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No. 58927-0

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WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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BEAL BANK, SSB, a Texas State Savings Bank,

Appellant/Plaintiff,

vs.

STEVEN and KAY SARICH, and the marital community comprised  
thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital  
community comprised thereof  
Respondents/Defendants.

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APPELLANT'S OPENING BRIEF

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**A. Assignments of error.**

**Assignments of Error**

1. The trial court erred in ruling on summary judgment that a trustee's non-judicial foreclosure sale bars an independent suit by non-foreclosing creditors on promissory notes which were secured, in part, by separate but foreclosed junior Deeds of Trust on the property. (CP 415-417)

2. The trial court erred in not granting summary judgment in favor of Beal Bank, the undisputed holder of two promissory notes that are past due in an amount in excess of \$730,000. (CP 421-423)

3. The trial court erred in finding the Sarichs and Mr. Cashman were prevailing parties and awarding attorney fees. (CP 456-457; CP 451-452; CP 453-455)

**Issues Pertaining to Assignments of Error**

1. Whether a non-judicial foreclosure of a First Deed of Trust abolishes the rights of a junior lienholder to sue independently on promissory notes supporting a separate obligation? (Assignment of Error #1 and #3) Review is de novo.

2. Whether the Court on appeal should grant summary judgment in favor of Beal Bank based on the undisputed material facts? (Assignment of Error #2) Review is de novo.

3. Whether the trial court abused its discretion in awarding attorney fees in excess of \$90,000 for defense when the single prevailing claim was the assertion of the non-judicial foreclosure as a bar to the action? (Assignment of Error #3) Review is for abuse of discretion.

**B. Statement of the Case.**

This appeal asks whether a senior lienholder's non-judicial foreclosure (RCW 61.24.100(1)) precludes junior lienholders from pursuing an independent action to collect on promissory notes, albeit as an unsecured party (RCW 61.24.100(10)). Over the years, Mr. and Mrs. Sarich borrowed significant amounts of money from their lender for commercial purposes. Mr. Sarich also joined with his business partner, Mr. Cashman, to borrow significant sums from their lender for commercial purposes. It is undisputed that in excess of \$730,000 remains unpaid on two promissory notes.

The holder of the notes, Beal Bank, was denied summary judgment against the Sarichs and Mr. Cashman. Judge McBroom reasoned a non-judicial foreclosure of a superior deed of trust on real property that likewise secured Beal Bank's notes extinguished all rights of any creditor to sue on any unpaid debt secured by the foreclosed property. (CP 415-417) The question for the Court is straightforward, is that the law? The case arises out of the following undisputed facts.

On September 26, 2001, Steve Sarich and Kay Sarich signed and delivered to U.S. Bank their commercial promissory note in an amount of \$344,600.79, which is referred to as Note # 61. (Supp. Aff. of Wall ¶4, Ex. B; CP 334 and CP 361-362) As security for Note #61, Mr. and Mrs. Sarich granted security including a Second Deed of Trust on a valuable condominium located in Seattle, Washington, which was recorded on October 8, 2001. (CP 26-34 and CP 639) The condominium was not the personal residence of the Sarichs. (Supp. Aff. of Wall, ¶3; CP 334)

On September 24, 2002, Mr. Sarich and Mr. Cashman executed and delivered to U.S. Bank their continuation of a commercial promissory note in an amount of \$420,000.00, which is referred to as Note #62. (Supp. Aff. of Wall ¶5, Ex. C; CP 334-335 and CP 367-368) As security for Note #62, Mr. and Mrs. Sarich granted a Third Deed of Trust on the same condominium, which had been re-recorded on November 15, 2001. (CP 35-44)

On September 24, 2003, U.S. Bank assigned Note #61 and Note #62, as well as the supporting Deeds of Trust, to Beal Bank. (Supp. Aff. of Wall ¶4, 5; CP 334-335 and CP 45-46) Beal Bank is now the holder of Note #61 and Note #62.

Steve Sarich, Jr. and Kay Sarich failed to pay on Note #61 since November 21, 2003. Steve Sarich Jr. and Joe Cashman have failed to pay on Note #62 since April 16, 2004. Both notes remain due and owing. As of August 10, 2006, the amount due on Note #61 was \$458,591.85. (Aff. of R. Elkins ¶6, Attachment "A"; CP 203 and CP 206) As of August 10, 2006, the amount due on Note #62 was \$261,167.79. (Aff. of R. Elkins ¶7, Attachment "B"; CP 203 and CP 207)

Beal Bank filed a complaint for default on the promissory notes and to judicially foreclose on the Deeds of Trust in King County Superior Court on April 5, 2005. (CP 1)

Washington Mutual Bank held a first Deed of Trust on the condominium, which had been recorded on July 29, 2001. (CP 145) On July 25, 2005 the trustee for the Washington Mutual Deed of Trust sent a notice of default of the Washington Mutual debt, which at that date was \$1,581,303.29. (CP 146) Washington Mutual Bank then proceeded with its rights under RCW 61.24 *et. seq.* to non-judicially foreclose without objection from the Sarichs. The trustee provided notice of intention to sell the property on August 25, 2005. (CP 148) As is required by RCW 61.24.040(1)(f)VIII, the notice states:

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of *all their right, title*

*and interest in the above described property.* (CP 150, emphasis added)

The property was sold at the trustee's sale on January 6, 2006 for the sum of \$1,648,630, the amount then owed to Washington Mutual Bank. (CP 316-317) Beal Bank did not participate as a bidder in the trustee's sale. (Supp. Aff. of Wall ¶12; CP 336)

Beal Bank amended its complaint to exclude the request for foreclosure and sought relief to collect as an unsecured party upon the promissory notes through the significant personal assets of Sarichs and Mr. Cashman. (CP 67)

Beal Bank filed a motion for summary judgment on April 26, 2006 seeking judgment against the "promissory notes at issue in this suit". (CP 53) In response to Beal's motion, the Sarichs asserted that since a Deed of Trust secured the notes, once Washington Mutual non-judicially foreclosed its senior lien, all obligations of the Sarichs on Beal Bank's promissory notes were a deficiency and extinguished. (CP 75) Mr. Cashman responded to the motion offering the same argument. (CP 166) On August 11, 2006 Sarichs filed a cross motion for summary judgment seeking dismissal of the Amended Complaint based on the effect of the non-judicial foreclosure by Washington Mutual Bank. (CP 184) Mr. Cashman joined in the motion by argument held on September 8,

2006. The trial court accepted the proposition that a non-judicial foreclosure pursuant to RCW 61.24.100 extinguished *all debt of any party* secured by the real property subject to the non-judicial foreclosure. Without setting forth its reasons, however, the trial court entered an order granting the Sarichs' Motion and extended its effect to Mr. Cashman. (CP 415) Beal Bank's motion for summary judgment was denied. (CP 421)

Beal Bank timely filed its notice of appeal on October 6, 2006. (CP 441) On October 18, 2006 the trial court awarded attorney fees in the amount of \$86,399.81 for the Sarichs. (CP 453-455) This order was appealed on November 1, 2006. (App. 1; At the time of this brief this designation has not yet been received by the Appellate Court) On October 27, 2006 Mr. Cashman requested a specific amount of \$4,812.50 for attorney fees, which was awarded. (CP 456-457) This order was appealed on November 6, 2006. (App. 2; At the time of this brief this designation has not yet been received by the Appellate Court)

**C. Summary of Argument.**

The trial court relied on the Sarichs' and Mr. Cashman's narrow reading of Washington Mutual v. United States, 115 Wn.2d 52, 793 P.2d 969 (1990) to conclude the effect of a non-judicial foreclosure goes beyond the relationship between the debtor and the party foreclosing.

The trial court erred by reasoning a non-judicial foreclosure sale bars an action to recover any debt that was secured by the property whether or not the creditor purchased at the trustee's sale. If this ruling were to be correct, then a first lienholder could unconstitutionally extinguish the contract rights of third parties who have not elected to join in the non-judicial foreclosure. The trial court erred by ignoring both the language of RCW 61.24 *et. seq.* and the clarification of the Supreme Court that its ruling in Washington Mutual, supra, was not intended to "...address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note...." See, Washington Mutual v. United States, Order clarifying opinion, 800 P.2d 1124 (1990).

The Deed of Trust Act, RCW 61.24 *et. seq.* gives to the holder of a deed of trust an option to foreclose as a mortgage or to avoid the cost of a trial and proceed with a trustee's sale. Each option has consequences for the holder of the deed of trust as well as the debtor. If there is a foreclosure as a mortgage, the creditor may still obtain a judgment "deficiency" for amounts owed after the property is sold. But, the debtor also has the right to redeem the property at a later date. The creditor can avoid the cost and risk of trial by non-judicially foreclosing, but it must give up its right to a deficiency judgment as the holder of that deed of trust. This action gives certainty to the purchasers of foreclosed property

because the debtor's right to redemption does not survive the sale. Neither the language of the Deed of Trust Act nor the law provides the relief granted to the Sarichs and Mr. Cashman in this case, i.e. wipe out all debt of any creditor who was given a trust deed by the debtor. Respectfully, the Deed of Trust Act was not intended to give a windfall to debtors such as the Sarichs and Mr. Cashman to avoid \$730,000 of debt because of the action of a non-party to the contract. If Judge McBroom's ruling were to be the law, no lender would lend money as a junior lienholder given the devastating results if a senior lienholder forecloses. Such a result would unfairly deprive borrowers of the economic power of equity in property while effectively destroying a commonly used financing device in the State of Washington.

