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No. 72805-9-I

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

JOHN T. BLANCHARD; RANDY S. PREVIS
and KATIE L. PREVIS, husband and wife,

Appellants,

v.

UNION BANK, N.A., a national banking association,

Respondent.

**BRIEF OF
RESPONDENT MUFG UNION BANK, N.A.**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. OVERVIEW OF THE APPEAL	3
III. STANDARD OF REVIEW	4
IV. RESPONSE TO ASSIGNMENTS OF ERROR.....	4
V. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	5
VI. STATEMENT OF CASE	7
A. Procedural History	7
B. Factual Statement.....	9
1. Appellants, Who Own Borrower, Give Guaranties of Borrower’s Indebtedness to Frontier Bank	9
2. Frontier Bank Fails and Union Bank Buys Frontier Bank’s Assets from the FDIC, including the Note and Guaranties.....	11
3. The Snohomish County Superior Court Appoints a Receiver for the Property and Borrower, and Appellants Actively Oppose the Acts of the Receiver and Appeal to the Court of Appeals.....	12
4. Appellants Put Borrower into Bankruptcy and the Bankruptcy Court Rejects Appellants’ Opposition and Directs the Chapter 7 Trustee to Sell the Property	17
5. The Bankruptcy Court Enforces the Guaranties and Subordinates Appellants’ Proofs of Claim to Union Bank’s Claim.....	19
6. The Receivership and Bankruptcy Case Appeals are Voluntarily Dismissed with Prejudice	20

TABLE OF CONTENTS
(continued)

	Page
7. The Receivership and Bankruptcy Case Are Closed	21
8. This Lawsuit is Commenced.....	22
9. Appellants Assert Affirmative Defenses and Counterclaims	22
VII. ARGUMENT.....	23
A. There is No Dispute That the Guaranties are Absolute and Unconditional, with Extensive Authorizations, Representations, Warranties and Waivers by Each Guarantor	23
B. Each Guaranty is Absolute and Unconditional so the Trial Court was Correct in Enforcing the Guaranties	26
C. Each Guarantor Expressly and in Writing Waived All Defenses and Rights of Setoff and Counterclaim, so the Trial Court was Correct in Enforcing the Waivers	29
D. Appellants Ignore and Thereby Concede Washington’s Credit Agreement Statute of Frauds	33
E. Appellants’ Counterclaims and Affirmative Defenses are Barred by the <i>D’Oench</i> Doctrine and 12 U.S.C. § 1823(e)	35
F. Appellants Ignore and Thereby Concede their Failure to Exhaust Remedies under FIRREA	39
G. Appellants are Bound by Orders of the Receivership Court and the Acts of the Receiver, and Cannot Challenge Them Here	40
H. Appellants are Bound by the Orders of the Bankruptcy Court and the Acts of the Chapter 7 Trustee, and Cannot Challenge Them Here	42

TABLE OF CONTENTS
(continued)

	Page
I. “As a Matter of Law, There Cannot be a Breach of the Duty of Good Faith When a Party Simply Stands on Its Rights to Require Performance of a Contract According to Its Terms”	44
J. Appellants’ Arguments about Fraud and Deceit are Factually Insufficient	45
K. Findings and Conclusions are Not Required in a Decision on Summary Judgment	47
L. Appellants Make Other Meritless Arguments	48
VIII. REQUEST FOR ATTORNEYS’ FEES	49
IX. CONCLUSION	50
APPENDIX 1 - Text Providing for Absolute and Unconditional Guaranty	i
APPENDIX 2 - Text Providing for Authorizations and Waivers	ii
APPENDIX 3 - Text Providing for the Definition of “Indebtedness”	v
APPENDIX 4 - Text of Notice of Final Agreement	vi
APPENDIX 5 - Notices of Washington Credit Agreement Statute of Frauds	vii
APPENDIX 6 - Issues Related to Assignment of Error Sorted by Categories	viii

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

<i>Baumann v. Savers Federal Savings & Loan Ass’n</i> , 934 F.2d 1506 (11th Cir. 1991), cert. denied, 504 U.S. 908, 112 S. Ct. 1936, 118 L.Ed.2d 543 (1992).....	37
<i>In re Christ Hospital</i> , 502 B.R. 158 (Bankr. D.N.J. 2013).....	42
<i>In re Croney</i> , 2011 WL 1656371 (Bankr. W.D. Wa. 2011)	26, 27, 29
<i>D’Oench Duhme & Co. v. FDIC</i> , 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942).....	35
<i>Dane v. Indymac Mortgage Services</i> , 2013 WL 5595406 (D. Ore. 2013).....	38
<i>Elmhurst Dairy, Inc. v. Van Peenen’s Dairy, Inc.</i> , 2012 WL 1116978 (S.D.N.Y. 2012).....	30
<i>In re Farmland Industries, Inc.</i> , 376 B.R. 718 (Bankr. W.D. Mo. 2007).....	43
<i>FDIC v. Zook Bros. Constr. Co.</i> , 973 F.2d 448 (9th Cir. 1991)	35
<i>Federal Deposit Insurance Corp. v. Galloway</i> , 856 F.2d 112 (10th Cir. 1988).....	38
<i>Federal Deposit Insurance Corp. v. Payne</i> , 973 F.2d 403 (5th Cir. 1992).....	38
<i>Federal Financial Co. v. Hall</i> , 108 F.3d 46 (4th Cir., 1997).....	36
<i>HSBC Realty Credit Corp. (USA) v. O’Neill</i> , 2013 WL 362823 (D. Mass. 2013).....	30
<i>HSH Nordbank Ag New York Branch v. Street</i> , 421 Fed. Appx. 70 (2d Cir. 2011), aff’g summary judgment, 672 F. Supp. 2d 409, 418(S.D.N.Y. 2009).....	29

TABLE OF AUTHORITIES

(continued)

	Page
<i>Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC</i> , 740 F.3d 1146 (7th Cir. 2014), aff’g summary judgment, 901 F. Supp. 1066, 1071(E.D. Ill. 2012).....	29
<i>Kanany v. Union Bank, N.A.</i> , 2012 WL 5258847 (U.S.D.C. W.D. Wa. 2012).....	34, 35, 37
<i>Langenkamp v. Culp</i> , 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990).....	42
<i>Langley v. FDIC</i> , 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).....	35, 37
<i>Langley v. Federal Deposit Insurance Corp.</i> , 484 U.S. 86, 91-92, 108 S. Ct. 396, 98 L.Ed.2d 340 (1987).....	35, 36, 37
<i>United States v. Mallet</i> , 782 F.2d 302 (1st Cir. 1986).....	30
<i>In re Previs</i> , 31 B.R. 208 (Bankr. W.D. Wash. 1983).....	10
<i>In re Winstar Communications, Inc.</i> , 554 F.3d 382 (3rd Cir. 2009).....	42

STATE COURT CASES

<i>Adams v. Allen</i> , 56 Wn. App. 383, 783 P.2d 635 (1989).....	45, 46
<i>Amick v. Baugh</i> , 66 Wn.2d 298, 402 P.2d 342 (1965).....	25
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 47 P.2d 356 (1991).....	43
<i>Barclay Receivables Co. v. Mountain Majesty, Ltd.</i> , 903 P.2d 37 (Colo. Ct. App. 1995).....	37
<i>Century 21 Products, Inc. v. Glacier Sales</i> , 129 Wn.2d 406, 918 P.2d 168 (1996).....	25, 28
<i>Columbia Bank v. New Cascadia Corp</i> , 37 Wn. App. 737, 682 P.2d 966 (1984).....	29

TABLE OF AUTHORITIES

(continued)

	Page
<i>Cowlitz Bank v. Leonard</i> , 162 Wn. App. 250, 254 P.3d 194 (2011)	33
<i>Franco v. People’s Nat’l Bank</i> , 39 Wn. App. 381, 693 P.2d 200 (1984).....	26
<i>Fruehauf Trailer Co. of Canada Ltd. v. Chandler</i> , 67 Wn.2d 704, 409 P.2d 651 (1966).....	28
<i>Grayson v. Platis</i> , 95 Wn. App. 824, 978 P.2d 1105 (1999)	28, 29, 31
<i>Klitten v. American Sec. Bank of Kennewick</i> , 140 Wash. 286, 248 P. 435 (1926).....	33
<i>Marine Enters. v. Sec. Pac. Trading Corp.</i> , , review denied, (1988).....	48
<i>Moore v. Kildall</i> , 111 Wash. 504, 191 P. 394 (1920).....	33
<i>National Bank of Washington v. Equity Investors</i> , 81 Wn.2d, 886, 506 P.2d 20 (1973).....	31
<i>National Bank v. Equity Invs.</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	26
<i>Neighborhood Alliance of Spokane County v. County of Spokane</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	4
<i>Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Ass’n</i> , 64 Wn. App. 938, 827 P.2d 344 (1992).....	38
<i>NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Ass’n</i> , 64 Wn. App. 938, 827 P.2d 334 (1992).....	36, 37
<i>Old Nat’l Bank of Washington v. Seattle Smashers Corp.</i> , 36 Wn. App. 688, 676 P.2d 1034 (Div. I 1984).....	29
<i>Pacific County v. Sherwood Pac., Inc.</i> , 17 Wn. App. 790, 567 P.2d 642 (1977).....	29
<i>Puyallup Valley Bank v. Mosby</i> , 44 Wn. App. 285, 723 P.2d 2 (1986).....	30

TABLE OF AUTHORITIES
(continued)

