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DIVISION II

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STATE OF WASHINGTON
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NO. 43194-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ESTATE OF JOHN BALL BY AND THROUGH LAUREEN MONETTE EXPR, *Appellant*,

v.

JPMORGAN CHASE BANK, N.A., *Respondent*.

BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.

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I. INTRODUCTION

The doctrine of merger occurs when a fee interest and a charge, such as a deed of trust or a mortgage, vest in the possession of one person. The doctrine is not favored either at law or equity and courts will not compel a merger without a showing of intent. Appellant argues that the doctrine of merger precludes Respondent JPMorgan Chase Bank, N.A. ("Chase") from recovering any surplus funds resulting from a nonjudicial foreclosure where it purchases the property at the sale. Appellant is incorrect.

The doctrine of merger does not apply to preclude a junior lienholder from surplus funds in the situation where the junior lienholder purchases the encumbered property at the foreclosure sale. Specifically, the doctrine of merger does not apply for multiple reasons.

First, the fee interest in the foreclosed property obtained through the issuance of the trustee's deed and the junior lien interest attached to the property are mutually exclusive interests that cannot be simultaneously held. There is no mortgage and fee interest that can merge together given that a purchaser at a trustee's sale buys the property free and clear of any junior liens.

Second, the doctrine of merger operates upon a showing of intent. The record does not establish any intent on the part of Chase that fee title

to the foreclosed property and the junior deed of trust merge together. Moreover, Appellant cannot overcome the presumption that Chase's intent coincided with its best interests. Operation of the doctrine of merger in such a situation would be inimical to the interest of Chase and would provide a windfall to the foreclosed borrower.

Third, the merger doctrine is a common-law doctrine that impacts estates in or charges upon realty. The merger doctrine does not eliminate the debt rendered unsecured by operation of the foreclosure. Importantly, the elimination of the debt is governed by contract principles and is not affected by merger.

In summary, the merger doctrine cannot operate to preclude Chase from obtaining the surplus funds and the trial court's decision to disburse the surplus funds to Chase should be affirmed.

II. COUNTERSTATEMENT OF CASE

On or about April 4, 2001, John W. Ball executed a deed of trust (the "senior Deed of Trust") in favor of Washington Mutual Bank, FA. CP 180. The senior Deed of Trust secured a loan in the amount of $52,000 and encumbered real property commonly known as 721 5th Avenue NW, Puyallup, WA 98371 (the "Property"). *Id.*

On or about May 24, 2006, John W. Ball took out a $132,000.00 home equity line of credit (the "Line of Credit") with Washington Mutual

Bank. CP 161—169. The Line of Credit was secured by a deed of trust (the junior "Deed of Trust") encumbering the Property and was executed on or about May 24, 2006 and recorded with the Pierce County Auditor's office on June 7, 2006. CP 154—160. On or about October 22, 2007, the Line of Credit was increased to the amount of $154,700.00. CP 170—175. The modification was recorded with the Pierce County Auditor's Office November 6, 2007. *Id.*

John W. Ball passed away on March 18, 2009. CP 218. Laureen K. Monette was appointed as the personal representative of the estate of John W. Ball. CP 32.

On September 2, 2011, Northwest Trustee Services, Inc. as successor trustee, conducted a trustee's sale of the Property, foreclosing the senior Deed of Trust. CP 1—25. A trustee's deed was issued to Homesales, Inc., the purchaser of the Property at the trustee's sale. CP 24—25.

The Property sold for an amount greater than the amount owed to the foreclosing beneficiary, and Northwest Trustee Services, Inc. deposited surplus funds in the amount of $35,286.22 ("surplus funds") in the Pierce County Superior Court registry. CP 1—2.

On February 8, 2012, the court entered an order disbursing the surplus funds to Chase. CP 247—248.

