

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 41741-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOANNE PETERSON,

Respondent/Cross-Appellant,

v.

KITSAP COMMUNITY FEDERAL CREDIT UNION,

Appellant/Cross-Respondent.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

A. *Summary of Reply*

The trial court's initial summary judgment ruling correctly dismissed all of plaintiff Joanne Peterson's (Peterson) claims against Kitsap Credit Union (KCU).

The trial court erred in reconsidering its dismissal of the Consumer Protection Act ("CPA") claim and thereafter ruling as a matter of law that KCU's contractually authorized Deed of Trust reconveyance fee was violative of the CPA.

B. *Summary of Response to Cross Appeal*

The trial court correctly dismissed Peterson's claims for breach of contract and unjust enrichment because the Deed of Trust contract expressly provided that Peterson "shall pay Lender a reconveyance fee."

The trial court correctly made a discretionary ruling that Peterson should not receive a class representative incentive award as part of the final judgment.

II. ARGUMENT IN RESPONSE TO PETERSON'S CROSS APPEAL

In her cross appeal, Peterson seeks to reinstate her claims for breach of contract and unjust enrichment. Additionally, Peterson asks this court to reverse the discretionary ruling of the trial court which disallowed a class representative incentive fee to Peterson.

The trial court properly ruled on each of these matters as explained herein.

A. *Peterson's Breach of Contract Claim was Properly Dismissed*

Peterson incorrectly states that the Deed of Trust reconveyance fee "did not fall within any of the categories secured by the Deed of Trust." Respondent/Cross-Appellant's Opening Appeal Brief, p. 12.

The Deed of Trust expressly "secures to Lender" KCU the repayment of the debt under the Credit Agreement as well as "the performance of Borrower's covenants and agreements under this Security Instrument and the Agreement." (CP 192.) Payment of a reconveyance fee to Lender is a covenant of the Deed of Trust found at Paragraph 18. (CP 196.)

Peterson incorrectly states that the reconveyance fee was not required to be paid by the covenants and agreements set forth within the Deed of Trust. Respondent/Cross-Appellant's Opening Appeal Brief, p. 12.

Peterson makes the tortured argument that the following contractual language in the Deed of Trust does not require Peterson to pay KCU a reconveyance fee:

Such person or persons shall pay any recordation costs and, as permitted by law, shall pay lender a reconveyance fee. (CP 196, 489.)

Peterson focuses on the clause "as permitted by law," for the unsupported proposition that the reconveyance fee could only be charged if it is expressly permitted by law.

"Washington law is clear that unambiguous contracts mean what they say. Where contractual language is unambiguous, the courts will not read ambiguity into the contract." *Syrovoy v. Alpine Res.*, 122 Wn.2d 544, 551, 859 P.2d 51 (1993), citing *Jacoby v. Grays Harbor Chair & MFG. Co.*, 77 Wn.2d 911, 917, 468 P.2d 666 (1970). Conversely, a contract is ambiguous if it is "capable being understood in either of two or more possible senses." *Syrovoy, supra* at 551 at footnote 7, citing *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d

109, 116, 411 P.2d 868 (1966). Here, the Deed of Trust cannot be clearer: it expressly and unambiguously authorizes Kitsap Credit Union to charge a reconveyance fee. Upon payment of all sums due, the Borrower "shall pay" Lender a reconveyance fee. (CP 196.) There is only one possible interpretation of the reconveyance language. It cannot successfully be argued that Section 18 of the Deed of Trust on Reconveyance is ambiguous or capable of being interpreted in any other way.

Nor is the phrase in Section 18 of the Deed of Trust ambiguous. It is capable of only one interpretation. Either something is permitted by law or it is not. No Washington case addresses the lawfulness of reconveyance fees. There is no Washington authority suggesting that reconveyance fees are prohibited. There is no authority indicating that reconveyance fees are somehow excluded from the parties' common-law freedom to contract.

Although not in the context of reconveyance fees, a New Jersey case discusses the meaning of the phrase "permitted by law." *State v. International Federation of Professional and Technical Engineers, Local 195*, 169 N.J. 505, 780 A.2d 525 (2001) defines the phrase in determining the appropriateness of a labor law arbitration

award. The issues and outcome of that case are not relevant to the case at bar, but its explanation of “permitted by law” illustrates that the Deed of Trust’s use of that term is unambiguous and supports KCU’s interpretation.

