NO. 72114-3-I

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

ALGO, INC., a Washington corporation and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community

Appellants and Cross-Respondents,

vs.

WASHINGTON FEDERAL SAVINGS, a United States Corporation,

Respondent and Cross-Appellant.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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Part I below responds to the issue raised by Washington Federal on appeal and in its opening brief: whether the trial court erred in awarding the bank a judgment for the amount the parties agreed was due at the time of the judgment. In arguing for the additional $150,000 that was not due for another three years, Washington Federal ignores the well-settled law that a party may not recover more than it would have been entitled to under the contract.

Without the law on its side, Washington Federal next attempts to rewrite the facts to invoke the terms of a draft promissory note with terms that were in addition to those in the settlement term sheet and that Mr. Grant never agreed to. But even if he had agreed to the additional terms verbatim, the draft note would not have provided the right of acceleration Washington Federal asserts.

Part II is in reply to Washington Federal's response to the issues raised by Mr. Grant and Algo, Inc. (collectively, "Mr. Grant" or "Appellants") on appeal and in their opening brief.[1] Here too, Washington Federal fails to articulate a coherent legal basis for its position regarding attorneys' fees or prejudgment interest. Instead, it seeks to invoke the underlying loan documents without having established that they were ever breached; again asks the Court to read into the settlement an acceleration

[1] Accordingly, Washington Federal may not submit further briefing on these issues.

clause that is not there (and was never agreed to); misconstrues the law; and repeats unfounded accusations of bad faith and misconduct, calling Appellants' arguments "shocking." The need to resort to agreements other than the one at issue, inapposite and unpublished case law from Ohio, *ad hominem* attacks, and hyperbole merely demonstrates the weakness of the bank's positions.

I. ARGUMENT: RESPONSE TO CROSS-APPEAL

A. The Law Does Not Allow Washington Federal to Recover More Than It Would Have Received Had the Contract Been Fully Performed

Mr. Grant did not fail to pay Washington Federal money due under the settlement term sheet. The breach, as alleged by the bank and found by the trial court, was of the duty to secure the payment obligation with certain real property. As of the date of the breach in February 2013, the payment due under the agreement was $850,000.

Had Mr. Grant been able to provide security, even today Washington Federal would have a lien but no payment (and no interest). But because Mr. Grant was unable to provide security[2], Washington

[2] Washington Federal's suggestion that this was the result of dishonesty or bad faith on Mr. Grant's part is unfounded. The record cited by the bank at pages 3–4 of its brief shows that Mr. Grant and Mr. Olmsted did indeed have an agreement in principle (or, as the bank would have it described, a "bilateral willingness") in advance of the mediation to make arrangements allowing Mr. Grant to encumber their property as security. Mr. Olmsted himself testified—and Washington Federal cannot dispute—that he later was unwilling to do this. (CP 306–08.)

Federal obtained a judgment long before it would have been entitled to payment under the parties' agreement. In effect, Mr. Grant's inability to provide security allowed Washington Federal to say, "Pay me what you owe me under our agreement ***now***." The question is: what did Mr. Grant owe under the parties' agreement in June 2014, when the judgment was entered?

The law is clear that a party is not entitled to more than what they would have received had the contract been fully performed. *Rathke v. Roberts*, 33 Wn.2d 858, 879–80, 207 P.2d 716 (1949); *McFerran v. Heroux*, 44 Wn.2d 631, 642, 269 P.2d 815 (1954). Accordingly, it is well settled that, where "damages represent losses that are expected to occur in the future, those damages are traditionally reduced to present value." DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 12.6(1), at125–26 (2d ed. 1993). The rule applies in contract cases just as any other. *Id.*

> The idea is that if the plaintiff recovers money today that is not needed to replace a loss until sometime in the future, the plaintiff can invest the money and reap the interest. Full compensation does not require an award of the money when due plus the interest it can presently earn. The reduction to present value attempts to provide an award that gives the plaintiff an amount of present capital which, with the interest it can safely earn, will provide a total sufficient to

> compensate for the loss when the loss occurs.

Id. In other words, to enter an award of money not yet due without a discount to present value is to grant a windfall.

