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In Pro Per

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Foundation Management, Inc.,

Respondent,

v.

William J. Barkett & Jane Doe Barkett,

Appellants.

CASE NO. 68318-7-I

**APPELLANTS' REPLY TO
RESPONDENT'S BRIEF**

2012 SEP 11 AM 9:15
SUPERIOR COURT
STATE OF WASHINGTON
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TABLE OF CONTENTS

I. THERE ARE MATERIAL ISSUES OF FACT IN DISPUTE..... 1

II. THERE CAN BE NO COLLATERAL ESTOPPEL..... 3

 A. Review is De Novo..... 3

 B. The District Court Cases are Inapposite..... 3

 C. Respondent’s Collateral Estoppel Argument is Without Merit 5

III. THE LOAN DOCUMENTS ARE UNENFORCEABLE..... 6

 A. The Loan Documents are Illegal 6

 B. Respondent Fails to Address the Barketts’ Claims 7

IV. THE LOAN DOCUMENTS ARE USURIOUS 8

 A. The Loan Documents Were Negotiated in California..... 8

 B. The Loan Documents are Usurious Under California Law 8

 C. Washington Law Does Not Apply 9

V. CONCLUSION..... 10

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Brack v. Omni Loan Co., Ltd.</i> , 16 Cal.App.4th, 80 Cal.Rptr.3d 275 (2008).....	7, 8
<i>Castro v. Stanwood School Dist. No. 401</i> , 151 Wash.2d 221.....	3
<i>Erwin v. Cotter Health Ctrs.</i> , 161 Wash.2d 676, 167 P.3d 1112 (2007) (en banc).....	2, 10
<i>Franklin v. Mortgage Guaranty & Sec. Co.</i> , 57 F.2d 834 (9th Cir. 1932)	7
<i>Gamer v. duPont Glore Forgan, Inc.</i> , 65 Cal.App.3d 280, 135 Cal.Rptr. 230 (1976).....	6, 8
<i>Gibbo v. Berger</i> , 123 Cal.App.4th 396, 19 Cal.Rptr.3d 829 (2004).....	7
<i>Goodwin Co. v. Nat'l Disc. Corp.</i> , 5 Wn.2d 521, 105 P.2d 805 (1940)	7
<i>Hall v. Beneficial Finance Co.</i> (1981) 118 Cal. App. 3d 652	9
<i>Hash-by-Hash v. Children's Orthopedic Hosp. and Medical Center</i> , 110 Wn.2d 912, 757 P.2d 507 (1988).....	1, 2
<i>McKee v. AT&T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845 (2008).....	7, 8
<i>McQuillon v. Schwarzenegger</i> , 369 F.3d 1091 (9th Cir. 2004)	5
<i>Niederer v. Ferreira</i> , 189 Cal.App.3d 1485, 234 Cal.Rptr. 779 (1987).....	7
<i>Pelton v. Tri-State Mem'l Hosp., Inc.</i> , 66 Wash.App. 350, 831 P.2d 1147 (1992).....	1, 3
<i>Podolsky v. First Healthcare Corp.</i> , 50 Cal.App.4th 632, 58 Cal.Rptr.2d 89 (1996).....	7

<i>Saunders v. Superior Court</i> , 27 Cal.App.4th 832, 33 Cal.Rptr.2d 438 (1994).....	7
<i>Stoneridge Parkway Partners, LLC v. MW Housing Partners</i> (2007) 153 Cal. App. 4th 1373	9
<i>The Richard and Sheila J. McKnight 2000 Family Trust v. William Barkett et al.</i> (United States District Court, District of Nevada Case No. 2:10-cv-1617-RCJ)	4
<i>United Medical Mgmt. v. Gatto</i> , 49 Cal.App.4th 1732 (1996)	7, 8
<i>W.F. Capital v. Barkett</i> (United States District Court, Western District of Washington Case No. 2:10- cv-01617-GMN-LRL).....	4
<i>Wells v. Comstock</i> , 46 Cal.2d 528 (1956)	7, 8
<i>Wolfson v. Brammer</i> , 616 F.3d 1045 (9th Cir. 2010)	5, 6
<i>WRI Opportunity Loans II, LLC v. Cooper</i> , 154 Cal.App.4th 525, 65 Cal.Rptr.3d 205 (2007).....	7, 8
STATUTES	
Cal. Bus. & Prof. Code §§ 17200 <i>et seq.</i>	7
Cal. Civ. Code § 2205	8
Cal. Civ. Code §§ 2205 and 2810.....	7
Cal. Corp. Code §2203	8
Cal. Fin. Code § 22000 <i>et seq.</i>	7, 8
Cal. Fin. Code § 22100(a)	8
Civ. Code § 1916.1	9
Civ. Code § 2810	8
RCW 19.52.080	9
OTHER AUTHORITIES	
Black’s Law Dictionary 126 (9th ed. 2009)	3

Cal. Const., art. XV, § 1 6, 8
Article XV of the California Constitution 9
Fed. R. Civ. Proc. 56 6
Restatement (Second) Conflict of Laws § 187(2)(b) (1971)..... 2

Appellants William J. Barkett and Lisa Barkett, erroneously sued as Jane Doe Barkett, (hereafter the “Barketts”) submit the following brief in response to Respondent’s Brief:

I.

