SC#92633-6

No. 72529-7-I

THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BINGO INVESTMENTS, LLC, a Washington limited liability company, FRANCES P. GRAHAM, a single person, SCOTT BINGHAM and KELLEY BINGHAM, husband and wife, CHRISTOPHER G. BINGHAM and CHERISH BINGHAM, husband and wife, and DAVID S. BINGHAM and SHARON G. BINGHAM, husband and wife,

Appellants,

v.

MUFG UNION BANK, N.A., a national banking association,

Respondent.

ANSWER OF RESPONDENT MUFG UNION BANK, N.A., TO APPELLANTS' PETITION FOR REVIEW

RIDDELL WILLIAMS P.S.

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I. IDENTITY OF RESPONDENT

This Answer is from Respondent MUFG Union Bank, N.A. ("Union Bank").

II. CITATION TO COURT OF APPEALS DECISION

Appellants have filed a Petition for Review ("Petition") of the decision of Division I of the Court of Appeals in *Frontier Bank v. Bingo Investments*, Court of Appeals No. 72529-7, ___ Wn. App. ___, 361 P.3d 230, 2015 WL 6680234, decided on November 2, 2015.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

The only criteria that Appellants give for their Petition is RAP 13.4(b)(4). Petition at 1. That Rule provides that a "petition for review will be accepted by the Supreme Court only . . . [i]f it involves an issue of substantial public interest that should be determined by the Supreme Court." The only issue that they raise in their Petition is whether the Court of Appeals' "application of 12 U.S.C. § 1823(e)" was "overly broad" as applied to Appellants' opposition to Union Bank's summary judgment motion based on an alleged "scheme by the Lender, Frontier Bank" and "should be corrected." Petition at 1,5.

To oppose summary judgment, Appellants relied on two documents as evidence of the alleged scheme. 361 P.3d at 238 - 239.[1] These documents were signed neither by Frontier Bank nor the Appellants. So, the issue presented for review is whether "the application of 12 U.S.C. § 1823(e)" to bar consideration of two unsigned documents that purport to be evidence of a "scheme by the Lender, Frontier Bank," and that Appellants submitted in opposition to summary judgment, involves an issue of substantial public interest, and if so, whether it should be determined the Supreme Court of Washington.

IV. COUNTERSTATEMENT OF STATEMENT OF CASE

Appellants are borrowers and guarantors of indebtedness to Frontier Bank. The notes and guaranties evidencing the indebtedness were purchased from the FDIC by Union Bank. The trial court granted summary judgment in favor of Union Bank and against Appellants on the notes and guaranties. The Court of Appeals affirmed.

Both the trial court and the Court of Appeals refused to consider the two unsigned documents by which the Appellants sought to oppose summary judgment because consideration of the documents was barred by

[1] "One document on which they rely is the Declaration of Scott Switzer dated January 19, 2010. . . . The second document on which the guarantors rely to oppose summary judgment is a Frontier loan memorandum dated March 13, 2008."

(1) the Washington statute of fraud for credit agreements, RCW 19.36.110, and (2) 12 U.S.C. § 1823(e) and the *D'Oench* doctrine. 361 P.3d at 238, 241.

Appellants challenge only the Court of Appeals' decision about 12 U.S.C. § 1823(e) and the *D'Oench* doctrine. Appellants do not challenge the Court of Appeals' decision about the Washington statute of fraud for credit agreements, RCW 19.36.110. So, that uncontested decision, standing alone, disposes of the appeal even if the Petition is granted.

V. ARGUMENT

A. The Petition Does Not Involve an Issue of Substantial Public Interest

The decision of the Court of Appeals applying 12 U.S.C. § 1823(e) and the *D'Oench* doctrine applies well-settled law to the facts of this case. It does not have sweeping implications, create confusion, impact a significant segment of the population, or affect virtually all similar proceedings.

This case is unlike *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005). Review was granted there under RAP 13.4(b)(4) because the case "present[ed] a prime example of an issue of substantial public interest." 155 Wn.2d at 577. A prosecuting attorney distributed a memorandum to all county judges announcing a general policy that the prosecuting attorney

would follow regarding recommendations for drug offender sentencing. The Court of Appeals held that the memorandum was an *ex parte* communication by a public official and, as a result, the decision that had sweeping implications and broad application.

The Supreme Court discussed the factors it considered to decide that the decision by the Court of Appeals raised an issue under RAP 13(4)(b)(4) of substantial public interest that needed to be determined by the Supreme Court:

- The decision had the potential to affect every similar proceeding;
- It invited unnecessary litigation;
- It created confusion generally;
- It had the potential to chill policy decisions taken by attorneys and judges;
- It immediately affected a significant segment of the population;
- It presented a question of a public nature that was likely to recur;
- It was desirable to provide an authoritative determination for future guidance of public officials.

155 Wn.2d at 577-578.

Significant among those factors is the potential of the Court of Appeals decision to affect virtually all similar proceedings. In *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 513, 29 P.3d 1242 (2001), a petition was granted under a disciplinary rule that was the equivalent of RAP 13.4(b)(4) as involving an issue of substantial public interest. That the disciplinary decision, which had the possibility of affecting virtually all criminal proceedings, concerned whether a prosecuting attorney may offer an inducement to a defense witness to not testify at a criminal proceeding. Likewise, in *In re Marriage of Ortiz*, 108 Wn.2d 643, 646-647, 740 P.2d 843 (1987), the Court of Appeals decision, which had the potential to affect many marital dissolution and custody cases, concerned whether the use of escalation clauses and percentage of income awards was retroactive or not.

None of the factors identified in the cases cited above are present here. The Court of Appeals decision is not confusing, will not create unnecessary litigation, and does not affect a significant segment of the population or virtually all cases by lenders against guarantors. Appellants overstate the sweep of the opinion of the Court of Appeals and it certainly does not have the result "that investors, borrowers, and guarantors are . . .

left entirely without recourse when banks fail after illegal conduct." Petition at 5.

B. Even if the Petition Involved an Issue of Substantial Public Interest, it has Already Been Determined by the U.S. Supreme Court and so Does Not Need to be Determined by the Supreme Court of Washington

Appellants argue that the Petition should be granted because "[i]t is not good construction or good public policy to construe the [*D'Oench*] doctrine so broadly as to sweep in innocent guarantors who gain no benefit from an illegal scheme against the FDIC." Petition at 5. Yet, as the decision of the Court of Appeals explains, this very issue has already been decided by the United States Supreme Court and followed by the appellate courts in Washington. It does not need to be determined by the Supreme Court of Washington.

As the Court of Appeals explained at 361 P.3d at 242:

> In *Langley v. Federal Deposit Insurance Corp.*, [484 U.S. 86, 91-92, 108 S. Ct. 396, 401, 98 L. Ed. 2d 340, 347 (1987)], the Court determined whether an alleged scheme, that a borrower in default on a commercial loan claimed existed, could be asserted against the FDIC. The agency had succeeded to the failed bank's position as the holder of notes and guaranties for the loan the failed bank had made.
>
> The [U.S. Supreme] Court referred to its earlier decision in *D-Oench*. It stated:

> [This] Court held that this "secret agreement" could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. The Court stated that when the maker "lent himself to a *scheme or arrangement* whereby the banking authority ... was likely to be misled," that scheme or arrangement could not be the basis for a defense against the FDIC. We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes. Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D-Oench, Duhme*) or of the truthfulness of a warranted fact.

> Here, the guarantors assert the existence of a scheme by Frontier to mislead regulatory authorities and the guarantors regarding the guaranteed loans. But the guarantors fail to overcome *Langley*'s express holding that such alleged schemes may not be asserted under § 1823(e).

Moreover, as stated in *NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Assn.*, 64 Wn. App. 938, 943, 827 P.2d 334 (1992):

> The doctrine established in D'Oench has been codified in 12 U.S.C. § 1823(e) and expanded beyond the facts of D'Oench. An oral contract cannot be enforced against FSLIC, FDIC or its assignees even though the regulatory agency knows of the agreement before taking control. Such contracts cannot be enforced *even when a bank fraudulently induces a customer with oral representations, or when a customer is completely innocent.* (Emphasis added.)

The law is already clear. It has been determined by the U.S. Supreme Court, and applied by the appellate courts in Washington. It does not need to be determined again by the Supreme Court of Washington.

VI. REQUEST FOR ATTORNEYS' FEES

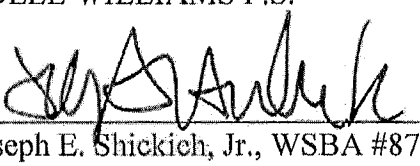
Union Bank requests its attorneys' fees in connection with its Answer to Appellants' Petition for Review. Each note and each guaranty includes an attorneys' fee clause permitting Union Bank to recover all costs and fees of the enforcement of each note and each guaranty, and this includes costs and fees on appeal. CP 611, 637, 641, 645, 658, 683, 688, 711, 715, 725, 730, 734, 738, 742. *Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290, *review denied*, 111 Wn.2d 1013 (1988).

VII. CONCLUSION

Union Bank asks the Supreme Court to deny the Petition.

RESPECTFULLY SUBMITTED this 17th day of February, 2016.

RIDDELL WILLIAMS P.S.

By 

Joseph E. Shickich, Jr., WSBA #8751
Attorneys for Respondent MUFG Union Bank, N.A.

CERTIFICATE OF SERVICE

I, Veronica Magda, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent MUFG Union Bank, N.A., in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On February 17, 2016, I served a true and correct copy of the foregoing document on the following party, attorney for Appellant, via email and hand-delivery as follows:

R. Bruce Johnston
Emanuel Jacobowitz
Johnston Lawyers, P.S.
2701 1st Ave. Suite 340
Seattle, WA 98121
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 17th day of February, 2016.

Veronica Magda

4825-5495-6588.03

RIDDELL WILLIAMS PS

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Transmittal Letter

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Court of Appeals Case Number: 72529-7

Party Respresented: Respondent MUFG Union Bank, N.A.

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- ○ Affidavit of Attorney Fees
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Comments:

Answer of Respondent MUFG Union Bank, N.A., to Appellants' Petition for Review

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