

CASE NO. 38610-1-II

Court of Appeals  
of the State of Washington  
Division II

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LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife;  
LAUREN L. ELLIS d/b/a ELLIS CONSULTING d/b/a  
AMERICAN HOME APPRAISAL,

Appellants,

v.

KITSAP CREDIT UNION, a Washington State Nonprofit Credit Union  
d/b/a KITSAP COMMUNITY FEDERAL CREDIT UNION

Respondent.

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Appellant's Reply Brief

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Appendix A: “Plaintiff’s First Amended Complaint”

KCU's Response exhibits little more than its substantial confusion about both the law and the application of that law to the facts on its motion for summary judgment:

I. REGARDLESS OF WHETHER UCC OR COMMON LAW APPLIES, THIS IS A "LAYERED CONTRACT."

Layered contract analysis is not limited to the UCC, but extends by analogy to similar contracts<sup>1</sup>, regardless of whether the UCC or the common law controls. In *Puget Sound Financial v. Unisearch*, 146 Wn.2d 428, 47 P.3d 940 (2002), the court analyzed a common law contract for services<sup>2</sup> using the layered contract analysis by analogy to the UCC (*Id.*, at 440, fn. 14) and concluded that the disputed term was included within the parties' agreement. *Id.*, at 430; *see also: Tacoma Fixture Company v. Rudd Company*, 142 Wn. App. 547, 551, 174 P.2d 721 (2008)

A. UCC Layered Contract Analysis Applies:

Despite KCU's claim that this was a contract for services, this was in fact a transaction in "goods": KCU was looking to justify its loan with an appraisal document to place in its file. Ellis's mental appraisal of the property and his oral communication of the result, would not have

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<sup>1</sup> Contracts in which it is difficult to determine the exact moment of contracting and in which, the inclusion of particular terms delivered with the product itself, is disputed.

sufficed. KCU wanted and needed the tangible product, an appraisal document, i.e., the “goods,” in order to conform to lending regulations and justify making the loan. Ellis’s undocumented services would have been inadequate.

Regardless, the very case KCU relies on for the proposition that this was a contract for services and that, therefore, the UCC does not apply, states that the determination of whether a contract is for the sale of goods or services “is a factual issue.” *Tacoma Athletic Club v. Indoor Comfort Systems*, 79 Wn.2d 250, 258, 902 P.2d 175 (1995).

Even if one assumes this question is material, since it is one of fact, resolution thereof on KCU’s motion for summary judgment would be error. However, the question is immaterial.

B. In Any Event, Whether This was a Transaction for Goods or for Services, the Parties Formed a Layered Contract:

Layered contract analysis is equally applicable to transactions whether analyzed under the UCC or the common law. *Puget Sound Financial, supra*, at 440, fn. 14; *Tacoma Fixture, supra* at 551.

Ultimately recognizing this, KCU attempts to distinguish the layered contract cases of *Mortenson v. Timberline Software*, 140 Wn.2d

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<sup>2</sup> A contract to provide the results of searches for UCC filings.

568, 998 P.2d 305 (2000)(applying the layered contract analysis in the context of the UCC), and *Puget Sound Financial, supra*, (applying this analysis in the common law context), from the situation presented by the Ellis appraisal transaction<sup>3</sup>. KCU first attempts to make a distinction between limitations of liability and indemnity clauses, but fails to explain why this distinction makes any difference to the analysis of the transaction between Ellis and KCU.

KCU then argues that *Mortenson and Puget Sound Financial* are distinguished because these cases involved multiple documents (Response, p. 16), while Ellis and KCU exchanged only one appraisal. However, KCU also fails to explain why that distinction makes any analytical difference.

The number of documents employed by the parties does not determine the applicability of the layered contract analysis. *Hill v. Gateway*, 105 F.3d 1147 (7<sup>th</sup> Cir. 1997) and *ProCD v. Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996)<sup>4</sup>, both relied on by the *Mortensen* court<sup>5</sup>, involve a single, discrete transaction.

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<sup>3</sup> Response, p. 14.

<sup>4</sup> These cases are attached as Appendix G to Ellis's Opening Brief.

<sup>5</sup> See 140 Wn.2d at 583-84; 93 Wn. App at 830

The contract between KCU and Ellis is layered, not by multiple documents, but by successive (layered) offers and acceptances: KCU offered to purchase an appraisal, Ellis accepted by preparing the appraisal and giving it to KCU, KCU accepted by failing to reject, paying Ellis for the appraisal, and using it appraisal for its own purposes.

