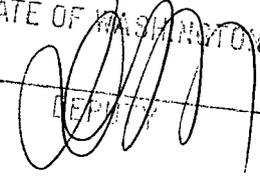


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DIVISION II

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STATE OF WASHINGTON

BY



No. 44839-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

UNION BANK, N.A., successor-in-interest to the FDIC, as Receiver for
Frontier Bank,

RESPONDENT,

v.

GRANVILLE A. BRINKMAN, an individual; JUDY M. OLSON dba JMO
ENTERPRISES; and JUDY M. OLSON, an individual,

APPELLANTS.

APPELLANT BRINKMAN'S OPENING BRIEF

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Appendix

Order Granting Defendant F.R. McCabe, Inc.’s Motion for Summary Judgment in *Union Bank, N.A., vs. F.R. McAbee, Inc.*, King County Superior Court Case No. 12-2-12590-2 SEA

INTRODUCTION

The issue presented on this appeal is whether a lender is prohibited from seeking a deficiency judgment against a guarantor following a non-judicial foreclosure pursuant to Washington's Deed of Trust Act, chapter 61.24 RCW, where the foreclosed deed of trust (drafted by the bank) secured not only the borrower's obligations, but also the guarantor's obligations. The answer is "yes." Once a lender voluntarily elects the statutory remedy of non-judicial foreclosure, that lender is statutorily prohibited from further action against any party whose obligations were secured by the deed of trust foreclosed upon.

In this case, Frontier Bank, respondent Union Bank's predecessor-in-interest, made a commercial loan to JMO Development, LLC (JMO). The loan was secured by a Deed of Trust against certain real property owned by JMO. Appellants Granville Brinkman and Judy Olson also each signed a loan Guaranty. All of the loan documents, including the Deed of the Trust and the Guaranties, were drafted by Frontier Bank without any input from JMO, Brinkman or Olson. Significant to this appeal, the express terms in Frontier Bank's Deed of Trust form provide that the Deed of Trust secures not only the Promissory Note signed by borrower JMO, but also the Brinkman and Olson Guaranties upon which Union Bank now sues. After Frontier

Bank failed and the FDIC sold the Bank's assets to Union Bank, Union Bank elected to non-judicially foreclose upon this Deed of Trust that secured both the JMO Note and the Brinkman and Olson Guaranties. That election served to bar Union Bank's action in this case.

There is no dispute between the parties that Washington law unambiguously provides that Union Bank's election to non-judicially foreclose on the deed of trust served to fully and completely discharge the borrower (JMO) of any and all remaining obligations under the promissory note secured by the deed of trust, regardless of any deficiency. Union Bank is statutorily prohibited from seeking a deficiency judgment against JMO. RCW 61.24.100(1); See also *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).

Section 100 of the Deed of Trust Act provides that a lender may both non-judicially foreclose and pursue a deficiency judgment against a commercial guarantor, but this statutory authorization is conditional. Satisfaction of all statutory conditions is an absolute prerequisite to any post non-judicial foreclosure deficiency action. One such condition to a deficiency action against a guarantor is that the guaranty obligations cannot be secured by the deed of trust foreclosed upon. RCW 61.24.100(10) provides:

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

RCW 61.24.100(10) and the Banks' voluntary elections are dispositive of this case. The bank-drafted Guaranties that are the subject of this lawsuit were, in fact, expressly secured by the deed of trust that was non-judicially foreclosed. Union Bank voluntarily elected to invoke the Deed of Trust Act and receive the benefit of a swift, efficient foreclosure of the property without judicial supervision. That election served to fully discharge all obligations secured by the Deed of Trust, including all obligations under the Brinkman and Olson Guaranties.

Had the Bank drafted its Deed of Trust differently, excluding the guaranty obligations from those secured, its deficiency action would have been authorized. It did not and, in light of Union Bank's subsequent election to non-judicially foreclosure, the bar against its deficiency action is absolute. The Legislature did not authorize Union Bank, nor any other bank, to contractually expand or modify their remedies under the Deed of Trust Act. Unfortunately, without any oral or written explanation for its ruling, the trial court in this case did not

recognize and apply this legislative prohibition but, on summary judgment, held that Union Bank was entitled to a deficiency judgment against Brinkman and Olson.

It is noteworthy that the issues presented in this appeal are yet to be addressed by an appellate court. Several superior courts have addressed the issue, however, and there is currently a split in the local jurisdictions and appellate court guidance is needed. Two King County superior court judges recently accepted the position advanced here by Brinkman, and dismissed deficiency actions founded upon guaranties secured by deeds of trusts non-judicially foreclosed.¹ A Skagit County superior court judge² and one Snohomish County judge³ have likewise concluded that such deficiency actions are barred. On the other hand, another Snohomish County superior court judge⁴ accepted the banks'

¹ *Union Bank v. F.R. McAbee, Inc.*, King County Superior Court cause no. 12-2-12590-2 SEA, Order Granting Summary Defendant F.R. McAbee's Motion for Summary Judgment (May 3, 2013), Judge Ken Schubert; *Union Bank v. Kenneth Lyons, et al*, King County Superior Court cause no. 12-2-14844-9, Order Granting Defendants Summary Judgment Dismissing Plaintiff's First Amended Complaint (April 10, 2013), Judge Jean Rietschel.

² *Washington Federal v. Kendall and Nancy Gentry*, Skagit County Superior Court cause no. 12-2-00608-6, Order Granting Defendant's Motion for Summary Judgment (February 22, 2013), Judge Dave Needy.

³ *Washington Federal v. Lance Harvey, et al*, Snohomish County Superior Court cause no. 12-2-02123-4, Order Granting Defendants Summary Judgment Dismissing Plaintiff's Complaint (November 29, 2012), Judge Eric Lucas.

⁴ *Washington Federal v. Benjamin Magnuson*, Snohomish County Superior Court cause no. 11-2-10460-3, Order Denying Defendants' Motion for Summary Judgment and Granting Washington Federal Partial Summary Judgment (October 25, 2012), Judge Anita Farris.

position and concluded that deficiency actions on secured guaranties are not barred. Several Pierce County judges have also addressed the issues presented here and have uniformly rejected the argument that such bank deficiency actions are prohibited;⁵ though uniform, Pierce County's position is in the minority. While other judges who have applied the bar to deficiency actions have issued brief explanatory letters,⁶ one judge, King County Judge Ken Schubert, has issued a detailed opinion with its order. The 18-page decision is comprehensive to all issues presented in this appeal and well-reasoned. Appellant Brinkman acknowledges that this lower court decision is not binding on this Court, but requests this Court to take judicial notice of and consider Judge Schubert's well-reasoned opinion as potential

⁵ The list may not be comprehensive, however, in addition to this action, Pierce County Judges have rejected that post non-judicial foreclosure deficiency actions against secured are barred in the following cases: *First Citizens Bank & Trust Co. v. Cornerstone Homes Development, LLC, et al*, Pierce County Superior Court cause no. 10-2-13379-3, Order for Judgment on the Pleadings (May 24, 2012), Judge John Hickman; *Union Bank v. Daniel Moore, et al*, Pierce County Superior Court cause no. 12-2-06492-5, Order Granting Plaintiff Union Bank's Motion for Summary Judgment (May 14, 2013), Judge Jack Nevin; *Union Bank v. William Riley, et al*, Pierce County Superior Court cause no. 12-2-11019-6, Order Granting Summary Judgment to Union Bank and Denying Defendant's Cross-Motion for Summary Judgment (May 10, 2013), Judge Garold Johnson. *Union Bank v. L&P Development, LLC*, Pierce County Superior Court cause no. 11-2-16499-9, Order Granting Summary Judgment to Union Bank and Denying Defendant's Cross-Motion for Summary Judgment (May 17, 2013), Judge Ronald Culpepper; *Union Bank v. Pacific Resource Development, Inc., et al.*, Pierce County Superior Court cause no. 12-2-11271-7, Order Granting Summary Judgment to Union Bank and Denying Cross-Motion for Summary Judgment (May 12, 2013), Judge Susan Serko.

⁶ None of the judges that have accepted the bank's position and entered deficiency judgments have issued written explanations for their decisions.

persuasive authority. A copy of Judge Schubert's order is therefore attached to this Brief as Appendix A.

Appellant Brinkman respectfully requests this Court to also conclude that Union Bank's election to non-judicially foreclose on the Deed of Trust discharged all obligations secured by that Deed of Trust, including Brinkman's obligations under the Guaranty. Appellant Brinkman thus requests this Court to reverse the trial court and remand this matter with instruction to dismiss Union Bank's deficiency action with prejudice.

ASSIGNMENTS OF ERROR

Brinkman assigns error to the trial court's order on summary judgment entered on December 17, 2012 (CP 517-18.), which order provides that Union Bank is entitled to a deficiency judgment against Brinkman pursuant to the Guaranty, despite that Brinkman's obligations under the Guaranty were discharged when Union Bank foreclosed on the deed of trust that secured the Guaranty.

ISSUES

1. Does the Deed of Trust Act, chapter 61.24 RCW, prohibit a secured lender that voluntarily elected to non-judicially foreclose under the Act from seeking a deficiency judgment against a guarantor,

where the guarantor's obligations are also secured by the same deed of trust foreclosed upon?

2. By its terms, did the non-judicially foreclosed Deed of Trust prepared by Union Bank's predecessor secure the Guaranty obligations of Brinkman in addition to the borrower/grantor's obligations?

3. May a secured lender who invoked and benefitted from the non-judicial foreclosure remedy created by the Deed of Trust Act contractually eliminate corresponding statutory limitations on post non-judicial foreclosure deficiency actions?

STATEMENT OF THE CASE

A. The Frontier Bank Loan, Union Bank's Election To Non-Judicially Foreclose And The Basis For Union Bank's Deficiency Suit.

