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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Supreme Court No. 80318-8

Court of Appeals No. 34714-8-II

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WACHOVIA SBA LENDING, INC., d/b/a  
WACHOVIA SMALL BUSINESS CAPITAL,  
a Washington corporation,

*Plaintiff/Respondent,*

v.

DEANNA D. KRAFT, individually,

*Defendant/Appellant.*

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On Appeal from the Superior Court of the State of Washington  
In and for the County of Pierce  
Superior Court Docket Number 05-2-11846-1

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**RESPONDENT'S ANSWER TO PETITION FOR  
REVIEW**

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**A. IDENTITY OF RESPONDENT**

Respondent Wachovia S.B.A. Lending, Inc., d/b/a Wachovia Small Business Capital, asks this Court to deny review of the published decision of the Court of Appeals, Division II dated May 30, 2007.

**B. STATEMENT OF THE ISSUES**

1. Did the trial court err in not awarding Kraft her attorneys' fees under RCW 4.84.330 when Wachovia voluntarily dismissed its claims without prejudice and the trial court never determined whether Washington or North Carolina law applied in this case? Answer: No.

2. Did the trial court err in dismissing the underlying action without prejudice when the trial court never determined whether Washington or North Carolina law applied, and the parties never briefed the applicable statutes of limitations regarding Wachovia's two claims? Answer: No.

**C. STATEMENT OF THE CASE**

The Plaintiff in the action giving rise to this appeal, Wachovia SBA Lending, Inc. ("**Wachovia**"), Respondent herein, is the legal holder of a U.S. Small Business Administration Promissory Note dated June 30, 1997 in the principal amount of \$172,000.00 ("**Note**"). CP 19.<sup>1</sup> Randolph S. Kraft, Defendant/Appellant Deanna M. Kraft's ("**Kraft**") ex-husband, executed the Note. CP 19. The Note secured a commercial loan in the principal amount of \$172,000.00 with an interest rate of the prime rate plus 2.5% per annum, payable in regular installments ("**Loan**"). Id.

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<sup>1</sup> This Statement of the Case is largely taken from Wachovia's Brief of Respondent dated August 23, 2006. Kraft filed a Motion to Strike Brief of Respondent based on Wachovia's Statement of the Case. The Court of Appeals denied this request on September 22, 2006. A true and correct copy of the Court of Appeals's letter ruling to this effect is including in the Appendix, designated as A-3.

The Note was secured by a Deed of Trust on the Krafts' real property in North Carolina ("**Property**"), the state in which they previously lived. Id.

The Note and Deed of Trust provide that in the event the holder of these instruments forecloses on the Deed of Trust and sells the Property, Randolph and Deanna Kraft will be liable for any deficiency balance. CP 20. The stated purpose of the Loan was for Mr. Kraft's veterinary clinic, which was located on the Property. Id. Kraft is also a veterinarian. CP 75, 83.

Kraft executed a Small Business Administration Guaranty in connection with the Note and Loan on June 30, 1997 ("**Guaranty**"). CP 10-13, 20. Wachovia is the legal holder of the Guaranty. CP 20. Per the Guaranty, Kraft absolutely and unconditionally guaranteed to pay the holder of the Note and Guaranty in accordance with the terms set forth therein. CP 10-13.

Read together, the Note, Deed of Trust, and Guaranty require Kraft and her ex-husband to pay for any costs and attorney's fees incurred by the holder of these obligations in enforcing these responsibilities. CP 10-20.<sup>2</sup> These documents do *not* contain a bilateral attorney's fees provision by including ubiquitous language like "in the event of litigation, the prevailing party shall be entitled to a reasonable attorney's fee and all costs and expenses." See id.

Because both Wachovia and the United States Small Business Administration ("**SBA**") have rights regarding the Loan, the SBA has the right to enforce the Note and Guaranty in the event Wachovia chooses not

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<sup>2</sup> A true and correct copy of the Note, Guaranty, and Deed of Trust are attached to the Affidavit of Michelle Snorgrass in Support of Plaintiff's Motion for Summary Judgment and designated as A-5 herein.

to do so. See CP 81-101. Wachovia is also obligated to obtain SBA approval in the event a borrower makes a settlement offer on an SBA loan that lies below a particular threshold. Id.

Randolph S. Kraft filed an individual voluntary Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Washington at Tacoma under Case Number 03-50941 on September 29, 2003 (“**Kraft Bankruptcy**”). CP 20. Mr. Kraft received his Order Granting Discharge on January 28, 2004. Id. Mr. Kraft’s obligations under the Note were discharged in the Kraft Bankruptcy. Id.

Wachovia obtained an order granting its Motion for Relief From Stay in the Kraft Bankruptcy on February 11, 2004. CP 20. Per this order, Wachovia foreclosed its Deed of Trust on the Property and sold the Property at a foreclosure sale. See CP 10-11, 20. After applying these proceeds to the outstanding Kraft indebtedness, approximately \$78,196.77 was due and owing under the Guaranty, not including Wachovia’s costs and attorney’s fees. CP 20. Wachovia last received payment on the Loan on December 22, 2004. CP 82.

Wachovia filed its Complaint for Judgment on Guaranty and Unjust Enrichment against Kraft in Pierce County Superior Court Case No. 05-2-11846-1 on September 19, 2005. CP 4. Kraft retained two Washington attorneys and a North Carolina attorney to represent her with respect to Wachovia’s claims. See RP 12. Kraft filed her Answer and Affirmative Defenses on October 10, 2005, which did not include any counterclaim against Wachovia. CP 10-13. Kraft’s Answer did not assert the statute of limitations as a defense to either of Wachovia’s claims. Id.

After numerous discussions regarding a possible settlement, it appeared the parties herein reached an impasse. RP 7. Accordingly,

Wachovia filed its Motion for Summary Judgment on January 26, 2006, in which Wachovia sought the entry of summary judgment against Kraft on its claims for breach of the Guaranty and unjust enrichment. CP 45-49.

After Kraft filed her Affidavit of Prejudice, the Honorable Linda Lee was assigned to this case, and it was Judge Lee who presided over the hearing on Plaintiff's Motion for Summary Judgment on March 3, 2006. See RP 10. After hearing argument from counsel, the trial court denied Plaintiff's Motion for Summary Judgment in part because of a concern as to whether Washington or North Carolina law applied in this case. RP 10; CP 104-05. The trial court stated this issue would have to be briefed by the parties, and the trial court did not make any factual findings or legal conclusions at that time. CP 105.

Trial was set for March 20, 2006 at 9:00 a.m. CP 1. Neither party conducted any discovery in this case. See CP 45-49; CP 66-73.

In the hope of settling this case short of trial, the parties agreed to split the cost of an appraisal of Kraft's home, which had considerable equity that could be used to settle Wachovia's claims even after taking Kraft's homestead exemption into account, which at the time was \$40,000.00. See RP 7. At that time, based largely on an analysis of what Wachovia would receive in the event Kraft filed a chapter 7 bankruptcy, Kraft offered to settle Wachovia's claims against her for \$16,882.00. Id. Wachovia made clear that both Wachovia *and* the SBA would have to approve a settlement in this amount because said amount is approximately 20% of the principal amount owing under the Guaranty. See RP 7; CP 81-101.

Because it could take approximately two (2) weeks to receive word back from the SBA as to whether this proposal would be acceptable,

Wachovia's counsel suggested continuing the March 20, 2006 trial date until word could be received both from Wachovia and the SBA; however, Kraft refused to continue the trial date. See RP 7.

Wachovia then notified Kraft and the trial court of Wachovia's intention to voluntarily dismiss this action without prejudice and without costs, which Kraft objected to. See RP 4. After a hearing several days later on March 20, 2006 (the original trial date in this case), the trial court entered an order granting Wachovia's Motion for Voluntary Dismissal Without Prejudice ("**Order**"), thereby dismissing the underlying lawsuit without prejudice and causing Wachovia and Kraft to bear their own costs and attorneys' fees. CP 108-9.

The trial court correctly noted at this hearing that because it had not determined whether the statute of limitations had expired on Wachovia's two claims, the lawsuit should be dismissed without prejudice as opposed to with prejudice. RP 7. The trial court also considered Kraft's request for her costs and attorneys' fees at this time, and concluded, after hearing argument from counsel and considering CR 41 and other applicable law, that each party should bear its own costs and fees. RP 13; CP 108-9

Kraft filed her Notice of Appeal of the Order on April 17, 2006. CP 110-12. After Division Two of the Court of Appeals considered briefing on the issue of whether this appeal was properly before that court, the Court of Appeals Court Clerk advised counsel by letter dated June 9, 2006 that the Order was appealable to the extent that it did not grant Kraft's request for attorneys' fees. The question of whether the trial court erred in dismissing the underlying action without prejudice as opposed to with prejudice was not before the Court of Appeals.

The Court of Appeals published its decision in this case on May 30, 2007, in which it held that as a matter of first impression, a CR 41 voluntary dismissal without prejudice is not a “final judgment” under RCW 4.84.330, which provides for prevailing party attorney’s fees in an action on a contract that contains a unilateral attorney’s fees provision and defines “prevailing party” as the party in whose favor final judgment is rendered. Wachovia S.B.A. Lending v. Kraft, 158 P.3d 1271 (2007) (“**Decision**”). Kraft’s Petition for Review followed shortly thereafter.

#### **D. ARGUMENT**

##### **1. The Court of Appeals Rightly held that Kraft Cannot Recover her Attorney’s Fees Under RCW 4.84.330 Because no “Final Judgment” has been Entered in this Case.**

Although the trial court never determined whether Washington or North Carolina law applied in this case, the Court of Appeals considered whether Kraft could recover her attorney’s fees from Wachovia under Washington law, namely, RCW 4.84.330. There is no evidence in the record that suggests North Carolina has an analog to RCW 4.84.330, which makes a unilateral attorney’s fees provision bilateral.

RCW 4.84.330 provides for the recovery of attorney’s fees by the “prevailing party” in actions on a contract in which there is a unilateral attorney’s fees provision, even if the actual “prevailing party” is not the party entitled to recover its attorney’s fees under said contract. This statute goes on to state “[a]s used in this section “prevailing party” means the party in whose favor final judgment is rendered.”

The Court of Appeals rightly held that a CR 41 voluntary dismissal without prejudice is not a “final judgment” under RCW 4.84.330. CR 41

is based on RCW 4.56.120, entitled “Judgment of dismissal or nonsuit, grounds, effect – other judgments on merits.” This statute provides that “[w]hen judgment of nonsuit is given, the action is dismissed, but such judgment shall not have the effect to bar another action for the same cause.” RCW 4.56.120(8). In reaching its holding, the Court of Appeals considered the plain meaning of “final judgment” and rightly noted that because the underlying action was dismissed without prejudice, “Wachovia is free to file a new action against Kraft, leaving final judgment on their dispute for a future day.” Decision, 158 P.3d at 1275.

Given that the trial court never entered a final judgment herein, and that the subject attorney’s fees provisions are unilateral in favor of Wachovia, the Court of Appeals rightly determined in this case of first impression that Kraft cannot recover her attorney’s fees from Wachovia under RCW 4.84.330 after a voluntary dismissal without prejudice.

**2. Wachovia’s Claims are not Time Barred.**

Kraft also argues the trial court erred in dismissing Wachovia’s claims without prejudice as opposed to with prejudice because Kraft believes Wachovia’s claims against her are time barred. This issue was not considered by the Court of Appeals, and is not properly before this Court. Regardless, as seen below, Wachovia’s claims are not time barred under Washington or North Carolina law.

A voluntary dismissal under CR 41 can be entered with prejudice when the plaintiff’s claims are no longer viable, such as where dismissal without prejudice would be pointless. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 69 P.3d 895 (2003) (citing CR 41(a)(4)).

As seen from the report of proceedings regarding the hearing on Wachovia's Motion for Voluntary Dismissal Without Prejudice, the trial court never determined whether Washington or North Carolina law applied in this case. RP 10. Further, the trial court recognized that Kraft did not brief the statute of limitations regarding Wachovia's equitable claim for unjust enrichment. Id.<sup>3</sup>

Under Washington law, a claim for unjust enrichment is subject to a three year statute of limitations. Dam v. General Electric Co., 265 F.2d 612 (9<sup>th</sup> Cir. 1958) (applying Washington law); Eckert v. Skagit Corp., 20 Wn. App. 849, 583 P.2d 1239 (1978). An action upon a contract in writing is subject to a six year statute of limitations. RCW 4.16.040(1).

Under North Carolina law, a claim for unjust enrichment is subject to a ten year statute of limitations. Hill v. Lassiter, 275 S.E.2d 237, 239 (N.C. App. 1981) (citing North Carolina statutes G.S. §§ 1-52, 1-56). An action upon a contract in writing is subject to a three year statute of limitations. N.C.G.S.A. § 1-52(1); Vreede v. Koch, 380 S.E.2d 615 (N.C. App. 1989) (noting statute of limitations for written guarantee is three years from breach triggering obligation of guarantor).

The statute of limitations began to run after Wachovia last received payment on the Loan, which was December 22, 2004. CP 82. Wachovia filed suit against Kraft on the written Guaranty and for unjust enrichment on September 19, 2005. CP 4. The trial court dismissed the underlying action on March 20, 2006. If Washington law applied, Wachovia's claim on the Guaranty would be subject to a six year statute of limitations, and

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<sup>3</sup> Nor did Kraft cite the applicable Washington or North Carolina statute of limitations regarding a suit on the Guaranty. Because the Guaranty is an independent obligation separate and apart from the Deed of Trust, a suit on the Guaranty is not subject to the one year statute of limitations for pursuing a deficiency judgment after a foreclosure sale.

its unjust enrichment claim would be subject to a three year statute of limitations. If North Carolina law applied, Wachovia's claim on the Guaranty would be subject to a three year statute of limitations and its unjust enrichment claim would be subject to a ten year statute of limitations.

Regardless of which state's law applies, both of Wachovia's claims against Kraft were viable on March 20, 2006 because they were brought within three years from the earliest date they accrued, namely, December 22, 2004, the last date Wachovia received payment on the Loan. Moreover, notwithstanding any tolling of the statutes, Wachovia's claims are *still* viable, even today, as three years from December 22, 2004 is December 22, 2007.

Wachovia's claims against Kraft are still existent regardless of whether Washington or North Carolina law is applied herein. As such, the trial court did not err in dismissing the underlying action without prejudice as opposed to with prejudice when it dismissed this lawsuit on March 20, 2006.

**3. The Decision is not in Conflict with a Supreme Court Decision.**

Contrary to Kraft's assertion, the Decision is not in conflict with Anderson v. Gold Seal Vineyards, Inc., 81 Wn.2d 864, 975 P.2d 532 (1973). Anderson did not involve RCW 4.84.330. Anderson involved RCW 4.28.185, the long-arm statute, and ultimately held that "the trial court was authorized by RCW 4.28.185(5) to awards costs and attorneys' fees to the defendants in both indemnity actions, when they were dismissed on motion of the plaintiffs." 81 Wn.2d at 868, 505 P.2d 790. Given that Anderson did not involve RCW 4.84.330 — the statute at issue

in this case, which states the “prevailing party” is the one “in whose favor final judgment is rendered” — the Decision is not in conflict with Anderson.

