70628-4

70628-4

No. 70628-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HERBERT HEINTZ and BARBARA HEINTZ, husband and wife,
Plaintiffs/Appellants,

vs.

J.P.MORGAN CHASE BANK, N.A.; and QUALITY LOAN SERVICE CORP. OF WASHINGTON, Trustee,
Defendants/Respondents

RESPONDENT JPMORGAN CHASE BANK, N.A.'S

ANSWERING BRIEF

Adam G. Hughes, WSBA # 34438
BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
Telephone: (206) 622-5306
Attorney for Respondent JPMorgan Chase Bank, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

I. INTRODUCTION

This case requires only a reading of the terms of the Plaintiffs' (Appellants') adjustable rate $1,000,000 promissory note (the "Note"). CP 112-117. The Plaintiffs have not made a single mortgage payment since early 2010 because they allegedly disagree with JP Morgan Chase Bank, National Association's ("Chase") reading of the terms of the Note. The trial court reviewed the undisputed terms of the Note and properly dismissed the complaint for failure to state a claim upon which relief could be granted. CP 70-71. This Court should affirm that ruling because the facts stated in the Complaint are plainly refuted by the terms of the Note and thus do not give rise to any claims against Chase.

II. ASSIGNMENTS OF ERROR

With respect to the assignments of error and issues pertaining to those assignments identified by Plaintiffs, Chase affirmatively denies that the trial court made any error in dismissing the Complaint. To the contrary, the trial court reviewed the terms of the Note and properly applied the law. There is nothing illusory about the interest rate index reference, and there is no basis for agreeing with the Plaintiffs' unsupportable interpretation of the contract whether extrinsic evidence is admitted or not. Chase is entitled to an award of its attorneys' fees as provided in the deed of trust.

///

///

///

III. STATEMENT OF CASE

Chase's motion to dismiss was based upon the factual allegations contained in the Complaint, filed on December 12, 2012, the terms of the Note and Deed of Trust referenced therein, and the payment change statements sent to the Plaintiffs that Plaintiffs claim required increased monthly payments in violation of the terms of the Note. *See* CP 1 - 4. As Plaintiffs state, they executed the Note and Deed of Trust at issue with Washington Mutual Bank in order to refinance an older loan. CP 2, ¶3. The subject loan secured by the deed of trust encumbered real property commonly known as 10430 47th Avenue Southwest, Seattle, WA (the "Property"). As can be seen on the face of the Note and Deed of Trust, they were executed by Plaintiffs on or about October 2007. *See* CP 112-117, 119-140.

Plaintiffs' Complaint asserts that the Note provides for monthly payments at "a fixed amount per month for a period of five (5) years." *See* Complaint at ¶ 3, CP 2. Plaintiffs then assert that Chase breached the terms of the Note by "intentionally raising the monthly payments and refusing to abide by the note provisions, ignoring the protests by Heintz concerning the increases." *Id.* A review of the Note, however, makes it clear that monthly payments were not fixed for a period of five years. Rather, the Note includes a number of terms that provide for increases in the monthly payments at times other than at the five year mark, and specifically states in the first line of the agreement: "THIS NOTE

CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MONTHLY PAYMENT." *See* CP 112-117.

The Note provides for three occasions upon which the monthly payment can be changed. Most relevant here was the arrival of a "Payment Change Date." *Id.* According to the terms of the Note, the first Payment Change Date was December 1, 2008. *Id.* at ¶4(E), CP 114. Each subsequent December 1 was also a Payment Change Date. *Id.* The terms state that on each Payment Change Date, the Note Holder will recalculate the monthly payment. *Id.* The Note reads, in relevant part:

> The result of this calculation is the *new* amount of my minimum monthly payment, ..., *and I will make payments in this new amount until the next Payment Change Date unless my payments are changed earlier...*

Id. (emphasis added). Accordingly, the monthly payment not only could change, but was anticipated to change, on December 1 of each year commencing December 1, 2008. *Id.* Consistent with the terms of the Note, Plaintiffs' received notices each October, beginning in 2008, informing them of the change to their minimum monthly payment effective on that year's December 1, Payment Change Date. *See* CP 142-153.