The Court is asked to rule with precision that a non-judicial foreclosure does not extinguish a junior non-foreclosing party's contractual and judicial right to sue on the independent obligation of the debtors. Beal Bank asks this Court to grant it summary judgment as requested of the trial court.

**D. Argument.**

**1. Standard of Review**

Review of the trial court's grant of summary judgment is de novo with this Court engaging in the same inquiry as the trial court. Hartley v.

State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The material facts as set forth above are not in dispute and the Court is asked to grant Beal Bank judgment on the two unpaid promissory notes based on its motion for summary judgment.

## **2. Operation of the Deed of Trust Act**

RCW 61.24.020 provides that except for specific rules identified in RCW 61.24 *et. seq.* a deed of trust is subject to the all laws relating to mortgages on real estate. A fair reading of the Deed of Trust Act demonstrates a trustee's sale is only of the interest of the foreclosing beneficiary, such as Washington Mutual was in this case. No reading of RCW 61.24 *et. seq.* can conclude that non-foreclosing creditors of the debtor, such as Beal Bank in this case, are prevented from suing on the underlying promissory notes.

Reviewing the operation of the Deed of Trust Act requires an examination of similarities and differences between a mortgage and a deed of trust. As a basic rule, if the transaction involves both a note and a mortgage, the note represents the debt and the mortgage represents security for the payment of the debt. Am. Fed. Sav. & Loan Ass'n v. McCaffrey, 107 Wn.2d 181, 189, 728 P.2d 155 (1986) The mortgagee may sue on the note or foreclose on the mortgage and obtain a deficiency judgment that can be enforced. RCW 61.12.080; Am. Fed. Sav. & Loan,

supra relying extensively on the rulings in Seattle Sav. & Loan Ass'n v. Gardner J. Gwinn, Inc., 171 Wash. 695, 698, 19 P.2d 111 (1933) and Wilson v. Kirchan, 143 Wash. 342, 346-47, 255 P. 368 (1927). The only limitation is that the foreclosing creditor may not proceed on the note and seek foreclosure at the same time. RCW 61.12.120. If there are multiple notes secured by a single mortgage, the Court ruled in George v. Butler, 26 Wash. 456, 467-468, 67 P. 263 (1901):

Each note was the foundation for a separate cause of action, and suit might have been brought upon each note as it matured without foreclosure, or the mortgage might have been foreclosed as to each note at any time after its maturity. ...The mortgage being a mere incident to the note, and its only purpose being to secure the same, it has fulfilled its purpose, as far as the debt represented by the note is concerned, when there is no longer a right of action upon the note.

If mortgaged property is also encumbered with a junior mortgage, which has been extinguished by a foreclosure, then the sole remaining remedy is an action at law to recover on the debt. CJS Mortgages §494. See also Gilbert v. Dean, 496 N.Y.S.2d 101 (N.Y. App. Div. 1985); Anderson v. Renshaw, 294 N.W. 274 (Iowa 1940); Third Nat. Bank v. McCord, 688 S.W.2d 446 (Tenn. Ct. App. 1985); Hoagland v. Anderson, 72 P.2d 455 (Utah 1937). Beal Bank's right to pursue a separate action on a note is derived from the common law of Washington dealing with mortgages. There is nothing in the Deed of Trust Act that contravenes the

junior lienholder's right to pursue an unsecured action on the promissory note.

RCW 61.24 *et. seq.*, established in Washington the use of Deeds of Trust. It is a statutory creation and in construing the intent of the legislature, the Court looks primarily to the language of the statute itself. State v. Neslund, 103 Wn.2d 79, 82, 690 P.2d 1153 (1984). Review of the statute demonstrates the relief granted by Judge McBroom is contrary to the intent of the legislature.

RCW 61.24.020 provides that a deed, which conveys property to a trustee to secure performance of any obligation owed by the grantor to a beneficiary, may be foreclosed by a trustee's sale rather than resort to the courts. This is a different procedure obviously than that set forth for mortgages in RCW 61.12 *et. seq.* The statute makes clear the trustee is limited in power to act solely for the benefit of the foreclosing beneficiary. The power is not expanded to act for those who are not parties to the particular deed of trust being foreclosed. By way of illustration, RCW 61.24.005(4) defines a "trustee" as one who is appointed under RCW 61.24.010(2), which confirms the trustee powers are defined by statute. RCW 61.24.005(2) defines a "beneficiary" of a trust deed as the holder of an instrument evidencing the obligations secured by the deed of

trust, *excluding persons holding the same as security for a different obligation.* (emphasis added) Nothing suggests other lienholders in the property will have their separate obligation effected by the power of the trustee on an unrelated deed of trust.

Review of the provisions of the Deed of Trust Act setting forth the mechanics of application of the law continues to confirm the trustee is limited to acting solely upon the rights of his/her beneficiary in the burdened property. RCW 61.24.040 sets forth the procedure for foreclosure of a deed of trust. RCW 61.24.040(b) gives to the trustee the election to foreclose, "its lien or interest" or to preserve a right to deficiency, which is done by specific notice of election made by the trustee. The statute does not purport to address the interest of third parties when the property is sold. Rather, "... the trustee sells only the title he or she receives." Mann v. Household Fin. Corp. III, 109 Wn.App. 387, 392, 35 P.3d 1186 (Div. III, 2001). After a trustee's sale no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale. RCW 61.24.050. The property passes free of any foreclosed interest in the real estate and no foreclosed creditor can thereafter seek recovery from the property as a means of satisfying a debt owed by the original debtor. "The nonjudicial foreclosure under the statute

is intended to convey property as it existed at the time the grantor executed the deed of trust being foreclosed. “ Mann, supra at 393.

The issues in this case raise the question of what effect does the trustee’s sale have on those who held junior deeds of trust on the property?

The statute addresses the question. RCW 61.24.100(1) provides:

Except to the extent permitted in this section for deed of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured **by a deed of trust** against any borrower, grantor, or guarantor *after a trustee’s sale under that deed of trust.*” (emphasis added)

The statute does not preclude on its face any action to collect on a debt owed except those who had an obligation to the beneficiary in the specific deed of trust that resulted in the sale. Rather, RCW 61.24.110(10) provides:

A trustee’s sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation *was not secured by the deed of trust.* (emphasis added)

The language of the statute draws a distinction between the rights of one who has foreclosed on a particular deed of trust and those who have not foreclosed on a deed of trust, particularly as it relates to commercial loans. Nothing in the legislative history of the act suggests any effect on the debt of other creditors. The history speaks only of the amount owed to the foreclosing beneficiary who has elected to non-judicially foreclose.

House Bill Report ESSB 6191; House Bill Analysis ESSB 6191 and Senate Bill Report SB 6191. It can be fairly stated that by the language of the statute, only the creditor possessing the foreclosed note and deed of trust is prohibited from seeking a deficiency or maintaining a separate action. See as illustrative, First Interstate Bank of Kalispell v. Wann, 235 Mont. 111, 114, 765 P.2d 749 (Mont. 1988). Judge McBroom erred in not accepting this distinction and denying Beal Bank's motion for summary judgment. The statute does not provide the authority to wipe out the \$730,000 debt owed by Sarichs and Mr. Cashman.

**3. The Deed of Trust Act and Law authorized Beal Bank to sue on the promissory notes.**

The trial court was faced with cross motions relying on the same undisputed facts and issue of law. There is no dispute Sarichs and Mr. Cashman borrowed and have not repaid the money represented by Promissory Notes #61 and #62. The Sarichs and Mr. Cashman sought a \$730,000 windfall because of Washington Mutual's non-judicial foreclosure, which Beal Bank could not control. The question before the trial court on the motions was whether there was legal authority outside of the Deed of Trust Act, which extinguished Beal Bank's right as a non-purchasing party to sue in contract on the notes.

Sarichs and Mr. Cashman asserted the authority for this derogation from statutory law is found in the ruling of Washington Mutual v. United States, supra at 55. (CP 75; 166; 185; and 212) Respectfully, this narrow reading of the facts and holding of the case ignored significant clarification provided by the Court in the concurring opinion of Justice Guy as well as the subsequent “Order Clarifying Opinion and Denying Motion for Reconsideration” wherein the court added to its opinion the following at page 59,

We do not herein address the matter of a junior deed of trust holder’s continued right to sue the debtor on the promissory note because it is not before us.

The Washington Mutual opinion has one effect only and that is set forth at page 59 of the opinion:

A nonforeclosing junior lienholder *who purchases the property* at a nonjudicial foreclosure sale may not sue for a deficiency. (emphasis added)

Beal Bank was not a purchaser at the foreclosure sale. Judge McBroom erred in relying on the authority cited by Sarichs and Mr. Cashman to rule they were absolved of their third party liability because of Washington Mutual’s trustee sale. There is no other legal authority that can be relied upon to support the Court’s ruling.

