

COURT OF APPEALS  
DIVISION II

11 SEP 14 PM 3:35

No. 41421-0-II

STATE OF WASHINGTON  
BY JW  
DEPUTY

---

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION TWO

---

RACEWAY PARK, INC., a Washington corporation; and  
T & S PROPERTIES, LLC, a Washington limited liability company,

Appellants,

and

CORLISS SUNRISE APARTMENTS, LLC,  
a Washington limited liability company,

Plaintiff,

v.

MERIDIAN SUNRISE VILLAGE, LLC,  
a Washington limited liability company, ECT MERIDIAN  
PARTNERS, LLC, a Washington limited liability company;  
JUNCTION 192 LLC, a Washington limited liability company; ECT  
BONNEY LAKE PARTNERS LLC, a Washington limited liability  
company; INVESTCO FINANCIAL CORPORATION, a Washington  
corporation, MICHAEL J. CORLISS; and MARTIN D. WAISS,

Defendants,

---

MERIDIAN SUNRISE VILLAGE, LLC,  
a Washington limited liability company, ECT MERIDIAN  
PARTNERS, LLC, a Washington limited liability company;  
JUNCTION 192 LLC, a Washington limited liability company; ECT  
BONNEY LAKE PARTNERS LLC, a Washington limited liability  
company; INVESTCO FINANCIAL CORPORATION,  
a Washington corporation, and MARTIN D. WAISS,

Defendants/Counter Plaintiffs,

**ORIGINAL**

v.

RACEWAY PARK, INC., a Washington corporation; and  
T & S PROPERTIES, LLC, a Washington limited liability company,

Appellants,

and

CORLISS SUNRISE APARTMENTS, LLC,  
a Washington limited liability company,

Plaintiff.

---

EVERGREEN CAPITAL TRUST,  
a Washington grantor trust,

Respondent,

v.

T & S PROPERTIES, LLC, a Washington limited liability company,  
and RACEWAY PARK, INC., a Washington corporation,

Appellants.

---

---

RESPONDENT'S BRIEF

---

---

Christopher I. Brain (WSBA #5054)  
Mary B. Reiten (WSBA #33623)  
TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

Attorneys for Plaintiff/Respondent,  
Evergreen Capital Trust

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	3
III.	STATEMENT OF THE CASE.....	4
	A. The Genesis of Meridian Sunrise and Junction 192, the Project LLCs .....	4
	B. ECT Guranteed More Than \$100 Million in Loans to the Project LLCs, Enabling the Projects to Go Forward. ....	6
	C. As the Primary Guarantor, ECT Bargained for and Received the Veto Power.....	7
	D. The Dispute Over the Veto Power .....	9
	E. Procedural History .....	12
IV.	SUMMARY OF ARGUMENT .....	14
V.	ARGUMENT .....	15
	A. The Trial Court Correctly Ruled That a Primary Guarantor Must Only Be a “Person,” Not a “Member.” .....	15
	1. The Operating Agreements Are Not Ambiguous. ....	16
	2. Even if the Operating Agreements Were Ambiguous, They Should not be Construed Against ECT, Because it is not the Drafter.....	19
	3. T&S and Raceway’s Other Arguments Also Fail.....	21
	B. ECT had Standing to Assert its Rights as a Primary Guarantor. ....	22
	C. The Trial Court Did Not Err in Deciding ECT’s Motion for Declaratory Relief on the Merits, Because a Justiciable Controversy Existed.....	27
VI.	CONCLUSION.....	30

## TABLE OF AUTHORITIES

### Cases

<i>Boise Cascade Corp. v. Pence</i> , 64 Wn.2d 798, 394 P.2d 359 (1964).....	23
<i>Burke &amp; Thomas, Inc., v. Int'l Org. of Masters</i> , 92 Wn.2d 762, 600 P.2d 1282 (1979).....	23
<i>Dice v. Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	16
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973).....	28
<i>Drumheller v. Bird</i> , 170 Wash. 14, 15 P.2d 260 (1932) .....	19
<i>Foote v. Viking Ins. Co. of Wis.</i> , 57 Wn. App. 831, 790 P.2d 659 (1990).....	26
<i>Grandmaster Sheng-Yen Lu v. King Cnty.</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	28
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983).....	23
<i>Minton v. Ralston Purina Co.</i> , 146 Wn.2d 385, 47 P.3d 556 (2002).....	20
<i>Nollette v. Christianson</i> , 115 Wn.2d 594, 800 P.2d 359 (1990).....	27
<i>One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.</i> , 108 Wn. App. 330, 30 P.3d 504 (2001), <i>aff'd in part, rev'd in part on other grounds</i> , 148 Wn.2d 319, 61 P.3d 1094 (2002).....	20
<i>Osborn v. Grant Cnty. By and Through Grant Cnty. Comm'rs</i> , 130 Wn.2d 615, 926 P.2d 911 (1996).....	29
<i>Roberts, Jackson &amp; Assocs. v. Pier 66 Corp.</i> , 41 Wn. App. 64, 702 P.2d 137 (1985).....	19

