72114-3

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No. 72114-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ALGO, INC., a Washington corporation; ALLEN R. GRANT, individually and his marital community; and JANE DOE GRANT, her marital community,

Defendants/Appellants/Cross-Respondents,

v.

WASHINGTON FEDERAL SAVINGS; a United States corporation,

Plaintiff/Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE REGINA CAHAN

OPENING BRIEF OF CROSS-APPELLANT

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I. INTRODUCTION

Allen Grant ("Grant") concedes for purposes of this appeal that he breached a mediated settlement agreement ("Settlement Agreement"). The fundamental flaw permeating Grant's appeal is its failure to acknowledge that his refusal to provide security as promised was material and damaged Washington Federal. Had he not promised security, there would have been no settlement and Washington Federal's claim in his subsequent bankruptcy would have been in excess of $3.8 million.

Grant fallaciously argues that a judgment for $1,000,000 would put Washington Federal in a "better position" than if Grant had performed his obligations. This argument wholly ignores his agreement to provide security and the value of that promise. Grant's right to delay payment, and to a discount if he paid early, were each conditioned on his timely provision of security for the promissory note, which Grant undisputedly never provided. Therefore, the entire $1,000,000 became immediately due upon repudiation.

Washington Federal respectfully asks this Court to reverse the trial court solely by increasing the principal amount of the judgment to $1,000,000, and to affirm the trial court in all other respects. Washington Federal should also receive its attorney fees and costs incurred in

defending and prosecuting this appeal.

II. ASSIGNMENT OF ERROR

The trial court erred by entering judgment in the principal amount of $850,000 instead of $1,000,000.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did Grant breach the Settlement Agreement both by failing to execute a promissory note and by failing to provide security for the note?

2. Is Grant entitled to any discount of the $1,000,000 provided for in the Settlement Agreement following his unchallenged repudiation of it on February 11, 2013?

IV. STATEMENT OF THE CASE

A. Washington Federal Seeks a Deficiency Judgment Following a Non-Judicial Foreclosure.

In 2006, Washington Federal loaned $3.6 million to ARG Development, LLC, a company owned and operated by Grant. Grant and Algo, Inc. guaranteed the loan, which was secured by real property. Grant defaulted. Washington Federal non-judicially foreclosed on the security and sued for the deficiency of $2,414,633 in 2011. (CP 134.)

B. The Parties Discuss a Settlement Secured by Real Property.

Grant and Washington Federal began discussing settlement in May 2012. Ron McKenzie, a Vice President at Washington Federal, mentioned a possible willingness to accept a new promissory note if secured by additional real property. (CP 141.)

Grant proposed 200 acres in Merced, California ("Merced Property") as security for such an agreement. Grant represented that the Merced Property was owned by Go Merced GP, a general partnership owned equally by he and Donald Olmsted ("Olmsted"). (CP 143.)

C. Grant Falsely Represents That He and Olmsted Are "Ready to Proceed" with a 26 U.S.C. §1031 Exchange ("§1031 Exchange").

Settlement discussions stalled. McKenzie advised Grant that the parties needed to agree before the end of June "or just go to trial." (CP 145.) The following day, Grant responded to McKenzie's email:

> My partner, Don Olmsted, and I made a lot of progress in regards to dissolving our partnerships and preparing the 1031 exchange documentation, and we are ready to proceed.
>
> I have been advised by Counsel not to execute until we have an agreement as to the dollar amount and terms. To this end we will not be in a position to make a final decision until we have received and reviewed all requested information.

(CP 147, emphasis added.)

These statements were false. Grant and Olmsted prepared no

documentation to dissolve any partnership or complete a §1031 exchange, as Grant later acknowledged in a deposition. (CP 150, pp. 44:24-45:22.) Grant admitted that he did not even discuss the logistics of a §1031 exchange with Olmsted until after he executed the Settlement Agreement. (CP 150, pp. 43:6-45:25; CP 152, pp. 55:7-56:5.)[1]

D. The Parties Execute the Settlement Agreement.

The parties executed the Settlement Agreement following mediation on August 1, 2012. (CP 160-161.) The Settlement Agreement is not utterly comprehensive, but its intent is beyond reasonable dispute: "While the parties contemplate that these terms will be incorporated into a more detailed settlement agreement and release, promissory note, deed of trust and related documents, it is understood and agreed that this document is itself a binding and enforceable agreement." (CP 161.)

Two pertinent terms of the Settlement Agreement are:

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[1] Grant dissembles in disclosing these facts to this Court. His opening brief states: "Mr. Grant and Mr. Olmsted agreed in principle that they would partition the Merced property into two parcels of equal value and distribute a parcel to each partner." (Opening Brief, p. 11, citing CP 212, at par. 13; CP 307, at par. 5.) The paragraph of Grant's deposition cited states merely that "I was willing to do this and I understood from Mr. Olmsted that he was also willing to do this." (CP 212.) Bilateral willingness to do something is not the same as an agreement in principle to do it. Olmsted was even more equivocal: "Mr. Grant and I considered a partition of the Merced property into two parcels of equal value and a distribution of a parcel to each partner. I originally thought that this could work but later concluded that it was not feasible." (CP 307.) Grant misled Washington Federal then, and he misleads the Court now.

1. Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms:

a. Payment shall be due in 60 months from the date of this agreement;

b. Interest shall be 0% for the five-year term;

c. Interest shall accrue at 12% per annum in the event of default;

d. In any action to enforce the note, the prevailing party shall be entitled to recover its reasonable costs, including attorney fees;

e. The following discounts shall apply if the discounted amount is paid in full within the time periods set forth below:

If paid within 24 months:	15%
If paid within 36 months:	10%
If paid within 48 months:	5%

2. The note shall be secured by a first position deed of trust encumbering one or more properties owned by GO Merced GP (either the 145-acre parcel or the 56-acre parcel), to be determined and effectuated as follows:

a. By August 10, 2012 Mr. Grant shall identify the parcel to be encumbered and provide for that parcel a copy of the preliminary title insurance and the most recent tax assessor's appraisal of the property.

b. Within 30 days of the date on which Mr. Grant identifies the parcel to be encumbered, the bank shall obtain an appraisal of that property, at the bank's expense.

c. If the appraised value is less than $1 million, the parties shall negotiate additional collateral, which may include the 56-acre parcel owned by GO Merced.

d. In addition to providing a deed of trust, Mr. Grant will pledge his membership interest or other ownership interest in any entity holding title to the property to be encumbered.

(CP 160.)

Due to Grant's representations of Olmsted's prior assent, the Settlement Agreement was not conditioned on Olmsted's assent or Grant's receipt of specific tax advantages. (Id.)

E. A Promissory Note and Security Agreement Are Drafted; Grant Accepts Their Terms, But Never Executes Them.

Grant delayed performance of the Settlement Agreement for seven months. On October 2, 2012, he sought the assistance of a California attorney and a second accountant. (CP 165-167.) He stated that he needed to partition the Merced Property, but did not want the partition to constitute a taxable event. (Id.) The following day, Grant's counsel stated that he had "significant concern" about the tax ramifications of a §1031 exchange. (CP 166.) Despite these reservations, the attorney advised Grant to form a new limited liability company as soon as possible, as "this seems to be important to [Washington Federal]." (Id.)

After declining to complete a §1031 exchange, Grant considered dividing the property by lot line adjustment and giving Washington Federal security in his portion. However, he later determined that idea to be too costly and thus "would not be in [Grant or Olmsted's] best interest." (CP 170.)

F. Grant Is Sued By Union Bank, After Which He Is No Longer Willing to Perform the Settlement Agreement.

On November 1, 2012, Union Bank sued Grant for a $5,000,000 deficiency judgment in an unrelated matter. (CP 154, p. 62:6-11.) On February 11, 2013, Grant informed Washington Federal that he was "unable" to perform the Settlement Agreement. (CP 163.)[2] Grant's asserted reasons were Olmsted's unwillingness to allow Grant to transfer the Merced Property (because of a judgment entered against Olmsted in a different lawsuit), negative tax consequences, the Union Bank lawsuit, and Grant's desire to avoid bankruptcy. (CP 152-153, pp. 57:9-59:24.)

Grant further informed Washington Federal that he "is unable to pursue an alternative arrangement with Washington Federal alone. Rather, the solution will have to involve Union Bank as well." (CP 163.)

The trial court ruled that February 11, 2013 was the date on which Grant repudiated the Settlement Agreement and Grant does not challenge that finding. (See CP 599; Opening Brief, p. 4.)

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[2] Grant again dissembles in his factual summary to this Court. He asserts: "Washington Federal rejected Mr. Grant's offer to discuss an alternative agreement regarding security for the settlement terms[.]" (Opening Brief, p. 12.) Numerous "discussions" occurred in the eight months that Grant delayed. (See, e.g., CP 22: "Attempts to devise a work-around solution were not successful.") The delay has no other plausible explanation. Grant never proposed specific alternate security. He apparently faults Washington Federal for rejecting his "offer to discuss" security in perpetuity.

G. Grant Concedes That He Was Merely Unwilling to Perform the Settlement Agreement.

On February 22, 2013, Washington Federal filed a motion to withdraw the settlement. (CP 138.) In response, Grant wrote:

> Due to changed circumstances since the time of settlement, including a judgment being entered against him on another matter, Mr. Olmstead is no longer willing or able to execute the transaction regarding his interest in Go Merced contemplated at the time of the settlement. Mr. Grant therefore is no longer able to secure the promissory note to Plaintiff with the Go Merced property as originally contemplated in the parties' settlement agreement.
>
> Mr. Grant is still prepared to make payment under the terms of the note as agreed at mediation. He also remains willing to negotiate alternate security [....]

(CP 173.)

Despite Grant's claim that he was not "able" to perform, Grant later admitted that his failure to perform was by choice.

> Q. Would you agree that there were other ways to obtain a percent, 50 percent of that property in your personal name?
>
> A. There was all kinds of ways.

(CP 152, p. 54:6-22.)

In fact, Grant was simply unwilling to perform:

> Q. So this puts it on Mr. Olmsted. But there were other reasons you didn't want to proceed, right? It isn't just Mr. Olmsted as the cause. You didn't want to proceed with this settlement because you've now been sued by Union Bank.

Correct? . . .

A. Okay. That's correct.

(CP 153, p. 61:12-19.)

H. The Trial Court Denies Washington Federal's First Motion for Summary Judgment and Sets the Matter for Trial.

Washington Federal moved for summary judgment. (CP 32-58.) The motion was granted in part; while certain defenses were dismissed, the remainder of the case was set for trial. Crucially, Grant did not prevail on these claims or defenses, nor did Washington Federal fail to do so. They were simply reserved for trial. (CP 86-88.)

I. Washington Federal Amends to Seek the Alternate Relief of Enforcement of the Settlement Agreement.

Washington Federal then amended its complaint to include a claim for breach of the Settlement Agreement. (CP 89-97.)[3] It did not abandon its alternate theory of recovery under the underlying loan documents. (Id.)

