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CASE NUMBER: 12-2-08537-4 SEA

KING COUNTY SUPERIOR COURT OF WASHINGTON

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; and WINDERMERE
REAL ESTATE/EAST, INC.,

Defendants.

NO. 12-2-08537-4 SEA

PLAINTIFF'S TRIAL BRIEF

A. BACKGROUND FACTS.

Hartley McGrath contracted with Vestus and Windermere East for services to assist her with purchasing property in foreclosure to repair and resell for a profit. The practice of purchasing real estate to resell is called "flipping." Vestus is a real estate broker, operating under the license and in conjunction with Windermere East. Vestus specializes in assisting buyers in flipping foreclosing properties. Vestus failed to disclose very negative information in its possession concerning the property it helped McGrath select.

McGrath's complaint alleges that Vestus and Windermere breached their contract with her, negligently misrepresented the property, breached statutory duties imposed on real estate brokers, and violated the Consumer Protection Act.

1. RELATIONSHIP BETWEEN McGRATH AND VESTUS.

Hartley McGrath and her partner Mark Cooley began looking earnestly for investment houses for McGrath in early 2011. She wanted to buy a house, fix it up, and then sell it at a profit.

1 She considered approximately 100 houses and made unsuccessful bids on about five houses before
2 she contracted with Vestus.

3 McGrath had specific concerns about foundation problems from the outset of her search.
4 She had learned some of the signs of foundation problems from her father, an engineer, who lives
5 in Colorado. Specifically he had advised her, "Do not buy a house with foundation issues." Before
6 going to Vestus, she had rejected two prior houses specifically because they appeared to have
7 foundation problems. She knew foundation repairs were lengthy and expensive. She would never
8 knowingly purchase a house with foundation issues.
9

10 Another foreclosure investor suggested she work with Vestus. Her first interaction with
11 Vestus was through its website.
12

13 Vestus' website describes the services it provides to foreclosure investors. In particular,
14 it promises to gather information not generally available to the public, to drive to the property, to
15 perform due diligence on the information it has gathered, and to provide that information to its
16 investors. Among its website promises are that it gathers information about the foreclosing
17 properties from all available sources, that it conducts "a rigorous process of due diligence by cross
18 analyzing all the data gathered by our system . . . and by physically driving to each and every
19 property to ensure the accurate analysis of each foreclosure," that it provides all of the information
20 it has gathered to its clients, and that on the night before the auction to "go over every single top
21 pick of that week to prepare you for the upcoming auction. Each analysis provides an in-depth
22 study of the foreclosing property."
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25 McGrath and Cooley attended a Tuesday night workshop at Vestus' office, where Vestus'
26 founder elaborated on the same services provided by Vestus and to make buying at foreclosures
27 "almost risk free." Persuaded by the value of these promised services, on March 22, 2011 she
28

1 executed a Client Agreement with Vestus. The Agreement, like the website, promises that Vestus
2 will provide its clients with all of the information it has compiled on the properties scheduled for
3 foreclosure.
4

5 **2. VESTUS' SCHEDULED ROUTINES.**

6 Each week Vestus spends Monday through Thursday gathering information on properties
7 scheduled for foreclosure auction. On Thursday nights, it presents the gathered information to its
8 clients, and on Friday morning bids on the properties its clients selected the night before. At the
9 beginning of each week, between 300 and 500 properties are scheduled for auction. By Thursday
10 evening, Vestus has narrowed down the best prospects for its clients to its "top thirty picks." It
11 presents its top picks to its clients at its Thursday night meeting.
12

13 Vestus assigns its sales representatives to geographical territories. During the week, the
14 assigned representative drives to the homes in his area scheduled for foreclosure on Friday. At the
15 Thursday night meeting, that representative presents the properties in his territories which are
16 Vestus' top picks to the Vestus clients attending the meeting.
17

18 Vestus' top picks are documented for the meeting attendees in a packet containing multiple
19 pages for each property. The top picks and the packets are not made available to Vestus' clients
20 until the Thursday night meeting. For each property, the packet contains a cover sheet of Vestus
21 information and ratings ("Vestus Fact Sheet"). For some properties, the packet contains a
22 Residential Agent Detail Report ("Agent Report") obtained by Vestus from the Multiple Listing
23 Services ("MLS"). Also for some properties, the packet contains MLS listings of comparable
24 properties. Vestus does not know how many clients will attend the Thursday night meeting, but
25 makes 50 copies of its packet in anticipation.
26
27

28 The sales representatives present each of their properties in the packet and answer questions

1 from the assembled clients. The sales representatives routinely describe their extraordinary efforts
2 to get a good look at the properties scheduled for auction. McGrath thought they were “pretty good
3 braggers” talking about their efforts to see the condition of the property. She testifies, “part of the
4 presentation on Thursday is about how much they saw of this home, and they -- they have the
5 information and tell us they get the information from getting out of their car and walking around
6 the property and seeing as much as they can see. These guys are not shy.”

