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**Case No. 68240-7-I**

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GBC INTERNATIONAL BANK, INC., a California corporation,

Plaintiff/Respondent,

v.

CORY and GENEANNE BURKE, *et al.*,

Defendants/Appellants.

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**BRIEF OF RESPONDENT, GBC INTERNATIONAL BANK**

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## II. INTRODUCTION

GBC International Bank (“GBC” or “Respondent”), successor in interest to the Federal Deposit Insurance Corporation (“FDIC”) as receiver of Shoreline Bank (“Shoreline Bank”), by and through its attorneys, Hacker & Willig, Inc., P.S., respectfully presents this Respondent’s Brief in this appeal filed by Defendants below, Cory Burke and Geneanne Burke, husband and wife, and the marital community composed thereof (the “Burkes”); Greg Blunt and Jill Blunt, husband and wife, and the marital community composed thereof (the “Blunts”); and Crown Development, Inc. (“Crown Development”) (collectively, the “Guarantor Defendants” and/or the “Appellants”).

### **A. The Defendants Obtained a Commercial Loan to Finance their Real Estate Development Venture.**

The Burkes and the Blunts are very experienced and financially successful real estate developers and investors. Each of the Guarantor Defendants signed separate personal guaranties for a \$500,000.00 unsecured loan GBC (references to GBC herein, as they relates to loan history, may be used interchangeably with Shoreline Bank) made to Queen Anne Builders, LLC (“Queen Anne Builders”), their long time business partner. The terms “\$500,000.00 Loan” and “2545 Loan” – the last four digits of the loan number – will be used interchangeably herein. The loan was one of two separate loans relating to a proposed townhome project on Queen Anne Hill in Seattle, Washington. The Guarantor Defendants had been involved in the project since 1999. See, Report of

Proceedings (“RP”) 603:10-15. In fact, the Guarantor Defendants had previously personally guaranteed the original loan to acquire the property *Id.* The Defendants characterized this real estate venture as their “hot money” project. See, RP 536:17, 539:7. When the loan from GBC became due a year and a half later, the Defendants did not pay it. Instead, they forced GBC to file a lawsuit against all of them to collect the loan.

**B. The Defendants Refuse to Repay the Commercial Loan and Instead Raise Spurious “Defenses.”**

After the lawsuit was filed, the Defendants for the first time conjured up reasons why they should not have to repay their loan: (1) they claimed GBC orally agreed to make a “construction loan” to finance the building of the real estate venture; (2) they claimed that GBC fraudulently induced them into signing the loan documents with promises of a construction loan; (3) they claimed that GBC made misrepresentations in getting them to sign the loan documents, again with promises of a construction loan; (4) they claimed GBC’s foreclosure on a separate secured loan for \$1,100,000.00 (a loan that they also all personally guaranteed) actually included the \$500,000.00 loan (ignoring the fact that they would nevertheless still be liable for any deficiencies under the terms of their personal guaranties) and; (5) they claimed that GBC and the principal of Queen Anne Builders were really “acting in concert” and together they induced the Guarantor Defendants into signing the loan documents.

In fact, the Defendants’ claims at trial were belied by their internal

e-mail correspondence. See, RP 642:19 – 644:11. While simultaneously claiming “fraud” and “misrepresentation” by GBC, Defendants were manufacturing their own “defenses” to repayment, stating: “I envision laying down a series of firebombs and a running retreat until they wear out or come to their senses.” *Id.* Defendants’ attempts to manipulate GBC and its representatives were revealed at trial: “Theresa, the credit lady, is holding up pretty good and I may still be able to feed her info to soften her up.” *Id.* GBC then called Queen Anne Builders’ long-time bookkeeper, Kathy Bennett, to testify. Her testimony focused on a telling e-mail message she wrote to Queen Anne Builder’s principal, Andy Ryssel. Ms. Bennett responded to Mr. Ryssel’s attempts to intentionally misstate the facts surrounding the inception of the loans: **“Please remember that you [Andy Ryssel] proposed bringing in Crown and the unsecured line of credit as a solution at the time. I was present at that meeting and if asked would need to respond accordingly. To say they [GBC] forced it upon you is simply not true.”** See, RP 684:10-14 (emphasis added).

**C. The Jury Found the Defendants Fully Liable for Repayment of the Commercial Loan.**

The Defendants presented all of these claims, and more, to a 12-person jury – that Defendants had demanded – over the course of a 5-day trial. The jury overwhelmingly denied the Defendants’ claims and found that all the Guarantor Defendants breached their personal guaranties. The jury found that the full amount of the \$500,000.00 Loan was due and owing and that all of the Defendants were liable to GBC for repaying the

loan.

The Court then considered the Defendants' post-trial motions and supporting declarations for a new trial, objecting to the jury's verdict, and opposing entry of the judgment. See, Clerk's Paper ("CP") 1673-1679. All these motions were denied (see, CP 1704-1705, 1833-1836), and the Court properly entered a judgment against the Defendants. See, CP 1706-1716, 1840-1842.

On appeal, the Guarantor Defendants are picking up where they left off, rehashing claims rejected by the jury. The Defendants presented evidence to the jury and argued at trial each and every one of the theories of the case relating to which they now claim error: (1) the Defendants were permitted wide latitude in arguing that the 2545 (unsecured) Loan was secured by certain real property (the "Property," applicable only to the 4190 Loan), and that – following the foreclosure – the 2545 Loan was therefore satisfied along with the 4190 Loan (an argument which would not have been applicable to the Guarantor Defendants who remain liable for any deficiency as a matter of law); (2) the Defendants argued that the jury was entitled to a "correct" instruction on the statute of frauds as applicable to loan documents – the jury received such an instruction based on a variety of proposed instructions by both sides; and (3) the Defendants argued in extensive post-trial motions that the trial court should not award Judgment in favor of GBC in the full amount due on the 2545 Loan when the jury explicitly stated that the verdict should be entered in "[t]he dollar amount that is currently due on Loan No. 2545."

What the Burkes and the Blunts consistently chose to ignore – and try to distract attention away from – is that the Defendants are all responsible for and liable on the loan documents they agreed to and signed. The jury’s verdict clearly found the Defendants, including all Guarantor Defendants, liable on the loan contract. The amount of liability was subject to easy and straightforward calculation and it does not give rise to appealable error that the trial court entered a judgment for the amount outstanding on the \$500,000.00 Loan following entry of the verdict. The verdict and judgment of the jury and the trial court is correct and is respectfully requested to be upheld by this Court.

### **III. ASSIGNMENTS OF ERROR**

The trial court did not make any reversible error in these proceedings. The Jury Verdict in favor of GBC should stand and the Judgment and Supplemental Judgment entered thereupon should be upheld by this Court and remain in full force and effect as against the Defendants.

### **IV. STATEMENT OF THE CASE**

#### **A. Loan History.**

##### **1. The Guarantor Defendants Began Their Involvement in the Real Estate Project in 1999.**

In 1999, Queen Anne Builders purchased real property on Queen Anne Hill in Seattle, Washington. See, RP 497:12. At that time, Queen Anne Builders took a loan from Bank of Washington for approximately \$1,500,000.00. See, RP 243:18-24. The Defendants personally guaranty the Bank of Washington loan and also personally extended a loan to Queen Anne

Builders. See, RP 540:13-18. On March 7, 2007, the Defendants sought a loan from GBC to refinance the Bank of Washington loan. See, RP 243:18-24. By refinancing, the Defendants were both repaid their initial loan to Queen Anne Builders and initially did not have to personally guaranty the loan. Thereafter, Queen Anne Builders executed a promissory note in favor of GBC in the original principal amount of \$1,515,000.00 under loan number ending 4190 (the “4190 Note”) (see, CP 1632-1642, Trial Exhibit No. 1). The 4190 Note was secured by a deed of trust (the “Deed of Trust”) on the Queen Anne Property (see, CP 1632-1642, Trial Exhibit No. 4).

On September 8, 2008, the 4190 loan became due. The Defendants wanted to continue with developing the townhomes. They then asked for an extension of the 4190 Loan. The Defendants were well aware that the real estate market was starting to soften and that the value of the Queen Anne property had declined. See, RP 139:21, 288:9, 362:20, and 625:2. They insisted on continuing with their real estate venture, which they called their “hot money” deal. See, RP 536:17, 539:7.

