

NO. 09-0309

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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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IN RE JOSEPH CHARLES RUBIOLA A/K/A J.C. RUBIOLA,  
GREGORY ALLAN RUBIOLA, CATHERINE RUBIOLA, JGL DESIGN-BUILD  
LLC A/K/A JGL DESIGN BUILD AND MICHAEL CORTEZ,  
INDIVIDUALLY AND D/B/A THE HEIGHTS DESIGN AND CONSTRUCTION,  
  
RELATORS

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**RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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Original Proceeding from the 131<sup>st</sup> Judicial District Court, Bexar County, Texas  
Trial Court No. 2008-CI-13072; Honorable John Gabriel, Judge Presiding  
Court of Appeals Number 04-09-00115-CV

\* \* \*

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ATTORNEYS FOR REAL PARTIES  
IN INTEREST

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## STATEMENT OF FACTS

Real Parties in Interest Brian and Christina Salmon (“the Salmons”) accept Respondents’ (hereinafter collectively “the Rubiolas”) Statement of Facts except for the numerous misstatements and references to evidence not presented to the trial court or which are not properly before this Court.<sup>1</sup>

## SUMMARY OF ARGUMENT

The Salmons signed a real estate contract (SR-A) contracting to purchase the home and property located at 816 Garraty Road, San Antonio, Texas from Greg and Catherine Rubiola. **This contract is the sole agreement that gave rise to the Salmons’ claims in this cause.** The effective date of this contract was January 20, 2007 and

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<sup>1</sup> Since this Court’s review is based upon an abuse of discretion standard, the trial court could not have abused its discretion if the Rubiolas did not present the newly referenced evidence to which it now refers that was never presented to the trial court. Throughout the Petition the Rubiolas reference for the first time an entity called *Rubiola Mortgage & Realty*, apparently hoping to confuse the Court by identifying this entity since it has the words “mortgage” and “realty” in it to further its unjustified argument that the January 20, 2007 real estate contract and the February 13, 2007 financing document should be construed together. Rubiola Mortgage & Realty is not a party to either of these agreements and the Rubiolas never identified its involvement, if any, to the trial court. Even the affidavit of Greg Rubiola (SR-C), which was hastily provided to the trial court at the end of the first hearing that occurred on December 4, 2008 (SR-M – page 25), was never filed and was not provided to opposing counsel prior to the institution of mandamus proceedings (despite the fact that it was signed on November 12, 2008 – 22 days before the first hearing) does not reference an entity called Rubiola Mortgage & Realty.

Similarly, throughout the Petition the Rubiolas allege without supporting evidence that the Salmons were engaged in “one-stop shopping”. Further, the Rubiolas imply that J.C. Rubiola was acting as a real estate agent on behalf of Rubiola Mortgage & Realty; **however, the Texas Real Estate Commission identifies Greg Rubiola – not Rubiola Mortgage & Realty – as the responsible real estate broker for J.C. Rubiola** (Exhibit “1”).

Similarly, the Salmons agree that the reference in footnote 9 of the Petition regarding the sale of the Salmons’ home on Dover Road is patently irrelevant.

The Salmons further object to Exhibits D, F and V of the sworn record filed by the Rubiolas, together with Exhibit A attached to the Rubiolas’ Petition. None of these documents were presented to the trial court for consideration.

Further, attached collectively as Exhibit “2” to this Response are the affidavits of Ben Shub. These documents are not “affidavits” (and thus do not properly swear to anything) since they do not include a proper jurat and therefore violate TRAP 52.3(j); 52.3 (k)(1)(A) and 52.7. *Coastal Cement Sand, Inc. v. First Interstate Credit Alliance, Inc.*, 956 S.W.2d 562, 567 (Tex. App. – Houston [14<sup>th</sup> Dist] 1997, pet. denied) (document that does not include a jurat is not a sworn statement or affidavit). *In re. Butler*, 270 S.W.3d 757, 758 (Tex. App. – Dallas 2008, orig. proceeding) (mandamus relief denied when petitioner failed to properly prove record and documents in support of request for relief by failing to provide proper affidavit testimony); *accord, In re. Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 316 (Tex. App. - Houston [1<sup>st</sup> Dist.] 2006, orig. proceeding).

contained a “termination option” which expired on January 30, 2007.<sup>2</sup> A financing addendum was attached to the contract which allowed the Salmons five days to terminate the contract (by January 25, 2007) based upon an inability to obtain financing.<sup>3</sup> Thus, at the latest the Salmons were contractually obligated to purchase the home, irrespective of whether they could obtain financing or not, on January 30, 2007. On February 13, 2007, well after these dates, the Salmons approached Rubiola Mortgage Company (hereinafter “RMC”) to obtain financing. Using strained arguments, some of which are based upon evidence and documents clearly outside the record, the Rubiolas inappropriately request that this Court rewrite their real estate contract<sup>4</sup> and construe the two clearly separate agreements as one ball of wax.