	Page
<i>Reisig v. Resolution Trust Corp.</i> , 806 P.2d 397 (Colo. App. 1991)	37
<i>Sovereign Bank v. O'Brien</i> , 2013 WL 959301 (D.R.I. 2013).....	30
<i>Thompson v. Hanson</i> , 168 Wn.2d 738, 239 P.3d 537 (2010).....	10
<i>Washington Federal v. Harvey</i> , 182 Wn.2d 335, 340 P.3d 846 (2015).....	4

FEDERAL STATUTORY AUTHORITIES

12 U.S.C. § 1821.....	36
12 U.S.C. § 1821(d)(3) (13).....	1, 11, 39
12 U.S.C. § 1821(d)(3)-(12), 12	11
12 U.S.C. § 1821(d)(13)(D)(ii).....	39
12 U.S.C. § 1823.....	36
12 U.S.C. § 1823(e)	1, 6, 7, 11, 12, 34, 35, 36, 37, 38
12 U.S.C. § 1823(e)(1).....	36

STATE STATUTORY AUTHORITIES

RCW 7.60.005(10).....	47
RCW 7.60.190	40
RCW 7.60.210	40
RCW 19.36.110	7, 33, 34
RCW 19.36.140	2
RCW 61.12.120	21

TABLE OF AUTHORITIES
(continued)

Page

STATE RULES AND REGULATIONS

Local Rule 59(b)47

ADDITIONAL AUTHORITIES

Restatement (Third) of Suretyship and Guaranty (1996).....32

I. INTRODUCTION

On April 30, 2010, the Washington Department of Financial Institutions closed Frontier Bank and appointed the Federal Deposit Insurance Company (“FDIC”) as receiver for Frontier Bank to liquidate Frontier Bank and wind up its affairs. That same day, Respondent MUFG Union Bank, N.A., formerly Union Bank, N.A. (“Union Bank” or “Lender”), purchased certain assets of Frontier Bank from the FDIC.

Union Bank succeeded to the rights of the FDIC as receiver of Frontier Bank with regard to the assets purchased. This includes the rights under 12 U.S.C. § 1823(e), which codifies and expands the *D’Oench* Doctrine, and prohibits a party from using unwritten agreements or other schemes alleged to be entered into by a failed bank as a defense against the enforcement by the FDIC or its assignee of the failed bank’s loans. In addition, the FDIC expressly authorized Union Bank to use 12 U.S.C. § 1821(d)(3)-(12), 12 U.S.C. § 1823(e), and the *D’Oench* Doctrine in this lawsuit.

Those assets include the unpaid promissory note (the “Note”) and the “absolute and unconditional” guaranties of Appellants (each, a “Guaranty,” and collectively, the “Guaranties”), which contain extensive authorizations and waivers of defenses, setoffs, and counterclaims. The

text found in each Guaranty making it absolute and unconditional, without set-off or deduction or counterclaim, is attached as Appendix 1. The text providing for authorizations and waivers is attached as Appendix 2. The text providing for the definition of “Indebtedness” is attached as Appendix 3.

The assets also include the Notices of Final Agreement (each, a “Notice,” and collectively, the “Notices”) given under the Washington Credit Agreement Statute of Frauds, Chapter 19.36 RCW, which makes unenforceable unwritten agreements, promises or commitments to lend money, extend credit, modify credit terms, or forbear from enforcing repayment. The Notices were signed by Appellants and, consistent with RCW 19.36.140, state in bold and capital letters:

**ORAL AGREEMENTS OR ORAL COMMITMENTS
TO LOAN MONEY, EXTEND CREDIT, OR TO
FORBEAR FROM ENFORCING REPAYMENT OF A
DEBT ARE NOT ENFORCEABLE UNDER
WASHINGTON LAW.**

The form and text of each Notice is attached as Appendix 4. The Notices signed and additional notices received by each Appellant are summarized on Appendix 5.

Union Bank moved for summary judgment on the Guaranties, and was awarded summary judgment against the Appellants, jointly and severally, in the amount of \$41,960,087.72.

II. OVERVIEW OF THE APPEAL

The three Appellants argue that they should be relieved from their absolute and unconditional Guaranties and extensive waivers because Frontier Bank made oral promises to them, the collateral Property was sold for too little, this was the fault of the Receiver appointed by the Snohomish County Superior Court, and Union Bank is to blame. But, they are an experienced business and real estate lawyer and long-time real estate investors and developers who repeatedly received and signed the commercial statute of frauds notice that oral promises are not binding, the Property was sold by the Bankruptcy Trustee upon the order of the Bankruptcy Court in a Chapter 7 case that they commenced, not by the court-appointed Receiver or Union Bank, and they have already litigated their opposition to the sale of the Property in the Receivership (including an appeal to this Court) and in the Bankruptcy Case (including an appeal to the U.S. District Court) making the very same arguments here that they argued there.

III. STANDARD OF REVIEW

This is an appeal from the Summary Judgment in favor of Union Bank and against Appellants (the “Summary Judgment”), finding “[p]ursuant to Civil Rule 55(c), there is no genuine issue as to any material fact” and holding “Plaintiff Union Bank is entitled to judgment as a matter of law and plaintiff’s motion for summary judgment is granted.” CP 283.

Summary judgment rulings are reviewed *de novo*, and the appellate court performs the same inquiry as the trial court. *Washington Federal v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015).

A nonmoving party in a summary judgment may not rely on speculation or argumentative assertions that unresolved facts remain, rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists. Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that precludes a grant of summary judgment.

Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 741, 261 P.3d 119 (2011) (citations omitted).

IV. RESPONSE TO ASSIGNMENTS OF ERROR

Union Bank disputes Appellants’ assignments of error to the trial court’s decision to grant summary judgment to Union Bank for the Indebtedness due under the Note against Guarantors who absolutely and

unconditionally guaranteed such indebtedness, who expressly waived all defenses at law or in equity except actual payment of the indebtedness and all counterclaims, and who received and signed notices under the Washington Credit Agreement Statute of Frauds.

V. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Appellants list fifteen issues, citing for support in the Clerk's Papers mostly to their own answers, briefs and motion for reconsideration. Attached as Appendix 6 is a chart simplifying and categorizing the issues by the seven topics they raise. In light of those topics, the issues pertaining to the assignments of error are:

1. Are Appellants making mere allegations, argumentative assertions, conclusory statements, and speculation instead of setting forth specific facts that sufficiently rebut the trial court's finding of no material issue of fact?

2. Because Appellants do not dispute that they signed absolute and unconditional Guaranties that contained extensive waivers, including the waiver of all counterclaims and all defenses given to guarantors at law or in equity other than actual payment of the guaranteed indebtedness, and including the express waiver of "any and all rights or defenses based on

suretyship or impairment of collateral,” are Appellants barred from raising the defenses and counterclaims?

3. Because Appellants between February 2005 and December 2010 repeatedly received and signed the notice required by the Washington Credit Statute of Frauds, RCW 19.36.130 (Appendix 5), and do not dispute this, are Appellants barred by RCW 19.36.110 from using unwritten, oral agreements or other schemes alleged to be entered into by Frontier Bank or Union Bank as a defense or counterclaim against the enforcement by Union Bank of the Guaranties?

4. Because Union Bank as successor-in-interest to the FDIC as receiver of Frontier Bank is protected by 12 U.S.C. § 1823(e), which codifies and expands the *D’Oench* Doctrine, are Appellants barred from using unwritten, oral agreements or other schemes alleged to be entered into by Frontier Bank or Union Bank as a defense or counterclaim against the enforcement by Union Bank of the Guaranties?

5. Because Appellants actively litigated and participated in the Receivership and the Bankruptcy Case, and because the Property was sold by the Chapter 7 Trustee upon a final order of the Bankruptcy Court in the Bankruptcy Case commenced by Appellants, are Appellants barred from

complaining about the acts of the Receiver or challenging the Chapter 7 Trustee's sale of the Property?

6. Because Appellants say "fraud and deceit" excuses them from their waiver of the defense of impairment of collateral, and since that excuse rests on alleged unwritten and oral agreements or schemes of Frontier Bank or Union Bank, which are inadmissible under RCW 19.36.110 and 12 U.S.C. § 1823(e), and because Appellants did not establish the nine essential elements of fraud, let alone by clear, cogent and convincing evidence, are the Appellants barred from raising such an excuse.

7. Whether Union Bank breaches a duty of good faith to Appellants when it simply stands on its right to require performance of the Guaranties according to their terms?

8. Whether the trial court erred by not making extensive findings of fact, but instead finding only that, "[p]ursuant to Civil Rule 56(c), there is no genuine issue as to any material fact?"

VI. STATEMENT OF CASE

A. Procedural History

On March 20, 2014, Union Bank filed its Summary Judgment motion. CP 1-24. It sought judgment against Appellants because they had

signed absolute and unconditional Guaranties that contained extensive waivers, including the waiver of all defenses given to guarantors at law or in equity other than actual payment of the guaranteed indebtedness.

In support of its motion, Union Bank filed the Declaration of Andrew E. Bembry with its calculation of the amount due and its eleven authenticated Exhibits A-K, the Supplemental Declaration of Andrew E. Bembry with its nine additional authenticated Exhibits L-T, and the Second Supplemental Declaration of Andrew E. Bembry with its two additional authenticated Exhibits U and V. CP 80-84, 30-129, 398-426, 1319-1325. It also filed the Declaration of Joseph E. Shickich, Jr., authenticating 871 pages of court records relating to the Receivership and the Bankruptcy Case and the Supplemental Declaration of Joseph E. Shickich, Jr., with its four authenticated Exhibits A-D. CP 390-397, 429-1302, 1326-1382. It also filed a Reply, a Supplemental Reply, and a Table of Authorities with Westlaw and other cases attached. CP 337-384, 385-389, 1304-1318.