**2. GBC Agrees to Refinance and Extend the Existing Loan on the Condition that it Be Paid Down to \$1,117,316.14 to Establish a Reasonable Loan to Value Ratio on the Secured Loan. The Guarantor Defendants Agree and Take an Unsecured Loan to Accomplish this Requirement.**

GBC agreed to extend the 4190 Loan for a year and a half to May 8, 2010. However, GBC required that the 4190 Note be paid down, that interest reserves be set-aside for the year and an half, and that all real property taxes

be paid current. See, CP 1632-1642, Trial Exhibit No. 21. Rather than make these payments from their own pockets, the Defendants agreed to take the \$500,000.00 loan. *Id.* Thus, on or about December 19, 2008, the Defendants executed loan documents in the original principal amount of \$500,000.00 under loan number ending 2545 (see, CP 1632-1642, Trial Exhibit Nos. 21-30).<sup>1</sup> The maturity date for the \$500,000 loan was June 19, 2010. *Id.*

The very purpose of the loan transactions at this time was to pay down the secured (4190) loan to ensure a more reasonable loan-to-value ratio and to create an unsecured (2545) loan to give the Defendants additional time and breathing room to decide what to do next. See, RP 403:14-21.

Once the loan documents and personal guaranties for the \$500,000.00 Loan were signed by the Defendants, the funds were applied as follows: the \$1,515,000.00 loan (the 4190 Loan) was paid down to \$1,117,316.00 (which was memorialized by a Change in Terms Agreement (see, CP 1632-1642, Trial Exhibit No. 23). The 4190 Loan due date was extended to May 8, 2010. The real estate taxes on the property they were developing totaling \$10,483.00 were paid. The interest expense of \$68,000.00 was pre-paid on the loans so that they would not have to make monthly payments while they were developing their real estate project. Finally, a loan fee and expenses of \$11,173.00 were paid. All of this preserved the Defendants' cash on hand,

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<sup>1</sup> The 2545 Loan was also guaranteed by John Bargreen, but he was separately and erroneously granted summary judgment of dismissal of all claims against him on or about July 11, 2011. GBC appealed that decision. However, following entry of the final verdict and judgment thereon against the remaining Defendants, GBC voluntarily dismissed its appeal as unnecessary.

allowing them what should have been more than enough time to develop their project. See, RP 403:14-21; CP 1632-1642, Trial Exhibit No. 21.

It is undisputed that Queen Anne Builders and the Guarantor Defendants, in fact, executed three (3) sets of loan documents, one to originate the 4190 Loan in November of 2007, and another two to separate the 4190 Loan into two separate loans – the continuing 4190 Loan and the unsecured 2545 Loan – in December of 2008. Queen Anne Builders received the proceeds of those loans, and Queen Anne Builders and the Defendants would undoubtedly have received the benefit of the development venture, had it been successful.

**B. Transfer of Interest from Shoreline Bank to GBC.**

On October 1, 2010, GBC, by way of a Purchase and Assumption Agreement with the FDIC (the “Agreement”), assumed the \$500,000.00 loan and is now the real party in interest in this action. Though the Defendants tried to sensationalize and confuse the transfer during trial, the jury found that GBC properly owns the \$500,000 loan. See, CP 1626-1629. At trial, the Defendants argued vociferously that the FDIC receivership somehow voided borrowers’ obligations to Shoreline Bank (and, by extension, GBC), and that Shoreline Bank somehow failed because of its “shoddy” lending practices, sidestepping their own contractual duties to repay the loans they received. Such arguments were rejected by the jury.

**C. The Defendants Default by Failing to Repay the Loans Upon Maturity.**

Queen Anne Builders and the Guarantors failed to develop their

townhomes. When the loans became due, the Defendants defaulted. Consequently, on September 24, 2010, Shoreline Bank nonjudicially foreclosed its Deed of Trust against the Property (the “Trustee’s Sale”) on the 4190 Loan. The outstanding principal balance owed to Shoreline Bank on the 4190 Loan at the time of the Trustee’s Sale was \$1,117,316.14. Shoreline Bank credit bid \$900,000.00, took the Property back at the Trustee’s Sale, and later sold the Property for \$490,000.00. See, RP 147:5-15, 150:19-20. Thus, there was a deficiency of at least **\$217,316.00** (the “Deficiency”), which is the difference between the outstanding principal balance of \$1,117,316.14 and the \$900,000 bid amount at the Trustee’s Sale.<sup>2</sup> Such Deficiency is being pursued by the owner of that claim, Republic Credit One, LP, against all of the Guarantor Defendants, under King County Superior Court Case No. 11-2-32517-2 SEA (the “4190 Deficiency Action”). While not entirely relevant to the appeal herein, it is worth noting that the testimony presented at trial essentially established the fair market value for the Property at \$490,000, i.e., the price paid in an arms-length transaction by a third-party during the relevant time period. See, RP 150:20.

**1. At the End of Trial, the 2545 Loan Had an Outstanding Balance of \$574,479.16.**

By its specific terms, the \$500,000 Loan was due and payable in full to GBC on June 19, 2010. At the time of trial, the Defendants owed the accruing sum of **\$574,479.16** to GBC, which amount was *inclusive* of

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<sup>2</sup> The actual balance on the 4190 Loan, when accounting for accrued interest, fees, and costs was even higher, over \$1,210,000.00.

\$500,000.00 in principal, \$74,479.16 in past accrued interest, late charges, and other fees and costs, and with interest continuing to accrue at \$97.22 *per diem*; and *exclusive* of future accruing interest, attorneys' fees, costs, and other expenses. GBC demanded payment from Queen Anne Builders and the Defendants, on the 2545 Loan, and, not having received any payment or agreement to pay, filed the lawsuit to collect the entire amount due.

**D. The \$500,000 Loan Was Clearly Unsecured.**

The \$500,000.00 Loan was clearly unsecured, which was set forth in the testimony presented at trial. See, RP 110:2, 113:2, 140:4, 145:22, 156:5, 178:2, 200:8, 252:2, 288:16, 290:19, 318:1, 15, 323:15; 325:25, 367:16, 587:12-15, 593:11-14, and 620:3-6. The \$500,000 Note, itself, confirms same, and goes on to state the specific purpose of the \$500,000 Loan and the disbursements made: (1) a \$375,000.00 principal reduction of the 4190 Loan; (2) to establish a \$68,000.00 twelve (12) month interest reserve account, with accrued interest advanced monthly as a convenience to Defendants; (3) \$11,173.16 loan renewal fee for the 4190 Loan, as a courtesy to Defendants so there would be no out of pocket costs to them; and (4) \$10,483.00 to pay estimated accrued real estate taxes on the Property. See, CP 1632-1642, Trial Exhibit 21. The \$500,000 Loan was intended and helped to decrease the loan to value ratio on the 4190 Loan given the reduction in property values during the relevant period in 2008. See, RP 128:22, 190:5-7, 231:4-6; 403:14-21, 458:15-18. Tellingly, in the 2545 Note, where the "Collateral" is required to be listed, none is listed. See, CP 1632-1642, Trial Exhibit No. 21. The consistent and clear testimony of all GBC

representatives, who were all employees of Shoreline Bank, along with Defendants' own testimony at trial (see, RP 587:12-15, 593:11-14, 620:3-6, 699:14-15), confirms that the \$500,000 Loan was unsecured. Finally, the 2545 Change in Terms Agreement (an Agreement entered into on December 19, 2008, reduced the applicable fixed interest rate from 7.00% to 4.00%) states: "**DESCRIPTION OF COLLATERAL.** This loan is unsecured." See, CP 1632-1642, Trial Exhibit No. 22.

**E. Defendants' Liability to GBC.**

As evidenced by the Defendants' own declarations filed with the trial court, none of the Defendants ever objected to or even questioned either loan or the loan terms. See, CP 2348-2350, 2351-2352, 63, 253-255, 256-258, and 280-282. The Guarantor Defendants had the opportunity to review all loan documents prior to execution. None of the Defendants offers a single document to back-up their *post hac* litigation claim that the Defendants thought they were agreeing to a "future" construction loan, or that they were guarantying a "defaulted" loan, or that they thought their personal guaranties were somehow withdrawn. Such arguments only came to light at trial, after which the jury rejected all these arguments.

