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DIVISION 1, COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 70004-9-I

WASHINGTON FEDERAL, a federally chartered savings association,

Appellant,

v.

KENDALL D. GENTRY and NANCY GENTRY,

Respondents.

---

and

No. 69791-9-I

WASHINGTON FEDERAL, a federally chartered savings association,

Appellant,

v.

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

Respondents.

GENTRY AND HARVEY RESPONSE
TO BRIEF OF AMICI CURIAE

COPY

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I. INTRODUCTION

Respondents Kendall Gentry and Lance Harvey and their spouses submit this joint opposition to the Brief of Amici Curiae Washington Bankers Association and Union Bank, N.A. (hereinafter the "Amici Brief"). Amici ask this Court to reject rulings recently made by Division II of the Court of Appeals in *First Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, Cause No. 43619-1-II, -- Wn.App.--, 314 P.3d 420 (Dec. 3, 2013) (the "*Cornerstone*" case). *Cornerstone* involved essentially identical deficiency claims brought against guarantors following a non-judicial foreclosure sale, based upon the same "Laser Pro" deed of trust form utilized by Washington Federal's predecessor-in-interest Horizon Bank in the *Gentry* and *Harvey* cases.

Division II determined that the Laser Pro deed of trust form by its terms expressly secured the guarantors' obligations, and that RCW 61.24.100 accordingly barred further claims against the guarantors once the non-judicial foreclosure sale had been completed. Amici now attempt to convince this Court that *Cornerstone* is factually distinguishable from the *Gentry* and *Harvey* appeals. And, despite the RAP 10.3(e)'s strictures against repetition, Amici offer little more to this Court than assertions that *Cornerstone* was wrongly decided, based on the same arguments previously made by Washington Federal in its briefing herein. Amici had

an opportunity to address the same issues to Division II before oral argument in *Cornerstone*.[1] Division II found Amici's assertions unpersuasive, and this Division should do so as well.

II. RESPONSE TO CLAIMED INTERESTS OF AMICI

Although the Amici Brief is ostensibly submitted on behalf of Washington lenders generally, it is focused on the interests of Union Bank, which is a party to eight other appeals currently pending in Divisions I and II.[2] Each of Union Bank's cases involves the same Laser Pro deed of trust form and post-trustee's sale deficiency claims against guarantors at issue in *Cornerstone* and the present cases.

Amici describe those Laser Pro deed of trust and guaranty forms as "identical to standard form documents used in the industry." Amici Brief at 1. They further assert that the "issues before the Court affect many WBA members" and that "many banks and lenders including Union Bank are signatories to and/or have rights under deeds of trust that are identical or similar to the Construction Deeds of Trust at issue here, which are

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[1] See Brief of Amici Curiae Washington Banker's Association, Washington Federal and Union Bank, N.A. dated August 12, 2013 and Appellants Allison Response to Brief of Amici Curiae dated August 20, 2013, filed prior to oral argument in the *Cornerstone* case.

[2] A listing of those cases, which have not yet been set for oral argument, is set forth in Appendix A attached hereto. This Court's decision in the *Gentry* and *Harvey* cases should be dispositive of the four Union Bank appeals presently pending in Division I, just as the decision in the *Cornerstone* case should be dispositive of Union Bank's four appeals pending before Division II.

based on a so-called "Laser Pro" form document." Id. at 2 and 3. Amici attempt to create the false impression that the Laser Pro deed of trust form at issue in the pending appeals has been and will continue to be utilized by virtually all Washington lenders.

In fact, the Laser Pro deed of trust form involved in *Cornerstone,* as well as *Gentry* and *Harvey*, was primarily used by community banks which failed and were taken over by the FDIC during the economic downturn of 2009 and 2010. Union Bank, Washington Federal and First Citizens are involved in the current cases only because they purchased the loan assets of those banks from the FDIC under loss-sharing agreements.[3]

In making all of those loans, the failed banks chose to secure the guarantor obligations with the same deed of trust securing the obligations of the borrowers. The banks which later purchased those loans from the FDIC then chose the expedient remedy of non-judicial foreclosure, rather than suing on the borrower on the note, suing the guarantors on their guaranty contracts, or foreclosing the acquired deeds of trust judicially. As a result of those choices and the provisions of RCW 61.24.100, the purchasing banks are now barred from seeking deficiency judgments against the guarantors of those loans.

