

66190-6

66190-6

No. 66190-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SILVERHAWK, LLC, Appellant,

v.

KEYBANK NATIONAL ASSOCIATION, Respondent.

KEYBANK NATIONAL ASSOCIATION'S RESPONSE TO
APPELLANT'S OPENING BRIEF

Shannon L. McDougald, WSBA #24231
C. N. Coby Cohen, WSBA #30034
2812 East Madison Street, Suite IV
Seattle, Washington 98112
(206) 448-4800

Attorneys for KeyBank National
Association

2011 FEB 23 11:34:18

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUES.....	1
III.	STATEMENT OF THE CASE.....	2
	A. The Parties Entered Into a Loan, an ISDA Master Agreement and a Swap Transaction.....	2
	B. Silverhawk and Key Agreed to Terminate the Swap Transaction.....	2
	C. The Loan Remained in Effect Following the Agreement to Terminate the Swap.....	5
	D. Key Moved to Dismiss the Lawsuit for Failing to State a Claim Upon Which Relief Can Be Granted.....	6
IV.	ARGUMENT.....	6
	A. The Standard of Review is De Novo.....	6
	B. The Parties Were Free to Contract to Terminate the Swap.....	7
	C. The ISDA Master Agreement is Not Applicable to the Termination of the Swap and Is Not Applicable in This Case.....	8
	D. There are Several Bases for Affirmance of the Dismissal.....	15
	1. Because Silverhawk’s Entire Case Relies Upon Application of the ISDA Master Agreement, it Can Prove No Set of Facts to Establish Any Claim Against Key.....	15

2.	The Termination Agreement Did Constitute an Accord and Satisfaction.....	17
3.	There Was No Miscalculation, and Silverhawk Bore the Risk of One Anyway.	20
E.	Key Should be Awarded Attorney’s Fees and Costs on Appeal.	22
1.	This Appeal is Frivolous and Should Result in an Award of Fees and Costs to Key.	23
2.	The Equitable Doctrine of Mutuality of Remedy Should Result in an Award of Fees and Costs to Key.	24
V.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<u>Bennett v. Shinoda Floral, Inc.</u> , 108 Wn.2d 386, 739 P.2d 648 (1987).....	21
<u>Boyd-Conlee Co. v. Gillingham</u> , 44 Wn.2d 152, 266 P.2d 339 (1954).....	18
<u>Chapman v. Perera</u> , 41 Wn. App. 444, 704 P.2d 1224, <u>review denied</u> 104 Wn.2d 1020 (1985).....	23
<u>Consarc Corp. v. Marine Midland Bank, N.A.</u> , 996 F.2d 568 (2d Cir. 1993).....	9
<u>Corrigal v. Ball & Dodd Funeral Home, Inc.</u> , 89 Wn.2d 959, 577 P.2d 580 (1978).....	16
<u>CPL (Delaware) LLC v. Conley</u> , 110 Wn. App. 786, 40 P.3d 679 (2002).....	21
<u>Davidson Serles & Assoc. v. City of Kirkland</u> , --- P.3d ---, 2011 WL 198618 (Div. 1, 2011).....	7
<u>Evans v. Columbia Int'l Corp.</u> , 3 Wn. App. 955, 478 P.2d 785 (1970).....	18
<u>Kaintz v. PLG, Inc.</u> , 147 Wn. App. 782, 197 P.3d 710 (2008).....	24
<u>LaMon v. Butler</u> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	7
<u>Lybbert v. Grant County</u> , 141 Wn.2d 29, 1 P.2d 1124 (2000).....	6

<u>Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc.</u> , 17 Wn. App. 886, 565 P.2d 1235 (1977).....	8
<u>Morgan v. Morgan</u> , 10 Wn. 99, 38 P. 1054 (1894).....	17, 19, 20
<u>Mt. Hood Bev. Co. v. Constellation Brands, Inc.</u> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	24
<u>Schoneman v. Wilson</u> , 56 Wn. App. 776, 785 P.2d 845 (1990).....	7
<u>Tiegs v. Boise Cascade Corp.</u> , 83 Wn. App. 411, 922 P.2d 115 (Div. 3, 1996).....	21
<u>Wallace Real Estate Inv., Inc. v. Groves</u> , 124 Wn.2d 881, 881 P.2d 1010 (1994).....	7

