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**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

PENNY ARNESON f/k/a PENNY ARNESON SWEET, on behalf of
herself personally and on behalf of the 6708 Tolt Highlands Personal
Residence Trust

Appellant

v.

GARY NORDLUND and ALDENTE, LLC

Respondents,

And

Defendants,

MFE, LLC; COLUMBIA NORTH WEST MORTGAGE; MARK D.
FLYNN; L80 COLLECTIONS, LLC; and DOE DEFENDANTS 1
through 20, inclusive

APPELLANT'S REPLY BRIEF

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Appellant, PENNY ARNESON, f/k/a PENNY ARNESON SWEET (hereinafter “Ms. Arneson”) on behalf of herself individually and on behalf of the testamentary trust, the “6708 Tolt Highlands Personal Residence Trust” (hereinafter “the Trust”) make this reply to the response briefs of Respondents, ALDENTE, LLC (hereinafter “Aldente”) and GARY NORDLUND (hereinafter “Nordlund”)

A. Overview of Respondent Lenders’ Argument

Essentially and simply put, the Respondent lenders claim summary judgment was appropriate because the maker of the two notes was a trust. Nothing else matters. Importantly, it doesn’t matter why the loans were sought and it doesn’t matter how the proceeds were used. No other facts matter. Aldente puts it this way:

A loan to an irrevocable Trust, secured by Trust property and used for Trust purposes is exempt from the provisions of the Consumer loan Act pursuant to RCW 31.04.025(2)(e) which exempts:

“Any person making a loan primarily for business, commercial or agricultural purposes unless the loan is secured by the borrower’s primary residence.”

Aldente Brief at page 2. This claim is reiterated again and again in various forms, but to paraphrase Lincoln, calling a tail a leg doesn’t make it one.

For the sake of argument, let us first suppose, that Ms. Arneson is not a proper party to this case and that the real borrower in form and

fact was the trust.¹ Let us also suppose, for the sake of argument, the Trust was not holding title to a personal residence, notwithstanding the fact that Ms. Arneson and her family actually lived there. Finally, let us also suppose, for the sake of argument, the Respondent lenders properly characterize the trust as irrevocable and of no tax benefit. Given these presumptions, for the sake of argument, does that mean, in and of itself, the loans were primarily for business purposes absent any factual inquiry as to purpose? In the 61 pages of Respondents' combined briefings there is not one citation of authority to support this conclusion. Ms. Arneson submits the reason there is no citation to authority is that there is none to be found. The plain language of the statute directs a factual inquiry as to the primary purpose of the loan regardless of the identity of the borrower.

Plainly, the Trust is a potential borrower under the statute entitled to the protection of the statute. *RCW 31.04.015(3) and (18)*. The purpose of the loan is a factual question, not a legal one. *McGovern v. Smith*, 59 Wn. App. 721, 731, 801 P.2d 250 (1990). The burden is on the lender to establish he or she falls within the statutory exemptions which are strictly construed against the lender. *Sparkman and McLean v. Wald*, 10 Wn. App. 765, 768, 520 P.2d 173 (1974). Courts should

¹ Nevertheless the Trust is a proper party to this action and a judgment in favor of the Trust against these lenders would be an outcome welcomed by Appellants.

give “persuasive significance” to whether the loan proceeds were actually used for personal or business purposes. *Jansen v. Nu-West, Inc.*, 102 Wn. App. 432, 440, 6 P.3d 98 (2000), *rev’ denied* 143 Wn.2d 1006.

Unless this Court rules, as a matter of law, that a trust can only obtain a loan for business purposes absent any factual inquiry and regardless of the facts, the summary judgments at issue must be reversed.

Moreover, given the facts of this case, the summary judgment should have favored Appellants and the ruling gone the other way. As Aldente concedes: “The Sweets, as trustees of the Trust, directed escrow to make the distribution of the loan proceeds to them and the proceeds was [sic.] apparently used by the Sweets personally.” Aldente Brief at page 1. Nowhere in either response brief, or in the record on review, is there any evidence, or even a claim, that the purpose of the loan was business or commercial aside from the unsupported legal argument that a trust can only, as a matter of law, negotiate a loan for business purposes. All of the evidence before this Court establishes that Ken Sweet and Penny Arneson and their personal creditors were to be the beneficiaries of the loan proceeds, with the funds to be distributed for their personal use, which is exactly what in fact happened. This is

apparent from documents in the escrow file including the HUD-1 Settlement Statements, The Private Money Term Sheet, the family court orders and all the other evidence before the trial court. (CP 50-52, 220-222, 448-485, 487).