Union Bank sued for a deficiency judgment on a \$1,250,000 commercial loan made in November 2006 by its predecessor, Frontier Bank, to JMO. (CP 1-9.) The loan was evidenced by a Promissory Note dated November 21, 2006 (CP 10-11), two Construction Loan Agreements (CP 12-19, 42-49) and five Change in Terms Agreements (Exs. 38-41, 50-55), all signed by JMO though a manager and/or member. The Promissory Note and Construction Loan Agreements were secured by a Construction Deed of Trust, also dated November 21, 2006 against certain described real property in Tacoma,

Washington. (CP 20.) After JMO defaulted on the loan, Union Bank, which acquired Frontier Bank's assets from the Federal Deposit Insurance Corporation (FDIC) (CP 5-8), non-judicially foreclosed on the Deed of Trust and acquired the property at the Trustee's Sale. (CP 298-99; 59-74.)

Shortly before the loan was made to JMO, on or around October 13, 2006, Granville Brinkman executed a Commercial Guaranty.⁷ (CP 29-31.) The Guaranty provides that the "Indebtedness" guaranteed includes all JMO's promissory notes, "whether now existing or hereafter arising." (CP 29.) Thus, while the Guaranty was executed before the subject loan, it nonetheless purports to extend to that loan. The Guaranty executed on October 13, 2006 is the sole basis for Union Bank's claim against Brinkman. (CP 1-19.)

B. The Express Terms Of The Bank-Drafted Loan Documents.

The Promissory Note, the Deed of Trust, the Guaranty and all of the other loan documents are on the Frontier Bank's pre-printed forms. Thus, the form and express terms of the loan documents, to include the Deed of Trust and Guaranty, were exclusively dictated by the Bank.

⁷ Judy Olson also executed two Commercial Guaranties. She executed one as Judy Olson dba JMO Enterprises (CP32-34) and another in her individual capacity (CP 35-37).

By their own terms, the Promissory Note, the Deed of Trust and the Guaranty are related and intertwined; and the loan documents direct that they must be construed together. In fact, the Guaranty expressly incorporates the terms of the subsequent Promissory Note and the Deed of Trust, as well as all other loan documents, into the Guaranty itself. The Guaranty, under the section entitled Miscellaneous Provisions, provides:

Amendments. This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of, or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment. (Underlining added.)

(CP 30.) Under section entitled Definitions, the Guaranty provides:

Definitions. The following capitalized words and terms shall have the following meanings when used in this Guaranty. ...

* * *

Related Documents. The words "Related Documents" means all promissory notes, credit agreements, loan agreements, environmental agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other Instruments. Agreements and documents, whether now or hereafter existing, executed in

connection with the Indebtedness.
(Underlining added.)

(CP 30-31.) Thus, the terms of the subsequently executed Deed of Trust that Union Bank foreclosed upon are expressly incorporated into the Guaranty and are also considered terms of the Guaranty.

The pre-printed Deed of Trust sets forth the obligations it secures. The obligations secured go beyond the borrower's obligations in the Promissory Note. The Deed of Trust provides:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. (All caps in original, underlining and bolding added).

(CP 21.)

The scope of the obligations secured is clarified further by the Deed of Trust's stated definition of "Indebtedness" and "Related Documents." "Indebtedness" includes obligations in "Related Documents:"

The words "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and

substitutions for the Notes or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. (Emphasis added.)

(CP 26.) "Related Documents" are explicitly defined in the Deed of Trust to include all guaranties:

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" as are not secured by this Deed of Trust. (Emphasis added).

(CP 27.) Thus, the Deed of Trust expressly secured the Guaranty upon which Union Bank now sues.

C. On Summary Judgment, The Trial Court Held That Union Bank Was Entitled To A Deficiency Judgment Under the Guaranty.

As noted earlier, Union Bank commenced this lawsuit seeking deficiency judgments under the Brinkman and Olson Guaranties after it successfully completed a non-judicial foreclosure on the Deed of Trust. (CP 1-9.) Union Bank attached and incorporated into its

Complaint all the Frontier Bank loan documents (CP 10-55), including the Promissory Note (CP 10-11), Deed of Trust (CP 20-28) and the Guaranties (CP 29-37). Union Bank also attached and incorporated into its Complaint all documents pertinent to its non-judicial foreclosure. (CP 56-74.)

Appellants Brinkman and Olson each filed a motion to dismiss Union Bank's lawsuit pursuant to CR 12(b)(6) asserting that Union Bank's action was barred by RCW 61.24.100(10). (CP95-123, 124-228). Despite that all of the relevant loan documents were attached and incorporated into Union Bank's Complaint and that appellants' motions presented purely legal questions related to the attached documents, Union Bank initially responded that the trial court should look outside the pleadings. (CP 233-34.) Following complete oral argument on all issues, appellants voluntarily converted their motions to summary judgment motions so that additional briefing (and affidavits) could be submitted in advance of a decision on the substantive issues. (See CP 268-69)

Thereafter, Union Bank both defended appellants' summary judgment and cross-moved for summary judgment based upon the same loan document originally attached to its Complaint. (CP 270-94, 410-33.) After hearing oral argument on all issues at three separate

hearings, the trial court took the cross-motions under advisement. (CP 512-13.) Approximately two weeks later, the Court advised in writing that it granted summary judgment to Union Bank on the issue of liability, but the trial court did not state the reasons for its decision (CP 516-18.)

The parties subsequently stipulated to a judgment, but fully reserved appellants' right to appeal the trial court's summary judgment ruling. (CP 520-21.) Both Brinkman and Olson timely appealed. (CP 526-35.)

ARGUMENT

A. Standard Of Review.

This Court reviews the trial court's summary judgment determination *de novo*, engaging in the same inquiry as the trial court. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 492, 501, 115 P.3d 262 (2005). As the trial court was presented with cross-motions for summary judgment on the issue of liability, the parties agree that the relevant facts are not in dispute.

The issues in this appeal primarily present questions of statutory construction and contract interpretation. The meaning of a statute is a question of law reviewed *de novo*. *Ryan v. State Dept. of Social and Health Services*, 171 Wn. App. 454, 465, 287 P.3d 629

(2012). Interpretation of an unambiguous contract is also a question of law. *Absher Construction Co. v. Kent School Dist. No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). A court may interpret a contract as a matter of law even if the parties dispute the legal effect of certain contract provisions, so long as interpretation does not turn on the credibility of extrinsic evidence or a choice of reasonable inferences to be drawn from extrinsic evidence. *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992); *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

- B. The Deed of Trust Act Precludes Post Trustee Sale Deficiency Judgments Against Guarantors Whose Obligations Were Secured By The Same Deed Of Trust Non-Judicially Foreclosed.**
 - 1. The Washington Deed of Trust Act as originally enacted and its bar against post non-judicial foreclosure deficiency judgments.**

Washington enacted the Deed of Trust Act, chapter 61.24 RCW, in 1965. The Act created a non-judicial foreclosure option for deeds of trust as an alternative to the traditional judicial mortgage foreclosure system. See, 67 Wash. L. Rev. 235, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure, Washington Mutual Savings Bank v. United States* (1992). It was designed by the Legislature to “save substantial time and money” by allowing secured lenders to avoid time-consuming judicial foreclosure proceedings.” *Peoples Nat’l Bank*

of *Wash. V. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971). Courts have acknowledged this statutorily authorized power of sale is a “significant power” conferred to lenders, since it allows for the swift forfeiture of debtors’ interests with relative ease and without judicial supervision. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 95, 285 P.3d 34 (2012). As a result, courts consistently have strictly construed the Act in favor of borrowers, rather than the secured creditors who foreclose under the Act. *Id.*; *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007).

A lender that elects to invoke this power of sale without judicial oversight, however, must also accept certain statutorily imposed limitations on otherwise available remedies. The power did not come without a price. Under a judicial foreclosure, a creditor may sue for a deficiency when the sale of property secured under a deed of trust falls short of the debt. RCW 61.12.070, .080. On the other hand, debtors subject to a judicial foreclosure can potentially obtain an upset price to reduce or eliminate the deficiency or even redeem their property following the judicial foreclosure. RCW 61.12.060; RCW 6.21.080; RCW 6.23.010, .020. The Deed of Trust Act contemplated a “quid pro quo” between lenders and borrowers. Debtors “relinquished a right to redemption and to a judicially imposed upset price. Creditors, in

exchange for inexpensive and efficient non-judicial foreclosure procedures, sacrificed a substantial benefit that remains available in a judicial foreclosure.” *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990). Creditors forfeited their right to seek a deficiency judgment against debtors. *Id.* RCW 61.24.100.

As originally enacted, if the debt owed to the lender exceeded the sales price at the Trustee’s Sale, the lender was wholly precluded from recovering a deficiency judgment – the debt was deemed fully discharged by operation of law.⁸ More specifically, with regard to anti-deficiency, the Deed of Trust Act originally provided at RCW 61.24.100:

Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation. Where foreclosure is not made under this chapter, the beneficiary shall not be precluded from enforcing the

⁸ At that time, RCW 61.24.100 provided that, following a Trustee’s Sale, the sole remaining opportunity to collect further on any remaining debt was the limited authorization, in the context of commercial loans only, to foreclose against additional deeds of trusts or liens covering real or personal property securing the same debt.

security as a mortgage nor from enforcing the obligation by any means provided by law. (Emphasis added.)

The Washington Supreme Court accurately articulated in 1990 the anti-deficiency rule that followed an election to foreclose non-judicially: Washington law provides that no deficiency may be obtained when a trustee's deed is foreclosed." *Washington Mutual Savings Bank v. United States*, 115 Wn.2d 52, 58, 793 P.2d 969 (1990), Justice Guy, concurring.

2. The 1998 amendment to the Deed of Trust Act created limited exceptions to the general bar against post non-judicial foreclosure deficiency judgments.

In 1998, the Washington Legislature amended the Deed of Trust Act. The most significant amendment was to the anti-deficiency provision at RCW 61.24.100. As amended, the Act retained a general prohibition against deficiency judgments following a non-judicial foreclosure. As amended, RCW 61.24.100(1) provides:

Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

The Amendment nonetheless created new exceptions to the broad prohibition against deficiency judgments.

