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NO. 63321-0-I

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

MKA REAL ESTATE OPPORTUNITY FUND I, LLC a California
limited liability company; MKA CAPITAL GROUP ADVISORS, LLC, a
California limited liability company; MICHAEL A. ABRAHAM, an
individual; and JASON SUGARMAN, an individual,

Appellants,

v.

FREESTONE CAPITAL PARTNERS L.P.; FREESTONE LOW
VOLATILITY PARTNERS LP; FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.; and FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is, or should be, a simple commercial collection case.

Through a series of nine Secured Promissory Notes (the “Notes”), MKA Real Estate Opportunity Fund I, LLC (“MKA”) borrowed \$30 million from a group of affiliated Seattle-based limited partnerships collectively referred to as “Freestone.” MKA defaulted on its payment obligations, and Freestone filed suit to collect the amounts owing on the Notes from Michael Abraham and Jason Sugarman (the “Guarantors”), two principals who “unconditionally guarant[eed]” the “immediate” payment of all amounts owed by MKA.

The Guarantors visited Washington, placed calls to Washington, sent numerous documents (including their personal guarantees) to Washington, requested extensions on those obligations, and assumed obligations directly to the Washington lenders for the Guarantors’ personal benefit. In their agreements, the parties expressly and repeatedly selected Washington law, and they agreed that the prevailing party would be awarded fees in any suit “aris[ing] out of” or “relat[ed]” to the Notes, obligations which the Guarantors expressly affirmed in a series of Note Extension Agreements. On this unremarkable record, the Superior Court, the Honorable James Rogers, entered Judgments against the Guarantors

for the principal and interest owing, as well as the fees incurred in collecting on the obligations arising out of the Notes.¹

As below, in this appeal, Appellants assert a series of spurious arguments in order to delay their plain obligations under the agreements they signed. As Judge Rogers properly concluded after scrutinizing the record, Appellants' arguments are without merit: Guarantors knowingly did business in and directed to the State of Washington over the course of years; the parties purposefully and repeatedly selected Washington law; there is no "necessary" party missing from these proceedings; the action was not in violation of a Subordination Agreement which expressly reserved to Freestone the right to collect from the Guarantors; and the prevailing party, Freestone, was entitled to fees. None of this was, or is, in genuine dispute. The trial court's rulings were correct in all respects, and the Judgments entered below should be affirmed with an award of the additional fees and expenses incurred in this ongoing folly.

¹ In addition, as part of the final Judgments, the Appellants were ordered to comply with their contractual reporting obligations to Freestone. Aside from the Guarantors' jurisdictional arguments, Appellants do not appear to assign error to this relief, including the temporary restraining order and subsequent preliminary injunction which were entered against Appellants.

II. STATEMENT OF THE CASE

A. The Parties

Respondents Freestone Low Volatility Qualified Partners LP, Freestone Capital Qualified Partners L.P., Freestone Low Volatility Partners LP, and Freestone Capital Partners L.P. (collectively referred to as “Freestone”), are limited partnerships based in Seattle, Washington. CP 335-36 (¶¶ 4-8). Freestone Capital Management LLC is the investment advisor to all of the Freestone partnerships (collectively referred to as “Freestone”). CP 335 (¶ 3). Freestone’s offices are at 1191 Second Avenue in downtown Seattle, and all of the Freestone’s books and records are maintained at that location. CP 335-36 (¶¶ 4-8).

The Guarantors, Abraham and Sugarman, each own a 50% interest in defendant MKA Capital Group Advisors, LLC (“MKA Advisors”), a limited liability company based in Newport Beach, California. CP 258, 260 (Abraham Dep., 10:2-5; 18:17-22). MKA Advisors manages MKA Opportunity Fund I, LLC (“MKA”), CP 257 (Abraham Dep., 7:14-9:15), an investment fund which is in the business of providing financing to developers of commercial and residential real estate projects in various locations throughout the country. CP 259 (Abraham Dep., 17:4-11); 346-52. MKA Advisors (and thus Abraham and Sugarman) receive a share of the profits of MKA. CP 260 (Abraham Dep., 18:25-19:14).

B. Appellants' Relationship with Freestone and the State of Washington

In 2004, Freestone began corresponding with John Stewart, a “third party marketer” who was used by MKA to raise funds, usually in exchange for a fee. CP 336 (¶ 11); 282 (Sugarman Dep., 8:5-9:5). Stewart sent Freestone a variety of materials regarding MKA’s business, and he introduced Freestone to MKA’s President, Jason Sugarman. CP 336 (¶¶ 11-12) and CP 344-70.

Sugarman traveled to Washington in August 2004 for the purpose educating Freestone on MKA and its business, although Sugarman apparently now does not recall making the trip. CP 336 (¶ 13) and CP 393-94 (contemporaneous notes of meeting the Sugarman “at FCM”); *see* CP 284 (Sugarman Dep., 15:12-19). Negotiations ensued, and beginning in 2004, certain Freestone entities entered into a lending relationship with MKA. CP 337 (¶ 15). Advances to MKA were evidenced by promissory notes that were initially prepared by MKA’s counsel and then sent to Freestone in Washington by Sugarman. CP 336 (¶ 12); *e.g.*, CP 376-383. As part of the original advances, Abraham agreed to personally guarantee MKA’s obligations. CP 337 (¶ 15).

Over the following years, Freestone loaned more than \$30 million to MKA at the request of MKA and its managers, Abraham and

Sugarman. CP 337-38 (¶¶16, 18). Freestone was one of only three or four lenders tapped by MKA since 2005. CP 262 (Abraham Dep., 27:8-20). Abraham and Sugarman visited Freestone in Seattle in May of 2006 around the time that the first of the promissory notes at issue in this litigation were executed. CP 205 (Sugarman Dec., ¶ 10); CP 208 (Abraham Dec., ¶ 3); CP 341 (¶ 29). The record is replete with evidence of the Guarantors' extensive correspondence and many calls to Freestone at its Seattle offices during a period stretching from 2004 into 2008. CP 283 (Sugarman Dep., 12:2-21); CP 285 (18:14-19) ("if we needed short term money we'd call" Freestone in Seattle); CP 336-341; CP 385-395; CP 496-503.