<i>Sackman Orchards v. Mountain View Orchards</i> , 56 Wn. App. 705, 784 P.2d 1308 (1990).....	18
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985).....	18, 25
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	28
<i>Vikingstad v. Baggott</i> , 46 Wn.2d 494, 282 P.2d 824 (1955).....	23
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	18
<i>Wash. Fed'n of State Emps. v. State</i> , 107 Wn. App. 241, 26 P.3d 1003 (2001).....	27, 28
<i>Wash. Local Lodge No. 104 of Int'l Bhd. of Boilermakers, Iron Ship Builders and Helpers of Am. v. Int'l Bhd. of Boilermakers, Iron Ship Builders and Helpers of Am.</i> , 28 Wn.2d 536, 183 P.2d 504 (1947).....	25, 26
<i>Wick v. Western Union Life Ins. Co.</i> , 104 Wash. 129, 175 P. 953 (1918) .....	18
<i>Wm. Dickson Co. v. Pierce Cnty.</i> , 128 Wn. App. 488, 116 P.3d 409 (2005).....	16
<b>Statutes</b>	
RCW 7.24 .....	4
RCW 7.24.020 .....	27
RCW 7.24.030 .....	30
<b>Other Authorities</b>	
Karl B. Tegland, 15 Washington Practice, Civil Procedure § 42:1 (2d ed. 2009).....	27, 29
Restatement (Contracts) § 236.....	25

## I. INTRODUCTION

Appellants T&S Properties, LLC (“T&S”) and Raceway Park, Inc., (“Raceway”) appeal the trial court’s summary judgment order granting declaratory relief to Respondent Evergreen Capital Trust (“ECT”). Their appeal hinges on the interpretation of a single, unambiguous contract provision that the trial court interpreted correctly, and it should be denied.

This matter arises from two commercial retail real estate projects (the “Projects”) developed by Meridian Sunrise Village, LLC (“Meridian Sunrise”) and Junction 192, LLC (“Junction 192”) (collectively, the “Project LLCs”). T&S and Raceway are members of the Project LLCs. ECT is not a member, rather it holds a membership interest in two LLCs that are members of the Project LLCs.

To obtain loans for the Projects, the financing banks required each Project LLC to obtain an unlimited guaranty. The only entity with the financial strength to support the loan guarantees was ECT, which became the sole guarantor of more than \$100 million in loans to the Project LLCs. In exchange, the Project LLCs’ members, including Raceway and T&S, granted specific rights to ECT in the Project LLCs’ Operating Agreements (the “OAs”). Specifically, the OAs vest a “Primary Guarantor,” such as

ECT, with veto power over decisions made by the members (the “Veto Power”). The provision defining “Primary Guarantor” reads:

Primary Guarantor means any Person that is providing a guaranty to any lender in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company and greater than such Member’s percentage interest in the Company;

ECT specifically bargained for this Veto Power and the Project LLC members, including Raceway and T&S, agreed to it. Indeed, ECT would not have guaranteed the Project LLCs’ debt but for the Veto Power.

T&S and Raceway argue, contrary to the plain language of the OAs, that a Primary Guarantor must be an LLC member. (They do not dispute that ECT otherwise meets the definition of a Primary Guarantor, or of a Person.) ECT’s position, which the trial court agreed with and which accords with the plain language of the OAs, is that a Primary Guarantor need not be an LLC member but may be “any Person.” Further, a “Member” may also be a Primary Guarantor, but only if the guaranty it provides is greater than that member’s percentage interest in the company. The latter requirement could have been drafted more clearly, but that lack of clarity does not affect the question at issue here, which is whether a Primary Guarantor must be a Member in addition to being a Person. If the

drafters had intended that only a Member could be a Primary Guarantor, the provision could easily have begun by stating: “Primary Guarantor means any Member,” instead of “any Person,” but it does not. The interpretation advanced by T&S and Raceway is strained and unreasonable, rendering the phrase “any Person” inexplicable and meaningless. Because ECT’s is the only reasonable interpretation, the trial court’s summary judgment order should be upheld.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in ruling on summary judgment that a Primary Guarantor is not required to be a Member in addition to being a Person, where the Operating Agreements are susceptible to only one reasonable interpretation on that question?

2. Did the trial court err by implicitly ruling that ECT had standing to seek a declaratory judgment as to the rights granted to it under the Operating Agreements, where ECT alleged that the Operating Agreements vested it with certain rights, making it a third-party beneficiary of those agreements?

3. Did the trial court err by granting ECT declaratory relief pursuant to RCW 7.24, the Declaratory Judgment Act, where a justiciable controversy existed?<sup>1</sup>

### **III. STATEMENT OF THE CASE**

#### **A. The Genesis of Meridian Sunrise and Junction 192, the Project LLCs**

In 2004, T&S and Raceway owned interests in real property in Puyallup, Washington (now Meridian Sunrise) and in Bonney Lake, Washington (now Junction 192). T&S and Raceway could not develop the Puyallup property due to disagreements with their then-current partners, and T&S had begun, but not completed, development of the Bonney Lake property. CP 319.

The Scott Corliss family owns and controls T&S and Raceway. Scott Corliss's second cousin is Michael J. Corliss, the sole beneficiary and one of the trustees of ECT. CP 319. ECT is the sole shareholder of Investco Financial Corporation ("Investco"), a property development and management company. Scott Corliss requested that Investco aid and advise his companies on the Projects. CP 319-20; CP 333.

---

<sup>1</sup> This issue was not certified for discretionary review by this Court. Because T&S and Raceway briefed it as though it had been certified for review, however, ECT will address it.

