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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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CENTRALBANC MORTGAGE CORPORATION,

Appellant,

v.

SOLUTIONS FINANCIAL GROUP, INC., NORTH AMERICAN  
SPECIALTY INSURANCE COMPANY, CHOICE ESCROW, INC.,  
JULIE DEKMAN, SLAVA DEKMAN, ALLA PYATETSKAY AND  
DAVID SOBOL

Respondents,

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REPLY BRIEF OF APPELLANT, CENTRALBANC MORTGAGE  
CORPORATION

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**A. THE FIRST LOAN**

Defendants outline the same argument presented at trial court, devoid of the realities and practicalities of business practice. American Home Mortgage Corporation (“AHMC”), purchaser of the first and second loans secured by the property located at 2106 Fairmount Avenue SW, Seattle, Washington 98126 (the “Property”) foreclosed on the Property. Defendants accurately state that John Delaney had no obligation to insert himself as the purchaser of the Property in order to extinguish the obligation owed by CentralBanc Mortgage Corporation (“CMC”) to AHMC. CP at 936. But the focus of the appeal is the duty and obligation of CMC, not John Delaney. Damages directly caused by Choice Escrow, Inc., the Dekmans and Solutions Financial Group, Inc. derive from CMC’s obligation to AHMC and the satisfaction of that obligation. Id. The AHMC foreclosure and acquisition of the Property did not extinguish CMC’s contractual duties to AHMC. It bears repeating the AHMC was not an ordinary creditor of CMC. AHMC purchased all qualifying mortgages from CMC and this relationship was essential to the ongoing business operations of CMC. CP at 944. Selling mortgage paper replenished the financial ability CMC to continue mortgage financing and reselling qualified loans to AHMC.

Choice, Dekman and NASIC point to the absence of John Delany’s individual liability on the CMC contract with AHMC. Defendants fail to cite one legal authority that would restrict well established damage concepts

of foreseeability and proximity to allow damages to only parties bound by written contract to perform. Defendants ignore the massive obligation owed by CMC to AHMC, the realities of its inception and practicalities of finding money to satisfy CMC's repurchase requirement. Defendants seek to excuse their gross mishandling of escrow and participation in a scheme to defraud mortgagors through false and fraudulent loan application on the back of CMC's only practical choice for satisfying the AHMC obligation. Asserting lack of cause, in fact, misdirects the real focus of the proximate and foreseeable nature of the damages actually sustained by CMC. John Delaney was one of two equity principals of CMC. CMC depended upon its business and contractual relationship with AHMC. John Delaney controlled CMC's finances. John Delaney testified by way of Declaration that he caused CMC to pay all mortgage payments that have been made to pay the very debt incurred to satisfy the AHMC obligation. Those payments were reasonable and necessary to sustain the vital business relationship between CMC and AHMC. CMC, in fact, paid mortgage payments relative to the Property. CMC sustained the financial burden of the Property mortgage and the receipts from tenant rent payments. These were included on the audited books and records of CMC from 2007 until now.

Historically, courts have evaluated contract damages using the language of foreseeability:

“This court has announced that damages for breach of contract can be recovered only for such losses as were reasonably foreseeable by the party to be charged at the time the contract was made or if the injury was not foreseeable, then it must specifically be shown that

the defendant had special knowledge of the risk he was undertaking. *Larsen v. Walton Plywood Co.*, 65 Wash.2d 1, 7, 309 P.2d 677, 396 P.2d 879 (1964). In the *Larsen* case we quoted with approval from 5 Corbin, Contracts § 1009 at 7:

The existing rule requires only reason to foresee, not actual foresight. It does not require that the defendant should have had the resulting injury actually in contemplation \* \* \* but in general damages are awarded for a breach not because they were contemplated and promised to be paid, but to compensate the injured party for harm done that ought to have been foreseen whether it was or not.” *Wilkins v. Grays Harbor Community Hospital*, 71 Wn.2d 178, 186, 427 P.2d 716, (Wash. 1967).<sup>1</sup>

The real question for the Court is whether Andrey and Vera Stukov (the borrowers), Choice Escrow, Inc., the Dekmans and NASIC, who participated in the succession of fraudulent financings “ought to have foreseen” that Stukovs, failure to pay even one mortgage payment on the CMC first and/or second mortgage would result in direct financial harm to CMC? Was it foreseeable that CMC would have to bear the burden of dealing with the mortgage and property foreclosure from AHMC, the purchaser of the Stukov mortgage to address Stukovs’ breach? Was the CMC repurchase of the loan from AHMC foreseeable as to Choice and the Dekmans who violated numerous escrow standards, strict adherence to which would have alerted CMC to the fraudulent nature of Stukov

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<sup>1</sup> Earlier cases employed language found in *R.P. Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 514, 209 P. 690, (Wash. 1922):

It may be admitted to be the rule that, where two parties make a contract which one of them breaks, the damages which the other party can recover are such as may be fairly and reasonably considered as the natural and proximate result of the breach, and such as were within the contemplation of the parties at the time the contract was made, and are the probable result of the breach of it. *Benjamin v. Puget Sound Commercial Co.*, 12 Wash. 476, 41 P. 166; *Ransberry v. N. T. T., etc., Co.*, 22 Wash. 476, 61 P. 154.

