No.
100066-9

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 81686-1)

In re: Receivership of:
EM PROPERTY HOLDINGS, LLC,
a Washington limited liability company.

COMMENCEMENT BANK, a Washington banking corporation,

Appellant,

v.

EPIC SOLUTIONS, INC., a Washington corporation,

Respondent.

APPELLANT'S PETITION FOR REVIEW

EISENHOWER CARLSON PLLC
By: Darren R. Krattli, WSBA # 39128
Attorneys for Appellant

EISENHOWER CARLSON PLLC
909 A St., Suite 600
Tacoma, Washington 98402
Telephone: (253) 572-4500
Facsimile No.: (253) 272-5732

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

TREATISES

APPENDICES

I. IDENTITY OF PETITIONER

Petitioner is Commencement Bank ("**Commencement**"), a claimant in the underlying receivership case and the Appellant herein.

II. CITATION TO COURT OF APPEALS DECISION

Commencement requests review of the Court of Appeals, Division I, in *In re the General Receivership of EM Property Holdings, LLC*, No. 81686-1-I (Wash. Ct. App. June 21, 2021), which affirmed the trial court's determination of priority between two secured claimants.[1]

III. ISSUES PRESENTED FOR REVIEW

I. Is review appropriate where the decision is in conflict with the Supreme Court's decision in *Kim v. Lee*[2] and involves an issue of substantial public interest, as it (i) adopts Restatement (Third) of Property (Mortgages) ("**Restatement**") §7.3(c) as a blanket exception to *Kim*'s prohibition on senior lienholders acting to the material prejudice of known junior lienholders (ii) without incorporation of the related "trade off" provision of §7.3(d), (iii) such that the availability of junior lien financing in Washington will be materially impacted?

II. Is review appropriate where the decision involves an issue of substantial public interest, as it holds that a deed of trust may secure an

[1] Appendix, A.
[2] 145 Wn.2d 79, 31 P.3d 665 (2001).

obligation not identified in the deed of trust?

III. Is review appropriate where the decision is in conflict with the Supreme Court's decisions in *Elmendorf-Anthony Co. v. Dunn*[3] and *Cedar v. W.E. Roche Fruit Co.*[4] and involves an issue of substantial public interest, where the decision holds that RCW 60.04.226 applies not just to construction deeds of trust, but instead to *all* deeds of trust, totally eliminating the Supreme Court's distinction between obligatory and optional advances?

IV. STATEMENT OF THE CASE

A. FACTUAL HISTORY

This case concerns the obligations of multiple related debtors: TTF Aerospace, Inc. ("**TTF Aerospace**"), EM Property Holdings, LLC ("**EM Holdings**"), Bradford Wilson, Timothy Morgan, and Philip Fields. EM Holdings was the real estate holding company for TTF Aerospace.[5] Bradford Wilson, Timothy Morgan, and Philip Fields (collectively "**Owners**") were the owners of both TTF Aerospace and EM Holdings.[6]

Appellant Commencement and Respondent Epic Solutions, Inc. ("**Epic**") are creditors of TTF Aerospace, EM Holdings, and the Owners.

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[3] 10 Wn.2d 29, 116 P.2d 253 (1941).
[4] 16 Wn.2d 652, 134 P.2d 437 (1943).
[5] Verbatim Report of Proceedings – July 9, 2020 (RP) at 7:5-6.
[6] *E.g.,* CP 63:13-21 ("Proof of Claim" by Epic Solutions Inc.).

On August 7, 2015, the Owners entered into an Amended and Restated Service Agreement with Epic (the "**Service Agreement**"), whereby Epic agreed to perform consulting services for TTF Aerospace.[7]

When the Owners were unable to make payments under the Service Agreement, the Owners executed a Commercial Promissory Note in favor of Epic dated April 19, 2017 ("**Epic Note**") in the amount of $344,762.50.[8] The Epic Note makes no reference to the Service Agreement or potential modifications.[9] A Deed of Trust referencing the balance of the Epic Note ("**Epic DOT**") was subsequently recorded on April 21, 2017, against real property owned by EM Holdings (the "**Property**").[10] By its terms, EM Holdings granted the Epic DOT to secure the repayment of: (a) the 2017 Epic Note, (b) "all renewals, modifications or extensions thereof," and (c) "[a]lso such further sums as may be advanced or loaned by beneficiary to Wilson, Morgan, and Fields."[11] It did not include the Service Agreement.[12]

The Epic Note and Epic DOT were amended to reflect additional debt incurred by TTF under the Service Agreement.[13] Specifically, the Epic Note was amended on September 30, 2017 (increasing the principal balance

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[7] CP at 67-81 ("Amended and Restated Service Agreement").
[8] CP at 390.
[9] CP at 83-88 ("Commercial Promissory Note").
[10] CP at 96-101 ("Short Form Deed of Trust").
[11] CP at 98.
[12] *Id.*
[13] CP at 416 ¶ 13 ("Declaration of Douglas Hettinger").

of the Epic Note by $201,975.00[14] ("**First Amended Note**"); November 2017 (increasing the principal balance by an additional $184,843.49 for a total outstanding principal balance of $731,580.99)[15] ("**Second Amended Note**"); and finally on February 26, 2019 (effectively *doubling* the principal balance on the note – for a total principal balance of $1,515,000.00)[16] ("**Third Amended Note**"). No other terms in the Epic Note were modified by the amendments.[17] Importantly, none of these amendments to the Epic Note referenced advances beyond the stated principal increases.

Following the First Amended Note, the Epic DOT was also amended ("**First Amended DOT**") on October 6, 2017, to reflect the same increase in principle.[18] Following the Second Amended Note, the First Amended DOT was also amended ("**Second Amended DOT**") on November 13, 2017, to reflect the same increase in principle.[19]

However, although the Epic Note was amended three times, none of the amendments included the Service Agreement.[20] Similarly, the Epic DOT was amended twice, but did not add the Service Agreement as a secured obligation.[21] The only contract explicitly secured by the Epic DOT

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[14] CP at 90.
[15] CP at 92.
[16] CP at 94.
[17] *Compare* CP at 83-88 *with* CP at 90, 92, and 94.
[18] CP at 103-107 ("Amendment to Deed of Trust").
[19] CP at 109-114 ("Second Amendment to Deed of Trust").
[20] *Compare* CP at 83-88 *with* CP at 90, 92, and 94.
[21] CP at 103-107 and 109-114

remained the Epic Note. No amended deed of trust was recorded to secure the Third Amended Note, which was modified sixteen months after Commencement acquired an interest in the Property.[22]

On November 9, 2017, EM Holdings granted a Deed of Trust in favor of Commencement to secure repayment of loans ("**Commencement DOT**"), which was recorded on November 27, 2017.[23] Epic had actual knowledge of the Commencement DOT and its secured obligations.[24]

B. PROCEDURAL HISTORY

On February 25, 2020, a general receiver was appointed (the "**Receivership**") to take control of the assets of EM Holdings.[25] On March 31, 2020, Commencement filed its claim in the Receivership.[26] On April 3, 2020, Epic filed its claim in the Receivership,[27] which Commencement subsequently objected to.[28]

After oral argument on the pleadings, the trial court denied

[22] *Compare* CP at 94 *with* CP at 46.
[23] CP at 46-61 ("Deed of Trust").
[24] CP at 1087-1088 ("Supplemental Declaration of Rick Larson in Support of Commencement Bank's Objections to Claim").
[25] CP at 1-17 ("Order for the Appointment of General Receiver").
[26] CP at 18-19 ("Proof of Claim RCW 7.60.210 (Commencement Bank)").
[27] CP at 62-64 ("Proof of Claim RCW 7.60.210").
[28] CP at 361-370 ("Objection to Claim of Epic Solutions Inc.").

