

FILED  
FEB 22 2016  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 294692

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

Mountaineer Investments LLC,

*Respondent,*

v.

Gary and Barbara Heath,

*Appellants.*

---

AMENDED BRIEF OF APPELLANT

---

Alan L. McNeil, WSBA #7930  
Attorney for Appellants  
Sophia A. Medina, WSBA #9117772  
Legal Intern for Appellants  
721 N. Cincinnati St.  
PO Box 3528  
Spokane, WA 99220-3528  
(509) 313-5791

RECEIVED  
FEB 22 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 294692

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

Mountaineer Investments LLC,

*Respondent,*

v.

Gary and Barbara Heath,

*Appellants.*

---

AMENDED BRIEF OF APPELLANT

---

Alan L. McNeil, WSBA #7930  
Attorney for Appellants  
Sophia A. Medina, WSBA #9117772  
Legal Intern for Appellants  
721 N. Cincinnati St.  
PO Box 3528  
Spokane, WA 99220-3528  
(509) 313-5791

TABLE OF CONTENTS

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR .....2

    No. 1 .....2

    No. 2.....2

    No. 3.....2

*Issues Pertaining to Assignments of Error* .....3

    No. 1.....3

    No. 2.....3

    No. 3.....3

    No. 4.....3

III. STATEMENT OF THE CASE.....3

    A. **Factual Statement** .....3

    B. **Procedure Below**.....8

IV. SUMMARY OF ARGUMENT .....9

V. ARGUMENT .....11

    A. **The Trial Court Erred When it Granted Summary Judgment For Mountaineer Because Mountaineer Failed To Comply With Washington’s UCC**.....13

        1. The Notice of Sale is defective because it did not state the correct manner or date and time of the sale as required by RCW 62A.9A-614(1)(A) .....14

            a. *The use of the Safe Harbor form does not excuse Mountaineer’s non-compliance with the statute because the ‘manner’ and ‘date and time’ is information required by paragraph 1 of RCW 62A.9A-614*.....21

            b. *The Heaths in no way waived their right to the statutorily required notification of sale* .....23

i. The Heaths did not waive their right to proper notification by permitting voluntary repossession .....	23
ii. The Heaths did not waive their right to proper notification by not attending the “sale.” .....	25
2. <u>The defective Notice of Sale entitles the Heaths to damages under RCW 62A.9A-625(c)(2)</u> .....	27
<b>B. The Sale In This Case – If One Occurred – Was Not Commercially Reasonable</b> .....	32
1. <u>Sufficient notice to both the debtor and the public is required in order for a sale to be commercially reasonable, both of which are lacking in this case</u> .....	33
2. <u>Mountaineer failed to establish there has been a sale at all</u> .....	34
3. <u>Even if the sale took place as reported, it did not promote competitive bidding, as required by RCW 62A.9A-610, and therefore is not commercially reasonable</u> .....	36
4. <u>The vehicle was never registered, or reported as sold to the Washington State Department of Licensing</u> .....	37
<b>C. The Heaths Are Entitled To Attorney’s Fees And Costs in Compliance with RAP 18.1(a), (b) and Pursuant To RCW 4.84.330</b> .....	38
VI. CONCLUSION.....	39
VII. APPENDIX .....	A-1
1. RCW 62A.1-102 .....	A-1
2. RCW 62A.2-106 .....	A-1
3. RCW 62A.9A-602 .....	A-1
a. <i>Official Comment 3. Nonwaivable Rights and Duties</i> .....	A-1
4. RCW 62A.9A-610 .....	A-2
a. <i>Official Comment 7. Public vs. Private Dispositions</i> .....	A-2

5. RCW 62A.9A-611 .....	A-2
6. RCW 62A.9A-613 .....	A-3
a. <i>Official Comment 2. Contents of Notification</i> .....	A-3
7. RCW 62A.9A-614 .....	A-4
a. <i>Official Comment 2. Notification in Consumer-Goods</i> <i>Transactions</i> .....	A- 4
b. <i>Official Comment 3. Safe-Harbor Form of Notification; Errors in</i> <i>Information</i> .....	A-4
8. RCW 62A.9A-624 .....	A-4
9. RCW 62A.9A-625 .....	A-5
a. <i>Official Comment 4. Minimum Damages in Consumer-Goods</i> <i>Transactions</i> .....	A-5
10. R.C. 1309.602 .....	A-6
11. R.C. 1309.613 .....	A-6
12. R.C. 1309.614 .....	A-6, A-7
13. R.C. 1309.624 .....	A-7
14. F.S.A. 679.613 .....	A-7
15. F.S.A. 679.614 .....	A-8
16. 13 Pa.C.S.A. 9602.....	A-8
17. 13 Pa.C.S.A. 9613.....	A-8, A-9
18. 13 Pa.C.S.A. 9614.....	A-9
19. 13 Pa.C.S.A. 9624.....	A-9

## TABLE OF AUTHORITIES

### Table of Cases

#### **Washington State**

##### Supreme Court

<i>Am. Star Ins. Co. v. Grice</i> , 123 Wn.2d 131, 865 P.2d 507 (1994) .....	14, 15
<i>Henderson v. Tagg</i> , 68 Wn.2d 188, 412 P.2d 112 (1966) .....	15
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993) .....	11, 12
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002) .....	11
<i>Kadoranian v. Bellingham Police Dep't</i> , 119 Wn.2d 178, 829 P.2d 1061 (1992) .....	12
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003) .....	11

##### Court of Appeals

<i>Arango v. Success Roofing, Inc.</i> , 46 Wn. App. 314, 730 P.2d 720 (1986) .....	14
<i>Bailey v. Allstate Ins. Co.</i> , 73 Wn. App. 442, 869 P.2d 1110 (1994) .....	30
<i>Commercial Credit Corp. v. Wollgast</i> , 11 Wn. App. 117, 521 P.2d 1191 (1974) .....	24, 25
<i>Empire South, Inc. v. Repp</i> , 51 Wn. App. 868, 756 P.2d 745 (1988) .....	27
<i>McChord Credit Union, v. Parrish</i> , 61 Wn. App. 8, 809 P.2d 759 (1991) .....	23, 27
<i>Quality Food Centers v. Mary Jewell T, LLC</i> , 134 Wn. App. 814, 142 P.3d 206 (2006) .....	38
<i>Rotta v. Early Indus. Corp.</i> , 47 Wn. App. 21, 733 P.2d 576 (1987) .....	27
<i>Tacoma Athletic Club, Inc., v. Indoor Comfort Sys., Inc.</i> , 79 Wn. App. 250, 902 P.2d 175 (1995) .....	14
<i>Vance v. Dep't. of Ret. Sys.</i> , 114 Wn. App. 572, 59 P.3d 130 (2002) .....	12

#### **Federal Cases**

<i>Bristol Assoc. Inc., v. Girard Trust Bank</i> , 505 F.2d 1056 (3 <sup>rd</sup> Cir. 1974) .....	15
<i>Chisolm v. S. Fin. Corp.</i> , 194 F.R.D. 538 (E.D. Va. 2000) .....	30
<i>Cosgrove v. Citizens Auto. Fin., Inc.</i> , 2010 WL 3370760, (E.D. PA. Aug. 26, 2010) .....	13, 14, 24
<i>In re Koresko</i> , 91 B.R. 689 (Bankr. E.D. Pa. 1988) .....	31

<i>Muro v. Hermanos Auto Wholesaler, Inc.</i> , 514 F.Supp.2d 1343 (S.D. Fla. 2007) .....	28
<i>Swanson v. S. Or. Credit Serv., Inc.</i> , 869 F.2d 1222 (9 <sup>th</sup> Cir. 1988).....	25
<i>United States v. Cawley</i> , 464 F.Supp. 189 (E.D. Wash. 1979).....	27

**Other State Courts**

Supreme Court

<i>Erdmann v. Rants</i> , 442 N.W.2d 441 (N.D. 1989).....	10
<i>Exxon v. Gill</i> , 299 S.W.3d 124 (Tex. 2010).....	15
<i>Lloyd's Plan, Inc. v. Brown</i> , 268 N.W.2d 192, 24 U.C.C. Rep.Serv. 1053 (Iowa 1978).....	16
<i>Pioneer Dodge Center, Inc. v. Glaubenslee</i> , 649 P.2d 28, 33 UCC 1588 (Utah 1982).....	16
<i>Security Federal Sav. &amp; Loan v. Prendergast</i> , 108 N.M. 572, 775 P.2d 1289 (1989).....	16
<i>Stoppi v. Wilmington Trust Co.</i> , 518 A.2d 82 (Del. 1986) .....	10
<i>Walker v. V.M. Box Motor Co., Inc.</i> , 325 So.2d 905 (Miss. 1976).....	29, 30

