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No. 90085-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff-Respondent,

v.

KENDALL D. GENTRY and NANCY GENTRY, individually and the marital community comprised of thereof,

Defendants-Petitioners.

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ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

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# ANSWER TO PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION ..... 1

II. COUNTERSTATEMENT OF THE ISSUES ..... 2

III. COUNTERSTATEMENT OF THE CASE ..... 3

IV. ARGUMENT ..... 8

A. The *Gentry* and *First Citizens* Decisions Have Conflicting Interpretations of the Same Form Deed Of Trust Document; *Gentry* Properly Interprets The Deed Of Trust ..... 8

B. The *Gentry* and *First Citizens* Decisions Have Conflicting Construction Of The Deed Of Trust Act; *Harvey* Properly Held that RCW 61.24.100(10) Does Not Prohibit A Deficiency Judgment Against Guarantors In Cases Like This One ..... 11

C. If Review Is Accepted, This Court Should Also Consider Whether Sophisticated Guarantors of Commercial Loans Can Waive The Deed Of Trust Act's Anti-Deficiency Defenses ..... 16

V. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

CASES PAGE

*Bain v. Mortg. Elec. Registration Sys.*,
175 Wn.2d 83, 285 P.3d 34 (2012) ..... 18

*Cox v. Helenius*,
103 Wn.2d 383, 693 P.2d 683 (1985) ..... 15, 19

*Densley v. Dep't of Ret. Sys.*,
162 Wn.2d 210, 173 P.3d 885 (2007) ..... 13, 14

*First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*,
178 Wn. App. 207, 314 P.3d 420 (2013) ..... *passim*

*Fruehauf Trailer Co. of Canada Ltd. v. Chandler*,
67 Wn.2d 704, 409 P.2d 651 (1966) ..... 17

*Schroeder v. Excelsior Mgmt. Grp., LLC*, 177
Wn.2d 94, 297 P.3d 677 (2013) ..... 18, 19

*Scott v. Cingular Wireless*,
160 Wn.2d 843, 161 P.3d 1000 (2007) ..... 17

*Seattle First Nat'l Bank v. West Coast Rubber Inc.*,
41 Wn. App. 604, 705 P.2d 800 (1985) ..... 17

*Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*,
134 Wn.2d 692, 952 P.2d 590 (1998) ..... 11

*United States v. Everett Monte Cristo Hotel, Inc.*,
524 F.2d 127 (9th Cir. 1975) ..... 17

STATUTES, REGULATIONS AND COURT RULES

RCW 61.24.042 ..... 6

RCW 61.24.100 ..... 1, 2

RCW 61.24.100(3) ..... 12, 14

RCW 61.24.100(3)(a) ..... 8, 11, 12, 14

RCW 61.24.100(3)(c) ..... *passim*

RCW 61.24.100(4) ..... 12

RCW 61.24.100(5) ..... 12, 14

RCW 61.24.100(6) ..... 12, 14, 15

RCW 61.24.100(10) ..... *passim*

RAP 13.4(b)(2) ..... 1

RAP 13.4(b)(4) ..... 1

MISCELLANEOUS

Marjorie Dick Rombauer, 27 *Wash. Practice: Creditors' Remedies—Debtors' Relief* § 3.37 (2d ed. Supp. 2012) ..... 13

38A C.J.S., *Guaranty* § 125 (2008) ..... 17

## I. INTRODUCTION

Washington Federal agrees with the Gentrys that the Court of Appeals' published opinion in *Washington Federal v. Gentry*, --- Wn. App. ---, 2014 WL 627817 (2014) ("Gentry"), and its unpublished companion case *Washington Federal v. Harvey*, 2014 WL 646746 (2014) ("Harvey"), satisfy two criteria for acceptance of review. First, Division 1's opinion in *Gentry* and *Harvey* conflict with Division 2's opinion in *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013) ("First Citizens"), on both the proper interpretation of the parties' deeds of trust and the Deed of Trust Act, RCW 61.24.100. RAP 13.4(b)(2).[1]

Second, *Gentry* and *Harvey* involve issues of substantial public interest because the form deed of trust and guaranty at issue in these cases were widely used in the industry and, thus, this Court's resolution of the issues decided in *Gentry*, *Harvey* and *First Citizens* will impact Washington nonjudicial foreclosures and likely determine the viability of most pending and future deficiency actions brought by lenders against commercial guarantors based on these form documents. RAP 13.4(b)(4).