This principle has long been recognized in Washington. One of this state's earliest cases on point is *Yarno v. Hedlund Box & Lumber Co.*, 129 Wash. 457, 225 P. 659, *modified*, 227 P. 518 (1924). In *Yarno*, a logger who had been hired by the defendant to cut its trees sued for breach of a roughly four-year contract for timber-harvesting services. *Id.* at 459. Under the contract, the plaintiff was required to cut and deliver a certain amount of logs per year and was to be paid semi-annually based on the amount of logs he delivered. *Id.* at 474. The defendant breached by prematurely terminating the contract, and the plaintiff sued for lost profits, including future profits that would have been earned had the contract been performed. At the time of trial, more than three years still remained under the agreement. *Id.* at 476-77. The trial court entered judgment for the plaintiff for the full amount of payments due under the contract. *Id.* at 459.

The Supreme Court reversed. To the extent the judgment was for future payments not yet due, without a discount to adjust for the value of receiving those payments early in the form of a judgment, it was in error.

As the Supreme Court stated, "[t]he rule is... that in computing damages recoverable for the deprivation of future payments" recovery must be limited to the "present value." *Id.* at 477. The reason is clear: "a judgment for the whole amount at the time of trial would be more valuable than the right to receive the money at a later period." *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 407, 237 P. 102 (1925) (following remand).

The Washington Supreme Court applied this rule again in *McFerran v. Heroux*, 44 Wn.2d 631, 269 P.2d 815 (1954). *McFerran* also involved an action seeking future damages for a present breach. In *McFerran*, the plaintiff had an option allowing him to take possession of an improvement at a future date in exchange for $5,000. *Id.* at 636–37. To calculate damages, the court determined the cost to rebuild the property at the time of the breach, reduced that amount to reflect five years of depreciation (to the time when the plaintiff would have had the right to exercise the option), and subtracted the option price. *Id.* at 643–44. The result was the amount of the damages—in five years. The court then discounted this amount to find its present-day value at the time it entered judgment. *Id.* at 644.

As in *Yarno*, the discount to present day in *McFerran* was necessary to reflect the fact that awarding the plaintiff a judgment for the

full amount of damages not yet incurred would give the plaintiff more than he would have been entitled to under the contract. "An award of damages is compensation in money as a ***substitute*** for the promised performance" and not to give plaintiff something more than it would have received under the contract. *Id.* at 642 (citing 5 CORBIN ON CONTRACTS 3, § 990; emphasis in original).[3]

Here, the parties' agreement contemplated that Washington Federal would receive $1 million ***in August 2017***—39 months after the judgment was entered. To award the bank $1 million as of the date of the judgment would have placed it in a better position than it would have been in had the contract been fully performed. The law required that the judgment be discounted to the present value of this future obligation, as the trial court did.

In the absence of evidence to the contrary, the trial court could have used the legal rate of interest to discount the judgment to its present value. *See, e.g., McFerran*, 44 Wn.2d at 646 (applying the legal rate of interest to discount the judgment to its present-day value); *Aetna Life Ins. Co. v. Geher*, 50 F.2d 657, 659–60 (9th Cir. 1931) (applying legal rate of

[3] Nor does Washington Federal cite any support for the suggestion that the amount of the award should have compensated it for the future consequences of being an unsecured judgment creditor in Appellants' subsequent bankruptcy proceedings. (Op. Br. of Cross-Appellants at 11–12, 15.) Whatever unspecified "real damage" (*id.* at 15) the bank may have later incurred in hindsight had not been incurred and was not contemplated as of the date of the judgment. It is therefore irrelevant.

interest to determine present worth of money owed at future date). But here the parties had already agreed as to the amount of the payment due in first 24 months (until August 1, 2014): $850,000. Accordingly, that was the amount of the judgment.[4]

Entering a judgment for the higher amount due 39 months in the future without any discount to present value would have given Washington Federal a windfall for the time-value of that money and thus violated the fundamental rule that damages for breach should place a party in as good as position as it would have been in had the contract been performed—and not award more than the party would have received had the contract been fully performed. *Rathke*, 33 Wn.2d at 879–80.

B. There is No Evidence That the Parties Agreed to Accelerate the Payment Obligation in the Event of a Failure to Provide Security

Without support in the law, Washington Federal instead attempts to rewrite the facts. Washington Federal argues that Mr. Grant approved the terms of a promissory note drafted by the bank's counsel, which supposedly accelerated the $1 million payment obligation. But Mr. Grant never agreed to the additional terms in the draft note, and the parties never executed it. And even if they had, the additional terms proposed by the bank would be inapplicable to this situation.

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[4] That amounts to an effective discount rate of less than 5% per annum.

