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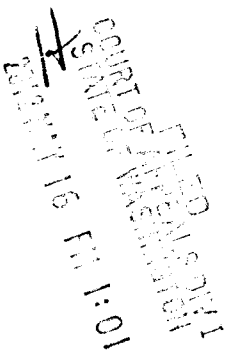

No. 66527-8-I

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

DONALD AND BETH COLLINGS

Plaintiffs-Appellees,

v.

CITY FIRST MORTGAGE SERVICES, LLC

Defendant-Appellant.

CITY FIRST MORTGAGE SERVICES, LLC'S ANSWER TO WASHINGTON DEFENSE TRIAL LAWYERS' AMICUS CURIAE BRIEF

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Defendant-Appellant City First Mortgage Services respectfully submits this answer to the brief of amicus curiae submitted by Washington Defense Trial Lawyers ("WDTL") and states as follows:

1. WDTL's amicus brief confirms that one of the central issues in this appeal – whether a party who negotiates a covenant not to execute with one or more but fewer than all defendants must disclose that agreement before trial – is of "statewide" concern, as evidenced by its decision to file an amicus brief. WDTL Br. at 1. In its motion to file the amicus brief, WDTL likewise notes that the Court's decision regarding this issue will "have broad impact on lawsuits ... in this State." City First agrees with WDTL on this point and others – as set forth below.

2. WDTL's amicus brief also confirms that all three divisions of the Washington Court of Appeals have condemned such agreements. For example:

- In *Giambattista v. National Bank of Commerce of Seattle*, 21 Wn. App. 723, 735 n.5, 586 P.2d 1180 (1978) (Div. I), which WDTL cites at page 3 of its amicus brief, this Court noted that such agreements "foist[] a fictitious controversy on the courts, fail[] to identify the true parties litigant or unfairly conceal[] from the trier of fact the true battle lines and interests of the parties litigant."
- In *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103-04, 841 P.2d 1300 (1992) (Div. II), *aff'd on other grounds*, 125 Wn.2d 1 (1994), which WDTL cites at page 6 of its amicus brief, Division Two recognized that "[t]he existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact."

- In *Bunting v. State*, 87 Wn. App. 647, 654, 943 P.2d 347 (1997) (Div. III), which WDTL cites at pages 15-16 of its amicus brief, Division Three addressed circumstances similar to those presented here and stated that "neither equity nor public policy favors [plaintiffs'] attempt to manipulate the system in an effort to obtain payment from the [co-defendant] State for [co-defendant] Timothy's fault."

In this respect as well, City First agrees with the extensive legal analysis in WDTL's amicus brief.

3. Turning specifically to whether a party who negotiates a covenant not to execute with one or more but fewer than all defendants must disclose that agreement before trial, WDTL explains that "jurisdictions that allow such deals do not allow secrecy, and require their disclosure to the other parties and often to the jury." WDTL Br. at 6. In support of that argument, WDTL cites numerous cases, including *McCluskey*. *See id.* at 6-7. The court in that case stated:

> Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court. The trial court can then advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses.

68 Wn. App. at 104. Like WDTL, City First urges the Court to follow these cases, including *McCluskey*, and require pretrial disclosure of such agreements.

4. WDTL also highlights the many reasons that disclosure was essential in this case. As WDTL correctly notes, the Collingses' execution of the covenant not to execute was contingent upon Andrew

Mullen's testimony being "acceptable." WDTL Br. at 8; *see also* CP 1773 ¶ 3. Consistent with that improper incentive, Mullen provided testimony at his deposition that was unfavorable to City First, including:

- That City First supervised Mullen's and Loveless's work. Ex. 70 (Transcript of Mullen Deposition) at 11:4-14 (Q. Did City First provide any supervision or check your work in any way? A. Just like any loan, all our loans had to be underwritten .... [T]hat underwriter would be in City First headquarters.").
- That all of Home Front Services' loans were placed with City First. *Id.* at 31:4-14 (Q. As part of Home Front's business, did you, from time to time, place loans ... where City First was the lender? A. Yes.... All of our loans that we did were through City First. Q. A hundred percent? A. Yes.").
- Based entirely on "speculation," that City First profited from Home Front Services' loans. *Id.* at 32:10-24 (Q. Do you know whether or not they made money on an interest rate spread? A. [A]gain, this is going to be speculation, but I believe that they made money off of that.... [M]y speculation is that they did make other funds through points or through scalping or whatever the fact might be.").
- Referring specifically the initial loan relating to the Collingses' residence, that there was a significant documentation error. *Id.* at 46:12-20 (Q. Does this document ... contain an error on the first page? .... A. Oh, yes.... Q. A fairly significant one or would you disagree with that? A. Yes. It's a tenant living in Illinois.").
- Based on what Mullen "would imagine," that City First should have identified the above error. *Id.* at 46:21-47:3 (Q. Do you know whether or not City First ever ... made a comment about that? A. Not to me anyways. I would think that they want to make a comment, they would just deny that if they would have ... caught that, I would imagine....").