J. The Trial Court Grants Summary Judgment to Washington Federal in the Principal Amount of $850,000.

Washington Federal moved for summary judgment on its claim for

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[3] Washington Federal considered amending its complaint to obtain the security promised. However, because Olmsted was a general partner in the entity owning that security, Washington Federal would have had to join him in the action. This would have caused considerable delay and expense; even assuming that personal jurisdiction over Olmsted could be obtained.

breach of the Settlement Agreement. Grant responded that Olmsted's declination to provide the security excused Grant's non-performance, and alternatively argued that any judgment "would have to be for the present-day value of $1 million on August 1, 2017". (CP 191.)

The trial court orally granted judgment in favor of Washington Federal in the amount of $1,000,000 and orally denied Washington Federal's request for attorney's fees. The trial court requested supplemental briefing on the issue of prejudgment interest. (See CP 412; CP 422.)

Both sides also moved for reconsideration; Washington Federal of the denial of its fees and Grant of the principal judgment amount. The trial court, in essence, granted both motions for reconsideration: its final order awarded fees and costs, but (without explanation) awarded the principal sum of only $850,000. (CP 540.) It also awarded prejudgment interest from February 11, 2013; the date on which Grant repudiated the Settlement Agreement. Thus, the trial court acknowledged that the amount due Washington Federal was a "sum certain" on that date. (Id.) Grant does not challenge that finding. (Opening Brief, p. 4.)

In its motion for attorney fees, Washington Federal sought only the fees and costs incurred after execution of the Settlement Agreement. (CP

543-555.) Thus, it proposed an objectively reasonable segregation to the trial court. (Id.)

The motion delineated how Grant's vexatious litigation strategy vastly increased the attorney fees incurred by Washington Federal; including discovery abuses, the assertion of attorney-client privilege on documents sent to non-attorneys, objections to motions to take out of state depositions, and the production of over 1700 pages of duplicative and non-responsive documents. (See CP 563.) In its motion, Washington Federal requested only $142,554 of its fees. (CP 556.) Grant's attorneys declined to disclose the fees and costs incurred by Grant during that time and suggested an award not to exceed $88,397.68. (CP 556; CP 650.)

The trial court awarded the fees and costs requested by Washington Federal, supported by detailed findings of fact and conclusions of law. (CP 694-698.)

K. Grant Crams Down a Bankruptcy Plan That Delays Payment for Three Years and Precludes Interest.

Grant filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code on July 14, 2014. (CP 709-711.)

Because Grant breached the Settlement Agreement, Washington Federal was treated as a general unsecured creditor in the bankruptcy and

forced to accept a plan under which it would not receive payment until September 2017. (See *In re: Grant*, No. 14-43829-BDL ("BK Pleadings"), Dkt. No. 222, p. 19 (Bankr. W.D. Wash Oct. 9, 2015).)[4] In addition, Washington Federal lost the right to interest during the pendency of the bankruptcy action. See 11 U.S.C. 502(b)(2).

Grant then tried to prevent this appeal from moving forward; objecting to Washington Federal's motion to lift the stay. (BK Pleadings, Dkt. No. 248.) None of this would have been necessary had Washington Federal been a secured creditor in the bankruptcy. The ruling lifting the stay was entered on January 11, 2016; nearly five years after Washington Federal commenced this action. (CP 712.)

V. ARGUMENT AND AUTHORITY

A. Standard of Review.

Summary judgments are reviewed *de novo*. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). The interpretation of an unambiguous contract is a question of law and

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[4] The Court is permitted to take judicial notice of public documents "in proceedings engrafted, ancillary, or supplementary" to the action before it. *Avery v. Dep't of Social & Health Servs.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citing *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952). According to Grant, "Washington Federal was the creditor pursuing the aggressive collection which triggered the Debtors' bankruptcy cases." (BK Pleadings, Dkt. 192-1, p. 8.)

reviewed *de novo*. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006).

B. The Trial Court Erred When It Interpreted the Settlement Agreement to Entitle Washington Federal to Only $850,000.

1. Legal Standard for Interpretation of Agreement.

"The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

This Court can and should determine the intent of the parties by viewing the contract as a whole, including: (1) the subject matter and intent of the contract, (2) examination of the circumstances surrounding its formation, (3) subsequent acts and conduct of the parties, (4) the reasonableness of the respective interpretations advanced by the parties, (5) and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing. *Adler v. Manor*, 103 P.3d 773, 784, 103 P.3d 773 (2004).

However, "extrinsic evidence of a party's subjective, unilateral, or undisclosed intent regarding the meaning of a contract's terms is inadmissible." *RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 315, 358 P.3d 483 (2015) (citing *Hulbert v. Port of Everett*, 159 Wn. App.

389, 400, 245 P.3d 779 (2011).

2. The Parties Intended the Contract Amount to Be $1,000,000, Subject Only to Conditions That Never Occurred.

Damages for breach of contract "should place the plaintiff in the position he would be in if the contract had been fulfilled." *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949) (citing McCormick, Handbook on the Law of Damages §137 (1935)). An alternative method of calculating damages attempts "to put the injured party in as good a position as before the contract" (also known as "restitution damages"). *Dravo Corp. v. L. W. Moses Co.*, 6 Wn. App. 74, 90, 492 P.2d 1058 (1971).

The parties agreed to sign a series of additional documents to provide Washington Federal security on a $1,000,000 promissory note. If Grant secured the note and paid early, he was entitled to a discount of an amount dictated by how early he paid. Grant neither paid early nor provided security. Surprisingly, he still sought the discount.

