

No. 71114-8-I

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BLACK DIAMOND DEVELOPMENT COMPANY, LLC,  
a Washington limited liability corporation; LEE WITTENBERG,  
individually and on behalf of his marital community; WAYNE COURTNEY,  
individually and on behalf of his marital community,

*Appellants,*

vs.

UNION BANK, N.A.,

*Respondent.*

**FILED**  
COURT OF APPEALS  
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**CORRECTED BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Plaintiffs did not file their Notice of Appeal within 30 days after the triggering final judgment was entered in this lawsuit. The Notice of Appeal was untimely (except as to attorneys' fees) and must be dismissed in accordance with RAP 2.2(a)(1), 2.4(b) and 5.2 and this Court's recent on-point decision. All of plaintiffs' claims were dismissed on August 30, 2013 when the Superior Court entered summary judgment in Union Bank's favor. Although plaintiffs' motion for reconsideration extended the time to appeal, that motion was denied on October 1, 2013. The last day for plaintiffs to file a timely Notice of Appeal as to all issues except attorneys' fees was October 31, 2013. Plaintiffs did not file their Notice of Appeal until November 5, 2013.

This Court has made it clear that plaintiffs who do not file a notice of appeal within 30 days after having their claims dismissed on summary judgment are barred from appealing the summary judgment order, even if the issue of attorneys' fees has not been resolved. *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007). *Washington Practice* counsels: "The practical lesson is clear—counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending." 2A Karl v. Tegland, *Washington Practice: Rules Practice RAP 2.4* at 181 (6th ed. 2004).

The sole order plaintiffs timely appealed is the October 14, 2013 Order Granting Defendant Union Bank, N.A.'s Motion for Attorneys' Fees and Costs. This Court need not and should not look at the merits of the other orders (the grant of summary judgment and denial of reconsideration) because plaintiffs' Notice of Appeal is untimely. If the Court were to look at the merits of these orders, it would find that the Superior Court's rulings are correct.<sup>1</sup>

## II. STATEMENT OF THE CASE

### A. Black Diamond's Construction Loan

On November 28, 2005, Black Diamond Development Company, LLC ("Black Diamond") entered into a Construction Loan Agreement with Frontier Bank to build two buildings, Building B and Building C. (CP 591-98.) The parties executed 11 documents that form their agreement, which are listed in the Notice of Final Agreement: (1) Construction Loan Agreement, (2) Promissory Note, (3) Commercial Guaranty executed by Wittenberg, (4) Commercial Guaranty executed by Courtney, (5) Black Diamond's LLC Resolution, (6) Deed of Trust,

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<sup>1</sup> Perhaps plaintiffs erroneously thought that the Superior Court's October 31, 2013 entry of judgment form prescribed by RCW 4.64.030 was the trigger for the 30-day appeal deadline. Plaintiffs' mistaken belief does not excuse their failure to timely appeal, as this Court held in *Carrara*, 137 Wn. App. at 824 (the statutory judgment form was entered on October 21, 2005, and this Court held appeal was triggered by July 8, 2005 summary judgment order); see also *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) (holding that appeal-triggering final judgment exists upon determination of claims even though judgment form prescribed by RCW 4.64.030 has not been entered).

(7) Assignment of Rents, (8) Agreement to Provide Insurance, (9) Hazardous Substance Agreement, (10) Disbursement Request and Authorization, and (11) Notice of Final Agreement. (CP 616.) Only one of these, the Construction Loan Agreement, mentions permanent financing (i.e., post-construction loan financing).

The Construction Loan Agreement was set to mature on May 28, 2007. It clearly states that it is “FOR CONSTRUCTION PURPOSES ONLY,” not for permanent financing. (CP 591.) The Construction Loan Agreement mentions permanent financing only once, in a section in which the borrower agrees to comply with the following covenants and ratios:

1.) Construction of Phase II or Building C per the proposed site plan that was submitted to Frontier Bank to gain loan approval will not commence until the gross collected rental income is equal to or greater than \$160,000. This amount is calculated on an annualized basis using fully executed lease agreements.

2.) The **permanent financing** terms provided above [none are stated] *will not be available until* the aggregate collected rents of *both buildings, ‘B’ and ‘C’* are equal to or greater than \$381,000. This figure will be calculated using fully executed leases on an annualized basis.

(CP 593-94) (capitalization removed, emphasis added.) **There are no permanent financing terms provided in this agreement.** (CP 591-98.)

In addition to executing the 2005 Loan Agreement, *one* of the plaintiffs (Lee Wittenberg) signed a commitment letter, which sets forth *some* terms for possible future permanent financing. (CP 612-14.) This

letter is critical to plaintiffs' claims but simply does not help plaintiffs. Three features of the commitment letter are important. First, the place for Wayne Courtney's signature, as guarantor, remains blank. (CP 614.) In short, the commitment letter was not fully executed, a dispositive fact under governing federal law, as explained below. Second, the commitment letter is a classic "agreement to agree," stating emphatically that the parties would still need to later agree on terms for permanent financing: "When all conditions governing a roll over loan have been met, Frontier Bank shall have the exclusive right to place the permanent financing of the subject property for a maximum period of three months *at terms and conditions that are acceptable to Borrower and Lender.*" (CP 612) (emphasis added). Third, the letter gives Frontier Bank "the exclusive right"—but not an obligation—to provide permanent financing.

In 2007, Frontier Bank and Black Diamond executed two change-in-terms agreements. In May 2007, the parties extended the maturity date of the construction loan by 90 days. (CP 618.) In September 2007, the parties extended the maturity date of the construction loan by three years, to September 25, 2010. (CP 621.) Neither change-in-terms agreement mentions permanent financing.

**B. Frontier Bank Failed and Union Bank Acquired Some of its Assets**

On April 30, 2010, Frontier Bank failed and was taken over by the FDIC as receiver. (CP 586 at ¶ 8.) That same day, Union Bank became the successor-in-interest to the FDIC as receiver of Frontier Bank, and acquired the Black Diamond construction loan. (*Id.*)

The construction loan matured in September 2010. (CP 586-87 at ¶ 9.) Between September 2010 and September 2012, Union Bank worked with Black Diamond to try to arrange for payment of the construction loan. (*Id.*) Black Diamond contends that Union Bank was obligated to extend the maturity as if it were entitled to a permanent loan. (*Id.*) For numerous reasons, Union Bank had no obligation to extend a permanent loan to Black Diamond. Among those reasons is the fact that after completing Building B, Black Diamond never built Building C, which plainly was a condition of permanent financing as stated in the block-quote above from the Construction Loan Agreement. (*Id.*) Without Building C, the property did not meet the loan-to-value ratio requirements for Union Bank to extend permanent financing and Black Diamond's failure to follow its business development plan by not constructing Building C caused concern. (*Id.*) Union Bank therefore declined to enter into an agreement with Black Diamond for permanent financing.

**C. Plaintiffs Sued Union Bank to Try to Force Union Bank to Extend Permanent Financing**

On August 9, 2012, Black Diamond and its two principals, who are guarantors of the construction loan, filed the instant lawsuit against Union Bank. The Complaint asserts three claims: breach of contract, equitable estoppel, and injunctive relief to prevent Union Bank from foreclosing on its deed of trust. In October 2012, Black Diamond secured a loan from another bank, American West, and paid the full amount due at that time to Union Bank. (CP 587 at ¶ 11.) With the loan paid, Union Bank no longer had to foreclose on the deed of trust to recover the money plaintiffs owed to it, mooting the claim for injunctive relief.

For almost a year the parties amicably tried to resolve this dispute, including through production of files. On November 28, 2012, Union Bank received 32 requests for production from plaintiffs. (CP 296-303.) Union Bank sent out its first production of documents on January 9, 2013, and believed that it had fully answered plaintiffs' requests by the end of January 2013. (CP 297 at ¶ 4.) Union Bank's production included the complete loan file for the Black Diamond loan, in addition to the explanation for the default interest rates that were applied and support for the other costs and fees incurred. (*Id.*) Months went by without plaintiffs expressing any dissatisfaction with Union Bank's document production.