During the year and a half before the original loan became due, the Borrower and Defendants could have used that time to actually construct their project, find investors for their development, find a construction lender, or to simply sell the property. Further, the Defendants clearly understood the loan documents they were agreeing to and even performed

their own due diligence on the real estate venture: they were shown appraisals, budgets, and cash flow analyses, among other reports.

Despite the Defendants' obvious mismanagement of the project, the actions – or inactions – the Defendants took during the course of their real estate development venture were all solely within their control. Again, not once during the year and a half term of the loan did any of the Defendants raise any issues with the loans, the nature and extent of the guarantees, or the nature of the security as it related to the loans. In sum, there is not a single document the Defendants can point to that supports their claims.

**F. The Clear Terms of the Loan Documents are Enforceable Against Defendants and Waive the Very Arguments Presented at Trial and in this Appeal.**

Each and every one of the Commercial Guaranties signed by Defendants, regarding Guarantor's representations and warranties, state the following:

Guarantor represents and warrants to Lender that: (A) no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty; (B) this Guaranty is executed at Borrower's request and not at the request of Lender, (C) Guarantor has full power, right and authority to enter into this Guaranty, (D) the provisions of this Guaranty do not conflict with or result in a default under any agreement or other instrument binding upon Guarantor and do not result in a violation of any law, regulation, court decree or order applicable to Guarantor; . . .”

See, CP 1632-1642, Trial Exhibit Nos. 14-20, 24-30.

**1. The Guarantor Defendants Specifically Waived Any Right to Require GBC to Liquidate Any Collateral it May Have Held.**

Each and every one of the Commercial Guarantees signed by the Defendants, as to Guarantor's waivers, state the following:

Guarantor waives any right to require Lender (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the Indebtedness or in connection with the creation of new or additional loans or obligations; (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) **to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person**; (E) **to pursue any other remedy within Lender's power**; or (F) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

**Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale**; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other

guarantor, or of any other person or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; . . .

See, CP 1632-1642, Trial Exhibit Nos. 14-20, 24-30 (emphasis added).

Further, each and every one of the Commercial Guarantees signed by the Defendants, as to the integration of the document, state to following:

**Integration.** Guarantor further agrees that Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless from all losses, claims, damages, and costs (including Lender's attorneys fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations and agreements of this paragraph.

See, CP 1632-1642, Trial Exhibit Nos. 14-20, 24-30.

The loan documents all speak for themselves and are fully enforceable against the Defendants. Accordingly, the verdict of the jury and the judgment should be upheld.

**G. Trial and Jury Verdict.**

The trial in this matter commenced on Monday, November 7, 2011, and concluded on Monday, November 14, 2011. Following a five-day jury trial and after two full days of jury deliberations, on November 16, 2011, the 12-member jury entered the Special Verdict finding that the

Defendants are liable to GBC International Bank in the amount of “[t]he dollar amount that is currently due on Loan No. 2545.” In reaching its verdict, the jury found that Queen Anne Builders was in default on the \$500,000.00 2545 Loan evidenced by a promissory note and related documents (**unanimous**), that each of the Defendants guaranteed in writing the 2545 Loan (**unanimous**), found no fraud by Shoreline Bank, the predecessor to GBC International Bank (**unanimous**), found that GBC International Bank was not estopped from enforcing its rights against the Defendants (**unanimous**), and found no misrepresentation by Shoreline Bank as to the Defendants (**ten to two in favor**). See, CP 1626 -1629.

**H. Uncontroverted Evidence that \$574,479.16 Was Due and Owing on the 2545 Loan.**

During trial, Dawn Beagan, GBC International Bank’s Vice President of Credit Administration and designated custodian of records, provided uncontroverted testimony as to the amounts currently due on the 2545 Loan. Ms. Beagan testified in the afternoon on Wednesday, November 9, 2011, between approximately 1:30 PM and 3:40 PM. During her testimony, Ms. Beagan testified that the total amount currently due for Loan No. 2545 is **\$574,479.16**, which is the principal balance of \$500,000.00 and the amount of the promissory note, accrued interest of 7.00% *per annum* totaling \$74,479.16 as of October 25, 2011, and a *per diem* amount of \$97.22. See, CP 1632-1642, Trial Exhibit No. 21.

Therefore, at the time of trial, the specific/established amount due on the 2545 Loan was **\$574,479.16**. The Defendants did not offer any

credible evidence to contradict the amount due and owing. In reaching the ultimate issue, the jury's verdict was clearly in favor of GBC. Question 8 of the Special Verdict clearly states: "If you find that Queen Anne Builders, LLC or any guarantor is liable to GBC International Bank on Loan No. 2545, what is the amount of the damages?" The jury unanimously responded: "The dollar amount that is currently due on Loan No. 2545." See, Verdict Form, CP 1626 -1629.

**I. Extensive Jury Instructions Were Offered by Both Plaintiff and Defendants.**

As is required under the King County Superior Court local rules, prior to trial, both Plaintiff and Defendants offered extensive sets of jury instructions, both cited and uncited, to the trial court. See, CP 798-873 and 899-938. Thereafter, at the conclusion of the evidence and prior to closing arguments, the parties submitted revised/supplemental proposed jury instructions to the trial court. See, CP 995-1014 and CP 1053-1059. Prior to instructing the jury, the trial court selected the proper jury instructions to be used from those offered by Plaintiff and Defendants, heard argument on same, revised certain instructions, and took exceptions prior to reading the Court's instructions to the jury. See, RP 808:22-25, and 810:5 – 829:19.

Contrary to the Defendants' arguments in this appeal, the correct legal instructions were given to the jury, the vast majority of which were Defendants' proposed instructions. See, CP 1029-1052. Regarding instructions on contract interpretation and parol evidence / statute of

frauds, the Court instructed properly. See, Court's Instructions Nos. 8-9, CP 1029-1052. Both such instructions are pattern jury instructions, which are favored by Washington courts. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 301.05 and 301.06 (5th ed.). The jury was also given the loan documents among other trial exhibits, which contained the appropriate "no oral agreement" language under Washington law. See, RCW 19.36.110.

The Defendants assert that the trial court erred in using the Washington Pattern Instructions as opposed to the Defendants' own drafted instructions, which were presumably cobbled together from claimed "applicable" case law. The trial court's use of pattern instructions was not error; the jury was properly instructed on all points of law.

**J. Entry of Judgment Upon Jury Verdict.**

On or about November 21, 2011, GBC filed its Motion for Entry of Judgment Upon Jury Verdict requesting entry of a judgment in the amount of **\$578,465.18**, the total amount of principal and interest owing on the 2545 Loan through December 5, 2011. On or about November 23, 2011, the Defendants filed their competing Motion for Judgment Upon Jury Verdict requesting entry of a judgment in the amount of "\$0.00" due to the fact that the jury had not issued the specific monetary amount owing on the 2545 Loan. The lower court rejected the Defendants' arguments, and, on December 5, 2011, the Judgment Upon Jury Verdict was entered in favor of GBC in the amount of **\$578,465.18**. On or about February 1, 2012, a Supplemental Judgment was entered for attorneys' costs and fees

in the amount of **\$192,575.00**. The Supplemental Judgment was not timely appealed. In January and February 2012, the Defendants made payments to GBC in the total amount of the Judgment and Supplemental Judgment, plus interest owing thereon.

The jury's near-unanimous verdict in favor of GBC should stand.

#### **V. ISSUES PRESENTED**

The Defendants raise three (3) "issues" on appeal, none of which offer any sufficient or legitimate basis on which to appeal. Nevertheless, this Court must decide as follows:

1. Whether the trial court erred in properly finding that the 4190 Deed of Trust did not secure the 2545 Note and that the 2545 Note was not part of the foreclosure process relating to the 4190 Deed of Trust, and even if this was an error, whether it was harmless given that the Appellant in fact presented argument as to the fair value of the Property which would have established a total deficiency much greater than the amount awarded in judgment.