1. Additional terms in the draft promissory note prepared by Washington Federal's counsel are not part of the parties' agreement

The settlement term sheet contemplated that the parties would prepare a more detailed settlement agreement, note and deed of trust, and other documentation. (CP 228.) Accordingly, Mr. Grant's counsel, Miles Yanick, drafted a formal "Settlement Agreement" shortly after the mediation. (CP 281.) The draft Settlement Agreement incorporated the terms of the settlement term sheet and included additional provisions. (*See* CP 294–97.) The additional provisions were, of course, proposals; Washington Federal was free to reject or negotiate them. Indeed, the settlement term sheet contemplated that the parties might not agree on the terms of any additional documentation and so provided (in that event) that the term sheet "is itself a binding and enforceable agreement." (CP 228.)

Washington Federal's counsel, Ken Hart, sent the draft Settlement Agreement back to Mr. Yanick on August 20, 2012. (CP 491–96.) With his proposed edits, Mr. Hart also sent a draft promissory note and a draft pledge agreement, which ***he*** had drafted. As Mr. Hart's transmittal email explains: "Attached for your review and comment is a ***redline*** of the draft settlement agreement, a ***draft*** of the promissory note and a ***draft*** of the pledge agreement. (CP 492; emphasis added.) The different authorship is

also clear from the fonts and formatting of the draft settlement agreement as compared to the note and pledge agreement. (*See* CP 493–504.)

The fact that there were three separate documents prepared by two authors and exchanged at different times is important, because there is no evidence that Mr. Grant or his counsel ever agreed to or otherwise provided feedback regarding the draft note and pledge agreement prepared by Mr. Hart—and indeed they did not. To the contrary, the only relevant email correspondence in the record shows that Mr. Yanick forwarded Mr. Hart's email and attachments to Mr. Grant saying, "I've not reviewed Ken's edits or the note and pledge agreement yet." (CP 491.) There is no further communication in the record about the note and pledge agreement proposed by Mr. Hart.

While Mr. Hart's review, revision, and approval of the draft Settlement Agreement may make that document indicative of the parties' understanding regarding the settlement term sheet, the same cannot be said of documents prepared by Mr. Hart, which Mr. Grant never approved. Shortly after Mr. Hart provided the draft documents, the parties began to encounter the other hurdles that would eventually end with Mr. Grant's inability to provide the security. (*See* CP 280–90.) Thus, Mr. Grant did not "refuse" to execute these documents: they became moot before the parties could negotiate them.

Washington Federal's representation to this Court that Mr. Grant reviewed and approved the note prepared by Mr. Hart is false and unsupported by the very evidence it cites. In his March 17, 2014 deposition, Mr. Grant was asked whether he "read the ***formal settlement agreement***" and whether he recalled "objecting to any part of the ***formal settlement agreement.***" (CP 507 ¶ 50:11–16, 18–19; emphasis added.) Mr. Grant was never asked about the draft promissory note or about the draft pledge agreement prepared by Mr. Hart. (*See* CP 507.)

Mr. Grant's answer confirms this. Mr. Grant testified that he wanted to make sure it was clear that the interest under paragraph 1.c. would not begin to accrue until the end of the five years. (CP 507 ¶ 50:24–51:5.) Paragraph 1.c of the Settlement Agreement referred to interest (CP 493); there is no paragraph 1.c in the draft note or in the draft pledge agreement (CP 497, 502).[5]

The settlement term sheet did not contain an acceleration clause. The parties never agreed that the full amount due at the end of 60 months would become immediately due if Mr. Grant breached the obligation to provide security. That term is simply nowhere in the parties' written agreement. Even if it had been included as an ***additional proposed*** term

[5] Mr. Hart's proposed edits to paragraph 1.c. of the Settlement Agreement changed the provision that default interest would accrue "in the event of default" after 60 months to say that default interest would accrue "in the event of default or upon maturity." (CP 493.)

in the draft note prepared by Mr. Hart (which, as discussed below, it was not), there is no evidence that Mr. Grant ever indicated his assent to such a term.

2. The draft promissory note prepared by Washington Federal's counsel did not contain an acceleration clause in the event of "default"

Even if Mr. Grant had agreed to the draft note prepared by Mr. Hart, without modification, and the parties had executed it, the draft note would not have entitled Washington Federal to a judgment for $1 million in June 2014. The draft note contained a "Due on Sale" provision, which would have allowed the bank to "declare all sums due under this Note immediately due and payable"—but ***only*** in the event of a sale or transfer of the property securing the note without the bank's consent. (CP 502.) There is no allegation or evidence that the property was sold: the Due on Sale provision would be wholly inapplicable here, even if the parties had agreed to it.