8 Cooley was also impressed by the sales representatives’ efforts, including trespassing at
9 times, to learn the condition of the property: “And they were very explicit on the fact that they
10 didn't just drive by the property. They got out. They’d walk the property. The only time they
11 wouldn't walk the property is if there was a specific No Trespassing sign or someone asked them
12 to leave the property. Then they would exit. Otherwise, they were -- they were fairly forward in
13 reviewing the property. . . . So, in my mind, they went -- they not only drove by the property to
14 verify external things, but they went above and beyond to make sure that the house was in the right
15 condition; to at least tell us -- they were going to be honest -- that they would tell us what the
16 condition was.”

19 3. MCGRATH’S SELECTION OF THE PROPERTY.

20 On the evening of April 7, 2011, McGrath and Cooley attended Vestus’ Thursday night
21 meeting to go over properties scheduled for foreclosure auction the next morning. Christopher
22 Hall, Vestus’ co-founder and 25% owner, ran the meeting. Each client received a packet of
23 material containing the information Vestus had compiled about the properties. Included in the
24 packet was information about a house in Federal Way at 33130 2nd Place SW, then owned by the
25 Njoku’s. (“The Property.”) Chris Nelson, one of Vestus’ sales representatives, whose territory
26 includes Federal way, presented the Property to the assembled clients. He said he had gone to the
27
28

1 Property a few days before the auction. Chris Nelson is a licensed real estate agent.

2 The Vestus Fact Sheet for the Property, attached, states in the Notes box, "4/4/2011 Chris
3 N: Occ, shake roof EOL, needs ext paint, on cul-de-sac, great area." This means that Chris Nelson
4 drove to the property on 4/4/2011, that "Occ" means occupied; that "shake roof EOL" means the
5 end of the roof's life, and "needs ext paint" means the house needs exterior paint.
6

7 The bottom left corner of the Vestus Fact Sheet contains Vestus' ratings. Vestus rated the
8 roof as 1, the exterior as 3, the yard as 4, and the house as 3. A rating of 1 is the worst, and a
9 rating of 5 is best.
10

11 The auction packet distributed on April 7 did not contain an Agent Detail Report for the
12 Property. Vestus, however, had a copy of an Agent Detail Report for the Property since March 13,
13 2011. It was pulled from the MLS site by Hugh Stewart, one of Vestus' principals. At about one
14 third of the way down the page contains the words, "Partial Slope." At the bottom, in a section
15 called "Agent Only Remarks," is "settling issues."
16

17 Nelson told the group that he lived near the Property, and knew it was in a great
18 neighborhood. He assured the meeting participants that he knew the house well, that the exterior
19 had been neglected and needed paint. Nelson told McGrath he had walked the Property. McGrath
20 understood that Nelson had the skill to make a reasonable assessment of the condition of the
21 property and would report it. "I would say that I had an expectation that Christopher Nelson,
22 along with the other gentlemen who were viewing the houses, had a -- an ability to see and
23 understand potential issues or issues with homes from what they could visibly see. Not that they
24 would be experts at a specific -- like he's not a roof expert, but he wrote in there, It needs a new
25 roof because you can see the shakes are falling off."
26
27

28 McGrath understood at the Thursday night meeting that Nelson had not gone inside the

1 house because it was occupied, but she was reassured that Nelson knew the house because he lived
2 nearby and that he had personally gone to the house to assess its condition.

3 McGrath then went through the properties in the packet separately with Christopher Hall.
4 Hall had told her that he particularly looks out for first time investors, as McGrath was. Hall
5 recommended the deals that appeared to be the best for her. He included probable repair costs in
6 his evaluation of each deal. She picked four properties for bid the next morning, ranking them in
7 her order of preference. The Property was her fourth choice.