The Rubiolas improperly employ two tactics to achieve their unjustified result. First, the Rubiolas wrongfully allege that the Salmons have engaged in “artful pleading – an absolutely false allegation. Plaintiffs’ Original Petition does not mention financing, loans, points, any statement or misrepresentation made by any Rubiola related to

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<sup>2</sup> Paragraph 23 of the real estate contract states in pertinent part:

**23. TERMINATION OPTION:** For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer’s agreement to pay Seller \$100.00 (Option Fee) ..., Seller grants to Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within the 10 days after the effective date of this contract. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

<sup>3</sup> The financing addendum states in pertinent part: Buyer shall apply promptly for all financing described below and make every reasonable effort to obtain approval for the financing (Financing Approval).... If Buyer cannot obtain Financing Approval, Buyer may give written notice to Seller within 5 days after the effective date of this contract and this contract will terminate and the earnest money will be refunded to Buyer. **If Buyer does not give such notice within the time required, this contract will no longer be subject to Financing Approval. Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

Once the financing condition addendum expired on January 25, 2007 the contract was complete for financing purposes. Thus, the Salmons could have been exposed to a suit for specific performance and other remedies that the Rubiolas may have sought had the Salmons tried to terminate the contract based upon lack of financing – see paragraph 15 of real estate contract

<sup>4</sup> Contrary to the Rubiolas’ catch phrase on page 4 and 5 of their Petition that the Salmons “cannot have their contract and defeat it too” – the Rubiolas – not the Salmons- ask the Court to rewrite their contract. The Rubiolas chose the form and filled in the blanks of the real estate contract – see stipulation at page 41 and 42 of SR-P. Further, both Greg and J.C. Rubiola are very experienced real estate brokers/agents and thus are familiar with the terms of the TREC form of the contract they chose for this transaction.

financing, etc. or RMC for a reason - this cause relates to the physical condition of the home/property that the Salmons purchased, not financing. The Salmons disavow and confirm to this Court that they are unaware of any misrepresentations made by the Rubiolas relating to financing or any cause of action that they have relating to same.

Next, contrary to established legal principles, the Rubiolas invites this Court to construe the real estate contract and financing document together. In reality, they are two separate, free-standing agreements which should not be construed together. The Rubiolas chose the form and filled in the blanks of the real estate contract (see affidavit of Christina Salmon - SR-C and the Rubiolas' stipulation SR-P, p. 41-42); further, paragraph no. 16 authorizes the parties to seek relief related to any dispute "from a court of competent jurisdiction".<sup>5</sup> In addition, the real estate agreement contains an "entire agreement clause"<sup>6</sup> and references a "*third party financing condition addendum*", which expired on January 25, 2007. In addition, neither the real estate contract nor financing document refer to each other, do not have the same parties and were not executed contemporaneously. Further, since the financing termination option in the real estate contract expired on January 25, 2007 the financing document signed on February 13, 2007 was not essential to the contract since the Salmons were legally bound on January

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<sup>5</sup> Paragraph 16 provides in pertinent part:

**16. MEDIATION:** It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation.... This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

<sup>6</sup> Paragraph 22 states in pertinent part:

**22. AGREEMENT OF PARTIES:** This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (check all applicable boxes):

Third Party Financing Condition Addendum

...

Addendum for Sale of Other Property by Buyer

26, 2007 to purchase the property irrespective of whether they could obtain financing or not.

## ARGUMENT

### **A. THE RUBIOLAS' REQUEST TO HAVE THIS COURT REWRITE THEIR REAL ESTATE CONTRACT SHOULD BE REJECTED**

#### **1. This Court should maintain the integrity of the real estate contract.**

This Court should reject the Rubiolas' request to have their real estate contract rewritten. In *In re. Merrill Lynch Trust Company FSB*, 235 S.W.3d 185, 191 (Tex. 2007), this Court rejected a similar request, noting that, despite an extremely broad arbitration clause<sup>7</sup> in an agreement between Merrill Lynch Pierce Fenner & Smith, Inc. and the Plaintiffs in that cause, the Court would not rewrite the contracts of Merrill Lynch's affiliates, Merrill Lynch Trust and Merrill Lynch Insurance.