On May 14, 2014, Appellants filed their Opposition and Declarations. CP 130-275. They later filed their Supplemental Opposition and Declarations. CP 1383-1451.

On June 20, 2014, the summary judgment motion was heard but was continued by the trial court pursuant to Civil Rule 56(f), at Appellants' request, to allow Appellants more time to conduct discovery. CP 1303.

On September 19, 2014, the hearing on summary judgment was conducted by the King County Superior Court.

On October 10, 2014, the trial court granted Union Bank's summary judgment motion and entered the Summary Judgment. CP 281-284.

On November 6, 2014, the trial court denied Appellants' reconsideration motion. CP 296.

On December 4, 2014, Appellants filed their Notice of Appeal. They have not paid or superseded the Summary Judgment.

B. Factual Statement

1. Appellants, Who Own Borrower, Give Guaranties of Borrower's Indebtedness to Frontier Bank

Wellington Hills Park, LLC ("Borrower") is a limited liability company that owned the Wellington Hills Business Campus in Woodinville, a 14-acre site with a leased building, an unleased building, and an unbuilt pad ("Property"). Its members are Randy S. Previs and

Katie L. Previs (85%), who are long-time real estate investors and developers, and John T. Blanchard (15%), a lawyer admitted to the Washington State Bar in 1973 (WSBA No. 5049). CP 32. Randy Previs has been involved in many commercial lawsuits, including his own bankruptcy in the 1980s (Case No. 80-00377, U.S. Bankruptcy Court, W.D. Wa.).¹ John Blanchard is “an experienced business and real estate attorney” who was Borrower’s general counsel. CP 262.

In 2005, to build the Business Campus, Borrower got a construction loan from Frontier Bank. To evidence the debt (“Indebtedness”), Borrower executed a Promissory Note, dated May 27, 2005, in the principal amount of \$36,700,000.00 (as modified by the Change in Terms Agreement, the “Note”). CP 32, 59-67. The Note is secured by a Construction Deed of Trust encumbering the Property and by

¹ To enforce the Summary Judgment against Randy and Katie Previs, Union Bank has had to sue them to set aside fraudulent transfers. *MUFG Union Bank, N.A. v. Randy S. Previs and Katie L. Previs, et al.*, Snohomish County Superior Court Cause No. 14-2-07154-8. Randy Previs has past experience making fraudulent transfers. His transfers of various properties to his parents were held to be fraudulent conveyances. *In re Previs*, 31 B.R. 208, 210 (Bankr. W.D. Wash. 1983) (“[T]he conveyance of the deed to the subject property from [Randy Previs] to his father was fraudulent”). He was the fraudulent transferor in a seminal Washington case establishing that fraudulent transferees are liable to the creditor for a money judgment for value of property fraudulently transferred. *Deyong Management, Ltd. v. Previs*, 47 Wn. App. 341, 347, 735 P.2d 79 (1987) (Div. I), cited with approval in *Thompson v. Hanson*, 168 Wn.2d 738, 745, 239 P.3d 537 (2010) (“question...of first impression in this state”).

an Assignment of Rents. CP 32, 69-111. The Note is absolutely and unconditionally guaranteed by Defendants. CP 32, 40-50. When each Defendant signed the Note as a member of Borrower, and when each Defendant individually signed a Guaranty, and on four additional occasions, each Defendant also signed a Notice of Final Agreement twice: once as a member of Borrower and once individually as a Guarantor. Appendix 5. Borrower defaulted on the Note when it came due on January 5, 2010. CP 32.

2. Frontier Bank Fails and Union Bank Buys Frontier Bank's Assets from the FDIC, including the Note and Guaranties

On April 30, 2010, the Washington State Department of Financial Institutions closed Frontier Bank, and the FDIC was appointed as the receiver to liquidate Frontier Bank and wind up its affairs. The same day, Union Bank purchased certain assets of Frontier Bank from the FDIC, including the Note and the Guaranties. Union Bank succeeded to the rights of the FDIC as receiver of Frontier Bank as to the assets purchased, and the FDIC authorized Union Bank to use 12 U.S.C. § 1821(d)(3)-(12), 12 U.S.C. § 1823(e) and the *D'Oench* Doctrine.² CP 32. The last day to

² Appellants assert that "Union Bank produced no evidence . . . that it did obtain FDIC approval to apply *D'Oench* in this matter . . . and importantly, produced no documentation as to the process involved in obtaining such FDIC consent."

file claims against Frontier Bank with the FDIC was August 4, 2010.

CP 32.

3. The Snohomish County Superior Court Appoints a Receiver for the Property and Borrower, and Appellants Actively Oppose the Acts of the Receiver and Appeal to the Court of Appeals

On November 19, 2010, Union Bank filed an Application for Appointment of Custodial Receiver in Snohomish County Superior Court (“Receivership Court”) under Cause No. 10-2-09992-0 (“Receivership”).

CP 33.

On December 21, 2010, the Receivership Court entered its Order Appointing Custodial Receiver (“Custodial Order”), appointing

Brief of Appellant (“AB”) at 53. They forget the production made by Union Bank during discovery. In response to their Second Request for Production No. 1, Union Bank responded and provided documents on August 25, 2014:

REQUEST FOR PRODUCTION NO. 1: Produce all correspondence between Union Bank and the FDIC as relates to the Wellington loan.

RESPONSE: In the Conference, it was agreed that this request is limited to Union Bank’s representation that the FDIC has authorized Union Bank to use 12 U.S.C. § 1823(e) and the D’Oench Duhme Doctrine. Produced as UB4625-4634 are (1) July 31, 2013 letter from Joseph J. Catalano of Union Bank to Mark A. Brunger of the FDIC; (2) August 30, 2013 letter from L. Robert Bracken of the FDIC to Joseph J. Catalano of Union Bank; and (3) August 29, 2013 letter from Joseph J. Catalano of Union Bank to Mark A. Brunger of the FDIC.

Turnaround Inc. (“Receiver”) as custodial receiver for the Property. CP 33, 390, 429-450.

On July 27, 2011, Union Bank moved to convert the custodial receivership to a general receivership [Receivership Dkt. # 27].

On August 12, 2011, John Blanchard filed a declaration opposing the motion to convert to a general receivership. CP 391, 451-473.

On August 12, 2011, Randy Previs filed a declaration opposing the motion to convert to a general receivership. CP 391, 474-497.

On August 16, 2011, the Receivership Court entered its Order Converting Case to General Receivership (“Conversion Order”), in which the Receivership Court appointed Receiver as general receiver authorized to liquidate all property of Borrower, wherever located, and to wind up the affairs of Borrower’s business, but stayed the Conversion Order. On November 17, 2011, the Receivership Court affirmed the Conversion Order and made it effective. CP 33, 391, 498-511.

On December 28, 2011, the Receiver gave notice of the deadline to file proofs of claim in the Receivership [Receivership Dkt. #99].

On January 17, 2012, John Blanchard, Randy Previs and Katie Previs, and Randy Previs as assignee of Veritas Development, Inc.

(“Veritas”), filed proofs of claim in the Receivership [Receivership Dkt. ##132, 133, 134]. CP 1311 n. 3.

On April 27, 2012, the Receiver moved for an order approving a settlement agreement and release of claims in connection with soft cost insurance claim (“ACOA Lawsuit”) [Receivership Dkt. #151].

On May 30, 2012, John Blanchard filed a declaration opposing the settlement. CP 391, 512-526.

On May 30, 2012, Randy Previs filed a declaration opposing the settlement. CP 391, 527-534.

On June 1, 2012, the Receivership Court entered an order approving the settlement agreement and release of claims (the “ACOA Order”). The ACOA Order finds that “the agreement is fair and equitable, and in the best interests of the estate and its creditors, and that the responses or objections should be over-ruled.” CP 391, 535-543.

On July 26, 2012, the Receiver moved the Receivership Court for an order to approve bid procedures for the sale of the Property [Receivership Dkt. #194].

On August 31, 2012, the Receivership Court granted the motion and entered its “Bid Procedures Order.” CP 392, 525-616.

On January 23, 2013, the Receiver gave notice of the winning bidder under the Bid Procedures Order and set a hearing to approve the sale [Receivership Dkt. #297].

On January 28, 2013, John Blanchard filed an objection, including a declaration, to the proposed sale. CP 392, 618-631.

On January 28, 2013, Randy Previs filed a declaration opposing the proposed sale. CP 392, 632-674.

On January 28, 2013, Veritas filed an objection to the proposed sale that relied on the declaration of Mr. Previs. CP 392, 675-690.

On January 31, 2013, the Receivership Court approved the sale (“Sale Order”) of the Property by a Purchase and Sale Agreement between Receiver and OIBP Wellington Hills, LLC (“OIBP”) for a purchase price of \$10,850,000 (“Sale”). The Sale Order was entered after an extensive marketing campaign for the sale of the Property. CP 33, 392, 691-704.

On February 8, 2013, Randy Previs and a company he controlled, Veritas, sought revision of the Sale Order but their revision motion was denied. CP 33, 392, 705-723.