Treatises

1 C.J.S. <u>Accord and Satisfaction</u> §2 (1985)	18
---	----

Rules

CR 12(b)(6)	16
CR 56(c)	16

I. INTRODUCTION

Appellant Silverhawk, LLC (“Silverhawk”) sued KeyBank National Association (“Key”) based on a flawed claim that that the mutual agreement to terminate a contract between them and their subsequent performance of that agreement should be annulled because the payment agreed to and made by Silverhawk to Key for that termination should have been based, not on the agreed-to amount, but on a wholly unrelated and inoperative contract provision from an earlier separate contract. Silverhawk’s entire theory of the case rests on an untenable, flawed and inaccurate reading of that separate contract between the parties. Because that separate contract between the parties did not have an operative termination provision affecting the termination agreement between Key and Silverhawk, Key and Silverhawk were free to negotiate and execute a termination of the transaction as they did (and had no other method of doing so), and Silverhawk has no viable cause of action based thereon. As all of Silverhawk’s claims improperly rely on that inoperative separate contract, the dismissal below should be affirmed. Given the frivolous nature of this appeal, attorneys’ fees and costs should also be assessed against Silverhawk.

II. STATEMENT OF THE ISSUES

1. Did the Superior Court properly find that Silverhawk has failed to state a claim upon which relief can be granted, and should this appeal therefore be denied?

2. Should Key be granted its attorneys' fees and costs on appeal as a result of Silverhawk's frivolous appeal or under the doctrine of mutuality of remedy?

III. STATEMENT OF THE CASE

A. The Parties Entered Into a Loan, an ISDA Master Agreement and a Swap Transaction.

On July 27, 2001, Key made a 10 year variable rate loan to Silverhawk for the principal amount of \$1,230,400.00. CP at p. 2 (¶4.1) (Complaint). On the same date, Key and Silverhawk entered into an interest rate swap transaction (the "Swap") governed by an ISDA Master Agreement, which included as component parts a Schedule and a Confirmation of the Swap. Id. (¶4.2). Silverhawk alleged that the Swap was a valid contract. Id. (¶4.3). Pursuant to the Confirmation, the Swap was to be in effect for a period of 10 years as well, with a termination date of August 1, 2011. CP at pp. 50 (¶9), 72-77 (Declaration of Linda Maraldo ("Maraldo Decl.)); CP at pp. 15 (¶13), 40-45 (Declaration of Vani Rao ("Rao Decl.)).

B. Silverhawk and Key Agreed to Terminate the Swap Transaction.

Silverhawk sought to sell the building for which the loan and Swap had been put in place in December 2008. CP at p. 3 (¶4.10) (Complaint). In connection with that sale and expected payoff of the loan, Silverhawk

sought to terminate the Swap entered into with Key. Id. (¶4.10). To that end, Silverhawk informed Key on or about December 30, 2008 that it wished to terminate the Swap on that date. CP at p. 16 (¶¶14-15) (Rao Decl.). Three persons were present on the call on behalf of Silverhawk: (1) Steve Bowman; (2) Vicki Bowman; and (3) Maygan Bowman (now Maygan Hurst). Id. (¶14). Ms. Vani Rao (“Ms. Rao”) took the call on behalf of Key, as she is in the Interest Rate Risk Management Group at Key and has authority to act on Key’s behalf in such transactions. CP at pp. 13-16 (¶¶1, 2, 6, 14-15). Ms. Rao placed Silverhawk’s representatives on hold and obtained a quote based upon market conditions for termination of the Swap at that time, then informed Silverhawk’s representatives of the cost of termination of the Swap at that time. CP at p. 16 (¶¶16-17). Ms. Rao offered to Silverhawk’s representatives termination of the Swap and discharge of all future obligations thereunder in exchange for a payment of \$123,167.00 by Silverhawk to Key. Id. (¶17). All three of Silverhawk’s representatives confirmed orally that they did wish to proceed with the termination of the Swap in exchange for a payment of \$123,167.00 to Key by Silverhawk, as had been offered by Ms. Rao on behalf of Key. Id. (¶18).