[3] Loans made by Frontier Bank were acquired by Union Bank; loans made by Horizon Bank were acquired by Washington Federal; and loans made by Venture Bank were acquired by First Citizens.

Amici neglect to inform this Court that neither Union Bank nor other major banks such as Key Bank, U.S. Bank, Wells Fargo, Chase, or Bank of America have ever used the Laser Pro deed of trust form for their own commercial lending, let alone any other commercial deed of trust forms that also secure the performance of obligations by guarantors of those loans. Amici also fail to acknowledge that while Washington Federal continues to use a Laser Pro form for its commercial loans, that form was revised to specifically exclude guaranties from the list of "Related Documents" secured by the deed of trust. Through this simple change in wording,[4] which could easily have been used by Horizon Bank for the Gentry and Harvey deeds of trust, Washington Federal made RCW 61.24.100 inapplicable to post-sale deficiency claims against guarantors, because guaranties are expressly not secured by the deed of trust.

So while it is correct that millions of dollars of deficiency claims are governed by *Cornerstone,* and by the decisions to be issued by this Court in *Gentry* and *Harvey* (Amici Brief at 18-19), those claims are based on loans made by failed banks prior to the recent economic downturn, the

[4] Washington Federal's revised deed of trust changed the definition of "Related Documents" as follows: "The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, ~~guaranties,~~ environmental agreements, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that ~~environmental indemnity agreements~~ guaranties are not "Related Documents" and are not secured by this Deed of Trust."

outcomes of which turn on drafting choices made by the original lenders. A decision by this Court, consistent with the recent determinations by Division II in *Cornerstone,* simply confirms the legal consequences arising from the language used in those documents prepared long ago, combined with the remedy choices later made by the acquiring banks. It will have no effect upon current or future commercial lending practices in Washington, and certainly not the chilling effect implied by Amici, because lenders are not using the former Laser Pro deed of trust form.

II. DIVISION II CORRECTLY CONSTRUED THE "LASER PRO" DEED OF TRUST LANGUAGE

A. The Document Language at Issue.

It is axiomatic that the obligations secured by a deed of trust are defined by the conveyance language of the document itself. In the Laser Pro deed of trust form used in *Gentry* and *Harvey*, as well as in *Cornerstone*, those secured obligations were identified as follows:

> **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.

Gentry CP 11 and 25, Harvey CP 556 (emphasis added)

The Laser Pro deed of trust form used by the now-defunct lending banks also included specific definitions of "Indebtedness" and "Related

Documents," which read in relevant part as follows:

> The word "Indebtedness" means all principal, interest, and any other amounts, costs and expenses payable under the Note **or Related Documents**, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note **or Related Documents** ...
>
> The words **"Related Documents" mean 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, whether now or hereafter existing, **executed in connection with the Indebtedness**; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.

Gentry CP 16-17 and 30-31, Harvey CP 562 (emphasis added).

In *Gentry* and *Harvey*, as well as in *Cornerstone*, the "Indebtedness" consisted of a loan made by the bank to a property owner LLC entity owned by the individual guarantors who were its members. The LLC acted as the "Borrower" of the loan and the "Grantor" of the deed of trust. The only "guaranties ... executed in connection with the Indebtedness" were those by the individual LLC members. Per the terms of the Commercial Guaranty forms signed by the Gentrys and Harveys in the current cases (Gentry CP 118-135, Harvey CP 585-88), and by the Allisons in *Cornerstone*, those individuals guaranteed "full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations to Lender under the Note and Related Documents." Under the express language of

the Laser Pro deed of trust form and as a matter of common sense, their guaranties were "Related Documents" to the Note and loan Indebtedness.[5]