8
9 Vestus asserts that the Agent Detail Report for the Property had to have been in the April
10 7, 2011 packet. McGrath insists that had she seen the red flags of “slope” and “settling issues” she
11 would never have bid on the Property. She looked very carefully at all the documentation in the
12 packet on the properties that interested her. Cooley also testifies that Vestus provided no
13 information about “settling issues.” Chris Nelson, the sales representative who drove to and
14 presented the Property at the meeting, testifies that he did not see the agents remark concerning
15 “settling issues” prior to McGrath’s purchase of the Property.
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18 The meeting concluded after dark. Because three of the properties were close to the
19 meeting location, she and Cooley drove past them on their way home. The Property, however, was
20 in Federal Way, and because it was occupied they could not see the interior, and because it was
21 after dark they could not see the exterior. They therefore did not drive to Federal Way to see the
22 Property.
23

24 The auction began the next morning, Friday, April 8, 2011, at 10:00 am. McGrath and
25 Cooley attended. Hall bid on her four selections. McGrath’s top three choices went to other
26 bidders, and the bid on the Property, her fourth choice, was the high bid.
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1 **4. THE CONDITION OF THE PROPERTY.**

2 The next day, Saturday, April 9, 2011, McGrath and Cooley drove to Federal Way to see
3 the Property. A public trail abuts the property line at the back of the house allowing them to see
4 the Property from the back. McGrath describes what she saw:
5

6 Walking up to that house, looking on public property from behind, you could see
7 that there were three decks that were sloping downward, which to me is a sign that
8 it's not constructed well. And it's on a slope. So that gives me -- first of all, I'm
9 questionable about how that's being supported.

10 But then the next thing was seeing that the foundation cement and the cement posts
11 that hold the deck were not covered with dirt anymore, so it had eroded underneath
12 it. The chimney was also twisted. . . .

13 She also noted that a window next to that chimney was at an angle that was concerning, and
14 other indications that the house was moving. When she got closer, she saw that the rebar holding
15 up the deck was exposed and deteriorating, and that the chimney had pulled away from its base.

16 A few weeks later after the former owners vacated the Property, McGrath was able to go
17 inside the house. There, she discovered a wide crack running diagonally across the basement floor,
18 smaller spider cracks throughout the basement floor, crooked windows, and cracked wall board.

19 McGrath expected to replace the roof, paint the exterior, and do whatever interior
20 improvements would be required to make the house more marketable. She had not expected to
21 have expenses to repair the foundation and the interior problems caused by the foundation
22 problems.

23 McGrath spent a very sizeable amount more than what she had expected to repair the
24 foundation. The foundation problems also required her to pay three months additional mortgage
25 interest and utilities to maintain and hold the property for three months longer than would have
26 been required by repairs limited to the roof, paint, and other interior repairs and improvements.
27 The financial drain caused by the foundation repairs exhausted her assets, all her available credit,
28

1 and put her in great emotional and financial distress.

2 After McGrath and Cooley discovered the house's foundation problems in April 2011,
3 McGrath was emotionally devastated. She had set aside funds to make repairs to the house,
4 including replacing the roof, but she had not anticipated requiring the financial resources to correct
5 the serious foundation problem. Her struggles to pay for the repairs was a continuing source of
6 stress. Her self confidence and self esteem also took a terrible beating from what she perceived
7 as utter failure in her first real estate venture. She believed she had let her whole family down.
8 She lost sleep, and appetite, and had bouts of crying. She received medication for anxiety,
9 although it offered only partial relief.
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12 **5. PROCEDURAL HISTORY.**

13 Hartley McGrath's immediate thoughts were not upon suing Vestus, but on making and
14 paying for repairs and getting the house on the market. Through this process, however, she began
15 to question how Chris Nelson could have missed the signs of foundation problems given that he
16 claimed to have walked the property.
17

18 After the repairs were finally complete, she put the house back on the market. In doing so,
19 her real estate agent gave her a copy of the MLS Agent Detail Report prepared by real estate agent
20 Joni Kemmer, who had attempted to sell the property before it went into foreclosure. The Agent
21 Detail Report disclosed that the house was on a slope and that there were "settling issues." This
22 was the first time McGrath knew that Vestus had not disclosed the Agent Detail Report with its
23 alarming red flags forewarning of the foundation problems she encountered. Later she learned that
24 Vestus actually acquired this Agent Detail Report almost a month before she bid on the property.
25 She would never have purchased the house had the Agent Detail Report been in the packet. Upon
26 seeing the Agent Detail Report, she felt Vestus had deceived her.
27
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1 Hartley McGrath filed a complaint against Vestus, Windermere, and Christopher Hall in
2 March, 2012. She alleged breach of contract, fraudulent and negligent misrepresentation, breach
3 of real estate professionals' duties owed under RCW 18.86.030, and violation of the Consumer
4 Protection Act ("CPA".)