On April 24, 2013, plaintiffs requested Union Bank to exhaustively search its email archives on the offhand chance that an email relating to the Black Diamond loan had not already been produced.<sup>2</sup> (CP 298 at ¶ 6.) The total cost to do the search plaintiffs demanded would have been between \$45,600.00 and \$182,400.00, not including attorneys' fees for reviewing any emails for responsiveness and privilege. (CP 210 at ¶ 4 (cost to search Frontier emails), CP 293 at ¶ 6 (cost to search Union Bank emails).) This is a significant amount given that plaintiffs were seeking only about \$370,000 in this lawsuit. (CP 583 at ¶ 3.) Accordingly, on June 21, 2013, Union Bank filed a motion for protective order and plaintiffs filed a motion to compel. (CP 109-22; CP 187-201.) The Court granted plaintiffs' motion to compel, ordering the emails to be produced by September 1, 2013. (CP 575-78.)

Union Bank filed its Motion for Summary Judgment on June 19, 2013. (CP 625-42.) This motion asked the Court to dismiss the Complaint in its entirety because (1) there is no fully-executed written contract for permanent financing, which is the basis of plaintiffs' breach of contract claim; (2) equitable estoppel cannot be used offensively to force

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<sup>2</sup> Because Frontier and Union Bank's practice was to put hardcopies of pertinent emails in the loan file, and the loan file was produced to plaintiffs, plaintiffs likely have all emails relating to the Black Diamond loan. (CP 292 ¶ 3.)

Union Bank to extend permanent financing; and (3) the claim for injunctive relief was moot. (*Id.*)

In response, plaintiffs filed a Motion for Stay, asking the Court to delay hearing Union Bank's Motion for Summary Judgment until after plaintiffs received additional discovery. (CP 647-58.) Union Bank opposed the Motion for Stay, arguing that the requested emails could not raise a genuine issue of material fact necessary to resolve the Summary Judgment Motion. (CP 679-91.) The Court reexamined the discovery issue in light of the then-pending summary judgment motion and decided to extend the deadline for Union Bank to search its archives for additional emails, so that the expensive and burdensome search would only have to take place if the Summary Judgment Motion were denied. (CP 700-01.)

On August 30, 2013, the Court granted Union Bank's Motion for Summary Judgment, dismissing plaintiffs' claims with prejudice. (CP 801-02.) The Court held that even if the commitment letter "is somehow folded in" with the documents that comprise the 2005 Loan Agreement, the agreement "is missing some material provisions that defeat it as a contract...what is left to negotiate is really a vast majority of the contract and not simply small terms." (RP 33:10-19.)

On September 9, 2013, plaintiffs filed a Motion for Clarification and Reconsideration. (CP 805-16.) The "clarification" portion of the

motion was an improper attempt to add claims after all of plaintiffs' claims had been dismissed with prejudice. The Court denied plaintiffs' "clarification" and reconsideration motion on October 1, 2013. (CP 1214-17.) The Court then granted Union Bank's attorneys' fees motion on October 14, 2014. (CP 1223-25.) Plaintiffs did not file their Notice of Appeal until November 5, 2013, more than 30 days after denial of the reconsideration motion. (CP 1251-57.)

### **III. ARGUMENT**

#### **A. Plaintiffs' Appeal is Untimely**

Black Diamond's Notice of Appeal was filed more than 30 days after final judgment was entered in this lawsuit. It is untimely. The Court entered its Order Granting Defendant's Motion for Summary Judgment on August 30, 2013. (CP 810-02.) This order dismisses all of plaintiffs' claims with prejudice. (*Id.*) Plaintiffs filed a Motion for Clarification and Reconsideration of the Court's Order Granting Union Bank's Motion for Summary Judgment (CP 805-16), which extended the appeal deadline. The Court denied plaintiffs' clarification and reconsideration motion on October 1, 2013. (CP 1214-17.)

After the Court granted Union Bank's summary judgment motion and denied plaintiffs' motion for reconsideration, the only issue remaining in the lawsuit was the issue of attorneys' fees. Thus, the October 1, 2013

Order Denying Plaintiffs' Motion for Clarification and Reconsideration of the Court's Order Granting Union Bank's Motion for Summary Judgment was a final, dispositive judgment that triggered the appeal period. *See* RAP 2.2(a)(1) (appeal is from a final judgment, "regardless of whether the judgment reserves for future determination an award of attorney fees or costs."); CR 54(a)(1) ("A judgment is the final determination of the rights of the parties in the action..."); *Bank of America*, 173 Wn.2d at 51 ("Whether an order constitutes a judgment is determined by whether it finally disposes of a case and was intended to do so."). Only the attorneys' fees dispute remained in this lawsuit after the October 1, 2013 order denying reconsideration—and every germane rule and decided case is clear that the pendency of a fees dispute does not extend the time for appeal of the merits determination.

Under RAP 5.2(e), plaintiffs had 30 days to appeal following the October 1, 2013 Order Denying Plaintiffs' Motion for Clarification and Reconsideration of the Court's Order Granting Union Bank's Motion for Summary Judgment. *See* RAP 5.2(a) (requiring notice of appeal to be filed within the longer of "(1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)"); RAP 5.2(e) (if a timely motion for reconsideration is filed, the notice of appeal must be filed within 30 days

of the order denying the motion for reconsideration). Plaintiffs did not file their notice of appeal until November 5—after the October 31 deadline.

Plaintiffs styled their Notice of Appeal as being from the “Judgment in Favor of Defendant Union Bank, N.A. signed October 31, 2013 (attached hereto as Exhibit A) and all adverse orders and rulings embraced therein, including but not limited to the Trial Court’s Order Granting Defendant’s Motion for Summary Judgment (Dkt. No. 61) and Order Denying Plaintiffs’ Motion for Clarification and Reconsideration (Dkt. No. 86).” (CP 1251-57.) But the judgment form attached to the Notice of Appeal as Exhibit A does **not** restart the time to appeal the merits, both because our Supreme Court held in *Bank of America* that this statutory form simply acts as a summary that must be entered under RCW 4.64.030 in order for the prevailing party to be able to *execute* on the judgment (173 Wn.2d at 54), and because the determination of all substantive (non-fees) rights was final as of the October 1, 2013 rejection of plaintiffs’ reconsideration motion. *See* RAP 2.2(a)(1), RAP 2.4(b); *see also* CR 54(a)(1) (“A judgment is the final determination of the rights of the parties in the action[.]”). The RCW 4.64.030 form is not *itself* a final judgment from which an appeal runs.

This Court’s holding in *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007), is on-point and

dispositive. In *Carrara*, all of plaintiff's claims were dismissed on summary judgment, leaving open only the issue of attorneys' fees. Although the plaintiff filed a notice of appeal within 30 days of the order granting attorneys' fees (which was at the time of entry of a RCW 4.64.030 form), this Court held that because the notice of appeal was filed more than 30 days after the summary judgment order was entered, the plaintiff was barred from appealing the underlying summary judgment order. *Id.* at 826. *Carrara* is well supported by RAP 2.4(b):

RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision, but makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e. it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision.

*Id.* at 825 (emphasis by Court). *Washington Practice*, quoted in *Carrara*, counsels: "The practical lesson is clear—counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending." 2A Karl Tegland, *Washington Practice: Rules Practice RAP 2.4* at 181 (6th ed. 2004); *see also Bushong v. Wilsbach*, 151 Wn. App. 373, 376, 213 P.3d 42 (2009) ("An appeal from an award of attorney fees does not bring up for review the merits of the underlying summary judgment decision.").

Plaintiffs waited too long to file their Notice of Appeal. As in *Carrara*, this Court should decline to review the Order Granting

Defendant's Motion for Summary Judgment and the Order Denying Plaintiffs' Motion for Clarification and Reconsideration of the Court's Order Granting Union Bank's Motion for Summary Judgment. The Court should limit its review to the issue of whether attorneys' fees were properly awarded, the sole issue preserved for appeal by plaintiffs' November 5, 2013 Notice of Appeal.

