

No. 65251-6-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NORCON BUILDERS, LLC, a Washington limited liability company,

Plaintiff,

vs.

LIBERTY CAPITAL STARPOINT EQUITY FUND,
Defendant/*Respondent*; GMP Homes VG, LLC, et al., Defendants,

and

RYAN K. JOSWICK and STEPHANIE C. JOSWICK, husband and wife,
et al.,

Third-Party Plaintiffs/*Appellants*,

vs.

NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation,

Third-Party Defendant.

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Julie Spector)

APPELLANTS' OPENING BRIEF

John T. Ludlow,
WSBA No. 7377
Timothy J. Graham,
WSBA No. 26041
HANSON BAKER LUDLOW DRUMHELLER, P.S.
2229 – 112th Avenue NE, Suite 200
Bellevue, WA 98004-2936
Telephone: (425) 454-3374
Facsimile: (425) 454-0087

Michael B. King,
WSBA No. 14405
Elizabeth K. Maurer,
WSBA No. 21973
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Appellants

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ASSIGNMENTS OF ERROR

John M. O'Connor, Erich and Erin Naumann, Ryan and Stephanie Joswick, Stephen Oppenheim, and Laura Klebs, the third-party plaintiffs in the underlying foreclosure and injunctive relief action and the appellants in this proceeding (collectively "the Unit Owners"), make the following assignments of error:

1. The trial court erred in dismissing the Unit Owners' claim to quiet title and in authorizing non-judicial foreclosure of the Unit Owners' condominium units. *See* CP 1861 to 1866 (Final Order Dissolving Injunction, Authorizing Non-Judicial Foreclosure and Dismissing Claims (a copy of the order is attached as App. A)).

2. The trial court erred in declaring that Liberty Capital held a first position deed of trust against the title to the Unit Owners' property. *See* CP 2676 to 2677 (Order Denying Applicants' Motion for Order Amending Findings of Fact and Conclusions of Law and Declaring that Liberty Capital's Deed of Trust is Subordinate to Deeds of Trust the Applicants Granted to Their Lenders (a copy of the order is attached as App. B)).

3. The trial court erred in entering the following findings of fact and conclusions of law:

¶15 – Finding the unpaid balance of Liberty’s loan to GMP as of January 8, 2010;

¶21 – Finding Liberty Capital insisted on reviewing and approving the financial terms of each sale giving rise to a particular reconveyance request;

¶22 – Finding that First American acted as the Unit Owners’ agent;

¶24 – Finding that First American acted as an agent for the Unit Owners when Liberty Capital and First American established a repetitive course of dealing for written confirmation of Liberty Capital’s approval of the transaction;

¶25 – Finding that Liberty Capital “insisted” on receiving a “zero payoff” e-mail request for partial reconveyance and signing off on each unit sale to release the deed of trust for recording and referencing Ex. 224 to suggest Liberty Capital had to sign every HUD statement as part of the closing process;

¶34 – Finding that “First American’s insistence on separate written approvals for each unit closing contradicts any assertion that First American believed that it had some kind of omnibus agreement by Liberty [Capital] to release its deed of trust on multiple units”;

¶39 – Finding that Liberty Capital suffered prejudice from not having the opportunity to approve the Unit Owners’ individual sales; that had Liberty Capital “received earlier notice of the higher number of units being sold (and the consequent reduction in its loan collateral)” it could have demanded additional collateral that was available “as late as January 2008”;

¶40 – Finding that Liberty Capital was deprived of the opportunity to make “such changes” as rejecting the sale of the Unit Owners’ units;

¶44 – Finding that Liberty Capital was “prejudiced in several ways” by not having the opportunity to review the Unit Owners’ settlement statements before closing;

¶46 – Finding that even if Liberty Capital had discerned the four sales that had closed without its express consent in August 2007, “there was little that Liberty Capital could have done about it”;

¶47 – Finding that Liberty Capital never promised to give a written reconveyance to First American or the Unit Owners;

¶48 – Finding that First American, acting as the Unit Owners’ agent, never asked Liberty Capital to reconvey its deed of trust against the Unit Owners’ units;

¶61 – Finding that but for the delayed foreclosure Liberty Capital’s loan to GMP would have been paid in full in June 2009 and First American, in its capacity as insurer, would have been responsible for the Norcon lien and the Frontier loan, and repeating the damages finding recited in ¶15;

¶III.A.2 – Concluding First American acted as the Unit Owners’ agent and implying that agency excluded all the other parties to the escrow, including Liberty Capital;

¶III.A.3. – Concluding First American and the Unit Owners were charged with knowledge that Liberty Capital had not approved reconveyance of its deed of trust at the times their sales closed;

¶III.B. – Concluding that evidence of the Unit Owners’ title insurance is “directly relevant” to the conduct of “its insurer”;

¶III.C.10 – Concluding the Unit Owners’ estoppel argument is governed by *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1969);

¶III.C.12 – Concluding the Unit Owners failed to prove “any agreement” under which Liberty Capital promised to reconvey its deed of trust on the Unit Owners’ units;

¶III.C.15 – Concluding the preliminary injunction was not properly supported and that Liberty Capital is entitled to present its resulting damages in a CR 65.1 proceeding.

See CP 1837 to 1860 (Findings of Fact and Conclusions of Law (a copy of which is attached as App. C)).

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. The Unit Owners' Equitable Right to Have Title to Their Condominium Units Quieted In Them. Where Respondent Liberty Capital (1) established a course of conduct of written consent to the sale of condominium units, under which Liberty received no proceeds in exchange for agreeing to a partial reconveyance of its deed of trust, and adhered to that course of conduct for sixty-two condominiums sold between July and November 2007, (2) received multiple actual notices that the sale of the Unit Owners' units had in fact closed during this same period in 2007, and (3) received and retained the benefit of the Unit Owners' aggregate reduction of Frontier's senior encumbrance by over \$1.2 million dollars, did the trial court err by not extinguishing the deed of trust held by Liberty Capital and quieting title in the Unit Owners based on equitable principles of estoppel and unjust enrichment? *See* Findings of Fact ¶¶ 15, 21-22, 24-25, 34, 39-40, 44, 46-48, 61; Conclusions of Law ¶¶ III.A.2-3, III.B, III.C.10, III.C.12, & III.C.15.

2. Equitable Subrogation of the Unit Owners' Lenders. Where the Unit Owners' lenders' loan proceeds were paid to Frontier, the lender ahead of Liberty Capital, did the trial court err when it determined that Liberty Capital's junior deed of trust should be elevated to a first position? *See* Findings of Fact ¶¶ 15, 40, 44, 46, 61; Conclusions of Law ¶¶ III.A.3, III.B, & III.C.15.

I. SUMMARY INTRODUCTION

Against the backdrop of the collapsing local real estate market, this case calls upon the Court to balance the equities between five innocent condominium unit owners and a hard-money lender whose security is a subordinate deed of trust, and determine who should bear the risk of losing title to or the security interest in real property arising from technical processing errors by a non-party escrow agent in the closing of the purchases of condominium units sold during the development of a condominium project.

The five third-party plaintiffs and appellants, John M. O'Connor, Erich and Erin Naumann, Ryan and Stephanie Joswick, Stephen Oppenheim, and Laura Klebs, (the "Unit Owners"),¹ purchased condominium units at the Starpoint complex in Issaquah Highlands between July and November 2007. Norcon Builders, LLC ("Norcon") built Starpoint for developer GMP Homes VG, LLC ("GMP"). GMP borrowed \$26 million to fund the construction of the project from Frontier Bank ("Frontier"). GMP also borrowed funds from hard-money and

¹ At the trial court level, the Unit Owners were referred to as "the Applicants" or the "homeowners" or "the homeowner Applicants" because they entered this lawsuit when they applied for a temporary restraining order to block a foreclosure of their homes in June 2009.

“equity based” lender and respondent Liberty Capital,² whose loan was secured by a deed of trust subordinate to Frontier’s.

Liberty Capital understood from the outset that it would not receive any of the proceeds from the Starpoint condominium sales until Frontier’s deed of trust had been satisfied in full. Liberty Capital agreed that, in each of the sales it reviewed and approved, it would receive no monetary payoff from the condominium buyers in exchange for agreeing to reconvey its subordinated deed of trust against their units. Sales of the units advanced Liberty Capital’s interests by reducing GMP’s debt to Frontier, and thereby increasing the likelihood that Liberty Capital would eventually receive a stream of payments that would repay Liberty Capital the monies it had loaned to GMP. Liberty Capital therefore had every interest in facilitating the closing of sales of Starpoint units as quickly as possible, in order to accelerate the pay down of GMP’s obligations to Frontier.

² “Liberty Capital” collectively refers to three related entities: 1) respondent Liberty Capital Starpoint Equity Fund LLC, the original lender to condominium developer and defendant GMP, the original party to the first settlement agreement with Norcon, and a party to the second settlement agreement with Norcon; 2) respondent Liberty Capital Bridge LLC, the assignee of rights to defendant GMP’s loan and a party to the second settlement with Norcon; and 3) affiliate Liberty Capital REO Management LLC, a party to the second settlement agreement with Norcon and the assignee of all rights under Norcon’s mechanic’s lien claim and default judgment. See Trial Exs. 94, 114, 115, 206 & 236. Neither Norcon nor GMP are parties to this appeal.

The Starpoint condominium units did not sell as quickly as GMP and Liberty Capital had hoped they would in the Summer of 2007. Because of slow sales and declining values, GMP was unable to pay its builder Norcon when construction was completed in October 2007. Norcon filed a mechanic's lien against the Starpoint project in November 2007, which lien demoted Liberty Capital's deed of trust to a subordinated third-lien position behind both Frontier and Norcon. Although Starpoint condominium sales continued through July 2008, the sale proceeds were insufficient to pay off Frontier and Norcon. In July 2008, Norcon filed this lawsuit to foreclose its mechanic's lien. The court entered a default judgment in Norcon's favor in September 2008. In October 2008, GMP filed for bankruptcy and Liberty Capital started foreclosure proceedings against the ten residential units owned by GMP which it had been unable to sell before filing for bankruptcy.

That same month, Liberty Capital acknowledged its belated discovery of a technical error in five of the sixty-seven residential condominium closings that occurred in 2007, involving the purchases made by the Unit Owners. Non-party escrow agent First American Title

Insurance Company (“First American”)³ had apparently failed to obtain written confirmations of Liberty Capital having adhered to its established course of conduct of reviewing the draft settlement statement and accepting a zero payoff to authorize the partial reconveyance of Liberty Capital’s deed of trust. Seizing on this discrepancy, Liberty Capital added the five Unit Owners’ units to its foreclosure notice in December 2008. The Unit Owners in turn obtained a temporary restraining order and then a preliminary injunction blocking Liberty Capital’s trustee’s sale of their units in June 2009.⁴ The Unit Owners amended their action in August 2009 to include an equitable claim against Liberty Capital to extinguish Liberty Capital’s deed of trust and to quiet title.

After a six-day bench trial in January 2010, the trial court dissolved the preliminary injunction, dismissed the Unit Owners’ quiet title action with prejudice, denied the Unit Owners’ motion to subordinate Liberty Capital’s deed of trust to the deed of trust which each of them had granted to their respective lenders, and authorized Liberty Capital to

³ As used in this brief, the abbreviated “First American” refers only to First American Title Insurance Company acting in its capacity as the escrow agent for the Starpoint Condominium transactions.

⁴ Third-party defendant Northwest Trustee Services, Inc. is the trustee of Liberty Capital’s deed of trust.

proceed to foreclose against the five Unit Owners. This timely expedited appeal followed.

The Unit Owners now seek reversal of the trial court's decisions to uphold Liberty Capital's deed of trust and to subordinate their respective lenders' deeds of trust to that of Liberty Capital, and to allow Liberty to foreclose on their units while permitting it to retain 100 percent of the beneficial interest in the \$1.2 million reduction in Frontier's loan balance which resulted from the five Unit Owners' original purchases. This Court should grant the Unit Owners' requested relief for the following reasons:

- First, Liberty Capital should have been equitably estopped from enforcing its deed of trust against the Unit Owners' title, and title should instead have been quieted in the Unit owners.

To begin, Liberty Capital's present claim to an existing deed of trust against the title of these units is completely inconsistent with its course of conduct at the time the Unit Owners purchased their units. Liberty acquiesced in First American's approach to closing unit sales – a “fast track,” “e-mail only” process, with inherently greater risk of transmittal and documentary errors than the strict “sign on the dotted line” approach to which First American would ultimately switch for the last 15 Starpoint unit sales. Liberty agreed to the fast track approach because Liberty was not going to realize any sales proceeds until Frontier's loan

was paid off, after which Liberty would begin to see its own loan begin to be paid back. Liberty then failed to exercise any due diligence by failing to monitor a stream of reports that expressly declared that the Unit Owners' five units had in fact been sold, the sales had closed, and the sales proceeds paid to Frontier.

Had Liberty exercised due diligence in monitoring sales and closing reports, it would have readily discovered the documentary transmittal lapses relating to the Unit Owners' purchases of their units. Yet at trial, *Liberty admitted that it could not say it would have withheld consent to these sales, had the closing documents been available for its review prior to those closings.* And with good reason. For the purchase prices paid by the Unit Owners and the percentages disbursed to Frontier were well within the sales prices and distribution percentages approved by Liberty, and Liberty never withheld its consent to a sale so long as the price was within that range. Liberty's present claim against the title of these units thus is wholly inconsistent with its course of conduct regarding the sixty two units that in fact closed and for which Liberty's deed of trust was reconveyed.

Moreover, the Unit Owners justifiably relied on the closing process followed by First American, and acquiesced in by Liberty. The Unit Owners did everything expected of them: (1) they arranged for funding to

pay the purchase price; and (2) they executed all documents required of them at closing. They would not have purchased their units had they known that Liberty had positioned itself so that it could take advantage of a technical failure to transmit closing documents, and claim the right to a paramount deed of trust after accepting the benefit of those purchases' contribution to the paydown of the Frontier loan.

Finally, the Unit Owners have been injured by Liberty Capital's inconsistent conduct. The Unit Owners have been deprived of clear title in their units, and their lenders have been deprived of a first deed of trust as security that they should have received in those units. In sum, the trial court should have estopped Liberty from claiming the existence of Liberty's deed of trust, Liberty's claim should have been dismissed with prejudice, its claimed deed of trust extinguished, and title instead should have been quieted in the Unit Owners.

- Second, the Unit Owners should have received the benefit of a constructive trust, in order to prevent Liberty Capital from reaping the benefits of an unjust enrichment. The present action is a proceeding in equity, and the Chancellor in equity will take whatever action is necessary to prevent an unjust enrichment. Here, Liberty first accepted the benefits of the Unit Owners' paydown of Frontier's loan to the tune of some \$1,200,000 and now seeks to deprive the Unit Owners of title to their units

by foreclosing against units that Liberty itself values at over \$1,300,000. Having accepted the benefit of the proceeds derived from the Unit Owners' purchase of their units, Liberty should not be allowed to enrich itself by the value of the units themselves. The trial court should have imposed a constructive trust, under which (again) Liberty's deed of trust should have been extinguished and title quieted in the Unit Owners.

- Third (and alternatively), the Unit Owners and their Lenders should have been equitably subrogated to the extent of their payments reducing Frontier's loan, in order to prevent a \$1,200,000 unjust windfall to Liberty. Under this approach, title would be quieted in the Unit Owners and Liberty's deed of trust would be subordinated to that of the Unit Owners' lenders, to the extent of the paydown of Frontier's loan.

This is an equitable proceeding, and the trial court manifestly failed to do equity. The resulting injustice should be undone by this Court.

II. STATEMENT OF THE CASE

A. Facts.

1. Development and Financing of Starpoint Condominiums Establishes Frontier as the Senior Lien Holder.

GMP developed the Starpoint Condominium complex in the Issaquah Highlands in 2006 and 2007. CP 1839, 1838. Ninety-two residential units and six commercial units stretching across two parcels of

land comprise the Starpoint complex. RP: Trial 1/13/10 at 72:35; CP 1839. The prime contractor was Norcon. Trial Exs. 85-87. The primary construction lender was Frontier. Trial Ex. 90. Over the course of the project, Frontier loaned GMP over \$26 million dollars secured by a recorded first deed of trust on Starpoint.⁵ Trial Exs. 90, 105 & 106. Frontier's loan agreement with GMP did not contain any partial reconveyance provision that would have required Frontier to release its interest in any Starpoint unit before Frontier was fully paid. Trial Ex. 90.

After construction of Starpoint had begun and before the Unit Owners purchased their units, Liberty Capital loaned GMP \$1.5 million dollars over a series of transactions from July 2006 through November 2006, all secured by a recorded deed of trust subordinate to Frontier's.⁶ After the five Unit Owners' sales had closed, Liberty Capital loaned GMP an additional \$400,000 also secured by its subordinate deed of trust. Trial

⁵ Frontier loaned GMP 20 million dollars in September 2005, another 5.5 million dollars in June 2006, and an additional \$977,000 in March 2007. The loans were secured by an original deed of trust on Starpoint and modifications of the deed of trust, all of which were recorded. Trial Exs. 90, 105, and 106.

⁶ Liberty Capital loaned GMP \$500,000 in June 2006, \$500,000 in July 2006, and \$500,000 in November 2006. Exs. 205, 208, 214. These loans were secured by a deed of trust on Starpoint. Exs. 203, 209, 212. Liberty Capital charged GMP 1 percent monthly interest with a final additional "exit fee" amounting to 20 percent of the total loan amount. Trial Ex. 205. The default interest rate was 18 percent. *Id.*

Ex. 5. Liberty Capital understood at all times that Frontier's deed of trust took priority. Trial Ex. 206.⁷

2. Liberty Capital's Participation in the Sales of Starpoint Condominium Units in 2007 Reflected a Consistent Course of Conduct to Support Sales That Paid Down Frontier's Deed of Trust, Resulted in Liberty Receiving None of the Sales Proceeds, and Required Liberty to Accept Zero Consideration in Exchange for a Request for Partial Reconveyance of Its Deed of Trust. The Only Exception: If the Projected Sales Price Fell Below a Level Minimally Acceptable to Liberty.

GMP selected First American to provide escrow services for all Starpoint sales. RP: Trial 1/14/10 at 92:11-93:4. The first sale, unit N-413, closed on July 30, 2007. Trial Ex. 41 at FA 21. Consistent with the understanding of GMP, First American, Frontier, and Liberty Capital, 100 percent of the net proceeds went to Frontier—around 90 percent of the unit sale price. *Id.* Without prompting by First American or its post-closing services affiliate Northwest Post Closing Center, Frontier issued a

⁷ Liberty Capital's loan agreement with GMP required GMP to pay Liberty Capital back in full by July 12, 2007, the first anniversary of the loan disbursement date. Trial Ex. 206. The Liberty Capital-GMP loan agreement provided that, if GMP was not in default, and the obligation in favor of Frontier was being reduced at a rate sufficient to amortize that indebtedness over the course of the first 75 unit closings, Liberty would release its lien against those units without the right to review and approve the financial terms of those closings. *Id.* If GMP were in default, Liberty Capital would then have the right to condition its release for each unit based upon its review and approval of those terms. *Id.* As the Unit Owners will demonstrate, even assuming GMP was in default by the time of the sales and closings of the units at issue here, Liberty was prepared to give its approval so long as the price paid would adequately contribute to paying down the debt owed by GMP to Frontier.

request for partial reconveyance of its deed of trust in unit N-413 and also included the unit in a bulk partial reconveyance dated September 27, 2007. RP: Trial 1/21/10 at 86:6-10; *e.g.*, Ex. 30 at FA 191.

