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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.

BRIEF OF RESPONDENT MUFG UNION BANK, N.A.

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I. INTRODUCTION

On April 30, 2010, the Washington Department of Financial Institutions closed Frontier Bank and appointed the Federal Deposit Insurance Company ("FDIC") as receiver for Frontier Bank to liquidate Frontier Bank and wind up its affairs. That same day, Respondent MUFG Union Bank, N.A. ("Union Bank") purchased certain assets of Frontier Bank from the FDIC.

Union Bank succeeded to the rights of the FDIC as receiver of Frontier Bank with regard to the assets purchased. This includes the rights under 12 U.S.C. § 1823(e), which codifies and expands the *D'Oench-Duhme* Doctrine, and prohibits a party from using unwritten agreements or other schemes alleged to be entered into by a failed bank as a defense against the enforcement by the FDIC or is assignee of the failed bank's loans.

Those assets include the unpaid promissory notes (each, a "Note", and collectively, the "Notes") and the "absolute and unconditional" guaranties (each, a "Guaranty," and collectively, the "Guaranties"), which contain extensive authorizations and waivers of defenses, setoffs, and counterclaims. The text found in each Guaranty making it absolute and

unconditional is attached as Appendix 1. The text providing for authorizations and waivers is attached as Appendix 2.

The assets also include the Notices of Final Agreement (each, a "Notice," and collectively, the "Notices") given under the Washington Credit Agreement Statute of Frauds, Chapter 19.36 RCW, which makes unenforceable unwritten agreements, promises or commitments to lend money, extend credit, modify credit terms, or forbear from enforcing repayment. The Notices were signed by Appellants and, consistent with RCW 19.36.140, state in bold and capital letters:

> **ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.**

The form and text of each Notice is attached as Appendix 3. The Notices signed by each Appellant are summarized on Appendix 4.

Union Bank moved for summary judgment on the Notes and Guaranties, and was awarded summary judgment against the Appellants. The judgment amount as to each Appellant is summarized on Appendix 5.

II. STANDARD OF REVIEW

This is an appeal from the Summary Judgment in Favor of Plaintiff and Against the Appellants (the "Summary Judgment"), which found that, "[p]ursuant to Civil Rule 55(c), there is no genuine issue as to any material fact" and held that "Plaintiff Union Bank is entitled to judgment as a matter of law and plaintiff's motion for summary judgment is granted." CP73-79.

Summary judgment rulings are reviewed *de novo*, and the appellate court performs the same inquiry as the trial court. *Washington Federal v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015).

> A nonmoving party in a summary judgment may not rely on speculation or argumentative assertions that unresolved facts remain, rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that precludes a grant of summary judgment.

Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 741, 261 P.3d 119 (2011) (citations omitted).

III. RESPONSE TO ASSIGNMENTS OF ERROR

Union Bank disputes Appellants' assignments of error to (a) the trial court's decision to grant summary judgment to Union Bank for the indebtedness due under the Bingo Notes against the parties who signed the

Notes and for the indebtedness due under the Bingo, Bayside and Sinclair Notes against the guarantors who absolutely and unconditionally guaranteed such indebtedness and who expressly waived all defenses at law or in equity except actual payment of the indebtedness and all counterclaims (CP 69-70, 73-79), and (b) the trial court's decision to deny reconsideration upon finding that Appellants' motion for reconsideration under CR 59(a)(9) did not specify, as required by CR 59(b), any specific reasons in fact and law "that substantial justice has not been done" and further finding no basis under CR 59(a)(9) for reconsideration of the summary judgment (CP 14-16).

IV. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are Appellants making mere allegations, argumentative assertions, conclusory statements, and speculation instead of setting forth specific facts that sufficiently rebut the trial court's finding of no material issue of fact and disclose that a genuine issue as to a material fact exists, especially when none of the Appellants themselves submitted an opposing affidavit and the only affidavit on which they rely is the January 19, 2010 Declaration of Scott Switzer that precedes the FDIC's receivership of Frontier Bank and Union Bank's purchase of the assets of Frontier Bank,

and contains testimony that is barred by 12 U.S.C. § 1823(e) and Chapter 19.36 RCW?

2. Because Appellants do not dispute that they signed absolute and unconditional Guaranties that contained extensive waivers, including the waiver of all defenses given to guarantors at law or in equity other than actual payment of the guaranteed indebtedness, are Appellants bound by the waivers and thus barred from raising the waived defenses?

3. Because Appellants do not dispute that they received and signed the notice required by the Washington Credit Statute of Frauds, RCW 19.36.130, and because Union Bank as successor-in-interest to the FDIC as receiver of Frontier Bank is protected by 12 U.S.C. § 1823(e), which codifies and expands the *D'Oench-Duhme* Doctrine, are Appellants bound by the Washington Credit Statute of Frauds and 12 U.S.C. § 1823(e) and thus barred from using unwritten agreements or other schemes alleged to be entered into by a Frontier Bank as a defense against the enforcement by Union Bank of the Notes and Guaranties?

V. STATEMENT OF CASE

A. Procedural History

On May 30, 2014, Union Bank filed its Summary Judgment motion. CP 755-782. It sought a judgment against Bingo Investments,

LLC ("Bingo") and Frances Graham as the parties who signed the Bingo Notes. It sought judgment against the other Appellants because they had signed absolute and unconditional Guaranties that contained extensive waivers, including the waiver of all defenses given to guarantors at law or in equity other than actual payment of the guaranteed indebtedness.

In support of its motion, Union Bank filed the Declaration of Guillermo Herrera with its twenty-nine authenticated Exhibits A-CC, and the Supplemental Declaration of Guillermo Herrera with its calculation of the amounts due. CP 80-84, 597-754. It also filed the Declaration of Joseph E. Shickich, Jr., with its thirty-four authenticated Exhibits A-HH. CP 85-327.

On July 21, 2014, Appellants filed their Response. CP 344-357. Appellants did not dispute the Declaration of Guillermo. None of the Appellants submitted an opposing affidavit. The only affidavit used by Appellants to oppose the Summary Judgment motion was the January 19, 2010 Declaration of Scott Switzer that precedes the FDIC's receivership of Frontier Bank and Union Bank's purchase of the assets of Frontier Bank, and contains testimony that is barred by 12 U.S.C. § 1823(e) and Chapter 19.36 RCW.

On July 30, 2014, the trial court heard oral argument and granted Union Bank's summary judgment motion and entered the Summary Judgment. CP 69, 73-79.