Appellate Court

<i>All Valley Acceptance Co., v. Durfey</i> , 800 S.W.2d 672 (Tex. App. 1991).....	28, 29
<i>Ayers v. Mellon Bank</i> , 1987 WL 8274, at *3 (Del.Super. March 6, 1987) .....	31, 32
<i>Jackson v. S. Auto Fin. Co.</i> , 988 So.2d 721 (Fla. 2008).....	18
<i>Joyce v. Cloverbrook Homes, Inc.</i> , 81 N.C. App. 270, 344 S.E.2d 58 (1986).....	28, 29
<i>Huntington Bank v. Freeman</i> , 53 Ohio App.3d 127, 560 N.E.2d 251 (1989).....	17, 18, 25, 26, 34
<i>Indus. Valley Bank &amp; Trust Co. v. Nash</i> , 502 A.2d 1254 (Pa.Super.Ct.1985).....	13, 14, 20
<i>Miami Valley Prod. Credit Assoc. v. Hastings</i> , 42 Ohio App.3d 125, 536 N.E.2d 1177 (1985).....	23, 24
<i>Merch. Nat'l Bank of Chicago v. Scanlon</i> , 86 Ill.App.3d 719, 408 N.E.2d 248 (1980).....	31

//

## Statutes

### Revised Code of Washington

RCW 4.84.330 .....	38, 39
RCW 46.12.101 .....	33, 37
RCW 62A.1-102 .....	17
RCW 62A.2-106 .....	15, 16
RCW 62A.9A-602 .....	23, 24
RCW 62A.9A-610 .....	2, 8, 9, 11, 12, 20, 23, 27, 32, 36
RCW 62A.9A-611 .....	8, 9, 11, 12, 13, 23, 26
RCW 62A.9A-613 .....	11, 12, 13, 14, 22, 23
RCW 62A.9A-614 .....	1, 2, 3, 8, 11, 12, 13, 14, 17, 20, 21, 22, 23, 26, 27
RCW 62A.9A-624 .....	23, 24, 26
RCW 62A.9A-625 .....	3, 9, 10, 11, 25, 27, 30, 37

### Other Authorities

Official Comment 3 to RCW 62A.9A-602. Nonwaivable Rights and Duties .....	24
Official Comment 7 to RCW 62A.9A-610. Public vs. Private Dispositions.....	16
Official Comment 2 to RCW 62A.9A-613. Contents of Notification .....	15
Official Comment 2 to RCW 62A.9A-614. Notification in Consumer-Goods Transactions.....	15, 21, 22
Official Comment 3 to RCW 62A.9A-614. Safe-Harbor Form of Notification; Errors in Information.....	22
Official Comment 4 to RCW 62A.9A-625. Minimum Damages in Consumer-Goods Transactions.....	27
J.J. White and R.S. Summers, Uniform Commercial Code, West (2 <sup>nd</sup> ed. 1980).....	14
J.J. White and R.S. Summers, Uniform Commercial Code, West (6 <sup>th</sup> ed. 2010).....	16
American Jurisprudence, Thomson West (2 <sup>nd</sup> ed. 2007).....	19, 36

## I. INTRODUCTION

After paying faithfully on a motor home loan for over 12 years, Appellant Gary Heath became disabled. Although the Heaths repaid approximately \$54,000.00 on a \$34,000.00 loan, Appellee Mountaineer chose to repossess the vehicle. In so doing Mountaineer failed to follow the strict notice requirements of the Uniform Commercial Code (UCC), for which Mountaineer is liable. The trial court erred by substituting its subjective evaluation of adequate notice for the proper notice Washington statutes require and therefore erred in granting summary judgment for Mountaineer. It is the Heaths - not Mountaineer – who are entitled to judgment and statutory damages per the statute. The collateral in question is a motor home that was owned by the Heaths and repossessed by Mountaineer in February of 2009. Although entitled to repossess the motor home, Mountaineer failed to follow the strict requirements regarding the handling and sale of the collateral after repossession. The legislature acted to protect the debtor and police the creditor since the creditor has the unilateral right to seize property with no notice and no judicial oversight. RCW 62A.9A-614 specifically requires that the secured party must promptly send Notice of Sale before the collateral is sold. The notice must include the manner of disposition as well as the time and place of a public disposition. Recognizing how critical proper

notice is, RCW 62A.9A-614 does not allow for errors of information in either of these two areas. The Notice of Sale that was sent to the Heaths stated that there was to be a public sale on March 2, 2009, which was false. Mountaineer has no record or other evidence of its claimed 16-day bidding process or the claim that it later sold the motor home on April 15, 2009. It is undisputed that Mountaineer never sent a further notice to the Heaths correcting the false information, as required by the UCC. Based on this error, the Heaths are entitled to statutory damages, costs, and attorney's fees.

Furthermore, RCW 62A.9A-610 requires that the disposition of collateral must be commercially reasonable in all aspects. Not only was the notice and sale in this case fundamentally botched, Mountaineer's own evidence refutes that there was any sale at all.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of October 1, 2010, granting plaintiff's cross-motion for summary judgment.
2. The trial court erred in entering the order of October 1, 2010, denying defendants' motion for summary judgment.
3. The trial court erred in denying the Heaths' motion for reconsideration.

//

*Issues Pertaining to Assignments of Error*

1. Mountaineer, which has the right of self-help repossession, must strictly comply with the statutory requirements when selling a repossessed vehicle.
2. The record established that Mountaineer failed to send required notice after repossession.
3. Mountaineer failed to prove a sale, much less the commercial reasonableness of any sale.
4. The Heaths are entitled to recover statutory damages under RCW 62A.9A-625 for Mountaineer's failure to comply with RCW 62A.9A-614.

III. STATEMENT OF THE CASE

**A. Factual Statement**

Gary and Barbara Heath are 64 and 60 years old respectively. (CP 234, p 3; CP 223, p 4). They were married in 1970, and have both lived in Spokane, WA the majority of their lives. (CP 234, p 4; CP 223, p 4-5). On May 10, 1994, Mr. and Mrs. Heath entered into an agreement with KEY Bank to finance \$34,446.30 for the purchase of a 1992, 23-foot Fourwinds motor home vehicle. (CP 94, ¶¶ 1, 3). The Heaths purchased the motor home for personal and family use. (CP 94, ¶ 4). The Heaths

faithfully made payments on the motor home for 12 years at \$350.14 per month, repaying approximately \$54,000.00 on the loan. (CP 95, ¶ 6).

At the age of 60, Mr. Heath became permanently disabled due to a workplace injury in 2006. (CP 95, ¶ 6). As Mr. Heath was the sole income earner, the Heaths were forced to reduce the amount of their motor home payments to \$150.00 per month. *Id.* They paid at this amount for another two years until the couple's income was reduced to only Social Security disability in 2008, and they could no longer afford to make the payments. (CP 95, ¶ 7). At that point the Heaths had paid approximately \$54,000.00 on the \$34,446.30 loan. (CP 95, ¶ 8).

In the winter of 2008, upon realizing they would no longer be able to afford the payments, the Heaths tried unsuccessfully to sell the motor home. (CP 95, ¶¶ 12, 13). Because the Heaths could no longer afford the payments, Mountaineer, through Alpine Recovery Inc., repossessed the Heaths' motor home in early February 2009. (CP 87). The Heaths, cooperating fully in the repossession, provided the keys to the vehicle and even helped prepare the vehicle for the repossession company. (CP 227, p 19-20).

Mountaineer is in the business of purchasing debt. (CP 449, p 13). Tom Olesky, Mountaineer representative and the account manager for the Heaths, testified that he, along with another employee manage

approximately 600 – 700 motor home accounts similar to that of the Heaths. (CP 451, p 21). On May 12, 2004, Mountaineer purchased the note from KEY Bank, and succeeded to KEY Bank's interest. (CP 10-12). The Heaths then made their regular payments on a timely basis to Mountaineer, until 2006.

After the repossession, Mountaineer sent the Heaths a Notice of Sale dated February 17, 2009. The Notice of Sale listed the statutorily required "public sale" date as March 2, 2009, at 9:00 a.m. at Alpine Recovery. (CP 199-204; CP 264-268; CP 317-321). The stated date was false. The vehicle was sold on April 15, 2009, rather than on March 2, 2009 as indicated in the February 17, 2009 Notice of Sale. (CP 5 ¶ 1.9; CP 14; CP 87; CP 104; CP 109; CP 134, ¶ 11; CP 174, ¶ 17; CP 210; CP 286; CP 303; CP 324; CP 404; CP 453, p 32; CP 461; CP 477). Mountaineer did not send a notice cancelling the March 2, date or any further notice to the Heaths informing them of Mountaineer's intent to sell the vehicle at a later date. (CP 87; CP 104). Therefore, the Heaths were never sent prior notice of the time, date, and place of actual public sale.

