70628-4

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No. 70628-4

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION I

HERBERT HEINTZ AND BARBARA HEINTZ, HIS WIFE,

PETITIONERS

v.

J. P. MORGAN CHASE BANK NATIONAL ASSOCIATION AND QUALITY LOAN SERVICE CORP. OF WASHINGTON, TRUSTEE

RESPONDENTS.

PETITIONERS' OPENING BRIEF

Robert H. Stevenson
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Seattle, WA 98104
(206) 682-3624

[redacted] and [redacted] directed to the attorney of record for plaintiff-defendant, containing a true copy of the document to which this affidavit is affixed.

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

9-10-13

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II. Statement of the Case

In October of 2007, Petitioners (Heintz) felt the need to lower their monthly mortgage payments. They were referred to Washington Mutual Savings Bank of Seattle for a "refinance", with the lowering of monthly payments at a reasonable interest rate. CP1, CP 12

To obtain a lower monthly payment, the note executed by Heintz for $1,000,000.00 was to provide for a payment of $3451.26 for a period of 5 years at an interest rate of 8.959%. After the five years, there were interest change provisions for increases in monthly payments. The note provided that the principal may be larger than the amount originally loaned but not more than 115% of the loan or $1,150,000.00. This first monthly payment was on December 1, 2007. Appendix 1, Note (P.1).

The 5-year moratorium was set out in the note as Section 4 (I), P.3, Appendix A,Note (p.3):

> "Section 4 (I) Required monthly payment.
> On the fifth anniversary of the due date of the first monthly payment, and on that same day every fifth year thereafter, any minimum monthly payment will be adjusted without regard to the payment cap limitation
> in Section 4 (F)."

Relying on the moratorium, Heintz paid $3,451.26 for the next 27 months to Washington Mutual and Chase Bank, in addition to paying taxes and insurance. CP 5.

Unknown to Heintz, the Federal Deposit Insurance Corporation (FDIC) closed Washington Mutual on September 25, 2008, and sold the latter's assets to Chase Bank the same day. Those assets included the Heintz deed of trust and note.

On September 30, 2010, two years later, Quality Loan Service Corporation, acting as trustee under the deed of trust, notified Heintz that he was in default on monthly payments that had been unilaterally raised by Chase. A nonjudicial sale was set for February 11, 2011. Heintzs' protest to Chase that he was not in default under the moratorium were ignored. CP12, CP1. Heintz filed a complaint to restrain the foreclosure on January 31, 2011. Chase countered with a motion to dismiss on the basis that, under the Purchase and Sale Agreement between Chase and the FDIC, Chase could not be sued for the conduct of Washington Mutual. The court dismissed the complaint, but noted that it had not passed on the merits of the action. CP12.

The foreclosure sale was never concluded. Two years later, June or July of 2012, Heintz received a second notice of nonjudicial foreclosure which set a sale date of November 16, 2012. No Notice of Default was given. CP15.

On December 12, 2012, Heintz filed a second action against Chase asking the court again to restrain the new sale and for damages, restitution, and attorneys' fees. CPI. Chase responded with a CR12 (b)(6) Civil Motion for Summary Judgment of Dismissal. CP16. Chase denied that validity of the 5-year moratorium and claimed the note provided for interest adjustment on at least three different times under various provisions of the note. CP23, CP20. Chase and Heintz agreed to submit the matter to the court without oral argument CP 25.

Heintz later amended his complaint to include the alleged negligence of the trustee in failure to give proper notices at the time of resetting a new foreclosure sale date. The trustee denied the allegations and moved to dismiss by Summary Judgment. CP15, CP29.

On June 6 and 7, the trial court dismissed the actions against Chase and the trustee. Motions for reconsideration were both denied. CP35, CP37.

II. Argument

A. THE FIVE-YEAR PAYMENT MORATORIUM WAS A PART OF REFINANCING AND IS PLAIN AND UNAMBIGUOUS: THE BALANCE OF THE NOTE IS ILLUSORY AND UNENFORECABLE.

