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

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, National Association,

Respondent

v.

AZURE CHELAN, LLC,  
a Washington limited liability company,

Appellant.

v.

LPSL CORPORATE SERVICES, INC., a Washington  
Corporation

Respondent

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

Defendant/Appellant Azure Chelan, LLC (“Azure”) appeals from a pair of erroneous summary judgment rulings, in which the trial court allowed a junior lienholder to invalidate Azure’s senior lien.

Azure possessed a senior, secured interest in real property in Chelan County, Washington, (“Property”), which was intended to be developed for residential housing. Washington Federal<sup>1</sup> later obtained an invalid Deed of Trust that purportedly conveyed a junior security interest in the same property covered by Azure’s senior lien.

In 2011, the Bank foreclosed on its invalid junior interest and obtained a Trustee’s Deed (which was also invalid for additional reasons). Then, claiming to be “owner” of the property subject to Azure’s lien, the Bank invoked RCW 7.28.300 (which confers standing only on property “owners”) to seek to invalidate Azure’s allegedly time-barred senior lien. The trial court awarded summary judgment quieting title in the Bank and invalidating Azure’s senior lien. It is undisputed that without

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<sup>1</sup> Washington Federal is successor to Horizon Bank (collectively the “Bank”).

RCW 7.28.300, the Bank would have no standing to assert the borrower's statute of limitation defense and its quiet title claim would fail as a matter of law.

The Bank's position reflects two primary flaws, both of which are independently fatal to its summary judgment motion. First, because the Bank's Deed of Trust was invalid (LHDD1 having disabled itself to make any further encumbrance after granting Azure's Deed of Trust) the Bank did not take valid legal title to the Property when it foreclosed in 2011. Second, the Trustee did not convey the property described in the Bank's Deed of Trust and called out in the Notice of Sale; instead the Bank caused the Trustee (a subsidiary of the Bank's law firm) to draft an entirely new property description that it inserted in the Trustee's Deed, which the Trustee was without power to convey. As it does not own the Property, the Bank lacked standing under RCW 7.28.300 to quiet title. For either reason, summary judgment quieting title in the Bank's favor under RCW 7.28.300 was error.

The trial court expressed "concern" that the Bank's law firm "unilaterally changed the legal description" without court

approval and while acting as trustee.<sup>2</sup> While the Bank claims, with absolutely no evidentiary support, that the effect of the new and different property description it caused the Trustee to put into the Trustee's Deed was merely to correct a "scrivener's error," the evidence before the trial court was that the errors in the legal description were "profound" and material. On summary judgment the trial court was not allowed to ignore those errors. Summary judgment under RCW 7.28.300 was error because questions of fact exist about: (1) whether anything was actually conveyed to the Bank, and (2) whether that which was purportedly conveyed included the Property securing the Azure Deed of Trust.

The trial court also erred in accepting the Bank's argument that the 6-year statute of limitation on Azure's claim against its borrower began to run in May 2007 (when the Bank agreed that Azure accelerated debt). While the Bank was only able to support this position by pointing to a single unsigned, undated document, Azure offered evidence not only that it did not accelerate the debt in May 2007, but that the borrower cured

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<sup>2</sup> CP 0-0429, CP 0-0548.

defaults by making substantial payments after this date, and that acceleration did not occur until later in August 2009. Even *if* acceleration did occur in May 2007, questions of fact exist as to whether Azure's acceptance of the borrower's payments reinstated the secured obligations or constituted either abandonment or waiver of any acceleration. To complete the record, Azure offered evidence that it actually accelerated the debt in August 2009.

The Bank also sought, and erroneously obtained, summary judgment on Azure's counterclaims that the Bank's Deed of Trust and the Trustee's Deed it obtained at the foreclosure sale were invalid, the Bank slandered Azure's title, the Trustee breached various legal duties, and that the Bank's claims were frivolous

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting summary judgment in favor of the Bank on its quiet title claim based on expiration of the statute of limitations.<sup>3</sup>

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<sup>3</sup> CP 0-0429, CP 0-0453, CP 0-0454 – 459.

2. The trial court erred in quieting title in the subject property in favor of the Bank.<sup>4</sup>

3. The trial court erred in granting summary judgment in favor of the Bank on Azure's counterclaims.<sup>5</sup>

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Bank had standing to assert a statute of limitations defense to defeat Azure's senior Deed of Trust, including whether the Bank met its burden of proving it is the "owner" of the subject property under RCW 7.28.300.

(Assignments of Error 1-3).

2. Whether the Bank's junior Deed of Trust was valid. (Assignments of Error 1-3).

3. Whether the Foreclosure Trustee's insertion of a new, materially different legal description in the Trustee's Deed rendered the Trustee's Deed void and/or ineffective to convey any property interest. (Assignments of Error 1-3).

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<sup>4</sup> CP 0-0429, CP 0-0453, CP 0-0454 – 459.

<sup>5</sup> CP 0-0544 – 0-0547, CP 0-0548.

4. Whether questions of fact exist concerning when the statute of limitations began to accrue on Azure's claim against LHDD1. (Assignments of Error 1-2).

5. Whether questions of fact exist concerning when Azure accelerated the underlying loan. (Assignments of Error 1-2).

6. Whether questions of fact exist concerning whether Azure either waived or abandoned the alleged debt acceleration. (Assignments of Error 1-2).

7. Whether questions of fact exist on Azure's counterclaim that the Bank's Deed of Trust was invalid because LHDD1 had no ability to grant a second trust deed encumbering the same property as covered by Azure's Deed of Trust. (Assignment of Error 3).

8. Whether questions of fact exist on Azure's counterclaim that the Bank's Deed of Trust and Trustee's Deed were invalid because they lack proper legal descriptions. (Assignment of Error 3).

9. Whether questions of fact exist on Azure's counterclaim that the Bank's Deed of Trust and the Trustee's

Deed amount to a slander of title to the subject property.

(Assignment of Error 3).

10. Whether questions of fact exist on Azure's counterclaim that the Foreclosure Trustee violated RCW 61.24.

(Assignment of Error 3).

#### IV. STATEMENT OF THE CASE

##### A. Background Facts.

##### 1. February 2007 - Azure's senior Deed of Trust was created.

The subject property ("Property") is known as the Lake Hills Estates, a 168-acre tract next to the Chelan public golf course. Jack Mr. Cole, the owner of Azure, acquired the Property in 2005 for the purpose of development into single-family residential lots.<sup>6</sup> Mr. Cole is now 75-years old and retired; this investment accounts for a significant part of his retirement.<sup>7</sup>

Mr. Cole formed a development company for his involvement in the project – Azure Chelan, LLC. Azure joined with an unrelated development partner, Lakehills Development

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<sup>6</sup> CP 0-0326, 0-0336 – 337.

<sup>7</sup> CP 0-0327.

LLC, to form a single-purpose development company for this project, Lake Hills Development Division 1, LLC (“LHDD1”). Mr. Cole was the LLC Manager of LHDD1.<sup>8</sup>

Development of the Property began in 2005. The plan was to develop the Property in two phases: Phase 1 would consist of 86 residential lots on a 46-acre portion on the West end of the Property. Once the Phase 1 lots were sold, LHDD1 was to go through a similar process in Phase 2, which was expected to be roughly 120 lots on the remaining 122 acres at the East end of the Property.<sup>9</sup>

In February 2007, Lakehills Development LLC purchased Azure’s interest in the development in an Equity Redemption Agreement for cash and a \$5,500,000 Promissory Note (“Azure Note”).<sup>10</sup> The Equity Redemption Agreement<sup>11</sup> and the Note were secured by a recorded first Deed of Trust on the Phase 2 portion of the Property (“Azure Deed of Trust”). The Phase 1 portion of the Property was left unencumbered for the express purpose of

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<sup>8</sup> CP 0-0326, 0-0336 – 337.

<sup>9</sup> Id.

<sup>10</sup> CP 0-0354 – 0358.

<sup>11</sup> CP 0-0360 – 0367.

permitting LHDD1 to obtain construction financing for the development work on Phase 1.<sup>12</sup>

The Azure Deed of Trust specifically prohibited subordinate Deeds of Trust on Phase 2.<sup>13</sup> As the Azure Deed of Trust was recorded in February 16, 2007, the Bank had record notice of the fact that LHDD1 had relinquished its right to grant any further encumbrance over Phase 2 property without either paying Azure or obtaining its written consent, which the Bank never sought nor received.

When Azure and LHDD1 executed the Promissory Note and Deed of Trust in February 2007, the parties intended that LHDD1 would apply for and obtain a construction loan from another lender.<sup>14</sup> The agreed upon plan allowed LHDD1 to obtain a construction loan using Phase 1 of the Property as collateral, develop the 46 acres in Phase 1 into approximately 86 building lots, and then upon completion repay the Promissory Note in a lump sum to Azure.<sup>15</sup> Azure's Deed of Trust was

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<sup>12</sup> CP 0-0326 – 327, CP 0-0336 – 337.

<sup>13</sup> CP 0-0343.

<sup>14</sup> CP 0-0328, CP 0-0336 – 337, CP 0-0355 – 0356.

<sup>15</sup> Id.

therefore limited to the acreage within Phase 2, as to which LHDD1 formally disabled itself to make any conveyance or further encumbrance without Azure's consent or by paying off its obligation to Azure.

## **2. Spring 2007 - LHDD1 defaulted.**

LHDD1 defaulted in the spring of 2007.<sup>16</sup> However, as it was entitled to, Azure elected to accept the payments, actions, assurances, and other commitments of LHDD1 to cure the defaults rather than initiate foreclosure in 2007.<sup>17</sup> Azure opted to permit LHDD1 to cure the defaults or, in some instances, temporarily excused performance of the defaulted terms.<sup>18</sup> While, Azure continued to send LHDD1 Notices of Default,<sup>19</sup> in each event Azure elected to accept the assurances from LHDD1 as supporting a cure or excuse of those default events.<sup>20</sup>

As part of the accommodation to LHDD1, Azure accepted late payments in the spring of 2007 after sending out default notices. As an example, the first Notice of Events of Default

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<sup>16</sup> CP 0-0368, CP 0-0387.

<sup>17</sup> CP 0-0328 – 329, CP 0-0336 – 337.

<sup>18</sup> Id.

<sup>19</sup> CP 0-0376 – 377, CP 0-0378 – 387.

<sup>20</sup> CP 0-0329, CP 0-0336 – 337.

listed various payments that LHDD1 was required to make.<sup>21</sup>

The May Notice relied upon by the Bank recited that to reinstate the Deed of Trust, LHDD1 must pay those amounts.

<sup>22</sup>LHDD1 made the required partial payments.<sup>23</sup>

**3. May 2007 - Bank obtained invalid junior security interest.**

In May 2007, three months after Azure recorded its Deed of Trust, Horizon Bank extended a \$9,900,000 construction loan to LHDD1 (“Horizon Loan”).<sup>24</sup> Despite having knowledge of the Azure’s Deed of Trust, in which LHDD1 had disabled itself to grant any further encumbrance, and having no evidence of Azure’s written consent (which was never given) Horizon Bank attempted to secure its loan via a junior Deed of Trust (“Bank Deed of Trust”).<sup>25</sup> which purported to encumber all of the Property, including Phase 2.<sup>26</sup>

**4. August 2009 - Azure declared LHDD1 in default.**

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<sup>21</sup> CP 0-0369 – 371.

<sup>22</sup> CP 0-0311 – 317.

<sup>23</sup> CP 0-0329, CP 0-0336 – 337.

<sup>24</sup> CP 0-0257.

<sup>25</sup> CP 0-0260 – 271.

<sup>26</sup> CP 0-0327, CP 0-0336 – 337.

The Azure Note was due at the completion of the construction and sale of Phase 1 lots, and carried an outside limit for LHDD1's payment of 24 months from the funding date in February 2007.<sup>27</sup>

By mid-2009, it was apparent to Azure that LHDD1 was bankrupt, and that LHDD1 could not complete and sell the Phase 1 lots without additional investment of somewhere between \$500,000 and \$2 million.<sup>28</sup> Accordingly, Azure served upon LHDD1 another, updated Notice of Events of Default, which went uncured. Azure also elected at that time to accelerate the Azure Note with a Statutory Notice of Default under RCW 61.24.<sup>29</sup> This notice was dated August 7, 2009, thus allowing Azure until August 2015 to foreclose on LDHH1.

Significantly, at this time the Bank approached Azure about completing the project on its behalf.<sup>30</sup> Based on the possibility of working with the Bank to complete the project, Azure elected not to proceed with foreclosure.<sup>31</sup> During these

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<sup>27</sup> CP 0-0355.

<sup>28</sup> CP 0-0330, CP 0-0336 – 337.

<sup>29</sup> CP 0-0330, CP 0-0388 – 405.

<sup>30</sup> CP 0-0330, CP 0-0336 – 337.

<sup>31</sup> CP 0-0330, CP 0-0336 – 337.

discussions, the Bank was in a first secured position on Phase 1, and Azure was in a first (and sole) secured position on Phase 2. Together, the parties had the opportunity to proceed with the project.

**5. 2010-2011: Washington Federal purportedly acquired Property through foreclosure.**

Horizon Bank failed on January 8, 2010, and Washington Federal acquired the Horizon Loan from the FDIC receivership of Horizon Bank and became the beneficiary under the Bank Deed of Trust.<sup>32</sup> When LHDD1 defaulted by failing to pay amounts due under the Horizon Loan, Washington Federal caused a trustee to non-judicially foreclose on the Bank's Deed of Trust in January, 2011.<sup>33</sup>

**6. The Foreclosure Trustee unilaterally inserted a new, materially different legal description into the Trustee's Deed.**

After the foreclosure sale, the Bank decided it wanted to take title to property described differently than its Deed of Trust. It had the Trustee insert an entirely new and different

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<sup>32</sup> CP 0-0258.

<sup>33</sup> Id., CP 0-0272 – 282

legal description into the Trustee's Deed. The Bank claims the changed description was to correct some "scrivener's errors."<sup>34</sup> However, the Bank offered no evidence to support that assertion, and the evidence of record is that there *were no* "scrivener's errors": the property description that was covering Phase 2 contained in the Bank's Deed of Trust was faithfully copied from Azure's Deed of Trust over Phase 2, and was faithfully set out in the Notice of Trustee's Sale.

At the Bank's instance, the trustee, LPSL Corporate Services, Inc., a company that is a subsidiary of the Bank's law firm,<sup>35</sup> changed the legal description to one that appears entirely different, as to which there is no evidence what property it now covers.<sup>36</sup> Of note, the officers of LPSL are practicing lawyers with the Bank's law firm — Lane Powell.<sup>37</sup> Thus, the Bank's law firm, acting as the Foreclosure Trustee and with the assistance of the title company, created and recorded a new, revised Trustee's Deed using the "corrected" legal description, without

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<sup>34</sup> CP 0-0417

<sup>35</sup> CP 0-0422 – 423.

<sup>36</sup> CP 0-0417, CP 0-0422 – 423.

<sup>37</sup> CP 0-0422, CP 0-0427 – 428.

notice to any interested party and without court approval.<sup>38</sup>

**B. Procedural History.**

**1. Bank's first summary judgment motion.**

After amending its Complaint to include a quiet title claim under RCW 7.28.300, the Bank moved for summary judgment, arguing that Azure's Deed of Trust was unenforceable because the statute of limitations on its claim against LHDD1 on the secured obligations had run. After realizing that the Trustee's Deed (the document under which the Bank claimed ownership) contained a new and materially different legal description from that appearing in the Bank's Deed of Trust and Notice of Sale, the trial court requested additional briefing on the issue.<sup>39</sup> This was because of the trial court's "concern" that Lane Powell had unilaterally changed the legal description without court approval and did so while acting as trustee.<sup>40</sup>

On January 29, 2015, the trial court granted summary judgment in favor of the Bank, quieting title as requested based

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<sup>38</sup> Id.

<sup>39</sup> "Upon review of the motion, the court noted the difference in language between the legal descriptions appearing in the deeds of trusts and the legal description appearing in trustee's deed." CP 0-0421.

<sup>40</sup> CP 0-0429.

on the expiration of the statute of limitations under RCW 7.28.300.<sup>41</sup> The trial court did *not* rule that the statute of limitations had run as to LHDD1's underlying obligations; rather it carefully limited its order to a determination that the statute of limitations barred Azure's right to enforce the Deed of Trust. The trial court's order certified the issue as final under CR 54(b), and Azure timely filed a notice of appeal.<sup>42</sup>

**2. Bank's second summary judgment motion.**

After entry of the initial order on summary judgment, the Bank filed a second summary judgment motion, seeking dismissal of Azure's counterclaims. The trial court granted this motion, dismissing Azure's counterclaims on June 26, 2015.<sup>43</sup> Azure timely filed a notice of appeal of this order on July 17, 2015.<sup>44</sup> Subsequently, upon Azure's motion, the two appeals were consolidated.

**V. SUMMARY OF ARGUMENT**

The only way the Bank could take advantage of LDHH1's

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<sup>41</sup> CP 0-0454 – 459.

<sup>42</sup> CP 0-0460 – 469.

<sup>43</sup> CP 0-0544 – 547.

<sup>44</sup> CP 0-0549 – 555.

personal statute of limitations defense and quiet title was as “owner” of the property under RCW 7.28.300. That statute only allows owners to quiet title. The Bank did not become an owner, however, for two reasons. First, LHDD1, as grantor, could not convey any more than it had, and at the time it granted the second Deed of Trust to Horizon it had disabled itself to grant any further encumbrance (of which fact Horizon was on notice). Second, the Trustee’s Deed purportedly conveying title from the Trustee to the Bank contained a property description materially different from that in the Bank’s purported Deed of Trust, which was published in the Notice of Trustee’s Sale.

The Bank’s improper attempt at self-help by “correcting” the Trustee’s Deed invalidated any conveyance because the Trustee (a) had no authority under the Deed of Trust Act to invent a new legal description, and was forbidden to do so under the Statute of Frauds, and (b) could not convey title to other than what it actually held. On this record, there is simply no way of knowing what property is covered by the new property description, but it was neither within the Trustee’s authority to insert a new and different property description into its deed, nor

to convey any property other than exactly what it held, if anything. If the Bank wanted to change the legal description for its Trustee's Deed, it needed to take title then petition the court to reform the Deed. It is not clear that the Bank owns any of the Property securing Azure's Deed of Trust, and there are questions of fact about whether the Bank had a right to rely on RCW 7.28.300 as a mechanism to quiet title. Consequently, summary judgment was erroneously granted.

Alternatively, even if the Bank was the "owner" of the Property, material questions of fact exist as to when the six-year statute of limitations began to run on Azure's claim against LDHH1. Specifically, material questions of fact exist as to whether and when Azure accelerated the Azure Note and whether subsequent acts amounted to a waiver or abandonment of any acceleration.

There is a complex and disputed factual record relating to Azure's counterclaims, including issues concerning whether the Bank obtained anything in its Deed of Trust, the validity of the Trustee's Deed, and the Foreclosure Trustee's failed attempt to unilaterally modify the Trustee's Deed without court approval.

Consequently, the trial court erred in dismissing Azure's claims on summary judgment.