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[1] The petitions for review in *Gentry* and *Harvey* are nearly identical. For the sake of simplicity (at the expense of redundancy), with the exception of the Counterstatement of the Case, Washington Federal's responses to the *Gentry* and *Harvey* petitions are identical as well.

Finally, Washington Federal agrees with the Gentrys that, if this Court accepts review, it should also accept review of an issue raised in *Gentry* and *Harvey*, but which the Court of Appeals did not reach: whether a sophisticated guarantor of a commercial loan may knowingly agree to waive the anti-deficiency provisions of the Deed of Trust Act.

But that is where the agreement ends. The Gentrys' framing of the issues, description of the facts, and discussion of the issues decided in *Gentry*, *Harvey* and *First Citizens* are one-sided and misleading. For the reasons that follow, if this Court accepts review, it should affirm *Gentry* and *Harvey*, and reject *First Citizens*' erroneous interpretation of the form deeds of trust and RCW 61.24.100. In the event it reaches the issue, the Court should also confirm that public policy does not prohibit a sophisticated commercial guarantor from knowingly and voluntarily agreeing to waive the Act's limited anti-deficiency defenses.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Did the parties intend the borrower's form deed of trust to secure only a borrower's or grantor's underlying obligation to repay the commercial loan, and not a guarantor's separate guaranty of that loan?

2. If a deed of trust secures a guaranty of a commercial loan, does the Deed of Trust Act permit an action for a deficiency judgment against the guarantor after the deed of trust is nonjudicially foreclosed?

3. If the Deed of Trust Act prohibits an action for a deficiency judgment against a guarantor of a commercial loan, may the guarantor knowingly and expressly waive that statutory protection?

## III. COUNTERSTATEMENT OF THE CASE

***Factual Background.*** Washington Federal foreclosed on two deeds of trust that secured three commercial loans, and thereafter brought an action for a deficiency judgment against the Gentrys, who guaranteed repayment of the loans. The first loan was made in December 2005, when Blackburn Southeast, L.L.C., a company owned and/or controlled by Kendall Gentry, borrowed over $2.5 million from Horizon Bank. CP 92-94; 104-107. The loan to Blackburn Southeast was secured by a deed of trust granted on property located on Little Mountain Road in Mount Vernon ("Little Mountain Deed of Trust"). CP 178-197.

In April 2009, Landed Gentry Development, Inc., also a Gentry-owned entity, borrowed over $3.5 million from Horizon Bank. CP 96-98; 108-112. The loan was secured by the Little Mountain Deed of Trust and a junior deed of trust on property located on East Blackburn Road in Mount Vernon ("Blackburn Road Deed of Trust"). CP 137-57. Lastly, in September 2009, Gentry Family Investments, L.L.C. borrowed over $1.1 million from Horizon Bank. CP 100-102; 113-116. This loan was also secured by the Little Mountain Deed of Trust. CP 178-197. In sum, the

Little Mountain Deed of Trust secured all three loans, and the Blackburn Road Deed of Trust secured only the Landed Gentry loan. The Gentrys were not the borrowers on the loans, nor the grantors of the deeds of trust.

The Blackburn Road Deed of Trust and original Little Mountain Deed of Trust were nearly identical form documents. They provided:

> THIS DEED OF TRUST ... 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 138; 179 (underlining added). In the next section, the deeds of trust also identified whose obligations to "pay" and "perform" were secured:

> **PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Borrower and Grantor shall pay to Lender all Indebtedness secured by this Deed of Trust as it becomes due, and Borrower and Grantor shall strictly perform all their respective obligations under the Note, this Deed of Trust and the Related Documents.

CP 138; 179 (underlining added). In other words, although the deeds' boilerplate definition of "Related Documents" refers to various loan-related agreements including the generic term "guaranties," *see* CP 144; 185, the deeds only secured the obligations of the "Borrower" or "Grantor"—not a "Guarantor"—to pay or perform any such agreement.