Liberty Capital reviewed the financial terms of the unit sales transactions “to see what percentage of net proceeds were being distributed . . . how they were being distributed,” how the sale price compared to the list price, “and to see how much equity was left in the project to make sure that we get our loan repaid.” RP: Trial - 1/13/10 at 145:21-46:1. Liberty Capital received no monetary proceeds from the sale of unit N-413. Trial Ex. 41 at FA 21. Before the closing, First American sent Liberty Capital the draft HUD-1 settlement statement⁸ and requested and received email confirmation from Liberty Capital that Liberty Capital was “collecting 0.00 for this payoff.” Trial Ex. 41 at LC 934. During this email exchange, Liberty Capital’s representative, David Dammarell, invited First American’s closer, Brianna Warthan, to “[p]lease let me know if this is what you need or something more formalized. Thanks.”

⁸ The HUD-1 (U.S. Department of Housing and Urban Development Settlement Statement) lists the sales price and itemizes all charges imposed upon a borrower and seller for a real estate transaction and lists each party’s incoming and outgoing funds. The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2603 and 24 CFR § 3500.8 requires closing agents to use a HUD-1 settlement statement in all transactions in the United States that involve federally regulated mortgage loans.

Trial Exs. 41 at LC 948 & 223 at 1. Ms. Warthan replied, “This is fine, thank you!” *Id.*

As Mr. Dammarell testified, this procedure “was fine with us [i.e., Liberty Capital], because from our perspective it needed to be more formalized later, but if they didn’t want to do it, you know, it was less risky for us, if that makes sense.” RP: Trial 1/13/10 at 152:17-20. While Liberty Capital would not “go back on our word” “when we gave a zero payoff,” from Liberty Capital’s perspective, this consent to the closing and to zero monetary disbursements to Liberty Capital did not mean Liberty Capital agreed to partially reconvey its deed of trust; Liberty Capital contended at trial that it was still First American’s “responsibility to send us a partial reconveyance request.” RP: Trial, 1/14/10 at 44. But at no time during this first closing on unit N-413, which Liberty Capital reviewed and approved, or during any of the sixty-one following Starpoint sales transactions which Liberty Capital in fact had reviewed and approved in 2007, did Liberty Capital ever share its new-found “perspective” with First American on this point, or volunteer to First American the reconveyance terms of its GMP loan agreement or Liberty Capital’s interpretation of those terms. CP 1841.⁹

⁹ Liberty Capital also did not sign a request for partial reconveyance of its deed of trust as to unit N-413 until nearly two years later in August 2009. Trial Ex. 130.

This closing pattern repeated itself sixty-one more times in 2007 -- during the next twenty-one residential transactions from July 31, 2007 through August 13, 2007, during the three residential transactions on August 17, 2007, during the thirteen residential transactions from August 24, 2007 through September 14, 2007,¹⁰ and during twenty-four residential transactions from September 17, 2007 through November 16, 2007. Exhibits. Trial Exs. 1-82, 168.¹¹ In each of the sixty-one transactions, Frontier received at least 85 percent of the gross sale proceeds from the units¹²; Frontier on its own initiative then signed a request for partial reconveyance of its deed of trust in the respective condominium unit and included the unit as well in a bulk partial reconveyance¹³; Liberty Capital reviewed the HUD settlement statement and confirmed by email to First American that it would accept a zero dollar payoff¹⁴; First American relied on Liberty Capital to ultimately sign a request for partial reconveyance of

¹⁰ Among these thirteen transactions for which the pattern holds true was Mr. Dammarell and his wife's purchase of unit N-302. Mr. Dammarell later resold his unit *before* Liberty Capital had partially reconveyed its lien against it. RP: Trial – 1/13/10 at 35-36.

¹¹ For the sake of simplifying the calculations, the six commercial units coded as "SC" and sold in two closings of three units each are not included in the sixty-seven single unit transactions described above.

¹² See Appendix D, Chart of Sales Prices & Closing Disbursements, comprised of information from Trial Exs. 1-82 & 168.

¹³ RP: Trial 1/21/10 at 86:640; *e.g.*, Exs. 7 & 53; Exhibits 11, 14, 16-25, 28, 30-42, 46-52, 54, 57-62, 64-65, 68-74, 79, 81-82.

¹⁴ Exhibits 1-6, 8-9, 11-12, 14-21, 23-24, 26-30, 32-48, 51, 53-58, 60, 62, 64-67, 69, 71-80, 82.

its deed of trust at some time after the closing, RP: Trial 1/21/10 at 110:19-22; and in point of fact, Liberty Capital did not sign a request for partial reconveyance of its deed of trust in the respective units until nearly two years later, in August, 2009. RP: Trial – 1/14/10 at 52, Ex. 130.

3. The Unit Owners' Purchase of Starpoint Condominium Units Substantially Benefitted Liberty Capital by Paying Down Frontier's Deed of Trust at Percentages Consistent With Purchases Liberty Capital Approved Pre-Closing. At Trial, Liberty Capital's Principal Representative *Could Not Say That Liberty Would Have Refused to Consent to Any of the Sales to Any of the Unit Owners, Had Liberty Been Able To Review the Closing Documents Prior to Closing Of Those Transactions.*

Unit Owners O'Connor, Nauman, Joswick, Oppenheim, and Klebs closed the twenty-sixth, twenty-seventh, twenty-eighth, thirty-second, and forty-sixth Starpoint transactions respectively on August 15, 2007, August 23, 2007, and September 14, 2007. Ex. 168. From O'Connor Frontier received a payoff of \$319,504.11, about 90% of the sale price. Trial Ex. 31, Appendix D. From the Naumanns Frontier received a payoff of \$239,172.35, about 87% of the sale price. Trial Ex. 10, Appendix D. From the Joswicks Frontier received a payoff of \$229,270.20, about 89% of the sale price. Trial Ex. 7, Appendix D. From Oppenheim Frontier received a payoff of \$185,606.88, about 90% of the sale price. See Trial Ex. 13, Appendix D. From Klebs Frontier received a payoff of

\$227,993.17, about 88% of the sale price. Trial Ex. 40, Appendix D. Frontier signed requests for partial reconveyance of its deed of trust for all five units. Exs. 105 and 106. In the aggregate, from the sales of the Unit Owners' five units, Liberty Capital obtained the benefit of Frontier's debt reduction by over \$1.2 million dollars.¹⁵

Liberty Capital did not review the HUD settlement statements for these five transactions before they closed because Liberty Capital did not receive them from First American. RP: Trial— 1/13/10 at 29. First American did not effect the transmittal of its established e-mail inquiry regarding zero payoff to Liberty Capital, and First American therefore did not receive email confirmation from Liberty Capital of the zero payoff for these five transactions. RP: Trial 1/13/10 at 43-46. At trial, Liberty's Mr. Dammarell had the opportunity to review three of the five settlement statements. RP: Trial – 1/25/10 at 176-180, 209. He testified that he would have opposed a \$13,445.00 payment to GMP in the Naumann transaction, a \$12,895.00 payment to another GMP entity in the Joswick transaction, and \$750.00 of alleged First American commission shortages from other sales that were added to the Oppenheim transaction. RP: Trial – 1/25/10 at 176-180.

¹⁵ Appendix D, Chart of Sales Prices & Closing Disbursements from Unit Owners' Sales; Exhibits 7, 10, 13, 31, 40, & 168.

But, while Mr. Dammarell testified he might have modified and questioned various terms of the Unit Owners' transactions had he been given the opportunity to review their HUD settlement statements before the closings, RP: Trial – 1/14/10 at 77, *Mr. Dammarell could not say he would have withheld Liberty Capital's consent to any one of the Unit Owners' transactions from going forward.* As he explained to Judge Spector:

THE COURT: Before we get there, do you mind if I ask him one question?

MR. LUDLOW: Absolutely.

THE COURT: Mr. Dammarell, was it to Liberty Capital's advantage, when I say Liberty Capital, I mean all the entities, was it to their advantage to have First American be so sloppy -- and let me continue on, just to give you time to think. Had they sent emails, as had Ms. Warthan initiated this process, and then the partial reconveyances and then you -- I'm assuming that you would have, but had kind of gone along in due course, as you had been with a large majority of these units, except for a couple, including Griggs, you would not have the ability at this time to go after these five that had either been missed, as Ms. Schroeder indicated in that email? Would you agree this has sort of worked in your favor to a certain extent?

THE WITNESS: Well --

THE COURT: I mean that's being charitable.

THE WITNESS: Yeah. Can I give you an answer?

THE COURT: Absolutely.

THE WITNESS: Well, we've spent a lot of money to be here today, and so it doesn't feel very good at all. Our company's shut down, this company is. It's difficult to answer that. And I've thought about that often. But you know how we handle closings

on the process, I think that you know if those requests came to me, what would I have done? Right. **And that's the question that I've asked myself and talked to my wife about, what would I have done? In truth, I may have signed off, but I don't know. I wasn't given the opportunity, and I don't know what I would have done. I don't know how that would have changed things different down the course of the project. So...**

RP: Trial - 1/14/10 at 68:6-25 - 69:1-20 (emphasis added).

4. The Unit Owners Fully Complied With Their Obligations Relating to the Purchase of Their Units. The Unit Owners Would Not Have Purchased Their Units Had They Known of Liberty Capital's Claim to Continuing Rights and Interests in Their Units After Closing.

The Unit Owners had no communications with Liberty Capital at any time before Liberty Capital elected to foreclose on their units. Ex. 175. Liberty Capital has made no claim that any of the Unit Owners in any way failed to comply with their obligations relating to the purchase of their units. All the Unit Owners are current on their mortgage payments to their respective lenders.¹⁶ Ex. 175. All the Unit Owners are current on their Starpoint homeowner association dues and assessments. *Id.* All the Unit Owners knew prior to closing, from the preliminary title commitment they each received, that Liberty Capital had a recorded Deed of Trust against the Starpoint complex, including each of their units. *Id.* The Unit

¹⁶ The five Unit Owners' five respective lenders are Wells Fargo Bank, N.A., Quick Mortgage Services LLC, Liberty Financial Group, Inc., Wells Fargo Bank, N.A., and Flagstar Bank, FSB. Trial Ex. 175

Owners relied on First American to clear the Liberty Capital deed of trust against title to their respective properties. *Id.* The Unit Owners never expected to encounter a deed of trust on their property other than their own lender's after they had closed on the purchase of their units from GMP. *Id.* The Unit Owners never would have purchased their units had they known of Liberty Capital's claim that its deed of trust remained unsatisfied after closing, thus entitling Liberty Capital to continuing rights and interests in their units. *Id.*

5. Liberty Capital Had Actual Notice of the Sales of the Unit Owners' Condominium Units and Numerous Opportunities to Realize It Still Needed to Review The Financial Terms of the Sales, Including Well Before Either the Builder Norcon Filed its Lien or the Developer GMP Filed for Bankruptcy.

Although Liberty Capital did not receive the draft HUD closing statements of the Unit Owners' transactions in writing before they closed, Liberty Capital on numerous occasions received notice of the fact that the five units had in fact been sold and the sales had closed, including before both Norcon filed its lien and GMP filed for bankruptcy:

- On August 30, 2007, over a month before Liberty Capital agreed to loan GMP an additional \$400,000, GMP sent Mr. Dammarell a detailed spreadsheet describing the sales status of each Starpoint unit and identifying the five units of Unit Owners O'Connor, Naumann, Joswick,

and Oppenheim by name, unit number, survey number, list price, contract price, and contract date as “closed” and similarly identifying the unit of Unit Owner Klebs with a projected closing date of September 14, 2007. Trial Ex.160. Despite this information, Liberty Capital made no effort to question or corroborate the closing information it received from GMP based on its own files, or to compare GMP’s list of closed units against its own records or to make any inquiry of First American. RP: Trial 1/14/10 at 21:13-22:17.

- On November 28, 2007, GMP again provided Liberty Capital with another update of Starpoint sales and the remaining balance of the Frontier debt. Ex. 109; RP: Trial – 1/13/10 at 73:9-72:2. GMP informed Liberty Capital that sixty-seven residential units had closed out of a total of ninety-two, and listed the unsold units by unit number. Ex. 109. *Id.* The five units belonging to the Unit Owners were not listed among the unsold units. *Id.* Liberty Capital made no effort to determine if its own records matched this information. RP: Trial – 1/13/10 at 73:8-18. Had Liberty done so, it would have realized the sum of sixty-seven closings included the sixty-two transactions for which Liberty Capital had reviewed HUD-1 settlement statements and issued a “zero” dollars payoff email pre-closing, plus the five Unit Owners’ closings for which it had not.

In this same November 28, 2007 email, GMP also reported to Liberty Capital that the balance owed Frontier was down to \$5,788,172. Ex. 109. This balance reflected the reduction of Frontier's debt by the \$1.2 million dollars generated by the sales of the five Unit Owners' units. *Id.* GMP projected the equity in seven pending sales at \$3,492,500 and the equity remaining in the unsold units as \$7,894,100. *Id.* Based on these projections, there appeared to be sufficient equity to pay off both Frontier and Liberty Capital. *Id.* Without independently corroborating the sales and Frontier debt information against its own records, Liberty Capital shared with "Investors and Friends" in December 2007 the news that "67 units have closed[.]" Ex. 133. Those 67 "closed" units, however, included the five units purchased by the Unit Owners.

- In January 2008, at Liberty Capital's request, GMP sent another spreadsheet identifying each unsold unit by unit number. Ex. 165. The Unit Owners' five units were once again not among the twenty-five unsold units listed. *Id.* Between April 17, 2008 and June 26, 2008, Liberty Capital received three more emailed status reports from either GMP or a realtor from Coldwell Banker Bain. Ex. 156. In none of these reports were the Unit Owners' five units ever listed as unsold. *Id.*

During this eleven month time frame Liberty Capital did not make *any* effort to compare any of these reports (from GMP and the realtor, as

well as from First American) to confirm that its *own* records were complete and accurate. RP: Trial 1/14/10 at 21:13-22:17; Trial 11/13/10 at 73:12-18. Had it done so, Liberty would immediately have realized that it did not have a record showing its receipt of the closing documents for the sales of the Unit Owners' units.

6. Norcon's Mechanic's Lien Set In Motion a Process That Ultimately Prompted Both Liberty Capital and First American to Inspect Their Respective Records and Elicited Opposite Reactions to the Discovery of Record Discrepancies Between Them.

The day after GMP provided Liberty Capital with the November 28, 2007 sales and equity update, Norcon filed its original mechanic's lien against Starpoint. Trial Ex. 233. Norcon filed an amended mechanic's lien on January 10, 2008, in the amount of \$1,084,585.80. Trial Ex. 234; RP: Trial – 1/13/10 at 85. The lien filing stopped any closings and this “upset” Liberty Capital, because it believed there was sufficient equity left in the project to pay off everyone, even if Norcon's lien had priority. RP: Trial – 1/12/10 at 37:1-38:6. In early January 2008, Norcon, GMP, Frontier, and Liberty Capital met to agree upon a schedule of disbursements of future sales proceeds so that sales activity could resume. *Id.* By mid-January they had agreed to split the sale proceeds between Frontier, Norcon, and certain subcontractors “that liened around Norcon as

a general to the project directly.” *Id.* at 43:24-25. Liberty Capital, however, again agreed to continue to receive a zero payout. *See, e.g.*, Trial Ex. 155. As late as March 2008, Liberty Capital continued to encourage sales “even if short.” Trial Ex. 110.

Norcon’s lien filing also prompted First American to change its closing protocol. RP: Trial – 1/14/10 at 177. With so many parties making claims to the sales proceeds, beginning in January 2008 First American began requiring all the parties, including Liberty Capital, to sign requests for a partial reconveyance “up front instead of after the fact.” *Id.* Fifteen more unit closings occurred between January 17, 2008 and July 15, 2008, under this revised approach. Ex. 160. By July 15, 2008, eighty-two of the ninety-two residential units had in fact been sold, including the five units purchased by the Unit Owners eleven months earlier, leaving ten unsold units. Trial Ex. 168.

Three days after the last Starpoint closing on July 15, 2008, Norcon filed this lawsuit on July 18, 2008. RP: Trial 1/12/10 at 46:3-9. On September 18, 2008, Norcon had obtained a default judgment against GMP. CP 76-78. In July and in September 2008, First American sent, and Liberty Capital received, a bulk request for partial reconveyance to Liberty Capital for all eighty-eight sold units, including the five purchased by the Unit Owners. Trial Ex. 238. By October 1, 2008, Liberty Capital

had abandoned its hope of any additional sales and decided its best option would be to “drive the foreclosure process” for the ten remaining unsold Starpoint units. Trial Ex. 126. Around this same time, First American sent another email to Liberty Capital requesting its execution of a bulk request for partial reconveyance that included the Unit Owners’ five units. Trial Ex. 238, p. 187. On October 7, Liberty Capital recorded an internal assignment of its original deed of trust which only included the ten unsold units. Trial Ex. 236.

The next day, Liberty Capital signed its first settlement agreement with Norcon. Trial Ex. 94. In this first settlement agreement, Norcon agreed to release its lien claim against all the Starpoint units upon receipt of Liberty Capital’s settlement payments.¹⁷ In the meantime, First American’s emailed requests that Liberty Capital sign partial reconveyances had prompted Liberty Capital to take another look at its transaction records. Trial Ex. 238. On October 9, Liberty Capital requested from First American all the signed requests for reconveyances for the Starpoint units. Trial Ex. 237. In an email exchange with Liberty

¹⁷ After signing this first settlement agreement, Liberty Capital concluded it had made a mistake by failing to appreciate the value of Norcon’s lien rights. Benthin Dep. p. 67:17-70:14; p. 77:22-78:10; CP 2725-2726 and 2727-2728. Were Norcon to “release” its lien claim against Starpoint, this lawsuit would have ended. Liberty Capital defaulted on the first settlement agreement and renegotiated with Norcon for an “assignment” of its lien claim and for a premium over the first agreement, and entered into a second settlement agreement with Norcon in May 2009. Trial Ex. 114.

Capital over October 9-10, 2008, First American responded by referring to the previously sent bulk request and admitting it “ha[d] some, but not all” the signed reconveyance requests. Trial Ex. 238. Mr. Dammarell admitted to having received the bulk requests in July and again in September, but explained that “the units didn’t match our records of what we signed off on.” *Id.* Ms. Warthan’s supervisor, Suzanne Schroeder, replied that First American “maybe” had “missed some” of the units for which it was supposed to have requested a partial reconveyance. *Id.* She expressed her understanding that the partial reconveyance should cover “all the units that have sold.” *Id.*

The parties exchanged wishes for a good weekend, Mr. Dammarell writing on October 10 that “[i]f I am confused, I’ll get back to you.” Liberty Capital then “g[ot] back” to First American on November 11, 2008, with a demand that First American purchase Liberty Capital’s promissory note. Trial Ex. 240. On December 4, 2008, Liberty Capital amended its notice of default to include the five Unit Owners’ units in the foreclosure proceedings. CP 194-201.