#### **2. The Salmons are not engaging in "artful pleading"**

The Rubiolas accuse the Salmons of engaging in artful pleading, relying upon evidence outside the record by consistently referring to an entity called Rubiola Mortgage & Realty and alleging the Salmons engaged in "one-stop shopping", etc. Again, Plaintiffs' Original Petition does not mention financing or RMC. Further, the Salmons disavow any knowledge of any cause of action against RMC or the Rubiolas regarding financing. The clear substance of Plaintiffs' claims relate to the physical condition of the home/property that they purchased. The real estate contract, which does not contain an arbitration clause and expressly authorizes the parties to resort to the litigation system, is the contractual nub for their causes of action against the Rubiolas.

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<sup>7</sup>

The Merrill Lynch arbitration provision, which is more broad than the one at issue, stated:

I agree that all controversies that may arise between us, including but not limited to those involving any transaction for the construction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Id. at 188

**3. The real estate contract and financing document are two separate, free-standing instruments which should not be construed together.**

Contrary to established principles of contract law, the Rubiolas invite this Court to construe the real estate contract and financing document together. In order for two separate agreements to be construed together they must be executed contemporaneously, by the same parties, for the same purposes and as part of the same transaction. *Personal Security & Safety Systems, Inc. v. Motorola*, 297 F.3d 388, 393 (5<sup>th</sup> Cir. 2002); *I.D.E.A. v. WC&R Interests*, 545 F. Supp. 2d 600, 608 (W.D. Tex. 2008) (court properly denied motion to compel arbitration when movant alleged that business relationship agreement that contained arbitration clause should be incorporated by reference into manufacturing agreement signed by same parties that did not; neither agreement referred to each other and the manufacturing agreement contained an “entire agreement” term); *In re. Sino Swearingen Aircraft Corporation*, 2004 W.L. 1193960 (Tex. App. – Dallas 2004, orig. proceeding) (trial court properly denied motion to compel arbitration when movant attempted to incorporate by reference arbitration clause in distributorship agreement to purchase agreement that did not contain arbitration clause even though distributorship agreement referenced purchase agreement as an exhibit; “entire agreement” provision in purchase agreement revealed parties’ intent that it was a separate contract not subject to conditions of distributorship agreement).

Both the real estate contract and financing document fail the test identified in *Personal Security*, *supra* and *I.D.E.A.*, *supra*. First, neither the real estate contract nor financing document refer to each other; in addition, the real estate contract contains an entire agreement clause, thus indicating that the parties intended to form “*the complete agreement of the parties*”. *I.D.E.A.*, *supra* at 607, citing from *Perlstein v. D. Steller 3, Ltd.*, 109 S.W.3d 36, 41 (Tex. App. – Corpus Christi 2002, pet. denied). Further, the real

estate contract is an agreement between Greg and Catherine Rubiola and the Salmons while the financing document is an agreement between the Salmons and RMC. In addition, the documents were not executed contemporaneously (January 20, 2007 v. February 13, 2007).

In addition, the real estate contract, the sole contractual agreement between the Salmons and the Rubiolas giving rise to the Salmons' claims, expressly authorizes the parties to resort to the trial system to resolve their disputes.<sup>8</sup> Further, the financing condition addendum specified that all contingencies regarding financing expired on January 25, 2007. Therefore, the February 13, 2007 financing document was immaterial for purposes of the real estate contract.

The cases cited by the Rubiolas are readily distinguishable. First, the court in *AutoNation USA Corporation v. Leroy*, 105 S.W.3d 190 (Tex. App. – Houston [14<sup>th</sup> Dist] 2003, orig. proceeding) held that since the Plaintiffs' petition in that case referenced rights (overcharge for "vehicle preparation fee") provided by the purchase agreement that contained an arbitration clause, the Plaintiffs' claims were subject to arbitration. In contrast, Plaintiffs' Original Petition in the instant cause does not reference any cause of action relating to the financing document or rights provided to Plaintiffs in same. The *AutoNation* court also noted that "*However, if the facts alleged in support of the claims stand alone, are completely independent of the contract and the claim could be maintained without reference to the contract, the claim is not subject to arbitration,*" *id* at 195, citing *Pennzoil Co. v. Arnold Oil Company*, 30 S.W.3d 494, 498 (Tex. App. – San Antonio 2000, no pet.). The Salmons' claims, which relate to the physical condition of

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<sup>8</sup> See paragraph 16 of the real estate contract.

the home/property and have nothing to do with financing, are “*completely independent*” of the terms and provisions of the financing document.

