

71090-7

71090-7

No. 71090-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Trudy M. Davis, a single person,

Appellant,

v.

The Blackstone Corporation, successor trustee;
and Michael E. Menashe, whose marital status is unknown,

Respondents.

BRIEF OF APPELLANT

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ORIGINAL

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I. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1. The Court erred by entering its Order Granting Defendant Michael E. Menashe's Motion for Summary Judgment, Denying Plaintiff Trudy M. Davis's Cross-Motion for Summary Judgment, and Declaratory Judgment entered June 21, 2013 (CP 918-921) and its related Order Denying Motion for Reconsideration Decision Amending Summary Judgment Ruling entered on July 15, 2013 (CP 1040-1041).

No. 2. The Court erred by entering its Order Denying Motion for TRO on April 2, 2013. CP 287-289.

No. 3. The Court erred in entering its Judgment and Order Granting Defendant Michael E. Menashe's Motion for Award of Reasonable Foreclosure and Litigation Expenses and Judgment entered September 26, 2013 (CP 1749-1751) and its related Order Granting Defendant Michael E. Menashe's Motion for Reconsideration entered November 27, 2013 (CP 1819-1820).

Issues Pertaining to Assignments of Error

No. 1. When a Court calculates whether a loan bears a usurious interest rate under Ch. 19.52 RCW (the “Usury Act”), how is that calculation to be performed? Assignment of Error No.’s 1 & 2.

No. 2. When a Court calculates whether a loan’s interest rate is usurious under the Usury Act, in deciding the principal amount at issue does the phrase “principal actually received by the borrower,” as that phrase is generally used in Washington decisions, mean “principal received in fact” by the borrower? Assignments of Error No.’s 1 & 2.

No. 3. When a Court calculates a loan’s interest rate for purposes of the Usury Act, is it error to deem a sum of money simultaneously both principal and interest? Assignments of Error No.’s 1 & 2.

No. 4. When a Court calculates a loan’s interest rate for purposes of the Usury Act, are “points” interest? Assignment of Error No. 1.

No. 5. When a Court calculates a loan’s interest rate under the Usury Act, what charges or fees are considered interest for purposes of

that calculation versus those charges or fees that are not considered interest? Assignment of Error No. 1.

No. 6. Does a Court err when it enters summary judgment against a borrower in a usury case by determining a loan is primarily for a business purpose, and not primarily for a personal or consumer purpose, when there are material facts in dispute on the issue? Assignment of Error No. 1.

No. 7. Does the Deed of Trust Act (“DTA”), Ch. 61.24. RCW, injunction provision authorize a hearing on the merits at the initial injunction hearing? Assignment of Error No. 2.

No. 8. Under the DTA may the court enter an enforceable money judgment for fees as a condition of reinstatement in favor of the lender, and not in favor of the foreclosing trustee, when under that Act the lender is not entitled to request such relief and also when that Act only lists the trustee as the party entitled to payment of reinstatement sums? Assignment of Error No. 3.

No. 9. Does a court err when it awards interest on the sums determined necessary to reinstate a loan when the DTA does not authorize such award of interest? Assignment of Error No. 3.

II. STATEMENT OF THE CASE

The following facts are undisputed. On November 2, 2011, Appellant Trudy M. Davis (“Davis”) borrowed money from Respondent Michael E. Menashe (“Menashe”) evidenced by the Promissory Note at issue (the “Note”). CP 7-10; Full copy at Appendix (“Apdx.”) 1-4. At the same time, Davis secured the Note via Deed of Trust recorded against residential real estate she owns in King County (the “Deed of Trust”). CP 11-20. The Note and Deed of Trust are collectively referred to as the “Loan.”

Davis later informed Menashe, through their respective counsel, she believed the Loan was usurious. CP 835-839. Because Davis declined to send any Loan payments to Menashe, he appointed The Blackstone Corporation as successor trustee (the “Trustee”) under the Deed of Trust. CP 1301:20-21. The Trustee then took the first step in commencing a nonjudicial, deed of trust foreclosure by issuing its Notice of Default. CP 1569:10-11. It then issued its Notice of Foreclosure (CP 79-81) and its

Notice of Trustee's Sale setting a foreclosure sale date of February 22, 2013 ("1st Trustee's Sale"). CP 21-25.

On January 30, 2013, Davis commenced suit and asked the Court to enjoin the nonjudicial foreclosure under Ch. 61.24 RCW, the Deed of Trust Act ("DTA"), and requested other relief¹. CP 1-25; 98-140. As to enjoining the Trustee's Sale Davis' position was, and remains, that the nonjudicial foreclosure was improperly commenced because it was based on incorrectly calculated sums due to the usurious Loan. CP 100:1-101:9. Simply put, she asserts the amounts alleged due in the foreclosure documents are incorrectly calculated because if the Loan is usurious, then the remedies afforded her under Washington's Usury Act ("Usury Act") would change the sums allegedly due. *Id.*

At the initial hearing to restrain the 1st Trustee's Sale, the Court Commissioner set the matter for hearing before the assigned Judge, Jean Rietschel. CP 229-232. Ultimately, the parties submitted a number of briefs and materials on the injunction request. CP 47-92; 98-140; 222-228; 233-238; 239-244; 245-258; 261-262. As will be further described in

¹ The other relief was for violating Washington's Usury Act, for a Consumer Protection Act claim and for a declaratory judgment. CP 3:19-5:14.

the Authority & Argument section of this brief, Judge Rietschel denied Davis' request to enjoin that sale. CP 287-289. Davis appeals the court's decision. CP 1786:19 & 1788-1790.

Notably, due to Judge Rietschel's oral ruling, the Trustee determined it had improperly calculated the sums allegedly due by Davis and it abandoned the 1st Trustee's Sale. CP 266. Based on that abandonment, Davis argued to the court that its decision on the injunction was moot. CP 273-280. However, the court disagreed and entered its denial order. CP 287-289.

Following its recalculation of the sums allegedly due by Davis, the Trustee issued an amended Notice of Foreclosure (CP 1367-1369) and a new Notice of Trustee's Sale setting a new sale date of August 16, 2013 ("2nd Trustee's Sale"). CP 1458-1462.

Cross-motions for summary judgment were filed by Menashe and Davis (CP 595-698, 702-743), responsive and reply briefing was submitted by both parties (CP 747-843, 844-857, 866-909, 910-914), and the court entertained oral argument from both parties (RP (6/21/13) 1-46).

The court denied Davis' motion, but granted Menashe's motion ("SJ Order"). CP 918-921; RP (6/21/13) 43:5-45:6. Davis appeals the SJ Order. CP 1786:23-25 & 1794-1797. Davis moved for reconsideration and provided additional briefing, as allowed by the court. CP 922-969; RP (6/21/13) 43:5-44:15. Menashe responded (CP 972-986) and Davis filed a reply (CP 989-1039). The court then entered an order amending the SJ Order which changed the basis of the court's ruling ("SJ Amendment"). CP 1040-1041. The SJ Amendment is also being appealed. CP 1787:1-4 & 1798-1799.

Before the date of the 2nd Trustee's Sale Davis moved the court, under the DTA, to determine the amount of fees due from her to reinstate the Loan. CP 1044-1121. However, the court entered a money judgment against Davis in favor of Menashe (the "Reinstatement Judgment"). CP 1749-1751. The Reinstatement Judgment is also being appealed. CP 1787:4-5 & 1800-1802. Menashe moved for reconsideration of the Reinstatement Judgment which was granted in the form of an amendment. CP 1819-1820. The amendment of the Reinstatement Judgment is included in this appeal pursuant to RAP 2.4(f)(3) because Menashe's motion for reconsideration was timely filed and this Court permitted formal entry of the

amendment of the Reinstatement Judgment pursuant to RAP 7.2(e). CP 1821-1822.

Also before the 2nd Trustee's Sale occurred, Davis obtained a supersedeas order by which the foreclosure process was stayed pending appeal (the "Supersedeas Order"). CP 1548-1549.

III. SUMMARY OF ARGUMENT

The trial court erred when it:

1. Improperly calculated the Loan's interest rate and entered summary judgment against Davis based on that incorrect calculation. Davis asserts the Loan's rate exceeds the 12.00 percent usury maximum;

2. Entered summary judgment against Davis based on its ruling the Loan was for a business purpose. Davis asserts the Loan was for a personal/consumer purpose and that material facts in dispute on this point made entry of summary judgment improper;

3. Failed to enjoin the trustee's sale under the DTA. Davis asserts she alleged a proper legal or equitable ground to enjoin the sale, which is all that is required under the DTA. The court erred by holding a hearing on the merits and denying the injunction based on that hearing.

4. Entered an enforceable money judgment under the DTA, that bears interest, against Davis and in favor of Menashe as a condition to reinstate the loan and thereby halt the foreclosure. Davis asserts the DTA only authorizes the court to issue a ruling that authorizes the foreclosing trustee to demand and collect the court-determined fees as a condition of reinstating the Loan. The pertinent section of the DTA does not authorize an enforceable money judgment or an award of interest.

IV. AUTHORITY & ARGUMENT

A. The De Novo Standard of Review Applies to this Appeal.

The de novo standard applies to all aspects of this appeal. An Appellate Court reviews summary judgment orders de novo, and engages in the same inquiry as the trial court. *Adams v. Great Am. Ins. Companies*, 87 Wn. App. 883, 886, 942 P.2d 1087 (1997). As the responding party to the motion for summary judgment, Davis is entitled to have all reasonable inferences drawn in her favor. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 587, 943 P.2d 350 (1997). Affidavits submitted on behalf of the non-moving party must be taken as true for summary judgment purposes. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 245, 943 P.2d 1358 (1997). Summary Judgment should be

denied unless, based on the evidence, reasonable minds can come to but one conclusion. *Ruffer v. St. Francis Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). The burden is on the moving party (see *Ochsner v. Board of Trustees of Washington Cmty. Coll. Dist. No. 17*, 61 Wn. App. 772, 775, 811 P.2d 985 (1991)); in this case Menashe must establish that in light of all the evidence, with all reasonable inferences resolved in Davis' favor, no genuine issues of fact exist, and no reasonable jury could conclude the Loan is usurious.

This action also involves the proper interpretation of statutes by the trial court. Statutory interpretation is a question of law that is also reviewed de novo. See *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); *City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002). The primary objective of any statutory construction inquiry is “to ascertain and carry out the intent of the Legislature.” *HomeStreet, supra* (citing *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

B. Usury Issue: Specific Facts. A loan broker (“Knapp”) arranged the Loan between Davis and Menashe. CP 814:16-816:25, 818:9-

23, 820:15-821:22, 825:11-827:3. Knapp's handwritten notes about the Loan are at CP 785 (Apdx. 5) and his letter confirming terms of the Loan are at CP 786 (Apdx. 6) (the "Term Sheet"). His notes contain the following statement about the purpose of the Loan: "***Needs money to live***, build up reserves and to rehab Seattle prop for business/rental cash flow." Apdx. 5 (emphasis added). The Term Sheet states Menashe was charging Davis a 6.0 percent loan fee. Apdx. 6. Menashe's attorney drafted the Loan documents. CP 817:2-13, 774 (2nd to last paragraph), 784 at ¶33.

1. The Note. The Note (Apdx. 1-4) is an interest only note bearing stated monthly interest of \$2,276.04 (Apdx. 1, ¶d) and contains the following pertinent provisions:

a. The Repair Reserve. Paragraph "b" states \$12,500 was to be withheld by Menashe as a repair reserve ("Repair Reserve"). Apdx. 1. It was to earn interest when it was disbursed. *Id.* at ¶b. The Repair Reserve was never disbursed to Davis. CP 1367 (Amended Notice of Foreclosure showing principal of \$237,500, not \$250,000 face amount of Note.)

b. The Interest Reserve. Paragraph "d" states \$16,770.83 was to be withheld by Menashe as an interest reserve ("Interest Reserve"). Apdx. 1. It reads:

Upon execution hereof, Borrower authorizes Lender to withhold from the loan proceeds an "Interest Reserve" in the amount of Sixteen Thousand Seven Hundred Seventy and 83/100 Dollars (\$16,770.83). So long as Borrower is not in default hereunder or is not in default pursuant to any other agreement between Borrower and Lender, Lender shall apply Two Thousand Two Hundred Seventy Six and 04/100 Dollars (\$2,276.04) of the Interest Reserve to Borrower's obligation to make interest payments as required hereunder until disbursements are made from the Repair Reserve and thereafter the actual interest due until the Interest Reserve is exhausted. Upon full expenditure of the Interest Reserve, Borrower shall make all required payments.