B. Procedural Facts.

1. **Norcon's Original July 2008 Action to Foreclose on Its Mechanic's Lien.**

Norcon filed this lawsuit in King County Superior Court on July 18, 2008, to foreclose on its mechanic's lien against Starpoint initially filed on November 29, 2007, and amended on January 10, 2008. CP 105-132 and Exs. 233-234. On September 18, 2008, Norcon obtained an \$821,270.39 default judgment with 9 percent annual interest against GMP. CP 76-78. Although the mechanic's lien foreclosure action continues to be prosecuted in Norcon's name, in fact Liberty Capital obtained Norcon's lien rights to the ten unsold Starpoint units through a settlement agreement entered into on May 26, 2009. Trial Ex. 114. Liberty Capital determined it needed to buy out Norcon's lien rights because Norcon's lien was superior to Liberty Capital's deed of trust. In August 2009, Liberty Capital paid \$801,203 to Frontier to extinguish GMP's debt to Frontier and to release Frontier's deed of trust. *Id.*¹⁸

¹⁸ As part of the bench trial in this case in January 2010, Norcon sought and obtained an Amended and Superseding Judgment and Order of Mechanic's Lien Foreclosure regarding the ten unsold GMP condominium units and a related Supplemental Findings of Fact and Conclusions of Law in Support of Additional Attorneys' Fee Award. CP 1870-1875 and 1867-1869. Both of these orders were entered on March 18, 2010. *Id.* Although the Unit Owners defended on these lien claims and included them in their Notice of Appeal, the Unit Owners are not challenging them in this appeal as they have no bearing on the equitable issues raised in this proceeding.

2. The Unit Owners' June 2009 Receipt of a Preliminary Injunction Enjoining Liberty Capital From Foreclosing on Their Homes.

At the same time in May 2009 that Liberty Capital was settling with Norcon for a second time to obtain its lien rights, CP 83-89, Liberty Capital gave notice of a non-judicial foreclosure of its deed of trust (which now included the Unit Owners' units) for June 5, 2009. CP 474. The Unit Owners filed a complaint for injunctive relief to enjoin the foreclosure sale of their units. CP 268-277. The trial court granted a temporary restraining order on June 3, 2009, and a preliminary injunction pending discovery and trial on June 19, 2009. CP 582-584 & 686-689.

The injunction restrained only the foreclosure proceedings against the five Unit Owners' units. CP 686-689. The Unit Owners did not oppose Liberty Capital's efforts to foreclose on the ten unsold GMP units. Trial Ex. 260. Although the Unit Owners stated they would not oppose the foreclosure of the ten unsold units and signed two stipulations to that effect, Liberty Capital requested the Unit Owners' signed agreement that they would not oppose entry of the order declaring a two-part foreclosure sale. Ex. 260. The Unit Owners agreed not to oppose entry of the order, provided that Liberty Capital signed a bulk request for partial reconveyance of its deed of trust on all eighty-three sold Starpoint units to date, with the exception of the Unit Owners' five disputed units, and

directed its trustee to record a full reconveyance of Liberty Capital's deed of trust in the eighty-three units. *Id.*

3. The Unit Owners' August 2009 Claim and January 2010 Trial to Quiet Title.

In August 2009, the Unit Owners amended their complaint to add a claim to quiet title in their units. CP 698-707. Liberty Capital and the Unit Owners each cross-moved for summary judgment, which the trial court denied in December 2009. CP 1501-1503.

The case was tried to the court over six days in January 2010 before the Honorable Judge Julie A. Spector. At the beginning of the trial, Judge Spector ruled on the parties' motions in limine. The Unit Owners moved to exclude any testimony regarding damages as irrelevant and premature; the court granted the motion without prejudice once Liberty Capital's counsel conceded the issue of damages was post-adjudicatory. RP: Trial 1/11/10 at 48:5-49:8. The Unit Owners moved to exclude evidence of any non-party at fault as Liberty Capital had not affirmatively pled this defense as required by CR 8(c), *Id.* at 44:16-45:16; the trial court granted the motion in part and reserved it in part to see what Liberty Capital's defense would be. *Id.* at 66:18-67:3. The Unit Owners also moved to exclude evidence that the Unit Owners had title insurance with First American Title Insurance Company; although the court agreed the

case “is not about, you know, who’s got insurance,” it reserved ruling on the issue of admissibility for bias. *Id.* at 67:12. No evidence was admitted regarding insurance policies or coverage or any other assumption by First American Title Insurance Company, acting in its capacity as the Unit Owners’ insurer, for responsibility for the Norcon lien or the Frontier loan.¹⁹

Judge Spector issued her findings of fact and conclusions of law on February 12, 2010. CP 1837-1860. On March 18, 2010, the trial court dissolved the preliminary injunction, authorized non-judicial foreclosure against the Unit Owners’ units, and dismissed their quiet title claims. Also on March 18, 2010, the trial court denied the Unit Owners’ motion to amend the findings of fact and conclusions of law and declare that Liberty Capital’s deed of trust should be subordinate to the Unit Owners’ lenders’ deeds of trust.

4. Appeal.

The Unit Owners timely filed this appeal on April 15, 2010. CP 2247-2289. Commissioner James Verellen granted the Unit Owners’ motion for a stay of a nonjudicial foreclosure sale of their units, and

¹⁹ The only proposed evidence that related to this subject matter was Exhibit 247. Exhibit 247 was not admitted.

expedited briefing so that this matter could be heard during the Fall 2010 Term. *See* May 17, 2010 Order and Letter of Commissioner Verellen.

5. CR 65.1 Proceedings.

After the trial court entered judgment in favor of Liberty Capital, Liberty initiated a proceeding against the bonds supporting the Unit Owners' June 2009 application for injunctive relief under CR 65.1. Because the CR 65.1 action related to the bonds, First American Title Insurance Company, bond principal, and Fidelity Surety and Deposit of Maryland, a bond surety, were joined as parties to this lawsuit for the first time. While this appeal has been pending, the trial court entered Findings of Fact and Conclusions of Law on May 5, 2010, awarding \$1,094,677.76 to Liberty Capital, as follows: (1) \$46,841.88 for interest and fees it paid from June 3, 2009, to May 1, 2010, to Frontier on GMP's loan and to the bank from which Liberty Capital borrowed funds to pay off Frontier's loan to GMP; (2) \$444,534.86 in interest and late fees accrued on its loan to GMP from June 3, 2009, to May 1, 2010; (3) attorney's fees and costs added to Liberty Capital's loan as a result of the injunctions and litigation to make them permanent; (4) \$3,179.00 for the Trustee's fee for the enjoined June 2009 foreclosure sale; and (5) \$178,762.50 for consulting fees incurred by Liberty Capital in defending against injunction action. CP 2591. The trial court postponed a ruling on diminution-in-value

damages — upon Liberty Capital’s concession that the parties should first be allowed an opportunity for discovery — and so has not yet heard evidence on the fair market value of the Unit Owners’ five units as of any date (which precludes any determination that the five units had sufficient value so that Liberty Capital would have fully recovered the amount owing to it in the June 2009 foreclosure).

First American Title Insurance Company, Fidelity Surety and Deposit, and the Unit Owners moved for reconsideration, which was denied. They timely filed a notice of appeal on June 3, 2010.²⁰

III. ARGUMENT.

A. Summary of Argument.

The Unit Owners brought this action to quiet title in their property under RCW 7.28.010, which says that any person “having a valid subsisting interest in real property” may recover the same “and may have judgment in such action quieting or removing a cloud from the plaintiff’s title.” *Id.* “An action to quiet title is equitable and designed to resolve competing claims of ownership.” *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (Div. 3, 2001). A quiet title action “is not aimed at a particular piece of evidence, but at the pretensions of the individual” who

²⁰ While the trial court postponed ruling on Liberty Capital’s claim for damages for diminution in value to the Unit Owners’ five units, the trial court directed entry of a judgment under CR 54(b) on the issues decided in the judge’s May 5 ruling.

has asserted a claim to the plaintiff's property. *McGuinness v. Hargiss*, 56 Wn. 162, 164, 105 P. 233 (1909), *overruled on other grounds by Rorvig*, 123 Wash.2d 854, 873 P.2d 492 (1994)) (quoting *Castro v. Barry*, 79 Cal. 443, 21 P. 946 (1889)) *and cited in Kobza*, 105 Wn. App. at 95.²¹

The Unit Owners seek reversal of the trial court's orders and a conclusion as a matter of law that title in their five units should be quieted in them and Liberty Capital's deed of trust against their property should be extinguished based on principles of equitable estoppel and unjust enrichment. Even if Liberty Capital's deed of trust is not extinguished, the Unit Owners seek reversal of the trial court's order refusing to subordinate Liberty Capital's deed of trust to their lenders' deeds of trust under the doctrine of equitable subrogation, and a specific determination that the trial court's Finding of Fact No. 61 lacks sufficient support in the record and therefore should be vacated.

B. Standard of Review.

"The standard of review for a trial court's findings of fact and conclusions of law is a two-step process." *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the Court

²¹ The trial court's express reliance on *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989), is entirely misplaced in the context of all of the Unit Owners' equitable arguments in their favor.

must determine if the trial court's findings of fact were supported by substantial evidence in the record, and then the Court must decide “whether those findings of fact support the trial court's conclusions of law.” *Id.* “A finding incorrectly denominated a conclusion of law is reviewed as a finding.” *Valentine v. Department of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (Div. 2, 1995). “A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law.” *Willener v. Sweeting*, 107 Wn.2d 388, 394 730 P.2d 45 (1986).

All of the Unit Owners’ theories of recovery derive from equitable principles, and “the question of whether equitable relief is appropriate is a question of law.” *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). The scope of an escrow agent’s duties and of the agency relationship as well as the imputation of an agent’s knowledge are also matters of law. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 63 P.3d 125 (2003); *Hurlbert v. Gordon*, 64 Wn. App. 386, 396, 824 P.2d 1238 (Div. 1-1992), *review denied*, 119 Wn.2d 1015 (1992). In all issues of law, the court’s review is *de novo*. *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

- C. The Trial Court Erred by Failing to Extinguish Liberty Capital’s Deed of Trust Against the Unit Owners’ Property, Which the Court Should Have

Done Under a Correct Application of the Doctrine
of Equitable Estoppel.

Through the doctrine of equitable estoppel, “a party may be prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 539, 146 P.3d 1172 (2006). To prevail in their quiet title action under the doctrine of equitable estoppel, the Unit Owners must satisfy a three-part test:

(1) [T]he conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party, (2) the party asserting estoppel took action in reasonable reliance upon that conduct, act, or statement, and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conducts, act, or statement.

Id. at 538-39. Washington courts require clear and cogent evidence “to estop an owner out of a legal title to real property.” *Tyree v. Gosa*, 11 Wn.2d 572, 578, 119 P.2d 926 (1941). The record before the trial court and this Court meets this standard.

1. Liberty’s Capital’s Course of Conduct From July 2007 Through October 2008 is Inconsistent With Its Present Claim to an Existing Deed of Trust Against the Title to the Unit Owners’ Condominium Units.

From July 2007 through October 10, 2008, Liberty Capital facilitated a process for fast-tracking the sales of Starpoint condominiums,

as long as the price was right. There was nothing unique about the Unit Owners' purchases and closings; they were intended to be a part of this fast-track process because the prices paid for each were right. Through its silence in 2007 and 2008, Liberty Capital ratified the Unit Owners' five sales and closings because those sales and closings advanced Liberty Capital's financial interest in seeing Frontier's senior lien paid down and extinguished, just as had the other 62 sales of whose closings Liberty had expressly approved. This course of conduct, comprised of acts and silence, clearly and cogently contradicts Liberty Capital's long belated claim of a right to foreclose on the Unit Owners' property.

a. Liberty Capital's Actions Relating to the Closing Process.

Liberty Capital agreed to an expedited sales and closing process with First American in 2007, in order to close sales quickly and efficiently. Liberty Capital was focused on the sale price and the percentage distribution to Frontier. Liberty Capital knew its deed of trust was subordinate to Frontier's loan and that it would not receive any monetary proceeds from any Starpoint condominium sale until Frontier's senior debt was fully discharged. Accordingly, Liberty Capital accepted no proceeds from any of the eighty-eight unit sales in 2007 and 2008, and approved those sales and closings as long as the price was right – as long

as what the purchaser proposed to pay would contribute sufficiently to the goal of fully discharging Frontier's senior debt.

At the outset of the closings in July 2007, Liberty Capital agreed to a written email exchange with First American confirming the "zero payoff" for each transaction so that First American had something in writing upon which to close the sales transactions. Liberty Capital has acknowledged that it recognized from the beginning that while this process to which it acquiesced carried some risk, it is undisputed that the intended written exchange occurred in sixty-two of the sixty-seven sales that closed in 2007. First American understood and expected that Liberty Capital would ultimately execute requests for partial reconveyance of its deed of trust after closing just as Frontier was doing, and Liberty Capital never said or did anything to alert First American that its expectation was in any way unfounded.

Had either Liberty Capital or First American realized that a pre-closing review for the five units at issue in this case had not taken place, shortly after the closings in dispute in 2007 instead of fifteen months after the fact, Liberty Capital could have reviewed the transactions and contractually resolved the \$28,000²² of disputed fees and disbursements it

²² See Appendix D.

identified at trial. The trial record establishes, moreover, that Liberty Capital could not say that it would have blocked the Unit Owners' transactions. Indeed, given that the Unit Owners' five sales reduced Frontier's debt to GMP by over \$1.2 million dollars, and in percentages of disbursement of sales proceeds consistent with the sixty-two other transactions Liberty Capital reviewed and approved pre-closing, it is inconceivable that Liberty Capital would have blocked the Unit Owners' purchases of their Starpoint properties, if Liberty had been given the chance to review their documents, pre-closing. Yet only if Liberty *would* have blocked those transactions can Liberty plausibly assert that its present claim is consistent with its conduct at the time those transactions were closed.

b. Liberty Capital's Silence in the Face of Actual Knowledge of the Sale of the Units.

Liberty Capital's course of conduct also included Liberty's failure to speak up when it would have reasonably been expected to do so in order to protect its interests. "Silence can lead to equitable estoppels -- '[w]here a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent'." *Peckham v. Milroy*, 104 Wn. App. 887, 892-93, 17 P.3d 1256

(Div. 3, 2001), *review denied*, 144 Wn.2d 1010 (2001) (quoting *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 553-54, 741 P.2d 11 (1987)).

In August 2007, Liberty Capital received specific written notice by unit number, sale price, and purchaser's name that four of the five Unit Owners sales had closed and that the fifth was poised to close in September 2007. Ex. 160 (App. E). Liberty Capital also received information of the aggregate balance of the Frontier loan that included the Unit Owners' \$1.2 million dollar contribution to its reduction. *Id.* If Liberty Capital were concerned about protecting its interest in its deed of trust and compliance with the Liberty Capital-GMP loan agreement, the first time that Liberty could have caught the oversight, and raised it with GMP and First American and explored ways to correct it, was in August 2007, before Liberty Capital loaned an additional \$400,000 to GMP in October 2007 and before the Norcon lien was filed in November 2007.

Liberty Capital again received actual notice of the Unit Owners' sales in communications from the realtor or GMP in November 2007, January 2008, April 2008, May 2008, and June 2008. Liberty Capital passed along this sales and Frontier debt information as fact to its investors in December 2007 and March 2008. In July and September 2008, Liberty Capital received First American requests for a bulk partial reconveyance and still remained silent. Moreover, when Liberty Capital

recorded the first internal assignment of its deed of trust and filed its first notice of foreclosure in October 2008, it did not ever list the five Unit Owners' property. In short, Liberty Capital had numerous opportunities to engage in some sort of due diligence and check its records against the information it was receiving from or sending out to other interested parties; Liberty failed to do so, and this failure is diametrically at odds with its present contention that a contemporaneous opportunity to review proposed closing documents was an absolute condition precedent to its willingness to allow its deed of trust to be reconveyed.

c. Liberty Capital's Course of Conduct is Not Consistent With Its Foreclosure Claim.

Liberty Capital's conduct in cooperating with a fast-track sales process, together with its silence at numerous critical times when it would have been expected to speak up, is inconsistent with its claim to foreclose on an allegedly unsatisfied deed of trust and satisfies the first element of equitable estoppel. As the Washington Supreme Court explained in *Nugget Properties, Inc. v. Kittitas County*, 71 Wn.2d 760, 431 P.2d 580 (1967):

Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: *If one maintains silence*

when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection,

Id. at 767 (quoting 3 Pomeroy, Equity Jurisprudence § 818 (5th ed. 1941)) (emphasis added). Liberty and First American may have together created an imperfect closing process that cost Liberty the opportunity to engage in a contemporaneous review of the closing documents for the Unit Owners' unit purchases. But the record clearly and cogently establishes that this oversight was in actuality of no moment to Liberty because in the end *the price was right* on the Unit Owners' property. That price was all that Liberty cared about, and Liberty therefore would not have blocked these transactions even had it been given the opportunity to review the documentation at the time of closing. Liberty's claim in this proceeding that it, and not the Unit Owners, should retain its deed of trust against these five properties is wholly inconsistent with its conduct at the time these properties were sold.

2. The Unit Owners Fully Complied With Their Obligations Relating to the Purchase of Their Units, and They Refrained From Any Further Action Until Liberty Capital Moved to Foreclose Against Their Units in Reliance On Liberty Capital's Course of Conduct.

The Unit Owners have relied to their detriment on the course of conduct of Liberty Capital, its actions and its silence. The Unit Owners relied on the process GMP, Frontier, First American, and Liberty Capital followed in 2007, and the Unit Owners closed on their property believing they had acquired clear title to it and that only the deeds of trust they had granted to their respective lenders encumbered their title. The Unit Owners met all of their obligations to make sure their transactions closed. The Unit Owners would never have purchased their condominiums had they known Liberty Capital would accept the full benefit of their purchase monies, then turn around and assert a claim to foreclose against them, fifteen months later, based on a deed of trust arising from a handful of isolated communication lapses between First American and Liberty Capital.

As the trial court's findings of fact and conclusions of law reflect, at trial Liberty Capital insinuated that First American had been negligent through these communication lapses with Liberty -- though Liberty Capital never exercised its right to bring a negligence claim against First

American or otherwise make the escrow agent a party to the lawsuit.²³ Liberty Capital argued instead that the Unit Owners were charged with First American's knowledge and the consequences of First American's conduct under principles of agency. *See* FF 22-47 at CP 1842-1851. While the Unit Owners agree that First American acted as their escrow agent in the closing process, the Unit Owners object to the trial court's findings to the extent they imply that First American was their exclusive agent because such a conclusion of law is erroneous. *See National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 910, 506 P.2d 20 (1973) (an escrow agent is the agent of all the parties to the escrow and "occupies a fiduciary relationship to all parties to the escrow"); *Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238 (Div. 1, 1992) (attorney's duty as escrow agent included both parties and agent's notice and knowledge was imputed to both parties); *see also Claussen v. First American Title Guar. Co.*, 186 Cal.App.3d 429, 435, 230 Cal. Rptr. 749 (1986) (noting in context of lender negligence action against escrow service that escrow holder is agent for all parties exchanging instruments and payments through an escrow – buyers, sellers, contractors, and lenders).

