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SUPREME COURT OF
THE STATE OF WASHINGTON

No. 69791-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WASHINGTON FEDERAL, a federally chartered savings association,

Appellant,

vs.

LANCE HARVEY and JANE DOE HARVEY,

Respondents.

MEMORANDUM SUPPORTING REVIEW
BY AMICUS CURIAE UNION BANK, N.A.

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. INTEREST OF AMICUS CURIAE	2
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT.....	5
A. Where other parties have pending similar litigation—such as the 20 Union Bank cases—the express conflicts between Divisions I and II concerning a lender's right to enforce commercial guaranties require resolution for certainty, consistency and to conserve resources.....	6
B. Timely resolution of all three legal issues presented is important to similarly situated parties and the public because of the inconsistent results, the number of pending cases concerning the same issues, the amounts at stake and the importance of the issues.	7
C. Immediate resolution will settle this area of law and eliminate the threat that incorrectly decided or conflicting precedents will lead to further uncertainty.....	8
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cox v. Helenius</i> , 103 Wn.2d 383 (1985)	7
<i>Donovick v. Seattle-First Nat'l Bank</i> , 111 Wn.2d 413 (1988)	3, 8, 10
<i>First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC</i> , 178 Wn. App. 207 (2013)	2, 8, 9
<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wn.2d 493 (2005)	6
<i>Tanner Elec. Coop v. Puget Sound Power & Light Co.</i> , 128 Wn.2d 656 (1996)	6
<i>Udall v. T.D. Escrow Servs. Inc.</i> , 159 Wn.2d 903 (2007)	6
<i>Wash. Fed. v. Gentry</i> , 179 Wn. App. 470 (2014)	<i>passim</i>
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692 (1998)	3, 8, 10
Statutes	
RCW 7.60.260(2)	9
RCW 61.24.100	3
Rules	
RAP 13.4(b)(2)	5
RAP 13.4(b)(4)	5

I. INTRODUCTION

Amicus Union Bank, N.A. supports the Harveys' Petition for Review ("Harvey Petition"). This Court immediately should act to resolve the express conflicts and outstanding legal issues that are clogging Washington courts, creating uncertainty, producing inconsistent results, and draining party resources.

Timely review is necessary because multiple parties currently are facing the identical issues in many cases currently pending throughout Washington's court system. All are queued for determinations that require this Court's immediate guidance. No factors weigh in favor of waiting to decide these important legal issues. Parties throughout the state—like Union Bank—need prompt Supreme Court action.

The Harvey Petition is noted before Department 2 on July 8, 2013. On this same date, regarding Supreme Court No. 900850, the very similar petition for review by the Gentrys of a published decision is noted before Department 1. Division I combined for oral argument *Harvey* and *Gentry* and issued the decisions the same day. The *Gentry* Petition seeks review of the same legal issues.¹ The Court should coordinate immediate

¹ Also pending before this Court since its note date of March 27, 2014 before the Commissioner is a motion to transfer from Division II to this Court the case *Union Bank v. Brinkman*, Supreme Court No. 89964-9, for immediate resolution of the same issues.

resolution of the legal issues and express conflicts presented by Division I's decisions *Harvey* and *Wash. Fed. v. Gentry*, 179 Wn. App. 470 (2014), and Division II's decision *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn. App. 207 (2013).

II. INTEREST OF AMICUS CURIAE

Union Bank's interest lies in the right of banks and other lenders to bring actions for deficiency judgments against guarantors of commercial loans following a non-judicial foreclosure under the Deed of Trust Act. Union Bank also has an interest in seeing certainty and consistency returned to this important area of law impacting its commercial lending practices and its collection rights.

Union Bank, N.A. is a National Banking Association authorized to do business in Washington. Union Bank possesses rights under deeds of trust and guaranties that are identical or similar to the loan documents at issue in this case. Union Bank has an interest because this Court's determinations will control or influence the outcome of its **20 pending cases that involve 90 adverse parties and no less than \$100 million dollars in deficiencies.**²

² Union Bank is party to four appeals in Division I involving similar issues: *Union Bank v. Lyons, et al.*, (Cause No. 70327-7-1) (appealed May 7, 2013), *Union Bank v. F.R. McAbee* (Cause No. 70497-4-1) (appealed June 12, 2013), *Union Bank v. Deyo* (Cause No. 71168-7-1) (appealed November 25, 2013), and *Union Bank v. Pelzel, et al.*, (Cause

Union Bank also is keenly interested that this Court restore commercial reasonableness to the equation when deciding these issues. Commercial reasonableness has been a hallmark of this Court's jurisprudence since its decided cases such as *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692 (1998) ("Where two commercial entities sign a commercial agreement, we will give [it] a commercially reasonable construction."), and *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413 (1988) ("A literal reading of RCW 61.24.100 here as urged by debtors would ignore the intent of the statutory scheme and give an unjustified, unwarranted windfall to the debtor—a windfall completely without merit in logic or equity in principle."). This Court should accept review to apply these precedents.