Separately, the draft note would have defined "an event of default under this Note" to include a "failure to comply with or to perform any other term or obligation of Maker contained in this Note." (CP 504.) But this "Default" provision does not contain an acceleration clause. Thus, even if Mr. Grant had agreed to the draft note prepared by Mr. Hart,

without modification, and the parties had executed it, Mr. Grant's "default" under the note would not have triggered the right to accelerate.

Washington Federal's statement that "Grant agreed to sign a promissory note, providing for acceleration of the debt in the event of default" (Op. Br. of Cross-Appellant at 19) is therefore false in every respect. Not only did Mr. Grant never agree to the terms of the note Mr. Hart drafted, but draft note itself does not provide for acceleration in the event of default (assuming too that Mr. Grant had agreed to the bank's proposed definition of "default"). In short, nothing about the draft note supports Washington Federal's claim to have been entitled to $1 million more than three years in advance.

C. Washington Federal is Not Entitled to An Award of Fees Incurred on Appeal

Because Washington Federal was not entitled to recover its fees below, it is not entitled to recover them on appeal either. Even if Washington Federal prevails on the right to recover fees generally but not as to the amount, on the issue of prejudgment interest, or on its cross-appeal for a larger judgment, then it is not entitled to fees incurred on appeal either. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007).

II. ARGUMENT: REPLY REGARDING APPEAL ISSUES

A. Washington Federal Has Failed to Identify a Legitimate Basis for the Award of Fees

Washington Federal's argument that it is entitled to attorneys' fees is rambling and incoherent. This is perhaps the best indication of its weakness. But to try to identify and address the various points raised:

1. Washington Federal did not prevail on its claim to enforce the underlying loan guarantees

Washington Federal's argument appears to be founded upon the original underlying loan documents. (Op. Br. of Cross-Appellant at 20–21.) These are the documents relating to the loan from Washington Federal to ARG Development for the acquisition and development of the Bell Woods property. (CP 323–26.) The default on that loan led to the underlying action to enforce personal guarantees executed by Mr. Grant and Algo (the defendants below), which in turn resulted in the settlement term sheet. (CP 228–29.) The subsequent breach of the settlement term sheet resulted in the summary judgment now on appeal. (CP 540–42, 694–98.)

Before deciding to sue for breach of the settlement term sheet, Washington Federal moved for summary judgment on the underlying action to enforce the personal guarantees. (CP 32–58.) That motion failed. (CP 86–88.) It is beyond dispute that Washington Federal did not

prevail on its claim to enforce the underlying note and guarantees—it released them as a condition of the settlement term sheet that it chose to enforce. (*See* CP 228, ¶ 3.)

Washington Federal's own motion for summary judgment—the successful one underlying this appeal—correctly took the position that because the settlement term sheet "is enforceable and judgment on it entered, the parties' remaining claims and counterclaims should be dismissed with prejudice." (CP 176.) Thus, the bank ***voluntarily dismissed*** its claim for breach of the underlying loan guarantees when it sought and obtained summary judgment on its claim for breach of the settlement term sheet.[6]

The fact that the underlying loan documents are the basis for the bank's claim for fees is dispositive: the bank did not prevail on those claims. Where a contract provides for the recovery of attorneys' fees "incurred to enforce the provisions of such contract," fees are to be awarded to the "prevailing party," defined as "the party in whose favor final judgment is rendered." RCW 4.84.330; *see Wachovia SBA Lending,*

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[6] The trial court had previously bifurcated the claims for breach of the personal guarantees and the claim for breach of the settlement term sheet (CP 132–33). In doing so, the court agreed with the argument that "the settlement term sheet that Washington Federal seeks to enforce includes the complete release of its claim for deficiency judgment against the Defendant guarantors" such that, if the bank prevails on is claim for breach of the settlement term sheet, "then it has no other claims to try" and trial on the underlying loan documents would be unnecessary. (CP 125.)