## VI. ARGUMENT

### A. The trial court's rulings on summary judgment are subject to *de novo* review.

An order granting summary judgment is subject to review *de novo*, and the appellate court engages in the same inquiry as the trial. See *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). Summary judgment is only warranted when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c). The burden is on the party seeking summary judgment to demonstrate the absence of a genuine issue of material fact. *Folsom*, 135 Wn.2d at 663. All of the facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. See *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6 (2012). Even where the evidentiary facts are undisputed, if reasonable minds could draw different inferences from those facts, then summary judgment is not warranted. See *Chelan Cnty. Deputy Sheriffs Ass'n v. Chelan Cnty.*, 109 Wn.2d 282, 294-95 (1987).

For purposes of determining whether there is a genuine issue of material fact for trial, materiality is based on the governing substantive law. *See Rossiter v. Moore*, 59 Wn.2d 722, 724 (1962) (indicating “material facts” are determined “under applicable principles of substantive law”; quotation omitted); *Morris v. McNicol*, 83 Wn.2d 491, 494 (1974) (indicating “a ‘material fact’ is a fact upon which the outcome of the litigation depends”).

**B. The trial court erroneously granted summary judgment on the Bank’s quiet title claim based on expiration of the statute of limitations.**

In its Amended Complaint, the Bank asserted four causes of action.<sup>45</sup> The Bank sought summary judgment on only one of its claims,<sup>46</sup> which was an assertion that Azure’s senior deed of trust was unenforceable because enforcement of the underlying debt was barred by the applicable statute of limitations.

The Bank’s summary judgment motion was flawed because (1) the Bank lacked standing to raise the LHDD1’s statute of limitations defense and, alternatively, (2) material

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<sup>45</sup> CP 0-0181 – 239.

<sup>46</sup> CP 0-0243, n.3.

questions of fact existed concerning whether LHDD1's debt was accelerated on the date claimed by the Bank.

**1. Bank lacks standing to quiet title based on LHDD1's statute of limitation defense.**

It is axiomatic in every American jurisdiction, including Washington that a defense based upon the statute of limitations in personal to a defendant, *Vern. J. Oja & Ass'n. v. Wash. Park Towers Inc.*, 89 Wn.2d 72 (1977), and may be waived, *Boyle v. Clark*, 47 Wn.2d 418 (1955). It is equally well settled that one creditor of a debtor may not invoke the debtor's personal statute of limitations defense so as to maneuver ahead of another creditor. *Guar. Sec. Co. v. Coad*, 114 Wash. 156 (1921). The Bank, therefore, lacked standing to invoke LDHH1's personal statute of limitations defense to argue that LDHH1's obligation to Azure is time-barred. There is one narrow exception to that rule; under RCW 7.28.300, a property owner can assert in a quiet title action that a lien clouding his title is time-barred.

The Bank's standing to seek to invalidate Azure's senior Deed of Trust thus rested solely and completely upon its challenged claim of ownership. The Bank's asserted ownership flows solely from the Trustee's Deed, which has no effect because

the Trustee had nothing to convey and because it purports to convey something different from that which LHDD1 purported to give to the Trustee (if the Trustee received anything at all).

At common law, a mortgage existed separately from the obligation it secured; therefore, even when the statute of limitations had run on an underlying debt, a mortgagee still could foreclose on the mortgage. This was in part because the equitable foreclosure action was not governed by the legal statute of limitations defense, and in part because the expiration of the limitation period “bars merely the remedy on the debt, not the right.” *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, 742 (1995) (internal citations omitted). “Washington’s deed of trust statute, RCW 61.24, does not refer to any limitation period for nonjudicial foreclosures.” *Id.* at 743. Thus, under the common law and Washington’s deed of trust statute, expiration of the statute of limitations of the underlying debt would not bar a nonjudicial foreclosure action.

Although the distinction between a deed of trust and a regular mortgage is becoming increasingly less significant, it has not been totally destroyed. One of the most important persisting notions is that it, like other trusts, continues until the

performance of the trust purpose, viz., the payment of the debt for which the trust was created. One result is that there is no time limit on it *except as specifically provided by statute*. Barring of the remedy on the debt has no effect upon the trustee's power to sell the property and pay the debt with the proceeds.

*Walcker*, 79 Wn. App. at 742-743 (citation omitted).

In light of the forgoing, the Washington legislature enacted RCW 7.28.300, which subjects nonjudicial foreclosures to a statute of limitations, but only in quiet title actions brought by the current owner of the subject property. RCW 7.28.300 provides:

The record *owner* of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

(emphasis added).

Absent enactment of RCW 7.28.300, there would be no statute of limitations defense that would block Azure's ability to seek nonjudicial foreclosure of its Deed of Trust, even if collection of the underlying debt against LDHH1 was time barred.

As RCW 7.28.300 only applies to “owners,” the sole basis upon which the Bank could claim standing to quiet title based on the alleged running of the statute of limitations was as an owner of the Property. While the Bank claimed owner status, it failed to establish either the validity of its Deed of Trust (given the clear provision in Azure’s recorded, prior Deed of Trust disabling LDHH1 to grant any further encumbrance), or the validity of the Trustee’s Deed (given the Trustee’s admitted decision to convey a property whose description was materially different from that in the Bank’s Deed of Trust and Notice of Trustee’s Sale). These are of critical significance, because the Foreclosure Trustee was without power to convey a Trustee’s Deed if the Trustee never had title, or, if it did, its effort to convey property different than what was specified in the Bank’s Deed of Trust was invalid. At a minimum, material issues of fact were presented to the trial court on the question, requiring denial of summary judgment.

The Bank’s sole evidence that it was the “owner” of the Property when it sought to quiet title is the Trustee’s Deed it obtained after foreclosure. However, the Trustee’s deed is either

(1) void, or (2) ineffective as a matter of law, or (3) material questions of fact exist concerning its validity. Either way, summary judgment was inappropriate given the Bank's doubtful claim to be an "owner" of the property secured by Azure's Deed of Trust.

**a. Summary judgment was inappropriate because the Bank's Trustee never received title to anything.**

The Deed of Trust LDHH1 granted to Azure, and that Azure recorded in Chelan County in February 2007, provided:

4.11 Sale, Transfer, or Encumbrance of Property. Grantor shall not, without out the prior written consent of Beneficiary . . . further encumber the property or any interest therein . . . without first repaying in full the Note and all other sums secured hereby.<sup>47</sup>

Washington law recognizes that there are different variants of such provisions. According to Professor Stoebuck:

A "disabling" restraint is one that is stated in the form of a prohibition; the transferor in some way forbids the transferee from alienating. A variant form of disabling restraint that is sometimes recognized is a "promissory" restraint, where the transferee promises not to alien. An example of a disabling restraint is a conveyance in which the grantor says "grantee shall not alienate" or a conveyance accompanied by the grantee's covenant not to alienate.

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<sup>47</sup> CP 0-0027.

17 William B. Stoebuck & John W. Weaver, Washington Practice, Real Estate: Property Law § 1.26 (2d ed. 2004 & Supp. 2015).

LDHH1 had clearly agreed to disable itself, consonant with Professor Stoebuck's example: its Deed of Trust provided that it "shall not . . . further encumber the property...." Accordingly, the Deed of Trust that LDHH1 conveyed to Horizon Bank's Trustee conveyed nothing because LDHH1 had nothing left to convey.<sup>48</sup> Because the Trustee took nothing in the Deed of Trust LDHH1 gave it, the Trustee had nothing to convey to the Bank following a foreclosure sale.

- b. Summary judgment was inappropriate because the Trustee's Deed was void and/or purported to convey property the Trustee had no power to convey.**
  - i. The Trustee had no power to alter any legal description, and its attempt to do so was void under the Statute of Frauds.

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<sup>48</sup> We are not confronted here with any difficult equitable question of fairness to the Bank, because Azure's Deed of Trust was of record, and Horizon Bank was clearly aware of it, given that the property description that Horizon Bank used to describe Phase 2 in its Deed of Trust was identical to that in Azure's Deed of Trust.

A Trustee under a Deed of Trust has no power to alter legal descriptions. In *Bigelow v. Mood*, 56 Wash.2d 340, 341, 353 P.2d 429 (1960), the Washington Supreme Court reiterated the long-established rule that:

[I]n order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description. Conveyances of land must contain a description of the land that is sufficiently definite to locate it without recourse to oral testimony.

*Bigelow*, 56 Wn.2d at 341 (citing *Berg v. Ting*, 125 Wn.2d 544, 551 (1995); RCW 64.04.010; RCW 64.04.020).

A deed may be reformed, but only in circumstances where an inadequate description resulted from a scrivener's error or because of a mutual mistake. *See, e.g., Berg*, 125 Wn.2d at 553-54. Reformation is an equitable remedy, *Denaxas v. Sandstone Ct. of Bellevue, LLC*, 148 Wn.2d 654, 669 (2013), which *only a court is empowered to grant*. A party seeking reformation must prove the facts supporting it by clear, cogent, and convincing evidence. *Id.*

Nothing in Washington's statutes creating and governing Deeds of Trust (RCW Chapter 61.24) provides an exception to the Statute of Frauds, or empowers a Trustee to collude with a lender to alter a property description in a trust deed.<sup>49</sup> In *House v. Erwin*, 81 Wn.2d 345 (1972), our Supreme Court declared that it would not allow real estate brokers to supply or alter real property descriptions in earnest money agreements, unless the agreement specifically empowered and authorized them to do so, because such authority could not be reconciled with the policies underlying the Statute of Frauds. *House* is directly applicable here, and dictates a holding that the Bank's Trustee could not arrogate to itself the power to reform or rewrite a property description. The Trustee did so here at the direction of the Bank; the product of its effort was void as a matter of law.

ii. There was no scrivener's error.

Even if the Bank's Trustee had authority to "correct" the legal description of the property it purported to convey, no grounds existed to do so here. There was no "scrivener's error".

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<sup>49</sup> A trustee that colludes with the lender/beneficiary commits a violation of the Consumer Protection Act. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013).

The property description of Phase 2 in the Bank's Deed of Trust is identical to that in Azure's Deed of Trust, and was presumably faithfully copied from it. Further, it is undisputed the Notice of Sale published by the Bank's Trustee faithfully set forth the exact same legal description that had appeared in LDHH1's Deed of Trust. There was no intervening error in copying the description into new documents. *Cf. Glepco, LLC v. Reinstra*, 175 Wn. App. 545 (2013). Rather, it is undisputed that the Trustee's Deed obtained by the Bank in foreclosure purports to convey something entirely different than what was set forth in Bank's Deed of Trust, for no better reason than that the Bank wanted it that way. The changes were material: even a cursory comparison of the Bank's Deed of Trust and the Trustee's Deed reveal substantial changes. *Compare* Appendix A (Bank's Deed of Trust),<sup>50</sup> Appendix B (Trustee's Deed),<sup>51</sup> and Appendix C, which is a demonstrative exhibit showing the differences between the two documents.

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<sup>50</sup> CP 0-0260 – 271.

<sup>51</sup> CP 0-0272 – 282.

Recognizing the differences between the legal description in the Bank's Deed of Trust and the Trustee's Deed issued after the Bank's foreclosure, the trial court requested additional briefing on the issue as it related to the Bank's quiet title claim.<sup>52</sup> Without evidentiary support, the Bank argued that its Deed of Trust contained "scrivener's errors" that needed correction. Based on this undefined and unsupported claim of a scrivener's error, the trustee, LPSL Corporate Services, Inc., a subsidiary of the Bank's law firm,<sup>53</sup> altered the legal description "in order to more accurately describe Phase II and to avoid future confusion."<sup>54</sup> Of note, the officers of LPSL are practicing lawyers with the Bank's law firm — Lane Powell.<sup>55</sup> The effect of this was that the Bank's law firm altered the legal description on the Bank's Deed of Trust, for the Bank's benefit, then the Bank's law firm acted as the Foreclosure Trustee, and with the assistance of the title company, created and recorded a Trustee's

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<sup>52</sup> "Upon review of the motion, the court noted the difference in language between the legal descriptions appearing in the deeds of trusts and the legal description appearing in trustee's deed." CP 0-0421.

<sup>53</sup> CP 0-0422.

<sup>54</sup> CP 0-0417.

<sup>55</sup> CP 0-0422, CP 0-0427 – 428.

Deed using the “corrected” legal description, without notice to anyone and without court approval.<sup>56</sup> Without ruling on the legal significance of this conduct, the trial court expressed its “concern” that Lane Powell unilaterally changed the legal description without Court’s approval when acting as trustee.<sup>57</sup>

In contrast to the Bank’s factually unsupported contention that the differences in the legal descriptions were the result of scrivener’s errors, Azure retained a surveyor to examine the legal descriptions and advised that the differences were “profound.”<sup>58</sup> The surveyor gave a preliminary opinion that the legal description in the Trustee’s Deed significantly expanded the land area described, but felt the degree of expansion was difficult to quantify.<sup>59</sup>

- iii. The Bank’s Trustee had no power to convey property different from what was conveyed to it.

It is a fundamental proposition of American law of real property (fully in effect in Washington since Statehood) that a

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<sup>56</sup> Id.

<sup>57</sup> CP 0-0429.

<sup>58</sup> CP 0-0423 and CP 0-0427-28.

<sup>59</sup> Id.

grantor can only convey whatever title it has. “[N]o form of deed is sufficient to convey a title where the grantor has none.” *Ankeny v. Clark*, 1 Wash. 549 (1889). The Bank’s Trustee never held title to the property described in the Trustee’s Deed (whatever it may be). Therefore, alternatively, the Trustee’s attempted conveyance to the Bank was ineffective to convey any interest in the described property, because even assuming LHDD1 had the power to convey any interest in Phase 2 (it didn’t) the Trustee could not in any event have obtained or held title to anything other than the property LHDD1 purportedly conveyed. Accordingly, the Bank was not the “owner” of the property purportedly conveyed to it because the Trustee never held title to it.

**c. Summary judgment was error because the Bank was not the “owner” of the Property.**

The Trustee never received any valid interest in the property covered by Azure’s Deed of Trust. And even if it had, the Trustee’s cavalier attempt at “self-help” substitution of a different legal description is fatal to the Bank’s summary judgment claim. The Bank, to this day, has never sought

judicial reformation of the Trustee's Deed. It is up to the Court, not the Trustee, to assess the facts and determine whether clear, cogent and convincing evidence justifies reformation of the Trustee's Deed. *See Glepco, LLC v. Reinstra*, 175 Wn. App. 545 (2013).

Instead, the Bank and Trustee, acting in concert, elected a self-help remedy and inserted a new and different legal description into the deed without Court approval. This purported reformation either had no legal effect and made the resulting Trustee's Deed void as a matter of law, or, even if it was not void, it purported to convey a property that the Trustee did not own and had no power to convey, and therefore was just as ineffective to convey title as George C. Parker's legendary "deed to the Brooklyn Bridge." The Bank is not the "owner" of the Property and lacked standing under RCW 7.28.300 to quiet title. As the Bank's only mechanism to assert that Azure's Deed of Trust was time barred arose under RCW 7.28.300, which it had no standing to invoke, summary judgment should be reversed and the Bank's quiet title claim should be dismissed for lack of standing as a matter of law.

**d. Questions of fact exist concerning whether Azure accelerated the Azure note.**

- i. The Bank has no argument for a time bar if the Azure Note was not accelerated in early 2007.

Assuming, *arguendo*, that the Bank owned the Property and had standing to avail itself of RCW 7.28.300, summary judgment was still not appropriate because material questions of fact exist concerning when the six-year statute of limitation on Azure's claim against LDHH1 began to run.

The Bank claimed that RCW 4.16.040's six-year statute of limitations barred Azure from enforcing the note against LLHD1 and, therefore, its Deed of Trust was also unenforceable. The Bank's claim is premised on a factual assumption that Azure accelerated all payments on the LDHH1 Note in May 2007. The Bank concedes its argument for a time bar fails if the Note was not accelerated in early 2007. That is so because the terms of the Note did not require payment until February, 2009, and Azure thus had until *at least* February, 2015 to bring suit on the note (and foreclose under its Deed of Trust), if not later.

Because material questions of fact remain as to whether the debt was accelerated, summary judgment is inappropriate.

- ii. Issues of fact exist as to whether any acceleration occurred before August 2009.

The general rule for debts payable by installment provides, “a separate cause of action arises on each installment, and the statute of limitations runs separately against each....” 31 Richard A. Lord, *Williston on Contracts* § 79:17, at 338 (4th ed. 2004). But if an obligation that is to be repaid in installments is accelerated—either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause—the entire remaining balance of the loan becomes due immediately and the statute of limitations is triggered for all installments that had not previously become due. *Id.*; § 79:18, at 347–50; RCW 62A.3-118.

Here, the Azure Note contained an acceleration clause, which permitted, but did not require, acceleration of the entire note balance upon the occurrence of specified default events.<sup>60</sup>

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<sup>60</sup> CP 0-0287.

Under Section 7 of the Azure Note, Azure had the “option” to accelerate the obligation under the terms specified therein.<sup>61</sup>

Azure denies that it accelerated LDHH1’s obligations in its notices in early 2007.<sup>62</sup> It offered evidence that it did not accelerate until mid-2009.<sup>63</sup> That evidence alone was sufficient to require the trial court to deny the Bank’s motion for summary judgment.

Further, the law is settled in this jurisdiction that even if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note. *A. A. C. Corp. v. Reed*, 73 Wn.2d 612, 615-16 (1968) (citing *White v. Krutz*, 37 Wash. 34 (1905)). The same result occurs when, as here, the note may be accelerated only at the option of the holder. *Id.*; *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 803 (1957). Washington’s Supreme Court has held “that mere default in payment does not mature the whole debt, whether there be words of option in the agreement or not. Such a provision

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<sup>61</sup> CP 0-0287.

<sup>62</sup> CP 0-0328 – 329, CP 0-0336 – 337

<sup>63</sup> CP 0-0330 – 331, CP 0-0336 – 337

hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it, before tender is actually made, there is in law no default such as will cause the maturity of the debt before the regular time provided in the agreement.” *A.A.C. Corp.* 73. Wn.2d at 615-616 (quoting *Coman v. Peters*, 52 Wash. 574, 578 (1909)).

Moreover, the Supreme Court has also held that in the case of acceleration, “some affirmative action is required, some action by which the [creditor] makes known to the [debtor] that he intends to declare the whole debt due. *Weinberg v. Naher*, 51 Wash. 591, 594 (1909) (emphasis added). Importantly, “acceleration must be made **in a clear and unequivocal manner** which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.”

*Glassmaker v. Ricard*, 23 Wn. App. 35, 38 (1979) (emphasis added). The reason for this heightened evidentiary standard is so that the “exercise of the option ... be made in a manner so clear and unequivocal as to leave no doubt as to the holder’s intention and to apprise the maker effectively of the fact that the option has been exercised.” C. T. Drechsler, *What is*

*Essential to Exercise of Option to Accelerate Maturity of Bill or Note*, 5 A.L.R.2d 968, § 4[a] (2015).