The basic aim of the refinancing of Heintz 's old loan was to lower monthly payments for 5 years. In addition, Heintz was to pay taxes and insurance. The note provided for monthly payment increases if the principal sum of $1,000,000.00 was "excessively" exceeded by the limitation of 115% or $1,150,000.00. Another provision Chase contends, permits the monthly payment to be "adjusted" on the fifth anniversary of the due date of the first monthly payment, without regard to the percentage increase limitation. CR16, P3, Appendix 1, Note, CP5, P.1.

Paragraph 4 (I) of the note provides, in simple language, that the monthly payment will be the same for five years from the first due date (December 1, 2007). It does so by stating that, in effect, no adjustments of the payment will be made for 5 years and this is without regard to another payment cap limitation in Section 4(F).

Chase's contentions of payment change based on "excessive" exceeding of the principal is based solely on the whim of Chase. No standards for the amount in "excess" of the principal are afforded in the note. Likewise, the claim by Chase that the monthly payment is "adjustable" (without regard to the limit on the principal amount) under 4(I) (on the fifth anniversary of the due day), is in direct conflict with the moratorium language. CP16, p. 2 and 3.

The note itself is an impenetrable jungle of paragraphs, sub-paragraphs, sub-provisions, exceptions to paragraphs, sub-divisions, sub-sections, clauses and sub-clauses. The note simply lacks reasonable clarity and consistency. It places in the hands of Chase the exclusive right to dictate just when, and in what manner, minimum monthly changes are to be made. For example, it is impossible to determine what Section 4(H) means. What does "would otherwise exceed 115%" refer to and how does one determine such a question? When does it occur?

Paragraph E and 3(b) and 4(E) are also in conflict. These provisions permit Chase to fix the amount of the monthly payments "sufficient to repay the projected principal balance as of the payment change date in full on the maturity date at the interest rate in effect 45 days

prior to the Payment Change Date" Appendix 1, Note, CP 1 & 3. These provisions are incapable of understanding, for a court to enforce it. The language is vague, indefinite, and uncertain.. How, for example, can Chase determine when and how much the "projected principal balance" is on a Payment Change Date, so long as it is under 115% or $1,150,000.00?

Paragraph 4(B) is another vague and incomprehensible paragraph dealing with what is called an Index used to change the interest rate on change dates. Chase is given sole control of changing the Index and its terms and standards. If, for example, the original "Index is no longer available," the new Index can be almost anything Chase wants it to be. These provisions are illusory and unenforceable for they lack mutuality and promise nothing. Sandeman v. Sayres, 50 Wn2d 539, 541, 314, P2d 428 (1957) (illusory company bonus offer); Spooner v. Reserve Life Ins. Co., 47 Wn, 2d 454, 287, p.2d 735 (1955) (illusory language by an insurance company to pay its assets a renewal bonus.) A promise to be sufficient consideration for a promise to pay must be legally binding, otherwise it has no value. Therefore, the promise of Heintz to pay the loan, in a bilateral exchange, is not binding so as to constitute consideration for the counter-promise of Chase. In

reality, Chase has promised nothing at all because of indefiniteness and duration. Williston on Contracts, Sec. 104 (a contract that can be performed without detriment to the Defendant or benefit to that Plaintiff is insufficient consideration.) The change dates of higher interest payments are unenforceable by Chase because how, when and by what alchemy they are fixed, is undeterminable.

B. EXTRINSIC EVIDENCE IS PERMITTED TO ASCERTAIN THE INTENT AND RESONABLE BACKGROUND OF THE MORATORIUM.

The circumstances surrounding the execution of the note moratorium are important in ascertaining the intent of the parties and meanings of the provision. Berg v. Hudesman, 115 Wn2d 657, 801 P.2d 222 (1990). Under Berg, extrinsic evidence that does not modify or contradict the writing, is admissible under the "context" rule. The "context" rule is one requiring some objective manifestation of the agreement rather than a subjective interest of the parties. Ambiguity is not necessary before extrinsic evidence is allowed. Berg.

