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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JERRY C. REEVES, et al.

Appellant,

vs.

GRAVITY SEGREGATION, LLC

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff-Respondent Gravity Segregation, LLC (“Gravity”) respectfully submits this brief in response to the opening brief submitted by Defendant-Appellant Jerry C Reeves (“Reeves”).

Reeves is appealing a trial court judgment granting Gravity’s request to foreclose on a debt secured by a deed of trust on real property located in Woodland, Washington, along with a judgment of \$671,046.20 (including fees and costs). CP 273. During a two-day bench trial, Reeves offered no exhibits or witness testimony (other than his own), and the trial court rejected his two primary defenses: that the original lenders (Charles and Mary Lou Babitkze) forgave the debt; and that Gravity could not foreclose because Reeves was in physical possession of the original promissory note secured by the deed of trust. CP 257-58, 268-69, 273.

On appeal, Reeves renews these arguments and offers several new ones, including a statute of frauds defense (raised by Reeves for the first time post-trial). Gravity opposes.

II. RESTATEMENT OF THE CASE

In 2006, Charles and Mary Lou Babitzke (the “Babitzkes”) agreed to sell Reeves two tax parcels they owned located at 1601 Guild Road, Woodland, Washington (tax parcel numbers 507350100 and 507350101).¹ CP 258. At the time of the 2006 sale, one of the parcels was subject to a first position deed of trust in favor of PNC Bank. Reeves agreed to assume and pay that debt. *Id.* Reeves also agreed to pay the Babitzkes \$1,000,000 for the property on the following terms: \$100,000 down and \$100,000 annually. CP 258-59. These payments were in addition to the payments that Reeves agreed to pay PNC Bank to cover the existing mortgage. CP 259.

Reeves signed a promissory note to this effect on July 21, 2006. CP 259; Trial Ex. 1. The note was amended and recorded on November 13, 2006. CP 259; Trial Ex. 3. The amended note is the operative document in this foreclosure case and is hereinafter referred to as the “Promissory Note.” On the same date in November, the parties executed and recorded a deed of trust (“Deed of Trust”). CP 260; Trial Ex. 4.

¹ The two tax parcels were formerly numbered 6016601 and 6016602. They have since been renumbered as 507350100 and 507350101, respectively. CP 258.

Reeves told the Babitzkes he needed to take the Promissory Note to be recorded and he would bring it back to them. CP 261-62.

However, Reeves did not return the original Promissory Note to the Babitzkes, and they never asked for it back because they did not realize that it might be important for them to have physical possession of the original document. CP 262. Eventually, the Babitzkes forgot Reeves had the original Note. CP 262.

On March 30, 2007, the parties re-recorded the Promissory Note and Deed of Trust to include full legal descriptions of the encumbered property attached, as the descriptions were omitted from the original recorded versions. CP 260-61; RP Vol. 3 at 177-78;² Trial Ex. 11.

Reeves made annual payments under the Promissory Note in 2006 and 2007. After that, his payments were small and sporadic. CP 266-67. Reeves paid a total of \$203,743.94, leaving \$796,256.06 due and owing.³ As a result of Reeves' failure to pay, one of the two parcels

² The record on appeal includes five non-chronological volumes of verbatim reports:
Vol. 1 – 4/17/18 and 6/26/18 – Presentation of Findings and Conclusions
Vol. 2 – 5/1/18 – Presentation of Findings and Conclusions
Vol. 3 – 3/8/18 – Trial Day 1, Part 1
Vol. 4 – 3/8/18 – Trial Day 1, Part 2
Vol. 5 – 3/9/18 – Trial Day 2 and Announcement of Decision

³ However, the parties stipulated at trial that \$200,000 of the debt was uncollectable due to applicable the statute of limitations. CP 267.

that he purchased from the Babitzkes was foreclosed upon by the first-position lender, PNC Bank. CP 265.

In 2016, the Babitzkes assigned their interest in the Promissory Note and Deed of Trust to Gravity. CP 262-63. Since the Babitzkes did not have the original Promissory Note and forgot that they had given it to Reeves, they gave Gravity a Lost Instrument Affidavit stating that the Note was “lost at the time it was in [their] custody, care and control” and that its whereabouts was unknown. CP 263; Trial Ex. 6. The Babitzkes did not learn or remember that Reeves had the original Promissory Note until after the litigation started. CP 263.

Reeves came to trial in possession of the Promissory Note and claimed the Babitzkes gave it to him in 2014 with the intention of waiving the debt. CP 263. The Babitzkes denied this. CP 264. The trial court did not find Reeves’ testimony credible. CP 264-65. The court found he was in physical possession of the original Promissory Note “by fraud or violation of the Babitzkes’ confidence and trust, which they reposed in him and/or he obtained physical possession of the original promissory note(s) in an unconscientious manner.” CP 266. The trial court also found that Reeves “engaged in a concerted scheme to build a friendship with the Babitzkes, earn their affinity and trust, and then play

upon that friendship by repeatedly breaking promises to pay them, stringing them along so that the statute of limitations on the Babitzkes' ability to enforce the note would expire." CP 266.

The court held that given Reeves' unconscionable behavior, it "would be inequitable to allow [him] to maintain possession of the original November 2006 Note." CP 266. So, on the second day of trial, March 9, 2018, the Court signed a bench order requiring Reeves to deliver to the Clerk of the Court the original Promissory Note until further Order of the Court. Reeves did so. CP 266. Following trial, the court held that Gravity was the rightful owner and holder of the Promissory Note and corresponding Deed of Trust and was entitled to possession of the Note.⁴ CP 268-69. The court found that the Babitzkes' assignment of the November 2006 Note and accompanying Deed of Trust to Gravity in 2016 was proper:

Although the Babitzkes lacked physical possession of the Note at the time of the assignment, they were the owners and rightful holders of the note. In reaching this conclusion, the Court notes that it accords persuasive value to the reasoning regarding the meaning of "holder" under RCW 62A.3-301 expressed in *Wells Fargo Bank, N.A. v.*

⁴ In order to recover physical possession of the Promissory Note, Gravity made a motion during trial to amend its complaint to add a claim for replevin. RP Vol. 5 at 110-11; CP 77. Reeves did not file an objection to the motion but did argue against it at trial. RP Vol. 5 at 103. The court granted the motion to amend from the bench. *Id.* at 111. Gravity filed the amended complaint on June 4, 2018. CP 236.