The parties subsequently agreed to modify the Little Mountain Deed of Trust to "cross-collateralize" all three loans. This modification amended the original deed of trust with the following language:

> In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of either Grantor or Borrower to Lender ..., as well as all claims by Lender against Borrower or Grantor ..., whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note ...

CP 192 (underlining added). By its express terms, the modified Little Mountain Deed of Trust removed reference to "Related Documents" and confirmed that that the deeds were intended to secure only the obligations of the "Borrower" or "Grantor"—not the obligations of a "Guarantor."

For all three loans, as another avenue for repayment, the Gentrys signed a Commercial Guaranty (the "Guaranties"). *See* CP 118-123. In each, the Gentrys "absolutely and unconditionally guarantee[d] and promise[d] to pay" the indebtedness" on the loans. *Id.* The Guaranties contained an express "Waiver" clause, in which the Gentrys 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 ...

*Id.* There is no language in the Guaranties stating or suggesting that the Gentrys' obligation as guarantors was secured by the Little Mountain or

Blackburn Road Deeds of Trust or other security. *Id.* In contrast, the promissory notes for all three loans specifically referenced the fact that they were secured by one or both deeds of trust. *See* CP 93; 97; 101.

In April 2010, the FDIC assigned Horizon Bank's interest in the three loans, the deeds of trust and the Guaranties to Washington Federal. CP 87. By then, the borrowers had defaulted on the loans. CP 85-86. Washington Federal sent the borrowers and the Gentrys notices of default, asking that they cure the default, or else the property secured by the Little Mountain and Blackburn Road Deeds of Trust would be nonjudicially foreclosed. CP 209-217; 241-246. The notices warned the Gentrys, as guarantors, that they "may be liable for a deficiency judgment to the extent the sale price obtained at the Trustee's Sale is less than the debt secured by the Deed[s] of Trust." CP 211; 244. Neither the borrowers nor the Gentrys cured the defaults on the three loans. CP 88-89; CP 782.

Accordingly, on December 30, 2010, Washington Federal caused the trustee to send Notices of Trustee's Sale. CP 219-231; 248-256. Pursuant to RCW 61.24.042, the notices informed the Gentrys that, as guarantors, they could be liable for a deficiency judgment. CP 223; 253. The sales went forward as scheduled and Washington Federal purchased both properties by credit bid. CP 233-239; 258-261. After the sale proceeds were applied to the indebtedness remaining on the loans, plus

interest, foreclosure expenses, fees and costs, a total deficiency remained in the amount of approximately $7,615,624. CP 89.

***Procedural History.*** In March 2012, Washington Federal sued the Gentrys for the deficiency under RCW 61.24.100(3)(c), a provision in the Deed of Trust Act that permits deficiency actions against guarantors of commercial loans. CP 515-558. The Gentrys moved for summary judgment, arguing that the deeds of trust secured the Guaranties and that, after the properties were nonjudicially foreclosed, another provision of the Act—RCW 61.24.100(10)—prohibited Washington Federal from seeking a deficiency judgment against them. CP 792-798. The trial court granted the Gentrys' motion, and entered judgment in their favor. CP 765-771.

While the case was on appeal, Division 2 issued its opinion in *First Citizens*. Analyzing a similar form deed of trust, the court held that the deed secured not only the borrower's loan, but also the guarantors' separate guaranty. 178 Wn. App. at 212-214. Moving to the statutory question, the court next held that RCW 61.24.100(10) impliedly barred an action against the guarantors for a deficiency judgment after nonjudicial foreclosure of the borrower's deed of trust. *Id.* at 215-218. The court noted that the parties had not raised the issue of waiver. *Id.* at 212 n. 5.

In *Gentry*, Division 1 rejected *First Citizens* on both issues. On the contract issue, the court held that "[t]here simply is no way to read these

provisions so that any deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor**. The guarantors of the loans are neither." Slip Op. at 23. On the statutory issue, the court refused to construe RCW 61.24.100(10) as an implied prohibition on a deficiency action permitted by RCW 61.24.100(3)(c), even if the guaranty was secured by a foreclosed deed of trust. *Id.* at 9-21. The court likewise did not reach the issue of waiver. *Id.* at 27.

## IV. ARGUMENT

### A. The *Gentry* and *First Citizens* Decisions Have Conflicting Interpretations Of The Same Form Deed Of Trust Document; *Gentry* Properly Interprets The Deed Of Trust In Context.