The Supreme Court of New Jersey held, “First, the phrase “permitted by law” means that the award cannot be prohibited by law....That phrase does not mean ... that the award would have to be explicitly authorized by statute or regulation.” *State v. Local 195, supra* at 522.

It is immaterial that no Washington statute expressly allows reconveyance fees. Some state statutes do address the allowability and/or amount of reconveyance fees. (CP 1267-1270.) Washington statutes are silent on this issue. Reconveyance fees are permitted in Washington because they are within the scope of the parties common-law freedom to contract and are not prohibited by any law.

Peterson has not met her burden to show that the reconveyance fee is prohibited by contract or by statute. In *Berryman v. Merit Property Management, Inc.*, 152 Cal.App. 4th 1544, 62 Cal.Rptr.3d 177 (2007), the court affirmed dismissal of a challenge to fees charged by a homeowner’s association. The court stated:

Throughout its briefs and in the court below, plaintiffs repeatedly stated that (the defendant) charges are 'unauthorized'. . . that is, not specifically permitted by statute or contract. The implication, however, that a for-profit business must have a statutory or contractual authorization for providing a service to a third party in charging a fee for that service, is fundamentally flawed. Indeed, it is up to plaintiffs to demonstrate why a statute or contract *prohibits* (the defendant) from doing so. *Berryman* at p. 1553.

Peterson provides no authority that Washington law prohibits a reconveyance fee.

B. *Washington Law Permits a Lender to Charge Recording and Reconveyance Fees Upon Loan Payoff*

Peterson claims "Washington law does not permit" a reconveyance fee. Respondent/Cross-Appellant's Opening Appeal Brief, p. 13. Peterson cites RCW 61.16.020 and RCW 61.24.110 which require reconveyance/release of the security "upon payment of the obligation secured." Peterson claims that these statutes do not permit a lender to charge a reconveyance fee. (Respondent/Cross-Appellant's Opening Appeal Brief at p. 14.)

Deeds of Trust in Washington are subject to all laws relating to mortgages of real property. RCW 61.24.020. It is not disputed that Washington law requires reconveyance by the trustee upon payment

of the Deed of Trust obligation. RCW 62.24.110. It does not "logically follow," as Peterson asserts in respondent's cross-appellant's opening Appeal Brief at p. 15, that loan payoff does not include, as a matter of law, a contractually mandated reconveyance fee.

Neither of the aforementioned statutes expressly permits the lender to shift the cost of recordation of the reconveyance to the borrower. Neither statute expressly permits the lender to pass through reconveyance costs charged by a trustee. Applying Peterson's reasoning, the lender would be required to absorb the recording fees and all costs associated with release of the mortgage because Washington statutes do not expressly permit these fees. In the present action, the recording fee totaling \$32 was part of the \$85 reconveyance fee charged to Peterson. Yet Paragraph 15 of Peterson's Complaint (CP 77) and Peterson's First Amended Complaint (CP 248) exclude recordation costs from her claim for excess fees:

15. Plaintiff seeks to represent a Class consisting of all persons who, within the applicable statute of limitations, paid off loans to Defendant and were charged a fee, *except for recordation costs of the deed of*

reconveyance, which they paid . . . (CP 77, 248.)
(Emphasis added.)

Apparently, plaintiff accepts the right of the parties to contract for payment of recordation fees despite the absence of permissive language in the statutes. Freedom of contract is implicitly recognized by Peterson in permitting KCU to charge a fee not specifically authorized by statute but required by the Deed of Trust contract.

The balance of the \$85 reconveyance fee consisted of a \$27 pass through charge to Trustee Services, Inc. and a \$26 administrative charge to KCU. Peterson only challenges the \$26 fee retained by KCU. Peterson takes the narrow position that the borrower's agreement to pay a reconveyance fee "as permitted by law" requires explicit statutory authorization under Washington law, Yet the challenge is not to the entire reconveyance fee over and above recordation costs. Rather, Peterson challenges only the non-pass through portion of the \$85 reconveyance fee. There is no logic to this position. There is no express Washington authority for charging recordation costs or pass through charges to Trustee

Services, Inc.¹ Peterson ignores basic principles of freedom of the parties to contract for payment of these fees absent express prohibition. It is well settled under Washington law that parties may incorporate into a contract any provision that is not illegal or against public policy. See e.g., *Coast Sash & Door Co. v. Strom Constr. Co.*, 65 Wn.2d 279, 281, 396 P.2d 803 (1964); *Cope v. J.K. Campbell & Assoc., Ltd.*, 71 Wn.2d 453, 456, 429 P.2d 124 (1967); *Redford v. Seattle*, 94 Wn.2d 198, 206-07, 615 P.2d 1285 (1980).