Admittedly, the language of Washington Mutual without reference to the clarifying order did raise confusion to the legal community. As noted in the Washington Practice Series, a reading of the case prior to the clarification could support Judge McBroom's reasoning because of the Court's interrelated use of the technical term "deficiency" in both the Deed of Trust Act and in IRS statutes. However, the comment goes on to state,

Given that the court clarification was apparently intended to correct the misapprehension that the opinion held that junior lienors could not sue on their note after their lien was extinguished by a senior foreclosure, the best reading of the opinion may be that it was an unfortunate use of the terms mandated by the language of the federal statutes. 27 WAPRAC §3.37<sup>1</sup>

Justice Guy originally emphasized this point in his concurrence in Washington Mutual, supra, by stating "...where a junior deed of trust holder does not foreclose, that junior deed of trust holder is not precluded from suing under the note." Washington Mutual, 115 Wn.2d at 60, (relying on Adams v. FedAlaska Fed. Credit Union, 757 P.2d 1040 (1988), a decision by the Alaska Supreme Court in which the junior lienor was permitted to pursue an action on its promissory note even though it no longer had a security interest in the property.) See also as instructive,

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<sup>1</sup> See also 18 WAPRAC §20.17, which suggests clarification of Washington Mutual would be desirable for the legal community.

Long v. Corbet, 888 P.2d 1340 (Ariz. Ct. App. 1994); First Interstate Bank of Kalispell v. Wann, *supra*.

This Court is asked to consider by analogy the law applicable to Real Estate Contract Forfeitures as provided in RCW 61.30. *et. seq.* RCW 61.30.100(2)(a) provides that after forfeiture, no purchaser or one claiming through the seller shall have further rights “in the contract or the property”. In Metropolitan Mortgage v. Becker, 64 Wn.App. 626, 630, 825 P.2d 360 (Div. III. 1992), the court was confronted with an identical argument advanced by Respondents, albeit arising under the contract forfeiture statute. Metropolitan was the purchaser of a promissory note secured by a deed of trust on the property that later was forfeited per the contract forfeiture statute. Metropolitan admitted it had no interest in the property after the forfeiture and sued on the unsecured promissory note, as did Beal Bank against the Sarichs and Mr. Cashman. The Beckers appealed contending the deed of trust and promissory note were an integral part of the original real estate contract and RCW 61.30.100(2)(a) extinguished the obligation on the note. Rejecting this argument, the Court reasoned deeds of trust were like mortgages in this type of transaction and the effect of the forfeiture was to make a subordinate note unsecured. Metropolitan, *supra* 631. It would be a strange result to suggest that an action on a note by a non-forfeiting party could proceed if

an interest in collateral was extinguished by forfeiture of a real estate contract but such could not occur if there was forfeiture by a trustee's sale. The Court is asked to harmonize the Deed of Trust Act with the Real Estate Forfeiture Act to continue the contract rights of non-foreclosing junior lienholders.

Further, this Court is asked to consider as instructive the ruling in Donovick v. Seattle-First, 111 Wn.2d 413, 757 P.2d 1378 (1988). There, Sea-First Bank held two separate deeds of trust securing a single promissory note. Upon Donovanick's default, the bank foreclosed on both deeds of trust and bid at the trustee's sale of each parcel. Donovanick refused to surrender possession of the second property and challenged the appropriateness of the second deed of trust sale. Donovanicks argued the nonjudicial foreclosure satisfied the underlying debt precluding a creditor from foreclosing on another deed of trust securing the same obligation. Donovick, supra at 415. Like Sarichs and Mr. Cashman, Donovanicks offered a literal reading of the statute to say the first sale satisfied the obligation. Rejecting this argument, the Court opined RCW 61.24.100 needed to be read in its entirety and the waiver of a right to a deficiency judgment did not surrender the right to realize on separate collateral given for the obligation. The Court went on to note the literal reading of the statute suggested by the Donovanicks would "...give an unjustified,

unwarranted windfall to the debtor—a windfall completely without merit in logic or equity in principle.” Donovick, supra at 416. It would be incongruous to have a rule that the debt of a single creditor is not extinguished by RCW 61.24.100 if it holds multiple properties as collateral, but if multiple parties hold collateral interests in a single property then all of their debt is extinguished by the trustee’s sale. Judge McBroom’s ruling leads to this unreconciled conflict in controlling legal principals on the rights of multiple lienholders.

Most importantly, the facts in Washington Mutual, supra, are distinguishable from the facts of this case. In Washington Mutual, supra, the non-foreclosing junior lienholder purchased the property at the non-judicial foreclosure sale and subsequently sued for a deficiency. Washington Mutual, 115 Wn.2d at 54. The junior lienholder participated in the foreclosure by buying the interest of the senior lienholder and stepped into the shoes of the first lienholder. Here, Beal Bank did not purchase the collateral property at the non-judicial foreclosure sale and was not the foreclosing creditor. This factual distinction makes inapposite any reliance on Washington Mutual, supra as the legal authority for the ruling by Judge McBroom.

Respectfully, it may have been fair for the trial court to reason Washington Mutual supra, deviated from prior decisions that the anti-

deficiency remedy is limited based on the election of nonjudicial foreclosure e.g., Fluke Capital & Mgmt. Serv. Co. v. Richmond, 106 Wn.2d 614, 724 P.2d 356 (1986). However, in view of the Supreme Court's clarification, Judge Guy's concurring opinion and the above noted decisions, Judge McBroom erred in exempting the Sarichs and Mr. Cashman from an action on the promissory notes.

#### **4. Public Policy does not support the trial court's ruling.**

The Washington Deed of Trust Act, RCW 61.24 *et. seq.* statutorily imposes on a secured creditor in real property a choice of remedies. The Deed of Trust Act's bar to a deficiency judgment after a trustee's sale was not intended to deny creditors their remedies but to merely require an election of remedy. John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*, 67 Wash. L. Rev. 235, 237 (January 1992). Because one creditor makes an election of remedy, should not bar other creditors from seeking their legal recourse, even though any rights that creditor had in the collateral were extinguished by the trustee's sale.

For numerous reasons, Judge McBoom's ruling if correct would violate important public policies. As a policy matter Beal Bank's request for relief is consistent with the long recognized principle that debts must be repaid. Beal Bank wants to collect on the just debt on its own. Beal Bank acknowledges the real property collateral it once had is no longer

available and it is partially unsecured. (There is other collateral such as stock.) The fact that one avenue of recovery is no longer available is not a bar to other legal remedies so long as there is one recovery. For example, an action is appropriate to collect all amounts due and owing under a promissory note. DeYoung v. Cenex, 100 Wn.App. 885, 1 P.3d 587 (2000). Even when a creditor redeems the property in a foreclosure sale, the creditor is “not precluded from suing on the note.” Cenex, 100 Wn.App. at 894. “This result is logical and equitable because the... debt ... was never paid.” Cenex, 100 Wn.App. at 895. The Mortgage Act permits an action to foreclose as well as suit on a note, as long as it is not at the same time. RCW 61.12.120. By further example, the Uniform Commercial Code remedies are intended to operate as a cumulative process until the aggrieved party is satisfied. RCW 62A.2-703 (Comment 1); RCW 62A.2-711 (Comment 3); and RCW62A.9A-601 (Comment 5). Allowing a holder of a note to pursue an action when its collateral is taken by a senior lienholder is not abhorrent to public policy. Rather allowing such an action is consistent with an ordered society’s necessity of having debts repaid.

Although the Deed of Trust Act gives to the superior lienholder the right to control by election the disposition of the pledged real property, that right as a policy decision should not bar other creditors that have no

relationship or privity to the beneficiary foreclosing on the collateral. It is fair to state as to multiple parties claiming rights in a single piece of property there is going to be an order of priority of payment from the sale of the collateral. However, it is unfair to say that an inadequate sale is going to extinguish all debt owed to those not foreclosing. Such a policy would invade the constitutional contractual rights of third parties since it would deny any remedy to the non-foreclosing creditor. Denial of a contractual remedy by use of a state statute would facially violate the United States Constitution prohibition against impairment of contracts. Art. 1, Section X, United States Constitution. This result has no basis in American jurisprudence and cannot be justified as appropriate public policy given these facts and the state of the law.

The Court is asked to take judicial notice of the reality of the marketplace. Borrowing is a reality of American life and the health of our economy. Borrowers are routinely asked to pledge collateral as a condition of getting a loan. The collateral has to have value, i.e. equity, or it is not accepted. Much property is pledged as collateral to multiple parties with the promise of performance of an obligation. If Judge McBroom's ruling were to stand, the reality is no lender will accept a property encumbered with a prior first deed of trust. No lender will put at risk the face value of the note by accepting an eventuality it cannot control

but would totally extinguish debt. Such would result in drying up credit and specifically deny smaller borrowers, such as homeowner's, access to their equity. Likewise, the purchase of promissory notes in the secondary market is critical to making our nation's banking system work. Purchasers such as Beal Bank would not buy a Washington promissory note secured in whole or part by a junior deed of trust. This easily identified marketplace effect of Judge McBroom's ruling, if it were the law, demonstrates why the ruling is contra to public policy.