A threshold issue in both *Gentry* and *First Citizens* is whether the form deed of trust secured not only the borrower's obligation to repay the commercial loan, but also a non-signatory's separate guaranty of that same loan. Only if that question is answered in the affirmative does the construction of the Deed of Trust Act and RCW 61.24.100(10) matter. The decisions reach opposite answers on this threshold question because only *Gentry* properly considered all the provisions in the deeds of trust together and as a whole, whereas *First Citizens* erroneously relied solely on the deed's boilerplate definition of "Related Documents."

In *First Citizens*, the court noted that the deeds of trust there, like those here, were "[g]iven to secure ... payment ... and ... performance of

*any and all obligations* under the ... *Related Documents*, and [the] deed[s] of trust." 178 Wn. App. at 213 (emphasis in original). Because the deeds defined "Related Documents" to include the generic term "guaranties," the court summarily concluded that the deeds secured the guaranties at issue in addition to the borrower's loan. *Id.* at 213-14. Critically, *First Citizens* ignored the reference to "payment" and "performance" in the quoted provision and, worse yet, did not consider (or even mention), the separate "Payment and Performance" provision that immediately followed it.

That conspicuous oversight fatally undermines Division 2's entire analysis. The deeds of trust do not say they were given to secure the "Related Documents"; they secure "payment" or "performance" of the Related Documents. CP 138; 179. The issue is whose payment and performance? As *Gentry* recognized, the deeds answer that question in the "Payment And Performance" provision, which limits the security to the obligations of the "Borrower and Grantor"—not a "Guarantor." *Id.* *Gentry* properly held that when these provisions are read together, the "exclusive focus [was] on the payment and performance obligations of the **Borrower and Grantor**," not the obligations of a guarantor. Slip Op. at

23-24. The fact that the borrower's promissory note incorporates the deeds of trust, while the Guaranties do not, confirms that interpretation.[2]

This result makes sense. The "Related Documents" term is a boilerplate definition listing all conceivable "instruments, agreements and documents ... executed in connection with" a commercial loan. CP 144. If the deeds of trust truly secured all such agreements without regard to who owes the obligation, then they would secure not only a third-party guaranty of a construction loan as *First Citizens* held, but potentially also a completely separate loan the lender makes to the borrower's contractor, or any number of tangentially related obligations common to complex land development projects. The "Payment and Performance" provision avoids that unintended result (and the mischief it would create for the deed of trust's grantor) by expressly and specifically limiting the scope of what is secured to only those obligations owed by the "Borrower and Grantor."[3]

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[2] *Gentry* also correctly rejected *First Citizens*' suggestion that the deeds of trust should be construed against Washington Federal. 178 Wn. App. at 214 n. 8. As *Gentry* noted, that rule does not apply because "the deeds of trust in this case are not ambiguous when read as a whole." Slip Op. at 26-27. In any event, Washington Federal was not the "drafter" of the deeds (Horizon Bank was), nor were the Gentrys party to the them, and, thus, the Gentrys cannot invoke the rule against Washington Federal.

[3] It is also confirmed by the terms of the modified Little Mountain Deed of Trust, which likewise limit the scope of security to the obligations of the "Grantor or Borrower" only—without any reference to "Related Documents." CP 192. Indeed, even if *First Citizens* were correctly

Further, it would serve no commercial purpose for the deeds of trust to secure the borrower's loan and a guaranty of that loan. From a lender's perspective, the purpose of a guaranty is to obtain an additional source of payment in the event the borrower's collateral is insufficient to satisfy the debt. From the guarantor's perspective, his or her liability is reduced by the value of the collateral whether or not the guaranty is secured. *First Citizens* conceded this commercial reality, but ignored it. 178 Wn. App. at 214 n. 10. That too was error. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998) ("Where two commercial entities sign a commercial agreement, we will give [it] a commercially reasonable construction."). If this Court accepts review, it must affirm *Gentry* for this reason as well.