Even more surprisingly, the trial court gave it to him, despite his bad faith refusal to honor the Settlement Agreement. Even though the trial court did not say so explicitly, an early payment discount is the only

conceivable source of the $850,000 judgment amount.[5] Use of the early payment discount to reduce Washington Federal's damages was reversible error.

Washington Federal was not made whole by entry of a discounted judgment; indeed, as set forth above, its unsecured status caused Washington Federal to be in a far worse position than if Grant had not breached. Washington Federal agreed to accept $1,000,000 (itself a significant discount on the amount owing), payable in five years, only in exchange for a secured debt that could be enforced expeditiously. By failing to provide such security and then going bankrupt, Grant saddled Washington Federal with a reduced unsecured debt; exactly what it bargained to avoid. This unsecured status caused Washington Federal real damage.

The cases cited by Grant below in support of the principal judgment reduction are materially distinguishable from these facts. Each of those cases addressed default solely of one obligation; the duty to pay money owed at a future time. See *Yarno v. Hedlund Box & Lumber Co.*, 129 Wn. 457, 477, 225 P. 659 (1924) (future profits under service

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[5] See Settlement Agreement, Sect. 1(e), referencing a 15% discount "if paid within 24 months". (CP 160.)

contract); *McFerran v. Heroux*, 44 Wn.2d 631, 269 P.2d 815 (1954) (future damages on an option contract); *Aetna Life Ins. Co. v. Geher*, 50 F.2d 657, 659-60 (9th Cir. 1931) (future amounts owed under insurance policy); *Rathke*, 33 Wn.2d at 879-80 (future profits under contract for the sale of goods).

In contrast, Grant had two primary obligations: to execute the Note and to secure it. When he failed to timely perform these obligations, and thereby unambiguously repudiated the Settlement Agreement, Washington Federal was entitled to suspend its own performance and to recover its contractual damages. $850,000 is an erroneous calculation of both expectation damages and restitution damages. Such a judgment does not restore Washington Federal to its position prior to breach or execution of either the Settlement Agreement or the loan documents.

Appellate courts are directed to "adopt the contract interpretation that best reflects the parties' reasonable expectations". *Forest Mktg. v. Dep't of Natural Res.*, 125 Wn. App. 126, 135, 104 P.3d 40 (2005) (citing *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980)). An unsecured judgment for $850,000 is not a reasonable measure of damages to Washington Federal as a matter of law.

The Settlement Agreement expressly provides that the intent of the

parties is that it "will be incorporated into a more detailed settlement agreement and release, promissory note, deed of trust and related documents[.]" (CP 160.) Washington courts favor amicable settlement of disputes and are inclined to view settlements with finality. *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978).

Grant reviewed the supporting documents referenced in the Settlement Agreement and sought only one clarification:

> Q. So your side of the table, you're ready to proceed? Two months later . . . you go to a mediation . . . . You sign the settlement agreement. And I want to go back to the more formal settlement terms. Did you receive a copy of these? Did you read the formal settlement agreement? I can see where you received a copy of it, but did you actually go through it and read it?
> A. Yes.
> Q. As you sit here today, do you recall objecting to any part of the formal settlement agreement?
> A. There were several things in there that I don't know when this one was done.
> Q. This particular one was done on or about August 20th, 2012.
> A. I think - there was one issue that I wanted to get clarified. So this - and that was the interest under settlement terms, first paragraph.
> Q. Okay.
> A. 1C. I just wanted to make sure that the 12 percent didn't start accruing from the date of the agreement versus at the end of five years.

(CP 507.)

Thus, because these documents expressly comprise part of the

parties' intent, and such documents were drafted and not objected to by Grant, these documents become especially useful in construing the Settlement Agreement to determine the intent of the parties on the damages issue.

The Note drafted following the Settlement Agreement (to which Grant had no substantive objection) included the following:

> 1. **PAYMENT**. This Note shall be due and payable by on or before sixty (60) months from the date hereof.
>
> 4. **PREPAYMENT DISCOUNT:** Maker may prepay part of the balance owed under this Note at any time without penalty. The amount due under the Note shall be discounted as follows if the discounted amount is paid in full within the time periods set forth below:
>
> If paid within 24 months of the date of this Note: 15%
> If paid within 36 months of the date of this Note: 10%
> If paid within 48 months of the date of this Note: 5%
>
> 6. **DUE ON SALE**. This Note is secured by a Deed of Trust and a Pledge of Membership Interest (the "Collateral") and the property described in such security instruments may not be sold or transferred without the Holder's consent. The breach of this provision shall constitute and [sic] an event of default, and Holder may declare all sums due under this Note immediately due and payable, unless prohibited by applicable law.
>
> 16. **DEFAULT.** Each of the following shall constitute an event of default under this Note: (a) Maker's failure to pay this Note when due; (b) Maker's failure to comply with or to perform any other term or obligation of Maker contained in this Note or contained in the deed of trust, the pledge or any

other agreement by which this Note is secured[.]

(CP 502-504, bold in original, underlineation added.)

The Court should construe the Settlement Agreement with the aid of those documents. The Note addresses acceleration in the event of default: "Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms: ... Interest shall accrue at 12% per annum in the event of default." (CP 488.) A "default" under the Settlement Agreement includes the failure to provide the promised collateral.

Essentially, Grant asks this Court to revise section 1(e) of the Settlement Agreement to read "The following discounts shall apply if the discounted amount is paid in full or if Grant decides in bad faith not to perform his obligations herein...". (CP 160.) The Court should decline to do so. The expectation of the parties was that Washington Federal would get $1,000,000, unless Grant paid early. Grant did not pay early.

