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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 294692

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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Mountaineer Investments LLC,

*Respondent,*

v.

Gary and Barbara Heath,

*Appellants.*

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APPELLANTS' REPLY BRIEF

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Alan L. McNeil, WSBA #7930  
Attorney for Appellants  
Sophia A. Medina, WSBA #9117772  
Legal Intern for Appellants  
University Legal Assistance  
721 N. Cincinnati St.  
PO Box 3528  
Spokane, WA 99220-3528  
(509) 313-5791

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## I. INTRODUCTION

The Washington State Legislature gave Respondent, Mountaineer Investments LLC, (Mountaineer) the right of self-help repossession under RCW 62A.9A-609. However, as a counterbalance to that powerful right of self-help, the statute provides strict requirements that that secured parties, like Mountaineer, must abide by.

The issues before this Court are 1) whether Mountaineer complied with the Notice of Sale requirements imposed by RCW 62A.9A-611 and RCW 62A.9A-614; and 2) whether, in light of the many defects in the sale, the court below erred by entering summary judgment in favor of Mountaineer on the fact-bound issues of commercial reasonableness under RCW 62A.9A-610.

The first issue centers on the fact that Mountaineer chose to send the Heaths notice of a public sale, thus rendering itself subject to the statutory requirement that the Notice of Sale clearly state the time and place of public disposition. Mountaineer's non-compliance with its own notice, namely that the vehicle was not sold on the day specified in the February 17, 2009 Notice of Sale, is admitted in the record. This failure entitles the Heaths to the minimum damages provided by RCW 62A.9A-625(c)(2), regardless of harm. Therefore, the decision of the trial court denying the Heaths their motion for summary judgment should be reversed.

The second issue concerns the more fact intensive question of “commercial reasonableness” of any sale that may have occurred. Reasonableness is generally a question for the finder of fact. The trial court erred by overlooking or improperly weighing the evidence that undermines commercial reasonableness in this case: the absence of the most basic basic commercial documentation of the alleged sale, such as the name of the purported buyer; the fact that the seller’s agent accepted a “bid” from a close relative, the seller’s mother; the lack of proof of adequate advertisement; the unorthodox, uncompetitive bidding process; and the fact that despite an alleged sale, the vehicle remains titled in the Heath’s name, all in addition to the defective notice.

## II. ARGUMENT

RCW 62A.9A-611 and RCW 62A.9A-614 set forth the requirements of the post-repossession Notice of Sale that must be sent by the creditor to the debtor informing him of the particulars of the proposed disposition of his collateral. RCW 62A.9A-610 imposes upon the secured party the duty of commercial reasonableness of any disposition of collateral. Mountaineer, throughout its brief, confuses and conflates these two separate issues.

Even a reasonable sale procedure (which did not happen here) is not a defense to improper notice. “Commercial reasonableness and notice are

distinct requirements . . . Thus, even if the debtor concedes that a commercially reasonable sale was held, a creditor must prove it gave notice to the debtor in its own right.” *Thong v. My River Home Harbour, Inc.*, 3 S.W.3d 373, 377 (Mo. Ct. App. 1999); *Accord Kruse v. Voyager Ins. Co.*, 72 Ohio St.3d 192, 196, 648 N.E.2d 814, 816-817 (1995) (failure to give notice triggers the statutory damages provision and that notice can be a part of the total inquiry into whether a sale of collateral was commercially reasonable).

The Heaths discussed the statutory requirements of RCW 62A.9A-614 in detail in their opening brief. *See* Appellants’ Br. at 12-16. It is important to note these provisions do not place any duty on the debtor regarding the repossessed collateral. *See* RCW 62A.9A-611 and RCW 62A.9A-614. The remedies for consumer-goods transactions are specifically provided for in RCW 62A.9A-625(c)(2).

The Heaths contend that because Mountaineer made the decision to note disposition of the collateral by public sale, RCW 62A.9A-614 required the Notice of Sale to contain the actual date the vehicle was to be sold at that public sale. This means that either 1) the vehicle should have actually been sold on March 2, 2009 as noted, or 2) Mountaineer was required to send the Heaths a new/revised Notice of Sale for the later date.

Mountaineer counters that the Notice of Sale is sufficient because the vehicle was ‘on sale’ on March 2, 2009 and that Washington law does not require the sale to take place on that date nor the notice to say how long the public sale would take or when the bidding would close. Mountaineer does not point to a single authority in support. Resp’t Br. 19.