As a matter of public policy, the non-judicial foreclosure alternative provides the benefit of non-redeemable title in exchange for the beneficiaries' loss of right to a deficiency judgment. Donovick, supra at 416. This provides strong incentive for the beneficiary to ensure that the debt is not undersecured, and to ensure that the price bid at foreclosure is fair. However, as a commentator has noted:

The same incentive does not exist for non-foreclosing junior lienors because the junior lienors are not in control. Once the senior lienor forecloses and sells the property, junior lienors lose their security no matter what price is paid. The surplus over the senior lienor's obligation received from the sale will be paid over to satisfy other creditors' obligations. However, if junior lienors also are barred from suing on the obligation, then the junior lienors recover less than their full debt when the security is sold for less than the combined amount due on both the senior and junior obligations....

Although junior lienors have no redemption right, they can purchase at the trustee's sale. However, if the net value of the property, or the fair market value less the sale price, is less than the junior lienors' obligations and the junior lienors are barred from a deficiency judgment, then they will not improve their positions by purchasing the security. Junior lienors will be discouraged from any competitive bidding that reduces the net value. Faced with foreclosing property with market value less than the likely sale price plus the debt, junior lienors would choose judicial foreclosure and a right to a deficiency judgment. When the senior lienor preempts that choice, junior lienors should not be penalized.

John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*, 67 Wash. L. Rev. 235 at 248 (January 1992); See also, Restatement of Law Third, Mortgages §8.4, Comment d.

Beal Bank filed in Spring of 2005 seeking judicial foreclosure. Subsequent to the filing, the senior lienor gave notice of its intent to pursue a non-judicial deed of trust foreclosure and did so by trustee's sale in January 2006. At that point, Beal Bank's remedy options were to purchase the property at the sale thereby stepping into the shoes of Washington Mutual and be bound by the non-deficiency or sue on the contract, i.e., the promissory notes. The Washington Mutual lien required payoffs of approximately \$1.6 million. Beal Bank made the business judgment not to pay such sum but to sue the Sarichs and Mr. Cashman on

their promissory notes, albeit, on an unsecured basis. As Beal Bank made the business decision not to purchase at the trustee's sale; its decision should not be a bar to the action on the notes as a matter of sound public policy to promote economic incentive to lend money in the marketplace.

**5. Beal Bank did not sue for a deficiency judgment.**

The trial court did not enter an opinion or written reasons for the grant of Sarich's motion. However, the motion relied, in part, on an argument that Beal Bank was seeking a deficiency. (CP 191) That is not correct. The underlying claim is an action on the promissory notes now owned by Beal Bank for which no satisfaction by sale of collateral has occurred. Beal is not asking for a "deficiency judgment" in the nature allowed by RCW 61.12.070 and 080. Sarichs and Mr. Cashman equate the term "deficiency judgment" with the unpaid debt. The argument is not factually or legally based. What Sarichs and Mr. Cashman requested was in effect to extend the RCW 61.24.100(1) anti-deficiency limitation imposed on the senior lienholder to the junior lienholders.

As a commentator has suggested the anti-deficiency provisions of the Act would be limited only to foreclosing lienors, if the Deed of Trust Act was strictly construed.

The Deed of Trust Act provides an efficient alternative to the cumbersome judicial foreclosure that preserves the balance between lenders' and

borrowers' rights. The denial of the deficiency judgment rights to non-foreclosing junior lienors disrupts this balance by contravening three important policy objectives. First, the lenders' and borrowers' expectations should be met by using the property to satisfy as much of the underlying debt as possible. Debtors should not receive unwarranted windfalls. Second, foreclosing lienors should be forced to an election of remedies and to waive their right to a deficiency in order to obtain the more efficient nonjudicial foreclosure. At the same time, junior lienors should not be penalized by the whim of a more senior lienor. Third, the law should promote stability and certainty.

John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*, 67 Wash. L. Rev. 235, 245 (January 1992).

Beal Bank is suing on the two promissory notes. Judge McBroom erred by extending the anti-deficiency judgment rule beyond the senior foreclosing lienholder.

**6. Beal Bank's Motion for Summary Judgment should have been granted and this Court can enter such a ruling.**

Summary judgment is appropriate where the "pleadings, affidavits, depositions, or admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Vicwood Meridian Partnership v. Skagit Sand and Gravel, 123 Wn.App. 877, 98 P.3d 1277 (2004). Summary judgment was appropriate because there are no genuine issues of material fact. Beal Bank is entitled to collect on the promissory notes, Beal Bank was entitled

to make a business decision not to bid during the foreclosure and Beal Bank is not suing for a deficiency. Like the ruling in Metropolitan, *supra*, an action on the promissory notes was appropriate and judgment for Beal Bank should have been granted.

RAP 12.2 provides the appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. As there is no dispute in the material facts, the Court is asked to direct entry of summary judgment in favor in Beal Bank on the two promissory notes.

The Court is asked to enter judgment nunc pro tunc as of September 8, 2006 consistent with the undisputed facts, (CP 421) as follows:

a. Judgment entered against Steven Sarich, Jr. on Notes #61 and #62 in the amount of \$725,878.93, plus a per diem of \$211.01 from August 11, 2006 to September 8, 2006 (\$6,119.29) for a total of \$731,998.22 for monies due and owing. (CP 203) Post judgment interest to accrue from the date of this Judgment at the legal rate allowed by Washington law until paid.

b. Judgment entered against Kay Sarich on Note #61 in the amount of \$458,591.85 plus a per diem of \$136.40 from August 11, 2006 to September 8, 2006 (\$3,955.60) for a total of \$462,547.45 for monies

due and owing. (CP 203) Post judgment interest to accrue from the date of this Judgment at the legal rate allowed by Washington law until paid.

c. Judgment entered against Joe Cashman on Note #62 in the amount of \$261,167.79 plus a per diem of \$74.61 from August 11, 2006 to September 8, 2006 (\$2,163.69) for a total of \$263,331.48 for monies due and owing. (CP 203) Post judgment interest to accrue from the date of this Judgment at the legal rate allowed by Washington law until paid.

Promissory Note #61 provides for the award of attorney fees and costs to the prevailing party. (CP 361) Contractual rights to the award of attorney fees are enforced. RCW 4.84.330. Beal Bank is entitled to its attorney fees against Mr. and Mrs. Sarich based on Note #61 as the prevailing party on its motion for summary judgment, for its fees in defense of the matters raised at the trial court as well as its fees on appeal. RAP 18.1 With entry of summary judgment in favor of Beal Bank, the Court is asked to award attorney fees and costs as permitted by RAP 18.1 or in the alternative, remand the matter to the trial court for entry of judgment for Beal Bank and award of attorney fees and costs. RAP 18.1(i) The Court is also asked for fees and costs on appeal as allowed by RAP 18.1(d).

**7. The amount of the Award of Attorney fees to the Sarichs and Mr. Cashman was error.**

Arguendo only, and to preserve the issue on appeal, Beal Bank assigned err to the award of attorney fees to Sarichs and Mr. Cashman. If the Court after review were to opine Sarichs and Mr. Cashman should have prevailed on Sarichs' motion, then the Court is respectfully asked to find Judge McBroom incorrectly calculated the appropriate attorney fees and cost awarded.

Although the matter was concluded on summary judgment on the issue presented on this appeal, excessive amounts for the efforts of multiple attorneys were awarded as fees and costs. Mr. and Mrs. Sarich were represented by Gayle E. Bush and Katriana L. Samiljan of the Bush, Strout & Kornfeld firm, who were awarded \$22,262.73 for fees and costs. Spencer Hall associated with Mr. Bush's firm on June 21, 2006, and filed a Notice of Association of Counsel for only Mrs. Sarich, and was awarded \$64,137.08 in attorney fees and costs. Sarichs' total attorney fees and costs awarded \$83,399.81. (CP453-455) Mr. Cline, the attorney for Mr. Cashman was awarded fees and costs of \$4,812.50. (CP451-452; CP 456-457)

There was no effort by Sarichs and Mr. Cashman to segregate the fees for issues addressed in discovery versus the legal matters. The fees

were awarded to three different law firms for the same motion. Mr. Cashman and Mrs. Sarich in part did not have a right to claim fees. Review of the record shows Judge McBroom abused his discretion in making an excessive award and to parties without a right to attorney fees. The reasonableness of the award is reviewed for such. Rettkowski v. Department of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

Note #62 does not have an attorney fee provision. (CP 367) Mr. Cashman signed only Note #62 and had no statutory right or contractual right to claim fees or costs. Mrs. Sarich was not a signatory to Note #62, yet she sought and was awarded fees for significant work attributed to Note #62 by Mr. Hall's firm that was not segregated in the affidavit. (CP 573-592) A party who has never signed or endorsed a promissory note is not entitled to attorney's fees and costs in an action in which that party successfully resisted efforts to be held liable for the note. Mutual Security Financing v. Unite, 68 Wn.App. 636, 847 P.2d 4 (1993). It was an abuse of discretion to award fees or costs to Mr. Cashman for any purpose. It was also an abuse to award Mrs. Sarich fees for work done on Note #62 by both of her law firms.