To eliminate any conceivable question about whether the guaranties were "related" to the loan and deed of trust, the Laser Pro loan document "package" included a "Notice of Final Agreement" form, specifically listing the guaranties as part of the overall "Loan Agreement." See, e.g., Harvey CP 568-69.[6]

Thus via the Laser Pro loan forms, which were solely the creature of the banks, each lending bank employed not simply a "belt and suspenders" approach, but multiple "belts and suspenders" which repeatedly tied all loan-related obligations together and secured the performance of all of them (including the guaranties) by the Laser Pro deed of trust form. This approach provided benefits, e.g. entitling the

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[5] To further tie the deeds of trust, guaranties and other "Related Documents" together, each Laser Pro deed of trust form contained an "Amendments" clause stating that "This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust." Similarly, each Commercial Guaranty contained a parallel "Amendments" clause reciting that "This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty." Each guaranty further defined the term "Related Documents" to include all "promissory notes," "deeds of trust" and other documents "now or hereafter existing, executed in connection with the Indebtedness." (emphasis added) See Gentry CP 16, 29, 120, 123, 126, 129, 132, 135, and Harvey CP 587 and 588.

[6] That form declared that the written Loan Agreement contained the final agreement of the parties, and globally defined the term "Loan Agreement" to mean all "promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, relating to the Loan, including without limitation the following Loan Documents:" The Notice then proceeded to list not only the promissory note and deed of trust signed by the LLC borrower, but also the Commercial Guaranties executed by its individual members.

bank to foreclose based upon a default under any of the documents making up the "Loan Agreement," rather than merely a payment default by the borrower LLC. But those benefits came with tradeoffs, including loss of the right to pursue deficiency claims under those other agreements when the bank elected to foreclose the deed of trust non-judicially.

B. The Construction Applied by Division II

In *Cornerstone*, as in *Gentry* and *Harvey*, the loan documents were prepared entirely by the lending bank, and there is no evidence of any participation by the borrowers or guarantors in either the negotiation or drafting of the words employed.[7] Division II had no difficulty concluding that the obligations secured by the deed of trust, as delineated by its "granted to secure" paragraph, included those arising under the original loan guaranties signed by the individual members of the LLC borrower:

> These deeds of trust defined (1) "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note *or Related Documents*"; and (2) "Related Documents" to include any "*guaranties* ... whether *now* or hereafter *existing*, executed in connection with the indebtedness." A plain reading of this language includes the Allisons' earlier guaranty among the "now ... existing" "Related Documents" that these deeds of trust secured.

Opinion at 5 (emphasis in original, footnotes omitted). The Court also pointed to the "Amendments" (i.e. "entire agreement") clause and

[7] Harvey CP 535.

"Related Documents" definition in the Allisons' Commercial Guaranty as further confirmation of its interpretation as to later guaranties:

> This plain language expressly incorporates future "Related Documents," which unambiguously includes future "deeds of trust" as well as "promissory notes" "executed in connection with the indebtedness," "now or hereafter existing," namely Cornerstone's promissory notes and deeds of trust later executed to obtain this contemplated loan.
>
> Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness," in both the deeds of trust and the Allisons' guaranty, to refer to Cornerstone's construction loans from Venture bank, secured by the deeds of trust. Thus, *we agree with the Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons' guaranty in addition to Cornerstone's construction loan.* (emphasis added)

Opinion at 6-7. These interpretations give effect to the plain meaning and stated intent of the documents drafted by the lending banks, and the same determinations should be reached by this Court.

In an attempt to avoid the mutually reinforcing provisions of the loan documents and the interpretation flowing from their plain and unambiguous language, Amici advance a series of tenuous arguments, most of which were also asserted in their Amici Brief to Division II, and rejected by that Court. The following sections address those arguments.