In the context of commercial loans only, a lender is afforded limited post-foreclosure recourse against a borrower if (1) the fair value of the property foreclosed upon is less than the debt owed and (2) the property foreclosed upon is not the residence of the borrower. In such case, the lender may obtain a judgment against the borrower for wrongful retention of any rents, insurance proceeds or condemnation awards that are owed to the lender, or to the extent the deficiency was caused by waste to the property committed by the borrower. RCW 61.24.100(3)(a). Thus, the legislative authorization for a deficiency judgment against a commercial borrower is limited to only those instances in which the borrower wrongfully retained property proceeds or engaged in wrongful conduct that devalued the property foreclosed upon. There was no such conduct in this case and Union Bank did not seek a deficiency against the borrower JMO. This narrow exception thus has no application here.

The amended Act also provided broader, but still limited authorization for lenders to obtain a deficiency judgment against a guarantor of a loan secured by the deed of trust non-judicially foreclosed. RCW 61.24.100(3)(c). The legislative grant to obtain post non-judicial foreclosure deficiency judgments against guarantors is conditional and expressly “subject to” other provisions in RCW

61.24.100. *Id.* The statutory prerequisites to a deficiency judgment against a guarantor include that that deficiency action be commenced within one years of the Trustee's Sale (RCW 61.24.100(4)); only against guarantors of commercial loans (RCW 61.24.100(3)(c)); and only against guarantors who received specified minimum notice (RCW 61.24.100(3)(c)). The Deed of Trust Act also entitles guarantors to a judicial determination of the fair value of the property foreclosed upon and limits the amount of any deficiency judgment to the amount the unpaid obligation exceeds the judicially determined fair value. RCW 61.24.100(5).

The final statutory limitation on post non-judicial foreclosure deficiency judgments is set forth at RCW 61.24.100(10) and is the limitation that is the subject of this appeal. It provides:

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

Thus, even if the other pre-requisites are satisfied (e.g., commercial loan, notice to guarantor, action commenced within one year), the legislative authorization to pursue a post non-judicial foreclosure deficiency judgment against a commercial guarantor does not extend

to a guarantor whose obligations were secured by the deed of trust foreclosed upon.

3. RCW 61.24.100(10) must be construed to preclude post non-judicial foreclosure deficiency judgments against guarantors whose obligations were secured by the deed of trust foreclosed upon.

The starting point for analysis of RCW 61.24.100(10) is that it pertains to an exception to a general bar against post non-judicial foreclosure deficiency judgments. This general prohibition is plainly stated at RCW 61.24.100(1):

Except to the extent permitted in this section [RCW 61.24.100] for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust. (Emphasis added.)

With regard to guarantors, the exceptions to the legislative prohibition against post non-judicial foreclosure deficiency judgment actions are expressly enumerated in other subsections to RCW 61.24.100:

- (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

* * *

- (c) **Subject to this section**, an action for a deficiency judgment against a guarantor if the guarantor is timely

given the notices under RCW 61.24.042.

* * *

- (4) Any action referred to in subsection 3(a) and (c) of this section shall be commenced within one year after the date of the trustee's sale, or a later date to which the liable party otherwise agrees in writing with the beneficiary after the notice of foreclosure is given...

* * *

- (10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

As exceptions to the general prohibition in RCW 61.24.100(1) against deficiency judgments, the limited authorizations must be construed narrowly. *City of Union Gap v. Washington State Dept. of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008); *Muckleshoot Indian Tribe v. Washington Dept. of Ecology*, 112 Wn. App. 712, 722, 50 P.3d 668 (2002). The rule requiring narrow construction ensures effect is given to the legislative intent underlying the general provisions and thus requires a court to choose, when a choice is available, a restrictive interpretation over a broad, more liberal interpretation. *Union Gap*, 148 Wn. App at 527.

When the above-quoted provisions are read together, section 100 of the Deed of Trust Act provides that deficiency judgments following a non-judicial foreclosure are statutorily prohibited against a guarantor [RCW 61.24.100(1)] except when (1) the guarantor guaranteed a commercial loan [RCW 61.24.100(3)], (2) the guarantor of the commercial loan was given certain specified notice [RCW 61.24.100(3)(c)], (3) deficiency action is commenced within one year of the trustee's sale [RCW 61.24.100(4)], and (4) the guarantor's obligation "was not secured by the deed of trust" foreclosed upon [RCW 61.24.100(10)].

With regard to subsection (10) specifically, the Legislature's use of the word "if" is significant. The Legislature only authorizes a lender to further pursue collection from a guarantor following non-judicial foreclosure *if* the guarantor's obligation is not secured by the deed of trust foreclosed upon. ("A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a... guarantor *if* that obligation ... was not secured by the deed of trust." RCW 61.24.100(10).) *Webster's Ninth New Collegiate Dictionary* defines "if" to mean "on condition that."⁹

⁹ In determining the plain meaning of words used in a statute, courts will look to the dictionary definition of the words employed. *Homestreet, Inc., v. State Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

Applying that definition, the limited statutory authorization to pursue collection against a guarantor following a Trustee's Sale will never arise if the guarantor's obligation was secured by the deed of trust foreclosed upon.

Finally, that the Legislature took care to specifically list the circumstances in which it would authorize deficiency judgments against guarantors implies that the Legislature intended to exclude authorization for deficiency judgments for any unspecified or unexpressed circumstances. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993); *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008).¹⁰ This maxim of statutory construction (along with the canon that exceptions must be narrowly construed) is particularly relevant when determining a foreclosing lender's powers under the Deed of Trust Act, since Washington's Supreme Court has twice ruled in the last year that the Act should not be construed to provide more expansive rights to lenders than those expressly conferred. See *Bain, supra*, 175 Wn.2d at 107-08; *Schroeder v. Excelsior*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013).

¹⁰ This canon of statutory construction is sometimes referred to through the Latin phrase "*expressio unius est exclusion alterius*," which means the expression of one thing is the exclusion of another." *State v. Cromwell*, 157 Wn.2d 529, 540, 140 P.3d 593 (2006).

RCW 61.24.100(10) prohibits deficiency actions against guarantors whose obligations are secured by the deed of trust non-judicially foreclosed. In this case, there is no dispute that Union Bank elected to invoke its power to non-judicially foreclose on the Frontier Bank Deed of Trust it acquired from the FDIC. Thus, to ascertain whether the prohibition imposed by RCW 61.24.100(10) applies to this case, the Court must determine if the Deed of Trust drafted by Frontier Bank secured the Guaranty upon which Union Bank now sues.

C. The Deed Of Trust Drafted By Frontier Bank And Foreclosed Upon By Union Bank Expressly States That It Secures The Brinkman Guaranty.

The “touchstone of contract interpretation is the parties' intent,” which starts with review of the plain language used in the contract documents. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301(1996). Courts will look at the contract language as a whole and will give greater weight to specific terms over general terms to harmonize apparently contradictory terms. *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 277 P.3d 679 (2012); *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003).

In this case, the plain words in the Deed of Trust drafted by Frontier Bank provide that the Brinkman Guaranty was secured by the

Deed of Trust. The Deed of Trust provides that the obligations secured are comprised of the “Indebtedness” and obligations in “Related Documents.” (CP 21.) The term “Indebtedness” includes both the Promissory Note and obligations under “Related Documents.” (CP 26.) “Related Documents” are expressly defined to include all guaranties. (CP 27.) There is, therefore, only one interpretation that may flow from the plain contract language: The Guaranty is secured by the Deed of Trust. The Guaranty was not drafted in isolation of the terms of the Deed of Trust. It not only acknowledges these and all other terms in the Deed of Trust, it expressly incorporates the Deed of Trust terms into the Guaranty. (“This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty.” CP 30.) The words Frontier Bank invoked in its Deed of Trust and acknowledged and accepted in its Guaranty provide that the Deed of Trust secures the Guaranties.

Frontier Bank no doubt understood that all obligations included in its “Related Documents” definition would be secured by the Deed of Trust and, further, would be discharged upon election and completion of a Trustee’s sale. This is evidenced by the fact that Frontier Bank

took care to expressly exclude obligations that are not secured by the Deed of Trust. Again, the Deed of Trust provides:

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust. (Emphasis added).

(CP 27.) Frontier Bank deliberately and intentionally excluded environmental indemnities from obligations secured by the Deed of Trust and deliberately and intentionally included guaranties with the obligations to be secured by the Deed of Trust. The Deed of Trust unambiguously secures the Guaranties.

It is worth noting that other bank deed of trust forms have excluded guaranties from the obligations secured. For example, a deed of trust form publicly recorded by First Citizens Bank with the Pierce County Auditor under Auditor File No. 201203380450 is a form nearly identical to the Frontier Bank form in this case.¹¹ (CP 397-409.)

¹¹ This First Citizens' Bank deed of trust was provided to the trial court as an example of a simple drafting solution for Union Bank; and Brinkman requested that the trial court take judicial notice of the publicly recorded document pursuant to the authority

Like the Frontier Bank form, the First Citizens' form includes obligations in "Related Documents" as obligations secured by the deed of trust. (CP 400.) In the definition section, however, First Citizens Bank not only omitted guaranties from the "Related Documents" definition, it expressly excluded guaranties from the obligations secured by the deed of trust. The First Citizens' Deed of Trust provides:

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereinafter existing, executed in connection with the indebtedness, provided that guaranties are not "Related Documents" and are not secured by this Deed of Trust. (Emphasis added.)

(CP 407.)

Just as First Citizens Bank did in the above deed of trust and just as Frontier Bank did with environmental indemnities, Frontier Bank could have expressly excluded guaranties from the obligations secured by its Deed of Trust. It did not. To the contrary, Frontier Bank

provided by ER 201(b) and *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). (CP 386, 397-409.) Union Bank did not object.

affirmatively included guaranties in its definition of obligations secured by the Deed of Trust. That affirmative language is now inescapable.