Inc. v. Kraft, 165 Wn.2d 481, 494, 200 P.3d 683 (2009) (noting that a voluntary dismissal is not a "final judgment" for purposes of "prevailing party" provision in RCW 4.84.330). To recover fees under such a contract, a party must "prevail" specifically on its claim for breach of the provision that authorizes a fee recovery. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 389–90, 896 P.2d 1309 (1995).

2. Mr. Grant's asserted right to recover fees under the loan documents has no bearing on Washington Federal's right to fees under the settlement term sheet

Next, Washington Federal seems to argue that, because Mr. Grant took the position in a letter that he might be entitled to recover attorneys' fees if he prevailed in the underlying action on the loan guarantees, Washington Federal should be able to recover its fees in an action on the settlement term sheet. (Op. Br. of Cross-Appellant at 21–24.)

This implied-reciprocity argument is based on RCW 4.84.330, which applies in "[a]ny action on a contract or lease." The statute makes any provision in "such contract or lease" providing for recovery of fees incurred in enforcement reciprocal, such that the prevailing party is entitled to fees.

Nothing in RCW 4.84.330 suggests that, in an action involving two discrete claims based on ***two separate agreements***, a party who takes the position that the prevailing party may recover fees under ***one***

agreement somehow stipulates that the prevailing party may recover fees under the ***other*** agreement. Nor does joining claims on the two separate agreements in a single action somehow make fees incurred in enforcement of Agreement A recoverable under Agreement B, as Washington Federal also seems to argue. (Op. Br. of Cross-Appellant at 24.) Indeed, Washington Federal cites no support for its statement that RCW 4.84.330 "broaden[s] the availability of fees beyond the terms of such fee provisions." (*Id.* at 24.) To make the argument is effectively to concede that the provisions don't go as far as Washington Federal would like.

Again, the rule is simple: To recover fees under a contact, a party must not only "prevail" but must prevail specifically on its claim for breach of the provision that authorizes a fee recovery. *C-C Bottlers, Ltd.*, 78 Wn. App. at 389–90. At the very least, this means prevailing on the contract that provides for the fee recovery. By taking the position that Washington Federal must have prevailed (which it did not) on its underlying claim for breach of the personal guarantees to recover fees under them, Mr. Grant is not "implicitly argu[ing] that the Settlement Agreement intrinsically vitiates the right of the attorney's fees to the prevailing party" (Op. Br. of Cross-Appellant at 23); rather, he is arguing for the application of basic black-letter law.

3. It is not bad faith to argue for the application of the plain meaning of a contract's terms

Next, Washington Federal argues that it is incredible or would constitute bad faith to take the position that the settlement term sheet does not provide for recovery of fees in any action to enforce its terms. (Op. Br. of Cross-Appellant at 24.) But "it is the duty of the court to declare the meaning of what is written, and not what was intended to be written." *U.S. Life Credit Life Ins. Co. v. Williams,* 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (internal quotation marks omitted).

Here, the settlement term sheet provides for recovery of fees in an action to enforce the payment obligation (i.e., "the note"), not "any action" to enforce its terms.[7] It is not disingenuous to argue for enforcement of the agreement's plain, unambiguous terms. Again, the fact that Washington Federal is now arguing that the settlement term sheet cannot mean what it says is an acknowledgement that it does not say what Washington Federal would like.

4. The prevention-of-performance doctrine does not beget contractual provisions to which the parties never agreed

Washington Federal next seeks refuge in the prevention-of-performance doctrine. The argument seems to be that, because the

[7] The settlement term sheet did address remedies with respect to the agreement as a whole, but it did not include fee recovery among those remedies. For instance, the agreement provided that "[a]ny dispute regarding the terms of this agreement" would be submitted to binding arbitration. (CP 229, ¶ 5.)

settlement term sheet contemplated execution of a note embodying its terms and Mr. Grant never agreed to or executed the note prepared by Washington Federal, he should be bound by the terms of the draft note. (Op. Br. of Cross-Appellant at 25–26.)

There are several obvious problems with this argument. The first is that Mr. Grant is not claiming that Washington Federal did not perform, let alone seeking to avail himself of the fact.

Second, to the extent that the argument is that Mr. Grant "prevented" execution of the draft note prepared by Washington Federal, the draft note contained terms not in the settlement term sheet, including the due-on-sale provision on which Washington Federal relies. To the extent that "performance" means executing a note containing the terms set forth in the settlement term sheet, Mr. Grant did not prevent that any more than Washington Federal did by preparing a note that included terms the parties had not agreed to.

