

69791-9

69791-9

No. 69791-9-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff-Appellant

v.

LANCE HARVEY, individually and the marital community comprised of  
LANCE HARVEY and "JANE DOE" HARVEY, husband and wife,

Defendants-Respondents

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ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT  
(Hon. Eric Z. Lucas)

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**REPLY BRIEF**

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MISCELLANEOUS

27 Marjorie Dick Rombauer, *Wash. Practice:  
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## I. INTRODUCTION

The bank agreed to loan Kaydee Gardens millions of dollars for a real estate development project. Harvey stood to benefit greatly from that loan; he owned Kaydee Gardens. The bank insisted, however, that Harvey guarantee the loan because it knew the value of Kaydee Gardens' property in its then-condition, which secured the loan by way of a Deed of Trust, might not be sufficient to cover the debt in the event of a default. For his part, Harvey agreed to the Guaranty because he knew that, without it, the bank would never make the loan. The Guaranty is unconditional and absolute. When Kaydee Gardens defaulted on the loan, Harvey refused to pay his company's debt. When the bank foreclosed on Kaydee Gardens' property, Harvey refused to pay the amount of the deficiency. There is no dispute that the Guaranty was intended to apply in precisely this situation.

But to Harvey, intent does not matter. He asks the Court to construe Kaydee Gardens' Deed of Trust and the Deed of Trust Act to reach an absurd result that neither the parties nor the legislature intended. The Court should refuse to do so. The plain language of the parties' loan documents shows that the Deed of Trust did not secure the Guaranty and, even if it did, the plain meaning of RCW 61.24.100(3)(c) allows a lender to obtain a deficiency judgment against a commercial guarantor who, like Harvey, does not grant a deed of trust on his own property. Finally, even

if Harvey did have an anti-deficiency defense here, there is no public policy that would prevent the Court from enforcing Harvey's express waiver of that defense. The judgment below must be reversed, and the case remanded for further proceedings on Harvey's "fair value" defense.<sup>1</sup>

## II. ARGUMENT

### A. **RCW 61.24.100(10) Does Not Limit Washington Federal's Right To Obtain A Deficiency Judgment Against Harvey.**

Harvey does not dispute that section (3)(c) of RCW 61.24.100 allows a lender to obtain an *unlimited* deficiency judgment against a guarantor of a commercial loan, subject only to a "fair value" defense. Respondents' Br. at 21; RCW 61.24.100(3)(c) & (5). That right is curtailed only where the guarantor grants the deed of trust on his own property, in which case section (6) limits the deficiency judgment to waste and wrongful retention of rents. RCW 61.24.100(6). In this way, section (6) mirrors section (3)(a), which likewise limits a deficiency judgment against a "borrower or grantor" to waste and wrongful retention of rents. RCW 61.24.100(3)(a)(i). None of these limitations apply to Harvey, however; he was not the borrower, nor was he the grantor of the Deed of

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<sup>1</sup> The issues presented in this appeal are substantially similar to the issues raised in *Washington Federal v. Gentry*, Case No. 70004-9-I, also currently pending before the Court. Washington Federal has not moved for consolidation, but would not oppose a linking of the two appeals for purposes of determination by the same panel of judges.

Trust. On its face, then, section (3)(c) allows Washington Federal to obtain an *unlimited* deficiency judgment against Harvey.

Into this perfectly symmetrical scheme, Harvey tries to inject section (10), which—as Washington Federal explained—does not even address a lender’s right to a “deficiency judgment.” *See* Opening Br. at 14-15. Worse yet, Harvey would interpret section (10) to give him an anti-deficiency defense the Deed of Trust Act affords no other category of obligor. There is no dispute that an unsecured guarantor is liable for an unlimited deficiency judgment. RCW 61.24.100(3)(c). Similarly, there is no dispute that a borrower, grantor or guarantor who grants a deed of trust on his own property is also subject to deficiency judgment, albeit limited to waste and wrongful retention of rents. RCW 61.24.100(3)(a)(i) & (6). Yet, under Harvey’s implausible interpretation of section (10), a guarantor whose guaranty is fortuitously secured by the borrower’s or grantor’s deed of trust would be totally immune from a deficiency judgment.