Investco, T&S and Raceway decided to create the Project LLCs to own, develop, construct, and manage the Projects. CP 320; CP 333. Investco is the manager of both Project LLCs, and ECT participated in ownership of the Project LLCs through two entities created for that purpose: ECT Bonney Lake, a member of Junction 192, and ECT Meridian, a member of Meridian Sunrise. CP 64; CP 109; CP 320; CP 333-34. ECT Bonney Lake and T&S, along with Tarragon Construction L.L.C. and Tarragon L.L.C.,<sup>2</sup> formed Junction 192 to develop the Junction 192 Project. CP 320.<sup>3</sup> ECT Bonney Lake and T&S each own 49 percent of Junction 192, and the Tarragon entities each own one percent. *Id.* ECT Meridian, T&S, Raceway, and the Tarragon entities formed Meridian Sunrise to develop the Meridian Sunrise Project. CP 320.<sup>4</sup> ECT Meridian owns 49 percent; T&S and Raceway together own 49 percent; and the Tarragon entities each own one percent of Meridian Sunrise. *Id.*

Each Project LLC has a limited liability company agreement setting forth the members' and manager's rights and duties (the OAs). CP 59-102; CP 103-216; CP 320-21.

---

<sup>2</sup> The Tarragon entities are commercial developers.

<sup>3</sup> Junction 192 was originally named Bonney Lake Town Center L.L.C.

<sup>4</sup> Meridian Sunrise was originally named New Meridian L.L.C.

**B. ECT Guranteed More Than \$100 Million in Loans to the Project LLCs, Enabling the Projects to Go Forward.**

Neither Project could have gone forward without the experience, management, construction capability, performance history, and financial capacity of ECT and Investco. CP 321; CP 334. In particular, ECT guaranteed more than \$100 million of Project-related loans. CP 322.

For the Junction 192 Project, ECT guaranteed a \$20 million construction loan from Union Bank (the “Union Bank Loan”). Union Bank would not have loaned the funds to Junction 192 to develop the Junction 192 Project if Investco was not the manager and ECT the guarantor of the Union Bank Loan. CP 321.

For the Meridan Sunrise Project, ECT guaranteed four separate loans from US Bank. First, Meridian Sunrise borrowed \$18.3 million to acquire the land for the project (the “Land Acquisition Loan”). CP 323. Later, US Bank funded three additional loans: a Land Development Loan in the amount of \$41.25 million, which in part funded the unpaid balance of the earlier Land Acquisition Loan and the balance of which was later converted to a separate loan secured by the land parcel (the “Converted Loan”); a Vertical Construction Loan in the amount of \$75 million; and a \$1.68 million loan for acquisition of an additional parcel (the “Valley

Bank Loan”). CP 323-24. US Bank has testified that the facts that Investco was the manager and ECT the guarantor of the US Bank Loans were “important considerations” in US Bank’s decision to loan funds to Meridian Sunrise. *See generally* CP 326-28; CP 321.

**C. As the Primary Guarantor, ECT Bargained for and Received the Veto Power.**

In exchange for its guarantees, ECT entered a Guaranty Fee and Indemnity Agreement for Loans and Bonds (the “Guaranty Agreements”), for each project. CP 218-24; CP 226-234; CP 332-34. In addition, the OAs vested a “Primary Guarantor” such as ECT with special voting rights. As previously stated, “Primary Guarantor” is defined as follows:

Primary Guarantor means any Person that is providing a guaranty to any lender in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company and greater than such Member’s percentage interest in the Company;

CP 332-34; CP 66; CP 111. “Person” is defined as “any individual or Entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of such Person where the context so permits.” CP 66; CP 111. “Entity” means: “[A]ny general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative or association or any other organization that is

not a natural person.” CP 63; CP 108. And finally, “Member” or “Members” means each “Person who executes a counterpart of this Agreement as a Member and each Person who may thereafter become a Member.” CP 64; CP 109. Accordingly, a Primary Guarantor may be a Person, a Member, or both, but nothing in the OAs requires that a Primary Guarantor be both. CP 66; CP 111.

The OAs vest a Primary Guarantor with “Veto Power” over decisions of the LLC members:

**6.10.3 VETO POWER OF PRIMARY GUARANTOR.**  
NOTWITHSTANDING ANYTHING TO THE CONTRARY OTHERWISE CONTAINED IN THIS OPERATING AGREEMENT, THE MEMBERS ACKNOWLEDGE AND AGREE THAT SO LONG AS THERE IS A PRIMARY GUARANTOR, THE ACTIONS AND DECISIONS IDENTIFIED HEREIN WHICH REQUIRE THE APPROVAL OF THE MEMBERS CONSTITUTING A MAJORITY INTEREST SHALL BE PRESENTED TO A VOTE BY ALL MEMBERS IN ACCORDANCE WITH THIS AGREEMENT BUT THE PRIMARY GUARANTOR SHALL HAVE THE RIGHT TO VETO THE TAKING OF ANY ACTION OR DECISION WHICH WAS OTHERWISE APPROVED OR DISAPPROVED BY THE MEMBERS.

CP 71; CP 116 (capitalization in original).

**D. The Dispute Over the Veto Power**

ECT exercised the Veto Power for the first time in September 2009, when the Union Bank Loan to Junction 192 was due to mature. At the time, it was not possible to obtain permanent or alternate financing

within the necessary time frame or upon reasonable terms.<sup>5</sup> Union Bank agreed to a two-year extension of the loan, but T&S would not consent to it. CP 323. Without T&S's approval, the loan extension could not be completed and was, as a practical matter, rejected.