The statutory language of RCW 62A.9A-614 requires the Notice of Sale for a public sale to state the time and place of disposition. Cases from sister jurisdictions have so interpreted this uniform provision. *See First Ala. Bank v. Parsons*, 390 So. 2d 640, 643 (Ala. Civ. App. 1980) (holding that the bank’s notice of February sale was insufficient as a matter of law to notify debtor of March sale); and *In re Lucas*, 28 B.R. 366, 369-370 (Bankr. S.D. Ohio 1982) (holding that the burden is on the creditor to keep the debtor apprised of developments; it became the duty of the creditor to notify the debtor of any and all sales; and that simply being aware of an impending sale is insufficient); *Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117, 121-122 (Tex. Ct. App. 1990) (where creditor who noticed a public sale but rejected all bids, the original notice held not to constitute “reasonable notification” of a subsequent private sale).

Mountaineer’s casual intermingling of these related yet legally distinct requirements serves only to confuse the analysis in an area where the court of almost all jurisdictions have spoken uniformly.

**A. The Notice of Sale is Defective and Summary Judgment Should Have Been Granted to the Heaths Because Mountaineer Failed to Comply with RCW 62A.9A-614.**

The issue of (im)proper notice in this case is a question of law rather than a question of fact. Regarding the Notice of Sale issue, the only relevant facts are that 1) Mountaineer sent but one notice, of a public sale, to the Heaths stating that the sale of their vehicle would take place on March 2, 2009, at 9:00 a.m., (CP 199); and 2) Mountaineer did not sell the vehicle until April 15, 2009. CP 5 ¶ 1.9; CP 87; CP 104; CP 109. Mountaineer acknowledges “the facts unequivocally indicate that . . . Heaths were not notified of the actual date on which a ‘sale’ was completed and possession of the collateral was transferred (April 15, 2009).” Resp’t Br. 20.

RCW 62A.9A-614 was revised and went into effect in 2001. The majority of Washington cases pre-date this much stricter standard imposed by the Washington Legislature. *See* Laws of 2000, ch. 250. The revised statute requires the Notice of Sale to include the time and place of a public sale and does not allow for error in that key information. *See* RCW 62A.9A-614(1). “A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law.” (Emphasis added). Off. Cmt. 2 to RCW 62A.9A-614; *See also* Appellant’s Br. 15. In light of the

strict requirement of the statute, the Notice of Sale sent to the Heaths was insufficient.

1. Mountaineer's Notice of Sale was insufficient under RCW 62A.9A-614.

Mountaineer contends that because the Heaths vehicle was 'on sale' on March 2, 2009, its Notice of Sale was sufficient. Resp't Br. 19. Mountaineer misinterprets the plain statutory language. Date and time of public disposition means *the* date and time of sale, not a hypothetical date or time when the sale "process" allegedly commences. *See Graham v. Conn. Nat'l Bank*, 1983 WL 160538 (Conn. Super.), 38 UCC Rep. Serv. 1421 (Bank that conceded that the automobile was not sold at public sale on the date specified is liable for damages); *Am. Gen. Fin. Serv. Inc., v. Woods-Witcher*, 294 Ga. App. 685, 669 S.E.2d 709 (2008) (Noticed public sale that did not take place at the "specific time for the disposition" stated in the notice held non-compliant with UCC (citations omitted)). Even if bidding did begin on March 2, 2009, as Mountaineer contends, the notice would still be insufficient. RCW 62A.9A-613(1) and therefore RCW 62A.9A-614(1) through incorporation, require the Notice of Sale to "[s]tate[] the time and place of a public disposition or the time after which any other disposition is to be made." (Emphasis added). The February 17,

2009 notice that Mountaineer chose to send did not indicate that the sale would take place on any day other than March 2, 2009. CP 199.

In setting out the requirements for the Notice of Sale, the legislature distinguished between a public and private sale. For a private sale, the requirement is that the debtor is notified of “the time after which the disposition is to be made.” RCW 62A.9A-613(1)(E). Conversely, for a public sale, the statute requires the exact “time and place of public disposition.” *Id.* Courts interpreting statutory language should assume the legislature “means exactly what it says.” *Berger v. Sonneland, M.D.*, 144 Wn.2d 91, 105, 26 P.2d 257, 264 (2001). Mountaineer claims it sold the motor home to the \$3,500 bidder (the seller’s mother) plus \$500 on April 15, 2009. *See* Resp’t Br. 8; CP 159. This renders the notice of a March 2, 2009 public sale deficient as a matter of law.