**B. The Court's Fees Award is Proper**

Plaintiffs do not challenge the reasonableness of the attorneys' fees award; they challenge only the Court's decision to hold plaintiffs/guarantors Wittenberg and Courtney individually liable for attorneys' fees. The Court's decision on liability for attorneys' fees was mandated by the guaranties that Wittenberg and Courtney signed.

**1. Union Bank is the Prevailing Party and Entitled to Fees**

Union Bank prevailed on every claim pled in the Complaint. As the prevailing party, Union Bank is entitled to its fees and costs under the fees clause in the Construction Loan Agreement and the terms of guaranties. (CP 596, 282, 286.) Those contracts mandate a fees award.

The attorneys' fees award was not premature. The attorneys' fees award was entered at the proper time: after the Court rejected plaintiffs' untimely attempt to add a claim and denied their motion for

reconsideration (i.e., after all issues of liability had been determined).<sup>3</sup>

## **2. The Guarantors Are Liable for Attorneys' Fees**

Wittenberg and Courtney (collectively, the “Guarantors”), principals of Black Diamond, agreed to personally guarantee the loan made to Black Diamond. (CP 282, 286.) Pursuant to these guaranties, Wittenberg and Courtney each agreed to “absolutely and unconditionally guarant[y] full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower’s obligations under the Note and the Related Documents.” (*Id.*) The guaranties define “Indebtedness” to include “attorneys’ fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe to Lender.” (*Id.*) The guaranties further make it clear that Lender can seek payment directly from the Guarantors without having to first exhaust its remedies against the borrower:

Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender’s remedies against anyone else obligated to pay the Indebtedness or against

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<sup>3</sup> Moreover, because plaintiffs did not timely appeal the order denying plaintiffs’ motion for clarification and reconsideration, plaintiffs cannot argue now that the attorneys’ fees award was premature on the ground that the Order Denying Plaintiffs’ Motion for Clarification and Reconsideration was wrongly decided. *See Bushong*, 151 Wn. App. at 377 (holding that because plaintiff did not timely appeal from the underlying summary judgment decision, only reasonableness of the amount of fees could be reviewed on appeal, not the underlying decision to award fees).

any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. (*Id.*)

On October 31, 2012, the Guarantors secured permanent financing from another bank, American West, and paid Union Bank the entire amount owed on the loan to that point. (CP 865 at ¶ 3.) Having secured from another bank the permanent financing they had been seeking, plaintiffs could have ended their lawsuit against Union Bank. Instead, plaintiffs continued to pursue claims, arguing that they were entitled to permanent financing from Union Bank.

From October 31, 2012 until the present, Union Bank has been incurring attorneys' fees and costs defending itself in this lawsuit. The cases plaintiffs cite stand for the unremarkable proposition that the obligations of a guarantor are extinguished when the entire underlying obligation of the borrower is satisfied. Here, the Construction Loan Agreement requires the Borrower "to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement." (CP 596.) **That obligation has not yet been satisfied, and thus neither have Wittenberg's and Courtney's obligations as guarantors.** Plaintiffs' attempt to avoid paying Union Bank's attorneys' fees by leaving insufficient funds in Black Diamond and attempting to

escape from personal liability as guarantors should not be rewarded. Plaintiffs have forced Union Bank to endure more than a year of litigation based on their erroneous assertion that they were entitled to permanent financing. Plaintiffs are now obligated under the terms of the contracts they signed to pay Union Bank's attorneys' fees. The Court's attorneys' fees order properly holds the Guarantors liable for their obligation to pay Union Bank's attorneys' fees.

**C. The Remainder of Plaintiffs' Appeal Lacks Merit, Even if it Were Not Untimely**

Because plaintiffs did not timely appeal from the underlying summary judgment order in Union Bank's favor or from the order denying plaintiffs' clarification/reconsideration motion, this Court need not and should not review the remaining issues raised in plaintiffs' appeal. If the Court were to look at the merits of plaintiffs' remaining arguments, it would find that the Superior Court's decisions are well-founded.

**1. The Court Properly Dismissed the Breach of Contract Claim**

Union Bank (and Frontier Bank) never agreed to extend permanent financing to Black Diamond. The rules that apply here are unique to a failed-bank-rescuer circumstance. To mitigate national economic impact from a bank failure, Congress enacted 12 U.S.C. § 1823(e). It protects rescuer-banks that assume the obligations of a failed bank. The protection

is in the form of exacting requirements for a purported obligation of the failed bank to be binding on the rescuer bank. Under § 1823(e), Union Bank was required to provide permanent financing only if plaintiffs had *fully* and *contemporaneously* executed a written agreement for permanent financing, which was approved by Frontier Bank's board of directors or credit committee and maintained as an official bank record. No such agreement exists. Plaintiffs try to cobble together an "agreement" by pointing to the commitment letter which is not fully executed, for Guarantor Courtney's signature is missing (CP 614), and by dragging in extraneous documents from 2007—two years after the purported 2005 agreement. Two years later is plainly not contemporaneous. Further, plaintiffs cannot turn an agreement that does not expressly extend permanent financing into an agreement for permanent financing because Washington law does not allow plaintiffs to point to anything outside of the loan agreement to add to, modify, or interpret the terms of a loan agreement. *See* RCW 19.36.110. As a matter of law, the parties simply did not agree upon all material terms and state such terms in a contract that satisfies 12 U.S.C. § 1823(e). The Superior Court properly dismissed plaintiffs' breach of contract claim after finding that several material terms were missing, as a matter of law.

**a. The Documents in the Loan File Must Establish a Meeting of the Minds to be Binding on Union Bank**

*i. The Exacting Standards of 12 U.S.C. § 1823(e) Govern*

Under the *D'Oench* doctrine, which was later codified and expanded upon by Congress in 12 U.S.C. § 1823(e), in order for a purported agreement between a failed bank and borrower to be valid and enforceable against the FDIC, or a successor-in-interest of the FDIC (such as Union Bank), the agreement must meet the following exacting criteria: (1) the agreement must be in writing; (2) fully and contemporaneously executed by the parties; (3) officially approved by the financial institution (i.e., by its board or its credit committee); (4) which approval must be reflected in the official records of the institution (e.g., the board's or committee's minutes); and (5) maintained from the date of execution as an official record of the institution. 12 U.S.C. § 1823(e); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942); *Bell & Murphy and Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754–55 (5th Cir. 1990) (holding that claims barred as to the FDIC by the *D'Oench* doctrine likewise are barred as to its successors-in-interest).

If an agreement does not meet **all** of the congressionally-mandated criteria, it cannot be enforced against the FDIC or its successor-in-interest (such as Union Bank). *See, e.g., Bell & Murphy*, 894 F.2d at 753 (even when an agreement to extend future loans is put in *writing*, it is not

enforceable against the FDIC or its successor-in-interest unless **all** of the other criteria are also met).

All five criteria are important to ensure that FDIC examiners and the rescuer bank can “accurately assess the condition of a bank based on its books” without having to “retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes.” *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990). The requirements that the agreement be fully and contemporaneously executed by the parties and officially approved by the financial institution “ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure.” *Langley v. FDIC*, 484 U.S. 86, 92 (1987).

The *D'Oench* doctrine and 12 U.S.C. § 1823(e) embody an important policy decision made by the Supreme Court and Congress that because the borrower is in the best position to protect against being “wronged” by a failed bank, it is the borrower that must bear the cost, not the FDIC or its successor-in-interest:

*D'Oench* determines, as between two “innocents” (the FDIC and the “wronged” bank customer) who should bear the cost of the failed bank’s wrongs. If the customer bears the slightest blame—by failing to protect himself by getting an agreement in writing, then the scale tips in favor of the FDIC and *D'Oench* bars the claim or defense.