**B. The *Gentry* and *First Citizens* Decisions Have Conflicting Constructions Of The Deed Of Trust Act; *Gentry* Properly Held That RCW 61.24.100(10) Does Not Prohibit A Deficiency Judgment Against Guarantors In Cases Like This One.**

*Gentry* held that, even if the deeds of trust secured the Guaranties, the result would be the same because RCW 61.24.100(3)(c) expressly allows "an action for a deficiency judgment against a guarantor" of a commercial loan, and RCW 61.24.100(10) cannot be construed to prohibit such an action. Slip Op. 12-21. Here too, Division 1 rejected Division 2's

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decided, its reasoning would not apply to the modified deed of trust, which applies to the Guaranties of two of the three loans at issue in *Gentry*.

reasoning and conclusion in *First Citizens* on an identical issue. *Id.* at 17-19. *Gentry* held that the plain language of section (10) is permissive, and cannot be read as a limitation on section (3)(c) without impermissibly striking or adding words to the statute and implausibly construing it to impliedly mean the inverse of what the legislature expressly provided. *Id.* at 13-17. As *Gentry* noted, *First Citizens* made both mistakes.

When it comes to a deficiency judgment on an obligation to repay a foreclosed commercial loan, including a guaranty of the loan, section (3) exclusively governs. Section (3)(a) applies to borrowers and grantors, and it generally prohibits deficiency judgments (except for waste and wrongful retention of rent). Section (3)(c) applies to guarantors, and it generally permits deficiency judgments. As *Gentry* noted, the right to a deficiency judgment against guarantors under section (3)(c) is not absolute; it is "subject to" a statute of limitations, RCW 61.24.100(4), and a guarantor's right to a "fair value" hearing, RCW 61.24.100(5)—neither of which is relevant here.[4] Critically, however, section (3)(c) does not limit a lender's

[4] Section (6) also applies to guarantors, but only those who (unlike the Gentrys) grant a deed of trust on their own property. Like borrowers and grantors, the Act generally prohibits deficiency judgments against this class of grantor-guarantors except for waste and wrongful retention of rents. RCW 61.24.100(6). As explained below, this exception for grantor-guarantors further demonstrates the legislature's intent to provide anti-deficiency protection only for those who actually forgo rights by agreeing to a nonjudicial foreclosure in lieu of a judicial foreclosure.

right to a deficiency judgment in cases where the guaranty is, for whatever reason, deemed secured by the borrower's foreclosed deed of trust.

RCW 61.24.100(10) is not a limitation on section (3)(c), but is intended to protect lenders—not borrowers or guarantors. A borrower or guarantor can owe multiple debts to a single lender or multiple obligations in connection with a single transaction. As *Gentry* held and respected commentators have recognized, section (10) provides that foreclosure of a deed of trust securing a commercial loan does not affect a lender's right to enforce obligations unrelated to the obligation to repay the indebtedness on the loan. Slip Op. at 13; Marjorie Dick Rombauer, 27 *Wash. Practice: Creditors' Remedies—Debtors' Relief* § 3.37 (2d ed. Supp. 2012) (under section (10), parties can "carve out" obligations unrelated to the debt, such as liability for environmental contamination). Section (10) does not apply to a payment guaranty, like the Gentrys', because it is not unrelated to the debt; it is part of the same obligation and, as such, a lender's right to a deficiency judgment is exclusively governed by section (3)(c).

Even beyond its permissive character, section (10)'s language confirms the legislature did not intend it to limit deficiency actions on the underlying debt. "When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219,

173 P.3d 885 (2007). When the legislature intended to mean an action for a "deficiency judgment" on the commercial loan, the statute uses that specific term in multiple sections. *See* RCW 61.24.100(3), (5), (6). For section (10), however, it uses a different and unique term: "an action to collect or enforce any obligation." The use of different language was intentional. Indeed, if section (10) is construed to impliedly limit a lender's right to seek a "deficiency judgment" on the underlying commercial loan, as *First Citizens* believed, then it would be both duplicative of and contrary to the express terms of sections (3).[5]

Finally, only *Gentry*, not *First Citizens*, fulfills the purpose of the Deed of Trust Act. The Act reflects a "quid pro quo" between lenders, on one hand, and borrowers and grantors, on the other; borrowers and grantors give up the right to redemption and a judicially imposed upset price and, in return, lenders give up the right to a deficiency judgment. *Donovick v. Seattle–First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). Guarantors are not part of the quid pro quo; unlike borrowers and