Union Bank issued a notice of loan default on September 9, 2009. CP 334-45. To cure the loan default, ECT, as the Primary Guarantor, exercised its Veto Power and approved the loan extension on behalf of Junction 192. CP 334-35. Once the Veto Power was exercised, Investco, Junction 192's manager, was authorized to execute all documents required to implement the extension. *Id.* As a result, the Union Bank Loan was extended for two years. *Id.*

In late 2009, Raceway and T&S filed an action challenging the validity of the Veto Power provisions (Case No. 10-2-06523-2, the "Raceway Action"). They framed their challenge as a claim for declaratory relief against Michael Corliss, Meridian Sunrise, ECT Meridian, Junction 192, ECT Bonney Lake, Investco, and Martin Waiss (the President of Investco, a co-trustee of ECT, and owner of a minority

---

<sup>5</sup> In their brief, T&S and Raceway make a number of allegations about Investco's motivations and alleged breaches of fiduciary duty. Appellants' Brief at 6-8. ECT denies these allegations, and they are irrelevant here. The issue at hand is only whether ECT is a Primary Guarantor and thus entitled to exercise the Veto Power.

position in ECT Meridian and ECT Bonney Lake) (collectively, the “Raceway Action Defendants”).<sup>6</sup> CP 1-16. Among other things, Raceway and T&S sought a declaratory judgment that the Veto Power provisions are “void and unusable.” CP 11. At the time, however, they did not allege that ECT was not a “Primary Guarantor” because it was not a Member. Much to the contrary, they conceded that ECT fit the definition of a “Primary Guarantor.” CP 11 (“[T]he only entity fitting [the definition of a ‘Primary Guarantor’ is Evergreen Capital Trust . . . .”). Their objection to the Veto Power was primarily that its use would be a breach of fiduciary duties of the Raceway Action Defendants.

Because ECT was not a party to the Raceway Action, but had a significant right and interest in the enforceability of the Veto Power provisions, it commenced an action against T&S and Raceway on March 31, 2010 (Case No. 10-2-07936-5). CP 511-519. ECT sought a declaration that the Veto Power provisions are valid and subsisting provisions, and are in full force and effect. CP 518-19. The two cases were consolidated by order dated June 29, 2010. CP 52-54.

---

<sup>6</sup> T&S and Raceway later voluntarily dismissed their claims against Michael Corliss.

Meanwhile, as to Meridian Sunrise, the Vertical Construction Loan and Converted Loan matured in January 2010 and were extended to April 4, 2010, and the Valley Bank Loan matured May 15, 2010. CP 324. Extending the loans was of critical important not only to Meridian Sunrise, but also to ECT. Without an extension, Meridian Sunrise would be in default and the loans would be a substantial economic risk to ECT as the guarantor. CP 335. US Bank agreed to a three-year extension of all of the loans, but only on the condition that the balances be reduced in order to reduce the loan-to-value ratio of the loans. *Id.*

The extension was scheduled to close on June 25, 2010, and it almost failed to go through. *Id.* On June 24, T&S and Raceway informed US Bank and ECT that they would not execute the authorizing resolution required for closing the loan extensions because they were concerned about waiving rights in this litigation. CP 338-39. As a result of Raceway and T&S's refusal to authorize the extensions, counsel for ECT requested that US Bank consent to ECT's use of the Veto Power to execute the authorizing resolution. US Bank refused and indicated it would not recognize the Veto Power for the US Bank Loan extensions because of the challenge to the Veto Power raised by T&S and Raceway here. CP 316-

17; CP 339; CP 335. The closing occurred at the eleventh hour after the parties executed a reservation of rights agreement. CP 317; CP 339.

**E. Procedural History**

ECT moved for partial summary judgment, seeking a declaration that the Veto Power provisions are valid and subsisting provisions, and are in full force and effect. CP 300. In response, T&S and Raceway argued, among other things, that the “Primary Guarantor” definition is ambiguous. Notably, however, no representative of T&S or Raceway testified that he or she had ever had the understanding that a Primary Guarantor had to be a Member.<sup>7</sup>

The trial court granted ECT’s motion, ruling on October 8, 2010, that: (1) a Primary Guarantor did not need to be a Member in addition to being a Person; (2) that because no dispute existed that ECT was a “Person . . . providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligations(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company,” ECT is a Primary

---

<sup>7</sup> Scott Corliss addressed his understanding of the Veto Power provision in a declaration, testifying that his understanding was that it would only allow the Primary Guarantor to prevent the Project LLCs from taking actions, but he did not testify about his understanding of the Primary Guarantor definition. CP 393.

Guarantor; and (3) that ECT is entitled to exercise the Veto Power. CP 491-92.

Raceway and T&S filed a notice of appeal of the trial court's order. CP 494-96. The Court of Appeals, ruling that the trial court's order was not a final declaratory judgment because it did not resolve all issues in the case, converted the notice of appeal to a notice of discretionary review. Appendix to Appellants' Brief, A-12. The Commissioner of this Court granted discretionary review, concluding that the trial court committed probable error when it entered the order for partial summary judgment, on the grounds that the OAs are ambiguous as to whether a Primary Guarantor had to be a Member or simply a Person. *Id.*, A-24. Notably, the Commissioner's decision contains a misunderstanding: that "the respective Operating Agreements for both specific Project LLCs . . . were written by Michael [Corliss]." *Id.*, A-15. In reality, the OAs were drafted by Investco, the manager of both Project LLCs. CP 392. Neither Michael Corliss nor ECT (which has no employees) participated in the drafting process. CP 319-20.