In this appeal, the surrounding circumstances were unopposed by Chase. The purpose of refinancing the old mortgage was to lower the monthly payment. Washington Mutual agreed to allow a fixed 5-year

moratorium minimum; with the difference in the monthly payment and the total monthly interest to be added to the principal. CP5; CP19. Heintz's Declaration stated the basic background:

> "Together my wife and I borrowed one million ($1,000,000.00) from Washington Mutual Savings Bank in Seattle, Washington, to finance a prior loan. The intention of both the bank and the plaintiff was to lower the monthly payments for a period of five years. After five years, the monthly payments would be adjusted to a higher payment." (CP5).

In addition to the declaration, Washington Mutual accepted the $3451.26 payments from Heintz for 12 months without further demand. It was only when Chase bought the note that a higher monthly payment was demanded. The trial court treated the moratorium as if it didn't exist and ignored the reasons for it in the refinancing. Instead, the court enforced other interest rate change dates that were not enforceable. CP5, CP12.

The meaning and interpretation in this appeal should be given its plain meaning in accordance with that meaning given to the moratorium by Heintz if

Washington Mutual knew or had reason to know that he did so. On this score, the trial court should have heard all relevant evidence of the surrounding circumstances and weigh the credibility of the evidence. Summary judgment was improper.

C. IT WAS REVERSIBLE ERROR TO DISMISS THE HEINTZ COMPLAINT. CR12(b)(6)

Chase moved for Summary Judgment under CR12(b)(6) of the Rules for Superior Court. CP16. The basis alleged was failure to state a claim upon which relief can be granted. The rule is a substitute for the old demurrer and performs the same function.

Under this rule, the complaint is liberally construed upon the broad principle that a motion to dismiss for the insufficiency of the complaint should not be granted unless it appears to a certainty that no state of facts could be proved that would entitle a plaintiff to relief. It may also be treated as a motion for summary judgment and is sparingly granted: Collins v. Lomas Nettleton, Corp. 29 Wn. App. 415, 628 P.2nd 855 (1981). Street v. Moore, 26 Wn. App. 450, 613, P2d 1188 (1981).

The rule admits, for the purpose of this motion, that the moratorium granted to Heintz was true. The denial of

this proposition is a question of law and fact properly resolved by trial. Pearson v. Vandermay, 67 Wn.2d 222, 407, P.2d 143 (1965) (reversing a judgment of dismissal in light of the acceptance of the trial court that certain allegations pleaded were true on a motion to dismiss.)

In Stidham v. Dept. of Licensing, 30 Wn. App. 611, 637 P.2d 970, the court considered an action by a former securities division attorney against his employer for defamation and tortious interference. In reviewing the dismissal of the action under CR12(b)(6) for failure to state a claim the court said:

> "In reviewing the propriety of the trial court's ruling, we confine ourselves to the pleadings.... In addition, we may examine a 'hypothetical' statement of facts, submitted by the parties. If the 'facts' their veracity aside, entitles the plaintiff to relief, we must consider the complaint sufficient and reverse the dismissal."

The court found, however, that the actions of the state securities director, and her assistant, were privileged and affirmed the dismissal.

When the matter on appeal is in the form of a summary judgment, but in substance is actually a motion to dismiss for failure to state a cause of action upon which relief can be granted, the Court will review the action as a motion to dismiss for failure to state a claim. Green v. Holmes, 28 Wn. App. 135, 622, P.2d 869

Summary judgment by the trial court in this appeal was wrongfully granted under CR12(b)(6).

D. THE TRUSTEE'S NEGLIGENCE IN FAILURE TO FOLLOW STATUTORY REQUIREMENTS UNDER THE DEED OF TRUST ACT IS A QUESTION FOR TRIAL.

Heintz alleged he was forced to pay attorneys' fees and costs because the trustee failed to give proper notices to him under R.C.W. 61.24. He contends that the notices are especially important in a nonjudicial foreclosure where there is no protection afforded to the borrower by the court. Cox v. Helenius, 103 Wn. 2d 383, 693 P2d (1985). Statutes protecting borrowers are strictly construed, under nonjudicial foreclosures, in their favor. Udall v. T.D. Escrow Service, Inc. 159 Wn.2d 903, 915-16, 154 P.3rd 882 (2007). CP15.