Commencement's objection, [29] and Commencement appealed.[30]

V. ARGUMENT

A. STANDARD OF REVIEW

This case involves assignments of error regarding the determination of lien priorities. The Court of Appeals reviewed the matter de novo.[31]

B. THE DECISION CONFLICTS WITH *KIM* AS IT ELIMINATES THE ANALYSIS OF MATERIAL PREJUDICE WHERE THE SECURITY INSTRUMENT INCLUDES A FUTURE ADVANCES CLAUSE.

A fundamental holding of *Kim*[32] is that a senior lienholder may not modify its lien to the material prejudice of a known junior lienholder.[33] The court's decision, adopting Restatement §7.3(c) without the corresponding protection of §7.3(d), threatens to upend *Kim*'s protection of junior lienholders. As evidenced by the facts of this case, where a senior lender increased its principal balance from $783,419.01 to $2,127,073.06 (an increase of 271.5%), this holding will have significant consequences for

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[29] CP at 1171-1174 ("Order Approving Epic Solutions Inc.'s Claim and Determining Priority and Amount of Claim"); RP at 5:7-6:15. Commencement was joined in its objection by Elite Aviation Interiors ("**Elite**"), a similarly situated junior secured creditor of EM Property. Elite has not separately pursued this appeal, as Commencement (a creditor of Elite) obtained a writ of attachment against Elite's claim.

[30] CP 1175 ("Notice of Appeal to the Washington Court of Appeals, Division One").

[31] Appendix A at 4.

[32] 145 Wn.2d 79.

[33] 145 Wn.2d at 89-90. *See also Inland Trading Co. v. Edgecombe*, 57 Wash. 257, 262, 106 P. 768, 770 (1910); *Eltopia Fin. Co. v. Colley*, 126 Wash. 554, 558-59, 219 P. 24, 25 (1923); *Cedar v. W. E. Roche Fruit Co.*, 16 Wn.2d 652, 664, 134 P.2d 437, 442 (1943); *Elmendorf-Anthony Co. v. Dunn*, 10 Wn.2d 29, 41, 116 P.2d 253, 258 (1941); *Nat'l Bank of Wash. v. Equity Inv'rs*, 81 Wn.2d 886, 899-900, 506 P.2d 20, 29 (1973).

existing loans and the availability of junior lending in Washington.

Kim analyzed the impact of lien modifications on junior, perfected lienholders.[34] It adopted Restatement §7.3(b), which states:

> If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify as provided in subsection (c).[35]

Although the above passage references subparagraph (c), *Kim* did not quote or otherwise indicate adoption of §7.3(c), which addresses the priority of senior liens with future advances clauses, nor §7.3(d), which protects borrowers from the harsh application of §7.3(c) by allowing borrowers to unilaterally opt out of a future advances clause.

The Court of Appeals relied on Restatement provisions not actually endorsed by *Kim* to create an exception that swallows *Kim*'s rule.[36] The court held that by citing §7.3(b), which references (c) at the end, *Kim* adopted §7.3(c), which states:

> (c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).

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[34] *Kim*, 145 Wn.2d at 89 (in the context of equitable subrogation).
[35] *Id.*
[36] Appendix A at 6 ("*Kim* does not quote Restatement §7.3(c)…; by adopting subsection (b), the court impliedly adopted subsection (c)."). The court also points to *Kim*'s reference to §7.3 cmt. c in support of this position. Appending A at 7.

However, *Kim* only mentions §7.3(c) is in its quote of §7.3(b). Subsection (c) and its subject matter are not found anywhere else in *Kim*.

As additional support, the court pointed to *Kim*'s citation of §7.3 cmt. c:

> *Kim* also cites with approval Restatement §7.3 cmt. c, which states "Even when material prejudice exists … no loss of priority will occur if the mortgage contains a clause reserving the right to modify, the modification is within the scope of the clause, and the clause's operation has not been terminated by notice from the mortgagor."[37]

But *Kim* did not reference the above Restatement quote or even imply its adoption. Instead, the Court quoted §7.3 cmt. c to clarify that some changes, such as an extension of a maturity date or rescheduling installment payments may not constitute prejudice to junior lienholders.[38] But *Kim* went on to cite §7.3 cmt. c to state that "an increase in the principal amount or the interest rate of the mortgage" actually constitutes material prejudice to junior lienholders.[39] Nothing in *Kim* implies adoption of the portions of §7.3 cmt. c relied upon by the Court of Appeals.

Also, reliance on §7.3 cmt. c highlights an additional problem for borrowers and lenders resulting from the Court of Appeal's decision. §7.3(c) makes direct reference to §7.3(d), which states:

> (d) If a mortgage contains a reservation of the right to

[37] Appendix A at 7.
[38] 145 Wn.2d at 89.
[39] *Id.* at 89-90 ("Absent an increase in the principal amount or the interest rate of the mortgage, such modifications normally do not jeopardize the mortgagee's priority as against intervening interests.").

> modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

§7.3(d) softens the harsh application of §7.3(c) by providing borrowers the unilateral ability to terminate the protections of §7.3(c). As stated in §7.3 cmt. e:

> Where the mortgagor and mortgagee reserve the right to modify the senior mortgage, *the mortgagor's ability to obtain further financing from other lenders may be jeopardized. Third parties will often be unwilling to advance credit when the amount secured by the senior mortgage is uncertain due to its potential for modification*. Because modification provisions can operate in much the same fashion as future advances provisions, the mortgagor, by analogy to § 2.3(b), has the right to issue a "cut-off notice" to the mortgagee terminating the priority-retention effect of the mortgage modification provision. *Upon receipt of the notice, the modification provision will no longer be effective to preserve the priority of future modifications against those taking subsequent interests in the mortgaged real estate; any subsequent modifications will be governed by § 7.3(b)*.[40]

As acknowledged in the Restatement, under the strict rule of §7.3(c) borrowers will face difficultly obtaining additional financing from junior lenders if the junior loan is to be secured by property with an existing lien

[40] Emphasis added.

that includes a future advances clause.[41] To protect borrowers, the Restatement adopted §7.3(d) to allow borrowers to unilaterally offer potential junior lenders protection from §7.3(c). This changes the bargaining dynamic between the parties. Without §7.3(d), junior lenders would likely require formal agreements with the senior lender to clarify the amount of the senior lien receiving priority over the junior lien. Without the senior lender's cooperation, the junior lender would be unprotected from an expansion of the senior lien. The senior lender could then use the existing lien to extract more favorable terms from the borrower, such as requiring the borrower to use the existing lender for the new financing (even if other potential lenders offered more favorable terms) or even requiring the borrower to refinance the existing senior loan entirely. The language cited by the Court of Appeals in §7.3 cmt. c even acknowledges this by referencing the notice protections of §7.3(d).[42]

The functional problem with the decision is that it invokes the lender protections of §7.3(c) without determining the applicability of the

[41] Future advances clauses are almost universal in commercial lending, as evidenced by Commencement's form Deed of Trust. CP at 48 and 56-57 ("THIS DEED OF TRUST … IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST." This combined with the "CROSS-COLLATERALIZATION" section and the definitions of "Indebtedness", "Note", and "Related Documents" authorize future advances or modifications).