2. Whether the trial court erred in excluding a single instruction to the jury when the Defendants had ample opportunity to – and did – present argument to the jury as to their misrepresentation, fraud, and "estoppel" "defenses," and where the jury simply did not accept such "defenses."

3. Whether the Judgment was properly entered in the full amount due on the 2545 Loan where the jury found in favor of GBC in "[t]he dollar amount that is currently due on Loan No. 2545."

None of the Defendants' arguments have any merit, and thus the trial court should be upheld. There is no need to conduct another trial in this matter where the Defendants were allowed to present all of their arguments to the jury, where the jury reached a near-unanimous verdict in favor of GBC, and where a Judgment and Supplemental Judgment were properly entered accordingly.

## VI. STANDARD OF REVIEW

Though the Defendants do not articulate in any way the proper standard of review, this Court reviews **jury instructions** *de novo*, and an instruction containing an erroneous statement of the law is reversible error where it prejudices a party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). However, **jury instructions are sufficient** if “they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). This Court reviews a challenged jury instruction *de novo*, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635 (2010).

This Court reviews a trial court's decision to **admit or exclude evidence** for an *abuse of discretion*. See, *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* “A trial court's decision is manifestly unreasonable if it

‘adopts a view “that no reasonable person would take.” ’ ” □ *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting, *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting, *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003))). “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” *Id.*; citing, *Mayer*, 156 Wn.2d at 684); *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-669 (2010).

This Court employs an *abuse of discretion* standard in reviewing denial of **motions for new trial**, *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000), and motions for amended judgment, see, *Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 175-76, 116 P.3d 381 (2005). A trial court abuses its discretion when it fails to grant a new trial or amend a judgment where the damage award is contrary to the evidence. *Locke v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d 705 (2007). The court examines the record to determine whether the award is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Where an award is not contrary to the evidence, this court will not find it to be the result of “passion or prejudice” based solely on the award amount. As this Court said in *James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971), “where it can be said that the jury . . . could believe or disbelieve some of [the evidence] and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it

cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.” We keep in mind that “courts are reluctant to interfere with a jury’s damage award when fairly made” because determination of damages is the duty of the jury. *Palmer*, 132 Wn.2d at 197. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454 (2008).

Generally, “[a] trial court *abuses its discretion* when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009) (emphasis added).

## VII. LEGAL AUTHORITY & ARGUMENT

### A. **The Trial Court Did Not Err in Declining to Allow the Burkes’ and the Blunts’ “Defenses” Arising from the Nonjudicial Foreclosure of the 4190 Loan; Defendants Offered Copious Evidence Regarding Same.**

Defendants’ first assignment of error seems to be that the Defendants were somehow entitled to present a “defense” arising from the Trustee’s Sale in litigation that did not involve the 4190 Loan or the Trustee’s Sale in any way. The present case involves the 2545 Loan, as stated clearly in Shoreline Bank’s Complaint, plain and simple. A separate lawsuit has been filed by the owner of the Deficiency claim following the Trustee’s Sale; Defendants’ “fair value defenses” may be applicable in that proceeding, if at all.

#### 1. **The Complaint and Answer Were Limited to the 2545 Loan, Only.**

In its Complaint, Shoreline Bank stated as causes of action breach of contract, breach of personal guaranties, and for resulting attorneys' fees and costs, all within the single context of the 2545 Loan. See, CP 96-190.<sup>3</sup> Shoreline Bank prayed for relief under the 2545 Note, only; Defendants answered accordingly under the 2545 Loan, citing as their affirmative defenses the general, oft cited laundry list including: lack of capacity, failure of consideration, estoppel, fraud, negligent misrepresentation, unclean hands, assumption of risk, Plaintiff's own acts/omissions created the damage, and failure to mitigate. See, CP 191-196. Nowhere in Defendants' Answer is the 4190 Loan referenced in any way. See, CP 191-196. Defendants' "defenses" only were asserted at the time of trial in an attempt to muddy the factual waters of this case and confuse the jury.

Testimony at trial confirms that the Defendants knew they were executing two separate loans, each loan package containing numerous separate loan documents bearing separate loan numbers. See, RP 514:18, 698:5-6. As outlined clearly below, Washington contracting parties – especially wealthy,

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<sup>3</sup> Defendants attempt to make much of Plaintiff's amendment of its original Complaint filed in the lower court. See, CP 1-65 and 96-190. In reality, Plaintiff's original Complaint stated simple causes of action for breach of contract and for breach of personal guaranties, and limited its prayers for relief to the outstanding amounts due on the 2545 Loan. While the 4190 Loan was addressed in the Complaint to provide context, Plaintiff never sought recovery on the 4190 Loan in its Complaint or the First Amended Complaint. The filing of the First Amended Complaint was not a strategic decision to permit Plaintiff to later pursue foreclosure on the 4190 Loan. The two defaulted loans were addressed by Shoreline separately (and in fact were later assigned by the FDIC to two different parties): the Bank elected to sue on one and foreclosure (and pursue a deficiency judgment) on the other, and there are no contractual, statutory, or otherwise legal prohibitions to same.

experienced commercial real estate developers such as Defendants – are deemed to have read and understood the contracts they sign. In this case, the Defendants signed two sets of contracts: one for a secured loan, and the other for an unsecured loan, both of which loans were separately, personally guaranteed. The trial court correctly found same, as a matter of law, and recognized the implication of same in any appeal. See, RP 774:5-10.

**2. The Defendants Cannot Now Allege Error Because They Were Allowed to Put On Extensive Evidence at Trial of All of Their “Defenses.”**

Yet, contrary to the Defendants’ assertions, the fact remains that the Defendants were nevertheless permitted to offer copious evidence at trial as to their theory of the interrelatedness of the two loans (see, RP 94:23-24, 176:20, 177, 330:14-22, 587:12-15, 685:21-24, 703:8-9), the value of the Property (see, RP 91:25, 93:25, 123:24, 124:6-9, 131:15-17, 139:23-25, 149:1, 22, 149:14-20, 265:20, 416:9-10, 417:8-11, and 428:21-443:15), and all Defendants’ claimed “defenses” flowing therefrom (see, RP 860:15-883:20). The jury considered all of this testimony, heard argument from counsel, and found against the Defendants on each argument and “defense,” including those relating to the Trustee’s Sale. The fact that neither the trial court nor the jury found these arguments to be credible does not create an issue for appeal.

Factual evidence in the record below supports the reality that the 4190 Loan was to be kept separate from the 2545 Loan, the first – and most obvious – of which being that the two separate sets of loan documents bore different loan numbers. See, CP 1632-1642, Trial Exhibit Nos. 1-30. In their brief,

Guarantor Defendants end up strengthening Respondent's arguments by stating that the 2545 Business Loan Agreement, which the Defendants admit they signed, affirms that the 2545 Loan is excluded from the 4190 Deed of Trust, and that the 2545 Note is silent – says nothing – where it would be required to list the collateral (of any kind) which secures the note. See, Defendants' Brief, pg. 12. Moreover, the 2545 Notice of Final Agreement does not list the 4190 Deed of Trust. *Id.* The fact that separate personal guaranties were executed for each loan only strengthens the clear reality that the Defendants knew precisely that they were guaranteeing the unsecured 2545 Loan, and any deficiency regarding the 4190 Loan following the Trustee's Sale of the Property. See, Trial Exhibit Nos. 1-33.

At trial, despite the clearly distinct loan agreements, the Defendants were also permitted to offer evidence as to the value of the Property which secured the 4190 Loan (see, e.g., RP 91:25, 93:25, 123:24, 124:6-9, 131:15-17, 139:23-25, 149:1, 22, 149:14-20, 265:20, 416:9-10, 417:8-11, and 428:21-443:15). Over Respondent's objections, the trial court permitted expansive evidence of the value of the Property to go to the jury, and the jury was not persuaded by any such evidence, finding instead, as directed by the 2545 loan documents, that the Defendants are liable to GBC in the full amount due on the 2545 Loan. The Defendants also neglected to offer any supplemental jury instructions at the conclusion of the evidence at trial regarding their "defenses" relating to the conduct or outcome of the Trustee's Sale. See, CP 995-1014 and CP 1053-1059.