As a general rule, Washington courts will uphold whatever lawful agreement the parties make with each other. *Dix Steel Co. v. Miles Construction, Inc.*, 74 Wn.2d 114, 119, 443 P.2d 532 (1968).

Washington law does not prohibit charging a reconveyance fee, just as it does not prohibit parties from agreeing that a borrower will pay a reconveyance recording fee. The phrase "as permitted by law" is not ambiguous. "Permitted" means "allowed" to do something.

¹ In its original Complaint, Peterson challenged the entire reconveyance fee except for recordation costs of the Deed of Reconveyance (CP 77). In its First Amended Complaint, Paragraph 13 (CP 248), Peterson alleges KCU retains "\$26.00 for its own profit and only was required to expend \$59.00 to 'Release' and 'Reconvey.' Defendant never advised plaintiff or any other putative class members that it was marking up the costs . . ." Apparently services performed by KCU as part of the reconveyance process are not "costs" of release and reconveyance. (CP 248.) Inexplicably, Peterson limits the contractually allowable "reconveyance fee" to out of pocket costs incurred by KCU.

Peterson ignores the holding in *State v. Local 195, supra*, which defines the phrase "permitted by law," as meaning not prohibited by law.

The cases cited by Peterson on this issue are not on point and do not contradict the holding in *State v. Local 195, supra*. In *Mulford v. Altana Group, Inc.*, 506 F.Supp.2d 733, 757 (D.N.M. 2007) the court was looking at the New Mexico Unfair Practices Act to determine if actions of a tobacco company were exempt from that law. The phrase under consideration in the *Mulford* case was "permitted under laws administered by a regulatory body," a much narrower authorization. Peterson misstates the holding and the facts. The statute at issue further reads that "all things silent by the legislature are subject to the rules" of the NMUPA. The statute at issue required specific authorization for the exemption. This case does not support Peterson's argument.

Hage v. General Service Bureau, 306 F.Supp.2d 883 (D. Neb. 2003) and *Johnson v. Riddle*, 305 F.3d 1107 (2002), cases cited by Peterson, actually support KCU'S interpretation of the phrase. In *Hage, supra*, the Nebraska court dealt with imposition of attorney's fees where a Fair Debt Collection Practices Act case was settled prior

to a judgment. The statute allows for the collection of attorney's fees when "permitted by law." The court noted that Nebraska follows the American Rule with regard to collection of attorney's fees. Collection of fees is allowed if authorized expressly by agreement or if permitted by law. Peterson misrepresents this case to stand for the proposition that an amount is "permitted by law" only if a court holding establishes that collection of the amount is lawful. Peterson ignores the actual ruling of the court which expressly allows for attorney's fees permitted by statutory language *or* by agreement of the parties. This case bolsters the argument of KCU in the present action that reconveyance fees are a matter of contractual agreement between the parties.

Johnson v. Riddle, supra does not support Peterson's position. In that case, the court did not require a Supreme Court holding for attorney's fees to be "permitted by law" as Peterson suggests. (Respondent's/Cross-Appellant's Opening Appeal Brief, p. 19.)

In *Johnson, supra*, at p. 1119, the court stated:

We hold that an amount is 'permitted by law' within the meaning of the FDCPA if state supreme court holdings establish that collection of the amount is lawful. Absent state supreme court holdings on point, we follow our familiar Erie analysis by predicting what the state supreme court would hold, or, in the appropriate case, certifying the issue to the state supreme court.

C. The Deed of Trust Language at Issue Is Not Ambiguous

Peterson relies upon *Mayer v. Pierce County Med Bureau, Inc.*, 80 Wn.App. 416, 421, 709 P.2d 1323 (1995) in support of its argument that the Deed of Trust language authorizing a reconveyance fee is ambiguous. (Respondent/Cross-Appellant's Opening Appeal Brief, p. 16.)

