has knowledge or information which is sufficient to put an ordinarily prudent person upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects, the purchaser will be held chargeable with knowledge thereof.

INSTRUCTION NO. 15

The term "as is" means that the property is taken with whatever faults it may possess and that the seller is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property. An "as-is" clause does not override a written, express provision contained in the contract unless it references the written, express provision.

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INSTRUCTION NO. 16

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of its contract.

INSTRUCTION NO. 17

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

In order to recover actual damages, the plaintiffs have the burden of proving that the defendant, Business Plans & Strategies, Inc. ("defendant") breached a contract with plaintiff Shu-Chin Wang, assigned to plaintiff Mountlake Investment, LLC, ("plaintiffs"), and that plaintiffs incurred actual economic damages as a result of defendant's breach, and the amount of those damages.

If your verdict is for plaintiffs on plaintiffs' breach of contract claim and if you find that plaintiffs have proved that they incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiffs.

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiffs' actual damages, you should determine the sum of money that will put the plaintiffs in as good a position as they would have been in if plaintiffs and defendant had performed all of their promises under the contract.

The burden of proving damages rests with the plaintiffs and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

INSTRUCTION NO. 18

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in the case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has an opportunity to be heard and to participate in the deliberations on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms A and B for recording your verdict. If you decide the case in favor of the plaintiffs, then you will use Verdict Form A. If you decide the case for the defendant, then you will use Verdict Form B.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, call the bailiff who will bring you a form for that purpose. Write the question simply and clearly on the form provided by the bailiff. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict, whether or not the presiding juror agrees with it. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

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

SHU-CHIN WANG and WEN-SHYAN WANG, )  
Husband and wife; and MOUNTLAKE )  
INVESTMENT, LLC, a Washington limited )  
liability company, )

Plaintiffs, )

vs. )

BUSINESS PLANS & STRATEGIES, INC., )  
a Washington Corporation, )

Defendant. )

NO: 06-2-36091-5 SEA

VERDICT FORM A

We, the jury, find for the plaintiffs in the sum of \$\_\_\_\_\_.

Dated: \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUROR

Appendix B

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

SHU-CHIN WANG and WEN-SHYAN WANG, )  
Husband and wife; and MOUNTLAKE )  
INVESTMENT, LLC, a Washington limited )  
liability company, )

Plaintiffs, )

vs. )

BUSINESS PLANS & STRATEGIES, INC., )  
a Washington Corporation, )

Defendant. )

NO: 06-2-36091-5 SEA

VERDICT FORM B

We, the jury, find for the defendant.

Dated: 5/28/2008

Peter D. Wells  
PRESIDING JUROR

Appendix B

# HOUSE BILL REPORT

## 2EHB 1659

### As Passed Legislature

**Title:** An act relating to real estate brokerage relationships.

**Brief Description:** Regulating real estate brokerage relationships.

**Sponsors:** Representatives Mielke, Quall, Crouse, Costa, Kremen and Cooke.

#### **Brief History:**

##### **Committee Activity:**

Commerce & Labor: 1/24/96, 1/29/96 [DPA].

##### **Floor Activity:**

Passed House: 2/8/96, 94-0.

Passed Legislature.

#### **HOUSE COMMITTEE ON COMMERCE & LABOR**

**Majority Report:** Do pass as amended. Signed by 11 members: Representatives McMorris, Chairman; Hargrove, Vice Chairman; Thompson, Vice Chairman; Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cairnes; Cody; Cole; Goldsmith; Horn and Lisk.

**Staff:** Pam Madson (786-7166).

**Background:** The duties owed by a real estate broker or sales agent to a buyer, seller, landlord, or tenant are based on the common law of agency. Agency is a consensual relationship between two persons where one (the principal) empowers the other (the agent) to act, and the agent acts based on that authority. Agency relationships can be created expressly in writing or by words or conduct. Conduct that determines an agency relationship in real estate sales and leasing includes who pays the commission.

Duties owed by an agent to a principal in a real estate transaction include loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting. The scope of these duties has evolved through the courts. In any given transaction, the duties owed may be unclear.

In the purchase and sale of real estate, the issue of who an agent represents may also be unclear. Licensed real estate brokers, affiliated brokers, and sales people may be involved in a firm that deals with both buyers and

sellers or landlords and tenants. It may not be clear to the buyers or sellers who is representing their interests.