*Brookside Assocs. v. Rifkin*, 49 F.3d 490, 497 (9th Cir. 1995); *see also Bowen*, 915 F.2d at 1017 (“Unrecorded agreements...are a threat to the ecology of the banking system that we can ill-afford. To check the growth of these hardy perennials, *D’Oench* forces borrowers to bear the risk that their unorthodox plants will bear no fruit. Those who till these soils may not shift the cost of their peculiar agronomy to the FDIC[.]”).

Plaintiffs argue that the statute does not bar their claims based on an alleged obligation to extend permanent financing because permanent financing is *mentioned* in the 2005 Loan Agreement and in the commitment letter. The case plaintiffs cite—*In re Beitzell & Co., Inc.*, 163 B.R. 637 (1993)—does not hold that a document containing only one term of a purported agreement is enough to satisfy § 1823(e). Rather, the borrower’s claims must be “premised on ***an obligation*** that is found in the loan documents[.]” *Beitzell*, 163 B.R. at 649 (emphasis added). Mere mention of permanent financing—without agreement in writing as to all of the material terms for permanent financing—does not create ***an obligation***. *Beitzell* does not erase the rigorous requirements of § 1823(e). Any incomplete agreements, any non-contemporaneous terms/statements, any documents not fully executed, and any oral promises or promises made in letters or emails are not enforceable against Union Bank.

*ii. RCW 19.36.110 Bars Looking Outside the Agreement to Add Terms*

In addition to the requirements of 12 U.S.C. § 1823(e), Washington law requires credit agreements to be in writing and does not allow the terms of the written agreement to be modified or “interpreted” by oral or written statements not contained within the agreement:

A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. **The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement**, and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement.

RCW 19.36.110 (emphasis added). Thus, the 2005 Loan Agreement and the two 2007 change-in-terms agreements must be interpreted solely on the basis of the plain language within those agreements.

Nothing in RCW 19.36.110 permits emails, other written agreements, etc. to be used to add (or even interpret) the rights and obligations of the parties to a credit agreement. Even putting aside the rigorous restrictions imposed by RCW 19.36.110, principles of contract interpretation preclude a court from adding missing terms, because extrinsic evidence is relevant only to “ascertain the meaning of what is written in the contract and not what the parties intended to be written.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

**b. The Loan Agreement is Missing Material Terms as a Matter of Law**

*i. Whether Material Terms are Missing is an Issue of Law*

In granting Union Bank's summary judgment motion, the Superior Court correctly held that even if the commitment letter is folded into the 2005 Loan Agreement, material terms are missing and thus the parties had not formed a contract requiring Union Bank to extend permanent financing. To be an enforceable contract for permanent financing, the commitment letter would have had to specify **all** of the material and essential terms, "and leave none to be agreed upon as the result of future negotiations." *Hubbell v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952). Even "preliminary agreements must be definite enough on material terms to allow enforcement without the court supplying those terms." *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985). Here, several material terms are missing as a matter of law.

Plaintiffs argue that there is a factual dispute as to whether the parties had a meeting of the minds on all material terms. But several material terms are missing completely. Per se there is no meeting of the minds if material facts are missing. See *Sea-Van Inv. Assocs. v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994) (holding as a matter of law that certain material terms were missing and so the contract was not enforceable).

**ii. Amount, Default Terms, Prepayment Terms, and Cure Rights are Material**

Among the missing terms here are an amount, default terms, prepayment terms, and cure rights. All such terms are material, as a matter of law, in a purported contract for permanent financing to be secured by real property. In *Hubbell*, for example, our Supreme Court lists 13 material terms required for an earnest money agreement to be enforceable, **including default terms**. 40 Wn.2d at 782–83 (“[I]n what manner, if any, may the seller declare a forfeiture of the proposed real estate contract in the event of default by the purchaser in his performance thereof?”).<sup>4</sup> Similarly, in *Setterlund*, our Supreme Court held that a **default interest rate** is a material term, and its absence from an earnest money agreement rendered the agreement unenforceable because of the missing material term. 104 Wn.2d at 27. These precedents doom plaintiffs’ appeal on the merits: the absence of an amount, default terms, prepayment terms, and cure rights renders the at-issue “agreement” unenforceable due to missing material terms.

Lacking case authorities with holdings that support their truncated set of material terms, plaintiffs stretch *Farm Crop Energy Inc. v. Old Nat. Bank of Wash.*, 109 Wn.2d 923, 750 P.2d 231 (1988), far beyond its actual

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<sup>4</sup> *Hubbell* is not based on the statute of frauds. Rather, the Court decided that these 13 terms are material as a matter of law by considering whether the rights of the parties were sufficiently clear without these terms to allow the Court to enforce the agreement.

holdings. Plaintiffs seem to be arguing that the terms in the *Farm Crop* commitment letter are the only terms that are material. But *Farm Crop* doesn't come close to addressing which terms are material. In *Farm Crop*, the jury was instructed that it could find that the commitment letter did not create a binding obligation if the letter contained preconditions that were not satisfied. *Id.* at 938 n. 1. *Farm Crop* holds that the trial court erred by not instructing the jury that the borrower's promissory estoppel theory should also fail if the preconditions in the commitment letter were not satisfied. *Id.* at 934. *Farm Crop* has no bearing on this appeal.

Plaintiffs' reliance on the RESTATEMENT (SECOND) OF CONTRACTS § 33 is similarly misplaced. This section of the Restatement does not address which terms are material. It does, however, support Union Bank's position that amount, default terms, collateral, prepayment terms, and cure rights should all be considered material because all of these terms are necessary to determine the existence of a breach. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."). In any event, the Restatement does not supersede *Hubbell's* listing of germane material terms.

Plaintiffs also cite two out-of-state cases in an attempt to truncate the list of material terms, yet even these cases list amount and repayment

terms (which would include prepayment terms) as being material. *See T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (listing the following material terms: “the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms”); *Union State Bank v. Woell*, 434 N.W.2d 712, 717 (N.D. 1989) (listing the following material terms: “the amount and duration of the loans, interest rates, and, where appropriate, the methods of repayment and collateral for the loans, if any”). Moreover, these out of state cases are not persuasive in light of conflicting Washington authority.<sup>5</sup>

***iii. There Is No Written, Fully-Executed, Bank-Approved Agreement Extending Permanent Financing***

The only agreements that arguably meet all of the 12 U.S.C. § 1823(e) criteria are the 2005 Loan Agreement and the 2007 change-in-terms agreements. None of these extends permanent financing to Black Diamond.

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<sup>5</sup> In their motion for reconsideration, plaintiffs relied upon two other out-of-state cases to support their theory that there are supposedly only five material terms: amount of loan, duration, interest rate, repayment schedule, and specification of collateral. But far from supporting plaintiffs’ position, the two cases expressly contradicted plaintiffs’ argument. In *Teachers Ins. and Annuity Ass’n of Am. v. Ormesa*, 791 F. Supp. 401, 414 (S.D.N.Y. 1991), the Court’s non-exhaustive list of what it considered to be “material” explicitly included prepayment terms: “**the period during which the loan would not be callable, and prepayment penalties applicable thereafter.**” *Id.* (emphasis added). In *Fifth Third Bank v. McClure Props., Inc.*, 724 F. Supp. 2d 598, 603–06 (S.D. West. Va. 2010), the Court held that the commitment letter was a legally enforceable contract, but found that **because the permanent financing section of the commitment letter did not clearly establish the “structure of permanent financing”** (it only projected how the permanent loan would be allocated, once established), **the commitment letter did not obligate the bank to extend permanent financing.** Far from supporting plaintiffs’ reconsideration motion, *Fifth Third Bank* eviscerates plaintiffs’ argument.