Short, No. 30726-3-III (Wash.App. Mar. 27, 2014). The court recognizes that this case is persuasive authority that it is permitted to consider under GR 14.

CP 268-69.⁵ The *Wells Fargo* decision provides authority for the conclusion that the Babitzkes retained the ability to sue under the Promissory Note even though Reeves had the original copy in his possession.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY REJECTED REEVES' ARGUMENT REGARDING LACK OF A LEGAL DESCRIPTION IN THE DEED OF TRUST BECAUSE (1) THE ISSUE WAS NOT TIMELY RAISED; AND (2) A VERSION OF THE DEED OF TRUST RECORDED MARCH 30, 2007 (TRIAL EX. 11) CONTAINED A FULL LEGAL DESCRIPTION OF THE PROPERTY BEING FORECLOSED

On appeal, Reeves incorrectly claims that the trial court erred in rejecting his claim that the Deed of Trust violated the statute of frauds due to lack of a legal description. Reeves first raised the issue of a missing legal description via a "Declaration" he filed on June 26, 2018 --

⁵ The trial court also noted:

Plaintiff [Gravity] is not currently entitled to enforce the November 2006 Note under RCW 62A.3-309 because the Note does not currently meet the definition of a "lost, destroyed, or stolen instrument" covered by that statute because the Note is currently in the possession of the court clerk. The court notes that at the time this trial started, the Note was still under Mr. Reeves' control and at that time *did* meet the definition of a "lost, destroyed, or stolen instrument" because its exact whereabouts were unknown.

CP 269.

three months after trial -- when the parties and the court convened a second time to finalize the court's findings of fact and conclusions of law. RP Vol. 1. at 83; CP 246-255. Treating Reeves argument as motion for dismissal under CR 41, the trial court rejected it as untimely:

[THE COURT:] I do have the Declaration that was filed. It seems as though it was filed -- okay -- from Mr. Reeves, so there's a question of whether it should be considered by the Court as being untimely. But, I need to understand, why are we -- or, what is the -- you know, the legal description -- you know, a Motion to Dismiss on that basis is not timely. It requires, if we look at Court Rule 41(b)(3), you know, Defendant can make a Motion after the Plaintiff has rested for presenting his or her own case, without prejudice to his or her right to present a case. In the event the Motion is denied -- certainly, a Motion brought after trial, it's not in the nature of a Motion for a New Trial.

RP Vol. 1. at 83-84.

The court's ruling here is subject to de novo review. *North Coast Electric Co. v. Signal Electric, Inc.*, 193 Wn.App. 566, 373 P.3d 296 (2016) ("Interpretation of a court rule is a question of law, subject to de novo review.... If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent.") Court Rule 41 does not allow a defendant (Reeves) to wait until after the close of his case to file a Motion to Dismiss. (Reeves has failed to identify any other court rule that would permit a similar type of motion in this case.)

Thus, because the motion was made in an untimely fashion, the trial court properly rejected it. But the trial court did not end its analysis there. It also rejected the motion on grounds of prejudice in response to the following argument by Gravity's counsel:

MS. LONG: Your Honor, you've touched on, essentially, all the points that I wanted to make today in response to this revised Declaration. You know, in addition to being hamstrung, in terms of responding to it today because I received it about -- well, I was able to check my email and read it about an hour before I came here, the bigger issue is what you pointed out, that this is raising, essentially, a new defense to the foreclosure action, post-trial, which if it was raised prior to trial, or even at trial, my client would have been able to present additional facts, raise additional defenses in response to this defense that Your Honor then could have applied under the legal analysis that's applicable, including one point that Your Honor has already brought up. There's the issue of, well, do we have a defense of partial performance? There are other defenses that I read about that might apply in a circumstance like this [such as] mutual mistake. Was there a mutual mistake or a scrivener's error such that the Deed could be reformed?

...[I]f Jerry Reeves had argued, well, they're not suing on a ... Deed of Trust that contains a legal description sufficient to satisfy the statute of frauds, we could've revised the Complaint and instead of attaching the Deed that was submitted as Exhibit 4, we could have attached the Deed that was submitted to the Court as Exhibit 11, which is a revised Deed of Trust, which does contain a full legal description, and I noted that in the Findings of Fact that you're going to be signing today. So, we do, in fact, have a Deed of Trust with a complete legal description. It just doesn't have to be -- it doesn't happen to be the Deed of Trust that's referenced in the initial Complaint in this

action. And, so, because Jerry Reeves failed to bring this up until after trial, my client is prejudiced because they were not able to adequately address these issues.

THE COURT: I agree. We've had a number of hearings, on these -- lengthy, lengthy, lengthy hearings on this. The time for raising this issue has long since passed. The time for filing Declarations is not on the day of the hearing.

RP Vol. 1 at 94-96.

The trial court's decision to reject Reeves' motion to dismiss on grounds of untimeliness was therefore proper.

The court's decision was also proper given the evidence admitted during trial. Although Reeves is correct in claiming that the Deed of Trust recorded November 13, 2006 (Trial Ex. 4) does not contain a full legal description (the referenced attachments, "Exhibits A and B" containing the description were not recorded), the Deed of Trust was re-recorded on March 30, 2007 with the attachments containing the legal description (Trial Ex. 11). CP 260-61. Deeds and other conveyance documents that require the court to resort to extrinsic evidence to determine the legal description are invalid per the statute of frauds. But in this case, no extrinsic evidence was necessary – the trial court was able to determine the legal description of the property being foreclosed

based on the face of Exhibit 11. *Id.* Thus, there was no basis for Reeves' statute of frauds argument.

B. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT GRAVITY HAD A RIGHT TO ENFORCE THE PROMISSORY NOTE AND DEED OF TRUST

Reeves claims Gravity had no power to foreclose on the Promissory Note and Deed of Trust because he had physical possession of the Promissory Note. The statutes governing the analysis of this issue are RCW 62A.3-301 and 62A.3-309. These statutes are part of Washington's Uniform Commercial Code and set forth a framework for determining whether a person who is attempting to enforce a promissory note actually has the power to do so where the note has been lost or stolen. RCW 62A.3-301 provides:

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-309 provides:

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in

possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

In this case, the trial court found that Gravity was entitled to enforce the Promissory Note under RCW 62A.3-301 as an "owner and holder." CP 269. The court held Gravity was not entitled to enforce the Promissory Note under RCW 62A.3-309 because the Note did meet the definition of a "lost, destroyed, or stolen instrument" at the time of judgment because at that point the Note had been placed in the hands of the court clerk via a bench order. CP 269. These conclusions of law

are subject to de novo review. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341-42, 308 P.3d 791 (2013).

Reeves claims that the Babitzkes never physically possessed the Promissory Note and therefore their attempt to transfer it to Gravity was ineffective. Opening Br. of Appellant at 27. The trial court rejected this argument, finding that “[a]lthough the Babitzkes lacked physical possession of the Note at the time of the assignment, they were the owners and rightful holders of the note.” CP 268-69. In reaching this conclusion, the Court specifically noted that it was “accord[ing] persuasive value to the reasoning regarding the meaning of ‘holder’ under RCW 62A.3-301 expressed in *Wells Fargo Bank, N.A. v. Short*, No. 30726-3-III (Wash.App. Mar. 27, 2014).” CP 269. In the unpublished *Wells Fargo* decision,⁶ our Court of Appeals made clear that the term “possession” under the UCC is not limited to actual physical possession. Rather, merely having “the continuing exercise of a claim to the exclusive use of a material object” will suffice.

⁶ Wash. GR 14.1(a) provides, in relevant part: “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”

The Babitzkes both testified that when they met with Reeves to execute the Promissory Note and Deed of Trust, he told them he needed to take the originals to “the courthouse” to be recorded and promised to bring them back to the Babitzkes afterwards. RP Vol. 3 at 52-55; 103-04. The Babitzkes either never physically possessed the Note or they did so for just a brief moment before Reeves took it for “recording.” Either way, the Babitzkes and Reeves expected and agreed that the original note would be returned and therefore the Babitzkes continued to have “a claim to the exclusive use” of the note. Mrs. Babitzke testified she did not realize she did not have the note until went looking for it in 2016. RP Vol. 3 at 120-21. Since she could not find and did not recall what happened to it ten years prior, she signed a declaration declaring in “lost” in March 2016. *Id.* at 121-22; CP 263; Trial Ex. 6. The Babitzkes and Gravity learned that Reeves was in possession of the original note after this action was filed. CP 263.

The trial court found the Babitzkes’ testimony on these facts credible and found that the Babitzkes were the rightful “holders” of the note even though Reeves possessed the original. In so ruling, the trial court relied on authority of the *Wells Fargo* case. No. 30726-3-III (Wash.App. Mar. 27, 2014). Even though Wells Fargo did not have

physical possession of the note in that case (Chase, its document custodian by virtue of a servicing agreement,⁷ had the original) the court allowed Wells Fargo to judicially foreclose because “[t]o commence a judicial foreclosure action, a plaintiff must simply show an ownership interest in the mortgage” and “that the plaintiff is the *current owner* of the promissory note and mortgage.” *Id.* Ownership of the note is demonstrated either by physical possession of the original or demonstrating ownership of legal title to the note through a demonstrable chain of title. “Either method of showing ownership is sufficient.” *Id.*

Although there was no servicing agreement between the Babtizkes/Gravity and Reeves like there was in *Wells Fargo*, there was no need for one. There is no dispute that, pre-2014, Reeves was never supposed to hold the original note and, if it was in his actual possession, he had agreed to deliver it to the Babtizkes every bit as much as Chase had agreed to deliver the original note in that case to

⁷ As noted in the *Wells Fargo* decision, “[b]ank beneficiaries that originate the mortgage ... commonly transfer [ownership of] the notes and mortgages, often in blocks, to large secondary financiers, such as insurance companies, real estate investment trusts, or the Federal National Mortgage Corporation (Fannie Mae)” while “[t]he originating financier generally continues to act as agent for collection and servicing of the loan” under a servicing agreement whereby they hold the original note in custody for the note’s legal owner.

Wells Fargo, if demanded. That undisputed agreement and understanding, alone, is sufficient to put the Babtizkes/Gravity into “possession” of the original and/or to make Reeves the *de facto* custodian of the original note. The lack of an express, written agreement to that effect is immaterial since this doctrine of “constructive possession”⁸ can arise by express agreement, through principles of agency or in equity.

Decisions rendered by appellate courts in other states support this. In a case arising under the Texas Uniform Commercial Code (which appears to be almost identical to Washington’s), *Manley v.*

⁸ See, e.g., *Selkowitz v. Litton Loan Serv., L.P.*, No. 72505-0-1 (Wash. App. Div. 1, Nov. 23, 2015) (nonbinding unpublished decision) (“Both the UCC and pre-UCC Washington case law recognize that constructive possession is sufficient to make one a holder of a note.”); *id.* (“But, if we assume that the note was not in [the defendant’s] actual possession, it was clearly under his control, and constructively therefore in his possession”) (quoting *Gleeson v. Lichty*, 62 Wn. 656, 659, 114 P. 518 (1911)). Another very helpful case the Court may want to review is an unpublished decision from the Texas Court of Appeals, *Bronco Printer Serv. & Supplies, Inc. v Byte Lasercharge, Inc.*, No. 2-04-105-CV (Texas Ct. App. February 24, 2005). The situation in that case is nearly identical to this case. The borrower, Bronco, was appealing from a judgment in favor of the lender, Byte, under a promissory note and claimed that that Byte could not enforce the note because it never actually possessed it. The court held that since the lender, Byte, “had the intent and capability to maintain control and dominion over the note through” its owners “who were ... present at the closing,” Byte’s presence at the closing constituted constructive possession of the note and Byte could, therefore, enforce it. “Constructive possession exists when a person does not actually possess land or chattel but has the intent and capability to maintain control and dominion over it.” *Id.* Under this holding, the Babtizkes’ presence at the closing, coupled with the undisputed intent for them to ultimately have dominion and control over the note, would suffice to show constructive possession. See *id.*