In this appeal, the trustee, Chase, allowed 2 years to elapse between the first Notice of Default in September of 2010 and July of 2012, the second nonjudicial foreclosure . A second sale was set in June or July of 2012 for November 16, 2012 without a Notice of Default. It is submitted that this failure violates R.C.W. 61.24.031(8):

> "-----at least 30 days before the notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustees to the borrower....."

The trustee, likewise, violated R.C.W. 61.24.040(6), which fixes 120 days as the maximum time a nonjudicial foreclosure can be continued. In this case, it was 21 months beyond the 120 days. CHD, Inc. v. Bayles, 138Wn App. 131, 137, 157, P2d 415 (2007) (continuing a nonjudicial sale beyond 120 days is a statutory breach that avoids the sale.); Albice v. Premier Mortgage Services, 174 Wn.2d 360 (2011).

Both of the foregoing questions are mixed questions of law and fact. Summary judgment was error.

E. HEINTZ IS A PREVAILING PARTY, HE SHOULD RECOVER HIS ATTORNEYS' FEES.

Chase's deed of trust provides for attorneys' fees and costs for Chase only. Appendix I. No provision is provided for in the note for attorneys' fees. Washington's public policy bars a one-way attorneys' fee provision. Our rule now is to provide attorney fees for the prevailing party. R.C.W. 4. 84.330.

> "In any action on a contract....where such a contract.....specifically provides that attorneys' fees and costs....shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract....or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

IV. CONCLUSIONS

1. Refinancing was the basis of a 5-year monthly payment moratorium.

2. The moratorium is clear and unambiguous.

3. A CR12(6) Motion to Dismiss admits the truth of the matters pleaded and summary judgment is inappropriate.

4. The various vexing paragraphs of the note relied upon to calculate when and what interest payment changes can be made are illusory in nature, not reasonably understandable and unenforceable.

5. The trustee caused Heintz to incur costs and attorney's fees by negligently failing to follow notices required by the Deed of Trust Act.

6. If Heintz prevails in this appeal, he should be awarded reasonable attorneys' fees and costs.

Dated this date of September 10th, 2013.

Robert H. Stevenson
Attorney for Petitioners

V. Appendix

1. Promissory Note (6 pages)

2. Chase Purchase & Assumption Agreement (2 pages)

A

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M68

ADJUSTABLE RATE NOTE
(FHLB Index - Payment and Rate Caps)

3014685162-048

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. MY MONTHLY PAYMENT INCREASES WILL HAVE LIMITS WHICH COULD RESULT IN THE PRINCIPAL AMOUNT I MUST REPAY BEING LARGER THAN THE AMOUNT I ORIGINALLY BORROWED, BUT NOT MORE THAN 115% OF THE ORIGINAL AMOUNT (OR $ 1,150,000.00). MY INTEREST RATE CAN NEVER EXCEED THE LIMIT STATED IN THIS NOTE OR ANY RIDER TO THIS NOTE. A BALLOON PAYMENT MAY BE DUE AT MATURITY.

OCTOBER 19, 2007 SHORELINE (CITY), WASHINGTON (STATE)

10430 47TH AVE SW, SEATTLE, WA 98146
PROPERTY ADDRESS

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 1,000,000.00 plus any amounts added in accordance with Section 4 (G) below, (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is WASHINGTON MUTUAL BANK, FA. I will make all payments under this Note in the form of cash, check or money order. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder".

2. INTEREST

Interest will be charged on unpaid principal until the full amount has been paid. Up until the first day of the calendar month that precedes the first payment due date set forth in Section 3 of the Note, I will pay interest at a yearly rate of 8.959 %. Thereafter, until the first Change Date (as defined in Section 4 of this Note) I will pay interest at a yearly rate of 8.959 %.The interest rate required by this Section 2 and Section 4 of this Note is the Rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay Principal and interest by making a payment every month. In this Note, "payments" refer to Principal and interest payments only, although other charges such as taxes, insurance and/or late charges may also be payable with the monthly payment.

I will make my monthly payments on FIRST day of each month beginning on DECEMBER, 2007. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on NOVEMBER 01, 2037, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date".

I will make my monthly payments at P.O. BOX 78148, PHOENIX, AZ 85062-8148, or at a different place if required by the Note Holder.