The only document in the 2005 Loan Agreement that mentions permanent financing is the Construction Loan Agreement. It is impossible to read the Construction Loan Agreement in its entirety and conclude that it is an agreement for permanent financing. The Construction Loan Agreement clearly states that it is “FOR CONSTRUCTION PURPOSES ONLY.” (CP 591.) It is a standard construction loan that provides financing for a fixed period of 18 months for the purpose of building two buildings. (*Id.*) The Construction Loan Agreement mentions permanent financing only once, in a section in which the *borrower* agrees to comply with the following covenants and ratios:

The **permanent financing** terms provided above [which are not actually provided] **will not be available until** the aggregate collected rents of *both* buildings, ‘B’ and ‘C’ are equal to or greater than \$381,000. This figure will be calculated using fully executed leases on an annualized basis.

(CP 593-94.) This clause is contained in the borrower’s covenants and ratios section, indicating that the *borrower* promised to build Building C and understood that Frontier Bank would not even consider entering into an agreement for permanent financing until Building C had been built and the aggregate collected annual rents of Buildings B and C were at least \$381,000. Although the clause in the block quote above references “permanent financing terms provided above,” there are no permanent financing terms provided anywhere in the Construction Loan Agreement.

In short, there is no genuine dispute that plaintiffs must scrounge *outside* the 12 U.S.C. § 1823(e)-compliant agreement in order to reach for a putative agreement to provide permanent financing. And that dooms plaintiffs' appeal on the merits.

***iv. The 2007 Change-in-Terms Agreement Does Not Contain an Obligation Requiring Union Bank to Extend Financing Past September 2010***

Nothing in the September 2007 Change-in-Terms Agreement says that it can be imported into the 2005 Agreement to supply the missing terms. Further, such “importing” from a 2007 Agreement to try to shore-up a 2005 Agreement, and turn the earlier agreement into something it wasn't, plainly runs afoul of 12 U.S.C. § 1823(e)'s requirement that the agreement be “contemporaneous.”

Even if its terms are imported to the 2005 Agreement, it would only create an obligation for “permanent” financing that matures on September 25, 2010. The 2007 Agreement makes it clear that financing would not extend after September 25, 2010: “Borrower's final payment will be due on September 25, 2010, and will be for all principal and all accrued interest not yet paid.” (CP 621.) The 2007 Agreement states clearly that it: “REPRESENTS A CHANGE IN THE MATURITY DATE.” (*Id.*) When plaintiffs signed the September 2007 Agreement, they agreed that their financing would extend only until September 25,

2010, at which point they were required to pay their loan in full. Plaintiffs are bound by that agreement. Because Union Bank continued to provide financing through September 25, 2010, plaintiffs received everything to which the parties agreed. Plaintiffs have no basis to contend they were owed *another* extension of their financing.

***v. The Commitment Letter Does Not Provide Permanent Financing***

The only document that contains at least partial “permanent financing terms” is the commitment letter, which was signed by only one of the two Guarantors. (CP 612-14.) Because the commitment letter was signed by only one Guarantor (the other Guarantor’s signature block is left blank), the commitment letter is not a fully-executed agreement. As a matter of law, the commitment letter cannot be folded into the 2005 Loan Agreement under 12 U.S.C. § 1823(e), for the commitment letter indisputably fails § 1823(e)’s test for “fully executed.”

Even if the commitment letter “is somehow folded in” with the documents that comprise the 2005 Loan Agreement, the Superior Court held that the agreement is still insufficient to create an obligation because it “is missing some material provisions that defeat it as a contract...what is left to negotiate is really a vast majority of the contract and not simply small terms.” (RP 33:10–19.) In fact, in addition to the dispositive failure

to satisfy § 1823(e)'s "fully executed" criterion, there are at least three legal bars to plaintiffs' reliance on the commitment letter to establish a duty of Union Bank to extend permanent financing:

**First**, the commitment letter gives Union Bank the *option* to extend permanent financing; it does not create an obligation: "***When all conditions governing a roll over loan have been met***, Frontier Bank shall have the *exclusive right* to place the permanent financing of the subject property for a maximum period of three months ***at terms and conditions that are acceptable to Borrower and Lender.***" (CP 612.) (emphasis added). Plaintiffs do not explain how this sentence can be read to mean that the Lender is required to provide permanent financing. No reasonable interpretation of "exclusive right" can transfer that right into an obligation.

**Second**, the clause stating that Lender shall have the exclusive right to place permanent financing "at terms and conditions that are acceptable to Borrower and Lender" plainly evidences an intent not to be bound, as a matter of law. *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 179, 94 P.3d 945 (2004) (holding that by "expressly referencing the need for further negotiations," a clause "evidences an intent not to be bound") (citing *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) ("reference to a binding sales agreement to be completed at some future date" is evidence of a present

intent *not* to be bound)). Like the absence of a necessary signature, the facially-evident “agreement to agree” feature of the commitment letter is a complete legal bar to plaintiffs’ argument that Union Bank was required to extend permanent financing. Indeed, the language in the commitment letter connoting the need for the parties to reach a *future* agreement on permanent financing, is textbook “agreement to agree” and falls squarely within *Keystone*.

**Third**, the commitment letter itself lacks most of the terms for permanent financing—amount of the loan,<sup>6</sup> cure rights, pre-payment terms, default terms, specification of collateral—and so does not cure the 2005 Agreement’s deficiencies. In lieu of the requisite specification of actual terms and conditions is this flabby clause: after certain criteria are satisfied (one of which is the construction of Building C, which never happened) the parties have a three-month window to try to negotiate “terms and conditions that are acceptable to Borrower and Lender.” (CP 612.) The absence of so many terms further reinforces the legal reality that the commitment letter is, at most, an unenforceable “agreement to agree.” *See Keystone*, 152 Wn.2d at 175 (“An agreement to agree is ‘an agreement to do something which requires a further meeting of the minds

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<sup>6</sup> The loan amount listed in the commitment letter is the amount that was given for the construction loan. Nothing in the commitment letter indicates that this amount would also be the amount for the permanent loan.

of the parties and without which it would not be complete.”).  
“Agreements to agree are unenforceable in Washington.” *Id.* at 176.<sup>7</sup>

*vi. Plaintiffs’ Chart of Missing “Material Terms” is  
Unsupported by the Documents*

Plaintiffs’ argument that each of the material terms is present—so long as the Court cobbles them together from various sources—ignores the fact that there is *no evidence* that the parties intended terms from the short term loans to be incorporated into a loan for permanent financing. And, of course, plaintiffs’ chart also ignores the rigorous requirements of 12 U.S.C. § 1823(e) and RCW 19.36.110.

**Amount:** Plaintiffs claim that the amount is evidenced in the promissory note and the commitment letter. The promissory note explicitly states that it matures on May 28, 2007 (CP 50), and there is nothing showing *agreement* that the terms of the 2005 promissory note would later govern a loan for permanent financing. The loan amount listed in the commitment letter is the amount that was available for the construction loan. Nothing in the commitment letter indicates that this amount would **also** be the amount for a permanent loan.

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<sup>7</sup> Plaintiffs misstate that the commitment letter allows Union Bank to “renegotiate” terms for permanent financing. That implies that all material terms had already been negotiated. There is no evidence in the loan file that these terms had ever been negotiated—they are missing from all of the signed contracts—and, thus, under 12 U.S.C. § 1823(e) and RCW 19.36.110, such terms cannot be added to the loan agreements to create a binding obligation.

Plaintiffs cannot rely on the *internal* bank Loan Memorandum to support their contention that the amount of a permanent loan would be the same as the amount of the construction loan. (CP 602-10.) The Loan Memorandum is an internal bank document that was never executed or even seen by any of the plaintiffs. Such an internal document is precisely what Congress, in 12 U.S.C. § 1823(e), forbade being used to create or evidence an obligation. In any event, at most the internal memo shows that Frontier Bank contemplated that the construction loan would be paid off by a permanent loan. But the Loan Memorandum explicitly states that that permanent loan would either be with Frontier Bank or it would be a “refinance loan with another lender.” (*Id.*) There is nothing that indicates the parties had agreed that the amount of the permanent loan would be the same as the construction loan (*i.e.*, no signed writing that satisfies all of the requirements of 12 U.S.C. § 1823(e)). Under RCW 19.36.110, and Washington’s common law of contract interpretation, the terms of this internal memorandum cannot be used to determine (or even interpret) the rights and obligations of the parties. Without any of the documents indicating that the parties **agreed** that the amount of the construction loan would be the same amount for a permanent loan, the Court cannot make that assumption to fill in this important term. It would make just as much sense for the amount of the permanent loan to include the interest that was

due at the time on the construction loan, or it could have included additional closing costs.

**Collateral:** Plaintiffs contend that the collateral for a permanent loan is specified in the commitment letter. The commitment letter states that security would be “First Deed of Trust on ~51k sf of mixed-use improvements located at 30711 3rd Avenue in Black Diamond” and that “Proposed improvements will include two concrete tilt-up structures measuring approximately 25,200 square feet.” (CP 612.) First, there is nothing to indicate that the parties agreed that this collateral—which was the collateral for the construction loan—would be the same collateral for a permanent loan. Second, the second building—Building C—was never built! Thus, the collateral could not have included two concrete tilt-up structures because only one such structure was ever built.

**Default Terms, Cure Rights, and Prepayment Terms:** Plaintiffs argue that default terms, cure rights, and prepayment terms are specified in the 2005 promissory note. But there is nothing showing *agreement* that the terms of the 2005 promissory note would later govern a loan for permanent financing.

Plaintiffs also argue that the default terms, cure rights, and prepayment terms that were agreed upon in the 2007 change-in-terms agreement should be incorporated into an agreement for permanent

financing. Plaintiffs' argument fails for two reasons. **First**, the 2007 change-in-terms agreement was a short term agreement, extending financing for only three years. It is preposterous to indulge in the unsupported assumption that the commercial terms for a short-term construction loan agreement would be identical to the terms of permanent, *i.e.*, 10-year, financing to be provided several years hence. Nor is there a signed document indicating that the parties **agreed** that terms governing a three-year loan would be the same terms for a 10-year loan. **Second**, plaintiffs have been arguing that the 2005 Loan Agreement (plus the additional terms in the partially-signed commitment letter) create an agreement in 2005 for permanent financing. The terms of the 2007 agreement were obviously not agreed upon until 2007. Under 12 U.S.C. § 1823(e), these 2007 terms cannot be imported into the 2005 agreement because they were not contemporaneously executed. And under RCW 19.36.110, the 2007 terms cannot be used to determine the rights and obligations of the parties.

Without permanent financing default terms, permanent financing prepayment terms, and permanent financing cure rights agreed upon by the parties, the respective rights and obligations are too uncertain for there to be a binding contract for permanent financing. What constitutes a default? What is the interest rate if there is a default? What procedures

must the bank follow after a default? Does the borrower have the right to cure after default? If so, when? Who else has the right to cure? What are the fees for late payments? When is a payment considered late? Are there fees for pre-payment? What are those fees? “[N]egotiation, not litigation, is the proper method for agreeing upon these vital terms.” *Sea-Van*, 125 Wn.2d at 129.

***vii. Plaintiffs Have Not Met the Conditions for Permanent Financing***

Even if the 2005 Agreement had included the many missing terms for permanent financing, Union Bank would not have an obligation to extend permanent financing because it is undisputed that plaintiffs failed to construct Building C—a condition for negotiating permanent financing.

The 2005 Agreement sets out a two-tiered set of conditions before the bank would agree to address permanent financing.<sup>8</sup> First, under item No. 1, it is plain that plaintiffs were not to **start** construction of Building C until Building B was generating \$160,000 annualized rent. Second, plaintiffs were then required to construct Building C, as is plain from the entirety of the 2005 Agreement. The 2005 Agreement plainly states that it

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<sup>8</sup> “1.) Construction of Phase II or Building C per the proposed site plan that was submitted to Frontier Bank to gain loan approval will not commence until the gross collected rental income is equal to or greater than \$160,000...  
2.) The permanent financing terms provided above will not be available until the aggregate collected rents of both buildings, ‘B’ and ‘C’ are equal to or greater than \$381,000...”  
(CP 593-94.)

is for the construction of **two** buildings: “The Project includes the following work: CONSTRUCTION OF (2) 25,000 SF CONCRETE TILT-UPS.” (CP 591.)<sup>9</sup> Further, plaintiffs’ obligation to complete Building C prior to discussions of permanent financing is heavily underlined by No. 2 of the provision quoted at n. 8. Specifically, after construction of Building C can be commenced pursuant to No. 1, the “aggregate collected rents of **both** buildings” must achieve a certain minimum before any permanent financing could be considered. There is no such thing as “aggregate” collected rent from one building. The parties agreed that Black Diamond had to build two buildings before negotiations for permanent financing would start. **It is undisputed that Building C was never built.** Plaintiffs did not satisfy this condition for discussion of permanent financing, and thus there could not be an obligation to extend permanent financing.

*viii. Additional Discovery Sought From Email Archives  
Could Not Create a Genuine Issue of Material Fact*

The Superior Court’s decision not to permit additional discovery before ruling on the summary judgment motion is reviewed under an

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<sup>9</sup> The file materials submitted by plaintiffs in no way undermine this plain fact. To the contrary, CP 768-75 repeatedly states the obligation to construct Building C, at CP 768 (in the box under “Specific Purpose This Loan”), CP 769 (in both “Action Requested” and “Purpose” sections), CP 770 (“permanent financing will be obtained when the aggregate net operating income being generated by both building B and Building C...”), CP 771 (in “Collateral” section). Similarly, CP 777-78 also states that the loan is for construction of 2 buildings (that line is bottom email on CP 777).

abuse of discretion standard. *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 629, 218 P.3d 621 (2009).

The Loan Agreement (even including the terms in the commitment letter) is missing material terms as a matter of law. Although the question of whether there has been a meeting of the minds can be an issue of fact where reasonable minds could come to more than one conclusion, there cannot be a meeting of the minds about terms that are (1) required to be written under RCW 19.36.110 and 12 U.S.C. § 1823(e) and (2) are not contained in the Loan Agreement. Plaintiffs' CR 56(f) motion to stay was properly denied because none of the emails plaintiffs requested (if they exist), nor any of the depositions they would like to take, would allow the Court to add material terms to the Loan Agreement to create a fully-executed, bank-approved, binding obligation requiring Union Bank to extend permanent financing. See *Farmer v. Davis*, 161 Wn. App. 420, 430–31, 250 P.3d 138 (2011) (holding that the court must deny a CR 56(f) motion if “the desired evidence will not raise a genuine issue of fact”); *Mutual of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn. App. 728, 744, 97 P.3d 751 (2004) (holding that the trial court properly denied CR 56(f) motion because the desired evidence would not raise a genuine issue of material fact); *Hewitt v. Hewitt*, 78 Wn. App. 447, 455, 896 P.2d 1312 (1995) (“A Rule 56(f) motion must show how additional discovery

would preclude summary judgment and why a party cannot immediately provide ‘specific facts’ demonstrating a genuine issue of material fact.”).

RCW 19.36.110 mandates that “[t]he rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement[.]” (Emphasis added.) Thus, the only documents plaintiffs could rely upon to resolve the breach of contract issue are those they allege to be a contract extending permanent financing (there is none). Union Bank produced to plaintiffs the complete loan file, except for documents properly withheld for privilege. (CP 582-83 ¶ 2.) Because one of the requirements of 12 U.S.C. § 1823(e) is that the written contract be maintained in the bank’s official records, plaintiffs already have the only agreements that could conceivably be enforceable against Union Bank.