Guardianship of Freitas, 58 Wn.2d 400, 363 P.2d 385 (1961) is not in conflict with the Decision either. The Freitas court held that the trial court abused its discretion, “under all the circumstances of the case, not to impose terms” when the plaintiff voluntarily dismissed its lawsuit without prejudice under Rule 41.08W and the defendant was forced to travel to Seattle from Hawaii to defend this action. Freitas did not involve an action on a contract with a unilateral attorney’s fees provision. Nor did Freitas concern RCW 4.84.330, which specifically states a “prevailing party” under that statute is the party in whose favor “final judgment” is rendered.

In sum, the Court of Appeals rightly held that as a matter of first impression, a CR 41 voluntary dismissal without prejudice is not a “final judgment” under RCW 4.84.330. Because this Court has never addressed this issue, the Decision is not in conflict with a decision of this Court. As such, the Court should not grant review on this basis.

**4. The Decision is not in Conflict with Other Court of Appeals Opinions.**

Contrary to Kraft’s assertion, the Decision is not in conflict with other Court of Appeals decisions such as Hawk v. Branjes, 97 Wn. App. 776, 986 P.2d 841 (1999), Allahayari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1993), and Walji v. Candyco, Inc., 57 Wn. App. 284, 787 P.2d 946 (1990).

Allahayari involved a disgruntled vehicle owner's attempt to recover \$5,500.00 in damages from a car dealership for its alleged breach of an oral agreement to repair a car. Because plaintiff Allahayari sought damages in an amount less than \$10,000.00, RCW 4.84.250, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – Allowed to prevailing party" provided Allahayari with a basis to recover his attorney's fees in the event he prevailed in the lawsuit. See RCW 4.84.250.

Ultimately, the Allahayari court held that the trial court erred in not awarding the prevailing Subaru dealership its attorney's fees under RCW 4.84.250 because Allahayari took nothing by voluntarily dismissing his suit, thereby making Subaru a "prevailing party" under RCW 4.84.270. Id. at 524, 897 P.2d at 15-16. <sup>4</sup>

In determining Subaru was entitled to recover its attorney's fees under RCW 4.84.250, the Allahayari court concluded that in an action for damages for \$10,000.00 or less, the defendant is the prevailing party for purposes of an award of attorney fees under RCW 4.84.250 if the plaintiff voluntarily dismisses all of its claims, even when no final judgment has been entered. Id.

Importantly, RCW 4.84.250 – RCW 4.84.300 do not specifically require a "prevailing party" to obtain a final judgment before seeking its attorney's fees. In contrast, the statute at issue herein, RCW 4.84.330, states "[a]s used in *this* section 'prevailing party' means the party in whose favor *final judgment is rendered*." (Emphasis added). Given that

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<sup>4</sup> RCW 4.84.270, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – When defendant deemed prevailing party," states it applies to RCW 4.84.250, *not* RCW 4.84.330, the statute at issue herein.

Allahayari did not involve RCW 4.84.330, this case is not in conflict with the Decision.

Marassi v. Lau is not in conflict with the Decision either. Marassi involved a final judgment entered after trial; it did not involve a CR 41 voluntary dismissal. Further, attorney's fees were awarded in Marassi pursuant to a bilateral attorney's fees provision contained in the subject contract, which allowed the "successful party" in litigation to recover its attorney's fees. 71 Wn. App. at 913, 859 P.2d 605. The Marassi court held that after a trial in which the plaintiffs obtained an affirmative judgment on only two of their original twelve claims, the defendant was a prevailing party entitled to recover its attorney's fees under the fee provision in the parties' contract. Id. at 916-17, 859 P.2d at 607. Marassi is inapplicable to this case because the contract at issue herein contains unilateral attorney's fees provisions in favor of the holder of the obligations. Further, the trial court herein never entered a final judgment, let alone after a trial, as it dismissed Wachovia's claims without prejudice, per its request.

Similarly, in Hawk v. Branjes, the contract at issue therein contained a bilateral attorney's fees provision, in which the "prevailing party" was entitled to recover its attorney's fees from the other party. After the plaintiffs voluntarily dismissed their suit, the trial court awarded the defendants reasonable attorney's fees under this bilateral fee provision. On appeal, the plaintiffs argued this award was not supportable under RCW 4.84.330. The Hawk court noted that "at issue here is not the statutory definition of prevailing party, but rather the intent of the parties with regard to the [bilateral] attorney's fee provision in the lease agreement." 97 Wn. App. at 779, 986 P.2d 841.

After noting that “[t]he decision as to whether a particular voluntary nonsuit should trigger attorney fees should be left to the discretion of the trial judge in light of the circumstances of the particular case, whether interpreting a contract clause or statute”, the Hawk court paid heed to the parties’ intent by enforcing the bilateral attorney’s fees provision. See id.

Hawk can be readily contrasted from this case because the attorney’s fees provisions herein are unilateral. Based on the express language of the Note, Deed of Trust, and Guaranty, it is clear that the SBA and The Money Store never intended to pay for the Krafts’ attorneys’ fees or costs in the event of litigation. Thus, Kraft cannot recover her attorneys’ fees under the specific language of the contract at issue herein. The trial court’s refusal to award Kraft her attorneys’ fees pursuant to statute after Wachovia voluntarily dismissed its claims without prejudice was not contrary to the subject loan documents, nor is the trial court’s ruling or the Decision contrary to Hawk.

As with Hawk, Walji v. Candyco, Inc. involved an award of attorney’s fees after a CR 41 voluntary dismissal pursuant to a bilateral attorney’s fees provision in a written contract. 57 Wn. App. at 286, 787 P.2d 946. The contract at issue in Walji stated “the prevailing party shall be entitled to a reasonable attorneys’ fee and all costs and expenses expended or incurred in connection with such default or action.” Id. at 287, 787 P.2d 946.

The Walji court upheld the award of fees by effectuating the intent of the parties in light of the bilateral attorney’s fees provision. Id. Because of the bilateral attorney’s fees provision, the Walji court saw no reason to apply the definition of “prevailing party” found in RCW

4.84.330 as being the party in whose favor final judgment is rendered. As with Hawk, Walji is not in conflict with the Decision because the attorney's fees provisions at issue herein are unilateral, thereby triggering RCW 4.84.330 with its "final judgment" requirement. Accordingly, assuming Washington law applies in this case, the statutory definition of "prevailing party" set forth in RCW 4.84.330 must be applied to the unilateral attorney's fees provisions at issue herein. Because this was not the case in Walji, Walji is not in conflict with the Decision.

In sum, Division Two of the Court of Appeals rightly held that as a matter of first impression, a CR 41 voluntary dismissal without prejudice is not a "final judgment" under RCW 4.84.330. Given that neither Division One nor Division Three of the Court of Appeals has ever addressed this issue in a published decision, the Decision is not in conflict with another Court of Appeals decision. Therefore, the Court should not grant review on the basis of a conflict between divisions of the Court of Appeals.

**5. The Decision does not give Rise to an Issue of Substantial Public Interest.**

In enacting RCW 4.84.330, the Legislature made clear that in the event attorney's fees are to be awarded pursuant to this statute where there is a unilateral attorney's fees provision in a written contract, a "final judgment" must first be rendered.

The application of RCW 4.84.330 as enacted does not give rise to an issue of substantial public interest. If the public desires a departure from this law, it can seek redress in the Legislature. Until then, contracting parties may protect themselves by bargaining for bilateral attorney's fees provisions. As seen from the cases set forth above,

Washington courts will enforce such agreements by awarding attorney's fees where appropriate.

**6. Wachovia Respectfully Requests an Award of Costs and Attorney's Fees.**

Taken together, the Note, Deed of Trust, and Guaranty provide that Kraft is liable for any costs and attorney's fees incurred by the holder of these obligations in enforcing the promises therein. These writings do not require Wachovia to obtain a "final judgment" against Kraft for Wachovia to recover its costs and attorney's fees incurred in enforcing the terms of these obligations. Further, the Deed of Trust specifically states Kraft is liable for any deficiency balance in the event the Property is sold at a foreclosure sale and the sale proceeds are insufficient to repay the Loan.

Kraft refused to agree to a continuance of the March 20, 2006 trial date, notwithstanding the fact that the parties had split the cost of an appraisal on Kraft's home and Wachovia could not immediately respond to Kraft's settlement offer given the SBA's involvement in this case. This caused Wachovia to dismiss the underlying lawsuit. Kraft then appealed, claiming the trial court should have dismissed this case with prejudice, and that it should have awarded her attorneys' fees for her three (3) attorneys.

Even though the Court of Appeals published its Decision in this case of first impression, Kraft nevertheless proceeded with her petition for review, thereby necessitating a response from Wachovia. Although the Decision is obviously a case of first impression — as made clear by the Court of Appeals — Kraft nevertheless claims the Decision is in conflict with a decision of this Court and is also in conflict with other Court of Appeals opinions. This is hardly the case.

Given Wachovia's need to respond to Kraft's petition for review, and the fact that Kraft has no real basis to appeal the Decision under RAP 13.4(b), Wachovia respectfully requests an award of costs and reasonable attorney's fees pursuant to RAP 18.1(a) and the subject loan and security documents. Wachovia believes such an award is warranted in light of the attorney's fees provisions in the subject loan and security documents, recognized grounds in equity, the procedural posture of this case, and the particular facts and circumstances set forth herein.

**E. CONCLUSION**

Division Two of the Court of Appeals rightly held that as a matter of first impression, a CR 41 voluntary dismissal without prejudice is not a "final judgment" under RCW 4.84.330, which provides for prevailing party attorney's fees in an action on a contract that contains a unilateral attorney's fees provision and defines "prevailing party" as the party in whose favor final judgment is rendered.

The Decision is supported by law, and is not in conflict with a decision of this Court or another division of the Court of Appeals.

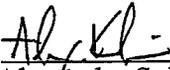
This case does not involve an issue of substantial public interest. If the public desires a departure from RCW 4.84.330, it can seek redress in the Legislature. Until then, parties can protect themselves by bargaining for bilateral attorney's fees provisions, which Washington courts have long enforced by awarding attorney's fees where appropriate.

Lastly, Wachovia requests an award of costs and reasonable attorney's fees given its need to respond to Kraft's petition for review. Wachovia believes such an award is appropriate in light of the attorney's

fees provisions in the subject loan and security documents, equitable considerations, and the particular facts and circumstances of this case.

RESPECTFULLY SUBMITTED this 30th day of July, 2007.

EISENHOWER & CARLSON, PLLC

By:   
Alexander S. Kleinberg, WSBA # 34449  
Attorneys for Respondent  
Wachovia S.B.A. Lending, Inc.

Certificate of Service

I, Deidre M. Turnbull, am a legal assistant with the firm of  
Eisenhower & Carlson, PLLC, and am competent to be a witness herein.

On July 30, 2007, at Tacoma, Washington, I caused a true and  
correct copy of Respondent's Answer to Petition for Review to be served  
via ABC Legal Services, Inc. for same-day delivery to:

Douglas N. Kiger  
Blado, Stratton & Kiger, P.S.  
3408 S. 23rd, 2nd Floor  
Tacoma, WA 98405

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

DATED this 30th day of July, 2007, at Tacoma, Washington.

Deidre M Turnbull  
Deidre M. Turnbull

# **APPENDIX**

**A-1**

Westlaw.

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158 P.3d 1271  
(Cite as: 158 P.3d 1271)Wachovia SBA Lending v. Kraft  
Wash.App. Div. 2,2007.Court of Appeals of Washington, Division 2.  
**WACHOVIA SBA LENDING**, d/b/a **Wachovia**  
Small Business Capital, a Washington corporation,  
Respondent,

v.

Deanna D. KRAFT, individually, Appellant.  
No. 34714-8-II.

May 30, 2007.

**Background:** Creditor brought deficiency action against debtor's wife, after foreclosure of promissory note secured by deed of trust on debtor's and wife's North Carolina home. Wife answered that she was guarantor, and asserted affirmative defense of choice of remedy under North Carolina law. The Superior Court, Pierce County, Linda Cj Lee, J., denied creditor's motion for summary judgment, granted creditor's subsequent motion to dismiss the complaint without prejudice, and declined to award attorney fees and costs to either party. Wife appealed.

**Holding:** The Court of Appeals, Houghton, C.J., held that as a matter of first impression, voluntary dismissal without prejudice is not a "final judgment," within meaning of statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision, which statute defines prevailing party as the party in whose favor final judgment is rendered.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most

Cited Cases

Applicability of statute providing for prevailing party attorney fees, in action on contract or lease which contains unilateral attorney fee provision, is a question of law, which is reviewed de novo. West's RCWA 4.84.330.

[2] Appeal and Error 30 ↪984(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorneys' Fees. Most

Cited Cases

An award of attorney fees is reviewed for "abuse of discretion," that is, whether it was based on tenable grounds or reasons.

[3] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most

Cited Cases

Where the meaning of an attorney fee statute is at issue, the trial court's decision to award or not award attorney fees is reviewed de novo as a question of law.

[4] Costs 102 ↪194.32

102 Costs

102VIII Attorney Fees

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102k194.24 Particular Actions or Proceedings  
 102k194.32 k. Contracts. Most Cited  
 Cases

**Costs 102 ↪194.34**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

Where the statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision is applicable, awarding attorney fees is mandatory. West's RCWA 4.84.330.

**[5] Costs 102 ↪194.32**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited

Cases

**Costs 102 ↪194.34**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

For statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision to be applicable: (1) action must be on contract or lease; (2) contract or lease must contain unilateral attorney fee provision; and (3) there must be a prevailing party. West's RCWA 4.84.330.

**[6] Costs 102 ↪194.32**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited

Cases

**Costs 102 ↪194.34**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the first two requirements of statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision, which requirements are: (1) action must be on contract or lease, and (2) contract or lease must contain unilateral attorney fee provision. West's RCWA 4.84.330.

**[7] Costs 102 ↪194.32**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited

Cases

Under statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision, defendant generally prevails by successfully defending a contract action. West's RCWA 4.84.330.

**[8] Statutes 361 ↪181(1)**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

**Statutes 361 ↪184**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k184 k. Policy and Purpose of Act.

Most Cited Cases

The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.

**[9] Statutes 361 ↪205**

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## 361 Statutes

## 361VI Construction and Operation

## 361VI(A) General Rules of Construction

## 361k204 Statute as a Whole, and Intrinsic

## Aids to Construction

## 361k205 k. In General. Most Cited

## Cases

**Statutes 361 ↻206**

## 361 Statutes

## 361VI Construction and Operation

## 361VI(A) General Rules of Construction

## 361k204 Statute as a Whole, and Intrinsic

## Aids to Construction

## 361k206 k. Giving Effect to Entire

## Statute. Most Cited Cases

When interpreting a statute, the court must consider the statute as a whole and give all its language effect.

**[10] Statutes 361 ↻223.2(.5)**

## 361 Statutes

## 361VI Construction and Operation

## 361VI(A) General Rules of Construction

## 361k223 Construction with Reference to

## Other Statutes

## 361k223.2 Statutes Relating to the Same Subject Matter in General

## 361k223.2(.5) k. In General. Most

## Cited Cases

The court reviews related statutes as a means of identifying legislative intent.

**[11] Statutes 361 ↻190**

## 361 Statutes

## 361VI Construction and Operation

## 361VI(A) General Rules of Construction

## 361k187 Meaning of Language

## 361k190 k. Existence of Ambiguity.

## Most Cited Cases

The court resorts to statutory construction only if the statute can reasonably be interpreted in more than one way.