²³ Liberty Capital must recognize that any negligence claim it might bring against First American would be limited by proximate causation, contributory fault, and the relatively inconsequential closing amounts it questioned on the Unit Owners' closing statements.

The trial court's adoption of Liberty Capital's characterization of First American's relationship with the Unit Owners as an exclusive agency not only misstates the law, it misses the point of the reliance element of equitable estoppel. If the Unit Owners must somehow be charged with First American's technical oversights in their transactions, then the Unit Owners must also be credited with First American's reliance on Liberty Capital's course of conduct that signified nothing less than consent to the Unit Owners' transactions and a commitment to ultimately sign a request for partial reconveyance of its deed of trust for their units. *See Foley v. Scottsdale Ins. Co.*, 28 Kan. App. 2d 219, 223-24, 15 P.3d 353 (2000) ("Under agency law, once a principal knows of an agent's unauthorized actions, it cannot sit back and see if it will benefit or suffer from the agent's actions. Instead, a principal who receives notice of an unauthorized act of an agent must promptly repudiate the agent's actions or it is presumed that the principal ratified the act").

Thus, to the extent Liberty Capital implies it was an innocent victim of First American's implementation of the closing process to which they both agreed, the equities lie with the Unit Owners because Liberty Capital facilitated the process that allowed First American to omit transferring five of the sixty-seven HUD statements to Liberty in 2007. *See 28 Am Jur. 2d Escrow* § 31 (when two innocent persons suffer from

the wrongful act of a third, equitable principles dictate that the loss should be borne by the person who put the wrongdoer in a position of trust and confidence and enabled him to perpetrate the wrong); *Ketner Bros., Inc. v Nichols*, 52 Wn.2d 353, 356, 324 P.2d 1093 (1958) (discussing this equitable maxim). Under the circumstances of this case, Liberty Capital was First American's principal, too, and should not be permitted to profit from its agent's errors. *Cf., Bingham v. Keylor*, 25 Wash. 156, 176, 64 P. 942 (1901) ("Courts of equity adopt very enlarged views in regard to the rights and duties of agents, and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them they will take care that the omission to do so shall not be used as a means of escaping responsibility, or of obtaining undue recompense").

3. The Unit Owners' Will Be Damaged if Liberty Capital is Permitted to Foreclose on Their Units Based on a Technically Unsatisfied Deed of Trust.

The third element of equitable estoppel requires a showing of injury to the Unit Owners. If Liberty Capital is permitted to repudiate its course of conduct on which the Unit Owners relied and to foreclose on the Unit Owners' real property, the Unit Owners will lose title to their property. In sum, the United Owners have met their burden to establish their right to have Liberty Capital estopped, and title quieted in them.

D. Liberty Capital's Retention of Both The Right to Foreclose on the Unit Owners' Units and the \$1.2 Million Dollar Benefit From the Unit Owners' Pay Down of Frontier's Debt Results in Unjust Enrichment, and the Court Should Impose a Constructive Trust to Prevent This Injustice.

1. Liberty Capital Has Been Unjustly Enriched.

Unjust enrichment derives from the legal theory of a contract implied "from the ties of natural justice [.]” *State v. Cont'l Baking Co.*, 72 Wn.2d 138, 143, 431 P.2d 993 (1967) (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676, 678 (1760)). It is “the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

To establish a claim of unjust enrichment, the Unit Owners must prove three elements: (1) Liberty Capital has received a benefit; (2) the received benefit is at the Unit Owners' expense; and (3) the circumstances make it unjust for Liberty Capital to retain the benefit without payment. *Id.* at 484-85. The Unit Owners easily met this burden. To begin, Liberty Capital has received a substantial benefit by virtue of the trial court's orders, and at the Unit Owners' expense. The Unit Owners bought their properties for a combined total of \$1,352,830 of which \$1,201,542 were disbursed to Frontier. Thus, while Liberty received the benefit of the

\$1,200,000 reduction in GMP's indebtedness to Frontier, Liberty's deed of trust attached to *at most* \$151,288 of the Unit Owners' properties, taken as a whole. The trial court, however, has given Liberty the benefit of the \$1.2 million reduction in the value of Frontier's loan, while permitting Liberty to leapfrog from the junior lien holder position into the senior lienholder position (ahead of the Unit Owners' lenders), *and* authorizing Liberty to foreclose on the Unit Owners' properties. *See* FF 15, 39, 40, 44, 46. The Unit Owners stand to lose title they reasonably believed was theirs free and clear at the time they purchased their units, and their lenders have lost the first-priority position they reasonably believed they had when they financed Unit Owners' purchases.

This is a patently unjust result. The Unit Owners are completely innocent parties who fulfilled all of their requirements for closing the sales on their units. By contrast, Liberty Capital ignored actual notice of the Unit Owners' sales for fifteen months while acknowledging the actual benefit in the loan reduction to Frontier, failed to police its own requirements for reviewing each sales transaction, engaged in a transactional course of conduct that implied an intent to reconvey its deed of trust, and only decided to contradict its course of conduct and to exploit the five technical imperfections in the Unit Owners' closings when it became economically advantageous to do so.

2. Clear, Cogent and Convincing Evidence of Liberty Capital's Equitable Duty to Extinguish Liberty's Deed of Trust Against the Title of the Unit Owners Supports the Equitable Remedy of Impressing a Constructive Trust.

“Constructive trusts arising in equity are imposed when there is clear, cogent, and convincing evidence of the basis for impressing the trust. *Baker v. Leonard*, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). “Equity’s need for flexibility” requires that the equitable bases for impressing a constructive trust not be limited to circumstances of fraud, misrepresentation, or bad faith. *Id.* at 548. Thus, a constructive trust also arises “where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.” *Id.* at 547-48 (quoting *Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511 (Div. 1, 1971)) (emphasis added). Because constructive trusts derive from equity “for the purpose of working out right and justice,” *Kausky v. Kosten*, 27 Wn.2d 721, 728, 179 P.2d 950 (1947) (quoting 1 *Pomeroy’s Equity Jurisprudence* at 210 (5th Ed.)), they arise “even though acquisition of the property was not wrongful,” *Scymanski v. Dufault*, 80 Wn.2d 77, 89, 491 P.2d 1050 (1971) “and often directly contrary to the intention of the one holding the legal title” *Kausky*, 27 Wn.2d at 728 (quoting *Pomeroy’s Equity Jurisprudence* at 210).

As previously explained, Liberty Capital would be unjustly enriched if it were permitted to foreclose on the Unit Owners' five units *and* retain the benefit of the \$1.2 million dollar reduction of Frontier's loan. The trial court's orders effectively permitted Liberty Capital to "double dip." Liberty Capital has reaped the benefit of the Frontier loan reduction Liberty received from the Unit Owners' purchases of Starpoint condominium units, and now stands to enjoy the proceeds from re-selling the Unit Owners' five units, which by Liberty Capital's own valuation of each unit's current fair market value, would be an additional \$1.375 million dollars. Thus, Liberty Capital will receive \$2.575 million dollars in value from five units that only had \$1.3 million dollars in total value when the Unit Owners acquired them. A constructive trust is the proper means to prevent this inequitable result, and the trial court erred in failing to impose one, and to extinguish the deed of trust held by Liberty Capital.

E. The Trial Court Erred as a Matter of Law By Failing to Equitably Subrogate the Unit Owners (and Their Lenders) to the Rights of Frontier Bank to the Extent Frontier Bank's Loan Was Paid Down When the Unit Owners' Sales Closed.

The trial court should not have permitted Liberty Capital to leap frog into first position because Frontier's more senior loan was paid off by the Unit Owners and their lenders. Under the principle of equitable subrogation, the party paying the debt of a prior lien holder takes that prior

lien holder's position in the priority line "so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 510, 2 N.E. 103, 104 (1885). As the Washington Supreme Court explained the operation of equitable subrogation in *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007):

For example, suppose A, a homeowner, has two mortgages: one recorded first by bank B and one recorded second by bank C. Our recording act says B has a higher priority because it recorded first, putting the world on notice as to its interest in A's land. RCW 65.08.070. If D fully discharges B's debt, then equitable subrogation substitutes D for B, so D has a higher priority than C, even though D recorded after.

Id. at 564. In *Prestance*, the Washington Supreme court adopted the approach of the *Restatement (Third) of Property: Mortgages* § 7.6 *Subrogation* (1977) and held that "D", which was Wells Fargo Bank West, should have a higher priority than "C", which was Bank of America, because Wells Fargo had discharged the debt of "B", which was Washington Mutual. In addition to applying equitable principles derived from unjust enrichment to support its expansive application of equitable subrogation, the Supreme Court in *Prestance* also relied on the important policy considerations of stemming the threat of foreclosures and reducing title insurance premiums for homeowners. *Id.* at 565.

Washington courts have applied equitable subrogation not only in the refinancing context of *Prestance*, but in sales transactions as well. See *Credit Bureau Corporation v. Beckstead*, 63 Wn.2d 183, 385 P.2d 864 (1963). As the court declared in *Prestance*, “[e]quitable subrogation is a broad doctrine and should be followed whenever justice demands it and where there is no material prejudice to junior interest.” 160 Wn.2d at 581.

Both the equitable principles and the policy considerations underlying the doctrine of equitable subrogation demand its application to Unit Owners and their lenders.²⁴ Under the terms of the Unit Owners’ Starpoint condominium purchases, First American disbursed all of the net proceeds from each of their transactions to first-priority lender, Frontier, and in exchange Frontier reconveyed its deed of trust to each Unit Owner. The sources of the money that paid off Frontier’s first-priority debt on each Unit Owner’s unit were the Unit Owner and the Unit Owner’s lender. Aligning the parties and non-parties in keeping with *Prestance*, the Unit Owners and their lenders stand in the same situation as “D”, Frontier is “B”, and Liberty Capital is “C”. The Unit Owners and their lenders paid

²⁴ Unit owners and their lenders are entitled to share the same lien priority position because while the lenders advanced the sums that paid Frontier, the Unit Owners became liable to their lenders for those funds. See *Pipola v. Chicco*, 274 F.2d 909, 915 (2nd Cir. 1960), discussed with approval in *Credit Bureau Corporation v. Beckstead*, 63 Wn.2d 183, 385 P.2d 864 (1963).

off “B”, the first-priority lien holder, and deserve all of the rights and priorities Frontier had against GMP, Norcon, and Liberty Capital.

By denying the Unit Owners’ motion to substitute their lenders in Frontier’s first-place position—the very same place in the priority line of the debt the Unit Owners and their lenders fully discharged as to Homeowner’s respective units—the trial court has unjustly enriched Liberty Capital by permitting it to now foreclose on the Unit Owners’ property and retain a \$1.2 million dollar load reduction. The trial court’s decision should be reversed.

F. Finding of Fact No. 61 Lacks Any Evidentiary Support and Explains How the Trial Court Reached the Wrong Result in This Case.

In its last finding the trial court found:

It was undisputed that, but for the delayed foreclosure, Liberty Capital’s loan would have been paid in full in June, and First American would have been left to deal with the Frontier loan, the Norcon lien and any excess value in the 10 unsold units. Due to the delays and costs incurred while waiting for trial, however, the balance on the Liberty loan grew to \$3,311,404.46 as of January 8, 2010, as calculated in the undisputed Ex. 255 (which gives credit for the \$400,000 used to foreclose on GMP’s units).

¶ 61 CP 1855 (emphasis added). This finding assumes that First American Title Insurance Company would have paid off Liberty Capital’s loan in full in June 2009 rather than let its insureds, the Unit Owners, lose their properties. The trial court, however, does not cite any evidence in support

of this assumption masquerading as a factual finding, for its own rulings regarding insurance coverage and damages precluded it from admitting any such evidence. Finding of Fact No. 61 should be reversed for lack of *any* evidence in the record to support it.

More telling is the fact that this “factual” finding was included at all in the court’s findings. Its presence reveals that the trial court considered the fact that the Unit Owners had title insurance for more purposes than just attributing bias to the individuals who, as employees of First American, provided closing services to the Unit Owners, GMP, Frontier, and Liberty Capital. The trial court has conflated the separate roles of First American as escrow agent and First American Title Insurance Company as title insurer, and evidently considered the availability of title insurance in weighing the equities as between the actual parties to the quiet title action—the Unit Owners and Liberty Capital. The trial court has all too clearly denied the Unit Owners the equitable remedies to which they are legally entitled because the judge “found” their title insurer would supposedly have engaged in what would have amounted to patently foolish conduct, and with absolutely no reason

to believe that such economically irresponsible behavior would have been required to protect its insureds.²⁵

The trial court is effectively punishing non-party First American for negligence that has never been pled against it as a party defendant in any proceeding, and which it was powerless to defend against in the context of a quiet title action between the innocent Unit Owners and a hard-money lender attempting to exploit a gap in closing documentation arising out of a fast-track closing process during which that lender failed to exercise the most minimal due diligence. The very fact that the court interjected Finding of Fact No. 61 into this case demonstrates the trial court's fundamental failure to grasp the nature of the equitable determinations that the court was called upon to make, in order to do justice between Liberty Capital and the Unit Owners.

²⁵ The assumption and argument imbedded in Finding of Fact No. 61 ignores economic realities to the point of absurdity. At the time of purchase in 2007, the Unit Owners' five units had an aggregate value of about \$1,400,000. *See* Appendix D. The evidence makes clear that the entire Starpoint project suffered from a loss in value from 2007 to 2009, so the inescapable conclusion is that the Homeowners' units were also worth less than their original purchase prices. According to Liberty Capital's own calculations, it was owed about \$3,000,000 as of June 6, 2009. Had First American paid the title policies' face amounts, this maximum exposure was less than half of what Liberty Capital was owed. Liberty Capital has never presented evidence so much as suggesting that First American Title Insurance Company would have had to pay an additional \$1.5 million dollars over its policy limits to prevent a foreclosure on its insureds' condominiums.

IV. CONCLUSION.

Liberty Capital has been inequitably rewarded for its course of conduct and unjustly enriched by the trial court's orders. Liberty's speculative and ultimately valueless junior deed of trust in the Starpoint condominium complex has been transformed into an asset worth over \$2.3 million through the deliberate and wrongful exploitation of technical oversights in transactions Liberty Capital never would actually have blocked because of the benefits it reaped from them. This Court should remedy this injustice by extinguishing Liberty's deed of trust and quieting title in the Unit Owners.

RESPECTFULLY SUBMITTED this 29th day of June, 2010.

HANSON BAKER LUDLOW DRUMHELLER, P.S.

CARNEY BADLEY SPELLMAN, P.S.

By

MBK for
#14405

John T. Ludlow,
WSBA No. 7677
Timothy J. Graham,
WSBA No. 26041

2229 – 112th Avenue NE, Suite 200
Bellevue, WA 98004-2936
Telephone: (425) 454-3374
Facsimile: (425) 454-0087

By

Michael B King

Michael B. King,
WSBA No. 14405
Elizabeth K. Maurer,
WSBA No. 21973

701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Appellants

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APPENDIX

A

FILED
KING COUNTY, WASHINGTON

Honorable Julie Spector
March 11, 2010

MAR 18 2010

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NORCON BUILDERS, LLC, a Washington
limited liability company,

Plaintiff,

v.

GMP HOMES VG, LLC, et al.,

Defendants.

No. 08-2-24201-3 SEA

~~[SECOND AMENDED PROPOSED]~~
FINAL ORDER DISSOLVING
INJUNCTION, AUTHORIZING NON-
JUDICIAL FORECLOSURE AND
DISMISSING CLAIMS

RYAN K. JOSWICK and STEPHANIE C.
JOSWICK, husband and wife, ERICH B.
NAUMANN and ERIN M. NAUMANN, husband
and wife, STEVEN OPPENHEIM, a single
man, YIBELTAL ABDI and ELNATA DEGEFA,
husband and wife, JOHN MICHAEL
O'CONNOR, a single man, STARPOINT
SHOPS, LLC, a Washington limited liability
company, JENNY SEELENBACHER, a single
woman, LORI BECKER, a single woman,
BRIAN MARTINEZ and STACEY MARTINEZ,
husband and wife, and LAURA KLEBS, a
single woman,

Third-Party Plaintiffs,

v.

NORTHWEST TRUSTEE, SERVICES, Inc., a
Washington corporation,

Third-Party Defendant.

~~[SECOND AMENDED PROPOSED]~~ FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 1

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

ORIGINAL

1 In early June, 2009, defendant Liberty Capital Bridge LLC sought to non-judicially
2 foreclose a recorded deed of trust (the "**Deed of Trust**") against certain units in the Starpoint
3 Condominium.

4 Defendant owners Steven Oppenheim (Unit N-213), John Michael O'Connor (Unit N-
5 402), Ryan and Stephanie Joswick (Unit N-205), Erich and Erin Naumann (Unit N-209), and
6 Laura Klebs (Unit S-412), collectively the "**Applicants**," successfully obtained temporary
7 restraining (in the June 3, 2009 "ORDER GRANTING MOTION TO RESTRAIN SHERIFF'S
8 SALE," the "**TRO**") and preliminary injunctive (in the June 19, 2009 "ORDER GRANTING
9 PRELIMINARY INJUNCTION AND ORDER RESTRAINING TRUSTEE'S SALE," the
10 "**Preliminary Injunction**") relief.

11 The Applicants later sought in their August 18, 2009 "AMENDED CROSS CLAIM
12 AGAINST DEFENDANTS LIBERTY CAPITAL STARPOINT EQUITY FUND, LLC AND
13 LIBERTY CAPITAL BRIDGE, LLC" (the "**Amended Cross Claim**") to make that injunctive
14 relief permanent, seeking to quiet title in their units (Units N-205, N-209, N-213, N-402 and
15 S-412, the "**Applicants' Units**") in the Starpoint Condominium Project (the "**Project**"), which
16 Applicants' Project Units are legally described as follows:
17

18 BUILDING N, UNITS N-205 (PARCEL NUMBER 7971500110), N-209
19 (PARCEL NUMBER 7971500150), N-213 (PARCEL NUMBER 7971500190),
20 AND N-402 (PARCEL NUMBER 7971500380), AND BUILDING S, UNIT S-
21 412 (PARCEL NUMBER 7971500960), STARPOINT CONDOMINIUM, A
22 CONDOMINIUM ACCORDING TO THE DECLARATION THEREOF
23 RECORDED UNDER RECORDING NO. 20070724001244, AND ANY
AMENDMENTS THERETO; SAID UNITS ARE LOCATED ON SURVEY MAP
AND SET OF PLANS FILED IN VOLUME 238 OF CONDOMINIUMS,
PAGES 9 THROUGH 21, INCLUSIVE, RECORDS OF KING COUNTY,
WASHINGTON.

24 The TRO and Preliminary Injunction enjoined third party defendant Northwest
25 Trustee Services, Inc. ("**Northwest Trustee**"), the trustee acting under the Deed of Trust as
26

[~~SECOND AMENDED PROPOSED~~] FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 2

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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in this case who have offered no objection to Liberty Capital's motion shall be estopped from objecting to the timeliness of the continued sale under RCW 61.24.040(6).