Respondent admits in interrogatories that no live auction was held on March 2, 2009. The “[v]ehicle was not sold at live auction. Bids were solicited and received.” CP 408; CP 453, p 29-30. Furthermore, Alpine Recovery began accepting bids prior to March 2, 2009. “As of March 2, 2009, and after more than a full week of advertising, approximately three bids were received ” CP 109; CP 134; CP 210; CP 430, p 42. It is true, as Mountaineer contends, the notice did state a date, time and place (Resp’t Br. 19), however, the statute requires the date, time, and place stated to be

the correct date, time, and place of the public sale. RCW 62A.9A-614; *See also Am. Gen. Fin. Serv.*, 294 Ga. App. 685, 669 S.E.2d 709.

The statutory requirement of strict accuracy is rooted in sound policy reasons, including keeping the debtor closely informed, maintaining integrity of the disposition process, and encouraging strict compliance with the law. *See In re Massaquoi*, 412 B.R. 702, 708-710 (Bankr. E.D. Pa. 2008); *In re Koresko*, 91 B.R. 689, 699 (Bankr. E.D. Pa. 1988).

To excuse the undisputed fact that the sale was not at the date or time noted Mountaineer relies on the safe harbor form. Resp't Br. 19-20. However, the safe harbor form, by its terms, does not protect the creditor when there are errors in information required by paragraph (1) of RCW 62A.9A-614. RCW 62A.9A-614(5) states, "[a] notification in the form of [subsection] (3) of this section is sufficient, even if it includes errors in information not required by [subsection] (1) of this section, unless the error is misleading with respect to rights arising under this Article." The error in the time (date and hour) and place, a requirement of subsection (1), is a fatal flaw, regardless of the use of the safe harbor form. *See Off. Cmt. 3 to RCW 62A.9A-614*. While the Notice of Sale listed March 2, 2009, as the sale date, the date which the vehicle was sold (if at all) was April 15, 2009. *See Resp't Br 20*.

In its brief, Mountaineer attempts to distinguish *Huntington Bank v. Freeman*, 53 Ohio App. 3d 127, 560 N.E.2d 251 (1989). Resp't Br. 25. However, Mountaineer misconstrues *Huntington*, the facts of which clearly state "a letter dated January 28, 1988 was mailed by certified mail to the appellant notifying her that the repossessed car would be sold at a public auction on February 13, 1988 at 10:00 a.m. . . ." *Huntington*, 52 Ohio App. 3d at 127, 560 N.E.2d at 253. "However . . . the car was not sold on February 13, 1988 . . . but, instead, sold on February 20, 1988 . . . . No notice of this second sale date was sent to the appellant." *Id.* The court found "absolutely no evidence in the record that the bank even attempted to notify appellant of this sale which occurred seven days later [than listed] in the January 28, 1988 letter." *Id.* at 130, 560 N.E.2d at 255-56.

The *Huntington* facts are nearly identical to the facts at hand. In particular, the bank did not have a bid that it deemed satisfactory on the date listed in the Notice of Sale, instead took a bid on a different day, and failed to send the debtor a revised Notice of Sale. *Huntington*, 53 Ohio App. at 127, 560 N.E.2d at 253. The only difference between the facts of *Huntington*, and the case at hand, is that Mountaineer sold the vehicle 45 days after the date listed on the notice, to the seller's mother, rather than a mere seven days later to an outside bidder as in *Huntington*. *Id.*

Furthermore, Mountaineer does not even attempt to distinguish the great weight of cited authority that contradicts its position, all dealing with the Notice of Sale issue as discussed in Appellants Br. 27-32.

Mountaineer violated the strict requirement for accurate Notice of Sale by not selling the motor home at the date, time, and place stated in the notice. As discussed below, this fatal shortcoming yields minimum statutory damages awardable to the Heaths “in any event.”

2. Because Mountaineer failed to comply with the requirements of RCW 62A.9A-614, the Heaths are entitled to damages as set forth by RCW 62A.9A-625(c)(2).