Key then sent a written agreement to Silverhawk memorializing the oral agreement consummated and executed over the telephone between Ms. Rao and Silverhawk's representatives. CP at pp. 16 (¶¶19-20), 47 (Rao Decl.); CP at pp. 49-50 (¶¶6, 7, 10), 79 (Maraldo Decl.). That written agreement again set forth that the Swap was being terminated for an agreed-upon payment from Silverhawk to Key of \$123,167.00. Id. A signed copy of the written termination agreement matching the terms entered into over the telephone between Silverhawk's representatives and Key was received by Key soon thereafter, and appears to have been signed by Carl A. Jacobson, *another* representative of Silverhawk who had not been on the telephone. Id. Key provided wire transfer instructions for payment of the agreed-to amount. CP at p. 94 (¶8) (Declaration of Maygan Hurst ("Hurst Decl.")). Silverhawk thereafter wired the agreed-upon termination payment of \$123,167.00 to Key. CP at pp. 17 (¶22) (Rao Decl.), 50 (¶12) (Maraldo Decl.), 94 (¶8) (Hurst Decl.).

The termination was made solely as a result of the oral and written agreement between Key and Silverhawk requiring a payment of \$123,167.00 to Key from Silverhawk to terminate the otherwise valid Swap. CP at p. 17 (¶24) (Rao Decl.). At that time, neither party had provided nor received notice of an Early Termination Date under the

ISDA Master Agreement that would trigger a default calculation of any amount due under the Swap. Id. Additionally, neither party sought further performance of the Swap following the agreement to terminate the Swap for the specified payment to Key. Id. (¶25). Silverhawk also did not question how the termination amount was calculated until *after* the transaction had been executed. Id. (¶23); CP at pp. 94-95 (¶¶8-9) (Hurst Decl.).

C. The Loan Remained in Effect Following the Agreement to Terminate the Swap.

At the time Silverhawk agreed to terminate the swap transaction in exchange for a payment of \$123,167.00 to Key by Silverhawk, the loan remained in place; it had not yet been paid off. CP at p. 94 (¶¶6-8) (Hurst Decl.). The telephone conversation took place in the morning, wherein Silverhawk agreed to the terms of the termination of the Swap, and, at the earliest, the payoff of the loan occurred in the afternoon. Id. Silverhawk thus acknowledges that the agreement to terminate the Swap preceded the payoff of the loan. Id. There is no provision in the ISDA Master Agreement addressing termination in such an instance. CP at pp. 53-70 (Maraldo Decl.). There is also no provision in the ISDA Master Agreement requiring calculation of the termination payment agreed to by the parties in any particular manner. Id.

D. Key Moved to Dismiss the Lawsuit for Failing to State a Claim Upon Which Relief Can Be Granted.

Key moved the trial court under Rule 12(b)(6) to dismiss the claims of Silverhawk (treated as a summary judgment motion because Key presented additional materials for the court's consideration) because Silverhawk improperly based its claims on the ISDA Master Agreement, which had no operative provision addressing the termination agreement between the parties. CP at pp. 5-12, 113-119. Though Silverhawk claims in its appellate brief that it "failed to address the applicability of the Contract," in reality it found it impossible to point out any portion of the contract that was applicable to the parties' agreed termination of the Swap. Appellant's Brief at p. 7.

IV. ARGUMENT

A. The Standard of Review is De Novo.

The Court shall review the ruling on the motion to dismiss of Key under Rule 12(b)(6) incorporating additional materials as if it were a summary judgment motion, thus requiring *de novo* review, the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.2d 1124 (2000). Under a motion for summary judgment standard, summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). It also must be noted that "[o]n summary judgment review, [the Court] may affirm the trial court's decision on any

basis within the record.” Davidson Serles & Assoc. v. City of Kirkland, --- P.3d ----, 2011 WL 198618 at *3 (Div. 1, 2011). This is true “even if the trial court did not consider it.” LaMon v. Butler, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989). There is ample basis to support the trial court’s dismissal of this action, and the dismissal of all of Silverhawk’s claims against Key should thus be affirmed.

B. The Parties Were Free to Contract to Terminate the Swap.

Silverhawk and Key were free to contract with one another to terminate the Swap between them when they did and as they did. There is no legal theory denying them that right, and thus the dismissal of Silverhawk’s claims should be affirmed.

Washington law establishes in several circumstances the right of parties to contract freely and without court interference. “There is no reason why persons, competent and free to contract, may not agree [upon any subject], or why their agreement when fairly and understandingly entered into . . . should not be enforced.” Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 892, 881 P.2d 1010 (1994) (citations omitted) (addressing freedom to contract for and enforceability of liquidated damage provisions). Similarly, “parties in any contract are free to abandon it by mutually manifesting a clear intention to do so.” Schoneman v. Wilson, 56 Wn. App. 776, 783, 785 P.2d 845 (1990).