Having failed to meaningfully distinguish either *Mortenson* or *Puget Sound Financial*, KCU abruptly abandons the effort to do so, and opts instead for distraction, veering off into an extended discussion of unconscionability.<sup>6</sup>

KCU never pleaded the issue of unconscionability, either as an affirmative defense or as a counterclaim. Nor was the issue raised to the trial court on summary judgment. As a result, Ellis has never had an incentive or opportunity to develop evidence or argument regarding unconscionability. KCU cannot be permitted to raise this issue for the first time on appeal.

## II. QUESTIONS OF FACT PRECLUDING SUMMARY JUDGMENT

### A. KCU's Assent to Indemnification is a Question of Fact:

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<sup>6</sup> Starting p. 16 and continuing all the way onto page 20.

KCU's Response largely reduces itself to the claim that it did not assent, and the parties' did not mutually assent, to the indemnity provision contained in the appraisal KCU accepted, paid for, and used. KCU claims, as many as a dozen times, that there is "no evidence" of bargaining or negotiations, and that it did not receive notice or have knowledge of the appraisal's indemnity provision. All of these arguments boil down to a question of mutual assent.

However, KCU also contradictorily claims that mutual assent is not an issue. (Response p. 23) This contradiction is not as odd as it seems: KCU has little choice but to take this position - Mutual assent is a question of fact (*Sea-van Investments v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994), as is an intent to include an indemnity clause. *Scott Galvinizing Inc. v. Northwest Enviroservices*, 120 Wn.2d 573, 584, 844 P.2d 428 (1993).<sup>7</sup>

Pursuant to CR 56(c), summary judgment "shall be rendered" if the *evidence*<sup>8</sup> indicates the absence of an issue of material fact. KCU's conclusory denial of assent is an inadequate basis for summary judgment.

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<sup>7</sup> See also: *deLisle v. FMC Corp.*, 57 Wn. App. 79, 786 P.2d 839 (1990), "The state of a man's mind is as much a fact as the state of his digestion." *Id.*, at 82, citations omitted.

<sup>8</sup> CR 56(c) specifically identifies appropriate evidence.

In the absence of actual evidence of rejection (and there is none), whether KCU assented to indemnification is a question of fact that precludes summary judgment.

KCU goes so far as to claim that there is “no evidence in the record of any attempt by Ellis to make KCU aware” of the indemnification provision. Response, p. 14. This is transparently untrue: The indemnity clause is expressly set forth on the appraisal’s seventh page of text. CP 67. This is, *exactly*, “evidence of an attempt by Ellis to make KCU aware.”

KCU does not deny the existence of a contract. That KCU choose not read the document it asked for, accepted, paid for, and used does not excuse it from the terms expressly stated therein. It is not necessary for a party “to actually read the agreement in order to be bound by it.”

*Mortenson, supra*, at 584, citations omitted.

Among the authorities relied upon by the *Mortenson* court in support of this proposition is the case of *Hill v. Gateway 2000, supra*, which states:

A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.

*Hill, supra*, at 1148.

Similarly, KCU claims an indemnification obligation requires an “express warning,” but the indemnification provision in the appraisal *is* expressed; it leaves nothing to inference or implication. The appraisal’s indemnity clause flatly states that KCU will indemnify Ellis. By KCU failing to read the appraisal, KCU accepted “the risk that the unread terms may in retrospect prove unwelcome.” *Id.*

Along these same lines, KCU, though it admits a manifest intent to contract, denies there is an objective manifestation of mutual assent to indemnification. Response, p. 13. In this regard, KCU claims its intent to indemnify was “unexpressed.”

However, KCU accepted and paid for the appraisal in which the indemnification term was explicitly set forth. Payment after receipt along with failure to reject after an opportunity to inspect, creates at least an inference of acceptance, i.e., assent to indemnification. On summary judgment, this inference is drawn in favor of Ellis, the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1980).

Here the indemnity clause is written, that is, express; *it is KCU’s purported rejection of indemnification that is unexpressed*, merely subjective. Yet, evidence of a party’s unilateral or subjective intent is not

admissible to prove that intent in contradiction to written terms. *Hollis v.*

*Garwell*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

*Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), citations omitted.

In discussing its reliance on the *Hill v Gateway* case<sup>9</sup>, the

*Mortenson* Court of Appeals decision states,

“The court posed this question: ‘Are these terms effective as the parties’ contract, or is the contract term-free because the order taker did not read any terms over the phone and elicit the customer’s assent?’ Relying in part on *ProCD*<sup>10</sup>, the court held the terms were effective, stating: ‘Practical considerations support allowing vendors to enclose the full legal terms with their products.’.. We find the Seventh Circuit’s reasoning persuasive...”