[5] Indeed, the conflict would go beyond section (3)(c). For example, section (3)(a) ***permits*** a lender to seek a limited deficiency judgment for waste and wrongful retention of rents against a borrower. RCW 61.24.100(3)(a)(i). Section (10) also applies to "an action to collect or enforce any obligation of a borrower." If that language in section (10) means an "action for a deficiency judgment," and it impliedly prohibits such actions as *First Citizens* held, then it would ***prohibit*** even the limited deficiency judgment expressly permitted in sections (3)(a).

grantors, they lose no rights in a nonjudicial foreclosure they would otherwise have in a judicial foreclosure. That is precisely why the Act generally prohibits a deficiency judgment against borrowers and grantors, but not guarantors. *Compare* RCW 61.24.100(3)(a) *with* (3)(c). That is also why the Act contains an exception for guarantors who (unlike the Gentrys) grant a deed of trust on their own land, giving them the same anti-deficiency protection as borrowers and grantors. RCW 61.24.100(6).

By the same token, it is *Gentry*, not *First Citizens*, that furthers a central goal of the Act: to encourage real estate financing through an "efficient and inexpensive" alternative to judicial foreclosures. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Under *Gentry*, lenders can nonjudicially foreclose deeds of trust securing commercial loans confident that, if there is a deficiency, they can obtain a judgment against a guarantor. Under *First Citizens,* lenders will be forced to file lawsuits on the guaranty, or initiate judicial foreclosure actions in lieu of nonjudicial foreclosure, if there is any chance the value of the foreclosed property will be insufficient to cover the debt; otherwise, their "absolute" and "unconditional" guaranties will be worthless. That result would also subject guarantors to judgments before lenders have an opportunity to apply the value of the borrower's collateral to reduce the guarantors'

liability. Only *Gentry* avoids this absurd result. If this Court accepts review, it should affirm *Gentry* on this issue as well.

### C. If Review Is Accepted, This Court Should Also Consider Whether Sophisticated Guarantors Of Commercial Loans Can Waive The Deed Of Trust Act's Anti-Deficiency Defenses.

Washington Federal argued below that, even if the Gentrys had an anti-deficiency defense, the Gentrys knowingly waived that defense in order to induce the lender's multi-million dollar loans to their companies. The trial court correctly recognized that the Gentrys "knowingly waived any rights or defenses arising by reason of any anti-deficiency law," by virtue of the Guaranties' "unambiguous" waiver language. CP 766. Nevertheless, the Gentrys argued, and the trial court agreed, that the waiver was "void because it violates public policy." *Id.* Because it held in Washington Federal's favor on the underlying contract and statutory interpretation issues, the Court of Appeals did not reach the waiver issue.

If this Court accepts review, it should also accept review of this issue so that, in the unlikely event the Court concludes the Gentrys have an anti-deficiency defense, it can consider and uphold the enforceability of their waiver. It is important to note the limited scope of this issue. It does not involve residential or consumer loans; nor does it involve procedural or substantive unconscionability in particular cases. The only question is whether, as a matter of public policy, the Deed of Trust Act prohibits

courts from enforcing an unambiguous waiver of anti-deficiency rights, knowingly and voluntarily agreed to by a guarantor of a commercial loan.

If the Court reaches the issue, it should confirm the enforceability of the Gentrys' waiver. It is black letter law that a guarantor's suretyship and statutory defenses "may be explicitly waived in a guaranty agreement and such waiver provisions are enforceable." 38A C.J.S., *Guaranty* § 125 (2008). Washington courts have long recognized and applied this common law rule. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 709, 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) (upholding guarantor's waiver of surety defenses); *see also United States v. Everett Monte Cristo Hotel, Inc.*, 524 F.2d 127, 136 (9th Cir. 1975) (under Washington law, guarantor defenses may be "lost by consent or waiver").

The Deed of Trust Act did not create public policy to the contrary. "An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). The Gentrys' waiver raises neither concern. The Act shows the legislature's intent to allow deficiency judgments against commercial guarantors. RCW 61.24.100(3)(c). And, even if section (10) is construed to curtail that right when the guaranty is

secured by the borrower's deed of trust, what possible "public good" is injured when a sophisticated guarantor, to induce a multi-million dollar commercial loan, knowingly and expressly agrees to give the lender the same right to a deficiency judgment it would otherwise have against an unsecured guarantor under section (3)(c)? None, of course.

