70327-7

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NO. 70327-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

KENNETH LYONS, MELANI A. LYONS, individually and the marital community thereof; ELIZABETH Y. VANDERVEEN, A MARK VANDERVEEN, individually and the marital community thereof; TODD ARRAMBIDE, KIM M. ARRAMBIDE, individually and the marital community thereof; HARLEY O'NEIL, JR., MICHELE O'NEIL, individually and the marital community thereof; the TORI LYNN NORDSTROM TRUST, a Washington state trust; and HARLEY O'NEIL, JR., Trustee for the Tori Lynn Nordstrom Trust,

Respondents.

APPELLANT UNION BANK, N.A.'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

I. ARGUMENT IN REPLY

Union Bank established in its Opening Brief three grounds for reversal of the summary judgment dismissing its claims. Each ground provides a legal reason for reversal on *de novo* review, the standard of review that all parties agree is correct. Each ground demonstrates why Union Bank can pursue a deficiency judgment against these commercial guarantors to satisfy the defaulted loan induced by their guaranties notwithstanding the nonjudicial foreclosure of the borrower's Deed of Trust. Guarantors do not dispute that the purpose of the commercial guaranties was to provide a source for repayment of the commercial loan in addition to the undeveloped property that the borrower gave as security through the Deed of Trust.

In their brief, Guarantors fail to overcome Union Bank's arguments. Guarantors raise alternative remedies that Union Bank might have pursued (such as judicial foreclosure or suit on the guaranties before the nonjudicial foreclosure) as a distraction from the unwarranted result they seek. RB 11-14. These hypothetical alternatives ignore the commercial purpose behind the Deed of Trust and Commercial Guaranties to permit nonjudicial foreclosure in the event of default, along with recovery of any deficiency from the Guarantors. Guarantors undermine these purposes in trying to escape their obligations. The loan documents

provided Union Bank the right to foreclose nonjudicially the borrower's Deed of Trust and then pursue the deficiency from Guarantors. Reversal is justified under the law and facts of the case.

In addition, Guarantors offer no legal justification for the attorney fee awards upon their untimely submissions.

A. Guarantors ignore the Deed of Trust's "Payment and Performance" provision, which shows that Union Bank's construction is correct that Guarantors' obligations are not secured.

Union Bank argued in its opening brief that when this Court reads the "Payment and Performance" provision on page two of the Deed of Trust *together with* the provision in all capital letters upon which Guarantors rely, the meaning is apparent that the Deed of Trust secures payment and performance *by Grantor*. OB 12-15. Union Bank argued that Guarantors' reading asks this Court to ignore the "Payment and Performance" provision specifying "*whose* obligations the parties intended to secure" and "does not read far enough." OB 12. Guarantors make no response. *See* RB 15-20 (discussing construction of the Deed of Trust without any response to Union Bank's argument). They continue to ignore the provision. Guarantors nowhere offer a reading of the "Payment and Performance" provision that supports their construction argument. This Court should reverse.

The Deed of Trust reads:

> **THIS DEED OF TRUST**, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, **IS GIVEN TO SECURE** (A) ***PAYMENT*** OF THE INDEBTEDNESS AND (B) ***PERFORMANCE*** OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. ***THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS***:
>
> **PAYMENT AND PERFORMANCE**. Except as otherwise provided in this Deed of Trust, **Grantor shall pay** to Lender all Indebtedness secured by this Deed of Trust as it becomes due, **and shall strictly and in a timely manner perform all Grantor's obligations** under the Note, this Deed of Trust and the Related Documents.