Importantly, “[p]arties are free to contract for any fee, or to relate that fee to any index, upon which they mutually agree[;] [t]he fact that this fee was financially unwise for one party does not give the court power to alter the contract[.]” Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc., 17 Wn. App. 886, 894, 565 P.2d 1235 (1977).

Absent a controlling agreement (as is more fully discussed below), Silverhawk and Key were freely able to enter into the termination agreement that they entered into and fully performed, with Silverhawk paying a fee to Key in order to discharge its obligations that remained under the Swap. In fact, they had no choice but to come to such an agreement where they wanted to effect a termination of the Swap. Arguments to the contrary are baseless, and the dismissal of Silverhawk’s claims should be affirmed.

C. The ISDA Master Agreement is Not Applicable to the Termination of the Swap and Is Not Applicable in This Case.

Silverhawk erroneously bases its entire case upon the mistaken application of a portion of the ISDA Master Agreement that has no application whatsoever to the early and voluntary termination of the Swap between them, and wrongly claims that the ISDA Master Agreement

somehow provided protections to it to allow it to avoid the negotiated contract it entered into with Key to terminate the Swap.

“If a contract is unambiguous, courts are required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning.” Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 573 (2d Cir. 1993) (citations omitted) (applying New York law to a contract)¹. “That is, extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous contract.” Id. Here, there is no ambiguity in the ISDA Master Agreement—it simply does not apply to the termination contract between Key and Silverhawk, as the calculation that Silverhawk seeks to impose on the termination contract was not triggered by the express and unambiguous terms of the contract.

The ISDA Master Agreement entered into between the parties does not contain a provision requiring the parties to act in a particular manner with regard to a mutual and voluntary termination of a swap transaction.

The ISDA Master Agreement does have provisions that address a potential

¹ New York law applies to the interpretation of the ISDA Master Agreement and the obligations therein. CP at p. 68 (Part 3(e)) (Maraldo Decl.). Given that the termination contract was entered in Washington and not subject to the ISDA Master Agreement in any way, Washington law is to be applied to that arrangement.

default by one of the parties that require certain further actions to terminate, but those provisions were not triggered because there was no default or similar scenario that would have triggered those provisions. Each of those provisions is addressed below.

The ISDA Master Agreement states that an “Event of Default” gives rise to a “Right to Terminate” that the non-defaulting party “may” exercise. CP at p. 58 (§6(a)) (Maraldo Decl.). Such termination requires that the party in default be provided a notice of an “Early Termination Date” not earlier than the effective date of the required notice. Id. It is only after an “Early Termination Date” occurs or is effectively designated that the calculation sought by Silverhawk, as specified in paragraph 6(e) of the ISDA Master Agreement, would even come into play. CP at pp. 59-60 (§6(e)).

An “Additional Termination Event” is treated in a similar manner under the ISDA Master Agreement as an Event of Default, providing the “Affected Party” with a *right* to terminate the transaction by designating and giving notice of an Early Termination Date not earlier than the effective date of the notice. CP at pp. 58-59 (§6(b)(iii)). While “Additional Termination Event” was defined in Schedule Part 1(i) to include an early payoff of the underlying loan transaction, it is undisputed

that agreement to terminate the Swap occurred *before* the loan was repaid, thus no Additional Termination Event had occurred between Key and Silverhawk before they negotiated the termination contract. CP at p. 67 (Part 1(i)) (Maraldo Decl.); CP at p. 94 (¶¶6-8) (Hurst Decl.). Even had there been such an Additional Termination Event prior to their acceptance of the termination agreement, however, that only would have given Key the *right* to terminate the transaction according to the terms set forth in the ISDA Master Agreement, and the parties *still* could have proceeded in the manner they did. CP at pp. 58-59 (¶6(b)(iii)) (Maraldo Decl.). It is undisputed that Key did *not* exercise that right (which was, in any event, unavailable to Key at the time), and thus that the provisions of 6(e) were not operative. Id.; CP at pp. 59-60 (¶6(e)).