*Mortenson v. Timberline*, 93 Wn. App. 819, 830, 970 P.2d 803 (1999); *aff’d*: 140 Wn.2d 568, 998 P.2d 305 (2000), reconsideration denied.

Ironically, while claiming Ellis has failed to offer proof of acceptance, KCU presents no competent evidence that it rejected, only stating what, according to its policies, it *should* have done. Response, p. 19, fn. 2. evidence of what KCU should have done is, of course, quite different from evidence of what KCU actually did.

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<sup>9</sup> Attached in Appendix G to Ellis’s Opening Brief.

<sup>10</sup> *ProCD* is also attached as Appendix G to Ellis’s Opening Brief.

KCU also alleges that there is no evidence of acceptance in its file, but fails to note that there is likewise no evidence of rejection in that file. On KCU's motion for summary judgment, the absence of documented evidence of acceptance does not, in light of KCU's payment for and use of the appraisal, disprove acceptance. However, the absence of documented evidence of a rejection, along with KCU's payment and use, creates *at least* a reasonable inference of acceptance<sup>11</sup>.

On KCU's summary judgment, inference are to be drawn in favor of Ellis, the nonmoving party. *Wilson, supra*, at 437.

B. Ellis's Uncontradicted Evidence of Trade Usage Creates a Question of Fact as to KCU's Knowledge of, and Assent to Indemnification

The inference that KCU assented is further strengthened by Ellis's uncontradicted testimony that such appraisals usually contain indemnification provisions (CP 43), and KCU's admission that it routinely uses such appraisals. CP 88.

“Unless otherwise agreed a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”

*Puget Sound Financial, supra*, at 434.

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<sup>11</sup> The consequences of KCU's failure to reject are discussed in more detail in Ellis's Opening Brief at pages 12-13.

Though a reviewing court will accept uncontradicted evidence of trade usage as fact<sup>12</sup>, KCU not only fails to rebut, but fails to even address the trade usage issue in its Response.

Even if KCU had offered a rebuttal evidence,

“The existence and scope of trade usage are to be determined as a question of fact.”

*Id.*

The reasonable inferences to be drawn from the uncontradicted evidence of trade usage is that KCU accepted, knowingly failed to reject, and knew or should have known that indemnity was a standard provision in professionally prepared appraisals. These inferences create questions of material fact as to whether KCU accepted the duty to indemnify. On KCU’s motion for summary judgment these inferences must be drawn in favor of Ellis. *Wilson, supra*, at 437.

C. There Can Be No Question but that the Parties’ Contract was Supported by Consideration:

Ellis gave KCU an appraisal and KCU paid for it; that’s all the consideration required for this contract. Nevertheless, KCU repeatedly claims there is “no evidence” of consideration for the indemnity clause.

However, KCU cites no authority for the proposition that not only contracts themselves, but also each clause of each contract must be supported by independent consideration. If this were in fact a correct statement of law, one cannot but wonder how the contracts at issue in *Mortenson* and *Puget Sound Financial* survived. Unsurprisingly, KCU offers no guidance on this perplexing question.

Nor is a lack of evidence of negotiations determinative of any issue. *Puget Sound Financial*, supra, at 440. Just as there is no evidence of negotiations, there is no evidence of a price term in the appraisal or the record. Just as KCU cannot now contend, from the absence of evidence of a price, that it did not assent to pay Ellis, KCU likewise cannot now contend, from the absence of evidence of negotiations, that it did not assent to indemnification. The mere absence of such evidence is entirely ambiguous, it proves nothing.

D. KCU Wrongfully Used Ellis's Appraisal in Breach of Contract:

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<sup>12</sup> *Graaf v. Bakker Bros.*, 85 Wn. App. 814, 818, 934 P.2d 1228 (1997), citations omitted

KCU's Response also claims there is "no evidence" of its improper "conduct" and that, absent evidence of such conduct, it has no duty to indemnify. Response pp. 20-21.

In this, KCU simply ignores the facts: The appraisal states it is for KCU's "sole and exclusive use" (CP 60), and:

If this report is placed in the hands of anyone other than the client (KCU), the client shall make such party aware of all limiting conditions...

CP 65.

Despite this clear injunction, KCU admits it routinely gave the appraisals it received to borrowers (CP 88), and never even claims that it told the borrower to limit use of this appraisal in any respect.