Each of the advances to MKA commencing in May 2006 was evidenced by a Secured Promissory Note that was personally and "unconditionally guarantee[d]" by either Abraham alone, or by both Abraham and Sugarman. CP 629-664.² The Notes were drafted by MKA's counsel, CP 263 (Abraham Dep., 32:9-15), although Freestone insisted that the documents provide for the application of Washington law. CP 337 (¶17).

² There are multiple copies of the various contracts throughout the Clerk's Papers as they were offered in connection with different motions. A complete set of the nine Notes is found at CP 629-664, and copies of the other contracts follow at CP 665-734. For consistency, Freestone will cite to these copies.

Each of the Notes and subjoined guarantees included the following language:

10. This Note is governed by the laws of the State of Washington, without regard to the choice of law Rules.

...

15. It is the intention of Maker and Lender to conform strictly to the usury laws now or hereafter in force in the State of Washington, and any interest payable under this Note shall be subject to reduction to the amount not in excess of the maximum non-usurious amount allowed under the usury laws of the State of Washington as now or hereafter construed by the courts having jurisdiction over such matters.

E.g., CP 631, 632.

As additional security, MKA (through either Abraham or Sugarman) also executed Security Agreements granting security interests in substantially all of its assets to Freestone to secure the amounts due under the Notes. CP 337 (¶¶ 16-17) and CP 720-725. Each of the Security Agreements contained the following terms:

3. **Choice of Law; Unenforceability.**
This Agreement shall be construed in accordance with and governed by the local laws (excluding the conflict of law rules, so-called) of the State [of Washington]³ . . .

³ In the Security Agreements, "State" is a defined term that is defined to mean "the State of Washington."

...

6. **Jurisdiction and Venue.** The Debtor hereby irrevocably consents that any legal action or proceeding against it or any of its property with respect to any matter arising under or relating to this Agreement may be brought in any court of the State [of Washington] . . . as Lender may elect, and by execution and delivery of this Agreement the Debtor hereby submits to and accepts . . . for itself and its property, generally and unconditionally, the jurisdiction of the aforesaid courts.

CP 723-24. Thus, all of the original contract documents between Freestone, MKA and the Guarantors selected Washington law as the law governing the parties' relations, with the express provision that any action against MKA would be brought in Washington.

C. The Subordination Agreement

In February 2007, MKA requested that Freestone execute a Subordination Agreement in favor of another of MKA's secured lenders, Gottex Fund Management, Ltd. ("Gottex"). CP 727-734. The Subordination Agreement states that "[Freestone] will forbear any action against [MKA] for the collection or payment" of its liabilities until MKA's liabilities to Gottex "have been fully and indefeasibly paid, satisfied and discharged." CP 728 (§ 4). More relevant to the issues before this Court, the Subordination Agreement states:

The provisions of this Agreement are *solely for the purpose of defining the relative rights of [Freestone] and [Gottex]*. Nothing contained in this Agreement is intended to or shall impair, as between [MKA] and [Freestone], the obligation of [MKA] to pay the [Freestone notes] as and when the same shall become due and payable . . . *nor shall anything herein prevent [Freestone] from exercising all remedies otherwise permitted by applicable law or under or with respect to the [Freestone notes] upon default*, subject to the restrictions set forth in this Agreement . . .

CP 730 (¶ 13) (emphasis added). Thus, by its own terms, the Subordination Agreement expressly permits Freestone to pursue its remedies against the Guarantors in the event MKA defaults on the Notes; there is no evidence whatsoever that it means anything other than what it says.

D. MKA and the Guarantors Request Note Extension Agreements

MKA was unable to meet its obligations to Freestone, and on or about February 21, 2008, the Appellants and Freestone entered into Note Extension Agreements in which (a) MKA reaffirmed and ratified its obligations to Freestone, (b) Abraham and Sugarman reaffirmed their guarantees, and (c) all of the Appellants (including the Guarantors) agreed to provide detailed information regarding MKA's financial condition and

the condition of its loan portfolio to Freestone on a regular basis. CP 339 (¶ 21) and CP 665-708.

The parties, including the Guarantors, executed two amendments to each of the Note Extension Agreements, extending the maturity dates to May 31, 2008. *E.g.*, CP 339 (¶ 22) and CP 709-718. Each of the amendments to the Note Extension Agreements expressly provided that “the rights and obligations of the parties hereto shall be construed and interpreted in accordance with the laws of the State of Washington, excluding its conflict of law provisions.” CP 711 (¶ 5) and CP 716 (¶ 6).

MKA did not pay the amounts due to Freestone on or before May 31, 2008, as required. CP 340. On July 30, 2008, Freestone sent notices of default to MKA, and demand letters were sent to the Guarantors giving notice that unless payment was made on or before August 7, 2008, Freestone reserved its right to commence legal action. CP 340 (¶ 24) and CP 484-494.

E. Brief Procedural History

On September 2, 2008, Freestone filed suit in King County Superior Court against the Appellants.⁴ The lawsuit included a request for

⁴ On August 7, 2008, the last day for repayment, the Guarantors commenced an action in California, seeking a declaratory judgment that they had affirmative defenses to the anticipated claims of Freestone. Based on this preemptive filing, the Guarantors argued that the King County action should be stayed, and even filed an unsuccessful petition for

a declaration that MKA was in default, a claim for money damages against the Guarantors, and a claim that all four Appellants were violating the reporting obligations in the Note Extension Agreements. CP 9-26.

After giving notice to Appellants, Freestone secured a temporary restraining order compelling Appellants to comply with their reporting obligations. From that point forward, there was essentially continuous motion practice, with Freestone trying to efficiently drive the case to resolution, and the Appellants seeking to avoid or delay judgment as long as possible:

- On October 9, 2008, Appellants moved to stay the proceedings in favor of anticipatory litigation filed by the Guarantors in Orange County.
- On October 17, Guarantors filed a motion to dismiss for lack of personal jurisdiction.
- The show cause hearing on whether the restraining order should be converted to a preliminary injunction was eventually heard on January 30, 2009, along with the motion to stay and motion to dismiss. Appellants lost on all issues.
- On February 13, Freestone filed a motion for summary judgment.
- On February 17, Appellants filed a motion to dismiss for lack of “subject matter jurisdiction” or, alternatively, failure to join necessary parties.

discretionary review to delay the King County case. Appellants do not assign error to the denial of their motion for a stay, and that issue will not be discussed herein.

