No. 90512-6

SUPREME COURT
OF THE STATE OF WASHINGTON

HERBERT HEINTZ and BARBARA HEINTZ, husband and wife,
Plaintiffs/Appellants,

vs.

J.P.MORGAN CHASE BANK, N.A.; and QUALITY LOAN SERVICE CORP. OF WASHINGTON, Trustee,
Defendants/Respondents

DEFENDANT/RESPONDENT JPMORGAN CHASE BANK, N.A.'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

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I. RESPONDENT

This Answer is submitted by Respondent JPMorgan Chase Bank, N.A. ("Chase" or "Respondent"), through its attorney Adam G. Hughes and the law firm of Bishop, Marshal & Weibel, P.S.

II. INTRODUCTION

This case should not be accepted for review by the Supreme Court of Washington as it is a matter that simply requires a reading of the terms of the Plaintiffs' (Appellants') adjustable rate $1,000,000 promissory note (the "Note") [CP 112-117] to determine that the Plaintiffs' arguments are unsupported and nonsensical. The Plaintiffs have not made a single mortgage payment since early 2010 because they allegedly disagree with JP Morgan Chase Bank, National Association's ("Chase") reading of the terms of the Note. The trial court and Court of Appeals have reviewed the undisputed terms of the Note and properly determined that the complaint should be dismissed. This Court should not grant Plaintiffs' petition for review because none of the criteria set forth in RAP 13.4(b) are present, and both the trial court and Court of Appeals have correctly ruled.

III. ASSIGNMENTS OF ERROR

Plaintiffs' first three assignments of error simply ask the Court to read the terms of the Note and decide who's interpretation of its language is correct. While Chase is confident that the Supreme Court is more than capable of this task, this task has already been accomplished by both the

trial court and Court of Appeals with little difficulty, as the terms are clear and unambiguous.

Plaintiffs' fourth and fifth assignments of error argue that the trial court and Court of Appeals misapplied CR 12(b)(6) because they did not take Heintz' interpretation of the Note and statements about its formation as true. This argument again fails based on clear law set forth in *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005), confirming Washington's adoption of the "objective manifestation of contracts," and explicitly clarifying/limiting the prior ruling in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Notably, Plaintiffs cite only to *Berg* and make no mention of *Hearst Commc'ns* in their Petition.

Assignment of error number six does not involve a claim against Chase, but involves reading unambiguous language contained in RCW 61.24.030(8). Plaintiffs have asked the trial court and Court of Appeals to add additional requirements to that statute and both have properly refused.

IV. STATEMENT OF CASE

Chase's motion to dismiss was based upon the factual allegations contained in the Complaint, filed on December 12, 2012, the terms of the Note and Deed of Trust referenced therein, and the payment change statements sent to the Plaintiffs that Plaintiffs claim required increased monthly payments in violation of the terms of the Note. *See* CP 1 - 4. As Plaintiffs state, they executed the Note and Deed of Trust at issue with Washington Mutual Bank in order to refinance an older loan. CP 2, ¶3.

The subject loan secured by the deed of trust encumbered real property commonly known as 10430 47th Avenue Southwest, Seattle, WA (the "Property"). As can be seen on the face of the Note and Deed of Trust, they were executed by Plaintiffs on or about October 2007. *See* CP 112-117, 119-140.

Plaintiffs' Complaint asserts that the Note provides for monthly payments at "a fixed amount per month for a period of five (5) years." *See* Complaint at ¶ 3, CP 2. Plaintiffs then assert that Chase breached the terms of the Note by "intentionally raising the monthly payments and refusing to abide by the note provisions, ignoring the protests by Heintz concerning the increases." *Id.* A review of the Note, however, makes it clear that monthly payments were not fixed for a period of five years. Rather, the Note includes a number of terms that provide for increases in the monthly payments at times other than at the five year mark, and specifically states in the first line of the agreement: "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MONTHLY PAYMENT." *See* CP 112-117.

The Note provides for three occasions upon which the monthly payment can be changed. Most relevant here was the arrival of a "Payment Change Date." *Id.* According to the terms of the Note, the first Payment Change Date was December 1, 2008. *Id.* at ¶4(E), CP 114. Each subsequent December 1 was also a Payment Change Date. *Id.*

The terms state that on each Payment Change Date, the Note Holder will recalculate the monthly payment. *Id.* The Note reads, in relevant part:

> The result of this calculation is the *new* amount of my minimum monthly payment, ..., *and I will make payments in this new amount until the next Payment Change Date unless my payments are changed earlier...*

Id. (emphasis added). Accordingly, the monthly payment not only could change, but was anticipated to change, on December 1 of each year commencing December 1, 2008. *Id.* Consistent with the terms of the Note, Plaintiffs' received notices each October, beginning in 2008, informing them of the change to their minimum monthly payment effective on that year's December 1, Payment Change Date. *See* CP 142-153.