Attorney's fees may only be awarded for those services related to the cause of action, which allow fees. Boeing Co. v. Sierracin, 108 Wn.2d 38, 738 P.2d 665 (1987). When attorney fees are authorized on only some

of the claims, the award must reflect a segregation of fees between recoverable and non-recoverable matters. Hume v. American Disposal, 124 Wn.2d 656, 880 P.2d 988 (1994). The burden of segregating rests on the one claiming the right to an award of fees. Loeffelhotz v. Citizens for Leaders, 119 Wn.App. 665, 82 P.3d 1199 (2004). Sarichs were awarded fees for the efforts of four lawyers in two different firms. The fees covered many aspects of the case unrelated to the summary judgment based on RCW 61.24.100. Because the Sarichs failed to segregate, especially with regard to Mrs. Sarich's defense of Note #62, it was impossible for Beal Bank to respond or object to the fee request. It is not reasonable for four attorneys to be compensated for the single motion on which the Sarichs prevailed below and Judge McBroom did not act reasonably in this regard.

Judge McBroom had the discretionary power to limit attorney's fees to a reasonable amount. Merrick v. Peterson, 25 Wn.App. 248, 606 P.2d 700 (1980). This matter was pending for less than 1½ year, little or no discovery was taken, and the Court concluded the matter on a motion for summary judgment. An award in excess of \$90,000.00 in fees and costs on a matter decided by a single-issue motion is unreasonable.

Mr. Bush's hourly rate was awarded at \$375.00 per hour, while Ms. Samiljan's hourly rate is \$225.00. Mr. Hall's hourly rate is similarly

at \$375.00, with Janet McEachern's billing at \$300.00 per hour. Paralegals for Mr. Hall's firm are billed at \$125.00 per hour. Mr. Cline's hourly rate was awarded at \$175 an hour. There was no consistency of the hourly rate for the work performed and it was duplicated to the extent it overlapped with the single-issue motion. Multiplicity of attorneys representing essentially the same parties being awarded overlapping fees at different rates would not be customarily viewed as a reasonable award and as such there was an abuse of discretion not to rule consistent with the above stated legal principals.

**E. Conclusion.**

For the reasons set forth in the undisputed material record, this brief and other matters to be submitted to the Court, Beal Bank respectfully requests that the Court: (1) Rule that a non-judicial foreclosure does not extinguish a junior non-foreclosing party's contractual and legal right to sue on separate and independent obligations of the debtors; (2) Reverse the grant of summary judgment and the award of attorney fees to the Sarichs and Mr. Cashman; (3) Grant and direct entry of summary judgment in favor of Beal Bank and against the Sarichs and Mr. Cashman in the amounts as set forth in Section D.7 of this brief; (4) Direct the award of Beal Bank's reasonable attorney fees and costs at the trial court and on appeal as permitted by the contract of the parties and

the Court's rules; (5) Remand for calculation of attorney fees of Sarichs and Mr. Cashman, if such are appropriate; and (6) Grant such other relief as the Court finds just and equitable in this matter.

Dated this 21<sup>st</sup> day of December 2006.

Respectfully submitted,



C. MATTHEW ANDERSEN

WSBA No. 6868

Attorney for Appellant

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF KING

BEAL BANK, SSB, a Texas State Savings  
Bank,

Plaintiff,

vs.

STEVEN and KAY SARICH, and the marital  
community comprised thereof; JOE  
CASHMAN and JANE DOE CASHMAN,  
and the marital community comprised thereof;  
U.S. BANK NATIONAL ASSOCIATION #  
1000,

Defendants.

No. 05-2-11440-1 SEA

AMENDED NOTICE OF APPEAL TO  
COURT OF APPEALS, DIVISION I

Plaintiff Beal Bank, SSB, by and through its attorneys, Nancy L. Isserlis and C. Matthew Andersen of Winston & Cashatt, seeks review by the Court of Appeals, Division I, of the Order Granting Motion for Summary Judgment by Defendants Steve and Kay Sarich and Defendants Cashman (Ex. A) and the Order Denying Plaintiff's Motion for Summary Judgment (Ex. B) signed by Judge Douglas McBroom, entered on September 8, 2006. Beal Bank also seeks review by the Court of Appeals, Division I, of the Order Granting Sarich Defendants' Motion for

1 Award of Attorneys' Fees and Costs (Ex. C); and the Judgment for Attorney's Fees in Favor of  
2 Joe Cashman and Against Beal Bank (Ex. D), signed by Judge Douglas McBroom on  
3 October 18, 2006. Copies of the Orders are attached to this notice.

4 *Attorneys for Plaintiff:*

5 C. Matthew Andersen, WSBA No. 6868  
6 Nancy L. Isserlis, WSBA No. 11623  
7 Winston & Cashatt  
8 601 West Riverside, Suite 1900  
9 Spokane, WA 99201  
10 (509) 838-6131

9 *Attorneys for Defendants Steven and Kay Sarich:*

10 Gayle Bush  
11 Katriana Samiljan  
12 Bush, Strout & Kornfeld  
13 601 Union Street, Suite 5500  
14 Seattle, WA 98101-2373  
15 (206) 292-2110

13 *Attorneys for Defendants Joe Cashman and Jane Doe Cashman:*

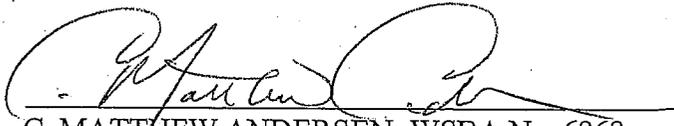
14 Thomas Cline  
15 Attorney at Law  
16 2502 North 50th Street  
17 Seattle, WA 98103  
18 (206) 789-2777

17 *Attorneys for Defendant Kay Sarich:*

18 Spencer Hall  
19 Janet McEachern  
20 Hall Zanzig Zulauf Claflin McEachern PLLC  
21 1200 Fifth Avenue, Suite 1414  
22 Seattle, WA 98101  
23 (206) 292-5900  
24

1 *Defendant U.S. Bancorp:*  
2 US Bancorp  
3 US Bancorp Center  
4 800 Nicollet Mall  
5 Minneapolis, MN 55402

6 DATED this 31<sup>st</sup> day of October, 2006:

7 

8 C. MATTHEW ANDERSEN, WSBA No. 6868  
9 NANCY L. ISSERLIS, WSBA #11623  
10 WINSTON & CASHATT  
11 Attorneys for Plaintiff Beal Bank SSB

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Honorable Douglas McBroom

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State Savings Bank,

Plaintiff,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION # 1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,

Defendants.

NO. 05-2-11440-1 SEA

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS STEVE AND KAY SARICH *and Defendants Cashman*

This matter having come on for hearing on September 8, 2006 on a Motion for Summary Judgment by Defendants Steve and Kay Sarich, and the Court having heard the argument of the parties, and having reviewed the motion and the records and files in this matter, including the following:

1. Motion for Summary Judgment by Defendants Steve and Kay Sarich;
2. Declaration of Kay Sarich, dated June 26, 2006;
3. Declaration of Michael McCormack, dated June 26, 2006;



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4. Declaration of Katriana L. Samiljan, dated June 26, 2006;
5. Motion to Strike Affidavits;
6. Plaintiff's Memorandum In Opposition to Defendants Sarich's Motion for Summary Judgment;
7. Supplemental Affidavit of David Wall In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
8. Affidavit of Roger Elkins In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
9. Affidavit of Chris Ashcraft;
10. Plaintiff's Response to Defendant's Motion to Strike the Affidavit of David Wall;
11. Motion to Strike Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;
12. Plaintiff's Response to Defendant's Motion to Strike the Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;
13. Reply Memorandum In Support of Motion to Strike Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;

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14. Plaintiff's Motion to Strike Portions of the Declaration of Kay Sarich;

15. Memorandum In Opposition to Plaintiff's Motion to Strike Portions of the Declaration of Kay Sarich;

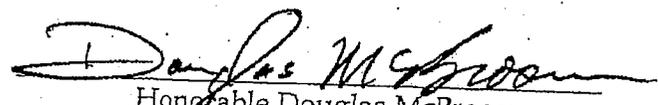
16. Reply Memorandum In Support of Steve and Kay Sarich's Motion for Summary Judgment;

17. Declaration of Thomas C. McEACHERN DDM  
NOW, THEREFORE, it is hereby:

ORDERED that the Motion for Summary Judgment by Defendants Steve and Kay Sarich is granted. All claims by plaintiff Beal Bank, SSB against defendants Steve and Kay Sarich and defendants Cashman DDM are dismissed with prejudice.

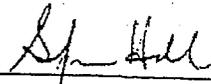
Defendants may make a motion for an award of attorneys' fees and costs to be set for a separate hearing.

DATED this 8 day of September, 2006.