While not triggered here, the second circumstance under which the monthly payment could be changed was if the unpaid principal exceeded 115% of the amount borrowed, or $1,150,000.00. *Id.* at ¶4(H), CP 114. In that circumstance, the monthly payment could be increased even

before a Payment Change Date. *Id.* at ¶¶ 3(B), 4(E), 4(H) CP 114. The Note reads, in relevant part:

> In the event my unpaid Principal would otherwise exceed that 115% limitation, I will begin paying a *new* minimum monthly payment until the next Payment Change Date notwithstanding the 7 1/2% annual payment increase limitation. The new minimum monthly payment will be an amount which would be sufficient to repay my then unpaid Principal in full on the Maturity Date at my interest rate in effect the month prior to the payment due date in substantially equal payments.

Id. at ¶4(H) (emphasis added). In other words, an excessive amount of unpaid principal as a result of unpaid interest could also trigger a change to the monthly minimum payment. *Id.*

Finally, the Note also provides for the minimum monthly payment to be adjusted on the fifth anniversary of the due date of the first monthly payment without regard to any payment percentage increase limitation. *Id.*, at ¶4(I), CP 114. The Note reads: "On the fifth anniversary of the due date of the first monthly payment... my minimum monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F)." *Id.*

Despite the foregoing, Plaintiffs claim that the Note's terms prevented Chase from increasing the amount of their monthly payment at all for five years. *See* Complaint ¶ 3, CP 2. They further claim that Chase "breached the conditions of the note upon receipt of the loan from the FDIC by intentionally raising the monthly payments and refusing to abide by the note provisions." *Id.* But as is clear from a review of the terms of

the Note, combined with Plaintiffs refusal to pay the increased minimum monthly payments provided thereby, it is Plaintiffs who have refused to "abide by the note provisions." *Id.* Plaintiffs Complaint was properly dismissed.

IV. ARGUMENT

A. CR 12(b)(6) Standard of Review

A motion to dismiss pursuant to CR 12(b)(6) is properly granted when a plaintiff's pleading fails to state a claim upon which relief can be granted. Whether dismissal under CR 12(b)(6) is appropriate is a question of law. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n.*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000). "Dismissal is appropriate only if the complaint alleges no facts that would justify recovery." *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp.,* 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

In deciding a dismissal motion, a plaintiff's allegations are presumed to be true, "and all reasonable inferences are drawn in the plaintiff's favor." *Gorman*, 175 Wn.2d at 71 (emphasis added). The same deference, however, cannot be extended to legal conclusions asserted in a complaint. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, *amended by* 750 P.2d 254 (1987). Nor is

deference extended to an unsupported interpretation of the undisputed written terms of a contract (as is at issue here). *See Judd v. American Telephone and Telegraph Co.*, 152 Wn.2d. 195, 206, 95 P.3d 337 (2004) (affirming dismissal of claims asserted in contravention of the undisputed terms of a contract).

Review of a dismissal pursuant to CR 12(b)(6) is *de novo*. *Glepco, LLC v. Reinstra,* 175 Wn. App. 545, 307 P.3d 744 (2013).

B. Plaintiffs' Complaint Failed to State a Claim and was Properly Dismissed

The complaint fails to set forth any facts that establish a right to recover against Chase, or provide any basis for enjoining a non-judicial foreclosure action. Plaintiffs' claims rest entirely on their assertion that the Note prohibited Chase from raising their monthly payment for five years; however, their own documentation belies this contention. Indeed, the Note states in numerous places that the monthly payment can be increased prior to the five year mark. *See* CP 112-117.

As stated above, the Note contains three triggers for a possible increase in the monthly payment: (1) the occurrence of a Payment Change Date, (2) when the unpaid principal on the loan exceeded a certain amount, and (3) the fifth anniversary of the first payment. Plaintiffs appear to argue that only the third trigger applies. This is a clear misreading of the plain language of the Note. The Note Holder, in this case Chase, was authorized to adjust the monthly payment upon the occurrence of a Payment Change Date (i.e.,

December 1, 2008, or any December 1 thereafter) and/or if the unpaid principal on the loan exceeded $1,150,000.00.