[42] Appendix A at 7 ("[A]nd the clause's operation has not been *terminated by notice from the mortgagor*") (emphasis added).

associated borrower protections in §7.3(d). Although the court addresses §7.3(d) in a footnote,[43] it does not analyze (i) whether *Kim* adopted §7.3(d) (meaning Commencement could have availed itself of those protections), or, if not, (ii) whether the Court of Appeals adopted §7.3(d) going forward. Borrowers and junior lenders are left without guidance.

There is nothing in the text of *Kim* implying that the Supreme Court adopted §7.3(d). Section 7.3(d) is not referenced anywhere in the opinion. There is no caselaw in Washington before or since *Kim* providing any indication that borrowers could avail themselves of §7.3(d). Junior lenders cannot extend loans with any confidence that a notice under §7.3(d) provides them actual protection from a modified senior lien.

That lack of case law adopting §7.3(d) remains after the Court of Appeals decision. The court did not express clearly whether borrowers can invoke the notice provisions of §7.3(d). Nowhere in the opinion does the court conclusively state that §7.3(d) is available to borrowers, leaving borrowers with the burden of §7.3(c) but without the protection of §7.3(d).[44]

No statute in Washington has adopted the trade-off intended by §7.3(c) and (d), and typically that type of balancing of powers and

[43] Appendix A, fn. 3 (comparing the protections of §7.3(d) to the "stop notice" protections of RCW 60.04.221).
[44] Appendix A at 6-7.

protections is the role of the legislature.[45] For this reason the harsh approach of the Court of Appeals in adopting §7.3(c) should be reversed. *Kim* and its predecessors stand for the general proposition that senior lenders cannot take actions to materially prejudice known junior lienholders, and the exception created by the Court of Appeals swallows the rule, as almost all commercial loans include future advances clauses.

C. THE DECISION INCORRECTLY HELD THAT EPIC'S NEW OBLIGATIONS UNDER THE SECURITY AGREEMENT WERE FUTURE ADVANCES ON EPIC'S SECURED CLAIMS, EVEN THOUGH THE SECURITY AGREEMENT WAS NOT AN OBLIGATION SECURED BY THE EPIC DOT.

Expanding the potential harm of the §7.3(c) adoption, the Court of Appeals upheld an overly-broad interpretation of the scope of the Epic DOT. Since the Epic DOT did not expressly secure the (then existing) Service Agreement, the sums owed under the Service Agreement should not have been included in the "future advances" clause of the Epic DOT.

Deeds of trust in Washington are subject to the prior law of mortgages.[46] A fundamental requirement of a mortgage is that it must state the obligation secured.[47] While there is no formality requirement for

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[45] *See Pac. Cont'l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 381, 273 P.3d 1009, 1013 (2012) (discussing the statutory trade-off between the lender protections of RCW 60.04.226 and the contractor protections of RCW 60.04.221.)

[46] RCW 61.24.020 (also stating that the deed is granted to secure an obligation).

[47] RCW 61.12.020 (providing the form for a mortgage, including the requirement to state: "the nature and amount of indebtedness, showing when due, rate of interest, and whether evidenced by note, bond or other instrument or not").

language to be used, the identification must be sufficient to form a binding contract between the grantor and beneficiary. Otherwise, the grant of a security interest in the collateral would be meaningless. To be binding on a junior lienholder it should also be sufficient to identify the scope of the senior lien sufficient to put the junior lienholder on notice.

The Court of Appeals glossed over this requirement by summarily holding that the Epic DOT included "future advances" in general, implying that *any* obligation between Epic and the Owners was included.[48] It neglected to analyze the specific language of the Epic DOT to determine what, exactly, it secured.

The Service Agreement was signed in 2015.[49] The Epic DOT was granted almost two years later in 2017.[50] Despite being executed well after the Service Agreement, the Epic DOT *does not* state that it secures sums due under the Service Agreement. Instead, the Epic DOT only states that it secures (i) the Epic Note and (ii) "all renewals, modifications, or extensions thereof, and also such further sums as may be advanced or loaned by [Epic]."[51] The Court of Appeals essentially held that "such further sums as may be advanced or loaned" was the functional equivalent of referencing

[48] Appendix A at 7-9.
[49] CP at 67.
[50] CP at 96.
[51] CP at 98.

the Service Agreement.

The plain language of the Service Agreement does not demonstrate an "advance" or "loan" to the owners.[52] It is a contract for consulting services.[53] It provides for monthly billings to be paid within 30 days, without any further grace periods.[54] Nothing in the plain language of the Service Agreement implies it is a loan or advance to the Owners. As such, if the parties wanted it to be secured by the Epic DOT, the parties could have easily just referenced the document itself. Not even the Epic Note nor its amendments reference the Service Agreement as an ongoing obligation related to the Epic Note or Epic DOT.

The Court of Appeals relied on *Am. Sur. Co. v. Sundberg*[55] for the argument that a deed of trust need not mention the underlying contracts that formed the basis for the sums advanced.[56] However, in *Sundberg* the court analyzed the specific agreements to determine that there was a binding set of agreements between the grantor and beneficiary providing for a secured obligation.[57] The promissory notes all referenced the mortgage, they were made relatively contemporaneously, and all interested parties

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[52] *See* CP at 67-81.
[53] CP at 67.
[54] CP at 71.
[55] 58 Wn.2d 337, 363 P.2d 99 (1961).
[56] Appendix A at 8.
[57] 58 Wn.2d at 345-46.

acknowledged their intent.[58]

That same conclusion does not apply to the Epic DOT as (i) the Epic DOT and its amendments do not reference the Service Agreement, (ii) the Epic Note and its amendments do not reference the Service Agreement, and (iii) the Epic Note and its amendments do not provide for the loan of additional sums beyond the stated principal balances.

As of the recording of the Commencement DOT in 2017, the Epic Note was only modified to include principal of $731,580.99.[59] It was subsequently modified in 2019 through the Third Amended Note to increase the principal to $1,515,000.00.[60] It was never modified to include the additional $612,073.06 in principle between the Third Amended Note and the Epic Claim balance of $2,127,073.06.

The exclusion of the Service Agreement is reflected in the history of the Epic DOT and its amendments. Prior to the Commencement DOT, Epic recorded two amendments to the Epic DOT, each paired with the first two amendments to the Epic Note.[61] In the two years between the Commencement DOT and EM Properties' Receivership, Epic did not attempt to amend the Epic DOT, even though they executed the Third

[58] *Id.*
[59] CP at 92.
[60] CP at 94.
[61] CP at 103 and 109.