The deeds of trust and commercial guaranties at issue in this case, which are identical to standard form documents used in the industry, represent important security instruments banks use when making

No. 70869-4) (appealed September 19, 2013).

Union Bank also is party to five appeals in Division II: *Union Bank v. Brinkman*, et al., (Cause No. 44839-4-II) (appealed April 30, 2013), *Union Bank v. Riley*, et al., (Cause No. 44970-6-II) (appealed June 6, 2013), *Union Bank v. Pacific Resource Development*, et al., (Cause No. 45010-1-II) (appealed June 17, 2013), *Union Bank v. L&P Development*, et al., (Cause No. 45014-3-II) (appealed June 17, 2013), and *Union Bank v. Edwards*, et al., (Cause No. 45966-3-II) (appealed March 6, 2014).

Currently, Union Bank has eleven superior court cases involving these issues.

commercial loans to Washington businesses. In *Harvey* and *Gentry*, Division I corrected the trial court's failure to enforce the commercial guaranties. In the panoply of similar litigation, results have been mixed; some but not all trial courts have enforced the guaranties. Failure to enforce, in Union Bank's view, results from incorrect construction of the deeds of trust and incorrect interpretation of the Deed of Trust Act stemming from a failure to apprehend existing precedents and pursue legislative intent.

III. STATEMENT OF THE CASE

Union Bank incorporates Washington Federal's "Counterstatement of the Case." *Answer* 3-8. In addition, many banks and lenders including Union Bank have rights under deeds of trust that are identical or similar to the deeds of trust at issue here, which are based on a so-called "Laser Pro" form document. In similar litigation, like in this case, the guarantors have asserted defenses based on the language of the deeds of trust and the Deed of Trust Act to the effect that non-judicial foreclosure of security granted by the *borrower* also prevents a lender from bringing an action against a *guarantor* for a deficiency judgment.

The Harveys—like all the commercial guarantors in the similar cases—never signed the deed of trust. CP 119, 126. They are not a party to it. The deed of trust is between the lender and the borrower. To escape

liability for the debt they voluntarily guaranteed with commercial motive, the Harveys premise their entire argument on terms in the deed of trust and seek a construction that—going against all commercial practice—favors their novel argument that their own guaranty obligations also are secured by that document. Finally, they misinterpret the Deed of Trust Act in an attempt to walk away from their voluntary, commercial obligations.

IV. ARGUMENT

This Court should accept review pursuant to RAP 13.4(b)(2) and RAP 13.4(b)(4). The Harveys have made the showing to satisfy both grounds for review. Washington Federal agrees that the criteria are satisfied. *Answer 1*. In this area of commercial law, certainty and predictability are essential. Commercially reasonable constructions of the controlling documents and consistent application of the Deed of Trust Act must be restored to stabilize access to lenders' statutory remedies and further commercial lending that is vital to Washington's economy. Without Supreme Court guidance, neither the lower courts nor the parties voluntarily can adequately resolve these cases given the express legal conflicts between published decisions of Divisions I and II.

A. **Where other parties have pending similar litigation—such as the 20 Union Bank cases—the express conflicts between Divisions I and II concerning a lender's right to enforce commercial guaranties require resolution for certainty, consistency and to conserve resources.**

This Court should accept review to resolve the two express conflicts between Divisions I and II over two critical legal issues present in many similar litigations. Union Bank has 20 pending cases at various stages that concern the same issues. This supports immediate review.

The express legal conflicts are undeniable.³ Even when conflicts are express and undeniable, the Court is not required to accept review. The Court might decline review, for example, because the record is inadequate in the case proposed for review or because the Court wishes to see further development of the analyses and reasoning by the lower courts. Such concerns should not prevail here. The record in *Harvey* (or *Gentry*) is perfectly suitable to resolve these legal issues. The Court already has divergent analyses to consider from the Court of Appeals. *Harvey* is suitable for immediate review of the presented issues to settle this area of law.

³ Division I reached opposite conclusions from Division II regarding construction of the deeds of trust and interpretation of the Deed of Trust Act. Interpretation of a contract ordinarily is a question of law. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, (2005); *Tanner Elec. Coop v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 574 (1996). Statutory interpretation similarly is a legal issue reviewed *de novo*. *Udall v. T.D. Escrow Servs. Inc.*, 159 Wn.2d 903, 908 (2007).