On September 2, 2014, the trial court denied Appellants' reconsideration motion. CP 14-16.

On October 1, 2014, Appellants filed their Notice of Appeal. CP 1-13.

B. Factual Statement

1. Undisputed Facts about Bayside Loan and Absolute and Unconditional Guaranties by David Bingham, Sharon Bingham and Christopher Bingham

Appellants have not disputed these facts. On November 15, 2006, L224-1 Bayside, LLC ("Bayside") executed a promissory note in favor of Frontier Bank in the original principal amount of $22,050,000.00, as modified by certain Change in Terms Agreements, dated November 6, 2007, March 31, 2008, and December 12, 2008, the latest of which was in the principal amount of $19,420,000.00, with a maturity date of March 31, 2009 (collectively, the "Bayside Note"). CP 600, 610-619.

On November 15, 2006, David Bingham and Sharon Bingham each executed a Guaranty in favor of Frontier Bank, "absolutely and

unconditionally" guaranteeing full payment and satisfaction of all debts ("Indebtedness") owed by Bayside to Frontier Bank.[1] CP 600, 636-642.

The Bayside Note was secured by a Construction Deed of Trust, from Bayside, as grantor, to Frontier Bank, as beneficiary, dated November 15, 2006, as modified by a Modification of Deed of Trust, dated November 6, 2007. CP 600, 621-634.

On November 15, 2006, David Bingham and Sharon Bingham as Guarantors signed a Notice for the Bayside Note. CP 601, 648-650.

On March 31, 2008, Christopher Bingham executed a Guaranty in favor of Frontier Bank "absolutely and unconditionally" guaranteeing full payment and satisfaction of all Indebtedness owed by Bayside to Frontier Bank. Cherish L. Bingham signed a spousal consent on behalf of the marital community. CP 601, 644-646.

On March 31, 2008, Christopher Bingham, David Bingham, and Sharon Bingham as Guarantors signed a Notice for the Bayside Note. CP 601, 652-653.

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[1] Each Commercial Guaranty includes the following provision:

> OBLIGATIONS OF MARRIED PERSONS. **Any married person who signs this Guaranty hereby expressly agrees that recourse under this Guaranty may be had against both his or her separate property and community property.**

On December 12, 2008, Christopher Bingham, David Bingham, and Sharon Bingham as Guarantors signed a Notice for the Bayside Note. CP 655-656.

Union Bank is the holder and in possession of the Bayside Note and the Guaranties from David Bingham, Sharon Bingham, and Christopher Bingham. CP 601.

On May 31, 2009, Bayside defaulted on the Bayside Note when it failed to pay upon maturity. CP 602.

On August 5, 2011, the Kitsap County Superior Court appointed a general receiver, pursuant to RCW 7.60 *et seq.*, to take control of Bayside with authority to market, sell, and liquidate Bayside's assets, in particular a 56-acre partially developed residential subdivision in Port Orchard, Washington (the "Bayside Property"), and apply the proceeds of a sale of the Bayside Property to the outstanding balance owing on the Bayside Note. CP 602.

The receiver listed the Bayside Property and actively marketed it, selling it in a court-approved sale. Union Bank received the net sale proceeds and applied such proceeds to the Bayside Note. CP 602. The summary judgment against David Bingham, Sharon Bingham, their marital community, Christopher Bingham, and his marital community with

Cherish Bingham, in the amount of $29,016,530.25 is for the balance remaining due and owing on the Bayside Note. CP 74.

2. Undisputed Facts about Sinclair Loans and Absolute and Unconditional Guaranties by David Bingham and Sharon Bingham

Appellants have not disputed these facts. On November 15, 2006, L198-1 Sinclair Ridge, LLC ("Sinclair") executed a promissory note in favor of Frontier Bank in the original principal amount of $12,876,500.00, as modified by certain Change in Terms Agreements, dated November 6, 2007, and March 31, 2008, the latest of them in the principal amount of $12,158,761.92, with a maturity date of March 31, 2009 (collectively, "Sinclair Note #1"). CP 602, 658-664.

Sinclair Note #1 was secured by a Construction Deed of Trust, from Sinclair, as grantor, to Frontier Bank, as beneficiary, dated November 15, 2006, as modified by a Modification of Deed of Trust, dated November 6, 2007 (collectively, the "Sinclair Deed of Trust"). CP 603, 666-681.

On November 15, 2006, David Bingham and Sharon Bingham each executed a Guaranty in favor of Frontier Bank, "absolutely and unconditionally" guaranteeing full payment and satisfaction of all Indebtedness owed by Sinclair to Frontier Bank. CP 710-716.

On March 16, 2007, Sinclair executed a promissory note in favor of Frontier Bank in the original principal amount of $113,750, as modified by a Change in Terms Agreement dated March 31, 2008 ("Sinclair Note #2"), and another promissory note in favor of Frontier Bank in the original principal amount of $227,500, as modified by a Change in Terms Agreement dated March 31, 2008 ("Sinclair Note #3").[2] CP 603, 604, 682-691.

Sinclair Note #2 was secured by a Deed of Trust, from Sinclair, as grantor, to Frontier Bank, as beneficiary, dated March 16, 2007 (the "Second Sinclair Deed of Trust"). CP 603, 692-700.

Sinclair Note #3 was secured by a Deed of Trust, from Sinclair, as grantor, to Frontier Bank, as beneficiary, dated March 16, 2007, (the "Third Sinclair Deed of Trust"). CP 603, 604, 702-709.

On November 5, 2007, David Bingham and Sharon Bingham as Guarantors signed a Notice for Sinclair Note #1. CP 604, 718-720.

On March 31, 2008, David Bingham and Sharon Bingham as Guarantors signed a Notice for Sinclair Note #1. CP 604, 722-723.

Union Bank is the holder and in possession of the Sinclair Notes and the Guaranties from David Bingham and Sharon Bingham. CP 604

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[2] Sinclair Note #1, Sinclair Note #2, and Sinclair Note #3 are collectively referred to as the "Sinclair Notes."

On March 31, 2009, Sinclair defaulted on Sinclair Notes ##1, 2 and 3 when it failed to pay upon maturity.

On August 5, 2011, the Kitsap County Superior Court appointed a general receiver, pursuant to RCW 7.60 *et seq.*, to take control of Sinclair with authority to market, sell, and liquidate Sinclair's assets, in particular the property covered by the Sinclair First, Second and Third Deeds of Trust ("Sinclair Property"), and apply the proceeds of a sale of the Sinclair Property to the outstanding balance owing to Union Bank. CP 605.