**3. The Loan Documents, Themselves, Are Abundantly Clear.**

The 2545 loan documents, themselves, are helpful in clarifying the rights and remedies of GBC following Defendants' default according to the terms of the 2545 loan documents: "Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount." See, CP 1632-1642, Trial Exhibit No. 21. The 2545 Note (which, again, all parties considered unsecured), further provides as follows:

**GENERAL PROVISIONS.** . . . All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; **or impair, fail to realize upon or perfect Lender's security interest in the collateral**; and take any other action deemed necessary by Lender without the consent of or notice to anyone.

See, CP 1632-1642, Trial Exhibit No. 21 (emphasis added).

The Defendants' commercial guaranties for the basis of GBC's demand for payment following Queen Anne Builders' default on the 2545 Loan:

For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness if Borrower to Lender, and the performance and discharge of all Borrower's obligations under the [2545] Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so **Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or**

**any other guaranty of the Indebtedness.** Guarantor will make any payments to Lender or its order, on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the [2545] Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

See, CP 1632-1642, Trial Exhibit Nos. 24-30 (emphasis added).

The above-stated provision, contained in each of the personal guaranties, provides that GBC may look to any of the Guarantor Defendants, individually, or specifically, even if GBC has not exhausted any or all of its remedies associated with its applicable collateral, and at any time after default, for payment of the amount of the 2545 Loan. As the 2545 Loan was unsecured, any or all of the Defendant guarantors were jointly and severally liable to GBC following default on the 2545 Loan – regardless of GBC's election of remedies under the 4190 Loan. These are the contractual obligations agreed to by the Defendants at the time they voluntarily signed the two sets of loan documents. Though they attempted to argue various “defenses” at trial, the jury found none of them credible.

The Court will note that the Defendants' commercial guaranties do not state they are only guaranteeing a part of the 4190 debt above the fair market value of the Property, or that they are only guaranteeing the 2545 Loan to the extent GBC recovers nothing under the 4190 Loan. No, the Defendants' personal guarantees are “unlimited” and “continuing.” See, CP 1632-1642, Trial Exhibit Nos. 24-30.

**4. GBC Properly Elected and Exercised its Remedies Here.**

Guarantor Defendants' arguments that the Trustee's Sale relating to the 4190 Note and the 4190 Deed of Trust preclude a lawsuit or otherwise impact the amount owing on the 2545 Loan are dispelled by the specific wording of the 2545 Note and the 2545 Guaranties as set forth above.

Here, Queen Anne Builders, as Borrower, and all Guarantors, defaulted on both the 2545 Loan and the 4190 Loan due to nonpayment upon maturity and by their failure to make required monthly payments when due. Thereafter, the Bank made demand on Borrower and Guarantors for payment of the full amounts due on the Loans. Upon Borrower and Guarantors' refusal to satisfy their obligations to GBC, the Bank elected its remedy of foreclosure of the 4190 Deed of Trust. See, *id.* None of the Defendants objected to any part or process of the Trustee's Sale. At the same time, pursuant to the clear terms of the 2545 Note, GBC was permitted to immediately file suit should Borrower and/or Guarantors fail to pay the "entire unpaid principal balance under [the Note] and all accrued unpaid interest[.]" See, CP 1632-1642, Trial Exhibit No. 21.

Under Washington law, "One is bound by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them." *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959). "The prosecution to final judgment of any one of the remedies constitutes a bar to the others." *Id.* The election of remedies rule

has a narrow scope, its sole purpose being the prevention of double redress for a single wrong. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997) (citations omitted). The doctrine seeks to prevent a party from asserting inconsistent positions in order to recover more than the value of the harm suffered. *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn. App. 1, 5, 604 P.2d 1325 (1979) (citation omitted). The rule does not apply here as there has been no “double redress” for GBC following Defendants’ “wrongs.” There were two separate promissory notes and the lender pursued foreclosure relating only to the secured note, the 4190 Loan. GBC credit bid \$900,000.00 at the time of the Trustee’s Sale, was left with a Deficiency of approximately \$217,316.00 on the 4190 Loan (which is being pursued separately by the owner of the Deficiency claim). GBC proceeded judicially on the separate unsecured 2545 Loan. There is no issue or even claim of double recovery. All parties here have received the benefit of their bargain knowingly and voluntarily made in two separate loan agreements.

**5. Defendants Have Waived All Arguments Applicable to the Trustee’s Sale of the Property.**

All of Defendants’ arguments relating to the Trustee’s Sale are red herrings. In Washington, the sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130. Waiver will result when a party: (1) receives notice of the right to enjoin the sale, (2) has actual or constructive knowledge of a defense to foreclosure before the sale, and (3) fails to bring an action to obtain a court

order enjoining the sale. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 114, 752 P.2d 385 (1988). “[T]he statutory notices of foreclosure and trustee’s sale will usually be sufficient.” *Country Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 751, 943 P.2d 374 (1997) (citing, *Koegel*, 51 Wn. App. at 114). See, *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137 (2007). Here, again, the Defendants never objected to the Trustee’s sale, through they admittedly received notice of same. See, RP 717:2 – 719:15. Therefore, they have waived any objections to the process or procedure of same.

**6. Even if the 254 Loan Was Considered Secured and Subject to the Trustee’s Sale, GBC Would be Entitled to Judgment Against the Guarantor Defendants as Entered.**

Defendants, again, only serve to strengthen Respondent’s arguments by citing to RCW 61.24.100 – the deficiency judgment provision under the Washington deeds of trust statutes. While the instant case is clearly *not* a deficiency action (again, the current owner of the Deficiency claim under the 4190 Loan has brought such a deficiency action under RCW 61.24.100(5) in the context of the 4190 Deficiency Action, referenced above), the statute makes clear that the Lender retains rights to collect deficiency judgments from guarantors of secured debt. In the event the 2545 Loan was considered secured by the 4190 Deed of Trust, and had therefore been included in the Trustee’s Sale, the debt would not have been extinguished, rather, the deficiency against the Burkes and the Blunts would have increased by **\$578,465.18**, the amount of the Judgment ultimately entered herein. Evidence

introduced at trial established that the all Defendants received proper notice of the Trustee's Sale, never objected to same or responded in any way. See, CP 1632-1642, Trial Exhibit Nos. 41 and 42. The Notice of Default and the Notice of Sale each stated, in clear terms, that the applicable promissory note – memorializing the loan obligation in default – was the 4190 Note bearing only the reduced principal balance of \$1,117,316.14 following the execution of the 2545 Note and the resulting pay-down of the 4190 Loan. See, *id.*

As stated above, this Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. See, *Stenson, supra*. A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* Here, the Defendants were allowed by the trial court to offer copious evidence – much of which was irrelevant – as to the Trustee's Sale, the fair value of the Property, and the "interrelatedness" of the two loans. All such evidence was rejected by the jury. The trial court did not abuse its discretion in making any of its evidentiary rulings here, the vast majority of which benefitted the Defendants.

Further, cross-collateralization clauses are common in commercial security agreements of all kinds, but, due to the election of remedies paragraphs also common in such security agreements, these cross-collateralization clauses do not compel lenders to foreclosure on all loans which may be technically secured by the collateral. This would be an absurd result that would hamstring lenders in commercial transactions and would benefit no one. Sophisticated real estate developers such as Defendants are certainly aware of same. Such result as encouraged by Defendants here is also

absurd in that it all but obliterates the agreed loan terms and would compel lenders to exercise options in direct contradiction of the contract terms.

**7. Any “Error” Here is Harmless Because the Fair Market Value of the Property Was Far Less than Was Owed on the 4190 Loan.**

Additionally, had the Defendants been allowed to present a “defense” based upon the inclusion of the 2545 Loan in the Trustee’s Sale, the result at trial would have been the same, and thus Guarantor Defendants’ perceived “error” is harmless. Though Plaintiff maintains that the 2545 Loan was unsecured, even if it were secured (wholly or in part) by the 4190 Deed of Trust, there is no harm because the Burkes, Blunts, and Crown Development would have remained fully liable for all amounts owing on both the 2545 and 4190 Loans following application of the “fair market value” of the Property. Application of the evidence most beneficial to Defendants shows that at the time of the Trustee’s Sale the fair market value of the Property was at most \$1,100,000.00, an amount less than even the outstanding principal balance on the 4190 Loan (\$1,117,316.14). In other words, the resulting balance on the Loans and the deficiency thereon would have been exactly the same, or even higher given that the Property was later sold following the Trustee’s Sale for \$490,000.00. See, RP 150:20. The Defendants’ arguments are meritless and the trial Court’s order should be upheld.