Amended Note in 2019. What would be the point? There was no further equity available in the Property, as evidenced by the Receiver's net proceeds of only $2,908,493.01.[62] The failure to amend the Epic DOT concurrently with the Third Amended Note was a tacit acknowledgment that the additional amounts were not secured ahead of the Commencement DOT.

The sums that the trial court added to Epic's total secured claim are actually obligations on a separate contract that were specifically *not included* as secured obligations under the 2017 Epic DOT. As such, these sums are not "future advances" contemplated to be secured by the Epic DOT, but instead new loans subject to the *Kim* analysis. Even if the Court of Appeals was correct in applying Restatement §7.3(c) to hold that the Third Amended Note was secured by the Epic DOT, there is no basis for the inclusion of the $612,073.06 difference between the Third Amended Note and the final statement of principal in Epic's claim, as there is no documentation evidencing that the parties intended a *fourth* amendment of the Epic Note to increase the principal beyond $1,515,000.00.

D. THE DECISION INCORRECTLY HELD THAT RCW 60.04.226 IS NOT LIMITED TO CONSTRUCTION LENDING, EFFECTIVELY ELIMINATING THE OBLIGATORY/OPTIONAL ADVANCES DISTINCTION.

[62] Which was less than the balances due under Epic's Second Amended Note, the Commencement DOT (capped at $1,500,000), and Elite's secured obligation.

The Court of Appeals decision holds for the first time that RCW 60.04.226, which was enacted in response to *National Bank of Washington v. Equity Investors*,[63] applies to all deeds of trust in Washington, and not just construction loans.[64] This holding eliminates the obligatory versus optional advances distinction for all loans in Washington, which is in conflict with the Supreme Court's holding in *Elmendorf-Anthony Co. v. Dunn*[65] and *Cedar v. W.E. Roche Fruit Co.*[66]

RCW 60.04.226 was not intended to broadly apply to *all* liens in Washington – it only abrogated the optional/mandatory standard for future advances clauses in the context of construction loans, as evidenced by its overall context. Statutory interpretation requires the court to look to (1) the text of the provision in question, (2) the context of the statute, (3) any related provisions, (4) any amendments to the provision, and (5) the overall statutory scheme.[67] RCW 60.04.226 is titled "Financial Encumbrances-Priorities" and states:

> Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the

[63] 81 Wn.2d 886, 506 P.2d 20 (1973). *See Pac. Cont'l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 380, 273 P.3d 1009, 1013 (2012).
[64] Appendix A at 9-10.
[65] 10 Wn.2d 29.
[66] 16 Wn.2d 652.
[67] *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 432, 395 P.3d 1031, 1037 (2017) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002)).

> mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.[68]

The Court of Appeals focused on the use of the word "any" to disregard the statute's context, amendments, related provisions, and the overall statutory scheme.

The provision is located in Chapter 60.04 RCW (governing Mechanics and Materialmen's Liens) rather than Title 61, which covers Mortgages, Deeds of Trust, and Real Estate Contracts. The only material amendment to RCW 60.04.226 in 1991 was the addition of a reference to its key related provision: the RCW 60.04.221 "stop notice" statute. The protections provided by RCW 60.04.221 only apply to construction lending.[69] If the Court of Appeals decision stands, RCW 60.04.226 will be broadened to other types of loans without corresponding protections like RCW 60.04.221. With respect to the statutory scheme as a whole, the provision was enacted first by Substitute House Bill 264 described as "AN ACT Relating to mechanics' and materialman's liens and construction loan mortgages . . . ."[70] and was later introduced in Substitute Senate Bill 5497 (as amended by the House) which is titled "CONSTRUCTION LIENS" and

[68] RCW 60.04.226.
[69] *See* RCW 60.04.221 and RCW 60.04.011(6).
[70] 1973 1st ex.s. c 47 § 3.

described as "AN ACT Relating to construction liens . . . ."[71] Neither the 1991 Act nor any of the bill reports for the Act discuss an intent by the legislature that RCW 60.04.226 apply to liens other than construction liens. The principles of statutory construction show that the legislature's intent was for RCW 60.04.226 to apply only to construction loans.

Since the obligations asserted by Epic are not construction loans, if the new obligations under the Service Agreement do in fact qualify as "future advances," the common law obligatory/optional advance analysis under *Elmendorf-Anthony* applies.[72] In 1941, Washington "adopted the rule that future advances take priority over intervening liens only if the advances are 'obligatory,' not if they are 'optional' with the lender."[73] Two years later, the Washington Supreme Court made clear that the *Elmendorf-Anthony* holding was not limited to construction mortgages.[74]

Under *Elmendorf-Anthony* and *Cedar*, the Washington Supreme Court established that future advances can be obligatory either because the specific sums are contractually required or when such advances are essential

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[71] 1991 c 281 § 23.
[72] *Elmendorf-Anthony Co. v. Dunn*, 10 Wn.2d 29, 39-40, 116 P.2d 253 (1941).
[73] *Pac. Cont'l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 380, 273 P.3d 1009 (2012) (citing 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 17.16, at 300 (2d ed. 2004) ("Stoebuck & Weaver").
[74] *Cedar v. W.E. Roche Fruit Co.*, 16 Wn.2d 652, 134 P.2d 437 (1943) (future advances necessary to continue fruit harvest operations maintained priority over subsequent lienors because they were obligatory to preserve the collateral (fruit sales)).

to preserve the collateral.[75] It is indisputable that Epic's advances were not obligatory, because they were not contractually required and were not necessary to preserve the real property serving as collateral. The additional sums claimed after the Second Note Amendment would not receive priority over the Commencement DOT under *Elmendorf-Anthony* and *Cedar*.

Until now, no Washington case has imposed RCW 60.04.226 outside of construction lending. The Court of Appeals decision is in conflict with the Supreme Court's prior holdings in *Elmendorf-Anthony* and *Cedar*, and should be reversed.

VI. CONCLUSION

Based on the forgoing argument and authority, the Court of Appeals decision improperly (i) adopts Restatement §7.3(c), effectively nullifying the Supreme Court's holding in *Kim*, and without clearly specifying whether borrowers can invoke the protections of §7.3(b) to avoid abuses by senior lenders; (ii) holds that a deed of trust may secure an obligation not identified as a secured obligation; and (iii) abandons the Supreme Court's optional/obligatory advances analysis under *Elmendorf-Anthony Co.* and *Cedar* by holding that RCW 60.04.226 is not limited to construction loans.

[75] *Cedar*, 16 Wn.2d at 664.

RESPECTFULLY SUBMITTED this 10th day of August, 2021.

EISENHOWER CARLSON PLLC

By: */s/ Darren R. Krattli*
Darren R. Krattli, WSBA # 39128
Attorneys for Appellant
Commencement Bank

DECLARATION OF SERVICE

I, Jennifer K. Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On August 10, 2021, at Tacoma, Washington, I caused a true and correct copy of the forgoing document to be served upon the following in the manner indicated below:

Sean Small small@lasher.com	☐	U.S. Mail, postage prepaid
	☐	Via Messenger Service
	☐	FedEx Overnight
	☑	Electronically via E-Service

and all other parties requesting electronic service.