Third, as addressed above in Part I.B.2, the due-on-sale provision in the draft note prepared by Washington Federal did not provide for recovery of fees in the event of the failure to provide security. Even if Mr. Grant had agreed to the terms of the draft note, it would not support the bank's claim for fees.

5. Breach of an agreement does not alter the agreement's terms

Finally, Washington Federal argues that Mr. Grant's breach of the settlement term sheet by not arranging for the security interest "vitiates any duty to so narrowly construe" the fee-recovery provision. There is, of course, no law cited in support of this argument. A court's only "duty" is to enforce agreements as they are written. This duty is not "vitiated" but ***invoked*** in the event of a breach. Again, the argument concedes that the settlement term sheet does not read the way Washington Federal would like, but it is overreaching at best to argue that the Court may rewrite the agreement merely because one party was found to have breached it.

B. Washington Federal Has Failed to Identify a Legitimate Basis for the Award of Fees Incurred on Unsuccessful Claims Before the Action for Breach of the Settlement Term Sheet

There is no dispute: Regardless of how the fee provision in the settlement term sheet is construed (to apply to "any" breach or, as it says, only to a breach of the payment terms), there was no "action" to enforce it before Washington Federal amended its complaint to allege a breach of the settlement term sheet. Nor is there any dispute that the fees incurred before the amendment were for the bank's unsuccessful attempt to win summary judgment on the underlying loan guarantees. The trial court erred in awarding fees incurred pursuing unsuccessful claims before there was an action to enforce the settlement term sheet.

1. There was no "action" to enforce before July 18, 2013

The settlement term sheet provides for recovery of fees in "any action to enforce the note"—i.e., the obligation to make payments when due. (CP 228, ¶1.d.) Washington Federal would like this to say "in any action to enforce this agreement." But even if the agreement were rewritten as the bank would have it, an "action to enforce" would still be a necessary condition of any fee recovery.

As the Washington State Supreme Court has held, an "action" to enforce a legal right refers to either a judicial proceeding or one judicial in nature. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 40–41, 42 P.3d 1265 (2002). In *International Association of Firefighters*, the issue was whether an arbitration was an "action" within the meaning of RCW 49.48.030, which provides for recovery of attorneys' fees "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her." The court relied on the definition of "action" in Black's Law Dictionary (a "civil or criminal judicial proceeding," "an ordinary proceeding in a court of justice," and "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree") and American Jurisprudence ("a judicial proceeding in which one asserts a right or seeks redress for a wrong"). *Id.* at 40–41 (internal quotation marks and citations

omitted). Construing the remedial statute liberally, the court concluded that, because "'arbitration' may be ***judicial in nature*** depending on the circumstances," it was an "action" to recover wages. *Id.* at 41 (emphasis added).

Thus, an "action" requires, at the very least, a judicial proceeding or one judicial in nature. Here, there was no such action before July 18, 2013, the date Washington Federal moved to amend its complaint. (CP 89–97.) Yet the trial court awarded fees incurred beginning in February 2013—five months before there was any "action" to enforce the settlement. This was an error.

2. Fees incurred on Washington Federal's unsuccessful pre-amendment claims are easily segregated

Washington Federal does not dispute that there was no "action" to enforce the settlement term sheet before it amended the complaint to state such a cause of action and cannot argue that it prevailed on its original claim to enforce the underlying loan guarantees. Instead, the bank argues that the original claim on loan documents and the subsequent claim for beach of the settlement term sheet are so closely related that they cannot be segregated. (Op. Br. of Cross-Appellant at 30–31.)

If ever there were a case where recoverable and non-recoverable fees could be segregated, this is one. As discussed in detail in Appellants'

Opening Brief (Parts III.C & E.2.b), the fees incurred before Washington Federal amended its complaint to include a claim for breach of the settlement term sheet were incurred in the unsuccessful pursuit of summary judgment on the underlying personal guarantees. The bank did not prevail on that claim: the trial court refused to grant summary judgment on the bank's claim and refused to dismiss Mr. Grant's counterclaims for breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel. (CP 87, ¶¶ A, B, D & F.) The bank later voluntarily dismissed its claim as moot in light of the summary judgment on the claim for breach of the settlement term sheet. (CP 176.)