THERE ARE MATERIAL ISSUES OF FACT IN DISPUTE

To prevail on a summary judgment motion, the moving party – here Respondent – bore the burden in the lower court of proving that there is no genuine issue of material fact in dispute between the parties. *Hash-by-Hash v. Children’s Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 757 P.2d 507 (1988). If Respondent failed to meet its burden, then the summary judgment motion should have been denied. *Ibid.* The lower court was required to construe the evidence and summary judgment motion in a light most favorable to the nonmoving party – the Barketts. *Pelton v. Tri-State Mem’l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

Respondent’s brief highlights material issues of fact that remain in dispute between the parties. Based on these facts alone, the lower court should have denied the summary judgment motion. Respondent claims in multiple locations that the loan documents at issue in this matter were negotiated and made in Washington state. (Respondent’s Brief 2, 3, 4, 12). The Barketts have always disputed these claims. At issue in this case is a loan agreement consisting of a note signed by a company called Merjan and personal guaranty thereon signed by the Barketts (together, the note, guaranty and related deed of trust are referred to herein as the “loan documents”). CP 8, 14. The Barketts have never resided in the State of Washington and own no property there. CP

66. The loan documents were executed in La Jolla, California. CP 67, 106, 113-14.

Respondent presents this case as though the majority of the negotiations and execution of the loan documents occurred in Washington. Some minimal amount of the activities relating to the loan may have taken place in Washington, but most occurred in California. CP 67. Merjan negotiated the loan from California and it conducts all of its business there. CP 66-67. It signed the documents in California, as did Barkett. CP 67. The subject matter of the transaction consists of property located in California and the deed of trust securing that property provides for California law and is recorded in California. CP 68-101. Moreover, the proceeds of the loan were put to use in California. Indeed, as the notary verifications bear witness, the last act consummating the loan transaction occurred in California when Barkett executed the guaranty. CP 113-114. The fact that the documents select a Washington jurisdiction is not controlling. Aside from the fact that the documents are invalid and their terms unenforceable, even Washington choice of law provisions favor California jurisdiction in this case. *Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 690-691, 167 P.3d 1112, 1120 (2007) (en banc); Restatement (Second) Conflict of Laws § 187(2)(b) (1971).

Respondent bases many of its arguments on the faulty premise that the loan documents were executed in Washington and/or that the bulk of the loan transaction was conducted in Washington. The Barketts dispute these assertions. This Court should find that the loan documents were negotiated and executed in California. Even if no such finding is made, this represents a material issue of fact in dispute. For that reason alone, the trial court should have denied Respondent's summary judgment motion. *Hash-by-*

Hash, supra, at 912; *Pelton, supra*, at 354. Its granting of that motion was in error, and the instant appeal should be resolved in the Barketts' favor.

II.

THERE CAN BE NO COLLATERAL ESTOPPEL

Nearly the entirety of Respondent's Brief is based on an unfounded claim that the Barketts' appeal should be denied on collateral estoppel grounds. This argument must fail factually and as a matter of law.

A. Review is De Novo

Respondent admits that appellate review in this matter is de novo. (Respondent's Brief p. 5) (citing *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224). It is axiomatic that "de novo" review is review anew. It is review that is nondeferential to any other court's findings. Black's Law Dictionary 126 (9th ed. 2009).

Respondent repeatedly notes that the lower court found against the Barketts in this matter. It also repeatedly notes that courts in cases wholly unrelated to the one before this Court have found against the Barketts on actions involving loans and guarantees. These arguments simply have no merit. This Court must review the evidence before it and, without deference to any other court's findings, decide the matter before it de novo. *Castro, supra*, at 224.

B. The District Court Cases are Inapposite

Even if this Court were to consider other cases involving the Barketts, the

two matters cited by Respondent are wholly inapplicable to this case.¹

Respondent first cites to the unpublished court decision in *W.F. Capital v. Barkett* (United States District Court, Western District of Washington Case No. 2:10-cv-01617-GMN-LRL). The W.F. Capital matter was a different case, involving different parties, involving a transaction utterly unrelated to any transaction involved in the instant matter. There, W.F. Capital, Inc. brought a claim against William J. Barkett and Lisa Barkett. In that case, William Barkett, in his capacity as President of Wasco Investments, LLC signed a Fourth Amended and Restated Commercial Promissory Note to W.F. Capital. Based on the unique circumstances of that case, the judge denied a motion to dismiss brought by William and Lisa Barkett and granted W.F. Capital's summary judgment motion. As such, the "issue" in that case is different from the "issue" in this case. The contracts and documents at issue in the W.F. Capital case are not at issue in the present case. None of the case law or analysis involved in that matter has any bearing on the instant action.