Once a debt has been accelerated, it can later be abandoned or waived. *Equitable Life Leasing Corp. v. Cedarbrook, Inc.* 52 Wn. App. 497, 501-502 (1988) (holding that acts inconsistent with acceleration constituted, as a matter of law, a waiver of acceleration); *Cent. Wash. Prod. Credit Ass'n v. Baker*, 11 Wn. App. 17 (1974) (course of dealing can include consistent failure to enforce specific contract requirements); *Dunn v. Gen. Equities of Iowa, Ltd.*, 319 N.W.2d 515 (Iowa, 1982) (right to enforce an acceleration clause in an installment note can be waived by a course of dealing accepting late payments); *Khan v. GBAK Prop., Inc.*, 371 S.W.3d 347, 353 (2012) (a note holder who exercises its option to accelerate may abandon acceleration before the limitations period expires, restoring the contract to its original condition, including the note's original maturity date.) Consequently, a “holder can abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity.” *Holy Cross Church of God in Christ v. Wolf*, 44

S.W.3d 562, 567 (2001); *see also* *Rivera v. Bank of Am., N.A.*,

2014 WL 2996159, at \*6 (E.D.Tex. July 3, 2014)

("[A]cceleration was abandoned ... when Defendants accepted a payment subsequent to the acceleration and opted not to foreclose at that time.")

The sole evidence offered by the Bank in support of its assertion that the Azure Note was accelerated is an unsigned, undated Notice of Events of Default,<sup>64</sup> and an unsigned, undated Notice of Default.<sup>65</sup> The Bank argued that the Notice of Events of Default is dated March 16, 2007,<sup>66</sup> and the Notice of Default is dated May 1, 2007. The Bank, therefore, uses May 1, 2007, as the date the statute of limitations began to run.

First, the Bank offered no signed copy of the Notice of Events of Default or Notice of Default, or any proof that either was delivered to LDHH1. Citing Azure's discovery responses, the Bank claims that Azure produced these documents as "Microsoft Word documents used for signing at those times."<sup>67</sup>

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<sup>64</sup> CP 0-0307 – 309.

<sup>65</sup> CP 0-0311 – 317.

<sup>66</sup> CP 0-0241.

<sup>67</sup> CP 0-0242.

This is not sufficient evidence at the summary judgments stage to establish that these draft were actually signed and delivered. In fact, there was *no* evidence offered to the trial court that this occurred, let alone the “*clear and unequivocal*” proof of acceleration required under Washington law. *Glassmaker*, 23 Wn. App. at 38. This alone justifies denial of summary judgment.

Even assuming that the document relied on by the Bank was actually signed and delivered to the debtors (there is no evidence that it was), it did NOT unequivocally accelerate all the obligations under the Note.

LHDD1 breached various provisions of the Azure Note and Deed of Trust in 2007, but Azure offered evidence that it elected to accept the actions, assurances and other commitments of LHDD1 rather than initiate foreclosure.<sup>68</sup> As permitted under its Deed of Trust, Azure elected to permit LHDD1 to cure the monetary default and temporarily excused performance of the defaulted terms.<sup>69</sup> While Azure continued to send LHDD1

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<sup>68</sup> CP 0-0328 – 329, CP 0-0336 – 337.

<sup>69</sup> *Id.*

Notices of Default,<sup>70</sup> in each instance Azure elected to accept the verbal assurances from LHDD1 as supporting a cure or excuse of those default events.<sup>71</sup>

The unsigned, undated “Notice of Default” the Bank relies upon as sole support for its assertion that the full LHDD1 debt was accelerated was allegedly dated May 2007.<sup>72</sup> It is far from “unequivocal” as to acceleration. Among other things, this document references a monetary default based on the failure of LHDD1 to pay about \$470,000.<sup>73</sup> The Notice relied upon by the Bank stated:

5. REINSTATEMENT: IMPORTANT! PLEASE READ!

- (a) As of May 1, 2007 the total amount that must be paid to reinstate the Deed of Trust and the obligation secured thereby before the date of recording the Notice of Trustee’s Sale is the total of unaccelerated portion of Section 3 plus Section 4 above, equaling \$470,448.50.<sup>74</sup>

That is not an unequivocal demand to pay the entire balance of the promissory note, and Azure offered evidence that LDHH1

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<sup>70</sup> See CP 0-0376 – 377, CP 0-0378 – 387.

<sup>71</sup> CP 0-0329, CP 0-0336 – 337.

<sup>72</sup> CP 0-0311 – 317.

<sup>73</sup> CP 0-0313.

<sup>74</sup> CP 0-0314.

paid only the amount demanded in the notice, and therefore curing the default.<sup>75</sup>

There is no logical reason that LDHH1 would have made that substantial payment if it believed that in doing so it was not going to succeed in reinstatement of the note by curing its payment default. Azure offered evidence that it continued to issue notices of “nonmonetary default” in April, 2007; May, 2007; and October, 2008; and finally accelerated in August, 2009. Azure is entitled to the inference, in defense of the Bank’s motion for summary judgment, that these notices (which would have been pointless if Azure had already accelerated the Note, and triggered the statute of limitations) demonstrate that it had *not* already accelerated the LDHH1 Note.

It cannot, therefore, be said that the Bank proved by clear and unequivocal evidence that the full LHDD1 debt was accelerated in May 2007. At a very minimum, even *assuming* the Bank had standing to raise the statute of limitation defense and *assuming* it offered sufficient evidence that the LHDD1 was initially accelerated in May 2007, material questions of fact exist

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<sup>75</sup> CP 0-0336 – 337, CP 0-0329, CP 0-0386 – 387.

concerning whether Azure either abandoned or waived the purported acceleration.<sup>76</sup> Drawing all reasonable inferences in favor of Azure, summary judgment should have been denied.<sup>77</sup>

**C. Summary Judgment on Azure's counterclaims was inappropriate.**

Azure asserted several counterclaims against the Bank. After obtaining summary judgment on its statute of limitations claim, the Bank filed a second summary judgment motion, seeking dismissal of Azure's counterclaims.

**1. Bank's Deed of Trust is invalid because LDHH1 had no ability to grant the Second Deed of Trust - (1st Counterclaim).**

In its first counterclaim, Azure asserted that the Bank did not possess a valid Deed of Trust in the first instance because LDHH1 could not have granted it.

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<sup>76</sup> Further, the time period from the initial demand and subsequent payment would be tolled from the statute of limitations. *See* RCW 4.16.270 (When any payment of principal or interest has been or shall be made upon any existing contract, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.)

<sup>77</sup> Azure offered evidence to the trial court that it declared LHDD1 in default in compliance with the operative documents by sending a Notice of Default in August 7, 2009, thus allowing Azure until August 2015 to commence an action. CP 0-030, CP 0-0388 – 405.

It is undisputed that Azure recorded its Deed of Trust, encumbering Phase 2 of the Property on February 16, 2007.<sup>78</sup> It is also undisputed that Section 4.11 of the Azure Deed of Trust prevented LDHH1 from granting any interest or further encumbrance of the Property, without Azure's written consent, which Azure never gave.<sup>79</sup>

It is settled that that the bundle of property rights includes the right to occupy a property, as well as rights to sell, lease, mortgage, or give away interests in it. *See* Appraisal Institute, *The Appraisal of Real Estate* 112 (13th ed. 2008); *see also Spanish River Resort Corp. v. Walker*, 497 So.2d 1299, 1302 (Fla. Ct. of Appeals, Fourth District, 1986) (the "sticks" which constitute the "bundle of rights" include the right to mortgage property). The effect of LHDD1's covenant in Section 4.11 was to remove one of the sticks of ownership from the "bundle of rights" it otherwise possessed. That is to say, Section 4.11 dispossessed LHDD1 from the right to convey any further interest in Phase 2

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<sup>78</sup> CP 0-0291 – 305.

<sup>79</sup> CP 0-0295.

of the Property, including a deed of trust, and any attempt to do so was a nullity.

As Azure's Deed of Trust was recorded, the Bank was on record notice of all terms therein, including Section 4.11. See *Tomlinson v. Clarke*, 118 Wn.2d 498, 500 (1992) (recorded deed of trust imparts constructive notice of such real property interest). Given that the Bank later used the same property description Azure used to cover Phase 2, Azure is entitled to the inference that Horizon Bank was specifically aware of the terms of Azure's Deed of Trust. Nevertheless, in May 2007, the Bank awarded a \$9,900,000 construction loan facility to LHDD1 and secured it with a Deed of Trust.<sup>80</sup> But, as the Bank knew, LHDD1 had already dispossessed itself of the right to encumber the Property by virtue of the previously recorded Azure Deed of Trust.

LHDD1 voluntarily deeded away its right to further encumber its Property when it executed the Azure Deed of Trust. As the right to encumber its Property was no longer a right it possessed, its attempt to again do so through the Bank

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<sup>80</sup> CP 0-0183.

Deed of Trust was a nullity. That is to say, LDHH1 could not transfer what it did not possess, and the Bank, being fully aware of the Azure Deed of Trust, knew it. The Bank's Deed of Trust was invalid, and the trial court erred in granting summary judgment in the Bank's favor on Azure's counterclaim.

**2. Bank's foreclosure was invalid because of a deficient Trustee's Deed - (3rd Counterclaim).**

Azure's third counterclaim seeks an order invalidating the foreclosure sale and the resulting Trustee's Deed under which the Bank is now claiming ownership.

As discussed above, LDHH1 had no authority to grant the Bank a Deed of Trust. Therefore, the Trustee's Deed conveyed nothing to the Bank after foreclosure. Further, the Bank and the Trustee's improper insertion into the Trustee's Deed a new property description materially at variance from that appearing in the Bank's Deed of Trust rendered the Trustee's purported conveyance ineffective, even if the Trustee did have something to convey. The trial court's grant of summary judgment against

Azure on this counterclaim was erroneous for the same reasons as its grant of summary judgment for the Bank was.<sup>81</sup>

**3. Foreclosure Trustee violated RCW 61.24 – (5th Counterclaim).**

Azure asserted, as its fifth counterclaim, that the Bank and the Foreclosure Trustee violated RCW 61.24 by the concerted effort of self-help in redrafting the Trustee's Deed to comport with what the Bank wanted the legal description to convey. The Bank's summary judgment on this claim repeated its thoroughly unsupported assertion that the modifications cured a "mere scrivener's error."<sup>82</sup> As shown previously, there was no "scrivener's error", the Trustee had no right or power to reform any property description, and its collusion with the Bank to do so violated both chapter 61.24 of the Revised Code of

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<sup>81</sup> The Bank, in support of its summary judgment motion on Azure's counter claims, argued that they were all barred because the court had just ruled Azure's Deed of Trust was no longer enforceable. That is immaterial: the bank positioned itself as "owner", in violation of law, and from that position extinguished Azure's senior lien. Azure retains standing to seek a remedy for that violation whether or not it still holds a valid lien. The trial court erroneously dismissed all Azure's other counterclaims, including slander of title and malicious prosecution, presumably on this basis, but without substantial discussion.

<sup>82</sup> CP 0-0496 – 0497.

Washington, but also the Consumer Protection Act, RCW 19.86.090. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013).

**4. Azure could not have waived its post foreclosure claims.**

As part of its second summary judgment motion, the Bank alleged that some of Azure's counterclaims, referred to as "non-foreclosure counterclaims," were waived because they were not raised prior to the Trustee's sale. Several flaws exist in the Bank's position.

First, the Bank's theory is based on a factual assumption that it failed to establish. Namely, the Bank claims that Azure learned of the Bank's Deed of Trust before the foreclosure, and failed to object.<sup>83</sup> It asserts that Azure admitted receiving notice of the pending foreclosure, which is correct.<sup>84</sup> However, the admission made by Azure is more limited than what is portrayed by the Bank. That is to say, Azure admits it was notified of the sale. What was not alleged, and not admitted, was whether what Azure received was legally sufficient notice. The only reference made by the Bank in support of this key fact is

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<sup>83</sup> CP 0-0498.

<sup>84</sup> CP 0-0068.

paragraph 2.18 of its Complaint, which alleges “Azure Chelan received notice of the trustee’s sale and did not restrain the sale.”<sup>85</sup> The Bank offered no evidence of what it provided Azure in the notice. This omission fatally undercuts the Bank’s position on summary judgment.

What is more, the Bank’s waiver argument fails because the claims raised by Azure challenge the very validity of the property interest claimed by the Bank via its faulty Deed of Trust and invalid Trustee’s Deed, and even if Azure had standing to litigate those claims previously, it had no reason to do so. The nonjudicial foreclosure of the Bank’s Deed of Trust, and the ensuing Notice of foreclosure sale did not trigger any need in Azure to bring any suit to enjoin the sale (and therefore could not have resulted in a waiver of Azure’s rights) because the Bank had nothing to foreclose on, and whatever it did have was indisputably junior to, and had no effect upon Azure’s rights. Azure had neither knowledge of the Trustee’s rewrite of the legal description nor motivation nor standing to challenge the Bank’s claim of title under the Trustee’s Deed until the

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<sup>85</sup> CP 0-0006, CP 0-0498.

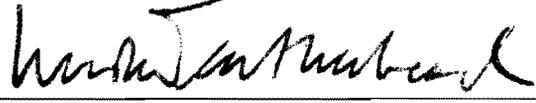
Bank brought this lawsuit, in which it sought to extinguish Azure's senior lien (and with it a substantial portion of the elderly Jack Mr. Cole's estate). Azure waived nothing, but at a minimum, the question of waiver is one of fact, and this court should remand the issue for resolution at trial, along with the many other questions of fact that are present in this complex real estate dispute.

## VII. CONCLUSION

This Court should hold, as a matter of law, that the Bank's Trustee's Deed is void and dismiss its lawsuit. Alternatively, the matter should be remanded to resolve the numerous questions of material fact that exist concerning the Bank's quiet title claim and Azure's counterclaims.

DATED this 1st day of October, 2015.

LEE & HAYES, PLLC

By 

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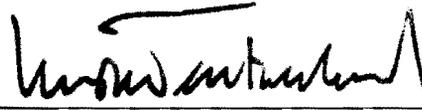
## **APPENDIX**

|  |           |
|--|-----------|
| <b>Appendix A – Bank’s Deed of Trust</b>   | <b>1</b>  |
| <b>Appendix B – Trustee’s Deed</b>   | <b>13</b> |
| <b>Appendix C – Deed Compare</b>   | <b>24</b> |
| <b>Appendix D – Rivera v. Bank of America, N.A.,<br/>2014 WL 2996159 (E.D.TEX. JULY 3, 2014)</b> | <b>35</b> |

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1st day of October, 2015, I caused to be served a true and correct copy of the foregoing document as follows:

|   |  |
|---|--|
| <p>Charles Dana Zimmerman<br/>Julie K. Norton<br/>Ogden Murphy Wallace,<br/>P.L.L.C.<br/>1 Fifth St., Ste. 200<br/>PO Box 1606<br/>Wenatchee, WA 98807-1606</p> | <p><input type="checkbox"/> Hand Delivery<br/><input type="checkbox"/> U.S. Mail<br/><input type="checkbox"/> Overnight Delivery<br/><input type="checkbox"/> Fax Transmission<br/><input checked="" type="checkbox"/> Email<br/><a href="mailto:czimmerman@omwlaw.com">czimmerman@omwlaw.com</a><br/><a href="mailto:jnorton@omwlaw.com">jnorton@omwlaw.com</a><br/><a href="mailto:lcooper@omwlaw.com">lcooper@omwlaw.com</a><br/><a href="mailto:lrussell@omwlaw.com">lrussell@omwlaw.com</a></p> |
| <p>Gregory R. Fox<br/>Daniel A. Kittle<br/>Lane Powell PC<br/>PO Box 91302<br/>1420 5<sup>th</sup> Ave., Ste. 4200<br/>Seattle, WA 98111-9402</p>               | <p><input type="checkbox"/> Hand Delivery<br/><input type="checkbox"/> U.S. Mail<br/><input type="checkbox"/> Overnight Delivery<br/><input type="checkbox"/> Fax Transmission<br/><input checked="" type="checkbox"/> Email<br/><a href="mailto:foxg@lanepowell.com">foxg@lanepowell.com</a><br/><a href="mailto:kittled@lanepowell.com">kittled@lanepowell.com</a><br/><a href="mailto:norbya@lanepowell.com">norbya@lanepowell.com</a></p>  |



Leslie R. Weatherhead, WSBA 11207  
*Attorney for Azure, Chelan*

# APPENDIX A



**RETURN ADDRESS:**  
Horizon Bank  
CML % Nancy Shipman  
2211 Rimland Dr, Suite 230  
Bellingham, WA 98226

1039143

**CONSTRUCTION DEED OF TRUST**

**DATE:** May 17, 2007

Reference # (if applicable): \_\_\_\_\_ Additional on page \_\_\_\_\_

Grantor(s):  
1. Lake Hills Development Division 1, LLC

Grantee(s)  
1. Horizon Bank  
2. Westward Financial Services Corporation, Trustee

Legal Description: NW1/4, NE1/4 OF SECTION 12 AND NE1/4, NW1/4 OF SECTION 11,  
TOWNSHIP 27 NORTH, RANGE 22 EAST

Additional on page 9 & 10

Assessor's Tax Parcel ID#: 272211110100; 272212200050 & 272212120000

**THIS DEED OF TRUST is dated May 17, 2007, among Lake Hills Development Division 1, LLC; A Washington Limited Liability Company ("Grantor"); Horizon Bank, whose mailing address is Snohomish Commercial Center, 2211 Rimland Drive, Suite 230, Bellingham, WA 98226 (referred to below sometimes as "Lender" and sometimes as "Beneficiary"); and Westward Financial Services Corporation, whose mailing address is 1500 Cornwall Avenue, Bellingham, WA 98225 (referred to below as "Trustee").**



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**CONVEYANCE AND GRANT.** For valuable consideration, Grantor conveys to Trustee in trust with power of sale, right of entry and possession and for the benefit of Lender as Beneficiary, all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in Chelan County, State of Washington:

See EXHIBIT "A", which is attached to this Deed of Trust and made a part of this Deed of Trust as if fully set forth herein.

The Real Property or its address is commonly known as NNA Golf Course Road, Chelan, WA 98816. The Real Property tax identification number is 272211110100; 272212200050 & 272212120000.

Grantor hereby assigns as security to Lender, all of Grantor's right, title, and interest in and to all leases, Rents, and profits of the Property. This assignment is recorded in accordance with RCW 65.08.070; the lien created by this assignment is intended to be specific, perfected and choate upon the recording of this Deed of Trust. Lender grants to Grantor a license to collect the Rents and profits, which license may be revoked at Lender's option and shall be automatically revoked upon acceleration of all or part of the indebtedness.

**THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS ALSO GIVEN TO SECURE ANY AND ALL OF GRANTOR'S OBLIGATIONS UNDER THAT CERTAIN CONSTRUCTION LOAN AGREEMENT BETWEEN GRANTOR AND LENDER OF EVEN DATE HEREWITH. ANY EVENT OF DEFAULT UNDER THE CONSTRUCTION LOAN AGREEMENT, OR ANY OF THE RELATED DOCUMENTS REFERRED TO THEREIN, SHALL ALSO BE AN EVENT OF DEFAULT UNDER THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust, and the Related Documents.

**CONSTRUCTION MORTGAGE.** This Deed of Trust is a "construction mortgage" for the purposes of Sections 9-334 and 2A-309 of the Uniform Commercial Code, as those sections have been adopted by the State of Washington.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property (this privilege is a license from Lender to Grantor automatically revoked upon default). The following provisions relate to the use of the Property or to other limitations on the Property. The Real Property is not used principally for agricultural purposes.