Mountaineer offers that statutory damages provided at RCW 62A.9A-625 could not have been “contemplated” and that following the statute would somehow be “unjust.” *See* Resp’t Br. 26-28. However, Mountaineer cites to no authority for supporting its attempt to disregard the statute’s clear language. The Heaths illustrate the exact purpose of RCW 62A.9A-625(c)(2) by giving examples of eight cases, from eight different states, interpreting the uniform statutory language and the policy behind it. *See* Appellants Br. 27-32. Although Washington does not have specific case law regarding RCW 62A.9A-625(c)(2), the UCC Article 9-614 and 9-625(c)(2) are uniform. These illustrative cases interpreting the same statutory language are therefore persuasive.

Mountaineer confuses the issue of statutory damages under RCW 62A.9A-625(c)(2), with actual damages, allowed for by RCW 62A.9A-625(b). Mountaineer repeatedly cites to *Commercial Credit Corp., v. Wollgast*, 11 Wn. App. 117, 521 P.2d 1191 (1974). Resp't Br. 22, 23, 29. The Heaths have already distinguished this pre-revision case in their opening brief. Appellants' Br. 24-25. Mountaineer claims that the Heaths are "estopped" from claiming damages under *Wollgast*. Resp't Br. 22, 23, 29. Mountaineer again fails to recognize that *Wollgast* is a pre-revision case addressing actual damages, not at issue in this case. *See Wollgast*, 11 Wn. App. at 122, 521 P.2d at 1194. Mountaineer further confuses this issue by citing to *McChord Credit Union v. Parrish*, 61 Wn. App. 8, 809 P.2d 759 (1991). Resp't Br. 26. *McChord* does not deal with RCW 62A.9A-625(c)(2), but instead focuses on the rebuttable presumption of value discussed below.

The formula for minimum statutory damages for insufficient notice is a simple arithmetic calculation: credit service charge plus ten percent of the amount financed. *See* RCW 62A.9A-625(c)(2). Credit service charge is the "finance charge clearly set forth in the retail installment sales contract." *Indus. Valley Bank*, 502 A.2d 1254, 1257 (Pa. Super. Ct. 1985). "Subsection (c)(2) **provides a minimum, statutory, damage recovery for a debtor . . .** and is designed to ensure that **every** noncompliance with

the requirements of Part 6 in a consumer-goods transaction results in liability, **regardless** of any injury that may have resulted.” Off. Cmt. 4 to RCW 62A.9A-625 (Emphasis added).

The statute, therefore, sets a floor for damages, rather than a ceiling, as Mountaineer contends. Resp’t Br. 28. This is discussed in Appellants’ Brief 27-32. “[T]he draftsmen installed a statutory penalty in [9-625] to up the ante for those who would abuse the consumer. The sentence is a penalty – a ‘minimum recovery’ the comment calls it – and the consumer is entitled to it even if he has not suffered a penny’s loss.” *Kruse*, 72 Ohio St.3d at 194, 648 N.E.2d at 815-816. There is surely no “windfall” to the unfortunate Defendants as Mountaineer rather cavalierly submits. Resp’t. Br. 26. Mountaineer is a sophisticated purchaser of consumer debt portfolios. *See* CP 449, p 13. It knew – or should have known – of the UCC’s notice and sale requirements, but chose to ignore them.

**B. There Are Genuine Issues of Material Facts In This Case as to Commercial Reasonableness, Because of the Unknown Buyer, the Lack of Proof of Advertisement, the Lack of Proper Notice, and Because Reasonableness is a Question for the Trier of Fact.**

To defeat a motion for summary judgment all that is required is a showing of a genuine issue of material fact. *See* CR 56(c). In *McChord*, the Court held “[t]he creditor has the burden of proving commercial reasonableness, and reasonableness is a question of fact for the trier of fact.” 61 Wn. App.

at 12, 809 P.2d at 761. “Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.” RCW 62A.9A-610(b) (Emphasis added).

1. The Facts of the Case Create Genuine Issues of Material Facts Regarding Commercial Reasonableness.

Mountaineer has changed, or attempted to change, the “facts” of this case several times. The first attempt came after the Heaths’ motion for summary judgment when Mountaineer requested to change its answers to selected admissions (CP 103-104) including its admission that the actual sale took place on April 15, 2009, and that the Heaths received no prior notice. CP 87; CP 104. Mountaineer also attempted to change the answer to interrogatory regarding the buyer’s name. CP 323.

