

NO. 45311-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

UNION BANK, N.A.

Respondent,

vs.

DANIEL J. MOORE and JEANNINE K. MOORE,

Appellants,

and

MARK D. NOWELS and the marital community of
MARK D. NOWELS and KRISTY NOWELS,

Defendants.

BRIEF OF RESPONDENT
UNION BANK, N.A.

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I. STATEMENT OF THE CASE

In this case, a lender, Frontier Bank, Union Bank’s predecessor in interest, provided the borrower, Core Development, LLC (“Core”), with financing for a real estate development project. To induce the bank to make the loan, the lender and the principals agreed that the principals would be required to personally guaranty the loan. The bank bargained for the right to pursue the commercial guarantors separately if the borrower and the borrower’s property pledged as security failed to satisfy the debt. When a trustee’s sale of the property did not satisfy the borrower’s debt, the lender properly brought suit against the guarantors for the deficiency, and the trial court correctly granted the bank’s motion for partial summary judgment on the issue of liability on the guaranties.

This Court should affirm the trial court ruling that Union Bank is entitled to a deficiency judgment on the commercial guaranties against Daniel and Jeannine Moore (collectively, the “Moores” or “Guarantors”). When reviewing the trial court’s decision and interpreting the Loan Documents (as defined below) and the Deed of Trust Act, Title 61.24 RCW, this Court should reach a different outcome than that reached in *First Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, __ Wn. App. __, 314 P.3d 420 (2013). The case before this Court is

positioned differently than was *Cornerstone* and presents issues that were not properly before that Court and on which that Court admittedly did not rule. In *Cornerstone*, the Court failed to account for, among other things, the commercial realities and context of the transaction and the legislative intent to permit deficiency judgments against commercial guarantors.

In November 2006, Frontier Bank made a loan to Core in the amount of \$712,500.00 (“Loan”) to finance construction of commercial property. CP 9. As part of the transaction, Core executed a Promissory Note (“Note”) in favor of Frontier Bank for \$712,500.00. CP 9-10. The Note was secured by a Construction Deed of Trust granted by Core on real property in Auburn, Washington (“Deed of Trust”). CP 10-19.

As additional security for the Loan, Daniel Moore, a member of Core, and his wife, Jeannine Moore each executed a Commercial Guaranty (collectively, the “Guaranties” and along with the Note, Deed of Trust, and any other documents executed in connection with the Loan, the “Loan Documents”) in favor of Frontier Bank. CP 20-25. In the Guaranties, the Moores unconditionally agreed to provide Frontier Bank with an additional source of repayment, independent of the collateral for the Loan, should Core default on its obligations to Frontier Bank. *Id.*

The Guaranties contain clearly marked sections concerning waivers. CP 20-25. The Guaranties contain a section titled, in capital

letters, “GUARANTOR’S UNDERSTANDING WITH RESPECT TO WAIVERS,” which provides that by signing the Guaranty, a guarantor makes the waivers with “full knowledge of [the] significance and consequences” of doing so. *Id.* The Guaranties contain a waiver of “all rights or defenses based on . . . any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender’s commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale.” *Id.* The Moores also waived all defenses pursuant to suretyship and impairment of collateral. *Id.*

Core defaulted under the terms of the Note and the Deed of Trust no later than November 2008. CP 9-10, 144. On or about April 30, 2010, all rights, title and interest under the Loan Documents were assigned to Union Bank by the FDIC as Receiver for Frontier Bank. CP 293-94. When the default was not cured by Core or the Moores, despite notice to both, Frontier Bank proceeded with a non-judicial foreclosure sale of its collateral property. CP 163-75. The Property was sold at a trustee’s sale in March 2011, to Union Bank, the highest and only bidder at the sale, for a credit bid in the amount of \$418,500.00. CP 172-75.