Moreover, the emails plaintiffs were seeking—if there were any that had not already been produced as part of the loan file—could not be used to interpret the contracts even under the Washington’s common law of contracts. Under common law contract interpretation principles, the bank’s *internal* emails cannot be used to interpret the meaning of an “agreement,” as plaintiffs proposed, because *internal* emails show only the bank’s unilateral, subjective intent. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84–85, 60 P.3d 1245 (2003) (“Admissible extrinsic evidence does not include [] evidence of a party’s unilateral or subjective

intent as to the meaning of a contract word or term...Unexpressed impressions are meaningless when attempting to ascertain the mutual intentions [of the parties].”). In *Hollis v. Garwall, Inc.*, the Court refused to consider extrinsic evidence showing that the developers of a subdivision intended restrictions to apply only to smaller parcels of land, because this evidence “is the unilateral and subjective intent” of one of the parties to a contract. 137 Wn.2d 683, 696, 974 P.2d 836 (1999). While emails *exchanged* between the bank and plaintiffs might inform the meaning of contract terms (putting aside the applicable federal and state statutes), plaintiffs already had the exchanged emails. The only emails they might possibly not have received were internal communications that are wholly irrelevant to interpreting the contracts.

Plaintiffs characterize as “bizarre” the fact that the Court granted plaintiffs’ motion to compel, ordering Union Bank to produce emails from Union Bank’s email archives and Frontier Bank’s backup email archives, and then granted Union Bank’s summary judgment motion, denying plaintiffs’ CR 56(f) motion. There is nothing bizarre about this series of events. Under CR 26(b)(1), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]” The fact that the discovery plaintiffs sought had *some relevance* to the subject matter of the litigation was sufficient for the

Court to grant their motion to compel; it was not sufficient to grant plaintiffs' CR 56(f) motion. As discussed above, the requested discovery could only have delayed the Court's summary judgment ruling if it had the potential to raise a genuine issue of material fact. Moreover, it was entirely appropriate for the Court to consider Union Bank's summary judgment motion before Union Bank was required to incur the cost of searching for the requested emails. The cost to search the email archives would have been between \$45,600.00 and \$182,400.00, in addition to attorneys' fees for reviewing the documents. (CP 583 at ¶ 3.) This is a significant amount given that plaintiffs were seeking only about \$370,000 in this lawsuit. (*Id.*) The Court's rulings on the motion to compel and CR 56(f) motion are not in conflict with each other, and certainly the Court did not abuse its discretion.<sup>10</sup>

## **2. The Court Properly Dismissed the Estoppel Claim**

Plaintiffs' equitable estoppel claim tries to force Union Bank to extend permanent financing despite the absence of a fully-executed written agreement for permanent financing. Specifically, the Complaint

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<sup>10</sup> Plaintiffs argue that the Declaration of Guillermo Herrera in Support of Defendant Union Bank, N.A.'s Motion for Summary Judgment (CP 585-624) was somehow insufficient to support the summary judgment motion because Mr. Herrera does not have personal knowledge of what the parties said during negotiations. Personal knowledge of the parties' negotiations is unnecessary because anything said that was not incorporated into the loan agreement is not binding on Union Bank and cannot be used to add material terms or to interpret the loan agreement. Mr. Herrera submitted his declaration based on his familiarity with the loan file, which contains the only documents that can be used to impose obligations on Union Bank or to interpret such obligations.

tries to make up for the fact that there is no such written agreement by alleging that Union Bank should be estopped from denying that “there exists an agreement to extend permanent financing[.]” But Washington’s courts have unambiguously held that “[e]quitable estoppel...is not available for ‘offensive’ use by plaintiffs,” it can only be used as a defense. *Greaves v. Medical Imaging Sys., Inc.*, 124 Wn.2d 389, 397, 879 P.2d 276 (1994); *see also Mudarri v. State*, 147 Wn. App. 590, 619, 196 P.3d 153 (2008) (“Equitable estoppel ‘is available only as a ‘shield’ or defense’; it cannot be used as a ‘sword.’”).

Plaintiffs’ estoppel claim is used as an offensive claim because it is being used to seek damages against Union Bank; it is not being used to defend against a claim for breach of contract (which Union Bank has not asserted). *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980) (holding that equitable estoppel is only available as a defense, not as a cause of action for damages); *Mudarri*, 147 Wn. App. at 619 (affirming dismissal of Mudarri’s equitable estoppel claim because he was the plaintiff).

Equitable estoppel cannot be used offensively to require Union Bank to extend permanent financing. Here, it would be particularly inappropriate to allow plaintiffs to force Union Bank to extend permanent financing, because it would effectively allow plaintiffs to circumvent the

requirements of 12 U.S.C. § 1823(e) and RCW 19.36.110. Plaintiffs' equitable estoppel claim was properly dismissed as a matter of law.

**3. The Court Properly Rejected Plaintiffs' Untimely Attempt to Add Claims to the Complaint**

After the Court had dismissed all of plaintiffs' claims on summary judgment, plaintiffs made a surreptitious and untimely attempt to amend the Complaint to add new claims. Recognizing that a post-summary judgment amendment would be barred, plaintiffs tried to sneak in an additional breach of contract claim through a motion for "clarification," rather than filing a CR 15(a) motion.<sup>11</sup> (CP 805-16.) The Court properly rejected plaintiffs' motion. (CP 1214-16.) The standard of review on this issue is abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

**a. Plaintiffs' Request for "Clarification" Was an Improper Attempt to Add a New Claim Not Pled in the Complaint**

In asking the Court to "clarify" whether they could assert a breach of contract claim based on events that occurred after the Complaint was filed, plaintiffs improperly attempted to add a claim that was not pled in

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<sup>11</sup> The only way to add new claims to a complaint is through a CR 15(a) motion. "A complaint must be properly amended under CR 15(a) to assert new legal theories." *Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (holding that plaintiffs cannot add a claim without a motion to amend). Plaintiffs' motion to "clarify" was not brought under CR 15(a) and was therefore procedurally improper.

the Complaint. The Complaint contains only one breach of contract claim, and that claim is based on plaintiffs' allegation that Union Bank breached its obligation to extend permanent financing. (CP 7 at ¶¶ 26–28.) Although plaintiffs noted in passing, in the Complaint, that they believed there was improper accounting (CP 6 at ¶¶ 23, 24), the Complaint deliberately refrains from asserting allegations to make that “belief” a legal claim, as evidenced by both the face of the Complaint and by plaintiffs' pre-summary judgment effort, which they halted, to amend the Complaint to add the precise claim they now disingenuously argue is already in the Complaint. The breach of contract claim as pled **is explicitly based solely on Union Bank's refusal to extend permanent financing**. Here is what plaintiffs pled:

26. Defendant through its predecessor-in-interest entered into a contract an express term of which was that Defendant would convert the existing construction loan to permanent financing based upon specified terms. That was a material element of the original agreement and it is set forth in writing signed by an authorized representative of Defendant.

27. Despite this agreement, Defendant has failed and refused to extend permanent financing, thus breaching the written agreement between the parties.

28. Plaintiffs have been damaged by Defendant's actions in an amount to be proven in trial, but believed to be no less than \$100,000 in that Plaintiffs have incurred new loan-origination fees, new appraisal costs and Plaintiffs have paid Defendant far more in interest than they would have

had to pay with a proper conversion to permanent financing. Therefore, Plaintiffs pray for judgment as set forth below.

(CP 7.) The Complaint's incorporation by reference, at ¶ 25, of the allegations in ¶¶ 1 through 24 (which includes the brief mention of purported improper accounting) does not transform their breach of contract claim into a claim based on improper accounting. Plaintiffs chose to draft ¶¶ 26 through 28 with such clarity and focus on permanent financing that Union Bank was not put on notice that plaintiffs also intended to (later) assert a breach of contract claim based on alleged improper accounting.

Moreover, a breach of contract claim based on improper accounting would not have been ripe until after the Complaint was filed, further establishing that the claim cannot be in the Complaint. The Complaint was filed in August 2012, before plaintiffs had paid Union Bank the amount due on the loan. It was not until October 2012 that plaintiffs asked Union Bank to make a payoff demand and plaintiffs paid the full amount due at that time on their loan. (CP 945 at ¶ 4.) A claim based on purported improper accounting would only become ripe when plaintiffs finally paid Union Bank the amount of the payoff demand on October 31, 2012. The Complaint could only then have been amended to add a new breach of contract claim, and so it is clear that the claim pled in

the Complaint could not have been based on alleged improper accounting because such claim did not even exist when the Complaint was filed!