Despite Mountaineer’s oft-repeated conclusion as to commercial reasonableness, it does not even know who purchased the Heaths’ vehicle. CP 323. Mountaineer refers to the second highest bidder, the \$3,500 bidder, coming up to \$4,000.00, but fails to acknowledge that Cinderella Williams, the mother of Mark Williams (the owner of Alpine Recovery who conducted the sale), was the only \$3,500.00 bidder. It was the mother who Mountaineer originally swore, through interrogatory, was the purchaser. CP 159; CP 323; CP 434, p 59. Mountaineer also omitted to mention in its brief that Mr. Williams (seller) was himself interested in

purchasing the vehicle. CP 209. It was on the eve of Mr. William's (seller) deposition that the name of the alleged purchaser changed to a "Mr. Clark." CP 323. However, there is no record of this alleged sale to "Mr. Clark," as the sale was reportedly a cash sale for which there is no receipt. CP 436, p 65-66. Furthermore, the only proof of purchase comes in the form of a check made out to Mountaineer for \$3775.00, from Alpine itself, and did not list the name of any purchaser. CP 170. All of these inconsistencies coupled with the admissions of sales or attempted sales to insiders cast grave doubt on the commercial reasonableness of the purported sale.

Furthermore, Mountaineer's evidence concerning advertising is weak and inconsistent. Mountaineer claims the vehicle was advertised for sale in Nickle Nic's (Resp't Br. 7) but was unable to produce a copy of the advertisement, receipt for the cost, or any other substantial evidence. CP 429, p 38-40. Mountaineer also claimed that it posted the motor home for sale on a generalized, online classified ad service (Resp't Br. 7) yet, there is no evidence of that fact except for two unauthenticated bid sheets. Resp't Br. 8. These conclusory statements should not warrant summary judgment as to commercial reasonableness.

Mountaineer also argues "sale price" is some sort of proof of commercial reasonableness. Resp't Br. 10, 30-33, 36. However, this fails

on the evidence and the law. “The primary focus of commercial reasonableness is not the proceeds received from the sale but rather the procedures employed for the sale.” *Mount Vernon Dodge, Inc., v. Seattle-First Nat’l Bank*, 18 Wn. App. 569, 585, 570 P.2d 702, 711 (1977). “[T]he price element alone does not establish the commercial reasonableness of a sale.” *Nat’l Blvd Bank v. Jackson*, 92 Ill. App. 3d 928, 931, 416 N.E.2d 358, 361 (1981). Moreover, Mountaineer failed to establish uncontradicted, admissible evidence as to a fair price for this particular unit, at the operative time.

The Notice of Sale in this case is not only statutorily insufficient, but also insufficient in regards to commercial reasonableness. Sufficient Notice of Sale is a required element of commercial reasonableness. *See United States v. Cawley*, 464 F. Supp. 189, 191 (E.D. Wash. 1979). Two clear illustrations show the February 17, 2009, Notice of Sale could not sufficiently provide the Heaths sufficient notice of the sale, because Mountaineer did not know what would take place surrounding the sale.

First, Mountaineer states that it was “the initial intention of Mountaineer to close the public bidding on the same date it opened, having been notified by Alpine that people were [sic] still calling with inquiries, Mountaineer decided to keep bidding open past March 2, 2009 . . . .” Resp’t Br. at 19. Secondly, according to Mountaineer’s audit trail on

March 5, 2009, Mr. Williams (seller) left a message stating, “ad ran all last week and has had 3 offers . . . should have up to 7 or so offers by Monday 3/9/09 . . . .” CP 210. Based on this, the decision to have a continuing sale was made, at the earliest, on March 2, 2009, therefore, the February 17, 2009 letter could not give the Heaths any notification of this type of sale.

Based on these factual issues, which are illustrative of the numerous problems discovered in the alleged sale, there are genuine issues of material fact regarding the commercial reasonableness of the sale and the trial court erred in granting summary judgment to Mountaineer.

2. The Issue of Commercial Unreasonableness Raises a Rebuttable Presumption, Placing On Mountaineer the Burden of Proof Regarding Its Entitlement to Deficiency.

Mountaineer suggests that RCW 62A.9A-625(d) bars the Heaths’ minimum remedy under RCW 62A.9A-625(c)(2). Mountaineer misquotes the actual text of RCW 62A.9A-625(d) when it posits statutory damages unavailable “to the extent the debtor is also pursuing an elimination of the deficiency pursuant to RCW 62A.9A-626.” Resp’t Br. 27. “[A] debtor . . . may not recover under subsection (b) or (c)(2) of this section for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance to the extent that its deficiency is eliminated or reduced under RCW 62A.9A-626.” RCW 62A.9A-625(d) (Emphasis added).