5
6 Vestus brought a summary judgement motion in January 2013 to dismiss all of McGrath's
7 claims. Judge Catherine Shaffer dismissed McGrath's fraud claims because McGrath had
8 insufficient evidence of fraudulent intent. Judge Shaffer agreed that McGrath had presented
9 evidence to support all of her other claims, that all claims, including negligent misrepresentation
10 and fraudulent concealment, had a basis in law, and that disputes of material fact precluded
11 summary judgement. The major factual dispute was then, and remains today, whether the Agent
12 Detail Report was in the auction packet. Vestus sought reconsideration, and was denied. In June,
13 Vestus brought another motion for summary judgement, limited to fraudulent concealment, based
14 on "new" facts and law. The same factual disputes continued and the new case did not provide
15 new law, and so Vestus' second motion was denied.
16
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18 Since the hearing on Vestus' motion, McGrath has notified Vestus' attorney that she
19 intends to drop her claim for fraudulent concealment. She has also decided to drop Christopher
20 Hall as a defendant. She has filed a motion to amend to reflect these changes in a stipulation and
21 order agreed upon by defendants' attorney.
22

23 **B. LEGAL BACKGROUND.**

24 **1. RELIANCE.**

25 One of the central legal and factual themes in this case is Hartley McGrath's right to have
26 relied upon Vestus' promises. Because the issue of reasonable meanings and reasonable reliance
27 arises in all of McGrath's claims, it is addressed separately.
28

1 Vestus argues that the disclaimer in paragraph 2 of its contract concerning the condition
2 of properties deprives McGrath's of the right to rely upon any of Vestus' promises.

3 The statement in paragraph 2 of the Agreement, "VESTUS, LLC and Broker do not have
4 physical access into the properties . . ." can be readily understood as McGrath reasonably
5 understood it. (Emphasis mine.) She knew that Vestus could not get access to the interiors of
6 occupied houses and would not flagrantly trespass onto the grounds. She did not understand the
7 provision to mean that Vestus did not take as thorough and careful a look at the property as
8 circumstances permitted. Vestus' argument changes the statement from "access *into* the
9 properties." to "access *to* the properties." Vestus does have access to the properties in varying
10 degrees. McGrath reasonably relied upon Vestus' promises to obtain as much evidence about the
11 physical condition of the property as circumstances allowed.

12 Next, the remainder of the same sentence, that Vestus does not "guarantee the accuracy or
13 completeness of the information it makes available," is equally consistent with McGrath's
14 understanding that Vestus gathers information collected by others and cannot control the accuracy
15 or completeness of what others have prepared. The language is inconsistent with Vestus'
16 construction that it could deliberately or accidentally withhold negative information in its possession.
17 It is also wholly inconsistent with Vestus' non-waiveable duties to disclose under RCW 18.86.030.

18 Next, the statement that Vestus does "not make any representations about the quality or
19 condition of the properties or the fitness of any property for Client's needs," is simply untrue as
20 demonstrated by Vestus' ratings on its Vestus Fact Sheet and Christopher Hall's admission that
21 he does make special provisions for first time investors. McGrath's understanding that the
22 statement means only that Vestus' representations about the conditions and quality of a property
23 and the fitness for a client's needs are limited to the information gathered by Vestus and what the
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1 client has told Vestus.

2 Next, the statement, “Client will independently assess any properties and will seek
3 independent advice from the appropriate professionals,” cannot reasonably mean that a Vestus
4 client will retain a professional inspector to examine the property prior to purchase. After all,
5 Vestus promotes its diligence in investigating, and more important, Vestus has not narrowed its
6 top picks until the night before the auction, the client has not received Vestus’ packet or
7 presentation and has not picked its bid properties until the night before the auction. It knows that
8 its clients cannot obtain a professional inspection in that time frame and in the dark. The statement
9 does not rule out the client’s reliance on Vestus’ advice. The more reasonable reading is that
10 Vestus has limited expertise, and cannot be responsible for advising what an appropriate
11 professional, such as a professional inspector, an attorney, or a building contractor might advise.
12
13

14 Vestus also points to a slide it shows to its investors telling them not to buy sight unseen.
15 McGrath does not recall seeing this slide, but even if she had, it appears to be more of a marketing
16 tool for Vestus’ services than an admonition to its clients. All of the 7 Critical Mistakes described
17 on the slide are ones that Vestus claims can be avoided by signing up for Vestus’ services. With
18 respect to the sight unseen warning, Vestus knows its clients cannot see the properties until after
19 the Thursday night meeting, if then, but that Vestus sales representatives do see the properties in
20 the week of the auction. Consequently, the reasonable meaning of the slide is: Do not buy unless
21 the property is seen by Vestus.
22
23

