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NO. 72805-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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Randy Previs, Katie Previs and John Blanchard,  
Appellants

v.

UNION BANK, N.A., successor-in-interest to the  
Federal Deposit Insurance Corporation, as receiver of Frontier Bank

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**OPENING BRIEF OF THE APPELLANTS**

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## I. INTRODUCTION

Appellants Randy and Katie Previs (collectively “Previs”) and John Blanchard (collectively “Appellants”) appeal the granting of Summary Judgment against them as loan Guarantors in favor of Union Bank in the approximate amount of \$42 million. Obviously such a judgment will devastate their lives. More importantly, however, this Summary Judgment was granted on a flawed interpretation of applicable law, and despite the existence of numerous disputed facts at issue, that could either eliminate Appellants’ liability as guarantors, or substantially reduce such liability. Disputed material issues of fact preclude Summary Judgment against Previs and Blanchard. Applicable law, properly applied, does not warrant Summary Judgment in this matter. The Trial Court’s granting of Summary Judgment against Appellants is reviewed *de novo* by this Court of Appeals. This Court should reverse the Trial Court and deny Union Bank’s Summary Judgment Motion.

## II. ASSIGNMENTS OF ERROR

1. **Material Facts In Dispute.** The Trial Court erred in granting Summary Judgment, concluding without explanation that that there were no material facts disputed in the Union Bank lawsuit against the Guarantors. Agreement as to material facts is a key component of

entitlement to Summary Judgment. However, Appellants asserted twenty five specific material facts that are in dispute, none of which were contested by Union Bank as being immaterial or not in dispute. (CP 286-289). The Trial Court's entire "ruling" in this regard, and its entire explanation as to disputed facts, consisted of its signing the Summary Judgment Order presented by Union Bank that simply recited "There is no genuine issue as to any material fact." (CP 283). As Appellants amply demonstrate, that is simply not true.

**2. Improper Application of Law.** The Trial Court erred in granting Summary Judgment, concluding that Union Bank was entitled to same as a matter of law, and that Appellants were precluded from presenting defenses to enforcement of the guaranty based on fraud, deceit or bad faith on the part of Frontier Bank and its successor Union Bank, as well as unconscionability, impairment of collateral and other issues raised in Appellants counterclaims. Union Bank based its "legal analysis" here on the unfair, unjust and thoroughly discredited "*D'Oench Doctrine*." (CP 12, 19-21, 262, 263). Apparently, the Trial Court accepted Union Bank's incorrect assertion, as regards guarantor liability, that applicable law requires a lender to refrain from fraudulent or deceitful conduct, and from acting in bad faith, only "at inception" (when the loan is first made), and that the lender can thereafter engage in such misconduct (actually *any*

misconduct) with legal sanction, with impunity and without recourse by guarantors. (CP 1312, 1313).

3. **Dismissal of Counterclaims.** The Trial Court erred in granting Summary Judgment, which in effect dismissed all of Appellant's counterclaims, including Promissory Estoppel Negligent Misrepresentation, Unjust Enrichment, Breach of Duty of Good Faith and Fair Dealing, and Breach of Contract. Here again, this was done on the basis of Union Bank's improper use of the *D'Oench* Doctrine (CP 262, 263), and failure to recognize or acknowledge specific (and applicable) exceptions for matters involving fraud, deceit and bad faith by the lender, which is the case here.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. **Fraudulent Inducement – Loans.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the potentially fraudulent conduct of Frontier Bank in entering into and subsequently increasing the amount of the Wellington Loan, and inducing the Appellants to guarantee such loans, at a time when Frontier Bank was failing and knew it may not be able to perform its obligations, but did not disclose same to the Appellants (CP 134, 266, 290, 321, 322).

**2. Fraudulent Inducement – Loan Payments.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding whether Frontier Bank acted with the intent of fraud, deceit, and/or bad faith in inducing the Appellants to contribute nearly \$2 million of their own funds (most of which went directly to Frontier Bank) with the assurance that the interest rate on the Wellington Loan would be decreased, and a new “mini-perm” loan would be issued, only to renege on that promise. (CP 132, 133, 267, 268).

**3. Nonpayment of Contractors.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the potential fraud, and the deceit and bad faith of Frontier Bank in promising that the Appellants and certain contractors would receive payment/reimbursement from the Primus TI Funds, from the ACOA insurance claim or from other funds collected by or available to Frontier Bank, whereas Frontier Bank and its successor Union Bank reneged on that promise. (CP 133, 134, 256, 268, 318, 319).

**4. Rejecting Joint Venture Funding.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the potential fraud, and the deceit and bad faith of Frontier Bank and/or Union Bank in inducing Appellants to seek additional “Joint Venture”

financing for the Wellington Project, on the premise that such Joint Venture financing would resolve issues on the Wellington Loan, and then not reasonably or seriously considering Joint Venture proposals put forward by Appellants. (CP 258, 268, 272, 320, 321).

**5. Impairment of Collateral.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the bad faith of Union Bank as to impairment of collateral in the administration and/or sale of the Wellington Property, notwithstanding substantial evidence that Union Bank took control of the Wellington Property, botched its administration, took major actions that substantially decreased the value of the Property without involving or advising the Appellants and sold the Wellington Property to the second highest bidder. (CP 131, 149, 287, 289).

**6. Rejection of Purchase Offers.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the bad faith of Union Bank in rejecting substantially higher offers to purchase the Wellington Loan or the Wellington Property and instead subsequently selling the Wellington Property for millions of dollars less than offered by other bidders for the Wellington Property. (CP 140-144, 257, 272, 290).

7. **Sale at Unreasonably Low Price.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the bad faith of Union Bank in allowing the Wellington Property to be sold for approximately one-third of Union Bank's own current appraised value for the Property. (CP 134, 139, 287, 288).

8. **Misrepresentation.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the bad faith of Union Bank in substantially decreasing the sale value of the Wellington Property by asserting, or allowing its Receiver to assert, to potential bidders of the Wellington Property that the cost of repairing the Wellington retaining wall would be \$10,000,000 when the actual cost thereof was only about \$250,000. (CP 142, 260, 272, 273, 287).

9. **Favoritism; Rejection of Higher Bid.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the deceit and bad faith of Union Bank in favoring OIBP/Onward, the ultimate purchaser of the Wellington Property, by allowing written deadlines to pass and altering the "rules" regarding sale of the Wellington Property, while twice ignoring the substantially higher bids of Veritas Development, the officially designated "backup bidder" for the Property. (CP 139, 142, 143, 150, 288, 290).

10. **Discrimination.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the deceit and bad faith of Union Bank in discriminating against Appellants Previs in their efforts to infuse additional funds into the Wellington Project, to cure defaults on the Wellington Loan or to purchase the Wellington loan portfolio, including rejection of the highest bid on the Wellington Property merely because the owner of such highest bidder was related to Randy and Katie Previs. (CP 139, 275, 291).

11. **Bad Faith Property Administration.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding whether Frontier Bank and/or its successor Union Bank acted fraudulently, deceitfully and/or in bad faith as regards its administration of the Wellington Property and the Wellington Loan, and the sale of the Wellington Property at auction (CP 131, 139, 142, 143, 286-290).

12. **Other Bad Conduct.** Whether the Trial Court erred by implicitly ruling that there was no triable issue of fact regarding the potential fraud and/or deceit and bad faith of Frontier Bank and/or Union Bank as to any of the other of the twenty five material facts at issue specifically identified by Appellants in this action, as set forth on Appendix A hereto. (CP 131, 134, 135, 137, 286-289, 292, 293, 321-324).

13. **Failure to Evaluate.** Whether the Trial Court erred in failing to specifically evaluate any of the twenty five material facts in dispute identified by Appellants in rendering its decision to grant Summary Judgment in this action by adoption of Union Bank's simplistic and erroneous assertion that no material facts are in dispute. (CP 283)

14. **FDIC Approval.** Whether the Trial Court erred in applying the *D'Oench* Doctrine to prevent Appellants from raising defenses to enforcement of the Guaranty, without a clear and specific showing of FDIC consent for same, which consent by law is requisite before any bank can use *D'Oench* in legal action against a borrower or guarantor. (CP 264, 286).

15. **Erroneous Application of Law.** Whether the Trial Court erred in applying the *D'Oench* Doctrine (and its related Federal Statute 12 U.S.C. Sec. 1823(e) to this situation, notwithstanding that such Doctrine does not apply to situations involving fraud, deceit or bad faith by the lender and/or its agents, and notwithstanding that such exceptions to *D'Oench* are clearly set forth in each of the cases cited by both Union Bank and the Appellants in that regard. (CP 149, 151-154, 262, 263, 1312, 1313). In other words, did the Trial Court properly conclude that lenders have no obligations to loan guarantors beyond the "inception of

the loan,” and can thereafter act fraudulently, deceitfully or in bad faith without consequence?

#### **IV. STATEMENT OF THE CASE**

The underlying matter involved in this appeal involves a lawsuit by Union Bank, on behalf of its predecessor Frontier Bank, to enforce guaranties executed by Randy and Katie Previs and John Blanchard, in connection with a series of loans to borrower Wellington Hills Park, LLC (“Wellington”), the entity that owned the subject industrial real estate project in Woodinville, Washington. The Wellington Project was developed by Appellant *Pro Se* Randy Previs, an experienced real estate developer with a “track record” of three previous successful developments in the Woodinville area. Appellant *Pro Se* Katie Previs is his wife. Appellant John Blanchard is a business attorney and a minority (15%) investor in Wellington. Randy Previs, Katie Previs and John Blanchard are referred to herein collectively as “Appellants” or “Guarantors.”

Commencing in 2005, Frontier Bank made several loans to Wellington, starting with a \$19.5 million land development loan in and culminating in a \$36.7 million construction loan in 2008 (the “Wellington Loan”), which included a Guaranty signed by the Appellants. (CP 2, 3). The proceeds from the Wellington Loan were used to construct two “flex

industrial” buildings on the Wellington Property, and to build tenant improvements in the building to be occupied by Primus International (“Primus”), Wellington’s tenant. Wellington complied with Frontier Bank’s various loan and construction conditions in completing such construction. Unfortunately, just prior to the time that Primus was scheduled to take occupancy, an excavation error by a subcontractor seriously damaged a retaining wall, which required about six months to repair, and consequently also delayed occupancy by Primus (CP 132). Such delay also impacted the Wellington Loan, which matured and was due to be paid off. Construction loans are typically paid off with a “permanent loan” (also called a “take out loan”) from a long-term lender and that was the plan here. However, permanent loans require an income producing tenant to be in occupancy, to provide a source of income to service the loan, which could not be done because Primus was not yet in occupancy. In this situation, at the very outset and continuing throughout the term of the Wellington Loan, Frontier Bank agreed to bridge the gap, so to speak, by converting the Wellington construction loan into relatively short term “mini-perm” to allow time for Primus to take occupancy and for Wellington to put a permanent loan in place. (CP 132, 318, 267, 268, 286-289). To make this a workable situation, Frontier Bank also agreed to reduce the interest rate on the Wellington Loan so that the income from

the Wellington Project would be roughly sufficient to service the loan. (263). However, Frontier Bank conditioned this modification on the Appellants curing loan payment deficiencies on the Wellington construction loan (approximately \$440,000) and completing certain construction items necessary for Primus to take occupancy and for the Wellington Project to pass final inspections. (267). To accomplish this, Previs/Blanchard cumulatively contributed approximately \$2 million in additional funds into Wellington, much of which ultimately went to Frontier Bank. (CP 132, 267, 318). They did this not knowing that in actuality Frontier Bank was in deep financial trouble due to numerous bad loans, was being investigated by the FDIC, and was at risk of failing. (CP 2, 3, 132, 134, 266). Frontier Bank considered the Wellington Loan to be its “Premiere Portfolio” and was desperate to have any problems with the Wellington Loan cured before it was required to advise the FDIC of its default status. Another default loan would be a serious problem for Frontier in its then undisclosed fight to stay alive as a viable banking institution. (*Id.*, CP 286-289).