  
Honorable Douglas McBroom

Presented by:

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

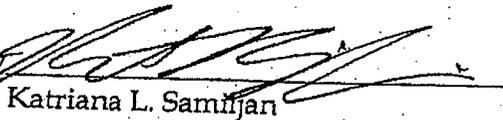
By   
Spencer Hall  
WSB No. 6162

APPENDIX 1-6

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Janet D. McEachern  
WSB No. 14450  
Attorneys for Defendant Kay Sarich

BUSH STROUT & KORNFELD

By 

Katriana L. Samirjan  
WSB No. 28672  
Attorneys for Defendants  
Kay Sarich and Steve Sarich

APPENDIX 1-7

ORDER GRANTING DEFENDANT SARICH'S  
MOTION FOR SUMMARY JUDGMENT - 4

HALL ZANZIG ZULAUF  
CLAFLIN MCEACHERN

1200 Fifth Avenue, Suite 1414  
Seattle, Washington 98101

206.292.5900

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Honorable Douglas McBroom

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State Savings Bank,

Plaintiff,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION # 1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,

Defendants.

NO. 05-2-11440-1 SEA

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on September 8, 2006 on Plaintiff's Motion for Summary Judgment, and the Court having heard the argument of the parties, and having reviewed the motion and the records and files in this matter, including the following:

1. Plaintiff's Motion for Summary Judgment;
2. Memorandum In Support of Plaintiff's Motion for Summary Judgment;
3. Affidavit of David Wall In Support of Plaintiff's Motion for

APPENDIX 1-8

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1



ALL ZANZIG ZULAUF  
 AFLIN MCEACHERN  
 1200 Fifth Avenue, Suite 1414  
 Seattle, Washington 98101  
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- Summary Judgment;
- 4. Affidavit of Brenda K. Hall Re Affidavit of David Wall;
- 5. Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 6. Declaration of Janet D. McEachern;
- 7. Cashman's Opposition to Plaintiff's Motion for Summary Judgment;
- 8. Declaration of Thomas Cline In Opposition to Plaintiff's Motion for Summary Judgment;
- 9. Supplemental Affidavit of David Wall In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
- 10. Affidavit of Roger Elkins In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
- 11. Affidavit of Chris Ashcraft;
- 12. Plaintiff's Reply to Defendant Sarich's Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 13. Plaintiff's Reply to Defendant Cashman's Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 14. Affidavit of R. Bret Beattie In Support of Reply Re Sarich

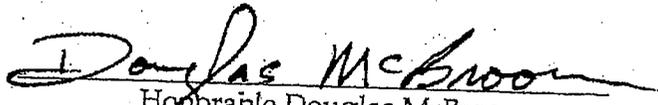
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Opposition to Plaintiff's Motion for Summary Judgment;

NOW, THEREFORE, it is hereby:

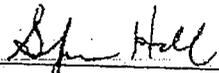
ORDERED that Plaintiff's Motion for Summary Judgment is denied.

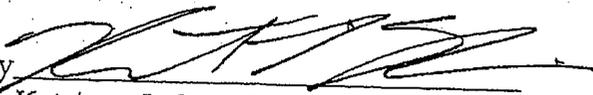
DATED this 8 day of September, 2006.

  
Honorable Douglas McBroom

Presented by:

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

By   
Spencer Hall  
WSB No. 6162  
Janet D. McEachern  
WSB No. 14450  
Attorneys for Defendant Kay Sarich

BUSH STROUT & KORNFIELD  
By   
Katriana L. Samiljan  
WSB No. 28672  
Gayle E. Bush  
WSB No. 7318  
Attorneys for Defendants  
Kay Sarich and Steve Sarich

RECEIVED  
OCT 18 2006

Honorable Douglas McBroom

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State  
Savings Bank,

Plaintiff,

NO. 05-2-11440-1 SEA

v.

ORDER GRANTING  
SARICH DEFENDANTS'  
MOTION FOR AWARD OF  
ATTORNEYS' FEES AND  
COSTS

STEVEN and KAY SARICH, and the  
marital community comprised  
thereof; JOE CASHMAN and JANE  
DOE CASHMAN, and the marital  
community comprised thereof;  
WASHINGTON MUTUAL BANK;  
U.S. BANK NATIONAL  
ASSOCIATION # 1000; and  
ONE ELEVEN HOMEOWNERS  
ASSOCIATION,

Defendants.

This matter having come on for hearing on October 18, 2006 on the  
Sarich Defendants' Motion for Award of Attorneys' Fees and Costs, and the Court  
having reviewed the motion and the records and files in this matter, and having  
found as follows:

1. The Sariches are the prevailing party in this action.
2. Plaintiff's claims against the Sariches were based on  
promissory notes that provide for recovery by the lender of attorneys' fees and

APPENDIX 1-11



ORDER GRANTING SARICH  
DEFENDANTS' MOTION FOR A  
OF ATTORNEYS' FEES AND COSTS - 1

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN

1200 Fifth Avenue, Suite 1414  
Seattle, Washington 98101

206 292 5900

1 costs. RCW 4.84.330 requires such provisions to be construed to apply to  
2 whichever party prevails in the action.  
3

4 3. The attorneys' fees and costs incurred by the Sariches are  
5 reasonable in light of the results achieved and the amount at issue. The Sariches  
6 obtained dismissal of all claims asserted against them by the plaintiff. Those  
7 claims exceeded \$720,000. The Sariches' attorneys' fees and costs of  
8 approximately \$87,000 are reasonable in relation to the amount of the claims at  
9 issue.  
10

11 4. The hourly rates charged by the attorneys for the Sariches are  
12 within the range charged by attorneys with similar experience and comparable  
13 legal practices in Seattle.  
14

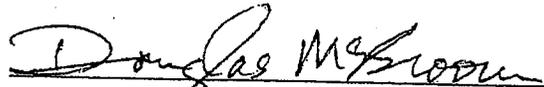
15 5. The amount of time spent by the attorneys for the Sariches is  
16 reasonable in light of the results achieved, the importance of the legal issues  
17 involved, the number of motions briefed, including two summary judgment  
18 motions, and the fact that the case was within a few weeks of trial.  
19

20 NOW, THEREFORE, it is hereby:

21 ORDERED that the Sarich Defendants' Motion for Award of  
22 Attorneys' Fees and Costs is granted. Plaintiff Beal Bank is ordered to pay the  
23 Sarich defendants a total of \$86,399.81 in attorneys' fees and costs. *Payment*  
24 *of such fees and costs is stayed until resolution*  
25 *of pending appeals.*  
26

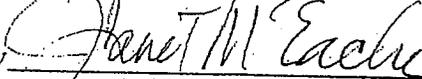
APPENDIX 1-12

1 DATED this 18 day of October, 2006.  
2  
3

4   
5 Honorable Douglas McBroom

6 Presented by:

7 HALL ZANZIG ZULAUF  
8 CLAFLIN McEACHERN PLLC

9   
10 By 

11 Spencer Hall

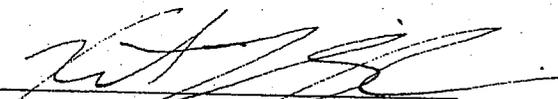
12 WSB No. 6162

13 Janet D. McEachern

14 WSB No. 14450

15 Attorneys for Defendant Kay Sarich

16 BUSH STROUT & KORNFELD

17 By 

18 Katriana L. Samiljan

19 WSB No. 28672

20 Gayle E. Bush

21 WSB No. 7318

22 Attorneys for Defendants

23 Kay Sarich and Steve Sarich  
24  
25  
26

APPENDIX 1-13

ORDER GRANTING SARICH  
DEFENDANTS' MOTION FOR AWARD  
OF ATTORNEYS' FEES AND COSTS - 3

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN  
1200 Fifth Avenue, Suite 1414  
Seattle, Washington 98101  
706 207 5000

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OCT 18 2006

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

BEAL BANK, SSB,

Plaintiff,

v.

STEVEN and KAY SARICH  
and JOE CASHMAN et ux.  
et al.,

Defendants.

No. 05-2-11440-1 SEA

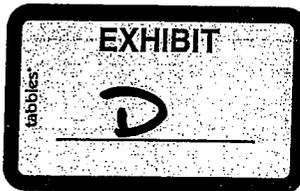
~~PROPOSED~~

JUDGMENT FOR ATTORNEY'S  
FEES IN FAVOR OF JOE CASHMAN  
AND AGAINST BEAL BANK

Clerk' Action Required

JUDGMENT SUMMARY

Judgment Creditor: Joe Cashman  
Jdmt. Creditor's Atty: Thomas Cline, WSBA 11772  
Judgment Debtor: Beal Bank, SSB  
Attorney's Fees:



JUDGMENT FOR ATTY'S FEES -- page 1

APPENDIX 1-14

THOMAS CLINE  
ATTORNEY AT LAW  
2502 N 50TH ST  
SEATTLE WA 98107  
(206) 789-2777

JUDGMENT

1 Judgment is hereby entered in favor of Joe Cashman against  
2 Beal Bank, SSB, for attorney's fees in the amount of \_\_\_\_\_.  
3 The orders entered September 8, 2006 regarding the cross motions for  
4 summary judgment shall otherwise remain in full force and effect.

DATED this <sup>19</sup> ~~14~~ day of <sup>October</sup> ~~September~~ 2006.