#### IV. SUMMARY OF ARGUMENT

Under the OAs, a Primary Guarantor is “any Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company.” If the Person in question is also a Member, it must meet an additional requirement: the amount it is guaranteeing must be “greater than such Member’s percentage interest in the Company.”

The trial court agreed with ECT’s interpretation of this provision, ruling on summary judgment that (1) a Primary Guarantor did not need to be a Member; (2) that because no dispute existed that ECT was a Person providing a “guaranty to any lender or other party in connection with Company recourse debt(s) or obligations(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company,” ECT is a Primary Guarantor; and (3) that ECT is therefore entitled to exercise the Veto Power. CP 491-92.

On appeal, T&S and Raceway do not dispute that ECT would qualify as a Primary Guarantor if it were a Member based on the guarantees it has provided. They argue simply that under the OAs, a

Primary Guarantor must be a Member as well as a Person. Then they essentially make the same argument in a different form, asserting that ECT lacked standing to seek relief.

The trial court's summary judgment order should be upheld, because the only reasonable interpretation of the OAs is ECT's. In addition, the trial court correctly allowed ECT to seek a declaration as to its rights under the OAs because if it is a Primary Guarantor, it is a third-party beneficiary of the OAs. Finally, declaratory relief was proper because a justiciable controversy exists: ECT claims that it is entitled to exercise the Veto Power, and T&S and Raceway deny that right.

## V. ARGUMENT

### A. **The Trial Court Correctly Ruled That a Primary Guarantor Must Only Be a "Person," Not a "Member."**

The trial court held that any "Person" could be a "Primary Guarantor," and, accordingly, that a Primary Guarantor need not be a "Member," as the OAs define those terms. CP 491. T&S and Raceway challenge this holding, arguing that the OAs compel the conclusion that a Primary Guarantor must be a Member or are at least ambiguous. They are wrong: their suggested interpretation flies in the face of the plain language of the OAs, which unambiguously provide that "any Person" can

be a Primary Guarantor. Because the OAs unambiguously provide that “any Person” can be a Primary Guarantor, the trial court’s summary judgment ruling was correct and should be upheld.

1. The Operating Agreements Are Not Ambiguous.

Contract interpretation is a question of law and a proper subject for summary judgment if the contract is unambiguous. *Dice v. Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006) (holding that the trial court properly granted summary judgment where contract was not ambiguous). A contract is not ambiguous just because the parties suggest opposing meanings. *Id.* Rather, a contract is ambiguous only if its terms are subject to more than one reasonable meaning. *Id.*; *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn. App. 488, 494, 116 P.3d 409 (2005) (“An ambiguous provision is one fairly susceptible to two different, reasonable interpretations.”).

Here, the OAs are not ambiguous and have only one reasonable meaning: that a Primary Guarantor can be any Person, not necessarily a Member. Again, the key provision reads:

Primary Guarantor means any Person that is providing a guaranty to any lender in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company and

greater than such Member's percentage interest in the Company;

CP 66; CP 111. "Person," as defined by the OAs, is not limited to Members, but is "any individual or Entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of such Person where the context so permits." CP 66; CP 111.

Under this provision, it is also possible for a Member to be a Primary Guarantor, but only if it is providing a guaranty greater than its percentage interest in the company. This requirement makes sense, because otherwise the Member would be guaranteeing no more than its ownership interest in the company. Moreover, a Member that did not meet this requirement—because it had a membership interest greater than 50 percent—would have a de facto "veto power" by virtue of its majority interest, rendering its status as "Primary Guarantor" irrelevant.

This requirement could have been drafted more clearly—for instance, by concluding "and, if the Person is a Member, greater than such Member's percentage interest in the Company"—but that lack of clarity does not make the question of whether a Primary Guarantor must be a Member or merely a Person ambiguous. Mistakes in grammar, spelling or punctuation should not be permitted to alter the intent of the parties. *See*

*Sackman Orchards v. Mountain View Orchards*, 56 Wn. App. 705, 706-07, 784 P.2d 1308 (1990) (where the omission of a semicolon gave a contract two possible interpretations which “allowed creative lawyers to obscure the clear intentions of the parties,” the court inserted a semicolon to clarify the contract); *Wick v. Western Union Life Ins. Co.*, 104 Wash. 129, 134, 175 P. 953, 954 (1918) (“A clumsy arrangement of words, even coupled with the ‘comma fault,’ will not be allowed to contravene a reasonable interpretation according to the intention of the parties at the time of using them.”).

T&S and Raceway ask the Court to ignore the phrase “any Person” altogether. Such an interpretation is disfavored. “An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.” *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)). ECT’s interpretation is the only one that does not render the phrase “any Person” meaningless and inexplicable. If the drafters had intended that only a Member could be a Primary Guarantor, the provision would have begun by stating: “Primary Guarantor means any Member,” but it does not.