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

DATED this 10th day of August, 2021, at Tacoma, Washington.

/s/ Jennifer Fernando
Jennifer K. Fernando, Legal Assistant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Matter of the General Receivership of: EM PROPERTY HOLDINGS, LLC, a Washington Limited Liability Company	No. 81686-1-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Epic Solutions Inc. (Epic) provided consulting services to TTF Aerospace Inc. (TTF), EM Property Holdings, LLC (EMP), and the owners of these companies. The owners granted a deed of trust with a future advances clause secured by property (Property) to Epic as security for payment for the services. EMP later granted a deed of trust to Commencement Bank (Commencement), also secured by the Property.

EMP went into receivership and the receiver sold the Property. Epic moved for the trial court to approve its claim of $2,127,073.06, and to compel the receiver to distribute the proceeds of the sale of the Property. Epic asserted that its security interest, including with regard to all future advances, was superior to those held by Commencement and another lienholder. The trial court granted Epic's motion. Commencement appeals, saying the trial court erred in ruling that the priority of Epic's security interest, including all future advances, related back to its original deed of trust. We disagree and affirm.

I. BACKGROUND

Timothy Morgan, Bradford Wilson, and Philip Fields (owners) are the shareholders of TTF and the members of EMP. Epic provided consulting services to TTF, EMP, and the owners under a contract (Service Agreement). In recognition of the debt owed under the Service Agreement, the owners issued a promissory note (Promissory Note) for $344,762.50 with eight percent interest secured by a deed of trust (Original Deed of Trust) on the Property, both dated April 19, 2017. The Original Deed of Trust states that it secures a sum of $344,762.50 "and also such further sums as may be advanced or loaned by Beneficiary" to the owners and any of their successors or assigns. Epic recorded the Original Deed of Trust on April 21, 2017. EMP owned the Property.

The owners amended the Promissory Note on September 30, 2017, to increase the principal to $546,737.50, and granted an amended deed of trust on October 5, which they recorded on October 6, 2017.[1]

In October 2017, Elite Aviation Interior Inc. (Elite) loaned $1.5 million to TTF. EMP granted a deed of trust on the Property to Elite that Elite recorded on October 6, 2017, just a few hours after Epic recorded the amended deed of trust.[2]

[1] The amended deed of trust does not include a future advances clause but states, "Except as provided herein, all terms and conditions of the Deed of Trust, as heretofore changed, remain unchanged and in full force and effect."

[2] The owners granted Epic's deeds of trust and EMP granted those to Elite and Commencement. The parties do not dispute the validity of any deed of trust; the dispute only their priority with regard to future advances.

The owners issued a second amended promissory note to Epic in November 2017 to reflect an increase in the amount owed to $731,580.99. They also granted a second amended deed of trust reflecting the change on November 8 and recorded it on November 13, 2017.

On November 9, 2017, EMP granted a deed of trust in Commencement's favor in the amount of $1.5 million, secured by the Property, in recognition of a loan from Commencement to EMP. On the same date, Commencement and Elite entered a subordination agreement that allowed Commencement to take priority over Elite for up to $1.5 million. Commencement recorded its deed of trust on November 27, 2017.

In February 2019, the owners issued a third amended promissory note to Epic reflecting an increase in the amount owed to $1,515,000.

In August 2019, the owners acknowledged that TTF owed Epic $1,788,406.64 for services rendered.

EMP later moved into receivership and the trial court authorized the receiver to sell the Property. Epic, claiming that it was owed $2,127,073.06, moved for the trial court to approve its claim on the Property's sale proceeds and to compel the receiver to disburse to it the sale proceeds. In its motion, Epic asserted its security interest, including with regard to all future advances, was superior to those asserted by Elite and Commencement. Commencement opposed Epic's motion.

After oral argument, the trial court granted Epic's motion to approve its claim and compel the receiver to disburse the sale proceeds. It reasoned that

> Epic's April 19, 2017 recorded Deed of Trust preceded the subsequent encumbrances of Commencement Bank and Elite. There is no dispute that Epic Solutions has a priority secured claim. In addition, Epic's April 19, 2017 recorded Deed of Trust included a future advances clause that provided Epic with a continued security interest on the on-going debt owed by the owners, TTF, and EMP. Pursuant to the holding in Kim v. Lee, 145 Wn.2d 79, 31 P.3d 665 (2001) and RCW 60.04.226, the priority of the future advances relates back to the April 19, 2017 Deed of Trust. As such, Epic is entitled to payment of its secured claim in the amount of $2,127,073.06 from the proceeds received from selling the real property.

II. ANALYSIS

Commencement says the trial court erred by failing to consider whether future advances made by Epic caused it material prejudice, and that the sums advanced by Epic did not constitute future advances. It also contends that the trial court erred in determining that RCW 60.04.226 applies to these circumstances. We disagree.

The parties dispute whether the trial court ruled on summary judgment. It does not appear the trial court did so. But since the question before us is one of lien priority, we review de novo regardless. Kim, 145 Wn.2d at 85–86.

A. Failure to Analyze Prejudice under Kim v. Lee

Commencement says the trial court erred in ruling that under Kim, the priority of the future advances under Epic's Original Deed of Trust relates back to its April 19, 2017 recording date. It contends that under Kim, the court should have analyzed whether Epic's future advances prejudiced junior lienholders such

as itself. Commencement asserts that if the trial court had analyzed prejudice, it would have concluded that the future advances issued after Commencement's mortgage do not relate back to the Original Deed of Trust's April 19, 2017 recording date. But Kim does not require analysis of prejudice to junior lienholders if the deed of trust includes a future advances provision.

In Kim, our Supreme Court adopted principles from the RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.3 (1997) related to mortgage priority, including, importantly here, subsection (b):

> If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests *and is not within the scope of a reservation of right to modify as provided in subsection (c)*.

145 Wn.2d at 89 (emphasis added). The court continued by saying that,

> Under the *Restatement,* a modification of a mortgage will ordinarily cause it to lose priority to junior interests to the extent that the modification is materially prejudicial to those interests. *Id.* § 7.3. Not all modifications will materially prejudice junior interests. For example, mortgagees commonly consent to an extension of the mortgage maturity date or to a rescheduling or "stretching out" of installment payments. *Id.* § 7.3 *cmt. c.* Absent an increase in the principal amount or the interest rate of the mortgage, such modifications normally do not jeopardize the mortgagee's priority as against intervening interests. *Id.*

Id. at 89–90. Commencement points to this language from Kim to support its claim that the trial court erred by failing to analyze material prejudice. But this passage does not purport to provide an exhaustive list of circumstances of when modifications to a mortgage will not lead to lost priority.