D. Union Bank Forfeited Its Right To Pursue The Guarantors When It Voluntarily Elected To Non-Judicially Foreclose On A Deed Of Trust That Secured The Obligations Of The Guaranties. RCW 61.24.100 Bars Union Bank's Action.

That the Guaranty is secured by the Deed of Trust, combined with the Bank's election to non-judicially foreclose on that Deed of Trust, is dispositive in this case. RCW 61.24.100(1) and (10) directs that all obligations secured by the Deed of Trust, including the Brinkman Guaranty, were discharged at the conclusion of the Trustee's Sale. The Bank's election to invoke the statutorily created remedy of non-judicial foreclosure on the Deed of Trust was also an election to forfeit further collection on all obligations secured by that same Deed of Trust, to include the Brinkman Guaranty.

It is the Banks' own actions that have caused the extinguishment of its deficiency judgment remedies under the Guaranty. Just as the Union Bank chose to foreclose non-judicially, Frontier Bank chose to secure the Guaranty by the Deed of Trust. The Bank could have excluded the guaranty obligations from the debts secured by the Deed of Trust and thereby preserved the limited remedy to seek a deficiency judgment under the Deed of Trust Act. In obvious recognition that all secured obligations will discharge following a non-

judicial foreclosure, the Bank expressly excluded environmental indemnity agreement obligations from the obligations secured by the Deed of Trust. (CP 27.) The Bank chose differently with regard to guaranties and wrote the Deed of Trust to explicitly secure guaranties.

Those choices now have ramifications. Brinkman's obligations under the Guaranty were discharged, as a matter of law, following the non-judicial foreclosure on the Deed of Trust securing the Guaranty. RCW 61.24.100. Union Bank is now statutorily barred from obtaining a deficiency judgment against Brinkman. *Id.*

E. Union Bank Cannot Contractually Expand The Remedy Legislatively Created Or Eliminate Conditions Imposed By The Deed Of Trust Act Through So-Called "Waivers."

Finally, Union Bank claimed below that it is shielded from the legislatively imposed limitations on remedies that accompany an election to foreclose non-judicially by the so-called "waiver" in the Guaranty. The so-called "waiver" is not applicable because Brinkman's challenge does not involve application of a guarantor's defense. Rather, this appeal involves the scope of a lender's remaining available remedies following a remedy election. More specifically, it involves the legal ramifications that follow a creditor's voluntary election to foreclosure non-judicially when the Guaranty is secured by the Deed of Trust.

What Union Bank labels as a “waiver” is, in reality, an attempt to contractually modify and expand a legislatively created remedy that is expressly limited and conditioned. The Bank has no legal authorization to expand its statutory remedies. To the contrary, the Washington Supreme Court held just last year that contractual alteration or expansion of remedies under the Deed of Trust Act is not authorized. *Bain v. Metropolitan Mortgage Group, Inc., supra*.

Again, under Washington law, a creditor that holds a deed of trust as security for a loan can use either judicial or non-judicial foreclosure.¹² *Fluke Capital Management Services, Co. v. Richmond*, 106 Wn.2d 614, 624, 724 P.2d 356 (1986). A creditor’s decision to non-judicially foreclose is a decision to limit its own remedies – to sacrifice the substantial remedies that remain available in a judicial foreclosure – so that it may receive the benefit of the efficient and inexpensive non-judicial foreclosure process to realize on its security. *Id.; Thompson v. Smith, supra*, 58 Wn. App. at 361. Once the lender elects the statutory remedy of non-judicial foreclosure, its rights are

¹² As the court explained in *Thompson*, 58 Wn. App. at 366:

[T]he beneficiary of a trust deed is faced with an election of remedies upon default. The beneficiary may (1) where the trust deed secures a note, sue on the note; (2) foreclose under the existing mortgage foreclosure proceedings; or (3) foreclose pursuant to RCW 61.24.

determined by the Deed of Trust Act. Absent express authorization, Union Bank cannot contractually modify those rights. *Bain, supra*.

In *Bain*, the Supreme Court was asked to determine if a deed of trust beneficiary may non-judicially foreclose under the Deed of Trust Act when the designated beneficiary is not also the holder of the promissory note that the deed of trust secures. In *Bain*, the subject deed of trust contractually authorized the designated beneficiary to non-judicially foreclose pursuant to the Act. The Deed of Trust Act, however, defines a beneficiary as one who is not only designated in the deed of trust, but also is the holder of the secured note. The Act only conferred the power of non-judicial foreclosure to a beneficiary as defined in the Act.

The *Bain* Court held that the Deed of Trust Act remedy could not be contractually altered and, since the beneficiary did not meet the statutory requirements, it was not conferred the power of non-judicial foreclosure. The Court explained:

This is not the first time that a party has argued that we should give effect to its contractual modification of the statute. In *Godfrey*,¹³ Hartford Casualty Insurance Company had attempted to pick and chose what portions of Washington's uniform arbitration act, chapter 7.04 RCW,

¹³ *Godfrey v. Hartford Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001).

it and its insured would use to settle disputes. The court noted that parties were free to decide whether to arbitrate, and what issues to submit to arbitration, but 'once an issue is submitted to arbitration, Washington's [arbitration] act applies.' By submitting to arbitration, 'they have activated the entire chapter and the policy embodied therein, not just the parts useful to them.' The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

Id., 175 Wn.2d at 107-08.

The Supreme Court again confirm its position this year in *Schroeder v. Excelsior Management Group, LLC, supra*. The *Schroeder* court also addressed a deed of trust in the context of the Deed of Trust Act. There, the parties attempted to contract around the statutory prohibition against non-judicial foreclosure against agricultural lands. 177 Wn.2d at 98, 106-107. Based on the contractual authorization in the deed of trust it drafted, the bank argued that, despite the statutory limitation, the borrower waived the protections of the Deed of Trust Act. Citing its recent decision in *Bain*, the court stated: "This is not the first time we have confronted the argument that statutory requirements of the deeds of trust act may be waived contractually."

Id at 107. The Court then confirmed that it will not allow contractual waiver under the Deed of Trust Act:¹⁴ “These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Id.* at 107.

This case is analogous to *Schroeder*. RCW 61.24.100(10) limits the power of parties who elect to foreclose non-judicially when a guaranty is secured by the deed of trust foreclosed upon. Banks cannot contract around the statutory bar to deficiency actions against parties whose obligations were secured by a non-judicially foreclosed deed of trust.

The statute is clear with regard to the scope of the exception to the general bar on deficiency judgments following non-judicial foreclosures. Union Bank chose to invoke the power of sale authorized by the Deed of Trust Act so as to complete a relatively quick and inexpensive sale of the property without judicial review. In electing that statutorily created remedy it forfeited the right to seek a deficiency judgment based upon any contractual obligation secured by the same

¹⁴ In a footnote, the Supreme Court allowed that “[t]here may be technical procedural details that the parties may, by agreement, modify or waive, but strict compliance with mandated requisites is required. *Id.* at 107, n.7.

deed of trust foreclosed upon. Union Bank cannot contract away the limitations that the Deed of Trust imposes.¹⁵

Even if the contract provisions in the Guaranties could be deemed “waivers”, as opposed to an effort to contractually expand a legislatively created remedy, the “waivers” are unenforceable. Of course waiver only results following an “intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his action must be inconsistent with any other intention than to waive them.” *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.3d 635 (1958).

In this case, the “waiver,” which the Guaranty itself provides may not be enforced if against public policy, is insufficiently specific and fails to expressly state that the guarantor waives rights it may hold as the guarantor on a secured Guaranty. (CP 29-30.) To be enforceable, the waiver must site the specific statute which provides

¹⁵ Statutory law in effect at the time of contract, “enter in and form a part of it, as fully as if they had been expressly referred to and incorporated in the terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.” *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942) (emphasis added). See also, *Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958); *Cunningham v. Weyerhaeuser Timber Co.*, 52 F. Supp. 654 (W.D. Wash. 1943).

the right being waived and explain the legal significance of the waiver. See *Union Bank v. Gradsky*, 265 Cal. App.2d 40 (1968); *Cathay Bank v. Lee*, 14 Cal. App. 1533 (1993); *Resolution Trust Corporation v. Titan Financial Corporation*, 22 F.3d 923 (9th Cir. 1994).¹⁶ The “waivers” in the subject Guaranty make no mention of the Deed of Trust Act and are wholly silent of the right of a secured guarantor.

Finally, enforcement of the so-called waiver would contravene public policy. The Deed of Trust Act has been acknowledged by our Supreme Court as representing the “public policy of our state.” *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 725, 565 P.2d 812 (1977). The Legislature afforded lenders the power of judicially unsupervised sales which allows them to inexpensively and efficiently realize the value of real property securing their loans. That power, however, was not unfettered. It came with limitations and consequences, among them, a forfeiture of the lender’s right to further pursue any obligations that were secured by a non-judicially foreclosed deed of trust. If enforced, the “waivers” in the Guaranty would upset the delicate balance that the Legislature created under the Deed of

¹⁶ The waiver in the Guaranty has its foundation on California Statutory law, specifically California Civil Code § 2856, which expressly authorizes such waivers. There is no such authorization in Washington. To the contrary, Washington’s Deed of Trust Act limits the allowable waivers or limitations on the extended statutory rights at RCW 61.24.100(9).

Trust Act and, therefore, would contravene public policy. As such, they should not be enforced. See *Shoreline Community College Dist. v. Employment Security Dept.*, 120 Wn.2d 394, 842 P.2d 938 (1992). See also, *Bain, supra*; *Schroeder, supra*.

F. Applying RCW 61.24.100(10)'s Prohibition Against Deficiency Judgments To This Case Will Not Result In An Unfair Windfall To Brinkman Or Chilling Effect On Lenders. It Will Simply Give The Appropriate Legal Effect To The Loan Documents The Bank Drafted.