In February 2012, Union Bank filed a Complaint against the Moores for breach of the Guaranties, and sought, among other things, a

deficiency judgment against Guarantors following the trustee's sale. CP 1-42. Union Bank moved for summary judgment and prevailed in the trial court on the issue of liability on breach of the Guaranties. RP 18-20; CP 456-59. The trial court found, among other things, that the waivers signed by the Moores, "sophisticated parties" to a commercial transaction, were valid and enforceable. *Id.*

II. STANDARD OF REVIEW

This Court reviews *de novo* both the trial court's rulings and the propriety of its statutory construction. "A court's objective in construing a statute is to determine the legislature's intent." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909-11, 154 P.3d 882 (2007). Application of these standards should result in affirmance.

III. ARGUMENT

A. The Trial Court Correctly Ruled that the Legislature Did Not Intend that Subsection (10) Bar Deficiencies in Commercial Transactions Between Sophisticated Parties.

This Court should hold that the Deed of Trust Act permits an action for a deficiency judgment whether or not the deed of trust secured the guarantor's obligations. The trial court reached the correct result. In *Cornerstone*, Division II incorrectly concuded that Subsection (10) of the Deed of Trust Act prevents a deficiency judgment where a guarantor's performance is secured by a foreclosed deed of trust offered *by the*

borrower. See Cornerstone, 314 P.3d 420. More recently, Division I reached the same result as the trial court here. See *Washington Federal v. Gentry*, No. 70004-9-I, 2014 WL 627817, at *1 (Wash. App. Div. I Feb. 18, 2014). *Gentry* correctly interpreted the Deed of Trust Act, as did the trial court, to exclude from the prohibition of pursuing deficiency judgments following a nonjudicial foreclosure, claims like the one in this case, against commercial guarantors of commercial transactions between sophisticated parties. *Gentry*, 2014 WL 627817, at *1. The trial court correctly found Union Bank and Guarantors capable of weighing risks and benefits, and of entering into contracts whose unambiguous plain language and meaning should be respected upon judicial review.

The *Cornerstone* Court concluded that Subsection (10) of RCW 61.24.100 is “an exception to subsection (1)’s general prohibition against deficiency judgments following nonjudicial foreclosure by allowing the lender to sue a commercial guarantor if the guaranty was *not* secured by the foreclosed deed of trust.” *Cornerstone*, 314 P.3d at 424.

Union Bank believes this conclusion is demonstrably wrong. The “general prohibition” does not apply to commercial guarantors in the first place. Subsection (1) makes this eminently clear right out of the gate. RCW 61.24.100(1) (“Except to the extent permitted in this section for deeds of trust securing commercial loans. . . .”). The prominent exception

for commercial loans in Subsection (1) refers to **Subsection (3)(c)**, *not* to Subsection (10). *Cornerstone* only addresses Subsection (3)(c) as an aside. *Cornerstone*, 314 P.3d at 425 n.16 . But Subsection (3)(c) is the operative provision nevertheless.

The Deed of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee’s sale under a deed of trust securing that loan. *See* RCW 61.24.100(1) (“Except to the extent permitted in this section for deeds of trust securing commercial loans . . . ”); *see also Gentry*, 2014 WL 627817, at *1. The Act carves out a considerable exception to the rule, however, and permits a deficiency action against a commercial guarantor. *See* RCW 61.24.100(3)(c) (“This chapter does not preclude . . . after a trustee’s sale under a deed of trust securing a commercial loan . . . an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042 . . .”). In this way, the Legislature ensures that a commercial guarantor is responsible for a deficiency following a trustee’s sale under a deed of trust securing the loan.

The conditions for guarantor liability on commercial loan deficiencies are spelled out in Subsection 3(c), which expresses the Legislature’s intent—where a commercial loan is involved—**not** to preclude, “[s]ubject to this section, an action for a deficiency judgment

against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.” RCW 61.24.100(3)(c). Subsection 3(c) was added to the Act as part of extensive amendments made in 1998 because the Legislature thought the amendments would be able to “better meet the evolving needs of commercial borrowers and lenders in real estate financing.” *See, e.g., Gentry*, 2014 WL 627817, at *3 (providing detailed analysis of legislative history). Subsections (4) and (5) offer additional protections to the commercial guarantor: he must receive proper notice of the deficiency action; the action must be filed within one year of the trustee’s sale; and the guarantor is entitled by statute to a fair value hearing.