Wachovia Small Bus. Capital, 349 S.W.3d 233 (Tex. App. 2011), the borrower, as a defense to a judicial foreclosure action, claimed that he had paid off the underlying note by delivering \$375,000.00 in \$100 bills to a local Wachovia branch. Those facts were disputed. What was not disputed is that the borrower somehow received the original note in the mail marked "Paid." *Id.* at 236. The lender presented evidence at trial that the note had never been paid and the original note was somehow accidentally marked "Paid" and delivered to the borrower. *Id.* The jury did not believe the borrower's claim to have paid the note and, based on the jury's findings, the court rendered judgment for the lender, despite the lender not being in possession of the original note (until it was delivered to the court in the process of the trial, just as it was in this case). *Id.* at 239-40.

The *Wachovia* court began its analysis by recognizing "[t]he majority rule in other jurisdictions ... that an unintentional or mistaken cancellation or return of the note does not discharge the obligation." *Id.* at 238 (citing *Gloor v. BancorpSouth Bank*, 925 So.2d 984, 989 (Ala.Civ.App.2005); *G.E. Cap. Mortg. Servs. v. Neely*, 135 N.C.App. 187, 519 S.E.2d 553, 556-57 (1999)). This is the law in Washington as well. *See Reid v. Cramer*, 24 Wn.App. 742, 746, 603 P.2d 851, 853 (1979)

("RCW 62A.3-605 recognizes that cancellation [of a note] involves intent. The cancellation of a note by mistake or without the authorization of the payee or holder is inoperative.") The *Wachovia* court held that the fact that the note was returned to the borrower stamped "Paid" did not deprive the lender of its UCC status as a person entitled to enforce the instrument under UCC §§ 3.301 or 3.309 (compare RCW § 62A.3.301 and 3.309). *Wachovia*, 349 S.W.3d at 238-39. The reasoning of the *Wachovia* court suggests that courts have the inherent power to compel delivery of the original note as part of a judicial foreclosure action when returning or canceling the note was never intended by its holder and is directly applicable to the facts of this case.

For example, consider the following excerpts from *Wachovia*:

Appellants [the borrower and guarantor] argue in effect that Wachovia was first required to file a suit to obtain possession of the note before it could file suit to collect on it. We disagree. The location of the note was known and a suit to obtain possession of the original note was not necessary because the trial court could have required appellants to produce it if they had not done so at trial.

Id. at 239.

We agree that appellants' argument is overly technical and places undue emphasis on physical possession of the note. This is particularly true in this case, where the

location of the original note was not in doubt and it was admitted in evidence at trial. Thus, one of the main concerns of the UCC— protecting the debtor from double liability should the note come into the hands of a later holder— is not implicated here.

Id. at 240.

The legal owner of a note always has the right to compel its delivery or reverse its inadvertent delivery. *See id.* Among other reasons, this is because “[i]t would be inequitable to conclude that the owner of an unpaid note who did not have possession of the original note due to a mistake could not sue to enforce the note.” *Id.* While the *Wachovia* case arises out of Texas it undoubtedly represents the law in Washington.

These very same principles were applied by the Washington Court of Appeals in a sufficiently analogous situation in *U.S. Bank, N.A. v. Oliverio*, 109 Wn. App 68, 33 P.3d 1104 (2001). In that case, U.S. Bank wanted to foreclose on a defaulted note but realized it had “inadvertently generated and mailed a notice of full reconveyance of the property and release of its security interest” to the borrower. *Id.* at 70. In reversing this mistake and allowing the lender to foreclose, the court held:

No Washington case has dealt with the question of the remedy available to a creditor who inadvertently releases a security interest in real property. But the courts in other states that have considered the issue have all decided to reinstate the security interest as a matter of equity, at least as long as reinstatement will not affect third parties' rights. For example, a North Carolina court upheld reinstatement of a promissory note and deed of trust after the mortgagee mistakenly marked both as paid and satisfied and sent them to the defendants and the state's register of deeds. *G.E. Capital Mortgage Servs., Inc. v. Neely*, 135 N.C. App. 187, 519 S.E.2d 553, 557 (1999); see also, e.g., *Taylor v. Jones*, 280 Ala. 329, 194 So.2d 80, 84 (1967); *Westgard v. Farstad Oil, Inc.*, 437 N.W.2d 522, 526-27 (1989); *United Serv. Corp. v. Vi An Constr. Corp.*, 77 So.2d 800, 803 (Fla.1955); *Benson v. Markoe*, 37 Minn. 30, 33 N.W. 38, 42 (1887).

And we have previously held that, under the Uniform Commercial Code, the mistaken or unauthorized cancellation of a promissory note is inoperative. *Reid v. Cramer*, 24 Wn.App. 742, 746, 603 P.2d 851 (1979) (citing *Gleason v. Brown*, 129 Wash. 196, 200, 224 P. 930 (1924) (holding inoperative bank's mistaken payment of check after drawee's death)). While the UCC does not apply to a deed of trust, the reasoning is analogous. The law will not relieve a party of an obligation due to another's mistake. Moreover, as the Bank argues, leaving the Bank without security for its loans would create an inequitable windfall for the Oliverios. See *Duley v. Westinghouse Elec. Corp.*, 97 Cal.App.3d 430, 158 Cal.Rptr. 668, 669 (1979). We find no error in the trial court's decision to reinstate the Bank's security interest in the trust's property.

Id. at 72.