Union Bank complained below and will likely again in this appeal that construing the Deed of Trust as written and limiting Union Bank's post non-judicial foreclosure remedies would be an unfair result. According to Union Bank, enforcing the Deed of Trust as drafted by the Bank will have a "chilling effect" and "wreak havoc in the commercial lending industry." (See CP 271, 293)

Of course, the result that will flow from application of the Deed of Trust Act as written will not result in a "windfall" to Brinkman any more than it was a "windfall" to JMO when its obligations as borrower were discharged pursuant to RCW 61.24.100(1) upon completion of the Trustee's Sale. Rather, it is simply the outcome designated by the Legislature as one of the trade-offs for granting lenders the cheap and expedient remedy of non-judicial foreclosure. The outcome is an intended consequence of voluntary elections. The release of Brinkman

from further liability under the Guaranty results directly from the Bank's initial choice to secure guarantor obligations with the same Deed of Trust that secured the borrower JMO's obligations, and then its second choice to non-judicially foreclose.

Moreover, the issue (and result) presented on this appeal is a direct of result of the Bank's own drafting, not some nefarious act of the guarantors. As the Supreme Court stated in *Bain* when it rejected similar bank-asserted complaints of "unfairness": "it is not the plaintiff [borrower] that manipulated the terms of the act; it was whoever drafted the forms used in these cases." *Id.* Regardless, as the *Bain* Court noted, "[t]he legislature, not this court, is in the best position to assess policy considerations." *Id.*

There will be no permanent chilling effect on commercial lending – Union Bank can simply draft future deeds of trust to exclude guaranty obligations from secured obligations. The First Citizens Bank deed of trust form presents an excellent example. (See CP 399-409.) With regard to existing deeds of trust that include guaranties among the obligations secured, banks may preserve the opportunity to obtain a deficiency judgment by electing judicial foreclosure. Union Bank and all other banks will continue to have viable options to recover the full amount of the debt. However, if banks elect to foreclosure on a deed

of trust non-judicially, they must accept that all obligations secured by that deed of trust will be forever discharged.

Brinkman asks for nothing more than that the Court apply RCW 61.24.100(10) to the Deed of Trust that Frontier Bank drafted and Union Bank elected to non-judicially foreclose upon. This Court should conclude that all of Brinkman's obligations under the Guaranty has been discharged and direct the trial court to dismiss this lawsuit with prejudice.

REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1(b), the terms of the Guaranty and RCW 4.84.330, appellant Brinkman requests that he be awarded his attorneys' fees incurred defending this lawsuit and prosecuting this appeal.

The Commercial Guaranty upon which Union Bank sued provides for payment of attorneys' fees as follows:

Attorneys' Fees, Expenses. Guarantor agrees to pay upon demand all of the Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a

lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Guarantor shall also pay all court costs, and such additional fees as directed by the court.

(CP 30.) RCW 4.84.330 provides that unilateral attorney fee provisions such as the above are to be construed to give reciprocal rights to all parties to the contract. More specifically, RCW 4.84.330 requires that under such provisions, reasonable attorneys' fees and costs shall be awarded to the prevailing party, "whether he is specified in the contract . . . or not." The contractual and statutory right of the prevailing party to an attorney fee award is absolute. The court only has discretion with regard to the amount to be awarded. *Metropolitan Mortgage & Securities Co, Inc. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992).

If this Court holds that Union Bank's election to non-judicially foreclose on the deeds of trust discharged Brinkman's obligation under the Guaranty, Brinkman, as the prevailing party, is entitled to an award for attorneys' fees, costs and expenses incurred defending this lawsuit and prosecuting this appeal. This Court should rule that Brinkman is entitled to recover all reasonable attorneys' fees in this action and, upon submission of a proper fee petition and costs bill, award

Brinkman the fees incurred in this appeal. The matter should be remanded to the trial court for a determination of the amount of reasonable fees incurred before the superior court.

CONCLUSION

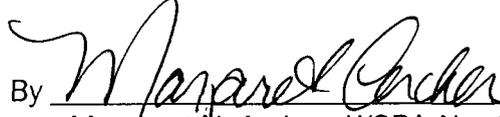
Union Bank had a variety of remedies available to it to collect on the JMO debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both JMO and the guarantors. It could have sued on the Guaranty first, leaving the foreclosure option available as a later remedy. Or, it could (and did) choose the efficient remedy of a Trustee's Sale pursuant to the Deed of Trust Act without judicial oversight. In choosing this last remedy, however, Union Bank also accepted the statutory limitations imposed on the remedy, to include the limitation that the bank must forego a deficiency judgment for any debts secured by the deed of trust foreclosed upon.

Union Bank is barred from seeking a deficiency judgment because of the bank's unilateral decision to secure each Guaranty by the Deed of Trust, and its subsequent election to foreclose non-judicially pursuant to the Deed of Trust Act. This Court should reverse the trial court's summary judgment and remand the matter with instruction to the trial court to dismiss the lawsuit with prejudice.

Dated this 15th day of July, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 
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Attorneys for Appellant Brinkman

APPENDIX A

The Honorable Ken Schubert

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

UNION BANK, N.A., successor-in-interest to the
Federal Deposit Insurance Corporation, as receiver
of Frontier Bank,

Plaintiff,

v.

F.R. MCABEE, INC., a Washington corporation,
et al,

Defendants.

NO. 12-2-12590-2 SEA

ORDER GRANTING DEFENDANT
F.R. MCABEE, INC.'S MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant F.R. McAbee Inc. ("FRM") moves for summary judgment, arguing that it is not liable to plaintiff Union Bank, successor-in-interest to the Federal Deposit Insurance Corporation as receiver of Frontier Bank (collectively "Union Bank") for the amounts left unpaid on loans that FRM guaranteed. FRM guaranteed several commercial loans that were issued to two limited liability companies both of which FRM was a member: Birch Bay Square I, LLC and

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ORIGINAL

1 Birch Bay Square II, LLC ("BB I" and "BB II" respectively). When BB I and BB II defaulted,
2 Union Bank non-judicially foreclosed upon the property that secured the loan. The securing
3 property sold for less than the total debt, and, Union Bank sued to recover the difference from
4 FRM as the guarantor.

5 FRM's motion presents three issues. First, does RCW 61.24.100 of Washington's Deed
6 of Trust Act preclude deficiency actions against a guarantor when the lender non-judicially
7 foreclosed upon a deed of trust that secured the guaranty? This Court holds that it does. Second,
8 do the Deeds of Trust issued by BB I and BB II secure FRM's Guaranties of Union Bank's
9 commercial loans? This Court finds that they do. Third, is the waiver of the statutory
10 protections of RCW 61.24.100 contained in FRM's Guaranties enforceable. This Court finds
11 that it is not. Because Union Bank non-judicially foreclosed upon Deeds of Trust that secured
12 FRM's Guaranties, and because FRM's waiver is unenforceable, RCW 61.24.100 precludes
13 Union Bank from maintaining this action against FRM. As a result and as explained in more
14 detail below, the Court grants FRM's motion for summary judgment.

15 **II. SUMMARY OF FACTS**

16 During a three year period, BB I and BB II collectively borrowed nearly \$20 million
17 dollars to develop a shopping complex in Blaine, Washington. They borrowed the money in
18 three separate installments from Frontier Bank. FRM guaranteed 50% of each loan. The first
19 loan occurred on August 2, 2007 when BB I and co-defendant Far North Ventures, Inc. assumed
20 a loan from another company secured by a deed of trust.¹ On the same day that BB I and Far
21 North Ventures assumed the loan, FRM signed a Commercial Guaranty.²

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23
24 ¹ Declaration of Gary Schaeffer ("Schaeffer Decl."), Exhibit A.

² *Id.*, Exhibit B.

1 The second loan occurred on June 5, 2008 when BB II executed, through its member
2 FRM, a Promissory Note with Union Bank.³ On that date, BB II also signed, again through
3 FRM, a Deed of Trust and FRM signed another Commercial Guaranty.⁴ Then on December 5,
4 2009, BB I executed the third Promissory Note, secured its obligation by modifying the 2007
5 Deed of Trust to include the 2009 loan, and FRM guaranteed the loan on the same day.⁵ Union
6 Bank drafted all of the contracts involved in this case and the language in relation to each
7 document—regardless of the year it was executed—is identical.

8 The Promissory Notes state that BB I and BB II promise to pay Frontier Bank and that
9 promise is secured by the Deeds of Trust as collateral.⁶ The Notes also list instances of default
10 which include events “with respect to any Guarantor of any of the Indebtedness.”⁷

11 The Deeds of Trust state, in pertinent part, as follows:

12 THIS DEED OF TRUST...IS GIVEN TO SECURE (A) PAYMENT OF THE
13 INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL
14 OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS,
15 AND THIS DEED OF TRUST. THIS DEED OF TRUST...IS ALSO GIVEN
16 TO SECURE ANY AND ALL OF GRANTOR'S OBLIGATIONS UNDER
17 THAT CERTAIN CONSTRUCTION LOAN AGREEMENT BETWEEN
GRANTOR AND LENDER OF EVEN DATE HEREWITH. ANY EVENT
OF DEFAULT UNDER THE CONSTRUCTION LOAN AGREEMENT, OR
ANY OF THE RELATED DOCUMENTS REFERRED TO THEREIN,
SHALL ALSO BE AN EVENT OF DEFAULT UNDER THIS DEED OF
TRUST.⁸

18 The Deeds contain a section titled “PAYMENT AND PERFORMANCE” which reads:

19 Except as otherwise provided in this Deed of Trust, Grantor shall pay to
20 Lender all amounts secured by this Deed of Trust as they become due, and

21
22 ³ *Id.*, Exhibit C.

⁴ *Id.*, Exhibits D & E.

23 ⁵ *Id.*, Exhibits F, G, & H.

⁶ Schaffer Decl., Exhibit C (UB_BB00073).

⁷ *Id.*

24 ⁸ Declaration of Adam Ware (“Ware Decl.”), Exhibit B (UB_BB000784) (emphasis added).