In the underlying case, plaintiffs sued Ellis because an agent of KCU's borrowers allegedly used Ellis's appraisal to solicit investment.<sup>13</sup> If KCU had abided by the limiting conditions in the appraisal, or warned the borrower of these conditions as it was required to, Ellis wouldn't have been sued.

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<sup>13</sup> Though Ellis has filed a Supplemental Designation of Clerk's Papers, as of the date of filing this brief, no supplemental index has been received. The referenced sections of Plaintiff's first amended complaint are attached hereto as Appendix A.

Given the uncontradicted evidence that KCU routinely gave appraisals to borrowers, and Ellis's testimony that he only gave the appraisal to KCU, it follows that KCU wrongfully used the appraisal in breach of contract by giving it to the borrower without notifying that borrower of limitations on its use. KCU is not only claiming it is not liable to indemnify, it is claiming it had no obligation to abide by any of the terms contained in the appraisal.

In failing to communicate limits on the borrower's use of the appraisal KCU's was improper and, regardless of KCU's contentions, this wrongful conduct fully predicates its duty to indemnify.

E. Even If the Appraisal is Analyzed as a Counter-Offer, Whether the Indemnification Clause was a Material Variance of the Offer is a Factual Question:

Ellis does not believe that this transaction can be properly analyzed as an offer and counter-offer, but even if the appraisal is analyzed as a counter-offer, the question of whether the indemnification provision is a material change of the terms of the offer, and therefore excluded from the contract, is a question of fact precluding summary judgment.

[W]hat constitutes a material variance is dependent on the particular facts of each case.

*Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994), citations omitted.

III. THE PARTIES' PERFORMANCE REMOVES THIS CONTRACT FROM THE STATUTE OF FRAUDS.

Because the doctrine of part performance requires clear proof of the existence of the contract, KCU claims, citing *Pacific Cascade v. Nimmer*, 25 Wn. App. 552 559, 608 P.2d 266 (1980), that the statute of frauds applies but part performance does not. Response, p. 25.

However, in *Nimmer*, there was only an agreement to agree at some future date. *Nimmer, supra*, at 556-557. Significantly, the *Nimmer* court also noted that Pacific Cascade (the party advocating for enforcement) did not take possession or make payment. On this basis the *Nimmer* court concluded that the contract itself was inadequately established and that, therefore, the doctrine of part performance was inapplicable. *Id.*, at 559.

Here, however, KCU *admits* the existence of a contract. Response, p. 13. KCU could hardly do otherwise: Ellis prepared the appraisal; KCU took possession of it, paid for it, and used it. Therefore, the doctrine of part performance *is* applicable to the transaction between Ellis and KCU because, unlike the *Nimmer* case cited by KCU, this contract *is* established *and* fully performed.

KCU's statute of frauds argument is essentially circular: KCU assumes the fact to be proven in order to prove the fact it has assumed:

KCU first *assumes* the indemnity provision is not included in the parties' contract (Response, pp. 23-24), in order to claim that contract was "not established." KCU then invokes the statute of frauds to exclude the indemnity provision from the parties' contract, despite the doctrine of part performance... because, lacking the indemnity term, the contract was not "established."

Here, both KCU and Ellis admit the existence of a contract. This, along with their reciprocal performances remove this transaction from the operation of the statute of frauds<sup>14</sup>.

## **VI. CONCLUSION**

Summary judgment was granted in error. The appellate court should reverse and remand for trial.

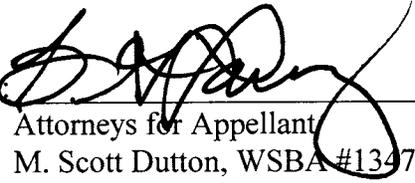
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<sup>14</sup> See also cases cited in Ellis's Opening Brief, pp. 16-18.

DATED this 5<sup>th</sup> day of June 2009.

Respectfully Submitted,

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DAVID W. PETERSON

IN THE SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

ROSEMARY and DAVID SUTTON, husband and wife; BELA SZABO, an individual; JERRY and BECKY DEETER, husband and wife; FOTH FAMILY TRUST, a Family Trust; JOHN LARSEN, an individual; PAMELA MCPEEK and WILLIAM HALLIGAN, husband and wife; START NOW CORPORATION, a nonprofit corporation; SARA BLAKE, an individual; LAVONNE and WILLIAM MUELLER, husband and wife; GENE and JOANNE BREITBACH, husband and wife; THE EDWARD L. SENNER AND EUNICE I. SENNER REVOCABLE LIVING TRUST, a living trust; MARK and KIMBERLEY SENNER, husband and wife,

Plaintiffs,

vs.