**Duty to Maintain.** Grantor shall maintain the Property in tenable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

**Removal of Improvements.** Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such Improvements with Improvements of at least equal value.

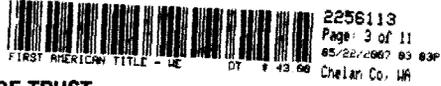
**Lender's Right to Enter.** Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Deed of Trust.

**Compliance with Governmental Requirements.** Grantor shall promptly comply, and shall promptly cause compliance by all agents, tenants or other persons or entities of every nature whatsoever who rent, lease or otherwise use or occupy the Property in any manner, with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Duty to Protect.** Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**Construction Loan.** If some or all of the proceeds of the loan creating the indebtedness are to be used to construct or complete construction of any Improvements on the Property, the improvements shall be completed no later than the maturity date of the Note (or such earlier date as Lender may reasonably establish) and Grantor shall pay in full all costs and expenses in connection with the work. Lender will disburse loan proceeds under such terms and conditions as Lender may deem reasonably necessary to insure that the interest created by this Deed of Trust shall have priority over all possible liens, including those of material suppliers and workmen. Lender may require, among other things, that disbursement requests be supported by receipted bills, expense affidavits, waivers of liens, construction progress reports, and such other documentation as Lender may reasonably request.

**DUPLICATE ON SALE - CONSENT BY LENDER.** Lender may, at Lender's option, (A) declare immediately due and payable all sums secured by this Deed of Trust or (B) increase the interest rate provided for in the Note or other document evidencing the indebtedness and impose such other conditions as Lender deems appropriate, upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial



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interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. If any Grantor is a corporation, partnership or limited liability company, transfer also includes any change in ownership of more than twenty-five percent (25%) of the voting stock, partnership interests or limited liability company interests, as the case may be, of such Grantor. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by Washington law.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are part of this Deed of Trust:

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, special taxes, assessments, charges (including water and sewer), fines and impositions levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of all liens having priority over or equal to the interest of Lender under this Deed of Trust, except for the lien of taxes and assessments not due and except as otherwise provided in this Deed of Trust.

**Right to Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialman's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Deed of Trust:

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a fair value basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgage clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Trustee and Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption, and boiler insurance, as Lender may reasonably require. Policies shall be written in form, amounts, coverages and bases reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, within 45 days after notice is given by Lender that the Property is located in a special flood hazard area, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Deed of Trust. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Deed of Trust, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid without interest to Grantor as Grantor's interests may appear.

**Grantor's Report on Insurance.** Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured, the then current replacement value of such property, and the manner of determining that value; and (5) the expiration date of the policy. Grantor shall, upon request of Lender, have an independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

**LENDER'S EXPENDITURES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Deed of Trust or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Deed of Trust or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Deed of Trust also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

**WARRANTY; DEFENSE OF TITLE.** The following provisions relating to ownership of the Property are a part of this Deed of Trust:

Title. Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title



**DEED OF TRUST  
(Continued)**

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insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Deed of Trust, and (b) Grantor has the full right, power, and authority to execute and deliver this Deed of Trust to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Trustee or Lender under this Deed of Trust, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

**Survival of Representations and Warranties.** All representations, warranties, and agreements made by Grantor in this Deed of Trust shall survive the execution and delivery of this Deed of Trust, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Deed of Trust:

**Proceedings.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice all at Grantor's expense, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Trustee or Lender in connection with the condemnation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Deed of Trust:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Deed of Trust and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Deed of Trust, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Deed of Trust.

**Taxes.** The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Deed of Trust or upon all or any part of the indebtedness secured by this Deed of Trust; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the indebtedness secured by this type of Deed of Trust; (3) a tax on this type of Deed of Trust chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Grantor.

**Subsequent Taxes.** If any tax to which this section applies is enacted subsequent to the date of this Deed of Trust, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Deed of Trust as a security agreement are a part of this Deed of Trust:

**Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Real and Personal Property. In addition to recording this Deed of Trust in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Deed of Trust as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

**Addresses.** The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Deed of Trust may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Deed of Trust.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Deed of Trust:

**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Grantor's obligations under the Note, this Deed of Trust, and the Related Documents, and (2) the liens and security interests created by this Deed of Trust as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

**FULL PERFORMANCE.** If Grantor pays all the indebtedness when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's



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security interest in the Rents and the Personal Property. Any reconveyance fee shall be paid by Grantor, if permitted by applicable law. The grantee in any reconveyance may be described as the "person or persons legally entitled thereto", and the recitals in the reconveyance of any matters or facts shall be conclusive proof of the truthfulness of any such matters or facts.

**EVENTS OF DEFAULT.** Each of the following, at Lender's option, shall constitute an Event of Default under this Deed of Trust:

**Payment Default.** Grantor fails to make any payment when due under the indebtedness.

**Other Defaults.** Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Deed of Trust or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

**Compliance Default.** Failure to comply with any other term, obligation, covenant or condition contained in this Deed of Trust, the Note or in any of the Related Documents.

**Default on Other Payments.** Failure of Grantor within the time required by this Deed of Trust to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Deed of Trust or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Defective Collateralization.** This Deed of Trust or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

**Death or Insolvency.** The dissolution of Grantor's (regardless of whether election to continue is made), any member withdraws from the limited liability company, or any other termination of Grantor's existence as a going business or the death of any member, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any property securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Breach of Other Agreement.** Any breach by Grantor under the terms of any other agreement between Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor to Lender, whether existing now or later.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

**Insecurity.** Lender in good faith believes itself insecure.

**Right to Cure.** If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Deed of Trust within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default: (1) cures the default within thirty (30) days; or (2) if the cure requires more than thirty (30) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**RIGHTS AND REMEDIES ON DEFAULT.** If an Event of Default occurs under this Deed of Trust, at any time thereafter, Trustee or Lender may exercise any one or more of the following rights and remedies:

**Election of Remedies.** Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Deed of Trust, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

**Accelerate Indebtedness.** Lender shall have the right at its option to declare the entire Indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay.

**Foreclosure.** With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**UCC Remedies.** With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

**Collect Rents.** Lender shall have the right, without notice to Grantor to take possession of and manage the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

**Appoint Receiver.** Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property, preceding or pending foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness by a substantial



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amount. Employment by Lender shall not disqualify a person from serving as a receiver.

**Tenancy at Sufferance.** If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

**Other Remedies.** Trustee or Lender shall have any other right or remedy provided in this Deed of Trust or the Note or available at law or in equity.

**Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

**Sale of the Property.** To the extent permitted by applicable law, Grantor hereby waives any and all rights to have the Property marshalled. In exercising its rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

**Attorneys' Fees; Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**Rights of Trustee.** Trustee shall have all of the rights and duties of Lender as set forth in this section.

**POWERS AND OBLIGATIONS OF TRUSTEE.** The following provisions relating to the powers and obligations of Trustee (pursuant to Lender's instructions) are part of this Deed of Trust:

**Powers of Trustee.** In addition to all powers of Trustee arising as a matter of law, Trustee shall have the power to take the following actions with respect to the Property upon the written request of Lender and Grantor: (a) join in preparing and filing a map or plat of the Real Property, including the dedication of streets or other rights to the public; (b) join in granting any easement or creating any restriction on the Real Property; and (c) join in any subordination or other agreement affecting this Deed of Trust or the interest of Lender under this Deed of Trust.

**Obligations to Notify.** Trustee shall not be obligated to notify any other party of a pending sale under any other trust deed or lien, or of any action or proceeding in which Grantor, Lender, or Trustee shall be a party, unless required by applicable law, or unless the action or proceeding is brought by Trustee.

**Trustee.** Trustee shall meet all qualifications required for Trustee under applicable law. In addition to the rights and remedies set forth above, with respect to all or any part of the Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**Successor Trustee.** Lender, at Lender's option, may from time to time appoint a successor Trustee to any Trustee appointed under this Deed of Trust by an instrument executed and acknowledged by Lender and recorded in the office of the recorder of Chelan County, State of Washington. The instrument shall contain, in addition to all other matters required by state law, the names of the original Lender, Trustee, and Grantor, the book and page or the Auditor's File Number where this Deed of Trust is recorded, and the name and address of the successor trustee, and the instrument shall be executed and acknowledged by Lender or its successors in interest. The successor trustee, without conveyance of the Property, shall succeed to all the title, power, and duties conferred upon the Trustee in this Deed of Trust and by applicable law. This procedure for substitution of Trustee shall govern to the exclusion of all other provisions for substitution.

**NOTICES.** Subject to applicable law, and except for notice required or allowed by law to be given in another manner, any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. All copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust shall be sent to Lender's address, as shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Subject to applicable law, and except for notice required or allowed by law to be given in another manner, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Deed of Trust:

**Amendments.** This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Annual Reports.** If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

**Caption Headings.** Caption headings in this Deed of Trust are for convenience purposes only and are not to be used to interpret or define the provisions of this Deed of Trust.

**Merger.** There shall be no merger of the interest or estate created by this Deed of Trust with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Governing Law.** This Deed of Trust will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions.

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**This Deed of Trust has been accepted by Lender in the State of Washington.**

**Choice of Venue.** If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of Whatcom County, State of Washington.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Deed of Trust unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Deed of Trust shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Deed of Trust. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Deed of Trust, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

**Severability.** If a court of competent jurisdiction finds any provision of this Deed of Trust to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Deed of Trust. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Deed of Trust shall not affect the legality, validity or enforceability of any other provision of this Deed of Trust.

**Successors and Assigns.** Subject to any limitations stated in this Deed of Trust on transfer of Grantor's interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Deed of Trust and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Deed of Trust or liability under the Indebtedness.

**Time is of the Essence.** Time is of the essence in the performance of this Deed of Trust.

**Waive Jury.** All parties to this Deed of Trust hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

**Waiver of Homestead Exemption.** Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of Washington as to all indebtedness secured by this Deed of Trust.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Deed of Trust. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Deed of Trust shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Beneficiary.** The word "Beneficiary" means Horizon Bank, and its successors and assigns.

**Borrower.** The word "Borrower" means Lake Hills Development Division 1, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Deed of Trust.** The words "Deed of Trust" mean this Deed of Trust among Grantor, Lender, and Trustee, and includes without limitation all assignment and security interest provisions relating to the Personal Property and Rents.

**Default.** The word "Default" means the Default set forth in this Deed of Trust in the section titled "Default".

**Event of Default.** The words "Event of Default" mean any of the events of default set forth in this Deed of Trust in the events of default section of this Deed of Trust.

**Grantor.** The word "Grantor" means Lake Hills Development Division 1, LLC.

**Guarantor.** The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

**Guaranty.** The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

**Improvements.** The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

**Indebtedness.** The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust.

**Lender.** The word "Lender" means Horizon Bank, its successors and assigns.

**Note.** The word "Note" means the promissory note dated May 17, 2007, in the original principal amount of \$9,900,000.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement. **NOTICE TO GRANTOR: THE NOTE CONTAINS A VARIABLE INTEREST RATE.**

**Personal Property.** The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property, together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all issues and profits thereon and proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

**Property.** The word "Property" means collectively the Real Property and the Personal Property.

**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in this Deed of Trust.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guarantees, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided, that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

**Trustee.** The word "Trustee" means Westward Financial Services Corporation, whose mailing address is 1500 Cornwell



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Avenue, Bellingham, WA 98225 and any substitute or successor trustees.

**GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS DEED OF TRUST, AND GRANTOR AGREES TO ITS TERMS.**

**GRANTOR:**

LAKE HILLS DEVELOPMENT DIVISION 1, LLC

By: [Signature]  
Robert J. McGarry, Manager of Lake Hills Development Division 1, LLC

By: [Signature]  
Gordon A. Gallagher, Member of Lake Hills Development Division 1, LLC

**LIMITED LIABILITY COMPANY ACKNOWLEDGMENT**

STATE OF Washington )  
COUNTY OF Snohomish ) SS

On this 21<sup>st</sup> day of May, 2007, before me, the undersigned Notary Public, personally appeared Robert J. McGarry, Manager; Gordon A. Gallagher, Member of Lake Hills Development Division 1, LLC, and personally known to me or proved to me on the basis of satisfactory evidence to be members or designated agents of the limited liability company that executed the Deed of Trust and acknowledged the Deed of Trust to be the free and voluntary act and deed of the limited liability company, by authority of statute, its articles of organization or its operating agreement, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute this Deed of Trust and in fact executed the Deed of Trust on behalf of the limited liability company.

By: [Signature] Residing at Edmonds  
Notary Public in and for the State of Washington My commission expires 9/15/07



**REQUEST FOR FULL RECONVEYANCE**

To: \_\_\_\_\_ Trustee

The undersigned is the legal owner and holder of all indebtedness secured by this Deed of Trust. You are hereby requested, upon payment of all sums owing to you, to reconvey without warranty, to the persons entitled thereto, the right, title and interest now held by you under the Deed of Trust.

Date: \_\_\_\_\_ Beneficiary: \_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

EXHIBIT "A"

PARCEL A:

A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SECTION CORNER COMMON TO SECTIONS 1, 2, 11 AND 12 AND RUNNING THENCE NORTH 89°38' WEST ALONG THE NORTH BOUNDARY OF SECTION 11 FOR 2632.27 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 11; THENCE SOUTH 00°26'50" EAST FOR 1395.93 FEET TO A STONE MARKING THE NORTH SIXTEENTH CORNER OF SAID SECTION 11; THENCE NORTH 86°38'30" EAST ALONG THE SOUTH BOUNDARY OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 11 FOR 807.34 FEET; THENCE SOUTH 80°34'45" EAST FOR 263.54 FEET; THENCE SOUTH 69°00'10" EAST FOR 258.00 FEET; THENCE SOUTH 60°54'10" EAST FOR 209.00 FEET TO A WEST ANGLE POINT OF TRACT "B" OF THE PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION; THENCE NORTH 38°20'37" EAST FOR 159.67 FEET TO THE NORTHWEST CORNER OF SAID PLAT; THENCE NORTH 51°39'23" WEST FOR 640.24 FEET; THENCE NORTH 38°20'37" EAST FOR 189.78 FEET; THENCE SOUTH 51°39'23" EAST FOR 178.00 FEET; THENCE NORTH 58°10'52" EAST FOR 126.43 FEET; THENCE NORTH 25°26'52" EAST FOR 127.56; THENCE SOUTH 78°24'38" EAST FOR 493.29 FEET; THENCE SOUTH 16°39'53" EAST FOR 282.69 FEET; THENCE SOUTH 41°31'53" EAST FOR 205.99 FEET; THENCE NORTH 23°36'37" EAST FOR 167.42 FEET; THENCE NORTH 25°40'52" EAST FOR 353.34 FEET; THENCE SOUTH 49°42'08" EAST FOR 1324.27 FEET; THENCE SOUTH 40°17'52" WEST FOR 75.00 FEET; THENCE SOUTH 37°36'38" EAST FOR 216.00 FEET; THENCE SOUTH 32°14'08" EAST FOR 181.41 FEET; THENCE NORTH 31°12'00" EAST FOR 206.69 FEET; THENCE SOUTH 89°34'30" EAST FOR 1378.23 FEET; THENCE NORTH 5°03'30" EAST FOR 75.25 FEET; THENCE SOUTH 89°34'30" EAST FOR 108.97 FEET; THENCE SOUTH 30°30'33" EAST FOR 87.44 FEET; THENCE SOUTH 89°34'30" EAST FOR 48.77 FEET TO A POINT ON THE EAST BOUNDARY OF SAID NORTHWEST QUARTER OF SECTION 12; THENCE NORTH 00°30'45" WEST ALONG SAID EAST BOUNDARY FOR A DISTANCE OF 1900.00 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 12; THENCE NORTH 88°53'15" WEST ALONG THE NORTH BOUNDARY OF SAID NORTHWEST QUARTER FOR 2673.23 FEET TO THE SECTION CORNER COMMON TO SAID SECTIONS 11 AND 12 BEING THE ORIGINAL POINT OF BEGINNING,

EXCEPT THEREFROM A PARCEL OF LAND IN THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 11, TOWNSHIP 27 NORTH, RANGE 22 EAST, W.M., CITY OF CHELAN, CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF LOT 77, PLAT OF GOLF COURSE TERRACE 3RD ADDITION ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 17 OF PLATS, PAGES 61 AND 62, RECORDS OF THE CHELAN COUNTY AUDITOR, THENCE SOUTH 53°48'15" EAST ALONG THE NORTHERLY LINE OF SAID LOT 77 FOR A DISTANCE OF 340.22 FEET TO THE NORTHEAST CORNER OF SAID LOT 77; THENCE NORTH 00°37'08" EAST FOR 26.62 FEET; THENCE NORTH 57°25'27" WEST FOR 324.94 FEET; THENCE SOUTH 57°24'53" WEST FOR 1.21 FEET TO THE POINT OF BEGINNING.

EXCEPT THEREFROM THOSE PORTIONS (RESERVOIR SITE AND 60 FOOT ROAD) AS DESCRIBED IN AND CONVEYED TO THE CITY OF CHELAN BY DEED RECORDED JULY 14, 1977, UNDER AUDITOR'S FILE NO. 775081.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 12 OF PLATS, PAGE 52 AND 53.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE SECOND ADDITION, CHELAN COUNTY, WASHINGTON; ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 14 OF PLATS, PAGE 43 AND 44.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE THIRD ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 17 OF PLATS, PAGE 61 AND 62.

ALSO EXCEPT ALL OF TRACTS "A" AND "B" PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF.



PARCEL B:

THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON.

EXCEPT THEREFROM THAT PORTION LYING EAST OF THE RIGHT OF WAY OF UNION VALLEY ROAD AS DISCLOSED BY AUDITOR'S FILE NO. 8403120035.

ALSO EXCEPT RIGHT OF WAY OF UNION VALLEY ROAD, AS DESCRIBED BY AUDITOR'S FILE NO. 8403120035.

EXCEPT FROM PARCELS A AND B ABOVE, THAT PORTION THEREOF DESCRIBED AS FOLLOWS:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET; THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:

SOUTH 25°18'29" WEST 352.82 FEET;  
SOUTH 23°19'20" WEST 167.40 FEET;  
NORTH 41°49'37" WEST 205.96 FEET;  
NORTH 17°01'53" WEST 282.57 FEET;  
NORTH 78°43'48" WEST 493.11 FEET;  
NORTH 00°00'13" WEST 38.08 FEET;

THENCE LEAVING SAID BOUNDARY SOUTH 73°51'53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 113.95 FEET; THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE ALONG

SAID CURVE 29.40 FEET; THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 53.36 FEET; THENCE NORTH 77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 59.64 FEET; THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH 21°32'18" WEST NORTH 22°21'52" EAST 197.38 FEET TO THE POINT OF BEGINNING.

ALSO EXCEPT FROM PARCELS A AND B, THAT PORTION THEREOF LYING EASTERLY OF A LINE DESCRIBED AS FOLLOWS:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET; THENCE SOUTH 89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12, 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;

THENCE SOUTH 00°18'31" WEST, 193.94 FEET;  
THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;  
THENCE SOUTH 33°06'49" EAST, 182.50 FEET;  
THENCE SOUTH 18°13'32" EAST, 125.62 FEET;  
THENCE SOUTH 66°03'53" WEST, 413.91 FEET;  
THENCE SOUTH 17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE SOUTHERLY TERMINUS OF SAID LINE.