The receiver listed and actively marketed the Sinclair Property, ultimately selling it in a court-approved sale. CP 605. Union Bank received the net sale proceeds and allocated the proceeds to Sinclair Notes #1, 2 and 3. The summary judgment against David Bingham, Sharon Bingham and their marital community in the amount of $18,920,973.74 is for the balance remaining on Sinclair Note #1; $183,521.26 for Sinclair Note #2; and $365,978.61 for Sinclair Note #3. CP 78.

3. Undisputed Facts about Bingo Loans by Bingo and Frances Graham and Unconditional Guaranties by Scott Bingham, Frances Graham and Christopher Bingham

On March 31, 2008, Bingo Investments, LLC ("Bingo") executed a promissory note in favor of Frontier Bank in the original principal amount

of $2,000,000, as modified by a Change in Terms Agreement dated September 30, 2008 ("Bingo Note #1"). CP 606, 725-728.

On March 31, 2008, Bingo and Frances Graham also executed a promissory note in favor of Frontier Bank in the original principal amount of $5,500,000 ("Bingo Note #2").[3]

On March 31, 2008, Christopher Bingham, Frances Graham, and Scott Bingham each executed a Guaranty in favor of Frontier Bank "absolutely and unconditionally" guaranteeing full payment and satisfaction of all Indebtedness owed by Bingo to Frontier Bank. Kelly Bingham signed a spousal consent on behalf of the marital community with respect to the Scott Bingham Commercial Guaranty. Cherish Bingham did the same on the Christopher Bingham Guaranty. CP 606, 733-743.

On March 31, 2008, Scott Bingham, Christopher Bingham, and Frances Graham signed a Notice for Bingo Note #1. CP 606, 745-746. On September 30, 2008, Scott Bingham, Christopher Bingham and Frances Graham as Guarantors signed a Notice for Bingo Note #1. CP 607, 746. On March 31, 2008, Scott Bingham, Christopher Bingham,

[3] Bingo Note #1 and Bingo Note #2 are collectively referred to as the "Bingo Notes."

and Frances Graham as Guarantors signed a Notice for Bingo Note #2. CP 607, 750.

Union Bank is the holder and in possession of the Bingo Notes and the Commercial Guaranties from Christopher Bingham, Frances Graham, and Scott Bingham. CP 604.

On September 30, 2009, Bingo defaulted on Bingo Note #1 when it failed to repay it upon maturity. The summary judgment against Scott Bingham, his marital community with Kelly Bingham, Christopher Bingham, his marital community with Cherish Bingham, Frances Graham, and Bingo, in the amount of $3,159,562.06 is the balance remaining on Bingo Note #1. CP 75.

On March 31, 2009, Bingo defaulted on Bingo Note #2 when it failed to pay upon maturity. The summary judgment against Scott Bingham, his marital community with Kelly Bingham, Christopher Bingham, his marital community with Cherish Bingham, Frances Graham, and Bingo, in the amount of $6,124,650.90 is the balance remaining on Bingo Note #2. CP 79.

4. Because Appellants Have Focused Their Appeal on Guarantees Executed With March 31, 2008 Change in Terms Agreements, They Have Limited Their Appeal to Just the Guaranty Signed by Christopher Bingham

Appellants have tied their appeal to March 31, 2008, which they say is the date on which Frontier Bank "inveigled" and fraudulently induced them to sign Guaranties in connection with Change in Terms Agreements of the same date. Brief of Appellants at 8, 12. Yet, there was only one new Guaranty signed on March 31, 2008 in connection with a Change in Terms Agreement, and that was the one signed by Scott Bingham. CP 616-617, 644-646; *see* Appendix 5.

The other Guaranties were signed long before then, or were signed on that date but not in connection with a Change in Terms Agreement.

Date	**Item**	**Guarantor**	**CP**
11/15/06	Bayside Guaranties	David Bingham, Sharon Bingham and their marital community	600, 636-642
11/15/06	Sinclair Guaranties	David Bingham, Sharon Bingham and their marital community	604, 710-716
3/31/08	Bayside Change in Terms Agreement		600, 616-617
3/31/08	Bayside Guaranties	Christopher Bingham and his marital community	601, 644-646

3/31/08	Bingo Note and Bingo Guaranties	Bingo, Frances Graham, Scott Bingham and his marital community, Christopher Bingham and his marital community	606, 733-743

So, if Appellants' argument is measured by its focus on March 31, 2008, then the only Guaranty in question is the one signed by Christopher Bingham, and liability on the rest conceded.

VI. ARGUMENT

A. There is No Dispute That The Guaranties Are Absolute and Unconditional, with Extensive Authorizations, Representations, Warranties and Waivers by Each Guarantor.

Appendices 1 and 2 set out the text of each Guaranty, and there is no dispute about the terms of each Guaranty.

The amount of each Guaranty is "unlimited."

Each Guarantor "absolutely and unconditionally guarantees and promises to pay" to Lender the "Indebtedness" of Borrower to Lender. Each Guarantor's liability for the Indebtedness guaranteed is "unlimited" and each Guarantor's obligations are "continuing."

"Indebtedness" is similarly defined in the Guaranty to mean:

The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities or obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations, whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then

> reduced or extinguished and then afterwards increased or reinstated.

Each Guaranty contains extensive authorizations, representations and warranties by each Guarantor to Lender. Each Guarantor authorizes Lender "to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral...[and] to apply such security and direct the order or manner of sale thereof..., as Lender in its discretion may determine." Each Guarantor represents and warrants that "no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty...."

Each Guaranty contains extensive waivers. Each Guarantor waives all defenses given to guarantors at law or in equity other than actual payment of the Indebtedness, and "any and all rights or defenses based on suretyship or impairment of collateral," including but not limited to the right to require Lender to proceed first against the Borrower or against any other person, or to exhaust collateral of the Borrower or pursue any other remedy before pursuing Guarantor.

Each Guaranty provides for the waiver of all counterclaims and setoffs:

> Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter-demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

Each Guarantor knowingly makes the waivers and

> ...warrants and agrees that each of the waivers set forth above is made with the Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law.

Each Guarantor agrees that "Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender."

Each Guarantor agrees that "Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty."

Each Guaranty includes an attorney fee clause permitting Lender to recover all costs and fees of enforcing the Guaranty.