Moreover, a substantial portion of the additional funding by Previs/Blanchard was obtained by additional personal borrowing, which Previs/Blanchard intended to repay from proceeds of a Wellington takeout loan and from approximately \$2 million in additional payments (the “TI

Reimbursement”) from Primus for extra work performed by various Wellington contractors and creditors at its request. (CP 133, 256, 268, 318, 319). A takeout loan was only possible, however, if the Frontier “mini-perm” loan was in place, if Primus was in occupancy and if construction of the first phase of the Wellington Project was completed. To accomplish that “completion work” Wellington made commitments to various contractors that they would be paid for such work from the Primus TI Reimbursement. Frontier Bank made specific commitments to Wellington (and to the Guarantors) that this \$2 million TI Reimbursement from Primus for extra work would be made available for payment to contractors and others, including entities owned by Randy Previs. (*Id.*). In the end, however, Frontier Bank kept nearly all of \$2 million Primus TI Reimbursement for itself. (CP 133, 263, 267, 268). When Union Bank acquired Frontier, it refused to honor Frontier’s commitments to the Appellants and to other contractors. (*Id.*). As a result, numerous contractors went unpaid for work performed, the Appellants faced huge additional debts and obligations and Wellington’s problems intensified.

Appellants held up their part of the deal by contributing additional funds to cure payment deficiencies on Wellington Loan as of December, 2009. (CP 132). Frontier Bank did not honor its part of the arrangement. Frontier did not implement the promised interest rate adjustment on the

Wellington Loan, or provide the mini-perm loan, and was pressured out of business by the FDIC. (CP 132, 133, 263, 367, 268, 318). Without the promised interest rate adjustment or “mini-perm,” Wellington was unable to make payments on the Wellington Loan, and it went into default.

As is typically the case in situations of this nature, the FDIC sought a “savior” bank to take over Frontier, and found same in Union Bank which acquired Frontier in April of 2010, subject to a “loss sharing” agreement wherein the FDIC would compensate Union Bank for 80% of any losses incurred by Union Bank with respect to the Wellington Project. (CP 143, 144). It is unknown how such “losses” are calculated, and whether they represent actual financial loss by Union Bank, or possibly a substantial profit. (*Id.*).

In December of 2010 Union Bank appointed Miles Stover/Turnaround, Inc. as Custodial Receiver of the Wellington Property, for the purpose of collecting rents and paying expenses as regards Wellington. (CP 3, 135). This was done even though prior to that all Wellington rents were promptly deposited into a Union Bank account, and all expense payments were subject to approval of Union Bank. (CP 138, 288). In November of 2011, over the objections of Randy Previs and John Blanchard, Union Bank “converted” the Wellington Custodial Receiver

into a General Receiver, with total authority over the Wellington Project and the Wellington Property, including the right to sell the property. (CP 4, 136, 137, 257). Pursuant to RCW 7.60.025, a General Receivership is to be granted only under exigent circumstances where there is a bona fide and immediate danger that the Property will be “lost or materially injured or impaired.” (*Id.*). At the time of the conversion, however, those conditions did not exist, and the judge handling the matter initially denied the Receivership conversion. (*Id.*). The judge was subsequently persuaded to grant the conversion based on Union Bank’s assertion that the soft costs insurance claim against Zurich was “at risk,” because the law firm handling the matter was going to withdraw because it had not been paid by Wellington. (CP 137, 138, 257, 269). However, that “risk” existed only because Union Bank’s Receiver (who controlled all Wellington funds) stopped paying the law firm, for no reason, and after having paid such firm previously on a regular basis. (*Id.*).

After Union Bank took over Frontier Bank it purported to work with Wellington and the Guarantors to resolve problems as regards the Wellington Project and return it to viability. In that regard, as had been the case previously with Frontier Bank, Union Bank advised the Guarantors to seek additional funding for the Project by way of refinancing the Wellington Loan, or involving funding infusions from

potential joint venturers in the Project. (CP 258, 272, 320, 321). Frontier Bank had advised Appellants that it would be willing to sell the Wellington Loan for its then “discounted” book value of about \$25 million, (CP 140, 271, 272), which information was known to Union Bank and was a basis for putting together various joint venture proposals. For over a year, the Guarantors sought funding from various sources around the country. Among others, Previs/Blanchard brought offers and proposals from Equity Investors (\$21 million, July 2010), Orbis Financial (\$25 million September 2010), Wellington Investors (\$25 million, December 2010), Trilateral Partners (\$58 million, February 2011), and Gramor Development (November 2011). (CP 140, 141, 258, 259, 272). Although such proposals would have paid off the Wellington Loan at a discount, Frontier Bank told the Appellants it was open to that (CP 140, 271, 272). And, the amount ultimately realized would still be far in excess of the approximate \$9.7 million recovery ultimately realized by Union Bank from its sale of the Wellington Property. (CP 5, 134). Most of such proposals sought to acquire the Wellington Loan “portfolio” from the bank. Frontier Bank had previously advised Randy Previs and John Blanchard that it was open to any proposal that would recover at least the current “book value” of the Wellington Loan, an amount of approximately \$25 million. (CP 140, 271, 272). Union Bank was advised of this

potential discount on the Wellington Loan at the onset of its involvement, and encouraged the Appellants to continue to seek “joint venture” and other financing. (CP 258, 272). These funding and Joint Venture arrangements would have paid off the Wellington Loan at its book value and in addition paid Wellington creditors 100 cents on the dollar. (*Id.*). This payment of creditors was important because the Wellington Project could not continue until creditors (who were supposed to be paid from the Primus TI Reimbursement or the ACOA Insurance Claim recovery) were paid for work already performed. (CP 133, 134, 318, 319). Although these offers and proposals were generated at the request of Union Bank, and were backed by established financing sources and entities, each of these proposals and offers were rebuffed, dismissed or simply ignored by Union Bank, mostly without explanation. (CP 140, 257, 269).

The Wellington Receiver, with the approval of Union Bank, elected to sell the Wellington Property “at auction,” and in 2012 initiated that process. (CP 141). Prior to and during the auction process, Union Bank and/or its Receiver received five specific offers to purchase the Wellington Property, including an offer from Talon Investors for \$23,650,000. (CP 290, 140, 141, 179). All of those offers were summarily rejected by Union Bank. (CP 259, 272). No reasonable rationale for the rejection of such offers was provided to Previs/Blanchard, nor was Previs

or Blanchard allowed to participate in the administration of the sale of the Wellington Property. (CP 140, 260, 262).

As part of the auction process, Union Bank's Receiver put together a "data package" on the Wellington Property that was made available to potential bidders online. One component of such data package was an estimate of the work required to fix certain potential problems with the Wellington Property retaining wall. According to the bidder data package, the cost of those repairs was quoted as \$10 million. (CP 142, 260, 272, 273). When Onward Partners, the ultimate purchaser of the Wellington Property, applied for permits to do those retaining wall repairs, it reflected that the cost of such repairs would be only \$250,000. (*Id.*).

In acting as General Receiver, Miles Stover took over all aspects of the Wellington Project, for the most part without involving or advising Randy Previs or John Blanchard – the persons most familiar with the Wellington Property/Project. (CP 138, 260, 262). Included in the actions taken by the Receiver – with the approval of Union Bank – were settlement of a \$5.2 million insurance claim for about 12% of its potential value (CP 134, 138) and an unwarranted 25% reduction in the rent payable to Wellington by Primus International, which resulted in a 28% decrease

in the amount bid for the Wellington Property by Onward, the ultimate purchaser of the Wellington Project. (CP 260-262).

Frontier Bank's appraisal of the Wellington Project in 2009 established a value of \$46.4 million. (CP 139, 146). Union Bank's own "distress" appraisal established a value for the Wellington Property nearly three times higher than the \$9.7 million Union Bank accepted when it sold the Wellington Property to Onward Partners.

In March 2013 Union Bank commenced this underlying legal action against the Guarantors. In March 2014 Union Bank moved for Summary Judgment. This was opposed by Appellants in their Reply Brief and in their Motion for Reconsideration. (CP Document 57, CP Document 90). The Trial Court found "There is no genuine issue as to any material fact." and granted Summary Judgment. (CP 283). The Trial Court also denied Appellants Motion for Reconsideration. (CP 296).

## **V. ARGUMENT**

### **A. Summary of Position**

This is a complex case, with extensive and complex facts. Thus far, all actions in this matter have been procedural in nature, involving various motions, affidavits and declarations, but no live testimony, witness examination or cross examination. (CP 293). Factors involved include a)

potential fraud by Frontier Bank, b) gross mismanagement by Union Bank and its Receiver appointed to manage the Wellington Property which resulted in massive devaluation of the Property, c) schemes conceived and implemented in bad faith by Frontier Bank in its manipulation of the Guarantors in its efforts to stay in business, and by Union Bank to obtain control of the Property, d) unreasonable and unwarranted rejection by Union Bank of offers and proposals consistent with Frontier Bank's stated willingness to accept a discounted payoff of the Wellington Loan and that would have resulted in financial recovery two to three times that ultimately realized and, finally, e) Union Bank's sale of the Wellington Property millions less than Union Bank's own appraised value for the Property. Union Bank deals with all that by saying in essence "it doesn't matter," that "unconditional" means guarantors are stuck no matter what, and that a lender can do whatever it wants and doesn't need to treat borrowers and guarantors fairly or reasonably, or live up to its commitments. (CP 147). Once a borrower or guarantor signs loan documents, Union Bank asserts, the lender can do whatever it wants with impunity. (CP 1312, 1313). It doesn't matter. The astounding conclusion from this argument is that once the loan documents are executed, the bank has an open license to lie, cheat and steal with impunity and without

accountability. Of course this flawed interpretation is not the law and is unconscionable on its face.