**[12] Costs 102 ↻194.48**

## 102 Costs

## 102VIII Attorney Fees

## 102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases

A voluntary dismissal without prejudice is not a "final judgment," within meaning of statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision, which statute defines prevailing party as the party in whose favor final judgment is rendered; voluntary dismissal without prejudice is not a formal decision or determination which leaves nothing further to be determined by the court, since plaintiff is free to file a new action against defendant. West's RCWA 4.84.330; CR 41(a)(4).

**[13] Judgment 228 ↻217**

## 228 Judgment

## 228VI On Trial of Issues

## 228VI(A) Rendition, Form, and Requisites in General

## 228k217 k. Final Judgment. Most Cited

## Cases

"Final judgment" is any court order having preclusive effect.

**[14] Judgment 228 ↻1**

## 228 Judgment

## 228I Nature and Essentials in General

## 228k1 k. Nature of Judgment in General.

## Most Cited Cases

"Judgment" means a formal decision or determination given in a cause by a court of law or other tribunal.

**[15] Pretrial Procedure 307A ↻517.1**

## 307A Pretrial Procedure

## 307AIII Dismissal

## 307AIII(A) Voluntary Dismissal

## 307Ak517 Effect

## 307Ak517.1 k. In General. Most Cited

## Cases

The effect of a voluntary dismissal of a complaint is to render the proceedings a nullity and leave the parties as if the action had never been brought. CR

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41.

[16] Costs 102 ⇌ 194.32

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited

Cases

Costs 102 ⇌ 194.34

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.34 k. Leases. Most Cited Cases

The purpose of the statute providing for prevailing party attorney fees in action on contract or lease which contains unilateral attorney fee provision is remedial, i.e., unilateral attorney fee provisions are to be applied bilaterally. West's RCWA 4.84.330.

\*1272 Douglas N. Kiger, Blado Kiger PS, Tacoma, WA, for Appellant.

Alexander Sether Kleinberg, Eisenhower & Carlson PLLC, Tacoma, WA, for Respondent.

HOUGHTON, C.J.

¶ 1 Deanna Kraft appeals the trial court's refusal to award her attorney fees under RCW 4.84.330 and costs under RCW 4.84.010, .060, and .080. We affirm.

## Fact

¶ 2 In June 1997, Kraft's husband (now her former husband) took out a Small Business Administration Loan (Loan) from Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital in order to purchase a home and an in-home veterinary business. Kraft's husband executed a Small Business Administration Promissory Note (Note), secured by a Deed of Trust on Kraft and her husband's North Carolina home. Kraft did not sign the Note. Kraft executed a Small Business Administration Guaranty (Guaranty) in connection with the Note. Wachovia claims to hold \*1273 the Guaranty signed by Kraft and secured by the Deed

of Trust on the North Carolina home.

¶ 3 By the terms of the Guaranty, the debtor agreed to pay all sums owed to the holder of an underlying Note, which Wachovia also claims to hold. The Note requires the debtor to pay "reasonable attorney's fees and costs" incurred in satisfaction of the debt.<sup>FN1</sup> Clerk's Papers (CP) at 32. The Note does not require the holder to pay the debtor's attorney fees or costs. Thus, the Note and Guaranty, if enforceable, require Kraft to pay Wachovia's attorney fees and costs but do not require Wachovia to pay Kraft's attorney fees or costs.

FN1. Specifically, the Note states, "The undersigned shall pay all expenses of any nature, whether incurred in or out of court .. including but not limited to reasonable attorney's fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the indebtedness." Clerk's Papers at 32.

¶ 4 Under the Deed of Trust, Wachovia foreclosed on Kraft's former residence in North Carolina. Wachovia then sued Kraft on the Note and Guaranty in Pierce County Superior Court, seeking a deficiency balance of \$78,196.77.<sup>FN2</sup> Kraft answered that she was the guarantor, but she pleaded North Carolina law and, among others, the affirmative defense of choice of remedy.

FN2. Wachovia also alleged unjust enrichment. But it does not explain how, if at all, that action bears on the present appeal. Accordingly, we do not consider it. See RAP 10.3(b); *State v. Dennison*, 115 Wash.2d 609, 629, 801 P.2d 193 (1990).

¶ 5 Wachovia unsuccessfully moved for summary judgment. Over Kraft's objection, Wachovia then sought leave to dismiss its complaint without prejudice, which the court granted. See CR 41(a)(1)(B), (a)(4). Kraft asked the trial court to reserve the issue of attorney fees and costs. The

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trial court apparently refused to reserve the issue of attorney fees because "it may hang out there for eternity if the parties do decide to settle and go away and never inform this Court." <sup>FN3</sup> Report of Proceedings at 12. The trial court declined to award attorney fees and costs to either party. Kraft appeals. <sup>FN4</sup>

FN3. The parties dispute whether the trial court refused to reserve the issue or instead decided Kraft was not entitled to attorney fees. Our review of the record indicates the trial court did not rule on the award of attorney fees but rather refused Kraft's motion to reserve the issue. Our understanding is bolstered by the fact that the motion before the trial court was for the reservation of the issue.

FN4. Kraft appealed the order dismissing Wachovia's suit without prejudice, a non-appealable order under RAP 2.2(a)(3).

See *Am. States Ins. Co. v. Chun*, 127 Wash.2d 249, 254, 897 P.2d 362 (1995); *Munden v. Hazelrigg*, 105 Wash.2d 39, 42-44, 711 P.2d 295 (1985). Our Commissioner properly allowed the appeal to proceed only to the extent Kraft claims attorney fees under RCW 4.84.330. See *Allahyari v. Carter Subaru*, 78 Wash.App. 518, 521 n. 2, 897 P.2d 413 (1995).

#### Analysis

¶ 6 Kraft relies on RCW 4.84.330 <sup>FN5</sup> and argues the trial court erred in failing to reserve the attorney fees issue and allowing her to show her prevailing party attorney fees and costs. She urges de novo review.

FN5. RCW 4.84.330 provides:

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.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

¶ 7 Wachovia argues RCW 4.84.330 will not support an award of attorney fees because a voluntary dismissal without prejudice is not a "final judgment" within the statute's meaning. Resp'ts Br. at 10-12. Wachovia asserts that where the plaintiff takes a voluntary dismissal without prejudice, we must review the denial of attorney fees for manifest abuse discretion. Thus, we first identify the appropriate standard of review.

[1] ¶ 8 The applicability of RCW 4.84.330 is a question of law. \*1274 *Quality Food Ctrs. v. Mary Jewell T, L.L.C.*, 134 Wash.App. 814, 817, 142 P.3d 206 (2006). We review questions of law de novo. *Mohr v. Grant*, 153 Wash.2d 812, 823, 108 P.3d 768 (2005).

[2][3][4] ¶ 9 Wachovia is correct that we review an award of attorney fees for abuse of discretion, that is, whether it was based on tenable grounds or reasons. *Taliesen Corp. v. Razore Land Co.*, 135 Wash.App. 106, 141, 144 P.3d 1185 (2006). But where the meaning of an attorney fee statute is at issue, we review the decision to award or not award attorney fees de novo as a question of law. <sup>FN6</sup> *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wash.App. 927, 936-37, 147 P.3d 610 (2006) (attorney fees on change of venue under RCW 4.12.090).

FN6. Moreover, where RCW 4.84.330 applies, awarding attorney fees is

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mandatory. *Singleton*, 108 Wash.2d at 729, 742 P.2d 1224 (“[a]n interpretation allowing the trial court to deny recovery of reasonable attorney’s fees at its discretion or whim would render the statute meaningless”); *Transpac Dev., Inc. v. Oh*, 132 Wash.App. 212, 217, 130 P.3d 892 (2006).

#### Attorney Fees

[5][6] ¶ 10 For RCW 4.84.330 to apply: (1) the action must be “on a contract or lease,” (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a “prevailing party.” RCW 4.84.330. The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute’s first two requirements. *Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 839, 100 P.3d 791 (2004). Here, the parties agree the Note contains a unilateral attorney fee provision incorporated to the Guaranty. The narrow question remains whether the trial court’s dismissal without prejudice is within RCW 4.84.330’s “prevailing party” language.

[7] ¶ 11 Under RCW 4.84.330, the defendant generally prevails by successfully defending a contract action. *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wash.App. 64, 68, 975 P.2d 532 (1999). The defendant also generally prevails where the plaintiff voluntarily dismisses its action under CR 41. *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wash.2d 863, 867-68, 505 P.2d 790 (1973) FN7 (construing former RCW 4.28.185 (1959)); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wash.App. 183, 193, 69 P.3d 895 (2003) (construing RCW 4.84.185); *Marassi v. Lau*, 71 Wash.App. 912, 918-19, 859 P.2d 605 (1993) (construing RCW 4.84.330); *W. Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wash.App. 293, 295-96, 716 P.2d 959 (1986) (construing RCW 4.84.330). But the applicability of RCW 4.84.330 to a CR 41 dismissal without prejudice is a matter of first impression.

FN7. More specifically, *Anderson* applied the long-arm statute, former RCW

4.28.185 (1959). 81 Wash.2d at 868, 505 P.2d 790. That statute then and now provides attorney fees for the out-of-state defendant who “prevails in the action,” but it does not define “prevail.” RCW 4.28.185(5). *Escude, Marassi, and Western Stud Welding* considered CR 41 dismissals with prejudice. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wash.App. 183, 190, 69 P.3d 895 (2003); *Marassi v. Lau*, 71 Wash.App. 912, 914, 920, 859 P.2d 605 (1993); *W. Stud Welding, Inc. v. Omark Indus. Inc.*, 43 Wash.App. 293, 295, 716 P.2d 959 (1986). It is not clear whether the Anderson court considered a dismissal with or without prejudice. 81 Wash.2d at 864, 505 P.2d 790.

[8][9][10][11] ¶ 12 “The primary goal of statutory interpretation is to ascertain and give effect to the legislature’s intent and purpose.” *In re Seattle Popular Monorail Auth.*, 155 Wash.2d 612, 627, 121 P.3d 1166 (2005). We must consider the statute as a whole and give all its language effect. *Seattle Popular Monorail Auth.*, 155 Wash.2d at 627, 121 P.3d 1166. We review related statutes as a means of identifying legislative intent. *Seattle Popular Monorail Auth.*, 155 Wash.2d at 627, 121 P.3d 1166. We resort to statutory construction only if the statute can reasonably be interpreted in more than one way. *Pub. Util. Dist. No. 2 v. N. Am. Foreign Trade Zone Indus., L.L.C.*, 159 Wash.2d 555, 566-67, 151 P.3d 176 (2007).

[12][13] ¶ 13 The statute defines “prevailing party” as “the party in whose favor final judgment is rendered.” RCW 4.84.330. The statute does not define “final judgment.” RCW 4.84.330. The term “final judgment” is facially unambiguous—it refers to any court order having preclusive effect. Thus, we refer to Webster’s Third New International \*1275 Dictionary. See *Sleasman v. City of Lacey*, 159 Wash.2d 639, 643, 151 P.3d 990 (2007) (where a statute is unambiguous, resorting to dictionary is appropriate). “Final,” in its legal sense, means ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court’s

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finding but not precluding an appeal-used of a court order, decision, judgment, decree, or sentence; compare interlocutory: being a court finding that is conclusive as to jurisdiction and precluding the right to appeal to or continue the case in any other court upon the merits.

Webster's Third New Intern'l Dictionary 851 (2002).

[14] ¶ 14 "Judgment," in its legal sense, means "a formal decision or determination given in a cause by a court of law or other tribunal." Webster's, *supra*, at 1223. Black's Law Dictionary similarly defines "final judgment" as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Black's Law Dictionary 859 (8th ed.2004).

[15] ¶ 15 As we have previously stated in the attorney fee context, "the effect of a voluntary dismissal 'is to render the proceedings a nullity and leave the parties as if the action had never been brought.'" *Beckman v. Wilcox*, 96 Wash.App. 355, 359, 979 P.2d 890 (1999) (quoting *Bonneville Assocs., Ltd. P'ship v. Barram*, 165 F.3d 1360, 1364 (Fed.Cir.1999)) (internal quotation marks omitted). In *Beckman*, we held a condemnee to be the prevailing party under RCW 8.24.030 where the condemnor took a voluntary dismissal without prejudice. 96 Wash.App. at 358, 365-66, 979 P.2d 890. But we reasoned that the statute at issue did not predicate attorney fees on the entry of judgment. *Beckman*, 96 Wash.App. at 361-62, 979 P.2d 890. In contrast, the statute does precisely that-expressly requiring a "final judgment" before we may deem either party a "prevailing party." FN8 A voluntary dismissal without prejudice is not a final judgment because it is not "a formal decision or determination" "leaving nothing further to be determined by the court." Webster's, *supra*, at 1223, 851; *accord State v. Taylor*, 150 Wash.2d 599, 601, 80 P.3d 605 (2003). (dismissal without prejudice is not "final"). *Wachovia* is free to file a new action against Kraft, leaving final judgment on their dispute for a future day.

FN8. The legislature does not explain, nor can we divine, its intent and purpose in so limiting RCW 4.84.330. The only other statute that defines "prevailing party" in terms of "final judgment" is RCW 49.44.135. That statute, adopted eight years after RCW 4.84.330, allows attorney fees in actions alleging an employer's violation of RCW 49.44.120 (general prohibition on employers requiring that employees take lie detector tests). Under RCW 49.44.135(3), a court may, under RCW 4.84.185 (reasonable expenses for frivolous claims), "award any prevailing party against whom an action has been brought for a violation of RCW 49.44.120 reasonable expenses and attorneys' fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause." (Emphasis added.) But the same statute allows a court to award "reasonable attorneys' fees and costs to the prevailing employee or prospective employee" without any such limitation. RCW 49.44.135(2). The clear purpose of chapter 49.44 RCW is to protect employees and potential employees from unfair labor practices. It follows that employers should be required to meet a more restrictive standard for attorney fees.

No similar policy rationale apparently underlies RCW 4.84.330. Indeed that statute, as written, permits a contract containing a unilateral attorney fee provision to be tested against summary judgment and later dismissed without the legislature's reciprocal purpose coming due. But "[t]he reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has 'prevailed' as things stand at that point." *Walji v. Candyco, Inc.*, 57 Wash.App. 284, 289, 787 P.2d 946 (1990).

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[16] ¶ 16 We note the purpose behind RCW 4.84.330 is remedial-unilateral attorney fee provisions are to be applied bilaterally. *Quality Food Ctrs.*, 134 Wash.App. at 817, 142 P.3d 206. Kraft's argument is eminently compelling—that, given this purpose, a plaintiff should not be permitted to avoid attorney fee reciprocity after having tested his or her claim against summary judgment and causing the defendant to incur costs and attorney fees for naught. But given the definition of “final judgment,” we cannot say \*1276 that the legislature intended a suit dismissed without prejudice to yield a “prevailing party” under RCW 4.84.330.<sup>FN9</sup> Accordingly, under the plain language of the statute, Kraft's request for attorney fees is misplaced, and we must affirm, although on other grounds, the trial court's refusal to reserve the attorney fee issue.<sup>FN10</sup>

FN9. We note that it is for the legislature to correct any injustice that its RCW 4.84.330 language may have inadvertently created.