III. ARGUMENT

A. Standard of Review

A trial court's ruling in a surplus funds disbursement is reviewed under an abuse of discretion standard. *Wilson v. Henkle*, 45 Wn. App. 162, 166, 724 P.2d 1069 (1986). However, to the extent Appellant raises issues that are purely legal and involve statutory construction, the standard of review is de novo. *In re Trustee's Sale of Real Prop. Of Giannusa*, 169 Wn. App. 904, 907, 282 P.3d 122 (2012) (citations omitted).

B. The Doctrine of Merger Does Not Apply as Chase's Security Interest was Extinguished by the Trustee's Sale

Appellant argues that the merger doctrine should apply to preclude Chase from recovering any surplus funds since Chase purchased the property at the nonjudicial foreclosure and held a deed of trust secured against the foreclosed property. *See* App. Brief at 8—9. Analyzing case law regarding the merger doctrine and the effect of a nonjudicial foreclosure on junior liens establishes that the merger doctrine cannot not apply to preclude Chase from the surplus funds as a matter of law.

Merger occurs when the fee interest and a charge, such as a deed of trust or a mortgage, vest in the possession of one person. *Anderson v. Starr*, 159 Wn. 641, 643, 294 P. 581 (1930). The doctrine of merger arises from the fact that, when the entire legal and equitable estates are united in

one person, there can be no occasion to keep them distinct. *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 698, 777 P.2d 544 (1989). Importantly, "[A]s a general rule, the legal estate should be coextensive with the equitable estate." *Hilmes v. Moon*, 168 Wn. 222, 237, 11 P.2d 253 (1932).

To address whether the merger doctrine precludes a foreclosed junior lienholder from making a claim to the surplus funds, it is necessary to analyze the interest a junior lienholder holds in the foreclosed property. The Washington Supreme Court has addressed the impact of a nonjudicial foreclosure on junior liens encumbering the foreclosed property. A nonjudicial foreclosure extinguishes all junior liens on the property. *See Glidden v. Municipal Authority of Tacoma*, 111 Wn.2d 341, 347 n. 3, 758 P.2d 487 (1988) (emphasis added). *See also, Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 548, 167 P.3d 555 (2007).

Appellant's argument is based on the assumption that Chase's junior Deed of Trust was not extinguished by the nonjudicial foreclosure. Appellant is incorrect. It is undisputed that Chase held a junior Deed of Trust encumbering the Property. *See* App. Brief at 5. It is also undisputed that the Property was subject to a nonjudicial foreclosure. *Id.*

By operation of law, the nonjudicial foreclosure *extinguished* Chase's junior Deed of Trust, along with all other subordinate liens, which

encumbered the property. When Chase obtained a fee interest in the Property by virtue of the issuance of a trustee's deed, its junior Deed of Trust was already extinguished by the nonjudicial foreclosure.

Appellant's hypothetical example imagines that the Property was deeded to Chase a day before the foreclosure. *See* App. Brief at 9. These imaginary facts are not applicable to the present situation and do not change the fact that Chase's junior Deed of Trust was extinguished by the foreclosure. Importantly, Chase's fee interest in the Property was not obtained until *after* the foreclosure upon issuance of a trustee's deed.

Overall, a specific prerequisite to the application of the merger doctrine is the vesting of a coextensive fee interest and charge in one person. In the context of a nonjudicial foreclosure and a junior lienholder who purchases the property, the fee interest and the security interest are mutually exclusive interests in the property. Accordingly, the doctrine of merger cannot apply to preclude Chase from obtaining the funds pursuant to the statutory order of priority enumerated in RCW § 61.24.080(3).

C. Appellant Cannot Establish the Requisite Intent Required for the Application of the Merger Doctrine

Appellant argues that the merger doctrine precludes Chase from asserting any claims to the surplus funds where there is no showing of express or implied intent that merger should not apply. *See* App. Brief at

8—9. Case law interpreting the merger doctrine reveals that Appellant incorrectly articulates the intent standard applicable to the merger doctrine.