CP 98 (App. 5) (emphasis added). Thus, the "(A) PAYMENT" and "(B) PERFORMANCE" that the Deed of Trust "is given to secure" is subsequently explained in the "PAYMENT AND PERFORMANCE" section as that of the Grantor. One cannot read the terms "(A) PAYMENT" and "(B) PERFORMANCE" in the paragraph in all capital letters divorced from the express direction in the following paragraph that "Payment and Performance" means "Grantor" "shall pay" and "shall strictly and in a timely manner perform" all "Grantor's obligations" under any of the documents. The two paragraphs together compel the conclusion that the Deed of Trust is given to secure Grantor's obligations of payment and performance under any document "executed in connection with the

Indebtedness."[1]

"It is a well-known principle of contract interpretation that 'specific terms and exact terms are given greater weight than general language.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) (quoting 2 RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981)). Here, the "PAYMENT" and "PERFORMANCE" stated in the paragraph in all capital letters immediately is explained as the payment and performance of Grantor in the "PAYMENT AND PERFORMANCE" paragraph. This specific explanation controls the construction of what is secured, namely, payment and performance by Grantor.

Guarantors refuse to acknowledge this language. This refusal undercuts their own approach to the Deed of Trust. Guarantors themselves seek to rely on certain definitional sections of the Deed of Trust such as the definition of "Related Documents." But they ask this Court to ignore where the Deed of Trust defines "PAYMENT AND PERFORMANCE." Guarantors offer no reading of the "PAYMENT AND PERFORMANCE" paragraph that is compatible with their argument that the "Payment" and "Performance" that the Deed of Trust "is given to secure" was owed by someone other than Grantor, such as by the

[1] Related Documents includes "all documents" "whether now or hereafter existing, executed in connection with the Indebtedness." CP 103.

Guarantors. Their argument is incompatible with this paragraph. Payment and performance by others is omitted in favor of "Payment" and "Performance" *by Grantor*.

Guarantors ask this Court to read out of the Deed of Trust the words "(A) PAYMENT" and "(B) PERFORMANCE" and also to read out the paragraph "PAYMENT AND PERFORMANCE." They insist that the Deed of Trust should be read as if it stated,

> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) ~~***PAYMENT*** OF~~ THE INDEBTEDNESS AND (B) ~~***PERFORMANCE*** OF~~ ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. ~~***THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:***~~
>
> ~~**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, **Grantor shall pay** to Lender all Indebtedness secured by this Deed of Trust as it becomes due, **and shall strictly and in a timely manner perform all Grantor's obligations** under the Note, this Deed of Trust and the Related Documents.~~

But it does not. Neither does the "Payment and Performance" provision include payment and performance by any other party such as the Guarantors, such as by stating:

> **PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor and Guarantor shall pay to Lender all Indebtedness secured by this Deed of Trust as it becomes due, and shall

> strictly and in a timely manner perform all Grantor's and Guarantor's obligations under the Note, this Deed of Trust and the Related Documents.

These phrases are absent. This Court should not read them **into** the document to suit Guarantors' desired construction. The parties expressed their intent that the "Payment and Performance" obligations that the Deed of Trust secures are those of Grantor. This resolves the issue.

Guarantors erroneously direct this Court's attention to the prepositional phrases "of the Indebtedness" and "of any and all obligations under the Note, Deed of Trust and Related Documents." *See* RB 6-7, 8, 18, 19. In so doing they misread the document. The direct object of what the Deed of Trust "is given to secure" is not "Indebtedness," "Note," "Deed of Trust," or "Related Documents." The Deed of Trust does **not** say, "This Deed of Trust is given to secure the Note, the Deed of Trust and the Related Documents." Instead, the Deed of Trust states that it is given to secure "Payment" and "Performance." It then explicitly states in the immediately following paragraph that the "Payment" and "Performance" secured is that of Grantor.[2]

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[2] Guarantors continually misstate these terms when paraphrasing the Deed of Trust in their brief, such as when they assert that the "[t]he Deed of Trust expressly stated that it secured the Guarantors' obligations under the Continuing Guaranties, as 'Related Documents.'" RB 16 fn 6. Nowhere does the Deed of Trust state this. The Deed of Trust states that it is given to secure "payment" and "performance," and then describes that