Plaintiffs admit that they refused to pay increased payments. They do not assert that a Payment Change Date had not occurred or that Chase's recalculation of the monthly payment was erroneous. Rather, they wrongfully assert that any payment change prior to five years was improper under the terms of the Note. Obviously, that is not what the Note provides, and as such, Plaintiffs have not, and cannot, put forth any factual basis for their contention that Chase breached the terms of the Note.

The Plaintiffs' Complaint asserts that Chase is not abiding by the terms of the Note. Chase disagrees. Given that the Note is an undisputed written document, and the fact that there is no reasonable basis for Plaintiffs' asserted interpretation of the Note, the trial court properly interpreted the note's terms and dismissed Plaintiffs' Complaint with prejudice. *See Judd*, 152 Wn.2d. at 206 (affirming dismissal of claims asserted in contravention of the undisputed terms of a contract).

C. Extrinsic Evidence Argument Asserted by Plaintiffs Fails

Plaintiffs' brief asserts that the trial court should have taken the Plaintiffs' asserted declaration with regard to their and Washington Mutual's alleged intent as to the purpose of the Note and enforced that purported intention rather than the actual terms of the note. This position is not only meritless under the "objective manifestation" theory of

contracts followed in Washington, but is also in direct contravention of the assertion in the Complaint that Chase refused to abide by the actual terms of the Note.

Washington courts follow the "objective manifestation" theory of contracts. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under the "objective manifestation" theory, the focus is on "the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id.* Words in a contract are assigned their reasonable, "ordinary, usual, and popular" meaning unless the agreement "clearly demonstrates a contrary intent." *Id.* at 503–04. If, as is the case here, the parties' intent can be determined from the actual words within the four corners of the document, extrinsic evidence will not be considered. *See id.* If the Court must resort to extrinsic evidence to interpret the agreement, it can do so only to determine the meaning of specific words and terms used in the contract, and not to infer an intent "independent of the instrument" or to "vary, contradict, or modify" what was written. *Id.* at 503. Washington courts "do not interpret what was intended to be written but what was written." *Id.* at 504 (clarifying the holding of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)).

Here, what was written is clearly set out in the Note and Plaintiffs failed to identify any specific words that need their meaning determined. Accordingly, Chase requests that this court confirm the trial court's and

Chase's reading of the Note and affirm the dismissal of Plaintiffs' claims in this action.

D. Plaintiffs' "Illusory" Argument Fails and Was Not Made to Trial Court

Despite arguing to the trial court that the terms of the promissory note are plain and unambiguous, Plaintiffs now argue that the terms are "vague and incomprehensible," and "incapable of understanding." This new argument is not only belied by the terms of the Note as set out above, but should not be considered by this court, as the Plaintiffs made exactly the opposite argument to the trial court. *See Ashwell-Twist Co. v. Burke,* 13 Wn. App. 641, 644, 536 P.2d 686 (1975) (argument made for the first time on appeal was not considered by court of appeals).

Plaintiffs additionally argue for the first time on appeal that the Note's reference to a well established and long standing index to determine the adjusted interest rate is somehow illusory. Despite the note providing the Plaintiffs with a $1,000,000.00 loan, they nonsensically argue that the reference to a well established index, and a thorough provision for what happens if the index is somehow no longer available means that "Chase has promised nothing at all because of indefiniteness and duration." This argument does not make any sense, and the cases cited by the Plaintiffs do not support a finding that anything in the promissory note here is illusory.

> An illusory promise is one which according to its terms makes performance optional with the promisor, 1

> Restatement of Contracts, s 2(b) (1932); or as stated in 1 S. Williston, Contracts, s 105 at 418 (3d ed. 1957): "An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract."

Mithen v. Board of Trustees of Central Washington State College, 23 Wn. App. 925, 932, 599 P.2d 8 (1979) (specifically distinguishing *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957) and *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 287 P.2d 735 (1955) cited by Plaintiffs).