The Heaths did not go to Alpine Recovery the morning of March 2, 2009, at 9:00 am. (CP 228, p 24). Neither did any other bidders, as there was no live public sale to attend that day. Contrary to their notice, Mountaineer changed the entire manner of sale from a March 2<sup>nd</sup> public

auction to what Mountaineer claimed was a telephone, internet, and in person bidding process that occurred from February 22, 2009, through March 9, 2009. (CP 408; CP 428-429, p 36-37; CP 453, p 29-30). As of March 2, 2009 three bids had been received, although it does not appear there was competitive, live bidding as the notice suggested. Mountaineer unilaterally decided to keep the bidding open for another week. (CP 430, p 42-43). The Heaths were not informed of the extension of the sale date, nor apparently were the first three bidders advised that they could increase their bids for one more week. Mountaineer never sent the Heaths notice that “bidding” would be private rather than public, nor that bids would be taken over a 16-day period rather than an actual auction on the date specified in the February 17<sup>th</sup> notice. (CP 87; CP 104; CP 199-204; CP 264-268). Mountaineer offered conflicting versions of the sale terms. Mountaineer first attested the motor home was sold to the auctioneer’s mother for \$4,000.00. (CP 323). Mountaineer later changed its testimony and asserted the motor home was not sold to the auctioneer’s mother. (CP 323). It now claims there was another “buyer”, but has not been able to produce any documentation or record of the sale it claims occurred. (CP 436, p 66).

Mountaineer did not establish that the motor home sale was properly advertised, as they have not provided either a copy of the advertisement

nor a receipt for the payment for any alleged ad. (CP 429, p 39). As stated above, Mountaineer originally listed the mother of the owner of Alpine Recovery, Ms. Cinderella Williams, as the purchaser. (CP 454, p 34). Mountaineer later attempted to change the name of the purchaser to “Gary Clark.” If a sale ever occurred at all, Mountaineer has never produced any record or receipt. Any claimed “sale” was never reported to Washington State Department of Licensing, nor new title ever recorded with the Washington State Department of Licensing. (CP 326-328; CP 442-444). The state continues to list the Heaths as the owners of the vehicle. (CP 326-328; CP 442-444).

After repossession, the Heaths received notice from Mountaineer that they owed a deficiency of \$13,973.95, plus \$3.47 per diem interest. (CP 212-216). The Heaths, in taking Mountaineer at their word regarding both the sale and the amount of the deficiency, and before contacting counsel, attempted to pay the deficiency by canceling Mr. Heath’s supplementary Medicare insurance in order to pay Mountaineer \$25 per month on the deficiency. (CP 95, ¶ 10). Mountaineer, while at first offering to accept this amount, later demanded an additional down payment of \$500. (CP 210-211; CP 455, p 38). The Heaths were unable to meet this subsequent demand. *Id.*

Despite producing no record of any auction sale and failing to transfer title, and despite its failure to give the required notice, Mountaineer sued the Heaths for a claimed deficiency of \$13,973.95, plus \$3.47 per diem interest, costs, and attorney's fees. (CP 3-6). The Heaths have alleged that the the Notice of Sale is insufficient as a matter of law, have challenged the commercial reasonableness of Mountaineer's actions, and have counterclaimed for statutory damages, costs, and attorney's fees. (CP 76-81).

**B. Procedure Below**

This matter began as an action for a deficiency judgment initiated by Mountaineer against Gary and Barbara Heath, and the marital community. (CP 3-15). The Heaths counterclaimed, alleging violations of RCW 62A.9A-610, RCW 62A.9A-611, and RCW 62A.9A-614, for failing to provide proper notification before disposition of collateral. (CP 76-81). In response to the Heaths' Request for Admissions, Mountaineer stated that the Heaths' vehicle was sold on April 15, 2009, instead of March 2, 2009, as listed in the Notice of Sale. Mountaineer also admitted its failure to notify the Heaths of the claimed April 15, 2009, disposition of the motor home. (CP 82-93). On the strength of these responses, the Heaths moved for summary judgment. (CP 82-93). On August 19, 2010, Mountaineer cross-moved for summary judgment. (CP 103-119). After

hearing oral argument on September 17, 2010, the Honorable Salvatore F. Cozza granted Mountaineer's cross-motion for summary judgment and denied the Heaths' motion for summary judgment. The order was entered on October 1, 2010. (CP 373-375, 379-398). The Heaths moved for reconsideration on October 11, 2010. (CP 399-400). The motion was denied in an order entered on October 22, 2010. (CP 485-486). The Heaths appeal from the order of summary judgment and the motion for reconsideration. (CP 489-496).

#### IV. SUMMARY OF THE ARGUMENT

A sale of repossessed collateral requires that the debtor be given notice of the sale and that every aspect of the sale be commercially reasonable. *See* RCW 62A.9A-610, RCW 62A.9A-611. RCW 62A.9A-610 and RCW 62A.9A-611 impose two requirements upon a reselling creditor. These requirements are that the secured party must send the debtor reasonable notification of sale and every aspect of the sale, including the method, manner, time, place and terms must be commercially reasonable.

When a secured party exercises its rights, in other words self-help repossession, under RCW 62A.9A-6 et. seq., but fails to comply with the strict statutory requirements, RCW 62A.9A-625 mandates a statutory remedy for the debtor. (Appendix A-5). The debtor's remedies for cases involving consumer goods include at a minimum statutory damages.

RCW 62A.9A-625(c)(2) makes **minimum** statutory damages available for almost every violation of Article 9, Part 6 of the UCC, including defective notices of sale and the failure to dispose of repossessed collateral in a commercially reasonable manner. Statutory violations, such as failing to provide proper notice of sale, trigger the consumer remedies. See *Stoppi v. Wilmington Trust Co.*, 518 A.2d 82 (Del. 1986) (holding that the creditor must comply with the requirements of Section 9-504 [currently 9-611], and a deviation from that provision affords the debtor a remedy for statutory damages under 9-507 [currently 9-625]); *Erdmann v. Rants*, 442 N.W.2d 441 (N.D. 1989) (holding that creditor's failure to give notice triggers the statutory damages provision and because the collateral is a consumer good, the debtor is entitled to recover damages, "in any event," regardless of his actual loss).

In this case, Mountaineer failed to provide a Notice of Sale that included the correct manner of disposition and the correct date and time of the sale of their motor home, denying the Heaths their rights under the statute. Furthermore, Mountaineer failed to produce any competent evidence that the vehicle has ever been sold and the current title establishes that it has not. The scant evidence in the record of events leading up to the alleged sale uniformly establishes commercial unreasonableness as to the time, manner, and methods of attempted sale.

Therefore, Mountaineer has violated both RCW 62A.9A-614 and RCW 62A.9A-610 as a matter of law, and the Heaths are entitled to statutory damages under RCW 62A.9A-625. The trial court erred in denying the Heaths' motion and granting summary judgment to Mountaineer.

#### V. ARGUMENT

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003) (citing *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068, 1073 (2002)).

At the heart of this case is Article 9 of the UCC. The statutes that are specifically in question in the present matter are RCW 62A.9A-610, which governs disposition of collateral after default, RCW 62A.9A-611, which requires notification before disposition of collateral, and RCW 62A.9A-614, which sets forth the required content and form of a Notice of Sale before disposition of collateral in consumer-goods cases. *See* Appendix A-2 – A-4. RCW 62A.9A-614(1)(A) incorporates the information specified in RCW 62A.9A-613(1) as information that is also required. (Appendix A-3).

The Washington Supreme Court in *In re Marriage of Kovacs* set forth principles of statutory construction. *See* 121 Wn.2d 795, 854 P.2d 629

(1993). The first principle is that, “a statute which is clear on its face is not subject to judicial interpretation . . . .” *Id.* at 804, 854 P.2d at 634. “Where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.” *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 185, 829 P.2d 1061, 1065 (1992). Further, this Court has stated, “[w]hen reading a statute, we will not construe language that is clear and unambiguous, but will instead give effect to the plain meaning.” *Vance v. Dep’t. of Ret. Sys.*, 114 Wn. App. 572, 577, 59 P.3d 130, 133 (2002).

The Washington statute plainly states “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.” RCW 62A.9A-610. “[A] secured party that disposes of collateral under RCW 62A.9A-610 shall send to the [debtor] a reasonable authenticated notification of disposition.” RCW 62A.9A-611 (Appendix A-2). RCW 62A.9A-614, through RCW 62A.9A-613(1), requires that the Notice of Sale state both the “manner of” and the “time and place of a public disposition.” RCW 62A.9A-614(1)(A).