Id. at ¶d. None of the Interest Reserve was ever physically delivered to Davis; instead, it remained in Menashe's bank account at all times. CP 817:6-23.

c. The Prepayment Penalty. Paragraph "h" contains a prepayment penalty in the amount of the Interest Reserve: \$16,770.83, less interest paid. Apdx. 2. In combination with the Interest Reserve created by Paragraph "d," the terms of this prepayment penalty provision ensured the \$16,770.83 Interest Reserve could never actually be disbursed to Davis. Apdx. 1-2. The last paragraph of the Note confirms the penal nature of the provision. Apdx. 4.

d. The Savings Clause. The Note also has a clause to make it comply with the Usury Act. Apdx. 4. It reads:

In no event shall any payment of interest or any other sum payable hereunder exceed the maximum amount permitted by applicable law. If it is established that any payment exceeding lawful

limits has been received, the holder hereof will credit the excess amount to principal or, at Lender's option, refund the same.

Apdx. 4.

2. The Loan Fees. In order to close the transaction, Menashe wired into escrow the amount of \$210,729.27 (CP 791 & 819:4-17), not the \$250,000 face amount of the Note (Apdx. 1). At closing escrow issued its final settlement statement ("Settlement Statement"). CP 790; Apdx. 7. The Settlement Statement confirms the following were disbursed as loan fees and charges to persons and entities other than Davis (collectively, the "Loan Fees")²:

--Origination charge to Menashe	\$10,000.00
--Loan fee to Menashe	\$ 5,000.00
--Underwriting fee to Menashe	\$ 1,195.00
--Loan processing fee to Universal Financial	\$ 1,500.00
--Mortgage Fee to Columbia Mortgage	<u>\$ 2,500.00</u>
TOTAL	\$20,195.00

Apdx. 7; CP 703:4-11.

a. The Loan Fees a/k/a the Interest "Points." The Settlement Statement (Apdx. 7) charges titled "Our origination charge-Michael E. Menashe," for \$10,000, and the "Loan Fee-Michael E. Menashe," for \$5,000, were the 6.0 percent Lender's Fee listed in the Term Sheet (Apdx.

² It is undisputed the "Loan fee-Michael E. Menashe" and the "Underwriting fee-Michael E. Menashe" totaling \$6,195.00 listed on Apdx. 7 were actually paid to his broker, Knapp. CP 703:12-13.

6) assessed in the form of percentage interest "points." Knapp, who received the \$5000 "Loan Fee-Michael E. Menashe," described his broker's demand for these fees/points as follows:

Q. And then it mentions a loan of \$250,000. and then below that there's a line that says, "Loan Origination." There's nothing where it says "percentage," and then it says "5,000." Could you describe for the record what that is.

A. We charge a fee to facilitate or to broker loans. In this particular case we charge \$5,000 and the origination fee to be paid out to title.

Q. To you?

A. To Michael Knapp and Associates.

Q. Correct. So then what is involved in loan origination?

A. Operating a business.

CP 943:1-13.

As to the Term Sheet (Apdx. 6), Knapp described the total fees/points as follows:

Q. The next line with an asterisk says, "Lender: 6 percent." Can you explain for the record what that indicates?

A. That is the fee that is charged in totality by the lender and/or broker in combination. You take that number of six and multiply it by the loan amount. That equates to the fee. That is the -- per this Letter of Understanding, that is the estimated amount that will be charged.

Q. Now, you previously talked about the \$5,000 fee that you requested in your broker demand. Is that 5,000 part of that six percent?

A. It is.

Q. So as you sit here today, do you know how that six percent fee was split?

MR. COULSON: I will object to the form of that question. The witness can answer.

A. It looks like if I look at Exhibit KNA3, if I were to take the six figure and multiply it by 250,000, that equates to approx-

imately a \$15,000 fee of which 10,000, line 803, was paid to Mr. Menashe and 5,000, line 808, was paid to Michael Knapp and Associates.

CP 944:19-945:15 (reference to "KNA 3" found at CP 694).

Knapp confirmed the amounts paid again, referencing CP 874:

Q. So also on page 1 I'm going to refer you to the section that says "Fees." It says, "4 pts to MM." Am I correct that that means four points to Michael Menashe?

A. Yes.

Q. That would represent the \$10,000 that you mentioned earlier in your testimony?

A. Four points of \$250,000.

Q. Would be \$10,000?

A. Correct.

Q. And then the next line under "Fees" it says, "2 points to Michael Knapp and Associates."

A. Correct.

Q. That would be the \$5,000 you mentioned earlier?

A. Correct.

CP 947:23-948:12.

Menashe confirmed Knapp's testimony, also referencing CP 874:

Q. Okay. The next line where it says "Fees" and then it says "4 pts" which I assume is points, "to MM," do you know what that phrase means?

A. That would be 4 percentage points to Michael Menashe.

Q. And that would be 4 percent of the that loan amount of 250,000 up there higher?

A. I assume.

MR. COULSON: Object to the form. You can answer.

Q. What was your answer?

A. Yes.

Q. Okay. And then below that last line we're looking at is says "2 points to Michael Knapp and Associates." Am I to understand that would mean that 2 percentage points of that 250,00 was to go to Michael Knapp & Associates?

A. Yes.

MR. COULSON: Object to the form. You can answer.

CP 936:5-21.

Menashe also confirmed the split of the interest points with Knapp:

Q. As I read that, and please correct me if I'm wrong, that there's a total \$15,000 loan fee of which you received 10,000 and Mr. Knapp of River Capital got 5,000?

A. Correct.

CP 939:21-24. Referencing Apdx. 7 Menashe also stated:

Q. Okay. And then it says, "Our origination charge – Michael E. Menashe," do you know what that means?

A. Yes.

Q. What does it mean?

A. That would be the -- this where the error is on the -- our origination charge would be the \$10,000 loan fee that we referred to earlier.

CP 940:16-22.

b. The Underwriting Fee. Knapp's testimony about his broker's demand indicates the \$1,195 Underwriting Fee on the Settlement Statement (Apdx. 7) was to pay his business overhead – not for services to Davis. He stated:

Q. And then the next line it has numbers would be the underwriting services underwriting a processing fee?

A. Yes.

Q. It says "1,195"?

A. Okay.

Q. So what's an underwriting processing fee then?

A. The energy and effort it takes to underwrite to determine the viability of a transaction is the underwrite. So determining the value of the property.

CP 943:14-22.

The Term Sheet Davis signed (Apx. 6) does not include this charge and Davis states she received no services for it. CP 932:28-32 (referencing CP 934).

c. The Loan Processing Fee to Universal Financial – Menashe has No Idea What It Was For. \$1,500.00 was deducted from principal and paid to Universal Financial LLC. Apx. 7. However, Menashe had no idea what it was for; he testified:

Q. Then the next line says “Loan processing fee – Universal Financial, LLC.” Do you know what that refers to?

A. I do not.

Q. And how about the accompanying \$1,500?

A. I do not.

CP 941:2-7.

The Term Sheet Davis signed (Apx. 6) does not include this charge and Davis states she received no services for it. CP 932:28-32 (referencing CP 934).

d. Mortgage Fee to Columbia Mortgage – Nobody Knows What This Charge Was For. Columbia Mortgage was paid \$2,500 (Apx. 7), but nobody knows what it was for. Menashe stated:

Q. I’ll ask you the same thing on the next line, it looks like it refers to mortgage fee, Columbia Mortgage. Do you know what that refers to?

A. I do not.

Q. And similarly do you know what the \$2,500 is about?

A. I do not.

CP 941:8-14.

Knapp also did not know what that fee was for; he testified:

Q. Then when I ask you to turn to KNA5, in particular I'm going to have you look at line 811. It says, "Mortgage fee to Columbia Mortgage."

A. Um-hmm.

Q. Now, do you know who or what Columbia [sic] Mortgage is?

A. I do not and -- I do not. I believe Mike Bauer works for one of these two companies. I am not -- I can't tell you which one for sure.

CP 946:7-14 (reference to "KNA 5" found at CP 696).

The Term Sheet (Apdx. 6) does not include this charge and Davis states she received no services for it. CP 932:28-32 (referencing CP 934).

3. Davis' Principal Calculations for the Two Hearings.

a. The Injunction Hearing. At the injunction hearing, held before any discovery occurred, Davis calculated the principal to be \$220,729.17.³

b. The Summary Judgment Hearing. By the time summary judgment was filed, discovery had disclosed the existence of the interest "points" and other Loan Fees. Apdx. 6 & 7 (documents produced by Knapp and Menashe); Deposition testimony of Menashe and Knapp quoted in p. 14-18 of this brief. Based on that discovery Davis calculated the

³ \$250,000 face amount of the Note (Apdx. 1), less the \$12,500 Repair Reserve (*Id.* at ¶b), less the \$16,770.83 Interest Reserve (*Id.* at ¶d). CP 184:7-10.

principal to be \$217,305.00.⁴ For purposes of the summary judgment motion, Davis included the Interest Reserve in the principal balance due to the Court's initial ruling (CP 704, footnote 2; initial ruling at RP (3/15/13) 22:10-20) although she continues to assert the Interest Reserve is not principal.

4. The Loan Purpose. Davis has continuously maintained the Loan was for a consumer purpose, not a business or commercial purpose. CP 124:18-23, 226:18-26, 526:1-13 (referencing 529-533), 732:19-733:23 (referencing 735-739), 907 p. 100:8-17, 908 p. 143:2-909 p. 146:18. She states the loan was to pay off a prior loan on the residence with Hazel Jordan, to pay property taxes on the residence and to make a personal loan to Lowell Ing, who further loaned the money to Gregg Yamate. *Id.* The Settlement Statement (Apx. 7) confirms Davis' testimony. It reflects a pay-off of the loan to Ms. Jordan, the payment of taxes to King County and "loan proceeds-Gregg Yamate" in the amount of \$147,718.18. *Id.* The Settlement Statement also shows Davis received "Cash to Borrower" in the amount of \$15,995.00. *Id.* The personal nature of the loan is confirmed by Knapp's hand-written notes which state the purpose of the loan:

⁴ \$250,000 face amount of the Note (Apx. 1), less the \$12,500 Repair Reserve (*Id.* at ¶b), less the points/loan fees of \$20,195.00 (CP 703:4-11, 728; Apx. 7). Calculation at

“*Needs money to live*, build up reserves and to rehab Seattle prop for business/rental cash flow.” Apdx. 5 (emphasis added).

Davis also submitted the 1st Declaration of Lowell Ing in which he confirmed the personal loan from Davis. CP 741:19-742:2. She also submitted the 1st Declaration of Gregg Yamate confirming he then borrowed the money from Mr. Ing. CP 841:19-24.

The existence of the Note’s usury savings clause (Apdx. 4) also adds to the facts supporting the personal nature of the loan; logically, a usury savings clause is unnecessary for a business purpose loan in Washington.

C. Usury Issue: Authority & Argument – the Trial Court Erroneously Calculated the Interest Rate & Erroneously Ruled the Loan was for a Business Purpose. Unless exempted from its coverage, the Usury Act sets a maximum rate of 12.00 percent for all loans. RCW 19.52.020. The pertinent portions of that statute read:

Highest Rate Permissible—Setup Charges. (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; . . . No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

CP 710:24-711:1.