To put it another way, to prove a business purpose for the loan, is it not incumbent on the lender to carry his burden to prove the alleged business purpose? If there is a reported case sustaining a business exception without specifically identifying the business or investment purpose to be benefited, Appellants are not aware of it. Beyond ambiguous and/or conclusory/boilerplate terms in the subject notes, the Respondent lenders do not identify a single business or investment purpose for the loans, much less explain how the loan proceeds disbursed according to the relevant court orders could possibly be of a business or commercial nature. (CP 448-485). See *McGovern v. Smith, supra.*, at 733 (“Moreover, though Smith may have assumed that McGovern had vague business prospects resulting from his discussions with other investors, he admits that he was unaware of any specific business venture to which McGovern intended to apply the loan proceeds. Such speculation by a lender, even when combined with a business purpose certificate signed by the borrower, is not enough to

establish the business purpose exemption of *RCW 19.52.080* as a matter of law”)

Nor do the Respondent lenders assert, under their theory, that transferring money to the trustees to pay personal expenses is a “business purpose.” Recall Aldente’s basic claim quoted at the beginning of this section refers to “trust purposes.” But what were those purposes? That is the question that remains to be answered even under the Respondent lenders’ theory. The Respondent lenders must at least prove the loan’s purpose was business, commerce or investment to qualify for the exemption, but they don’t and can’t.

Respondent lenders’ answer to this inconvenient question is to never ask it, or avoid it by asserting “the proceeds were used for Trust purposes, and were not and could not be used for personal or consumer purposes of the Trust.” Aldente Brief at page 17 (Emphasis in original) However, the statutory exemption found in *RCW 31.04.025* doesn’t rely upon the *use* of the funds (unlike the requirement that the residence be the borrower’s), rather the *purpose* must be business. See *RCW 31.04.025(2)(e)* (“Any person making a loan primarily for business, commercial or agricultural purposes”) On its face *RCW 31.04.025(2)(e)* is not limited to what the specific borrower does with the money, but rather the ultimate purpose of the loan. Cases “dealing with the

determination of a business purpose typically discuss the question in terms of the purpose of the transaction, rather than the purpose of the borrower.” [citing cases] *McGovern v. Smith, supra.*, at 735. Were this not the case *RCW 31.04, et seq.* (hereinafter “CLA”) and *RCW 19.52, et seq.*, could be easily avoided by simply laundering the money through an intermediary.

Taking Respondent lenders’ argument that a trust cannot, as a matter of law, have “personal” expenses and therefore can only engage in business transactions to its logical conclusion, none of the entities defined as “persons” under *RCW 31.04.015 (18)*, aside from natural persons, would be covered under the CLA. However under the CLA, even loans received by profit corporations must still be examined when the business purpose exemption is claimed. *Paulman v. Filtercorp, Inc.*, 127 Wn.2d 387, 394, 899 P.2d 1259 (1995) Moreover were Respondent lenders’ construction of the CLA accepted by this Court, there would be no reason for the CLA to expressly include “partnerships, associations, limited liability companies, limited liability partnerships, trusts, corporations, and all other legal entities.” *RCW 31.04.015(18)*. Respondent lenders’ theory would simply exempt every loan to a corporation or other legal entity as a matter of law, placing such loans beyond the reach of the CLA. This is hardly a “strict” construction of

the statute. Indeed, the construction of the CLA the Respondent lenders encourage this Court to adopt would be tantamount to a judicial repeal of the CLA and would invite laundering of consumer loans through all sorts of other legal entities to avoid CLA licensing requirements. That's where the Respondent lenders' argument leads.

B. Private Money Term Sheet (CP 487-488).

In support of this appeal, Ms. Arneson offers this Court the Private Money Term Sheet, CP 487-488, which is attached to Ms. Arneson's opening brief as Appendix 5. Nordlund attempts to dismiss this two page document as an "unidentified person's personal notes regarding the contemplated transaction between the Trust and Mr. Nordlund" Nordlund Brief at page 10, n. 10. Although knowledge on the part of the Nordlund as to the purpose of the loan is not required under the statute, this document is significant in that it bears the personal signature of Gary Nordlund. The sheet identifies Kenneth Sweet and Penny Sweet [now Arneson] as the borrower, not the Trust. It also says

Other items-Mr. Sweet is allowed to pull \$65,000 in cash to him. Mrs Sweet is required by court order to sign the loan documents or the court will sign for her. (CP 488)