Silverhawk, in its briefing, distorts a latter portion of the ISDA Master Agreement, arguing that the discussion of the “occurrence or effective designation of an Early Termination Date” means that somehow the notice specified under section 6 of the ISDA Master Agreement was not really necessary where there was an Additional Termination Event, and that termination was somehow automatic upon the occurrence of the Additional Termination Event (which, in any event, did not occur prior to the termination agreement between Key and Silverhawk). CP at p. 59

(¶6(c)(ii)); Appellant’s Brief at pp. 9-10. The ISDA Master Agreement states no such thing. First, it is the Early Termination Date that “occurs” or is “so designated,” not the Event of Default or Additional Termination Event that gives rise to the *right* to establish such an Early Termination Date. Cf. CP at p. 59 (¶6(c)) with CP at pp. 58-59 (¶¶6(a), 6(b)). And while there is a provision for automatically setting an Early Termination Date in some instances, thus resulting in an occurrence of such Early Termination Date without effective notice, it does not have *any* application to this case. See CP at p. 58 (¶6(a)).

Unlike Events of Default or Additional Termination Events, “Automatic Early Termination” requires no notice at all and “will occur immediately upon the occurrence with respect to such party of” the following, under the heading “Bankruptcy”:

is dissolved (other than pursuant to a consolidation, amalgamation or merger); . . . makes a general assignment, arrangement or composition with or for the benefit of its creditors; . . . has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); . . . seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; [or] . . . causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified. . . .

CP at p. 58 (¶6(a)); CP at pp. 56-57 (¶5(a)(vii)(1), (3), (5), (6) and (8)).

Silverhawk does not allege that there was an Automatic Early Termination through any of these possibilities, as there was not one. Thus, an Early Termination Date did not automatically occur, and the only way an Early Termination Date could have been set was through proper notice of same, elected by Key only after their ability to do so was triggered by the operative provisions, which in this case were not even triggered. CP at pp. 58-59 (¶¶6(a), 6(b)).

This is made even more clear by the portions of the ISDA Master Agreement addressing calculations of the amount due pursuant to such a termination, neither of which are addressed *at all* in Silverhawk's briefing. CP at pp. 59-60 (¶¶6(d) (entitled "Calculations"--the (d) was lost in reproduction); 6(e)). The very calculations that Silverhawk seeks to impose on the termination agreement with Key and which form the basis for *all* of Silverhawk's claims of wrongdoing against Key are *only* instituted "following the occurrence of an Early Termination Date[.]" CP at p. 59 (¶6(d)); see also CP at pp. 59-60 (¶6(e)). The paragraph setting forth the method of calculation that Silverhawk seeks to impose on Key for the termination agreement, market quotations, itself begins with the

following preface: “If an Early Termination Date occurs, the following provisions shall apply[.]” CP at p. 59 (§6(e)).

Here, there was no Early Termination Date because there was no automatic occurrence of one through bankruptcy, no cause to allow Key to designate one, no election by Key to give notice of one, and no effective notice and designation of one; there was thus *no occurrence* of an Early Termination Date. It is undisputed that there was no bankruptcy-related scenario resulting in an Automatic Termination Event. It is undisputed that neither party had provided or received notice of an Early Termination Date under the ISDA Master Agreement that would trigger a default calculation of any amount due under the Swap as provided for in paragraph 6(e) of that agreement. It is undisputed that the loan was not paid off before the termination agreement had been executed orally over the telephone between Key and Silverhawk, and, as a consequence, that the Additional Termination Event had not even *taken place* at the time the agreement to terminate was entered into. The calculations in the ISDA Master Agreement for those scenarios are therefore irrelevant and entirely inapplicable to the termination agreement between Key and Silverhawk. Silverhawk’s reliance on those inoperative provisions to establish its case

is baseless and meritless, and the dismissal of the action should be affirmed.

D. There are Several Bases for Affirmance of the Dismissal.

Because the ISDA Master Agreement does not apply to the termination agreement between Key and Silverhawk, there are several reasons why the dismissal of this case should be affirmed. Whether because Silverhawk has failed to state a claim upon which relief can be granted, or because the parties executed an accord and satisfaction, or that Silverhawk took the risk in entering into a contract with what it now views as insufficient information, the dismissal was appropriate and should be affirmed.

1. Because Silverhawk's Entire Case Relies Upon Application of the ISDA Master Agreement, it Can Prove No Set of Facts to Establish Any Claim Against Key.