Id. Whether the Loan's rate exceeds 12.00 percent is at issue in this appeal⁵.

The Usury Act contains an exemption, and an exception to that exemption. They are located at RCW 19.52.080, which reads:

Defense of usury or maintaining action thereon prohibited if transaction primarily agricultural, commercial, investment, or business – Exception. Profit and nonprofit corporations, Massachusetts trusts, associations, trusts, general partnerships, joint ventures, limited partnerships, and governments and governmental subdivisions, agencies, or instrumentalities may not plead the defense of usury nor maintain any action thereon or therefor, and persons may not plead the defense of usury nor maintain any action thereon or therefor if the transaction was primarily for agricultural, commercial, investment, or business purposes: PROVIDED, HOWEVER, That this section shall not apply to a consumer transaction of any amount.

Consumer transactions, as used in this section, shall mean transactions primarily for personal, family, or household purposes.

Emphasis added.

The underlined portion is the specific exemption, and the italicized portion is the exception to it; whether the Loan was for a consumer or commercial purpose is also at issue in this appeal⁶.

⁵ CP 4:12-15, 100:2-11, 103:6-12, 52:23-53:15, 223:20-224:7, 239:25-241:3 (referencing 244), 253:14-256:6, 261:16-262:13, 287-289, 705:16-707:15, 710:21-711:20, 610:5-611:20, 761:19-763:19, 920:20-22 (SJ Order citing rate as basis for decision), 1041:7-11.

⁶ CP 4:15-16, 51:1-52:22, 223:11-19, 224:19-25, 226, 256:7-257:8, 287-289; 608:1-610:4, 707:16-709:19, 732:19-23, 733:7-12 & 16-23, 741:19-742:2, 763:21-766:2, 850:12-854:6, 920:20-22; 1041:7-11 (SJ Amendment citing business purpose of Loan for basis of decision.)

The Usury Act remedy is a reduction of the principal owed by twice the amount of interest paid plus the amount of interest accrued, but not yet paid. RCW 19.52.030. In other words, a finding of usury significantly reduces the principal amount owed by the borrower, in this case, Davis. The debtor is also entitled to its attorney's fees and costs and to recover the amount of money it has paid that exceeds the amount due. *Id.*

To establish the defense of usury, a party must show: (1) a loan or forbearance, express or implied, of money or other negotiable tender; (2) an understanding between the parties that the principal must be repaid; (3) the exaction of a greater rate of interest than is allowed by law; and (4) an intention to violate the law. *Liebergesell v. Evans*, 93 Wn.2d 881, 887, 613 P.2d 1170 (1980) (citing *Flannery v. Bishop*, 81 Wn.2d 696, 504 P.2d 778 (1972)). The intent necessary to satisfy requirement (4) is the parties' intention merely to enter into the transaction. *Liebergesell, supra*. The intent thus need not be wrongful or calculated to violate the usury law. *Id.* (citing *Tacoma Commercial Bank v. Elmore*, 18 Wn. App. 775, 781, 573 P.2d 798 (1977)); see also *Metro Hauling, Inc. v. Daffern*, 44 Wn. App. 719, 721, 723 P.2d 32 (1986) (citing *Tacoma, supra*).

At issue in this appeal is the third element – whether the Loan’s rate exceeded 12.00 percent. The RCW 19.52.080 business purpose exemption and its consumer exception, which are also at issue, are discussed in a later section.

1. How to Calculate Whether a Loan is Usurious. Clausing v. Virginia Lee Homes, Inc., 62 Wn.2d 771, 384 P.2d 644 (1963), explains how a court determines whether a note is usurious (the “Clausing Calculation”). Footnote 1 to that opinion confirms how to determine whether a usurious rate is charged: by taking the loan amount actually received by the borrower and multiplying 12.00 percent interest for the term of the note; that sum represents the maximum interest allowed. Id. at 774. Next, the interest actually charged for the term for the note is calculated. Id. The two total interest charges are compared; if the amount actually charged exceeds the 12.00 percent rate charge the note is usurious. Id.

Additionally, when loan fees and charges not received by a borrower are at issue they are not only excluded from principal, they are also added to the stated interest. Busk v. Hoard, 65 Wn.2d 126, 135, 396 P.2d 171 (1965); Home Sav. & Loan Ass’n v. Sanitary Fish Co., 156 Wash. 80,

90-91, 286 P. 76 (1930); *Baske v. Russell*, 67 Wn.2d 268, 273, 407 P.2d 434 (1965).

Consequently, it is important for a court (including this one) to decide: what sum is principal actually received by the borrower, and what sum is interest. The trial court below erred in making these determinations.

2. Only Sums Actually Received by the Borrower are Principal. In calculating whether interest is usurious, the principal does not include sums not actually received by the borrower. In *Sparkman & McLean Income Fund v. Wald*, 10 Wn. App. 765, 768, 520 P.2d 173 (1974) the Court stated: “. . .only the money **actually received** by the borrower is relevant in allegedly ***usurious*** transactions. A lender may not evade the ***usury*** laws by executing a note which is nonusurious on its face while ***actually*** disbursing less than the ***principal*** amount of the note.” (emphasis added); see also, *Busk, supra*; *Home Sav. & Loan Ass’n., supra*. The Settlement Statement (Apx. 7) confirms Davis did not receive the principal face amount of the Note, even without the Repair Reserve (Apx. 1, ¶b).

3. The “Points” & Other Loan Fees are Interest. It has also long been the rule in Washington that loan fees deducted from principal are considered interest, and not part of the principal. *Home Sav. & Loan Ass'n., supra* (\$3,500 note, but only \$3,000 advanced; the \$500 difference found to be a bonus/loan fee which, when added to the interest created usurious loan); *Clausing, supra* (\$67,500 promissory note, but only \$56,200 determined to have been advanced due in part to commission/finders fee, and borrower entitled to credit against principal for difference in note found usurious); *Busk, supra* (\$7,500 note but only \$6,000 actually advanced because \$1,500 was retained as commission; commission plus interest at stated rate made loan usurious); *Baske, supra* (\$6,000 note, but only \$4,750 advanced due to deduction of \$1,250 commission; the commission plus the stated interest rate made the loan usurious); *Sparkman, supra* (\$8,000 in loan fees, commissions and discounts held to make loan usurious).

The law, explained at *Aetna Finance Co. v. Darwin*, 38 Wn. App. 921, 926, 691 P.2d 581 (1985) is as follows:

A charge for interest is not part of the loan transaction, regardless of what the parties may call the charge. *Sparkman & McLean Income Fund v. Wald, supra* (citation omitted in original). Charges for making a loan and for the use of money are interest; charges are not interest if they are for services actually provided by the lender, reasonably worth the price charged, and for which the

borrower agreed to pay. See *Testera v. Richardson*, 77 Wash. 377, 379, 137 P. 998 (1914); *Sparkman & McLean Income Fund v. Wald*, *supra* (citation omitted in original). Under RCW 19.52.020, a set-up charge is exempt from characterization as interest only if it is made in connection with a loan of \$500 or less. See also, *Sparkman & McLean Income Fund v. Wald*, 10 Wn. App. at 769, 520 P.2d 173 (1974). The trial judge found that Aetna's loan funding fee was for "services provided by Aetna Finance Company for which it was paid \$1,000.00 by the defendants, which was a legitimate cost of the loan." The judge described these services as "preparing the loan documents, arranging and paying off the [loans], ... arranging the payment of the truck, recording fees and loan disbursement, ..." Although Aetna's charges for these administrative services may have been "legitimate costs of the loan," they are set-up charges normally incidental to making a loan, which must be treated as interest.⁵ Thus, Aetna's \$1,000 loan funding fee was a charge for interest, and therefore was not part of the transaction.

Emphasis added. Footnote 5 to the *Aetna* case, cited in the above passage reads:

By contrast, Aetna's charges to the Darwins for title insurance and recording fees were for services provided by the lender, and were not set-up charges. See, e.g., *Busk v. Hoard*, 65 Wash.2d at 130-35, 396 P.2d 171. Although not dispositive, the fact that these services were obtained by payment to a third party is evidence the services were actually provided to the borrower and were reasonably worth the amount charged. See *Kyser v. T.M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198, 200 (1958); *Lyle v. Tri-County Fed. Sav. & Loan Ass'n of Waldorf*, 33 Md.App. 46, 363 A.2d 642, 644-45 (1976).

Emphasis added.

As argued below, the "points" and other Loan Fees were not for agreed-upon services provided to Davis, such as for title insurance or re-

ording fees; instead, they were, as described by the *Aetna* court and confirmed by Knapp's and Menashe's deposition testimony, set-up charges normally incidental to making a loan. Consequently, they are to be treated as interest.

a. "Points" are Interest, Not Principal. Menashe and Knapp referred to their Loan Fees as "points." CP 947:23-948:12; 936:5-21; 874. In real estate lending "points" have an established meaning and are interest. Washington law and Federal law recognize points as interest, as do other jurisdictions.

i. Washington Law. Ch. 19.144 RCW (Mortgage Lending and Homeownership) and Ch. 19.146 RCW (The Mortgage Broker Practices Act) both refer to "points". *See* RCW 19.144.020 & RCW 19.146.0201.

Washington's Department of Financial Institutions, charged with enforcing both acts, has defined points by regulation. WAC 208-600-200(2)(d) defines points as: "'Discount points' or 'points' refer to a fee paid by the borrower to the lender to reduce the interest rate. The points are expressed as a percent of the loan amount. The higher the points paid, the lower the interest rate." WAC 208-660-006 defines points as: "'Discount points' or 'points' mean a fee paid by a borrower to a lender to re-

duce the interest rate of a residential mortgage loan. Pursuant to Regulation X, discount points are to be reflected on the good faith estimate and settlement statement as a dollar amount.”

ii. Federal Law. Federal regulations define points similarly, including them in the cost of consumer credit. *See* 12 CFR 226.4(a) & (b)(3); CP 949-952. A copy of that regulation is attached at Apdx. 8-11.

iii. Other Jurisdictions. *B.F. Saul & Co. v. West End Part North, Inc.*, 250 Md. 707, 246 A. 2d 591 (1968), cited by Black’s Law Dictionary at 1040 (5th ed. 1979) in support of its definition of “points,” confirms that points are interest and are added to the total stated interest charged to determine if a loan violates usury statutes. A copy of the Black’s Law Dictionary definition of “points” (CP 967-968) is also attached at Apdx. 12-13.

Davis asserts the Loan Fees/“points” are interest as a matter of law and under the facts of this case, and she urges the Court to hold they are. They are not principal.

b. The Underwriting Fee, Loan Processing Fee and Mortgage Fee All Constitute Interest, Not Principal.

i. **Underwriting Fee.** Knapp's testimony confirms the \$1,195 underwriting fee was to pay his business overhead, not for any services to Davis. CP 943:14-22. Under *Aetna, supra*, it is interest.

ii. **Loan Processing Fee.** Menashe testified he has no idea what the \$1,500 loan processing fee was for. CP 941:2-7. If this was a fee for services he provided to Davis he should be able to state what those services were. He cannot state why he charged this fee to her; consequently, it cannot be found to be for services Menashe provided to Davis. This logically makes the charge interest.

Moreover, under *Aetna* administrative services incidental to setting up a loan by the lender are interest. Because this charge is described more as an administrative fee, and not for a specific service, under *Aetna* this charge is interest.

iii. **Mortgage Fee.** Menashe and Knapp both could not explain what this \$2,500 charge was for. CP 941:8-14; 946:7-14. Neither detailed any service provided to Davis for this sum. *Id.* Under *Aetna*, this charge

is an administrative charge by the lender to set up the loan; consequently, it also is interest.

iv. No Services Provided to Davis. The underwriting fee, the loan processing fee and the mortgage fee were not agreed to by Davis before the closing, and she states she received no services for them. CP 932:28-32 (referencing the Term Sheet, CP 934 & Apdx. 6). They are not listed on the Term Sheet which she signed. Apdx. 6. Again, under Aetna these charges are to be included in interest, not principal.