Raceway and T&S are sophisticated business entities that had been working with ECT and Investco on the Projects for four years by the time ECT moved for summary judgment. Raceway and T&S knew and understood that ECT was the Primary Guarantor and could exercise the Veto Power, and the OAs are not ambiguous on that point.

2. Even if the Operating Agreements Were Ambiguous, They Should not be Construed Against ECT, Because it is not the Drafter.

T&S and Raceway argue that to the extent the OAs are ambiguous, which they are not, they “must be construed against ECT because the Michael Corliss entities drafted it.” Appellants’ Brief at 18.<sup>8</sup> First, this rule of construction is not applicable because the OAs are not ambiguous. *See Roberts, Jackson & Assocs. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (holding that if the intent of parties can be determined, there is no need to resort to the rule that ambiguity be resolved against drafter). It is doubly inapplicable because ECT did not draft the OAs. Instead, Investco, which is the manager of both Project LLCs, was the drafter. *See Drumheller v. Bird*, 170 Wash. 14, 23, 15 P.2d 260 (1932)

---

<sup>8</sup> Indeed, this was apparently part of the basis for the Commissioner’s decision to allow discretionary review (see Appendix to Appellants’ Brief at A-15), but it is incorrect. The Commissioner believed Michael Corliss had drafted the OAs, but they were drafted by Investco.

(holding that where contract was drawn by attorney acting for both parties, the rule requiring construction against the drafter was inapplicable).

ECT is the sole shareholder of Investco, but they are distinct entities. (Michael Corliss is the trustee and sole beneficiary of ECT.) Neither of the cases cited by T&S and Raceway involves construing an agreement against an entity because it was drafted by a related entity, and ECT has not been able to discover any. Generally, separate corporate identities may be disregarded only when the separate identity of one has been lost to the other, with evidence that the funds and property interests of the corporations are commingled, the entities have failed to observe corporate formalities, or that one is undercapitalized. *See One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 350-51, 30 P.3d 504 (2001), *aff'd in part, rev'd in part on other grounds*, 148 Wn.2d 319, 61 P.3d 1094 (2002). The mere fact that corporations share officers, employees, a physical location, or common ownership of stock is insufficient to justify disregarding the separate corporate identities. *Id.* at 351; *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 399, 47 P.3d 556 (2002). Further, the party attempting to prove that the corporate identity should be disregarded must show that the corporation intended to work a fraud. *Minton*, 146 Wn.2d at 398. No

evidence exists here that Investco and ECT failed to maintain separate identities or of fraud. To the contrary, Raceway and T&S explicitly acknowledged in the OA that ECT is the owner of Investco. CP 63; CP 108.

3. T&S and Raceway's Other Arguments Also Fail.

T&S and Raceway suggest that if a Primary Guarantor could be any Person that it could lead to absurd results, but they overlook that similarly absurd results could ensue even if a Primary Guarantor were required to be a Member. T&S and Raceway propose a scenario in which the company has a value of \$50 million and outstanding liabilities of \$10 million, and ECT guaranteed \$6 million, thereby gaining the status of a Primary Guarantor. Appellants' Brief at 18. They suggest that it would be absurd for ECT to have a Veto Power in that case. Perhaps; but a similar scenario could arise under T&S and Raceway's proposed interpretation. That is, a member with a one percent interest, such as Tarragon L.L.C., could guarantee the \$6 million and thereby gain a disproportionate amount of control over the company. In reality, neither of these scenarios would ever arise because the other members would presumably not agree to accept the guaranty in those cases.

T&S and Raceway also imply that because ECT entered Guaranty Agreements with the LLCs and received fees in connection with its guarantees, it cannot be a Primary Guarantor. Appellants' Brief at 17. Similarly, T&S and Raceway maintain that ECT is "contractually estopped" from asserting rights under the Operating Agreement because of the existence of the Guaranty Agreements. Brief at 22. ECT was unable to discover any Washington cases recognizing a concept of "contractual estoppel." And, as explained above, it is unclear whether the Project LLCs could have conferred the Veto Power on ECT via the Guaranty Agreements instead of the OAs, given the requirements of the Washington LLC Act.

**B. ECT had Standing to Assert its Rights as a Primary Guarantor.**

T&S and Raceway maintain that ECT lacked standing to seek a declaratory judgment because it is not a party to the OAs. But as the trial court recognized, if ECT was the Primary Guarantor it was a third-party beneficiary of the OAs, and therefore had standing to seek a declaration of its rights under the OA. Accordingly, the trial court stated: "the issue of whether ECT has standing or not I think is inextricably intertwined with whether or not they're the primary guarantor, because if they are the

primary guarantor it seems to me they have standing to address this issue.”

RP 35-36.

Generally, a non-party to a contract cannot sue to enforce the contract, but an exception exists when the non-party is a third-party beneficiary of the contract. A third-party beneficiary exists when the parties intended to “assume a direct obligation to the intended beneficiary at the time they enter into the contract.” *See Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360-361, 662 P.2d 385 (1983) (citing *Burke & Thomas, Inc., v. Int’l Org. of Masters*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979)). Washington courts hold that the contracting parties had the requisite intent when the “terms of the contract necessarily require the promisor to confer a benefit upon a third person.” *Id.* (citing *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955)) (italics omitted). This is an objective test: courts do not inquire into the motive or desires of contracting parties, but instead, look at intent to confer a benefit upon a third party. *Id.* It is not essential that the third-party beneficiary be identified when the contract is made, just that the requisite intent exists. *See Boise Cascade Corp. v. Pence*, 64 Wn.2d 798, 803, 394 P.2d 359 (1964).