B. Each Guaranty Is Absolute and Unconditional So the Trial Court Was Correct in Enforcing It.

In each Guaranty, each Guarantor gives an absolute and unconditional guaranty of the Indebtedness of the Borrower, and acknowledges that the Guarantor's liability is unlimited and continuing. So, each Guaranty is an absolute and unconditional guaranty. *Century 21 Prods, Inc. v. Glacier Sales*, 129 Wn.2d 406, 414, 918 P.2d 168 (1996) ("An unconditional guaranty is one whereby the guarantor agrees to pay or perform a contract upon default of the principal without limitation. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform."); *Amick v. Baugh*, 66 Wn.2d 298, 303, 305, 402 P.2d 342 (1965) ("An absolute guaranty is one by which the guarantor unconditionally promises payment or performance of the principal contract on default of the principal debtor or obligor . . . . The obligation of the absolute guarantor, by his express agreement, is matured at the moment the debt is in default.")

As Washington courts mandate: "[an] absolute and unconditional guaranty should be and is enforceable to its terms. The courts are to enforce it as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent." *National Bank v. Equity Invs.*, 81 Wn.2d 886, 919, 506

P.2d 20 (1973); *Franco v. People's Nat'l Bank,* 39 Wn. App. 381, 387-88, 693 P.2d 200 (1984) (citing *National Bank v. Equity Invs.*, 81 Wn.2d at 919).

An almost identical form of guaranty to the one signed by Guarantors was recently determined to be an unconditional and absolute guaranty making the guarantor liable for the indebtedness. In *In re Croney*, 2011 WL 1656371 (Bankr. W.D. Wa. 2011) (No. 11-10836), the United States Bankruptcy Court for the Western District of Washington considered a form of guaranty virtually identical to the ones here. The Guaranties here and the Guaranty in *In re Croney* are "LaserPro" forms of guaranty. Frontier Bank used LaserPro, as did Business Bank in *In re Croney*.

In *In re Croney*, the borrower, Cowboy Campsite, was an LLC. Croney was a member of the LLC and a guarantor. The court began its analysis by quoting directly from the LaserPro Guaranty, and highlighting terms identical to those in the LaserPro Guaranties here: "Guarantor absolutely and unconditionally guarantees," "Guarantor's liability is unlimited and Guarantor's obligations are continuing," and a recitation of the same Guarantor's waivers. 2011 WL 1656371 at *1.

In holding that Croney was fully liable as a Guarantor of the borrower, Cowboy Campsite, the court explained:

> Under Washington law, a guarantee of payment of an obligation without words of limitation or condition is construed as an absolute or unconditional guarantee. In contrast, a conditional guarantee contemplates the happening of a contingent event other than default of the principal debtor as a condition of liability on the part of the guarantor. Unlike a conditional guarantee, and [*sic*] absolute guarantee imposes no duty upon the creditor to attempt collection from the principal debtor before looking to the guarantor.
>
> With an absolute guaranty, the guarantor is liable for the full amount of his guaranty upon default by the primary obligor. The guaranty in this case specifically states that it is unconditional, and goes on to specifically waive any requirement that Business Bank proceed against Cowboy, the collateral, or any of the other guarantors. The guaranty does not contain any provisions making debtor's [Mr. Croney's] liability contingent on an event other than default by Cowboy. The guaranty is clearly an unconditional or absolute guaranty under Washington law. Therefore, under Washington law, debtor is liable for the full amount of the debt guaranteed. The amount of the debt can be readily determined by reference to the Cowboy note.

2011 WL 1656371, at **2 3 (citations omitted).

Likewise, each Guaranty here is absolute and unconditional and the trial court did not err in enforcing them.

C. Each Guarantor Expressly and in Writing Waived all Defenses and Rights of Setoff and Counterclaim, So the Trial Court Was Correct in Enforcing The Waivers.

An "unconditional guarantee" precludes defenses asserted by guarantors. *Century 21 Products, Inc. v. Glacier Sales*, 129 Wn. 2d 406, 413, 918 P.2d 168 (1996); *Grayson v. Platis*, 95 Wn. App. 824, 830-31, 978 P.2d 1105 (1999) ("black letter law regarding unconditional guaranties"). As if this was not enough to impose unlimited liability, each Guarantor went further and expressly waived all defenses, setoffs and counterclaims, and warranted that these waivers are reasonable and knowingly made.

Such waivers of defenses and counterclaims are uniformly upheld and enforced by Washington courts, including on summary judgment. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 709, 409 P.2d 651 (1966) (upholding waiver of defense of release or discharge of principal obligation; "we hold that the quoted provision of the agreement constituted a full and complete waiver by the guarantors..."); *Old Nat'l Bank of Washington v. Seattle Smashers Corp.*, 36 Wn. App. 688, 691, 676 P.2d 1034 (Div. I 1984) (affirming summary judgment; upholding

waiver of consent of guarantor to grant borrower extension of time; "the language of the guaranty is dispositive" and guarantors could not complain about extension granted after they withdrew consent to future loans as they were bound by extension clause applying to original loans).[4]

Courts throughout the country, on summary judgment, have uniformly upheld these waivers of defenses and counterclaims when imposing liability on guarantors.[5]

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[4] *Grayson v. Platis*, 95 Wn. App. 824, 834, 978 P.2d 1105 (1999) (upholding waivers of right of recourse against lender and of defense based on lender's acceptance of deed in lieu); *Columbia Bank v. New Cascadia Corp*, 37 Wn. App. 737, 739-740, 682 P.2d 966 (1984) (upholding waivers of consent of guarantor to grant borrower extension of time and to release co-guarantor); *Pacific County v. Sherwood Pac., Inc.*, 17 Wn. App. 790, 800, 567 P.2d 642 (1977) (surety expressly waived right to object to time extensions for completion of tasks in underlying agreement and waived all rights to claim discharge except on satisfaction of underlying obligation).