Review of this issue would also give this Court an opportunity to distinguish this case from *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013) and *Bain v. Mortg. Elec. Registration Sys.*, 175 Wn.2d 83, 285 P.3d 34 (2012)—neither of which addressed deficiency judgments, commercial loans, guaranties or the enforceability of express waivers executed by sophisticated parties like the Gentrys. Rather, both cases held that parties cannot contractually modify "statutory requirements" that a *trustee* must follow as a prerequisite to nonjudicial foreclosure. *Schroeder*, 177 Wn.2d at 106-07; *Bain*, 175 Wn.2d at 108. As noted in *Schroeder*, although one can ordinarily waive statutory "rights or privileges," that rule does not apply to these procedural requisites because they "are not ... rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Id.*

These concerns are not implicated where, as here, the statutory prerequisites are followed, a valid trustee's sale is held, and the only interests that remain are the contractual rights of the lender and third-party

guarantor. If RCW 61.24.100(10) did give the Gentrys an anti-deficiency defense, contrary to the common law rule, then it is precisely the kind of "rights-or-privileges-creating statute" that this Court recognized could be waived. *Schroeder*, 177 Wn.2d at 107. To be sure, a public policy designed to prevent overreaching lenders and trustees from forcing the machinery of nonjudicial foreclosure on homeowners and unsophisticated borrowers has no applicability in a commercial transaction—where, as here, a sophisticated guarantor's knowing and voluntary waiver is a fundamental element of the consideration underlying the transaction.

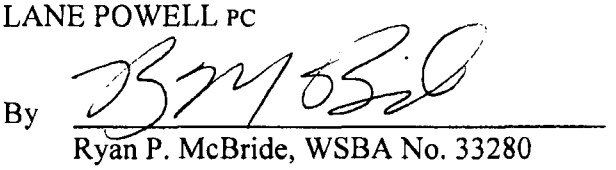
If anything, enforcing the waivers like the one signed by the Gentrys would promote the public policy underlying the Deed of Trust Act. As noted, a goal of the Act is to encourage real estate financing by keeping nonjudicial foreclosure efficient and inexpensive. *Cox*, 103 Wn.2d at 387. If, as *First Citizens* held, RCW 61.24.100(10) confers guarantors with an anti-deficiency defense, but courts cannot enforce a waiver of that defense, then lenders will have no choice but to sue on the guaranty or initiate judicial foreclosure actions. If this Court reaches the issue, it should conclude that public policy does not prohibit the enforceability of an express and unambiguous waiver, knowingly and voluntarily executed by a sophisticated guarantor of a commercial loan.

## V. CONCLUSION

Washington Federal agrees that this case satisfies the criteria for review. If the Court accepts review, it should affirm *Gentry* (and *Harvey*).

RESPECTFULLY SUBMITTED this 3rd day of April, 2014.

LANE POWELL PC

By 

Ryan P. McBride, WSBA No. 33280
Gregory R. Fox, WSBA No. 30559
*Attorneys for Washington Federal*

## CERTIFICATE OF SERVICE

I, Kathryn Savaria, hereby certify under penalty of perjury of the laws of the State of Washington that on April 3, 2014, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

Mr. Christopher I. Brain
Ms. Adrienne D. McEntree
Tousley Brain Stephens PLLC
1700 Seventh Avenue, Suite 2200
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Telephone: (206) 682-5000
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E-Mail: amcentee@tousley.com

☐ **by CM/ECF**
☑ **by Electronic Mail**
☐ **by Facsimile Transmission**
☑ **by First Class Mail**
☐ **by Hand Delivery**
☐ **by Overnight Delivery**

Kathryn Savaria

Kathryn Savaria

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Dear Clerk:

Attached for filing is the following document:

Case Number: 90085-0
Case Name: Washington Federal v. Kendall and Nancy Gentry
Document: Answer to Petition for Review
Attorney: Ryan P. McBride, WSBA No. 33280

Thank you.

**Kathryn Savaria**

Legal Assistant
Lane Powell PC
1420 Fifth Avenue, Suite 4200
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