24 When McGrath was asked, “Do you believe it's normal for a first-time investor to buy a
25 property sight unseen?” she answered, “I believe it's normal for a first-time investor with Vestus
26 to purchase a property that they recommend.” When she was asked, “You understood you were
27 engaged in investment that involved serious risks, did you not?” she answered, “Correct. And
28

1 that's the reason that I came to Vestus is so they could help mitigate that.” When asked about
2 buying sight unseen, she replied, “And again, the reason that I went to Vestus is because they were
3 walking properties.” McGrath reasonably relied on Vestus’ expertise and advertisements, exactly
4 as Vestus intended
5

6 It is well settled contract law that where one construction would make a contract
7 unreasonable or such as a prudent person would not ordinarily enter into, while another, equally
8 consistent with the language, would make it reasonable, fair, and just, the interpretation which
9 makes it a rational and probable agreement must be adopted. *Fisher Properties, Inc. v.*
10 *Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986); *Ball v. Stokely Foods*, 37 Wn.2d 79,
11 83, 221 P.2d 832 (1950). Vestus’ construction of these provisions is unreasonable in the
12 circumstances in which these statements are made.
13

14 Parties may offer extrinsic evidence in a contract dispute, regardless of whether the
15 contract’s terms are ambiguous, to help the fact finder interpret a contract term and to determine
16 the contracting parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 667–69, 801 P.2d 222 (1990).
17 “A question of interpretation of an integrated agreement is to be determined by the trier of fact if
18 it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to
19 be drawn from extrinsic evidence.” *Hudesman*, at 667–68, quoting the Restatement (Second) of
20 Contracts § 212(2) (1981). See also, WPI 301.05, Contract Interpretation.
21

22 McGrath did not rely upon Vestus’ professional inspection of the Property because she
23 knew Vestus was not qualified and that it could not gain access to the interior. She did rely on
24 Vestus’ marketing and promises of diligence and care, however. Her reliance on Vestus’ promises
25 and its duty of care and full disclosure, was reasonable in the context of the services Vestus
26 provides, the context of the broker responsibility statute, and the CPA.
27
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1 **2. CONTRACT.**

2 Vestus' promises contained in its Client Agreement with McGrath include: "2. Broker will
3 make available to Client information that VESTUS, LLC has compiled about properties in
4 foreclosure. VESTUS, LLC attempts to obtain information from trustees, tax records, multiple
5 listing service reports and other public sources."

6 Vestus breached that promise by not providing the Agent Detail Report which had been in
7 its possession since March 13, 2011, and which identifies "settling issues," and that the property
8 is on a slope.
9

10 Vestus asserts that it did provide the Agent Report to McGrath. No witness can confirm
11 that the Agent Report was in the packet. Vestus claims it can prove that the Agent Report was in
12 a packet it email to a limited group of special investors. It is irrelevant, however, whether the
13 Agent Report might have been in a packet emailed to special investors when the email packet was
14 not sent to McGrath. McGrath's and Cooley's insistence that it was not in the packet is all the
15 more credible in light of the attention they particularly paid to the information about the Property.
16 More powerful, however, is the testimony of Chris Nelson who was the Vestus agent assigned to
17 drive to the Property and to present it to the Vestus clients assembled on April 7, 2011. Nelson
18 testifies that he did not see the agents remark concerning "settling issues" prior to McGrath's
19 purchase of the Property. Nelson was required to pay particular attention to all of the information
20 in Vestus' possession about the Property. It is simply inconceivable that he would not see the
21 Agent Report that Vestus had for a month if it were in the packet.
22
23
24

25 Further, the Vestus Fact Sheet does not state in its own sales representative's notes that the
26 house was on a slope. The Vestus photograph of the Property does not reveal a slope. Chris
27 Nelson could see that the house was on a slope, acknowledged that being on a slope could affect
28

1 marketability in the Northwest, and that a number of people will not buy property on a slope. The
2 information that the property was on a slope is material information which Vestus also failed to
3 provide.

4 Vestus also breached the contract either by not observing what was there to be observed
5 or by not disclosing what it had observed. The promises contained in Vestus' website include,
6 "We conduct a rigorous process of due diligence by cross analyzing all the data gathered by our
7 system . . . and by physically driving to each and every property to ensure the accurate analysis of
8 each foreclosure."
9

10 Vestus breached its promises to provide all the information it compiled and to diligently
11 look at the property. McGrath did not expect Vestus to perform an inspection beyond its expertise
12 or ability. She reasonably expected, however, that Vestus would perform as it promised.
13