[5] *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*, 740 F.3d 1146 (7th Cir. 2014), *aff'g summary judgment* 901 F. Supp. 1066, 1071 (E.D. Ill. 2012) (waiver of impairment of collateral; per the 7th Circuit, "[t]he guaranty couldn't be clearer;" per the District Court, guarantors "made their deal, and they must live with it. [Lender] is entitled to the benefit of its bargain, and Guarantors must bear what turned out to be the detriment of one of the terms of their bargain"); *HSH Nordbank Ag New York Branch v. Street*, 421 Fed. Appx. 70 (2d Cir. 2011), *aff'g summary judgment* 672 F. Supp. 2d 409, 418 (S.D.N.Y. 2009) ("Where a guaranty states that it is 'absolute and unconditional,' guarantors are generally precluded from raising any affirmative defense....Furthermore, a guarantor cannot assert defenses that it expressly waived in the guaranty agreement"); *United States v. Mallet*, 782 F.2d 302, 303 (1st Cir. 1986), *aff'g summary judgment* 1985 WL 5696 (D.N.H. 1985) ("The case law is replete with examples of guarantors attempting to traverse this standard-form guaranty language. The courts, however, have uniformly upheld the "waiver-of-defenses" language;" citing cases from 3rd Circuit, 4th Circuit, 5th Circuit, and 8th Circuit); *First National Park Bank v. Johnson*, 553 F.2d 599,601-602 (9th Cir. 1977) (affirming summary judgment by D. Mont.; "[t]he

The court, *In re Croney*, 2011 WL 1656371, at *1, in holding the guarantor liable for the full amount of the debt guaranteed, quoted verbatim the very same waiver language from the *Croney* LaserPro Guaranty that is found in the Guaranties here.

Guarantors have waived all defenses, counterclaims and setoffs, and the trial court did not err in enforcing the waivers and entering the Summary Judgment against Guarantors.[6]

D. Appellants' Arguments About Fraud in the Inducement and Illegality Are Factually Insufficient

Appellants make the argumentative assertion that Frontier Bank made and breached promises, representations, and agreements as a "scheme" and "cover-up" that "tricked" and "inveigled" and thereby, with

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guaranty in this case...is absolute and unconditional.... The district court correctly found that guarantors had waived their right to rely on lack of notice as a defense. The guaranty agreement unambiguously contains such a waiver"); *Sovereign Bank v. O'Brien*, 2013 WL 959301, at **1, 3-4 (D.R.I. 2013) (granting summary judgment and upholding waiver of defenses provisions in guaranty); *HSBC Realty Credit Corp. (USA) v. O'Neill*, 2013 WL 362823, at **2-4, 5 n.7 (D. Mass. 2013) (granting Rule 12(c) motion for judgment on the pleadings and dismissing guarantor's 18 affirmative defenses and 8 counterclaims as "eviscerated" by the waiver language of the guaranty); *Elmhurst Dairy, Inc. v. Van Peenen's Dairy, Inc.*, 2012 WL 1116978, at *2 (S.D.N.Y. 2012) (granting summary judgment against guarantors jointly and severally while upholding waiver of defenses provisions in guaranty).

[6] Such waivers are expressly permitted by Section 48 of the *Restatement (Third) of Suretyship and Guaranty* (1996), and "[s]uch consent, agreement or waiver, if express, may be effected *[sic]* by specific language or by general language indicating that the secondary obligor [guarantor] waives defenses based on suretyship."

"illegality," "fraudulently induced" Appellants into signing Guaranties. Brief of Appellants 8, 9, 12, 13, 14.

There are nine essential elements of fraud in the inducement, all of which must be established by clear, cogent and convincing evidence: (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage. *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d at 166. In ruling on a summary judgment motion involving fraud in the inducement, the court must view the evidence presented through the prism of the substantive evidentiary burden. *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989).

Here, Appellants have neither met this substantive evidentiary burden for all of the elements, nor have they shown them by clear, cogent and convincing evidence. None of the Appellants submitted an affidavit, and the Declaration of Switzer addresses none of the elements. CP 910-917.

The excerpts from the deposition of Steve Arrivey do not demonstrate any of the elements of fraud. Brief of Appellants at 6, 8, 10. Mr. Arrivey is a special assets officer who had no involvement with the Notes or Guaranties until after they were in default, and he repeatedly explained that he did not have knowledge about the issues. CP 550; 553, l. 19, 11; 554, l. 16; 556, l. 5; 558, l. 11, 16; 559, l. 22; 556, l. 4; 562, l. 15, 25; 563, l. 20; 567, l. 17.

In *Adams v. Allen*, 56 Wn. App. at 393, an allegation of fraud was rejected on summary judgment when there was a failure to prove each element and to do so by clear, cogent and convincing evidence. Similarly, in *Elcon Const., Inc., v. Eastern Washington University*, 174 Wn.2d at 167, the trial court on summary judgment rejected a claim of fraud in the inducement as factually insufficient when the nine elements were not established by clear, cogent and convincing evidence. "As such, there are no genuine issues of material fact and summary judgment was appropriate."

On the issue of "illegality," Appellants attached several documents to their Response in the trial court, which they called "Exhibits," including a Cease and Desist Order that the FDIC entered against Frontier Bank. CP 531-543. Appellants built their opposition to the Summary Judgment

motion on this Order by saying that it preceded their signing of the March 31, 2008 Guaranties and that this created a material issue of fact about fraud in the inducement and illegality. CP 330-334. But, Appellants made a mistake: the date of the Cease & Desist Order is March 20, 200**9**, not March 20, 200**8**. CP 543. They had their facts wrong, the timing of events backwards (the signing of the Guaranties preceded the entry of the Cease & Desist Order, not vice versa), and thus their entire opposition was faulty and without merit.

On appeal, Appellants have abandoned reliance on the Cease and Desist Order, and do not mention it. Instead, making the same argumentative assertion as they did in the trial court, they look to another document saying it creates a material issue of fact about fraud in the inducement and illegality. Attached to Appellant's Response in the trial court is the *Material Loss Review of Frontier Bank, Everett, Washington*, by the Office of Inspector General of FDIC, December 2010. CP 495-530. Appellants now refer to this document, instead of to the Cease and Desist Order, to assert and make conclusory statements about fraud in the inducement and illegality. Brief of Appellants at 4, 5, 8, 13. It is a general report prepared by the FDIC "to (1) determine the causes of Frontier's failure and the resulting material loss to the DIF [Deposit Insurance Fund]

and (2) evaluate the FDIC's supervision of Frontier..." CP 500. It does not say that Frontier Bank acted illegally. It does not discuss or even mention Appellants, the Notes, the Guaranties, Bingo, Bayside, Sinclair, Union Bank, Switzer, Centurion or Hazelrigg, and it is not evidence that Frontier Bank acted illegally toward Appellants or fraudulently induced them to sign the Notes and Guaranties.

E. Appellants Arguments About Fraud in the Inducement and Illegality Are Barred by Washington's Credit Agreement Statute of Frauds and 12 U.S.C. § 1823(e).