**Summary of Bill:** The duties and the relationship of an agent to the principal (buyer or seller, landlord or tenant) are established in statute and supersede the common law rules applied to real estate licensees to the extent that they are inconsistent with the statute. An agent may represent only the buyer or the seller unless otherwise agreed in writing. Absent an agreement, the agent represents the buyer. A summary pamphlet of the statutory duties must be provided to all parties by the real estate agent before any agency agreements or real estate offers are signed, before a party consents to dual agency, or before a party waives any rights designated as waivable.

#### General Duties of a Licensee

Certain duties apply to real estate licensees generally when performing real estate brokerage services, including the duty to

- (1) exercise reasonable skill and care;
- (2) deal honestly and in good faith;
- (3) present all written offers, notices, and other communications in a timely manner;
- (4) disclose all material facts known by the licensee and not easily ascertainable to a party;
- (5) account for all money and property received in a timely manner;
- (6) provide a pamphlet on the law of real estate agency to all parties; and
- (7) disclose what party a licensee represents, if any, in a real estate transaction.

These duties cannot be waived.

The agent is not obligated to conduct an independent investigation of the property or of either party's financial condition. The agent has no duty to verify any information the agent reasonably believes to be reliable.

#### Duties of an Agent to the Seller or Buyer and Duties of a Dual Agent

Certain duties apply between a licensee agent and the seller or a licensee agent and the buyer or in a dual agency relationship, including the duty to

- (1) be loyal by taking no action that would be adverse to the client;
- (2) disclose timely, any conflicts of interest;

- (3) advise the client to get expert advice on matters relating to the transaction that are beyond the agent's expertise; and
- (4) refrain from disclosing confidential information about the client except under subpoena or court order.

These duties cannot be waived. The only duty that can be waived is the duty to make a good faith and continuous effort to seek a buyer for a seller or a seller for a buyer.

It is not a breach of duty to the principal for the agent, in the case of a seller, to show or list competing properties, or, in the case of a buyer, to show properties to competing buyers.

A real estate licensee may represent both the buyer and the seller if all parties agree in writing. The consent to this dual agency must include the terms of compensation.

#### Duration of the Agency Relationship

The agency relationship begins when the licensee performs brokerage services and continues until the licensee completes the services, the agreed upon period of service is ended, or the parties agree to termination. Once the brokerage relationship is terminated, an agent is obligated to account for all moneys and property received and to keep appropriate information confidential.

#### Compensation

Payment of compensation is not a factor in determining the existence of an agency relationship. A broker may be paid by any party to the transaction and may be paid by more than one party if the parties agree. A buyer's agent may be paid based on the purchase price without breaching any duty owed to the buyer.

#### Vicarious Liability

In the chain of relationships that operate in a real estate transaction, the liability of each party is addressed. A principal (buyer or seller) is liable for the actions of the agent (real estate licensee) only if the principal participated in or authorized the act, or the principal benefitted from the act and a court determines that no judgment could be enforced against the agent or a subagent. A licensee agent is not liable for the acts of a subagent unless the licensee participated in or authorized the act.

#### Imputed Knowledge

There is no presumption of knowledge on the part of the principal (buyer or seller) of facts known by the agent or subagent of the principal.

The contents of the pamphlet on real estate agency law that must be provided to sellers and buyers are contained in the law.

The director of the Department of Licensing may impose sanctions on a licensee for violation of the laws governing real estate brokerage relationships.

The provisions of this act apply when an real estate licensee represents a landlord or a tenant in a lease arrangement.

Only those agency relationships entered into after January 1, 1997, unless otherwise agreed in writing as to agency relationship entered into before that date, are subject to this law.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect January 1, 1997.

**Testimony For:** A lot of hard work has gone into addressing legislative concerns from the last session by all interested parties. Industry had concerns. Duties and responsibilities of real estate agents were very vague and unclear. Consumers had no knowledge of what the agent's duties and responsibilities really were. This bill clarifies those duties. Most buyers and sellers have no knowledge about the notions of **vicarious liability** and imputed knowledge. They do not know that the buyer or the seller could be responsible for what the agency says or does, including an agent misrepresentation. This legislation brings certainty to the public. They are in and out of the market every few years and don't really know what to expect. The most attractive feature of the legislation is that a person working with a licensee can assume that the licensee is working for that person. Without this legislation, that has not been the case. Historically, real estate agents represented the seller whether they were working with the seller or not. This legislation allows natural business relationships to exist. The duties of licensees in the same real estate office representing the buyer and the seller in the same transaction are defined. The bill is well organized and easy to read. Receiving a copy of this bill will be useful to the public.

**Testimony Against:** None.

**Testified:** Senator Pelz, prime sponsor; (pro) Glen Hudson, Washington Association of Realtors; Jim Corrello; and Chris Osborn.