- On March 2, Guarantors filed a motion for discretionary review of the order denying their motion to stay the case; following briefing and oral argument, their motion was denied by Commissioner Verellen on March 9.
- Further argument took place before Judge Rogers on March 13, and he eventually ruled against Appellants in an order entered on March 19.
- On March 26, Freestone moved for an award of fees and costs, entry of an order of summary judgment, and gave notice of presentation of its judgments.
- The Court entered summary judgment and signed the final Judgments on April 3, 2009.

Appellants filed their notice of appeal in this matter on or about April 9, 2009, and then requested a stay of the entire appeal due to an involuntary bankruptcy petition brought against MKA.

After the MKA bankruptcy was dismissed, Appellants opening brief was finally filed on or about September 28, 2008.

III. ARGUMENT

A. The Trial Court Properly Found it Had Jurisdiction Over the Person of the Guarantors

As their First and Second Assignments of Error, Appellants contend that the trial court erred by both entering judgment against the Guarantors and denying Guarantors' motion to dismiss due to a lack of personal jurisdiction. App. Brf. at 4, 18-27. Guarantors' jurisdictional

arguments are without merit. There is no genuine dispute that the Guarantors “availed [themselves] of the privilege of conducting activities within the state, invoking the benefits and protections of our laws,” *Raymond v. Robinson*, 104 Wn. App. 627, 637, 15 P.3d 697 (2001), and that the trial court properly exercised jurisdiction over the Guarantors for purposes of enforcing the guarantees and the Note Extension Agreements, as amended.

1. Applicable Test of Jurisdiction

Washington’s long-arm statute, RCW 4.28.185, reads in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within the state

RCW 4.28.185(1)(a). The statute reflects a “legislative intent to assert personal jurisdiction over a foreign [defendant] to the full extent permitted by due process.” *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311, *cert. denied*, *Kansai Iron Works, Ltd. v. Marubeni-Idia Inc.*, 409

U.S. 1009 (1972); *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766-67, 738 P.2d 78 (1989).

Due process is satisfied for purposes of specific jurisdiction if (1) the defendant has purposefully consummated some transaction in Washington; (2) the cause of action arises from or is connected with the transaction; and (3) the assumption of jurisdiction does not offend traditional notions of fair play and substantial justice. *Deutsch*, 80 Wn.2d at 711. “There is no formula; minimum contacts must be determined in light of the particular facts of each case.” *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 465, 975 P.2d 555 (1999).

2. Abraham and Sugarman’s Actions, Both Personally and on Behalf of MKA, Support Jurisdiction

While the Guarantors strain to minimize their extensive contacts with the State between 2004 and 2008 – including the many contacts in connection with the Notes and Note Extensions Agreement – the record established the following:

- Abraham and Sugarman are the owners of MKA Advisors, and they co-manage MKA. CP 257-58 (Abraham Dep., 7:15-10:7); CP 285 (Sugarman Dep., 19:7-10).
- By contract, Abraham and Sugarman share in the profits of MKA, and they guaranteed repayment of advances from Freestone with the expectation of receiving a personal benefit. CP 260, 266 (Abraham Dep., 19:6-20:1; 42:6-44:20).

- Contrary to his poor recollection, Sugarman traveled to the State of Washington in August 2004 at the inception of the parties' relationship to educate Freestone on MKA and its business. CP 336 (¶ 13) and CP 393-94.
- Both Abraham and Sugarman traveled to the State of Washington on MKA business on several occasions, and they met with Freestone in Seattle in May 2006, at or about the time they were securing new funding for MKA. CP 341 (¶ 29) and CP 385-95; CP 265 (Abraham Dep., 38:3-39:6); CP 284 (Sugarman Dep., 15:20-22).
- According to Sugarman, when they "needed short-term money" for MKA, they would "call" Freestone in Seattle. CP 285 (Sugarman Dep., 18:14-19).
- MKA has other Washington investors, including the City of Seattle Pension Fund (which has invested \$35 million with MKA), and Abraham and Sugarman have traveled to Washington on related MKA business. CP 261 (Abraham Dep., 23:2-22); CP 295-96 (Sugarman Dep., 60:24-62:8).
- Abraham and Sugarman regularly corresponded with Freestone in Washington, participated in numerous calls with Freestone representatives in their Seattle office, and sent documents to Washington for execution by Freestone. CP 341 (¶ 29); CP 283 (Sugarman Dep., 12:2-9); CP 272 (Abraham Dep., 68:14-19); CP 372-383 (examples of emails to Freestone); CP 385-395 (business records reflecting meetings and calls with Sugarman and Abraham); CP 496-503 (correspondence from Sugarman and Abraham to Freestone). As summarized by Freestone's Justin Young:
 - "While I am unable to provide an exact count of the calls and correspondence that were directed to our offices in Seattle between 2004 and the end of 2008, there were many. I specifically remember calls involving both Mr. Abraham and Mr. Sugarman in which the performance of [MKA] and its portfolio were discussed. Both Mr. Abraham and Mr. Sugarman visited our offices in Seattle in May 2006 at the time we were making the first of the advances that are now in

default. Mr. Abraham, Mr. Sugarman and their agents contacted us to request various concessions, including extensions of the obligations . . . , and they sent documents to us in Seattle for review and approval.” CP 341 (¶ 29).

- Payments were made to Freestone at its Seattle offices. CP 338.
- Abraham and Sugarman personally guaranteed millions of dollars in obligations to Freestone. CP 337-38 (¶ 18); CP 283 (Sugarman Dep., 10:8-13); CP 259 (Abraham Dep., 14:6-25).
- Abraham and Sugarman agreed that their personal obligations to Freestone would be governed by Washington law. CP 629-718.
- Abraham and Sugarman agreed that any claims involving MKA or its property were properly heard in Washington. *E.g.* CP 720-25.