Appellants have established a myriad of disputed issues of material fact in this matter. Per applicable case law, including case law cited by Union Bank, any fact that could establish fraud, deceit, mismanagement or bad faith is potential grounds for affecting the outcome of this lawsuit, either by unenforceability of the guaranties, or a substantial decrease in the Guarantor's potential liability. The Appellants also have several counterclaims, including promissory estoppel, negligent misrepresentation, unjust enrichment, breach of duty of good faith and fair dealing, and breach of contract. Union Bank does not contend that the material facts in dispute asserted by Appellants are not material or are not in dispute. Union Bank's position is that *its* asserted material facts are not in dispute, and the Appellants' disputed facts should be ignored, or simply don't matter. Clearly, that position is not consistent with applicable law. Furthermore, Union Bank's interpretation of several key cases is incorrect, and leads to the astounding conclusion that after the loan documents are signed, a lender can do whatever it wants with impunity, including fraud, deceit and bad faith, and guarantors have no recourse with respect thereto. Again, this position is not supported by applicable law.

This complex matter should not be adjudicated on Summary Judgment. The Appellants did nothing wrong here, and did everything asked of them by Frontier Bank and Union Bank. The Appellants face potential huge damages, damages that will be ruinous to their lives. They have valid defenses to enforcement of the Guaranty and to the amount of their liability. The Appellants deserve their day in court, and the opportunity to defend themselves before a jury.

**B. Supplemental Background for Assignments of Error.**

The record clearly supports the facts and circumstances attendant to each of the errors asserted by Appellants, as set forth in the Assignment of Errors herein. This brief will not attempt to set forth all of the myriad facts and record references supporting these contentions. However, in summary the essential background and facts involved are as follows:

**1. Fraudulent Inducement – Loans.** Appellants believe it is likely that Frontier Bank was “in trouble” financially and not in compliance with applicable bank regulations at the time the original Wellington Construction Loan (and Appellants signed the Guaranty) was made in May, 2005, and almost certainly was when subsequent modifications were made to the loan in January and December 2008. (CP 266). Moreover, at the very outset of loan discussions Frontier Bank

proposed and specifically agreed that upon maturity of the Wellington Construction Loan it would make a bridge loan to “bridge the gap” pending permanent financing on the property, and specifically reconfirmed this commitment at the end of the original Wellington Loan term. (CP 132, 263, 267, 269). This so-called “mini-perm” was a significant inducement to the Guarantors to guarantee the Wellington Loan.

**2. Fraudulent Inducement – Loan Payments.** For its own benefit, and to the detriment of Guarantors, commencing in 2008 and continuing thereafter until it went out of business, Frontier Bank induced Randy Previs and John Blanchard to contribute substantial additional funds into Wellington, much of which went directly to Frontier Bank to cure then existing payment defaults on the Wellington Loan. (CP 256, 286). For example, in December of 2009, additional contributions were made, approximately \$440,000 of which went directly to Frontier Bank to bring the Wellington Loan current and in good standing as of January 2010. (CP 256, 293, 323). Previs/Blanchard did this only on the express commitment by Frontier Bank that it would a) modify the Wellington Loan, or make a “mini-perm” loan to allow it to be substantially serviced with existing rents and b) that Frontier Bank would work cooperatively with Appellants to approve “joint venture” restructuring of Wellington

and/or would sell the Wellington Loan portfolio for its then “book value” (approximately \$25 million) (CP 132, 133, 258, 263, 267-269, 271, 272, 318-324). It is important to note that the loan modification/mini-perm was absolutely necessary. Without that, the Wellington Loan would simply just go into default again, which it ultimately did. Any knowledgeable investor understands the concept of cutting one’s losses. There is simply no way Randy Previs and John Blanchard would come up with an additional \$440,000 to cure the Wellington Loan, and contribute significant additional funds to keep the Wellington Project moving, if that meant the Wellington Loan would simply go into default again the next month. That money was put in only because Frontier Bank committed to reduce the amount payable on the Wellington Loan to make it substantially “serviceable” from existing Wellington income. Which it would have been had Frontier Bank honored its commitment.

**3. Nonpayment of Contractors.** Wellington’s lease with its tenant, Primus International, allocated a certain amount of funds for tenant improvements (“TI’s”) to be constructed in the building (basic walls, flooring etc.) The lease also provided that if Primus wanted additional or more expensive TI’s, Wellington would construct same and Primus would reimburse the cost thereof upon initial occupancy. Primus did order additional and more expensive TI’s in the approximate amount of \$2

million (the “Additional TI’s”), which amount (the “Primus TI Reimbursement”) would be paid to Wellington upon Primus’ occupancy. (CP 133, 268, 269, 318, 319). The cost of these Additional TI’s was not included in the Frontier Loan (only the standard TI’s were covered, as at the time the loan was made the nature or cost of additional TI’s were unknown), so the Appellants needed to fund these alternatively. It was Wellington’s intent to fund the cost of the Additional TI’s by a) additional contributions from its owners (Previs/Blanchard) which would subsequently be reimbursed from the Primus TI Reimbursement, and b) by getting various contractors to perform work with the assurance that they also would be paid when Primus paid the TI Reimbursement. This plan was specifically submitted to and approved by Frontier Bank, which assured the Guarantors and the primary contractor, in writing, that payment would be made to participants from the Primus TI Reimbursement. (CP *Id.*). In other words, the Additional TI’s were in essence prefunded by the Guarantors and certain contractors, all of whom would be reimbursed/paid from the Primus TI Reimbursement. To accomplish that, Frontier Bank would need to allow the Primus TI Reimbursement to be paid to the various parties “making it happen.” This repayment was to be done according to a payment schedule prepared by Randy Previs and submitted to Frontier. (CP 256, 267, 268). The \$2

million Primus TI Reimbursement was in fact paid by Primus in 2009, and was promptly deposited into Frontier Bank. However, instead of allowing such funds to be paid to the “prefunding” parties as it previously agreed, Frontier Bank kept most of the Primus TI Reimbursement for itself, renegeing on its commitment and in effect “stiffing” the people who actually performed or paid for the work. (CP 133, 263). When it took over for Frontier, Union Bank was made aware of this Frontier Bank breach and injustice, but did nothing to address it even though it succeeded to the \$2 million Primus TI Reimbursement kept by Frontier.

**4. Rejecting Joint Venture Funding .** Because the Wellington Project had exhausted its construction funding due to the unexpected retaining wall repair and other factors, both Frontier Bank and Union Bank requested that the Wellington owners (the Guarantors) find additional sources of equity or financing for the Project. (CP 258, 272, 320, 321). In this context, Frontier Bank advised Appellants that it was “open” to selling the Wellington Loan to a JV Partner for its then “book value,” which was about \$25 million. (CP 258, 271, 272) It was discussed and understood by all that that could be accomplished by Wellington “selling” an interest in the Project by taking on a partner (“JV Partner,” thus converting Wellington into a joint venture) or by refinancing. (CP 140, 141, 258-260, 271, 272). Particularly considering the deteriorating national and regional

economic outlook at that time (2009) either option meant that the Wellington owners would have to give up a portion of their ownership to make things happen. The Wellington owners were willing to do that, and ultimately located a number of potential JV Partners who made offers and proposals. These offers and proposals ranged from a complete refinance of the entire Wellington Project (Trilateral Partners, which offered, in writing, to provide \$58 million), to offers to purchase the Wellington Loan at a discount. (*Id.*). However, notwithstanding both Frontier Bank's and Union Bank's statements to Appellants of willingness to accept "discounted" offers on the Wellington Loan, all of such proposals and offers were quickly rejected. (CP 259, 272, 290). Union Bank contends that such JV Partners "were not real" or were unable to perform. Appellants contend otherwise, that such JV Partners were established development/financing entities with a track record of "done deals." (CP 272) Obviously, at a minimum, this results in material facts in dispute.

Bottom line, however, Frontier reneged on its specific promise to cooperate and work with potential JV Partners, and Union Bank didn't even give them a chance. For example, in an initial telephone call with Gramor Development, an experienced and well-funded development company with an excellent track record, Union Bank scoffed at their potential offer (\$20 million - \$25 million) and advised that it would take

“a lot more than that, more than you would want to pay” to conclude a deal with Union Bank. (CP 259). Clearly, it is unreasonable and unconscionable for Union Bank to turn down even “discounted” proposals and offers (\$15 million to \$25 million), only to subsequently realize only \$9.7 million from its sale of the Wellington Property, and then stick the Guarantors with the difference. It makes no sense. Why would Union Bank do that? That’s a bit of a mystery at this point, to be determined at trial. However, Appellants believe it is at least partially because Union Bank would realize even more by selling at a “loss” and being paid by the FDIC pursuant to the complicated “loss sharing” agreement it executed when it took over Frontier Bank. (CP 143, 144). In other words, the bigger the “loss” the more money Union Bank would make.

**5. Impairment of Collateral.** Appellants contend, and believe they can prove at trial, that the conduct and sloppy administration of Frontier Bank, Union Bank and its Receiver, and unreasonable and bad faith conduct and decisions of the Receiver which were approved by Union Bank, significantly devalued the Wellington Property. One example of this is a faulty and totally unrealistic assessment in the Receiver’s “Data File” for bidders on the Wellington Property, as to the cost of repairing minor deficiencies with respect to the Wellington retaining wall. The “Data File” reflected a contractor quote for such

repairs at approximately \$10 million. In fact, Onward Partners, the purchaser of the Wellington Property, apparently made these repairs for about \$250,000. (CP 142, 260, 272, 273). Along with other things Appellants intend to establish at trial, this egregious error severely depressed the value of the Wellington Property in the minds of potential and actual bidders. Union Bank's contention that impairment of collateral and other issues were decided by summary proceedings in Snohomish County and in Bankruptcy Court misses the point, as none of those proceedings dealt with guarantor liability. Moreover, Union Bank admits there may have been collateral impairment of \$1,150,000 (a grossly undervalued calculation), as if this amount is a mere pittance not worth discussing. (CP 1314). The amount of potential liability is very important to Appellants, however, as it would be to any reasonable person.

**6. Rejection of Purchase Offers.** Many of the critical events involved in this matter took place in the midst of the recent economic recession, which left property values falling across the country, and the Wellington Property was no exception. It appears that under most scenarios, Frontier Bank/Union Bank would not be able to recover the full value of the Wellington Loan. At that point, standard business practices, and common sense, dictated that a way be found to minimize any potential loss. That's not only in the best interests of the Guarantors here; it is also

in the best interests of the banks involved. And it is consistent with Frontier Bank's and Union Bank's stated willingness to accept discounted offers for the Wellington Loan. Both Union Bank and Frontier Bank knew, or should have known, that any substantial recovery from the Guarantors was unlikely. Even if the bank incurred a loss, an ultimate loss of \$X dollars is still better than a loss of \$3X dollars. Nonetheless, Union Bank turned down and rejected opportunities to realize \$3X or \$2X, and accepted the mere \$9.7 million it got from the sale to Onward. (CP 5, 134, 290).