*Payment pursuant to this order  
has been stayed until the appeal in this  
matter is concluded*

*Douglas McBroom*  
\_\_\_\_\_  
Hon. Douglas McBroom  
Superior Court Judge

Presented by:

*TC*

\_\_\_\_\_  
Thomas Cline  
Attorney for Joe and  
Jane Doe Cashman

WSBA 11772

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

NOV 06 2006

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF KING

BEAL BANK, SSB, a Texas State Savings  
Bank,

Plaintiff,

vs.

King County No. 05-2-11440-1 SEA  
Court of Appeals No. 58927-0

STEVEN and KAY SARICH, and the marital  
community comprised thereof; JOE  
CASHMAN and JANE DOE CASHMAN,  
and the marital community comprised thereof;  
U.S. BANK NATIONAL ASSOCIATION #  
1000,

Defendants.

SECOND AMENDED NOTICE OF  
APPEAL TO COURT OF APPEALS,  
DIVISION I

Plaintiff Beal Bank, SSB, by and through its attorneys, Nancy L. Isserlis and C. Matthew Andersen of Winston & Cashatt, seeks review by the Court of Appeals, Division I, of the Order Granting Motion for Summary Judgment by Defendants Steve and Kay Sarich and Defendants Cashman (Ex. A) and the Order Denying Plaintiff's Motion for Summary Judgment (Ex. B) signed by Judge Douglas McBroom, entered on September 8, 2006. Beal Bank also seeks review by the Court of Appeals, Division I, of the Order Granting Sarich Defendants' Motion for

1 Award of Attorneys' Fees and Costs (Ex. C) signed by Judge Douglas McBroom on October 18,  
2 2006; and the Corrected Judgment for Attorney's Fees in Favor of Joe Cashman and Against  
3 Beal Bank (Ex. D) entered with the Court on October 27, 2006. Copies of the Orders are  
4 attached to this notice.

5 *Attorneys for Plaintiff:*

6 C. Matthew Andersen, WSBA No. 6868  
7 Nancy L. Isserlis, WSBA No. 11623  
8 Winston & Cashatt  
9 601 West Riverside, Suite 1900  
Spokane, WA 99201  
(509) 838-6131

10 *Attorneys for Defendants Steven and Kay Sarich:*

11 Gayle Bush  
12 Katriana Samiljan  
13 Bush, Strout & Kornfeld  
601 Union Street, Suite 5500  
Seattle, WA 98101-2373  
(206) 292-2110

14 *Attorneys for Defendants Joe Cashman and Jane Doe Cashman:*

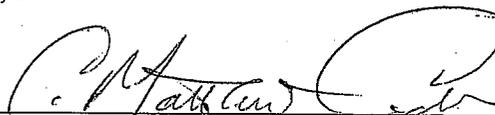
15 Thomas Cline  
16 Attorney at Law  
17 2502 North 50th Street  
18 Seattle, WA 98103  
(206) 789-2777

19 *Attorneys for Defendant Kay Sarich:*

20 Spencer Hall  
21 Janet McEachern  
22 Hall Zanzig Zulauf Claflin McEachern PLLC  
1200 Fifth Avenue, Suite 1414  
23 Seattle, WA 98101  
24 (206) 292-5900

1 *Defendant U.S. Bancorp:*  
2 US Bancorp  
3 US Bancorp Center  
4 800 Nicollet Mall  
5 Minneapolis, MN 55402

6 DATED this 3<sup>rd</sup> day of November, 2006.

7 

8 C. MATTHEW ANDERSEN, WSBA No. 6868  
9 NANCY L. ISSERLIS, WSBA #11623  
10 WINSTON & CASHATT  
11 Attorneys for Plaintiff Beal Bank SSB  
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Honorable Douglas McBroom

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State Savings Bank,

Plaintiff,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION # 1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,

Defendants.

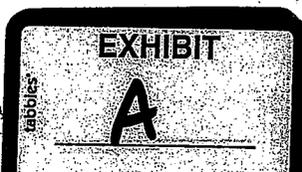
NO. 05-2-11440-1 SEA

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS STEVE AND KAY SARICH and Defendants Cashman

This matter having come on for hearing on September 8, 2006 on a Motion for Summary Judgment by Defendants Steve and Kay Sarich, and the Court having heard the argument of the parties, and having reviewed the motion and the records and files in this matter, including the following:

1. Motion for Summary Judgment by Defendants Steve and Kay Sarich;
2. Declaration of Kay Sarich, dated June 26, 2006;
3. Declaration of Michael McCormack, dated June 26, 2006;

ORDER GRANTING DEFENDANT SA MOTION FOR SUMMARY JUDGMENT



APPENDIX 2-4 L. ZANZIG ZULAUF FLIN MCEACHERN

1200 Fifth Avenue, Suite 1414 Seattle, Washington 98101 206.292.5900

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4. Declaration of Katriana L. Samiljan, dated June 26, 2006;
5. Motion to Strike Affidavits;
6. Plaintiff's Memorandum In Opposition to Defendants Sarich's Motion for Summary Judgment;
7. Supplemental Affidavit of David Wall In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
8. Affidavit of Roger Elkins In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
9. Affidavit of Chris Ashcraft;
10. Plaintiff's Response to Defendant's Motion to Strike the Affidavit of David Wall;
11. Motion to Strike Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;
12. Plaintiff's Response to Defendant's Motion to Strike the Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;
13. Reply Memorandum In Support of Motion to Strike Supplemental Affidavit of David Wall and Affidavit of Roger Elkins;

APPENDIX 2-5

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14. Plaintiff's Motion to Strike Portions of the Declaration of Kay Sarich;

15. Memorandum In Opposition to Plaintiff's Motion to Strike Portions of the Declaration of Kay Sarich;

16. Reply Memorandum In Support of Steve and Kay Sarich's Motion for Summary Judgment;

17. *Declaration of Thomas Cline DDM*  
NOW, THEREFORE, it is hereby:

ORDERED that the Motion for Summary Judgment by Defendants Steve and Kay Sarich is granted. All claims by plaintiff Beal Bank, SSB against defendants Steve and Kay Sarich *and defendants Cashman DDM* are dismissed with prejudice.

Defendants may make a motion for an award of attorneys' fees and costs to be set for a separate hearing.

DATED this 8 day of September, 2006.

*Douglas McBroom*  
Honorable Douglas McBroom

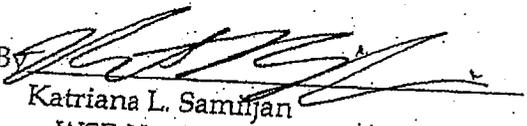
Presented by:  
HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

By *Spencer Hall*  
Spencer Hall  
WSB No. 6162

APPENDIX 2-6

1 Janet D. McEachern  
2 WSB No. 14450  
3 Attorneys for Defendant Kay Sarich

4 BUSH STROUT & KORNFELD

5  
6 By 

7 Katriana L. Samirjan  
8 WSB No. 28672  
9 Attorneys for Defendants  
10 Kay Sarich and Steve Sarich  
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APPENDIX 2-7

Honorable Douglas McBroom

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State Savings Bank,

Plaintiff,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION # 1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,

Defendants.

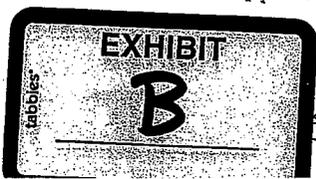
NO. 05-2-11440-1 SEA

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on September 8, 2006 on Plaintiff's Motion for Summary Judgment, and the Court having heard the argument of the parties, and having reviewed the motion and the records and files in this matter, including the following:

1. Plaintiff's Motion for Summary Judgment;
2. Memorandum In Support of Plaintiff's Motion for Summary Judgment;
3. Affidavit of David Wall In Support of Plaintiff's Motion for

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1



APPENDIX 2-8

LL ZANZIG ZULAUF  
 AFLN MCEACHERN | 1200 Fifth Avenue, Suite 1414  
 Seattle, Washington 98101  
 206.292.5900

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- Summary Judgment;
- 4. Affidavit of Brenda K. Hall Re Affidavit of David Wall;
- 5. Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 6. Declaration of Janet D. McEachern;
- 7. Cashman's Opposition to Plaintiff's Motion for Summary Judgment;
- 8. Declaration of Thomas Cline In Opposition to Plaintiff's Motion for Summary Judgment;
- 9. Supplemental Affidavit of David Wall In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
- 10. Affidavit of Roger Elkins In Support of Plaintiff's Motion for Summary Judgment and In Opposition to Motion by Defendants;
- 11. Affidavit of Chris Ashcraft;
- 12. Plaintiff's Reply to Defendant Sarich's Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 13. Plaintiff's Reply to Defendant Cashman's Memorandum In Opposition to Plaintiff's Motion for Summary Judgment;
- 14. Affidavit of R. Bret Beattie In Support of Reply Re Sarich

APPENDIX 2-9

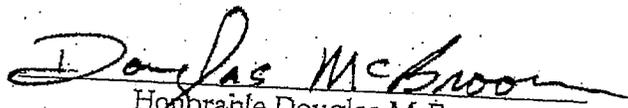
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Opposition to Plaintiff's Motion for Summary Judgment;

NOW, THEREFORE, it is hereby:

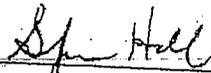
ORDERED that Plaintiff's Motion for Summary Judgment is denied.