Silverhawk has made the unfounded argument throughout this litigation that it believes Key acted improperly under the ISDA Master Agreement, notwithstanding the contract language at issue, by failing to calculate the termination fee due to Key by Silverhawk in a particular manner pursuant to paragraph 6(e) of that agreement. Because the ISDA Master Agreement does not apply and has no operative provision requiring any calculation for the termination agreement entered between Key and Silverhawk, Silverhawk's entire case lacks the very basis on which Silverhawk can proceed.

Rule 12(b)(6) supports dismissal where a plaintiff is unable to “state a claim upon which relief can be granted,” as here. CR 12(b)(6). Where “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief[,]” dismissal is appropriate. Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961, 577 P.2d 580 (1978). Similarly, Rule 56(c) requires that the Court enter judgment in favor of Key where the materials in the record “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Given the inoperative nature of the provision of the ISDA Master Agreement on which Silverhawk bases all of its claims, affirmance of the dismissal below is appropriate under both standards.

Each of Silverhawk's claims relies wholly on the application of the calculation set forth in paragraph 6(e) of the ISDA Master Agreement. Silverhawk's cause of action for breach of contract notes that the failure to abide by that calculation constitutes a breach of contract, and its cause of action for a consumer protection act violation alleges that such failure was a routine practice of Key and constituted an unfair act or practice allowing for recovery by Silverhawk. Silverhawk even acknowledges in its appeal brief, incorrectly, that an Early Termination Date “triggered KeyBank's obligation to calculate the prepayment penalty by actual market quotations,” and that the failure to do so constituted a breach of contract. Appellant's Brief at p. 18.

Critically, Washington law holds that “the mistake of a party as to the effect of an agreement which he executes, or the legal result of an act which he performs, is not a ground for relief.” Morgan v. Morgan, 10 Wn. 99, 122, 38 P. 1054 (1894). Regardless of what Silverhawk would have liked the ISDA Master Agreement to require, or even what they thought it may have required, their error in failing to understand what it *actually* required, or, in this case, did not require, does not provide any basis for relief on Silverhawk’s behalf.

Because the ISDA Master Agreement does not apply to the termination agreement between Key and Silverhawk, and because nothing triggered the requirement that Key calculate the payment for termination of the Swap in any specific manner, the entire basis for the claims against Key is faulty, and Silverhawk has failed to state a claim upon which relief can be granted. The dismissal of the claims should thus be affirmed.

2. The Termination Agreement Did Constitute an Accord and Satisfaction.

Silverhawk is incorrect that the termination agreement between Key and Silverhawk was anything other than an accord and satisfaction under the law. Even ignoring that the terms of the ISDA Master Agreement did not apply, the parties entered into the termination agreement with the intent to discharge the Swap obligations otherwise due between them in exchange for a set payment from Silverhawk to Key. Again, this should result in affirmance of the dismissal of all of Silverhawk’s claims.

“Accord and satisfaction and is a method of discharging a contract, or settling a cause of action arising either from a contract or from tort, by substituting for such contract or such cause of action an agreement for the satisfaction thereof, and executing such substituted agreement.” See 1 C.J.S. Accord and Satisfaction §2 (1985). “An accord and satisfaction is a new contract between the parties, complete in itself.” Evans v. Columbia Int’l Corp., 3 Wn. App. 955, 957, 478 P.2d 785 (1970). “An accord may be reached by express agreement or it may be implied from the circumstances.” Id.

“An accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principles of contract.” Boyd-Conlee Co. v. Gillingham, 44 Wn.2d 152, 155, 266 P.2d 339 (1954). “To create it, there must be a meeting of the minds upon the subject and an intention by both parties to make such an agreement.” Id.

Silverhawk miscasts the issue as whether Silverhawk agreed to terminate Key’s “obligation to calculate” the termination value according to the terms of the ISDA Master Agreement paragraph 6(e). Because that section of the ISDA Master Agreement was inoperative as to the termination agreement, the query has no basis, as neither Silverhawk nor Key could ever have agreed to discharge a duty that did not exist. Again,

“the mistake of a party as to the effect of an agreement which he executes, or the legal result of an act which he performs, is not a ground for relief.” Morgan, 10 Wn. at 122. Silverhawk is charged with the knowledge of the legal effect of the contract it entered into with Key, including the fact that the market quotation calculation was not yet operative given the situation. Silverhawk cannot use its ignorance of the irrelevance of those terms of the contract to undermine its uncontroverted express assent to the termination agreement with Key.