**B. The Trial Court’s Instructions and Evidence Presented to the Jury as to the Statute of Frauds and Parol Evidence was Proper Under Washington Law.**

Contrary to the Defendants’ assertion, no new trial is warranted as the

statute of frauds and parol evidence instructions (see, Court's Instructions Nos. 8 and 9) were adequate. See, CP 1029-1052. Prior to the trial court's reading its instructions to the jury, GBC argued in favor of instructions regarding Washington's Credit Agreement Statute of Frauds (RCW 19.36.110), the parol evidence rule, and an instruction on an integrated contract. See, GBC's Proposed Jury Instructions, CP 798-873; see, also, GBC's Supplemental Proposed Jury Instructions, CP 995-1014. The trial court did not accept GBC's proposed instructions and instead tailored its rulings on its instructions to the jury to permit the Defendants sufficient latitude to argue the full variety of their affirmative defenses. The resulting instructions rested on a sound legal foundation, were tailored to the evidence presented at trial, and were, if anything, most beneficial to the Defendants.

Defendants claim that it constitutes reversible error for the trial court to refuse to give a *non-pattern* instruction that allegedly constitutes a convoluted description of the "applicable" law. The Defendants' proposed instruction at issue is stated as follows: "Washington law does not permit a party to enforce an oral agreement to loan money offensively against a bank in order to make the bank loan money. However, Washington law does not prevent a party from relying upon an oral agreement to loan money defensively to excuse performance." See, CP 1053-1059. Such requested instruction is not only an incorrect statement of Washington law, it would have been overly prejudicial to GBC in arguing its theory of the case to the jury; if anything, a recitation of Washington's Credit Agreement Statute of Frauds (RCW 19.36.110) should have been given to the jury, to be followed by instructions regarding the

Guarantor Defendants' "defenses." In any event, it was unnecessary in light of the trial court's Instructions Nos. 8-9, and the Instructions relating to Fraud and Misrepresentation (Nos. 12, 14, and 15), and was also unnecessary in light of the voluminous instructions given to address each and every one of Defendants affirmative defenses and theories of the case. See, Court's Instructions, CP 1029 -1052.

The Crown Guarantors' cited authority actually supports GBC's arguments as outlined above. In *Thola v. Henschell*, 140 Wn. App. 70, 84 (2007), the Court states that parties are entitled to jury instructions that accurately state the law, which the Court's instructions to the jury did in the present case, largely in pattern form. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 420, 58 P.3d 292 (2002), review denied, 149 Wn.2d 1034 (2003). Jury instructions are presumed sufficient when they allow counsel to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Instructions that are merely misleading are not grounds for reversal unless they cause prejudice. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). There was no misstatement of the law here.

As stated above, this Court reviews jury instructions *de novo*, and an instruction containing an erroneous statement of the law is reversible error where it prejudices a party. *Cox, supra*. However, jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the

law to be applied.” *Hue, supra*. This court reviews a challenged jury instruction *de novo*, within the context of the jury instructions as a whole. *Jackman, supra; Gregoire, supra*. The trial court’s Instructions, were sufficient, as they sufficiently allowed argument by all sides as to their theories of the case, did not prejudice any party, and properly informed the jury as to the law to be applied. Thus, no new trial is warranted, the trial court’s instructions to the jury were proper in all respects, and the Defendants’ arguments to the contrary must fail.

**1. The Court’s Damages Instructions Were Also Proper Under Washington Law.**

The same is true for the trial court’s instructions regarding damages (see, Instruction Nos. 4 and 5), which were well drafted, discussed, and affirmed by all counsel and Mr. Ryssel, and provided a roadmap for the jury and properly describe and set forth the claims, defenses, and decisions to be considered, and specifically stated when damages were appropriately award to each party. Again, the vast majority of the proposed jury instructions by GBC, and all of the final Court’s instructions to the jury, were taken directly from the pattern jury instruction forms.

Having accurately assessed the proper calculation of the jury’s verdict, there was no “surprise” to the jury’s verdict,<sup>4</sup> the verdict did not arise from

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<sup>4</sup> *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960) (one who makes no objection to testimony on grounds of surprise at the time it is offered and does not request a continuance waives any right to claim surprise as a ground for a new trial).

undue passion or prejudice from the jury,<sup>5</sup> and there may be no allegation of juror, judicial, or attorney misconduct here.<sup>6</sup> Further, even an erroneous instruction to the jury which is not prejudicial cannot support an order granting a new trial. *Lakoduk v. Cruger*, 48 Wn.2d 642, 296 P.2d 690 (1956). Here, no instruction was erroneous, and the Defendants cannot argue with sufficiency that any prejudice (beyond their status as the losing party) resulted.

In the recent opinion in *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 921-923 (2011), Division I rejected appellant's argument that a new trial was warranted because the damages instruction was allegedly unduly prejudicial. In *Unigard*, appellant (Mutual of Enumclaw) breached its duty of good faith to defend its insured, was found pre-trial to be liable, and a trial ensued on the sole issue of damages. *Id.* at 916-917. The insured assigned his rights to the company that sued him, and the company assigned those rights to Unigard. Following a trial before a 12-member jury of the King County Superior Court, Unigard was awarded damages. *Id.* As here, in *Unigard*, the jury was provided with two damages instructions (Instruction Nos. 6 and 7), which were relatively simple as liability had previously been allocated to Mutual of Enumclaw prior to trial. *Id.* at 921-922. The

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<sup>5</sup> *Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 524 P.2d 251 (1974) (an order granting a new trial because of an award of damages based upon passion and prejudice must set forth specific reasons).

<sup>6</sup> *Kuhn v. Schall*, 155 Wn. App. 560, 228 P.3d 828 (2010) (juror failed to disclose a history of child sexual assault); *Alway v. Carson Lumber Co.*, 57 Wn.2d 900, 355 P.2d 339 (1960) (statement of trial court that it could not make "heads or tails" out of certain of appellant's exhibits was not prejudicial error); *Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960) (statement by plaintiff's counsel that "plaintiff could not afford to go running to the doctor frequently" was improper).

instruction primarily at issue (Instruction No. 6), Mutual of Enumclaw argues, was unfairly prejudicial because it set forth the bases for Mutual of Enumclaw's liability. *Id.* The Court rejected that argument and denied Mutual of Enumclaw's motion for a new trial.

Here, the Crown Guarantors may make no such argument. Not only were the present Instruction Nos. 4 and 5 clear and unbiased, they contained additional provisions as to the elements and process the jury was to use to determine and assess liability, which it did quite accurately.

**C. The Dollar Amount Due on the 2545 Loan Was Clear from the Trial Testimony and Thus the Verdict, Judgment, and Supplemental Judgment Must Stand as Entered.**

**1. The Judgment Amount Was Easily Calculated from the Terms of the Contract.**

If there is sufficient evidence to sustain the verdict of the jury, it is an abuse of discretion to grant a new trial on the ground of inadequacy of the verdict, or that substantial justice had been done. *McKenzie*, footnote 3 *supra*; *McUne v. Fuqua*, 45 Wn.2d 650, 277 P.2d 324 (1954). As set forth above, the amount currently owing on the 2545 Loan can be and has been calculated with absolute certainty. The jury almost unanimously found in favor of GBC and also found that the Defendants had no defense to liability. Entering judgment in the amount outstanding on the loan, as the Court did on December 5, 2011, was the only appropriate response to the verdict returned. No new trial is warranted on any point.

The Defendants appear to be raising the same "we don't know what

the jury awarded and so a new trial is warranted” arguments in this appeal, as were previously unsuccessfully raised in their prior lower court motion for entry of judgment upon jury verdict and their motion for new trial.