Likewise, in this case, after Reeves asserted his defense of possessing the original note, there was no longer any doubt as to where

the original note was, thereby obviating the need to invoke the “lost” note provisions of RCW 62A.3-309, or hold steadfastly to an overtechnical interpretation of the UCC requiring actual physical possession of the note. The issue, at that point, became one of whether the Babitzkes (and later Gravity) really intended to relinquish the note or remained the legal owner of the note with full rights of enforcement. This is because the right of ownership always implicates the right to possession, which remains unaffected by the inadvertent or unintentional relinquishment of actual physical possession.

Constructive Possession and Constructive Trust

Alternatively, this Court may rely upon the related *Wells Fargo* line of cases and the theory of “constructive possession” to dispense with the formality of actual delivery of the original note and hold that the Babitzkes/Gravity are in constructive possession of it by virtue of the parties’ pre-2014 agreement at closing that Reeves would return the original note to the Babitzkes, thereby making him *de facto* custodian for the original note.

Yet another alternative for the Court is to dispense with the formality of actual physical possession of the original note and hold that the Babitzkes/Gravity are in constructive possession of it (or entitled to actual physical possession) under the equitable remedy of

constructive trust. This is essentially what the courts in the *U.S. Bank* line of cases did (perhaps in an unstated manner).

“A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it.” *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001). A court may impose constructive trusts not only in cases of fraud, misrepresentation, or bad faith, but also in circumstances not amounting to fraud or undue influence. *Baker v. Leonard*, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). As recognized by the Washington Supreme Court:

If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

Kausky v. Kosten, 27 Wn.2d 721, 728, 179 P.2d 950 (1947) (quoting 1 JOHN NEWTON POMEROY, A Treatise on Equity Jurisprudence § 15 5, at 210 (Spencer W. Symons ed., 5th ed. 1941)).

The primary purpose of a constructive trust is to prevent unjust enrichment. *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App.

80, 87, 18 P.3d 1144 (2001). "A person is unjustly enriched when he or she profits or enriches himself or herself at the expense of another or contrary to equity." *Brooke v. Robinson*, 125 Wn.App. 253, 257, 104 P.3d 674 (2004). The inquiry is whether the enrichment is unjust, not whether the holder of the property acted with bad motive or malicious intent. *Id.*

Here, a constructive trust in the Babitzkes' favor arguably arose when they discovered Reeves had somehow obtained the original promissory note, either through violating his agreement to deliver it to them after the so-called recording or otherwise.⁹

In conclusion, under the *Wachovia* and *U.S. Bank* line of cases, the trial court could have exercised its inherent equitable and judicial foreclosure powers to compel Reeves to deliver the original note to the Babitzkes/Gravity. Alternatively, the trial court could have relied on the related *Wells Fargo* line of cases to dispense with the formality of actual physical possession of the note by holding that Reeves was the *de facto* custodian for the original note. Similarly, the trial court could have imposed a constructive trust and reach the same result.

⁹ While the remedy of constructive trust is subject to a three-year statute of limitations, RCW 4.16.080, "[t]he statute of limitations begins to run on a constructive trust when the beneficiary discovers or should have discovered the wrongful act which gave rise to the constructive trust." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). Thus there is no time-bar concern with imposing a constructive trust remedy because the Babitzkes/Gravity did not learn Mr. Reeves was in possession of the original note until after this action was filed. Until then, they did not know what happened to it.

Whatever legal theory applies, one thing is very clear: it would have been inequitable to allow Reeves to essentially take the Babtizkes' land away from them for far less than he agreed to pay simply because he wrongfully usurped control of the original promissory note in violation of the parties' intent and understanding.

"Lost" Note under RCW 62A.3-309

This Court could also uphold the trial court's ruling based on a finding that the Promissory Note qualified as "lost" for purposes of RCW 62A.3-309(a).

RCW 62A.3.309(a) provides that a person not in possession of an instrument is entitled to enforce it if:

- (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,
- (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and
- (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

As explained above, the Babitzkes' testimony at trial could support a finding that the Promissory Note was briefly in their possession before Reeves took it from them for "recording," thus satisfying the first of the three elements of the test outlined in the statute.

The second element is also satisfied because it was determined by the Court that the Babitzkes' loss of possession was not the result of a voluntary transfer by them to Reeves, leaving only the third and final element of this statute at issue. There are three ways to satisfy the third element's requirement of demonstrating "the person cannot reasonably obtain possession of the instrument"—first, that it was destroyed; second, "its whereabouts cannot be determined"; or, third, it is in the wrongful possession of either (a) "an unknown person" or (b) a known person that cannot be found or served with process.

The trial court asked the parties to try to locate guidance on what it means for a note's "whereabouts" to be undetermined under RCW 62A.3-309. [cite] Unfortunately, neither party could not locate any binding authority illuminating this issue.¹⁰ If we apply a common sense, practical reading of the requirement to the facts of this case,

¹⁰ The unpublished decision in *Bronco Printer Serv. & Supplies, Inc. v Byte Lasercharge, Inc.*, No. 2-04-105-CV (Texas Ct. App. February 24, 2005) may be helpful. Its facts are nearly identical to the facts of this case. Borrower and lender attended a closing. The lender never took actual physical possession of the note. And, at the time of trial, the original note was physically in the possession of the borrower or his attorney. The court mentioned UCC § 3.309 in the body of its opinion and its reference to Section 3.309 in footnote 3 of the decision suggests that Section 3.309 could be read as an alternative basis for its decision in addition to holding the note was in the lender's constructive possession. The *Bronco Printer* case appears to stand for the proposition that when the original note remains in the possession of the borrower or the borrower's attorney, its whereabouts may, nonetheless, be unknown to the lender for purposes of Section 3.309.

however, it seems clear that the Promissory Note's exact whereabouts were unknown until the point in time when the Court took possession of it. Even if the Babitzkes knew Reeves had control of the Note, its *precise* whereabouts were unknown such that the Babitzkes could not readily gain physical possession of it.