Union Bank does not disagree with Guarantors that the Deed of Trust adopts a "belt and suspenders" approach. *See* RB 9. But, as the "PAYMENT AND PERFORMANCE" provision shows, it only is a "belt and suspenders" approach regarding obligations owed *by Grantor* under any documents "executed in connection with the Indebtedness" "whether now or hereafter existing."[3] The Deed of Trust secures "Payment" and "Performance" *by Grantor* under any connected document.[4]

This Court should adopt Union Bank's construction, which does not read anything out of the Deed of Trust, unlike Guarantors' construction which requires negation of the "Payment and Performance"

"payment" and "performance" as that of the Grantor. Guarantors misstate the main sentence on which they rely. This Court should reject the Guarantors' effort to rewrite the Deed of Trust.

[3] The definition of Related Documents includes "all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness." CP 103.

[4] Guarantors argue that this Court should draw no inference from the failure to include "Guaranty"—the defined term relating specifically to Guarantors' guaranties—in the Deed of Trust's definition of Related Documents. RB 18 fn 8. To the contrary, this failure further demonstrates that the parties were not concerned with Guarantors' obligations when they drafted the Deed of Trust. It is, at the very least, interesting that the parties went to the trouble to define "Guaranty," and then declined to use that term anywhere in the Deed of Trust. Whether or not the undefined term "guaranties" includes the defined term "Guaranties," is not determinative, however, because the "PAYMENT AND PERFORMANCE" provision expressly provides that *Grantor's* obligations under any connected document to "pay" and "perform" are what the Deed of Trust secures.

provision as written.

Guarantors ask this Court to attach significance to the fact that "Events of Default" in the Deed of Trust includes "Events Affecting Guarantor." RB 8, 10, citing CP 101 (Deed of Trust) and CP 95 (Note). Guarantors misunderstand the significance of this language by arguing that because the Note makes it a default *of Grantor's obligations* if anything goes wrong with the guaranties, this somehow supports their argument that the Deed of Trust secures Guarantors' payment and performance obligations. *See* RB 10. This is wrong. The Note provides that *the borrower/Grantor* is in default if a problem arises with the Guarantor, by stating, "Any of the preceding events [of default] 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." CP 95. This obligation *of the borrower/Grantor* carries into the Deed of Trust. Echoing these provisions in the Note, the Deed of Trust contains the exact same language regarding "Events Affecting Guarantor," *Cf.* CP 101 (Deed of Trust) and CP 95 (Note). The Deed of Trust thus reflects Grantor's obligations as stated in the Note. This demonstrates—again—that the Deed of Trust secures Grantor's obligations.

Union Bank agrees with Guarantors that all the documents, including the Guaranties, should be read together for purposes of

construction. *See* RB 10-11, 16-17 citing *Kenney v. Read*, 100 Wn. App. 467, 474, 997 P.2d 455 (2000). Union Bank also agrees that the Notice of Final Agreement listed documents related to the loan transaction including the Commercial Guaranties. *See* RB 9 citing CP 111-12. Clearly, the documents should be read together. When they are, they prove Union Bank's point.

First, this Court should be convinced by the **lack** of a provision in the Commercial Guaranties equivalent to the provision in the Note specifying that the Note is secured by the Deed of Trust. The lack of an equivalent provision in the Commercial Guaranties demonstrates that the parties had no intent that the Deed of Trust secure *Guarantors'* performance and payment obligations under their Commercial Guaranties, or they would have said so in the Commercial Guaranties. [5]

Second, the resolutions executed by the LLCs demonstrate the intent only to secure the obligations of the borrowers. *See* OP 15 citing CP 113-16. The resolutions authorize the use of Company property "as security" for "indebtedness of the Company." These resolutions do not authorize the use of Company property as security for obligations of

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[5] Though not necessary to draw the appropriate inference, this Court also has the uncontroverted testimony of Frontier Bank Vice President Wilma Snider that as a matter of commercial practice, Frontier Bank reflected when an instrument was secured by collateral. CP 304 ¶ 8.

anyone else. Guarantors ask this Court to accept the fiction that Frontier Bank chose to secure Guarantors' performance with the Deed of Trust. If this were so, one would expect the contemporaneous resolutions to reflect that deliberate choice. They do not. This further illustrates the parties' intent that the Deed of Trust secures only Grantor's obligations.