4. Davis' Usury Calculations & How the Court Erred. Davis' Calculations for the injunction hearing and the summary judgment hearing were as follows:

a. The Injunction Hearing. At the injunction hearing, before any discovery occurred, Davis calculated the Note to carry a usurious rate of 12.37 percent. CP 184:6-12. She calculated that rate by dividing \$27,312.48 (12 months of the stated monthly interest of \$2,276.04) by the principal of \$220,729.17. *Id.* As stated previously, the principal was cal-

culated by deducting the Repair Reserve and Interest Reserve from the face amount of the Note.

The court held the Note did not bear a usurious rate because the court ruled the Interest Reserve was included in the Principal. RP (3/15/13) 22:10-20. It appears to have arrived at this conclusion by adopting Menashe's argument that Section d of the Note (Apdx. 1) meant Davis had constructively received the interest reserve as principal by agreeing to let Menashe hold it. RP (3/15/13) 14:16-16:25.

The court erred because only principal "actually received" by the borrower is the principal amount used in a usury calculation. *Sparkman, supra; Busk, supra; Financial Commerce, Inc. v. McLean*, 73 Wn.2d 52, 435 P.2d 932 (1968) (Discussing, in part, that a reserve fund which was an additional penalty for default, was not to be included as a part of principal). Those opinions consistently qualify the word "receive" with "actual" or "actually." *Id.*

The word "actually" as used to describe principal received must mean "in fact;" otherwise, a usurer could always draft around the Usury Act by having provisions in its note stating the sums held by the usurer are constructively held for the borrower when, in fact, the usurer is earning those sums. A common dictionary meaning of "actual" is "existing in fact,

real, current.” Oxford American Dictionary 8 (4th ed. 1980). Black’s Law Dictionary defines “actual” in part as, “Something real, in opposition to constructive or speculative; something existing in act. It is used as a legal term in contradistinction to virtual or constructive as of possession or occupation.” Black’s Law Dictionary 33 (5th ed. 1979).

Because the Interest Reserve was never “actually received” by Davis, this Court should reverse the trial court and hold that it is not included in principal for the usury calculation for this Note. Instead, the Interest Reserve should only be considered interest.

b. The Summary Judgment Hearing. The summary judgment hearing was held after discovery occurred, and Davis renewed her argument the Note contained a usurious rate. CP 705:16-707:15. Her argument was based on discovery that the interest “points” and other Loan Fees had further reduced the principal she had actually received. *Id.*

Davis again performed a Clausing Calculation for the Court, this time including the Interest Reserve in the principal, as the court had previously ruled at the injunction hearing. RP (3/15/13) 22:10-20 (initial ruling). Even with the Interest Reserve as part of the principal, Davis’ Clausing Calculation showed the Note was still usurious. CP 705:16-

707:15. Davis' summary judgment argument relied not only on *Clausing, supra*, but on *Busk, supra*, as well. Under *Busk*, loan fees and charges that are not paid to the borrower as part of the loan proceeds are excluded from principal and are, instead, added to interest. *Busk*, 65 Wn.2d at 135.

At that hearing, Davis's basic *Clausing* Calculation, relying only on the \$2,276.04 monthly interest and using the \$217,305 principal figure (see calculation at footnote 4 of this brief), results in a *minimum* interest rate of 12.57 percent. CP 705:16-707:15. The reason it is a minimum interest rate is because when the interest "points" and other Loan Fees are *added to* the nominal interest under *Busk*, it results in an interest rate of 18.76 percent. CP 706, footnote 3; CP 711:11-20. Davis's full *Clausing/Busk* calculations are at CP 710:21-711:20.

The Court erred when it failed to exclude the "points" and other Loan Fees from principal thereby determining the rate was not usurious and entered judgment against Davis. CP 918-921 (Apdx. 14-17). At the time it entered judgment, the court declined to find the Loan was for a business purpose. Apdx. 16:17-19. During argument the Court allowed Davis to provide additional briefing on the loan charges. RP (6/21/13) 43:5-23. Davis did so via reconsideration motion. CP 922-969.

c. The Summary Judgment Reconsideration & the Effect of the Court's Amendment. In her reconsideration motion, Davis pointed out specifically why the interest “points” and other Loan Fees were interest and not principal. CP 922:40-930:18. Menashe responded to that motion but did not formally move for reconsideration. CP 972-986. Davis supplied a reply brief. CP 989-1039. Although the judge denied Davis' reconsideration motion, she amended the summary judgment order (the “SJ Amendment”). CP 1040-1041 (Apx. 18-19). The SJ Amendment states in pertinent part:

2. The order is amended as follows: Defendant is entitled to judgment as a matter of law, because Washington law governs the question of whether the loan at issue is usurious, and the loan is exempt from that state's usury restrictions because the loan was taken primarily for commercial, investment, or business purposes.

Apx. 19:7-11.

It is unclear if the SJ Amendment is intended to replace the court's original finding that the loan rate did not exceed 12.00 percent (Apx. 16:20-22) or to add a second basis for granting summary judgment. Apx. 19:7-11. Its operative text tends to read as though it replaced ¶7 of the SJ Order with the new text from the SJ Amendment. Compare Apx. 16:20-22 with Apx. 19:7-11.

To the extent the SJ Amendment retains the court's ruling that the rate did not exceed 12.00 percent, that ruling remains in error on the rate issue as argued above. To the extent the SJ Amendment replaced the ruling on the rate, or added to it, with a ruling based on a business purpose of the loan it is erroneous as argued in the next section.

5. The Court Erred When It Ruled the Loan was for a Business Purpose: Whether a Loan is for a Personal or Business Purpose is a Jury Question. Under RCW 19.52.080 if a loan transaction is primarily for personal, family or household purposes then the loan must comply with the usury limits. If, on the other hand, the loan is primarily for commercial, investment or business purposes, it is exempt from the usury protections. *Id.*

A loan's purpose in the context of RCW 19.52.080 is "principally established by the representations the borrower makes to the lender at the time the loan is procured." *Brown v. Giger*, 111 Wn.2d 76, 82, 757 P.2d 523 (1988) (concerning use of loaned funds to make a no interest personal loan – business purpose statements written in loan documents found determinative). The business or personal nature of the loan is a factual question to be answered after evaluating the circumstances surrounding the

transaction. Conrad v. Smith, 42 Wn. App. 559, 563, 712 P.2d 866, rev. denied, 105 Wn.2d 1017 (1986).

Where a borrower's representations are inconclusive, written statements in the loan documents may be dispositive. Marashi v. Lannen, 55 Wn. App. 820, 824, 780 P.2d 1341 (1989) (summarizing holdings of Brown v. Giger, *supra*; Pacesetter Real Estate, Inc. v. Fasules, 53 Wn. App. 463, 767 P.2d 961 (1989); and Conrad v. Smith, 42 Wn. App. at 566). A direct conflict in the evidence on the material issue of the loan's purpose, however, will normally create an issue for the jury. Marashi, 55 Wn. App. at 824 (noting that determination of the purpose is for the jury, and the question of whether that purpose constitutes a business purpose is a question of law to be decided by the court) (citing to Pacesetter, 53 Wn. App. at 471, 767 P.2d 961). Thus, where a written certificate of purpose is in conflict with oral disclosures, the court cannot conclude as a matter of law that the lender was unaware of the true purpose of the loan nor that the lender was entitled to rely on the statements contained in the borrower's written certificate. See Marashi, 55 Wn. App. at 825, 780 P.2d 1341; see also Brown v. Giger, *supra* (objective manifestations of purpose are not always determinative of applicability of business purpose exemption, since courts will not deny a borrower's protections against usury when a lender

manipulates a loan's structure so as to evade usury restrictions). Simply put, competing facts about a loan's purpose makes the issue a jury question, unresolvable on summary judgment.

a. The Borrower's Representations. In this case Davis has consistently maintained the purposes of the loan were personal: to pay off a prior loan on the residence, to pay taxes on the residence and to make a personal loan to Lowell Ing. CP 4:15-16, 124:18-23, 226:18-26, 526:1-13, 732:19-733:23, 907 p.100:8-17, 908 p.143:2-909 p.146:18. Mr. Ing in turn loaned the funds to Gregg Yamate. CP 741:19-742:2. In fact the vast majority of the funds actually disbursed to Davis went to the Ing-Yamate loan in the amount of \$147,718.18. *Id.*; Apdx. 7 (line entitled "loan proceeds - Gregg Yamate"). Mr. Ing's Declaration confirms Davis' no interest loan and that he used the funds to lend them to Mr. Yamate. CP 741:19-742:2. The Settlement Statement (Apdx. 7) confirms Davis' and Ing's declarations about where the money went. Given the vast majority of the funds actually disbursed to Davis went to Mr. Ing as a personal loan – that was the primary purpose of the loan at issue. Further, Knapp's handwritten notes state the loan was, at least in part, for money to live on. Apdx. 5.

b. The Usury Savings Clause is Evidence the Loan was for Personal/Consumer Purposes. The Note's usury savings clause (Apdx. 4) exists to ensure the Note complies with the Usury Act. However, in light of the business purpose exemption found in RCW 19.52.080, the only logical reason the usury savings clause exists in this Note is because the Note is for a personal/consumer purpose. In other words, because business purpose loans are exempt from the usury statutes there is no need for this provision if the loan is for a business purpose. Menashe's inclusion of this provision in the Note is written evidence the Loan was for a personal/consumer purpose.

Brown v. Giger, supra, is instructive on this issue. At the Court of Appeals level, Brown v. Giger, 48 Wn. App. 172, 738 P.2d 312 (1988) ("Brown v. Giger I"), the court determined the borrower's oral statements that she had made a personal loan was sufficient to invoke the usury protections. The Supreme Court reversed the Court of Appeals, as referenced above. Brown v. Giger, 111 Wn.2d 76, 757 P.2d 523 ("Brown v. Giger II"). In reversing the Court of Appeals, the Supreme Court noted the written loan transaction documents signed by the borrower contradicted the borrower's oral statements. *Id.* at 81-83. Notably, the Court in Brown v. Giger II did not hold that making a personal loan was an unprotected

transaction, as urged by Menashe. Instead, Brown v. Giger II stands for the proposition that if a borrower's oral statements are equivocal or contradicted by her own signed documents, those documents can be relied upon as evidencing the loan's purpose. *Id.* In Brown v. Giger, the borrower had signed transaction documents stating the loan was for a business purpose and that is what prompted the Supreme Court to reverse in Brown v. Giger II. *Id.* In the instant case, Davis signed no business purpose statement. The Term Sheet (Apdx. 6), the Note (Apdx. 1-4), and the Deed of Trust (CP 11-20) all signed by Davis, contain no statement the Loan was for a business purpose. Instead they are consistent with her statements the Loan was for personal purposes. Consequently, under the Brown v. Giger I & II cases Davis' statements of the personal purpose of the Loan are sufficient to take the matter to a jury.

The loan was primarily used for a "Consumer Transaction" as that phrase is defined in RCW 19.52.080. Davis is entitled to a jury trial on the issue and the court erred in ruling against her on this issue.

D. Consumer Protection Act Claim Survives if Usury Act

Claim Survives. Davis asserted a Consumer Protection Act ("CPA") Claim based on a per se violation of the Usury Act. CP 4:22-5:6; RCW

19.52.036 (violation of Usury Act is per se violation of CPA). Consequently, the court's summary judgment ruling dismissing Davis' usury claim simultaneously dismissed her CPA claim. RP (6/21/13) 43:25-44:7. The trial court took no other action about the CPA claim. *Id.*; Apdx. 14-17. As a result, if Davis' usury claim is allowed to proceed, her CPA claim should also be reinstated.