While not triggered here, the second circumstance under which the monthly payment could be changed was if the unpaid principal exceeded 115% of the amount borrowed, or $1,150,000.00. *Id.* at ¶4(H), CP 114. In that circumstance, the monthly payment could be increased even before a Payment Change Date. *Id.* at ¶¶ 3(B), 4(E), 4(H) CP 114. The Note reads, in relevant part:

> In the event my unpaid Principal would otherwise exceed that 115% limitation, I will begin paying a *new* minimum monthly payment until the next Payment Change Date notwithstanding the 7 1/2% annual payment increase limitation. The new minimum monthly payment will be an amount which would be sufficient to repay my then unpaid Principal in full on the Maturity Date at my interest rate in effect the month prior to the payment due date in substantially equal payments.

Id. at ¶4(H) (emphasis added). In other words, an excessive amount of unpaid principal as a result of unpaid interest could also trigger a change to the monthly minimum payment. *Id.*

Finally, the Note also provides for the minimum monthly payment to be adjusted on the fifth anniversary of the due date of the first monthly payment without regard to any payment percentage increase limitation. *Id.*, at ¶4(I), CP 114. The Note reads: "On the fifth anniversary of the due date of the first monthly payment... my minimum monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F)." *Id.*

Despite the foregoing, Plaintiffs claim that the Note's terms prevented Chase from increasing the amount of their monthly payment at all for five years. *See* Complaint ¶ 3, CP 2. They further claim that Chase "breached the conditions of the note upon receipt of the loan from the FDIC by intentionally raising the monthly payments and refusing to abide by the note provisions." *Id.* But as is clear from a review of the terms of the Note, combined with Plaintiffs refusal to pay the increased minimum monthly payments provided thereby, it is Plaintiffs who have refused to "abide by the note provisions." *Id.* Plaintiffs Complaint was properly dismissed.

V. ARGUMENT

A. Criteria Provided by RAP 13.4(b) Not Met

Pursuant to RAP 13.4(b), a petition for review will be accepted by the Supreme Court of Washington only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Plaintiffs' petition for review fails to meet any of these criteria. The Court of Appeals' decision does not conflict with any decision of the Washington Supreme Court, nor with any other Court of Appeals' decision. It does not present a question of constitutional law and does not involve any issues of substantial public interest.

Plaintiffs' petition does argue that the Court of Appeals' decision is in contravention of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), but fails to even address *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), which substantially clarifies and limits *Berg* in the exact context that is at issue here. As such, *Hearst Commc'ns* is the controlling Washington Supreme Court precedent on the issue and Plaintiffs fail even argue that the Court of Appeals decision in this case was contrary to *Hearst Commc'ns.*

Plaintiffs' petition otherwise only argues contract interpretation, which is not a basis for granting a petition for review under RAP 13.4(b). Accordingly, and also for the reasons set forth below, Plaintiffs' petition should be denied.

B. CR 12(b)(6) Standard of Review

A motion to dismiss pursuant to CR 12(b)(6) is properly granted when a plaintiff's pleading fails to state a claim upon which relief can be granted. Whether dismissal under CR 12(b)(6) is appropriate is a question of law. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n.*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000). "Dismissal is appropriate only if the complaint alleges no facts that would justify recovery." *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

In deciding a dismissal motion, a plaintiff's allegations are presumed to be true, "and all reasonable inferences are drawn in the plaintiff's favor." *Gorman*, 175 Wn.2d at 71 (emphasis added). The same deference, however, cannot be extended to legal conclusions asserted in a complaint. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, *amended by* 750 P.2d 254 (1987). Nor is deference extended to an unsupported interpretation of the undisputed

written terms of a contract (as is at issue here). *See Judd v. American Telephone and Telegraph Co.*, 152 Wn.2d. 195, 206, 95 P.3d 337 (2004) (affirming dismissal of claims asserted in contravention of the undisputed terms of a contract).

Review of a dismissal pursuant to CR 12(b)(6) is *de novo*. *Glepco, LLC v. Reinstra,* 175 Wn. App. 545, 307 P.3d 744 (2013).

C. Plaintiffs' Complaint Failed to State a Claim and was Properly Dismissed

The complaint fails to set forth any facts that establish a right to recover against Chase, or provide any basis for enjoining a non-judicial foreclosure action. Plaintiffs' claims rest entirely on their assertion that the Note prohibited Chase from raising their monthly payment for five years; however, their own documentation belies this contention. Indeed, the Note states in numerous places that the monthly payment can be increased prior to the five year mark. *See* CP 112-117.

As stated above, the Note contains three triggers for a possible increase in the monthly payment: (1) the occurrence of a Payment Change Date, (2) when the unpaid principal on the loan exceeded a certain amount, and (3) the fifth anniversary of the first payment. Plaintiffs appear to argue that only the third trigger applies. This is a clear misreading of the plain language of the Note. The Note Holder, in this case Chase, was authorized to adjust the monthly payment upon the occurrence of a Payment Change Date (i.e.,

December 1, 2008, or any December 1 thereafter) and/or if the unpaid principal on the loan exceeded $1,150,000.00.

Plaintiffs admit that they refused to pay increased payments. They do not assert that a Payment Change Date had not occurred or that Chase's recalculation of the monthly payment was erroneous. Rather, they wrongfully assert that any payment change prior to five years was improper under the terms of the Note. Obviously, that is not what the Note provides, and as such, Plaintiffs have not, and cannot, put forth any factual basis for their contention that Chase breached the terms of the Note.