PARCEL C:

A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON.

EXCEPT THEREFROM THAT PORTION LYING EAST OF THE RIGHT OF WAY OF UNION VALLEY ROAD AS DISCLOSED BY AUDITOR'S FILE NO. 8403120035.

ALSO EXCEPT RIGHT OF WAY OF UNION VALLEY ROAD, AS DESCRIBED BY AUDITOR'S FILE NO. 8403120035.

TOGETHER WITH THE FOLLOWING:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET; THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:

SOUTH 25°18'29" WEST 352.82 FEET;  
SOUTH 23°19'20" WEST 167.40 FEET;  
NORTH 41°49'37" WEST 205.96 FEET;  
NORTH 17°01'53" WEST 282.57 FEET;  
NORTH 78°43'48" WEST 493.11 FEET;  
NORTH 00°00'13" WEST 38.08 FEET;

THENCE LEAVING SAID BOUNDARY SOUTH 73°51'53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 113.95 FEET; THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 29.40 FEET; THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 53.36 FEET; THENCE NORTH

77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 59.64 FEET; THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH 21°32'18" WEST NORTH 22°21'52" EAST 197.38 FEET TO THE POINT OF BEGINNING.

ALSO TOGETHER WITH THE FOLLOWING:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET; THENCE SOUTH 89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12, 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;

THENCE SOUTH 00°18'31" WEST, 193.94 FEET;  
THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;  
THENCE SOUTH 33°06'49" EAST, 182.50 FEET;  
THENCE SOUTH 18°13'32" EAST, 125.62 FEET;  
THENCE SOUTH 66°03'53" WEST, 413.91 FEET;  
THENCE SOUTH 17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE SOUTHERLY TERMINUS OF SAID LINE.

EXCEPT THEREFROM A PARCEL OF LAND IN THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 11, TOWNSHIP 27 NORTH, RANGE 22 EAST, W.M., CITY OF CHELAN, CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF LOT 77, PLAT OF GOLF COURSE TERRACE 3RD ADDITION ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 17 OF PLATS, PAGES 61 AND 62, RECORDS OF THE CHELAN COUNTY AUDITOR, THENCE SOUTH 53°48'15" EAST ALONG THE NORTHERLY LINE OF SAID LOT 77 FOR A DISTANCE OF 340.22 FEET TO THE NORTHEAST CORNER OF SAID LOT 77; THENCE NORTH 00°37'08" EAST FOR 26.62 FEET; THENCE NORTH 57°25'27" WEST FOR 324.94 FEET; THENCE SOUTH 57°24'53" WEST FOR 1.21 FEET TO THE POINT OF BEGINNING.

EXCEPT THEREFROM THOSE PORTIONS (RESERVOIR SITE AND 60 FOOT ROAD) AS DESCRIBED IN AND CONVEYED TO THE CITY OF CHELAN BY DEED RECORDED JULY 14, 1977, UNDER AUDITOR'S FILE NO. 775081.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 12 OF PLATS, PAGE 52 AND 53.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE SECOND ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 14 OF PLATS, PAGE 43 AND 44.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE THIRD ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 17 OF PLATS, PAGE 61 AND 62.

ALSO EXCEPT ALL OF TRACTS "A" AND "B" PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF.

# APPENDIX B

**Return Address:**

LPSL Corporate Services, Inc.  
Successor Trustee  
Attn: Gregory R. Fox  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101-2338

150993  
REAL ESTATE EXCISE TAX  
EXEMPT  
Chelan County Treasurer  
David E. Griffiths, CPA  
By [Signature] 1-14-11  
Deputy

1584502

**TRUSTEE'S DEED**

|                            |   |
|----------------------------|---|
| GRANTOR:                   | LPSL CORPORATE SERVICES, INC.   |
| GRANTEE:                   | WASHINGTON FEDERAL SAVINGS<br>& LOAN ASSOCIATION  |
| ABBREV. LEGAL DESCRIPTION: | PTN SEC 11 TWP 27N RGE 22E NE QTR & PTN<br>SEC 12 TWP 27N RGE 22E NW QTR NE QTR,<br>CHELAN COUNTY |
| TAX PARCEL NUMBER(S):      | 272211110100; 272212200050; 272212120000  |
| AFFECTED DOCUMENTS:        | 2256113   |

The Grantor, LPSL Corporate Services, Inc., as Successor Trustee under that certain Construction Deed of Trust, as hereinafter particularly described, in consideration of the premises and payment recited below, hereby grants and conveys, without warranty, to Washington Federal Savings & Loan Association, as Grantee, that real property, situated in the County of Chelan, State of Washington, described as follows:

See Exhibit A attached hereto.

**RECITALS**

1. This conveyance is made pursuant to the powers, including the power of sale, conferred upon said Successor Trustee by that certain Construction Deed of Trust ("Deed of Trust") dated May 17, 2007 and recorded May 22, 2007 under Instrument No. 2256113, records of Chelan County, Washington, from Lake Hills Development Division 1, LLC, a Washington limited liability company, as Grantor, to Westward Financial Services Corporation, as Trustee, to secure an obligation in favor of Horizon Bank as Beneficiary ("Beneficiary"). The Deed of Trust and the obligation secured thereby were assigned to Washington Federal Savings & Loan Association ("Washington Federal") by the Federal Deposit Insurance Corporation ("FDIC") receivership of Horizon Bank, as memorialized by an Assignment of Deed of Trust dated May 11, 2010 and recorded May 18, 2010 under Instrument No. 2323450, records of Chelan County, Washington.

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2. Said Deed of Trust was executed to secure, together with other undertaking, the payment of a promissory note in the original principal amount of \$9,900,000, with interest thereon, according to the terms thereof, in favor of the Beneficiary of the Deed of Trust, and to secure any other sums of money which might become due and payable under the terms of said Deed of Trust.

3. The described Deed of Trust provides that the real property conveyed therein is not used principally for agricultural or farming purposes.

4. Default having occurred in the obligation secured and/or covenants of the Grantor, as set forth in the Notice of Trustee's Sale described below, which by the terms of the Deed of Trust makes operative the power to sell, the 30-day advance Notice of Default was transmitted to the Grantor, or its successor in interest, and a copy of said Notice was posted or served in accordance with law.

5. The Beneficiary, being then the holder of the indebtedness secured by said Deed of Trust, delivered to said Successor Trustee a written request directing said Successor Trustee to sell the described premises.

6. The default specified in the "Notice of Default" not having been cured, the Successor Trustee, in compliance with the terms of said Deed of Trust, executed, and on July 20, 2010, recorded in the office of the Auditor of Chelan County, Washington, under Instrument No. 2326684, a "Notice of Trustee's Sale" of said property.

7. The Successor Trustee, in its aforesaid "Notice of Trustee's Sale," fixed the place of sale as the main entrance of the Chelan County Courthouse, 350 Orondo Street, Wenatchee, Washington, a public place, on the 22<sup>nd</sup> day of October, 2010, at the hour of 10:00 a.m., and in accordance with law caused copies of the statutory "Notice of Trustee's Sale" to be transmitted by mail to all persons entitled thereto and either posted or served prior to 90 days before the sale; further, the Trustee caused a copy of said "Notice of Trustee's Sale" to be published once on September 22, 2010, and once on October 13, 2010, in a legal newspaper in the county in which the property or any part thereof is situated; and further, included with this Notice, which was transmitted to or served upon the Grantor or its successor in interest, a "Notice of Foreclosure" in substantially the statutory form, to which copies of the Grantor's Note and Deed of Trust were attached.

8. The Successor Trustee having continued the trustee's sale from October 22, 2010 to November 19, 2010 at the hour of 10:00 a.m., by calling the continuance and mailing a Notice of Continuance on October 22, 2010, in accordance with applicable law.

9. The Successor Trustee having continued the sale from November 19, 2010 to December 17, 2010 at the hour of 10:00 a.m., by calling the continuance and mailing a Notice of Continuance on November 19, 2010, in accordance with applicable law.

10. The Successor Trustee having continued the sale from December 17, 2010 to December 27, 2010 at the hour of 10:00 a.m., by calling the continuance and mailing a Notice of Continuance on December 20, 2010, in accordance with applicable law.

11. The Successor Trustee having continued the sale from December 27, 2010 to January 7, 2011 at the hour of 10:00 a.m., by calling the continuance and mailing a Notice of Continuance on December 29, 2010, in accordance with applicable law.

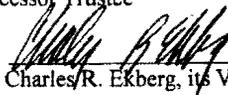
12. During foreclosure, no action was pending on an obligation secured by said Deed of Trust.

13. All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW.

14. The matured obligation secured by said Deed of Trust remaining unpaid on January 7, 2011, the date of sale, which was not less than 190 days from the date of default in the obligation secured, the Successor Trustee then and there sold at public auction to said Grantee, the highest bidder therefore, the property hereinabove described for the sum of \$1,863,000 in partial satisfaction of the obligation then secured by said Deed of Trust, together with fees, costs and expenses as provided by statute.

DATED: January 13, 2011.

LPSL Corporate Services, Inc.  
Successor Trustee

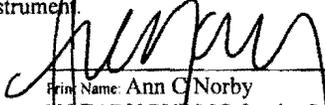
By:   
Charles R. Ekberg, its Vice President

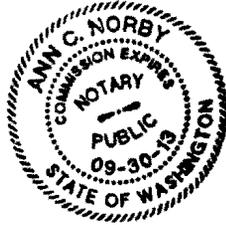
Address:  
LPSL Corporate Services, Inc.  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101-2338  
Phone: (206) 223-7000

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I certify that I know or have satisfactory evidence that Charles R. Ekberg is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he is authorized to execute the instrument and acknowledged it as the Vice President of LPSL Corporate Services, Inc. to be his free and voluntary act of such parties for the uses and purposes mentioned in this instrument.

DATED: January 13, 2011.

  
Print Name: Ann C. Norby  
NOTARY PUBLIC for the State of  
Washington, residing at Seattle  
My appointment expires: 9/30/2013



**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

The land referred to in this deed is situated in the State of Washington, County of Chelan and is described by follows:

PARCEL A (LAKE HILLS DEVELOPMENT PHASE I):

A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SECTION CORNER COMMON TO SECTIONS 1, 2, 11 AND 12 AND RUNNING THENCE NORTH 89°38' WEST ALONG THE NORTH BOUNDARY OF SECTION 11 FOR 2632.27 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 11;  
THENCE SOUTH 00°26'50" EAST FOR 1395.93 FEET TO A STONE MARKING THE NORTH SIXTEENTH CORNER OF SAID SECTION 11; THENCE NORTH 86°38'30" EAST ALONG THE SOUTH BOUNDARY OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 11 FOR 807.34 FEET;  
THENCE SOUTH 80°34'45" EAST FOR 263.54 FEET;  
THENCE SOUTH 69°00'10" EAST FOR 258.00 FEET;  
THENCE SOUTH 60°54'10" EAST FOR 209.00 FEET TO A WEST ANGLE POINT OF TRACT "B" OF THE PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION;  
THENCE NORTH 38°20'37" EAST FOR 159.67 FEET TO THE NORTHWEST CORNER OF SAID PLAT;  
THENCE NORTH 51°39'23" WEST FOR 640.24 FEET;  
THENCE NORTH 38°20'37" EAST FOR 189.78 FEET;  
THENCE SOUTH 51°39'23" EAST FOR 178.00 FEET;  
THENCE NORTH 58°10'52" EAST FOR 126.43 FEET;  
THENCE NORTH 25°26'52" EAST FOR 127.56 FEET;  
THENCE SOUTH 78°24'38" EAST FOR 493.29 FEET;  
THENCE SOUTH 16°39'53" EAST FOR 282.69 FEET;  
THENCE SOUTH 41°31'53" EAST FOR 205.99 FEET;  
THENCE NORTH 23°36'37" EAST FOR 167.42 FEET;  
THENCE NORTH 25°40'52" EAST FOR 353.34 FEET;  
THENCE SOUTH 49°42'08" EAST FOR 1324.27 FEET;  
THENCE SOUTH 40°17'52" WEST FOR 75.00 FEET;  
THENCE SOUTH 37°36'38" EAST FOR 216.00 FEET;  
THENCE SOUTH 32°14'08" EAST FOR 181.41 FEET;  
THENCE NORTH 31°12'00" EAST FOR 206.69 FEET;

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- A1 -

THENCE SOUTH 89°34'30" EAST FOR 1378.23 FEET;  
THENCE NORTH 5°03'30" EAST FOR 75.25 FEET;  
THENCE SOUTH 89°34'30" EAST FOR 108.97 FEET;  
THENCE SOUTH 30°30'33" EAST FOR 87.44 FEET;  
THENCE SOUTH 89°34'30" EAST FOR 48.77 FEET TO A POINT ON THE EAST  
BOUNDARY OF SAID NORTHWEST QUARTER OF SECTION 12; THENCE  
NORTH 00°30'45" WEST ALONG SAID EAST BOUNDARY FOR A DISTANCE  
OF 1900.00 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 12;  
THENCE NORTH 88°53'15" WEST ALONG THE NORTH BOUNDARY OF  
SAID NORTHWEST QUARTER FOR 2673.23 FEET TO THE SECTION  
CORNER COMMON TO SAID SECTIONS 11 AND 12 BEING THE ORIGINAL  
POINT OF BEGINNING,

EXCEPT THEREFROM A PARCEL OF LAND IN THE NORTHEAST QUARTER  
OF SECTION 11, TOWNSHIP 27 NORTH, RANGE 22 EAST, W.M., CITY OF  
CHELAN, CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY  
DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF LOT 77, PLAT OF GOLF  
COURSE TERRACE 3RD ADDITION ACCORDING TO THE PLAT THEREOF,  
RECORDED IN VOLUME 17 OF PLATS, PAGES 61 AND 62, RECORDS OF  
THE CHELAN COUNTY AUDITOR,  
THENCE SOUTH 53°48'15" EAST ALONG THE NORTHERLY LINE OF SAID  
LOT 77 FOR A DISTANCE OF 340.22 FEET TO THE NORTHEAST CORNER  
OF SAID LOT 77;  
THENCE NORTH 00°37'08" EAST FOR 26.62 FEET;  
THENCE NORTH 57°25'27" WEST FOR 324.94 FEET;  
THENCE SOUTH 57°24'53" WEST FOR 1.21 FEET TO THE POINT OF  
BEGINNING.

EXCEPT THEREFROM THOSE PORTIONS (RESERVOIR SITE AND 60 FOOT  
ROAD) AS DESCRIBED IN AND CONVEYED TO THE CITY OF CHELAN BY  
DEED RECORDED JULY 14, 1977, UNDER AUDITOR'S FILE NO. 775081.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE, CHELAN COUNTY,  
WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN  
VOLUME 12 OF PLATS, PAGE 52 AND 53.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE SECOND  
ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT  
THEREOF RECORDED IN VOLUME 14 OF PLATS, PAGE 43 AND 44.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE THIRD ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 17 OF PLATS, PAGE 61 AND 62.

ALSO EXCEPT ALL OF TRACTS "A" AND "B" PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF.

ALSO EXCEPT THAT PORTION THEREOF DESCRIBED AS FOLLOWS (BIRDIE POINT PARCEL):

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;  
THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:

SOUTH 25°18'29" WEST 352.82 FEET;  
SOUTH 23°19'20" WEST 167.40 FEET;  
NORTH 41°49'37" WEST 205.96 FEET;  
NORTH 17°01'53" WEST 282.57 FEET;  
NORTH 78°43'48" WEST 493.11 FEET;  
NORTH 00°00'13" WEST 38.08 FEET;  
THENCE LEAVING SAID BOUNDARY SOUTH 73°51'53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 113.95 FEET;  
THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT;  
THENCE ALONG SAID CURVE 29.40 FEET;  
THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 53.36 FEET;  
THENCE NORTH 77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT;  
THENCE ALONG SAID CURVE 59.64 FEET;  
THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH 21°32'18" WEST SOUTH 22°21'52" WEST 197.38 FEET TO THE POINT OF BEGINNING.

ALSO EXCEPT THAT PORTION THEREOF LYING EASTERLY OF A LINE DESCRIBED AS FOLLOWS:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;  
THENCE SOUTH 89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12, 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;  
THENCE SOUTH 00°18'31" WEST, 193.94 FEET;  
THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;  
THENCE SOUTH 33°06'49" EAST, 182.50 FEET;  
THENCE SOUTH 18°13'32" EAST, 125.62 FEET;  
THENCE SOUTH 66°03'53" WEST, 413.91 FEET;  
THENCE SOUTH 17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE SOUTHERLY TERMINUS OF SAID LINE.

PARCEL B (LAKE HILLS DEVELOPMENT PHASE II):

THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON.

EXCEPT THEREFROM THAT PORTION LYING EAST OF THE RIGHT OF WAY OF UNION VALLEY ROAD AS DISCLOSED BY AUDITOR'S FILE NO. 8403120035.

ALSO EXCEPT RIGHT OF WAY OF UNION VALLEY ROAD, AS DESCRIBED BY AUDITOR'S FILE NO. 8403120035.

TOGETHER WITH A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SECTION CORNER COMMON TO SECTIONS 1, 2, 11 AND 12 AND RUNNING THENCE NORTH 89°38' WEST ALONG THE NORTH BOUNDARY OF SECTION 11 FOR 2632.27 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 11;  
THENCE SOUTH 00°26'50" EAST FOR 1395.93 FEET TO A STONE MARKING THE NORTH SIXTEENTH CORNER OF SAID SECTION 11; THENCE NORTH 86°38'30" EAST ALONG THE SOUTH BOUNDARY OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 11 FOR 807.34 FEET;  
THENCE SOUTH 80°34'45" EAST FOR 263.54 FEET;

THENCE SOUTH 69°00'10" EAST FOR 258.00 FEET;  
 THENCE SOUTH 60°54'10" EAST FOR 209.00 FEET TO A WEST ANGLE  
 POINT OF TRACT "B" OF THE PLAT OF FIRST ADDITION TO GAUKROGER  
 SUBDIVISION;  
 THENCE NORTH 38°20'37" EAST FOR 159.67 FEET TO THE NORTHWEST  
 CORNER OF SAID PLAT;  
 THENCE NORTH 51°39'23" WEST FOR 640.24 FEET;  
 THENCE NORTH 38°20'37" EAST FOR 189.78 FEET;  
 THENCE SOUTH 51°39'23" EAST FOR 178.00 FEET;  
 THENCE NORTH 58°10'52" EAST FOR 126.43 FEET;  
 THENCE NORTH 25°26'52" EAST FOR 127.56;  
 THENCE SOUTH 78°24'38" EAST FOR 493.29 FEET;  
 THENCE SOUTH 16°39'53" EAST FOR 282.69 FEET;  
 THENCE SOUTH 41°31'53" EAST FOR 205.99 FEET;  
 THENCE NORTH 23°36'37" EAST FOR 167.42 FEET;  
 THENCE NORTH 25°40'52" EAST FOR 353.34 FEET;  
 THENCE SOUTH 49°42'08" EAST FOR 1324.27 FEET;  
 THENCE SOUTH 40°17'52" WEST FOR 75.00 FEET;  
 THENCE SOUTH 37°36'38" EAST FOR 216.00 FEET;  
 THENCE SOUTH 32°14'08" EAST FOR 181.41 FEET;  
 THENCE NORTH 31°12'00" EAST FOR 206.69 FEET;  
 THENCE SOUTH 89°34'30" EAST FOR 1378.23 FEET;  
 THENCE NORTH 5°03'30" EAST FOR 75.25 FEET;  
 THENCE SOUTH 89°34'30" EAST FOR 108.97 FEET;  
 THENCE SOUTH 30°30'33" EAST FOR 87.44 FEET;  
 THENCE SOUTH 89°34'30" EAST FOR 48.77 FEET TO A POINT ON THE EAST  
 BOUNDARY OF SAID NORTHWEST QUARTER OF SECTION 12; THENCE  
 NORTH 00°30'45" WEST ALONG SAID EAST BOUNDARY FOR A DISTANCE  
 OF 1900.00 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 12;  
 THENCE NORTH 88°53'15" WEST ALONG THE NORTH BOUNDARY OF  
 SAID NORTHWEST QUARTER FOR 2673.23 FEET TO THE SECTION  
 CORNER COMMON TO SAID SECTIONS 11 AND 12 BEING THE ORIGINAL  
 POINT OF BEGINNING,

EXCEPT THAT PORTION THEREOF LYING WESTERLY OF A LINE DESCRIBED AS FOLLOWS:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF  
 SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11  
 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;  
 THENCE SOUTH 89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12,  
 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;  
 THENCE SOUTH 00°18'31" WEST, 193.94 FEET;  
 THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;

THENCE SOUTH 33°06'49" EAST, 182.50 FEET;  
THENCE SOUTH 18°13'32" EAST, 125.62 FEET;  
THENCE SOUTH 66°03'53" WEST, 413.91 FEET;  
THENCE SOUTH 17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON  
THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE  
SOUTHERLY TERMINUS OF SAID LINE.