Why would the legislature treat that guarantor any different than an unsecured guarantor? In both cases, the guarantor has not encumbered his own property to secure the debt; unlike the borrower-grantor or guarantor-grantor he’s sacrificed nothing toward the “quid pro quo” inherent in non-judicial foreclosures. *Donovick v. Seattle-First Nat’l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). Even more inexplicable, why would the

legislature give that guarantor total immunity from a deficiency judgment when the borrower or grantor are still on the line for a limited deficiency judgment? It simply makes no sense. Harvey briefly argues that section (10) would be “meaningless” if not given his construction (Respondents’ Br. at 23), but he ignores the most obvious and accepted meaning of the provision; *i.e.*, foreclosure does not impede a lender’s right to enforce a *separate* obligation that the parties “carved-out” of the commercial loan. Opening Br. at 14 (citing 27 Marjorie Dick Rombauer, *Wash. Practice: Creditors’ Remedies—Debtors’ Relief* § 3.37 (2d ed. Supp. 2012)). Not only does Harvey carefully ignore this authority, he fails to explain where in RCW 61.24.100 this right is preserved—if not section (10).

Harvey also ignores the conflict his interpretation would create between sections (3)(a) and (6), on the one hand, and section (10), on the other. As noted, and Harvey does not dispute, sections (3)(a) and (6) *permit* a lender to obtain a limited deficiency judgment against a borrower or a guarantor who grant a deed of trust on their own property. RCW 61.24.100(3)(a)(i) & (6). If section (10)’s reference to an action “to collect or enforce any obligation” is construed to mean the same thing as an action “for a deficiency judgment,” then section (10) would *preclude* any form of a deficiency judgment against a “borrower or guarantor” if the

loan or guaranty was secured by the foreclosed deed of trust. In short, section (10) would prohibit exactly what sections (3)(a) and (6) permit.

Harvey tries to reconcile this manufactured conflict between section (10) and section (6)—he simply ignores the conflict with section (3)(a)—by suggesting that section (6) “be read as presenting a limited exception” to section (10)’s supposed “general rule that ... deficiency claims against guarantors are precluded ....” Respondents Br. at 26. In other words, Harvey asks the Court to construe section (6) as an implicit exception to section (10), which he asks the court to construe as an exception to section (3)(c), which, of course, is an exception to section (1). This Court should reject these interpretive gymnastics, and give RCW 61.24.100 its plain meaning: section (3)(c) is the “general rule” allowing a lender to obtain an unlimited deficiency judgment against a guarantor of a commercial loan, except when the guarantor is himself the “grantor” of the deed of trust, in which case section (6) limits the scope of the deficiency judgment to waste and wrongful retention of rents; section (10) simply has nothing to do with a “deficiency judgment.”

Unlike Washington Federal, which supported its straightforward reading of RCW 61.24.100 with both legislative history and secondary authority (*see* Opening Br. at 15, 18-20), Harvey finds none to support his strained interpretation of section (10). The best he can do is cite to an

article from a WSBA newsletter. Respondents' Br. at 27-28. Worse yet, Harvey either badly misreads or mischaracterizes the article; it supports Washington Federal's interpretation, not his. Harvey quotes from a paragraph which he says "address[es] subsection (10)." *Id.* But even a superficial reading of the quote reveals that it addresses section (6), not section (10): when a guarantor grants a deed of trust to secure a guaranty, his liability is limited "to the same extent" as a borrower. *Id.*, App. B; *compare* RCW 61.24.100(6) (guarantor subject to deficiency judgment "to the extent" stated in subsection (3)(a)(i)). Indeed, the paragraph refers to the guarantor's right to proceeds of a sale of a "principal residence" under the "homestead exemption"—a proviso set forth exclusively in section (6).

The article does discuss section (10), but it does so several paragraphs *before* the paragraph Harvey quotes. That paragraph reads:

The amended Act also provides that a trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the "substantial equivalent" of that obligation, is not secured by the deed of trust. RCW 61.24.100(10). Thus, the parties may segregate liabilities into those that may be included in the lender's bid price, and therefore recovered from the sale if the lender is outbid, and those that will survive a trustee's sale. ...

Respondents' Br., App. B at 3. This paragraph not only cites section (10), it quotes it verbatim—leaving no doubt that the paragraph cited by Harvey relates exclusively to section (6). More than that, the author's comments

on section (10) confirm that it does not bar a deficiency judgment, but rather—as discussed above—allows a lender to enforce obligations that are *separate* from the commercial loan at issue, *i.e.*, “segregate liabilities ... that will survive a trustee’s sale.” *Id.* Harvey ignores this too.