(B) Amount of My Initial Minimum Monthly Payments

The lowest payment I can make each month and not be in default under this Note is called my "minimum monthly payment". Each of my minimum monthly payments until the first Payment Change Date will be in the amount of U.S. $ 3,451.20, unless adjusted at an earlier time under Section 4(H) of this Note. I understand and agree that this minimum monthly payment may be based on

an interest rate that is less than the interest rate set forth in Section 2 of this Note and, if that is the case, even during the first month of my loan, my minimum monthly payment may not be sufficient to pay all of the interest that accrues on my loan during the month. In that case, the unpaid interest will be added to my Principal balance as provided in Section 4(G) of this Note and interest will accrue on such amount as provided in Section 4(G) of this Note.

(C) Payment Changes

My minimum monthly payment will be recomputed, according to Sections 4(E)(F)(G)(H) and (I) of this Note, to reflect changes in the principal balance and interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my minimum monthly payment in accordance with Section 4 of this Note.

(D) In addition to the minimum monthly payment, I may have up to three (3) other payment options each month. These payment options are 1) the interest only payment 2) the full principal and interest payment (based on the then current interest rate, the then outstanding Principal balance and the then remaining loan term (the "Full Principal and Interest Payment") and 3) if my Loan has an original term of more than 15 years, a payment amount based on the then current interest rate and the then outstanding Principal balance but determined as if my loan had an original term of fifteen (15) years. I understand and agree that one or more of these three payment options will not be available for any month in which the payment option is equal to or less than the minimum monthly payment. In addition, if my minimum monthly payment is past due by more than forty-five (45) calendar days, the Note Holder reserves the right to require me to make a Full Principal and Interest Payment.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Interest Rate Change Dates

The interest rate I will pay may further change on the 1ST day of DECEMBER, 2007, and on that day every month thereafter. Each such day is called a "Change Date".

(B) The Index

On each Change Date, my interest rate will be based on an Index. The "Index" is the monthly weighted average cost of funds for Eleventh District savings institutions as announced by the Federal Home Loan Bank of San Francisco (the "11th District Monthly Weighted Average Cost of Funds Index"). The most recent Index figure available on each interest rate Change Date is called the "Current Index".

Information on the 11th District Monthly Weighted Average Cost of Funds Index may be obtained by writing to the Federal Home Loan Bank at P.O. Box 7948, San Francisco, California 94120, Attention: Public Information Department; or by calling the Federal Home Loan Bank at 1-415-616-2600.

If the Index is no longer available, the Note Holder will use the new Index as if it were the Index. The new Index will be the Twelve-Month Average, determined as set forth below, of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve-Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. This information may be available in your library, or you may write to the Federal Reserve Board, Board of Governors, Publications Services, Washington, D.C. 20551. The most recent figure available 15 days prior to each Interest Rate Change Date will be the Current Index. If the new Index is no longer available, the Note Holder will choose an alternate Index which is based upon information comparable to the new Index. The Note Holder will give me notice as to this choice.

(C) Interest Rate Change Calculation

Before each Change Date, the Note Holder will calculate my new interest rate by adding FOUR AND 60/100 percentage points 4.600 % ("Margin") to the Current Index. The Note Holder will then round the result of this addition to the nearest one-thousandth of one percentage point (0.001%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. In the event a new Index is selected, pursuant to paragraph 4(B), a new Margin will be determined. If a new Index is selected, the new Margin will be the difference between the average of the Index for the most recent three year period which ends on the last date the Index was available plus the then effective Margin and

the average of the new Index for the most recent three year period which ends on that date (or if not available for such three year period, for such time as it is available). If an alternate Index is selected, the new Margin will be the difference between the average of the new Index for the most recent three year period which ends on that last date the new Index was available plus the then effective Margin and the average of the alternate Index for the most recent three year period which ends on that date (or if not available for such three year period, for such time as it is available). In either case, this difference will be rounded to the next higher 1/8 of 1%.