On March 25, 2013, Previs and Veritas filed a Notice of Appeal of the Sale Order with the Court of Appeals (Case No. 701061) and posted a

\$10,000 cash supersedeas bond with the Receivership Court, thereby staying the closing of the approved Sale. CP 34, 392, 724-817.

On April 1, 2013, Receiver and Union Bank objected to the amount of the bond arguing, as authorized by RAP 8.1(c)(2), that the supersedeas bond posted by Appellants was inadequate. CP 34.

On April 12, 2013, the Receivership Court entered an order increasing the supersedeas amount to \$9,886,741 and requiring Veritas and Previs to file a supersedeas bond by April 19, 2013. They did not post a supersedeas bond. Instead, they filed a motion with the Court of Appeals, for review of the supersedeas amount. CP 34, 393, 818-822.

On June 28, 2013, the Commissioner of the Court of Appeals set the supersedeas amount at \$7,102,611. CP 34, 393, 823-825.

On July 30, 2013, this amount was affirmed by a three judge panel of the Court of Appeals. The panel gave Previs and Veritas until August 12, 2013, to post the supersedeas bond. They did not post the bond. Instead, to stop the Sale, they had Borrower file bankruptcy. CP 34, 393.

4. Appellants Put Borrower into Bankruptcy and the Bankruptcy Court Rejects Appellants' Opposition and Directs the Chapter 7 Trustee to Sell the Property

On August 20, 2013, Borrower filed a Chapter 7 bankruptcy case in the U.S. Bankruptcy Court for the Western District of Washington ("Bankruptcy Court") under Case No. 13-17546 ("Bankruptcy Case"). The Chapter 7 Voluntary Petition was signed by Randy Previs as the managing member of the Borrower. CP 34, 393.

The Bankruptcy Judge presiding over the case was the Hon. Karen A. Overstreet. The Chapter 7 trustee was Dennis Lee Burman ("Trustee"), a Washington state attorney. CP 34.

On September 5, 2013, the Bankruptcy Court gave notice of the deadline to file proofs of claim [Bankruptcy Dkt. #21].

On September 13, 2013, Trustee filed a motion asking the Bankruptcy Court to approve the Sale saying "assurance and speed of closing" was critical, that "the Trustee cannot ignore the history of the dispute and the decisions made by the Receiver, the tenant, the Bank, the County, the Superior Court and the Court of Appeals." CP 34-35, 393, 826-836.

On September 13, 2013, the Chapter 7 Trustee filed his own declaration in support of the sale. In the declaration, he declares:

I have concluded, based on the facts and circumstances of this case, that I should seek Bankruptcy Court approval to sell the Property to OIPB Wellington Hills, LLC, pursuant to essentially the same terms as those agreed to in the state court receivership case. For the reasons set out in my motion, I have determined it is not in the best interest of the estate and its creditors to accept the offer of Veritas and put it before the Court for approval, or to open up this matter to an auction or to a new marketing process.

CP 393, 838-928.

On September 27, 2013, Veritas filed an objection to the Chapter 7 Trustee's sale motion. CP 393, 929-942. The objection was supported by the Declaration of Ashley Previs. The exhibits to the Declaration of Ashley Previs include copies of the objections to the Sale Order made by Veritas and Randy Previs in the Receivership, and the Declaration of Randy Previs. CP 393-394, 943-1063.

On September 27, 2013, John Blanchard filed an objection and a declaration opposing the Chapter 7 Trustee's sale motion. CP 394, 1065-1127.

On October 2, 2013, Randy Previs filed, under the letterhead of Seavestco, Inc., an objection as to the Chapter 7 Trustee's sale and motion

and to the Receiver's continued control of the Property pending its sale.
CP 394, 1128-1136.

On October 16, 2013, the Bankruptcy Court granted Trustee's motion, made findings, and entered its Order Approving Sale of the Property ("Bankruptcy Sale Order"). CP 35, 394-395, 1198-1223.

On October 30, 2013, Veritas filed a notice of appeal from the Bankruptcy Sale Order. CP 395, 1223-1226.

On November 26, 2013, the Sale of the Property closed and, from the sale proceeds, the closing agent disbursed \$9,696,411.88 to Union Bank for its Construction Deed of Trust. CP 35.

5. The Bankruptcy Court Enforces the Guaranties and Subordinates Appellants' Proofs of Claim to Union Bank's Claim

On December 5, 2013, proofs of claim were filed in the Bankruptcy Case by John Blanchard, Randy and Katie Previs, and Veritas by Randy Previs as its assignee [Bankruptcy Claims ##10, 11 and 13]. CP 1311 n. 5.

On March 31, 2014, Union Bank moved in the Bankruptcy Case for summary judgment against Appellants on grounds that the subordination provision in the Guaranties subordinated the proofs of claim of Appellants against Borrower to the claims of Union Bank. CP 396.

On May 16, 2014, Appellants filed their opposition to the motion saying that “[t]he [Appellants’] position is that Union Bank’s conduct in conducting the receivership of Wellington Hills Business Park was substantively unconscionable, rendering the personal guarantees—including the subordination clause—unenforceable.” CP 1268-1283.

On May 16, 2014, John Blanchard filed his declaration opposing the summary judgment motion in Bankruptcy Court. CP 1284-1290.

On May 20, 2014, Randy Previs filed his declaration opposing the summary judgment in the Bankruptcy Court. CP 1291-1296.

On May 27, 2014, the Bankruptcy Court entered its summary judgment in favor of Union Bank and against the Appellants upholding the Guaranties, enforcing the subordination provision in the Guaranties, and holding that “all distributions on [Appellants’] claims must be paid to Union Bank.” CP 1297-1299.

6. The Receivership and Bankruptcy Case Appeals are Voluntarily Dismissed with Prejudice

On December 23, 2013, Veritas, Borrower and the Chapter 7 Trustee agreed to dismiss with prejudice the appeal from the Bankruptcy Sale Order. CP 395, 1227-1228.

On December 31, 2013, the United States District Court for the Western District of Washington dismissed with prejudice the appeal of the Bankruptcy Sale Order. CP 396, 1229.

On January 7, 2014, Randy Previs and Veritas moved the Washington Court of Appeals to withdraw its appeal of the Sale Order of the Receivership Court. CP 396, 1230-1264.

On January 23, 2014, the Washington Court of Appeals dismissed the appeal of the Sale Order. CP 396, 1265.

On March 7, 2014, the Court of Appeals issued its mandate to the Superior Court terminating review of the Sale Order. CP 396, 1266-1267.

7. The Receivership and Bankruptcy Case Are Closed

On December 18, 2014, the Receivership Court entered its Order approving the Receiver's Final Report and discharging the Receiver [Receiver Dkt. #412].

On January 30, 2015, the Bankruptcy Court entered its order discharging the Trustee and closing the case [Bankruptcy Dkt. Entry for 1/30/15].

8. This Lawsuit is Commenced

On March 29, 2013, while the Receivership was pending and before the Bankruptcy Case was commenced, Union Bank filed the Complaint against the Guarantors. CP 297-313.

9. Appellants Assert Affirmative Defenses and Counterclaims

On July 15, 2013, Guarantors filed Amended Answers, in which they asserted counterclaims. They admit signing the Guaranties, and state that they are “parties to a Guaranty contract” with “Frontier Bank, and its successor, Union Bank.” CP 314-336.

Guarantors asserted affirmative defenses (CP 316-318, 329-330):

- The deficiency provisions of the Washington Deed of Trust Act (RCW 61.12.120).
- Election of remedies.
- Impairment of collateral.
- Statute of limitations.
- Laches.
- Failure to mitigate damages.
- Estoppel.
- Unconscionability.
- Unclean hands.
- “Plaintiff’s claim on the Commercial Guaranty is barred and/or waived because it is personally motivated against Defendants personally, mendacious and has no substantial business purpose.”
- “Union Bank cannot ‘pick and choose’ to sue on Frontier Bank’s Guaranty and yet ignore other contracts, agreements and obligations of Frontier Bank to Wellington and/or the Defendants.”

Guarantors alleged (CP 318-321, 330-332):

- In fall 2009, “agents of Frontier Bank” told Guarantors that Frontier Bank would issue a “revised construction loan and/or ‘mini-perm’ loan”, but did not do so after Guarantors contributed their own personal funds to bring the loan current.
- In December 2008, “agents of Frontier Bank” told Guarantors that if tenant improvements were accomplished to the satisfaction of tenant, Primus International, Inc., and upon the tenant’s reimbursement to the Bank of the tenant improvements expenses, Frontier Bank would make the funds available to pay certain subcontractors and to pay and reimburse Guarantors.
- In 2009 and 2010, “agents of Frontier Bank” told Guarantors that Frontier Bank would sell the Note for \$20 to \$25 million, but did not do so when Guarantors found parties willing to purchase the Note from Frontier Bank at that price.

Based on these allegations, the Guarantors asserted counterclaims

(CP 321-324, 332-335):

- Negligent misrepresentation.
- Promissory estoppel.
- Unjust enrichment.
- Breach of duty of good faith and fair dealing.
- Breach of contract.

VII. ARGUMENT

A. There is No Dispute That the Guaranties are Absolute and Unconditional, with Extensive Authorizations, Representations, Warranties and Waivers by Each Guarantor

Appendices 1, 2, and 3 set out the text of each Guaranty, and there is no dispute about the terms of each Guaranty.

The amount of each Guaranty is “unlimited.”

Each Guarantor “absolutely and unconditionally guarantees and promises to pay” to Lender the “Indebtedness” of Borrower to Lender “without set-off or deduction or counterclaim.” Each Guarantor’s liability for the Indebtedness guaranteed is “unlimited” and each Guarantor’s obligations are “continuing.”