Apparently satisfied with Mullen's testimony (much of which is incorrect, misleading, and wholly speculative), both the Collingses and their counsel executed the covenant not to execute after Mullen's deposition. CP 1167, 1173 ¶ 2. Yet City First could not cross-examine Mullen on this critical point – which WDTL correctly notes is "fertile territory for cross examination" (WDTL Br. at 8) – because the Collingses and their counsel failed to disclose the covenant not to execute before trial.

5. As WDTL also notes, Mullen was likewise incentivized to "downplay" or "neglect to mention" evidence helpful to City First. *Id.* Consistent with that assertion, Mullen did not mention at his deposition several critical facts that would have corrected or clarified the above testimony and avoided unfair prejudice to City First. Mullen, for example, "downplayed" or "neglected to mention" the following:

- That Home Front Services operated as an independent branch of City First (RP 53:1-8, 154:10-155:7, 184:20-22 (Sept. 15, 2010)) and that City First was not involved in preparing loan documents originating out of Mullen's and Loveless's Home Front Services office. RP 102:19-22, 133:24-134:6, 136:22-137:2 (Sept. 15, 2010).
- That there was and is no common ownership or management or employment or agency agreement between City First and Home Front Holdings, LLC or Integrity Management Group. *See* RP 157:8-12 (Sept. 15, 2010).
- That there was no yield spread premium on the loans relating to the Collingses' residence (RP 147:11-13 (Sept. 15, 2010)), that all of the fees charged for those loans were "average" fees (RP 87:10-88:2, 94:17-95:1 (Sept. 14, 2010)), and that City First lost money on those loans. RP 85:23-86:1 (Sept. 15, 2010).

- That City First did not underwrite any loan relating to the Collingses' residence, did not service any such loan, and was not the actual lender for any such loan. RP 101:9-102:22, 139:22-140:21, 168:9-21, 171:10-18 (Sept. 15, 2010).
- That the paperwork for the loans relating to the Collingses' residence was prepared in Mullen's and Loveless's Home Front Services office and, upon completion, was sent directly to the respective lender – *not* to City First. RP 79:1-80:12, 98:24-103:11, 102:19-103:11, 133:13-134:6, 136:22-137:2, 181:5-9 (Sept. 15, 2010).

Because the Collingses did not disclose the covenant not to execute until after entry of judgment, City First did not ask Mullen to clarify and/or correct these points at his deposition. Instead, City First continued to believe that Mullen (both as a co-defendant in this case and as a witness subject to a Notice to Attend Trial (*see* CP 281-82)) would appear and be subject to cross-examination at trial.

6. In addition to creating and concealing an improper incentive – which is not materially different than secretly paying a witness to give favorable testimony – the Collingses' failure to disclose the covenant not to execute before trial also prevented both City First and the jury from knowing that Mullen was no longer a potentially liable defendant. And rather than disclose why Mullen did not appear at trial, the Collingses' counsel has never denied that he did precisely the opposite: he drew the jury's attention to the Mullens' absence by asking the jury "where are they?" and "why aren't they here?" CP 1775 ¶ 3. The trial court, too, was unaware of the covenant not to execute, as evidenced by several jury instructions that erroneously indicated that Mullen was still

a party. *See* CP 837-90. As noted in *McCluskey*, this could have been avoided through disclosure, which would have permitted the trial court to "advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses." 68 Wn. App. at 104.

7. WDTL concludes its amicus brief by stating: "In sum, the Court should reverse the trial court's ruling denying [City First] a new trial based on the covenanting parties' withholding evidence of their secret deal." WDTL Br. at 16. In that respect as well, City First agrees.

RESPECTFULLY SUBMITTED this 16th day of May, 2012.

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I certify under penalty of perjury under the laws of the state of Washington that, on May 16, 2012, I caused ***City First Mortgage Services, LLC's Answer to Washington Defense Trial Lawyers' Amicus Curiae Brief*** to be filed with the Court of Appeals (original and one copy); and caused to be served on the persons listed below in the manner shown:

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DATED: May 16, 2012, at Seattle, Washington.

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