Kim does not quote RESTATEMENT § 7.3(c). But it does adopt RESTATEMENT § 7.3(b), which cites to and is qualified by subsection (c); by adopting subsection (b), the court impliedly adopted subsection (c). And under subsection (c), "If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d)."[3]

[3] Subsection (d) is a provision functionally similar to Washington's "stop notice" provision for construction lenders and lienholders, codified at RCW 60.04.221 and addressed below. It states that,

> If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

Subsection (d) does not apply here.

But relatedly, Commencement says that holding that a court need not analyze material prejudice in the case of a future advances clause would "pose[] significant risks to the lending environment in Washington," and would "severely limit the market for loans secured by a junior security interest." Yet by allowing a mortgagor to issue a notice to terminate any future advances, the stop notice provision in RESTATEMENT § 7.3(d)—which subsection (c) cites to and is qualified by—acts as a trade-off that protects junior lienholders. See 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE, REAL ESTATE § 17.16 (2d ed.) (characterizing RCW 60.04.221 as a "trade-off" with RCW 60.04.226, which provides that a recorded deed of trust has priority over all later recorded deeds of trust no matter when the loan secured by the original is disbursed). RESTATEMENT § 7.3 cmt. e explains how a stop notice protects borrowers and junior lienholders:

> Third parties will often be unwilling to advance credit when the amount secured by the senior mortgage is uncertain due to its potential for modification. Because modification provisions can operate in much the same fashion as future advances provisions, the mortgagor, by analogy to § 2.3(b), has the right to issue a "cut-off notice" to the mortgagee terminating the priority-retention effect of the mortgage modification provision. Upon receipt of the notice, the modification provision will no longer be effective to preserve the priority of future modifications against

Kim also cites with approval RESTATEMENT § 7.3 cmt. c, which states, "Even when material prejudice exists . . . no loss of priority will occur if the mortgage contains a clause reserving the right to modify, the modification is within the scope of the clause, and the clause's operation has not been terminated by notice from the mortgagor." 145 Wn.2d at 89.

Thus, under Kim, since the Original Deed of Trust secured "such further sums as may be advanced or loaned by Beneficiary" to TTF, EMP, and the owners, the trial court need not have analyzed whether the future advances prejudiced junior lienholders such as Commencement.[4]

B. New Obligations as Future Advances

Commencement says that the trial court erred by ruling that the sums owed under the Service Agreement constituted future advances on Epic's secured claims. Specifically, it asserts that because there was not a maximum amount of funds that could be advanced under the Service Agreement, and because the Original Deed of Trust did not secure repayments under the agreement, the amounts owed under the agreement did not constitute future advances. We disagree as to both claims.

Commencement says future advances provisions must set a maximum amount that a lender can extend to a borrower. Commencement cites a number

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> those taking subsequent interests in the mortgaged real estate. . . . The purpose of § 7.3(d) is to encourage subsequent lenders to rely on the "cut-off notice" and therefore be willing to advance credit to the mortgagor.

[4] Commencement does not dispute whether the modification is within the scope of the future advances clause or claim that the mortgagors terminated the clause's operation.

of cases in which courts dealt with future advances clauses that stated a maximum amount of funds that could be advanced. See, e.g., Pac. Cont'l Bank v. Soundview 90, LLC, 167 Wn. App. 373, 376, 273 P.3d 1009 (2012) (lender committed to loan up to $10.3 million); Nat'l Bank of Wash. v. Equity Inv'rs, 81 Wn.2d 886, 890, 506 P.2d 20 (1973) (lender granted $1.75 million construction loan). But it cites none in which the court said a future advances clause *must* state such a maximum. And in American Surety Company of New York v. Sundberg, the court held that a mortgage need not list the amount to be extended as a future advance in order to retain priority. 58 Wn.2d 337, 345–46, 363 P.2d 99 (1961). Further, RESTATEMENT § 7.3 cmt. b states that:

> Where the original mortgage clearly states that it secures future advances and specifies no maximum monetary amount, the intervening lienor is not materially prejudiced. Since the intervenor takes its lien on notice that future advances are possible, it cannot validly claim injury based on the fact that the replacement mortgage exceeds the pre-release balance of its predecessor.

The Original Deed of Trust need not have set a maximum amount that Epic could lend to the borrowers.

Also, Commencement cites no law to support its claim that debts owed under the Service Agreement cannot constitute future advances because the Original Deed of Trust does not reference it. We need not consider arguments unsupported by legal authority. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding a court need not consider arguments unsupported by legal authority). But we note that the mortgage in Sundberg did not mention the underlying contracts that formed the basis of the

sums advanced as future advances, yet the court still held a tax lien was junior to those advances, even though the sums were extended after the tax lien. 58 Wn.2d at 345–46 ("There was no specific limitation, no mention of the surety contract, or the painting contract, or anything else which would put a searcher of the record on notice that the mortgage might cover advances.").

C. RCW 60.04.226

Commencement says that the trial court erred in determining that RCW 60.04.226 applies here, because its legislative intent suggests it should apply only to construction loans. We disagree. The statute applies to any deed of trust and thus it applies here.

RCW 60.04.226 provides that:

> Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.

We review de novo the meaning of a statute. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To interpret a statute, we begin by analyzing its plain meaning. Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). To do so,

> we consider the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent.

Id. (citing Campbell & Gwinn, 146 Wn.2d at 10–11) (citation omitted).

RCW 60.04.226 states that "any" recorded deed of trust is prior to "all" later recorded deeds of trust. This unambiguous language suggests the statute applies to all deeds of trust, and not just construction loans. The statute's title ("Financial encumbrances—Priorities") does not suggest any limitation to construction loans. And one of the statutes linked in its text—RCW 60.04.221—specifically applies to construction loans, and does not use the broad language seen in RCW 60.04.226. Granted, the statute is in Chapter 60.04, which is titled "Mechanics' and Materialmen's Liens"; but under RCW 1.08.017(3), "[s]ection captions, part headings, subheadings, tables of contents, and indexes appearing in legislative bills shall not be considered any part of the law." And while, as recognized by Pacific Continental Bank v. Soundview 90, LLC, the legislature enacted RCW 60.04.226 after encountering difficulties to construction loans imposed by the obligatory versus optional distinction embodied in the Washington Supreme Court's ruling in National Bank of Washington, Pacific Continental Bank does not limit RCW 60.04.226's application to construction loans. 167 Wn. App. 373, 380–81, 273 P.3d 1009 (2012). The contextual factors surrounding RCW 60.04.226—including its actual text—suggest that it applies to all deeds of trust. Thus, we conclude that RCW 60.04.226 applies to the Original Deed of Trust.[5]

[5] Commencement says, assuming we agree that RCW 60.04.226 applies only to construction loans, then we must decide whether the sums advanced by Epic were optional or obligatory under the Original Deed of Trust, citing Elmendorf-Anthony Co. v. Dunn, 10 Wn.2d 29, 116 P.2d 253 (1941). There, the court "adopted the rule that future advances take priority over intervening liens only if the advances are 'obligatory,' not if they are 'optional' with the lender." 18 STOEBUCK & WEAVER, supra, § 17.16. The legislature later enacted RCW 60.04.226 to abrogate the obligatory versus optional

D. Attorney Fees, Costs, and Interest

Epic says we should award it appellate attorney fees and costs either under the Promissory Note or in equity. It also says it is entitled to eight percent interest on the unpaid balance owing to it. We decline to award Epic attorney fees and costs or interest.