The cases cited by Washington Federal do not favor a different conclusion. To the contrary, they illustrate Appellant's point. In *Loeffelholz v. CL.EA.N*, 119 Wn. App. 665, 690–91, 82 P.3d 1199 (2004), Pierce County and one of its sheriffs sued a citizen's watchdog group and certain individuals for defamation based on (a) statements on the group's website and (b) complaints that the defendants made to the sheriff's office that resulted in an internal-affairs investigation, as well as malicious prosecution based on a separate federal civil rights case. *Id.* at 677. The defendants' counterclaims included a claim for attorneys' fees under RCW 4.24.510, which creates immunity for complaints to a government

agency and provides for recovery of fees where a person successfully invokes the immunity. *Id.*

The trial court dismissed the plaintiffs' defamation claim. *Id.* at 678. This entitled the defendants to fees under RCW 4.24.510 for defending against the defamation claim based on the internal-affairs complaint but not for defending against or prosecuting other claims. *Id.* at 688. Notwithstanding twice asking the defendants' attorneys to segregate the compensable from the non-compensable time and finding that the fees were still not sufficiently segregated, the court awarded fees of $50,000 under RCW 4.24.510. *Id.* at 680.

The Court of Appeals reversed, applying the well-established rule that "[i]f, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues." *Id.* at 691. The court went on to address the claims:

> In this case, segregation clearly was possible. The defamation claims were based on the events of November 1 and 2, 1996; the malicious prosecution claims on the federal proceeding commenced in December 1996 and April 1997; and the counterclaims on the state proceeding commenced in July 1998. At the core of each claim or type of claim was a different time and different

> facts, even though the facts overlapped in the sense that facts relevant on one were sometimes relevant to others as well. The record does not show that the claims were so interrelated as to excuse segregation.

Id. at 692. Accordingly, the trial court's failure to "include, on the record, a segregation of the time allowed for the [separate] legal theories" was an abuse of discretion. If segregation was possible in *Loeffelholz*, there is no question that it was possible here, where there is no overlap in time or the material facts.

In *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 600, 880 P.2d 988 (1994), also cited by Washington Federal, four garbage-truck drivers sued their employer for harassment and constructive discharge in violation of public policy after being retaliated against for demanding overtime pay. In addition, one of the plaintiffs claimed disability and age discrimination and another claimed age discrimination. *Id.*

The jury returned a verdict in favor of all four plaintiffs for wrongful harassment and in favor of three of them for constructive discharge. *Id.* at 661. In addition, the jury returned a verdict in favor of one plaintiff on his age-discrimination claim but not the other. *Id.* The trial court awarded fees under RCW 49.48.030 for constructive discharge and RCW 49.60.030(2) for age discrimination. *Id.* at 996. The

defendants appealed, the Court of Appeals certified the case to the Washington Supreme Court. *Id.* at 661–62.

The Supreme Court reversed the trial court's decision to deny a motion for judgment n.o.v. on the age-discrimination claim. *Id.* at 670. Accordingly, attorneys' fees were recoverable only for the successful constructive-discharge claims under RCW 49.48.030—not for the harassment claims, not for claim for constructive discharge by the one plaintiff whose claim was unsuccessful, and not for the unsuccessful age- and disability-discrimination claims. *Id.* at 673. The Supreme Court remanded to the trial court to segregate the fees, noting: "While we recognize that these claims are related and to some extent rest on a common core of facts, we remand the attorney fees award to the trial court for recalculation of trial and appellate attorney fees."

If segregation was possible in *Hume*—where there was a common core of facts underlying the claims—it certainly was possible here, where neither the facts nor the time in which the fees were incurred on the respective claims overlapped.

Finally, *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958 (2001), provides an example of what this case is not. In that case, a tenant at a mobile home park sued her landlord for unreasonably refusing to authorize her to sell her home to two prospective buyers. *Id.* at 451. The

plaintiff alleged three separate causes of action based on the refusals: violation of the Mobile Home Landlord Tenant Act, violation of the Consumer Protection Act, and tortious interference with contract. *Id.* at 451–52. The jury found for the plaintiff on all three claims. *Id.* at 452. Under these circumstances, there was no need to segregate: "Proof of the tortious interference claim involved the same preparation as the other claims—establishing that [the defendant] acted unreasonably." *Id.* at 461. Thus, nearly every fact in the case related in some way to all three claims." *Id.*

Here, even a cursory review of Washington Federal's respective motions for summary judgment on the underlying loan (CP 32–58) and on the breach of the settlement (CP 175–89) reveal that not a single fact relevant to one was relevant to the other.