Whether the damages claimed come within

participants? Was the CMC repurchase of the loan purchases by AHMC foreseeable as to NASIC and its insured, Solutions Financial Group, Inc. who originated the fraudulent Stukov loan in sequence with five other similar loans. Decl. M . Herriot, CP at 403-406. Clearly, all of the contributors to the Stukov loan scam “ought to have foreseen” the direct and substantial harm actually sustained by CMC resulting from any action that misrepresented the qualifications of the Stukovs, the origin of funds used for the transaction and that concealed in any way, the true nature of the Stukov mortgage finance scam. CMC asserts that as a mortgage banker/financier, an entity that originates loans for itself and others that subsequently sells the loans into the secondary market, the consequences of loan application fraud and extreme escrow misconduct causing default are extremely foreseeable. That CMC will somehow and somehow absorb the losses surrounding the loan repurchase is a foregone conclusion. CMC acted responsibly and reasonably by paying for the John Delaney loan that covered the CMC/.AHMC obligation. CMC acted responsibly by manifesting the obligation of CMC with respect to the John Delaney mortgage by executing a corporate resolution that obligated CMC to pay for the Delaney mortgage.

Choice, Dekman and NASIC have all argued that Jon Delaney was a volunteer and had no reason to purchase the AHMC Property post foreclosure and that Delaney’s action to literally save CMC from financial ruin constituted a break in causation. The natural extension of Defendants’

position would have been to allow the AHMC repurchase requirement to go unheeded, sever the business relationship with AHMC, the very entity that purchases all mortgage paper originated by CMC and allow CMC to fail-all to make sure that the trail of causation is left intact. Ironically, a court rule or policy that would require this absurd result would unduly restrict a trial court's ability to hear the totality of circumstances that comprise actual, proximate and foreseeable damages. Damages would have increased if CMC had not creatively and promptly paid the AHMC obligation in order to preserve ongoing business relationship with AHMC and CMC's ability to market its loans to the secondary market.

Choice/Dekman's statement that they "did not cause, in a direct sequence, unbroken by any new, independent cause, the injury CentralBanc complains of" is not founded in fact. CMC discharged its obligation to AHMC through the Delaney mortgage of the Property. John Delaney's control of CMC's finances, indeed, facilitated CMC payments of the Delaney Mortgage and made the formality of a contract between John Delaney and CMC unimportant. CMC discharged its obligation under the AHMC contract in good faith and has not embellished or enhanced the computation of damages. The numbers speak for themselves. CP at 937 – 940.

## **B. THE SECOND LOAN**

Defendants assert lack of evidence that supports the existence and payment of the Second Loan does not correctly reflect the content of the court records. On the contrary, there was no evidence introduced by any Defendant in any of the three summary judgment hearings that directly controverted the existence and payoff by CMC of the Second Loan. The second loan was clearly part of the Stukov purchase transaction documented in the United States Department of Housing and Urban Development Settlement Statement (“HUD-1). Decl. of John Delaney, ¶ 11, CP at 68. Choice and Dekman should have been familiar with the Second Mortgage since they prepared the HUD-1 and disclosed on the HUD-1, Line 205 the “Principal amount 2<sup>nd</sup> loan” at \$125,000. CP at 109. Choice and Dekman also signed the Addendum to Closing Instructions (CP at 1003. See also Specific Closing Instructions, CP at 1001) which required Choice to close both the first and second mortgages simultaneously. To state that Defendants were unaware of the Second Mortgage or feign surprise by CMC’s direct repayment of the Second Mortgage is specious at best.