The Court's February 12, 2010 Findings and Conclusions dissolved the TRO and Preliminary Injunction, ruling that Liberty Capital was "entitled to foreclose [its] valid, recorded deed of trust" (Conclusion of Law No. 14) and additionally authorized Liberty Capital to present its "resulting damages" flowing from the Court's "not properly supported" June 2009 Preliminary Injunction in follow-on CR 65.1 motion proceedings (Conclusion of Law No. 15). Based on that February 12, 2009 adjudication and the Sale Continuance Order,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Northwest Trustee is entitled to conduct a continued non-judicial foreclosure sale as to the above described Applicants' Units in collection of all amounts properly due to Beneficiary Liberty Capital under the GMP promissory note that is secured by the Deed of Trust, including the \$3,311,404.46 unpaid balance owned by GMP to Liberty Capital as of January 8, 2010 (as found in Liberty Capital Findings of Fact Nos. 15 and 61).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Northwest Trustee may conduct such continued sale on April 16, 2010 (which, in accordance with RCW 61.24.130(3), is a date not less than 45 days from February 12, 2009), or at the earliest following date at which, in connection with such foreclosure sale and in accordance with RCW 61.24.130(3), Northwest Trustee shall have:

- (a) complied with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and,
- (b) caused a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in

~~[SECOND AMENDED PROPOSED]~~ FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 4

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

1 to the above legally described Applicants' Units of which the beneficiaries were defendants
2 Liberty Capital Starpoint Equity Fund LLC and/or Liberty Capital Bridge LLC (collectively,
3 "**Beneficiary Liberty Capital**") from non-judicially foreclosing their Deed of Trust as to the
4 above legally described Applicants' Units. The grantor who executed the Deed of Trust was
5 defendant GMP Homes VG, LLC ("**GMP**"), the developer of the Project.

6
7 The Applicants' Amended Cross Claim came on for trial before the Court between
8 January 11, and January 25, 2010. The Court has previously entered its February 12, 2010
9 "FINDINGS OF FACT AND CONCLUSIONS OF LAW" (the "**Liberty Capital**
10 **Findings/Conclusions**"). Pursuant to the Liberty Capital Findings/Conclusions, the Court
11 enters this final order.

12 **I. FINAL ORDER DISSOLVING TRO AND PRELIMINARY INJUNCTION AND**
13 **AUTHORIZING NON-JUDICIAL FORECLOSURE OF BENEFICIARY LIBERTY**
14 **CAPITAL'S DEED OF TRUST AGAINST APPLICANTS' UNITS**

15 The Court's July 24, 2009 "ORDER GRANTING LIBERTY CAPITAL'S MOTION FOR
16 DECLARATORY JUDGMENT APPROVING TWO-PART FORECLOSURE SALE" (the "**Sale**
17 **Continuance Order**"), entered without opposition by the Applicants' or any other party,
18 authorized a two-part non-judicial foreclosure sale (the first of which occurred in the summer
19 of 2009) and provided in paragraph 2 that a second—with respect to the Applicants' Units—
20 "shall proceed only if and when the Court's current injunction against such foreclosure is
21 lifted, and subject to all notice requirements that may be applicable under RCW
22 61.24.130(3)."

23 The Sale Continuance Order further stated in paragraph 3 that:

24 To the extent that the Court's pending injunction causes the completion of
25 Liberty Capital's non-judicial foreclosure sale to be scheduled more than 120
26 days after the time fixed for the initial foreclosure on unsold units, the parties

[~~SECOND AMENDED PROPOSED~~] FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 3

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

1 which the property is situated once between the thirty-fifth and twenty
2 eighth day before the sale and once between the fourteenth and
3 seventh day before the sale.
4

5 **II. FINAL ORDER OF DISMISSAL OF THE APPLICANTS' AMENDED CROSS**
6 **CLAIM SEEKING TO QUIET TITLE**

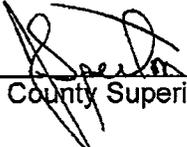
7 As developed in the Liberty Capital Findings/Conclusions, there are no factual or
8 legal bases justifying the decree of quiet title sought by the Applicants' August 18, 2009
9 Amended Cross Claim.

10 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Applicants'
11 Amended Cross Claim is dismissed with prejudice in all aspects, including its request for a
12 decree quieting title in the Applicants to the above legally described Applicants' Units.

13 **III. FINAL ORDER IS WITHOUT PREJUDICE TO LIBERTY CAPITAL'S RIGHTS**
14 **UNDER THE INJUNCTION BONDS**

15 Pursuant to the provisions of RCW 61.24.130 and CR 65(c), the Applicants were
16 required to and did file bonds (trial Exhibit 245, the "Injunction Bonds") providing security to
17 Beneficiary Liberty Capital for any damages which it may have incurred as a consequence
18 of having been wrongfully enjoined by the TRO and Preliminary Injunction. This final order
19 is without prejudice to Liberty Capital's right to subsequently seek recovery against the
20 Injunction Bonds and the principal and surety thereunder, either by an independent action or
21 by post-judgment CR 65.1 motion proceedings in this case.

22 Done in open court this 16th day of March, 2010.

23
24
25 
26 _____
King County Superior Court Judge Julie Spector

[~~SECOND AMENDED PROPOSED~~] FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 5

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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Presented by:

By s\ Douglas S. Oles
Douglas S. Oles, WSBA #9366
Christopher Butler, WSBA # 27303
Oles Morrison Rinker & Baker LLP
701 Pike Street, Suite 1700
Seattle, WA 98101
Telephone: (206) 623-3427
Fax: (206) 682-6234
E-mail: oles@oles.com
butler@oles.com

Attorneys for Norcon Builders & Liberty Capital

~~[SECOND AMENDED PROPOSED]~~ FINAL ORDER
DISSOLVING INJUNCTION, AUTHORIZING NON-JUDICIAL
FORECLOSURE AND DISMISSING CLAIMS - 6

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

APPENDIX

B

FILED

KING COUNTY, WASHINGTON Honorable Julie Spector
March 12, 2010

MAR 18 2010

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NORCON BUILDERS, LLC, a Washington
limited liability company,

Plaintiff,

v.

GMP HOMES VG, LLC, et al.,

Defendants.

No. 08-2-24201-3 SEA

~~PROPOSED~~ ORDER DENYING
APPLICANTS' MOTION FOR ORDER
AMENDING FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
DECLARING THAT LIBERTY CAPITAL'S
DEED OF TRUST IS SUBORDINATE TO
DEEDS OF TRUST THE APPLICANTS
GRANTED TO THEIR LENDERS

RYAN K. JOSWICK and STEPHANIE C.
JOSWICK, husband and wife, ERICH B.
NAUMANN and ERIN M. NAUMANN, husband
and wife, STEVEN OPPENHEIM, a single
man, YIBELTAL ABDI and ELNATA DEGEFA,
husband and wife, JOHN MICHAEL
O'CONNOR, a single man, STARPOINT
SHOPS, LLC, a Washington limited liability
company, JENNY SEELNBACHER, a single
woman, LORI BECKER, a single woman,
BRIAN MARTINEZ and STACEY MARTINEZ,
husband and wife, and LAURA KLEBS, a
single woman,

Third-Party Plaintiffs,

v.

NORTHWEST TRUSTEE SERVICES, Inc., a
Washington corporation,

Third-Party Defendant.

[PROPOSED] ORDER DENYING APPLICANTS' MOTION
FOR ORDER AMENDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 1

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OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

ORIGINAL

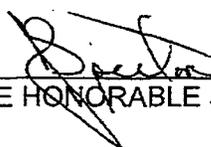
1 This matter came before the court on Applicants' March 2, 2010 motion (the
2 "Motion"), brought under CR 52(b) and 59(a), asking the Court to reconsider its February 12,
3 2010 "Findings of Fact and Conclusions of Law" by adding a proposed Finding and
4 Conclusion. Applicants' Motion has been brought *before* final judgment, the entry of which
5 has been separately sought by defendants Liberty Capital and Norcon Builders, Inc. in
6 proposed forms noted for presentation on March 11, 2010.

7 Pursuant to CR 59(e)(2) "Consolidation of Hearings," the Court exercises its
8 discretion to decide Applicants' Motion *prior* to entry of final judgment.

9 Having considered the Motion, Liberty Capital's opposition, the appellants' reply
10 papers, and being duly advised, it is hereby

11 ORDERED that the appellants' Motion is denied.

12 DONE in open court this 15th day of March, 2010.

13
14
15 
16 THE HONORABLE JULIE SPECTOR

17 Presented by:

18 OLES MORRISON RINKER & BAKER, LLP

19
20
21 By s/ Douglas S. Oles
22 Douglas S. Oles, WSBA #9366
23 Christopher Butler, WSBA # 27303
24 Attorneys for Norcon Builders & Liberty Capital

25
26 [PROPOSED] ORDER DENYING APPLICANTS' MOTION
FOR ORDER AMENDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 2

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OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

APPENDIX

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FILED
KING COUNTY, WASHINGTON

FEB 19 2010

Honorable Julie Spector

SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NORCON BUILDERS, LLC, a Washington
limited liability company,

Plaintiff,

v.

GMP HOMES VG, LLC, et al.,

Defendants.

No. 08-2-24201-3 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

RYAN K. JOSWICK and STEPHANIE C.
JOSWICK, husband and wife, ERICH B.
NAUMANN and ERIN M. NAUMANN, husband
and wife, STEVEN OPPENHEIM, a single
man, YIBELTAL ABDI and ELNATA DEGEFA,
husband and wife, JOHN MICHAEL
O'CONNER, a single man, STARPOINT
SHOPS, LLC, a Washington limited liability
company, JENNY SEELENBACHER, a single
woman, LORI BECKER, a single woman,
BRIAN MARTINEZ and STACEY MARTINEZ,
husband and wife, and LAURA KLEBS, a
single woman,

Third-Party Plaintiffs,

v.

NORTHWEST TRUSTEE SERVICES, Inc., a
Washington corporation,

Third-Party Defendant.

FINDINGS AND CONCLUSIONS

ORIGINAL

King County Superior Court
Judge Julie A. Spector
516 THIRD AVE
SEATTLE, WA 98101-2381
PHONE: (206) 296-9160

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I. INTRODUCTION

Defendants Liberty Capital Starpoint Equity Fund, LLC and Liberty Capital Bridge, LLC (collectively "Liberty Capital") hold an unsatisfied deed of trust against five units in the Starpoint Condominium in Issaquah, Washington. Those units are owned by defendant "Applicants" Joswick, Naumann, Oppenheim, O'Conner and Klebs (Units N-205, N-209, N-213, N-402 & S-412). Liberty Capital sought to conduct a nonjudicial foreclosure in June 2009, but the homeowners obtained a temporary injunction against such foreclosure while pursuing claims in this lawsuit to nullify Liberty Capital's deed of trust. The homeowners' injunction has caused great financial harm to Liberty Capital, effectively forcing it out of business while waiting for the trial in this case. Liberty Capital now asks the Court to confirm that its deed of trust remains validly in effect against the five disputed condominium units.

The dispute between Applicants and Liberty Capital is essentially quite simple. Applicants purchased their units without having obtained any form of approval from Liberty prior to closing. The central question is whether Applicants may avoid or nullify Liberty's recorded encumbrance by alleging some kind of agreement or equitable estoppel.

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II. FINDINGS OF FACT

18

A. The Parties

19 1. Defendant GMP Homes VG, LLC, the Starpoint condominium developer, later
20 became insolvent.

21 2. Frontier Bank was the primary lender on GMP's development project, loaning
22 around \$26 million secured by a deed of trust.

23 3. Defendant Liberty Capital Starpoint Equity Fund, LLC, was the second place
24 secured lender to GMP on the Starpoint project. It recorded a deed of trust against the
25 condominium project and later assigned that deed of trust to Liberty Capital Bridge LLC.

26 FINDINGS AND CONCLUSIONS

King County Superior Court
Judge Julie A. Spector
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1 4. Defendant Liberty Capital Bridge, LCC, owned by a different group of
2 investors than Liberty Capital Starpoint Equity Fund, LLC, took an assignment of the latter
3 entity's deed of trust and increased GMP's principal loan to \$1.9 million.

4 5. The plaintiff, Norcon Builders, LLC, was GMP's prime contractor on the
5 Starpoint project. It secured its unpaid contract balance by filing liens against the
6 condominium property.

7 6. The "Applicant" homeowners, including defendants Joswick, Naumann,
8 Oppenheim, O'Conner and Klebs, purchased Starpoint units in August and September
9 2007. They applied in June 2009 for a temporary injunction blocking Liberty Capital's
10 nonjudicial foreclosure against their units, and they later added a prayer to quiet title on
11 August 18, 2009.

12 7. First American Title Insurance Company was hired as escrow closing agent
13 for all 88 units sold in the Starpoint condominium. Its affiliate Northwest Post Closing Center
14 assisted in processing paperwork for reconveyances of lender deeds of trust. As reflected
15 in Ex. 246, First American has accepted tender of the Applicants' defense without a
16 reservation of rights and posted the required bonds (Ex. 245) as security for damages
17 arising from issuance of the Court's pre-trial injunction.

18 **B. Liberty Capital Holds A Recorded, Unsatisfied Deed of Trust**

19 9. GMP Homes VG LLC ("GMP") developed the Starpoint condominium in 2006
20 and 2007. It comprised 98 units built on two parcels of land in the City of Issaquah. The
21 two parcels are sometimes referred to as Division 31 and Division 43.

22 10. GMP obtained its primary project financing from Frontier Bank, which secured
23 its loan (around \$26 million) with a recorded deed of trust. GMP then retained Norcon
24

25
26 FINDINGS AND CONCLUSIONS

King County Superior Court
Judge Julie A. Spector
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SEATTLE, WA 98101-2381
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1 Builders LLC ("Norcon") to construct the 98-unit condominium. Construction had begun by
2 the first half of 2006.

3 11. By July 2006, GMP needed additional financing to complete the new
4 condominium project. It negotiated a Loan Agreement (Ex. 206) under which Liberty Capital
5 Starpoint Equity Fund initially loaned \$1,000,000 to GMP in two separate \$500,000
6 advances. Over time, the principal amount of Liberty Capital's loan was increased to
7 \$1,900,000 (Exs. 208, 214, 228 and 230).

8 12. Liberty Capital's loans on the Starpoint condominium were fully funded by
9 wire transfers (Exs. 204, 210, 217 & 229) and were fully secured by recorded deeds of trust
10 (Exs. 203, 209 & 212)

11 13. The financing to GMP came from both Liberty Capital Starpoint Equity Fund
12 LLC and Liberty Capital Bridge LLC. In October 2008, by way of two assignment
13 documents (Exs. 235 & 236), Liberty Capital Bridge LLC became sole owner of the
14 amended deed of trust against the Starpoint properties. It was undisputed that Liberty
15 Capital's deeds of trust were properly recorded in King County as encumbrances on the
16 Starpoint properties.

17 14. Liberty Capital's initial loan disbursement (\$500,000) was on or about 7/12/06
18 (Ex. 204). GMP's promissory note (Ex. 205) was dated 7/12/06, and the Loan Agreement
19 (Ex. 206) required the loan to be repaid within one year.

20 15. GMP became insolvent and defaulted on Liberty Capital's loan, paying none
21 of the principal or deferred loan fees. David Dammarell offered uncontroverted evidence
22 (Ex. 255) that the unpaid balance of Liberty's loan to GMP, as of January 8, 2010, was
23 \$3,311,404.46, after giving credit for the \$400,000 that Liberty Capital Bridge bid to acquire
24 GMP's 10 unsold units at a nonjudicial foreclosure sale in the summer of 2009.

25
26 FINDINGS AND CONCLUSIONS

King County Superior Court
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1 16. Liberty Capital's 2006 Loan Agreement (Ex. 206) included an initial
2 agreement with GMP on how to handle partial reconveyances of Liberty's deed of trust on
3 individual units as they were sold:

4 Provided Borrower is not in default under the terms of this Agreement and the
5 obligation in favor of Frontier Bank is being reduced at a rate that will amortize such
6 indebtedness over the course of the first seventy-five (75) Condominium Unit
7 closings, Lender will release the lien of its Deed of Trust as against the first seventy-
8 five (75) Condominium Units, at closing of the sales thereof, by way of partial
9 reconveyance and without the necessity of Lender reviewing and approving the
10 financial terms of the transactions giving rise to a particular reconveyance request.
11 Commencing with the seventy-sixth (76th) Condominium Unit closing, and
continuing until such time as the entire obligation due Lender hereunder has been
fully satisfied, Lender will release the lien of its Deed of Trust as against a given
Condominium Unit only upon Borrower's written request and Lender's prior written
consent and approval of the financial terms of the transaction giving rise to a
particular reconveyance request.

12 17. The 2006 Loan Agreement was never shared with Applicants or with their
13 escrow agent prior to discovery in this lawsuit. It follows that neither Applicants nor First
14 American relied in any way on Liberty Capital's conditional promise to reconvey its deed of
15 trust on 75 Starpoint units.

16 18. Applicants admitted during the litigation that they are "not seeking third party
17 beneficiary status under Liberty Capital's loan agreements" and are "also not seeking to
18 enforce the loan agreements [between Liberty Capital and GMP]".¹

19 19. It was undisputed that GMP defaulted under its 2006 Loan Agreement. GMP
20 failed to repay its loan by July 2007, and sales of Starpoint units did not generate net
21 revenue at a rate that would repay the primary lender (Frontier Bank) from the first 75 unit
22 sales. GMP therefore failed to meet key conditions under which Liberty Capital initially
23 agreed to reconvey its deed of trust against the first 75 units sold.

24
25 ¹ Applicants' Reply Brief of 6/18/09, at p. 4.

26 FINDINGS AND CONCLUSIONS

King County Superior Court
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1 20. Liberty Capital's deed of trust included a provision that its acceptance of late
2 payments did not "waive its right to require prompt payment when due of all other sums so
3 secured or to declare a default for failure to so pay". Ex. 203 at p. 2. There was no
4 evidence that Liberty Capital knowingly or intentionally waived its right to declare GMP in
5 default with respect to the unpaid balance of its loan.

6 21. Because GMP's loan was in default before the first Starpoint unit was sold,
7 the record of emails will confirm that Liberty Capital insisted on reviewing and approving the
8 financial terms of each sale transaction giving rise to a particular reconveyance request.
9 See, e.g., Ex. 224.

10 **C. Liberty Capital's Agreed Course of Dealing With First American, and**
11 **First American's Omissions**

12 22. Beginning with the first Starpoint unit sale on or about July 30, 2007, the
13 Applicants' escrow agent (First American Title Insurance Co.) implemented a standard
14 practice for securing Liberty Capital's approval for each unit sale: First American's closing
15 agent, Brianna Warthan, asked Liberty Capital's David Dammarell to "email or fax me a
16 notice that you're collecting \$0.00 for this payoff." (Ex. 223)

17 23. Ms. Warthan set up the system so there would be a separate email request
18 (with an escrow number in the subject line) for each unit closing. At trial and in her
19 Declaration of June 10, 2009, Ms. Warthan acknowledged that she needed lender "approval
20 on each closing". (Ex. 244 at par. 7).