PARCEL C (BIRDIE POINT PARCEL):

A PARCEL OF LAND SITUATED IN THE NORTHEAST QUARTER OF  
SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN  
COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS  
FOLLOWS:

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF  
SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11  
BEARS SOUTH 89°58'24" WEST 2634.69 FEET;  
THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE  
SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE  
ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE  
FOLLOWING COURSES:  
SOUTH 25°18'29" WEST 352.82 FEET;  
SOUTH 23°19'20" WEST 167.40 FEET;  
NORTH 41°49'37" WEST 205.96 FEET;  
NORTH 17°01'53" WEST 282.57 FEET;  
NORTH 78°43'48" WEST 493.11 FEET;  
NORTH 00°00'13" WEST 38.08 FEET;  
THENCE LEAVING SAID BOUNDARY SOUTH 73°51'53" EAST 20.90 FEET TO  
A 580.00 FOOT RADIUS CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 113.95 FEET;  
THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS  
CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS  
CURVE TO THE RIGHT;  
THENCE ALONG SAID CURVE 29.40 FEET;  
THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS  
CURVE TO THE LEFT;  
THENCE ALONG SAID CURVE 53.36 FEET;  
THENCE NORTH 77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS  
CURVE TO THE RIGHT;  
THENCE ALONG SAID CURVE 59.64 FEET;  
THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT  
BEARS SOUTH 21°32'18" WEST SOUTH 22°21'52" WEST 197.38 FEET TO THE  
POINT OF BEGINNING.

# APPENDIX C

5/17/07 Horizon Deed of Trust

1/14/2011 Trustee Deed

Moved From (Double Strikethrough)

Moved To (Double Underline)

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

The land referred to in this deed is situated in the State of Washington, County of Chelan and is described by follows:

**PARCEL A: (LAKE HILLS DEVELOPMENT PHASE I):**

A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SECTION CORNER COMMON TO SECTIONS 1, 2, 11 AND 12 AND RUNNING THENCE NORTH  $89^{\circ}38'$  WEST ALONG THE NORTH BOUNDARY OF SECTION 11 FOR 2632.27 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 11; ~~THENCE SOUTH  $00^{\circ}26'50''$  EAST FOR 1395.93 FEET TO A STONE MARKING THE NORTH SIXTEENTH CORNER OF SAID SECTION 11;~~

THENCE SOUTH  $00^{\circ}26'50''$  EAST FOR 1395.93 FEET TO A STONE MARKING

THE NORTH SIXTEENTH CORNER OF SAID SECTION 11; THENCE NORTH  $86^{\circ}38'30''$  EAST ALONG THE SOUTH BOUNDARY OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 11 FOR 807.34 FEET;

THENCE SOUTH  $80^{\circ}34'45''$  EAST FOR 263.54 FEET;

THENCE SOUTH  $69^{\circ}00'40.00''$  EAST FOR 258.00 FEET;

THENCE SOUTH  $60^{\circ}54'40.54''$  EAST FOR 209.00 FEET TO A WEST ANGLE POINT OF TRACT "B" OF THE PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION;

THENCE NORTH  $38^{\circ}20'37''$  EAST FOR 159.67 FEET TO THE NORTHWEST CORNER OF SAID PLAT;

THENCE NORTH  $51^{\circ}39'23''$  WEST FOR 640.24 FEET;

THENCE NORTH  $38^{\circ}20'37''$  EAST FOR 189.78 FEET;

THENCE SOUTH  $51^{\circ}39'23.39''$  EAST FOR 178.00 FEET;

THENCE NORTH  $58^{\circ}10'52''$  EAST FOR 126.43 FEET;

THENCE NORTH  $25^{\circ}26'52''$  EAST FOR 127.56; ~~FEET;~~

THENCE SOUTH  $78^{\circ}24'38''$  EAST FOR 493.29 FEET;

Deed Compare - Pg1

THENCE SOUTH ~~15°39'53"~~16°39'53" EAST FOR 282.69 FEET;

THENCE SOUTH ~~41°34'53"~~31'53" EAST FOR 205.99 FEET;

THENCE NORTH ~~23°~~36'37" EAST FOR 167.42 FEET;

THENCE NORTH ~~25°~~40'52" EAST FOR 353.34 FEET;

THENCE SOUTH ~~49°~~42'08" EAST FOR 1324.27 FEET;

THENCE SOUTH ~~40°~~17'52" WEST FOR 75.00 FEET;

THENCE SOUTH ~~37°~~36'38" EAST FOR 216.00 FEET;

THENCE SOUTH ~~32°~~14'08" EAST FOR 181.41 FEET;

THENCE NORTH ~~31°~~12'00"12'00" EAST FOR 206.69 FEET;

THENCE SOUTH ~~89°~~34'30" EAST FOR 1378.23 FEET;

THENCE NORTH ~~5°~~03'30" EAST FOR 75.25 FEET;

THENCE SOUTH ~~89°~~34'30"89°34'30" EAST FOR 108.97 FEET;

THENCE SOUTH ~~30°~~30'33" EAST FOR 87.44 FEET;

THENCE SOUTH ~~9°~~34'30"89°34'30" EAST FOR 48.77 FEET TO A POINT ON THE EAST BOUNDARY OF SAID NORTHWEST QUARTER OF SECTION 12;

THENCE NORTH ~~00°~~30'45" WEST ALONG SAID EAST BOUNDARY FOR A DISTANCE OF 1900.00 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 12;

THENCE NORTH ~~88°~~53'15"588°53'15" WEST ALONG THE NORTH BOUNDARY OF SAID NORTHWEST QUARTER FOR 2673.23 FEET TO THE SECTION CORNER COMMON TO SAID SECTIONS 11 AND 12 BEING THE ORIGINAL POINT OF BEGINNING,

EXCEPT THEREFROM A PARCEL OF LAND IN THE NORTHEAST QUARTER OF THE ~~NORTHEAST QUARTER OF SECTION 11~~, TOWNSHIP 27 NORTH, RANGE 22 EAST, W.M., CITY OF CHELAN, CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF LOT 77, PLAT OF GOLF COURSE TERRACE 3RD ADDITION ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 17 OF PLATS, PAGES 61 AND 62, RECORDS OF THE CHELAN COUNTY AUDITOR,

Deed Compare - Pg2

THENCE SOUTH 53°48'15" EAST ALONG THE NORTHERLY LINE OF SAID LOT 77 FOR A DISTANCE OF 340.22 FEET TO THE NORTHEAST CORNER OF SAID LOT 77;

THENCE NORTH ~~00037°08'00"~~00°37'08" EAST FOR 26.62 FEET;

THENCE NORTH ~~57°25'27"~~27°25'27" WEST FOR 324.94 FEET;

THENCE SOUTH 57°24'53" WEST FOR 1.21 FEET TO THE POINT OF BEGINNING.

EXCEPT THEREFROM THOSE PORTIONS (RESERVOIR SITE AND 60 FOOT ROAD) AS DESCRIBED IN AND CONVEYED TO THE CITY OF CHELAN BY DEED RECORDED JULY 14, 1977, UNDER AUDITOR'S FILE NO. 775081.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 12 OF PLATS, PAGE 52 AND 53.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE SECOND ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 14 OF PLATS, PAGE 43 AND 44.

ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE ~~THIRD ADDITION~~ADDITION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 17 OF PLATS, PAGE 61 AND 62.

ALSO EXCEPT ALL OF TRACTS "A" AND "B" PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION, CHELAN COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF.

**PARCEL B:**

~~THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 27 NORTH, RANGE 22, E.W.M., CHELAN COUNTY, WASHINGTON. EXCEPT THEREFROM THAT PORTION LYING EAST OF THE RIGHT OF WAY OF UNION VALLEY ROAD AS DISCLOSED BY AUDITOR'S FILE NO. 8403120035. ALSO EXCEPT RIGHT OF WAY OF UNION VALLEY ROAD, AS DESCRIBED BY AUDITOR'S FILE NO. 8403120035.~~

~~EXCEPT FROM PARCELS A AND B ABOVE, THAT PORTION THEREOF DESCRIBED AS FOLLOWS: (BIRDIE POINT PARCEL):~~

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;

THENCE SOUTH 12°49'37°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE

Deed Compare - Pg3

SOUTHERLY BOUNDARY AND ~~THE~~ THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:

SOUTH ~~25018'29~~25°18'29" WEST 352.82 FEET;

SOUTH ~~23019'20~~23°19'20" WEST 167.40 FEET;

NORTH ~~41049'37~~41°49'37" WEST 205.96 FEET;

NORTH ~~17001'53~~17°01'53" WEST 282.57 FEET;

NORTH 78°43'48" WEST 493.11 FEET;

NORTH 00°00'13" WEST 38.08 FEET;

THENCE LEAVING SAID BOUNDARY SOUTH ~~73°51'53~~73°51'53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 113.95 FEET;

THENCE SOUTH ~~85°07'16~~85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT;

THENCE ALONG SAID CURVE 29.40 FEET;

THENCE SOUTH ~~89°02'38~~89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 53.36 FEET;

THENCE NORTH ~~77°22'05~~77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT;

THENCE ALONG SAID CURVE 59.64 FEET;

THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH ~~21°32'18~~21°32'18" WEST ~~NORTH 22°21'52~~NORTH 22°21'52" EAST ~~SOUTH 22°21'52~~SOUTH 22°21'52" WEST 197.38 FEET TO THE POINT OF BEGINNING.

~~ALSO EXCEPT FROM PARCELS A AND B,~~ THAT PORTION THEREOF LYING EASTERLY OF A LINE DESCRIBED AS FOLLOWS:

Deed Compare - Pg4

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;

THENCE SOUTH ~~89°20'52"~~89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12, 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;

THENCE SOUTH 00°18'31" WEST, 193.94 FEET;

THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;

THENCE SOUTH ~~33°06'49"~~33°06'49" EAST, 182.50 FEET;

THENCE SOUTH ~~18°13'32"~~18°13'32" EAST, 125.62 FEET;

THENCE SOUTH ~~66°03'53"~~66°03'53" WEST, 413.91 FEET;

THENCE SOUTH ~~17°25'38"~~17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE SOUTHERLY TERMINUS OF SAID LINE.

**PARCEL C:**

~~A PARCEL OF LAND SITUATED PARTLY IN THE NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22, E. W. M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:~~

PARCEL B (LAKE HILLS DEVELOPMENT PHASE II):

THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 27 NORTH, RANGE 22, E. W. M., CHELAN COUNTY, WASHINGTON.

EXCEPT THEREFROM THAT PORTION LYING EAST OF THE RIGHT OF WAY OF UNION VALLEY ROAD AS DISCLOSED BY AUDITOR'S FILE NO. 8403120035.

ALSO EXCEPT RIGHT OF WAY OF UNION VALLEY ROAD, AS DESCRIBED BY AUDITOR'S FILE NO. 8403120035.

TOGETHER WITH A PARCEL OF LAND SITUATED PARTLY IN THE FOLLOWING:

COMMENCING AT THE AFOREMENTIONED NORTHWEST QUARTER OF SECTION 12 AND PARTLY IN THE NORTHEAST CORNER QUARTER OF SECTION 11, FROM WHICH ALL IN TOWNSHIP 27 NORTH, RANGE 22, E. W. M., CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Deed Compare - Pg5

BEGINNING AT THE SECTION CORNER COMMON TO SECTIONS 1, 2, 11 AND 12 AND RUNNING THENCE NORTH 89°38' WEST ALONG THE NORTH BOUNDARY OF SECTION 11 FOR 2632.27 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 11 BEARS;

~~THENCE SOUTH 89°58'24" WEST 2634.69 FEET; THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:~~

00°26'50" EAST FOR 1395.93 FEET TO A STONE MARKING THE NORTH SIXTEENTH CORNER OF SAID SECTION 11; THENCE NORTH 86°38'30" EAST ALONG THE SOUTH BOUNDARY OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 11 FOR 807.34 FEET;

THENCE SOUTH 25°18'29 80°34'45" EAST FOR 263.54 FEET;

THENCE SOUTH 69°00' 10" EAST FOR 258.00 FEET;

THENCE SOUTH 60°54'10" EAST FOR 209.00 FEET TO A WEST ANGLE

POINT OF TRACT "B" OF THE PLAT OF FIRST ADDITION TO GAUKROGER SUBDIVISION;

THENCE NORTH 38°20'37" EAST FOR 159.67 FEET TO THE NORTHWEST CORNER OF SAID PLAT;

THENCE NORTH 51°39'23" WEST 352.82 FOR 640.24 FEET;

SOUTH THENCE NORTH 38°20'37" EAST FOR 189.78 FEET;

THENCE SOUTH 51°39'23" EAST FOR 178.00 FEET;

THENCE NORTH 58°10'52" EAST FOR 126.43 FEET;

THENCE NORTH 25°26'52" EAST FOR 127.56;

THENCE SOUTH 78°24'38" EAST FOR 493.29 FEET;

THENCE SOUTH 16°39'53" EAST FOR 282.69 FEET;

THENCE SOUTH 41°31 '53" EAST FOR 205.99 FEET;

THENCE NORTH 23°49'20°36'37" EAST FOR 167.42 FEET;

THENCE NORTH 25°40'52" EAST FOR 353.34 FEET;

Deed Compare - Pg6

THENCE SOUTH 49°42'08" EAST FOR 1324.27 FEET;

THENCE SOUTH 40°17'52" WEST 167.40 FOR 75.00 FEET;

~~NORTH 41°49'37" WEST 205.96 FEET;~~

~~NORTH 17°01'53" WEST 282.57 FEET;~~

~~NORTH 78°43'48" WEST 493.11 FEET;~~

~~NORTH 00°00'13" WEST 38.08 FEET;~~

~~THENCE LEAVING SAID BOUNDARY SOUTH 73°51'53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID CURVE 113.95 FEET; THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT;~~

THENCE SOUTH 37°36'38" EAST FOR 216.00 FEET;

THENCE SOUTH 32°14'08" EAST FOR 181.41 FEET;

THENCE NORTH 31°12'00" EAST FOR 206.69 FEET;

THENCE SOUTH 89°34'30" EAST FOR 1378.23 FEET;

THENCE NORTH 5°03'30" EAST FOR 75.25 FEET;

THENCE SOUTH 89°34'30" EAST FOR 108.97 FEET;

THENCE SOUTH 30°30'33" EAST FOR 87.44 FEET;

THENCE SOUTH 89°34'30" EAST FOR 48.77 FEET TO A POINT ON THE EAST BOUNDARY OF SAID NORTHWEST QUARTER OF SECTION 12;

THENCE NORTH 00°30'45" WEST ALONG SAID EAST BOUNDARY FOR A DISTANCE OF 1900.00 FEET TO THE NORTH QUARTER CORNER OF SAID SECTION 12;  
THENCE NORTH 88°53'15" WEST ALONG THE NORTH BOUNDARY OF SAID NORTHWEST QUARTER FOR 2673.23 FEET TO THE SECTION CORNER COMMON TO SAID SECTIONS 11 AND 12 BEING THE ORIGINAL POINT OF BEGINNING,

EXCEPT THAT PORTION THEREOF LYING WESTERLY OF A LINE DESCRIBED AS FOLLOWS:

~~THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 29.40 FEET; THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT; THENCE ALONG SAID~~

Deed Compare - Pg7

~~CURVE 53.36 FEET; THENCE NORTH 77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE LONG SAID CURVE 59.64 FEET; THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH 21°32'18" WEST NORTH 22°21'52" EAST 197.38 FEET TO THE POINT OF BEGINNING.~~

~~ALSO TOGETHER WITH THE FOLLOWING:~~

COMMENCING AT THE AFOREMENTIONED NORTHEAST CORNER OF SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 89°58'24" WEST 2634.69 FEET;

THENCE SOUTH 89°20'52" EAST, ALONG THE NORTH LINE OF SECTION 12, 281.47 FEET TO THE TRUE POINT OF BEGINNING OF SAID LINE;

THENCE SOUTH 00°18'31" WEST, 193.94 FEET;

THENCE SOUTH 45°32'32" EAST, 1167.66 FEET;

THENCE SOUTH 33°06'49" EAST, 182.50 FEET;

THENCE SOUTH 18°13'32" EAST, ~~+251.25.62~~ FEET;

THENCE SOUTH 66°03'53" WEST, 413.91 FEET;

THENCE SOUTH 17°25'38" WEST, 243.61 FEET TO AN ANGLE POINT ON THE SOUTHERLY LINE OF THE AFOREMENTIONED PARCEL A AND THE SOUTHERLY TERMINUS OF SAID LINE.