In sum, the evidence overwhelmingly established that Sugarman and Abraham knowingly and purposefully did business in and directed to the State of Washington, invoking the protections of Washington law each step of the way.

3. Washington Law Supports the Exercise of Personal Jurisdiction Over the Guarantor Defendants

Washington law supports the exercise of jurisdiction over claims arising from interstate commercial relationships that have a meaningful connection to the State. As summarized in WASHINGTON PRACTICE, “The court may acquire personal jurisdiction over the defendant even though the defendant is not physically present in the state. For example, the

solicitation of business (or the negotiation of a contract) in Washington by telephone or by mail may be sufficient.” 14 Karl B. Tegland, WASHINGTON PRACTICE, Civil Procedure § 4:7 (2009) (footnotes omitted). “[A] transaction that is negotiated by a nonresident by telephone and correspondence and contemplates important performance elements in a third jurisdiction may be found to be the transacting of business in Washington within the purview of the [long-arm] statute.” *Id.* at § 4:8.

In *Precision Lab. Plastics, Inc. v. Micro Test*, 96 Wn. App. 721, 727, 981 P.2d 454 (1999), the Court of Appeals reversed a trial court’s dismissal for lack of personal jurisdiction, and held that negotiations via telephone and fax constituted minimum contacts with the forum state. As the court explained, “when parties reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional ‘consent’ in order to sustain the jurisdiction of [the latter state’s courts].” *Id.*

In *Crown Controls, Inc. v. Smiley*, 47 Wn. App. 832, 836-37, 737 P.2d 709 (1987), *remanded*, 110 Wn.2d 695, 756 P.2d 709 (1988), the court held that as few as four telephone calls, by themselves, provided the minimum contacts necessary to justify imposition of personal jurisdiction. Similarly, in *Byron Nelson Co.*, 95 Wn. App. 466-68, the court exercised jurisdiction over a Virginia equipment broker who called a Washington

broker, setting in motion a chain events that led to a disputed purchase and third party sale. The Court noted that while the Virginia defendant made first contact, “who first contacted whom is less important than the resulting commercial connection.” *Id.* at 466.

The Court of Appeals found personal jurisdiction over a Massachusetts purchaser of Christmas trees in *Kysar v. Lambert*, 76 Wn. App. 470, 489-90, 887 P.2d 431 (1995), stating:

The particular transaction at issue here involved an exchange of forms, letters, and phone calls between Washington and Massachusetts. It concluded with Lambert knowingly and purposefully ordering Christmas trees from Washington. The contract that was formed contained a choice-of-law clause to the effect that Washington law would govern any dispute, and such clause is one factor tending to support the existence of minimum contacts.

Guarantors argue that their many contacts with the State in this case do not constitute “purposeful availment,” citing *CTVC of Hawaii Co. v. Shinawatra*, 82 Wn. App. 699, 919 P.2d 1243 (1996).⁵ In *Shinawatra*, the court found that defendants’ relevant contacts with the State were minimal

⁵ Guarantors also cite *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371 (9th Cir. 1977), and *Forsythe v. Overyer*, 576 F.2d 779 (9th Cir. 1978), in support of their argument. *Chem Lab* has nothing to do with a guarantee or other action taken by an individual for his or her personal benefit, and *Forsythe* is a case in which the court found long-arm jurisdiction over an out-of-state guarantor who sent a telegram and later the guaranty itself to the jurisdiction. Indeed, the facts of *Forsythe* are strikingly similar to those in the instant case, and that holding *supports* Judge Rogers’ ruling on personal jurisdiction.

and largely unrelated to the causes asserted by the plaintiff, and that the defendants did not “invoke[] the benefits and protections of Washington law.” *Id.* at 716. As discussed at length in this brief, here the Guarantors repeatedly invoked the protections of Washington law, and knowingly did business in the State. Guarantors’ unsupported argument that litigating in Washington is “fundamentally unfair” to them appears to be a throwaway as no court has so found on facts comparable to those in this case.

In this case, Guarantors visited the State of Washington, regularly called and wrote to the State, sent contracts to the State, agreed to the application and protections of Washington law, and expressly agreed that the Washington courts would have jurisdiction over the obligations of MKA and its property. Most importantly, the Guarantors assumed more than \$30 million in liabilities to Washington lenders, all for the Guarantors’ personal benefit. There is no genuine dispute that the Guarantors “availed [themselves] of the privilege of conducting activities within the state, invoking the benefits and protections of our laws.” *Raymond*, 104 Wn. App. at 637. The assertion of jurisdiction over Abraham and Sugarman comported with due process, and their arguments to the contrary should be rejected.

4. Guarantors' Guarantees of Obligations to Washington Lenders Under Washington Law Support Jurisdiction

Although there is no *published* Washington authority on point, numerous courts have ruled that guarantees such as the ones made by the Guarantors are sufficient to support personal jurisdiction.⁶ In *Sirius America Insurances Co. v. SCPIE Indemnity Co.*, 461 F. Supp. 2d 155 (S.D.N.Y. 2006), the district court ruled that even though a non-resident guarantor had no presence in New York and formation activities had occurred outside of the state, New York had jurisdiction over the guarantor where the guarantee indicated that the other party was a New York corporation, correspondence was to be mailed to it in New York, and there was a New York choice of law provision. *Id.* at 164. The court concluded:

[Guarantor] deliberately contracted to provide services to a New York entity and thus it was not unreasonable for [Guarantor] to anticipate being haled into court in New York in the event that AHI defaulted on its payments to Sirius.

Id. At least one state has indicated that the location of the creditor to whom the debt is guaranteed may be dispositive. *See Fountain Mktg. Group v. Franklin Progressive Resources*, 1996 WL 406633 at * 5 (N.D. Ill. 1996) (“The guaranty . . . required performance in Illinois. Illinois is

⁶ Washington’s long arm statute extends “to the limit” of federal due process. *Shute*, 113 Wn.2d at 771-72. Thus interpretations of differently or more narrowly worded out-of-state long arm statutes are relevant to this inquiry.

where [the plaintiff] resides, and where Progressive sent its payments to [the plaintiff]. As a result, the guaranty supports personal jurisdiction over [the guarantor] based on primary performance in Illinois.”); *cf. Wash. Ins. Guar. Ass'n v. Ramsey*, 922 P.2d 237, 242 (Alaska 1996) (noting in the insurance context that “[n]umerous courts have held that the act of guaranteeing an obligation in the forum state alone is a sufficient contact to establish jurisdiction”).