This is strong evidence that not only were the Sweets, including Ms. Arneson, the real borrowers, but establishes that the actual purpose of the loan was consumer and personal in nature and that *Nordlund knew it*. It puts Nordlund on notice of the pending dissolution and the trial

court's involvement as the real reason for the consumer loan. Nordlund knew exactly what was going on and "phonied up" the note to falsely assert that the proceeds of the loan were "being used for business, investment or commercial purposes, and not for personal, family or household purposes." CP 349. This provision in the Nordlund note was false and Nordlund knew it, based on his actual knowledge to the contrary (evidenced by his signature on the Private Money Term Sheet). At the time, this was a blatant attempt to get around the provisions of *RCW 19.52, et seq.* and the CLA and mislead Ms. Arneson and her former husband. Now, Nordlund argues in his Brief there is "no evidence" "anyone made any representations to [him] at the time of the January 2010 loan transaction that the Trust's loan was for anything other than business purposes," in an apparent attempt to mislead this Court. Nordlund Brief at page 23.

C. Business Purpose Clause in Nordlund Note Doesn't Justify Summary Judgment

Nordlund argues at pages 19-26 of his Brief that the business purpose clause in his note (unlike the language in the Aldente note) justifies summary judgment, citing *Jansen v. Nu-West, Inc., supra.*, and *Trust of Strand v. Wel-Co Group*, 120 Wn. App. 828, 86 P.3d 818 (2004). While it is true both of these cases ultimately yielded judgment for the lender in the context of a note containing a business purpose

clause (and both were written by Sweeney, J.), neither bases its holding simply on the presence of a business purpose clause in the note. Both recognize that such a clause has some value to the lender, but is not dispositive, rather “the purpose the borrower actually represented at the time, not what was written on the application....And that is a factual question, determined by examining the circumstances of the transaction.” *Jansen*, 102 Wn. App. at 440. And one of the “circumstances of the transaction” which is considered to be of “persuasive significance” “is the fact that the funds were actually used for business purposes.” *Id.*

The problem for the borrowers in *Jansen* and *Trust of Strand* cases was there was no factual evidence the loans were used for any purpose other than for business purposes. For example, *Jansen* argued that paying off a business loan and using the balance of the proceeds for a personal use meant the refinance was not for a business purpose. The court disagreed as a matter of law, since most of the proceeds went to a business purpose. *Wel-Co* argued a loan to purchase a residential condo must be, as a matter of law, a consumer transaction, an argument the court rejected based on initial representations the purchase of the condo was for investment purposes.

But here, there are substantial, if not overwhelming “circumstances surrounding the transaction” proving this loan was exclusively used for consumer and personal use, notwithstanding the inclusion of a business purpose clause in the Nordlund note, which Nordlund knew to be false based on his actual knowledge to the contrary (evidenced by his signature on the Private Money Term Sheet). These circumstances include the Private Money Term Sheet Nordlund personally signed discussed in the preceding section (Appendix 5); the HUD-1 disclosure document from the escrow file showing the loan proceeds were directed to the Sweets personally and their personal creditors (Appendix 6); the “persuasive significance” that the loan proceeds were used for a personal purpose; as well as the court documents from the dissolution file that Nordlund was aware based not only from the Term Sheet he signed but also through his agent. (CP 449-485).

As to the last point concerning the knowledge of the agent, *Jansen* expressly relies upon *Marashi v. Lannen*, 55 Wn. App. 820, 780 P.2d 1341 (1988) to recognize claimed representations to the lender’s agent “created a question of fact for the jury” to be decided at trial. *Jansen*, 102 Wn. App. at 441. In this regard, it is important to note that the agent for Nordlund actually filed an affidavit in the Sweets’

dissolution proceedings. CP 665-670. This is yet another circumstance of the transaction yielding at least a question of fact. Nordlund tries to get around this by claiming the agent, Mark Flynn, didn't sign the note. However that doesn't matter. *Marashi v Lannen*, 55 Wn. App. at 825 deals with exactly that point in a very similar context involving a note with a business clause, an agent who did not sign the note, and the claim the proceeds were used in a dissolution of marriage. The court held representations to the agent which contradicted the business clause created a question of fact, quoting *RCW 19.52.030 (2)*:

The acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is usurious interest contracted for by the transaction of any agent the principal shall be held thereby to the same extent as though he had acted in person...

The evidence of the business or personal purpose of the loan was conflicting, and the Lannen's imputed knowledge of Mr. Marashi's alleged disclosure to [agent] Mr. Van Gelder precluded finding, as a matter of law, that the Marashis were estopped to deny the written statement.

Nordlund also makes much of language in *Jansen* that loan documents "carr[y] more weight than unsubstantiated claims of contrary oral representations." Nordlund brief at 21, citing *Jansen*, 102 Wn. App. at 440. But what Nordlund fails to acknowledge or appreciate is that in this record there *are* loan documents that *contradict* the note's claim of business purpose (i.e. the Term Sheet and the HUD-1). CP 50-52, 487-488. This also defeats summary judgment by raising an additional question of fact.