Not only is RCW 62A.9A-625(d) actually inapplicable to the case at hand because the amount of the Heaths' deficiency has not been eliminated or reduced under RCW 62A.9A-626, the provision is not a bar to statutory damages, and only applies where the issue is commercial reasonableness.

Two things must occur in order for RCW 62A.9A-626 to apply. One, the trier of fact must find that the sale was not commercially reasonable. “[I]f the secured party’s compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.” RCW 62A.9A-626(2). The “burden of proving commercial reasonableness is on the creditor, who is in the better position to know and control the nature of resale, and is the one asserting the deficiency judgment.” *Rotta v. Early Indus. Corp.*, 47 Wn. App. 21, 24-25, 733 P.2d 576, 578 (1987). Two, Mountaineer must then fail to rebut the presumption that the value of the collateral is equal to the amount of the deficiency as provided for in RCW 62A.9A-626(3)(B), (4). In accordance with this Court’s holding in *Empire S., Inc. v. Repp*, 51 Wn. App. 868, 879, 756 P.2d 745, 750-51 (1988):<sup>1</sup>

*In order to overcome that presumption, the secured party has the burden of either (1) obtaining a fair and reasonable appraisal at or near the time of repossession, or (2) producing convincing*

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<sup>1</sup> The reason for the Code’s emphasis on “like condition” is recognition of the significant variance among vehicles of like age or mileage that derives from *condition* (of *e.g.* paint, tires, interior, motor, etc.) and resultant impact on market value. See *e.g. Savoy v. Beneficial Bank*, 503 Pa. 74, 468 A.2d 465, 468 (1983).

*evidence of the value of the collateral. In order to meet the latter burden, the secured creditor is required to bring forward proof of the condition of the collateral and the usual price of items of like condition. (Emphasis in original.)*

In this case, the only amount that has been applied is the alleged sale proceeds of \$4000.00, as required by RCW 62A.9A-615. CP 213.

Mountaineer's argument that RCW 62A.9A-626 somehow bars the Heaths recovery to any statutory damages is therefore flawed in three different ways. First, Mountaineer in making this argument gets ahead of itself. The Heaths have alleged that the sale was conducted in a commercially unreasonable manner and this should have shifted the burden of proving commercial reasonableness to Mountaineer. If this Court agrees that there are factual issues surrounding the (un)reasonableness of the disposition as Heaths argue, the case will be remanded, and Mountaineer can still seek to overcome a rebuttable presumption regarding the value of the collateral.

Second, RCW 62A.9A-625(d) by its terms does not completely bar damages under 9625(c)(2) when the amount of the deficiency is reduced under RCW 62A.9A-626. RCW 62A.9A-625(d) says the debtor may not recover under RCW 62A.9A-625(c)(2) "to the extent that the deficiency is eliminated or reduced under RCW 62A.9A-626." The statute does not bar statutory damages "if" the deficiency is eliminated or reduced, but merely

allows a setoff “to the extent” of such reduction. *Id.* For example, if the consumer had a \$10,000 deficiency that is eliminated under 9-626 but would otherwise be entitled to \$12,000 in statutory damages under 9-625(c), then the damages would be reduced “to the extent” of the waived deficiency. The net result, of course, would be that the creditor owes the debtor \$2,000 in statutory damages but not the full \$12,000. This is to prevent “double dipping” when the sale of the collateral is commercially unreasonable. *See* Wash. Cmt. to 2003 Main Volume RCW 62A.9A-626. Permitting any deficiency reduction to bar all statutory damages under RCW 62A.9A-625(c)(2) would effectually negate the minimum damages portion of RCW 62A.9A-625(c)(2). An automatic, total setoff rule would encourage the commercially unreasonable disposition of collateral. In such a scenario, any departure from commercially reasonable standards would completely immunize a secured party from liability for statutory minimum damages arising from all other misconduct. It is apparent that a reasonable disposition is to be encouraged and that the drafters intended a more measured approach, reducing damages only “to the extent” – *i.e., in the amount by which* the deficiency is eliminated or reduced.<sup>2</sup>

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<sup>2</sup> It must be assumed that the legislature chose the statutory language with care, and did not casually employ words reflecting a measured sum *i.e.*, “to the extent” if it meant a very different “if” or “whenever.” *See Barnes v. Wash. State Community Coll. Dist. No. 20*, 85 Wn. 2d 90, 92-93 (1975)(recognizing that legislature could have created a different meaning in a statute “by substituting the word ‘if’ for the words ‘to the extent

Third, Mountaineer again confuses the two separate issues of insufficient notice with commercial reasonableness. RCW 62A.9A-626 applies “[w]hen a secured party seeks a deficiency after disposing of collateral in a manner that is not commercially reasonable.” Wash. Cmt. to RCW 62A.9A-626. This means that RCW 62A.9A-626 only applies to the issue of commercial reasonableness, in other words the violation of RCW 62A.9A-610 and not to the violation and statutory damages that flow from the violation of RCW 62A.9A-614.

In short, while the Heaths are entitled to minimum damages “in any event” under RCW 62A.9A-625(c)(2) for insufficient notice under RCW 62A.9A-614, that insufficient notice is only one element of the commercial reasonableness of the sale under RCW 62A.9A-610. *See Rotta*, 47 Wn. App. at 25, 733 P.2d at 578-79. Thus, the Heaths may or may not be liable to Mountaineer for some deficiency, depending on Mountaineer’s ability to prove commercial reasonableness and meet the rebuttable presumption under RCW 62A.9A-610 and RCW 62A.9A-626.

**C. Procedural Issues Should Not Affect the Court’s Treatment of Case Because the Record was Not Supplemented and No Issues Were Raised Inappropriately.**

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that”), *Wash. Mut. Sav. Bank v. Dep’t of Revenue*, 77 Wn. App. 669, 676-77, 893 P.2d 654, 657-58 (Div. 1 1995) (omitting these words in statutory interpretation the subject tax statute “makes the ‘to the extent’ language superfluous, something this court cannot do when interpreting statutes.”) (citations omitted). Elsewhere in the revised UCC, the drafters likewise used the phrase “to the extent of” to mean only “in the amount up to.” *See* Off. Cmt. 7 to RCW 62A.9A-103.

The Heaths contend they did not violate RAP 9.12. Nevertheless, RAP 1.2 supports allowing both the depositions and the letter from the Department of Licensing to be considered in this case. RAP 1.2(a) states, “[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” This policy was further established by the Washington State Supreme Court in *State v. Olson*, which held the Appellate Court may exercise its discretion to consider cases and issues on the merits despite one or more flaws in appellant’s compliance with Rules of Appellate Procedure. *See* 126 Wn.2d 315, 893 P.2d 629 (1995).

1. The record was not supplemented.

RAP 9.12 states, “[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” However, this appeal is from both a motion for summary judgment and a motion for reconsideration. RAP 9.1 states that “[t]he ‘record on review’ may consist of (1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.” RAP 9.1(a). The Heaths included the documents attached as exhibits to their motion for reconsideration that were classified as “clerk’s papers.” The depositions of both Mountaineer Representative Tom Olesky and Seller

Mark Williams were taken on August 24, 2010, and August 25, 2010, respectively. *See* CP 446 and CP 419. However, transcripts were not received until September 27, 2010, and September 16, 2010, respectively.

The Heaths moved for summary judgment on June 25, 2010, based on Mountaineer's answers to the Heaths' request for admissions. CP 82. Namely, that Mountaineer sold the vehicle on April 15, 2009, and that Mountaineer did not give the Heaths Notice of Sale regarding the April 15, 2009 sale. CP 87. Oral argument was heard on September 17, 2010. CP 379. The Heaths could not continue the summary judgment hearing because trial was set to begin on September 27, 2010. The Heaths felt these depositions were important and referred to them in their Summary Judgment Reply, submitted to the court on September 10, 2010. The Heaths, not having a transcript, could not pinpoint cite. *See* CP 255.

Contrary to Mountaineer's assertion that the deposition confirmed the affidavits of Mountaineer Representative Mr. Olesky and Mr. Williams (seller), (Resp't Br. 16), the evidence instead shows the exact opposite. For example, the affidavit of Mark Williams, which states, "[n]otice was given in said advertisements that Alpine would start accepting bids from the public at 9:00 am on March 2, 2009." CP 133. This affidavit is rebutted by Mr. Williams' deposition in three ways: 1) Mr. Williams testified that he could not remember the language of the advertisement

(CP 429, p 39-40); 2) that as of March 2, 2009, and after a full week of advertising, approximately three bids were received (CP 430, p 42) suggesting that bidding began before March 2, 2009; and 3) that no live oral auction was held. CP 408; CP 430. Inconsistency between the affidavit and the deposition further establishes disputed issues of material fact, precluding summary judgment.

Also in question is the letter from the Department of Licensing. Resp't Br. 24. The Heaths entered this letter into evidence on September 14, 2010. CP 326. It is included in the record prior to CP 398, Mountaineer's requested record cut-off. Resp't Br. 15. The Heaths submitted this document as an exhibit to their motion for reconsideration. CP 442. The Heaths did not submit the letter into evidence when the reply to summary judgment was filed as the issue was not able to be raised in the initial memorandum. The trial court was in possession of this document three days before the oral argument on summary judgment and had the letter before it when reviewing the later motion for reconsideration. This is sufficient to put the matter before the court below and place the evidence in the record. *See Beal Bank, SSB v. Sarich*, 147 Wn. App. 1030 (2008) (In UCC case, issue of commercial reasonableness raised for the first time in answer to creditors *reviewed* motion for summary judgment found "adequately preserved" for appellate review). Mountaineer was also put on

notice of this document, and its contents, before the motion for reconsideration. CP 326. In other words, these documents were in the record, and Mountaineer has not shown, or even alleged, prejudice from the timing of the filing.

2. The Appellants properly preserved the “method of sale” issue, although it is merely a sub-issue.

Mountaineer contends that the Heaths inappropriately raised the ‘method of sale’ issue late. Resp’t Br. 16-17. However, it was in the Heaths’ motion for reconsideration. CP. This Court has held that issues in motions for reconsideration ought to be considered and are sufficiently raised and preserved for appellate review. *See Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122, 1125 (1986).

The Heaths fully agree that Mountaineer chose to note a public sale instead of private sale, and therefore, must meet the requirements of RCW 62A.9A-610, RCW 62A.9A-611, and RCW 62A.9A-614. The Heaths’ brief states “no public sale took place at all (rather a private bidding scheme), and that no further notice was sent to the Heaths.” Resp’t Br. 16 citing Appellants’ Br. 14. However, this was a reference to the fact that there was no live auction held on March 2, 2009, at 9:00 a.m. *See* Appellants’ Br. 14; CP 408; CP 453, p 30, ln. 1-3. The word ‘private’ was used not to classify the sale, but rather as a description of the fact that

bidders did not know what their competitors were bidding, therefore the sale did not promote competition. Appellants' Br. 14, 19. The phrase 'private sale' was used in a citation, which states a private sale "usually does not occur at a pre-appointed time and place, and may or may not be generally advertised" to show that a public sale does occur at a pre-appointed time and place and is generally advertised. Appellants' Br. 16.

### III. CONCLUSION

The Heaths request judgment be entered as a matter of law regarding deficient Notice of Sale, or remanded to the trial court with instructions, that statutory damages in the amount of \$32,403.30, and that the matter be remanded to determine costs and reasonable attorney's fees for efforts in this court and below. Furthermore, the Appellants request the decision of the Superior Court of Spokane County be reversed, the matter be remanded for trial on commercial reasonableness regarding any sale that may have occurred, and Mountaineer's entitlement to a deficiency, if any.

RESPECTFULLY SUBMITTED, this 13<sup>th</sup> day of May, 2011.

#### UNIVERSITY LEGAL ASSISTANCE



Alan L. McNeil  
Attorney for Appellants  
WSBA #7930



Sophia A. Medina  
Legal Intern for Appellants  
WSBA #9117772

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

GARY HEATH and BARBARA HEATH,  
husband and wife, and the marital community  
comprised thereof,  
  
Appellant.  
  
vs.  
  
MOUNTAINEER INVESTMENT LLC, a  
foreign corporation  
  
Appellee.

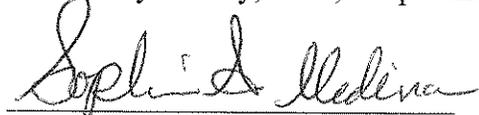
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) APPELLANTS' REPLY BRIEF  
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I, Sophia A. Medina, hereby declare that I served a true and correct copy of the foregoing Appellants' Reply Brief, via U.S. Mail delivery, to all parties named below:

Delian P. Deltchev  
Ewing Anderson. P.S.  
522 W. Riverside, Suite 800  
Spokane, WA 99201

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

Dated this 13<sup>th</sup> day of May, 2011, at Spokane, Washington.

  
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Sophia A. Medina