Guarantors make no response to either argument. Guarantors simply ignore these two critical pieces of context evidence. *See* RB 15-20 (discussing construction of Deed of Trust without any response to arguments). This compelling evidence supports reversal on the ground that the Deed of Trust does not secure the Guarantors' obligations.

The context evidence overall strongly favors Union Bank's construction, which makes sense of the parties' expressions of intent and the circumstances of this commercial transaction. Guarantors—who admitted to never reading the documents and who did not dispute any testimony by Wilma Snider—offer no context evidence to undermine the reasonable construction offered by Union Bank that harmonizes the documents. This Court should reject Guarantors' after-the-fact, opportunistic construction that is inconsistent with the language in the Deed of Trust, unsupported by the contrasts between the Note and the Commercial Guaranties, and unreasonable based on the commercial purposes of the transaction.

No party argues that the Deed of Trust is ambiguous. Guarantors attempt to assert that, if the Deed of Trust is ambiguous, they should benefit from the rule of *contra proferentum,* or "construe against the drafter." RB 17 fn 7. This assertion fails. Their authority does not support application of the rule to benefit nonparties to a document. The Deed of Trust is between the lender, the Trustee, and the Grantor LLCs. None of their authority holds or even suggests that a stranger to the document receives the benefit of construction. *See id.*, citing *Sprague v. Safeco Ins. Co. of America*, 174 Wn.2d 524, 528, 276 P.3d 1270 (2012); *Puget Sound National Bank v. Dept. of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Morse Electro Products Corp. v. Beneficial Industrial Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978); *Sunset Oil Co. v. Vertner*, 34 Wn.2d 268, 276, 208 P.2d 906 (1949).[6] Guarantors correctly argue that Union Bank as assignee steps into the shoes of Frontier Bank. *Id.* This Court need not apply the doctrine of *contra proferentum* because the plain language and context evidence show that the Deed of Trust secures the payment and performance obligations of Grantor only. Even if this Court perceived ambiguity, Guarantors have not established their right as strangers to the Deed of Trust to benefit from the doctrine of *contra*

[6] Guarantors do not dispute, and in fact offer authority correctly demonstrating, that Union Bank as assignee steps into the shoes of Frontier Bank as a party to the document. RB 17 fn 7.

proferentum.

The Michigan appellate case cited by Guarantors has no relevance or persuasive value. *See* RB 20, citing *Greenville Lafayette, LLC v. Elgin State Bank*, 296 Mich. App. 284, 818 N.W.2d 460 (2012). Michigan does not follow the context rule like Washington does. In Michigan, "[o]nly when the terms of a contract are so ambiguous that the parties' intent cannot be understood merely from examining the written document is extrinsic evidence admissible to show the intent of the parties at the time they entered into the contract." *Truck Center Corp. v. Gen. Motors Corp.*, 67 Wn. App. 539, 544, 837 P.2d 631 (1992) (citing *Glenwood Shopping Ctr. Ltd. P'ship v. Kmart Corp.*, 136 Mich. App. 90, 99, 356 N.W.2d 281 (1984)). Thus, the *Greenville* court did not even consider the relevant provision in the context of the rest of the loan documents or the intent of the parties when entering into the overall loan transaction. *Greenville Lafayette*, 818 N.W.2d at 465 (making its determination "[o]n the basis of the plain language of the mortgage . . .").

The case also arises in a different procedural posture (a suit by the borrower to enjoin foreclosure) and depends on application of Michigan's "one action" rule, not an anti-deficiency rule. *Greenville Lafayette*, 818 N.W.2d at 463. The *Greenville* case has been distinguished on this procedural ground by other courts. *See In re Kaid*, 472 B.R. 1, at *12

(Bankr. E.D. Mich. 2012). This Court is not bound by the Michigan court's construction of those parties' agreements, which are not before this Court. This Court must construe the parties' contracts and their legal effect under Washington law.