Nothing in the Note makes performance optional. Plaintiffs borrowed money that they agreed to repay pursuant to the terms of the Note. The interest rate to be used is determined by "The Index," set out in paragraph 4(B). This section provides not only the specific index to be used (the "11th District Monthly Weighted Average Cost of Funds Index"), but also provides for a replacement index in case The Index is no-longer available (something that has not happened here). Notably, this paragraph does not give Chase the option to make the new Index "almost anything Chase wants it to be" as argued by Plaintiffs. This paragraph actually provides in relevant part as follows:

> If the Index is no longer available, the Note Holder will use the new Index as if it were the Index. The new Index will be the Twelve-Month Average, determined as set forth below, of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve-Month Average is determined by adding together the Monthly Yields for the most recently available twelve

> months and dividing by 12. This information may be available in your library, or you may write to the Federal Reserve Board, Board of Governors, Publication Services, Washington D.C. 20551. The most recent figure available 15 days prior to each Interest Rate Change Date will be the Current Index. If the new Index is no longer available, the Note Holder will choose an alternative index which is based upon information comparable to the new Index. The Note Holder will give me notice as to this choice.

CP 113 at ¶4(B).

This paragraph does not provide an option for any party to either perform or not perform the contract. To the contrary, it defines and index that will be used, a replacement index that will be used if the first index is no-longer available, and the methodology that will be used for any other replacement index that might have to be used. The extremely remote potential scenario that provides the Note Holder the right to choose an alternative index "based upon information comparable to the new Index" is not a choice to either perform or not perform the contract. It is a defined restriction on how the contract is to be performed. If Chase did not follow its terms, that would be a breach of the contract. Plaintiffs' "illusory contract" argument thus fails on the merits as well.

E. Chase is Entitled to Its Attorneys' Fees

Chase is entitled to an award of its fees and costs pursuant to the terms of the Note and Deed of Trust and as provided under RAP 18.1.

Paragraph 7(E) of the Note provides as follows:

> **(E) Payment of Note Holder's Costs and Expenses**
> If the Note Holder has required me to pay Immediately in

> full as described above [Notice of Default], the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note, whether or not a lawsuit is brought, to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

CP at 115.

Paragraphs 14 and 26 of the Deed of Trust provide that the Lender is entitled to recover its reasonable attorneys' fees and costs for services "in connection with Borrower's default," and in "any action or proceeding to construe or enforce any term" of the Deed of Trust, including without limitation, attorneys' fees incurred on appeal. *See* CP at 129 (¶14), and 133 (¶26).

Accordingly, Chase requests that the Court affirm the trial court's dismissal of Plaintiffs' Complaint, and award Chase its reasonable attorneys' fees and costs incurred on appeal as provided by the Note, Deed of Trust, and RAP 18.1.

///

///

///

///

V. CONCLUSION

For the foregoing reasons, the Court below correctly found that the Heintz' Complaint failed to state a claim upon which relief could be granted against Chase. Chase respectfully requests that this Court affirm that ruling and award Chase its reasonable fees and costs on appeal.

Dated this 11th day of October, 2013.

Respectfully submitted,

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.

Adam G. Hughes, WSBA #34438
Attorneys for Respondent JPMorgan Chase Bank, N.A.

CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 11th day of October, 2013, I caused the foregoing document, RESPONDENT JPMORGAN CHASE BANK, N.A.'S ANSWERING BRIEF, to be delivered to the following parties in the manner indicated below:

Robert H. Stevenson 810 Third Avenue, Suite 228 Seattle, WA 98104-1612 *Attorney for Plaintiffs/Appellants*	[X] By First Class Mail [ ] By Legal Messenger [ ] By Email [ ] By Facsimile
Joseph W. McIntosh McCarthy & Holthus, LLP 19735 10th Ave NE, Ste N-200 Poulsbo, WA 98370 *Attorneys for Defendant/Respondent Quality Loan Service Corp. of Washington*	[X] By First Class Mail [ ] By Legal Messenger [ ] By Email [ ] By Facsimile

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 11th day of October, 2013, at Seattle, Washington.

Kay Spading

Kay Spading