A main objective of the Deed of Trust Act is to keep the nonjudicial foreclosure process efficient and inexpensive. *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985). The present state of affairs makes a mockery of that goal. Parties are facing extreme uncertainty, uncutting any alternative or voluntary dispute resolution. Additionally, parties are experiencing inordinate depletion of their resources to resolve very ordinary commercial situations. Finally, the plethora of cases across the superior courts' and Court of Appeals' dockets demonstrates that the courts also are suffering the costs of the uncertainty and inconsistency. The time is ripe for guidance.

B. Timely resolution of all three legal issues presented is important to similarly situated parties and the public because of the inconsistent results, the number of pending cases concerning the same issues, the amounts at stake and the importance of the issues.

This Court should accept review of all three issues presented in the Harvey Petition. *See Petition*, 1-2. Timely resolution of these legal issues is essential. Currently, different results on these identical issues are being enforced throughout Washington courts. As this memorandum makes clear, Union Bank alone has 20 cases pending concerning these issues. Opposed to Union Bank in these cases are no less than 90 defendants. Union Bank's litigations alone concern legitimate debts of more than \$100 million. The uncertainty and lack of predictability in this area of law is

harmful to both lenders and their customers. The specter of forum shopping is present. Settlement is near impossible. This Court should restore certainty and predictability, and reach a resolution of the legal issues that appreciates the commercial realities of these transactions and applies past jurisprudence of which “commercial reasonableness” is a hallmark. See *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, *supra*, and *Donovick v. Seattle-First Nat’l Bank*, *supra*.

The Harvey Petition presents three issues. At this point in time, the Court should accept the third issue concerning waiver. See *Petition* 16-18; *Answer* 3. All the commercial guarantors expressly waived anti-deficiency protections that they now seek to assert. If Division II is correct on the other issues (which Union Bank believes the law will show it is not), the parties dispute whether these waivers by these sophisticated parties are enforceable to permit the deficiency actions. The Court should accept review of this issue so that it fully can decide the case on review.

C. **Immediate resolution will settle this area of law and eliminate the threat that incorrectly decided or conflicting precedents will lead to further uncertainty.**

The *First-Citizens* decision sparked more outlandish arguments by guarantors desperately seeking to avoid the liability they willingly undertook. In *Union Bank v. Vanderhoek Associates, LLC*, just appealed to Division II (Pierce Superior Court Cause No. 11-2-06955-4) but

decided before Division I's *Gentry* and *Harvey* decisions, the guarantor extended the reach of the *First-Citizens* holding to unsettle a related but distinct area of law concerning receiverships. In short, the guarantor argued, and the trial court accepted, that *First-Citizens* compelled dismissal of Union Bank's claim for a deficiency judgment against guarantors following sale of the collateral property by a general receiver pursuant to RCW 7.60.260(2), on the grounds that a receiver's sale is analogous to a non-judicial foreclosure.

The final judgment in *Vanderhoek* demonstrates that the poorly reasoned *First-Citizens* decision—which, this Court later should conclude, disregarded this Court's precedent to construe and interpret in the context of commercial reasonableness—is bleeding into additional areas. This creates even more confusion. These results are inimical to the established statutory schemes they flout. Immediate correction is necessary to restore stability, predictability and rationality to Washington's jurisprudence concerning statutorily established lender remedies.

The Court immediately should assert its authority in this area.

V. CONCLUSION

The Court should take action to accurately state the law for all concerned, and to prevent further offshoots of *First-Citizens* before this Court endorses or rejects *First-Citizens*. In Union Bank's view, *First-*

Citizens is demonstrably wrong and this Court must take the opportunity to examine the issues. Union Bank anticipates that this Court, upon application of precedent including *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, and *Donovick v. Seattle-First Nat'l Bank*, will endorse the reasoning and outcome of *Harvey* and the published *Gentry* case and put an end to the unjustified absolution of guarantors from their obligations.

The issues presented for review in this case (and in the companion published case *Gentry* before Department 1) are perfectly suited for—and require—immediate review by this Court. This Court should accept review not only on the strength of the Petition, unopposed by Washington Federal, but based on surrounding circumstances. The backlog of these cases in the lower courts, the inconsistent results, the uncertainty and the costs to the courts and the parties must be halted. The need for guidance from this Court is plain.

Respectfully submitted on this 19th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2014, I caused to be served *via email and U.S. mail* of the foregoing MEMORANDUM SUPPORTING REVIEW BY AMICUS CURIAE UNION BANK, N.A. on the following parties at the following addresses:

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Subject: FILING BY ATTACHMENT TO EMAIL: Washington Federal v. Harvey/Supreme No. 90078-7

Dear Clerk:

Attached please find the following documents to be filed with the Supreme Court:

- Motion to File Amicus Curiae Memorandum Supporting Review by Union Bank, N.A.
- Memorandum Supporting Review by Amicus Curiae Union Bank, N.A.

Thank you,

Mary

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