Each Guaranty contains extensive authorizations, representations and warranties by each Guarantor to Lender. Each Guarantor authorizes Lender “to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral...[and] to apply such security and direct the order or manner of sale thereof..., as Lender in its discretion may determine.” Each Guarantor represents and warrants that “no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty....”

Each Guaranty contains extensive waivers. Each Guarantor waives all defenses given to guarantors at law or in equity other than actual payment of the Indebtedness, and “any and all rights or defenses based on suretyship or impairment of collateral,” including but not limited to the

right to require Lender to proceed first against the Borrower or against any other person, or to exhaust collateral of the Borrower or pursue any other remedy before pursuing Guarantor.

Each Guaranty provides for the waiver of all counterclaims and setoffs:

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter-demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

Each Guarantor knowingly makes the waivers and

...warrants and agrees that each of the waivers set forth above is made with the Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law.

Each Guarantor agrees that "Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender."

Each Guarantor agrees that "Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the

Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty."

Each Guaranty includes an attorney fee clause permitting Lender to recover all costs and fees of enforcing the Guaranty.

B. Each Guaranty is Absolute and Unconditional so the Trial Court was Correct in Enforcing the Guaranties

Each Guarantor gives an absolute and unconditional guaranty of the Indebtedness of the Borrower, and acknowledges that the Guarantor's liability is unlimited and continuing. So, each Guaranty is an absolute and unconditional guaranty. *Century 21 Prods, Inc. v. Glacier Sales*, 129 Wn.2d 406, 414, 918 P.2d 168 (1996) ("An unconditional guaranty is one whereby the guarantor agrees to pay or perform a contract upon default of the principal without limitation. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform."); *Amick v. Baugh*, 66 Wn.2d 298, 303, 305, 402 P.2d 342 (1965) ("An absolute guaranty is one by which the guarantor unconditionally promises payment or performance of the principal contract on default of the principal debtor or obligor The obligation of the absolute guarantor, by his express agreement, is matured at the moment the debt is in default.")

Washington courts mandate that “[an] absolute and unconditional guaranty should be and is enforceable to its terms. The courts are to enforce it as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent.” *National Bank v. Equity Invs.*, 81 Wn.2d 886, 919, 506 P.2d 20 (1973); *Franco v. People’s Nat’l Bank*, 39 Wn. App. 381, 387-88, 693 P.2d 200 (1984) (citing *National Bank v. Equity Invs.*, 81 Wn.2d at 919).

An almost identical form of guaranty to the one signed by Guarantors was determined to be an unconditional and absolute guaranty making the guarantor liable for the indebtedness. In *In re Cronney*, 2011 WL 1656371 (Bankr. W.D. Wa. 2011) (No. 11-10836) (CP 341-344), the United States Bankruptcy Court for the Western District of Washington considered a form of guaranty virtually identical to the ones here. The Guaranty here and the one in *Cronney* are “LaserPro” forms of guaranty. Frontier Bank used LaserPro, as did Business Bank in *Cronney*.

In *Cronney*, the borrower, Cowboy Campsite, was an LLC. Cronney was a member of the LLC and a guarantor. The court began its analysis by quoting directly from the LaserPro Guaranty, and highlighting terms identical to those in the LaserPro Guaranties here: “Guarantor absolutely

and unconditionally guarantees,” “Guarantor’s liability is unlimited and Guarantor’s obligations are continuing,” and a recitation of the same Guarantor’s waivers. 2011 WL 1656371 at *1 (CP 342).

In holding that Croney was fully liable as a Guarantor of the borrower, Cowboy Campsite, the court explained:

Under Washington law, a guarantee of payment of an obligation without words of limitation or condition is construed as an absolute or unconditional guarantee. In contrast, a conditional guarantee contemplates the happening of a contingent event other than default of the principal debtor as a condition of liability on the part of the guarantor. Unlike a conditional guarantee, and [*sic*] absolute guarantee imposes no duty upon the creditor to attempt collection from the principal debtor before looking to the guarantor.

With an absolute guaranty, the guarantor is liable for the full amount of his guaranty upon default by the primary obligor. The guaranty in this case specifically states that it is unconditional, and goes on to specifically waive any requirement that Business Bank proceed against Cowboy, the collateral, or any of the other guarantors. The guaranty does not contain any provisions making debtor’s [Mr. Croney’s] liability contingent on an event other than default by Cowboy. The guaranty is clearly an unconditional or absolute guaranty under Washington law. Therefore, under Washington law, debtor is liable for the full amount of the debt guaranteed. The amount of the debt can be readily determined by reference to the Cowboy note.

2011 WL 1656371, at **2 3 (citations omitted) (CP 343-344).

Likewise, each Guaranty here is absolute and unconditional and the trial court did not err in enforcing them.

C. **Each Guarantor Expressly and in Writing Waived All Defenses and Rights of Setoff and Counterclaim, so the Trial Court was Correct in Enforcing the Waivers**

An “unconditional guarantee” precludes defenses asserted by guarantors. *Century 21 Products, Inc. v. Glacier Sales*, 129 Wn.2d 406, 413, 918 P.2d 168 (1996); *Grayson v. Platis*, 95 Wn. App. 824, 830-31, 978 P.2d 1105 (1999) (“black letter law regarding unconditional guaranties”). As if this was not enough to impose unlimited liability, each Guarantor went further and expressly waived all defenses, setoffs and counterclaims, and warranted that these waivers are reasonable and knowingly made.

Such waivers of defenses and counterclaims are uniformly upheld and enforced by Washington courts, including on summary judgment. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 709, 409 P.2d 651 (1966) (upholding waiver of defense of release or discharge of principal obligation; “we hold that the quoted provision of the agreement constituted a full and complete waiver by the guarantors...”); *Old Nat’l Bank of Washington v. Seattle Smashers Corp.*, 36 Wn. App. 688, 691, 676 P.2d 1034 (Div. I 1984) (affirming summary judgment; upholding

waiver of consent of guarantor to grant borrower extension of time; “the language of the guaranty is dispositive” and guarantors could not complain about extension granted after they withdrew consent to future loans as they were bound by extension clause applying to original loans).³

Courts throughout the country, on summary judgment, have uniformly upheld these waivers of defenses and counterclaims when imposing liability on guarantors.⁴ Indeed, the *Cronney* court, in holding the

³ *Grayson v. Platis*, 95 Wn. App. at 834 (upholding waivers of right of recourse against lender and of defense based on lender’s acceptance of deed in lieu); *Columbia Bank v. New Cascadia Corp.*, 37 Wn. App. 737, 739-740, 682 P.2d 966 (1984) (upholding waivers of consent of guarantor to grant borrower extension of time and to release co-guarantor); *Pacific County v. Sherwood Pac., Inc.*, 17 Wn. App. 790, 800, 567 P.2d 642 (1977) (surety expressly waived right to object to time extensions for completion of tasks in underlying agreement and waived all rights to claim discharge except on satisfaction of underlying obligation).

⁴ *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*, 740 F.3d 1146 (7th Cir. 2014), *aff’g summary judgment* 901 F. Supp. 1066, 1071 (E.D. Ill. 2012) (waiver of impairment of collateral; per the 7th Circuit, “[t]he guaranty couldn’t be clearer;” per the District Court, guarantors “made their deal, and they must live with it. [Lender] is entitled to the benefit of its bargain, and Guarantors must bear what turned out to be the detriment of one of the terms of their bargain”); *HSH Nordbank Ag New York Branch v. Street*, 421 Fed. Appx. 70 (2d Cir. 2011) (CP 357-362), *aff’g summary judgment* 672 F. Supp. 2d 409, 418 (S.D.N.Y. 2009) (CP 363-373) (“Where a guaranty states that it is ‘absolute and unconditional,’ guarantors are generally precluded from raising any affirmative defense....Furthermore, a guarantor cannot assert defenses that it expressly waived in the guaranty agreement”); *United States v. Mallet*, 782 F.2d 302, 303 (1st Cir. 1986), *aff’g summary judgment* 1985 WL 5696 (D.N.H. 1985) (“The case law is replete with examples of guarantors attempting to traverse this standard-form guaranty language. The courts, however, have uniformly upheld the “waiver-of-defenses” language;” citing cases from 3rd Circuit, 4th Circuit, 5th Circuit, and 8th Circuit); *First National Park Bank v. Johnson*, 553 F.2d

guarantor liable for the full amount of the debt guaranteed, quoted verbatim from the very same waiver language from the LaserPro Guaranty that is found in the Guaranties here. 2011 WL 1656371, at *1.

Appellants argue that (AB 61):

A jury should be allowed to determine whether Union Bank's bungling of the loan before and after appointment of the Receiver is grounds to pursue the Appellants' counterclaim or at least assert the affirmative defense of impairment of collateral.⁵

To support this, they say that *National Bank of Washington v. Equity Investors*, 81 Wn.2d, 886, 918-19, 506 P.2d 20 (1973), "left open the

599,601-602 (9th Cir. 1977) (affirming summary judgment by D. Mont.; "[t]he guaranty in this case...is absolute and unconditional... The district court correctly found that guarantors had waived their right to rely on lack of notice as a defense. The guaranty agreement unambiguously contains such a waiver"); *Sovereign Bank v. O'Brien*, 2013 WL 959301, at **1, 3-4 (D.R.I. 2013) (CP 380-384) (granting summary judgment and upholding waiver of defenses provisions in guaranty); *HSBC Realty Credit Corp. (USA) v. O'Neill*, 2013 WL 362823, at **2-4, 5 n.7 (D. Mass. 2013) (CP 351-356) (granting Rule 12(c) motion for judgment on the pleadings and dismissing guarantor's 18 affirmative defenses and 8 counterclaims as "eviscerated" by the waiver language of the guaranty); *Elmhurst Dairy, Inc. v. Van Peenen's Dairy, Inc.*, 2012 WL 1116978, at *2 (S.D.N.Y. 2012) (CP 348-350) (granting summary judgment against guarantors jointly and severally while upholding waiver of defenses provisions in guaranty).