MALIBU DEVELOPMENT CORPORATION, a Washington Corporation; THE MERIDIAN ON BAINBRIDGE ISLAND, LLC, a Washington limited liability company; JOHN ERICKSON and JANE DOE ERICKSON, husband and wife; BRUCE A. MCCURDY and CONNIE M. MCCURDY, husband and wife; LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife; LAUREN L. ELLIS d/b/a ELLIS CONSULTING d/b/a AMERICAN HOME APPRAISAL; CHRISTOPHER M. HEINS and CYNTHIA HEINS, husband and wife; PREFERRED BENEFIT SERVICES, INC., a Washington Corporation,

Defendants.

NO. 06-2-02385-6

PLAINTIFFS' FIRST AMENDED COMPLAINT

COME NOW the plaintiffs, ROSEMARY and DAVID SUTTON, husband and wife, BELA

**APPENDIX A**

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1 SZABO, an individual, JERRY and BECKY DEETER, husband and wife, FOTH FAMILY TRUST,  
2 a Family Trust, JOHN LARSEN, an individual, PAMELA MCPEEK and WILLIAM HALLIGAN,  
3 husband and wife, START NOW CORPORATION, a nonprofit corporation, SARA BLAKE, an  
4 individual, LAVONNE and WILLIAM MUELLER, husband and wife, GENE and JOANNE  
5 BREITBACH, husband and wife, THE EDWARD L. SENNER AND EUNICE I. SENNER  
6 REVOCABLE LIVING TRUST, a living trust, and MARK and KIMBERLEY SENNER, husband  
7 and wife, and by and through their attorney, for cause of action against the defendants, allege as  
8 follows:

9 **I. PARTIES, JURISDICTION AND VENUE**

10 1. Plaintiffs ROSEMARY and DAVID SUTTON (the "SUTTONS") are husband and  
11 wife, residing in Kitsap County, Washington.

12 2. Plaintiff BELA SZABO ("SZABO") is an individual residing in Kitsap County,  
13 Washington.

14 3. Plaintiffs JERRY and BECKY DEETER (the "DEETERS") are husband and wife  
15 residing in Kitsap County, Washington.

16 4. Plaintiff FOTH FAMILY TRUST ("FOTH") is a family trust established in  
17 Washington State.

18 5. Plaintiff JOHN LARSEN ("LARSEN") is an individual residing in Kitsap County,  
19 Washington.

20 6. Plaintiffs PAMELA MCPEEK and WILLIAM HALLIGAN  
21 ("MCPEEK/HALLIGAN") are husband and wife residing in Kitsap County, Washington.

22 7. Plaintiff START NOW CORPORATION ("START NOW") is a non profit  
23 corporation doing business in Kitsap County, Washington.

24 8. Plaintiff SARA BLAKE ("BLAKE") is an individual residing in Kitsap County.

25 9. Plaintiffs LAVONNE and WILLIAM MUELLER (the "MUELLERS") are husband

**APPENDIX A**

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1 121. As a result of said breaches by MALIBU and MERIDIAN, the Plaintiffs have  
2 suffered damages in an amount to be proven at trial.

3 122. The Plaintiffs are entitled to recovery of attorneys' fees and costs associated with  
4 this action to the fullest extent allowed by law, contract or equity, including under each Plaintiffs'  
5 promissory notes.

6 **COUNT II. FRAUD**

7 (Against Defendants MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS  
8 CONSULTING, HEINS and PBS)

9 123. Paragraphs 1 through 122 are incorporated into this paragraph as if fully set forth  
10 herein.

11 124. The representations of CHRISTOPHER M. HEINS and JOHN ERICKSON that the  
12 Plaintiffs would each be placed in first position on certain units of the Meridian Project were  
13 knowingly and willfully false.

14 125. None of the Plaintiffs are currently in first position on any units of the Meridian  
15 Project.

16 126. The representations of CHRISTOPHER M. HEINS and JOHN ERICKSON that  
17 MALIBU was the owner of the Meridian Project were knowingly and willfully false, and made with  
18 the intent to deceive the Plaintiffs into investing money directly with MALIBU under the false belief  
19 that MALIBU was the owner of the Meridian Project.

20 127. The only document provided to the Plaintiffs that shows MERIDIAN as the owner  
21 of the Meridian Project – the Deeds of Trust - were presented to the Plaintiffs only after they had  
22 invested in the Meridian Project.