Here, the LLC members’ intent to assume a direct obligation to the Primary Guarantor is evident. The OAs define “Primary Guarantor” as

“any Person” providing the requisite guaranty and then vest that Primary Guarantor with a Veto Power. In all-capital letters for emphasis, Article 6.10.3 states: “Notwithstanding anything to the contrary otherwise contained in this Operating Agreement, the members acknowledge and agree that so long as there is a Primary Guarantor . . . the Primary Guarantor shall have the right to veto the taking of any action of decision which was otherwise approved or disapproved by the members.” CP 321-22; CP 71; CP 116. The OAs clearly evince the LLC members’ intent to assume a direct obligation to the Primary Guarantor, and ECT meets the definition of Primary Guarantor. As a third-party beneficiary of the OAs, ECT had standing to seek a declaration of its rights under the OAs.

The existence of Article 17.10 does not change this conclusion. Found under the heading “Miscellaneous,” Article 17.10 provides in pertinent part:

The provisions of this Agreement (including, but not limited to any provisions that make reference to any lender or other third party or that could benefit any lender or other third party) are intended for the exclusive benefit of the parties hereto, and no other person (including, but not limited to, the creditors of the Company or of any Member) shall have any right or claim against any party by reason of any provision of this Agreement or be entitled to enforce any provision of this Agreement against any party.

CP 94-95; CP 139-40. When read in context, Article 17.10 is meant to prevent the creation of unintended third-party beneficiaries, not to prevent the enforcement of the terms of the operating agreements. Interpreting Article 17.10 to prohibit a Primary Guarantor from enforcing the Veto Power would render that right illusory and the language superfluous, contrary to the rules that govern the interpretation of contracts. *Seattle-First Nat'l Bank*, 42 Wn. App. at 274.

Where an inconsistency exists in a contract between general terms and specific terms, the specific terms will be interpreted to qualify the meaning of the general terms. *Wash. Local Lodge No. 104 of Int'l Bhd. of Boilermakers, Iron Ship Builders and Helpers of Am. v. Int'l Bhd. of Boilermakers, Iron Ship Builders and Helpers of Am.*, 28 Wn.2d 536, 541, 183 P.2d 504 (1947) (quoting Restatement (Contracts) § 236). For example, in *Wash. Local Lodge No. 104*, the appellate court was faced with a conflict between general terms giving the “International President” power to supervise subordinate lodges, and specific terms giving subordinate lodges the power to prevent funds from being withdrawn without the consent of members. The appellate court held that the specific term allowing the subordinate lodge to prevent withdrawal of funds

supplemented the general power of the International President to govern the subordinate lodges. *Id.* at 514-42.

Likewise, in *Foote v. Viking Ins. Co. of Wis.*, 57 Wn. App. 831, 790 P.2d 659 (1990), the appellate court was faced with a similar dilemma. In *Foote*, an insurance policy defined “bodily injury” as including death. Hence, the plaintiff claimed that he was entitled to income continuation benefits because the policy owned by the decedent had a provision for such benefits due to bodily injury. But the policy also included a term that provided it would terminate on the death of the insured. *Id.* at 660-61. The appellate court found that the specific provision terminating the policy on the death of the holder controlled over the more general term defining bodily injury to include death. *Id.* at 835.

The same analysis applies here. Article 17.10 is a general term of the contract that cannot abrogate more specific terms, which, under Washington law, control. For example, Article 17.10 is placed under the heading “Miscellaneous.” In context, it is a general term meant to prevent any unintended third-party beneficiaries from being created. In contrast, the specific terms of Article 6.10.3, which are in all capital letters, grant a Primary Guarantor the right to utilize a Veto Power over any decision of the Members so long as that guaranty is outstanding. This specific

provision controls as it grants a specific power to a specific entity that is specifically defined in the operating agreements.

**C. The Trial Court Did Not Err in Deciding ECT’s Motion for Declaratory Relief on the Merits, Because a Justiciable Controversy Existed.**

A trial court’s decision whether or not to entertain an action for declaratory relief is reviewed for abuse of discretion. *See Wash. Fed’n of State Emps. v. State*, 107 Wn. App. 241, 244, 26 P.3d 1003 (2001) (citing *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990)). Here, the trial court did not abuse its discretion by determining that a justiciable controversy existed and deciding ECT’s claim for declaratory relief on the merits.

The Washington Declaratory Judgments Act allows “any person interested under a . . . written contract . . . or whose rights, status or other legal relations are affected by a . . . contract” to “have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.” RCW 7.24.020. This procedure has been described as a “useful way to alleviate insecurity and uncertainty by clarifying rights, status, and other legal relationships.” Karl B. Tegland, 15 Washington Practice, Civil Procedure § 42:1 (2d ed. 2009). To achieve these goals, Washington

courts interpret the Declaratory Judgments Act liberally. *See Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn. App. 92, 38 P.3d 1040 (2002) (the Declaratory Judgments Act should be liberally interpreted to “to facilitate its socially desirable objective of providing remedies not previously countenanced by Washington law.”).