In short, when the Legislature intended Section 100 to address deficiency judgments, it used the precise term “deficiency judgment.” The drafters used the phrase in Subsections (1), (3)(a) (“an action for a deficiency judgment”), 3(c) (same), (5) (calculation of “deficiency judgment” following nonjudicial sale); and (6) (“shall be subject to a deficiency judgment”).

The Moores, however, argue that Subsection (10), which references neither Subsection (3), (4), (5) or (6), nor the phrase “deficiency judgment,” nonetheless somehow acts to prohibit a deficiency against a guarantor where a deed of trust secures the guaranty and has been foreclosed judicially. For this proposition, they cite to *Cornerstone*,

which read into Subsection (10) such a prohibition.

By its “plain language,” however, Subsection (10) “states a permissive rule applicable to situations where the obligation of a borrower or a guarantor is *not* secured by the deed of trust that was foreclosed by a trustee’s sale. In that situation, the trustee’s sale *does not* preclude the lender from bringing an action to collect on or enforce a guaranty.” *Gentry*, 2014 WL 627817, at *6 (emphasis in original). In other words, Subsection (10) provides that there are no impediments to a lender’s ability to seek enforcement of a guaranty “where the obligation of a borrower or guarantor is *not* secured by the deed of trust that was foreclosed by a trustee’s sale.” *Id.* (emphasis in original).

The reading urged by the Moores, and articulated in *Cornerstone*, is not a permissive rule; instead, their formulation states the logical inverse of the actual plain language. *See Gentry*, 2014 WL 627817, at *5-6 (elucidating the logical rules and representative cases that refute *Cornerstone*’s statutory construction of Subsection (10)). *Gentry* provides a helpful guide to understanding the difference by quoting the statute and striking out the words a court would need to ignore and write out of the statutory language to find that Subsection (10) states the prohibition relied on by the Guarantors:

The problem with the [Guarantors'] interpretation is that it requires striking from the statute the word "not," as indicated in the following revision:

A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.

Gentry, 2014 WL 627817, at *6 (emphasis in original).

Guarantors' reading of Subsection (10) is both "an expression of the inverse" and a "logical fallacy." *Id.* at *7. The inverse of Subsection (10) is stated more or less as follows: The Act does preclude pursuit of an obligation if the obligation was secured by the deed of trust foreclosed upon. "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically [from] the other." *Gentry*, 2014 WL 627817, at *7 n.48 (quoting *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 n.20 (2d Cir. 1980) (internal citation omitted)). The courts should "decline to add the inverse to the statute when the Legislature did not expressly do so." *Id.* at *6. The plain language of RCW 61.24.100 does not contain an expression of the inverse and the Court should decline to read it as if it does. The Court should not read the word "not" out of Subsection (10), which is what Guarantors suggest and what the Court in *Cornerstone* did implicitly. *See Gentry*, 2014 WL 627817, at *5-6.

Guarantors advance the notion, in keeping with *Cornerstone*, that Subsection (10) should be read to “say more than it actually does,” i.e., the Bank may bring the action to enforce the Guaranties, “*only if the* guaranties were not secured by the nonjudicially foreclosed deeds of trust securing the commercial loans.” *Gentry*, 2014 WL 627817, at *9 (emphasis in original). But the statute says, “if, not only if.” *Id.* This Court should decline to rewrite the statute by adding the word “only” into the statute to arrive at the result Guarantors espouse, i.e., the unsecured nature of any guaranty is “an indispensable condition precedent” to obtaining a deficiency. *Id.*

Subsection (10) makes clear that if a borrower or guarantor owes obligations separate from the underlying loan, such as environmental indemnities or guaranties of other unrelated loans with the same lender, the lender’s ability to enforce those obligations remains unaffected by nonjudicial foreclosure of the deed of trust securing the underlying loan. In short, Subsection (10) is not a limitation on Subsection (3)(c).