The overarching purpose of the "lost note" statute is to protect parties such as Reeves from "a claim by another person to enforce the instrument." RCW 62A.3-309(b). There is no risk of the original note popping up in someone else's hands because the original note was in Reeves' possession and is now in the possession of the Court.

Therefore, there is absolutely no risk that some third party will come forward claiming to possess (and have the right to enforce) the original note.

In short, although the Babitzkes/Gravity feel that it is not necessary for the Court to reach the lost instrument analysis of RCW 62A.3-309 for the reasons stated earlier in this brief, it is clear from the record that the Babitzkes had "possession" of the Promissory Note at closing, as that term is defined above, that it was not lawfully seized or transferred, and that until Reeves came forward with the original note during the course of this litigation its whereabouts were unknown to

the Babitzkes/Gravity. These facts are sufficient to satisfy the requirements of RCW 62A.3-309.

C. THE TRIAL COURT DID NOT ERR IN ALLOWING GRAVITY TO AMEND ITS COMPLAINT DURING TRIAL TO INCLUDE A CLAIM OF REPLEVIN BECAUSE THE AMENDMENT DID NOT PREJUDICE REEVES AND THE STATUTE OF LIMITATIONS HAD NOT EXPIRED

A trial court's ruling on a request to amend a complaint is reviewed for "manifest abuse of discretion." *Wrigley v. State*, 5 Wn.App. 2d 909, 931, 428 P.3d 1279 (2018). The trial court did not abuse its discretion when it granted Gravity's motion to amend its complaint following the close of evidence on the second day of trial because Reeves was not prejudiced by the amendment.

CR 15(a) governs amendments to pleadings and provides, in pertinent part, that "a party may amend [his] pleading only by leave of court ... and leave shall be freely given when justice so requires." "[T]he pleadings may be amended to conform to the evidence at any stage in the action, including at the conclusion of a trial, and even after judgment...." *Green v. Hooper*, 149 Wn.App. 627, 636 (2009).

Washington's Supreme Court has recognized that "[a]ppellate decisions permitting amendments have emphasized that the moving

parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading.” *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987). Accordingly, “when the amendment seeks only to assert a new legal theory based on the same circumstances set forth in the original pleading, it should be allowed.” *Wrigley*, 5 Wn.App. 2d at 931. In any such case, “[t]he touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.” *Id.*

The only argument that Reeves’ counsel made at trial suggesting prejudice was as follows:

The whole case has changed character. It's analogous to you want -- not only going to allow an amendment to allow a copyright claim, but you want to order, ten years later, the book to be handed to the Plaintiff and pretend the Plaintiff had it ten years ago. My client would have behaved totally different. I wouldn't even be here, possibly. All this defense and stuff was mounted based on his understanding of the law and the facts, you know. None of this would have happened. We probably wouldn't even be here, so there's a huge prejudice.

RP Vol. 5 at 103. The conclusory allegation that Reeves “would have behaved totally different” is not sufficient to support a finding of prejudice. In his appellate brief, Reeves fails to identify any specific

evidence that he might have used to defend against the replevin claim if he had known about it earlier, merely claiming he could have cross-examined more witnesses, brought more motions, conducted more discovery and prepared differently for trial. Opening Br. of Appellant at 34. The fact that Reeves can only assert prejudice in this general way and cannot point to anything specific that he would have done differently if the claim for replevin had been made earlier indicates that Reeves suffered no actual prejudice.

In fact, no prejudice could have resulted from allowing Gravity to add a claim for replevin because it was merely a “new legal theory based upon the same circumstances set forth in the original pleading.” *Wrigley*, 5 Wn.App. 2d at 931. Gravity’s claim for replevin was based on the same set of facts and issues set forth in the original complaint and answer filed in this case. In its original complaint, Gravity claimed it was the assignee of the note and had a right to foreclose. CP 4-5. In his original answer, Reeves claimed that Gravity was not the holder or owner of the note. CP 6. In summary judgment proceedings, Reeves specifically argued that Gravity could not foreclose on his property because he had physical possession of the original note. CP 329-330 (Reeves alleges in summary judgment brief that “Defendant accepted

and kept the original November 13, 2006, Promissory Note and is the lawful owner and holder thereof due to the Babitzkes' surrender of same to him in 2014.... Plaintiff has been advised that Defendant Reeves has the original November 13, Promissory Note and that it can and will be made available for review...."); CP 350 (Reeves claims "[t]he Babitzkes had no lawful right to assign the November 13, 2006, Promissory Note, nor the November 13, 2006, Deed of Trust securing same ... since the original of those two documents had been previously returned and given to me in 2014.") Gravity made very clear at that time that it wanted the original Note back but Reeves refused to hand it over. CP 360 (Gravity argues in summary judgment opposition that "[t]he Babitzkes possessed the note and had a right to enforce it when it was lost ... and the current holder refuses to return it."); CP 378 (Reeves claims in summary judgment reply brief that "Plaintiff's Demand for Return of the Original Note is Rediculous" [sic]).

In making any factual determinations necessary to determine if Gravity had the right to foreclose as the holder of the note, the trial court necessarily had to determine the only question relevant to the replevin claim: Who was the rightful owner or holder of the note – Gravity or Reeves? *See Graham v. Notti*, 147 Wn.App. 629, 635, 196

P.3d 1070 (2008) (to succeed in a replevin action, plaintiff must prove his title and right to possession of the personal property in question).

Because there was no prejudice, and because adding the replevin claim did not require the trial court to consider any facts or testimony outside of what was presented to it in connection with the resolution of other claims in the case, the trial court's decision to allow Gravity to amend its complaint during trial to include the claim was not a manifest abuse of discretion.

The trial court also correctly concluded that Gravity's request for replevin was not barred by the statute of limitations.

