

1 Joseph S. Kistler, Esq. (3458)
 Cynthia G. Milanowski, Esq. (5652)
 2 Michael S. Kelley, Esq. (10101)
 HUTCHISON & STEFFEN, LLC
 3 Peccole Professional Park
 10080 West Alta Drive, Suite 200
 4 Las Vegas, NV 89145
jkistler@hutchlegal.com
 5 cmilanowski@hutchlegal.com
mkelley@hutchlegal.com
 6 Tel: (702) 385-2500
 Fax: (702) 385-2086

7
 8 *Attorneys for Plaintiff, National Credit Union*
Administration Board, in its Capacity as Liquidating
Agent of Ensign Federal Credit Union

9
 10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF NEVADA**

12 NATIONAL CREDIT UNION
 ADMINISTRATION BOARD, in its Capacity
 13 as Liquidating Agent of ENSIGN FEDERAL
 CREDIT UNION,

14 Plaintiff,

15 v.

16 MARK B. MOODY, an individual; DAVID L.
 17 OSBURN, an individual DOES I-X, and ROE
 CORPORATIONS I-X,

18 Defendants.

) Case No: 2:11-cv-00769

) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW, AND**
) **DECISION**

19
 20 This matter came before the Court on Plaintiff National Credit Union Administration
 21 Board's, in its Capacity as Liquidating Agent of Ensign Federal Credit Union ("Plaintiff" or the
 22 "Liquidating Agent") Motion for Summary Judgment Re Defendant Osburn (Doc. # 15,
 23 hereinafter the "Motion"). The Motion was granted on March 29, 2012 (Doc. # 29). The Court
 24 having considered the papers submitted in support of, and in opposition to, the Motion and
 25 other relevant pleadings in this matter, now makes the following findings of fact and
 26 conclusions of law:

27 **FINDINGS OF FACT**

28 1. This is a breach of commercial guaranty action again Defendant Mark B. Moody
 and David L. Osburn ("Osburn").

HUTCHISON & STEFFEN
 A PROFESSIONAL LLC
 PECCOLE PROFESSIONAL PARK
 10080 WEST ALTA DRIVE, SUITE 200
 LAS VEGAS, NV 89145

1 2. Plaintiff is an independent federal agency charged with regulating federally
2 chartered and insured credit unions. On November 3, 2009, the NCUA Board placed Ensign
3 Federal Credit Union (“Credit Union”) into involuntary liquidation pursuant to section
4 207(a)(1)(A) of the Federal Credit Union Act, 12 U.S.C. § 1787(a)(1)(A). The NCUA Board
5 appointed itself as the Liquidating Agent. Pursuant to the Federal Credit Union Act, 12 U.S.C.
6 §§ 1766(d), 1766(I), 1787(a)(2), and 1789 (a)(10), the NCUA Board is authorized to appoint
7 agents to assist the Board in it duties as Liquidating Agent. As the Liquidating Agent, NCUA
8 Board succeeded to all right, title, and interest of the Credit Union by operation of law in
9 accordance with the provisions of 12 U.S.C. § 1787(b)(2)(A).

10 3. On December 11, 2007, Russell Ft. Apache Holdings, LLC (“Russell Ft. Apache
11 Holdings”) and the Credit Union entered into a “Business Loan Agreement” whereby Russell
12 Ft. Apache Holdings agreed to borrow \$255,000.00 from the Credit Union.

13 4. On December 11, 2007, Russell Ft. Apache Holdings executed a “Promissory
14 Note” whereby Russell Ft. Apache Holdings agreed to repay the amount borrowed from the
15 Credit Union per the terms of the Promissory Note.

16 5. In connection with the Business Loan Agreement and Promissory Note, Osburn
17 executed a Commercial Guaranty whereby Osburn personally guaranteed the obligations of
18 Russell Ft. Apache Holdings as set forth in the Business Loan Agreement and the Promissory
19 Note.

20 6. A “Deed of Trust” dated December 11, 2007 securing the Business Loan
21 Agreement and Promissory Note was recorded with the Clark County Recorder on December
22 14, 2007, on real property located at 5536 S. Ft. Apache Road, Las Vegas, Nevada 89148,
23 Assessor Parcel No. 163-29-410-013, and more particular described in the Deed of Trust (the
24 “Property”).

25 7. The Deed of Trust granted by Russell Ft. Apache Holdings to the Credit Union
26 was the second deed of trust recorded against the Property.

27 8. Russell Ft. Apache Holdings failed to make the required payments and defaulted
28 on its obligations under the Promissory Note and Business Loan Agreement.

1 22. Summary judgment is appropriate in this matter because when, viewing the
2 evidence and inferences in favor of the non-moving party, there are no issues of material fact in
3 dispute. Fed. R. Civ. P. 56; *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

4 23. As conceded by Osburn, “[t]he underlying elements to establish the Plaintiff’s
5 breach of contract claim are not disputed.” Accordingly, the Court concludes that Osburn is
6 liable on Plaintiff’s breach of contract claim.

7 24. Osburn argues that, beyond the principal balance owed on the Promissory Note
8 (\$255,000), he disputes the damages he owes for the breach of contract. Accordingly, the Court
9 concludes that Osburn is liable for the principal balance owed on the Promissory Note in the
10 amount of \$255,000.

11 25. Osburn disputes the interest and late fees that have accrued from the date of the
12 loan through August 22, 2011. The only evidence that he submits relevant to this issue is a
13 statement, in his declaration, asserting that “it appears to” him that the amount of accrued
14 interest is overstated by about \$5,000.00. This is insufficient to raise a triable issue of fact.
15 Accordingly, the Court concludes that Osburn is liable for accrued interest and late fees of
16 \$98,528.27 as of August 22, 2011. The Court further concludes that Osburn is further liable for
17 interest accruing at the rate of \$72.60 per day since August 22, 2011.

18 26. Osburn does not dispute that, pursuant to the terms of the Commercial Guaranty,
19 he is obligated to pay the Plaintiff’s attorney’s fees and legal expenses incurred in connection
20 with the enforcement of the guaranty. Osburn asserts, however, that Plaintiff has failed to
21 submit proof that attorney’s fees and costs were incurred in the enforcement of the Commercial
22 Guaranty. The Court concludes, however, that, as of August 22, 2011, Plaintiff has incurred
23 \$11,005.00 in attorney’s fees and \$471.54 in costs that were reasonably and necessarily
24 incurred in the prosecution of Plaintiff’s claims.

25 27. The Court concludes that Plaintiff has not met its burden of showing that it is
26 entitled to summary judgment on its claim of breach of the implied covenant of good faith and
27 fair dealing. Although Plaintiff generally sought summary judgment on its claims, its
28 memorandum in support of the motion does not address the claim for breach of the implied

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

1 covenant of good faith and fair dealing. Plaintiff's reply indicates that its claim for breach of
2 the implied covenant of good faith and fair dealing rests upon nothing more than Osburn's
3 breach of the contract. Breach of the implied covenant occurs when a party performs the
4 contract in a manner contrary to its intent or purpose, injuring another party's justifiable
5 expectations. *See Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 233 (1991).
6 Although Plaintiff has shown that Osburn failed to perform his duty under the contract, Plaintiff
7 has not shown that he performed his duty in a manner contrary to its intent.

8 ///

9 ///

10 ///

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

DECISION

Based on the foregoing, it is the Decision of the Court that Plaintiff National Credit Union Administration Board, in its Capacity as Liquidating Agent of Ensign Federal Credit Union, have Judgment against defendant David L. Osburn as follows:

In the amount of \$255,000 (the principal amount due under the Promissory Note as of August 22, 2011);

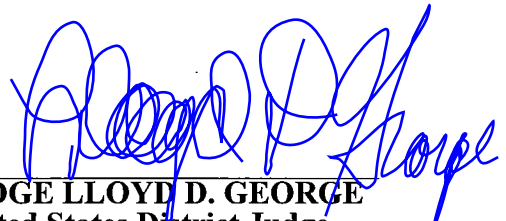
Accrued interest and late fees due as of August 22, 2011 in the amount of \$98,528.27;

Additional interest accruing at the rate of \$72.60 per day subsequent to August 22, 2011, until the outstanding balance is paid in full;

Attorney's fees as of August 22, 2011 in the amount of \$11,005.00; and

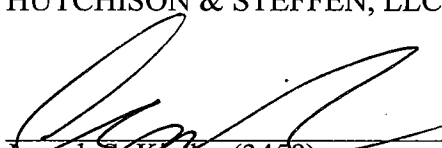
Costs as of August 22, 2011 in the amount of \$471.54.

Dated this 28 day of Nov, 2012.


JUDGE LLOYD D. GEORGE
United States District Judge

Respectfully submitted this 11th day of April, 2012 by:

HUTCHISON & STEFFEN, LLC


Joseph S. Kistler (3458)
Cynthia G. Milanowki (5652)
Michael S. Kelley (10101)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

*Attorneys for Plaintiff, National Credit Union
Administration Board, in its Capacity as Liquidating Agent of Ensign Federal Credit Union*

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145