1 shall strictly and in a timely manner perform all Grantor's obligations under
2 the Note, this Deed of Trust, and Related Documents.⁹

3 The Deeds of Trust define the key terms "Guarantor," "Guaranty," "Indebtedness," and "Related
4 Documents" as well:

5 The word "Guarantor" means any guarantor, surety, or accommodation party or
6 any or all of the Indebtedness;

7 The word "Guaranty" means the guaranty from Guarantor to Lender, including
8 without limitation a guaranty of all or part of the Note.

9 The word "Indebtedness" means all principal, interest, and other amounts, costs
10 and expenses payable under the Note or Related Documents...

11 The words "Related Documents" mean all promissory notes, credit agreements,
12 loan agreements, guaranties, security agreements, *deeds of trust*, security deeds,
13 collateral mortgages, and all other instruments, agreements and documents,
14 whether now or hereafter existed, executed in connection with the indebtedness;
15 provided, that the environmental indemnity agreements are not "Related
16 Documents" and are not secured by this Deed of Trust.¹⁰

17 The Deeds also list events that, at the lender's option, constitute an "Event of Default." These
18 events include: payment default, compliance default, false statements, death or insolvency, and
19 "any of the preceding events [that] occurs with respect to any Guarantor of any of the
20 Indebtedness."¹¹ FRM signed the Deeds of Trust as a member of BB I and BB II.¹²

21 At the same time, FRM signed Guaranties that obligated it to pay and perform
22 "Borrower's obligations under the Note and Related documents."¹³ The Guaranties authorize the
23 Lender to "take and hold security for the payment of [the Guaranties]... and direct the order or
24 manner of sale thereof, including without limitation, any non-judicial sale permitted by the terms

⁹ *Id.*, Exhibit B (UB_BB000784).

¹⁰ *Id.*, Exhibit B (UB_BB000789) (emphasis added).

¹¹ *Id.*, Exhibit B (UB_BB000787).

¹² It did not sign the 2007 Deed, but it did sign 2007 assumption agreement when BBS assumed the loan and the
2009 Deed which modified the 2007 Deed to also secure the 2009 loan.

¹³ Schaeffer Decl., Exhibit B (UB_BB000709).

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1 of the controlling security agreement or deed of trust, as Lender in its discretion may
2 determine.”¹⁴ The Guaranties define the “Borrower” as BB I or BB II and the “Lender” as
3 Frontier Bank, its successors or assigns.

4 The Guaranties also state that they “together with any Related Documents, [constitute]
5 the entire understanding and agreement of the parties as to the matters set forth in [the
6 Guaranties].”¹⁵ The Guaranties define “Related Documents” as “all promissory notes, credit
7 agreements, loan agreements, environmental agreements, guaranties, security agreements,
8 mortgages, *deeds of trust*...and all other instruments, agreements and documents, whether now
9 or hereafter existing, executed in connection with the Indebtedness.”¹⁶

10 The Guaranties also define Indebtedness to mean “Borrower's indebtedness to Lender as
11 more particularly described in this Guaranty.”¹⁷ Elsewhere in the Guaranties, Indebtedness
12 includes that which “Borrower individually, collectively or interchangeably with others owes or
13 will owe Lender...including loans...primary or secondary in nature arising from a guaranty or
14 surety, secured or unsecured.”¹⁸

15 In addition, the Guaranties include a waiver provision. This section states that the
16 guarantor waives “any and all rights or defenses based on suretyship or impairment of collateral
17 including but not limited to, any rights or defenses arising by reason of...any...‘anti-deficiency
18 law.’”¹⁹ The waiver provision says that it will be effective “only to the extent permitted by law
19 or public policy.”²⁰

21 ¹⁴ *Id.*
22 ¹⁵ *Id.*, Exhibit B (UB_BB000710).
¹⁶ *Id.*, Exhibit B (UB_BB000711) (emphasis added).
23 ¹⁷ *Id.*
¹⁸ *Id.*, Exhibit B (UB_BB000709).
24 ¹⁹ *Id.*, Exhibit B (UB_BB000710).
²⁰ *Id.*

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1 Finally, the Guaranties state that the bank may recover attorney's fees and costs "incurred
2 in connection with the enforcement of" the guaranties.²¹

3 In 2010, Union Bank acquired Frontier Bank and all the contracts it held with Birch Bay
4 and FRM. Shortly thereafter, BB I and BB II defaulted on the loans. Union Bank elected to
5 pursue a non-judicial foreclosure of the property that secured the loans. Union Bank recovered
6 \$7,951,500 from the non-judicial foreclosure. Now it has sued FRM as guarantor of the loan
7 seeking to recoup the difference between the sale and the \$20 million borrowed.

8 III. LEGAL ANALYSIS

9 A. The Pros and Cons of Non-Judicial Foreclosures: Speed Without Deficiencies.

10 Loans are often secured by deeds of trust, which grant a creditor an interest in real
11 property to secure the performance of some obligation.²² Upon default, the creditor may sue to
12 enforce the obligation or foreclose on the property to secure performance. Foreclosure may
13 occur in two ways—judicially or non-judicially. To foreclose judicially, a creditor must sue and
14 pursue the time-consuming process of litigation. In 1965, the Washington Legislature enacted
15 the Washington Deed of Trust Act, codified at RCW 61.24 *et seq.*, to provide parties the option
16 of non-judicial foreclosure.

17 The benefit of the Deed of Trust Act was that it removed judicial oversight and sped up the
18 vesting process for the sale of secured property. The non-judicial option comes with one major
19 drawback for lenders such as Union Bank. Normally, under a judicial foreclosure, a creditor
20 may sue for any deficiency when the sale of property secured under a deed of trust falls short of
21 the debt. But, as a general rule and as discussed below, those employing non-judicial
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23

24 ²¹ Schaeffer Decl., Exhibits B (UB_BB000710) & E (UB_BB000746).

²² *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 376, 588 P.2d 1153 (1979).

1 foreclosures may *not* sue for deficiency. This trade-off is a “*quid pro quo*” between borrowers
2 and lenders.²³

3 **B. 1998 Amendments to the Deed of Trust Act Allowed Some Suits for Deficiency.**

4 In 1998, the legislature amended The Deed of Trust Act to provide exceptions to the
5 general rule that deficiency actions are not allowed in non-judicial foreclosures. The act starts
6 with the basic rule that deficiency actions after non-judicial foreclosure are the exception:
7 “Except to the extent permitted in this section for deeds of trust securing commercial loans, a
8 deficiency judgment shall *not* be obtained on the obligations secured by a deed of trust against
9 any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.”²⁴

10 The statute then goes on to provide that for commercial loans, guarantors such as FRM
11 may, in limited instances be subject to deficiency judgments:

12 (3) This chapter does not preclude any one or more of the following after
13 a trustee's sale under a deed of trust securing a commercial loan executed
14 after June 11, 1998:

15 ***

16 (c) Subject to this section, an action for a deficiency judgment against a
17 guarantor if the guarantor is timely given the notices under RCW
18 61.24.042.

19 Further, a guarantor may grant its own deed of trust to secure its guarantec, but that a non-
20 judicial foreclosure will limit deficiency actions to any decrease in the fair value of the property
21 caused by waste or the wrongful retention of rents, insurance proceeds or condemnation
22 awards.²⁵ Finally, and most critically for purposes of FRM's motion before this Court, the

23 ²³ *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990).

24 ²⁴ RCW 61.24.100(1) (emphasis added).

24 ²⁵ RCW 61.24.100(6), which references RCW 61.24.100(3)(a)(i).

1 statute says a creditor may sue a guarantor for deficiency *if the guarantee was not secured by the*
2 *deed of trust that was the subject of the non-judicial foreclosure.*²⁶

3
4 **C. The 1998 Amendments Do Not Allow Union Bank to Sue FRM for Deficiency if the Deeds of Trust Secured FRM's Guaranties.**

5 Union Bank argues that RCW 61.24.100(3)(c) allows a lender to sue a guarantor for any
6 deficiency after a non-judicial foreclosure of a deed of trust. In support of that argument, Union
7 Bank cites a Bill Report for the 1998 amendments.²⁷ The Bill Report states that deficiency
8 judgments against guarantors are allowed if commenced within one year and if the guarantor is
9 given notice. The Bill Report also reiterates that a guarantor may seek an appraisal of the
10 property when sued for deficiency.²⁸

11 Union Bank's argument is sound as far as it goes, but misses the real issue. The question
12 is not whether a guarantor may be sued for deficiency—it plainly can. Rather, the question is
13 *whether a guarantor may be sued for deficiency after the non-judicial foreclosure of a deed of*
14 *trust that secured its guarantee.* If a lender takes advantage of the efficiency provided by
15 Washington's Deed of Trust Act to non-judicially foreclosure upon a deed of trust that secures a
16 guaranty, RCW 61.24.100(10) precludes that lender from maintaining a deficiency action against
17 the guarantor.²⁹

18
19
20
21 ²⁶ RCW 61.24.100(10) (“(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an
action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial
equivalent of that obligation, was not secured by the deed of trust.”).

22 ²⁷ When statutory language is unambiguous, Courts look only to that language to determine the legislative intent
without considering outside sources. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Here, the Court
23 does not believe that RCW 61.24.100 is ambiguous.

²⁸ H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg. Reg. Sess. (Wash 1998).

24 ²⁹ *Cf. Udall v. T.D. Escrow Servs., Inc.*, 159 Wn. 2d 903, 916 n. 8, 154 P.3d 882 (2007) (“Washington law provides
that no deficiency judgment may be obtained when a trustee's deed is foreclosed.”).