Respondent next cites to the unpublished court decision in *The Richard and Sheila J. McKnight 2000 Family Trust v. William Barkett et al.* (United States District Court, District of Nevada Case No. 2:10-cv-1617-RCJ). The McKnight matter is also distinct from the instant matter. In that case, Richard McKnight brought a claim against William Barkett and Castaic Partners III, LLC on loan documents executed by the LLC

¹ These cases are not on the record before this Court and should be ignored. The Barketts discuss them herein for the sole purpose of correcting misstatements made by Respondent.

and guaranteed by William Barkett. Based on the unique facts of that case, and on Nevada law the judge erroneously found to be applicable, the court in that case granted a summary judgment motion filed by Richard McKnight. As with the W.F. Capital case, the McKnight matter is wholly unrelated to the instant matter. The contracts and documents at issue in that case are not at issue in the present case. None of the case law or analysis involved in that matter has any bearing on the instant action. It should also be noted that the Barketts plan to appeal the order in that case once a valid final judgment as to all parties is reached and the order is thus not a final judgment on the merits.

C. Respondent's Collateral Estoppel Argument is Without Merit

Even assuming, arguendo, that the W.F. Capital and McKnight cases had some bearing on this action (which they do not), Respondent cites them for the sole purpose of arguing that the Barketts' arguments in this case should be collaterally estopped. The elements of collateral estoppel have not been met.

When a federal court has decided an earlier case, federal law controls the collateral estoppel analysis. *McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004). For a collateral estoppel argument to apply, four requirements must be met: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated; (3) there was a final judgment on the merits; and (4) the person against whom collateral estoppel is asserted was a party to or in privity with a party in the previous action." *Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010).

It is undisputed that the parties, documents and issues in the W.F. Capital and McKnight cases are different than those before this Court. The judgment in the

McKnight case is not yet final. The law is clear that this Court must decide this appeal cautiously, based on its de novo determination of whether the lower court erroneously found that Respondent met its burden of proving 1) that there is no genuine dispute as to any material fact *in this case* and 2) that Respondent is entitled to judgment as a matter of law *in this case*. Fed. R. Civ. Proc. 56. That Washington and Nevada district courts decided summary judgment motions based on the unique undisputed facts of two completely separate matters is irrelevant to this action. It was irrelevant to the lower court's decision in this action, and is irrelevant on appeal. Other than William J. Barkett being a party in the W.F. Capital and McKnight cases and in the instant matter, none of the requisite elements of collateral estoppel have been met. *Wolfson, supra*, at 1064. The lower court should have given no weight to Respondent's references to the W.F. Capital and McKnight matters, and nor should this Court.

III.

THE LOAN DOCUMENTS ARE UNENFORCEABLE

A. The Loan Documents are Illegal

Respondent claims that Washington law applies *because the parties' loan documents say it does*. (Respondent's Brief p. 10). Based on the terms of the loan documents, Respondent argues for liability on principal, interest, costs, attorneys' fees and appellate costs. (*Id.* at pp. 10, 12-15). This argument misses the point. The provisions set forth in the parties' loan documents are irrelevant because the loan documents themselves are void and unenforceable. Cal. Const., art. XV, § 1; *Gamer v. duPont Glove Forgan, Inc.*, 65 Cal.App.3d 280, 287, 135 Cal.Rptr. 230, 234 (1976);

Brack v. Omni Loan Co., Ltd., 16 Cal.App.4th, 1312, 1316-17, 80 Cal.Rptr.3d 275, 284 (2008); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845, 852 (2008); *Goodwin Co. v. Nat'l Disc. Corp.*, 5 Wn.2d 521, 531, 105 P.2d 805 (1940); *Gibbo v. Berger*, 123 Cal.App.4th 396, 403, 19 Cal.Rptr.3d 829, 834 (2004) [*Niederer v. Ferreira*, 189 Cal.App.3d 1485, 1506, 234 Cal.Rptr. 779 (1987)]; *United Medical Mgmt. v. Gatto*, 49 Cal.App.4th 1732, 1740 (1996); *Saunders v. Superior Court*, 27 Cal.App.4th 832, 839, 33 Cal.Rptr.2d 438, 441 (1994). *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647, 58 Cal.Rptr.2d 89, 98 (1996); *Franklin v. Mortgage Guaranty & Sec. Co.*, 57 F.2d 834, 836 (9th Cir. 1932); *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal.App.4th 525, 533, 65 Cal.Rptr.3d 205 (2007); *Wells v. Comstock*, 46 Cal.2d 528, 533 (1956); see Cal. Fin. Code § 22000 *et seq.*, Cal. Civ. Code §§ 2205 and 2810; Cal. Bus. & Prof. Code §§ 17200 *et seq.*

B. Respondent Fails to Address the Barketts' Claims

Respondent erroneously states that the Barketts claim the loan documents are unenforceable solely because Respondent did not obtain a "Certificate of Qualification" in California. (Respondent's Brief p. 10). That term appears nowhere in the Barketts' opening brief.