E. Davis Asserted a Proper Ground under the Deed of Trust Act to Enjoin the Trustee's Sale; the Court Erred when it Denied her that Relief. RCW 61.24.130 allows the Court to enjoin a nonjudicial deed of trust foreclosure on "any proper legal or equitable ground." It states, in pertinent part:

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the

amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

Emphasis added. The entire text of RCW 61.24.130 is reproduced at Apdx. 20-21.

Davis asserted the Usury Act as the proper legal ground. CP 100:2-11. Namely, if the Loan is usurious then the amounts being demanded by the Trustee were incorrect because the Usury Act remedies would greatly reduce the amounts owed. *Id.* And reducing the amounts owed would make the Trustee's statutory notices⁷ incorrect.

Unless a borrower moves the court to restrain a trustee's sale, its right to later contest the underlying note or the foreclosure itself is extremely limited. RCW 61.24.127; *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008) (stating rule prior to enactment of RCW 61.24.127). And because of the great power vested in foreclosing trustees, who normally do so without Court oversight, the DTA “. . . **must be construed in favor of borrowers** because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (emphasis added).

⁷ The Notice of Default, Notice of Trustee's Sale and Notice of Foreclosure.

The *Klem* court reiterated that Washington has a long history of protecting property rights from wrongful appropriation through judicial process. *Klem*, 176 Wn.2d 771, 790 at footnote 10. The risk of losing property nonjudicially was deemed serious enough the *Klem* court even seemed to invite a state constitutional challenge of nonjudicial foreclosures. *Klem*, 176 Wn.2d 771, 790 at footnote 11. The *Klem* court's concerns lend support to the notion that once a proper ground is plead by a borrower, an injunction should be issued.

A portion of the DTA, RCW 61.24.020, states that except as provided in that act a deed of trust is subject to all laws relating to mortgages on real property. This logically means cases involving usury as a defense to a mortgage foreclosure are instructive in defending against a deed of trust foreclosure.

Clousing, supra, confirms that usury is a valid defense to a mortgage foreclosure. It only stands to reason, both logically and under RCW 61.24.020, that usury is also a valid defense to a deed of trust foreclosure. Consequently, Davis asserted a proper "legal or equitable" ground for enjoining the trustee's sale as a matter of law. The sale should have been enjoined at the injunction hearing; Davis asserts it was error not to enjoin the sale at that time.

At the injunction hearing, the judge discussed that it found RCW 61.24.130 had not been interpreted and that all she had to guide her was the statute and CR 65. RP (3/15/13) 19:23-23:14. Davis argued that RCW 61.24.130 supplanted CR 65. RP (3/15/13) 6:16-8:10. Because the DTA must be construed in favor of borrowers, and based on the text of RCW 61.24.130, the court should have enjoined the sale. CR 65(e) is clear that the rule only supplements statutes such as the DTA. Menashe argued that under CR 65 an injunction could only issue if Davis was likely to prevail at trial. CP 252-258 (in particular, CP 253:2-13 & 258:2-4).

The court followed Menashe's argument and instead of granting an injunction, made a decision on the substantive merits of the usury case by determining whether the rate exceeded 12.00 percent. RP (3/15/13) 22:10-23:5. Namely, the court decided the likelihood of Davis prevailing on the merits, not whether Davis asserted a proper legal ground as specified by RCW 61.24.130. By reaching the merits of the action it also logically means the court implicitly found that usury was a proper ground to enjoin the sale. Consequently, the Court went beyond what was authorized by the statute when deciding the injunction issue. Instead of holding a hearing on the merits, the DTA simply requires that a party assert a proper legal or equitable ground for an injunction to be issued. Enjoining a sale to allow a

later decision on the merits, after pursuing discovery, is the logical goal of RCW 61.24.130. Otherwise, the court runs the risk of making premature decisions with the concomitant risk of someone losing their land⁸.

Once Davis pled a proper ground, in this case usury, the court should have enjoined the sale and determined what security was appropriate for the injunction. RCW 61.24.130. It should not have held a hearing on the merits at that time; that was not authorized by the DTA.

1. The Post-Appeal Import of Injunctive Relief under RCW

61.24.130. This issue remains important should Davis prevail on appeal. Namely, following remand the trial court would need to decide whether to stay the foreclosure pending resolution at trial. Currently the Supersedeas Order restraining any foreclosure sale is contingent on the outcome of this appeal. CP 1548-1549. Unless this Court confirms a usury claim is a proper ground to enjoin a trustee's sale, the trial court would be confronted with the issue again on remand.

⁸ That almost happened in the instant case; only because the Trustee had to recalculate the sums alleged due was the 1st Trustee's Sale abandoned. Had that not occurred it is entirely possible Davis would have lost her property before learning of the loan fees and charges in later discovery.

Consequently, this court should hold that usury is a proper ground to enjoin a trustee's sale under DTA; the trial court may then enter a proper injunction order.

F. The Court Erred by Entering an Enforceable Money

Judgment in Favor of the Lender in a Nonjudicial Deed of Trust

Foreclosure Before any Trustee's Sale. RCW 61.24.090(2), a section of the DTA, states:

Any person entitled to cause a discontinuance of the sale proceedings shall have the right, before or after reinstatement, to request any court, excluding a small claims court, for disputes within the jurisdictional limits of that court, to determine the reasonableness of any fees demande d or paid as a condition to reinstatement. The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorneys' fees, and render judgment accordingly. An action to determine fees shall not forestall any sale or affect its validity.

Emphasis added. Reinstatement of a loan before the trustee's sale prevents such a sale from occurring. RCW 61.24.090(3). A complete copy of RCW 61.24.090 is reproduced at Apdx. 22-23.

RCW 61.24.090(1) specifies that a "borrower" or a "grantor" is entitled to discontinue a foreclosure sale. Davis is *both* a "borrower" and a "grantor." RCW 61.24.005(3) & (7); Apdx. 1-4; CP 1-20. Consequently, Davis was entitled to request the court determine the reasonableness of

fees demanded in the Amended Notice of Foreclosure to reinstate the Loan (CP 1367-1369), and she did so (CP 1044-1121). Menashe, the “beneficiary” (RCW 61.24.005(2)), is not listed as a party entitled to discontinue a sale under RCW 61.24.090(1); consequently, he is not entitled to affirmative relief under RCW 61.24.090(2).

The court granted Davis’ motion to determine the Loan reinstatement fees. CP 1210-1211. However, Menashe requested the court to grant him an enforceable money judgment. CP 1222-1224 (Menashe’s proposed judgment); 1539:20-1540:7. The court then entered an enforceable money judgment in favor of Menashe and against Davis (the “Reinstatement Judgment”). CP 1749-1751.

The court’s entry of the Reinstatement Judgment was error. Instead, under RCW 61.24.090(2) the court was to determine the reasonableness of the fees the *Trustee* was demanding for reinstatement of the loan; only the *Trustee* can demand such sums (RCW 61.24.040(2)), and any payment made prior to a trustee’s sale must be made to the *Trustee*. RCW 61.24.090(7). The court’s ruling should have ensured no enforceable money judgment was entered against Davis in favor of Menashe, as Davis argued. CP 1464:17-21; 1465:1-19. It should have only authorized the Trustee to demand those sums as a condition to reinstate the Loan. By

doing otherwise, the court created a potential deficiency judgment, contrary to RCW 61.24.100(1). Here, Menashe was not precluded from bringing an action against Davis *prior* to the notice of trustee's sale being given, or *after* discontinuance of the trustee's sale (see RCW 61.24.100(2)); however, the court's entry of judgment in favor of Menashe while the 2nd Trustee's Sale was pending is error. Even if this Loan were a commercial loan, an action against Davis for a deficiency judgment is to be brought after the date of the trustee's sale. See RCW 61.24.100(3).

Highlighting the trial court's error is its last hand-written phrase in the Reinstatement Judgment which granted interest, ". . . once the trustee's sale takes place." CP 1751:9. Because a reinstatement of a loan precludes any trustee's sale, the court's inclusion of this phrase shows a misunderstanding and a misapplication of the law. It is evident the court entered an enforceable money judgment for collection purposes, not an order setting the reinstatement fees.

By its express terms RCW 61.24.090(2) only grants court authority to determine fees as a condition of *reinstating* the loan; in this case, before the trustee's sale was to occur. It does not authorize an enforceable money judgment.

1. No Interest Authorized on Fees to Reinstate a Loan.

Menashe then obtained an amendment of the Reinstatement Judgment. CP 1819-1820. The purpose was to collect interest on the reinstatement sums awarded. CP 1819:16-18; 1757:9-1758:14. Nowhere in RCW 61.24.090(2) does it authorize an award of interest. By its terms, that statute is a method of determining reasonable foreclosure fees for the purpose of *reinstating a loan, not for collecting a money judgment*. The provisions of RCW 61.24.090 bear this out (Apdx. 22-23). That statute does not contemplate a lender obtaining an enforceable money judgment that bears interest incident to reinstating a loan.

The Court of Appeals should vacate the Reinstatement Judgment and its amendment.

G. RAP 18.1 Request for Attorney's Fees & Costs.

RAP 18.1 requires a party requesting an award of attorney's fees and costs to devote a portion of its brief in support of that request. RCW 19.52.030, RCW 61.24.090(2), the Note (Apdx. 3 at 3rd full paragraph) and the Deed of Trust (CP 19 at ¶28) allow a prevailing party to recover its attorney's fees and costs. As to the Note and Deed of Trust, a contractual attorney's fee and cost award by the court is authorized by RCW 4.84.330.

Assuming she prevails on appeal, Davis requests an award of her attorney's fees and costs.

V. CONCLUSION

Davis requests the Court to:

A. Rule the Loan has an interest rate above 12.00 percent, or order the Trial court to recalculate the rate, and thereby reverse the Injunction Order and the Summary Judgment Order that relied on the erroneous decision on the rate;

B. Reverse the Summary Judgment Order as amended by the SJ Amendment and order that whether the Loan was for a personal or business purpose is a jury question unresolvable at summary judgment;

C. Rule that usury is a proper ground to enjoin a nonjudicial foreclosure;

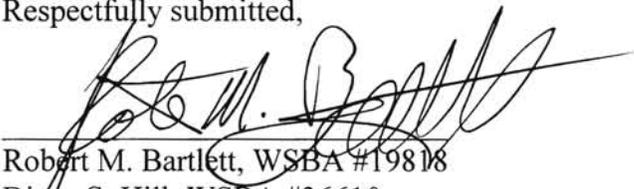
D. Vacate the Reinstatement Judgment and its amendment;

E. Award Davis her attorneys fees and costs; and

F. Enter such other legal or equitable relief as deemed appropriate by the Court.

Dated this 27th day of January, 2014.