1 The Court reaches that conclusion because RCW 61.24.100(10) states that a lender may
2 bring a deficiency action against a guarantor if, meaning “on condition that,”³⁰ the guaranty is
3 not secured by a deed of trust. The doctrine of *expressio unius est exclusio alterius*, which
4 means “to express or include one thing implies the exclusion of the other,” supports this
5 interpretation of the statute.³¹ Because the Legislature conditioned a lender’s ability to bring a
6 deficiency action against a guarantor on the guaranty *not* being secured by the judicially
7 foreclosed-upon deed of trust, the Legislature intended to exclude a lender from being able to
8 bring a deficiency action against a guarantor after judicially foreclosing upon the deed of trust
9 that secured the guaranty.³²

10 In short, if the deed of trust does not secure the guaranty, then Union Bank may sue for
11 deficiency, but if it does, then Union Bank may not.³³ Thus, the question becomes whether the
12 Deeds of Trust secured FRM’s Guaranties. The answer to that question requires an examination
13 of the contracts themselves.

14 **D. Interpretation of the Deeds of Trust Confirms They Secured FRM’s Guaranties.**

15 **1. Standard of Review**

16 Interpretation of a contract is ordinarily a question of law.³⁴ Summary judgment is
17 appropriate if the written contract, viewed in light of the parties’ objective manifestations, has
18 only one reasonable meaning. To determine the objective manifestations of a contract, courts

19 _____
20 ³⁰ Courts will give the words in a statute their plain meaning. *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166
21 Wash. 2d 444, 451, 210 P.3d 297 (2009). To determine the plain meaning of a word, courts may look to the
22 dictionary. *Id.* Dictionaries define “if” to mean “on condition that.” *If Definition, Dictionary.com*,
23 <http://dictionary.reference.com/browse/if> (last visited May 3, 2013) (“I’ll go if you do.”).

24 ³¹ *State v. Ortega*, 297 P.3d 57, 61, 2013 WL 1163954 (2013) (quoting Black’s Law Dictionary 661 (9th ed. 2009))

³² In *Ortega*, a unanimous Supreme Court cited this doctrine as supporting its conclusion that “the express
authority to rely on the request of another officer in making an arrest for a traffic infraction indicates that such
authority does not extend to other nonfelony offenses. See *Staats v. Brown*, 139 Wn.2d 757, 768 n. 3, 991 P.2d 615
(2000) (finding that the exceptions to the presence requirement under RCW 10.31.100 are exclusive).”

³³ RCW 61.24.100(3)(c) and (10).

³⁴ *Tanner Elec. Coop v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301.

1 look to the reasonable meaning of the words used.³⁵ In addition to the reasonable meaning of the
2 words used, courts also look to the context within which the agreement was made.³⁶ The
3 contract is viewed as a whole including the circumstances surrounding its formation, the
4 reasonableness of parties' interpretations of its language, and the subsequent acts and conduct of
5 the parties.³⁷ Courts will not read ambiguity into a contract where it can be reasonably
6 avoided.³⁸ Where ambiguities exist, courts construe them against the drafter.³⁹

7 2. A Textual Analysis of the Contracts at Issue

8 A plain reading of the Deeds of Trust confirms they secure FRM's Guaranties. The
9 Deeds expressly secures "PAYMENT OF THE INDEBTEDNESS" and the "PERFORMANCE
10 OF ANY AND ALL OBLIGATIONS UNDER THE RELATED DOCUMENTS . . ."⁴⁰ The
11 Deeds define "Guarantor" as "any guarantor, surety, or accommodation party of any or all of the
12 indebtedness."⁴¹ The Deeds define "Guaranty" to mean "the guaranty from Guarantor to Lender,
13 including without limitation a guaranty of all or part of the Note."⁴² Under the Deeds,
14 "indebtedness" means "all principal, interest, and other amounts, costs and expenses payable
15 under the Note or Related Documents . . ."⁴³ And the Deeds expressly include "guaranties" in the
16 definition of "Related Documents" whose obligations are secured by the Deeds of trust.
17 Accordingly, the payment of Indebtedness and the performance of any and all obligations under
18 the Related Documents, which the Deeds secure, includes, by the very definitions contained in
19

20 ³⁵ *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-4, 115 P.3d 262 (2005).

21 ³⁶ *Chatterton v. Business Valuation Research, Inc.*, 90 Wn. App. 150, 155, 951 P.2d 353 (1998).

22 ³⁷ *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2011).

23 ³⁸ *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

24 ³⁹ *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

⁴⁰ Schaeffer Decl., Exhibit D (UB_BB000796).

⁴¹ *Id.* (UB_BB000801).

⁴² *Id.*

⁴³ *Id.*

1 those same Deeds, the Indebtedness guaranteed by the Guaranties of all or a part of the Note, and
2 the performance of the payment obligations of those Guaranties.⁴⁴

3 Union Bank argues that the "PAYMENT AND PERFORMANCE" section limits the
4 deeds to payment and performance of the Grantors' obligations—the Grantors being the
5 borrowers, BB I and BB II. But reading that paragraph in relation to the rest of the Deeds, as the
6 Court must, shows that the Deeds covers more than just the Grantor's obligations. The first
7 sentence of the paragraph identifying what the Deeds secure explicitly encompasses *more* than
8 only the secured obligations of the Grantor. As noted above, the Deeds explicitly extend that
9 security to the payment of the "Indebtedness" and the performance of any and all obligations
10 under the "Related Documents" including guaranties. Using the definitions of those terms
11 contained in the Deeds, which expressly include the *guaranties and the guarantor's obligations to*
12 *pay and perform*, confirms that the Deeds were given to secure payment and performance of any
13 and all obligations under the guaranties, among others.

14 Further, the second sentence in the secured obligation paragraph immediately above the
15 "PAYMENT AND PERFORMANCE" section makes clear the security is not limited to that
16 given by the grantor.⁴⁵ That sentence states that the Deeds are "*also* given to secure any and all
17 of Grantor's obligations under that certain Construction Loan Agreement Between Grantor and
18 Lender of even date herewith."⁴⁶ Of course, there would be no reason to explicitly include the
19 word "also" *unless the Deeds provided security for obligations other than those for which the*
20 *Grantor was responsible*. The last sentence of that paragraph drives the point home by making

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22 ⁴⁴ Even if the Deed's relevant provisions are ambiguous (and the Court does not believe them to be), they are
construed against Union Bank as the drafter of the contract. *Rouse*, 101 Wn.2d at 135.

23 ⁴⁵ Schaefer Decl., Exhibits B (UB_BB000796) and E (UB_BB000768) ("THIS DEED OF TRUST...IS ALSO GIVEN TO
SECURE ANY AND ALL OF GRANTOR'S OBLIGATIONS UNDER THAT CERTAIN CONSTRUCTION LOAN AGREEMENT
24 BETWEEN GRANTOR AND LENDER OF EVEN DATE HEREWITH.").

⁴⁶ *Id.* (emphasis added).

1 clear that a default of the Construction Loan Agreement or any Related Documents, which
2 include the Guaranties by definition, is a default of the Deeds of Trust. If the Deeds of Trust
3 only secured the Grantor's obligations, there would be no reason to make the default of the
4 Grantor's obligations an event of default of the Deeds of Trust.

5 Union Bank next contends that the parties did not intend the Deeds to secure the
6 Guaranty because “[n]o utility arises by having the deeds of trust also secure the guaranties” and
7 that “[s]uch a structure offers no advantage to a bank, where the borrower’s full debt is already
8 secured by the deeds of trust.”⁴⁷ Union Bank cites no applicable authority to support its
9 apparent contention that whether a party ended up receiving a benefit from language in a deed or
10 contract it drafted is somehow determinative of the parties’ intent. Union Bank drafted the
11 contracts and could have excluded guaranties from the definition of Related Documents just as it
12 excluded “environmental indemnity agreements” from the definition and from being secured by
13 the Deeds of Trust. It did not.

14 That Union Bank specifically chose to include guaranties in its definition of “Related
15 Documents” secured by the Deeds prevents it from now complaining about the legal effect of the
16 provision it drafted. Regardless, Union Bank did receive an advantage by securing the
17 Guaranties to the Deeds of Trust. As mentioned above, the Deeds listed “Events Affecting
18 Guarantor,” including the guarantor’s default, as events that could trigger default on the loan. As
19 a result, Union Bank could foreclose on the *whole* amount secured by the Deeds, if FRM, which
20 only guaranteed *half* of the Notes, triggered a default. Union Bank gained this advantage by
21 securing *both* obligations under the Notes and the Guaranties to the Deeds of Trust.

22 Further, the fact that the Deeds secured the Guaranties did not, in of itself, preclude
23 Union Bank from recovering against FRM any deficiency from the sale of the development. In

24 ⁴⁷ Pif.’s Resp., p. 12.

1 reality, as FRM points out persuasively, Union Bank had a number of avenues that it could have
2 pursued against FRM in addition to pursuing its rights against BB I and BB II under the Deeds.
3 First, as each Commercial Guaranty makes clear, Union Bank could have simply demanded
4 payment from FRM of BB I and BB II's obligations under the Notes they executed and then sued
5 FRM if it failed to comply.⁴⁸ Second, Union Bank could have initiated in court foreclosure
6 proceedings of the Deeds of Trust, which have none of the deficiency prohibitions contained in
7 RCW 61.24.100. Third, Union Bank could have initiated a receivership proceeding to take
8 control of the development and sell it to satisfy in whole or in part the payment obligations of
9 Birch Bay I and II, and FRM.⁴⁹

10 Union Bank did none of these things. Instead, it chose to take the seemingly expeditious
11 route of non-judicial foreclosure of the Deeds as allowed by Washington's Deed of Trust Act.
12 But by doing so, Union Bank gave up the right to maintain a deficiency action against FRM
13 when those Deeds secured the Guaranties. Union Bank may well have had good reason to make
14 that choice at the time. For example, there may have been a pressing sale to someone or some
15 entity for an amount that Union Bank felt would make a deficiency action unnecessary or
16 unjustified. But Union Bank's reason(s) for choosing the non-judicial foreclosure option is
17 irrelevant—what matters is the legal effect as to the Guaranties once Union Bank made that
18 choice.