⁵ Even if Appellants had not waived the impairment of collateral defense, the defense would not discharge the Guaranties. Instead, the defense would simply reduce their liability under the Guaranties by the amount of the impairment, for which the Appellants have the burden of proof. "It is settled law in this state that the creditor's impairment of collateral discharges the guarantor only to the extent of impairment . . . [T]his jurisdiction has not adopted a rule of *strictissimi juris* with regard to impairment of collateral." *Puyallup Valley Bank v. Mosby*, 44 Wn. App. 285, 288, 723 P.2d 2 (1986).

possibility that a guarantor can be relieved of his or her obligations under a personal guarantee if the loan is mismanaged through bad faith, fraud or deceit.” AB 61. Their explanation of the holding in *Equity Investors* is incomplete and inaccurate. When it mentions fraud and deceit, *Equity Investors* is discussing only fraud or deceit in the inducement at the making of the guaranty, which is not the case here. 81 Wn.2d at 920.

Appellants also look to the terms, “fraud” and “bad faith,” found in *Grayson v. Platis*, 95 Wn. App. 824, 978 P.2d 1105 (1999), as an excuse to relieve them of their waiver of the affirmative defense of impairment of collateral. AB 61. Again, their explanation of the holding was incomplete and inaccurate. When *Platis* mentioned fraud and bad faith, it was referring to *Equity Investors*, 95 Wn. App. at 833, so it, too, was talking only about fraud or bad faith in the inducement at the making of the guaranty, which is not the case here.

The Appellants’ Guaranties were made on May 27, 2005. If there was any fraud or deceit in the inducement, it would have had to have happened then. Appellants presented no evidence that there was fraud or deceit or bad faith by Frontier Bank that induced them to sign the Guaranties in May 2005.

Guarantors have waived all defenses, counterclaims and setoffs, and the trial court did not err in enforcing the waivers and entering the Summary Judgment against Guarantors.⁶

D. Appellants Ignore and Thereby Concede Washington's Credit Agreement Statute of Frauds

Appellants ignore and thereby concede Washington's Credit Agreement Statute of Frauds. This is because Appellants cannot show that the purported agreements, promises, and commitments were in writing and signed by Frontier Bank or Union Bank. Consequently, Appellant's arguments on appeal fail under the statute of frauds.

Washington's Credit Agreement Statute of Frauds provides:

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. Partial performance of a credit agreement does not remove the agreement from the operation of this section.

RCW 19.36.110. A "credit agreement" as used in RCW 19.36.110 is defined as:

⁶ Such waivers are expressly permitted by Section 48 of the *Restatement (Third) of Suretyship and Guaranty* (1996), and "[s]uch consent, agreement or waiver, if express, may be effected [*sic*] by specific language or by general language indicating that the secondary obligor [guarantor] waives defenses based on suretyship."

an agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

RCW 19.36.100.⁷ Frontier Bank and Union Bank prominently notified Appellants of the implications of the Washington Credit Agreement Statute of Frauds. As Appendix 5 shows, thirteen Notices were provided to, and five of them signed twice by each Appellant.

This is like *Cowlitz Bank v. Leonard*, 162 Wn. App. 250, 252, 254 P.3d 194 (2011), where the plaintiff bank had loaned money and a third party had guaranteed repayment. Neither the borrower nor the guarantor repaid the loan when it came due, and the bank sued the guarantor. The guarantor asserted affirmative defenses and counterclaims alleging that the bank “fraudulently induced” him into not changing banks by promising to increase the loan amounts and not call the loan due at maturity. The bank moved for summary judgment on the guaranty and to dismiss the

⁷ Washington’s Credit Agreement Statute of Frauds codifies long-standing common law in this state. *See, e.g., Klitten v. American Sec. Bank of Kennewick*, 140 Wash. 286, 290-91, 248 P. 435 (1926) (declining to enforce bank officers’ alleged oral promise); *Moore v. Kildall*, 111 Wash. 504, 507, 191 P. 394 (1920) (holding that “a contemporaneous parol agreement limiting the liability of [the maker of a promissory note] . . . is not available as a defense” to enforcement of the note).

guarantor's affirmative defenses and counterclaims; the guarantor argued that there were material issues of fact whether he was fraudulently induced. The trial court granted the bank's motion and the guarantor appealed. Relying on RCW 19.36.110, the Court of Appeals affirmed the trial court, holding that

The representations that [guarantor] alleges [bank] made, even if proved, would constitute oral agreements to loan money, extend credit, of forbear from enforcing repayment. As such, under RCW 19.36.110, [guarantor] cannot enforce them. The trial court did not err in dismissing his counterclaims or in granting summary judgment to [bank].

Id. at 253-54.

E. Appellants' Counterclaims and Affirmative Defenses are Barred by the D'Oench Doctrine and 12 U.S.C. § 1823(e)

This case is like *Kanany v. Union Bank, N.A.*, 2012 WL 5258847 (U.S.D.C. W.D. Wa. 2012) (CP 374-379), where the U.S. District Court granted summary judgment to Union Bank. The borrower, Mr. Kanany, alleged that he:

...had several loans outstanding with Frontier Bank when Mr. Bouchard (a former Frontier Bank employee) made promises and assurances regarding Mr. Kanany's failure to make payments on certain loans while repaying others; required Mr. Kanany to terminate his partnership with Matt Hagwood in order to qualify for a refinance; and led him to believe that he could refinance his loans through Frontier Bank. The complaint alleges that Frontier Bank reported on

a credit report that Mr. Kanany was delinquent on his loan payments, so that he could not obtain a loan from another bank; declined to refinance the loan; and refused to permit Mr. Kanany to access files so that he could develop a proposal to present to the bank.

Id. at *3 (CP 376) (citations omitted).

As the Court explained at *5 (CP 378):

Union Bank contends that Mr. Kanany's claims are barred by the *D'Oench* Doctrine and 12 U.S.C. § 1823(e).

The federal *D'Oench* doctrine prohibits a party from asserting a cause of action against the FDIC or its assignees based upon unwritten agreements or other schemes alleged to be entered into by a failed bank. *Langley v. FDIC*, 484 U.S. 86, 92-93, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987). In *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), the United States Supreme Court enunciated this doctrine, which is intended to protect the FDIC and its assignees from fraudulent schemes by borrowers of failed institutions. The doctrine also protects the FDIC by allowing bank representatives to rely solely on the records of the bank in evaluating the bank's financial condition, rather than leaving it exposed to suits founded on undisclosed conditions or deceptive documents. *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 448, 1450-51 (9th Cir. 1991).

The doctrine established in *D'Oench* was codified and expanded in 12 U.S.C. § 1823(e), as part of the Federal Deposit Insurance Act. 12 U.S.C. § 1823(e)(1) provides as follows:

(1) In general. No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 11 [12 U.S.C. § 1821], either as security for a loan or by purchase or as

receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

Either the FDIC or an assignee of the FDIC can assert the *D'Oench* doctrine/Section 1823 as an affirmative defense in litigation brought by a borrower who relies on oral conditions, promises, or agreements. *See Federal Financial Co. v. Hall*, 108 F.3d 46, 49 (4th Cir., 1997); *NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Ass'n*, 64 Wn. App. 938, 943-44, 827 P.2d 334 (1992). The statutory term “agreement” in 12 U.S.C. § 1823 is defined more broadly than a mere promise, and includes the “truthfulness of a warranted fact.” *Langley v. FDIC*, 484 U.S. at 92-93. “Such [oral] contracts cannot be enforced even when a bank fraudulently induces a customer with oral misrepresentations, or when a customer is completely innocent.” *NW Land & Investment, Inc.*, 64 Wn. App. at 944, 827 P.2d 334.

The Court granted Union Bank’s motion for summary judgment in *Kanany*, and dismissed the borrower’s claims on alleged agreements and purported assurances by Frontier Bank (including, as here, for breach of

contract, breach of the duty of good faith and fair dealing, inappropriate lending practices, and estoppel). This case presents precisely the situation, as in *Kanany*, where courts apply 12 U.S.C. § 1823(e). The Appellants are alleging promises and agreements which 12 U.S.C. § 1823(e), by its codification and expansion of the *D'Oench* Doctrine, bar from enforcing or using to defeat recovery on loans like those on which Summary Judgment was granted here.