The Service Agreement and Promissory Note include attorney fees and costs provisions. But Commencement is not a party to either of these contracts, so we decline to grant an award of fees and costs on those grounds.

Epic also says it is entitled to attorney fees and costs in equity, since a third party to the notes is subjecting it to litigation. A court may award attorney fees and costs in equity where acts by a third party subject it to litigation. See City of Seattle v. McCready, 131 Wn.2d 266, 274, 931 P.2d 156 (1997) (citing Wells v. Aetna Ins. Co., 60 Wn.2d 880, 882–83, 376 P.2d 644 (1962)). Epic cites Wells, in which our Supreme Court held that "when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney's fees." Id. at 882. But Epic does not allege any wrongdoing by Commencement, and it does not appear Commencement committed any wrongful act. This doctrine does not provide any grounds for attorney fees and costs here.

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distinction. 18 STOEBUCK & WEAVER, supra, § 17.16; see Pac. Cont'l Bank, 167 Wn. App. at 380–81. Because RCW 60.04.226 applies to all deeds of trust, we need not reach this issue.

Finally, Epic says it is entitled to eight percent interest on the unpaid balance owing to it, since the Promissory Note provides for eight percent interest. But Epic does not explain who owes the interest. It does not appear that Commencement owes interest since it is not a party to the Promissory Note. It does not appear that we can hold that an obligor on the note owes interest because the obligors are not parties to this appeal. And Epic cites no law in support of its request for interest.

We affirm. And we deny Epic's request for attorney fees, costs, and interest.[6]

Chun, J.

WE CONCUR:

[6] Commencement says for the first time in its reply brief that Epic does not explain how $612,073.06 accrued on the debt owed to it in the time between the third amended promissory note and the filing of its claim, so we should reduce Epic's claim by that amount. Because Commencement waited until its reply brief to raise this issue, Epic had no opportunity to respond to these assertions. Nor does it appear that Commencement raised this issue to the trial court. For these reasons, we decline to consider this issue. See White v. Kent Med. Ctr., Inc., P.S., 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (recognizing that courts decline to consider issues raised for the first time in reply materials because the respondent has no opportunity to respond); RAP 2.5(a).

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those held by Commencement and another lienholder. The trial court granted Epic's motion. Commencement appeals, saying the trial court erred in ruling that the priority of Epic's security interest, including all future advances, related back to its original deed of trust. We disagree and affirm.

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Timothy Morgan, Bradford Wilson, and Philip Fields (owners) are the shareholders of TTF and the members of EMP. Epic provided consulting services to TTF, EMP, and the owners under a contract (Service Agreement). In recognition of the debt owed under the Service Agreement, the owners issued a promissory note (Promissory Note) for $344,762.50 with eight percent interest secured by a deed of trust (Original Deed of Trust) on the Property, both dated April 19, 2017. The Original Deed of Trust states that it secures a sum of $344,762.50 "and also such further sums as may be advanced or loaned by Beneficiary" to the owners and any of their successors or assigns. Epic recorded the Original Deed of Trust on April 21, 2017. EMP owned the Property.

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its April 19, 2017 recording date. It contends that under Kim, the court should have analyzed whether Epic's future advances prejudiced junior lienholders such as itself. Commencement asserts that if the trial court had analyzed prejudice, it would have concluded that the future advances issued after Commencement's mortgage do not relate back to the Original Deed of Trust's April 19, 2017 recording date. But Kim does not require analysis of prejudice to junior lienholders if the deed of trust includes a future advances provision.

In Kim, our Supreme Court adopted principles from the RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.3 (1997) related to mortgage priority, including, importantly here, subsection (b):

> If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests *and is not within the scope of a reservation of right to modify as provided in subsection (c)*.

145 Wn.2d at 89 (emphasis added). The court continued by saying that,

> Under the *Restatement,* a modification of a mortgage will ordinarily cause it to lose priority to junior interests to the extent that the modification is materially prejudicial to those interests. *Id.* § 7.3. Not all modifications will materially prejudice junior interests. For example, mortgagees commonly consent to an extension of the mortgage maturity date or to a rescheduling or "stretching out" of installment payments. *Id.* § 7.3 *cmt. c.* Absent an increase in the principal amount or the interest rate of the mortgage, such modifications normally do not jeopardize the mortgagee's priority as against intervening interests. *Id.*

Id. at 89–90. Commencement points to this language from Kim to support its claim that the trial court erred by failing to analyze material prejudice. But this

passage does not purport to provide an exhaustive list of circumstances of when modifications to a mortgage will not lead to lost priority.

Kim does not quote RESTATEMENT § 7.3(c). But it does adopt RESTATEMENT § 7.3(b), which cites to and is qualified by subsection (c); by adopting subsection (b), the court impliedly adopted subsection (c). And under subsection (c), "If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d)."[3]

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[3] Subsection (d) is a provision functionally similar to Washington's "stop notice" provision for construction lenders and lienholders, codified at RCW 60.04.221 and addressed below. It states that,

> If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

Subsection (d) does not apply here.

But relatedly, Commencement says that holding that a court need not analyze material prejudice in the case of a future advances clause would "pose[] significant risks to the lending environment in Washington," and would "severely limit the market for loans secured by a junior security interest." Yet by allowing a mortgagor to issue a notice to terminate any future advances, the stop notice provision in RESTATEMENT § 7.3(d)—which subsection (c) cites to and is qualified by—acts as a trade-off that protects junior lienholders. See 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE, REAL ESTATE § 17.16 (2d ed.) (characterizing RCW 60.04.221 as a "trade-off" with RCW 60.04.226, which provides that a recorded deed of trust has priority over all later recorded deeds of trust no matter when the loan secured by the original is disbursed). RESTATEMENT § 7.3 cmt. e explains how a stop notice protects borrowers and junior lienholders:

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Kim also cites with approval RESTATEMENT § 7.3 cmt. c, which states, "Even when material prejudice exists . . . no loss of priority will occur if the mortgage contains a clause reserving the right to modify, the modification is within the scope of the clause, and the clause's operation has not been terminated by notice from the mortgagor." 145 Wn.2d at 89.

Thus, under Kim, since the Original Deed of Trust secured "such further sums as may be advanced or loaned by Beneficiary" to TTF, EMP, and the owners, the trial court need not have analyzed whether the future advances prejudiced junior lienholders such as Commencement.[4]

B. New Obligations as Future Advances

Commencement says that the trial court erred by ruling that the sums owed under the Service Agreement constituted future advances on Epic's secured claims. Specifically, it asserts that because there was not a maximum amount of funds that could be advanced under the Service Agreement, and because the Original Deed of Trust did not secure repayments under the agreement, the amounts owed under the agreement did not constitute future advances. We disagree as to both claims.

> § 2.3(b), has the right to issue a "cut-off notice" to the mortgagee terminating the priority-retention effect of the mortgage modification provision. Upon receipt of the notice, the modification provision will no longer be effective to preserve the priority of future modifications against those taking subsequent interests in the mortgaged real estate. . . . The purpose of § 7.3(d) is to encourage subsequent lenders to rely on the "cut-off notice" and therefore be willing to advance credit to the mortgagor.

[4] Commencement does not dispute whether the modification is within the scope of the future advances clause or claim that the mortgagors terminated the clause's operation.

Commencement says future advances provisions must set a maximum amount that a lender can extend to a borrower. Commencement cites a number of cases in which courts dealt with future advances clauses that stated a maximum amount of funds that could be advanced. See, e.g., Pac. Cont'l Bank v. Soundview 90, LLC, 167 Wn. App. 373, 376, 273 P.3d 1009 (2012) (lender committed to loan up to $10.3 million); Nat'l Bank of Wash. v. Equity Inv'rs, 81 Wn.2d 886, 890, 506 P.2d 20 (1973) (lender granted $1.75 million construction loan). But it cites none in which the court said a future advances clause *must* state such a maximum. And in American Surety Company of New York v. Sundberg, the court held that a mortgage need not list the amount to be extended as a future advance in order to retain priority. 58 Wn.2d 337, 345–46, 363 P.2d 99 (1961). Further, RESTATEMENT § 7.3 cmt. b states that:

> Where the original mortgage clearly states that it secures future advances and specifies no maximum monetary amount, the intervening lienor is not materially prejudiced. Since the intervenor takes its lien on notice that future advances are possible, it cannot validly claim injury based on the fact that the replacement mortgage exceeds the pre-release balance of its predecessor.

The Original Deed of Trust need not have set a maximum amount that Epic could lend to the borrowers.

Also, Commencement cites no law to support its claim that debts owed under the Service Agreement cannot constitute future advances because the Original Deed of Trust does not reference it. We need not consider arguments unsupported by legal authority. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding a court need not consider

arguments unsupported by legal authority). But we note that the mortgage in Sundberg did not mention the underlying contracts that formed the basis of the sums advanced as future advances, yet the court still held a tax lien was junior to those advances, even though the sums were extended after the tax lien. 58 Wn.2d at 345–46 ("There was no specific limitation, no mention of the surety contract, or the painting contract, or anything else which would put a searcher of the record on notice that the mortgage might cover advances.").

C. RCW 60.04.226

Commencement says that the trial court erred in determining that RCW 60.04.226 applies here, because its legislative intent suggests it should apply only to construction loans. We disagree. The statute applies to any deed of trust and thus it applies here.

RCW 60.04.226 provides that:

> Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.

We review de novo the meaning of a statute. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To interpret a statute, we begin by analyzing its plain meaning. Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). To do so,

> we consider the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of

> the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent.

Id. (citing Campbell & Gwinn, 146 Wn.2d at 10–11) (citation omitted).

RCW 60.04.226 states that "any" recorded deed of trust is prior to "all" later recorded deeds of trust. This unambiguous language suggests the statute applies to all deeds of trust, and not just construction loans. The statute's title ("Financial encumbrances—Priorities") does not suggest any limitation to construction loans. And one of the statutes linked in its text—RCW 60.04.221—specifically applies to construction loans, and does not use the broad language seen in RCW 60.04.226. Granted, the statute is in Chapter 60.04, which is titled "Mechanics' and Materialmen's Liens"; but under RCW 1.08.017(3), "[s]ection captions, part headings, subheadings, tables of contents, and indexes appearing in legislative bills shall not be considered any part of the law." And while, as recognized by Pacific Continental Bank v. Soundview 90, LLC, the legislature enacted RCW 60.04.226 after encountering difficulties to construction loans imposed by the obligatory versus optional distinction embodied in the Washington Supreme Court's ruling in National Bank of Washington, Pacific Continental Bank does not limit RCW 60.04.226's application to construction loans. 167 Wn. App. 373, 380–81, 273 P.3d 1009 (2012). The contextual factors surrounding RCW 60.04.226—including its actual text—suggest that it applies to all deeds of trust. Thus, we conclude that RCW 60.04.226 applies to the Original Deed of Trust.[5]

[5] Commencement says, assuming we agree that RCW 60.04.226 applies only to construction loans, then we must decide whether the sums advanced by Epic were optional or obligatory under the Original Deed of Trust, citing Elmendorf-Anthony Co. v.

D. Attorney Fees, Costs, and Interest

Epic says we should award it appellate attorney fees and costs either under the Promissory Note or in equity. It also says it is entitled to eight percent interest on the unpaid balance owing to it. We decline to award Epic attorney fees and costs or interest.

The Service Agreement and Promissory Note include attorney fees and costs provisions. But Commencement is not a party to either of these contracts, so we decline to grant an award of fees and costs on those grounds.

Epic also says it is entitled to attorney fees and costs in equity, since a third party to the notes is subjecting it to litigation. A court may award attorney fees and costs in equity where acts by a third party subject it to litigation. See City of Seattle v. McCready, 131 Wn.2d 266, 274, 931 P.2d 156 (1997) (citing Wells v. Aetna Ins. Co., 60 Wn.2d 880, 882–83, 376 P.2d 644 (1962)). Epic cites Wells, in which our Supreme Court held that "when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney's fees." Id. at 882. But Epic does not allege any wrongdoing by Commencement, and it does not appear Commencement committed any

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Dunn, 10 Wn.2d 29, 116 P.2d 253 (1941). There, the court "adopted the rule that future advances take priority over intervening liens only if the advances are 'obligatory,' not if they are 'optional' with the lender." 18 STOEBUCK & WEAVER, supra, § 17.16. The legislature later enacted RCW 60.04.226 to abrogate the obligatory versus optional distinction. 18 STOEBUCK & WEAVER, supra, § 17.16; see Pac. Cont'l Bank, 167 Wn. App. at 380–81. Because RCW 60.04.226 applies to all deeds of trust, we need not reach this issue.

wrongful act. This doctrine does not provide any grounds for attorney fees and costs here.

Finally, Epic says it is entitled to eight percent interest on the unpaid balance owing to it, since the Promissory Note provides for eight percent interest. But Epic does not explain who owes the interest. It does not appear that Commencement owes interest since it is not a party to the Promissory Note. It does not appear that we can hold that an obligor on the note owes interest because the obligors are not parties to this appeal. And Epic cites no law in support of its request for interest.

We affirm. And we deny Epic's request for attorney fees, costs, and interest.[6]

Chun, J.

WE CONCUR:

[6] Commencement says for the first time in its reply brief that Epic does not explain how $612,073.06 accrued on the debt owed to it in the time between the third amended promissory note and the filing of its claim, so we should reduce Epic's claim by that amount. Because Commencement waited until its reply brief to raise this issue, Epic had no opportunity to respond to these assertions. Nor does it appear that Commencement raised this issue to the trial court. For these reasons, we decline to consider this issue. See White v. Kent Med. Ctr., Inc., P.S., 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (recognizing that courts decline to consider issues raised for the first time in reply materials because the respondent has no opportunity to respond); RAP 2.5(a).

EISENHOWER CARLSON PLLC

August 10, 2021 - 1:50 PM

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