(D) Interest Rate Limit

My interest rate will never be greater than NINE AND 95/100 percentage points 9.950 % ("Cap"), except that following any sale or transfer of the property which secures repayment of this Note after the first interest rate Change Date, the maximum interest rate will be the higher of the Cap or 5 percentage points greater than the interest rate in effect at the time of such sale or transfer.

(E) Payment Change Dates

Effective every year commencing DECEMBER 01, 2008, and on the same date each twelfth month thereafter ("Payment Change Date"), the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the projected principal balance I am expected to owe as of the Payment Change Date in full on the maturity date at the interest rate in effect 45 days prior to the Payment Change Date in substantially equal payments. The result of this calculation is the new amount of my minimum monthly payment, subject to Section 4(F) below, and I will make payments in this new amount until the next Payment Change Date unless my payments are changed earlier under Section 4(H) of this Note.

(F) Monthly Payment Limitations

Unless Section 4(H) and 4(I) below apply, the amount of my new minimum monthly payment, beginning with a Payment Change Date, will be limited to 7 1/2% more or less than the amount I have been paying. This payment cap applies only to the principal payment and does not apply to any escrow payments Lender may require under the Security Instrument.

(G) Changes in My Unpaid Principal Due to Negative Amortization or Accelerated Amortization

Since my initial minimum monthly payment may not be based on the interest rate set forth in Section 2 of this Note, since the minimum monthly payment amount changes less frequently than the interest rate and since the minimum monthly payment is subject to the payment limitations described in Section 4(F), my minimum monthly payment could be less than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the maturity date in substantially equal payments. For each month that the minimum monthly payment is less than the interest portion and I choose to make only the minimum monthly payment, the Note Holder will subtract the minimum monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal balance, and interest will accrue on the amount of this difference at the current interest rate. For each month that my minimum monthly payment is greater than the interest portion, the Note Holder will apply the excess towards a Principal reduction of the Note.

(H) Limit on My Unpaid Principal; Increased Minimum Monthly Payment

My unpaid principal can never exceed a maximum amount equal to 115% of the principal amount originally borrowed. 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.

(I) Required Full Monthly Payment

On the fifth anniversary of the due date of the first monthly payment, and on that same day every fifth year thereafter, my minimum monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F).

(J) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in the amount of my minimum monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment". When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without payment of any Prepayment charge. The Note Holder will apply all of my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note.

If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may have the effect of reducing the amount of my monthly payments, but only after the first Payment Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any minimum monthly payment by the end of FIFTEEN calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of Principal (if applicable) and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each minimum monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, 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.

8. GIVING OF NOTICES

Unless Applicable Law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety, or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety, or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower.

If all or any part of the Property or any interest in the Property is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee, (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument or other obligations related to the Note or other loan document is acceptable to Lender, (c) Assuming party executes Assumption Agreement acceptable to Lender at its sole choice and discretion, which Agreement may include an increase to Cap as set forth below and (d) Payment of Assumption Fee if requested by Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption and Lender may increase the maximum rate limit to the higher of the Cap or 5 percentage points greater than the interest rate in effect at the time of the transfer. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender has entered into a written Assumption Agreement with transferee and formally releases Borrower.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

12. MISCELLANEOUS PROVISIONS

In the event the Note Holder at any time discovers that this Note or the Security Instrument or any other document related to this loan, called collectively the "Loan Documents," contains an error which was caused by a clerical or ministerial mistake, calculation error, computer error, printing error or similar error (collectively "Errors"), I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors and I also agree that I will not hold the Note Holder responsible for any damage to me which may result from any such Errors.

If any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

Barbara A. Heintz

BARBARA A HEINTZ

B

PURCHASE AND ASSUMPTION AGREEMENT

WHOLE BANK

THIS AGREEMENT, made and entered into as of the 25th day of September, 2008, by and among the **FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER of WASHINGTON MUTUAL BANK, HENDERSON, NEVADA** (the "Receiver"), **JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**, organized under the laws of the United States of America, and having its principal place of business in Seattle, Washington (the "Assuming Bank"), and the **FEDERAL DEPOSIT INSURANCE CORPORATION**, organized under the laws of the United States of America and having its principal office in Washington, D.C., acting in its corporate capacity (the "Corporation").