23 128. In order to induce the Plaintiffs into investing in the Meridian Project, Defendants  
24 MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and  
25 PBS engaged in a systematic scheme to provide incomplete and inaccurate information, and false  
values and projections to the Plaintiffs, including but not limited to appraisals and valuations by a  
purportedly independent third party appraiser (Defendant LAUREN L. ELLIS), but who, in reality, is

**APPENDIX A**

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1 a Member of Defendant MERIDIAN and had a financial interest in the Meridian Project.

2 129. Further, Defendant LAUREN L. ELLIS entered into a finders agreement on or about  
3 October 23, 2001, wherein LAUREN L. ELLIS was to receive a fee for any investor that LAUREN  
4 L. ELLIS introduced to the Meridian Project. A true and correct copy of the Finder's Agreement is  
5 attached hereto as **Exhibit R** and incorporated by reference.

6 130. In various appraisals prepared by LAUREN L. ELLIS regarding the Meridian  
7 Project, including appraisals in 2003 and 2006, LAUREN L. ELLIS represented that she had no  
8 present or prospective interest in the property that is the subject of this report, and she had no  
9 personal interest or bias with respect to the parties involved.

10 131. At no time were Defendant LAUREN L. ELLIS's financial interests in the Meridian  
11 Project or Defendant MERIDIAN disclosed to the Plaintiffs prior to them investing.

12 132. On information and belief, at all relevant times, LAUREN L. ELLIS was aware and  
13 intending that her appraisals of the Meridian Project would be used to solicit investors to the  
14 Meridian Project.

15 133. Each of the defendants MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS,  
16 ELLIS CONSULTING, HEINS and PBS failed to disclose to the Plaintiffs the material risks  
17 involved with investing in the Meridian Project, including but not limited to: the value of the  
18 property, the amount of outstanding debt owed on the property, the number of other investors  
19 involved with the Meridian Project, including the amounts invested, how much money was being  
20 raised to fund the Meridian Project, how much money was necessary to complete the Meridian  
21 Project, what the limit on total investment amounts was, why the units were not being completed and  
22 sold, and what the position of the individual Plaintiffs and other investors was within the investment  
23 group in the event of MALIBU and/or MERIDIAN's default on the construction loan.

24 134. At all relevant times, Defendants PBS and CHRISTOPHER M. HEINS were aware  
25 that the Meridian Project was financially unstable, yet they continued to solicit investors, including  
the Plaintiffs, to invest in the Meridian Project.

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1           135. By at least 2005, Defendants PBS and CHRISTOPHER M. HEINS were aware that  
2 Defendants ERICKSON, MCCURDY, MALIBU and MERIDIAN were seeking new investors to  
3 pay off old investors in the Meridian Project, effectively creating a giant "pyramid" scheme for the  
4 Meridian Project.

5           136. Despite this knowledge, Defendants PBS and CHRISTOPHER M. HEINS continued  
6 to solicit investors, including several of the Plaintiffs, for the Meridian Project.

7           137. At not time prior to the Plaintiffs investing in the Meridian Project did Defendants  
8 MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and  
9 PBS disclose to the Plaintiffs that their money would be used to pay off other investors.

10          138. At no time prior to the Plaintiffs investing in the Meridian Project did Defendants  
11 MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and  
12 PBS disclose to the Plaintiffs their knowledge concerning the Meridian Project's financial problems.

13          139. At all relevant times, JOHN ERICKSON was acting as an agent for and with the  
14 approval of both Defendants MALIBU and MERIDIAN.

15          140. At all relevant times, BRUCE A. MCCURDY knew of and approved of the  
16 representations of JOHN ERICKSON and CHRISTOPHER M. HEINS.

17          141. At all relevant times, in providing the valuations for the Meridian Project, Lauren L.  
18 Ellis had a financial interest in the Meridian Project and as such, was not an independent appraiser as  
19 she was represented to be.

20          142. At all relevant times, CHRISTOPHER M. HEINS was acting as an agent for and  
21 with the approval of Defendant PBS, and in concert with the other Defendants MALIBU,  
22 MERIDIAN, ERICKSON, MCCURDY, ELLIS, and ELLIS CONSULTING.

23          143. On information and belief, Defendants CHRISTOPHER M. HEINS, LAUREN L.  
24 ELLIS, MCCURDY and ERICKSON stood to gain personally from the investments of the Plaintiffs  
25 in the Meridian Project.

144. On information and belief, CHRISTOPHER M. HEINS and PBS received a

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1 commission of at least FIFTEEN PERCENT (15%) for each investor they induced to invest in the  
2 Meridian Project. A true and correct copy of the Finders Fee Agreement is attached hereto as  
3 **Exhibit S.**

4 145. At no time prior to the execution of the Promissory Notes by Plaintiffs, did any  
5 Defendant disclose CHRISTOPHER M. HEINS and PBS's commission to Plaintiffs.