Appellants cannot show that the purported agreements, promises, and commitments as a "scheme" and "cover-up" that "tricked" and "inveigled" and thereby, with "illegality," "fraudulently induced" Appellants into signing Guaranties were in writing and signed by Frontier Bank. Consequently, Appellant's arguments on appeal fail under the statute of frauds and 11 U.S.C. §1823(e).

Washington's Credit Agreement Statute of Frauds provides:

> A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement, and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement. Partial performance of a credit agreement

> does not remove the agreement from the operation of this section.

RCW 19.36.110. A "credit agreement" as used in RCW 19.36.110 is defined as:

> an agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

RCW 19.36.100.[7] Frontier Bank prominently notified Appellants of the implications of the Washington Credit Agreement Statute of Frauds. As Appendix 4 shows, eleven Notices of Final of Agreement were provided to and signed by the Appellants that conspicuously stated, pursuant to RCW 19.36.140:

> **ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF**

[7] Washington's Credit Agreement Statute of Frauds codifies long-standing common law in this state. *See, e.g., Klitten v. American Sec. Bank of Kennewick*, 140 Wash. 286, 290-91, 248 P. 435 (1926) (declining to enforce bank officers' alleged oral promise); *Moore v. Kildall*, 111 Wash. 504, 507, 191 P. 394 (1920) (holding that "a contemporaneous parol agreement limiting the liability of [the maker of a promissory note] . . . is not available as a defense" to enforcement of the note).

A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

The Declaration of Scott Switzer is a prime example of the type of testimony prohibited by Washington's Credit Agreement Statute of Frauds and by the comparable federal statute, 12 U.S.C. § 1823(e).[8] CP 910-917. The Declaration consists solely of "he told me so" testimony that violates the statute of frauds:

CP	Line	Statement
911	20	"Jim Reis told me..."
911	22	"He said..."
912	5	"Mr. Reis assured us..."
912	13	"Mr. Reis stated..."
912	17	"Frontier stated..."
912	26	"Frontier responded..."
913	6	"Mr. Reis told me..."
913	10	"He stated that..."
913	25	"According to Mr. Reis..."
914	3	"Frontier agreed..."
914	7	"Frontier made it clear to me..."
914	8	"Mr. Reis told me..."
914	12	"Frontier once again stated..."
914	14	"Frontier agreed..."
914	19	"Frontier's assurances..."
914	21	"Frontier had reneged upon its agreement to forbear."

The only "writings" that the Appellants submit in support of their allegations is a spreadsheet attached as an exhibit to the Declaration of Scott Switzer and a 3/13/08 Loan Memorandum. CP 582, 917. The spreadsheet is entitled, "Credit Limits Analysis—Frontier Bank," and

[8] As Appendix 4 shows, Mr. Switzer himself received and signed five Notices of Final Agreement for the Notes.

simply provides a listing of the amounts of the various loans and the applicable borrowers and guarantors. The Loan Memorandum was an internal Frontier Bank document. Regardless of what these writings show or do not show, they are not sufficient under Washington's Credit Agreement Statute of Frauds, which provides that "[a] credit agreement is not enforceable against a creditor unless the agreement is in writing and signed by the creditor." RCW 19.36.110. Neither are signed by Frontier Bank. Neither are sufficient under 12 U.S.C. § 1823(e)(1)(B), which requires that it be signed by the bank and by each of the parties claiming the adverse interest. Neither are signed by Frontier Bank nor by each of the Appellants. So, the Switzer Declaration, its exhibit, and the Loan Memo fail under Washington's Credit Agreement Statute of Frauds and under 12 U.S.C. § 1823(e).

This is like *Cowlitz Bank v. Leonard*, 162 Wn. App. 250, 252, 254 P.3d 194 (2011), where the plaintiff bank had loaned money and a third party had guaranteed repayment. Neither the borrower nor the guarantor repaid the loan when it came due, and the bank sued the guarantor. The guarantor asserted affirmative defenses and counterclaims alleging that the bank "fraudulently induced" him into not changing banks by promising to increase the loan amounts and not call the loan due at maturity. The bank

moved for summary judgment on the guaranty and to dismiss the guarantor's affirmative defenses and counterclaims; the guarantor argued that there were material issues of fact whether he was fraudulently induced. The trial court granted the bank's motion and the guarantor appealed. Relying on RCW 19.36.110, the Court of Appeals affirmed the trial court, holding that

> The representations that [guarantor] alleges [bank] made, even if proved, would constitute oral agreements to loan money, extend credit, of forbear from enforcing repayment. As such, under RCW 19.36.110, [guarantor] cannot enforce them. The trial court did not err in dismissing his counterclaims or in granting summary judgment to [bank].

Id. at 253-54.

Likewise, as stated in *NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Assn.*, 64 Wn. App. 938, 943, 827 P.2d 334 (1992)[9]:

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[9] Cited with approval and an explanation in *Barclay Receivables Co. v. Mountain Majesty, Ltd.*, 903 P.2d 37, 41 (Colo. Ct. App. 1995):

> 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 United States Supreme Court concluded that it could not engraft an equitable exception on the plain terms of § 1823(3). The court held that an agreement that satisfies § 1823(e) prevails even if the agency did not know of it and an agreement that does not satisfy § 1823(e) fails even if the agency knew. *See Reisig v. Resolution Trust Corp.*, 806 P.2d 397 (Colo. App. 1991) (innocent victims acting in good faith are subject to *D'Oench* doctrine); *see also Federal Deposit Insurance Corp. v. Payne*,

> 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.)

In a similar case, Union Bank has already received a favorable decision based on 12 U.S.C. § 1823(e) and its codification and expansion of the *D'Oench-Duhme* Doctrine. In *Kanany v. Union Bank, N.A.*, 2012 WL 5258847 (U.S.D.C. W.D. Wa. 2012), the U.S. District Court granted summary judgment to Union Bank. The borrower, Mr. Kanany, alleged that he:

> ...had several loans outstanding with Frontier Bank when Mr. Bouchard (a former

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973 F.2d 403, 407 (5th Cir. 1992) ("the *Langley* Court destroyed the 'wholly innocent borrower' exception...."); *Baumann v. Savers Federal Savings & Loan Ass'n*, 934 F.2d 1506 (11th Cir. 1991) *cert. denied*, 504 U.S. 908, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992) (complete innocence of any intentional or negligent wrongdoing is no longer a defense); *Federal Deposit Insurance Corp. v. Galloway*, 856 F.2d 112 (10th Cir. 1988) (agency's knowledge of bank president's misrepresentation at the time it acquired notes did not prevent agency from asserting § 1823(e) as a bar to guarantors' defense of fraud in the inducement); *Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Ass'n*, 64 Wn. App. 938, 827 P.2d 344 (1992) (oral contract cannot be enforced against the assignees of the FDIC even if the agency knew of the agreement prior to taking control).