Guarantors' argument rests solely on the fact that "Related Documents" includes guaranties. But this does not justify the result that they desire. The Deed of Trust is plain that only payment and performance by Grantor—under any document connected to the Indebtedness—is secured. This Court should hold that the Deed of Trust does not secure Guarantors' payment and performance obligations under their guaranties.

B. Guarantors' unworkable interpretation of Subsection (10) of the Deed of Trust Act contradicts other provisions and misunderstands the *quid pro quo* upon which the legislature premised any bar against deficiency judgments

Guarantors' arguments concerning the Deed of Trust Act are equally unavailing. Union Bank explained in its opening brief that, even if the Court construes the Deed of Trust to secure Guarantors' payment and performance obligations under their commercial guaranties, the Deed of Trust Act at RCW 61.24.100(3)(c) affirmatively permits a deficiency against Guarantors. *See* OB 20-21. If the Court interpreted Subsection (10) to bar this action as Guarantors urge, Subsection (10) would conflict with Subsections (3)(a), (3)(c) and (6). *See* OB 21-27. Guarantors' argument

fails to make sense of the statute, and contravenes legislative intent. This Court should reject it and reverse.

Guarantors first err when they raise the *quid pro quo* upon which the legislature premised the deficiency bar. *See* RB 21. Guarantors misapprehend the *quid pro quo*. Their error demonstrates why the result they seek is not the one the legislature intended as a matter of policy. Guarantors cite *Thompson v. Smith*, 58 Wn. App. 361, 793 P.2d 449 (1990), and *Donovick v. Seattle-First Nati'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1998), both of which expressly describe the *quid pro quo* "between lenders **and borrowers**." (emphasis added). Guarantors are **not** "borrowers." They are not, therefore, part of the compact between the lender and the borrower that led the legislature to allow a nonjudicial foreclosure in exchange for barring a deficiency against a borrower. In their Brief, Guarantors recite that debtors "relinquished their right to redeem the property within one year after foreclosure sale, as well as the right to judicially-imposed upset price." RB 21 citing *Thompson*, 58 Wn. App. at 365. This is true in this case only as to Grantors East Creek and Shoreline. They offered the property, and they gave up these rights. The statute, therefore, bars a deficiency against East Creek and Shoreline.

Guarantors, on the other hand, did **not** offer the property. They did not give up any rights in exchange for the benefit of a deficiency bar. The

quid pro quo addressed in the *Donovick* and *Thompson* cases is between the lender and the borrower who offers the property. It has no application to these Guarantors. Further, the Deed of Trust Act gives the Guarantors the right to establish in these proceedings the fair value of the property. *See* RCW 61.24.100(5). A bar on a deficiency against these Guarantors, therefore, is unjustified and incompatible with legislative intent because these Guarantors have relinquished nothing in exchange for the bar.

Also, the legislature did create a limited deficiency bar that benefits a guarantor, but only when that guarantor—like a traditional borrower—offers property as security. *See* OB 20-21, citing RCW 61.24.100(6). Only in that circumstance—a circumstance expressly addressed by the legislature—does a guarantor participate in any *quid pro quo* and receive the benefit of a partial bar. But where, as in this case, the Guarantors have not given up anything, the Guarantors remain subject to a full deficiency judgment as expressed at Subsection 3(c).

Guarantors' argument that Subsection (10) bars this deficiency action, *see* RB 24-34, also is wrong because it defies the structure of the Deed of Trust Act. Guarantors would have this Court find that Subsection (3)(c) is an exception to Subsection (1), Subsection (6) is an exception to Subsection (3)(c), and then Subsection (10) is an exception to (6) and (3)(a). This convoluted construction makes no sense. At other times

Guarantors argue that Subsection (10) is the "general rule" and Subsection (6) is "a limited exception" to it. *See* RB 30. Guarantors never explain why the legislature would place the supposed "general rule" at the end of the statute. The reading of Section (10) urged by Guarantors conflicts with what Subsection 3(a)—as to borrowers—and Subsection (6)—as to guarantors—permit: deficiencies for a defaulted debt notwithstanding the fact that a Deed of Trust securing that debt was nonjudicially foreclosed. Guarantors' construction, therefore, is wrong.