6 146. On information and belief, as a general practice Defendants MALIBU and  
7 MERIDIAN paid the commission of Defendants PBS and/or CHRISTOPHER M. HEINS directly  
8 from the proceeds of any investment Defendants PBS and/or CHRISTOPHER M. HEINS brought to  
9 the Meridian Project before distributing the remainder of the proceeds.

10 147. At all relevant times, Defendants MALIBU, MERIDIAN, ERICKSON,  
11 MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and PBS intended that the Plaintiffs would not  
12 be paid unless and until the individual units of the Meridian Project were sold and unless those units  
13 were sold for a certain price. This scheme was directly contrary to the representations of  
14 CHRISTOPHER M. HEINS to the Plaintiffs and the terms of the Promissory Notes, which required  
15 the Plaintiffs to be paid by dates certain.

16 148. The Plaintiffs reasonably relied upon the representations of the Defendants  
17 MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and  
18 PBS in investing in the Meridian Project.

19 149. As a result of the false representations of the Defendants MALIBU, MERIDIAN,  
20 ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and PBS, the Plaintiffs have  
21 suffered damages in an amount to be proven at trial.

22 150. The Plaintiffs are entitled to recovery of attorney's fees and costs to the fullest extent  
23 allowed by law, equity and contract.

24  
25

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1 **COUNT III. NEGLIGENT MISREPRESENTATION**

2 (Against MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING,  
3 HEINS and PBS)

4 151. Paragraphs 1 through 150 are incorporated into this paragraph as if fully set forth  
5 herein.

6 152. The Defendants failed to disclose accurate, complete and material information to the  
7 Plaintiffs when they solicited and induced the Plaintiffs to invest in the Meridian Project.

8 153. As a result of the Defendants' negligent misrepresentation, Plaintiffs were induced to  
9 invest in the Meridian Project and have suffered damages as a result in an amount to be proven at  
10 trial

11 **COUNT IV. VIOLATION OF THE WASHINGTON STATE CONSUMER PROTECTION  
12 ACT, R.C.W. 19.86.020 and RCW 48.01.030**

13 (Against MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING,  
14 HEINS and PBS)

15 154. Paragraphs 1 through 153 are incorporated into this paragraph as if fully set forth  
16 herein.

17 155. The false representations of the Defendants MALIBU, MERIDIAN, ERICKSON,  
18 MCCURDY, ELLIS, ELLIS CONSULTING, HEINS and PBS to the Plaintiffs constitute unfair or  
19 deceptive acts or practices in the conduct of trade or commerce as defined by R.C.W. 19.86.020 and  
20 RCW 48.01.030.

21 156. The actions of the Defendants MALIBU, MERIDIAN, ERICKSON, MCCURDY,  
22 ELLIS, ELLIS CONSULTING, HEINS and PBS to induce each separate Plaintiff, on separate  
23 occasions, to invest in the Meridian Project constitute an unfair or deceptive act or practice in the  
24 conduct of trade or commerce as defined by R.C.W. 19.86.020.

25 157. The Defendants' false representations and failure to provide accurate and complete  
information to the Plaintiffs impacts the public interest.

158. Plaintiffs are entitled to recover their damages suffered as a result of the Defendants'

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1 induce new investors to invest in order to pay off older investors, Defendants PBS and  
2 CHRISTOPHER M. HEINS violated their fiduciary duties to the Plaintiffs.

3 167. Plaintiffs are entitled to damages suffered as a result of the Defendants' unfair and  
4 deceptive conduct in an amount to be proven at trial.

5 168. Plaintiffs are entitled to recovery of their actual attorneys' fees and costs to the  
6 fullest extent allowed by contract, law and equity.

7  
8 **COUNT VI. VIOLATION OF WASHINGTON STATE SECURITIES ACT, RCW 21.20.**  
9 (Against MALIBU, MERIDIAN, ERICKSON, MCCURDY, ELLIS, ELLIS CONSULTING,  
10 HEINS and PBS)

11 169. Paragraphs 1 through 168 are incorporated into this paragraph as if fully set forth  
12 herein.

13 170. The Plaintiffs' investments in the Meridian Project constitute securities within the  
14 meaning of RCW 21.20.005(12)(a).

15 171. All Defendants offered and sold securities to the Plaintiffs and are therefore liable to  
16 the Plaintiffs under RCW 21.20.430(1).