In fact, the *Mayer* case supports KCU's assertion that the language is not ambiguous. In the *Mayer* case, the court affirmed a summary judgment ruling that there was no ambiguity in the terms of the agreement at issue. The court stated at p. 421:

A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003, 898 P.2d 308 (1995). A provision, however, is not ambiguous merely because the parties suggest opposing meanings. *Shafer*, 76 Wn.App. at 275. '[A]mbiguity will not be read into a contract where it can reasonably be avoided.' *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

D. Peterson's Claim of Unjust Enrichment Is Without Merit

Peterson's claim of unjust enrichment must fail. The agreement to pay a recordation fee and reconveyance fee is part of the contract between the parties. Unlike the cases cited by Peterson, this case does not involve fax fees, priority fees, or payoff statement fees which are not part of the agreement between the parties.

Under Washington law, unjust enrichment occurs when someone has profited at the expense of another contrary to equity. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn.App. 719, 741 P.2d 58 (1987). Restitution based on unjust enrichment is awarded through a mechanism called "quasi contract." See *Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 776 P.2d 681 (1989).

Plaintiff's claim for unjust enrichment must be dismissed because a party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract. *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943). In *Mt. Pac. C., Assoc. General Contractors v. State*, 10 Wn.App. 404, 410, 518 P.2d 212 (1974) the

court held that a benefit accruing to the contractors is not an unjust benefit when the contractors are merely asserting their contractually provided right to full payment of the contract price. The parties were bound by their agreements. In *Eaton v. Englecke Mfg.*, 37 Wn.App. 677, 681 P.1312 (1984) the court proceeded with an analysis on an implied contract only after finding no express contract. See also *Pierce County v. State*, 144 Wn.App. 783, 185 P.3d 594 (2008). In *MacDonald v. Hayner*, 43 Wn.App. 81, 85-86, 715 P.2d 519 (1986), the court barred recovery for excess work where no evidence showed an agreement beyond the express contracted-for fee.

Given that the Deed of Trust contract authorized KCU to charge a reconveyance fee and Peterson received the benefit of the reconveyance for which the reconveyance fee was charged, this is not a case of unjust enrichment. In this case, the reconveyance fee is charged as consideration for services rendered. Under the parties' contractual arrangement, KCU retains the benefit of a portion of the reconveyance fee and Peterson retains the benefit of the cancellation of the Deed of Trust and the reconveyance of clear title to her property. Accordingly, her claim of unjust enrichment necessarily fails as a matter of law.

Peterson cannot assert a claim for unjust enrichment under circumstances where she also claims breach of contract.

The trial court correctly stated:

The reconveyance fee was expressly addressed in Paragraph 18 of the Deed of Trust and is enforceable. Given there is an express contract which is supported by consideration, there is no claim for unjust enrichment as a matter of law. (Court's Memorandum Opinion, CP 232.)

Recently, in *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010), discussed at length later in this brief, the court similarly dealt with an unjust enrichment claim and breach of contract claim. The court stated in a footnote at p. 105:

⁴ The McCurrys' unjust enrichment claim is based upon Chevy Chase allegedly taking payment beyond that permitted in the deed of trust and thus is analyzed in conjunction with the breach of contract claim.

E. *Class Representative Incentive Award Was Properly Denied*

An incentive award to a class representative is discretionary and is intended to compensate a class representative for work done on behalf of the class and to make up for financial or reputational risk undertaken in bringing the action. See *Rodriguez v. West Publishing*

Corp., 563 F.3d 948, 958 (9th Cir. 2009); *In Re Mego Fin. Corp. SEC Lit.*, 213 F.3d 454, 463 (9th Cir. 2000).

In the present action the trial court ruled there was little discovery involving Ms. Peterson and no deposition of her. Additionally, there was no evidence presented that Ms. Peterson would bear any personal liability for any costs incurred. (CP 941.) The trial court properly denied, in its discretion, the request for an incentive fee award to Peterson.

Peterson cites *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp. 2d 1185 (S.D. Fla. 2006). That case is clearly distinguishable. The class representatives were involved in a 15-year lawsuit on a billion dollar claim against Exxon Corporation. The class representative accepted liability for many costs and made personal contributions to the case.