These requirements are clear and unambiguous, and thus the plain meaning of the statute must be given effect. In this case, Mountaineer did not comply with the statute in that it failed to provide the Heaths with proof that a sale occurred, much less that a reasonable sale took place, and

it did not provide the Heaths a proper Notice of Sale. Mountaineer did not have the right or discretion to vary from the required disclosure. To sell the motor home, if it in fact was sold, in a different manner and on a different day from the date listed on the notice renders the Notice of Sale insufficient as a matter of law and the sale commercially unreasonable.

**A. The Trial Court Erred When it Granted Summary Judgment For Mountaineer Because Mountaineer Failed To Comply With Washington's UCC.**

In determining that Mountaineer did not need to send the Heaths a new notice reflecting the correct sale date, the trial court erred as a matter of law by not requiring statutory compliance on the part of Mountaineer. (CP 395-396). The information required in the Notice of Sale pursuant to RCW 62A.9A-613(1), includes a description of the type of sale which is to take place, and the date and time of the sale.

RCW 62A.9A-611 and RCW 62A.9A-614 give rise to the requirement that the creditor send the debtor a Notice of Sale, as well as the specific information that the notice must contain. Accurate pre-auction notice is both mandated and vitally important. Accurate notice is animated by the “forlorn hope that if he is notified, [the borrower] will either acquire enough money to redeem the collateral or send his friends to bid for it.” *Cosgrove v. Citizens Auto. Fin., Inc.*, 2010 WL 3370760, \*3 (E.D. PA. Aug. 26, 2010) (citing *Indus. Valley Bank & Trust Co. v. Nash*, 502 A.2d

1254, 1263 (Pa.Super.Ct.1985) (quoting J.J. White and R.S. Summers, Uniform Commercial Code, § 26-9 (2<sup>nd</sup> ed.1980)).

The notice that Mountaineer provided to the Heaths stated that a public sale would take place on March 2, 2009 at 9:00 a.m. But Mountaineer admits that no sale took place on March 2, 2009, that no public sale took place at all (rather a private bidding scheme) and that no further notice was sent to the Heaths. Therefore, Mountaineer failed to comply with Washington's UCC, because it sent a Notice of Sale without the specific information and content that RCW 62A.9A-614 requires, and the Heaths are entitled to damages as provided for in the statute.

1. The Notice of Sale is defective because it did not state the correct manner or date and time of the sale as required by RCW 62A.9A-614(1)(A).

The information required by RCW 62A.9A-613(1), and therefore RCW 62A.9A-614(1)(A), is “the method of intended disposition” and “the time and place of a public disposition.” See RCW 62A.9A-613(1)(C), (E) (Appendix A-3). When interpreting the UCC this court has relied on and referred to the official comments. See *Tacoma Athletic Club, Inc., v. Indoor Comfort Sys., Inc.*, 79 Wn. App. 250, 255, 902 P.2d 175, 255 (1995); *Arango v. Success Roofing, Inc.*, 46 Wn. App. 314, 317, 730 P.2d 720, 722 (1986). In interpreting uniform acts Washington Courts often look to the authority of other jurisdictions as persuasive. See *Am. Star Ins.*

*Co. v. Grice*, 123 Wn.2d 131, 865 P.2d 507 (1994); *Henderson v. Tagg*, 68 Wn.2d 188, 412 P.2d 112 (1966). Other states have also looked to the comments when interpreting the provisions of the UCC. *See Exxon v. Gill*, 299 S.W.3d 124, 126 (Tex. 2010) (holding that although the official comments to the Code were not enacted by the Legislature, they serve as a valuable aid in construing the statutory language); *Bristol Assoc. Inc., v. Girard Trust Bank*, 505 F.2d 1056, 1058 n. 2 (3<sup>rd</sup> Cir. 1974) (noting that the Pennsylvania Supreme Court gives substantial weight to the Comments as evidencing the intended application of the Code).

The official comments in this case emphasize strict statutory compliance by stating, “[p]aragraph (1) sets forth the information required for a reasonable notification in a consumer-goods transaction. A notification that lacks **any** of the information set forth in paragraph (1) is **insufficient as a matter of law.**” Official Comment 2 to RCW 62A.9A-614 (Emphasis added), (Appendix A-4).

Although not defined by the statute itself, the term ‘time’ is elaborated upon in the official comments, which explain that “[t]he reference to ‘time’ of disposition means here . . . not only the hour of the day but also the date.” Official Comment 2 to RCW 62A.9A-613 (Appendix A-3). Although the statute does not define the term ‘sale’ in RCW 62A.2-106 defines ‘sale’ as “the passing of title from the seller to the buyer for a

price.” RCW 62A.2-106 (Appendix A-1). A ‘public disposition’ is also defined by the comments as a sale “at which the price is determined after the public has had a meaningful opportunity for competitive bidding.” Official Comment 7 to RCW 62A.9A-610. ‘Meaningful opportunity’ “is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).” *Id.* “The essence of a public sale is that the public is not only invited to attend and bid but is also informed when and where the sale is to be held.” *Lloyd’s Plan, Inc. v. Brown*, 268 N.W.2d 192, 196, 24 U.C.C. Rep.Serv. 1053 (Iowa 1978). “Other courts have, in the same spirit, stressed that a public sale is open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time and place of the sale.” J.J. White and R.S. Summers, Uniform Commercial Code, § 34-11, 474 (6<sup>th</sup> ed. 2010) (citing *Pioneer Dodge Center, Inc. v. Glaubenslee*, 649 P.2d 28, 33 UCC 1588 (Utah 1982)). “A private sale, by contrast, is not open to the general public, usually does not occur at a pre-appointed time and place, and may or may not be generally advertised.” *Id.* (citing *Security Federal Sav. & Loan v. Prendergast*, 108 N.M. 572, 775 P.2d 1289 (1989)).

As the basis for these statutes is the UCC, the statutory language is extremely similar, if not identical, throughout the various jurisdictions.

Compare RCW 62A.9A-614 with Ohio, R.C. 1309.614; Florida, F.S.A. 679.614; and Pennsylvania, 13 Pa.C.S.A. 9614. (Appendix A-6 - A-9). One of the purposes and policies of the UCC is to make uniform the law among the various jurisdictions. *See* RCW 62A.1-102(2)(c) (Appendix A-1). Keeping in mind the desire to promote uniformity among various jurisdictions, the Legislature instructs that the statute shall be liberally construed and applied to promote its purposes and policies. *See* RCW 62A.1-102(1) (Appendix A-1). This is important because Washington does not have case law specifically addressing statutory damages for a deficient Notice of Sale. However, other jurisdictions have ruled on this issue, and keeping this policy in mind, this Court should adopt the rule of these jurisdictions.

In *Huntington Bank v. Freeman*, a case that is substantially similar to the current case, the court found that although notice of a February 13, 1988 sale was sent to the debtor, the record revealed that the collateral, a car, was not sold until February 20, 1988. *See* 53 Ohio App.3d 127, 560 N.E.2d 251 (1989). The court found that this was insufficient notice, holding that, “[t]he record showed that the bank failed to prove that it sent any notice to the appellant of the **actual** date, place, time and minimum bid required in the sale of her collateral. By failing to send this notice, the

bank has violated [the statute].” *Id.* at 131, 560 N.E.2d at 256 (Emphasis added).

*Huntington Bank* parallels the case at hand in that although one notice was sent to the debtor, the sale did not take place on the day listed and the debtors were not notified of the new sale date. The court in that case found that the statute had been violated, and thus this court should find the statute at issue in this case violated as well. *See also Jackson v. S. Auto Fin. Co.*, 988 So.2d 721, 721 (Fla. 2008) (holding that the notice provided by the lender failed to include where or when the sale would be held, therefore the lower court erred in entering a summary judgment for the lender).

The Heaths acknowledge they were provided with a notice, however it was inaccurate. The Notice of Sale the Heaths received stated “a public sale will be held on March 2, 2009, at 9:00 a.m. at Alpine Recovery.” (CP 265-268). Through its complaint, admissions, and Account Manager, Tom Olesky’s audit trail, Mountaineer admitted there was not a live auction and that the alleged sale of the vehicle did not take place until April 15, 2009. (CP 5, ¶1.9; CP 104; CP 210). Mountaineer has not asserted that it attempted to notify the Heaths of the April 15, 2009 sale date, and in fact admitted that it did not. (CP 104).