Finally, this Court can reject Harvey’s claim that his interpretation of section (10) “does not represent a ‘windfall’ to the Harveys, any more than it was a ‘windfall’ to Kaydee Gardens as borrower ....” *Id.* at 23. His interpretation does lead to a windfall. Only Kaydee Gardens agreed to encumber its property and, in exchange, only it is entitled to the anti-deficiency protections of the Deed of Trust Act. Harvey did not agree to encumber his property, was not a party to Kaydee Gardens’ Deed of Trust and, indeed, never intended it to secure his Guaranty. On the contrary, instead of encumbering his property to induce the Loan, he promised “absolutely and unconditionally” to guaranty Kaydee Gardens’ debt if the value of its property came up short—which it did. To give Harvey total immunity would not only nullify the Guaranty, but would give him the benefit of a “quid pro quo” to which he contributed nothing.

**B. Harvey’s Guaranty Was Not Secured By The Deed Of Trust.**

Harvey concedes that his construction of the Deed of Trust, like the trial court’s, is based entirely on the boilerplate definition of the term “Related Documents.” The argument goes like this: because the Deed of

Trust secures the “Indebtedness,” and term “Indebtedness” is defined to include the term “Related Documents,” and the term “Related Documents” is defined to include the term “guaranties,” then—Harvey says—the Deed of Trust secures the Guaranty. Respondents’ Br. at 5-6, 16-17. Harvey does not actually argue that this was what the parties intended, or even that this was his intent. It plainly wasn’t. Fortunately, the plain language of the parties’ agreements, as well as their context, reflect the parties’ actual intent. The Deed of Trust secures only Kaydee Gardens’ obligations under the Loan—not Harvey’s separate obligation under the Guaranty.

Harvey studiously ignores all other terms in the Deed of Trust, attempting to pass them off in a footnote. *See* Respondents’ Br. at 6 n. 2 (“naturally most of [the Deed of Trust’s] provisions were devoted to the borrower/grantor’s obligations”). But as Washington Federal showed, when “Related Documents” is properly construed with the “Payment and Performance” and other unambiguous terms in the Deed of Trust, as it must, it is clear that the parties intended the deed to secure only the “Grantor’s” performance under the Note and Related Documents—the “Grantor” being Kaydee Gardens alone. *See* Opening Br. 22-24. In contrast, Harvey cannot point to a single provision in the Deed of Trust (or any other loan document, including the Guaranty) to support his flawed construction of the “Related Document” term. There is none.

Harvey concedes that the Deed of Trust expressly referred to, and defined, Harvey as the “Guarantor” and his guaranty as the “Guaranty” Respondents’ Br. at 5-6. But, here too, he carefully ignores the fact that the Deed of Trust omits the term “Guarantor” from the “Payment and Performance” provision (which identifies whose obligations are secured), and similarly omits the term “Guaranty” from the “Related Documents” provision (which describes what obligations are secured). As Washington Federal explained, the generic term “guaranties” found in the “Related Documents” laundry-list cannot mean the same thing as the defined term “Guaranty” without violating established rules of contract interpretation and rendering the later term superfluous. *See* Opening Br. at 24-25. This Court must deem the omission of the defined term to be intentional.<sup>2</sup>

Harvey tries to find support for his construction by pointing to other agreements executed with the Loan, arguing that they reflect “Horizon Bank’s ‘belt and suspenders’ approach [of] tying all loan-related

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<sup>2</sup> Harvey suggests that the generic term “guaranties” must refer to the Guaranty because it was “the only ‘guaranty’ executed at the time of the November 2008 loan documents ....” Respondents’ Br. at 17. The definition of “Related Documents,” however, applied to documents “whether now or hereafter existing.” CP 861. Thus, for example, the term “guaranties” would capture a so-called “completion guaranty” granted by the borrower or other third-party; such a guaranty does not guarantee payment of the borrower’s debt, but rather timely completion of the real estate development project financed by the borrower’s loan. *See, e.g., Turnberry Residential Ltd. Part., L.P. v. Wilmington Trust FSB*, 99 A.D.3d 176, 183, 950 N.Y.S.2d 362, 367 (2012).

obligations together and securing them with the Deed of Trust....” Respondents’ Br. at 7-10. But none of these associated agreements say that. They merely reflect the fact that Harvey’s commitment to guaranty the Loan was a fundamental condition precedent to the Loan itself. That is why, as Harvey points out, the Business Loan Agreement and Notice of Final Agreement defines the parties’ “Loan Documents” to include Harvey’s Guaranty. CP 568; CP 574. In short, just because the parties recognized that the Guaranty was a *loan document* does not mean it was a “Related Document” within the meaning of the Deed of Trust.

Indeed, Harvey’s reliance on the parties’ other loan documents only undermines his construction of the Deed of Trust. As Washington Federal pointed out, as part of the Loan, Kaydee Gardens executed a “Resolution” authorizing it to “mortgage, pledge ... or otherwise encumber” its real property “as security for the payment of any loans ... or any other or further indebtedness *of the Company to Lender ....*” CP 362-63 (emphasis added). Consistent with the terms of the Deed of Trust, the Resolution *did not* authorize Kaydee Gardens to encumber its property to secure the obligations or indebtedness of a “Guarantor” on a “Guaranty.” *Id.* It is surprising that Harvey completely ignores the Resolution in his brief; he’s the one who signed it on behalf of Kaydee Gardens. *Id.*

Of course, unlike Kaydee Gardens' promissory note—which expressly stated that it was secured by the Deed of Trust (CP 845)—the Guaranty contains no reference to the Deed of Trust, or any suggestion that the parties intended Harvey's obligations thereunder to be secured by Kaydee Gardens' property (or any collateral for that matter). CP 848-51. On the contrary, as Harvey himself notes, the Guaranty repeatedly states that its purpose is to guarantee performance of the “*Borrower's obligations* under the Note and Related Documents.” CP 848 (emphasis added). This language confirms the parties intended the Deed of Trust to secure Kaydee Gardens' obligations, not Harvey's, and that the generic word “guaranties” in the boilerplate definition of “Related Documents” does not encompass the specifically defined term “Guaranty.” After all, Harvey cannot guarantee performance of his own Guaranty. *See Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 709, 952 P.2d 590 (1998) (“a party to a contract cannot guarantee its own contract”).<sup>3</sup>

If anything, the parties' recognition that the Guaranty was a critical inducement to the Loan is a strong reason why Harvey's construction must

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<sup>3</sup> Harvey points out that a form deed of trust used by Washington Federal has a different definition of “Related Documents” than the Deed of Trust used by Horizon Bank at issue in this case. Respondents' Br. at 11-12. The language Washington Federal used in an unrelated document in an unrelated transaction has no relevance to the meaning Horizon Bank and Kaydee Gardens ascribed to the Deed of Trust.

be rejected; Harvey's implausible reading of the Deed of Trust would defeat the Guaranty's very purpose. Under the context rule, this Court may ascertain the parties' intent, not only by reference to contract language, but also by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, ... and the reasonableness of [their] respective interpretations[.]" *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). Especially pertinent here, "[w]here two commercial entities sign a commercial agreement, [courts] will give such an agreement a commercially reasonable construction." *Wilson Court*, 134 Wn.2d at 705.

Harvey's construction is the opposite of commercially reasonable. It simply makes no sense for the parties to agree to have the same deed of trust secure the borrower's loan and a guaranty of that loan. As Washington Federal explained, no party—not the lender, not the borrower, not the guarantor—receives a benefit from doing so. Opening Br. at 26. Harvey does not argue otherwise. Ironically, if Harvey's interpretation of RCW 61.24.100(10) is correct, his construction of the Deed of Trust becomes even more untenable. Why would a sophisticated commercial lender insist on having the borrower's deed of trust secure a guaranty of the borrower's indebtedness when doing so would render the guaranty meaningless in the very situation it was intended to apply most, *i.e.*, where

a deficiency remained after the non-judicial foreclosure of the deed of trust? Here too, Harvey doesn't say. This Court should not accept Harvey's strained construction of the "Related Documents" term when doing so would result in an absurd result the parties did not intend.<sup>4</sup>

*Wilson Court, supra*, is instructive. There, the landlord agreed to enter into a commercial lease with a corporate tenant, Tony Maroni's. As an inducement, Toni Maroni's president, Riviera, executed a commercial guaranty. When he signed the guaranty, however, Riviera wrote the word "president" after his name. The issue was whether the parties intended Riviera to sign the guaranty as a corporate officer, or in a personal capacity. 134 Wn.2d at 696-98. In rejecting Riviera's argument that the parties did not intend personal liability, the Supreme Court recognized:

As an inducement to the execution of the Lease, the Guaranty should be reasonably interpreted in such a way as to give it effect. Riviera's asserted position renders the entire Guaranty meaningless, hardly an inducement to

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<sup>4</sup> This Court should reject Harvey's suggestion that his reading of the Deed of Trust creates an ambiguity that must be construed against Washington Federal as the "drafter." Respondents' Br. at 16. Washington Federal was not the "drafter" of the Deed of Trust (Horizon Bank was) and Harvey was not a party to the Deed of Trust (Kaydee Gardens was) and, thus, Harvey cannot invoke the rule against Washington Federal. In any event, the rule applies only if an ambiguity remains after the court construes the contract in light of its circumstances, objective and reasonableness of the parties' interpretations. *See Roberts, Jackson & Assoc. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985). Here, proper construction of the Deed of Trust reveals no ambiguity.

anything, and is contrary to established rules of contract construction.

*Id.* at 706-07. The Court found that “it would make no sense for Tony Maroni’s to guarantee obligations it had already promised to undertake in the Lease,” especially given the “commercial sophistication of the parties” and “the circumstances under which the Guaranty was entered into.” *Id.* at 709-10. This Court should likewise refuse to give the Deed of Trust an unreasonable construction that makes no sense and that would, if Harvey is right about RCW 61.24.100(10), render the Guaranty meaningless following a non-judicial foreclosure of the Deed of Trust.

**C. Harvey’s Knowing Waiver Does Not Violate Public Policy.**

As a threshold matter, like the trial court, this Court must refuse to credit Harvey’s self-serving declaration that he did not read and would not have understood the Guaranty’s multiple waiver provisions. *See* CP 396 (Harvey Decl., ¶ 8).<sup>5</sup> Even if that were true, it doesn’t make a difference; Harvey is bound by the unambiguous terms of his Guaranty as a matter of law. *See Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d

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<sup>5</sup> Harvey did not argue below (and does not argue on appeal) that the waiver was ambiguous or did not, by its terms, apply to the very anti-deficiency defense he raises in this case. CP 518-20. Similarly, Harvey’s suggestion that the Guaranty’s waiver was “buried in fine print” or inconspicuous can be rejected out-of-hand. Respondents’ Br. at 30. The Guaranty’s waiver terms were set forth the bold and capitalized headings entitled “**GUARANTOR’S WAIVERS**” and “**GUARANTOR’S UNDERSTANDING WITH RESPECT TO WAIVERS.**” CP 849.

37 (1987) (“It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.”) (citation omitted). In *Skagit State Bank*, the court noted “there is no indication in the record that [Harvey] did not have the time or the opportunity, or could not have taken the opportunity, to read the documents or to consult an attorney.” *Id.* The same is true here.

The only issue is whether a commercial guarantor’s waiver of anti-deficiency defenses violates public policy. Harvey presents no reason why it would. He does not dispute that Washington courts have long upheld the common law rule that a guarantor can expressly waive suretyship defenses in a guaranty agreement. Nor does he dispute that the legislature did not forbid waivers in the text of the Deed of Trust Act—as it has with other statutes. *See* Opening Br. at 28-29. Thus, while RCW 61.24.100(9) allows an agreement to prohibit a deficiency judgment (*i.e.*, to make an otherwise recourse loan a non-recourse loan), the statute reveals nothing about the validity of an agreement to allow a deficiency judgment. The doctrine of *expressio unius est exclusio alterius* does not apply where, as here, the rights at issue are not of the same category. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999) (“Legislative inclusion of certain items in a category implies that other items *in that category* are intended to be excluded.” (emphasis added)).

Perhaps most glaring, Harvey fails to offer even one reason why a commercial guarantor's waiver of anti-deficiency defenses is "against the public good" or "injurious to the public"—which is the standard he must satisfy. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). The Deed of Trust Act unambiguously reflects the legislature's intent to **allow** deficiency judgments against commercial guarantors. RCW 61.24.100(3)(c). Indeed, there is no dispute that, under section (3)(c), a lender has a right to an unlimited deficiency judgment against an unsecured guarantor, subject only to a "fair value" defense. Even if Harvey's interpretation of section (10) is accepted, and that right is curtailed where the guaranty is deemed secured by the borrower's deed of trust, what possible "public good" is injured by allowing the parties to agree to give the lender the same rights it would otherwise have against an unsecured guarantor under section (3)(c)? None, of course.

All Harvey can do is threaten that if his waiver is enforced, then "waivers would be included in every Washington loan document," giving lenders "the right to recover deficiency judgments against borrowers and guarantors ...." Respondents' Br. at 31, 32 (emphasis in original). This is a red-herring. The Court need only decide the validity of an express waiver of anti-deficiency rights executed by a guarantor of a commercial loan; nothing more. A waiver executed by a sophisticated commercial

guarantor—as part of a guaranty intended to induce the lender to make a loan to a related entity—implicates none of the public policy concerns that may arise from a waiver executed by a borrower of a residential loan. To be sure, enforcing a third party commercial guarantor’s waiver of anti-deficiency defenses does nothing to upset the Deed of Trust Act’s “quid pro quo between lenders and borrowers.” *Donovick*, 111 Wn.2d at 416. The borrower still receives all the anti-deficiency protections of the Act, and the lender gets nothing more than what it bargained for.

That leaves Harvey’s predictable and misplaced reliance on *Bain v. Mortg. Elec. Registration Sys.*, 175 Wn.2d 83, 285 P.3d 34 (2012), and *Schroeder v. Excelsior Mgmt. Group LLC*, --- Wn.2d ---, 2013 WL 791863 (Feb. 28, 2013). These cases have nothing to do with deficiency judgments or guarantors, and neither holds that rights created by the Deed of Trust Act cannot be waived by express agreement. On the contrary, in *Schroeder*, the Court recognized that “[m]ost rights can be waived by ... contract,” specifically noting that its opinion should not be construed to preclude parties from agreeing to modify or waive aspects of the Act that are not “mandated requisites.” 2013 WL 791863, \*4-5 & n.7. As the Court explained, “requisites to a trustee’s sale” cannot be waived because they are not “rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Id.* at \*5.

Thus, contrary to Harvey’s argument that *Bain* and *Schroeder* were not just about waivers of “pre-foreclosure procedural requirements,” Respondents’ Br. at 33 (emphasis in original), that is precisely what they were about. As Washington Federal explained, unlike requisites to a trustee’s sale (notice of sale, opportunity to cure, etc.), which are statutory limits on trustee’s power to conduct a sale, the Deed of Trust Act’s anti-deficiency rights arise only after a sale, and they affect no one but the parties to the loan and/or guaranty. *See* Opening Br. at 31-32. In short, the right to be free from a deficiency judgment is tantamount to a private “right held by the debtor.” Even if there were public policy reasons to limit a borrower’s ability to waive that right in the context of a residential loan, those concerns do not exist in the case of a commercial loan—especially for a guarantor, who is not even party to the deed of trust.

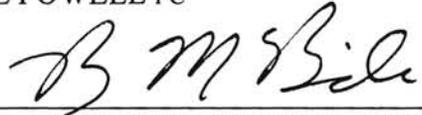
### III. CONCLUSION

The trial court’s construction of the Deed of Trust and Deed of Trust Act were erroneous as a matter of law, as was its refusal to enforce Harvey’s waiver of anti-deficiency defenses. This Court should reverse,

hold Harvey to the unambiguous terms of his absolute Guaranty, and remand the case for further proceedings on Harvey's "fair value" defense.<sup>6</sup>

RESPECTFULLY SUBMITTED this 2nd day of May, 2013.

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\_\_\_\_\_  
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<sup>6</sup> If this Court affirms, Washington Federal concedes that Harvey is entitled to an award of reasonable attorneys' fees incurred on appeal based on the fee provision contained in the Guaranty, subject to any right of set-off available to Washington Federal. CP 587. If this Court reverses, however, Washington Federal reserves its right to seek an award of appellate fees in the trial court after remand, if and when the trial court determines that Washington Federal is the prevailing party in this action. *See Stieneke v. Russi*, 145 Wn. App. 544, 572, 190 P.3d 60 (2008).

**CERTIFICATE OF SERVICE**

I, Valerie M. Allen-Powell, hereby certify that on May 2, 2013, I caused to be served a copy of the foregoing **REPLY BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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