C. The *Gentry* and *Harvey* Cases are not Factually Distinguishable from *Cornerstone*

In an effort to avoid the impact of the *Cornerstone* decision, Amici attempt to factually distinguish the current cases based upon the existence

of "additional context evidence." Amici Brief at 4-7. In *Gentry*, they point to a Modification of Deed of Trust (see, e.g. Gentry CP 191-93 - copy attached as Appendix B for ease of reference). The original deed of trust defined the term "Note" to mean a single note dated August 13, 2007 in the principal amount of $3,575,000. The Modification replaced that definition with one referring to three promissory notes. It also provided that, in addition to the "Note" as so redefined, the deed of trust also secured "all [other] obligations ... of Grantor or Borrower to Lender."

Amici attempt to argue that this Modification confirmed an intent that <u>only</u> the obligations of the Grantor and Borrower were secured by the original deed of trust, and effectively deleted its "granted to secure" provisions as well as its definitions of "Indebtedness" and "Related Documents." Amici brief at 4-5. Nothing of the sort was accomplished by the Modification, which on the contrary recited as follows:

> CONTINUING VALIDITY. Except as expressly modified above, the terms of the original Deed of Trust shall remain unchanged and in full force and effect.

The Modification made no change to the terms of the original Deed of Trust stating that it was "given to secure ... performance of any and all obligations under the Related Documents," the latter defined to include "all ... guaranties ... executed in connection with the Indebtedness."

Amici engage in a similarly misguided attempt to distinguish

Cornerstone from the facts in *Harvey*, pointing to an LLC Borrowing Resolution signed by Kaydee Gardens, LLC, the entity owned by the Harveys which served as Borrower under the Note and Grantor of the Deed of Trust. Amici Brief at 5. Amici claim that the borrowing resolution approved nothing beyond the granting of a deed of trust to secure the LLC's obligations to the bank. Even if that accurately characterized the resolution, its language cannot supersede the "granted to secure" provisions of the deed of trust itself. However, rather than being limited to the Borrower's obligations, the resolution in fact referred generally to the grant of mortgages or other security by the LLC "for the payment of any loans or credit accommodations" obtained from the bank, without limiting that to the liability of a particular party. The guarantors were liable for such payment under the express language of Continuing Guaranties under which they guarantied "payment and satisfaction of the Indebtedness" and "performance and discharge of all Borrower's obligations under the Note."

There was no detriment to Kaydee Gardens, LLC in granting a deed of trust which not only secured its own obligation to repay the loan from the bank, but also secured its members' obligation to make that payment if the LLC failed to do so. That's what the terms of the deed of trust itself provided. There is no reason for this Court to interpret the

controlling deed of trust language contrary to its express terms, nor to assume that a resolution authorizing the deed of trust, prepared solely by the bank for the bank's benefit, would make the LLC's execution of the bank's deed of trust form an ultra vires act.

D. No Evidence in the Record Supports the "Intent" Asserted by Amici

After noting that the *Cornerstone*, *Gentry* and *Harvey* loans were real estate development or construction loans, Amici assert that banks "often" require personal guaranties for such loans because the property does not have sufficient value to cover the loan amount at the time the loan is made. Amici Brief at 3-4. Later, Amici assert that "Here, the parties intended the guaranties to provide security for the loans which was additional to the security that each borrower offered, i.e. the properties." This is followed by assertions that "The lending bank had determined that the properties alone did not warrant the extensions of credit the borrowers sought. The bank required a remedy independent of the deeds of trust in the form of the guaranties by the guarantors." *Id.* at 15-16.

Yet there is nothing in the *Harvey* or *Gentry* records to support any of these assertions of purported "facts." Rather, the undisputed evidence shows that Horizon Bank drafted all the documents for each loan, and that they were presented to and signed by the borrowers and guarantors

without discussion. See, e.g., Harvey CP 535. No separate statements of determination, intent or purpose exist in the record, whether as to the value of the subject properties, the reasons for requiring guaranties, or the remedies expected to be available to the bank in the event of default.

Under long-established Washington law, only objective manifestations of intent are relevant to interpretation of contract language.[8] There is no such evidence here beyond the words of the bank's loan documents themselves. And while the obligations of borrower and guarantor could have been structured as separate and supplemental to each other, it was the lending bank which voluntarily chose to tie them together by securing both with the deeds of trust.