Similarly, in *Nike USA, Inc. v. Pro Sports Wear, Inc.*, 208 Or. App. 531, 145 P.3d 321, 327 (Or. App. 2006), the court ruled that Oregon courts could properly exercise jurisdiction over an Ohio resident who had personally guaranteed an Ohio corporation’s obligations, finding that the defendants had “purposefully availed themselves of the privilege of causing important economic consequence in the State of Oregon.” The court concluded that “defendants reasonably should have understood that, if problems arose over credit extended to Pro Sports for goods purchased from plaintiff, they would be subject to personal jurisdiction in Oregon.” *Id.* at 328. Other cases are in accord. *E.g., Goodman Co., L.P. v. A & H Supply, Inc.*, 396 F. Supp. 2d 766, 771 (S.D. Tex. 2005) (“a choice-of-law provision, coupled with an expansive guaranty . . . is sufficient to establish minimum contacts supporting personal jurisdiction”); *see also Marathon Metallic Bldg. Co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 923 (5th Cir.

1981) (finding personal jurisdiction when a corporate officer of the principal debtor personally guaranteed the debt).

Independent of Guarantors' substantial contacts with the State, there is no reason that a Washington court, applying the same Constitutional due process analysis as state and federal courts in Alaska, Illinois, New York, Oregon and Texas should come to a different conclusion. The act of purposefully guaranteeing obligations to Washington partnerships, under Washington law (in this case with knowledge that the borrower's obligations would be adjudicated in the Washington courts), by the managers of the debtor, for the Guarantors' personal benefit, amply supports the exercise of jurisdiction over the Guarantors in this case.

B. The Trial Court Properly Applied Washington Law to the Obligations of the Guarantors

1. The Parties Agreed to Washington Law

Notwithstanding that *every* relevant document signed by the Guarantors (including the ones drafted by their own counsel) selects Washington law, the Guarantors argue that the trial court erred in applying Washington law to their guarantees. This is so, they assert, because

although they never said anything to Freestone, they *now* say they *secretly intended* that their guarantees be governed by some other law.⁷

Factually, the premise that the Guarantors did not manifest assent to the applicable law is simply wrong. Each of the nine Notes executed by the Guarantors provides that the Note is governed by the laws of the State of Washington, *e.g.*, CP 631 (¶ 9), and that Washington usury laws govern the loan terms. *E.g.*, CP 632 (¶ 15). Abraham admitted the obvious: That he guaranteed notes that call for the application of Washington law. CP 264-65 (Abraham Dep., 37:25-38:2).

While Guarantors protest that their signatures on the Notes do not reflect their agreement to their terms, they fail to acknowledge that they also expressly agreed to the application of Washington law in the note extension documents that they signed *as guarantors*. In both the First Amendment[s] to [the] Note Extension Agreement[s], CP 711 (¶ 5), and the Second Amendment[s] to [the] Note Extension Agreement[s], CP 716 (¶ 6), Abraham and Sugarman agreed that the “rights and obligations of the parties hereto shall be construed and interpreted in accordance with the laws of the State of Washington, excluding its conflict of law provisions.” *See* CP 273 (Abraham Dep., 70:5-12) (agreeing First Amendment signed

⁷ Nowhere do Appellants argue that the Guarantors (or anyone else) advised Freestone that notwithstanding its insistence on the application of Washington law, the guarantees would be governed by the law of a different jurisdiction.

as guarantor calls for application of Washington law); CP 288 (Sugarman Dep., 33:12-34:15) (refusing to answer questions re his understanding of choice of law, saying “I think it calls for a legal opinion.”)

In support of their argument that they did not agree to the applicable law, Guarantors cite *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 135 P.2d 95 (1943) and *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207 (9th Cir. 2001). *Robey* is a case which stands for the proposition that a bondholder can collect from a guarantor notwithstanding the bondholder’s agreement to a “moratorium” on foreclosing against the borrower’s property (much like this case); the cited *dicta* from AM. JUR. does not stand for the proposition that the terms of the note cannot be agreed by a guarantor. *Shannon-Vail* (which states the rule that in the absence of agreement, the state to which money is to be repaid governs under RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 195) stands for nothing more than the proposition that a note and separate guaranty can be governed by different laws, although in that case, they were not.

This is not a case in which the Guarantors were duped into selecting Washington law. Abraham and Sugarman are sophisticated businesspeople who agreed to Washington law, and the application of the chosen law will “protect the justified expectations of the parties and . . . make it possible for them to foretell with accuracy what will be their rights

and liabilities under the contract.” *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 700, 167 P.3d 1112 (2007). Honoring the contractual choice of law clauses was proper, and there is no need for the Court to do any further analysis to reach the correct result.

2. Standard Choice of Law Rules Call for the Application of Washington Law

Even if the Court were to ignore the plain language of the relevant agreements and accept the Guarantors’ argument that “that the parties to the guarantees made no choice of law selection,” App. Br. 29, application of black letter choice of law doctrine still results in the application of Washington law to the claims against the Guarantors.

While many contracts that fail to select the applicable law are governed by “the law of the state which has the most significant relationship to the contract,” the rules are different for guarantees. When a guarantee does not select the applicable law, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 194 applies. *See Potlach No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 809-10, 459 P.2d 32 (1969).

Under § 194, absent an effective choice of law by the parties, guarantee contracts are governed by “the law governing the principal obligation which the contract of suretyship was intended to secure unless... some other state has a more significant relationship to the

transaction and the parties” See also *id.* cmt a (noting that this provision applies to whether a creditor may be required to proceed first against the principal). In other words, the law that governs the Notes presumptively governs the guarantee obligations. *Ermer v. Case Corp.*, 2002 WL 1796438 at *2 (D. Neb. 2002) (“Generally, the rights created under a suretyship (which would include a guaranty agreement) are determined by the law governing the principal obligation.”).