Furthermore, the Notice of Sale, which indicated a 9:00 a.m., March 2, 2009 sale, in no way described the 16-day private, secretive, bidding process, nor did it indicate that bidding would take place on days other than March 2, 2009. (CP 265-268). Also, Mountaineer stated, without providing actual evidence as to the accuracy of this statement, that the collateral was advertised beginning the week of February 22, 2009, through March 2, 2009. And although Mountaineer asserted that three bids were received by March 2, 2009, Mountaineer admitted that it decided to keep the bidding open through March 9, 2009, and did not actually sell the vehicle until April 15, 2009. (CP 428-429, p 36-37; CP 453, p 29-30). This ad hoc, change-as-you-go bidding process is not only unorthodox, but essentially defeats the purpose of competitive bidding. *See 7 Am. Jur. 2d Auctions and Auctioneers* §1, 373 (2007). If the first three, or any other subsequent bidders knew they had another week to bid, and then a further five weeks to obtain the funds or delay delivery of the vehicle, their bids may have been higher.

The Notice of Sale was also misleading in that it stated, “[y]ou may attend the sale and bring bidders if you want.” (CP 265-268). There is no possible way that the Heaths could have been present for a sale when bids were taken for 16 days, from February 22, 2009 – March 9, 2009. Nor is there any way for the Heaths to ensure the commercial reasonableness of a

sale of this type. It does not logically follow that Mountaineer can assert that the Notice of Sale with a sale date of March 2, 2009, is proper after admitting that the bidding remained open until March 9, 2009. Therefore both the notice and the bidding process were fatally flawed. Either one of these undisputed facts is sufficient to grant summary judgment to the Heaths, and defeat Mountaineer's cross motion for summary judgment under RCW 62A.9A-610 and RCW 62A.9A-614.

As Mountaineer had begun accepting bids prior the scheduled March 2, 2009 sale date, and had three bids as of March 2, 2009, Mountaineer could have either: (a) accepted one of the bids available on that day, or (b) simply, notified the Heaths of the change in the sale date in order to comply with RCW 62A.9A-614. As one court noted:

[W]e are unable to perceive any possible prejudice to the secured creditor in requiring compliance with . . . the notice requirements . . . of the U.C.C. The inconvenience of possibly an additional letter and postage stamp is far outweighed by the debtor's inability, because of lack of notice, to protect his interests and the public sale either in person or through relatives or friends.

*Indus. Valley Bank and Trust Co.*, 502 A.2d at 1264. Furthermore, the fact that Mountaineer began accepting bids before the scheduled sale date is inconsistent with both the date and manner of the sale that was described in the notice.

In this case, the Notice of Sale stated that a public sale would be held on the date specified, however, no sale was actually held on that day. The Notice of Sale listed a date and time. However, the date specified was not the actual date when the sale of the vehicle occurred. Furthermore, Mountaineer had begun accepting bids before the scheduled sale date, which undermines the reasoning behind the debtor being sent a Notice of Sale. An incorrect date and time is, practically speaking, no better than simply not including the date or time at all. As discussed below, while the statute does forgive some errors of information in the Notice of Sale, errors in the manner of sale or the date and time render the notice inadequate as a matter of law. The trial court erred in failing to apply the plain language of the statute.

a. *The use of the Safe Harbor form does not excuse Mountaineer's non-compliance with the statute because the 'manner' and 'date and time' is information required by paragraph 1 of RCW 62A.9A-614.*

“A notification in the form of RCW 62A.9A-614(3) of this section [safe harbor form] is sufficient, even if it includes errors in information **not required** by RCW 62A.9A-614(1) of this section, unless the error is misleading with respect to rights arising under this Article.” RCW 62A.9A-614(5) (Emphasis added). As stated above, “[a] notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law.” Official Comment 2 to RCW 62A.9A-614 (Appendix A-

4). The meaning of the error provision is explained in the comment: “Paragraph (5) provides that non-misleading errors in information contained in a notification are permitted if the safe-harbor form is used *and if the errors are in information not required by paragraph (1)*. (Emphasis in original), Official Comment 3 to RCW 62A.9A-614, (Appendix A-4).

The “time and place of a public disposition” is required information under paragraph (1) of RCW 62A.9A-614 through paragraph (1) of RCW 62A.9A-613. In this case, Mountaineer admits it did not hold a live sale on the date or at the time specified in its Notice of Sale. (CP 408). Nor did the sale of the vehicle actually occur on the date specified, March 2, 2009. Mountaineer claims – without providing evidence – that the sale occurred 44 days later on April 15, 2009. (CP 199-204; CP 5, ¶ 1.9). As discussed *infra*, the evidence (or lack thereof) suggests the motor home has never been sold. In either case, the Notice of Sale sent to the Heaths contained erroneous information regarding the manner and the date and time of the sale. Pursuant to RCW 62A.9A-614, that shortcoming is a fatal error. The trial court erred in excusing the deficient notice. (CP 395-396).

//

b. *The Heaths in no way waived their right to the statutorily required notification of sale.*

“Except as otherwise provided in RCW 62A.9A-624, to the extent that they give rights to . . . a debtor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in RCW 62A.9A-610(b), RCW 62A.9A-611, RCW 62A.9A-613, and RCW 62A.9A-614 . . . .” RCW 62A.9A-602(7). “A debtor may waive the right to notification of disposition of collateral under RCW 62A.9A-611 only by an agreement to that effect entered into and authenticated after default.” RCW 62A.9A-624(a) (Emphasis added). This Court has already held that, “[u]nder the U.C.C., the notice requirement cannot be waived except in writing *after* default.” *McChord Credit Union, v. Parrish*, 61 Wn. App. 8, 13, 809 P.2d 759, 762 (1991) (Emphasis in original).

In this case, the Heaths did not enter into any agreement with Mountaineer to waive their right to a Notice of Sale. Mountaineer does not allege that such an agreement was made. Therefore, the Heaths did not waive their right to Notice of Sale.

i. The Heaths did not waive their right to proper notification by permitting voluntary repossession.

“The purpose of notice to the debtor is the same regardless of whether he has voluntarily surrendered the collateral or the creditor had been required to repossess it.” *Miami Valley Prod. Credit Assoc. v. Hastings*,

42 Ohio App.3d 125, 126, 536 N.E.2d 1177, 1178 (1985) (R.C. 1309.614). In Pennsylvania, again interpreting identical statutory language, the federal court held, “[v]oluntary surrender of vehicles with defaulted loans is to be encouraged, as it reduces potential conflicts between debtors and creditors [and the same notice is required]” *Cosgrove*, 2010 WL 3370760 \*3 (E.D. PA. Aug. 26, 2010) (interpreting 13 Pa.C.S.A. 9614).

In the pre-code revision case of *Commercial Credit Corp. v. Wollgast*, a commercial debtor voluntarily relinquished possession of collateral because he had been unable to sell machines himself. He had notice of the creditor’s intention to sell and was financially unable to take any action. *See* 11 Wn. App. 117, 521 P.2d 1191 (1974). It was held that the debtor had waived his right to notice of sale. *Id.* at 118, 521 P.2d at 1192. There are several reasons why *Commercial Credit Corp.*, is distinguishable.

The most significant reason is that the statute itself has undergone significant revisions since 1974. RCW 62A.9A-602 has its roots in Former Section 9-501(3) and as the comment states, “[t]his section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties . . . .” Official Comment 3 to RCW 62A.9A-602. RCW 62A.9A-624 comes from 9-504(3), 9-505, and 9-506 and was enacted in 2000. Furthermore, the Court in *Commercial Credit Corp.* states “the only penalty for failure to give proper notice is the

debtor's right to recovery from the creditor any loss caused by the failure to give that notice." *Id.* at 122, 521 P.2d at 1194. This is completely at odds with the current code and RCW 62A.9A-625 which provides for **minimum** statutory damages for any noncompliance. Therefore, the entire concept of debtor waiver and the right to damages have undergone a complete metamorphosis in the 37 years since *Commercial Credit Corp.*

A further reason why the case at hand is distinguishable from *Commercial Credit Corp.* is that this case is a consumer case rather than a commercial case. The debtor in *Commercial Credit Corp.* was a snowmobile dealer, rather than someone who purchased goods for personal use. This is significant because consumers are often held to a "least sophisticated consumer" standard and therefore are more protected by the legislature and the courts. *See Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222 (9<sup>th</sup> Cir. 1988). Finally, *Commercial Credit Corp.* was not a summary judgment case but an appeal from a trial disposition where the reasonableness of the notice and sale was demonstrated by admissible evidence.

ii. The Heaths did not waive their right to proper notification by not attending the "sale."

"[T]he burden of proof is on the [creditor] to show that notice was sent. [The debtor] had no duty to present evidence of her attendance at the

sale.” *Huntington Bank*, 53 Ohio App.3d at 130-131, 560 N.E.2d at 256. The Notice of Sale is a requirement owed to the debtor, and must be fulfilled, before the sale. RCW 62A.9A-611. It does not place a responsibility on the debtor to attend the sale. *See Id.* In the present case, even if the Heaths attempted to attend the sale noted for March 2, 2009, there was no sale being held for them to attend. (CP 408; CP 428-429, p 36-37; CP 453, p 29-30). In other words, the violation was complete upon the sending of improper notice. Reliance is not an element of RCW 62A.9A-611 or RCW 62A.9A-614.