This Court also should consider the *quid pro quo* upon which the legislature premised any bar to deficiency judgments. This “*quid pro quo* between lenders and borrowers”—not guarantors—is premised on the borrower giving up certain rights attendant to judicial foreclosure to allow a speedy nonjudicial foreclosure procedure in exchange for a bar on

deficiency judgments. See *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990) (emphasis added) (quoting *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988)). Borrower granted an interest in its own property to secure its performance, through a deed of trust, thereby relinquishing its redemption rights and the right to a judicially-imposed upset price. The benefit Borrower (and now Grantor) received is to have eliminated the possibility of it becoming liable to the lender for a deficiency judgment.

Guarantors, on the other hand, did **not** offer property. They did not relinquish any rights in exchange for the benefit of a deficiency bar. A bar in these circumstances is unjustified and incompatible with legislative intent. When a commercial guarantor herself offers property, she benefits from a limitation on the deficiency. See RCW 61.24.100(6). Only in that circumstance—a circumstance expressly addressed by the statute—does a guarantor participate in any *quid pro quo*. To be faithful to the intent of the Deed of Trust Act, this Court should hold that Subsection (3)(c) permits the actions.

B. The “Payment and Performance” Provision in the Deed of Trust, Together With Extrinsic Evidence in the Commercial Context, Show That the Deed of Trust Does Not Secure the Guarantors’ Obligations

The Moores’ interpretation of the Deed of Trust simply is unreasonable given the entire context of the parties’ transaction. This

Court must interpret the Loan Documents in a commercially reasonable manner. *Wilson Court Ltd. P 'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998) (court must recognize “the commercial context” and [offer] “a commercially reasonable construction”).

Here, the Guarantors are not parties to the Deed of Trust. They have not granted any interest in property to secure the Borrower’s obligations under the promissory note. The provisions of the Deed of Trust apply to the relationship between the Bank and the party pledging its own property as collateral for a commercial loan. From a lender’s perspective, securing a guarantor’s obligations with the same deed of trust that secures the borrower’s underlying debt would accomplish nothing.

The whole point of a guaranty is to obtain an *additional* source of credit support that will protect the lender in the event the foreclosure sale of the property secured by the borrower’s deed of trust fails to satisfy the underlying debt. There is no benefit to the lender whatsoever if the same property is used to secure both the borrower’s primary obligation and the guarantors’ secondary obligation. For this reason, this Court should affirm the trial court’s judgment, which accurately reflected the commercial context of the parties’ sophisticated dealings.

Union Bank argues that the Deed of Trust does not secure the Guarantors’ obligations in any event. This provides another basis for

affirmance of the trial court decision. The Moores incorrectly presume that Subsection (10) prohibits a commercial lender from pursuing a commercial guarantor for a deficiency following a nonjudicial foreclosure if the deed of trust foreclosed also secured the commercial guaranties in addition to the borrower's principal obligation. *Cornerstone* also articulates this misinterpretation of the statute.

Based upon this incorrect premise, Guarantors further argue that their Guaranties are secured by the deed of trust foreclosed in this case. Accordingly, they claim that the trustee's sale under this Deed of Trust bars the Bank's action for a deficiency judgment. Even if the premise were correct, this Court should still disagree with their conclusion and hold that the Deed of Trust granted by Core Development did not secure the Commerical Guaranties signed by Daniel and Jeannine Moore.

The Moores' arguments that the Guaranties were secured by the Deed of Trust, by virtue of its "payment and performance" section, coupled with its definition of "Related Documents," are incorrect because they patently ignore *whose* obligations the parties intended to secure. *See* CP 12, 18.

The Deed of Trust states that the obligations of "payment" and "performance" secured by the Deed of Trust are those of Core, the "Grantor," not those of Guarantors. CP 12, 17.

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) *PAYMENT* OF THE INDEBTEDNESS AND (B) *PERFORMANCE* OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THE DEED OF TRUST . . . **THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

CP 12. Three paragraphs later, the Deed of Trust states whose payment and performance obligations are secured by the Deed of Trust:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust and the Related Documents.

Id. (emphasis added).

Read together, these provisions must be read as securing the payment and performance obligations of the Borrower and the Grantor. The Deed of Trust defines “Grantor” and “Borrower” exclusively as Core Development. CP 17. “There simply is no way to read these provisions so that [the] deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor.**” *Gentry*, 2014 WL 627817, at *10 (emphasis in original.) Indeed, “the guarantors of th[is] loan[] are neither.” *Id.*

That the Deed of Trust secures only Core Development's obligations, and not Guarantors', is further reinforced by the "FULL PERFORMANCE" section, which states that reconveyance shall occur when "Grantor" pays or otherwise performs:

FULL PERFORMANCE. If Grantor pays all the Indebtedness, when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and Personal Property . . .

CP 15 (emphasis added). The Deed of Trust is discharged only when "Grantor"—Core Development—"pays" and "performs." *Id.* There is no mention of the obligations of Guarantors. The Court should conclude that the plain language of the Deed of Trust indicates that the only obligations it secures are those of the Borrower and Grantor, i.e., Core Development, and not those of the Guarantors.

Guarantors' arguments focus on the following Deed of Trust provision stating that the Borrower granted the Deed of Trust to secure "payment" and "performance" of the Guarantors:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) *PAYMENT* OF THE INDEBTEDNESS AND (B) *PERFORMANCE* OF ANY AND ALL OBLIGATIONS UNDER THE NOTE,

THE RELATED DOCUMENTS, AND THIS DEED OF TRUST . . . *THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:*

CP 12 (emphasis added). From there, the Moores look to the definition of the term “Related Documents,” which includes, among its laundry list of generic document types, the word “guaranties.” CP 18. While the list includes the word “guaranties,” it does not include the word “Guaranty,” which is a defined term that applies exclusively to Guarantors. CP 17. The specific term “Guaranty” does not fall within the generic term “guaranties.” Additionally, the parties did not include Guarantors’ specific Guaranties in the definition of “Related Documents.” CP 18. “Related Documents” are defined as “all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents . . . executed in connection with the indebtedness.” CP 18.

Based on the plain language of the Deed of Trust alone, this Court should conclude that the Deed of Trust only secured Core’s obligations under the Loan Documents, not Guarantors’ separate and independent obligations under the Guaranties. Tellingly, the Moores have never represented to the trial court or this Court—that their intent was for their Guaranties to be secured by the Deed of Trust. See *Tanner Elec. Coop. v.*

Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (context rule allows courts to look at circumstances surrounding the making of a contract). On the contrary, examination of the Note executed by Core and the Guaranties executed by the Moores supports the trial court's conclusion. The Note identifies the Deed of Trust as the instrument securing it; the Guaranties, conspicuously, do not. CP 9-10 (Note); CP 20-31 (Guaranties). Had the parties intended the Moores' Guaranties to be secured by the Deed of Trust, like Core's Note, it is reasonable to expect them to have said so in their written contract. They did not.

Here, the parties intended the Guaranties to provide security for the loan that was *in addition to* the security that the borrower offered, i.e. the property. The lending bank had determined that the collateral property alone did not warrant the extension of credit the borrower sought. The bank required a remedy *independent* of the Deed of Trust in the form of the personal guaranties by the Guarantors.

The *Cornerstone* Court accepted this as the commercial context, *see Cornerstone*, 314 P.3d at 423 n.10, but, inexplicably, failed to then construe the loan documents in a commercially reasonable way. The parties would not have secured the "additional" guaranty obligations by the very same deed of trust for which the guaranties were—in essence—

back-up security. Such a construction cannot be reconciled with the structure of the transaction and the role of the Guaranties.

The *Cornerstone* Court also avoided any discussion of the striking absence in the guaranty, mentioned above, of a provision stating that the Deed of Trust secured the Guaranty. In contrast, the Borrower's promissory note contained an explicit provision titled "COLLATERAL" that stated that the Deed of Trust secured the Note. CP 10. These same provisions—and telling absences—are present in the documents before this Court.

The failure of the *Cornerstone* Court to address these provisions undermines the adequacy of its construction analysis. This Court should account for these provisions in its analysis.

C. The Trial Court Properly Found Guarantors' Waivers Enforceable As a Bar to Their Asserting a Defense Based on RCW 61.24.100 But Need Not Decide the Issue of Waiver to Dispose of this Appeal

In *Cornerstone*, Division II did not rule on waiver. *Cornerstone* 314 P.3d at 422 n.5. Neither did Division I in the *Gentry* decision. *Gentry*, 2014 WL 627817, at *1. The issue of waiver by sophisticated parties, often in the context of multi-million dollar commercial lending transactions, would be before this Court as a matter of first impression.