C. Washington Federal Concedes That the Trial Court's Findings and Conclusions Failed to Address the Issues Raised Below and in This Appeal

Washington Federal does not dispute that a trial court must enter findings and conclusions sufficient to allow a reviewing court to determine why the trial court awarded the amount it did. (Op. Br. of Cross-Appellant at 32–33.) This means addressing the arguments of the opposing party and not, as the trial court did here, merely rubber-stamping

conclusory findings prepared by counsel. *See Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013).

Contrary to Washington Federal's assertion, *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014), did not purport to "clarify" or limit the requirements as set forth in *Berryman* (discussed in Appellants' Opening Brief, Part IV.E.3). To the contrary, the court in *SentinelC3* held that the "trial court erred by ***failing to explain*** the amount of its award." *SentinelC3*, 181 Wn.2d at 145 (emphasis added). But because the court found that fees were not recoverable in any event, there was little need to elaborate. *Id.*

There is no question that the trial court failed to explain why it awarded fees to Washington Federal for all work that occurred after the alleged breach—even the more than $60,000 in fees and costs that were incurred on an unsuccessful summary judgment motion on the underlying personal guarantees before the action for breach of the settlement term sheet was ever commenced. This was an error.

D. Washington Federal Has Failed to Identify a Legitimate Basis for the Award of Prejudgment Interest

Washington Federal does not dispute the bedrock principle that prejudgment interest is proper only where one party has ***retained funds*** (whether by nonpayment or breach of some other obligation) rightfully

belonging to another—to compensate for the lost use-value of the funds. (Op. Br. of Cross-Appellant at 33.) Nor can Washington Federal dispute that there was no obligation under the settlement term sheet to make any payment (or to pay interest) until August 2017. Mr. Grant did not breach an obligation to pay or otherwise retain funds—directly or indirectly—belonging to the bank.[8]

The unpublished Ohio Court of Appeals case that Washington Federal cites as "directly on point" bears only the most superficial resemblance to this one. *See W.O.M. Ltd. V. Willys-Overland Motors, Inc.*, 2006 WL 3825247 (Ohio Ct. App. Dec. 29, 2006). True, *W.O.M. Ltd.* involved a breached settlement agreement and prejudgment interest. But the similarity stops there.

The underlying lawsuit in *W.O.M. Ltd.* was for breach of an agreement to sell a business. *Id.* at *1. Accordingly, the settlement agreement contemplated that all of the assets of the business would be turned over to the plaintiff. *Id.* The defendant repudiated the settlement, and the plaintiff sued for breach. *Id.* at *2.

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[8] Washington Federal's argument that Mr. Grant's inability to provide security was a "total breach" making payment immediately due—even in the absence of an acceleration clause—is a repackaging of the argument that it was entitled to $1 million instead of the $850,000 agreed to (and relies on the same cases). As such, it is addressed above in Part IA.

As damages, the plaintiff claimed and was awarded lost profits on the inventory that should have been transferred to it as part of the settlement (and it therefore would have sold) but for the breach. *Id.* at *6. The defendant argued that prejudgment interest was not proper because the plaintiff had not been deprived of ***money***. *Id.* at *8. The court rejected that argument because the plaintiff/appellee "was denied the benefit of his bargain"—i.e., the assets of the business, including inventory. *Id.* at *9. "Thus, to be made whole, he was entitled to statutory interest on the value of the loss incurred from the loss of that benefit"—i.e., on the lost profits.

Here, Washington Federal incurred no deprivation of money or assets, because no payment was yet due as of the date of the breach. No doubt the security for payment was material; the breach of the obligation to provide it thus allowed Washington Federal to obtain a judgment in June 2014, over three years early. But the breach did not operate to deprive the bank of money or other assets between the date of the breach and the date of judgment. Thus, *W.O.M. Ltd.* is in apposite. It was error to award the bank prejudgment interest on money that was never owed to or withheld from it.[9]

[9] The fact that Washington Federal has not yet received payment of the judgment due to Appellants' bankruptcy is immaterial: there is no argument that the bank may not recover interest on the judgment.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court (1) affirm the trial court's decision to order judgment in the amount of $850,000, (2) reverse the trial court's award of prejudgment interest, and (3) reverse the trial court's award of attorneys' fees or remand the fee award with instructions to make proper findings and conclusions.

Respectfully submitted this 6th day of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 6, 2016 a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS** was served via Email/PDF on the following party:

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