E. The "Payment and Performance" Provision

Amici do not deny that the key paragraphs in the deeds of trust at issue are the ones declaring what they were "given to secure." Those paragraphs ended with the sentence "This Deed of Trust is given and accepted on the following terms." Seizing upon the reference to "following terms," Amici argue that the intent of the "given to secure" provisions must be determined by the paragraph immediately following, entitled "Payment and Performance." There, the Grantor LLC promised to pay to the lender bank "all amounts secured by the deed of trust" and to

[8] *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (1993) (rejecting evidence of unexpressed subjective intent of parties to a contract).

"perform all of Grantor's obligations under the Note, this Deed of Trust, and the Related Documents." Amici argue that this paragraph confirms that the obligations of the Grantor LLC were the only ones intended to be secured by the deed of trust, to the exclusion of the obligations of its members under their guaranties. This argument is fatally flawed.

First, Amici's argument contravenes the plain language of the "granted to secure" provision itself, which specifically recites that the deed of trust secures performance of "any and all obligations under the Note, the Related Documents *and* this Deed of Trust." (emphasis added) The guaranties signed by LLC members were designated as "Related Documents" through express definitions in both the deed of trust and the guaranties themselves, and as part of the "Loan Agreement" by the Notice of Final Agreement. The guaranties involved commitments for "payment of the Indebtedness" which the deed of trust also expressly secured. The fact that the deeds of trust contained sections devoted to payment and performance by the grantor/borrower LLC's simply elaborated upon those secured obligations. It in no way negated the fact that other obligations were likewise secured.

Secondly, Amici are asking the Court to read a few sentences of the deed of trust with blinders, ignoring the document as a whole. Clearly the "following terms" referenced at the end of the "given to secure"

paragraph included not just the "Payment and Performance" paragraph which immediately followed, as Amici suggest, but rather all of the other terms and conditions of the deed of trust on its remaining six pages. Those terms included the key definitions of "Indebtedness" and "Related Documents," as well as the "entire agreement" provision which confirmed that the deeds of trust secured obligations under the guaranties as "Related Documents" "executed in connection with the Indebtedness."

F. "Guaranty" vs. "guaranty"

In another vain attempt to avoid the plain language of the deeds of trust, Amici argue that the reference to "guaranties" (with a small "g") in their definitions of "Related Documents" cannot refer to the LLC members' Commercial Guaranties signed by in connection with the loans at issue, because those were separately defined as "Guarantors" and "Guaranties" (both with a capital "G"). The deed of trust definitions in question read as follows:

> The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.
>
> The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Amici fail to explain how the global reference to "all ... guaranties ... executed in connection with the Indebtedness" in the definition of "Related Documents" could possibly exclude the Continuing Guaranties

executed by the Guarantors. No other guaranties of the Indebtedness existed; the definition of "Guaranty" confirmed that it was a "guaranty"; and the G/guaranties executed by the LLC members are the ones on which the bank's deficiency claims are now based.

Amici's argument also ignores the interchangeable use of the terms "guaranty" and "Guaranty" made in the deeds of trust. For example, after designating disputes as to liability under a Guaranty and the death of a Guarantor (both with a capital "G") to be "Events of Default," the deed of trust forms went on to provide that:

> In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations under the guaranty in a manner satisfactory to lender ..." (emphasis added)

Clearly, the referenced "guaranty" (with a small "g"), assumable by the Guarantor's estate at the Lender's option, is the same "Guaranty" of the Note signed by the Guarantor at the time of the loan. Such "guaranties" are Related Documents secured by the deeds of trust.

III. DIVISION II CORRECTLY INTERPRETED RCW 61.24.100 TO BAR DEFICIENCY CLAIMS ON SECURED GUARANTY OBLIGATIONS

Having determined that the guaranties of the Allisons were secured by the deeds of trust granted by their LLC Cornerstone Homes, Division II's *Cornerstone* opinion addressed the question of whether deficiency claims against the guarantors were barred by RCW 61.24.100.

Subsection (1) of that statute begins with the statement that "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any ... guarantor after a trustee's sale under that deed of trust" (emphasis added). Subsection 3(c) elaborates on the referenced exception, stating that deficiency judgments can be obtained against guarantors of commercial loans if they receive certain notices. However, subsection (3)(c) makes that exception expressly "subject to this section," i.e. the other provisions of 61.24.100. The most important of those provisions is subsection (10), which states:

> 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 ... guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (emphasis added)

Division II construed those statutory provisions together, giving them their plain and ordinary meaning:

> Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure, by allowing the lender to sue a commercial loan guarantor if the guaranty was *not* secured by the foreclosed deed of trust."

Opinion at 8 (emphasis in original).

The Court then applied the statutory language to the facts actually presented in *Cornerstone*, i.e. that the guaranty obligations were secured

by the non-judicially foreclosed deed of trusts. In doing so, Division II followed the construction principle of "expressio unius est exclusio alterius," determining by necessary implication that "where a guaranty *was* secured by the foreclosed deed of trust (which also secured the commercial loan), the lending bank *cannot* sue the guarantor for any deficiency remaining after the trustee's sale of the secured property." *Id.* at 9 (emphasis in original).

In *Cornerstone* and before this Court, the banks have attempted to argue that subsection (10) is purely permissive, and that subsection 3(c) constitutes a blanket authorization of deficiency claims against guarantors of commercial loans. The former ignores the well-established "expressio unius" principle applied by Division II, while the latter ignores the language of subsection 3(c), which made it expressly "subject to" the other provisions of Section 61.24.100, including subsection (10).

Amici also argue that construing subsection (10) to preclude deficiency claims based on guaranties secured by the foreclosed deed of trust would conflict with both subsections 3(c) and (6). Amici Brief at 9. Of course, there is no conflict with subsection 3(c), because that is made expressly "subject to" the other parts of the section. Subsection (6) plays no role in this case, because there are no allegations of waste or misappropriation of rents, and the deeds of trust at issue were granted by

the borrower LLC's, not against property owned by the guarantors as individuals. But even if subsection (6) did apply, the construction which gives meaning to all parts of RCW 61.24.100 is the one treating subsection (6) as an exception subsection (10), as done by Division II. Opinion at 9, footnote 14. This Court should not read the latter subsection out of the statute by concluding that deficiency claims may be maintained against guarantors regardless of whether their obligations were secured by the foreclosed deeds of trust, as the lenders now urge this Court to do.

Amici argue that "Subsection (10) makes clear that if a borrower or guarantor owes obligations separate from the underlying loan, such as environmental indemnities, the lender's ability to enforce those obligations remains unaffected by nonjudicial foreclosure." Amici Brief at 10. That point is undisputed, and indeed reinforces Division II's decision. In the "Laser Pro" loan documents, the guarantor obligations were not "separate from the underlying loan." Their obligations were to pay the same loans on which their borrower LLC's were obligated. And most importantly, the lenders tied the borrower and guarantor obligations together, securing both with the deed of trust. Where the loan documents are structured in that fashion and the deed of trust is non-judicially foreclosed, Division II correctly determined that subsection (10) bars

further deficiency claims against the guarantors, just as subsection (1) bars them against the borrowers.

IV. RCW 61.24.100'S PROTECTIONS AGAINST DEFICIENCY JUDGMENTS ARE NOT SUBJECT TO WAIVER

As noted at pages 17-18 of the Amici Brief, *Cornerstone* did not decide the "waiver" issue, because First Citizens elected not to argue that the boilerplate waiver provisions of its Continuing Guaranty form were enforceable under RCW 61.24.100. The same Laser Pro guaranty form was utilized by Washington Federal in the *Gentry* and *Harvey* cases. Division II has strongly indicated that it would find waivers of the protections of the statute to be unenforceable, if the issue were squarely presented to it. *See Cornerstone* Opinion at page5, footnote 5; and *First-Citizens Bank & Trust Co. v. Reikow*, --Wn.2d--, 313 P.3d 1208 (2013) at footnote 4. Amici offer no new arguments in support of such waiver, and Respondents Gentry and Harvey accordingly refer the Court to the Gentrys' Brief at 22-24 and the Harveys' Brief at 30-34.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2014, I caused to be served a copy of the foregoing **RESPONSE TO BRIEF OF AMICUS CURIAE BY RESPONDENTS GENTRY AND HARVEY** on the following persons in the manner indicated below at the following address:

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Attorneys for Amicus Union Bank, N.A.