Washington Federal would be in a far better position had the contract been fully performed. Grant agreed to sign a promissory note, providing for acceleration of the debt in the event of default. Grant's own actions and testimony show that this provision was intended by the parties. Washington Federal gave a discount of millions of dollars in exchange for

the security promised. Accordingly, the trial court properly awarded Washington Federal $1,000,000 for breach of the Settlement Agreement in its initial ruling and erred when it reconsidered that facet of its ruling.

C. The Trial Court Correctly Ruled That Washington Federal Is Entitled to Its Attorney Fees and Costs.

Attorney fees must be based on a contract, statute, or recognized ground in equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). RCW 4.84.330 provides that a contract containing an attorney fees provision entitles the prevailing party in an enforcement action to recover reasonable attorney fees and costs. *Lane v. Wahl*, 101 Wn. App. 878, 884, 6 P.3d 621 (2000).

The original Promissory Note provides:

> If the Lender seeks the services of an Attorney (whether Lender's employee or outside counsel) to enforce any provision of this Note, Deed of Trust, the Construction Loan Agreement or Land Loan Agreement (if any), or other promises of the Borrower as contained in the loan documents, the Lender shall be entitled to all of its attorney's fees and costs of enforcement[.]

(CP 323.)

The Deed of Trust provides:

> In the event the Loan Documents are referred to an attorney for enforcement of Lender's rights or remedies, whether or not suit is filed or any proceedings are commenced, Borrower shall pay all Lender's costs and expenses (including Trustee's

> fees, attorneys' fees and attorneys' fees for any appeal, bankruptcy proceeding or any other proceeding), accountants' fees, appraisal and inspection fees and cost of a title report.

(CP 330.)

The Settlement Agreement provides: "in any action to enforce the note, the prevailing party shall be entitled to recover its reasonable costs, including attorneys fees". (CP 160.)

Washington authority makes two consistent and unambiguous holdings in interpreting fee provisions. The first is that under RCW 4.84.330, "unilateral" attorney fee provisions are construed to be bilateral and entitle the prevailing party to an award of fees and costs in any dispute in which such a clause is alleged to apply. *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Dev., LLC*, 178 Wn. App. 207, 218-19, 314 P.3d 420 (2013); *Yuan v. Chow*, 96 Wn. App. 909, 916, 982 P.2d 647 (1999). The purpose behind this principle has been explained as designed to "prevent oppressive use of one-sided attorney's fees provisions". *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn. App. 188, 196, 692 P.2d 867 (1984).

Thus, courts seek to avoid a situation where one party has a "free ride"; a chance to recover attorney fees if they should prevail, but to successfully defend a motion for fees if they should lose.

Grant's counsel was aware of these cases when he claimed an entitlement to fees as a prevailing party in a letter prior to summary judgment:

> We are also mindful of the *First Citizens Bank & Trust v. Cornerstone Homes & Development* case, in which your client filed an amicus brief, and others like it. We will argue that the related-document doctrine applies in this case as well, thus precluding Washington Federal from recovering on the personal guarantees, (and entitling Mr. Grant to recover attorneys' fees as well).

(CP 386.)[6]

First-Citizens had facts directly analogous to how Grant viewed this case. A lender non-judicially foreclosed and sued the guarantors for a deficiency. *First-Citizens*, 178 Wn. App. at 218. The trial court granted summary judgment to the lender and awarded attorney fees based on the loan documents. *Id.* at 218. The appellate court reversed judgment in favor of the lender, finding that the loan documents were not enforceable against the guarantors. *Id.* Despite the non-applicability of the agreements to the case, the guarantors were awarded their fees. *Id.* at 219.

Grant was fully aware of the line of cases that would render the unilateral fee provisions to be bilateral. (CP 386.) And yet, after he did

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[6] Grant's Opening Brief ignores the position previously taken by Grant with respect to attorney fees for the prevailing party and cites no authority related to the bilaterality of attorney fee provisions. These omissions are both shocking and telling.

not prevail below, he challenged Washington Federal's right to attorney fees. To allow Grant to recover his fees if he had prevailed (as he clearly would have under *First-Citizens*), but deny fees to Washington Federal here, would be to blatantly violate the principle underlying RCW 4.84.330 and the cases interpreting it.

Grant may argue that he was claiming that he would prevail in an action on the underlying loan documents, but not in an action for breach of the Settlement Agreement. Such an argument would be factually inaccurate and legally irrelevant. Grant's counsel claimed an entitlement to fees in a letter dated January 6, 2014; over five months after the parties stipulated to the language of the Amended Complaint included with Washington Federal's Motion to Amend. (CP 386; CP 1366-1368.) Further, because Washington Federal requested attorney fees in the Amended Complaint, Grant would have been entitled to his fees if he successfully defended those claims as well, under the same rationale delineated above. Thus, a fee award to Washington Federal is similarly compelled by the principle of those cases.

Grant thus implicitly argues that the Settlement Agreement intrinsically vitiates the right of attorney fees to the prevailing party in the lawsuit simply because its fee provision references only "actions to

enforce the note". (CP 160.) Neither authority nor logic suggests that it should.

Grant's refusal to perform the Settlement Agreement resulted in additional litigation; both to enforce the Settlement Agreement itself and on the underlying Loan Documents. All of these actions took place "in an action in which it is alleged that a person is liable on a contract". RCW 4.84.330. This is sufficient to entitle Washington Federal to an award of fees and costs as the prevailing party.