Guarantors argue that this Court should draw no conclusion from the fact that Subsection (10) is worded permissively and not as a bar, because that would "allow [] lenders to bring deficiency actions against guarantors whose obligations were secured by the non-judicially foreclosed deed of trust, and also against guarantors whose obligations were not secured." RB 26-27. But this *is* precisely what the legislature intended. This is apparent from Subsection (3)(c), which permits deficiencies against commercial guarantors, and Subsection (6), which limits the deficiency—yet still permits it—when the guarantor secured its guaranty with property offered by the guarantor. In *both* situations a deficiency still is permitted. And, a deficiency still is permitted against a borrower under Subsection 3(a) in limited amounts even when the borrower's obligations were secured by a deed of trust that was

nonjudicially foreclosed. Guarantors' view of Subsection (10) is wrong. It conflicts with Subsections 3(a), 3(c) and (6).

To support their flawed reading, Guarantors insist on describing Subsection (10) as addressing "deficiency judgments." *See, e.g.,* RB 28 (discussing Subsection (10) as if it referred to "a deficiency judgment" or "a post-sale deficiency claim"). Union Bank already demonstrated that Subsection (10) does not. *See* OB 22 (showing that Subsection (10) nowhere refers to "deficiency judgment"). Though Guarantors continually add the phrase "deficiency judgment" to their restatements of the statute, this Court should observe as an indication of legislative intent that Subsection (10) nowhere uses those words.

Guarantors urge this Court to construe the Deed of Trust Act "against lenders." RB 24-25, citing *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013), *citing Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007). This is misleading. These cases in fact support construction in favor of "a borrower." Guarantors are not borrowers. The construction preference stated in *Schroeder* and *Udall* does not apply to them.

Guarantors tacitly acknowledge that their construction of the Deed of Trust Act suffers from inherent contradictions. *See* RB 29 ("Certainly the legislature could have been clearer in articulating how all the parts of

RCW 61.24.100 fit together.").

While the legislative history provides no certain answer, this Court should agree with Union Bank that if Subsection (10) is the "general rule" or has the broad impact Guarantors assert, the official legislative history likely would have offered some hint of that. But it does not. *See* OB 24-27, citing H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998). Guarantors do not cite any legislative history. They instead attempt to rely on a 1998 WSBA newsletter, which does not purport to demonstrate legislative intent. *See* RB 31. Their attempt, moreover, to connect their quoted paragraph to Subsection (10) fails. The paragraph they quote in fact relates not to Subsection (10) but to Subsection (6), as follows:

> Finally, as long as the guarantor is not a borrower, the guarantee itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guarantee to the same extent a borrower's liabilities are terminated by a trustee's sale. However, if the foreclosed property is the guarantor's principal residence, the guarantor has the first right to the sales proceeds in an amount equal to the homestead exemption, which, under RCW 60.13.030, is the lesser of $30,000 or the guarantor's equity in the property.

RB 31 citing Fielden, Craig, WSBA *Real Property, Probate & Trust*, "An Overview of Washington's 1998 Deed of Trust Act Amendments" (Summer 1998) (Appendix B to Respondent's Brief). The paragraph

plainly is drawn from Subsection (6) and the limited deficiency permitted against a guarantor who grants "a deed of trust to secure its guaranty," as stated in Subsection (6), which reads:

> (6) A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. If the deed of trust encumbers the guarantor's principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.

RCW 61.24.100(6). The newsletter tracks the contours of Subsection (6), illustrated by the discussion regarding the guarantor's principal residence and the homestead exemption benefitting a guarantor. The relationship between the quoted paragraph and Subsection (6) shows that the author did not foresee Guarantors' present day argument regarding the meaning of Subsection (10). This secondary source offers no persuasive support for Guarantors' position.