☐ **by CM/ECF**
☑ **by Electronic Mail**
☐ **by Facsimile Transmission**
☐ **by First Class Mail, postage pre-paid**
☑ **by Hand Delivery**
☐ **by Overnight Delivery**

Joy K. Lawrence, Legal Assistant to
Dean A. Messmer

APPENDIX A – UNION BANK APPELLATE CASES

The following cases involving deficiency claims against guarantors following non-judicial foreclosure sales under the "Laser Pro" deed of trust form are currently pending before Division I of the Court of Appeals:

Appeal No.	Case Name	Status
70327-7-I	Union Bank vs. Lyons	Fully briefed, awaiting oral argument date
70497-4-I	Union Bank vs. McAbee	Not yet briefed
70869-4-I	Union Bank vs. Pelzel	Not yet briefed
71168-7-I	Union Bank vs. Deyo	Not yet briefed

The following cases involving such issues are currently pending before Division II of the Court of Appeals:

Appeal No.	Case Name	Status
44839-4-II	Union Bank vs. Brinkman	Fully briefed, awaiting oral argument date
44970-6-II	Union Bank vs. Riley	Fully briefed, awaiting oral argument date
45010-1-II	Union Bank vs. Brunaugh	Fully briefed, awaiting oral argument date
45014-3-II	Union Bank vs. Brunaugh	Fully briefed, awaiting oral argument date

APPENDIX B

GENTRY MODIFICATION OF DEED OF TRUST

UNOFFICIAL DOCUMENT

RETURN ADDRESS:
Horizon Bank
Cliff % Documentation
Dept NS
2211 Rimland Dr, Suite 230
Bellingham, WA 98226

200904300174
Skagit County Auditor
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GUARDIAN NORTHWEST TITLE CO
ACCOMMODATION RECORDING ONLY
M9328

MODIFICATION OF DEED OF TRUST

Reference # (if applicable): 200605090130 CMLG3072 Additional on page ____

Grantor(s):
1. Little Mountain East, L.L.C.

Grantee(s)
1. Horizon Bank

Legal Description: PTN NE 1/4 OF SW 1/4, 28-34-4 E W.M.

Additional on page ____

Assessor's Tax Parcel ID#: 340428-3-0005(P28026)

THIS MODIFICATION OF DEED OF TRUST dated April 27, 2009, is made and executed between Little Mountain East, L.L.C.; A Washington Limited Liability Company ("Grantor") and Horizon Bank, whose address is Skagit Commercial Center, 2211 Rimland Drive, Suite 230, Bellingham, WA 98226 ("Lender").

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UNOFFICIAL DOCUMENT

MODIFICATION OF DEED OF TRUST
(Continued)

DEED OF TRUST. Lender and Grantor have entered into a Deed of Trust dated May 1, 2006 (the "Deed of Trust") which has been recorded in Skagit County, State of Washington, as follows:

Recorded May 9, 2006 in Skagit County, State of Washington under Auditor's File No. 200605090130.

REAL PROPERTY DESCRIPTION. The Deed of Trust covers the following described real property located in Skagit County, State of Washington:

See Schedule "A-1", which is attached to this Modification and made a part of this Modification as if fully set forth herein.

The Real Property or its address is commonly known as 2080 Little Mountain Road, Mount Vernon, WA 98274. The Real Property tax identification number is 340428-3-0005(P28026).

MODIFICATION. Lender and Grantor hereby modify the Deed of Trust as follows:

This Note is a renewal and replacement of Promissory Note from Borrower to Lender dated August 13, 2007 in the original amount of $3,570,000.00. All references in the loan documents to the old Note shall be deemed to be a reference to the new Note.