When a party challenges a trial court's findings of fact and conclusions of law, the Court of Appeals limits its review to "determining whether substantial evidence supports the findings and whether those findings, in turn, support its legal conclusions." Conclusions of law are reviewed de novo. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341-42, 308 P.3d 791 (2013). Here, the trial court's rejection of Reeves' statute of limitations defense was supported by substantial evidence. In general, the statute of limitations begins to run "when a party has a right to apply to a court for relief." *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329

(1981). Reeves argued that the limitations period began to run when he took the original Promissory Note home with him after he signed it in 2006 (or alternatively when he missed a payment under the Note in 2008), RP Vol. 1 at 59, but the trial court rejected this argument, finding that the action triggering the start of the statute of limitations did not occur until 2016, when Gravity filed the foreclosure action against Reeves. RP Vol. 1 at 64-70. The trial court reached this conclusion based on the following factual findings: the Babitzkes let Reeves take the Promissory Note from them in November 2006 and Reeves promised to bring it back; the Babitzkes didn't realize the importance of retaining the Note and forgot they gave it to him and didn't ask for it back; and Reeves retained possession of the Note. RP Vol 1. at 64-66. Reeves' possession of the Note was not wrongful and not contrary to the Babitzkes' rights until after the lawsuit between Gravity and Reeves started. RP Vol. 1 at 67-70. The trial court reasoned:

... the Babitzkes, ... they essentially handed [the Note] to, or allowed Mr. Reeves to leave with it, for what was not a wrongful -- for him -- he wasn't going to be doing something wrongful with it. That was not their understanding, was that he would do anything wrongful with the Note. They thought he was going to return the Note. And, in that way, it's similar to when, I might be in their position and I would hand the Note to him and say, "I would like you to keep it in your fire proof safe because I'm

afraid that it will get burned down in my house." Or, maybe you just hand it over because he wants to look at it, he says, "I'd like to look at it, I'd like to take a picture of it," and then maybe he flees with the Note. You know, something like that. So, you can hand over the Note -- of course, that would be -- the last example would involve a wrongful act, but in the first example I gave, which is handing a Note to somebody for something that is not wrongful, whether it be, hey, you're going to take this Note and go record it, or you're going to hold this Note for me in your fire proof safe, you know, that's not wrongful. And that can go on for a long time. Maybe it goes on for twenty years, when somebody's holding the Note for you, because it was never the intent of the person who allowed the holder of the Note to allow the other person to get legal rights from that. That wasn't the intent. If you're holding the Note for me because you said you were going to record it and that was okay with me, and you didn't return it but I'm not worried about because you're my friend, and I know that you're not going to do anything wrong, and I know you won't do anything to hurt me because you're my friend, so it's not that big of deal that you didn't return it to me; or, I handed it to you because I wanted you to hold it in your fire proof safe. None of those contemplate a wrongful act. But, when we come up to after the filing of this case where the Babitzkes say, I'd like to sue on the installments under this Promissory Note that I'm still able to sue on because the statute hasn't run, and that's the six installments that were the subject of our -- our hearing last time, I need the Note back. And he says, "Nope, I'm not going to give you the note back." Well, that's a wrongful act, and that's when it became, essentially, conversion or exerting unauthorized control over the Note.

RP Vol. 1 at 67-69. Because the Babitzkes did not realize the importance of holding onto the original note and forgot that Reeves had it, and because Reeves did not commit any wrongful act with respect to the

Note until he after the lawsuit was filed against him and he claimed to be the rightful holder and owner of the Note, the trial court properly concluded that the statute of limitations had not begun to run after the lawsuit was filed.

D. THE TRIAL CORRECTLY INCLUDED THE PNC DEBT IN CALCULATING GRAVITY'S DAMAGES AND CORRECTLY APPLIED POST-JUDGMENT INTEREST OF TWELVE PERCENT

Reeves claims that “[t]he trial court erred by allowing Gravity to calculate its damages ... by adding the debt owed to PNC Bank ... as well as by allowing interest to accrue on the judgment at 12% interest, even though the Note at issue provides for 0% interest.” Opening Br. of Appellant at 5 (Assignment of Error No. 4). Reeves is wrong on both counts.

With respect to the damages calculation, the trial court’s determination is a factual finding subject to review for “substantial evidence.” *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341-42, 308 P.3d 791 (2013). Here, there was substantial evidence supporting the trial court’s finding that the amount of the Promissory Note was \$1 million plus the value of a mortgage

Reeves agreed to assume, not a flat \$1 million, as Reeves argues.

Specifically, the trial court found:

Mr. Reeves agreed to assume and pay [the PNC] debt as part of the agreement with the Babitzkes. In addition, Mr. Reeves agreed to pay the Babitzkes ONE MILLION AND NO/100 dollars (\$1,000,000.00) million for the property on the following terms: \$100,000 down and \$100,000 per year payable over the next nine years. These payments to the Babitzkes were to be made in addition to the payments that Reeves agreed to pay to PNC Bank to cover the existing mortgage.

CP 258-59.

This ruling was consistent with all of the evidence presented at trial, beginning with the plain language of the Promissory Note, which provides (in part):

The undersigned promises to pay to the order of Charles and Mary Lou Babitzke the amount of **\$900,000.00** excluding the \$100,000.00 paid on July 21, 2006. The total purchase price is \$1,000,000.00. The Undersigned further agrees and promises to assume payment responsibility for the mortgage currently on the property in the amount of \$194,000.00.

Trial Ex. 3 (emphasis added). In addition, Mary Lou Babitzke testified that she believed the deal with Reeves required him to pay her and her husband \$1 million for the property and assume the PNC debt:

Q ...[W]hat was your understanding about what was going to happen with the PNC debt?

A That Jerry would be responsible for it.

Q And was it your understanding that Mr. Reeves was going to be responsible for paying you a million dollars and paying the PNC debt? Or did the million dollars include the PNC debt?

A A million dollars for us and he was going to assume the responsibilities of PNC. That was my understanding.

RP Vol. 3 at 94.

Even if Reeves had presented evidence to the trial court supporting his own views on the Promissory Note (which he did not), the evidence cited above makes clear that the trial court's interpretation was a very reasonable one. Given that this Court views "the evidence in the light most favorable to the prevailing party," the trial court's decision must stand. *Hegwine v. Longview Fibre Co.*, 132 Wn.App. 546, 556, 132 P.3d 789 (2006).