1. The Owner of the Equitable and Legal Title is Not Required to Establish an Intent that Merger Not Apply

The merger doctrine is not favored at law or equity, and consequently, is not applied without the requisite showing of intent:

> "It was an inflexible rule at common law that a merger always took place when a greater and a lesser estate met in the ownership of the same person without any intermediate estate, but modernly the doctrine of merger is not favored either at law or in equity. Consequently, the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united..."

Mobley v. Harkins, 14 Wn.2d 276, 281—282, 128 P.2d 289 (1942).

The doctrine of merger is not favored in Washington. *Anderson v. Section 11, Inc.*, 28 Wn.App. 814, 819—820, 626 P.2d 1027 (1981). Whether there be such a merger depends upon the intention, actual or implied, of the person in whom the interests are united. *Anderson v. Starr*, 159 Wn. 641, 643—644, 294 P. 581 (1930).

Appellant incorrectly interprets the standard of intent as requiring the manifestation of an express or implied intent that merger should <u>not</u>

apply. *See* App. Brief at 9. This argument contradicts established Washington case law disfavoring the merger doctrine.

To follow Appellant's interpretation of the intent standard underlying the merger doctrine would require automatic application of the merger doctrine with the burden of proof on the owner of the equitable and legal title in establishing contrary intent. As set forth in *Mobely*, the doctrine of merger does not automatically apply when a greater and lesser estate are unified in one person. The doctrine is disfavored and the party asserting merger has the burden of proof of establishing the requisite intent that merger apply.

2. The Intent of the Owner of the Equitable and Legal Title is Presumed to Coincide with his Interests

Washington case law establishes that the intent of the owner of the equitable and legal title is presumed to coincide with his interests. *See, e.g., Gill v. Strouf*, 5 Wn.2d 426, 431, 105 P.2d 829 (1940) ("On the theory that a merger is a question of intention, and on the further theory that the intention of the mortgagee is presumed to coincide with his interests..."); *Hilmes v. Moon*, 168 Wn. 222, 237, 11 P.2d 253 (1932) ("...his intention should be given great weight, and that he is presumed to have intended that which is most to his advantage."); *Beecher v. Thompson*, 120 Wn. 520, 524—525, 207 P. 1056 (1922).

As set forth by the Washington Supreme Court, the merger doctrine is not favored at law or equity and there is a presumption that the intent of the owner of the equitable and legal title is presumed to coincide with his interests.

In this case, the trial court did not abuse its discretion in declining to apply the merger doctrine as there was no evidence presented in the record that would overcome the presumption that Chase's intent coincided with its interests.

First, Appellant alleges that merger should preclude Chase from the surplus funds as there is no express or implied intent that merger should not apply based on the language in the junior Deed of Trust and Line of Credit. *See* App. Brief at 9. The lack of language barring the application of the merger doctrine does not establish an intent that the merger doctrine apply, nor does it overcome the presumption that Chase's intent coincided with its interests. The lack of language regarding the application of the merger doctrine can be reconciled with the fact that the junior Deed of Trust is extinguished by the foreclosure by operation of law.

Second, purchasing a property as at a foreclosure does not establish an intent that the doctrine of merger apply. Finally, the merger doctrine cannot be applied as precluding Chase from recovering any

surplus funds due to merger would be inimical to its own interests in recovering the excess sale proceeds.

Overall, the merger doctrine does not apply automatically. Appellant has failed to rebutt the presumption that Chase's intent coincided with its interests. As Appellant has failed to satisfy the burden of proof in establishing the requisite intent, and given that precluding Chase from recovering surplus funds would be inimical to its interests, the trial court's decision should be affirmed.

D. The Merger Doctrine is a Common-law Doctrine Affecting Estates in or Charges Upon Realty

Appellant alleges that the merger doctrine applies to prevent Chase from asserting any further claims under its Line of Credit. *See* App. Brief at 10. Appellant is mistaken as the merger doctrine deals with estates in or charges upon realty and does not extinguish the underlying debt which was secured by the junior Deed of Trust.