21 24. Liberty Capital and First American (acting for the homeowners) established a
22 repetitive course of dealing over the months when Starpoint units were sold. Throughout
23 the period when the five disputed units were sold (8/13/07 to 9/14/07, as summarized on Ex.
24 168), the Applicants' escrow agent at First American was Brianna Warthan. She stated in
25 her sworn declaration that she not only needed Liberty Capital's approval on each closing;

26 FINDINGS AND CONCLUSIONS

King County Superior Court
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1 she also needed to confirm that Liberty was in agreement regarding how she would
2 distribute the sale proceeds from each closing (Ex. 244 at par. 7). At trial, Ms. Warthan
3 confirmed that under what she understood to be an agreed procedure, she would not close
4 any unit sale without first obtaining Liberty Capital's *written* approval. When Applicants'
5 counsel suggested that a verbal approval might have been sufficient, she maintained that a
6 written approval was needed. See also Warthan Dep. 42:25 to 43:7 & 69:4-11. This
7 testimony was corroborated by David Dammarell, who confirmed that Liberty Capital needed
8 to give written approval for each Starpoint closing (initially by email and later by a signed
9 request for partial reconveyance). It was also corroborated by the deposition testimony of
10 First American's branch manager, Suzanne Schroeder, who testified that she would expect
11 Ms. Warthan's file to include "some kind of written communication from the lender" in
12 connection with each closing. (Dep. 12:18 to 13:13). .

13 25. In addition to sending "zero payoff" email requests on most closings, First
14 American also had a procedure of sending a Seller's HUD-1 Settlement Statement to Liberty
15 Capital in advance of each closing. These Settlement Statements explained in detail how
16 cash proceeds from each closing would be distributed. Typically, most proceeds from the
17 closings went to Frontier Bank, the senior secured lender, but the lenders also agreed for
18 \$1,500 from each closing to go to Richard Prendergast (a guarantor of GMP's loan) and to
19 some of Norcon's subcontractors that filed liens against the Starpoint property. Liberty
20 Capital insisted on signing off on each unit sale to release the deed for recording. (see, e.g.,
21 Ex. 224).

22 26. In connection with the sale of unit S-412 to Laura Klebs on September 14,
23 2007, Applicants offered no evidence that First American ever requested or obtained Liberty
24 Capital's approval (in any form) prior to closing. First American's own updated summary of
25 the closings (Ex. 168, at p. 3) confirms that First American never sent a HUD-1 Settlement
26 FINDINGS AND CONCLUSIONS

King County Superior Court
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1 Statement and never sent a "zero payoff" request to Liberty on this unit. The unredacted
2 first page of Ex. 81 includes Suzanne Schroeder's handwritten acknowledgement that "No
3 email sent to Dave Dammarell on this one."

4 27. In connection with the sale of unit N-402 to John O'Connor on August 15,
5 2007, Applicants offered no evidence that First American ever sent a HUD-1 Settlement
6 Statement to Liberty Capital prior to closing. Applicants also offered no evidence that First
7 American ever obtained Liberty Capital's approval (in any form) prior to closing. Applicants
8 offered Ex. 163, suggesting that GMP received a "zero payoff" email for unit N-402 on
9 August 13, 2007, but that email did not attach a HUD-1 Settlement Statement. First
10 American's own updated summary of the closings (Ex. 168, at p. 2) indicates that First
11 American had no record of ever sending a "zero payoff" request on unit N-402, and the
12 unredacted first page of Ex. 31 includes Suzanne Schroeder's handwritten
13 acknowledgement that "No reply from Liberty on this one."

14 28. In connection with the sale of unit N-205 to the Joswicks on August 15, 2007,
15 Applicants on the eve of trial produced Ex. 161, indicating that GMP received a "zero payoff"
16 email from First American on August 13, 2007. Neither Liberty Capital nor First American
17 was able to find copies of this message, indicating that it failed to reach those two
18 addressees. Brianna Warthan testified to her belief that she must have received an
19 approving written response before closing on August 15, there was no evidence that any
20 such approval was ever given. The First American witnesses both confirmed that their
21 company policy required saving and archiving all such lender approvals, First American's
22 own updated summary of the closings (Ex. 168, at p. 2) indicates that First American has no
23 record of ever sending a "zero payoff" request on unit N-205.

24 29. In connection with the sale of unit N-209 to the Naumanns on August 15,
25 2007, Applicants on the eve of trial produced Ex. 162, indicating that GMP received a "zero
26 FINDINGS AND CONCLUSIONS

King County Superior Court
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1 payoff" email from First American on August 14, 2007. Neither Liberty Capital nor First
2 American was able to find copies of this message, indicating that it failed to reach those two
3 addressees. Brianna Warthan testified to her belief that she must have received an
4 approving written response before closing on August 15, there was no evidence that any
5 such approval was ever given. The First American witnesses both confirmed that their
6 company policy required saving and archiving all such lender approvals, First American's
7 own updated summary of the closings (Ex. 168, at p. 2) indicates that First American has no
8 record of ever sending a "zero payoff" request on unit N-209. The unredacted first page of
9 Ex. 10 includes Suzanne Schroeder's handwritten acknowledgement that "No payoff in file
10 for Frontier or Liberty".

11 30. In connection with the sale of unit N-213 to Stephen Oppenheim on August
12 23, 2007, Applicants on the eve of trial produced Ex. 164, indicating that GMP received a
13 "zero payoff" email from First American on August 22, 2007. Neither Liberty Capital nor First
14 American was able to find copies of this message, indicating that it failed to reach those two
15 addressees. Brianna Warthan testified to her belief that she must have received an
16 approving written response before closing on August 23, there was no evidence that any
17 such approval was ever given. The First American witnesses both confirmed that their
18 company policy required saving and archiving all such lender approvals, First American's
19 own updated summary of the closings (Ex. 168, at p. 3) indicates that First American has no
20 record of ever sending a "zero payoff" request on unit N-213.

21 31. Brianna Warthan, First American's closing agent for all five of the disputed
22 sales, testified that she only earned her "own desk" in the second half of 2006, the same
23 time frame when she was assigned to handle the Starpoint condominium closings. Ms.
24 Warthan's supervisor and branch manager, Suzanne Schroeder, testified to having trained
25 Ms. Warthan to require written lender approvals before closing on the units and to retaining
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1 copies in First American's file of all such consents. She also acknowledged, however, that
2 Ms. Warthan did not have substantial experience in closing multi-unit condominium projects
3 before Starpoint. Dep. 28:7-11. Ms. Schroeder expressed her belief that Ms. Warthan
4 would not close a transaction if she didn't have lender consents in hand, and she
5 acknowledged her deposition testimony to the effect that such consents should have been in
6 writing (Dep. 12:18 to 13:13). Ms. Schroeder also acknowledged, however, that she was
7 not personally involved in unit closings at the time of the five disputed transactions and had
8 no personal communications with Liberty Capital in that time frame.

9 32. During the first half of 2007, GMP accumulated a backlog of condominium
10 pre-sales that could not close until the two buildings received certificates of occupancy. Ms.
11 Schroeder acknowledged that the summer of 2007 was an extremely active period of real
12 estate closings, recalling "200 closings per day" for the first six months of that year. Ex. 256
13 at par. 7. In her deposition, Ms. Schroeder acknowledged that her office was "very busy" in
14 July and August 2007 (Dep. 28:12-16), the period when four of the five disputed units
15 closed. In her lawyer-drafted declaration of June 10, 2009 (Ex. 244 at par. 11), Ms. Warthan
16 acknowledged that closings without Liberty's consent "may have occurred very early in the
17 sale process". Similarly, on October 10, 2008, when First American's Suzanne Schroeder
18 first realized that her files were missing approvals on the same units for which Liberty was
19 unable to find approvals, her first reaction was to admit that her people "maybe have missed
20 some" (Ex. 238 at p. 2). It was only at trial when Ms. Schroeder and Ms. Warthan attempted
21 to argue that First American could never have made the mistake of closing without written
22 consent from Liberty Capital.

23 33. There was no testimony or other evidence at trial of any agreement (written
24 or oral) under which Liberty Capital promised to reconvey its deed of trust on any of the five
25 disputed units. Brianna Warthan testified to an undocumented telephone conversation in
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1 which she recalled that David Dammarell stated that Liberty Capital would not claim any
2 cash proceeds from closings of Starpoint units until Frontier Bank's senior loan was paid off,
3 but she never testified that Liberty agreed to reconvey its deed of trust other than in writing
4 and on a unit-by-unit basis.

5 34. On December 3, 2007, several months after the five disputed units had
6 closed, First American's Suzanne Schroeder sent an email (Ex. 155) asking whether Liberty
7 Capital was "still taking 0 amount until Frontier is paid". Mr. Dammarell responded by saying
8 "Yes we are ok with \$0.00". The subject line of this email related only to unit N-307, but
9 Applicants argue that it was understood as an agreement relating to all units on the
10 Starpoint project. Even if the email may be construed as a confirmation that Liberty Capital
11 would not claim proceeds from unit closings until Frontier Bank was paid off, it cannot
12 reasonably be viewed as a blanket agreement by Liberty to reconvey its deed of trust on all
13 previous or subsequent unit closings. On this point, Liberty Capital demonstrated that First
14 American required an additional written approval (i.e. a signed request for partial
15 reconveyance) on unit N-307 (Ex. 21, p. LC 779 & LC 610) before that sale was closed on
16 January 17, 2008. Moreover, First American's own updated summary of unit closings (Ex.
17 168) confirms that First American required Liberty Capital to provide a separate signed
18 request for partial reconveyance prior to closing each unit that sold in 2008. First
19 American's insistence on separate written approvals for each unit closing contradicts any
20 assertion that First American believed that it had some kind of omnibus agreement by
21 Liberty to release its deed of trust on multiple units.

22 35. In 2008, during the last six months of Starpoint unit sales, First American
23 began requesting formal signed requests for partial reconveyance from Liberty Capital as a
24 precondition for each unit closing(see, e.g., page LC 610 in Ex. 21). Such documents were
25 requested and obtained on units N-307 (Ex. 21), S-303 (Ex. 61), S-101 (Ex. 47), S-305 (Ex.
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1 63), S-203 (Ex. 50), S-201 (Ex. 49), S-406 (Ex. 76), S-311 (Ex. 68), S-301 (Ex. 59), S-314
2 (Ex. 70), S-205 (Ex. 52), N-311 (Ex. 25), and N-308 (Ex. 22). First American reports in Ex.
3 168 that those units closed between 1/17/08 and 7-15-08.

4 36. Brianna Warthan testified that she sent emails in late 2007 and early 2008,
5 asking Liberty Capital to sign an omnibus request for partial reconveyance covering
6 approximately 15 unit closings that had occurred previously. She could not recall the dates
7 of such emails, and David Dammarell testified that he never received such requests. The
8 Applicants were unable to produce copies of any such emails from either First American or
9 from its affiliate, Northwest Post Closing Center. If such omnibus requests for partial
10 reconveyance ever existed, they must have been lost or discarded by First American,
11 Northwest Post Closing Center and Liberty Capital, and Applicants offered no explanation
12 as to how all three parties could have lost such documents. First American also failed to
13 mention any such communications when issues arose in late 2008 or even when Ms.
14 Warthan and Ms. Schroeder recounted their recollections in pre-trial declarations (Ex. 244 &
15 256). The preponderance of evidence therefore indicates that Ms. Warthan's memory was
16 inaccurate when she recalled such documents at trial.

17 37. On each of the five disputed units, the purchaser received a preliminary title
18 commitment report showing Liberty's deed of trust as an encumbrance against their property
19 (see the Schedule B Exceptions in such reports at Exs 219, 220, 221, 222 & 226). Those
20 same referenced exhibits show that First American deleted the references to Liberty
21 Capital's deed from the final reports issued by First American to the Applicants, despite
22 actual knowledge that it had not obtained Liberty Capital's consent to reconvey its deed.

23 38. Ms. Warthan testified in her deposition and reconfirmed at trial that she kept
24 her own list of Starpoint closings as they occurred (Dep. 33:16-20). Ms. Warthan also said
25 that she kept track of lender consents to closings by marking up copies of the preliminary
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1 title reports on each property (Dep. 36:23 to 38:1). She said that she saved various emails
2 or notes pertaining to specific unit files (Dep. 71-6-14). She also recalled that she may have
3 kept notes of her conversation with Mr. Dammarell regarding his alleged willingness to sign
4 an omnibus retroactive request for reconveyance (Dep. 82-19 to 83:5). According to the
5 testimony of Ms. Warthan and Ms. Schroeder, however, all these categories of documents
6 were lost or discarded before or after Ms. Warthan was laid off in approximately July 2008.
7 The omissions in First American's email files are reflected by the fact that what Ms.
8 Schroeder identified as her company's closing files for individual Starpoint units (e.g., Exs 1-
9 82) are supplemented with numerous Liberty Capital documents (marked with "LC" bates
10 numbers) where those items were apparently missing from First American's own records.
11 The testimony from Ms. Warthan and Ms. Schroeder indicate that substantial numbers of
12 documents relating to Starpoint closings were either lost or discarded from First American's
13 files.

14 39. Liberty Capital suffered prejudice from not having been asked to approve a
15 deed reconveyance on the five disputed units prior to their closings in August and
16 September 2007. Liberty Capital presented un rebutted evidence that had it received earlier
17 notice of the higher number of units being sold (and the consequent reduction in its loan
18 collateral), it could have gone to the borrower (GMP) and demanded additional collateral.
19 David Dammarell testified without contradiction that GMP had additional collateral available
20 as late as January 2008 (a gas station property in Kirkland).

21 40. Mr. Dammarell also testified that Liberty Capital insisted on changes in some
22 transactions based on his review of draft HUD-1 Settlement Statements from First American.
23 He said he had rejected the proposed sale of unit S-406 to Wayne & Janice Griggs when
24 GMP proposed selling that unit at a significant discount (to repay a separate debt owed by
25 Greg Prendergast to Mr. Griggs). Mr. Dammarell repeatedly testified that he also made
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1 changes in terms of sale (e.g., commissions) when given the chance to review and approve
2 the draft HUD-1 Settlement Statements. Liberty Capital was deprived of the opportunity to
3 make such changes when First American closed the five disputed sales without Liberty
4 Capitals' prior consent.

5 41. Mr. Dammarell testified that he would not have approved distributing \$12,895
6 to GMP Homes IH, LLC on the sale of unit N-205 if he had seen the draft Settlement
7 Statement prior to closing (see Ex. 161 at p. 3). Greg Prendergast corroborated this
8 testimony by agreeing that GMP Homes IH, LLC was separate from GMP Homes VG, LLC
9 and was not supposed to receive any proceeds from Starpoint sales.

10 42. Mr. Dammarell testified that he would have questioned distributing \$13,445 to
11 GMP Homes VG LLC on the sale of unit N-209 if he had seen the draft Settlement
12 Statement prior to closing (see Ex. 162 at p. 3). Greg Prendergast corroborated this testimony
13 by acknowledging that GMP should not have been receiving proceeds from unit closings
14 before the secured loans were paid off.

15 43. Mr. Dammarell testified that he would have questioned distributing \$750 to
16 First American for errors in calculating commissions for units N-401 and N-304 from the
17 proceeds of selling unit N-213 (see Ex. 13 at p. 3). He noted that these distributions were
18 not shown on the draft HUD-1 Settlement Statement that First American claims to have sent
19 to Liberty Capital (Ex. 164 at p. 3).

20 44. Liberty Capital was therefore prejudiced in several ways when First American
21 closed the five disputed units without obtaining Liberty's approval for an accurate Settlement
22 Statement prior to closing.

23 45. Applicants point to several emailed sales reports received by Liberty Capital
24 from which Liberty might have inferred the accurate number of Starpoint units sold in 2007.
25 The earliest such report is Ex. 160, a GMP request for additional credit on August 30, 2007,
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1 that attached a list showing four of the five disputed units to be sold. Although Ex. 160 gave
2 Liberty Capital information from which it might have discovered that four units had been
3 closed without its consent, the evidence indicates that Liberty Capital did not realize the
4 discrepancy in that time frame. Liberty Capital expressed genuine surprise when learning of
5 the unapproved closings in October 2008, which was the earliest time at which it understood
6 that it had not provided approvals for five unit sales.

7 46. Even if Liberty Capital had discerned in late August 2007 that four units had
8 closed without its consent, the unrebutted testimony demonstrated that there was little that
9 Liberty Capital could have done about it. The unit purchasers would have already paid their
10 money for units that continued to carry Liberty's deed of trust as a recorded encumbrance.
11 Moreover, Frontier Bank's loan balance was still so large in 2007 that it was financially
12 impractical for Liberty Capital to commence a foreclosure action at that time. Further,
13 Liberty Capital's status reports to its own LLC members reflect that it continued to expect
14 that collateral would be sufficient to pay off its loan until sometime in the spring of 2008.
15 Mr. Dammarell testified without opposition that Liberty Capital could not afford (as a junior
16 creditor) to commence a foreclosure action before the second half of 2008, when the
17 foreclosure proceeding in fact began. By that time, sufficient additional Starpoint units had
18 sold so that Frontier Bank's balance was a sum low enough for Liberty Capital to pay it off
19 with borrowed funds.

20 47. Liberty Capital never gave or promised to give a written reconveyance of its
21 deed of trust to First American or the Applicants.

22 **D. Events After Norcon Filed Its Lien.**

23 48. Out of the 98 Starpoint units, GMP managed to sell 88. The last unit sale
24 closed on or about July 15, 2008 (see Ex. 168). Because Applicants and their escrow agent
25 (First American) never asked Liberty Capital to reconvey its deed of trust against the five
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1 disputed units, Liberty Capital's deed of trust remained as a recorded encumbrance against
2 those units. It was undisputed that the deed of trust could only be reconveyed by Liberty
3 Capital's trustee, and First American knew that no such reconveyance had been obtained
4 during the months that passed before Liberty Capital became aware of the five units lacking
5 approvals.

6 49. On November 18, 2007 (Ex. 233) and January 10, 2008 (Ex. 234), GMP's
7 contractor (Norcon) filed liens against the Starpoint properties. On July 18, 2008, Norcon
8 commenced this lawsuit, suing to foreclose its lien, which remains in place against the units
9 and parking spaces that were never sold by GMP.

10 50. Because Liberty Capital did not have accurate and updated records on all the
11 units that had sold, it sent an email on October 9, 2008 (Ex. 237) asking First American to
12 provide a complete list. First American provided a list of all the sold units.

13 51. On October 10, 2008, Mr. Dammarell responded that First American's list
14 "didn't match" Liberty Capital's list of the units on which his company had "signed off".

15 52. In Response to Mr. Dammarell First American admitted that it may have
16 failed to provide information on all sales and to request reconveyances from Liberty Capital
17 as to some sales. (Ex. 238)

18 53. No later than November 10, 2008, Liberty Capital provided a list of six units
19 for which it could not find any written approval to close (Ex. 240, at p. 2). This list included
20 the five units now in dispute (plus unit S-103 for which a mis-labeled "zero payoff" email was
21 later found). Only after receiving this email did First American disclose the five units for
22 which it also was unable to find Liberty Capital's written approval to close. Under the
23 Applicants' theory at trial, both Liberty Capital and First American coincidentally lost the
24 approving emails on the same five out of 88 closings. Ms. Schroeder admitted that this was
25 an amazing coincidence, and the Court finds by a preponderance of the evidence that First
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1 American closed the five disputed closings without receiving any prior approval from Liberty
2 Capital.