John Delaney, as the president of CMC, testified that CMC paid \$145,249.97 to AHMC to purchase the Stukov Note secured by the second deed of trust. CP at 941. Defendants introduced no competent contrary evidence in any of the summary judgment motions that contradicted Plaintiff’s assertion. This repurchase of the second deed of trust did not involve any assistance from any third party which would test theories of causation, remoteness or proximity or the damages. CMC made the

payment directly to AHMC to discharge CMC repurchase obligation under the AHMC/CMC Mortgage Loan Purchase Agreement and Addendum to the Mortgage Loan Purchase Agreement. CP at 937. John Delaney testified that he caused CMC to comply with the repurchase requirements invoked by AHMC and CMC pursuant to concerning the Stukov Loan for the Second Loan of \$125,000 in second position by paying outright all of the interest and principal owing on the second mortgage in the total amount of \$145,249.97. CP at 69, 367 937, 941. The payment went directly from CMC to AHMC. Id. CMC supplied the Register QuickReport (CP at 941) that itemized all of the interest calculations supporting the entire Stukov Second Loan repayment.

That testimony is corroborated by CMC's independent Auditor's Report from Vavrinek, Trine, Day & Company, Certified Public Accountants which carries the CMC/AHMC obligation and payments made on the Property as a current asset (CP at 1010) and as a liability (CP at 1008) on CMC's Balance Sheet. The fact of CMC's payment of \$145,249.97 to AHMC cannot reasonably be challenged by Defendants' bald allegation that CMC presented no proof. Sworn testimony with corroborative detail constitutes proof. CMC, as party defending the summary judgment motions by NASIC, Choice and Dekman, is entitled to "[a]ll reasonable inferences from the evidence must be construed in favor of the non-moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) as cited in *Green v. Normandy Park*, 137

Wn.App. 665, 681, 151 P.3d 1038, (Wash.App. Div. 1 2007). At the very minimum, CMC's representations concerning its direct payment is sufficient to create a factual issue and defeat summary judgment.

### **C. CMC WAS A PARTY TO THE GENERAL AND SPECIFIC CLOSING INSTRUCTIONS**

Choice and Dekman have stretched the term utilized by CMC inferring that Choice Dekman are parties to the Escrow Instructions. Petitioner's Brief at P. 20. That term was used to globally identify the transaction and bears clarification. Choice, Andrey Stukov and Sky Benson executed the document identified as Closing Agreement and Escrow Instructions for Purchase and Sale Transaction including the addenda thereto. CP at 988-999 ("Closing Agreement"). The Closing Agreement contains Paragraph 3 (CP at 900) which is reproduced here:

"Instruction from Third Parties. If any written instruction necessary to close the transaction according to the parties' agreement are given to closing agent by anyone other than the parties or their attorneys, **including but not limited to lenders,** such instructions are accepted and agreed to by the parties." Emphasis added.

While it is true CMC did not sign the Closing Agreement, Sky Benson and Andrey Stukov did agree to the terms of the General, Specific Closing Instructions and Addenda to which CMC and Choice are parties. Benson and Stukov agreed to the terms of the General and Specific Closing Instructions. Choice and Dekman categorically state that CMC did not sign any agreement with Choice Escrow. That statement is blatantly false and

misleading. Choice Escrow, Inc., through its authorized closing agent, Julie Dekman, signed and initialed every page of the General and Specific Closing Instructions and the Addendum to Closing Instructions (CP at 1000 through 1003). CMC asserts that the terms of the Closing Agreement did place CMC into a position of contractual privity where it could assert claims based upon the terms of the Closing Agreement and General and Specific Closing Instructions.

The standard imposed by Washington courts on persons acting in the capacity of escrow and to whom such duties are owed is helpful. See *Butko v. Stewart Title Co. of Washington, Inc.*, 99 Wn.App. 533, 549, 991 P.2d 697, (Wash.App. Div. 2 2000).

“An escrow holder is an agent who occupies a fiduciary relationship with **all** parties to the escrow. *National Bank v. Equity Investors*, 81 Wash.2d 886, 909-10, 506 P.2d 20 (1973). An escrow holder's fiduciary duties are set forth in the escrow instructions. *Equity Investors*, 81 Wash.2d at 910, 506 P.2d 20.

As a general rule, the escrow holder must act strictly in accordance with the provisions of the escrow agreement; he must comply strictly with the instructions of the parties, and it is his duty to exercise ordinary skill and diligence, and due or reasonable care in his employment. In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence.

*Equity Investors*, 81 Wash.2d at 910, 506 P.2d 20 (quoting 30A C.J.S. Escrows § 8 (1965)).

An escrow holder's fiduciary duty will extend to a third party beneficiary for the limited purpose of informing such a beneficiary of the termination of the escrow. *Gray v. England*, 69 Wash.2d 52, 58, 417 P.2d 357 (1966).”

As CMC can and did establish contractual privity between Choice and CMC, arguments attempting to minimize standing must fail. Demonstrating CMC's standing as the party that actually sustained the financial harm caused by the contractual breaches and negligent and intentional torts committed by Defendants does address Defendants' proximate cause arguments. CMC was legally required to compensate AHMC and honored the commitment by directly paying the Second Mortgage and funding all the obligation undertaken by John Delaney's mortgage of the Property.