III. ARGUMENT IN REPLY TO PETERSON ANSWER TO KCU'S APPEAL

The trial court committed error in reconsidering its ruling dismissing Peterson's CPA claim and later ruling in favor of Peterson and granting her summary judgment. The trial court correctly ruled on

the initial motion for summary judgment when it dismissed Peterson's CPA claim. (CP 232, 236-237.)

A. *It Is Not an Unfair or Deceptive Act or Practice Violative of the Consumer Protection Act When a Lender Charges a Reconveyance Fee Expressly Authorized By the Deed of Trust.*

Peterson makes the fallacious statement that:

KCU violated the CPA when it informed Ms. Peterson that she needed to pay \$26 for part of the Reconveyance Fee, when it did not in fact actually incur that expense, when it did nothing to justify the charge, and when that expense was not allowed by the parties' contract. (Respondent/Cross-Appellant's Opening Appeal Brief, p. 25.)

Peterson misstates the record in a futile attempt to establish an unfair or deceptive act on the part of KCU violative of the CPA. The actual facts in the record support the court's initial ruling on Summary judgment dismissing the CPA claim. At a minimum, the factual disputes created by Peterson are material issues of fact precluding summary judgment by the trial court.

With respect to the allegation that KCU informed Ms. Peterson that she needed to pay \$26 for part of the reconveyance fee, the record reflects otherwise. In fact, the payoff statement listed principal and interest due on the loan and a "Release Fee (reconveyance)" in

the sum of \$85 pursuant to Paragraph 18 of the Deed of Trust. (CP 203.) The \$85 fee was not itemized. That expense was specifically allowed by the parties' contract contrary to Peterson's assertion. Paragraph 18 of the Deed of Trust requires that Peterson "shall pay any recordation costs and, as permitted by law, shall pay Lender a reconveyance fee." (CP 196.) The \$85 fee included recordation costs, payment to Trustee Services, Inc. and a \$26 administrative fee retained by KCU.

Throughout its brief, Peterson claims that KCU did not actually incur the \$26 expense and did nothing to justify the charge which Peterson repeatedly refers to as "profit." In truth and in fact, the only person using the word "profit" was Peterson's counsel in deposition questioning of KCU employee Melinda Anthony. Despite counsel's suggestion that the \$26 fee was "profit," Ms. Anthony explained the \$26 represented the "processing fee" charged by the Credit Union justifying the fee as expenses incurred for staff involvement in processing the loan payoff. (CP 190, 749-757, 1215-1216.)

To assert that the \$26 fee was not allowed by the parties' contract is absurd. Paragraph 18 of the Deed of Trust provides that Peterson "shall pay lender a reconveyance fee." (CP 196.)

The only way for Peterson to support her claim of profit and marking up the costs is to challenge that any services were performed by KCU in the reconveyance process. Alternatively, Peterson could accept the fact that services were actually performed by KCU but challenge the reasonableness of the \$26 fee. In either case, Peterson presents a genuine issue of material fact precluding summary judgment in her favor.²

It is the position of KCU before the trial court and on this appeal that a fully disclosed \$85 reconveyance fee which includes recordation costs, is neither an unfair or deceptive act or practice under the CPA, particularly where the borrower is contractually obligated to pay Lender a reconveyance fee as well as recordation costs.

B. *Failure to Itemize the \$85 Reconveyance Fee is Not an Unfair or Deceptive Act or Practice*

In order to constitute a "deceptive" act under the CPA, the actor must misrepresent something of material importance. *Hiner v.*

² Peterson's theory of unlawful charges has evolved throughout this litigation. She believed the \$85 fee was a "pass-through" of the actual cost of the reconveyance. "She later learned the \$85 fee was not authorized at all." During discovery she found "further wrongdoing" in the \$26 portion of the fee she characterizes as "profit." (Respondent/Cross-Appellant's Opening Appeal Brief, pp. 1-2.)

Bridgestone/Firestone, 91 Wn.App. 722, 730, 959 P.2d 1158 (1998).

In the *Hiner* case, a plaintiff's CPA claim was dismissed because the plaintiff failed to establish that a tire manufacturer had knowledge of an inherent danger in the use of its product.

Peterson also relies upon *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009). In that case, an insurance company issued a notice which was found to be deceptive because it was disguised to appear to be a debt collection notice, when in fact the notice represented nothing more than an unadjudicated claim for tort damages. See *Panag* at 47.