The Plaintiffs' Complaint asserts that Chase is not abiding by the terms of the Note. Chase disagrees. Given that the Note is an undisputed written document, and the fact that there is no reasonable basis for Plaintiffs' asserted interpretation of the Note, the trial court and Court of Appeals properly interpreted the note's terms and dismissed Plaintiffs' Complaint with prejudice. *See Judd*, 152 Wn.2d. at 206 (affirming dismissal of claims asserted in contravention of the undisputed terms of a contract).

D. Extrinsic Evidence Argument Asserted by Plaintiffs Fails

Plaintiffs' Petition asserts that the trial court and Court of Appeals should have taken the Plaintiffs' asserted declaration with regard to their and Washington Mutual's alleged intent as to the purpose of the Note and enforced that purported intention rather than the actual terms of the Note.

This position is not only meritless under the "objective manifestation" theory of contracts followed in Washington, but is also in direct contravention of the assertion in the Complaint that Chase refused to abide by the actual terms of the Note.

Washington courts follow the "objective manifestation" theory of contracts. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under the "objective manifestation" theory, the focus is on "the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id.* Words in a contract are assigned their reasonable, "ordinary, usual, and popular" meaning unless the agreement "clearly demonstrates a contrary intent." *Id.* at 503–04. If, as is the case here, the parties' intent can be determined from the actual words within the four corners of the document, extrinsic evidence will not be considered. *See id.* If the Court must resort to extrinsic evidence to interpret the agreement, it can do so only to determine the meaning of specific words and terms used in the contract, and not to infer an intent "independent of the instrument" or to "vary, contradict, or modify" what was written. *Id.* at 503. Washington courts "do not interpret what was intended to be written but what was written." *Id.* at 504 (clarifying the holding of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 2221990)).

Here, what was written is clearly set out in the Note and Plaintiffs failed to identify any specific words that need their meaning determined. Accordingly, there is no reason for the Supreme Court to accept review in

order to again simply read the plain language of the Note as has already been properly done by the trial court and Court of Appeals.

E. Chase is Entitled to Its Attorneys' Fees

Chase is entitled to an award of its fees and costs pursuant to the terms of the Note and Deed of Trust and as provided under RAP 18.1.

Paragraph 7(E) of the Note provides as follows:

> **(E) Payment of Note Holder's Costs and Expenses** If the Note Holder has required me to pay Immediately in full as described above [Notice of Default], the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note, whether or not a lawsuit is brought, to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

CP at 115.

Paragraphs 14 and 26 of the Deed of Trust provide that the Lender is entitled to recover its reasonable attorneys' fees and costs for services "in connection with Borrower's default," and in "any action or proceeding to construe or enforce any term" of the Deed of Trust, including without limitation, attorneys' fees incurred on appeal. *See* CP at 129 (¶14), and 133 (¶26).

Accordingly, Chase requests that the Supreme Court deny Plaintiffs' Petition for Review, and award Chase its reasonable attorneys' fees and costs incurred in filing this Answer as provided by the Note, Deed of Trust, and RAP 18.1.

VI. CONCLUSION

For the reasons set forth above, Chase respectfully requests that this Court deny Plaintiffs' Petition for Review and award Chase its reasonable fees and costs in preparing and filing this Answer.

Dated this 11th day of August, 2014.

Respectfully submitted,

BISHOP, MARSHALL & WEIBEL, P.S.

Adam G. Hughes, WSBA #34438
Attorneys for Respondent JPMorgan Chase Bank, N.A.

CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 11th day of August, 2014, I caused the foregoing document, RESPONDENT JPMORGAN CHASE BANK, N.A.'S ANSWER TO APPELLANTS' PETITION FOR REVIEW, to be delivered to the following parties in the manner indicated below:

Robert H. Stevenson 810 Third Avenue, Suite 228 Seattle, WA 98104-1612 *Attorney for Plaintiffs/Appellants*	[X] By First Class Mail [ ] By Legal Messenger [ ] By Email [ ] By Facsimile
Joseph W. McIntosh McCarthy & Holthus, LLP 19735 10th Ave NE, Ste N-200 Poulsbo, WA 98370 *Attorneys for Defendant/Respondent Quality Loan Service Corp. of Washington*	[X] By First Class Mail [ ] By Legal Messenger [ ] By Email [ ] By Facsimile

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 11th day of August, 2014, at Seattle, Washington.

Kay Spading

Kay Spading

OFFICE RECEPTIONIST, CLERK

To: Kay Spading
Cc: Adam Hughes; Robert Stevenson; Joseph McIntosh; linwilson@mccarthyholthus.com
Subject: RE: Case No. 90516 / Heintz v. JPMorgan Chase Bank / Responsdent JPMorgan Chase Bank, NA's Answer to Appellants' Petition for Review

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Good Afternoon,

Attached please find Respondent JPMorgan Chase Bank, N.A.'s Answer to Appellants' Petition for Review, by attorney Adam G. Hughes, WSBA # 34438. A hard copy will be mailed to counsel.

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