14 **3. NEGLIGENT MISREPRESENTATION.**

15 Negligent misrepresentation is shown by a breach of the affirmative duty to disclose a
16 material fact. *Baddley v. Seek*, 138 WnApp. 333, 338-39, 156 P.3d 959 (2007) (citing *Baertschi*
17 *v. Jordan*, 68 Wn2d 478, 482, 413 P.2d 657 (1966)). Washington adopted the Restatement
18 (Second) of Torts (1977) (Restatement) as the standard governing claims of negligent
19 misrepresentation. *Haberman v. WPPSS*, 109 Wn.2d 107, 161-62, 744 P.2d 1032 (1987), 750 P.2d
20 254 (1988).
21

22 Liability under Section 551 arises for a failure to disclose when:
23

24 (1) One who fails to disclose to another a fact that he knows may justifiably induce the
25 other to act or refrain from acting in a business transaction is subject to the same liability
26 to the other as though he had represented the nonexistence of the matter that he has failed
27 to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to
28 disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to
disclose to the other before the transaction is consummated,

1 (a) matters known to him that the other is entitled to know because of a fiduciary or other
2 similar relation of trust and confidence between them; and
3 (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous
statement of the facts from being misleading; . . .

4 *Colonial Imports, Inc.*, at 731. See also, *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545,
5 55 P.3d 619 (2002). See also, WPI 165.02.

6 Vestus was in the business of supplying information regarding foreclosing properties to its
7 clients in the clients' business transactions, and specifically promised McGrath that it would
8 provide all of the information it acquired about the foreclosing properties. It did not, however, use
9 reasonable care to provide the Residential Agent Detail Report identifying that the Property was
10 on a slope and had settling issues. The nondisclosure of a fact which one is bound to disclose is
11 an indirect representation that such fact does not exist. *Oates v. Taylor*, 31 Wn.2d 898, 902-05,
12 199 P.2d 924 (1948). McGrath was particularly alert to foundation problems, and would not
13 knowingly purchase a property with foundation problems.
14
15

16 McGrath reasonably relied upon Vestus' contractual obligation to provide all the
17 information in its possession concerning the Property. Her purchase of the Property with
18 undisclosed settlement issues caused her damage.
19

20 The measure of damages for negligent misrepresentation is (1) the lesser of either the cost
21 of cure or the difference between actual and represented property value and (2) reasonably
22 foreseeable consequential damages. *Olmsted v. Mudler*, 72 Wn.App. 169, 180, 863 P.2d 1355
23 (1993), *review denied*, 123 Wn.2d 1025 (1994). Here the cost of cure, including foreseeable
24 consequential damages, and the difference between the actual and represented property value are
25 approximately the same.
26

27 In addition, emotional distress damages as a consequence of the negligent
28 misrepresentation are proper. *Bloor v. Fritz*, 143 Wn.App. 718, 744-45, 180 P.3d 805 (2008).

1 **4. VIOLATION OF CHAPTER 18.86 RCW**

2 RCW 18.86.110 provides that common law tort causes of action permit recovery for breach
3 of statutory duties set forth in Chapter 18.86 RCW. *Jackowski v. Borchelt*, 174 Wn2d 720, 735,
4 278 P.3d 1100 (2012). RCW 18.86.030(1) imposes the following duties upon licensees, “which
5 may not be waived:”
6

7 (a) To exercise reasonable skill and care;

8 (b) To deal honestly and in good faith; . . .

9
10 (d) To disclose all existing material facts known by the licensee and not apparent
11 or readily ascertainable to a party; provided that this subsection shall not be
12 construed to imply any duty to investigate matters that the licensee has not agreed
13 to investigate; . . .

14 RCW 5.40.050 provides, “A breach of a duty imposed by statute, ordinance, or
15 administrative rule shall not be considered negligence per se, but may be considered by the trier
16 of fact as evidence of negligence; . . .” See also WPI 60.01, 60.02.

17 The most obvious of breach of duty is Vestus’ failure to disclose “all existing material facts
18 known by the licensee and not apparent or readily ascertainable to a party.” In addition, although
19 promising to diligently drive by the property, and boasting about its near heroic efforts to assess
20 a property’s condition, the examination of the Property was cursory and lacked reasonable skill and
21 care.

22 “[C]ommon law tort causes of action remain the vehicle through which a party may recover
23 for a breach of statutory duties set forth in chapter 18.86 RCW.” *Jakowski*, at 735. Consequently,
24 damages for breach of duties under Chapter 18.86 RCW are those damages allowable for breach
25 of common law tort duties. The “basic underpinning of all tort law” is that “the injured person
26 ought to be made as nearly whole as possible through pecuniary compensation.” *DeNike v.*
27 *Mowery*, 69 Wn.2d 357, 371, 418 P.2d 1010 (1966). Similarly, “The measure of damages in tort
28

1 actions is that indemnity which will afford an adequate compensation to a person for the loss
2 suffered or the injury sustained by him as the direct, natural, and proximate consequence of the
3 wrongful act or omission.” *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948).

4
5 **5. CONSUMER PROTECTION ACT.**

6 To prevail on a Consumer Protection Act claim (“CPA”), the plaintiff must show “(1)
7 unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;
8 (4) injury to plaintiff in his or her business or property; (5) causation.” *Bain v. Metropolitan*
9 *Mortg. Group, Inc.*, 175 Wn2d 83, 115, 285 P.3d 34 (2012), quoting, *Hangman Ridge Training*
10 *Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn2d 778, 780, 719 P.2d 531 (1986). Vestus challenged
11 the first, third, and fifth elements, conceding that the act occurred in trade or commerce, and that
12 there was injury to McGrath. Judge Shaffer agreed that McGrath stated a valid claim under the
13 CPA.
14

15 Misrepresentation of the material terms of a transaction or *the failure to disclose material*
16 *terms violates the CPA.”* *Bain*, at 115-116, quoting, *State v. Kaiser*, 161 WnApp. 705, 719, 254
17 P.3d 850 (2011) (emphasis added). The public interest element is met by Vestus’ posting
18 foreclosing properties on its website and then including it in its auction packet, as it does with
19 numerous other properties for numerous other clients. Here, Vestus posted the Property on its
20 website and then included it in its auction packet to an audience of approximately 50 clients,
21 without disclosing known defects. Similar to the facts here, is *Bloor v. Fritz*, 143 WnApp. 718,
22 735-6, 180 P.3d 805 (2008), in which a real estate agent did not disclose the history of illegal drug
23 manufacturing on the property. Because the agent admitted advertising the property, listing it, and
24 showing the property to another prospective buyer without disclosing the property’s history, the
25 Court concluded, “Listing and showing the property without disclosing its history of illegal drug
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1 manufacturing had the capacity to deceive any member of the public who used the directory or
2 expressed interest in the property.”

3
4 For a number of years Washington courts have held that the third element, the public
5 interest element, is satisfied when the issue is the agent’s or broker’s failure to disclose a material
6 fact. “[F]ailure of a salesman to disclose information has long been recognized as the basis for an
7 action under RCW 19.86.” *McRae v. Bolstad*, 101 Wn2d 161, 166, 676 P.2d 496 (1984). The
8 Court of Appeals, which was later affirmed, observed,

9
10 Examination of the regulatory and licensing scheme of the Real Estate Brokers and
11 Salesmen Act, under RCW Title 18, shows the welfare of the general public is implicated
12 by the primary purpose of the act; to promote a minimum standard of conduct for those
13 engaged in the business of real estate in the capacity of a fiduciary. Such heavy regulation
14 of the real estate industry for the purpose of protecting people from negligent, unscrupulous
or dishonest real estate brokers denotes that Mazza's failure to disclose the water conditions
of the real property affected the public interest. The court correctly applied the Consumer
Protection Act to this transaction.”

15 *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982) (citations omitted.).

16 Finally, the fifth challenged element, causation, is readily satisfied. McGrath would not
17 have purchased a property on a slope with settling issues. Had Vestus disclosed this information
18 in its possession, McGrath would not have been injured. The cause of McGrath’s injury is Vestus’
19 failure to disclose the information it had about the Property.
20

21 **C. MEASURE OF DAMAGES.**

22 The damages for each of McGrath’s claims requires similar measurements and calculations.
23 Although noneconomic damages are available only for her negligent misrepresentation and
24 negligent breach of statutory duties claims, the measurements are the same for the two causes of
25 action. Damages for reasonable attorneys fees and costs are available only through her contract
26 and CPA claims, however, the Court will use the same measurements for either or both if the jury
27 finds in favor of McGrath on those claims. Her economic damages, the costs of remedying the
28

1 foundation problem, for lost profits, and prejudgement interest are all available under all of her
2 claims and require substantially the same measurement.

3 Applicable to McGrath's breach of statutory duty, "The measure of damages in tort actions
4 is that indemnity which will afford an adequate compensation to a person for the loss suffered or
5 the injury sustained by him as the direct, natural, and proximate consequence of the wrongful act
6 or omission." *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948). The measure of damages
7 for negligent misrepresentation is consistent: (1) the lesser of either the cost of cure or the
8 difference between actual and represented property value and (2) reasonably foreseeable
9 consequential damages. *Olmsted v. Mudler*, 72 Wn.App. 169, 180, 863 P.2d 1355 (1993), *review*
10 *denied*, 123 Wn.2d 1025 (1994).

11 "Contract damages are ordinarily based on the injured party's expectation interest and are
12 intended to give that party the benefit of the bargain by awarding him or her a sum of money that
13 will, to the extent possible, put the injured party in as good a position as that party would have been
14 in had the contract been performed." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 849, 792
15 P.2d 142 (1990). The WPI jury instruction reflects this basis for contract damages, calling for an
16 award of foreseeable actual damages.¹

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22 ¹WPI 303.01 provides in pertinent part: ". . . In order to recover actual damages, the plaintiff has the
23 burden of proving that the defendant breached a contract with [him] [her] [it], and that plaintiff incurred actual
24 [economic] damages as a result of the defendant's breach, and the amount of those damages.
25 [If your verdict is for plaintiff on plaintiff's breach of contract claim and] if you find that plaintiff has proved that
26 [he] [she] [it] incurred actual damages and the amount of those actual damages, then you shall award actual
27 damages to the plaintiff.
28 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 plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as
good a position as [he] [she] [it] would have been in if both plaintiff and defendant had performed all of their
promises under the contract. . . .

1 The usual case law measures of contract damages for real property transactions do not
2 precisely align with the circumstances here. Defendants did not damage the Property or sell the
3 Property – the usual circumstances in most contract cases. In most contract cases, the buyer is
4 entitled to the lesser of the benefit of the bargain or the cost of cure, plus foreseeable consequential
5 damages. See, *Lyall v. DeYoung*, 42 Wn.App. 252, 260, 711 P.2d 356 (1985). Benefit of the
6 bargain damages are calculated as “the difference in the market value of the property as warranted
7 on the date of sale and its actual value on that date with the defect, along with any consequential
8 damages not inherent in the benefit of the bargain . . .” *Id.*, at 259.
9
10

11 The benefit of the bargain amount cannot be calculated with reliability here, because unlike
12 the usual case, there is no reliable measure of market value with the defect. Defendants may argue
13 that the fair market value without defect is the value on Vestus’ cover sheet for the Property,
14 presumably based upon comparable properties. Even assuming *arguendo* that Vestus’ assessment
15 is reliable, neither Vestus nor McGrath have any basis for estimating the fair market value with the
16 foundation defect apart from the cost of cure.
17

18 Damages for CPA violations are prescribed by RCW 19.86.090, which provides in
19 pertinent part:

20 Any person who is injured in his or her business or property by a violation of RCW
21 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, . . . may bring a civil action in
22 superior court to enjoin further violations, to recover the actual damages sustained by him
23 or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In
24 addition, the court may, in its discretion, increase the award of damages up to an amount
25 not to exceed three times the actual damages sustained; PROVIDED, That such increased
26 damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand
27 dollars: . . .

28 Thus, while the restriction to injuries to “business or property,” preclude emotional distress
damages, McGrath may recover all “actual damages” for injuries resulting from a violation of the
CPA. The meaning of “actual damages” is far broader than either benefit of the bargain or cost

1 of cure in contract actions.

2 “Actual damages” is a

3 [t]erm used to denote the type of damage award as well as the nature of injury for
4 which recovery is allowed; thus, actual damages flowing from injury in fact are to
5 be distinguished from damages which are nominal, exemplary or punitive. *Rasor*
6 *v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041, 1049. “Actual damages” are
7 synonymous with compensatory damages.

8 Black's Law Dictionary 35 (6th ed.1990).

9 As the dictionary definition notes, Washington courts have interpreted the term “actual
10 damages” in this manner. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041
11 (1976) (stating that actual damages “Encompass all the elements of compensatory
12 awards”); *Sing v. John L. Scott, Inc.*, 83 Wn.App. 55, 70, 920 P.2d 589 (1996), rev'd on
13 other grounds, 134 Wn.2d 24, 948 P.2d 816 (1997).


14 *Martini v. Boeing Co.*, 137 Wn.2d 357, 367-68, 971 P.2d 45 (1999).

15 **D. CONCLUSION.**

16 The evidence will show that defendants did not disclose negative information about the
17 Property which was in their possession and failed to exercise the diligence promised to observe the
18 defects that could be seen by a reasonable look at the exterior of the Property. The evidence will
19 show that Hartley McGrath was damaged by the defendants failure to disclose and negligent
20 observation of the property.

21 Dated this 5th day of August, 2013

22 REAUGH OETTINGER & LUPPERT, P.S.

23 By 
24 Sylvia Luppert, WSBA 14802
25 Attorneys for Hartley McGrath