19 Next, Union Bank argues that when viewed in light of the parties' conduct, the Deeds are
20 not meant to secure the Guaranties. It argues that FRM made no demand that the Deeds also

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22 ⁴⁸ *Id.*, Exhibit E (UB_BB000745) ("This is a guaranty of payment and performance and not of collection, so Lender
23 can enforce this Guaranty against Guarantor *even when Lender has not exhausted Lender's remedies* against
24 anyone else obligated to pay the Indebtedness or *against any collateral securing the Indebtedness*, this Guaranty,
or any other guaranty of the Indebtedness.") (emphasis added).

⁴⁹ RCW 7.60 *et seq.*

1 secure the Guaranties.⁵⁰ And it points to a letter from FRM's attorney sent four years after
2 Union Bank demanded payment on the guarantee. The letter indicates that FRM requested an
3 extension to respond to Union Bank's demand of payment, and that it wished to examine the
4 appraisal before it responded.⁵¹

5 The Court agrees with FRM that such extrinsic sources of evidence does not and cannot
6 modify the written word of the contract.⁵² Further, FRM's actions in response to Union Bank's
7 demand for payment—four years after the contracts were drafted—do not show the
8 “circumstances under which the contract was written.”⁵³ Finally, FRM's letter cannot be seen as
9 a waiver, which must be unequivocal, and cannot be inferred from “doubtful or ambiguous
10 factors.”⁵⁴

11 **E. The Waivers of RCW 61.24.100 in the Guaranties are Unenforceable.**

12 Union Bank argues that FRM waived its right to assert a defense under RCW 61.24.100
13 when it signed the contract that contained a waiver provision. It argues that the Deed of Trust
14 Act has no anti-waiver provision, and that the Court should not read one into the law when other
15 laws contain express anti-waiver provisions.⁵⁵

16 FRM argues that the waivers are contrary to public policy and thus, are unenforceable.
17 FRM cites several cases in support of its position. First, in *Kennebec, Inc. v. Bank of the W.*,⁵⁶
18 the Washington Supreme Court—in discussing the history of non-judicial foreclosures—said that

19 _____
20 ⁵⁰ Plf's Resp. at 12.

21 ⁵¹ FRM objected to the belated submission of this letter based on its untimeliness and argued that it was
22 inadmissible under ER 408. While FRM is correct that Union Bank did not satisfy the excusable neglect standard
23 set forth in CR 6(b), the letter does not contain an offer and is not evidence of conduct or statements made in
24 compromise negotiations. Because the Court does not find that the letter helps Union Bank's cause, the Court's
consideration of that letter does not adversely impact FRM.

⁵² Def't's Reply at 4 (citing *Hearst*, 154 Wn.2d at 503).

⁵³ *Id.* (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669 (1990)).

⁵⁴ *Id.* (citing *224 Westlake, LLC v. Ergstrom Props.*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012)).

⁵⁵ Plf.'s Resp. at 20 (listing RCWs that contain anti-waiver provisions).

⁵⁶ 88 Wn.2d 718, 565 P.2d 812 (1977).

1 the Deed of Trust Act represents the “public policy of the state.”⁵⁷ Second, FRM cites *Shoreline*
2 *Community College District v. Employment Security Department*,⁵⁸ which states that “[w]here a
3 statutorily created private right serves a public policy purpose, the persons protected by the
4 statute cannot waive the right either individually or through the collective bargaining process.”⁵⁹
5 That case dealt with waiver of unemployment benefits, but the court spoke in broad terms.

6 Next, FRM cites two recent cases dealing with The Deed of Trust Act, where the
7 Supreme Court refused to allow parties to waive their protections by contract—*Bain v. Metro*
8 *Mortgage Group, Inc.*⁶⁰ and *Schroeder v. Excelsior Management Group, LLC.*⁶¹ In *Bain*, parties
9 tried to contractually change the requirement that the beneficiary must be the actual holder of the
10 promissory note under RCW 61.24.030. The Washington Supreme Court did not allow the
11 parties to contractually circumvent the statute. It analogized to the arbitration process, where
12 parties are free to choose whether or not to arbitrate. But the Supreme Court said that once
13 parties submit to arbitration, the Washington Arbitration Act controls, as does the “policy
14 embodied therein, not just the parts that are useful to [the parties].”⁶² The Supreme Court went
15 on to say that “[t]he legislature has set forth in great detail how nonjudicial foreclosures may
16 proceed. We find no indication the legislature intended to allow the parties to vary these
17 procedures by contract. *We will not allow waiver of statutory protections lightly.*”⁶³

18 Similarly, the parties in *Schroeder* attempted to contract around a limitation in the statute
19 that agricultural land may not be foreclosed on non-judicially.⁶⁴ The Washington Supreme Court
20

21 ⁵⁷ *Id.* at 725.

22 ⁵⁸ 120 Wn.2d 394, 842 P.2d 938 (1992)

23 ⁵⁹ *Id.* at 410.

24 ⁶⁰ 175 Wn.2d 83, 285 P.3d 34 (2012)

⁶¹ 6772013 WL 791863, 297 P.3d 677 (2013).

⁶² *Bain*, 175 Wn.2d at 108, 285 P.3d 34.

⁶³ *Id.* (emphasis added).

⁶⁴ *Schroeder*, 297 P.3d at 683

1 would not allow a contractual waiver under the Deed of Trust Act: "These are not, properly
2 speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose
3 without judicial supervision."⁶⁵ In a footnote, the Supreme Court allowed that "[t]here may be
4 *technical procedural details* that the parties may, by agreement, modify or waive but strict
5 compliance with mandated requisites is required."⁶⁶

6 This case is analogous to *Schroeder*. RCW 64.21.100(10) limits the power of parties to
7 foreclose non-judicially when a guarantee is secured by a deed of trust. Parties cannot contract
8 around this mandated limitation. The analogy to the arbitration process by the court in *Bain*
9 supports this Court's finding. Non-judicial disclosure is an elective process, just like arbitration.
10 In exchange for an expedient foreclosure process, parties forgo the right to sue for deficiency.
11 Again, this trade-off is a "*quid pro quo*" between borrowers and lenders encapsulated by the
12 policy of the statute.⁶⁷ Parties choosing this process, choose to be governed by the procedures,
13 protections and limitations of the applicable statute.

14 Union Bank cannot both use the Deed of Trust Act's speedy and less expensive non-
15 judicial foreclosure procedure and eliminate by way of a waiver the Deed of Trust Act's limit on
16 a lender's power to seek a deficiency judgment after such non-judicial foreclosure. The waiver
17 of any anti-deficiency laws contained in the Guaranties is not a "technical procedural detail."
18 The deficiency provision in the Deed of Trust Act is a limit on the trustee's power to foreclose
19 without judicial supervision. Accordingly, the waiver of that provision in the Guaranties violates
20 public policy and is unenforceable.

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23 ⁶⁵ *Id.*

⁶⁶ *Id.* at 683 n.7 (emphasis added).

24 ⁶⁷ *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990).

1 **F. The Attorney's Fees Provision in the Guaranties Provides FRM with a Right to**
2 **Recover its Fees as the Prevailing Party.**

3 FRM seeks attorney's fees in this case in accordance with the Guaranties' attorney's fee
4 provision and RCW 4.84.330. That statute provides that in "any action on a contract...where
5 such contract or lease specifically provides that attorney's fees and costs...shall be awarded to
6 one of the parties...the prevailing party shall be entitled to reasonable attorney's fees in addition
7 to costs and necessary disbursements."⁶⁸ In essence, when a contract contains a one-sided
8 attorney's fees provision, the statute makes that provision two-sided.

9 Here, the 2007 and 2008 Guaranties provide that the bank is entitled to attorney's fees
10 and costs "incurred in connection with the enforcement of" the guaranties. Union Bank sought
11 to enforce the Guaranties against FRM. FRM prevailed. This court finds that RCW 4.84.330
12 applies, and Union Bank does not argue to the contrary. In granting FRM's motion for summary
13 judgment the court also awards reasonable attorney's fees and costs incurred in connection with
14 the enforcement of the Guaranties. FRM should note a reasonableness hearing should the parties
15 be unable to agree upon an award amount.

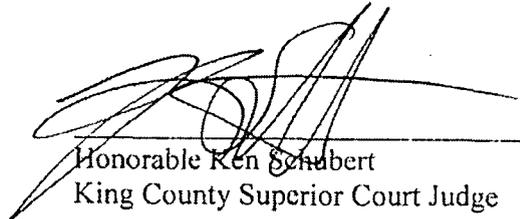
16 **IV. CONCLUSION**

17 The Deed of Trust Act precludes Union Bank's deficiency action against FRM because
18 Union Bank non-judicially foreclosed upon Deeds of Trust that secured FRM's Guaranties. The
19 waiver of the statutory protections of RCW 61.24.100 contained in FRM's Guaranties
20 contravenes public policy and is unenforceable. Because Union Bank non-judicially foreclosed
21 upon Deeds of Trust that secured FRM's Guaranties, and because FRM's waiver is
22 unenforceable, RCW 61.24.100 precludes Union Bank from maintaining this action against
23

24 ⁶⁸ RCW 4.84.330.

1 FRM. As a result, the Court grants FRM's motion for summary judgment and awards FRM its
2 attorney's fees and court costs incurred in defending this action.

3 Signed this 3rd of May 2013.

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7 Honorable Ken Schubert
8 King County Superior Court Judge
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No. 44839-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

UNION BANK, N.A., successor-in-interest to the FDIC, as Receiver for
Frontier Bank,

RESPONDENT,

v.

GRANVILLE A. BRINKMAN, an individual; JUDY M. OLSON dba JMO
ENTERPRISES; and JUDY M. OLSON, an individual,

APPELLANTS.

CERTIFICATE OF SERVICE

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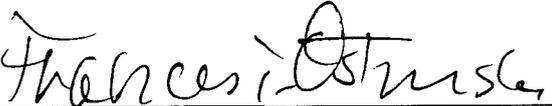
THIS IS TO CERTIFY that on this 15th day of July, 2013, I did serve via U.S. Postal Service (or other method indicated below), true and correct copies of the foregoing by addressing and directing for delivery to the following:

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