Grant argues that he subjectively believed that the "attorneys'-fee provision" in the Settlement Agreement was to be narrowly applied only to payment defaults. (Opening Brief, p. 10, citing CP 211.) This is both implausible and irrelevant. The notion that Grant scrutinized the Settlement Agreement as the mediation was winding down to ensure that he could not be sued for his fees if he breached other provisions of the Settlement Agreement strains credulity and would constitute bad faith even if true.

More fundamentally, as detailed above, RCW 4.84.330 and cases interpreting it broaden the availability of fees beyond the terms of such fee provisions. And Grant's subjective understanding of what the provision means is inadmissible evidence of its meaning. *RSD AAP, LLC*, 190 Wn.

App. at 315.

The prevention of performance doctrine provides an additional basis to render improper a denial of Washington Federal's attorney fees, based on the language in the promissory note that Grant improperly refused to sign.

"A party to a contract cannot avail himself of nonperformance where the nonperformance is caused by his acts." *Pac. County v. Sherwood Pac., Inc.*, 17 Wn. App. 790, 567 P.2d 642 (1977) (citing *Wolk v. Bonthius*, 13 Wn.2d 217, 219, 124 P.2d 553 (1942)). "The purpose of the rule is to prevent a party from benefitting by its wrongful acts." *Wolk*, 13 Wn.2d at 219.

Here, the Settlement Agreement provides that in "any action to enforce the note, the prevailing party shall be entitled to recover its reasonable costs, including attorneys [*sic*] fees." (CP 160.) The Note, in turn, provides in pertinent part:

> This Note is secured by a Deed of Trust and a Pledge of Membership Interest (the 'Collateral') and the property described in such security instruments may not be sold or transferred without the Holder's consent. The breach of this provision shall constitute and [*sic*] an event of default and Holder may declare all sums due under this Note immediately due and payable, unless prohibited by applicable law.

(CP 358.)

The Note provides for "attorney fees and costs incurred collecting sums due . . . after default or maturity." (Id., emphasis added.)

Washington Federal amended its complaint to add a claim to recover $1,000,000, to enforce both the underlying Promissory Note and the Note that Grant refused to sign. But Grant never objected to the terms of either note. He should not now benefit from his failure to sign the latter (an undisputed breach of the Settlement Agreement) by claiming that he is not liable for attorney fees when such an award is clearly otherwise permitted.

Finally, Grant breached the Settlement Agreement. "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 725, 281 P.3d 693 (2012) (citing *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951)).

Even if the language of the Settlement Agreement's fee provision were written in such a way as to excuse Grant's duty to pay Washington Federal's fees for breaching a duty other than a duty to pay, Grant's breach of the Settlement Agreement vitiates any duty to so narrowly construe that provision. Thus, the various other bases for entitling Washington Federal

to attorney fees remain enforceable.

The second unambiguous holding of fee cases is that where fees are recoverable under RCW 4.84.330, an award of attorney fees is mandatory; the Court's only discretion is as to the amount. *Kofmehl v. Steelman*, 80 Wn. App. 279, 908 P.2d 391 (1996). Thus, it would have been reversible error to deny an award of fees below and it would be error to reverse the trial court's fee award on appeal.

The authority cited by Grant in his Opening Brief does not compel a different result. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 896 P.2d 1309 (1995), distinguished between claims "arising out of the contract" and "permissive counterclaims" for securities fraud. *C-C Bottlers*, 78 Wn. App. at 388. Here, all of the fees sought pertain to the claims for breach of contract with attorney fee provisions.

Hindquarter Corp. v. Property Development Corp., 95 Wn.2d 809, 631 P.2d 923 (1981), is similarly unavailing. The primary holding of *Hindquarter* is that a landlord is not obligated to renew a lease with a tenant in monetary default. *Hindquarter*, 95 Wn.2d at 814. Then, without citation to authority or further explanation, the Court stated that "the terms of the lease authorized attorney's fees only for **curing defaults**, and the award of fees should reflect only those services rendered toward that end".

Id. at 815 (emphasis added).

Washington Federal incurred all of the fees awarded in "curing defaults" by Grant. In addition to the defaults of the underlying loan documents, two distinct defaults of the Settlement Agreement formed the basis of the Amended Complaint and the fees incurred thereafter. *Hindquarter* does not compel a different result than reached by the trial court here.

Finally, Grant's reliance on *Belfor USA Grp., Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007), is also misplaced. This *en banc* decision reversed an award of attorney fees for successfully enforcing an arbitration clause. *Belfor*, 160 Wn.2d at 670. The Court then noted that "Belfor has not yet prevailed in collecting under the contract." *Id.* at 671. Thus, at the time of the award, it was not yet clear who had prevailed on the merits, because the issue for which fees were sought pertained only to the forum of the action. Here, in contrast, all of the fees were related to the merits.

The Court should affirm the trial court's award of fees and costs.

D. The Trial Court Did Not Abuse Its Discretion as to the Amount of Attorney Fees Awarded.

The trial court chose to segregate Washington Federal's fees by awarding fees and costs incurred after the execution of the Settlement

Agreement. Grant concedes that this Court reviews the amount of attorney fees awarded for abuse of discretion. (Opening Brief, p. 17; see *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013).)

Grant makes several arguments related to various aspects of the fees awarded. None should persuade this Court to rule that the trial court abused its discretion.

Grant posits that fees incurred prior to the amendment of the complaint cannot be awarded because "before July 18, 2013, there was no action to enforce the settlement term sheet". (Opening Brief, p. 28.) The sole support cited for this proposition is *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) ("*IAFF*"). In *IAFF*, the Court construed the fee provision in RCW 49.48.030 broadly to include fees for an arbitration proceeding. *IAFF*, 146 Wn.2d at 32.