FN10. Whether Kraft can seek reimbursement for attorney fees if Wachovia refiles its action is not before us.

¶ 17 Kraft also argues the trial court erred in refusing to award her statutory costs, including the nominal attorney fees provided under RCW 4.84.010, .060, and .080. But the trial court correctly noted that CR 41(d) allows it to impose costs on further action by the plaintiff. The trial courts have discretion to award statutory costs after a plaintiff's voluntary dismissal. *Anderson*, 81 Wash.2d at 865, 505 P.2d 790. On this point, the trial court ruled on a tenable basis. Kraft does not show the trial court abused its discretion. Therefore, we affirm the trial court's denial of statutory costs and attorney fees.

#### Attorney Fees on Appeal

¶ 18 Both parties request attorney fees on appeal, relying on RAP 18.1. That rule authorizes the award of attorney fees on appeal where “applicable

law grants to a party the right to recover reasonable attorney fees.” RAP 18.1(a). Here, the applicable law is RCW 4.84.330, which under our holding does not permit either party to recover attorney fees where the plaintiff takes a CR 41 dismissal without prejudice. Accordingly, neither party is awarded attorney fees on appeal.

¶ 19 We hold a CR 41 voluntary dismissal without prejudice is not a “final judgment” within the meaning of RCW 4.84.330's “prevailing party” language and affirm the trial court.

We concur: ARMSTRONG and HUNT, JJ.  
 Wash.App. Div. 2,2007.  
 Wachovia SBA Lending v. Kraft  
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END OF DOCUMENT

**A-2**

**RCW 4.84.330**

**Actions on contract or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of parties -- Prevailing party entitled to attorney's fees -- Waiver prohibited.**

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.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

[1977 ex.s. c 203 § 1.]

**A-3**



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

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September 22, 2006

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**CASE #: 34714-8-II**

**Wachovia SBA Lending, Inc., Respondent v. Deanna D. Kraft, Appellant**

Counsel:

The action indicated below was taken in the above-entitled case.

**A RULING SIGNED BY COMMISSIONER SCHMIDT:**

Appellant's motion to strike respondent's brief is denied.

Very truly yours,

David C. Ponzoha  
Court Clerk



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

THE HONORABLE LINDA CJ LEE

DEPARTMENT 19

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WACHOVIA SBA LENDING, INC.,	)	
d/b/a WACHOVIA SMALL BUSINESS	)	
CAPITAL, a Washington	)	COA NO. 34714-8-II
corporation,	)	
	)	NO. 05-2-11846-1
Plaintiff,	)	
	)	
vs.	)	
	)	
DEANNA D. KRAFT,	)	
	)	
Defendant	)	

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VERBATIM REPORT OF PROCEEDINGS  
PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT  
PREJUDICE

MARCH 20, 2006

COPY

APPEARANCES: (See first page of text.)

DIANNE Y. WILSON, CCR-RPR Reporter No. 82124  
Official Court Reporter (253) 798-7736  
930 Tacoma Avenue South, Department 19  
Tacoma, Washington 98402

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APPEARANCES:

For the Plaintiff: ALEXANDER S. KLEINBERG  
For the Defendant: DOUGLAS N. KIGER

\*\*\*\*\*

BE IT REMEMBERED that on Monday, the 20th day of MARCH, 2006, at 9:09 a.m., at Pierce County Superior Court, Department 19, 930 Tacoma Avenue South, Tacoma, Washington, before THE HONORABLE LINDA CJ LEE and reported by Dianne Y. Wilson, CCR-RPR, the following proceedings were had, to wit:

\*\*\*\*\*

THE COURT: Please be seated.

Calling the case of Wachovia SBA Lending Inc., v. Deanna D. Kraft, Cause No. 05-2-11846-1. Are the parties present and ready to proceed in this matter?

MR. KLEINBERG: Yes, your Honor.

THE COURT: All right. If I could have attorneys identify themselves for the record, please?

MR. KLEINBERG: Your Honor, Alex Kleinberg here on behalf of the plaintiff Wachovia SBA Lending, Inc.

1 MR. KIGER: Doug Kiger here present on behalf  
2 of Deanna Kraft.

3 THE COURT: Please proceed.

4 MR. KLEINBERG: Your Honor, we're here today  
5 on plaintiff's motion and order for voluntary dismissal  
6 without prejudice. This is the first time the plaintiff  
7 has filed this lawsuit. And at issue is whether or not the  
8 dismissal would be with or without prejudice here. And at  
9 this time, your Honor, I'll present plaintiff's motion to  
10 the Court. I've given Mr. Kiger a copy as well.

11 THE COURT: Is there a dispute as to whether  
12 this is with prejudice or without prejudice?

13 MR. KLEINBERG: Well, yes, there appears to  
14 be, your Honor.

15 THE COURT: All right. Please proceed.

16 MR. KLEINBERG: Again, this is the first time  
17 that the plaintiff has filed suit in this matter. Now,  
18 under CR 41(a) and applicable case law, a trial court's  
19 discretion to order dismissal with prejudice should only be  
20 exercised in limited circumstances where dismissal without  
21 prejudice would be pointless.

22 I've attached a case that I believe is on point to  
23 plaintiff's motion. This is a Division 1 Court of Appeals  
24 case, Escude v. King County Public Hospital, 117  
25 Wn.App.183, 2004. And in essence what the Escude case held

1 was the dismissal with prejudice should only be done in  
2 really extreme circumstances in which it would be pointless  
3 to dismiss a case without prejudice.

4 Escude involved actually three consolidated cases.  
5 And in the first set of cases, the appellate court held  
6 that the trial court's dismissal with prejudice of two  
7 lawsuits was proper where the various applicable statutes  
8 of limitations had run. And I've highlighted some relevant  
9 portions of the Escude opinion that's attached there.

10 Also, regarding the second set of cases that was  
11 consolidated in this Escude appeal, the court held that the  
12 dismissal with prejudice of the second set of claims was  
13 proper where the claimants had conceded in a response to  
14 opposing -- the opposing side's motion for summary judgment  
15 that their claims in a sense were barred and no longer  
16 viable.

17 So in both those cases it was clear, crystal clear,  
18 that the parties that had their claims dismissed with  
19 prejudice really had no viable cause of action.

20 Now, in this case we have an entirely different  
21 story. And, you know, unless your Honor wants to hear  
22 additional background, I will not get into that. But  
23 again, this is the first time the plaintiff has filed its  
24 lawsuit. We have a six-year statute of limitation that  
25 applies here to plaintiff's breach of contract action. And

1 there appears to be approximately four more years left  
2 there in that action.

3 And based on the applicable case law and my reading  
4 of CR 41(a), I see really no reason to dismiss this case  
5 with prejudice, given that plaintiff's claims are still  
6 viable.

7 MR. KIGER: I have provided counsel actually  
8 copies of the statute of limitations from North Carolina  
9 and Washington, and I can hand those forward.

10 It's our position that the statute of limitations  
11 is one year on a deficiency judgment following a  
12 foreclosure, which is what this really is. There wasn't  
13 any dispute that this was a suit for deficiency judgment  
14 about three weeks ago on summary judgment, and now it's  
15 Wachovia's position that this is a breach of contract case.  
16 It's our position that it's a deficiency judgment. That's  
17 why we're asking that it be dismissed with prejudice,  
18 because the one-year statute of limitations has run.

19 And then we're also asking that the Court just  
20 reserve jurisdiction to award attorneys' fees, with  
21 defendant as a prevailing party.

22 I attached a case, Marassi v. Lau, which basically  
23 says that when a plaintiff dismisses a case voluntarily,  
24 either with or without prejudice, the Court does retain  
25 jurisdiction to consider an award of fees. And if the

1 Court would just reserve that issue, I can talk to my  
2 client about bringing a motion at a later time for that, as  
3 long as the Court reserves jurisdiction.

4 MR. KLEINBERG: Your Honor, one of the reasons  
5 that we're seeking to dismiss this lawsuit without  
6 prejudice is that the parties are in -- were unable after  
7 the hearing on plaintiff's motion for summary judgment to  
8 agree to extend the trial date.

9 In addition, there have been ongoing settlement  
10 discussions, going back approximately three months. The  
11 defendant and the plaintiff split the cost of an appraisal  
12 on the defendant's home to try to work out a settlement in  
13 this matter. As of last week, last Friday, actually, my  
14 client was told that it would be willing to settle this  
15 matter, but the defendant had changed her position  
16 regarding that.

17 Regarding the choice of law issue, I was not going  
18 to raise this, but now of course it appears relevant.  
19 These haven't been decided. And that was one of the  
20 concerns that the Court had expressed back several weeks  
21 ago regarding the motion for summary judgment. So we can't  
22 say at this point as to whether North Carolina or  
23 Washington law is applying with respect to anything in this  
24 case, let alone statutes of limitations or deficiency  
25 judgments. This is the first that I've heard that counsel

1 is asserting a one-year statute of limitations in this  
2 case.

3 These are issues that can be resolved safely  
4 between the parties subsequently, by filing an additional  
5 lawsuit, if need be, and if the parties are not able to  
6 work out a settlement in this case, which, frankly, I think  
7 they would be able to.

8 THE COURT: Thank you.

9 I think what I'd like to do is take a brief recess  
10 so I can review the case law that's been handed up to the  
11 Court as this argument has been proceeding. And I will  
12 give a decision in about ten minutes.

13 MR. KIGER: Okay.

14 MR. KLEINBERG: Okay.

15 (Pause in the proceedings.)

16 THE COURT: We are back on the record in the  
17 case of Wachovia SBA Lending v. Kraft, Cause  
18 No. 05-2-11846-1.

19 MR. KLEINBERG: Your Honor, if I may, before  
20 the Court issues it's ruling, may I make one more point?

21 THE COURT: The Court has heard argument. The  
22 Court is ready to make its ruling.

23 MR. KLEINBERG: Okay.

24 THE COURT: You were given the opportunity to  
25 argue, not only argue your opening but a rebuttal. Is this

1 going to be a critical point? Go ahead.

2 MR. KLEINBERG: I'll make it very brief, your  
3 Honor. The plaintiff has asserted two causes of action  
4 here, breach of guaranty, a written contract, and also an  
5 equitable claim of unjust enrichment. This is the first  
6 I've heard today of any sort of statute of limitations  
7 issue. This is not raised in defendant's answer. If the  
8 Court is disinclined to grant plaintiff's motion based on a  
9 statute of limitations argument, then I would ask it to  
10 consider these points that really are determining whether  
11 plaintiff has any remedy here. This is the first, again,  
12 that we have heard of a statute of limitations, your Honor.

13 That's all I have to say.

14 THE COURT: Anything further, Mr. Kiger?

15 MR. KIGER: No.

16 THE COURT: All right. Under the civil rules,  
17 specifically Civil Rule 41(a)(4), this Court does have the  
18 discretion in limited circumstance to dismiss a case under  
19 a voluntary nonsuit with prejudice, only if dismissing it  
20 without prejudice would be pointless.

21 In the case provided to the Court, Escude v. King  
22 County Public Hospital District No. 2 -- I've reviewed that  
23 case, and it was provided by both Mr. Kleinberg and  
24 Mr. Kiger. I've reviewed the three cases, the three  
25 situations under which the trial court dismissed a

1 voluntary nonsuit with prejudice. And I find that all  
2 three situations are not applicable here.

3 First of all, with regard to the first case, Escude  
4 v. King County Public District No. 2, the court only  
5 dismissed with prejudice those claims that were conceded  
6 during a summary judgment motion.

7 With regard to the second, Fleming v. Lease  
8 Crutcher, the court noted that the defendant had been  
9 dismissed on a summary judgment, and then the voluntary  
10 nonsuit was taken.

11 With regard to the third, Anderson v. Lease  
12 Crutcher, the court granted a voluntary nonsuit with  
13 prejudice due to the running of the applicable statutes of  
14 limitation.

15 As Mr. Kleinberg astutely noted, this Court did not  
16 decide what law applies in this case, whether it be North  
17 Carolina or Washington. Nor does this Court feel it's been  
18 appropriately briefed on the issues to determine whether  
19 the applicable statute of limitations has run on this case  
20 or has not run on this case.

21 Also, with the claims of unjust enrichment, which  
22 is an equitable claim, the statutes don't -- no applicable  
23 statute has been pointed out to this Court as to whether  
24 that has run or not at this point.

25 So this Court will grant the voluntary nonsuit

1 without prejudice.

2 MR. KIGER: Could we reserve the issue of  
3 costs? The other case I submitted said that the defendant  
4 is automatically a prevailing party. We would have to  
5 brief the Court on the issue of whether -- you know, what  
6 types of fees and costs are awarded. But we just want to  
7 reserve that issue, your Honor.

8 I believe their proposed order says without fees or  
9 costs, and we just want to reserve that issue.

10 That's the Marassi v. Lau case.

11 THE COURT: Do you have anything to say with  
12 regard to that issue, Mr. Kleinberg?

13 MR. KLEINBERG: Well, yes, your Honor. We  
14 don't believe that it would be appropriate, the plaintiff,  
15 that is, to either make a decision today regarding fees and  
16 costs or even to reserve the issue. You know, each party  
17 here has borne its own costs. This is not going to be the  
18 end of the matter, most likely. And in the event the  
19 plaintiff ultimately prevails, then as the prevailing party  
20 and in accordance with the parties' contract, it would  
21 receive fees and costs.

22 So we would ask that the Court grant the order in  
23 its proposed form as submitted by the plaintiff.

24 THE COURT: Anything further, Mr. Kiger?

25 MR. KIGER: Just to reiterate we're not asking

1 for a decision today; we're just asking that the issue be  
2 reserved.

3 THE COURT: The problem I have with reserving  
4 this is that it will be hanging out there. And it may hang  
5 out there for eternity if the parties do decide to settle  
6 and go away and never inform this Court of that issue.

7 I believe the civil rule does give the defendant  
8 the opportunity to ask for those fees if Wachovia files  
9 suit again, under the Civil Rule 41.

10 MR. KIGER: The rule only allows costs, it  
11 doesn't allow fees, is my reading of it.

12 For what it's worth, I can assure the Court that I  
13 will probably file a motion within the week if I could --

14 Ms. Kraft has other attorneys advise her, you know,  
15 a North Carolina attorney on this issue. And it may take a  
16 little while for me to get their cost bill. And we could  
17 certainly let the Court know too if for some reason  
18 Ms. Kraft decides not to file a motion.

19 MR. KLEINBERG: Your Honor, from what I recall  
20 too under CR 41 and the applicable case law, the Court does  
21 have the discretion as to whether or not it will reserve or  
22 even decide this issue. And again, I'd like to reiterate  
23 this is the first time plaintiff has filed suit and  
24 dismissed the case. It's not a case where we have had two  
25 or three filings here.

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So we would ask that the Court deny the request here of defendant's counsel and allow each party to bear its own fees and costs, which seems appropriate. Frankly, in this case it's a matter of equity, especially given that the statute of limitations issue was raised today for the first time.

THE COURT: I am going to dismiss this case without prejudice and without costs.

MR. KLEINBERG: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

MR. KIGER: Thank you.

(Proceedings concluded.)