> Frontier Bank employee) made promises and assurances regarding Mr. Kanany's failure to make payments on certain loans while repaying others; required Mr. Kanany to terminate his partnership with Matt Hagwood in order to qualify for a refinance; and led him to believe that he could refinance his loans through Frontier Bank. The complaint alleges that Frontier Bank reported on a credit report that Mr. Kanany was delinquent on his loan payments, so that he could not obtain a loan from another bank; declined to refinance the loan; and refused to permit Mr. Kanany to access files so that he could develop a proposal to present to the bank.

Id. at *3 (citations omitted).

As the Court explained at *5:

> Union Bank contends that Mr. Kanany's claims are barred by the *D'Oench* doctrine and 12 U.S.C. § 1823(e).
>
> The federal *D'Oench* doctrine prohibits a party from asserting a cause of action against the FDIC or its assignees based upon unwritten agreements or other schemes alleged to be entered into by a failed bank. *Langley v. FDIC*, 484 U.S. 86, 92-93, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987). In *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), the United States Supreme Court enunciated this doctrine, which is intended to protect the FDIC and its assignees from fraudulent schemes by borrowers of failed institutions. The doctrine also protects the FDIC by allowing bank representatives to rely solely

on the records of the bank in evaluating the bank's financial condition, rather than leaving it exposed to suits founded on undisclosed conditions or deceptive documents. *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 448, 1450-51 (9th Cir. 1991).

The doctrine established in *D'Oench* was codified and expanded in 12 U.S.C. § 1823(e), as part of the Federal Deposit Insurance Act. 12 U.S.C. § 1823(e)(1) provides as follows:

> (1) In general. No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 11 [12 U.S.C. § 1821], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

> Either the FDIC or an assignee of the FDIC can assert the *D'Oench* doctrine/Section 1823 as an affirmative defense in litigation brought by a borrower who relies on oral conditions, promises, or agreements. *See Federal Financial Co. v. Hall*, 108 F.3d 46, 49 (4th Cir., 1997); *NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Ass'n*, 64 Wn. App. 938, 943-44, 827 P.2d 334 (1992). The statutory term "agreement" in 12 U.S.C. § 1823 is defined more broadly than a mere promise, and includes the "truthfulness of a warranted fact." *Langley v. FDIC*, 484 U.S. at 92-93. "Such [oral] contracts cannot be enforced even when a bank fraudulently induces a customer with oral misrepresentations, or when a customer is completely innocent." *NW Land & Investment, Inc.*, 64 Wn. App. at 944, 827 P.2d 334.

The Court granted Union Bank's motion for summary judgment in *Kanany*, and dismissed the borrower's claims on alleged agreements and purported assurances by Frontier Bank (including, as here, for breach of contract, breach of the duty of good faith and fair dealing, inappropriate lending practices, and estoppel). This case presents precisely the situation, as in *Kanany*, where courts apply 12 U.S.C. § 1823(e). The Appellants are alleging promises and agreements which 12 U.S.C. § 1823(e), by its codification and expansion of the *D'Oench, Duhme* doctrine, bar from enforcing or using to defeat recovery on loans like those on which

Summary Judgment was granted here.[10] The trial court did not err in granting Summary Judgment.

F. "As a Matter of Law, There Cannot Be a Breach of the Duty of Good Faith when a Party Simply Stands on its Rights to Require Performance of a Contract According to its Terms."[11]

Appellants assert that Frontier Bank acted "acted with a manifest lack of good faith" with respect to the Notes and Guaranties on which Union Bank was granted Summary Judgment. Brief of Appellants at 15, 16. To support this charge, Appellants cite to irrelevant provisions of law: UCC Article 3, which applies to negotiable instruments, and UCC Article 4, which applies to bank deposits collections. Brief of Appellants at 15. The UCC, which concerns personal property, these UCC Articles and the citations to 3-303 (value and consideration) and 4-401 (when bank may charge customer's account), have nothing to do with the Notes and Guaranties here that relate to commercial real property developments.

A lender like Union Bank **does not**, as a matter of law, breach the implied duty of good faith and fair dealing simply by standing on its contractual rights under notes and guaranties and requiring payment of what is owed.

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[10] Washington recognizes that the *D'Oench Duhme* Doctrine "has been codified in 12 U.S.C. § 1823(e) and expanded beyond the facts of *D'Oench*." *NW Land & Inv., Inc. v. New West Fed. Sav. & Loan Ass'n*, 64 Wn. App. at 943.

[11] *Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 47 P.2d 356 (1991).

Since *Badgett v. Security State Bank*, 116 Wn.2d 563, 47 P.2d 356 (1991), a claim of bad faith like the one that the Appellants assert has neither been recognized nor permitted under Washington law. In *Badgett*, a borrower brought an action against a bank arguing that it had a good faith duty to affirmatively cooperate in efforts to restructure its defaulted loan agreement. The Supreme Court flatly rejected this proposition. The Supreme Court said at 116 Wn.2d at 519-572 and 574:

> There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it "inject substantive terms into the party's contract". Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only connection with terms agreed to by the parties.
>
> * * *
>
> The duty of good faith implied in every contract does not exist apart from the terms of the agreement.

There is no valid claim for bad faith by the Appellants here. In seeking to enforce the Notes and the Guaranties, Union Bank is acting in good faith

and pursuant to its clear contractual right to which each Guarantor expressly agreed. As the Supreme Court said in *Badgett*:

> As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

116 Wn.2d at 570.

G. Irrelevant and Unsubstantiated Items

Appellants make the argumentative assertion that "Appellee Bank knew of the defenses at the time of its acquisition of the loans and guaranties." Brief of Appellants at 2, 10, 11. Appellants do not explain why this makes a difference, nor do they provide any authorities in support of such an argument. They provide no evidence that Union Bank, in fact, had such knowledge. But even if it did, it does not matter. Union Bank is protected by the Washington Credit Statute of Frauds and by 12 U.S.C. § 1823(e). Those statutes exist to protect the assignee of the FDIC as the receiver of a failed bank, even if the assignee has knowledge. *See* Note 8 *supra*.