As stated in *NW Land & Investment, Inc. v. New West Fed. Sav. & Loan Assn.*, 64 Wn. App. at 943⁸:

⁸ Cited with approval and an explanation in *Barclay Receivables Co. v. Mountain Majesty, Ltd.*, 903 P.2d 37, 41 (Colo. Ct. App. 1995):

In *Langley v. Federal Deposit Insurance Corp.*, [484 U.S. 86, 91-92, 108 S. Ct. 396, 401, 98 L.Ed.2d 340, 347 (1987)], the United States Supreme Court concluded that it could not engraft an equitable exception on the plain terms of § 1823(3). The court held that an agreement that satisfies § 1823(e) prevails even if the agency did not know of it and an agreement that does not satisfy § 1823(e) fails even if the agency knew. *See Reisig v. Resolution Trust Corp.*, 806 P.2d 397 (Colo. App. 1991) (innocent victims acting in good faith are subject to *D'Oench* Doctrine); *see also Federal Deposit Insurance Corp. v. Payne*, 973 F.2d 403, 407 (5th Cir. 1992) (“the *Langley* Court destroyed the ‘wholly innocent borrower’ exception...”); *Baumann v. Savers Federal Savings & Loan Ass’n*, 934 F.2d 1506 (11th Cir. 1991) *cert. denied*, 504 U.S. 908, 112 S. Ct. 1936, 118 L.Ed.2d 543 (1992) (complete innocence of any intentional or negligent wrongdoing is no longer a defense); *Federal Deposit Insurance Corp. v. Galloway*, 856 F.2d 112 (10th Cir. 1988) (agency’s knowledge of bank president’s misrepresentation at the time it acquired notes did not prevent agency from asserting § 1823(e) as a bar to guarantors’ defense of fraud in the inducement);

The doctrine established in D'Oench has been codified in 12 U.S.C. § 1823(e) and expanded beyond the facts of D'Oench. An oral contract cannot be enforced against FSLIC, FDIC or its assignees even though the regulatory agency knows of the agreement before taking control. Such contracts cannot be enforced *even when a bank fraudulently induces a customer with oral representations, or when a customer is completely innocent.* (Emphasis added.)

The trial court did not err in granting Summary Judgment.

F. Appellants Ignore and Thereby Concede their Failure to Exhaust Remedies under FIRREA

Appellants ignore and thereby concede their failure to exhaust remedies under FIRREA. The deadline to file claims with the FDIC was August 4, 2010. CP 32, 121. Guarantors did not meet this deadline and thereby failed to exhaust their FDIC remedies. CP 32. As a result, the trial court did not have subject matter jurisdiction over Guarantors' counterclaims.

This was explained in *Dane v. Indymac Mortgage Services*, 2013 WL 5595406 at *1 (D. Ore. 2013) (CP 345-347):

The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") empowers the FDIC to "act as receiver or conservator of a failed institution for the protection of depositors and creditors. *Benson v. JP*

Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Ass'n, 64 Wn. App. 938, 827 P.2d 344 (1992) (oral contract cannot be enforced against the assignees of the FDIC even if the agency knew of the agreement prior to taking control).

Morgan Chase Bank, N.A., 673 F.3d 1207, 1211 9th Cir. 2013) (internal quotation omitted). FIRREA lays out a scheme for asserting claims against a financial institution subject to FDIC receivership or conservatorship. 12 U.S.C. § 1821(d)(3) (13). Where a financial institution has failed and the FDIC has assumed receivership, “no court shall have jurisdiction over . . . (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver” unless that claim was first exhausted before the FDIC. 12 U.S.C. § 1821(d)(13)(D)(ii); *Benson*, 673 F.3d at 1211 12.

FIRREA’s jurisdiction-stripping provision “distinguishes claims on their factual bases rather than on the identity of the defendant.” *Benson*, 673 F.3d at 1212. A plaintiff is required to exhaust her claim before the FDIC whenever it is based on the conduct of a failed institution, even where the plaintiff does not name that institution as a defendant. *Id.* The jurisdictional bar applies even where the failed bank or some of its assets are transferred to another bank by the FDIC. *Id.* at 1214 15.

The trial court did not have subject matter jurisdiction over Guarantors’ counterclaims, and properly dismissed them.

G. Appellants are Bound by Orders of the Receivership Court and the Acts of the Receiver, and Cannot Challenge Them Here

Because they filed proofs of claim and participated in the Receivership, Appellants are bound by the orders of the Snohomish County Superior Court and by the acts of the Receiver in managing and disposing of the Property, whether or not they were formally joined as parties. That means that Appellants are bound by the ACOA Order, the Sale Order, including the findings made by the Receivership Court

(CP 734-740), and the acts of the Receiver in managing the Property during the Receivership. They cannot challenge them here.

RCW 7.60.190 is entitled, “Participation of creditors and parties in interest in receivership proceeding—Effect of court orders on nonparties.”

Subsections (1), (4) and (7) say:

(1) Creditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as parties.

(4) Orders of the court with respect to the treatment of claims and disposition of estate property, including but not limited to orders providing for sales of property free and clear of liens, are effective as to any person having a claim against or interest in the receivership estate and who has actual knowledge of the receivership, whether or not the person receives written notice from the receiver and whether or not the person appears or participates in the receivership.

(7) All persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.

Appellants fall squarely within these subsections. Each submitted written proofs of claim in the Receivership. Each received notice, had actual knowledge of and actively participated in the Receivership.

As subsections (1) and (7) provide, Appellants “are bound by the acts of the receiver with regard to management and disposition of estate property” and “are bound by any order of the court with respect to the action” of the receiver, “whether or not they are formally joined as parties.” And, as subsection (4) provides, the orders of the Receivership Court with respect to disposition of property of the receivership estate, including the finding (CP 738-739) that “\$10,850,000 is the highest and best price the Receiver, or any other party, could obtain for the Property, for a sale that would actually close,” “are effective” against the Appellants because they had “actual knowledge of the receivership.”

H. Appellants are Bound by the Orders of the Bankruptcy Court and the Acts of the Chapter 7 Trustee, and Cannot Challenge Them Here

Because they filed proofs of claim and participated in the Bankruptcy Case, Appellants are bound absolutely by the orders of the Bankruptcy Court and by the acts of the Trustee in managing and disposing of the Property, whether or not they were formally joined as parties. That means that they are bound by the Bankruptcy Sale Order,

including the findings made by the Bankruptcy Court in the Bankruptcy Sale Order (CP 1199-1200). They are also bound by the acts of the Trustee, including the Trustee's sale of the Property for the price of \$10,850,000. They cannot challenge them here.

Appellants submitted written proofs of claim in the Bankruptcy Case. By filing their proofs of claim, the Appellants submitted themselves to the jurisdiction of the Bankruptcy Court. *Langenkamp v. Culp*, 498 U.S. 42, 45, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990); *In re Winstar Communications, Inc.*, 554 F.3d 382, 406 (3rd Cir. 2009). Each received notice, had actual knowledge of and actively participated in the Bankruptcy Case, and in particular, each opposed the Trustee's motion for sale of the Property. They also actively defended an adversary proceeding in the Bankruptcy Case brought against them by Union Bank to enforce the subordination provisions of the Guaranties.

By actively participating in the Bankruptcy Case, and affirmatively opposing the motion by the Trustee to sell the Property, the Appellants are bound by the orders of the Bankruptcy Court with respect to the disposition of the Property, and by the actions of the Trustee in selling the Property, including the sales price of \$10,850,000. *In re Christ Hospital*, 502 B.R. 158, 174-175 (Bankr. D.N.J. 2013); *In re Farmland Industries*,

Inc., 376 B.R. 718, 727 (Bankr. W.D. Mo. 2007) (bankruptcy court sales order is binding on entity that participated in Bankruptcy Case sale motion and that entity cannot, in another lawsuit, challenge the sale as improper).

I. **“As a Matter of Law, There Cannot be a Breach of the Duty of Good Faith When a Party Simply Stands on Its Rights to Require Performance of a Contract According to Its Terms”**⁹

Appellants assert that Frontier Bank failed to act in good faith with respect to them and their proposals. BA at 25, 30, 40, 60, 64. A lender like Union Bank **does not**, as a matter of law, breach the implied duty of good faith and fair dealing by standing on its contractual rights under Note and Guaranties and requiring payment of what is owed.

Since *Badgett v. Security State Bank*, a claim of bad faith like the one that the Appellants assert has neither been recognized nor permitted under Washington law. In *Badgett*, a borrower brought an action against a bank arguing that it had a good faith duty to cooperate affirmatively in efforts to restructure its defaulted loan agreement. The Supreme Court flatly rejected this proposition. The Supreme Court said at 116 Wn.2d at 519-572 and 574:

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate

⁹ *Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 47 P.2d 356 (1991).

with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it “inject substantive terms into the party’s contract”. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only connection with terms agreed to by the parties.

* * *

The duty of good faith implied in every contract does not exist apart from the terms of the agreement.

There is no valid claim for bad faith by the Appellants here. In seeking to enforce the Guaranties, Union Bank acted pursuant to its clear contractual right to which each Guarantor expressly agreed.

As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

116 Wn.2d at 570.

J. Appellants’ Arguments about Fraud and Deceit are Factually Insufficient

Appellants make the argumentative assertion that Frontier Bank “fraudulently induced” Appellants into signing Guaranties and making payments on the Note. AB 3, 4, 21, 22-23. The repeatedly make the

argumentative assertion of “fraud and deceit” against Frontier Bank and Union Bank.¹⁰ Appendix 6.

There are nine essential elements of fraud, all of which must be established by clear, cogent and convincing evidence: (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker’s knowledge of its falsity, (5) the speaker’s intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter’s reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage. *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d at 166. In ruling on a summary judgment motion involving fraud in the inducement, the court must view the evidence presented through the prism of the substantive evidentiary burden. *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989).