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

THE HONORABLE LINDA CJ LEE DEPARTMENT 19

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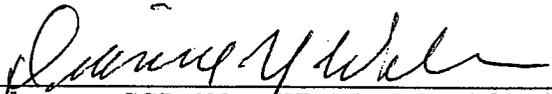
WACHOVIA SBA LENDING, INC., )  
d/b/a WACHOVIA SMALL BUSINESS )  
CAPITAL, a Washington ) COA NO. 34714-8-II  
corporation, ) NO. 05-2-11846-1  
Plaintiff, )  
vs. ) REPORTER'S  
DEANNA D. KRAFT, ) CERTIFICATE  
Defendant

---

STATE OF WASHINGTON )  
COUNTY OF PIERCE ) ss

I, Dianne Y. Wilson, Official Reporter of the Superior Court of the State of Washington, County of Pierce, do hereby certify that the foregoing is a true and correct transcript of the proceedings, Plaintiff's Motion for Voluntary Dismissal Without Prejudice, held in the above-entitled matter on MARCH 20, 2006.

Dated this 8th day of May, 2006.

  
Dianne Y. Wilson, CCR NO. WI-LS-OD-Y461R0  
Official Reporter Reporter No. 82124

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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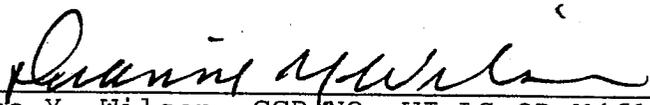
WACHOVIA SBA LENDING, INC., d/b/a	)	
WACHOVIA SMALL BUSINESS CAPITAL,	)	
a Washington corporation,	)	COA NO. 34714-8-II
	)	
Plaintiff,	)	NO. 05-2-11846-1
	)	
vs.	)	NOTICE OF FILING
	)	
DEANNA D. KRAFT,	)	
	)	
Defendant.	)	

---

TO: Clerk of the Court of Appeals  
Douglas N. Kiger  
Alexander S. Kleinberg

PLEASE TAKE NOTICE that pursuant to RAP 9.5(b) the Verbatim Report of Proceedings in the above-entitled matter, Plaintiff's Motion for Voluntary Dismissal Without Prejudice, heard on MARCH 20, 2006, before the Honorable Linda CJ Lee, is hereby filed with the Superior Court for forwarding to the Court of Appeals.

Dated this 9th day of May, 2006.

  
Dianne Y. Wilson, CCR NO. WI-LS-OD-Y461R0  
Official Reporter Reporter No. 82124

**A-5**



1 these instruments forecloses on the deed of trust and sells the Property, Randolph and Deanna  
2 Kraft will be liable for any deficiency balance. The stated purpose of the Loan was for Mr.  
3 Kraft's veterinary clinic, which was located on the Property.

4 3. Defendant Deanna D. Kraft executed a Small Business Administration Guaranty  
5 in connection with the Note on June 30, 1997 ("Guaranty"). Wachovia is the legal holder of the  
6 Guaranty. Per the Guaranty, Ms. Kraft unconditionally guaranteed to pay the holder of the Note  
7 and Guaranty in accordance with the terms set forth therein. The Guaranty also provides that,  
8 upon demand, Ms. Kraft shall furnish to Wachovia a financial statement setting forth in  
9 reasonable detail her assets, liabilities, and net worth. The Guaranty further provides that Ms.  
10 Kraft will pay Wachovia's costs and attorney's fees in the event Wachovia must retain an  
11 attorney to collect on the Guaranty.

12 4. Randolph S. Kraft filed an individual voluntary Chapter 7 bankruptcy in the  
13 United States Bankruptcy Court for the Western District of Washington at Tacoma under Case  
14 Number 03-50941 on September 29, 2003 ("Kraft Bankruptcy"). Mr. Kraft received his Order  
15 Granting Discharge on January 28, 2004. Mr. Kraft's obligations under the Note were  
16 discharged in the Kraft Bankruptcy.

17 5. Wachovia obtained an order granting its Motion for Relief From Stay in the Kraft  
18 Bankruptcy on February 11, 2004. Per this Order, Wachovia foreclosed its deed of trust on the  
19 Property and sold the Property at a foreclosure sale. After applying these proceeds to the  
20 outstanding balance, approximately \$78,196.77 is due and owing under the Guaranty.

21 6. The Guaranty is in default because Wachovia has demanded payment in full of  
22 the Loan from Ms. Kraft, but she has failed to pay or make payment arrangements.

23 7. Ms. Kraft will be unjustly enriched unless she repays Wachovia in accordance  
24 with the Guaranty.

25 8. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiff's Complaint  
26 for Judgment on Guaranty and Unjust Enrichment filed in the instant case on September 19,  
2005 ("Complaint"). I have read and reviewed the Complaint, and the contents thereof are true

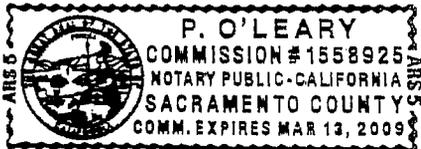
1 and correct to the best of my knowledge.

2 9. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiff's Notice and  
3 Motion for Relief from Automatic Stay (65 Beverly Road, Asheville, North Carolina) filed in the  
4 Kraft Bankruptcy ("Bankruptcy Motion"). Attached as **Exhibit 1** to the Bankruptcy Motion is a  
5 true and correct copy of the Note. Attached as **Exhibit 2** to the Bankruptcy Motion is a true and  
6 correct copy of the Deed of Trust.

7 10. Attached as **Exhibit C** is a true and correct copy of the Guaranty executed by  
8 Defendant Deanna Kraft. Per the Note, Guaranty, and deed of trust, Ms. Kraft and her ex-  
9 husband agreed they would be individually responsible for any deficiency balance owing in the  
10 event Plaintiff foreclosed its deed of trust and sold the property at a foreclosure sale.

11   
12 MICHELLE SNORGRASS

13 SUBSCRIBED AND SWORN to before me this 20 day of January, 2006, by  
14 Michelle Snorgrass.



15   
16 NOTARY PUBLIC, in and for the State of  
17 California, residing at PLACER CO.  
18 Printed Name: P. O'LEARY  
19 My Commission expires: 3.13.09

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 19 2005 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

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

WACHOVIA SBA LENDING, INC., d/b/a  
WACHOVIA SMALL BUSINESS CAPITAL,  
a Washington corporation,

Plaintiff,

vs.

DEANNA D. KRAFT, individually,

Defendant.

NO. 05 2 11846 1

COMPLAINT FOR JUDGMENT ON  
GUARANTY AND UNJUST  
ENRICHMENT

COMES NOW the Plaintiff, Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital ("Wachovia"), by and through its attorneys, Eisenhower & Carlson, PLLC, and Alexander S. Kleinberg, and for causes of action against Defendant, asserts and alleges as follows:

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

1.1 Wachovia is a Washington corporation that has paid all required taxes and license fees due and owing to the State of Washington.

1.2 Defendant Deanna D. Kraft is an individual who resides in Tacoma, Pierce County, Washington.

1.3 This Court has jurisdiction over the subject matter of this action because this action involves aspects of Washington law. Venue is proper in Pierce County, Washington because Defendant resides in Pierce County.

**II. FIRST CAUSE OF ACTION: BREACH OF SBA GUARANTY**

2.1 Wachovia realleges Paragraphs 1.1 through 1.3 above.

COMPLAINT FOR JUDGMENT ON GUARANTY AND UNJUST  
ENRICHMENT - 1  
00310032.DOC

COPY

**EISENHOWER**  
EISENHOWER & CARLSON, PLLC

1200 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402  
Tel: 253.572.4500  
Fax: 253.272.5732

**EXHIBIT A**

1           2.2     Wachovia is the legal holder of a U.S. Small Business Administration Promissory  
2 Note dated June 30, 1997 in the principal amount of \$172,000.00 executed by Randolph S. Kraft,  
3 Defendant's husband ("Note"). The Note secured a loan in the principal amount of \$172,000.00  
4 with an interest rate of the prime rate plus 2.5% per annum, payable in regular installments  
5 ("Loan"). The Note was secured by a Deed of Trust on the Krafts' real property in North  
6 Carolina ("Property"). The stated purpose of the Loan was for Mr. Kraft's veterinary clinic,  
7 which was located on the Property.

8           2.3     Defendant executed a Small Business Administration Guaranty in connection  
9 with the Note on June 30, 1997 ("Guaranty"). Wachovia is the legal holder of the Guaranty. Per  
10 the Guaranty, Defendant unconditionally guaranteed to pay the holder of the Note and Guaranty  
11 in accordance with the terms set forth therein. The Guaranty further provides that, upon demand,  
12 Defendant shall furnish to Wachovia a financial statement setting forth in reasonable detail  
13 Defendant's assets, liabilities, and net worth. The Guaranty further provides that Defendant will  
14 pay Wachovia's costs and attorney's fees in the event Wachovia must institute legal action to  
15 collect on the Guaranty.

16           2.4     Randolph S. Kraft filed an individual voluntary Chapter 7 bankruptcy in the  
17 United States Bankruptcy Court for the Western District of Washington at Tacoma under Case  
18 Number 03-50941 on September 29, 2003 ("Kraft Bankruptcy"). Mr. Kraft received his Order  
19 Granting Discharge on January 28, 2004. Mr. Kraft's obligations under the Note were  
20 discharged in the Kraft Bankruptcy.

21           2.5     Wachovia obtained an Order granting its Motion for Relief From Stay in the Kraft  
22 Bankruptcy on February 11, 2004. Per this Order, Wachovia foreclosed its Deed of Trust on the  
23 Property and sold the Property at a foreclosure sale. After applying these proceeds to the  
24 outstanding balance, approximately \$78,196.77 is due and owing under the Guaranty.

25           2.6     The Guaranty is in default because Wachovia has demanded payment in full of  
26 the Loan from Defendant, but Defendant has failed to pay or make payment arrangements.

### **III. SECOND CAUSE OF ACTION: UNJUST ENRICHMENT**

3.1     Wachovia realleges Paragraphs 1.1 through 2.6 above.



1 Terrence J. Donahue  
Eisenhower & Carlson, PLLC  
2 1200 Wells Fargo Plaza  
1201 Pacific Avenue  
3 Tacoma, Washington 98402  
Telephone: (253) 572-4500  
4 Facsimile No.: (253) 272-5732

The Honorable Philip H. Brandt  
Chapter 7  
Hearing Date: February 23, 2004  
Hearing Time: 9:30 a.m.  
Response Date: February 9, 2004  
Hearing Location: Tacoma, WA

5  
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8 IN THE UNITED STATES BANKRUPTCY COURT  
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

9 In Re:

NO. 03-50941-PHB

10 RANDOLPH SCOTT KRAFT,

11 Debtor.

NOTICE AND MOTION FOR RELIEF  
FROM AUTOMATIC STAY (65  
BEVERLY ROAD, ASHEVILLE,  
NORTH CAROLINA)

12  
13 **NOTICE**

14 **TO :** Randolph Scott Kraft, Pro Se Debtor  
15 **AND TO:** Mark D. Waldron, Chapter 7 Trustee  
**AND TO:** U. S. Trustee's Office  
16 **AND TO:** All creditors and parties in interest  
**AND TO:** Clerk of the Court

17 **YOU AND EACH OF YOU** are hereby given notice that The Money Store Investment  
18 Corporation doing business as Wachovia Small Business Capital ("Wachovia") has moved for relief  
from automatic stay concerning property located at 65 Beverly Road, Asheville, North Carolina to  
19 allow it to foreclose its Deed of Trust thereon. Debtor lists the subject property as having a value of  
\$170,000.00. Wachovia asserts a lien against the property in the amount of \$186,785.71.

20 **The hearing on this Motion will be heard on the 23<sup>rd</sup> day of February, 2004, at 9:30 a.m.**  
**in the United States Bankruptcy Court, Courtroom I, 1717 Pacific Avenue, Tacoma,**  
21 **Washington, and the clerk is requested to note the Motion on the Motion calendar for that**  
**date.**

22 **YOU ARE FURTHER NOTIFIED** that responsive pleadings must be filed with the Court  
and served upon the undersigned by February 9, 2004. Failure to comply with this local rule may be  
23 deemed by the Court as opposition without merit. **IF YOU OPPOSE** the Motion you must file your  
written response with the court clerk, serve two copies to the Judge's chambers and deliver a copy to  
24 the undersigned **NOT LATER THAN the RESPONSE DATE which is February 9, 2004.**

25 **IF NO RESPONSE IS TIMELY FILED AND SERVED,** the Court may, in its discretion,  
**GRANT THE MOTION PRIOR TO THE HEARING, WITHOUT FURTHER NOTICE,** and  
26 strike the hearing.

NOTICE AND MOTION FOR RELIEF FROM  
AUTOMATIC STAY (65 BEVERLY ROAD,  
ASHVILLE, NORTH CAROLINA) - 1  
00267638.DOC

EISENHOWER & CARLSON, PLLC

ATTORNEYS-AT-LAW  
1200 WELLS FARGO PLAZA  
1201 PACIFIC AVENUE  
TACOMA, WASHINGTON 98402

PHONE 253-572-4500  
FAX 253-272-5732

**EXHIBIT B**

1 MOTION

2 COMES NOW The Money Store Investment Corporation doing business as Wachovia  
3 Small Business Capital ("Wachovia") by and through its attorneys, Eisenhower & Carlson, PLLC  
4 and Terrence J. Donahue, and moves the Court pursuant to 11 U.S.C. § 362(d)(1) and (2) for relief  
5 from automatic stay to allow it to foreclose its Deed of Trust on certain property located at 65  
6 Beverly Road, Ashville, North Carolina. This Motion is based on the records and files herein, and  
7 the verification of Hector Perez attached hereto.

8 BACKGROUND

9 This Chapter 7 bankruptcy proceeding was filed on November 25, 2003.

10 Randolph S. Kraft is the debtor herein ("Debtor").

11 Mark D. Waldron is the duly appointed and acting Chapter 7 Trustee ("Trustee").

12 The property subject to this Motion is located at 65 Beverly Road, Asheville, North Carolina.

13 On or about June 30, 1997, Debtor executed and delivered to Wachovia his Promissory Note  
14 ("Note") in the amount of \$172,000.00. A copy of the Note is attached hereto as **Exhibit A** and  
15 incorporated herein by this reference.

16 To secure the Note, Debtor and Deanna D. Kraft executed and delivered to Wachovia a Deed  
17 of Trust dated June 30, 1997, concerning property located at 65 Beverly Road, Ashville, Buncombe  
18 County, North Carolina, the legal description of which is more fully set forth in said Deed of Trust.  
19 A copy of the Deed of Trust is attached hereto as **Exhibit B** and incorporated herein by this  
20 reference. The Deed of Trust was properly recorded in Buncombe County on July 1, 1997.

21 Pursuant to the terms of the Note, Debtor is required to make monthly payments in the  
22 amount of \$1,723.00 on the first day of each month. Debtor has failed to make the required monthly  
23 payments from February 2002 forward. There are current arrearages in excess of \$40,000.00. As of  
24 January 9, 2004, the Note has an outstanding balance of \$155,438.46, plus accruing interest and  
25 appraisal fee for a total payoff as of January 9, 2004, of \$186,785.71, plus attorneys' fees and costs.  
26

1 Debtor lists the subject property on Schedule A—Real Property as having a value of  
2 \$170,000.00. Wachovia obtained an appraisal of the subject property by Foster Real Estate  
3 Appraisers, Inc. providing the value as of October 13, 2003, of \$150,000.00. The cover sheet of the  
4 appraisal from Foster Real Estate Appraisers, Inc. is attached hereto as **Exhibit C** and incorporated  
5 herein by this reference. Because of the voluminous nature of the appraisal, only the cover sheet is  
6 attached hereto.