The statute clearly states that entering into an authenticated agreement after default is the **only** way to waive the right to a Notice of Sale. *See* RCW 62A.9A-624 (Emphasis added). The Heaths did not enter in such an agreement, and thus they could not have waived any rights to receive a proper notice of sale.

As illustrated above, the Notice of Sale is fatally flawed, and therefore deficient, in at least two ways. The manner of sale was listed as public, however no public auction was held. Furthermore, the Notice of Sale did not state the correct time and place of the sale. These errors are of the type that is not excused by the use of the safe harbor form. And the Heaths in no way waived their right to be sent proper notice, a notice free from such blatant errors.

2. The defective Notice of Sale entitles the Heaths to damages under RCW 62A.9A-625(c)(2).

Failure to comply with the RCW 62A.9A-610 or RCW 62A.9A-614 in consumer goods cases gives rise to specific statutory remedies for the debtor.

If the collateral is consumer goods, a person that was a debtor or a secondary obligator at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

RCW 62A.9A-625(c)(2). Again courts look to the plain meaning of the statute. “Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It . . . is designed to ensure that **every noncompliance** with the requirements of Part 6 in a consumer-goods transaction results in liability, **regardless of any injury that may have resulted.**” Official Comment 4 to RCW 62A.9A-625 (Emphasis added).

The majority of Washington cases deal with the commercial reasonableness of the sale and therefore the rebuttable presumption of the deficiency. See e.g. *McChord Credit Union*, 61 Wn. App 8, 809 P.2d 759; *Empire South, Inc. v. Repp*, 51 Wn. App. 868, 756 P.2d 745 (1988); *Rotta v. Early Indus. Corp.*, 47 Wn. App. 21, 733 P.2d 576 (1987); *United States v. Cawley*, 464 F.Supp. 189 (E.D. Wash. 1979). However, there are

numerous examples of cases in other jurisdictions, interpreting the same basic statutory language as Washington's statute, which address the question of statutory damages for a defective Notice of Sale. See e.g. *Muro v. Hermanos Auto Wholesaler, Inc.*, 514 F.Supp.2d 1343 (S.D. Fla. 2007); *Joyce v. Cloverbrook Homes, Inc.*, 81 N.C. App. 270, 344 S.E.2d 58 (1986); *All Valley Acceptance Co., v. Durfey*, 800 S.W.2d 672 (Tex. App. 1991). These courts, as illustrated below, hold that deficiencies in the Notice of Sale entitle the debtor to statutory damages as a matter of law.

In *Muro v. Hermanos Auto Wholesaler, Inc.*, the US District Court for the Southern District of Florida held that "because the transaction was clearly a consumer-goods transaction, the notice provision of [9-614] applies. Since [creditor's] notification lacks some of the required elements of that section, it fails as a matter of law and [debtor] is entitled to statutory damages." 514 F.Supp.2d 1343, 1352 (S.D. Fla. 2007).

In *Joyce v. Cloverbrook Homes, Inc.*, on a substantially similar fact pattern to the subject case, the North Carolina Court of Appeals awarded statutory damages based on deficient Notice of Sale. 81 N.C. App. 270, 344 S.E.2d 58 (1986). In *Joyce*, the creditor mailed a notice of repossession and sale, which stated that the mobile home had been repossessed and would be sold at public auction on May 6, 1982. *Id.* However, the mobile home was not sold on May 6, 1982. *Id.* The court

found the Notice of Sale did not meet the statutory requirement and therefore the debtor was entitled to statutory damages. *See Id.* at 271-74, 344 S.E.2d at 59-61.

In *All Valley Acceptance Co., v. Durfey*, the Texas Court of Appeals granted 9-625 statutory damages for failure to send the Notice of Sale to a debtor who had vacated a mobile home, (the collateral), agreed to the repossession, and did not suffer any actual damages. *See* 800 S.W.2d 672 (Tex. App. 1991). That court held: (a) voluntary surrender of the collateral does not constitute waiver of the debtor's right to notice of resale; (b) when a creditor fails to comply with section 9-504 [9-611] damages are specifically provided for in 9-507 [9-625]; and (c) notice of a September 3rd sale, mailed ten days before that date, cannot serve as a reasonable notice of a sale conducted on August 28th. *Id.* Therefore, the court affirmed the judgment of the trial court that the debtors were entitled to recover statutory damages of \$37,752.87 from the creditor as well as their attorney's fees. *See Id.*

Finally, Courts have held that:

The failure to give the notice does entitle the debtor [] to recover from the secured party [] any actual loss caused by such failure and, in the case of the sale of consumer goods such as the automobile in this case, the debtor also shall have the right to recover 'in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.'

*Walker v. V.M. Box Motor Co., Inc.*, 325 So.2d 905, 906 (Miss. 1976) (citing Miss. Code Ann. § 75-9-625, interpreting § 75-9-614).

When interpreting statutory language, courts also look to the intent of the legislature. Washington Courts have held that “[a]pplying the general principles of statutory construction in interpreting statutes, the court’s function is to discover the intent of the Legislature and give effect to that intent.” *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 445, 869 P.2d 1110, 1113 (1994). When determining a case with the same issue as the one before this court, the United States District Court for the Eastern District of Virginia stated, “[t]he Court is persuaded that the drafters of the Uniform Commercial Code did not intend to place a burden upon debtors, but instead intended to police lenders under Article 9 . . . . Those seeking recovery under the statutory minimum provision need not show actual damages.” *Chisolm v. S. Fin. Corp.*, 194 F.R.D. 538, 551 (E.D. Va. 2000).

The exact amount of damages in cases such as the case at hand is set forth in RCW 62A.9A-625, which provides the aggrieved debtor “an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.” RCW 62A.9A-625(c)(2).

This recovery provision, with its minimum limit, leaves no doubt that it was intended not as a means of compensating the debtor but rather to impose a civil penalty upon the lender . . . . The purpose of imposing such civil liability upon creditors is to force compliance with the protective provisions of [the statute]. To deny [the debtor] his 'right to recover' would be to undercut the effectiveness of the act without apparently furthering other policies.

*Merch. Nat'l Bank of Chicago v. Scanlon*, 86 Ill.App.3d 719, 723, 408 N.E.2d 248, 251 (1980). A further example of awarding statutory damages for deficient Notice of Sale is *In re Koresko*, which held that the creditor's failure to provide Notice of Sale resulted in the debtor's statutory damages in the sum of the credit service charge or finance charge of \$11,995.58 in the transaction, plus 10 percent of the principal amount of the debt in the transaction of \$22,934.50, or \$2,293.45, totaling a sum of \$14,289.03. *See* 91 B.R. 689 (Bankr. E.D. Pa. 1988). The court held that, notwithstanding,

[t]he apparent inability of the Debtors . . . to do much to forestall the sale even had they known about it or to prove actual damages as a result of the failure to provide the requisite notice . . . statutory damages such as are provided in § 9507(a) [current 9-625(c)(2)] are fixed by the legislature as a means of encouraging strict compliance with that law and not allowing the party violating the law to be extricated by the difficult prospect of the victim's proving actual damages.

*Id.* at 699. Yet another example of statutory damages being awarded for a deficient Notice of Sale is found in *Ayers v. Mellon Bank*, where the court awarded \$11,647.70 for insufficient notice by using the following

formula: 10 percent of the cash price (\$1,341.50) plus the time price differential (\$7,772.96 finance charge plus \$2,533.24 credit insurance). *Ayers v. Mellon Bank*, 1987 WL 8274, at \*3 (Del.Super. March 6, 1987).

In this case, the Heaths' finance charge was \$28,404.30 and the cash price of the vehicle was \$39,990.00. Under the statutory credit service charge formula the Heaths should have been awarded damages in the amount of \$32,403.30 under the statute.

**B. The Sale In This Case – If One Occurred – Was Not Commercially Reasonable.**

The trial court erred in entering summary judgment for Mountaineer and finding that the sale was commercially reasonable. The Heaths have explained above the importance of notice and why the notice in this case was insufficient. This case can be resolved – reversed – on the deficient notice alone. In addition, the Heaths will address the evidence regarding the alleged sale, as it also goes to commercial (un)reasonableness. RCW 62A.9A-610 states: “[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable.”

In addition to the insufficient notice, there is a litany of circumstances that render the sale commercially unreasonable. They include: 1) The failure of Mountaineer to meet its burden of proof in establishing

commercial reasonableness, 2) the irregular, unorthodox sale methodology -- first an auction date then an extended “bidding” period (where certain bidders were under different standards than others), 3) an alleged sale to the mother of the man who owned the repossession company, who was conducting the sale, 4) later changing the identity of the buyer to a “Mr. Clark”, and finally, 5) the vehicle appears to have never been sold at all as Mountaineer has a) no documentation, not even a receipt of the alleged cash payment, and b) to date, no report of sale nor title transfer has been reported to the Washington State Department of Licensing (a misdemeanor under RCW 46.12.101(1)(a)).