Definition of Note is hereby modified to be Promissory Note dated April 27, 2009 from Borrower, Landed Gentry Development, Inc. to Lender in the original amount of $3,574,847.74; Promissory Note dated December 14, 2006 from Borrower, Blackburn Southeast, L.L.C. to Lender in the original amount of $2,550,000.00 and Promissory Note dated January 23, 2007 from Borrower, Gentry Family Investments, L.L.C. to Lender in the original amount of $1,127,832.73.

CROSS-COLLATERALIZATION:

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, or any one or more of them, as well as all claims by Lender against Borrower and Grantor or any one of more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Borrower or Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party of otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

CONTINUING VALIDITY. Except as expressly modified above, the terms of the original Deed of Trust shall remain unchanged and in full force and effect. Consent by Lender to this Modification does not waive Lender's right to require strict performance of the Deed of Trust as changed above nor obligate Lender to make any future modifications. Nothing in this Modification shall constitute a satisfaction of the promissory note or other credit agreement secured by the Deed of Trust (the "Note"). It is the intention of Lender to retain as liable all parties to the Deed of Trust and all parties, makers and endorsers to the Note, including accommodation parties, unless a party is expressly released by Lender in writing. Any maker or endorser, including accommodation makers, shall not be released by virtue of this Modification. If any person who signed the original Deed of Trust does not sign this Modification, then all persons signing below acknowledge that this Modification is given conditionally, based on the representation to Lender that the non-signing person consents to the changes and provisions of this Modification or otherwise will not be released by it. This waiver applies not only to any initial extension or modification, but also to all such subsequent actions.

COUNTERPARTS. This Agreement may be executed in a number of identical counterparts and by each party on a separate counterpart. If so executed, all of such counterparts shall collectively constitute one agreement.

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MODIFICATION OF DEED OF TRUST AND GRANTOR AGREES TO ITS TERMS. THIS MODIFICATION OF DEED OF TRUST IS DATED APRIL 27, 2009.

GRANTOR:

LITTLE MOUNTAIN EAST, L.L.C.

By: _____
Brian D. Gentry, Manager of Little Mountain East, L.L.C.

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MODIFICATION OF DEED OF TRUST
(Continued)

LENDER:

HORIZON BANK

X VP
Authorized Officer

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

STATE OF WA)
) SS
COUNTY OF Skagit)

On this 30 day of April, 20 09, before me, the undersigned Notary Public, personally appeared Brian D. Gentry, Manager of Little Mountain East, L.L.C., and personally known to me or proved to me on the basis of satisfactory evidence to be a member or designated agent of the limited liability company that executed the Modification of Deed of Trust and acknowledged the Modification to be the free and voluntary act and deed of the limited liability company, by authority of statute, its articles of organization or its operating agreement, for the uses and purposes therein mentioned, and on oath stated that he or she is authorized to execute this Modification and in fact executed the Modification on behalf of the limited liability company.

By Hayley B. Mensonides
Notary Public in and for the State of WA

Residing at Mount Vernon
My commission expires 08-09-2012

HAYLEE B. MENSONIDES NOTARY PUBLIC STATE OF WASHINGTON MY COMMISSION EXPIRES 8-09-12

LENDER ACKNOWLEDGMENT

STATE OF Washington)
) SS
COUNTY OF Skagit)

On this 30th day of April, 20 09, before me, the undersigned Notary Public, personally appeared John Voth and personally known to me or proved to me on the basis of satisfactory evidence to be the Vice President, authorized agent for Horizon Bank that executed the within and foregoing instrument and acknowledged said instrument to be the free and voluntary act and deed of Horizon Bank, duly authorized by Horizon Bank through its board of directors or otherwise, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute this said instrument and in fact executed this said instrument on behalf of Horizon Bank.

By Patricia J. Goodell
Notary Public in and for the State of WA

Residing at Bellingham
My commission expires 06/23/2012

PATRICIA J. GOODELL NOTARY PUBLIC STATE OF WASHINGTON MY COMMISSION EXPIRES 06-23-10

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Skagit County Auditor
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