Here, Appellants have neither met this substantive evidentiary burden for all of the elements, nor have they shown them by clear, cogent and convincing evidence. Appellants’ citations to the record do not demonstrate any of the elements of fraud. They cite their own

¹⁰ Appellants neither pled fraud as a defense or counterclaim, nor complied with the requirement of Civil Rule 9(b) that the circumstances constituting fraud be stated with particularity. CP 316-324, 329-335.

declarations, but their declarations show none of the elements. CP 256, 258, 263, 267-269, 271, 272. Otherwise, they cite their own answer and briefs, which are not evidence. CP 132, 133, 293, 318-324.

In *Adams v. Allen*, 56 Wn. App. at 393, an allegation of fraud was rejected on summary judgment when there was a failure to prove each element and to do so by clear, cogent and convincing evidence. Similarly, in *Elcon Const., Inc., v. Eastern Washington University*, 174 Wn.2d at 167, the trial court on summary judgment rejected a claim of fraud in the inducement as factually insufficient when the nine elements were not established by clear, cogent and convincing evidence. “As such, there are no genuine issues of material fact and summary judgment was appropriate.”

K. Findings and Conclusions are Not Required in a Decision on Summary Judgment

Appellants complain that the trial court did not explain the basis for its decision, made no findings or conclusions except that “[p]ursuant to Civil Rule 56(c), there is no genuine issue as to any material fact...[and] Plaintiff is entitled to judgment as a matter of law” and “this ‘broad brush’ conclusory approach does not meet the letter or spirit of Rule 56(h) nor the basic tenants of Summary Judgment standards.” AB 44-45. To the

contrary, Civil Rule 52(a)(5)(B) says findings of fact and conclusions of law “are not necessary...on decisions of motions under rule...56...,” and Civil Rule 56 (h) says the form of the order “shall designate the documents and other evidence called to the attention of the trial court,” which the Summary Judgment does in detail. CP 282-283.

L. Appellants Make Other Meritless Arguments

Appellant say they “asserted twenty five specific material facts that are in dispute, none of which were contested by Union Bank as being immaterial or not in dispute. (CP 286-289)” AB 2, 46. This is misleading. The first time Appellants “asserted twenty five specific material facts” was in their Motion for Reconsideration, which is what they cite at CP 286-289. Union Bank did not respond to these “twenty five specific material facts” raised for the first time in the Motion for Reconsideration because King County Local Rule 59(b) directed Union Bank not to respond to the Motion for Reconsideration unless requested by the trial court, which the court did not do.

Appellants repeatedly say that Union Bank appointed and paid the Receiver and the Receiver is “Union Bank’s Receiver.” AB 13, 14, 17, 30, 32, 34, 35, 38. This is wrong. The Receiver is “a person appointed by the court as the court’s agent, and subject to the court’s direction...”

RCW 7.60.005(10). Pursuant to the Receivership orders, the Receiver was paid from the rents generated by the Property. CP 440-441, 500-501. As Union Bank told Appellants in response to their Second Interrogatory No. 6, “Union Bank did not pay any amounts to Turnaround or Stover or the Receiver’s counsel.”

VIII. REQUEST FOR ATTORNEYS’ FEES

Union Bank requests its attorneys’ fees in connection with this appeal. The Note and each Guaranty includes an attorneys’ fee clause permitting Union Bank to recover all costs and fees of the enforcement of the Note and each Guaranty, and this includes costs and fees on appeal. CP 41, 45, 49, 59, 62, 64, 66. *Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290, *review denied*, 111 Wn.2d 1013 (1988).

IX. CONCLUSION

Union Bank respectfully asks this Court to affirm the trial court and uphold the Summary Judgment, and award attorneys' fees and costs to Union Bank.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

RIDDELL WILLIAMS P.S.

By 

Joseph E. Shickich, Jr., WSBA #8751
Attorneys for Respondent MUFG Union
Bank, N.A.

APPENDIX 1
Text Providing for Absolute and Unconditional Guaranty

Each Guaranty states:

CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment in satisfaction of the Indebtedness of the Borrower to Lender, and the performance and the discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so 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 any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order, on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

CONTINUING GUARANTY. THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LIABILITY UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INDEBTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME.

APPENDIX 2
Text Providing for Authorizations and Waivers

Each Guaranty states:

GUARANTOR'S AUTHORIZATION TO LENDER. Guarantor authorizes Lender, either before or after any revocation hereof, **without notice or demand and without lessening Guarantor's liability under this Guaranty, from time to time:** (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower, to lease equipment or other goods to Borrower, or otherwise to extend additional credit to Borrower; (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order or manner of sale thereof, including without limitation, any nonjudicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) to sell, transfer, assign or grant participations in all or any part of the Indebtedness, and (H) to assign or transfer this Guaranty in whole or in part.

* * *

GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender: (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower,

Lender, any surety, endorser, or other guarantor in connection with the Indebtedness or in connection with the creation of new or additional loans or obligations; (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to pursue any other remedy within Lender's power; or (F) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

* * *

Guarantor also waives any and all rights or defenses arising by reason of: (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of

setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

Appendix 3
Text Providing for the Definition of
“Indebtedness”

Each Guaranty defines “Indebtedness” to mean:

The word “Indebtedness” as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys’ fees, arising from any and all debts, liabilities or 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 Lender. “Indebtedness” includes, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations, whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

APPENDIX 4
Text of Notice of Final Agreement

NOTICE OF FINAL AGREEMENT

Borrower:

Lender:

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

By signing this document each Party acknowledges receipt of the above notice. In addition (and not as a limitation on the legal effect of the notice), by signing this document each Party represents and agrees that: (a) The written Loan Agreement represents the final agreement between the Parties, (b) There are no unwritten oral agreements between the Parties, and (c) The written Loan Agreement may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the Parties.

As used in this Notice the following terms have the following meanings:

Loan. The term "Loan" means the following described loan:

Loan Agreement. The term "Loan Agreement" means one or more promises, promissory notes, agreements, understanding, security agreements, deeds of trust, or other documents, or comments, or any combination of those actions or documents, relating to the Loan, including without limitation the following:

LOAN DOCUMENTS

Parties. The term "Parties" means Frontier Bank and any and all entities or individuals who are obligated to repay the loan or have pledged property as security for the Loan, including without limitation the following:

Borrower:

Guarantor:

Each Party who signs below, other than Frontier Bank, acknowledges, represents, and warrants to Frontier Bank that it has received, read, and understood this Notice of Final Agreement. This Notice is dated _____.

APPENDIX 5

Notices of Washington Credit Agreement Statute of Frauds

Thirteen times between the loan commitment letter in February 2005 and the commencement of the Receivership in December 2010, Frontier Bank and Union Bank prominently notified Appellants of the Washington Credit Agreement Statute of Frauds:

CP	Bembry Decl. Exhibit	Date of Notice	Randy Previs	Katie Previs	John Blanchard
122-123	H	May 27, 2005	X	X	X
124-125	I	June 5, 2007	X	X	X
126-128	J	January 28, 2008	X	X	X
128-129	K	December 5, 2008	X	X	X
403-406	L	February 10, 2005	X	X	X
407-408	M	September 24, 2008			X
409-410	N	July 22, 2010	X		X
411-412	O	July 22, 2010	X	X	
413-414	P	July 22, 2010			X
415-417	Q	December 8, 2010	X		X
418-420	R	December 9, 2010	X		X
421-423	S	December 16, 2010	X		X
424-426	T	December 16, 2010	X		X

Each Appellant signed each of Exhibits H through L twice: once as a member of Borrower and once, individually, as a Guarantor, and every time agreed that “[e]ach Party who signs below, other than Frontier Bank, acknowledges, represents, and warrants to Frontier Bank that it has received, read and understood this Notice of Final Agreement.”

APPENDIX 6
Issues Related to Assignment of Error Sorted by Categories

Issues Related to Assignments of Error	CP	Unwrittten Oral Agreement	Acts of Receiver	Sale of Property	Fraud, Deceit	Bad Faith	D'Oench Doctrine	No Finding of Fact
Fraudulent Inducement—Loans	3, 21-22	x			x			
Fraudulent Inducement—Loan Payments	4, 22-23	x			x	x		
Nonpayment of Contactors	4, 23-25	x			x	x		
Rejecting Joint Venture Funding	4-5, 25-27	x			x	x		
Impairment of Collateral	5, 27-28		x			x		
Rejection of Purchase Offers	5, 28-30	x		x		x		
Sale at Unreasonably Low Price	6, 30-32		x	x				
Misrepresentation	6, 32		x			x		
Favoritism; Reject. of Higher Bid	6, 32-34		x	x		x		
Discrimination	7, 35-36		x	x	x	x		
Bad Faith Property Admin.; Exclusion of Appellants	7, 37-39		x	x	x	x		
Other Bad Conduct	7				x	x		x
Failure to Evaluate	8							x
FDIC Approval	8						x	
Erroneous Application of Law	8						x	

CERTIFICATE OF SERVICE

I, Cynthia Concannon, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent MUFG Union Bank, N.A., in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On July 20, 2015, I served a true and correct copy of the foregoing document on the following persons for Appellant, via email and hand-delivery as follows:

Randy and Katie Previs, *Pro Se*
22819 Woodway Park Road
Woodway, Washington 98020
(425) 774-0188
katieprevis@comcast.net

John T. Blanchard, WSBA No. 5049
Attorney for John T. Blanchard
340 N. 133rd Street
Seattle, Washington 98101
John@JTBAvocate.com

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

SIGNED at Seattle, Washington, this 20th day of July, 2015.


Cynthia Concannon

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