It should be kept in mind that there was a very simple, very "cost effective" way for Frontier Bank to have avoided *any* substantial loss on the Wellington loan, or possibly any loss at all. That would be for Frontier Bank to go through with its commitment to reduce the interest rate on the Wellington Loan and/or issue the mini-perm loan it promised. (And remember, Appellants paid for this commitment by paying hundreds of thousands to bring the Wellington Loan current.) (CP 256, 267, 286, 293, 323). Under that scenario, the Wellington Loan would have continued at a rate that could be substantially paid by existing rents, and the Wellington Project would continue and be commercially successful. That is exactly the scenario that actually did occur on thousands of "underwater" loans that were renegotiated by lenders in the recent economic downturn. In this

instance, at worst Frontier Bank (and its successor Union Bank) would be “out” a relatively small amount of interest payable on the Wellington Loan. Even that may not have occurred if Frontier elected to recoup the interest shortfall when permanent financing was obtained for the Wellington Property. Instead, Frontier Bank and Union Bank elected financial Armageddon. Appellants contend that Frontier did this because it did not want to tell the FDIC of any additional “problems” in its fight to stay in business, and that Union Bank did this either because it stood to make more from FDIC payments per its favorable “loss sharing” agreement, or because it unrealistically thought it could recoup any actual losses by pursuing the Guarantors. Appellants contend neither bank acted reasonably or applied sound business practices to this situation. Union Bank claims it has no “obligation” to accept any JV or sale offers. (CP 1316). While that may be true in a technical legal sense, it does not negate Union Bank’s overriding legal and moral obligation to act reasonably and in good faith, which it most certainly did not in this matter.

**7. Sale at Unreasonably Low Price.** Union Bank ultimately realized about \$9.7 million when it sold the Wellington Property. (CP 5). Union Bank protests that it didn’t sell the Wellington Property, but that the sale was accomplished by the Wellington Receiver and approved by the Bankruptcy Court. Here again, Union Bank seeks to wash its hands of any

accountability by pointing to the “independent” status of the Receiver it appointed, whose actions it approved, and to a pro forma Bankruptcy Court hearing wherein the Receiver’s sale was accepted. A tactic employed throughout the ages: blame someone else.

Nonetheless, Union Bank can fairly be charged with offloading the Wellington Property at an unreasonably low price. The Wellington Receiver, Miles Stover/Turnaround, Inc., was appointed by and paid by Union Bank. (CP 3, 4, 136, 137, 270). Moreover, Mr. Stover was converted from Custodial Receiver to General Receiver (with authority to sell the Wellington Property, and save Union Bank the trouble of foreclosure) only by deceit in claiming the ACOA insurance claim was “at risk” because of lack of counsel, when that “crisis” was manufactured by the Receiver stopping payment to the law firm. (CP 137, 138, 257, 269). In addition to the aforementioned erroneous \$10 million wall repair estimate, another major factor in depressing the sales price of the Wellington Property was an unnecessary and unwarranted 25% reduction of the rent payable by Primus International, which promptly resulted in a 28% decrease in the price offered by Onward. (CP 260, 261). The Receiver claims such renegotiated rent was necessary to satisfy certain claims made by Primus International. However, had he checked with John Blanchard (which he refused to do), the business attorney who negotiated

and drafted the Primus lease, he would have known that the Primus claims were relatively trivial, pretty much without merit, and certainly didn't justify a massive rent reduction. (CP 262). Here again, Union Bank contends that was done by the Receiver, not by them. Here again, the Receiver was appointed and paid by Union Bank, and Union Bank ultimately approved everything the Receiver did. (CP 136, 270)

**8. Misrepresentation.** Among the misrepresentations of Frontier Bank, Union Bank or its Receiver is the aforementioned \$10 million quote provided to prospective bidders on the Wellington Property sale, when the actual cost thereof was \$250,000. (CP 142, 260, 272, 273). Perhaps this was a "negligent" misrepresentation, but given the huge difference between \$10 million and \$250,000, that's a rather large degree of negligence (or incompetence). This and other misrepresentations to be proven by Appellants at trial severely depressed the value and sale price of the Wellington Property.

**9. Favoritism; Rejection of Higher Bid.** Union Bank identified the "successful bidder" for the Wellington Property as Onward Partners, in the process naming Veritas Development ("Veritas," a company owned by the Previses daughter, Ashley Previs) as the officially qualified and court-approved "backup bidder" in the auction. (CP 274). The "winning"

Onward bid price was not disclosed to Veritas or to the Guarantors.

Veritas naturally thought that it had been outbid by Onward and that its bid price was lower than that of Onward. Unbeknownst to Veritas, its bid for the Wellington Property was not lower than Onward's, it was actually substantially higher. (CP 142, 143, 273, 274, 290). There were actually two "rounds" of bidding. In the first round, the Veritas bid was about \$5 million greater than that of Onward. (*Id.*). A second round was required because as referenced above the Receiver had renegotiated the Primus lease to reduce its rent. (CP 142, 260, 261). In the second round, the Veritas bid was still more than a million dollars greater than that of Onward. (CP 274). The bid results were kept secret. Neither Union Bank nor its Receiver disclosed this patent injustice to Veritas or the Guarantors. (CP 274). That was discovered in the discovery process of this lawsuit, and in connection with Veritas complaints as to the fairness and adequacy of the bidding and sale. This occurred despite a specific reassurance given to the Guarantors by a Union Bank Loan Officer in writing that the Wellington Property "would be sold to the highest bidder." (CP 139, 275). In fact, the Wellington Property was sold to the second highest bidder. Onward was outbid in the first auction by about \$5 million, and by more than \$1 million in the second auction. Union Bank attempts to deal with this obvious inequity by claiming that Veritas did not have financing to

purchase the Wellington Property pursuant to its bid, but that is not the case. (CP 273, 274). Appellants are prepared to present irrefutable evidence at trial that Veritas did have appropriate financing. In fact, Union Bank's Receiver was presented with a written financing commitment from the Veritas lender, and advised Mr. Previs that he was satisfied with same. (*Id.*). Moreover, why would Veritas be officially designated and court approved as "backup bidder," if Union Bank and/or its Receiver did not believe Veritas could perform?

In contrast, it was Onward that could not perform, and on several occasions asked for and received substantial extensions of time and modifications of the preordained bidding process to accommodate its purchase. (*Id.*). The purchase/closing process ("Sale Process") for all bidders was stated in writing, including specified deadlines for completion of due diligence, and for closing the transaction. In each instance, Onward's requests for changes or for extra time were granted by the Receiver, and were approved by Union Bank. (CP 136, 270). Union Bank also approved the Receiver's acceptance of the second highest bid for the Wellington Property, despite its specific earlier written commitment to the Guarantors to accept only the highest bid. (CP 275).

10. **Discrimination.** As is amply demonstrated herein, Union Bank and its appointed Receiver acted unreasonably and illogically in its administration and sale of the Wellington Property, including, as referenced, rejection and failure to even reasonably consider proposals and offers to acquire the Wellington Project/Loan, rejecting opportunities to cure defaults on the Wellington Loan, and acceptance of a substantially lower bid for the Wellington Property. The one consistent element throughout is that Randy Previs was involved, as a continuing owner of Wellington, or that his family (i.e. his daughter Ashley) was involved. (CP 273) Appellants believe they can at trial establish personal bias and discrimination against Randy Previs, which is a violation of the obligation of lenders to act in good faith, as specifically enunciated by case law cited by Union Bank. *National Bank of Washington v. Equity Investors*, 81 Wash. 2d 886 (1973). Another example of such bias, which Appellants intend to introduce at trial, is that Union Bank's Receiver sent copies of an old (16 years) Orcas Island newspaper article that was unflattering to Randy Previs (who was back then attempting a development on Orcas Island), to a number of people, including Union Bank, the Title Company officer handling the Wellington Property and others unrelated to Wellington. (CP 291). There was absolutely no reason to do that, other than to discredit Randy Previs, and by association, Veritas Development, a

legally separate entity owned entirely by Ashley Previs, the daughter of Mr. Previs.

The animus and obvious discrimination against the involvement of anyone named Previs goes to the very heart of this lawsuit, at a minimum by substantially increasing the liability of the Appellants. Although the Appellants sincerely believe there is a basis for non-enforceability of the guaranties, even if that is not the case one cannot simply take the position that the amount of liability imposed on the Appellants doesn't matter. Although the Appellants dispute such liability, this lawsuit is also very much about the *amount* of any potential damages, if the Appellants are found to be liable. That is not an inconsiderable factor in this lawsuit, and must be determined by a careful examination of the facts, and a decision by a jury. If a bank improperly added thousands to an already substantial mortgage, would any borrower think that didn't matter? Of course not. If Union Bank or its agents have done things to justify a decrease or elimination of this debt, which Appellants claim is the case in this matter, they have a right to have a jury determine that issue, and the amount of their liability. That basic right of the Appellants to defend the Bank's damages calculation is totally destroyed in granting Union Bank's simplistic request for the full amount, with no consideration of its conduct in affecting damages.

### 11. **Bad Faith Property Administration; Exclusion of**

**Appellants.** As can be seen from the specifics referenced above, Union Bank and its Receiver acted carelessly, negligently, deceitfully and in bad faith in its stewardship of the Wellington Property, over which it took complete control, to the exclusion of Randy Previs and John Blanchard, the Guarantors here and owners of Wellington before Union Bank took it away from them. One of the most salient aspects of that process is that in administering the Wellington Project, including dealing with its tenant, Primus International, and dealing with potential additional tenants, contractors, creditors and governmental authorities, neither Union Bank nor its Receiver allowed appropriate involvement by the two people most familiar with the rather complex, multimillion dollar Wellington Project, developer Randy Previs and business/real estate attorney John Blanchard. (CP 260). It's not that they didn't offer their services. They did, and for a short while Union Bank modestly compensated them for their services. (CP 136) When Union Bank converted its Receiver, however, that ended. Thereafter, Mr. Stover attempted (unsuccessfully, in the view of the Guarantors) to administer the Wellington Property on his own. In the course of that, Appellants contend and will prove at trial, he botched nearly everything. Appellants contend that is partially the result of the Receiver's inadequate qualifications to handle a large project of the nature

of Wellington, and more specifically for his failure to involve the most knowledgeable parties (primarily Mr. Previs and Mr. Blanchard) in dealing with the complex issues that are bound to arise from a major real estate development.