Before a party can obtain declaratory relief, it must show that a justiciable controversy exists, which requires four elements:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves an interest that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-11, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Here, all four elements are easily satisfied. And, as noted above, this determination is reviewed for an abuse of discretion. *See Wash. Fed. of State Emps.*, 107 Wn. App. at 244.

First, ECT, Raceway and T&S have a “present and existing dispute” regarding the validity of ECT’s right to exercise the Veto Power, and “genuine and opposing interests.” ECT claims the Veto Power right and Raceway and T&S deny that ECT has the right. Such a conflict

constitutes a classic dispute that, at this time, needs a judicial decision. *See Osborn v. Grant Cnty. By and Through Grant Cnty. Comm'rs*, 130 Wn.2d 615, 631-32, 926 P.2d 911 (1996) (holding that where county clerk and board of commissioners both claimed control over the clerk's office employees, they had genuine and opposing interests and an actual and present dispute existed). ECT has already had occasion to exercise the Veto Power twice. The second time, ECT was unable to exercise it, because of T&S and Raceway's refusal to recognize it. Ironically, Raceway and T&S contend that there is no actual dispute because ECT has no rights under the OAs, neatly demonstrating the nature of the actual dispute and the opposing interests that exist. Appellants' Brief at 26.

As to the third factor, a direct and substantial interest, ECT is currently the sole guarantor of more than \$95 million in loans to the Project LLCs. *See* 15 Karl B. Tegland, *Washington Practice, Civil Procedure* § 42:2 (2d ed. 2009) ("Economic interests are sufficient to give standing to sue."). The Veto Power is critical to ECT's ability to protect itself from financial risk associated with its guarantees. For instance, ECT's ability to use the Veto Power enabled it to cure Junction 192's default when the LLC members could not agree on a loan extension. ECT need not have already suffered an "injury" to meet this requirement, as

T&S and Raceway suggest. The Declaratory Judgments Act makes clear that a court can issue a declaratory judgment construing a contract either before or after a breach occurs. *See* RCW 7.24.030. ECT is not required to wait until the next time it wishes to exercise the Veto Power to protect its substantial financial interests before seeking a declaratory judgment.

As to the fourth factor, T&S and Raceway do not point to any reason why the trial court's order is not final and conclusive on this issue. They point only to the fact that their notice of appeal was converted to a motion for discretionary review, which reflects only the fact that the consolidated cases involved a number of additional parties and claims that were not addressed by the trial court's partial summary judgment order.

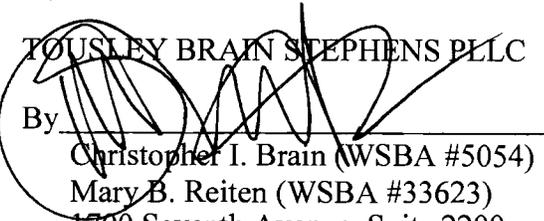
#### VI. CONCLUSION

For the reasons set forth above, the court should affirm the trial court's order granting summary judgment to ECT.

DATED this 14<sup>th</sup> day of September, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By

  
Christopher I. Brain (WSBA #5054)

Mary B. Reiten (WSBA #33623)

1700 Seventh Avenue, Suite 2200

Seattle, Washington 98101

206.682.5600

*Attorneys for Plaintiff/Respondent,  
Evergreen Capital Trust*

11 SEP 14 PM 3:35

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 14<sup>th</sup> day of September, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Richard C. Yarmuth, WSBA #4990  
John H. Jamnback, WSBA #29872  
Jeremy E. Roller, WSBA #32021  
YARMUTH WILSDON CALFO PLLC  
818 Stewart Street, Suite 1400  
Seattle, WA 98101  
*Attorneys for Certain Plaintiffs*

- U.S. Mail
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail
- E-Service

---

G. Perrin Walker, WSBA #4013  
Scott D. Winship, WSBA #17047  
Marlo DeLange, WSBA #27080  
VANDEBERG JOHNSON & GANDARA LLP  
1201 Pacific Avenue, Suite 1900  
P.O. Box 1315  
Tacoma, WA 98401-1315  
*Attorneys for Certain Defendants*

- U.S. Mail,
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail
- E-Service

AND

Mindy L. DeYoung, WSBA # 39424  
RIDDELL WILLIAMS PS  
1001 Fourth Avenue, Suite 4500  
Seattle, WA 98154-1065  
*Co-Counsel for Def. Martin D. Waiss*

- U.S. Mail
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail
- E-Service

AND

Jerry R. McNaul, WSBA #1306  
MCNAUL EBEL NAWROT & HELGREN PLLC  
600 University Street, Suite 2700  
Seattle, WA 98101-3143

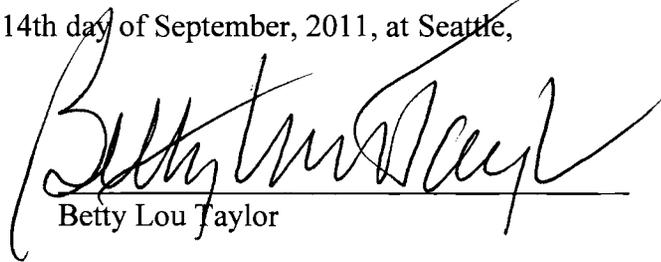
- U.S. Mail
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail
- E-Service

*Co-Counsel for Def. Investco  
Financial Corporation*

---

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 14th day of September, 2011, at Seattle, Washington.



Betty Lou Taylor