Silverhawk, through its agreement to terminate the Swap with Key, sought to terminate its obligations under the Swap, an otherwise valid agreement between the parties requiring payments through August 2011, by payment of a single termination payment terminating the Swap and any further payments due thereunder. Key quoted Silverhawk a price acceptable to it to enable Silverhawk to exchange payment of the single amount for the otherwise due stream of payments due pursuant to the terms of the Swap. Silverhawk, through three representatives on the telephone, accepted the price quoted by Key. That constituted an oral contract in accord and satisfaction of the Swap, which was memorialized shortly thereafter by a writing expressing the same terms signed by another representative of Silverhawk. Further, Silverhawk performed on

the accord and satisfaction, wiring payment to Key for the agreed-upon amount, and neither party sought further performance on the Swap contract. These facts are all uncontroverted.

This is a textbook example of an accord and satisfaction, and Silverhawk's attempt to impose inapplicable and inoperative terms from the ISDA Master Agreement to alter the analysis is without merit. The dismissal of this matter should be affirmed as a result of the accord and satisfaction rendering the prior Swap obligations discharged and terminated in their entirety.

3. There Was No Miscalculation, and Silverhawk Bore the Risk of One Anyway.

There was no miscalculation where there was no construct requiring calculation in any particular manner, but Silverhawk's ignorance of the calculation of the amount of the termination contract was a choice, and Silverhawk bears the risk associated with that choice.

It bears repeating yet again that "the mistake of a party as to the effect of an agreement which he executes, or the legal result of an act which he performs, is not a ground for relief." Morgan, 10 Wn. at 122. Even if the mistake is factual, "[i]n the contractual setting, a party bears the risk of mistake if 'he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake

relates but treats his limited knowledge as sufficient.” CPL (Delaware) LLC v. Conley, 110 Wn. App. 786, 791, 40 P.3d 679 (2002). “In other words, a party’s willingness to enter a contract notwithstanding limited knowledge of certain facts shows that those facts were not essential elements of the contract.” Id.; see also Tiegs v. Boise Cascade Corp., 83 Wn. App. 411, 426, 922 P.2d 115 (Div. 3, 1996) (same). “In such a situation there is no mistake. Instead, there is an awareness of uncertainty or conscious ignorance of the future.” Tiegs, 83 Wn. App. at 426 (quoting Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 396-97, 739 P.2d 648 (1987) (holding a release not voidable for mistake in such a situation)).

Plaintiff agreed in this case to execute a contract with Key to terminate the Swap contract in exchange for a payment to Key of \$123,167.00. It did not question how that amount was arrived at by Key, and chose to accept that amount, and thereafter to pay that amount to Key, notwithstanding that lack of knowledge. Such actions exhibited either a conscious choice to accept that amount as a proper payment amount to terminate Plaintiff’s obligations under the Swap contract, or a conscious choice to disregard how that amount was calculated by Key. Either way, Plaintiff remains bound to that transaction, and cannot now go back and challenge the propriety of the termination amount.

It also bears noting that the position of Key as “Calculating Agent” under the ISDA Master Agreement, in the same manner as the other

calculating provisions under the agreement, was wholly inapplicable to the termination agreement between Key and Silverhawk. Silverhawk brashly sets forth an amount it believes to have been appropriate as a payment to Key for termination, (see CP at p. 96), but claims that it was somehow unable to learn that information before agreeing with Key on the termination payment, or paying it to Key thereafter. Silverhawk could have done its own calculations before agreeing to Key's offer, could have asked Key how it arrived at the number it did, could have negotiated further with Key to attempt to get a more favorable payment, and could have simply held off on any agreement until Key sent a notice of an Early Termination Date following the Additional Termination Event of the loan payoff. It elected to do none of those things, and elected instead to proceed with the termination agreement with Key for the offered amount with limited knowledge. The dismissal of the claims based upon the terminated Swap should thus be affirmed.

E. Key Should be Awarded Attorney's Fees and Costs on Appeal.

Because both this action and this appeal are frivolous, and because the doctrine of mutuality of remedy affords Key a right to obtain its attorney's fees for the successful defense of the contract claims against it, Key should be awarded its attorneys' fees and costs on appeal of this matter.