In *Buffington v. Henton*, 70 Wash. 44 (1912), the Supreme Court of Washington found that **where a jury had entered a general verdict finding a breach of contract against one party, the court may enter judgment in the proper amount as fixed by the contract itself, where it is a mere matter of computation.** *Id.* at 47. The *Buffington* Court specifically held: “The duty of construing the contract devolved upon the court and the amount of the judgment, after the jury found the default of the appellants, was a mere matter of computation.” *Id.* See also, *Young v. Rummens*, 121 Wash. 639 (1922) (following *Buffington* and finding that the court properly entered a judgment in an amount the prevailing party was entitled by law following the jury’s verdict). Here, simple computations were all that was required. The principal balance owing was \$500,000.00. Interest accrued at the rate of 7.00% per annum. Late fees and other costs were permitted by the contract at the rate of 5.00% of the unpaid portion of the regularly schedule payment. Therefore, the total amount owing was **\$574,479.16**. See, CP 1632-1642, Trial Exhibit No. 21.

**2. There Was No Credible Dispute as to the Amount Borrowed or the Amount Owing.**

More generally, where a trial is held before a jury and a verdict is entered in favor of the plaintiff, but without an assessment of the recovery, where there is no disputed question of fact about the amount owed, the court

may either direct a verdict for the full amount sued for, or discharge the jury and enter a judgment for such amount. See, *Casety v. Jamison*, 35 Wash. 478, 480 (1904). There is no disputed question of fact as to the amount owed here, as the amount is set by the terms of the promissory note and guarantees.

Further, a verdict in a civil cause which is defective or erroneous in a mere matter of form, not affecting the merits or rights of the parties, may be amended by the court to conform to the issues and give effect to what the jury unmistakably found. See, *City Bond & Share, Inc. v. Klement*, 165 Wash. 408, 410-11, 5 P.2d 523 (1931). While the court cannot supply **substantial omissions**, the amendment can be made “....such as to make the verdict conform to the real intent of the jury. If a general verdict is returned, and the amount which should have been found is a matter of mere computation and over which there is *no controversy*, the court may amend. But the court cannot, under the guise of amending a verdict, invade the province of the jury or substitute [its] verdict for theirs” *Id.* at 411. The intent of the jury is clear and the only appropriate result was entry of judgment against all Defendants in the amount of **\$574,479.16**, exclusive of continually accruing interest and attorneys’ fees and costs.

**3. There is No Evidence that the Jury Made a Mistake in its Verdict.**

This case is distinguishable from those cases cited by Guarantor Defendants. For example, in *Beglinger v. Shield*, 164 Wash. 147, 154 (1931), a case decided before there were pattern jury instructions, it was undisputed that the verdict returned and filed, because of a mistake or misapprehension,

did not express the real finding of the jury. *Id.* Here, that is simply not the case. The jury's verdict here was expressed in the same terms as were argued and testified to at trial, was in precisely the same amount requested by GBC, and the remainder of the rather complicated special verdict form was completed intuitively, representing a complete denial of the Crown Guarantors' defenses.

Unlike in *Marvik v. Winkelman*, 126 Wn. App. 655, 664 (2005), the jury here did not award damages twice on the verdict form; it award damages only once to GBC, as required, in "[t]he dollar amount that is currently due on Loan No. 2545." See, Special Verdict, Docket No. 224A.

Finally, unlike in *Miles v. Mead*, 98 Wash. 215, 217 (1917), an equally outdated opinion, the jury here made no mistake, and Defendants Blunts and Burkes have not carried their burden of proving that any mistake was made.

#### **4. The Trial Court Did Not "Correct" the Jury Verdict.**

The Defendants cited several cases in support of the proposition that the court may not substitute its own judgment to "correct" a jury verdict. Each of the cited cases involve alleged error by the jury and generally contradictory or subjective testimony relating to damages (all involved personal injury or property damage where the amount of damages was clearly at issue). In each case the jury did give a verdict in a set dollar amount. These cases are clearly distinguishable from the issues involved here because in this case there is no need to "correct" the jury's verdict. The jury clearly stated that damages must be entered in "[t]he dollar amount that is currently due on Loan No. 2545."

See, Special Verdict.

For example, in *Tolli v. School Dist. No. 267 of Whitman County*, 66 Wn. App. 494 (1865), the jury returned a verdict of \$18,230 for plaintiff in a personal injury case. When the defendant appealed, claiming the verdict was excessive, the trial court's denial of a motion for new trial or judgment notwithstanding the verdict, was upheld and the court stated: "We are not persuaded that the amount of the verdict is so extravagant or out of proportion to the disabilities induced by the accident as to unmistakably point to passion and prejudice on the part of the jury, or to compel the conclusion that substantial justice has not been done. Though in the view of some the verdict may be considered high, it cannot be said to be lacking in evidentiary support." *Id.* at 495. Here, the Court is not lacking in any evidentiary support.

In *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wn.2d 631 (1943), the jury entered a verdict for the plaintiff in the amount of \$6,500.00. In that case, the plaintiff thought the verdict too low and moved for an increased judgment notwithstanding the verdict. The verdict of \$6,500 was upheld on appeal with the court finding that the jury's determination of damages was supportable and stating that "this court knows of no mathematical process by which it can compute away their verdict." *Id.* at 651. This Court should similarly refrain from invading the province of the jury.

As stated, these cases are factually distinguishable in that they involved a determination of unliquidated damages. More importantly, they are legally distinguishable because in this case there is no need to "correct" the jury's verdict. The jury clearly stated that damages must be entered in

“[t]he dollar amount that is currently due on Loan No. 2545.” See, Special Verdict, CP 1626-1629. This is not an error that needs correction; it is simply a very basic mathematical calculation known from the clear, unambiguous terms of the promissory note.

**5. Judgment was property entered against Guarantor Defendants for \$578,465.18.**

This has always been a relatively straightforward collection matter. Unlike personal injury or destruction of property matters, there is no actual dispute or difficulty in determining the damages arising from the failure to repay a promissory note. The amount owing on the 2545 Loan is “liquidated,” in that it can be calculated exactly based upon the interest rate set out in the promissory note itself and such determination is not subject to either opinion or discretion. This is merely an accounting exercise, and one that was completed by Dawn Beagan.

In light of Ms. Beagan’s clear, uncontroverted testimony, the Defendants’ argument that the jury’s verdict was somehow ambiguous, and that judgment could only have been entered in **no** amount must fail. The Defendants attempted to argue at trial that GBC had somehow shorted the 2545 Loan proceeds in the amount of \$22,000.00 (see, RP 688:13, 853:15, 857:3, and 902:16), yet the jury considered and rejected these arguments in their entirety. Ms. Beagan’s testimony was clear, her specific calculations were not successfully attacked by way of cross-examination, and thus such evidence stands. More importantly, the jury’s intent is clear. It found the Defendants liable for the full amount outstanding on the 2545 Loan.

The Defendants here are essentially seeking to amend the jury's verdict by avoiding all liability and entering a judgment in no amount in clear contravention of the verdict.

The jury returned its verdict in favor of GBC for "[t]he dollar amount that is currently due on Loan No. 2545." See, Special Verdict, CP 1626-1629. As set forth in *Meenach v. Triple "E" Meats, Inc.*, 39 Wn.App. 635, 639 (Div. III 1985) the "best rule is to view the verdict in light of the instructions and the record to see if the clear intent of the jury can be established." The *Meenach* Court found that where a jury found that the defendant breached its contract but specifically wrote "\$-0- (zero)" in the space for damages, the jury's intent to find in favor of the defendants was clear. *Id.* at 638-639. Here, the jury's intent is likewise clear that the Defendants are liable for the full amount currently due under the note. If the jury had intended no monetary award, like the *Meenach* jury, it would simply have written in "\$0" or "None." The intent of its words are unmistakable, "[t]he dollar amount that is currently due on Loan No. 2545[,]" obviously shows the intent that a money judgment will be entered and that the amount will be the amount calculated to be currently due on the loan.

The amount of the judgment herein, i.e., the amount currently due on the 2545 Loan, involves a simple mathematical calculation: \$500,000.00 principal balance divided by 360 days, multiplied by the interest rate of 7.00%, yields the *per diem* accrual figure of \$97.22. The Bank has applied only one rate of interest throughout the life of this loan, and that rate is 7.00%. Ms. Beagan testified that the outstanding unpaid interest as of October 25,

2011 is **\$74,479.16**, and thus the total amount outstanding of **\$574,479.16**, exclusive of the Bank's attorneys' fees and costs. There is no discretion or opinion involved in determining the amount owing and there is simply no reason to conclude that judgment in any amount less than \$574,479.16 could be consistent with the clear jury verdict.