3 54. Liberty Capital consistently maintained that it had never approved a deed
4 reconveyance on the five disputed units. On November 11, 2008, Liberty Capital therefore
5 asked First American to purchase its note.

6 The [zero payoff] e-mail system was started by First American with the very first
7 closing. Brianna [Warthan] may have been too busy, overworked or perhaps this is
8 an example of why she is no longer with First American.

9 First American's negligence is absolutely clear with regard to the 10 units. Given the
10 sales price of these units, it makes sense for First American to accept our offer,
11 purchase our note and proceed with the foreclosure to maximize the recovery to
12 First American.

13 (Ex. 240).

14 55. In October and November 2008, First American believed it would be able to
15 retrieve records from its file showing that Liberty Capital had authorized a reconveyance of
16 its deed on the five disputed unit closings (Ex. 241). Ultimately, however, First American
17 was unable to provide any evidence that such authorization was ever received (although Ex.
18 161-64 indicate that First American attempted to request such approval on four units).

19 56. Having determined that Norcon's lien filings related back to the start of
20 Starpoint construction (and therefore had higher priority than Liberty Capital's deed of trust),
21 Liberty Capital negotiated to protect its own security interest by arranging for an affiliate to
22 purchase Norcon's lien. Liberty Capital initially hoped to finance this purchase through
23 proceeds of nonjudicial foreclosure on Starpoint units.

24 57. After setting earlier foreclosure dates that had to be postponed, Liberty
25 Capital scheduled a non-judicial foreclosure of its deed of trust on June 5, 2009. The
26 Applicants responded by filing a complaint on May 22, 2009, that sought injunctive relief
against the foreclosure sale (pending further pretrial discovery and a trial on the merits).

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1 58. The Applicants sought, and were granted, a temporary injunction preventing
2 Liberty Capital from proceeding with the nonjudicial foreclosure sale. On June 3, 2009, the
3 Court Commissioner issued a temporary restraining order, and on June 19, 2009 the Court
4 issued a preliminary injunction on June 19, 2009. The injunction was, however, conditioned
5 on posting of a \$640,000 bond to protect Liberty Capital against damages that were
6 expected to arise from delays to its foreclosure process (e.g., additional accruing interest,
7 additional costs and expenses and diminution of collateral value in a falling real estate
8 market). The required bond was posted by First American. Subsequently, on December 18,
9 2009, the Court ordered that the bond be increased to \$1,239,969.28, based on evidence
10 that Liberty Capital's delay-related costs were turning out to be significantly larger than
11 expected in June. See Ex. 245.

12 59. On July 24, 2009, Applicants stipulated that Liberty Capital could split its
13 foreclosure sale into two parts in exchange for Liberty Capital's dropping its deed of trust
14 claim against five resold Starpoint units. (see Ex. 260, insisting on release of 83 units as a
15 condition for allowing a split foreclosure sale). Based on that stipulation, Starpoint
16 conducted a nonjudicial foreclosure sale against the 10 Starpoint units that had never been
17 sold by GMP. As part of its foreclosure process, Liberty Capital obtained a new title
18 commitment, confirming that its deed of trust remains on record as an encumbrance against
19 the five disputed Starpoint units.

20 60. The foreclosure sale on GMP's ten unsold units paid down Liberty's loan by
21 \$400,000. Although this sum was substantially less than the gross fair market value of the
22 foreclosed properties, the interest acquired by Liberty was subject to Frontier Bank's first
23 Deed of Trust (approximately \$1.1 million) as well as the Norcon lien (approximately
24 \$900,000). In these circumstances, Liberty Capital Bridge's purchase at its own
25 foreclosure sale did not constitute a substantial windfall as alleged by Applicants.

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1 *Brewing, LLC v. Fairway Resources, Ltd.*, 152 Wn. App. 229, 268, 215 P.3d 990 (2009)
2 (citing *Hendricks v. Lake*, 12 Wn. App. 15, 22, 528 P.2d 491 (1974); see also *Kelsey Lane*
3 *Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn. App. 227, 235, 103 P.3d 1256 (2005).

4 3. Consequently, because the Applicants' escrow agent, First American, had
5 actual knowledge of the following matters, so the Applicants are legally and constructively
6 chargeable with the same knowledge, to wit: that Liberty Capital's deed of trust was
7 recorded; that a recorded reconveyance was required to discharge that deed of trust; and
8 that no such reconveyance had been recorded or approved by Liberty Capital at the times
9 their sales closed.

10 **B. EVIDENCE OF THE APPLICANTS' INSURANCE IS DIRECTLY RELEVANT TO**
11 **THE CONDUCT OF ITS INSURER.**

12 4. Applicants' case relies almost entirely on testimony by First American's
13 branch manager (Suzanne Schroeder) and the escrow agent who closed the five disputed
14 sales for First American (Brianna Warthan). Under ER 411, the Court may properly consider
15 that First American's testimony in this case (especially its recollection of communications
16 that do not exist in its own files) may be affected by bias. This bias arises from evidence
17 that First American has agreed to accept tenders of the Applicants' defenses in this case
18 without a reservation of rights (Ex. 246). ER 411 states in pertinent part:

19 Evidence that a person was or was not insured against liability is not
20 admissible upon the issue whether the person acted negligently or
21 otherwise wrongfully. This rule does not require the exclusion of evidence
22 of insurance against liability when offered for another purpose, such as
23 proof of agency, ownership, or control, or bias or prejudice of a witness.

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1 **C. WASHINGTON LAW BARS THE APPLICANTS' EFFORTS TO EXTINGUISH**
2 **LIBERTY CAPITAL'S DEED OF TRUST BASED ON ORAL STATEMENTS OR**
3 **INFORMAL COMMUNICATIONS.**

4 5. Liberty Capital has long and consistently argued that its recorded deeds of
5 trust "are formal instruments that are reconveyed and released by equally formal
6 documentation". See Memorandum of May 29, 2009. Liberty has also maintained that
7 "informal emails [do not] meet the legal requirements for reconveying a Deed of Trust under
8 Washington law. The Court has nonetheless ruled that Liberty Capital was barred from
9 amending its Answer to state a defense under the Statute of Frauds, RCW 64.04.010.

10 6. It appears that the Statute of Frauds issue has become largely moot,
11 because Applicants offered no evidence at trial of any oral agreement by Liberty Capital to
12 reconvey its deed of trust on any of the five disputed Starpoint units. Ms. Warthan, the only
13 person in direct communication with Liberty Capital during the period of the disputed
14 closings, did not claim to have relied on any oral agreements to reconvey Liberty's deed of
15 trust; instead, she acknowledged that she needed Liberty's *written* approval for each closing
16 and insisted that she must have had such approvals back in 2007.

17 7. The purpose of an express, written, and recorded instrument for the transfer
18 of an interest in real property promotes and protects "certainty of title." The Recording Act
19 governing transactions in real property achieves this by providing "constructive notice" to
20 third parties, like the Applicant homeowners of the five units at issue. RCW 65.08.030.
21 Moreover, any deed not recorded is statutorily void against any subsequent purchaser.
22 RCW 65.08.070. This system is in place to prevent exactly the types of subjective claims
23 that are at issue before this Court.

24 8. The Applicants' escrow agent failed to obtain Liberty Capital's consent to a
25 partial reconveyance on the five disputed units. The Applicants may therefore have been
26 victims of First American's negligence, but their remedy for such omissions does not lie

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1 against Liberty Capital.

2 9. Liberty Capital is not estopped from enforcing its deed of trust. Although
3 Applicants seem to have claimed at one time that Liberty Capital should be estopped from
4 enforcing its deed of trust based on promises in its loan agreement with GMP (Ex. 206).
5 Applicants have admitted, however, that they are not seeking specific enforcement of that
6 promise, and they are not claiming to be third party beneficiaries of that promise. Pursuant
7 to the Court's pre-trial ruling in limine, the Applicants were thereafter precluded from arguing
8 reliance or rights under the Liberty-GMP loan agreement. *Arikson v. Ethan Allen, Inc.*, 169
9 Wn.2d 535, 160 P.3d 13 (2007)(A party is estopped from asserting one position in a court
10 proceeding and later seeking an advantage by taking a clearly inconsistent position).

11 10. The Applicants' estoppel argument was similar to that asserted by the plaintiff
12 in *Kesinger v. Logan*, in which title to a strip of land along an irrigation canal was claimed by
13 two competing parties. 113 Wn.2d 320, 779 P.2d 263 (1989). As in *Kesinger*, no deed
14 memorializing a reconveyance of Liberty Capital's deed of trust was ever recorded for the
15 five units at issue here. Since the deed of trust never passed from Liberty's control, and
16 since there was never any agreement between Liberty Capital and either first American or
17 the Applicants to reconvey the deed of trust, the Court can find no estoppel.

18 11. The Applicants' failed to meet the "clear and convincing" burden of proof as to
19 the existence of an agreement between themselves or their agent, and Liberty Capital that
20 they have failed to carry. "Washington courts have usually stated that there must be 'clear
21 and convincing' proof that an oral promise was made." 17 Washington Practice § 7.12
22 "Informal Conveyances" at 499. The following is a typical statement:

23 The contract must be proven by evidence that is clear and unequivocal and
24 which leaves no doubt as to the terms, character, and existence of the
25 contract. A mere preponderance of the evidence is not sufficient. If the
evidence leaves it at all doubtful as to whether a contract was entered into,
the court will not decree specific performance.

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1 Powers v. Hastings, 93 Wn.2d 709, 713-4, 612 P.2d 371 (1980) (quoting Miller v.
2 McCamish, 78 Wn.2d 821, 829, 479 P.2d 919 (1971)) (emphasis added); see also Berg v.
3 Ting, 125 Wn.2d 544, 651-2, 886 P.2d 564 (1995) (same); Ferguson v. McBride, 69 Wn.2d
4 35, 36, 416 P.2d 464 (1966) (same); Granquist v. McKean, 29 Wn.2d 440, 445, 187 P.2d
5 623 (1947) (same); Richardson v Taylor Land & Livestock Co., 25 Wn.2d 518, 529, 171
6 P.2d 703, 710 (1946) (same); Ben Holt Indus., Inc. v. Milne, 36 Wn.App. 468, 475-6, 675
7 P.2d 1256 (1984) (same); Freidl v. Benson, 25 Wn.App. 381, 389-90, 609 P.O. 2d 449
8 (1980) (same); Clarke v. Alstores Realty Corp., 11 Wn.App. 942, 945-6, 527 P.2d 698
9 (1974) (same). As the Supreme Court added in Miller v. McCamish, 78 Wn.2d 821, 829,
10 479 P.2d 919 (1971):

11 Another requirement of the doctrine [of part performance] is that the acts
12 relied upon as constituting part performance must unmistakably point to the
13 existence of the claimed agreement.

14 (emphasis added).

15 12. The Applicants failed to prove the existence of any agreement under which
16 Liberty Capital promised either Applicants or their agent (First American) to reconvey
17 Liberty's deed of trust on more than one unit at a time. On the contrary, Applicants' own
18 evidence fully supported Liberty Capital's position that the parties' course of performance
19 required Liberty Capital to provide a separate written approval prior to each unit closing.
20 There was no credible evidence of any such approval on any of the five disputed unit sales.

21 13. Even if the Court were to infer some kind of an agreement, it would
22 necessarily post-date the five disputed sale closings and would not have been supported by
23 any consideration. There can be no contract in the absence of consideration. Carbon v.
24 Spokane Closing & Escrow, Inc., 135 Wash.App. 870, 876, 147 P.3d 605 (2006)(citing
25 Huberdeau v. Desmarais, 79 Wash.2d 432, 439, 486 P.2d 1074 (1971)). The Carbon court,
26 citing the Restatement of Contracts, found that "[t]o constitute consideration, a performance
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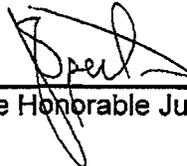
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SEATTLE, WA 98101-2381
PHONE: (206) 296-9160

1 or promise must be bargained-for, meaning "it is sought by the promisor in exchange for his
2 promise and is given by the promisee in exchange for that promise." *Id.* at 877. Applicants
3 failed to provide any evidence or proof that Liberty Capital received anything in exchange for
4 whatever agreement to reconvey may be argued by the Applicants' attorneys.

5 14. Liberty Capital has a valid, recorded deed of trust upon which it is entitled to
6 foreclose.

7 15. The Court's injunction preventing the nonjudicial foreclosure sale in June of
8 2009 was not properly supported, and Liberty Capital is entitled to present its resulting
9 damages in a supplemental or separate proceeding under CR 65.1.

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11 DATED this Friday, February 12, 2010.

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16 The Honorable Judge Julie A. Spector

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26 FINDINGS AND CONCLUSIONS

King County Superior Court
Judge Julie A. Spector
516 THIRD AVE
SEATTLE, WA 98101-2381
PHONE: (206) 296-9160

APPENDIX

D

Chart of Sales Prices & Closing Disbursements from Unit Owners' Sales

Case No. 65251-6-I

Transaction #/88 & Date	Homeowner/Unit	Contract Price	Liberty Capital's Objections to HUD Statement	Uncontested Payoff to First Lien Holder, Frontier
#26, 8/15/07 (Ex. 168)	J. M. O'Connor, N-402 (Ex. 168)	\$355,900.00 (Ex. 31)	No draft statement to review	\$319,504.11 (90% of contract price) (Ex. 31)
#27, 8/15/07 (Ex. 168)	E. & E. Naumann, N-209 (Ex. 168)	\$276,110.00 (Ex. 10)	\$13,445.00 Earnest Money Released to GMP Homes VG LLC (RP: Trial – 1/25/10 at 177)	\$239,172.35 (87% of contract price) (Ex. 10)
#28, 8/15/07 (Ex. 168)	R. & S. Joswick, N-205 (Ex. 168)	\$257,900.00 (Ex. 7)	\$12,895.00 Earnest Money Released to GMP Homes VG, LLC (RP: Trial – 1/14/10 at 189)	\$229,266.08 (89% of contract price) (Ex. 7)
#32, 8/23/07 (Ex. 168)	S. Oppenheim, N-213 (Ex. 168)	\$205,420.00 (Ex. 13)	\$750 Commissions from two other sales (RP: Trial – 1/25/10 at 180)	\$185,606.96 (90% of contract price) (Ex. 13)
#46, 9/14/07 (Ex. 168)	L. Klebs, S-412 (Ex. 168)	\$258,500.00 (Ex. 40)	No draft statement to review	\$228,532.45 (88% of contract price) (Ex. 40)
Total Value of Liberty Capital's Objections				
Total Homeowners' Contribution To Payment Of Frontier's First Lien				\$1,201,532.57

Chart of Sales Prices & Closing Disbursements¹

Trans. #	Unit #	Contract Price	Amount to Frontier
#1, 7/30/07	N-413	\$205,420.00	\$184,227.74 (90%)
#2, 7/31/07	N-305	\$295,500.00	\$252,368.28 (85%)
#3, 7/31/07	N-304	\$277,900.00	\$249,528.45 (90%)
#4, 8/1/07	N-309	\$293,316.00	\$257,584.14 (88%)
#5, 8/1/07	N-404	\$290,900.00	\$254,491.39 (87%)
#6, 8/3/07	N-202	\$345,000.00	\$319,811.96 (93%)
#7, 8/3/07	N-410	\$399,950.00	\$366,133.49 (92%)
#8, 8/3/07	N-407	\$519,900.00	\$465,478.76 (90%)
#9, 8/3/07	N-313	\$205,420.00	\$187,020.28 (91%)
#10, 8/7/07	N-212	\$205,420.00	\$186,990.24 (91%)
#11, 8/7/07	N-204	\$270,900.00	\$247,854.70 (91%)
#12, 8/7/07	N-412	\$250,500.00	\$228,532.45 (91%)
#13, 8/8/07	N-406	\$250,500.00	\$228,512.98 (91%)
#14, 8/8/07	S-C104	\$972,979.20	\$1,029,069.96 (106%)
#15, 8/8/07	S-C105		
#16, 8/8/07	S-C106		
#17, 8/9/07	N-201	\$354,900.00	\$324,522.46 (91%)
#18, 8/9/07	N-303	\$272,900.00	\$237,408.87 (87%)
#19, 8/10/07	N-403	\$284,900.00	\$249,499.58 (88%)
#20, 8/10/07	N-206	\$205,420.00	\$196,959.09 (96%)
#21, 8/10/07	N-405	\$264,900.00	\$235,525.22 (89%)
#22, 8/10/07	N-415	\$424,950.00	\$379,679.96 (89%)
#23, 8/10/07	N-312	\$205,420.00	\$186,968.00 (91%)
#24, 8/10/07	N-401	\$388,508.06	\$347,831.89 (90%)
#25, 8/13/07	N-210	\$374,900.00	\$348,388.79 (93%)
#29, 8/17/07	N-409	\$263,900.00	\$234,471.57 (89%)
#30, 8/17/07	N-408	\$468,950.00	\$419,703.42 (89%)

¹ This chart compiles information from Trial Exhibits 1 – 82 and 168.