Respectfully submitted,



Robert M. Bartlett, WSBA #19818
Diana S. Hill, WSBA #36610
Attorneys for Appellants

RECEIVED

JAN 11 2013

LAW OFFICES
COOK & BARTLETTPROMISSORY NOTE

\$250,000.00

Seattle, Washington

November 7, 2011

The undersigned ("Borrower"), for value received, hereby promises to pay to the order of MICHAEL E. MENASHE ("Lender"), his successors and assigns, the principal sum of Two Hundred Fifty Thousand & 00/100 Dollars (\$250,000.00) together with interest and all costs and fees, including attorneys' fees, incurred by Lender in enforcing the obligations of this Note. Principal hereof and interest are payable to Lender at 333 NW 9th Avenue, Suite 1504, Portland, OR 97209, or such other place as the Lender may direct, in such coin or currency of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts. Principal and interest shall be payable as follows:

- a. The unpaid principal balance shall bear interest at the annual rate of eleven and one-half percent (11.50%) per annum on the sum of Two Hundred Thirty Seven Thousand Five Hundred and 00/100 Dollars (\$237,500.00) from the date hereof.
- b. Lender is withholding the sum of Twelve Thousand Five Hundred and 00/100 Dollars (\$12,500.00) from the principal balance of this Note as a "Repair Reserve". All repairs to the property described in the "Deed of Trust" shall require the prior written approval of Lender. Upon satisfactory completion of such repairs and receipt by Lender of lien releases and such other documents as Lender may reasonably request, the undersigned may request disbursements from the Repair Reserve (not more than once per month). Interest shall accrue on such amounts upon disbursement.
- c. Accrued interest shall be paid monthly, beginning on the first (1st) day of December, 2011, and continuing on the same day of each month thereafter.
- d. Upon execution hereof, Borrower authorizes Lender to withhold from the loan proceeds an "Interest Reserve" in the amount of Sixteen Thousand Seven Hundred Seventy and 83/100 Dollars (\$16,770.83). So long as Borrower is not in default hereunder or is not in default pursuant to any other agreement between Borrower and Lender, Lender shall apply Two Thousand Two Hundred Seventy Six and 04/100 Dollars (\$2,276.04) of the Interest Reserve to Borrower's obligation to make interest payments as required hereunder until disbursements are made from the Repair Reserve and thereafter the actual interest due until the Interest Reserve is exhausted. Upon full expenditure of the Interest Reserve, Borrower shall make all required payments.
- e. All payments herein shall be applied first to late charges, if any, then to fees and costs, if any, and then to accrued interest, and then to principal.

f. Interest shall be computed on the basis of a three hundred sixty (360) day year having twelve (12) thirty (30) day months.

g. The entire principal and any accrued interest on this Note shall be paid in full on May 1, 2013, (the "Maturity Date") or upon default thereon. Provided, however, so long as Borrower is not then in default nor has been in default under any provisions of any of the "Loan Documents" referred to herein, or with respect to any payment provided for herein, Borrower may elect to extend the Maturity Date of this Note two (2) additional periods of three (3) calendar months each (the "First Extended Maturity Date", and "Second Extended Maturity Date", respectively), upon giving Lender notice in writing of its intention to extend the Maturity Date, on or before fifteen (15) days before the Maturity Date, and First Extended Maturity Date, respectively, of this Note and upon paying Lender a fee, for each such Maturity Date extension, equal to three and one-half percent (3.5%) percent of the original principal balance so long as any such extension does not affect the priority of the Deed of Trust (as hereafter defined) securing repayment of this indebtedness. Borrower's right to extend this Note is expressly conditioned upon said written notice and the simultaneous payment of said extension fee along with all of Lender's costs, including but not limited to the cost of a date-down modification/endorsement on Lender's title insurance policy, recording fees and Lender's attorney's fees. Borrower acknowledges that if the Maturity Date is extended, the Interest Reserve will have been exhausted and Borrower will be responsible for the monthly interest payments as required hereunder.

h. Borrower shall have no right to pay this Note prior to the Maturity Date without paying to Lender as a prepayment premium an amount equal to Sixteen Thousand Seven Hundred Seventy and 83/100 Dollars (\$16,770.83), less the amount of interest (but not any interest at the "Default Rate" as hereafter defined) previously paid by Borrower to Lender. The purpose of this prepayment premium is to ensure that Lender receives a minimum of seven (7) months interest on the full principal balance of the loan regardless of when the balance of this Note is paid. A payment on account of Borrower's default shall be deemed a prepayment pursuant to this paragraph.

This Note is secured by a Deed of Trust ("Deed of Trust") between Lender and Borrower, of even date, on real property commonly known as 10529 Ashworth Avenue, North Seattle, WA 98133 situated in King County, Washington.

If default be made with respect to any payment herein provided for, or in case an event of default (as defined in the Deed of Trust or any other documents executed in connection with or to secure this Note, collectively referred to as "Loan Documents") shall occur, the principal of this Note and any accrued interest and all other indebtedness secured or to be secured by the Loan Documents may be declared due and payable in full without notice to Borrower, except as may be provided in the Loan Documents, if any. After default, whether or not acceleration has occurred, the unpaid principal hereof shall thereafter bear interest at the rate of twenty (21%) percent per annum (the "Default Rate"), without notice to Borrower. In addition, in the event the principal hereof is not paid

on the Maturity Date, then the Default Rate shall take effect immediately. Failure to exercise this option shall not constitute a waiver of the right to exercise the same at any other time.

Borrower recognizes that default by Borrower in making the payments herein and in the Loan Documents when due will result in Lender incurring additional expense in servicing the loan and loss to Lender of the use of the money due and frustration to Lender in meeting its other loan commitments. Borrower agrees that if for any reason Borrower fails to pay within five (5) days of the due date any interest or principal due under this Note or any amounts due under the Loan Documents, Lender shall be entitled to damages for the detriment caused thereby but that it is extremely difficult and impractical to ascertain the extent of such damages. Borrower therefore agrees that a reasonable estimate of such damages to Lender which amount Borrower agrees to pay on demand is the following:

In the event that any monthly payment or portion thereof is not paid within five (5) days after the date it is due or if this Note is not paid on or before the Maturity Date, Lender may collect, and Borrower agrees to pay with such payment a "late charge" of ten (10%) percent of each dollar so overdue as liquidated damages for the additional expense of handling such delinquent payments. Such late charge represents the reasonable estimate by the parties of a fair average compensation due to the failure of the undersigned to make timely payments. Such late charge shall be paid without prejudice to the rights of Lender to collect any other amounts provided to be paid or to declare a default hereunder, under the Loan Documents, including, without limitation, the right to collect interest at the Default Rate.

In the event that Borrower defaults with respect to any payment herein provided for or in case of an event of default under any of the Loan Documents, Lender shall have the right, at Borrower's expense, to retain an attorney or collection agency to make any demand, enforce any remedy, or otherwise protect its rights under this Note and the Loan Documents. Borrower hereby promises to pay all costs, fees and expenses so incurred by Lender, including, without limitation, attorneys' fees (with or without arbitration or litigation), arbitration and court costs, collection agency charges, notice expenses and title search expenses, and the failure of the defaulting Borrower to pay the same shall, in itself, constitute a further and additional default. In the event that suit or action or arbitration is instituted by Lender to enforce this Note or any rights under the Loan Documents, Borrower hereby promises to pay, in addition to costs and expenses provided by statute or otherwise, such sums as the court may award as attorneys' fees in such proceeding and on any appeals from any judgment or decree entered therein and the costs and attorneys' fees for collection of the amount due therein. Time is of the essence. All reimbursements and payments required by this paragraph shall be immediately due and payable on demand. Borrower and each and every maker hereof agrees that they have received valuable consideration hereunder, that they sign this Note as makers and not as sureties, and that any and all suretyship defenses are hereby waived. Borrower and each and every maker, drawer and endorser severally waive presentment for payment, protest, notice of protest and notice of nonpayment of this Note.

In the event Borrower becomes the debtor in any bankruptcy proceeding, voluntarily, involuntarily or otherwise, while there exists any outstanding obligation created by this Note, Borrower agrees to pay the holder's reasonable attorney fees and costs which the holder may incur as the result of the undersigned's participation in such bankruptcy proceedings. It is understood and

agreed by both parties that applicable federal bankruptcy law or rules of procedure may affect, alter, reduce or nullify the attorney fee and cost awards mentioned in the preceding sentence.

BORROWER ACKNOWLEDGES THAT ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR, ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

BORROWER AND LENDER BY ITS ACCEPTANCE OF THIS NOTE, TO THE FULL EXTENT PERMITTED BY LAW, KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FOREGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THE INDEBTEDNESS EVIDENCED BY THIS NOTE OR ANY CONDUCT, ACT OR OMISSION OF BORROWER OR LENDER, OR ANY OF ITS RESPECTIVE DIRECTORS, OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, AGENTS OR ATTORNEYS, OR ANY OTHER PERSONS AFFILIATED WITH BORROWER OR LENDER, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE.

Prior to signing this Note, Borrower read and understood all the provisions of the Note, and the Loan Documents referenced herein.

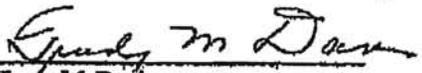
In no event shall any payment of interest or any other sum payable hereunder exceed the maximum amount permitted by applicable law. If it is established that any payment exceeding lawful limits has been received, the holder hereof will credit the excess amount to principal or, at Lender's option, refund the same.

The Truth-in-Lending Act and Regulation Z do not apply to this Note in that Lender is not a creditor as defined in said Act and Regulation.

This Note has been prepared by the law firm of Greene & Markley, P.C. ("G&M") in its capacity as counsel to Lender. The undersigned is hereby advised that G&M has not performed any legal services for or on behalf of the undersigned in connection with this Note. Prior to execution of this Note, the undersigned should seek independent legal advice in connection with the matter set forth herein.

NOTICE TO THE BORROWER

Do not sign this loan agreement before you read it. This loan agreement provides for the payment of a penalty if you wish to repay the loan prior to the date provided for repayment in the loan agreement.


Trudy M. Davis

10.7.11

DAVIS:

VACANT DUPLEX - POSSIBLE SFR
WITH ADD

- 10K FT LOT MIN
- N.Y @ 200K Looking For 225-275K
- CURRENTLY VACANT / BROKER WARE HOUSE / MANGER

T. DAVIS

- LINESIA HANRED
- A COUPLE OF BAD YEARS
- LOSS OF INCOME
- REACTOR

- NEEDS MONEY TO LIVE, BUILD UP RESERVES
WANT TO REHAB. SEATTLE PROP FOR BUSINESS / RENTAL
CASH FLOW

RAOER REFERENCED / KING.

- NEED / LIKE TO CLOSE 13% THANKS GIVING

EXHIBIT

3

KNA46

Apdx.5

MICHAEL KNAPP & ASSOCIATES
LLC License #713385
1000 SW Broadway Suite 920
Portland Or 97205
360.624.7917-Direct

September 28, 2011

Trudy M. Davis
10529 Ashworth Ave. North
Seattle, Washington 98133

Letter of Understanding

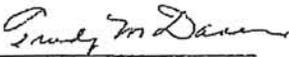
The Intent of this communication is to provide estimated financing terms for the above noted property.

Loan Amount:	\$250,000
Interest Rate:	11.50%
Term:	Interest Only -18 months
Fees:	
*Attorney:	\$995 Greene & Markley, P.C.
*Title/Escrow:	TBD
*Lender:	6.0%
*Misc	

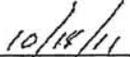
Loan subject but not limited to the following:

1. Lender to be in First Trust Deed position
2. Maximum 55% Loan to Value based on Lender's determination of value
3. Home Owners Insurance Binder
4. Satisfactory property management strategy in place
5. Interest reserve of 7 months *in escrow account*
6. Lender call with Client
7. Other documentation requested by Lender
8. Please sign and remit deposit

Estimated Closing Date: October 12, 2011



Trudy M. Davis

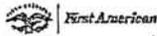


Date

EXHIBIT 4

KNA9

Apdx. 6



First American Title Insurance Company

3224 Wetmore Ave • Everett, WA 98201

Borrower's Final Settlement Statement

Property: 10529 Ashworth Avenue North, Seattle, WA 98133

File No: 4221-1640088

Officer: Kathy Huber/KH

New Loan No:

Settlement Date: 11/03/2011

Disbursement Date: 11/03/2011

Print Date: 11/04/2011, 12:39 PM

Buyer: Trudy M Davis

Address: 10529 Ashworth Avenue North, Seattle, WA 98133

Seller:

Address: 10529 Ashworth Avenue North, Seattle, WA 98133

Charge Description	Borrower Charge	Borrower Credit
New Loan(s):		
Lender: Michael E Menasha		
New Loan to File - Michael E Menasha		250,000.00
Our origination charge - Michael E Menasha	10,000.00	
Repair Reserve - Michael E Menasha	12,500.00	
loan fee - Michael E Menasha	5,000.00	
Underwriting fee - Michael E Menasha	1,195.00	
loan proceeds - Gregg Yamate	147,718.18	
Loan Processing fee - Universal Financial LLC	1,500.00	
Mtg Fee - Columbia Mortgage	2,500.00	
Payoff Loan(s):		
Lender: Hazel Jordan		
Principal Balance - Hazel Jordan	9,442.94	
Interest on Payoff Loan 10/21/11 to 11/04/11 @\$2.100000/day - Hazel Jordan	31.50	
Title/Escrow Charges to:		
Escrow/Closing Fee to First American Title Insurance Company \$450.00 Sales Tax: \$41.40	491.40	
Policy: ALTA Lenders - 2006 EXT to First American Title Insurance Company \$505.00 Sales Tax: \$47.98	552.98	
Record Deed of Trust-First to First American Title Insurance Company	85.00	
Disbursements Paid:		
Interest reserve to Lender Interest reserve	16,770.73	
Attorney fees to be paid by Borrower to Greeno & Markley POC-B \$995.00		
Add attorney fees to Greeno & Markley	405.00	
Delq 2011 Taxes to King County Treasurer	6,980.71	
Tax Installment: Penalty Due to King County Treasurer	1,536.40	
Tax Installment: Interest to King County Treasurer	3,763.98	
Delq 2009 taxes to King County Treasurer	6,908.94	
Delq 2010 Taxes to King County Treasurer	6,622.74	
Cash (From) (X To) Borrower	15,995.00	
Totals	250,000.00	250,000.00

First American Title Insurance Company

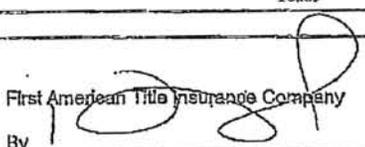
By 
Kathy Huber

EXHIBIT 6

Page 1 of 1

MEN000056

Apdx. 7

Code Of Federal Regulations
 Title 12. Banks and Banking
 Chapter II. FEDERAL RESERVE SYSTEM
 Subchapter A. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
 Part 226. TRUTH IN LENDING (REGULATION Z)
 Subpart A. GENERAL

Current through April 25, 2013

§ 226.4. Finance charge

- (a) *Definition.* The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.
- (1) *Charges by third parties.* The finance charge includes fees and amounts charged by someone other than the creditor, unless otherwise excluded under this section, if the creditor:
- (i) Requires the use of a third party as a condition of or an incident to the extension of credit, even if the consumer can choose the third party; or
 - (ii) Retains a portion of the third-party charge, to the extent of the portion retained.
- (2) *Special rule; closing agent charges.* Fees charged by a third party that conducts the loan closing (such as a settlement agent, attorney, or escrow or title company) are finance charges only if the creditor-
- (i) Requires the particular services for which the consumer is charged;
 - (ii) Requires the imposition of the charge; or
 - (iii) Retains a portion of the third-party charge, to the extent of the portion retained.
- (3) *Special rule; mortgage broker fees.* Fees charged by a mortgage broker (including fees paid by the consumer directly to the broker or to the creditor for delivery to the broker) are finance charges even if the creditor does not require the consumer to use a mortgage broker and even if the creditor does not retain any portion of the charge.
- (b) *Examples of finance charges.* The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:
- (1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.
 - (2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature.
 - * (3) Points, loan fees, assumption fees, finder's fees, and similar charges.
 - (4) Appraisal, investigation, and credit report fees.
 - (5)

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Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss.

- (6) Charges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.
 - (7) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction.
 - (8) Premiums or other charges for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, written in connection with a credit transaction.
 - (9) Discounts for the purpose of inducing payment by a means other than the use of credit.
 - (10) Charges or premiums paid for debt cancellation or debt suspension coverage written in connection with a credit transaction, whether or not the coverage is insurance under applicable law.
- (c) *Charges excluded from the finance charge.* The following charges are not finance charges:
- (1) Application fees charged to all applicants for credit, whether or not credit is actually extended.
 - (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.
 - (3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.
 - (4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.
 - (5) Seller's points.
 - (6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.
 - (7) *Real-estate related fees.* The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:
 - (i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.
 - (ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.
 - (iii) Notary and credit-report fees.
 - (iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood-hazard determinations.
 - (v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.
 - (8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the Act.
- (d) *Insurance and debt cancellation and debt suspension coverage.*
- (1)

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Voluntary credit insurance premiums. Premiums for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

- (i) The insurance coverage is not required by the creditor, and this fact is disclosed in writing.
 - (ii) The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.
 - (iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.
- (2) *Property insurance premiums.* Premiums for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, including single interest insurance if the insurer waives all right of subrogation against the consumer,⁵ may be excluded from the finance charge if the following conditions are met:
⁵ [Reserved]

- (i) The insurance coverage may be obtained from a person of the consumer's choice,⁶ and this fact is disclosed. (A creditor may reserve the right to refuse to accept, for reasonable cause, an insurer offered by the consumer.)
⁶ [Reserved]
 - (ii) If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage shall be disclosed. If the term of insurance is less than the term of the transaction, the term of insurance shall also be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.
- (3) *Voluntary debt cancellation or debt suspension fees.* Charges or premiums paid for debt cancellation coverage for amounts exceeding the value of the collateral securing the obligation or for debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in case of accident may be excluded from the finance charge, whether or not the coverage is insurance, if the following conditions are met:
- (i) The debt cancellation or debt suspension agreement or coverage is not required by the creditor, and this fact is disclosed in writing;
 - (ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also shall be disclosed. The fee or premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §226.17(g), and certain closed-end credit transactions involving a debt cancellation agreement that limits the total amount of indebtedness subject to coverage;
 - (iii) The following are disclosed, as applicable, for debt suspension coverage: That the obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension.

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- (iv) The consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.
- (4) *Telephone purchases.* If a consumer purchases credit insurance or debt cancellation or debt suspension coverage for an open-end (not home-secured) plan by telephone, the creditor must make the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, orally. In such a case, the creditor shall:
 - (i) Maintain evidence that the consumer, after being provided the disclosures orally, affirmatively elected to purchase the insurance or coverage; and
 - (ii) Mail the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, within three business days after the telephone purchase.
- (e) *Certain security interest charges.* If itemized and disclosed, the following charges may be excluded from the finance charge:
 - (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.
 - (2) The premium for insurance in lieu of perfecting a security interest to the extent that the premium does not exceed the fees described in paragraph (e)(1) of this section that otherwise would be payable.
 - (3) *Taxes on security instruments.* Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness.
- (f) *Prohibited offsets.* Interest, dividends, or other income received or to be received by the consumer on deposits or investments shall not be deducted in computing the finance charge.

Cite as 12 CFR 226.4

History. 75 FR 7794, Feb. 22, 2010

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,
Bankruptcy, Mortgages, Constitutional Law, Interpretation
of Laws, Rescission and Cancellation of Contracts, Etc.

FIFTH EDITION

BY

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WEST PUBLISHING CO.
1979

CP 967

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this offense was in general fatal to the action; but, under the legislation of the emperors Zeno and Justinian, the offense (if *re, loco, or causa*) exposed the party to the payment of three times the damage, if any, sustained by the other side, and (if *tempore*) obliged him to postpone his action for double the time, and to pay the costs of his first action before commencing a second.

Plus valet consuetudo quam concessio /plás vâlat kônsuetyúwdow kwâm kansésh(ly)ow/. Custom is more powerful than grant.

Plus valet unus oculatus testis quam auriti decem /plás vâlat yúwnás ôkyaléydas téstas kwâm ôraday désam/. One eye-witness is of more weight than ten ear-witnesses [or those who speak from hearsay].

Plus vident oculi quam oculus /plás vídent ôkyalay kwâm ôkyalas/. Several eyes see more than one.

P.M. An abbreviation for "postmaster;" also for "post-meridiem," afternoon.

Pneumoconlosis /núwmowkôwniyówsas/. A generic term including all lung diseases caused by dust particles of any sort. *Genesco, Inc. v. Greeson*, 105 Ga. App. 798, 125 S.E.2d 786, 789. See *Black Lung Benefits Act*.

P.O. An abbreviation of "public officer;" also of "post-office."

Poach. To steal or destroy game on another's land. See *Poaching*.

Poaching. In criminal law, the unlawful entry upon land for the purpose of taking or destroying fish or game. The illegal taking or killing of fish or game.

Pocket veto. The act of the President in retaining a legislative bill without approving or rejecting it at the end of the legislative session and, in effect, vetoing it by such inactivity.

P.O.D. account. An account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees. *Uniform Probate Code*, § 5-101.

Pœna /pýna/. Lat. Punishment; a penalty.

Pœna ad paucos, metus ad omnes perveniat /pýna æd pókows, mfydas æd ômnlyz pærvýn(i)yat/. If punishment be inflicted on a few, a dread comes to all.

Pœna corporalis /pýna kôrpæréylas/. Corporal punishment.

Pœnæ potius mollendæ quam exasperandæ sunt /pýniy pówsh(ly)as móliyéndiy kwâm egzæspæriéndiy sént/. Punishments should rather be softened than aggravated.

Pœnæ sint restringendæ /pýniy sént rêstrinjéndiy/. Punishments should be restrained.

Pœnæ suos tenere debet actores et non alios /pýna súwows tániriy débæd æktóriyz èt nón æliyows/. Pun-

ishment ought to be inflicted upon the guilty, and not upon others.

Pœna ex delicto defuncti hæres teneri non debet /pýna èks dalíktow dáfygktay híriyz ténfray nòn débæt/. The heir ought not to be bound by a penalty arising out of the wrongful act of the deceased.

Pœnalis /pænéylas/. Lat. In the civil law, penal; imposing a penalty; claiming or enforcing a penalty. *Actiones pœnales*, penal actions.

Pœna non potest, culpa perennis erit /pýna nòn pówdæst, kálpa pærénas éhræt/. Punishment cannot be, crime will be, perpetual.

Pœna pillorialis /pýna pílréylas/. In old English law, punishment of the pillory.

Pœna suos tenere debet actores et non alios /pýna s(y)úwows tániriy débæd æktóriyz èt nòn æliyows/. Punishment ought to bind the guilty, and not others.

Pœna tolli potest, culpa perennis erit /pýna tólay pówdæst, kálpa pærénas éhræt/. The punishment can be removed, but the crime remains.

Pœnitentia /pænáténsh(ly)æ/piyn"/. Lat. In the civil law, repentance; reconsideration; changing one's mind; drawing back from an agreement already made, or rescinding it.

Locus pœnitentiæ. Room or place for repentance or reconsideration; an opportunity to withdraw from a negotiation before finally concluding the contract or agreement. Also, in criminal law, an opportunity afforded by the circumstances to a person who has formed an intention to kill or to commit another crime, giving him a chance to reconsider and relinquish his purpose.

Point. A distinct proposition or question of law arising or propounded in a case. See also *Issue*.

In the case of shares of stock, a point means \$1. In the case of bonds a point means \$10, since a bond is quoted as a percentage of \$1,000. In the case of market averages, the word point means merely that and no more. If, for example, the Dow-Jones Industrial Average rises from 870.25 to 871.25, it has risen a point. A point in this average, however, is not equivalent to \$1.

Real estate financing. The word "point" as used in home mortgage finance industry denotes a fee or charge equal to one percent of principal amount of loan which is collected by lender at time the loan is made. It is a fee or charge which is collected only once, at inception of loan, and is in addition to constant long-term stated interest rate on face of loan. *V. F. Saul Co. v. West End Park North, Inc.*, 250 Md. 707, 246 A.2d 591, 595, 597.

Point reserved. When, in the progress of the trial of a cause, an important or difficult point of law is presented to the court, and the court is not certain of the decision that should be given, it may reserve the point, that is, decide it provisionally as it is asked by the party, but reserve its more mature consideration for the hearing on a motion for a new trial, when, if it shall appear that the first ruling was wrong, the verdict will be set aside. The point thus treated is technically called a "point reserved."

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FILED
THE COURT OF WASHINGTON

JUN 21 2013

DAVID WITTE
DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR
THE COUNTY OF KING

TRUDY M. DAVIS, a single person,

Plaintiff,

v.

THE BLACKSTONE CORPORATION,
successor trustee; and MICHAEL E.
MENASHE, whose marital status is unknown,

Defendants.

No. 13-2-03991-5 SEA

ORDER GRANTING DEFENDANT
MICHAEL E. MENASHE'S MOTION
FOR SUMMARY JUDGMENT,
DENYING PLAINTIFF TRUDY M.
DAVIS'S CROSS MOTION FOR
SUMMARY JUDGMENT, AND
DECLARATORY JUDGMENT

~~(PROPOSED)~~ *OK [Signature]*

This matter came before the Court upon the Motions for Summary Judgment filed by Plaintiff Trudy M. Davis and Defendant Michael E. Menashe ("Defendant"). The Court heard argument of counsel for Plaintiff, Robert Bartlett, and counsel for Defendant, Edward R. Coulson.

The following documents were called to the Court's attention:

1. Plaintiff's Motion for Summary Judgment, with Sub-Joined Declaration of Robert M. Bartlett.
2. Defendant Michael E. Menashe's Motion for Summary Judgment.
3. Defendant Michael E. Menashe's Response to Plaintiff's Motion for Summary Judgment.
4. Trudy Davis' Response to Defendant Menashe's Motion for Summary Judgment, with Sub-Joined Declaration of Robert M. Bartlett.

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- 1 5. Reply Brief Supporting Plaintiff's Motion for Summary Judgment with Subjoined
- 2 Declaration of Robert M. Bartlett.
- 3 6. Reply Brief in Support of Defendant's Motion for Summary Judgment.
- 4 7. Declaration of Edward R. Coulson in Support of Defendant Michael E. Menashe's
- 5 Motion for Summary Judgment.
- 6 8. Declaration of Michael Knapp in Support of Defendant Michael E. Menashe's Response
- 7 to Plaintiff's Motion for Temporary Restraining Order.
- 8 9. Complaint.
- 9 10. Declaration of Michael E. Menashe in Support of Defendant Michael E. Menashe's
- 10 Motion for Summary Judgment.
- 11 11. Order Denying Motion for Temporary Restraining Order.
- 12 12. Order Denying Plaintiff's Motion for Reconsideration.
- 13 13. Declaration of Zachary E. Davies in Support of Defendant Michael E. Menashe's
- 14 Surreply in Opposition to Plaintiff's Motion for Temporary Restraining Order.
- 15 14. 1st Declaration of Gregg Yamate.
- 16 15. Declaration of Enver W. Painter.
- 17 16. 4th Declaration of Trudy Davis.
- 18 17. Declarations of Service.
- 19 18. 1st Declaration of Lowell Ing.
- 20 19. 5th Declaration of Trudy Davis.
- 21 20. Defendant's Proposed Order on Summary Judgment.
- 22 21. Plaintiff's Proposed Order on Summary Judgment.
- 23 22. Notice for Hearing.
- 24

1 23. _____

2 24. _____

3 25. _____

4 The Court, having reviewed the aforementioned documents and heard the argument of
5 counsel, and being otherwise fully advised in the premises, now hereby ORDERS AND
6 ADJUDGES:

7 1. Defendant's Motion for Summary Judgment is granted *in part*

8 2. Plaintiff's Motion for Summary Judgment is denied.

9 3. There are no genuine issues of material fact *in part.*

10 4. Defendant is entitled to judgment as a matter of law, because Oregon law governs the
11 question of whether the loan at issue is usurious, and the loan is exempt from that state's usury
12 restrictions because it is secured by a first deed of trust on real property, and because the loan
13 amount exceeds \$50,000.

14 5. Defendant is entitled to judgment as a matter of law, because Hawaii law governs the
15 question of whether the loan at issue is usurious, and the loan is exempt from that state's usury
16 restrictions because it is secured by a first deed of trust on real property.

17 6. Defendant is entitled to judgment as a matter of law, because Washington law governs the
18 question of whether the loan at issue is usurious, and the loan is exempt from that state's usury
19 restrictions because the loan was taken primarily for commereial, investment, or business purposes.

20 7. Defendant is entitled to judgment as a matter of law, because Washington law governs the
21 question of whether the loan at issue is usurious, and the loan's interest rate does not exceed the
22 maximum rate allowed by law.

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1 8. Defendant is entitled to judgment as a matter of law, because Washington law governs the
2 question of whether the loan at issue is usurious, and Defendant did not intentionally exact interest
3 exceeding the maximum amount allowed by law.

4 9. The Court declares that the loan at issue is not usurious and that Defendant is entitled,
5 under the terms of the promissory note, to an award of all fees, costs, and other expenses reasonably
6 incurred in enforcing his rights under the note and the deed of trust securing it. A declaratory
7 judgment to this effect, in favor of Defendant and against Plaintiff, shall immediately enter.
8

9 Dated: June 21, 2013.

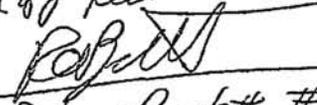
10 
11 Judge Jean Rietschel

12 Presented by:

13 SCHWEET RIEKE & LINDE, PLLC

14 

15 Edward R. Coulson, WSBA #14014
16 Zachary E. Davies, WSBA #41794
Attorneys for Mr. Menashe

17
18 *copy sent*
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20 Robert Bartlett, #19818
21 attorney for Troy Davis
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FILED
KING COUNTY, WASHINGTON

JUL 15 2013

LEAH
WILSON
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Trudy M. Davis, a single person,

Plaintiff,

v.

The Blackstone Corporation, successor trustee;
and Michael E. Menashe, whose marital status
is unknown,

Defendants.

No. 13-2-03991-5 SEA

**Order Denying Motion for
Reconsideration
Decision Amending Summary
Judgment Ruling**

This motion for reconsideration came on for hearing before the undersigned judge of the above-referenced court on July 12, 2013 at the request of Plaintiff Trudy M. Davis for an order denying summary judgment to Michael Menashe. The Order that is the subject of the reconsideration motion is attached as Exhibit 1 (the "Summary Judgment Order".)

Plaintiff appeared through counsel Robert M. Bartlett and Defendant Michael E. Menashe appeared through counsel Ted Coulson. Defendant The Blackstone Corporation ("Trustee") did not appear.

The Court considered the papers in the court file including the papers of the parties listed in the Summary Judgment Order, as well as the following additional papers:

A. Motion for Reconsideration of Summary Judgment Ruling with Subjoined Declarations of Robert M. Bartlett and Trudy Davis and the exhibits/attachments thereto:

ORDER - 1

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COOK & BARTLETT
A Law Partnership
3300 W. McGraw St., Suite 230
Seattle, WA 98199
Telephone: (206) 282-2710
Facsimile: (206) 282-2707

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B. Response, Declaration of Diane Hart

C. Reply

Based on the briefing of the parties, the contents of the court file and the argument of their counsel the Court hereby Orders:

Based on the foregoing the COURT ORDERS:

1. The Motion for Reconsideration is denied
2. The order is amended as follows: Defendant is entitled to judgment as a matter of law, because Washington law governs the question of whether the loan at issue is usurious, and the loan is exempt from that state's usury restrictions because the loan was taken primarily for commercial, investment, or business purposes.

DATED this 15th day of July, 2013.

Hon. *J. Rietschel*
Jean Rietschel, Superior Court Judge

Presented by:

Robert M. Bartlett, WSBA #19818
Attorney for Plaintiff

ORDER - 2

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COOK & BARTLETT
A Law Partnership
3300 W. McGraw St., Suite 230
Seattle, WA 98199
Telephone: (206) 282-2710
Facsimile: (206) 282-2707

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RCW 61.24.130**Restraint of sale by trustee — Conditions — Notice.**

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in RCW 61.24.040(1)(f), the court granting such restraining order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale

Apdx. 20

date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(6).

(6) The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6).

[2008 c 153 § 5; 1998 c 295 § 14; 1987 c 352 § 5; 1981 c 161 § 8; 1975 1st ex.s. c 129 § 6; 1965 c 74 § 13.]

RCW 61.24.090

Curing defaults before sale — Discontinuance of proceedings — Notice of discontinuance — Execution and acknowledgment — Payments tendered to trustee.

(1) At any time prior to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual sale, the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee:

(a) The entire amount then due under the terms of the deed of trust and the obligation secured thereby, other than such portion of the principal as would not then be due had no default occurred, and

(b) The expenses actually incurred by the trustee enforcing the terms of the note and deed of trust, including a reasonable trustee's fee, together with the trustee's reasonable attorney's fees, together with costs of recording the notice of discontinuance of notice of trustee's sale.

(2) Any person entitled to cause a discontinuance of the sale proceedings shall have the right, before or after reinstatement, to request any court, excluding a small claims court, for disputes within the jurisdictional limits of that court, to determine the reasonableness of any fees demanded or paid as a condition to reinstatement. The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorneys' fees, and render judgment accordingly. An action to determine fees shall not forestall any sale or affect its validity.

(3) Upon receipt of such payment the proceedings shall be discontinued, the deed of trust shall be reinstated and the obligation shall remain as though no acceleration had taken place.

(4) In the case of a default which is occasioned by other than failure to make payments, the person or persons causing the said default shall pay the expenses incurred by the trustee and the trustee's fees as set forth in subsection (1)(b) of this section.

(5) Any person having a subordinate lien of record on the trust property and who has cured the default or defaults pursuant to this section shall thereafter have included in his lien all payments made to cure any defaults, including interest thereon at eight percent per annum, payments made for trustees' costs and fees incurred as authorized, and reasonable attorney's fees and costs incurred resulting from any judicial action commenced to enforce his or her rights to advances under this section.

(6) If the default is cured and the obligation and the deed of trust reinstated in the manner provided, the trustee shall properly execute, acknowledge, and cause to be recorded a notice of discontinuance of trustee's sale under that deed of trust. A notice of discontinuance of trustee's sale when so executed and acknowledged is entitled to be recorded and shall be sufficient if it sets forth a record of the deed of trust and the auditor's file number under which the deed of trust is recorded, and a reference to the notice of sale and the auditor's file number under which the notice of sale is recorded, and a notice that the sale is discontinued.

(7) Any payments required under this section as a condition precedent to reinstatement of the deed

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of trust shall be tendered to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof.

[1998 c 295 § 11; 1987 c 352 § 4; 1981 c 161 § 6; 1975 1st ex.s. c 129 § 5; 1967 c 30 § 4; 1965 c 74 § 9.]

2. On January 27, 2014 I sent the original and one copy of the *Brief of Appellant* and the original of this *Affidavit of Service* via ABC Legal Messenger to the Court of Appeals Division I, for filing in the above entitled action.

3. Also on the same day I sent copies of (1) *Brief of Appellant*, (2) *Notice of Filing Verbatim Report of Proceedings*, (3) Verbatim Report of Proceedings for 3/8/13, 3/15/13, and 6/21/13; and (4) this *Affidavit of Service* via ABC Legal Messenger to the following individual at the following address:

Edward R. Coulson
Schweet Rieke & Linde, PLLC
575 S. Michigan St.
Seattle, WA 98108

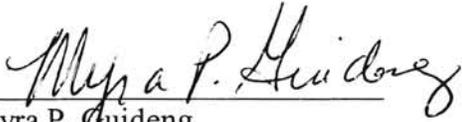
and, via First Class US Mail, to the following individual at the following address:

Michael D. Currin
Witherspoon • Kelley
422 West Riverside, Suite 1100
Spokane, WA 99201

David Weiner
1515 SW Fifth Avenue
Suite 600
Portland, OR 97201

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DATED this 27th day of January, 2014.



Myra P. Guideng

Subscribed and sworn to before me on this 27th day of January,
2014, by the above-named affiant.





Erin A. Lutz
Notary Public, State of Washington,
Residing at Seattle, WA
My appointment expires 4/29/2017