DATED this 8 day of September, 2006.

  
Honorable Douglas McBroom

Presented by:

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

By 

Spencer Hall

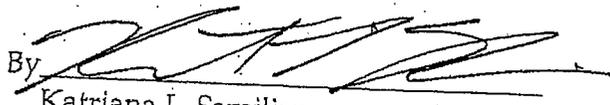
WSB No. 6162

Janet D. McEachern

WSB No. 14450

Attorneys for Defendant Kay Sarich

BUSH STROUT & KORNFELD

By 

Katriana L. Samiljan

WSB No. 28672

Gayle E. Bush

WSB No. 7318

Attorneys for Defendants

Kay Sarich and Steve Sarich

APPENDIX 2-10

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OCT 18 2006

Honorable Douglas McBroom

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN PLLC

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BEAL BANK, SSB, a Texas State  
Savings Bank,

Plaintiff,

v.

STEVEN and KAY SARICH, and the  
marital community comprised  
thereof; JOE CASHMAN and JANE  
DOE CASHMAN, and the marital  
community comprised thereof;  
WASHINGTON MUTUAL BANK;  
U.S. BANK NATIONAL  
ASSOCIATION # 1000; and  
ONE ELEVEN HOMEOWNERS  
ASSOCIATION,

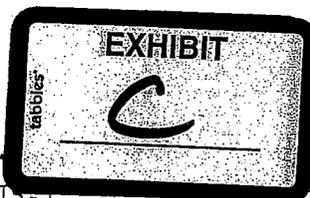
Defendants.

NO. 05-2-11440-1 SEA

ORDER GRANTING  
SARICH DEFENDANTS'  
MOTION FOR AWARD OF  
ATTORNEYS' FEES AND  
COSTS

This matter having come on for hearing on October 18, 2006 on the  
Sarich Defendants' Motion for Award of Attorneys' Fees and Costs, and the Court  
having reviewed the motion and the records and files in this matter, and having  
found as follows:

1. The Sariches are the prevailing party in this action.
2. Plaintiff's claims against the Sariches were based on  
promissory notes that provide for recovery by the lender of attorneys' fees and



APPENDIX 2-11

ORDER GRANTING SARICH  
DEFENDANTS' MOTION FOR AWARD  
OF ATTORNEYS' FEES AND COSTS

HALL ZANZIG ZULAUF  
CLAFLIN McEACHERN

1200 Fifth Avenue, Suite 1414  
Seattle, Washington 98101

206 297 5000

1 costs. RCW 4.84.330 requires such provisions to be construed to apply to  
2 whichever party prevails in the action.  
3

4 3. The attorneys' fees and costs incurred by the Sariches are  
5 reasonable in light of the results achieved and the amount at issue. The Sariches  
6 obtained dismissal of all claims asserted against them by the plaintiff. Those  
7 claims exceeded \$720,000. The Sariches' attorneys' fees and costs of  
8 approximately \$87,000 are reasonable in relation to the amount of the claims at  
9 issue.  
10

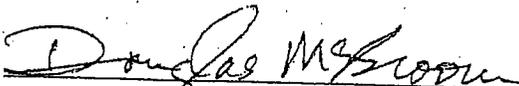
11 4. The hourly rates charged by the attorneys for the Sariches are  
12 within the range charged by attorneys with similar experience and comparable  
13 legal practices in Seattle.  
14

15 5. The amount of time spent by the attorneys for the Sariches is  
16 reasonable in light of the results achieved, the importance of the legal issues  
17 involved, the number of motions briefed, including two summary judgment  
18 motions, and the fact that the case was within a few weeks of trial.  
19

20 NOW, THEREFORE, it is hereby:

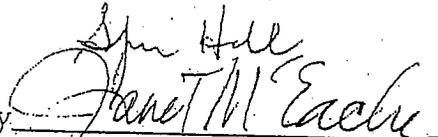
21 ORDERED that the Sarich Defendants' Motion for Award of  
22 Attorneys' Fees and Costs is granted. Plaintiff Beal Bank is ordered to pay the  
23 Sarich defendants a total of \$86,399.81 in attorneys' fees and costs. *Payment*  
24 *of such fees and costs is stayed until resolution*  
25 *of pending appeals.*  
26

1 DATED this 18 day of October, 2006.  
2  
3

4   
5 Honorable Douglas McBroom

6 Presented by:

7 HALL ZANZIG ZULAUF  
8 CLAFLIN McEACHERN PLLC

9   
10 By Janet D. McEachern

11 Spencer Hall

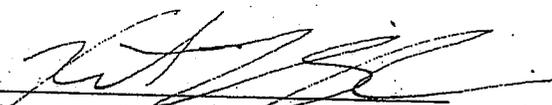
12 WSB No. 6162

13 Janet D. McEachern

WSB No. 14450

Attorneys for Defendant Kay Sarich

14 BUSH STROUT & KORNFELD  
15

16   
17 By Katriana L. Samiljan

18 WSB No. 28672

19 Gayle E. Bush

20 WSB No. 7318

Attorneys for Defendants

21 Kay Sarich and Steve Sarich  
22  
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26

APPENDIX 2013

ORDER GRANTING SARICH  
DEFENDANTS' MOTION FOR AWARD  
OF ATTORNEYS' FEES AND COSTS - 3

HALL ZANZIG ZULAUF  
CLAFLIN MCEACHERN  
1200 Fifth Avenue, Suite 1414  
Seattle, Washington 98101  
206 297 5000

**FILED**  
KING COUNTY, WASHINGTON

**OCT 27 2006**

**SUPERIOR COURT CLERK  
GARY POVICK  
DEPUTY**

**SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY**

BEAL BANK, SSB, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STEVEN and KAY SARICH )  
 and JOE CASHMAN et ux. )  
 et al., )  
 )  
 Defendants. )

No. 05-2-11440-1 SEA  
~~PROPOSED~~ CORRECTED  
JUDGMENT FOR ATTORNEY'S  
FEES IN FAVOR OF JOE CASHMAN  
AND AGAINST BEAL BANK.

Clerk's Action Required

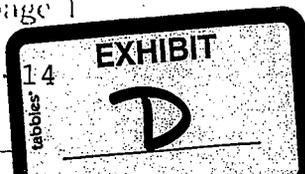
**JUDGMENT SUMMARY**

Judgment Creditor: Joe Cashman  
Jdmt. Creditor's Atty: Thomas Cline, W SBA 11772  
Judgment Debtor: Beal Bank, SSB.  
Attorney's Fees: \$ 4,812.50

**ORIGINAL**

JUDGMENT FOR ATTY'S FEES page 1

APPENDIX 2-14



**THOMAS CLINE**  
ATTORNEY AT LAW  
2502 N 50TH ST  
SEATTLE WA 98107  
(206) 789-2777

JUDGMENT

1 Judgment is hereby entered in favor of Joe Cashman against  
2 Beal Bank, SSB, for attorney's fees in the amount of #4,812.50.  
3 The orders entered September 8, 2006 regarding the cross motions for  
4 summary judgment shall otherwise remain in full force and effect.

DATED this <sup>11<sup>th</sup></sup> ~~14<sup>th</sup>~~ day of September 2006.  
*Payment pursuant to this order  
is stayed until the appeal in this  
matter is concluded*

*Douglas McBroom*  
Hon. Douglas McBroom  
Superior Court Judge

Presented by:

*TC*  
Thomas Cline  
Attorney for Joe and  
Jane Doe Cashman

WSBA 11772



1 correct copy of said to be delivered in the manner indicated to the following persons at the  
2 addresses shown below:

3 Gayle Bush **Via U.S. Mail/Facsimile**  
4 Katriana Samiljan  
5 Bush, Strout & Kornfeld  
6 601 Union Street, Suite 5500  
7 Seattle, WA 98101-2373  
8 Attorney for Defendant Sarichs

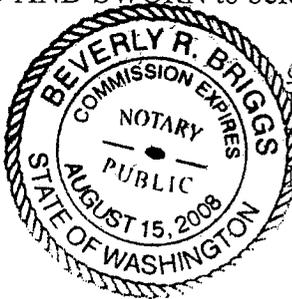
7 Thomas Cline **Via U.S. Mail/Facsimile**  
8 Attorney at Law  
9 2502 North 50th Street  
10 Seattle, WA 98103  
11 Attorney for Defendant Cashman

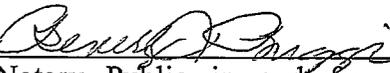
10 US Bancorp **Via U.S. Mail**  
11 US Bancorp Center  
12 800 Nicollet Mall  
13 Minneapolis, MN 55402

13 Janet McEachern **Via U.S. Mail/Facsimile**  
14 Spencer Hall  
15 Hall Zanzig Zulauf Claflin McEachern PLLC  
16 1200 Fifth Avenue, Suite 1414  
17 Seattle, WA 98101  
18 Attorney for Defendant Kay Sarich

17  
18   
19 CHERYL L. KRENDEL

20 SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of December, 2006.



  
Notary Public in and for the State of  
Washington, residing at Spokane Valley  
My commission expires 8/15/08