**D.       EQUITABLE   SUBROGATION   SHOULD   BE  
CONSIDERED**

The summary judgment motions were conducted before the trial court without a jury. Defendants' respective motions, CMC's responses and Defendants' Replies were briefed and supported by declarations. Plaintiff's appeal and Designation of Clerks Papers contain no additional facts. To a large extent, all of the elements of equitable subrogation were before the trial court. John Delaney, as the president of CMC was placed in the untenable position of having to pay AHMC for the defaulted Stukov First and Second Loans totaling approximately \$964,000. Defendants mischaracterize Delany's undertaking of the loan as 'voluntary,' as if the breach with AHMC and default with the key purchaser of mortgage paper

were an option. CMC maintains that Delaney's personal guarantee was essential and the only practical means of funding the AHMC obligation.

Under circumstances where new theories applicable to evidence before the trial court on motion for reconsideration were advanced for the first time, appellate courts have extended some latitude in hearing and considering such theories in the context of motions for reconsideration. See *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241, 122 P.3d 729 (Wash.App. Div. 1 2005). Relying upon *Reitz v. Knight*, 62 Wash.App. 575, 581 note. 4, 814 P.2d 1212 (1991), the court held that a new theory based on the evidence presented in a nonjury bench trial could be raised for the first time in a motion for reconsideration. That same latitude should be afforded to CMC. CMC reasserts its arguments made in its Opening Brief as responsive to arguments made by Defendants relative to equitable subrogation.

#### **E. ATTORNEY FEE PROVISION**

Defendants' conclusion that CMC has no claim for attorney fees on grounds that CMC was not a party to the escrow instructions must fail. Stukov and Benson executed the Closing Agreement which was discussed in CMC Reply Brief. The Closing Agreement contains Paragraph 3 (CP at 900) which incorporates the terms of the CMC/Choice Escrow General and Specific Closing Instructions making CMC a party to the Closing Agreement as well.

The Section entitled “Disputes” in the Closing Agreement does provide for reasonable attorney fees for the benefit of Choice Escrow for fees “incurred in any lawsuit arising out of or in connection with the transaction or these instructions, whether such law suit is instituted by the closing agent, the parties or any other person. CP at 991. A unilateral attorney fee provision may be invoked by any party who prevails to assert legal fees.<sup>2</sup> The Wachovia court explains the application of RCW 4.84.330:

“For RCW 4.84.330 to apply: (1) the action must be "on a contract or lease," (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a "prevailing party." RCW 4.84.330. The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute's first two requirements. *Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 839, 100 P.3d 791 (2004). Here, the parties agree the Note contains a unilateral attorney fee provision incorporated to the Guaranty. The narrow question remains whether the trial court's dismissal without prejudice is within RCW 4.84.330's "prevailing party" language.”

*Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 859, 158 P.3d 1271 (Wash.App. Div. 2 2007).

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RCW 4.84.330 provides:

“In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.”

In the event CMC is determined to be the prevailing party in the appeal and its damages cognizable under contract and tort theories, CMC would become the prevailing party and should be accorded reasonable attorney fees as requested in its Opening Brief.

#### **F. NASIC REQUEST FOR DISMISSAL**

CMC acknowledges the dismissal of Solutions Financial Group, Inc. as represented by NASIC. However, this Court ruled after the dismissal of Solutions Financial Group, Inc. and after the motion to dismiss this appeal by Defendants, including NASIC, that Defendants' motions to dismiss were denied. CMC proceeded as indicated by the Court.

#### **G. CONCLUSION**

CMC resubmits its request that the Appeals Court overturn the November 2 and November 13, 2012 Orders granting Defendants Choice and NASIC Motions for Summary Judgment. In satisfaction of the AHMC contract, CMC, in good faith, discharged its indebtedness utilizing the credit of CMC's principal, John Delaney. CMC directly paid AHMC the Second Mortgage of \$145,249.97. CMC paid all taxes, insurance and mortgage payments relative to the Property and has carried the Stukov property and obligations on its audited financial statements from 2007 forward. CMC has shown the existence of a direct causal relationship between CMC

damages and Defendants' tortious conduct and breaches of contract. The trial court failed to interpret factual inferences in favor of CMC. CMC has provided ample evidence of quantifiable damages directly resulting from the Stukov loan debacle. The Court may utilize an principles of equitable subrogation as a basis for awarding compensatory damages.

Respectfully submitted this 30<sup>th</sup> day of April, 2014.

STEPHEN J. PLOWMAN



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