### 7 DISCUSSION

8 11 U.S.C. § 362(d)(1) and (2) provide that the court shall grant relief from automatic stay:

9 1. for cause, including the lack of adequate protection of an interest in property of such  
10 party in interest;

11 2. with respect to a stay of an act against property under subsection (a) of this section,  
12 if—

13 A) the debtor does not have an equity in such property; and

14 B) such property is not necessary to an effective reorganization.

15 In any motion for relief from automatic stay, the party requesting such relief has the burden of proof  
16 on the debtor's equity in the property and the debtor has the burden of proof on all other issues. 11  
17 U.S.C. § 362(g).

18 For purposes of 11 U.S.C. § 362(d)(1) the term "cause" is a broad concept that extends  
19 beyond a lack of adequate protection. See e.g. In Re Ashton, 63 B.R. 244 (Bankr. D.N.D. 1986);  
20 Matter of Rutter, 25 B.R. 244 (Bankr. E.D. Mich. 1982). Because there is no clear definition of what  
21 constitutes cause under 11 U.S.C. § 362(d)(1), the courts must determine when relief from the  
22 automatic stay is appropriate on a case by case basis. In Re Castlerock Properties, 781 F.2d 159 (9<sup>th</sup>  
23 Cir. 1986). In doing so, the courts must consider all the circumstances before it. In Re Opelika Mfg.  
24 Corp., 66 B.R. 444 (Bankr. N.D. Ill. 1986).

25 Herein, there is no equity in the subject property. Relying on either Debtor's estimation of  
26 value under Schedule A of \$170,000.00 or the appraised value of \$150,000.00, in light of the

1 outstanding balance in excess of \$186,000.00 there is no equity in the subject property. Because this  
2 is a Chapter 7 bankruptcy proceeding, the property is not subject for a reorganization. Cause exists  
3 for relief from stay under 11 U.S.C. § 362(d)(2). Additionally, Debtor has failed to make the  
4 required monthly payment on the subject property for almost two (2) years. Said delinquency  
5 justifies cause for relief from stay under 11 U.S.C. § 362(d)(1).

6 Accordingly, Wachovia requests relief from automatic stay to allow it to continue or  
7 commence a foreclosure of the subject Deed of Trust on the real property located in Asheville, North  
8 Carolina and to exercise any and all state rights in the foreclosure thereof, including, if necessary,  
9 replevin and repossession of the subject property and that said relief be granted without delay under  
10 FRBP 4001.

11 DATED this 15<sup>th</sup> day of January, 2004.

12 EISENHOWER & CARLSON, PLLC

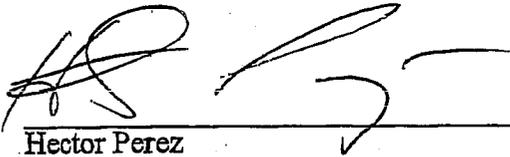
13  
14 By: 

15 Terrence J. Donahue, WSBA #15193  
16 Attorneys for Wachovia Small Business  
17 Capital  
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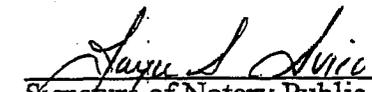
1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF PLACER )

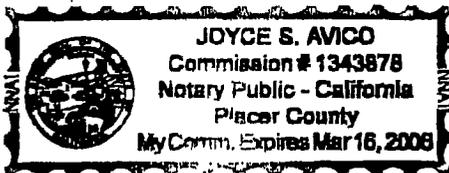
4 Hector Perez, being first duly sworn, on oath deposes and says:

5 That I am Special Assets Manager and make this verification based on my own personal  
6 knowledge and review of Wachovia Small Business Capital's records and files concerning this  
7 matter. Having read the foregoing Motion for Relief from Automatic Stay, the undersigned verifies  
8 that the information contained therein is true and correct and that the documents attached hereto are  
9 true and correct copies of the originals of the same.

10   
11 \_\_\_\_\_  
12 Hector Perez

13 SIGNED AND SWORN to before me on this 15<sup>th</sup> day of January, 2004, by Hector Perez.

14   
15 \_\_\_\_\_  
16 Signature of Notary Public  
17 Joyce S. Avico  
18 \_\_\_\_\_  
19 Name of Notary Public  
20 NOTARY PUBLIC  
21 3-16-06  
22 \_\_\_\_\_  
23 My Appointment Expires



U.S. Small Business Administration

NOTE

SBA LOAN NUMBER
PLP-1055574004

Asheville, NC  
(City and State)

\$172,000.00

(Date) June 30, 19 97

For value received, the undersigned promises to pay to the order of: .....  
..... **The Money Store Investment Corporation** .....  
(Payee)

at its office in the city of Sacramento, State of California

or at holder's option, at such other place as may be designated from time to time by the holder .....

**\*\*\*\*One Hundred Seventy-Two Thousand Dollars and No Cents (\$172,000.00)\*\*\*\***

(Write out amount)

with interest on unpaid principal computed from the date of each advance to the undersigned at the rate of Prime +2.500  
percent per annum, payment to be made in installments as follows:

One installment of interest only will be payable on the first day of the month following date of Note. Then, equal monthly installments of principal and interest in the amount of \$1,723.00 will be due on the first day of the second month following date of Note and on the first day of each and every month thereafter, unless the amount of any installment changes pursuant hereto. The balance of principal and accrued interest shall be payable on or before Twenty-One (21) years from date of Note. The initial interest rate shall be Ten and Three-Quarters Percent (10.750%) per annum. Each payment shall be applied first to the interest accrued to the date of receipt of said payment, and the balance, if any, to principal. The interest rate shall not exceed the rate allowable under Federal or State Usury laws, whichever is applicable.

This is a variable interest rate loan in which the interest rate will fluctuate in accordance with the Prime Rate published in the Wall Street Journal. The interest rate (spread) to be added to the Prime Rate at the beginning of each adjustment period will be Two and One-Half Percent (2.500%). Each adjustment period will be three months beginning on the first business day of the calendar quarter following date of first disbursement. Adjustment periods and calendar quarters shall commence on the first business day of January, April, July and October.

The interest rate on this Note shall increase or decrease by adding the interest rate spread to the Prime Rate as of the beginning of each adjustment period.

Upon any change in the note interest rate, the above monthly principal and interest payment shall be adjusted to amortize the remaining loan balance in equal monthly payments of principal and interest over the remaining term of the loan.

Lender shall give written notice to Borrower of each increase or decrease in the interest rate within thirty (30) days after the effective date of each rate adjustment; however, the fluctuation of the interest rate is not contingent on whether the notice is given.

EXHIBIT 1

If Borrower shall be in default in payment due on the indebtedness herein and the Small Business Administration (SBA) purchases its guaranteed portion of said indebtedness, the rate of interest on both the guaranteed and unguaranteed portions herein shall be fixed at the rate in effect as of the first date of uncured default. If the Borrower shall not be in default in payment when SBA purchases its guaranteed portion, the rate of interest on both the guaranteed and unguaranteed portion herein shall be fixed at the rate in effect as of the date of purchase by SBA.

Borrower agrees to pay a late charge equal to 4% of the payment amount due if such payment is not received within 15 DAYS of the due date. Funds received from the Borrower will be applied first to interest to the date of receipt, then to principal and then to the late fee.

If this Note contains a fluctuating interest rate, the notice provision is not a pre-condition for fluctuation (which shall take place regardless of notice). Payment of any installment of principal or interest owing on this Note may be made prior to the maturity date thereof without penalty. Borrower shall provide lender with written notice of intent to prepay part or all of this loan at least three (3) weeks prior to the anticipated prepayment date. A prepayment is any payment made ahead of schedule that exceeds twenty (20) percent of the then outstanding principal balance. If borrower makes a prepayment and fails to give at least three weeks advance notice of intent to prepay, then, notwithstanding any other provision to the contrary in this note or other document, borrower shall be required to pay tender three weeks interest on the unpaid principal as of the date preceding such prepayment.

The term "Indebtedness" as used herein shall mean the Indebtedness evidenced by this Note, including principal, interest, and expenses, whether contingent, now due or hereafter to become due and whether heretofore or contemporaneously herewith or hereafter contracted. The term "Collateral" as used in this Note shall mean any funds, guaranties, or other property or rights therein of any nature whatsoever or the proceeds thereof which may have been, are, or hereafter may be, hypothecated, directly or indirectly by the undersigned or others, in connection with, or as security for, the Indebtedness or any part thereof. The Collateral, and each part thereof, shall secure the Indebtedness and each part thereof. The covenants and conditions set forth or referred to in any and all instruments of hypothecation constituting the Collateral are hereby incorporated in this Note as covenants and conditions of the undersigned with the same force and effect as though such covenants and conditions were fully set forth herein.

The Indebtedness shall immediately become due and payable, without notice or demand, upon the appointment of a receiver or liquidator, whether voluntary or involuntary, for the undersigned or for any of its property, or upon the filing of a petition by or against the undersigned under the provisions of any State insolvency law or under the provisions of the Bankruptcy Reform Act of 1978, as amended, or upon the making by the undersigned of an assignment for the benefit of its creditors. Holder is authorized to declare all or any part of the Indebtedness due and payable upon the happening of any of the following events: (1) Failure to pay any part of the Indebtedness when due; (2) nonperformance by the undersigned of any agreement with, or any condition imposed by, Holder or Small Business Administration (hereinafter called "SBA"), with respect to the Indebtedness; (3) Holder's discovery of the undersigned's failure in any application of the undersigned to Holder or SBA to disclose any fact deemed by Holder to be material or of the making therein or in any of the said agreements, or in any affidavit or other documents submitted in connection with said application or the Indebtedness, of any misrepresentation by, on behalf of, or for the benefit of the undersigned; (4) the reorganization (other than a reorganization pursuant to any of the provisions of the Bankruptcy Reform Act of 1978, as amended) or merger or consolidation of the undersigned (or the making of any agreement therefor) without the prior written consent of Holder; (5) the undersigned's failure duly to account, to Holder's satisfaction, at such time or times as Holder may require, for any of the Collateral, or proceeds thereof, coming into the control of the undersigned; or (6) the institution of any suit affecting the undersigned deemed by Holder to affect adversely its interest hereunder in the Collateral or otherwise. Holder's failure to exercise its rights under this paragraph shall not constitute a waiver thereof.

Upon the nonpayment of Indebtedness, or any part thereof, when due, whether by acceleration or otherwise, Holder is empowered to sell, assign, and deliver the whole or any part of the Collateral at public or private sale, without demand, advertisement or notice of the time or place of sale or of any adjournment thereof, which are hereby expressly waived. After deducting all expenses incidental to or arising from such sale or sales, Holder may apply the residue of the proceeds thereof to the payment of the Indebtedness, as it shall deem proper, returning the excess, if any, to the undersigned. The undersigned hereby waives all right of redemption or appraisal whether before or after sale.

Holder is further empowered to collect or cause to be collected or otherwise to be converted into money all or any part of the Collateral, by suit or otherwise, and to surrender, compromise, release, renew, extend, exchange, or substitute any item of the Collateral in transactions with the undersigned or any third party, irrespective of any assignment thereof by the undersigned, and without prior notice to or consent of the undersigned or any assignee. Whenever any item of the Collateral shall not be paid when due, or otherwise shall be in default, whether or not the Indebtedness, or any part thereof, has become due, Holder shall have the same rights and powers with respect to such item of the Collateral as are granted in this paragraph in case of nonpayment of the Indebtedness, or any part thereof, when due. None of the rights, remedies, privileges, or powers of Holder expressly provided for herein shall be exclusive, but each of them shall be cumulative with and in addition to every other right, remedy, privilege, and power now or hereafter existing in favor of Holder, whether at law or equity, by statute or otherwise.

The undersigned agrees to take all necessary steps to administer, supervise, preserve, and protect the Collateral; and regardless of any action taken by Holder, there shall be no duty upon Holder in this respect. The undersigned shall pay all expenses of any nature, whether incurred in or out of court, and whether incurred before or after this Note shall become due at its maturity date or otherwise, including but not limited to reasonable attorney's fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the Indebtedness or the administration, supervision, preservation, protection of (including, but not limited to, the maintenance of adequate insurance) or the realization upon the Collateral. Holder is authorized to pay at any time and from time to time any or all of such expenses, add the amount of such payment to the amount of the Indebtedness, and charge interest thereon at the rate specified herein with respect to the principal amount of this Note.

The security rights of Holder and its assigns hereunder shall not be impaired by Holder's sale, hypothecation or rehypothecation of any note of the undersigned or any item of the Collateral, or by any indulgence, including but not limited to (a) any renewal, extension, or modification which Holder may grant with respect to the Indebtedness or any part thereof, or (b) any surrender, compromise, release, renewal, extension, exchange, or substitution which Holder may grant in respect of the Collateral, or (c) any indulgence granted in respect of any endorser, guarantor, or surety. The purchaser, assignee, transferee, or pledgee of this Note, the Collateral, and guaranty, and any other document (or any of them), sold assigned, transferred, pledged, or repledged, shall forthwith become vested with and entitled to exercise all the powers and rights given by this Note and all applications of the undersigned to Holder or SBA, as if said purchaser, assignee, transferee, or pledgee were originally named as Payee in this Note and in said application or applications.

This promissory note is given to secure a loan which SBA is making or in which it is participating and, pursuant to Part 101 of the Rules and Regulations of SBA (13 C.F.R. 101.1(d)), this instrument is to be construed and (when SBA is the Holder or a party in interest) enforced in accordance with applicable Federal law.

This Note is secured by real property and the Deed(s) of Trust and/or Mortgage(s) securing same contain the following:

In the event the herein described property or any part thereof, or any interest therein is sold, agreed to be sold, conveyed, transferred, disposed of, further encumbered, or alienated by Mortgagor or by the operation of law or otherwise without the written consent of Mortgagee first obtained, all obligations secured by this instrument, irrespective of the maturity dates expressed herein, at the option of the holder Mortgagee, and without demand or notice, shall immediately become due and payable. Consent to one such transaction shall not be deemed to be a waiver of the right to require such consent to future or successive transactions.



Randolph S. Kraft

**RECORDATION REQUESTED BY:**

The Money Store Investment Corporation  
P.O. Box 162247  
Sacramento, CA 95816-2247

**WHEN RECORDED MAIL TO:** *Van Winkle*

TMSICTMSCMI  
P.O. Box 15143  
Sacramento, CA 95851

*(CWE)*

BK 1834 PG 571

*11-0263001*  
*1997-1*  
REGISTERED

97 JUL -1 AM 11:19

*Richard D. ...*  
REG. CLERK  
BUNCOMBE COUNTY

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

This Deed of Trust prepared by: X *Cindy Eller*  
The Money Store Investment Corporation

**DEED OF TRUST**

THIS DEED OF TRUST IS DATED *30 June 1997*, among Randolph S. Kraft and Deanna D. Kraft, whose address is 65 Beverly Road, Asheville, NC 28805 (referred to below as "Grantor"); The Money Store Investment Corporation, whose address is P.O. Box 162247, Sacramento, CA 95816-2247 (referred to below sometimes as "Lender" and sometimes as "Beneficiary"); and Paul Finnican, a resident of Charlotte, NC & Dave White, a resident of Raleigh, NC (referred to below as "Trustee").