This presumption is conclusive when any of the following occurs in the state whose law governs the principal obligation: (1) the extension of credit or other reliance on the surety’s promise; (2) contract performance; (3) contract negotiations; (4) contract delivery; or (5) either the creditor or surety are domiciled in that state. *Id.* cmt. c. A guarantee contract is “performed” in the state where the creditor is located and payments would be expected. *E.g.*, *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 325, 525 P.2d 223 (1974). The law governing the guarantee and the principal obligation may differ on the “occasion” that the law governing the principal obligation would invalidate the guarantee, or the guarantee bears little or no relationship to the state governing the principal obligation. RESTATEMENT § 194 cmt. c. (providing two examples of when a different state has the most significant relationship).

The presumption that the same law governs the both guarantee and the principal obligation is logically based on the relationship between the agreements. The guarantee and the principal obligation “will usually be closely related and have many common elements,” and this presumption applies with particular force when the agreements were executed contemporaneously in the same instrument. *Id.* cmt. b. While the Guarantors cite *Robey* for the premise that a guarantee and its underlying note are separate obligations, App. Br. 28, the same case notes that one agreement could not exist without the other. *Robey*, 17 Wn.2d at 255 (“if a primary obligation does not exist, there cannot be a contract of guaranty”).

Here, generic choice of law principles would have called for the application of Washington law. Sugarman and Abraham cannot dispute that they expressly agreed that Washington law would govern every Note and every extension agreement at issue in this case. They cannot dispute that Washington is Freestone’s principal place of business, that Freestone extended credit from this State, and that Freestone relied on the Guarantors’ guarantees in this State. The contracts were delivered to Washington, and MKA made payments to the Washington lenders. CP 337-38. Thus, even in the absence of a contractual choice of law,

Washington law would still govern the Guarantors' obligations to Freestone under the principles reflected in RESTATEMENT § 194.

3. Guarantors Raise a “False Conflict” That Has No Effect on the Outcome of This Case

Finally, even if the Guarantors had not repeatedly agreed to the application of Washington law (which they did), and RESTATEMENT § 194 did not call for the application of Washington law (which it does), the Guarantors' cursory argument that the “difference between the States' laws is critical in this case” is untrue. App. Brf. at 32.⁸ In requesting California law, Guarantors posit a “false conflict”:

When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 937 (1994). When the result of the issues is different under the law of the two states, there is a ‘real’ conflict. *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 344-45, 622 P.2d 850 (1980). The situation where laws or interests of concerned states do not conflict is known as a ‘false’ conflict. *Burnside*, 123 Wn.2d at 101. If a false conflict exists, the presumptive local law is applied. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994).

Seizer v. Sessions, 132 Wn.2d 642, 648-49, 940 P.2d 261 (1997).

⁸ In their brief, Guarantors cite Sections 2845 and 2849 as giving rise to a conflict. Freestone objects to further argument on any other uncited law.

Guarantors cite the general rule that absent evidence of intent to the contrary, guarantors⁹ in California may require their creditors to proceed against the principal first, and are entitled to the benefit of “every security for performance of the principal obligation.” Cal. Civ. Code §§ 2845(a), 2849 (2009); *American Guaranty Corp. of Cal. v. Stody*, 230 Cal. App. 2d 390, 394-95 (Cal. Ct. App. 1964). These statutory provisions are gap fillers, however, and their operative effect is “subordinate” to the parties’ intent. *See Bloom v. Bender*, 48 Cal. 2d 793, 804, 313 P.2d 568 (1957). The California legislature specifically provided that these rights may be waived. Cal. Civ. Code § 2856(a) (emphasis added); *WRI Opportunity Loans II v. Cooper*, 154 Cal. App. 4th 525, 545, 65 Cal. Rptr. 3d 205 (Cal. Ct. App. 2007).

Here, Guarantors’ promise of the “unconditional” and “immediate” payment of MKA’s obligations in the event of default supersedes any gap fillers. California courts do not require guarantors to utter any magic words, and when a guarantor’s intent is evident, waiver may be found on “the basis of a very vague clause in the guarantee agreement.” *River Bank Am. v. Diller*, 38 Cal. App. 4th 1400, 1414-15 (1995) (commenting on the waiver language in *Bloom*). The contract need not mention the term

⁹ The California Civil Code uses the terms “surety” and “guarantor” interchangeably. California has statutorily abolished any differences between them. Cal Civ. Code § 2787; *Bloom*, 48 Cal. 2d at 798.

“waiver,” or specifically note the right or code section waived.¹⁰ Cal. Civ. Code. § 2856(b) (“[a waiver shall be effective without regard to the inclusion of any particular language . . . to waive any rights and defenses or any references to statutory provisions or judicial decisions); *Diller*, 38 Cal. App. 4th at 1414. Further, any ambiguities in the guarantee provision are “resolved in favor of the creditor.” *Brunswick Corp. v. Hayes*, 16 Cal. App. 3d 134,138-9, 93 Cal. Rptr. 635 (Cal Ct. App. 1971).

California courts have found a guarantor’s unconditional guarantee of payment waives the rights asserted by Guarantors. For instance, in *Brunswick*, the court held that a guarantor waived his rights under sections 2845 and 2849 when the contract stated, “[t]his Guarantee is absolute, unconditional and continuing, and payment . . . shall be made . . . notwithstanding . . . other guarantees against which it may be entitled to resort for payment.” 16 Cal. App. 3d at 138; *see also Bloom*, 48 Cal. 2d at 796.

There is no genuine dispute that the Guarantors agreed to the application of Washington law, or that Washington law would apply to the guarantees in any event. Regardless, even under California law, the

¹⁰ Legislative intent to liberalize waiver requirements is evident in the history of section 2856. Section 2856 was specifically enacted in response to *Cathay Bank v. Lee*, 14 Cal. App. 4th 1533 (Cal. Ct. App. 1993), where the court held that a guarantor could not waive his rights without uttering specific words or phrases. *Cooper*, 154 Cal. App. 4th 525, 545 (2007) (noting the relationship between § 2856 and *Cathay Bank v. Lee*).

outcome here would be the same: Guarantors committed to the *immediate* and *unconditional* payment of the debts of MKA, a commitment which waives the “statutory conditions” that they now advocate to this Court. Given that a court applying California law would also require unconditional and immediate payment of MKA’s debts, Guarantors present a false conflict that does not change the law that is properly applied in this case.