One example of many in that regard is the Receiver's inept handling of a valuable Wellington insurance claim. In December of 2008, a portion of the retaining wall around the Wellington Property was damaged as a result of a subcontractor error, and required approximately six months to repair. This incident was insured, and Wellington filed a claim against its insurer, ACOA, to recover the cost of repairs and rental revenue lost as a result of the repair delay. (CP 134, 137, 138, 257, 287). ACOA paid most of the "hard costs" involved (cost of repair) but balked at paying for lost income, for which Wellington had specific insurance coverage, for which it paid an extra premium. Accordingly, on behalf of Wellington, Mr. Blanchard engaged Harper Hayes, a law firm specializing in pursuing insurance claims. Based on the specific wording of the policy, Harper Hayes estimated the value of the Wellington "soft costs" claim at a minimum of \$1.8 million, and potentially as much as \$5.2 million. (CP 137, 138, 256, 257). When he first came on board, Mr. Stover, Union Bank's Receiver, was satisfied with the efforts of Harper Hayes and consistently paid its bills rendered to Wellington. (CP 257). After several

months of regular payment, however, with no explanation the Receiver refused to pay continuing Harper Hayes invoices, and as a result Harper Hayes threatened to withdraw for nonpayment. (*Id.*). Instead of paying Harper Hayes their due (which he ultimately did, much later), the Receiver in effect fired the law firm, again without explanation. Realizing the potential impact to this valuable Wellington claim, Randy Previs and John Blanchard protested, to no avail. As previously noted, after using this artificial “crisis” to justify conversion of its Receiver from Custodial to General, Union Bank approved the engagement of an entirely new law firm (the same firm that represents the Receiver) to handle the claim. This new firm is not an insurance claim specialty firm, and there were no issues or problems disclosed to justify the firing of Harper Hayes. Moreover, one must seriously consider a change of attorneys in any complex matter as it costs thousands just for the new firm to get up to speed. In any event, without the involvement of either of the persons most knowledgeable about the claim (Randy Previs and John Blanchard) subsequently with the approval of Union Bank the Receiver settled the ACOA claim for \$750,000, which is a fraction of the \$1.8 million - \$5.2 million value attributed to the claim by specialists Harper Hayes. (CP 257, 258).

**C. Standard of Review: Review *De Novo*; Summary Judgment Improper if Material Facts in Dispute.**

Procedurally, Summary Judgment is handled by Rule 56, which in relevant portion states:

**Rule 56(c). Motion and Proceedings.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

**Rule 56(h) Form of Order.** The order granting or denying the motion for Summary Judgment shall designate the documents *and other evidence called to the attention of the Trial Court* before the order on Summary Judgment was entered. (emphasis added).

The standard of review on Summary Judgment is well settled.

Review is *de novo*; the Appellate Court engages in the same inquiry as the Trial Court. *Trimble v. Washington State Univ.*, 93 Wn.2d 88 (2000), citing *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary Judgment is appropriate if there is no genuine issue of material fact **and** the moving party is entitled to judgment as a matter of law. *Trimble v. Washington State Univ.*, *supra*, citing *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 261, 138 P. 3d 943 (2006); CR 56 (c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to

the nonmoving party. *Trimble v. Washington State Univ.*, *supra*, citing *Clements*, 121 Wn.2d at 249; *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements*, *supra*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982); *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash. 2d 471, 484, 258 P. 3d 676 (2011); *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn. 2d 640, 646, 835 P.2d 1030 (1992)). An order erroneously granting Summary Judgment on a claim is inherently prejudicial and *requires reversal*. (emphasis added) *Beers v. Ross*, 173 Wn. App. 566, 569, 154 P.3d 277,279 (2007)

Right of trial is a bedrock foundation of the American legal system. With respect to nearly all legal proceedings, and with very limited exception, the parties involved have a state and federal constitutional right to a trial by jury. That right should not be taken away lightly. Summary Judgment is an administrative efficiency measure, and should never be used to trump or deny basic constitutional rights. The purpose of the Summary Judgment procedure is to avoid an unnecessary trial when there truly is no genuine issue of material fact. It is meant to prevent a waste of "judicial resources" if the result is without question a foregone conclusion, not to deprive litigants of constitutional rights and the opportunity to

defend themselves. A trial is absolutely necessary if there is a genuine issue as to *any* material fact. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977); *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). A "material fact" is one upon which the outcome of the litigation depends, meaning that such fact could affect the properly rendered outcome. *Jacobsen v. State, supra*; *Morris v. McNicol, supra*; *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 500 P.2d 88 (1972). In ruling on a Motion for Summary Judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, *if reasonable people might reach different conclusions, the motion must be denied* (emphasis added). *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); 45 Wash. L. Rev. 4, 5. Any doubts about whether there are material facts in dispute are to be resolved against the moving party. *Phillips v. King County*, 136 Wn.2d 946, 968, 968 P.2d 871 (1998).

Summary Judgment is only appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to a judgment as a*

*matter of law.*” CR 56(c) (emphasis added). It is a two-prong standard, consisting of “factual” and “legal” elements, both of which must clearly be met. The court is required to view “the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving part.” *Lakey v. Puget Sound Energy Inc.*, 176 Wn.2d 909, 922 (1996); *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 279 (1997); *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). If there is a dispute as to any material fact, *summary judgment is improper. Id* (emphasis added). Summary Judgment should be denied where there is “any reasonable hypothesis” entitling Appellants to the relief sought. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Weighing evidence, balancing competing experts' credibility, and resolving conflicting issues of fact are not appropriate on summary judgment — trial is necessary to resolve these types of issues. *Larson v. Nelson*, 118 Wn. App. 797, 810, 77 P. 3d 671 (2003).

Summing up, on a *de novo* review of a Summary Judgment the Court of Appeals gives no deference to the Trial Court’s decision. Based on the same record presented to the Trial Court, the Court of Appeals makes its own decision as to whether there are genuine issues of material fact that prevent Summary Judgment. It also makes its own decision as to whether the moving party was entitled to judgment as a matter of law. The

court views all in the light most favorable to the Appellants, in this instance the Previses and Mr. Blanchard. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011); *The Analysis and Decision of Summary Judgment Motions A Monograph on Rule 56 of the Federal Rules of Civil Procedure* William W Schwarzer, Alan Hirsch, David J. Barrans. Federal Judicial Center 1991.

**D. The Court Erred in Concluding Material Facts Are Not in Dispute.**

The Trial Court signed Union Bank’s proposed Order with a couple of minor handwritten adjustments, essentially adopting all of the language and format proposed by Union Bank. Moreover, and a critical element of this appeal, the Trial Court adopted wholly, the conclusory statement provided by Union Bank in its proposed Order that “there is no genuine issue as to any material fact.”

The Order referenced certain documents as having been “considered” in the context of dealing with the matter. However, it did not reference *any* of the specific material facts contended by Appellants to be at issue, nor did it indicate *any* analysis or consideration of same. Appellants contend this “broad brush” conclusory approach does not meet

the letter or spirit of Rule 56(h) nor the basic tenants of Summary Judgment standards. The Trial Court is obligated to consider and weigh the specific facts in dispute as alleged by the nonmoving party, any one or more of which could be a bona fide material fact in dispute. The Trial Court is obligated to view all disputed facts most favorably to the Appellants position. This obligation cannot be fairly met by simply reciting certain documents were considered. The language of Rule 56(h) – that “*other evidence called to the attention of the Trial Court*” must be specifically considered – and basic justice, require more. Appellants are entitled to know that their “disputed fact” contentions were specifically considered and if rejected by the Trial Court as not material or not disputed, the basis for such rejection. The Trial Court cannot reject specifically contended facts by stating, in conclusory language drafted by the adverse party, that “I looked at some of your documents.” The law requires, and Appellants deserve, a more deliberate reckoning.

The law is clear that Summary Judgment cannot be granted if material facts are in dispute. As is reflected in Appellants Motion for Reconsideration, Appellants specifically identified twenty five material facts in dispute<sup>1</sup>, any or all of which could affect the outcome of a trial.

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<sup>1</sup> Some of these material disputed facts are specifically discussed herein. All of them are set forth on Appendix A hereto.

Union Bank did not contest that any of such facts were not in dispute or were not material, but remained silent on that issue. However, given that the specified facts go to the issue of impairment of collateral, decimation of value, potential fraud, deceit, malfeasance, personal discrimination and manifest bad faith on the part of Frontier Bank and/or Union Bank one can assume that Union Bank “disagrees” with such facts. If so, obviously such facts are “in dispute.” If not, there is a viable basis for the Guarantors to avoid enforcement of the Frontier guaranty by Union Bank, or a substantial reduction of liability thereunder. One thing is absolutely true: Union Bank cannot get rid of material disputed facts by ignoring them, as they did here. They may not agree with such contentions, but that’s the point – meaning such facts are genuinely in dispute.

Before rendering judgment, the Trial Court is obligated to carefully consider and evaluate facts the nonmoving party designates as disputed, but there is no evidence the Trial Court did that. Appellants are entitled to have these issues tried by a jury. Not only are Appellants entitled to a trial on such facts, some of them go to the issue of whether Union Bank can rightfully apply the *D’Oench* doctrine against Appellants as a matter of law (discussed below).

The burden is on the moving party to demonstrate there is no genuine issue of material fact and that, as a matter of law, Summary Judgment is proper. *Jacobsen, supra*, 89 Wn. 2d at 108. That burden clearly was not met in this instance, as Union Bank did not specifically contest any of the disputed facts proposed by Appellants to be either nondisputed or nonmaterial. Union Bank did recite a long string of facts they contend as nondisputed, but these consisted primarily of a recital of documents signed by Appellants and language therefrom. Appellants did not contest those particular “facts,” but that is not the point here. The disputed facts contested by Appellants are totally different than the facts Union Bank recited. Union Bank cannot and did not meet its burden as the moving party by in effect stating that *some* facts involved in the litigation are not disputed. The Trial Court must consider *all* “disputed facts” proposed by the parties.

If the moving party satisfies its initial burden of proof as to the lack of “disputed facts,” then the nonmoving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Assn v Blume* 115 Wn. 2d 506, 516, 799 P.2d 250 (1990). Union Bank implies that it did meet its initial burden, but here again there is nothing in the record stating that, and the record reflects otherwise. Appellants contend that Union Bank did not meet such burden. Again, one cannot meet such

burden by reciting some facts not in dispute – all contested facts must be considered. Even if it had, however, the nonmoving party must be given an opportunity to demonstrate material facts actually are in dispute. In this instance, Appellants did so in their Motion for Reconsideration, specifying twenty five material facts in dispute, none of which were refuted by Union Bank as either nondisputed or nonmaterial. Nonetheless, the Trial Court denied Appellants Motion for Reconsideration, once again without the slightest indication as to why the Trial Court considered any of the proposed disputed facts to be either nondisputed or nonmaterial. With due regard, the Trial Court erred in doing so, and in granting and sustaining Union Bank’s Motion for Summary Judgment. Each of the factual allegations in dispute here go directly to a cause of action which under existing case law would relieve the Guarantors here from the guaranty, or substantially limit their liability. There is no evidence in the record that demonstrates that the Trial Court dealt with Appellant’s “disputed facts” contentions substantively, or in any meaningful fashion other than its adoption of Union Bank’s simplistic language that there are no material facts in dispute.