1. This Appeal is Frivolous and Should Result in an Award of Fees and Costs to Key.

From its inception, Silverhawk's case has been baseless, resulting in dismissal at its inception in the trial court. Silverhawk's choice to proceed with this appeal in light of the clear contract language establishing that it is meritless should result in an award of fees and costs to Key.

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." Chapman v. Perera, 41 Wn. App. 444, 455-56, 704 P.2d 1224, review denied 104 Wn.2d 1020 (1985). Such is the case here, and thus the fees and costs incurred by Key in fighting this appeal should be assessed against Silverhawk.

Put simply, no reasonable argument can be made that the ISDA Master Agreement applied to the termination agreement between Key and Silverhawk. It is only by ignoring the specific terms of the ISDA Master Agreement and altering the factual scenario without admitting or alerting the Court to the same that Silverhawk can even attempt to make an argument that the ISDA Master Agreement had any operational provision affecting the termination agreement. The argument is at its best baseless, and at its worst intentionally misrepresented. Because Silverhawk's argument that the ISDA Master Agreement somehow controls the termination agreement between the parties is wholly devoid of merit, and because that argument is the key lynchpin of Silverhawk's entire case, the case was brought frivolously and the appeal is similarly being brought

frivolously. As a result, Key's reasonable attorneys' fees and costs on appeal should be assessed against Silverhawk.

2. The Equitable Doctrine of Mutuality of Remedy Should Result in an Award of Fees and Costs to Key.

Even if the appeal were not wholly frivolous, however, Key's success in defending against the claim of the applicability of the ISDA Master Agreement provisions should result in an award of Key's fees thereunder pursuant to the doctrine of mutuality of remedy.

The "mutuality of remedy [doctrine] exists as a 'well recognized principle of equity' in Washington." Kaintz v. PLG, Inc., 147 Wn. App. 782, 789, 197 P.3d 710 (2008) (quoting Mt. Hood Bev. Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 121, 63 P.3d 779 (2003)). As this Court noted, "the principle of mutuality of remedy authorizes the award of attorney fees where a party prevails in an action brought on a contract that contains a bilateral attorney fee clause . . . by establishing the invalidity or unenforceability of the contract." Id.

Here, as noted in the Complaint, (CP at p. 4 (¶4.19), the ISDA Master Agreement provides for the recovery of attorneys' fees and all other expenses incurred enforcing rights under the agreement or related to the early termination of a swap transaction entered thereunder (CP at p. 61-62 (¶9) (Maraldo Decl.)). By establishing that the contract is unenforceable as it relates to the termination agreement between Key and Silverhawk, Key is entitled to recover its fees and costs associated

therewith, which it now requests on appeal. Given the lack of a basis to Silverhawk's claims, all such reasonable fees and costs should be assessed to Silverhawk.

V. CONCLUSION

For the foregoing reasons, the appeal of Silverhawk should be denied, the dismissal of all claims by Silverhawk against Key should be affirmed, and Key's attorneys' fees and costs should be imposed against Silverhawk.

DATED this 23rd day of February, 2011.

MCDUGALD & COHEN, P.S.

By

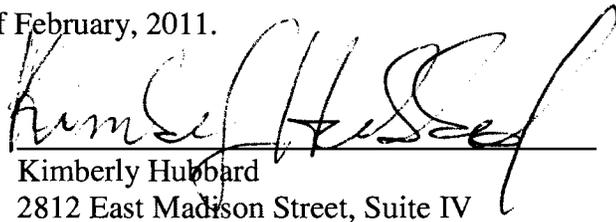

Shannon L. McDougald, WSBA #24231
C. N. Coby Cohen, WSBA #30034
Attorneys for Respondent KeyBank
National Association

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused a true and correct copy of the foregoing document to be e-mailed and mailed to the attorney of record listed below, in accordance with the agreement between counsel to accept service in such manner:

Maygan Hurst
1911 SW Campus Drive, #774
Federal Way, WA 98023-6473
mayganhurst@gmail.com
Attorney for Silverhawk

Dated this 23rd day of February, 2011.

A handwritten signature in black ink, appearing to read "Kimberly Hubbard", written over a horizontal line.

Kimberly Hubbard
2812 East Madison Street, Suite IV
Seattle, WA 98112
Ph: (206) 448-4800
Fx: (206) 448-4801