C. The Trial Court Properly Disposed of MKA’s Claims and Defenses Under the Subordination Agreement

As the Fourth and Fifth Assignments of Error, Appellants make related arguments that the trial court erred in entering judgment in the absence of a “necessary party” (Gottex), and further erred in dismissing MKA’s counterclaim for “breach of contract.” App. Brf. at 32-40. Both arguments turn on Appellants’ contention that Freestone’s claims were brought in violation of the Subordination Agreement between Freestone, Gottex, and MKA, and that entry of judgments against the Guarantors impairs Gottex’s rights under that agreement. Appellants’ arguments find no support in the plain language of the Subordination Agreement, and they were properly rejected by Judge Rogers.

1. The Subordination Agreement Does Nothing More Than Limit Freestone’s Ability to Collect From MKA or Execute on Its Collateral

The Subordination Agreement (to which three of the four Appellants are not even parties) states:

The provisions of this Agreement are *solely for the purpose of defining the relative rights of [Freestone] and [Gottex]*. Nothing contained in this Agreement is intended to or shall impair, as between [MKA] and [Freestone], the obligation of [MKA] to pay the [Freestone notes] as and when the same shall become due and payable . . . *nor shall anything herein prevent [Freestone] from exercising all remedies otherwise permitted by applicable law or under or with respect to the [Freestone notes] upon default*, subject to the restrictions set forth in this Agreement . . .

CP 730 (¶ 13) (emphasis added). The Subordination Agreement limits Freestone’s right to collect from MKA or exercise its rights as a secured creditor. CP 728-29 (¶¶ 4, 6); *see* App. Brf. at 38, 39 (citing ¶¶ 4 and 6). Freestone has done neither. By its own terms, the agreement does not affect Freestone’s right to declare MKA in default or to collect from the Guarantors, rights which are *expressly reserved to Freestone*.

2. Gottex Had No Interest in the Declaratory Judgment That Was Rendered by the Trial Court, and Was Not a Necessary Party

For reasons that are never fully articulated, Appellants contend that Gottex was a “necessary party” to the proceedings below under Civil Rule 19, and that its absence deprived the trial court of “subject matter

jurisdiction” to decide Freestone’s claims for declaratory relief under RCW 7.24.110. Appellants’ entire rationale is found in single sentence at page 36 of their brief, in which they argue (without citing to anything in the record) that “[t]he objective of the Subordination Agreement was to secure Gottex’s investment in MKA by preventing any collection activities that would drain assets from MKA, divert its attention, or precipitate liquidity issues.”

Whatever Appellants and their counsel may imagine, the “sole purpose for” – and the limitations imposed by – the Subordination Agreement are those set forth *in the agreement*, not some unstated “objectives” concocted by Guarantors to avoid their unconditional obligations to pay Freestone upon MKA’s default. MKA misleadingly cites the trial court’s observation that Gottex has an interest in the Subordination Agreement in an attempt to bootstrap an argument that it should have been joined, but Judge Rogers’ observation was merely a precursor to the ruling that those interests *were not affected by the limited relief sought by Freestone in the case*. Verbatim Report of March 13, 2009 Proceedings at 14 (issue is whether Freestone is seeking to collect from MKA). This ruling was correct in all material respects.

While Section 7.24.110 of the Revised Code of Washington requires joinder of parties with a genuine stake in a declaratory judgment

action, it is well established that nonparty interests which are merely “speculative and secondary to the issue at hand” are insufficient to warrant dismissal under the Uniform Declaratory Judgment Act (“UDJA”). *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998); *accord Guenther v. Fariss*, 66 Wn. App. 691, 698, 833 P.2d 417 (1992). Similarly, in circumstances in which plaintiffs do not seek adjudication of the contractual rights or obligations of a nonparty, joinder under Civil Rule 19 is inappropriate. *Floor Express, Inc. v. Daly*, 138 Wn. App. 750, 756-57, 158 P.3d 619 (2007). This is especially true when the nonparty “claims no interest in the action.” *Id.*¹¹

Here, Freestone did not seek a declaration under, about, or touching the Subordination Agreement — the only agreement to which Gottex is a party. A comparison of the Subordination Agreement and Freestone’s claims makes this abundantly clear. At most, the Subordination Agreement pertains to (1) Freestone’s ability to collect directly from MKA; and (2) Freestone’s ability to exercise its rights as a

¹¹ Appellants spend two pages discussing *National Homeowners Ass’n v. City of Seattle*, 82 Wn. App. 640, 919 P.2d 615 (1996), a decision which they characterize as “underscor[ing]” the trial court’s “error.” In *National Homeowners*, Eagle had prepared a relocation plan for a mobile home park, relocated 26 tenants, and spent time and money securing permits. An association petitioned for review of the relocation plan – but failed to join the party who had submitted it. Freestone is not seeking to invalidate the Subordination Agreement, and this case bears no resemblance *National Homeowners* (in which the petitioner “[did] not seriously dispute that Eagle was a necessary party”), or the other cases cited by Appellants in which the requested relief would “impair [the missing party’s] interest.” 82 Wn. App. at 643-44.

secured creditor in relation to Gottex. CP 728-29 (¶¶ 4, 6). By comparison, in this action Freestone sought relief on *completely separate issues* — namely (1) a declaration that MKA is in default (which is a predicate to collecting on the guarantees) (CP 22-23); (2) a decree requiring Appellants to comply with their reporting obligations (CP 25); and (3) a money judgment against the Guarantors (but not MKA or the pledged collateral) (CP 23-25).