Union Bank cannot have it both ways. They either disagree with the facts raised by the Appellants in this action, in which case a trial is necessary to determine the applicability of those facts. Or, alternatively,

Union Bank agrees with Appellant's position on these facts (argued below), in which case applicable Washington case law provides that the guaranty signed by Appellants is either partially or totally unenforceable

**E. The Trial Court Erred in Concluding that Appellants Are Not Entitled To Any Defenses and in Applying the *D'Oench Doctrine***

It is abundantly clear that there are many material facts in dispute in this matter. What's left is the "second prong" of Summary Judgment entitlement: whether Union Bank is entitled to Summary Judgment as a matter of law. Union Bank claims it is, but that is based on its erroneous interpretation and "spin" on the two primary cases cited by Union Bank, those being *National Bank of Washington v. Equity Investors*, 81 Wash. 2d 886 (1973) and *Grayson v. Platis*, 95 Wash. App. 824 (1999). Interpreted fairly, reasonably and the context of actual words in the ruling, both such cases favor the Appellants in this matter. Both make it clear that fraud, deceit, misrepresentation and bad faith are valid defenses to enforcement of an "unconditional guarantee." Neither case applies such defenses exclusively to an "inducement" situation as contended by Union Bank. And, neither case supports Union Bank's contention that fraud, deceit, misrepresentation and bad faith by a lender *after* the loan documents are signed simply doesn't matter, and that the borrower/guarantors have no recourse.

Union Bank's position is that an unconditional guaranty is just that, totally and absolutely unconditional under all circumstances and conditions, and that all defenses potentially available to the Guarantors are waived. It further asserts that enforcement of a guaranty is unaffected by the conduct of the lender – be it fraud, deceit, bad faith or otherwise, except is such conduct was existent at the time the original loan documents were signed<sup>2</sup>. Most anyone who has obtained a loan from a bank knows that with the exception of a few key business provisions such as term of the loan and the applicable interest rate, bank loan documents are standardized and are not negotiated. Essentially the bank puts a pile of documents on a table and the borrower and guarantors sign the documents. Millions of these loan transactions are conducted every year, and with extremely rare exception the lending bank is not acting fraudulently, deceitfully or in bad faith at that time. Yet, Union Bank erroneously contends that if the lender does act fraudulently or in bad faith, the only time that matters is if the lender engages in such conduct in “inducing” the borrower/guarantors to sign. This interpretation leads to the astounding conclusion that after the loan documents are signed, the lender is free to defraud, deceive and cheat borrowers and guarantors, and to deal with

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<sup>2</sup> At page 10 of its Supplemental Brief in support of its SJ Motion, Union Bank asserts: “The Defendant’s Guaranties were made on May 27, 2005. If there was any fraud, or deceit in the inducement, it would have had to have happened then.” (CP 1313)

them in abject bad faith, with total impunity. Think about that. The bank has an open license to commit fraud? It's clearly not the applicable law in the state of Washington, or anywhere else. Nor should it be.

Moreover, Union Bank contends, if the post-signing fraud, deceit or bad faith is subsequently discovered by the borrower or guarantors, as is the case here, there is nothing they can do about it, and are estopped from raising any such issues as a defense.

Thankfully, however, that is not the law. Moreover, it defies common sense and the basic tenants of our legal system. Banks can lie, cheat and steal with impunity? Borrowers and guarantors have no recourse? Really? It sounds absurd, because it is.

***D'Oench Doctrine and U.S.C. Sec. 1823(e)***. This amazing misstatement of applicable law flows from two basic sources. First, from application of a 73 year old, highly discredited Supreme Court case, *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its statutory equivalent U.S.C. Sec. 1823(e). Application of *D'Oench* and its statutory equivalent is commonly known as the *D'Oench Doctrine*, which simply stated prevents borrowers in lender enforcement actions from relying on or utilizing documents, conduct and actions of a lender that do not meet certain proscribed documentation standards, primarily that they must be in

writing and preserved in certain lender records. *D'Oench* has been used to unfairly and unreasonably deprive borrowers and guarantors of otherwise valid defenses. At its essence, *D'Oench* says that that borrowers and guarantors who would otherwise have valid legal defenses to enforcement of a loan or guaranty cannot raise those otherwise valid defenses, for one reason and one reason only: *because they had the misfortune of their lending bank going out of business*. That's it. The entire rationale of *D'Oench*. If Frontier Bank had stayed in business, Appellants could and would raise all of their defenses to enforcement or limitation of the guaranties. Union Bank contends that because it acquired a failed bank, now the Appellants have no defenses. In other words, Appellants must pay for Frontier Bank's bad business practices with other borrowers, with respect to which they had absolutely no connection. It is fair to say that this grossly inequitable "doctrine" may not quite be totally dead, but is highly discredited and by both regulation and conscience should not be applied to the Guarantors in the Wellington situation.

*D'Oench* has been universally cited as a miscarriage of justice, and has been so unfairly applied and thoroughly condemned by legal scholars, treatises and law review articles<sup>3</sup> that the FDIC adopted a rule requiring

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<sup>3</sup> As further evidence of how widely the *D'Oench Doctrine* and U.S.C. Sec. 1823(e) have been criticized and limited in their application, it should be noted that there are numerous

any lender seeking to assert the *D'Oench* Doctrine to obtain FDIC preapproval to do so<sup>4</sup>. Union Bank contends that it did obtain FDIC approval to apply *D'Oench* in this matter. However, Union Bank produced no evidence of same, and importantly, produced no documentation as to the process involved in obtaining such FDIC consent. Appellants were given no opportunity to participate in such process, to review the facts submitted by Union Bank in such process, or to challenge such “approval” in any way. All we have is Union Bank stating that it obtained FDIC consent. Appellants believe the “consent process” utilized by Union Bank in this matter was flawed. To be fair and truthful in this process Union Bank would be obligated to advise the FDIC in its application that this case involves specific allegations of deceit, misrepresentation, bad faith and potential fraud, because those elements have been specifically alleged by Appellants. Since fraud, deceit or bad faith are exceptions to the application of *D'Oench*, it is difficult to imagine

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scholarly and law review articles published on the subject, including *Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Duhme and 12 U.S.C. Sec. 1823(e) Superpowers in Failed Bank Litigation*, 80 Minnesota L.Rev. 1323 (1995) and *Alive But Not Quite Kicking: Circuit Split Illustrates the Progressive Deterioration of the D'Oench, Duhme Doctrine*, 42 St. Louis Univ. Law Journal 945 (1997).

<sup>4</sup> FDIC Regulations – 5000 – STATEMENT OF POLICY REGARDING FEDERAL COMMON LAW AND STATUTORY PROVISIONS PROTECTING FDIC, AS RECEIVER OR CORPORATE LIQUIDATOR, AGAINST UNRECORDED AGREEMENTS OR ARRANGEMENTS OF A DEPOSITORY INSTITUTION PRIOR TO RECEIVERSHIP

that the FDIC was fully and properly advised when Union Bank obtained its consent for this matter. This alone justifies overturning the Summary Judgment in this instance, absent a showing by Union Bank that it fully and fairly advised the FDIC of the allegations extent in this matter. If Union Bank obtained FDIC consent to use *D'Oench* improperly, by not clearly stating that specific exceptions to *D'Oench* are involved, then Union Bank's FDIC consent is not valid. Additionally, Appellants believe that evidence exists that at least some of Appellants contentions and allegations do in fact meet *D'Oench* criteria, in two respects: a) that even Union Bank's erroneous "inducement" standard was met when the Appellants were induced by Frontier Bank to guarantee the Wellington Loan without advising that Frontier Bank was in serious financial difficulty, and to cure defaults on the Wellington Loan in Frontier's frantic efforts to avoid another "bad" loan in its dealings with the FDIC, and b) that in some instances "alternate" records can be used to satisfy *D'Oench*, or even no written records, if the bank has failed to properly and regularly document its arrangements with borrowers.<sup>5</sup> Moreover, technically *D'Oench* may not apply to the \$17.2 million "increase" in the Wellington

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<sup>5</sup> ***Diligent Party Exception; Outside Ordinary Banking:*** Per the above referenced FDIC Guidelines, there can be an exception for a "diligent party" who did what was reasonably required and had no control over whether the bank satisfied the applicable record keeping criteria, as well as for matters "outside of" normal banking procedures.

Loan as Frontier Bank did not acquire any “new” collateral for same as is required by U.S.C. 1823 (e) (1) B.

Not only is usage of *D'Oench* by lenders universally discredited, it is also totally one-sided. If a borrower or guarantor agrees, orally or otherwise, to take actions that benefit the bank, *D'Oench* does not prohibit the lender from enforcing such action, regardless of the specifics of the documentation thereof. Washington law, and state law in general, allows enforcement of business arrangements and other agreements – including oral agreements made in meetings and otherwise – that are not necessarily documented in a specific way, so long as such agreements can be proven. In this instance, under prevailing Washington law, all of the "unofficial" agreements and loan modifications contended by appellants, oral and written, can be established and proven at trial. Normal business practices, and applicable law, allow this. Utilizing *D'Oench*, Union Bank here attempts to prevent the introduction of any “agreements” or “deals” made by Frontier Bank (of which there were many) that are not formally a part of the loan documents signed at the original loan signing (2005) and are not recorded in the official minutes of Frontier Bank. Union Bank does not acknowledge broad defenses to *D'Oench* based on fraud, deceit or bad faith nor does it acknowledge exceptions to *D'Oench* based on records, correspondence and sources other than the specific loan documents or

written minutes of the bank, even though those exceptions are part of the *D'Oench* Doctrine and are a part of the caselaw Union Bank cites in its favor.

The world of business, and basic reality, understands that complex construction projects such as the Wellington project consist of many moving parts, and various interactions of lender and borrower, not all of which are "officially" entered into formal documentation or minutes of the bank. Any lender that would require that for every accommodation, agreement and understanding would be instantly out of business.

In simple terms, here is what unfettered application of *D'Oench* means: A man's word and pledge means nothing – if he's a banker. Take fairness and reason, and throw it away – if you're a bank. Allow a lender to act unconscionably. If you're a borrower or guarantor, however, all your words and actions can be enforced by the bank, and you have no recourse for the bank's unconscionable conduct. Fortunately, however, *D'Oench* cannot be applied without recourse, as propounded by Union Bank. A bank must have specific FDIC approval to use *D'Oench*, and even then there are clear exceptions – fraud, deceit and bad faith -- to its application.

*D'Oench* is unfair at its very core and premise. Prohibitions and exclusions apply to the borrower/guarantors that do not apply to the lender

seeking enforcement. In accordance with business practices and principles of commercial law (e.g. the Uniform Commercial Code), a lender can and will enforce all manner of agreements and arrangements, even oral agreements, notwithstanding they may not be formally a part of the loan documents and are not reflected in the minutes of the bank. Nonetheless, when it utilizes *D'Oench*, Union Bank claims that same lender can prohibit borrowers and guarantors from doing that same thing, i.e. proving and enforcing agreements and arrangements pursuant to normal legal standards. It is the quintessentially “unlevel” playing field. Here, under the rubric of *D'Oench*, Union Bank, attempts to throw out normally applicable law, and common sense, to prohibit evidence of promises and commitments made by Frontier Bank not because such promises and commitments were not made, were not relied upon and even paid for by the Appellants, and not because such commitments and promises cannot be proven at trial -- but simply because old discredited case law says a “takeover” bank can “play unfairly” in some instances. Union Bank does not deny that Frontier Bank made such promises and commitments to Appellants, or that the Appellants performed their end of the bargain. Instead, Union Bank simply says per *D'Oench* none of that can be introduced, unless it is written in the loan documents and reflected in the formal minutes of the bank. The result is that reason and justice are

perverted. Even worse, use of *D'Oench* means that the borrower/guarantors pay for the “sins” – poor business practices – of the lender. *D'Oench* is a classic example of very bad case law, on steroids. Utilization of *D'Oench* is unfairness and injustice in the extreme. *D'Oench* does not trump all, as Union Bank contends. Because of specific exceptions, *D'Oench* is not applicable here, and should not be applied.

***Equity Investors* and *Platis*: Unconditional Guaranties Are Not Unconditional.** In reality, an “unconditional” guaranty is not unconditional. Based on case law cited by the Appellants a guaranty may be unenforceable, or limited in its application, in instances where lender fraud, deceit or bad faith exists. Union Bank does not dispute this; in fact it cites the same cases, but draws very different and unsupportable conclusions from such cases. In general, two cases are involved; *National Bank of Washington v. Equity Investors*, 81 Wash. 2d 886 (1973) and *Grayson v. Platis*, 95 Wash. App. 824 (1999).

***Equity Investors Case.*** *Equity Investors* involved a bank’s enforcement action against guarantors of a construction loan, which is precisely the situation we have here with the Wellington Guarantors. The *Equity Investors* guarantors alleged that the bank acted negligently in disbursing loan funds, including disbursements made *after* the guaranties were executed. However, the *Equity Investors* court found that the record

did not support the trial court's finding of negligence, and reversed on that basis. The Court observed that it could "not find in this record evidence supporting the court's conclusion of negligence in administering the loan."<sup>6</sup> *Equity Investors*, supra 918. This clearly indicates that if the Court did find evidence of negligence in administering the loan, it could find that personal guaranty at issue would not be enforceable. Moreover, the Court again set forth a caveat that that it would enforce an unconditional personal guaranty only "absent fraud or deceit." "There was no claim here of fraud, misrepresentation, deceit or overreaching." *Equity Investors*, supra, 918. 920. That's why the guarantors in *Equity Investors* did not prevail, not because the guarantors were limited to situations involving "inducement." In its ruling, the *Equity Investors* court consistently noted exceptions to enforcement of a guaranty based on *fraud, deceit, coercion, misrepresentation, and overreaching*, without limitation.

As to the "inducement" factor, which is essentially a timing issue, clearly the *Equity Investors* court looked to actions of the bank *after* the

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Specifically, the Court noted in that case that "the bank acted with reasonable dispatch to preserve its security. It neither neglected nor failed to sue upon the note or foreclose its interest in the property, and it did not otherwise impair the security supporting the debt." The defense in the present case has established that the banks decimated the value of the property through mismanagement of the loan in the receivership, and thus clearly impaired the value of the property. At a minimum, there are issues of material fact as to the banks' management of the project before and during the receivership

loan was made to determine enforceability of a guaranty. Notwithstanding Union Bank's incorrect assertion that those terms apply only to a situation "in the inducement," meaning applicable only at the time the loan is made or the guaranty is signed, the facts and circumstances of the *Equity Investors* case clearly show a much broader applicability. Again, the guarantors' claims related to a series of loan disbursement made by the bank, which were made *well after* the loan documents were signed.

But we are unable to find in this record evidence of such dereliction or breach of duty. That other banks may have followed different procedures in advancing construction loan funds does not establish that this bank, in administering this loan, failed to act with reasonable prudence. Whatever may be the general rules of guaranty and suretyship, we think in the *absence of fraud, deceit and overreaching* that the principles of law upon which the new guarantors rely have no application to the present contract. *Equity Investors*, 916, 917 (emphasis added)

Clearly the court was applying its "fraud, deceit and overreaching" applicability to guaranties generally, and overall bank conduct on an overall loan administration, not just when the loan documents are signed. The court made a similar broad application as to the obligation for lenders to act in good faith, ruling that lenders will be held liable for not doing so, in the context of a construction loan. "Outside the contract, the major duty which a construction lender owes to any other party is the *duty of good faith*; though a loan may be inefficiently managed and with adverse

consequences, neither inferior lienors nor absolute guarantors have any recourse against the lender *unless it is alleged and proved that the lender acted in bad faith.*” *Equity Investors, supra*, 920. (emphasis added). The *Equity Investors* case clearly, absolutely, and unequivocally left open the possibility that a guarantor can be relieved of his or her obligations under a personal guaranty if the loan is mismanaged through bad faith, fraud or deceit. A jury should be allowed to determine whether Union Bank’s bungling of the loan before and after appointment of the Receiver is grounds to pursue the Appellants counterclaim or at least assert the affirmative defense of impairment of collateral

***Platis Case.*** Union Bank’s use of the *Platis* case is similarly inaccurate and misplaced. *Platis* cites *Equity Investors*, but in no manner limits potential guarantor defenses based on fraud or bad faith to a specific time frame (i.e. when the guaranty was signed) or to a situation involving lender inducement. The *Platis* case did not base its decision on there being no bad faith or fraud by the lender when the guaranties were signed. It found there was no evidence of lender bad faith or fraud *at any time*. Union Bank dismisses *Platis* on the basis that it was based on the *Equity Investors* case and was limited only to guarantor defenses based on “fraud in the inducement.” That’s not only an incorrect assertion of the *Equity Investors* case, but again a misreading and flawed interpretation of the

*Platis* case. In fact, *Platis* unequivocally stated that fraud and bad faith are valid defenses to enforcement of a guaranty. The *Platis* court said:

The unconditional nature of the guaranty is important because, except as provided by the guaranty, "though a loan may be inefficiently managed and with adverse consequences, neither inferior lienors nor absolute guarantors have any recourse against the lender *unless it is alleged and proved that the lender acted in bad faith*. And there is no evidence here of bad faith or fraud by the Trust." *Platis*, 828 (emphasis added)

The *Platis* court did not reference fraud or bad faith in the inducement, or utilize that terminology. In fact the word "induce" or "inducement" does not appear in the opinion, nor is there any indication of any time limitation (i.e. only at the time the loan was made) imposed by the court in potentially allowing guarantor defenses. Moreover, the basic issue involved in *Platis* was conduct by the lender (allowing third party impairment of collateral) that clearly occurred well after the guaranties in question were executed. If the *Platis* court intended to limit potential guarantor defenses to those existing when the loan was made, it wouldn't have spent time analyzing the conduct of the lender subsequent to the guaranty execution, and specifically finding that there was no such evidence of wrongdoing. That is in stark contrast to our situation here in Wellington, where Appellants believe they can establish potential fraud by Frontier Bank "in the inducement" and multiple occasions of deceit and

bad faith by both Frontier Bank and Union Bank throughout the course of the loan, and the administration and sale of the Wellington Property. Bottom line, what is important in both the *Equity Investors* and *Platis* cases is not that the lender prevailed, but that the court did not find evidence of fraud, deceit, overreaching or bad faith that was clearly stated as a basis for nonenforcement of a guaranty.

And, it should be noted, the *Platis* court cited *Miller v. U.S. Bank of Washington, N.A.*, 72 Wash.App. 416, 425, 865 P.2d 536 (1994) as support that under some circumstances guarantors may assert claims against lenders, including breach of good faith claims. Moreover, the *Miller* case deals with certain other claims – tortious interference with a contractual relationship or business expectancy, breach of fiduciary duty and injury to guarantors in their individual capacity, which Appellants contend could be present in this Wellington situation.

**Other Jurisdictions.** Other jurisdictions are in agreement with Washington law that there are well founded exceptions to an “unconditional” guaranty, and that a determination of whether and to what extent a guaranty is enforceable is a factual matter to be determined at trial. Two cases from New Jersey illustrate this specifically as regards the situation here with the Wellington Guarantors; *Langeveld v. L.R.Z.H.*

*Corporation*, 376 A.2d 931 (N.J. S. Ct. 1977) and *Lenape State Bank v.*

*Winslow Corp.*, 523 A.2d 223, (N.J. Superior Ct., Appellate Div. 1986).

In each instance, Summary Judgment was granted against the guarantors, and then overturned for a determination of issues of fact and impairment of collateral – the exact situation we are dealing with here. Appellants have credible evidence of misconduct and irresponsible decisions that severely impaired the Wellington collateral and greatly increased the potential liability of the Guarantors. This falls squarely within exceptions to guaranty enforcement and cannot be determined by Summary Judgment.

**F. The Trial Court Erred in Dismissing Counterclaims.**

In granting Summary Judgment to Union Bank the Trial Court in effect dismissed all of Appellant's counterclaims, including promissory estoppel, negligent misrepresentation, unjust enrichment, breach of duty of good faith and fair dealing, and breach of contract. The basis for this was Union Bank's incorrect and legally unsupported contention that all Guarantor defenses and counterclaims are trumped by application of *D'Oench*, U.S.C. 1823(e) and its flawed interpretation of *Equity Investors* and *Platis*. For the reasons set forth above, Appellants are in fact entitled to a trial and jury decision on their defenses and that applies to their

counterclaims as well, all of which involve elements of deceit, bad faith or potential fraud. For that reason, Appellants counterclaims should be reinstated.