CONVEYANCE AND GRANT. NOW, THEREFORE, as security for the indebtedness, advancements and other sums expended by the Beneficiary pursuant to this Deed of Trust and costs of collection (including attorneys' fees as provided in the Note) and other valuable consideration, the receipt of which is hereby acknowledged, Grantor has bargained, sold, given, granted and conveyed and does by these presents bargain, sell, give, grant and convey to Trustee, and Trustee's heirs or successors and assigns, for the benefit of Lender as Beneficiary, all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, located in Buncombe County, State of North Carolina (the "Real Property"):

See Exhibit "A", attached hereto and incorporated herein by this reference.

To have and to hold said Real Property with all privileges and appurtenances thereunto belonging, to the Trustee, his heirs, successors and assigns forever, upon the trusts, terms and conditions and for the uses hereinafter set forth.

The Real Property or its address is commonly known as 65 Beverly Road, Asheville, NC 28805. The Real Property tax identification number is 9658.08-88-5028.

Grantor presently assigns to Lender (also known as Beneficiary in this Deed of Trust) all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants Lender a Uniform Commercial Code security interest in the Rents and the Personal Property defined below.

DEFINITIONS. The following words shall have the following meanings when used in this Deed of Trust. Terms not otherwise defined in this Deed of Trust shall have the meanings attributed to such terms in the Uniform Commercial Code. All references to dollar amounts shall mean amounts in lawful money of the United States of America.

**Beneficiary.** The word "Beneficiary" means The Money Store Investment Corporation, its successors and assigns. The Money Store Investment Corporation also is referred to as "Lender" in this Deed of Trust.

**Borrower.** The word "Borrower" means each and every person or entity signing the Note, including without limitation Randolph S. Kraft.

**Deed of Trust.** The words "Deed of Trust" mean this Deed of Trust among Grantor, Lender, and Trustee, and includes without limitation all assignment and security interest provisions relating to the Personal Property and Rents.

**Grantor.** The word "Grantor" means any and all persons and entities executing this Deed of Trust, including without limitation Randolph S. Kraft and Deanna D. Kraft. Any Grantor who signs this Deed of Trust, but does not sign the Note, is signing this Deed of Trust only to grant and convey that Grantor's interest in the Real Property and to grant a security interest in Grantor's interest in the Rents and Personal Property to Lender and is not personally liable under the Note except as otherwise provided by contract or law.

**Guarantor.** The word "Guarantor" means and includes without limitation any and all guarantors, sureties, and accommodation parties in connection with the Indebtedness.

**Improvements.** The word "Improvements" means and includes without limitation all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

**Indebtedness.** The word "Indebtedness" means all principal and interest payable under the Note and any amounts expended or advanced by Lender to discharge obligations of Grantor or expenses incurred by Trustee or Lender to enforce obligations of Grantor under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust.

**Lender.** The word "Lender" means The Money Store Investment Corporation, its successors and assigns.

**Note.** The word "Note" means the Note dated *June 30, 1997* in the principal amount of \$172,000.00 from Borrower to Lender,

000019 EXHIBIT 2

DEED OF TRUST  
(Continued)

Loan No 11026300

together with all renewals, extensions, modifications, refinancings, and substitutions for the Note. **NOTICE TO GRANTOR: THE NOTE CONTAINS A VARIABLE INTEREST RATE.**

**Personal Property.** The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

**Property.** The word "Property" means collectively the Real Property and the Personal Property.

**Real Property.** The words "Real Property" mean the property, interests and rights described above in the "Conveyance and Grant" section.

**Related Documents.** The words "Related Documents" mean and include without limitation all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

**Trustee.** The word "Trustee" means Paul Finnican, a resident of Charlotte, NC & Dave White, a resident of Raleigh, NC and any substitute or successor trustees.

**THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (1) PAYMENT OF THE INDEBTEDNESS AND (2) PERFORMANCE OF ANY AND ALL OBLIGATIONS OF GRANTOR UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

**GRANTOR'S REPRESENTATIONS AND WARRANTIES.** Grantor warrants that: (a) this Deed of Trust is executed at Borrower's request and not at the request of Lender; (b) Grantor has the full power, right, and authority to enter into this Deed of Trust and to hypothecate the Property; (c) the provisions of this Deed of Trust do not conflict with, or result in a default under any agreement or other instrument binding upon Grantor and do not result in a violation of any law, regulation, court decree or order applicable to Grantor; (d) Grantor has established adequate means of obtaining from Borrower on a continuing basis information about Borrower's financial condition; and (e) Lender has made no representation to Grantor about Borrower (including without limitation the creditworthiness of Borrower).

**GRANTOR'S WAIVERS.** Grantor waives all rights or defenses arising by reason of any "one action" or "anti-deficiency" law, or any other law which may prevent Lender from bringing any action against Grantor, including a claim for deficiency to the extent Lender is otherwise entitled to a claim for deficiency, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale. Grantor expressly waives, to the extent permitted by North Carolina law, all of Grantor's rights under (a) N.C. Gen. Stat. Sections 25-7 through 9 (1986) to require Lender to take action, (b) N.C. Gen. Stat. Section 25-3-606 (1965 and Supplement 1985) relating to the impairment of the collateral, and (c) N.C. Gen. Stat. Section 25-9-501 (1986) with respect to the "commercial reasonableness" of any sale of collateral.

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Borrower shall pay to Lender all Indebtedness secured by this Deed of Trust as it becomes due, and Borrower and Grantor shall strictly perform all their respective obligations under the Note, this Deed of Trust, and the Related Documents.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor and Borrower agree that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (a) remain in possession and control of the Property, (b) use, operate or manage the Property, and (c) collect any Rents from the Property.

**Duty to Maintain.** Grantor shall maintain the Property in tenable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Hazardous Substances.** The terms "hazardous waste," "hazardous substance," "disposal," "release," and "threatened release," as used in this Deed of Trust, shall have the same meanings as set forth in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or Federal laws, rules, or regulations adopted pursuant to any of the foregoing. The terms "hazardous waste" and "hazardous substance" shall also include, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos. Grantor represents and warrants to Lender that: (a) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any hazardous waste or substance by any person on, under, about or from the Property; (b) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (i) any use, generation, manufacture, storage, treatment, disposal, release, or threatened release of any hazardous waste or substance on, under, about or from the Property by any prior owners or occupants of the Property or (ii) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (c) Except as previously disclosed to and acknowledged by Lender in writing, (i) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of, or release any hazardous waste or substance on, under, about or from the Property and (ii) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation those laws, regulations, and ordinances described above. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Deed of Trust. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for hazardous waste and hazardous substances. Grantor hereby (a) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws, and (b) agrees to indemnify and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Deed of Trust or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Deed of Trust, including the obligation to indemnify, shall survive the payment of the indebtedness and the satisfaction and reconveyance of the lien of this Deed of Trust and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), soil, gravel or rock products without the prior written consent of Lender.

**Removal of Improvements.** Grantor shall not demolish or remove any improvements from the Real Property without the prior written consent of

**DEED OF TRUST**  
(Continued)

Loan No 11026300

Lender. As a condition to the removal of any improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such improvements with improvements of at least equal value.

**Lender's Right to Enter.** Lender and its agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Property for purposes of Grantor's compliance with the terms and conditions of this Deed of Trust.

**Compliance with Governmental Requirements.** Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans with Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Duty to Protect.** Grantor agrees neither to abandon nor leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**DUE ON SALE - CONSENT BY LENDER.** Lender may, at its option, declare immediately due and payable all sums secured by this Deed of Trust upon the sale or transfer, without the Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest therein; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of Real Property interest. If any Grantor is a corporation, partnership or limited liability company, transfer also includes any change in ownership of more than twenty-five percent (25%) of the voting stock, partnership interests or limited liability company interests, as the case may be, of Grantor. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by North Carolina law.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are a part of this Deed of Trust.

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, special taxes, assessments, charges (including water and sewer), fines and impositions levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of all liens having priority over or equal to the interest of Lender under this Deed of Trust, except for the lien of taxes and assessments not due and except as otherwise provided in this Deed of Trust.

**Right To Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Deed of Trust.

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with trustee and Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption, and boiler insurance, as Lender may reasonably require. Policies shall be written in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property at any time become located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance for the full unpaid principal balance of the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at its election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Deed of Trust. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Deed of Trust, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

**Unexpired Insurance at Sale.** Any unexpired insurance shall inure to the benefit of, and pass to, the purchaser of the Property covered by this Deed of Trust at any trustee's sale or other sale held under the provisions of this Deed of Trust, or at any foreclosure sale of such Property.

**Grantor's Report on Insurance.** Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (a) the name of the insurer; (b) the risks insured; (c) the amount of the policy; (d) the property insured, the then current replacement value of such property, and the manner of determining that value; and (e) the expiration date of the policy. Grantor shall, upon request of Lender, have an independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

**EXPENDITURES BY LENDER.** If Grantor fails to comply with any provision of this Deed of Trust, or if any action or proceeding is commenced that

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would materially affect Lender's interests in the Property, Lender on Grantor's behalf may, but shall not be required to, take any action that Lender deems appropriate. Any amount that Lender expends in so doing will bear interest at the rate provided for in the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses, at Lender's option, will (a) be payable on demand, (b) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (i) the term of any applicable insurance policy or (ii) the remaining term of the Note, or (c) be treated as a balloon payment which will be due and payable at the Note's maturity. This Deed of Trust also will secure payment of these amounts. The rights provided for in this paragraph shall be in addition to any other rights or any remedies to which Lender may be entitled on account of the default. Any such action by Lender shall not be construed as curing the default so as to bar Lender from any remedy that it otherwise would have had.

**WARRANTY; DEFENSE OF TITLE.** The following provisions relating to ownership of the Property are a part of this Deed of Trust.

**Title.** Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Deed of Trust, and (b) Grantor has the full right, power, and authority to execute and deliver this Deed of Trust to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Trustee or Lender under this Deed of Trust, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities, including without limitation all applicable environmental laws, ordinances, and regulations, unless otherwise specifically excepted in the environmental agreement executed by Grantor and Lender relating to the Property.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Deed of Trust.

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Trustee or Lender in connection with the condemnation.

**Proceedings.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments as may be requested by it from time to time to permit such participation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Deed of Trust:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Deed of Trust and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Deed of Trust, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Deed of Trust.

**Taxes.** The following shall constitute taxes to which this section applies: (a) a specific tax upon this type of Deed of Trust or upon all or any part of the indebtedness secured by this Deed of Trust; (b) a specific tax on Borrower which Borrower is authorized or required to deduct from payments on the indebtedness secured by this type of Deed of Trust; (c) a tax on this type of Deed of Trust chargeable against the Lender or the holder of the Note; and (d) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Borrower.

**Subsequent Taxes.** If any tax to which this section applies is enacted subsequent to the date of this Deed of Trust, this event shall have the same effect as an Event of Default (as defined below), and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (a) pays the tax before it becomes delinquent, or (b) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Deed of Trust as a security agreement are a part of this Deed of Trust.

**Security Agreement.** This instrument shall constitute a security agreement to the extent any of the Property constitutes fixtures or other personal property, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall execute financing statements and take whatever other action is requested by Lender to perfect and continue Lender's security interest in the Real and Personal Property. In addition to recording this Deed of Trust in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Deed of Trust as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall assemble the Personal Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender.

**Addresses.** The mailing addresses of Grantor (debtor) and Lender (secured party), from which information concerning the security interest granted by this Deed of Trust may be obtained (each as required by the Uniform Commercial Code), are as stated on the first page of this Deed of Trust.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Deed of Trust.

**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or re-recorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (a) the obligations of Grantor and Borrower under the Note, this Deed of Trust, and the Related Documents, and (b) the liens and security interests created by this Deed of Trust as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. The lien of this Deed of Trust and the security interest granted hereby will automatically attach, without further act, to all after-acquired property attached to and or used in the operation of the Property or any part thereof. Unless prohibited by law or agreed to the contrary by Lender in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph Lender may do so for and in the name of

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Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

**FULL PERFORMANCE.** If Borrower pays all the indebtedness when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property. Any reconveyance fee required by law shall be paid by Grantor, if permitted by applicable law.

**DEFAULT.** Each of the following, at the option of Lender, shall constitute an event of default ("Event of Default") under this Deed of Trust:

**Default on Indebtedness.** Failure of Borrower to make any payment when due on the indebtedness.

**Default on Other Payments.** Failure of Grantor within the time required by this Deed of Trust to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with the Property.

**Compliance Default.** Failure of Grantor or Borrower to comply with any other term, obligation, covenant or condition contained in this Deed of Trust, the Note or in any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by or on behalf of Grantor or Borrower under this Deed of Trust, the Note or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished.

**Defective Collateralization.** This Deed of Trust or any of the Related Documents ceases to be in full force and effect (including failure of any collateral documents to create a valid and perfected security interest or lien) at any time and for any reason.

**Death or Insolvency.** The death of Grantor or Borrower or the dissolution or termination of Grantor or Borrower's existence as a going business, the insolvency of Grantor or Borrower, the appointment of a receiver for any part of Grantor or Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor or Borrower.

**Foreclosure, Forfeiture, etc.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any of the Property. However, this subsection shall not apply in the event of a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the foreclosure or forfeiture proceeding, provided that Grantor gives Lender written notice of such claim and furnishes reserves or a surety bond for the claim satisfactory to Lender.

**Breach of Other Agreement.** Any breach by Grantor or Borrower under the terms of any other agreement between Grantor or Borrower and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor or Borrower to Lender, whether existing now or later.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness. Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure the Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

**Insecurity.** Lender in good faith deems itself insecure.

**Right to Cure.** If such a failure is curable and if Grantor or Borrower has not been given a notice of a breach of the same provision of this Deed of Trust within the preceding twelve (12) months, it may be cured (and no Event of Default will have occurred) if Grantor or Borrower, after Lender sends written notice demanding cure of such failure: (a) cures the failure within fifteen (15) days; or (b) if the cure requires more than fifteen (15) days, immediately initiates steps sufficient to cure the failure and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of any Event of Default and at any time thereafter, Trustee or Lender, at its option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

**Accelerate Indebtedness.** Lender shall have the right at its option without notice to Grantor or Borrower to declare the entire Indebtedness immediately due and payable, including any prepayment penalty which Borrower would be required to pay.

**Express Power of Sale Provision.** Upon the application or request of Lender, it shall be lawful for and the duty of the Trustee, and the Trustee is hereby authorized and empowered, to expose to sale and to sell the Property at public auction for cash, after having first complied with all applicable requirements of North Carolina law with respect to the exercise of powers of sale contained in deeds of trust or such other sales appropriate under the circumstances; and upon any such sale, the Trustee shall convey title to the purchaser in fee simple. In the event of any sale under this Deed of Trust by virtue of the exercise of the powers granted in this Deed of Trust, or pursuant to any order and any judicial proceeding or otherwise, the Property may be sold as an entirety or in separate parcels and in such manner or order as Lender in its sole discretion may elect. Trustee shall be authorized to hold a sale pursuant to North Carolina General Statute Chapter 45. If Trustee so elects, Trustee may sell the Property covered by this Deed of Trust at one or more separate sales in any manner permitted by applicable North Carolina law, and any exercise of the powers granted in this Deed of Trust shall not extinguish or exhaust such powers, until the entire Property is sold or the indebtedness is paid in full. If such indebtedness is now or hereafter further secured by any chattel mortgages, pledges, contracts of guaranty, assignments of lease or other security instruments, Lender may at its option exercise the remedies granted under any of the security agreements either concurrently or independently and in such order as Lender may determine.