**D. The Defendants are Bound by the Loan Documents They Signed.**

Defendants' argument, distilled to its essence, is that they somehow should be excused from the terms of the loan guaranties they voluntarily signed. The Defendants arguments display a breathtaking fundamental misunderstanding of the law of contract and real property. Under long-standing Washington law, parties are bound to the contracts they voluntarily sign.<sup>7</sup>

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<sup>7</sup> The relevant principles are neatly summarized in *National Bank v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973):

It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.2d 661 (1934). One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand. [The plaintiff], being not only a person of ordinary understanding but one with more than ordinary experience in land transactions and instruments of conveyance and security, and with time and opportunity both to consult with an attorney and to inspect the instruments before signing, cannot now be heard in law to repudiate his signature. The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs. As we said in *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 480, 256 P.2d 301 (1953):

Appellant had ample opportunity to examine the

Despite the Defendants' obvious default of their own loan accounts and their claim of confused legal obligations, this a fairly straight-forward collection matter. Defendants have done their best to confuse these proceedings, but the fact remains that the Defendants obtained loans from GBC for their speculative real estate venture. They defaulted on the loans despite having an additional year and a half to pursue their development plans. The loan documents are very clear. The Defendants contractually obligated themselves to pay the \$500,000.00 Loan, including all interest and attorney's fees. They failed to make any payment as they were required to do. GBC was therefore entitled to the verdict and judgment entered by the trial court and such verdict and judgment must be upheld.

**1. Defendants are Deemed to Have Read and Understood the Contracts They Signed, and are Legally Bound Thereby.**

While the Guarantor Defendants do not dispute the validity of the signatures on the loan documents, they seem to argue that they should not be bound by the contracts they signed, despite the clear terms of the documents, and despite the fact that they wanted to participate in the real estate venture with Defendant Ryssel. However, Guarantor Defendants, as sophisticated real estate developers, cannot shirk their contractual obligations to GBC so easily.

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contract in as great a detail as he cared, and he failed to do so for his own personal reasons. [H]e cannot be heard to deny that he executed the contract, and he is bound by it.

*Id.* at 913.

Each personal guaranty is dated and signed and includes a provision acknowledging that each guarantor read and agrees to all terms of the guaranty. (See, CP 1632-1642, Trial Exhibit Nos. 24-30). No Defendant has denied that they voluntarily signed the loan documents, including the personal guaranties. There can be no reasonable question that the contractual obligations of the personal guaranties stand. Moreover, the Defendants provided information to GBC that they have similarly collaborated on other real estate development projects in the past, with similarly structured loans.

**2. This Court Should Follow the Clear Washington Authority in Favor of Enforcement of Contract Terms, As Written.**

All terms expressed in the loan documents referenced herein are clear, agreed upon, and should be enforced accordingly. In the oft-cited case of *Berg v. Hudesman*, 115 Wn.2d 657, 663-664 (1990), the Supreme Court has held that only if a contract is ambiguous on its face will the court look to evidence of the parties' intent as shown by the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations. E.g., *St. Yves v. Mid State Bank*, 111 Wn.2d 374, 378, 757 P.2d 1384 (1988); *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wn.2d 488, 496, 268 P.2d 654, 45 A.L.R.2d 984 (1954); *Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 384, 125 P.2d 668 (1942).

Though parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake, and that are intended by the parties as an “integration” or final expression of their agreement, the Defendants overtly raised at trial, and impliedly raise in this appeal, the question alleged of whether the Commercial Guaranties were such integrated or final agreements. See, *St. Yves v. Mid State Bank*, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988) (quoting, *Emrich v. Connell*, 105 Wn.2d 551, 555-56, 716 P.2d 863 (1986) (quoting, *Buyken v. Ertner*, 33 Wn.2d 334, 341, 205 P.2d 628 (1949)). Though the Defendants may wish they were not, they clearly were so.

The Guaranties themselves, on pg. 2, provide:

**Integration.** Guarantor further agrees that **Guarantor has read and fully understands the terms of this Guaranty;** Guarantor has had the opportunity to be advised by Guarantor’s attorney with respect to this Guaranty; **the Guaranty fully reflects Guarantor’s intentions and parol evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless** from all losses, claims, damages, and costs (including Lender’s attorneys’ fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations, and agreements of this paragraph.

See, CP 1632-1642, Trial Exhibit Nos. 24-30.

These Defendants, as experienced and wealthy real estate developers, are certain to have – and are in fact deemed to have – read and

understood the contracts they voluntarily signed, including the personal guaranties. Given the applicability of the parol evidence rule in this state, the Defendants are barred from attempting to vary the terms of the binding contracts they admittedly signed. Therefore, the order of the court below, founded upon the near unanimous jury verdict, must stand.

**E. Plaintiff is Entitled to its Attorneys' Fees and Costs in this Appeal.**

Pursuant to the clear terms of the loan documents, as Plaintiff was the prevailing party at trial, and pursuant to RCW 4.84.330, Plaintiff is entitled to all of its attorneys' fees and costs incurred in this appeal. Pursuant to Rule of Appellate Procedure ("RAP") 18.1, Plaintiff hereby requests such fees and costs incurred in this appeal. Regarding attorneys' fees and costs, the 2545 Note provides as follows:

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, 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, expenses for bankruptcy proceedings[,]and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

See, CP 1632-1642, Trial Exhibit No. 21.

Each of the Commercial Guaranties contains a similar provision; each of the Commercial Guaranties are admittedly signed and properly executed by the Defendant Guarantors. See, CP 1632-1642, Trial Exhibit Nos. 24-30. Plaintiff is entitled to all of its attorneys' fees and costs in this

proceeding.

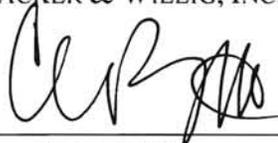
### VIII. CONCLUSION

For all the reasons stated above, the jury verdict and judgment should be upheld, and fees awarded to GBC in this Appeal. The Defendants were allowed considerable latitude and raised at trial and before the jury all the “issues” on which they now claim “error.” No error or irregularity exists in or following the lower court proceedings; the Judgment and Supplemental Judgment must stand as entered in favor of GBC.

DATED this 18<sup>th</sup> day of June, 2012.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.



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GBC International Bank

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

GBC INTERNATIONAL BANK, INC., a California corporation,

Plaintiff/Respondent,

v.

CORY and GENEANNE BURKE, *et al.*,

Defendants/Appellants.

**DECLARATION OF SERVICE**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JUN 18 PM 4:31

ORIGINAL

1 I, Kristen Evans, declare that I am an employee of the firm of Hacker & Willig,  
2 Inc., P.S., I am over the age of 18, and I am not a party to the above-entitled action.

3 On June 18, 2012, I caused to be served via legal messenger true and correct  
4 copies of the **Brief of Respondent, GBC International Bank** and this **Declaration of**  
5 **Service**, to the parties listed below:

6 Washington State Court of Appeals  
7 Division One  
8 One Union Square  
9 600 University Street  
Seattle, WA 98101-1176

C. Chip Goss, Esq.  
TACEY GOSS, P.S.  
330 112th Ave NE, Suite 301  
Bellevue, WA 98004

10 On June 18, 2012, I caused to be served overnight mail true and correct copies of  
11 the **Brief of Respondent, GBC International Bank** and this **Declaration of Service**,  
12 to the parties listed below:

13 Andy Ryssel  
14 Renee Ryssel  
15 c/o Riverside Sand & Gravel, Inc.  
16 12225 Dubuque Road  
Snohomish, WA 98290

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

19 DATED this 18<sup>th</sup> day of June, 2012 at Seattle, Washington.

20 

21 Kristen Evans  
22 HACKER & WILLIG, INC., P.S.  
23 1501 Fourth Avenue, Suite 2150  
24 Seattle, WA 98101  
25 Telephone: (206) 340-1935  
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