The Washington Supreme Court has interpreted the merger doctrine as extinguishing the underlying debt: "Whether there is a merger of equitable and legal title and a satisfaction and extinguishment of the underlying debt depends on the intention of the parties and is therefore a question of fact." *Van Woerden v. Union Imp. Co.,* 156 Wash. 555, 560, 287 P. 870 (1930). The *Van Woerden* opinion should be distinguished.

Case law from other jurisdictions provides guidance on this issue. The doctrine of merger, properly speaking, is a common-law doctrine having to do with estates in or charges upon realty. *Wright v. Anderson*, 62 S.D. 444, 448, 253 N.W. 484 (1934). "Merger is absolutely inapplicable to the debt transaction" and the ability to collect the debt "must be resolved by the application of contract principles." *Licursi v. Sweeny*, 156 Vt. 418, 420, 594 A.2d 396 (1991) (citing Burkhart, *Freeing Mortgages of Merger*, 40 Vand. L. Rev. 283, 369 (1987)).

A mortgage is a mechanism to secure an obligation to repay a debt and has existed since at least the 14th century. *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 92, 285 P.3d 34 (2012). The Washington Supreme Court has held that the elimination of a security instrument does not extinguish the debt, it renders the debt unsecured:

> "Put another way, while Beal Bank's rights in the collateral are extinguished by Washington Mutual's trustee's sale, the underlying promise by the Sariches and Mr. Cashman to pay Beal Bank on the two notes continues via the promissory notes, although the promissory notes are now unsecured as a result of that trustee's sale."

Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 550, 167 P.3d 555 (2007)

Other jurisdictions have distinguished the applicability of the merger doctrine to contract rights. *See, e.g, Licursi v. Sweeney*, 156 Vt. 418, 420, 594 A.2d 396 (1991). Similarly, the *Van Woerden* opinion

should be distinguished as Washington case law recognizes that the extinguishment of the security instrument renders the debt unsecured, but does not discharge the debt.

As the merger doctrine can only apply to interests in land, whether the debt was satisfied by the nonjudicial foreclosure is a matter of contract law. Finally, even assuming the merger doctrine could apply to extinguish a debt, the record is devoid of any showing of *intent* that the merger doctrine apply to extinguish the debt secured by the junior Deed of Trust.

IV. CONCLUSION

The merger doctrine cannot be applied to preclude Chase from receiving the surplus funds as Chase's interest in the surplus funds and the foreclosed property are mutually exclusive. As the record is devoid of any showing that Chase intended the merger doctrine to apply to extinguish its junior Deed of Trust or Line of Credit, the Court should affirm the trial court's order disbursing the surplus funds to Chase.

Dated at Bellevue, Washington this 11th day of March, 2013.

RCO Legal, P.S.

By: _____

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AMENDED DECLARATION OF SERVICE

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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

ESTATE OF JOHN BALL BY AND THROUGH LAUREEN MONETTE EXPR, Appellant, v. JPMORGAN CHASE BANK, N.A., Respondent.	No. 43194-7-II **AMENDED DECLARATION OF SERVICE**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on March 14, 2013, I caused a copy of the BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.; and this AMENDED DECLARATION OF SERVICE to be served to the following in the manner noted below:

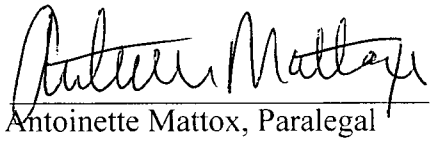
BTA Lawgroup, PLLC Attn: Jan Gossing 31811 Pacific Hwy S B-101 Federal Way, WA 98003	[X] First-class Mail
N Brian Hallaq 14201 SE Petrovitsky Rd Renton, WA 98058	[X] First-class Mail

Court of Appeals Division II Attn: Court Clerk 950 Broadway, Suite 300 Tacoma, WA 98402	[X] First-class Mail

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

DATED this 14th day of March, 2013.

RCO LEGAL, P.S.

By: 
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