1. Sufficient notice to both the debtor and the public is required in order for a sale to be commercially reasonable, both of which are lacking in this case.

The notice of sale is of the utmost importance to the consumer. It informs a consumer of when to expect loss of the property if actions are not taken to redeem it or otherwise prevent the sale. It informs the debtor of the kind of sale to be held and gives the debtor the opportunity to ensure that the sale be conducted in a commercially reasonable manner. The Notice of Sale sent to the Heaths did not meet the minimum statutory requirements and is therefore defective.

Furthermore, Mountaineer was unable to meet its burden of proof regarding commercial reasonableness because Mountaineer has failed to

provide either a copy of any advertisement that allegedly ran, or a receipt for the cost of the advertisement. Mark Williams, owner of Alpine Recovery, did not have a copy of, nor could he remember the wording of, the alleged advertisement. (CP 309-310). Instead of providing proof of advertising, Mountaineer relies on "bid sheets" produced to them by Alpine. However, there is no way for these sheets to be authenticated. "The burden of proof is on the [creditor] to show that the collateral was sold in a commercially reasonable manner. The [creditor] has not met its burden because it has failed to show that it advertised the public sale of the collateral." *Huntington Bank*, 53 Ohio App.3d at 131, 560 N.E.2d at 256. It is clear that Mountaineer failed to meet their burden of proving adequate advertising to the public in this case by their failure to produce a copy of the advertisements or even a receipt for the cost of any advertising.

2. Mountaineer failed to establish there has been a sale at all.

In response to interrogatories, Mountaineer listed Sandy (Cinderella) Williams as the purchaser of the vehicle. (CP 323). Ms. Williams is the mother of Mark Williams, the owner of Alpine Recovery, which was the company in charge of both the repossession and the disposition of the Heaths' vehicle. In his deposition, Mountaineer representative, and the Heaths account manager, Mr. Olesky, stated that he "had no reason not to believe" that Sandy Williams had in fact purchased the vehicle. (CP 454,

p 34). In other words, Mountaineer had reason to believe its earlier sworn testimony that Sandy Williams was the purchaser of the vehicle, was truthful. However, when the Heaths summoned Mark Williams for deposition, Mountaineer contradicted earlier testimony by changing the name of the alleged purchaser to Gary Clark. (CP 323-324; CP 460-461). Despite the lack of documentation of any sale to a Mr. Clark. (CP 159-168). Neither is there any evidence of a transfer of ownership to Mr. Clark. (CP 326-328). There is on the other hand a bid sheet for Cinderella Williams, with a bid of \$3,500.00. (CP 159). Furthermore, Mr. Olesky's audit log states that on April 14, 2009, "Alpine said that bidder at \$5,100.00 fell through and \$3,500.00 bidder went up to 4K.....told her to sell unit at 4K and have Mark call me." (CP 210). The only bidder that bid \$3,500.00 was Cinderella Williams. (CP 159). Adding further to the conflicting testimony regarding this transaction, the audit log also states that on February 11, 2009, Mr. Olesky called Alpine Recovery to verify if the unit had been delivered. (CP 209). It is noted that "Christie said owner [Mark Williams] wanted to talk to me in regards to HIM purchasing the RV she said he would call me." (*Id.*)(Emphasis in original).

During his deposition, Mr. Williams stated that when the vehicle came in, he called his mother to see if she wanted to look at it. (CP 438, p 74).

Additionally, when asked about the sale of the vehicle to ‘Mr. Clark,’ Mr. Williams stated that it was a cash sale, he had no receipt, and that he did not do any of the paperwork for the transfer of the vehicle. (CP 435-436, p 61, 63, 65). The Heaths submit that a vague, undocumented, phantom “sale” (to Clark, Williams, or whomever) coupled with the failure to transfer title to the alleged buyer as that statute requires fails the test for commercial reasonableness as a matter of law. *See* RCW 62A.9A-610.

3. Even if the sale took place as reported, it did not promote competitive bidding, as required by RCW 62A.9A-610, and therefore is not commercially reasonable.

There is no dispute: no sale occurred on March 2, 2009. Instead bids were allegedly received via the phone, internet, and by people stopping by the lot in person. (CP 408; CP 428-429, p 36-37; CP 453, p 29-30). This type of sale does not allow for competition, because there is no way for a bidder to know what the other bids are, and therefore, no way to drive up the price, which would have resulted in a lower deficiency amount for the Heaths. In other words, there was no competition between bidders, and once a bid was submitted, it was fixed and a bidder did not have the opportunity to “out bid” his competitor. A sale of this type serves to defeat the purpose of the Notice of Sale requirement, and is unreasonable as a matter of law. *See* 7 Am. Jur. 2d *Auctions and Auctioneers* §23, 395 (2007).

4. The vehicle was never registered, or reported as sold to the Washington State Department of Licensing.

According to the Washington State Department of Licensing, the vehicle's last title transfer was in 1994 when the Heaths purchased it. (CP 326-328, CP 442-444). In some 21 months since the alleged "sale," Mountaineer never submitted the required title transfer document to the Washington State Department of Licensing. Washington vehicle regulations require report of the sale to be submitted to Washington State Department of Licensing within 5 days from the date of sale and new title to be recorded within 15 days. RCW 46.12.101(1)(a), (6). This is detrimental to the Heaths in two significant ways: first, it does not allow for any way to verify the actual purchaser of the vehicle; second, and more importantly, the Heaths remain liable for the vehicle. If this vehicle so much as runs a red light, injures someone, or worse, the Heaths could be held liable, and will have to go through the turmoil of trying to prove that they are no longer the responsible party.

In summary, Mountaineer failed to provide the Heaths with a Notice of Sale that listed the correct manner or date and time of the sale. Based on this violation of the statute, the Heaths should be awarded the statutory damage minimum granted under RCW 62A.9A-625. Furthermore, Mountaineer is unable to provide proof that a sale actually occurred. It

failed to show that adequate advertisement was given to the public. It is unknown whom, if anyone, actually purchased the Heaths' vehicle, as there is no record or receipt of the sale, nor was it reported to the Washington State Department of Licensing. Even if a sale did occur, the type of sale did not promote competition among the bidders nor was there any way for the Heaths to ensure commercial reasonableness of the sale. A sale that involves so many errors and so much confusion ought not to be deemed commercially reasonable.

**C. The Heaths Are Entitled To Attorney's Fees And Costs in Compliance with RAP 18.1(a), (b) and Pursuant To RCW 4.84.330.**

Attorney's fees and costs are provided for in the language of the original installment contract, and therefore the Heaths are entitled to recover under RCW 4.84.330.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

RCW 4.84.330. "The remedial purpose behind the enactment of RCW 4.84.330 is that unilateral attorney fees provision be applied bilaterally." *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App 814, 817, 142 P.3d 206, 208 (2006). The Installment Sale Contract signed by the Heaths

states that “I agree to pay collection costs, reasonable collection agent’s fees and reasonable fees of attorneys who are not your salaried employees incurred by you in enforcing your rights under this Agreement, including any appeal and collection of any judgment awarded.” (CP 9, ¶ F). As Mountaineer is entitled to reasonable attorney’s fees under the Installment Sale Contract, the Heaths are thereby entitled to attorney fees both below and for this appeal under RCW 4.84.330. The lower court upon reversal and remand should be directed to conduct a hearing to determine fair and reasonable attorney’s fees.

#### VI. CONCLUSION

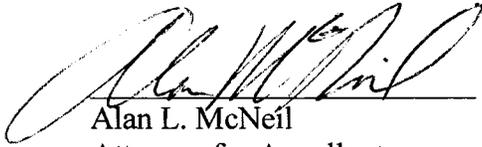
In conclusion, the Appellants request judgment be entered as a matter of law regarding the deficient Notice of Sale, the Heaths awarded statutory damages in the amount of \$32,403.30, and that the matter be remanded to determine costs and for calculation of reasonable counsel fees for efforts in this court and below. Furthermore, the Appellants request that the decision of the Superior Court of Spokane County be reversed, and the matter be remanded regarding the genuine issue of material fact surrounding whether a sale occurred, and the commercial reasonableness regarding any sale that may have occurred.