D. Ms. Arneson is the True Borrower

Nordlund claims Ms. Arneson has failed to come forth with any material fact that she is the true borrower. Nordlund Brief pp. 15-19.

Nordlund attempts to distinguish *McGovern v. Smith*, 59 Wn. App. 721, 801 P.2d 250 (1990) by (correctly) pointing out that McGovern signed the notes in question. But so did the Marinos. Nonetheless the court concluded that the Marinos “should not be regarded as borrowers” since they received no disbursements from the loan, while McGovern did. However the Marinos did have title to the security and therefore should be regarded “as sureties to the extent of the value of the pledged real property.” *McGovern v. Smith*, 59 Wn. App. at 735. Here, the Trust is in the position of the Marinos. Yes, the Trust, through its trustees Mr. Sweet and Ms. Arneson, signed the note, but the Trust did not receive the loan proceeds. Ms. Arneson and her former spouse did. The Sweets did not technically sign the note as its makers, but did sign as personal guarantors. *McGovern* preferred substance over form when it came to the usury statute and the lender’s claim of business purpose based on the business clause of the note. Since the Marinos signed the note but were not characterized as borrowers under the usury statute in *McGovern v. Smith, supra.*, neither should the Trust here. The real borrowers were Ms. Arneson and her former spouse. Moreover the

Sweets not only received the money directly from the Respondent lenders, but were personally liable on the notes as guarantors. In characterizing the substance of the subject transactions, the Sweets were the borrowers and their personal residence was the collateral. This is the reality which is properly before the Court for consideration in view of *McGovern v. Smith, supra*.

D. Conclusion.

As noted in Appellants' Opening Brief, there were numerous genuine issues of material fact in dispute before the trial court that rendered the trial court's summary judgments of dismissal improper. Moreover the lenders are not entitled to prevail as a matter of law under those facts which were undisputed.

The relevant Family Law Court Orders that authorized the subject loans and the declarations filed with the trial court at the time the loans were negotiated establish that the real borrowers were Ms. Arneson and her former husband, Mr. Sweet; that the loan proceeds were to be used for consumer/personal rather than business purposes and that the subject real property used to secure the loans was Ms. Arneson's "family home." This information was known to Nordlund and Aldente at the time the loans were made. Certainly the Respondent lenders do not claim otherwise. Moreover, knowledge of the identity of the real

borrowers, the purpose of the loan and character of the collateral can be imputed to Nordlund through the knowledge of his broker and agent Mr. Flynn, who had actual knowledge and through the signed Private Money Term Sheet. CP 487-488. In any event, neither Aldente nor Nordlund can rely on the recitations of the subject Notes as to the identity of the borrower, anticipated use of the funds and character of the collateral, in view of (1) trial court Orders authorizing the loan and the parties Declarations, specifying Ms. Arneson and Mr. Sweet to be the true borrowers, (2) the personal/consumer purpose of the loan and the “family home” character of the collateral; (3) the Respondent lender’s acknowledgement that Ms. Arneson and Mr. Sweet were the real borrowers set out in the Term Sheet, attached to Appellants’ Opening Brief as Appendix “5”; and (4) the fact that not one dime was paid out to the Trust, but went directly to Ms. Arneson’s former husband. See Ms. Arneson’s Declaration of June 13, 2013. CP 438-447.

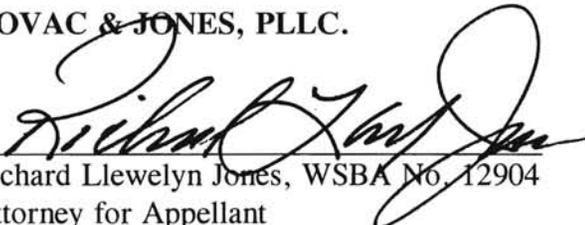
Even if the Court determines that the real borrower is, indeed, the Trust, the provisions of *RCW 31.04, et seq. and RCW 19.52*, apply to defeat the trial court’s summary judgments. As noted above, trusts are also protected by the Usury Statute and the CLA and are not necessarily business entities which can only obtain business loans.

Accordingly, these summary judgments must be reversed and the case remanded for further proceeding or trial.

Finally, Appellants should be awarded taxable costs and attorney's fees on appeal, pursuant to *RAP 18.1*, based on the terms of the subject notes and deeds of trust.

REPECTFULLY SUBMITTED this 30th day of June, 2014.

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CERTIFICATE OF MAILING

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on June 30, 2014, I arranged for service of the foregoing Reply Brief of Appellant on the following parties in the manner(s) indicated:

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