MKA does not (and cannot) point to any provisions in the Subordination Agreement that precluded the adjudication of Freestone’s claims, or that barred the relief Freestone obtained in the case. Paragraph 13 of the Subordination Agreement expressly provides that it does not impair MKA’s obligation to pay Freestone as and when the Notes come due. CP 730. The clause preserves Freestone’s right to “exercis[e] all remedies” upon MKA’s default, save for those that are expressly prohibited in the contract. *Id.* The bottom line is that Freestone did not claim that its liens have priority over those Gottex, nor did it seek collection of payment from MKA — the only interests arguably protected by the Subordination Agreement. In the absence of relief that would somehow impair Gottex’s rights, it was not a necessary party, and the trial court properly rejected Appellants’ motion to dismiss.

3. MKA Has No Claim for Breach of the Subordination Agreement

MKA's arguments fare no better when they are cast as a "counterclaim" for "breach of the Subordination Agreement." App. Brf. at 37-39. Again, the plain language of the Subordination Agreement provides:

[Freestone] will forbear *any action against [MKA] for the collection or payment of [the Freestone Notes]* until the [liabilities to Gottex] have been fully and indefeasibly paid . . .

. . .

The provisions of this Agreement are solely for the purpose of defining the relative rights of [Freestone] and [Gottex]. Nothing contained in this Agreement is intended to or shall impair, as between [MKA] and [Freestone], the obligation of [MKA] to pay the [Freestone notes] as and when the same shall become due and payable . . . *nor shall anything herein prevent [Freestone] from exercising all remedies otherwise permitted by applicable law or under or with respect to the [Freestone notes] upon default,* subject to the restrictions set forth in this Agreement . . .

CP 728 (¶ 4) and 730 (¶ 13). This language (which MKA acknowledges is properly interpreted as a matter of law, App. Brf. at 37) was interpreted by Judge Rogers to mean that (a) Freestone would not seek to collect from MKA until Gottex was paid, but that (b) nothing in the Subordination

Agreement prevents Freestone from exercising its remedies against the Guarantors in the event of MKA's default. Freestone's actions were entirely consistent with the Subordination Agreement, including the important rights that it reserved to itself to pursue the Guarantors. MKA's counterclaim for "breach of contract" fails as a matter of law.

D. Guarantors Are Liable for Freestone's Attorneys' Fees

Notwithstanding the sweeping fee clauses in the Notes and Note Extension Agreements, Guarantors argue that Freestone was not entitled to an award of fees incurred in collecting the amounts owed on the Notes from the Guarantors. App. Brf. at 40-44. In support of their argument, Guarantors argue that their signatures on the Notes are "independent" of the terms set forth above, and that their commitment to pay "all fees and expenses, including without limitation, reasonable attorneys' fees and disbursements . . . in any dispute relating to" the Notes in both the Notes and the Note Extension Agreements somehow does not include the claims in this case.

The trial court properly rejected Guarantors' disingenuous attempt to wriggle out of their promise to make Freestone whole in the case of MKA's default. Each of the nine Notes signed by the Guarantors contains the following language:

If *any* proceeding is commenced which *arises out of or relates to this Note*, the prevailing party shall be entitled to recover from the other party such sums as may be adjudged to be reasonable attorneys' fees, in addition to costs and expenses otherwise allowed by law.

E.g., CP 631 (§ 9) (emphasis added). Washington courts have interpreted “arising out of” to mean “‘flowing from,’ ‘having its origin in,’ or ‘growing out of.’ The phrase indicates a requirement of a causal relationship but not one of proximate cause.” *Australia Unlimited Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 775 n.43, 198 P.3d 514 (2008).

In seeking extensions on the Notes, each of the Guarantors expressly acknowledged “that his guarantee includes the obligation to pay [to Freestone] all fees and expenses, including without limitation, reasonable attorneys' fees and disbursements incurred by [Freestone] in all efforts to enforce . . . any of the obligations under the . . . [Notes]” or in any dispute “relating to” the Notes. *E.g.*, CP 669 (§ 10). The word “guarantee” is in lower case for the simple reason that there is no document called a “Guarantee”; Guarantors' “*expressio unius est exclusio alterius*” argument is misleading wordplay.

The Guarantors agreed to pay fees on any claims “arising out of” or “related to” the Notes when signing their subjoined guarantees. *See FDIC v. Indian Creek Warehouse, J.V.*, 974 F. Supp. 746, 750 (E.D. Mo.

1997), *aff'd*, 143 F.3d 1111 (8th Cir. 1998) (“liability of guarantors is the same as that as the maker of the note which obligated guarantor to pay attorney’s fees”). In this case, the Guarantors also expressly agreed to pay fees on any claims “relating to” the Notes in the Note Extension Agreements. CP 669 (¶ 10). There is no extrinsic evidence that these agreements mean something other than what they say. There is no genuine dispute that Freestone’s claims against the Guarantors “arise out of” or “relate to” the Notes – they are derived directly from the obligations in the Notes and subjoined guarantees. Freestone is the substantially prevailing party, and fees were properly awarded.

E. Freestone Is Entitled to Fees on Appeal

Because this appeal, like the proceedings below, “arises out of” or “relates to” the Notes and Note Extension Agreements, Freestone is entitled to an award of fees, and makes a request for same pursuant to RAP 18.1(a). *Bushong v. Wilsbach*, 151 Wn. App. 373, 376, 213 P.3d 42 (2009) (“Because the underlying contract provided for an award of attorney fees, Wilsbach is entitled to fees on appeal provided she complies with RAP 18.1.”).

IV. CONCLUSION

For well over a year, Freestone has been an unwilling participant in a frustrating shell game. The Guarantors, who are wealthy and

sophisticated businesspeople, have raised every conceivable obstacle to payment of what were supposed to be “unconditional” guarantees of “immediate” payment under Washington law. The court had jurisdiction to enforce the Guarantors’ obligations under the Notes and the Note Extension Agreements; Washington law was properly applied; and Freestone was entitled to fees in this collection action. The trial court’s rulings were well-reasoned and correct in all material respects, and Freestone respectfully requests that they be affirmed with an award of the additional fees and costs incurred in connection with this appeal.

RESPECTFULLY SUBMITTED this 28th day of October, 2009.

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CERTIFICATE OF SERVICE

I certify and declare that on the 28th day of October, 2009, I caused to be served by legal messenger service the foregoing Brief of Respondents on the following parties at the following addresses:

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