Finally, Guarantors references to *Beal Bank* and *Glenham v. Palzer* are unavailing. *See* RB 32, citing *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 550, 167 P.3d 555 (2007) and *Glenham v. Palzer*, 58 Wn. App. 294, 298, 792 P.2d 551 (1990). These cases are not analogous. They do not concern guarantors. The legislature amended the Deed of Trust Act in

1998 to resolve the question that the courts had refused to answer whether a guarantor remained liable on a guaranty after a nonjudicial foreclosure. The legislature demonstrated at Subsection (3)(c) of the revised statute that the answer to this question for commercial guarantors unequivocally was "yes." It also provided a limited deficiency at Subsection (6) in circumstances where a guarantor granted its own deed of trust, thereby participating in the *quid pro quo*. Subsections (3)(c) and (6) establish that Union Bank's action for a deficiency against Guarantors is proper.

C. Guarantors' waivers remain enforceable under the common law and are unaffected by the Deed of Trust Act and recent Supreme Court decisions.

As a third ground for reversal, Union Bank argued that Guarantors' waivers of their anti-deficiency defense are enforceable. *See* OB 27-32. Guarantors' seek to defend the trial court's refusal to enforce the waivers by ignoring longstanding common law and expanding the Supreme Court decisions *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 107-08, 285 P.3d 34 (2012) and *Schroeder, supra,* beyond their scope. *Bain* and *Schroeder* do not control. In this commercial context, and based on case law not overruled by *Bain* and *Schroeder* or supplanted by the Deed of Trust Act, the waivers are enforceable.

This Court should reject Guarantors' argument against having waived any anti-deficiency defense. Ironically, their argument begins with

the assertion that Guarantors "did not understand the meaning of the term 'anti-deficiency'" in the waiver. RB 34. Given that Guarantors testified that they never bothered to read the documents at all, CP 126 ¶ 7 (Elizabeth Vanderveen); CP 145 ¶ 7 (Todd Arrambide), this Court should reject their position that their lack of comprehension at the time justifies vitiating the waivers. The waivers were plain and unambiguous, as Union Bank already demonstrated. *See* OB 27-28.

Union Bank demonstrated that Washington law recognizes waivers by guarantors, and that neither the Deed of Trust Act nor the decisions in *Bain* and *Schroeder* changed this law. OB 29-32. Where a main purpose of the 1998 revisions, moreover, was to establish the right to obtain deficiencies against guarantors notwithstanding nonjudicial foreclosure, such an outcome is not against the public policy of the Act. Guarantors again retreat to their flawed understanding of the *quid pro quo* to justify the result they seek, *see* RB 38, failing to recognize that they have given up nothing in exchange for denying Union Bank a remedy against them.

In this multi-million dollar commercial transaction, the commercial parties had the right to waive anti-deficiency protections. The Supreme Court in *Schroeder* specifically acknowledged that a person can ordinarily waive "rights or privileges," and distinguished such waivers from its holding that procedural requisites to a Trustee's Sale may not be waived

precisely because they "are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Schroeder*, 177 Wn.2d at 107. The waivers in this case do not impact a trustee's power to foreclose without judicial supervision. To the contrary, this case does not implicate any acts by the trustee, nor any authority of the trustee. Consistent with *Schroeder*, this Court can enforce these Guarantors' waivers of their "rights or privileges."

D. Guarantors offer no legal authority to sustain their fee awards premised on untimely filings.

Guarantors moved for attorney fees beyond the ten-day period established by CR 54(d)(2). The trial court should have denied the tardy requests for fees and expenses. OB 32-36. This ground for reversal is simple despite Guarantors' attempt to make it complex. Guarantors offer no authority for affirmance. This Court should reverse the fee awards.