Moreover, there is another basis for such restoration, and that is that potentially valid defenses and counterclaims of the borrower, Wellington, were intentionally wasted by the Union Bank Receiver. Much of the “unconditional” language of the Wellington Loan Guaranty, and its multiple waivers of defenses, did not apply to Wellington as the borrower, meaning potentially Wellington in its capacity as borrower could have raised various defenses and made certain claims arguably not available to Wellington Guarantors. Wellington was the borrower, and did not execute the guarantee. Consequently, Wellington could assert claims or defenses to enforcement of the loan without restriction by the various waivers contained in the Guaranty. Of course, most any borrower would raise available defenses or assert counterclaims if it had been mistreated by the lender, or if the borrower believed it was not liable in full for the debt as asserted by the lender. However, as a practical matter Wellington could not do this. Wellington didn’t do that here for only one reason, that being that when the Union Bank Receiver was converted to General Receiver, Wellington was totally controlled by the Union Bank Receiver. Here, Receiver Miles Stover was appointed by Union Bank, and was paid

by Union Bank. All of his actions and decisions were subject to the approval of Union Bank. All his litigation expenses were paid by Union Bank. Notwithstanding his “independence” as touted by Union Bank, he was not going to bite the hand that fed him. There is nothing in the record that shows Mr. Stover ever did anything inconsistent with the wishes of Union Bank. He would not and did not bring any claims of any nature against Union Bank in his capacity as Wellington Receiver, although he had the authority to do so, and although there was abundant basis for doing just that. After all, as Receiver Mr. Stover is supposed to act in the best interests of the receivership entity he represents. Conversely, Mr. Stover wasted Wellington’s defenses and claims against Union Bank. That internecine decision should not be binding on the Wellington Guarantors, who had no role in such wasting. The Wellington Guarantors should be able to pursue and utilize all defenses and counterclaims that were available to Wellington as borrower, but were prevented from assertion by the influence of Union Bank.

## **VI. CONCLUSION**

The Trial Court should not have granted Summary Judgment in this matter. Summary Judgment is a limited procedure that denies a trial and jury consideration. It should be granted only when there are

absolutely no material issues of fact in dispute, when the nonmoving parties have no applicable defenses or counterclaims and where the law is clear – absent contortion and spin -- that the moving party is entitled to judgment without trial. Only when all inferences or uncertainties were decided in favor of the nonmoving parties. And, most important of all, only when the result is just and fair.

That is clearly not the case here. Appellants have specified and documented numerous issues of material fact in dispute, any one of which could affect the outcome of a trial. Moreover, Appellants have demonstrated that under applicable case law they are entitled to assert certain defenses and counterclaims, which also could affect the outcome of a trial. But, a trial outcome cannot be affected if there is no trial.

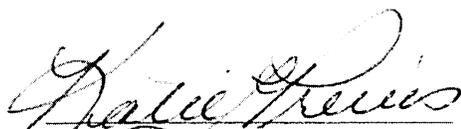
Union Bank has not claimed that the bad conduct and bad faith alleged as to Frontier Bank, Union Bank or its appointed Receiver was acceptable in the view of a reasonable man (or jury member). Instead, it purports discredited and misconstrued case law in claiming that the law permits such actions and conduct. That in this instance, injustice is OK. That is counter to the basic tenants of our legal system, is unsupported by applicable law and should not be adopted as the applicable standard in this instance.

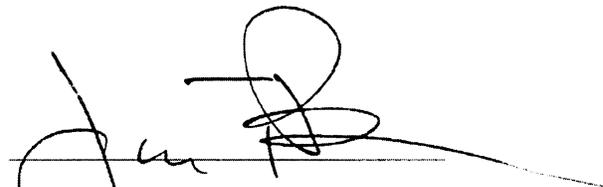
Union Bank is wrong, legally and morally. It gave short shrift to Appellants' dedicated and personally costly efforts to do what was requested of them by their lenders. It unreasonably turned down numerous opportunities to resolve this matter in a businesslike and prudent way, and in a manner that would have netted the bank a far greater recovery. Instead, it elected only "the Union Bank Way" -- to crush and punish the Appellants.

The Summary Judgment erroneously granted to Union Bank should be reversed by this Court, and remanded for trial by jury.

Dated this 7<sup>th</sup> day of June, 2015



  
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## **Appendix A**

### **Material Issues of Fact in Dispute Previously Cited by Appellants (From Sections II and V of Appellants Motion for Reconsideration)**

- Whether and to what extent the Bank's decisions and those of its appointed receiver impaired the collateral.
- Whether and to what extent the banks acted with deceit, in bad faith or with fraud toward the defendants, which is an exception to the general rule that unconditional guaranties are enforceable. The exception is found in every case cited by Union Bank.
- Whether the Receiver acted as the agent for Union Bank, and his obvious animus towards the Previs family can be attributed to Union Bank.
- Whether Frontier Bank acted with the intent of fraud, deceit, and/or bad faith in compelling the defendants to contribute nearly \$2 million of their own funds with the written assurance that the loan would be modified, only to renege on that promise.
- Union Bank has claimed it had no obligation to protect the collateral. It in fact took control of the Wellington Hills Business Park and botched control of the project entirely. Issues of material fact exist with respect to the errors and omissions of Union Bank and the ramifications to the value of the collateral and to the damages incurred by the defendants.
- Whether the FDIC authorized Union Bank to assert the D'Oench doctrine. Also at issue is what facts were presented by Union Bank to the FDIC with respect to the Wellington Hills Park, LLC receivership and subsequent bankruptcy proceedings.

- Whether reliance on the D'Oench doctrine and its statutory extensions (which the bank mistakenly believes completely exonerates them of liability) is supportable, given the fraud, deceit and bad faith exercised by Frontier Bank.
- Whether the writings in the files of Frontier Bank and those authored by Mr. Blanchard and Mr. Previs confirming the agreement to refinance the loan if the defendants contributed their own funds to the project are sufficient to avoid assertion of the D'Oench doctrine.
- Whether the conduct of Frontier Bank's successor, Union Bank, makes the improper actions and conduct of Frontier Bank attributable to Union Bank.
- Whether the writings in the files of Frontier Bank and those authored by Mr. Blanchard and Mr. Previs confirming the agreement to refinance the loan if the Defendants contributed their own funds to the project (most of which went directly to Frontier Bank) are sufficient to avoid assertion of the *D'Oench* doctrine and its statutory extensions.
- Whether Union Bank acted deceitfully or in bad faith in discontinuing payment to the law firm handling the Wellington/ACOA lawsuit to create a crisis upon which it justified conversion of its Custodial Receiver to General Receiver.
- Whether Union Bank acted deceitfully or in bad faith in settling the Wellington/ACOA lawsuit, which was commenced when Randy Previs and John Blanchard managed the Wellington Project, for a fraction of its value without advising or involving either of them in the matter.
- Whether Union Bank acted in bad faith in non-renewing the Frontier Bank Airplane Loan to John Blanchard, the full proceeds of which were contributed into the Wellington Project.
- Whether the Receiver, and/or Union Bank, acted fraudulently, deceitfully or in bad faith in approving the bona fides and financial capability of Veritas Development, and then rejecting

Veritas despite the fact that the Veritas bid for the Wellington Property was over a million dollars higher than the bid accepted by Union Bank.

- Whether Union Bank acted fraudulently, deceitfully or in bad faith in discontinuing payments to the law firm representing Wellington in the ACOA matter to artificially create a crisis which Union Bank then argued justified conversion of its Custodial Receiver to General Receiver. Ultimately this conversion significantly increased the potential liability of the Defendants due to the inept and improper judgments and decisions of the Receiver.
- Whether Union Bank, and/or its agents, dispensed or allowed the dispensation of untrue and inflammatory information to potential bidders for the Wellington Project, including that the cost of repair of the Project's wall would cost \$10 million, when the true cost was only \$250,000. This drove down the selling price of Project by at least \$5 million, and increased the Defendants' potential liability by the same amount.
- Whether Union Bank allowed the sale of the Wellington Property for less than \$10 million, when its own (undisclosed) appraisal found the true value to be about three times that amount.
- Whether Union Bank acted improperly and in bad faith to increase the potential liability of the Defendants in allowing Onward/OIBP, the potential purchaser of the Wellington Property, to renegotiate and substantially decrease the rent of Primus International (the Wellington tenant) without any notice to or involvement of the Defendants. This action immediately reduced the pending offer of Onward/OIBP for the Wellington property by 28%.
- Whether Union Bank and/or Frontier Bank reneged on promises to the Defendants to consider in good faith joint venture or other proposals initiated by the Defendants at the urging of such banks to acquire or restructure the Wellington Project.
- Whether Union Bank acted fraudulently, deceitfully or bad

faith in not advising Veritas Development that despite being designated as “backup bidder” to Onward/OIBP, that the Veritas bid was in fact substantially higher than the Onward/OIBP bid.

- Whether Union Bank acted in bad faith in proposing to the Defendants that the proceeds of the ACOA lawsuit be shared in accordance with which party funded the expense thereof, and then renegeing on this proposal when the Defendants offered to fund 100% of such costs.
- Whether Union Bank acted in bad faith to allow the sale of the Wellington Property to Onward/OIBP at a substantially lower price than that offered by Veritas Development.
- Whether Union Bank acted irrationally, unreasonably and/or in bad faith with respect to “joint venture” and other offers made by various parties for the Wellington Project, and in its dealings with the Defendants, due to expected remuneration to Union Bank by the FDIC in its commitments to Union Bank in getting Union Bank to take over the failed Frontier Bank

Additional input on the issue of material facts in dispute, significant evidence of at least negligence, deceit and bad faith in Union Bank’s administering the Wellington Hills Park loan, was set forth in Section V of the Appellants Motion for Reconsideration as follows:

- Union Bank rejected a proposal by Trilateral Partners in February 2011 to refinance the Wellington Project in the amount of \$58 million, which would have paid off the Frontier/Wellington loan in full;
- Union Bank refused to even entertain an offer from Gramor Development to pay \$20 - \$25 million for a “joint venture” acquisition of the Wellington Property, along with the Defendants.
- Union Bank rejected an offer from Orbis Financial for \$24.5

million in 2011 and sold the property to Onward/OIBP for under \$10 million;

- Union Bank rejected five offers between \$12 million and \$15 million in the summer of 2011, and ultimately sold the property to Onward/OIBP for under \$10 million.
- In the initial auction, Union Bank rejected an offer from Veritas Development, Inc. that was \$5 million higher than Onward/OIBP.
- After Onward/OIBP was awarded the project, it missed numerous deadlines to close on the financing for the deal, yet the second place bidder, Veritas Development, was never offered the opportunity to close on the project.
- Veritas Development, Inc. is owned 100% by Ashley Previs, the daughter of defendant Randy Previs. The bank's illogical conduct seems motivated by animus against the Previs family, which is a clear indication of bad faith. At a minimum, issues of fact exist with respect to the mismanagement of the loan.
- The bank's receiver acted with obvious personal animus against defendant Randy and Katie Previs, by, among other things, distributing negative articles about the Previs family to persons absolutely unrelated to the receivership.

**CERTIFICATE OF SERVICE**

I, JAEI MEJIA, certify under penalty of perjury that, on June 17<sup>th</sup>, 2015, I caused the foregoing Appellants Opening Appeal Brief to be served on the persons identified below via hand delivery to:

Joseph Shickich  
Riddell Williams PS  
1001 4th Ave Ste 4500  
Seattle W A 98154-1065

Dated this 17<sup>th</sup> day of June, 2015.

  
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JAEI MEJIA