The "deceptive" act allegations in the cases cited by plaintiff are vastly different than KCU's charge for services expressly authorized by contract. An \$85 reconveyance fee, which includes \$26 for actual services provided by the Credit Union is not a misrepresentation of something of "material importance." It is not a misrepresentation at all.

It is well established under Washington law that acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the CPA. See *Capelouto v. Valley Forge Ins. Co.*, 98 Wn.App. 7, 22, 990 P.2d 414 (1999). In

Perry v. Island Savings & Loan Assn., 101 Wn.2d 795, 684 P.2d 1281 (1984), the court held that a lender's action in attempting to enforce a due-on-sale clause was done in good faith under an arguable interpretation of existing law. As such, the court held that such conduct should not be considered "unfair" in the context of the CPA. The lender simply attempted to enforce what was arguably a valid and enforceable clause in its contract.

Similarly, in the present action, KCU had a contractual right to charge the borrower for recording costs and a reconveyance fee. The trial court correctly ruled that the imposition of such charges was not a breach of contract. The fact that there was no itemization of the costs and charges incorporated in the \$85 fee is not "unfair" nor "deceptive" under the CPA.

Peterson has not established injury. The Deed of Trust at paragraph 18 disclosed to plaintiff that upon payment of all sums due on her loan, KCU would arrange for the Deed of Trust to be reconveyed. The exact amount of recording costs and reconveyance fees is not disclosed, nor could these unknown costs reasonably be expected to be disclosed at the inception of the loan. There is no contractual requirement that an itemization of the reconveyance fee

be done at loan payoff. There is no evidence that KCU was "marking up" fees for services actually performed. There is no evidence that an \$85 reconveyance fee, including recordation costs, is an unreasonable fee.

RCW 19.86.920 provides for liberal interpretation of the CPA.

but that section also specifically states:

It is, however, the intent of the Legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

In determining if an act is deemed a violation of the CPA, a court must weigh the public interest against a business' right to conduct its trade. *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn.App. 357, 374, 936 P.2d 1191 (1997); *Travis v. Washington House Breeders Assn., Inc.*, 111 Wn.2d 396, 759 P.2d 418 (1988). See also *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987)("Where conduct is motivated by legitimate business concerns, there can be no violation of RCW 19.86.")

KCU rejects Peterson's assertion that the \$26 reconveyance fee is profit. Rather, as the above-referenced cases indicate,

reasonableness of the charge is a defense to a CPA claim. The charge imposed by KCU was reasonable for the services performed.

Peterson summarizes her claim of deception stating a reasonable consumer could not believe "that KCU would mark up the actual expense, turn it into a profit center, and then hide those acts within what appeared on the documentation KCU prepared to be an actual amount incurred by KCU." (Respondent/Cross Appellant's Opening Appeal Brief at p. 31.)

Peterson persistently ignores the evidence presented by KCU that it actually performed services in the reconveyance process. (CP 190, 749-757, 1215-1216.)

C. Peterson's Reliance Upon Dwyer v. J.I. Kislak Mortg. Corp. is Misplaced

Peterson relies upon *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn.App. 542, 13 P.2d 240 (2000) as being factually similar to the present action. See Respondent/Cross Appellant's Opening Appeal Brief at p. 29. That case has been addressed in KCU's Brief of Appellant at pp. 22-25.

In *Kislak* the Deed of Trust expressly provided that the Deed of Trust would be reconveyed "without charge" to the Dwyers, except

for the recording costs.³ Adding fax fees to the payoff statement disguised as miscellaneous service charges was deceptive. In the present action, KCU's imposition of a reasonable reconveyance fee, including pass through charges, was expressly allowed and therefore not deceptive as a matter of law.

D. Peterson's CPA Cause of Action is Pre-empted Because KCU Was a Federally Chartered Credit Union Pursuant to the Federal Credit Union Act and the National Credit Union Administration Regulations

Dismissal of Peterson's causes of action, as initially done by the trial court, precludes the necessity of a federal pre-emption analysis. Nonetheless, the pre-emption analysis provided in *McCurry v. Chevy Chase Bank, supra*, supports KCU's position that Peterson's CPA claim is pre-empted by federal law.