Similarly, both *Kirby Highland Lakes Surgery Center, LLP v. Kirby, M.D.*, 183 S.W.3d 891 (Tex. App. – Austin 2006, orig. proceeding) and *Personal Security & Safety Systems, Inc., supra.* are distinguishable. First, the agreements in those cases that did not reference arbitration did not expressly authorize the parties to resort to the trial system, which is the case here. In addition, contrary to the instant cause, in these cases the same parties signed both contracts at issue and the agreements referred to each other. Further, the contracts in these cases were both signed at the same time and the opinions do not mention whether either of the agreements had an “*entire agreement*” clause (presumably because they did not). Further, in *Kirby* the Plaintiffs admitted in their pleadings that they were suing at least in part pursuant to the terms of the contract that contained the arbitration clause. All of these facts distinguish *Kirby and Personal Security* from the instant cause.<sup>9</sup>

**4. Though the court should not construe the real estate agreement and financing document together, nonetheless pursuant to general contract construction principles, the Rubiolas’ arguments should be rejected**

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<sup>9</sup> Further, *Pennzoil, supra* does not deal directly with the issues in this cause – the existence of two contracts, one with a litigation term and the other with an arbitration clause signed by different parties at different times, etc. However, the *Pennzoil* court noted that if the facts alleged stand alone and are completely independent of the contract that contains the arbitration clause the claim is not arbitrable. *Id.* at 498. *Ft. Worth Independent School District v. City of Ft. Worth*, 22 S.W.3d 831 (Tex. 2000) does not deal with the construction of an arbitration clause, etc. and is based upon a unique set of facts regarding ordinances and agreements dating back to 1927.

The Rubiolas also cite three unreported decisions, *In re. Oakwood Mobile Homes, Inc.*, 1999 W.L. 1073846 (Tex. App. – San Antonio 1999, orig. proceeding); *In re. International Bank of Commerce*, 2008 W.L. 192260 (Tex. App. – Corpus Christi 2008, orig. proceeding) and *Netherlin Homes v. Love*, 2007 W.L. 700996 (Tex. App. – Corpus Christi 2007, orig. proceeding) in support of its arguments. In addition to being unreported decisions, they likewise are readily distinguishable. The *Oakwood* court did not deal with two separate contracts, etc. However, the *Oakwood* decision supports the Salmons’ argument since that court refused to enforce an arbitration provision in another party’s contract against the Zuerns, who had no such contract. Similarly, in *Netherlin* the Court did not deal with two separate contracts, one with a litigation term and the other with an arbitration clause. Instead the court construed one retail installment contract that contained a broad arbitration clause. Last, the *International Bank of Commerce* court dealt with issues regarding waiver of the right to arbitration and misrepresentations regarding the meaning and validity of the arbitration clause, which are not issues in this appeal.

Clearly the real estate contract and financing document should not be construed together. However, even if they are the Rubiolas' arguments fail. Arbitration provisions are construed pursuant to general contract principles. To the extent that this Court determines that any ambiguities exist involving the construction of the real estate contract and financing document together (i.e., trial term v. arbitration clause), all ambiguities should be resolved against the drafters of these documents (the Rubiolas) and in favor of the Salmons. *Gonzalez v. Mission American Insurance Company*, 795 S.W.2d 734 (Tex. 1990). In addition, terms stated earlier in an agreement are favored over conflicting terms stated later in the document. *La Vaca Bay Auto World v. Marshall Pontiac Buick Oldsmobile*, 103 S.W.3d 650, 658 (Tex. App. – Corpus Christi Edinburg 2003, no writ). Thus, the trial term in paragraph no. 16 of the real estate contract should be favored over the later appearing arbitration provision. In addition, the words chosen by the Rubiolas in the financing document are known by the company they keep; pursuant to the doctrine of *ejusdem generis*, the Rubiolas use of the specific phrase in the financing document “*future credit facilities*” frames the meaning of the general words in the arbitration term. *Dawkins v. Meyer*, 825 S.W.2d 444 (Tex. 1992).

**B. THE SALMONS SHOULD NOT BE REQUIRED TO  
ARBITRATE THEIR CLAIMS AGAINST NON-SIGNATORIES**

For the reasons stated herein, the Salmons likewise should not be required to arbitrate their claims against non-signatories.

**CONCLUSION AND PRAYER**

For the reasons stated herein, this Court should deny the Rubiolas' request for relief and grant the Salmons all other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BRYAN A. WOODS, hereby certify that a true and correct copy of the foregoing has been sent to Ben Shub, 111 West Olmos Drive, San Antonio, Texas 78212, Elizabeth Conry Davidson, 1802 Blanco Road, San Antonio, Texas 78212 and the Honorable John D. Gabriel, Judge, 131<sup>st</sup> Judicial District Court, Bexar County Courthouse, 100 Dolorosa, San Antonio, Texas 78205 on this the \_\_\_\_\_ day of April, 2009.

\_\_\_\_\_  
BRYAN A. WOODS