This Court does not have to reach the waiver issue, however, if either one of the following is true: (1) the Deed of Trust Act does not

condition a lender's right to a deficiency against a commercial guarantor on the guaranty being unsecured; or (2) the Deed of Trust signed by Core Development did not secure the performance of the Guaranties in any event. If either (or both) of these is true, Subsection (10), the provision Guarantors so vehemently argue they should not be permitted to waive, affords them no procedural or substantive rights in the first place, making it irrelevant whether they waived it.

This being said, should this Court decide to take up the waiver issue, the Court should enforce the Moores' waivers and affirm the trial court's decision that the legislative intent behind RCW 61.24.100 was not to limit sophisticated parties' freedom of contract in commercial lending transactions, including when commercial guarantors knowingly and voluntarily waive their rights to assert certain defenses.

In the Guaranties, Guarantors agreed to:

. . . waive[] any and all rights or defenses based on suretyship or impairment of collateral including, but not limited, any rights or defenses arising by reason of ... 'anti deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale . . .

CP 20-25. The Guaranties contain a separate provision, "GUARANTOR'S UNDERSTANDING WITH RESPECT TO

WAIVERS,” which further demonstrates the clarity, conspicuousness, and completeness of the waiver. *Id.* Guarantors each signed an acknowledgement, which appears immediately above the signature line, that they read and agreed to all the provisions of the Guaranty. *Id.*

Guarantors do not claim—and have never claimed—that they did not have an opportunity to read or understand the plain import of these waivers. Rather, Guarantors argue that the waivers are unenforceable as a matter of law. They are not. At common law, a guarantor’s surety and statutory defenses “may be explicitly waived in a guaranty agreement and such waiver provisions are enforceable.” 38A C.J.S., *Guaranty* § 125 (2008); *also* 38 Am.Jur.2d, *Guaranty* § 67 (“the guaranty may provide, by its terms, that the guarantor remains liable despite the release of the principal debtor”). This rule has long been recognized by Washington courts. *See, e.g., Fruehauf Trailer Co. of Can. Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966) (upholding guarantor’s waiver of defense of discharge); *Seattle First Nat’l Bank v. West Coast Rubber, Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985) (guarantor “waived virtually all of his surety defenses”).

The Deed of Trust Act did not disturb this black letter law. When the legislature intends to deny contracting parties the freedom to bargain away statutory rights, it says so expressly. *See, e.g., RCW 19.118.130*

(waiver of rights under lemon law void); RCW 19.100.220(2) (same result under franchise act); RCW 21.20.430(5) (securities act); RCW 50.40.010 (unemployment compensation); RCW 51.04.060 (workers-compensation). Had the Legislature intended to preclude parties from waiving guaranty defenses under the Deed of Trust Act, it would have said so. *See, e.g., Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 191, 139 P.3d 386 (2006) (Legislature’s use of language in only one of two similar situations suggests a different legislative intent). This Court should find the Legislature’s refusal to do so conclusive on this issue. Indeed, in the commercially analogous context of UCC Article 9, the Legislature prohibited waivers of a debtor’s rights upon default, but *preserved the common law rule permitting waiver of guarantor defenses*. RCW 62A.9A-602 & cmt. (emphasis added) (“Washington variations of this section . . . preserve the ability of a guarantor to waive suretyship defenses”).

Moreover, the waivers are not void as against “public policy” as Guarantors argue. Guarantors fail to articulate how enforcing a guarantor’s express waiver of anti-deficiency defenses in the context of *commercial lending transactions* injures the public good or frustrates the policies underlying the Deed of Trust Act. It most certainly would not. It would preserve the fabric of commercial lending in this State and

conform to long-established trade custom and course of dealing, as well as legislative intent and prior case law.