**Foreclosure.** With respect to all or any part of the Real Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**UCC Remedies.** With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

**Collect Rents.** Lender shall have the right, without notice to Grantor or Borrower, to take possession of and manage the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in

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response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

**Appoint Receiver.** Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

**Tenancy at Sufferance.** If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (a) pay a reasonable rental for the use of the Property, or (b) vacate the Property immediately upon the demand of Lender.

**Other Remedies.** Trustee or Lender shall have any other right or remedy provided in this Deed of Trust or the Note or by law.

**Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of Personal Property may be made in conjunction with any sale of the Real Property.

**Sale of the Property.** To the extent permitted by applicable law, Grantor and Borrower hereby waive any and all rights to have the Property marshalled. In exercising its rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

**Waiver; Election of Remedies.** A waiver by any party of a breach of a provision of this Deed of Trust shall not constitute a waiver of or prejudice the party's rights otherwise to demand strict compliance with that provision or any other provision. Election by Lender to pursue any remedy provided in this Deed of Trust, the Note, in any Related Document, or provided by law shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor or Borrower under this Deed of Trust after failure of Grantor or Borrower to perform shall not affect Lender's right to declare a default and to exercise any of its remedies.

**Attorneys' Fees; Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and on any appeal. Whether or not any court action is involved, all reasonable expenses incurred by Lender which in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the indebtedness payable on demand and shall bear interest at the Note rate from the date of expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees whether or not there is a lawsuit, including reasonable attorneys' fees for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**Rights of Trustee.** Trustee shall have all of the rights and duties of Lender as set forth in this section.

**POWERS AND OBLIGATIONS OF TRUSTEE.** The following provisions relating to the powers and obligations of Trustee are part of this Deed of Trust.

**Powers of Trustee.** In addition to all powers of Trustee arising as a matter of law, Trustee shall have the power to take the following actions with respect to the Property upon the written request of Lender and Grantor: (a) join in preparing and filing a map or plat of the Real Property, including the dedication of streets or other rights to the public; (b) join in granting any easement or creating any restriction on the Real Property; and (c) join in any subordination or other agreement affecting this Deed of Trust or the interest of Lender under this Deed of Trust.

**Trustee.** Trustee shall meet all qualifications required for Trustee under applicable law. In addition to the rights and remedies set forth above, with respect to all or any part of the Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**Trustee's Fees.** The Trustee's commission shall be five percent (5%) of the gross proceeds of the sale for a completed foreclosure. In the event foreclosure is commenced, but not completed, Grantor shall pay all expenses incurred by Trustee and partial commission computed on five percent (5%) of the outstanding indebtedness, according to the following schedule: one-fourth of the commission before Trustee issues a notice of hearing on the right to foreclosure; one-half of the commission after issuance of notice of hearing; three-fourths of the commission after a hearing; and the full commission after the initial sale.

**Express Power to Substitute a Trustee.** Lender shall have the irrevocable right to remove at any time and from time to time without limit the Trustee named in this Deed of Trust without notice or cause and to appoint a successor by an instrument in writing, duly acknowledged, in such a form as to entitle such written instrument to be recorded in the State of North Carolina; and, in the event of the death or resignation of the Trustee named in this Deed of Trust, Lender shall have the right to appoint a successor by such written instrument, and any Trustee so appointed shall be vested with the title to the Property, and shall possess all the powers, duties and obligations herein conferred on the Trustee in the same manner and to the same extent as though the successor trustee were named in this Deed of Trust as Trustee.

**NOTICES TO GRANTOR AND OTHER PARTIES.** Any notice under this Deed of Trust shall be in writing, may be sent by telefacsimile, and shall be effective when actually delivered, or when deposited with a nationally recognized overnight courier, or, if mailed, shall be deemed effective when deposited in the United States mail first class, certified or registered mail, postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender and Trustee informed at all times of Grantor's current address.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Deed of Trust:

**Amendments.** This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Annual Reports.** If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

**Applicable Law.** This Deed of Trust has been delivered to Lender and accepted by Lender in the State of North Carolina. This Deed of Trust shall be governed by and construed in accordance with the laws of the State of North Carolina.

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**Caption Headings.** Caption headings in this Deed of Trust are for convenience purposes only and are not to be used to interpret or define the provisions of this Deed of Trust.

**Merger.** There shall be no merger of the interest or estate created by this Deed of Trust with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Multiple Parties.** All obligations of Grantor and Borrower under this Deed of Trust shall be joint and several, and all references to Borrower shall mean each and every Borrower, and all references to Grantor shall mean each and every Grantor. This means that each of the persons signing below is responsible for all obligations in this Deed of Trust.

**Severability.** If a court of competent jurisdiction finds any provision of this Deed of Trust to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Deed of Trust in all other respects shall remain valid and enforceable.

**Successors and Assigns.** Subject to the limitations stated in this Deed of Trust on transfer of Grantor's interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Deed of Trust and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Deed of Trust or liability under the indebtedness.

**Time is of the Essence.** Time is of the essence in the performance of this Deed of Trust.

**Waivers and Consents.** Lender shall not be deemed to have waived any rights under this Deed of Trust (or under the Related Documents) unless such waiver is in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by any party of a provision of this Deed of Trust shall not constitute a waiver of or prejudice the party's right otherwise to demand strict compliance with that provision or any other provision. No prior waiver by Lender, nor any course of dealing between Lender and Grantor or Borrower, shall constitute a waiver of any of Lender's rights or any of Grantor or Borrower's obligations as to any future transactions. Whenever consent by Lender is required in this Deed of Trust, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required.

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS DEED OF TRUST, AND GRANTOR AGREES TO ITS TERMS.  
IN WITNESS WHEREOF ON THE DATE SHOWN AT THE BEGINNING OF THIS DEED OF TRUST.

GRANTOR:

x *Randolph S. Kraft* (SEAL)  
Randolph S. Kraft

x *Deanna D. Kraft* (SEAL)  
Deanna D. Kraft

Signed, acknowledged and delivered in the presence of:

x \_\_\_\_\_  
Witness

x \_\_\_\_\_  
Witness

INDIVIDUAL ACKNOWLEDGMENT

STATE OF North Carolina  
COUNTY OF Buncombe ) SS

I, Wilma T. Reynolds, a Notary Public for said County and State, certify that Randolph S. Kraft and Deanna D. Kraft personally came before me this day and acknowledged the due execution of the foregoing instrument.

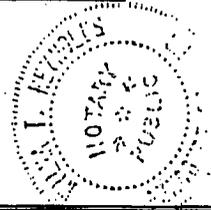
Witness my hand and Notarial Seal this the 30th day of June, 1997.

*Wilma T. Reynolds*  
Notary Public

My Commission Expires:

May 27, 2002

( Affix Notarial Seal Here )



State of North Carolina, County of Buncombe

Each of the foregoing certificates, namely of Wilma T. Reynolds

a notary or Notaries public of the State and County designated is hereby certified to be correct.

Filed for registration on this the 1 day of July, 1997 at 11:19 A. M.

*Otto W. DeBruhl*  
OTTO W. DeBRUHL  
Register of Deeds, Buncombe County

*Anne E. Jeger*  
By: Asst./Deputy Register of Deeds

## EXHIBIT A TO DEED OF TRUST

BEGINNING at a point said point being in the Southern margin of Beverly Road and being the most Northern point in Lenoir B. Moore, Jr. property as described in the Buncombe County Registry Deed Book 1369, Page 374; thence from said established beginning point the next three calls being along the Southern margin of Beverly Road: North 43 degrees 19 minutes 0 seconds West 27.88 feet, North 50 degrees 17 minutes 0 seconds West 38.09 feet, North 54 degrees 50 minutes 0 seconds West 209.48 feet; thence South 38 degrees 41 minutes 30 seconds West 99.73 feet to an iron pipe set in the Southern margin of a 10 foot soil drive; thence South 52 degrees 26 minutes 40 seconds East 144.37 feet to an iron pipe set; thence South 36 degrees 9 minutes 40 seconds East 99.0 feet to a point in the Northwest margin of Lenoir B. Moore, Jr. property as described in Deed Book 1369, Page 374; thence North 53 degrees 35 minutes 40 seconds East 135.62 feet to the point and place of BEGINNING.

OMB Approval No. 3245-0201

Expiration Date: 11-30-90

SBA LOAN NUMBER

PLP-1055574004

## SMALL BUSINESS ADMINISTRATION (SBA) GUARANTY

In order to induce The Money Store Investment Corporation, (hereinafter called "Lender") to make a loan or loans, or renewal or extension thereof, to Randolph S. Kraft (hereinafter called "Debtor"), the Undersigned hereby unconditionally guarantees to Lender, its successors and assigns, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor, made by the Debtor to Lender, dated June 30, 1997 in the principal amount of \$172,000.00, with interest at the rate of (initial) 10.750 percent per annum (Prime plus 2.500 percent). Such note, and the interest thereon and all other sums payable with respect thereto are hereinafter collectively called "Liabilities." As security for the performance of this guaranty the Undersigned hereby mortgages, pledges, assigns, transfers, and delivers to Lender certain collateral (if any), listed in the schedule at the end hereof. The term "collateral" as used herein shall mean any funds, guaranties, agreements, or other property or rights or interests of any nature whatsoever, or the proceeds thereof, which may have been, are, or hereafter may be, mortgaged, pledged, assigned, transferred or delivered directly or indirectly by or on behalf of the Debtor or the Undersigned or any other party to Lender or to the holder of the aforesaid note of the Debtor, or which may have been, are, or hereafter may be held by any party as trustee or otherwise, as security, whether immediate or underlying, for the performance of this guaranty or the payment of the Liabilities or any of them or any security therefor.

The Undersigned waives any notice of the incurring by the Debtor at any time of any of the Liabilities, and waives any and all presentment, demand, protest, or notice of dishonor, nonpayment, or other default with respect to any of the Liabilities and any obligation of any party at any time comprised in the collateral. The Undersigned hereby grants to Lender full power, in its uncontrolled discretion and without notice to the Undersigned, but subject to the provisions of any agreement between the Debtor or any other party and Lender at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

- (a) To modify or otherwise change any terms of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to Lender), to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, compromise, or settlement with respect thereto;
- (b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral, and to change the terms of any such agreement;
- (c) To forbear from calling for additional collateral to secure any of the Liabilities or to secure any obligation comprised in the collateral;
- (d) To consent to the substitution, exchange, or release of all or any part of the collateral, whether or not the collateral, if any, received by Lender upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by Lender;
- (e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as Lender may elect, at any public or private sale or sales, for cash or on credit or for future delivery, without demand, advertisement, or notice of the time or place of sale or any adjournment thereof (the Undersigned hereby waiving any such demand, advertisement and notice to the extent permitted by law), or by foreclosure or otherwise, or to forbear from realizing thereon, all as Lender in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.

The obligations of the Undersigned hereunder shall not be released, discharged or in any way affected, nor shall the Undersigned have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the Undersigned. Lender shall not be required, prior to any such demand on, or payment by, the Undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral. The Undersigned shall have no right of subrogation whatsoever with respect to the Liabilities or the collateral unless and until Lender shall have received full payment of all the Liabilities.

EXHIBIT C

**SBA GUARANTY  
(Continued)**

Loan No 11026300

The obligations of the Undersigned hereunder, and the rights of Lender in the collateral, shall not be released, discharged, or in any way affected, nor shall the Undersigned have any rights against Lender: by reason of the fact that any of the collateral may be in default at the time of acceptance thereof by Lender or later; nor by reason of the fact that a valid lien in any of the collateral may not be conveyed to, or created in favor of, Lender; nor by reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way; nor by reason of the fact that any of the Liabilities may be invalid for any reason whatsoever; nor by reason of the fact that the value of any of the collateral, or the financial condition of the Debtor or of any obligor under or guarantor of any of the collateral, may not have been correctly estimated or may have changed or may hereafter change; nor by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral, unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of Lender.

The Undersigned agrees to furnish Lender, or the holder of the aforesaid note of the Debtor, upon demand, but not more often than semiannually, so long as any part of the indebtedness under such note remains unpaid, a financial statement setting forth, in reasonable detail, the assets, liabilities, and net worth of the Undersigned.

The Undersigned acknowledges and understands that if the Small Business Administration (SBA) enters into, has entered into, or will enter into, a Guaranty Agreement, with Lender or any other lending institution, guaranteeing a portion of Debtor's Liabilities, the Undersigned agrees that it is not a coguarantor with SBA and shall have no right of contribution against SBA. The Undersigned further agrees that all liability hereunder shall continue notwithstanding payment by SBA under its Guaranty Agreement to the other lending institution.

The term "Undersigned" as used in this agreement shall mean the signer or signers of this agreement, and such signers, if more than one, shall be jointly and severally liable hereunder. The Undersigned further agrees that all liability hereunder shall continue notwithstanding the incapacity, lack of authority, death, or disability of any one or more of the Undersigned, and that any failure by Lender or its assigns to file or enforce a claim against the estate of any of the Undersigned shall not operate to release any other of the Undersigned from liability hereunder. The failure of any other person to sign this guaranty shall not release or affect the liability of any signer hereof.

THIS GUARANTY IS DATED 6/30/97.

GUARANTOR:

x Deanna D. Kraft (SEAL)  
Deanna D. Kraft

Signed, acknowledged and delivered in the presence of:

x Corbeller  
Witness

x Wilma J. Reynolds  
Witness

NOTE.—Corporate guarantors must execute guaranty in corporate name, by duly authorized officer, and seal must be affixed and duly attested; partnership guarantors must execute guaranty in firm name, together with signature of a general partner. Formally executed guaranty is to be delivered at the time of disbursement of loan.

**(LIST COLLATERAL SECURING THE GUARANTY)**

Guaranty of Deanna D. Kraft secured by Deed of Trust of FIRST priority on borrower's property located at 65 Beverly Road, Asheville, NC 28805.

See attached EXHIBIT A for legal description.

EXHIBIT A TO SBA GUARANTY

BEGINNING at a point said point being in the Southern margin of Beverly Road and being the most Northern point in Lenoir B. Moore, Jr. property as described in the Buncombe County Registry Deed Book 1369, Page 374; thence from said established beginning point the next three calls being along the Southern margin of Beverly Road: North 43 degrees 19 minutes 0 seconds West 27.88 feet, North 50 degrees 17 minutes 0 seconds West 38.09 feet, North 54 degrees 50 minutes 0 seconds West 209.48 feet; thence South 38 degrees 41 minutes 30 seconds West 39.73 feet to an iron pipe set in the Southern margin of a 10 foot soil drive; thence South 52 degrees 26 minutes 40 seconds East 144.37 feet to an iron pipe set; thence South 36 degrees 9 minutes 40 seconds East 99.0 feet to a point in the Northwest margin of Lenoir B. Moore, Jr. property as described in Deed Book 1369, Page 374; thence North 53 degrees 35 minutes 40 seconds East 135.62 feet to the point and place of BEGINNING.