The trial court's decision to apply post-judgment interest at a rate of twelve percent to the judgment against Reeves must also stand. This decision qualifies as a conclusion of law and is reviewed de novo. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341-42, 308 P.3d 791 (2013).

First and foremost, Reeves waived his right to assign error to this decision by failing to raise it at the trial court level. RAP 2.5(a). Reeves

made no objection to the trial court's interest rate ruling at any time prior to this appeal. This is fatal to this portion of his appeal.

Even if Reeves had properly preserved the issue for appeal, he still would not be able to have the trial court's decision overturned because the statute governing post-judgment interest, RCW 4.56.110, allows courts to award post-judgment interest on judgments stemming from one party's default under a contract with no specific provision for interest.

The suit between Gravity and Reeves was essentially a breach of contract action – Reeves signed a promise to pay money for real property and then breached that agreement. In an action for breach of contract, RCW 4.56.110(1) sets the amount of interest a court may award. *Oros v. Anderson*, No. 72238-7-I (Wash. App. Div. I, Aug. 24, 2015) (nonbinding unpublished decision). It provides that judgments shall bear interest at the rate specified in the contracts provided that the interest rate is set forth in the judgment. *Id.* The contract at issue in this case (the Promissory Note) does not set a rate of interest. It does not mention interest at all. Trial Ex. 3. In cases where a contract does not indicate whether interest shall apply in the event of payment default or judgment, the trial court may award post-judgment interest at the rate

set forth in RCW 4.56.110(5). *Oros*, No. 72238-7-I. That is exactly what the trial court did in this case – it awarded twelve percent interest on the amount of the judgment. CP 273. The award was proper and should be upheld.

E. THE TRIAL COURT DID NOT ERR IN DENYING REEVES' MOTION TO AMEND HIS ANSWER, NOR DID IT ERR IN DENYING REEVES' MOTION FOR A TRIAL CONTINUANCE

Reeves is incorrect in his claim that “[t]he trial court erred, and again showed favoritism towards Plaintiff Gravity, when it refused to grant a motion to amend the Answer months before trial and a simple, short continuance for new counsel to prepare for trial....” Opening Br. of Appellant at 5 (Assignment of Error No. 5).

With respect to Reeves’ motion to amend his answer, it is unclear how this Court can be expected to review the trial court’s denial given the dearth of information provided by Reeves. He has not provided this Court with the appropriate clerk’s papers per RAP 9.6 nor has he indicated why the denial should be overturned on appeal. Accordingly, the trial court’s ruling on this issue must stand.

With respect to Reeves’ motion for a trial continuance, the record clearly establishes that the trial court properly exercised

discretion in denying his motion. “Whether a motion for continuance should be granted or denied is a matter discretionary with the trial court, reviewable on appeal for manifest abuse of discretion.”

Balandizich v. Demeroto, 10 Wn.App. 718, 720 (1974).

Reeves made his motion orally just prior to the start of evidence on the first day of trial. RP Vol. 3 at 4. Reeves claimed he needed more time to prepare for trial because he had only retained trial counsel one week prior. *Id.* He suggested that the court bifurcate the trial, with Gravity putting on its case right away and Reeves following with his case in chief weeks later. *Id.* Gravity objected on grounds that the trial had been scheduled for many months and Reeves, an experienced litigant, had no legitimate excuse for waiting so long to retain counsel. *Id.* at 7, 8. Gravity claimed it would be prejudiced by the continuance because it was based in Utah and had flown two people to Washington specifically for the trial. *Id.* at 7.

The trial court denied Reeves’ motion for a continuance, finding that it would prejudice Gravity and also finding that Reeves lacked good cause:

All right, well, based on what I've heard and based on the fact that this case has been -- it was filed in 2016; trial date was set in August. I agree, it appears that Mr. Reeves

is a sophisticated litigant. The Pretrial Brief was filed on February 15th. I don't see any basis to continue the case, either in whole or in part. We need to proceed, because I think it would work significant hardship to the Plaintiff to have to bifurcate this trial, and I don't think there's a valid reason. Obviously, you know, this is not a criminal case. The analysis is totally different, and Mr. Reeves has had ample notice of this trial date and should have been prepared today -- with or without counsel should have been prepared today. So, we will proceed today.

RP Vol. 3 at 9-10.

In assessing a motion to continue, the trial court may consider any number of factors, including the needs of the moving party, prejudice to the adverse party, prior history of the litigation, any conditions posed in previously-granted continuances, and any other material matters bearing on the court's discretion. *Balandizich*, 10 Wn.App. at 720 (1974). In this case, it is clear that the trial court's ruling is was based on these factors. The court was within its discretion to conclude that no continuance was warranted given the possible prejudice to Gravity and the unexcused untimeliness of Reeves' motion.

F. GRAVITY SHOULD BE AWARDED ATTORNEY'S FEES ON APPEAL UNDER RAP 18.1

Gravity asks this Court to enter an award of attorney's fees in this appeal consistent with the following provision in the promissory note on which this action is based:

If this note is placed in the hands of an attorney for collection, the undersigned promises and agrees to pay the reasonable collection costs of the holder hereof; and if suit or action is filed hereon, also promises to pay (1) holder's reasonable attorney' fees to be fixed by the trial court and (2) **if any appeal is taken from any decision of the trial court, such further sum as may be fixed by the appellate court, as the holder's reasonable attorney's fees in the appellate court.**

Trial Ex. 3 (emphasis added). As the individual who signed the promissory note, Reeves is bound by the promise to pay attorney's fees contained within it. This Court has discretion to award Gravity its "reasonable attorney's fees" in connection with this appeal. If the Court agrees to award Gravity its fees, Gravity will submit an affidavit of fees and expenses for review.

IV. CONCLUSION

For the reasons set forth above, Respondent Gravity Segregation LLC respectfully requests that this Court affirm all aspects of the trial court's judgment.

July 9, 2019.

Respectfully submitted,



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