17 172. In the alternative, if any of the Defendants did not offer and sell securities to the  
18 Plaintiffs, that Defendant directly or indirectly controlled a person who offered and sold securities to  
19 the Plaintiffs; was a partner, officer, director or person who occupied a similar status or performed a  
20 similar function of a person who offered and sold securities to the plaintiffs; was an employee of a  
21 person who offered and sold securities to the Plaintiffs who materially aided in the Plaintiffs'  
22 investments in the Meridian Project; or was a broker-dealer, salesperson, or person exempt under the  
23 provisions of RCW 21.20.040 who materially aided in the Plaintiffs' investments in the Meridian  
24 Project and pursuant to RCW 21.20.430(3) is therefore jointly and severally liable for any acts of that  
25 person.

173. At all relevant times, Defendants PBS and CHRISTOPHER M. HEINS engaged in  
business with the Plaintiffs as an investment adviser within the meaning of RCW 21.20.005.6.

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1           181. Defendants knowingly sold securities in the Meridian Project to the Plaintiffs  
2 without disclosing CHRISTOPHER M. HEINS' or LAUREN L. ELLIS' Membership interest in the  
3 MERIDIAN and their financial interest in the Meridian Project. This failure to disclose this  
4 information constitutes a violation of RCW 21.20.010.

5           182. At the time the Plaintiffs invested in the Meridian Project, MALIBU was not  
6 registered to sell its securities in the State of Washington and is not currently so registered.

7           183. At the time the Plaintiffs invested in the Meridian Project, MALIBU was not  
8 registered as a broker-dealer in the State of Washington and is not currently so registered.

9           184. At the time the Plaintiffs invested in the Meridian Project, MERIDIAN was not  
10 registered to sell its securities in the State of Washington and is not currently so registered.

11           185. At the time the Plaintiffs invested in the Meridian Project, PBS was not registered as  
12 a broker-dealer in the State of Washington and is not currently so registered.

13           186. At the time the Plaintiffs invested in the Meridian Project, CHRISTOPHER M.  
14 HEINS was not registered to sell his securities in the State of Washington and he is not currently so  
15 registered. Further, at the time the Plaintiffs invested in the Meridian Project, CHRISTOPHER M.  
16 HEINS was not registered as a securities salesperson or broker-dealer in the State of Washington and  
17 is not currently so registered.

18           187. At the time the Plaintiffs invested in the Meridian Project, JOHN ERICKSON was  
19 not registered to sell his securities in the State of Washington and he is not currently so registered.  
20 Further, at the time the Plaintiffs invested in the Meridian Project, JOHN ERICKSON was not  
21 registered as a securities salesperson or broker-dealer in the State of Washington and is not currently  
22 so registered.

23           188. At the time the Plaintiffs invested in the Meridian Project, BRUCE A. MCCURDY  
24 was not registered to sell his securities in the State of Washington and he is not currently so  
25 registered. Further, at the time the Plaintiffs invested in the Meridian Project, BRUCE A.  
MCCURDY was not registered as a securities salesperson or broker-dealer in the State of

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

LAUREN L. ELLIS and JOHN DOE )	
ELLIS, husband and wife; LAUREN L. )	Case No.: 38610-1-II
ELLIS d/b/a ELLIS CONSULTING )	
d/b/a AMERICAN HOME )	
APPRAISAL, )	DECLARATION OF
)	SERVICE
Appellants, )	
)	
and )	
)	
KITSAP CREDIT UNION, a )	
Washington State Nonprofit Credit )	
Union d/b/a KITSAP COMMUNITY )	
FEDERAL CREDIT UNION )	
)	
Respondent. )	
)	

I, KATHRYN M. NIES, declare under penalty of perjury that:

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is Suite 809, AGC Building, 1200 Westlake Avenue North, Seattle, Washington 98109.

On June 8, 2009, I delivered via ABC Legal Messenger, Inc. a true and correct copy of the following documents:

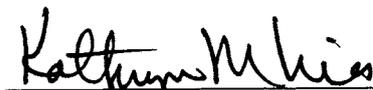
1. Appellant Reply Brief; and
2. Declaration of Service,

to the following:

Brian C. Read  
Frank R. Siderius  
Siderius Lonergan & Martin, LLP  
500 Union Street, Suite 847  
Seattle, Washington 98101

Executed on June 5<sup>th</sup>, 2009 at Seattle, Washington.

I DECLARE UNDER PENALTY OF PERJURY UNDER  
THE LAWS OF THE STATE OF WASHINGTON THAT  
THE ABOVE IS TRUE AND CORRECT.

  
\_\_\_\_\_  
Kathryn M. Nies