Appellants also make the argumentative assertion that "the Appellee Bank paid virtually nothing for the loans in question". Brief of Appellants at 2, 10. Appellants do not explain why this makes a

difference, nor do they provide any authorities in support of this argument. It is the undisputed fact that Union Bank is the holder and in possession of the Notes and Guaranties. What Union Bank paid to acquire them is irrelevant so long as Union Bank is their holder.

Appellants refer to the Purchase and Assumption Agreement between the FDIC and Union Bank, dated as of April 30, 2010, and they say that it provides that "Loans or other assets charged off the Accounting Records of the Failed Bank prior to the Bid Valuation Date shall be purchased at a price of zero." But, this Agreement does not identify or speak particularly of the Notes or the Guaranties, and there is no evidence that the Notes or the Guaranties were purchased at a price of zero. CP 358. The "Bid Valuation Date" is defined as January 15, 2010, and it is not likely that these Notes and Guaranties were written down to zero on January 15, 2010 because they were secured by real property. CP 363. But, even if they were, it makes no difference because Union Bank is the holder of them. Appellants engage in mere allegations, argumentative assertions, conclusory statements and speculation, and these do not raise issues of material fact.

VII. REQUEST FOR ATTORNEYS' FEES

Union Bank requests its attorneys' fees in connection with this appeal. 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).

VIII. CONCLUSION

Union Bank respectfully asks this Court to affirm the trial court and uphold the Summary Judgment, and award attorneys' fees and costs to Union Bank.

RESPECTFULLY SUBMITTED this 22nd day of May, 2015.

RIDDELL WILLIAMS P.S.

By _____

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

APPENDIX 1
Text Providing for Absolute and Unconditional Guaranty

Each Guaranty states:

CONTINUING GUARANTY OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment in satisfaction of the Indebtedness of the Borrower to Lender, and the performance and the discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order, on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or a counterclaim, and will otherwise perform Borrower's obligations under the Note in Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

CONTINUING GUARANTY. THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LIABILITY UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INDEBTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME.

APPENDIX 2
Text Providing for Authorizations and Waivers

Each Guaranty states:

GUARANTOR'S AUTHORIZATION TO LENDER. Guarantor authorizes Lender, either before or after any revocation hereof, **without notice or demand and without lessening Guarantor's liability under this Guaranty, from time to time:** (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower, to lease equipment or other goods to Borrower, or otherwise to extend additional credit to Borrower; (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order or manner of sale thereof, including without limitation, any nonjudicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) to sell, transfer, assign or grant participations in all or any part of the Indebtedness, and (H) to assign or transfer this Guaranty in whole or in part.

* * *

GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender: (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the

Indebtedness or in connection with the creation of new or additional loans or obligations; (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to pursue any other remedy within Lender's power; or (F) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

* * *

Guarantor also waives any and all rights or defenses arising by reason of: (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right,

whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

APPENDIX 3
Notice of Final Agreement

NOTICE OF FINAL AGREEMENT

Borrower: **Lender:**

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

By signing this document each Party acknowledges receipt of the above notice. In addition (and not as a limitation on the legal effect of the notice), by signing this document each Party represents and agrees that: (a) The written Loan Agreement represents the final agreement between the Parties, (b) There are no unwritten oral agreements between the Parties, and (c) The written Loan Agreement may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the Parties.

As used in this Notice the following terms have the following meanings:

Loan. The term "Loan" means the following described loan:

_____

Loan Agreement. The term "Loan Agreement" means one or more promises, promissory notes, agreements, understanding, security agreements, deeds of trust, or other documents, or comments, or any combination of those actions or documents, relating to the Loan, including without limitation the following:

LOAN DOCUMENTS

_____

_____

Parties. The term "Parties" means Frontier Bank and any and all entities or individuals who are obligated to repay the loan or have pledged property as security for the Loan, including without limitation the following:

Borrower:
Guarantor:

Each Party who signs below, other than Frontier Bank, acknowledges, represents, and warrants to Frontier Bank that it has received, read, and understood this Notice of Final Agreement. This Notice is dated _____.

_____

_____

APPENDIX 4
Notices of Final Agreement

CP	Date of Notice of Final Agreement	David Bingham	Sharon Bingham	Christopher Bingham	Scott Bingham	Kelly Bingham	Frances Graham	Bingo Inv.	Scott Switzer
648-650	11/15/2006	x	x						
718-720	11/5/2007	x	x						
652-653	3/31/2008	x	x	x					x
722-723	3/31/2008	x	x						x
745-746	3/31/2008	x	x	x	x		x	x	
750-751	3/31/2008	x			x		x	x	
869	3/31/2008	x	x						x
873	3/31/2008	x	x						x
748-479	9/30/2008	x		x	x		x	x	
879	9/30/2008		x		x	x	x		
655-656	12/12/2008	x	x	x					x

APPENDIX 5
Summary Judgment (CP 73-79)

Note	**Bayside**	**Sinclair #1**	**Sinclair #2**	**Sinclair #3**	**Bingo #1**	**Bingo #2**
Amount	$29,016,530.25	$18,920,973.74	$183,521.26	$365,978.61	$3,159,562.06	$6,124,650.90
David Bingham, individually	x	x	x	x		
Sharon Bingham, individually	x	x	x	x		
Marital Community of David and Sharon Bingham	x	x	x	x		
Scott Bingham, individually					x	x
Marital Community of Scott and Kelly Bingham					x	x
Christopher Bingham, individually	x				x	x
Marital Community of Christopher and Cherish Bingham	x				x	x
Frances Graham, individually					x	x
Bingo Investments, LLC					x	x

Plus interest, fees and costs from and after July 30, 2014.

CERTIFICATE OF SERVICE

I, Veronica Magda, certify that:

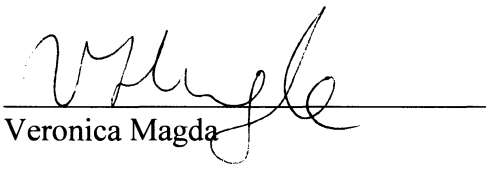
1. I am an employee of Riddell Williams P.S., attorneys for Respondent MUFG Union Bank, N.A., in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On May 22, 2015, 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
Johnston Lawyers, P.S.
2701 1st Ave. Suite 340
Seattle, WA 98121
bruce@rbrucejohnston.com

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 22nd day of May, 2015.



Veronica Magda

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