In fact, the Barketts set forth a litany of reasons that the loan documents are unenforceable. Respondent utterly fails to address most of these arguments. Without restating the Barketts' entire opening brief, the reasons that the loan documents are invalid and unenforceable include the following:

-Respondent failed to obtain the proper licensing to conduct business in

California. Cal. Fin. Code § 22100(a).

-The loan documents are usurious. *WRI Opportunity Loans II, LLC, supra*, at 533, 542; *Wells, supra*, at 533; Civ. Code § 2810.

-Respondent failed to properly register its business in California. Cal. Corp. Code §2203.

-California law prohibits an out of state lender from relying on choice of law provisions to circumvent important California law. Cal. Const., art. XV, § 1; *Gamer, supra*, at 287; *Brack, supra*, at 1316; *McKee, supra*, at 372; Cal. Fin. Code § 22000 *et seq.*

-Respondent has an adequate remedy at law in California. Cal. Civ. Code § 2205; *United Medical Mgmt., supra*, at 1740.

IV.

THE LOAN DOCUMENTS ARE USURIOUS

Respondent argues that the loan documents are not subject to either Washington or California usury laws.

A. The Loan Documents Were Negotiated in California

Respondent argues that “[b]ecause the Loans were negotiated and made in Washington State, California usury laws simply do not apply.” That assertion misstates the facts. The loan documents were negotiated and executed in California. CP 67, 106, 113-14.

B. The Loan Documents are Usurious Under California Law

Respondent argues that even if California law were to apply, the loan documents would not be found to be usurious because California law exempts loans

made by real estate brokers *or* those secured by real property from the usury laws. (Respondent's Brief p. 13) (citing Cal. Const. Art. XV, § 1 and Civ. Code § 1916.1). Respondent misinterprets California law.

Section 1 of Article XV of the California Constitution sets the rates at which interest will become usurious. Civil Code Section 1916.1 sets forth a usury exemption for licensed real estate brokers that are making loans secured by real property. (“[t]he restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply to any loan or forbearance made or arranged by any person **licensed** as a real estate broker by the State of California, **and** secured, directly or collaterally, in whole or in part by liens on real property” Civ. Code § 1916.1 (emphasis added)).

Nowhere does California provide an exemption for unlicensed real estate brokers, nor does it provide an exemption for loans that are secured by real property (unless, per Civil Code Section 1916.1, the secured loan happens to be made by a licensed real estate broker). Respondent does not dispute that it is not a licensed real estate broker in California. As such, the usury exemption does not apply. *Hall v. Beneficial Finance Co.* (1981) 118 Cal. App. 3d 652, 654; *Stoneridge Parkway Partners, LLC v. MW Housing Partners* (2007) 153 Cal. App. 4th 1373, 1378-79.

C. Washington Law Does Not Apply

Respondent alternatively argues that the Washington usury laws do not apply because RCW 19.52.080 exempts usury from loans made primarily for commercial or business purposes. Washington usury laws do not apply because the applicable law in

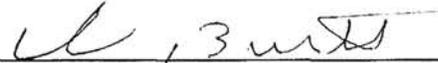
this matter is California law. Respondent's only basis for claiming the application of Washington law lies in its argument that the loan documents, which call for Washington law, are enforceable. The loan documents are not enforceable. Even if they were, Washington choice of law provisions favor the application of California law in this matter. *Erwin, supra*, at 1120.

V.

CONCLUSION

California law should apply to the dispute in this case. The loan documents are not enforceable. The trial court's order granting summary judgment for Respondent should be vacated.

DATED: September 10, 2012



WILLIAM J. BARKETT, PRO PER

DATED: September __, 2012

LISA BARKETT, PRO PER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is Post Office Box 28907, Fresno, California 93729-8907.

On September 10, 2012, I served true copies of the following document(s) described as **APPELLANTS' REPLY TO RESPONDENT'S BRIEF** on the interested parties in this action as follows:

Brian H. Krikorian
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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Gilmore, Wood, Vinnard & Magness's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 10, 2012, at Fresno, California.



Lisa Renwick