Nothing in that case's holding or reasoning suggests that the trial court abused its discretion by awarding fees incurred both before and after the amended complaint **in the same lawsuit**; where one claim was successful as a matter of law and the other was abandoned as moot before its success was adjudicated. This is particularly true where the trial court did segregate the fees to not award fees incurred prior to execution of the Settlement Agreement.

Grant similarly posits that the trial court abused its discretion in awarding fees "unrelated to the claims on which the bank prevailed". (Opening Brief, p. 29.) This section of Grant's Opening Brief includes no citations to authority. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *Bale v. Allison*, 173 Wn. App. 435, 450, 274 P.3d 789 (2013).

The fallacy of Grant's position is that it seeks to cast the fees incurred prior to amendment as not "fee-authorized claims". *See Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 690-91, 82 P.3d 1199 (2004). But fees were authorized for this claim under the loan documents, and all arise under the same fact pattern. Where the trial court finds the claims to be so related that no reasonable segregation of "fee-authorized" and non "fee-authorized" claims can be made, there need be no segregation. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994). This is also true "where the claims all relate to the same fact pattern, but allege different bases for recovery". *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001).

There is no prescribed method of determining when claims are too closely related to segregate them; implicitly leaving this task inherent in

the trial court's discretion. A trial court is better situated to determine the interrelatedness of claims, as it has considered the totality of the positions taken by the parties. A reviewing court, by contrast, should not be compelled to consider the totality of the record to second-guess trial courts on this issue. To do so would needlessly impose undue burden on both courts.

The trial court awarded the fees and costs incurred after execution of the Settlement Agreement; both for the element of the claim on which Washington Federal prevailed as a matter of law and the alternate grounds on which Washington Federal did not lose, but chose not to further pursue. It had the discretion to award those fees and the Court should not disturb that discretion.

Finally, Grant objects that the trial court "simply signed the order awarding attorney's fees proposed by Washington Federal, without modification". (Opening Brief, p. 32.) Grant cites *Berryman, supra,* for the proposition that the trial court "must show how the court resolved disputed issues of fact". *Berryman*, 177 Wn. App. at 658. However, subsequent cases have clarified that a trial court's duty is not so onerous.

Rather, the trial court merely "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why

the trial court awarded the amount in question". *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

Though Grant undoubtedly would have preferred that the trial court acknowledge his unpersuasive arguments and greater detail will always educate a reviewing court more than will less, here the findings and conclusions entered by the trial court are sufficient.

Washington Federal presented the trial court with extensive evidence of Grant's vexatious litigation conduct throughout the proceedings. (CP 543-555.) Though not explicitly referenced in the trial court's findings and conclusions, appellate courts "presume that the [trial] court considered all evidence before it". *In re Parentage of Goude*, 152 Wn. App. 784, 791, 219 P.3d 717 (2009) (quoting *Kelly v. Hannan*, 85 Wn. App. 785, 793 934 P.2d 1218 (1997)). This Court should not disturb the trial court's fee award.

Even assuming that this Court finds the detail insufficient, the remedy is not to deny those fees. Rather, "the preferred remedy is to remand to the trial court for entry of proper findings and conclusions". *See Berryman*, 177 Wn. App. at 659. There is every reason to think that the trial court would simply explicitly incorporate all of the facts cited by Washington Federal in its motion and reach the same result. This

additional labor is unnecessary given the facts and equities.

The Court should affirm the award of fees in full. If the Court finds the findings lacking, then it should remand to the trial court to enter new findings to support the previously awarded amounts.

E. The Trial Court Correctly Awarded Prejudgment Interest.

Prejudgment interest is awarded when a party to the litigation retains funds rightfully belonging to another; namely, when the amount at issue can be calculated with precision and without reliance on opinion or discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (citing RCW 4.56.110 and RCW 19.52.020). The touchstone for an award of prejudgment interest is that a party must have the "use value" of the money when it was properly attributable to the plaintiff, but in the defendant's possession. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 552, 114 P.3d 1182 (2005); *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1968). In effect, it compels a party who wrongfully holds money to disgorge the benefit thereof. *Hansen*, 107 Wn.2d at 473.

Prejudgment interest is awarded for "default in paying money when due, or delay in making compensation for breach of contract or breach of some other obligation." *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968) (citing McCormick, Handbook on the Law of

Damages §54 (1935)). Accordingly, prejudgment interest is computed from the date of the default or breach. *Id.* (emphasis added).

The Settlement Agreement states that "while the parties contemplate that these terms will be incorporated into a more detailed settlement agreement and release, promissory note, deed of trust and related documents, it is understood and agreed that this document is itself a binding and enforceable agreement." (CP 161.)

Three weeks after execution of the Settlement Agreement, Grant was in possession of draft documents that would have fulfilled his obligations. Grant delayed for months before unambiguously repudiating the Settlement Agreement on February 11, 2013 (a verity on appeal). Grant's repudiation constituted a "total breach" of the Agreement, and thus all damages became due as of that date. *Walker v. Herke*, 20 Wn.2d 239, 253, 147 P.2d 255 (1944); *McFerran v. Heroux*, 44 Wn.2d at 640; *W.O.M., Ltd. v. Willys-Overland Motors, Inc.*, No. L-05-1201, LEXIS 6907, at *23 (Ohio Ct. App. Dec. 29, 2006).