~~EXCEPT THEREFROM PARCEL C (BIRDIE POINT PARCEL):~~

A PARCEL OF LAND SITUATED IN THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 11, ALL IN TOWNSHIP 27 NORTH, RANGE 22 EAST, E.W.M., ~~CITY OF CHELAN~~, CHELAN COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

~~BEGINNING~~ COMMENCING AT THE NORTHWEST AFOREMENTIONED NORTHEAST CORNER OF LOT 77, PLAT OF GOLF COURSE TERRACE 3RD ADDITION ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 17 OF PLATS, PAGES 61 AND 62, RECORDS OF THE CHELAN COUNTY AUDITOR, ~~THENCE~~ SECTION 11, FROM WHICH THE NORTH QUARTER OF SAID SECTION 11 BEARS SOUTH 53°48'15" EAST ALONG THE NORTHERLY LINE OF SAID LOT 77 FOR A DISTANCE OF 340.22 FEET TO THE NORTHEAST CORNER OF SAID LOT 77; THENCE NORTH 00°37'08" EAST FOR 26.62 FEET; THENCE NORTH 57°25'2789°58'24" WEST 2634.69 FEET;

Deed Compare - Pg8

THENCE SOUTH 12°19'37" WEST 903.33 FEET TO AN ANGLE POINT ON THE SOUTHERLY BOUNDARY AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID SOUTHERLY AND WESTERLY BOUNDARY THE FOLLOWING COURSES:

FOR 324.94 SOUTH 25°18'29" WEST 352.82 FEET;

SOUTH 23°19'20" WEST 167.40 FEET;

NORTH 41°49'37" WEST 205.96 FEET;

NORTH 17°01 '53" WEST 282.57 FEET;

NORTH 78°43'48" WEST 493.11 FEET;

NORTH 00°00'13" WEST 38.08 FEET;

THENCE LEAVING SAID BOUNDARY SOUTH 73°51 '53" EAST 20.90 FEET TO A 580.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 113.95 FEET;

THENCE SOUTH 85°07'16" EAST 246.60 FEET TO A 105.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 130.87 FEET TO A 25.00 FOOT RADIUS CURVE TO THE RIGHT;

THENCE ALONG SAID CURVE 29.40 FEET;

THENCE SOUTH 89°02'38" EAST 77.26 FEET TO A 225.00 FOOT RADIUS CURVE TO THE LEFT;

THENCE ALONG SAID CURVE 53.36 FEET;

THENCE NORTH 77°22'05" EAST 308.46 FEET TO A 100.00 FOOT RADIUS CURVE TO THE RIGHT; 57°24'53

THENCE ALONG SAID CURVE 59.64 FEET;

THENCE LEAVING SAID CURVE, FROM WHICH THE RADIUS POINT BEARS SOUTH 21°32'18" WEST FOR 4.24 SOUTH 22°21 '52" WEST 197.38 FEET TO THE POINT OF BEGINNING.

~~EXCEPT THEREFROM THOSE PORTIONS (RESERVOIR SITE AND 60 FOOT ROAD) AS DESCRIBED IN AND CONVEYED TO THE CITY OF CHELAN BY DEED RECORDED JULY 14, 1977, UNDER AUDITOR'S FILE NO. 775081.~~

Deed Compare - Pg9

APPENDIX C - 33

~~ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE, CHELAN COUNTY,  
WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 12 OF  
PLATS, PAGE 52 AND 53.~~

~~ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE SECOND ADDITION, CHELAN  
COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN  
VOLUME 14 OF PLATS, PAGE 43 AND 44.~~

~~ALSO EXCEPT THE PLAT OF GOLF COURSE TERRACE THIRD ADDITION, CHELAN  
COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF RECORDED IN  
VOLUME 17 OF PLATS, PAGE 61 AND 62.~~

~~ALSO EXCEPT ALL OF TRACTS "A" AND "B" PLAT OF FIRST ADDITION TO  
GAUKROGER SUBDIVISION, CHELAN COUNTY, WASHINGTON, ACCORDING TO  
THE PLAT THEREOF.~~

Deed Compare - Pg10

APPENDIX C - 34

# APPENDIX D

2014 WL 2996159

Only the Westlaw citation is currently available.

NOT FOR PRINTED PUBLICATION

United States District Court,  
E.D. Texas, Sherman Division.

Wilfredo Rivera and Ines Del C. Rivera, Plaintiffs,  
v.

Bank of America, N.A. as successor by merger to  
BAC Home Loans Servicing, L.P., and Mortgage  
Electronic Registration Systems, Inc., Defendants.

CASE NO. 4:13cv195 | Signed  
July 2, 2014 | Filed July 3, 2014

**Attorneys and Law Firms**

J.B. Peacock, Jr., David M. Vereeke, Kristen Nicole  
Blanchard, Michael Patrick Moore, Gagnon Peacock  
Shanklin & Vereeke, PC, Dallas, TX, for Plaintiffs.

Nathan Templeton Anderson, Frank Jeffrey Catalano,  
McGlinchey Stafford, PLLC, Dallas, TX, for Defendants.

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF THE UNITED  
STATES MAGISTRATE JUDGE**

Ron Clark, United States District Judge

\*1 Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On May 14, 2014, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that Defendants' Motion for Summary Judgment [Doc. # 16] be granted [Doc. # 25]. On May 29, 2014, Plaintiffs filed objections [Doc. # 27]. On June 11, 2014, Defendants filed a response [Doc. # 28].

The court notes that the Magistrate Judge prepared a detailed report and recommendation that totaled twenty pages. After consideration of the briefing, the Magistrate Judge recommended the granting of Defendants' motion. Defendants' response to the objections correctly points out that Plaintiffs merely re-urged the same arguments made

in their response and sur-reply to the motion for summary judgment.

Plaintiffs first reassert that Defendants are barred from foreclosing by the statute of limitations. Plaintiffs object to the finding by the Magistrate Judge that the payments accepted in 2006 were an effective abandonment of the acceleration. The Magistrate Judge correctly noted that the summary judgment evidence established that the January 2004 acceleration was abandoned in 2006, when Defendants accepted a payment subsequent to the acceleration and opted not to foreclose. The acceptance of this payment had the effect of restoring the contract to its original condition and restoring the Note's original maturity date of November 1, 2031. Plaintiffs' objection is overruled.

Plaintiffs also assert that the Magistrate Judge accepted Defendants' argument that the Notice of Default and intent to accelerate sent in September 2010 reset the statute of limitations. This objection is overruled. The Magistrate Judge made no such findings. The Magistrate Judge indicated that the issue of the September 2010 notice had no bearing on the issue of statute of limitations and that the acceptance of the payment in January 2006 reset the clock.

Plaintiffs also assert that any attempted claim to abandon the acceleration is absurd when taken with the attempt to act on the acceleration in March 2006. The Magistrate Judge found that there was no evidence in the record that Defendants issued a notice of substitute trustee sale in March 2006. Plaintiffs state that the Magistrate Judge ignored evidence submitted by both parties. Plaintiffs point to their summary judgment exhibit 1C; however, this exhibit is a notice of substitute trustee sale dated March 5, 2013, and not one for March 2006. Plaintiffs also point to Defendants' summary judgment exhibit A-4, which is not a notice of substitute trustee sale. There is no evidence in the record to show that Defendants issued a notice for substitute trustee sale in March 2006. Even if there were such evidence, the acceptance of payments would reset the statute of limitations.

Plaintiffs next object to the Magistrate Judge's finding that Defendants did not waive the right to accelerate and foreclose. The Magistrate Judge found that there was no summary judgment evidence that Defendants expressed an actual intent to waive their right to foreclose, thus Plaintiffs' "waiver argument has no merit." Plaintiffs once again merely re-urge the exact arguments set forth in their summary judgment response, without citing to any additional authority for

their position. The court agrees with the Magistrate Judge that Plaintiffs have not provided this court with summary judgment evidence that Defendants manifested their intent to waive their right to foreclose.

\*2 Plaintiffs next object to the Magistrate Judge's findings that the economic loss doctrine bars Plaintiffs' negligent misrepresentation claim. Plaintiffs assert that they suffered injuries independent from any breach of contract. Plaintiffs argue that they presented evidence of personal injuries which are outside of the subject matter of the contract, including anxiety and stress.

Plaintiffs once again copy the same argument advanced in their summary judgment response, that the economic loss doctrine does not bar Plaintiffs' negligent misrepresentation claim because Plaintiffs suffered injuries independent from any breach of contract. The Magistrate Judge correctly addressed the issue that Plaintiffs cannot demonstrate that Defendants owed them a duty that was independent of the Note and Deed of Trust. The Magistrate Judge also correctly found that Plaintiffs failed to offer sufficient evidence of mental anguish that would qualify as damages that were independent of any breach of contract claim. Plaintiffs' objections are overruled. Plaintiffs' tort claims are barred by the economic loss doctrine and fail as a matter of law.

Plaintiffs next object that they provided sufficient evidence to show a genuine issue of material fact as to their claims under the Texas Debt Collection Act ("TDCA"). Plaintiffs' objections again contain no new argument related to the Magistrate Judge's recommendation that their TDCA claims should be dismissed. Plaintiffs have provided no evidence that Defendants made any false or misleading assertion, and, in fact, the Magistrate Judge correctly acknowledged that the evidence shows that "Plaintiffs have had over ten years to cure the default on the loan and that Defendants did not make false representations to Plaintiffs." Plaintiffs' objections in no way address the Magistrate Judge's reasoning that "[r]epresentations related to a loan modification do not constitute an attempt to collect a debt." The objections are overruled.

As part of Plaintiffs' TDCA objections, Plaintiffs continue to try and convince this court that declarations allegedly made by former employees of Bank of America are proper summary judgment evidence that should be deemed admissible in this case. The Magistrate Judge correctly found that declarations from an unrelated lawsuit, bearing no relation to the date

this case was filed and having absolutely nothing to do with Plaintiffs' loan, are inadmissible as summary judgment evidence to support contentions Plaintiffs may be asserting in this suit. The Magistrate Judge also correctly recognized, even if this evidence were admissible, the dismissal of all claims would not change, since the summary judgment evidence shows that Plaintiffs' loan was in serious default and Plaintiffs are not entitled to a loan modification.

Plaintiffs' last objection relates to the denial of their requests for declaratory relief and an accounting. The Magistrate Judge correctly recommended dismissal of all of Plaintiffs' causes of action, which means that there is no basis for declaratory relief or equitable relief.

Having received the report of the United States Magistrate Judge, and considering the objections thereto filed by Plaintiffs [Doc. # 27] and response by Defendants, this court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the court.

\*3 It is, therefore, **ORDERED** that Defendants' Motion for Summary Judgment [Doc. # 16] is **GRANTED** and Plaintiffs' case is **DISMISSED** with prejudice.

So **ORDERED**.

**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

AMOS L. MAZZANT, UNITED STATES MAGISTRATE  
JUDGE

Pending before the Court is Defendants' Motion for Summary Judgment (Dkt. # 16). The Court, having considered the relevant pleadings, finds that Defendants' Motion for Summary Judgment should be granted.

**BACKGROUND**

On or about September 28, 2001, Plaintiffs Wilfredo Rivera and Ines Del C. Rivera obtained a home equity loan in the amount of \$280,000 on real property located at 2605 Saratoga Drive, Plano, Texas 75075 (the "Property"). In conjunction with this home equity loan, Plaintiffs executed a Texas Home Equity Note (the "Note"), and Texas Home Equity

Security Instrument. The Note and Deed of Trust identified the lender as Full Spectrum Lending, Inc. ("Full Spectrum"). The Deed of Trust states that Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") "is a beneficiary under this Security Instrument." MERS assigned the Deed of Trust to Countrywide Home Loans, Inc. on March 16, 2006. Defendant Bank of America, N.A. ("Bank of America") is the successor by merger to Countrywide.

In or about September 2003, Plaintiffs' loan fell in default, and from that point on Plaintiffs have failed to cure the default. Specifically, the loan history shows that the "Regular Payment" made on or about May 28, 2004, only brought the loan current through the October 2003 payment. Plaintiffs' last regular payment made on the loan was on or about January 6, 2006, which at that point brought the loan current only through March, 2004.

The Escrow Balance on the loan has been in the negative since Defendants made a property tax payment on behalf of the Plaintiffs back in December 2003. Defendants have continued to make county tax payments on the Property, which has now resulted in a total negative Escrow Balance of \$68,323.03. In addition to the outstanding principal balance due on the loan of \$274,189.44, the property taxes paid by Defendants are now nearly \$70,000, which will continue to grow until Defendants are allowed to exercise their right to foreclosure.

In 2003, after Plaintiffs began having trouble making payments, Defendants sent a letter, dated January 6, 2004, to Plaintiffs informing them that Defendants intended to accelerate Plaintiffs' home equity loan. On May 3, 2004, Plaintiffs filed for Chapter 13 Bankruptcy, which was dismissed on April, 28, 2005. Plaintiffs filed for bankruptcy for the second time on May 3, 2005. Plaintiffs' second bankruptcy filing was closed on July 13, 2005. Plaintiffs also received notice of substitute trustee sale in March of 2006.

Bank of America sent Plaintiffs a Notice of Default and intent to accelerate on September 17, 2010. At that time, the total due to reinstate the loan and cure the default was \$184,533.56.

On February 28, 2012, Bank of America sent Plaintiffs a loan modification application for the Making Homes Affordable Program. On February 28, 2012, Plaintiffs filled out the application and sent it along with the required documents to Bank of America. On March 12, 2012, Bank of America called Plaintiffs to inform them that more documentation was needed for the loan application. Plaintiffs sent via facsimile

an additional ninety pages requested by Bank of America on April 4, 2012.

\*4 On June 26, 2012, Plaintiffs called to inquire about the status of their loan modification and spoke to Nathaniel Kennedy-Trevino ("Kennedy-Trevino"), a Bank of America representative, who informed Plaintiffs that some documents were still missing and Plaintiffs needed to send them to Bank of America before it could begin to process Plaintiffs' loan application. Plaintiffs sent fifteen additional documents to Kennedy-Trevino that same day.

Plaintiffs called Bank of America on July 3, 2012, to make sure it had received the documents. Plaintiffs were unable to speak to anyone at Bank of America at that time. Plaintiffs called Bank of America again on July 10, 2012, to inquire whether the faxed documents were received and spoke again to Kennedy-Trevino. Kennedy-Trevino informed Plaintiffs that the documents now needed to be faxed directly to the processing department, and gave Plaintiffs the fax number for them to refax the documents.

On August 9, 2012, Plaintiffs spoke to Gwenita Lawton, a supervisor at Bank of America, who informed Plaintiffs that Bank of America still needed more documents. Plaintiffs again sent the requested documents. On September 10, 2012, Plaintiffs spoke to Veronica Velasquez (Velasquez"), another Bank of America representative, who informed Plaintiffs that she would be their new account manager. Velasquez demanded that Plaintiffs send the documents again. Plaintiffs faxed the requested information, to which were duplicates of what had already been submitted several times before to Velasquez.

Plaintiffs received a letter from Bank of America on September 13, 2012, stating that it had received the documents, and then received a call from Bank of America on September 14, 2012, from Rosemarie Cirilo ("Cirilo") notifying Plaintiffs that she would be their new account manager. One day after Plaintiffs were informed that Bank of America finally received their loan documents, Cirilo demanded that Plaintiffs fill out a new application and refax the documents again. This process continued for the next four months, and by January 20, 2013, Plaintiffs had faxed one hundred and thirty-two documents to Bank of America on several different occasions.

On February 3, 2013, Plaintiffs received notice from Bank of America that their home would be posted for foreclosure sale

on March 5, 2013. Plaintiffs called Cirilo on February 4, 2013, but she was out of the office and did not return Plaintiffs' call. Plaintiffs called Cirilo again on February 5, 2013, to inquire why their home was scheduled to be foreclosed upon when they had provided all the required documentation for a loan modification. Cirilo stated that Bank of America had not received Plaintiffs' documents and Plaintiffs should resend them again to a different fax number. Cirilo said she would contact Plaintiffs in a few days, but this was the last Plaintiffs heard from Bank of America.

Plaintiffs filed this action in March 2013 in the 366th Judicial District Court, Collin County, Texas. On April 3, 2013, Defendants removed the case to this Court on the basis of diversity jurisdiction. On May 3, 2013, Plaintiffs filed their First Amended Complaint ("Amended Complaint.") In their Amended Complaint, Plaintiffs allege causes of action for: (1) statute of limitations; (2) negligence and negligent misrepresentations; (3) breach of the common law tort of unreasonable collection efforts; (4) violations of the Texas Debt Collection Act ("TDCA") and the Texas Deceptive Trade Practices Act ("DTPA"); (5) equitable relief (declaratory judgment) and a claim that Defendants have waived their right to foreclose; and, (6) accounting. Plaintiffs also assert that Defendants are prohibited from foreclosing upon the Property because they have purportedly violated a Consent Judgment between the United States of America, forty-nine state attorneys general, and Bank of America.

\*5 On November 13, 2013, Defendants filed a motion for summary judgment (Dkt.# 16). On December 16, 2013, Plaintiffs filed a response (Dkt.# 22). On December 23, 2013, Defendants filed a reply (Dkt.# 23). On January 2, 2014, Plaintiffs filed a sur-reply (Dkt.# 24).

#### LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits "[show] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The trial court must resolve all

reasonable doubts in favor of the party opposing the motion for summary judgment. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The substantive law identifies which facts are material. *Anderson*, 477 U.S. at 248.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* at 247. If the movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure all of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). But if the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000). Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248-49). The nonmovant must adduce affirmative evidence. *Anderson*, 477 U.S. at 257.

#### DISCUSSION AND ANALYSIS

##### Statute of Limitations

Plaintiffs assert that Defendants are barred from foreclosing on the Property due to the four-year statute of limitations under Texas Civil Practice and Remedies Code Section 16.001, et seq.

Section 16.035 of the Texas Civil Practice & Remedies Code establishes a four-year limitations period for real property actions. Whereas section 16.035(a) addresses judicial foreclosures, section 16.035(b) addresses nonjudicial foreclosures, such as the one at issue in this case:

(b) A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues.

Tex. Civ. Prac. & Rem. Code § 16.035(b). Upon the expiration of the limitations period, the real property lien

and the power of sale to enforce the lien become void. *Id.* § 16.035(d).

The Court must determine when the cause of action accrued. Section 16.035(e) provides some guidance regarding the accrual date, stating that, for notes payable in installments and secured by a real property lien, “the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment. Tex. Civ. Prac. & Rem. Code § 16.035(e). Under Texas law, “[i]f a note or deed of trust secured by real property contains an optional acceleration clause, default does not ipso facto start limitations running on the note. Rather, the action accrues only when the holder actually exercises its option to accelerate.” *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex.2001) (citing *Hammann v. H.J. McMullen & Co.*, 122 Tex. 476, 62 S.W.2d 59, 61 (Tex.1933); *Curtis v. Speck*, 130 S.W.2d 348, 351 (Tex.App.—Galveston 1939, writ ref’d)). Effective acceleration requires two acts: (1) notice of intent to accelerate and (2) notice of acceleration. *Holy Cross*, 44 S.W.3d at 566. A note holder who exercises its option to accelerate may “abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity.” *Id.* at 566–67. Acceleration can also be abandoned by agreement or other action of the parties. *Id.* at 567 (citing *San Antonio Real-Estate, Bldg. & Loan Ass’n v. Stewart*, 94 Tex. 441, 61 S.W. 386, 388 (1901)).

\*6 Plaintiffs claim that a notice of acceleration was sent to them on January 6, 2004, and that Bank of America has nine years later posted Plaintiffs’ home for foreclosure. Plaintiffs agree that the statute of limitations was tolled during their bankruptcy filings from May 2003 until July 2005, and again when they filed a previous lawsuit from April 2006 until September 2008. Using these tolling periods, Plaintiffs calculate that Defendants should have foreclosed prior to August 2011.