The Washington Supreme Court's decisions in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); and *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), do not require a different outcome. Neither case addresses RCW 61.24.100(10), deficiency judgments, commercial loans, guaranties, or the enforceability of express waivers by sophisticated parties like Guarantors. Nor do they disturb prior cases such as *Fruehauf Trailer* or *Seattle First Nat'l Bank*.

In both *Bain* and *Schroeder*, the Court held that parties cannot contractually waive "statutory requirements" to a nonjudicial foreclosure sale. *Bain*, 175 Wn.2d at 107-08 (emphasis added); *Schroeder*, 177 Wn.2d at 107. As the Court noted, the rule that a person can ordinarily waive "rights or privileges" does not apply to procedural requisites because they "are not, properly speaking, rights held by the debtor; instead, they are limits on the Trustee's power to foreclose without judicial supervision." *Schroeder*, 177 Wn.2d at 107.

In *Bain*, the Court declined to expand the definition of beneficiary in the Deed of Trust Act, reasoning that the definitions in the Act codify hundreds of years of mortgage law procedures and norms and should not

be subject to waiver by contract. *Bain*, 175 Wn.2d at 83. MERS argued that it could be a “beneficiary” under the Act despite not holding the secured note simply by virtue of guarantors having purportedly waived any right to argue against expansion of the definition of “beneficiary.” *Id.* at 99.

Similarly, In *Schroeder*, the lender sought to foreclose nonjudicially on land that may have been agricultural land and purported to seek the guarantors’ waiver to effectively broaden the Act’s stated scope to include agricultural land with the parties consent. Again, the Court refused to permit the lender to write out of the Act the procedural requirement that the deed of trust secure non-agricultural land. The Court drew a distinction between the types of provisions that would be waivable, which are related to a guarantor’s “rights and privileges,” and those that would be, or are, unwaivable, which purport to modify by contract “statutory requirements” in the Act that are “limits on the Trustee’s power to foreclose without judicial supervision. *Schroeder*, 177 Wn.2d at 107.

In *First Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 313 P.3d 1208 (2013), the Court took up the issue of waiver again, in *dicta*, refusing to allow waiver of a fair value hearing because the “fair value” is part of how a “deficiency judgment” is defined in Subsection (5). The “fair value” process in the statute can be undertaken *sua sponte* by the

trial court, as in *Reikow*, and, thus, it is a limit on the Trustee’s power to foreclose without judicial supervision, and cannot be waived. *Reikow* cites *Sec. of State v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000) as standing for the proposition that the Deed of Trust Act should be interpreted, if possible, in harmony with interpretations of “analogous” provisions in the Uniform Commercial Code. *Reikow*, 177 Wn. App. at 796-97 (citing *Burk*, 100 Wn. App. at 101).

These conditional “procedural requisites” to foreclosure must be followed (and may not be contractually altered) to (1) protect other interested parties (like junior lienholders); and (2) prevent future title disputes—two key purposes of the Deed of Trust Act. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Here, the waivers in the Commercial Guaranties do not seek to alter the mechanics of a nonjudicial foreclosure sale or redefine any well-established principles of foreclosure or mortgage law. The Court’s concern in other cases for protecting consumers, e.g., homeowners needing protection from MERS, has no applicability in a commercial lending transaction between sophisticated parties like Guarantors and their commercial lender.

IV. CONCLUSION

Union Bank urges affirmance. The contracts and controlling law demonstrate that the trial court's judgment for Union Bank was correct. The Moores agreed absolutely and unconditionally to cover the debt of Core Development to induce the bank to make the loan. This Court, therefore, should enforce the rights and obligations for which the parties bargained.

Respectfully submitted on this 7th day of March 2014.

ASSAYAG MAUSS,
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March 2014, I caused to be served via U.S. Mail, postage prepaid and by email the foregoing BRIEF OF RESPONDENT, UNION BANK, N.A. on the following parties at the following addresses:

Mark B. Anderson - marka@mbaesq.com
Anderson Law Firm PLLC
1119 Pacific Avenue, Suite 1305
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: this 7th day of March, 2014 at Lake Oswego, Oregon.

/s/ Blanche Niksich
Blanche Niksich

ASSAYAG MAUSS LLP

March 07, 2014 - 11:27 AM

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