//

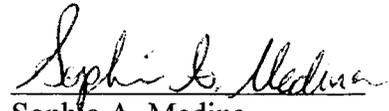
//

February 22, 2011

Respectfully submitted,



Alan L. McNeil  
Attorney for Appellants  
WSBA #7930



Sophia A. Medina  
Legal Intern for Appellants  
WSBA #911772

## VII. APPENDIX

### 1. RCW 62A.1-102. Purposes; Rules of construction; variation by agreement

- (1) This Title shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Title are
  - (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
  - (c) to make uniform the law among the various jurisdictions.

### 2. RCW 62A.2-106. Definitions: “Contract”; “agreement”; “contract for sale”; “sale”; “present sale” “conforming” to contract; “termination”; “cancellation”

- (1) . . . A “sale” consists in the passing of title from the seller to the buyer for a price (RCW 62A.2-401). . . .

### 3. RCW 62A.9A-602. Waiver and variance of rights and duties

Except as otherwise provided in RCW 62A.9A-624, to the extent that they give rights to an obligor (other than a secondary obligor) or a debtor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

- (7) RCW 62A.9A-610(b), 62A.9A-611, 62A.9A-613, and 62A.9A-614, which deal with disposition of collateral;

#### a. *Official Comment 3. Nonwaivable Rights and Duties.*

This section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties . . .

#### 4. RCW 62A.9A-610. Disposition of collateral after default

(b) **Commercially reasonable disposition.** Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

*a. Official Comment 7. Public vs. Private Dispositions.*

This Part maintains two distinctions between “public” and other dispositions: (i) the secured party may buy at the former, but normally not at the latter (Section 9-610(c)), and (ii) the debtor is entitled to notification of “the time and place of a public disposition” and notification of “the time after which” a private disposition or other intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under former Section 9-504(4), under which transferees in a noncomplying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, Section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a “public disposition” is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

#### 5. RCW 62A.9A-611. Notification before disposition of collateral

(b) **Notification of disposition required.** Except as otherwise provided in subsection (d) of this section [**Perishable collateral; recognized market**], a secured party that disposes of collateral under RCW 62A.9A-610 shall send to the persons specified in subsection (c) of this section a reasonable authenticated notification of disposition.

//

//

//

**6. RCW 62A.9A-613. Contents and form of notification before disposition of collateral: general.**

(1) The contents of a notification of disposition are sufficient if the notification:

(A) Describes the debtor and the secured party;

(B) Describes the collateral that is the subject of the intended disposition;

(C) States the method of intended disposition;

(D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) States the time and place of a public disposition or the time after which any other disposition is to be made.

*a. Official Comment 2. Contents of Notification.*

To comply with the “reasonable authenticated notification” requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to “time” of disposition means here, as it did in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor's rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.

//

//

**7. RCW 62A.9A-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.**

In a consumer-goods transaction, the following rules apply:

- (1) A notification of disposition must provide the following information:
  - (A) The information specified in RCW 62A.9A-613(1);
  - (B) A description of any liability for a deficiency of the person to which the notification is sent;
  - (C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under RCW 62A.9A-623 is available; and
  - (D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

*a. Official Comment 2. Notification in Consumer-Goods Transactions.* Paragraph (1) sets forth the information required for a reasonable notification in a consumer-goods transaction. A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law. Compare Section 9-613(2), under which the trier of fact may find a notification to be sufficient even if it lacks some information listed in paragraph (1) of that section.

*b. Official Comment 3. Safe-Harbor Form of Notification; Errors in Information.*

. . . [P]aragraph (3) specifies a safe-harbor form that, when properly completed, satisfies paragraph (1) . . . Paragraph (5) provides that non-misleading errors in information contained in a notification are permitted if the safe-harbor form is used *and if the errors are in information not required by paragraph (1)*. (Emphasis in original)

**8. RCW 62A.9A-624. Waiver.**

(a) A debtor may waive the right to notification of disposition of collateral under RCW 62A.9A-611 only by an agreement to that effect entered into and authenticated after default.

**9. RCW 62A.9A-625. Remedies for secured party's failure to comply with article.**

(c) Persons entitled to recover damages; statutory damages in consumer-goods transaction.

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

*a. Official Comment 4. Minimum Damages in Consumer-Goods Transactions.*

Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

//

//

//

//

//

//

## OHIO STATUTES

### **10. R.C. 1309.602 Waiver and variance of rights and duties**

Except as otherwise provided in section 1309.624 of the Revised Code, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the following provisions of the Revised Code;

(G) Division (B) of section 1309.610 and sections 1309.611, 1309.613, and 1309.614 of the Revised Code, which relate to the disposition of collateral;

### **11. R.C. 1309.613 Contents and form of notification before disposition of collateral: general**

(1) The contents of a notification of disposition are sufficient if the notification:

- (a) Describes the debtor and the secured party;
- (b) Describes the collateral that is the subject of the intended disposition;
- (c) States the method of intended disposition;
- (d) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
- (e) States the time and place, by identifying the place of business or address or by providing other information that, in each case, reasonably describes the location, of a public disposition or the time after which any other disposition is to be made.

### **12. R.C. 1309.614 Contents and form of notification and before disposition of collateral; consumer goods transaction**

(A) In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide all of the following information:

(a) The information specified in division (A)(1) of section 1309.613 of the Revised Code;

(b) A description of any liability for a deficiency of the person to whom the notification is sent;

(c) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under section 1309.623 of the Revised Code is available; and

(d) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

### **13. 1309.624 Waiver**

(A) A debtor or secondary obligor may waive the right to notification of disposition of collateral under section 1309.611 of the Revised Code only by an agreement to that effect entered into and authenticated after default.

## **FLORIDA STATUTES**

### **14. F.S.A. 679.613. Contents and form of notification before disposition of collateral; general**

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(a) Describes the debtor and the secured party;

(b) Describes the collateral that is the subject of the intended disposition;

(c) States the method of intended disposition;

(d) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(e) States the time and place of a public disposition or the time after which any other disposition is to be made.

**15. F.S.A. 679.614. Contents and form of notification before disposition of collateral; consumer-goods transaction**

In a consumer-goods transaction, the following rules apply:

- (1) A notification of disposition must provide the following information:
  - (a) The information specified in s. 679.613(1);
  - (b) A description of any liability for a deficiency of the person to whom the notification is sent;
  - (c) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under s. 679.623 is available; and
  - (d) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

PENNSYLVANIA STATUTES

**16. 13 Pa.C.S.A. 9602. Waiver and variance of rights and duties**

Except as otherwise provided in section 9624 (relating to waiver), to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in:

- (7) sections 9610(b) (relating to commercially reasonable disposition), 9611 (relating to notification before disposition of collateral), 9613 (relating to contents and form of notification before disposition of collateral: general) and 9614 (relating to contents and form of notification before disposition of collateral: consumer-goods transaction);

**17. 13 Pa.C.S.A. 9613. Contents and form of notification before disposition of collateral: general**

Except in a consumer-goods transaction, the following rules apply:

- (1) The contents of a notification of disposition are sufficient if the notification:

- (i) describes the debtor and the secured party;
- (ii) describes the collateral which is the subject of the intended disposition;
- (iii) states the method of intended disposition;
- (iv) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
- (v) states the time and place of a public disposition or the time after which any other disposition is to be made.

**18. 13 Pa.C.S.A. 9614. Contents and form of notification before disposition of collateral: consumer-goods transaction**

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

- (i) the information specified in section 9613(1) (relating to contents and form of notification before disposition of collateral: general);
- (ii) a description of any liability for a deficiency of the person to which the notification is sent;
- (iii) a telephone number from which the amount which must be paid to the secured party to redeem the collateral under section 9623 (relating to right to redeem collateral) is available; and
- (iv) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

**19. 13 Pa.C.S.A. 9624. Waiver**

**(a) Waiver of disposition notification.**--A debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9611 (relating to notification before disposition of collateral) only by an agreement to that effect entered into and authenticated after default.

FILED  
FEB 28 2011  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

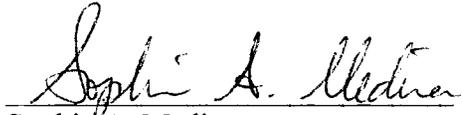
GARY HEATH and BARBARA HEATH, ) APPELLATE NO: 294692  
husband and wife, and the marital community )  
comprised thereof, )  
Appellant. ) CERTIFICATE OF SERVICE OF  
vs. ) AMENDED BRIEF OF APPELLANT  
MOUNTAINEER INVESTMENT LLC, a )  
foreign corporation )  
Appellee. )

I, Sophia A. Medina, hereby declare that I served a true and correct copy of the foregoing  
Brief of Appellant, by hand delivery, to all parties named below:

David E. Eash  
Delian P. Deltchev  
Ewing Anderson. P.S.  
221 North Wall Street, Suite 500  
Spokane, WA 99201-0824

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

DATED this 22nd day of February, 2011, at Spokane, Washington.

  
Sophia A. Medina