Plaintiffs misleadingly point to discovery requests as “evidence” that Union Bank was put on notice that plaintiffs had asserted a breach of contract claim based on alleged improper accounting. To the contrary, the discovery requests ask Union Bank to support their Loan Payoff Demand, which was issued on October 26, 2012—*two months after* the Complaint was filed. (CP 131–44.) Union Bank provided the requested information in order to facilitate settlement negotiations and because it understood the possibility that plaintiffs might try to amend their Complaint to add a claim based on allegedly improper accounting.

Indeed, on May 7, 2013, plaintiffs circulated a draft amended complaint and asked Union Bank to stipulate to allow plaintiffs to file it. (CP 945 at ¶ 6.) The draft amended complaint explicitly added a breach of contract claim based on allegedly improper accounting. (CP 1052 at ¶ 33.) If plaintiffs really believed this (new) claim is in the Complaint, they would not have proposed adding ¶ 33 in the draft amended complaint.

Union Bank declined to stipulate to the proposed amendment because, *inter alia*, the amended complaint would have removed plaintiffs Wittenberg and Courtney, so that Union Bank would only be able to seek its attorneys’ fees from Black Diamond, which may no longer have funds

to pay Union Bank’s attorneys’ fees. (CP 945 at ¶ 6.) When Union Bank declined to stipulate to the amendment, plaintiffs could have made a motion to amend under CR 15(a). Instead, plaintiffs waited *four months* before making their surreptitious request to amend the Complaint through their “clarification” motion. As we explain below, for nearly an entire year plaintiffs made the deliberate, strategic decision to refrain from filing the amended complaint that they drafted. Having selected a strategy that failed, plaintiffs are not entitled to a “do over.”

**b. Plaintiffs’ Attempt to Amend Was Untimely**

Plaintiffs waited far too long to amend the Complaint. “When a motion to amend is made after the adverse granting of summary judgment, *the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.*” *Doyle v. Planned Parenthood of Seattle-King Cnty., Inc.*, 31 Wn. App. 126, 130–31, 639 P.2d 240 (1982) (holding that the trial court properly refused to grant plaintiff’s untimely motion to amend) (emphasis added). In *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 890–91, 155 P.3d 952 (2007), the Court of Appeals held that the trial court properly denied plaintiff’s motion to amend after summary judgment was granted because too much time had elapsed before plaintiff sought to amend the complaint. The Court of Appeals held that “[a]llowing [the

plaintiff] to pursue entirely new theories of liability at this stage would prejudice the other parties' interests in promptly resolving all claims." *Id.* at 890; *see also Del Guzzi Const. Co., Inc. v. Global Nw., Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (affirming denial of "untimely and unfair" motion to amend complaint made one week before the summary judgment hearing because such late filing would have caused prejudice to the party who had filed the summary judgment motion). As in *Doyle* and *Haselwood*, the Court properly denied plaintiffs' motion to amend the Complaint **after having lost on summary judgment** and nearly **a year** after plaintiffs could have asserted the new claims they strategically opted not to assert in order to focus solely on their alleged entitlement to permanent financing.

Plaintiffs waited far too long to attempt to amend their Complaint, and their new theories would have prejudiced Union Bank. Plaintiffs' attempt to amend the Complaint through their "clarification" motion occurred almost *one year* after October 31, 2012, when plaintiffs received Union Bank's payoff demand and paid Union Bank the full amount due at that time on their construction loan. (CP 945 at ¶ 4.) Plaintiffs' new purported claims for breach of contract based on alleged improper accounting and alleged wrongful retention of a commitment fee became ripe on October 31, 2012, and plaintiffs could easily have moved to amend

their Complaint at that point to add their new breach of contract claims. For their own strategic reasons, they did not.

Instead, plaintiffs let the time to amend their Complaint lapse. The case schedule imposed a January 17, 2013 deadline to file the confirmation of joinder of claims and parties. (CP 964.) This deadline was nearly three months after plaintiffs made their payment of the full demand to satisfy the loan. If plaintiffs intended to assert additional claims, they were required to amend their Complaint by January 17, 2013. *See Parry v. Windermere Real Estate/E., Inc.*, 102 Wn. App. 920, 925 (2000) (“KCLR 4.2(a)(1) provides that no additional parties may be joined and **no additional claims** or defenses may be raised after the date designated in the case schedule for confirmation of joinder of additional parties, claims and defenses, unless the court orders otherwise for good cause and subject to such conditions as justice requires.”) (emphasis added). On January 17, 2013, plaintiffs indicated their intent **not** to add new claims, by filing their confirmation of joinder, which represents that “[a]ll mandatory pleadings have been filed.” (CP 969.) Plaintiffs reaffirmed their intent not to assert the new contract claims when they abandoned their amendment in May 2013.

The trial court’s denial of plaintiffs’ surreptitious amendment motion, post-summary judgment, was soundly within that court’s

discretion. Under the circumstances, it would have been an abuse of discretion to permit addition of claims. Allowing plaintiffs to amend their Complaint to add a new breach of contract claim almost *one year* after the claim became ripe, almost *nine months* after plaintiffs asserted that they did not intend to add any new claims to the Complaint, and *after* Union Bank prevailed on summary judgment and the Court dismissed all of the claims asserted in the Complaint, would have prejudiced Union Bank's interest in promptly resolving all claims. See *Haselwood*, 137 Wn. App. at 890. Moreover, waiting until after Union Bank prevailed on summary judgment drastically increased the prejudice to Union Bank. Had plaintiffs amended their Complaint *before* Union Bank filed its summary judgment motion, Union Bank could have included the new claims in the summary judgment motion and had them dismissed without incurring the cost and burden of additional discovery and motions practice. The whole point of *Doyle* and *Haselwood* is that defendants should not be exposed to the burdens created by a plaintiff's decision not to assert all claims in a timely fashion. Plaintiffs waited *too long* to amend their Complaint. Putting aside the procedural impropriety in plaintiffs' trying to sneak around CR 15, the plain fact is that *Doyle* and *Haselwood* preclude plaintiffs' too-long-delayed (and surreptitious) attempt to amend the Complaint after the Court terminated on summary judgment all of

plaintiffs' asserted claims. The Court properly denied plaintiffs' motion for "clarification," and did not abuse its discretion.

**D. Union Bank is Entitled to Attorneys' Fees on Appeal**

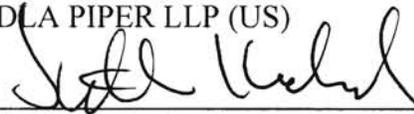
Union Bank requests an award of reasonable attorneys' fees and costs under RAP 18.1. For the reasons discussed in Section III(B) above, Union Bank is entitled to its attorneys' fees and costs under the Loan Agreement's fee-shifting provision<sup>12</sup> (CP 596), and the Court should find that plaintiffs Black Diamond, Wittenberg, and Courtney are each jointly and severally liable for Union Bank's fees and costs.

**IV. CONCLUSION**

For the foregoing reasons, Union Bank respectfully requests that the Court dismiss the appeal on the merits, affirm the Superior Court's award of fees, and award Union Bank reasonable fees for appeal.

Respectfully submitted this 23rd day of May, 2014.

DLA PIPER LLP (US)



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<sup>12</sup> See *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) ("[A]n action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute."); *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984) (holding that even a defendant who successfully defends a breach of contract action by proving that the document sued on does not contain the purported obligation is entitled to its fees if that document includes a fees clause).

**CERTIFICATE OF SERVICE**

I declare that on May 23, 2014, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

J. Craig Rusk, WSBA No. 15872 Brandon D. Young, WSBA No. 44422 Oles Morrison Rinker & Baker 701 Pike Street, Suite 1700 Seattle, Washington 98101 Tel: 206.623.3427 Fax: 206.682.6234 Email: rusk@oles.com Email: young@oles.com  <i>Attorneys for Plaintiff</i>	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of May, 2014 at Seattle, Washington.

  
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Tara Holland

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