KCU has provided a pre-emption analysis in its Brief of Appellant at pp. 26-39.

³ Peterson ignores this significant difference in the Deed of Trust before this court which authorizes a reconveyance fee and other Deeds of Trust, such as in *Dwyer*, which compel reconveyance without charge. The Declaration of Peterson's counsel (CP 1208-1270) provides examples of court approval of classes in "similar class actions." See Exhibits B, C, D, E and F to the Declaration of Rob Williamson for Plaintiff's Motions for Summary Judgment and Class Certification. (CP 1229-1267.) Yet, language in most of the Deeds of Trust referenced in those classes (6 out of ten) provide for reconveyance "without charge." Of the four remaining Deeds of Trust referenced, two are silent as to a reconveyance fee and two provide for "a release fee in an amount allowed by applicable law."

Contrary to Peterson's assertion, the reconveyance fee at issue in the present action is a "fee" and "term of repayment" pursuant to 12 CFR §701.21(b). The mechanical act of transferring (reconveying) the Deed of Trust is not at issue. The issue is the manner and method of charging an expressly authorized reconveyance fee upon loan payoff.

In its struggle to claim that the reconveyance fee charged to Ms. Peterson was not a loan fee or term of repayment, Peterson argues the same untenable position argued before the Court of Appeals in *McCurry v. Chevy Chase Bank*. There is no indication that footnote 5 of the Division One opinion found at 144 Wn.App. 900, 910, 193 P.3d 155 (2008) was reversed by the Washington Supreme Court, *McCurry* opinion. The Court of Appeals stated:

The contrary contention, advanced by both the McCurrys and the plaintiffs in *Lopez* - that fees associated with something fundamentally necessary to the discharge of the loan (the payoff statement) are somehow not 'loan-related' – fairly strains the English language.⁵

⁵ The McCurrys have put forward the theory that only fees associated with the *origination* and *maintenance* of loans – rather than their discharge – are 'loan-related fees' within the meaning of 12 C.F.R. §560.2(b)(5). This theory,

while plausible-seeming, suffers from the fact that it is utterly unsupported by legal authority.

Counsel for Peterson attack the NCUA opinion letters referenced by KCU. The 1993 NCUA (National Credit Union Administration) Opinion Letter, No. 92-1131 (CP 417-418) referenced in KCU's Brief on Appeal at p. 32, states categorically that fees collected to reimburse a federal credit union for actual recording fees paid to public officials, and fees for preparation and/or filing of a mortgage satisfaction document are within the purview of Section 701.21(b)(1)(i)(C) of the NCUA regulations. Peterson claims the Opinion Letter should not be given deference and seeks to ignore the persuasive impact of this letter and the second Opinion Letter of NCUA counsel No. 08-0120. (CP 420-421.)

A similar argument was made by Peterson's counsel before Division One in *McCurry v. Chevy Chase Bank*, *supra* at p. 910 and the Court of Appeals stated the following in a footnote:

⁴ The McCurrys contend that OTS opinion letters are not entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The McCurrys are correct. Rather, 'interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944),

but only to the extent that those interpretations have the 'power to persuade.' *Christensen v. Harris County*, 529 U.S. 576, 587, 12 S.Ct. 1655, 146 L.Ed. 2d 621 (2000). But it hardly follows from this principle that OTS's view of its own regulation is irrelevant.

Peterson struggles to distinguish *American Bankers Assoc. v. Lockyear*, 239 F.Supp.2d 1000 (E.D. Cal. 2002) because it did not deal specifically with a reconveyance fee. However, the case clearly deals with federal credit unions and the fact that "terms of repayment" of Credit Union loans to customers are pre-empted by the FCUA (Federal Credit Union Act). Peterson reiterates the unsupportable argument that because a reconveyance does not occur until after a Deed of Trust loan is paid off, the reconveyance fee is not a term of repayment and therefore not pre-empted. Why a reconveyance fee contractually required by the Deed of Trust and due upon payoff of the loan is not a "term of repayment" defies reasoning.

Peterson cites *Davis v. Redstone Federal Credit Union*, 401 So. 2d 52 (Ala. 1981) for the proposition that application of the CPA is not pre-empted by federal law. However, that case was decided prior to enactment of the NCUA pre-emption regulations found at 12 CFR 701.21. Pre-1984 regulations contained only general pre-

emption language. See 49 Fed. Reg. 30683 found in the Appendix to KCU's Brief of Appellant.

The Washington State Supreme Court opinion in *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010) is relevant to the issues before this court. Peterson and the trial court challenge the manner in which a contractually authorized reconveyance fee is assessed. They challenge the fact that KCU did not fully disclose or itemize the components of its reconveyance fee. Peterson seeks to dictate how and in what manner reconveyance fees can be charged. The *McCurry* court, however, stated at p. 105:

If, and to the extent that McCurrys argue the CPA regulates how or when facts or notary fees (loan-related fees) can be charged, the CPA, as applied directly to the loan-related fees, is preempted.

Peterson glosses over *Moskowitz v. Washington Mutual Bank*, 768 N.E.2d 262, 329 Ill.App.3d 144 (2002) which is cited with approval in the *McCurry, supra*, decision. In *Moskowitz*, the court affirmed dismissal of a class action complaint against a bank holding that federal law pre-empted state law claims of violation of the Illinois Consumer Fraud Act. Specifically, the bank customer argued that the

bank's practice of requiring her to pay a payoff statement fee before the bank released the mortgage violated the Consumer Fraud Act.

The court held the payoff statement fee was a loan-related fee and federal law pre-empted the Illinois Consumer Fraud Act claim to the extent it was used to regulate imposition of payoff statement fees. The facts in *Moskowitz* are relevant to the facts in the present action. KCU is charging a contractually authorized reconveyance fee and, as the trial court found, there is no breach of contract. Rather, Peterson and the trial court challenge the lack of an itemized disclosure of the fees charged. As such, the issue is not whether Peterson agreed to pay a reconveyance fee. She agreed to pay KCU a reconveyance fee pursuant to Paragraph 18 of the Deed of Trust. In fact, Peterson does not challenge the pass through portion of the fee to Trustee Services, Inc. Rather, Peterson challenges the manner in which the fee is charged.

In following the *Moskowitz* rationale, our State Supreme Court in *McCurry* at p. 107 states:

. . . Regardless, the outcome in *Moskowitz* appears consistent, based upon the facts readily apparent in its decision, with our decision here. The basis for the *Moskowitz* plaintiff's contract and consumer fraud claims was that state law required the bank to disclose

the payoff statement fees in the contract, that requirement constituted a regulation of lending operations, and that the state laws were thus preempted. 768 N.E.2d at 266 ('The effect of plaintiff's claim would be to impose, at the state level, a substantive requirement mandating when in the loan process such fees must be disclosed.'). Here, no such requirement arises because the issue is whether Chevy Chase *agreed* not to charge such fees *in its contract* with the McCurrys, any effect on the fees is incidental, and thus the state laws are not preempted.

The contractually authorized reconveyance fee in the present action is clearly a "term of repayment" pursuant to 12 CFR §701(21)(b). Peterson's CPA claim which seeks to regulate terms of repayment is thus preempted by federal credit union law.

IV. CONCLUSION

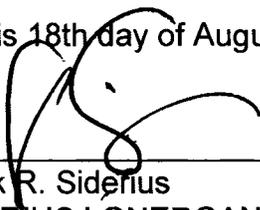
The trial court correctly dismissed all of Peterson's causes of action for breach of contract, unjust enrichment, and CPA violations. The order granting defendant's motion for summary judgment (CP 236-237) should be reinstated. The order reconsidering dismissal of the CPA claim and subsequent summary judgment in favor of Peterson on the CPA claim was error and should be reversed. KCU is entitled to summary judgment dismissing the CPA claim as a matter of law. Alternatively, the CPA issue should be remanded for trial based upon disputed issues of fact raised by Peterson challenging

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services performed by KCU relating to the \$26 portion of the reconveyance fee.

Peterson's cross appeal seeking to reinstate the breach of contract and unjust enrichment claims should be denied. The decision of the trial court with regard to these claims and the denial of a class representative incentive fee to Ms. Peterson should be affirmed.

Respectfully submitted this 18th day of August, 2011.



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Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid and/or sent by legal messenger a true copy of this document to:

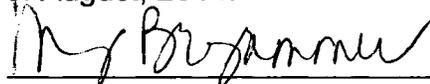
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Dated this 18th day of August, 2011.



Mary Berghammer