Defendants assert that, as the loan history indicates, Plaintiffs’ last regular payment on the loan was on or about January 6, 2006, and that any notice of acceleration allegedly sent in 2004 was abandoned by Defendants when they opted to receive further payments from Plaintiffs, up to and including January 2006, which restored the Note’s original maturity date of November 1, 2031. Defendants further assert that even if the Note’s original maturity date was not restored, the most recent Notice of Default and intent to accelerate was sent in September 2010, thus any putative four-year statute

of limitations to foreclose would not expire until September 2014.

Plaintiffs respond that the sending of a Notice of Default and intent to accelerate in September 2010 did not reset the statute of limitations. Plaintiffs argue that for proper acceleration to occur, Bank of America is required to mail both a notice of intent to accelerate and a notice of acceleration. Plaintiffs argue that because Defendants never sent the notice of acceleration, the statute of limitations was not reset and expired in August of 2011.

Plaintiffs concede that while accepting payments can signal abandonment, they assert that Defendants clearly did not abandon their acceleration. Plaintiffs point to the fact that Defendants applied all 2006 payments to the first quarter of 2004, and they also posted Plaintiffs’ Property for substitute trustee’s sale in March 2006<sup>1</sup>, after they supposedly abandoned their acceleration. Plaintiffs argue that Defendants’ attempt to claim that they abandoned their acceleration by accepting payments is absurd when taken with their attempts to act on the acceleration in March of 2006.

The summary judgment evidence establishes that the January 2004 acceleration was abandoned in 2006, when Defendants accepted a payment subsequent to the acceleration and opted not to foreclose at that time. Acceptance of this payment had the effect of restoring the contract to its original condition and restoring the Note’s original maturity date of November 1, 2031.<sup>2</sup> “Even when a note holder has accelerated a note upon default, the holder can abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity.” *Holy Cross*, 44 S.W.3d at 566–67 (citations omitted); see also *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 356 (Tex.App.—Houston [1st Dist.] 2012, no pet.); *Denbina v. City of Hurst*, 516 S.W.2d 460, 463 (Tex.App.—Tyler 1974, no writ). The Note and Deed of Trust were restored to their original terms when the acceleration was abandoned, by accepting payments. Defendants are entitled to summary judgment that the efforts to foreclose are not barred by the applicable statute of limitations.

#### Economic Loss Doctrine

\*7 Defendants assert that Plaintiffs’ claims for negligence and negligent misrepresentation are barred by the economic loss doctrine. Defendants assert that any such claims are based solely on the contractual nature of the terms of the Note

and Deed of Trust. Defendants argue that the economic loss doctrine generally prevents Plaintiffs from recovering in tort for an alleged breach of a contractual duty.

The economic loss rule generally precludes recovery in tort where a plaintiff's only injury is an economic loss to the subject of a contract. *Academy of Skills & Knowledge, Inc. v. Charter Schools, USA, Inc.*, 260 S.W.3d 529, 541 (Tex.App.—Tyler 2008, pet. denied) (citing *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex.2007)); *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex.1991)). “When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone.” *UMLJC VP LLC v. T & M Sales and Env’tl Sys., Inc.*, 176 S.W.3d 595, 614 (Tex.App.—Corpus Christi, 2005, pet. denied) (citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex.1986)). The focus of the rule “is on determining whether the injury is to the subject of the contract itself.” *Academy*, 260 S.W.3d at 541 (citing *Lamar Homes*, 242 S.W.3d at 12). The rule restricts contracting parties to contractual remedies for such economic losses, even when the breach might reasonably be viewed as a consequence of a contracting party's negligence. *Id.* (citing *Lamar Homes*, 242 S.W.3d at 12–13). “If the action depends entirely on pleading and proving the contract in order to establish a duty, the action remains one for breach of contract only, regardless of how it is framed by the pleadings.” *OXT USA, Inc. v. Cook*, 127 S.W.3d 16, 20 (Tex.App.—Tyler 2003, pet. denied). Thus, in order for a tort duty to arise out of a contractual duty, i.e., negligent failure to perform a contract, the liability must arise independent of the fact that a contract exists between the parties; the defendant must breach a duty imposed by law rather than by the contract. *DeLanney*, 809 S.W.2d at 494.

“[W]hen a written contract exists, it is more difficult for a party to show reliance on subsequent oral representations.” *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 651 (Tex.App.—Houston [14th Dist.] 2003, pet. denied). Generally, “negligent misrepresentation is a cause of action recognized in lieu of a breach of contract claim, not usually available where a contract was actually in force between the parties.” *Airborne Freight Corp. Inc. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 295 (Tex.App.—El Paso 1992, writ denied); see *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex.App.—Amarillo 2007, no. pet) (explaining that “there must be an independent injury, other than breach of contract, to support a negligent misrepresentation finding.”).

Plaintiffs assert that the economic loss doctrine does not bar their negligent misrepresentation claim because Plaintiffs suffered injuries independent from any breach of contract. Plaintiffs assert that there is evidence of personal injuries, which are outside the subject matter of the contract and benefit-of-the-bargain damages.

The Court agrees with Defendants that Plaintiffs cannot demonstrate that Defendants owed them a duty that was independent of the Note and Deed of Trust. In this case, Plaintiffs' claims arise from claims dependent upon the existence of a contract. Any complaints by Plaintiffs relate to the parties' contractual relationship under the terms of the Note and Deed of Trust and cannot, as a matter of law, form the basis of a negligent misrepresentation or negligence claim. Moreover, Plaintiffs fail to offer sufficient evidence of mental anguish. Plaintiffs' negligent misrepresentation claim fails as a matter of law, and summary judgment should be granted on this claim. See *Hurd v. BAC Home Loans Servicing, LP.*, 880 F.Supp.2d 747, 764 (N.D.Tex.2012).

#### Waiver

\*8 Plaintiffs, alternatively, assert that Defendants waived their right to foreclose. Under Texas law, “[t]he elements of waiver are: (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) an actual intent to relinquish the right (which can be inferred from conduct).” *G.H. Bass & Company v. Dalsan Properties—Abilene*, 885 S.W.2d 572, 577 (Tex.App.—Dallas 1994, no writ); *Wigginton v. Bank of New York Mellon*, No. 3:10–cv–2128, 2011 WL 2669071, at \*4 (N.D.Tex. July 7, 2011). “Intent is the key element in establishing waiver,” but “[t]he law on waiver distinguishes between a showing of intent by actual renunciation and a showing of intent based on inference.” *G.H. Bass & Company*, 885 S.W.2d at 577; *Motor Vehicle Bd. of the Texas Dep’t of Transp. v. El Paso Indep. Auto. Dealers Ass’n, Inc.*, 1 S.W.3d 108, 111 (Tex.1999). Where waiver is based on inference, “it is the burden of the party who is to benefit by a showing of waiver to produce conclusive evidence that the opposite party ‘unequivocally [sic] manifested’ its intent to no longer assert its claim.” *G.H. Bass & Company*, 885 S.W.2d at 577.

Plaintiffs assert that Defendants, as holders of the Deed of Trust, had a right to pursue foreclosure if Plaintiffs defaulted, Defendants knew they had the right, and Defendants accepted Plaintiffs' payments after the acceleration through January of 2006, which is intentional conduct inconsistent with the right to foreclose. Defendants assert that Plaintiffs failed

to produce any evidence that would establish that they intentionally waived their right to accelerate the Note and foreclose.

The Court finds that Plaintiffs have offered insufficient summary judgment evidence that Defendants “unequivocally manifested” an intent to waive their acceleration rights. Because there is no summary judgment evidence that Defendants expressed an actual intent to waive their right to foreclose under the loan agreement, Plaintiffs’ claim for waiver fails. The acceptance of partial payments is not evidence of waiver on the part of Defendants. The waiver argument has no merit. *See Watson v. CitiMortgage*, 530 Fed.Appx. 322 (5th Cir. 2013).

#### Unreasonable Collection Efforts Claim

Defendants next assert that Plaintiffs’ claim for common law tort of unreasonable collection efforts fails as a matter of law because Plaintiffs cannot produce any evidence that they engaged in a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.

Under Texas law, “[u]nreasonable collection is an intentional tort.” *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex.App.–Dallas 2008, no pet.). “[T]he elements are not clearly defined and the conduct deemed to constitute an unreasonable collection effort varies from case to case.” *Id.* To recover on this claim, Plaintiffs must prove that Defendants’ debt collection efforts “amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.” *Id.* at 868–69 (citations omitted); *Steele v. Green Tree Servicing, LLC*, No. 3:09–CV–0603–D, 2010 WL 3565415, at \*6 (N.D.Tex. Sept. 7, 2010). The reasonableness of conduct is judged on a case-by-case basis. *B.F. Jackson, Inc. v. CoStar Realty Information, Inc.*, No. H–08–3244, 2009 WL 1812922, at \*5 (S.D.Tex. May 20, 2009) (citing *Woodrum v. Bradley*, No. 1314–90–00071–CV, 1990 WL 151264, at \*4 (Tex.App.–Houston [14th Dist.] Oct. 11, 1990, writ denied)). Generally, “mental anguish damages alone will not establish a right of recovery; the plaintiff must suffer some physical or other actual damages in order to be entitled to relief.” *Id.*

The Court has consistently applied the EMC standard. *See Watson v. CitiMortgage, Inc.*, 814 F.Supp.2d 726, 734 (E.D.Tex.2011); *Henry v. CitiMortgage*, No. 4:11–CV–83, 2011 WL 2261166, at \*4 (E.D.Tex. May 10, 2011); *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09–CV–370, 2011 WL

676955, at \*6 (E.D.Tex. Jan. 27, 2011); *see also Smith v. JPMorgan Chase Bank, N.A.*, 519 Fed.Appx. 861 (5th Cir. 2013); *Milton v. U.S. Bank Nat. Ass’n.*, 508 Fed.Appx. 326 (5th Cir. 2013).

\*9 Plaintiffs have failed to provide any evidence that Defendants’ conduct amounted to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm. Plaintiffs’ unreasonable collection efforts claim fails as a matter of law.

#### Texas Debt Collection Act Claim

Plaintiffs allege that Defendants violated Texas Finance Code, Sections 392.304(a)(19), 392.304(a)(8), 392.303(a)(2), and 392.301(a)(8).

In order to state a claim under the TDCA, Plaintiffs must show: (1) the debt at issue is a consumer debt; (2) Defendants are debt collectors within the meaning of the TDCA; (3) Defendants committed a wrongful act in violation of the TDCA; (4) the wrongful act was committed against Plaintiffs; and (5) Plaintiffs were injured as a result of Defendants’ wrongful act. *See Tex. Fin.Code* § 392.001, et seq.

The TDCA does not prevent a debt collector from “exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings.” *Tex. Fin.Code* § 392.301(b)(3); *Sweet v. Wachovia Bank and Trust Company*, No. Civ.A. 3:03–CV–1212–R, 2004 WL 1238180, at \*3 (N.D.Tex. Feb. 26, 2004). The TDCA prohibits a debt collector from “threatening to take an action prohibited by law.” *Tex. Fin.Code* § 392.301(a)(8). The TDCA also prohibits a debt collector from “using any other false representation or deceptive means to collect a debt or obtain information concerning a consumer.” *Tex. Fin.Code* § 392.304(a)(19). Section § 392.303(a)(2) prohibits a debt collector from using unfair or unconscionable means that employ the following practices: (2) collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer.

Section 392.304(a)(8) states, “in debt collection or obtaining information concerning a consumer, a debt collector may not use a fraudulent, deceptive, or misleading representation that ... misrepresent[s] the character, extent, or amount of a consumer debt.” For a statement to constitute a misrepresentation under the TDCA, Defendants must have

made a false or misleading assertion. *Reynolds v. Sw. Bell Tel., L.P.*, No. 2-05-356-CV, 2006 WL 1791606, at \*7 (Tex.App.-Ft. Worth June 29, 2006, pet. denied). Section 392.304(a)(19) prohibits the use of false representations or deceptive means to collect a debt or obtain information concerning a consumer. Section 392.303(a)(2) of the Texas Finance Code prohibits a debt collector from collecting or attempting to collect interest or charges not authorized by the Note, Deed of Trust, or applicable law.

The Court does agree that Plaintiffs offer no evidence that Defendants did anything that was false or deceptive in attempting to collect the debt, or threatened an action prohibited by law. The Deed of Trust provides Defendants with a contractual right to foreclose on the Property in the event of a default. Representations related to a loan modification do not constitute an attempt to collect a debt. See *Singha v. BAC Home Loans Servicing, LP*, No. 4:10-CV-692, 2011 WL 7678684, at \*7-8 (E.D. Tex. June 1, 2011). The summary judgment evidence shows that Plaintiffs have had over ten years to cure the default on the loan and that Defendants did not make false representations to Plaintiffs. In addition, any alleged or implied allegations of Defendants' oral representations in support of Plaintiffs' TDCA claims are barred as a matter of law.<sup>3</sup>

\*10 The evidence in this case is clear that Plaintiffs were never promised that they qualified for a loan modification. The fact that Plaintiffs were encouraged to apply for a loan modification is not a violation of the TDCA. The fact that Plaintiffs were repeatedly denied a loan modification and filed additional applications is also not a violation of the TDCA. There is no evidence that Defendants induced Plaintiffs to remain in default. The Court agrees that Defendants are entitled to summary judgment on Plaintiffs' TDCA claim. Plaintiffs' TDCA claim fails as a matter of law. *Kruse v. Bank of New York Mellon*, 936 F.Supp.2d 790, 792-93 (N.D.Tex.2013); *Singh*, 2012 WL 2013019, at \*5.

#### Texas Deceptive Trade Practices Act Claim

Defendants move for summary judgment on Plaintiffs' DTPA claim. Plaintiffs assert a claim under the DTPA as an independent claim as well as using the TDCA as a tie-in statute. Defendants assert that Plaintiffs' DTPA claim fails as a matter of law because Plaintiffs are no consumers. To recover under the DTPA, a plaintiff must show: (1) the plaintiff is a consumer; (2) the defendant can be sued under the DTPA; (3) the defendant violated a specific provision of

the DTPA; and (4) the defendant's violation is a producing cause of the plaintiff's damages. Tex. Bus. & Com.Code §§ 17.41-17.63; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex.1996). To qualify as a consumer, a plaintiff must (1) seek or acquire goods or services, and (2) the goods or services purchased or leased must form the basis of the complaint. *Modelist v. Deutsche Bank Nat. Trust Co.*, No. H-05-1180, 2006 WL 2792196, at \*7 (S.D.Tex. Aug. 25, 2006) (citing *Sherman Simon Enters., Inc. v. Lorac Serv. Corp.*, 724 S.W.2d 13, 14 (Tex.1987)). Whether a plaintiff is a consumer under the DTPA is a question of law. *Id.* (citing *Holland Mortg. & Inv. Corp. v. Bone*, 751 S.W.2d 515, 517 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.)).

In evaluating whether a plaintiff is a consumer, the Court must look to the object of the transaction. Tex. Bus. & Com.Code § 17.45; *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 567 (Tex.1984). In *La Sara Grain Company*, the Texas Supreme Court held that a lender may be subject to a DTPA claim if the borrower's "objective" was the purchase or lease of a good or service. *La Sara Grain Co.*, 673 S.W.2d at 567. However, a person whose objective is merely to borrow money is not a consumer, because the lending of money does not involve either the purchase or lease of a good or service. *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex.1980).

In the present case, it is undisputed that Plaintiffs' claims arise out of a loan and do not involve the purchase or lease of either goods or services. Plaintiffs did not seek to purchase or lease any goods or services from Defendants. Therefore, Plaintiffs are not "consumers" with respect to the home loan. Therefore, Plaintiffs' DTPA claim should be dismissed. See *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 724-25 (5th Cir. 2013).

#### Declaratory and Other Equitable Relief

Defendants also move for summary judgment on Plaintiffs' claims for declaratory relief and for an accounting. The federal Declaratory Judgment Act states, "[i]n a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. Federal courts have broad discretion to grant or refuse declaratory judgment. *Torch, Inc. v. LeBlanc*, 947 F.2d 193, 194 (5th Cir. 1991). "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion

in deciding whether to declare the rights of litigants.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The Declaratory Judgment Act is “an authorization, not a command.” *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962). It gives federal courts the competence to declare rights, but does not impose a duty to do so. *Id.*

\*11 The Declaratory Judgment Act is a procedural device that creates no substantive rights, and requires the existence of a justiciable controversy. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–241 (1937); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984). Thus, the Act provides no relief unless there is a justiciable controversy between the parties. The Fifth Circuit stated as follows:

In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future. Based on the facts alleged, there must be a substantial and continuing controversy between two adverse parties. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury.

Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects. To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. Similar reasoning has been applied to suits for declaratory judgments.

*Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (citations and quotations omitted).

The parties agree that these remedies do not constitute independent causes of action. At the present time, there is no actual controversy between the parties that would allow for declaratory relief, and this claim should be denied. Furthermore, Plaintiffs are not entitled to these equitable remedies, including an accounting, because they have no viable cause of action.

#### **Defendants' Request to Strike Summary Judgment Evidence**

In their Response, Plaintiffs attach numerous declarations from a Massachusetts lawsuit regarding HAMP. Defendants move to strike this evidence because the declarations from an unrelated lawsuit, bearing no relation to the date this case was filed and having absolutely nothing to do with Plaintiffs' loan, are inadmissible as summary judgment evidence to support contentions Plaintiffs may be asserting in this suit. Defendants further assert that even if the Court would consider allegations regarding alleged modification practices, such alleged oral misrepresentations, without a written modification, are barred by the statute of frauds. Plaintiffs respond that contrary to Defendants' attempt to argue otherwise, the declarations are relevant as the affidavits show the patterns and practices of Bank of America throughout the entire country in regards to their loan modification process, and they should be admitted as evidence of those patterns and practices for the purposes of both all dispositive motions and for the trier of fact to consider at trial.

The Court agrees that these declarations are not admissible in this lawsuit. The declarants have no personal knowledge of the facts of this case. Even if the evidence were admissible, the result does not change. Plaintiffs were in breach of the Note and Deed of Trust and were never entitled to a loan modification. The Court also agrees with Defendants that any alleged oral misrepresentations, without a written modification, are barred by the statute of frauds.

#### **RECOMMENDATION**

\*12 Based upon the findings discussed above, the Court RECOMMENDS that Defendants' Motion for Summary Judgment (Dkt.# 16) be **GRANTED** and Plaintiffs' case **DISMISSED** with prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other*

*grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

**SIGNED this 14th day of May, 2014.**

**All Citations**

Not Reported in F.Supp.3d, 2014 WL 2996159

**Footnotes**

- 1 Despite making this statement, Plaintiffs provide the Court with no evidence to establish this fact.
- 2 Plaintiffs argue that Defendants continue to erroneously argue that the statute of limitations has not run because they abandoned the January 2004 acceleration and because an additional Notice of Default was sent in September of 2010. Plaintiffs argue that the September 2010 letter was a notice of intent to accelerate and not a notice of acceleration, making acceleration improper. Even if this true, it has no bearing on the statute of limitations. The acceptance of the payment restored the original maturity date of November 1, 2031. If the later notification somehow does not qualify as a new acceleration, the statute of limitations period has still been reset to the original maturity date.
- 3 In support of their TDCA claim, Plaintiffs assert their statute of limitations argument, stating that since Defendants were allegedly barred from foreclosing, that their foreclosure efforts amount to threatening to take an action prohibited by law. The Court has already rejected this argument.

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