Guarantors seek to defend the fee awards by asking this Court to rewrite CR 54(d)(2) to add the words "*entitlement* to fees" and require only that a party's "entitlement" to fees be "established" within ten days of judgment. RB 40. But CR 54(d)(2) says nothing of the sort. It requires that "the claim" to the fees be "filed" within ten days of judgment. Guarantors cannot dispute that their fee applications did not meet this requirement.

In response Guarantors discuss when the trial court should "complete the process of quantifying" the fee award. RB 40. This

discussion is irrelevant, misperceiving the rule and Union Bank's objection. The rule does not require quantification by a date certain. The rule is not a limit on *trial court* action. In fact, although the trial court was not asked to and did not in this case, the trial court can extend the time limit. *See* CR 54(d)(2) ("Unless otherwise provided by statute or order of the court . . . ."). The rule provides a time limit *on parties* to file any claim for fees. It simply requires that the fee claims be "filed" within ten days. This Court should enforce CR 54(d)(2) as written.

Guarantors admit that they chose to bifurcate their claim for fees into a two-step process, asking first that the Court rule on their right to fees in the summary judgment motion, but not including the actual amounts sought in that motion. RB 39-40. This was their strategic choice. Simply because they chose to proceed this way does not excuse their subsequent failure to file their claims (their "second step") within ten days of the judgment.

The rules do not provide, nor do Guarantors offer any authority, that the filing of a motion for reconsideration by either party impacts CR 54(d)(2).

Moreover, while the record shows that Guarantors' counsel's staff had *ex parte* communications with court staff about *noting* their fee applications, *see* RB 41 citing CP 432, this also is irrelevant. Guarantors

grossly misrepresent these *ex parte* communications when claiming to this Court that these *ex parte* communications should be construed as the judge "effectively" granting an extension in this case "by directing that the attorney fee applications would not be heard until at least May 6, 2013." RB 40.[7] Guarantors' argument distorts the facts. The record shows that the judge never ordered any extension of the deadline to file fee applications. CP 499-502; 539-41. The trial court awarded the fees on the erroneous basis urged by Guarantors that "[t]he 10-day time period set forth in Civil Rule 54(d)(2) does not apply" "because the Court has already ruled on defendants' entitlement to attorney's fees as part of its April 10, 2013 Summary Judgment Order." CP 541 at Conclusion of Law 3. The trial court misconstrued the rule.

Acceptance of this incorrect construction would undermine the purpose of the rule to establish an outer limit on filing claims for fees. Guarantors' interpretation fails to promote the finality of the trial court proceedings that the rule is intended to secure.

It cannot be correct that a party who obtained a ruling recognizing

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[7] Guarantors also assert without citation that the *ex parte* emails with court staff regarding the note date "were passed on to other counsel." RB 41. Union Bank had no notice of these *ex parte* communications and learned of them when Guarantors revealed them in reply to Union Bank's objection that the fee applications were untimely under CR 54(d)(2). CP 432-33. The emails are irrelevant.

their legal theory to support fee recovery—like Guarantors here—can wait indefinitely to file their claims for the amount.[8] Yet that is what Guarantors ask this Court to hold. The Court should not construe CR 54(d)(2) as Guarantors request. Guarantors did not comply with CR 54(d)(2). This Court should reverse the fee awards.

II. CONCLUSION

This Court should reverse summary judgment on any of the three legal bases Union Bank presents. These commercial parties bargained for nothing less than the remedy Union Bank pursues in this action.

This Court also should give CR 54(d)(2) its proper effect by reversing the untimely attorney fee and expense awards.

Respectfully submitted on this 21st day of November, 2013.

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[8] CR 54(d)(2) works with RAP 2.4(g), which provides that an appeal from a decision on the merits of case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits. These rules require a timely resolution of fee issues outstanding at the time of final judgment to prevent the filing of fee applications weeks, months or even years after final judgment.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, I caused to be served *via E-mail (per the Stipulated Agreement)* the foregoing APPELLANT UNION BANK, N.A.'S REPLY BRIEF on the following parties at the following addresses:

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