#31, 8/17/07	N-314	\$374,900.00	\$348,339.15 (93%)
#33, 8/24/07	N-215	\$382,900.00	\$341,940.87 (89%)
#34, 8/24/07	N-414	\$449,950.00	\$380,404.55 (85%)
#35, 8/31/07	N-302	\$324,900.00	\$306,712.68 (94%)
#36, 8/31/07	N-310	\$376,900.00	\$350,369.14 (93%)
#37, 8/31/07	N-203	\$278,508.00	\$248,954.04 (89%)
#38, 9/7/07	N-103	\$331,900.00	\$295,713.88 (89%)
#39, 9/12/07	S-414	\$434,900.00	\$394,027.63 (91%)
#40, 9/13/07	N-102	\$363,900.00	\$332,608.72 (91%)
#41, 9/14/07	N-207	\$519,950.00	\$466,436.35 (90%)
#42, 9/14/07	S-411	\$253,900.00	\$225,207.99 (89%)
#43, 9/14/07	S-410	\$446,950.00	\$394,927.55 (88%)
#44, 9/14/07	S-405	\$414,900.00	\$370,368.54 (89%)
#45, 9/14/07	S-404	\$205,420.00	\$186,556.80 (91%)
#47, 9/17/07	S-403	\$436,800.97	\$396,255.54 (91%)
#48, 9/17/07	S-306	\$244,900.00	\$217,082.01 (89%)
#49, 9/17/07	S-310	\$436,950.00	\$389,932.35 (89%)
#50, 9/17/07	S-304	\$211,420.00	\$186,443.62 (88%)
#51, 9/17/07	S-312	\$250,500.00	\$230,798.59 (92%)
#52, 9/18/07	S-409	\$288,900.00	\$256,753.87 (89%)
#53, 9/19/07	S-401	\$450,950.00	\$407,336.55 (90%)
#54, 9/21/07	S-308	\$292,500.00	\$263,037.07 (90%)
#55, 9/25/07	S-211	\$299,950.00	\$248,646.61 (83%)
#56, 9/26/07	S-C101	\$1,054,060.80	\$1,033,712.68 (98%)
#57, 9/26/07	S-C102		
#58, 9/26/07	S-C103		
#59, 9/26/07	S-208	\$272,900.00	\$242,313.08 (89%)
#60, 9/26/07	S-204	\$210,420.00	\$184,188.67 (88%)
#61, 9/27/07	N-315	\$414,950.00	\$365,485.82 (88%)
#62, 9/28/07	S-209	\$279,900.00	\$254,346.99 (91%)

#63, 9/28/07	S-402	\$395,900.00	\$350,959.34 (89%)
#64, 9/28/07	S-212	\$205,420.00	\$190,636.16 (93%)
#65, 10/2/07	S-206	\$248,900.00	\$218,990.50 (88%)
#66, 10/10/07	S-309	\$287,900.00	\$254,057.04 (88%)
#67, 10/18/07	N-214	\$404,950.00	\$366,455.57 (90%)
#68, 10/18/07	S-210	\$415,000.00	\$373,431.49 (90%)
#69, 10/19/07	S-102	\$259,950.00	\$234,278.17 (90%)
#70, 10/23/07	S-408	\$305,950.00	\$271,897.27 (89%)
#71, 10/29/07	N-306	\$250,500.00	\$225,507.27 (90%)
#72, 11/13/07	N-101		
#73, 11/16/07	S-302	\$417,000.00	\$372,099.78 (89%)
#74, 1/17/08	N-307	\$533,950.00	\$458,908.04 (86%)
#75, 2/6/08	S-202		
#76, 2/8/08	S-303	\$409,950.00	\$338,641.41 (83%)
#77, 2/8/08	S-101	\$575,950.00	\$511,287.39 (89%)
#78, 2/26/08	S-305	\$420,000.00	\$339,454.27 (81%)
#79, 2/27/08	S-203	\$407,300.00	\$313,964.96 (77%)
#80, 2/27/08	S-201	\$375,000.00	\$305,981.87 (82%)
#81, 3/26/08	S-406	\$275,000.00	\$81,571.85 (30%)
#82, 3/31/08	N-301		
#83, 4/30/08	S-311	\$259,038.00	\$223,169.73 (86%)
#84, 5/20/08	S-301	\$416,000.00	\$366,442.62 (88%)
#85, 5/30/08	S-314	\$415,000.00	\$358,841.25 (86%)
#86, 6/2/08	S-205	\$417,000.00	\$371,296.94 (89%)
#87, 7/14/08	N-311	\$440,000.00	\$365,209.42 (83%)
#88, 7/15/08	N-308	\$415,000.00	\$296,629.92 (71%)

APPENDIX

E

-----Original Message-----

From: Greg Prendergast
Sent: Thursday, August 30, 2007 9:45 AM
To: David Dammarell
Subject: RE: update

I would like to move the Altura note to starpoint. This way I still have the \$500k and Liberty would receive payment from Starpoint in November on this \$500k instead of May 08. I have attached an updated summary of all our sales to date for your review. This other investor would need to be in second position to make to make his funding work. This is why I will need to move the Liberty \$500k to Starpoint. I understand that you can't go any higher right. Starpoint is a couple of months behind due to the concrete strike last summer coupled with some overruns these are the reasons I am coming up short.

Greg

---Original Message---

From: David Dammarell [mailto:davidd@lfgloan.com]
Sent: Thursday, August 30, 2007 9:26 AM
To: Greg Prendergast
Subject: RE: update

So you are saying add the Altra note for \$500k over to the Starpoint Note to be paid off with that project, correct?

Separate quick question for you:

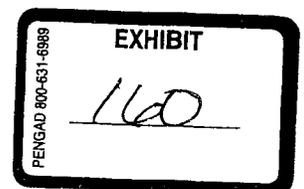
My friend Corey is a land developer. He is talking with someone to work with on a project who listed you as a reference.

His company is called Rynas or something like that. I probably spelled it wrong. What do you think of him?

Thanks!

David Dammarell
Vice President
Liberty Financial Group

Direct: 425-945-8035
Fax: 425-945-8135
Cell: 206-356-3156



205 108th Ave NE
Suite 270
Bellevue WA 98004

--Original Message-----

From: Greg Prendergast [mailto:Greg@gmphomes.com]
Sent: Thursday, August 30, 2007 3:23 AM
To: David Dammarell
Subject: RE: update

Dave,

Vacation with a three year is always exciting hence the late hour for quiet time. I am going to proceed with my original plan on having the Liberty note against Altura paid off. Would you be able to add this to Starpoint like we talked about?

Greg

-----Original Message-----

From: David Dammarell [mailto:davidd@lfgloan.com]
Sent: Wednesday, August 29, 2007 4:19 PM
To: Greg Prendergast
Subject: RE: update

Not at this point.

When you get home, lets discuss. Also, I am sure you are aware but we cant record on starpoint because of a mechanics lien. Is there funds to handle this?

David Dammarell
of sales
Liberty Financial Group

sent from handheld

-----Original Message-----

From: "Greg Prendergast" <Greg@gmphomes.com>
To: "David Dammarell" <davidd@lfgloan.com>
Sent: 8/29/2007 4:15 PM
Subject: update

Dave,

Any word on the additional funds for Altura?

Greg

	Unit	Scheme	Unit Allocation	Survey	SQ FT	Type	Parking Space(s)	Exposure	List Price	Contract Price	Contract Date	PPSF on List Price	Purchaser	Total Sales	Closed Sale	Projected Close
JLS	N301	Warm	1026	1026	1090	2/2		NW	\$341,900	341,900.00	5/4/06	\$314	Daniel & Judy Fallon	1		8/31
JLS	N402	Warm	1029	1029	1110	2/2		NE/C Y	\$330,900	355,900.00	5/6/06	\$298	Mike O'Conner	1	1	closed
JLS	N409	Warm	761	761	815	1+1		S	\$263,900	263,900.00	5/6/06	\$324	Sherlie Svob	1	1	closed
JLS	S306	Warm	738	738	800	1+1		N	\$244,900	244,900.00	5/8/06	\$306	Ryan & Stephanie Joswick	1		9/17
JLS	N302	Warm	1029	1029	1110	2/2		NE/C Y	\$324,900	324,900.00	5/15/06	\$293	David Dammarell & Davis Hsu	1	1	closed
JLS	N304	Cool	799	799	855	1+1		CY	\$252,900	277,900.00	5/15/06	\$296	Britton Whitworth	1	1	closed
JLS	S206	Cool	738	738	800	1+1		N	\$246,900	246,900.00	5/15/06	\$309	Livin Nicoara	1		9/26
JLS	N209	Cool	761	761	815	1+1		S	\$268,900	276,110.00	5/17/06	\$330	Erin & Erich Naumann	1	1	closed
JLS	S402	Cool	1161	1161	1235	2/2		S/CY	\$395,900	395,900.00	5/17/06	\$321	Sohail & Atiyya Mirza	1		9/14
JLS	N103	Cool	721	951	1045	LW		W	\$331,900	331,900.00	5/18/06	\$318	Jeffery Abercrombie	1		9/14
JLS	S406	Cool	738	738	800	1+1		N	\$245,900	245,900.00	5/19/06	\$307	Wayne & Janice Griggs	1		9/14
MCM	N411	Warm	1244	1244	1335	2/2.5	2*	SE	\$509,950		5/20/06	\$382				
JLS	N215	Warm	1158	1158	1240	2/2		NE	\$382,900	382,900.00	5/22/06	\$309	Steven & Michelle Guggenmos	1	1	closed
JLS	N401	Cool	1026	1026	1090	2/2		NW	\$361,900	388,508.06	5/23/06	\$332	Willis Gable & John Telefson	1	1	closed
JLS	N314	Warm	1163	1163	1255	2/2		NW/ CY	\$374,900	374,900.00	5/24/06	\$299	Doug Dyer	1	1	closed
JLS	S411	Warm	738	738	805	1+1		CY	\$253,900	253,900.00	5/24/06	\$315	Danai Kongkarat	1		9/14
JLS	N407	Warm	1299	1299	1400	2+2		SW	\$519,900	519,900.00	5/25/06	\$371	Elsa Benitez	1	1	closed
JLS	S405	Cool	1150	1150	1235	2/2		NW	\$414,900	414,900.00	5/26/06	\$336	Turnkey Properties, Inc.	1		9/14
JLS	N201	Cool	1026	1026	1090	2/2		NW	\$354,900	354,900.00	6/1/06	\$326	Carolyn McIntosh	1	1	closed
JLS	S309	Cool	884	884	945	1+1		N	\$287,900	287,900.00	6/7/06	\$305	Sampurna Sen	1		9/17
JLS	N405	Cool	738	738	800	1/1		W	\$264,900	264,900.00	6/14/06	\$331	Vic & Ellen Bally	1	1	closed
JLS	S208	Cool	857	857	915	1+1		N	\$272,900	272,900.00	6/15/06	\$298	Bruce Yan	1		9/26
JLS	S409	Warm	884	884	945	1+1		N	\$288,900	288,900.00	6/22/06	\$306	Jennifer & James Bricker	1		9/17
JLS	S209	Cool	884	884	945	1+1		N	\$279,900	279,900.00	7/3/06	\$296	Dan & Neda Stoll	1		9/26
JLS	S403AD A	Warm	1118	1118	1215	2/2		W	\$399,900	419,900.00	9/14/06	\$329	Susan E. Camicia	1		9/14
JLS	N202	Cool	1029	1029	1110	2/2		NE/C Y	\$345,000	345,000.00	1/24/07	\$311	Linda Raymond	1	1	closed
JLS	N403	Cool	760	760	820	1/1		W	\$284,900	284,900.00	1/30/07	\$347	Wei Chen & Qi Zhao	1	1	closed
JLS	S408	Warm	857	857	915	1+1		N	\$305,900	305,900.00	1/30/07	\$334	Flora Witten	1		9/17
JLS	N204	Warm	799	799	855	1+1		CY	\$270,900	270,900.00	4/1/07	\$317	Barbara A. Garcia	1	1	closed

JLS	S308	Warm	857	857	915	1+/1		N	\$292,500	292,500.00	4/1/07	\$320	Kirsten Grumet	1		9/21
MCM	N404	Warm	799	799	855	1+/1		CY	\$290,900	290,900.00	4/10/07	\$340	Dusit Roongsang	1	1	closed
JLS	N309	Cool	761	761	815	1+/1		S	\$285,900	293,316.00	4/15/07	\$351	Leroy A. Maxwell	1	1	closed
MCM	N305	Cool	738	738	800	1/1		W	\$295,500	295,500.00	4/17/07	\$369	Hillary and Steven Lambert	1	1	closed
MCM	N102	Cool	720	949	1045	L/W		W	\$343,900	343,900.00	4/28/07	\$329	Charlene, Ward, and Grace Baugher	1		9/13
MCM	S311	Warm	738	738	805	1+/1		CY	\$279,950	279,950.00	5/2/07	\$348	David Stoddert and Justina Jones	1		9/14
JLS	N413	Warm	619	619	670	1/1		E	\$205,420	205,420.00	5/5/07	\$307	Michael Hull	1	1	closed
MCM	N212	Warm	649	649	720	1/1		CY	\$205,420	205,420.00	5/7/07	\$285	Sara Ninteman	1	1	closed
JLS	N205	Warm	738	738	800	1/1		W	\$257,900	257,900.00	5/8/07	\$322	Ryan & Stephanie Joswick	1	1	closed
MCM	N206	Warm	681	681	740	1/1		CY	\$205,420	205,420.00	5/8/07	\$278	Kyle Yasui	1	1	closed
MCM	S211	Cool	738	738	805	1+/1		CY	\$299,950	299,950.00	5/9/07	\$373	Andrew Mahon	1		9/26
MCM	S414	Cool	1176	1176	1255	2+/2		SE	\$434,900	434,900.00	5/16/07	\$347	Helen Elise Tanner	1		9/14
JLS	N203	Warm	760	760	820	1/1		W	\$261,900	278,508.06	5/17/07	\$319	Michael & Jannie Nitso	1		9/3
MCM	S102	Cool	506	691	770	L/W		W	\$259,950	259,950.00	5/17/07	\$338	Green & Koepping	1		10/22
MCM	S404	Warm	673	683	730	1/1		CY	\$205,420	205,420.00	5/17/07	\$281	Nina Yurakova	1		9/14
JLS	N210	Warm	1142	1142	1220	2/2		S	\$374,900	374,900.00	5/19/07	\$307	Barry Horn	1	1	closed
JLS	N310	Warm	1142	1142	1220	2/2		S	\$376,900	376,900.00	5/19/07	\$309	Jason Gelrich & Eric Ovanessian	1		8/31
JLS	S204	Warm	673	683	730	1/1		CY	\$205,420	210,420.00	5/19/07	\$281	Heidi Anderson	1		9/26
MCM	S412	Warm	708	708	770	1/1		E	\$250,500	250,500.00	5/20/07	\$325	Laura Klebs	1		9/14
JLS	N303	Cool	760	760	820	1/1		W	\$266,900	273,080.00	5/21/07	\$325	M. Ximena Bernal & David Island	1	1	closed
MCM	S312	Warm	708	708	770	1/1		E	\$250,500	250,500.00	5/25/07	\$325	Patrick Reilly	1		9/17
MCM	N406	Warm	681	681	740	1/1		CY	\$250,500	250,500.00	6/2/07	\$339	Erwin Lam	1	1	closed
MCM	N213	Warm	619	619	670	1/1		E	\$205,420	205,420.00	6/3/07	\$307	Tyler Oppenheim	1	1	closed
MCM	N306	Warm	681	681	740	1/1		CY	\$250,500	250,500.00	6/3/07	\$339	Ashley Milligan	1		
MCM	N412	Warm	649	649	720	1/1		CY	\$250,500	250,500.00	6/6/07	\$348	Danita Jolly	1	1	closed
MCM	S304	Warm	673	683	730	1/1		CY	\$205,420	211,420.00	6/6/07	\$281	Phillip Palios	1		9/14
MCM	S212	Warm	708	708	770	1/1		E	\$205,420	205,420.00	6/9/07	\$267	Ki H. Hong	1		9/26
MCM	N410	Warm	1142	1142	1220	2/2		S	\$399,950	399,950.00	6/12/07	\$328	Lisa Moritz	1	1	closed
MCM	S410	Warm	1173	1173	1250	2/2	2*	NE	\$446,950	446,950.00	6/17/07	\$358	David Jeffrey	1		9/14
MCM	S101	Cool	1191	1486	1690	L/W	2*	W	\$593,950	593,950.00	6/21/07	\$351	Susan Farrar	1		10/22
MCM	N312	Warm	649	649	720	1/1		CY	\$205,420	205,420.00	6/30/07	\$285	Corrine Deal	1	1	closed
MCM	N313	Warm	619	619	670	1/1		E	\$205,420	205,420.00	6/30/07	\$307	Christopher Hart	1	1	closed
MCM	N415	Cool	1158	1158	1240	2/2	2*	NE	\$424,950	424,950.00	7/8/07	\$343	Tamara & Tyler Johnson	1	1	closed
MCM	N308	Cool	1264	1264	1345	2/2	2*	S	\$459,950	459,950.00	7/9/07	\$342	Jim & Nancy Murcatell	1		9/30
MCM	N207	Warm	1299	1299	1400	2+/2	2*	SW	\$514,950	519,950.00	7/24/07	\$368	Larry Cragun and Kathleen Leavitt	1		

MCM	N414	Cool	1163	1163	1255	2/2	2*	NW/ CY	\$449,950	449,950.00	7/26/07	\$359	Janette Little	1	1	closed
MCM	N408	Warm	1264	1264	1345	2/2	2*	S	\$469,950	468,950.00	8/1/07	\$349	Karen Paulsen	1	1	closed
MCM	S401	Cool	1117	1117	1215	2+/2	2*	SE	\$450,950	450,950.00	8/10/07	\$371	Asif Jabbar	1		9/14
MCM	S310	Cool	1173	1173	1250	2/2	2*	NE	\$436,950	436,950.00	8/23/07	\$350	David Zhang	1		9/17
MCM	N307	Cool	1299	1299	1400	2+/2	2*	SW	\$529,950	533,950.00	8/25/07	\$379	Frank & Olivia Woodman	1		10/11
MCM	N315	Warm	1158	1158	1240	2/2	2*	NE	\$414,950	414,950.00	8/27/07	\$335	Annie Lin & Kien Ho	1		TBD
MCM	N101	Cool	1896	2208	1345	L/W	2*	W	\$476,950			\$355				
MCM	N208	Warm	1264	1264	1345	2/2	2*	S	\$454,950			\$338				
MCM	N211	Cool	1244	1244	1335	2/2.5	2*	SE	\$483,950			\$363				
MCM	N214	Warm	1163	1163	1255	2/2	2*	NW/ CY	\$419,950			\$335				
MCM	N311	Warm	1244	1244	1335	2/2.5	2*	SE	\$488,950			\$366				
MCM	S201	Warm	1117	1117	1215	2+/2	2*	SE	\$434,950			\$358				
MCM	S202	Warm	1161	1161	1235	2/2	2*	S/CY	\$429,950			\$348				
MCM	S203	Warm	1118	1118	1215	2/2	2*	W	\$434,950			\$358				
MCM	S205	Cool	1150	1150	1235	2/2	2*	NW	\$450,950			\$365				
MCM	S207	Warm	1264	1264	1340	2/2.5	2*	N	\$454,950			\$340				
MCM	S210	Warm	1173	1173	1250	2/2	2*	NE	\$429,950			\$344				
MCM	S213	Cool	1240	1240	1325	2/2	2*	S/CY	\$449,950			\$340				
MCM	S214	Warm	1176	1176	1255	2+/2	2*	SE	\$434,950			\$347				
MCM	S301	Cool	1117	1117	1215	2+/2	2*	SE	\$439,950			\$362				
MCM	S302	Warm	1161	1161	1235	2/2	2*	S/CY	\$436,950			\$354				
MCM	S303	Warm	1118	1118	1215	2/2	2*	W	\$441,950			\$364				
MCM	S305	Warm	1150	1150	1235	2/2	2*	NW	\$456,950			\$370				
MCM	S307	Cool	1264	1264	1340	2/2.5	2*	N	\$459,950			\$343				
MCM	S313	Warm	1240	1240	1325	2/2	2*	S/CY	\$456,950			\$345				
MCM	S314	Warm	1176	1176	1255	2+/2	2*	SE	\$449,950			\$359				
MCM	S407	Warm	1264	1264	1340	2/2.5	2*	N	\$469,950			\$351				
MCM	S413	Warm	1240	1240	1325	2/2	2*	S/CY	\$466,950			\$352				

Projected Sales \$32,570,200

69 32

Retail Space:

2520 NE Park Dr. A - C

1,048,011.37

Starpoint Shops, LLC

X closed

2525 NE Park Dr. A - C

1,052,588.63

Starpoint Shops, LLC



24,388,972.12

PLTF/ [REDACTED] EXHIBIT **160**
08-2-24201-3 SEA
NORCON BUILDERS, LLC
VS.
GMP HOMES VG. LLC.ET AL

FILED

KING COUNTY, WASHINGTON

JAN 1 1 2010

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY