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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 41741-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOANNE PETERSON, on behalf of herself and
others similarly situated,

Respondent/Cross-Appellant,

v.

KITSAP COMMUNITY FEDERAL CREDIT UNION,

Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S
REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ARGUMENT	1
A. Because Washington law prohibits the imposition by lenders of reconveyance fees to their borrowers, KCU breached its Deed of Trust contract with Ms. Peterson by charging her a reconveyance fee as a precondition to requesting the trustee to reconvey the Deed	1
1. RCW 61.16.020 and RCW 61.24.110 require lenders to request reconveyance of deeds of trust when their borrowers pay off the amount secured; these statutes do not authorize an additional fee to be paid to a lender to fulfill this statutory obligation	2
2. There are no Washington laws authorizing lenders to charge their borrowers reconveyance fees	4
3. At a minimum, the phrase “as permitted by law” in the Deed of Trust contract between Ms. Peterson and KCU is ambiguous; therefore, because KCU drafted the contract and it is a contract of adhesion, it must be construed against KCU	10
4. It was not inconsistent for Ms. Peterson to request reimbursement of the Reconveyance Fee but not the recording fee to record the Reconveyance	10

B.	The trial court should not have dismissed Ms. Peterson's unjust enrichment cause of action	12
C.	Ms. Peterson is entitled to recover an Incentive Fee for her services as Class Representative	16
IV.	CONCLUSION	19

TABLE OF AUTHORITIES

Washington State Cases

<i>Bennett v. Computer Task Group, Inc.</i> , 112 Wn. App. 102, 47 P.3d 594 (2002)	13
<i>George v. Butler</i> , 26 Wash. 456, 67 P. 263 (1901)	3
<i>Halver v. Welle</i> , 44 Wn.2d 288, 266 P.2d 1053 (1954)	13, 14
<i>Mayer v. Pierce County Med. Bureau</i> , 80 Wn. App. 416, 709 P.2d 1323 (1995)	10
<i>McKee v. AT & T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845 (2008)	16
<i>Rustad Heating & Plumbing Co. v. Waldt</i> , 91 Wn.2d 372, 588 P.2d 1153 (1979)	2
<i>Seattle v. Walker</i> , 87 Wash. 609, 152 P. 330 (1915)	14
<i>State ex rel. Smith & Co. v. Seattle</i> , 74 Wash. 438, 133 P. 1005 (1913)	13
<i>Voicelink Data Services, Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 937 P.2d 1158 (1997)	10

Cases from Other Jurisdictions

<i>Berryman v. Merit Property Management, Inc.</i> , 152 Cal. App.4th 1544, 62 Cal. Rptr.3d 177 (2007)	6, 7
<i>Gerber v. First Horizon Home Loans Corporation</i> , 2006 WL 581082 (W.D. Wash. 2006)	15
<i>Hage v. General Service Bureau</i> , 306 F. Supp.2d 883 (D. Neb. 2003)	7, 8, 9
<i>In re Mego Fin. Corp. SEC Lit.</i> , 213 F.3d 454 (9th Cir. 2000)	17

Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) 7, 8, 9

Orser v. Select Portfolio Servicing, Inc., 2005 WL
3478126 (W.D. Wash. 2005) 14, 15

Rodriguez v. West Publishing Corp., 563 F.3d 948
(9th Cir. 2009) 16, 17, 18

*State v. Int’l Federation of Professional and Technical
Engineers, Local 195*, 780 A.2d 525, 169 N.J. 505 (2001) 4, 5, 6

Statutes

RCW 61.16.020 2, 3, 11

RCW 61.24.020 2, 3

RCW 61.24.110 2, 3, 11

15 U.S.C. § 1692(1) 7

I. INTRODUCTION

Kitsap Credit Union (“KCU”) has failed to persuasively rebut Cross-Appellant Ms. Peterson’s argument in support of her request that this Court reverse the trial court’s dismissal of her breach of contract and unjust enrichment claims, and the trial court’s ruling that Ms. Peterson is not entitled to an Incentive Fee for her services as Class Representative. Accordingly, the Court should reverse these rulings and remand the case to the trial court for further proceedings on the breach of contract and unjust enrichment claims, and with directions for the court to award Ms. Peterson an Incentive Fee.

II. ARGUMENT

- A. **Because Washington law prohibits the imposition by lenders of reconveyance fees to their borrowers, KCU breached its Deed of Trust contract with Ms. Peterson by charging her a reconveyance fee as a precondition to requesting the trustee to reconvey the Deed.**

Ms. Peterson’s Deed of Trust only authorized KCU to charge her a fee related to the reconveyance of her home to the extent such fee was “permitted by law.” Washington law does not authorize lenders to charge a reconveyance fee as a precondition to requesting the trustee under the Deed of Trust to reconvey the security. Indeed, Washington law prohibits charging the fee. Therefore, KCU breached its contract with Ms. Peterson

by requiring her to pay a Reconveyance Fee.

- 1. RCW 61.16.020 and RCW 61.24.110 require lenders to request reconveyance of deeds of trust when their borrowers pay off the amount secured; these statutes do not authorize an additional fee to be paid to a lender to fulfill this statutory obligation.**

KCU argues that Washington law does not prohibit a lender from charging a borrower a fee for the reconveyance of her deed of trust when the debt secured by it is paid off. Thus, KCU argues, the imposition of such a fee on Ms. Peterson was “permitted by law”, and it was authorized to charge the fee. However, KCU’s initial premise -- that Washington law doesn’t prohibit lenders from charging their borrowers reconveyance fees when their loans secured by the deeds of trust are paid off -- is incorrect. Because Washington law prohibits lenders from imposing such charges, KCU could not charge Ms. Peterson a reconveyance fee. Its imposition of such a fee was not “permitted by law,” and KCU breached its contract with Ms. Peterson by charging it.

RCW 61.16.020 requires a lender to record a satisfaction of mortgage, “[w]henever the amount due on a mortgage is paid.”¹ Deeds of trust are “subject to all laws relating to mortgages on real property.” RCW

¹ A deed of trust is “a species of mortgage.” *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 377, 588 P.2d 1153 (1979).

61.24.020. And RCW 61.24.110 provides that a grantor of a deed of trust is absolutely entitled to a reconveyance of the deed “upon satisfaction of the obligation secured.” In Ms. Peterson’s case, the “obligation secured” was (a) the repayment of the debt under Ms. Peterson’s Line of Credit Agreement with interest, and all renewals, extensions and modifications of the Agreement, (b) the payment of all other sums, with interest, advanced under paragraph 5 of her Deed of Trust to protect the security of the Deed of Trust, and (c) “the performance of Borrower’s covenants and agreements under [the Deed of Trust and Credit Agreement].” CP 446. The “obligation secured” did not include a reconveyance fee. Because both RCW 61.16.020 and 61.24.110 specifically required KCU to request the trustee to reconvey Ms. Peterson’s Deed of Trust when she paid off the debt it secured, these statutes prohibited KCU from imposing additional conditions and fees as a precondition to performance of its obligation. KCU’s imposition of the Reconveyance Fee was not “permitted by law.” By charging Ms. Peterson a Reconveyance Fee, KCU breached its contract with her.² The trial court committed error by dismissing Ms. Peterson’s breach of contract claim.

² A mortgage is a contract. *George v. Butler*, 26 Wash. 456, 463, 67 P. 263 (1901).

2. There are no Washington laws authorizing lenders to charge their borrowers reconveyance fees.

Legislatures in many states have passed laws to authorize lenders to charge their borrowers reconveyance fees.³ But because the Washington legislature has not passed any such laws, in Washington such fees are not “permitted by law.”

While Ms. Peterson cited several cases in her opening Appeal Brief supporting the proposition that for an act to be “permitted by law,” Washington law must specifically authorize the act, KCU argues that the provision in Ms. Peterson’s Deed of Trust, “Such person or persons shall pay any recordation costs and, as permitted by law, shall pay lender a reconveyance fee,” means that as long as there was no express prohibition in Washington’s laws preventing it from charging Ms. Peterson a Reconveyance Fee, it was authorized to charge it. In support of this dubious proposition, KCU cites only two cases. Both are distinguishable, and neither are persuasive.

In the first, *State v. Int’l Federation of Professional and Technical Engineers, Local 195*, 780 A.2d 525, 169 N.J. 505 (2001), the 4-3 majority concluded that back pay was a remedy an arbitrator could award to public

³ See Ms. Peterson’s opening Appeal Brief at 14, n.9, for citations to many such states and statutes.

sector union members for improperly denying employees at the top of the rotational list the opportunity to work overtime, which the arbitrator ruled was a breach of a collective bargaining agreement. The bargaining agreement provided that a back pay remedy could only be awarded “provided such remedy [was] permitted by law.” The majority ruled that “permitted by law” meant that the arbitrator’s ruling could not be “prohibited by law,” and that there need not be a specific statutory authorization for the remedy provided by the arbitrator, as the court “[could not] expect the legislative and executive branches to specifically authorize every possible provision that the State and a collective representative may consider agreeing to in a collective negotiations agreement[; ... r]equiring the Legislature or Executive to specifically authorize each and every one of those provisions in order for an arbitrator to give force to those provisions would pose a virtually insurmountable burden on those branches of government.” *Id.* at 538.

In addition, the majority concluded that although specific legislative authority for the remedy provided by the arbitrator was not required, such authority existed in any event. *Id.* at 536.

Three of the court’s seven members did not agree with the majority’s conclusion that “permitted by law” means “not prohibited by

law.” Therefore, the persuasive value of this decision as it pertains to this case is minimal. Further, because the decision deals with whether the arbitrator had authority to award a remedy that the majority ruled was specifically and affirmatively authorized not only in the collective bargaining agreement but also by the relevant statutes and regulations, the case is readily distinguishable from this case. Here, there is no question about whether any statutes, regulations, or cases affirmatively authorize a lender to charge a reconveyance fee. Simply put, there are none. Accordingly, the case is neither relevant to nor persuasive in helping to decide the issues in the dispute between Ms. Peterson and KCU.

As to *Berryman v. Merit Property Management, Inc.*, 152 Cal. App.4th 1544, 62 Cal. Rptr.3d 177 (2007), the plaintiffs in that case, former members of homeowners associations, sued the managing agent of the associations for marking up closing expenses the agent passed on to the members related to sales of the members’ property, and retaining the marked-up amounts as additional profit. The plaintiffs sought to employ the provisions of a California statute which prohibited homeowners associations from marking up expenses they incurred in the administration of their affairs, then passing those marked-up expenses to the members for payment. The court ruled that the statutes invoked by the plaintiffs did not

apply to managing agents of homeowners associations, so the statutory prohibition raised did not constrain the agents' conduct. The *dicta* from the decision quoted by KCU in its Brief at 6 has no bearing on the issues in this case.

More apt to the facts in this case are *Hage v. General Service Bureau*, 306 F. Supp.2d 883 (D. Neb. 2003) and *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), both of which address what the phrase "permitted by law" means in the federal Fair Debt Collection Practices Act ("FDCPA"), and both of which were cited in Ms. Peterson's opening Appeal Brief.

15 U.S.C. § 1692(1) provides as an example of an unfair action under the FDCPA "[t]he collection of any amount (including interest, fee, charge, or expense incidental to the principal obligation)" unless "authorized by the agreement or permitted by law." *Hage*, 306 F. Supp.2d at 887. In *Hage*, the court considered whether a collection agency's practice of requiring debtors to pay statutory costs as part of settlements in lawsuits filed against them where judgments were not obtained violated the FDCPA. "The dispositive question [in the case] is thus whether the additional sums collected by [the collection agency] in the county court actions were 'permitted by law.'" *Id.* at 887 (citation omitted). In

addressing the issue, the court looked to Nebraska state law rather than federal law, concluding that “An amount is ‘permitted by law’ within the meaning of the FDCPA if state supreme court holdings establish that collection of the amount is lawful.” *Id.* at 888 (citation omitted). The court determined that no Nebraska statutes or court cases permitted collection agencies to collect amounts in excess of an alleged debt for statutory costs without first obtaining a judgment; thus, the collection agency’s actions were not “permitted by law” for purposes of determining whether there had been a violation of the FDCPA.⁴

In *Riddle*, the issue was whether an attorney had violated the FDCPA for improperly seeking to recover against the plaintiff, in a lawsuit to recover upon a bad check that the plaintiff had written, an additional \$250 penalty under Utah’s shoplifting statute. As in *Gage*, the court was tasked with determining whether the attorney’s action was “permitted by law.” The court held that whether a collection agent’s action were “permitted by law” was an issue of state law, and that “an amount is ‘permitted by law’ within the meaning of the FDCPA if state supreme

⁴ The court further held, however, that there was a genuine issue of material fact about whether a recognized and accepted uniform course of procedure allowed the recovery of an attorney’s fee in these collection cases, a basis for non-liability in FDCPA cases, so the plaintiffs’ motion for summary judgment was denied. *Hage*, 306 F. Supp.2d at 888.

court holdings establish that collection of the amount is lawful.” *Riddle*, 305 F.3d at 1119. Absent a state supreme court decision on the issue, the federal court was to predict “what the supreme court would hold, or in the appropriate case, certifying the issue to the state supreme court.” *Id.* The court held that the applicable Utah statute precluded the collection attorney from trying to recover the additional penalty under the shoplifting statute:

We find it unmistakably clear from the text of Utah statutory law that shoplifting penalties are unavailable in the collection of dishonored checks. The applicable Utah statute unambiguously states that the holder of a dishonored check is permitted to collect “a service charge that may not exceed \$15.” § 7-15-1 (emphasis added). The shoplifting statute applies only to “the taking of merchandise that has not been purchased from a merchant’s premises without the permission of the merchant.” § 78-11-14(5) (emphasis added) Accordingly, this transaction, like all typical transactions involving dishonored checks, does not involve “the taking of merchandise that has not been purchased from a merchant’s premises without the permission of the merchant.” § 78-11-14(5). By seeking to collect a shoplifting penalty where no shoplifting (as the term is defined by Utah statute) occurred, *Riddle* sought to collect an amount not permitted by law in violation of the FDCPA.

Id. at 1119-20.

Thus, both *Hage* and *Riddle* support the conclusion that for conduct to be “permitted by law,” there must be a statute or a court case affirmatively authorizing the conduct. Because no court cases or statutes expressly authorized KCU to charge Ms. Peterson a Reconveyance Fee, its

imposition of it not “permitted by law.” Accordingly, when KCU charged Ms. Peterson the Reconveyance Fee, it breached its contract with her.

3. **At a minimum, the phrase “as permitted by law” in the Deed of Trust contract between Ms. Peterson and KCU is ambiguous; therefore, because KCU drafted the contract and it is a contract of adhesion, it must be construed against KCU.**

If nothing else, the phrase “as permitted by law” is ambiguous. A contract is ambiguous if it is fairly susceptible to two different but reasonable interpretations. *Mayer v. Pierce County Med. Bureau*, 80 Wn. App. 416, 421, 709 P.2d 1323 (1995). As discussed at length in Ms. Peterson’s opening Appeal Brief at 16-19, if the contract is ambiguous it must be construed against KCU, Ms. Peterson’s interpretation of it must be accepted, and it must be concluded that KCU breached the contract. *See Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 619 n.3, 937 P.2d 1158 (1997) (citation omitted) (ambiguities in contract are to be construed against the drafter).

4. **It was not inconsistent for Ms. Peterson to request reimbursement of the Reconveyance Fee but not the recording fee to record the Reconveyance.**

KCU argues that it is inconsistent for her to request reimbursement of the Reconveyance Fee but not the fee necessary to record the Reconveyance. While Ms. Peterson would be happy to recover the

recording fee, she did not seek to recover it because the statutory framework and the language of the Deed of Trust contract permitted KCU to charge her the recording fee.

In full, RCW 61.16.020 provides,

Whenever the amount due on any mortgage is paid, the mortgagee or the mortgagee's legal representatives or assigns shall, at the request of any person interested in the property mortgaged, execute an instrument in writing referring to the mortgage by the volume and page of the record or otherwise sufficiently describing it and acknowledging satisfaction in full thereof. Said instrument shall be duly acknowledged, and upon request shall be recorded in the county wherein the mortgaged property is situated. Every instrument of writing heretofore recorded and purporting to be a satisfaction of mortgage, which sufficiently describes the mortgage which it purports to satisfy so that the same may be readily identified, and which has been duly acknowledged before an officer authorized by law to take acknowledgments or oaths, is hereby declared legal and valid, and a certified copy of the record thereof is hereby constituted prima facie evidence of such satisfaction.

And RCW 61.24.110 provides, in full,

The trustee shall reconvey all or any part of the property encumbered by the deed of trust to the person entitled thereto on written request of the beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the beneficiary or the person entitled thereto.

Thus, while RCW 61.16.020 and 61.24.110 obligated KCU to request the Trustee to prepare the Reconveyance when Ms. Peterson paid off the debt

secured by the Deed of Trust, those statutes did not impose a similar duty on KCU or the Trustee to record the Reconveyance. The Reconveyance was to be recorded only upon the request of Ms. Peterson. Thus, KCU had the right to include in its Deed of Trust contract a provision that payment of the recording fee would be Ms. Peterson's obligation. Because the provision of the contract obligating Ms. Peterson to pay the recording fee was not modified by the phrase "as permitted by law," the obligation was absolute, unlike KCU's attempt to impose a similar obligation upon Ms. Peterson to pay the Reconveyance Fee. It was not inconsistent for Ms. Peterson to request reimbursement of the full amount of the Reconveyance Fee but not the fee required to record the Reconveyance.

B. The trial court should not have dismissed Ms. Peterson's unjust enrichment cause of action.

KCU argues that because there was a contract between Ms. Peterson and KCU, Ms. Peterson could not pursue an unjust enrichment claim against KCU for its collection of the Reconveyance Fee. KCU's invocation of the general rule that a cause of action for unjust enrichment does not lie if there is a contract governing the relationship between the parties overstates the correct analysis of the issue, and does not end the inquiry.

There are reported decisions in Washington where a contract

existed between two parties, but the wrongdoing arose out of an implied liability, not out of the written contract, supporting an unjust enrichment claim. *See, e.g., State ex rel. Smith & Co. v. Seattle*, 74 Wash. 438, 133 P. 1005 (1913) (contract existed between City and contractor, but City paid contractor interest on bonds that exceeded contract amount); *Halver v. Welle*, 44 Wn.2d 288, 294, 266 P.2d 1053 (1954) (homeowners contracted to build a house, but were overcharged by the contractor); *Bennett v. Computer Task Group, Inc.*, 112 Wn. App. 102, 47 P.3d 594 (2002) (employee had employment contract, but worked overtime, outside the terms of employment contract). For example, in *Halver*, the homeowners sued to recover an overpayment they made to a contractor who had built their home. The court concluded that the contractor's liability to repay the overpayment did "not arise out of the contract under which the overpayment [was] made, nor from any implied liability contained in the contract itself, but . . . ar[ose] from a duty imposed by law to repay an unjust and unmerited enrichment." *Halver*, 44 Wn.2d at 295 (1954). Even though they had an express contract with the contractor to build their home, the homeowners were not precluded from bringing an action for unjust enrichment. Rather, an unjust enrichment claim can be brought separately from any breach of contract claim.

In Ms. Peterson's case, she paid \$53 for the Reconveyance Fee (\$85 less recording fee), a fee not authorized by or under her Deed of Trust, which KCU retained. KCU received "an unmerited enrichment ... which is unjust, and in equity and good conscience [it] should repay.... The law in such cases implies a liability to refund the illegal payment, and, if not refunded, an action will lie to recover the amount unjustly retained." *Halver*, 44 Wn.2d at 292 (quoting *Seattle v. Walker*, 87 Wash. 609, 611, 152 P. 330 (1915)).

In *Orser v. Select Portfolio Servicing, Inc.*, 2005 WL 3478126 (W.D. Wash. 2005), the borrower sought to recover a "Payoff Statement Fee" charged by the lender when he paid off the debt secured by a Deed of Trust. He asserted causes of action for, *inter alia*, breach of contract and unjust enrichment. The lender moved to dismiss the unjust enrichment claim, arguing that the relationship between it and the borrower was governed by a contract and therefore a claim for unjust enrichment could not lie. Judge Coughenour denied the lender's motion to dismiss the unjust enrichment claim, concluding that the fact that a contract existed between the borrower and the lender did not preclude the borrower's possible unjust enrichment recovery:

"Quasi contracts," also known as "contracts implied in law," arise "from an implied legal duty or obligation. It is

this connection between unjust enrichment and a concept often characterized as an implied contract that has prompted Defendant to argue that Plaintiffs' claim for unjust enrichment must be dismissed because "a party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract."

While Defendant correctly states the principle of law, it is not squarely applicable to the present case. The "matter" at the center of Plaintiffs' claim for unjust enrichment is Defendant's collection of the \$50.00 Payoff Statement Fee, whereas the "matter" of the acknowledged contract is the agreement between a borrower and a lender to secure a promissory note with the deed of trust relating to a piece of real property.

...

In addition, the Court is hesitant to equate a remedy based on "quasi contract" with an implied contractual obligation. "Labels are labels and one should be as good as another, but the term *quasi contract* is an unfortunate one because the substantive right that is being discussed has little to do with the law of contract. Restitution involves a liability imposed by society for reasons of public policy."

For these reasons, the Court does not find that Plaintiffs' acknowledgment of a valid express contract forecloses the possibility of a recovery in restitution based on unjust enrichment.

Orser, 2005 WL 3478126, *4 (citations omitted); *accord Gerber v. First Horizon Home Loans Corporation*, 2006 WL 581082 (W.D. Wash. 2006) (court refused to dismiss unjust enrichment claim in similar case).

Because Ms. Peterson's unjust enrichment claim seeks recovery of

an extra-contractual fee charged her by KCU, the claim does not arise out of the contract between the parties, and her unjust enrichment claim is not foreclosed. The trial court should not have dismissed the cause of action.

C. Ms. Peterson is entitled to recover an Incentive Fee for her services as Class Representative.

The trial court abused its discretion when it refused to award Ms. Peterson an Incentive Fee for her services as Class Representative, and this Court should reverse the trial court's refusal and remand with instructions to the trial court to award Ms. Peterson \$5,000 from the common fund she was instrumental in recovering for the Class.

It is a fundamental public policy in Washington that class action relief be available for "small dollar" consumer claims like those at issue in this case. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 386, 191 P.3d 845 (2008). Therefore, those willing to serve as named plaintiffs in class action cases should be encouraged to do so; awarding an Incentive Fee to a Class Representative not only rewards that person for the time and risk she undertook to further the public policy of Washington State, but it also serves as an incentive to others who have valid claims that would not be worthwhile to pursue in the absence of the class action procedural device. Such awards are "fairly typical" in class action cases, and are generally sought "after a settlement or verdict has been achieved." *Rodriguez v.*

West Publishing Corp., 563 F.3d 948, 958-59 (9th Cir. 2009). They “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.*

The cases cited by KCU in support of its argument that the trial court should not have awarded Ms. Peterson an incentive fee are not on point. In *In re Mego Fin. Corp. SEC Lit.*, 213 F.3d 454 (9th Cir. 2000), the trial court *awarded* the class representatives an incentive fee, and this award was affirmed by the Ninth Circuit. And in *Rodriguez*, the class representatives and class legal counsel entered into “Incentive Agreements” at the beginning of the case that committed the attorneys, in the event the class action was ultimately successful, to apply to the court for incentive awards to the class representatives based on the amount of the ultimate recovery. As the court noted, this placed the class representatives in a position of conflict with class counsel “from day one.” *Id.* at 959. The Agreements also put the class representatives in a position of conflict with the class members. *Id.* And the Agreements were not disclosed to the trial court prior to the court’s ruling on plaintiffs’ motion

for class certification as they should have been.⁵

Here, Ms. Peterson entered into no such “Incentive Agreement.” She was successful in obtaining a complete, 100% recovery on the claims that remained after the trial court dismissed the breach of contract and unjust enrichment causes of action. The trial court’s refusal to award Ms. Peterson an Incentive Fee ignored the time, effort, and risk she undertook to successfully represent the Class, and if not reversed, will be a disincentive to others with similarly valid claims who might be considering serving as a named plaintiff in a class action. In view of the “fundamental public policy” of Washington State favoring class actions for small dollar claims, the trial court’s refusal to award Ms. Peterson an Incentive Fee was an abuse of discretion that should be reversed.

⁵ The Ninth Circuit agreed with the trial court’s determinations that the Incentive Agreements were inappropriate and contrary to public policy for a number of reasons: “[T]hey obligate class counsel to request an arbitrary award not reflective of the amount of work done, or the risks undertaken, or the time spent on the litigation; they create at least the appearance of impropriety; they violate the California Rules of Professional Conduct prohibiting fee-sharing with clients and among lawyers; and they encourage figurehead cases and bounty payments by potential class counsel. [It was] particularly problematic that the incentive agreements correlated the incentive request solely to the settlement or litigated recovery, as the effect was to make the contracting class representatives’ interests actually different from the class’s interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than \$10 million.” *Id.* at 959.

IV. CONCLUSION

In addition to affirming the trial court's order of summary judgment on Ms. Peterson's Consumer Protection Act claim, and the Judgment that followed (except for the refusal to award an Incentive Fee), this Court should reverse the trial court's dismissal of Ms. Peterson's breach of contract and unjust enrichment claims, and remand the case to the trial court for further proceedings on those claims. In addition, this Court should reverse the trial court's refusal to award Ms. Peterson an Incentive Award, and remand to the trial court with instructions that she should be awarded an Incentive Fee of \$5,000 from the common fund payable to Class Members that she was instrumental in creating.

DATED THIS 21st day of October, 2011.

BERRY & BECKETT, PLLP



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Co-Counsel for Respondent/Cross-Appellant

DECLARATION OF SERVICE

Guy W. Beckett declares:

On October 21, 2011, I mailed a copy of the foregoing document by United States first-class mail, with proper postage affixed, to:

Frank Siderius
Siderius Lonergan & Martin, LLP
500 Union Street, Ste. 847
Seattle, WA 98101

On October 21, 2011, I also delivered a copy of this motion to Mr. Siderius, by forwarding a copy to him via his e-mail address, franks@sidlon.com. Throughout the history of this case, the parties have had an agreement in place that service of papers may be accomplished by e-mail.

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

EXECUTED THIS 21st day of October, 2011, at Seattle,
Washington.



Guy W. Beckett

11 OCT 2011 10:01 AM
BY MAIL
10/21/11