W.O.M., Ltd. is directly on point. There, the parties mediated and reached a settlement agreement. *Id.* The mediator outlined the agreement as follows: "Item one in this document was 'purchase price $ 187,500 [*sic*] 10% down;' item two: 'term 5 years;' item 3: 'interest 9 ½% fixed;' item

four: 'security agreement OK (by [. . . appellee's president].'" A few weeks after entering into such settlement, the appellants revealed that they "had no intention of going forward with the settlement agreement." *Id.* at *30. Based on this representation, the trial court ruled on summary judgment that the appellants anticipatorily breached the settlement agreement and awarded prejudgment interest. *Id.*

On appeal, appellants alleged the trial court erred in awarding prejudgment interest because under the settlement agreement, no money was yet due to appellee. *Id.* at *52.

The court began by explaining the initial consequences of the anticipatory repudiation: "When an anticipatory breach of a contract has occurred, the nonbreaching party may resort to any remedy available for the breach. The option belongs to the aggrieved party. The breaching party has no say." *Id.* at *34.

In affirming the award of prejudgment interest on the total amount due, the court went on to explain:

> Here, there was an intention to exchange money for something of value. Thus, with a breach of the agreement, the nonbreaching party was deprived of something of value and the dollar amount of that value was ascertainable. The purpose of prejudgment interest is to make the aggrieved party whole. At the moment the cause of action accrued, the injured party was entitled to be left whole and become entitled

to be made whole . . . .

> When appellants repudiated the settlement agreement . . . appellee was denied the benefit of his bargain. Thus, to be made whole, he was entitled to statutory interest on the value of the loss incurred from the loss of that benefit. This is what the trial court awarded. We find no error in this action.

Id. at *56-57.

Like in *W.O.M. Ltd.*, shortly after mediation, Grant repudiated the Settlement Agreement by failing to provide security and by refusing to sign the Note (which provides for acceleration of payments upon breach). By this repudiation, Washington Federal lost the benefit of its bargain; the right to $1,000,000 and to the security for such payment. Prejudgment interest is properly awarded for "default in paying money when due, or delay in making compensation for breach of contract or breach of some other obligation." *See Prier*, 74 Wn.2d at 34.

The amount due is liquidated. A claim is liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Prier*, 74 Wn.2d at 32 (internal citations omitted). "Doubtless all courts would agree that a specific sum or money named in and covenanted to be paid by an express contract, where the liability to pay the principal sum is undisputed, is a 'liquidated' sum." *Id.* at 32-33. It follows that "'the

existence of a dispute over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated sum . . . .'" *Id.* at 33.

Grant again glosses over the fact that the failure to provide security was a material breach of the Settlement Agreement. As set forth above, the early payment discount does not reduce the amount due in the event of breach; it follows that the $1,000,000 is a liquidated sum certain following such breach.

Grant's arguments reek of bad faith. This bad faith was not lost on the trial court when it awarded prejudgment interest (as well as all of the attorney fees occasioned by Grant's vexatious litigation conduct). This Court should affirm the award of prejudgment interest; and do so on the full $1,000,000 due upon anticipatory repudiation.

F. This Court Should Award Washington Federal Its Fees and Costs Incurred on Appeal.

"Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court." *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9. P.3d 898 (2000); *see also Richter v. Trimberger*, 50 Wn. App. 780, 786, 750 P.2d 1279 (1988) (applying same principle to action seeking fees under RCW 4.84.330).

Upon affirmance of the trial court's decision, and reversal on the narrow issue that is the subject of this cross-appeal, the Court should award Washington Federal its attorney fees and costs incurred on appeal, subject to its compliance with RAP 18.1.

VI. CONCLUSION

Grant breached his contractual obligations with impunity. The trial court correctly awarded prejudgment interest and attorney fees incurred after execution of the Settlement Agreement. However, the trial court erroneously gave Grant the benefit of a "prepayment discount" in the Settlement Agreement; conflating prepayment with a fallacious argument based on the time value of money.

Under the Settlement Agreement as fairly construed, the entirety of the $1,000,000 became due when Grant breached. As such, this Court should reverse the trial court and remand with instructions to enter judgment in that principal amount, along with the corollary increase in prejudgment interest and the fees and costs incurred on appeal.

The trial court should be affirmed in all other respects. Grant has engaged in bath faith throughout this litigation process and deserves no accommodation from this Court.

RESPECTFULLY SUBMITTED this 5th day of May, 2016.

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

ALGO, INC., a Washington, corporation, and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community, Defendants/Appellants, vs. WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff/Cross-Appellant.	NO.72114-3-I DECLARATION OF SERVICE

I, Jodi Graham, declare as follows:

1. I am not a party to the above-captioned action and am over the age of 18.

2. I am competent to testify to the matters herein and do so based upon my personal knowledge.

3. I caused the following documents to be filed with the Court of Appeals and served on Miles Yanick on May 5, 2016

A. Opening Brief of Cross-Appellant; and

Nold ♦ Muchinsky PLLC
Bellevue Place, Suite 930
10500 NE 8th Street
Bellevue, WA 98004
425.289.5555 FAX 425.289.6666

B. Declaration of Service.

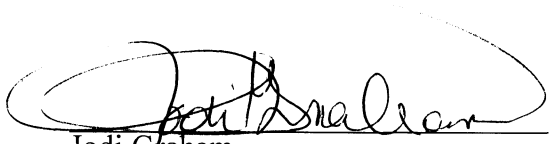
4. The above documents were served on the following via E-Mail:

Court of Appeals
Division I
600 University Street
Seattle, WA 98101

Miles A. Yanick
Savitt Bruce & Willey LLP
1425 Fourth Avenue, Ste. 800
Seattle, WA 98101
myanick@sbwllp.com

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

DATED this 5th day of May, 2016 Bellevue, Washington.



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