WITNESSETH:

WHEREAS, on Bank Closing, the Chartering Authority closed Washington Mutual Bank (the "Failed Bank") pursuant to applicable law and the Corporation was appointed Receiver thereof; and

WHEREAS, the Assuming Bank desires to purchase substantially all of the assets and assume all deposit and substantially all other liabilities of the Failed Bank on the terms and conditions set forth in this Agreement; and

WHEREAS, pursuant to 12 U.S.C. Section 1823(c)(2)(A), the Corporation may provide assistance to the Assuming Bank to facilitate the transactions contemplated by this Agreement, which assistance may include indemnification pursuant to Article XII; and

WHEREAS, the Board of Directors of the Corporation (the "Board") has determined to provide assistance to the Assuming Bank on the terms and subject to the conditions set forth in this Agreement; and

WHEREAS, the Board has determined pursuant to 12 U.S.C. Section 1823(c)(4)(A) that such assistance is necessary to meet the obligation of the Corporation to provide insurance coverage for the insured deposits in the Failed Bank and is the least costly to the deposit insurance fund of all possible methods for meeting such obligation.

NOW THEREFORE, in consideration of the mutual promises herein set forth and other valuable consideration, the parties hereto agree as follows:

may be agreed upon by the Receiver and the Assuming Bank. The Receiver, in its discretion, may extend the Settlement Date.

"Settlement Interest Rate" means, for the first calendar quarter or portion thereof during which interest accrues, the rate determined by the Receiver to be equal to the equivalent coupon issue yield on twenty-six (26)-week United States Treasury Bills in effect as of Bank Closing as published in The Wall Street Journal; provided, that if no such equivalent coupon issue yield is available as of Bank Closing, the equivalent coupon issue yield for such Treasury Bills most recently published in The Wall Street Journal prior to Bank Closing shall be used. Thereafter, the rate shall be adjusted to the rate determined by the Receiver to be equal to the equivalent coupon issue yield on such Treasury Bills in effect as of the first day of each succeeding calendar quarter during which interest accrues as published in The Wall Street Journal.

"Subsidiary" has the meaning set forth in Section 3(w)(4) of the Federal Deposit Insurance Act, 12 U.S.C. Section 1813(w)(4), as amended.

ARTICLE II
ASSUMPTION OF LIABILITIES

2.1 Liabilities Assumed by Assuming Bank. Subject to Sections 2.5 and 4.8, the Assuming Bank expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform, and discharge, all of the liabilities of the Failed Bank which are reflected on the Books and Records of the Failed Bank as of Bank Closing, including the Assumed Deposits and all liabilities associated with any and all employee benefit plans, except as listed on the attached Schedule 2.1, and as otherwise provided in this Agreement (such liabilities referred to as "Liabilities Assumed"). Notwithstanding Section 4.8, the Assuming Bank specifically assumes all mortgage servicing rights and obligations of the Failed Bank.

2.2 Interest on Deposit Liabilities. The Assuming Bank agrees that it will assume all deposit contracts as of Bank Closing, and it will accrue and pay interest on Deposit liabilities assumed pursuant to Section 2.1 at the same rate(s) and on the same terms as agreed to by the Failed Bank as existed as of Bank Closing. If such Deposit has been pledged to secure an obligation of the depositor or other party, any withdrawal thereof shall be subject to the terms of the agreement governing such pledge.

2.3 Unclaimed Deposits. If, within eighteen (18) months after Bank Closing, any depositor of the Failed Bank does not claim or arrange to continue such depositor's Deposit assumed pursuant to Section 2.1 at the Assuming Bank, the Assuming Bank shall, within fifteen (15) Business Days after the end of such eighteen (18)-month period, (i) refund to the Corporation the full amount of each such Deposit (without reduction for service charges), (ii) provide to the Corporation an electronic schedule of all such refunded Deposits in such form as may be prescribed by the Corporation, and (iii) assign, transfer, convey and deliver to the Receiver all right, title and interest of the Assuming Bank in and to Records previously transferred to the Assuming Bank and other records generated or maintained by the Assuming Bank pertaining to such Deposits. During such eighteen (18)-month period, at the request of the